

THE PLEA BARGAINING SYSTEM AS A CRIMINALIZATION MODEL UNDER THE LAW NUMBER 19 YEAR OF 2016 ON ELECTRONIC INFORMATION AND TRANSACTION ACT AND THE DIGNIFIED JUSTICE

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Abstract

From the perspective of economic analysis of law theory, the increasing number of criminal convictions would indicate that the Indonesian criminal Code and regulations have not been effective in reducing the rate of crimes. By combining a preliminary hearing, hearing of cases through a special route and the application of the principle of bargaining for sentence in the plea bargaining system, a new mechanism may be formulated in the Indonesia criminal justice proceedings. This criminal justice approach employs the dignified justice principle (*teori keadilan bermartabat*) approach, whereby, the trial of cases using a preliminary hearing as a special route under a sole judge that is intended for an accused who pleads guilty and bargains for a sentence. Accordingly, this research attempts to explore the use of the principles of the plea bargaining system as a criminal justice model under the Law Number 19 year of 2016 on the Electronic Information and Transaction Act ("EIT Act"). Equally important, this research employs the juridical-normative method, statute, case, and conceptual approaches in order to obtain a comprehensive result.

Keywords: *Plea bargaining system, Indonesian Criminal Justice system, Theory of Dignified Justice, Indonesian Law on Electronic Information and Transaction Act (UU ITE)*

1. INTRODUCTION

Nowadays, the rapid progress in the field of information technology (IT) has contributed profoundly in the development of digital transactions.¹ However, it is undeniable that such progress on the one hand brings blessings to humanity but on the other it also brings harm to the same.

Whenever various forms of crime grow, but there is no law that regulates and is coercive in nature, these crimes will kill the community where they were committed. However, making legal provisions for a rapidly changing field is not an easy matter; so, a paradigm shift in responsive legal models is needed in line with the dynamics of the development and progress of cyberspace. The characteristics of cross-border activities in the cyberspace that are no longer subject to territorial boundaries and traditional laws require responsive law, because certain articles of the Criminal Code are considered insufficient to answer legal issues that arise as a result of activities in cyberspace.²

The Law Number 19 year of 2016 on Electronic Information and Transactions ("EIT Act") EIT Act was introduced to control all human activities carried out through the

¹ Part of the considerations of Ruling No. 50/PUU-VI/2008 of the Bench of the Supreme Court in the Judicial review of Article 27(3) of the Electronic Information and Transaction Act, the request for which has been submitted by Narliswandi Piliang (also known as Iwan Piliang)

² *Ibid.*

cyberspace as the development of such activities were not initially accompanied by the provisions of laws and regulations. Accordingly, the EIT Act may be said as a form of response from the government to tackle abuse of electronic business (e-commerce) practices and criminal acts committed through cyberspace.

Considering that criminal offences against EIT are carried out through electronic media, everyone who commits such acts really understands, comprehends and intends to do such acts regardless of whether his actions have legal consequences.

Hence, such acts are deemed to be intentionally and deliberately committed. The type of intention has been referred to as an intention for certain purposes, or in other words, as written by Kartanegara, an *opzet* (or intention) is a goal.³ Deliberateness is the conscious direction of the will towards certain evils.⁴ According to van Hattum, *opzet*, linguistically only means intention in the sense of purpose and will.⁵ This certainty results in the absence of any other way for criminals under the EIT Act to escape from legal snares other than to accept the fact that their actions have fulfilled the criminal provisions of the EIT Act and may be subject to a criminal sentence.

The introduction of laws and regulations must be seen as a moral responsibility, as these have a public dimension and legal consequences for the public. Laws cannot be introduced by ignoring their intents. Soetopo Conboy and Seno Adji write, as follows⁶:

“Legal liability is usually based on problem solving and decision making using certain methodologies. In the context of government policy, Economic Analysis of Law (EAL) is applied in the formulation of laws and regulations”.

In order to make the introduction and application of criminal laws efficiently and to lower the rate of crimes through a means in the form of the EAL, it is necessary to consider the plea bargaining system as a model of the procedural law in the criminal justice process. The lower the rate is the more effective and efficient the adoption and application of legal provisions will be.

The plea bargaining system has 2 (two) inherent characteristics of the justice system, namely, of the criminal justice system and the criminal justice process. Hagan, as quoted by Atmasasmita, writes⁷:

"A criminal justice process is every stage of a decision that confronts a suspect in a process that leads to a criminal sentence against him. The criminal justice system is the interconnection between the decisions of each agency involved in the criminal justice process."

The plea bargaining system is part of the criminal justice process and the criminal justice system. The inquisitor method is an inherent part of the former system, as it focuses on resolving upon cases through guilty pleas. The accused's plea serves as a basis for the public prosecutor to resolve upon the criminal offense charged against him. The plea bargaining system is also inherently accusatory as the sequence of conclusions of the

³ Leden Marpaung, *Unsur-Unsur Perbuatan Yang Dapat Dihukum(Delik)*, (Jakarta: Sinar Grafika, 1991), P..14

⁴ Schaffmeister, Keizer dan E.P.H Sutorius, *Hukum Pidana*, (Yogyakarta: Liberty, 1995), p. 88

⁵ Andi Hamzah, *Hukum Pidana Indonesia*, (Jakarta: Sinar Grafika, 2019), p. 107

⁶ Maria G.S Soetopo Conboy dan Indriyanto Seno Adji, *Economic Analysis of Law Krisis Keuangan dan Kebijakan Pemerintah*, (Jakarta: Diadit Media, 2015), p.28-29.

⁷ Romli Atmasasmita, *Sistem Peradilan Pidana Perspektif Eksistensialisme dan Abolisionisme*, (Bandung: Binacipta, 1996), p. 14

criminal indictments against the accused continues to be carried out through the procedural law mechanism based on the Indonesian Criminal Procedure Code (KUHAP), embodied in the Law Number 8 year of 1981.

Ramadhan writes that "In addition to admitting guilt, the accused or his lawyer may make an agreement with the public prosecutor regarding the form and length of a sentence which is generally lighter."⁸ Alschuler, as quoted by Nelson, writes, "Plea bargaining is an exchange of rights offered by law enforcement agencies in exchange for an admission of guilt for the accused.

This exchange may be in the form of a sentence handed down by a court of laws or a serious criminal charges brought by a public prosecutor, the crime charged, or various other conditions."⁹

According to the Black's Law Dictionary, Eight Edition, plea means 'an accused's formal plea of being guilty, not guilty, or no contest, to a criminal charge.'¹⁰ Furthermore, Curzon defines plea bargaining as an informal procedure, conducted usually in chambers, whereby the accused could agree to plead guilty as an exchange for the prosecution's dropping other charges (or a sentence concession, ie, sentence bargaining)¹¹. Based upon the expositions abovementioned, this research attempts to analyze as to how to model the resolution of the EIT criminal acts based upon the dignified justice principles?

2. RESEARCH METHODS

In order to obtain holistic and verified results, this research applies a juridical-normative method using several approaches, namely, the statute, approach, conceptual.¹² Sources of legal material are important tools used to discuss and solve legal issues in the research. In order for these legal issues to be solved, the sources are needed. The sources consist of:

- a. Primary legal materials¹³ which are authoritative, meaning they have authority. Primary legal materials consist of legislation, notes or minutes in the making of legislation and judge's decisions.¹⁴ The primary legal materials used in legislation and a judge's decisions.¹⁹ The primary legal materials used in the research include the Criminal Code, the CPC, the Electronic Information and Transactions Act Number 11 of 2008 (EIT ACT), amended by Act Number 19 of 2016 concerning the Amendments to the EIT Act.

⁸ Choki Risda Ramadhan, http://mappifhui.org/wp-content/uploads/2015/10/891632jalur-special_plea-bargaining_crr_edited_mappi.pdf, accessed on 27 November 2020

⁹ Febby Mutiara Nelson, *Plea Bargaining & Deferred Prosecution Agreement Dalam Tindak Pidana Korupsi*, (Jakarta: Sinar Grafika, 2020), p.29-30

¹⁰ B. A. Garner, *Black Law Dictionary, Eighth Edition*, (: Thomson West, 1999), p. 1189

¹¹ L.B Curzon, *Dictionary of Law*, Sixth Edition, (Essex England: Peason Education Limited, 2002), p.318

¹² P.M.Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana, 2015), p.93

¹³ Soerjono Soekanto and Mamudji (2007-12), "In research, in general, a distinction is made between data obtained directly from the community and from library materials. Those obtained directly from the community are called primary data (or basic data), while those obtained from library materials are usually called secondary data. *See*, Soekanto, Soerjono & Sri Mamudji, *Penelitian Hukum Normatif*, (Jakarta: PT. Rajagrafindo, 2007), p.12

¹⁴ P.M. Marzuki, *Op.Cit.*, p.141

- b. Secondary legal materials are all publications on law that are not official documents, including textbooks, legal dictionaries, legal journals and commentaries on court decisions.¹⁵

3. ANALYSIS AND DISCUSSION

Pancasila (or the State Five-Rule Philosophy) as a way of life for the Indonesian people states the spirit of material and spiritual justice. Material justice is an important matter that must be reflected in formal law enforcement and spiritual justice places humans in an honorable position even though they may be the perpetrators of a crime. The existence of material and spiritual justice in Pancasila was the main *impetus* for Teguh Prasetyo to introduce dignified justice principle (*Teori Keadilan Bermartabat*).¹⁶ As dignified justice has both material and spiritual dimensions, the researcher uses this theory as an analytical tool to engineer a criminalization model that is in accordance with the articles of the EIT Act regarding prohibited activities.

The values of dignified justice stated in Pancasila have the characteristics of mutual cooperation, whereby the spirit of mutual cooperation is the resolution of every problem in society, including legal issues, amicably. This manner is possible if each party is given an equal opportunity to express themselves about a problem.

The manifestation of dignified justice must be seen from the purpose of the law itself, in that the purpose of criminal law is to realize dignified justice with its material and spiritual dimensions. This objective may be enforced through criminal procedural law as a formal provision. Loqman¹⁷ writes that the objectives of criminal procedural law are:

- a. To seek and obtain or at least approach the material truth, which is the complete truth of a criminal case by applying the provisions of the criminal procedural law fairly and accurately;
- b. To find and then indict the perpetrators of a crime; and
- c. To ensure that those who are innocent are not indicted irrespective of indictments of a crime.

One interesting feature of the application of the theory of dignified justice is that it is possible for the perpetrators of criminal acts to bargain for a sentence before or during the trial, so that a resolution may be taken quickly and efficiently if they plead guilty. In addition, they or their attorneys may reach an agreement with the public prosecutor on the form and length of a sentence which is generally lighter.¹⁸

In the past, when the Revised Indonesian Regulation (RIR) was still in effect in the country, the concentration of case resolution powers rested in the hands of the prosecutor, as stated by Loqman¹⁹,

¹⁵ *Ibid.*

¹⁶ Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum*, (Bandung: Nusa Media, 2015), p. 16

¹⁷ Loebby Loqman, *Pra Peradilan di Indonesia*, (Jakarta Timur: Ghalia Indonesia, 1990), p. 8

¹⁸ Choki Risdha Ramadhan, http://mappifhui.org/wp-content/uploads/2015/10/891632jalur-special_plea-bargaining_crr_edited_mappi.pdf, accessed on 27 November 2020

In several discussions relating to a guilty plea, this matter has indeed caused new problems, especially the existence of several principles inherent in criminal law such as non-self incrimination and presumption of innocence. A guilty plea is deviant from non-self incrimination and presumption of innocence.

¹⁹ Loebby Loqman, *Op.Cit.*, p.23

”In the RIR, the preliminary cross-examination consisted of two stages, namely, the first involves the investigation carried out on the suspect by the police and the second further investigation by the prosecutor's office to wrap up its charges, and in essence the prosecutor had the full authority in carry out the preliminary cross-examination, as the police were the 'hulp megistraat', so that during the preliminary cross-examination, the police acted only as assistants, and the judge acted to grant a temporary detention extension, ordered that the relevant evidential documents be submitted to him to cross-examine and to determine when the prosecutor should submit the case”.

As a result, it may be concluded that, in the preliminary cross-examination process, the prosecutor was a central figure and the police an assistant to him, and the judge provided control, especially in the extension of temporary detention.²⁰

From the date of the promulgation of the CPC, the dominance above has shifted to the police. The duty of the prosecutor is purely to prosecute the Accused in the trial process. In Loqman's notes, it is found that²¹,

”... in the system adopted by the CPC, the power for preliminary cross-examination, in the sense of an investigation of a person suspected of committing a crime, entirely rests with the police (Article 6 of the CPC), and the prosecution power entirely with the prosecutor acting as a Public Prosecutor (see Article 13 of the CPC).”

The initial determination of a criminal as a suspect is an important step for the next legal process. The police must ensure the fulfillment of two valid pieces of evidence to determine a person who is firmly suspected of being the perpetrator of a criminal act as a suspect. The significance of this determination for Reksodiputro relates to the limitation of the suspect's freedom during the legal process. He writes²²:

“The determination of person as a suspect of a crime (i.e., the charging decision) is a very important step. The consequences for this suspect are very serious. First, this will severely limit his freedom.”

The stage of cross-examination of a suspect will begin with his arrest. Each step of the cross-examination will determine his legal status in the criminal process. The investigation stage places the perpetrator as a suspect; the prosecution stage as an accused, and the stage of implementing a court decision as a convict. Hence, schematically, one may say that the activities or stages of the judicial process according to the criminal justice system start at the cross-examination of lawbreakers by criminal justice agencies, ranging from determining the status of the perpetrator (as a suspect) by the police, the status of the perpetrator as an accused by the prosecutor, hearing of the accused by the judge, followed by a decision by the judge, to the determination of the perpetrator to undergo such a decision in a correctional institution, and then his return to society.²³

If we use Packer's²⁴ scheme, we may know the full sequence as follows:

- a. The period counting from the arrest time through the decision to charge the suspect with a crime.

²⁰ *Ibid.*, p. 23-24

²¹ *Ibid.*, p. 25

²² Topo Santoso and Choky Risda Ramadhan, *Prapenuntutan dan Perkembangan di Indonesia*, (Depok: PT. Rajagrafindo Persada, 2019), p.230

²³ Kadri Husin and Budi Rizki Husin, *Sistem Peradilan Pidana di Indonesia*, (Jakarta: Sinar Grafika, 2016), p.92

²⁴ *Ibid.*, p. 92-93

- b. The period of sentence for committing a crime after the determination of guilt.
- c. The stage of review and correction of errors that have been accrued during the earlier periods.

The criminal justice process is not solely aimed at law enforcement but also sentence control. In relation to efforts made to achieve dignified justice, the use of the plea bargaining system model is expected to include the dimensions of sentence control and law enforcement. Sentence control is closely related to the realization of spiritual justice, namely, putting the principles of humanity in the legal process, or in other words, the legal process must prioritize the principle of respecting humans as they are. Law enforcement is the embodiment of material justice which includes legal certainty which has been widely discussed by western scholars. Atmasasmita further writes²⁵,

“A control system within these limits is defined as a management tool which means controlling or controlling or exercising restraint. If the criminal justice system is defined as a means of law enforcement, it should include legal aspects that focus on the operation of laws and regulations in an effort to tackle crimes and aim to achieve legal certainty.”

However, in Hulsman's views, the criminal justice system is a social problem. His understanding is motivated by several notes, namely²⁶:

- a. The criminal justice system creates suffering;
- b. The system cannot work in accordance with the goals it aspires to reach;
- c. The system is out of control; and
- d. The approach used by the system is fundamentally flawed.

The criminal justice system in Indonesia is like the wheels of a machine that only functions when a criminal act or legal case arises. Even worse, law enforcement officers are part of the wheel of the machine, as they are only law enforcers, not as seekers of material legal issues. Unfortunately, this fact occurs due to the boredom and even laziness to explore and develop a legal issue that is accepted and will be handled.

From the dates of their respective enactments, the RIR and the CPC have made, virtually no progress in their roles played as the systems capable of solving the problem of the high number of cases being cross-examined. The judiciary branch has been stagnating and been an institution that carries out routines without trying to get out of the zone of routine that binds them. The judiciary branch has made virtually no innovation and contribution to reduce the high number of cases that enter and burden the state's finances. This criticism is summarized by Harahap²⁷ as follows,

”Dispute resolution is slow, costs of hearing are high, the judiciary branch is not responsive, court decisions do not solve problems, court representatives often do not provide legal certainty and are unpredictable, and the judges are generalists.”

The issue raised by Hulsman was tested when there was a difference in perception between the police and the prosecutor's office regarding the pre-prosecution process as described by Santoso and Ramadhan²⁸, as follows:

²⁵ Romli Atmasasmita, *Sistem Peradilan Pidana Perspektif*, *Op.Cit.*, p.15-16

²⁶ *Ibid.*, p. 98

²⁷ M. Yahya Harahap, *Beberapa Tinjauan Mengenai Sistem Peradilan dan Penyelesaian Sengketa*, (Bandung: PT. Citra Aditya Bakti, 1997), p. 240-246

²⁸ Topo Santoso dan Choky Risda Ramadhan, *Prapenuntutan dan Perkembangan di Indonesia*, *Op.Cit.*, p.101-102

Table 1 Police and Prosecutors' Perspectives on the Pre-Prosecution Process

No	Police Officer's Opinions	Prosecutors' Opinions
1.	Prosecutors often give vague clues. They give instructions to change questions X, Y, Z, but after that, the questions are changed; the prosecutors even ask for further corrections, so that they will become questions A, B, C and so on.	The police often don't carry out the instructions from the prosecutors properly, so they have to go back and forth, wasting time.
2.	Prosecutors often do not understand that general criminal investigators are much more difficult than those into special crimes	Police do not understand that special criminal investigations are much more difficult than general crimes and require extensive knowledge
3.	The police should be the main investigators, as they are responsible for the results.	the prosecutors must participate in the investigation as they hold a central and most responsible position in court
4.	Prosecutors often change the contents of articles of indictment given by the police, thereby weakening the results of police cross-examinations in court, even though the police have worked hard on that	The police often provide a weak legal basis for cross-examination, so that prosecutors are assessed as being weak in court hearings. Hence, the prosecutors must change the indictments again, as they play the most responsible roles
5.	No one supervises case brief that are not brought by the prosecutors to court, and the police may be subject to a pretrial.	No one can supervise the police if the brief that the prosecutor asks for correction is not returned to the prosecutor. There are thousands of other brief.
6.	If police capacity is indeed lacking, the police personnel need to improve, and the existing system should not change.	In order to compensate for their incompetence, the police must be supported by a system that provides fast and precise proceedings

In addition, the issue of the length of time for the resolution of a criminal case and the protracted resolution of a criminal act needs to be an entry point for pursuing the criminal justice process, the resolution immediately gets legal certainty for both the victim and the perpetrator of the crime. By using a dignified justice approach, the plea bargaining system may be utilized as a new mechanism in the criminal justice process in the country.

The system does not merely take over technical litigation from the country where the principle of the system was born, but what is important to be embedded in the criminal justice process in Indonesia is the principles of case resolution attached to the system, so that the perpetrators of criminal acts are given the opportunity to bargain for the form and duration of the sanctions that will be handed down against him. In the mechanism for applying the system within the criminal justice process as described by Atmasasmita, it is known that the stages of the process of resolving a criminal act are as follows:²⁹

²⁹ Romli Atmasasmita, Sistem Peradilan Pidana Perspektif, *Op.Cit.*,P. 111

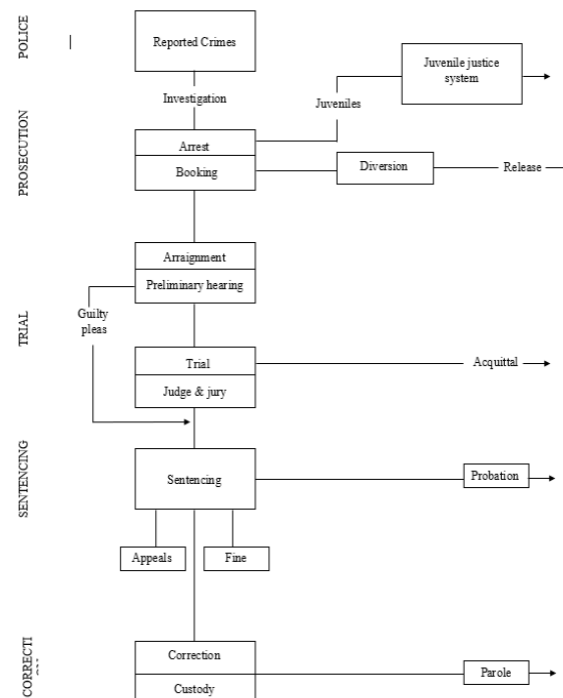


Figure 1 A General Vice of Criminal Justice System

Atmasasmita's explanation regarding the process of the above scheme is as follows: The process of the criminal case above goes through several stages, starting with the investigation of the arrest or detention, prosecution, determination of guilt, determination of sentence, and finally the execution of the sentence. If we review the criminal justice system currently in effect in the United States in general, it is clear that plea bargaining occurs during the arraignment and preliminary hearing period. If an accused declares himself to be guilty of a crime committed, (according to the scheme) the next process is the imposition of a sentence without going through a trial. This arraignment on information or sentence term is brief in order to achieve two goals: (1) to inform the accused about the charges against him, and (2) to give him the opportunity to answer the charges by stating not guilty, or guilty, or *nolo contendere* (or no contest). In this step, the court will pronounce the indictments made to the accused and then ask him questions and how he will respond to the indictments. If he declares not guilty, the case is prepared for further proceedings and then tried before the jury. If he declares either guilty or *nolo contendere*, the case is ready to be decided upon. In particular, the statement of *nolo contendere* essentially has the same implications as the statement of being guilty, and in this case, it is not required that the accused must admit his guilt, but it is sufficient if he states that he will not challenge the prosecutor's indictment before the jury later.³⁰

In order to adapt to the national criminal justice process, it is necessary to absorb the principles inherent in the plea bargaining system by adopting them in criminal procedural law as plea bargaining based upon dignified justice with several adjustments and developments as follows:

³⁰ *Ibid.*,p.111-112

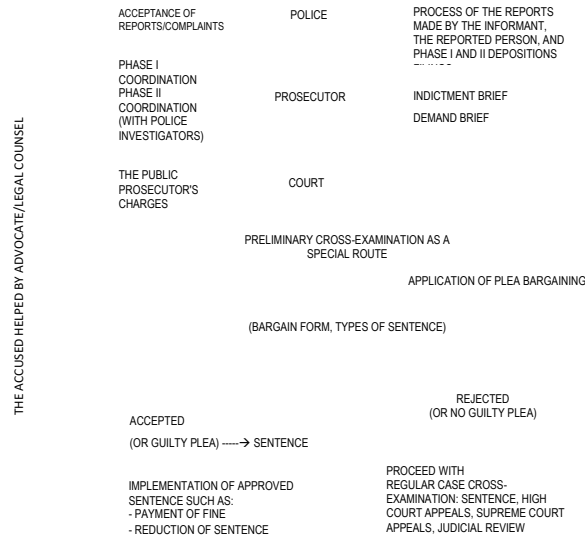


Figure 2 Plea Bargaining System in the Criminal Procedural Law

From the above scheme, we may describe that the stages of the application of the system under discussion are as follows:

First Stage: Process by the Police. The process by the police begins with the receipt of reports from the public or victims to the police, both reports on ordinary offenses and complaints. Then, an investigator is appointed to handle it. Furthermore, by the investigator, summons are given to the informant to take his statements, and the witnesses who see and witness the occurrence of the reported crime. After examining the complainant and witnesses, the investigator continues to summon and cross-examine the reported person. All information in the cross-examination is stated in the case cross-examination brief. After everything is complete, the case brief will be transferred to the public prosecutor ‘s office (for the handover of stage one (covering the brief only) and stage two (the brief and suspect).

Second Stage: Process by the prosecutor's office. After the public prosecutor receives the brief from the investigator, the public prosecutor prepares the indictment brief against the suspect to be transferred to the preliminary hearing (or special route).

Third Stage: Preliminary hearing Process. For court proceedings, two routes of hearing are available: Firstly, a special route, or preliminary case cross-examination, serving as a forum for the implementation of dignified justice-based plea bargaining. In the practice of the plea bargaining system, this stage serves to implement the arraignment. In this route, the public prosecutor brings charges against the accused. After his knowledge about the articles of the criminal offense charged and the threat of sentence, the accused, accompanied by his legal advisors, makes a draft bargain which will be presented at the next step of hearing. The draft bargain states the plea of guilt and the accused's plea of guilt of the crime charged. Then, the accused offers a form of sanctions or sentences against himself. Given the nature of bargaining, the sanctions threatened by the public prosecutor may be waived due to a new option in the form of new sanctions proposed by the accused such as reducing the length of the sentence accompanied by the payment of compensation or fines to the victim. If the accused's proposal is agreed to by the public prosecutor, this agreement is

stated in a decision by a sole judge. At this stage, the plea of guilt becomes the entrance to case resolution. However, if viewed from the law of evidence, in an ordinary case cross-examination, the public prosecutor plays an important role and duty to prove whether the accused is guilty or not. This task requires a special struggle for the prosecutor, as it is not easy to prove the accused is guilty. Notwithstanding, with the application of the principle of confession of guilt, the principles of dignified justice may be upheld, so that the implementation of the plea bargaining system under discussion may realize the principles of fast, simple criminal justice at low costs and accelerate the fulfillment of legal certainty for both the victims and perpetrators of a crime, as the victims will receive immediate compensation (if the loss is economic in nature) and assurance that the perpetrator will be immediately sentenced. For criminals, the application of the system will speed up the fulfillment of legal certainty on the grounds that if the case is processed based on an ordinary trial, the accused will experience longer detention, a lot of time is wasted and costs are high. Secondly, if the bargain by the accused and his legal counsel is rejected by the public prosecutor, based on the decision of the sole judge, the case cross-examination process will proceed in an ordinary trial by following the process and stages as in general case cross-examinations (known in the system as cross-examination by jury).

If compared with what is applied in the United States, the plea bargaining option for dignified justice purposes that may be applied in Indonesia is to combine the application of the authority of the commissioner judge, the principle of bargaining for a sentence in the plea bargaining system and the implementation of the principles of the special route under the Indonesian criminal procedural bill.

In the preliminary hearing or the special route, the evidence is not cross-examined, and the hearing proceeds with the pronouncement of the indictments. Seno Adji writes³¹,

“...in the Pretrial Conference process, the magistrate court does not conduct any cross-examination and investigation of evidence relating to indictments against suspects, as the control over the validity of obtaining evidence from law enforcers is aligned with the Exclusionary Rules during the cross-examination of indictments in subject matter hearing, namely, Court Trial, not at pre-trial.”

The research author is of the opinion that the implementation of the pretrial conference (consisting of planning a court session, including litigation rights and evidence) as referred to by Indrianto Seno Adji, may be applied to the preliminary session in the implementation of the plea bargaining under discussion.

In the process of implementing the plea bargaining system in the United States as described by Romli Atmasasmita, the momentum for the system comes at the arraignment stage. Kerper writes³²,

"Arraignment is one of the procedures for resolving criminal cases according to the adversary system where the suspect is present in court to submit his statement (wherein he may plead guilty or declare innocent on the charges of the public prosecutor) and, at the same time, the accused is allowed to choose at his own will which court he wants (a trial by a judge only or a jury trial)."

³¹ Indriyanto Seno Adji, *Peradilan & KUHP Catatan Mendatang*, (Jakarta: Diadit Media, 2015), p.11

³² Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer*, (Jakarta: Kencana, 2013), p. 39

Churchill, as quoted by Loqman, writes³³,

"Arraignment is a trial before a judge or his deputy that takes place a few days after a person is detained in which the charges against the suspect are pronounced and the suspect is asked whether he is guilty or not guilty.. It will be brought before trial by a jury; from the moment of this arraignment, the responsibility for supervising the implementation of the criminal process against the suspect rests with the court."

Arraignment does not stand alone as a form of case resolution but is part of the overall case resolution process consisting of arraignment, preliminary hearing and pretrial conference. Seno Adji and Seno Adji³⁴ explain these three processes as follows:

Firstly, arraignment is a trial before a judge or his deputy that takes place a few days after a person is detained, and the charges against him are pronounced, and he is asked whether he is guilty or not guilty, and only if he suspect declares to be not guilty, he will be brought before trial by a jury. From the moment of this arraignment, the responsibility for supervising the implementation of the criminal process against the suspect rests with the court, and if he has admitted guilt for his actions, a court trial process is sufficient.

Secondly, preliminary hearing which will bring the investigator before the judge to be able to determine whether there has been a probable cause that the suspect has committed a crime.

Thirdly, the pretrial conference which is aimed at planning court hearings, especially regarding evidence and the rights of the parties to the matter on hand to obtain evidence from other parties, called as discovery.

The difference from the application of plea bargaining for dignified justice purposes in the country is that in the preliminary cross-examination stage or special route, the case is only cross-examined by a sole judge. Cross-examination of cases through special routes is only really intended for an accused who pleads guilty and bargain for his sentence. If there is no confession of guilt, the case cannot be cross-examined through a special route. So, efforts to bid for the resolution of the case begins from the time at which the case is received by a public prosecutor, following which the accused may propose that his case be cross-examined in a preliminary session or a special route. So, he will then have prepared a proposal or offer for the form, type and severity of sentence which he will be capable of undergoing.

Latifah writes³⁵,

"In the academic proposal for the criminal procedural bill, the arrangement of the special route is referred to as the introduction of plea bargaining. This is probably due to the fact that the concept set forth in the bill regarding special routes seems to have been adopted from the plea bargaining institution developed in the criminal justice system of countries that belong to the Anglo-Saxon law, especially in the United States. This institution offers an accused a less complicated route and the application of lighter criminal provisions if he pleads guilty and admits his actions. The regulation regarding the special route in the bill is an effort to accelerate the process of resolving cases and to reduce overcapacity in correctional institutions as well as the realization of the principle of carrying out criminal procedures in a simple, fast, and

³³ Loebby Loqman, *Op. Cit.*,p.50-51

³⁴ Oemar Seno Adji and Indriyanto Seno Adji, *Peradilan Bebas & Contempt of Court*, (Jakarta: Diadit Media, 2007), p.182

³⁵ Marfuatul Latifah, Pengaturan Jalur Khusus Dalam Rancangan Undang-Undang Tentang Hukum Acara Pidana, accessed on 11 Desember 2020

low-cost manner. This is indicated by the permission of the accused to admit all things that he is accused of and to plead guilty of committing a criminal act which is indictable by a term of not in excess of seven (7) years, so that the public prosecutor may delegate the case to a brief session where the case will be cross-examined, tried, and decided upon by a sole judge, and will only be sentenced to two-thirds (2/3) of the maximum sentence.”

The arrangement of the special route in the bill is a step to reform the criminal procedural law in the country. In setting forth the special route in Article 199 of the bill, the drafters do not seem to simply adopt the practices accepted in the US. This may be seen from several striking differences between the special routes in the bill and the plea bargaining mechanism in the Federal Rules of Criminal Procedure in the US.³⁶ In Rule 11 (e) of the Federal Rules, the public prosecutor and the accused may reach an agreement by which the accused admits his guilt and the public prosecutor offers whether his charge will be withdrawn, recommends a certain sentence to the court or agrees not to go against the accused's wishes for the sentence, what he expected.³⁷

From the bill, it turns out that its conception was greatly influenced by the application of the plea bargaining system in the United States. As Ramadhan writes³⁸:

“The drafting team of the Criminal procedural bill has conducted comparative studies of criminal procedural laws from several countries such as Italy, Russia, the Netherlands, France and the United States. However, it is undeniable that the United States plea bargaining has inspired the team in formulating a special route in the bill. The drafting team explains the special route under the sub-title “plea bargaining” in the academic text of the bill. Robert Strang writes, “The plea bargaining arrangement in the bill was added after the drafting team conducted a comparative study in the United States”.

In regulating the special route in the bill, the roles played by the actors involved in criminal justice system remain unchanged. The judge remains at the top of the hierarchy as he will later decide whether the case at hand may use an admission of guilt and then be transferred to a summary hearing, and he will also test whether the guilty statement is really issued voluntarily and whether the accused understands which rights he will waive by pleading guilty. In addition, the judge also remains the sole determinant of what sentence will be imposed on the accused, who pleads guilty in a brief trial. In addition, the roles played by the public prosecutor in the practice of the special route is not necessarily the same as those by the public prosecutor in the United States. In the special route, the public prosecutor is not given the authority to bargain with the accused or his legal advisor. The role of the public prosecutor in this case is to pronounce the indictments and present the case to a brief cross-examination session when the accused accepts the indictments, as the bill only stipulates that the accused pleads guilty of the indictments presented by the prosecutor. It seems that the drafters of the bill hope that with the provision of a special route, the accused will voluntarily plead guilty of the crime that is charged against him without any agreement with any party outside the court.³⁹

³⁶ *Ibid.*

³⁷ *Ibid*

³⁸ Choky Risda Ramadhan, *Media Hukum dan Keadilan*, “Teropong”, Volume 1 Agustus 2014, p.139

³⁹ *Ibid*

For the purpose of resolution of a case through the special route, there is at least has a place to carry out the initial cross-examination process before it is brought to court. This is in line with what Latifah writes⁴⁰,

"...therefore, it is better for a resolution means to plead guilty before trial to be arranged as a series in the special route mechanism while this route is not a process of bargaining for sentence as is known in the plea bargaining mechanism adopted in the United States. It is preferable that in the trial each party already knows their respective positions, so that the trial session for reading out the indictments will only be used by the judge to test the guilty statement of the accused, so that no accused will declare a guilty plea without the prior knowledge of the public prosecutor acting as the representative of the state in the case. The arrangement is intended so that the efforts made by law enforcement officers will not come to no avail as they are not informed of whether the accused will plead guilty or otherwise."

The light sentence that will be received by the accused is one of the objectives of a special route in the process of resolving criminal cases. This leniency must be proportional to the benefits received by the victim, namely, the compensation for the losses suffered by the victim and the sentence served by the perpetrator or accused, even though the sentence is not as severe as what the accused has to undergo if he is brought to a case cross-examination process at an ordinary trial. Nelson writes⁴¹,

"The suspect in the Criminal Procedure Code is a subject, so that at each stage of cross-examination he must be treated in a humane manner and with value, dignity, and self-respect, and he is not seen as an object whose human rights and dignity are arbitrarily treated by the investigator on the grounds that he has been guilty of a criminal act. This is due to the principle of presumption of innocence adopted in the criminal justice process in the country as provided for in Article 8 of Act no. 4 of 2004 concerning judicial power, namely, "Anyone who is detained, suspected, arrested, prosecuted and/or brought to a court must be deemed innocent until a court declares him to be guilty, and the order has come into permanent legal force".

The main hope is that special routes in the resolution of criminal acts may be applied in the process of resolving EIT crimes in order to suppress the rate of increase in the number of inmates. As stated by President Jokowi, "The regulation regarding special routes in the criminal procedural bill represents an effort to speed up the process of resolving cases and to reduce overcapacity in correctional institutions as well as the realization of the principle of implementing simple, fast, and low-cost criminal procedures".⁴²

The special route in the Draft CPC is only regulated in one article, namely, Article 199 of the Bill, which reads as follows⁴³:

“Part Six
special routes
Article 199

1. After the public prosecutor pronounces his indictments and the accused admits all the acts he has been accused of and pleads guilty of committing a criminal offense, the sentence for which the term of sentence is not in excess of seven (7) years, the public prosecutor may present the case to a trial for a summary hearing.

⁴⁰ Marfuatul Latifah, *Op.Cit.*

⁴¹ Febby Mutiara Nelson, *Op.Cit.*,167

⁴² President Jokowi's statement as quoted by Marfuatul Latifah, *Op.Cit.*

⁴³ Rancangan Undang-Undang Republik Indonesia Nomor ... Tahun ... Tentang Hukum Acara Pidana, <https://antikorupsi.org/sites/default/files/dokumen/Rancangan-KUHAP.pdf>, accessed October 22 2021

2. The guilty plea shall be stated in the official minutes of hearing signed by the accused and the public prosecutor.
3. The judge must:
4. notify the accused of the rights he has waived by pleading guilty, as referred to in paragraph 2 above;
5. notify the accused of the length of the sentence that may be imposed; and
6. ask whether the plea is voluntary.
7. The judge may reject the plea if he judge has doubts about its veracity.
8. Notwithstanding Article 198(5), the criminal sentence against the accused as referred to in paragraph 1 shall not exceed two-thirds (2/3) of the longest imprisonment term demanded.”

Like plea bargaining, a special route is given to an accused who pleads guilty of the criminal charges. As a result, the accused will be tried using a summary hearing procedure.” It is hoped that the change from an ordinary hearing session to a summary hearing will speed up the trial process.⁴⁴

The researcher is of the opinion that the provisions of Article 199(1) of the Criminal procedural bill include an uncertainty, namely, the questions of at which hearing will the indictments be pronounce and the accused pleads his guilt?

After the completion of the plea stage, the case will be transferred to a summary hearing. Is the venue for the guilt plea is a kind of the dismissal process? The agenda for hearing cases through this special route should suffice with reading the sentence and the accused's response to the sentence in the form of an offer of the form and type of sentence in which if the prosecutor agrees to the offer then an official report is made which then the contents of this report are confirmed as a decision. Because according to the researcher, the preliminary hearing or the special route should be the one that should apply the summary hearing procedural law. Pangaribuan writes⁴⁵,

“The new law (or Criminal procedural bill) will not facilitate the purpose of indicting everyone who is brought to it and with the maximum severity, so the purpose is purely sentence, which model in the legal literature is called as a crime control, or administrative, model, but it is more directed at every violation of the law in society, in order to ensure that there must be a fair, objective and accountable process without making the sentence the main goal, which is called in the same literature as the due process model. In other words, every use of power relating to fundamental matters must be subject to the principle of judicial security. It shall not be sufficient for decisions to be based solely on discretion such as determination of status as a suspect and detention. It shall not be sufficient to practice it only by notice but by a court order, for which propriety must also be considered. The notice model like this will potentially be a source of moral hazard for law enforcement officials, as this suggests a holy inquisition which occurred in the Middle Ages”.

The application of the plea bargaining system in the resolution of criminal acts under the EIT Act is an effort to develop an integrated criminal justice system, especially in EIT crimes. The rapid development of technology has caused a big clash in the prevention and handling of such crimes. From the perspective of a new criminalization system in criminal law, EIT crimes target individuals who have above average abilities, as electronic media may only be used by individuals with such abilities. Therefore, it is certain that only people who are capable and have a high intellectual level may use and even abuse them.

⁴⁴ *Ibid*

⁴⁵ *Ibid.*,p.5-6

Incorporating the principles of the plea bargaining system into the Indonesian criminal justice system represents an enrichment of criminal procedural law from the time the accused is charged until he is prosecuted in court. This is in accordance with the opinion of Seno Adji who writes that "the criminal justice system and criminal justice administration are a procedural path of a criminal procedural law from the time of the indictments are filed until the sentence is pronounced against the accused. Criminal justice administration is only part of the sub-judicial system".⁴⁶

Criminal acts which are regulated and prohibited in the articles of the EIT Act may ensnare anyone who takes advantage of EIT activities. Everyone suspected of committing an EIT crime will be prosecuted by referring to the criminal procedural law and the criminal process based on the length of the sentence or the sanctions regulated in the EIT Act. Everyone who commits an EIT crime is considered to have the intention and will to commit the crime. However, what cannot be ignored is the fact that the EIT Act was actually designed to cover trade transactions carried out by e-commerce. So, the EIT Act should not deviate from its original purpose as the legal umbrella for e-commerce transactions. Notwithstanding, the world of social media has become boisterous with criminal acts committed by its users, and, hence, the perpetrators have to deal with the police. Reporting about each other, defamation, SARA (Ethnic, Religion, Race-related) crimes, hatred and fake news have emerged in the world of social media. Of course, if this problem is solved by a normal criminal process mechanism, there will be an increase in the number of prisoners, which of course will burden the government with the costs.

The plea bargaining system may at least be used as a model for resolving criminal cases under the EIT Act based on respect for the dignity of the perpetrators, which act emphasizes the principles of spirituality and materiality-based justice enforcement. It is said to be spirituality-based as the resolution of the crime prioritizes respect for the dignity of the perpetrator by "re-humanizing" him, so that he returns to his original nature as stated in the Second Precept of Pancasila, namely, just and civilized humanity. The term 'materiality-based justice' means that the enforcement of justice shall not ignore the nature of the perpetrator's guilt. Every mistake must be rewarded with a commensurate sanction. This basic thinking represents a benchmark for entering into efforts to find an ideal model in resolving EIT crimes where the plea bargaining system model is one option. The reason being this system provides a spiritual justice-based resolution option where the perpetrator of a crime has the opportunity to negotiate the amount of his sentence with public prosecutor. In addition, the system continues to prioritize the enforcement of materiality justice by continuing to carry out a due process in court also in order to help provide the victims with justice.

The system is an option to be engineered as a procedural law model in criminal law as the system provides and opens options for the resolution of the criminal process that will be experienced by the perpetrator. On the one hand, the system continues to carry out the process of the criminal justice system, namely, the stages of the trial process, but there is also legal certainty for the criminal perpetrator to speed up the sentencing process by

⁴⁶ Rocky Marbun, *Sistem Peradilan Pidana Indonesia Suatu Pengantar*, (Malang: Setara Press, 2015), p.20

bargaining for criminal sanctions that will be prosecuted by the public prosecutor and decided upon by the bench.

Cole, Smith and De Jong, as quoted by Nelson, argues⁴⁷:

“...the defense attorney and the prosecutor reach an agreement; the accused agrees to plead guilty in exchange for a reduction of charges or a lighter sentence. As a result of this exchange, the prosecutor gains a quick, sure conviction; the offender receives a shorter sentence; and the defense attorney can move on to the next case. Thus, the cooperation underlying the exchange promotes the goals of each participant.”

The mechanism proposed by Cole, Smith, and De Jong is carried out before a court process begins. When the negotiation is successful, an agreement will be made, called the plea agreement, which is to be brought before the judge. The judge will ask the accused questions regarding his understanding of the agreement he has made with the public prosecutor. This understanding includes whether he agrees to the sentence stated in the agreement, the waiver of his rights such as the right to be tried in court by a neutral jury and his right to appeal, and he is informed of the consequences that will befall him for his plea.⁴⁸

Although the trial takes place in a simple manner, the judge still has to cross-examine the evidence in accordance with the formalities of the trial. Decisions made under the special procedure for trial are effectively final resolutions, which cannot be appealed through special procedures on the basis of defective evidence or procedural errors. From the explanation above, the research author assumes that the arrangement of the special route seems to be inclined more to the arrangement of the special procedure for trial used in criminal procedural law in Russia. With the maximum limit for imposing a criminal sentence, which is two-thirds (2/3) of the maximum sentence, the judge continues to cross-examine evidence in the same way as other criminal cases.⁴⁹

In Reksodiputro's understanding, the plea bargaining system occurs when the accused (through his advocate) negotiates with the public prosecutor to obtain leniency in charges and sentences.⁵⁰ The system may be understood from the principle of prosecutorial discretion, which principle is (almost) unknown to the Indonesians (which is different from the principle/opportunity right which belongs (only) to the Indonesian Attorney General. In the United States, the prosecutor has broad discretion in carrying out their job. He may determine whether the completed minutes of investigation will be forwarded to the court. Of the cases that will be so forwarded, the majority are resolved by the system (whereby the accused bargains for the charges and decisions). The system is practiced by a guilty plea filed by the accused in exchange for a reduced charge and/or a reduced criminal charge. In this process, the judge no longer conducts hearings and may immediately impose a sentence. This is considered cost effective and reduces the burden on prosecutors and courts (or cheap and fast).⁵¹

⁴⁷ Febby Mutiara Nelson, *Op.Cit.*, p.167

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Mardjono Reksodiputro, “Beberapa Catatan Tentang Justice Collaborator dan Bentuk Perlindungannya”, Paper presented during the Celebration of Peradi's 11th Birthday, Crown Hotel, Jakarta

⁵¹ *Ibid.*,p.3

Factors that affect the system include⁵²:

- a. The evidence that the prosecutor feels is not strong enough;
- b. The prosecutor's witness who is deemed less convincing; and
- c. There is the possibility of diversion (also known as pretrial diversion).

Reksodiputro writes, "The plea bargaining system is not regulated in the United States constitution or laws, everything is based on customs in their criminal justice system. Criticisms raised against the system include, among others, that the accused has beaten the system and tarnished the CJS process".⁵³ Hamzah and Surachman writes that, through plea bargaining, the prosecutor offers a lighter charge if the suspect agrees and pleads guilty. Generally, pre-trial judges always agree to the prosecutor's proposal, as the judges like to offer the same.⁵⁴ From the system, we can see that any information or data will not be taken for granted, but still has to go through the cross-examination of evidence.⁵⁵

Atmasasmita offers the following definitions for the system⁵⁶:

- a. Plea bargaining is essentially a negotiation between the public prosecutor and the accused and his defense lawyers.
- b. The main motivation for the negotiation is to speed up the process of handling criminal cases.
- c. The negotiation must be based on the volunteering of the accused to plead his guilt and the willingness of the public prosecutor to offer an sentence desired by the accused and his defense lawyers.
- d. It shall not be permitted for the judge to participate in the negotiation. The judge shall not play a role. His role is not needed as it will create a bad image on the judiciary branch (which should be impartial).

Sprack as quoted by Mulyadi, writes⁵⁷:

"It can mean an agreement between the judge and the accused that if he pleads guilty to some or all of the offences charged against him the sentence will or will not take a certain form...Second, plea bargaining can mean an undertaking by the prosecution that if the accused will admit to certain charges they will refrain from putting more serious charge into the sentence or will ask the judge to impose relatively light sentence... Thirdly, plea bargaining may refer to the prosecution agreeing with the defence that if the accused pleads guilty to a lesser offence they accept the plea...Lastly, it may refer to the prosecution agreeing not to proceed on one or more counts in the sentence against the accused if he will plead guilty to the remainder"

The efforts made to employ the system so as to reduce penalties for the perpetrators of EIT crimes have been initiated by Seno Adji. The idea is described as follows⁵⁸:

"On one hand, the draft criminal procedure code (CPC) begins moving closer to towards such a prosecution system, which of course will change the prosecution system under the norms of legislation, and on the other, the pattern of criminal resolution through pre-adjudication such

⁵² *Ibid.*

⁵³ *Ibid.*,p.4

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*,p.12

⁵⁶ Febby Mutiara Nelson, *Op. Cit.*, p.192

⁵⁷ *Ibid.*,p.82

⁵⁸ Indriyanto Seno Adji, *Hukum Pidana (KUHP&KUHP) Perkembangan dan Permasalahan*, (Jakarta: Diadit Media, 2014), p.47-48

as the alternative dispute resolution concept offered by Teguh Soedharsono, former head of the Legal Division of the National Police Headquarters, is relevant due to the firm determination of the characterization of the form and nature of the crime. Termination of prosecution by public prosecutors in the public interests and/or for certain reasons (conditionally or otherwise) through a concept such as (a) plea bargaining which is pre-adjudication is realized through Articles 42(2), (3) and (5) of the draft CPC, namely, the criminal acts committed are minor in nature, threatened with a maximum imprisonment of one year, or a fine, the suspect at the time of committing the crime is older than 70 years and/or the loss has been compensated for. Especially for the perpetrators who are over 70 years old and the loss has been compensated for, this only applies to criminal acts that are indictable by a maximum imprisonment of five years; and (b) the idea of plea bargaining for adjudication in accordance with Article 199 of the Draft CPC, namely, the existence of a special route. The public prosecutor pronounces the indictments and the accused admits all the acts that have been charged against him, and he pleads guilty, and the possible term of imprisonment is not more than 10 years.

Indriyanto Seno Adji writes, "One of the protections for those who cooperate with law enforcement is to provide immunity from prosecution and mitigating of sentence."⁵⁹

Ramadhan writes that there are several patterns of plea bargaining in practice⁶⁰:

- a. Fact bargaining (or negotiation of legal facts) whereby the prosecutor will only reveal facts that relieve the accused; and
- b. Sentence bargaining (or negotiation) whereby negotiations between the prosecutor and the accused regarding the sentence against the accused. The sentence is generally lighter. Such negotiations can take place by phone, at the prosecutor's office, or in the courtroom. However, the negotiations do not involve any a judge. The agreement between the two may be in the form of the prosecutor: 1) not accusing or accusing a lesser offense against the accused; 2) recommending to the judge the sentence to be handed down; 3) agreeing with the accused for the imposition of a certain sentence. However, the judge is not bound to make a decision in accordance with the agreement between the prosecutor and the accused or his lawyers.

In the United States, the plea bargaining system has been found to be able to solve more cases. The system encourages enforcement officers to resolve 97% of federal government crimes and 94% of state government crimes. The efficiency resulting from the system has inspired legal experts and parliamentarians in various countries. Civil law countries such as Italy, Russia, or countries in Asia such as Taiwan, have adopted regulations regarding the system in their criminal procedural law.⁶¹

The need for options for resolving criminal acts other than the existing system is as written by Sudarto⁶²:

"The negative aspects of criminal sanctions should only be applied if other efforts are actually not sufficient, so that criminal law should have a subsidiary function. In addition to the unpleasant nature felt by the indicted arising from the negative aspects, there are still other consequences that are felt in the form of stigmas even though they have finished serving a

⁵⁹ Indriyanto Seno Adji, *Humanisme dan Pembaharuan Penegakan Hukum*, (Jakarta: Kompas, 2009), p.157

⁶⁰ Choky Risda Ramadhan, *Op.Cit.*, p.142

⁶¹ *Ibid.*

⁶² Bambang Purnomo, *Pola Dasar Teori Asas Umum Hukum Acara Pidana dan Penegakan Hukum Pidana*, (Yogyakarta: Liberty, 1993), p.199

sentence, and, therefore if it is not necessary, criminal sanctions should not be used other than as a last resort that is called as *ultimum remedium*.”

Purnomo writes⁶³:

“...it is possible that the criminal law in reality may be applied “*ius operatum*”, or not fully in accordance with the “*ius constitutum*”, as a requirement for legal practice. For example, the police should stop the investigation so as not to proceed with the case according to the law, the prosecutor should not carry out prosecutions as an effort to apply the principle of opportunity or close the case for the sake of the law, and the judge should follow the reasons for eliminating mistakes or justifying an illegality, and so on. This process of implementing criminal law may also be justified from the expansion of the pattern of criminal law in the administration of a criminal justice system in that all criminal law enforcement officers must hold equal positions.”

4. CONCLUSION

By combining preliminary hearing, hearing of cases through a special route and the application of the principle of bargaining for sentences in the plea bargaining system, a new mechanism may be formulated in the criminal justice process employing a dignified justice approach, namely, the trial of cases in a preliminary hearing as a special route under a sole judge that is intended for an accused who pleads guilty and bargains for a certain sentence. In the absence of a guilty plea, the case cannot be heard through a special route. If the guilty plea and the bargain are accepted by the public prosecutor, the judge makes a decision. However, if the same are not accepted by the public prosecutor, the judge makes a determination, so that the case will be heard in an ordinary court under the Indonesian criminal procedural law, embodied in the Law Number 8 year of 1981.

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⁶³ *Ibid.*,p.199-200

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