

## **Extradition In Criminal Justice System Related To Foreign Jurisdiction**

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**Abstract:** On extradition law in Indonesia is based from the fact that since the adoption of the Act in 1979, there have been fundamental changes in the criminal procedure ode in Indonesia, namely the enactment of Law No. 8 of 1981 on Criminal Proceedings and has the ratification of the International Covenant on Civil and Politics Rights (International Convention on Civil and political Rights, abbreviated as ICCPR) under Law No. 12 of 2005 which requires Indonesia to immediately adjust its positive legal provisions in accordance with the principles set out in the ICCPR. Considering the purpose of extradition implementation as an effort to support law enforcement process and related to examination process in extradition case which is not different from the stages of case handling process as regulated in criminal procedure law, it is necessary to affirm the concept of extradition as an integral part of the enforcement process law so that the principle of due process can be implemented consequently in the process of extradition implementation.

**Keywords:** *extraditio; criminal justice system*

### **INTRODUCTION**

To face the rapid evolution of crimes, international cooperation is key to the success of law enforcement related to foreign jurisdictions. The establishment of cooperation between countries in combating crime is based on the understanding that crimes are serious threat to the every countries economic, security and sovereignty order, regardless where

that crime occurred and who becomes the victim.<sup>1</sup>

The idea to review some of the provisions on extradition law in Indonesia is based from the fact that since the adoption of the Act in 1979, there have been fundamental changes in the criminal procedure ode in Indonesia, namely the

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<sup>1</sup> RM. Surachman and Jan S M.48aringka. (2014). *Peran Jaksa dalam Sistem Peradilan Pidana di Kawasan Asia Pasifik*, Jakarta: Sinar Grafika pg. 157.

enactment of Law No. 8 of 1981 on Criminal Proceedings and has the ratification of the International Covenant on Civil and Politics Rights (International Convention on Civil and political Rights, abbreviated as ICCPR) under Law No. 12 of 2005 which requires Indonesia to immediately adjust its positive legal provisions in accordance with the principles set out in the ICCPR.

The need to reform extradition law in Indonesia is also considered important due to the changes of duties and functions of the Minister of Justice, which in turn impacting the effectiveness of its position the "central authority in the extradition process as set in Law No. 1 of 1979.

## METHOD

### ANALYSIS AND RECITATION

#### A. Legal Basis

Through equality are pairs of freedom inherent in every modern concept of justice.<sup>2</sup>

The word *Extradition* comes from the Latin language, "*extradere*" or submission. Etymologically, extradition can also be divide into two syllables of "*extra*" and *tradition*, it because extradition offer a different concept from the tradition

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<sup>2</sup> Jantje Tjiptabudy, Reveny Vania Rugebregt at al. (2016). *Natural Resource Management Problems of Coastal Areas and Small Island In the Aru Island*, Pattimura Law Journal, 1(1): 48.

practices which emphasis that a nation should give hospitality and provide *asylum* for those who seek refuge.<sup>3</sup>

Along the way, the practice of extradition which originally based on an agreement can also be done on the basis of good relations between the two countries. Such habits are further strengthened by HUGO de GROOT or better known as Grotius, who introduced the concept of international law *aut dedere aut puniere* (that criminals should be punished, wherever located or found).<sup>4</sup>

The definition of extradition as stipulated in Article 1 of Law No. 1 of 1979, is a submission by a state to the requesting state, of a person suspected or convicted of a crime committed within the territorial jurisdiction of the requesting state who have the authority to adjudicate and convict that crime.

Based on Law No. 1 of 1979, the incoming extradition process in Indonesia can be divided into several phases, namely pre request, inquiry of extradition request, examination of extradition request, approval from president, and submission of extradite person. Each of these stages can be described as follows:

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<sup>3</sup> Daniel Philpott. (1995). *Sovereignty: An Introduction and Brief History*. Journal of International Affairs. 48: 76.

<sup>4</sup> Carol Devine, et.al. (1999). *Human Rights: The Essential Reference*. Phoenix, USA: Oryx Press. pg. 47.

## **1. Pre Request**

According to Article 18 of Law No. 1 of 1979, prior an extradition request sent by the requesting country, the Chief of Indonesia National Police (INP) or the Attorney General may issue detention order to a person seek by other states on the grounds of urgency if the detention is not contrary to the laws of the Republic of Indonesia, with the provision that the requesting state should state that the extradition request document is already available and will be sent soon after the arrest.

Furthermore, according to Article 19, after receiving a detention request issued by a competent authorities in the requesting state through Interpol or diplomatic channels or directly send by post or telegram, the Chief of INP or the Attorney General may issue a warrant to arrest or detain a person based on the Indonesia Criminal Procedure Code.

## **2. Inquiry of Extradition Request**

According to Article 22, extradition request must be submitted in writing through diplomatic channel to the Minister of Justice of the Republic of Indonesia to be forwarded to the President. According to Article 23, if in the opinion of the Minister of Justice that the request it not

qualify with the conditions stipulated in the agreement, then the requesting state should have the opportunity to complete the required documents in the period deemed sufficient by the Minister of Justice of the Republic of Indonesia. After all terms and requirements referred are met, the Minister of Justice will sent the extradition request and its annexes to the Chief of INP and the Attorney General for an examination.

However, the procedural framework as described above will be different if the extradition request is submitted by a country that does not have an extradition treaty with Indonesia. According to Article 39 of Law No. 1 of 1979, in a case that there is no extradition treaty between the requesting country with Indonesia, than after receiving such request, the Minister of Justice with the consideration from the Minister of Foreign Affairs have to ask for the President's approval before processing that request. If the extradition request is approved, the President will order the Minister of Justice to process further that request as there is an extradition treaty between the requesting state with the Republic of Indonesia, but if the extradition request is denied, the decision then will be forward to the requesting state by the diplomatic channel.

### **3. Examination of Extradition Request**

As mentioned above, after all the requirements in extradition request is completed (or for requests from non-treaty countries, after approval of the President), the Minister of Justice sent the request for extradition along with its annexes to the Chief of INP and Attorney General for the purpose of examination.

According to Article 25 of Law No. 1 of 1979, when the crime which becomes the basis of extradition request is a crime subject to detention under the Indonesian Criminal Procedure and that a detention request is submitted by the requesting state, then the person requested for extradition is liable to detention. According to Article 34, a detention in extradition case under Article 25 can be revoked if ordered by the Court, or if after for 30 (thirty) days, unless extended by the court at the request from the prosecutor or if the extradition request was rejected by the President.

Meanwhile, with regard to the extension of detention given by the Court, Article 35 stipulates that the period of detention at any time can be extended up to 30 (thirty) days until the issuance of the Court decision which can be in favour or reject the extradition request, or if the Minister of Justice deemed it is necessary

to ask additional explanation as stipulated in Article 36, or if extradition is also sought by other countries or if the President has not rendered its decision or in the case of an extradition request has been granted, but not yet implemented.

The hearing in the District Court is conducted in open session, unless the Judge considers it necessary to do a closed session, in the presence of the prosecutor and the requested person. According to Article 29, the Prosecutor summons the requested person to appear before the Court on the day of the hearing and a summons should have been received by that person at least three (3) days before the day of the trial. After the court determines whether or not the person can be extradited, then the decision and related documents will be immediately handed over to the Minister of Justice to be used as further consideration to the President.

### **4. Approval of the Extradition Request.**

After receiving the Court Decision and considerations from the Minister of Justice, Minister of Foreign Affairs, the Attorney General, and the Chief of INP then the President decides whether or not the requested person can be extradited. The Presidential Decree of the extradition request is notified by the Minister of Justice

to the requesting state via diplomatic channel.

In the case of extradition request is submitted by non-treaty countries, then there are 2 (two) kind of President's decision related to the extradition request, namely:

- a. Approval from the President referred to the provisions of Article 39 of Law No. 1 of 1979, which is required to start the process of examination of the requested person;
- b. Approval from the President referred to the provisions of Article 36 of Law No. 1 of 1979, as the final decision on whether or not a person can be extradite, taken after receiving the Court Decision with consideration from Minister of Justice, Minister of Foreign Affair, Attorney General, and the Chief of INP.

## **5. Surrender of Extradite Person**

According to Article 40 of Law No. 1 of 1979, if the extradition request is approved, the requested person will immediately handed over to the representative of the requesting country, in a place and at a time determined by the Minister of Justice. If until a period of time (after the passage of fifteen (15)

days, or in the special condition, after the passage of thirty (30) days), the hand over of requested person is not taking place due to the omission of the requesting state, then the person may be released. The next extradition requests against the same crime and the same person, after the passage of 30 (thirty) days, may be rejected by the President

Furthermore, Article 41 stipulate that if the surrender of extradite person can not be carry out because of a condition beyond the capabilities of the countries (requesting countries or requested country), the country concerned is obliged to inform other countries and both countries will decide together a different date for fetching or surrendering the extradite person. In such case the provisions of Article 40 paragraph (3) is apply, and the period of time is calculated since the date agreed by both parties.

## **B. Implementation of Extradition Law in Practice**

### **1. Extradition Treaties between Indonesia with Other Countries**

Although Law No. 1 of 1979 on Extradition was ratified more than three decades, however, the amount of the extradition treaty which has been signed by Indonesia with other countries still a few.

Up to 2015, according to our data, there are only eight extradition treaty which has been ratified by Indonesia, namely: 1) Malaysia, ratified by Law No. 9 of 1974; 2) the Philippines, ratified by Law No. 10 of 1976; 3) Thailand, ratified by Law No. 2 of 1978; 4) Australia, ratified by Law No. 8, 1994; 5) Hongkong, ratified by Law No. 1 of 2001; 6) South Korea, ratified by Law No. 42 of 2007; 7) India, ratified by Law No. 13 of 2014; and 8) Papua New Guinea, ratified by Law No. 6 of 2015;

From the description above, it is clear that the extradition treaty which in accordance with Law No. 1 of 1979 should be the basic foundation of the implementation of extradition between Indonesia and other countries, in reality not able to function optimally. In the end, the extradition in Indonesia (both as requested or requesting country) more rests on the principle of good relations between Indonesia and other countries.

## 2. Incoming Extradition Process

### a) Red Notice

The provisions of Article 18 in conjunction with Article 19 of Law No. 1 of 1979 in reality become the basis for INP to arrest and detain a person based on *the Red Notice* issued by INTERPOL as long as the Red Notice also contain the warrant of

arrest or detention issued competent authority in the requesting state. Thus, the Red Notice equated with official request from the requesting country to make an arrest or detention of a person whose extradition is requested.<sup>5</sup>

However, the problem becomes complex considering that not all countries that requested an arrest through Red Notice has extradition treaty with Indonesia. In that regards, arrests made by the INP based on the Red Notice requested by non-treaty country raises a separate given pursuant to Article 39 of Law No. 1/1979 which stipulate that extradition request from non-treaty countries needs to be approve by President before it can be proceed. Thus, there is a risk that although an arrest already made based on red notice, the extradition request itself can not be proceed because it not approve by the President.

### b) Position of the Ministry of Justice as “Filtering Authority”

Law No. 1 of 1979 provides a strategic role to the Minister of Justice in the implementation process of extradition. When looking at the Act No. 14 of 1970 which is used as the basis of the Law No. 1 of 1979, then it can not be separated from the position of the Minister of Justice at that time which is an integral part of the

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<sup>5</sup> *Ibid.*

judicial authority at the time, given the Minister of Justice responsible for management of organizational, administrative and financial bodies general courts under the Supreme Court.<sup>6</sup>

If it is related to the position of the Minister of Law and Human Rights after the issuance of Law Number 35 Year 1999, it is clear that the position of the Minister of Justice and Human Rights in its current function has been very much different from its function as regulated in Law Number 14 Year 1970 which became the basis of preparation Law Number 1 Year 1979. The fact that the role of the Minister of Justice and Human Rights is technically not in contact with the functions of the judiciary and no longer a part of the judicial authority clearly affects the accuracy and accuracy of the Ministry of Law and Human Rights in assessing and considering the needs of law enforcement agencies related to the proof in court proceedings.

#### c) Case Files Research by the Prosecutor

In practice, although Law Number 1 Year 1979 only regulates the relationship between the Police and the Public Prosecution Service simply, but in the field, the coordination relationship established between the Police and the Prosecutor's Office in handling the

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<sup>6</sup> Article 11 paragraph (1) of Law no. 14 Year 1970: The bodies conducting the courts of this article paragraph 10 paragraph (1) organizational, administrative and financial are under the leadership of each department concerned.

extradition cases adjusts to the configuration pattern as set out in the Criminal Procedure Code, Notice of Commencement of Investigation (SPDP), submission of Phase I, Pre-Prosecution and Phase II Submission of the requested person to extradition. In such context, if the Attorney judges there is still a deficiency in the result of examination conducted by the Police in handling extradition cases, the Prosecutor shall return the file of the case to the Police for completion by the Police as the procedure applicable in the Criminal Procedure Code. Thus the 7 (seven) day period for the Prosecutor to delegate the case of extradition to the Court shall no longer be counted since the Police hand over the extradition case files, but shall be calculated from the moment of the second phase of submission, namely the handover of liability to the person being requested for extradition.<sup>7</sup>

Under these conditions, in the end there are two times of research on the completeness of extradition documents, namely:

1. Extradition documents of extradition cases conducted by the Ministry of Justice and Human Rights

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<sup>7</sup> Interview with Head of Denpasar District Attorney and Prosecutor at South Jakarta District Attorney.

2. If the Prosecutor considers that the case file submitted by the Police in the extradition case is still deficient, the Prosecutor shall give instructions to the Police to immediately complete the file of the case, which in its implementation is coordinated through the Minister of Law and Human Rights to be fulfilled by the requesting State.

3. Pre-Trial of validity of detention in extradition cases.

Law No. 1 of 1979 issued prior to the entry into force of the Criminal Procedure Code, contains very little regulation of the rights of extradition requests in the extradition examination process. The extradition law, on the other hand, does not govern the rights of the extradition requester to file an objection against the forced action imposed on him in an extradition case, specifically on detention.

In fact, in its Decision Number : 01 / Pid.Pra / 2015 / PN.BTM dated April 20, 2015, the Batam District Court granted a pre-trial petition filed by the extradition requester Lim Yong Nam, who has been arrested and detained by the Riau Islands Regional Police since October 24, 2014. Although Lim Yong Nam has been in detention since October 24, 2014, in reality the process of administrative examination

in the Lim Yong Nam municipality is complicated. Thus, the approval of the President to continue the request for extradition submitted by the United States Government (this is in accordance with Article 39 of the Extradition Act, must be done since the United States does not have an extradition treaty with Indonesia) can only be issued on March 20, 2015, which is almost 4 ) month Lim Yong Nam was detained in Riau Islands Police.

The submission and granting of a pre-trial petition for detention in an extradition case clearly indicates a paradigm shift in view of the provisions of detention in Law No. 1 of 1979, namely that the process of extradition execution is necessary by upholding respect for human rights including the conditions of detention as set out in the Criminal Procedure Code.

Furthermore, another important message that can be captured from the judicial verdict on behalf of the extradition applicant of Lim Yong Nam, indicates that the extradition detention process is considered to be no different from the process of detention in the investigation or prosecution of ordinary criminal cases, which may be requested by a pre-trial examiner. This indicates that in reality, the Court considers the process of extradition execution subject to applicable criminal

procedure law, so that the provisions of criminal procedural law can also be applied in the process of extradition execution.

#### 4. Legal Efforts on Court Decision

By placing the Court Decision on the basis of a statement or opinion, Law No. 1 of 1979 gives the executive (in this case the Minister of Justice) the discretion to choose whether or not to use the determination made by the Court. Nevertheless, in its development, the paradigm that the determination of the judge in the extradition case is only an opinion and therefore cannot be made a legal effort began to change after on 17 February 2014, the High Court of DKI Jakarta in its Decision number: 16 / Pid / Plw / 2014 / PT.DKI granted the public prosecutor's objection to the Stipulation of the South Jakarta District Court number: 01 / Pid.C / Ekst / 2013 / PN.JKT.SEL dated July 11, 2013. in the case of extradition on behalf of SAYEED ABBAS AZAD Bin SAYED ABDUL HAMID.<sup>8</sup>

The fact that the judgment of the court in extradition cases may be tested by a higher court through the mechanism of justice proceedings indicates that the position of the court of appeal in the extradition case can no longer be viewed as

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<sup>8</sup> Data from South Jakarta District Attorney, obtained on April 2017.

an opinion which can be easily disregarded by the Government in deciding to approve or deny an extradition request from other countries.

#### 5. Presidential Approval in Extradition Cases

Law Number 1 Year 1979 stipulates that the process of extradition implementation must be completed quickly, it can be concluded from the provision of Elucidation of Article 36 Paragraph (4) that in view of the very strict time limit in the request of an extradition, the Presidential Decree is taken in short time. Although the Elucidation of Article 36 Paragraph (4) states that given the very strict time limits in the request of an extradition, the Presidential Decision must be taken within a short period of time, but in reality the President's decision on the approval or rejection of the extradition request submitted by the requesting state after the issuing of the determination the court also took a long time.

Furthermore, the situation becomes even more confusing in terms of extradition requests submitted by countries that do not yet have an extradition treaty with Indonesia. Under the aforementioned conditions, according to Article 39 of Law Number 1 Year 1979, before the extradition process can be forwarded to the

Police or the Attorney for examination, the Minister of Justice shall first report the request of extradition to the President with the consideration and consideration of the Minister of Foreign Affairs regarding whether or not the extradition request is approved. Therefore, the provisions of Law Number 1 Year 1979 which again requires the approval of the President in the final stages after the issuance of a court decision is clearly a duplication of the stipulation of the consent previously taken.

#### 6. Extradition Execution Process in Indonesia Capacity as Requesting Country

In contrast to Indonesia's success in extradition to perpetrators of crimes demanded by other countries, whether they have extradition agreements or those who do not have an extradition treaty, since the enactment of Law No. 1 of 1979, Indonesia's success in repatriating the wanted criminals by Indonesia from the requesting country can be said to be very small, which is recorded as 2 (two) people, on behalf of Adrian Kiki Ariawan (requested extradition to the Australian government in 2005 and submitted in late 2013) and on behalf of Peter Walbran (requested extradition to the government Australia in 2010 and submitted in 2011).

### **C. Ideal Concept of Legal Policies of Extradition Execution in the Criminal Justice System of Foreign Jurisdictions**

#### 1. Effectiveness of Central Authority Existence In Extradition Execution Process In Indonesia

The function of the central authority in the implementation of extradition requests is clearly different from the expected function in mutual assistance mechanisms in criminal matters. In the context of extradition, the main function confronted by a central authority in extradition mechanisms should be emphasized on the urgency of information provided by the competent authorities of the country being asked for extradition regarding the completeness of the documents required to support the examination and verification required in the criminal proceeding proceedings extradition.

The Authority of the Prosecutor The investigation of the extradition court files by the Prosecutor is logical considering that the Prosecutor actually appears in court proceedings to prove whether or not a person can be extradited so that he can factually assess the adequacy of the necessary documents in support of advance proof trial.

The effectiveness of the prosecutor's office as a focal point in the process of

extradition implementation is also felt more appropriately considering that as Officers are involved from the beginning to the end in the entire criminal justice process, the Prosecutor's Office has access to all components involved in the extradition examination process, namely Police and Courts.

## 2. Limitations of Detention Time in Extradition Cases

In cases of extradition, restricted periods of detention which may be exercised in the process of extradition execution shall be of particular importance, especially to those requested by extradition to undergo the allegations or allegations against which the requesting State is charged. Therefore endless detention in the extradition process is clearly a form of punishment that must be experienced by that person while in the eyes of the law he must still be treated as an innocent person. Based on the above description, it is clear that the non-regulation of the duration of detention in extradition cases as regulated in Law No. 1 of 1979 is felt to have been inconsistent with the principle of respect for Human Rights adopted by KUHAP and ICCPR which has been ratified by Indonesia.

Furthermore, it is also important to refine the supervisory mechanism, especially on arrests or detentions by the

Police on the basis of Red Notice INTERPOL. In accordance with the spirit of the Criminal Procedure Code, there is an obligation for the Police to immediately deliver the Notice of Commencement of Investigation to the Public Prosecution Service as a further form of control for the Attorney Office in following the process of further handling of cases.

## 3. The role of the Government in the Extradition Execution Process

As a logical consequence of the purely presidential system in the Indonesian state administration system after the amendment of the 1945 Constitution<sup>9</sup>, the authority of the President as the holder of the highest power of state government in the context of establishing relations with other countries can be understood, especially when connected with the provisions of Article 11 paragraph (1) of the 1945 Constitution of 1945 governing the President with the consent of the People's Legislative Assembly declaring war, with other countries.

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<sup>9</sup> The system of government that is celebrated is presidential if : (a) the position of the head of state is inseparable from the post of head of government; (b) the head of state is not accountable to the parliament, but directly responsible to the president who elects him; (c) the president is otherwise not authorized to dissolve parliament; (d) the cabinet fully responsible to the president the holder of governmental power or as the highest administrator. *Ibid.* pg. 59

However, as a consequence of the mandate of Article 11 Paragraph (3) of the 1945 Constitution which stipulates that further provisions on international treaties shall be regulated by Law, then with the issuance of Law Number 24 Year 2000 on International Agreements, the power to engage in an agreement with another State attached to the President, in its implementation may be performed by the Minister of Foreign Affairs and other Officials by a power of attorney.

Instead, in the context of an extradition request filed by a state that does not yet have an extradition treaty with Indonesia, it is clear that there is an interest from the Government to assess whether such extradition request can be granted on the basis of good relations and whether the interests of the Republic of Indonesia will. Therefore, it is a logical thing to be able to process such extradition request as the country which has already had extradition treaty with Indonesia, it is necessary to request prior approval from the President.

However, in view of the fact that at the time of signing an extradition treaty with another country, the President may be represented by a Minister-level Official, the same standard of approval of extradition requests may be filed by a country that does not have an extradition

treaty with Indonesia. According to the author's opinion, it is felt appropriate if the task is entrusted to the Minister of Foreign Affairs in accordance with its duties and functions in the relationship of the state of Indonesia with other countries, both bilaterally and multilaterally. The assignment of the duty to the Minister of Foreign Affairs is also deemed appropriate, in view of the Government's decision to grant the extradition request from a country that has not had an agreement with Indonesia, may be used by the Minister of Foreign Affairs in taking various diplomatic steps in defending the interests of the Indonesian state in the country on the basis of the principle of reciprocity or reciprocal relationship.

### **3.Extradition as the Implementation of a Judgment of a Powerful Law Court**

As a logical consequence of applying the due process of law principle in the extradition case, Court ruling should be placed as the final and final decision of a series of extradition examination processes that must be respected and upheld by all parties, including the State. In that context, the state and the extradition requested party must be placed in the position and equal rights as the seeker of justice in the extradition process. It is a logical

consequence of efforts to provide human rights protection in the implementation of the extradition process. Furthermore, by placing the Court Decision as the final point and sole in the handling of the extradition case, it is clear that in the end the extradition exercise in the form of the extradition of extradition requests to the requesting State shall be placed in the context of the execution of a permanent, permanent court ruling, in which case the Prosecutor A Negarra official in accordance with his duties and functions as stipulated in the criminal procedure law, as the enforcement of a permanent legal court decision.

## CONCLUSION

The provisions of Law No. 1 of 1979 which does not set strict time limits on detention are no longer in line with the development of the national criminal justice system especially after the presence of the Criminal Procedure Code and the ratification of ICCPR by Indonesia, which is a milestone of the principles of the protection of Human Rights Humans in the criminal justice system in Indonesia.

Considering the purpose of extradition implementation as an effort to support law enforcement process and related to examination process in

extradition perkara which is not different from the stages of case handling process as regulated in criminal procedure law, it is necessary to affirm the concept of extradition as an integral part of the enforcement process law so that the principle of due process of law can be applied consequently in the process of extradition implementation.

The reality of extradition implementation in the criminal justice system related to foreign jurisdiction in Indonesia shows that the position of the Minister of Law and Human Rights as the Central Authority in accepting, examining, giving consideration and implementing the handover in the extradition execution has been inconsistent with its capacity and function which is more emphasized to the administration and legal coaching and legislation. The fact that extradition is an inseparable part of the law enforcement process indicates that the Central Authority should be submitted directly to law enforcement agencies so that the reception and enforcement channel function can be in one hand, for the sake of acceleration and effectiveness of the extradition exercise.

1. The provisions of Law No. 1 of 1979 which does not set strictly limits on the ICCPR by Indonesia, which is a

milestone of the principles of the protection of Human Rights Humans in the criminal justice system in Indonesia.

2. Considering the purpose of extradition implementation as an effort to support law enforcement process and related to examination process in extradition case which is not different from the stages of case handling process as regulated in criminal procedure law, it is necessary to affirm the concept of extradition as an integral part of the enforcement process law so that the principle of due process can be implemented consequently in the process of extradition implementation.

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