# INDEPENDENT COMMISSION FOR PERSONAL DATA PROTECTION: QUASI-JUDICIAL AND EFFORT TO CREATE RIGHT TO BE FORGOTTEN IN INDONESIA An Analysis of Decision Number 438/Pid.Sus/2020/PN JKT.UTR

*by* Gunardi Gunardi

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# INDEPENDENT COMMISSION FOR PERSONAL DATA PROTECTION: QUASI-JUDICIAL AND EFFORT TO CREATE RIGHT TO BE FORGOTTEN IN INDONESIA

## An Analysis of Decision Number 438/Pid.Sus/2020/PN JKT.UTR

# KOMISI INDEPENDEN PERLINDUNGAN DATA PRIBADI: QUASI PERADILAN DAN UPAYA TERCIPTANYA RIGHT TO BE FORGOTTEN DI INDONESIA

## Kajian Putusan Nomor 438/Pid.Sus/2020/PN JKT.UTR

**Gunardi**

gunardi@fh.untar.ac.id

**Ahmad Redi**

ahmadr@fh.untar.ac.id

**Dylan Aldianza Ramadhan**

Tarumanagara University

dylan.205180227@stu.untar.ac.id

**Abstrak**

Penyelesaian persoalan data pribadi di Indonesia sekarang ini diselesaikan melalui Pengadilan Negeri. Dikarenakan belum adanya aturan hukum yang mengatur hadirnya Peradilan Khusus Data Pribadi di Indonesia. Bercermin pada kasus Putusan Nomor 438/Pid.Sus/2020/PN JKT.UTR. Pada kasus *a quo* dijatuhkan dengan tuntutan UU ITE. Putusan Nomor 438/Pid.Sus/2020/PN JKT.UTR sejatinya juga terdapat ketidak tepatan pada pertanggung jawaban pihak perusahan, belum lagi masalah efesiensi, dan penegakan hak korban. Kasus ini mencerminkan adanya kesulitan dalam mewujudan terlaksananya hak yaitu *right to be forgotten* pada hukum positif di Indonesia. Gambaran membuat satu lembaga independen yang menjadi quasi peradilan dan kelak bisa menegakan prinsip *right to be forgotten* di Indonesia, belum lagi kasus data pribadi yang sangat banyak di Indonesia. Hal itu menjadi latar belakang ketertarikan penulis mengulas persoalan ini. Metode penelitian yang digunakan yaitu normatif, dengan beberapa pendekatan yaitu: pendekatan perundang-undangan, pendekatan konseptual, pendekatan historis, pendekatan kasus, dan pendekatan perbandingan. Data yang digunakan dalam penelitian terdiri dari bahan hukum primer, bahan hukum sekunder, dan bahan non hukum.

Analisis yang digunakan yaitu kualitatif. Berdasarkan dari analisis dan penelusuran penulis ditemukan peluang untuk Komisi PDP ini menjadi quasi peradilan diranah data pribadi. Analisa berhasil memetakan terkait korelasi kehadiran komisi PDP ini dengan penegakan prinsip *right to be forgotten*, dan *quasi judicial* di Indonesia. Kesimpulan ditemukan Komisi PDP kelak bisa menjadi quasi peradilan perlindungan data di Indonesia dan menegakan prinsip *right to be forgotten*. Saran penulis, sebaiknya Pemerintah segera menunjuk badan yang menyelenggarakan fungsi Komisi Khusus PDP ini.

**Kata Kunci:** Quasi Peradilan, Perlindungan Data Pribadi, Komisi Independen, *Right to be Forgotten*.

## Abstract

Personal data cases in Indonesia are currently being resolved through the District Court due to no legal rules regulating the presence of a Special Court for Personal Data in Indonesia. Reflecting on the case of Decision Number 438/Pid.Sus/2020/PN JKT.UTR, the decision was handed down with claims based of the Electronic Information and Transactions Law (UU ITE). Decision Number 438/Pid.Sus/2020/PN JKT.UTR also contains inaccuracies in terms of accountability of the company, as well as issues in efficiency and enforcement of the victims' rights. This case shows that there are difficulties in realizing the implementation of the right to be forgotten in Indonesian positive law. There is an opportunity to establish an independent institution that becomes quasi-judicial which will be able to uphold the principle of the right to be forgotten in Indonesia. Not to mention, there are still many personal data cases in Indonesia. This serves as the background of the author's interest to discuss this issue. The research was carried out using a normative method with several approaches, namely the statutory approach, conceptual approach, historical approach, case approach, and comparative approach. The data used in the research consisted of primary legal materials, secondary legal materials, and non-legal materials. The research used qualitative analysis. Based on the author's analysis and research, the result showed that there is an opportunity for the Personal Data Protection (PDP) Commission to become a quasi-judicial institution in the area of personal data. The analysis succeeded in mapping the correlation between the presence of the PDP Commission with the enforcement of the right to be forgotten and quasi-judicial principles in Indonesia. The conclusion is that the PDP Commission can one day become a quasi-judicial data protection

institution in Indonesia and uphold the principle of the right to be forgotten. The author suggests that the Government immediately appoint a body that carries out the functions of the PDP Commission.

**Keywords:** Quasi-Judicial, Personal Data Protection, Independent Commission, Right to be Forgotten.

## A. INTRODUCTION

### 1. Background

Decision Number 438/Pid.Sus/2020/PN JKT.UTR heard and settled a dispute related to the breach of personal data. This case ensnared a debt collector as the defendant. In its holding, the North Jakarta District Court imposed a sanction in which the defendant, Dede Supardi, was sentenced to 1 year and 6 months of imprisonment as well as a subsidiary fine of IDR 100,000,000 or 3 months of imprisonment. Injustice exists in this court decision as there is another party—Teddy, the defendant's superior who is the Vice Director of the company— who did not receive criminal sanctions for his actions (Prasetio, 2020: 90).

Apart from the issue of criminal violations and unresolved liability in decision Number 438/Pid.Sus/2020/PN JKT.UTR, it is interesting to discuss the issue of law enforcement of personal data cases in Indonesia within it. This decision can serve as a stepping stone to examine the extent of the relationship between a court decision and the supervisory authority, as well as the laws and regulations currently regulating the protection of personal data in Indonesia.

The state, as a civil service organization or *ambtenorganisatie* (Wahjono, 1995:45-60), is the most responsible party in ensuring every human right within it. The fulfillment of people's rights is not monotonous, because progress in human civilization increasingly causes change of needs from time to time. Technology is one of its factors. Technological advances have implications for the development of crime (Bunga, 2019, 2). At its development, the mode of operation of a crime moves forward along with the development of human civilization (Maskun et al., 2020: 1). Following the development of society and technology, utilization of digital technology facilities by humans to interact between one individual and another keeps increasing (Hamdi, 2013: 25).

One of the technological advances is evident in the growth of the internet today. Technological advances gave birth to a modern world widely known as the internet, in which

individuals can interact with one another without regional boundaries, without having to directly meet face to face, but through electronic transactions (Meliala, 2015: 100). Internet has reached all lines of life, including the trade sector. There has been a shift in all transaction modes to digitization, and more sophisticated online trade frauds are increasingly occurring in which it seems to not leave any evidence (Susanto, Hendrawati & Basri, 2017: 41-42).

At times, progress is not supported by sufficient guidance for people to enter the digital era wisely. Many things are not positioned proportionally. Furthermore, what most people consider as trivial or irrelevant information can, at some point, be beneficial for others. For example, personal information can be used for research and science (Spahiu, 2015: 15), which is an example of using information in the right context. However, if the use of information is carried out in a deviant context, issues related to online lending such in Decision Number 438/Pid.Sus/2020/PN JKT.UTR will continue to exist.

Cases of misuse of personal data continue to emerge. In actuality, data shows that many online lending companies misuse personal data from 2018 to 2021. There were 3,631 illegal online lending companies that have been cracked down from 2018 to November 12th 2021 (Agustini, 2021). Report from the Cyber Crime Directorate of the Indonesian Criminal Investigation Agency (*Patroli Siber*) shows that there have been 13,664 public complaints from January to September 2021 alone with a total loss of IDR 3.88 trillion, with the most cases being fraud, defamation, threat and extortion (Siber Polri, 2021). When viewed globally, the transaction value of sales of consumer personal data in 2006 had reached three billion Dollars (E.Peek, 2006: 6-7).

Looking back at the initial discussion, Decision Number 438/Pid.Sus/2020/PN JKT.UTR contains two issues that can be raised, namely:

1. There is an opportunity to set a special institution for personal data protection that is in line with the efforts to codify the law on Personal Data Protection; and
2. There are difficulties in manifesting the implementation of the right to be forgotten in Indonesian positive law.

The aforementioned issues were both raised because the author is interested in an issue related to the principle of the right to be forgotten: the difficulty in submitting requests for

erasure of data that has been widely disseminated. This happens due to the many procedures and the length of the stages of the cases heard in the Court. Although law is the product of politics, when a law exists, politics must be subject to the law that governs them (Mahfud, 1998: 8). Based on this matter, the author is interested in discussing further the relationship between the existence of an independent Personal Data Protection (PDP) Commission and the judiciary system in Indonesia.

**B. Research Questions**

With regard to the aforementioned background, the North Jakarta District Court Decision Number 438/Pid.Sus/2020/PN JKT.UTR contains a number of issues. The author wishes to be able to contribute ideas that can protect people's rights in time to come and provide efficiency in the law enforcement of personal data protection cases. According to Sajipto Rahardjo (2003: 121), protection is defined as an effort to protect a person's interests by distributing human rights and granting them power to act in the context of their interests. The main problems of this research are focused as follows:

1. Can the establishment of an Independent Special Commission for Personal Data Protection in Indonesia become a quasi-judicial in the field of data protection and materialize the creation of the right to be forgotten in Indonesia?
2. What are the implications of the presence of the Independent Special Commission for Personal Data Protection in Indonesia to Indonesian Courts?

**C. Research Objectives and Purpose**

The objective of this paper is to provide a concrete picture regarding the establishment of the Independent Special Commission for Personal Data Protection and its correlation with every court decision related to personal data issues. Additionally, this paper is intended to assess whether the legal certainty in the decision Number 438/Pid.Sus/2020/PN JKT.UTR can be fulfilled.

The purpose of the research of Decision Number 438/Pid.Sus/2020/PN JKT.UTR in relation to the Independent PDP Commission is as follows:

1. Academically, this paper is aimed to be able to contribute theoretical thoughts related to the urgency of the establishment of the Independent Personal Data Protection Commission and its relation to special judiciary for personal data cases in Indonesia;
2. For the Government, this paper expects them to immediately appoint an independent institution that can carry out the functions of the PDP Commission (in accordance with the mandate of Article 58 (paragraph 2) of the Personal Data Protection Law); and
3. For the society, it is hoped that this paper can be useful as informative reading material and become a means of social education related to telematics law, the judiciary, and government institutions.

## D. Literatures

### 1. Independent Government Institutions

According to Michael R. Asimov (2001: 432-443), independent government institutions, government commissions or administrative agencies are "units of government created by statute to carry out specific tasks in implementing the statute. Most administrative agencies fall in the executive branch, but some important agencies are independent." Its existence is independently designed to deal with issues that are too complex to be resolved through ordinary legislative process (Schroeder et al., 2000: 70). Furthermore, as a government institution, they can also be distinguished by their structural and functional characteristics, which are different from others (Pierce, Shapiro & Verkuil, 2009: 101).

There are a number of independent government institutions in Indonesia, namely:

a. National Commission on Human Rights/*Komisi Nasional Hak Asasi Manusia* (Komnas HAM);
b. Judicial Commission/*Komisi Yudisial* (KY);
c. Ombudsman of the Republic of Indonesia/*Ombudsman Republik Indonesia* (ORI);
d. Indonesian Press Council/*Dewan Pers*;
e. Central Information Commission/*Komisi Informasi Pusat,* and many others.

The birth of these institutions is often regarded as a further development of the classic concept of the three branches of government, as an answer to the inevitability of the increasing need for the state to serve its citizens (Mochtar, 2019: 2). Furthermore, some countries include

their independent institutions in their constitutions. This is evident in Latin American, Asian, and African countries as seen in their constitutional amendments (Thohari, 2006: 28).

The nomenclature given to those new government institutions are state auxiliary organs or auxiliary institutions. The United States and France are examples of established democracies, in which many new government institutions are growing (Asshiddiqie, 2018: 7).

## 2. Personal Data Protection

At present, personal data is associated with the depiction of the right to privacy. In international law, privacy is clearly recognized as part of the basic human rights that must be protected (Rosadi, 2009: 32). In Indonesia, there is no codified compilation of legal regulations regarding the protection of personal data or the Personal Data Protection (PDP) Law; hence its regulations are still dispersed in other sectoral laws. The legal regulations governing personal data include, among others:

a. Article 28G of the 1945 Constitution of the Republic of Indonesia;
b. Law Number 17 of 2007 on Long-Term National Development Plan;
c. Law Number 29 of 1999 on Human Rights;
d. Law Number 11 of 2009 on Electronic Information and Transactions;
e. Law Number 43 of 2009 on Archives;
f. Law Number 8 of 1997 on Corporate Documents;
g. Law Number 36 of 2009 on Health, and many others.

Currently privacy is regulated in several international instruments, such as:

a. Universal Declaration of Human Rights, 1948;
b. International Covenant on Civil and Political Rights, 1966;
c. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950;
d. American Convention on Human Rights, 1979;
e. Cairo declaration of Islamic Human Rights, 1990.

The right to data protection aims to protect individuals in the information society era (Djafar, 2019: 4). Currently, personal data is a commodity of economic value which is also a basic right that should be protected internationally (Rosadi, 2009: 32). Therefore, the presence of

an independent supervisory body is necessary in Indonesia at the present moment. There is a need for an implementing institution, namely The Data Protection Commissioner, which is authorized to supervise all users of personal data (Khansa, 2021: 656).

To protect the right to privacy also means to protect the right to freedom of speech. This means the right to privacy guarantees protection from the fear to do or not to do something, which is a human right (Cynthia, 2018: 193). Information technology is defined as a technology related to the processing of data into information and the process of distributing such data/information within the boundaries of space and time (Indrajit, 2000: 129). The trend of continued development of technology certainly brings various implications that must be anticipated and also to be watchful of (Ramli, 2008: 2). The Electronic Information and Transactions Law (UU ITE) is one of the components that underlie personal data. UU ITE in actuality is an effort to accelerate the benefits and functions of law (regulations) within the framework of legal certainty (Mertokusumo & Pitlo, 1993: 1). Although the regulations in the provisions of UU ITE are made general, it is quite comprehensive and able to accommodate all matters related to the cyber world (Ramli, 2008: 5).

### 3. The Right to be Forgotten

The Right to be forgotten is regulated in Article 17 of the General Data Protection Regulation (GDPR). The incident behind the emergence of the right to be forgotten concept was a personal data dispute of Google Spain v AEPD and Mario Costeja González. The subject of this case is Mario's past personal information; he once went bankrupt and sold his house through auction to pay off his debts. A few years later he wanted to borrow money from the bank, but was refused because his past information in which he was bankrupt had not been changed. In short, the court won Mario in this dispute.

Sinta Dewi Rosadi expressed the following opinion:

> "In Indonesia the principle of right to be forgotten is included in UU ITE, whereas it has been included as one of the basic principles in the Indonesian Data Protection Law. The implementation of the right to be forgotten in the latest revision of UU ITE does not seem to adopt the concept carried out by European Union countries, which regulations have contents that are strictly specific on personal data protection. Take, for example, in a number of states in the United States, there is prevalence of United States state regulations that expand the scope of the right to be forgotten." (Hukum Online, 2016).

There are many obstacles in the practice of the right to be forgotten. One of the obstacles found regarding the right to be forgotten, which also happens in Europe, is the issue of Geo Blocking. Geo Blocking is defined as the will of external control, in which content is only restricted within the territory of one region while it can still be accessed in other regions. In Indonesia, the application of the right to be forgotten is contained in Article 43 of Law No. 27 of 2022 on Personal Data Protection.

The emergence of such provision attracted public attention because it had never appeared in the initial proposal for the Amendment to the UU ITE (LBH Pers, 2018: 2). Indonesia is considered to have not been able to apply the principle of the right to be forgotten, because the legislators do not have good enough benchmarks to compile the scope of the right to be forgotten, including how will the implementation procedure be (LBH Pers, 2018: 3). The formulation of the article on the right to be forgotten, in actuality, shows the lack of available knowledge and resources, which can be used as a basis in the formulation of this article. This is certainly understandable, considering the need to accommodate an article on the right to be forgotten is not a part of study of the academic text in the preparation of the Bill on the Amendment to the UU ITE. Even at the beginning of its formulation in 2016, Indonesia was the first country in Asia that specifically discussed or formulated a clause regarding the right to be forgotten, following developments in Europe (Varagur, 2016).

**4. Quasi-Judicial**

According to Sudikno Mertokusumo (1971: 2), judicial means anything related to the duty of judges in deciding cases, both civil and criminal, to maintain or ensure compliance with the law. According to Rohmat Soemitro (1978: 9-10), an institution is said to be judicial if it has the following elements:

a. An abstract general binding rule that can be applied to an issue;
b. Concrete legal disputes;
c. At least two parties;
d. A judicial apparatus authorized to decide disputes.

In Indonesia, judicial power is regulated in Article 24 of the 1945 Constitution of the Republic of Indonesia. There are also other institutions that carry out semi-judicial functions whose establishment are not mentioned in the 1945 Constitution, but is still established through

law. Examples of such institutions are the Business Competition Supervisory Commission/*Komisi Pengawas Persaingan Usaha*, the Information Commission/*Komisi Informasi*, and the Ombudsman of the Republic of Indonesia. Those three institutions have the same functions and authorities as a court because they have the authority to decide disputes and their decisions have the same power as court decisions. (Risnain, 2014: 49).

The establishment of these semi-judicial institutions was motivated by the need for special expertise in solving legal problems, and then driven by the progress of human civilization which forced these judicial institutions to develop. On the other hand, the development of the life of the people and of the nation, which is so complex due to the influence of globalization and democratization, has caused some of life affairs to no longer be able to be resolved by a general institution. Special expertise is needed to solve the legal problems that it faces (Risnain, 2014: 50). Usually, quasi-judicial institutions are contained in independent institutions. For example, almost every independent institution in the United States carry out mixed functions, namely regulatory functions, administrative functions, and semi-judicial functions altogether (Asshiddiqie, 2010: 4).

The existence of a quasi-judicial institution contains several problems related to the judicial power of the court. This includes, among others:

a. The first problem is regarding the existence of institutions. There are only two judicial institutions recognized in Indonesian constitution, namely the Supreme Court (MA) and the Constitutional Court (MK). The limited number of institutions has caused decisions made by quasi-judicial institutions to be easy to be disputed and overturned in the Constitutional Court. When there are parties involved in a dispute that is being handled by this institution, they can then be sued in the Constitutional Court on the pretext of its unconstitutional existence (Risnain, 2014: 50).
b. Secondly, if there is a dispute of authority with another institution, it is not possible for the quasi-judicial institution to file a Dispute on Authority of the State Institution/*Sengketa Kewenangan Lembaga Negara* (SKLN) lawsuit. The reason is because the quasi-judicial institution is independent, and the concept of the independence of the state is not constitutionally recognized in Indonesia. This can be seen in the dispute between the Indonesian Broadcasting Commission (KPI) and the Ministry of Communication and Information Technology (*Kominfo*) in Constitutional Court Decision

No. 030/SKLN-IV/2006. In the decision, the Constitutional Court ruled that it rejects the application (*niet ontvantelijk verklaard*), on the grounds that it rejects KPI as a constitutional organ that could deal with the government. This means that an independent institution such as KPI is not considered to be part of a state institution that can file disputes through the SKLN mechanism at the Constitutional Court.

However, it would be unfair if we only focus on the problematic aspects of quasi-judicial institutions—it would be more appropriate if we also review the advantages of having quasi-judicial institutions. The advantages of the having the institution are, among others:

a. Reducing the pile of government power in one place. Accumulation of authority in one place can lead to inefficiency of service or abuse of power (Asshiddiqie, 2010, 2);
b. Faster case handling time. The handling of cases will be faster and more efficient because the institution that handles it is usually an independent institution with mixed functions;
c. The decision is more accurate, because the quasi-judicial authority is usually only owned by an independent special institution with expertise in a particular field. This is in contrast to the District Court which handles various cases in a large number, where the capacity of the judges to understand multiple areas in depth is questionable.

At present, there is a number of growing and developing institutions which, despite not explicitly referred to as courts, have adjudicating authority and work mechanism based on the provisions of the law. Such institutions are given the authority to examine and decide on disputes or cases of violation of the law, with decisions that are final and binding, akin to court decisions that are *inkracht* in general. All of this is intended to provide justice for the parties who are harmed by a decision-making system in the name the power of the state. Therefore, it can be said that institutions that are "judicial" but are not referred to as courts are quasi-courts or semi-courts. Some of them are in the form of government commissions, but some use the term body or council (Furqon, 2020: 79).

## II. METHOD

This paper uses a normative research method, namely research that focuses on the implementation of a legal norm based on literature review. According to Marzuki (2017: 37), research is conducted to find necessary sources to predict what will be done to know what

actions can be taken. According to Diantha (2016: 12), normative legal research method examines the law from an internal perspective with legal norms as the object of research.

The data used in the study consists of primary legal materials, secondary legal materials, and non-legal materials. The primary legal materials are in the form of legislation, which includes Law No. 11 of 2008 on Electronic Information and Transactions, Law No. 43 of 2009 on Archives, Law No. 39 of 1999 on Human Rights, Law No. 24 of 2013 on Amendment to Law No. 23 of 2006 on Population Administration, Law No. 27 of 2022 on Personal Data Protection, and Decision No. 438/Pid.Sus/2020/PN JKT.UTR.

The secondary legal materials include a law book entitled "*Hukum Telematika, Perlindungan Data Pribadi, Lembaga Negara Independen, dan Permasalahan yang Terkait.*" The non-legal materials, according to Marzuki (2017: 183), can be in the form of books on political science, economics, sociology, philosophy, culture or non-legal research reports and non-legal journals, assuming that they are relevant to the research topic.

The writing of this paper uses qualitative analysis, in accordance with Muhammad's opinion (in Ohoiwutun, 2015: 9) where the data that has been collected is systematized and assessed based on the provisions and principles of applicable law and the reality that occurs. Descriptive qualitative analysis is carried out by explaining the concept of the relationship between the presence of the Special Independent Commission for Personal Data Protection in Indonesia and the case in Decision Number 438/Pid.Sus/2020/PN JKT.UTR as a stepping stone. The approaches in this research are the statutory approach, conceptual approach, historical approach, case approach, and comparative approach.

## III. DISCUSSION

### A. Juridical Consequence of Decision Number 438/Pid.Sus/2020/PN JKT.UTR. in terms of the Protection of Personal Data in Indonesia

Law enforcement, also called *handhaving van het recht*, has at least two meanings: (1) to keep or maintain compliance or implementation of the law, and (2) to prevent and take action against deviations or violations of the law (Ngape, 2018: 128). In the area of law enforcement, judges as one of its pillars occupy the final position in upholding the law. The purpose of the law, be it the value of justice, benefit, and legal certainty, shall be realized by law enforcement.

The District Court/*Pengadilan Negeri* (PN) is the entry point for all cases to seek justice as mandated in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, where judicial power is built for the purpose of upholding law and justice. The District Court is a judicial body under the Supreme Court as mandated in Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Each branch of legal issues has its own court. For example, cases involving the military will be directed to the Military Court, cases related to religion will be directed to the Religious Court, et cetera. However, there is an impression that the District Court is compelled to try cases, because any issues for which there is no specific court provision in the relevant law will be directed to the District Court.

For example, cases of blasphemy and cyber crime have been tried in the District Court. There are many more cases that require special courts with expertise in such fields and have accurate assessment competencies. On this issue, the author quotes the opinion of constitutional law expert Refly Harun stated in a YouTube podcast. He stated that, as in the case of blasphemy, there should be a special institution that is competent to assess this matter (Corbuzier, 2021). This statement also applies to cases other than blasphemy. For example, cases related to children will require a juvenile court; cases related to trade will require a commercial court, et cetera.

The existence of a Special Court established to examine, hear, and decide certain cases with experience in certain fields is an alternative to solving the aforementioned issue. But that alone is not enough, considering the rapid pace of development that forces new things to incessantly exist, and that the law is always left behind as the result. This condition is true to the adage "*Het Recht Hink Achter de Feiten Aan"*, which means "the law is always hobbled behind events or occurences that arise in society" (Atmasasmita, 2014: 5).

The aforementioned statement is appropriate when we consider the case of personal data protection in Indonesia, where the Personal Data Protection Law does not mandate the existence of a Special Court to handle cases related to Personal Data Violations. The law only mandates the establishment of a supervisory institution that has the authority, among others, to supervise, impose administrative sanctions, assist law enforcement officers in handling cases of personal data breaches, receive complaints, carry out examinations, and various other tasks, but it does not grant the institution the authority to adjudicate.

As a result, the adjudication of cases related to personal data is still under the authority of the District Court. A concrete example can be seen in the case of Decision Number 438/Pid.Sus/2020/PN JKT.UTR.

Decision Number 438/Pid.Sus/2020/PN JKT.UTR is a court decision on a criminal case of violation of data transfer provisions. This case involves Mahdi Ibrahim as the victim and Dede Supardi Bin H. Supriadi, who is a debt-collector in an online loan company, as the defendant. In this case, in essence, the victim felt aggrieved by the defendant because the victim, who was a debtor on an online loan, had his loan collected inappropriately with the following methods:

1. The defendant terrorized the victim with harsh words;
2. The defendant threatened the victim with online threats in the form of SMS messages; and
3. The defendant threatened to disclose information of the debt to the victim's family and close relatives if the victim did not comply with the defendant's demands.

In this case, the defendant was sentenced to 1 year and 6 months of imprisonment. The sentence was imposed because the defendant was legally proven guilty according to the law as stipulated in Article 45 paragraph (4) in conjunction with Article 27 paragraph (4) of Law No. 19 of 2016 on Amendments to Law No. 11 of 2008 on Electronic Information and Transactions. In the ratio of the decision, the defendant was charged with multiple charges; therefore the Panel of Judges had directly considered the indictment in accordance with the facts revealed before the trial. The elements of the criminal act are: (referring to the ratio of the decision of the North Jakarta District Court Number 438/Pid.Sus/2020/PN Jkt.Utr.)

1. Any Person;
2. Who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents;
3. With contents of extortion and/or threats, as referred to in Article 27 paragraph (4) of UU ITE.

Any Person who knowingly and without authority discloses Personal Data that does not belong to them as stipulated in Article 65 paragraph (2) shall be sentenced to imprisonment not exceeding 4 (four) years and/or a fine not exceeding IDR 4,000,000,000 (four billion Rupiah). In

this case, the judges were still using UU ITE as the basis for their consideration. In the decision, all elements of the alleged violation of UU ITE related to personal data violations were fulfilled, with focus on "without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Documents" which is in line with the second point of the judges' consideration.

It is interesting to investigate further about UU ITE as the touchstone in this case, as well as the authority of the District Court to adjudicate this matter. On this occasion, the author tried to explore aspects of personal data protection in Indonesia. Referring to Article 26 of Law No. 19 of 2016, it is regulated that the transfer of a person's personal data must be carried out with the permission of the person concerned. When this provision is violated, the owner of the personal data may apply for compensation to the court (Article 26 paragraph (2)). However, the difficulty of the evidentiary process in civil courts in Indonesia makes it difficult for the public (data owners) to legally process the alleged leak of their personal data (Djafar, 2019: 7).

It is important to note that in the PDP Law, the settlement of disputes over the protection of personal data can be carried out through the Civil Court and Alternative Dispute Resolution Institutes, such as Arbitration (Article 64). The lack of clarity on rules of evidence, as well as the absence of a special authority established under law that ensures compliance of data processing, are shortcomings for Indonesia that must be addressed quickly. The existence of these shortcomings is not limited to the law regulating the protection of personal data. We have yet to explore other laws, such as the Law on Archives, Finance, Taxation, and Health, in which similar shortcomings may also exist. The appointment of a Special Commission that warrants the implementation of the PDP Law needs to be expedited to instigate legal progress.

**B. Independent Special Commission for Personal Data Protection in Indonesia as a Special Quasi-Judicial for Personal Data Protection**

The enactment of the PDP Law is certainly a breath of fresh air for Indonesian citizens, especially in the aspect of protecting personal data. The presence of the PDP Law will certainly have implications in several aspects, one of which is the judicial aspect. The courts will also be impacted, as the presence of the PDP Law requires the existence of an Independent Commission for Personal Data Protection, who, in the future, will be given the authority to control and resolve issues related to personal data.

This statement is supported by several findings, including the aspects of the PDP Commission's institutional criteria that may carry out a quasi-judicial function, namely:

a. The Independent PDP Commission is governed by a regulation equivalent to the law (*Undang-Undang*), namely the PDP Law;
b. The Independent PDP Commission is a special commission that specifically handles PDP matters;
c. The PDP Commission will later become the Coordinator of the protection of personal data guaranteed by the law, who, in the future, will be able to issue institutional regulations that regulate externally;
d. The significant rate of personal data violation cases: (i) Personal Data Leak; (ii) Illegal online loans; (iii) Unauthorized data transfer; and (iv) Violations of data management by the government on the pretext of public interest.

The establishment of independent government institutions is not meant to be only centered on one type of branch of power, but on all types of branches of power, including the judicial branch of power (Furqon, 2020: 79). Judicial institutions have long developed to be very complex and vary in every country (Assidiqqie, 2017: 8). As of date, at least 11 types of special courts have been established in the Indonesian justice system (Assidiqqie, 2010: 5).

Indonesian positive law in principle approves the existence of quasi-judicial institutions. This can be seen from the 1945 Constitution of the Republic of Indonesia which provides space for the creation of other bodies with functions related to judicial power (Furqon, 2020: 80). The PDP Commission is considered to be a hope for a better Indonesia in the future. It is appropriate that the authority of the personal data court be assigned to the PDP Commission. This is because it is regulated in the law. This is made so in order that the president is not able to freely decide (with discretionary decision) the dismissal of the head of the government commission (F.Fox, Jr., 2000: 56) and to ensure proper judgment when the government commits a personal data breach, such as in the case of the BPJS data leak (Burhan, 2021).

On the other hand, independent institutions are considered to be the answer to exercising control over government power, as well as a momentum for reviewing the design of state institutions (Sukmariningsih, 2014: 194-204). Indirectly, the establishment of the Independent Special Commission for Personal Data Protection can function as social control for the

government. The specific independent commission for personal data protection may later become a coordinator on data protection issues, where its authority does not only warrants the implementation of the PDP Law, but it may also indirectly become a judicial institution, just like the authority of the Central Information Commission (KIP) (Assoc. Prof. Sonny Zulhuda, personal communication, 19 November 2021).

There are already several government institutions existing in Indonesia, especially independent institutions that have mixed authority. The institutions are given quasi-judicial mandates under the law. These institutions include the following:

**Table 1.** Quasi-Judicial Independent Government Institutions and their Regulations

| Institution | Regulation |
|---|---|
| Indonesia Competition Commission/*Komisi Pengawas Persaingan Usaha* | Law No 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition |
| Indonesian Broadcasting Commission/*Komisi Penyiaran Indonesia* (KPI) | Law No 32 of 2002 on Broadcasting |
| Central Information Commission and Regional Information Commission/*Komisi Informasi Pusat & Daerah* | Law No 14 of 2008 on Public Information Disclosure |
| The General Election Supervisory Agency/ *Badan Pengawas Pemilu* | Law No 17 of 2017 on Elections |
| Ombudsman of the Republic of Indonesia | Law No 37 of 2008 on Ombudsman |

Among the institutions in the table above, KIP is an institution which, according to the PDP Law, may later be merged with the PDP Commission. This shows that in terms of presentation of the idea, the majority have received the green light. Especially if we consider that the government will be monitored regarding the management of personal data in the future. This is something that should be appreciated, considering that the government has previously published information obtained illegally, for example from hacking of personal computers or unauthorized access to government files, and argued that this could still be justified as long as it was intended for the public interest (Sartor , 2016: 72-98).

There is injustice in Indonesia regarding the prosecution of personal data protection violations. If the violation is committed by a private party, the sanctions imposed will be very strict. For example, in the case of data leak at Tokopedia they were charged with IDR 100 billion (Heriani, 2020). Meanwhile, in the case of BPJS (2020) or KPU (2014) there were no further demands for accountability regarding their case. This indicates that there are irregularities that must be rectified, because Article 28D paragraph 1 of the 1945 Constitution of the Republic of Indonesia clearly mandates the principle of equality before the law. In the case above, referring to the article, the government must also be held accountable for the violations it committed.

A similar opinion regarding the unfairness of attitude in enforcing personal data breaches was also expressed by Rafi Wasesa (based on personal communication, 30 November). According to him:

> "Personal data monitoring in Indonesia at the moment cannot be said to be ideal and fair. When a personal data breach occurs, on the private side, of course, it will be very firm and focused, meanwhile when the government does it, it seems as if it is fine and a few moments later the case is over. I don't mean to offend, but the current reality is that when a personal data breach occurs, the private sector always becomes the scapegoat. In the future, it is hoped that there will be an independent authority specifically for the protection of personal data, who will not only supervise the private sector, but the government will also be the object of their supervision."

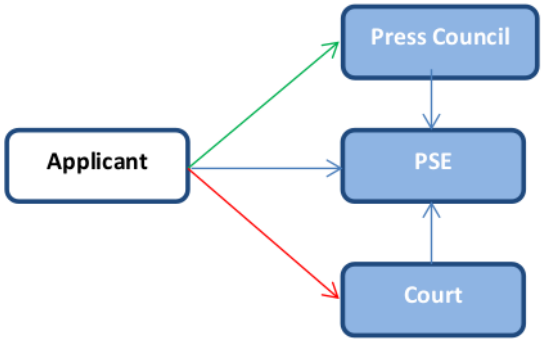
Based on the explanation above, it is reasonable to accelerate the establishment of the PDP Commission, and it is hoped that the deadlock that occurred at the last PDP Law discussion will soon be resolved. Both parties are expected to be able to put aside their respective sectoral egos and resolve all the concerns when the PDP Law and the Independent PDP Commission are present in Indonesia. This is because a policy is believed to be good after it brings beneficial effects in the future.

### C. Establishment of an Independent Special Commission for Personal Data Protection as an Effort to Create Right to be Forgotten in Indonesia

The discussion related to the Independent PDP Commission is in fact quite relevant and actual to be studied in connection with current social issues. This commission, once it is established in Indonesia, will be the coordinator in processing permits and enforcing the

protection of personal data. In connection with the context of Decision Number 438/Pid.Sus/2020/PN JKT.UTR, it is interesting to discuss how will the mechanism be if in the future a detrimental dissemination of personal data occurs, as is the case with Google Spain v AEPD and Mario Costeja González. These decisions have the same motive on the element of "post-action losses". Therefore, it is clear that the existence of a mechanism for data erasure, especially in cases of personal data dissemination needs to be strictly enforced and implemented. In relation to the concept of the right to be forgotten as formulated in Article 26 paragraph (3) of UU ITE, the cyber media acts as the Electronic System Operator (PSE) (LBH, 2018: 77). The PSE acts on a person's request based on a court order. As for the request for the deletion of data, it is necessary to obtain permission from the court and the approval of the Press Council. The following is a graph regarding the simulation of the process of deleting Electronic Information/Documents.

**Image 1.** Simulation Graph of the Electronic Information/Document Deletion Process (LBH Pers, 2018: 78)



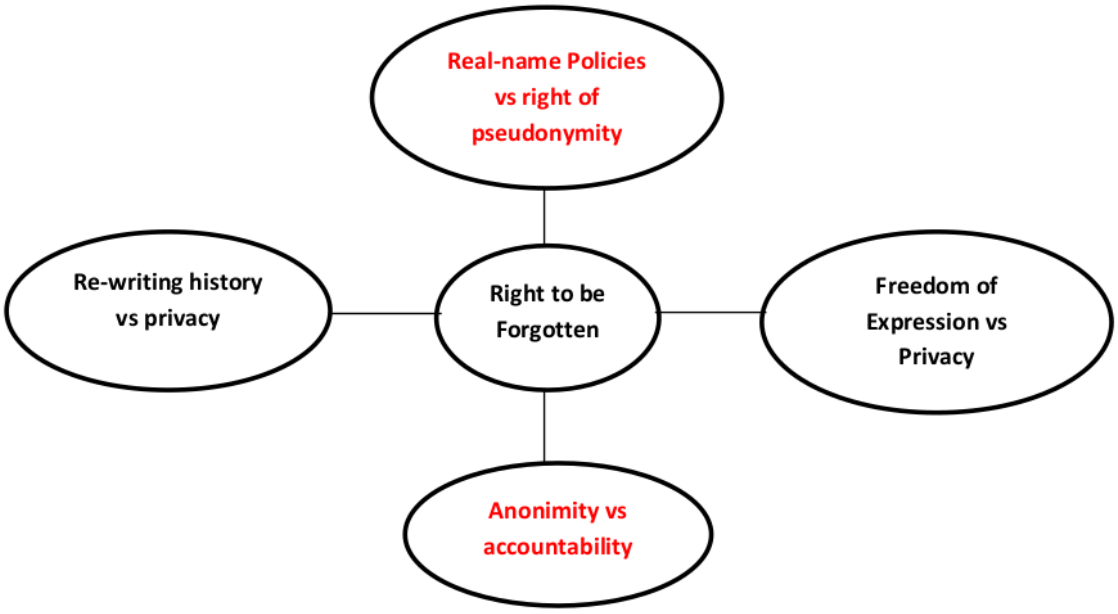

The image above can explain how slow and inefficient it is when an applicant submits a request for right to be forgotten on their data. This is not without reason. The author takes the example of the North Jakarta District Court. From the 2020 report, the North Jakarta District Court has 20 judges, 151 human resources, 678 applications, 792 lawsuits, and a total of 74,773 cases entered in the first instance in 2020 (2020 Annual Activity Implementation Report, PN Class IA North Jakarta). This data illustrates how crowded the activities of one court in Indonesia can be.

If the report is accompanied by a number of personal data violations, for example the BPJS case or the rampant cases of illegal online loans, it is certain that there will be many cases

that request data erasure. A swift mechanism is needed to resolve this issue, and it is important to have adequate capacity in terms of personal data. An Independent PDP institution would be an appropriate answer to this problem, considering that it is an independent institution, has mixed functions and is governed by a regulation equivalent to the law.

Another problem that may arise is if the decision on the application for the right to be forgotten intersects with violation of other rights that have equal severity. This way, it has to go through the court mechanism again, and this will become an unstoppable and never-ending cycle. This is clearly detrimental to the community. The potential conflicts between rights to be forgotten with other rights, among others, include the following.

**Image 2**. Potential Conflicts between the Right to be Forgotten with Other Rights.




The potential conflict between these rights must be seriously considered and a solution must be found. In truth, conflict or tension between privacy and freedom of expression is not something new, but the growing use of Internet technology that allows flood of information has had an impact on increasing the level of conflict in cyberspace (Smet, 2010: 184). The right to be forgotten is very relevant to be applied to the Independent PDP Commission, because this principle is essentially included in the basic principles of the PDP Law, as previously stated by Sinta Dewi Rosadi as quoted by the author above. Sony Zulhuda's statement also reaffirms that

the Independent PDP Commission will oversee all issues related to Personal Data in Indonesia. Therefore, it is appropriate for the The House of Representatives and the Government to enact the PDP Law and include the Independent PDP Commission as the PDP supervisory institution in Indonesia.

## IV. CONCLUSION

The conclusions that can be drawn from the research above are as follows:

The case in Decision Number 438/Pid.Sus/2020/PN JKT.UTR can actually be categorized as a Personal Data Protection issue and can be resolved at a quasi-judicial institution for personal data. However, since there is currently no appointment of an Independent Special Commission for Personal Data Protection in Indonesia, dispute resolution of Decision Number 438/Pid.Sus/2020/PN JKT.UTR in the North Jakarta District Court is appropriate. The use of UU ITE as a basis for prosecution is also quite appropriate because, according to the previous explanation, at present Indonesia has yet to have any codification of the PDP Law.

The existence of the PDP Commission based on the PDP Law as its legal basis will later be able to increase efficiency and enforce the right to be forgotten principle in Indonesia, because the key factors in its realization are trimming bureaucracy and accelerating the handling of cases appropriately.

In order that those benefits can be enjoyed immediately, the author suggests to immediately enacting the Bill of PDP into the PDP Law. Furthermore, it is better to include the definition of the Independent Special Commission for Personal Data Protection in the latest revision of the Bill of Personal Data Protection. The necessity to establish this new institution aims at the effectiveness and maximization of personal data protection in Indonesia.

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