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Maintaining order: Public prosecutors in post-authoritarian countries, the case of Indonesia

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Citation
Afandi, F. (2021, January 21). *Maintaining order: Public prosecutors in post-authoritarian countries, the case of Indonesia*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/3134560

Version:	Publisher's Version
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Note: To cite this publication please use the final published version (if applicable).

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Title: Maintaining order: Public prosecutors in post-authoritarian countries, the case of Indonesia
Issue Date: 2021-01-21

1 The Indonesian Prosecution Service (*Kejaksaan Republik Indonesia*): Introduction, Academic Background, Theoretical Framework, and Research Methodology

1.1 Introduction

In 1993, during the New Order military authoritarian regime, Yudi Susanto, Mutiari, and seven employees of the watch manufacturing *company*, PT Catur Putera Surya, were prosecuted for murdering a labour rights activist (Marsinah), in Sidoarjo District Court, East Java, Indonesia. During the trial, all the defendants withdrew their confessions (which had been recorded in the investigation files). They stated that they had been tortured and forced into making their confessions by the military and police, during the interrogation process. Moreover, evidence presented by the public prosecutor to the court supported the defendants' claims, as well as those of the witnesses. For this reason, the defendants' lawyer asked the prosecutor to demand an acquittal.[1] However, the prosecutor preferred to stick to the information in the investigation files, ignoring the facts revealed during the trial and proposing a 20-year sentence for the defendants (Qurniasari and Krisnadi 2014). Even though there was significant public protest around the hearing process, the Sidoarjo District Court sentenced all the defendants for murder. It was believed that when the judges decided this case they were not free, and were instead being controlled by the military regime (Rosari 2010). However, it was surprising that the Supreme Court judgement included an acquittal for all of the defendants in 1995. The Supreme Justice, Adi Andojo Soetjipto, argued that there was no evidence to support the prosecutor's indictment.[2] Most observers believe that the military regime was actually responsible for Marsinah's brutal murder.[3]

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1 Tempo Magazine, *Babak Akhir Kasus Marsinah,* (The Final Round of the Marsinah Case) https://majalah.tempo.co/read/hukum/1122/babak-akhir-kasus-marsinah, accessed on 15 January 2020.

2 An influential Supreme Justice, known for his integrity, Adi Andojo Soetjipto was the chair of the Supreme Court panel in the Marsinah case (Qurniasari and Krisnadi 2014). See (Pompe 2005, 160–64), for more stories on Adi Andojo Soetjipto's performance in handling controversial cases.

3 Until the time of writing, the actual murderers have never been found or been prosecuted at trial. Tirto.id, *Pembunuhan Buruh Marsinah dan Riwayat Kekejian Aparat Orde Baru* (The Murder of Marsinah and the Atrocities of the New Order Apparatus), https://tirto.id/pembunuhan-buruh-marsinah-dan-riwayat-kekejian-aparat-orde-baru-cJSB, accessed on 15 January 2020.

This is one of many cases showing how public prosecutors have followed directives from the authoritarian military regime. However, in some cases the public prosecutor did *not* follow the regime scenario when prosecuting criminal cases. One such example is a 1996 murder case involving a journalist from Bernas Magazine, Fuad Muhammad Syarifuddin (Udin). Udin was actively involved in revealing the Mayor of Bantul District's involvement in corruption; the mayor had a military background. Similar to the Marsinah case, the regime manipulated the Udin case by prosecuting Dwi Sumiaji (Iwik) in order to hide the original perpetrators, who were affiliated with the regime. In this case, the public prosecutor demanded an acquittal, because no evidence to support the prosecutor's indictment was presented at trial. However, since the Chief Prosecutor supported the prosecutor's decision, the Indonesian Prosecution Service's (IPS) relationship with the police and military became quite tense.

In 1997, one year after Udin's case, the police arrested and detained several prosecutors from the Supreme Prosecution Office for falsifying investigation files on the Nyo Beng Seng murder case. The IPS defended its prosecutors against the police allegation, saying that the evidence presented in the police investigation file was not sufficient to prove the defendant's wrongdoings. Therefore, the prosecutors conducted an additional examination, the results of which were incorporated into the police file, based on the latest findings. In the meantime, the police released the prosecutors after the Vice Chief Prosecutor, Soedjono Atmonegoro, made a strong protest against the Commander of the Indonesian Armed Forces (*Angkatan Bersenjata Republik Indonesia*/ABRI), General Faizal Tanjung. The IPS then switched to following the police and military scenario, authorising the police investigation file without any changes and revoking the results of the additional inquiry carried out by the prosecutors (Mangoenprawiro 1999).

As shown in the cases elaborated above, the New Order military regime positioned the public prosecutor as a mere 'postman' who would deliver the police investigation report to court. Such situations are commonly seen in authoritarian countries, where the executive dominates the political power and public prosecutors have become tools of the government. During the military regimes in Brazil (1964-1985) and Chile (1973-1990), public prosecutors could be punished if they made decisions that were not in the regime's interest (Pereira 2008). Similarly, Indonesia's authoritarian government has controlled criminal justice actors, including the prosecution service, and ordered them to maintain political order by prosecuting opponents of the regime (Lolo 2008).

After the demise of the New Order, there were high hopes that these things would change. In May 1998, frustrated citizens (led by students) held mass demonstrations and succeeded in pushing Soeharto into stepping down.[4]

4 This matter will be discussed further in Chapter 2

Accordingly, reformers sought legislation to guarantee independence for the judiciary and ensure due process in the criminal justice system, by developing a more accountable and professional prosecution service. As a country that has made a successful transition from authoritarian to democratic governance, Indonesia has faced a number of important questions. With a new constitution that protects human rights and guarantees the rule of law, Indonesia has had to reform its legal system, including the role and powers of the public prosecutor. But, to what extent has this really worked out?

From 1998 onwards, the government passed hundreds of new laws and reformed its bureaucracy to bring it in line with constitutional requirements. However, numerous observers argue that Indonesia's democracy and rule of law are still under-developed (Robison and Hadiz 2004; Lindsey 2007; Bedner and Berenschot 2011). As I will discuss in this thesis, one of the challenging issues for an Indonesian post-military government is criminal justice system reform. The new constitution was designed to prevent the regime's political interference in the justice system; to guarantee the independence of the judiciary, by transferring court administration from the Ministry of Justice to the Supreme Court; and to limit the influence of the military in the criminal justice system, by separating the police from the armed forces (ABRI). In addition, in 2002 the government established a new state agency – *Komisi Pemberantasan Korupsi* (KPK, or the Corruption Eradication Commission) – to achieve its main agenda: combating corruption within bureaucracy. Compared to the IPS, the KPK (with just one office in Jakarta) has a bigger budget and better management of human resources.[5]

As this research will show, however, after the establishment of the KPK the post-military authoritarian government made no serious efforts to reform the prosecution service. Under Law 16/2004 on the Indonesian Prosecution Service (thereafter, the 2004 IPS Law), the IPS is designed to be politically dependent on the president. The government retained the previous authoritarian military design of the IPS by positioning the Chief Prosecutor as a cabinet member. In addition, the post-military government allocated an insufficient amount to the IPS' operational budget.[6] In fact, the budget must cover the expenditure of all the prosecution offices throughout the country, and they must prosecute not only corruption, but all criminal cases investigated by the police and other special investigators. One Indonesian Prosecutors Association member complained about the situation, stating that "*…where law enforcement is concerned, it seems that the Prosecution*

5 Although the power of the KPK to deal with corruption cases has been changed and limited by Law 19/2019, the KPK's budget and management of human resources are still much better than those of the IPS.

6 This matter will be discussed further in Chapter 3.

Service is treated as a state-owned company…"[7]. As I will discuss further in this thesis, the government gives public prosecutors a limited budget for controlling crimes; it will increase the budget only if prosecutors can spend it in its entirety, as well as prosecuting cases which bring more revenue to the state.[8]

Despite the key role of the IPS in the Indonesian Justice System, the literature has not yet provided a clear analysis of the performance of the post-authoritarian IPS. It is the aim of this study to provide such an analysis, by considering the context in which the IPS conducts its relationship with different regimes, as well as with other criminal justice actors, societal actors, and the public at large. Subsequently, this study will discuss the IPS as an organisation, examining its structure and its culture.

The research will thus be able to show how public prosecutors perform their functions within Indonesia's criminal justice system. Since security and the rule of law are both desirable attributes of a democratic political system, the purpose of this study is to demonstrate both the practices and development of the IPS, as well as looking at the best way to strengthen the rule of law within IPS performance. This research will also critically observe and analyse the role of the public prosecutor within the criminal justice system; a role which cannot be isolated from the political preferences of the various Indonesian regimes over time.

1.2 Academic Background and Problem Statement

Much literature is available on police and courts worldwide, but only a few studies have been done on public prosecutors.[9] More research has recently

7 Narendra Jatna, a prosecutor in the Indonesian Prosecutors Association (*Persatuan Jaksa Indonesia*/PJI), complained about the Indonesian Prosecution Service's (IPS) budget allocation, which was reduced by the government because the IPS could not spend the previous year's budget in its entirety. Kbr.id, *Pemerintah Diminta Jangan Perlakukan Kejaksaan Seperti BUMN* (The Government is requested not to treat the Prosecution Service like a state-owned company), https://kbr.id/nasional/03-2016/pemerintah_diminta_jangan_perlakukan_kejaksaan_seperti_bumn/79324.html, accessed on 12 September 2019. For more discussion on IPS state budgeting, see section 3.3: Budget.

8 This matter will be discussed further in Chapter 3.

9 Prosecutors have received relatively little attention from social scientists. The sheer number of studies dealing with policing issues, for instance, dwarfs those aimed at prosecution. This may be because of the visibility of the policing profession. Cops are, without a doubt, the gatekeepers of the criminal justice system. Perhaps another reason why prosecutors have received scant attention from researchers is the misguided assumption that they play a smaller role in procedure. There have been many publications on the courts and police as central actors in ensuring the fairness and effectiveness of the criminal justice system. Studies on the police, for example, emphasise their function as a tool for maintaining security and order; the police have been perceived as a tool for twisting the law in favour of the powerful, and for the repression and containment of the vulnerable (Dammert 2019). In addition, studies on the respective roles of the court and judiciary within the justice system are also dominant, because of their function in guarding due process of law throughout (Shapiro 1981).

been conducted into the role of the prosecution service and its position within the criminal justice system. Most of the literature written in English focusses on the prosecution service in western, developed countries, such as the Netherlands (van de Bunt and van Gelder 2012; Tak 2008), the United States (L.Worrall and Nugent-Borakove 2008), the United Kingdom (Ashworth 1984; Samuels 1986), and Italy (Federico 1998; Montana and Nelken 2011; Montana 2009a). Other studies have also been conducted, comparing the prosecution services in Europe with that of the UK (Fionda 1995; Jehle and Wade 2006; Marguery 2008; Tak 2004; 2005), and the prosecution services in the United States with those in European Countries (Langer and Sklansky 2017b; Luna and Wade 2012).

Most of the aforementioned studies discuss the role of the prosecution service as a filter for the criminal justice system, and its connection with both the rule of law and democracy.[10] As magistrate, the prosecutor has a legal and moral duty to enforce the law, in the sense that violations of criminal law will be punished, as well as ensuring that criminal investigators exercise their coercive measures based on procedural rules. In most of the countries mentioned above, public prosecutors have discretion as to whether to accept or dismiss a case—they can select which crimes should be prosecuted and charged, determine all aspects of pre-trial and trial strategy, and (in many cases) essentially decide the punishment that will be imposed, upon conviction. Therefore, most of the aforementioned research focusses more on prosecutorial discretion in the public interest. Since prosecutorial discretion may be the subject of abuse, when it is either used in a diversionary way or exercised to suit the political agenda of a governing regime (Boolell 2012; O'Brien 2012), the aforementioned studies focus on controlling prosecutorial decision-making, and deal with the manner in which prosecutorial discretion may be used to create a more efficient criminal procedure.

Research into prosecution services is also currently on the rise in Asia. Some legal studies focus on what prosecution services are supposed to be and do;[11] others explain what public prosecutors actually are, or how they operate. Some such studies are Ling Li's (2010) thesis on Chinese courts, Cheesman's (2015) research on Myanmar's criminal justice system, and Hurst's (2018) research on China's and Indonesia's criminal justice systems. Such studies show that criminal justice actors, including public prosecutors,

10 Comparative literature on prosecutors in the European system, especially in the Netherlands, helped me to develop a more detached perspective of the Dutch system, upon which the IPS was modelled.

11 A notable report on the prosecution services in Asian developing countries was published by the United Nations Asia and the Far East Institute for the Prevention of Crime and Treatment of Offenders (UNAFEI), in 1998. The report discussed the role and function of the prosecution service in Cameroon, China, Costa Rica, India, Indonesia, Kenya, Laos, Malaysia, Pakistan, Philippines, and Thailand ("Annual Report For 1997 Resource Material Series No . 53", 1998).

play a pivotal role as governmental tools, not only for crime control but also for other political interests (Li 2010; Cheesman 2015; Hurst 2018).

Recent work dealing specifically with prosecutors' performance includes studies by Johnson (2002), on the Japanese prosecution system, and Lee (2014), on the South Korean prosecution service. The former explains how Japanese public prosecutors manage an effective prosecution process that leads to a high conviction rate (Johnson 2012; 2002). Pre-war Japanese public prosecutors, controlled by the totalitarian regime, were used as instruments for the regime, in order to suppress political opponents (Sasamoto-Collins 2015; Mitchell 1992). However, Johnson (2002) argues that, after World War II ended in 1945, Japan was able to reform its criminal justice system, including the prosecution service, to be more protective of the rights and interests of criminal suspects (Johnson, 2002).[12]

Another study explores the South Korean prosecution service's political role in presidential democracies. Similar to the Japanese public prosecutors, South Korean prosecutors have enormous power over criminal procedure.[13] However, unlike its counterpart in Japan, the South Korean prosecution service uses its power as a political weapon against those who oppose its interests, including the President. Furthermore, the incumbent president usually seeks to form an alliance with the prosecution service, expecting short-term political benefits under intense political competition, rather than reforming the prosecution service by limiting prosecutorial power within the justice system (Lee 2014a).

The political tension between the prosecution service and other state institutions, such as the President, can furthermore hinder the prosecution service's reform process towards becoming more accountable and professional (Lee 2014b). Reforming the prosecution service is hard, since it is linked to governmental power, operating as its tool within the criminal justice system. This prosecution service feature is different to the equivalent features of other justice actors, making the prosecution service the key actor for developing a more efficient and protective criminal procedure. A study on the post-authoritarian prosecution service in Latin America suggests that the trend towards adopting an adversarial prosecution system helps countries to reform their civil law prosecution system (Michel 2019).

12 Japan's high conviction rate means that many criminal offenders, who would be criminally charged and convicted under other systems, are never charged, which has negative consequences. Many victims of crimes feel abandoned or betrayed by prosecutors when they do not charge the people who have offended against them. To cope with this issue, Japan enacted two laws in 2004—the Lay Judge Law, and the (revised) Prosecution Review Commission Law—to check and control prosecutors' decisions not to charge (Johnson and Hirayama 2019).

13 As the civil law inquisitorial system has been adopted, South Korean prosecutors are involved in and can direct criminal investigations, and they have broader discretion to dismiss criminal cases in the public interest (Lee 2016; Choe 2018).

The scarcity of in-depth research on the prosecution service in post-authoritarian countries extends to Indonesia. Most Indonesian Prosecution Service (IPS) publications are merely formal legal elucidations of criminal justice procedures, and they fail to deal practically with the manner in which the prosecution process is managed. There are a few publications on how Indonesian prosecutors operate in practice. Among recent work dealing specifically with the IPS are those by Lolo (2008) Kristiana (2010) and Clark (2013). Lolo and Kristiana were both Indonesian prosecutors, and they both reported their experiences in their PhD theses. Lolo examined the Prosecution Service's position as the regime's political instrument during the New Order military era, while Kristiana focussed on the IPS' post-authoritarian performance in investigating and prosecuting corruption cases. Both of them agree that the IPS' centralistic bureaucracy, along with its command system, hinders public prosecutors in performing their tasks (Lolo 2008; Kristiana 2010). Meanwhile, Clark's research on the district prosecution office found that informal politics can play a part in determining the outcomes of corruption prosecutions (Clark 2013). These studies provide key information on certain areas of IPS operation, but they do not paint a full picture of how the IPS performs. Building on Lolo's, Kristiana's and Clark's analyses, and my own fieldwork data, this thesis develops a more comprehensive analysis of the post-authoritarian IPS.

Other studies that deserve mention are Lev (1965), Yahya (2004), and Ravensbergen (2018), all of which provide useful insights into the historical elements; I can compare their findings with the official history of the IPS, as written and published during the authoritarian military regime. In addition, since the IPS claims that it has adopted similar principles to the previous Dutch Colonial Prosecution Service (*Openbaar Ministerie*), this study considers general works on Indonesian legal transplants, such as those mentioned by Pompe (2005), Bedner (2001; 2013), and Massier (2008), in order to gain more insight into the current situation.

This thesis tries to locate the study of the Indonesian Prosecution Service within a broader literature on public prosecutors and prosecution services in post-authoritarian countries. It intends to contribute to the body of work produced by scholars who have addressed the role of the Indonesian public prosecutor and how criminal justice functions within Indonesia. It aims to fill the gap in the literature by examining the socio-legal dimensions of the public prosecutor's role, both in promoting the rule of law and in maintaining the political status quo via the criminal justice system. It will also analyse the IPS' position and design within the legal system. In doing so, it presents an empirical analysis of the development of the Indonesian prosecution service, historically and politically. Using the historical institutionalism approach (Fioretos, Falleti, and Sheingate 2016; Thelen 1999), it will discuss how temporal processes influence the origin and transformation of the prosecution service, governing political and economic relations.

Additionally, the thesis will examine the institutional nature of the IPS. The discussion will not only present legal institutional theories, it will also

analyse the public prosecutor's cultural context and organisational setting. This study fits into a research tradition on legal institutions in Indonesia, which combines law with the social and political studies conducted by Lev (2000), Bedner (2001), Pompe (2005), Setiawan (2013), Huis (2015), Rositawati (2019) and Crouch (2019). The aforementioned studies include the recruitment system, training, budget, organisation of legal personnel, and political structures within which civil, administrative and criminal justice are located and constructed from the legacy of the New Order Military authoritarian regime.

In this way, the present study seeks to provide a better understanding of the ways in which the public prosecutor operates in practice. The problem of the prosecutor's performance relies on his/her dual role as a civil servant and a *Magistraat* (Judicial Officer). In the former role, prosecutors are oriented toward executing the directives and policies of their organisation. As a member of the state bureaucracy, they must focus on state interests and take into account the instrumental goals of its criminal laws. On the other hand, the latter role is closely related to the concept of due process. The prosecutor must weigh up all the interests involved in a case, impartially. The core of the *Magistraat* role is neither effectiveness nor crime control, but justice (Packer 1964; Tak 2008; Fionda 1995; Montana 2009b; van de Bunt and van Gelder 2012).

In order to achieve the above objectives, the following key research questions guide the analysis in this research:

1. *How have subsequent Indonesian political regimes positioned and regulated the Prosecution Service, and how has this affected the prosecution service's performance?*
2. *What do post-authoritarian Indonesian public prosecutors do, in practice, during the criminal procedure?*
3. *How can this be assessed from the perspective of the rule of law, and in what way can it be improved?*

The thesis will finish by providing a number of recommendations for reforming the Indonesian Prosecution Service more effectively within the framework of the rule of law, and by detailing areas for further research.

1.3 Theoretical Framework

In this research, the socio-legal approach is used to understand the rise and fall of the prosecution service's power within Indonesian criminal procedure.[14] This study is inspired (among other things) by the criminal justice

14 It is an interdisciplinary approach, providing (among other things) analyses of how social and political factors influence the performance of legal institutions in interpreting and implementing the law (Banakar and Travers 2005).

approach, which for decades has been applied as a critical analytical tool to the development and performance of criminal justice systems (Ashworth 2011). The criminal justice approach is a particular approach within the socio-legal field. It combines criminal law, criminology, political science and anthropological theory, providing an important framework for the analysis and critiquing of the conditions for, impacts of, and possibilities for prosecution services, globally (Luna and Wade 2012).

The discussion and analysis have been inspired by the occurrence of the following theoretical frameworks: (1) rule of law concepts within the criminal justice system; (2) institutional theory in public administration; and (3) the social function theory within criminal procedure. The rule of law is used as an entry point for understanding the Prosecution Service's role in guarding democracy and promoting the rule of law within the criminal justice system. The institutional theory is used to analyse the internal and external factors that contribute to shaping the prosecutor's work patterns. Finally, the social function theory of criminal process is used as a tool to identify the role of public prosecutors within the criminal procedure.

1.3.1 The Rule of Law in the Criminal Justice System

> *"Nowadays, in contrast, we must say that the state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory."* (Weber, 2004, 33).

All states use the punishment mechanism as a means to maintain order and the rule of law. However, different state regimes have different ways of prioritising the maintenance of order and the enforcement of the rule of law (Cheesman 2015). The power to punish expresses the ultimate authority, whereas those who are punished are powerless compared to the state. Similar to all bureaucratic structures, the state is theoretically goal-directed: it exists for a set of purposes. The power to punish during the criminal process is supposed to be wielded in order to attain these goals, rather than the private goals of individuals occupying positions within its structure (Chambliss and Seidman 1971, 271). In his book, *Discipline and Punish*, Michel Foucault demonstrates historical constitutional transformations and the exercising of political power, wherein punishments are largely seen as displays of governmental power (Foucault 1995). The government establishes a criminal justice system, consisting of a set of agencies and processes to control and minimise crime, as well as to impose penalties on those who commit crimes. However, in order to maintain its legitimacy, the state must punish within certain constraints. The punishment must be transparent and transcendent (i.e. impersonal), and its rationale must be ascertainable by the public (McBride 2007). Furthermore, the guarantee of due process is intended to restrain the state's repressive potential (Nonet and Selznick 2009, 66). The idea of controlling and restraining the executive

arms of the state should take into account the law on which the rule of law is based.[15]

The rule of law is an umbrella term for a number of legal and institutional instruments which protect citizens from those who abuse state power. The basic functions of the rule of law are to: (1) curb any arbitrary and inequitable use of state power; and (2) protect citizens' property and lives from infringement or assault by fellow citizens (Bedner 2010, 50-51). However, these functions raise a number of questions regarding which instruments are best suited to attaining an optimum balance between limitations to state power and the protection of citizens' property and lives. Another question is: Which of the above functions should be prioritised, if they should come into conflict? Answers to such questions depend on the context of a given state or society (Bedner 2010, 52). Closer adherence to the rule of law may not only protect the people's rights more efficiently; it may also contribute to a more rational and effective penal policy (Allen 1996, 97). This is mainly because the rule of law requires laws to be articulated with a clarity and generality that is sufficient to enable citizens to moderate their behaviour; citizens can predict how the state will respond to and discourage any capricious or arbitrary use of state authority. Careful articulation may also lessen any avoidable conflicts and inconsistencies between new and existing laws, as well as diminishing any disharmony or incoherence within the legal system (Allen 1996, 98).

The criminal justice system is constituted of interrelated actors—the police, prosecutors, defence attorneys, and judges—all of whom serve their individual functions, but still interrelate with each other to form an identifiable holistic system with emergent characteristics, including the power to deprive an individual of liberty (Luna and Wade 2012, 177). Potentially, prosecutors are the most powerful figures in any country's criminal justice system. They decide: what crimes to prosecute; whom and what to charge; whether to plea bargain (where plea bargains exist), offer concessions or divert a case; how aggressively a conviction should be sought; and what sentence should be proposed. Police arrest suspects, but prosecutors decide whether or not the arrests will lead to charges. Judges only preside over trials and sentence defendants which prosecutors deem worth bringing before them (Tonry 2012). However, in practice there is considerable disparity between countries regarding the power of their respective prosecution services. There are more powerful prosecutors within certain systems, such as in Japan, South Korea and the Netherlands, while in other countries prosecutors have only limited power.

15 As a concept, the rule of law (as developed within the common law tradition) corresponds closely to what the German tradition refers to as *'Rechtsstaat'* - what the French call *etat de droit*, or the Indonesian idea of *Negara Hukum*. These terms all originated in the nineteenth century, but the notions they entail are much older, and they have formed part of a common tradition based on constitutionalism, the legality principle, equality before the law, and due process. For further discussion of this topic, see (May and Winchester 2018).

It is important to identify the different types of prosecutors across the world. Their role may be to prepare charges and process cases, but their function is to ensure that the guilty are convicted and the innocent are exculpated (Tonry, 2012). Important differences can be derived from the foundational characteristics of national legal systems. The most important of these are the contrasts between continental European civil law, Anglo-Saxon common law systems and hybrid systems, and between systems characterised by the "legality principle" and the "expediency principle" (Tonry, 2012).

The civil law tradition is historically associated with inquisitorial adjudication and its heavy emphasis on determining the material truth of each case—the unobstructed, objective understanding of what actually happened. Hence, civil law countries place greater emphasis on non-partisan investigations prior to trial, since substantive truth-finding is the primary objective (Luna and Wade 2012, 179).[16] Meanwhile, common law jurisdiction is associated with an adversarial (or accusatorial) criminal process. This system places opponents—a public prosecutor on behalf of the state, against the defendant and perhaps a public defender or private criminal defence attorney—before a presumably impartial decision maker, in the form of a judge and/or a jury. The truth is supposed to emerge as the parties present evidence and convince the judge to support their claims (Luna and Wade, 2012, p. 179). When applied to actual criminal justice systems, the distinctions between common law and civil law traditions seem less stark; therefore, whether or not the distinctive features of each tradition are clear cut between justice systems is questionable. Moreover, the criminal justice systems of certain countries may be best described as hybrid, given the mix of legal traditions found in their own unique criminal processes (Luna and Wade 2012, 181).

Hybrid systems can also be seen in post-colonial countries, whose criminal justice systems have adopted not only features from their own former colonial systems, but also certain features from other systems. Criminal procedure comparatists believe that post-colonial countries adopting the inquisitorial civil law system tend to be authoritarian states, in contrast to those which apply the adversarial common law system (Ross and Thaman 2018). They argue that the inquisitorial system gives broader discretion to the state and allows for less public control. It is different from the adversarial system, which has more features to protect citizens during

16 In most European countries, and in the parts of Latin America which have adopted inquisitorial civil law, preliminary investigation consumes the most resources and time. During this stage, an investigating magistrate or public prosecutor will prepare the central piece of criminal procedure and a comprehensive investigative dossier or file, including all the evidence that would eventually be admissible at the trial stage, as the bases for proving guilt and imposing a sentence (Luna and Wade 2012, 157). In contrast with the adversarial process, in which the truth is conceived as a by-product of a battle between the state and the defence, the inquisitorial process demands that prosecutors view 'facts' and evidence through an objective lens (Luna and Wade 2012, 39–40).

the criminal procedure (cf. Lee, 2014a). A common trend has occurred in post-authoritarian Latin American countries, which previously adopted civil law and are now adjusting their justice systems to be more adversarial (Michel, 2018). Such transformation of justice administration in democratising countries is mostly a corollary transition from crime control to due process (Lee 2014a).

Like other developing countries which have inherited a colonial system, Indonesia's criminal justice system follows the former colonial Dutch civil law system. During its development, the Indonesian government adopted several features from the adversarial system in the 1981 Law, or *Kitab Undang-Undang Hukum Acara Pidana* (*KUHAP*, or Code of Criminal Procedure).[17] However, since the code was drafted during the authoritarian regime, provisions on the protection of citizens are limited. The KUHAP still gives the government significant power to control criminal procedure (Strang 2008, 202). Like other authoritarian countries, criminal justice was a key tool for the Indonesian military regime, which used it to maintain the political stability of the ruling government by weakening the rule of law in cases related to state security (cf. Savelsberg and Mcelrath 2014; Skinner 2015).

Authoritarian regimes prioritise social control over dispute resolution, as their main mission for justice administration (Tate and Haynie 1993). In authoritarian states, criminal justice systems rely on a larger law enforcement-punishment apparatus for the maintenance of order, and to produce higher rates of arrest, prosecution, conviction, and incarceration. Authoritarian governments often create specialised units for political policing, and assign criminal police to the maintenance of law and order (Sung 2006). By contrast, in liberal democracies justice is sought through the defence of civil liberties via the due process of law, which leads to heavier investment in the judiciary and a higher rate of case attrition in the criminal justice process.

Criminal justice systems rely heavily on the official granting of discretionary power (Dworkin 1963; Galligan 1990). Considerable discretionary authority is vested in criminal justice bureaucracies, in terms of making and implementing policy. Judges, prosecutors, public officials, and lawyers all exercise some form of discretion in their daily decision-making on matters of criminal law and criminal justice cases (Woude 2017). In the context of the prosecution system, the most important legal principles are the expediency principle (known as the 'opportunity principle') and the legality principle. The two principles concern the degree of discretion that is permitted or expected from all branches of the criminal justice process, particularly at the prosecution stage. In states which apply the legality principle, prosecutors have limited or no official discretion during their work on individual cases. This principle demands the mandatory prosecution of all cases where sufficient evidence is presented to prove the guilt of a suspect, as long as no

17 This matter will be discussed further in Chapter 5.

legal hindrances prohibit such prosecution.[18] The expediency principle, by contrast, justifies prosecutorial discretion in decisions to prosecute. Prosecutors are authorised to dispose of cases for any good faith reason, such as extenuating circumstances, victim compensation, or conflict with other prosecution priorities.

One of the public prosecutor's objectives is to act in the public interest (e.g. ensuring public safety, or seeking fair and just outcomes). Furthermore, the prosecutor must take public interest into account when deciding whether or not to prosecute a case. This decision must be preceded by sufficient evidence to justify making a prosecution. This public interest consideration also influences whether or not the prosecutor exercises their discretion to waive a case. For this reason, prosecution services are referred to as the 'filters' and 'managers' of the criminal justice system (Fionda 1995; Jehle and Wade 2006; Tak 2008).

In some countries, public interest criteria for waiving criminal cases can be found in policy considerations that are publicly accessible and may be tested directly in court. This mechanism is used to ensure that prosecutors continue to carry out their functions in the public interest. However, Fionda's study in the UK, the Netherlands and Germany, found that public interest has little to do with public opinion. Although the public voice in the media may influence public interest formulation, policy makers formulate public interest *criteria* with minimum reference to the views of actual members of the public. Under such criteria, policy makers unilaterally impose the minimum standards necessary to protect citizens from victimisation, and to ensure a minimum level of retribution and deterrence (Fionda 1995, 227).

Unlike other civil law countries, such as the Netherlands and Germany (above), the Indonesian legal system allows top government officials to define 'public interest', with minimum input from the public itself. Public interest criteria in criminal case dismissal cannot even be tested in court. Indonesian scholars argue that the government alone can exercise discretion (*freies ermessen)* regarding the public interest (Gautama 1983; Joeniarto 1968; Asshiddiqie 2008; Utrecht 1986). The government may even exercise its discretion to override the law in the public interest (Utrecht 1986, 35).[19] This is similar to post-colonial authoritarian countries, which may lack the ability to produce written policies, and often provide unclear translations of legal text (Massier 2008).

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18 Based on the legality principle, the prosecutor must prosecute all cases, although a filter mechanism exists to dismiss cases. In Italy, for example, a preliminary hearing judge (*giudice dell'udienzavpreliminare*) has authority over whether or not to commit a case to trial, dismiss the case, or inform the parties about matters that still need to be addressed and investigated (Montana 2012, 105).

19 The opinion that government discretion may violate law made in the public interest has been supported and promoted since the Soekarno Guided Democracy era (Fakih 2014), which centralised state power in the president's hands and rejected the separation of powers. This will be discussed further in Chapter 2.

Indonesian scholars and government officials invariably translate *Beleid* (policy), *Wijsheid* (wisdom), and *Freies Ermessen* (discretion) as either *Kebijakan* or *Kebijaksanaan* (Pringgodigdo 1994, 6-7); both words come from the term, *bijak*, which means 'wise'. The perception is that both policy and discretion are part of a ruler's wisdom, which is reflected in the Indonesian state ideology of integralism. The integralism ideology implies that a harmonious relationship between the state and society is an Indonesian value, supposedly found in all Javanese villages. Within this view, state leaders will (by default) pursue the common good, which, if there are diverging views, will be established through 'deliberation and consensus' (*musyawarah-mufakat*). Since leadership plays an important role in the state ideology, such discretion cannot be questioned. Moreover, as I will elaborate in Chapter 5, although Indonesian criminal procedure adopts the opportunity principle, only the Chief Prosecutor can dismiss a criminal case for public interest reasons. The IPS believes that prosecutorial discretion in criminal case dismissal is the prerogative of the Chief Prosecutor, and that such dismissal cannot therefore be reviewed by the court.[20] The dominant role of policy makers in determining public interest criteria may contribute to the prosecutor's position as more of a state instrument than a public official.

It is, perhaps, not surprising that, when I did my preliminary fieldwork in 2014, I found only three cases which had been dismissed by the IPS for public interest reasons. Further, I found that the IPS applied the military's command system, which has strong influence on the reporting mechanism during criminal proceedings. The IPS treats public prosecutors as soldiers and not as street-level bureaucrats (as defined by Lipsky (2010)), precisely because individual prosecutors have hardly any opportunity to exercise discretion.[21] This preliminary finding contributed to changes in my research focus. The most significant change was shifting from an initial focus on prosecutorial discretion to studying the performance of the public prosecutor in post-authoritarian Indonesia. For this new research focus, I decided to study the ways in which the public prosecutor operates, in practice, within the IPS' military command system, and how can this be assessed from the perspective of the rule of law.

1.3.2 Organisational Setting, Bureaucracy and Performance

Law enforcers such as the police and the prosecution service, which in most countries fall within the executive branch, are mutually dependent upon one another. Each sub-system may be designed to fulfil the goals of the system as a whole, the success of which can be measured from an input-output perspective. As a system, criminal justice typically aims to process cases efficiently, while ensuring correct outcomes through the acquittal (or

20 See Constitutional Court Decision 29/PUU-XIV/2016.

21 This matter will be discussed further in Chapter 3

non-prosecution) of the innocent, and the conviction and suitable punishment of the guilty. Scholars and reformers focus on prosecutors as being the key to how the criminal justice system is administered, and increasingly blame or praise them for failures within the system (Jehle and Wade 2006; Langer and Sklansky 2017a; Lee 2014b; Montana 2009a; Johnson 2012; Luna and Wade 2012; Michel 2019). One way to analyse the prosecution service's operation within the criminal justice system is to measure its performance based on standards, goals, or benchmarks, established by the government.

Several scholars (see Langer and Sklansky 2017b) believe that the position and design of prosecution within the legal system has an impact on both democracy and the rule of law. This is because the independence and accountability of prosecutors will influence due process implementation within the criminal procedure (Michel 2018; Boyne 2017; Wright and Miller 2010). Furthermore, the question of the prosecution service's position in the state organisation has been the subject of ongoing debate in many countries (Marguery 2008; Tonry 2012). This is mainly because successful criminal prosecution depends on investigations being conducted or supervised by the prosecution service. Therefore, to be able to evaluate the consequences of the prosecution service's position, one must understand both the objectives providing direction for the system and the features that sustain the idea of the prosecution service within the constitution. The objectives are emphasised differently, according to the prosecution service's main priority, whether that is to maintain public or political order, or to promote the rule of law. In Indonesia, debate concerning the Prosecution Service's position in the state organisation became increasingly heated after the authoritarian military government stepped down in 1998. The subject of this debate is the extent to which the prosecution service is, and should be, free to perform its functions, independent of political influence and the risk of abuse (Tim MaPPI FH UI 2015; Maringka 2015; Waluyo 2015; Mahfud MD 2015).

In a democratic government, prosecutors must implement the rule of law faithfully. In most European countries, prosecutors rely on internal bureaucratic accountability to ensure they remain within rule of law norms. In some countries, such as Sweden (Asp 2012), France (Hodgson 2005), Italy (Montana 2009a), the Netherlands (Tak 2003), and Germany (Boyne 2017), public prosecutors have a quasi-judicial role,[22] although the prosecution service is a part of the executive.[23] In this manner, the prosecution service should be counted as the executive power at policy level, while the action

22 Dutch prosecutors have a judicial role. They have gained wider authority to dispose of cases without judicial involvement (although subject to appeal to judges) through dismissals, 'transactions' (in which suspects agree to pay a penalty without pleading guilty), and 'penal orders' (in which sanctions are imposed and convictions are carried out) (van de Bunt and van Gelder 2012, 120).

23 Dutch public prosecutors are positioned as judicial civil servants (*rechterlijke ambtenaren*) (Marguery 2008, 120).

of the public prosecutor at concrete case level must be traced back to its capacity as the part of the judiciary (Crijns 2010, 316).

By contrast, in some other countries prosecutors are members of the executive branch of government. In England and Wales, prosecutors work for the Crown Prosecution Service, led by a politically appointed director of public prosecutions. Line prosecutors are civil servants and members of the national bureaucracy, and although prosecutors are assigned to work either within a specific district or at central headquarters, they can be transferred from one location to another. As members of the executive branch, prosecutors' priorities are set by political officials, who take both public opinion and political considerations into account (Lewis 2012). In the US, however, where prosecutors build their accountability on an electoral basis, an external check is designed to compensate for the shortcomings of weak judicial review and overly broad criminal codes (Luna and Wade, 2012). State prosecutors typically work in county-level offices, led by an elected chief prosecutor. US federal prosecutors work either in a specialised unit of the Department of Justice, or in offices attached to federal district courts which are led by the US attorney, who is appointed by the government (Tonry 2012).

As mentioned in the previous section, studies on the prosecution service in developing countries, including Indonesia, are still lacking. There are, however, a great many studies that investigate the performance of legal institutions (notably, in Indonesia) from an organisational perspective.[24] The studies demonstrate how insufficient financial, human, and organisational resources have contributed to serious problems regarding the quality of judicial administration in Indonesia. There are two types of organisational factors influencing the performance of Indonesian legal institutions. The first is external: the organisation's socio-political context, including a wide range of factors and actors that are largely beyond its scope of control. These include social, cultural, economic, political and legal relationships, as well as historical and geographical contexts, and the technological possibilities available. The second is internal: human, financial and material resources, and how people's behaviour within the organisation influences its functions (Wilson 1989). For this reason, the IPS' budget, structure, bureaucracy, culture, supervision, training, recruitment, transfer, and promotion will all be discussed in this research.

The cultural context of the Indonesian Prosecution Service and its organisational setting need to be addressed, in order to understand how public prosecutors should exercise their tasks and powers within the criminal justice system. This research analyses the legal culture within the Prosecution Service, which is closely connected to its organisational culture. Legal culture has long been recognised as an important factor in explaining

24 Studies on Indonesian legal institutions, conducted by Lev (1965), Pompe (2005), Bedner (2001), and Setiawan (2013), inspired me to analyse the IPS and how it is influenced by other political actors.

the character, performance, and effectiveness of law and legal systems. In this case, 'legal culture' means "the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away" (Friedman 1969, 34).

As mentioned above, the prosecution service's position within the state organisation has an impact on the prosecution process. The activities of the prosecution service are based on organisational goals, which are defined as "an image of a desired future state of affairs" (Wilson 1989, 34). One way to analyse the prosecution service's operation in the criminal justice system is to measure its performance, based on standards, goals, or benchmarks established by the government. In this research, 'performance' is a neutral concept, meaning that it does not have an inherently positive or negative connotation. This allows for further specification of organisational performance: it may be excellent, terrible, or anything in between (Setiawan 2013). The prosecution service's performance is usually defined as the difference between a goal (or standard) and the actual result achieved by an individual (an operator, a manager, and an executive),[25] an organisation (the prosecution service), or the justice system as a whole (Contini and Carnevali 2010).[26]

In the English Crown Prosecution Service, for example, job descriptions and performance indicators are set for each prosecutor. Their progress and future career path both depend on the judgements of their seniors, in relation to how well they have fulfilled the guidelines set down locally and nationally, as well as the local workload targets (Jehle and Wade 2006, 157). In the American adversarial system, where prosecutors function as parties to criminal hearings, winning cases is a strong performance indicator (Polzer, Nhan, and Polzer 2014). Whereas, the performance of German prosecutors is assessed not by the conviction rate or the length of sentences given, but by whether or not they have applied the law correctly in a particular case (Boyne 2017, 146), which can be seen (for example) in their closing statements. German prosecutors are expected to present the facts for *and* against a defendant, and they may ask the court to acquit a defendant if they are not convinced the defendant is guilty after all the evidence has been presented at court. A prosecutor may even appeal an unjust conviction on behalf of a defendant. Unlike the German approach, Japanese prosecutors are career civil servants who are not under pressure to amass convictions.

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25 I borrow Wilson's (1989) classification of government agencies, which splits the role of bureaucrat into three types—operator, manager and executive—in order to understand what motivates different actors within the hierarchy of IPS bureaucracy.

26 Setiawan's (2013) thesis on the National Human Rights Commissions in Indonesia and Malaysia defined 'performance' as a process which concerns the relationship between inputs and outputs. Inputs are an organisation's supplies (such as human and financial resources, and equipment), while outputs consist of the work the agency does, and the outcomes of that work (Setiawan, 2013). However, Setiawan also comments that a state agency's good performance cannot guarantee that its outcomes will be effective, referring to the extent to which an organisation has achieved its goals in order to change, improve and benefit society.

They consider that their primary purpose is not to charge the innocent, but instead to charge only those who have really committed crimes (Johnson, 2002, p. 228). Thus, Japanese prosecutors are very selective about the cases they bring forward. Unless a trial is highly likely to lead to a conviction, Japanese prosecutors will refrain from filing charges.

Although Indonesian prosecutors are civil servants, similar to Japanese and Dutch prosecutors, their position as magistrates who promote due process has been minimised.[27] The IPS retains its militaristic culture, to impose on public prosecutors loyalty to the Chief Prosecutor, while his/her position remains dependent on the President's political preferences.[28] As stated in the Chief Prosecutor Regulations PERJA 007/A/JA/08/2016, the IPS goals,[29] and its visions and missions, are all designed to be in line with the President's programme during his five-year term. Therefore, the performance of Indonesian public prosecutors is assessed by whether or not they can implement and secure the President's political agenda in their work.[30] The IPS goals, as mentioned in the Chief Prosecutor Regulations PERJA 007/A/JA/08/2016, include:

1. increasing asset recovery from corruption cases;
2. enhancing the quality of law enforcement, to provide legal certainty, justice, and benefit to the public, and to justice seekers;
3. expanding government authority to solve civil law and administrative disputes;
4. increasing public trust in the IPS; and
5. realising bureaucratic reform and good governance within the IPS.

Because the normative goals seem vague and difficult to operationalise, management controls that encourage efficient case-handling procedures exert a strong influence on practice. In addition, the meaning of 'justice' is ambiguous in the IPS goals. A somewhat less vague (but still complex) prosecutorial goal would be to maximise a sense of public security, which might be conceptualised as (among other things) reducing crime through deterrence and rehabilitation.

Later, I will discuss various regimes which have adjusted the IPS' tasks and powers to serve their own political interests. Due to this, some IPS functions are currently no longer in line with its core duties within the prosecution process. The government positions public prosecutors as state lawyers, who assist the government and its companies in both civil and

27 This matter will be discussed further in Chapter 2

28 This matter will be discussed further in Chapter 3.

29 Unlike the police force and the Human Rights Commission, which has specific goals written into its own laws, The IPS law has no provisions specifically stating goals for its prosecutors. See Article 4 Law 2/2002, which mentions goals for the police. See also Article 75 Law 39/1999, which regulates the goals of the National Human Rights Commission.

30 This will be elaborated further in Chapter 3.

administrative disputes. The government also stipulated an additional function for prosecutors: to act as state intelligence. In this manner, the IPS was not designed simply to support the prosecution process, but also to protect government interests by maintaining public order. The IPS then created specialised divisions to serve these additional functions, and arranged goals for those divisions. In some cases, similar tasks may fall to more than one division, which confuses prosecutors in aiming to achieve their goals.[31]

1.3.3 The Role of the Public Prosecutor in Criminal Procedure

Article 12 of the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, Cuba, on 27 August to 7 September 1990, states:

> *"Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."*

In post-authoritarian Indonesia, more studies have been carried out on criminal proceedings, which analyse the role of public prosecutors. Upon closer examination, through a socio-legal lens, the IPS seems to use security and order standards to support public prosecutors' work within the criminal justice system. A war on crime campaign by the state will jeopardise the rule of law in the criminal process, since it often oversteps the limits of legality and frees public officials from accountability (Allen 1996).

A convenient starting point for analysing the role of the IPS within criminal procedure is Herbert Packer's (1964) *Two Models of the Criminal Process*, which connects the rule of law in criminal justice closely with the idea of due process (Sanders and Young 1994). Packer proposed that the whole of criminal process could be interpreted, not so much as a battle between the prosecution and defence, but as a conflict between two competing value systems or models – those of crime control and due process – which require balancing (Packer 1964). The crime control model is based on societal interests, such as security and order, while the due process model is based on the primacy of individual rights in relation to the state. Packer assumes that the crime control model promotes more efficient work by the police and prosecutors. On the other hand, the due process model places more emphasis on the need for an "obstacle course" for police and prosecutors in carrying out their work, which is designed to protect defendants' rights and freedoms before a conviction is carried out (Packer 1964).

31 This will be elaborated further in Chapter 4.

Packer's models provide a useful way to reduce the complexity of the criminal process. The models allow us to simplify details and to highlight common themes and trends. They provide a guide for actors within the criminal process, regarding the actual and positive operation of the criminal justice system (King 1981). Although there are critiques of Packer's model on the basis of empirical findings from the field, criminal justice scholars use his framework as a structure for pointing out new ideas, and for establishing other criminal justice frameworks (Griffiths 1970; Feeley 1973; King 1981; Fionda 1995; Roach 1999; Macdonald 2008).

The first critique of Packer's model came from Griffiths. He argued that Packer presented two sides of the same model: the "battle" between the "police and prosecutor perspective, and the court perspective" (Griffiths 1970, 367). Thus, as an alternative to this battle framework, Griffiths proposed a "family model". Under the new paradigm, the state treats offenders like children: punishing them so that they learn a lesson, then aiding their reintegration into society. Another comment came from Malcolm Feeley. He argued that due process is a normative, idealised concept, generated by the court and masking the empirical reality that is much closer to crime control (Feeley 1973).

Suggestions for additional models followed. Michael King (1981) proposed six models, including Packer's due process and crime control models, and four others. The additional four models are: (1) the medical model, where the justice system should resemble a clinic, in which the successive objectives are diagnosis, prognosis, treatment and cure; (2) the bureaucratic model, where the justice system's objective is to process defendants according to a standardised procedure – quickly and cheaply; (3) the status passage model, which focuses more on stigma and labelling; and, (4) the power model, where the criminal justice system is considered a part of the state machinery, serving the political interest of the ruling class (King 1981, 13-28).

Kent Roach (1999) added victim perspectives, by introducing two new models: a punitive model of victims' rights, and a non-punitive one. The punitive model refers to a victim's participation in advancing the retributive and expressive importance of punishment, while the non-punitive model places more emphasis on the importance of crime prevention and restorative justice (Roach 1999).

Since public prosecutors have expanded their roles within the criminal justice system, Julia Fionda (1995) proposed three models for understanding their actual operation. She argued that Packer's models are inappropriate for explaining the expansion of the prosecutor's role into sentencing. She thus proposed three models: (1) the operational efficiency model, where prosecutors have a managerial role and exercise sentencing powers to control an increasing workload; (2) the credibility model, which seeks to restore the public's trust in the criminal justice system by intervening in the prosecution of low-level offenders early on in the criminal justice process; and (3) the restorative model, where prosecutors use sentencing powers to

advance mediatory, reparative, compensatory, rehabilitative, and reintegrative goals, to help restore the social balance which has been disrupted by the offence (Fionda 1995, 180-88).

Some Indonesian criminal law experts attempt to combine the above frameworks, and use them to explain how the Indonesian criminal justice system operates. For example, Sahetapy attempted to tailor Griffith's (1970a) model to Indonesia's situation by proposing the *Pengayoman* model, which (as he argued) is based on Indonesian values that position the state as father and offenders as his children. Hence, the objective of Indonesian criminal justice is to punish the offenders so that they can learn a lesson, and to help their reintegration into society (Setiadi and Kristian 2017, 101-2). Similar to Sahetapy, Muladi proposed using the balance of interests model to meet the objectives of the criminal justice system, not only to protect the interests of victims and perpetrators, but also to pay attention to the state and public interest (Muladi 1995). In this regard, he seems to emphasise state interests over a victim's interests, reflecting the Indonesian state ideology of integralism. However, in practice, integralism has been linked to authoritarianism (Bedner 2017, 160; Simanjuntak 1994, 252-53). Since leadership plays an important role in state ideology, the President still has the power to intervene in criminal justice policies and to align them with his/her political preferences (Atmasasmita 2010, 64-65).

By combining the afore-mentioned models, the present study attempts to understand public prosecutors' performance in post-authoritarian Indonesia. Public prosecutors' roles within criminal procedure also differ in the degree to which they promote certain models. Combining such models leads to the following continuum:

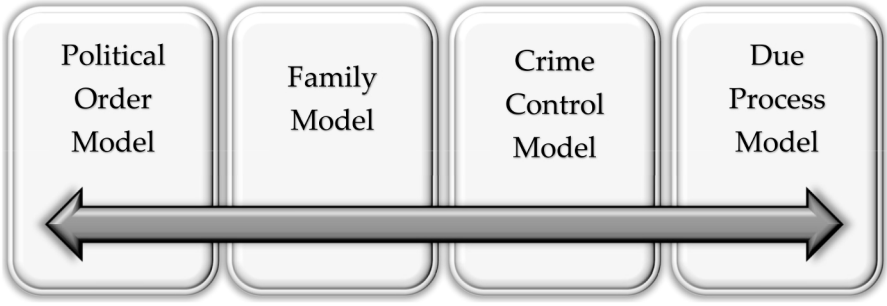

Figure 1: The four criminal process models

This continuum will be used in the present study, to identify how the character of the Indonesian public prosecutor has changed over time. The models form a basis for monitoring the operation of public prosecutors within criminal procedure, and are unlikely to exist either in isolation, or within one regime only. Therefore, the public prosecutor's role within criminal procedure moves, together with patterns and prosecutorial policies, along the continuum. The above models are the ideal type, and no

prosecution service in the world conforms fully to just one. The prosecution service's operation in criminal proceedings has always had different features, from various models. Here, features are adopted from Packer's models – the due process and crime control models. Both of these models are ideal foundations, which are promoted within Indonesian criminal procedure by both civil society and human rights researchers. While the family model features are adopted from Griffith, they are also popular among Indonesian criminal justice scholars, because the government promotes the integralist model, positioning the state as 'parents' within the justice system. The three models emerged from the rule of law principle, which prevents government officials from abusing their powers. Meanwhile, the political order model is adopted from King's model, which positions criminal procedure as part of the state machinery, serving the political interests of the ruling class. As I will discuss throughout this study, Indonesia has operated within all four models, at different points in time.

The operationalisation of the four models in this study includes identifying the function of the criminal justice system and its features. A historical overview and mapping of the Indonesian constitutional and legal framework (and its political contestation), are provided, in order to identify the public prosecutor's role within the criminal process. The table below details which features are associated with the four models.

Social Function	**Process Model**	**Features of the Criminal Justice System**
Justice	Due Process Model	a) Equality between parties b) Rules to protect defendants against error c) Restraint of arbitrary power d) Presumption of innocence
Punishment	Crime Control Model	a) Disregard of legal controls b) Implicit presumption of guilt c) High conviction rate d) Discretion of decision makers e) Supportive of police
Rehabilitation	Family Model	a) Discretion of decision makers b) Expertise of decision makers c) Minimising conflicts d) Restoring social balance
Maintenance of Political Power domination	Political Order Model	a) Dependent on political consideration b) Discretion as policy c) Reinforcement of regime's values d) Alienation and suppression of defendant e) Minimising of conflict f) Paradoxes and contradictions between rhetoric and performance

Table 1: The functions of criminal procedure and their features (adjusted from Packer 1964, King, 1981 and Griffith, 1970)

1.4 Research Methodology

1.4.1 Research Approach

After eight years of practicing law in Indonesia – as a professional lawyer, public defender, and criminal law lecturer – I have been seeking an answer to a number of perplexing questions about the system of which I have been a part. These questions essentially boiled down to just one: Is this the criminal justice system Indonesians want? This question eventually led to my interest in studying the Indonesian Prosecution Service as a central criminal justice actor, because it is often forgotten by Indonesian scholars. It was Lev's (1965) article, discussing the political contestation between prosecutors, judges, and the police during early Indonesian independence, which opened my mind to conducting socio-legal research on the IPS.[32] As I mentioned above, following Lev's (1965) seminal work, only a few Indonesian legal or political experts have carried out empirical studies on how the IPS actually works.[33]

The socio-legal research approach is considered to be non-legal research by some Indonesian legal scholars.[34] One possible explanation for this situation is the significant impact of academic censorship, imposed by the previous authoritarian regime. During the New Order era, most socio-legal research was conducted by foreign Indonesianists. It was not common for Indonesian legal scholars to conduct socio-legal research, since censorship limited their academic freedom. One exception was the prominent lawyer and former prosecutor, Adnan Buyung Nasution, who used the socio-legal approach in his PhD research on the 1950s Indonesian constitution. Since his thesis promoted the amendment of the constitution, Commander in Chief of the Restoration of Security and Order (KOPKAMTIB), General Susilo Sudarman, sent radiograms to all universities in Indonesia, in order to prohibit the circulation of Nasution's book (Nasution 2010, 80).

Socio-legal research should, according to Galligan, start with the features of law which are "relevant to the actions of citizens and officials and examine meanings attributed to such features by citizens and officials, and the actions that follow" (Galligan 2007, 36). This research starts with an analysis of the law, followed by an examination of its impact and its use by those working within the criminal justice system (Ashworth 2011, 336).

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32 I wish to thank the Indonesian Directorate General of Higher Education, the Ministry of Education and Culture, and Leiden University, all of which provided me with financial support for my doctoral study via the DIKTI-Leiden PhD scholarship.

33 Kristiana (2011) uses the socio-legal approach to examine how the IPS handles corruption cases, while Lolo (2008) examines corruption practices in the IPS during the New Order era. Clark (2013) examines how district prosecutors have handled corruption cases, from a political economy perspective.

34 For further discussion, see Bedner (2015).

The socio-legal approach in this thesis employs doctrinal research to understand the normative system of the IPS. The approach is employed not only by analysing relevant laws, such as IPS law, criminal law, and criminal procedure law, but also by analysing any relevant court cases. In this sense, I examine legal rules and decisions and clarify ambiguities within the rules, then structure them in a logical and coherent manner, and describe their inter-relationships. In this study I try to examine the inter-relationship between the law and the governmental institutions that are its main producers and users.

Most of the previous legal researches on the IPS, which had been carried out by students (undergraduate to doctoral level) tend to emphasise the statute, legal comparative and philosophical approaches. Only a few of the students have considered studying case law. During the authoritarian military regime, it was difficult to access court decisions, since the Supreme Court did not publish (and limited researchers' access to) them (Pompe, 2005). Although in recent years the Supreme Court has released almost all of its decisions online,[35] not many legal researchers have seriously observed Supreme Court decisions in their doctrinal research (Kouwagam 2020, 60).

As I mentioned above, socio-legal research applies various methods and techniques to the collection of data. I conducted empirical research, in order to have a broader understanding of what the IPS does in practice. I obtained most of my information and data through interviews and the collection of documents. Initially, my research focused on the prosecutor's work within the general crime division. However, when I did fieldwork in certain prosecution offices, it turned out that I also needed to pay more attention to other divisions, since they have inter-connected tasks and powers within the prosecution process. Thus, I extended my research to include the special crimes and intelligence divisions. In addition, I paid attention to the advancement division, which is responsible for human resource management, budgeting, and bureaucracy reform within the IPS. Although I did not conduct field research within the civil law and administrative law dispute divisions, I gained information about these divisions from top level prosecutors with experience working within them.[36]

During my fieldwork (from 2014 to 2016) I interviewed 50 IPS staff, including operators, managers, and executives[37], in seven district prosecution offices, two provincial high prosecution offices, and the Supreme Prosecution Office in Jakarta. I also interviewed ten criminal lawyers, five

35 For this research, I collected some court decisions via the website of the Supreme Court, https:/putusan3.mahkamahagung.go.id/, while other decisions not accessible on this website were collected from NGOs, such as the Institute for Criminal Justice Reform and Indonesian Legal Aid institutions.

36 See Chapter 3. For certain divisions, the IPS offers no specific career path. All prosecutors should be ready to be placed in any division, even if they have not followed any special training in the functions and tasks of each division.

37 I borrow the labels for these roles from James Q. Wilson's (1989) study of bureaucracy. The Indonesian Prosecution Service uses the terms *Jaksa Fungsional* for operators, *Jaksa Struktural* for managers, and *Pimpinan Kejaksaan* for executives.

police officers, three Supreme Court judges, two District Court judges, and ten NGO activists who were involved in Indonesian criminal justice issues. The interviews were conducted in a semi-structured way, on the basis of a list of questions I drafted in Leiden at the beginning of the research period. However, I continuously adapted the list on the basis of new insights from my field research. Since this thesis focusses on the IPS, I did not conduct extensive research on other criminal justice actors, such as advocates, the police, and judges; instead, I interviewed the heads of criminal investigation units in district police forces, as well as judges and advocates working in the same areas. In triangulating my findings, I always verified pieces of information by cross-checking informants' statements with those of other informants, as well as with other available documentation, such as newspapers, websites, and project documents – if available; this was to ensure that such information was reliable and accurate. In addition, I followed the prosecutors' debates on their Facebook group. When I found exciting information in a discussion, I contacted them by telephone or email to inquire further. Since I promised interviewees anonymity, I use a coding system that identifies subjects by category only. Each code represents one sub-category, indicating a prosecutor's performance within the criminal procedure.

In addition to above methods, I undertook participant and non-participant observations of the ways in which IPS public prosecutors interpret the law, how they act, and how they understand their day-to-day activities. This approach is similar to Pompe's (2005) ethnography-based research on the Indonesian Supreme Court, and Bedner's (2001) research on Indonesian administrative courts. In this manner I attempt to describe and analyse prosecutors' professional and legal culture, in practice. As an observer, I participated in public debates, meetings, and informal discussions between IPS leadership and its operators at national, regional and district levels. I observed public prosecutors' activities, whenever this was possible. The activities included not only those open to the general public, but also in-house activities, including some internal meetings and discussions. I also stayed in a boarding house for prosecutors and in IPS leaders' official residences, which allowed me to have many informal conversations, and to learn more about the lives of prosecutors, stories from old times, and current gossip, about which I afterwards made notes. The prosecutors knew that I was there to collect information and would not disclose their personal identities, in case it damaged their careers.

Ethnographic methods are considered useful to scholars who are employing a historical framework or examining legal changes. As both Sally Engle Merry and Lawrence Friedman describe in their chapters, ethnographic methods can be used to build a contemporary context for understanding legal history (Merry 2002; Friedman 2002). I looked at the developments in prosecution service legal doctrine in Indonesia, constituting a development within a "judicial tradition". As legal heritage, legal doctrine is transferred between generations within a judicial institution or system, where each generation consciously builds on the transferred heritage of its

predecessors, the authoritativeness of which is based on certain origins and historical backgrounds (Huis 2015, 10).

An impressive collection on Indonesian history at Leiden University library helped me to unravel the history of the IPS. I compared the materials I found there with the IPS' official history, which was published during the New Order military regime, in order to gain a more comprehensive story. However, since my Dutch is limited, I relied heavily on secondary sources which discuss Indonesian criminal justice, such as Lev (1965, 2000, 2007, 2009), Pompe (2005), Bedner (2001), Yahya (2004) and Ravensbergen (2018). In addition, when I found relevant information in Dutch that had rarely been discussed, I sought assistance from colleagues and my supervisor in translating the materials.

Since this study discusses the IPS as a part of the criminal justice system, its focus is on looking at the prosecution service as a legal institution. This study will also include significant bodies of law, and the prosecutors' practice in performing decision making roles within what is often referred to as 'the criminal justice system' (Ashworth 2011, 335). Thus, this study is a mixture of criminal justice, and criminological and socio-legal perspectives and techniques. It starts with an analysis of criminal procedure, then examines the impact of the law and its use by those working within the criminal justice system. Using this perspective, the study concerns actors who play certain roles within institutions. It is not simply a matter of exposing and commenting on the issue of the gap between law in the books and law in action; the study also includes a more philosophical assessment, and an examination of the justifications for particular rules and practices (Ashworth, 2011, 341).

1.4.2 Gaining Access

Gaining access is crucial to the success of empirical research. As Glesne and Peshkin state, access involves getting consent "to go where you want, observe what you want, talk to whomever you want, obtain and read whatever documents you require, and do all this for whatever period of time you need to satisfy your research purposes" (Glesne and Peshkin 1992, 33). Although I have experience in working as a criminal law advocate, legal aid activist, and law lecturer, and am familiar with certain issues within the IPS, gaining access to conduct socio-legal research in the IPS is nevertheless challenging.

Since the New Order regime the IPS has been co-opted into a military-style bureaucracy; it is well known as a closed institution that will not easily give access or provide information to outsiders, especially researchers.[38]

38 This is evidenced by the fact that only a small amount of empirical research on the bureaucracy and prosecution culture has been carried out by those who are not working for the IPS. Some empirical research has been done by externally funded institutions, involving researchers from the IPS (e.g. Tim Peneliti Komisi Kejaksaan 2013b; 2013a; Komisi Hukum Nasional 2005c; 2005b; 2005a).

Further, conducting empirical research on the IPS is risky, as demonstrated by what happened to two prosecutors researching the IPS for their PhDs: Andi Lolo (2008) and Yudi Kristiana (2007). It is suspected that they were demoted from their positions, because of their empirical work on the IPS. Lolo eventually resigned from the IPS and went to work as a lecturer in the University of Indonesia, while Kristiana was transferred to a prosecution office in a remote area.[39] Moreover, although the dictatorial regime fell in 1998, the Indonesian government retains several regulations which censor any criticism of state institutions (Wiratraman 2014). Since the IPS maintains the bureaucratic and military culture of the authoritarian regime, a study of the current IPS can categorised under the authoritarian field. Therefore, doing this research involved a certain amount of risk (Glasius et al. 2017). I have considered the risks of undertaking this research, and I must be cautious about publishing my findings in Indonesia.[40]

Obtaining research consent from the IPS was also one of the challenges I had to overcome during my fieldwork. When I started my fieldwork, in 2014, I relied heavily on official letters, from Leiden Law School and Brawijaya Law School, explaining my status as a PhD student and state university lecturer. I hoped the letters would help IPS top management to give me access to the information I needed. However, it turned out that the letters were not sufficient to ensure the IPS would open its gates. When I started my research in a District Prosecution Office near my home town, I could only get access to interview a junior prosecutor, who unfortunately was unable to answer my questions.

Consequently, I decided to move my fieldwork to the Supreme Prosecution Office in Jakarta. Since I did not have a contact in that office, I asked an NGO friend who was involved in IPS reform to help me gain access. In addition to this, I used the Brawijaya Law School alumni network to find prosecutors who had graduated from Universitas Brawijaya. Finally, I obtained access through the Brawijaya alumni network and NGOs, enabling me to meet many influential top-level IPS managers, who helped me open the IPS gates – not only in the Supreme Prosecution Office, but also in the high provincial and district prosecution offices. It turned out that this informal approach was more effective than the formal method of using official letters (a lengthier procedure, and therefore more time-consuming). Moreover, when I used the formal approach the information I obtained was very limited and normative. Interviewees were reluctant to explain what they did based on the criminal procedure; they wanted to discuss

39 Lolo's dissertation on prosecutorial corruption during the New Order Era, published by the University of Auckland, New Zealand, was not openly accessible. I was fortunate to obtain one copy as part of the literature for my research.

40 During my fieldwork, one of my friends (a lecturer in Jakarta), concerned about the issues of security and intelligence, checked my mobile and said that I was being tapped. A discussion on the risk of researching criminology in sensitive areas can be read in Goldsmith (2003).

legal doctrines only. However, when I used the informal approach and got a verbal recommendation from high-ranking IPS managers, I could easily access documents, interview prosecutors, and make observations within the IPS. Since gaining access to the IPS is very time-consuming, my fieldwork plan was extended from six months to one-and-a-half years. From 2014 to 2016 I researched seven district prosecution offices, two provincial high prosecution offices, and the Supreme Prosecution Office in Jakarta. I also lived in a boarding house with prosecutors for three months in Jakarta, and sometimes I stayed at their 'official' and private residences during my fieldwork. Moreover, I could observe and easily communicate with prosecutors during my stay. I asked them about their personal lives, as well as asking for their opinions about their professional duties as prosecutors.

1.4.3 Ethical Dilemmas and Safety Issues

Conducting socio-legal research on the post-authoritarian Indonesian Prosecution Service is tricky, because its military culture prevents outsiders from accessing documents, limiting access to information. Therefore, I needed some time to gain the trust of top-level IPS management and to obtain access. In order to respect their trust, I did not record conversations regarding sensitive information; instead, I wrote such information down in field notes, after meetings.[41] I asked for their permission to quote their statements, and assured them that I would not mention specific details, such as their names, location, or even the date of the conversation, because this might endanger their careers. Furthermore, in this study I sometimes use real names and I sometimes use pseudonyms. If I considered a particular case study to be sensitive, I decided to protect the anonymity of my informant. I also changed the names of institutions and people, in order to avoid certain risks and to meet ethical standards for research (Saunders, Kitzinger, and Kitzinger 2015).

As an Indonesian conducting research on IPS performance, I of course have a dream that someday the IPS can successfully reform itself, and be able to guarantee due process and promote the rule of law within the criminal justice system. For this reason, I prefer to use a relational perspective concerning my relationship with the IPS and its prosecutors, which is not limited to my field research but can remain in place in order to build their trust (Cunliffe and Alcadipani 2016, 544).[42] Since, when I return to Indonesia, I will need to present my research findings to top-level IPS

41 This method of recording data is similar to Bedner's (2001) and Berendschot's (2011) ethnography work on collecting sensitive data.

42 I did not use an instrumental perspective in my research, which would have created a short-term relationship with the IPS as merely the research object, based on the duration of the field research. Neither did I use a transactional perspective, which would have created a relationship with the research object that is based on reciprocity (Cunliffe and Alcadipani 2016, 542–43).

managers and assist them in reforming the IPS bureaucracy, this approach may minimise any risk for, and reluctance on the part of, the IPS leadership. In order to build a long-lasting relationship with the IPS, (in 2015) I established a centre for criminal justice research (*Pusat Pengembangan Riset Sistem Peradilan Pidana*/PERSADA) at the Universitas Brawijaya.[43] The research centre is designed to promote multi-disciplinary research on criminal justice issues. One of PERSADA's agenda items is to strengthen the position of the IPS within the criminal justice system, since the current criminal procedure gives limited power to prosecutors in the pre-trial phase.[44]

In addition, I have not simply criticised IPS policies, I have also assisted them in several cases. In doing so, I was able to gain more information on the IPS' performance. Once, the IPS top managers asked me to assist them in providing expert testimony in a Constitutional Court hearing regarding the constitutionality of prosecutorial discretion (*seponering*) for the Chief Prosecutor.[45] By representing the IPS in this case, I could access not only oral information from top-level IPS managers, but also obtain documents which had not been disclosed by the IPS.

I was also involved as an expert witness in the pre-trial hearing of KPK senior criminal investigator, Novel Baswedan, who was arrested for a crime that was allegedly based on the fabrication of evidence. Similar to Samad and Widjojanto, Baswedan was arrested by the police after revealing a corruption case involving a police general. Almost all the Indonesian criminal law lecturers refused to assist Baswedan, because they were worried that they could be affected by this contestation. I held a conference on (and legal examination of) the case, in order to support Samad and Widjojanto. In doing so, I also could gain relevant information for my research. I also assisted legal aid activists in giving a legal opinion (in- and outside trial) on prosecutors' performance in some controversial cases, such as a blasphemy case in Sampang, Madura, a child sex abuse case in the Jakarta International School, and a persecution case in Banyuwangi. By being involved in such cases, I could obtain files and details which the IPS has not formally disclosed.

I never imagined that the trust of the top-level IPS managers would have an impact on one of my respondent's careers. When interviewing a top-level manager who had the power to promote and transfer staff within the IPS, I mentioned the name of my respondent as an example of a good

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43 The official website of PERSADA UB (*Pusat Pengembangan Riset Sistem Peradilan Pidana Universitas Brawijaya*/Centre for Criminal Justice Research) is: http://persada.ub.ac.id/.

44 Persada UB, *Persada UB ingin perbaiki manajemen barang bukti di Kejaksaan.* (PERSADA UB wants to participate in reforming IPS evidence management) http://persada.ub.ac.id/persada-ub-ingin-perbaiki-manajemen-barang-bukti-di-kejaksaan/, accessed 18 December 2019.

45 In this case, the police asked the Constitutional Court to review and revoke prosecutorial discretion, because the Chief Prosecutor had dismissed the controversial case of two KPK commissioners: Abraham Samad and Bambang Widjojanto.

prosecutor who had been placed in the wrong position. Later on, I found out that he got a promotion to a better position within the IPS.

The fieldwork verified my assumption that, even though the IPS has a bad image for its corruption and abuses of power, not all prosecutors are corrupt. I met a number of good prosecutors, who did in fact make some changes in order to reform their organisation. As I will discuss in this thesis, structural constraints, such as the IPS' militaristic bureaucracy and its informal rules, limit individual decision making. This situation makes it very difficult for even good prosecutors to act in a different manner.

1.5. The Structure of the Thesis

The title of this thesis is "Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the case of Indonesia". I am aiming to investigate the functions of the IPS as a government agency whose tasks and powers are to maintain security and order. The thesis focusses on the legal, historical and political aspects of the prosecution process in Indonesia's criminal justice system, across different political regimes. To begin with I explain the reasons for conducting this study, the research objectives, the theoretical frameworks, and the research method.

In order to understand why the Prosecution Service is oriented more towards maintaining political order than promoting the rule of law and the tensions between legal norms and practices, the thesis is divided into two parts.

The first part provides some context for the IPS, describing the origins of the Prosecution Service and the impact of its transformation into the Prosecution Service bureaucracy – this is presented in two chapters. Chapter 2 looks into the Prosecution Service's legal history, including the Dutch and Japanese colonial eras. It also explains how the Prosecution Service transformed after Indonesian Independence. I will also discuss the position of and legal framework for public prosecutors, before and after the authoritarian regimes from 1959 to 1998. Ultimately, the chapter reflects on how the position of the Prosecution Service within the criminal justice system has been used by various regimes to retain their political power. Chapter 3 explores the cultural context of prosecution, and its organisational setting. Since prosecutors make decisions within the ambit of a special kind of organisation, one must view their choices within the context of that organisation. I will describe the key features of the prosecutors' organisation: its national and militaristic structure, and the vague division of labour between frontline operators, mid-level managers, and top-level executive authorities. Together with the other contextual factors discussed, these organisational attributes shape the Indonesian Prosecution Service's approach to justice.

The second part, concerning the Indonesian Prosecution Service's approach to justice, investigates how the values of the Prosecution Service are performed practically, by the prosecutors. This part is also presented

in two chapters. Chapter 4 explores the Prosecution Service's tasks and powers, not only in criminal cases, but also when acting as state intelligence to guard public order, and as state attorney in civil law and administrative disputes. It argues that these tasks and powers have been designed to serve the regimes' interests, retaining their power. The chapter also looks into public prosecutors' relationships with the police, judges, lawyers, and other criminal justice actors. Since prosecutors lost their control over the pre-trial stage, they have been developing strategies to influence other actors, keeping them in line with the mission of the Prosecution Service. Chapter 5 demonstrates how the Prosecution Service's culture and the weakened position of prosecutors within the criminal justice system, have both affected the prosecution process. It attempts to explain how public prosecutors apply criminal procedure, from the pre-trial phase to the trial phase. I will show that a prosecutor's position is similar to that of a 'postman' within the criminal justice system; hence, they will defend their investigation files at trial and insist on sentencing defendants, even if it requires them to breach procedural rules.

Finally, Chapter 6 brings the most significant findings of this research together. I will situate my conclusions within the context of current research on the rule of law and criminal justice in post-authoritarian countries, by comparing the case of the Indonesian Prosecution Service to similar cases in other countries. I will end the chapter by discussing the limitations of this research and by suggesting topics for further research.