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

Afandi, F.

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Author: Afandi, F.
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2 The Origins and Position of the Indonesian Prosecution Service: From Colonial Times to Post-military Regimes

2.1 Introduction

Understanding the current condition of the Indonesian Prosecution Service (the IPS, or *Kejaksaan Republik Indonesia*)[1] requires an inquiry into how the Prosecution Service's history has been commodified to fit the political interests of different regimes. As Lev (1985) believes, it is important to track legal history from the colonial period onwards, in order to understand significant features that were sewn into the fabric of the colonial state and have yet to unravel. By tracking the Prosecution Service's legal history through the records (literally) of the structure of the state, this chapter reflects on how the position of the service within the criminal justice system has been used by various regimes, in order to retain their power.

During the Dutch colonial period, using the criminal justice system to exert control over the natives of Indonesia was of primary concern for the government. The vague criminal procedures put in place did not sufficiently protect human rights, and they were designed – in conjunction with the weak position of the native prosecutor (or, *Jaksa*) – to ensure that the colonial administration retained its power (Bloembergen, 2011a; Cribb, 2010; Idema, 1938; and Ravensbergen, 2018). Although the criminal procedure, *Herziene Inlandsch Reglement* (HIR), enacted in 1941, was intended to improve the protection and rights of native people, the Japanese military colonisation of Indonesia from 1942 to 1945 halted this effort. During early independence the new Indonesian government tried to build the so-called Indonesian rule of law, guaranteeing better protection of its citizens, and even though chaotic political contestation and civil war both occurred during the 1950s, criminal justice actors (including the prosecutor) operated quite well during that time, in terms of judicial independence and the rule of law (Feith 2007, 320). However, political contestation between civilians and the military contributed to the repositioning of criminal justice actors. The rise of the Guided Democracy and New Order military authoritarian regimes repositioned such actors as the regime's instruments for retaining political power.

1 In this chapter, I use the terms 'Prosecution Service' and '*Kejaksaan*' interchangeably, when referring to the Indonesian Prosecution Service.

This chapter addresses the development of the Prosecution Service and its role in the criminal justice system from a historical perspective, from colonial times to the present day. It begins by highlighting the origins of the *Jaksa*[2], who was positioned as a member of the judiciary in all the Javanese Kingdoms. The position of *Jaksa* was later adjusted by the Dutch and Japanese colonial administrations, and it was completely transformed after Indonesian independence. In the following analysis I will try to explain these transformations, by including descriptions of the relationship between the legislation or policies and their political context.

2.2 Searching for the Origins of the Prosecution Service

The official history of the Prosecution Service connects its origin to similar institutions in Majapahit, the most significant of the Javanese Hindu kingdoms, which existed from the 13th century until the 15th century. This idea is commonly used, not only by the Prosecution Service itself, but also by other state institutions. Ali argues that the development of this historiography was influenced by the spirit of nationalist leaders in the revolutionary period, in order to transform the Neerlando-centric historical writing from the Dutch point of view into Indo-centric writing adopting an Indonesian perspective (Ali 2005, 35, 152-55). M. Yamin is an influential figure who promoted the Indo-centric approach in Indonesian historiography. He argues that the origin of the Indonesian unitary concept is not the Dutch East Indies, but instead it originates from two great pre-colonial empires: Sriwijaya in Sumatra, and Majapahit in Java. In his book, Yamin portrays Majapahit territory as being more or less as broad as the Dutch East Indies territory.[3] In 1948, Yamin published his book on Gadjah Mada – a Majapahit era prime minister who managed to unite the various regions of the *Nusantara*[4] – and called him a national hero who initiated the idea of a unitary state before the colonial period (Yamin 1948). This book was written to affirm that the concept of the unitary state of Indonesia had existed in pre-colonial times.

The figure of Gadjah Mada later became a vital symbol for Indonesia's state agencies.[5] The police, army and Prosecution Service all claimed that the figure of Gadjah Mada was their hero and represented their organisa-

2 The terms '*Jaksa*' and 'native public prosecutor' are used interchangeably in this chapter.

3 The Indonesian government still promotes Yamin's portrayal of the Majapahit territory, which is exactly the same today as it was then - stretching from Aceh to Papua. See: detikTravelCommunity, *Sepenggal Kisah Gerbong Maut di Museum Brawijaya Malang* http://travel.detik.com/read/2016/07/14/142000/3251578/1025/4/sepenggal-kisah-gerbong-maut-di-museum-brawijaya-malang, accessed 4 April 2016.

4 Nusantara is a name for the Indonesian archipelago, originating in Javanese.

5 The first state university in Indonesia was named after Gadjah Mada, to commemorate his role as the nation's first unifier. See Wikipedia, Gadjah Mada University: https://en.wikipedia.org/wiki/Gadjah_Mada_University, accessed 4 April 2016.

tions. The Indonesian police, for instance, erected a Gadjah Mada statue in front of their headquarters, as a long-term symbol.[6] They also use *Bhayangkara*, believed to be the name of Gajah Mada's special troops, as the Indonesian word for 'police'. Moreover, the police claim that their organisational philosophy, *Catur Prasetya*, was coined by Gadjah Mada[7] (Awaloeddin Djamin et al. 2006, 304). On the other hand, although the Prosecution Service did not build its own statue of Gajah Mada, it does believe that Gajah Mada is an important symbol for their office. As written in the official prosecution service history, which also refers to Yamin's book, Gadjah Mada was the *Adhyaksa*, who supervised the elite forces (*Bhayangkara*) with his officers (*Dhyaksa*).[8] In 1978, the Chief Prosecutor, Major General Ali Said, created the doctrine *Satya Adhi Wicaksana*; translated from Javanese Madjapahit Sanskrit, *Satya* means 'loyalty', *Adhi* implies 'professionalism', and *Wicaksana* means 'able to use power wisely'.[9] The doctrine was created to strengthen the ésprit de corps, uniting the *jaksas*' minds and their loyalty to the government.

However, historians and Indonesian legal scholars agree that the root of the term *Jaksa* is the term *Adhyaksa*[10], who indeed have an essential position in the judicial structure of the Majapahit empire (Mertokusumo, 1970; Ravensbergen, 2018; Soepomo, 1953; and Tresna, 1957). According to Boechari, only talented people could be appointed as the *Dhyaksa*, which translates as 'superintendent' or 'chairperson'. The candidate had to be highly literate, and have an ability to analyse and interpret the Majapahit legal sources related to a case ("Simposium Sejarah Hukum", 1976, p. 80). The Majapahit Kingdom classified its courts based on the severity of the punishments they might deliver, and on whether any of their cases might affect the interests of the crown. The *Padu* Court was for trivial cases, in which the *Adhyaksa* acted as judge, and the *Pradata* Court was for serious

6 It seems that there is struggle for this claim, especially between the police and the Prosecution Service. As stated by one Deputy Chief Prosecutor: "Gajah Mada was an *Adhyaksa*; he was not a *Bhayangkara*. But, since we (the Prosecution Service) had not taken account of this, the police quickly created his statue, and now the Gadjah Mada statue stands in front of their headquarters". Interview with BW in 2015.

7 The four pledges of the police (*Catur Prasetya*) are: *Satya Haprabu*: To be faithful to the country and its leaders; *Hanyaken Musuh*: To get rid of the enemy; *Gineung Pratidina*: To defend the state; and *Tan Satrisna*: Faithfulness to obligations.

8 The police, however, referred to Gadjah Mada as *Bekel,* the head of the *Bhayangkara* special troops who guard and enforce the law (Awaloeddin Djamin et al. 2006).

9 Chief Prosecutor Decision 074/J.A./7/1978 jo. Chief Prosecutor Decision 052/J.A./8/1979 and Chief Prosecutor Decision 030/J.A./1988. The military police also implement a similar doctrine: *Satya Wira Wicaksana*. They also use Gajah Mada's face as their logo. See, for instance, Pom Kodam Mulawarman, Arti dan Lambang: http://pom.kodam-mulawarman.mil.id/profil-pomdam-mulawarman/arti-dan-lambang, accessed 4 April 2016.

10 According to a Chief Prosecutor Decision KEP-017/5/66, 25 May 1966 jo. KEP-008/D.A/2/1968 8 February 1968, the title *Adhyaksa* was only given to the high-ranking *Jaksas*. See the Chief Prosecutor Regulation Perja 002/A/JA/04/2018, which regulates that only Chief Prosecutor badges should feature the title *Adhyaksa*.

crimes regulated by Hindu law[11] (Tresna, 1957, 16). The *Adhyaksa* had the authority to prosecute criminal cases in the *Pradata* court, while also acting as judge in the *Padu* court.

After the fall of the Majapahit Kingdom, the terms *Adhyaksa* and *Dhyaksa* evolved into *Jeksa/Jaksa*, and their positions continued as part of the judiciary (Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan RI 1985, 11). Meanwhile, *Jaksa* was the official name for the prosecutor in the *Pradata* court *and* the judge in the *Padu* court, both courts serving to adjudicate criminal cases and resolve private disputes[12] (Tresna 1957, 17). *Jaksa* was still being used as a name for court officials when Islam began to influence the Javanese kingdoms. The position of the *Jaksa* as a judge in the *Padu* court was retained in the Islamic Mataram Kingdom (1613-1645). The *Pradata* court was changed into the *Surambi* court,[13] but the *Jaksa* retained the role of court official, and continued to prepare cases to be adjudicated before the king (Tresna 1957, 18-20). This gradual change in the role of the *Jaksa* took place when the *Vereenigde Oostindische Compagnie* (VOC) took control of Batavia and the Javanese kingdoms in the 17th century.

2.3 The *Vereenigde Oostindische Compagnie* (VOC) and the Dutch East Indies

As the *VOC* occupied several kingdoms in Java, the Javanese criminal justice system was influenced by the European system. The VOC established and operated the *Raad Van Justitie binnen het Casteel Batavia*,[14] (the Batavian court).[15] The *Advocaat Fiscaal van Indie* occupied the position of public prosecutor for the court. However, the VOC kept the Javanese court as the indigenous judiciary, since most citizens lived in remote areas (Tresna 1957, 28; Balk, Dijk, and Kortlang 2007, 65).

The VOC, for instance, kept the *Karta* Court in the Sultanate of Cirebon. The court followed the procedure stated in the *Pepakem Cirebon*[16]. The formulation of the procedure was inspired and influenced by the Javanese criminal justice system and by Islamic law. The court was led by the *Jaksa*

11 The Pradata court jurisdiction covered cases endangering the security of the king and his realm, such as social unrest, murder, violence, robbery and theft, that were difficult to investigate.

12 This division is different from the European criminal justice system, which divides courts based on the nature of their cases: private, or public.

13 The *Penghulu*, assisted by Islamic Law scholars, advised the Sultan when to decide a case.

14 Aside from this, the VOC created the *Drossaard*, which had the authority to adjudicate disputes between landlords in Batavia. The VOC installed the *Schouten*, which had the authority to investigate and prosecute criminal cases in the *Drossard*.

15 Batavia was the capital city of the Dutch East Indies.

16 In 1758, President P.V Hasselaar enacted the *Pepakem Cirebon* as the codification of Javanese Law (Tresna 1957, 32).

Papitu, who referred to seven court officials.[17] The seven *Jaksas* would examine the less severe criminal cases and decide whether or not a defendant was guilty.[18] The sultan and the president judged and gave verdicts on serious crimes (Tresna 1957, 31-34).

In 1747, the VOC established the *Landraad* in Semarang as the court for natives, consisting of seven regents led by a European President, and substituting the *Pradata* court. Since the regent had the authority to resolve trivial cases, the VOC abolished the *Padu* court. The *Jaksa*, however, could adjudicate minor cases on behalf of the regent (Tresna 1957, 36-37). The *jaksas*' expertise in the Javanese legal system made their position indispensable. In the *Landraad*, the function of the *Jaksa* was advisor, similar to the *Penghulu*.[19] The Jaksa would advise the *Landraad* member before deciding a case. The chief *Jaksa* (*Hoofd Jaksa*, or Javanese Fiscaal) served both as a public prosecutor in the trial process, and as a supervisor for police investigations in each district (Ravensbergen 2018, 57).

In 1798, the VOC was officially declared bankrupt, and its possessions became colonies of the Dutch State. In 1808, the King of the Netherlands, Louis Bonaparte, appointed Herman Willem Daendels as the Governor General of the Dutch East Indies. Part of Daendels' agenda was to reform the judiciary. He created the *Landgerecht* (the circuit court), to mediate disputes between natives. The police chiefs (*Schouten*) were in charge of investigating and prosecuting crimes in this court. Daendels also established four large *Landraaden*, as well as smaller law courts in all of the Northeast Coast of Java residencies (Ravensbergen 2018, 63-64).

The Dutch colonial administration was enabled, not only by diverse sources of law – such as Adat Customary Law, Islamic Law and European Law – but also by various judicial systems (municipal, kingdom, and regent) which competed and overlapped with each other. The Dutch maintained a pluralist legal approach in the colony.[20] During that time there were native courts[21] – Islamic courts in Java and the outer islands, and customary courts found mainly in the outer islands[22] (Lev 2000, 16).

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17 The Jaksa's office was called *Kejaksan*, and it was located under the Banyan Tree in the Lunar Square in Cirebon.

18 If they could not agree on a verdict, the sultan and VOC resident would pronounce judgement.

19 The *Penghulu* is traditionally the highest authority in Islamic bureaucracy at the Javanese district level. In the Dutch East Indies, the *Penghulu* also acted as judge in the Islamic courts, and as advisor on Islamic matters in the general courts. In modern Indonesia, the *Penghulu* is the district-level head of Islamic bureaucracy (Huis 2015, xxi).

20 Article 67 RR states that the native population should be administrated and governed by their native leaders, under certain conditions.

21 The Indigenous court was ruled and managed by indigenous officials, adjudicating trivial cases (Pompe 2005, 30).

22 In East Nusa Tenggara and Bali, for instance, *Jaksas* played a more significant role than judges. People preferred to contact a *Jaksa* to ask for advice (Yahya 2004, 26).

In 1811-1816, when Britain acquired the Netherlands East Indies from the VOC, Governor-General Thomas Stamford Raffles changed Daendels' policies. He introduced a uniform judicial system of identical circuit courts and *Landraaden*. Raffles also replaced large *Landraaden* with new circuit courts, led by lawyers trained to deal with criminal cases with the possibility of a death sentence. Raffles introduced the jury system and private prosecutor (*Aanklager*)[23] into the trial process. Unlike the previous period, the resident was made the sole judge, while the other *Landraad* members (including the *Penghulu* and *Jaksa*) were asked to act as advisors. The *Jaksa* could only act as a public prosecutor if no private prosecutor attended the trial (Ravensbergen 2018, 67).

When the Dutch regained control of the Netherlands East Indies, the Dutch colonial government changed Raffles' policies. The Provisional Regulations 1819, *Reglement op de administratie der Politie en de Criminele en Civiele rechtsvordering onder den inlander in Nederlandsch Indie*, repealed the jury system and limited the private prosecutor to the litigation of trivial matters only (Ravensbergen 2018, 70-71). In addition, the *Jaksa* was transformed from an advisor on local traditions into a representative of colonial interests. Moreover, this transformation strengthened the *Jaksa*'s position as public prosecutor in the *Landraad* (Ravensbergen 2018, 131-32).

In order to maintain public order amongst the natives, the colonial administration could intervene judicially and punish natives without any legal grounds for doing so. The Governor-General and the resident controlled both judicial administration and police tasks. A resident even determined whether or not a criminal case would be prosecuted in a higher court. A resident could punish the natives with corporal punishment, regardless of the type of violation, based on the *rottingslagen* arrangement[24] (Wignjosoebroto 2014, 18-19).

The constitutional reform movement and political shift in the Netherlands forced the Dutch parliament and the King to create the new constitution, or *Grondwet*, in 1848. The constitution changed the governmental system from a monarchy into a parliamentary system. Based on the constitution, the King must obtain parliamentary approval in order to make laws for the colonies. Furthermore, in 1854 the colonial government promulgated the first constitution in the Netherlands East Indies: *The Reglement op bet beleid van de Regering in Nederlandsch-Indie or called as Regeringsreglement*

23 The private prosecutor concept can be found within the common law system; it is used to prosecute cases affecting an individual victim. One of the private prosecutor's tasks is to conduct proceedings in defamation cases. The origin of this role is found in common law, which has long considered defamatory libel to be 2a tort of a quasi-criminal character, affecting an individual rather than the community" (Kaufman 1960, 108).

24 In 1844, the colonial government limited the number of blows that could be struck in a single corporal punishment to forty. In 1848, this limit was reduced to twenty, and the beating of women was banned. In August 1862 the punishment was finally banned altogether, but in that year official records noted that a total of 474,375 rattan blows had been carried out in the colony, most of them in Java. (Cribb 2010, 59)

(RR). Efforts to establish an independent judiciary in the colony followed. The colonial government replaced the position of Resident with that of Jurist, as president of the *Landraad*. Although the jurists were impeachable by the government, the police magistracy remained in the hands of the resident (Ravensbergen 2018, 260).

The colonial constitution segregated the citizens of the colony into three classes: Europeans, Indonesian natives, and foreign orientals.[25] This policy also applied in the judiciary administration, as stipulated in the Law on Judicial Organisation 1847, or the *Reglement op De Rechterlijke Organisatie* en *Het Beleid der Justitie (RO)*. In the criminal court, citizens were distinguished by racial status.[26] Europeans were brought before the *Raad van Justitie*, with the possibility of appeal to the Netherlands East Indies Supreme Court in Batavia, while Indonesians were brought before the *Landraad* (with the possibility of appeal to the *Raad van Justitie*).

In 1849, the Dutch established a dual system of criminal procedure. One part, which closely resembled the Dutch Code of Criminal Procedure and applied to Europeans, was regulated by the *Reglement op de Strafvordering* (SV)[27]. This code was the stricter of the two, and it offered better protection to defendants. Moreover, the government recruited professional officers to enforce it. The other code, which was much looser and more flexible, was the *Inlandsch Reglement* (IR)[28], covering criminal procedure for Indonesians (Pompe 2005, 28). The latter gave far less protection, and fewer rights to defendants and suspects, mainly because there were no strict procedures for conducting an investigation, or any limitations on the duration of detention (Lev 1999, 177).

The dual criminal procedure systems also extended to the Prosecution Service. In European criminal courts, according to Article 43 of the RO, the *Procureur-Generaal* headed a hierarchical prosecution service (*Openbaar Ministerie/OM*) staffed by fully trained prosecutors (*officieren van justitie*).[29] On the Indonesian side, the *jaksas* were structurally subordinated to the *resident*, as native prosecutors, and did not serve the *Procureur-Generaal*.[30]

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25 Article 75 of the *Regerings Reglement* (RR).

26 Article 76 of the *Regerings Reglement* stipulated that the criminal procedure for Europeans should have the hallmarks of criminal procedure in the Netherlands (the *concordantie* principle).

27 The SV was changed in 1876 and 1914, and in 1932 the *politierechter* became regulated. (Soepomo 1997, 45)

28 For the outer islands, the *Rechtsreglement Buitengewesten* was equivalent to the *Inlandsch Reglement* on Java.

29 In Art. 55 RO, the OM tasks were described as: "to enforce all legal provisions and decisions of the public authority, prosecute all crimes and violations, and execute all criminal convictions".

30 A *Jaksa's* authority was completely different under the *Officieren van Justitie* tasks, as mentioned by Article 55 of the R.O. In this instance, the *jaksas* were simply police officers under the Assistant Resident, without any independent authority. (Idema 1938, 69)

This was intended to maintain the unitary authority's principle of colonial government of the natives (Idema 1938, 67).[31]

According to IR 1848, there were two kinds of *Jaksa* who could engage in trials of natives: the *Hoefd Jaksa* (or Chief of Natives Prosecutor) and the *Jaksa*. The Chief *Jaksa* was the officer in the resident's office. The chief was in charge of prison and suspect interrogations. On the other hand, the *Jaksa* had limited responsibility, for one district only. Even though the *Jaksa* received criminal reports from the *wedono* (the native district official), they still needed to wait for orders from the regent and resident before beginning an investigation. The *Jaksa* collected information from the preliminary *wedono* investigation, as well as summoning and interrogating witnesses in order to prepare the indictment (Ravensbergen 2018, 175-76).

During pluralistic court sessions in the *Landraad*, the *Jaksa* acted as public prosecutor and translator for the trial proceedings (Ravensbergen 2018, 174). *Landraad* judges' non-proficiency in the native language affected the court session. While judges would examine the evidence or witness testimony, they also depended on the *Jaksa's* translation during the trial. It was common for *Jaksas* to rehearse the witness in giving evidence to the judge, according to their instructions (Idema 1938). Since *Jaksas* had little legal training in Dutch criminal procedure,[32] they had no responsibility for the indictment (*acte van beschuldiging)*.[33] Although *Jaksas* sat behind the bench alongside the judge, at the trial stage, the *Landraad* judges were responsible for drafting the proper and correct indictments[34] (Lev 2000, 254).

The Dutch colonial government also divided the police. Police responsibility for maintaining the security of European citizens was supervised and led by the Dutch East Indies High Court's Chief Prosecutor (*Procureur-Generaal op Het Hooggerechtshof van Nederlands Indie*), while the resident

31 Mr. Visscher, Algemeen-Secretaris, Vroeger Procureur-Generaal, komt met zwaarder geschut: "Het zou schadelijk zijn voor het politiek gezag indien de Djaksa's zich meer onder geschikt konden achten aan den Proc.-Gen. dan aan den Resident".

32 The *Jaksa's* role as Advisor to the *Penghulu* in the *Landraad* was repealed. The *Jaksa's* position was changed to that of public prosecutor. (Ravensbergen 2018, 134–35)

33 In 1884, W. A. J Van Davelar wrote, in a judicial handbook, that it was impossible to give *Jaksas* responsibilities equivalent to the European prosecutors. The public prosecution service had to be independent, and the *jaksas* could not possibly meet this requirement. First, because *Jaksas* often ranked lower than the Javanese members of the law court – if these were regent, or *patih* – and they would tend to follow their orders instead of acting independently. Second, the *jaksas* did not have the judicial knowledge necessary to stand before the European Court President. (Ravensbergen 2018, 277–78)

34 "Until 1898, the division of labour was that the *Landraad* judge would draft the document of reference whereas the *Jaksa* drafted the indictment. In practice, the *Landraad* judge also checked the indictment written by the *Jaksa*, because it was said the *jaksas* could not draft indictments on their own. In 1898, indictments were completely taken away from the *Jaksa* by abolishing the indictment altogether, and keeping the document of reference (drafted by the *Landraad* judge) and formally introducing this document as the indictment." (Ravensbergen 2018, 278)

supervised the *Pangreh Pradja* (the native police), who were responsible for the security of the natives. The *Openbaar Ministerie* directed and supervised the judicial police (*rechtspolitie*), or repressive police (*repressieve politie*), as *hulpofficieren*, who were assigned to assist the criminal investigation of European citizens. However, when the *Openbaar Ministerie* investigated cases among the natives, they could not ask for the assistance of *Pangreh Pradja* without the resident's permission (Bloembergen 2011a, 9-10). In 1916 the colonial government established the *Politieke Inlichtingendiest/PID* (the police intelligence division), and then renamed it as the *Algemeene Recherchedienst*, or ARD (General Criminal Investigation Service), in 1918.[35] This division, led by the Chief Prosecutor, had the authority to investigate and oversee native political movements that might endanger political stability (Bloembergen 2011b, 172).

The lack of clarity regarding the separation of powers that applied in the Netherlands East Indies allowed the executive to intervene in judicial power. Although the *Procureur-Generaal* was expressly mentioned as part of the judicial power,[36] the governor general controlled prosecution policy for the entire population of the colony. Article 56 of the RO stated that the *Procureur-Generaal* and its officers should comply with the Governor General's instructions, with regard to maintaining public order and conducting criminal prosecutions. Even the *Hooggerechtshof* could not control the Governor General's intervention in the prosecution process. The *Hooggerechtshof* only had limited authority to supervise the *Procureur-Generaal*'s decisions to waive criminal cases based on the opportunity principle[37] (Soepomo 1997, 137). The Governor General retained this authority up until 1925, when the *Indische Staatsregeling* (IS) passed into the Dutch East Indies constitution. Article 35-37 IS gave the Governor General greater authority to intervene in the native judicial process (for example, by suspending the prosecution process for certain people), as well as the authority of *exorbitante rechten*, which was used to alienate, restrict the movement of, and detain people perceived to be threatening public order, without due process (Pompe, 2005, 23).

In 1915 the government enacted the Criminal Code (*Wetboek van Strafrecht voor Indonesie*), which came into effect for all residents in 1918. This code could be seen as the first step towards a gradual unification of the criminal justice systems in the colony. Another action taken by the colonial

35 *Gewestelijke Recherce* (the District Criminal Investigation Service) was set up at district level. As the Chief Prosecutor had succeeded in taking over police supervision from the interior department, the Prosecution Service found itself with a new position available: Deputy Chief Prosecutor (*Advocaat-Generaal*) for the police (Bloembergen 2011a, 216–24, 236).

36 Art. 147 IS stated that the *Procureur-Generaal* held the same position as the Chief of the *Hooggerechtshof*.

37 The *Hooggerechtshof* could request a report on cases dismissed by the *Procureur-Generaal*. When the *Hooggerechtshof* found that there was negligence in a dismissal process, they could ask the *Procureur-Generaal* to prosecute the case (Article 179 (1) RO).

government was revision of the code of criminal procedure (IR), making it into the *Herziene Inlandsch Reglement* (HIR) which was enacted in 1941. The process in the HIR was much better than in the IR. Every detention order had to be based on a written letter. Indeterminate detention periods, as controlled by the Assistant Resident, were replaced with arrest (*gevangenhouding*) for 30 days, and this could be extended by the President of the *Landraad* for an additional 30 days (Soepomo 1997, 145-46). Similar to the SV's detention and arrest arrangement, the HIR only allowed detention orders for defendants who were accused of crimes punishable by a five-year imprisonment (Article 62 of the HIR). Permission from the *Landraad's* president was required for house or body searches, except in urgent circumstances (Articles 77 and 78 of the HIR). The public prosecutor, however, had the authority to undertake seizure without the permission of the *Landraad's* president (Article 63 of the HIR). Broadly speaking, although the HIR was better than the IR, which had no strict procedures for conducting investigation and prosecution, it still did not specifically regulate the defendant's rights, or judicial control of coercive measures (*dwangmiddelen*) such as custody or preliminary detention. The differences between the SV, IR and HIR (predominantly, when law enforcers exercise coercive measures) can be seen in the following table:

	SV	**IR**	**HIR**
Defence	The defendant was entitled to a lawyer. If s/he was unable to pay for a lawyer, the government provided one for free (120 of the SV).	The defendant was entitled to a lawyer (Article 349 of the IR).	The defendant was entitled to a lawyer (Article 254 of the HIR).
Detention/Arrest	Detention might be applied, in the case of a suspect being prosecuted for a crime entailing a potential five-year imprisonment. The judge had the authority to postpone detention (Article 360a of the SV).	The arrest was conducted based on a written order from the Assistant Resident, at the request of either the *Procureur-Generaal* or *Officieren van Justitie* (Article 77 of the IR).	A detention order was only allowed for defendants who were accused of crimes punishable by a five-year imprisonment. (Article 62 of the HIR).
Foreclosure/Seizure	If the public prosecutor wanted to seize property, s/he needed to get a permit from the president of the *Raad van Justitie*, except in urgent situations.	Law enforcement could seize property under any circumstances, without permission from the court.	The public prosecutor had the authority to undertake seizure, without permission from the *Landraad's* president (Article 63 of the HIR).

House/Body Search	The public prosecutor could conduct house searches, after obtaining permission from the president of the *Raad van Justitie* (Article 91).	House searches were not regulated. Law enforcement could seize property under any circumstances, without court permission.[38]	Permission from the *Landraad's* President was required for house or body searches, except in urgent circumstances (Article 77 and 78 of the HIR).
Judicial Control of Coercive Measures	The *Rechter Commissaris* supervised and controlled the coercive measures undertaken by investigators and prosecutors (Article 41-65 of the SV).	The control of coercive measures was not regulated.	Judicial control of coercive measures was limited
Officers who could exercise coercive measures	The *Officieren Van Jusitite*	*Hoefd Jaksa* and *Jaksa* (Article, 55-64).	The *Officieren Van Jusitite* and *Magistraat*

Table 2: Coercive measures in the SV, IR, and HIR

Unlike the previous IR, which accommodated the *Jaksa*, the HIR introduced the *Magistraat*[39] as public prosecutor and replaced the *Hoefd Jaksa* and *Jaksa* roles in the native court with the *Officieren Van Justitie* (Article 38 of the HIR). The assistant resident adopted the *Magistraa*t position, if no official with a legal background was appointed to the *Magistraat* position in the *Landraad*. Therefore, the public prosecutor in the native court was part of the prosecution service (*Openbaar Ministrie*), serving under a Chief Prosecutor (*Procureur-Generaal)*.[40] The prosecution service served three primary functions: investigation, prosecution, and execution of the court's decision. The public prosecutor was attached to the *Raad van Justitie.* Hierarchically, this position was under the Chief Prosecutor, who was head of the Prosecution Service. The public prosecutor had the authority to supervise the police, conduct additional investigations, and draft indictments.[41] As the lead investigator, the *Officieren van Justitie*, in the *Raad van Justitie*, could instruct and coordinate (as well as supervise) both the *Magistraat* and public prosecutors, in the *Landraad*. The police and other government investigators were also mentioned, such as the *hulpmagistraat* or the prosecutor's assistant. Furthermore, the public prosecutor could take over the investigation

38 According to *Arrest Hoogerechtshof* (the Supreme Court Decision), 7 September 1937, house searches were permitted for criminal investigations (Soepomo 1997, 145).

39 The *Magistraat* was a judicial official with a Dutch legal background (Tresna 1955, 74).

40 In some cities, like Jakarta, Semarang and Surabaya, the public prosecutor position was held by the *Magistraat*, who had a Dutch legal background, but in other cities the assistant resident played the public prosecutor role (Soepomo 1997, 145).

41 See articles, 42, 46, 49 and 56 of the HIR.

from the police, if they wanted to speed up the process.[42] The HIR was an essential step towards unifying the prosecution service in Indonesia, and it might also have led to a unified criminal procedure (Lev 2000, 73), but its operation was halted by the Japanese invasion of the archipelago in 1942.[43]

2.4 The Japanese Military Administration

Some scholars cite the Japanese colonisation period as the beginning of military politics in Indonesian society (Slater 2010, 141-42; Kenichi 1996, 16-18). Military doctrines, such as strict discipline, full obedience to the leader, and marching drills, were all imposed on Indonesian citizens (Weerd 1946, 45-53). The Japanese taught these military values and provided military training to all Indonesians, in order to increase their military power in preparation for the Pacific War against the United States and its allies. Japan also forced Indonesians to provide hard labour, within and outside of Java, which led to thousands of civilian casualties (Kurasawa 1988, 672).

The Japanese decided to simplify and unify the criminal procedure, and for this reason it adopted the *Herziene Indonesisch Reglement* of 1941 (with some adjustments) as the only national procedural code in Indonesia (Pompe, 2005, 178). The racial distinctions made by the Dutch colonial judiciary were repealed.[44] Soon, the Dutch (and nationals of other western countries then at war with Japan) were interned in special camps.[45] Privileges were now given exclusively to the Japanese, who could only be prosecuted before Japanese judges and under Japanese law (Lev 2000, 39; Lolo 2008, 62-63).

The Japanese established the *Gunsei Hooin*, or Courts of the Military Administration. (Weerd 1946, 35). They allowed the judicial system to function as it had done under the Dutch administration, as long as it did not contradict Japanese military rules (Lev 2000, 73). Europeans lost all their legal privileges, and their bureaucratic role was eliminated. The Japanese placed native people in the Europeans' former positions in government and law enforcement (Kurasawa 1988, 537). Since there was a lack of legal expertise within the colony, the Japanese established a crash course legal qualification, the *Shihö Kanri Yöseizyo*, for Indonesian staff (Siong 1998, 448).

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42 Article 54 of the HIR.

43 The Japanese 16th Army occupied Java on 8 March 1942, after defeating the Dutch East Indies Government (Kurasawa 1988, 24). Sumatra and Java were thereafter administrated by the Japanese Army, while the Celebes, Borneo, and all the islands east of a line running north to south, through Bali and the Makassar Straits, were under the control of the Japanese Navy.

44 Ordinance No. 14 of the Japanese Commander in Chief, 29 April 1942, established *the Gunsei Hooin*/Law for Military Government Courts; it abolished all the existing law courts.

45 The Japanese administration detained Dutch officers and professionals in military camps (Wignjosoebroto 2014, 174).

The course took only one year, in comparison to the Batavia School of Law, which took at least five years to complete. The course probably produced 150 Indonesian graduates, many of whom remained judges and prosecutors until after independence (Lev 2000, 40).

The military government did not establish any specific laws regarding the judicial system; instead, it replaced all the Dutch terms in the previous regulations with Japanese and Indonesian terms. The Indonesian judiciary was differentiated into eight levels and types. The *Landraad* (renamed *Tihoo Hoin*) became the General First Instance Court; the *Raad Van Justitie* (renamed *Kootoo Hoin*) became the General Court of Appeal[46]; and the *Hooggerechtshof* (renamed *Saikoo Hoin*) became the Supreme Court (Lev 2000, 39). The Japanese also converted other courts, such as the Misdemeanour (or Police) Court (*Keizai Hooin*), the District Courts (*Ken Hooin*), the Municipal Courts (*Gun Hooin*), the Islamic Court (*Kakyoo Kootoo Hooin*), and the Court of the Priests (*Sooryoo Hooin*). *Kooto Hooin* was originally comprised of Japanese members only, and the lower courts were staffed by Indonesians (Weerd 1946, 36). The Japanese removed the executive staff from *Tihoo Hoin* and stipulated, in Law No.34/*Osamu Seirei* No. 3 of 26 September 1942, that the court had to be administrated by a single judge, appointed by the Japanese military authorities (Siong 1998, 423-24).

The Army General Headquarters (*Gunshireibu*) controlled and supervised the criminal justice system, to ensure that their decisions were in line with the objectives of the military administration. The *Openbaar Ministerie* was also renamed in Japanese, as *Kensatu Kyoku*.[47] Therefore, since the HIR became the only criminal procedure at this time, the position and function of the *Officieren van Justitie* (the prosecutor, under the European procedural code) was replaced by that of the *Jaksa*, who become the prosecutor attached to the *Landraad.* The *Kensatu Kyoku* was organised hierarchically, according to the three judicial levels, and it was controlled by the military administration (Lev 2000, 40). This system was strongly centralised, and in its later stages it was even detached altogether from the justice department. There was no Chief Prosecutor during this period.[48] The Prosecution Service and police were jointly brought under the police department, which for this purpose was renamed *Tianbu* (Public Security Department) and came directly under the *Gunseikanbu* (Central Military Administration) (Weerd 1946, 38). Like its predecessor, the colonial Public Prosecution Office (*Openbaar Ministerie*), the *Kensatu Kyoku* served three primary functions under the Japanese military administration: investigation, prosecution and execution of the court's decisions. The prosecutors supervised criminal investigations undertaken by the police and other investigating bodies (Lolo 2008, 65).

The military also controlled trials held in Indonesian courts. The

46 The *Kooto Hooin* had control over the lower courts.

47 See Article 3, Osamu Seirei No. 14, 1944

48 *Gunseikanbu Sihobuco*, and then *Gunseikanbu Cianbucco*, in turn, acted as Prosecutor General (Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan RI 1985, 48).

Kempeitai (Japanese Secret Service) observed trial sessions and supervised the judge's verdict in criminal cases thought to be of military interest (Weerd 1946, 38). The Japanese changed the law of evidence, to make it procedurally easier for them to punish suspects or defendants who were suspected of disturbing the Japanese interest (Lev 2000, 40). On 12 July 1942, the *Gunseikan* (Head of the Military Administration) of Java published*'Tjara mendjalankan atoeran-atoeran dalam oendang-oendang tentang boekti-boekti (bewijsmiddelen) dalam perkara kriminal'* (The application of the law of evidence in criminal cases). It stated that offenders should not escape punishment just because the prosecutor could not fulfil certain formal legal conditions. A single piece of legally admissible evidence was deemed to be sufficient. If they were dated, signed and sealed, with an indication of the name of the office concerned, written statements by civil servants or local administration officials – such as reports written by prosecutors, police officials, or members of the *Kempeitai* – had to be treated as legal documents. However, as Siong found, judges in Batavia did not obey this instruction, and thus they made the Japanese administration's criminal law system dependent on the former Netherlands East Indies procedures (Siong 1998, 438-39).

In 1945, when the Japanese realised that they were losing the Pacific war, they created *Dokuritsu Junbii Chōsakai* (The Committee for Preparatory Work for Indonesian Independence/PPKI). This committee, consisting of Indonesian nationalists, was appointed by the Japanese government to prepare for Indonesian independence and an Indonesian constitution. Soekarno (who would later become the first Indonesian President), Yamin and Soepomo were the influential committee members during the drafting process. A Constitution was drafted to satisfy the Japanese interest, and to make Indonesia a puppet state – part of Japan's Greater East Asia Co-Prosperity Sphere. Unsurprisingly, the resulting constitution contained few arrangements for human rights and the protection of citizens when dealing with the state[49] (Cribb 2000, 182).

2.5 The Indonesian Revolution

After Indonesian independence was proclaimed on 17 August 1945, the new government decided to keep all the existing institutions and laws inherited from both the Dutch and Japanese colonial governments. These colonial systems have persisted wherever new state institutions have not yet been established in conformity with the 1945 Indonesian constitution.[50] The 1945 Constitution adopts the provisions of the Dutch East Indies Constitution, when it comes to arranging state institutions and structuring authorities.

49 The 1949 and 1950 constitutions provide better protection of democratic rights. See (Drooglever 1997) for further details of the drafting process for these constitutions.

50 See articles I and II of the transitional provisions in the 1945 Constitution.

The House of Representatives (*Dewan Perwakilan Rakyat* or DPR) replaced the *Volksraad* function, the President function evolved from that of the *Gouverneur-Generaal*, and the Supreme Court displaced the *Hooggerechtshof.* The Financial Audit Board comes from *Rekenkamer*, and the Supreme Advisory Council derives from either *Raad van Nederlandsch-Indië* (in Batavia) or *Raad van Staat* (in the Netherlands). In contrast with the colonial system, the Indonesian Constitution introduces the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR)[51] as the highest political institution, with the authority to elect and impeach the President.

Even though the *Procureur-Generaal* (Chief Prosecutor) and its *Openbaar Ministrie* (Prosecution Service) played an important role during the Dutch colonial period, the constitution did not mention these institutions in its provisions. On 19 August 1945, the Indonesian Independence Preparatory Committee (*Panitia Persiapan Kemerdekaan Indonesia* or PPKI) agreed to adjust the Japanese judiciary structure, which positioned the prosecution service within the Public Security Department to the Ministry of Justice[52] (Yamin 1959, 453; Kusuma 2010, 512). The new government positioned the Prosecution Service as a department, and appointed Mr. Gatot Taroenamihardja as Indonesia's first Chief Prosecutor.[53] However, criminal justice actors, such as the police and Prosecution Service, were involved in fighting Dutch military aggression (Turan et al. 2000, 47-52). Chief Prosecutor Taroenamihardja ordered the police to focus on maintaining public security,[54] especially against the Dutch who were trying to reign over all territory[55] *(Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan* RI 1985, 52). As mentioned by the third Chief Prosecutor, Tirtawinata, this revolutionary situation did indeed cause the Prosecution Service to not carry out its work properly (Poeze 2009, 250).

However, during the war, the new government issued its first law regulating the Prosecution Service – Law 7/1947 on the structure of the Supreme Court and the Supreme Prosecution Office.[56] The position of the Prosecution Service was mentioned in Law 7/1947, which referred to Article 24 of the 1945 Constitution on the judiciary:

> *"…as the composition of the judiciary and its authorities cannot be organised as required*

51 *Majelis Permusyawaratan Rakyat* - inspired by the single-party system in communist countries (Asshiddiqie 2014, 134–35).

52 Soepomo later added that the department of justice's authority included the courts, prisons, prosecutors and cadastre (Yamin 1959, 464).

53 Gatot Taroenamihardja obtained his doctoral legal degree at the University of Leiden.

54 A *Maklumat Pemerintah* (Government Statement) on 1 October 1945 stated that the Head of the Judicial Police is the Chief Prosecutor.

55 A *Maklumat Pemerintah* (Government Statement) on 1 October 1945 said that the Chief Prosecutor was leader of the Judicial Police (*Justitiale Politie*).

56 The elucidation of this law cited Japanese laws (*Sihoobutyoo Osamu Seirei*, 14 January 1944, and *Gunseikanbu Osamu Seirei* No. 49, 8 November 1944), when positioning the Prosecution Service under the Ministry of Justice.

in Article 24 of the Constitution, it is therefore crucial to regulate: … (c) the structure of the Prosecution Service; and, (d) the Chief Prosecutor's supervisory authority over the public prosecutor."

Article 24 (1) of the 1945 Constitution states that judicial power is exercised by the Supreme Court and other judicial bodies. Law 7/1947 clarified that the Prosecution Service is part of the judiciary. The law adopted a judiciary setting based on Dutch judiciary law (RO), thereby making the Indonesian Prosecution Service's position the same as it was in the former Dutch colonial prosecution service. Therefore, when the first Chief Prosecutor, Gatot Taroenamihardja, resigned from his position on 24 October 1945, the Chief of the Supreme Court was assigned multiple positions as Chief Prosecutor[57] (*Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan* RI 1985, 69). Since the 1945 Constitution did not embrace the separation of powers, and the Indonesian political system has continued to oscillate between being a presidential and a parliamentary system,[58] the President and Ministry of Justice are both able to appoint and dismiss judicial officials.[59]

Law 7/1947 was enacted retroactively, from 17 August 1945 onwards. This retroactive arrangement was intended to provide legitimacy for the work of the courts and Prosecution Service during the revolutionary war against the Dutch, and the rise of internal republican conflicts. Kasman Singodimedjo, the second Chief Prosecutor (1945-1946), who was also Commander of the Armed Forces (*Badan Keamanan Rakyat* or BKR), instructed the police and prosecutors to release native prisoners, in order to help the new government at war (Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan RI 1985, 78). On the other hand, the Prosecution Service also prosecuted republican political leaders and their followers, when they attempted a coup of the parliamentary government in 1946.[60]

The new government retained the *Wetboek van Strafrecht* 1918 (WvS)

57 Articles 60 and 61 of the RO state that the *Advocaat Generaal* and the *Raadsheer of Hoog-gerechtshof* could both hold the position of Procureur-Generaal, temporarily.

58 President Soekarno applied a presidential system in the new republics, while Vice President Muhammad Hatta convinced the new government to implement a parliamentary system. On 14 November 1945, Vice President Moh Hatta issued a statement that the presidential system was being changed to a parliamentary one.

59 The President appoints and dismisses the Chairman, Vice Chairman, members, and clerks of the Supreme Court, as well as the Chief Prosecutor and High Prosecutor, whereas the Minister of Justice appoints court deputy clerks and court prosecutors.

60 The Prosecution Service prosecuted the case of a republican political coup attempt on 3 July 1946. About 800 people were arrested for the attempted kidnapping of Prime Minister Sutan Syahrir. M Yamin, one of the most prominent republicans, was prosecuted as the intellectual actor behind the abduction. One of Yamin's tactics when refusing prosecution was to question the application of the WvS to his case. He claimed that the WvS, which was inherited from the colonial government, contradicted the Indonesian revolutionary principle. The WvS application was presented as evidence of the new government's lack of effort to establish a new criminal code which would have suited the Indonesians better (Poeze 2010, 278). The court sentenced Yamin to four years in prison, but two years later, in 1947, Soekarno granted him clemency and released him from prison.

as the criminal code for Indonesians. In its elucidation, the government preferred to adopt Dutch criminal law rather than Japanese criminal law, stating that the Japanese law was fascist and unclear, which potentially allows law enforcement officers to abuse their power. However, as Siong and Lev have said, the Indonesian government did not annul the Japanese regulations regarding criminal procedure (Siong 1998, 436,439; Lev 1973, 8). This can be seen in Law 7/1947 and Law 20/1947, both of which refer to the Japanese regulations governing criminal procedure. Since the laws adopt the RO to the provisions, the position and function of *Jaksa* (or native prosecutor) replaces that of the Dutch prosecutor (*Officier van Justitie).* This later influenced the government decision to use the HIR, rather than the SV.

Chief Prosecutor Tirtawinata preferred to uphold the HIR as the Indonesian criminal procedure, rather than using *Gunsei Keizirei*, the Japanese criminal procedure. According to the public prosecutor, the latter would only be applicable in a police state (*Politiestaat*), and not in a democratic state.[61] Indonesia's new government adopted the HIR instead, because the Minister of Justice argued that Indonesia was eager to establish its own national procedural laws, rather than following strict and complicated European procedural codes. In addition to the lack of resources, the government also believed that prosecutors would not be able to uphold the stricter European criminal procedure set out in the SV (Lev 2000, 75).

A further regulation of the Prosecution Service, Law 19/1948, dealt with the structure and jurisdiction of the judiciary and the Prosecution Service. As judicial officers, public prosecutors and judges worked in the same office. This law guaranteed the independence of the judiciary and prohibited the government from intervening in judicial matters, unless otherwise provided by the Constitution[62] (Article 3). In the same way as the previous law, the Chief Prosecutor had authority to supervise both the prosecutor and the police (Article 56). However, due to military conflict with the Dutch, and the enforcement of procedural law that had not yet been established, Law 19/1948 never came into effect (Pompe, 2005, 179).

The political and security conditions in Indonesia gradually stabilised, when the Indonesian government and the Netherlands agreed to negotiate. At the 1949 Round Table Conference, it was decided that Indonesia was a federal state, and that the federal government would arrange the constitution and adopt a parliamentary system. Although the position of the Prosecution Service was not explicitly included in the Constitution, it did mention that the service would be attached to the Supreme Court, indicating that it was a part of the judicial power (Article 148). The Constitution stated that the Prosecution Service consisted of a central service and federal state services. At the federal level, only one Supreme Prosecution Service

61 Chief Prosecutor's letter 1626/2/KA, 1 September 1947 *(Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan* RI, 1985, p. 83).

62 The government was allowed to intervene in matters such as abolition, clemency and amnesty.

existed at the highest level in the Indonesian federal state. The Federal Constitution guaranteed the independence of judicial power, by banning any intervention in judicial procedure (Article 145).

Based on the Federal Presidential Decision 22/1950, 16 January 1950, the Chief Prosecutor could supervise the police on behalf of the Prime Minister. Administration of the police was led by the Minister for Home Affairs. The brevity of the federal state period – only seven months and twenty days – meant that the federal government had no time to make laws regarding the Prosecution Service as an institution, i.e. laws determining its organisation, tasks and powers.

2.6 Parliamentary Governments

The implementation of the Provisional Constitution of 1950, on 15 August 1950, marked the end of the federal government, and returned Indonesia to the concept of a unitary state. The 1950 constitution was designed to be temporary, because the government planned to organise a Constitutional Assembly election to choose who would be drafting the new constitution. The 1950 Constitution adopted the parliamentary system, just like the previous federal constitution. The Provisional Constitution also prohibited the government from intervening in the judiciary (Article 103). The Constitution contained 28 articles on human rights protection, as well as some articles which protected defendants' rights in the criminal justice process.[63]

Furthermore, the government adjusted the criminal procedure in Emergency Law 1/1951, by renaming the HIR as *Reglemen Indonesia yang Diperbarui* (RIB, or Amended Indonesian Legal Procedure), and it became the official criminal procedure. However, since the Indonesian government dreamed of its own procedure, Emergency Law 1/1951 positions the RIB as guidance for criminal justice actors when dealing with cases. The government also structured Indonesian judicial organisations using Emergency Law 1/1951. The law not only regulates the court, but also the Prosecution Service's organisation and powers.[64] The Prosecution Service was positioned as part of the judiciary (Article 2) and the Chief Prosecutor's power to supervise police investigations was retained (Article 5). The Chief Prosecutor had another position as Chief Military Prosecutor[65], with the authority to supervise military prosecutors and the police while they

63 These included: protection from unlawful arrests and detentions (Article 12); equality before the law (Article 13); presumption of innocence (Article 14); the prohibition of criminal punishment, such as any deprivation or punishment of a guilty party which would result in the loss of civil rights (Article 15); a ban on home searches without a legal basis (Article 16); and, the protection of privacy (Article 17).

64 The law translated both the *Officieren Van Justitie* and the *Magistraat* terms in the HIR as *Jaksa*.

65 See Government Regulation S.4/1948, on military titular rank. The Chief Prosecutor's rank was Army Lieutenant General.

were conducting investigations or prosecuting criminal cases involving military personnel[66] (Article 27 of Law 5/1950). Therefore, It seemed that *Jaksas* could enjoy independence when performing their duties, similar to the former Dutch colonial prosecutors (Lolo 2008, 70).

The Prosecution Service employed and recruited many prosecutors with a Dutch legal education (Lev 2000, 82). Chief Prosecutors Tirtawinata and Soeprapto were both former colonial judges. Chief Prosecutor Gatot Taroenamihardja, Chief Prosecutor Baharuddin Loppa, Omar Seno Adji, Adnan Buyung Nasution, Prijatna Abdurrasyid, and many more people who later become reputable Indonesian lawyers, began their careers as public prosecutors. The public prosecutors belonged to a professional organisation called *Persaja* (*Persatuan Jaksa-Jaksa*, or The Prosecutor's Association), which played a pivotal role in promoting the rule of law[67] and reforming the Prosecution Service to become more professional and akin to its predecessor, the *Openbaar Ministrie*. Taking into account the poor legal knowledge of the pre-war public prosecutors, Chief Prosecutor Soeprapto asked high-ranking public prosecutors with a legal background to assist the lower level pre-war public prosecutors in drafting indictments (Lev 2000, 80).

On 28 December 1950, Prime Minister Mohammad Natsir suggested to the President that Mr. Soeprapto be appointed as Chief Prosecutor at the Supreme Court.[68] Soeprapto, who was a former judge and chairman of the *Landraad*, succeeded in keeping the Prosecution Service working to maintain the rule of law, amid political contestations during the parliamentary period (Nasution 1995). Even though Soeprapto faced a shortage of trained personnel, budget, equipment, and facilities, he managed to make the legacy of the Dutch system work impressively. The Chief of the Police, General Soekanto, and Soeprapto were known for their positive leadership, maintaining a good relationship between public prosecutors and the police, and for emphasising criminal procedure which was based on the law and not simply used for particular political interests (Lev 2007, 238). This fact should be understood as a consequence of both the judicial independence guarantee in the constitution, and the balance of political parties within the parliamentary system.

66 The Prosecution Service could use the HIR and SV procedures when prosecuting the military. See Article 1, Law 8/1946.

67 See Article 1 of the Persaja (Prosecutor Association) Statute, which stated that the *Jaksa* association aimed to promote the rule of law. *Indonesischtalige statuten van de Persatuan Djaksa*, 1955.

68 Soeprapto was proclaimed 'a national hero' by the Prosecution Service. The service built a statue of him, and placed it in front of the Supreme Prosecution Office.

Soeprapto maximised the role of the Directorate of Central Investigation *(Direktorat Reserse Pusat*, or DRP)[69], regarding the investigation of serious crimes. The effectiveness of the DRP was related to its authority to conduct investigations and prosecutions. This was an important factor in Soeprapto's success.[70] The Prosecution Service was now able to prosecute army officers who were smuggling goods, as well as other high-profile cases. Some ministers, high-ranking military officers, and top government officials were arrested and prosecuted for serious crimes. In 1955, the Prosecution Service even arrested and prosecuted the Minister of Justice (Mr. Djody Gondokusumo) for corruption, with allegations under Article 419 Subsidair 418 of the Criminal Code[71] (Yahya 2004, 197-206). This situation forced President Soekarno to instruct Soeprapto to waive any criminal cases involving his political friends. Soeprapto refused to grant Soekarno's request, and continued his work.

The Prosecution Service's independence and authority resulted in severe friction between Soeprapto, the Army, and the President. The government and military considered that Soeprapto's decisions disturbed political stability. When the military started controlling civilian administration with Law 74/1957 on Emergency Situations (*Regeling Op De Staat Van Oorlog En Beleg*, or SOB), it also tried to take over the Prosecution Service, but it was not easy because Soeprapto was still in power. In 1958, the military proposed a government regulation, stipulating that any Prosecution Service investigation involving military personnel ought to first be granted permission to investigate from the personnel's commander. Although Soeprapto was against this plan, the army succeeded in convincing the government to accept their proposal and enact the regulation (Yahya 2004, 57).

In 1959, with the support of the army, President Soekarno issued a decree which effectively ended the parliamentary system era (Sundhaussen 1986, 206-10). This decree, which re-enacted the strong presidential constitution of 1945, became a turning point in the so-called 'guided democracy' (Lev 2009). The government and military now had a reason to dismiss Soeprapto.[72] He was accused of being a counter-revolutionary figure for

69 The Prosecution Service retained the position of *Dinas Reserse Pusat* (*Algemene Recherche Diens*), which was established in 1920 by the *Procureur-Generaal*. Articles 180 and 101 of the RO stated that this division had a role in coordinating and supervising investigations conducted by the police *(Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan* RI, 1985, p. 121).

70 The DRP was similar to the KPK authority, which also dealt with investigation and prosecution.

71 The Public Prosecutor sentenced Mr. Djody Gondokusumo to two years in prison, for receiving Rp. 40.000 from Bong Kim Tjong and assisting him with his visa application. It was later revealed that the money was intended for the political party chaired by Djody.

72 The Ministry of Information released the reason for Soeprapto's dismissal. It said that Soeprapto was the only person standing against government policy to place supervision of the Prosecution Service under the authority of the ministry. He was also known as the person who created political instability, by investigating party members and some ministers. Soeprapto's dismissal was a way to control the Prosecution Service (Lev 2009, 275).

releasing Schmidt, a former unit commander in the Dutch army.[73] The Public Prosecutor's Association (*Persaja*) disputed this decision. The Head of *Persaja*, Oemar Senoadji, said that Soeprapto's dismissal from his position as Chief Prosecutor broke the rule of law; Soeprapto had been dismissed without any proper administrative procedure or hearing.

The tension between the Prosecution Service and the army increased, beginning with the Chief Prosecutor, Gatot Taroenamihardja's[74] decision to arrest and detain several high-level military officials for smuggling. The army general, Nasution, argued that Gatot's action disrupted public order, and the army then retaliated by arresting and detaining Chief Prosecutor Gatot.[75] Soekarno resolved the conflict by dismissing Gatot as Chief Prosecutor and transferring the military officers who had committed smuggling.

Soekarno issued Presidential Decree 5/1959, which stipulated that the Prosecution Service was a government instrument. The position of the Chief Prosecutor was governed by the Security Ministry, which was led by Army General Nasution at the time. Soekarno then appointed Gunawan (a junior chief prosecutor who had support from army headquarters) as Chief Prosecutor.

2.7 The Guided Democracy

> "*You are in an organisation, and the organisation is (represented by) the leader, so you (must) understand that being part of the organisation means you are also a part of the leader. You must help the government to lead the state, to destroy everything opposed to the state, and to promote everything developed by the state.*" (Soekarno 1960, 15)[76]

During the 1950 Constitution period, Soekarno's relationship with the parliamentary government was quite tense. He opposed the Prime Minister's role in government and was against the separation of powers. He considered the parliamentary model to be a western style of government,

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73 Soeprapto argued that the Prosecution Service was merely executing a high court decision. Since Schmidt had served a prison sentence of more than five years, based on a high court decision, he should be released immediately. Soeprapto stated that his decision to allow Schmidt to re-enter the Netherlands was based on permission from the Minister of Justice. However, at a cabinet meeting on 31 March 1959, it was decided that Soeprapto would be dismissed from the position of Chief Prosecutor, because he was the person ultimately responsible for the Schmidt case.

74 Soeprapto's successor as Chief Prosecutor.

75 As Adnan Buyung said, Gatot was hit by a car and sustained severe injuries (Nasution 2004, 117).

76 "*Saudara-saudara adalah satu organisasi dan organisasi adalah an sich hal pimpinan, maka Saudara-saudara mengerti bahwa saudara ini adalah satu bagian daripada organisasi itu, bagian daripada pimpinan itu. Saudara harus membantu kepada negara untuk memimpin djalannja Negara demikian rupa, sehingga Negara bisa berfungsi disini, membinasakan segala sesuatu jang menentang, disini membangun segala sesuatu jang membina*". President Soekarno's speech at the first Prosecution Service Department conference, on 30 October 1960.

identical to that of colonialism. Via a presidential decree on 5 July 1959, which re-enacted the 1945 Constitution, he coined the term 'guided democracy', placing all the political power in his hands.

In 1960, Soekarno declared the end of the separation of powers doctrine in the People's Consultative Assembly session. The Minister of Justice, Sahardjo, asserted that the separation of powers did not complement the Indonesian legal system. Sahardjo introduced the *Pengayoman* model as an 'Indonesian legal system'; a system which placed the wisdom of the President at the centre of national legal principle (Sahardjo 1963). Moreover, while Soekarno was now enjoying absolute power, citizens' rights were still not being regulated (Hart and Nusantara 1986, 6).

Soekarno said that the revolution was not yet over; therefore, intervention by the President was essential to the justice system[77] (Lev 2009, 70). Soekarno also determined the position of Supreme Court Chief Justice, Wirjono Prodjodikoro in the cabinet. Wirjono was appointed Minister of Law and the Interior, as well as Coordinating Minister of Law and Home Affairs (Pompe 2005). Through Minister of Justice, Astrawinata the government started reorganising the Prosecution Service, giving it executive power; the Chief Prosecutor had to take direction from the Minister of National Security/Army Chief of Staff, General AH Nasution.

Unlike his predecessor, Gunawan allowed the President to intervene in the Prosecution Service. Gunawan's appointment marked the transformation of the Prosecution Service from an independent institution into an institution that was entirely controlled by the executive (Lev 1965, 196). On 22 July 1960, a cabinet meeting was held and it was decided that the Prosecution Service was no longer subordinate to the Ministry of Justice. The Prosecution Service became the Ministry for Prosecution Service, and the Chief Prosecutor became the Minister for the Prosecution Service, who was directly responsible to the President.[78] This date was later declared (by the Minister for the Prosecution Service, Gunawan) to be the 'birthday' of the Prosecution Service, still celebrated today, as *Hari Bhakti Adhyaksa*.[79]

Furthermore, with military support, Gunawan began the militarisation of prosecution service bureaucracy. The position of Chief Prosecutor was redefined to resemble that of Army General, with the highest level of command and the ability to treat other public prosecutors as troops. The Chief Prosecutor required public prosecutors to undertake military training and wear military uniforms[80] (Lev 1965, 197), undergoing basic military training for two months in the LKPS (*Latihan Kemiliteran Pegawai*

77 Article 19 of Law 19/1964 allowed the President to intervene in judicial process.

78 President Soekarno issued Presidential Decree No. 204/1960 on 15 August 1960, which stated that the position of Chief Prosecutor would change to Minister for the Prosecution Service from 22 July 1960.

79 See Chief Prosecutor Decision No. Org/A.51/1 2 January 1960, and No.Kep-62/J.A/7/1982, 16 July 1982 (Ritonga et al. 2003, 59).

80 See *Suara Persadja*, 1961.

Sipil, or Military Civil Service Training) (Mangoenprawiro 1992, 41). The public prosecutor position was now even more disreputable than it had been pre-war (as *executive ambtenaar*). The public prosecutors had lost their independence and become troops who needed to obey their leader's directions. The Prosecution Service metamorphosed into a tool, which the regime could use to eradicate any political activities opposing government policy. Since Gunawan was loyal to the regime,[81] Soekarno granted the Prosecution Service a budget to build a new office, which was designed to look similar to the United States Attorney General's Office [82] (Mangoenprawiro 1992, 42).

When Law 13/1961 on the Police was enacted, Gunawan failed to retain the prosecutorial power to supervise the police during their criminal investigations (Lev 1965, 198). Even though Law 15/1961 on the Indonesian Prosecution Service retained the Chief Prosecutor's authority, including the supervision and coordination of police investigations,[83] Law 13/1961 on the Police granted the Police Chairman control over and supervision of preventive and repressive policing, including criminal investigations (Article 7).[84] Because of these contradictory provisions, the police were reluctant to be supervised by the IPS during criminal investigations, since police law stated that it was the Police Chairman who had the power to supervise investigation processes, including any coercive measures taken (Articles 13 and 14).[85] As a result, during the investigation process, the prosecutors and the police each had their own interpretation of the HIR, according to their own interests (Poernomo 1988, 21).

In 1962, due to the deterioration of Gunawan's relationship with the military and his malpractice while reigning as Chief Prosecutor, Soekarno replaced him with Kadarusman, who was the former Deputy Chief Prosecutor.[86] However, it was not long before a special committee for reorganising the Prosecution Service recommended Brigadier General Soetardhio

81 Even though it failed, Gunawan urged the Supreme Court to accept his concept of 'the consensual model'. It means that the judge's verdict and sentence must not differ from the prosecutor's charges and demands. Because of this, the Chief of PERSAJA, Oemar Seno Adji, who believed judicial independence should not be interfered with, resigned from his position as Deputy Chief Prosecutor (Pompe 2005).

82 Since the Indonesian Government obtained the loan from the US Government to build the Prosecution Service Building, its design was inspired by the US Attorney General's Office Building. The main difference is that whereas the US Attorney General's Office lower floor houses shooting range facilities, the Indonesian Prosecution Service's lower floor is equipped for receptions or ceremonies. Moreover, when US Attorney General Robert Kennedy visited Indonesia, Chief Prosecutor Gunawan gifted him a Sumatran Tiger.

83 The 1961 IPS Law also authorised prosecutors to conduct a further investigation if they believed that the evidence was insufficient (Article 7, paragraph 2).

84 This law positioned the police (as a department) under the army, which was answerable only to the President.

85 An elucidation on Article 15 of Law 13/1961, which stated that police investigations should also be conducted with due consideration of the Prosecution Service Law.

86 Kadarusman was the Chairman of the Committee for Preparation of the 1961 Law on the Prosecution Service.

as Chief Prosecutor. This recommendation correlated with the Prosecution Service's position as subordinate to the Department of Defence and Security (Lev 1965, 198).

Soekarno issued Presidential Decree/Law 11/1963 on Anti-subversion, in order to silence his political opponents and strengthen his regime. The Chief Prosecutor played an important role under this law, becoming responsible for the investigation and prosecution of subversion cases (Article 5). While the law contained the 'rubber article' (or 'catch-all article'), the Chief Prosecutor could easily prosecute anyone who was targeted by the regime. The Chief Prosecutor would often visit the presidential palace, to be instructed on who would be prosecuted for revolutionary reasons (Mangoenprawiro 1992, 43).

Even though Law 19/1964 on Judicial Power and Law 13/1965 on the Courts both stated that the President could intervene in judicial process, for revolutionary reasons, there was no precise definition of "revolutionary reasons" in either of the laws. Furthermore, the President (as revolutionary leader) could define the cause, based on his political interest. As former Chief Prosecutor Singgih pointed out, Brigadier General Soenarjo (Head of the DRP) had instructed him to put Osman, a Surabaya businessman, in jail. Osman had hampered Soekarno's wish to marry a Surabaya woman, which meant (to Soenarjo) that he opposed the regime. As a criminal investigator at the DRP, Singgih needed to find a crime for Osman, in order to justify prosecuting him. Osman was found to be in possession of an illegal warehouse, and he could therefore be arrested and prosecuted for an economic crime (Ritonga et al. 2003, 78-81). Another case was mentioned by former Deputy Chief Prosecutor, Prijatna Abdurrasyid, who received an order from the regime to arrest and detain Muchtar Kusumaatmadja, a professor of international law, for insulting Soekarno. As the Head of the West Java High Prosecution Service (*Advocaat-General*), Prijatna instructed his prosecutors to investigate, and summoned some professors and students from Padjadjaran University. Since there was no reliable evidence of Muchtar's crime, Prijatna refused to detain him. Prijatna believed that the Muchtar case was fabricated because Muchtar was due to run against a candidate from the Communist party, for election as rector of Padjadjaran University (Abdurrasyid 2001, 195-97).

In 1965, the clash between the Communist Party (*Partai Komunis Indonesia*, or PKI) which supported Soekarno, and the army heated up, when seven army generals were found murdered. Soon, the army accused PKI of being the mastermind behind the so-called coup of 30 September, and it mobilised the masses to dissolve the Communist Party. The army then led a purge of PKI members across Indonesia. It was reported that 1,500,000 people were detained without fair trial, and 100,000 people were murdered during this purge (Roosa 2008, 5). The Prosecution Service supported the army's action by detaining several PKI members, and then transferring them to the KODAM (*Komado Daerah Militer*, or the military headquarters in the area) for further processing (Mangoenprawiro 1992, 66).

2.8 The New Order Military Regime

> "*National stability clearly requires a safe and orderly atmosphere. The role of the ABRI*[87] *(Armed Forces) in this case is significant, both as a defensive security power and a social political power. The ABRI has carried out its duties well, both as a protector of national stability and an initiator of more dynamic development policy.*" (Eriyanto 2000, 90) [88]

In 1966, General Soeharto and his army took over the government from Soekarno and his Guided Democracy regime. Soeharto claimed he had a mandate from Soekarno to organise and lead the cabinet.[89] He began to reorganise the administration and purge Soekarno's loyalists and any communist elements from the government. Soeharto structured the Chief Prosecutor role to fall under the Cabinet Presidium, which he led.[90] Soeharto then replaced Chief Prosecutor Soethardio, a Sukarno loyalist, with his own man, Lieutenant General Sugih Arto.

One of first things that Soeharto did, after he was officially appointed President in 1967[91], was to arrest and detain the Deputy Chief Prosecutor for Intelligence, Soenarjo Tirtonegoro. Soeharto dismissed Soenarjo from his position, even though there were no allegations of wrongdoing regarding Soenarjo's relationship with Soekarno. He was briefly detained in a military prison, and later released. It was firmly believed that this arrest was Soeharto's retaliation towards Soenarjo, for Soenarjo's actions whilst he had been in the military police. Soenarjo had investigated smuggling cases in Central Java in the 1950s, in which Soeharto had been involved, and the Army Commander demoted Soeharto's position as a consequence (Mangoenprawiro 1992, 71).

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87 ABRI is an abbreviation of *Angkatan Bersenjata Republik Indonesia* (or, the Indonesian Armed Forces).

88 "*Stabilitas nasional jelas memerlukan suasana aman dan tertib. Peranan ABRI di dalam hal ini cukup besar, baik sebagai kekuatan pertahanan keamanan maupun kekuasaan sosial politik. ABRI sebagai stabilisator dan dinamisator dalam pembangunan telah menjalankan tugas-tugasnya dengan baik.*" Soeharto's presidential speech, 1994. ABRI has carried out its duties properly, both as a stabilising force and as a stimulus for the country's development.

89 Soeharto claimed he had been given a mandate from President Soekarno on 11 March 1966, to secure the nation after protests to dismiss PKI, which was accused of being the main actor in the killing of seven army generals. The mandate later became known as *Supersemar* (*Surat Perintah Sebelas Maret 1966, or Eleven March Mandate 1966*), which was exploited by Soeharto to maintain his political power and seize the presidential position from Soekarno.

90 Presidential Decree No.163 of 1966, 25 July 1966, and the Decree of the Ampera Cabinet Presidium No.26/U/Kep/l966, 6 September 1966, (*Amanat Penderitaan Rakyat* – The Message of the People's Suffering).

91 On 7 March 1967, the Provisional People's Consultative Assembly (MPRS) appointed Soeharto as its acting president, before the national election in 1968. After the People's Consultative Assembly (MPR) was elected, on 27 March 1968, Soeharto was appointed its president (Tap MPRS No XLIV/MPRS/1968).

Soeharto named his regime the 'New Order', to distinguish his administration from Soekarno's Guided Democracy, which would now be considered the 'Old Order'. When the New Order began, there were high hopes that the new regime might promote the rule of law which had remained unenforced by the previous administration (Nasution 2004, 199). However, it turned out that Soeharto instead preferred to retain the previous repressive regulations and strengthen military power instead of civilian politics[92] (Lev 1978, 62).

The New Order shaped a bureaucratic military administrative regime. The regime restricted the political freedom of civil servants, including prosecutors, in order to maintain political stability. Prosecutors were obligated to join the KORPRI (*Korps Pegawai Republik Indonesia*, or the Indonesian Civil Servant Corps), which was a wing of the GOLKAR party (*Golongan Karya*, or the Functional Group Party) formed by the military. Therefore, prosecutors were forced to vote for GOLKAR in every national election (Lolo 2008, 153). *Dharma Wanita* was also established, in order to domesticate women's roles in politics, making wives into a governmental tool to ensure their husbands' loyalty to the regime (Suryakusuma 2011, 8-10; Lolo 2008, 116-17). With its tight command-and-control structures, the New Order military bureaucracy forced the Prosecution Service to serve the ruling regime.[93] The military influence on the Prosecution Service was obvious.[94] Five military generals were also Chief Prosecutors during Soeharto's era – Navy Admiral Soekarton Marmosudjono, and four army generals: Lieutenant General Sugih Arto, Lieutenant General Ali Said, Lieutenant General Ismail Saleh, and Major General Hari Soeharto.

Although a Chief Prosecutor had the same structural status in the cabinet as the Commander of the Armed Forces (ABRI), in practice the two were not equal. Since the military rank of Chief Prosecutor was only a two-star or three-star general (lower than a four-star military commander), the Chief Prosecutor's level was below that of the ABRI Commander. It is not surprising then that in 1971 Chief Prosecutor Sugih Arto handed his position as Army Chief Prosecutor to an ABRI Commander.[95] The submissive attitude of the Chief Prosecutor towards his superiors was a bonus for the President, who already had control over the Armed Forces (Lolo 2008, 132).

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92 *Dwi Fungsi*, ABRI, or the 'dual function of the armed forces' concept was established to legitimise the role of the army in civilian politics.

93 The New Order also forced courts and their judges to serve the regime (Pompe 2005).

94 The military co-opting of the Prosecution Service is evidenced by the fact that the Head of the High Prosecution Office in each province was required to join a meeting initiated by Kowilhan (*Komando wilayah pertahanan*/Defense Territory Command). In spite of the Head of the High Prosecution Office position not falling under the Kowilhan structurally, he nevertheless had to report the Prosecution Service's work to the commander of the Kowilhan (Mangoenprawiro 1992, 136).

95 Even though Law 5/1950 was not repealed, Chief Prosecutor Sugih Arto delegated the military prosecutor mandate to the Army Commander in 1973 (*Panitia Penyusunan dan Penyempurnaan Sejarah Kejaksaan* RI, 1985, p. 237).

To begin with, the New Order's main agenda was to purge communist ideology in government and society. Therefore, the military had an interest in controlling and using the Prosecution Service as a backbone for prosecuting most of the communist party elite and its other members. On 3 March 1969, Soeharto issued Presidential Decree 19, which strengthened the KOPKAMTIB's (*Komando Operasional Pemulihan Keamanan dan Ketertiban*, or the Operational Command for the Restoration of Security and Order)[96] power to control all governmental apparatus, including judicial institutions. For security reasons, the KOPKAMTIB could direct and intervene in the criminal procedural processes of the police, Prosecution Service, or court.

The Chief Prosecutor Lieutenant General of the Army, Ali Said, confessed that in 1978 he received an instruction from the KOPKAMTIB to interrogate, arrest and detain suspects of subversive cases, without a trial.[97] The KOPKAMTIB could also take criminal cases from the police and prosecutors, and instruct them to use evidence prepared and controlled by the KOPKAMTIB. Adnan Buyung Nasution, a former prosecutor who is also known as a prominent human rights defender in Indonesia, criticised the KOMKAPTIB's power as excessive, he equated the KOPKAMTIB's actions with shooting flies using a cannon (Nasution 2004, 268). Later, Nasution was detained without trial, due to his criticism of the government. Chief Prosecutor Ali Said revealed that Nasution's detention by the Prosecution Service was instructed by the Commander of the KOPKAMTIB, and it happened mainly because Nasution was a suspected intellectual actor behind the MALARI riots in 1974.[98] The Prosecution Service detained Nasution in a military prison for two years. Although Nasution was found innocent, the government refused to apologise; but it did announce through the press that Nasution was not involved in the Malari incident (Nasution 2004, 303-30).

During the New Order military regime, the Prosecution Service was an effective government instrument to keep military systems in power, through the Anti-Subversion Law. Via this draconian law, prosecutors played the role of the regime's guardians, prosecuting political opponents to the government and any citizens who criticised regime policy. Singgih

96 Soeharto established the KOPKAMTIB on 10 October 1965, to strengthen the military operation to purge the Indonesian Communist Party. According to the presidential decree, KOPKAMTIB's actions should have been in line with the rule of law, but in practice it was too difficult to control KOPKAMTIB's coercive measures.

97 Instruction No. 03 /Kopkamtib/XI/1978 stated that KOPKAMTIB was an institution with the highest authority to conduct coercive measures, such as putting someone under arrest or detaining them, for security reasons.

98 Malari (*Malapetaka Lima belas Januari*/the Fifteenth of January Riot) was one of the political riots which happened during the time of the New Order. Students used the momentum created by the riot to protest against Japanese investments, when Japanese Prime Minister Tanaka visited Jakarta on 14-17 January 1974. The regime took serious measures against protesters, who included students, pro-democracy activists, and journalists (Wiratraman 2014, 97–100).

stated that, when he was appointed Chief Prosecutor in 1990, he received an instruction from Soeharto to use the Anti-Subversion Law against those opposing government policies, without hesitation (Ritonga et al. 2003, 238). This can be seen in the case of Muchtar Pakpahan, the labour activist, who was prosecuted by the Prosecution Service under the Anti-Subversion Law, due to his criticism of the regime in his controversial book on Indonesian Politics[99] (Lolo 2008, 173-91).

In addition to government intervention, the Prosecution Service also suffered corruption among its own public prosecutors. Nasution affirms it can easily be found that some parties in criminal cases are required to provide *Uang Semir*[100], in order to obtain 'benefits' due to the cases being handled by the Prosecution Service (Nasution 2004, 270). During this time, the police, prosecutors and judges were not only corrupt themselves; they also thought of corruption as a 'side benefit', and one of their official rights. Lev explained that, during the New Order era, every legal profession could be controlled, guided and interfered with by the regime (Lev 2005, 3). It is a paradox that prosecutors seemed to be brave enough in prosecuting minor cases, but they did not have the courage to prosecute corruption cases involving President Soeharto and his cronies. In the 1970s, the Prosecution Service closed several major corruption cases, such as Ibnu Sutowo's Pertamina corruption case, for unexplained reasons.

The New Order not only exploited the Prosecution Service for its own political interests, it also shaped criminal procedure to ensure that it could tighten its grip on the justice system. Although the RO (*Reglement op De Rechterlijke Organisatie en Het Beleid der Justitie*, Stb, 1847-23 jo 1848-58, or the Law on Judicial Organisation) was never legally repealed, the New Order retained the previous regulations, which allowed criminal justice system actors to become more fragmented. The Prosecution Service lost its supervisory power over police investigations, when Chief Prosecutor Ali Said ceded power to the police during the drafting process for the new criminal procedure in 1981[101] (Awaloeddin Djamin et al. 2006, 399). In addition, since parliament was dominated by the Golkar party and the military, Law 8/1981 on Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or the KUHAP) was designed to replace the HIR, in order to empower the

99 Muchtar confessed that the military controlled his trial. The army supervised the interrogation right up until the prosecution process in court. He knew that the prosecutor's questions were drafted by military intelligence, who monitored his case (Lolo 2008, 173–91).

100 *Uang Semir* means a sum of money or service, provided by parties to the prosecutors or their wives.

101 The National Police Chairman, Awaloeddin Djamin, initiated a meeting with Chief Prosecutor Ali Said and the Minister of Justice Mudjono, to discuss the Draft KUHAP. Awaloeddin succeeded in convincing Ali Said to transfer the Prosecution Service's investigatory powers to the police. Since the police were part of the military faction in the DPR (House of Representatives), Ali Said left the discussion of the KUHAP to the police (Awaloeddin Djamin 1995, 218–23).

police.[102] The KUHAP allowed the police (which were part of the military) to investigate and exercise coercive measures, such as pre-trial detentions and foreclosure, not only without the prosecutor's supervision but also with minimum judicial control.[103]

Two years after the KUHAP was enacted, the military (under the Commander of the KOPKAMTIB) ran the *Celurit* operation, where hundreds of civilians were killed as a means of reducing crime. The military instructed mystery shooters (*Penembak Misterius/Petrus*) to kill civilian street criminals, based merely on their tattoo. Hundreds of people were found dead, with their bodies tied up or put into sacks (Cribb 2000; Kroef 1985). The KUHAP was insufficient whenever cases involved the regime's own political interests. The new police powers, under the new code, strengthened the military's capacity to control the legal process indirectly. Since the police were part of the armed forces, the military could intervene in criminal processes relating to their own concerns. If the police were handling cases in which the military had an interest, it was not possible for such cases to go through the prosecution process (Lolo 2008). Even after the case had been through the prosecution process, a public prosecutor sometimes needed to accommodate the military's intentions by not taking into account evidence presented at trial. In 1993, for instance, the public was shocked by the controversial case of Marsinah, who was killed due to her criticism of a company's labour policy in Surabaya, East Java. It was later found that the military intervened in the case; it asked investigators and public prosecutors to manipulate the case by hiding the original perpetrators, who were allegedly affiliated with the regime (Rosari 2010).

The KUHAP adopts most of the procedure in the HIR, but it also adds new concepts, such as pre-trial procedure, claiming that these will protect human rights. It gives citizens a chance to take legal action against coercive measures, such as arrest, detention and seizure by law enforcers. The KUHAP introduces the Functional Differentiation (*Diferensiasi Fungsional*) principle, which means that investigation and prosecution are defined as two separate processes. Via this principle, the KUHAP replaces the prosecutor's *dominus litis* at the pre-trial stage. The police force is a main actor and master of pre-trial procedure, who can initiate investigations and exercise coercive measures without any assistance from the public prosecutor. The police are granted positions as primary investigators, with the authority to oversee and supervise the investigation process conducted by civil service

102 The police investigator has more power in the KUHAP than in the HIR. While Article 53 of the HIR makes the police force the prosecutor's assistant in finding pieces of evidence to present at trial, the KUHAP repeals this provision and gives the police investigator autonomy to investigate, without any intensive supervision by the prosecutor.

103 See 5.3.4: Control of the Investigation Process.

investigators[104] (Harahap 2007, 47-48). The prosecutor's role, as stipulated in Article 13 of the KUHAP, is limited to prosecuting and executing legally binding court orders only (Article 1, Section 6, KUHAP). The prosecutor is reduced to functioning as an intermediary officer (who brings the investigation files to court) in criminal procedure. However, since the KUHAP still recognises special criminal procedure for other laws, such as anti-corruption and anti-subversion law, the Prosecution Service can retain its authority to investigate special crimes. Public prosecutors succeeded in keeping this power, under Law 5/1991 on the Prosecution Service.[105]

However, the Prosecution Service Law 1991 affirmed the Chief Prosecutor's position as the president's man.[106] As Chief Prosecutor Singgih revealed, during the drafting process for the Prosecution Service Law 1991, Soeharto instructed the Minister of Justice, Ismail Saleh (who was also a Chief Prosecutor), to make the appointment and dismissal of the Chief Prosecutor similar to that of cabinet members, who did not need approval from the House of Representatives.[107] The Prosecution Service Law 1991 also required the Chief Prosecutor to obtain the President's approval before exercising prosecutorial discretion and waiving a criminal case in the public interest. Still, the law did not explicitly define public interest – it only set out procedures for the Prosecution Service to consult with other government agencies, and obtain presidential approval regarding whether or not a case deserved to be dismissed for public interest reasons (Article 32c). Therefore, it is not surprising that prosecutorial discretion was only exercised when the regime had an interest in a case.

Public prosecutors seemed fearless in requesting acquittals for cases which were fabricated by the regime, if the Chief Prosecutor supported their actions. In 1996, the public prosecutor demanded an acquittal for the murder case of Bernas journalist, Fuad Muhammad Syarifuddin (Udin). The public appreciated the prosecutor's decision, since it was firmly believed that Udin was killed by the regime for his activities in revealing the corruption practiced by Bantul Mayor, who had a military background. As was acknowledged by Chief Prosecutor Singgih, this prosecutor's decision made the relationship between the police and the Prosecution Service quite tense (Ritonga et al. 2003, 266).

In 1997, tension between the Prosecution Service and the police heated up. The police arrested and detained several prosecutors from the Supreme Prosecution Office for falsifying the investigation files in Nyo Beng Seng's

104 The PPNS (or civil service investigator) must coordinate with the police before handing the investigation dossier to the Public Prosecutor. Article 107, KUHAP, Article 14 Law 2/2002 on the Police.

105 See Chapter 4.

106 Before the KUHAP was enacted, the New Order positioned the Chief Prosecutor as a high state official. Then, in 1983, the Chief Prosecutor was repositioned as a state official at the same level as the minister.

107 This argument was then adopted in Article 19 of the Prosecution Service Law 5/1991.

murder case.[108] The prosecutors believed that the evidence presented in the police dossier was not sufficient to prove the misdeeds of the defendants, Agiono and Atok.[109] They argued that, based on Article 27 of Law 5/1991, prosecutors could conduct an additional examination, in order to complete police files. After Vice Chief Prosecutor Soedjono Atmonegoro made a strong protest to the ABRI Commander, General Faizal Tanjung, the National Police Headquarters released the prosecutors[110] (Mangoenprawiro 1999, 43).

In 1997, when most of the Asian countries were hit by a severe financial crisis, Indonesia also suffered economic collapse, which turned public opinion against the government. In May 1998, students organised a big rally to demand Soeharto's resignation and reform Indonesia's political and economic structure. The regime fought back against the massive student demonstration, causing civilians and several students to be killed or injured. This accident provoked further protests and riots in Jakarta, and in other cities. Then, as the international pressure placed on his regime increased, political support for Soeharto collapsed. Finally, on 21 May 1998, Soeharto resigned from the presidency, marking the fall of the New Order regime.

In short, the Soeharto military regime succeeded in turning the Prosecution Service and public prosecutors into its instruments. Whereas Soekarno's Guided Democracy provided a set of rules for the regime to intervene in the prosecution process, the New Order Regime allowed this practice to normalise deviancy and damaging behaviour. Appointing a Chief Prosecutor with a military background created the opportunity to intervene in the Prosecution Service's policies and make them comply with the regime's interests. The Chief Prosecutor then introduced military doctrines, creating strain amongst public prosecutors and neutralising any critics of the regime.

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108 Tempo, *Wawancara Mayjen Pol. (Purn) Koesparmono Irsan: Berani Nggak Polisi Menghadapi Menteri Tenaga Kerja?* (An Interview with Police Major General Koesparmono Irsan: Are the Police Brave to go Against the Labour Minister?), http://tempo.co.id/ang/min/02/42/nas1.htm, accessed 14 April 2016. See also, JPNN, *Ditanya Pembubuhan Nyo Bengseng, Andi Nirwanto Langsung Kabur* (Andi Nirwanto refused to answer the Nyo Bengseng murder case), https://www.jpnn.com/news/ditanya-pembunuhan-nyo-bengseng-andhi-nirwanto-langsung-kabur?page=1, accessed 14 April 2016.

109 In the trial, the two defendants withdraw their statement from the police dossier, since they had been giving testimony under threat of death. They confessed that they were tortured during the interrogation process Jawawa.id, Police tortured the suspects, witness in murder trial says, https://jawawa.id/index.php/newsitem/police-tortured-the-suspects-witness-in-murder-trial-says-1447893297, accessed 14 April 2016.

110 As a result of this conflict, prosecutors organised solidarity actions in each District Prosecution Service Office; they rejected police investigation dossiers and caused case backlogs for the police.

2.9 Post-military Regimes: The *Reformasi* (1999-2019)

The reform movement pushed to separate the military's role from civilian politics, which included depriving Golkar of its privileged political position in the government.[111] The People's Consultative Assembly (MPR) issued two resolutions – TAP MPR No. VI/MPR/2000 and TAP MPR NO. VII/MPR/2000 – revoking military power over the police, and repositioned the police as a civilian institution. The President's authority to control law enforcement was also reduced. Unlike the previous regime, under which the President could control the police by assigning his man as the Chief of Police, Law 2/2002 states that the President must obtain parliament's approval to appoint and dismiss the National Police Chairman.[112] The new regime made a commitment to fight corruption, and this can be seen in the enactment of Law 30/2002, which established a new, strong institution to eradicate corruption: the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, or *KPK*). The KPK was designed as an independent institution, with a similar level of authority to that of the Prosecution Service during the Soeprapto period – the KPK would have the power to investigate and prosecute. In contrast with the police and the Prosecution Service, the KPK could investigate and prosecute corruption cases involving high-ranking officials and parliamentary members, without any obligation to get a permit from the President.[113]

Since there was a tremendous push to enforce the rule of law, the government and parliament amended the 1945 Constitution, which clearly stated a separation of powers and guarantees judicial independence. As in Article 24 of the 1945 Constitution:

> a. *The judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice.*
> b. *The judicial power shall be implemented by the Supreme Court, by judicial bodies operating under it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court.*
> c. *Other institutions with functions relating to judicial powers shall be regulated by law.*

The government also transferred the Ministry of Justice authority to manage court administration to the Supreme Court.[114] However, since the position of the Prosecution Service is not explicitly stated in Article 24, this led to confusion over whether or not the Prosecution Service is part of the executive or the judiciary (Maringka 2015; Waluyo 2015). Former Chief Prosecutor, Basrief Arief, admitted that the Prosecution Service's involvement

111 Civil servants were no longer forced to join the Golkar Party.
112 Law 2/2002 on the Police.
113 Law 30/2002 on the KPK.
114 Law 4/2004 on the Judiciary.

came quite late in the drafting discussions for Article 24. Consequently, in the amended 1945 Constitution there were no specific articles regulating the Prosecution Service's position and authority.[115] Meanwhile, during the drafting discussions in parliament for Article 24, some factions, such as the PKB (National Awakening Party), the PBB (Crescent Star Party) and Golkar, proposed specific chapters and articles on the Prosecution Service which would state the position of Chief Prosecutor as being independent from the executive power (*Naskah Komprehensif Perubahan UUD Buku VI Kekuasaan Kehakiman* 2010, 53:47, 50, 54). The parliamentary discussion minutes show that the Prosecution Service's position was designed to be part of the judicial power[116] (*Naskah Komprehensif Perubahan UUD Buku VI Kekuasaan Kehakiman* 2010, 53:74, 77, 78, 96, 316, 319). However, since other professions (such as advocates, notaries, and institutions such as the police and prison service) were also demanding inclusion as part of the judicial power, parliament accommodated this by formulating Section 3 of Article 24, which is mentioned above.

Since the President lost most of his control over the justice system during the constitutional amendment process, he exploited the Prosecution Service's vague position in the constitution, preserving its power over the IPS in the new 2004 Prosecution Service Law. The government succeeded in hindering the parliament's draft of the IPS Law, and replaced it with its own draft.[117] Unlike the parliament draft, which was dramatically adjusted to support the Prosecution Service's bureaucracy, IPS Law 2004 retains the President's control over the Chief Prosecutor and sets up the IPS as the executive body.

As the government believes that the Prosecution Service should be an executive body, it also believes that the appointment or dismissal of a Chief Prosecutor, and the length of the role's term, should be a prerogative power of the President (Article 21 of Law 16/2004 on the IPS jo. and Article 1 (2) of President Regulation 38/2010 on the Organisation of the Prosecution Service). This makes the position of Chief Prosecutor vulnerable to replacement by the government, if prosecutorial policies are not in line with the President's concerns. This was demonstrated in President Habibie's era (1998-1999), when there were tremendous demands to prosecute former President Soeharto for corruption during his presidency. As one of Soeharto's loyalists, President Habibie dismissed Soedjono C Atmonegoro from his position as Chief Prosecutor the day after Soedjono reported to

115 Interview with Basrief Arief, 2 December 2015.

116 Legislators, such as Hamdan Zoelva, Hari Mustafa, Zain Badjeber, Soetjipto, and I Dewa Gede Palguna, proposed positioning the Prosecution Service as part of the judicial authority.

117 The parliament draft introduced the secretariat general as a supporting administrative system in the prosecution process and prevented the Chief Prosecutor from becoming a member of the cabinet. See Risalah Pembahasan Undang-Undang Kejaksaan 2002-2004 (Legislative Minutes for the Prosecution Service Law).

President Habibie that the Prosecution Service had strong proof for prosecuting Soeharto for corruption. Habibie replaced Soedjono C Atmonegoro; Lieutenant General Andi Ghalib became the new Chief Prosecutor. It was later proven that, under Andi Ghalib the Prosecution Service did not take the handling of Soeharto's corruption case seriously[118] (Mangoenprawiro 1999). From 1999-2001, Marzuki Darusman, a Golkar politician, was Chief Prosecutor; he was appointed by President Abdurahman Wahid (commonly known as Gus Dur). Darusman argued that, as a civilian, a public prosecutor should not wear a uniform and badges; he asked public prosecutors to wear professional attire instead. It seems that this was one of the first initiatives to alter the military culture among public prosecutors.[119] Since President Gus Dur felt dissatisfied with Darusman's performance,[120] he appointed Baharuddin Lopa to replace Darusman as Chief Prosecutor. Lopa was a reputable public prosecutor with unshakable integrity. Gus Dur had faith in Lopa's ability and believed that, under his command, the Prosecution Service could prosecute corruption cases from the previous New Order regime. However, Lopa was in the position for only two months, because he died of heart failure during a visit to Saudi Arabia.[121] Marsilam Simanjuntak was then appointed as Chief Prosecutor.

When the political relationship between the parliament and the President heated up in February 2001, the parliament voted to impeach Gus Dur and make Megawati Soekarnoputri (Megawati) President. Megawati then appointed MA Rachman, a career public prosecutor, as Chief Prosecutor. Rachman's appointment was controversial at the time, due to the Public Servant's Wealth Audit Commission (KPKPN) alleging that Chief Prosecutor

118 The Prosecution Service prosecuted Soeharto for corruption in his capacity as foundation chairman, but not as the President who allegedly misused his authority during the New Order regime. On 11 October 1999, the prosecution service waived Soeharto's case investigation, due to no available evidence to prosecute him for corruption.

119 This initiative did not last long, since Marzuki's replacement requested that prosecutors continue to wear uniforms.

120 Marzuki Darusman reopened Soeharto's corruption case. In the Chief Prosecutor's official investigation order, Prin.096a/J.A/12/1999, Darusman gave the public prosecutor a mandate to prosecute former President Soeharto. In the indictment, the public prosecutor charged Soeharto for using his position as chairman of seven different foundations to embezzle 571 US dollars (Aditjondro 2006). Many critics (including the Minister of Justice, Yusril Ihza Mahendra, and the former Chief Prosecutor, Ismail Saleh) were disappointed with the quality of the public prosecutor's indictment. Saleh said that the indictment should align with the Chief Prosecutor's official investigation order, which focuses on Soeharto's role as President (Saleh 2001, 114–15). In the end, the court released Soeharto, due to his serious illness. Supreme Court Decision 1846K/Pid/2000 stated that, since the Prosecution Service failed to bring Soeharto to trial, due to his illness, the prosecution process should be terminated; further, the Prosecution Service should cover Soeharto's medical expenses, and bring him back to trial as soon as he had recovered.

121 Rumours were spread that the death of Baharuddin Lopa was strange, since he was in good health before leaving for Saudi Arabia. Some connected his death with the Prosecution Service's serious prosecution of big cases.

MA Rachman had not properly disclosed his acquisition of a mansion in South Jakarta. However, Megawati insisted on retaining Rachman as Chief Prosecutor. Some donors, such as the Asian Development Bank (ADB), who were assisting the Prosecution Service reform agenda, stopped their assistance programmes due to lack of political will from the administration to enforce the rule of law.

In 2004, when Soesilo Bambang Yudhoyono (commonly known as SBY) was elected President, he appointed former Supreme Judge and reputable legal aid activist, Abdul Rachman Saleh, as Chief Prosecutor. Saleh restarted bureaucratic reform within the Prosecution Service. Using his experience in reforming the Supreme Court's bureaucracy, he invited reputable reformer activists to act as a special team to promote the bureaucratic reform of the Prosecution Service. The Prosecution Service reform agenda was put into action, aiming to reorganise the bureaucracy to make it more professional and accountable. One programme focussed on preparing online case management, in order to solve caseloads and strengthen the supervision of public prosecutors working in the Prosecution Service (Saleh, 2008). The programme has not yet been launched, due to Abdul Rachman Saleh's replacement by Hendarman Supanji, the former Deputy Chief Prosecutor of Special Crimes, in 2007. Although Supanji was not seriously following Abdul Rachman Saleh's initiative to reform the Prosecution Service bureaucracy, he had issued some PERJA (Chief Prosecutor Regulations) on bureaucratic reform.

In 2009, SBY was re-elected in a second run for the presidency. He retained Supanji's position as Chief Prosecutor, without issuing a new Presidential Decree on Supanji's appointment (as would be the case for any other minister). This became problematic when a former Minister of Justice, Yusril Ihza Mahendra, who was being investigated by the Prosecution Service on a charge of corruption, challenged the legitimacy of Supanji's appointment as Chief Prosecutor in the Constitutional Court. Mahendra argued that, since the President did not issue a new Presidential Decree on Supanji's appointment in the second term of SBY's presidency, Supanji's position as Chief Prosecutor was illegitimate.[122] Mahendra believed that the Chief Prosecutor's term should be the same as a minister's term, which always depends on the President's term. The Constitutional Court approved Mahendra's argument, and decided that the term of a Chief Prosecutor should be the same as that of cabinet members, i.e. similar to the presidential term.[123] This Constitutional Court decision legally confirmed the Chief Prosecutor's position as a member of the cabinet.

President SBY went on to employ his presidential prerogative, selecting his old colleague, Basrief Arief (a former Deputy Chief Prosecutor who

122 Presidential Decree Number 187/2004 mentions the Chief Prosecutor's position as a member of the Cabinet of *Indonesia Bersatu*.

123 See Constitutional Court Decision 49/PUU-VIII/2010.

had already retired), to replace Supanji.[124] Arief continued the reform programme initiated by the previous Chief Prosecutor, and issued some PERJA on the reform programme. However, Chief Prosecutor Arief regretted his failure to reform human resource management within the Prosecution Service. This shows that the Chief Prosecutor's willingness to reform prosecution service bureaucracy was insufficient. There were still political impediments, both inside and outside the Prosecution Service, which aimed to retain the status quo of prosecution service bureaucracy in maintaining various political interests.

During SBY's administration (as confessed by former Chief Prosecutors, Abdul Rahman Saleh and Basrief Arief), the President let the Prosecution Service carry out its tasks and duties according to the law, but the Chief Prosecutor had to inform the President if the service was prosecuting a case which would have political impact on the President (Saleh, 2008).[125] However, since there were no clear guidelines on the relationship between the President and Chief Prosecutor with regard to prosecution policy, there was opportunity for the President to intervene in the prosecution process. For example, the former State Secretary Mahendra witnessed Chief Prosecutor Hendarman Supandji visiting President SBY, to receive directions about a Prosecution Service decision to investigate a corruption case.

In 2014, Joko Widodo (Jokowi) was elected as the new President. As there was legitimacy from the constitutional court for the presidential prerogative to hire and fire a Chief Prosecutor as a cabinet member, Jokowi hired M Prasetyo, a former public prosecutor and politician from the National Democratic Party (Nasdem). Critics said that Prasetyo's appointment was a case of 'pork barrel politics', in which Jokowi constructed his cabinet from different political parties, in return for their political support in the presidential election. By naming Prasetyo as Chief Prosecutor, Jokowi positioned the Prosecution Service as a political weapon, to control and warn opposition politicians against destabilising his administration (Muhtadi 2015, 365). The Prosecution Service was also used by Nasdem to coerce sub-national executives into joining the party (Power 2018, 331). In addition to political impediment by the President, the Prosecution Service now had to deal with direct intervention in the prosecution process by political parties. As the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, or *KPK*) revealed, Nasdem politicians intervened in Gatot Pujo Nugroho's case, offering to influence the Prosecution Service to drop the corruption case against him.[126] Although there was public demand to

124 Basrief Arief worked with SBY during Megawati's Administration. SBY was the Coordinating Minister for Political and Security Affairs, and Basrief Arief was the Deputy Chief Prosecutor for Intelligence.

125 Interview with Basrief Arief, 2 December 2015.

126 Jakarta Globe, Top Prosecutor Denies Involvement Nasdem Bribery Case, https://jakartaglobe.id/news/top-prosecutor-denies-involvement-nasdem-bribery-case/, accessed 6 March 2016

reposition Prasetyo, it seems that Nasdem succeeded in convincing Jokowi not to replace Prasetyo.[127]

One member of the Prosecution Service reform team complained about Prasetyo's lack of willingness to reform the Prosecution Service.[128] Prasetyo did not persist with the previous Chief Prosecutor Arief's efforts to improve prosecution service bureaucracy. Instead, he took a step backwards by issuing policies which contradicted the Prosecution Service reform goals, such as not considering assessment results when deciding on the promotion process, and using the high official meeting to decide on a promotion. Prasetyo also reinstated the authority of the intelligence division to investigate corruption cases[129], by issuing a circular letter which repealed the PERJA regulation 011/A/JA/04/2013.[130] He also strengthened the military culture among public prosecutors, by introducing the swagger stick as a symbol of authority.[131]

2.10 Conclusion

> *"Like many other new states, Indonesia possessed no fully articulated ideology backed up by a powerful political organization. Without these, abolishing the old law could only mean a symbolic vacuum, into which chaos must rush. Or so it probably seemed."* (Lev 1973, 13)

Using the historical institutionalism approach (Fioretos, Falleti, and Sheingate 2016; Thelen 1999), this chapter discusses how temporal processes

127 Nasdem also used the media (Metro TV) to campaign for Prasetyo's success in the Prosecution Service. Metro TV organised and broadcasted the FGD (Focus Group Discussion) on the Prosecution Service, during a massive protest requesting a reshuffle of Prasetyo's cabinet in his capacity as Chief Prosecutor. See Misbahul Munir, *Mengembalikan Kepercayaan Publik Terhadap Prosecution Service* (Restoring Public Trust in the Prosecution Service), 1 December 2015, http://news.metrotvnews.com/read/2013/11/22/196472/kesadaran-keamanan-informasi-minim-permudah-penyadapan. Accessed 6 March 2016.

128 Interview with AG, 2016.

129 Former Chief Prosecutor Basrief Arief issued the PERJA, which revokes the intelligence division's authority to investigate corruption cases. Arief said that this regulation was enacted to end the conflict between prosecutors in the special crimes and intelligence divisions, when deciding whether a case can be prosecuted as corruption or not. In some cases, while the intelligence division agreed to investigate corruption cases, the special crimes division opposed investigation. As a result, there was no legal certainty for people being investigated by both divisions.

130 See the Chief Prosecutor's circular letter, SE-017/A/ JA/08/2015. As the PERJA regulation should have been repealed by a regulation of the same degree, it showed that the decision to return authority for corruption investigations to the intelligence division was intended to maintain political stability in the Prosecution Service. It seems that Prasetyo had not considered the impacts which had already been faced by suspects in the Arief period (See 3.2.3: The Prosecution Service as State Intelligence).

131 A swagger stick is a short stick or riding crop, which is usually carried by the military as a symbol of authority, https://en.wikipedia.org/wiki/Swagger_stick

influence the origin and transformation of a prosecution service, governing both political and economic relations. I therefore divide the history of the Indonesian Prosecution Service into political conjunctures when concerted efforts were made to put important new institutional frameworks in place, and periods during which those frameworks have provided a relatively stable structure for politics or policymaking.

This chapter presented a discussion of post-independence ideological contestation, showing that Indonesia's criminal justice system still has similar problems to those it suffered during the colonial period. Like other post-colonial states, Indonesia has an ambition to apply the rule of law, in order to provide its citizens with better protection and justice.[132] However, the regime's interest in maintaining political stability and public order influences the rule of law discourse, keeping it in line with so-called 'Indonesian values'. This study shows that a vague state ideology, which has been interpreted based on the regime's best interests, affects criminal justice actors' understanding of how they can exercise discretionary powers within criminal procedure.

Since late colonial times, discussion of whether criminal justice institutions should prioritise the rule of law over law and order has persisted in Indonesia. The Dutch colonial government established a dual criminal justice system, wherein the native system was designed to maintain public order; therefore, the native system actually provided less protection for native defendants. On the other hand, the European system upheld the rule of law principle, which provided more protection for European citizens. Since there were enormous protests against this criminal justice division,[133] the Dutch administration responded by introducing a new criminal procedure (*Herziene Inlandsch Reglement/HIR*), intended to provide better protection for native defendants, compared to the previous procedure. The Dutch administration began to modernise the prosecution process in the native courts (*Landraad*), repositioning native prosecutors (*Jaksa*s), placing them under the control of assistant residents and public prosecutors with a Dutch legal background (*Openbaar Ministrie*).

The Japanese military occupation of the Netherlands East Indies in 1941 interrupted Dutch efforts to modernise the native criminal justice system. Unlike the Dutch, the Japanese colonial administration was led and controlled by the military. Since the Japanese were facing the Pacific War, colonial bureaucracy was militarised. The Japanese recruited one million natives and trained them to assist them in the coming war. The

132 Article 1 (3) of the Constitution.

133 There were many protests against the native criminal justice system. In 1917, for instance, some prominent leaders of Sarekat Islam (the most significant native organisation in the Netherlands East Indies), such as O.S Tjokroaminto and Semaoen, complained about unjust treatment by justice actors, who could easily detain natives in a pre-trial process, with insufficient evidence (Ravensbergen 2018, 379–80).

justice system was also adjusted for this reason. The Japanese applied the HIR as a criminal procedure, but they adjusted the procedure in order to serve and maintain public order. The Japanese repealed the position of Chief Prosecutor, and merged the police and prosecution services together under the title of Ministry of Security. Since the Japanese incarcerated most of the Dutch legal officials (including the public prosecutors), the military administration had to recruit natives to work as public prosecutors.

After Indonesia gained independence in 1945, the Indonesian government seems to have committed to fostering the rule of law in its criminal justice system. The new government restructured the position of Chief Prosecutor (which had been repealed by the Japanese), to become the leader of the Prosecution Service. The administrative position of Chief Prosecutor fell under the Minister of Justice, but the Chief Prosecutor was also a part of the judiciary, as in the Dutch colonial period. Chief Prosecutor Gatot Taroenamiharjo, who obtained his doctoral law degree from Leiden University, was appointed as the first republican Chief Prosecutor. Since the new republic suffered from a lack of professional lawyers with a thorough understanding of Dutch criminal procedure, the HIR was used to govern criminal procedure. However, as there was a revolutionary war from 1945 to 1949, the Prosecution Service could not operate effectively.

After the revolutionary war ended in early 1950, criminal justice actors (including the Prosecution Service, courts, and police) could start to operate properly. The new government adjusted criminal procedure in Emergency Law 1/1951, by reclaiming the term *Jaksa* as the translation of *Officieren Van Justitie* and *Magistraat* in the HIR. The government renamed the HIR as *Reglemen Indonesia yang Diperbarui* (RIB, or Amended Indonesian Regulation), and it became the official criminal procedure. However, since the Indonesian government dreamed of its own procedure, Emergency Law 1/1951 positions the RIB as guidance for criminal justice actors when dealing with cases. Actors can waive the RIB if they think the procedure is not in line with their interests. This provision had far-reaching consequences later on.

However, since criminal justice actors (like the police and Prosecution Service) had courageous leaders who insisted on maintaining and fostering the rule of law (Feith 2007, 320), the criminal justice system began to operate well, and reached a golden age (Lev 2007, 238). As Lev (1973) argues, the elite tends to play an important role in imposing new institutional models on a society, whether or not the society itself is receptive (Lev 1973, 2), and it seems that, during this period, Chief Prosecutor Soeprapto succeeded in upholding the rule of law in the prosecution process. The Prosecution Service could choose to use the RIB or the SV (the Dutch criminal code), according to which of these offered better protection for the defendants of a case. Chief Prosecutor Soeprapto resolved criminal legal pluralism, by advising the public prosecutor to exercise the opportunity principle when dealing with criminal cases which had already been settled by *Adat* criminal law (Yahya 2004, 33-34).

The rise of military-political power in 1959 halted this effort. The President dismissed Chief Prosecutor Soeprapto and National Police Chairman Soekanto Tjokrodiatmodjo from their positions. From that time onwards, the Prosecution Service and police were militarised. The public prosecutor was indoctrinated with military values, to ensure their loyalty to the regime. The government applied colonial law with Indonesian-based interpretations, while it tried to create Indonesian legal norms to replace the colonial model (Massier 2008, xx). In the Guided Democracy era (1959-1965), these norms were proposed and established as Indonesian legal interpretations, by Minister of Justice Sahardjo.

Sahardjo introduced the *Pengayoman* concept.[134] According to this concept, the rule of law must be based on community wisdom, which is represented by the leader's wisdom. During Guided Democracy, the idea of the President as the greatest leader and wisest man in the community was promoted. Therefore, the President's discretion became the law itself (Sahardjo 1963). The military New Order regime (1965-1999), expanded this *Pengayoman* concept further, not only in terms of legal interpretation but also in terms of social and political understanding. Leaders had the power to interpret the law, based on their own positions as representatives of public wisdom. Thus, a leader's discretion was considered to be a demonstration of both policy and wisdom, and it was used as a reason to legitimately apply or ignore rules. Hence, this power to use unlimited discretion affected law enforcement. The regime controlled prosecution policies to suit its own political interests. In general, it seems that Indonesian criminal justice actors emphasised law and order in dealing with criminal cases.

This situation was unlikely to change after the 1945 Constitution was amended in the post-authoritarian military regime. Although the new constitution guaranteed judicial independence, Prosecution Service Law 2004 makes the Chief Prosecutor's position dependent on the President's political power. In addition, the Prosecution Service retains the military culture set up by previous regimes to control public prosecutors. In the next chapter I will show that these toxic organisational norms have succeeded in shaping the Prosecution Service's structures, values and practices, and promoting rule-breaking as long as it is in line with the government's political interests (cf. van Rooij and Fine 2018).

134 The *Pengayoman* is symbolised by the Banyan Tree, and it represents both protection and succour (Lev 2000, 119).