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

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4 The Indonesian Prosecution Service within the Criminal Justice System: Its Tasks, Powers, and Relationship with other Criminal Justice Actors

4.1 Introduction

This chapter presents how the public prosecutors' tasks and powers within the criminal justice system have been designed to serve the regime in retaining its power. Although the authoritarian New Order regime of President Soeharto ended in 1998, the new government retained certain provisions obligating the Indonesian Prosecution Service (IPS) to serve the ruler's political interests. However, the decreasing political power of the President, the strengthening of the role of parliament and the judiciary in the constitution, and the emergence of various civil society actors, all inevitably affect how the Prosecution Service exercises its powers and duties. Therefore, the IPS' top-level managers must adjust their functions within IPS law – i.e. as public prosecutors in criminal cases, as state lawyers in civil law disputes and administrative cases, and as state intelligence – so that they remain in line with the demands of political actors.

Besides, since public prosecutors require other criminal justice actors (such as the police and the courts) to achieve their mission, I will also discuss the relationship between the IPS and other criminal justice actors. These criminal justice actors experienced similar problems to the IPS during the New Order. The authoritarian regime repealed their independence and emphasised their loyalty to the government, instead of encouraging them to demonstrate legal professionalism. As Lev (2000, p. 97) noted, changes in the relationship between such actors are very influential on the evolving character of justice. This chapter will discuss the extent to which the Prosecution Service interacts with criminal investigation institutions, advocates and legal aid providers, the ministry of law and human rights, and the courts. As the KUHAP (the Code of Indonesian Criminal Procedure) meant that prosecutors lost their power to supervise the pre-trial stage, they have developed strategies to influence other actors, in line with their mission. This chapter will show how the Prosecution Service exploits the weaknesses of other criminal justice system actors, in order to achieve its own goals.

4.2 Legal Resources: Tasks and Powers within the Prosecution Service

The Indonesian Prosecution Service is a government body that implements state power in the prosecution process, and performs other tasks according to the law.[1] As part of this executive power the Prosecution Service has duties, not only as the provider of public prosecution, but also as state intelligence, and as state attorney in administrative and civil law disputes.[2] Furthermore, the KUHAP and the 2004 IPS Law differentiate between the terms *Jaksa*[3] and Public Prosecutor (*Penuntut Umum*). *Jaksa* means the state officials (or civil servants) who have the authority to prosecute, execute judgements, and perform other duties based on law (Art 1 (1) of the IPS Law jo. Article 6 (a) of the KUHAP), while the public prosecutor is described as *Jaksa*, who has the authority to prosecute and execute judgements only (Article 1 (2) of the IPS Law jo. Article 6 (b) of the KUHAP).

In addition to the IPS Law and the KUHAP, provisions for the IPS can also be found in laws such as the Indonesian Criminal Code (known as *Kitab Undang-undang Hukum Pidana*, or KUHP), the Anti-Corruption Law, the Economic Crime Law, the Blasphemy Law, the Human Rights Law, the Juvenile Justice System Law, the Tax Law, the Foundation Law, and the Bankruptcy Law.[4] Even though the government granted Nanggroe Aceh Darussalam province special autonomy to impose sharia criminal law, the public prosecutor still plays an important role in determining if a case may be prosecuted using sharia law (in *Qanun*[5]) or the national Criminal Code (Article 39 of the 2004 Law Prosecution Service jo. Law 18/2001 on Aceh Special Autonomy).

The IPS Law gives the Chief Prosecutor special powers as supreme prosecutor.[6] Article 35 of the IPS Law stipulates the duties and authorities of the Chief Prosecutor, as follows:

1 Article 2 (1) of Law 16/2004 on the Indonesian Prosecution Service (hereafter, the IPS Law).

2 Article 30 of the IPS Law.

3 For more details on the term *Jaksa*, see Chapter 2.

4 Article 2 (2) of Law 37/2004 on Bankruptcy states that the IPS can bring a company bankruptcy before the court, for public interest reasons.

5 Law 18/2001 on Aceh Special Autonomy allowed the local legislature to formulate *Qanun*, the term for regional regulations in Aceh. See *Qanun* Aceh 6/2014 on Islamic Criminal Law.

6 The Military Court Law also mentions that the Chief Prosecutor is the Supreme Prosecutor in the Military Court. See Elucidation of Article 57 of Law 31/1997 on the Military Court. The IPS planned to establish the Deputy Chief Prosecutor for Military Crimes. Requisitoire Magazine, *Perlu ada Jaksa Agung Muda Militer di Kejaksaan Agung* (It is necessary to have the Deputy Chief Prosecutor for the Military in the Supreme Prosecution Office) http://requisitoire-magazine.com/2014/07/14/perlu-ada-jaksa-agung-muda-militer-di-kejaksaan-agung/, accessed 2 September 2018.

a. *To decide and control policies within the Prosecution Service;*
b. *To streamline the law enforcement process conducted by the Prosecution Service;*
c. *To dismiss any case, in the interests of the public;*
d. *To file cassation in the interests of law to the Supreme Court, in criminal law, civil law and administrative disputes;*
e. *To give legal advice to the Supreme Court, when examining criminal cases during the cassation process;*
f. *To impose travel bans on criminal case suspects who wish either to travel from Indonesia or to enter Indonesia.*

The Chief Prosecutor's power not only covers the prosecution policies within the IPS; it also maintains the uniformity of judgements within the judiciary by giving advice to the Supreme Court and filing cassation in the interests of law (MaPPI FH UI 2012, 6). Some observers say that these judicial powers are similar to the authority held by the Dutch *Procureur-Generaal* in the Supreme Court in the Netherlands today (*Sistem Kesatuan Hukum Dan Beberapa Topik Tentang Hukum & Peradilan Di Negeri Belanda* 2011). The IPS combines two different functions, which are held by two different officials in the Dutch system. In the Netherlands, the *Openbaar Ministerie* is in charge of controlling prosecution policies, while the Supreme Court *Procureur-Generaal* advises Supreme Court judges during cases (van de Bunt and van Gelder 2012, 121; Chorus, Hondius, and Voermans 2016, 450). Unlike the function of the Dutch *Procureur-Generaal*, who files cassation in the interests of legal uniformity, the IPS uses this power to enforce its policies within the prosecution process. It is clearly stated, in Vice Chief Prosecutor Circular Letter B-281/E/6/1996, that a Chief Prosecutor's legal advice to the Supreme Court is drafted in order to reinforce a prosecutor's cassation statement (*Memori Kasasi*).[7]

The next section will discuss how public prosecutors carry out their roles as criminal prosecutor, state attorney, and state intelligence. I will also discuss the difficulties prosecutors face in defining the three roles, when handling criminal cases.

4.2.1 The Public Prosecutor in Criminal Cases

Before the KUHAP was enacted in 1981, the Prosecution Service was authorised to carry out investigations of all crimes and violations of law, but this power decreased after the KUHAP was enacted, as it also allows police and civil service investigators certain investigative powers.[8] As the KUHAP adopts the principle of functional differentiation, which divides criminal procedure stages based on the actors involved, prosecutors' duties and powers are also more limited within the prosecution process. Prosecu-

7 See 5.4.4: Appellate Procedure

8 At least 30 civil service investigator bodies have been established since the KUHAP was enacted in 1981.

tors only examine investigation files after the police have completed their investigation; then they carry out any binding court decisions (Articles 137 and 270 of the KUHAP).

However, the transitory provisions of Article 284 Section 2 of the KUHAP allow the IPS to retain its investigative power, as follows:

> *"Within two years of the promulgation of this law, all cases shall be subject to its provisions, with temporary exceptions for special provisions on criminal procedure, as mentioned in certain laws, until they are amended or declared invalid."*[9]

Based on these provisions, the IPS argues that it still has the power (outside of the KUHAP) to investigate special crimes. With this in mind, the IPS has adjusted its organisational structure by dividing the position of Deputy Chief Prosecutor for Operation into two deputy positions:[10] a Deputy Chief Prosecutor for General Crimes (*algemeen strafrecht*); and a Deputy Chief Prosecutor for Special Criminal Cases (*bijzonder strafrecht*).[11] The most striking difference between these divisions is the relative authority to investigate. Under the New Order regime, the IPS was authorised to investigate subversive activities and corruption. When the Anti-Subversion Law was repealed after President Soeharto's fall in 1998, the IPS retained its power to investigate corruption.

Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 mentions that the General Crime Division prosecutes crimes that are regulated in the KUHP, specifically: crimes against people and property; crimes against state security and public order; and general crimes regulated outside of the KUHP, including criminal acts or misdemeanours that are regulated by local governments (PERDA).[12] Chief Prosecutor Regulation PERJA 017/A/JA/07/2014 stipulates that the Special Crimes Division deals with corruption, tax crimes, economic crime (customs and excise), human rights violations[13], and money laundering cases.[14] The IPS also has the authority

9 Article 17 of Government Regulation 27/1983 on Implementation of the KUHAP states that public prosecutors can function as criminal investigators.

10 Presidential Decision 86/1982.

11 Theoretically, general crimes are defined by the offences stipulated in the KUHP, while special crimes are criminal acts that sit outside the KUHP (Mudzakkir 2008). However, in practical terms this categorisation is different from the categorisations used by the police, the IPS, and the judiciary. Moreover, there is no similarity between the different categorisations used by these institutions. For example, terrorism is categorised as a special crime by the police, but the IPS classifies it as a general criminal offence.

12 Chief Prosecutor Regulation 036/A/JA/09/2011 also includes certain criminal provisions outside of the KUHP, such as juvenile law, cyber-crime and terrorism.

13 The IPS is the only institution with the authority to investigate cases of human rights violation. See Law 26/2000 on the Court of Human Rights.

14 The Special Crimes Division only handles money laundering cases within specific offences, such as corruption, and other crimes dealt with by the division. The general crimes division also handles money laundering cases within offences investigated by the police or other civil service investigators.

to investigate any corruption that is committed by civilians or the military (Article 39 of Law Number 31, 1999).

However, if an offender is being prosecuted for several offences which were committed concurrently, the IPS' differentiation of the procedures for general crimes and special crimes (via its dual criminal prosecution divisions) complicates the prosecution process.[15] Because the Special Crime Division cannot prosecute the general *and* special crimes in a single case, without cooperating with the police or civil service investigators, the division usually limits itself to prosecuting special crimes and disregards any general crimes.[16]

In 2007, the Constitutional Court reviewed the IPS' power to conduct criminal investigations.[17] Subarda Midjaja (Subarda) filed a constitutional review of this IPS power, because he was named by the IPS as a suspect in a case of alleged soldier health insurance corruption, even though the case had already been investigated and dismissed by the police beforehand.[18] Subarda argued that the Prosecution Service's authority to reinvestigate the case violated his constitutional rights. The IPS argued that its investigation was not double jeopardy, since the police used the KUHP to investigate the case, and the Prosecution Service used the Corruption Law. The IPS stated that the KUHAP allows an investigator to reinvestigate a case which was earlier waived, as long as there is strong evidence for doing so.

The police were involved as a party at the trial, and they asked the Constitutional Court to eliminate the IPS power to investigate the corruption case.[19] The police argued that the IPS should not conduct its own inves-

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15 *Concursus realis (*in Dutch*: meerdaadse samenloop).* See Article 65 of the KUHP. *Concursus idealis* (in Dutch: *eendaadse samenloop).* See Article 63 of the KUHP.

16 Personal Communication with a prosecutor in the Special Crimes Division, 2015.

17 Constitutional Court Decision 28/PUU-V/2007. See Hukum Online, *Istri Subarda Ajukan Uji Materi UU Kejaksaan* (Subarda's wife filed the constitutional review on the IPS Law) http://www.hukumonline.com/berita/baca/hol18096/istri-subarda-ajukan-uji-materi-uu-kejaksaan, accessed 23 February 2016. Apart from this case, the Constitutional Court also reviewed the IPS' authority in the corruption investigation. See Constitutional Court Decision 2/PUU-X/2012 and Constitutional Court Decision 16/PUU-X/2012. In both decisions, the Constitutional Court retains the IPS authority to investigate. Hukum Online, *Pertarungan Wewenang Polisi dan Jaksa Dalam Menyidik Perkara Korupsi* (Contestation between the police and prosecutors in investigating corruption cases) https://www.hukumonline.com/berita/baca/hol18538/pertarungan-wewenang-polisi-dan-jaksa-dalam-menyidik-perkara-korupsi-, accessed 12 June 2018.

18 In 2004, Subarda was already being investigated by the police for alleged embezzlement based on the KUHP (or, Criminal Code). Following a request from the Inspector General of the Department of Defence to drop the case, the police issued the cessation of the investigation - S.Tap/103/VII/2004/Dit-I, 20 July 2004. See Constitutional Court Decision 28/PUU-V/2007, p. 4.

19 The police argue that the heavy standards of the IPS burden their investigation work, while the IPS' investigation work is less burdened and more convenient. The police feel that the IPS prefers to conduct its own investigations into corruption cases, to gain more *rezeki*. The police also think that the IPS does not provide any serious supervision for small cases that are being investigated by the police (Rajab 2003, 199).

tigation and, if the IPS were to find new evidence, it should be given to the police, so that they could reopen the case.[20] The police also complained that the IPS often returns police investigation files in corruption cases, because of insufficient evidence. The police therefore had the impression that the IPS was underestimating police investigators' capacity to handle corruption cases.[21] The police ultimately believed that the IPS' power to investigate corruption cases had caused tension and unfair competition between them and, as a result, the public was suffering legal uncertainty.[22]

The Prosecution Service responded to police complaints by presenting data on corruption case investigations from 2003 to 2007, which showed that every year an average of 80% of the corruption cases in Indonesia were investigated by the IPS. Since the new government priority during the reform period was to eradicate corruption, repealing the IPS' power to investigate corruption cases had the potential to disrupt the government agenda.[23] The IPS also argued that prosecutors are more professional, and have more experience in handling corruption, than police officers. Moreover, the IPS argued that using a single institution to investigate and prosecute corruption is more effective, because public prosecutors can directly verify facts and evidence during the investigation process, thereby anticipating other possibilities that might arise during the trial process.[24] In its decision, the Constitutional Court admitted that corruption investigation by the IPS and the police overlaps, which may affect legal certainty. However, the Constitutional Court rejected Subarda's judicial review to repeal the Prosecution Service's power to investigate corruption cases, because Subarda did not have any legal standing.[25] It seems that the Constitutional Court was being cautious, and did not want to get involved in the tension between the IPS and the police. The court suggested that parliament and the President should draft a new law, to decide whether the IPS or the police should be the sole institution investigating corruption cases.

However, IPS duties regarding corruption issues are not limited to investigation and prosecution processes. Since the IPS is part of the executive, prosecutors have an additional duty to prevent government corruption. President Joko Widodo instructed the IPS and police not to investigate and prosecute regional heads for corruption, because of their discretion to accelerate infrastructure projects.[26] Chief Prosecutor Prasetyo then

20 Constitutional Court Decision 28/PUU-V/2007, p. 70.
21 Ibid, p. 71.
22 Compared to the KPK (which only handles 4% of corruption cases) and the police (who only investigate 16% of corruption cases). Ibid, p 77.
23 Ibid, p. 81.
24 Ibid, p. 84.
25 Ibid, p 102.
26 Tirto, *Ketika Jaksa Jadi Centeng Proyek Infrastruktur* (When the prosecutor became the government's hitman for infrastructure projects), https://tirto.id/ketika-jaksa-jadi-centeng-proyek-infrastruktur-bZ5z, accessed 12 June 2018.

responded to the instruction by establishing the Team for Guarding and Securing the Government and its Development Projects (or TP4).[27]

The team of prosecutors in the TP4 must ensure that government infrastructure projects are in line with legal procedures.[28] However, since TP4 can only oversee the formal documents and procedures for a project, there is no guarantee that the project will be free of corruption. TP4's position is vulnerable, because corruptors may use the TP4 assistance report as a shield, if they are involved in a corruption case which the Special Crimes Prosecutor wants to investigate. Although Chief Prosecutor Regulation 04/A/JA/11/2016 states that prosecutors must investigate and prosecute cases of corruption in a TP4-supervised project, as far as I have discovered, the IPS has never investigated any allegations of corruption in projects supervised by TP4. It is likely that the Corruption Eradication Commission (KPK) only investigates and prosecutes corruption in projects overseen by TP4 prosecutors.[29] In addition, some prosecutors gain *rezeki*[30] from the TP4. A NGO, *Masyarakat anti Korupsi Indonesia* (or MAKI) asked the Chief Prosecutor to dissolve TP4, because it found that the prosecutors were either extorting the contractor or asking to be involved in the project.[31]

4.2.2 The Public Prosecutor as State Attorney in Civil Law and Administrative Disputes

Originally, the prosecutor's function as state attorney was to handle civil law disputes related to criminal cases being handled by the IPS.[32] This role is adopted from Article 3 of *Staatsblad* 1922 No. 522 on the *landsadvocaat*, Article 123 (2) of the HIR, and Article 147 of the Rbg, which state that prosecutors can represent the government in civil law disputes. Therefore, the IPS positioned the Directorate of Civil Law disputes under the Directorate General of Crimes (Jusuf, 2014). The government then upgraded these

27 Chief Prosecutor Regulation 04/A/JA/11/2016 on the Team for Guarding and Securing the Government and its Development Projects.

28 Kompas.com, *Jaksa Agung Ancam Pecat Jaksa yang Tak Patuhi Instruksi Jokowi* (The Chief Prosecutor warns public prosecutors who do not obey the Jokowi's instructions), 20 July 2016 https://nasional.kompas.com/read/2016/07/20/13210581/jaksa.agung.ancam.pecat.jaksa.yang.tak.patuhi.instruksi.jokowi, accessed 12 June 2018.

29 Detik, *Soal OTT KPK di Pamekasan Wapres JK Soroti Peran Tim TP4 Kejagung* (The KPK's sting operation against Pamekasan District prosecutors - Vice President JK criticises the role of the TP4 team of the IPS) https://news.detik.com/berita/d-3587374/soal-ott-kpk-di-pamekasan-wapres-jk-soroti-peran-tim-tp4-kejagung, accessed 12 June 2018.

30 For more discussion on *rezeki*, see chapter 3.

31 Afdal Namakule, *Oknum Jaksa Diduga Peras Proyek Pemerintah di Bali, MAKI harap TP4D dibubarkan* (Prosecutor attempted to extort officials in Bali, and MAKI asked the IPS to dissolve TP4) https://fin.co.id/2018/09/13/oknum-jaksa-diduga-peras-proyek-pemerintah-di-bali-maki-harap-tp4-dan-tp4d-dibubarkan/, accessed 7 March 2019.

32 The prosecutor would file a civil lawsuit against the family of a defendant who had passed away.

functions to handle not only civil law disputes related to criminal cases, but also civil law cases related to the government and its companies.[33] When Law 5/1986 on the Administrative Court was enacted, the government added powers for the IPS to represent the state in disputes regarding administrative law (Jusuf 2014, 125). The IPS then created the special position of Deputy Chief Prosecutor for Civil Law and Administrative Disputes, because Prosecution Service Law 5/1991 had added the state attorney role for prosecutors.

As the state attorney[34] in civil law and administrative law,[35] the prosecutor has to provide legal assistance,[36] legal opinions[37], and other legal action[38] on behalf of the state or government.[39] The prosecutor's function as the attorney in civil law disputes has been regulated in various laws. Some provisions in the Civil Code[40] regulate: the prosecutor's role in child custody requests (Article 360); the prosecutor's right to request the power of attorney necessary to manage the property of a person who is untraceable by the court (*afwezigheid*) (Article 463); and the prosecutor's right to request a calculation report for disputed objects of sequestration status (Article 1737). Further, Law 1/1974 on Marriage gives prosecutors the authority to request that a judge cancels a marriage.[41] Also, Law 31/1999 mentions that the state attorney may lodge a civil suit, if s/he finds evidence of state

33 Chief Prosecutor Decision KEP-116/JA/6/1983.

34 Originally, this title was *pengacara wakil negara* (the State Lawyer), which was then adjusted to *Jaksa Pengacara Negara* (the State Attorney Prosecutor) (Jusuf 2014, 52).

35 Article 30 (2) of the IPS Law. Presidential Regulation 38/2010 jo 29/2016 mentions the state attorney's role in enforcing the law by filing civil suits to the court, such as marriage cancellation, company dissolution, and bankruptcy, as well as other tasks, such as providing legal service by giving legal counsel in civil law and administrative disputes within the community.

36 Legal Assistance means that the prosecutor functions as the State Attorney in civil and administrative law disputes, on behalf of state institutions, government agencies, and state-owned companies, in either the litigation or non-litigation process. The prosecutor can represent these entities as plaintiffs or defendants in civil law and administrative trials.

37 Once the IPS leadership approves a request from state institutions, government agencies (at local or national level) or state-owned companies, the operator can function as State Attorney, providing legal opinion or legal assistance in civil and administrative law disputes.

38 'Other legal action' means that the prosecutor functions as the mediator or facilitator in civil and administrative law disputes between state institutions, state-owned companies, and government agencies (at national and local levels).

39 Including state agencies or institutions, central or local government, and state-owned companies.

40 Indonesia still uses the Civil Code inherited from the Dutch Colonial Era, which has never been officially translated into Indonesian.

41 Article 26 (1) of Law 1/1974 on Marriage jo. Government Regulation 9/1975 regulates that, if a marriage takes place that is against the law, prosecutors can submit a request to court to annul the marriage.

financial losses in a corruption case wherein the defendant died during an investigation or trial.[42]

The Prosecution Service may file for a company's bankruptcy, in the public interest (Article 2, paragraph 1 of Law 37/2004 and Government Regulation 17/2000).[43] Law 40/2007 on companies also authorises prosecutors to examine a bankruptcy application (Article 138), and to request that the court dissolves the company in the public interest (Article 146).[44] In addition, the prosecutor may submit a request for the dissolution of a private foundation (Law 18/2001 jo. Law 28/2004).

However, the IPS rarely exercises the powers mentioned above. I found only one case where the IPS filed for company bankruptcy in the public interest (in 2005), which happened after intense demonstrations by employees of the company, demanding that their salaries be paid. The IPS filed a bankruptcy request against Aneka Surya Agung Company in the Medan Commercial Court, in order to force the company to pay the employees' salaries.[45]

Public Prosecutors also handle civil law disputes for state-owned companies (SOEs). Some lawyers have protested against the prosecutor's role in this regard, since it may lead to abuses of power.[46] One such example was the land dispute case between the Pelindo company and landowners in Makassar. The IPS prosecuted the land owners for illegal land grabbing. Since the court decided that the case was a civil law dispute, not a criminal case, the IPS (acting as the civil law attorney for PT Pelindo) summoned the

42 A notable example of this is when the IPS filed a civil law dispute on Soeharto corruption's case: Kompas, Kejagung Klaim Menangkan Kasus Perdata Soeharto (Supreme Prosecution Office claimed that they won the Soeharto civil law cases) https://nasional.kompas.com/read/2008/03/28/11573325/kejagung.klaim.menangkan.kasus.perdata.soeharto, accessed on 8 March 2019

43 Article 2 (2) states that the IPS may file a bankruptcy application for public interest reasons when: a) the debtor escapes; b) the debtor embezzles some of their wealth; c) the debtor owes a debt to state-owned enterprises, or any other enterprises that raise funds from the community; e) the debtor has no intention to repay the debt due, or is not being cooperative about solving their debt problem; or, f) there are any other conditions relating to public interest, according to the IPS.

44 There is no public interest definition in the Law on Companies.

45 Hukum Online, *Jaksa Pernah Ajukan Pailit Demi Kepentingan Umum*, (Prosecutors filing bankruptcy requests, for public interest reasons) http://www.hukumonline.com/berita/baca/lt4fe179a67ba94/jaksa-pernah-ajukan-pailit-demi-kepentingan-umum, accessed 12 June 2018.

46 Hukum Online, *Masalah Hukum Jika BUMN Gunakan Jaksa Pengacara Negara* (Legal Issues when the SOE requests (the IPS as) state attorneys (in civil law disputes)), https://www.hukumonline.com/berita/baca/lt53630f8713fa2/masalah-hukum-jika-bumn-gunakan-jaksa-pengacara-negara, accessed on 3 May 2018. Watch Indonesia, *Sebaiknya Kajati Baca Lagi UU Kejaksaan* (The Head of the High Prosecution Office should read the IPS Law): http://www.watchindonesia.org/1563/uu-kejaksaan-negara-pemerintah?lang=ID, accessed on 3 May 2018.

landowners and asked them to release the land for PT Pelindo[47] (MaPPI FH UI 2012, 20). The summoning method is also used by the IPS when it acts as the attorney for the State Health Care and Social Security Agency (BPJS), to gain contributions from private companies towards healthcare for their workers. As the Head of the District Prosecution Office himself summons the company to the Prosecution Office, most of the companies pay the contribution.[48] In 2012, the Supreme Court banned prosecutors from representing government companies at trial, because Article 11 of Law 19/2003 on State-Owned Companies categorises government companies as private legal entities.[49] However, the Supreme Court later revised its circular letter, and it now allows prosecutors to represent SOEs in civil cases, based on Article 24 Presidential Regulation 38/2010 jo 29/2016, which mentions the IPS' role in civil law disputes involving SOEs.

The IPS also functions as government attorney in administrative law cases. In such cases, prosecutors act as legal representatives of the government. However, although the prosecutor is recognised as a state lawyer, the government does not specifically mention the prosecutor's position as government state lawyer handling judicial review cases in the Supreme Court or Constitutional Court (Presidential Regulation 100/2016). Bedner found that some Administrative Court judges complain about the prosecutor's capacity in administrative cases (Bedner 2001), and the prosecutors I met indeed confessed that they do not have the skills required to handle administrative suits.[50] As I discussed in Chapter 3, this is likely to be caused by the poor management of training and the IPS' limited budget.[51] Besides, the promotion system creates problems regarding the prosecutor's placement as a state lawyer. Even if a prosecutor receives adequate training in administrative law, there is no guarantee that the IPS will place him/her in the administrative law division.

Most civil society organisations have criticised the prosecutor being given the role of state attorney since the government drafted the 2004 Prosecution Service Law. Indonesia Corruption Watch (ICW), a reputable NGO, argues that prosecutors functioning as state attorneys in civil law and administrative disputes hampers their main roles as corruption inves-

47 PT Pelabuhan Indonesia (Pelindo, or the Indonesian Port Corporation) is a state-owned company that is involved in port and harbour services.

48 Kejari Jakbar, *Perusahaan Penunggak Iuran BPJS Ketenagakerjaan Dipanggil Kejaksaan Negeri Jakarta Barat* (Companies that tried to avoid paying BPJS insurance were summoned by the West Jakarta District Prosecution Office): http://www.kejari-jakbar.go.id/index.php/arsip/berita/item/611-perusahaan-penunggak-iuran-bpjs-ketenagakerjaan-dipanggil-kejaksaan-negeri-jakarta-barat, accessed on 20 September 2018.

49 Supreme Court Circular Letter 07/2012.

50 Personal Communication, 2015. A judge in the Banten Administrative Court admitted that most prosecutors have poor skills for handling cases in the administrative court. Therefore, district governments also hired professional lawyers to assist with their case at trial. Personal Communication, 13 August 2019.

51 See. 3.4: Human Resources

tigator and prosecutor for the government and government companies.[52] ICW believes that a prosecutor could face difficulties in investigating and prosecuting government corruption, because s/he is also involved in the case in their capacity as attorney. Since the attorney must keep and secure his/her client's information regarding a case, it would be a contradiction of the prosecutor's duties to reveal and investigate acts that are not in line with the law.

In addition to their role as state attorney in civil law and administrative disputes, public prosecutors also function as legal consultants for the government. The IPS Annual Report notes that the prosecutor's predominant role in civil and administrative law is to provide legal assistance to the government.[53] Most government institutions involve prosecutors in their projects, in order to prevent a corruption prosecution arising because of maladministration. As I mentioned above, President Joko Widodo instructed the IPS to act as a consultant for government projects, rather than becoming more active in prosecuting corruption cases. This fact likely indicates that the government employs the IPS as legal consultant, not on the basis of the IPS' expertise, but on the basis of its important role as corruption investigator.

This is exactly why most government institutions propose that the IPS assists them, either as attorney or legal consultant.[54] If the IPS approves such a proposal, the top manager will sign a Memory of Understanding (MoU) stating that the IPS (at either district or provincial level) will assist the institution; this can include providing legal advice and acting as attorney at trial, for as long as the government institution covers an operating budget to include the prosecutor's honorarium.[55] Although prosecutors in the Civil and Administrative Law Disputes Division handle implementation of the MoU, the MoU is always signed by the top manager (for example, the Head of the District Prosecution Office). As I described above, any corruption prosecution of such an institution would be conducted only after receiving approval from the leadership.

4.2.3 The Public Prosecutor as State Intelligence

The intelligence division of the Prosecution Service is known as the *Indra Adhyaksa* (or, the Prosecutor's Eyes). This division adopted the colonial era intelligence division of the Dutch East Indies' *Procureur Generaal*, i.e.

52 Indonesia Corruption Watch, *Konflik Kepentingan Wewenang Jaksa* (The conflict of interest in prosecutors' powers), https://antikorupsi.org/id/news/konflik-kepentingan-wewenang-jaksa-130704, accessed on 30 October 2018.

53 See the IPS Annual Report 2014, p 65.

54 For example see Portal Berita Pemerintah Provinsi Jawa Tengah, *MOU PEMKAB Dengan Kejaksaan Batang* (MOU between the Batang District Government and District Prosecution Office): https://jatengprov.go.id/beritadaerah/mou-pemkab-dengan-kejaksaan-batang/, accessed on 30 October 2018.

55 Interview with HH, the Head of M District Prosecution Office, 30 August 2015.

the *Algemeene Recherchedienst*, (ARD, or General Criminal Investigation Service), which monitored Indonesian political movements and ensured political stability within the colony.[56] However (as I mentioned earlier, in Chapter 2), this was adjusted under the administration of Chief Prosecutor Soeprapto, when the division was made responsible for the investigation of important criminal cases.[57] According to former Deputy Chief Prosecutor for Intelligence, Prijatna Abdurrasyid, the division's role was to support the IPS in prosecuting top-level military officers involved in smuggling cases (Abdurrasyid 2001, 155,157). However, when the KUHAP repealed the IPS' power to conduct additional investigations, the IPS adjusted the intelligence division's authority to take preventative action (Hamzah 1984, 94).

The IPS' role in intelligence experienced another transformation when the New Order military regime came into power in 1965. With its anti-communist purge agenda, Army General Soeharto reorganised the IPS, appointing the Military Police Colonel as Deputy Chief Prosecutor for Operations and Intelligence. Soeharto ordered the Chief Prosecutor to cooperate with the Minister of Defence and Security, in order to maintain public order and to prosecute Indonesian Communist Party activists for an alleged coup (Article 14 of the Ampera Cabinet Presidium Decision 26/U/Kep/9/1966). In 1969, when Soeharto was appointed President, he upgraded the title of the IPS intelligence division's leader to Deputy Chief Prosecutor for Intelligence (Presidential Decree No. 29 of 1969). Deputies of Chief Prosecutors for Intelligence were appointed from among active military generals, which were recommended to the President by Army Commanders[58] (Lolo 2008, 131; Abdurrasyid 2001, 243-45). The intelligence division then played a role in prosecuting the regime's political opponents, using the draconian Anti-subversion Law.

In addition to prosecuting writers who opposed regime ideals, the IPS was authorised (by Martial Law 4/PNPS/1963) to search for and ban books that opposed or contained criticism of the regime's policies. During the New Order Regime,[59] the IPS also searched for and banned books related to communism (Soegiharto 1989, 288-98). In 2010, the Constitutional Court

56 See 2.3: The *Vereenigde Oostindische Compagnie* (VOC) and the Netherlands East Indies

57 See. 2.6: The Parliamentary Government

58 Prijatna Abdurrasyid confessed that Chief Prosecutor Soegiharto asked him to consult the Chief of Staff for the Armed Forces, Umar Wirahadikusumah, and the Commander in Chief of the Armed Forces (ABRI), Maraden Panggabean. In the following months, Prijatna asked President Soeharto himself about the candidate for the role of Deputy Chief Prosecutor for Intelligence. Soeharto questioned Prijatna in return: "Who do you want?" Prijatna said, "if I can choose it is better to have Ali Said, even though Ali Said and Suwandi are both good. Aren't they? (is that a) coincidence?" Soeharto said, "I will indeed appoint Suwandi to be MPR secretary". So, Ali Said was appointed Deputy Chief Prosecutor for Intelligence (Abdurrasyid 2001, 244–45).

59 See. 2.8: The New Order

repealed the Law, through its Decision 6-13-20/PUU-VIII/2010, but left in place the IPS power to oversee books in order to maintain public order, as stated in Article 30 of the 2004 IPS Law. The court stated that, for public order reasons, the IPS may seize books and prosecute authors, but it also stipulated that the IPS must respect legal due process.[60]

The IPS seems to maintain the New Order legacy when interpreting its function within state intelligence. Despite the fact that the IPS now appoints a Deputy Chief Prosecutor for Intelligence from its own ranks, it still retains military influence within the division, especially since intelligence prosecutors are trained at the army's intelligence training centre.[61] Since the IPS lacks prosecutors, the intelligence prosecutors in some offices are forced to function as criminal prosecutors. In addition, the promotion system creates further problems. There is no guarantee that a prosecutor with adequate intelligence skills will be appointed as an intelligence prosecutor.

Law 17/2011 on State Intelligence states that the IPS' intelligence function is similar to the police intelligence unit, when it comes to law enforcement intelligence (Article 13). However, there is no clear definition of 'law enforcement intelligence'. The State Intelligence Law delegates the description of IPS intelligence to the IPS Law, which contains only a vague definition of the IPS' intelligence role as: "the guardian of public order" (Article 30 (3) of the 2004 IPS Law).

The main task of the division is to act as a support system for other divisions, such as general crimes prosecution, special crimes investigation, or civil law and administrative law disputes. However, various intelligence division tasks may create a conflict of interest with criminal prosecution.[62] As stated in Article 15 (2) of Presidential Regulation 38/2010 jo 29/2016:

> "*The Prosecution Service intelligence duties, which include intelligence activities such as inquiry, security, and 'preconditioning', are intended to prevent criminal acts and to support the IPS' task of imposing the law by conducting preventative or repressive measures to guard state ideology, politics, economics, finance, socio-culture, defence and security (including banning people from leaving or entering Indonesia, where necessary)*[63]*, and to maintain public order.*"

60 Constitutional Court Decision 6-13-20/PUU-VIII/2010, pp. 245-246.

61 Pitu News, *Kabandiklat Kejaksaan Utus 40 Jaksa Belajar Intelijen Bersama TNI*, (the Head of the Prosecutor's Training Centre sent forty prosecutors to learn intelligence from the Indonesian Army): http://pitunews.com/kabandiklat-kejaksaan-utus-40-jaksa-belajar-intelijen-bersama-tni/, accessed on 8 October 2017.

62 Kejaksaan Republik Indonesia, *Peranan Intelijen Yustisial Kejaksaan Dalam Penyelesaian Perkara*, (The role of intelligence from prosecutors in investigating cases): https://www.kejaksaan.go.id/unit_kejaksaan.php?idu=28&idsu=34&idke=0&hal=2&id=1539&bc=, accessed on 4 December 2017.

63 Since only the Chief Prosecutor has the power to ban people, the intelligence function in this matter means that the intelligence division can give a suggestion or advice to the Chief Prosecutor about people who may be banned from going abroad or entering Indonesia.

Most intelligence prosecutors agree that their duties include conducting an inquiry (*penyelidikan*/LID), security (*pengamanan*/PAM), and preconditioning[64] (*penggalangan*/GAL), also known as LIDPAMGAL. IPS intelligence exercises its power of inquiry (LID) by gathering information from people who have been targeted via a procedure known as PULBAKET (*Pengumpulan Bahan Keterangan*, or Evidence Collection). IPS intelligence then conducts an interrogation of persons who they find 'suspect', based either on public reports or on the instructions of their leader. As I will also discuss in Chapter 5, the IPS authorises the intelligence prosecutor to conduct preliminary investigations of corruption cases. This power causes tension between intelligence prosecutors and prosecutors in the special crimes' division of the Supreme Prosecution Office. This is primarily because intelligence prosecutors may conduct the PULBAKET procedure in certain corruption case investigations, without consulting with the Special Crimes Division.[65]

The security function (PAM) of the IPS means that the intelligence prosecutor must secure the interests of the state, government, and government institutions against any threat or disruptions (Article 1 (19) of PERJA 037/A/J.A/09/2011). Furthermore, intelligence prosecutors must work and coordinate with other intelligence agencies such as the police and army, to ensure state security at both national and local levels via the Intelligence Committee (Article 1 jo. and Article 12 of Government Regulation 67/2013). During the New Order, the regime and army used this committee to support their political interests (Muradi 2013, 80-81). Since Law 17/2011 was enacted, this committee has been led by the district-level mayor, who acts as coordinator and gathers state intelligence to support security

64 Article 1 (21) Chief Prosecutor Regulation/PERJA 037 037/A/J.A/09/2011 states that Intelligence pre-conditioning" covers all attempts, events, works, and actions that are done in a planned, gradual and sustainable manner, by an intelligence organization in a cycle of intelligence activities, using an intelligence strategy and techniques to make, create, and/or change a condition or situation in a certain area, or to improve people's potential (most importantly, individual or group potential, but also people's potential generally) within a specific timespan, towards a level of state which is beneficial for carrying out IPS duties and efforts to overcome obstacles to the implementation of its main tasks, or to creating a condition and situation that is desired by the user.

65 Due to the tension, prosecutors' intelligence powers when investigating corruption cases were repealed under Chief Prosecutor Basrief Arief; later, Chief Prosecutor Prasetyo revised the policy and it now allows the intelligence prosecutor to investigate corruption cases. See 2.9: The Post-military Regime, and 5.2.1. Preliminary Investigation

during general elections,[66] international summits,[67] or presidential visits.[68] However, since the term 'security' has a broad definition, the government also asks the IPS to secure infrastructure projects. As I mentioned above, the IPS establishes a team to guard and secure government development projects (known as TP4), and appoints a Deputy Chief Prosecutor for Intelligence to lead the team.[69]

Among other duties, intelligence prosecutors are responsible for conducting preconditioning (or, GAL), which is defined as a component of their activities to promote public support for the IPS (Article 1 (21) of PERJA 37/A/JA/ 09/2011). The preconditioning procedure is commonly understood by intelligence prosecutors as securing, promoting and handling their superiors' tasks and orders.[70] Thus, most top managerial prosecutors believe that the intelligence unit must secure the public reputation of their office. Bad performance by any prosecutor would endanger the IPS' public image, and the prosecutor's leadership would suffer a negative evaluation from the IPS. Furthermore, intelligence prosecutors must have a good network (including journalists), in order to promote their performance and minimise their chances of getting a bad reputation.[71]

Intelligence prosecutors also have to serve the IPS by finding and providing off-budget funds for formal or informal IPS operations (Kristiana 2009). The IPS often holds routine or incidental parties or ceremonies which are not covered by the IPS budget, such as golf tournaments on

66 Forum Keadilan, *Kejaksaan Agung RI Siapkan 4000 Jaksa ikut membantu sukseskan Pengamanan Pemilu,* (The Supreme Prosecution Office provided 4,000 prosecutors to assist with general election security) https://forumkeadilan.com/2019/04/kejaksaan-agung-ri-siapkan-4000-jaksa-ikut-membantu-sukseskan-pengamanan-pemilu/, accessed on 5 December 2018. Kompas.com *Jaksa Agung Perintahkan Kajati Kerahkan Intelijen Awasi Konflik di Pilkada Serentak*" (The Chief Prosecutor asked the Office of the High Prosecutor to employ intelligence when dealing with conflicts connected with local leader elections) https://nasional.kompas.com/read/2015/06/17/13545421/Jaksa.Agung.Perintahkan.Kajati.Kerahkan.Intelijen.Awasi.Konflik.di.Pilkada.Serentak, accessed on 5 December 2018.

67 The Bandung Prosecution Office, for instance, was actively involved in a meeting to prepare for the security of the Asia-Africa Conference in 2015. Personal Communication with DH, the Head of Bandung Prosecution Office, 12 June 2015.

68 Kejaksaan RI, *Kunjungan Presiden RI Joko Widodo ke Kejari Sawahlunto* (The President visits Sawahlunto District Prosecution Office), https://www.kejaksaan.go.id/berita.php?idu=22&id=12135, accessed on 5 December 2018.

69 See 4.2.1: The Public Prosecutor in Criminal Cases

70 Article 848 of Chief Prosecutor Regulation 006/A/JA/07/2017.

71 Personal Communication with the Prosecutor in IW, 12 June 2015. During my fieldwork, I have found that some district prosecution office leaders hold meetings with journalists, in their office or in a restaurant, in order to promote their work and collect information. On this occasion, prosecutors shared out a *rezeki*, in order to avoid bad news for the IPS.

the anniversary of the IPS[72], or welcoming ceremonies for new officials.[73] The intelligence prosecutors exploit their networks in business circles and among district government officials, in order to request funding for the IPS agenda.[74] Another of the informal duties an intelligence prosecutor must perform at district level is to serve and prepare accommodation for the top-level managerial prosecutor, when s/he visits their office.[75] As I discussed in Chapter 3, the executive prosecutor will consider this to be a form of loyalty from his/her officers, and it may eventually contribute to the advancement of a prosecutor's career.

The findings of this study suggest that the role of the intelligence prosecutor has altered from carrying out primary tasks, such as supporting the IPS in ensuring adequate evidence at trial, to backing up IPS operational issues. The main reasons for this are that the IPS suffers from a limited budget and experiences frequent political intervention, as I discussed in previous chapters.[76] Public prosecutors' reliance on guiding intelligence action has continued beyond the New Order era, and has reduced the autonomy of the organisation. A good example of this is the failed role of the IPS as guardians of public order in blasphemy cases. Despite the fact that Chief Prosecutor Decision KEP-146/A/JA/09/2015 and Chief Prosecutor Regulation PERJA 019/A/JA/09/2015 on the Team for the Monitoring of Mystical Beliefs (or *Tim PAKEM*)[77] require intelligence prosecutors to gather data to support blasphemy prosecutions and guard public order, most of the intelligence prosecutors in district prosecution services believe that their role in coordinating PAKEM is ineffective (Nandan Iskandar et al., 2017). A Head of the Intelligence Division at one District Prosecution Service complained that no budget was provided by the IPS for holding a PAKEM meeting.[78] He admitted that the meeting is often initiated by

72 Kumparan, *Beredar Viral, Turnamen Golf Yang Diselenggarakn Jaksa*, (Going Viral! Golf Tournaments were organised by the prosecutor), https://kumparan.com/@kumparannews/beredar-viral-turnamen-golf-yang-diselenggarakan-jaksa, accessed on 7 November 2018.

73 Radar Kepri, *Pisah Sambut Kajati Kepri digelar di Hotel CK Tanjung Pinang* (A welcoming ceremony for the Head of the High Riau Islands Prosecution Office is held in CK Tanjung Pinang Hotel), https://radarkepri.com/pisah-sambut-kajati-kepri-digelar-di-hotel-ck-tanjungpinang/, accessed on 7 November 2018.

74 Tempo, *Jaksa Muda di Kejari Ketapang Edarkan Proporsal HUT Adhyaksa* (A junior prosecutor in the Ketapang District Prosecution Office circulates the proposal for IPS anniversary funding) https://nasional.tempo.co/read/783734/jaksa-muda-di-kejari-ketapang-edarkan-proposal-hut-adhyaksa, accessed 7 November 2018.

75 Observations and personal communications with intelligence prosecutors in Batu, Kepanjen, Bandung, Jakarta, and Surabaya 2015.

76 See chapters 2 and 3.

77 The BAKOR PAKEM was initially set up under the Ministry of Religion in 1952, but it was placed under the IPS in 1984. The role of the IPS in the PAKEM is currently based on Article 30 (3), sections d and e, Law of 16/2004 on the IPS, which authorises duties and prosecutorial functions in the field of intelligence, leading to investigations, security, and pre-conditioning to prevent crimes.

78 Personal Communication with the Head of Intelligence Division, 2015.

other actors. In most blasphemy cases, other organisations – such as the Indonesian Council of Ulema (MUI)[79] – hold regular meetings with the BAKORPAKEM (*Badan Koordinasi Pengawas Aliran Kepercayaan Masyarakat* or the Board for the Monitoring of Mystical Beliefs), at its own office. As a result, public order within blasphemy law is defined by other actors, not the IPS. The IPS prefers to adopt the *fatwa* from MUI (on specific cases) as the primary evidence in blasphemy cases (Crouch 2017), rather than initiating the investigation as PAKEM coordinator, in order to gain evidence before prosecuting those suspected of having committed a blasphemy.

4.3 The Prosecution Service and other Indonesian Criminal Justice Actors

The previous section demonstrates how, over the years, the IPS has accumulated different duties to perform. The Prosecution Service suffers from a heavy backlog, and it has become ineffective as an organisation. Moreover, the government has redesigned IPS powers, in order to serve its own political interests within the justice system. As I discussed in Chapter 2, the authoritarian military government has controlled the criminal justice system by manipulating (and intervening in) not only the IPS, but also the police, the courts, and other actors in the justice system. The regime has undermined the independence of the IPS, emphasising its loyalty to the government instead of promoting its legal professionalism (Lolo 2008; Pompe 2005; Bedner 2001; Muradi 2014; Lev 2000).

Lev (1965) notes that, since the 1950s Indonesian criminal justice actors have been competing with each other to gain more powers. In addition, actors have stopped referring to the comprehensive task division contained in the RO (*Reglement op De Rechterlijke Organisatie* en *Het Beleid der Justitie*, Stb, 1847-23 jo 1848-58, or the Law on Judicial Organisation) and the HIR (*Herziene Inlandsch Reglement*, or the Indonesian Legal Procedure Code). The 'ego-sectoralism'[80] of criminal justice actors has been caused, in part, by cooperative difficulties. The police, public prosecutors and judges had their own interpretations of their tasks within the criminal procedure. Yet, they applied Article 6 (1) of the Emergency Law 1/1951 when implementing the HIR:

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79 The role of Ulema, or Islamic clerics, in the MUI has become more significant in the Indonesian political sphere. In 2005, President Susilo Bambang Yudoyono asked the MUI to offer recommendations to shape government policy, including asking it to produce guidelines to be implemented by the government, to prevent the development of "deviant religious teaching" (Ichwan 2011; Amnesty International 2014). A former MUI chairman, Ma'ruf Amin, was elected as Vice President in the 2019 election.

80 Each sector tends to realise its own interests only - so-called, 'ego-sectoralism'. It means that the sectoral departments emphasise aspects which benefit themselves, rather than considering wider interests when making decisions. For further discussion, see (Arnscheidt 2009, 388).

> "*When this regulation comes into force in all District Courts, all the attached Prosecution Services, and all the High Courts in Indonesian territory, the updated HIR (Staatsblad 1941 No. 44) should be used as guidelines for criminal cases, as much as possible.*"

The phrase, "should be used as guidelines for criminal cases, as much as possible" makes it easy for criminal justice actors to use the HIR very loosely as a standard for criminal procedure. The police, public prosecutors and judges have all used this phrase to justify ignoring the HIR provisions when handling criminal cases (Utari 1986, 110). As a result, some HIR articles regulating the control of coercive measures have become ineffective. One such example was judges' power to control the coercive measures used by police and prosecutors, such as the arrest procedure in Article 83d of the HIR. Although this article authorised judges to order the police or prosecutor to release a suspect, if they found any aspect of the arrest procedure to be unlawful, the judges preferred to allow the arrest to be carried out without any legitimate reason (Yuwono 1982, 13).

Afterwards, this gradually worsened. For instance, the police were reluctant to comply with the provisions of the HIR and report all detentions to the Prosecution Service, so many people were detained for months (or years), without any certainty about when they would be brought to trial. The police argued, based on Article 14 of the 1961 Police Law, that detentions need only be reported to the National Police Chairman, via their superiors[81], and not to the prosecutor – as stipulated in Article 72 (1) of the HIR. Also, based on Article 12 of the 1961 Police Law, the police force claimed that it was the main actor at the investigation stage. However, the 1961 Prosecution Service Law stated that public prosecutors had the authority to control and supervise investigators (Article 7)[82], and the power to conduct additional investigations (*nasporing*) (Article 2). As a result, a suspect's rights could be violated, since prosecutors might investigate criminal cases that had already been investigated by the police (Harahap, 2007, p. 355). Since the 1961 Police Law and the 1961 Prosecution Service Law dispute the roles of each institution in the criminal procedure,[83] any coercive measures

81 See, for example, Articles 62, 71, and 72 of the HIR. Article 62 (2) of the HIR regulates the police to make a temporary arrest only for crimes that carry a sentence of five years' imprisonment or more. The exception to this article is if the defendant is caught and must be reported to the prosecutor (Article 71 (2) of the HIR). The prosecutor has control over such detention, and if the prosecutor sees an opportunity to prolong the detention, the police could prolong it by up to 20 days. If the police are willing to do so, they must first ask permission from the prosecutor. If the detention still needs to be prolonged, the prosecutor must ask permission to do so from the Chief of the District Court, and it could be prolonged by up to 30 more days (Article 83c (4) of the HIR).

82 Article 39 of the HIR noted that prosecutors had the authority to investigate (*opsporing*).

83 The 1961 Police Law, for instance, explicitly regulates that police investigators can start or discontinue an investigation of a criminal case, for public interest reasons, without the interference of a prosecutor. On the other hand, the 1961 IPS Law on Attorneys maintains the prosecutor's power to supervise police investigations, and even to conduct an independent investigation, if the police investigations are considered to be sub-optimal.

taken by the police or prosecutors were no longer based on the HIR, but rather on their own subjective decisions (Utari 1986, 113).

During the New Order regime (1966-1998), the military controlled criminal justice actors, including the police, prosecutors, and judges, through the KOPKAMTIB (Operational Command for the Restoration of Security and Order), which was led by the Army Commander.[84] The military government regularly ordered the police or prosecutors to arrest and detain the regime's political opponents. When it came to a trial, military intelligence oversaw judges in adjudicating such cases, and cautioned them to impose severe punishments on the defendant (Asrun 2004, 130). The KOPKAMTIB also supervised the implementation of policies for criminal justice actors on how to exercise their own tasks and powers.

In the late 1970s there were significant complaints about corruption issues among law enforcers. Therefore, the Commander of the KOPKAMTIB gathered together criminal justice actors, such as a Chief of Justice of the Supreme Court, a Chief Prosecutor, a National Police Chairman, and the Minister of Justice in Cibogo Bogor, to discuss the legal uncertainty within the justice system. The gathering is known as the Cibogo Convention, and it resulted in an agreement that criminal justice actors must exercise their powers within criminal procedure based on the HIR, as long as the government had not already established a new procedural law. However, it seems that the actors did not comply with the agreement, because of frequent political intervention (Utari 1986, 116).

The government enacted a new Code of Criminal Procedure – the KUHAP – in 1981, which includes better protection for the defendant. Unlike the HIR, which could be deviated from by criminal justice actors based on Law 1/1951, the government ensures that each criminal justice actor follows the KUHAP when handling criminal cases. In 1984 the government established a consultative forum of law-enforcement offices, called the MAHKEJAPOL.[85] This was an attempt to ensure that criminal justice actors were basing their work on the KUHAP, and it produced several agreements to overcome criminal procedure problems that had not been clearly stipulated in the KUHAP.

A number of Indonesian criminal law scholars believe that the MAHKEJAPOL may function as a forum for synchronising the policies of criminal justice actors, as long as there continue to be no guidelines similar to the RO, which link the tasks and powers of all the criminal justice actors

84 See 2.8: The New Order

85 MAHKEJAPOL is an abbreviation for *Mahkamah Agung* (Supreme Court), *Departemen Kehakiman* (Department of Justice), *Kejaksaan Agung* (Supreme Prosecution Service), and *Polisi* (Police). Now, the term MAHKEJAPOL has been changed into MAHKUMJAKPOL, since the Ministry of Justice has been renamed The Ministry of Law and Human Rights (*Menteri Hukum dan Hak Asasi Manusia*).

(Santoso 2000, 109).[86] The New Order regime enacted the Judicial Power Law, which is fairly similar to the RO, except that it only applies to the courts. The current Judicial Power Law 28/2009 also only regulates the courts and their authority.[87] Other judicial actors, such as the IPS and police, are regulated according to their own laws.[88] There are no provisions for how criminal justice actors should synchronise their tasks and powers. The absence of such regulation has contributed to high backlogs in the criminal justice system, which results in legal uncertainty for defendants. The main reason for this is that each actor decides on policies, without taking any others into consideration.[89] As a result, the suspect or victim may face legal uncertainty, since the investigator or prosecutor follows different guidelines for the same cases (Arief 2011, 22). Also, mutual mistrust between actors undermines the criminal justice system – the police do not trust prosecutors and prosecutors do not trust judges, while judges believe that prosecutors are untrustworthy. Each actor suspects that the other actor's decision on a particular case is made based on fraudulent behaviour.[90]

However, since the MAHKEJAPOL does not have a mechanism enforcing agreement between criminal justice actors, they find it easy to be reluctant about following the MAHKEJAPOL agreement. One such example is when the MAHKEJAPOL seeks to resolve the problem of the length of time it should take a police investigation notification letter (SPDP) to reach the prosecutor. The MAHKEJAPOL states that an investigator's agency may send the SPDP after issuing an Investigation Warrant (SPRINDIK), in order to avoid investigations being conducted without the prosecutor having been notified. If investigators cannot complete the investigation immediately, they must send a report on the progress of the investigation (and any problems with it) to the prosecutor. The prosecutor may then provide suggestions to accelerate the investigation (Santoso 2000, 105-6). However, the police are reluctant to follow this agreement. Since the police believe that they are the *dominus litis* in the investigation stage, they only send the SPDP after they have completed the investigation. They also refuse to request suggestions from the prosecutor during the investigation process.[91]

Another example of this is when the Supreme Court took the initiative to issue a Supreme Court Regulation (or PERMA 2/2012), in order to adjust the limitation for minor crimes and the number of fines within the Criminal Code. This initiative was taken because the government had never

86 As far as I know, no regulation revoking the RO exists. Many authors mention that the RO is still referred to, in order to elaborate on the actors' authority when it is not mentioned in their sectoral regulations.

87 The Law recently adds the Constitutional Court and Judicial Commission to its provisions.

88 See Article 41 of Law 4/2004 and Article 38 of Law 48/2009 on Judicial Power.

89 See Chapter 5

90 During my fieldwork and interviews with public prosecutors, police officers, judges and lawyers, I observed it is likely that they both mistrust and underestimate each other.

91 See 5.2.5: The Pre-Prosecution Process

changed the number of fines, following inflation in 1960. The Supreme Court then gathered other actors in the MAHKEJAPOL, in order to promote this PERMA. The police and prosecutors formally agreed to sign the agreement to operate the PERMA, in order to overcome the problem of prison overcapacity.[92] However, similarly to the previous case, the MAHKEJAPOL decision was not implemented effectively. Prosecutors seem reluctant to execute the PERMA, since the IPS has not published any technical instructions helping to enforce the agreement.[93]

The MAHKEJAPOL is also known as a forum that was established by the government to intervene in judicial independence, and act as a form of negotiating table (Santoso 2000; Lolo 2008). The police, for instance, can use it to ask the prosecutor not to apply the pre-trial procedure when examining their decision on the dismissal procedure. For instance, a MAHKEJAPOL meeting on 21 March 1984 agreed to ask the IPS to order its prosecutors not to use their pre-trial procedure power to examine police decisions to dismiss criminal cases. MAHKEJAPOL believed that the agreement could avoid friction between the police and IPS. However, the police still had to inform the public prosecutor if they had dismissed a case; further, in a situation where a prosecutor believed that an investigator's decision to dismiss a case did not have sufficient legal justification, they should coordinate with the investigator via a consulting forum (Hernanto et al. 1987, 157).

This section discusses how the IPS (as one of the criminal justice actors) needs other actors to assist its public prosecutors with tasks within the prosecution process. I will explore the role of public prosecutors versus that of the police, special investigators, lawyers, judges and other criminal justice actors. Although the KUHAP repealed the prosecutor's control over investigations, most public prosecutors still believe that they are the *dominus litis* within the criminal procedure. However, since the IPS has retained its military culture, and most prosecutors suffer from a heavy workload, the prosecutor's position is more like a postman, shuttling between the police and the courts.

4.3.1 The Criminal Investigators

Although post-authoritarian regimes established another prosecution agency, the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, or KPK) to deal with corruption cases, the IPS still prosecutes most of the criminal cases which go to court. The IPS' position within the Indonesian criminal justice system is visualised in the following figure:

92 See Memory of Understanding between the Supreme Court, Ministy of Law and Human Rights. The Prosecution Service and the Police 131/KMA/SKB/X/2012, M.HH-07. HM.03.02 Tahun 2012, KEP-06/E/EJP/10/2012 dan 39/X/2012, October 2012.

93 See Constitutional Court Decision 42/PUU-XI/2013 p. 13. Personal Communication with the prosecutor in the Supreme Prosecution Office, 2015.

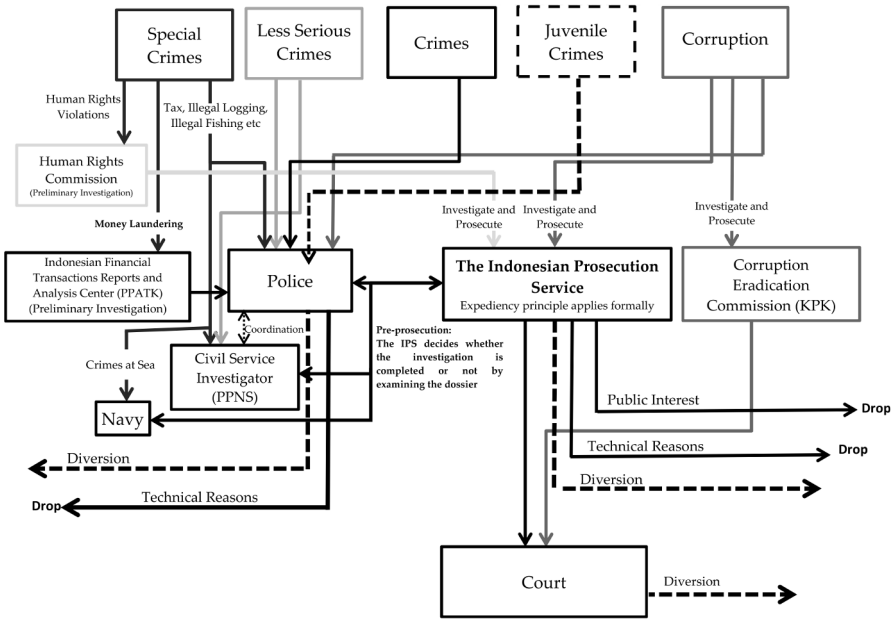

Figure 5: The position of the IPS within the criminal justice system[94]

The police claim that the Code of Criminal Procedure (KUHAP) only allows them to conduct criminal investigations. However, other actors have also retained some of their investigation powers, based on Article 284 of the KUHAP.[95] This provision allows them to investigate special crimes, based on special criminal laws. The Anti-corruption Law 2001, for instance, authorises the Prosecution Service and the Corruption Eradication Commission (KPK)[96] to investigate corruption. There are also some new state auxiliary institutions which employ special investigators, such as the National Anti-Narcotics Agency (BNN), the Centre for Financial Transaction Reports and Analysis (PPATK)[97], as well as the Human Rights Commission.[98]

The KUHAP also gives Civil Service Investigators (or PPNS, *Penyidik Pegawai Negeri Sipil*) authority to conduct criminal investigations, under police supervision. Unlike special investigators, the PPNS units are under ministries that are entitled, via a special law, to handle misdemeanours or

94 I designed this figure based on criminal justice actor laws prior to 2019.

95 Article 39 of the Dutch Colonial Law Procedure, or the HIR (*Herziene Inlandsch Reglement*), acknowledged officials who can investigate criminal cases, such as the head of a village, a village police officer, the head of the district, police officers, and all district court prosecutors.

96 Law 30/2002 on Corruption Eradication Commission, or *Komisi Pemberantasan Korupsi* (KPK) See also the Constitutional Court Decision 109/PUU-XIII/2015, which states that the KPK can recruit its own investigators outside of the police.

97 Law 8/2010 on the Prevention and Eradication of Money Laundering.

98 Law 39/1999 on Human Rights.

specific crimes within their specific areas of expertise. The Forest Ministry, for instance, has a PPNS to investigate illegal logging, and the Ministry of Fishery has a PPNS which can handle illegal fishing.

In summary, each actor conducts criminal investigations based on particular categories: the police investigate all crimes that are stipulated within and outside of the Criminal Code, while crimes that are regulated outside of the Criminal Code can be investigated not only by the police, but also by the PPNS, and possibly other special investigators.

4.3.1.1 The Police

> "*The Indonesian police force, as an instrument of the state that maintains public order and security, has the duty to protect, guard, and serve the people, and to uphold the law.*" *(Art 30 (4) of the Constitution)*

The 1945 Amended Constitution passes the role of the military[99], in maintaining public order and protecting civilian security, to the police. Following the amendment of the Constitution, some government bureaucracy positions formerly held by military personnel under the New Order regime were filled by members of the police force.[100] Even though the police force is a civilian institution, its employment status remains similar to the army and does not follow civil servant regulations. Unlike the IPS and other civilian

99 As I discussed in chapter 2, during the New Order regime the military had a strong political influence on civilian politics and the criminal justice system. When the authoritarian New Order regime stepped down in 1998, the reform movement pushed to separate the role of the military from civilian politics. In 2000, 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. The MPR also repositioned the police force as a civilian institution. The debate about whether the police should be divided and supervised by certain ministries intensified. For instance, the Prosecution Service requested that the police be under its supervision, because the police function is part of law enforcement. At the same time, the Ministry of Interiors requested that the police be under its guidance, because of its policing duties. The Minister of Defence also requested that the police be positioned under him, as the police function also relates to state security and defence. In the end, the police force successfully ensured that the government placed it under the President's control, and established KOMPOLNAS as a supervisory body with a limited role.

100 Some positions that had been held by military personnel were filled by the police, such as the Director General of Immigration in the Ministry of Law and Human Rights, and several Director Generals at the Ministry of Transportation. President Jokowi also appointed a former Vice National Police Chairman as Minister of Civil Servants and Bureaucratic Reform. See Tirto, *Bintang Berjatuhan dari Trunojoyo* (Stars have fallen from Trunojoyo) https://tirto.id/bintang-berjatuh-dari-trunojoyo-9eU, accessed on 7 November 2018. During the District Government election, Jokowi selected a police officer as acting governor, replacing the incumbent who also running for the election. Apart from replacing the army's position in state civilian bureaucracy, the police also took over the army's role in securing a large amount of *rezeki* from businesses (Muradi 2014; Baker 2013).

state institutions, which are subject to civil service rules, this employment status allows the police to determine their salary grades (and other staffing rules) more flexibly than the IPS. Furthermore, compared to other criminal justice actors, such as the IPS and the Ministry of Law and Human Rights, the police are politically more powerful.[101]

The police believe that they are the fourth branch of state power, as per Van Vollenhoven's *Catur Praja* theory (Rajab 2003); therefore, they must be positioned as an independent institution.[102] Apart from the role the police have as a law enforcement institution, maintaining public order and security, Article 24 of the Constitution includes the police as an institution with functions related to the judiciary. In addition, the Code of Criminal Procedure (KUHAP) positions the police as the *dominus litis*, able to investigate and exercise coercive measures with minimum supervision from prosecutors.[103] These regulations lead the police to believe that they are the leaders in directing criminal justice policies.

The post-authoritarian government has established the National Police Commission (KOMPOLNAS) to oversee the police (Article 37-40 of the Police Law 2/2002). Since the KOMPOLNAS functions only as an advisory board, it does not have the power to control and supervise the police. Therefore, the police may ignore the recommendations in the KOMPOLNAS if there happen to be any public complaints about their work (Meliala 2015).[104]

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101 The police budget is higher than the army and that of other criminal justice actors, such as the IPS, Ministry of Law and Human Rights, and the court. See Kornelius Purba, End police power to punish everything under the sun, https://www.thejakartapost.com/academia/2019/10/15/end-police-power-to-punish-everything-under-the sun.html?utm_campaign=newsletter&utm_source=mailchimp&utm_medium=mailchimp-oct&utm_term=police-state-commentary, accessed on 16 October 2019.

102 Many scholars of constitutional law believe that Van Vollenhoven's Catur Praja theory divides state power into four branches: executive (*bestuur*), police, judicative, and legislative. They believe that this theory is similar to Montesquieu's separation of power theory (Asshiddiqie 2006; Utrecht 1986). However, the director of Van Vollenhoven Institute, at Leiden Law School, Professor Adriaan Bedner, said that C. van Vollenhoven said nothing about police independence being one of the branches of state power. Although he indeed divided state functions into government, legislative, judicative, and police, van Vollenhoven opposed Montesquieu's theory. He argued that the four functions are interchangeable when exercised by state agencies. For example, the judiciary might exercise its function to adjudicate a case, administer its bureaucracy, and issue some regulations. Meanwhile, the executive might also issue some regulations, solve the case, and police society. See Van Vollenhoven's book, *Staatsrecht Overzee* (Vollenhoven 1934, 104–25).

103 See Chapter 5

104 Adrianus Meliala, one of the KOMPOLNAS commissioners, was investigated by the police for a hate speech he gave in 2015. He said that national police criminal investigation body (the BARESKRIM) is like an ATM (Automatic Teller Machine), from which the police can obtain illegal funding. In the end, Meliala apologised for this statement before the police closed its investigation. Tempo, *Kisah Kompolnas Dilaporkan Polisi Karena Ujaran Kebencian*, (Kompolnas' story - reported to the police for giving a hate speech) https://nasional.tempo.co/read/715928/kisah-kompolnas-dilaporkan-polisi-karena-ujaran-kebencian/full&view=ok, accessed on 17 November 2019.

Similar to the Prosecution Service, the police also have a Profession and Ethics Division (PROPAM/Internal Affairs). Its tasks are to investigate any incidents, suspicion of law-breaking, and professional misconduct attributed to police officers.[105] Since the police have retained their military bureaucracy and culture, the examination procedure for police misconduct adopts that of the army. It enables the police leadership to decide on whether criminal proceedings or disciplinary procedures are applicable to the case. Civil society organisations argue that this procedure provides police officers with impunity, since many officers reported for their crimes have never been prosecuted (Tim Penelitian dan Dokumentasi LBH Jakarta 2015; Amnesty Internasional 2009).

The National Police Chairman's Regulation, PERKAP 8/2009, was issued to ensure Human Rights Principles during the investigation process. Similar to the Indian police, as observed by Wahl (2014), "the political and legal systems in which these officers operate not only tolerate but encourage the use of torture, and [that] the police and military organizations expect officers to use it" (p. 831). As reported by legal aid activists and some researchers, the police cannot escape from their military authoritarian legacy (*Tim Penelitian dan Dokumentasi* LBH Jakarta 2015, 38). The police believe that the presumption of innocence must only be applied in court, not during the investigation. They believe that a suspect is someone guilty of committing a criminal offence. Thus, since police investigators can use a confession as evidence, they also use various methods (like physical torture) to force the suspect to make a confession ("Achievements, Challenges and Recommendations for Judicial Reform" 2018, 29).

Since the KUHAP adopts the principle of functional differentiation,[106] public prosecutors do not have the power to oversee the police during the investigation process. Thus, prosecutors cannot check whether an investigation has been conducted based on the appropriate procedures.[107] Furthermore, prosecutors may not be able to defend their indictment, if the defendant can prove that the police have conducted a malicious investiga-

105 After 'splitting up' from the army, the police adjusted its military police function by establishing the PROPAM (*Profesi dan Pengamanan*) for police internal affairs (National Police Chairman Decision KEP/53/X/2002 jo. National Police Chairman Decision KEP/97/XII/2003). The PROPAM tasks are to enforce discipline and order within the police, to conduct internal investigations, and to handle public complaints (National Police Chairman Regulation PERKAP 21/2010).

106 See Chapter 5

107 Most prosecutors I met refer to this process as "buying a pig in a poke". In fact, one of the functions of the IPS' intelligence division is to assist public prosecutors with the prosecution process. During my fieldwork, I found that most of the prosecutorial leaderships are afraid to be in conflict with the police. Moreover, the IPS does not provide a budget for this kind of task.

tion, fabricated evidence, or tortured the suspect in order to make them confess.[108]

This principle also affects technical matters within the prosecution process. The KUHAP divides detention powers between actors, depending on the stage in the process. Thus, the police believe that their responsibility for guarding detainees has ended when the public prosecutor takes over the process. Hence, the IPS recruit staff to guard detainees during the prosecution process. However, the IPS still needs police assistance to secure and guard its public prosecutors and detainees during the trial.[109] One Head of a District Prosecution Office admitted that the police have been known to ask the Prosecution Office to provide an operational budget to pay for expenditure, whenever the police provide security and guarding services during the prosecution process.[110]

As I have mentioned in the previous chapters, District Prosecution Offices suffer from limited budgets and heavy workloads. Therefore, the Prosecution Office leadership must have a good relationship with the police leadership, in order to ensure their assistance in prosecuting cases. While the police budget is higher than the IPS budget, some District Prosecution Offices handle more criminal cases than their budget can cover.[111] In some cases, the police provide a budget for the public prosecutor,[112] but they may also threaten prosecutors, forcing them to accept their investigation file.[113] It is not surprising when observers argue that the public prosecutor's function is to deliver the case, based on the interests of the police.

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108 Thousands of complaints about malicious investigations were received by legal activists from 2011 to 2017 - Tirto, *Polisi: Kami Akui Ada Kasus Salah Tangkap* (Police: "We confess that there have been cases of false arrest"), https://tirto.id/polisi-kami-akui-ada-kasus-salah-tangkap-cKi8, accessed on 17 November 2019.

109 See Joint Instruction of the Chief Prosecutor and Police Chairman INSTR-006/JA/10/1981 No. Pol INS/17/X/1981 on IPS and police cooperation when handling summons for suspects and witnesses, escorting detainees, guarding defendants during trials, and controlling suspects/defendants during criminal proceedings.

110 Personal communication, December 2015.

111 In 2015, for instance, the Malang District Prosecution Office prosecuted 406 criminal cases, whereas their budget only allows for 350 cases.

112 Personal communication with a prosecutor in Jakarta, 2015. He confessed that, in some narcotics cases, if the prosecutor believes that evidence provided by the police is insufficient, the police leader can reassure the prosecutor that they will assist the trial process, and provide a budget to support the prosecutor's work. This budget can be used to invite an expert witness or to keep the prosecutor and his family secure during the trial process.

113 Berita Satu, *Petinggi Polda Maluku ancam tembak Jaksa* (Police high official threatens to shoot prosecutor). https://www.beritasatu.com/nasional/287332/petinggi-polda-maluku-ancam-tembak-jaksa, accessed on 1 July 2015. AJNN *Kapolres Sabang Ajak Duel Kasi Pidum Kejari Sabang*, (The Chairman of the District Police challenged the public prosecutor to a duel), http://www.ajnn.net/news/kapolres-ajak-duel-kasi-pidum-kejari-sabang/index.html on, accessed on 23 May 2017.

4.3.1.2 The PPNS and Special Investigators

Civil service investigators, or the PPNS (*Penyidik Pegawai Negeri Sipil*), and special investigators can all investigate special crimes, based on criminal procedures outside the KUHAP. It is difficult to state the exact number of institutions with investigative powers, due to the absence of published data. Some observers say it is around 21 to 80 state institutions (N. Simanjuntak 2009, 57).[114] Besides, since the collapse of the New Order military regime in 1998, there have been demands to establish criminal investigation institutions that are more accountable and professional. The new administration responded to this by creating numerous state agencies with the authority to investigate (Mochtar 2016).[115]

It has been mentioned that Indonesia does not have a regulation, which would synchronise criminal justice actor powers, including the PPNS. The arrangement of PPNS tasks and powers can be found in the KUHAP and in Government Regulation 58/2010 jo. Government Regulation 27/1983 on Implementation of the KUHAP. The regulations arrange procedures for appointing PPNS officials, but do not set out procedures for establishing special investigation divisions in state agencies.[116] When the law was drafted, the decision to develop special investigation institutions was left to parliament and the government. Indonesian legal experts found that parliament and the government did not carefully consider the establishment of new institutions (Rosita, n.d.; Mochtar 2016). Instead of increasing the effectiveness of criminal investigation, the establishment of various state criminal investigators resulted in various problems. The Corruption Eradication Commission (KPK) alone has been successful in gaining public trust, in its capacity as a special investigator of corruption cases. The KPK has successfully investigated and prosecuted top-level officials – from ministers and national parliamentarians, to law enforcement officials, such as supreme judges, prosecutors, and police generals (Kristanto and Suhanda 2009). Law 30/2002 on the KPK even authorises the commission to act as

114 Hukum Online, *Ada Kemungkinan Korwas Akan Dihapus* (There is a possibility that Korwas will be dissolved), https://www.hukumonline.com/berita/baca/lt555edcc8d0f1c/ada-kemungkinan-korwas-akan-dihapus, accessed on 17 November 2019.

115 Some examples are the Corruption Eradication Commission (KPK), which was set up to investigate and prosecute corruption, and the National Anti-Narcotics Agency (BNN), set up to investigate illegal drug abuse.

116 Government Regulation 58/2010 jo. Government Regulation 27/1983 on Implementation of the KUHAP only regulate the procedures for appointing PPNS officials, and not the procedures on establishment of a criminal investigation division in specific institutions. Approval needs to be obtained from the Chief of the National Police and the Chief Prosecutor, before the PPNS is officially inaugurated by the Ministry of Law and Human Rights (Art 3C Government Regulation 58/2010 jo Government Regulation 27/1983).

supervisor in corruption investigations conducted by the police and the IPS.[117]

The KUHAP authorises the police to act as supervisor of the PPNS in the investigation process. There is no provision in the KUHAP for special investigator issues – such as who supervises the navy's criminal investigator in illegal fishing cases, or the IPS' investigator in corruption cases. As a result, the state's investigative institutions compete with one another to handle criminal case investigations.[118] Illegal fishing cases are good examples of this. The Fisheries Law gives powers not only to the police and the PPNS, but also to the navy,[119] to investigate illegal civilian fishing cases. This causes overlaps in the law enforcement process (cf. Saptaningrum 2019)[120], as reported by the Supreme Court in one illegal fishing case, which was investigated not only by the police but also the PPNS and the navy.[121]

The police have issued a regulation on the Management of PPNS Investigations.[122] It states that the police can supervise and coordinate with the PPNS to investigate a case, from its start date until it is complete. Furthermore, the PPNS must report its activities during the investigation to the police, including any coercive measures taken. The PPNS must also submit its investigation files to the police before sending them to the public prosecutor.[123]

117 Because of this the KPK has withstood several attempts to cripple it over the past decade, but it has always been able to count on strong civil society and public support to save it. It was not long until the government and parliament enacted law 19/2019, which reduced the KPK's power and its independence in investigating and prosecuting corruption cases.

118 As mentioned in 4.2.1, the police and the IPS investigator also compete in corruption cases.

119 The navy claims investigation powers, based on Article 9 (b) of Law 34/2004 on the Army, which states that the navy is the enforcer of law throughout the Indonesian Sea. Besides, the navy's role as a civilian criminal investigator is also mentioned in Law 5/1983 on the Indonesian Exclusive Economic Zones, Law 6/1996 on Indonesian Waters, and Law 17/2008 on Shipping.

120 CNN Indonesia, *Tumpang Tindih Aturan Penegakan Hukum Maritim* (Overlapping Maritime Enforcement Laws), https://www.cnnindonesia.com/nasional/20151004163018-20-82691/tumpang-tindih-aturan-penegakan-hukum-maritim, accessed on 17 November 2019.

121 Laporan Tahunan MA (The Annual Report of the Supreme Court), (2012), p. 208. See also, Hukum Online, *Kewenangan PPNS Tumpang Tindih Dengan Polri* (PPNS Authority Overlaps with that of the Police), https://www.hukumonline.com/berita/baca/hol16248/kewenangan-ppns-tumpang-tindih-dengan-polri, accessed on 17 November 2019.

122 See National Police Chairman Regulation 6/2010. Article 47 regulates that the police and PPNS leadership can control PPNS investigations. Certain PPNS investigators are under the coordination, supervision, and technical training of the national police, from the initial stages until the end of the investigation. PPNS must provide a report to the police, every time they conduct coercive measures.

123 Articles 6, 7 Paragraph (2), 107, 109 Paragraph (3) of the KUHAP. See also, Article 9 Government Regulation 43/2012 on Special Police Coordination, Supervision, and Technical Advancement.

However, some laws allow the PPNS to conduct investigations and submit a report directly to the public prosecutor, with no supervision from the police. One example is Law 32/2009 on the Environment, which allows the PPNS to send investigation files directly to the public prosecutor. The PPNS only makes a report to the police when they need assistance in technical matters (Article 94). The PPNS for the Ministry of Fisheries and the Ministry of Maritime Affairs can also conduct investigations and exercise coercive measures without coordinating with the police, and it can submit investigation files directly to prosecutors (Articles 73a and 73b of Law 45/2009 jo. and Law 31/2004). Furthermore, Law 18/2013 on Illegal Logging Eradication enables prosecutors to supervise the PPNS, and to conduct additional investigations if the PPNS cannot complete its investigation.[124] On the other hand, the IPS perceives this to be a good opportunity for it to try to restore its supervisory authority in a new draft of the criminal procedure.[125]

The police have complained about such regulations, since they cannot oversee any PPNS investigations, and because of the regulations they cannot guarantee the quality of the PPNS investigation (cf. Abdussalam and Zanibar 1998, 852). Unlike the police, the public prosecutors are pleased with the regulations, since they can directly supervise PPNS investigations without engaging the police.[126]

4.3.2 Advocates and Legal Aid Providers

The KUHAP imposes an obligation on criminal justice actors to provide legal assistance for suspects and defendants (Articles 54-56). The state must provide a free legal advisor for suspects or defendants who risk either a sentence of 15 years' imprisonment (or more) or the death penalty. Additionally, those who are charged with a crime carrying a sentence of five years or more, and who have no legal representation, are eligible for a

124 Detik, *Pertama Di Indonesia Jaksa Sidik dan Tuntut Kasus Illegal Logging*, (For the first time in Indonesia, prosecutors have investigated and prosecuted an illegal logging case), https://news.detik.com/berita/d-3809331/pertama-di-indonesia-jaksa-sidik-dan-tuntut-kasus-illegal-logging, accessed on 18 January 2019.

125 See Articles 42 and 46 of the new Draft KUHAP draft, which allows prosecutors to supervise investigations and to conduct additional examinations if the investigator cannot complete the investigation. The Draft KUHAP http://pantaukuhap.id/?cat=27, accessed on 18 January 2019.

126 Prosecutors complain about the quality of police supervision on the PPNS. In many cases, although the PPNS investigations have already been supervised by the police, the quality of the investigation has not met the prosecutor's standards (NJ, Personal Communication, 27 January 2019). See also, Kejaksaaan Negeri Jakarta Barat, *Reposisi Penyidik Pegawai Negeri Sipil dan Jaksa Penuntut Umum Dalam Tahap Penyidikan*, (Re-positioning of civil service investigators and public prosecutors in the investigation process), http://www.kejari-jakbar.go.id/index.php/component/k2/item/255-reposisi-penyidik-pegawai-negeri-sipil-dan-jaksa-penuntut-umum-dalam-tahap-penyidikan, accessed on 18 March 2019.

free legal advisor (Article 56). Criminal justice actors, such as investigators, prosecutors, judges, and correction staff, must provide legal representatives with access to the suspect's or defendant's documents, at all stages of the process (Articles 71-73).

There are two main actors in the provision of legal assistance to individuals accused of crimes: advocates, and legal aid providers. Advocates are professional lawyers who are registered as advocates with the Bar Association, and who can provide legal services inside or outside court (Article 1(1) of Law 18/2003 on Advocates).[127] Legal aid providers are legal aid offices, or civil society organisations providing legal assistance (Article 1(3) of Law 16/2011 on Legal Aid).[128]

Indonesia has no more than 30,000 advocates for a population of 260 million (Kouwagam and Bedner 2019).[129] Those who live in rural areas may find it difficult to get access to Legal Aid Providers (Achievements, Challenges and Recommendations for Judicial Reform, 2018, 30). In addition, advocates and legal aid providers are not equally distributed across Indonesia. This all contributes to the lack of control over illicit coercive measures taken by criminal investigators, such as illegal detention or confiscation. The Institute for Criminal Justice Reform reports that most of the pre-trial procedures to examine coercive measures were present in cases where advocates were assisting (Supriyadi W. Eddyono et al. 2014, 88),[130] which indicates the importance of such assistance.

As mentioned above, in addition to the lack of advocates and legal aid providers, the quality of legal assistance provided is considered to be poor. Access to justice is therefore moving further out of reach for average citizens (Bedner and Berenschot 2011, 19). A notable example of this is the case of the teenager, Yusman Telaumbanua, who was charged with murder in North Sumatra. Although the public prosecutor sought life imprisonment for him, Telaumbanua's advocate asked the court to sentence his client to death. Instead of giving Telaumbanua legal assistance, the advocate did not inform him that he could submit an appeal, and suggested that he accept the death sentence instead. KontraS, a reputable human rights NGO later found out that the police used ill-treatment to extract a confession from Telaumbanu (Anggara 2015, 36).

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127 Candidates must join the training, do an internship, and pass the exam held by the Bar Association, before taking the advocate oath before the court.

128 Other laws refer to legal aid providers by different terms. Law 23/2004 on the Elimination of Domestic Violence mentions '*relawan pendamping*', or a companion volunteer. Law 3/1997 on the Juvenile Court uses the term 'social worker', while Law 2/2004 on Industrial Relations Dispute Settlement states that the 'Labour Union' may represent its members at trial.

129 Compare this to neighbouring Malaysia, which has more than 20,000 lawyers for a population of 31 million, or Thailand, which in 2008 had 54,000 lawyers for a population of 60 million.

130 As reported by LeIP, out of 1,490 criminal cases, defendants only had assistance from advocates in 318 (Semendawai et al. 2011, 30).

In order to cope with the limited number of advocates, the Ministry of Law and Human Rights issued Regulation 1/2018 on Paralegals, allowing lawyers who had not registered as advocates to assist and provide legal assistance inside and outside of court. However, this regulation was repealed a month later, after some advocates filed a judicial review with the Supreme Court.[131] The Bar Association believed that this regulation caused legal aid quality to remain poor, since *Pokrol Bambu* (or, bush lawyers) were likely to make use of this law within the justice system.[132]

Prior to the Advocates Law, *Pokrol Bambu*[133] and legal aid activists[134] were allowed to provide legal assistance during a trial. Lev (2000) defines *Pokrol Bambu* as para-professional lawyers providing access to legal institutions, without holding any formal qualifications (p. 144). However, some observers include legal aid activists who have not registered as advocates within this definition.[135]

Despite their limited number, advocates intend to strengthen their positions in the justice system as the only actors who can provide legal assistance.[136] Article 31 of the Advocates Law criminalises those who are not registered as an advocate but are offering legal services. This arrangement prevents *Pokrol Bambu* and legal aid activists providing free legal

131 See Supreme Court Decision 22 P/HUM/2018.

132 RMOL, *Peradi Minta Menkumham Cabut Aturan Tentang Paralegal* (Peradi Asks the Ministry of Law and Human Rights to Repeal the Regulations on Paralegals), https://hukum.rmol.id/read/2018/03/20/331603/, accessed on 1 April 2017.

133 Lev (2000) refers to *Pokrol Bambu* as para-professional lawyers who have no formal qualifications but provide access to legal institutions (p. 144). During the Dutch colonial era, only Europeans or Javanese elites could afford advocates with a legal education, because their tariffs were quite expensive. Furthermore, the *Inlands Reglement* provided opportunities for natives to be assisted by the *zaakwaarnemer*, which were referred to as *Pokrol Bamboo* (or 'bush-lawyers') throughout the criminal process (Massier 2008; Ravensbergen 2018; Lev 1973).

134 The Legal Aid Office, or LBH (*Lembaga Batuan Hukum*), recruited not only advocates, but also law students and law lecturers who were not registered as advocates. The office was initiated by prominent lawyers, such as Adnan Buyung Nasution and Yap Thiam Hien. See, *No Concessions - The Life of Yap Thiam Hien, Indonesian Human Rights Lawyer*, for more details (Lev 2011). In 1972, the office was prohibited by KOPKAMTIB, since the government perceived it as disturbing political stability. This inspired some universities to establish a *Lembaga Bantuan Hukum* (Legal Aid Institution). In 1974, the Ministry of Justice allowed universities to establish LBHs (Afandi, 2013).

135 Anggara, *Menakar Peran Paralegal Gerakan Bantuan Hukum* (Measuring the Paralegal Role in the Legal Aid Movement), https://anggara.org/2010/11/23/menakar-peran-paralegal-gerakan-bantuan-hukum/, accessed on 18 January 2019. Medium, *Mengenal Paralegal* (Knowing Paralegal), https://medium.com/@imagili/mengenal-paralegal-e03029093984, accessed on 18 January 2019.

136 Article 5 (1) Advocates of Law states that advocates are law enforcers. A former advocate who was appointed as a parliamentarian, Nudirman Munir, argues that this law enforcer status is vital to strengthen the position of advocates among criminal justice actors. Hukum Online, *Status Advokat sebagai Penegak Hukum Dipersoalkan* (The Status of the Advocate as a Law Enforcer is Questioned), https://www.hukumonline.com/berita/baca/lt4fd979e0088e5/status-advokat-sebagai-penegak-hukum-dipersoalkan/, accessed on 18 January 2019.

assistance for 'have-not' people to fulfil their basic rights. Therefore, in 2004, the Constitutional Court declared that Article 31 of the Advocates Law was unconstitutional.[137] Since then, lawyers without advocate licences, such as law lecturers, legal aid institutions and campus legal clinics, may provide access to justice outside the court.

Since Law 16/2011 on Legal Aid was enacted, the government has accredited hundreds of legal aid offices and provided them with operational budgets. However, because not all legal aid institutions were able to report their budget accountability, their expenditures were not reimbursed by the government (Afandi et al., 2014). This situation forces legal aid providers to ask for operational funding from their clients.

Article 22 of Law 18/2003 obligates advocates to provide free legal assistance for poor people, but the Bar Association fails to enforce this provision. The association suffers from internal conflict, causing it to be broken down into numerous smaller associations.[138] None of these associations have evaluation or enforcement mechanisms to ensure that free legal aid can be provided by advocates. They also have no plans to distribute advocates, in order to improve access to justice across Indonesia (Caesar et al. 2019).

Competition between the various Bar Associations also causes a lack of control over the quality and ethical conduct of advocates. Advocates can move to another Bar Association if their current association imposes disciplinary sanctions. It is found that most advocates are categorised as brokers, and are not committed to enforcing the rule of law (Kouwagam and Bedner 2019).[139] Instead, according to Kouwagam and Bedner, they play by informal rules in providing *rezeki* to the police, prosecutors and judiciary:

137 See, Constitutional Court Decision 006/PUU-II/2004. Muhammadiyah University of Malang Legal Aid Institute filed this case at the Constitutional Court, because the police rejected their provision of legal assistance based on this article. The police even threatened the institute members with arrest, if they continued to provide legal assistance to their clients. Hukum Online, *Pasal 31 UU Advokat Menjadikan Dosen Hukum Acara Berorientasi Teori* (Article 31 of the Advocate Law caused law lecturers, who could not give practical lessons, to give students purely theoretical criminal procedure lessons), https://www.hukumonline.com/berita/baca/hol11149/pasal-31-uu-advokat-menjadikan-dosen-hukum-acara-berorientasi-teori/, accessed on 23 January 2019.

138 Since the Advocate Law only recognises one Bar Association, various bar associations claim that they are the legitimate one based on the law After the PERADI (*Persatuan Advokat Indonesia*, or Indonesian Advocates Union) was established in 2005, another advocate association was also established: the KAI (*Kongres Advokat Indonesia*, or Indonesian Advocates Congress). In 2015, the PERADI even split into three parts, all claiming to be the legitimate representative of all Indonesian advocates. The split had nothing to do with different visions of lawyers' roles in a democracy; instead, it expressed competition over who would administer the bar exam (Kouwagam and Bedner 2019).

139 For further elaboration see, *Lawyers in Indonesia: Professionals, Brokers and Fixers* (Kouwagam and Bedner 2019).

> "*Many will approach judges, play golf with prosecutors and police, and engage in other suspicious activities to realize their objectives, unafraid of sanctions because of the weak disciplinary system. They also charge most clients a discretionary 'professional fee' for the purpose of bribing public officials, part of which may end up in their own pockets.*" (Kouwagam and Bedner 2019)

Therefore, it is not surprising if criminal justice actors, including the police investigator and prosecutor, offer defendants hand-selected lawyers who want to cooperate with the police or prosecutor. A notable anti-corruption NGO, Indonesia Corruption Watch (ICW), confirms that some advocates ask for *rezeki* from their clients; in the indictment, advocates will negotiate with prosecutors about the charge (Zakiyah et al., 2002, 95).[140]

4.3.3 The Ministry of Law and Human Rights

Initially, all criminal justice actors, such as the police, prosecutors, and courts, were administered by the Ministry of Law and Human Rights (previously the Ministry of Justice) (Kusuma 2010, 512).[141] The Ministry's role was to harmonise and control government policies, including criminal justice policies. However, since the Minister was a cabinet member, the regime was able use the ministry to control the justice system, including the judiciary, in order to serve its own political interests[142] (Lindsey and Butt 2009, 205). The Ministry's function in the criminal justice system was adjusted in the 1960s, when the Prosecution Service and the police both upgraded their positions in the constitution. Since then, the IPS and police have administered their own bureaucracy, without consulting with the Ministry. When the New Order regime fell in 1998, the judiciary's administration was transferred from the Ministry of Justice to the Supreme Court.[143] Since then, the Ministry of Law and Human Rights (MLHR) has been responsible for law making, the storage of evidence, detention centres, prisons, immigration, and human rights protection.[144]

The MLHR plays an important role in the criminal justice system. The KUHAP instructs criminal investigators and public prosecutors to detain suspects and defendants in state detention houses or prisons,[145] and to store all evidence in the state's confiscated goods storage houses (*RUPBASAN/*

140 A number of advocates that I interviewed stated that prosecutors send them a signal during the trial process, if '*rezeki*' is need for them and their superior. Some prosecutors even promise that a verdict will be ensured, if they can also give the '*rezeki*' to the judge.

141 See the History of the Ministry of Law and Human Rights at: https://www.kemenkumham.go.id/profil/sejarah, accessed on 3 April 2019.

142 See Chapter 2.

143 See Law 35/1999 on Judicial Power.

144 Presidential Regulation 44/2015.

145 Article 22 KUHAP.

Rumah Penyimpanan Barang Sitaan)[146], which are managed by the MLHR.[147] However, the ministry has a limited number of detention houses and confiscated goods storage houses[148], so it allows the police and IPS to build their own detention rooms in their own offices. As a result, the IPS and police prefer to detain suspects and store evidence in their own offices. This imposes on their operational budgets, but they can always obtain *rezeki* by threatening detainees (Domingo and Sudaryono 2015, 16).

Since the KUHAP adopts the principle of functional differentiation, the police and prosecutors prefer to detain all suspects and prosecute them themselves, in almost all the cases that they manage.[149] The ministry seems to be powerless, and cannot supervise *and* control detention and confiscation by other actors. Correction officers seem to feel inferior to other criminal justice actors.[150] Furthermore, they cannot release detainees who have over-stayed,[151] as Article 28 (1) of the Minister of Justice Regulation M.04-UM.01.06 of 1983 asks them to first seek approval for such release from the police or prosecutors who detained the suspect. One Head of a District Prosecution Office admitted that, since it was suffering from a heavy workload, it had not been giving enough attention to controlling the detention period at the investigation stage.[152] In some cases, correction officers allow the police to detain suspects in their detention centre without a warrant[153] (Supriyadi Widodo Eddyono et al. 2012, 66). As a result of all

146 Article 44 KUHAP.

147 Article 21, 30 Government Regulation 27/1983 jo. Government Regulation 58/2010. See also, Article 17-20 Presidential Regulation 44/2015.

148 The Elucidation of Article 22 (1) KUHAP states that, in cases of emergency, if a district detention centre is not available, the police and prosecutor may detain a suspect or defendant in their office, in prison, in hospital, or in another place.

149 The prosecutors are aware that they have no budget to search for the fugitive. Thus, they choose to detain all suspects who do not give bail, in order to guarantee that they will not escape. The prosecutors argue that this is neither risky nor costly, since the budget for detention centres is the responsibility of the Ministry of Law and Human Rights (Personal Communication with a Head District Prosecution Office, 20 January 2016).

150 Different from the Prosecution Service and the police, which are regulated by laws enacted by the government and parliament, the Ministry's function is governed only by a presidential regulation. See Presidential Regulation 44/2015, concerning the Ministry of Law and Human Rights.

151 Even though the KUHAP obligates the police or prosecutors to extend the detention period, once the time is up, as reported by the Centre for Detention Studies, 31 of 71 detainees overstayed in Medan Detention Centre, while 159 detainees overstayed in Jakarta Detention Centre (Semendawai et al. 2011, 29).

152 The KUHAP states that the police must have permission from the prosecutor to extend the detention period. However, in most cases, the police send the permission in late, i.e. when they submit the investigation file (Personal Communication with a Head District Prosecution Office, 2015).

153 The KUHAP obligates criminal justice actors to have a detention warrant to use on the suspect.

these issues, the MLHR suffers from over-crowding in prisons[154] and an insufficient budget; it therefore cannot guarantee either detainees' or defendants' rights.

The weakness of the MLHR's powers in this respect also creates severe problems when managing evidence. The ministry's function is limited to storing evidence only, and it cannot return a confiscated object to its owner without the prosecutor's approval. Due to the prosecutor's workload, this results in delays in the auctioning process for confiscated pieces of evidence seized by the government (Ifani et al. 2016, 88),[155] and the RUPBASAN is full of confiscated goods which are almost worn out.[156] In addition, prosecutors keep evidence in their offices, because the MLHR does not have a RUPBASAN in every district of Indonesia. In 2014, in order to cope with these storage issues, the IPS established the Asset Recovery Centre (*Pusat Pemulihan Aset*)[157], and issued regulations on the management of confiscated assets.[158] However, the centre only has one location (in Jakarta) and the IPS has a very small budget for asset management (Niniek Suparni et al. 2017). Therefore, regional District Prosecution Offices cannot manage the confiscated goods properly, because they suffer from heavy workloads and limited budgets.

The KUHAP only provides a mechanism to examine coercive measures, such as detention and confiscation, at the pre-trial stage. However, the KUHAP has no complaints procedure for suspects or witnesses, if their evidence is damaged during their criminal procedure. NGOs, such as the

154 In 2015, the Directorate General of Corrections reported that there were 178,063 occupants, spread across 477 prisons/detention centres, 34% of which were pre-trial detainees. The report does not include the number of detainees in police custody. The density of inmates in the prison/detention centre is around 145%, but in many large prisons the number of occupants can reach 662% of the available capacity (Domingo and Sudaryono 2015, 1).

155 Personal Communication with IW, the Head of the General Crimes Division and a Head of a District Prosecution Office, 2015.

156 Tempo, *Barang Bukti di RUPBASAN Nyaris Jadi Rongsokan* (Evidence in RUPBASAN almost turned out to be junk), https://fokus.tempo.co/read/1039275/barang-bukti-di-rupbasan-nyaris-jadi-rongsokan, accessed on 5 May 2019. A management and security coordinator in Rupbasan said that some timber had begun to rot, and some was already rotten, after it had been sitting in the office yard for years. As a result, its value has declined and the state has lost hundreds of millions of rupiah. Jubi, *Confiscated Timber about to Decay* https://eng.jubi.co.id/confisted-timber-about-to-decay/, accessed on 5 May 2019.

157 See Chief Prosecutor Regulation 006/A/JA/3/2014 and 013/A/JA/06/2014 on Asset Recovery. Chief Prosecutor Regulation 027/A/JA/2014 on Asset Recovery Guidelines.

158 See Chief Prosecutor Circular Letter SE-010/A/JA/08/2015 on the prosecutor's obligation to auction either the fragile confiscated goods, or those which need to be stored at high cost, Chief Prosecutor Circular Letter SE- 011/A/JA/08/2015 on Confiscated Goods that can be used by the IPS, and Chief Prosecutor Circular Letter No. B-079/A/U.1/05/2016 on the Administration of Settlements for Confiscated Goods which are deposited in the *RUPBASAN*.

Institute for Criminal Justice Reform, have suggested that the government should give the MLHR more power to manage detention centres and confiscated goods.[159]

4.3.4 The Courts

The courts initially played an important role in the Dutch colonial HIR and the RO. The courts controlled coercive measures imposed by criminal investigators and prosecutors.[160] Then, when the New Order regime drafted the KUHAP, court control was limited.[161] The government instead promoted internal control by each actor, known as the 'built-in control mechanism'[162] (Hart & Nusantara, 1986, pp. 8-9). During the authoritarian government period, (similar to the Prosecution Service and police) the court also became a tool for protecting the interests of the regime (Pompe 2005). It was not surprising if the court favoured the government and its cronies in cases that involved their political interests (Zakiyah et al. 2002, 7).

When the New Order fell, in 1998, the new constitution provided new guarantees of judicial independence (Article 24 (1) of the 1945 Constitution).[163] As well as entrenching the Supreme Court, the constitution established a New Constitutional Court to review legislation.[164] The Constitutional Court plays a pivotal role in mediating political contestation among criminal justice actors. As mentioned above, the police attempted to repeal "the IPS power in corruption case[s]" investigation through the courts.[165] Besides, the Constitutional Court is more powerful than the MAHKEJAPOL, since it can force the police to send their notification of investigation letter (SPDP) to the prosecutor a maximum of 7 days after starting the investigation.[166]

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159 ICJR, *ICJR Dorong Reformasi Rumah Penyimpanan Benda Sitaan Negara (Rupbasan) dan Eksekusi Barang Sitaan.* (The ICJR encourages reform of the State Confiscated Goods Storage Houses (Rupbasan) and the Execution of Confiscated Goods), https://icjr.or.id/icjr-dorong-reformasi-rumah-penyimpanan-benda-sitaan-negara-rupbasan-dan-eksekusi-barang-sitaan/, accessed on 7 June 2019.

160 Therefore, the warrant and documents relating to the coercive measures are entitled *Pro Yustisia*. This originally meant that coercive measures must be examined at court. But the term *Pro Yustisia* was redefined after the KUHAP introduced the principle of functional differentiation (meaning that the police and prosecutor had powers to use coercive measures without being supervised by the judiciary).

161 The regime rejected the concept of the *Rechter Commissaris* (which allows judges to control coercive measures directly), which was replaced by the pre-trial procedure, with less potential to control coercive measures (Supriyadi W. Eddyono et al. 2014, 39).

162 Built-in control means that the control and supervision of criminal investigators and public prosecutors are under the authority of their leadership (Rosjadi and Badjeber 1979; Harahap 2007).

163 It also guarantees the judicial independence of institutions relating to the judicial power, such as the IPS and the police (Article 24 (3) of the Constitution).

164 Articles 24 (2), 24C, 7B of the Constitution.

165 See 4.2.1 The Public Prosecutor in Criminal Cases

166 See chapter 5 for further elaboration.

The new Constitution gives the Supreme Court the authority to manage judicial administration, in order to eliminate government intervention via the Ministry of Justice.[167] The government also increased judge's salaries and added to the judiciary's budget, since a judge's status is no longer equivalent to a civil servant; it is equivalent to a state official. The new Constitution also creates a Judicial Commission, intended to monitor the ethical conduct of judges (Art. 24B (1) of the Constitution). However, the Supreme Court later reviewed the commission's power to control supreme judges' performance. The Supreme Court argued that the commission's power can be used to interfere with judges' independence.[168] Since then, the Supreme Court has been ignoring the commission's recommendation to impose disciplinary sanctions on judges who have been examined by the commission.[169]

As Bedner (2008) puts it, "there is no one-model-shortcut-fits-all solution when it comes to judicial reform. However, if it is based on sound knowledge and carried out by capable people, under relatively favourable conditions, a strategic, small-step and long-term approach will ultimately make a difference" (p. 27). These issues are apparent in the reform of the judiciary. Compared to the IPS, I found court reform to have been more successful. In addition to most of the Supreme Judges having the political will to reform their institution, the Institute for Independence of the Judiciary (LeIP) supports legal efforts in the Supreme Court. The LeIP is backed up by senior, capable legal experts, who assist and supervise the court administration in planning and implementing reform.

In 2011 the Supreme Court implemented the Chamber System[170], in order to achieve legal unity and consistent court decisions. However, it seems that the Chamber System cannot fully achieve its objective to eliminate inconsistency in court decisions. As reported by the LeIP, most judges understand that compliance with jurisprudence is a form of intervention in judicial independence in determining court decisions (Achievements, Challenges and Recommendations for Judicial Reform 2018, 16).

The court's complicated relationship with other state agencies and criminal justice actors, and its dependency on the quality of legislation can be obstacles in the reform effort (Bedner 2008, 5). As I discussed in Chapter 3, the new government has kept some institutions from the former authoritarian regimes in position – such as the FORKOPIMDA. The President

167 For further discussion see (Rositawati 2019).

168 See Constitutional Court decision 005/PUU-IV/2006. The case was controversial, because the Constitutional Court repealed the Judicial Commission's supervision of constitutional court judges, even though the constitutional complaint was filed by supreme judges, excluding constitutional court judges.

169 Emerson Yuntho in Kompas, *Korupsi Hakim* (Corrupt Judge), https://kompas.id/baca/opini/2018/12/11/korupsi-hakim/, accessed on 16 June 2019.

170 See Supreme Court Decree No. 142/KMA/SK/IX/2011 jo. Supreme Court Decree No. 213/KMA/SK/XII/2014 on the Supreme Court chamber system guidelines.

of the District Court and the Head of the District Prosecution Office both joined FORKOPIMDA, which is managed by the local government.[171] The local government may even provide facilities for the court, such as buildings or official cars.[172] Therefore, judges will consider these facilities prior to making a decision on a case involving government interests.

Besides, criminal justice actors use the MAHKEJAPOL (or DILJAPOL) at district level as a forum for the police, Prosecution Service, and court. The court seems to maintain good relations with the police and public prosecutors; therefore, it permits almost every coercive measure used by the police and public prosecutors (cf. Irianto et al. 2017, 169-75). It is common for judges to have a similar outlook to, and sympathy with, other government executives. These bonds are strengthened by their shared university experiences, often in the same law faculties, and by their frequent professional contact (cf. Shapiro, 1981). Instead of implementing the presumption of innocence and taking a more neutral stance, judges' views often lean more towards those of the prosecutors (Achievements, Challenges and Recommendations for Judicial Reform, 2018, 38). Senior judges have stated that they often assist junior prosecutors in reviewing and revising their indictments.[173]

The principle of functional differentiation in the Criminal Procedure Code, which makes judges responsible for detention during a trial, causes judges to be dependent on prosecutors. In practice, prosecutors (not judges) are responsible for ensuring the defendant is detained, and are allocated a budget for picking up detainees from detention centres during the trial. In addition, even though the judge has to maintain a detainee's health during trial, the prosecutor is responsible for taking care of the detainees if they get sick and need to go to hospital.[174] Since the IPS does not allocate a budget

171 Sulselsatu, *Ramah Tamah di Selayar, Ketua Pengadilan Tinggi Sulsel Pamit* (Farewell party in Selayar – the President of the High Court says goodbye), https://www.sulselsatu.com/2019/08/07/sulsel/selatan/ramah-tamah-di-selayar-ketua-pengadilan-tinggi-sulsel-pamitan.html, accessed on 16 June 2019.

172 When I did my fieldwork in 2015, in three different cities, I found that all three district governments provided an official car for the president of their district court. This situation seems to be quite common in other places too. See, for example, *Brebes Beli Mobil untuk Kepala Pengadilan Negeri* (The Brebes District Government buys cars for its district court president), https://nasional.tempo.co/read/518502/brebes-beli-mobil-untuk-kepala-pengadilan-negeri, accessed on 14 September 2019, and *Mobil Dinas Ketua PN Surabaya Diminta Kembali oleh Pemkot Surabaya* (The Surabaya District Government demands that the district court president returns his official car), http://kelanakota.suarasurabaya.net/news/2017/186265-Alasan-Mendesak,-Mobil-Dinas-Ketua-PN-Surabaya-Ditarik-Pemkot-Surabaya, accessed on 28 September 2019.

173 Interview with Indonesian Supreme Court Judges Delegation in Leiden, July 2018.

174 Hukum Online, *Kebijakan Pembantaran dilaporkan ke KY* (The policy of postponing detention for sick leave is reported to the Judicial Commission) https://www.hukumonline.com/berita/baca/lt517e292d85f38/kebijakan-pembantaran-dilaporkan-ke-ky, accessed on 16 October 2019.

for placing and protecting a defendant in hospital, in some cases the prosecutor will ask a defendant to fund the operational expenditure.[175]

As has been mentioned above, in criminal trials court dependency on other criminal justice actors (such as prosecutors and the police) may cause the court to grant almost every request from police and prosecutors. I will elaborate further on this in Chapter 5.

4.4 Conclusion

The Indonesian Prosecution Service's position as a government instrument influences its role within the criminal justice system. Various regimes have adjusted the IPS' tasks and powers, in order to serve their own political interests. As elaborated above, some IPS functions were no longer in line with its core duties within the prosecution process. The government set the public prosecutors up as state lawyers, who assisted the government and its companies in both civil and administrative law disputes. The prosecutor's intelligence function was no longer designed only to support the prosecution process, but also to protect government interests by maintaining public order.

The IPS created special divisions to serve these additional functions, and to arrange the division of tasks and powers. In some cases, more than one division had similar tasks, making prosecutors confused about how to achieve their goals. Wilson observes: "When goals are vague, circumstances become important" (Wilson 1989, 36). The broad discretion of IPS top-level managers' in performing their tasks eventually became a guide for operators in handling their various duties. So their work patterns changed: they were no longer simply to enforce the law, they should also handle a situation as defined by the leader (cf. Wilson, 1989, p. 37). This can be seen in the next chapter, when I elaborate on the public prosecutors' functions within criminal procedure.

Additionally, this chapter shows that the IPS must maintain its relationship with other actors, since the KUHAP introduces the principle of functional differentiation – dividing a criminal justice actor's powers, based on the four stages of criminal procedure. As discussed in Chapter 2, the New Order government created this principle to entrench military power within the criminal justice system, because the police were part of the army at the time. The KUHAP transfers the *dominus litis* from the public prosecutor to the police, who are now the masters of the pre-trial procedure.

Apart from this principle, the Indonesian criminal justice system has no special regulation that bridges between each actor's authority. Therefore, similar to Lev's picture 50 years ago (1965), political contestation among

175 Interview with a Head of the General Crimes Division of a District Prosecution Office, 6 January 2016.

criminal justice actors remains. Although the government established the MAHKEJAPOL as a coordinating forum to harmonise criminal justice policies, the institution taking part in the MAHKEJAPOL just follows its own policies, without fear of any repercussions.

The amended Constitution gives the police authority to replace the military in maintaining public order. The public prosecutor and judges need the assistance of the police to guard and secure defendants, evidence, and their own safety during criminal proceedings. As the most powerful criminal justice actors, the police may interfere with a public prosecutor's decision if a case is prosecuted at trial. However, since the police force is not the sole actor with investigative powers, it also competes with the PPNS and special investigators when handling a case. Thus, because of the lack of supervision by prosecutors and control by judges, a person may be investigated and detained several times, by various investigators, for a single case. However, unlike the previous criminal procedure (HIR), the KUHAP states that those suspected of having committed a crime may ask for legal assistance during the proceedings.

The KUHAP even obligates criminal justice actors to provide free legal assistance for suspects or defendants who are unable to afford such services. However, the number of advocates and legal aid providers is not equally distributed across Indonesia. In addition, political contestation among advocates within the Bar Association, and between advocates and legal aid providers, results in a lack of quality control when providing legal assistance. It seems that actors such as the police and public prosecutors take advantage of this condition, since only a few complaints about their performance during the prosecution process have ever been filed by defendants.

Previously, in the early years of Indonesian independence, the Ministry of Justice administered and harmonised policies for all criminal justice actors – such as the police, prosecutors, and courts. However, the Ministry of Law and Human Rights' role in the criminal justice system is currently minimal. Although the ministry manages detention houses, prisons, and confiscated storage houses, the KUHAP gives them limited power within criminal procedure. Therefore, it seems that prosecutors perceive the ministry as a recycling bin. As a result, the criminal justice system suffers from under-capacity in prisons, detention houses, and evidence storage houses. Although the ministry still has the power to harmonise government policies, including for the police and IPS, the 'ego-sectoralism' of criminal justice actors causes them to produce policies which are not in line with one another, which I will elaborate on in the next chapter.

The amended constitution guarantees the independence of the judiciary. Many people have high hopes that the court can control and supervise criminal justice actors who are working in line with the rule of law. However, since the courts' role in the pre-trial stage is limited, they cannot actively examine whether coercive measures have been employed by the police and prosecutor. Besides, the court seems to maintain good relationships with the police and public prosecutors; therefore, almost all coercive measures

used by the police and public prosecutors are permitted by the court. Because of this court practice, the public prosecutor believes that every case prosecuted in court must be accepted, and that the defendant must be punished as requested by the prosecutor. Therefore, as I will discuss in the next chapter, if the court rejects the prosecutor's indictment, or gives a less severe punishment than is required by the prosecutor, the prosecutor will either appeal the court decision or file a cassation in the Supreme Court, in order to ensure that the court accepts their charge.