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

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

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

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

5 The Indonesian Prosecution Service in Action: The Interpretation of Criminal Procedure and Prosecutorial Discretion

5.1 Introduction

As I have discussed in the previous chapter, political legacies from previous regimes and the Indonesian Prosecution Service's (IPS') limited budget do not enable prosecutors to uphold the rule of law. This chapter will explain how the IPS' military culture, which is inherited from the New Order regime, influences the way public prosecutors interpret the Code of Criminal Procedure (KUHAP). One of the results of this culture is that only the IPS leadership has the authority to use discretion, as stipulated in the criminal process. This chapter will show how a prosecutor's role within the criminal justice system is similar to that of a 'postman'. Ultimately, a prosecutor's subservient position means that s/he will defend the investigation files at trial and insist on prosecuting defendants, even though this requires him/her to breach procedural rules.

In addition, this chapter elaborates on the main prosecution process concepts within the Criminal Code (KUHP) and the Code of Criminal Procedure (KUHAP), analysing how the two codes are interpreted in daily practice. More specifically, it will analyse how public prosecutors perform their tasks and powers during the pre-trial stage, trial stage, appeal stage, and execution stage, for an ordinary examination (*pemeriksaan biasa*).[1] Since the current KUHAP was drafted and enacted under the New Order authoritarian regime, criminal proceedings are marked by military features. One such feature is the use of a coercive measure procedure called 'warrant as an

1 Apart from ordinary examinations (*pemeriksaan biasa*), the KUHAP also recognises two other types of trial: summary examinations (*acara pemeriksaan singkat*) and expedited examinations (*acara pemeriksaan cepat*). Summary examinations are for cases which the public prosecutor considers to be simple - the application of the law is straightforward, and the case can easily be proved (Article 203(1) of the KUHAP). See, for instance, Chief Prosecutor Circular Letter SEJA 029/A/EJP/03/2019 on summary examination for narcotics prosecution. On the other hand, expedited examinations are for crimes that are result in either a three-month detention (*kurungan*) or a Rp 7,500 fine, minor insult or slander (*penghinaan ringan)* (Article 205(1) of the KUHAP), or traffic violations (Articles 205, 211 of the KUHAP).

order letter'.[2] The KUHAP seems to adopt the military unity of command,[3] introducing the built-in control principle, wherein the leadership fully controls its investigators and prosecutors (Harahap, 2007, p. 79).

As mentioned in a previous chapter, the KUHAP divides criminal procedure into four stages[4] – preliminary investigation, investigation, prosecution, and trial – and strongly emphasises three main actors: the police, public prosecutors and judges. This division, referred to as the principle of functional differentiation, results in a situation where each criminal justice actor has their own interpretation of their own powers. The police lead preliminary investigations and the investigation stages.[5] Public prosecutors only enter at the prosecution stage, when they prepare for and present their case against the defendant in court.[6] Judges take the lead at the trial stage, when a panel of judges examines the case and decides whether the defendant is guilty or innocent; if the defendant is found guilty, the judges impose a punishment.

The KUHAP does not comprehensively regulate the procedure that should be carried out by criminal justice actors. Therefore, this chapter also considers other statutes and regulations, such as the Police Law, Prosecution Service Law, Judiciary Law, and other internal rules and circular letters from criminal justice actors. However, instead of providing a complete and consistent procedure, the regulations are often very complex, with ambiguous or contradictory provisions. I will also refer to court decisions and opinions from Indonesian legal scholars, in order to analyse the public prosecutor's authority and duties under the KUHAP.

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2 See, for instance, Order Letter for Arrest (*Surat Perintah Penangkapan)* (Article 18 of the KUHAP), Order Letter for Detention (*Surat Perintah Penahanan)* (Article 21 of the KUHAP), and Order Letter for Searches (*Surat Perintah Penggeledahan)* (Article 33 of the KUHAP).

3 The unity of command principle emphasises a single command for each unit, and limits interference from other parties in the supervision and control of unit members. The army believes that supervision and control from other institutions, without the leaders' permission, will interfere with the preparation of military operations (Zen and Sirait 2006, 12).

4 Compared to the HIR, which divides the stage into just two procedures: the Preliminary Examination, in which the public prosecutor controls and supervises the investigation (Articles 41 (2) and (3)), and the Trial Examination, in which the prosecutor presents the case to the court (Ranoemihardja 1980, 34).

5 The PPNS, or civil service investigators (CSIs), are also mentioned in the KUHAP. However, since they supervise and coordinate CSI investigations before passing the dossier on to the prosecutor, the police effectively position themselves as the supervisor and leader during this phase.

6 Articles 1 (6), (7), 13-15 and Chapter XV KUHAP.

5.2 Pre-Trial Process

This section discusses how provisions on laws and regulations such as the KUHAP (and other regulations on the pre-trial stage, including those concerning the rights of suspects and defendants) work in practice. The KUHAP makes the police and other criminal investigators the main actors in the pre-trial phase, but they lack controls and supervision. Furthermore, the KUHAP authorises Civil Service Investigators (PPNS) and special investigators to exercise coercive measures, such as detention and confiscation, without the prosecutor's supervision. This frequently leads to the use of coercive measures for improper purposes during the investigation stage of the prosecution process. As a result, those suspected of having committed a crime can suffer due to the lack of due process, and they may not receive a fair trial (Tim Penelitian dan Dokumentasi LBH Jakarta 2015; Supriyadi Widodo Eddyono et al. 2012; Domingo and Sudaryono 2015).

5.2.1 Preliminary Investigation (*Penyelidikan*)

The KUHAP defines preliminary investigation as follows:

> "*... a series of acts by a police investigator to seek and find an event that is presumed to be a criminal offence, in order to determine whether or not an investigation may be carried out via the means regulated in this law.*" (Article 1, Number 5 of the KUHAP)

The above definition adopts some concepts from the HIR[7] which regulated the prosecutor and *hulpmagistraat* (prosecutor's assistant) in conducting a criminal examination to determine if a crime had been committed (Hamzah 1984, 6). Unlike the HIR, which positioned the police as the *hulpmagistraat*[8] and authorised the public prosecutor as the main actor at the investigation stage,[9] the KUHAP makes the police the main actor at this stage.[10] Besides,

7 See Articles 38, 43, and 73 of the HIR.

8 Emergency Law 1/1951 translated the term *Hulpmagistraat* as *Pembantu Jaksa*, which carries a connotation of being a prosecutor's 'maid'.

9 Article 74 of the HIR stated that the police and other investigators could investigate a criminal case, as long as the public prosecutor decided that s/he would not be investigating it. Meanwhile, if the police and other investigators were investigating a case, prosecutors might get involved and supervise the investigation.

10 Neither the HIR nor the Draft KUHAP 1979 had provisions on preliminary investigation. The Draft KUHAP 1979 divided the pre-trial process into two phases: investigations by the police and the PPNS; and additional investigations by prosecutors to complete the police report (Rosjadi and Badjeber 1979). An additional investigation would be when the prosecutors do not investigate directly, but instead the police investigator had to follow the prosecutors' orders in order to complete the file. See the government statement by Minister of Justice Mudjono in a DPR meeting discussion RKUHAP, on 9 October 1979 (Rosjadi and Badjeber 1979, 181).

the term 'prosecutor's assistant' in the HIR is changed to the term 'assistant police investigator' in the code; the assistant police investigator can initiate preliminary investigations (Articles 1 (3), 10, 11, and 12 of the KUHAP).[11]

The KUHAP states that the police can run an independent preliminary investigation, without any control or supervision from either the prosecutor or the court. At this stage, the police cannot impose coercive measures, such as detention and confiscation.[12] The Criminal Procedure Code only gives the police the power to arrest and detain a person suspected of having committed a crime for one day (Article 16 of the Criminal Procedure Code). If the police do not name an arrested person as a suspect, they must release him or her. Initially, the KUHAP designed this stage as a preliminary filter to determine whether a case can be investigated based on the criminal provisions.[13]

The KUHAP only grants the police the power to initiate a preliminary investigation.[14] Criminal law scholars believe that this provision authorises a police monopoly during the investigation phase, since the KUHAP stipulates that every investigation process must begin with this stage. Thus, other criminal investigators, such as the PPNS and special investigators, cannot initiate an investigation before a preliminary investigation has been held by the police (Harahap 2007, 103). However, ignoring the KUHAP, in practice the PPNS and special investigators *can* investigate a case without a preliminary investigation.[15]

Some special laws allow state agencies to handle preliminary investigations for specific criminal offences, such as the National Narcotics Agency (BNN), the National Human Rights Commission (KOMNASHAM), and the Corruption Eradication Commission (KPK).[16] This means that the police force is no longer the sole actor in preliminary investigations. Furthermore, as I have discussed in the previous chapter, the Prosecution Service can

11 Government Regulation 27/1983 states that police officers of Bintara rank (a non-commissioned officer) can be appointed as police assistance investigators.

12 Article 12 of the National Police Chairman Regulation PERKAP 14/2012 on Managing the Investigation of Crimes states that an investigation is carried out via: a) crime scene processing; b) observation; c) interviewing; d) surveillance; e) undercover work; and, f) tracking and document analysis.

13 See the National Police Chairman Circular Letter 7/VII/2018 on Stopping a Preliminary Investigation, which states that an investigation can cease if the investigator cannot find facts or evidence for an event which is alleged to be a crime.

14 See Article 1 (4) of the KUHAP.

15 The police implicitly allow the PPNS to investigate, without holding a preliminary investigation. See National Police Chairman Regulation PERKAP 6/2010 on the Management of Investigations by the PPNS.

16 See Article 70(i) of Law 35/2009 on Narcotics, Article of 6 (c) Law 30/2002 on KPK, Article 18 of Law 26/2000 on the Human Rights Court.

also conduct preliminary investigations of corruption cases.[17] Because of these developments, the government is considering removing preliminary investigation from the new KUHAP.[18]

The IPS has two regulations on preliminary investigation: Chief Prosecutor Regulation 039/A/JA/10/2010 on the Standard Operating Procedure for Handling Special Crimes, and Chief Prosecutor Regulation 037/A/J.A/09/2011 on the Standard Operating Procedure for Intelligence. As stated in the previous chapter,[19] the two regulations create competition between the Intelligence and the Special Crimes Divisions, when handling corruption cases. In practice, the Prosecutorial Intelligence Division argues that its preliminary investigations are independent, i.e. not related to the Special Crimes Division. As a result, the prosecutor's Head of the Special Crimes Division does not receive any information on preliminary investigations which have been carried out by the Prosecutorial Intelligence Division (Kristiana 2009, 96). Besides, the special crimes prosecutor repeats the procedure when s/he receives the preliminary investigation files from prosecutorial intelligence; this is because the court only recognises evidence that is presented in investigation files.

Although the preliminary investigators cannot impose coercive measures, they may force those who have been targeted during this stage to obtain *rezeki*.[20] Special investigators may summon a targeted person and then threaten him/her to get the *rezeki* (Zakiyah et al. 2002, 87). The IPS' special criminal investigator may arrest a person and name him/her as a suspect, recommending that their superiors continue the investigation. However, a targeted person or his/her advocates may negotiate with a preliminary investigator by providing *rezeki* to close the case[21] (Zakiyah et al. 2002, 78). The IPS seems to allow prosecutorial intelligence to conduct

17 See Supreme Court Decision No. 1148 K/Pid/2003 on 10 January 2005, and No. 1205 K/Pid/2003 on 10 October 2005, stating that (based on Laws 31/1999, 28/1999, and 5/1991, and Government Statement 19/2000 on The Joint Team to Eradicate Corruption) prosecutors have the right to investigate and prosecute corruption cases, then compare these to Supreme Court Ruling (*Fatwa MA*) KMA1102/I1I/2005, which states that, "based on Article 30 (1) (d) of Law 16/2004 on the IPS, it has tasks and rights to investigate specific crimes, based on several different laws."

18 Hukum Online, *Pro Kontra Peniadaan Penyelidikan dalam RKUHAP,* (The pros and cons of repealing preliminary investigation provisions in the Draft KUHAP) https://www.hukumonline.com/berita/baca/lt52ef88bda5026/pro-kontra-peniadaan-penyelidikan-dalam-rkuhap, Vivanews, *KPK: Revisi KUHAP Hilangkan Penyelidikan dan Pembuktian Terbalik* (KPK revision of the KUHAP repealed a provision on preliminary investigation and the shifting burden of proof) https://www.viva.co.id/arsip/454866-kpk-revisi-kuhap-hilangkan-penyelidikan-dan-pembuktian-terbalik, accessed 3 March 2018.

19 See 4.2.3: The Public Prosecutor as State Intelligence

20 See Chapter 3 for further discussion of *rezeki*.

21 Another term for *"Rezeki"* that is known within the police force is 86 (*delapan enam*), which means that the police can negotiate a case based on the money provided by an advocate. For example, Lawyer IS acknowledges that it is easier to cease the process of crime investigation during this phase, since the police do not have to report any cessation to the prosecutor. Interview with IS, lawyer, Malang, 25 April 2015.

unofficial preliminary investigations.[22] In some cases, prosecutorial intelligence does not register such preliminary investigations in its official record (cf. Kristiana, 2006, pp. 109-110).

The IPS regulates that reports from preliminary investigations for corruption cases must be discussed in a forum called *ekspose perkara.* At district level, a criminal investigator from the Intelligence Division organises the *ekspose perkara.* Prosecutorial leaders, such as the Head of the District Prosecution Office, the Head of the Intelligence and Special Crimes Division, and the prosecutorial investigator are involved in the forum. Members of the forum can then make a recommendation confirming that the preliminary investigation is complete and can thus be investigated further by determining a suspect. The recommendation will then be submitted to the prosecutorial leadership, in order to obtain a final decision (Kristiana 2009, 82). However, in many cases, the choice either to close or continue a case onto the next investigation stage depends on the prosecutor's leadership discretion, with no consideration of the recommendation (Kristiana 2009, 86).[23] Furthermore, if the prosecutorial leaders decide to close a case, the *ekspose perkara* member must compile a preliminary investigation report, based on the decision of the leadership. The preliminary investigator must then adjust the legal facts, and find reasons to close the corruption case[24] (Kristiana 2009, 122).

5.2.2 Investigation (*Penyidikan*)

The KUHAP defines investigation as follows:

> "*…investigation is a series of acts by an investigator, in matters and by means regulated in this law, to seek and gather evidence with which to clarify whether an offence has occurred, and to locate the suspect.*" (Article 1, Number 2 of the KUHAP)

During the investigation phase, investigators gather evidence, identify suspects, examine witnesses, and (if necessary) carry out a crime scene reconstruction. Under the KUHAP, only five types of evidence are considered to be legally valid proof at trial. These are: (1) a witness testimony;[25] (2) an expert

22 My respondents from the IPS call this unofficial preliminary investigation *LID BODONG*, or *Penyelidikan Bodong.*

23 Some prosecutors I met complained about this situation, since they have had to adjust the evidence and facts in files in order to meet leadership expectations. Personal Communication, 2015.

24 In Semarang District Prosecution Service, for example, only one out of nine investigations registered eventually progressed to court. There were actually eight other investigations which had sufficient evidence, but most of these were stopped. He argues that this was possibly either because of pressure from senior IPS leadership, or because of higher compensation, i.e. money given to stop the investigation process (Kristiana 2006, 109–10).

25 The Constitutional Court Decision No. 65/PUU-VIII/2010 allowed a person to give testimony as a witness, even if s/he may not have heard, seen, or experienced the evidence themselves.

testimony; (3) a 'document', i.e. a public record, written affidavit, or another document relating to the contents of another means of proof; (4) an 'indication', i.e. testimony, or documentary evidence, of an act that intends to establish either that an offence has occurred or the identity of the perpetrator; and, (5) a defendant statement (Articles 184-189). Investigators must have testimonies from at least two witnesses, or evidence from at least two out of the five categories of proof, in order to name a person as a suspect.

Article 1 (14) of the KUHAP defines a suspect as a person who, based on preliminary evidence, is suspected of committing an offence. Also, Article 1 (21) of the National Police Chairman Regulation 14/2012 defines 'preliminary evidence' as a police report, plus one other piece of legal evidence. This provision frequently leads to the use of two kinds of witness testimonies, i.e. one from victims or informants, and one from experts. Although the latter does not inform or prove any criminal facts, in some cases criminal investigators use it to determine that a person is a suspect.[26]

Article 4 of the National Police Chairman Regulation 14/2012 on Criminal Investigation Management states that the administrative basis for an investigation should be formed by administrative documents, such as a police report (*LP*, or *Laporan Polisi*), an operation order (*Surat Perintah Tugas*), a preliminary investigation report (*Laporan Penyelidikan*), an investigation order, or a notification letter to open the investigation (*Surat Pemberitahuan Dimulainya Penyidikan/SPDP*). The police argue that, since the goal of an investigation is to find a suspect, the documents should mention the suspect's identity. Based on this argument, most investigators believe that they must name their suspect before starting their investigation.[27]

This practice has serious consequences, because the suspect's status prevents them from exercising certain civil rights. The government may issue a civil servant with a temporary discharge notice, if s/he is named as a suspect in a criminal case.[28] Most job vacancies require a Police Certificate of Good Conduct, stating that the applicant is neither a suspect, nor convicted under criminal law.[29] Consequently, 'suspect' status blocks a person from applying for scholarships and certain positions in the government and companies. The Constitutional Court has made an effort to overcome this situation with its Decision 21/PUU-XII/2014, which provides an opportunity for a suspect to examine his/her status at the pre-trial hearing.[30]

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26 Since the KUHAP has no clear definition of 'expert witness', criminal investigators also use the testimony of criminal law lecturers to assist them in determining if elements of a criminal offence fit a suspect's actions (A'yun 2014). The investigator also relies heavily on such testimony to convince the prosecutor to accept their investigation files.

27 Kompas.com *Terbitkan SPDP Wajib Ada Tersangka* (Issuing an SPDP - There Must be Suspect), https://nasional.kompas.com/read/2011/10/11/10275976/Terbitkan.SPDP.Wajib.Ada.Tersangka, accessed 1 February 2019.

28 Article 276 of Government Regulation 11/2017 on Civil Servant Management.

29 See National Police Chairman Regulation PERKAP 18/2014 on the Police Certificate of Good Conduct (*Surat Keterangan Catatan Kepolisian/SKCK*).

30 Constitutional Court Decision 21/PUU-XII/2014, p. 69, 105.

Since both the police and the IPS apply militaristic culture and centralise their bureaucracy, the leadership plays an important role in determining a person as a suspect. In a similar way to that mentioned in the previous section, the IPS leadership has the power to determine suspects in corruption cases. For example, the IPS' decision in 2003 to prosecute certain members of the Central Java provincial parliament, while letting others go free. The prosecutorial investigator cannot name certain members of parliament as suspects, even if there is strong evidence for doing so, because the IPS leadership wants to let them go free (Kristiana, 2009, p 143).

Article 50 (1) of the KUHAP mentions that a suspect has the right to be examined immediately by an investigator, and to have his/her case referred to a public prosecutor. Since, in most cases, the investigation process lasts for more than a year, a judicial review was filed to the Constitutional Court in 2015, asking the court to interpret the word "immediately" in Article 50 (1) of the KUHAP. A specific time frame should be given, within which criminal investigators must complete their investigation: either within 60 days of a suspect being detained, or within a maximum of 90 days, if a suspect has not been detained. The claimant argued that this interpretation might prevent a person having suspect status for years. However, the Constitutional Court rejected this objection in its Decision 123/PUU-XIII/2015. The court argues that the word "immediately" in Article 50 (1) and (2) of the KUHAP is hard to measure, because the completion of a case investigation cannot be generalised. It depends on how difficult it has been to search for evidence.[31]

Another issue is that suspect status can be attributed to a person for years, as long as the investigators have not issued an SP3 (*Surat Perintah Penghentian Penyidikan*, or a Letter Ordering the Cessation of an Investigation). Issuing an SP3 is also problematic, because it means the police may close the case. This situation may affect an investigator's career, since the perception is that s/he is spending the nation's budget on random cases. A number of criminal law experts believe that when a case is closed the investigator cannot use evidence from that case to investigate another case. For even one case, a criminal investigator must find new evidence and compile new investigation files for every new suspect. A notable example of this is the Mataliti case. A pre-trial hearing judge decided that the prosecutor's investigation of Mataliti's corruption case was illegal, because the IPS used

31 In its consideration, the Constitutional Court made comparisons with the previous Constitutional Court Decision 3/PUU-XI/2013, which argued that the word "immediately" in Article 18 paragraph 3 of the KUHAP means a maximum of seven days. The reason behind this is that Article 18 of the KUHAP only regulates administrative matters. The court argued that the word "immediately" in Article 50 (1) and (2) of the KUHAP is hard to measure, because the completion of a case investigation cannot be generalised. It depends on how difficult it is to search for evidence. See Constitutional Court Decision 123/PUU-XIII/2015 p. 48-50.

evidence from a previous case to prosecute Mataliti.[32] The judge cited the argument of a criminal law professor, who was an expert witness testifying that evidence used in previous cases cannot be used in another case.[33]

National Police Chairman Regulation 14/2012 states that an investigation process is supervised and controlled by the investigator's superior. In some cases, if police investigators find it challenging to construct a case based on evidence, they may organise a discussion called *gelar perkara* (or case exposé), inviting experts (including prosecutors) to attend.[34] In response to this, the IPS issued Chief Prosecutor Circular letter 001/A/JA/02/2008, prohibiting prosecutors from attending *gelar perkara* organised by a police investigator. The IPS does not want the opinions of prosecutors invited to the *gelar perkara* to be used to force the IPS to accept police investigation files. The IPS prefers to have its own *gelar perkara*, to decide whether the investigation files are complete or not. For this reason, the investigator now carries out *gelar perkara* without involving the prosecutor,[35] whereas the IPS organises *gelar perkara* without inviting the criminal investigator,[36] even when cases are serious.

When the Prosecution Service receives an SPDP from the investigator, the Head of the District Prosecution Service will appoint a public prosecutor to be the examining prosecutor (*Jaksa Peneliti*) during the investigation.[37] The examining prosecutor must then coordinate with the investigator and provide technical instructions that are applicable to the suspect, in accordance with the KUHAP and with criminal qualifications based on the Criminal Code.[38] However, the police seem unaware of this IPS regulation, arguing that they can investigate without public prosecutor supervision, based on the principle of functional differentiation. For this reason, the police do not obligate their investigators to coordinate with the public prosecutor.

Article 109 of the KUHAP states that an investigator must send a notification (SPDP) to the prosecutor when starting the investigation process. The Ministry of Justice Decision M.14-PW.07.03/1983 on Additional Guidelines for the KUHAP states that sending a written SPDP is a must. Criminal investigators must send the SPDP to the prosecutor, even before the inves-

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32 See pre-trial hearing decisions 11/PRAPER/ 2016/ PN.SBY and 19/PRA.PER/2016/PN.SBY.

33 I made some legal annotations on this decision. For more details, see Afandi (2015), Memeriksa Keabsahan Penetapan Tersangka atau Menguji pokok perkara? (Are we checking the validity of a suspect status or examining a case?) Hukum Online, https://www.hukumonline.com/berita/baca/lt574e7c88a8193/memeriksa-keabsahan-penetapan-tersangka-atau-menguji-pokok-perkara-broleh--fachrizal-afandi-/, accessed 19 February 2019.

34 Article 70 of National Police Chairman Regulation PERKAP 14/2012.

35 See Articles 69-72 of National Police Chairman Regulation PERKAP 14/2012.

36 Personal Communication with a public prosecutor, 2015.

37 Article 9 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011.

38 Articles 9 and 10 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011.

tigator summons witnesses or takes coercive measures, such as arrest or detention.[39] Likewise, if an investigator wants to stop the investigation, they must inform the prosecutor of their intention.

However, since the IPS and police do not coordinate effectively during the investigation process, most coercive measures or suspect determinations are undertaken by the police alone, without notifying the public prosecutor. The IPS stipulates that an investigator must report investigation files to a public prosecutor for a maximum of 30 days after the IPS receives an SPDP. The prosecutor is required to request a progress report for the investigation. If the investigator has not sent the investigation files 30 days after the prosecutor has requested them, the prosecutor must return the SPDP to the investigator.[40] However, the police will not stop the case when the prosecutor returns the SPDP. Instead, the police examine and evaluate the investigator, because an incomplete investigation is generally viewed as a failure.[41] In practice, the police investigator strategises by sending the SPDP, along with the investigation files, when they have completed the investigation process. Research by LBH and MaPPI FHUI in 2016 revealed that, between 2012 and 2014, the data for investigation processes carried out by the IPS and police were asynchronous. The police claimed that they investigated 643,063 cases, while the IPS only received 463,697 SPDPs. This means that 179,366 cases were not reported to the Prosecution Service (Zikry, Ardhan, and Tiara 2016).

This phenomenon may be linked to police efforts to mediate cases and internal corruption issues. The police keep their investigations away from the public prosecutor, because they are trying to reconcile and resolve cases outside of the criminal justice system (Afandi 2013, 392; 2015, 29); corruption issues can also be attributed to this phenomenon. Recent cases, reported by Muradi (2014), also support the fact that the police use *parmin*[42] (criminal participation) to support their operational budget and low salaries (*Polri & KKN* 2004, 29, 43). In some cases, the police will offer a suspect a change of articles in an investigation file. They may also manipulate evidence and witness statements, if the suspect provides *rezeki* (cf. Zakiyah et al. 2002, 82).

In 2015, in its Decision 130/PUU-XIII/2015, the Constitutional Court obliged the investigator to send an SPDP – no later than two weeks after the investigator decides to start the investigation process – to prosecutors, and to those who report on (or are reported in) criminal cases. The court argued that a delay in SPDP notification from the criminal investigator

39 Joint Instruction Chief Prosecutor and National Police Chairman 6 October 1981 Inster 006/JA/10/1981 jo. No. pol: Ins/17/K/1981 stated that, from the beginning of the investigation, the public prosecutor should advise the investigator on the Criminal Code and Criminal Procedure.

40 Article 12 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011.

41 Article 2 of National Police Chairman Regulation PERKAP 14/2012.

42 *Partisipasi Kriminal (Parmin)* is a well-known term for payment generated by criminal activity (Muradi 2014).

might violate the due process of law, since prosecutors could not monitor the investigation process from the beginning. Besides, those who either reported a crime or were reported for alleged criminal acts could not prepare further action to defend their rights.[43] Because of the decision, the IPS asked prosecutors to reject SPDPs which are sent more than two weeks after the start of an investigation.

5.2.3 Coercive Measures (*Upaya Paksa*)

Once criminal investigators start the investigation process, they can use coercive measures, which can be any one of the following: (a) summons; (b) arrest; (c) detention; (d) searches; (e) confiscation; or (f) the examination of letters (Article 26 of The National Police Chairman14/2012). After receiving an order from their leadership, investigators can arrest a person who is suspected of committing a crime, based on sufficient preliminary evidence (Article 16-17 of the KUHAP).[44] The investigators must immediately[45] send a copy of the warrant to the family of the suspect (Article 18 (3) of the KUHAP). The only situation in which the investigator does not need to send a copy of the warrant to the suspect's family is when the suspect is caught red-handed (Article 18 (2) of the KUHAP).

The investigators may search the suspect's body or house for the sake of investigation[46] (Article 32 of the KUHAP). However, in order to search a house, investigators must obtain permission and a warrant from the Chief of the District Court. Two people and a village leader, or the coordinator of the suspect's neighbourhood, must also witness this search process (Article 33 of the KUHAP). On the other hand, in urgent circumstances[47] investigators can conduct a house search without permission from the court, or even

43 Constitutional Court Decision 130/PUU-XIII/2015, p. 146-147.

44 An Arrest Order Letter is not issued by the court, but by the investigator's superior. Those suspected of misdemeanors can only be arrested if they have been absent from summonses several times, without clear legal reasons (Article 19 (2) of the KUHAP).

45 The term "immediately" has been reviewed at the Constitutional Court by Hendry Batoarung Ma'dika. The police detained him for 24 hours, without sending a letter of notification to his family. The court then decided that the word "immediately" in Article 18 (3) of the KUHAP should be interpreted as meaning not exceeding seven days following detention. The Constitutional Court set a time limit of seven days because of differences in distance and geographical conditions in several regions in Indonesia. The Constitutional Court Decision 3/PUU-XI/2013, pp. 33–34.

46 Article 1 number 17 of the KUHAP states that a search is defined as an investigator entering a person's house for an examination, confiscation, and/or arrest. However, the criminal investigator often arrests a suspect in his/her house, bringing an arrest warrant only (i.e. without bringing a house search permit). See, for example, the pre-trial hearing at South Jakarta District Court, 37/Pid.Prap/2015/PN.Jkt.Sel.

47 Elucidation of Article 34 (1) of the KUHAP defines "urgent circumstances" as criminal investigators becoming concerned about a suspect who might escape, repeat a crime, or destroy or change evidence, if a permit cannot be obtained from the Chief of the District Court in a manner (suitable way) and in a short time.

the presence of witnesses (Article 34 (1) of the KUHAP). The investigator must immediately report their house search to the Chief of the District Court, in order to obtain retroactive approval (Article 38 (2) of the KUHAP). Since the courts always approve requests, criminal investigators no longer ask for permission in advance. They prefer to use 'urgent circumstances' as a reason to conduct a house search, to ease the procedure.[48] In Jakarta, for instance, only 9 out of 368 suspects received a warrant when their houses were searched by investigators (R. Gunawan et al. 2012, 80-81).

Similar procedures are also imposed during the confiscation process. An investigator may confiscate goods by force at a suspect's house, using confiscate and search warrants from the District Court (Article 38 jo. Article 1 (17) of the KUHAP). In urgent circumstances, the investigator can confiscate movable objects without permission from the District Court, and report the confiscation to the court as soon as possible, in order to obtain an approval (Article 38 of the KUHAP). When a suspect is caught red-handed, the investigator can immediately confiscate the goods without the court's permission (Article 40 of the KUHAP). However, since prosecutors are not involved in the investigation process, certain evidence collected by criminal investigators from the search and confiscation process cannot be used to support a prosecutor's indictment.[49]

The KUHAP allows investigators, prosecutors, and judges to detain suspects for two reasons. First, if they are afraid that the suspect will repeat a crime, escape, or damage or dispose of the evidence (Article 21 (1) of the KUHAP). Secondly, investigators, prosecutors, or judges can place a suspect in custody if the suspect commits a particular crime[50] (Article 21 (b) of the KUHAP), or a criminal offence carrying a sentence of at least five years in prison (Article 21 (4) (a) of the KUHAP).[51] Even if the first reason does not apply to a suspect, in practice the criminal investigator and prosecutors can detain the suspect, as long as the second reason applies. As I have mentioned in the previous chapter, this results in overcrowded detention centres (Pandupraja, Santoso, and Prasetyo 2010, 72).[52]

The table below shows how the KUHAP limits the length of detention each of the criminal justice actors can apply to a suspect or defendant:

48 Article 34 (1) of the KUHAP restricts an urgent search to a suspect's residence, any other place where a suspect is located, the place where the crime was committed, hotels, and other public places.

49 Personal Communication with a Head of the District Prosecution Office, 2015.

50 Particular crimes under the Criminal Code (KUHP) can be seen in Articles 282 (3), 296, 335 (1), 351 (1), 353 (1), 372, 378, 379a, 453, 454, 455, 459, 480, and 506. Also, other crimes are mentioned under the customs, immigration, and narcotics laws.

51 Compare this to the detention process in the Netherlands. Apart from the severity of a sentence, a criminal investigator must consider the public interest, prior to deciding to detain a suspect.

52 Prosecutors consider their detention power to be their subjective authority. Personal communication with DH, the Head of the Bandung District Prosecution Service, 2015.

Procedure	Detention/Extended by	Maximum	Legal Ground
Investigation	Investigator	20 days	Article 24 (1) of the KUHAP
	Extended by the Public Prosecutor	40 days	Article 24 (2) of the KUHAP
Prosecution	Public Prosecutor	20 days	Article 25 (1) of the KUHAP
	Extended by the District Court President	30 days	Article 25 (2) of the KUHAP
Court Trial	District Court Judge	30 days	Article 26 (1) of the KUHAP
	Extended by the District Court President	60 days	Article 26 (2) of the KUHAP
Appeal	High Court Judge	30 days	Article 27 (1) of the KUHAP
	Extended by the High Court President	60 days	Article 27 (2) of the KUHAP
Cassation	Supreme Court Judge	50 days	Article 28 (1) of the KUHAP
	Extended by the Chief of Supreme Court	60 days	Article 28 (2) of the KUHAP
Total		400 days	

Table 3: Duration of detention during the criminal process

As I discussed in the previous chapter, the power to detain a suspect has become an economic commodity for investigators and prosecutors, since they can use it to gain *rezeki* to cover their operational costs (Supriyadi Widodo Eddyono et al. 2012, 225-27). In some cases, the police threaten a suspect by saying they will put them in the same cell as murderers and rapists if they not provide *rezeki* (Zakiyah et al. 2002, 84).

Articles 71 and 62 jo. 83 c of the HIR gave the prosecutor authority to control the investigator's detention process, but the KUHAP only gives the prosecutor the power to extend the investigator's detention period. However, prosecutors rarely refuse an extension of the detention period proposed by the police. Prosecutors admit that, in order to maintain a good relationship, they allow police to extend the detention to a maximum of 40 days.[53] As discussed in Chapter 4, the prosecutor needs the assistance of the police in keeping themselves and the defendant secure during trials.

Article 31 (1) of the KUHAP allows suspects to suspend or postpone their detention, by paying bail and meeting the conditions determined by the investigator, public prosecutor, or judge. Such circumstances include an obligation to report to authorities, stay at home, or not leave the city of residence during the detention suspension. The detainer can lift or postpone the detention suspension if one of these requirements are violated (Article 31 (2) of the KUHAP). Article 35 of the Government Regulation 27/1983

53 Personal Communication with the heads of the district prosecution offices in three cities, 2015.

on Implementation of the KUHAP states that a detainer can determine the amount of bail money. The suspects, or their lawyer, must pay the bail to the District Court, in order to get a receipt.[54] If a suspect escapes and cannot be found after three months, the bail will be transferred to the state. However, in practice, suspects or legal advisors post the bail to the police investigator or prosecutor, not to the court clerk.[55] Government Regulation 27/1983 does not stipulate a mechanism for how bail should be returned if the suspect does not escape during the detention period. As a result, bail money is rarely returned to suspects, in practice (Gunawan et al. 2012). In this way, the criminal investigator or prosecutor can use this procedure to gain *rezeki* from suspects (Simanjuntak 2009, 86-87; *Polri & KKN* 2004, 37, 41).

5.2.4 Pre-Trial Hearings (*Pra-peradilan*)

To control coercive measures, Minister of Justice Oemar Seno Adji introduced the concept of the Examining Judge *(Rechter Commissaris)* in the 1974 Draft of the KUHAP. The concept was adopted from the Dutch Colonial Criminal Procedure *(Reglement op de Strafordering).* However, both the IPS and the police rejected this concept, since it had the potential to reduce their criminal proceedings powers as stipulated in the HIR (Supriyadi W. Eddyono et al. 2014, 31-34). As a result, the KUHAP drafting discussions reached deadlock. In 1979, Minister of Justice Mudjono eliminated the concept of the Examining Judge from the Draft of the KUHAP and let the police and prosecutor control their coercive measures respectively, via internal supervision. The KUHAP calls internal supervision "built-in controls", which means that the police and prosecutorial leadership are in charge of monitoring coercive measures (Supriyadi W. Eddyono et al. 2014, 35-37). The Draft of the KUHAP then became controversial, and it was criticised by academics and legal aid activists. Due to these protests, parliament and the government adopted a pre-trial hearing mechanism in the 1981 KUHAP, which was conceptually weaker in controlling coercive measures than the Examining Judge concept (Hart & Nusantara, 1986, pp. 8-9).[56] Through this procedure, the court could only check coercive measures after the fact, and it had limited time and powers to examine the legality of the coercive measures (Articles 77-83 of the KUHAP).

54 Three copies of the proof of bail should be made. This is regulated in 8a of the attachment to Ministry of Justice Decision No. M.14-PW.07.03/1983. The three copies are: (i) for the clerk's archive at the District Court; (ii) for those who pay the bail, to be handed to the authorities at the institution detaining the suspect; and, (iii) for the clerk, to send to the authorities at the institution detaining the suspect (via courier) as a control tool.

55 Community Legal Aid Institute Report, 2012.

56 The concept of a pre-trial hearing is adopted from the American concept of habeas corpus. However, because of the compromising politics within the parliament, the pre-trial concept is seen as weaker than the concept already proposed (Supriyadi W. Eddyono et al. 2014, 39).

A pre-trial judge examines an application and decides within ten days of the application being submitted (Articles 78 and 82 (1) of the KUHAP).[57] Since the judge has such limited time for examination, in practice s/he tends to examine coercive measures based on administrative completion, without delving into material facts. As a result, pre-trial judges rarely decide that coercive measures are invalid (Supriyadi W. Eddyono et al. 2014). Besides, during the authoritarian New Order regime, the pre-trial procedure never granted public complaints about coercive measures being against human rights, especially in cases that had an impact on the government's political interests[58] (Hart and Nusantara, 1986, p. 39).

The pre-trial hearing can also be used to ask for compensation for illegal arrests or detention. An acquitted defendant may even sue for compensation for being subjected to illegal coercive measures (Article 95 of the KUHAP). Government Regulation 92/2015 changes the value of compensation from a minimum of 5,000 rupiahs and a maximum of 1,000,000 rupiahs, to a minimum of 500,000 rupiahs. If the suspect or defendant dies during trial, the family may receive compensation up to a maximum of 600,000,000 rupiahs. However, because the government has not issued a technical regulation relating to compensation disbursement, in practice, a defendant who wins pre-trial cannot get compensation.[59]

The pre-trial judge's decision has an impact on police criminal investigators. If a pre-trial judge decides that the coercive measures are illegal, investigators and their leaders will be examined by the Division of Internal Affairs. Based on the pre-trial decision and their examination, the division will determine whether the investigators and their leaders have used sloppy procedures or abused their coercive measures powers. The investigators and their leadership will receive administrative sanctions for any carelessness evidenced in their pre-trial procedure, and disciplinary penalties if they abuse their power (Faal 1991; Rajab 2003). One example of this is the demo-

57 The police usually cheat the time limit by not attending the initial hearing to make concessions on the pre-trial hearing examination. Personal Communication with a legal aid activist at LBH Jakarta, 2016

58 Since the New Order era, lawyers such as OC Kaligis have used pre-trial as an occasion to question an investigator's responsibility, if the suspect dies during detention. Even though Kaligis lost his pre-trial hearing, it is important to note that the investigator's testimony about the suspect's death was used as evidence for a civil suit against the police. Both the district and high courts then asked the police to pay compensation to the suspect's family (Kaligis et al. 2000, 109–10).

59 Andro, who was freed by a cassation decision of the Supreme Court, sued the police, claiming he was a victim of miscarriage of justice, and he was supported by legal aid activist. Even though the pre-trial judge granted Andro's claim, the compensation was not received. It was because the Ministry of Finance had no procedure for pre-trial compensation. detikNews, *Ganti Rugi Tak Kunjung Cair, Korban Salah Tangkap Gugat Menkeu* (Compensation not yet received - victim of false arrest sues the Ministry of Finance), https://news.detik.com/berita/4167913/ganti-rugi-tak-kunjung-cair-korban-salah-tangkap-gugat-menkeu, accessed 13 March 2019.

tion of Surabaya District Police Chief, Takdir Mattanette, to the position of a 'non-job officer'. The Division of Internal Affairs believed that Mattanette was responsible for the district police's loss in the pre-trial hearing.[60]

Therefore, criminal investigators tend to avoid and prevent pre-trial hearings filed by a suspect. Indeed, they will try to force a suspect not to file a pre-trial hearing case. In some cases, investigators will even ask a suspect to replace his/her legal representative, if they advise filing a pre-trial hearing. The lawyer selected by the investigators will then revoke the pre-trial hearing. Further, the Chief of the District Police may lobby the District Court President to ask a pre-trial judge to reject the suit from the suspect (Kaligis, Nurima, Kailimang, and Lontoh, 2000, pp. xx1, 19, 61). On the other hand, when criminal investigators or prosecutors see that there is a chance of their investigation process being annulled during the pre-trial hearing, they transfer their case files to the court before the pre-trial judge has a chance to decide the case.[61] Since Article 82 (1) of the KUHAP states that the pre-trial hearing is cancelled when the court starts its trial, the examination of the legality of coercive measures used will end.[62]

In 2014, the Constitutional Court extended the pre-trial mechanism power to not only examine coercive measures (such as detention, arrest, and confiscation), but also to examine the process of determining a suspect.[63] The police decision to determine a person as a suspect, for instance, can be seen in the Investigation Order (*Sprindik/Surat Perintah Penyidikan)* and the SPDP (the Letter of Notification to Open the Investigation).[64] Article 25 of National Police Chairman Regulation or PERKAP 14/2012 stipulates

60 Kompas.com, *Kapolres digugat karena penetapan tersangka kasus korupsi di Dinas Tenaga Kerja Surabaya,* (Chief of District Police was sued (in the Pre-trial Hearing) for determining a (wrongful) suspect of corruption in the Surabaya Manpower Division) https://regional.kompas.com/read/2016/12/09/14125041/polisi.kalah.praperadilan.kapolres.tanjung.perak.diperiksa.propam, accessed 29 March 2019. DetikNews, *Usai diperiksa Mabes Polri, AKBP Takdir tinggalkan kursi Kapolres Tanjung Perak,* (After being examined at Police Headquarters, Takdir left his position as Chief of Tanjung Perak District Police), https://news.detik.com/berita-jawa-timur/d-3373404/usai-diperiksa-mabes-polri-akbp-takdir-tinggalkan-kursi-kapolres-tanjung-perak, accessed 29 March 2019.

61 Berita Satu, *Pelimpahan Berkas Cara KPK Gugurkan Praperadilan Sutan* (Transferring the Dossier allows the KPK to annul Sutan's Pre-trial Hearing), https://www.beritasatu.com/nasional/260368/pelimpahan-berkas-cara-kpk-gugurkan-praperadilan-sutan, accessed 2 April 2019.

62 Constitutional Court Decision 102/PUU-XIII/2015 stated that, once a prosecutor begins their first hearing, the pre-trial hearing must be cancelled.

63 Constitutional Court Decision 21/PUU-XII/2014.

64 See the attachment on SPDP Formats in the National Police Chairman Regulation PERKAP 6/2010 about the PPNS' investigation management. See also, Detiknews, *Wakapolri: SPDP dari Kepolisian Tak Identik dengan Status Tersangka,* (Vice Police Chairman: the SPDP has no equivalent term for Suspect Determination), https://news.detik.com/berita/d-3724593/wakapolri-spdp-dari-kepolisian-tak-identik-dengan-status-tersangka, accessed 2 April 2019.

that a suspect's identity does not need to be included in the SPDP and the *Sprindik*. However, in practice police investigators mention suspects' names and criminal law articles in both the *Sprindik* and the SPDP.[65] In contrast with the police, the IPS has a procedure for naming a person as a suspect in a corruption case (Article 331 of Chief Prosecutor Regulation or PERJA 039/A/JA/10/2010). After the IPS investigator has completed the preliminary investigation report, the IPS will issue a warrant determining the suspect (Pidsus-18).

In practice, the pre-trial hearing mechanism can examine the process of suspect determination in the *Sprindik*. Thus, a pre-trial judge can state that the *Sprindik* is illegal in its decision. In some cases, the police or IPS criminal investigator will not release the suspect after the ruling. They respond to the decision by issuing a new *Sprindik* to process the case further. One example of this is the La Nyala Matalitti corruption case.[66] The IPS rejected three pre-trial judge decisions ordering the IPS to release Matalitti because the *Sprindik* is illegal. The IPS issued a new *Sprindik* every time a pre-trial judge annulled it. The IPS argued that the pre-trial judge's decision was not independent, because Matalitti was the nephew of the Chief Justice of the Supreme Court at the time.[67] Finally, Matalitti preferred not to file a pre-trial mechanism again, and let his case be tried. In the end, the Supreme Court acquitted Matalitti, because the prosecutor could not present sufficient evidence.[68]

Article 80 of the KUHAP provides an opportunity for investigators, public prosecutors, or third parties to examine either the termination of an investigation (SP3) or the cessation of a prosecution (SKPP) during pre-trial

65 Both the *Sprindik* and the SPDP emphasise the suspect's name.

66 Fachrizal Afandi, *Memeriksa Keabsahan Penetapan Tersangka atau Menguji pokok perkara?* (Are we checking the validity of a suspect's status or examining a case?) https://www.hukumonline.com/berita/baca/lt574e7c88a8193/memeriksa-keabsahan-penetapan-tersangka-atau-menguji-pokok-perkara-broleh--fachrizal-afandi-, accessed 22 March 2019.

67 The public prosecutor argued that a pre-trial judge was careless in weighing the prosecutor's evidence. Additionally, the public prosecutor viewed the judge as not being independent, since the Chief of the Supreme Court was La Nyala's relative. Republika *La Nyalla kerabat dekat ketua MA, Ini tanggapan Jaksa Agung*, (La Nyala is a Supreme Court President's relative: this is the Chief Prosecutor's response) https://www.republika.co.id/berita/nasional/hukum/16/06/03/o86bb9377-la-nyalla-kerabat-dekat-ketua-ma-ini-tanggapan-jaksa-agung, accessed 23 March 2019.

68 NewsDetik, *La Nyalla Bebas, Kajati Jatim: Lawannya ini yang punya pengadilan* (La Nyalla is acquitted, the Head of East Java High Prosecution Office says: "Our enemy is the person who owned the court") https://news.detik.com/berita/d-3381454/la-nyalla-bebas-kajati-jatim-lawannya-ini-yang-punya-pengadilan, Sindo News, *Sudah diputus bebas MA, 2 rekening La Nyalla masih diblokir* (Supreme Court acquitted La Nyalla, but La Nyalla's bank account is still blocked), https://daerah.sindonews.com/read/1323065/23/sudah-diputus-bebas-ma-2-rekening-la-nyalla-masih-diblokir-1531966637, accessed 23 March 2019.

hearings.[69] It is designed to have a 'checks and balances' effect on police and prosecutors, when waiving criminal cases. Unfortunately, neither the police nor prosecutors use this opportunity.[70] Some public prosecutors admit that they are not willing to enter into conflict with the police.[71] They know that the decision to investigate and stop an investigation also relates to the gaining of *rezeki* to cover police operational costs. In 2013, the Constitutional Court expanded the list of those eligible to file a pre-trial hearing to include non-governmental organisations.[72] It enables various NGOs which may represent the public interest to examine a criminal case dismissal by the police. A notable example of this is when a pre-trial judge accepted a claim from WALHI, an environmental protection NGO, to reopen the investigation of illegal mining cases conducted by 12 mining companies in West Java.[73] Because of this decision, the police continued its investigation of the case.[74]

5.2.5 The Pre-Prosecution Process (*Pra-Penuntutan*)

As I stated earlier, the functional differentiation principle in the KUHAP categorises criminal procedure according to the actors involved – the police, for both preliminary and primary investigations, and the public prosecutor for the prosecution process. To bridge the investigation and prosecution stages, the KUHAP introduces a step stage called the pre-prosecution process. The term 'pre-prosecution'[75] was introduced to replace an additional investigation by the prosecutor as stipulated in the HIR (Hamzah 1983, 159). Article 14 (b) of the KUHAP states that the prosecutor has authority to conduct pre-prosecution, to provide instructions for the investigator, and to complete the investigation file.

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69 The KUHAP makes an exception for the case dismissal due to the public interest (*Seponering*)), as it is a mechanism which cannot be tried by pre-trial judges (Explanation of Article 77 of the KUHAP).

70 Based on searching for information in Supreme Court decisions, and an interview with prosecutors during my fieldwork.

71 Personal Communication with a senior prosecutor DG, 2015.

72 See the Constitutional Court Decision 98/PUU-X/2012.

73 Tempo, *WALHI gugat pra-peradilan Polda Jabar* (WALHI submits a pre-trial hearing application against the West Java Provincial Police), https://nasional.tempo.co/read/650514/walhi-gugat-praperadilan-polda-jabar, accessed 12 March 2018. WALHI asked me to be one of its expert witnesses for the pre-trial hearing.

74 Pojok Satu, *Kasus Cirangsad mulai digarap serius*, (Cirangsad case is to be investigated seriously) https://jabar.pojoksatu.id/bogor/2015/08/05/kasus-cirangsad-mulai-digarap-serius/, accessed 23 March 2018.

75 The pre-prosecution process is considered complete when an investigator hands their case files in to the prosecution office. If a public prosecutor argues that the investigation is not complete, the prosecutor can give the case files back, and urge that an additional investigation is conducted, based on advice from the public prosecutor.

The KUHAP regulates the pre-prosecution process in Articles 110 and 138.[76] Criminal experts criticised the separation of pre-prosecution arrangements in these two articles, details of which are presented in different chapters of the KUHAP.[77] The experts argue that the provision for pre-prosecution should be set out in one single article, because the provision stated in each of the articles is connected (Sofyan and Asis 2017; Hamzah 1983).[78] It seems that the government wants to create an impression that the KUHAP sharply divides the authority of the police and prosecutors into investigations and prosecutions. Because of this arrangement, the police can both collect evidence and apply particular articles to their investigation files, without being supervised by the prosecutor. This procedure also limits the opportunity for the public prosecutor to use a different article in his/her indictment, because evidence in the investigation file will not support it.

In essence, the KUHAP does not elaborate explicitly on the definition of pre-prosecution. The KUHAP simply obligates prosecutors to refer to

76 Article 110 of the KUHAP:
(1) If an investigator has completed conducting an investigation, s/he is obliged to pass the relevant case dossier on to the public prosecutor, immediately.
(2) If the public prosecutor believes that the result of an investigation is still inconclusive, s/he shall immediately return the case dossier to the investigator, with directives for its completion.
(3) If the public prosecutor returns the results of an investigation for completion, the investigator is obliged to carry out additional investigation immediately, in line with the public prosecutor's directives.
(4) An investigation shall be considered complete if the public prosecutor does not return the result of the investigation within fourteen days, or if before the end of the fourteen-day time limit the investigator has already been notified by the public prosecutor about the matter.
Article 138 of the KUHAP:
(1) After receiving the result of an investigation from an investigator, a public prosecutor shall immediately study and examine it carefully and is obliged, within seven days, to inform the investigator of whether or not the result of the investigation is complete.
(2) If the result of the investigation has been determined as not yet complete, the public prosecutor shall return the case dossier to the investigator, accompanied by directives on what must be done to make it complete within fourteen days of the investigator receiving the dossier.

77 Article 110 of the KUHAP is located in Chapter XIV on the Investigation while Article 138 KUHAP is located in Chapter XV on the Prosecution.

78 Topo Santoso contends that an investigation cannot stand by itself, since the investigation supports the prosecution in court. This is because the success of a prosecution is determined by the success of the relevant investigations (Santoso 2000, 95). Santoso's opinion is based on the Ministry of Justice decision M.01.PW.07.03/1982 on Guidelines for Implementing the KUHAP, which states that the position of the police cannot be separated from the functions of prosecution and the court, leading to the idea that this job division does not mean segmentation. In fact, according to Luhut Pangaribuan, the relationship between the police and judges in pre-prosecution process can sometimes be seen as ineffective and inharmonious, with the actors potentially blaming one another (Pangaribuan 2016).

Articles 110 (3) and (4), when conducting pre-prosecution. Article 138 of the KUHAP obliges the public prosecutor to examine the investigation files within seven days (Article 138 (1)). The public prosecutor will later decide whether or not the investigation has been completed. If the prosecutor does not return the files to the investigator within 14 days, the prosecutor must prosecute the case based on the investigation files. However, if the public prosecutor believes that the case does not have sufficient evidence, s/he can return the files to the police. The public prosecutor makes an annotation, as a starting point from which the police can conduct an additional investigation within the next 14 days (Article 14(b) and 138(2) of the KUHAP). This back-and-forth process is commonly referred to the P-19 process.[79]

However, the IPS defines the pre-prosecution process differently from the KUHAP. Chief Prosecutor Regulation PERJA 36/A/JA/09/2011 on Standard Operating Procedures for Handling General Crimes, defines pre-prosecution as follows:

> *"…. the prosecutor's action in following the progress of an investigation, after receiving a letter of notification of the start of the investigation (SPDP) from the investigator, in analysing and examining the completeness of the investigation file from the investigator, and in providing instructions to be completed by the investigator, to be able to determine whether or not the investigation file is complete."*

According to this PERJA, the pre-prosecution process starts when an investigator sends an SPDP to the Prosecutor's Office. The IPS appoints an examining prosecutor to follow the progress of the investigation, and to coordinate with an investigator before the investigation is completed.[80] However, the police choose to follow the KUHAP definition of the pre-prosecution process, and involve the examining prosecutor only when their investigator has completed the investigation. In practice, the examining prosecutor chooses to wait for police investigators to come to their office, instead of directly checking the facts during the police investigation,[81] and the investigator sends the file after the investigation has been completed. The file also contains the investigator's juridical analysis relating to the

79 P-19 is the number of the IPS form that is attached to a document, when a prosecutor passes files back to investigators. The P-19 is sent to investigators, then signed by the public prosecutor and the Head of the General Crime Division, who represents the Head of the District Prosecution Office (Article 92 of Chief Prosecutor Regulation PERJA 36/A/JA/09/2011).

80 As has been elaborated in Chapter 4, the IPS follows the principle of equality. This means that the High Prosecution Office prosecutor receives an investigation file from provincial level investigators. On the other hand, Supreme Prosecution Office prosecutors receive investigation files from national level investigators. (Article 59 of Chief Prosecutor Regulation PERJA 36/A/JA/09/2011).

81 Interview with DG, 6 May 2015. Even though Article 10 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011, about standard operation for general crimes, urges the prosecutor to supervise actively, the limited budget available means that the prosecutor works passively. For more details, see 3.4.4: Budget.

selection of articles.[82] The prosecutor then checks the application of the articles and the evidence specified by the investigator, and makes an indictment based on this.

One of the performance indicators for investigators is when they successfully convince prosecutors to accept their investigation files. Therefore, in some cases investigators press public prosecutors to receive their files. [83] Although Article 142 of the KUHAP states that a prosecutor has the power to split a case, in practice the police decide to split a case, enabling them to spend the investigation budget, since they are tied to a budget limit per case.[84] In this regard, the police split a case which has more than one suspect into two cases, without coordinating with the prosecutors.

In practice, the pre-prosecution process is carried out in two stages. The first stage is when the criminal investigator submits investigation files to the public prosecutor, who checks whether the files are complete and can be forwarded to the court. The second stage is when criminal investigators transfer the evidence and suspect(s) to the Prosecution Office, after the examining prosecutor states that the files are complete (Article 74 of National Police Chairman Regulation PERKAP 14/2012). Criminal experts consider the term 'complete' to be unclear. It does not address the issue of whether the application of the law is correct, or whether an action alleged by the criminal investigator is in accordance with the selected criminal law provision. Not to mention the fact that, in the second stage of the pre-prosecution process, the prosecutor only assesses the completeness of investigation files based on two conditions: whether or not the suspect or evidence is described in the investigation files; and, whether or not the files have met the evidentiary requirements based on the KUHAP.[85] As a result, the prosecutor drafts the indictment based solely on files formulated by the investigator, without being able to verify the accuracy of the criminal law application (Hamzah 1984, 132-33).[86] In some cases, the investigator

82 Article 73 (2) of National Police Chairman Regulation PERKAP 14/2012. On the one hand, the police consider themselves to be cooks, preparing ingredients, then cooking them. On the other hand, a prosecutor is more like a waitress, serving dishes to the judge. Personal Communication with S, the Head of Criminal Investigation, Malang District Police, 2015.

83 In some cases, the District Police Chief lobbies the Head of the District Prosecution Office, in order to command the public prosecutor to accept the file. Personal Communication with HH, the Head of the M Prosecution Office, 2015 The police even threaten or force the public prosecutor into receiving the dossier. Berita Satu, *Petinggi Polda Maluku ancam tembak Jaksa* (Police high official threatens to shoot prosecutor), 1 July 2015, http://www.beritasatu.com/hukum/287332-petinggi-polda-maluku-ancam-tembak-prosecutor.html, AJNN, *Kapolres Sabang ajak Duel Kasi Pidum Kejari Sabang*, (The chairman of the district police challenges the public prosecutor to a duel), http://www.ajnn.net/news/kapolres-ajak-duel-kasi-pidum-kejari-sabang/index.html,.acessed 23 May 2018

84 See Chapter 3.

85 Chief Prosecutor Circular Letter SEJA 013/JA/8/1981, 20 August 1981.

86 With this type of procedure, the KUHAP applies *dominus litis* (master of the procedure) to investigators (Surachman and Hamzah 2015, 287).

submits evidence that does not match the description in the investigation files. Because of this, the prosecutor finds it difficult to prove the criminal act during trial, and to execute the judge's verdict.[87]

The KUHAP does not regulate the prosecutor's power to stop a case if s/he considers that the evidence presented by investigators is insufficient. Furthermore, the KUHAP does not regulate whether prosecutors can ask investigators to change the articles selected for their investigation files (Hamzah 1984, 135). The KUHAP does not stipulate how an additional investigation process can be carried out by an investigator, or what legal consequences may emerge if the investigator does not complete the additional investigation within fourteen days. As a result, a suspect suffers legal uncertainty, because their case is not being processed properly. The following figure shows that almost half of the investigation files on general crime cases that were returned to investigators were not followed up within the time limit regulated in the KUHAP.

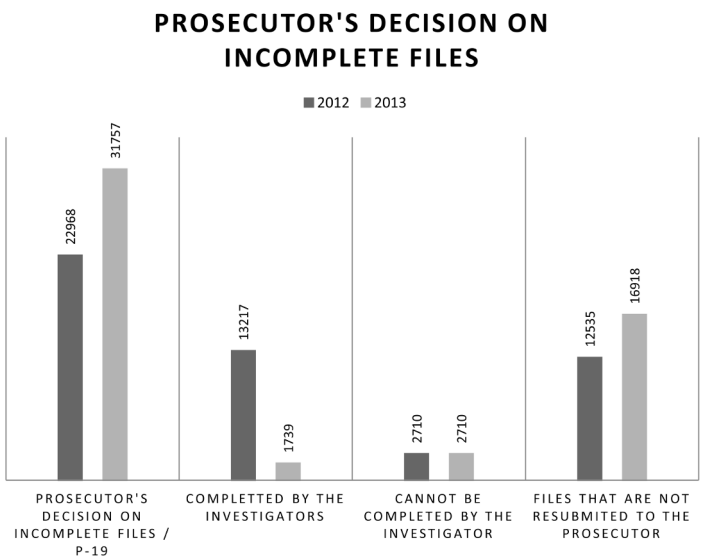

Figure 6: Prosecutor's decision on incomplete investigation files (data from the IPS Annual reports for 2012 and 2013)

It can be seen from the above figure that, in 2012 and 2013, the police investigator failed to re-submit around 55% of the investigation files, after the prosecutor had decided that the files were incomplete. Thus, the police are in the possession of thousands of cold cases. It seems that the police have

87 In many cases where a vehicle is part of the evidence, an investigator might replace a car's machine specification with another (worse) specification, so that prosecutors find it difficult to return the vehicle if the judge wants them to do so. Some legal representatives complain, and ask prosecutors to restore the original car. Personal Communication with WW, the Head of the Prosecution Office General Crimes Division, 2015.

no procedure to follow if the prosecutor rejects their files.[88] Apart from legal reasons, the prosecutor's decision to reject the files is likely to be influenced by the *rezeki* provided by the broker (Zakiyah et al. 2002, 93).

However, when an investigator returns the files to the prosecutor, informing that their investigation is 'optimal' but they still cannot fulfil the prosecutor's instructions, the IPS itself may conduct an additional examination. It aims to complete the files, in order either to allow the case to proceed further to the prosecution stage or to stop the prosecution. Article 30 of the IPS Law states that prosecutors can conduct additional examinations before files are submitted to court. However, the prosecutor must coordinate with investigators during additional examinations. The prosecutor may check the evidence and witnesses, but not the suspect. Article 28 of Chief Prosecutor Regulation PERJA 36/A/JA/09/2011 states that an additional examination can also be conducted, to decide whether or not a case may be prosecuted at trial. Since the IPS has a limited budget and cannot examine suspects, prosecutors are reluctant to use their authority to conduct additional examinations.[89]

5.3 Prosecutorial Discretion in Criminal Case Dismissal

In European criminal justice system literature, prosecutorial discretion in criminal case dismissal refers mostly to solutions for filtering criminal cases and decreasing case backlogs at court (Fionda 1995; Tak 2008; Jehle and Wade 2006; Geelhoed 2016). Public prosecutor discretion plays an important role, both in coping with the limited state budget, and in implementing restorative justice in the juvenile justice system.[90] However, criminal case dismissal practice in Indonesia often connotes opportunities for corruption (Zakiyah et al. 2002; Kristiana 2010; Reksodiputro 2002; Lindsey and Butt 2009; *Polri & KKN* 2004). This negative connotation[91] influences Indonesian criminal justice system regulations, leading to tighter procedures or

88 Article 98 and Article 70 of National Police Chairman Regulation PERKAP 14/2012 regulates that an investigator's superior can give instructions to the investigator when the files are returned, and conduct a case exposé *(Gelar Perkara*) to meet the prosecutor's instructions.

89 Data from SIMKARI 2013-2014 shows that not even one additional examination is done by the prosecutor. See also 2.3 on the case of prosecutors in the Nyo Ben Seng case; Those prosecutors was arrested by police because they conducted an additional examination.

90 In 2012 the Indonesian government enacted Law 11/2012 on the Juvenile Justice System, which requires judges, police and prosecutors to implement restorative justice by applying a diversion to cases where the suspect is a juvenile. Unfortunately, this diversion process cannot run optimally, since the government is not yet able to provide any alternative sentences (such as community service orders or training orders) to those stipulated in the Juvenile Justice System Law (Afandi 2015; Sutriadi Pinim and Erasmus Napitupulu 2013).

91 Hukum Online, *Mencermati Pemberian SP3 Kasus Korupsi,* (Observing corruption case dismissals) https://www.hukumonline.com/berita/baca/hol11608/mencermati-pemberian-sp3-kasus-korupsi, accessed on 11 February 2019.

the removal of power to dismiss cases. We can see these provisions in the KUHAP, which binds the investigator and prosecutor to obtain permission from their superiors and hold a *gelar perkara* (case exposé), before ceasing a criminal case for technical reasons.[92] Another regulation is the IPS law, which only allows the Chief Prosecutor to dismiss a case for public interest reasons (*Seponering*). Besides, previously the government imposed the Commission Eradication Corruption (KPK), which could prosecute all corruption cases with sufficient evidence, but did not have the power to waive any such cases.[93]

However, these strict procedures on criminal case dismissal do not prevent investigators and prosecutors from being corrupt and abusing their power. As I have elaborated in the previous section, at district level the leadership's control over criminal case dismissal allows them to force their investigator or prosecutor to dismiss a case in order to gain more *rezeki* (cf. Kristiana 2006, 114; Zakiyah et al. 2002).[94] The discretion to stop a case thereby becomes a commodity, which is traded based on the severity of the criminal law punishment and the suspect's profile. The investigator or prosecutor may gain more *rezeki* if a suspect has a high-level political background (Kristiana 2009, 156-57). Therefore, criminal justice actors are likely to be reluctant to waive small cases, since they can gain no compensation or *rezeki* from suspects.

Further, this procedure cannot prevent any political intervention in prosecutorial discretion. Since the position of a Chief Prosecutor is politically dependent on the President, the IPS meets the President's request to stop certain criminal cases. One example of this is the IPS decision to terminate a corruption case dealing with an Indonesian Central Bank bailout loan in 2004. The case was controversial, since the IPS decision was based on Presidential Instruction 8/2002, which asked the Chief Prosecutor to stop the case if suspects returned the bailout. However, the IPS later waived cases, even though the suspects did not return the bailout.[95]

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92 See Article 76 of National Police Chairman Regulation 14/2012 and Article 25 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 on Standard Operational Procedure for General Crimes. In corruption cases which are being processed by a District Prosecution Office, a prosecutor can only propose the cessation of a prosecution to the Head of the District Prosecution Office. After the case has been decided, the prosecutor should report the cessation to the High Prosecution Office, as well as sending a copy to the Deputy Chief Prosecutor for General Crimes. See also Article 558 of Chief Prosecutor Regulation PERJA- 039/A/JA/10/2010.

93 Article 40 of Law 30/2002 on Corruption Eradication Commission. However, in 2019, Jokowi's administration through Law 19/2019 changed this provision and allowed the KPK to dismiss corruption cases

94 This is also acknowledged by a number of lawyers, who prefer to negotiate with the Head of the District Prosecution Office prior to ceasing a case. Personal Communication with advocate IS, 2015.

95 Tirto.id *Yang Perlu Diketahui dari Persidangan Kasus BLBI dan Peran Boediono* (What must be known from the trial of BLBI and Boediono's role in the case), https://tirto.id/yang-perlu-diketahui-dari-persidangan-kasus-blbi-dan-peran-boediono-cPq6, accessed 11 March 2019.

This sub-section will discuss how a criminal case dismissal is processed within the Indonesian Criminal Justice System[96] which has two main kinds of dismissal, according to the KUHAP. The first kind is criminal case dismissal for technical reasons, because the case lacks evidence, the action or omission does not constitute a criminal offence under national law, or the criminal case is terminated for legal reasons. The second kind is prosecutorial discretion for public interest reasons. This condition only applies to the Chief Prosecutor.[97]

5.3.1 A Criminal Case Dismissal for Technical Reasons (SKPP)

The KUHAP provides three reasons for the termination of an investigation or prosecution: (1) insufficient evidence; (2) the case does not cover a criminal offence; and (3) the case is closed for legal reasons (Articles 109 and 140 (2) of the KUHAP).[98] Article 25 of Chief Prosecutor PERJA 036/A/JA/09/2011 states that:

> "*The Public Prosecutor may terminate the prosecution, if s/he believes that the investigation file does not have sufficient evidence, or that the case does not cover a criminal act, or that the case should be closed for legal reasons, considering any legal developments and the community's sense of justice.*"[99]

The KUHAP and IPS internal regulations do not offer any further explanation of what is meant by a closed case for legal reasons (*vervolgingsuitsluitingsgronden*). The IPS even adds a clause mentioning that a case may be closed following consideration of any legal developments and the community's sense of justice. This clause was likely added by the IPS in order to broaden criminal case dismissal for legal reasons, which is not limited to legal doctrine. Indonesian criminal law observers connect these legal reasons with the provisions in the Criminal Code (*Kitab Undang-undang Hukum Pidana*/KUHP). The KUHP stipulates that a case must be stopped if a person revokes their complaint regarding a crime (*klacht delicten*) (Articles 72-75 of the KUHP), a criminal event has been prosecuted before or *Nebis in idem* (Article 76 of the KUHP), the suspect dies (Article 77 of the KUHP),

96 The 2012 Juvenile Justice System Law introduces the concept of case cessation through a process of diversion.

97 The division is similar to that stipulated in an Instruction from the Chief Prosecutor on 7 June 1962, No 7/Inst/HK1962, which states that the Head of the District Prosecution Office and High Prosecutor can cease a case for a technical reasons, such as a lack of evidence. On the other hand, only the Chief Prosecutor has the power to dismiss a case for public interest reasons.

98 A public prosecutor can open up a dismissed case, only if they find a new reason for doing so (Article 140 (2) huruf d KUHAP).

99 Compare with Article 76 (1) of National Police Chairman Regulation Perkap 14/2012.

or because the case has expired/*Verjaring* (Article 78 of the KUHP).[100] In addition, if a suspect in a misdemeanour case (*Overtredingen*) pays fines as stipulated in Article 82 of the KUHP, the prosecutor can stop the case (commonly called *Afdoening Buiten Proces*).[101] However, prosecutors never use this mechanism, because the value of fines in the KUHP has not been renewed since 1960, resulting in very minimal penalties due to inflation.[102]

Although Article 14 (h) of the KUHAP allows a public prosecutor to close a case for legal reasons, this does not mean that an operator can stop the case if they think it is not feasible to proceed. Article 25 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 states that the public prosecutor must obtain permission from the Head of the Public Prosecutor Office, in order to dismiss the case. If the Head of the Public Prosecutor Office approves the public prosecutor's proposal, s/he shall issue a Decree on the Termination of Prosecution (*Surat Ketetapan Penghentian Penuntutan*, or SKPP). Article 25 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 shows that the IPS also implements a command system, when interpreting prosecutorial discretion in criminal case dismissal for legal reasons.[103]

Apart from the prosecutor's decision to prosecute, which is based only on the investigation files, this procedure makes prosecutors reluctant to stop prosecutions for technical reasons, or if they find that a case lacks evidence. Prosecutors prefer to return the investigation files to investigators and ask them to stop the investigation. Furthermore, if the investigator insists on sending their files to the prosecutor and states that they cannot fulfil the prosecutor's instructions, the prosecutor may suggest to the Head of the District Prosecution Office that the prosecution should be stopped. This proposal may be submitted after the prosecutor conducts additional examinations (Article 28 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011). This situation may explain the statistics data in the following table, which shows that prosecutors rarely stop criminal cases, compared to police investigators.

100 When the HIR was still valid, a prosecution would start with an initial process of investigation, which is supervised by a prosecutor. Furthermore, a case expiry date would be planned for a certain time after the investigator had begun an investigation. This is different from the KUHAP, in which the beginning of a prosecution is the submission of a file/files to the court, and a case expiry date would be planned according to when a public prosecutor submits the case to the court (Abidin 1983, 278).

101 This is called 'completion outside the process', or *Afdoening buiten proces*. In general, it relates to the payment of fines to prevent or end the prosecution of a criminal case, except for crimes that require a six-year imprisonment or more, or crimes such as violations (Remmelink 2003, 442).

102 The amount of fine requested in the KUHP follows the Government Regulation in Lieu of Law Perppu 16/1960. This causes some mischief, and may trigger unwanted consequences, as has been regulated in Article 480 of the KUHP on Rp 250 fines. It can cause articles to become irrelevant, and law enforcers use other articles instead, to impose heavier sentences.

103 See Chapter 3.

	Police Investigation (reported to the IPS)	Case Dismissal by the Police Investigator	Percentage	Completed Investigation	Case Dismissal by the IPS	Percentage
2013	129.301	851	0,66%	109.072	26	0,02%
2014	143.187	1.081	0,75%	122.710	67	0,05%
2015	132.338	1660	1,25%	133.830	43	0,03%
2016	142.374	2.201	1,55%	135.842	20	0,01%

Table 4: Dismissal of general crimes cases for legal reasons[104]

Although only the Head of the District Prosecution Office has the power to issue an SKPP, higher-level prosecutors have a significant influence over whether or not the IPS decides to stop the prosecution process, especially if a case starts to be of public concern. One notable example of this is the involvement of Chief Prosecutor Prasetyo in the dismissal of a criminal case involving a KPK investigator, Novel Baswedan, in the Bengkulu District Prosecution Office. Baswedan was a former police investigator, who arrested several Police Generals for corruption.[105] NGO activists and leaders of civil societies suspected that the police investigation was an act of revenge. Due to public pressure, the Chief Prosecutor ordered the Head of the Bengkulu District Prosecution Office, I Made Sudarwan, to issue SKPP: B-03/N.7.10/Ep.1/02/2016 on Baswedan's case dismissal.[106] This

104 I collected the data in this table from the annual IPS reports from 2013, 2014, 2015, and 2016. According to several Executive Prosecutors and operators working in the Statistics Centre for Crime and Information Technology (*Pusat Data Statistik Kriminal dan Teknologi Informasi* /PUSDAKRIMTI), within the Supreme Prosecution Office; the number or cases in this report therefore may not depict the true regional situation. One reason for this is the limited skills of regional operators in inputting case data to SIMKARI—on SIMKARI, for more detail, please see 3.8: Reform Effort. It is interesting to note that the annual reports do not show the number of special crimes cases which were dismissed, such as corruption. Instead, the reports present successes in investigating and prosecuting corruption cases, exceeding the targets and budget provided by the government.

105 Novel Baswedan was investigated by the police in 2012, for the mistreatment of a swallow nest thief in Bengkulu in 2004. See Tim Taktis, *Catatan Kriminalisasi Pada Kasus Novel Baswedan*, 2015.

106 The IPS closed Novel's case for legal reasons, and because it had expired, Detik, *Ini 2 alasan Kejagung hentikan kasus Novel tak cukup bukti dan kadaluwarsa*, (Two reasons why the Supreme Prosecution Office stopped Novel's case: insufficient evidence and expiry of the case), https://news.detik.com/berita/3147896/ini-2-alasan-kejagung-hentikan-kasus-novel-tak-cukup-bukti-dan-kadaluwarsa. "The case expiry date is calculated from the first day after the crime is committed," said the Deputy Chief Prosecutor for General Crimes, Noor Rohmat See Detik, *Begini Penjelasan Kejagung Soal Kedaluwarsa dan Bukti Tak Kuat di Kasus Novel* (The Supreme Prosecution Office's explanation of expiration and insufficient evidence in Novel's case) https://news.detik.com/berita/3147948/begini-penjelasan-kejagung-soal-kedaluwarsa-dan-bukti-tak-kuat-di-kasus-novel., accessed 8 June 2019.

SKPP was later declared to be illegal by the pre-trial judge at the Bengkulu District Court.[107] However, even though the pre-trial judge asked the IPS to continue Baswedan's prosecution, the IPS seemed reluctant to comply with the court's decision. Although there was massive pressure on the Chief Prosecutor to issue a *Seponering* (a case dismissal for public interest reasons), the IPS seemed unwilling to use this power.[108]

However, criminal case dismissal for legal reasons has been used in cases which needed to be stopped, by using the *Seponering* mechanism. One example is the cessation of the theft of 15 bananas case, by Kuatno and Topan, in 2012. The Head of the Central Java Prosecution Office, Bambang Waluyo, ordered the Head of the Public Prosecution Service, Cilacap Sulijati, to stop the case due to massive protests (called the '1,000 Bananas Movement') against the police over the arrests of Kuatno and Topan[109] (Purwowidagdo et al. 2012, 102-3). According to Waluyo, the decision to issue the SKPP was based on the community's sense of justice. Waluyo then ordered the Head of the Cilacap District Prosecution Office to find a legal reason for granting the SKPP. The Cilacap District Prosecution Office then asked a hospital to examine Kuatno and Topan, who were believed to be incapable of criminal liability. Cilacap Regional Hospital then concluded that they suffered from mental retardation.[110] However, although the police denied this conclusion and presented a comparative analysis from a psychologist, the IPS insisted that the prosecution of Kuatno and Topan be stopped. [111]

The IPS also issued an SKPP due to public interest, when it stopped the prosecution of two KPK Commissioners, Bibit Samad Rianto and Chandra

107 SKPP: B-03/N.7.10/Ep.l/02/2016 makes it clear that the IPS seems not to be serious about studying a case before ceasing it. The IPS did not explain the reasons why the case lacks evidence, or why it should be dismissed for legal reasons. In the SKPP the IPS even explains the case chronology, showing how Novel is guilty by looking at the chronology generated by the police.

108 Vivanews, *Jaksa Agung pertimbangkan Deponeering kasus novel* (The Chief Prosecutor considers issuing a 'Seponering' for Novel's case), http://nasional.news.viva.co.id/berita/nasional/755234-jaksa-agung-pertimbangkan-deponering-kasus-novel, accessed 8 June 2019.
The Advocacy Team for the Baswedan case, from the Legal Aid Institute, said that the Chief Prosecutor refused to issue a *Seponering*, because he considered that Novel was not a state official. The IPS believes that a *Seponering* is given to high state officials, while the SKPP is for ordinary people. Personal Communication MR, 2016.

109 Jawa Pos, *1000 Pisang Untuk Polisi*, (One thousand bananas for the police), https://www.jpnn.com/news/1000-pisang-untuk-polisi, accessed 1 April 2019.

110 Kompas, *Kuatno and Topan Terbukti Lemah Mental*, (Kuatno and Topan were proven to be mentally disabled), https://megapolitan.kompas.com/read/2012/01/06/13051651/kuatno.dan.topan.terbukti.lemah.mental, accessed 1 April 2019.

111 Even though the police did not use their power to examine a prosecutor's decision at a pre-trial hearing, Waluyo mentioned that, because of his decision, his relationship with the Head of the Central Java Police had worsened. This may be because the IPS decision to cease the case of Kuatno and Topan proves the public assumption that the police are not professional when conducting investigations. Interview with Bambang Waluyo, a former Head of the Central Java Prosecution Office, 5 February 2014.

Hamzah. Anti-corruption activists and the public urged the IPS to halt the case, because they believed it had been fabricated by the police.[112] The South Jakarta Prosecution Office then issued an SKPP to stop the case.[113] Although the police believed that there was sufficient evidence to prosecute Bibit Samad Rianto and Chandra Hamzah, the IPS issued the SKPP on sociological grounds, in order to maintain the integration/harmonisation of law enforcement agencies (the IPS, the National Police, and the Corruption Eradication Commission) and to respond to a sense of community justice. The legal basis for the SKPP was challenged in a pre-trial hearing at the South Jakarta District Court and later cancelled, because the KUHAP does not allow an SKPP to be issued for sociological reasons.[114] The IPS then appealed to the High Court and filed a cassation to the Supreme Court, which they lost. The Chief Prosecutor decided to stop the case for public interest reasons (*Seponering*).

This section shows how the IPS leadership, in both district and high provincial prosecution offices, uses the SKPP mechanism to dismiss criminal cases for public interest reasons, because only a Chief Prosecutor may exercise the *Seponering* mechanism. However, since this practice is not in line with the KUHAP, a pre-trial hearing may annul this dismissal decision.

5.3.2 A Criminal Case Dismissal for Public Interest (*Seponering*)

Some Indonesian criminal law observers believe that the Indonesian criminal justice system adopts the legality principle, rather than the opportunity principle. This is mainly because the KUHAP recognises criminal case dismissals for technical reasons but limits a prosecutor's power to accept or reject the investigation files from a criminal investigator (Harahap 2007, 38; Rachman 2016; Siregar 1983). However, other experts argue that Indonesia adopts the opportunity principle, since the KUHAP recognises the Chief Prosecutor's power in the IPS Law to dismiss cases for public interest

112 Detik, *Kronologi Kasus Suso, Cicak v. Buaya Hingga Korupsi Pilgub Jabar* (Chronology of Susno's Case: from the Cicak v. Buaya case to the corruption of the West Javan Governor Election), https://news.detik.com/berita/d-2229197/kronologi-kasus-susno-cicak-vs-buaya-hingga-korupsi-pilgub-jabar, Kompas, *Bibit Chandra Ditahan, Polri Dikecam* (Bibit Chandra Arrested - National Police Criticised) https://nasional.kompas.com/read/2009/10/29/20260077/bibit.dan.chandra.ditahan.polri.dikecam, accessed 17 November 2018.

113 SKPP Nomor: Tap-01/0.1.14/Ft.1/12/2009 dated 1 December 2009, for defendant Chandra Hamzah, and SKPP Nomor: Tap-02/0.1.14/Ft.1/12/2009 dated 1 December 2009, for defendant Bibit Samad Rianto. Kejaksaan Negeri Jakarta Selatan, *Kejari Jaksel Menerbitkan SKPP Perkara Bibit dan Chandra* (South Jakarta District Prosecution Office Issues an SKPP for Bibit and Chandra's Case), http://www.kejari-jaksel.go.id/read/news/2009/12/01/46/kejaksaan-negeri-jakarta-selatan-menerbitkan-skpp-perkara-bibit-dan-chandra-46, accessed 17 November 2018.

114 DKI Jakarta High Court No. 130/Pid/Prap/2010/PT.DKI Judicial Review Decision No. 152 PK/Pid/2010 rejects the prosecutors' appeal regarding the pre-trial decision, since it considers that the District Court's pre-trial decision is final and binding.

reasons (Surachman and Hamzah 2015; Karniasari 2012; Afandi 2016).[115] Compared to other countries, such as the Netherlands, France, England, and Poland, which apply the opportunity principle in order to filter out more trivial cases (Fionda 1995; Tak 2008; Jehle and Wade 2006), the IPS uses the opportunity principle only for cases that have a political impact on the government, not for small cases (Karniasari 2012, 109).

The first IPS Law 15/1961 stated that only the Chief Prosecutor can stop a criminal case for public interest reasons (Article 8), but it provides no definition of 'public interest'. IPS Law 15/1961 only regulated that the Chief Prosecutor might consult with high-ranking officials, such as the Minister/Chief of the National Police, the Minister for National Security, or even the President, before deciding to stop a case for public interest reasons. This provision was then adjusted in Article 32 of IPS Law 5/1991, which provides a vague explanation of public interest reasons – limited to either the interests of the nation and state, or the interests of the wider community. Similar to the previous elucidation, Article 32 of IPS Law 5/1991 states that the Chief Prosecutor can dismiss a case only after taking into account suggestions and opinions from state agencies that have an interest in the case. The Chief Prosecutor may then report this to the President in order to obtain a direction. Likewise, the Criminal Case Procedure was not altered much by Article 35 (c) of IPS Law 16/2004; it continues to limit the application of the opportunity principle to the Chief Prosecutor, and obligates him/her to consider suggestions and opinions from state power agencies that have an interest in the case. However, in contrast with the previous rule, the current law removes the procedure to obtain an instruction from the President before applying the opportunity principle. In addition, no further explanation is given for when the Chief Prosecutor's decision to dismiss a case is not in line with state agency suggestions.

As has been mentioned above, the 2004 IPS Law contains no clear definition of public interest reasons. Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 has no provision defining 'public interest'. The 1982 Minister of Justice Decree M.01.PW.07.03 on the Guidelines for KUHAP Implementation, in fact hands the power to define public interest to a meeting between the Chief Prosecutor and high-level state officials, such as the Minister for Defence and Security, the Chief of the National Police, or the President. Because of this arrangement, most Chief Prosecutors believe that the power to dismiss a criminal case because of public interest is their prerogative.[116] Unlike the decision to dismiss a case for technical reasons, which can be examined at the pre-trial hearing stage, the Chief Prosecutor's decision to stop a case for public interest reasons cannot be examined.[117]

115 Article 35 of the IPS Law.

116 Kompas.com, *Jaksa Agung: Deponering itu Hak Prerogatif saya*, (Chief Prosecutor: "*Deponering* is my Prerogative"), https://nasional.kompas.com/read/2016/02/11/21371781/Jaksa.Agung.Deponering.Itu.Hak.Prerogatif.Saya, accessed 4 March 2018.

117 Elucidation of Article 77 of the KUHAP.

Besides, a case closed due to public interest can no longer be opened, even if new evidence (*novum*) arises.[118] Vice Chief Prosecutor Darmono thus illustrates that the *Seponering* is equivalent to being given clemency (Darmono 2013, x, 31).

Indonesian scholars argue that a vague definition of public interest provides the IPS opportunity to stop the prosecution of economic crimes. The IPS may issue a *Seponering* after a suspect pays a fine (or *schikking*) and undergoes mediation, as regulated in Emergency Law 7/1955[119] (Prakoso 1986, 76). As practiced during Chief Prosecutor Soeprato's reign,[120] the IPS may also dismiss cases for this reason, if a criminal case has been resolved based on *Adat* Law/Customary Law (Amiati 2014, 102). Besides, the broad definition of public interest also allows the Chief Prosecutor to stop criminal cases that are connected with the regime's political affairs. One example of this is the IPS' decision to terminate the prosecution of a case of corruption within PERTAMINA (the State Oil Company), because the suspect was a close colleague of President Soeharto (Nababan 2009).

The Chief Prosecutor's position as a cabinet member allows the President to ask the Chief Prosecutor to stop a case. During the New Order regime, *Seponering* was used as an exchange tool for opponents of the regime who were subordinate to the President. For example, former Army General M. Yusuf was prosecuted for subversion after criticising President Soeharto. The IPS issued a *Seponering* for him after he publicly apologised to Soeharto (Sumarkidjo 2006). Another example is the case of Adnan Buyung Nasution, a human rights lawyer who was prosecuted for subversion. He stated that the IPS offered him a *Seponering* if he signed an apology letter to the President, which he refused to do (Nasution 2004).

In the post-New Order era, the Chief Prosecutor seemed to be issuing *Seponering* in order to maintain political stability. The Chief Prosecutor only dismissed criminal cases involving key figures who had strong political positions. A notable example is the *Seponering* for two KPK Commissioners, Bibit Samad Rianto and Chandra Hamzah, in 2012. In this case, the IPS issued the *Seponering* after the pre-trial judge decided that the SKPP was illegal. Acting Chief Prosecutor Darmono explained the public interest reasons behind the decision. He stated that, since both commis-

118 Chapter II on the Prosecution Process of Ministry of Justice Decision: M.01.PW. 07.03-year 1982 states that, "…when a case is set aside because of public interest, the public prosecutor cannot prosecute against the suspect in the same case in future".

119 Emergency Law 7/1955 introduced *schikking*, or a payment which is made to the state outside of the prosecution process; the prosecutor may also seize items owned by the suspect from a third party. Compare this with Article 34 of Government Regulation 80/2007 on Taxation, which allows the Chief Prosecutor to cease the prosecution process due to national budget restrictions. One example of an SKPP is TAP-009/A/JA/09/2014 for Agung Bagus Santoso and Rusman, who obtained an IPS decision to stop the investigation of a falsified taxation report; the suspects were willing to pay both fines and tax, in order to stop the investigation.

120 See Chapter 2.

sioners were named as suspects, the KPK could not perform its work to eradicate corruption.[121] In this case, the IPS defined the public interest as the problem of fighting corruption if the case was not dismissed. In 2016, Chief Prosecutor Prasetyo also used similar reasons to stop a case involving KPK Commissioners, Abraham Samad and Bambang Widjojanto, because of massive protests.[122] It is worth mentioning that, even though other state agencies suggested that the Chief Prosecutor should not issue a *Seponering*, the Chief Prosecutor *did* issue a *Seponering* in this case.[123] Because of this decision, various organisations affiliated with the police, such as the Police Association and Professional Association, Indonesian Police Watch, and the Police and Children's Families, urged the DPR (House of Representatives) to question Chief Prosecutor Prasetyo's decision. They also submitted three separate claims to the Constitutional Court, aiming to repeal the Chief Prosecutor's power to issue a *Seponering*. The court later rejected the lawsuits and retained the Chief Prosecutor's authority to issue a *Seponering*.[124]

The IPS has no specific internal regulations on how the public prosecutor proposes a *Seponering* to the Chief Prosecutor.[125] As a result, prosecutors at district or provincial levels never recommend criminal case dismissal because of public interest to the Chief Prosecutor. As mentioned above, the prosecutor at district level prefers to use the SKPP mechanism to stop prosecuting, even for public interest reasons. This confirms that the *Seponering* arrangement is designed for cases that have an impact on political order, and not for filtering trivial cases.

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121 The public urged the Chief Prosecutor to cease the case, since the police investigation of the KPK commissioners was presumed to be malicious. President SBY also suggested that the Chief Prosecutor should respond to the case. See the Decree on Dismissal of a Prosecution for Public Interest Reasons TAP-001/A/JA/01/2011, for Chandra M Hamzah, and TAP-002/A/JA/01/2011 for Bibit Samad Rianto.

122 In response to increased public outrage, generated by the belief that criminal cases being investigated by the police were a retaliation for the KPK's investigation of corruption within the police force. See the Decree on the of Prosecution Dismissal for Reasons of Public Interest TAP-012/A/JA/03/2016, for Abraham Samad and TAP-013/A/JA/03/2016, for Bambang Widjojanto.

123 The DPR suggested that the Chief Prosecutor should continue the prosecution and not issue a *Seponering*. However, other institutions, such as the police and Supreme Court, let the Chief Prosecutor decide at his own discretion.

124 See Constitutional Court Decision Nos. 29/PUU-XIV/2016, 40/PUU-XIV/2016, and 43/PUU-XIV/2016, rejecting the Chief Prosecutor's power to issue a *Seponering*. However, Constitutional Court Decision No. 29/PUU-XIV/2016 states that the Chief Prosecutor must consider advice from state institutions before issuing a *Seponering*. The Constitutional Court did not explain how the suggestions received by the Chief Prosecutor are different to those made in the case of Samad and Widjojanto. In this case, the DPR rejected the *Seponering*, and two other institutions let the Chief Prosecutor decide. In the end, the Chief Prosecutor was still able to choose which suggestion s/he should act on.

125 There is a column in the *Seponering* which reports on the SIMKARI, for all public prosecutors. However, prosecutors at district and provincial level have never proposed that the Chief Prosecutor should issue a *Seponering*. The reason for this is that the IPS has no guidelines on the *Seponering*.

5.4 The Trial Process

When an examining prosecutor decides that an investigation is complete,[126] the Head of the District Prosecution Office appoints the public prosecutor to draft an indictment based on the investigation file(s).[127] The public prosecutor then submits the case to the District Court (Article 1 (7) of the KUHAP). Similar to the pre-prosecution process, the IPS leadership controls and supervises the public prosecutor's work at this stage. Usually, the Head of the District Prosecution Office controls the prosecution process, excluding some cases which are considered important by the IPS leadership, whereas either the Chief Prosecutor or the Head of the High Prosecution Office takes control of the prosecution (Article 56 Chief Prosecutor Regulation PERJA 036/A/JA/09/2011). The public prosecutor may organise a case exposé (*Gelar Perkara*) if s/he finds the case difficult to prove, or if there is public pressure surrounding the case. A case exposé may be held with other prosecutors, after obtaining approval from the IPS leadership (Article 62 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011). The case exposé results in a recommendation on how the leadership should handle the case.

This case handling mechanism shows that the IPS' military culture influences how the public prosecutor implements and interprets the KUHAP. Article 58 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 allows public prosecutors to make their own decisions, only under circumstances which prevent them being directed by the IPS leadership. However, if direction by the leadership contributes to an unsuccessful prosecution, the prosecutor is nevertheless held responsible for the failure (Article 61 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011).[128] According to the IPS, a prosecution is successful when the public prosecutor successfully convinces the judge to impose a sentence on a defendant. On the other hand, if the judge acquits the defendant, the IPS considers a prosecution to have failed.[129]

126 This decision is taken after criminal investigators have completed both stages of the pre-prosecution process. See 2.5: The Pre-Prosecution Process.

127 Article 30 of the Chief Prosecutor Regulation PERJA 036/A/JA/09/2011 states that, even though the High Prosecution and Supreme Prosecutor Office receive the case file, due to the principle of equality, the District Prosecution Office *submits* the case files. Thus, it is the Head of the District Prosecution Office who appoints a prosecutor to prosecute a case at trial (see Chapter 3).

128 Other than public prosecutors and heads of the General Crime Division, the Head of a District Prosecution Office will also be evaluated if a judge frees a defendant. Interview with DG, Coordinator at the Office of the Deputy Chief Prosecutor for General Crimes, on 6 May 2015.

129 See, for instance, Deputy Chief Prosecutor for Special Crimes Circular Letter B-711/F/Fu.1/1212004, which states that failure to prosecute a corruption case may be because the public prosecutor does not manage to provide adequate proof to convince judges to sentence the defendant.

5.4.1 Indictment (*Dakwaan*)

An indictment plays an essential role in the prosecution process during trial. It leads the judges, prosecutors, defendants, and their advocates to examine evidence and witnesses during the trial.[130] Article 140 (1) of the KUHAP states that the public prosecutor should draft an indictment based on the investigation files within 30 days, and submit it to the court after a criminal investigator has completed the second stage of the pre-prosecution process.[131] The public prosecutor must take into account the legal requirements of the indictment, as referred to in Article 143 (2) of the KUHAP.[132] A notable example of this is the problem a prosecutor faces when drafting an indictment for a corporate crime. Since the KUHAP still does not have provisions on how to identify a corporation as a defendant, advocates often file an exception (*exceptie*). It is argued that the format of the prosecutor's indictment does not comply with Article 143 (2) of the KUHAP, which requires the inclusion of the defendant's identity, such his/her as gender and religion. To deal with this, prosecutors may make a note of the religiosity of a corporation, based on its operation. In some cases the prosecutor may mention the corporate religiosity status of a non-Islamic company, since the company does not operate based on Sharia (Maradona 2018, 134).

When drafting an indictment, public prosecutors seem puzzled when interpreting the Criminal Code (*Kitab Undang-undang Hukum Pidana/KUHP*), which originated from the 1918 Dutch Colonial Criminal Code (*Wetboek van Straftrecht voor Nederlandsch-Indie*/WvS-NI). Since it has never officially been translated into Indonesian, each criminal justice actor prefers to use the KUHP translation which fits their interests.[133] As a result, defendants

130 Chief Prosecutor Circular Letter SEJA 004/JA/11/1993 mentions that, for courts or judges, an indictment letter can function as the basis for limiting the scope of an investigation, and it may be a consideration when deciding the case. For public prosecutors, an indictment letter can be used as a basis for proof, juridical analysis, crime prosecution, and the legal effort required. On the other hand, for the defendant or public prosecutors, an indictment letter can be used as a basis for preparing a defence.

131 Article 30 and 32 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011. See 5.2.5: The Pre-Prosecution Process.

132 Formal requirements for an indictment are based on Article 143 (2.a) of the KUHAP, stipulating that an indictment should be dated, signed, and contain the following: a full name, a place and date of birth, age, sex, nationality, address, religion, and occupation. Additionally, material requirements which need to be met at the time of drafting an indictment include a careful, clear, and complete elaboration on the crime being charged, mentioning the time and place where the crime was committed (Article 143 (2) b of the KUHAP). If the formal requirements are not met, the indictment letter can be annulled, whereas if the material requirements not met, the indictment is invalid for legal reasons.

133 At least fifteen versions of the KUHP were published between 1915 and 1983 (Massier 2008, 21).

are regularly charged using provisions in the KUHP that would not have fitted their wrongdoings originally.[134]

The Deputy Chief Prosecutor for General Crimes Circular Letter B-607/E/11/1993 on the Technical Procedure for Making an Indictment states that, before the public prosecutor determines the form of indictment,[135] s/he must review evidence, and analyse the criminal provisions relevant to the case. The prosecutor then outlines their 'indictment plan' *(Rencana Dakwaan/Rendak*) in the matrix[136], and shares it with the IPS leadership, in order to obtain approval prior to submitting it to the District Court.[137]

Initially, the supervision procedure aimed to guarantee the quality of the prosecution process, prevent its failure, and minimise the ability of prosecutors to abuse their powers. One reason for this was that the IPS found the quality of prosecutors' indictments was not meeting the requirements of Article 143 (2) of the KUHAP. Some indictments did not explain how the crime was committed, or which elements of the KUHP fitted the defendant's crime. Also, the unlawful element (*wederechtelijk*) and the role

134 One such example is the way the word *aanslag* was translated to *makar* in Article 104 of the KUHP. The Indonesian word *makar* conveys deception, or an attempt to commit a coup d'etat. Mistranslating *aanslag* as *makar* can lead to a miscarriage of justice; for example, if people wave separatist flags peacefully, they can still be charged with *makar* based on Article 104 of the KUHP (Wulandari and Moeliono 2018).

135 There are five types of indictment letters based on the Circular Letter of Chief Prosecutor SEJA 004/JA/11/1993. These are: (1) a singular indictment, where there is a charge for one crime only; and (2) an alternative indictment, which can be used by prosecutors if they are not sure which of the crimes being charged can be proven, i.e. if one charged crime has been proven, it is not necessary to prove the other; (3) a subsidiary indictment, where layered accusations are applied and the first accusation functions as a substitute for the others, i.e. all accusations default to the most serious accusation; (4) a cumulative indictment, which is an accumulation of several accusations, all of which can be proven during trial (unfounded accusations should be made clear and dismissed from the indictment), i.e. when the defendant commits certain criminal acts which have different consequences; and (5) a combined indictment, where a cumulative indictment can be combined with an alternative or subsidiary indictment.

136 The matrix of an indictment is transformed into a flow chart including qualifications for the crime, flouted article(s), elements of the crime, facts of the defendant's actions, supportive evidence, and evidence that can help the prosecutor to prove their indictment.

137 When the HIR was still valid, judges controlled prosecutors when drafting an indictment *(acte van verwijzing).* After the 1961 IPS Law was enacted, the role of the judge was limited only to giving suggestions to prosecutors for changes or additions to an indictment, as long as it has not been filed at court. The judges' limited role is regulated by Article 282 of the HIR. See Joint Circular Letter 6/MA/1962/24/SE on 20 October 1962 (Pradja 1985, 10–11).

of the defendant (*deelneming*) were not mentioned for certain offences.[138] As a result, the court declared that the prosecutors' indictments were void (Supramono 1991; Harahap 2007; Mulyadi 2012).

However, public prosecutors often complain about the obligation to have an indictment plan. They argue that the interlocking procedure allows the IPS leadership to intervene in cases, and fails to prevent corruption during the drafting of an indictment (Komisi Hukum Nasional 2005d, 80; Kristiana 2009, 100).[139] Apparently, advocates provide a *rezeki* to the prosecutor's superior to ease the charge in the indictment, by choosing weaker evidence and criminal law provisions which carry a less serious charge (Zakiyah et al. 2002, 92).[140]

As mentioned in the previous section, the principle of functional differentiation (in the KUHAP) also contributes to limitations placed on prosecutors when drafting indictments. A prosecutor drafts an indictment based on the file(s) compiled by the investigators, without being able to verify the facts in the file(s) (Santoso 2000, 154).[141] Compared to Article 282 of the HIR, which allows public prosecutors to amend an indictment during trial,[142] Article 144 of the KUHAP limits the prosecutor to changing the indictment once, within seven days prior the trial. Because of this, prosecutors must prepare their indictments as well as they can. Many scholars have criticised this provision, because when a witness or defendant appears in court, they tend to change their testimony from that which is given in the investigation files (Hamzah and Dahlan 1984, 197). To cope with these problems, prosecutors often stick to the witness statements provided in the files, ignoring the witness statements presented at the trial.

138 See, for instance, Hukum Online, *Ketika Deelneming Tak Terbukti, Rohadi Pun Lolos dari Suap Bersama-sama Hakim* (When *Deelneming* Cannot be Proven, Rohadi Even Escaped from Bribery Together with the Judges), https://www.hukumonline.com/berita/baca/lt584a6c708f6ab/ketika-ideelneming-i-tak-terbukti--rohadi-pun-lolos-dari-suap-bersama-sama-hakim/, accessed 2 June 2018. Hukum Online, *Delik Penyertaan Tak Terbukti, Susno Bisa Bebas* (Participatory Offenses Cannot be Proven, Susno Can be Acquitted), https://www.hukumonline.com/berita/baca/lt4d42786bd9562/delik-penyertaan-tak-terbukti-susno-bisa-bebas, accessed 2 June 2 2018.

139 Some prosecutors believe that "the indictment plan" (*Rencana Dakwaan*) is crucial, because of the prosecutor's negative image as possessing weak legal knowledge and being corrupt. Personal communication with W, the Deputy Chief Prosecutor for Supervision, DG, the Coordinator at the Office of the Deputy of Chief Prosecutor for General Crimes, and DH, the Head of the Bandung District Prosecution Office, 2015.

140 Personal communication with IS, a lawyer in Malang, 2015.

141 Some prosecutors say this is like buying a cat in a sack, because holistic indictment is dependent on the facts collected by investigators. Personal communication with the Head of the Centre for Supreme Prosecution Office Legal Information and the Head of the West Java High Prosecution Office, 2015.

142 This change did not cause any additional issues. The Supreme Court Decision No. 15/Kr/1969 on February 13 1971 states that changes to an indictment cannot cause any other crime(s) to emerge (Prakoso 1988, 153).

5.4.2 Presenting Evidence at Trial

Article 184 of the KUHAP divides evidence into five types that can be used in criminal proceedings. These are witness statements,[143] expert witness statements,[144] documents/letters,[145] indications,[146] and the defendant's testimony.[147] The KUHAP has not yet adopted more modern forms of evidence, such as photographs, telephone records, videos, and electronic transmissions.[148] In practice, the judge classifies the more modern forms of evidence as 'indications'. Much of the literature on Indonesian criminal procedure states that the KUHAP applies a negative system for legal proof (*Negatief-wettelijk bewijsstelsel*). It states that the conviction is based not only on the evidence, but also the judge's belief (Harahap 2000; Hamzah 1993; Hiariej 2012).[149] Therefore, as well as preparing strong evidence, prosecutors must have an ability to convince judges.

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143 A witness is someone who gives testimony on what they saw, heard, and experienced themselves; such testimony is given during investigation, prosecution, and trial (Article 1 (26) of the KUHAP). However, a testimony from one witness may not be sufficient on its own; testimonies should come from at least two different witnesses (Article 185 (2) of the KUHAP), or a testimony may come from one witness but be supported by other valid evidence (Article 185 (3) of the KUHAP). The Constitutional Court Decision No. 65/PUU-VIII/2010 provides a broader definition of a witness as "a person who can give testimony during the investigation, prosecution, and hearing of an alleged crime, which they perhaps did not hear, see, and experience themselves".

144 In this case, expert witness testimony can only be obtained from doctors, not from legal experts. However, due to the limited knowledge of judges, prosecutors and police officers when they refer to legal doctrine, legal experts are also included as possible expert witnesses.

145 Utilising a document or letter as evidence is limited by Article 184 (1) (c) of the KUHAP. The article limits documents to: (1) evidence with the status of an "official document", drafted by "state officials", and regarding an event that they heard, saw, or experienced themselves, including an interview note (Article 187 (a) of the KUHAP); (2) documents containing expert opinion, including complaints (Article 187 (b) of the KUHAP); and, (3) other documents, "as long as" they are related to the substance of other types of evidence (Article 187 (c) of the KUHAP).

146 Indications, which are largely an 'indirect' form of evidence, are hard to describe and implement. Two formal definitions of proof of guidance, covering acts, events, or a condition - due to their consistency with one another, or with the crime itself - show either the wrongdoer's identity, or that the criminal act has been committed (Article 188 (1) of the KUHAP). In the HIR, an indication is usually referred to as 'the judge's belief'. In the KUHAP, this is broadened to include investigators and prosecutors also being allowed to use this evidence.

147 It is permissible to present the defendant's testimony in court, but it must be supported by at least one other type of evidence (Article 189 (2) of the KUHAP).

148 Other laws, such as Law 11/2008 on Electronic Information and Transactions, permit digital evidence, and Law 20/2001 on Corruption Eradication recognises modern forms of evidence as 'indications'.

149 Article 183 of the KUHAP states that judges can only impose a sentence if there is a minimum of two valid forms of evidence, and the judges are certain that a crime has been committed by the defendant.

The trial commences when a presiding judge opens the hearing[150] and asks the public prosecutor to read the indictment (Article 145 (1) – (4) of the KUHAP). The defendant or his/her legal advisor can submit an exception to the prosecutor's indictment or court jurisdiction. If the panel of judges approves an exception, it then decides that the hearing is stopped. If the panel of judges does not approve the exception, the hearing proceeds further by examining witnesses and evidence (Article 156 (1), (2) of the KUHAP). In practice, legal representatives will try to stop the hearing for procedural reasons, such as criminal investigators' mistakes not guaranteeing a suspect's right to have legal representation during the investigation process.[151] Both the public prosecutor and the defendant, or his/her legal representative, may appeal against this decision. However, unlike legal representatives, who can declare appeals when a judge decides a case, the prosecutor must obtain permission from the Head of the District Prosecution Office before appealing a decision[152] (Article 35 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011).

During trial hearings, public prosecutors must present the defendant at court. Since the IPS has a limited budget, prosecutors tend to detain defendants at the pre-prosecution stage, and the judge also seems to follow this process by detaining defendants during trial. Although the judge is responsible for the defendant's detention during trial, based on the principle of functional differentiation, in practice the prosecutor is responsible for ensuring the defendant's condition before they are presented at trial. The IPS also covers any expenditure for transporting detainees from the detention house to the court – this is not within the court's budget.[153] Public

150 All trials must be held in Indonesian, and the Chief Judge should ensure that the defendant and witnesses can answer questions freely. All trials must also be open to the public, except those regarding a sexual misconduct or juvenile case. Violating these requirements will cause all decisions made to be invalid (for legal reasons) (Article 153 (1) – (4) of the KUHAP).

151 Hukum Online, *Salah satu contoh Penyidikan Tidak Sah, Hakim Batalkan Dakwaan* (An example of an invalid investigation, where the judge cancels the indictment), https://www.hukumonline.com/berita/baca/lt4dcac4e944fc9/penyidikan-tidak-sah-hakim-batalkan-dakwaan, accessed 8 June 2018.

152 If the decision cancels the indictment for legal reasons, causing the defendant to be free, the prosecutor can make an appeal to the higher court. However, if the indictment is cancelled due to formal reasons, the prosecutor can revise the indictment and re-submit it to the court (Harahap 2000).

153 The budget *does* include a police salary for guarding the defendant during the trial. The Head of the Malang District Prosecution Office said that, legally, it is the police force's duty to send their personnel to guard the defendant in hospital, but the Prosecution Office still needs to pay them. Personal communication, 2015.

prosecutors even have the task of keeping the defendant secured, if s/he has to stay in hospital during the trial.[154]

The prosecutor is also responsible for presenting witnesses mentioned in investigation file(s). Suffering from a limited budget, prosecutors can only intimidate witnesses[155] into voluntarily coming to court.[156] Article 162 (1) of the KUHAP provides an opportunity for prosecutors not to present witnesses, if the witnesses live a long way from the court, or due to urgent circumstances, death, or other reasons related to state interests. The prosecutor then can read the witness testimony from the file.

If the witness' or defendant's testimonies are found to be different from the statement recorded on file, the prosecutor may ask the Chief Judge to remind the witness of the obligation to be truthful, and ask for an explanation for the discrepancy (Article 163 of the KUHAP). The prosecutor also can ask the judge to detain the witness and charge him/her with providing a false statement (Article 174 of the KUHAP). However, in some cases the witness or defendant has revoked the statement they gave during an investigation. This was usually because they claimed that the criminal investigator forced and tortured them during the investigation process. To avoid an acquittal decision because of this admission, the prosecutor will ask the investigator to give a contra-statement at the trial.[157] The prosecutor then will use the contra-statement to maintain the prosecution process and validity of the investigation files. Because of this, judges rarely accept a complaint against illegal coercive measures ("Achievements, Challenges and Recommendations for Judicial Reform" 2018, 29).

5.4.3 *Requisitoir* and Court Decisions

After all the witnesses have been heard at court, the public prosecutor proposes a sentencing demand (*Requisitoir/Tuntutan*) (Article 162 (1) of the KUHAP). Similar to the indictment mechanism, the prosecutor must make a sentencing demand plan (*Rencana Tuntutan/Rentut)* that is controlled and supervised by the IPS' leadership. If the IPS superiors consider that a case is important and is attracting public attention, they may instruct the

154 This is called *pembantaran tahanan* (or, *stuiting*). See SEMA 1/1989 on 15 March 1989, for more details regarding this procedure. IA, the Head of the General Crime Division in the M District Prosecution Office, complained about this procedure, since he had to find the budget to pay police to guard a defendant in hospital. He said that the IPS does not have such budget for the *stuiting* procedure. Personal communication, 2015.

155 Those who do not want to give testimony as a witness can be charged with nine months in prison (Article 224 (1) of the KUHP).

156 Witnesses often complain about the absence of a state budget to cover their expenditures. Since there is no fixed schedule for criminal trials, most witnesses spend a whole day at court, and therefore cannot earn money on that day. Personal communication with a prosecutor, 2015.

157 See Deputy Chief Prosecutor for General Crimes Circular Letter B-3358/E/Ejp/11/2013 on 12 November 2013.

prosecutor to organise another case exposé (*Gelar Perkara*).[158] The *Rentut* procedure aims to avoid disparity between the demands of different prosecutors.[159] However, in several cases prosecutors ask judges to postpone hearings, because they cannot propose sentencing demands before the IPS leadership has approved their *Rentut*. Because of this, some defendants must stay at the detention centre longer, while the court decides their case. To cope with the lengthy administrative process of the *Rentut*, the IPS asks the prosecutor not to postpone hearings and allows him/her to ask for approval by telephone, fax, or email.[160] In practice, the IPS leadership usually reviews the length of the charge and the criminal law articles proposed by the public prosecutor, but it does not take into consideration the examination process during the trial.[161]

Some advocates may take advantage of the *Rentut* mechanism, in order to achieve a lighter sentence for their clients, by providing *rezeki* to the IPS leadership so that the public prosecutor will propose a lighter sentence in his/her demand (Zakiyah et al., 2002, pp. 96-97). Similarly, prosecutors may abuse this procedure in order to seek *rezeki* from defendants. The prosecutor may also offer to help a defendant by giving *rezeki* to a judge, to encourage him/her to decide on a minimum sentence (Zakiyah et al., 2002, pp. 103-104).[162] A prosecutor may lodge an appeal or file a cassation, if the court rejects his/her demands. Furthermore, it seems that judges prefer their judgement not to be appealed and approved, in at least two-thirds of the prosecutors' demands (Domingo and Sudaryono, 2015, p. 36).

As I have mentioned before, most prosecutors avoid proposing an acquittal or discharge in their sentencing demands, even though the facts and evidence presented at hearings might support such proposals. Prosecutors will propose a minimum sentence, which matches the detention period

158 Article 37 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011.

159 Chief Prosecutor Circular Letter SEJA 001/J.A/4/1995.

160 Chief Prosecutor for General Crimes Circular Letter B-410/E/Ejp/8/2003.

161 The Superior Officer at the Supreme Prosecution Office has limited time in which to check the *Rentut*, since the document delivery process consumes time. See, for example, Serambinews.com *Rentut Belum Turun dari Kejagung, Tuntutan Kasus Sabu 50 Kg Ditunda Hingga 28 Januari*, (The *Rentut* has not been issued by the Supreme Prosecution Office, and an indictment for possessing 50 kg heroine is postponed until 28 January), https://aceh.tribunnews.com/2019/01/14/rentut-belum-turun-dari-kejagung-tuntutan-kasus-sabu-50-kg-ditunda-hingga-28-januari, accessed 3 April 2019. Tempo, *Dua Kali Jaksa Minta Sidang Pembunuhan Dufi Ditunda, Kenapa?* (The prosecutor asks for the Dufi murder trial to be postponed: Why?), https://metro.tempo.co/read/1189674/dua-kali-jaksa-minta-sidang-pembunuhan-dufi-ditunda-kenapa/full&view=ok, accessed 3 April 2019.

162 Antaranews, *Pengusaha dan advokat didakwa suap Aspidum Kejati DKI Jakarta*, (A businessman and his lawyers are charged with bribing a General Crimes Assistant at the High Prosecution Office of Jakarta), https://www.antaranews.com/berita/1071278/pengusaha-dan-advokat-didakwa-suap-aspidum-kejati-dki-jakarta, accessed 22 September 2019.

served by the defendants. [163] The prosecutor must obtain an approval from the Supreme Prosecution Office, before proposing an acquittal (*Vrijspraak*), [164] a discharge (*ontslag van rechtsvervolging*), or a death sentence at a trial hearing.[165] The IPS considers that an acquittal or discharge proposal indicates that a prosecutor has failed in handling the case. The IPS argues that prosecutors have a chance to reject a case at the pre-prosecution stage, if they are not sure that they can win it. Furthermore, the IPS will evaluate and examine the prosecutor's work during the process, and this could affect his/her career.[166]

The defendant may respond to the prosecutor's sentencing demand by presenting his/her defence (*pleidooi*). Following this, two more hearings may be conducted to provide opportunities for prosecutors to present their response to the defence (*repliek*) and for defendants to answer the prosecutor's *repliek* (*dupliek*). The Chief Judge then holds a meeting with two other judges, to decide the case based on the indictment, as well as on the facts and evidence presented at previous hearings (Article 182 (4) of the KUHAP). The judges may issue three kinds of decision. The first is an acquittal (*Vrijspraak*), meaning that the defendant is declared not guilty. The second is a discharge (*ontslag van rechtsvervolging*); pursuant to Article 191 (2) of the KUHAP, if the judges believe that a defendant's action has been proven but is not a criminal offence, the judges issue a discharge and release the defendants from prosecution.[167] The third is a criminal sentence, whereby the judges charge the defendant with criminal punishment, based on the prosecutor's indictment that the defendant has legally and convincingly been proven to have committed a criminal offence.

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163 Personal communication with, G, a prosecutor's manager from B District Prosecution Office, 2014.

164 One notable example of this was in 2008, when the public prosecutor prosecuted Sugik for murdering Asrori in Jombang, East Java. This case was controversial, because the public prosecutor insisted on prosecuting Sugik, while there was strong evidence that a police investigator had tortured Sugik into confessing. Even though police headquarters found that Asrori had been killed by another person (named Ryan, not Sugik), the public prosecutor at the Jombang District Office persisted in prosecuting Sugik, based on the dossier. The public prosecutor's plan was to summon the police investigator to defend the dossier. However, since there was public pressure and strong evidence to release Sugik, the district office ordered the public prosecutor to recommend acquittal for Sugik. For further details, see (Chazawi 2011, 143–74).

165 Chief Prosecutor Circular Letter SE-013/A/JA/12/2011.

166 Deputy Chief Prosecutor for General Crimes Circular Letter SEJAMPIDUM B-572/E/10/1994 mentions that the public prosecutor cannot be allowed to fail. According to the IPS, some indictments fail because public prosecutors have weak control of a case, and they violate the ethics. Therefore, when a prosecutor receives case files from the investigators, there is no choice but to successfully win the case. Personal communication with prosecutors in seven district prosecution offices, 2015.

167 Based on Article 191 (1) of the KUHAP, a defendant can be freed if the court has decided (after the defendant has been heard) that s/he has not been proven guilty, and there is no proof that s/he has been involved in wrongdoing.

5.4.4 Appellate Procedure

The Chief Prosecutor Circular Letter SE-013/A/JA/12/2011 states that prosecutors must respond to a defendant's appeal against conviction by appealing to the High Court, which is located in the capital city of each province.[168] A prosecutor may file an appeal against a District Court decision, if it provides a lesser sentence than s/he has demanded.[169] However, the public prosecutor must either obtain permission from his/her superior or hold an exposé, prior to filing an appeal.[170] Because of this procedure, prosecutors may not respond to the District Court decision in the final hearing; instead, they ask judges to give them some time to decide whether to file an appeal or not.[171] Article 240 of the KUHAP states that the High Court may either correct the District Court decision or order it to amend its decision on a case. The High Court may also issue a decision that is different from that of the District Court.[172]

Public prosecutors may file a cassation (*Kasasi*) to the Supreme Court, if they believe that the High Court judges have applied the law wrongly, or exceeded their jurisdiction when deciding the case (Article 253 (1) of the KUHAP).[173] This provision ensures that the procedure of cassation continues to examine whether the High Court decision has applied the law correctly. However, in practice, prosecutors use cassation to object to High Court decisions that issue lighter criminal sentences than the equivalent District Court decisions. In their cassation file, prosecutors argue that those decisions are not in line with the KUHAP, which asks judges to issue a sentence with a proper argument (Arsil, Hertanto, Farihah, and Puslitbang Mahkamah Agung, 2016, p. 15). The Supreme Court seems to be inconsistent in responding to prosecutors' actions. Although the Supreme Court rejects the prosecutor's argument, in some cases supreme judges grant a

168 Since Article 43 of the Supreme Court Law states that only those who file an appeal can lodge a cassation. The IPS obligates the prosecutor to send an appeal memorandum and appeal contra memorandum, in order to respond to the defendant's appeal. See Chief Prosecutor Circular Letter SE-013/A/JA/12/2011, point 4.1.

169 Chief Prosecutor Circular Letter SE-013/A/JA/12/2011 states that public prosecutors may file an appeal against the district court decision, if judges issue a sentence which is half what the prosecutor demands, or the judge's decision does not take the prosecutor's argument into account in its sentencing demands.

170 Article 41-42 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011.

171 If, seven days after the decision is presented, a defendant or public prosecutor does not take the chance to appeal, they are considered to be in agreement with the District Court decision (Articles 87, 233, and Article 234 (1) of the KUHAP).

172 An appeal is not generally done directly, and there is no option to do it verbally. A court of appeal bases its decision on the appeal document only (Article 238 (1) of the KUHAP).

173 See also Chief Prosecutor Circular Letter SE-013/A/JA/12/2011. Similar to the reason for appeal, prosecutors must either obtain permission from their superiors or hold a case exposé, before filing a cassation. (Article 43 of Chief Prosecutor Regulation PERJA 036/A/JA/09/2011).

prosecutor's cassation and overturn the High Court decision (Arsil et al. 2016, 15-16).

The KUHAP formally limits the cassation process to examination of the High Court decision only.[174] However, the cassation can also be filed in order to review an acquittal that has been decided by the District Court. Article 244 of the KUHAP prohibits prosecutors from appealing an acquittal.[175] However, the IPS obligates the public prosecutor to file a cassation if a District or High Court issues an acquittal decision or a discharge decision.[176] The IPS argues that the prosecutor is allowed to file a cassation, based on the 1983 Ministry of Justice Decision M.14-PW.07.03 on Implementation of the KUHAP, and the Supreme Court's jurisprudence 275/K/Pid/1983, which overturns the acquittal of the Natalegawa case.[177] A notable NGO on reform of the judiciary, LeIP, reports that public prosecutors dominate the total number of cassation applicants to the Supreme Court[178] (Arsil et al. 2016, 13-16).

In 2013, the Constitutional Court ended the debates on whether a prosecutor may file a cassation for an acquittal decision. In its Decision 114/PUU-X/2012, the court allowed the prosecutor to do so.[179] The Constitutional Court bases its decision on Supreme Court practices for receiving a

174 Parties have fourteen days from when the High Court decision is presented to them (Article 244 and 245 (1) of the KUHAP). In the cassation process, the Supreme Court can cancel the lower court decisions if, for example, they run out or surpass their jurisdiction, or apply legal principles wrongly (Article 253 (1) of the KUHAP).

175 The defendant and public prosecutors may file a cassation with the Supreme Court for a decision handled by the district or high court, except for an acquittal.

176 Chief Prosecutor Circular Letter SE-013/A/JA/12/2011 and Chief Prosecutor Circular Letter B-036/A/6/1985.

177 In its Decision 275/K/Pid/1983 the Supreme Court differentiates between pure acquittals (*bebas murni*)) - loosely, acquittal on the merits (*bebas tidak murni*) – and other forms of acquittals; for example, acquittal because of a procedural error. This jurisprudence was used by the government as a basis for legalising the prosecutor's cassation in Ministry of Justice Decision M.14-PW.07.03 on the Implementation of the KUHAP.

178 If prosecutors do not file an appeal or cassation, they may be examined by their superior. Personal communication with IW, a prosecutor of B District Prosecution Office, 2015. For this reason, the Supreme Court Annual Report 2017 noted the prosecutors who filed the most cassations in that year. See also the Supreme Court Annual Report 2017. Hukum Online, *Laporan Tahunan MA 2017: Jaksa Paling Banyak Ajukan Kasasi pada 2017, Ini Sebabnya* (Prosecutors who filed the most cassations in 2017: here are their reasons for doing so), https://www.hukumonline.com/berita/baca/lt5aa01a52a143f/jaksa-paling-banyak-ajukan-kasasi-pada-2017--ini-sebabnya/, accessed 21 September 2019.

179 Following this decision, the Supreme Court changed the format of the form to request a cassation to no longer differentiate between pure and impure acquittals. Hukum Online, *bebas murni atau tidak murni sudah tak relevan* (Whether an acquittal is pure or impure is no longer relevant), https://www.hukumonline.com/berita/baca/lt526dcda563378/bebas-murni-atau-tidak-murni-sudah-tak-relevan, accessed 10 June 2015.

prosecutor's cassation on an acquittal decision.[180] Some observers criticise this decision, because protection of acquitted defenders is effectively weaker than that given to defendants convicted by District Courts. This is mainly because convicted defendants are offered a fact examination in the High Court *and* its legal application in the Supreme Court, whereas acquitted defendants only have one chance to defend their rights in the Supreme Court (Kadafi 2019).

The Chief Prosecutor may file a cassation under the interest of the law, to correct the final and binding decision of a District or High Court to maintain the application of unity of the law. This cassation must not have any legal consequences for the defendant (Article 259 of the KUHAP)[181]. However, Deputy Chief Prosecutor for General Crimes Circular Letter R-32/E/6/1994 states that the prosecutor may propose a cassation in the interest of the law to the Chief Prosecutor, if the prosecutor finds a binding District or High Court Decision which is not in line with the IPS interest.[182] For example, cassations filed by the Chief Prosecutor to annul pre-trial hearings deciding that confiscation by the IPS was illegal, and that the government must pay compensation to the defendant. The Chief Prosecutor argued that this decision was not in line with the KUHAP. Although Article 259 (2) of the KUHAP states such a cassation shall not harm the defendant, in its Decision 1828 K/PID/1989, on 5 July 1990, the Supreme Court nevertheless annulled the pre-trial hearing decision, and stated that pre-trial hearings do not have authority to examine confiscation, because the KUHAP does not mention this explicitly (Silaban 1997, 401-2). Moreover, the IPS is likely to exercise these authorities in order to achieve its goal of winning the case at trial.

Another procedure for reviewing the final and binding decision of the court, at all levels[183], is the review (*Peninjauan Kembali*, or PK). A review is also designed to protect defendants' rights, by prohibiting the Supreme Court from issuing a sentence that is heavier than that of the previous deci-

180 The Constitutional Court argues that legalising cassation practices might not affect the defendant aversely, since the Supreme Court can always support the District Court decision. See Constitutional Court Decision No. 114/PUU-X/2012 p. 28-29, in which a constitutional judge (Harjono) expresses a dissenting opinion, regarding the protection of the defendant's human rights as more important than the decision in Article 67 of the KUHAP. Harjono argues that the Supreme Court practice is not a basis for saying that Article 244 of the KUHAP is against the Constitution.

181 Arsil and Yura, *Kasasi Demi Kepentingan Hukum, Penunjang Fungsi Mahkamah Agung yang Terlupakan,* (Cassation in the interests of the law: the forgotten supporting function of the IPS to the Supreme Court), www.leip.or.id/artikel/101-kasasi-demi-kepentingan-hukum-penunjang-fungsi-mahkamah-agung-yang- terlupakan.htm, accessed 10 June 2015.

182 Article 259 (1) of the KUHAP states that the Chief Prosecutor may file a cassation in the interests of the law, for a district or high court decision that has permanent legal force and can only be used once.

183 Article 263 of the KUHAP states that the review may examine any court decision, from district to supreme court level, excluding the constitutional court.

sion[184] (Article 266 (3) of the KUHAP). Article 263 of the KUHAP states that requirements for filing a PK include determinative circumstances (novum), inconsistent court decisions, or judicial error.[185] Although the KUHAP explicitly does not allow the public prosecutor to lodge a PK,[186] the IPS uses it to overturn Supreme Court cassations which issue an acquittal. The IPS argues that its action is based on the Supreme Court jurisprudence 55PK/Pid/1996, which granted a prosecutor review and overturned a Supreme Court decision acquitting Muchtar Pakpahan, a labour activist in the New Order era, who was prosecuted for subversion.[187]

In 2016, Anna Buntaran, Djoko S. Tjandra's wife, who was being prosecuted for corruption, challenged the constitutionality of the prosecutor's power to lodge a review based on Article (1) 263 of the KUHAP with the Constitutional Court. She claimed that this practice is not in line with the due process of law, which is promoted by the KUHAP and Article 28 of the Indonesian Constitution. Because of this practice, her husband, who was acquitted by South Jakarta District Court in 2000 and by the Supreme Court in 2001, had to stay in prison because the Supreme Court had decided to convict Tjandra of corruption, based on the prosecutor's review of the 2009 decisions. The Constitutional Court decided that public prosecutors would not be allowed to file a review.[188] The justices argued that Article 263 (1) of the KUHAP limits the applicant of the review only to those convicted as guilty and his/her beneficiaries (heirs). They believed that the prosecutor could not review an acquittal decision, since the KUHAP aims to protect citizens' rights before the state. However, the Chief Prosecutor refused to comply with this Constitutional Court decision, and ordered public prosecutors to lodge reviews to protect victims and state interests instead.[189] In addition, the Supreme Court seems to agree with the Chief Prosecutor, and

184 A review is filed to the first court handling the case, and there is no time limit for when it should be filed (Article 264 (3) of the KUHAP). If a novum is being reviewed, the District Court handles it in the first instance (including a witness hearing), and if the evidence is considered to be strong enough, the case will be sent on to the Supreme Court.

185 See also Article 248(2) of Law 31 of 1997 on the Military Court.

186 Article 263 (1) of the KUHAP states that only those convicted or their heir may file a review with the Supreme Court for binding decisions, except for acquittal or discharge.

187 Justice Andi Andojo, who is well known for his for his integrity, freed Muchtar Pakpahan through a cassation: Decision no. 395 K Pid/1995. Afterwards, the New Order regime pressed the Supreme Court to grant the prosecutor's review and sentence Muchtar (Pakpahan and Tambunan, 2010; Pompe, 2005).

188 See Constitutional Court Decision 33/PUU-XIV/2016.

189 Detik.com *Dilarang MK Ajukan PK, Jaksa Agung: Kami Akan Tetap Ajukan* (The Constitutional Court prohibits the IPS from filing a review, but the Chief Prosecutor says, "we will still file it"), https://news.detik.com/berita/d-3226703/dilarang-mk-ajukan-pk-jaksa-agung-kami-akan-tetap-ajukan, accessed 2 September 2019.

it gives judges the right to accept or reject a review which has been filed by the prosecutor.[190]

Initially, a convicted person or his/her heirs could only file a review once.[191] In 2013, the Constitutional Court, through its Decision 34/ PUU-XI/2013, removed the restrictions in Article 268 (3) of the KUHAP and allowed a review to be lodged more than once. However, the Supreme Court refuses to implement this Constitutional Court decision, since the Supreme Court Law and the Judicial Power Law limits the lodging of a review to only one instance. The Chief Prosecutor supports the Supreme Court's decision, because the IPS finds it difficult to execute death row prisoners when they file more than one review to avoid execution.[192] In order to follow the decisions, the Constitutional Court stated that the provisions on reviews in the two previous laws must be in line with the previous Constitutional Court decision on the KUHAP. Furthermore, following these decisions, the Supreme Court does seem to be accommodating the lodging of reviews more than once.[193]

5.4.5 Execution

Apart from cassation decisions, District or High Court decisions have final and binding status, so the prosecutor can execute those decisions. Article 270 of the KUHAP states that the prosecutor is the only executor of court decisions. Therefore, the prosecutor is responsible for managing the implementation of criminal sentences. For example, putting the accused in prison,

190 Hukum Online, *MA: Larangan Jaksa Ajukan PK Mengikat Kejaksaan* (The Supreme Court: Prosecutors are prohibited from proposing a review which binds the IPS), https://www.hukumonline.com/berita/baca/lt57412b95477b5/ma--larangan-jaksa-ajukan-pk-mengikat-kejaksaan, accessed 2 September 2019.

191 Article 263 of the KUHAP, Article 24 (2) of the 2009 Judicial Power Law, and Article 66 (1) of the Supreme Court Law.

192 Detik.com, *Jaksa Agung: PK Berkali-kali jadi Hambatan Eksekusi Mati* (Chief Prosecutor says that reviewing more than once may hinder capital punishment), https://news.detik.com/berita/2769044/jaksa-agung-pk-berkali-kali-jadi-hambatan-eksekusi-mati?nd 771106com, accessed 2 September 2019.

193 Constitutional Court Decisions 108/ PUU- XIV/ 2016, 1/ PUU- XV/ 2017, and 23/ PUU- XV/ 2017. However, the Supreme Court website requires a review at least once, see Kepaniteraan Mahkamah Agung, *Prosedur Penanganan Perkara Peninjauan Kembali Putusan Pengadilan Yang Telah Memperoleh Kekuatan Hukum Tetap,* (The review procedure for any binding court decision), https://kepaniteraan.mahkamahagung.go.id/index.php/prosedur-berperkara/prosedur-peninjauan-kembali, accessed 3 March 2019 Another Supreme Court's website mentioned that there had been seventeen review cases, of which 78% were cassation decisions that had been objected. Kepaniteraan Mahkamah Agung, *Objek PK adalah Putusan Kasasi* (Review objection is the cassation decision), https://kepaniteraan.mahkamahagung.go.id/index.php/kegiatan/1272-78-objek-pk-adalah-putusan-kasasi, accessed 3 March 2019.

or releasing them from prison (either on parole or not), seizing the evidence for the state, or returning evidence to its owners.[194]

However, public prosecutors can only execute a court decision after obtaining decision minutes from the clerk, and after receiving directions from the Head of a District Prosecution Office. In practice, because of this provision the IPS finds it difficult to enforce court decisions. The IPS complains of a long wait when delivering the minutes of court decisions, which can result in delays in execution.[195] The defendant, or his/her legal representative, may exploit the procedure by bribing the clerk to delay (or not send) the minutes of a decision. As a result, the public prosecutor cannot execute the decision.[196] Another strategy for postponing the execution is to file an injunction to the District Court. In some cases, the court decides to suspend an execution of a final and binding decision.[197]

In some cases, the accused or his/her advocates try to obstruct the execution of a court decision, for instance, by reporting prosecutors who put the accused in the prison to the police. One Criminal Division Head states that the police want to arrest him, because he put powerful political actors in jail. Even though the execution process was carried out according to the Chief Prosecutor's orders, and there was a final and binding decision, the

194 Article 30 (1) of 2004 IPS Law; Article 54(1) of Law 48 of 2009 on Judicial Power; Articles 270–83 of the KUHAP.

195 HukumOnline.com, *MA Akui Lamban Kirim Salinan Putusan,* (The Supreme Court acknowledges that it has been less responsive in delivering a copy of the decision), https://www.hukumonline.com/berita/baca/lt4f8ee3937dcce/ma-akui-lamban-kirim-salinan-putusan, *MA Perketat Pengawasan Proses Minutasi*, (The Supreme Court supervises the process of drafting meeting minutes), https://www.hukumonline.com/berita/baca/lt56d699271544a/ma-perketat-pengawasan-proses-minutasi-putusan, accessed 3 March 2019.

196 LeIP, *Korupsi Lewat Celah Administrasi Penanganan Perkara: Urgensi Reformasi Manajemen Perkara Pada MARI*, (Corruption via an administration gap in the of handling cases: urgent reform of case management in the Supreme Court), http://leip.or.id/korupsi-lewat-celah-administrasi-penanganan-perkara-urgensi-reformasi-manajemen-perkara-pada-ma-ri/, accessed 2 March 2019. A report on simplifying the format of the Supreme Court decision by MaPPI FHUI finds that one of the reasons why drafting meeting minutes can take so much time is because the criminal decision-making format, based on Article 197 (1) KUHAP, is inefficient. In cassation, for example, a decision should contain all the investigations, from the first to the last stages. In fact, judges' arguments on a cassation decision generally consist of no more than two pages, http://mappifhui.org/wp-content/uploads/2016/01/Laporan-simplifikasi_COMPLETED.pdf.

197 See, for example, the Bandung District Court Injunction (*Penetapan*) No. 132/Pid/B/1997/PN.Bdg on 30 September 2002, regulating that a sentence cannot be imposed before the President grants clemency, so the defendant may not reside outside of prison. See Architia Dewi, 2017, Legal certainty of the deadline to impose an imprisonment by public prosecutors based on the KUHAP and Law 16/2004 on the IPS. University of Pasundan, Bandung.

Head admitted that executing such people was costly and risky.[198] To avoid such problems, most prosecutors prefer to detain the defendant at an early stage in the prosecution process. Since the budget for execution is small,[199] it cannot cover the prosecutor's expenditures for jailing an accused person who does not want to go to prison voluntarily, following the court decision. Besides, as discussed in the previous section,[200] the prosecutor often cannot execute the court's decision, because the assets or goods specified in the files are different from the actual assets or goods.

Article 273 (3) of the KUHAP states that the prosecutor must seize any evidence selected by the court for the state. The poor management of confiscated goods, as discussed in Chapter 4, also affects the prosecutor's work throughout the execution process.[201] Since the value of the seized goods decreases when they are stored, the prosecutor cannot maximise state revenue from the execution process (Niniek Suparni, Sri Humana, Imas Sholihah, and Suryadi Agoes, 2017, pp. 4-6). This relates to the IPS annual budget, since the government may increase the annual budget for the IPS after considering its revenue.

5.5 Conclusion

Most Indonesian criminal law experts perceive that current Indonesian criminal procedure adopts the Dutch Civil Law system, with its opportunity principle. However, this chapter finds that legal norms, in both criminal proceedings and the practice thereof, have developed and changed, i.e. not keeping strictly to the previous system, but based on the regime's interest. Some common law systems – such as the pre-trial hearing mechanism in the 1981 Code of Criminal Procedure (KUHAP) – have not been adopted because the regime wants to protect citizens' rights, but in order to find a more agreeable institution than an Examining Judge (*rechter commissaris*). As stated in Chapter 2, Law 8/1981 on the KUHAP was drafted and enacted under the New Order military regime. The regime controlled the criminal justice system by positioning the police as a part of the army.[202] Therefore,

198 An interview with the Head of the General Crimes Division of the Bandung District Prosecution Office, 2015. See also, Berita Satu, *Eksekusi Dinilai Cacat Hukum, Pengacara Susno Laporkan Jaksa* (An execution is considered to have legal defects, Lawyer Susno reports a prosecutor to the police), https://www.beritasatu.com/nasional/254374/eksekusi-dinilai-cacat-hukum-pengacara-susno-laporkan-jaksa, accessed 2 March 2019.

199 See Chapter 3.

200 See 2.2: Investigation.

201 TEMPO, *Barang Bukti di Rupbasan Nyaris Jadi Rongsokan* (Evidence obtained from seizures is almost worn-out), https://fokus.tempo.co/read/1039275/barang-bukti-di-rupbasan-nyaris-jadi-rongsokan, accessed 22 April 2019.

202 In the New Order era, the police were a part of the Indonesian Army and reported to the Army Commander. See Chapter 2.

the KUHAP gives the prosecutor certain supervisory powers over police coercive measures and positions the police as the *dominus litis* during the pre-trial stage. The regime also controlled the IPS by appointing chief prosecutors with a military background and instilling military culture into IPS bureaucracy. As I have discussed in this chapter, the New Order's legacies are retained by the IPS, which affects public prosecutors when interpreting the criminal procedure.

Public prosecutors are bound by IPS internal regulations, when interpreting the KUHAP and exercising their discretion. The internal regulations, which adopt the command system, transfer public prosecutors' KUHAP powers to their superiors. Although the KUHAP grants public prosecutors discretion in exercising coercive measures, and in prosecuting or dismissing cases, as well as in demanding high or low sentences at trial, the IPS obligates prosecutors to first obtain approval from their superior.

As I have elaborated in this chapter, this procedure changes the work of prosecutors from enforcing the law to merely handling situations (cf. Wilson, 1989, p. 36-37). The decision to demand a high or low sentence, for instance, is based on the leader's direction, rather than on the facts at trial. The IPS seems to treat public prosecutors like soldiers who have a responsibility to win a case at court.[203] Therefore, prosecutors will do anything to ensure that, once they are prosecuting a criminal case, they must win it in court.[204] Thus, most public prosecutors perceive a trial to be like battle, and position the defendants or their legal representatives as the enemy. Even if the KUHAP is needed, the IPS allows its prosecutors to violate its stipulations, which can be seen in IPS decisions which order a prosecutor to file a cassation or review for an acquittal decision, which was initially prohibited by the KUHAP. Notwithstanding the IPS performance regarding criminal procedure, this chapter has found that the court prefers to side (in part) with the prosecutor, rather than promoting due process and protecting defendants.

Besides, as I elaborated in Chapter 4, the functional differentiation principle in the KUHAP empowers the police force's position at the pre-trial stage. The KUHAP bridges the investigation stage of the prosecution process by establishing the pre-prosecution process. This results in the prosecutor being incapable of screening evidence and witnesses during the investigation process. The IPS attempts to solve this issue by asking the public prosecutor to supervise the criminal investigators from the beginning of the investigation. However, the police force's refusal to cooperate with the IPS' initiatives, the IPS' small budget, and its heavy workload all make the prosecutors prefer to rely on fact-checking in the investigation files. Not

203 Article 61 PERJA 036/A/JA/09/2011.

204 Personal communication with the Head of the General Crimes Division of the M District Prosecution Office, 2014.

only does the KUHAP limit the time available for the prosecutor to examine investigation files, but the police superior may also intervene in the leadership of the IPS, in order to get their own files accepted. Consequently, public prosecutors seem to prosecute the case, even though they are uncertain about the evidence presented in the files.

The IPS cannot be positioned as a criminal justice filter, simply because of its opportunity principle. It cannot be positioned as such, because prosecutorial discretion is designed to dismiss any case with high political impact on the government. The IPS Law stipulates that only the Chief Prosecutor can dismiss a criminal case for public interest reasons (*Seponering*). This is decided later by the Chief Prosecutor, after s/he receives advice from the high official state institution. Since there is no specific procedure for public prosecutors to use when proposing a *Seponering*, they prefer to stop a case either by returning the investigation files to the criminal investigator or by dismissing a case for legal reasons.[205]

The IPS relies on other criminal justice actors exercising their power. Since they must cover any police expenditure if the defendant escapes, prosecutors prefer to detain the defendant during the prosecution process. This scheme seems more affordable from the prosecutor's point of view, since the IPS only provides a small budget for execution. Other problems during the execution process relate to court administration and the Ministry of Law and Human Rights' poor storage management. In some cases, the prosecutor must postpone an execution, because the court cannot send minutes of the decision on time. Besides, the prosecutor cannot guarantee that evidence seized from defendants or other parties would remain the same, because the Ministry only has limited storage for such evidence.

In addition to criminal procedure, public prosecutors deal with the 1918 Dutch Colonial Criminal Code, or KUHP, with a few adaptations to the current situation. The government has never published an official translation of the KUHP. As a result, numerous different translations and interpretations deviating from the original provisions have created problems in the prosecution process. The KUHP has also been amended several times, but incomprehensively.[206] One relevant provision, which has not been changed since 1960, relates to the categorisation of minor crimes and the amounts of related fines.[207] Since Indonesia's currency has since inflated severely, the

205 Article 25 of PERJA 036/A/JA/09/2011.

206 According to the ICJR, the government has amended the KUHP sixteen times. In 1999, for instance, the parliament added several articles on crimes against state security to the KUHP, via Law 27/1999. The Law prohibits the publication, broadcasting or spreading of communist teachings, Marxism/Leninism, and the expression of desires to overturn or abolish Pancasila as the national ideology.

207 The Government Regulation in Lieu of Law/Perppu 16/1960, on amendments to the KUHP.

1960 provisions are no longer enforceable.[208] Public prosecutors therefore never use provisions to prosecute trivial cases for minor crimes, and never use their prosecutorial discretion to filter out the smaller cases.[209]

This chapter finds that centralised power in the IPS leadership, the IPS' military culture, the vagueness of the KUHAP provisions, and the outdated KUHP make the public prosecutor's role within the criminal justice system equivalent to a postman, who delivers a case based on the government's (and other powerful actors, such as political parties', companies' or the police force's) interests. The IPS is lacking in budgetary support, and political intervention (as I have elaborated in the previous chapters) makes the prosecution process more like a market process. Prosecutors offer their powers as commodities to the regime, in order to show their loyalty, as well as to the market, in order to gain incentives for their organisation.

208 An example from the definition of 'light theft' is: if an item costed 250 IDR in 1960, its value in 2012 is equal to 2.500.000 IDR. This kind of assumption can cause all theft to be defined as 'heavy theft', carrying a sentence of 5 years or more, and can mean that a defendant is detained during the investigation process. The Institute for Criminal Justice Reform, *Menghidupkan kembali Tindak Pidana Ringan dalam KUHP,* (Re-activating trivial crimes in the KUHP), http://icjr.or.id/menghidupkan-kembali-tindak-pidana-ringan-dalam-kuhp/, accessed 3 September 2019. In 2012, the Supreme Court issued PERMA 2/2012, in order to adjust the value of items and fines in the KUHP. However, this PERMA is no longer valid, since the police and prosecutors consider this regulation non-binding.

209 Article 82 of the KUHP regulates the *Afdoening Buiten Process*, carried out by prosecutors and regarding misdemeanours. However, since the fines in the KUHP have never been updated, this regulation cannot be applied.