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

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6 The Indonesian Prosecution Service and The Political Order: Conclusions on the Performance of Public Prosecutors in the Post-Authoritarian State

6.1 Introduction

This thesis has presented and analysed the role of the Indonesian Prosecution Service as a government agency, whose tasks and powers are to maintain security and order. The discussion in this thesis focussed specifically on the legal, historical, and political aspects of the prosecution process in Indonesia's criminal justice system, across different political regimes. After 1998, Indonesia began to reform its constitutional system, including its criminal justice system. The post-military authoritarian regimes have enacted several regulations promoting due process within the criminal justice system. For instance, in 2005 the government ratified the International Covenant on Civil and Political Rights via Law 12/2005. A year after, Law 13/2006 was enacted to protect the witnesses and victims of crimes. Further, a number of Constitutional Court decisions marked changes in the criminal procedure. As discussed in this thesis, in the constitution the position of the Indonesian Prosecution Service remains similar to its position under previous authoritarian regimes, while the code of criminal procedure (KUHAP) continues to position the public prosecutor as "a justice postman".

Recently, in June 2020, the public was shocked and angered by the performance of public prosecutors in the controversial case of a reputable KPK (Corruption Eradication Commission) criminal investigator – Novel Baswedan (Novel). In this case, public prosecutors demanded one-year imprisonments for two of Novel's attackers. The charge was considered to be too light and laden with conflicts of interest, since the two defendants were active police officers.[1] In addition, at trial the prosecutors did not complain about the status of the defendants' lawyers, who were also

1 Prosecutors argued that the motives of both defendants were personal, and that they had no intention of harming Novel by throwing acid on his face, causing serious injury to his eyes. During the trial, the public prosecutors only followed the police investigation files, ignoring a fact-finding report by the National Human Rights Commission and reports from the fact-finding team (TPF), which all mentioned that the attack was related to his job in the KPK. Jakarta Post, House to question attorney general on 'light' sentence sought for suspects in Novel case https://www.thejakartapost.com/news/2020/06/15/house-to-question-attorney-general-on-light-sentence-sought-for-suspects-in-novel-case.html, accessed 22 June 2020.

police officers.[2] For this reason, anti-corruption and human rights activists protested against the prosecutors' performance at trial, stating that the prosecutors had acted on behalf of the defendants, rather than acting on behalf of the victim.[3] This is just one of many controversial cases, in which the public prosecutor was more likely to support the interests of the police and police investigation files, rather than carefully checking and impartially considering fact finding during the trial.

This chapter summarises the findings of this research, and addresses the research questions on the role of the prosecution service in post-authoritarian Indonesia, and the ways in which the public prosecutor operates in practice. The discussion and analysis in this thesis were structured around the following driving questions: *How have subsequent Indonesian political regimes positioned and regulated the Prosecution Service, and how has this affected its performance? What do post-authoritarian Indonesian public prosecutors do in practice, during the criminal procedure? How can this be assessed from the perspective of the rule of law, and in what way can it be improved?*

In the following sections I will present a summary of the key findings of the previous chapters, while revisiting the research questions and making theoretical reflections on the topic. The contribution of this research to relevant academic discussions on the performance of post-authoritarian prosecution services is presented, empirically and theoretically. The chapter ends by offering ideas regarding what can be learned from Indonesia about public prosecutors in authoritarian states. This will provide the basis for several recommendations and suggestions for further research.

6.2 The Indonesian Prosecution Service within the Constitution and its Political Context

The Indonesian Prosecution Service (IPS) has its origins in the colonial state, and some of its features can only be understood through historical analysis. Essential changes took place during many years of authoritarian regimes, and these still define the performance of current public prosecutors. In order to understand this, Chapter 2 considered the influence of the political

2 The defendants' legal team was led by the National Police Law Division Head, Insp. Gen. Rudy Heriyanto Adi Nugroho, who was serving as Head of the Jakarta Police General Crime Division during the investigation of the acid attack, in April 2017. The Jakarta Post, KPK urged to take on Novel's acid attack case after prosecutors demand light sentence, https://www.thejakartapost.com/news/2020/06/20/kpk-urged-to-take-on-novels-acid-attack-case-after-prosecutors-demand-light-sentence.html, accessed 22 June 2020. For this reason, Novel objected to the prosecutors' performance at trial, in which they positioned themselves on behalf of the defendants, rather than acting on his behalf as victim.

3 Benarnews, Indonesia: Rights groups question acid-attack case trial https://www.benarnews.org/english/news/indonesian/trial-questioned-06222020161932.html, accessed 23 June 2020.

environment and institutional development of the IPS, before, during and after the authoritarian regimes of Guided Democracy and the New Order.

Like other post-colonial states, Indonesia has an ambition to apply the rule of law, in order to provide its citizens with better protection and justice. However, as this thesis found, Indonesian political regimes during most periods have prioritised the maintenance of order as their main goal for justice administration. Further, a vague constitution, interpreted in the regime's best interests (i.e. to maintain political order), influenced the public prosecutor's role in criminal procedure. This was different during the 1950s, which was a period of political effort to foster the rule of law within the criminal justice system. At the time, a clear provision in the 1950 constitution, promoting the due process of law, helped to prevent political intervention in criminal procedure. In addition, a prosecutor's status as magistrate and the IPS' institutional setting as part of the judiciary both seemed to help the Prosecution Service maintain the rule of law within the criminal procedure.[4]

During Guided Democracy, President Soekarno declared the end of the separation of powers doctrine and re-enacted the 1945 Constitution, which contained no provisions on either due process or judicial independence. He obtained full support from the army to place all the political power in his hands. From that time onwards, the prosecution service and police were militarised. The IPS was detached from the judiciary, and the Chief Prosecutor was positioned as a cabinet member. All public prosecutors were indoctrinated with military values, to ensure their loyalty to the regime. The government applied colonial law with Indonesian-based interpretations, while trying to create Indonesian legal norms to replace the colonial model. In the Guided Democracy era (1959-1965), the *Pengayoman* concept was proposed and established as an Indonesian way to make legal interpretations. According to this concept, the rule of law must be based on community wisdom, represented by the leader's wisdom. Therefore, the idea of the President as the greatest leader and wisest man in the community was promoted. For this reason, the President could intervene in criminal procedure.

During the New Order period, the military took the lead in the criminal justice system. KOPKAMTIB (Operations Command for the Restoration of Security and Order) was created for political policing, devoting a criminal police force to the maintenance law and order. It could, for security reasons, instruct and intervene in the criminal procedural process, via the police, Prosecution Service or court. Military influence over the Prosecution Service was quite obvious. Five military generals were also Chief Prosecutors during Soeharto's era. Although a Chief Prosecutor had the same structural status in the cabinet as the Commander of the Armed Forces (ABRI), in practice the two were not equal. Since the military rank of Chief Prosecutor

4 See 2.6 Parliamentary Governments

was only a two-star or three-star General (lower than a four-star military commander), the Chief Prosecutor's level was below that of the ABRI Commander.

The New Order military regime enacted the criminal procedure code (KUHAP) in 1981, and gave it military features. The KUHAP applies the principle of Functional Differentiation, which was designed to entrench military power in the criminal justice system, via the police. This principle allows the police to initiate an investigation and exercise coercive measures, without the prosecutor's supervision and with a minimum of judicial control. In addition, the KUHAP adopts military unity of command by implementing the built-in control principle, wherein the leaders monitor their investigators and prosecutors. For this purpose, both investigators and prosecutors must seek approval from their leadership, before making decisions on criminal procedure.[5]

This situation was not easy to change after the 1945 Constitution was amended during the post-authoritarian military regime. The amended constitution indeed guarantees the independence of the judiciary, but it still bears some features of the authoritarian model, including the application of repressive legislation.[6] In addition, the post-authoritarian government seemed not to take criminal procedural rights seriously. The amended constitution has no provision guaranteeing due process in criminal procedure, as in the 1950 Constitution. By way of comparison, the 1987 South Korean post-authoritarian constitution explicitly stipulates the value of due process and gives detailed provisions on criminal procedure (Cho 2006). Since 1988, enormous effort has been made to reform the criminal justice system, including eliminating the strict hierarchical bureaucracy in the 2004 Prosecutor's Law, in order to gain a more independent prosecutor and prevent the regime making political interventions in the prosecution process (Lee 2014a, 77). In opposition to this, the Indonesian post-authoritarian government retained certain provisions obliging the IPS to serve the rulers' political interests. As I discussed in Chapter 2, the President lost most of his/her control over the judiciary, the police and the KPK during the constitutional amendment process. Thus, s/he exploited the Prosecution Service's vague position in the constitution. The government succeeded in hindering the parliament's draft of the IPS Law, and replaced it with its own draft. Unlike the parliament's draft, which was adjusted to support reform of the Prosecution Service by preventing the Chief Prosecutor becoming a member of the cabinet, the IPS Law 2004 retains the President's control over the Chief Prosecutor and sets the IPS up as the executive body.

The case of Indonesia constitutes an example of the way in which prosecution services evolve within countries that are marked by authoritarian tendencies. Unlike post-authoritarian governments in Latin America, such as Chile, Guatemala and Mexico (which recreated and reorganised

5 See Chapter 5
6 See Chapter 2 and Chapter 5

their prosecution agencies to be more independent and accountable, by reforming their codes of criminal procedure and establishing private prosecution to improve victims' access to the criminal justice system (Michel 2018; Hafetz 2002)), Indonesian post-authoritarian governments have kept the prosecution service functioning as a government instrument, similar to previous regimes; they have also not reformed the KUHAP. A new special agency (the KPK) was established to prosecute corruption, but it has no aims to promote due process in the criminal justice system. In contrast with the post-authoritarian South Korean and Japanese prosecution services, each of which adopted the inquisitorial system (Lee 2014a; Johnson 2002), the Indonesian Prosecution Service repealed the prosecutor's status as magistrate, by limiting their discretion and independence in handling criminal cases. This indicates that designing the prosecution service to strengthen its control over society is a dominant feature of the Indonesian criminal justice system. In short, post-authoritarian governments in Indonesia have retained the IPS' authoritarian design. Furthermore, there are no clear regulations guaranteeing the prosecutor's independence during the prosecution process. In fact, the IPS' status in the constitution remains similar to its status under the previous authoritarian regime.

6.3 The Nature of the Indonesian Prosecution Service

On 22 July 2016, during my fieldwork, I attended the IPS anniversary in the Supreme Prosecution Office. I was struck by the military atmosphere of the ceremony.[7] I saw prosecutors stand and line up neatly in the field, like soldiers, while the leaders and guests sat in a shady tent in front of them. I heard background music from a marching band, hired from army headquarters especially for this ceremony. At the same time, three junior prosecutors folded and presented the *Panji Adhyaksa* (the military flag bearing the IPS symbol). This *Panji* is only presented publicly once a year, during the IPS anniversary ceremony.[8] On this occasion, the Chief Prosecutor – as the supreme leader of the IPS – delivered a speech called the "Daily Order", which was intended as a guideline for all prosecutors, throughout the countries, for a year.[9]

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7 I was attending the ceremony with the delegation of the Dutch SSR (*Studiecentrum Rechtspleging*/the Judicial Training and Study Centre). During the ceremony, a prosecutor said to me (guessing at the SSR's impression of the IPS anniversary): "I believe that the SSR delegation might question our status as a former Dutch Colony. Since they have seen that this military ceremony is more like those which happen in other communist totalitarian prosecution services, they might be forgiven for thinking that Indonesia was a colony of the Soviet Union". Personal Communication, 22 July 2016.

8 See Chapter 3, section 3.2: The *Één en Ondeelbaar* Doctrine and Organisational Culture

9 See the official website of the West Jakarta District Prosecution Office, *Perintah Harian Jaksa Agung RI* (Chief Prosecutor's Daily Order): http://www.kejari-jakbar.go.id/index.php/profil/perintah-harian-jaksa-agung-ri, accessed 22 August 2018.

This thesis has found that the IPS' problems with promoting due process relate to issues of an institutional nature. In essence, there are problems with the Prosecution Service's position within the state organisation and hierarchical bureaucracy, as well as with its military culture, limited budget, and the lack of professionalism shown by prosecutors when handling their tasks and powers. Together, analysis of each of these aspects contributes to explaining the behaviour of the Prosecution Service as an institution. Apart from the IPS' lack of political power within the constitution, the root of its bureaucratic dysfunction is found in making prosecutors behave like the military; this generates an important erosion in the administrative quality of criminal justice, for three reasons.

The first reason is that skills decline. Since military hierarchical orientation does not fit the prosecutor's role as magistrate, the Prosecution Service finds it difficult to manage its human resources. Most prosecutors do not want to be operators, instead desiring to become managers, with more power. The IPS organises its prosecutor placement system based on a prosecutor's rank. A high-ranking prosecutor cannot occupy a position as an operator in a District Prosecution Office, because the office should be led by a prosecutor of a lower rank. As a result, high-ranking prosecutors accumulate in the High and Supreme Prosecution offices, even though the District Prosecution offices lack skilled operators. In addition, since the IPS employs a promotion and transfer procedure to control prosecutors' loyalty to their leaders, prosecutors' career paths depend on such loyalty. Although the IPS provides training programmes in specific legal techniques, such as administrative law, prosecutors who pass such training too often do not get a promotion compatible with their training background.[10] The leaders assess prosecutors' loyalty based on their performance when carrying out orders within the prosecution process, even if they must break the law by doing so. As a result, a skilled public prosecutor, who would promote the rule of law, may find it difficult to get a promotion.

The second reason is that the prosecutor's job has become harder. As I elaborated in chapters 3 and 4, the post-authoritarian regimes have a preference in common with the previous regime: using the IPS as a government instrument, to accomplish the government's agenda. This applies not only to prosecuting criminal cases, but also to maintaining political stability as the state intelligence agency, and to providing legal assistance as the state attorney in civil and administrative law disputes. Although the IPS suffers from a lack of prosecutors, such additional functions can be served by exploiting the prosecutor's position in a similar way to that of a soldier. As a result, prosecutors suffer from a heavy workload.[11] However, in some cases more than one division had similar tasks, meaning that prosecutors were confused about how to achieve their goals. The IPS leadership's broad discretion in performing their tasks eventually becomes a guide for pros-

10 See 3.4.1 Recruitment and Training

11 See 3.3 The Prosecution Service Structure and Hierarchical Control

ecutors in handling their various duties. Therefore, their work patterns have changed—they no longer simply have to enforce the law, but instead need to handle the situation as defined by the leader (cf. Wilson, 1989, p. 37).

The third reason is corrupt practice within the IPS. Compared to other criminal justice actors, such as the police and judiciary, the IPS receives the smallest budget. Thus, a prosecutor's salary is lower than that of both a policeman/woman and a judge. Surprisingly (as reported in its annual report), the Prosecution Service is capable of exceeding the government target for handling criminal cases, even though its budget is limited.[12] As this thesis found, IPS managers must strategise this limited budget, by: transferring any allocation which cannot be spent in other divisions to divisions which lack operational funding; and allowing operators to fund their operations with *rezeki* (illicit money) donated by those with an interest in the prosecution process.[13]

The Prosecution Service leadership monitors the overall performance of its operators, from their success in overcoming and processing limitations, to their achievement of organisational goals. Further, since the Prosecution Service adopts military-style bureaucracy, a prosecutor's career path depends on his/her loyalties. One way of demonstrating loyalty that is common among prosecutors is to provide their leadership with *upeti*[14] (cf. Butt 2012; Lolo 2008; Kristiana 2010).

These organisational norms have succeeded, as long as those shaping IPS structure and promoting rule-breaking have stayed in line with the government's political interests. It is no wonder that public prosecutors prefer to serve their leadership's interests and reinforce the regime's values (cf. King 1981, 27; Wilson 1989, 26). In addition to internal barriers imposed by top managers, who benefit from maintaining the current status quo within the IPS, the approach of donor agencies and NGOs seems to ensure that the IPS bureaucracy remains unreformed.[15] These all create an image of the Prosecution Service as an institution whose leadership, general culture and institutional dynamics all conspire to protect its own interests, condone corruption, and prevent change.

12 The Prosecution Service is always proud of its performance when criminal prosecutions exceed the target set by the government. See the IPS annual reports from 2011 to 2016. See also chapters 3 and 5.

13 Similar money-making practices via criminal cases have also happened in in Myammar, Bangladesh and China (Cheesman 2015, 190–91).

14 *Upeti* means 'gifts', which are provided by subordinates to their superior as a symbol of the willingness of children to be under *Bapak*'s protection.

15 See 3.5: A Reform Effort

6.4 Public Prosecutors in the Criminal Procedure: Crime Fighters and Guardians of Political Order

The criminal justice system study also relates to the study of legal actors who apply and interpret the system. In this sense, this thesis has attempted to analyse the extent to which the post-authoritarian public prosecutors define, investigate and prosecute crime. This research has found that the role of the public prosecutor in the Indonesian criminal justice system cannot be isolated from the political preferences of the various Indonesian political regimes.

The 2004 IPS law mentions that a public prosecutor's function is to prosecute a criminal case based on justice and truth, by considering whether or not the evidence is legitimate.[16] However, this provision seems to be relatively weak, and it contradicts other rules which position the IPS as the regime's political instrument. As I discussed above, the authoritarian government promoted a military culture within the IPS, and placed public prosecutors in a similar position to military troops, obliging them to follow IPS leadership decisions when handling criminal cases; this has remained unchanged.

As this thesis has demonstrated, post-authoritarian governments have relied on criminal justice actors, such as the police and public prosecutors, to maintain order and achieve higher rates of arrest, prosecution, conviction and incarceration. Furthermore, unlike public prosecutors in other inquisitorial countries (such as the Netherlands, Germany or France), who have managerial roles, control an increasing workload, and restore public trust and the balance disrupted by an offence (Fionda 1995), Indonesian public prosecutors work merely as crime fighters for and guardians of the political order.[17]

The construction of the prosecutor's position is also connected with his/her relationship with the police. Compared with current inquisitorial procedure in countries like the Netherlands, France and Germany, which put judicial supervision at the centre of the procedural model of criminal justice (Crijns, Leeuw, and Wermink 2016; Tak 2003; Boyne 2017; Hodgson 2005; Fionda 1995; Jehle and Wade 2006), in Indonesia it is the police who dominate the criminal process. Since the Indonesian Code of Criminal Procedure (KUHAP) currently applies the principle of functional differentiation, which defines the stages of criminal procedure based on the actors involved, the public prosecutor and the court have limited powers to supervise the investigation process and control its coercive measures (such as arrest and detention).

As this thesis has demonstrated, the amended constitution set the police up to replace the military's role in maintaining security and order. Although the post-authoritarian government positioned the police as a civilian

16 See Article 8 of the 2004 IPS Law.

17 See 3.4.4: The Budget

institution, they kept its military bureaucracy and culture. Therefore, it is not surprising that the police cannot escape their military authoritarian legacy, when handling criminal cases.[18] In some cases the police provide a budget for the public prosecutor, but they may also threaten prosecutors, forcing them to accept the police investigation file. Since the public prosecutor needs the assistance of the police to guard and secure defendants and evidence, as well as their own safety during criminal proceedings, the Prosecution Office leadership must have a good relationship with the police leadership. As a result, some District Prosecution offices handle more criminal cases than their budget can cover.

In order to discuss the role of the public prosecutor in criminal procedure, in the first chapter of this thesis I presented some general criminal justice model theories, which might influence the performance of public prosecutors.[19] Although Indonesia has become more democratic, its criminal justice system model cannot simply be described as Packer's due process and crime control model.[20] All of the models underline how criminal justice actors must perform their tasks and powers in line with the rule of law, and that they must not break the rules of the game during that process.

However, as this thesis has shown, the Indonesian government tends to promote the family model within its criminal justice system; as a system which is based on the government's love for its citizens as its children, and on mutual respect via the *Pengayoman* model. This model depends on significant trust in public officials, because it provides them with great discretion at almost all stages of the system (cf. Foote 1992). A notable example of this model is the benevolent paternalism of the Japanese criminal justice system, which emphasises the prevention of criminal cases. In this manner, criminal justice officials use their discretion for at least three reasons: encouraging leniency (including diversion) at the pre-trial stage, de-emphasising imprisonment, and promoting community dispute resolution (Foote 1992). However, the Indonesian criminal justice system is designed to strengthen its control over society, and to achieve higher rates of arrest, prosecution, conviction, and incarceration. Furthermore, the political order model indeed suits the Indonesian situation during authoritarian regimes. Indonesian criminal justice actors regularly ignore the rules of the game in order to achieve their goals. They apply the criminal procedure, as long as it is in line with their interests, but they prefer to ignore rules which do not suit their objectives.

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18 See 4.3.1.1: The Police

19 See 1.3.3: The Role of the Public Prosecutor in Criminal Procedure

20 Although Griffiths' family model has been promoted, in order to help offenders reintegrate into society through the *Pengayoman* concept, in practice, detention centres and prisons could not run serious lessons or training for offenders, since they were already suffering from over-crowding and limited budgets. See Chapter 4.

Since 1998 there have been many efforts to promote due process within the criminal procedure. However, as I have discussed in previous chapters, the regime has little intention of promoting due process, tending more towards features which apply either crime control or the political order model in the criminal procedure. The public prosecutor is bound to IPS internal regulations, when interpreting the KUHAP and exercising discretion. The internal regulations, which adopt the command system, transfer the public prosecutor's power within the KUHAP to his/her superior. Although the KUHAP grants public prosecutors discretion to exercise coercive measures, to prosecute or dismiss cases, and to demand a low or high sentence at trial, the IPS obligates prosecutors to first obtain approval from their superiors.[21] The IPS treats public prosecutors like crime fighters with a responsibility to win cases at court. Most public prosecutors perceive a trial to be a battle, and they position defendants or their legal representatives as their enemy. This procedure changes the work of prosecutors from enforcing the law to merely handling situations. 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. Since one of their goals is winning cases in order to achieve a high conviction rate, they tend to ignore legal controls. Just how important it is for the IPS to win a criminal case is demonstrated when the KUHAP prohibition on filing a cassation or review for an acquittal is ignored.[22]

In 2012, the post-authoritarian government enacted Law 11/2012 on the Juvenile Justice System. The law promoted and reinforced restorative justice in the victim's interest, while also trying to find the best resolution for repairing harm caused by juvenile criminal behaviour. However, as the ICJR reported, public prosecutors preferred to not implement this restorative model fully. As shown in four district courts in Jakarta Province, public prosecutors still demanded prison sentences for more than 80% of 259 juvenile cases (Maya and Napitupulu 2019). Although the restorative model is also promoted, it seems that public prosecutors still perceive themselves as crime fighters.

Apart from being crime fighters, public prosecutors have a function to maintain political order. As I discussed in the previous section, the IPS' dependency on the government and parliament force public prosecutors to consider their political preference when performing their tasks and exercising their powers. In addition, public prosecutors must reinforce the government agenda, in order to maintain stability. One such example is how public prosecutors respond to the developmentalist values of the Joko Widodo administration. Instead of prosecuting corruption cases related to infrastructure projects, the public prosecutor prefers to offer legal assistance to those projects. Another example is the case of former Governor of Jakarta,

21 See 5.2.3: Coercive Measures (*Upaya Paksa*)

22 The Supreme Court allowed prosecutors to appeal the acquittal decision, instead of promoting due process and protecting defendants. See Chapter 5 for further discussion.

Basuki Tjahaja Purnama (also known as Ahok), who was charged under anti-blasphemy law. Although there was much criticism from criminal law observers, who believed that the prosecution process against Ahok was anything but political,[23] the IPS insisted on prosecuting and sending Ahok to jail for two years, because of the enormous political pressure from his political opponent and from conservative Muslim groups.[24] As a result, Ahok lost the governor election. However, in response to the criticism from Ahok supporters, the IPS also prosecuted Buni Yani (a man who helped send Ahok to jail by sharing the edited version of Ahok's controversial comments), and sent him to prison for one and a half years, for hate speech.[25] Such cases show how the IPS uses its prosecutorial powers to maintain political stability.

As this thesis has demonstrated, prosecutorial discretion is only exercised in order to maintain the political order. Since only the Chief Prosecutor can exercise prosecutorial discretion, only cases with high political impact on the government have been dismissed for public interest reasons (cf. Chambliss and Seidman 1971, 503). Furthermore, unlike the Dutch prosecutor, the Indonesian public prosecutor cannot be positioned as a criminal justice filter, simply because of its opportunity principle. I argued that such a provision was designed to prevent problems caused by public prosecutors' exercising of discretion in criminal cases dismissal. As a result, public prosecutors prefer to stop a case either by returning the investigation files to the criminal investigator or by dismissing a case for legal reasons[26] (cf. Chambliss and Seidman 1971, 506).

The experiences of Indonesian post-authoritarian public prosecutors within criminal procedure demonstrate that the rule of law is far from having been implemented. The centralised power in the IPS leadership, the IPS' military culture, and the vagueness of the criminal procedure provisions all seem to contribute to the role of public prosecutor as being a crime fighter for, and guardian of, political order. In the next section I will discuss policy recommendations for strengthening the rule of law in the prosecution process.

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23 Rafiqa Qurrata A'yun, Politics complicate blasphemy investigations in Indonesia and around the world https://theconversation.com/politics-complicate-blasphemy-investigations-in-indonesia-and-around-the-world-68817, Simon Butt, Why is Ahok in prison? A legal analysis of the decision https://indonesiaatmelbourne.unimelb.edu.au/why-is-ahok-in-prison-a-legal-analysis-of-the-decision/, accessed 10 November 2020

24 BBCNews, Mass prayer rally in Jakarta against governor 'Ahok', https://www.bbc.com/news/world-asia-38178764 accessed 10 November 2020

25 The Jakarta Post, Prosecutors seek two years for Buni Yani https://www.thejakartapost.com/news/2017/10/03/prosecutors-seek-two-years-for-buni-yani.html, accessed 10 November 2020

26 See 5.3: Prosecutorial Discretion in Criminal Case Dismissal

6.5 Towards the Rule of Law Approach in the Prosecution Process: Policy Recommendations

The IPS, in general, suffers from a lack of authority, budget and independence. This has serious implications for public prosecutors' performance within the criminal justice system. These problems are very difficult to solve, since they are rooted in political patterns that have developed over many years. The future of the IPS depends, to a large extent, on the political future of Indonesia in general, and it is therefore difficult to predict. Some of the findings in this thesis, however, point in the direction of possible solutions which would help prosecutors' performance in following the demands set by the rule of law.

First and foremost, due process features within the criminal procedure should be better guaranteed, and even mentioned in the Constitution. In addition, the current criminal procedure (KUHAP) must be revised. Actually, the revision effort was initiated in 2004.[27] The draft was previously discussed in the house of representatives (DPR), and would have been enacted in 2014, if criminal justice actors such as the KPK[28], police[29] and NGOs had not rejected the plan.[30] In the 2012 Draft of the KUHAP, some obstacles are implemented to protect the defendant from the arbitrary power of criminal justice actors. The draft established a new actor – *Hakim Pemeriksa Pendahuluan/HPP* – who is, to a certain extent, similar to the Dutch Examining Judge (*Rechter Commissaris*), in that they can control all coercive measures, such as detention, arrest, wiretapping and seizure, at

27 Komite Masyarakat Sipil untuk Pembaharuan KUHAP (The Civil Society Committee for reform of the KUHAP), *Perjalanan Rancangan KUHAP* (The Pathway of the Draft KUHAP) http://blog.pantaukuhap.id/perjalanan-rancangan-kuhap/, accessed 15 June 2020.

28 Tempo, *12 Poin RUU KUHAP yang bikin KPK lemah* (12 Points in the Draft KUHAP which weaken the KPK). https://nasional.tempo.co/read/551038/12-poin-ruu-kuhap-yang-bikin-kpk-lemah?page_num=2, accessed 15 June 2020.

29 Gressnews, *Hakim Komisaris ganjalan Polisi terapkan KUHAP baru* (The Examining Judge makes the Police Reluctant to Apply the New KUHAP) http://www.gresnews.com/berita/hukum/84539-hakim-komisaris-ganjalan-polisi-terapkan-kuhap-baru/, accessed 17 December 2019.

30 LBH Jakarta, *Hentikan pembahasan rancangan KUHAP pada DPR periode ini* (Stop the Draft KUHAP Deliberations in the House of Representatives Immediately!) https://www.bantuanhukum.or.id/web/hentikan-pembahasan-rancangan-kuhap-pada-dpr-periode-ini/. As I observed during my fieldwork, not all NGOs rejected the Draft KUHAP entirely. The ICJR and LeIP, for instance, believed that the draft was better than the current criminal procedure code, because it had more features for implementing due process within the criminal procedure, as the judge would control any coercive measures. The strongest opponent of such features was the ICW, which had support from the KPK. The KPK did not want coercive measures supervised by the judge; instead, it wanted to keep the current KUHAP concept, with minimum supervision by the judge. However, most NGOs agreed that the draft discussion should be postponed, since the parliamentary discussion was inaccessible. They were afraid that such a discussion would result in the worst KUHAP provisions.

the pre-trial stage.[31] Further, the draft returns the *dominus litis* to the public prosecutor, authorising him/her to supervise the police investigation, as well as granting him/her prosecutorial discretion to dismiss a case, in the public interest. Such features would have positive effects on promoting due process during the pre-trial procedure. Another crucial issue in achieving a more efficient criminal justice system is the establishment of a law that regulates the tasks and powers of criminal justice actors. Apart from repealing the functional differentiation principle in the current KUHAP, a law that governs and bridges the criminal justice actor authorities is also needed. The law must clearly regulate which institution is responsible for the policies of criminal justice, and ensure the security of criminal justice officials. Moreover, since all criminal justice actors have their own laws that are not harmonised and synchronised, such laws must be amended in order to prevent siloism (or *ego-sectoralism*). Another revolutionary measure is the merger of the National Police Criminal Investigation Body (BARESKRIM/ *Badan Reserse dan Kriminal*) with the IPS. As we can learn from the KPK's success in prosecution corruption, the investigation and prosecution process should be undertaken by one institution. By merging the BARESKRIM into the IPS, the tension between criminal investigators and public prosecutors could be reduced.

A better criminal justice system cannot be achieved solely by such revisions of criminal procedure. Another important change to ensure promotion of the rule of law is institutional reform of the IPS. As I argue elsewhere, the position of Chief Prosecutor, the IPS' military culture, the public prosecutor's status (which is similar to that of a military civil servant), and the IPS' limited budget have all contributed to the prosecutor's performance within the criminal justice system. Therefore, several regulatory measures would be required in order to remedy these flaws.

First, the Chief Prosecutor's position within the state organisation should be limited to high state official status (*Pejabat Negara*), rather than cabinet status. This is less revolutionary than it seems, since the amended constitution would position the IPS as part of the judiciary.[32] Furthermore, the mechanisms for the Chief Prosecutor's appointment and term should be clearly defined. The government could copy the selection process for the KPK Commissioner, who is selected by an independent committee with a good political record. In addition, the IPS' responsibility to parliament should be limited to general policies on budgets and bureaucracy. Thus, parliamentary members would not be able to interfere with the prosecution process in particular cases.

A second measure would be to redefine the *en een ondeelbaar* doctrine, which became a fundamental principle in the implementation of military culture. This doctrine has resulted in complicated problems with IPS

31 See the 2012 Draft KUHAP in https://icjrid.files.wordpress.com/2012/12/r-kuhap.pdf
32 See 2.9: Post-military Regimes: The *Reformasi* (1999-2019)

bureaucracy.[33] By repealing its military culture, the IPS bureaucracy could promote professionalism among prosecutors handling criminal cases. The prosecutor's status as a civil servant could be redefined. The IPS could imitate the German or Dutch prosecution system, which positions the public prosecutor not only as a civil servant but also as a magistrate. The IPS could merge prosecutor training with the training of judges, and give prosecutors independence in handling cases by repealing military procedures such as RENDAK or RENTUT.[34] Another issue – the IPS' limited budget – should be addressed by the government. The government is obliged to cover a prosecutor's expenditure during the prosecution process, in order to prevent corrupt practices, such as the prosecutor accepting *rezeki* from defendants or victims. Since it is almost impossible to gain a sufficient budget for prosecuting all criminal cases, the government should provide guidelines for public prosecutors on criminal case dismissal in the public interest.

However, the IPS must gain political support from civil society organisations, academia, politicians, and donor organisations, to promote the above recommendations. The IPS may use intelligence prosecutors to conduct preconditioning,[35] to promote public support for the IPS and to identify reformers in the political party who can assist the IPS in achieving its ends via the legislative process. As we can learn from criminal justice reform in South Korea and in Latin American post-authoritarian countries, support from civil society activists, human rights lawyers, and academia could assist the government in restructuring its prosecution system to guarantee the rule of law (Hafetz 2002; Lee 2014a).

6.6 Suggestions for Further Research

This thesis was an initial effort to understand the post-authoritarian public prosecutor in Indonesia. Since this thesis focuses only on the prosecution service, further research could be carried out on several themes and topics, including legal and non-legal issues with the post-authoritarian criminal justice system.

The first topic is of a legal nature and was already mentioned above: it concerns developing criminal procedure that has more due process features, and which harmonises laws on criminal justice actors in order to develop a better criminal justice system. A study on other criminal justice actors, especially the Ministry of Law and Human Rights, is also urgently needed in Indonesia. Since Indonesia still adopts the inquisitorial civil law system, as I discussed in this thesis, the MLHR plays an essential role in maintaining criminal justice policies, as well as in guaranteeing due process during the

33 See 3.4: Human Resource and Budget Management
34 See 5.4: The Trial Process
35 See 4.2.3: The Public Prosecutor as State Intelligence

criminal procedure.[36] Such a study would enrich our understanding of post-authoritarian governments' power within the criminal justice system

The second topic is more of a political nature. It relates to political contestation among and between criminal justice actors and NGO activists. This thesis has shown that the police are probably the most powerful criminal justice actors in post-authoritarian Indonesia; replacing the military, when dealing with security issues.[37] It would therefore be useful to investigate the role of the police in the deliberation of criminal procedure in parliament. Further, as illustrated by this thesis, in post-authoritarian Indonesia NGO reformers with international donor support play an important role in legal reform, including the reform of criminal justice actors. Despite some resistance from criminal justice actor organisations, internally, the reformers' approaches in promoting their agenda seemed to contribute their success.[38] Thus, research on NGO strategies to promote their reform programmes would assist our knowledge of criminal justice reform strategies in post-authoritarian countries.

36 See 4.3.3: The Ministry of Law and Human Rights
37 See 4.3.1.1: The Police
38 See 3.5: A Reform Effort