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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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Cover Page



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Issue Date: 2021-01-21

Summary

Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the Case of Indonesia

Despite the demise of the New Order authoritarian military regime in 1998, Indonesian post-authoritarian governments have continued to rely on criminal justice actors, such as public prosecutors, to maintain political order. Although the post-military authoritarian regimes have enacted several regulations promoting the rule of law in the criminal justice system, they have a preference in common with the previous regime which is to use it to accomplish their political agenda.

The aim of this thesis is to provide an analysis which considers the context in which the Indonesian Prosecution Service (IPS) conducts its relationship with different regimes, as well as with other criminal justice actors, societal actors, and the public at large. Moreover, this thesis tries to locate the study of the IPS within a broader literature on public prosecutors and prosecution services in post-authoritarian countries, and to examine the socio-legal dimensions of the public prosecutor's role, in promoting the rule of law or in maintaining the political status quo via the criminal justice system.

Chapter 1 sets the scene for the thesis, by providing an introduction to the topic and elaborating the theoretical framework underlying the research. This includes discussion of the rule of law concept within the criminal justice system, institutional theory within public administration, and the social function theory within criminal procedure. The chapter also discusses the socio-legal research approach used in this thesis: doctrinal research to understand the normative system of the IPS; empirical research to examine what the IPS does in practice.

Chapter 2 deals with the Prosecution Service's legal history and its transformation from the pre-colonial eras up until the present. Essential changes took place during many years of authoritarian regimes, and these still define the performance of current public prosecutors. This chapter explores how the position of the Prosecution Service within the criminal justice system has been used by various regimes to retain their political power and maintain order. A vague constitution, interpreted according to the regime's interests (i.e. maintaining political order), has influenced the public prosecutor's role in the criminal procedure. This was different in the 1950s, which was a period of political effort to foster the rule of law in the criminal justice system. A clear provision in the 1950 constitution, promoting the due process of law, helped prevent political intervention in the criminal procedure. In addition, the prosecutor's status as magistrate and the IPS' institutional setting as part of the judiciary seemed to help their

role in maintaining the rule of law in the criminal procedure. However, the rise of military-political power in 1959 halted this effort. The re-enactment of the 1945 constitution, which had no provisions on either judicial independence or due process, allowed the authoritarian regimes to intervene in criminal procedure at will. This situation did not change following the most recent amendment of the 1945 Constitution in 2002. Although the new constitution guarantees judicial independence and the protection of human rights, it has no provisions on due process like those in the 1950 constitution. Besides, the Prosecution Service Law 2004 still makes the IPS' position dependent on the President's political power. As this thesis finds, the Prosecution Service indeed follows the President's political decisions, when managing its prosecution policies.

Chapter 3 examines the way in which the Indonesian Prosecution Service manages its bureaucracy. There are problems with the Prosecution Service's 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. The Prosecution Service maintains its military interpretation of the *één en ondeelbaar* (one and indivisible) doctrine, in order to impose loyalty on its prosecutors. This militaristic culture affects the bureaucratic structure of the IPS, which emphasises a command hierarchy. Moreover, the IPS uses human resource management, such as promotion and transfer procedures, to control prosecutors' loyalty to their leadership. It is no wonder that in these conditions public prosecutors prefer to serve their leadership's interests, and reinforce the regime's values or interest as well.

The performance of the IPS is also affected by its budget constraint, in the sense that public prosecutors do not have the possibility to perform all the actions required to handle criminal cases properly. For example, most prosecutors tend to remain passive in using their powers to supervise the investigation process, since the IPS pre-trial budget does not cover the cost of prosecutors being actively involved from the beginning of an investigation. On the other hand, although its budget is limited, the Prosecution Service is still capable of exceeding the government target for handling criminal cases. This is because top-level managers in the IPS allow operators to seek additional funds to cover their operational expenditures.

Chapter 4 seeks to understand how the Indonesian Prosecution Service's position as a government instrument influences its role within the criminal justice system, and the IPS' relationship with other criminal justice actors. Since the IPS' tasks and powers have been adjusted to serve the regime's political interests, public prosecutors' functions are no longer in line with their core duties within the prosecution process. The IPS adjusts public prosecutors' functions within IPS law – i.e. as public prosecutors in criminal cases, as state lawyers in civil law disputes and administrative cases, and as state intelligence – so that the functions remain in line with the demands of political actors. This has resulted in confusion amongst public prosecutors, in terms of how to achieve their goals. As this study reveals,

public prosecutors basically rely on the orders of IPS top-level managers in performing their tasks.

The KUHAP (*Kitab-Undang-undang Hukum Acara Pidana*/ Code of Criminal Procedure) introduces the principle of functional differentiation – defining three main powers for criminal justice actors, which are based on the four stages of criminal procedure. The police lead preliminary investigations and the stages of investigation. Public prosecutors only enter at the prosecution stage, when they prepare for and present their case against the defendant in court. 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.

In addition to this principle, the Indonesian criminal justice system has no special regulation similar to RO (*Reglement op De Rechterlijke Organisatie en Het Beleid der Justitie*, Stb, 1847-23 jo 1848-58, or the Law on Judicial Organisation), that bridges each actor's authority. Therefore, similar to Lev's picture 50 years ago (1965), political contestation among criminal justice actors persists. Since the IPS must maintain its relationship with other actors – such as criminal investigation institutions, advocates and legal aid providers, the ministry of law and human rights, and the courts – public prosecutors have developed strategies to influence such actors, in line with their own mission.

Chapter 5 demonstrates how legal norms (both in criminal proceedings and in practice) have developed and changed, based on different regimes' interests. The IPS' military culture, which is inherited from the New Order regime, influences the way in which public prosecutors interpret the KUHAP. One of the results of this culture is that, when interpreting the KUHAP and exercising their discretion, public prosecutors are bound by IPS internal regulations. The IPS indeed has exercised the opportunity principle to drop a criminal case for public interest, but it was used only very occasionally to dismiss a case which has a serious political impact on the government. As this book found, public prosecutors prosecute almost all criminal case files received from the police. As a result, the Indonesian criminal justice system suffers from a heavy caseload and overcrowding in prisons.

Although the KUHAP grants public prosecutors discretion in exercising coercive measures, in prosecuting or dismissing cases, and in demanding high or low sentences at trial, the IPS obligates prosecutors to obtain approval from their superiors first. The IPS seems to treat public prosecutors like soldiers, who have responsibility for winning cases at court. In this regard, loosing may hurt their careers. Therefore, once they are prosecuting a criminal case in court, they must win it, even if this requires them to breach procedural rules.

Chapter 6 concludes with the main findings of the thesis, situating them more explicitly within the theoretical framework in the first chapter; it also provides a number of recommendations. The IPS, in general, suffers from a lack of authority, budget and independence. This research has shown

that making prosecutors behave like the military is at the heart of the IPS' bureaucratic dysfunction; it generates a significant erosion of the quality of criminal justice administration. This has serious implications for public prosecutors' performance within the criminal justice system.

Although Indonesia has become more democratic since the fall of the New Order regime, its criminal justice system cannot be analysed in terms of Packer's due process and crime control model only. This model emphasises 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. Nevertheless, Indonesian criminal justice actors (including public prosecutors) regularly ignore the rules of the game in order to achieve their goals. They apply criminal procedure, as long as it is in line with their interests, but they prefer to ignore rules which do not suit their objectives.

The case of Indonesia constitutes an example of the way in which prosecution services tend to evolve in countries marked by authoritarian tendencies. The Indonesian criminal justice system is designed to strengthen its control over society, and to achieve higher rates of arrest, prosecution, conviction, and incarceration. Overall, this reflection on the post-authoritarian public prosecutor in Indonesia shows that a better criminal justice system cannot be achieved solely through institutional reform of the IPS. The government must invest more in guaranteeing due process within criminal procedure, or even within the constitution. Strengthening the control mechanism of coercive measures at the pre-trial stage, returning the *dominus litis* to public prosecutors, and granting prosecutors the discretion to dismiss a case for public interest reasons, must all be addressed properly in the code of criminal procedure, if the government is serious about promoting the rule of law within its criminal justice system. These changes would result in institutional reform not only for the IPS, but also for other criminal justice actors, such as the police, detention centres and courts.