

**Can the Indonesian criminal justice system be enhanced
by replacing the mandatory prosecution system with a
discretionary one, like that used in Australia?**

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**Submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy**

March 2016

Abstract

Worldwide there are two major systems for prosecuting criminal cases, namely the Mandatory Prosecution System (MPS) and the Discretionary Prosecution System (DPS). Under a MPS, prosecutorial discretion to discontinue criminal matters is limited while in DPS it is considerably broader. In the countries surveyed for comparison (i.e. Australia, France, Germany and the Netherlands) which use a DPS it was found that prosecutorial discretion has become more accepted as a mechanism to rationalize the criminal justice bureaucracy and to achieve justice. Prosecutors need discretion in order to adapt to new situations, maximize their resources and tailor individualized justice. Currently Indonesia uses a very restrictive MPS but the current draft of the Criminal Procedure law does facilitate more prosecutorial discretion.

This research answered the question of whether the Indonesian criminal justice system could be enhanced by replacing the MPS with a DPS, like that used in Australia.

Both doctrinal legal research and comparative legal research (non doctrinal legal research) techniques were used, especially concerning the difficulties associated with legal transplantation from one legal system to another. The research involved interviewing significant players both in Indonesia and in Australia. The unstructured data was analysed using the qualitative software package NVivo.

The findings demonstrated that a move to a DPS in Indonesia is advisable as long as the endemic corruption problems are systematically dealt with by the government fully supporting the *Komisi Pemberantasan Korupsi Indonesia* (Indonesian Anti-Corruption Body) and other external bodies such as the Ombudsman and the *Komisi Kejaksaan Indonesia* (Indonesian Prosecution Commission) and provided the discretion is confined, structured, and reviewed, in order to enhance both transparency and accountability. In addition, it was recommended that the President cease to have executive control over the prosecution service or, if the President is to retain that control, then any exercise of discretion to discontinue a criminal matter must be published and publicly available and that the President must give reason(s) for that decision. To facilitate

the move from a MPS to a DPS it was also recommended that significant players in the criminal justice system – prosecutors, lawyers, politicians and judges and the general public – be informed and educated about the guidelines to be applied when discretion is to be exercised.

Declaration

I, Taufik Rachman, declare that the PhD thesis entitled ‘Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia?’ is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature:

Date:

Acknowledgements

I am indebted to my supervisor, Dr Edwin Tanner for his support throughout completing this thesis. Without his wonderful supervision and constant help this thesis would not possible. I would also like to thank my associate supervisor Professor Neil Andrews for the many discussions we have had and for the literature he has brought to my attention.

I would like to thank to the Dean of the College of Law and Justice Victoria University Australia, Professor Andrew Clarke, the Dean of Law Faculty Airlangga University Indonesia, Professor Eman Ramelan and the Director of Research and Research Training, Professor Anona Armstrong AM.

I am particularly grateful for my sponsor, the Indonesian Directorate General of Higher Education.

I would like to thank to all staff and colleagues at Victoria University Australia and Airlangga University Indonesia.

My gratitude extends to people who assisted me during the process of completing this thesis, Dr Kerry Tanner, Professor M. Zaidun, Professor Nur Basuki Minarno and other people whom I cannot name individually because there are too many of them. I am also thankful to the participants for their time and opportunity to interview them.

Special thanks with love for my parents and my wife Inge Dhamanti also both of my kids, Archiliant and Kayailla.

I dedicated my work for a better Indonesia.

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List of Abbreviations

AAT	Administrative Appeals Tribunal
AAUPB	<i>Asas-Asas Umum Pemerintahan yang Baik</i> (The General Proper Principle for Good Administration)
BLBI	<i>Bantuan Likuiditas Bank Indonesia</i> (Indonesian Bank Liquidity Assistance)
BUMN	<i>Badan Usaha Milik Negara</i> (State-Owned Enterprise)
CLR	Commonwealth Law Report
CPI	Corruption Perception Index
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
DPR RI	<i>Dewan Perwakilan Rakyat Republik Indonesia</i> (Indonesian legislature)
DPS	Discretionary Prosecution System
HIR	Herziene Inlandsch/Indonesisch Reglement
ICW	Indonesia Corruption Watch
IMF	International Monetary Fund
JP	Justice of the Peace
JPU	<i>Jaksa Penuntut Umum</i>
KPK	<i>Komisi Pemberantasan Korupsi</i> (Eradication Corruption Commission)
KPPU	<i>Komisi Pengawas Persaingan Usaha</i> (Supervisory Agency)
KRIS	<i>Konstitusi Republik Indonesia Serikat</i> (Republic of the Indonesian Federation)
KUHAP	<i>Kitab Undang-Undang Hukum Acara Pidana</i> (Criminal Procedure Law)
MOU	Memorandum of Understanding
MPS	Mandatory Prosecution System
NSWSC	New South Wales Supreme Court
PKS	<i>Partai Keadilan Sejahtera</i> (Prosperous Justice Party)
PNS	<i>Pegawai Negeri Sipil</i> (government employee)

POLRI	<i>Kepolisian Republik Indonesia</i> (Indonesian National Police)
RUU	<i>Rancangan Undang-Undang</i> (the draft)
SP3	<i>Surat Pemberitahuan Penghentian Penyidikan</i> (announcement letter of discontinuance of investigation)
UK	United Kingdom
UNCAC	United Nations Convention Against Corruption
UU	Undang-Undang (Act)
UUDS	<i>Undang-Undang Dasar Sementara Republik Indonesia</i> (Indonesian Temporary Constitution)

Chapter 1

Introduction

1.1 Introduction

This thesis aims to answer the question which became the title of the thesis: Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia? In this thesis it is argued that such a move could be made in Indonesia provided it moves to eliminate corruption and provided the discretion is limited, confined, structured, and reviewed, so as to enhance both transparency and accountability.

Based on the literature review and the contextual overview, this thesis framed several research sub questions. They are:

1. To what extent does Indonesian law confer discretion on prosecutors to discontinue criminal matters, and what factors, if any, are taken into account when exercising that discretion?
2. To what extent does Victorian Australia law confer a discretion on prosecutors to discontinue criminal matters, and what factors, if any, are taken into account when exercising that discretion?
3. What features of discretionary prosecutorial models are suitable for adaption to the Indonesian mandatory prosecutorial model?
4. What procedures, including legislative changes, would need to be implemented in Indonesia to ensure that a discretionary prosecutorial model enhances both the independence and accountability of prosecutors and mitigates against arbitrary decision making?
5. What factors, including social, cultural, political, economic, or legal, may act as an impediment to any changes to prosecutorial discretion in Indonesia and how could those impediments be dealt with.

As the literature review in Chapters 3 and 4 indicates, discretion is an inevitable part of decision making, including prosecutions. Its existence is compatible with both the common law concept of the “rule of law” and the civil law concept of the “*rechtsstaat*”. In most contemporary legal systems whether civil or common law the extravagant version of the rule of law or the principle of strict adherence to legality in the *rechtsstaat* generally gives way to the perceived need for discretion (see 3.3.2 The Extravagant versions of the Rule of Law and the *Rechtsstaat*). This was in part driven by the development of the regulatory state, which has created and enlarged discretions to better enable bureaucrats and technocrats to coordinate more complex and integrated social, economic and political systems.

In the prosecution decision-making context, discretion also becomes commonly used especially in the decision to discontinue criminal matters. Both the civil law and common law based countries surveyed use discretion in their prosecutorial decision making. In this regard, prosecutorial discretion becomes a force of convergence driven by the similarities of the regulatory state across cultures. Civil law countries such as Germany that invented the ‘Mandatory Prosecution System’¹ (hereafter called as MPS) where discretion is strictly limited, now utilize more discretion to discontinue criminal matters. Prosecutorial discretion is also commonly used in other civil law based countries such as the Netherlands and France because it is impractical to totally eliminate discretion which is needed to adapt to factual situations and circumstances, and achieves individualized justice, as explained in Chapter 4. Prosecutorial discretion becomes the rational choice of efficient bureaucracies where prosecutors are expected to work professionally while exercising discretion. Arguably the reason for the move into more discretionary prosecution systems in most European countries such as Germany and France is part of general bureaucratic reform that was based on the

¹ Ronald F Wright and Marc L Miller, ‘The Worldwide Accountability Deficit for Prosecutors’ (2010) 67 *Washington and Lee Law Review* 1587, 1595. The mandatory prosecution system (MPS) is described as follows:

By tradition, a prosecutor does not exercise legitimate discretion over the criminal charge. If the evidence supports a criminal charge, the prosecutor in theory is obliged to file those charges and does not ask if the prosecution is a wise use of limited resources or if it serves appropriate social objective.

Neo-Weberian State and occurred in order to modernize traditional bureaucracies.²

In Indonesia there is a proposal to change the Mandatory Prosecution System into a more discretionary based system. A draft of the Indonesian Criminal Procedure Law (hereafter ‘the new draft’), will give Indonesian prosecutors discretionary power to discontinue criminal matters with or without conditions. A critical question is whether it is wise to give Indonesian prosecutors more discretion given the endemic corruption which still prevails there? The next section demonstrates the importance of the research by looking at the context in which the research questions have been generated.

1.2 Contextual background

Changing current practice is hard because the new system might be rejected and any proposal of reform needs to address the current social, cultural, political, economic and legal situation. So an important question is whether prosecutorial discretion is compatible with the Indonesian context? Several things need to be considered before adopting prosecutorial discretion in Indonesia and these are discussed below.

1.2.1 Indonesian social and cultural situation

Indonesia is an archipelago defined by islands and the seas that separate them.³ There are more than 17,000 islands but the big five are Java, Sumatra, Sulawesi, Kalimantan and Irian Jaya. Indonesia is situated in South East Asia and has a total area of more than 1.9 million square kilometers. Most of the islands which make up the archipelago are mountainous and some of the terrain remains jungle. Some people still live in outlying areas which makes applying government policy or

² The Neo-Weberian state model was used to modernize traditional bureaucracy by making it more professional, efficient and citizen friendly in France and Germany. See Christopher Pollitt and Geert Bouchaert, *Public Management Reform A Comparative Analysis New Public Management, Governance and the Neo-Weberian State* (Oxford, 3rd ed, 2011) 19.

³ Michael Vatikiotis, *Indonesia Islands of the Imagination* (Tuttle Publishing, 2012) 7.

simply giving them proper information a difficult task. Additionally, the illiteracy level can pose problems.



Figure 1.1 Map of Indonesia⁴

In terms of the level of education of Indonesians, Country Watch in 2015 reported the following:

In terms of literacy, at the start of the decade, 84.1 percent of the female population and 92.9 percent of the male population aged 15 and over could read and write. In recent years, the literacy rate has increased to 90.4 percent for the total population, 86.8 percent among women and 94 percent among men.⁵

As a developing country this situation shows positive development but is not sufficient for Indonesia to be globally competitive. The Indonesian government has identified high levels of disparity of education in society between poor and rich people, between those in the city and countryside, between provincial and urban jurisdictions, and there is also a gender disparity.⁶ Hence it may be hard to explain to Indonesian citizens how the Indonesian mandatory prosecution model could and should be changed into a more discretionary model; it not going to be without its difficulties. There are some complex factors which will need to be considered and explained and factors which should not be considered, and certain procedures will need to be followed in implementing prosecutorial discretion. As

⁴ The Indonesian map is taken from <<http://www.mapsofworld.com/indonesia/>>.

⁵ Country Watch, *Indonesia 2015 Country Review* (2015), 144 <<http://www.countrywatch.com>>.

⁶ See General Condition, supplementary document of *Undang-Undang Nomor 17 tahun 2007 tentang Rencana Pembangunan Jangka Panjang Nasional* (Law No.17 of 2007 on National Long-term Development Plan) (Indonesia) ('2007 Law National Long-term Development Plan').

a result, giving information and furthering understanding during this process will be challenging.

The *Badan Pusat Statistik* (Central Bureau of Statistics) Indonesia reported in 2014 that the number of Indonesian people who live under the poverty line reached 27.73 million or 10.96 percent of the total population,⁷ or more than four times that of the 5.6 million people who live in the state of Victoria, Australia.⁸ These poor people are marginalized in terms of access to justice. The *sandal jepit* case, cocoa picker case, and other similar cases involving impoverished defendants demonstrate how disadvantaged the poor are in the criminal justice system in Indonesia.⁹ Because of the MPS in Indonesia, prosecutors could not discontinue these prosecutions even though justice and common sense suggested that they should do so. As explained in Chapter 4, one of the advantages of using prosecutorial discretion is that it can enhance individual justice which is important not only for Indonesia's poor and the marginalized, but also for those of different ethnicities and cultural backgrounds.¹⁰ For example, *adu ayam jago* (cock fighting) in Bali is considered as part of its tradition where people gamble in a venue during certain religious events.¹¹ Indonesian criminal law prohibits gambling. If Indonesian law enforcers do not investigate and prosecute in this context, they will be considered to disobey the law. However, if they strictly enforce the law through the MPS they will face anger from the Balinese people. Similarly, people in Papua still exercise the *bakar batu* (rock burning) ritual for conflict resolution between tribes.¹² Brawls between

⁷ See *Badan Pusat Statistik Indonesia* (Central Bureau of Statistics) on *Berita Resmi Statistik* (Official News on Statistic) downloaded in <<http://www.bps.go.id/Brs/view/id/1099>>.

⁸ See <<http://www.liveinvictoria.vic.gov.au/living-in-victoria/melbourne-and-regional-victoria#VcALaQD4FSU>>.

⁹ Information about the cases mentioned can be seen in 1.4.2 the prosecution process.

¹⁰ Hasil Sensus Penduduk Kewarganegaraan, Suku Bangsa, Agama, dan Bahasa Sehari-Hari Penduduk Indonesia (Population Census Report on Citizenship, Ethnicity, Religion, and Daily Language of the Indonesian People) (2010, Badan Pusat Statistik), 9.

¹¹ The study of cock fight has contributed to western sociology, including a socio-legal methodology known as 'thick description'. Clifford's study in 1958 said that it was illegal. Clifford Geertz, *Deep Play: Notes on the Balinese Cockfight* reprinted from the Interpretation of Cultures <<http://itu.dk/~miguel/ddp/Deep%20play%20Notes%20on%20the%20Balinese%20cockfight.pdf>>.

¹² Proditia Sabarini, 'Bakar batu': A Gestaltist Dance, *The Jakarta Post*, 23 March 2013 <<http://www.thejakartapost.com/news/2013/03/23/bakar-batu-a-gestaltist-dance.html>>.

tribes in Papua sometimes occur leading to injury and even death. However the *bakar batu* ritual usually resolves this conflict. In this context if the law enforcer strictly investigates and prosecutes each of the individuals involved, it may well lead to further revenge and bigger conflicts.¹³ It should be noted that cultural conflict resolution mechanisms exist in Indonesia including in Java, Lombok, Bali Kalimantan, Sumatra, and Papua. This local wisdom or *Adat* (local traditional law) blends culture with certain aspects of religion such as Islam.¹⁴ For those who fall within this description, a move to a discretionary prosecution system (DPS) may enable the legal system to tailor justice and move away from a formalistic response to those perceived to have committed crimes.

1.2.2 Indonesian political situation

Based on the ‘political stability index’¹⁵ Indonesia scored above average in 2014. Indonesia scored 7 out of 10 where the higher score represents the most stable political condition. This score was 2.5 under the Australian score of 9.5 out of 10. According to the *Kompas* study in 2015 the Indonesian political situation is said to be stable and represents significant public satisfaction with government performance and the political system.¹⁶ For any reform to the Indonesian political situation to be realized, having a stable context is most important. Reform must occur in a democratic way based on approved procedures and the pursuit of justice.

¹³ Ahmad Ubbe, *Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI* (National Law Development Agency the Ministry of Justice and Human Right), *Laporan Pengkajian Hukum tentang Mekanisme Penanganan Konflik Sosial* (Research Report on Legal Mechanism Handling Social Conflict), (2011), *Pusat Penelitian dan Pengembangan Sistem Hukum Nasional* (Central Study and Development of National Legal System), 53, 95 <<http://www.bphn.go.id/data/documents/pkj-2011-10.pdf>>

¹⁴ Ibid 52.

¹⁵ Political stability index is a proprietary index measuring a country's level of stability, standard of good governance, record of constitutional order, respect for human rights, and overall strength of democracy. See Country Watch, above n 5.

¹⁶ *Politik Semakin Stabil* (Political Situation more Stable), *Kompas* 28 July 2015.

It is internationally acknowledged that politicians should not interfere in prosecution decision making,¹⁷ and exert improper political influence. The Venice Commission mentioned two types of improper influence: firstly, bringing prosecutions which ought not to be brought and secondly, the failure of the prosecutor to bring prosecutions which ought to be brought.¹⁸ Both types of political interference occur in Indonesia.

During the authoritarian regimes of both President Soekarno and President Soeharto, political prosecutions based on ideology commonly occurred. During the Soekarno era, *kontra revolusi* (contra revolution) was used as a label for prosecuting political opponents who could be detained without trial.¹⁹ In the Soeharto era, the label used for such prosecutions was *subversi* (subversion) or *Partai Komunis Indonesia* (Communist party of Indonesia). This practice was used as a political tool to eliminate political opponents who criticized the government. Since the Indonesian prosecution system has not changed and the President today is the ultimate controller of the prosecution system, arguably this kind of practice still occurs but is now hidden.²⁰ Instead of using political ideology to oppress political opponents, allegations of corruption have been used to deal with opponents.²¹ For this reason, having a fully independent anti-corruption body (e.g. the Eradication Corruption Commission known as the KPK) in Indonesia is critically important.

¹⁷ See paragraph 2. Independence. The International Association of Prosecutors, Standard of Professional Responsibility and Statement of the Essential Duties and Rights of prosecutors (1999).

¹⁸ James Hamilton, Prosecutorial Independence and Accountability, European Commission For Democracy Through Law, Seminar on The Independence of Judges and Prosecutors: Perspectives and Challenges (Trieste Italy 28 February – 3 March 2011), Venice Commission 6. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT\(2011\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2011)008-e)>.

¹⁹ A famous case of this was the *Buya Hamka* case in 1964. Alleged counter revolution during Soekarno era was made to investigate him. He had different political views to Soekarno on *Pancasila* (Indonesian ideology). See *Mengenang 100 Tahun Hamka* (In memory 100 years of Hamka). <muslimminang.files.wordpress.com/2013/08/biografi-full-hamka.pdf>. See also Yusril Ihza Mahendra, *Isyu Buruk di tiap Zaman* (Bad Issues in Each Period) (2010). <<http://yusril.ihzamahendra.com/2010/10/03/isyu-buruk-di-tiap-zaman/>>.

²⁰ Several cases involving well known anti-corruption activists have been investigated and some of them are ready to be charged in the criminal court. One of them is a criminal allegation against Professor Denny Indrayana. See Simon Butt and Tim Lindsey, 'Jokowi losing fight to stamp out corruption', *The Age* (6 April 2015) 15.

²¹ See Simon Butt and Tim Lindsey, 'Jokowi losing fight to stamp out corruption', *The Age* (6 April 2015) 15.

The second related form of abuse is the failure to bring prosecutions which should have been brought. Two former KPK leaders during the Susilo Bambang Yudhoyono Presidency were charged with corruption (i.e. abuse of power) but the matter was set aside by the *Jaksa Agung* (the Indonesian Attorney-General).²² Because the two KPK leaders held positions of authority and trust, their prosecutions should not have been discontinued. Other forms of corruption are equally dangerous. Prosecutions ought not to be discontinued when it is in the public interest to continue with them. It is in public interest to bring prosecutions on serious matters such as corruption, human rights abuse and other serious criminal offences. The common principle is that the more serious the offence, the more likely it is that a prosecution will be in the public interest. This kind of principle is acknowledged internationally. For example, the Report of the International Bar Association Human Right Institute stated:²³

Under international standards, prosecutors should ensure that abuse committed by state officials is properly investigated. More specifically, prosecutors should 'give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

This type of political influence in the Indonesian prosecution system leads inextricably to the question of whether the Indonesian prosecutor is independent. Indeed, prosecutorial independence can only be achieved by preventing improper political influence. Hamilton concluded that:

... (the) independence of the prosecutor does not exist as a value in itself but rather as a means of preventing improper political or other interference in the work of the prosecutor and ensuring that prosecutorial decisions, so far as possible, are made fairly and impartially, just as a judge is expected to act fairly and impartially without being subject to outside pressures.²⁴

²² See both *Jaksa Agung* decisions to set aside *Bibit Samad Riyanto and Candra Martha Hamzah* cases. The Decision to set aside a criminal matter by the Indonesian *Jaksa Agung* number: Tap – 002/A/JA/01/2011 (*Surat Ketetapan Mengesampingkan Perkara Demi Kepentingan Umum*). The document can be obtained from the researcher if needed.

²³ Report of the International Bar Association Human Right Institute, *Separating Law and Politics: Challenges to the Independence of Judges and prosecutor in Egypt* (February 2014) <www.ibanet.org/Document/Default.aspx?DocumentUid=15887C66-917B-4456-9C02-56300CD66590>.

²⁴ James Hamilton, above n 18.

Thus, it is of paramount importance for the Indonesian prosecution system to be free from improper political influence. The current system continues the past authoritarian practice where the Indonesian President influences the prosecution decision-making process and outcomes. The strong allegation that the Indonesian President often gives directions to the Indonesian Attorney-General whether to prosecute or not in several cases was made by the former Indonesian President Secretary Yusril Ihza Mahendra. He mentions that:²⁵

as far as I know and experienced during my service as Presidential Secretary Ministry in *Kabinet Indonesia Bersatu I* (First Indonesian United Cabinet – Soesilo Bambang Yudhoyono Cabinet), Hendarman Supandji (*Jaksa Agung* at that time) met the President and on several occasions wrote letters asking for instruction to decide whether to prosecute or not to prosecute person for a corruption matter.

Arguably, looking for advice, guidance or instruction from the Indonesian President still continues in the Jokowi Presidency. The *Jaksa Agung* (the Indonesian Attorney-General) still believes that he is ‘the servant’ of the Indonesian President as the current *Jaksa Agung* has commented on the corruption case involving the former deputy of the Corruption Eradication Commission, Bambang Wijayanto as follows:

Presiden, saya pikir, tidak akan serta-merta memberikan perintah yang akan mencampuri masalah itu. Tetapi, ketika nanti beliau memberikan imbauan kepada kami sebagai pembantunya, kami akan mempertimbangkan hal itu (The President, I think, will not give instruction which influenced that matter. But, when the President gives a suggestion to us as his servant, we will consider it.)²⁶

It seems that the Indonesian President is above the law as the Indonesian *Jaksa Agung* will never prosecute their master. This arguably contradicts the rule of law that all persons are equal before the law. However as explained in Chapter 4, this kind of subordination of the prosecution service under the executive is a matter of tradition within the civil law system.

Since the Indonesian President is permitted to give directions to the prosecution service, it is important to make those directions transparent and accountable. Several suggestions are made in this thesis. Firstly, the direction

²⁵ See the Indonesian Constitutional Court Decision Number 49/PUU-VIII/2010.

²⁶ *Ada Kemungkinan Kasus Dihentikan* (It is possible that the case is stopped), *Kompas*, 5 October 2015.

must be made in writing. Secondly, a special body similar to the Dutch Board of Prosecutors or the Director's Committee in Victoria Australia should be appointed in Indonesia. The implementation of such a body in the Indonesian prosecutorial context could help reduce the extent of political influence, and the body could review prosecution decision-making policy concerning the exercise of discretion to continue or discontinue criminal matters.

1.2.3 Economic situation

As with many other Asian countries, the global economic crisis between 1997 and 1998 impacted on Indonesia. In 1998 the Indonesian situation became so bad that people took to the streets to complain, resulting in political uncertainty and instability. Largely as a result, but also because of the sharp depreciation of the rupiah, President Soeharto stepped down.²⁷ Between 1997 and 1998, the rupiah jumped from Rp. 2400 per US\$ to Rp. 14.900 per US\$ dollar.²⁸ This situation created serious problems such as inflation and high unemployment. Islam and Chowdhury described the situation as follows:

Indonesia's economy suffered the most from the Asian financial crisis and its fallout. From an average annual growth of nearly 7 per cent, real GDP declined dramatically in 1998 by close to 14 per cent. As a result, living standards fell dramatically, with real per capita GDP declining by about one-sixth in 1998 alone. Unemployment and inflation both rose sharply to become among the most serious problems facing the population, particularly in urban areas.²⁹

A decade later the Indonesian economic situation had considerably improved to such an extent that Country Review reported that:

Despite the global economic crisis, real GDP still recorded strong growth in 2009, slowing only moderately from 2007 and 2008. It climbed even higher in 2010. Inflation rose sharply in 2008 owing to large increases in world food and fuel prices, but declined in 2009 with falling world commodity prices. However, by 2010, it had surged again.³⁰

²⁷ Country Watch, above n 5.

²⁸ Iyanatul Islam and Anis Chowdhury, *Growth, Employment and Poverty Reduction in Indonesia* (2009, ILO), 140.

²⁹ Ibid 139.

³⁰ Country Watch, above n 5.

Elias and Noone in 2011 noted that the Indonesian economy had recorded strong growth.³¹

Despite the fact that the Indonesian economic situation is now better than after the economic crisis in 1998, the Indonesian government still pays low wages to its civil servants and this might be one cause of the Indonesian corruption problem. For example the *Kepala Kejaksaan Negeri* (the Head of District Prosecution Service) take home paid not more than 18 million rupiahs per month including functional allowance (equal to approximately 1800 Australian dollars).³² The current *Jaksa Agung* acknowledged that salaries for prosecutors are small compared to salaries of *Komisi Pemberantasan Korupsi* (Eradication Corruption Commission) members and he requested that law enforcers receive sustainable wages.³³ Emerson Yuntho from Indonesian Corruption Watch stressed that the low salaries can trigger corrupt practices and also extortion by *Jaksa* (Indonesian prosecutors).³⁴

1.2.4 Indonesian law

In terms of population Indonesia is the largest civil law country in the world.³⁵ The civil law tradition had its genesis during the Dutch colonial period which lasted for 350 years and can still be seen today. For example, the *Kitab Undang-Undang Hukum Pidana* (the general criminal law codification) and the *Kitab*

³¹ Stephen Elias and Clare Noone, 'The Growth and Development of the Indonesian Economy' (2011), *Reserve Bank of Australia Bulletin* 33, 33.

³² *Peraturan Pemerintah Republik Indonesia Nomor 30 Tahun 2015 tentang Perubahan Ketujuh Belas atas Peraturan Pemerintah Nomor 7 Tahun 1977 tentang Peraturan Gaji Pegawai Negeri Sipil* (Government Regulation Number 30/2015 on Seventeenth Amendment on Government Regulation Number 7/1977 on Civil Servant Salary). See also *Peraturan Presiden Republik Indonesia Nomor 117 Tahun 2014 tentang Tunjangan Jabatan Fungsional Jaksa* (President Regulation Number 117/2014 on Prosecutor Functional Allowance).

³³ Taufiqurrohman, *Jaksa Agung Prasetyo Curhat Gaji Kecil* ('The Attorney General Complaining about Low Salary'), *Liputan 6*, 22 January 2015 <<http://news.liputan6.com/read/2164785/jaksa-agung-prasetyo-curhat-gaji-kecil>>.

³⁴ Rodho Jun Prasetyo, *SBY dan Jokowi Diminta Naikkan Gaji Jaksa* (SBY and Jokowi asked to increase Prosecutor Salary) (2014, *Tempo Nasional*). <<http://nasional.tempo.co/read/news/2014/09/14/063606911/sby-dan-jokowi-diminta-naikkan-gaji-jaksa>>.

³⁵ It should be noted that China is considered as having a socialist legal system. See Kelik Wardiono, *Sistem Hukum China Sebuah Tatanan yang Terkonstruksi dalam Lintasan Li dan Fa* (Chinese Legal System as Order that Constructed the track of Li and Fa) (2012), *Jurnal Ilmu Hukum* vol 15, 71, 71 <http://www.undana.ac.id/jsmallfib_top/JURNAL/HUKUM/HUKUM%202012/SISTEM%20HUKUM%20CINA.pdf>.

Undang-Undang Hukum Perdata (the general codification of private law) are still of Dutch inheritance with modifications arising through translation, amendment and repeal of sections.³⁶ Since Independence the law has become much more complex. In addition, some areas of Indonesian law have been influenced by other traditions including common law and Islamic law. For example, the recent draft of the Indonesian Criminal Procedure law clearly states that the Indonesian Criminal Justice System adheres to a combination of the Continental European System with additions from the Adversarial System (Civil-Common Law).³⁷ The province of Aceh, for example, has been given special autonomy to implement Islamic law (*shari'ah*) as long as it does not contradict the national law,³⁸ as noted by Sumner and Lindsey:

The exception is, as mentioned, the province of Aceh, where legal standing has been granted to both a *Mahkamah Syariat*, or shari'ah court, and *Qanun* (laws for Muslims in Aceh, drawing in part on shari'ah norms) in the form of *Peraturan daerah* (*Perda*— regional regulations issued by the local government).³⁹

The source of the written law in Indonesia is hierarchically structured and is guided by rules or principles.⁴⁰ This structure means that laws lower in the hierarchy cannot contradict laws higher in the hierarchy or, to put it another way, superior norms suppress inferior norms (*lex superior derogat legi inferiori*); specific laws in the same hierarchy suppress the general law (*lex specialis derogat legi generali*). It is implied that the same specific law in the same hierarchy follows that of the later norms which suppress earlier norms (*lex posterior derogat legi priori*). The hierarchy of written laws from the highest to the lowest in Indonesia is as follow:⁴¹

³⁶ Further explanation of this can be seen in chapter 3 (3.2.4 The Netherlands).

³⁷ Section 4 of the supplementary document of the New Draft of the Indonesian Criminal Procedure Law (Copy of the document is available from the researcher if needed).

³⁸ See R. Michael Feener, *Shari'a and Social Engineering, the Implementation of Islamic Law in Contemporary Aceh, Indonesia* (Oxford University Press, 2013).

³⁹ Cate Sumner and Tim Lindsey, 'Courting Reform, Indonesia's Islamic Court and Justice for the Poor' (2010), *Lowy Institute for International Policy*, 6 <http://www.lowyinstitute.org/files/pubfiles/Sumner_and_Lindsey,_Courting_reform.pdf>.

⁴⁰ For further explanation of these principles see Peter M Marzuki, *An Introduction to Indonesian Law* (Setara Press, 2011) 50.

⁴¹ See section 7 *Undang-Undang Nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* (Law No.12 of 2011 on Law Making) (Indonesia) ('2011 Law Making').

1. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (the Indonesian Constitution)
2. *Ketetapan Majelis Permusyawaratan Rakyat* (the Enactment of the People's Consultative Assembly)
3. *Undang-Undang/ Peraturan Pemerintah Pengganti Undang-Undang* (Acts/Government Regulation in lieu of Act)
4. *Peraturan Pemerintah* (Government Regulation)
5. *Peraturan Presiden* (Presidential Regulation)
6. *Peraturan Provinsi* (Province Regulation)
7. *Peraturan Daerah Kabupaten/Kota* (Regional Regulation)

The unwritten law comes from local or traditional laws and customary practice know as *hukum adat* (*adat* law). This law has become nationally accepted and has been acknowledged in the national written law and has become part of the jurisprudence (i.e. the *yurisprudensi* is law based on decisions);⁴² for example, land rights of the *adat* people are acknowledged in the Indonesian land law. In the Indonesian Heritage Law (*Hukum Waris Indonesia*) there is much *yurisprudensi* which acknowledges the right of *adat* people in Indonesia.⁴³ However, as far as criminal law and procedure are concerned *yurisprudensi* based on *adat* law rarely occurs because of the strict application of the legality principle. The principle of legality requires all law to be clear, ascertainable and non-retrospective. All prohibited conduct must be written in clear national provisions (*Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang* (Acts/Government Regulation in lieu of Act)).⁴⁴

Tim Lindsey has stated that the Indonesian legal system is derived from the French and German models where its procedures are entirely different to those in Australia.⁴⁵ This assertion is especially true concerning the prosecution system. Indonesia uses a Mandatory Prosecution System (MPS) whereas Australia uses a

⁴² *Yurisprudensi* is considered as a written law within the Indonesian system. It is also known as law based on decision. See E. Utrecht, *Pengantar Dalam Hukum Indonesia* (Introduction on Indonesian Law) (1957, Ichtiar), 160. *Yurisprudensi* is not the same as the doctrine of *stare decisis* as the Indonesian judge is not bound to case law. See Peter M Marzuki, above n 39, 64.

⁴³ The *adat* communities are the communities of people (primarily indigenous and on outlying islands) who follow the customary law. See, Peter M Marzuki, *ibid*, 53.

⁴⁴ As previously stated, the only exception is on Aceh. An example of this is *Qanun Aceh Nomor 6 Tahun 2014 tentang Hukum Jinayat* (Aceh Qanun Number 6 year 2014 on *Jinayat* Law).

⁴⁵ Associate Professor Tim Lindsey Director, Asian Law Centre the University of Melbourne, *Indonesian Trial Process and Legal System Background Notes* <http://law.unimelb.edu.au/__data/assets/pdf_file/0010/1546309/Indonesians_Trial_Process_and_Legal_System_Background_Notes1.pdf>.

Discretionary Prosecution System (DPS). The MPS is derived from Savigny's legal thought and is of German origin, and the general system of law in Indonesia and other civil law countries is also mainly influenced by French jurisprudence, as discussed in Chapters 3 and 4. Furthermore, Lindsey explained that the Indonesian legal system does not use juries where a panel of three judges decides the guilt or innocence of the defendant. This is a key distinction with the common law Australian legal system which is adversarial in nature compared with the inquisitorial legal system. The judge under the adversarial model 'acts as an umpire, listening to the evidence produced by the parties, ensuring that the proceedings are conducted with procedural fairness and propriety.'⁴⁶ In common law systems it is the jury which decides guilt or innocence and not the judge.

According to section 18 2009 Judiciary Law⁴⁷

*Kekuasaan kehakiman dilakukan oleh sebuah Mahkamah Agung dan badan peradilan yang berada di bawahnya dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan militer, lingkungan peradilan tata usaha negara, dan oleh sebuah Mahkamah Konstitusi (the judiciary is exercised by a Supreme Court with judiciary bodies underneath in the general court, the religious court, the military court, the administrative court, and a Constitutional Court).*⁴⁸

It follows that the Indonesian judiciary consists of two important institutions, the *Mahkamah Agung* (the Supreme Court) and the *Mahkamah Konstitusi* (the Constitutional Court). There is only one constitutional court in Indonesia located in the capital, Jakarta. This means each applicant for constitutional review must register the case with the *Mahkamah Konstitusi* office in Jakarta. The *Mahkamah Agung* (Supreme Court) is also located in Jakarta but the *Pengadilan Tinggi* (Court of Appeal) is located in all of the provinces and the *Pengadilan Negeri* (Court of first instance) is present in all district courts in each province. Each

⁴⁶ Andrew Sanders and Richard Young, *Criminal Justice* (Butterworths,1994), 7.

⁴⁷ *Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman* (Law No 48 of 2009 on Judiciary) (Indonesia) ('2009 Judiciary Law').

⁴⁸ It should be noted that the *Komisi Yudisial* (Judicial Commission) exists in the Indonesian system. This commission was created to establish an independent judicial system by proposing *calon Hakim Agung* (candidate of Supreme Court Judges) and maintaining judges' honor, dignity and behaviour for the sake of law and justice. See consideration of part of the *Undang-Undang Nomor 18 Tahun 2011 tentang Perubahan Atas Undang-Undang Nomor 22 Tahun 2004 tentang Komisi Yudisial* (Law No 22 of 2011 on Judicial Commission) (Indonesia) ('2011 Judicial Commission Law').

district has four types of court; that is, the general court, the religious court, the military court and the administrative court. An appeals court is almost always available within the provinces. Below is the diagram of courts within the Indonesian system (Figure 1.2).

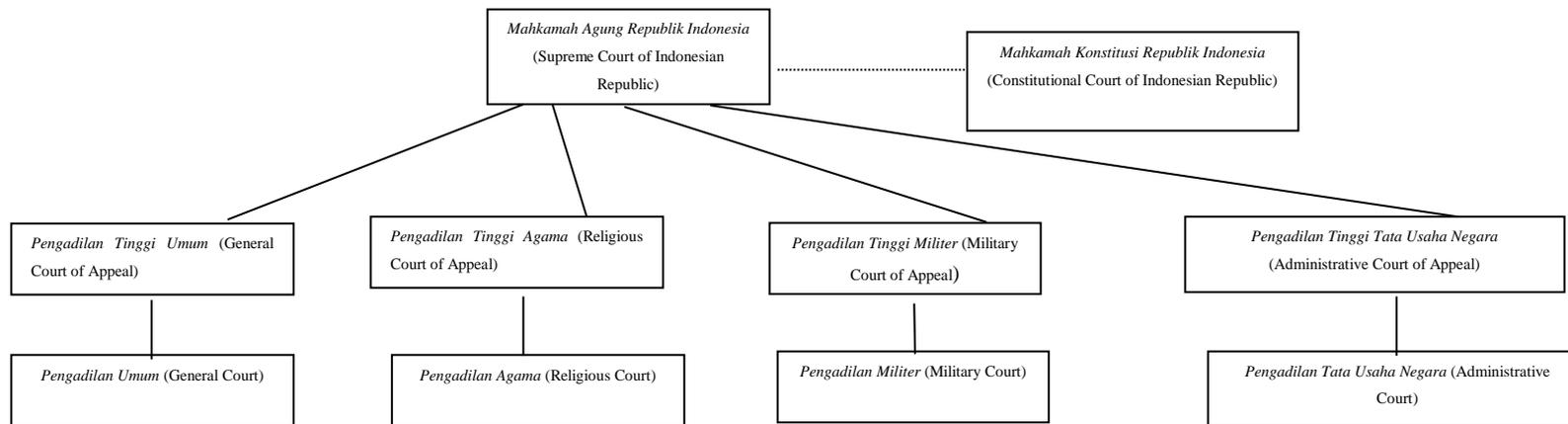


Figure 1.2 Indonesian courts system

What Indonesian law reformers should consider, especially in prosecution decision making, is that most developed civil law countries including France, Germany and the Netherlands use discretion. Discretion in those countries is confined, structured and reviewed in order to avoid corrupt practices. The current proposal of the New Draft of the Indonesian Criminal Procedure law provides that the prosecution system is to be based on discretion which is consistent with current developments in most civil law countries. However, corruption within the Indonesian system is still rampant and needs to be addressed.

1.3 Corruption in Indonesia

Corruption is a real problem in Indonesia.⁴⁹ As indicated in Chapter 3, Peerenboom explained that the thin conception of the rule of law in Asian countries is still a common problem because they are still in the process of establishing functional legal systems and are plagued by weak legal institutions, incompetent and corrupt administrative officials and judges, excessive delays, and limitations on access to justice including high court costs and the lack of legal aid.⁵⁰ This is also true in the Indonesian situation where corruption further weakens democracy because the core principle of democracy, the rule of law, is undermined. As Asfar et al. argue: ‘corruption undermines respect for all law, good and bad; it ... weakens the state and undermines the prospects for economic development.’⁵¹

⁴⁹ See Michael Bachelard, ‘Presidential hopefuls face Indonesia’s corruption commission’, *The Age* 24 June 2014 <<http://www.smh.com.au/world/presidential-hopefuls-face-indonesias-corruption-commission-20140624-zsk7k.html>>.

⁵⁰ See Randall Peerenboom, ‘Varieties of Rule of Law an Introduction and Provisional Conclusion’ in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (RoutledgeCurzon, 2004) 7. A thin conception stresses the formal or instrumental aspects of the rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non democratic society, capitalist, liberal or theocratic.

⁵¹ Omar Asfar, ‘Young Lee and Anand Swamy: The Causes and Consequences of Corruption’ (2001), *Annals of the American Academy of Political and Social Science* 42, 46.

Graycar and Sidebottom concur, explaining that:

Corruption undermines good governance and the rule of law; it negatively impacts service quality and efficiency, and poses threats to principles of democracy, justice and the economy.⁵²

Davis and Ruhe noted that:

The World Bank now identifies corruption as the single greatest obstacle to economic and social development because it distorts the rule of law and weakens the institutional foundation on which economic growth depends.⁵³

Corruption also impacts on confidence in Indonesian institutions and state legitimacy, as McAllister citing Gilley and Uslander explains:

Belief about corruption therefore forms an important component of citizens' overall judgments about how far government works to serve their interests, as other research has shown.⁵⁴

1.3.1 Perception of Indonesian corruption

Transparency International has produced a world wide corruption perception index (CPI) on which Indonesia in 2014 scored a CPI of 34, a slight increase of two points from 2013.⁵⁵ The ranking also climbed seven points to 107.⁵⁶ The Indonesian CPI was seen as good news (even though it is still high) presumably because Indonesia is on track to become a democratic nation enforcing the rule of law. A CPI score of 34 indicates that the perceived levels of public sector corruption in Indonesia are below average.⁵⁷ As a comparison, Australia scored 80 where 100 represents a score for the cleanest public sector.

Indonesian reform is considered to be in transition (to be in an *era reformasi* – a reform era) because this era marks a change from an authoritarian to a democratic regime. Svensson explained the characteristics of countries with high levels of

⁵² Adam Graycar and Aiden Sidebottom, 'Corruption and Control: A Corruption Reduction Approach' (2012), *Journal of Financial Crime* 384,384.

⁵³ James H Davis and John A. Ruhe, 'Perception of Country Corruption: Antecedents and Outcomes' (2003), *Journal of Business Ethic* 275, 276.

⁵⁴ Ian McAllister, 'Corruption and Confidence in Australian Political Institutions' (2014) *Australian Journal of Political Science* 174, 183.

⁵⁵ See Transparency International Indonesia, *Corruption Perception Index 2014* <<http://www.ti.or.id/index.php/publication/2014/12/06/corruption-perceptions-index-2014>>. access on 20 April 2015.

⁵⁶ Ibid.

⁵⁷ See Transparency International, *Report on Corruption Perception Index 2014*.

corruption by saying that ‘all of the countries with the highest levels of corruption are developing or transition countries.’⁵⁸ This might explain why corruption remains a problem in Indonesia.

A perception of corruption is considered to be more important than corruption experienced in Australia, as explained by McAllister:

Why do perceptions matter more than experiences of corruption? One possible explanation is the relatively few instances of bribery among public officials that citizens report.⁵⁹

Arguably, this is also true in the Indonesian situation where actual reports of corruption are lower than unreported corruption. Perceptions of corruption are generally based on empirical research using data of reported corruption cases whereas most corruption is not reported and therefore fails to be included in the data. For example, The Indonesia Corruption Watch (ICW) reported that ‘law enforcer’ corruption cases in the first semester of 2014 (the first six months) were a third lower (1.3 percent i.e. four cases) from 308 cases and the ranking of corruption decreased to 1.2 percent (i.e. four cases) from 321 cases.⁶⁰ So, from the first semester to second semester of 2014 there was a slight increase in the number of cases by 13, but the percentage for ‘law enforcer’ corruption cases had decreased. The ICW report was based on the number of corruption cases which had been investigated by the police, prosecutors and the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK). The 629 reported cases in 2014 represents only the tip of the iceberg and presumably unreported corruption cases are much higher. In collecting the data the ICW acknowledged that they had experienced difficulties because of the minimal information made available to it by law enforcement bodies which in itself may be significant.⁶¹

⁵⁸ Jakob Svensson, ‘Eight Questions about Corruption (2005)’, *Journal of Economic Perspectives* 19, 24.

⁵⁹ Ian McAllister, above n 54, 183.

⁶⁰ Indonesia Corruption Watch (ICW), *Tren Pemberantasan Korupsi 2014* (2014 Eradication of Corruption Trend), 9.

⁶¹ *Ibid.* It should be noted that based on the ICW report, corruption also happens amongst the legislative and executive arms of government. It was reported that in 2014 there were 35 cases involving the legislative arm. Institutions under the executive arm of the government dominated the rest.

1.3.2 Indonesian *mafia peradilan*

In reality, ‘law enforcer’ corruption has been commonly experienced by the Indonesian people but it is hardly ever proven or reported because of its complex nature. The *mafia peradilan* (the judicial mafia) is deeply rooted in the Indonesian justice system. People in Indonesia are not surprised at the level of judicial corruption.⁶² Widodo has described how judicial corruption happens in Indonesian as illustrated in the table below.⁶³

Table 1.1 Types of judicial mafia

No	Judiciary	Prosecution	Investigation
1.	Judges delay their decisions. This practice sends a signal that the trial judge is asking to be bribed. The intermediate actor is the <i>Panitera</i> (judges’s clerk).	Extortion by a prosecutor. A person who is called by a prosecutor usually has to pay some money to avoid being named as a suspect for a crime even if he or she is innocent.	Victims of crime or someone who reports a crime sometimes has to pay money when reporting a criminal case in order to get his or her case registered.
2.	Judges intentionally fail to appropriately evaluate facts or evidence or reduce sentences or set the defendant free unless they are bribed.	Negotiation in types of detention provided bribes are made.	Illegally drop criminal case or unlimited time delay to investigate a criminal matter by the investigator.
3.	Judges look for a different law or even invent the law when considering that the indictment was not proven provided they are bribed.	Negotiation in deciding whether to continue or discontinue a criminal matter, provided bribes are made.	<i>Negosiasi pasal</i> (Negotiation in deciding which law should be put in the police report).

⁶² Pajar Widodo, *Reformasi Sistem Peradilan Pidana dalam Rangka Penanggulangan Mafia Peradilan* (Criminal Justice System Reform in Combating Judicial Mafia) (2012) *Jurnal Dinamika Hukum* 108,112. See also *lampiran II* (Supplementary document II), *Matrik Modus Operandi Lengkap Mafia Hukum di Lembaga Kepolisian, Kejaksaan, Pengadilan serta Pemasyarakatan* (Complete Matrix How Judicial Mafia works on Police institution, Prosecutor institution, Court and Correctional institution) on Satuan Tugas Mafia Hukum report (2010).

⁶³ *Ibid.*

No	Judiciary	Prosecution	Investigation
4.	Giving extra money during case registration to the court.	Making an indictment letter unclear if bribed.	The decision to detain suspect of crime.
5.	Bribe for arranging trial judges.	Lengthy investigation indicates that someone had to meet and bribe the prosecutor.	Negotiation in types of detention
6.	Collusion between judges, prosecutors and defendant or lawyer before the trial to negotiate the case.	Negotiation to decide sentence in indictment letter.	Bribery to get <i>Berita Acara Pemeriksaan/BAP</i> (Investigation summary and other copies of documents)

The above types of corruption directly involve bribery, but it should be understood that corruption according to Indonesian law involves more than bribery. According to the *2001 Anti-Corruption Law*, there are 30 types of acts that might be considered as corruption.⁶⁴ Butt explains that:

The 1999 Anti Corruption Law defines corruption very broadly indeed, thereby catching a wide range of behaviour. The Law also makes investigating and prosecuting corruption easier than other crimes, and provides severe penalties, including the death penalty. The law is, therefore, not inherently defective or inadequate.⁶⁵

It should be noted that the *Undang-Undang no 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi*⁶⁶ was changed to the *Undang-Undang no 20 Tahun 2001 tentang perubahan atas Undang-Undang no 31 Tahun 1999*

⁶⁴ These include *korupsi terkait dengan kerugian keuangan negara* (corruption which directly or indirectly creates loss in the Government budget), *korupsi terkait dengan suap-menyuap* (corruption in relation to bribery), *korupsi terkait dengan penggelapan dalam jabatan* (corruption which is related to misuse public official power, embezzlement), *korupsi yang terkait dengan perbuatan pemerasan* (corruption which related to extortion), *korupsi yang terkait dengan perbuatan curang* (corruption which related to unethical conduct), *korupsi yang terkait dengan benturan kepentingan dalam pengadaan barang dan jasa* (corruption related to procurement) , *korupsi yang terkait dengan gratifikasi* (corruption which is considered gratification) and *korupsi yang terkait dengan tindak pidana korupsi* (other conduct which is considered as corrupt conduct) such as obstructing justice in corruption cases. See also *Undang-Undang no 20 Tahun 2001 tentang perubahan atas Undang-Undang no 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi* (Law No.20 of 2001 on the amendment of the 1999 Corruption Eradication Law) (Indonesia) (2001 Corruption Eradication Law).

⁶⁵ Simon Butt, *Corruption and Law in Indonesia* (Routledge, 2012) 14.

⁶⁶ *Undang-Undang no 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi* (Law No. 31 of 1999 on Corruption Eradication) (Indonesia) ('1999 Corruption Eradication Law').

*tentang Pemberantasan Tindak Pidana Korupsi.*⁶⁷ In terms of the types of corruption within the 2001 Corruption Eradication Law there is an additional type of corruption known as ‘gratification’, and pembuktian terbalik (i.e. shifting the burden of proof) in a matter of evidence law.⁶⁸ All presents and gifts to public officials are considered as bribery and must be reported to the *Komisi Pemberantasan Korupsi*. If a prosecutor charges an offender based on a gratification allegation, the onus of proof is on the defendant to prove that the gift was not corruption. This new law makes it easier for law enforcers to prosecute bribery cases which mostly involve public officials.

1.3.3 Causes of Indonesian corruption

If the law is not deficient then it is possible that ‘enforcing’ the law may be a source of corruption within the Indonesian system. Quah identified five main causes of Indonesian corruption as follows:

The civil service in Indonesia has five major defects that not only make its members vulnerable to corrupt behaviour but also render the task of curbing corruption a much more difficult one vis., lack of meritocracy, low salaries, red tape and inefficiency, weak disciplinary control and ineffective policing, and reliance on incremental and instrumental reform.⁶⁹

Quah is suggesting there is a perception of a *Mafia Peradilan* in Indonesia. It should be noted that the Indonesian *Jaksa* (i.e. prosecutor) is considered to be a *Pegawai Negeri Sipil* or PNS (government employee and part of the civil service).⁷⁰

⁶⁷ Undang-Undang no 20 Tahun 2001 tentang perubahan atas Undang-Undang no 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi (Law No.20 of 2001 on the amendment of 1999 Corruption Eradication Law) (Indonesia) (‘2001 Corruption Eradication Law’).

⁶⁸ See section 12 B Undang-Undang no 20 Tahun 2001 tentang perubahan atas Undang-Undang no 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi (Law No.20 of 2001 on the amendment of 1999 Corruption Eradication Law) (Indonesia) (2001 Corruption Eradication Law).

⁶⁹ Jon S T Quah, *Curbing Corruption in Asian Countries: An impossible Dream?* (2011, Emerald) 360.

⁷⁰ See section 14 Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (‘2004 Prosecutorial Law’). See also Undang-Undang Nomor 5 tahun 2014 tentang Aparatur Sipil Negara (Law No 5 of 2014 on Civil Service) (Indonesia) (‘2014 Civil Service Law’).

The lack of meritocracy and low salaries are inherited from the Dutch during colonial period and Japanese occupation that followed.⁷¹ East Indies personnel were underpaid and did not rely on merit in the recruitment process. During Japanese occupation this situation did not change and continued after Indonesian Independence. In the Soekarno era public officials were chosen based on whether or not they participated in revolution and were paid low salaries.⁷² During Soeharto, military personnel were inserted into all levels of government without proper consideration of their suitability and, once again, were paid low salaries. Even though their salaries increased significantly, real wages declined because of slower economic growth.⁷³ After Soeharto conditions changed gradually as anti-nepotism became part of the reform agenda.⁷⁴ It should also be noted that public service wages generally became higher than private sector wages. However, salaries for civil servants were not sufficient to make ends meet, as Quah observed:

...even if the salaries of junior civil servants are higher than those of their counterparts in the private sector, the fact remains that these civil servants consider their salaries to be low and inadequate for satisfying the monthly needs of their families. In short, for most civil servants in Indonesia, especially those in senior positions, their monthly salaries and allowances are clearly inadequate for their monthly needs, and this inadequacy serves to justify their reliance on corrupt practices to “make ends meet”.⁷⁵

The Indonesian bureaucracy is plagued with red tape and inefficiency. Warwick has described the Indonesian civil service as cumbersome, uncoordinated, inefficient and in some cases a barrier to effective action or development.⁷⁶ Furthermore, civil servants acknowledge the distinction between ‘wet and dry’⁷⁷

⁷¹ Jon S T Quah, above n 69.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ See Ketetapan Majelis Permusyawaratan Rakyat Nomor XI/MPR/1998 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme (the Decision of People Assembly Number XI/MPR/1998 on State Governing which is clean and free from Corruption, Collusion and Nepotism).

⁷⁵ Jon S T Quah, above n 69, 368-369.

⁷⁶ Ibid 370.

⁷⁷ Wet agencies means agencies that are generous with honoraria, allowances, service on committees, boards, and development projects, and, recently, opportunities for foreign training. They are departments that deal in money, planning, banking or public enterprises. Dry agencies are those doing traditional administrative work. See Warwick cited in Jon S.T.Quah, above n 68, 370.

agencies. Membership of a dry agency can lead to perceptions of unfairness and a 'perception of unfairness can lead to the feeling that illegal compensation is a fair way to even out staff benefits across agencies'.⁷⁸ In regard to the 'wet and dry' perception, Schutte argues that the Indonesian policy of the single-scale salary scheme which was implemented in 2015 may make this perception a thing of the past.⁷⁹

Within the Indonesian civil service weak discipline and punishment for infractions is also a problem that has caused corruption to flourish. Civil servants lower in the hierarchy are rarely disciplined or punished by their immediate supervisors because the supervisors acknowledge that they do not earn much and they have families who depend on them.⁸⁰ Moreover, punishment was considered to be ineffective because in prison they still can bribe prison officials, so they can come and go from prison at will. The case of Gayus Tambunan is illustrative.⁸¹

A further cause of corruption is the lack of political support and, according to Quah, the decision to choose incremental reform rather than comprehensive reform:

In sum, reform efforts in the Indonesian civil service have failed because of the lack of political support, their emphasis on institutional reform and the incremental strategy, their neglect of attitudinal reform and the avoidance of the comprehensive strategy.⁸²

1.3.3.1 Suggested solutions for Indonesian corruption

Quah suggested that to eliminate corruption in Indonesia, the five weaknesses that he identified should be systematically addressed. This would involve: firstly, implementing a system of meritocracy 'to ensure that recruitment and promotion of civil servants are based on merit and not patronage or other inscriptive

⁷⁸ Ibid 370.

⁷⁹ Sofie Arjon Schutte, 'Keeping the New Broom Clean Lessons in Human Resource Management from the KPK', *Bijdragen Toot de Taal-, land –en Volkenkunde* 171 (2015) 423, 450.

⁸⁰ Jon S.T. Quah, above n 69.

⁸¹ Gayus Tambunan was a junior tax official who accepted bribes from 44 companies to falsify their tax documents. He was sentenced to seven years and fined 300 million rupiahs. During his time in prison, he was able to leave and return to prison as he wanted because he bribed prison officers, judges, prosecutors, police and immigration officers.

⁸² Jon S T Quah, above n 69, 378.

criteria’;⁸³ secondly, improving salaries as a precondition for effectively curbing corruption; thirdly, red tape and inefficiency must be eliminated; fourthly, disciplinary control must be strengthened and civil servants who violate the rule of law must be punished; and finally, instead of using incremental reform, comprehensive reform would be required with the following three conditions: strong political support for the reforms at the top, careful analysis of alternatives with those most affected by the changes assisted, and pilot-testing of reforms and follow up analysis.

Generally, these five defects have been acknowledged by the Indonesian government as part of the reform agenda. For example, by enacting the *Undang-Undang Pokok Kepegawaian* (Civil Servant Essential Law) in 1974 which was further amended in 1999 and by making the new law (*Undang-Undang Nomor 5 tahun 2014 tentang Aparatur Sipil Negara* (2014 Civil Service Law) the Indonesian government demonstrates its commitment to building a tradition of meritocracy. The ministry of *Pemberdayaan Aparatur Negara dan Reformasi Birokrasi* (Ministry of Civil Servant and Bureaucratic Reform) was created to facilitate a commitment to bureaucratic reform.

Paying adequate salaries to Indonesian civil servants is part of bureaucratic reform through *remunerasi* (remuneration). It has been acknowledged that one of reasons for poor service within the Indonesian administration is that salaries remain low and the Indonesian government has gradually tried to increase them. According to *Undang-Undang no 17 Tahun 2007 tentang Rencana Pembangunan Jangka Panjang Nasional* (2007 Long Term Development Program Law), the Indonesian government has decided on a program of bureaucratic reform which is designed to eradicate corruption:

Pembangunan hukum juga diarahkan untuk menghilangkan kemungkinan terjadinya tindak pidana korupsi serta mampu menangani dan menyelesaikan secara tuntas permasalahan yang terkait kolusi, korupsi, nepotisme (the law development is directed to eradicate possible corruption, handle and solve completely the problems which relate to collusion, corruption and nepotism).⁸⁴

⁸³ Ibid 392.

⁸⁴ See supplementary document of *Undang-Undang no 17 Tahun 2007 tentang Rencana Pembangunan Jangka Panjang Nasional* (Law No. 17 of 2007 on National Long Term Development Program) (Indonesia) (‘2007 National Long Term Development Program’).

As a result, the salaries of civil servants have increased by six percent. This policy is based on section 7 (1) *Undang-Undang no 43 tahun 1999 tentang Perubahan atas Undang-Undang no 8 tahun 1974 tentang Pokok-Pokok Kepegawaian* (1999 Civil Servant Essential Law) which states that:

Setiap Pegawai Negeri berhak memperoleh gaji yang adil dan layak sesuai dengan beban pekerjaan dan tanggung jawabnya (Each public servant has the right to be paid fair and adequate wages based on their work and their level of responsibility.)

The Ministry of *Pemberdayaan Aparatur Negara dan Reformasi Birokrasi* (Ministry of Civil Servant and Bureaucratic Reform) has made law enforcement remuneration reform one its priorities.⁸⁵ Furthermore, the 1999 Civil Servant Essential Law was amended by the *Undang-Undang Nomor 5 tahun 2014 tentang Aparatur Sipil Negara* (2014 Civil Service Law), intended to achieve good governance (*tata kelola pemerintahan yang baik* (good governance))⁸⁶ by providing a civil service built on meritocracy where appointments and promotions are based on competence and having the appropriate qualifications.

President Susilo Bambang Yudhoyono, during his reform era, demonstrated his commitment to eradicating corruption in the *Instruksi Presiden Republik Indonesia Nomor 5 Tahun 2004 tentang Percepatan Pemberantasan Korupsi* (The Republic of Indonesia President Instruction Number 5/2004 about Speed up Eradication Corruption). The instruction consisted of 12 points including that all public officials must report their wealth to the *Komisi Pemberantasan Korupsi* (Eradication Corruption Commission); that the functioning of public services must be enhanced by ensuring transparency and the standardization of services; that maximum support must be given to the Indonesian Police, *Kejaksaan* and *Komisi Pemberantasan Korupsi* during all corruption investigations by providing them with all the information required; that the Indonesian Police must work together with the Corruption Eradication

⁸⁵ See *Peraturan Menteri Negara Pemberdayaan Aparatur Negara Nomor: PER/15/M.PAN/7/2008, tentang Pedoman umum Reformasi birokrasi* (Ministry of Civil Servant and Bureaucratic Reform Regulation No. 15 of 2008 on General Guidelines for Bureaucratic Reform) (Indonesia) ('2008 General Guidelines for Bureaucratic Reform Ministry Regulation').

⁸⁶ See consideration part of the *Undang-Undang Nomor 5 tahun 2014 tentang Aparatur Sipil Negara* (Law No 5 of 2014 on Civil Service) (Indonesia) ('2014 Civil Service Law').

Commission (*Komisi Pemberantasan Korupsi*) in order to identify potential corrupt systems or personnel; and that there must be enhanced supervision and training of officials in order to eradicate corrupt behaviour.

The President also gave specific instructions to each minister in his cabinet, including the *Jaksa Agung*, *Kapolri* (The Chief Indonesian National Police), *Gubernur/Bupati* (Governors) and all *Walikota* (Mayors).⁸⁷ For example, the *Jaksa Agung* was specifically instructed to work together with the *Kepolisian Republik Indonesia* (the Indonesian National Police), the *Badan Pengawas Keuangan dan Pembangunan* (Finance and Development Supervisory Body), the *Pusat Pelaporan dan Analisis Transaksi Keuangan* (Indonesian Financial Transaction Reports and Analysis Centre) and other governmental agencies that have authority to enforce the law and recover assets identified as being obtained through corruption.

Susilo Bambang Yudhoyono continued the reforms by implementing the *Strategi Nasional Pencegahan dan Pemberantasan Korupsi Jangka Panjang Tahun 2012-2025 dan Jangka Menengah Tahun 2012-2014* (National Strategy to Prevent and Eradicate Corruption for the Long Term 2012-2025 and Intermediate Term 2012-2014) by enacting the *Peraturan Presiden Republik Indonesia Nomor 55 Tahun 2012* (President Republic of Indonesia Regulation Number 55/2012). This regulation was based on the government commitment to combating corruption after it ratified the 2003 United Nations Convention Against Corruption (UNCAC) and was achieved by enacting the *Undang-Undang Nomor 7 Tahun 2006 tentang Pengesahan United Nations Convention Against Corruption, 2003* (2006 UNCAC Ratification Law). Through this reform it was intended to generate guidelines for the *Kementerian/Lembaga* (Ministries/Government Institutions) and *Daerah* (Provincial) to create clean government free from corruption. It should be noted that all Ministries and Government institutions follow this governmental reform by establishing goals designed to promote accountability, transparency, supervision, human resources

⁸⁷ *Instruksi Presiden Republik Indonesia Nomor 5 Tahun 2004 tentang Percepatan Pemberantasan Korupsi* (The Republic of Indonesia President Instruction Number 5/2004 about Speed up Eradication Corruption).

development and fund allocation. For example, the *Kejaksaan* (the Indonesian prosecutorial body) did this by designing strategies to implement these goals. From these reforms it is evident that there is a strong political commitment to combat corruption by facilitating comprehensive bureaucratic reforms.

Wagner and Jacobs described the reforms of Indonesian President Susilo Bambang Yudhoyono as follows:

His government's approach to the formidable task of fighting entrenched corruption has been both comprehensive and incremental. Measures implemented address multiple aspects of corruption reform, including prevention, state building, and civil society education.⁸⁸

While corruption in Indonesia remains a serious problem, during Susilo Bambang Yudhoyono's presidency genuine efforts were made to combat it, including enacting an anti-corruption law in 1999 and creating a special anti-corruption body known as *Komisi Pemberantasan Korupsi* (Corruption Eradication Commission) in 2002. Arguably, countries which create this kind of special body acknowledge the severity of their corruption problems. However such measures are commonly criticized as expensive⁸⁹ and can be open to abuse.⁹⁰ It is also considered as a super body with more power than ordinary law enforcement agencies, including additional powers of detention, the right to use entrapment, and wiretapping. In many ways their powers are a challenge to the presumption of innocence. Citing Peter William, Klitgaard provided several reasons for the creation of such bodies including that: 'the state of corruption in the particular society must have reached (a) critical or traumatic level to be sufficient to

⁸⁸ Benjamin B Wagner and Leslie Gielow Jacobs, 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations' (2008), *30 University of Pennsylvania Journal of International* 183, 205-206.

⁸⁹ The Indonesian parliament questioned the 750 millions rupiah budget in handling each corruption case. The reason is that the budget is large compared with that of the police and the prosecutor's handling of corruption cases. See Gilang Fauzi, *KPK ajukan pagu anggaran 2016 Rp 1.1 triliun* ((KPK proposed 1.1 billion rupiah in 2016), CNN Indonesia 16 September 2015 <<http://www.cnnindonesia.com/nasional/20150915193013-12-78980/kpk-ajukan-pagu-anggaran-2016-rp-11-triliun/>>.

⁹⁰ It is said that anti-corruption bodies in many countries were used as an instrument of repression against political opponents, not to fight corruption. Jakob Svensson 'Eight Questions about Corruption' (2005), *Journal of Economic Perspectives* 19, 35.

persuade the authorities that a radically new law enforcement agency is needed to combat it'.⁹¹

As indicated above, it is difficult to measure whether the Indonesian anti-corruption body or KPK has effectively overcome Indonesian corruption. In other countries, such as Hong Kong or Singapore, anti-corruption bodies are reported to be successful. According to Svensson their success has involved a combination of reforms which were implemented simultaneously with the strengthening of the enforcement agencies and a political commitment to fighting corruption.⁹² Nevertheless, Indonesia with its anti-corruption body and ongoing legal and bureaucratic reforms has demonstrated that it is on the right track.

Evidence of a political commitment from the top to combat corruption in Indonesia fluctuates depending on the issue. The decisions of Susilo Bambang Yudhoyono and Joko Widodo about whether they should support the KPK leaders (Bibit Samad Riyanto, Candra M Hamzah, Antasari Ashar, Bambang Wijayanto and Abraham Samad)⁹³ are illustrative. Indonesians will never know whether Bibit Samad Riyanto and Candra M Hamzah, former *Komisi Pemberantasan Korupsi* (KPK) leaders, were really abusing their powers as their cases were set aside by the Indonesian *Jaksa Agung*.⁹⁴ In the Antasari Ashar⁹⁵ murder case (former KPK leader), some people still believe that he was a victim of revenge by the President after putting his family in jail for corruption matters. Both the Bambang Wijayanto and the Abraham Samad cases (former KPK leader) are still under investigation which may demonstrate that no one is above the law. These cases were decided according to enacted law which is important, even on the

⁹¹ Robert Klitgaard, *Controlling Corruption* (University of California Press, 1988) 120-121.

⁹² Jakob Svensson, above n 88, 35. Regarding reform, it is explained that in Singapore civil servants' pay relative to the private sector increased substantially; public officials were routinely rotated to make it harder for corrupt officials to develop strong ties to certain clients; rewards were given to those who refused bribes and turned in the client; and importantly, rules and procedures were simplified and often published; permits and approval were scrapped; and fees (including import duties) were lowered or removed.

⁹³ Further information about the Bibit Samad Riyanto and Candra M Hamzah (Bibit-Candra cases) abuse of power cases and the Antasari Ashar case see Simon Butt, above n 64. In the Antasari Ashar murder case, the evidence against him was considered as flawed. In the other case, based on his observation, Butt argued that the evidence against Bibit-Candra was scant and weak. Antasari Ashar was not as lucky as Bibit-Candra where the *Jaksa Agung* set the case aside.

⁹⁴ See also 2.2.2 Interpreting the law.

⁹⁵ For further discussion about this case, see Simon Butt, above n 65.

thinnest conception, in a country committed to the Rule of Law, *Rechtsstaat* or *Negara Hukum*.

The political will of the President to defend the KPK when it is combating corruption is important.⁹⁶ However, focusing only on the KPK to eradicate corruption in Indonesia might have limitations as there are too few investigators and prosecutors and the KPK only functions in Jakarta. In contrast, *Polri* (Indonesian National Police) and *Kejaksaan* are nation-wide organizations. It is important to enable both the Indonesian National Police and the KPK to combat corruption and that it can be rooted out in all parts of Indonesia. In addition, Wagner and Jacobs argue for changes in the management of the investigatory and prosecution services:

The structures and traditions of the investigatory and prosecutorial services do not facilitate effective anti-corruption enforcement. Both the police and the prosecution service in Indonesia are managed through a highly centralized, hierarchical chain of command. In the AGO, which includes Indonesia's prosecution service, the effect of this top-down management system is that most serious measures require multiple levels and review and approval, reducing the ability of prosecutors to act quickly or innovate. This institutional rigidity reinforces the inherited Dutch civil law tradition that accords little discretion to prosecutors to follow the evidence to find new crimes and suspects.⁹⁷

Further, they argue for legal reforms which enhance the ability of law enforcement to investigate and prosecute corruption cases.⁹⁸ Changing from a MPS to a DPS would seem to be part of the solution to combating corruption, as it might enable prosecutors to act in a more innovative and flexible manner. Such a change is consistent with current criminal procedure law reform within Indonesia where the prosecution system is moving to more discretionary one based on the opportunity principle, which is explained further in Chapter 4. However, the potential abuse of discretion remains a main concern, as explained in Chapter 3, but as long as discretion is confined, structured and reviewed as Davis suggests, corruption can be reduced.

⁹⁶ See Simon Butt and Tim Lindsey, 'Jokowi losing fight to stamp out corruption', *The Age* (6 April 2015) 15.

⁹⁷ Benjamin B Wagner and Leslie Gielow Jacobs, above n 88, 201.

⁹⁸ *Ibid* 215.

The Klitgaard equation, $C = M+D-A$ (Corruption = Monopoly + Discretion - Accountability)⁹⁹, shows the relationship between discretion and corruption. This equation follows the principal-agent model. According to Shleifer and Vishny:

This model focuses on the relationship between the principal, i.e., the top level of government, and the agent, i.e., an official, who takes the bribes from the private individuals interested in some government-produced good.¹⁰⁰

From the equation it seems that discretionary power and monopoly with minimum accountability might potentially cause corruption and that: ‘Successful reforms combat corruption by reducing monopoly, limiting and clarifying discretion, and enhancing accountability’.¹⁰¹

Klitgaard has also stressed that monopoly plus unfettered discretion equals corruption and that anti-corruption efforts must provide for bureaucratic accountability as follows:

Theory teaches us that a rough formula for corruption holds. Monopoly plus discretion minus accountability equals corruption. Monopoly, whether public or private, grants the power to charge a higher than optimal price for a service and to provide less of it. Discretion means that an official has the power to say yes or no, or how much, without what lawyers call "bright lines" to limit his power. And a lack of accountability means that these transactions take place in the dark. And so anti-corruption efforts must attempt to mitigate monopoly, whether public or private: to privatize a public monopoly and let a private monopoly ensue will do little. They must limit discretion and provide clear rules of the game and bright lines for bureaucratic behaviour. And above all, anti-corruption efforts must provide more accountability. Information is one enemy of corruption.¹⁰²

1.3.3.2 Impact on prosecutor as state official

As indicated above, general reform to combat corruption is still arguably an ongoing process in the Indonesian system. Each of the governmental institutions including the prosecution service has implemented reform. This section discusses the *reformasi birokrasi* (bureaucratic reform) within the *Kejaksaan*. It looks at

⁹⁹ Robert Klitgaard, above n 91, 75.

¹⁰⁰ Andrei Shleifer and Robert W. Vishny, ‘Corruption’ (1993), *The Quarterly Journal of Economics* 599, 599.

¹⁰¹ Robert Klitgaard, ‘Universities Have the Responsibility to Tackle the World’s Toughest Problems’ (2008), *The Chronicle of Higher Education, Expanded Academic ASAP*.

¹⁰² Robert Klitgaard, ‘What can be done?’ (1996), *UNESCO Courier, Expanded Academic ASAP*.

whether Quah's suggestions to solve Indonesia's problems have been addressed by the Kejaksaan.¹⁰³

Bureaucratic reform including within the Kejaksaan (the office of the district prosecutor general and the office of the high prosecutor) is mandated by the *Undang-Undang Nomor 17 tahun 2007 tentang Rencana Pembangunan Nasional Jangka Panjang 2005-2025*. The aim of this reform was to restore public trust and enhance the institutional image of the Kejaksaan with the public¹⁰⁴ following corruption involving the judicial mafia within the *Kejaksaan*, as in the case of *Jaksa Urip Tri Gunawan* (known as *Bantuan Likuiditas Bank Indonesia* (Indonesian Bank Liquidity Assistance or BLBI case) who accepted a bribe of USD 660.000 (approximately AUD 700.000). He was sentenced to 20 years in prison.¹⁰⁵ According to Saleh, bribery cases which involved several *Jaksa* within the *Kejaksaan Agung* (Attorney-General's Office) demonstrated how difficult this office situation had become.¹⁰⁶ Following this case, the *Kejaksaan* became the first candidate for bureaucratic reform which was coordinated by the *Kementerian Pemberdayaan Aparatur Negara dan Reformasi Birokrasi* (Ministry of Civil Servant and Bureaucratic Reform).¹⁰⁷ Such reform is intended to build what is known as *tata kelola pemerintahan yang baik* (good governance).

Another famous corruption case was the Cyrus Sinaga case where he (as a prosecutor) intentionally changed his *dakwaan* (criminal charge) from corruption and money laundry charges into ordinary embezzlement criminal charge on 'Gayus Tambunan'¹⁰⁸ case. This kind of practice is known as *negosiasi dakwaan*

¹⁰³ See 1.3.4 suggestions for Indonesia's corruption problem. They are:

1. Recruitment and promotion based on merit;
2. Raising salary;
3. Elimination of red tape;
4. The disciplinary control; and
5. Comprehensive reform.

¹⁰⁴ Basrief Arief, *Reformasi Penegakan Hukum dan Penguatan Kelembagaan di Lingkungan Kejaksaan RI* (Legal Reform and Strengthened Institution *Kejaksaan RI*, Paper presented at Focus Group Discussion on *Reformasi Penegakan Hukum di Indonesia* (Indonesian Legal Reform), 12 October 2011 at Hotel Sari Pan Pasific Jakarta, 12.

¹⁰⁵ See *Putusan Mahkamah Agung No.243K/PID.SUS/2009* (Supreme Court decision No 243K/PID.SUS/2009).

¹⁰⁶ Asmar Oemar Saleh, *Skenario Reformasi Kejaksaan* (Scenario Reform for *Kejaksaan*).

¹⁰⁷ Basrief Arief, above n 104, 13.

¹⁰⁸ See above n 81.

(criminal charge negotiation) between the accused and the prosecutor after bribed.¹⁰⁹

In 2009, special task force known as *Satuan Tugas Pemberantasan Mafia Hukum* (The Judicial Mafia Task force)¹¹⁰ is created to tackle *Mafia Hukum* (Judicial Mafia) within Indonesian police institution, prosecution institution, judiciary institution and correctional institution. This task force published important information such as the root of *Mafia Hukum* and how to tackle combat *Mafia Hukum*. They consider that the root of *Mafia Hukum* within those institutions are complex such as weak regulation, weak human resource management, weak leadership, low salary, weak internal-external supervision and sanction, weak check and balances on case handling including time limitation and access of information. They make recommendation to tackle *Mafia Hukum* by strengthening the internal and external institutions supervision and public supervision. The disciplinary system and sanctions need to be more accountable and transparent. Other recommendation such as strengthened bureaucratic reforms, increasing salaries, and freedom of information need to be implemented consistently, whilst increasing the budget to support the judicial institution task and ensure strong leadership is also mentioned in their recommendations. What is interesting in their recommendations, is that they also mentioned the need for revision of several statutes including KUHAP. They recommend that forceful measures (detain person, seizure etc) by judicial officers need to be confined and supervised in the future KUHAP.

Discretion by judicial officials needs to be reduced on handling criminal cases also became one of this Task Force recommendations. The reason behind this recommendation might be that the corruption problems within Indonesian judicial system are still rampant. Adding more discretion might lead to greater corruption within Indonesian system. However, reducing discretion in handling criminal cases seems to be opposed in the draft of KUHAP where Indonesian

¹⁰⁹ See *lampiran II* (Supplementary document II), *Matrik Modus Operandi Lengkap Mafia Hukum di Lembaga Kepolisian, Kejaksaan, Pengadilan serta Pemasyarakatan* (Complete Matrix How Judicial Mafia works on Police institution, Prosecutor institution, Court and Correctional institution) on Satuan Tugas Mafia Hukum report (2010).

¹¹⁰ See *Keputusan Presiden No 37 Tahun 2009* [Presidential Decision Number 37/2009].

prosecutor are to be granted more discretion when it comes to prosecution decision-making. Thus it is important to carefully consider existing Indonesian corruption problems before actually implementing the draft of KUHAP which gives prosecutor more discretion.

Since 2005 particularly during the Yudoyono Presidency several ongoing agendas have attempted to deal with corruption. They include:

1. *Pembaharuan Organisasi dan Tata Kerja Kejaksaan serta Sumber Daya Manusia* (Organization Reform and Procedure within *Kejaksaan* and Human Resources). This agenda is important in enhancing prosecutorial professionalism by carefully selecting and recruiting *calon jaksa* (candidate as prosecutors) based on accountable and transparent mechanisms;
2. *Pembaharuan Organisasi dan Tata Kerja Intelijen* (Organizational Reform and Intelligence Procedure). This agenda is intended to optimize the current intelligence work concerning the investigation of corruption and other matters.
3. *Pembaharuan Manajemen Umum* (General Managerial Reform). This includes reform of the *sarana dan prasarana* (facilities and infrastructure), *anggaran penanganan perkara tertentu dan operasional lainnya* (budgeting and handling of specific matters and other operational costs) and a budget for increasing *kesejahteraan jaksa* (Prosecutor welfare) and *pegawai kejaksaan lainnya* (civil servant non prosecutor welfare);
4. *Pembaharuan Manajemen Perkara* (Case Management Reform). This reform stresses the development of *Sistem Informasi Penanganan Perkara* (Case Management and Information Systems) to ensure transparency and public access to information;and
5. *Pembaharuan Sistem Pengawasan Kejaksaan* (*Kejaksaan* Supervision System Reform). This reform is intended to generate a *Kode Perilaku Jaksa* (Prosecutor Code of Conduct) and also to develop mechanisms for coordination between the *Jaksa Agung Muda Bidang Pengawasan* (the Attorney-General Deputy of Supervision) and other external supervision bodies such as the *Komisi Kejaksaan* (Prosecutor Commission).

This agenda indicates Quah's suggestions for eliminating corruption have been addressed by the *Kejaksaan*. Arguably, its comprehensive reform is still ongoing which makes it difficult to determine whether it has been successful. But there is no doubt that during the Yudoyono presidency political support for reform was great and continued during the Jokowi Presidency¹¹¹ which has stressed the need for more *reformasi internal* (internal reform), as follows:

¹¹¹ Riana A Ibrahim, *Presiden Jokowi Minta Reformasi Kejaksaan Dipercepat* ('President Jokowi asked Accelerate *Kejaksaan* Reform', *Kompas*, 22 Juli 2015).

*Reformasi internal di Kejaksaan harus dimulai dari pembenahan integritas dan kompetensi jaksa. Dengan demikian, jaksa dapat menjadi aparat penegak hukum yang kompeten, kritis dan tidak terikat dengan kepentingan tertentu saat menangani perkara. Hal ini dibutuhkan karena kejaksaan harus jadi garda terdepan dalam penegakan hukum, terutama pemberantasan korupsi (Internal reform within Kejaksaan should be started by reforming prosecutorial integrity and competence. By doing this, a prosecutor is expected to become a competent law enforcer who will not be bound by ill interest. This thing is needed as kejaksaan is expected to become a front player in combating corruption)*¹¹²

Comprehensive reform within the *Kejaksaan* has also required analysis of the alternatives and research to show those who are most affected by the change, by implementing a *Analisis Jabatan* (Job Analysis), a *Evaluasi Jabatan* (Job Evaluation) and a *Struktur Remunerasi* (Remuneration Structure). Pilot projects as part of *Reformasi Birokrasi* have been called “Quick Wins projects”. Since 2010 the *Kejaksaan* has implemented two projects, the *Kejaksaan Negeri* (District Attorney-General Office) and the *Kejaksaan Tinggi* (Provincial Attorney-General Office). Such projects are to be implemented in all other jurisdictions in the near future.¹¹³

As a result of these ongoing reforms, there has been an increase in transparency within the institution. Most of the information can easily be accessed through the website *Kejaksaan R.*¹¹⁴ as a result of implementation of a SIMKARI or *Sistem Informasi Manajemen Kejaksaan Republik Indonesia* (Managerial System of Information *Kejaksaan* Indonesian Republic) which is being continuously developed.

As well as increasing transparency in the *Kejaksaan*, the current *Jaksa Agung* (Attorney-General) has been seriously attempting to combat corruption by setting up what is known as *Satuan Tugas Penanganan dan Penyelesaian Perkara Tindak Pidana Korupsi* (P3TPK) or *Satgassus* in early 2015. This kind of special task force to combat corruption is not new within the Indonesian system. However it should be noted that since *Satgassus* was established it has handled an increasing number of corruption cases compared with cases handled by the

¹¹² *Reformasi Internal Menjadi Kunci* (Internal Reform as the Key), *Kompas*, 23 Juli 2015.

¹¹³ Basrief Arief, above n 104, 12.

¹¹⁴ See *Kejaksaan Republik Indonesia* website on <<https://www.kejaksaan.go.id/>>.

KPK.¹¹⁵ Moreover, the *Jaksa Agung Muda Pengawasan* (Deputy Attorney-General on Supervision) between 2012 and 2014 punished more than 100 *Jaksa* (prosecutors) who had been found breaching the law or exhibiting other disciplinary conduct.¹¹⁶

As an important part of the legal system, the *Kejaksaan* as a prosecution service has become a filter for processing the results of investigations and for prosecuting criminal matters at court. They also execute judicial decisions on criminal matters.¹¹⁷ Thus corruption within the *Kejaksaan* may jeopardize the aim of the criminal justice system to provide justice for all. As civil servants who are trusted by the people and as members of the legal profession and of society, *Kejaksaan* are expected to work professionally, transparently and accountably. *Jaksa* are expected to follow the *Tri Krama Adhyaksa* (The Three Behaviors of Prosecutors) also known as the *Satya, Adhi* and *Wicaksana*.¹¹⁸ This doctrine provides guidance for all Indonesian prosecutors who are expected to be disciplined and to work professionally and with integrity.¹¹⁹

The next section provides a general background on the Indonesian criminal justice system and then examines an Indonesian prosecutor's ability to discontinue a criminal matter.

1.4 Indonesian criminal justice process

In order to understand the Indonesian criminal justice system it is important to know something about the criminal justice agencies which undertake the

¹¹⁵ M Fajar Marta, *Kualitas Pemberantasan Korupsi* (Corruption Eradication Quality), *Kompas*, 9 Oktober 2015.

¹¹⁶ *Kompas*, above n 112.

¹¹⁷ See section 13 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law') mentioned that a public prosecutor is a *Jaksa* (prosecutor) who is granted the authority by this law to conduct a prosecution and execute the rulings of a judge.

¹¹⁸ *Satya* means loyalty based on honesty through Mighty God, him/herself and family, and as human being. *Adhi* means perfection on exercising his/her duties through Mighty God, him/herself and family, and as human being. *Wicaksana* means wise in exercising their power and duty. See Basrief Arief, above n 102, 24. See also *Keputusan Jaksa Agung Nomor: Kep-030/JA/3/1988 tentang Penyempurnaan Doktrin Kejaksaan Tri Krama Adhyaksa* (Jaksa Agung Decision Number: Kep-030/JA/3/1988 on Revising *Kejaksaan* Doctrine *Tri Krama Adhyaksa*).

¹¹⁹ Basrief Arief, above n 104, 24.

investigation, prosecution and adjudication of cases. In Indonesia the administration of criminal justice is divided into several organizational bodies, namely the Indonesian National Police (*Polri*), the Office of the Public Prosecutor (*Kejaksaan*) and the Indonesian Supreme Court (*Mahkamah Agung*).

1.4.1 Investigative process

The investigation stage is divided into two parts known as a *Penyidikan* (formal investigation) and a *Penyelidikan* (preliminary investigation). Section 1 point 2 *1981 Criminal Procedure Law* states that a *Penyidikan* involves 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. A *Penyelidikan* involves a series of acts by a junior investigator (lower rank than a *Polri*) to seek and find an event that is presumed to involve an offence in order to determine whether or not a formal investigation may be carried out by means regulated in this law. A *Penyelidikan* occurs if the police are still trying to assess the nature of the crime and decide who the perpetrator is. This stage resembles an "inquest" used for certain types of crimes in some common law countries.¹²⁰ Based on the results of the *penyelidikan*, a case will be formally investigated if the criminal matter is considered to have been perpetrated by someone and the suspect can be identified. In the formal investigation, every investigator's action such as questioning the suspect or the witness, arrest, search and seizure, must be in a written form and then prepared as a dossier. The completed dossier will then be sent to the prosecutor.¹²¹ It consists of any information from the formal investigation, any report on investigators' actions such as questioning, arrest, detention, search and seizure, and any forensic information obtained from evidence which has been collected.¹²²

¹²⁰ Robert R. Strang, "More Adversarial, but not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code' (2008) 188 *Fordham International Law Journal*, 196.

¹²¹ See section 8 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

¹²² See section 75 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

1.4.2 Prosecution process

State officials known as '*Jaksa Penuntut Umum*'¹²³ (hereafter "JPU") or public prosecutors monopolize the Indonesian prosecution business except in some corruption matters which are prosecuted by the Indonesian Eradication Corruption Commission (*Komisi Pemberantasan Korupsi* or known as KPK). This does not mean that *Jaksa* do not have the power to prosecute corruption matters.¹²⁴ Both institutions have power to prosecute corruption matters and there is criticism about the overlap. A *kesepakatan* (agreement) between both institutions exists to avoid such overlap and should not be considered a problem in combating corruption.¹²⁵ Moreover, the KPK has the power to take over a corruption investigation or prosecution according to section 11 *UU no 30 tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (2002 Eradication Corruption Commission Law). Unlike Australia, the Indonesian government never hires private lawyers to prosecute criminal matters, as Indonesian public prosecutors are always public officials.¹²⁶ Hence corruption in the *Kejaksaan* (Prosecution service) is part of a larger civil service problem within Indonesian bureaucracy.

In Indonesia, the prosecution is an act of a *Jaksa Penuntut Umum* (Public Prosecutor) whose job is to bring a criminal matter before a competent district

¹²³ During the reign of *Majapahit* Kingdom who ruled (1350-13890) in East Java there was King's officer known as *Dhyaksa* dealing with *masalah peradilan* (judicial matters) with duties similar to that of a judge. *Dhyaksa* term called as *Jeksa* in Java language and *Jaksa* in Sunda language and Indonesian language. In 17th century under Amangkurat I the King of Mataram the term *Dhyaksa* was no longer used. *Jeksa* or *Jaksa* was the term used at that time. See Marwan Effendy, *Kejaksaan RI Posisi dan Fungsinya dalam Perspective Hukum* (Indonesian Prosecution Service Position and Function on Law Perspective) (2005, *Gramedia Pustaka Utama*), 58-60.

¹²⁴ Section 11 *UU no 30 tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* mentions that KPK investigate and prosecute corruption matter involving:

1. Public official or law enforcer;
2. Corruption case which become public intention; and
3. Corruption case with potential minimum loss of 1000.000.000 rupiahs (approximately AUD 100.000).

Others above mention that arguably *Kejaksaan* has power to prosecute corruption matters.

¹²⁵ Effendy mentions several *kesepakatan* (agreements) between *Kejaksaan RI* and other law enforcer institutions including with the KPK. See Marwan Effendy, *Korupsi dan Strategi Nasional Pencegahan serta Pemberantasannya* (Corruption and National Strategic on Prevention and Eradication) (2013, *Referensi*), 158-163.

¹²⁶ Tim Lindsey, above n 45.

court by means regulated in the *1981 Criminal Procedure Law* with the plea that it be heard and decided upon by the judge at trial.¹²⁷

The prosecutor must prosecute criminal matters if there is sufficient evidence to support a criminal charge being laid. The public interest is not considered separately because it is served by prosecuting the criminal matter. The decision to discontinue a criminal matter is allowed within strict parameters laid down in the *1981 Indonesian Criminal Procedure Law*. They are:

1. *The criminal nature test*. If the matter is not of a criminal nature then it can be discontinued;
2. *The paucity of evidence test*. If the evidence is weak then the matter can be discontinued; and
3. *The case is closed by law test*. This test may apply, for example, if the accused has died, has previously been convicted or acquitted on the same charge (double jeopardy) or the statute of limitations has expired.¹²⁸

The Indonesian prosecutor is prohibited from considering the public interest when deciding whether to continue the prosecution because the public interest is served by prosecuting the criminal matter. As a result, both petty and serious crimes are prosecuted alike. As an illustration, recently in Indonesia there have been cases in which the hard application of the prosecution system has resulted in a ‘tortured 15 years-old boy being sentenced to a period of imprisonment for stealing old sandals’¹²⁹ which were worth not more than 2000 rupiahs (A\$10) and a ‘women (55 years old) was prosecuted and incarcerated for two months for falsely taking three cocoa fruits worth approximately 2100 rupiahs’.¹³⁰ The resources of the criminal courts would probably have been better allocated if the prosecutor had

¹²⁷ See section 1 point 7 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (1981 Criminal Procedure Law).

¹²⁸ *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (1981 Criminal Procedure Law).

¹²⁹ Reny Sri Ayu, *Sandal Jepit Butut Seret Siswa SMK ke Meja Hijau* (Old Sandal Drag SMK Student to the Court), *Kompas.com* <<http://regional.kompas.com/read/2011/12/27/06271577>>. access on 27 December 2011.

¹³⁰ BEY and Abdur Rahman, *Dimejahijaukan, Ambil Tiga Biji Kakao Senilai Rp 2.100* (Trialled because of Taking Three Cocoa Fruit) <<http://infoindonesia.wordpress.com/2009/11/17/dimejahijaukan-ambil-tiga-biji-kakao-senilai-rp-2-100/>>.access on 17 November 2009.

chosen not to proceed with these cases. In both cases, the community signalled through the media and by petition, that neither case should proceed.¹³¹

Prosecutorial discretion does exist as a high executive decision of the *Jaksa Agung* to set aside criminal matters. This is known as *deponering/deponeer* (Dispose) which is based on the opportunity principle. Section 35(c) of the 2004 *Prosecutorial Law*¹³² states that the only justifiable reason for setting aside a criminal prosecution is the “public interest”. No clear guidelines are available as to what constitutes “public interest”. Section 35 c of the supplementary document of the 2004 Prosecutorial Law only mentions that “public interest” is the interest of the nation and/or the society at large.

1.4.3 Trial process

The highest court in Indonesia, except for constitutional matters, is the *Mahkamah Agung* (The Indonesian Supreme Court). The judicial power is implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military court, and administrative courts. The jurisdiction of the court is hierarchically structured from the lowest to the highest and they are the *Pengadilan Negeri* (District Court), the *Pengadilan Tinggi* (Court of Appeal) and the *Mahkamah Agung* (Supreme Court).¹³³ In criminal matters which are examined in the public court jurisdiction, section 87 of the 1981 Criminal Procedure Law mentions that the Court of Appeal is competent to adjudicate cases that have been decided by the District Court in its jurisdiction for which an appeal has been lodged. Furthermore section 88 of the 1981 Criminal Procedure Law mentions that the Supreme Court is competent to adjudicate all criminal cases for which cassation has been sought.

In Indonesia courts are not bound by previous decisions at the same or higher level. While some valuable previous court decisions known as

¹³¹ In the *sandal jepit* case see Rofiq Hidayat, *Terdakwa Pencurian Sandal Divonis Bersalah* (Accused in sandal jepit case is declared guilty), Hukum online 5 January 2012 <<http://www.hukumonline.com/berita/baca/lt4f0486c16639d/terdakwa>>.

¹³² *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

¹³³ See diagram 1, Indonesian Court.

yurisprudensi are followed, that does not mean that Indonesia holds to a doctrine of ‘precedent’ like that found in common law countries such as Australia. Tim Lindsey describes the ‘*yurisprudensi*’ as more like limited collections of judgments than precedent,¹³⁴ explaining that ‘Precedent, in the Common Law system, is the principle that previous cases with similar facts on an identical point of law will bind courts of equal or lower status’.¹³⁵ The French do not use precedent but have the concept known as *Jurisprudence Constante*¹³⁶ that requires like cases to be decided alike because they are considered as a source of law.

Indonesian judges control court proceedings and directly question witnesses.¹³⁷ Parties such as a prosecutor and a lawyer may also ask questions after being permitted to do so by the chief panel judges (*Hakim Ketua*) at the court. Conversely, judges in Australia are passive referees in the trial process, where parties are active agents questioning the witnesses. Witnesses are called by the parties and are examined by the calling party and cross-examined by the opposing party.¹³⁸

A guilty plea is permitted in Australia where the vast majority of cases end without trial.¹³⁹ In Indonesia, a guilty plea is not considered as an outcome of a criminal charge. Confession of guilt may become evidence at the trial and will be considered by the panel judges to determine the sentence. However, the panel judges are not bound by the confession of guilt in deciding the guilt or the innocence of a defendant.¹⁴⁰

¹³⁴ Tim Lindsey, above n 45.

¹³⁵ *Ibid.*

¹³⁶ See Vincy Fon and Francesco Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’, *International Review of Law and Economics* 26 (2006) 519.

¹³⁷ See section 153 Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (‘1981 Criminal Procedure Law’).

¹³⁸ Tim Lindsey explains that in the Australian system compared to the Indonesian system the judge generally does not ask questions of witnesses (*saksi*) and is usually active only in enforcing the rules of evidence and procedure. See Tim Lindsey Director, above n 45.

¹³⁹ Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices*, The Australian Institute of Judicial Administration Incorporated 1995, 4.

¹⁴⁰ Section 189 (4) Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (1981 Criminal Procedure Law).

1.5 Prosecutorial discretion to discontinue criminal matters in Australia

Australia has a well developed prosecution system which is based on discretion (Discretionary Prosecution System). The exercise of discretion is mainly based on a two-step evaluation before making a decision whether or not to prosecute a criminal matter. The steps are: firstly, is there a reasonable prospect of conviction, and secondly, is the prosecution in the public interest?¹⁴¹ This test can be found in the Office of Public Prosecutor Policies¹⁴² and the Office of the Commonwealth Director of Public Prosecution in their Prosecution Policy.¹⁴³ Deciding the answer to the first test is not merely a matter of considering the sufficiency of evidence. The public prosecutors implement a ‘forensic judgment’¹⁴⁴ which usually consists of ‘the brief of evidence, any depositions and other material and (from this) forms a view about the adequacy of the case’.¹⁴⁵ Under the rubric of the second test, issues such as whether or not it would be in the public interest to prosecute an offender who is, for example, ‘85 years of age, or has a life-threatening illness or is intellectually impaired’, is in the public interest.¹⁴⁶ For discretion to be exercised the prosecution must be satisfied that the answers to both tests are soundly based.

1.6 Possible discretionary model adaptation into Indonesian system.

The current proposal of the Indonesian Criminal Procedure Law uses discretion models to discontinue criminal matters. The models are public interest drop, conditional disposal and *Jalur Khusus* (Special Path) which are considered as plea bargain or negotiated case settlement and are further discussed together with other models such as penal order and simple drop in Chapter 3. Changing from one

¹⁴¹ Corns and Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (Lawbook Co., 2009) 291.

¹⁴² The office of public prosecutor policies, No.2, section 2.1, “Criteria Governing the Decision to Prosecute” <http://www.opp.vic.gov.au/resources/5/d/5da11300404a14a3abdefbf5f2791d4a/02_the_prosecutorial_discretion-13042010.pdf>.

¹⁴³ The commonwealth director of public prosecutor Prosecution Policy, section 2, “The Decision to Prosecute” <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

¹⁴⁴ Corns and Tudor, above n 141.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

system to another (Mandatory Prosecution System to Discretionary Prosecution System) is difficult but possible as part of a reform agenda. This thesis addressed issues in regard to this proposal that are discussed extensively in Chapter 4. It focused on how to make the current models in the proposal become more accountable and transparent. Specific issues related to possible legal transplant from other jurisdiction models into the Indonesian system are discussed in Chapter 2. Possible legal transplant is discussed because several suggestions are made in Chapter 3 about the need for these to be adopted by the Indonesian system. For example, the penal order model that exists in countries surveyed such as Australia or the Netherlands is recommended to be included in the current reform because it can be used to shorten the criminal process. Another example is published guidelines which exist in most countries surveyed and is also recommended for the current Indonesian reform process.

1.7 Indonesian executive control through *Kejaksaan* and its independence

According to section 2 (2) of the 2004 Prosecutor Law, the *Kejaksaan* is a body designed to perform prosecutions on behalf of the state and also has other powers which are vested in it by statute and must perform in an impartial manner and be independent of other influences. By this means this law should become a guarantee for the Indonesian citizen that every Indonesian prosecutor's decision is made independently.

One of the key indicators is to what extent the executive arm of government can give direction in prosecution decisions. As explained in Chapter 4, the Indonesian President can direct the *Jaksa Agung* (the Indonesian Attorney-General) whether or not to prosecute a person. This means political influence can enter into prosecution decisions, which decreases the independence of the Indonesian prosecutor. Moreover, the Presidential instruction is made in secret and accountability cannot be assessed. If this situation continues, giving the Indonesian prosecutor discretion does not prevent the President from overriding any prosecutorial decision. Prosecutorial discretion must be exercised independently and accountably. As discussed in Chapter 4, the International Association of Prosecutors, have warned that the use of prosecutorial discretion

when permitted in a particular jurisdiction should be exercised independently and be free from political interference.¹⁴⁷

Therefore, several legislative changes are required. As discussed in Chapter 4, the Indonesian system needs to eliminate any possible political influence especially from the President in their prosecution role. However, if the instruction is considered as important then it needs to be made in writing and publicly available. Moreover, a special body similar to Director's Committee in Victoria Australia or the Board of the Prosecutor in the Netherlands is also recommended to enhance transparency and mitigate against arbitrary decisions in Indonesia.

1.8 Organization of the thesis

This thesis consists of seven chapters as outlined below:

Chapter 1 is the introduction to the thesis. It provides the Indonesian contextual background based on social, cultural, political, legal and economic factors. The corruption issue within the Indonesian system is discussed in terms of the perception of corruption, *mafia peradilan* (judicial mafia), and the causes of Indonesian corruption and suggestions are made to limit corruption. The chapter also discusses the Indonesian criminal justice system to give an overview of how criminal procedure is exercised in terms of investigative processes, prosecution and trial processes. In addition it provides an overview of prosecutorial discretion to discontinue criminal matters in Australia (also specifically discussed in Chapter 4) as a matter of comparison with other jurisdictions such as France, Germany, the Netherlands and Indonesia. The chapter provides an overview of possible discretionary model adaptation in Indonesia, further discussed in Chapter 4. It then outlines the background to Indonesian executive control of the *Kejaksaan* (prosecution service) and its independence, which are further discussed in Chapter 4. The chapter also provides the research questions and the organization of the thesis.

¹⁴⁷ The International Association of Prosecutors, above n 17.

Chapter 2 explains the research methods used. It sets out the particular research methodology used and considers some of its strengths and limitations. This chapter discusses firstly, the doctrinal legal research method and secondly, the comparative law methodology used in this research. It then discusses a possible legal transplant (of the DPS) in the Indonesian system. Fieldwork was undertaken in Indonesia and Australia by interviewing significant players in both countries. This chapter provides information concerning how those interviews were conducted. As the software program NVIVO was used to analyse the interviews this program is explained to describe how the data was derived. Finally, this chapter discusses triangulation and how it was used in the research.

Chapter 3 reviews the literature on prosecutorial discretion and its relationship to the rule of law. It provides a general comparative study of the Australian, French, German, Dutch and Indonesian systems. It compares the concept of discretion and the manner in which it is confined, structured and subjected to review. The section on the Indonesian system discusses administrative review under Dutch and Japanese rule and under Guided Democracy (1959-1965) after the declaration of independence. It also discusses the creation of *Undang Undang tentang Ketentuan Ketentuan Pokok Kekuasaan Kehakiman No. 14 Tahun 1970* (the 1970 Essentials Guidance on Judicial Power Law), the 1986 Administrative Court Law and two amendments, discretion in Indonesian law and the 2014 Government Administrative Law, the *Upaya Administratif* (Administrative Appeal), the Indonesian ombudsman, the anti-corruption body and freedom of information law. The chapter also considers the relationship of discretion to the common law concept of the “rule of law” and the civil law concept of the “*rechtsstaat*”, as well as the convergence of the Rule of Law and the *Rechtsstaat*; extravagant versions of the Rule of Law and the *Rechtsstaat*; the Rule of Law and the Welfare State; and the Regulatory State. The chapter then discusses the issue of the rule of law or *rechtsstaat* and the regulatory state in the Indonesian context.

Chapter 4 focuses on the issue of discretion in prosecution decision making. It provides a more specific comparative discussion of prosecution decision making to discontinue criminal matters and discusses the different

approaches taken when dealing with the discretion vested in prosecutors in civil law compared with common law systems. It considers firstly, differences in the development of prosecutorial discretion in civil and common law systems in both the Mandatory Prosecution Systems and Discretionary Prosecution Systems in the context of the Packer model of criminal process and of convergence of prosecution decision making. Secondly, the chapter discusses the following types of decisions to discontinue criminal matters: the simple drop, the public interest drop, conditional disposal, plea-bargaining or negotiated case settlement in both civil and common law systems, and penal orders. Thirdly, it discusses issues concerning the independence and accountability of prosecutors together with the types of structure used for prosecution services and whether they exhibit functional autonomy or functional subordination specifically in the Indonesian context. Fourthly, the countries surveyed are discussed in the context of how prosecution decision making is confined, structured, reviewed and how its transparency can be enhanced. The chapter then discusses the types of evaluation in prosecution decision making (i.e. one stage and two stage evaluation processes), the structure of the prosecution service, confining and structuring prosecutorial discretion using guidelines, training prosecutors, senior supervision of prosecutors, writing-based processes, judicial review of prosecutorial decision making, transparency in prosecution decisions and what is considered as the “public interest” in the surveyed countries.

Chapter 5 provides the research findings. Seven themes emerged from the interviews conducted in Indonesia and Australia and are discussed in this and the following chapter. They are: the decision to discontinue criminal matters in Indonesia, impediments to change to the discretionary prosecution system, discretionary models in the draft of the Criminal Procedure Law, the independence of the Indonesian prosecution body, the decision to discontinue criminal matters by the DPP in Australia, prosecutorial discretion and corruption, and the formulation of public interest in the prosecution system.

Chapter 6 discusses the interview findings as they relate to each of the research questions and to the literature. It examines the circumstances and considerations for exercising prosecutorial discretion to discontinue criminal

matters in Indonesia and Victoria, Australia and provides answers to the first and second research questions. It then discusses a discretionary prosecutorial model which is suitable for adaption to the Indonesian system and provides an answer to the third research question. Next, the chapter discusses the issues of independence and accountability of the Indonesian prosecutor, in answering the fourth research question. It examines the nature of the *Kejaksaan* (Indonesian Attorney-General's Office), the *Jaksa Agung* (Attorney-General), the structure of the *Kejaksaan*, and recruitment and promotion of prosecutors, and transparency within prosecution decision making. Lastly, in answering the fifth research question the chapter discusses impediments to granting Indonesian prosecutors discretion to discontinue criminal matters with short-term and long-term suggestions for reform.

Chapter 7 provides conclusions and suggestions. It discusses prosecutorial discretion to discontinue matters and the advantages and dangers of implementing such a system in Indonesia. A move to a DPS would seem important because discretion can be tailored to produce individualized justice such as could have occurred in the cases of *sandal jepit* or *cocoa pickers*. In addition, this chapter considers how the Indonesian bureaucratic prosecution system can be improved and enhanced. A move to a DPS could be dangerous unless the discretion is fettered and accompanied by other Indonesian reforms which are discussed.

As most civil law countries move to use more prosecutorial discretion, Indonesia also needs to adapt to this situation. The new draft proposed changing its prosecutorial system from a mandatory prosecution system to a more discretionary one. How to limit the discretion to reduce potential abuse is important. The next chapter in this thesis discusses the research methodologies.

Chapter 2

Research Methodology

2.1 Introduction

This chapter sets out the research methods used and considers some of their strengths and limitations. Two main research methods were used – doctrinal legal research and comparative legal research. As interviews with significant players in the criminal justice system were part of the methodology they could be classified as empirical research. From those interviews, unstructured data was collected which was analysed using NVivo, a qualitative software program, using a triangulation process.

Doctrinal research and comparative legal research were considered appropriate research methods for this thesis, as Husa explains:

In an era when law is turning global, transnational or at least European, it is important to realise that legal translation, as well as an interpretation and systematisation of supranational law in national systems means that comparison and legal linguistic become factors that also have an impact on national methodology¹⁴⁸

Comparative law does not rely on the doctrinal interpretation of law within one system. A conceptual framework has to be built where two or more systems are simultaneously studied.¹⁴⁹ The comparison of the legal systems in this study goes beyond the descriptive to the analytical level.¹⁵⁰ Description is used as a starting point. The subsequent analysis suggested conclusions about the relative merits of different systems, both as to the goals they set and the means they adopt in

¹⁴⁸ Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Marck Van Hoecke, *Methodologies of Legal Research: Which kind of Method for What Kind of Discipline* (Bloomsbury Publishing, 2011) 211.

¹⁴⁹ Ibid 210.

¹⁵⁰ Samuel stressed that this analytical aspect of comparative research is essential. See Geoffrey Samuel, 'Comparative Law and Its Methodology' in Dawn Watkins and Mandy Burton (eds.), *Research Methods in Law* (Taylor and Francis, 2013) 108.

reaching them.¹⁵¹ As doctrinal studies tend to be focussed on a national legal system-based study, the comparative study gave more scope for internal perspectives of the Indonesian system.

The problems central to this research are clearly stated in the research questions. The focus is on the Indonesian legal system so the doctrinal approach is important to understand it as a normative system, or how law is used in Indonesia specifically in the prosecution system. Using both the doctrinal and comparative research methods contributes to a more comprehensive review of the Indonesian legal system and provided suggestions for its reform for several reasons, including:

1. They help describe the historical development of the prosecution system of Indonesia and other civil law and common law jurisdictions;
2. They provide a comparative analysis of prosecution decisions to discontinue criminal matters, particularly in the common law jurisdiction of Victoria, Australia;
3. They give perspective to recent innovations in relation to models of prosecution decision making to discontinue criminal matters in Indonesia and in other jurisdictions;
4. They provide ideas on how to limit and review discretion, especially prosecution decisions to discontinue criminal matters; and
5. They offer ideas on how to provide for independent and accountable prosecution decision making for more transparent decision making.

An application of the two research methods assisted in understanding prosecution decision making both in practice and in theory as is illustrated in Figure 2.1 below:

¹⁵¹ Oliver R. Goodenough, When “Stuff Happens” Isn’t Enough: How and Evolutionary Theory of Doctrinal and Legal System Development Can Enrich Comparative Legal Studies. Symposium on Evolutionary Approaches to (Comparative) Law: ‘Integrating Theoretical Perspectives’, Ghent, April 2010.

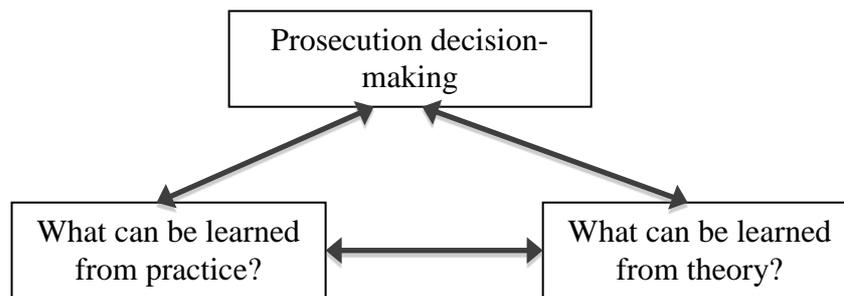


Figure 2.1 Prosecution decision making

The primary resources for Indonesian legislation are relatively complex, as they often are in contemporary legal systems. Under the structure of the 1945 Constitution (*Undang Undang Dasar 1945*) Indonesia is a unitary state. There are two institutions which are considered as representing citizens, namely the *Majelis Permusyawaratan Rakyat or MPR* (the People’s Consultative Assembly) and the *Dewan Perwakilan Rakyat or DPR* (the House of People’s Representative). After the amendment of the Indonesian Constitution (*Undang-Undang Dasar 1945*), the *MPR* does not have power to issue *Garis-garis Besar Haluan Negara* (the Broad Outline of State Policy) and appoint the President and the Vice President.¹⁵² It should be noted that previously the MPR listed the hierarchy of primary sources

¹⁵² AM Fatwa, *Tugas dan Fungsi MPR Serta Hubungan Antar Lembaga Negara dalam Sistem Ketatanegaraan* (‘The MPR Power and Function and the Government Bodies Relationship within Constitutional System’) (2009), *Jurnal Majelis* Vol 1, 26. According to sections 3 and 8 (2)(3) of the Indonesian Constitution, the MPR powers are as follows:

1. The MPR has the authority to amend and enact the Constitution;
2. The MPR shall inaugurate the President and/or Vice President;
3. The MPR may only dismiss the President and/or Vice-President during his/her term of office in accordance with the Constitution;
4. In the event that the position of Vice-President is vacant, the MPR should hold a session within sixty days at the latest to elect a Vice-President from two candidates nominated by the President; and
5. In the event that the President and the Vice President die, resign, are impeached, or are permanently incapable of performing their tasks and duties within their term of office simultaneously, the tasks and duties of the presidency shall be undertaken by a joint administration of the Minister of Foreign Affairs, the Minister of Home Affairs, and the Minister of Defence. At the latest thirty days after that, the MPR shall hold a session to elect a new President and Vice President from the tickets nominated by the political parties or coalitions of political parties whose tickets won first and second place in the last presidential election, who will serve for the remainder of the term of office.

of legislation based on the 2000 MPR Provision Number three.¹⁵³ This provision is no longer used because the primary sources of legislation are explained within *UU Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* (the 2011 Law Number 12 on Making Law). Information about the hierarchy of Indonesian law, types of law, scope of law and possible conflict of law and resolutions, can be found in this law.

It should be noted that according to section 8 of the 2011 Law Number 12 on Making Law, there are other laws which can be enacted by government bodies such as the *MPR*, *DPR*, *Mahkamah Agung* or *MA* (The Indonesian Supreme Court), the Commissions which are enacted according to an Act or Government Regulation, or Provincial or District/City *DPR*. These kinds of laws are permitted as long as the delegation is by the *Undang-Undang* (the Acts) or based on a *kewenangan* (power) which is mentioned in *Undang-Undang* (the Acts). Examples of this are the *Surat Ketetapan Jaksa Agung* (the Provision Letter of *Jaksa Agung*), the *Surat Edaran Mahkamah Agung* or the *SEMA* (the Supreme Court circular letter), or the *Keputusan Menteri* (Ministerial Decree). It is possible for conflicts of law to occur within the Indonesian system. As stated above, the solution to this kind of conflict is based on judicial review through the *Mahkamah Konstitusi* (Constitutional Court) or the *Mahkamah Agung* (Supreme Court). The *Mahkamah Konstitusi* reviews whether the *Undang-Undang* (the Acts) contradicts the *UUD 1945* (Indonesian Constitution). The *Mahkamah Agung* can review other laws which are hierarchically under the *Undang-Undang* (the Acts) to see whether such laws contradict each other *Undang-Undang* (Acts).

Legislation is published according to *Bab IX Pengundangan* (Part IX Enactment) of the 2011 Law Number 12 on Making Law for the public¹⁵⁴ and is

¹⁵³ *Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-Undangan* (The People's Consultative Assembly of Indonesian Republic Provision Number III/MPR/2000 on Source of Law and hierarchy of law or TAP MPR Number III/2000).

¹⁵⁴ Section 81 the 2011 Law Number 12 on Making Law mentions that:
It is intended to people to know, legislation must be enacted and be put in:
a. State Gazette of the Republic of Indonesia;
b. Additional State Gazette of the Republic of Indonesia;
c. News of the Republic of Indonesia;

generally regarded as authoritative for purposes of interpretation. Most Indonesian legislation can be easily accessed through the internet by searching each institution's website. However, other laws which are enacted by government bodies as mentioned above, such as the *Surat Ketetapan Jaksa Agung* (the Provision Letter of *Jaksa Agung*) are difficult to find because they are not published. Lawyers, academics or researchers commonly apply directly to the institution in order to get a copy of the enactment. This can pose an obstacle to doctrinal legal research as Snel notes¹⁵⁵ and is further explained in section 2.2 (Using doctrinal legal research).

When there is a conflict of laws in Indonesia the question then is how to interpret and apply the laws and resolve any conflict? Conflicts within the Indonesian system might occur because the source of written law in Indonesia is hierarchically structured. This structure means that a lower hierarchy law cannot contradict a higher hierarchy law or superior norms suppress inferior norms (*lex superior derogat legi inferiori*) and a specific law in the same hierarchy suppresses the general law (*lex specialis derogat legi generali*). It is also true that the same specific law in the same hierarchy follows that of later norms: later norms suppress earlier norms (*lex posterior derogat legi priori*). The interpretation of laws within the Indonesian system is discussed further in the next section.

To understand the prosecutorial decision making process in Indonesia it has been necessary to consider many multiple sources of law. The provisions are listed in footnote below.¹⁵⁶

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- d. Supplement to the State Gazette of the Republic of Indonesia;
 - e. Regional Gazette;
 - f. Regional Gazette; or
 - g. Regional news.

¹⁵⁵ Marnix Vincent Roderick Snel, *Source-usage within doctrinal legal inquiry: choice, problems and challenges* (Boom legal publisher, 2014).

¹⁵⁶ The Indonesian statutes for example Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law'), Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law'), Peraturan President Republik Indonesia Nomor 38 Tahun 2010 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (2010 Presidential Regulation Number 38 about The Indonesian Prosecutor Organization), Peraturan Jaksa Agung Republik Indonesia Nomor: PER-036/A/JA/09/2011 (Jaksa Agung circular Number: PER-036/A/JA/09/2011), and Kitab Undang-Undang Hukum Pidana or KUHP (Law No. 1 of 1946 on Criminal Code) (Indonesia) ('1946 Criminal Code'). Several

Secondary sources such as books, journals, theses, and reports in the mass and social media, were also collected for analysis. The relevant literature was chosen because it related to the research questions. Both primary and secondary sources were used to analyse the Indonesian prosecution system. Law books and journals are written by academics, lawyers and other legal scholars, and were available from libraries (e.g. University libraries or institutional libraries such as the one on the *Mahkamah Agung* (the Indonesian Supreme Court)) or other government institutions. *Varia peradilan* is a *Mahkamah Agung* journal which consistently publishes current law issues that are mostly directly related to judicial decisions. However, as far as prosecution decision making is concerned, the researcher could not find any issue of *Varia Peradilan* which was relevant to prosecutorial discretion to discontinue criminal matters. There are other journals which can be accessed in Indonesia; for example, the *Jurnal Konstitusi* (Constitutional Journal) published by the *Mahkamah Konstitusi* Indonesia (Indonesian Constitutional Court) and mainly discusses the implications and the implementation of Constitutional Court decisions. This journal can be accessed free on the Indonesian Constitutional Court website. It should be noted that there are no recognized authoritative texts as secondary sources both on criminal law and criminal procedure law in Indonesia. However, some legal scholars and law professors have written books which encompass judicial decision making. For example, in administrative law, Philipus M Hadjon's¹⁵⁷ book is often cited by lawyers during argumentation or by judges dealing with Indonesian administrative law. M Yahya Harahap's¹⁵⁸ book is commonly cited in the field of Indonesian criminal procedure law. Books written by prominent legal scholars such as these are one source of law within the Indonesian system. That source is known as the legal scholar doctrine or *La Doctrine* in French law.

Indonesian cases such as the sandal jepit case, the cocoa picker case, the Nila Vitria case and the Bibit-Candra case.

¹⁵⁷ Philipus M. Hadjon et al., *Introduction to the Indonesian Administrative Law* (Gadjah Mada University Press, 1999).

¹⁵⁸ M.Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP, Penyidikan and Penuntutan* (Discussion on the Problem and Implementation of KUHAP, Investigation and Prosecution) (2000, Sinar Grafika).

In general, the Indonesian legal system acknowledges two sources of law: written and unwritten.¹⁵⁹ The written law is explained within the *2011 Law Making*¹⁶⁰ and includes ratified international treaties.¹⁶¹ The unwritten law is known as *adat* law, *jurisprudensi* and includes the legal scholar's doctrine as mentioned above. Both *adat* law and *jurisprudensi* (*Jurisprudence Constante*) were explained in Chapter 1 (see 1.2.4 Indonesian law). It should be noted that written law has more authoritative power than unwritten law. This means that *jurisprudensi* is not strictly followed if the written law is clear and unambiguous and might sometimes create inconsistencies in Supreme Court decisions. An example of this is the court's interpretation of the meaning of *wederrechtelijk* (against the law) as mentioned by Soetandyo¹⁶² (see 2.4 Legal Transplant). However, there has been significant improvement in the Indonesian Supreme Court website where documentation and information concerning the law can be collected and collated.¹⁶³ This includes findings *jurisprudensi*, and land mark court decisions.

Indonesian media reports became an important secondary source for this thesis because they proved useful in analyzing, questioning, and reflecting on both prosecutorial and judicial practice. For example, the media has been very critical of both the investigation and the prosecution of two former Indonesian KPK leaders, Bibit-Candra, which resulted in the questionable decision to set aside their criminal prosecutions. This kind of resource can lead to discussion of the roles of investigators and prosecution and can reflect current social values within Indonesian society.

Legal resources were collected based on the identification of and the inventarisation of both primary and secondary legal resources. These sources were

¹⁵⁹ E Utrecht, *Pengantar Dalam Hukum Indonesia (the Introduction of Indonesian Law)* (Ichtiar, 4th ed, 1957), 130. See also Peter Mahmud Marzuki, above n 39, 51.

¹⁶⁰ It should be noted that the written law in this sense is what is hierarchically structured within *Undang-Undang Nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* (Law No.12 of 2011 on Law Making) (Indonesia) ('*2011 Law Making*'). See the hierarchy of Indonesian law above.

¹⁶¹ E Utrecht, above n 159, 130 and 158.

¹⁶² Soetandyo Wignjosebroto, *Hukum Paradigma Metode dan Masalah* (Law Paradigm Method and Problem) (2002, Elsam and Huma) 135.

¹⁶³ See Mahkamah Agung RI, *Jaringan Dokumentasi dan Informasi Hukum* (Link of Documentation and Information of law) <<https://www.mahkamahagung.go.id/>>.

then systematically classified according to the research questions which underpin this research. Once classified, the collected legal resources were then analysed according to themes and notes were made and then conceptually analysed using both a descriptive and analytical process. The process of analysis involved the application of rules or principles of interpretation to formulate a more comprehensive restatement of the law from the collected materials. The major interpretative rules in Indonesian law are discussed later (see 2.2.2 Interpreting the law).

As a country which follows the Mandatory Prosecution System (MPS), prosecutorial discretion is limited. To what extent prosecutorial discretion to discontinue criminal matters is allowed within the Indonesian system is one of the questions which needed to be answered in this thesis, using doctrinal legal analysis. This type of analysis has also been used to determine the extent to which the Indonesian prosecution service is independent and accountable to the public at large. This thesis focussed on the current Indonesian system and compared it with other jurisdictions, such as the legal systems used in Victoria Australia and France, Germany and the Netherlands. Comparative legal analysis was used in that context.

Consistent with its title, this thesis seeks to determine whether there is any justification for Indonesia moving from a MPS to a discretionary prosecution system (DPS). To this end, the thesis includes a comparison of the concept of discretion in the context of the rule of law (see Chapter 3). More specifically, this comparison is used to analyse the prosecution systems within the surveyed countries (see Chapter 4.) Statutes and guidelines which explicate the operation of discretion within administrative law as well as criminal law were accessed in the surveyed countries so that further light could be thrown on prosecutorial discretion and when and how it can be exercised. Guidelines, if applicable, were treated as a secondary source in this thesis and include the Victorian DPP guidelines and the unpublished circulars within the Indonesian system. As an internal guideline for prosecutors, the Indonesian *Jaksa Agung* (the Attorney-General) issues what are called the *Surat Ketetapan Jaksa Agung* (the Provision Letter of Jaksa Agung). This guideline is not published and is not publicly

available which makes it difficult for the Indonesian public to become educated about how the guideline functions and the reason for it. However, as mentioned above, lawyers, academics, and researchers commonly ask the relevant institution for copies of documents. During field research in Indonesia this researcher found no difficulty in asking for and obtaining documents from the Indonesian Attorney-General's Office in Jakarta. Arguably this is because most Indonesian government institutions are aware of the *UU No 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (the 2008 Freedom of Information Law) and know that the Indonesian people have a right to get information as long as it is not prohibited by law such as under the *rahasia negara* (being an official state secret).

The researcher is not familiar with the Dutch, French and German languages. As a consequence, the language barrier made it difficult to access primary and secondary sources from these countries. The researcher therefore relied on obtaining either English or Indonesian translations in order to access materials. This signals a limitation of the study. In conducting comparative research primary legal materials were used but there was a more significant use of secondary sources including books and journals articles. While this often relies on the interpretation of others of the legislative provisions, it is justified because it permitted more jurisdictions to be scanned for practices and ideas. Secondary literature is particularly significant in the analysis of discretion and how to limit and structure it. In respect of civil law jurisdictions, this was justified because it formed part of '*La doctrine*' where, by comparison, primary sources from Victoria Australia were mainly used as it is a common law jurisdiction and available in English.

In analysing both primary and secondary resources for comparative purposes, the researcher was aware that there is a difference between civil and common legal systems used in this study. Statute law is the main legal source within civil law based countries. In the criminal procedure context there is principle that 'there is no competence without a sound statutory basis, that there is no competence without responsibility and that there is no responsibility without

accountability’’,¹⁶⁴ for this enacted law is an important source in countries using the civil law tradition.

On the other hand, in common law jurisdictions judges may make law through their own decisions by a process known as *stare decisis*. In Victoria Australia, the criminal law comprises both judge made law and statute law. Civil law countries like Indonesia acknowledge previous court decisions as binding, based on *jurisprudence constante* or *jurisprudensi*.¹⁶⁵ This concept is directly related to the pursuit of justice as mentioned in Chapter 1. In common law systems a single precedent is unusual. Twining and Miers explained how precedent in common law jurisdictions is used or operates.¹⁶⁶ They argued that usually legal principles are supported by a cluster of precedents. Common law and statutory principles are used in the interpretation of legislation in common law countries like Australia.

There is a convergence between civil and common law legal systems in the use of both legislation and precedents and this is also relevant to prosecution systems, discussed in Chapter 4. However, in collecting and analysing data the researcher acknowledged these issues (i.e. the difference between common and civil law systems) and was cautious in interpreting data.

2.2 Using doctrinal legal research

Hutchinson and Duncan explained that doctrinal legal research consists of two processes; firstly, locating the source of the law to determine its objective reality and secondly, analysing the text using principles of legal interpretation.¹⁶⁷ However both processes are criticised by Snel because finding relevant sources of law is difficult and there can be disagreement over theories of interpretation where legal sources are deeply ambiguous and raise the question concerning the

¹⁶⁴ Peter J.P. Tak, *The Dutch criminal justice system* (Wolf Legal Publisher, 2008), 5.

¹⁶⁵ Zweigert, Konrad, and Hans-Jurgen Puttfarken. ‘Statutory Interpretation--Civilian Style’ *Tulane Law Review* 44 (1969) 704.

¹⁶⁶ Twining, William & Miers, David, *How to do things with rules* (Weidenfield and Nicolson, 3rd, 1992), 319-320.

¹⁶⁷ Terry Hutchinson and Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research* (2012), 110.

objectivity of interpretation.¹⁶⁸ The thesis acknowledges this kind of criticism and, as a consequence, other research methodologies such as comparative legal research and empirical legal research have been used to provide more comprehensive evaluations. Doctrinal legal research is considered beneficial for this thesis because it can provide more internal insights into the Indonesian legal system.

Doctrinal legal research is important for analysing the Indonesian legal system in order to ascertain the substantive law on prosecutions. The importance of doctrinal research in law is recognised by Bodig who has argued that:

Doctrinal scholarship has a crucial role in cultivating the epistemic authority the legal profession lays claim to. It provides a sort of academic validation (authentication) to the claim that the legal profession possesses a distinctive expertise without which quality governance is not possible.¹⁶⁹

These research methods are further explained below.

2.2.1 Locating the source of the law

The researcher is from Indonesia and has taught Indonesian criminal procedure and corruption law for more than 5 years. As a result, it is suggested that he has significant knowledge in locating the relevant Indonesian sources, and in interpreting and synthesizing those sources. Most Indonesian legislation is published and can be easily accessed. The researcher's PhD supervisors also assisted in the location of relevant sources from both Indonesian and other jurisdictions, specifically the relevant Victorian legislation, case law and administrative guidelines. Moreover, during interviews, some interviewees pointed to both legislation and guidelines in Indonesia and Victoria Australia.

Several approaches were used in this doctrinal legal research – legal analysis, the case approach, and the conceptual approach. Legal analysis was applied when examining and explicating the *asas oportunitas/deponeering/seponeering* (opportunity principle or the expediency

¹⁶⁸ Marnix Vincent Roderick Snel, above n 155.

¹⁶⁹ Matyas Bodig, *Doctrinal Knowledge, Legal Doctrines and Legal Doctrinal Scholarship* (2011) 9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921305>.

principle) and the *asas legalitas* (the legality principle) within the Indonesian system. Both concepts are embodied in the provisions of various statutes and in both common and civil law systems. This provided a comprehensive understanding of the prosecution system and how the principle is being implemented in various jurisdictions. A case approach was used to evaluate some decisions regarding discontinuation of criminal matters in Indonesia.

This approach is limited because cases are not reported as they are in the adversarial common law systems. However, in the past few years the Indonesian Supreme Court has published all of its decisions online as a result of joint cooperation and aid from the Australian Government. However, when it comes to lower court decisions, the situation is more problematic and it is hard to get hold of a copy of any decision. As a result, it can be difficult to critically evaluate the Indonesian court system to determine its flexibility as well as relative cost and fairness. The *sandal jepit* case and the *cocoa picker* case illustrate those issues. The *Bibit-Candra* case (former anti-corruption body leaders) is presented to show how the prosecution system failed to prosecute a highly rank officer and the possibility of political influence on the case. The media extensively reported both the *sandal jepit* case and the *cocoa picker* case and criticised the officers involved including the police, prosecutors and judges. These cases are sensitive for those involved but it proved hard to find copies of documents on the decision to prosecute for both cases. However, the researcher obtained a copy of the *Jaksa Agung* decision to set aside the *Bibit-Candra* case after asking for help from a friend in Jakarta.¹⁷⁰ This highlights Snel's¹⁷¹ criticism of the doctrinal methodology, where finding the relevant law to determine the objective facts can sometimes prove difficult.

The conceptual approach was used to evaluate concepts and legal doctrines. By using that approach, the researcher discovered relevant legal concepts and the logic behind them, including legal definitions and legal

¹⁷⁰ The document can be obtained from the researcher if needed.

¹⁷¹ Marnix Vincent Roderick Snel, above n 155.

principles which proved relevant to the issues being researched.¹⁷² Therefore, part of De Cruz's¹⁷³ recommended methodology was followed in collecting and analysing materials (see 2.3 Using comparative law methodology). Several concepts which are at the heart of this thesis were also evaluated including discretion, the separation of powers, the *rechtsstaat* or rule of law, the mandatory prosecution system, the discretionary prosecution system, the independence of prosecutors, accountability and corruption.

The next section discusses the interpretation of legal issues within this thesis.

2.2.2 Interpreting the law

This section provides information concerning the rules of interpretation. The analysis of legal sources involved the application of rules or principles of interpretation to formulate a more comprehensive restatement of the law from the available materials.

In Indonesia, the following principle is applicable:

Pengadilan dilarang menolak untuk memeriksa, mengadili, dan memutus suatu perkara yang diajukan dengan dalih bahwa hukum tidak ada atau kurang jelas, melainkan wajib untuk memeriksa dan mengadilinya (The court should not refuse to examine, hear and decide a case filed on the grounds that the law does not exist or is less clear, but is obliged to examine and hear the case.)¹⁷⁴

Under this principle, judges must apply the law in cases which are brought before them using *penemuan hukum* (finding the law or legal discovery) through interpretation.¹⁷⁵ Under the *penemuan hukum* principle, Indonesian judges have to

¹⁷² Peter Mahmud Marzuki, *Penelitian Hukum* (Legal Research) (Kencana Prenada Media Group, 2005) 95.

¹⁷³ Peter De Cruz, *Comparative Law in A Changing World* (Routledge, 2007).

¹⁷⁴ Section 10 (1) *Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman* (Law No. 48 of 2009 on Judicial Power) (Indonesia) (2009 Judicial Power Law).

¹⁷⁵ It should be noted that the Indonesian system is different with the French system where the judge declaring the law is known as *bouche de la loi* (mouthpiece of the law). The Indonesian law does not acknowledge 'the judge is not to declare the law...' as mentioned in article 5 of the French Civil Code because the Indonesian judge is active declaring the law as part of Indonesian legal development.

locate or create the law and apply it by following and understanding social values, with the objective of achieving justice within society.¹⁷⁶

The *penemuan hukum* principle is similar to what occurs when common law judges hear cases for which there is no precedent. In doing so those judges are establishing precedents. Common law judges are also required to apply the rules of statutory interpretation when provisions are unclear or ambiguous. Similarly, Indonesian judges also interpret statutes – *inteprestasi hukum* (interpreting statutes). The word ‘*hukum*’ which means law in English refers to the written law or statutory law. Below are several rules of legal interpretation used for interpreting statutes within the Indonesian system:¹⁷⁷

1. *Interprestasi gramatik* (grammatical interpretation): *makna ketentuan undang-undang yang ditafsirkan dengan cara menguraikannya menurut bahasa umum sehari hari* (Statute interpretation by describing it using everyday language);
2. *Interprestasi sistematis atau logis* (systematic Interpretation or logic): *penafsiran ketentuan perundang-undangan dengan menghubungkannya dengan peraturan hukum atau undang-undang lain atau dengan keseluruhan system hukum* (Interpreting a statute by seeing and connecting a section with other sections in the statute or other statutes as a whole system of law);
3. *Interprestasi historis* (historical interpretation): *penafsiran makna undang-undang menurut terjadinya dengan jalan meneliti sejarah terjadinya perundang-undangan tersebut* (Statutory interpretation by investigating the history of the statute); and
4. *Interprestasi teleologis or sosiologi* (teleological interpretation or sociologic) *menafsirkan undang-undang sesuai dengan tujuan pembentuk undang-undang dari pada bunyi kata-kata dari undang-undang tersebut* (Interpreting a statute based on the purpose of the law maker than merely relying on the wording of the statute itself).

Civil law systems heavily rely on statutory law and hence the rules for interpreting statutes are important. Under the common law tradition statutory interpretation is also considered important. Indeed, certain principles within the common law tradition are similar to those used in civil law countries. For example

¹⁷⁶ Section 5 (1) *Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman* (Law No. 48 of 2009 on Judicial Power) (Indonesia) (2009Judicial Power Law).

¹⁷⁷ Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana* (Legality Principle and Finding the Law in Criminal Law) (2009, Erlangga) 66-67.

‘the purpose rule’¹⁷⁸ is an interpretive rule which is similar to the *interpretasi teleologis* mentioned above. The common law system also acknowledges what it calls the ‘the plain meaning rule’¹⁷⁹ which is similar to the ‘restrictive interpretation’¹⁸⁰ rule within the civil law systems. Maccormick noted the common core to both common law and civil law traditions when exercising legal interpretation.¹⁸¹ As mentioned above, there is a systematic interpretation or logic within the Indonesian system as a civil law country. Friesen explained that this logic is exercised by judges in two situations: first, when a provision is ambiguous and second, when the text is not literally applicable.¹⁸² It should be noted that in Australia there is legislative provision for courts to interpret legislation according to the intention or purpose of the legislature. Section 15AA of the *Acts Interpretation Act 1901 (Cth)* mandates a purposive approach. At the state level, Victoria has a similar provision in section 35 of the *Interpretation of Legislation Act 1984 (Vic)*. The use of a purposive approach was affirmed in Australia in *Bropho v Western Australia (1990) 171 CLR 1*. This type of special legislation on legal interpretation does not exist in Indonesia. The Indonesian system acknowledges legal interpretation based on scholarly doctrine as one source of Indonesian law. Legal scholars within the Indonesian system learn about legal interpretation during their study at law school.

Legal interpretation was used to obtain an understanding of the meaning of the *kepentingan umum* (public interest) in section 35 (c) of the *2004 Prosecutor*

¹⁷⁸ Hughes et al. mention that this purpose rule requires the court to apply the expressed intention or purpose of the parliament as it is expressed in the enactment. See Hughes et al, *Australian Legal Institutions Principle, Structure and Organisation* (Lawbook, 2nded, 2003) 214.

¹⁷⁹ The rule provides that where the language of an enactment is clear and explicit, the plain meaning of the words used is to be applied, regardless of the consequences and regardless of what might otherwise have been thought to have been the intention of the Parliament. See Hughes et al, *Australian Legal Institutions Principle, Structure and Organisation* (Lawbook, 2nded, 2003) 213.

¹⁸⁰ Restrictive interpretation means to explain a statute by restricting its scope (*lex stricta*) where a content of a statute should not be expanded or differently interpreted as written in the statute itself (*lex certa*).

¹⁸¹ D Neil Maccormick and Robert S Summers, *Interpreting Statute a Comparative Study* (Dartmouth, 1991), 567. The editors find that there is a common core of eleven arguments used in all systems that recognize the importance of ordinary meaning, the significance of precedent, the relevance of evolving understandings of statutory purposes, and the need to put a particular provision into its statutory context.

¹⁸² Friesen, ‘When Common Law Courts Interpret Civil Code’ (1997), *Wisconsin International Law Journal*, 11.

Law. What the Indonesian prosecution system considers as the “public interest” is not clear, as discussed in Chapter 4 (see 4.3.1.9. Public Interest in surveyed countries). In order to understand whether or not the Indonesian prosecution system is independent, systematic interpretation was used for evaluation. It was also used to interpret section 2 of the 2004 *Prosecutor Law* where the word ‘*merdeka*’ (independence) is used to claim that the Indonesian prosecution service is independent. Based on a gramatical interpretation, the Indonesian prosecution service is supposed to be independent from any other branch of government. However, after further investigation using systematic interpretation, it was found that the Indonesian prosecution service is not independent because it is controlled by the President. Furthermore, using systematic interpretation by looking at another section of the 2004 *Prosecutor law* and other laws such as the *Keputusan President* (Presidential Decree) and the *Keputusan Jaksa Agung* (the Decision of the Attorney-General), it was concluded that the Indonesian prosecution service is not independent. This issue is discussed in Chapters 4 and 6. Based on interview results in Chapter 5, the interpretation that the Indonesian prosecution service is not independent is fully justified.

In both the cases concerning former Indonesian KPK leaders (*Bibit-Candra* cases), legal interpretative analysis shows that a positivist approach was followed using systematic interpretation or logic as well as a sociological interpretation. Both leaders were suspected of abuse of power but the cases were discontinued by the *Kejaksaan* (Indonesian prosecutor). The Indonesian people believed that both KPK leaders were framed by a group of people who disliked the *KPK* (Indonesian Eradication Corruption Commission). Many non-government organizations who campaigned against corruption in Indonesia demonstrated on the streets and media campaigns demonstrated that many people supported both KPK leaders. The *Kejaksaan* argued that based on this opposition to his decision his reasons were sociologically based.¹⁸³ The *Kejaksaan* had issued

¹⁸³ *Surat Ketetapan Penghentian Penuntutan Nomor* (the Decision Letter to Discontinue Prosecution Number): Tap-01/0.1.14/Ft.1/12/2009 for Candra Martha Hamzah and *Surat Ketetapan Penghentian Penuntutan Nomor* (the Decision Letter to Discontinue Prosecution Number): Tap-02/0.1.14/Ft.1/12/2009 for Bibit Samad Rianto. The documents are available from the researcher if needed.

a *Surat Ketetapan Penghentian Penuntutan* (the Decision Letter to Discontinue Prosecution) for both cases. The *Kejaksaan's* argument was that section 140 (2) of the *1981 Criminal Procedure Law* can be interpreted as he had done, but that there were sociological reasons that had led to the prosecution decision. The decision was challenged by the victims on *praperadilan* (pre-trial). In the *Pengadilan Negeri* (the court of first instance), the court ordered the *Kejaksaan* to continue to trial with both cases and the decision to discontinue was considered illegal. The main reason for the judge's decision was that sociological reasons cannot be used to discontinue criminal matters. Section 140 (2) of the *1981 Criminal Procedure Law* is clear that sociological reasons cannot be used to discontinue criminal matters.¹⁸⁴ Using systematic interpretation, the *praperadilan* judge argued that only the *Jaksa Agung* (Indonesian Attorney-General) had the power to set aside a criminal matter according to section 35 (c) of the *2004 Prosecutor Law* and the reason for discontinuance could not include sociological reasons based on the public interest or what is known as the *Deponering*.¹⁸⁵ The appeal decision (both in *Pengadilan Tinggi* and *Mahkamah Agung*) supported the decision of the *praperadilan* in *Pengadilan Negeri* (the court of first instance).

2.3 Using a comparative law methodology

Following De Cruz's¹⁸⁶ suggestion a comparative methodology was used. In Chapter 1, the problem was identified and stated as precisely as possible in the research questions. The main comparison was between the Indonesian and the state of Victoria, Australia's prosecution systems. However, since the Indonesian legal system is a civil law system it was considered important to compare it with those of the Netherlands, France and Germany to provide more evaluative value.

Because of its geographical location close to Indonesia, Australia was used for comparative purposes. Another reason was that the researcher is studying in Victoria. As previously discussed, the researcher is fully aware of the difficulty of comparing a civil law country with a common law country.

¹⁸⁴ *Putusan Praperadilan Nomor* (Pre trial Decision) 14/Pid.Prap / 2010/ PN.JKT. Sel.

¹⁸⁵ *Putusan Praperadilan Nomor* (Pre trial Decision) 14/Pid.Prap / 2010/ PN.JKT. Sel.

¹⁸⁶ Peter De Cruz, above n 173.

The primary sources of law as previously mentioned including relevant legislation and case law were collected and collated. Reports from the team who drafted the Indonesian Criminal Procedure law were also collected and analysed. Sources included a review of professional practice commentaries on relevant laws as well as other literature. All materials relating to the relevant jurisdictions were collected and examined. The material was organized in the context of the research questions in accordance with headings reflecting the legal philosophy and ideology of the legal systems being investigated. The possible answers to the problems were provisionally mapped out, with a careful comparison of the different approaches. The legal principles were initially critically analysed in terms of their intrinsic meaning in each legal system rather than any external standard. The conclusions were then set out within a comparative framework with caveats, if necessary, and with critical commentaries wherever relevant and were related to the original aims of the enquiry. That commentary included references to legal doctrine and policy. The analysis extended beyond doctrinal law to administrative structures, policies and procedures, to provide a context to the foreign law and to also ascertain what structures may be needed in Indonesian law to support foreign transplants.

In this thesis, comparative research should be understood as a non-doctrinal approach which allows an extra perspective to the sources of Indonesian law from jurisdictions of other countries.¹⁸⁷ In general, comparative law studies have been undertaken for many reasons, including as an aid to legislation and law reform.¹⁸⁸ In this thesis, this means as an aid to law reform and resulting legislation. This comparison was used to provide suggestions for Indonesian criminal procedure reform. It was also used so that the differences and similarities between Indonesia and foreign jurisdictions (Australian (Victorian), French,

¹⁸⁷ See Terry Hutchinson, *Researching and Writing in Law* (2010, Thomson Reuters) 117.

¹⁸⁸ Peter De Cruz, above n 173, 18. De Cruz asserts that comparative law can be used: as an academic discipline;

1. as an aid to legislation and law reform;
2. as a tool of construction;
3. as a means of understanding legal rules; and
4. as a contribution to the systematic unification and harmonization of law.

German and Dutch) could be ascertained. Chapter 3 discusses discretion in general while Chapter 4 specifically discusses prosecution decision making.

Summarized information concerning the similarities and differences between the prosecution systems of the countries surveyed has been provided in table form in Chapter 4 which also critically discusses models of prosecution decision making to discontinue criminal matters. Issues concerning legal transplantation within the Indonesian system are discussed further in the current chapter (see 2.4 Legal transplant). The specific issue of how to create a transparent and accountable prosecution system led the researcher to locate solutions offered by different systems. For example, the DPP's Committee in Victoria Australia and The Board of the Prosecutor General in the Netherlands may suggest solutions in the Indonesian context. Furthermore, the idea that the Indonesian President, as head of the executive, may be permitted to continue giving instructions to the prosecution service provided that those instructions including the reasoning behind them are in writing, published, and available to the public was considered as a way of enhancing transparency.

It is acknowledged that there is also a difference between macro and micro comparative studies.¹⁸⁹ A macro comparison is a study of two or more entire legal systems whereas a micro comparison refers to the study of topics or aspects of two or more legal systems. In this research context, a minor comparison is mainly used to understand the Indonesian prosecution system and the Victorian (Australia) legal system so that they can be compared with other jurisdictions, namely Germany, France and the Netherlands. Different prosecution systems were compared to identify the core set of principles underlying them and to distinguish them from those traits that are merely external features (inquisitorial-adversarial). A comparative study of this sort is beneficial because it may provide suggestions for reform in a particular jurisdiction.

Several general considerations have been acknowledged when engaging in comparative analysis. De Cruz mentioned that the barriers include: linguistic and terminological problems; cultural differences between legal systems; the potential

¹⁸⁹ Ibid 233.

of arbitrariness in the selection of the objects of the study; difficulties in achieving ‘comparability’ because of the desire to see a common legal pattern in legal systems, for example the theory of general patterns of development; the tendency to impose one’s own (native) legal conceptions and expectations on the systems being compared; dangers of exclusion; and ignorance of extra-legal rules.¹⁹⁰ Since the researcher cannot speak or understand French, German and Dutch languages there is a linguistic barrier that might exacerbate a misunderstanding of terminological and cultural meaning. To minimise these misunderstandings the researcher discussed his findings not only with his supervisors but also with any other people who could provide him with the necessary understanding. All that could be hoped for is minimization of risk.

The next section discusses possible legal transplantation within the Indonesian system.

2.4 Legal transplant

Legal transplantation is ‘the moving of a rule or a system of law from one country to another or from one people to another’.¹⁹¹ Langer highlighted the problems associated with trying to use the biological metaphor of the “transplant” in a legal context as follows:¹⁹²

A kidney or an elm will look essentially alike in its original and receiving body or environment, but this frequently does not happen with legal institutions and ideas, which are imitated at certain conceptual levels but not at others. Another problem with the metaphor of the transplant is that even when the reformers try to imitate a legal idea or practice as closely as possible, this new legal idea may still be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving legal system.¹⁹³

He was also critical of the use of the phrase “legal irritant” arguing that:

¹⁹⁰ Ibid 219.

¹⁹¹ Melissa Crouch, ‘Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia’ (2013), *Hague Journal on the Rule of Law* 146, 149.

¹⁹² See the legal translation used by Maximo Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) *Harvard International Law Journal* 1, 32.

¹⁹³ Ibid 31.

An irritant does not necessarily come from another (legal) system or from outside the system it irritates. Thus, the comparative dimension of the metaphor is lost regarding both between the original and receiving legal systems and between the original idea or practice and the transferred one.¹⁹⁴

While acknowledging these criticisms, this thesis prefers to use the legal transplant terminology. Indeed, the term “*transplantasi hukum*” is commonly used in Indonesian literature. In addition, Langer himself acknowledges the success of the transplant metaphor as it can fill the gap between theory and practice and is a well-known metaphor used in medical and botanical literature where an entity has to adjust to the new organism or environment.¹⁹⁵

The reason why a country engaged in *transplantasi hukum* Viona argued is that as part of the International community, adjustment or following the development of international law it is hard to resist and that includes Indonesia.¹⁹⁶ Crouch said it might be due to the aspiration of a country to achieve legitimacy or model the developmental success stories of other countries, or the transplant might be an imposition by an external organization such as the IMF, the Asian Development Bank or the World Bank.¹⁹⁷

It may be true that a concept borrowed from one jurisdiction for transplant into another might not fit which is often cited as the main problem associated with legal transplants rather than the concept itself being either good or the bad. Alan Watson’s “mirror theory”¹⁹⁸ is a major proponent of legal transplant theory and his definition is often used in discussions in this regard. However, the strongest opponent is Legrand, who argues that it is impossible:

No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects its rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the rule itself.¹⁹⁹

¹⁹⁴ Ibid 32.

¹⁹⁵ Ibid 29-30.

¹⁹⁶ Viona Wijaya, *Menghadapi Fenomena Transplantasi Hukum: Suatu Ajakan untuk Memperkuat Jangkang Cita Hukum dan Tujuan Bernegara* (‘Facing Legal Transplant Phenomenon: Persuasion to Strengthen Law Vision and aims of Nations’) (2015), *Rechts Vinding journal*.

¹⁹⁷ Melissa Crouch, above n 191, 151.

¹⁹⁸ See William Ewald, ‘Comparative jurisprudence (II): the logic of legal transplants’ (1995) 43 *American Journal of Comparative Law*, 491.

¹⁹⁹ Pierre Legrand, ‘The impossibility of “Legal Transplants”’ (1997), 4 *Maastricht Journal of European and Comparative Law* 111, 120.

Watson responded to Legrand's argument of impossibility by stating that his view was old-fashioned.²⁰⁰ In response, Watson gave examples of successful legal transplants from time immemorial, such as the transplantation of Roman law.

As indicated above, Teubner's term 'legal irritant'²⁰¹ suggests that inserting a borrowed foreign concept in a new environment might produce irritating effects which may trigger new difficulties. Thus a due diligence study needs to be conducted before a concept is transplanted from one country to another. Gunarto argues that before a legal transplant is selected it needs to be adapted to the Indonesian social, political and geographical situation.²⁰² Other writers such as Viona also stress that the borrowed concept must fit with the Indonesian ideology known as *Pancasila*.²⁰³ Arguably not all legal transplants within Indonesia can claim to be successful. In this regard Nelken questions how success can be measured:

Can we measure the success of a legal transfer? There are enough problems in assessing the outcome of technical innovations: no one would say that the telephone is not a success even if it is used much more for communication between those who live nearby than, as had been anticipated, between people living at long distance. Assessing social innovation is even more complex.²⁰⁴

Several studies of legal transplants in Indonesia claim that transplantation projects fail. Using Siedman's²⁰⁵ background study on British occupation in Africa, prominent Indonesian legal professor Soetandyo argued that the implementation of *Kitab Undang-Undang Hukum Pidana* (Indonesian Criminal Code) during the Dutch occupation of Indonesia was not followed consistently as different interpretations of what was considered as a crime within the Indonesian *adat* people still exist, especially concerning the Dutch concept known as

²⁰⁰ Alan Watson, 'Legal transplants and European private law' (2000) *Electronic Journal of Comparative Law*. Visited on 22 January 2015 <www.ejcl.org/44/art44-2.html>.

²⁰¹ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 12.

²⁰² Marcus P Gunarto, *Faktor Historis, Sosiologis, Politis, dan Yuridis dan Penyusunan RUU HAP* ('Historic, Sociologic, Politic and Juridical factors on Drafting RUU HAP') (2013), *Mimbar Hukum* Volume 25 13, 17.

²⁰³ Viona Wijaya, above n 196.

²⁰⁴ David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds.), *Adapting Legal Cultures* (Hart Publishing, 2001) 46.

²⁰⁵ See Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa A Problem in the Reception of Foreign Law' (1970), *Law and Society Review* 161.

wederrechtelijk (against the law).²⁰⁶ He further argued that codification or unification within the Indonesian system can be achieved but a gap will remain where what is considered a norm may be different when it comes to actual implementation of that norm.²⁰⁷ Saidin in his study of Indonesian copyright law also asserted that there had been a failure to transplant foreign law into Indonesia:²⁰⁸

... the rejection on Indonesian copyright law was not because of the weak legal sanction, but due to the failure in the law enforcement, because the legal substance regulated in copyright laws that were enacted in Indonesia, have never been part of their law; never been part of the nation's soul, or have never been the law of Indonesian society, but it is a law that was transplanted, and forced to be enforced in Indonesia.

He cautioned against forcing a foreign transplant into Indonesia:

... the battle of foreign ideology in legal political choice through transplantation policy, did not manage to give the victory to *Pancasila* as the country's ideology, but to give the victory to the foreign capitalistic ideology instead.²⁰⁹

The package of rules forced by international organizations such as the WTO and the TRIPS agreement onto Indonesia face the sort of difficulty highlighted by Saidin.

In addition, Indonesian scholars and legal practitioners commonly use legal comparisons to better describe existing legal concepts in Indonesian law, to search for new concepts or to support legal doctrinal and policy arguments. They tend not to impose limits by reference to civil or common law legal systems, or by jurisdiction or even by religion. This might create more problems than solutions in the future in particular areas because the idea may not fit with the Indonesian situation.

2.4.1 Legal transplants and elites

Strang argued that Indonesian code based reform can transform its legal culture:

²⁰⁶ Soetandyo Wignjosubroto, above n 162, 135.

²⁰⁷ Ibid 142.

²⁰⁸ OK Saidin, 'Transplantation of Foreign Law into Indonesian Copyright Law: the Victory of Capitalism Ideology on Pancasila Ideology' (2015), *Journal of Intellectual Property Rights* volume 20 230, 230.

²⁰⁹ Ibid.

Code-based change allows its proponents to seek to transform the legal culture. It can directly and systemically alter the mindset of the legal elites through the creation of new paradigms that require legal actors to accept and internalize a new conceptualization of their roles. By using a “total immersion” approach, it can challenge legal actors to do more than simply translate reforms back into their existing conceptual framework.²¹⁰

What he is talking about here is a group of elites which sit together to make proposals for changing the law, some of which may involve foreign transplants. These elites can come from different groups such as law enforcers (police, prosecutors, lawyers and judges), executive representatives, and academics. Such proposals offer the potential for reform. The proposal is then introduced by the particular elite to the government who may pass the idea on to the legislature for parliamentary debate. It should be noted that sometimes the proposal for reform comes directly from the legislature. In either case, the issue can then be debated by the parliamentary elite and, if successful, by “total emersion” become law.

There is also a connection between law and culture. However, we still need to be careful about using the word ‘culture’ within the Indonesian context, as Lindsey explains with regard to legal transplants:

Perhaps we should adopt the solution of Daniel Lev, a leading scholar of Indonesian law, who bans his students from using the word ‘culture’ because it is usually code for something else – politics, religion or ethnicity, for example. This has the advantage of forcing precision and more careful analysis of legal transplants and local culture in comparative legal studies and cross-jurisdictional law reform.²¹¹

Interestingly, Teubner²¹² offers observations on the links between political and legal systems and the significance of resistance in political systems to law reform.

Watson notes the importance of elites in successful transplants. These elites, lawyers and legislators,²¹³ are those who handle ‘the technical job of importing or adapting foreign law, or ... smoothing the process of moulding local

²¹⁰ Robert. R. Strang, “‘More Adversarial, but not Completely Adversarial’: Reformasi of the Indonesian Criminal Procedure Code’ (2008) *Fordham International Law Journal* 188,191.

²¹¹ Tim Lindsey, ‘History Always Repeats? Corruption, Culture, and “Asian Values”’ in Tim Lindsey and Howard Dick (eds.), *Corruption in Asia, Rethinking the Governance Paradigm* (2002, The Federation Press), 19.

²¹² Gunther Teubner, above n 201, 21-22.

²¹³ Alan Watson, ‘Comparative Law and Legal Change’ (1978), 37 *Cambridge Law Journal* 314, 314-5.

law to suit new needs and new social desires'.²¹⁴ He suggests it is the “idea” which is being appropriated. By concentrating on the foreign “idea” of the different stages of economic development or the differing political traditions may not impede the effectiveness of the transplant.²¹⁵

Kahn-Freund contends that the success of legal transplants depends on local factors, the most important being their political conditions²¹⁶ and organized interests in making and maintaining legal institutions. These include political elites, corporate sectors, trade unions and cultural and religious groups.²¹⁷

Teubner’s system theory based on ‘autopoiesis’,²¹⁸ seeks, among other things, to model the relationship of laws with other systems²¹⁹ and to revise understanding of the relationship between systems and the environment in highly modern differentiated societies.²²⁰ On the one hand, he asserts that 'since contemporary legal rule production is institutionally separate from culture norm production, large areas of law are only in loose, non-systematic contact with social processes'. But, on the other hand, he also insists on what he calls 'law's binding arrangements' to other social subsystems and discourses.²²¹

Teubner suggests that a transferred rule ‘irritates’ existing systems based on his study of the ‘good faith’ principle in British contract law.²²² It irritates both legal discourse and social discourse to which the law is connected to recreate something else. In other words, the transferred law triggers a whole series of new and unexpected events:

... it irritates law’s ‘binding arrangements’. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and

²¹⁴ Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001) 282, 96.

²¹⁵ Watson, 'Legal Transplant and Law Reform' (1976) 92 *Law Quarterly Review* 79 79 (1976); Watson, Alan Watson, *Legal Transplant: An Approach to Comparative Law* (The University of Georgia Press, 2003) 315.

²¹⁶ Otto Kahn-Freund, Otto Kahn-Freund, 'On uses and misuses of comparative law' (1974) 37 *Modern Law Review* 1, 1, 6, 8 and 27.

²¹⁷ *Ibid* 1-3.

²¹⁸ Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984), *Law and Society Review* 291, 292.

²¹⁹ Gunther Teubner, above n 201, 11 and 18.

²²⁰ David Nelken, above n 204, 7 and 15.

²²¹ Gunther Teubner, above n 201, 11 and 14.

²²² *Ibid* 11, 12.

forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated.²²³

Teubner argues that success in the transfer of law varies in accordance with the nature of the connection with its social system.²²⁴ This connection ranges from 'loose coupling to tight interwovenness'.²²⁵ Transfers are relatively easy in areas of law that have only loose contact with social processes, although it has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.²²⁶ On the other hand, a transferred rule that belongs to the category that has tight 'structural coupling', that is, closely connected to the 'social process',²²⁷ is prone to meet resistance from the recipient legal system. Kahn-Freund's observations in comparative law would suggest that politics is a significant resistant factor as it is the law's primary link to society.²²⁸ Teubner suggests that, in addition to politics, other discourses in the social system are similarly significant depending on the nature of their structural coupling to the law.²²⁹ They include the economy, technology, health, science and culture, and the multiple discourses in a society that make up its social systems.²³⁰ These will vary between societies.

In a similar way, in relation to the transfer of international human rights laws to domestic legal systems, Risse et al. argue that changes in the international environment are ultimately more important than a country's specific features and economics in explaining the spread of human rights' norms around the world.²³¹ The spread of these norms, in the form of persuasion, sanctions, coalition building and domestic institutions, generates domestic political change. The international

²²³ Ibid 26-8.

²²⁴ Ibid, 18-19.

²²⁵ Ibid, 18.

²²⁶ Ibid, 19.

²²⁷ Ibid, 18-20.

²²⁸ Otto Kahn-Freund, above n 216, 1, 8 and 27. See also Gunther Teubner, above n 201, 22.

²²⁹ Gunther Teubner, above n 201, 18.

²³⁰ Ibid, 22.

²³¹ Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms Into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press).

system – increasingly dense in human rights groups, multilateral agreements and entangling norms – can isolate illiberal regimes and push them to reform.²³²

2.4.2 Mandatory prosecution system as a legal transplant

The current Indonesian criminal procedure law known as KUHAP is the product of legal reform in 1981. Before this, the Indonesian criminal procedure law adapted the Dutch HIR (*Herziene Inlandsch Reglement*) through the *asas konkordansi* (concordant principle) after independence. Arguably, the criminal procedure law, before and after Indonesian independence until 1981, was similar if not the same. As part of criminal procedure, the Indonesian prosecution system followed the Dutch model where discretion to discontinue criminal matters is limited. This system is known as the mandatory prosecution system (MPS).

The MPS is not an original model of the Indonesian prosecution system because, as explained in Chapter 4, it originated from Germany and is commonly used by other civil law countries including the Netherlands. Limited discretion in prosecution decision making was followed by the Dutch system until it changed in the early 1970s and gave more discretion to prosecutors. (see 3.2.4 the Netherlands).

The current Dutch model which grants prosecutors more discretion is not followed by the Indonesian system. The Indonesian prosecution system after independence was borrowed from earlier Dutch systems which were designed for colonialization. In 1981 Indonesia reformed its Criminal Procedure law by enacting the *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) known as KUHAP. The prosecution decision about whether to continue or discontinue criminal matters in KUHAP is still the same as the previous model (HIR) where discretion is strictly limited. The Indonesian reformers at that time failed to acknowledge the change in the Dutch system where discretion is not strictly limited.

After more than 35 years, prosecution decision making to discontinue criminal matters is still limited. This will change in the future when the new draft

²³² Ibid 318.

of Indonesian criminal procedure law gives more discretion to discontinue criminal matters, as explained in Chapter 4. Several models of prosecution decision making to discontinue criminal matters were adapted in the new draft. It is difficult to identify which country is the source of the borrowed model within the new draft. If the Dutch system was used as the model, the criteria for assessing the “public interest” to discontinue criminal matters should have been changed to accord with the Dutch system. But this is not the case where the “public interest” criteria within the new Draft are different from those used in the Netherlands. Similarly, the “penal order” which is exercised by the Dutch system has not been adapted to the new draft.

2.5 Conducting the interviews

As previously mentioned, interviewing significant players in the criminal justice system formed the empirical research in this thesis. Interview data is considered as qualitative data. In order to gather quantitative data, a researcher uses a set of survey questions. Surveys are useful for providing quantitative or numerical descriptions of trends, attitudes or opinions by surveying a wide sample population.

The data from the interviews was used to understand prosecution practices in Indonesia and Victoria Australia. Interviews were used to see whether the law in the books matched the law in practice. One limitation of this research is that the researcher was not proficient in French, German and Dutch. This meant he could only interview players who spoke either Indonesian or English. This might affect the comparability between jurisdictions in this study. Furthermore, it is also unusual to use interviews as a research tool in doctrinal law. However, as previously mentioned, this study goes beyond doctrinal research to provide a more comprehensive and richer understanding of the prosecution decision-making process than would be otherwise available.

Looking at what the law does in practice and comparing it with the law in the books is illustrated by the *Australian Crime Commission v Stoddart* (2011)

HCA 47, where Heydon J refers to it on the issue of whether spouses have a common law privilege of not testifying against each other.²³³ At paragraph 65 he notes the ability of the judge in the course of a trial to apply ‘moral pressure’ to counsel not to undertake particular courses of action but also notes that it is not the ‘law’ or ‘discretion’ which has enabled a judge to do this. At paragraph 132 and then up to paragraph 139 he refers to ‘the weight of professional tradition’. At paragraph 133 he quotes AWB Simpson the legal historian who writes of the common law as follows:

the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes.²³⁴

It is unusual for a judge to be so revealing. Usually the sort of information the judge offered would only be available by interview.

Empirical data is important in order to justify whether law in the books matches law in practice. One obvious example is the claim that the MPS used in Indonesia necessarily means that every crime is prosecuted to its finality. This is not the case as not every crime is detected, and if detected, prosecuted.

The interviews were conducted based on purposive sampling, a type of non-probability sampling technique. Using this technique, sampling is based on the judgement of the researcher. The main goal is to focus on the particular characteristics of a population that are of interest. As a result, the sample is not representative of the population as a whole. However, this is not considered to be a weakness, as it can produce rich data. Holloway explained that the criteria for selecting interviewees may recognise that generalizability is less important than

²³³ See also Edward Fearis, ‘Australian Crime Commission v Stoddart: the End of Common Law Spousal Privilege’ (2012), *Queensland University Technology Law and Justice Journal* Volume 12 Number 2, 103.

²³⁴ *Australian Crime Commission v Stoddart* (2011) HCA 47. See also AWB Simpson, ‘The Common Law and Legal Theory’ in Simpson (ed), *Oxford Essays in Jurisprudence* (Clarendon Press, 2nd Series, 1973).

the collection of rich data and an understanding of the ideas of the people chosen for the sample.²³⁵ This reflects the nature of the interviews here and ‘the complexity, uniqueness and indeterminateness of each one-to-one interaction’²³⁶. Interviewing fits into the qualitative research model and has the advantage of it remaining open to new findings and some degree of unexpectedness.²³⁷

The interviewees chosen were significant players in the criminal justice process in Indonesia and Victoria, Australia. The number of participants was 21 and each participant was interviewed for approximately 45 minutes. Holloway suggested that the number of participants for qualitative research can vary from 4 to 40, or may be determined when it is considered that the interviewees have reflected the range of views of that sub-set of the population being interviewed and when informational redundancy or saturation has been reached.²³⁸ This is evident when the interviewees are saying nothing new. There may, however, still be some benefit in continuing to interview participants to confirm if a particular opinion is widespread and generally accepted.

The Australian participants interviewed had significant experience in the criminal justice system. They included a senior member of the Victorian Bar, five judges and an associate professor specializing in criminal law at Monash University (see Table A for the details of participants). All of the Australian participants were introduced to the researcher by the principal supervisor. This situation was different from the Indonesian participants where the researcher had to contact potential interviewees directly by letter, phone or email, or use personal contacts, or introductions through others. Some participants were interviewed using a snowball technique. Snowball sampling (or chain sampling, chain-referral

²³⁵ Holloway, *Basic Concepts for Qualitative Research* (1997, Victoria Australia), 142.

²³⁶ J Scheurich, *A Postmodernist Critique of Research interviewing Qualitative Studies in Education*, 8, 241 cited in Fontana and Frey, ‘The Interview: From Neutral Stance to Political Involvement’ in Denzin and Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (2008, Thousand Oaks) 116.

²³⁷ Marshall and Rossman, *Designing Qualitative Research* (1989, Newbury Park), 52-55.

²³⁸ Holloway, above n 235, 142.

sampling or referral sampling) is a non-probability sampling technique where existing study subjects recruit future subjects from among their acquaintances.²³⁹

During interviews two unexpected events occurred. First, an Australian judge stated that he had met and talked to a former Indonesian *Jaksa Agung* (Attorney-General) about the independence of the Indonesian prosecution system. The judge gathered from the comments and gestures of the former *Jaksa Agung* that he (the former *Jaksa Agung*) was not favourably disposed to the notion of prosecutorial independence. The judge came away from the discussion with the distinct impression that the former *Jaksa Agung* was beset by a corrupt mentality. Second, the day before the researcher was due to interview the Chief Justice of the Indonesian Constitutional Court, the Chief Justice was arrested and charged with corruption for allegedly accepting a bribe. Fortunately another Indonesian Constitutional Judge was willing to be interviewed.

In Indonesia, the players interviewed included a very senior judge of the Indonesian Supreme Court (*Mahkamah Agung*), a representative of the Indonesian Attorney-General (*Jaksa Agung*), a representative of the Indonesian National police (*Kapolri*), a very senior judge of the Indonesian Constitutional Court (*Hakim Mahkamah Konstitusi*), three politicians in the legislative law commission, and three Indonesian law professors. One of the Indonesian law professors interviewed was previously a *Jaksa Pengawas/Jamwas* (Deputy on Supervision) that is directly under the Indonesian Attorney-General (*Jaksa Agung*). He supervised the entire Indonesian prosecutor system prior to retiring. Another Indonesian law professor (and his team) had submitted a report on the New Draft of the Indonesian Criminal Procedure law to the Indonesian law commission at the Indonesian legislature (*Dewan Perwakilan Rakyat Republik Indonesia/DPR RI*).

Some interviews were recorded and some interviewees preferred that the researcher took only written notes. In the latter situation, the accuracy of what was transcribed may be an issue. However, in an attempt to overcome this problem interviewees were offered transcripts of the interviews so they could check them

²³⁹ Vogt, Dictionary of Statistic and Methodology: A Nontechnical Guide for the Social Science (2005, Thousand Oaks).

for accuracy. In a few instances the interviews were conducted by email because the schedule of the participant proved a barrier to a face-to-face interview. In those cases the interviewees might have felt constrained by the written record not to be as frank in answering questions. Further, the researcher could not observe the gestures of those interviewed. Silverman stressed that by preserving the details of interactions and observations, researchers are in a better position to identify the practical concerns, conditions and constraints that people confront and deal with in their everyday life and actions.²⁴⁰ The transcripts of Indonesian interviewees were translated by the author into English. The Australian interviews were transcribed and in both cases final translations were then analysed using the NVivo software program.

2.5.1 Data analysis

In terms of the analysis of the interview data, this researcher took the interpretive approach in order to understand the law, its reality and practice, as seen and experienced by the respondents in relation to the prosecution system whether in Indonesia or Victoria Australia.

2.8 Conclusion

This thesis can be seen as a mixed methods approach using doctrinal legal research, minor comparison legal research, and empirical legal research. The research methodologies outlined above provide a basis and also a justification for the conduct of the research that has been well established in law for both doctrinal and non doctrinal legal research. Chapters 3 and 4 mainly deal with comparative legal research, whereas doctrinal legal research is used subsequently for evaluating the Indonesian position. Chapter 5 analyses the results of the interviews as part of the qualitative research design for this thesis and NVivo nodes of analysis. The next chapter, Chapter 3, discusses discretion and its relationship to the rule of law.

²⁴⁰ David Silverman, *Doing Qualitative Research* (2005, 2nd, Sage) 174.

Chapter 3

Discretion and Its Relationship with the Rule of Law

3.1 Introduction

This chapter discusses discretion in administrative decision making in Australian, French, German, Dutch and Indonesian public law. It compares the concept of discretion and the manner in which it is confined, structured and subjected to review and considers the relationship of discretion with the common law concept of the “rule of law” and the civil law concept of the “*rechtsstaat*”. It demonstrates that the extravagant version of the rule of law or the principle of strict adherence to legality in the *rechtsstaat* generally gives way to concepts of both which provide more room for discretion. This was in part driven by the development of the regulatory state, which created and enlarged discretions to better enable bureaucrats and technocrats to co-ordinate more complex and integrated social, economic and political systems. This chapter provides a framework for the existence, exercise and review of discretion in the context of the rule of law and *rechtsstaat* of which prosecutorial discretion is a specific example and the lack of discretion to discontinue criminal matters in the Indonesian system, discussed in Chapter 4.

3.2 Discretion across legal systems

Discretion means different things in different legal systems but in all systems there is an understanding that it confers a power on a decision maker to exercise judgment in making decisions which may lead to different results. Klatt for example states that: ‘Legal systems differ widely in character and scope. Some sources of discretion are unique to specific types of legal systems’.²⁴¹

²⁴¹ Matthias Klatt, ‘Taking Rights Less Seriously, A Structural Analysis of Judicial Discretion’ (2007) *Ratio Juris* 506, 507.

There is also a shared understanding that there are boundaries to the leeway in exercising judgment, of the need to eliminate unnecessary discretion, to structure what remains and provide mechanisms for its review. There is some flexibility in designing such systems. Discretions and their control in each legal system represent the outcomes of evolutionary pathways in that legal system.

According to KC Davis ‘a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction’.²⁴² Hart provides three examples that would all clearly fall within the agreed ambit of the term ‘discretion’.²⁴³ The first is ‘expressed’ or ‘avowed’ use of discretion by administrative bodies and courts. The second is tacit or concealed discretion. The third is discretionary interference with or dispensation from acknowledged rules.²⁴⁴ His example of an avowed use of discretion by an administrative body is in the allocation of resources conceived to be at the disposal of government or in the management of services undertaken by government. In courts it includes the expressed use of discretion such as in the application of standards by a judge to determine whether an alleged malicious prosecution was based on ‘reasonable or proper cause’. Tacit or concealed use of discretion, according to Hart, is exercised in interpreting statutes or precedents. Further he explained that a pardon or a commutation of sentence in the criminal justice system is an example of discretionary interference or dispensation from acknowledged rules.²⁴⁵

Dworkin, in a well-known metaphor on the relativity of discretion, argued that ‘discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction’.²⁴⁶ He suggested two types of discretion, strong discretion and weak discretion. Strong discretion exists when officials are not bound by any rules or standards. Weak discretion has two forms. In the first the official is bound by a standard set by an authority with a possible review of

²⁴² KC Davis, *Discretionary Justice. Preliminary Inquiry* (Louisiana State University Press, 1969) 4.

²⁴³ H.L.A Hart, ‘Discretion’ in Nicola Lacey Essays ‘the Path Not Taken: H.L.A Hart’s Harvard Essay on Discretion’ (2013) *Harvard Law Review* 636, 655.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ronald Dworkin, *Taking Right Seriously* (Harvard University Press, 1977), 77.

the decision. In the second an official is similarly bound but is the final arbiter without review of any decision.

Forms of discretion described by Davis, Hart and Dworkin, can be seen in both common law and civil law systems. This first section provides a brief survey of discretion across the legal systems of Australia, France, Germany, the Netherlands and Indonesia. It considers Davis's suggestion that unnecessary discretion should be eliminated and that the exercise of necessary discretion should be confined, structured and checked. In other words, administrative agencies should be required to develop rules that communicate the limits to the powers they prescribe. They should be required to make rules to structure their discretions in meaningful ways. The decision or action should be amenable to review.

3.2.1 Australia

The Oxford English dictionary defines discretion in the context of law as:

The power of a court, tribunal, government minister, or other authority to decide the application of a law (such as the extent of a criminal punishment, the nature or extent of a civil remedy, or the administrative details of a statutory scheme), subject to any expressed or implied limits.²⁴⁷

Other dictionaries from common law backgrounds have a strong resemblance to each other. Black's Law dictionary in the US describes administrative discretion as 'A public official's or agency's power to exercise judgement in the discharge of its duties.'²⁴⁸ Jowitt's English dictionary describes the exercise of discretion as follows:

A person who may exercise a discretion in the performance of a function has the flexibility to perform it in a manner suitable for each individual case. Thus the court, person charged with administrative functions and persons acting in a fiduciary capacity are able to make decisions appropriate to the particular circumstances before them. However, the scope for the exercise of discretion is not unlimited, but is bounded by the legal requirements applicable to the kind of discretion in question.²⁴⁹

²⁴⁷ *Oxford English Dictionary* (Oxford University Press, 2014).

²⁴⁸ *Black's Law Dictionary* Ninth edition (2009).

²⁴⁹ *Jowitt's Dictionary of English Law* Third edition (Thomson Reuters, 2010).

Other dictionaries such as *the Australian Legal Dictionary* define discretion as:²⁵⁰

The power or authority of a decision maker to choose between alternatives, or to choose no alternative. Discretion may be absolute, that is, subject to no limitation or review. Alternatively, the discretion may be confined, structured, or checked in some way. Discretion is usually confined by the statute which describes the ambit of decision-making power. It is structured when a particular procedure must be followed in making the choice. A discretion may be checked by internal review or by external review such as judicial review of an administrative action.

In Australian law discretion may be expressed or implied in a statutory provision or in a common law principle or prerogative power. Prerogative is difficult to define, and is described as follows:

There is no single accepted definition of the prerogative. It is sometimes defined to mean all the common law, i.e. non-statutory powers, of the Crown. An alternative definition is that the prerogative consists of those common law powers and immunities which are peculiar to the Crown and go beyond the powers of a private individual e.g. the power to declare war as opposed to the normal common law power to enter a contract²⁵¹

Official decision makers, whether exercising a discretion or not, are confined by the rules or principles which give them the authority to act. Lane and Young state that:

The most easily identifiable exercise of public power is that which results from the exercise of an ordinary statutory power. Government regulation of economic and social activity is mostly achieved by way of legislation which authorises public bodies and officials to make decisions in accordance with the terms of the relevant statute. Decisions granting or revoking permits allowing persons to enter or remain in Australia; decision issuing, renewing or revoking occupational licences; and decisions levying rates and charges are all usually made pursuant to statutory powers.²⁵²

Decision making outside the terms of the legislation is not allowed and is reviewable. Lane and Young note that in Australia 'not all powers exercised by public bodies and officials have a legislative source'²⁵³. Examples are powers based on common law including executive decisions using the prerogative.

²⁵⁰ Australian Legal Dictionary (Butterworths, 1997) 368.

²⁵¹ Fourth Report of Session 2003-04, Taming the Prerogative: Strengthening Ministerial Accountability, HC 422 (2004), Ev 13.

²⁵² W.B. Lane and Simon Young, *Administrative Law in Australia* (Lawbook co, 2007) 37.

²⁵³ Ibid 38.

In the context of the United Kingdom Kunnecke notes that:

When defining the meaning of prerogative powers, no express written list of powers can be found within the British constitution. They are entrenched by practice and example. Prerogative powers are all those powers which were traditionally exercised by the monarch and which have not been regulated by statute.²⁵⁴

The Chief Justice of Australia R S French AC points out that the exercise of some prerogative powers may be unreviewable by courts.²⁵⁵ This seems to indicate that some absolute discretion exists. However, French agrees with a former judge of the High Court, Justice Gummow, that the judicial review of the exercise of some prerogative powers may not be impossible.²⁵⁶

Where discretionary power is granted by statute the power will have designated boundaries. French states that the boundaries will be found in the inherent logic of the statute, that is, in the subject matter, scope and purpose of the legislation by which it is conferred.²⁵⁷ The main focus with a ‘confining discretion’ is the power granted by the statute itself. This is different from a ‘structuring discretion’ which focuses on the decision maker vested with the discretion.

Davis describes a structuring discretion as answering the question of:

how can administrators structure the exercise of their discretionary power, that is, how can they regularize it, organize it, produce order in it, so that their decisions affecting individual parties will achieve a higher quality of justice.²⁵⁸

It is common to use published guidelines to structure the exercise of the discretion. Most government agencies in Australia do so under open government principles. The guidelines play a role in shaping the decision. On the other hand, the public can always check whether the officials have not gone beyond the indicated boundaries to their power. For example, there are guidelines made by the Commonwealth Director of Public Prosecutions around decisions to prosecute

²⁵⁴ Martina Kunnecke, *Tradition and Change in Administrative Law. An Anglo-German Comparison* (Springer, 2007) 74.

²⁵⁵ R.S. French AC, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed.) *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 31.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* 30.

²⁵⁸ KC Davis, above n 242, 97.

and other aspects of the prosecutorial power. This openness is important according to Davis: ‘the natural enemy of arbitrariness and a natural ally in the fight against injustice’.²⁵⁹

In addition, the enactment of the *Freedom of Information Act 1982* (Cth) played a significant role in making government accountable in Australia. Grove and Boughey stated that it was intended to make the federal government more accountable by providing individuals with a legally enforceable right to access government information.²⁶⁰

Besides confining and structuring discretion, reviewing discretion is considered as the other principal way to control it.²⁶¹ In Australia, judicial review of administrative decisions was available at common law through the prerogative writs.²⁶² These writs originated in English common law in the court of King Bench as part of its inherent power to supervise or oversee all other courts, tribunals and public bodies. They represented the central control of the sovereign and the supremacy of royal law. The orders were issued in the name of the sovereign. The courts controlled discretion under two main principles, *ultra vires* (outside the power) and natural justice.²⁶³ Acting *ultra vires*, as indicated, is to act outside the scope of authority. Natural justice related to procedures and the circumstances in which an administrative decision is made and takes effect.²⁶⁴ The principles for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are a restatement and simplification of the common law principles made as part of the reform of federal administrative law in the 1970’s.²⁶⁵

²⁵⁹ Ibid 98.

²⁶⁰ Matthew Groves and Janina Boughey, ‘Administrative Law in the Australian Environment’ in Matthew Groves (ed.) *Modern Administrative Law in Australia* (Cambridge University Press, 2014) 14.

²⁶¹ KC Davis, above n 242, 55.

²⁶² R A Hughes et al., *Australian Legal Institutions, Principle, Structure and Organisation* (Lawbook Co, 2003) 73. The examples of the prerogative writs are ‘*mandamus* (an order compelling a public official to perform his or her duty) or *certiorari* (an order of a superior court quashing the decision of a lower court or tribunal) or *prohibition* (an order directing a lower court or official to desist from some action) or *quo warranto* (challenging a person’s authority for some particular act)’.

²⁶³ Jurgen Schwarze, *European Administrative Law* (Sweet and Maxwell 1992), 282.

²⁶⁴ Ibid 286.

²⁶⁵ See section 5 Administrative Decisions (Judicial Review) Act 1977 (Cth). The principles are:

1. not taking an irrelevant consideration into account in the exercise of a power;

In Australian law, giving reasons controls the exercise of discretion as well as making it more amenable to review. Section 28 of the *Administrative Appeal Tribunal Act 1975* (Cth) gives a person the right to a statement of reasons for the decision if he or she is entitled to appeal to the Administrative Appeals Tribunal (AAT). Moreover, if a person is entitled to judicial review they have the right to a statement of reasons for the decision under section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

However, in general, the decision to prosecute in Australia is unreviewable by courts. The only exception is indirectly and after the event under the tort of malicious prosecution. This requires a prosecution instituted by the defendant, brought without reasonable or probable grounds of success, terminated in the plaintiff's favour which was motivated by the ill will or malice of the defendant. Historically in the common law system, prosecutions were brought by individuals under a dispersed and localized system. In respect of more serious crimes tried by jury in a preliminary hearing a grand jury, or a bench of magistrates following the inquisitorial procedure introduced under Queen Mary I, would have to find that there was sufficient evidence to put the accused on trial. Langbein describes the origin of the latter system which has become a basic part of the criminal justice system in England and Wales as well as Australia, as follows:

Supporting the altercation of citizen accuser and citizen accused at the felony trial was a system of pretrial procedure that helped the victim (or other prosecutor) to prepare the prosecution. The pretrial investigation had been organized in the Marian Committal Statute of 1555 (named after Queen Mary, in whose reign it was enacted).²⁶⁶

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2. failing to take a relevant consideration into account in the exercise of a power;
 3. utilizing an exercise of a power for a purpose other than a purpose for which the power is conferred;
 4. exercising a discretionary power in bad faith;
 5. exercising of a personal discretionary power at the direction or behest of another person; and
 6. exercising a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.
 7. exercising a power that is so unreasonable that no reasonable person could have so exercised the power;
 8. exercising of a power in such a way that the result of the exercise of the power is uncertain; and,
 9. any other exercise of a power in a way that constitutes an abuse of the power.

²⁶⁶ John H. Langbein, *The Origin of Adversary Criminal Trial* (Oxford University Press, 2003) 40.

This pre-trial procedure is also intended to end prosecutions that are weak before trial. Where the decision to indict for trial was made by a grand jury the principle that jury decisions are not to be lightly interfered with may have been another reason for not permitting review. These may explain the absence of review of the discretion to prosecute. Langbein also indicates that: ‘the Marian JP (the Justice of the Peace) who bound over the private prosecutor to testify at trial effectively stripped the victim of his discretion not to prosecute’.²⁶⁷

Judicial review is one way to review the exercise of administrative discretions in Australia; there are others, such as review by a superior officer, an ombudsman and by an administrative appeal tribunal. Most official decision making in Australia is subject to supervision by more senior officials as part of a system of internal control of discretion in an agency. In this sense it can be said that no official decision is merely an individual decision. It is an organizational decision made in a hierarchical structure. As part of the external control of discretion, judicial review, appeals to independent administrative tribunals and to an independent ombudsman exist in almost all Australian jurisdictions. In Australia, administrative tribunals tend to follow judicial procedures but can often make decisions on merit and not just for error. Ombudsmen in Australia accept complaints, conduct investigations and make recommendations in respect of decisions. They also perform audits and inspections, undertake processes to encourage good administration, and carry out specialist oversight tasks.²⁶⁸ Most democratic countries such as Germany, France, the Netherlands and Indonesia have ombudsman agencies to ‘receive complaints from citizens who are aggrieved by official action or inaction, to investigate, to criticize, and to publish findings.’²⁶⁹ Both internal and external control of discretion in the countries mentioned may have different characteristics. The French system of administrative law and the *Conseil d’Etat* is an example.

²⁶⁷ Ibid, 42

²⁶⁸ See the Commonwealth Ombudsman <http://www.ombudsman.gov.au/>, access on 18 September 2014.

²⁶⁹ KC Davis, above n 242, 150.

3.2.2 France

Jurgen explains that ‘in French administrative law the concept of discretion (*pouvoir* or *competence discretionnaire*) is a general term denoting the freedom of decision and action enjoyed by the executive within the law’.²⁷⁰ Citing Braibant he states that

it must be remembered that administrative conduct is always constrained by the rule that discretion may not be abused – *detournement de pouvoir*. There is a misuse of discretion whenever the executive knowingly exercises the authority it has been granted for a purpose other than the one for which it was intended.²⁷¹

The written *principes generaux du droit* (general principle of law) constrained the discretionary power enjoyed by the executive. It confines official decisions by limiting the development of discretionary powers beyond particular boundaries.

Under the principle of legality, every official power is based on a statutory provision whether or not it represents discretion. It can be said that there is no power without a statutory basis. To keep official decision makers within the boundaries of legitimacy, French law generally obligates them to give reasons for each decision or action. Jurgen writes:

The duty to give reasons for administrative acts is regulated by the law of July 11, 1979. The statutory duty to give reasons applies to all unfavorable administrative decisions. The reasons must be in writing and must contain the essential matters concerning the factual and legal situation (Article 3).²⁷²

The unusual feature of the French law, as mentioned previously, is a separate system of administrative courts ending not with the general courts of appeal but in a specialist tribunal, the *Conseil d’Etat* (Council of State) as an advisory body to the government as well as the Supreme Court for administrative justice.²⁷³

Jurgen refers to its origin in the First Republic:

Because of this strict regime of separation of powers, it was not for the court, but for the administration itself to adjudicate in complaints against administrative actions. This task was assigned to the *Conseil d’Etat*, which was established by

²⁷⁰ Jurgen Schwarze, above n 263, 261.

²⁷¹ Ibid 268.

²⁷² Ibid 1385-1386.

²⁷³ There is also a “*Tribunal des conflits*” to determine disputes between the general and administrative courts.

the Constitution of the Year VIII (1799) as a consultative body to the government.²⁷⁴

The reason in choosing the *Conseil d'Etat* as an administrative review body rather than the courts was because 'the pre-revolutionary courts (*Parlements*) had impeded attempts at reforming the administration and shown themselves hostile towards the ideas of the Revolution.'²⁷⁵ French administrative processes developed three ways of checking the exercise of discretionary powers in the administrative rather than the judicial system. The three categories are: maximum control, normal control and minimal control.²⁷⁶ Further administrative decisions can be rescinded in one of three ways: by *retrait*, by *abrogation*, and by *annulation*. Jurgen described these powers as follows:

Retrait means revocation by the administration itself; here the administrative decision is set aside from the outset (*ab initio*) and its legal effects are cancelled, both for the future and in the past. *Retrait* is carried out by the administrative authority which made the decision. *Abrogation* on the other hand, cancels only the future effects of the administrative decision, and does not interfere with its existing consequences. Authority for an *annulation* (avoidance) lies either with a higher decision-making level, a supervisory authority or, in the case of *recours pour excès de pouvoir*, with the court (*annulation contentieuse*). Through an annulation, the past effects of the administrative decision are also cancelled, the same rules applying, in principle, to *retrait*.²⁷⁷

These three concepts are appropriate remedies for unsuitable administrative decisions.

²⁷⁴ Jurgen Schwarze, above n 263, 101.

²⁷⁵ A. de Laubedere et al. cited in Jurgen Schwarze, *ibid*, 100-101.

²⁷⁶ *Ibid* 269. The categories are:

1. Minimal control (*contrôle minimum*) involves testing for procedural and formal defects, testing the accuracy of the supporting facts and ascertaining that there is no abuse of authority. One example is the review of administrative decisions in the law on foreigners and specialized technical fields;
2. In principle, there is no check on the legal weight given to the facts adduced, unless the plaintiff is alleging manifest error (*erreur manifeste d'appréciation*);
3. The ordinary extent of the test (*contrôle normal*) may extend beyond minimum control to a legal appraisal of the facts; and
4. Exceptionally, maximum control (*contrôle maximum*) may also include a test of the necessity and proportionality of the administrative measure. Here the court invariably intrudes into areas which are otherwise governed by the principle of expediency (*opportunité*) and are properly the preserve of the administration. One example of a legal area with maximum judicial control of the administration is police law.

²⁷⁷ *Ibid* 875-876.

The French prosecutor (*Procureur* or *Parquet*) exercises prosecutorial discretion which is judicially controlled. It should be noted that the *Procureur* together with the trial Judge and *Juge d'instruction* (investigating judge) have the same status as magistrates. Hodgson states that 'In France for example, as a *magistrat*, the public prosecutor belongs to the same judicial corps as the trial judge and the *juge d'instruction*.'²⁷⁸

The decision to dismiss a case by the *Procureur* is reviewable by *Juge d'instruction* as, for example, in the case of former President Jacques Chirac who was accused of misappropriating 4.5 million Euros in public funds during his time as mayor of Paris.²⁷⁹ The *Juge d'instruction* disagreed with the *procureur's* decision to discontinue the case because of the lack of evidence, whereas the *Juge d'instruction* believed otherwise.²⁸⁰

A victim of crime in France can join in a prosecution as a civil party, as Vouin explains:

Thus there are in France two prosecuting parties. The first and most essential is the public party, i.e., the state's counsel (*ministre public*) who represent the interests of the state, and who are still referred to as *the parquet* (literally, the "floor," in contrast to the "bench"); they consist of a body of magistrates (*magistrats*) whose principal task is the bringing of the public action. The second is the civil party who appears as plaintiff in the criminal trial and on whose behalf may appear an advocate chosen from among the members of the practicing bar.²⁸¹

The possibility of a victim joining with the prosecutor in a criminal trial did not exist in German law, as Langbein describes:

Although the German derived a good deal of their criminal procedure code in the nineteenth century from the French, they did not introduce a variant of *l'action civile* (known as *adhansionsverfahren*) until 1940. The procedure is seldom used for civil damages claim proper, and it cannot be used as in France to enable the victim (however defined) to institute the criminal case. If the German prosecutor

²⁷⁸ Jacqueline Hodgson, *French Criminal Justice, A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing, 2005) 65.

²⁷⁹ Jacqueline Hodgson, 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice' in Eric Luna and Marianne Wade (eds.), *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012) 119.

²⁸⁰ Ibid.

²⁸¹ Robert Vouin, 'The Role of the Prosecutor in French Criminal Trials' (1970) 18 *the American Journal of Comparative Law* 483, 484.

has determined not to prosecute, the victim can bring his civil action only in tort.²⁸²

Further explanation of the German system is provided below.

3.2.3 Germany

Germany also developed a separate system for the review of administrative decisions but one, unlike the French system with its *Conseil d'Etat*, which was independent of the executive branches of government. Its origin and development is succinctly described as follows:

The second half of the nineteenth century saw the establishment of autonomous administrative courts, which led a separate existence from the administration and from the ordinary courts. Contrary to what occurred in France, where the development of administrative jurisdiction was shaped by a central institution, the *Conseil d'Etat*, the German judicial system developed “from the bottom up,” i.e. from the *Lander*.²⁸³

As indicated, the administrative jurisdiction was instituted by the executive government of the states and not by the judiciary.²⁸⁴ As a federation, the administrative courts exist at the state and federal level. Emphasizing their potential to review discretion, Pakuscher explains that:

To protect citizens from errors in the exercise of administrative discretion the German system has placed primary emphasis on the review of administrative decisions by special administrative law courts having full independence from the executive.²⁸⁵

There are three different types of discretion recognized in German law, *einfaches Ermessen* (ordinary discretion), *beurteilungsspielraum* (margin of appreciation) and *planungsermessen* (discretion in the planning process).²⁸⁶

In German law discretion is distinguished by what is termed *unbestimmte Rechtsbegriff* (undefined legal concepts) such as ‘public welfare’, ‘public need’

²⁸² John H. Langbein, ‘Controlling Prosecutorial Discretion in Germany’ (1974) *the University of Chicago Law Review* 439, 442.

²⁸³ Jurgen Schwarze, above n 263, 115.

²⁸⁴ Carl Hermann Ule, ‘German Administrative Jurisdiction’ (1959) 173 *International Review of Administrative Science*, 174.

²⁸⁵ E.K. Pakuscher, ‘The Use of Discretion in German Law’ (1976) *The University of Chicago Law Review* 94, 107.

²⁸⁶ Martina Kunnecke, above 254, 79-80.

and ‘public safety’. These are common in statutes conferring powers on administrative bodies. They invest the bodies with a measure of discretion known as *beurteilungsspielraum* (margin of appreciation). This feature of German law is not found in other European legal systems and remains controversial in Germany.²⁸⁷ According to Reuss:

...a distinction is drawn between undefined legal concept(s) or statutory concept(s) which govern the application of the law in the existence of a legal principle, and discretion, as the freedom to decide which of a number of possible legal consequences will be adopted.²⁸⁸

Decisions under ordinary discretion and undefined legal concept can be reviewed by the administrative courts. Jurgen observes of decisions in the second category that ‘as for the undefined concept, they can be fully tested by the courts and that the review process is only occasionally limited by the presence of some scope for appraisal’²⁸⁹. Citing article 114 of the Rules of Procedure for Administrative Courts (*VwGO*) of 21 January 1960, Jurgen explains that:²⁹⁰

Where the administrative authority is empowered to use its discretion, the court will also satisfy itself that the acts or omissions of the administration are not unlawful because the statutory limits of discretion have been exceeded, or because discretion has been exercised in a manner not in conformity with the authority granted.

An important part of the German system of ‘confining discretion’ is the requirement for express authorization of the exercise of discretion and the obligation to give reasons in each case. In German law, discretionary powers require an express statutory authorization by the legislature.²⁹¹ This means that the first visible boundary to discretion is within the statute as seen in both Australian and French law, the inherent statutory logic, by the subject matter, and by the scope and purpose of the legislation by which it is conferred.²⁹² Jurgen observes that ‘in the case of discretionary decisions the underlying viewpoint on which the administration based its decision must also be stated.’²⁹³ The importance of giving

²⁸⁷ Ibid 79.

²⁸⁸ Jurgen Schwarze, above n 263, 271.

²⁸⁹ Ibid 273.

²⁹⁰ Ibid 278.

²⁹¹ Martina Kunnecke, above 254, 77.

²⁹² R.S. French AC, above n 255, 30.

²⁹³ Jurgen Schwarze, above n 263, 1387.

reasons for an administrative decision is an inseparable part of the legitimate exercise of administrative power. Jurgen concluded that:

...the absence of a statement of reasons affects the legality of an administrative act only where either it is a discretionary act or the defect in reasoning also has material consequences, for instance because certain factual circumstances were not taken into consideration.²⁹⁴

The pre-existence of guidelines for delegated legislation that grants discretion to public officials is considered important. They keep officials in the permitted boundaries and are a common tool for structuring discretion. Galligan cited in Kunnecke explains that: 'It is a common practice to structure discretion by formulating rules or guidelines to bridge the gap between the general power and the particular case'.²⁹⁵

In German law, legislation which delegates discretionary power without furnishing guidelines for its exercise is unconstitutional; that is, outside the constitutional grant of power to make such laws.²⁹⁶ Guidelines both confine and structure the discretion. In this way both the public and the administrator know what power may be exercised and how it should be exercised.

There is also judicial control of the discretion in German law to ensure that the boundaries of discretion are not exceeded and that discretionary powers are not wrongfully used as indicated above. This is based on section 114 of the Rules of Procedure for Administrative Courts (*VwGO*).²⁹⁷

Jurgen observes:

The statutory bounds of discretion will be exceeded whenever the decision fails to observe the outer legal limits of administrative discretion. For example, the bounds of discretion will be exceeded if the public authority orders a result which is not contemplated by statute. Another error in the exercise of discretion is covered by the prohibition against its wrongful use. This prohibition sets certain requirements for the points considered by the authorities in exercising their discretion. They must be sufficient, not unreasonable, relevant and appropriate to the purpose, and must observe the ban on unconstitutional excesses and the principle of equality²⁹⁸

²⁹⁴ Ibid 1388.

²⁹⁵ Martina Kunnecke, above 254, 84.

²⁹⁶ E.K. Pakuscher, 'The Use of Discretion in German Law' (1976) *The University of Chicago Law Review* 94, 96.

²⁹⁷ Jurgen Schwarze, above n 263, 278.

²⁹⁸ Ibid 278.

Derived from these concepts are the further concepts of ‘misuse of discretion’ and ‘discretionary negligence’:

Misuse of discretion is a subordinate category of the wrongful use of discretion; it covers cases in which irrelevant views, such as personal preferences (friendship or hostility) have played a part in the discretionary decision. This will render the administrative decision unlawful, even if it observes the outer limits of discretion. Where the motives of an individual administrator are subjective and therefore unacceptable, this is similar to the French *detournement de pouvoir*, which is generally used to mean a subjective exercise of official authority, contrary to the purpose of a statute. A further cause of error is the failure to exercise discretion when required to do so that also called discretionary negligence. This occurs whenever the administration mistakenly supposes that it is under a precise legal obligation and neglects to use the discretionary power that it possesses. If there is a provision calling for the use of discretion, the administration is bound to exercise it in a manner appropriate to the circumstances.²⁹⁹

As prosecuting public officials, German prosecutors bring criminal matters to court on a mandatory prosecution principle. The creation of a mandatory prosecution requirement is parallel to the creation of the separate office of the prosecutor in the middle of 19th century in order to separate the prosecution function from that of the inquisitorial judge.³⁰⁰ While the German prosecutor is the icon of the ‘mandatory prosecution’,³⁰¹ based on *Legalitatsprinzip* (legality principle), German prosecutors today in practice exercise discretion to dismiss cases even where there is sufficient evidence to prosecute. The decision to discontinue a criminal matter can be judicially reviewed by a judge in *Klageerzwingungsverfahren* (an appeal court), part of the High Court.³⁰²

3.2.4 The Netherlands

The Netherlands received the French Napoleonic codes when the puppet Kingdom of Holland under King Louis Napoleon Bonaparte was annexed to the first French Empire.³⁰³ The former Dutch legal system, *Rooms-Holland's recht* (Roman Dutch law), was based largely on judicial interpretation of Roman law sources and to a

²⁹⁹ Jurgen Schwarze, above n 263, 278-279.

³⁰⁰ John H. Langbein, above n 282, 446.

³⁰¹ Section 152 of the German Criminal Procedure Code stated that the prosecutor based on sufficient factual basis must prosecute all prosecutable offences. See also Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Clarendon Press Oxford, 1995) 135.

³⁰² *Ibid.*, 149.

³⁰³ Peter J.P. Tak, above n 164, 25.

lesser extent on Germanic custom. It was to continue only in the Dutch colonies abroad then occupied by Britain, including Java and Sumatra. The Napoleonic codes were not based on earlier French law but a systematic analysis of the *Corpus Juris Civilis* adapted for French society in the early 1800s.³⁰⁴ After the restoration of independence to the Netherlands parts of the codified law were rejected. For example, in the criminal trial the jury system was discontinued. In this regard, Tak explained that:

In the Netherlands, the Napoleonic Code *d'instruction criminelle* was applied until 1838 with some modifications. For example, the French jury system has never been adopted in the Netherland.³⁰⁵

The part of the Dutch East Indies occupied by Britain was returned to the Netherlands under the London Convention of 1814.³⁰⁶

During the British occupation some changes were made to the Dutch legal processes. Ball mentions the first jury trial in Jakarta:

The Java Government Gazette of May 1812 gave an account of what it described as 'the first trial by jury, or indeed, the first trial of any kind in open Court' ever to have taken place in Java. The trial was 'most numerously attended by all classes of people'. The accused, a Lieutenant Colonel in the previous Government, was charged with manslaughter of a 'native cooly' at Batavia. The Dutch members of the Supreme Court of Justice, headed by Muntinghe, conducted the trial with a jury of twelve in accordance with English criminal procedure³⁰⁷

With the restoration of Sumatra and Java to Dutch rule in 1816 the new codified Napoleonic law was introduced, displacing the earlier Roman-Dutch law. The Dutch *Wetboek van Strafrecht* (codified criminal law) was enacted in 1881 and enforced from 1886. This law was first introduced in Indonesia in 1918. Generally, the *Wetboek van Strafrecht* is still implemented in Indonesia but with several changes to its name, the Indonesian translation from the Dutch and

³⁰⁴ Robert B Holtman, *The Napoleonic Revolution* (Baton Rouge: Louisiana State University Press, 1981)

³⁰⁵ Peter J.P. Tak, above n 164, 29.

³⁰⁶ John Ball, *Indonesian Legal History 1602 – 1848* (Oughtershaw Preess, 1982) 167.

³⁰⁷ Ibid 138.

deleting and adding several sections. This was based on *UU No 1 Tahun 1946 tentang Hukum Pidana (1946 Penal Law)*.³⁰⁸

After Indonesian independence, the *1946 Penal Law* stressed that Japanese criminal law was not to be used any more. Indonesia revived the Dutch criminal law that was exercised before the Japanese occupation and existed on 8 March 1942. Japanese rule was abandoned by Indonesia because it was exercised only on several parts of the Indonesian territory such as Java, Sumatra and Borneo.³⁰⁹ The Japanese law was also considered incompatible with Dutch criminal law principles such as *Nullum Delictum Nulla Poena Sine Praevia Lege Punali* (There is no crime and there is no punishment without previously enacted penal law).³¹⁰ In Indonesia this principle is called the legality principle in criminal law³¹¹ and is important in a country with a '*trias politica*'³¹² system (separation of three branches of government: legislative, executive and judicative) Indonesia implemented this political system. Dana explains the relationship of the three branches as follows:

In a *trias politica* system, the principle of legality places obligations and limitations on the powers of all three branches of the government. For example, they oblige the law making body to define as precisely and clearly as possible the penalty applicable to a particular crime, including the form and severity of the punishment. They place on the judiciary the obligation to limit sanctions to those

³⁰⁸ This law re-emphasized by Soekarno enacted Undang-Undang Republik Indonesia Nomor 73 Tahun 1958 tentang Menyatakan Berlakunya Undang-Undang No 1 Tahun 1946 Republik Indonesia tentang Peraturan Hukum Pidana untuk Seluruh Wilayah Republik Indonesia dan Mengubah Kitab Undang-Undang Hukum Pidana (Law No. 73 of 1958 on the Enactment of Undang-Undang No 1 Tahun 1946 for all Indonesian Territory and Changing Kitab Undang-Undang Hukum Pidana) (Indonesia) (1958 the Enactment of Undang-Undang No 1 Tahun 1946 Law).

³⁰⁹ See Elucidation of *Undang-Undang No 1 Tahun 1946 Republik Indonesia tentang Peraturan Hukum Pidana* (Law No. 1 of 1946 on Penal Law) (Indonesia) (1946 the Penal Law).

³¹⁰ Paul Johann Anselm Ritter von Feurbach popularizes this principle. This principle is also known as the legality principle in criminal law. See Ake Frandberg, *From Rechtsstaat to Universal Law-State, An Essay in Philosophical Jurisprudence* (Springer, 2014) 2.

³¹¹ See section 1 (1) *Kitab Undang-Undang Hukum Pidana* (Penal Code). It should be noted that the legality principle in criminal procedure has a different meaning with the legality principle in Indonesian penal code which is further explained in chapter 4.

³¹² See also Mahfud MD explanation about *Trias politika* based on the Indonesian situation on footnote 510.

explicitly provided for by the legislature and prohibit judges from applying penalties retroactively.³¹³

Furthermore, the Dutch penal code was considered fairly comprehensive compared to Javanese rule which was made hastily during unstable conditions in Indonesia.³¹⁴ Adding and deleting sections is explained in section 8 of the *1946 Penal Law* which consists of 68 points. For example the term “*Gouverneur General*” was changed into President. Sentences such as “*of van den rechter in Nederland of in Suriname of in Curaco*” were deleted. The word *inlandsche* was not used any more. In the *1946 Penal Law*, “*Wetboek van Strafrecht voor Nederlandsh-Indie*” was called *Wetboek van Strafrecht* that translated into Indonesian as *Kitab Undang-Undang Hukum Pidana* (Penal Code).³¹⁵

In the administrative law field the French approach, as described above, continued to be used in the Netherlands. There is a similar body of separate administrative courts under the *Raad van State* (Council of State). Orucu noted that ‘Although it took place later, the creation of *Conseils d’Etat* in different countries of Europe was a consequence of the Napoleonic influence’.³¹⁶ He continued:

The countries formerly colonized by France, or placed under its protectorate, have generally kept after independence a system of courts inspired by the French model even if they generally included judicial courts and administrative courts inside a single order of courts.³¹⁷

In Dutch administrative law discretion is categorized as *beleidsvrijheid* (free discretion) and sometime *beoordelingsruimte* (scope for appraisal) which carry

³¹³ Shahram Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’ (2009), *The Journal of Criminal Law and Criminology* 857, 862.

³¹⁴ See Elucidation of *Undang-Undang No 1 Tahun 1946 Republik Indonesia tentang Peraturan Hukum Pidana* (Law No. 1 of 1946 on Penal Law) (Indonesia) (‘1946 the Penal Law’).

³¹⁵ See section 6 *Undang-Undang No 1 Tahun 1946 Republik Indonesia tentang Peraturan Hukum Pidana* (Law No. 1 of 1946 on Penal Law) (Indonesia) (‘1946 the Penal Law’). Further laws had been enacted such as *Undang-Undang no 18 Tahun 1960* which changed the currency from Gulden to Rupiahs. See Oemar Seno Adji, *Perkembangan Hukum Pidana dan Hukum Acara Pidana Sekarang dan Dimasa yang akan Datang* (The Current Development of Criminal Law and Criminal Procedure Law and the Future) (CV Pantjuran Tudjuh, 1971) 9.

³¹⁶ Esin Orucu, ‘The Influence of the *Conseil d’Etat* Outside France’ (2000) 49 *International and Comparative Law Quarterly* 700, 704.

³¹⁷ *Ibid*, 705.

the same meaning.³¹⁸ The ‘scope of appraisal’ concept is similar to the German concept of ‘margin of appreciation’. Jurgen indicates that ‘to explain them, borrowings are often made from German or French terminology’.³¹⁹ The French concept of prohibition against *detournement de pouvoir* is also borrowed from the case law of the *Conseil d’Etat*. Under Dutch administrative law the exercise of authority for a purpose other than the one prescribed by law is also prohibited.³²⁰

In respect of discretionary power, Jurgen explains:

By granting discretionary power, the legislature gives the executive room to choose for itself which methods to adopt and how it will make its decisions. Within this context several different and indeed conflicting outcomes may be perceived as being equally lawful. Discretion must be properly exercised, i.e. in accordance with the purpose of the rule, and in the light of the interest which it seeks to promote. The limits of discretionary freedom are furthermore derived from the general principles of sound administration.³²¹

In general, there are four grounds for an action for judicial review in the Dutch system:³²²

1. The decision infringes a provision which has general applicability;
2. In taking the decision concerned, the administrative body clearly used its powers for a purpose other than that envisaged by the statute;
3. Had the administrative body considered all the interest involved, it could not equitably have arrived at the decision concerned; or
4. The administrative body had taken a decision which contravenes basic notions of proper administration entrenched in the general legal consciousness.

Grounds one to three are similar to the concept of prohibition against abuse of power (*detournement de pouvoir*) or prohibition of arbitrary action. Four has been developed by reference to unwritten general legal principles for proper administration (*algemene beginselen van behoorlijk bestuur*) such as the

³¹⁸ Jurgen Schwarze, above n 263, 291-292.

³¹⁹ Ibid.

³²⁰ Ibid 293.

³²¹ Ibid 292.

³²² Ibid, 190.

principles of fair play, careful administration, honourable intentions, consistency and legal certainty.³²³

In the Netherlands, the *motiveringsbeginsel* (give reason)³²⁴ imposes a duty to give reasons for administrative decisions for individual acts of the administration. Jurgen explained that:

... the extent to which the statement of reasons must clarify the motives behind the decision depends on the circumstances of the individual case. In general it will suffice if the following are apparent from the statement of reasons: the factual conditions of the decision, the statutory provisions on which it is based and, in the case of discretionary decisions, the evaluator standard which was used or the criteria which were seen as decisive.³²⁵

Failure to give reasons might be considered as not exercising proper administration.

However, in general, the decision to prosecute in the Netherlands is unreviewable by courts as long as the prosecutorial guidelines have been followed. The guideline is an important tool for taming discretion. Tak notes that: 'Prior to the late 1960s the discretionary power to waive (further) prosecution was exercised on a very restricted scale'.³²⁶

There was a major change in the early 1970s in regard to interpreting opportunity principle or expediency principle in prosecutions, as Downes explains:

The principle of expediency was reinterpreted to mean that prosecution should be waived unless public interest demanded it, the reverse of the previous position which insisted on prosecution unless the public interest demanded it be waived.³²⁷

The negative sense of the expediency principle means that it is maintained to prosecute every criminal case, unless the public interest wanted it be waived. This negative sense was the position of the Netherlands before 1971. Conversely, the positive sense means that there is no obligation to prosecute criminal matters unless the public interest demands it. This is the current position in the

³²³ Ibid 190

³²⁴ Ibid 1396.

³²⁵ Ibid 1397.

³²⁶ Peter J.P. Tak, above n 164, 85.

³²⁷ David Downes, *Contrasts in Tolerance, Post-war Penal Policy in the Netherlands and England and Wales* (Clarendon Press, 1988) 3-14.

Netherlands where guidelines play a significant role in taming the exercise of prosecution discretion.

As indicated, a guideline is a common tool to confine and structure discretion. As the Dutch prosecutor has wide discretion, guidelines play a significant role in keeping the prosecutorial powers within their boundaries. Failure to follow guidelines in exercising prosecutorial discretion might be used by a defendant as the grounds for appeal. This means judicial review can be used to check prosecutor discretion as Fionda explains:³²⁸

In some cases defendants are using a prosecutor's deviation from the guidelines as the basis for an appeal. Indeed, in 1990 the Supreme Court of the Netherlands stated that the propriety of deviation from the guidelines is a question of law, not fact. Further, the High Court ruled in June 1990 that these guidelines for prosecutors, if officially published or drawn up by an official body accountable to the public (such as the five Procurators General and the Ministry of Justice), have the status of law and that a judge must therefore examine the activities of the public prosecutor in each case for compatibility with those guidelines.

Prosecutorial guidelines as checked and issued by the Board of Prosecutors General therefore play an important role in the Dutch system.³²⁹

3.2.5 Indonesia

Indonesia as colonised by the Dutch had its own distinctive path. The Dutch did not emphasise colonized people's rights against the state. The turbulence of independence was disruptive in developing a settled constitutional framework and good administrative procedures to check legal remedies. The period of autocratic control under Soekarno and Soeharto compromised the further development of the Constitution, a *rechtsstaat* and both the relationship between the state and independence of the judiciary. It also compromised the limited resources of Indonesia as a developing country. When development of administrative law took place, in spite of the period since independence, it turned to Dutch law, familiar legal process and legal principles, but did not borrow it, and is still developing.

The Indonesian concept of administrative law is influenced by the Dutch system. However, unlike the Dutch system, there is no *Raad van State* (Council of

³²⁸ Julia Fionda, above n 301, 126.

³²⁹ Peter J.P. Tak, above n 164, 51.

State) in Indonesia. There is a separate system of administrative courts but they are organized inside a single hierarchy under the final court of appeal, the *Mahkamah Agung* (Supreme Court).

On 29 December 1986, the first administrative court under *Mahkamah Agung* was established with its implementation in 1991.³³⁰ The reason for the delay was the need to prepare the personnel and structures of the court, as mentioned in section 145 of the *1986 Administrative Court Law*:

Lingkungan Peradilan Tata Usaha Negara ini merupakan lingkungan Peradilan yang baru yang pembentukannya memerlukan perencanaan dan persiapan yang matang oleh Pemerintah, mengenai prasarana dan sarana baik materil maupun personil. Oleh karena itu pembentukan Pengadilan di lingkungan Peradilan Tata Usaha Negara tidak dapat dilakukan sekaligus tetapi secara bertahap. (The Administrative Court is a new court that needs sufficient planning and preparation in regards of infrastructure and human resources. For this reason the making of the Administrative Court cannot be created at once but only gradually).

The *1986 Administrative Court Law* was subsequently repealed by the *2004 Administrative Court Law* and in turn by the *2009 Administrative Court Law*.

Bodies such as the *Raad van State* (State Council) have never existed in Indonesia either before or after independence for several reasons. Firstly, there was a continuing debate in the 19th century in the Netherlands over who should have the ultimate judicial control over government administration, the Supreme Court or *Raad van State*. In 1910 the concept of judicial review was questioned by the influential academic, Struycken, who argued that judicial administrative review was not consistent with democracy.³³¹ This argument was echoed in Indonesia after independence. Logeman argued that Indonesia needed institutional reform rather than judicial administrative review³³² and what it needed most was civil representation in democratic institutions.

Secondly, as indicated above, in the colonial period the role of a *Raad van State* to determine administrative disputes in the Dutch East Indies was vested in the Civil Court. Thirdly, after independence Indonesia chose a more simple

³³⁰ See section 145 Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 51 of 2009 on Administrative Court) (Indonesia) ('2009 Administrative Court Law').

³³¹ Adriaan Bedner, *Administrative Courts in Indonesia: A socio legal study* (Kluwer Law International, 2001) 12.

³³² *Ibid* 14.

arrangement without separate administrative court. As Orucu observed, ‘the idea is to have a separate administrative jurisdiction without the complexity or practical difficulties inherent in the existence of two separate orders of court’.³³³ In the colonial period there was no separation of power where the Governor-General ruled under the direction of the Dutch Ministry of colonies. The single Supreme Court was subordinate to the Governor-General as the highest ruler of colonial land.

3.2.5.1 Administrative review under Dutch and Japanese rule

Before independence, under the Dutch colonial regime, a special body for administrative review did not exist. There were provisions for review of specific matters:

1. *Pencabutan hak* (Revocation of rights)³³⁴
2. *Kewajiban dalam penjohosan beras* (Duty related to rice production)³³⁵
3. *Pertambangan* (Mining)³³⁶
4. *Pendaftaran merek* (Trademark registration)³³⁷

Disputes related to tax collection were heard by *Raad van Beroep voor Belastingzaken/Majelis Perbandingan dalam soal penarikan pajak* (Appeal tribunal on tax matters) according to S.1915 no 707.³³⁸

This situation continued while Indonesia was occupied by Japan in 1942. During Japanese occupation, the existing laws continued as long as they did not contravene Japanese military interests.

3.2.5.2 After the declaration of independence

After the declaration of independence in 1945 Indonesia created its own Constitution, *Undang-Undang Dasar 1945* (Indonesian Constitution 1945). Under

³³³ Esin Orucu, above n 316, 707.

³³⁴ Section 14 Staatsblad 1920 no 574 cited in Sudikno Mertokusumo, *Sejarah Peradilan dan Perundang-undangannya di Indonesia Sejak 1942 dan Apakah Kemanfaatannya Bagi Kita Bangsa Indonesia* (The history of Court Process and Indonesian Law since 1942 and What is the Benefit for Us Indonesian) (Gadjah Mada University Dissertation, 1970) 122.

³³⁵ Emergency Law no 7/1952. LN.33 cited in Sudikno Mertokusumo, *ibid* 122.

³³⁶ See Staatsblad 1899 no 214 and Staatsblad 1930 no 38 cited in Sudikno Mertokusumo, *ibid*.

³³⁷ See Staatsblad 1912 no 545 cited in Sudikno Mertokusumo, *ibid*.

³³⁸ *Ibid* 122

transitional provisions the existing law was still enforced as long as it did not contradict the spirit of Indonesian Independence.³³⁹ *Undang Undang Dasar 1945* was meant to be a temporary Constitution; however it remained in force after Soekarno passed the emergency law, known as *Dekret Presiden 1959* (Presidential Decree 1959).

In 1948, law number 19 known as *UU no 19 tahun 1948* stipulated that administrative disputes were to be reviewed by the Appeal Court as a court of first instance and the Supreme Court as the court of second instance.³⁴⁰ The reason why the *Pengadilan Negeri* (the Lower Court or General Court of the first instance) is not used to review administrative disputes is that it was thought to lack the capacity to review such matters. This law did not come into force because of ‘Military Aggression II’³⁴¹ by the Dutch in 1948.

The end of military conflict between the Dutch and Indonesia led to the creation of the Federal State on 17 August 1950.³⁴² During this period the *1949 Republic of the Indonesian Federation (Konstitusi Republik Indonesia Serikat tahun 1949 or 1949 KRIS)* was enforced. Provision 161 *1949 KRIS* provided that administrative disputes should be reviewed in the General Civil Court (*Pengadilan Umum*) or other bodies.³⁴³ It was not clear what constituted ‘other bodies’ as neither the organic law nor other law existed during the short period of the *1949 KRIS*.

Federation ended with the creation of a unitary state in 1950 and the adoption of the Indonesian Constitution in 1950 which is known as *Undang-Undang Dasar Sementara Republik Indonesia 1950* or as 1950 UUDS (The 1950 Indonesian Temporary Constitution).³⁴⁴ Provision 108 of the 1950 UUDS was a

³³⁹ *Pasal Peralihan* UUD 1945 (Transition section Indonesian Constitution 1945).

³⁴⁰ Sudikno Mertokusumo, above n 335, 33-34.

³⁴¹ Military Aggression II or *Agresi militer II* is a term used to explain the Dutch military operations during the Indonesian struggle for independence. It is also known as *Operatie Kraai* (Crow Operation).

³⁴² After the Dutch Military Aggression II, the *Linggardjati* agreement, the *Renville* agreement and the New Delhi Conference on 27 December 1949 the Indonesian government became federal state. It lasted until 17 August 1950.

³⁴³ See *Konstitusi Republik Indonesia Serikat 1949* (Indonesian Constitution 1949).

³⁴⁴ One of the reasons for changing from a federation to a unitary state was the Indonesian perception that the Dutch tried to divide or fragment territory and the people of Indonesia using

similar provision providing for administrative review as at 161 KRIS.³⁴⁵ Because of the political situation, a new permanent constitution to replace 1950 UUDS was never adopted.³⁴⁶

3.2.5.3 Guided democracy 1959–1965

On 5 July 1959 President Soekarno revived the *Undang Undang Dasar 1945* under an emergency law known as *Dekret Presiden 1959* (1959 Presidential Decree) and dissolved the parliament.³⁴⁷ The period from 1959 to 1965 is known as *periode Demokrasi Terpimpin* (Guided Democracy Period) and has been described as ‘a nightmare’ for the Indonesian judiciary.³⁴⁸ The prevalent ideological concepts of the revolution - *integralistic* state - rejected the possible existence of conflict between citizens and the Government.

In 1964, section 7 of the *Undang Undang No 19 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman Tahun 1964* (the 1964 Essentials Guidance on Judicial Power Law) acknowledged an administrative court.³⁴⁹ Under this law, the judicial power was controlled by the President. Section 19 stated that:

Demi kepentingan revolusi, kehormatan Negara dan Bangsa atau kepentingan masyarakat yang sangat mendesak, Presiden dapat turut atau campur-tangan dalam soal-soal pengadilan (In matters that are very urgent in the interests of the revolution, honour and interests of the State and Nation community, the President may participate or intervene in judicial matters).

Thus under Guided Democracy, heavy executive control is the main paradigm of control without separation of power. This was similar to the Indonesian situation under Dutch rule where the Governor-General controlled all matters in the colony

their colonial strategy to make Indonesian unstable. Indonesia tried to tackle this strategy by making a Constitution with firm acknowledgement that Indonesia is united.

³⁴⁵ See Article 108 *Undang Undang Dasar Sementara 1950* (Indonesian Constitution 1950).

³⁴⁶ Bedner mentions that there was no agreement about whether Indonesia should be secular or religious nation. Adriaan Bedner, above n 331, 31.

³⁴⁷ The Indonesian Constitution is known as *Undang Undang Dasar 1945* (Indonesian Constitution 1945) which has been amended on several occasions.

³⁴⁸ Adriaan Bedner, above n 331, 31.

³⁴⁹ Section 7 *Undang-Undang Republik Indonesia Nomor 19 Tahun 1964 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman* (Law No. 19 of 1964 on Essentials Guidance on Judicial Power) (Indonesia) (‘1964 Essential Guidance on Judicial Power Law’).

including judicial matters. Jayasuriya notes that this is a common problem in East Asia: 'In much of East Asia, the post-colonial state was trapped in repertoire of political rule established by the colonial state.'³⁵⁰ In his monograph, Daniel S. Lev articulated the relation between Soekarno and Guided Democracy as follows:

The political changes begun in 1957 were made possible by the power of the army; but it was Soekarno who provided the symbols which made Guided Democracy seem reasonable and necessary alternative to the parliamentary system.³⁵¹

3.2.5.4 Creation of Undang Undang tentang Ketentuan Ketentuan Pokok Kekuasaan Kehakiman no 14 Tahun 1970 (the 1970 Essentials Guidance on Judicial Power Law)

The 1964 Essentials Guidance on Judicial Power Law was repealed by *Undang Undang tentang Ketentuan Ketentuan Pokok Kekuasaan Kehakiman no 14 Tahun 1970* (the 1970 Essentials Guidance on Judicial Power Law). It still acknowledged the existence of the administrative court and no section mentioned that the President could interfere in judicial matters. The law was criticized as the administration of the *Mahkamah Agung Republik Indonesia* (The Indonesian Supreme Court) was still under the *Menteri Kehakiman* (the Minister of Justice).³⁵² During the 1970s and early 1980s Indonesian legal scholars and practitioners committed to the rule of law pushed the idea of an Administrative Court.³⁵³

In 1982 the first draft of the Administrative Court law and the Administrative Procedure law was debated in the Indonesian legislature. The Minister of Justice withdrew the draft legislation with the intention of drafting a single law on the Administrative Court. A team was therefore sent to the Netherlands to study Dutch law and practice, funded by the Dutch government. During this period the political relationship between Indonesia and the

³⁵⁰ Kaniskha Jayasuriya, 'Corporatism and Judicial Independence within Statist Legal Institutions in East Asia' in Kaniskha Jayasuriya (ed.), *Law, Capitalism and Power in Asia* (1999, Routledge) 3.

³⁵¹ Daniel S. Lev, *the Transition to Guided Democracy: Indonesian Politics, 1957-1959* (Ithaca, 1966), 46.

³⁵² See Adriaan Bedner, above n 331, 38.

³⁵³ Ibid 38-43.

Netherlands was good as cooperation between both countries helped to build the Indonesian rule of law. The result was the enactment of the 1986 Administrative Court Law.

3.2.5.5 The 1986 Administrative Court Law and two amendments

This is considered the most relevant administrative court law in Indonesia because it is used as a reference to the new existing administrative court law. The first amendment was in 2004: *Undang-Undang Nomor 9 Tahun 2004 tentang Perubahan atas UU no 8 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law number 9 year 2004 about Changing on Law number 8 year 1986 about Administrative Court Law).

The second amendment was in 2009: *Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law number 51 year 2009 about Second Changing on Law number 8 year 1986 about Administrative Court Law). The reason for these amendments was both judicial and non-judicial. The non-judicial related to organizational, administrative and financial arrangements under Mahkamah Agung (the Indonesian Supreme Court).³⁵⁴

In relation to the judicial aspect, there are two reasons for challenging administrative decisions. Firstly, the decision contradicts previously enacted law. Secondly, it is a breach of AAUPB. It should be noted that according to the 1986 Administrative Court Law there is no provision that clearly states that breaching AAUPB is not allowed.³⁵⁵ However, it is a matter of practice to acknowledge that administrative decisions must follow AAUPB. These two reasons appeared in the first change of 1986 Administrative Court Law, *Undang-Undang Republik*

³⁵⁴ See elucidation of *Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law No. 51 of 2009 on Administrative Court) (Indonesia) ('2009 Administrative Court Law').

³⁵⁵ Section 53(2) mentions three reasons for challenge administrative decisions. Firstly, the administrative decision breached enacted law; secondly, the administrative decision is based on other purposes previously stated; and thirdly, an administrator should not make a decision if he or she properly considers all competing aspects in the decision. See *Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law No. 5 of 1986 on Administrative Court) (Indonesia) ('1986 Administrative Court Law').

*Indonesia Nomor 9 Tahun 2004 tentang Perubahan atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara*³⁵⁶ and were still used in the second change to Administrative Court Law until recently. According to section 53(2)(b) of this law reference to AAUPB also follows *Undang-Undang Nomor 28 Tahun 1999 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme* (Law number 28 year 1999 about Clean Government which is Free from Corruption Collusion and Nepotism).³⁵⁷ As will be discussed in section 3.2.5.6, reference to AAUPB is based on the 1999 Clean Government which is Free from Corruption Collusion and Nepotism Law which became a further addition on previous practice in interpreting general legal principles for proper administration, which is based on the Dutch practice.

3.2.5.6 Discretion in Indonesian law and the 2014 Government Administrative Law

The possibility of choice by decision makers is recognized in Indonesian law. Indonesian administrative law recognises two types of power utilized by public officials. These are known as *kewenangan terikat* (strict power) and *kewenangan bebas* (discretionary power).³⁵⁸ *Kewenangan terikat* are powers vested in public officials to implement as dictated by statute. The power is firmly defined by its substance and when, under what conditions, and how it is to be utilized. Conversely, *Kewenangan bebas* (*beleidsvrijheid, freies ermessen*) are powers given to public officials with freedom to choose. Indonesian scholars such as

³⁵⁶ See section 53(2) Undang-Undang Republik Indonesia Nomor 9 Tahun 2004 tentang Perubahan atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 9 of 2004 on Administrative Court) (Indonesia) ('2004 Administrative Court Law').

³⁵⁷ Section 3 mentions seven principles such as *Asas Kepastian Hukum* (Legal certainty principle), *Asas Tertib Penyelenggaraan Negara* (Order on Governance principle), *Asas Kepentingan Umum* (Public Interest principle), *Asas Keterbukaan* (Openness principle), *Asas Proporsionalitas* (Proportionality principle), *Asas Profesionalitas* (Professionalism principle) and *Asas Akuntabilitas* (Accountability principle). See *Undang-Undang Nomor 28 Tahun 1999 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme* (Law No. 28 of 1999 on Clean Government which Free from Corruption Collusion and Nepotism) (Indonesia) ('1999 Clean Government which Free from Corruption Collusion and Nepotism Law').

³⁵⁸ Philipus M. Hadjon, *Pengertian-Pengertian Dasar Tentang Tindak Pemerintahan* (Basic Knowledge in Governmental Action) (Djumali, 1985) 12-13.

Hadjon and Ridwan aligned the concept of *kewenangan bebas* with the Dutch term *beleidsvrijheid* and *beoordelingsvrijheid*.³⁵⁹ Section 53 of the 2009 *Administrative Court Law*³⁶⁰ states that every person or private entity may challenge an administrative decision by a public official in the administrative court if their rights are considered to have been breached. It means that citizens or private entities may ask a court for judicial review of administrative decisions. Section 53(2)(a) of the 2009 *Administrative Court Law* provides that the challenge might be that the decision violates a specific regulation, or section 53(2)(b) that the decision breaches general legal principles for proper administration known as *Asas-Asas Umum Pemerintahan yang Baik* or AAUPB (The General proper principle for good administration). As indicated above, this legal principle is known in the Netherlands as *algemene beginselen van behoorlijk bestuur*. Further, section 1(3) of the 2009 *Administrative Court Law* states that this kind of judicial review is available only for decisions made by public officials meeting the following criteria:³⁶¹

1. The decision must be in writing;
2. The decision must be made by a public body or by a public official holding an administrative position;
3. The decision must be specifically administrative in nature;
4. The decision must be concrete and individual; and
5. The decision must have consequences for individuals or private entities.

That written decision is considered important because it can be used to prove the legality of the decision. In this written document the individual who is affected by the decision states the reason for the decision and the legal basis for it.

³⁵⁹ Ridwan H.R., *Hukum Administrasi Negara (Administrative Law)* (PT Rajagrafindo Persada, 2006), 108.

³⁶⁰ Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 51 of 2009 on Administrative Court) (Indonesia) ('2009 Administrative Court Law').

³⁶¹ Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 51 of 2009 on Administrative Court) (Indonesia) ('2009 Administrative Court Law'). See also Philipus M. Hadjon et al., *Introduction to the Indonesian Administrative Law* (Gadjah Mada University Press, 1999), 281.

Failure to provide the written decision may be considered to violate section 53(2)(b) of the 2009 Administrative Court Law (AAUPB).

Similar to French and Dutch law, the law acknowledges the prohibition on arbitrary action or *detournement de pouvoir*. The courts have also developed unwritten general legal principles for proper administration like the Dutch *algemene beginselen van behoorlijk bestuur* which is locally known as *Asas-asas Umum Pemerintahan yang Baik* or AAUPB. These principles are important as they can be used to ‘protect legal entitlements from the arbitrary exercise of administrative power’.³⁶²

Official discretion is structured and checked according to this concept of AAUPB. Principles such as reasonableness, clear motivation, carefulness, proportionality, and a prohibition of arbitrariness are acknowledged in AAUPB. All of the acknowledged principles are direct transplants from Dutch law.³⁶³ However, it should be noted that further reference to AAUPB should also include principles based on the 1999 Clean Government which Free from Corruption Collusion and Nepotism Law. Several additions to what is considered AAUPB were made by this law, such as *Asas Kepastian Hukum* (Legal certainty principle), *Asas Tertib Penyelenggaraan Negara* (Order on Governance principle), *Asas Kepentingan Umum* (Public Interest principle), *Asas Keterbukaan* (Openness principle), *Asas Profesionalitas* (Professionalism principle) and *Asas Akuntabilitas* (Accountability principle). Similar with Dutch law, the concept of AAUPB is open, which means it can be added to in the future based on perceived needs.

As indicated above, the duty to give reasons is acknowledged in the Indonesian AAUPB, *asas motivasi* (clear motivation principle). In Indonesian law this principle means that the administrative decision must clearly state the reasons for the decision, the decision must be based on undisputed facts and the reasons must be sufficiently convincing.³⁶⁴ Similar to Dutch law, failure to give reasons

³⁶² Claudio Franchini, ‘European Principles Governing National Administrative Proceedings’ (2004) 68 *Law and Contemporary Problems Duke University School of Law* 183, 192.

³⁶³ Philipus M. Hadjon et.al, above n 154, 279-280.

³⁶⁴ Ridwan H.R., *Hukum Administrasi Negara (Administrative Law)* (PT Rajagrafindo Persada, 2006) 251-252.

breaches proper administration which can be used as a ground for judicial review. Section 53(2)(b) of the Administrative Court Law states that:

Keputusan Tata Usaha Negara yang digugat itu bertentangan dengan Asas-Asas Umum Pemerintahan yang Baik (The administrative decision may be disputed because of breaching the AAUPB)

On 17 October 2014 a new law *Undang-Undang tentang Administrasi Pemerintahan No 30 Tahun 2014* (2014 Government Administrative Law) was enacted.³⁶⁵ This new law is considered part of the commitment to *Negara Hukum*. The supplementary document of the 2014 *Government Administrative Law* states that:

Penggunaan kekuasaan negara terhadap Warga Masyarakat bukanlah tanpa persyaratan. Warga Masyarakat tidak dapat diperlakukan secara sewenang-wenang sebagai objek. Keputusan dan/atau Tindakan terhadap Warga Masyarakat harus sesuai dengan ketentuan peraturan perundang-undangan dan asas-asas umum pemerintahan yang baik. (The use of state power on people is not without conditions. The people cannot be arbitrarily treated as objects. Government decisions and or actions which effect people's right should be in accordance with the provisions of the legislation and the general principles of good administration).³⁶⁶

In this law discretion is defined, confined and structured and provision is made for judicial review. Section 1(9) of the 2014 Government Administrative Law defines discretion as:³⁶⁷

Diskresi adalah Keputusan dan/atau Tindakan yang ditetapkan dan/atau dilakukan oleh Pejabat Pemerintahan untuk mengatasi persoalan konkret yang dihadapi dalam penyelenggaraan pemerintahan dalam hal peraturan perundang-undangan yang memberikan pilihan, tidak mengatur, tidak lengkap atau tidak jelas, dan/atau adanya stagnasi pemerintahan (Discretion is the decision and/or actions specified and/or carried out by government officials to address concrete problems encountered in the implementation of governance where legislation

³⁶⁵ *Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan* (Law No. 30 of 2014 on Government Administrative Law) (Indonesia) ('2014 Government AdministrativeLaw').

³⁶⁶ Supplementary document of *Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan* (Law No. 30 of 2014 on Government Administrative Law) (Indonesia) ('2014 Government AdministrativeLaw').

³⁶⁷ See also section 25 *Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan* (Law No. 30 of 2014 on Government Administrative Law) (Indonesia) ('2014 Government AdministrativeLaw'). Section 25 specifically explained that the official decisions or actions based on legislation make such options possible. The discretionary decision or action also can be taken because the legislation is silent on the matter. It also states that the discretionary decision or action can be taken where the legislation is not complete or clear. Further, it explains that the discretionary decision or action can be taken where government stagnation occurs and the government needs to serve the public interest.

gives an option, the law is absent, the law is incomplete or unclear, and/or there is stagnation in the administration).

Section 24 of the 2014 Government Administrative Law confines discretion by setting some requirements on its implementation:

Officials who exercise discretion must consider the government's duty to serve the community, to avoid gaps in the law, to provide legal certainty and *mengatasi stagnasi pemerintahan* (to overcome government stagnation) in specific situations based on principles of utility and public interest:

1. The exercise of discretion should not breach any law;
2. It should be based on AAUP;
3. It should be based on objective reasoning;
4. Its exercise should not produce conflict of interest; and
5. It should be exercised based on good faith.

Section 7 of the 2014 Government Administrative Law states that people have power to limit and review government power in general and specifically in the exercise of discretion. People have the legal right to be heard before the government exercises its power. They have the right to a notice before the action from the government if the government decision or actions cause loss or damage to them, within 10 working days. The time limit of 10 days means that if the government official fails to give the notice then it may be considered as breaching proper administrative procedure. Section 7(h) of this law clearly states that the Government has a duty to make standard operational procedures for decision making or actions. There is also an obligation for the government to prepare all the documents required and make them open and accessible to the public.

Section 30, section 31 and section 32 of the 2014 Government Administrative Law limit the exercise of discretion. Firstly, a public official's decision or action is considered to be *ultra vires* if the decision or action is taken outside of the time limit, beyond jurisdiction and it potentially changes the allocation of public money without the permission or knowledge of their supervisory officer. Secondly, a public official is considered as improperly exercising discretion if it is exercised not according to the aim of the discretion given and contrary to AAUPB. In addition, it is considered improperly exercised if it breaches standard use of changing fund allocation, as mentioned in sections 26, 27 and 28 of the 2014 Government Administrative Law. Each year the government allocates funds for local and central government departments, bodies

or units. Changing this fund allocation is strictly prohibited; however it is allowed as long as it is permitted and acknowledged by their supervisory officer. Thirdly, it considers the exercise of discretion by an unauthorised officer as *sewenang-wenang* (abuse of power). As a consequence the decision or action is considered illegal if the first and third conditions occur. If the second condition occurs, the decision or action can be nullified.

3.2.5.7 *Upaya Administratif* (the Administrative Appeal)

The 2014 Government Administrative Law establishes a procedure for appeal. According to section 75, people can challenge a government decision or action free of cost through what is called *upaya administratif* (administrative appeal). This administrative appeal is divided into two steps, *keberatan* (complaint) and *banding* (appeal). *Keberatan* is directly to the official or specified body that has competency to assess the matter. *Banding* is used when people are not satisfied with the decision from *Keberatan*. If the aggrieved person is still not satisfied with the *Banding* decision, they can make a further appeal to the Administrative Court.

3.2.5.8 Indonesian Ombudsman

The Ombudsman plays a significant role as an external check on discretion and is an independent government agency with no organic relationship with any other government agency.³⁶⁸

The general aim of the Indonesian Ombudsman is the control of discretion as stated in section 4 of the 2008 Indonesian Ombudsman Law. The role of the office is to help create and improve efforts to eradicate and prevent maladministration, discrimination, collusion, corruption, and nepotism. Discretion potentially permits these, as it provides choices to the administrator.

³⁶⁸ Section 2 *Undang-Undang Nomor 37 Tahun 2008 tentang Ombudsman Republik Indonesia* (Law No. 37 of 2008 on Indonesian Ombudsman Law) (Indonesia) ('2008 Indonesian Ombudsman Law').

The Indonesian Ombudsman's main duties are set out in section 7 of the 2008 Indonesian Ombudsman Law as follows:

1. To receive reports of alleged maladministration in the public service;
2. To examine reports;
3. To follow up reports within the scope of the authority of the Ombudsman;
4. To conduct an investigation on its own initiative against alleged maladministration in the public service;
5. To coordinate and cooperate with state agencies or other government agencies as well as community organizations and individuals;
6. To build networks;
7. To take steps to prevent maladministration in the public service; and
8. To perform other duties assigned by law.

By receiving, examining and conducting investigations on reports of maladministration, including in the exercise of discretionary power, the Ombudsman plays a significant role as one of the external reviewers of administrative decisions. One type of maladministration according to the 2008 Indonesian Ombudsman Law is 'abuse of discretion', arbitrariness and abuse of authority.³⁶⁹ This law gives further protection against arbitrary power in the Indonesian system. The Indonesian Ombudsman emerged in the reform era due to the focus on Indonesian corruption problems and good governance and the idea for a solution, as Crouch said as follow:

...the down fall of Soeharto and the New Order in 1998 has led to a renewed focus on "corruption" and "good governance" in Indonesia. In response to the perceived link between the problem of corruption and the perceived solution of good governance, new legislative initiative, such as the National Ombudsman, have emerged.³⁷⁰

3.2.5.9 Anti-corruption body, 2008 Freedom of Information Law and Prosecutor Commission

Another potentially significant external check on Indonesian officials is the anti-corruption body that is known as the *Komisi Pemberantasan Korupsi* or KPK

³⁶⁹ Antonius Sujata and RM Surachman, 'Efektivitas Ombudsman Indonesia (The effectiveness of the Indonesian Ombudsman)' (2003) *Komisi Ombudsman Indonesia* (Indonesian Ombudsman Commission), 153.

³⁷⁰ Melissa Crouch, 'the Yogyakarta Local Ombudsman: Promoting Good Governance Through Local Support' (2007) *Asian Journal of Comparative Law*, 6.

(Corruption Eradication Commission). It was created by the 2002 Eradication Corruption Commission Law.³⁷¹ This body investigates and prosecutes corruption allegations. According to the KPK Deputy of prevention, research and development team, 'The KPK was formed with the express intent of bringing about positive change in a stagnant national anti corruption effort'.³⁷²

The 2002 Law describes the duties and authority of the KPK as follows:³⁷³

1. Coordinate³⁷⁴ and supervise³⁷⁵ other institutions authorized to eradicate corruption;
2. Conduct pre-investigations, investigations, and prosecutions against corrupt acts³⁷⁶;

³⁷¹ *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law').

³⁷² KPK Deputy of Prevention, Research and Development team, KPK: the Corruption Eradication Commission of Indonesia <http://www.icac.org.hk/news/issue22eng/button3.htm>

³⁷³ See also section 6 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law')

³⁷⁴ See also section 7 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law'). The KPK coordinates its activities through the Prosecutor's Office, the Police, and various financial supervisory and regulatory bodies and also:

1. Provides a reporting system to aid corruption eradication;
2. Requests information on corruption eradicating activities from relevant institutions; and
3. Conducts consultation hearings or meetings with authorized institutions;
4. Requests corruption prevention reports from relevant institutions.

³⁷⁵ See section 8 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law'). The KPK's supervisory role includes surveillance, research, or studies on authorized corruption eradication institutions and those that perform public services.

³⁷⁶ See also section 11 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law'). The KPK may also take over the investigations or prosecutions conducted by the Police or the Prosecutor's Office in the following circumstances :

1. A public corruption report is not acted upon;
2. Incompetence or delays in corruption cases without sufficient reason;
3. Suspected bias in favor of perpetrator(s) or indications of corrupt elements in conduct of investigations;
4. Obstructions to the handling of a corruption case due to executive, judicial, or legislative intervention; or
5. Other circumstances which have hindered the capability of the Police or the Prosecutor's Office to conduct a proper investigation.
6. Involvement of law enforcers, state officials, and other connected individuals;
7. Significant public concern; and/or
8. At least one billion Rupiah in value (approximately AUD100,000).

3. Conduct preventive actions against corruption³⁷⁷; and
4. Monitor state governance.³⁷⁸

The KPK investigates and prosecutes high profile corruption cases from all branches of government (executive, judicial, legislative). Not everyone likes the KPK's work to combat corruption because some of its members were caught accepting bribes. They try to undermine the KPK by saying it is too draconian and aggressive, and defendants in corruption allegations receive inadequate protection during trial.³⁷⁹ Teten Masduki from Indonesian Transparency International is concerned that there is a systematic agenda to destroy the KPK³⁸⁰ through reducing its power by proposing a new bill to alter the 2002 Eradication Corruption Commission Law that would see the KPK lose its power to prosecute corruption matters and be dissolved after 12 years in operation.³⁸¹

The 2008 Freedom of Information Law³⁸² also plays a significant role in making the Indonesian administrators more accountable and transparent in the exercise of discretion. It does this by providing citizens with the right to access government information. Using this, members of the public may investigate decisions made by administrators.

³⁷⁷ See section 13 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law'). The KPK's purview in preventive measures includes :

1. Audits on the wealth of state officials;
2. Reviews of graft reports;
3. Anti-corruption education programs at all levels of education;
4. Design and promotion of corruption eradication social programs;
5. Anti-corruption campaigns for the public; and
6. Studies on management systems of all state and governmental agencies, with a view to making improvements to reduce the potential for corruption.

³⁷⁸ See section 14 *Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi* (Law No. 30 of 2002 on Eradication Corruption Commission Law) (Indonesia) ('2002 Eradication Corruption Commission Law').

³⁷⁹ Norimitsu Onishi, 'Corruption Fighters Rouse Resistance in Indonesia', *The New York Times*, 25 July 2009.

³⁸⁰ Norimitsu Onishi, 'Corruption Fighters Rouse Resistance in Indonesia', *The New York Times*, 25 July 2009.

³⁸¹ *Lima pasal dalam RUU KPK yang disusun DPR* (Five sections within draft of Eradication Corruption Commission Law which is proposed by DPR), BBC 7 October 2015 <http://www.bbc.com/indonesia/berita_indonesia/2015/10/151007_indonesia_ruu_kpk_limahal>.

³⁸² *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

This 2008 Freedom of Information Law is important because every public institution (executive, judicial, legislative) acknowledges that:

1. people have a right to get information;³⁸³
2. there is obligation for public official provides and gives requested information proportionally;³⁸⁴
3. some information might be classified as limited;³⁸⁵ and
4. there is an obligation for public institutions to reform their documentation and services.³⁸⁶

As the main paradigm is openness, it is intended to create good governance by involving *peran serta masyarakat* (public participation) in democratic society. Furthermore it is considered as a strategic plan to combat corruption, collusion and nepotism which is known as *Korupsi Kolusi Nepotisme* or KKN.³⁸⁷ Butt argued that the Indonesian Freedom of Information regime has been successful by saying

Although these reforms are new and a definitive assessment of them is likely premature, I argue that on the available evidence, however, Indonesia's reform in this area have, on the whole, thus far been largely successful.³⁸⁸

Butt considers the Indonesian Freedom of Information Law as 'an important component of the government transparency and accountability mechanisms established after Soeharto and his authoritarian "New Order" government fell in 1998.'³⁸⁹

In relation to the prosecutor's role as an external checker, there is body known as the *Komisi Kejaksaan* (Prosecutor Commission). According to section

³⁸³ See section 4 *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

³⁸⁴ See section 7 *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

³⁸⁵ See section 17 *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

³⁸⁶ See section 7 (3) *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

³⁸⁷ See supplementary document of *Undang-Undang no 14 Tahun 2008 tentang Keterbukaan Informasi Publik* (Law No. 14 of 2008 on Freedom of Information Law) (Indonesia) ('2008 Freedom of Information Law').

³⁸⁸ Simon Butt, 'Freedom of Information Law and Its Application in Indonesia: A Preliminary Assessment (2013), *Asian Journal of Comparative Law*, 3.

³⁸⁹ *Ibid* 1.

38 of the 2004 Prosecutor Law, the Indonesian President can create *Komisi Kejaksaan* (Prosecutor Commission) to enhance the prosecutor's performance. This commission is intended to monitor a prosecutor's performance externally (outside *Kejaksaan*). Internally, the role of the *Jaksa Muda Pengawas* or *Jamwas* (Deputy of Supervision) supervises the prosecutor's performance but is considered ineffective because of corruption problems within *Kejaksaan*. Thus for the first time the Indonesian President located *Komisi Kejaksaan* in Jakarta by issuing *Peraturan President Nomor 18 Tahun 2005 tentang Komisi Kejaksaan Republik Indonesia* (Presidential Regulation Number 18/ 2005 on the Prosecutor Commission of the Indonesian Republic hereafter *Perpres 18/2005*).

The 14 candidates of the *Komisi Kejaksaan* are named by *Jaksa Agung* (the Indonesian Attorney-General) and seven are chosen by the Indonesian President for four year terms. The members must have a minimum of 15 years experience practicing law. One of the duties of the *Komisi Kejaksaan* is making recommendations to *Jaksa Agung* related to the behaviour and performance of the prosecutor.

According to section 10 of *Perpres 18/2005*, the *Komisi Kejaksaan* has the following duties:

1. To supervise, monitor and evaluate prosecutors and civil servants within *Kejaksaan* in exercising their duties;
2. To supervise, monitor and evaluate the behavior of prosecutors and civil servants within *Kejaksaan* before and after office hours.
3. To monitor and evaluate organizational conditions, *Kejaksaan* resources and its human resources; and
4. To to make suggestions to *Jaksa Agung* based on their supervising, monitoring and evaluation.

Based on these duties, the *Komisi Kejaksaan* accepts public complaints about the prosecutor's performance, undertakes an investigation and reports the matter to *Jaksa Agung*. This report must be followed up by an internal investigation within *Kejaksaan Agung*.³⁹⁰

³⁹⁰ See section 13 *Perpres 18/2005*

After more than five years this law is considered to no longer match the current Indonesian situation.³⁹¹ The Indonesian President repealed the previous law by enacting a new law in 2011. Based on this law, the candidate for the *Komisi Kejaksaan* is not proposed by *Jaksa Agung* but by one of the cabinet Ministers and also publicly selected based on a selection process. Other significant reforms in strengthening the role of *Komisi Kejaksaan* are:

1. The *Komisi Kejaksaan* can propose to make *Majelis Kode Perilaku Jaksa* (Prosecutor Code of Conduct Assembly) to decide whether or not there is a breach of ethics by individual *Jaksa* (prosecutor).³⁹² This *Majelis* did not exist in previous law;
2. The *Komisi Kejaksaan* can directly report to police if there is a breach of criminal law or report directly to the KPK if there is a corruption allegation (Pasal 12); and
3. The *Komisi Kejaksaan* has an obligation to give the investigation result to the informant (public complaint).

Soetandyo criticised the role of *Komisi Kejaksaan* as ineffective because it only makes recommendations to the Senior Officer, in this case *Jaksa Agung*.³⁹³ The recommendation can only be useful if it is followed up by action to remedy the situation. Further he explained that most cases reported by *Komisi Kejaksaan* were not seriously addressed because of political reasons and *Jaksa Agung* protecting their *Korps* name (*Kejaksaan* institution). This situation, he argued, is part of the *mafia peradilan* type of corruption within the Indonesian system. In this regard corruption can cripple both good and bad systems in Indonesia.

Making *Komisi Kejaksaan* part of enhancing transparency and accountability of the prosecutor needs to be supported. As mentioned above, this

³⁹¹ See the section *Peraturan President Nomor 18 Tahun 2005 tentang Komisi Kejaksaan Republik Indonesia* (Presidential Regulation Number 18/ 2005 on the Prosecutor Commission of the Indonesian Republic hereafter *Perpres 18/2011*)

³⁹² Section 4 *Perpres 18/2011*.

³⁹³ Soetandyo Wignjosoebroto, *Pengawasan terhadap Kinerja Kejaksaan* (Monitoring on Prosecutor Performance). Paper presented in panel discussion at Gracia Hotel, Semarang-Indonesia 10 June 2006, *Fakultas Hukum Unisula* (Unisula Law Faculty) and *Serikat Pengacara Indonesia* (Indonesian Lawyer Consortium).

Commission was established in response to corruption within *Kejaksaan*. The 2011 law might reflect the Indonesian President's commitment to improving the role of *Komisi Kejaksaan* in enhancing the transparency and accountability of *Kejaksaan*. However, there is a similar problem with the KPK or *Komisi Pemberantasan Korupsi* (Eradication Corruption Commission), which only exists in Jakarta. There are more than 30 provinces in Indonesia each having a *Kejaksaan Tinggi* (Provincial Attorney-General's Office). According to section 15 *Perpres 18/2011*, nine people (previously it was seven people), have to monitor more than 9000 prosecutors across Indonesia which seems impossible. It is suggested in this thesis that a *Komisi Kejaksaan* representative should be based in each province. This recommendation is similar to that for enhancing the KPK's role in combating corruption within the Indonesian system.

3.2.6 Conclusion

In summary, the concept of discretion exists under various names across contemporary legal systems. Legal principles seek to confine and structure it and subject it to review. These often represent the individual evolutionary paths taken by each of these legal systems. However, there is also interaction between each legal system and borrowings between them.

In Australia, the control of discretion is still marked by the legal system's origin in English law and the multiple sources of legal rules involved in limiting and reviewing its exercise. The restrictions on the exercise of discretion may be expressed or implied in the language and purpose of the legislation conferring it or in common law principles. There are also legislative schemes for judicial review and review of decisions; however the review of discretions found in the inherited concept of the prerogative remains uncertain.

In French law under the concept of *pouvoir* or *competence discretionnaire* the executive enjoys freedom of decision making within the law. In German law discretion is distinguished by what is termed as *unbestimmite Rechtsbegriff* (undefined legal concepts) such as 'public welfare', 'public need' and 'public

safety'. These are commonly applied to statutes conferring powers on administrative bodies. They invest the bodies with a measure of discretion known as *Beurteilungsspielraum* (margin of appreciation). In Dutch administrative law influenced by both French and German law discretion exists under the term *beleidsvrijheid* (free discretion) or *beoordelingsruimte* (scope for appraisal) which carry the same meaning. Using similar concepts of discretion such as *beleidsvrijheid* found in Dutch law, the Indonesian system acknowledges the concept of discretion that is known as *kewenangan diskresi* (discretionary power).

Each legal system discussed commonly uses rules to confine discretion, and structures its exercise by developing principles and using published guidelines. The principles for proper administration play a significant role in structuring the manner in which a decision maker uses discretion and also by providing for a check through judicial review. In general most of their discretionary power is based on statute. Australia is an exception because of its common law background. The concept of the prerogative is even more accepted but this does not mean that the exercise of the prerogative power goes unchecked. Judicial review may still be possible.

Judicial review of the exercise of discretion exists in all countries with some differences. The French system of administrative review has separated the administrative courts from general courts and judicial and executive powers using the *Conseil d'Etat*. Germany also developed an independent system of administrative courts. The general court system is used in Australia although legislation has developed special administrative tribunals. While the Indonesian system is influenced by the Dutch system, separate administrative courts were not adopted. The Administrative Court is part of a single hierarchy of courts under *Mahkamah Agung* (the Indonesian Supreme Court). The Dutch *Conseil d'Etat*, *Raad van State* was not borrowed. As part of external review of the administrator's actions, Indonesia has an ombudsman. Beside the ombudsman, the enactment of the Freedom of Information Law and the specialist Anti-Corruption Commission restrict and review the behaviour of Indonesian officials.

From this brief survey, all countries apply discretion with the possibility of judicial review. Australia and the other countries surveyed are different because of

the distinction between common civil legal systems. However there is a convergent understanding in both to further allow the exercise of discretion by confining, structuring it and ensuring its exercise can be reviewed. French law appears to have affected German law and both impacted on Dutch law. The Dutch law in turn has influenced Indonesian law.

The identification of discretion and the limits sought to be imposed on it result from the perception that it may lead to arbitrary decision making. That arbitrariness is inconsistent with the principle of the rule of law as it is commonly known in common law systems, or *rechtsstaat*, as it is known in civil law systems. The next section discusses the rule of law and *rechtsstaat* across legal systems. It considers the relationship between discretion and the concept of the rule of law and the *rechtsstaat*.

3.3 The rule of law and the *Rechtsstaat*

There are two common concepts used to describe ‘the protection of individuals against state power’³⁹⁴: “the rule of law” and “*Rechtsstaat*”. The first is used in common law countries while the second is used in civil law countries.

There is no agreement on what the rule of law is. Stressing its importance, the United Nations Rule of Law Indicators refer to this uncertainty.³⁹⁵

The rule of law is a principle of governance. It is also a fundamental aspect of peace building and related efforts to build effective and credible criminal justice institutions. Although the term “rule of law” is widely used and often linked to State-building efforts, there is no single agreed-upon definition.

Harlow notes the effect of globalization and the concept of the rule of law, stating that ‘there is not one rule of law but many: judicial orders do not all occupy the same space in the system of governance, nor do they necessarily need to operate

³⁹⁴ Authors such as Adriaan W. Bedner mention that the Rule of Law or *Rechtsstaat* is also used to protect people’s property and safety from violation and incursion of other people. See Adriaan W. Bedner, *Suatu Pendekatan Elementer Terhadap Negara Hukum (An Elementary Approach to the Rule of Law)* (Pustaka Larasan, 2012) 48. Joseph Raz mentions that ‘The rule of law provides the foundation for the legal respect for human dignity’. See Joseph Raz, ‘The Rule of Law and its virtue’ in Richard Bellamy (ed.), *The Rule of Law and The Separation of Powers, The International Library of Essays in Law and Legal Theory*, (Ashgate, 2005) 87.

³⁹⁵ See the Introduction of the United Nations *Rule of Law Indicators: Implementation Guide and Project tools* (1sted.) (2011).

identically.’³⁹⁶ In the specific context of Asia, Jayasuriya notes an important difference in its use compared with western countries:³⁹⁷

Despite semantic resemblance, the rule of law does not function in East Asian countries as it is supposed to function in Western countries (especially in the United States). The rule of law will only function when underpinned by widespread adherence to liberal norms and values. However, in many East Asian societies ‘organic’ views of the ideal relation between the state and the judiciary abound more than elsewhere, stressing harmony, consensus, hierarchy, and statepower. These two additional requirements for the functioning of the rule of law are often overlooked by a variety of scholars (the ‘law and development school’, and those who have advocated rational choice explanations of economic growth), as well as by the multilateral organizations (especially the World Bank).

Tamanaha seeks to accommodate different understanding of the rule of law with the concept of ‘a thin to thick’.³⁹⁸ The thinnest is related to ‘law as an instrument of government action’, which is formal-procedural in nature. The thickest is related to ‘social welfare’ that stresses the substance rather than formal-procedural aspect.³⁹⁹ However, it should not be taken as a strict formulation, as formal versions have substantive implications and the substantive versions incorporate formal requirements.⁴⁰⁰

Thin or thick conceptions are useful in describing the rule of law in the context of particular legal systems. Peerenboom explains that:

Distinguishing between thin and thick theories makes it possible to use the rule of law more effectively as a benchmark for evaluating legal systems by clarifying the nature of the problem.⁴⁰¹

Peerenboom observed that in several Asian countries ‘thin rule of law’ issues are real problems:

Several of the countries in Asia are still in the process of establishing functional legal systems. Their legal systems are plagued by thin rule of law issues such as weak legal institutions, incompetent and corrupt administrative officials and

³⁹⁶ Carol Harlow, *State liability: Tort law and Beyond*, (Oxford University Press, 2004) 44.

³⁹⁷ Kanishka Jayasuriya (ed.), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999)

³⁹⁸ Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory* (Cambridge University Press, 2004) 91.

³⁹⁹ *Ibid* 92. The basic distinction can be summarized thus: formal theories focus on the proper sources and forms of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principles).

⁴⁰⁰ *Ibid*.

⁴⁰¹ Randall Peerenboom, ‘Varieties of Rule of Law an Introduction and Provisional Conclusion’ in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (RoutledgeCurzon, 2004) 7.

judges, excessive delays, and limitations on access to justice including high court costs and the lack of legal aid.⁴⁰²

Most models of the rule of law stress the potential threat to the exercise of discretion. For example, Dicey's concern with arbitrary discretion, which is further explained below, led him to caution against the exercise of discretion. For this reason, Saunders and Le Roy also stipulate four core principles of the rule of law, stressing that 'these rules (and no other rules) must be applied and enforced'.⁴⁰³ Arguing that the rule of law is an ideal worth striving for, Stein summarized his understanding of the definition in relation to discretion:

The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.⁴⁰⁴

Different civil law systems use their own languages to translate the concept of "Rechtsstaat" (*legal state* or *state of law*) such as "Etat de droit", "Stato di diritto" or "Estado di derecho".⁴⁰⁵ *Negara hukum* (state of law) is the term used in the Indonesian context.⁴⁰⁶

Sordi explained that the goal of *Rechtsstaat* was to circumscribe the enormous power that executive administrations had obtained during the French Revolution and the First French Empire.⁴⁰⁷ He saw its similarity in limiting official power to the rule of law:

It was thus unnecessary to alter the traditional way of thinking, which regarded the common law courts as the pre-eminent of the 'Rule of to which all litigants, including the executive, must submit. Indeed, in nineteenth century England, the very idea of the rule of law emerged in legal scholarship explicitly to delimit administrative powers analogous to those of the continent. In this, the idea of the Rule of Law ironically shared much with the *Rechtsstaat*: both sought to reconcile State sovereignty with the need for legal guarantees of individual rights and both

⁴⁰² Ibid.

⁴⁰³ Cheryl Saunders and Katherine Le Roy, *Perspective on the Rule of Law, The Rule of Law* (Federation Press, 2003) 5.

⁴⁰⁴ Robert Stein, 'Rule of Law Symposium, Rule of Law: What does it means?' (2009) *Minnesota Journal of International Law* 293, 302.

⁴⁰⁵ Michel Troper, 'The limits of the Rule of Law' in Cheryl Saunders and Kathrine Le Roy (eds.), *The Rule of Law* (Federation Press, 2003) 81.

⁴⁰⁶ See preamble of The Indonesian Constitution

⁴⁰⁷ Bernardo Sordi, 'Revolution, Rechtsstaat, and the Rule of Law: historical reflections on the emergence of administrative law in Europe' in Rose Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Research Handbooks in Comparative Law, 2010) 29.

acknowledged a general presumption of freedom, as well as the primacy of individual property.⁴⁰⁸

Historically, the concepts of *Rechtsstaat* and the rule of law arose from different political and historic contexts and in different legal traditions. Hadjon refers to this in his explanation:⁴⁰⁹

*Istilah “rechtsstaat” mulai populer di Eropah sejak abad XIX meskipun pemikiran tentang itu sudah lama adanya. Konsep “rechtsstaat” lahir dari suatu perjuangan menentang absolutism sehingga sifatnya revolusioner sebaliknya konsep “the rule of law” berkembang secara evolusioner. Istilah “the rule of law” mulai populer dengan terbitnya sebuah buku dari Albert Venn Dicey tahun 1885 dengan judul “Introduction to the study of the law of the constitution”. Konsep rechtsstaat bertumpu atas system hukum continental yang disebut “civil law” atau “modern Roman Law” sedangkan konsep the rule of law bertumpu atas system hukum yang disebut “common law”. Karakteristik “civil law” adalah “administrative” sedangkan karakteristik “common law” adalah “judicial”. (The term Rechtsstaat has been popular in Europe since the XIX century even though a body of knowledge about it had long existed. “Rechtsstaat” emerged from struggle against absolutism, thus it was revolutionary in nature, where in contrary “the rule of law” concept developed in an evolutionary way. The term “the rule of law” became popular after Albert Venn Dicey in 1885 published *Introduction to the study of the law of the constitution*. The Rechtsstaat concept attached to the continental legal system known as “civil law” or “modern Roman Law” whereas the rule of law concept attached to the “common law” legal system. The civil law is “administrative” in character whereas “common law” is “judicial”).⁴¹⁰*

The rule of law emerges in the common law tradition under the influence of John Locke and his justification for the Civil War and the Glorious Revolution of 1688. In his famous *Two Treatises of Government* he argues that individuals agreed to the creation of a state to protect their lives, liberty and property by giving up their existing rights under natural law. These natural rights existed before the state. The legitimation of the state came from individuals delegating their rights to the state in a process in which ‘the individual rights limit the state power.’⁴¹¹ If this is not respected the people are free to change the state. The US Declaration of

⁴⁰⁸ Bernardo Sordi, above n 407, 32.

⁴⁰⁹ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia* ‘(Legal Protection for the Indonesian People)’ (PT Bina Ilmu, 1987) 72-73.

⁴¹⁰ Ibid.

⁴¹¹ Nadia E. Nadzel, ‘Rule of Law v. Legal State: Where Have We Come From, Where Are We Going To?’ in James R. Silkenat et al. (eds.) *The Legal Doctrines of the Rule of Law and the Legal State* (Rechtsstaat) (Springer, 2014) 291.

Independence is based on this process of reasoning. It declares that the people have the right to alter, abolish and create a new government if the old government cannot protect their rights to life, liberty and the pursuit of happiness. Nedzel breaks this into two principles:

The Anglo-American conception of the rule of law consists of two interdependent components: (1) the citizen's obligation to obey the law (the law and order component), and (2) the government's subservience to the law (the limited government component).

Further, citing *Marbury v Madison*⁴¹² she explained that the second component means:

It is that the law itself is the ultimate sovereign, not the government, and a government is answerable to its people for any infringement of liberty: a government of laws and not of men.⁴¹³

In civil law countries, there is an assumption that the state came first before the rights of the citizens and the laws that respect those rights. Nedzel states that a civil law system:

traditionally regards the concept of government of laws as oxymoronic: laws cannot either create or enforce themselves, there has to be a government that creates them, and therefore, government came first.' Citing Jellinek 'the state is prior to the law and that laws only constrain its supreme powers'.⁴¹⁴

The *Rechtsstaat* creates the constitution and the state and further assists the state to govern according to law. Which came first, the chicken (government) or the egg (law) is considered less important as the law and the state both now exist. In the United Kingdom and the United States the question may no longer be important but Locke and the English and the American Revolutions show that it has been important in the past. It still provides a model of government and law that places the respect for the rights of the individual ahead of the state's need to govern.

⁴¹² 5 U.S. 137 (1803). In this case the Supreme Court of the US struck down an Act of Congress as being inconsistent with the Constitution as it infringed the separation of powers. It held, in effect, that the Constitution was sovereign. It distinguished the US Constitution from the unwritten constitution of the UK under which the parliament was sovereign.

⁴¹³ Nadia E. Nadzel, above n 411.

⁴¹⁴ See Stephan Kirste, 'Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and The Rule of Law' in James R. Silkenat et al. (eds.) *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 34.

3.3.1 Convergence of the rule of law and the *Rechtsstaat*

De Cruz indicates several theories which explain apparent convergence across legal systems. Legal evolution is one of them⁴¹⁵ which he describes as follows:

This theory proceeds on the basis that legal change is a natural process that will proceed inexorably and irresistibly because it is controlled by force beyond human power. Thus, legal systems are at different stages of development and, when they converge, it is because the less developed system is catching up with the more mature one. Since the civil law is much older than the common law, the logical corollary to this thesis is that the common law will gradually become more like the civil law. However, trends toward convergence may be observed in both systems.⁴¹⁶

In the early 21st century there appears to be a convergence in the use of the two concepts of the rule of law and the *Rechtsstaat*, but nuanced differences from their separate evolution in national histories still appear, as Ake explains:

The development after the Second World War is characterized by a very considerable degree of convergence between the *Rechtsstaat* and the Rule of Law doctrines—or, if you like, a return to the classical Western tradition of legalism and values attached thereto, shorn of some nineteenth century German and English peculiarities. A contributing factor in this development has been the appearance of international conventions of human rights, more or less effectively realized by institutions created for that very purpose.⁴¹⁷

Hadjon and other writers acknowledge that the differences between the terms are no longer debated as the convergence is acknowledged in the protection of human rights.⁴¹⁸ Authors such as MacCormick stated that:

a comparison of the German and English cases shows that *Rechtsstaat* and Rule of Law, despite their different constitutional histories, rest upon the same underlying principles, they are (1) the principle of legality, which is the same in the different contexts; (2) the principle of the general validity of legal precepts; (3) the principle of the public nature of laws; and (4) the principle of non retroactive.⁴¹⁹

⁴¹⁵ Peter De Cruz, above n 173, 504. It mentions that there are several philosophies of convergence: (a) return to the jus commune; (b) legal evolution; (c) the natural law theories; and (d) the Marxist thesis.

⁴¹⁶ Ibid 506.

⁴¹⁷ Ake Frandberg, *From Rechtsstaat to Universal Law- State, An Essay in Philosophical Jurisprudence* (Springer, 2014) 4.

⁴¹⁸ Philipus M. Hadjon, above n 409, 72-73.

⁴¹⁹ Gustavo Gozzi, 'Rechtsstaat and Individual Rights in German Constitutional History' in P. Costa and D. Zolo (eds.) *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 237.

Other authors such as Barber acknowledge the resemblance between the concepts of *Rechtsstaat* and the rule of law: 'It is unsurprising that conceptions of the *Rechtsstaat* resemble conceptions of the Rule of Law: both concepts provide similar answers to similar questions'.⁴²⁰

The political values underlying the different legal systems have also been mentioned. The rule of law is based on the tradition of common law which was elaborated by the courts and laid the foundation of the rule of law and gave the law some primacy over the actions of the state. In Germany the doctrine of the *Rechtsstaat* precludes the possibility of the primacy of law over the states.⁴²¹ This is sometimes referred to as the paradox of the *rechtsstaat*; that is, as the state made the law how can the state be subject to it? This suggests that there may be other sources to which the state lends its authority such as judicial doctrine, constitutional principles and the legitimate expectations of citizens and officials sharing public power.

The common law has been more comfortable with multiple and dispersed power and decision making. Judges of the Court of Kings Bench had an inherent power - not based on legislation - as judges of a superior court of record to review the procedures and decisions of all other courts and tribunals and officials apart from parliament. Judicial review in civil law systems was by judges with only those powers given to them by legislation. The review may also be by junior judges who have no equivalent in the common law. The common law reflects its evolution through a number of historical contingencies. England may have become one country in 1066 but it did not develop a strong and centralized government until the mid 1800s. Attempts to develop more powerful institutions controlled by the king failed in the constitutional conflicts of the 1600s, as Schwarze describes:

...an elementary form of supervision of administrative action had been developed, which culminated, during the Tudor Dynasty, in the establishment of the Star Chamber court, which exercised a certain degree of supervision over the

⁴²⁰ N.W. Barber, 'The Rechtsstaat and The Rule of Law' (2003) *University of Toronto Law Journal* 443, 444.

⁴²¹ Gustavo Gozzi, above n 419, 237-238.

lower administrative authorities. Subsequently, however, this court degenerated into an instrument in the service of arbitrary power exercised by the Stuarts.⁴²²

Schwarze further explains that:

At the end of the seventeenth century, following the “Glorious Revolution” of 1688/89, the fundamental principles of modern administrative law in England were established: disputes relating to administrative action were to be decided by the ordinary courts, more particularly through the mechanism of writs of certiorari, prohibition and mandamus.⁴²³

This is the origin of judicial review in all common law countries including Australia, as indicated above.

In civil law systems, such as those created by Napoleon in the First French Empire and in Germany after unification in 1870, the state in the person of the emperor was always at the centre and in control. Kunnecke observed of Germany that:

During the second half of the nineteenth century when Administrative Courts were established, judges and academics respected that the administration had to be permitted an area free of judicial control in reaching their decisions. Germany's system of constitutional monarchy allowed for discretionary powers to remain an area of unlimited exercise of sovereign powers by the monarch: in a constitutional monarchy the *pouvoir administratif* is the area of sovereign power where Parliament and the courts have no role to play.⁴²⁴

However, she further noted that:

A decisive shift in the interpretation of discretion occurred in 1945. This was a direct response to the experiences during the Nazi dictatorship during which government and administration possessed all powers and Administrative Courts were deprived of their functions. Discretionary powers were no longer regarded as an area of free exercise of administrative power but as a tool to grant a limited area of flexibility in the enforcement of the law. This development was the necessary consequence of history and the effect that the establishment of the *Rechtsstaat* had on German administrative law. The *Rechtsstaat* principle includes elements such as a state, which founded on and subject to the rule of law, a state respecting and conforming to the rule of law, a state governed by the rule of law.⁴²⁵

Schwarze explains that in the United Kingdom the effect of the industrial revolution, the co-ordination required to fight modern wars and the creation of the

⁴²² Jurgen Schwarze, above n 263, 141.

⁴²³ Ibid 141.

⁴²⁴ Martina Kunnecke, above n 254, 81.

⁴²⁵ Ibid 82.

welfare state and the consequent change in the role of the state and its administration led to technological progress that:

...meant that Parliament was no longer in a position to regulate satisfactory complex issues such as the railways (and, later, road transport), safety standards in the course of mass production, etc. As a result, increasing use was made of the practice of delegating legislative powers to the government or to specially selected administrative bodies, whose specialist staff was in a better position to issue detail regulations and to react flexibly to new developments. Thus, the practice of delegating legislation to the administration increased considerably towards the end of the nineteenth century. The welfare legislation of the early twentieth century created a new field of activity for the administration, particularly in the sphere of social security. Also, in the course of the First World War the powers of the executive to issue ministerial regulations and to set up special administrative tribunals were considerably enlarged.⁴²⁶

He further explained that ‘the increasing establishment of new tribunals after the First World War produced a rising tide of criticism directed at the inadequacy of their procedural guarantees and the defective nature of the legal protection against tribunal decisions.’⁴²⁷ There was an attempt to control tribunals to overcome this situation. He describes how:

as a result a ‘Council on Tribunals’⁴²⁸ was set up, which supervises the various tribunals and submits an annual report to parliament. Other measures include a strengthening of the procedural rights of the citizen concerned and an improvement in the opportunities for judicial review of tribunal decisions.⁴²⁹

3.3.2 Extravagant versions of the rule of law and the *Rechtsstaat*

As indicated above, there is no agreement on how the rule of law is defined. Like the concept of discretion, the concept of the rule of law itself varies and there is a strong relationship between discretion and the rule of law.

AV Dicey described three features of the rule of law⁴³⁰ which can be summarized as:⁴³¹

⁴²⁶ Jurgen Schwarze, above n 263, 142.

⁴²⁷ Ibid 150.

⁴²⁸ The Council of Tribunals was established as a result of the Franks Report Cmnd 218 (1957). This was an inquiry into land taken for defence purpose in World War II with a promise that it would be returned at the war’s end. It was not returned and the inquiry by Franks revealed deceit and abuse of power by Government in what is called the Crichton Down affair.

⁴²⁹ Jurgen Schwarze, above n 263, 146.

⁴³⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 1889), 189-190. ‘It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of

1. the supremacy of regular law as opposed to arbitrary power;
2. equality before the law of all persons and classes, including government officials; and,
3. the incorporation of constitutional law as a binding part of the ordinary law of the land.

In this conception of the rule of law arbitrary power exists when the law is not the main principle used in decision making. This is seen in the Frank Committee's use of the term:

The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law.⁴³²

The word 'arbitrary' may be defined as 'depending on individual discretion' and not by fixed rule.⁴³³ If an official decision depends on an individual discretion then it would be arbitrary and inconsistent with the concept of the rule of law as defined by Dicey. Loveland described Dicey's concerns about discretion as follows:

Dicey was much concerned that the laws which government administered had a high degree of predictability or foreseeability. People needed to know where they stood if they were to run a business, get involved in politics, or certain types of social relationships. So Dicey thought the rule of law demanded that parliament did not give government any arbitrary or wide discretionary powers.⁴³⁴

prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts The "Rule of law", lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individual, as defined and enforced by the Court; that, in short, the principles of Private law have with us been by the action of the Courts and the Parliament so extended as to determine the position of the Crown and of its servant; thus the constitution is the result of the ordinary law of the land'.

⁴³¹ Lawrence B Solum, 'Equity and the Rule of law' in Ian Shapiro (ed.), *The Rule of Law* (NOMOS XXXVI, 1992) 122.

⁴³² Franks Committee, 'the British Committee on Administrative Tribunals and Enquiries, Cmnd 218' (1957) cited in KC Davis, above n 242, 29.

⁴³³ KC Davis, above 242, 29.

⁴³⁴ Ian Loveland, *Constitutional Law, Administrative Law and Human Rights* (Oxford University Press, 2006) 61.

Dicey's argument is taken further by Hayek in what is known as the 'extravagant version of the Rule of law'.⁴³⁵ In *The Road to Serfdom*, Hayek stated that the rule of law:

stripped of all technicalities, ... means that government in all its action is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.⁴³⁶

There is no room for any discretion and the ideal is that all government power is bound by pre-enacted rules. However, Hayek's position changed in his subsequent *Constitution of Liberty* which took a less extreme position. According to Davis:⁴³⁷

Hayek is forced to grant that not all the acts of government can be bound by fixed rules and therefore that considerable discretion must be granted to the subordinate agencies but he reconciles this inescapable concession by saying that such discretionary power must be controlled by the possibility of a review of the substances of the decision by an independent court.

Loveland, using Hayek's concept, acknowledges that minimum government discretionary power is permissible; however 'such powers make it impossible for citizens to predict the exact extent of government authority'.⁴³⁸ The extravagant interpretation of the rule of law does not fit with the reality of contemporary societies or states in that eliminating all discretionary powers held by government agencies or public officials is impossible.

Dicey and Hayek's position on the supremacy of law is consistent with uses of the concept of legality in the *rechtsstaat*:

... as FJ Stahl and the German public law doctrine worked out the concept of *Rechtsstaat*, the State was to act under precise and fixed mechanisms, and predefined rules, thereby self-limiting its own power through the law.⁴³⁹

It should be noted that both the concept of the *rechtsstaat* and the rule of law acknowledges the principle of legality.

⁴³⁵ KC Davis, above n 242, 30.

⁴³⁶ F.A. Hayek, *the Road to Serfdom* (1944) 72.

⁴³⁷ KC Davis, above n 242, 33.

⁴³⁸ Ian Loveland, above n 4334, 66.

⁴³⁹ Gianluigi Palombella, 'The Measure of law: The Non-Instrumental Legal Side from the State to the Global Setting (and from Hamdan to Al Jeddah)' in Silkenat et.al (eds.), *The legal doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 135.

Extravagant versions of the rule of law and the concept of legality in the *rechtsstaat* are based on liberal ideals: '[s]erving certainty and submitting public powers to pre-established rules, is a necessary premise of a liberal state, of the separation of power.'⁴⁴⁰ In more extreme forms of liberalism or libertarianism, the government's role is minimalist. According to Kleinfeld, Hayek's intention in stressing this extravagant version of the rule of law was to buttress the market economy by stressing that the rule of law bound government to rule through legislated and judge made law.⁴⁴¹ The effect intended by him was that 'a predictable, efficient legal system allows business to plan, enables law-abiding citizens and businesses to stay on the correct side of the law, and provides some level of deterrence against criminal acts'.⁴⁴² Hayek saw the welfare state that emerged in a number of western countries after World War II as maximizing the role of the state at the expense of the rights of citizens and the free market. The welfare state and the reactions to it continue to impact on the way in which the rule of law is understood.

3.3.3 The rule of law and the welfare state

The welfare state could be seen as opposed to liberal models, particularly in economics. In Germany (Sozialstaat) and in the Netherlands (*welvaartsstaat/verzorgingsstaat/sociale rechtsstaat*) this is also recognized. The welfare state was a reaction to the economic crises of the interwar years and the sacrifices and contributions made by citizens in World War II. Liberalism with its private ownership of capital and free markets was considered to have failed in these crises. The welfare state was stronger in Western Europe with established political labour parties and socialist objectives which were incompatible with economic liberalism and free markets. It was intended to stabilize the economic and social order and give all citizens the chance of a good life. The state undertook many functions in the community and intervened in all spheres of life.

⁴⁴⁰ Ibid 132.

⁴⁴¹ Rachel Kleinfeld, *Competing Definitions of the Rule of Law in Promoting the Rule of Law Abroad in Search of Knowledge* (Carnegie Endowment For International Peace, 2006) 42.

⁴⁴² Ibid.

It was no longer the ‘nightwatchman’ that merely supplied security within a national territory under the older liberal concepts. Discretion in the hands of public officials broadened to manage, among other things, health, pensions, public transportation and the environment. In one area, human rights, socialist values underpin the welfare state and converge with liberalism. The violation of human rights revealed at the end of World War II led to sustained attention to human rights which fitted with the ideals of equality found in both liberalism and the welfare state.⁴⁴³

In the welfare state the government is seen to have the responsibility to guarantee the citizen’s welfare and be actively involved in both social and economic matters to ensure this. Leszko and Kakol explain the welfare state as follows:

The welfare state can be defined as a state that attaches a great importance to the realization of social functions through satisfying basic social needs like: providing work opportunities, at least minimum incomes for all citizens, care for the unemployed and those unable to work, health care, opportunities to study and equal chances of development for all citizens, public safety, prevention of socially detrimental income stratification, etc⁴⁴⁴

The state’s role should not be minimalist especially in economic matters. The idea of the welfare state, as noted, conflicts with liberal views that “the least government is the best government” and with *laissez faire* or the free market. Its oversight of society and the economy ‘required Parliament to give government officials large numbers of discretionary powers; it was simply not feasible to run a complex welfare state in accordance with legislative ‘rules’.’⁴⁴⁵ Loveland says of western states after World War II:

Government was now doing so much, and dealing with so many different situations, that it would simply be impossible for legislators to produce a rule for every foreseeable situation. This necessarily meant that there was some reduction

⁴⁴³ The Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly on 10 December 1948, The International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly on 16 December 1966. The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) of the Council of Europe, 3 September 1953.

⁴⁴⁴ Bogumita Mucha-Leszako and Magdalena Kakol, ‘Welfare State in Europe or the European Welfare State’ (2014) *Eurolimes*, 36, 36.

⁴⁴⁵ Ian Loveland, above n 434, 68.

in the degree to which citizens could precisely predict the limits of government's legal authority.⁴⁴⁶

In the welfare state discretion is considered to be inevitable. Does this contravene Dicey's conception of the rule of law? Harry Jones sought to reconcile the two, as Loveland explains:

While legislation in Hayekian society would take the form of rigid rules, the statutory basis of welfare state would also contain flexible standards, permitting government to make various responses to given situations. However, the adjudicative ideal demands that although the legislator can bestow wide discretion on government bodies, it may not grant them arbitrary powers. Jones' version of the rule of law does not dismiss the importance of predictability and certainty; rather it accepts that in some areas of government activity it is only necessary that citizens can foresee the general boundaries rather than the precise location of government authority.⁴⁴⁷

In the 1980s under Ronald Reagan in the US but also more significantly under Margaret Thatcher in the UK, Hayek's ideas were to be used to reduce the welfare state and led to privatisation of state owned enterprises and reduction in services provided by the state as well the reduced use of taxation and social security to redistribute wealth. Government was intended to become smaller with less room for the exercise of administrative discretion and more room for the market. This could be seen to impact on the way in which the state managed societies. It also impacted on another way of conceptualising the state after World War II, the regulatory state.

3.3.4 The regulatory state

Overlapping in both time and concepts with the welfare state was the development of the concept of the regulatory state. It was a term first used as a fundamental way of describing contemporary features of government in the United States by James Anderson in 1962.⁴⁴⁸ He used it to describe the expansion of the

⁴⁴⁶ Ibid 68.

⁴⁴⁷ Ian Loveland, above n 434, 68.

⁴⁴⁸ James Anderson, *The Emergence of the Modern Regulatory State* (1962).

administrative powers of the US federal government to limit and oversee the power being exercised by large corporations.⁴⁴⁹ Moran observes:

Americans virtually invented the modern regulatory state, in the sense that the United States was the great pioneer of the administrative technology of controlling business through law-backed specialized agencies rather than through the technique of public ownership.⁴⁵⁰

This was a distinctive form of regulation, including rule-making, rule-monitoring and rule-enforcement as part of a large bureaucratic enterprise. The size of that enterprise had been largely concealed because of the creation of independent agencies. The reduction in the activities of the welfare state impacted on what had been described as the regulatory state.

Grande describes the difference between what he sees as the positive state and regulatory state:

The positive state was a state directly providing public goods and services; the 'regulatory state' aims to achieve the same objectives indirectly, by regulating private actors and market.⁴⁵¹

The regulatory state can be seen as a tool to regulate the delivery of public services including those once delivered directly by the state. Levi defined the regulatory state 'on the basis of its instruments of control, that is, the regulatory state is a state that applies and extends rule-making, monitoring and enforcement via bureaucratic organs of the state'.⁴⁵²

In order to control the rule making process, monitoring and enforcement, the most powerful tool is legislation but there is a limit to what legislators can do.⁴⁵³ As the state expanded its reach legislators could not oversee everything and so had to delegate rule making and also discretionary decision making. Furthermore, Berg notes:

⁴⁴⁹ David Levi-Faur, 'The Odyssey of the Regulatory State, Episode One, The Rescue of The Welfare State', *Jerusalem Working Papers in Regulation and Governance*, Working Paper no 39 (2011), 18.

⁴⁵⁰ Michael Moran, 'Review Article: Understanding the Regulatory State' (2002) 32 *British Journal of Political Science* 391, 392.

⁴⁵¹ Edgar Grande, 'De-Regulation and Re-Regulation of Public Utilities: The New Regulatory State in the European System of Multi-Level Governance' in Lutz Leisering (ed.) *The New Regulatory State Regulating Pensions in Germany and the UK* (Pgrave Macmillan, 2011) 57-58.

⁴⁵² David Levi-Faur, above n 449, 14.

⁴⁵³ Chris Berg, 'The Growth of Australia's Regulatory State, Ideology, Accountability and the Mega – Regulators' (2008) *Institute of Public Affairs*, 9-10.

The modern state forges a compromise between Robert Nozick's 'night watchman state' and the welfare state by matching privatizations and liberalizations with regulatory *expansion*, rather than retreat. Governments have shifted away from the provision of services, to the regulation of those services.⁴⁵⁴

Administrators may face complex and new situations in every day decision making which could not be imagined by the legislator or rule maker. This may lead to an increasing number of discretionary decisions by the administrator which may extend to discretions to make new rules or dispense with compliance in existing rules, including legislation. Simultaneously with the growth in legislation, the number of agencies and administrators has also increased. However recently there has been a tendency to reduce the number of agencies to further save government expenditure.⁴⁵⁵

3.3.5 Conclusion

The rule of law is an important concept as it is a principle of governance. It is also a fundamental aspect of building effective and credible institutions. The central aim is to protect people against arbitrary government. Both the concept of the *Rechtsstaat* and the rule of law are the same in this regard although they have developed in historically different ways. To some extent there is convergence. Generally, the extravagant version of the rule of law and the legality principle in the *Rechtsstaat* based on traditional liberalism have waned over time because discretion in governing is inevitable. The development of the welfare and the regulatory states revealed the creation of further discretion, including law making and modification, to permit bureaucrats and technocrats to better co-ordinate more complex and integrated social, economic and political systems. In the criminal justice context, caution is needed in approaching the exercise of discretion as it can breach the principle of equality before the law and the idea of the rule of law itself, which is discussed further in Chapter 4. The next section continues the discussion of the rule of law and *Rechtsstaat* in the context of Indonesia.

⁴⁵⁴ Ibid 5.

⁴⁵⁵ David Crowe, 'Coalition Axing 175 Agencies', *The Australian*, 13 December 2014.

3.4 An Indonesian rule of law or *Rechtsstaat* and the regulatory state

The concept in Indonesian law and legal culture of the *Negara hukum* is taken from Dutch legal theory which originated largely in German legal culture. Burns noted Savigny influence to Indonesian Founding Fathers during their study in the Dutch:

I suggest that its latent function was to forge and anneal the icons of a national identity for the polity emerging out of the Dutch colonial state. In each case – for each student – Von Savigny provided the general theoretical framework for the intellectual event (the instant of self-recognition – or imagination): Van Vollenhoven supplied the particular minutiae which made the identification plausible.⁴⁵⁶

Van Vollenhoven institute is the forefront on studying *hukum adat/adatrecht* (Indonesian customary law) at the Leiden School that highly influenced by Von Savigny thought on organic law.⁴⁵⁷

Bourchier stated:

Indonesian legal thinking derives most of its key concepts from Dutch law. During the colonial era, Dutch scholarship on constitutional law in turn took its bearings from Germany, especially the enormous German literature on the philosophy of law.⁴⁵⁸

Rechtsstaat is influenced by positivist legal theory of which, it is observed:

Positivist doctrines have been used to underpin absolutist, centralized, bureaucratic regime but in their emphasis on rules they also contributed much to the growth of the *rechtsstaat*.⁴⁵⁹

In Indonesian law *Rechtsstaat* is termed *Negara Hukum* (law state or state of law) sometime also termed the rule of law by Indonesian scholars.⁴⁶⁰ Until the end of the Soeharto regime in 1998, Bouchier was critical that ‘The Indonesian ‘*negara hukum*’ was not prioritising law as the fundamental norm but ‘the public good’

⁴⁵⁶ Peter Burns, *Concepts of Law in Indonesia* (KITLV, 2004), 238.

⁴⁵⁷ Ibid, 232 and 236.

⁴⁵⁸ David Bourchier, ‘Positivism and Romanticism in Indonesian Legal Thought’ in Tim Lindsey (ed.) *Indonesia Law and Society* (the Federation Press, 1999), 95.

⁴⁵⁹ Ibid 95.

⁴⁶⁰ See Jimly Asshiddiqie, the first Indonesian Head of Constitutional Court using the term the Rule of Law interchangeable with *Rechtsstaat*. Jimly Asshiddiqie, *Constitution and Constitutionalism* (Konstitusi dan Konstitualisme) (no year), 122. Jimly Asshiddiqie was the first Chief of The Indonesian Constitutional Court, 123.

which was determined by a wise and benevolent public father figure'.⁴⁶¹ He asserted that:

Under 'democracy *Pancasila*' and 'Integralist state' or 'Village Republic', the proper role of the state was not simply to regulate society but to encompass it, involving itself in all aspects of social life for the sake of the well being of the whole - the whole family as it were.⁴⁶²

The danger of the 'integralistic state' concept in Indonesia is also acknowledged by an Indonesian legal practitioner Nasution who observed that:

From my study of constitutionalism in Indonesia, I had concluded that Professor Soepomo's concept of the "Integralistic State" was the root of authoritarianism in Indonesia, and represented the main threat to democracy.⁴⁶³

Yamin explained Soepomo's views as follows:

The state is the fabric of society which is integral, all classes, all parts, all of its members tightly connected with each other and is a unification of society which is organic. That which is most important in a state based on the integral school of thought is the life of the nation as a whole. The state does not side with the class which is the strongest or the biggest, it does not consider the importance of an individual as central, but the state does guarantee the safety of the life of the nation in its entirety as a community which cannot be separated.⁴⁶⁴

Jayasuriya explained the concept of Soepomo's integral state:

These notions of an integral state are premised on the assumption that there is an organic relationship between society and the state. Within this framework, the role of legal institutions was to promote certain conceptions of the collective good, not to allocate private rights amongst individual. In other words, it falls into the category of a 'statist legal' rather than a liberal set of legal institutions.⁴⁶⁵

Explaining 'statist' and a liberal set of legal institutions in the context of judicial independence, Jayasuriya states:

The defining aspect of judicial independence under a regime of liberal legalism is the separation of judicial and executive power, which importantly is embedded within a liberal conception of state. Within this framework where the state is neutral to different conceptions of the good, an independent judiciary is essential to restraining executive power. In contrast, within a statist regime of legalism, there is an organic notion of the state and society wherein, unlike the liberal state,

⁴⁶¹ David Bouchier, above n 458, 94.

⁴⁶² Ibid.

⁴⁶³ Adnan Buyung, Nasution papers on Southeast Asian Constitutionalism (2011), 13.

⁴⁶⁴ Ibid 13-14.

⁴⁶⁵ Kaniskha Jayasuriya, 'Corporatism and Judicial Independence Within Statist Legal Institutions in East Asia' in Kaniskha Jayasuriya (ed.), *Law, Capitalism and Power in Asia* (Routledge, 1999)191.

the organic or corporatist state seeks to actively implement a conception of the good.⁴⁶⁶

The idea of the integralistic state greatly influenced the ideology and leadership style of Soeharto and the New Order. It represents a similar idea to the welfare state in western society and its transition to liberal values. The welfare state emphasised the collective rather than the individual interest. In Indonesia it gained momentum when the first President, Soekarno, dismantled the liberal political concept in 1959, dissolved *badan konstituante* (parliament) and under ‘Guided Democracy’ revived the 1945 Constitution. As indicated above, the 1945 Constitution was drafted by people such as Soepomo. Lindsey says of Soepomo:

He was an impassioned opponent of Western socialist and liberal ideas, and it was he who was given the task of actually drafting the statute as Indonesia’s leaders awaited the surrender of occupying Japanese and the arrival of the recolonising Allies.⁴⁶⁷

He explains that Soepomo was a follower of the famous German thinker Friedrich Carl von Savigny and his idea of *Volksgeist*:

On Soepomo’s reading, the state, being the people, cannot be wrong. It therefore is the source of law because, in the Romantic tradition, the only valid law is that which expresses the *Volksgeist*, the spirit of the people. It follows that, if the state does embody the *Volksgeist*, then all state acts are *inherently* legitimate and legally correct. If the state’s action conflict with legislation, then the legislation is in conflict with the *Volksgeist* and is to that extent without authority.⁴⁶⁸

The concept of the integralistic state survived into Soeharto’s New Order and it was use to control. Nasution explains how Soeharto systematically stripped away individual rights:

To do this, Soeharto’s leadership was based on his being the protector of the entire Indonesian nation, which he said was based on the principle of “family”. He, in fact, appointed himself as “Father of the Nation”, presenting himself as father and leader of a nuclear family, where all family members had to obey him, and criticism of the father was considered taboo. Soeharto thus perfectly put into practice Soepomo’s Integralistic State concept, using Javanese cultural hegemony to legitimise his political patronage. Javanese cultural domination in fact became a hallmark of Soeharto’s leadership style and the New Order. The result was that branches of the state authorities were stripped of all independence and were

⁴⁶⁶ Ibid 182.

⁴⁶⁷ Tim Lindsey, ‘Devaluing Asian Value, Rewriting Rule of Law’ in Rendall Peerenboom (ed.), *Asian Discourses of Rule of Law* (Routledge, 1999) 291.

⁴⁶⁸ Ibid 292.

rendered ineffective in performing their functions. Soeharto was truly like a king and everybody had to bow down and humble themselves before him. The legislative body and the executive body became mere ornaments of his absolute power.⁴⁶⁹

The style of totalitarianism of the Soeharto regime was consistent with the concept of the emperor and the state in German politics and law. Tamanaha writes that in Germanic customary law: ‘The monarch and state existed within the law, for the law, and as creatures of the law, oriented toward the interest of the community’.⁴⁷⁰ Nasution argues that the concept was more strongly influenced by Japanese thought. Soepomo had supported the Japanese occupation:

...Japan was formed on the basis of an ideology of complete unity between *Tenno Heika* (the Emperor), the state, and the people. Within that one unity, the Emperor was the spiritual focus for the entire populace, and the imperial family, referred to as *Koshitsu*, was the highest family. Soepomo was of the opinion that a unity based on this “family principle” can also be found in Indonesian society and that the Japanese model was therefore suitable for the Indonesian state.⁴⁷¹

The meaning of *Negara hukum* is very similar to *Rechtsstaat*. The supplementary document to the Indonesian Constitution contains this statement:

The Indonesian Constitution states that Indonesia is a country based on law (*Rechtsstaat*) and it is not a country which is based on merely exercise of power (*Machstaat*).⁴⁷²

According to Lindsey the term *Negara hukum* since the fall of Soeharto is often used loosely as a synonym for the Anglo-American idea of the rule of law⁴⁷³ and that the Indonesian rule of law or *Rechtsstaat* during the Soeharto period was based on a thin conception of the rule by law. He explains:

...in Indonesia, (*Rechtsstaat*/Rule of Law) is a model derived historically from the civil law systems originated under Napoleon. This notion applies to the system of law-making and the process of implementation of those laws, rather than the larger political system in which the law operates. It is what contemporary theory might describe as ‘thin’ (procedural, formal) account of rule of law.⁴⁷⁴

⁴⁶⁹ Adnan Buyung, above n 463, 17.

⁴⁷⁰ Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory* (Cambridge University Press, 2004) 24.

⁴⁷¹ Adnan Buyung, above n 463, 14.

⁴⁷² See the supplementary document of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The Indonesian Constitution 1945) (‘1945 Indonesian Constitution’).

⁴⁷³ Tim Lindsey, above n 467, 293.

⁴⁷⁴ *Ibid* 294.

However, he observes that after Soeharto generally a thick (more substantive) account of the rule of law has been used.

The making of the 1986 Administrative Court Law⁴⁷⁵ and the 2014 Administrative Law in Indonesia reflects a Diceyan concern with arbitrary power or prohibition against *detournement de pouvoir* in *Rechtsstaat*. As indicated above, Dicey was concerned about the danger of arbitrary power, and cautioned against the use of discretion. Both laws seek to check discretion whether using administrative complaints to more senior administrators or the Administrative Court. Moreover with the 2014 Administrative Law discretionary power is further confined and more structured and more effectively checked than before.

According to Dicey, the limitations on Government are not the source of rights of citizens but the consequence of such rights which pre-exist the Constitution.⁴⁷⁶ As indicated above, as a civil law country Indonesia probably faces the paradox that the constitution which created the state and such rights somehow limits the state power in respect of them. It should be noted that before the 1945 Constitution there were pre-existing norms that it followed, as mentioned in the preamble of the 1945 Constitution. The pre-existing norms were: *Ketuhanan* (Belief in God), *Kemanusiaan yang adil dan beradab* (Humanity and Just Cause), *Persatuan Indonesia* (The Indonesian Unity), *Kerakyatan* (Democracy) and *Keadilan sosial* (Social Justice).⁴⁷⁷

However, it is not clear whether citizens and their rights precede the Constitution and limit it. All of the rights of Indonesian citizens are mentioned in the Constitution except for one, the right to overthrow the government and create a new one. Learning from the history of the revolution which ended Dutch rule and the Soeharto regime, Indonesian people should have the right to do so, as

⁴⁷⁵ The current law is Undang-Undang Republik Indonesia Nomor 51 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 51 of 2009 on Administrative Court) (Indonesia) ('2009 Administrative Court Law').

⁴⁷⁶ See Dicey's explanation about the Rule of Law.

⁴⁷⁷ This norm is known as *Pancasila*. It is also considered as Indonesian ideology based on elucidation of section 2 *2011 Making Law*. See elucidation of section 2 *Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* (Law No.12 of 2011 on Making of Law) (Indonesia) ('2011 Making Law').

Lock would approve. In Article 27 (1) of the 1945 Indonesian Constitution, Lindsey argues:

the state is therefore not constrained by law or any other state system in acting against its perceived 'enemies'. They have placed themselves outside the *Volk* by opposing the state and thus no longer have rights.⁴⁷⁸

This interpretation may be true during the Soeharto regime. In the *era reformasi* (Reform era) people can challenge officials' decisions or actions, people can ask for judicial review and, more importantly, through their representatives in the legislature, people can impeach the President or the Vice President in violation of the 1945 Indonesian Constitution.

In Indonesia, the Constitution is sovereign meaning it is the highest law of the land, according to section 7 of the 2011 *Making Statute Law*. The Constitution is the main reference for judicial review in the Constitutional Court. The main jurisdiction of this court is to review laws according to the Constitution. Explaining the role of the Constitutional Court and the Supreme Court in judicial review, the former Head of the Constitutional Court Mahfud MD states:

One of the efforts to strengthen the checks and balances mechanism between the judicial and legislative powers has been the establishment of the Constitutional Court which has the authority to conduct judicial review of laws against the 1945 Constitution, both materially and formally whereas the Supreme Court has the authority to conduct judicial review of regulations against laws and regulations of a higher rank in the hierarchy.⁴⁷⁹

This is similar to the principle which can be found in most common law countries with written Constitutions, after the ruling in *Marbury v Madison* 5 U.S. 137 (1803) that the Constitution is sovereign.⁴⁸⁰

Peerenboom noted that:

As with rule of law, *Rechtsstaat* has been interpreted in various ways. While some interpret it in more instrumental terms similar to rule by law, others would argue that the concept entails at minimum the principle of legality and a commitment on the part of the state to promote liberty and protect property rights, and thus some limits on the state. In any event, the concept *Rechtsstaat* has evolved overtime in Europe to incorporate democracy and fundamental rights.

⁴⁷⁸ Tim Lindsey, above n 467, 293.

⁴⁷⁹ Moh. Mahfud MD, *Separation of Powers and Independence of Constitutional Court in Indonesia*. A paper presented at the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro, Brazil on 16-18 January 2011, 4-5.

⁴⁸⁰ William E Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (University Press of Kansas, 2000).

Accordingly, it is often now used synonymously with (liberal democratic) rule of law.⁴⁸¹

In Indonesia, these two terms: rule of law and *rechtsstaat*, are used in similar ways by scholars as the translation of *negara hukum*. This represents the convergence of the terms indicated by Peerenboom.

In contemporary Indonesia the influence of the 'integralistic state' concept has decreased because of the acknowledgement of democratic values. The first Chief Justice of the Constitutional Court, Jimly, included the supremacy of the law, equality before the law and constraints on power in his twelve pillars of the current concept of the rule law or *Rechtsstaat*.⁴⁸² Under his twelve pillars, he indicated that adherence to the legality principle could also give discretion to a public administrator.⁴⁸³ This suggests that he considers the Indonesian *Rechtsstaat* also rejects the strict application of the legality principle or the extravagant version of the rule of law. Both strict power and discretionary power under *Negara Hukum* are able to be judicially reviewed as indicated above. However, as will be explained in Chapter 4 in prosecution decisions especially the decisions whether or not to prosecute, the lack of discretion represents a strong form of the legality principle or the extravagant version of the rule of law.

The Administrative Court is part of the concept of *Rechtsstaat* as civil protection against arbitrary executive government action.⁴⁸⁴ In general, questions about the legality of a public official's action are decided in this court. Bedner, in his sociological study of the court concluded that its creation is for the rule of law in which judicial review is important.⁴⁸⁵

The necessity of an Administrative Court was debated. Opponents, such as Logemann in 1929, disagreed with establishing such courts because of 'the absence democratic control', 'the hierarchical pattern of authority', 'the lack of

⁴⁸¹ See the note in Randall Peerenboom, 'Varieties of Rule of Law, An Introduction and Provisional Conclusion' in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law* (RoutledgeCurzon, 2004) 47- 48.

⁴⁸² Jimly Asshiddiqie, *Constitution and Constitutionalism* (Konstitusi dan Konstitualisme) (no date) 123-129. Jimly Asshiddiqie was the first Chief of The Indonesian Constitutional Court.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ Adriaan Bedner, above n 331, 50.

capable candidate judges’, and ‘the absence of an extended framework of administrative law’⁴⁸⁶ Others, such as Wirjono Prodjodikoro in 1952, argued that instead of creating such a court, using tort review for government action and trying incremental reform was more viable.⁴⁸⁷

As indicated above, the first Administrative Court was established at the end of 1986 but did not sit until 1991.⁴⁸⁸ According to Bedner⁴⁸⁹, the creation of the Court was the result of a combination of political exigencies, legal ideas formed over time and coincidence including the:

1. pervasiveness of the Dutch legal thinking in Indonesia;
2. accessibility of Dutch materials for key figures in the drafting team; and
3. development of Indonesian and Dutch administrative law and judicial review from a common basis.

These factors were reinforced by the legal cooperation between the countries.

The 1986 Administrative Court Law was repealed by the 2004 Administrative Court Law. According to the 2004 Administrative Court supplement document, the reasons for the change are:⁴⁹⁰

1. to enhance the independence of the judiciary branch; and
2. to create one judicial administration under *Mahkamah Agung* (Supreme Court) as an independent body and the only one vested with judicial power.

However, judicial review of issues associated with criminal prosecutions in the Administrative Court may be difficult because they are excluded from the reviewable administrative decision.⁴⁹¹ Even after the changes in 2014 criminal

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ See section 145 *Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law No. 5 of 1986 on Administrative Court) (Indonesia) (‘1986 Administrative Court Law’).

⁴⁸⁹ Adriaan Bedner, above n 331.

⁴⁹⁰ See supplementary document of *Undang-Undang Republik Indonesia Nomor 9 Tahun 2004 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law No. 9 of 2004 on Administrative Court) (Indonesia) (‘2004 Administrative Court Law’).

⁴⁹¹ Section 2 *Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara* (Law No. 5 of 1986 on Administrative Court) (Indonesia) (‘1986 Administrative Court Law’).

policy decisions are still not considered to be administrative decisions.⁴⁹² A review can only be undertaken in the *Pengadilan Umum* (General Court) or a special pre-trial court (*praperadilan*). The review in the General Court is like a civil wrongs proceeding review in a special pre trial court (*praperadilan*) that decides the legality of the action of a criminal law agency such as the police or the prosecutor over search, arrest and discontinuance of criminal matters. The stress on ‘formality’ means that the court cannot decide whether it is just or unjust. The *praperadilan* only decides the question of the legality of an officer’s conduct. For example it decides whether there was a valid warrant in existence before a search or an arrest, whether or not the decision to discontinue a criminal matter by a public prosecutor was legal by using set criteria as mentioned in the 1981 Criminal Procedure Law.⁴⁹³

To some extent the structure of the Administrative Court reflects German and Dutch practice. *Freis ermessen* is a German concept of discretion acknowledged by both Indonesian and Dutch scholars. AAUPB in Indonesia is similar to the Dutch concept *beginsel van behoorlijk bestuur* (general legal principles for proper administration). As indicated above, the French influence in the Dutch legal system is also accepted in Indonesia especially the acknowledgement of the prohibition of *detournement depouvoir*. However, unlike both France and the Netherlands, similar bodies such as a council of state are absent. As indicated above the reasons are that, firstly, administrative disputes in the Dutch East Indies were determined by the court that handled general civil matters and secondly, Indonesia chose a more simple arrangement without a separate administrative court. As Orucu explains: ‘the idea is to have a separate administrative jurisdiction without the complexity or practical difficulties inherent in the existence of two separate orders of court’.⁴⁹⁴

⁴⁹² Section 2 (d) Undang-Undang Republik Indonesia Nomor 9 Tahun 2004 tentang Perubahan Kedua atas Undang-Undang Nomor 5 Tahun 1986 tentang Peradilan Tata Usaha Negara (Law No. 9 of 2004 on Administrative Court) (Indonesia) (‘2004 Administrative Court Law’).

⁴⁹³ *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (‘1981 Criminal Procedure Law’).

⁴⁹⁴ Esin Orucu, above n 316,707.

In summary, the concept *negara hukum* is more closely related to *Rechtsstaat* than the rule of law. The Integralistic State idea was rejected after the Soeharto era by acknowledging liberal concepts of the rule of law or *Rechtsstaat*. The creation of the Administrative Court showed a commitment to the *Rechtsstaat* or the Rule of Law. In general, the extravagant rule of law concept or the strong legality principle of the *Rechtsstaat* has not been accepted as the need for discretion was acknowledged. Any decision relating to criminal justice policy or decisions in criminal investigations or prosecutions cannot be judicially reviewed by the Administrative Court. However, limited judicial review in the General Court using civil proceedings or *praperadilan* exists in deciding the formal legality of a decision. Chapter 4 specifically discusses discretion in prosecution decisions.

It should be noted in the Reform era and with four constitutional amendments, Indonesia now reflects multiple and dispersed power and decision making. Lindsey explains that Indonesian after Soeharto:

... also completed a formal constitutional transition from authoritarianism to a liberal representative democratic system, with a new institutional framework that would allow separation of powers, thus settling the *Negara hukum/trias politika* debate for the time being in favour of the historically weak, but now politically irresistible, Anglo-American ‘thick’ interpretation of rule of law.⁴⁹⁵

The term *Trias politika* is used to refer to separation of power in Indonesia. As Mahfud explains:

The concept of separation of powers in state administration is one of the key characteristics of a modern constitutional state. This concept is a result of a long experience that all powers which were previously concentrated on a King or a Queen, especially in countries applying theocracy, led to unrest and abuse of authority. It was John Locke who came up with the idea about the necessity to divide state power into 3 (three) functions, namely legislative, executive, and federative. Based on John Locke’s idea, Montesquieu in his book published in 1748, “*L’Esprit des Lois*” (The *Spirit of Laws*), divided state power into 3 (three) branches, namely legislative, executive and judicial powers...In the context of Indonesian state administration system following the amendments to the Constitution in 1999 -2002, the concept of separation of powers is applied by referring to the following principles: *First*, the legislative, executive and judicial powers have different functions, namely to make laws, to implement laws and to administer courts in order to enforce laws and justice, respectively. *Second*, it is not allowed to hold concurrent positions in those three branches of power. *Third*,

⁴⁹⁵ Tim Lindsey, above n 467, 296.

none of these institutions can intervene in the implementation of their respective functions. *Fourth*, the principle of *checks and balances* prevails among the branches of power. *Fifth*, the branches have equal positions with coordinative function rather than subordinative function.⁴⁹⁶

As indicated above, the judges in the Administrative Court have powers given by legislation and have the option of applying previous court decisions. The source of law is not only from the written law but also from principles developed by the court such as applying AAUPB. It differs from the power of common law judges whose power derives from outside the written constitution and legislation.

Indonesia had a similar experience to ‘the Germany 1945 moment’ where discretionary powers were no longer regarded as an area of free exercise of administrative power but as a tool granting a limited area of flexibility in the enforcement of the law. Under Sukarno and guided democracy the integralistic state idea was used. It survived and was widely used under Soeharto, with discretion often exercised as unrestricted free choice.

Even after the creation of the Administrative Court in 1986 which commenced in 1991, the executive government regime arguably still exercised free discretion because of the subordination of judicial power, *Mahkamah Agung* (Supreme Court), to the executive. Tim Lindsey described this subordination as follows:

In Indonesia, however, the governments of Soekarno and Soeharto claimed to have implemented *Negara hukum* in circumstances where there was no real representative democracy, certainly no separation of powers, and where final review sat formally in the hands of the *Mahkamah Agung*, or Supreme Court, but was consistently exercised in accordance with the dictates of the executive.⁴⁹⁷

As indicated above, Indonesia today can be considered a liberal representative democratic system. The liberal values became dominant after the end of the authoritarian Soeharto regime. During the Soekarno regime, liberal values were rejected as incompatible with communitarian values. Liberal values were considered to be individualistic and the idea of the integralistic state subordinated individualistic ideas to communal interests.

⁴⁹⁶ Moh. Mahfud MD, *Separation of Powers and Independence of Constitutional Court in Indonesia*. A paper presented at the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro, Brazil on 16-18 January 2011, 1-3.

⁴⁹⁷ Tim Lindsey, above n 467, 294.

Lindsey citing Bouchier, explains that:

Leading orthodox Indonesian law professors and government lawyers, however, for decades countered with sophisticated arguments drawing on civil law tradition to support the ‘thin’ interpretation: that is, that *Rechtsstaat* and *Negara Hukum* do not necessarily imply either representative democracy or separation of power.⁴⁹⁸

The ‘thin’ interpretations of the rule of law stress formality without considering more substantial matters such as individual justice. Formal-procedural is the main feature of this version while a ‘thick’ interpretation of the rule of law is more substantial, as Tamanaha indicated above. In general, after the enactment of the 1986 Administrative Court Law with its two amendments and the 2014 Government Administrative Law the interpretation of the Indonesian *Negara Hukum* should be considered as a move from a ‘thin’ to a more ‘thick’ version because there is an acceptance that there must be some discretion and protection against arbitrary decisions. However in criminal prosecutions this will not be the case, as explained in Chapter 4.

3.4.1 The Indonesian regulatory state

Privatisation is not unknown in Indonesia. It dates back to President Soekarno rejecting a ‘saving package’ from the World Bank to end an economic crisis in the 1960s. One of the proposals was to de-nationalize state owned companies which had previously been owned by foreign nationals before independence.⁴⁹⁹ In September 1965 General Soeharto led a military coup and in 1966 reversed all the nationalization measures of the Soekarno government.⁵⁰⁰ In October 1966 he adopted a "stabilization plan" formulated with the "assistance" of the IMF.⁵⁰¹ Arguably this made the Indonesian economy more liberal compared with its previous state.

Indonesia was also impacted by the market forces which pushed back state regulation after the advent of Ronald Reagan and Margaret Thatcher. It began in

⁴⁹⁸ Tim Lindsey, above n 467, 294-295.

⁴⁹⁹ Max Lane, Indonesia, ‘the legacy of IMF and World Bank rule’, *Green Left Weekly*, 31 May 2010<<https://www.greenleft.org.au/node/22234>>.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

1989 by privatizing 52 state owned enterprises during the period 1990 to 1992. Part of the cause of this privatization was the fall in oil prices in the mid 1980s. Policymakers were quick to realise that this had very significant implications for growth.⁵⁰² Did this make Indonesia a regulatory state? As indicated above, a regulatory state:

denotes new forms of legal regulation arising from the reform and streamlining of contemporary welfare states. It involves departure from 'old regulation', such as public ownership, planning, and central administration.⁵⁰³

In Indonesia the state had not monopolized provision of services as evident in the increase in the number of regulatory agencies relating to economic and social matters. In economic policy, there are laws that point to Indonesia being a regulatory state, such as the 1999 *Undang-Undang tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*⁵⁰⁴ (1999 Anti Monopoly and Unfair Competition Law) and the 2003 *Undang-Undang tentang Badan Usaha Milik Negara*⁵⁰⁵ (2003 State Own Enterprise Law). The 1999 Anti Monopoly and Unfair Competition Law is intended to secure 'market order' by political intervention. This kind of law is important to establish what Jayasuriya describes as 'economic constitutionalism':

Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures and institutions operating to protect the market order from political interference. However, these forms of economic constitutionalism demand the construction of a specific kind of state organisation and structure: a regulatory state, the purpose of which is to safeguard market order.⁵⁰⁶

In Section 1 of the (18) 1999 Anti Monopoly and Unfair Competition Law, the Supervisory Agency (*Komisi Pengawas Persaingan Usaha/KPPU*) creates KPPU

⁵⁰² Ross H. McLeod, *Privatization Failure in Indonesia* (2002), Australian National University, 2 accessed in 11 January

<<http://rspas.anu.edu.au/economics/publish/papers/wp2002/PrivatisationIndonDWP.pdf>>

⁵⁰³ Bettina Lange, 'Regulation', in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press) 996.

⁵⁰⁴ *Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat* (Law No. 5 of 1999 on Anti Monopoly and Unfair Competition Law) (Indonesia) ('1999 Anti Monopoly and Unfair Competition Law').

⁵⁰⁵ *Undang-Undang Nomor 19 Tahun 2003 tentang Badan Usaha Milik Negara* (Law No. 19 of 2003 on State Own Enterprise Law) (Indonesia) ('2003 State Own Enterprise Law').

⁵⁰⁶ Kaniskha Jayasuriya, 'Governance, Post-Washington Consensus and the New Anti-Politics' in Tim Lindsey and Howard Dick (eds.), *Corruption in Asia, Rethinking the Government Paradigm* (The Federation Press, 2002) 31.

to supervise business operations. It is a regulatory agency that Yeung describes as follows:

The independent regulatory agency was considered a useful vehicle for carrying out this oversight and monitoring function. The resulting shift in state involvement in economic and social activity has been aptly described as one ‘steering rather than rowing’, as the state turns from direct service provision to non-governmental service provision combined with regulatory oversight.⁵⁰⁷

It should be noted that regulatory agencies in Indonesia vary. Indonesian professional bodies such as lawyers, have their own regulatory agency without any direct state involvement representing self regulation. KPPU is an example of a regulatory agency exercising state control. This is also true in other professions such as medical practitioners, accountants or engineers. There is a wide degree of state involvement in regulatory agencies:

The degree of state involvement in any agency may vary considerably, from its complete absence (in the case of self-regulation) through to complete state control (in the case of regulatory bodies overseeing public service provision) with some form of mixed or ‘hybrid’ regime involving both public and private sector involvement (sometimes described as ‘co-regulation’) lying between these two extremes.⁵⁰⁸

The 2003 State Owned Enterprise Law regulates the types of enterprises owned by the government, how the government provides services and the privatisation of government enterprises. A state owned enterprise is a business entity owned by the Indonesian government providing goods and services to make a profit and public services. There are two types of state owned enterprises, *Perum* (Public Corporation) and *Persero* (Limited liability Company). There are more than 100 enterprises engaged in all economic sectors such as agriculture, fisheries, forestry, manufacturing, mining, finance, post and telecommunications, transport, electricity, industry and trade, and construction.⁵⁰⁹

⁵⁰⁷ Karen Yeung, ‘Regulatory Agencies’ in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law* (Oxford University Press) 998.

⁵⁰⁸ Ibid.

⁵⁰⁹ The number of BUMN (State Own Enterprises) until 2014 are 119 enterprises. See <<http://bumn.go.id/halaman/238/Statistik.Jumlah.BUMN>>.

Based on the 2003 State Owned Enterprise Law, privatization is possible. It should not be considered as loss of Indonesian control over the enterprise. The document explaining the law states:

Dengan dilakukannya privatisasi BUMN, bukan berarti kendali atau kedaulatan negara atas BUMN yang bersangkutan menjadi berkurang atau hilang karena sebagaimana dinyatakan di atas, negara tetap menjalankan fungsi penguasaan melalui regulasi sektoral dimana BUMN yang diprivatisasi melaksanakan kegiatan usahanya (Privatization does not mean control or sovereignty over the state-owned enterprises concerned to be reduced or lost because the state continues to run, to control and function through the regulation of the privatized state-owned sector where its business operate).⁵¹⁰

In social matters, the regulatory character of the state can be seen from regulation related to environmental law, consumer protection law, food and health safety law, and others which emphasize something other than maintaining competitive markets or compensating for their absence. It seeks to realise wider objectives by preventing harm or conferring benefits on citizen generally.⁵¹¹ Indonesia has this kind of regulation which stresses more the social than economic sphere. For example the 1999 Consumer Protection Law⁵¹² created *Badan Penyelesaian Sengketa Konsumen* (Consumer Dispute Resolution Agency) to review consumer disputes in each Indonesian province.

3.5 Conclusion

This chapter has provided a brief survey of discretion in administrative decision making in several jurisdictions. It compares the concept of discretion and the manner in which it is confined, structured and subjected to review. Several conclusions have been made in sections 3.2.5.11 and 3.3.5 in this chapter. The identification of discretion and the limits sought to be imposed on it result from the perception that it may lead to arbitrary decision making. That arbitrariness is

⁵¹⁰ See explanation document in *Undang-Undang Nomor 19 Tahun 2003 tentang Badan Usaha Milik Negara* (Law No. 19 of 2003 on State Own Enterprise Law) (Indonesia) ('2003 State Own Enterprise Law').

⁵¹¹ Bettina Lange, above n 503.

⁵¹² See section 49 *Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen* (Law No. 19 of 2003 on Consumer Protection) (Indonesia) ('1999 Consumer Protection Law').

inconsistent with the principle of the rule of law, as it is commonly known in common law systems or *rechtsstaat* as it is known in civil law legal systems.

In Indonesia, the turbulence of independence was disruptive in developing a settled constitutional framework and good administrative procedures in checking legal remedies. The period of autocratic control under Soekarno and Soeharto compromised the further development of the Constitution, a *rechtsstaat* and both the relationship between the state and independence of the judiciary. It also compromised a limited resource as a developing country. When development of administrative law took place in spite of the period since independence when it turned to Dutch law – familiar to legal process etc., but did not borrow it, and is still developing. The enactment of the Administrative Court based on the 1986 Administrative Law which has been subsequently twice amended demonstrated to some extent the commitment of Indonesia to *Negara Hukum* by protecting people's rights from government administrative action. Government powers can be judicially reviewed to check whether or not they fit with previously enacted law. In addition, general legal principles for proper administration like the Dutch *algemene beginselen van behoorlijk bestuur* which is locally known as *Asas-Asas Umum Pemerintahan yang Baik* or AAUPB and AAUPB based on the 1999 Clean Government which Free from Corruption Collusion and Nepotism Law are also used to check government power in the court.

In terms of discretion, the 2014 Government Administrative Law gives further protection against arbitrary decision making in Indonesia by stressing the aim and definition of administrative discretion. This new law confines and limits government power in exercising discretion, as it also requires it to be judicially reviewed. The new feature of administrative review that did not exist before the enactment of this law is *Upaya Administratif* (Administrative Appeal) where a review of the court is considered as a second stage of the review known as *Banding*. In addition, *Upaya Administratif Keberatan* is an administrative review without judicial interference. Thus, this new law shows further commitment to *Negara Hukum*.

The relationship of discretion to the common law concept of the “rule of law” and the civil law concept of the “*rechtsstaat*” was considered. It shows that

the extravagant version of the rule of law or the principle of strict adherence to legality in the *rechtsstaat* generally gives way to concepts which allow more room for discretion. This was in part driven by the development of the regulatory state which created and enlarged discretion to better enable bureaucrats and technocrats to co-ordinate more complex and integrated social, economic and political systems.

This chapter has explained that the term rule of law and *rechtsstaat* to some extent converge in the area of limiting official power, protection of human rights and underlying principles. This is also acknowledged in Indonesia where the term *negara hukum*, which is closely related to '*rechtsstaat*' in civil law countries, also refers to the term 'rule of law' used in common law countries. The interpretation of the rule of law in Indonesia should be understood as moving from thin to thick interpretation where in administrative law discretion is limited and is reviewed against arbitrary decision making or actions. This provides the context for a more specific discussion of discretion in relation to prosecutions and the lack of discretion to discontinue criminal matters in the Indonesian system that will be discussed in Chapter 4.

Chapter 4

Discretion in Prosecution Decision Making

4.1 Introduction

This chapter discusses the different approaches taken when dealing with the discretion vested in prosecutors in civil law compared with common law systems. It considers five jurisdictions: Australia, France, Germany, the Netherlands and Indonesia and how prosecutorial discretion in criminal prosecutions is structured, limited and judicially reviewed. It also considers several forms of prosecutorial discretion to discontinue criminal matters such as simple drop, public interest drop, conditional disposal, plea bargaining or negotiated case settlement, and penal orders discussed by Luna and Wade.⁵¹³ The independence and accountability of prosecutors is also discussed with a view to reducing improper political influence or interference.

4.2 Differences between prosecutorial discretion in civil and common law systems

France had an influence on prosecution systems even before the Napoleonic codes. Scotland, for example, adopted many principles of French law during the sixteenth century as it shared a history of Roman law which was a common source of French law.⁵¹⁴ A feature of common law jurisdiction is that private citizens still have the right to initiate private prosecution. Private prosecutions in

⁵¹³ See Erik Luna and Marianne Wade, 'Prosecutors as Judges' (2010), *Washington and Lee Law Review* 1413.

⁵¹⁴ English law influenced Scots law particularly after 1707. In the sixteenth century, the jurisprudence of Scotland was largely changed by the introduction of Roman law which accompanied the general revival of learning in Europe. At this time, many Scottish lawyers received their training in continental Europe. See Edwin R. Keedy, 'Criminal Procedure in Scotland' (1913), *Journal of the American Institute of Criminal Law and Criminology* 728, 728. The Scottish prosecution system has many characteristics which resemble those of its counterparts in continental jurisdictions and therefore it has been characterized as a quasi-inquisitorial prosecution system. See also Despina Kyprianou, *The Role of the Cyprus Attorney General's Office in Prosecutions: Rethoric, Ideology and Practice* (2010, Springer), 19.

Scotland were abolished in 1587 when the office of procurator fiscal was established to undertake prosecutions.⁵¹⁵

The greatest influence on French law came after the French Revolution. Napoleon's 1808 *Code d'instruction criminelle* was imposed in places occupied by France, including Germany. It is a revised version of the older inquisitorial system.⁵¹⁶ The Code continued the separation of powers between judges who investigated crimes and judges who tried criminal cases in order to determine the innocence or guilt of the defendant. When French occupation ended, the Code remained although some countries adapted it to perceived local needs.

The hierarchical and centralized French prosecutorial system that remained was controlled by the executive. It remains common in countries with civil law roots such as Germany, the Netherlands and Indonesia. Like French prosecutors, German and Dutch prosecutors are controlled by a Minister of Justice.

Police prosecutions in these jurisdictions are unknown. The police are controlled by the prosecutor and the investigating judge, such as in France. Under Article 41 of the French Criminal Procedure Law, the procurator directs the police investigation. The investigating judge or *Juge d'Instruction* remains involved in the investigation.⁵¹⁷ The position in the Netherlands is similar:

During the judicial preliminary investigation, the judge has full powers to decide on the investigative activities to be carried out, and on whether the questions put by the defence counsel need to be answered by the witnesses and experts.⁵¹⁸

In Germany and Indonesia the police assist the public prosecutor. However, Germany had already abolished their equivalent of the investigative judge

⁵¹⁵ A.F. Wilcox, *The Decision to Prosecute* (1972, Butterworths), 8.

⁵¹⁶ Spencer states that Napoleon's *Code d'instruction criminelle* of 1808 introduced a sanitized version of the old inquisitorial procedure – shorn, of course, of torture – for use in serious cases as a preliminary stage of the criminal process. See J.R. Spencer, 'Introduction' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press) 10-11. Ploscowe stated that old inquisitor refers to procedure based on French *Ordonnance Criminelle* of 1670. See Morris Ploscowe, 'Development of Inquisitorial and Accusatorial Elements' in French Procedure (1932), *Journal of Criminal Law and Criminology* 372, 374. See also A. Esmein, *A History of Continental Criminal Procedure with Special Reference to France* (Little Brown and Company, 1913).

⁵¹⁷ Jacqueline Hodgson, 'the Police, the Prosecutor and the *Juge D'Instruction*' (2001), *British Journal of Criminology*, 342, 347.

⁵¹⁸ Peter J.P. Tak, above n 164, 83.

(*Untersuchungsrichter*) and Indonesia had acquired the *praperadilan* without investigative authority.

The Indonesian legal system has a long shared history with the Netherlands and remains a civil law system. In general, it follows an earlier version of Dutch law. The first criminal procedure law was the Dutch *Herziene Inlandsch Reglement* (HIR) that was revised after Independence. In the first reform, a body similar to the *Rechter Commissaris* (investigative judge) in the Netherlands was established with the *praperadilan* (pre-trial) in the 1981 Criminal Procedure Law or KUHAP.⁵¹⁹ It has a similar function to *Rechter Commissaris* in protecting a suspect's rights against abuse of power during an investigation and prosecution. However, the *praperadilan* lacks investigative power compared with the *Rechter Commissaris*. It should be noted that when HIR was introduced in 1941, the first hierarchically structured prosecution body was created in Indonesia.⁵²⁰ It was reinforced during the Japanese occupation and survived after Independence.

The common law has developed differently, reflecting the reduced role of central government and the fragmentation of power between localities and individualized.⁵²¹ In the 18th century England did not have professional police or prosecutors. The enforcement of criminal law was largely a private matter for the victim or their family or a person who wanted to claim a reward. In any case of political significance the Attorney-General, the protector of the crown's interest, prosecuted.

After the 1820s, a professional police force was created in order to deal with urbanization and 'fear of rising crime'⁵²² in London. Its creation was opposed, as Radzinowicz explains:

⁵¹⁹ *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

⁵²⁰ M Karjadi and R. Soesilo, *Beberapa Data Sejarah Mengenai Lahirnya HIR/RIB (Undang-Undang Hukum Acara Pidana Lama) dan Pembentukan KUHAP (Undang-Undang Hukum Acara Pidana Baru)* (Several Notes on the Birth of HIR/RIB (Old Criminal Procedure Law) and The Enactment of KUHAP (New Criminal Procedure Law) (1988, Politeia) 8.

⁵²¹ J.R. Spencer, above n 516, 13.

⁵²² Reiner stated that 'the motive stressed by the police reformers, notably Peel in his introduction of the 1829 Metropolitan Bill in Parliament, was fear of rising crime. Robert Reiner, *The Politics of the Police* (2000, Oxford University Press) 37.

[...] the idea of introducing professional police in England initially met strong resistance from those who looked uneasily at what went on in France under the Bourbons and then Napoleon, and thought that professional policemen – and public prosecutors – were organs of dictatorship and tyranny that would undermine civil liberties and quickly turn the country into a police state.⁵²³

There were two important characteristics of the English police forces: they were organized locally and a public prosecutor did not control them, as a public prosecutor did not then exist. The professional police came to be treated as ‘private’ not ‘public’ agents when they brought prosecutions. This was criticized as it increasingly became a fiction. In 1879 the Director of Public Prosecution was created as an advisor to the police.⁵²⁴ This was the practice for almost one hundred years. The police remained the main prosecutor until the Crown Prosecution Service was created in 1985 with the functions of taking over, continuing or discontinuing prosecutions.⁵²⁵

With the establishment of professional police, the DPP and the Crown Prosecution Services, the trial phase was increasingly displaced from its traditional central stage in English criminal procedure.⁵²⁶ All three institutions filtered out smaller and weaker cases from trial. Even very strong cases came to be dropped for public interest reasons. As a consequence, a large number of cases were diverted from trial by jury using the discretion not to prosecute, to divert or where a caution could be given by the police.

Summary trial before Justices of the Peace (JP) and guilty pleas became common practice in the 19th century. Prior to that JPs had dealt with matters under the poor laws which involved minor disturbances to the peace in specific localities. They also investigated crimes in their localities in the absence of a police force and held preliminary hearings under the Marian Committal Statute of 1555 to determine whether there was a case for the accused to answer. This often reduced the length of resulting trials for those committed for trial. Langbein explains:

⁵²³ L. Radzinowicz cited in J.R. Spencer, above n 516, 14.

⁵²⁴ Ibid.

⁵²⁵ Ibid.

⁵²⁶ Ibid 15.

...by having the JP bind over the material witnesses and weed out the rest, the procedure got the best witnesses into court while saving the court from having to hear a lot of inconsequential testimony.⁵²⁷

This pre-trial procedure is still used to terminate prosecutions that are weak before they get to trial, as discussed in Chapter 3 (3.2.1. Australia). Langbein also explains that before the 19th century, the jury trial process was so fast and efficient that plea-bargaining was unknown and not needed.⁵²⁸ He describes how during the 18th century, the Old Bailey tried between 12 and 20 felony cases per day. There was dissatisfaction with the roles of JPs in criminal trials because of corrupt practices which led to them being called 'trading justices'.⁵²⁹ Grand juries, which had existed before the Marian statute, could still be used to find a true bill which would lead to a trial. Victims or citizens did not need to seek the JP's assistance before appearing at a grand jury. Explaining the role of the grand jury, Langbein states:

Because the power to instigate charges belonged wholly to private prosecutors, the system found it useful to maintain the grand jury as filtering mechanism to dispose of groundless or insubstantial prosecutions, sparing the defendant the peril and indignity of public trial in a transparently weak case.⁵³⁰

The rise of the adversarial system of trial and the related development of the law of evidence was perceived as making the jury system increasingly inefficient.⁵³¹

As the London Metropolitan situation became complex because of urbanization there was a need for innovation to tackle problems which related to the rise in the crime rate. The role of the Justice of the Peace was taken over by the police force in 1829. In the next development the role of private citizens in criminal matters was reduced significantly where the state (i.e. the police, the DPP and the Crown Prosecution Services) actively controlled prosecutions but this did not entirely abolish private prosecutions.

⁵²⁷ John H. Langbein, 'The Criminal Trial before the Lawyers' (1978), *the University of Chicago Law Review* 263, 282.

⁵²⁸ John H. Langbein, 'Understanding the Short History of Plea Bargaining' (1979), *Law and Society* 261, 262.

⁵²⁹ Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley, 1984). <<http://www.londonlives.org/static/Pretrial.jsp>>.

⁵³⁰ John H. Langbein, above n 282, 45.

⁵³¹ *Ibid* 262.

Changes in England impacted significantly on the settler colonies abroad including those in Australia. Sometimes the colonies often moved ahead of England to create rational systems of law and legal regulation. As indicated, in 1829 England created its first police force, the London Metropolitan Police which came to prosecute most criminal cases in the capital. Prior to 1829, prosecution was commonly exercised by private individuals. In Australia in 1788, the first police in the colony were appointed by the Governor from the ranks of the settlers and given the title of constable.⁵³² The military also played a significant role in policing. Edwards explained:

Maintaining order and upholding the law was a task for the military, and it could reasonably be expected that keeping sufficient control over the convicts would be an adequate way of dealing with crime.⁵³³

The idea was not to establish an organ for prosecution but a system for ‘policing a penal society’.⁵³⁴

By the mid 19th century as transportation ceased, colonial population demographics came to resemble that of the United Kingdom. The first police force based on the model of the London Metropolitan Police was established in 1844 in South Australia.⁵³⁵ This police force increasingly took over most private prosecutions, even though private prosecutions up to the committal stage remained. In Victoria, a centralized police force was established in 1853, in Western Australia in 1861, and New South Wales in 1862.⁵³⁶ The police prosecuted most summary offences in lower courts, similar to England. A police officer with a rank of sergeant did the prosecution on behalf of other police. In the next development, this practice led to the creation of a permanent prosecution department within the police force as a specialized unit. Further, in 1983, the first Director of Public Prosecutions was created in Victoria, followed by other jurisdictions.

⁵³² Chris Corns, ‘Police Summary Prosecutions in Australia and New Zealand: Some Comparison’ (2000), *University of Tasmanian Law Review* 280, 286; Charles Edwards, *Changing Policing Theories for 21st Century Societies* (2005, The Federation Press) 32; Kerry L. Milte and Thomas Weber, *Police in Australia: Development, Functions, Procedures* (1977, Butterworths) 22.

⁵³³ Charles Edwards, *ibid* 32.

⁵³⁴ Chris Corns, *above n* 532, 286.

⁵³⁵ Charles Edwards, *above n* 532, 32.

⁵³⁶ *Ibid*.

To sum up, there was a difference in historical developments between civil and common-law systems. The development of a prosecution body in civil law jurisdictions was largely influenced by French practice; that is, it was centralized, hierarchically structured, and controlled by the executive. This situation was different from common law countries with decentralized prosecution decision-making systems where prosecution bodies developed later and were organized locally. The next section discusses the often-cited differences in prosecutorial decision making in mandatory prosecution and discretionary prosecution systems.

4.2.1 Mandatory prosecution systems and discretionary prosecution systems

There are two common prosecutorial models, the mandatory prosecution system (MPS) and the discretionary prosecution system (DPS). In Packer's criminal process models, MPS is commonly used in crime control models and the due process model is used in the DPS, which is explained further below. The choice of prosecutorial systems may affect the criminal justice process as a whole. For example, if the prosecutor has limited discretion to discontinue criminal matters, this might increase the workload of trial courts and in turn affect the workloads of prison services. Countries such as Germany, which used a MPS, often experienced a backlog of cases before developing exceptions to compulsory prosecutions.⁵³⁷ These exceptions were created by widening prosecutorial discretions. However, it does not mean that jurisdictions with wider prosecutorial discretions do not experience delays in criminal processes. Delays are also commonly experienced by DPS-based systems such as those in Australia, but the problems may be caused by other factors. Common law based systems follow a criminal process that emphasizes the protection of civil liberties, described by Packer as a due process model. This protective approach in each stage of the criminal process makes it longer than in civil law systems. Without prosecutorial discretion, and actively screening out cases using that discretion, systems may collapse, as indicated above. Thus, it is important to understand Packer's criminal procedure models in relation to prosecution systems.

⁵³⁷ Julia Fionda, above n 301, 9.

4.2.1.1 Packer models and prosecution systems

There are two common models to describe criminal procedure known as the Crime Control Model and the Due Process Model. The Due Process model is different from the Crime Control Model commonly used in civil law jurisdictions. These two models were developed by Packer who described them as follows: 'If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course'.⁵³⁸

Explaining the models, Packer states:⁵³⁹

Crime Control model

The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.

Due Process model

It does not rest on the idea that it is not socially desirable to repress crime... Its ideology is composed of a complex of ideas, some of them based on judgment about the efficiency of crime control devices, others having to do with quite different consideration

In its application, the Crime Control Model uses 'the presumption of guilt' and the Due Process Model uses 'the presumption of innocence'. In this regard, both presumptions should not be seen as contradictory.⁵⁴⁰

In Indonesia the acknowledgement of the presumption of innocence in its first reform of the Criminal Procedure Law in 1981 shows a shift from a Crime Control Model to a Due Process Model. The rights of suspects become acknowledged in this reform, moving away from the 'inquisition model'⁵⁴¹ of getting a confession based on presumption of guilt. As explained by Harahap,

⁵³⁸ Herbert L. Packer, 'Two Models of the Criminal Process' in George F. Cole (ed), *Criminal Justice: Law and Politics* (1993, Wadsworth Publishing Company) 20. The assembly line is seen as a conveyor belt which moves an endless stream of cases, never stopping, carrying the case to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product. While the obstacle course means each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process.

⁵³⁹ Herbert L. Packer, *ibid* 17-20.

⁵⁴⁰ Herbert L. Packer, *ibid* 19. Packer explains: 'It would be a mistake to think of the presumption of guilt as the opposite of the presumption of innocence that we are so used to thinking of as polestar of the criminal process and that, as we shall see, occupies an important position in the Due Process Model. The presumption of innocence is not its opposite; it is irrelevant to the presumption of guilt; the two concepts are different rather than opposite ideas'.

⁵⁴¹ Before the first Indonesian Criminal Procedure Law reform, torture and indefinite detention was common practice. See M.Yahya Harahap, above n 158, 40.

before the first reform in 1981, the Indonesian system was based on the old Dutch Criminal Procedure Law (*Herziene Inlandsch/Indonesisch Reglement (HIR)*) that treats a suspect as an object of investigation without any rights to defend.⁵⁴² Thus, among Indonesian scholars, the Crime Control Model is commonly associated with the ‘bad practice’ of enforcing criminal procedure because it legitimately uses torture, limits the role of lawyers and uses unlimited detention. For example, an Indonesian lawyer argued that based on KUHAP the Indonesian system should be based on the due process model, but in practice it still used the Crime Control Model by disregarding the suspect’s right to defend himself, especially for poor suspects.⁵⁴³ It should be noted that Packer himself did not provide an evaluation of which is the better model.⁵⁴⁴ However, what was evident in Indonesia was the criminal procedure which acknowledged more rights for the suspect, as commonly characterized in the Due Process Model in their first reform (HIR to KUHAP).⁵⁴⁵ Lubis emphasized that ‘... it is clear that the KUHAP’s existence constitutes a significant improvement in the development of human right.’⁵⁴⁶

These two models have been criticized. Roach, for example, asserted that Packer’s models are outdated, and an inadequate guide in describing the law and politics of criminal justice.⁵⁴⁷ However, as a model they are important because.⁵⁴⁸

1. They provide a guide to judging the actual or positive operation of the criminal justice system;
2. They can also provide a normative guide to what values ought to influence the criminal law; and
3. As models of the criminal process they can also describe the ideologies and discourses that surround criminal justice.

⁵⁴² Ibid.

⁵⁴³ Frans Hendra Winata, *Pro Bono Publico: Hak Konstitusional Fakir Miskin untuk Memperoleh Bantuan Hukum* (Pro Bono Publico: the Constitutional Rights for the Poor to get Legal Aid) (2009, Gramedia Pustaka Utama), 7.

⁵⁴⁴ Herbert L. Packer, above n 538, 15.

⁵⁴⁵ Indonesian Criminal Procedure reform will be discussed further in the next section of the chapter.

⁵⁴⁶ Todung Mulya Lubis, *In Search of Human Rights, Legal-Political Dilemmas of Indonesia’s New Order, 1966-1990* (PT Gramedia Pustaka Utama, 1993), 112.

⁵⁴⁷ Kent Roach, ‘Four Models of the Criminal Process’ (1999) 671 *Journal of Criminal Law and Criminology*, 672-674.

⁵⁴⁸ Ibid, 673.

Other scholars such as Sanders and Young cited in McConvile and Baldwin acknowledge that the two Packer models are useful as tools of analysis.⁵⁴⁹

Understanding legal principles behind these two types of decision making is important as a measure of the effects of prosecutorial discretion in the criminal justice system. Using Packer's models (Due Process Model and Crime Control Model) to analyze this, Fionda explained:

Particular models of criminal justice may be strongly evident in a system and this may have limiting effects on the discretion of the prosecutor. For example, Packer's 'due process model' will severely restrict the level of discretion at the pre-trial stage, in order to safeguard the civil liberties of the accused. On the other hand, the aims of Packer's 'crime control model' would be achieved with a high degree of dispositional discretion at this early stage.⁵⁵⁰

The strong legality principle in MPS is counter-productive to the aims of the Packer crime control model because policies obligate prosecutors to prosecute every criminal matter, which slows the criminal justice process due to the number of cases. As the 'due process model' is commonly accepted in most civil law or common law based countries, it is important to control the use of discretion to protect civil liberties. However, it should be noted that most countries are hybrid systems with one dominant system. As Ogg argues:

No modern criminal justice system operates in strict adherence to the traditional adversarial and inquisitorial models. Each system typically has attributes of both models with one dominating.⁵⁵¹

As common law-adversarial based systems and civil law-inquisitorial based systems are convergent, so is their underlying based criminal justice policies (whether Due Process or Crime Control) and as a result they are mixed models.⁵⁵² Arguably, both models co-exist in one system of law, as in the case of the English or the US system⁵⁵³ or in this thesis in countries such as Indonesia. The trend of convergence is discussed further in section 4.2.1.4. (Convergence of the

⁵⁴⁹ Andrew Sanders and Richard Young, *Criminal Justice* (1999, Butterworths), 13.

⁵⁵⁰ Julia Fionda, above 301, 8.

⁵⁵¹ James Thomas Ogg, 'Italian Criminal Trials: Lost in transition? Differing degrees of criminal justice convergence in Italy and Australia' (2012), *International Journal of Comparative and Applied Criminal Justice* 229, 230.

⁵⁵² It is acknowledged that there is still significant difference between adversarial and inquisitorial models, such as the role of all participants (judge, jury, counsel, and accused), rules of evidence, pleas, pre-trial practices, and appeals. See James Thomas Ogg, *ibid* 230.

⁵⁵³ Andrew Sanders and Richard Young, above n 549, 18-20.

prosecution decision-making system). As a result, the hybrid system is common among countries and is reflected in their reforms. In Indonesia, the current reform proposal clearly states that the new criminal procedure law will be mixed between inquisitorial and adversarial.⁵⁵⁴ This proposed reform utilizes discretion within the prosecution system where the current MPS within Indonesian system is not strictly followed. Types of discretion in the current Indonesian criminal procedure reform are discussed in section 4.2.2 of this chapter (Types of prosecution decision in discontinuance of criminal matters). However, first it is important to understand the difference between a mandatory prosecution system (hereafter called MPS) and a discretionary prosecution system (hereafter called DPS).

4.2.1.2 Mandatory prosecution systems (MPS)

The mandatory prosecution system (MPS) originated from the German legal system and was promoted by the famous legal thinker, Carl Friedrich von Savigny.⁵⁵⁵ In its recent development, the German system does not strictly follow the MPS, as discretion has become a significant part of that system which has become a mixed system, as discussed later in this chapter.

MPS was based on a legality principle that in theory every criminal case must be prosecuted to its conclusion. Explaining the legality principle in prosecution, Fionda describes how:

The legality principle, on the other hand, excludes all discretion from the early stages of the criminal process. Under this principle, prosecution of all offences where sufficient evidence exists of the guilt of the defendant is compulsory, and public interest criteria are irrelevant in the prosecutor's decision-making. Thus, discretion is minimized and the prosecutor is precluded from taking a pro-active diversionary role.⁵⁵⁶

This system has been strongly criticized as 'a myth'⁵⁵⁷ and it is evident that many crimes are not reported, not all reported crime are investigated and not all potentially investigated crimes are referred to prosecutors.⁵⁵⁸

⁵⁵⁴ Section 4 of the supplementary document of the New Draft of the Indonesian Criminal Procedure Law (Copy of the document can be provided by the researcher if needed).

⁵⁵⁵ John H. Langbein, above n 282, 449.

⁵⁵⁶ Julia Fionda, above 301, 9.

⁵⁵⁷ Erik Luna and Marianne Wade, above n 513, 1502. The concept of compulsory prosecution is a myth according to Prof. Goldstein, cited in this journal.

The reason for strict adherence to the legality principle is that discretion can be potentially abused. An unfettered discretion or discretion that is inadequately circumscribed can lead to an abuse of power, as occurred in Nazi Germany. Unbridled discretion can lead to a prosecution service 'riding rough-shod over civil liberties and fundamental constitutional principles.'⁵⁵⁹ This can occur where like cases are not treated alike because the guiding principles are absent or inadequate. To overcome these difficulties, discretion needs to be confined, structured, reviewed and enhanced and be transparent, as discussed in Chapter 3. The difficulties must not be avoided because it is important to rationalize the prosecution bureaucracy and to promote individualized justice.

Guidelines and supervision for exercising discretion are required to enhance consistency. Total elimination of prosecutorial discretion is unrealistic because it may cause other problems such as inflexible systems, which fail to promote fairness and justice. Besides that, a prosecution system without discretion can be expensive and potentially create delays and backlogs in the system of criminal justice. In general, each criminal justice agent (police, judge and prosecutor) should exercise some discretion. Trial judges exercise discretion, as explained by the Lord Justice Bingham, when considering what is a fair and just thing to do or to order in the instant case.⁵⁶⁰ The point is made consistently in the literature that the police⁵⁶¹ and the prosecutor exercise discretion because:

⁵⁵⁸ Sir Leon Radzinowicz and Joan F. S. King, *the Growth of Crime: The International Experience* (1977, Hamish Hamilton).

⁵⁵⁹ Julia Fionda, above n 301.

⁵⁶⁰ The Right Hon. Lord Justice Bingham, 'The Discretion of the Judge' (1990), *the Denning Law Journal* 27, 28. He said that: 'according to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises discretion. It is only when he reaches the stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion'.

⁵⁶¹ For example, see Jack B. Molden, 'Management Reduction of Police Legal Discretion' (1973), *Police Law Quarterly* 5, 7. In everyday police practice, for example, Molden argues that there are several cogent reasons to support the need for some discretion:

1. In actual practice, enforcement situations vary greatly. What is determined to be wise policy in the handling of one type of situation may be entirely inappropriate for another;

1. it is impractical to totally eliminate discretion;⁵⁶²
2. it is needed to adapt to the factual situations and circumstances;
and
3. it achieves individualized justice.⁵⁶³

Thus, a prosecution system which strictly adheres to the legality principle (MPS) will be expensive and will engender delays and backlogs in the court and prison systems, which may in turn jeopardize the overall aim of protecting the rights and interests of the accused.⁵⁶⁴ Arguably, these are the main reasons for countries which previously strictly adhered to a MPS system to begin to utilize more discretion in their systems. These reasons are more practical than ideological and are aimed at achieving more efficient practices in achieving justice.

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2. There are vast differences between people or groups of people. Because of legitimate differences, equal or similar treatment is not always possible or even desirable;
 3. Community and neighborhood needs and values vary from place to place making discretion necessary; and
 4. There are numerous ambiguous, inappropriate, and unenforceable laws on the books; the decision to ignore or adjust enforcement of these statutes is not only acceptable, in some cases it is essential.

⁵⁶² For example, see Erik Luna and Marianne Wade, *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012), 1. They argue that the total elimination of discretionary authority is as impractical as it is unwise. Limited resources and the breadth of today's penal code- in terms of covered behaviours and potential offenders- forecloses the strictest interpretation of the legality principle in European systems or any notion of full enforcement in the United States. The police simply cannot investigate all known crimes and arrest all known criminals, nor can prosecutors charge and try all defendants to the maximum extent of the law. Jallow mentioned inevitable discretion by saying

Its necessity springs from the practical need for a selective, rather than automatic, approach to the institution of criminal proceedings, thus avoiding the over- burdening and perhaps clogging of the machinery of justice; and

Discretion is essential to the operation of any system of criminal justice for, without it, the system would grind to a halt - it would be paralysed and would lack any flexibility or ability to adapt to particular circumstances.

See also Hassan B. Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) (3) *Journal of International Criminal Justice* 145. 145.

⁵⁶³ For example see Brandon K. Crase, 'When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion' (2007), *The Georgetown Journal of Legal Ethics* 475, 481. He argued that discretion is a necessary and effective aspect of our criminal justice system:

1. Prosecutors are better suited to adapt the criminal law to new circumstances given that it will not always be possible to formulate statutes specifically enough or adapt the statutes quickly enough to meet changes in public attitudes;
2. Discretion is needed to limit the number of prosecutions because of limited resources available to the government, both in terms of time and money; and
3. Discretion in prosecution is necessary to achieve the individualized justice so valued in our criminal justice.

⁵⁶⁴ Julia Fionda, above n 301, 10.

4.2.1.3 Discretionary prosecution systems (DPS)

DPS are based on the opportunity principle, sometimes called the expediency principle. Explaining the opportunity principle in prosecution, Damaska argues:

The *opportunitätsprinzip* governs where the prosecutor, having persuaded himself of provable liability, can still refuse to prosecute on what Continental lawyers call “expediency ground” (e.g. triviality of the offense, low culpability, danger to foreign relations, etc).⁵⁶⁵

As indicated above, the Justice of the Peace, the grand jury, the police and the prosecutor in England actively filter weak cases before reaching trial and possible strong cases with a public interest reason. As a result, the common law prosecution system utilises discretion. A former Attorney-General of the United Kingdom, Lord Shawcross stated:

It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute ‘wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest.’⁵⁶⁶

In theory, DPS did not insist on prosecution, but in practice, according to Sanders and Young, most cases were prosecuted.⁵⁶⁷ Conversely, in MPS-based countries such as Germany, discretion to drop cases becomes a common practice. It should be noted that, according to Fionda:

In an ideal world, where resources were unlimited, the legality model would be more attractive than expediency model. However, to ignore the limitations of reality is naïve. On the other hand, a system based purely on the expediency principle will be criticized for riding rough-shod over civil liberties and fundamental constitutional principles. A more useful application of the models is to operate elements from both principles in one system, varying the emphasis according to the seriousness of the offence.⁵⁶⁸

⁵⁶⁵ Mirjan Damaska, ‘The Reality of Prosecutorial Discretion: Comments on A German Monograph’ (1981), *The American Journal of Comparative Law* 119, 120.

⁵⁶⁶ See Director of Public Prosecutions Victoria, *Policy on Prosecutorial Discretion*. It is mentioned in the “public interest” paragraph that public interest is the dominant principle. This principle was enunciated by Sir Hartley Shawcross in 1951, as Attorney-General of the United Kingdom, and is equally applicable in Victoria. See United Kingdom, House of Commons, *Debates*, Vol 188, col 981, 28 January 1951. Last updated on 24 November 2014.

⁵⁶⁷ Andrew Sanders and Richard Young, above n 549, 209.

⁵⁶⁸ Julia Fionda, above n 301, 10.

As indicated in Chapter 3, in administrative discretion strict adherence to the legality principle which is based on traditional liberal idealism is not strictly followed where discretion becomes an inevitable part of administrative decision making (see 3.3.5 Conclusion). This situation is also relevant to any criminal justice system. The impact of the regulatory state creates and enlarges discretion to enable prosecutors to coordinate more complex social, economic and political situations.

This legality principle is the traditional liberal ideal, as discussed in Chapter 3, in the context of discretion and *rechtsstaat* (see 3.3.2 Extravagant versions of the rule of law and the *Rechtsstaat*). The liberal *rechtsstaat* constitution in Germany did not permit wide discretionary power. In the next development, the liberal *rechtsstaat* was challenged by the welfare state idea (*Sozialstaat*) where the strict application of the legality principle was eroded. Damaska explained the role of the welfare state in the decline of the legality principle in German law:

The move toward the welfare state was accompanied by a new approach to crime, emphasizing social policy at the expense of legal considerations, with attitudes toward crime committed by minors often playing the role of the Trojan horse in the citadel of the classic legal system. Nor should one overlook how the discovery of extra-normative factors in legal decision-making undermined old conceptions that criminal justice could function by applying a fixed normative program.⁵⁶⁹

According to Walker, in the U.S situation in regard to the welfare state approach was based on the 1967 report of the president's crime commission, *The Challenge of Crime in a Free Society*:

The criminal policy was directed to spend more money on criminal justice by (for example hiring more police, raising their salaries, subsidizing their education, expanding their training, developing more sophisticated communications technology, creating more community-based treatment programs for convicted offenders, funding research) and general belief in rehabilitation where diversion was better than prosecution, probation was better than imprisonment and parole was better than long imprisonment.⁵⁷⁰

⁵⁶⁹ Mirjan Damaska, above n 565, 126.

⁵⁷⁰ Samuel Walker, 'Putting Justice Back into Criminal Justice: Notes for a Liberal Criminal Justice Policy' in George F. Cole (ed), *Criminal Justice: Law and Politics* (1993, Wadsworth Publishing Company) 505. See also U.S. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967, Washington DC. Government Printing Office).

This kind of policy was criticized because spending more money did not reduce the crime rate and the rehabilitation program might be ‘net widening’ as Walker explained:

Some evaluations indicated that programs designed to divert offenders from the criminal justice system actually brought more people under some form of official control.⁵⁷¹

As indicated in Chapter 3, after Ronald Reagan and Margaret Thatcher, the impact of the welfare state was reduced (see 3.3.3 The Rule of Law and The Welfare State). A liberal criminal justice policy was introduced with a renewed commitment to traditional liberal values of fairness and equality, as Walker explained:

A liberal criminal justice policy begins with a renewed commitment to the traditional liberal values of fairness and equality. These values are embodied in the constitutional principle of due process, equal protection of the law, and protection against cruel and unusual punishment.⁵⁷²

However, as also indicated in Chapter 3, the regulatory state as the new modern type of state made a compromise between liberalization and privatization (see 3.3.4 The Regulatory State). Criminal justice officers may face complex and new situations in everyday decision making which could not be imagined by the legislator or rule maker. Thus, discretion becomes more accepted as long as it is controlled. Administrative discretion becomes inevitable, including in the criminal justice system. However, some countries still adhere to the mandatory prosecution system with its legality principle that is eroded in practice.

In summary, discretion in criminal justice systems is inevitable as judges, the police and prosecutors exercise it. It is exercised in countries using both the civil law and common law traditions or within the Packer criminal justice framework of crime control and due process. Theoretically speaking, in mandatory prosecution-based countries such as Germany, prosecutor discretion was exercised in limited circumstances, which led to a backlog of cases which had been delayed by the formal procedure. A backlog of cases may also be experienced by countries using the discretionary prosecution system when the due

⁵⁷¹ Samuel Walker, *ibid* 506.

⁵⁷² *Ibid* 504.

process model of criminal process is strictly adhered to in order to protect civil liberties in each stage of the criminal process. Utilizing a more discretionary model within the prosecution system is considered more realistic than the mandatory prosecution system, which is expensive because prosecuting all criminal cases is time consuming and may be impossible. In addition, the mandatory prosecution system, where the legality principle is based on a traditional liberal ideal, leads to a system in which some discretion to prosecute is allowed, even in a country like Germany which invented the MPS system.

4.2.1.4 Convergence of prosecution decision-making systems

As explained above, a prosecution system with strict adherence to a mandatory prosecution system is no longer followed. This can be seen in Germany, the inventor of the MPS system, which moved to using more discretion in its prosecution system. One of the major reasons for this was practical; that is, to keep its justice system running efficiently and to avoid delays. This change highlights the fact that it is impractical to totally eliminate discretion. Max Weber argued that a bureaucracy was technically the most efficient form of organization because its features demonstrated:

the existence of a system of control based on rational rules, rules which try to regulate the whole organizational structure and process on the basis of technical knowledge and with the aim of maximum efficiency.⁵⁷³

⁵⁷³ Prosecution systems based on MPS best fit within ‘Weber bureaucracy’ because all people within be prosecution bureaucracy receive uniform treatment; that is, all criminal cases must be prosecuted. See Julia Fionda above n 301. However, Robert K. Merton criticized Weber bureaucracy because it ignored the “imperfection of bureaucracy” or such bureaucratic dysfunctions as goal displacement, excessive rigidity, red tape, impersonal treatment of clients and unreasonable resistance to change. This criticism is also relevant in MPS based bureaucracy. The goal of the law to achieve legal justice (substantive justice) is displaced by merely legal certainty (procedural justice). The excessive rigidity and the faceless treatment of the offender within MPS may make it hard to tailor more individualized justice. Red tape commonly happens where illegal discontinuation of prosecution is often exercised behind the legal bureaucracy itself. The public or media usually have difficulty getting information about these illegal practices because they may be exercised hierarchically and hidden. When the demand for change (reform) emerges, the status quo usually resist the idea of change because they havetheir own corrupt system which provides personal benefit. Discussion about Max Weber, rational bureaucracy and Robert K Merton’s critiques are in Jon S.T. Quah, *Curbing Corruption in Asian Countries: An impossible Dream?*(2011, Emerald), 370.

Arguably, efficient bureaucracy can be achieved by utilizing controlled discretion in prosecution decision making. It should be noted that efficiency should not be interpreted as an economic evaluation, because the aim of the criminal process as a whole is to achieve justice. Reducing delay in the criminal process and tailoring individualized justice are the main aims often cited for a move to discretionary prosecution decision making.

Granting more discretion in prosecution decision making in countries like Germany can also be explained by convergence. Civil law countries like Germany and the Netherlands saw that it was more practical and rational to give their prosecutors some type of discretion, where previously this idea had been rejected. To achieve justice in prosecution decision making, efficient and rational bureaucracies are paramount.

There are different philosophies and strategies of convergence. A move towards the use of discretion is evident in civil law based countries such as Germany which had previously adhered to the mandatory prosecution system explained through the 'legal evolution theory'. De Cruz explained:

...legal systems are at different stages of development and, when they converge, it is because the less developed system is catching up with the more mature one. Since the civil law is much older than common law, the logical corollary to this thesis is that the common law will gradually become more like the civil law. However, trends toward convergence may be observed in both systems.⁵⁷⁴

Thus as civil law prosecution systems evolved and developed, they were likely to move towards granting greater discretion to prosecutors to discontinue criminal matters. Similarly as common law systems evolved there was a move from private prosecutions to state control of prosecution business, as previously explained. Convergence of legal systems has also been common in other areas of law but it should be noted that differences still remain because although a particular legal system may have been in use in a particular country at a particular time, that system in a different country at a different time would evolve differently.

This philosophical based theory of convergence (legal evolution theory) may be driven by 'natural convergence' where legal systems will tend to become

⁵⁷⁴ Peter De Cruz, above n 173, 506.

more alike as the societies themselves become more like each other. It may also be driven by legal transplantation as in a case of former colonized countries. Another explanation might arise from ‘active programs for the unification of law’ as is common practice in the European Community.

The next section discusses different types of decision making involved in the discontinuance of prosecutions in criminal matters. It analyses how and why discretion becomes a central model in prosecution decision making within the surveyed countries.

4.2.2 Types of prosecution decisions in discontinuance of criminal matters

Before discussing the types of decisions involved in the discontinuance of criminal matters, several points need to be emphasized including:

1. Whether and to what extent a country utilizes the MPS or DPS system will depend in part on its historical origins and the extent of its development. This can help explain the extent of convergence as well as to what extent a prosecution system utilizes discretion to discontinue criminal matters;
2. A country which heavily adheres to the crime control model will become more flexible if it utilizes more prosecutorial discretion, whereas a country using the due process model will need to maintain its safeguards against the use of unbridled discretion; and
3. In most civil law countries which claim to use a crime control model there is tendency to grant more discretion to prosecutors but the state still maintains control of prosecution business. By comparison, in common law due process model countries, prosecutorial discretion is still widely exercised but there is an ‘increasing role of the state to control prosecution’⁵⁷⁵ by reducing the role of private (individual) prosecutions and the use of the

⁵⁷⁵ In the US the executive enjoys control over Federal criminal law enforcement because of the dramatic expansion of both Federal crime and the sophistication of criminals engaged in such conduct. See Harold J. Krent, ‘Executive Control Over Criminal Law Enforcement: Some Lesson From History’ (1989), *the American University Law Review* 275, 310.

grand jury, as previously explained. In other words, there is convergence of both systems in practice so that they become progressively more similar. The reason behind this convergence may be the rise of the regulatory state in general where efficient and rational bureaucracy is paramount. Any prosecution service which is part of the state organ needs to find more effective and efficient practices to prevent crimes and respond to them without jeopardizing the aim of achieving justice. All prosecution bureaucracies need rational rules with the aim of maximum efficiency while achieving justice. In this regard, the MPS is simply inefficient because it is expensive.

The next section discusses different types of prosecution decisions to discontinue criminal matters. Based on the countries surveyed, different prosecutors use different models of decision making to discontinue criminal matters. The categories are ‘simple drop’, ‘public interest drop’, ‘plea bargain’, ‘conditional disposal’, ‘penal order’ and ‘negotiated case settlement’.⁵⁷⁶ From these models, this section also describes the current and proposed model in the new draft of the Indonesian Criminal Procedure Law.

4.2.2.1 Simple drop

From the countries surveyed, Germany and Indonesia use this kind of case ending. Section 140 (2) of the Criminal Procedure Law (KUHAP) gives a prosecutor three reasons for discontinuing criminal matters.⁵⁷⁷ Any reason other than that mentioned in the KUHAP is not permitted.⁵⁷⁸ Indonesian prosecutors are

⁵⁷⁶ These models are discussed by Luna and Wade to explain that there is tendency to give a prosecutor power acting as a judge. See Erik Luna and Marianne Wade, above n 527, 1413.

⁵⁷⁷ See Section 140 (2) *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (*‘1981 Criminal Procedure Law’*). The reasons for discontinuing a criminal matter by a prosecutor are:

1. The criminal nature test. If the matter is not of a criminal nature then it can be discontinued;
2. The paucity of evidence test. If the evidence is weak then the matter can be discontinued; or
3. The case is closed by law test. This test may apply, for example, if the accused has died, has previously been convicted or acquitted on the same charge (double jeopardy) or the statute of limitations has expired.

⁵⁷⁸ Except in the Soeharto case which is discussed later in the chapter.

under a directive to prosecute all criminal matters no matter how serious or trivial.⁵⁷⁹ This position is similar to the German situation before reform of the law in 1975. In Germany prosecutorial decisions are based on section 152 (2) of the *Strafprozeßordnung(StPo)* (The German Code of Criminal Procedure) and prosecutors must prosecute all criminal matters supported by sufficient evidence:

Sie ist, soweit nicht gesetzlich ein anderes bestimmt ist, verpflichtet, wegen aller verfolgbaren Straftaten einzuschreiten, sofern zureichende tatsächliche Anhaltspunkte vorliegen (Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications).

German reforms after 1975, however, gave prosecutors more discretion to discontinue criminal matters. Birman gave several examples of this discretion:

charges for minor offences may be dropped, charges may also be dropped by the public prosecutor with the permission of the competent court on the grounds that the sentence would be inappropriate, the federal public prosecutor may decide to drop charges for a political offence, where there are multiple or related offences the prosecution may be abandoned as concerns the least important of the offences, the charge may be dropped if the accused committed the offence under duress or as a result of blackmail.⁵⁸⁰

The Indonesian position will also be changed in the near future as, according to the Draft of Criminal Procedure Law 2010 (hereafter called as *the New Draft*), several new reasons to discontinue criminal matters will be granted to prosecutors. They are:⁵⁸¹

1. the crime is minor in nature;
2. the maximum sentence for the crime is four years;
3. the criminal sanction is a fine;
4. the suspect's age when doing the crime is above seventy years old; and
5. the suspect has paid compensation.

⁵⁷⁹ See section 15 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

Penuntut umum menuntut perkara tindak pidana yang terjadi dalam daerah hukumnya menurut ketentuan undang-undang (Public prosecutor shall prosecute a criminal case occurring in his jurisdiction in accordance with the provision of law)

⁵⁸⁰ Rodolphe Juy-Birman revised by Jorge Biermann, 'The German System' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press), 339.

⁵⁸¹ Section 42 (3) of the New Draft of the Indonesian Criminal Procedure Law (Copy of the document is available from the researcher if needed).

However, this kind of arrangement in the New Draft should be considered as an aspect of the public interest drop rather than as a simple drop and conditional disposal, as discussed further.

Luna and Wade explained a prosecutor's decision to discontinue criminal matters based on simple drop as follows:

The decision not to pursue a case due to insufficient evidence or some dispositive legal bar is characterized as a "simple drop". This classic case ending is considered to be consistent with the principle of legality which, as mentioned, is the polestar of a number of continental criminal justice systems and is often associated with the rule of mandatory prosecution in Germany. A primary purpose of the prosecution service is to filter out untenable cases, including those where no crime has been committed, the offender cannot be found, the available evidence is inadequate to support a trial against the suspect, or a law precludes bringing the case to begin with (e.g. amnesty, double jeopardy, expiration of the statute of limitations).⁵⁸²

It should be noted that the New Draft clearly states that a prosecutor has power to discontinue a criminal matter based on public interest.⁵⁸³ This shows that mandatory prosecution based on the legality principle is no longer strictly followed. Since public interest is the main consideration to discontinue criminal matters in the New Draft, the legality principle has been replaced by the opportunity or expediency principle. The opportunity principle was previously an exclusive power of *Jaksa Agung* where an ordinary prosecutor did not possess that power.⁵⁸⁴

It should also be noted that authors such as Andi Hamzah and Surachman argue that the Indonesian prosecutor has power to set aside criminal matters based on public interest considerations which a *Jaksa Agung* possesses (Opportunity principle) because every prosecutor is an embodiment of the *Jaksa Agung* (alter ego).⁵⁸⁵ This is known as the doctrine of *Jaksa satu dan tidak terpisahkan* (the

⁵⁸² Erik Luna and Marianne Wade, above n 513, 1442.

⁵⁸³ Section 42 (2) of the New Draft of the Indonesian Criminal Procedure Law (Copy of the document is available from the researcher if needed).

⁵⁸⁴ See section 35 (c) *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

⁵⁸⁵ Andi Hamzah and RM. Surachman, *Pre Trial Justice dan Discretionary Justice dalam KUHAP berbagai Negara* (Pre Trial Justice and Discretionary Justice in some Countries Criminal Procedure Law) (2014, Sinar Grafika), 282.

principle of indivisibility) or as *een en ondeelbaar*.⁵⁸⁶ This argument is somewhat misleading because the doctrine included the possibility of a replacement of one *Jaksa* (prosecutor) if the first *Jaksa* in charge for some reason could not continue the prosecution.⁵⁸⁷ To some degree, this kind of principle in prosecution policy is important to ensuring that prosecution is not stopped because the *Jaksa* (prosecutor) for some reason, including sickness for example, cannot continue the prosecution. However, this may also mean that the *Jaksa Agung* can, at his or her will, replace a *Jaksa* (prosecutor) who did not follow his or her instruction.

Based on the New Draft, the opportunity principle is distributed to all prosecutors. Arguably there will be potential problems for the Indonesian criminal justice system if discretion to discontinue criminal matters is not properly confined, structured, reviewed and transparent. As the Indonesian system in general is undergoing a struggle to overcome corruption, granting all prosecutors discretion may potentially breed another form of corrupt conduct; that is, abuse of the discretion to discontinue criminal matters.

In conclusion, the Indonesian simple drop system is similar to the model used in Germany before 1975 where prosecutors were under an obligation to prosecute criminal matters unless there was a legal bar to the prosecution. In 1975 Germany gave prosecutors more discretionary power to discontinue criminal matters. Similarly, based on the current Indonesian New Draft, the Indonesian simple drop system which is based on the legality principle is no longer used as Indonesia has moved to using the more discretionary opportunity principle based on giving prosecutors some discretion to discontinue criminal matters. However, the types of reasons that enable the discontinuance of criminal matters in Germany and Indonesia under the New Draft remain different. The next model discussed is the public interest drop.

⁵⁸⁶ Section 2 (3) *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

⁵⁸⁷ See supplementary document of section 2 (3) of *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

4.2.2.2 Public interest drop

The Public interest drop is a type of discretionary case ending by a prosecutor even though the prosecutor has formed the view that the suspect is guilty and there is sufficient evidence available to present the accused in court. Luna and Wade explained this public interest drop as follows:

This category refers to a prosecutor's decision that proceedings should be dropped without any further consequence, even though he believes the suspect is guilty, and sufficient evidence is available to take the case to court. The public interest drop can be seen as recognizing that certain cases are not worth the prosecutorial capital required for a more intense response, implying that these resources would be better expended on more pressing matters.⁵⁸⁸

In Germany, the public interest drop is used, for example, to drop a minor offence, a political offence, or an offence committed abroad. In the Netherlands, section 167 (2) of the Criminal Procedure Code states that the prosecution might be waived based on a public interest ground. Tak made a list (including more than 15 criteria) for what is considered as a public interest drop, such as the crime is of a minor nature, or the suspect is too young or too old, or because of a change of circumstances in the life of the suspect, including condition of their health.⁵⁸⁹ The Australian Commonwealth also includes a public interest drop with more than 20 criteria; for example, the seriousness of the offence, the intelligence of the accused and his or her mental health.⁵⁹⁰ The Indonesian system also uses this kind of public interest drop which exclusively uses the *Jaksa Agung* power, as indicated above. The public interest according to the Indonesian legal system includes the interest of the nation and/or of society at large.⁵⁹¹ As indicated above, this broad definition of public interest is confusing. What is considered as public interest may vary from country to country depending on a variety of factors. However, having a set of public interest criteria which are not too broad or too

⁵⁸⁸ Erik Luna and Marianne Wade, above n 513, 1443.

⁵⁸⁹ Peter J.P. Tak, above n164, 85.

⁵⁹⁰ Commonwealth Director of Public Prosecution, Prosecution Policy of the Commonwealth, Guidelines For the Making Decisions in Prosecution Process, 5-6. Last update August 2014. <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>

⁵⁹¹ Section 35 c of the supplementary document of *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

specific can be important. If the criteria are too broad this may lead to abuse of discretion, whereas if the criteria are too strict this may lead to injustice as indicated above. Further research for determining the public interest criteria which are suitable for Indonesia is needed and is beyond the scope of this thesis. But as a starting point, public interest criteria from countries surveyed in this research can be used as a model for future research.

As indicated above, the public interest drop in section 42 (2) and 42 (3) of the New Draft is based on five criteria; that is, the crime is minor in nature; the maximum sentence for the crime is four years; the criminal sanction is a fine; the suspect's age when committing the crime is above seventy years; and the suspect has paid compensation. Based on section 42 (2) of the New Draft, a prosecutor can discontinue a criminal matter based on the public interest with or without condition/s. Where the prosecutor uses the public interest drop without setting any conditions that decision is final. If conditions are set before the discontinuance of a criminal matter, then it should be considered as an exercise in conditional disposal. This is explained furthered in section 4.2.2.3. Conditional Disposal.

To conclude, the public interest drop is used by Germany, the Netherlands, Australia and Indonesia. The different countries have each established their own public interest criteria. The current Indonesian setting for what is considered as public interest is too broad to compare with other surveyed countries. It is important to generate public interest criteria which are not too broad or strict. The current suggested reform in the New Draft of the Indonesian Criminal Procedure Law with regards to public interest needs further research to determine the criteria which are better suited to the Indonesian situation. The five criteria as mentioned in section 42 (3) of the New Draft are still considered as too narrow. It is suggested here that the public interest criteria within the New Draft should be removed and a set of published guidelines should be put in their place. This should facilitate more flexibility to changed circumstances. These criteria should be reviewed annually.

4.2.2.3 Conditional disposal

As indicated above, the New Draft of the Indonesian Criminal Procedure Law uses a type of case ending known as conditional disposal alongside the public interest drop. A prosecutor exercises conditional disposal if the decision to discontinue a criminal matter is followed by imposing a ‘condition’.⁵⁹² There is no further information about what ‘condition’ can be imposed within the New Draft. The only clue about this is mentioned in the new draft of Indonesian criminal law (hereafter the New Draft CL).⁵⁹³ In section 142 of the New Draft CL, a prosecutor can impose a condition to discontinue a criminal matter, such where the maximum fine for a certain crime is paid.⁵⁹⁴ This section should be ruled out of the New Draft CL and incorporated into the New Draft because it is a matter of criminal procedure. It will make the new criminal procedure law; that is, the New Draft more comprehensive.

⁵⁹² Section 42 (2) of the New Draft of the Indonesian Criminal Procedure Law states that a prosecutor has the power to discontinue a criminal matter based on public interest with or without condition. (Copy of the document is available from the researcher if needed).

⁵⁹³ Copy of the document can be obtained from the researcher if needed.

⁵⁹⁴ There are several suggested points within the draft of the Indonesian Criminal Law related directly to the Indonesian prosecutorial power, such as *gugurnya kewenangan menuntut* (ground for non prosecution). Based on section 142 of the Draft, the prosecutor does not have grounds for prosecution if:

1. *telah ada putusan yang memperoleh kekuatan hukum tetap* (there is previously a court decision in a matter of dispute which is legally binding);
2. *terdakwa meninggal dunia* (the accused pass away);
3. *kedaluwarsa* (Lapse of time);
4. *penyelesaian di luar proses* (out of court settlement);
5. maksimum denda dibayar dengan sukarela bagi tindak pidana yang dilakukan hanya diancam dengan pidana denda paling banyak kategori II (a fine had been paid voluntarily for a crime which is punished by a category II fine);
6. maksimum denda dibayar dengan sukarela bagi tindak pidana yang diancam dengan pidana penjara paling lama 1 (satu) tahun atau pidana denda paling banyak kategori III (a fine had been paid voluntarily for a crime which is punished by maximum one year’s prison or a category III fine);
7. *Presiden memberi amnesti atau abolisi* (the Indonesian give amnesty or abolition); (there seems to be a word missing here)
8. *penuntutan dihentikan karena penuntutan diserahkan kepada negara lain berdasarkan perjanjian* (prosecution is dropped due to another country undertaking the prosecution based on an international agreement);
9. tindak pidana aduan yang tidak ada pengaduan atau pengaduannya ditarik kembali; atau (the absence of a complaint in cases of private complaint offences) or;
10. *pengenaan asas oportunitas oleh Jaksa Agung* (the Indonesian Attorney General exercises the opportunity principle).

(Copy of the document is available from the researcher if needed).

Luna and Wade explain:

A 'conditional disposal' refers to the prosecutorial decision that although a case need not to proceed to trial, the suspect deserves some type of state reaction ... Conditional disposals are most often lauded as achieving greater efficiency by diverting relatively low-level offenders out of the criminal justice system and thereby minimizing court congestion. In fact, this option was often introduced alongside the public interest drop, with both intended to ease caseload pressures.

All of the countries surveyed recognized this kind of case ending. Indonesia acknowledges it for minor crimes that are punished only by a fine set within section 82 (1) of the *Kitab Undang-Undang Hukum Pidana* (Indonesian Criminal Code).⁵⁹⁵ In France, the *procurer de la Republique* has discretion to drop a case after the offender has agreed to perform some measure such as paying damages, or compensating the loss of the victim, or ending a disturbance resulting from the offence, or doing something which aids in the rehabilitation of the offender. This is known as *classement sous condition*.⁵⁹⁶ In Germany, a public prosecutor can dismiss a minor case if the offender has complied with (punitive) conditions determined by the public prosecutor such as paying a fine to a charity (or to the state), community service, compensating the victim and/or complying with maintenance duties.⁵⁹⁷ Tak mentions six conditions in the Netherlands which are known as "transaction"⁵⁹⁸ including:

1. the payment of a sum of money to the state, the amount being not less than three Euro and not more than the maximum of the statutory fine;
2. renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
3. the surrender of objects subject to forfeiture or confiscation, or payment to the State of their assessed value;
4. the payment in full to the State of a sum of money or transfer of object seized to deprive the accused, in whole or in part, of the estimated gains

⁵⁹⁵ Section 82 (1) of the *Kitab Undang-Undang Hukum Pidana or KUHP* (Law No. 1 of 1946 on Criminal Code) (Indonesia) ('1946 Criminal Code') state that:

The right to prosecute in the case of misdemeanors on which no basic punishment is imposed other than a fine, shall lapse by voluntary payment of the maximum of the fine, and of the cost if prosecution has already taken place, by authorization of the official designated thereto by general regulations within the term to be determined by him.

⁵⁹⁶ Valerie Dervieux, revised by Mikael Benillouche and Olivier Bachelet, 'The French System' in Mireille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedure* (Cambridge University Press, 2002), 284.

⁵⁹⁷ Hans-Jorg Albrecht, 'Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany' (2000), *European Journal of Crime, Criminal Law and Criminal Justice* 245, 247.

⁵⁹⁸ Peter J.P. Tak, above n 164, 87-88.

- acquired by means of or derived from the criminal offence, including the saving of costs;
5. full or partial compensation for the damage caused by the criminal offence; or
 6. the performance of non-remunerated work or taking part in a training course of 120 hours.

In Victoria Australia, cautioning is exercised for minor drug offences, shoplifting and for youth for a broad range of offences.⁵⁹⁹

There are a variety of types of condition which can be imposed by prosecutors to discontinue criminal matters based on the countries surveyed. Similar suggestions for how Indonesian should formulate its 'public interest' and what is considered as a suitable condition for non-prosecution needs further comprehensive research, and a matter of practice to be developed in published guidelines.

In conclusion, all of countries surveyed utilized types of conditional disposal to discontinue criminal matters although the conditions are different for the surveyed countries. In the Indonesian situation, the New Draft still acknowledges conditional disposal without further explanation of what kind of conditions can be imposed. This means there is no guidance offered in order to decide consistently how matters are to be resolved. Arguably this has the potential for abuse of power. The only clue as to the meaning of a 'condition' is what had been set in the New Draft CL and in section 82 of the KUHP (Criminal Code). As suggested, it is important to undertake further research about what kind of state reaction can be used for the Indonesian situation and as a matter of practice development. For example, setting conditions which are only based on money would be unwise as this will be criticized as 'the law for the rich'.

4.2.2.4 Plea bargaining or negotiated case settlement

Plea bargain is not known in the Indonesian legal system. However the current reform introduced what is called *Jalur khusus* (Special Path)⁶⁰⁰ which arguably

⁵⁹⁹ Carleen Thompson, Anna Stewart, Troy Allard, April Chrzanowski, Chelsea Luker and Jerneja Sveticic, 'Examining Adult-Onset Offending: A case for adult cautioning' (2014), *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology 2.

acknowledges that there is possible bargaining between prosecutor and defendant before the trial. In the New Draft, Indonesia introduced some kind of ‘plea bargaining’ where a person accused of a crime has admitted his guilt after the prosecutor has read a letter of indictment at the court for a crime with a maximum sentence of seven years imprisonment. The trial judge can reject the guilty plea if he or she believes that the confession is not genuinely true (i.e. not based on true facts).⁶⁰¹ If the trial judge accepts the plea of guilty then the maximum punishment must not exceeded two-thirds of the allowed punishment. This kind of system allows a tacit ‘bargain’ or agreement between the prosecutor and the accused before the judge in *jalur khusus*. This informal practice is common in a system which allows a guilty plea, such as in Australia. This practice has been explained as follows:

‘Many of these guilty pleas are entered by agreement after discussion between prosecutors and defense legal representatives (or defendant personally, if they do not have a lawyer)’.⁶⁰²

The next section discusses plea bargaining in common law and civil law jurisdictions.

4.2.2.4.1 Plea-bargaining in common law

As previously described, before the 19th century plea-bargaining was unknown in the English system because the jury trial was short and effective. Both Justices of the Peace and Grand Juries played a significant role in maintaining efficient prosecutions by filtering out groundless cases. However, as previously indicated, the rise of the adversarial system and the related development of the law of evidence have caused the jury system to become inefficient. The jury trial has become long and complex, particularly where contradictory expert evidence is called.

⁶⁰⁰ See *jalur khusus* (special path) section 197 of the New Draft of Criminal Procedure Law. (Copy of the document is in the researcher office if needed).

⁶⁰¹ Section 197 (4) of the New Draft of Criminal Procedure Law. (Copy of the document is available from the researcher if needed).

⁶⁰² Kathy Mack and Sharyn Roach Anleu, above 139, 4.

In the 19th century, with the establishment of the Police, the DPP and the Crown Prosecution Services, the trial phase was increasingly displaced from its traditional central stage in English criminal procedure. All three institutions filtered smaller and weaker cases from trial. One mechanism was the early identification of guilty pleas that became more accepted and more commonly sought in common law based countries including Australia.

Australia acknowledged the guilty plea in its system both for serious (indictable offences) and less serious ones (summary offences) to reduce delays in the criminal process. Firstly, the DPP has considerable discretion to continue or discontinue indictable offences:

The DPP is not bound to lay all charges for which the Magistrate has committed the accused, and in some circumstances may lay more serious charges than those on which the Magistrate committed. The accused is then arraigned in the higher court, that is, formally told of the charges and asked to plead. If the accused is pleads not guilty, the matter is set for jury trial.⁶⁰³

Secondly, summary offences are laid in the Magistrate's Court by the police and:

If the charges are not serious, all proceeding (first appearance, plea, trial if the accused pleads not guilty, and sentence if the accused pleads guilty or is convicted after trial) will be held in the Magistrate's Court. The prosecution is entirely in the hands of the police, and trials are heard by the magistrate alone, sitting without a jury.⁶⁰⁴

In Australia it is important to identify a guilty plea as soon as possible. Failure to do this might result in delay of cases and long trial lists. For example, in Victoria, Boag citing Pegasus reported that the late identification of guilty pleas was one of the fundamental problems exacerbating delays.⁶⁰⁵

Mack and Anleu suggest criteria to ensure that guilty pleas in Australia are just, fair and efficient. Some critics have suggested that resolution by discussion may coerce the innocent into pleading guilty or reward the guilty with unduly lenient sentences.⁶⁰⁶ Mack and Anleu's criteria include:

1. guilt is determined by a careful evaluation of the evidence and the law;

⁶⁰³ Ibid 3.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ann-Louise Boag, *Legal Aid and Its Role in the Reduction of Delays in Criminal Proceedings in Victoria* (No year), 227, 228 <http://www.aic.gov.au/media_library/publications/proceedings/24/boag.pdf>.

⁶⁰⁶ Kathy Mack and Sharyn Roach Anleu, above n 139, 7.

2. the accused's decision to plead guilty, while inevitably made under constraints, is as free from improper inducements as possible;
3. accused persons have adequate information and advice to be able to make a proper decision to plead guilty as early as possible;
4. the process is sufficiently open and accountable so that its operation is understandable by the accused, by victims of crime, and by the public generally;
5. the sentence is based on appropriate principles in light of the crime for which the accused is convicted and relevant personal characteristic; and
6. scarce human and financial resources are used efficiently and effectively.⁶⁰⁷

Civil law jurisdictions permit negotiated case settlements after the trial has commenced which is a unique characteristic, as explained in the next section.

4.2.2.4.2 Plea-bargaining in civil law

In Germany, France and the Netherlands a similar model of plea-bargaining is known as some kind of negotiated case settlement. Luna and Wade explain negotiated case settlement as follows:

In a negotiated case settlement, the conviction and the sanction imposed are the subject of an agreement between the prosecution and defense. During an abbreviated hearing, the parties present selected evidence in support of the proposed resolution, leading to a court decision on the defendant's guilt and punishment.⁶⁰⁸

In Germany, this system was introduced formally in 2009 as part of the reform of its Criminal Procedure Law with direct involvement of the court.⁶⁰⁹ The direct

⁶⁰⁷ Ibid.

⁶⁰⁸ Erik Luna and Marianne Wade, above n 513, 1451.

⁶⁰⁹ Section 257c of the StPO states that:

In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. Section 244 subsection (2) shall remain unaffected.

The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement;

The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal;

The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay; and

involvement of the court is the main difference with the Australian practice. This means that the court is not bound by what is presented by the parties. Explaining this, Weigend and Turner state:

Judges may not simply rely on the facts presented by the parties, including the defendant's confession, but must independently assemble a sufficient factual basis for the judgment.⁶¹⁰

In this regard, the current Indonesian reforms also include direct involvement of the court where the judge can still reject the admission of guilt and engage in examination during trial proceedings.⁶¹¹ The French have a similar current negotiated case settlement practice. According to Luna and Wade, France exercised negotiated case settlement called *comparution sur reconnaissance préalable de culpabilité* (appearance before a court after prior admission of guilt) for crimes punishable by up to five year's imprisonment where the prosecutor and the accused (with his or her lawyer) can make an agreement concerning individualized punishment.⁶¹² As indicated above, the court can still reject this individual punishment proposal. In the Indonesian current reform, the admission of guilt is stated in the court after the prosecutor has read the indictment letter for crimes punishable by a maximum of seven year's imprisonment.

It should be noted that an admission of guilt is unknown in the current Indonesian KUHAP (Criminal Procedure Law) but this does not prevent a tribunal of judges bringing in a finding of guilt or innocence.⁶¹³ The current proposed

The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).

This translation is taken from Stefan König and Stefan Harrendorf, 'Negotiated Agreements and Open Communication in Criminal Trials: The viewpoint of the Defense' in Russell A. Miller (ed.), *Review of Developments in German, European and International Jurisprudence* in Christoph Safferling and Elisa Hoven (special eds.) 'Special issues-Plea Bargain in Germany, (2014), *German Law Journal* 65-66.

⁶¹⁰ Weigend and Jenia Iontcheva Turner, 'The Constitutionality of Negotiated Criminal Judgment' in German in Russell A. Miller (ed.), *Review of Developments in German, European and International Jurisprudence* in Christoph Safferling and Elisa Hoven (special eds.), 'Special issues-Plea Bargain in Germany' (2014), *German Law Journal*, 91.

⁶¹¹ See section 196 and 197 of the New Draft of Criminal Procedure Law. (Copy of the document can be provided by the researcher if needed).

⁶¹² Erik Luna and Marianne Wade, above n 513, 1452.

⁶¹³ Section 189 (4) *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law') mentions that: Testimony of the accused alone is not sufficient to prove that he is guilty of the fact of which he is accused, but must rather be accompanied by another means of proof.

reform involving an admission of guilt is followed by a shorter trial known as a *Acara Pemeriksaan Singkat* (shorter trial).⁶¹⁴ This admission of guilt must be made in writing and signed by both the prosecutor and the accused as part of a court proceedings' report. Subsequently, the trial judges explain the consequences of admission and the maximum sentence that can be imposed on the accused. The trial judge must also ask the accused whether his or her admission of guilt is voluntarily given. As indicated, if a trial judge has doubts about the voluntary character of the admission, he or she can reject it and continue with the ordinary trial process. If they are satisfied about the voluntary character of admission of guilt, then the criminal process will be continued with a short trial; a process that is set out in section 196 of the New Draft. Such a trial is held before a single judge. Unlike the French system, individualized punishment is unknown within the current Indonesian Criminal Procedure reform (the New Draft). The maximum punishment for the accused in this regard is two-thirds that of the head sentence for the crime.⁶¹⁵

According to Strang, the current reform introducing the *Jalur Khusus* follows the Russian model but he offers no explanation as to what the model involves.⁶¹⁶ However, what is important for this thesis is discussion about how the current proposed reforms control and review Indonesian discretionary prosecutorial power. As indicated above, tacit agreement between a prosecutor and the defence might potentially occur before the prosecutor applies the *Jalur Khusus*. The decision as to whether or not a prosecutor chooses the *Jalur Khusus* is discretionary and this process needs to be made transparent. In order to enhance its transparency the New Draft needs more policy development. Where, for example, a defendant has admitted guilt before the trial has commenced, perhaps the discretion for the prosecutor not to apply for *Jalur Khusus* during first court

⁶¹⁴ Section 196 and 197 of the New Draft of Criminal Procedure Law. *Acara Pemeriksaan Singkat* (Shorter Trial) is not new within the KUHAP (Indonesian Criminal Procedure Law). See section 203 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law'). *Jalur Khusus* (special path) is the new procedural process within the New Draft of Criminal Procedure Law.

⁶¹⁵ Section 197 (5) of the New Draft of Criminal Procedure Law. (Copy of the document is available from the researcher if needed).

⁶¹⁶ Robert. R. Strang, "'More Adversarial, but not Completely Adversarial': Reformasi of the Indonesian Criminal Procedure Code' (2008) *Fordham International Law Journal* 188, 222.

appearance should be limited. As indicated, the trial court during the first appearance can reject or accept the admission of guilt. However, what is important is the admission of guilt during the first appearance. The trial judge should not only ask whether the confession is made voluntarily but also ensure that any discussion between the prosecutor and the defendant prior to the trial is transparent and that an accurate written record has been made. Only then should an accused be tried as part of the shorter trial process. The policy should focus, as indicated above, on ensuring that the innocent are not coerced into pleading guilty by holding out the reward of a lenient sentence. As suggested, section 197 should be amended to include an obligation on the trial judge to ask whether there has been any discussion between the prosecutor and the accused. If there is no discussion between them then the trial judge should examine the nature of the confession in order to ensure that it is voluntarily. If a discussion had occurred, the judge should ask the prosecutor for a copy of the record of those discussions and, depending on what the copy contains, make any further examinations he or she feel will ensure that the confession is a voluntary one. The decision during the first appearance at court to send the accused to a shorter trial must be accompanied by a full examination of the report. By doing this, the prosecutor's discussion is admitted rather than denying the potential existence in practice. It should be noted that the 2009 reform in Germany acknowledged the discussion between the prosecutor and the accused, as is contained in section 257 (c) StPo. This section was included in response to illegal prosecutor-accused-judge discussions before trial. Explaining the situation before section 257 c StPO came into existence, Safferling and Hoven state:

As the investigations and trials became more complicated – in particular in the field of economy crime or so-called white-collar crime– the StPO proves to provide a procedure that is too cumbersome. Defense counsel could give the judges a really hard time and provoke the near collapse of the trial. Under these circumstances the professional participants in a trial, i.e. counsel, prosecutor, and judge, started to do something that was not foreseen in the Procedure Code: to trade a confession for a lenient sentence. The advantages which were connected to this “deal” for each of the participants are obvious: Judge and prosecutor do not need to present a full set of evidence against the accused, the judge can issue

an abridged version of the written judgment, defense counsel can offer to his client a minimum amount of security regarding the outcome of the trial.⁶¹⁷

In summary, a guilty plea with a special process known as *Jalur Khusus* (Special Path) is a new proposed feature of Indonesian Criminal Procedure Law. Similar to France and Germany, the guilty plea involves a court decision where the judge can still reject the accused plea. This procedure is different with Australia where the guilty plea may be part of plea-bargaining or charge-bargaining which cannot be rejected by the court. The Indonesian current reform can be enhanced by ruling that prosecutor and accused discussions which have led to a guilty plea might potentially happen and the court needs to be fully informed about the discussions between them in order to enhance transparency. By doing this, the trial judge can examine a detailed report of the discussions between a prosecutor and an accused and be satisfied that a guilty plea has been made voluntarily. Furthermore, a trial judge should be able to properly assess the nature of the guilty plea so as to ensure that the innocent is not coerced into pleading guilty with the reward of lenient sentence.

The next section discusses what is known as a penal order.

4.2.2.5 Penal order

The current Indonesian draft of the Criminal Procedure Law did not recognize a model known as a penal order. The surveyed countries – France, Germany and the Netherlands and Australia – all use this model. In this section there is discussion as to whether or not the Indonesian New Draft of Criminal Procedure Law needs to be reformed, so as to include this model.

Arguably, this model is shorter than the *jalur khusus* process (see plea bargaining discussed above). It shortens the *jalur khusus* because it involves only one court examination based on a written document. As indicated above, *jalur*

⁶¹⁷ Christoph Safferling and Elisa Hoven, 'Foreword: Plea Bargaining in Germany after the Decision of the Federal Constitutional Court' in Russell A. Miller (ed.), *Review of Developments in German, European and International Jurisprudence* in Christoph Safferling and Elisa Hoven (special eds.) 'Special issues - Plea Bargain in Germany' (2014), *German Law Journal* 2-3.

khusus needs further examination by *Acara Pemeriksaan Singkat* (shorter trial).

Explaining a penal order, Luna and Wade assert:

In its conventional form, a penal order is requested by the prosecution through a standardized application form containing a brief summary and a suggested punishment, accompanied by the government's case file. Based upon the written information, the court either accepts the prosecution's request or rejects it outright, with the latter triggering the traditional process and a full trial. When the application is approved, as usually occurs, the court issues a penal order to the accused informing him of the judgment and the resulting punishment, as well as the time period in which he may formally object and thereby receive a standard trial...penal orders are used for minor acts of violence, low-level property crimes, petty theft, marijuana possession, and even traffic offences.⁶¹⁸

Under French law, the prosecutor sends the case file and its submission to the court where the judge rules without a prior hearing resulting in a 'criminal order' under the *De la Procedure Simplifiee* (Simplified Procedure).⁶¹⁹ In Germany this model is known as *Strafbefehl*. Similar to the French law, the procedure is entirely a written procedure without trial or other appearance of the accused before a court or an officer.⁶²⁰ Both French and German penal orders involve court decisions. In the Netherlands penal orders are known as *strafbeschikking* and these are finalized by a prosecutor without court involvement. Such orders can be exercised for crimes which carry a statutory prison sentence of six years or less.⁶²¹ The offender has an opportunity to be heard in person or by telephone before the penal order is made.⁶²² In Australia, for certain traffic infringements and for persons who commute using public transport without a valid ticket, punishment without court adjudication can be made by issuing an infringement notice. However, failure to meet the terms of the infringement notice might result in court adjudication.

It should be noted that a penal order is designed to shorten the criminal process. In some situations it is designed to avoid a trial, as in the Netherlands or Australia. The only drawback of this kind of model is that the accused may feel that they have lost the right to defend themselves before an impartial court. This right is internationally acknowledged within section 14 of the International

⁶¹⁸ Erik Luna and Marianne Wade, above n 513, 1449.

⁶¹⁹ Section 524-528 French Criminal Procedure Code

⁶²⁰ John H. Langbein, *Comparative Criminal Procedure: Germany* (1977, West Publishing Co) 96.

⁶²¹ Peter J.P. Tak, above n164, 90.

⁶²² Ibid 89. It explains that before the public prosecutor may impose a sentence, he has to hear the offender in person or by telephone.

Covenant on Civil and Political Rights (hereafter called as ICCPR).⁶²³ Thus it is important that if Indonesia wants to use this model, with or without court involvement, that it still acknowledges the right of the accused to appear before an impartial tribunal to adjudicate on his or her case.

In summary, the current Indonesian reform does not recognize the model of a penal order. Other surveyed countries acknowledge this model with or without direct involvement of the court. Instead of using the *jalur khusus*, Indonesia should consider the adoption of this type of penal order which tends to shorten the criminal process.

The utilization of the public interest drop, conditional disposal, plea-bargaining and penal orders grant the prosecution some discretion to discontinue or shorten criminal matters. As further explained in the next section, this discretionary power needs to be exercised independently and accountably in order to avoid abuse of power.

4.2.3 Independent and accountable prosecutors

According to the International Association of Prosecutors, the use of prosecutorial discretion when permitted in a particular jurisdiction should be exercised independently, and be free from political interference.⁶²⁴ This requirement indicates that accountability and transparency are also important issues.

This section discusses the independence and accountability of the prosecutor. Like judges, prosecutors within any system of justice must be free to carry out their professional duties without improper political interference. This means that the prosecutor must act according to the rule of law, in particular in accordance with the separation of powers doctrine that generally requires each arm of government to be separate and not exercise the powers or functions of the others. Fox explains the doctrine from a criminal justice point of view:

⁶²³ See section 14 (1) of the International Covenant on Civil and Political Right states:
...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

⁶²⁴ See The International Association of Prosecutors, above n 17.

[s]eparation of powers basically means that the legislature defines offenses and procedures for the prosecution; the executive arm of government, through policing agencies, is responsible for the investigation and prosecution of offences; and that the courts possess an exclusive right to try persons charged with offences and to convict and punish those found guilty.⁶²⁵

The independence principle is an essential requirement of the proper administration of justice.⁶²⁶ For example, this means that the prosecuting body cannot interfere with judicial decision making or *vice versa*. An essential element of the doctrine is that the judiciary be completely separate from the executive and from the legislature. To guarantee the independence of the judiciary, court decisions cannot be changed by other State organs, including the prosecution. This is a widely recognized principle which found expression in *Findlay v the United Kingdom*.⁶²⁷

Thus it is important to understand the position of the prosecution service in relation to the arms of government in order to ascertain the degree of independence. The next section discusses two types of prosecution service known as the functional autonomy model and the functional subordination model.

4.2.3.1 Functional autonomy or functional subordination

Functional autonomy means that prosecutorial bodies are independent and separate from the executive arm of government, while functional subordination means that the executive arm of government retains some control over prosecutorial bodies.⁶²⁸ Utilization of the latter model means that prosecutorial

⁶²⁵ Richard G. Fox, *Victorian Criminal Procedure* (Monash Law Book Co-operative Limited, 2005) 32.

⁶²⁶ International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyer and Prosecutor', *Practitioner Guide No 1*, 2007, 20.

⁶²⁷ *Ibid* 23. It is mentioned that in *Findlay v. The United Kingdom*, the European Court recalled that it is a widely recognized principle that legal decisions should not be changed by authorities who are not part of the judiciary. In other words, it is not possible for the juridical validity of judicial decisions and their status as *res judicata* to be subject to action by other branches of government. The Court therefore found the independence of courts to have been violated if it is possible for their decisions to be changed by officials or bodies belonging to the executive and such decisions can only be considered *res judicata* if they have been confirmed by such authorities.

⁶²⁸ Antoinette Perrodet, 'The Public Prosecutor' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press) 419.

bodies can more easily be subject to improper political influence in their decision making, especially in the matter of direction for specific cases.

In general, instruction in specific cases is prohibited in order to guarantee independence. However it is allowed with appropriate specific controls with a view to guaranteeing some degree of transparency.⁶²⁹ For example, the Netherlands grants members of the Board of the Prosecutor General the opportunity of giving their opinions in writing concerning any Minister of Justice instruction. This is discussed further with regard to the surveyed countries. Independence in prosecutorial decision making is discussed in the next section.

4.2.3.2 Independence in prosecutorial decision making

In order to assess the degree to which prosecutorial services are actually independent, some authors compare the independence of those services with other state organs which are also supposedly independent, namely the police and the judiciary. Corns and Tudor argue that ideally the prosecutor should be independent from government, the judiciary, the investigator, and the victim.⁶³⁰ Other writers, such as Hamilton, mention that the prosecutor should be independent from the legislature, the judiciary, the executive, and the police.⁶³¹ In addition, arguably the prosecutor should also be independent from the media, so that the media cannot influence or dictate in any way whether a prosecution should be made, should continue, or be discontinued. Nevertheless, it is arguable that the prosecution should retain a working relationship with the media as the media reflects societal values at any one time. In other words, it is important for the DPP in Australia to maintain some independence from the media as McKechnie notes: 'A working relationship between the media and a prosecution service is vital for the interests of justice and to maintain the independence of the prosecution service'.⁶³²

⁶²⁹ International Commission of Jurist, above n 640, 172.

⁶³⁰ Corns and Tudor, above n 141, 295.

⁶³¹ James Hamilton, above n 18, 2.

⁶³² John McKechnie, 'Directors of Public Prosecutions: Independence and Accountable' (1996), *Western Australian Law Review* 268, 277.

It is submitted that the prosecutor service needs to be independent from the investigatory service. Both will form a view as to the guilt or innocence of an accused. However, only the prosecution service has a duty to fully inform an accused of the charges he or she faces along with the evidence supporting those charges. The role of the prosecutor is to act impartially and in a fair manner, so as not to secure a conviction at all costs.⁶³³ Furthermore, because of the presumption of innocence in adversary legal systems, it is most important that the prosecutor be able to present a criminal case for trial with an impartial mind based on assessing the evidence which has been collected by the investigators.⁶³⁴

The prosecution service must also conduct itself so that victims or individual citizens do not influence the decision whether or not to prosecute, or whether or not to discontinue a prosecution. In criminal matters, the prosecution service represents society at large and not individuals. Corns and Tudor argue that the views of victims should not determine a prosecutorial decision.⁶³⁵ It is clear that since the prosecutor is working on behalf of society, any pressure or influence from the victim might undermine prosecutorial independence. However, the victim needs to be informed of any prosecution decision especially the decision not to prosecute. Further discussion about a possible challenge from the victim is discussed in this chapter (see 4.3.1.7. Judicial review for prosecutorial decision making).

There is a sound reason for the prosecution service to be independent of the government and the executive. A government may have a strong desire to see a particular person, or class or category of persons, prosecuted or not prosecuted.⁶³⁶ Any pressure or direction from the government might lessen or compromise prosecutorial independence. As a result, prosecutors must remain at arms length from any politician or political agenda. There should be a clear-cut delineation between the interest of the public, the interest of the government, and the role of the prosecution service. It is in the public interest that prosecution

⁶³³ Corns and Tudor, above n 141, 293.

⁶³⁴ Ibid 295.

⁶³⁵ Ibid 296.

⁶³⁶ Ibid 295.

services be independent whereas the interests of the government are mostly driven by political considerations.

Just as there is a need for the prosecution service to be independent of government, there is also a need for it to be independent from the judiciary. The judiciary should not be able to dictate to the prosecution service or any prosecutor which case or cases should or should not proceed, or how prosecution cases should be conducted, leaving aside the responsibility of judges to enforce the procedural and evidential rules that regulate trials.⁶³⁷ Any external judicial influence over the prosecution service might compromise the objectivity of the criminal process. Of course, prosecutors must respect the independence of the judiciary. Hamilton mentions that ‘Public prosecutors are to strictly respect the independence and the impartiality of judges; in particular they should neither cast doubt on judicial decisions nor hinder their execution’.⁶³⁸

The prosecution service needs to be independent from the legislature and the media because of the great danger that ‘legislative control over the work of the prosecutor can become a vehicle by which media pressures are used to undermine the independence of the prosecutor.’⁶³⁹ Furthermore, Hamilton notes, ‘Prosecutors can be subjected to populist pressures particularly when there is a media frenzy arising out of a high profile criminal trial.’⁶⁴⁰

Another way of looking at the concept of ‘independence’ is to compare prosecutorial independence with judicial independence. There are four core components for organizing any discussion of independence:

First, there is the issue of institutional independence, meaning a duty to refrain from seeking, taking, or giving instruction. Second, there is ‘personal independence’, meaning ‘[S]ecure tenure until retirement age, or fixed terms of sufficient duration and with no reappointment, are the two alternative models.’ This will necessitate clearly delineating the grounds and procedures for dismissal. In addition, ‘[P]ensions and salary levels are most important, and the mechanisms for determining them can easily compromise independence.’ Third, is ‘functional

⁶³⁷ Ibid 297.

⁶³⁸ James Hamilton, above n18, 10.

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

independence.’ This issue cannot be resolved outside a constitutional framework of the separation of powers. Fourth, is ‘financial independence’.⁶⁴¹

These four components can be used to evaluate the concept of prosecutorial independence. However, arguably, judicial independence and prosecutorial independence are different in nature. The Venice Commission mentions in its report that ‘The ‘independence’ of prosecutors is not of the same nature as the independence of a judge.’⁶⁴² Cowdery explains that independence is made manifest in many practical ways and some standards have been agreed⁶⁴³; these are:

1. There should be legislative prescription of the functions and accountabilities of the prosecutor;
2. There should be tenure in office of the prosecutor, preferably on similar terms to those for judges. Protection against arbitrary dismissal is a minimum requirement and provisions for reappointment need to be carefully crafted;
3. Appropriate resources must be provided to the prosecutor to enable that function to be carried out effectively and efficiently;
4. Proper leadership, training and support must be provided to prosecutors to enable them to attain and maintain appropriately high professional standards;
5. Publicly available guidelines should be promulgated to serve as a benchmark against which the performance of prosecutors may be assessed; and
6. Politicians and public commentators should learn and respect the rules that surround the execution of the prosecution function and refrain from inappropriate attack, directly or indirectly.

The next section discusses what is considered as accountability in prosecution decision making.

⁶⁴¹ Mads Andenas, ‘A European Perspective on Judicial Independence and Accountability’ (2007), *International Law* 1, 18.

⁶⁴² Paragraph 86, European Commission For Democracy Through Law (Venice Commission) *Report on European Standards as Regards the Independence of the Judicial System: Part II- The Prosecution Service*.

⁶⁴³ Nicholas Cowdery AM QC, *Independence of the Prosecution, Rule of Law: The Challenges of a Changing World*, Brisbane: 31 August 2007, 7.

4.2.3.3 Accountability in prosecutorial decision making

The terms ‘accountability’ and ‘independence’ are often used interchangeably when discussing prosecutorial independence.⁶⁴⁴ Hamilton also mentions that ‘Prosecutorial independence is not an end itself.’⁶⁴⁵ He went on to observe that independence and accountability are two sides of the one coin.

Wright and Miller argue that ‘In democratic governments committed to the rule of law, prosecutors should be *accountable* to the public, just like other powerful government agents who make important decisions.’⁶⁴⁶ They emphasized that the prosecutors perform an important role because they enforce the most serious moral commitments of a society, and control the most serious punishments which can be imposed. With regard to the decision to prosecute, Toole argues:

The decision whether to prosecute is of fundamental practical and philosophical importance. Its impact on individual defendants and victims may be more readily apparent, but the cumulative impact of prosecutorial decision-making extends beyond those directly involved in the individual prosecution, to the community as a whole, the reputation of the criminal justice system, and, perhaps most importantly, to the actual law itself.⁶⁴⁷

For every democratic nation which is based on the rule of law the accountability of their prosecutorial system is both necessary and inevitable. In other words, every prosecutorial system must be designed so that it is accountable for its own decisions and to the society in which it performs its functions.

Explaining further, Cowdery says that the accountability of the Office of the DPP (in Australia) is ensured through its relationship with Parliament, the Attorney-General, the courts, the media, the prosecution service itself and its internal mechanisms, the local profession; police, victims of crime and witnesses,

⁶⁴⁴ Nicholas Cowdery AM QC, Director of Public Prosecutions, NSW, Past President, International Association of Prosecutors. Independence of the Prosecution. Presented on Rule of Law: Challenges of a Changing World, Brisbane 31 August 2007. It is said that the other side of the independence coin is accountability – the prosecutor must not have a completely free rein to do as he or she wishes.

⁶⁴⁵ James Hamilton, above n 18, 2.

⁶⁴⁶ Ronald F. Wright and Marc L. Miller, ‘The Worldwide Accountability Deficit for Prosecutor’ (2010), *67 Wash & Lee Law Review*, 1587, 1587.

⁶⁴⁷ Kellie Toole, ‘The Making of Prosecutorial Decisions in Australia’ (2014), *AltLJ Vol 39* 268, 269.

and the general public who observe the courts in action.⁶⁴⁸ Accountability is also ensured by the measurement of prosecutorial performance against the law and prosecution guidelines. Furthermore, Cowdery mentions that ‘Prosecutors should also be factual, clear and direct, in responding to criticism and if they are wrong, then they should admit it and do everything reasonable to avoid error in the future.’⁶⁴⁹

Generally, in Australia, the DPP is indirectly answerable to the parliament in that he or she has a duty to explain the reasonableness of any decision. This does not mean that there is a direct structural relationship between the DPP and the Parliament. Rather, the Attorney-General is answerable to Parliament and is responsible for the performance of the DPP.⁶⁵⁰ McKechnie points to the fact that the DPP is required to provide the Attorney-General with information to enable that office to answer any parliamentary question which pertains to the way the DPP has proceeded in any case.⁶⁵¹ As McKechnie asserts ‘there is a measure of accountability to Parliament by the DPP, albeit indirectly, in respect of decisions after they have been made’.⁶⁵²

The Attorney-General may give the DPP guidance or direction. In all Australian jurisdictions, except Victoria, Queensland and Tasmania, the DPP and the Attorney-General have conjoint jurisdictions. The Attorney-General will exercise this power only in extreme cases, such as when it is thought that a decision might be capricious, corrupt, or inappropriate.⁶⁵³ In Victoria, the DPP is accountable to the Attorney-General through the Annual Report and through reports which are required when a decision of the DPP is contrary to a decision of the Director’s Committee regarding special decisions based on section 3 of the Public Prosecutor Act 1994 (Vic).⁶⁵⁴

⁶⁴⁸ Nicholas Cowdery AM QC, above n 643, 7.

⁶⁴⁹ Ibid.

⁶⁵⁰ Geoffrey Flatman, ‘Independence of the Prosecutor’ (1996), *Australian Institute of Criminology*, 6.

⁶⁵¹ John McKechnie, ‘Director of Public Prosecutions: Independent and Accountable’ (1996), *University of Western Australia Law Review*, 268, 276.

⁶⁵² Ibid.

⁶⁵³ Ibid.

⁶⁵⁴ Corns and Tudor, above n 141, 296.

Some prosecutorial functions may be called into question by courts as part of the appeals process or by ancillary measures, such as the stay of an indictment or the refusal to accept a *nolleprosequi*.⁶⁵⁵ The courts may also play an important role in ensuring that prosecutors abide by the rule of law and avoid decisions which appear to be biased or irregular. The court might also be used as a powerful tool by litigants to ensure the accountability and transparency of prosecutorial decisions.

In addition, the media can be a tool used by the public to ensure that prosecutorial decisions are transparent, unbiased and accountable, by publicizing any decision that appears to violate due process. Since the aim of the criminal sentence is specific and general deterrence, sentencing decisions need to be publicized. By doing that, the media plays a role in maintaining and restoring social order. McKechnie astutely observed that the general public cannot trust an office-holder if they do not know anything of the process, the reasoning or the factors which may influence an office-holder's decision.⁶⁵⁶ Thus, the media can be used to inform the community about the reasoning behind any prosecutorial decision and thereby enhance public trust in the prosecution service. In Victoria, the DPP Policy regarding media mentions that:

Justice must not only be done, but must be seen to be done'. For the criminal justice system to operate effectively, and for the community to understand and have confidence in it, the operation of the criminal justice system must be transparent and accessible.⁶⁵⁷

The professionalism of the prosecution service itself and its internal mechanisms guarantee its accountability. The professional attitude of prosecutors in doing their work is important for gaining and maintaining public trust. In Western Australia documents such as the Roles and Responsibilities of Crown Prosecutor which set out in exhaustive detail the role of Crown Prosecutors at each stage in a prosecution matter⁶⁵⁸ can provide a set of guidelines designed to ensure

⁶⁵⁵ John McKechnie, above n 632, 277.

⁶⁵⁶ Ibid, 277.

⁶⁵⁷ See the Director of Public Prosecutions Victoria, *Director's Policy in relation to the media* (last updated 9 October 2014).

⁶⁵⁸ John McKechnie, above n 632, 279.

prosecutorial professionalism and particularly to maintain consistency in decision making. McKechnie mentions that:

[a] fixed set of guidelines enables a degree of objectivity to be brought into the decision-making process, and independence is confirmed if the decision-maker is able to justify a decision in accordance with previously published material.⁶⁵⁹

The prosecution service is also indirectly accountable to the police. McKechnie argues that in the great majority of cases in Australia, it is the police who initiate charges and as a result, 'a prosecution service is necessarily accountable to police for the quality of its service and the quality of its independent decision-making'.⁶⁶⁰

In addition, the prosecution service must take account of the needs and rights of victims and witnesses. While neither determine how the prosecution system makes its decisions it is important that all prosecution services have procedures which ensure that both victims and witnesses are kept informed, and in some cases are consulted about the progress of any prosecution.⁶⁶¹

4.2.3.4 Independence and accountability in prosecutorial decision making in Indonesia

Despite different kinds of policies to make the prosecutors accountable, as mentioned above, in their conclusion Wright and Miller argued that 'most prosecutorial services around the world promote accountability through internal bureaucratic tools.'⁶⁶² These tools include training, articulated standards, internal review of individual decisions and written processes which together strengthen the prosecutor's role as a neutral quasi-judicial officer'.⁶⁶³ In the Indonesian situation, training does exist. It starts when fresh law graduates join the office of the prosecutor where they are continuously monitored during their careers as prosecutors. In terms of articulated standards, unpublished circulars exist. These are issued by the *Jaksa Agung* and are designed to ensure internal regulation and

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid 282.

⁶⁶¹ Ibid 283.

⁶⁶² Ronald F. Wright and Marc L. Miller, above n 1, 1604.

⁶⁶³ Ibid.

order within the prosecutorial structure. Prosecution decisions in the Indonesian system are also internally reviewed by their superiors in the *Lembaga Rencana Tuntutan*. Furthermore, most internal processes within the Indonesian prosecutorial body are written; for example, in deciding the maximum sentence for an individual case which has to be included in the indictment letter, senior public prosecutors give written indications to the prosecutor who prosecutes an individual matter. However, the Indonesian system lacks an obligation to make their executive (the President) incorporate his or her instructions with regard to individual prosecution decisions. There is no single Indonesian national law which obligates the President to give written instructions with regard to prosecutorial decisions (see brief survey of countries in this chapter). In practice, *Jaksa Agung* as the top leader of the prosecution service sometimes asks the Indonesian President for directions to decide whether or not some individual case needs to be prosecuted.⁶⁶⁴ In other words, the *Jaksa Agung*, in practice covertly accepts oral instruction from the President.

As far as its prosecution system is concerned, Indonesia follows the functional subordination model where the prosecution system is hierarchically controlled by the President. For this reason, the Indonesian system needs to have regulation which obligates the executive to use written instructions to prosecutors. As previously indicated, in general such a direction is prohibited in order to enhance the independence of the prosecution system. However, at a minimum, what is required in Indonesia is that such directions should be in writing. This may go some way to ensuring transparent. The need for transparency is internationally acknowledged in the Council of Europe Recommendation No. R (2000) 19 which sought to provide guidance about the relationship between public prosecutors and the executive and stressed the importance of transparency.⁶⁶⁵ The

⁶⁶⁴ See Yusril Ihza Mahendra in the Indonesian Constitutional Court Decision Number 49/PUU-VIII/2010.

⁶⁶⁵ Section 13 Council of Europe Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system. Section 13 Point d of the recommendation states that:

Where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:

Council also made recommendations for any country with a ‘functional autonomy model’,⁶⁶⁶ as follows:

In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.⁶⁶⁷

In this regard, procedures to guarantee a proper selection of prosecutors and to prevent their arbitrary dismissal become important, as Hamilton argues:

Procedures to guarantee a proper selection of prosecutors and to prevent their arbitrary dismissal are very important in safeguarding prosecutorial independence. There is no point having a system where on paper the prosecutor is independent but in practice is prepared to accept covert instructions from a government. Furthermore the independence of the prosecutor’s decisions could be undermined if there is a risk of arbitrary removal from office.⁶⁶⁸

In Victoria (Australia) in order to guarantee the independence of the DPP, the DPP has the same status as a Supreme Court judge and removal from office is circumscribed and difficult.⁶⁶⁹ However, if government intervention in a prosecution were to be permitted in a country using a functional autonomy model because of the need for prosecution of crime in an orderly and efficient manner, then it is suggested that a commission be appointed comprising ‘persons who would be respected by the public and trusted by the government.’⁶⁷⁰ It should be noted that such a commission exists in Victoria (Australia) and is known as the Director’s Committee. In the Netherlands it is known as the Board of the Prosecutor General. Both are further discussed later in this chapter. Even though the Netherlands is considered to be using the functional subordination model, its system uses a commission to enhance the transparency of decision making.

to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution;
duly to explain its written instructions, especially when they deviate from the public prosecutor’s advice and to transmit them through the hierarchical channels; and
to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments.

⁶⁶⁶ See models: functional autonomy model or functional subordination model previously mentioned.

⁶⁶⁷ Section 14 *Council of Europe* Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecutions in the criminal justice system.

⁶⁶⁸ James Hamilton, above n 18, 9.

⁶⁶⁹ Section 87 AB of the Constitution Act 1975 (Vic).

⁶⁷⁰ James Hamilton, above n 18, 9.

Prosecutorial discretion needs to be exercised independently whether the legal system uses a functional autonomy model or functional subordination model. This has been endorsed by the recommendation from the International Association of Prosecutors which stated that ‘the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.’⁶⁷¹ The reason behind this need is arguably because:

The tyranny of the majority can extend to the use of prosecution as an instrument of oppression. Majorities may be subject to manipulation and democratic politicians may be subject to populist pressures which they fear to resist, especially where these are supported by campaigning in the media.⁶⁷²

In addition, political interference can constitute an abuse of power:

The first is the bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence. A second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought.⁶⁷³

In summary, there are two models – the functional autonomy model and functional subordination model. Countries which use a functional subordination arrangement can influence a prosecution by using improper political inference. The requirement that any instructions to a prosecutor must be in writing could enhance transparency. Furthermore, prosecutors in a functional subordination situation need a greater degree of independence from the government, the legislature, the executive and the police, the judiciary, the investigator, and the victim, as well as the media in making prosecution decisions. However, their independence should be balanced with some degree of accountability to the public, to the people’s legislature (parliament), to the court, to the media, to the other legal professions, to the police, to the victims and the witnesses. Published guidelines, continuous individual prosecutor training, internal review mechanisms and written based processes are known to enhance accountability and transparency of the public prosecution office. In particular, instruction from

⁶⁷¹ International Association of Prosecutor, above n 17.

⁶⁷² Paragraph 20, *European Commission For Democracy Through Law (Venice Commission)* report on European Standards as Regards the Independence of the Judicial System: Part II- The Prosecution Service.

⁶⁷³ Ibid.

external sources, particularly the executive, should only be valid if made in writing.

The next section provides a brief survey of five countries to see how prosecutorial discretion is exercised. It focuses on how prosecutorial discretion is confined, structured and reviewed in Australia, France, Germany, the Netherlands and Indonesia.

4.3 Brief survey of five countries

This section discusses how prosecutorial discretion decision making is confined and structured in the reviewed countries. It also looks at how the systems utilize models to enhance transparency and to reduce improper political influence. It then discusses the structure of prosecution services in surveyed countries and what they considered as the public interest in prosecution decision making. Table 4.1 presents a brief summary of the surveyed countries.

Table 4.1 Brief summary of discretion to prosecute in surveyed countries

Country	Confined Discretion	Structured Discretion	Reviewable Discretion	Transparency
Victoria Australia	Two stage evaluation. The first stage is sufficiency of evidence and the second stage considers public interest. ⁶⁷⁴	1. Published guidelines (articulated standards) 2. Statute 3. Training 4. Internal review of individual decisions and 5. Written decision with reasons. ⁶⁷⁵	Judicial review of prosecutorial discretion is not allowed. Malicious prosecution is a recognized tortious liability.	Ministerial directive is not allowed. ⁶⁷⁶ In Victoria, Australia, there is a special organ that assists the DPP known as Director's Committee when making a special decision. ⁶⁷⁷

⁶⁷⁴ See the Director of Public Prosecutions Victoria, *Director's Policy on Prosecutorial Discretion*. The criteria stated that:

'A prosecution may only proceed if there is a reasonable prospect of a conviction; and a prosecution is required in the public interest'. Last updated, 24 November 2014.

⁶⁷⁵ Christopher Corns, *Public Prosecutions in Australia* (2014, Lawbook Co) 180. It states that 'all DPP's recognize that it is appropriate for the DPP to provide reasons for discretionary decisions to people or agencies who have a legitimate interest...include the victim and the police informant. Further he said '... the general principle is that the DPP has no formal obligation to provide reasons to the public (via the media) to explain any particular decision she or he has made'.

⁶⁷⁶ In regard to Ministerial direction, whether the Attorney-General within Australian State and Commonwealth jurisdictions can give direction in specific cases or in general (guidelines) varies. In the Commonwealth jurisdiction and in New South Wales, the Attorney-General is allowed to give direction both in specific cases or in general (guidelines). In section 7 of the Director of Public Prosecutions Act 1983 (Cth) the Attorney General has the right to have the DPP consult the Attorney-General. The Commonwealth Attorney-General may give directions in specific cases according to section 8(2)(c). There is obligation for the Commonwealth Attorney-General to table the direction in parliament based on section 8(3). Arguably, the Commonwealth Attorney-General still retains the prosecution power according to s 10(1)(a) and (b). This situation is similar in New South Wales where the Attorney-General also retains the prosecution power according to section 30 the Director of Public Prosecutions Act 1986 (NSW). The Attorney-General can intervene in the DPP's prosecution decision, as explained in section 27 of the Director of Public Prosecutions Act 1986 (NSW). On the other hand, the Attorney-General in Victoria retains the power to enter *a nolle prosequi* based on section 14 (2) the Director of Public Prosecutions Act 1982 (Vic) where it replaced by the Public Prosecutions Act 1994 (Vic) still keep the power to enter *a nolle prosequi* based on section 25 (2). The Victorian DPP can transfer power to the AG under section 29 of the Public Prosecutions Act 1994 (Vic) if the DPP is in a conflict of interest. In term of accountability, the Victorian DPP is responsible to the Attorney General for the due performance of his or her functions and exercise of his or her powers. Corns and Tudor argue that 'this does not mean that the Attorney General can direct the

Country	Confined Discretion	Structured Discretion	Reviewable Discretion	Transparency
France	Two stage evaluation. The first stage is sufficiency of evidence and the second stage considers expediency ground. ⁶⁷⁸	<ol style="list-style-type: none"> 1. Published guidelines (articulated standards) 2. Statute 3. Training 4. Internal review of individual decisions and 5. Written decision with reasons.⁶⁷⁹ 	<p>Oversight by Juge d’Instruction</p> <p>Specific judicial review of decision (the parquet and the police) to discontinue a criminal matter does not exist.</p> <p>Civil tort process is available.</p>	Instructions from <i>Garde de Sceaux</i> (the Minister of Justice) must be made in writing and put into the official records.

DPP on which cases to prosecute in general or to direct the DPP on any specific case.’ See Corns and Tudor, above n 136, 295. Section 10 (2) of the Public Prosecutions Act 1994 (Vic) protects the DPP being directed by the Attorney General.

⁶⁷⁷ See part 8 the Director’s Committee in the Public Prosecutions Act 1994 (Vic).

⁶⁷⁸ Expediency ground (expediency principle) is similar to opportunity principle that based on public interest. Expediency principle is commonly known amongs Civil law tradition based countries. See Mirjan Damaska, above n 565, 120. See also Bruno Aubusson Cavarlay, The Prosecution Service Function within the French Criminal Justice System in Jorg-Martin Jehle and Marianne Wade, *Coping With Overloaded Criminal Justice System, The Rise of Prosecutorial Power Across Europe* (2006, Springer) 195.

⁶⁷⁹ See section 40 French Code of Criminal Procedure.

Country	Confined Discretion	Structured Discretion	Reviewed Discretion	Transparency
Germany	Two stage evaluation. The first stage is sufficiency of evidence and the second stage considers expediency ground. ⁶⁸⁰	1. Published Guidelines (articulated standards) 2. Statute 3. Training 4. Internal review of individual decisions and 5. Written decision with reasons. ⁶⁸¹	<i>Klageerzwingungsverfahren</i> (an appeal court) is judicial proceeding to compel prosecution. ⁶⁸²	Instructions from <i>Bundesjustizminister</i> or <i>Landesjustizminister</i> (the Federal or <i>Lander</i> Ministers of Justice) can be made without official recording.
The Netherlands	Two stage evaluation. The first stage is sufficiency of evidence and the second stage considers expediency grounds. ⁶⁸³	1. Published Guidelines (articulated standards) 2. Statute 3. Training 4. Internal review of individual decisions and	Review by Court of Appeal. Any body with an interest in the prosecution of an offence can file a protest against a prosecutorial decision not to prosecute with a Court of Appeal.	Instructions by the Minister of Justice: 1. must be reasoned and issued in written form (in urgent cases can be oral but must be issued in writing within a week)

⁶⁸⁰ See section 153a *German StPo* in regard to public interest evaluation in the German system. See also Beatrix Elsner and Julia Peters, 'the Prosecution Service Function within the German Criminal Justice System' in Jorg-Martin Jehle and Marianne Wade, *Coping With Overloaded Criminal Justice System, The Rise of Prosecutorial Power Across Europe* (2006, Springer) 219.

⁶⁸¹ John H. Langbein and Lloyd L. Weinreb, 'Continental Criminal Procedure: "Myth" and Reality' (1978), *The Yale Law Journal* 1549, 1563.

⁶⁸² See section 172 *StPo*. See also John H. Langbein and Lloyd L. Weinreb, 'Continental Criminal Procedure: "Myth" and Reality' (1978), *The Yale Law Journal* 1549, 1563. See also Julia Fionda, above n 301, 149.

⁶⁸³ Peter J.P. Tak, above n 164, 84. It states that the expediency principle laid down in section 167 CCP authorizes the prosecution service to waive (further) prosecution 'for reasons of public interest'.

Country Surveyed	Confined Discretion	Structured Discretion	Reviewed Discretion	Transparency
The Netherlands (continued)		5. Written decision with reasons		2. subject to the expressed views of the Board of Prosecutors General concerning the instruction considered. 3. instruction and views of the Board are added to the case file unless this is contrary to state interest.
Indonesia	One stage evaluation based on sufficiency of evidence	1. Unpublished Guidelines (articulated standards) 2. Statute 3. Training 4. Internal review of individual decisions 5. Written decision with reasons. ⁶⁸⁴	<i>Praperadilan</i> (Pre-trial court)	The Indonesian President can secretly give instruction to prosecution services. The Attorney-General on several occasions consults the Indonesian President to decide whether to prosecute a criminal matter that has political repercussions.

⁶⁸⁴ See section 140 (2) *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

4.3.1 Confining, structuring, reviewing and transparency in prosecution decision making

Different legal systems have different ways of confining, structuring, reviewing and creating transparency in their prosecution systems. When it comes to a decision of whether or not to prosecute there are two basic principles which underpin such decisions. They are the legality principle and the opportunity or expediency principle. The first principle is based on the sufficiency of the evidence, whereas the second principle adds a public interest evaluation.

4.3.1.1. One-stage or two-stage evaluation system

Generally, the first mentioned principle is based on a one-stage evaluation whereas the last mentioned is based on a two-stage evaluation. From surveyed countries, only Indonesia uses one-stage evaluation. Indonesia still follows the traditional German mandatory prosecution system, although Germany no longer strictly observes this a system. The current German system uses a two-stage evaluation process when it comes to prosecution decisions. Similarly, France and the Netherlands also use this two-stage evaluation process where public interest becomes an important part of their prosecution system. Adding public interest as part of the prosecution decision about whether or not to prosecute means widening discretion, because prosecutors have a wider choice as to what they consider as the public interest. It does not mean that a country which follows a one-stage evaluation process does not consider the public interest. The act of prosecuting a criminal matter itself is considered as in the public interest in the strictest sense. However, from the countries surveyed which use the two-stage evaluation process it is considered inevitable that prosecutorial discretion will play an important role in decision making so as to provide a rational basis on which to organize the prosecution bureaucracy. Furthermore, as explained above, prosecutorial discretion is important to tailor individualized justice.

4.3.1.2 Structure of prosecution services

The countries surveyed have different arrangements about who performs the role of prosecutor. Some use a 'single prosecution system' while others use a 'double prosecution system'. The last mentioned classification shows that the role of prosecutor is not the monopoly of one organization. Only the Netherlands strictly follows the single prosecution system.⁶⁸⁵ In Australia, prosecution decision making is exercised by the DPP, the police, private individuals and other state or federal agencies.⁶⁸⁶ In France bodies other than the *procureur de la Republique* (public prosecutor) such as custom officers can prosecute criminal matters.⁶⁸⁷ Private individuals can prosecute as *partie civile*.⁶⁸⁸ In addition, the police prosecute offences categorized as *delits*.⁶⁸⁹ The German prosecution system can be categorized as a double-prosecution system because the public prosecutor is not always a representative of the state (State Monopoly). Other bodies can prosecute criminal matters. For certain minor crimes a private prosecution (*Privatklage*) can be commenced by the victim of that crime.⁶⁹⁰

The Indonesian system is also considered to be a double-prosecution system. Other bodies such as the Corruption Eradication Commission have the power to prosecute matters involving corruption. Victims can join a prosecution in order to obtain compensation from the accused. This is known as *gabungan perkara gugatan ganti kerugian* (join matter on civil loss).⁶⁹¹ However, this right

⁶⁸⁵ Peter J.P. Tak, above n 164, 54 and 84 . He mentions 'the power to prosecute resides exclusively with the prosecution service. No prosecutorial power is granted to private persons or bodies, not even when the prosecution service declines to prosecute.' As an exception, the Dutch Procurator-General at the Supreme Court who is appointed for life has the statutory task to prosecute members of Parliament, ministers and deputy ministers for criminal offences committed in the exercise of their function.

⁶⁸⁶ See Corns and Tudor, above n 141.

⁶⁸⁷ Andi Hamzah and RM. Surachman, *Pre Trial Justice dan Discretionary Justice dalam KUHP berbagai Negara* (Pre Trial Justice and Discretionary Justice in some Countries Criminal Procedure Law) (2014, Sinar Grafika).

⁶⁸⁸ Valerie Dervieux, revised by Mikael Benillouche and Olivier Bachelet, 'The French System' in Mireille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedure* (Cambridge University Press, 2002) 226

⁶⁸⁹ For offences categorized as crimes and contraventions, the parquet prosecutes the case, whereas offences categorized as *delits* are prosecuted by the police.

⁶⁹⁰ Section 374 *StrafprozeBordnung (StPo)* (The German Code of Criminal Procedure).

⁶⁹¹ See section 98 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law').

has been criticized by Harahap as ineffective because if the accused is poor then he or she cannot compensate the victim.⁶⁹² He therefore suggests that the government should be responsible for compensating victims.

4.3.1.3 Confining and structuring prosecutorial discretion using guidelines

As explained in Chapter 3, where discretion in the context of the rule of law or *rechtsstaat* is concerned it needs to be limited and transparent in order to avoid abuse of power. As a result, discretion should be confined, structured and reviewed. This also applies to prosecutorial discretion decision making. The surveyed countries had different ways of limiting discretion (see Table 4.2) but in general placed limits on discretion using guidelines some of which have been incorporated into statute.⁶⁹³

Table 4.2 Structure of prosecution service

Country	Structure of prosecution service
Victoria, Australia	<ol style="list-style-type: none"> 1. Dual Prosecution system 2. Separate independence of prosecution body (functional autonomy)
France	<ol style="list-style-type: none"> 1. Dual Prosecution system. 2. Under the Minister of Justice (functional subordination)
Germany	<ol style="list-style-type: none"> 1. Dual Prosecution system 2. Under the Minister of Justice (functional subordination)
The Netherlands	<ol style="list-style-type: none"> 1. Dual Prosecution system 2. Under the Minister of Justice (functional subordination)
Indonesia	<ol style="list-style-type: none"> 1. Single Prosecution system 2. Under the President (functional subordination)

⁶⁹² M.Yahya Harahap, above n 158, 76

⁶⁹³ All of the surveyed countries have statutes and guidelines for prosecutors exercising discretion in decisionmaking. Statutes such as Prosecution Law or Criminal Procedure Law were in existence. Guidelines for prosecutors also exist as a guide to prosecutors, where guidelines are published such as in Australia, the Netherlands and in Germany. Both France and Indonesia still use unpublished guidelines to guide their prosecutors internally.

In the countries surveyed which use guidelines, those guidelines are either published or unpublished. The former is preferable because publication enhances transparency. However, using guidelines to control prosecutorial discretion has been criticized by Barkow as being promising in theory but worrisome in practice.⁶⁹⁴ Guidelines may undermine the goal of law enforcement and also encourage litigation by providing a mechanism for challenging the decisions of prosecutors. In addition, if the guidelines are too broad then they might represent a meaningless check on discretion. Thus ideally a solution should rest somewhere in the middle.

As discussed in Chapter 3, guidelines can be used for both confining and structuring discretion. Prosecutors know their powers are limited in evaluating individual cases based on context and circumstances because the guidelines provide a set of factors which are relevant to the exercise of discretion and those which are not. In Australia, for example, it is inappropriate to consider either gender or politics when exercising discretion.⁶⁹⁵ This is to be discussed further in the next section 4.3.1.8. Transparency in Prosecution decisions (see also 6.2 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Australia)

By publishing the guidelines, prosecutorial discretion is structured and the public can check whether the prosecutor has exercised discretion within the allowed boundaries. This enhances transparency.

Prosecutorial discretion to discontinue criminal matters in Australia is confined by ensuring that decisions to prosecute occur in a two stage evaluation process. The first stage is based on the sufficiency of evidence, while the second stage is based on a public interest evaluation. If the first stage is reached then that means there should be a reasonable prospect of conviction. If there is no reasonable prospect of conviction, then prosecution is discontinued. It should be noted that a reasonable prospect of conviction should not be equated with a

⁶⁹⁴ Rachel E. Barkow, 'Institutional Design and the Policing of Prosecutors: Lesson from Administrative Law' (2009), *Stanford Law Review* 911-912.

⁶⁹⁵ See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth, Guidelines for the Making Decisions in Prosecution Process*, 6. Last update August 2014.

mathematic term like a 51 per cent prospect of conviction, but can be something more or less based on an objective evaluation.⁶⁹⁶

Most of the surveyed countries used this kind of evaluation. Even under the Indonesian system which still uses mandatory prosecution, the evaluation of the evidence is based on the evidence gathered during the investigation process. No matter how strong or weak the evidence is, a prosecution must continue. Even if there is no reasonable prospect of a conviction, the prosecution cannot discontinue a criminal matter. In the Indonesian system, conviction or acquittal is a matter for a judge to decide not the prosecutor. One example is the *Nila Vitria*⁶⁹⁷ case in Surabaya Indonesia where the victim was severely bashing by her former navy officer boy friend but ended up killing him with his combat knife. Police investigations revealed that on the night of the murder, Nila Vitria was severely tortured and dragged naked into a public area by her boyfriend. This report was supported by *visum et repertum* which mentioned that there were injuries to her head and all over her body. Several witnesses saw the incident where Nila Vitria was dragged naked in front of her house. Psychologists who examined Nila Vitria also made a report which mentioned that she was depressed and psychologically unstable after the death. Because of this report, the police believed that there was no point in the prosecution taking the matter to trial and as a result issued a discontinuation known as *Surat Pemberitahuan Penghentian Penyidikan/SP3* (announcement letter of discontinuance of investigation). This decision was

⁶⁹⁶ Michael Rozenes QC, Prosecutorial Discretion in Australia Today, Australian Institute of Criminology Conference, Melbourne Australia 18-19 April 1996, 10 <http://www.aic.gov.au/media_library/conferences/prosecuting/rozenes.pdf>. Rozenes explains: It should be emphasized that the “reasonable prospect” test is an objective one. In assessing the strength of the prosecution case the prosecutor should not take into account any perceived potential for a jury to have regard to what are essentially extraneous factors in reaching its verdict. In assessing ‘reasonable prospect’ the prosecutor is to proceed on the assumption that ‘the jury will act in an impartial manner in accordance with its instructions.’ This ensures, amongst other things, that a weak case does not satisfy the ‘reasonable prospect’ test simply because there are extraneous factors which may motivate a jury towards conviction. This is not to say that any potential for a court or jury to approach a particular defendant or type of case in a particular way must be excluded altogether from the decision whether to prosecute. If, for example, it is considered that a jury is likely to regard the prosecution of a particular defendant as oppressive, and as a result may be motivated towards an acquittal despite the strength of the prosecution case, that may be a very relevant factor in deciding whether a prosecution is warranted in the public interest.

⁶⁹⁷ See Surabaya Indonesia Court decision *Nomor 01/Pid.Prap/2008/PN.Sby*.

challenged by the friends and family of the deceased and they were backed up by the Navy legal service in *praperadilan*. The challenge was successful – the *praperadilan* ordered the police to continue the case.⁶⁹⁸ However, the case is still being investigated and the police still believe that the prosecution will fail or if it goes to trial, she will be acquitted as a result of raising the defence of self-defence. As a result the police are reluctant to expedite the investigation.

With regard to the second evaluation process, these are listed in published guidelines for what might be considered public interest considerations, such as the age, physical and mental health of the offender or seriousness of the offence. Both the sufficiency of evidence and the public interest test must be satisfied before a prosecution can be discontinued. Public interest can be understood as follows:

The public interest test, so imported into the guidelines, acknowledged that public interest factors would vary from case to case and that whilst many such factors would militate against a decision to proceed with the prosecution there are public interest factors which operate in favour of proceeding e.g. the seriousness of the offence and the need for deterrence.⁶⁹⁹

This system in England is known as a two-tier evaluation, which is different from one-tier evaluation, because that evaluation is based solely on the sufficiency or otherwise of the evidence. Kier Starmer QC explains:

Broadly speaking, criminal justice systems divide into two; those which apply – at least on paper – a rigid threshold for criminal proceedings based solely on the sufficiency of evidence; and those which apply a secondary threshold which is based on the notion that the prosecutor has a discretion to bring charges, notwithstanding the strength of the evidence.⁷⁰⁰

As indicated in the previous chapter, published guidelines are important tools for structuring discretion. Structuring prosecutorial discretion to discontinue criminal matters can regularize, organize and order the application of discretion. As indicated above, training, articulated standards, internal review of individual decisions and written processes are part of structuring discretion.

⁶⁹⁸ Taufik Rachman, *Dasar Teori Kewenangan Penyidik Maupun Penuntut Umum Dalam Menghentikan Perkara Pidana* (Theoretical based for Investigator and Prosecutor Power to Discontinue Criminal Matter) (2010), *Yuridika Journal Vol 25 No 3*, 259.

⁶⁹⁹ Damian Bugg AM QC, *The Independence of the Prosecutor and the Rule of law*. Paper presented in Rule of Law: the challenges of a changing world, Brisbane, 31 August – 1 September 2007.

⁷⁰⁰ Keir Starmer QC, *The Rule of Law and Prosecutions: To Prosecute or Not To Prosecute* (2011) *Advocate* 42.

4.3.1.4 Training for prosecutors

From the surveyed countries the way of structuring a prosecutor's discretion has been similar. The difference lies in whether the guidelines are published or not and whether there is special training for prosecutors. Only France⁷⁰¹ and Indonesia still do not publish official guidelines. They do however have guidelines which are circulated for internal purposes. Australian prosecutors within the DPP get their training during their formal study at university. This position is different from the other surveyed countries where intensive training of prosecutors is carried out after they are accepted into the unit. In France, prosecutors and judges are trained together at *Ecole nationale de la magistrature*.⁷⁰² A prosecutor in the Netherlands has to follow a six-year training program which comprises an internship, an externship and theoretical education designed to improve professional skills, abilities and knowledge.⁷⁰³ German prosecutorial candidates have to pass several training examinations before being nominated by a committee for appointment (*Richterwahlausschub*) to the Ministry of Justice. The training program can be explained as follows:

[a] first period at university (*Studium*) concluding with the first state exam administered in each land, and a second stage of practical training (*vorbereitungsdienst*), consisting of experience in court, in a sector of the public services and with lawyer. At the end of these training schemes, a second State exam administered in each land determines the aptitude of an individual to carry out judicial functions.⁷⁰⁴

In Indonesia, training is conducted by the office for education and training within the *Jaksa Agung's* office.⁷⁰⁵ However, prosecutors and judges are not trained together as in France, the Netherlands and Germany. In civil law based systems

⁷⁰¹ See Antoinette Perrodet, 'The Public Prosecutor' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press) 445.

⁷⁰² *Ibid* 422.

⁷⁰³ Peter J.P. Tak, above n 161, 53.

⁷⁰⁴ Rodolphe Juy-Birmann revised by Jorge Birmann, 'The German System' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press), 297.

⁷⁰⁵ See supplementary document Number III on the Jaksa Agung circular PER-009/A/JA/01/2011 about the Indonesian Prosecutor Organization (*Peraturan Jaksa Agung Republik Indonesia Nomor: PER-009/A/JA/01/2011 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia*).

freshly graduated prosecutors are systematically and carefully trained before they commence their prosecutorial role.⁷⁰⁶

4.3.1.5 Senior supervision

It is also common among the surveyed countries that prosecutorial decision making is subject to supervision by more senior officials as part of a system of internal control. In this sense it can be said that no official decision is merely an individual one. It is an organizational decision made in a hierarchical structure. In Indonesia every prosecution decision, including whether to continue or discontinue cases, the specific criminal charges and indicated sentences in the indictment must be discussed with the *Lembaga Rencana Tuntutan/Lembaga Rentut* (Prosecutor Advisory Body). This body is used by a senior prosecutor to supervise prosecutor decision making. In the Netherlands an individual can request a public prosecutor to review a prosecution decision or, should he or she refuse to do so, write a letter to a higher official in the hierarchy of the prosecution authority, requesting that the decision of the subordinate prosecutor be reviewed. In France, Vouin explains that the prosecutors work under the orders of senior prosecutors.⁷⁰⁷ Similarly, in the German system senior prosecutors control the prosecution process.⁷⁰⁸ In Australia, the DPP is the ultimate controller in prosecution decision making. It should be noted that in most civil law countries surveyed, all levels of bureaucracy are tied together by the principle of prosecutorial unity where subordinates must obey superior prosecutors.⁷⁰⁹

⁷⁰⁶ P.J.P. Tak, above n 164.

⁷⁰⁷ Robert Vouin, 'The Role of the Prosecutor in French Criminal Trials' (1970) 18 *The American Journal of Comparative Law* 483, 489. It mentions that:
it is true that when the state's attorney, after receiving an information or a complaint, decides on non-prosecution (classer sans suite), he always acts under the orders of his hierarchic superiors, from whom, as we know, he could have received an order to prosecute....

⁷⁰⁸ Rodolphe Juy-Birmann revised by Jorge Birmann, 'The German System' in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press), 299.

⁷⁰⁹ Ronald F. Wright and Marc L. Miller, above n 1, 1603.

4.3.1.6 Writing-based processes

A writing-based process is used among the countries surveyed in prosecution decisions to discontinue criminal matters. This is important because documentation and review by superiors either at the time of the decision or afterwards is facilitated by having a paper record. Most of civil law countries familiar with this writing based process use it as part of their traditional documentary dossier.⁷¹⁰ In the past this tradition has often been cited as the main difference with the common-law litigation process which stresses an ‘oral process’ rather than a written process. However, this does not mean that among common law countries like Australia a writing based process is absent. As part of any rational bureaucracy, most institutions stress the need for this writing based process for controlling their complex bureaucracies. In other words, a writing based process is a traditional one in both common law and civil law based countries.

4.3.1.7 Judicial review for prosecutorial decision making

As explained above, a senior prosecutor internally reviews most prosecutorial decisions. Judicial review works as an external review of prosecution decisions. Both a blend of internal and external control is used around the world.⁷¹¹ Germany and Indonesia have special courts to review prosecutorial decisions to discontinue criminal matters. In Germany they call it *Klageerzwingungsverfahren* whereas in Indonesia they known as *praperadilan*. The Court of Appeal in the Dutch system is available for individuals with an interest in the prosecution of an offence and they can file a protest against a decision to discontinue a case by lodging a complaint.⁷¹²

Both the Australia and French systems do not allow judicial review against a prosecutorial decision to discontinue a criminal matter. In Australia, however, in some serious matters such as ill-motivated or malicious prosecutions the laws

⁷¹⁰ Ibid 1604.

⁷¹¹ Ibid 1591.

⁷¹² Peter J.P. Tak, above n 164, 108.

recognize a tort liability. In the French system, as mentioned in Chapter 3, the *Juge d'Instruction* as part of its judicial power plays a unique role in reviewing a prosecutor's decision to discontinue a criminal matter as in the case of the former President, Jacques Chirac.⁷¹³

It should be noted that judicial review is important for limiting discretion in general. However, arguably in any system which allows judicial review for prosecutorial decision making, prompt litigation for challenging prosecutorial decisions is important. This litigation adds to the work of the prosecutor. Moreover, if the court rules in favor of the challenger then the prosecution service may be discredited. As a vitally important organization within society, the prosecution service should always maintain its credibility in order to ensure that the public has confidence in it. In Germany the *Klageerzwingungsverfahren* has been criticized as ineffective for victim applications because it has proved reluctant to order a prosecutor to file an accusation which challenges a prosecutorial decision.⁷¹⁴ Similarly, the *Praperadilan* in Indonesia has power to order an investigator or prosecutor to continue a previously discontinued case. As was evident in the case of *Nila Vitria*, the investigator although ordered to continue the case is reluctant to do so because the accused has a good defence and because continuing the investigation involves a waste of resources. This situation is commonly known to lawyers as a *di peti es kan* (i.e. put it in a cool room). In the *di peti es kan* case, the suspect's right to a trial is violated.

As previously discussed, the Indonesian *Jaksa Agung* has power to set aside criminal matters which has often been used to discontinue cases involving highly ranked members of the military or officials. In the *Bibit Samad Riyanto* and *Candra Martha Hamzah* cases, two Indonesian Corruption Eradication Commission leaders were prosecuted (during Susilo Bambang Yudhoyono's Presidency). An unsuccessful attempt to force the continuation of their trials was

⁷¹³ Jacqueline Hodgson, 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice' in Eric Luna and Marianne Wade (eds.), *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012) 119.

⁷¹⁴ Thomas Weigend, 'Reform Proposals On Dutch Criminal Procedure, A German Perspective' in Marc Groenhuijsen and Tijs Kooijmans (eds.), *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective* (2012, Martinus Nijhoff) 169.

made by the *praperadilan* because the *Jaksa Agung* exercised his power to set aside the matter and his decision is unreviewable by any court.

However, in Indonesia some mechanisms for reviewing prosecutorial decisions to discontinue criminal matters are considered important because the legal system is still plagued with corruption. If there is a system of review then justice for the victim can be protected because abuse of power by a prosecutor can be corrected by an external review (by the court or other independent body). Moreover it is important because abuse of prosecutorial decisions not to prosecute criminal matters may stem from political influence or interference, as is discussed further in the next section. Davis argues that the reasons for a judicial check on prosecutorial discretion are stronger than those for other administrative matters which are now reviewable.⁷¹⁵

In common law jurisdictions, there has been a move to make prosecution decisions to discontinue criminal matters reviewable. In England on 5 June 2013, the DPP Keir Starmer QC launched a new policy that enshrines a victim's right to request a review of any decision taken by the Crown Prosecution Service (CPS) not to charge a suspect or stop or discontinue a prosecution.⁷¹⁶ This policy was designed to enhance public trust in the prosecution service. According to Partington, citing data published by the CPS, between 5 June 2013 and 31 March 2014 the CPS made 113,952 decisions that could be subject to appeal under the scheme. The CPS reviewed 1,186 cases of which 162 decisions were overturned.⁷¹⁷ The policy had its genesis in the Court of Appeal decision in *R v Christopher Killick* (2011)⁷¹⁸ that a complainant has a right to have such a decision reviewed. The Court also held that an accused had a right to rely on

⁷¹⁵ KC Davis, above n 242, 212.

⁷¹⁶ See http://www.cps.gov.uk/news/latest_news/victims_right_to_review/.

⁷¹⁷ See <http://martinpartington.com/2014/10/12/victims-right-to-review-a-decision-not-to-prosecute/>.

⁷¹⁸ See the Background of *The Crown Prosecution Service policy on Victims' Right to Review Guidance*. Last updated on July 2014. In *R v Christopher Killick* (2011) EWCA Crim 1608, emphasized that: 1. Victims have a right to seek a review of a decision not to prosecute by the Crown Prosecution Service. 2. Victim should not have to seek recourse to judicial review. 3. The right to a review should be made the subject of a clearer procedure and guidance should be given about time limits. It also should be noted that the policy also gave effect to the principle laid down in Article 11 of the European Union Directive establishing standards on the rights, support and protection of victims of crime.

representation made by the CPS that he or she would not be prosecuted and if a prosecution was continued in that situation then that constitutes an abuse of process.

In England's child sex cases, the lawyer who represented victims called for review of the decision not to prosecute made by the DPP. The lawyer argued that it was in the public interest to publish the full independent review of the decision in order to enhance transparency and openness.⁷¹⁹ The first review of a decision of the DPP to discontinue a criminal matter in this child sex case occurred in 2015. It concerned a review of a decision of the DPP (Alison Saunders) to discontinue a prosecution of a former Labour peer who it was alleged had committed child sex offences. The review overturned the decision of the DPP.⁷²⁰ As a result and because of media pressure, Alison Saunders was asked to resign as DPP. Her decision to discontinue the case was overturned, and was considered to weaken confidence in the administration of criminal justice in England.⁷²¹

The CPS review scheme in the UK consists of two stages, local resolution by new prosecutors and independent review by the Appeals and Review Unit or relevant Chief Crown Prosecutor.⁷²² The aim of local resolution is to help victims understand the decision taken by providing additional information and it also provides the CPS with the opportunity of looking again at the decision in order to be certain that it is correct. The victim does not have to accept the decision. If the victim does not accept the decision then an Independent Review will occur. During this review there is reconsideration of the evidence in order to decide if the decision has been made in the public interest. In effect the new reviewing prosecutor will approach the case afresh to determine whether the original decision was soundly based.⁷²³

⁷¹⁹ See <http://www.theguardian.com/law/2015/jun/26/janner-prosecution-review-must-be-published-says-alleged-victims-lawyer>.

⁷²⁰ See <http://www.theguardian.com/uk-news/2015/sep/06/dpp-alison-saunders-says-im-still-the-right-person-for-the-job>.

⁷²¹ See <http://www.theguardian.com/media/greenslade/2015/jun/30/alison-saunders-dpp-sun-times-cps-lord-janner>.

⁷²² See paragraph 22-31 *Victims' Right to Review Guidance*. Last updated July 2014.

⁷²³ See paragraph 30 *Victims' Right to Review Guidance*. Last updated July 2014.

In Australia, a victim review of the decision to discontinue a criminal matter by the DPP is not available. However, the Victorian Law Reform Commission referred approval to the Court of Appeal decision in *R v Christopher Killick* (2011) in enhancing the role of victims in the criminal trial process.⁷²⁴ It also considered the CPS Victim Review Guidelines and perhaps they might become the policy in Victoria in the near future.⁷²⁵

As previously indicated, judicial review of prosecution decisions is not available in Australia except in the event of a malicious prosecution. One recently successful case involving a malicious prosecution occurred in *Beckett v State of New South Wales* (2015) NSWSC 1017. Rosenne Beckett was imprisoned in 1991 after being convicted on nine counts relating to the solicitation of two people to murder her husband. On appeal the New South Wales Court of Criminal Appeals acquitted her on one count, dismissed two counts, and ordered a retrial on the remaining counts.⁷²⁶ In 2005 the DPP decided not to proceed with the retrial and consequently Beckett launched her malicious prosecution claim in 2008. The prosecution dealt with the consequence of the DPP's decision not to proceed. A previous High Court decision, *Davies v Gell* (1924) 35 CLR 275, suggested that any plaintiff whose proceedings were terminated by *nolle prosequi* would have to prove her innocence before they could succeed in an action for malicious prosecution. The High Court overturned this judgment, finding that Beckett was not required to prove her innocence. She was, as a result, awarded compensation of \$2,310,350 plus interest. The main questions for this kind of tort proceeding are whether the DPP in initiating or maintaining the proceeding acted maliciously and whether the DPP acted without reasonable and probable cause.⁷²⁷ The media in the Beckett case played a significant role in revealing how some of the lawyers

⁷²⁴ See <http://www.lawreform.vic.gov.au/sites/default/files/Role_of_Victims_of_Crime_Info_Paper_4_Web_1.pdf>, 14.

⁷²⁵ See section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic). See also http://www.lawreform.vic.gov.au/sites/default/files/Role_of_Victims_of_Crime_Info_Paper_4_Web_1.pdf.

⁷²⁶ See <http://www.abc.net.au/radionational/programs/lawreport/compensation-awarded-for-27malicious-prosecution27/6720666#transcript>.

⁷²⁷ See *legal principles for malicious prosecution in Beckett v State of New South Wales* (2015) NSWSC 1017. Paragraph 123 states that for a plaintiff to succeed in an action for damages for malicious prosecution the plaintiff must establish:

for the crown had not acted as the crown is required by law to act. Investigative journalist, Wendy Bacon established the extent to which the New South Wales government had deployed its resources in an attempt to defeat Beckett.⁷²⁸

4.3.1.8 Transparency in prosecution decisions

As previously noted, the *International Association of Prosecutors* has stated that ‘the use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.’⁷²⁹ The countries surveyed have different ways of enhancing prosecutorial transparency when dealing with political instruction from superiors. As indicated above, prosecutor guidelines in Australia are published and list the factors which should not be considered in prosecution decisions. An example of this is the criteria that any prosecution decision should not be influenced by either gender or politics. To do so may be considered as taking into account improper considerations.⁷³⁰ Further, in order to guarantee the independence of prosecution decisions to discontinue criminal matters, decisions should not be politically influenced by the government or by an incumbent. In the common law system, the independence of the public prosecutor from government is arguably a common feature. Meanwhile, in most civil law systems like the Netherlands the executive or government controls the prosecution system. Different structural arrangements

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1. that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against a plaintiff by a defendant;
 2. that the proceedings were terminated in favour of that plaintiff;
 3. that the defendant in initiating or maintaining the proceedings acted maliciously; and
 4. that the defendant acted without reasonable and probable cause.

⁷²⁸ See Wendy Bacon, *State of NSW's 25 year battle against Roseanne Beckett* (2014). <<http://www.wendybacon.com/2014/state-of-nsw-25-year-against-roseanne-beckett/>>.

⁷²⁹ International Association of Prosecutors, above n17.

⁷³⁰ Director of Public Prosecutions, *Policy Number 2, Prosecutorial Discretion, Improper Considerations*. Last updated 24 November 2014. It is stated that:

A decision whether or not to prosecute must not be influenced by:

1. any other person involved ;
2. personal feelings concerning the offence, the offender or a victim;
3. possible political advantage or disadvantage to the Government or any political group or party; and
4. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

of the prosecution service are the main reason for this. In Australia, the prosecution system has a functional autonomy which is different from the systems in Germany, France, the Netherlands and Indonesia, where it is known as functional subordination.

Most 'functional subordination' based systems in the countries surveyed are controlled by the Minister of Justice, except in Indonesia where it is controlled by the President. In functional subordination based countries, instructions with a political motivation are common. To what extent is this instruction allowed within prosecution services? In the Netherlands in order to reduce possible inappropriate political influence the Ministry of Justice instructions in specific cases have to be in writing and then a member of the Board of Prosecutors General has to express an opinion about the matter. The Board thus plays a significant role in this regard. In France the instructions from the Minister of Justice must be made in writing and put into an official dossier. In Indonesia, the prosecution instructions to the President are not included in any dossier or recorded in any document. This position is similar to what occurs in the German system. Indonesian and German transparency is therefore less than other systems in terms of possible improper political influence. Instructions in specific cases are prohibited in order to guarantee independence. However, instructions may be allowed under appropriate specific controls with a view, in particular, to guaranteeing transparency.⁷³¹ But the instruction must be written and not motivated by ill political malfeasance. It is internationally accepted that instructions not to prosecute in a specific case should in principle be prohibited to guarantee transparency and independence. However instructions may be permitted in special cases, for example when it comes to matters of national security.

The Victorian DPP is a model of complete separation between political institutions and prosecution services which is exceptional among other jurisdictions within Australia. The Victorian Attorney-General cannot direct the DPP both in general or specific matters. Most of the Australian DPPs such as the Commonwealth DPP or the NSW DPP still allow their Attorney-General

⁷³¹ International Commission of Jurists, above n 626, 172.

(political entity) to direct them both in general or specific matters. Arguably, this is due to the view that the Attorney-General has a double role as a senior politician and the principal law officer.⁷³² Furthermore, under the Australian responsible government model where the Attorney-General might be part of the cabinet it has power to control their DPP.⁷³³ This Australian Attorney-General's position is different from the UK Attorney-General where the UK Attorney-General is not included in Cabinet and does not have ministerial responsibility for a government department.⁷³⁴

The Attorney-General in Victoria retains the power to enter *a nolle prosequi* based on section 14 (2) the Director of Public Prosecution Act 1982 (Vic), replaced by the Public Prosecutions Act 1994 (Vic), and still keeps the power to enter *a nolle prosequi* based on section 25 (2). The Victorian DPP can transfer power to the Attorney-General under section 29 of the Public Prosecutions Act 1994 (Vic) if the DPP is in a conflict of interest. In terms of accountability, the Victorian DPP is responsible to the Attorney-General for the due performance of his or her functions and exercise of his or her powers. Corns and Tudor argue that 'this does not mean that the Attorney-General can direct the DPP on which cases to prosecute in general or to direct the DPP on any specific case'.⁷³⁵ However it should be noted that it is common among Australian jurisdictions when direction from the Attorney-General is allowed, discussion between the Attorney-General and the DPP occurs before the implementation of the direction. Moreover, the direction should be tabled in Parliament.

⁷³² See Christopher Corns, *Public Prosecutions in Australia* (2014, Lawbook Co) 534.

⁷³³ Responsible government is the system of government that is sometimes called the Westminster model. It entails a system in which Ministers of State who are members of the government in the Parliament are the heads of the various Departments of State. They are accountable individually and collectively to the Parliament for the workings of those executive departments and therefore for running the business of government. See R A Huges et al., *Australian Legal Institutions, Principle, Structure and Organisation* (Lawbook Co, 2003) 37.

⁷³⁴ Alana McCarthy, *the Evolution of the Role of the Attorney General*. Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia (2-4 July 2014) 4.

⁷³⁵ See Corns and Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (Lawbook Co., 2009), 295. Section 10 (2) of the Public Prosecutions Act 1994 (Vic) protects the DPP from being directed by the Attorney-General.

4.3.1.9 Public interest in surveyed countries

All of the surveyed countries have public interest criteria to discontinue criminal matters (see Table 4.3). In the Netherlands the Board of Prosecutors issues published guidelines setting out the public interest criteria. In their policy guidelines, the expediency principle is widely exercised based on the public interest, which is similar to Australia where it is based on the opportunity principle.⁷³⁶ Age, physical and mental health of the offender or seriousness of the offence are used to evaluate prosecution decisions, beside sufficiency of the evidence.⁷³⁷ Public interest criteria to drop charges are also mentioned in the German criminal procedure law (*StPo*) as part of prosecutorial discretion decision making.⁷³⁸ Perrodet mentions that ‘guidelines on using discretion in closing a case have been laid down in circulars at the level of the *Lander*.’⁷³⁹ Cavarlay gives examples of the application of the French expediency principle; for example, where a prosecution is discontinued because all attempts to find the offender have been fruitless, or where the offender is claimed to be mentally deficient, or the victim is given compensation immediately before any intervention from the prosecutor, or the damage caused by the offence is slight.⁷⁴⁰ Public interest also becomes an important part of the *Jaksa Agung*’s (the Indonesian Attorney-General’s) power to set aside criminal matters. As discussed above and in the following chapter, in Indonesia the meaning attributable to the criteria used for establishing the public interest is far from clear. Defining the public interest as the interest of the nation and the interest of the public at large creates a broad and

⁷³⁶ It should be noted that the opportunity principle is used interchangeably with the expediency principle. See Mirjan Damaska, ‘The Reality of Prosecutorial Discretion’, *Comparative Law* 119, 120.

⁷³⁷ P.J.P. Tak, above n 164, 85-86.

⁷³⁸ Rodolphe Juy-Birmann revised by Jorge Birmann, ‘The German System’ in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press) 339.

⁷³⁹ Antoinette Perrodet, ‘The Public Prosecutor’ in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press) 450.

⁷⁴⁰ Bruno Aubusson Cavarlay, ‘The Prosecution Service Function within the French Criminal Justice System’ in Jorg-Martin Jehle and Marianne Wade, *Coping With Overloaded Criminal Justice System, The Rise of Prosecutorial Power Across Europe* (2006, Springer) 195-196.

untamed discretion which potentially can be used as a mechanism for abuse.⁷⁴¹ Furthermore, public interest is rarely used to set aside criminal matters and is only available to high-ranking officials.⁷⁴² See Table 4.3 for what countries surveyed considered as public interest in prosecution decision making.

⁷⁴¹ Taufik Rachman, *Kepentingan Umum Dalam Mengkesampingkan Perkara Pidana di Indonesia* (Public Interest to set a side criminal matter in Indonesia) in Agustinus Pohan et al (eds), *Hukum Pidana dalam Perspektif* (Criminal Law on Perspective) (Pustaka Larasan, 2012), 143. See also section 35 (c) Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

⁷⁴² See Muntaha, *The implementation of Opportunity Principle in Indonesian Criminal Law and Human Rights* (PhD thesis, Gadjah Mada University Indonesia, 2010).

Table 4.3 Several examples of what is considered as public interest in the surveyed countries

Australia ⁷⁴³	France ⁷⁴⁴	Germany ⁷⁴⁵	Netherland ⁷⁴⁶	Indonesia ⁷⁴⁷
<p>The public interest factors to be considered will vary from case to case, but may include:</p> <ol style="list-style-type: none"> 1. whether the offence is serious or trivial; 2. any mitigating or aggravating circumstances; 	<p>The public interest exercised by French prosecutor based on expediency principle:</p> <ol style="list-style-type: none"> 1. attempt to find the offender were fruitless; 2. the offender is claimed to be mentally deficient,; 	<p>Public interest according to German law:</p> <ol style="list-style-type: none"> 1. charges for minor offences may be dropped; 2. charges may also be dropped by the public prosecutor with the permission of the competent court on the grounds: 	<p>The public interest exercised by the Dutch prosecutor based on expediency principle:</p> <ol style="list-style-type: none"> 1. measures other than penal sanctions are preferable (mainly disciplinary sanctions or administrative or private law measures); and 	<p>Supplementary document on section 35 (c) of 2004 Prosecutorial Law mentions that “public interest” is the interest of the nation and/or the interest of society at large.</p>

⁷⁴³ Commonwealth Director of Public Prosecution, Prosecution Policy of the Commonwealth, Guidelines for the Making Decisions in Prosecution Process, 5-6. Last update August 2014. <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>

⁷⁴⁴ Bruno Aubusson Cavarlay, ‘The Prosecution Service Function within the French Criminal Justice System’ in Jorg-Martin Jehle and Marianne Wade, *Coping With Overloaded Criminal Justice System, The Rise of Prosecutorial Power Across Europe* (2006, Springer) 195-196.

⁷⁴⁵ Rodolphe Juy-Birmann revised by Jorge Biermann, ‘The German System’ in Mirreille Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedures* (2005, Cambridge University Press), 339.

⁷⁴⁶ Peter J.P. Tak, above n 164, 85-86.

⁷⁴⁷ Supplementary document on section 35 (c) *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (‘2004 Prosecutorial Law’).

Australia	France	Germany	Netherland	Indonesia
<p>3. the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, witness or victim;</p> <p>4. the alleged offender's antecedents and background;</p> <p>5. the passage of time since the alleged offence;</p> <p>6. the availability and efficacy of any alternatives to prosecution;</p>	<p>3. the victim is given compensation; immediately before any intervention from the prosecutor;</p> <p>4. the slight damage or disorder caused by the offences;</p> <p>5. the victim's position in the dossier causes the case to be dropped. French criminal law contains very few instances in which the victim's complaint is required for prosecution (these include breaches of private life, slander and injurious remarks in the press). In practice, on the other hand, the PPS accepts desisting of the plaintiff, absence of the plaintiff (who does not</p>	<p>3. that the sentence would be inappropriate,;</p> <p>4. the federal public prosecutor may decide to drop charges for a political offence;</p> <p>5. where there are multiple or related offences the prosecution may be abandoned as concerns the least important of the offences;</p> <p>6. the charge may be dropped if the accused committed the offence under duress or as a result of blackmail.</p>	<p>2. prosecution will be disproportionate, unjust or ineffective because:</p> <p>3. the crime is of a minor nature;</p> <p>4. the suspect's contribution to the crime was minor;</p> <p>5. the crime is old;</p> <p>6. the suspect is too young or too old;</p> <p>7. the suspect has recently been sentenced for another crime;</p> <p>8. the crime has negatively affected the suspect himself (victim of his own crime);</p> <p>9. the health conditions of the suspect;</p>	

Australia	France	Germany	Netherland	Indonesia
<p>7. the prevalence of the alleged offence and the need for general and personal deterrence;</p> <p>8. the attitude of the victim;</p> <p>9. the need to give effect to regulatory or punitive imperatives; and</p> <p>10. The likely outcome in the event of a finding of guilt.</p> <p>11. These are not the only factors, and other relevant factors are contained in the <i>Prosecution Policy</i>. Generally, the more serious the alleged offence, the more likely it will be that the public interest will require that a prosecution be pursued.</p>	<p>respond to summonses after having lodged a complaint), partial responsibility of the victim in the offence suffered (especially with respect to unintentional injury) as grounds for not prosecuting.</p>		<p>10. rehabilitation prospects of the suspect;</p> <p>11. change of circumstances in the life of the suspect;</p> <p>12. suspect cannot be traced;</p> <p>13. corporate criminal liability;</p> <p>14. the person in control of the unlawful behaviour is prosecuted, not the perpetrator;</p> <p>15. the suspect has paid compensation;</p> <p>16. the victim has contributed to the crime; and</p>	

Australia	France	Germany	Netherland	Indonesia
<p>12. The decision to prosecute must be made impartially and must not be influenced by any inappropriate reference to race, religion, sex, national origin or political association. The decision to prosecute must not be influenced by any political advantage or disadvantage to the Government.</p>			<p>17. A close relation between the victim and the suspect, and prosecution would be contrary to the interests of the victim.</p>	

As explained above, the countries surveyed have different criteria for establishing what constitutes the public interest. Public interest connotes not only specific norms consistent with democratic governance but also standards regarding logic and reason.⁷⁴⁸ Each of the countries surveyed is essentially different politically, demographically and socially so each has a different setting for public interest policy in prosecution decision making. However the policy should be legally and morally acceptable, politically responsive, and logical and must possess demonstrable beneficial effects and incorporate the needs of both powerful and unrepresented groups.⁷⁴⁹ In Indonesia the public interest criteria are unacceptable because it creates legal uncertainty. As a result, the Indonesian people do not know the boundaries of the *Jaksa Agung* to exercise his power to set aside criminal matters in the public interest – the definition is circular and the criteria not specific enough. Furthermore, as previously explained, the power of the *Jaksa Agung* to set aside criminal matters is only available for high ranking officials. Any decisions not to prosecute are highly political in nature and political considerations ought not to enter into prosecution decision making. However, decisions can be divided into those which are legitimate and those which are illegitimate. An example of the latter is the exercise of discretion not to prosecute based on the fact that the recipient is a political colleague (i.e. taking into account partisan considerations) and of the former where discretion is exercised for non-

⁷⁴⁸ Thomas J. Barth, 'The Public Interest and Administrative Discretion' (1992), *American Review of Public Administration* 289, 299.

⁷⁴⁹ Ibid. The Goodsell six principle is explained briefly in Barth as follows:

1. Legality-morality: implies adherence to law, the Constitution, and the basic precepts of moral behavior such as honesty and integrity;
2. Political responsiveness: conformity to the overriding wishes of citizens or relevant groups; preserving majority rule and minority rights;
3. Political consensus: commitment to finding common ground among competing interests rather than concern with naked self-interest;
4. Concern for logic: justifiable actions (i.e., logical and tied to reasonable purposes);
5. Concern for effects: future effects of the policy on all affected persons has been closely examined and determined to be beneficial, fair, and consistent with community values: and
6. Agenda awareness: concern for articulated or unrepresented needs within society; the interests of ignored or powerless groups who are not in the public debate or on the agenda.

partisan purposes with the intention of maintaining harmonious international relations between states.⁷⁵⁰

4.4 Conclusion

Prosecutorial discretion within the surveyed countries is limited differently. Most of the surveyed countries use the two-stage evaluation process in prosecution decision making as a mechanism for confining prosecutorial discretion. Indonesia is the country which uses a one-stage evaluation process because discretion in its system is strictly limited and forms part of the mandatory prosecution system. The German system follows the mandatory prosecution system but has moved into a more discretionary system using the two-stage evaluation process. As the Indonesian legal system evolves it should converge to a two-stage evaluation process.

Prosecutorial decision making in the surveyed countries is structured and is based on articulated standards which are found as internal guidelines or included in statutory form. It is important to train prosecutors in the application of internally articulated guidelines by requiring those who exercise discretion to give their reasons in writing so that they can be reviewed. Only Indonesia and France do not officially publish their guidelines. The publication of guidelines is important to enhance transparency in prosecution decision making. It is suggested that Indonesia should publish guidelines for that reason.

The review of prosecutorial decision making within surveyed countries stresses an internal review by senior or superior prosecutors. External reviews by means of judicial review exist in Germany, the Netherlands and Indonesia. In the French system the *juge d' Instruction* (judiciary) plays a unique role in reviewing the exercise of prosecutorial discretion to discontinue criminal matters as in the case of Jacques Chirac. Judicial review of prosecutorial discretion is not allowed in Australia. However, in some serious matters such as ill-motivated prosecution or malicious prosecution the laws recognize tort liability.

⁷⁵⁰ Phillip C. Stenning, 'Prosecutions, Politics and Public Interest. Some Recent Developments in the United Kingdom, Canada and Elsewhere' (2010), *Criminal Law Quarterly* 449, 459.

In Indonesia judicial review for prosecutorial decision making should continue to be exercised although there are acknowledged defects in the system, designed to protect rights of victims and defendants. As the Indonesian system is still plagued by corruption, judicial review can be used to review decisions which appear to constitute an abuse of power. However, that does not deal with corruption within the Indonesian judiciary and unfortunately that remains a problem.

It is internationally acknowledged that prosecutorial discretion must be exercised independently. To achieve this involves reducing improper political influence in prosecution decision making. In functional autonomy prosecution systems like Australia this becomes less important because political influence is strictly prohibited. In countries with a functional subordination system such as France, Germany, the Netherlands and Indonesia this issue is significant. Improper political influence by the executive can be minimized by requiring instructions to be presented in writing. The system in the Netherlands obligates the executive to provide such instructions and then they are reviewed by the Board of Prosecutors. This is designed to enhance transparency and reduce improper political influence. In Victoria Australia, there is a Special Committee to assist the DPP in decision making.

The countries surveyed defined the public interest differently, with the Netherlands and Australia having more public criteria than the other countries. Both the German and the French systems have fewer public interest criteria and in Indonesia such criteria play a minimal role. In Indonesia the public interest is expressed as 'the interest of the nation' or 'the interest of the society at large'. Because of the circular nature of these criteria and their lack of defined limits they can be used in a corrupt manner. Furthermore, illegitimate political factors such as partisan considerations can easily enter into prosecution decision making by the *Jaksa Agung* because of lack of transparency in the system which obligates the Indonesian President to present his instructions in writing to the *Jaksa Agung*.

This chapter describes the differences in the development of prosecutorial discretion-making in civil and common law systems. The development of a prosecution body in civil law jurisdictions was largely influenced by French

practice; that is, it was centralized, hierarchically structured, and controlled by the executive. This situation was different from common law countries with decentralized prosecution decision making, where prosecution bodies developed later and are organized locally.

In prosecution decision making, two common models are used which are known as the MPS and the DPS. The MPS strictly limits discretion in prosecution decision making while the DPS stresses the use of discretion. Based on the Packer model of the criminal process, the dominant crime control model is used in countries such as Indonesia, France, the Netherlands and Germany, whereas common law based countries such as Australia use the DPS which promotes earlier case disposal using discretion. It should be noted that the word 'dominant' means there is a mixed system in the countries surveyed where the pure crime control model or due process model does not exist. The MPS was invented in Germany to strictly limit discretion as part of its commitment to traditional liberal ideas within their *Rechtsstaat*. Such traditional liberal ideas are no longer followed owing to the rise of the modern state, known as the regulatory state. Discretion in state bureaucracies including within the criminal justice system is inevitable. Prosecutors are facing complex and new situations in everyday decision making which could not be imagined by the legislators or rule makers. The DPS becomes the rational model in prosecution decision making in both civil and common law based countries. In general, civil law countries surveyed such as Germany, France and the Netherlands have widened the scope for the exercise of prosecutorial discretion. This can be explained as part of the convergence of the legal systems where discretion in prosecution decision making is now used within most civil law countries to rationalize their bureaucracy to achieve justice.

The Indonesian system still strictly adheres to the MPS where the legality principle is the main consideration, but it is suggested that the system should change so that prosecutors are able to exercise more discretion to discontinue criminal matters. A move towards greater prosecutorial discretion is part of a global convergence of legal systems. Most of the countries surveyed used different forms of a discretionary model to discontinue criminal matters known as the public interest drop, the conditional disposal, plea-bargaining and the penal

order. In proposed reform within the New Draft, the Indonesian system introduced a discretionary model which can be categorized as combining public interest drop, a conditional disposal and plea bargaining. A penal order model is not to be introduced. Several suggestions have been made to enhance the proposed models in the discussion (4.2.2. Types of prosecution decision in discontinuance of criminal matters) and a penal order model has also been suggested.

Safeguards are needed in implementing prosecutorial discretion to avoid abuse of discretion. Prosecutorial discretion needs to be exercised independently and accountably. The prosecution services in France, Germany, the Netherlands and Germany lack full independence because the executive remains in control.

Chapter 5

Research Findings

5.1 Introduction

This chapter presents the results of the interviews conducted in Indonesia and Australia. Details about how the interviews were conducted and analysed are in Chapter 2. The questions for the Indonesian and Australian interviewees were not all the same because they had to be tailored to the different legal systems. The list of interview questions can be seen in the appendix of this thesis. The interviewees were chosen because they were considered to be significant players in their respective legal systems with specialist knowledge of the role of prosecutors. Several questions were asked and answers were summarized based on the following themes:

1. The decision to discontinue criminal matters in Indonesia;
2. Any impediments to changing from a mandatory prosecutorial system to a discretionary one;
3. Views concerning the discretionary model in the New Draft;
4. The independence of the Indonesian Prosecution body (*Kejaksaan*);
5. The decision to discontinue criminal matters by the DPP in Australia;
6. Prosecutorial discretion and corruption; and
7. The formulation of the public interest criterion.

The results of this part are summarized in the conclusion and discussed further in Chapter 6.

5.2 Decision to discontinue criminal matters in Indonesia

As indicated in the previous chapter, the Indonesian system in relation to the discontinuance of a criminal matter is based on the mandatory prosecutorial principle and discretion is severely limited (see sub-chapter 4.2.2.1 Simple drop).

Discretion exists only in the hands of the Indonesian Attorney-General (*Jaksa Agung*) where it has only been exercised in ‘high profile cases’⁷⁵¹ (see sub-chapter 4.2.2.2. public interest drop). There are two important provisions to be understood in this matter: section 140 (2) of the 1981 Criminal Procedure Law and section 35 (C) of the 2004 Prosecutorial Law. Under the former section there are three reasons for discontinuing criminal matters: the matter is not criminal in nature, there is a paucity of evidence, and the case is closed by law. The last mentioned section gives the *Jaksa Agung* power to set aside criminal matters based on the *kepentingan umum* (public interest). *Kepentingan umum* is further explained and elucidated in section 35 (C) of the 2004 Prosecutorial Law as *kepentingan bangsa dan negara dan/atau kepentingan masyarakat luas* (interest of the nation and society at large).

The Indonesian interviewees were asked why the section in the 1981 Criminal Procedure Law only allowed three reasons. One of the Indonesian criminal procedure law professors explained: ‘This provision exists to give legal certainty for victims or witnesses of crime that the prosecutor prosecutes all criminal matters which are brought before him’.⁷⁵²

Similarly, a senior police officer interviewed also stated that: ‘from normative perspective, it is used for legal certainty; however in practice these three reasons are an inadequate protection for people who have dealings with the law’.⁷⁵³

A very senior lawyer expressed the opinion that: ‘The current reasons are not sufficient and they need to be adjusted to recent developments’.⁷⁵⁴ A senior prosecutor expressed a similar opinion by saying that: ‘the reasons are not sufficient because people’s demands are not adequately considered. Moreover, in this provision, social justice is not accommodated and justice is rarely present’.⁷⁵⁵

⁷⁵¹ Muntaha criticised this principle because it was only available for a defendant with a high profile portfolio. Muntaha, *the implementation of Opportunity Principle in Indonesian Criminal Law and Human Rights* (PhD thesis, Gadjah Mada University Indonesia, 2010).

⁷⁵² QAIN400

⁷⁵³ QAIN700

⁷⁵⁴ QAIN1100

⁷⁵⁵ QAIN1300

Most of the Indonesian interviewees believed that these reasons are not adequate or sufficient for a country undergoing rapid change and development. Politicians who are members of parliament expressed the same concern that the three reasons are not sufficient. The first politician explained that: ‘those reasons are only based on legal certainty and order, where other legal purposes are not served such as justice and utility purposes’.⁷⁵⁶ A second politician explained that: ‘the overcrowding of prisons becomes one of the reasons to stop the existing prosecution process and find a more positive way of administering justice’.⁷⁵⁷

One leading Indonesian law professor explained that these reasons are not sufficient and must be related to the legality principle in prosecution. He stated that: ‘In the evolution of Indonesian law these reasons are not sufficient; however their insufficiency arises because we follow the legality principle which imposes limitations’.⁷⁵⁸ Another law professor made recommendations based on achieving greater prosecutorial efficiency and humanity, explaining that:

For the effective and efficient administration of justice prosecutors should have discretion to discontinue criminal cases with insignificant nominal value where the cost of prosecution is excessive as long as the wrongdoer is a first time offender, the maximum penalty is only a fine, the victim forgives and is paid damages caused by the perpetrator to the victim or the family of the victim. For reasons of humanity, the wrongdoer should not be brought before the court when he or she is very old, or is terminally ill, or in trivial cases such as where a poor person steals milk to give to his or her child.⁷⁵⁹

A senior member of the police made a general recommendation for changing the three reasons, with an open reason based on public interest considerations, as follows: ‘As a rapidly developing country there is a need to add another reason to discontinue criminal matters which based on the public interest’.⁷⁶⁰

A very senior judge expressed the view that:

The humanity principle should be considered to discontinue criminal matters as it is constitutionally protected. However, there must be some caution when exercising this reason because its meaning is debatable and subject to many possible interpretations.⁷⁶¹

⁷⁵⁶ QAIN200

⁷⁵⁷ QAIN300

⁷⁵⁸ QAIN500

⁷⁵⁹ QAIN400

⁷⁶⁰ QAIN1000

⁷⁶¹ QAIN1100

Further, the interviewees were asked about the power of the *Jaksa Agung* to set aside criminal matters. They were asked why only the Attorney-General has that the power and what they understand section 35 (C) of the 2004 Prosecutorial Law had to say about the public interest.

One senior prosecutor explained that:

There are two reasons why only the *Jaksa Agung* has the power to set aside criminal matters. Firstly, it provides tight control over the power. Secondly, it facilitates caution in the exercise of the power,⁷⁶²

while a very senior lawyer stated that: ‘Discretion can only be exercised by the *Jaksa Agung* because as the head of the public prosecution service it avoids any abuse of power’.⁷⁶³ A very senior judge expressed a similar view saying that: ‘Only the *Jaksa Agung* has power because it is exercised selectively and an ordinary prosecutor is not allowed because of concern that it will be subjectively exercised’.⁷⁶⁴

A law professor explained that: ‘Your ordinary prosecutor does not have this power because there is fear that this power will be used abusively and because our system is based on the legality principle’.⁷⁶⁵ However, another law professor argued that the power should be distributed and not be the sole power of the *Jaksa Agung*:

The argument which limits the power to set aside criminal matters to the *Jaksa Agung* is a classical one. This kind of power should not be an exclusive power of the *Jaksa Agung*. We have 260 million people in Indonesia and it is impossible to ask one *Jaksa Agung* to taking care of all matters such as insignificant crimes; that is, stealing one cocoa fruit, stealing six corn cobs etc. Moreover, the prosecutorial line to the top is too long. It is common for an ordinary prosecutor to decide to prosecute in insignificant cases in order to avoid the complexity of reporting the matter to the *Jaksa Agung*.⁷⁶⁶

As indicated above, the *Jaksa Agung* exercises the power to set aside criminal matters on the basis of the public interest. Guidelines or clear explanations about the meaning of the public interest are absent. The only clue is what is mentioned

⁷⁶² QAIN 1300

⁷⁶³ QAIN 1200

⁷⁶⁴ QAIN 1100

⁷⁶⁵ QAIN 500

⁷⁶⁶ QAIN 600

in the elucidation of section 35 (C) which refers to the *kepentingan umum adalah kepentingan bangsa dan negara dan/atau kepentingan masyarakat luas* (the interest of the nation and society at large). Most of the interviewees made reference to this elucidation. One politician stated that: ‘Public interest is *kepentingan bangsa dan negara dan/atau kepentingan masyarakat luas* which is based on the elucidation of section 35 (C)’.⁷⁶⁷ An Indonesian professor of law argued that: ‘There are no fixed parameters for the public interest’⁷⁶⁸, and another law professor expressed a similar opinion: ‘Normatively, the meaning of public interest is as mentioned in the elucidation. However it is not clear as to what are the parameters of the public interest’.⁷⁶⁹

Trying to ascertain the meaning of the public interest is difficult. Further elucidation is needed to avoid confusion. An Australian Supreme Court Justice was asked what he understood was the meaning of the ‘public interest’ and ‘the interest of the nation’ in Indonesian law. He drew attention to their vagueness when he said:

The expressions ‘the interest of the nation’ and ‘the interests of the society at large’ are too vague and imprecise. Lewis Carroll wrote ‘Humpty Dumpty: Through the Looking Glass’ and Humpty Dumpty said ‘a word means what I say it means, no more no less’. Well exactly what I would say about those expressions is that they are a collection of words but trying to grasp their meaning is extremely difficult. The expression ‘the interest of the nation’ seems to suggest that those interests should be viewed collectively rather than individually. But it is like the word ‘beauty’ which is in the eyes of the beholder.

One of the leading professors in Australia suggested that it is important to spell out public interest criteria. She said:

My personal view is that it is important to spell out what the criteria are, because if you don’t then inconsistency will be a problem. Another problem will be lack of transparency. So I think it is useful to have criteria because then any decision will have to be made by reference to those criteria.⁷⁷⁰

With regard to the meaning of the expression ‘the public interest’ several interviewees suggested that it should be made clearer by providing guidelines or by adding a new provision in the existing law; that is, by adding an inclusionary

⁷⁶⁷ QAIN 200, QAIN 400

⁷⁶⁸ QAIN 500

⁷⁶⁹ QAIN 600

⁷⁷⁰ QAIN 1600

definition. One Indonesian prosecutor opined: ‘As a realization of certainty, justice and utility in law, the meaning of public interest should be made clear and that can be achieved by providing public interest guidelines’.⁷⁷¹

An Indonesian law professor suggested adding a definition of public interest in the law. He said that: ‘In order to give legal certainty for suspects of crime, witnesses, victims and the public and also legal officers, a definition of the public interest needs to be added to the law’.⁷⁷²

A similar suggestion was made by one of the most senior Australian barristers by including an inclusionary definition:

I think it will be a sensible idea to have an inclusionary definition. So what do I mean by inclusionary? Just playing with words for a moment, take the 2004 Prosecutorial Law to which you refer, the section could be expressed as: ‘in considering any application under section 35(c) of the law by the Attorney-General to discontinue a criminal matter in the public interest, the Attorney shall have regard to the following matters and things listed without in any way limiting or derogating from the Attorney’s ability to exercise his or her discretion in appropriate cases as he or she sees fit. In that way the discretion is preserved, but some guidance is given both to the Attorney-General and to the profession about its limits. This could be useful.’⁷⁷³

In summary, a prosecution decision to discontinue a criminal matter based on 140 (2) of the 1981 Criminal Procedure Law is intended to give legal certainty to victims or witnesses of crime that a prosecutor will prosecute all criminal matters brought before him or her (i.e. legality principle in prosecution). However, the legality principle has been criticized as it no longer has relevance to Indonesia’s current situation because:

1. These three reasons inadequately protect people who have dealings with the law;
2. Social justice is not accommodated and justice is rarely present;
3. The current reasons are only based on legal certainty and achieving order, where there are other valid purposes which are not served, such as the achievement of justice and utility; and

⁷⁷¹ QAIN 800

⁷⁷² QAIN 400

⁷⁷³ QAIN 1500

4. Overcrowding of prisons has become one of the reasons to stop the current system and find more positive ways of administering criminal justice.

One suggested reform of the current Indonesian legal system is by amending section 140(2) of the 1981 Criminal Procedure Law by adding several other reasons to discontinue criminal matters such as where the offender is a first time offender, where the maximum penalty is a nominal fine, where the victim forgives the accused and where humanitarian reasons are important. By doing this, criminal prosecutions will become more effective and efficient. Another suggestion is to set out criteria for assessing the public interest.

Several reasons were ascertained from those interviewed concerning why the *Jaksa Agung* is the only official who can exercise this power. Firstly, the *Jaksa Agung* controls power. Secondly, there should be caution in the exercise of this power and hence it should be retained in the hands of the *Jaksa Agung*. Thirdly, the *Jaksa Agung* is the head of the prosecution body which should retain the power. Fourthly, confining it to the *Jaksa Agung* tends to avoid abuse of power. Fifthly, it avoids selective law enforcement. Sixthly, the Indonesian prosecution system is based on the legality principle. The seventh reason is the classical perspective.

With regard to the meaning of the 'public interest' most of interviewees still explained its meaning based on an elucidation of section 35 (C) of the 2004 Prosecutorial Law and further argued that there are still no fixed parameters to this power and the powers are unclear and uncertain. The elucidation itself has been criticized because it is difficult to understand. Some interviewees suggested that there should be public interest criteria or guidelines or the definition should be made inclusionary. In any event it is important that any published guidelines are not too broad and not too restrictive, as mentioned in Chapter 4 (see sub-chapter 4.2.2.2 Public interest drop).

5.3 Impediments to changing to a discretionary prosecution system

As indicated in the previous chapter, there are two main prosecution systems called the ‘mandatory prosecution system’ (hereafter called MPS) and ‘discretionary prosecution system’ (hereafter called DPS). In a strict sense, the MPS prohibits the exercise of prosecutorial discretion to discontinue criminal matters. On the other hand, central to the DPS is that it is the prosecutor who exercises the discretion of whether or not prosecute. As was indicated in the previous chapter (see section 3.3.2 Extravagant versions of the rule of law and the *Rechtsstaat*), a strict MPS is based on the Hayekian extravagant concept of the Rule of Law which today is commonly rejected because discretion in any prosecution system is unavoidable. This will be discussed further later in the chapter. Germany, as the inventor and pioneer of the MPS, today incorporates discretion in its prosecution system. The Netherlands changed its prosecution system from MPS to DPS in the second half of twentieth century.

The interviewees were asked whether the Indonesian strict MPS should be changed to a more discretionary system, similar to the Australian DPS and the Dutch DPS. Interviewees were also asked about the need for clear guidance in assessing the public interest to discontinue criminal matters. The interviewees from both systems were asked to consider any possible legal transplant from their legal systems into the Indonesian system. Legal transplant into the Indonesian system is specifically discussed in Chapter 2 (see section 2.4 Legal transplant). There were practical reasons for interviewing only players in the two legal systems. Firstly, Indonesia is a former colony of the Netherlands from which it gets its inquisitorial legal system. Where the Netherlands has moved to a DPS system, Indonesia has retained the MPS, and law reform in Indonesia often cites reform in the Netherlands. However, there are links in the development of the Dutch legal system to changes made in Germany and France. This is discussed in both Chapters 3 and 4 especially in regard to the concept of discretion, the rule of law and the MPS. Secondly, the Australian (specifically Victorian) model is chosen because it is the location of this study.

One Indonesia law professor agreed that the Indonesian system should be changed to a more discretionary one. He said: ‘The Indonesian prosecution system

should be changed into a more discretionary one. The best parts of the Netherlands and Australia prosecution systems should be implemented in Indonesia'.⁷⁷⁴

A very senior Indonesian judge agreed, adding:

In my opinion it is better to change it because there are lots of cases which are not supposed to be brought to court (but) still end up at the court. And when judges acquit where a prosecution should have been discontinued then the court as an institution is blamed. Further without discretion cases continue to (be) piled up in the court.⁷⁷⁵

A very senior lawyer also took this view, saying: '... gradually the Indonesian prosecution system should be changed into a more discretionary one'.⁷⁷⁶

As well, an Indonesian politician agreed about the need for change:

As I mentioned before, in my opinion the Indonesian prosecution system should be changed into a more discretionary one. In addition, the Indonesian investigation system should also be changed into a more discretionary one.⁷⁷⁷

Moreover, a senior prosecutor agreed by stressing:

I agree with a system incorporating discretion as long as it is supported with guidelines which have clear parameters. However, we should also be aware that discretion has the potential to be abused and can cause disparity unless it is confined by guidelines.⁷⁷⁸

However, another prosecutor expressed the opinion that the Indonesian system is not ready to be changed into a more discretionary one because it still lacks a clear definition of the public interest.

In my opinion, changing the prosecution system into a more discretionary one is a good idea and can be effective. However, Indonesia is still not ready to change its system into a more discretionary one like that used in the Netherlands and Australia because there is a lack of clear law and understanding about what is considered as the public interest. Knowledge of the parameters of the public interest is important because it is a basis for the discretion to discontinue criminal matters.⁷⁷⁹

Further, the interviewees were asked about any impediments (social, cultural, political, economic or legal) to changing the system in Indonesia to one in which

⁷⁷⁴ QAIN 400

⁷⁷⁵ QAIN 1100

⁷⁷⁶ QAIN 1200

⁷⁷⁷ QAIN 200

⁷⁷⁸ QAIN 1300

⁷⁷⁹ QAIN 1400

prosecutors do have discretion to discontinue criminal matters. One politician expressed his support for prosecutorial change into a more discretionary system and argued that those who oppose such change are not in a strong position:

In my opinion those who oppose a proposal to change into a more discretionary prosecution system are not thinking adequately enough because most of us believe that justice and utility should also be a paramount consideration in enforcing the law where the decision to discontinue criminal matters becomes one of the most important tools. As you can see the new draft of the Criminal Procedure Law accommodates such a concept. Indeed, there was a suggestion from a police representative that the discretion to discontinue criminal matters should be exercisable at the investigation stage.⁷⁸⁰

Another politician shared a similar view: ‘I believe that there will be no opposition to such a concept because for most of the younger generation who have expertise in law, their legal thinking on this matter is in that direction’.⁷⁸¹

A senior lawyer thought that change was inevitable but that change takes time. He said:

In my opinion there will be no impediment to changing the system. However, what often happens when changing a power by means of adding or reducing that power needs to be achieved over a long time frame so that both the institutions of the *Kejaksaan* and the investigative system are socialized to that change.⁷⁸²

An Indonesian law professor mentioned possible impediments:

From a social and cultural perspective, there will be problems because people, including the general public, still think that every criminal matter must be prosecuted and decided by the courts. In other words, they think that ‘punishment’ is better than ‘rehabilitation’. From a political and legal perspective, abuse of power is a real problem because giving discretion to prosecutors gives them extended powers which, if unfettered, can be used abusively. This may lead to uncertainty because similar cases may be dealt with differently.⁷⁸³

A senior police officer noted that change only occurs when the legislature is willing to progress it: ‘One impediment to change is government or legislative will. If there is no will then the law will not change’.⁷⁸⁴

⁷⁸⁰ QAIN 200

⁷⁸¹ QAIN 300

⁷⁸² QAIN 1200

⁷⁸³ QAIN 400

⁷⁸⁴ QAIN 700

A senior prosecutor nominated the following problems:

There are several problems associated with change. Firstly, there are internal problems concerning the quality of the human resources within the prosecution system. If discretion is given in those circumstances then it can potentially be abused. Secondly, the degree to which people understand the law varies. Not all people have a knowledge and understanding about discretion and when it should be exercised. Thirdly, because of functional differentiation between investigator and prosecutor, it is possible that 'tension' might appear when a prosecutor discontinues a criminal matter which has been investigated by the investigator.⁷⁸⁵

Another prosecutor was concerned about prosecutorial independence: 'The position of the prosecution institution in the constitutional arrangement shows ambiguity and inconsistency where it is not clear whether the institution has independence when exercising power'⁷⁸⁶

A very senior judge was also concerned about the quality of the human resources within the prosecution system:

In essence the change is good for reducing the number of cases which pile up in the court system. However we need to ensure the quality of human resources. Abuse of power can occur if discretion is exercised by untrained persons and can lead to corruption which can adversely affect the economic, political, social, cultural, as well as the administration of justice in Indonesia. Corruption can also adversely impact on national security.⁷⁸⁷

In summary, interviewees agreed that changing the MPS into a DPS can be justified. In fact, the Draft of the Criminal Procedure law includes a discretionary model to discontinue criminal matters. Interviewees identified several impediments to the move. Firstly, the general public have no knowledge of a system which uses discretion. Secondly, there was concern about the quality of human resources in the prosecution system. Thirdly, there was concern that discretion exercised by those who are untrained can lead to abuse of power and corruption. Fourthly, where discretion is exercised by untrained prosecutors it can lead to disparity, where similar cases are dealt with differently. Fifthly, there is the interesting observation concerning cultural impediments where those who argue for the retention of the MPS favour punishment over rehabilitation. Finally, there is the difficulty of motivating parliament to bring about change.

⁷⁸⁵ QAIN T 1300

⁷⁸⁶ QAIN T 800

⁷⁸⁷ QAIN T 1100

5.4 Discretionary model in the Draft of the Criminal Procedure Law

As indicated above, the current Indonesian Draft of the Criminal Procedure Law (hereafter called the New Draft) clearly states that the future procedure will be based on a combination of common law and civil law systems. Section 111 (h), section 42 (2) and section 42 (3) of the New Draft indicates that the prosecution system is to be based on the opportunity principle when it comes to decisions to discontinue criminal matters where the *Hakim Pemeriksa Pendahuluan* (investigative judge) can judicially review the exercise of discretion.⁷⁸⁸ This shows that judicial review of prosecution decisions in the future is considered important, as discussed in Chapter 4 (see 4.3.1.7. Judicial review for prosecutorial decision making).

Interviewees were asked about their knowledge and experience of the reasons for changes in the New Draft. One politician explained that the current proposal for change is based on practical considerations: ‘For practical reasons, discretion should be available under the Indonesian system of law for criminal acts which are considered trivial or petty crimes, as well as for reasons of humanity (e.g. people who are old or infirm)’.⁷⁸⁹ another politician suggested that Indonesians are ready for change: ‘In my opinion today people think in modern terms and are less likely to seek revenge’.⁷⁹⁰

An Indonesian law professor gave three reasons for the change:

The background (reasons) for change in the RUU KUHAP (the New Draft) are firstly, that there are criminal cases which can be resolved out of court process such as stealing sandals and stealing a watermelon. Secondly, some of the accused are very old and terminally ill and are not fit to stand trial and defend themselves in court. Thirdly, there is the *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2 year 2012) which shows the need for change and stressed that not all criminal matters need to be heard in court.⁷⁹¹

⁷⁸⁸ Section 111 (h) of the New Draft states that the *Hakim Pemeriksa Pendahuluan* (Investigative judge) has authority to give approval or make decisions in matters relating to the discontinuation of a criminal matter against the opportunity principle. Section 42 (2) states that a prosecutor has the power to discontinue a criminal matter based on public interest with or without conditions. Section 42 (3) limits the reasons for discontinuation.

⁷⁸⁹ QAIN 200

⁷⁹⁰ QAIN 300

⁷⁹¹ QAIN 400

Another Indonesian law professor stressed that in Indonesia there has been a change from the paradigm of the ‘crime control model’ to the ‘due process of law’ model:

When we talk about KUHAP ... our KUHAP follows the crime control model. The crime control model stresses efficiency, speed and the quantity of the trial process. The new KUHAP (the New Draft) follows the ‘due process of law’ model. It stresses the legal protection of individuals from arbitrary government. Individual protection means the protection afforded to criminal suspects which is needed for fairness and in order to avoid punishing innocent persons. It is for this reason that prosecutors are to be given discretionary power. In other words, there has been a change from the legality principle to the opportunity principle like in the Netherlands.⁷⁹²

The Packer models of the criminal process are discussed in Chapter 4 (see 4.2.1.1. Packer Models and Prosecution Systems).

A law professor who had previously served as a senior prosecutor in Indonesia argued that: ‘As I have previously indicated Section 140(2) is not comprehensive enough. However, it does provide a new perspective in Indonesian law which is based on sociological jurisprudence’.⁷⁹³

A senior police officer suggested a reason for change: ‘In context of legal enforcement, there has been a profound change where reality is no longer based on the norm (the written law) but on sociological and philosophical views. This change (is) the most important’.⁷⁹⁴

An Indonesian Constitutional judge also explained the reason of change:

The reason for change arose from cumulative experience and involved court decisions which lacked justice and had adverse social consequences, proved expensive, and where cases on appeal showed that the initial decision lacked certainty or should be reconsidered. That is why Mr. Bagirmanan (the former Head of the Indonesia Supreme Court) expressed his concern that a conflict over a shovel could have ended up in the Supreme Court.⁷⁹⁵

In Indonesia some accused are held in custody until they are finally processed through the criminal justice system because bail is limited. In that context a prosecutor stated:

⁷⁹² QAIN 500

⁷⁹³ QAIN 600

⁷⁹⁴ QAIN 700

⁷⁹⁵ QAIN 900

In my opinion the reason for the change in the New Draft is because incarceration does not work. Recidivism shows that incarceration does not deter offenders who learn new skills from other prison inmates.⁷⁹⁶

Further, the interviewees were asked why after more than ten years the changes recommended in the New Draft have not been enacted. One politician explained: ‘It has taken a decade. The Government knows it has a duty to Indonesians to pass the New Draft but it only gave it to the legislature in March 2013. I see the problem as residing in the government’.⁷⁹⁷

A law professor suggested that the delay was political:

The substantial reason is political. There is still the unanswered question as to whether after unification if there remains the possibility of making another special criminal procedure law. If that were to occur then the New Draft would be pointless.⁷⁹⁸

A second law professor provided another reason for the delay: ‘There were competing interests amongst criminal justice institutions. Not all institutions accept the current proposal’.⁷⁹⁹

A very senior judge expressed a similar view that the egocentric nature of criminal justice institutions is the problem.⁸⁰⁰ A senior police officer argued that: ‘The reason is that there is no political consensus between the Government and the legislature about the need to enact the new law’⁸⁰¹ while a constitutional judge argued that: ‘Delay has occurred because criminal law and criminal procedure law need deep thought and serious research’.⁸⁰²

A senior lawyer explained the reasons for the delay as: ‘There are a lot of problems when the New Draft is discussed. Based on the *Daftar inventarisasi Masalah* (the list of problems), there are 1.169 problems and of these 12 are commonly mentioned in media debate’.⁸⁰³

⁷⁹⁶ QAIN 1400

⁷⁹⁷ QAIN 200

⁷⁹⁸ QAIN 400

⁷⁹⁹ QAIN 600

⁸⁰⁰ QAIN 1100

⁸⁰¹ QAIN 700

⁸⁰² QAIN 900

⁸⁰³ QAIN 1200

As discussed in Chapter 2 in regard of legal transplantation, transplanting judicial institutions or procedures is more difficult than in other fields of law because of political considerations, as Kahn Freund and Montesquieu warned (see 2.4 Legal transplant).

In summary, several reasons have been identified regarding the change to the New Draft. They are:

1. Practical reasons – that petty crimes and the humanity principle should be considered in discontinuing criminal matters (out of court settlements and the humanity principle);
2. Younger Indonesians in particular are more prone to accept a modern way of thinking;
3. The *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2 year 2012) which shows the need for change where not all criminal matters need to be brought before the court;
4. The changing paradigm from the legality principle to the opportunity principle;
5. The changing paradigm from the crime control model to the due process model;
6. Section 140 (2) lacks relevance in the 21st century;
7. The accumulation of experience concerning how petty crime should be handled; and
8. The ineffectiveness of the prison system.

Several additional reasons for the delay in passing the New Draft were offered. These included: political and governmental stagnation or lack of will; the expressed need to unify the criminal procedure law; not all criminal justice institutions accept the need for change; before change occurs there is a need for deeper consideration of criminal law and criminal procedure law; and there is a need for further research before change is legislated.

5.5 Independence of the Indonesian prosecution body

The need for prosecutorial independence has been argued by Hamilton as follows:

Where (independence) exists it is intended to put the prosecutor in a situation where he or she can take the right decision in a case without fear or favour, without being subjected to improper pressure from another source, whether it be the media, politicians, the police, a victim seeking revenge or even a misguided public opinion.⁸⁰⁴

The independence of prosecutors is considered to be important. Indeed, in European countries there is widespread acceptance that there should be a move to a more independent prosecutorial service.⁸⁰⁵ In the Indonesian context, an independent prosecutor is also considered so important that it was mentioned in the 2004 Prosecutorial Law. However, what is written in law does not seem to be reflected in practice.

Most of the Indonesian interviewees who answered the question about prosecutorial independence did not support it. The fact that Indonesian prosecutors are not independent is contrary to the 2004 Prosecutorial Law. Several reasons were given as to why prosecutors should not be independent. Firstly, there is the existing *lembaga rentut* (Internal Supervision for Prosecution Decision Division); secondly, there is the existing unity principle; thirdly, the prosecution service is part of the government of the day; fourthly, only the *Jaksa Agung* has power to decide prosecutorial policy; fifthly, within the prosecution service promotion is decided by more senior prosecutors; and sixthly, the fear of corruption if the prosecution service is given independence. The *lembaga rentut* prevents the Indonesian prosecutor from being independent.

A senior prosecutor mentioned that:

Generally, the Indonesian prosecutor is not independent because there is the *Lembaga Rentut*. The *Lembaga Rentut* is a forum where the individual prosecutors who handle the criminal cases meet and ask for directions from his or her senior.⁸⁰⁶

⁸⁰⁴ James Hamilton, above n 18.

⁸⁰⁵ Ibid.

⁸⁰⁶ QAIN 1300

Similarly a law professor argued: ‘The Indonesian prosecutor is not independent because the Indonesian prosecutor needs to get directions from their seniors when doing prosecutions’.⁸⁰⁷

Such directions from senior prosecutors are almost unchallengeable. The unity principle which binds all prosecutors into one entity is also suspected as mitigating against prosecutorial independence. A senior lawyer explained that: ‘The Indonesian prosecutors are not independent because they have to get permission from their superiors to implement their jobs and the *Kejaksaan* (the Indonesian Prosecution body) is hierarchically one entity’.⁸⁰⁸ A law professor mentioned that: ‘A second reason why the Indonesian prosecutor lacks independence besides the existing of *lembaga rentut* is the unity doctrine or what is known as the doctrine *een on deelbaar*’.⁸⁰⁹

This doctrine is similar to the military doctrine of unity of command. Unity of command is a term that defines the purpose of ensuring unity of effort under one responsible person in this case the head prosecutor for completing the task of prosecuting.

It was stressed by a senior prosecutor that:

Generally, the Indonesian prosecutor is not independent because there is the *Lembaga Rentut*. Beside that there is an obligation on prosecutors up the chain of command to coordinate with senior prosecutors in the handling of all cases.⁸¹⁰

Further, a senior police officer mentioned: ‘The Indonesian prosecutor is still bound by their institution, their rank and the institutional structure which mitigates against independence’.⁸¹¹

The constitutional set up makes the prosecution body part of the government of the day. This was also given as a reason for the lack of prosecutorial independence by one prosecutor who argued:

⁸⁰⁷ QAIN 400

⁸⁰⁸ QAIN 1200

⁸⁰⁹ QAIN 600

⁸¹⁰ QAIN 1300

⁸¹¹ QAIN 700

The Indonesian prosecutor is not Independent because the 2004 Prosecutor Law puts the prosecution body as part of the executive and also prosecutors lack independence because they have to ask directions from their seniors which is known as the *Lembaga Rentut*.⁸¹²

Similarly, a politician noted that the prosecution service cannot be independent because it is answerable to the President:

The *Jaksa Agung* is appointed by the President and is also part of the cabinet which is led by the President. Thus we can see that the *Jaksa Agung* is part of government apparatus. In this context the prosecutor cannot be said to be independent.⁸¹³

A law professor made a similar observation: ‘The Indonesian prosecutor is not independent because the *Jaksa Agung* is under the shadow of the President and it is part of cabinet government’.⁸¹⁴ A very senior judge also opined: ‘The Indonesian prosecutor is not independent because they are part of the executive and appointed by the President’.⁸¹⁵

Furthermore, interviewees expressed the view that the Indonesian prosecutor is not independent because the *Jaksa Agung* has the power to decide prosecutorial policy and promotion is decided by more senior prosecutors. In addition corruption in the prosecution body has been identified.

One law professor stated that:

The Indonesian prosecution system will never be independent until the Doomsday if first, the *Lembaga Rentut* still exists, second, if the unity principle or *een on deelbaar* still exists, thirdly, if the Prosecutorial Law still asserts that the *Jaksa Agung* has power to decide prosecution policy and fourth if promotion is decided by their superiors.⁸¹⁶

With regard to corruption in the prosecution body, another politician asserted that: ‘The Indonesian prosecutor is not 100 per cent independent. That is the reason we have the KPK (Indonesian Eradication Corruption Commission)’.⁸¹⁷

It should be noted that most civil law countries have their prosecution services controlled by the executive. The model known as ‘functional

⁸¹² QAIN 800

⁸¹³ QAIN 200

⁸¹⁴ QAIN 500

⁸¹⁵ QAIN 1100

⁸¹⁶ QAIN 600

⁸¹⁷ QAIN 100

subordination’ was discussed in Chapter 4 (see 4.2.3.1. Functional autonomy or functional subordination). Further, the Indonesian interviewees were asked specifically about their understanding of institutional independence and individual independence in prosecution decision making.

Interviewees were asked ‘Is the prosecutor in Indonesia individually and institutionally independent? Overwhelmingly interviewees answered this question in the negative. A judge of the constitutional court stated: ‘Institutionally the *Kejaksaan* is independent according to the law but individually prosecutors are not independent because they have to follow their *Kajari* (the top regional senior prosecutor of their institution)’.⁸¹⁸

A law professor stated that: ‘The assertion is correct because individually the prosecution system is one entity, which is independent and free, but structurally prosecutors are not independent because they are controlled by the President’.⁸¹⁹ A senior police officer agreed: ‘Individually all of the prosecutor jobs are independent and it cannot be interfered with. On the other hand, institutionally the *Kejaksaan* is not an independent organization because it is part of the government’.⁸²⁰ A politician answered:

According to the 2004 Prosecutorial Law, prosecutors are independent and free from other bodies, as mentioned in the supplementary document. There the independence of prosecutors is envisioned as something noble so that the law can function properly. However, independence is limited because of the constitutional set up which puts the *Kejaksaan* as part of the government. This needs to be reviewed.⁸²¹

Another prosecutor asserted: ‘Indonesian prosecutors individually are not independent but institutionally they are independent because prosecution decisions are implemented according to the hierarchical structure in the *Kajaksaan*’.⁸²² Meanwhile, a very senior judge stated that:

⁸¹⁸ QAIN 900

⁸¹⁹ QAIN 500

⁸²⁰ QAIN 1000

⁸²¹ QAIN 200

⁸²² QAIN 1400

Both individually and institutionally prosecutors are not independent. Individually prosecutors are controlled by their *Kajari* (the top regional senior prosecutor of the institution) through the *lembaga rentut*. On some occasions, it is the *Jaksa Agung* which can give directives.⁸²³

A senior lawyer mentioned that: ‘The Indonesian prosecutor both individually and institutionally is not independent because they always have to consult and ask for permission from their seniors when it comes to every prosecution decision’.⁸²⁴

In summary, according to those interviewed Indonesian prosecutors are neither individually or institutionally independent for the following reasons: firstly, their decisions are subject to the *lembaga rentut*; secondly, because of the unity principle; thirdly, because they are part of the government of the day, fourthly, because the *Jaksa Agung* has power to decide prosecution policy; and fifthly, because of the current way prosecutors are promoted. Evidence of corruption in the prosecution system was noted by a number of those interviewed.

5.6 Decision to discontinue criminal matters by the DPP in Australia

Australia uses the DPS. In this section, the findings are based on interviews with Supreme Court Justices some of whom had been former DPP’s and legal academics. They agreed that the ability of a prosecutor to discontinue a criminal case is a fundamental part of Australian criminal law.

An Australian law professor confirmed this: ‘We certainly take the view that not every case should be prosecuted. So if someone breaks the law, it does not necessarily mean that they have to be prosecuted; there must be a decision to prosecute or not’.⁸²⁵

A Supreme Court judge also agreed that it is a fundamental part of Australian law, and then explained the circumstances where a prosecutor would discontinue a criminal case and considerations when doing so which are enshrined in guidelines:

Well I do agree that the decision to discontinue criminal prosecutions is enshrined in DPP policy. If you have a look at ... the policy guidelines which are

⁸²³ QAIN T 1100

⁸²⁴ QAIN T 1200

⁸²⁵ QAIN T 1600

freely available on the website ...you will find set out there the circumstances in which prosecutions can be discontinued. That depends on a variety of factors. By way of an example, if upon proper inquiry it is found that evidence is lacking, the DPP, whether Commonwealth or State, would discontinue a prosecution.⁸²⁶

A law professor explained the role of guidelines by saying:

There are guidelines that have been developed at a Commonwealth and State level for the decision whether to prosecute at all and then you can use those factors in deciding whether to discontinue a criminal prosecution. The Commonwealth guidelines and the State guidelines are very similar ... they list criteria for deciding whether or not it is in the public interest to continue with the prosecution. And then you (have) got to think of different factors ... so basically a prosecutor will ask the questions 'is this case likely to result in a conviction?' and 'is the evidence going to be admissible?' If a child is a witness, you ask 'is this child capable of giving full evidence'? You look to see whether there are other weaknesses in the case which makes it difficult to get a conviction. Therefore, it always comes back to the question 'is there evidence which makes it likely that we will get a conviction?' You should not prosecute just to make a point although sometime they do ... So there are many criteria for deciding whether to prosecute and then similarly as the case progresses you can make a decision that it is not in the public interest to proceed with the prosecution. It is all in the guidelines, which is good.⁸²⁷

Similarly, a crown prosecutor explained the circumstances in which a criminal prosecution can be discontinued by a prosecutor:

The ability to commence and continue a prosecution in most Australian States is in a statutory body, a Director of Public Prosecutions. That body has the sole prerogative of continuing or discontinuing a prosecution. But you need to distinguish between a permanent prosecutor of the Queen who is employed by the DPP pursuant to contract under the legislation and a freelance prosecutor, who is a member of the independent BAR. Independent prosecutors cannot discontinue prosecutions without the permission of the DPP. So he or she must confer with the DPP before seeking to discontinue any prosecution. Therefore, this is my first point; freelance prosecutors have no discretion, as the discretion is in the Director. The traditional considerations for discontinuing a prosecution arise when the Crown is essentially flawed and there is no strong or probable likelihood of conviction. That might be because evidence is missing or witnesses have died or witnesses have become uncooperative. A decision to discontinue might also arise where continuing the prosecution might cause unnecessary hardship either to the victim of crime or to the accused. Other reasons of humanity may also arise. For instance, the victim of the crime may not wish the prosecution to continue. The prosecution may be discontinued where an accused has become ill or is suffering from severe mental problems. In such situations, they cannot properly or adequately defend themselves. The guidelines provided to prosecute in Australia are essentially a version of the guidelines created by

⁸²⁶ QAIN 1700

⁸²⁷ QAIN 1600

British Attorney-General Sir Hartley Shawcross when he wrote an article which is still the basic guide for prosecutors.⁸²⁸

A Supreme Court Justice explained that discretion exists at two levels, at the level of the police and the DPP:

.... prosecutorial discretion in my view will exist at two different levels, at the level of the police officer that is the investigator who will always have some discretion whether or not to charge people and this will be bound up in a whole lot of considerations about the evidence, the seriousness with matter being dealt with, what is to be achieved by proceeding with the matter, so even though a policeman who pulls somebody up for speeding or going too fast in her motorcar, that policeman has the power not to charge the person because they generally think that it is not in the public interest to do so ... The major offences are dealt (with) by the DPP. Other offences may be dealt with summarily by a magistrate but the more serious cases are dealt with under indictment and they are within the province of the DPP and may come before a judge and jury. So there will still be some discretion if the matter doesn't even come into the hands of the Director Public Prosecution; there will be still some discretion left in the police who conduct the case and manage it.⁸²⁹

It is clear that circumstances to discontinue criminal matters can be identified based on these above arguments which are based on the guidelines which will be summarized below. Further, these arguments have identified specific considerations to discontinue criminal matters in Australia.

A senior barrister mentioned some of the factors which might be taken into account when considering whether to discontinue a criminal matter: '...in determining whether or not it (the case) meets those criteria factors such as, for example, the probable result of the hearing, the amount of cost involved, the amount of time and court resource involved have to be considered'.⁸³⁰

Similar arguments were expressed by a Supreme Court Justice:

The DPP is there to see the system operates properly. So if he has a case which he cannot possibly win then it is not in public interest to prosecute that case. If he continues with the case there may be a waste of court time and public money. All of those things are part of the decision not to prosecute.⁸³¹

A Court of Appeal Justice and Supreme Court judge explained this consideration as follows:

⁸²⁸ QAIN 1500

⁸²⁹ QAIN 1800

⁸³⁰ QAIN 1500

⁸³¹ QAIN 2100

We also live at a time when the resources of the court are scarce. Discretion to discontinue a case might arise when there is no reasonable prospect of conviction and continuing with the prosecution would involve spending public money for no particular public good ... Moreover it is not in the community interest for one its own members to be put through the ordeal of a trial where it is unlikely to result in that person being convicted and having to pay the penalty.⁸³²

Another Supreme Court Justice expressed caution with regard to cost considerations:

There is overarching discretion as well for the prosecutor to decide not in the public interest to prosecute, so it might be that even in the very serious matter you might be faced with someone who is very sick or might be dying and you can say that is not in the public interest to pursue this prosecution. And there will be other similar sorts of situation where you say: 'just not in the public interest'. You might be very careful about it, if it is a very minor wrong doing but there is going to be very significant and substantial trial costs to the community which will use up court resources and you might say: 'well it's not in public interest to pursue the matter'. But prosecutors have to be very careful when arguing that economic considerations should result in a case being discontinued. So if you had somebody say who was charged with a minor theft say theft of \$50 but you are being forced to run a trial which will take two or three weeks to run in the County Court. You might decide not to run the case on the basis that to do so is just not in the public interest. The most that can happen to the person at the end of the day is a very short term imprisonment, but much more likely it will be something like a fine. So can you justify using valuable resources? To do that is not an easy decision because you run the risk of the public viewing the decision about being a cost saving measure; that is, only about money.⁸³³

In summary, the ability of a prosecutor to discontinue a criminal case seems to be a fundamental part of Australian criminal law. Two main considerations were identified as grounds for exercising the discretion to discontinue a criminal matter; namely, where there is no 'reasonable prospect of conviction' and where it is not in the 'public interest' to continue with the matter. Other considerations were also mentioned including:

1. The cost in terms of court resources involved in continuing with a prosecution measured against the imperative of maintaining trust and confidence in the administration of criminal justice through the OPP;
2. The amount of time taken doing the prosecution;
3. The paucity of crown evidence;

⁸³² QAIN 1700

⁸³³ QAIN 1800

4. The minor nature of the crime;
5. Personal cost to the accused, the witnesses, and the victim; and
6. Where witnesses have become uncooperative.

It should be noted that the maintenance of trust and confidence in the DPP to pursue justice is the most important consideration.

5.7 Prosecutorial discretion and corruption

From the literature reviewed - and this was noted during the interviews - emerges the argument that if prosecutors are given the discretion to discontinue criminal matters this has the potential of leading to corruption. As indicated above, one of the impediments to change to a discretionary system is the perception that discretion potentially leads to abuse of power which is considered as a form of corrupt conduct. This section identifies how corruption can be avoided in the view of interviewees who have knowledge and experience of practicing and learning the law. As this research was conducted at a university in the state of Victoria, Australia, the views of Victorian judges, barristers and legal academics were sought in order to find solutions about how to avoid corruption when exercising prosecutorial discretion to discontinue criminal matters.

A Victorian barrister explained how to avoid corruption by dividing the office of public prosecution from the government, as follows:

So one very important means of avoiding corruption is to divide the office of public prosecutions from the government. It is independent and its independence is enshrined in legislation and a grant of statutory immunity is given effectively to those officers who do their jobs correctly ... Independence is essential because if you have someone whose livelihood depends on government pleasure they are hardly independent. The salary paid to those independent of government comes from government revenue but does not depend upon government authority and is commensurate with the senior member of the profession. So any financial motivation is lessened and should not exist.⁸³⁴

A law professor noted the existence of structural control over prosecutorial discretion and suggested that this provides accountability and helps avoid corruption:

⁸³⁴ QAIN 1500

So in Victoria and in Australia ... both the DPP and also the Attorney-General can discontinue criminal matters though individual prosecutors lower down cannot. The decision has to be made by an official person. So I think that gives some control. I guess if some individual prosecutor could make that decision may be they could be paid off or bribed although my sense is that the legal profession is very strict about that, I think any corruption or bribery would be exposed and the offender would have to leave the profession. But having the Attorney-General and the DPP overseeing the exercise of discretion and having the DPP as a statutory appointment lessen the issue of corruption. You probably know that in Victoria there is Committee that oversees what the DPP does in particular discontinuance decisions so that also provides some protection because The Attorney-General is an elected person. So the individual prosecutor can't make that choice to discontinue. It has to go up to the right level. In addition, the exercise of discretion has to be made by reference to a set of criteria. So you have a lot of different accountability mechanisms I think that should protect against corruption.⁸³⁵

Another the law professor also mentioned the role of a strong legal profession and the various monitoring mechanisms by bodies such as the Ombudsman:

I think we do have very strong legal profession and that sees itself as not being influenced by political pressure ... there is a strong ethos or ethic that says that you must not be influenced, but I don't know that it always works in practice, but it should work. The Ombudsman provides one monitoring mechanism, but you need a lot of different ones so they can work together as one system.⁸³⁶

A Supreme Court Justice explained that to avoid corruption, the exercise of discretion must be treated as very important and should be exercised by few. 'If there is too much delegation of the discretion there is a risk of corruption. So you must exercise control over it at a very high level and then it is not such a worry'.⁸³⁷

As indicated, the DPP in Australia is the head of the prosecution body and is a high ranking officer with the status of a Supreme Court Justice. Only a high ranking officer like the DPP has the power to discontinue criminal matters. Another Supreme Court Justice argued that corruption in the exercise of discretion is avoided because of the status of the DPP: 'Well corruption in this context is avoided in Australia and Victoria because of the DPP. Because an individual

⁸³⁵ QAIN 1600

⁸³⁶ QAIN 1600

⁸³⁷ QAIN 1800

prosecutor will not stop a prosecution ... that decision will go to the DPP ... and the Director will make that decision'.⁸³⁸

Furthermore, he mentioned the presence of an appeals court system as well as highly trained lawyers as explanations of how corruption is avoided in the Australian context:

I mean the notion of there being corruption in the prosecutorial process is unheard of ... it has never happened ... no ... I guess for two reasons, one, because of their training as lawyers and true because of that training they are independent. And there are checks and balances ... we have an appeals system. We get appeals from time to time where a charge has been laid by someone and the accused person says that this is an abuse process, or there is something about the reason for which the charges are laid, or the way in which the prosecution or police conducted themselves that is unfair and contrary to law ... it might come here or it might come to our Court on Appeal.⁸³⁹

Another Supreme Court judge also noted that having DPPs with the status of Supreme Court Justices is a bulwark against corruption, nepotism and cronyism:

We have state DPP's and we have a Commonwealth Director but there are dozens if not hundreds of people working for them and the Director is the person who, in fact, has the status of a Supreme Court judge and as a result is regarded as beyond corruption, beyond nepotism, beyond cronyism.⁸⁴⁰

Transparency in the exercise of discretion, an appropriate salary, and rigorous care in selecting DPP's provide protection against corruption, as one of Supreme Court judge explained:

So transparency is number one. The other one is a proper salary. Another safeguard is that a lot of care is taken in selecting the right person to do the job. A person has to have a good reputation. In the end, they have to be clever, diligent, and honest, and if that is so you will not get corruption. Another protection against corruption is that individual prosecutors do not select their own cases.⁸⁴¹

In summary, there are several ways in which corruption is avoided in the Australian prosecution system. They are:

1. The independence of the DPP, particularly from improper political interference;

⁸³⁸ QAIN 1900

⁸³⁹ QAIN 1900

⁸⁴⁰ QAIN 2000

⁸⁴¹ QAIN 2100

2. The status of the DPP as equal to that of a Supreme Court judge enhances independence;
3. Assiduous care in the selection of the DPP from the most eminent ranks of the legal profession;
4. Structural control over prosecutorial discretionary decisions to discontinue criminal matters so that the final decision rests with those of the rank of DPP;
5. The role of a strong and ethical legal profession and other monitoring mechanisms such as the office of the Ombudsman;
6. Treating the exercise of discretion as an important grant of power to be given only to office bearers of the rank of DPP;
7. An appeals court system; and
8. Transparency when exercising discretion, an appropriate salary, and providing individual prosecutors with random cases.

5.8 Formulation of public interest in the prosecution system

As a matter of theory, there are two ways to formulate the ‘public interest’ in prosecution systems. They are:

- a. A prosecution must continue unless the ‘public interest’ demands it be waived (hereafter called the ‘positive formulation’); and
- b. A prosecution case should be discontinued unless the ‘public interest’ demands it continue (hereafter called the ‘negative formulation’).

The interviewees were asked ‘based on their knowledge and experience about criminal prosecution systems, which statements are suitable for modern prosecution systems?’ A senior Indonesia judge agreed with ‘a’ because to do so shows equality before the law. He said: ‘I agree with the positive formulation because every person is equal before the law without any discrimination. Discrimination might potentially occur in the negative formulation when it is exercised dependently’.⁸⁴²

⁸⁴² QAIN 1100

An Indonesia prosecutor saw the positive formulation as the best formulation, saying: In my opinion ‘a’ is the one where a prosecution must be held unless the public interest demands it be waived. This is because every criminal matter must be punished in order to avoid chaos and abuse of power within society.⁸⁴³

A senior Victorian barrister and private prosecutor also agreed with the positive formulation by saying: ‘I will choose ‘a’ – a prosecution must be held unless the public interest demands it be waived. Better the safe one, because proposition ‘b’ invites agitation and may be the catalyst which leads to the political show-trial which I don’t believe in’.⁸⁴⁴

An Australia law professor also chose the positive formulation:

I think it is probably the first one (‘a’) because I think that people need to believe that there will be certainty. If a person commits a criminal offence then something will need to be done so police will charge and there will be an ongoing prosecution. Then you need to have those criteria for not continuing the prosecution.⁸⁴⁵

As well, a Supreme Court judge chose the positive formulation, saying: ‘It is ‘a’ because we are talking about a process which has begun and if it has begun it is about how it can be legitimately stopped’.⁸⁴⁶

The negative formulation was clearly not an option, as expressed by another Australian Supreme Court judge:

I don’t see ‘b’ as an option at all ... by definition the public interest is served by the administration of justice being fully pursued ... so the concept that some overriding or separate consideration that has to be entertained before you pursue the administration of justice is by definition wrong because the prosecution by definition is in the public interest. Under ‘a’ we only use the words ‘public interest’ in the narrow sense, looking at the nature of the evidence, looking at any particular circumstances – of the offender or the victim or the witnesses or some other feature of the case ... all factors bear upon the nature of the case, on the individual or on whether or not justice really requires that the case be pursued.

A further Supreme Court judge chose the positive formulation, explaining:

I would say ‘a’ is the better formulation because once you have sufficient evidence to justify laying charges then you have a reasonable prospect of conviction. The public interest discontinuance function should be exercised only exceptionally – to focus on the public interest as a precondition is effectively to

⁸⁴³ QAIN 1400

⁸⁴⁴ QAIN 1500

⁸⁴⁵ QAIN 1600

⁸⁴⁶ QAIN 1800

ask two questions; firstly, is there a reasonable prospect of conviction and secondly, does the public interest require prosecution. If we ask that second question then usually that does not get us very far because in almost every case the public interest will require prosecution.⁸⁴⁷

An Indonesian politician preferred the positive formulation, saying:

I prefer 'a' because the formulation starts with 'a prosecution must be held' followed by public interest considerations to discontinue criminal matters. The other starts with 'a prosecution case should be discontinued unless' which looks like that you can directly discontinue a criminal matter in an unplanned manner just like that.⁸⁴⁸

An Indonesian law professor similarly agreed with the politician by stressing the legality principle in prosecution:

I prefer 'a' where a prosecution must be held unless the public interest demands it be waived. It shows that a prosecutor has to prosecute all criminal matters according to the legality principle; however with an exception based on the opportunity principle where the *Jaksa Agung* may set aside a criminal matter based on the public interest. Furthermore, it can be used to give legal certainty for the public, the victim, and the witnesses that the case is being processed.⁸⁴⁹

However, some interviewees preferred the negative formulation; a senior lawyer in Indonesia arguing that the negative formulation fits within a modern prosecution system. He opined: 'The one which is suitable for modern prosecution systems is 'a prosecution case should be waived unless the public interest demands it continue. The reason is that it avoids the piling up of cases at the court and consequent expense'.⁸⁵⁰

A Supreme Court judge in Australia also believed that the negative formulation is the best, saying:

I think probably if I have to choose between the two, I would adopt 'b' because, there is no reason why somebody should be dragged through the criminal courts unless there is a public interest to do so. ... It is easy to conceive of cases where on compassionate or other grounds it would not be in the public interest to continue a criminal prosecution by way of example if somebody is very elderly and terminally ill or the facts which led to the charge happened 30 or 40 years previously ... But I am not entirely sure that there is great deal of difference between 'a' and 'b' but always you have to identify what the public interest is ...

⁸⁴⁷ QAIN 2000

⁸⁴⁸ QAIN 300

⁸⁴⁹ QAIN 400

⁸⁵⁰ QAIN 1200

If the evidence is sufficient to secure a conviction then it is in the public interest to continue with it.⁸⁵¹

An Indonesian politician also preferred the negative formulation, indicating:

The correct one is 'b' – a prosecution case should be waived unless the public interest demands it continue. However, the 'public interest' criteria must be formulated clearly and firmly within the law and not be based on issues which can be fabricated or lead to bias.⁸⁵²

An Indonesian law professor agreed with the negative formulation because it stressed the opportunity principle:

I prefer 'b' because it is based on the opportunity principle and because not every criminal matter is performed with the necessary intention. We need to consider circumstances such as motivation, duress, culpability or other reasons which can be used to eliminate the *mens rea*.⁸⁵³

Stressing that criminal sanction is *ultimum remedium*, another Indonesian law professor also preferred the negative formulation:

For me, I prefer number two ('b') because the prosecution of criminal cases should be avoided unless the public interest demands their prosecution. The *Ultimum remedium* principle must be followed where a criminal sanction is the last resort when there is no other choice.⁸⁵⁴

In summary, based on the interviews, the positive formulation is considered the more appropriate for the following reasons:

1. The positive formulation fits with the principle of equality before the law and avoids or mitigates against discrimination;
2. The positive formulation keeps or enhances order in society;
3. It is considered the safer formulation because the negative formulation focuses on discontinuance and does not provide the necessary criteria;
4. The negative formulation is not an option because the public interest is served by the administration of justice being fully pursued;
5. The public interest discontinuance function should be exercised only in exceptional circumstances; and

⁸⁵¹ QAIN 1700

⁸⁵² QAIN 200

⁸⁵³ QAIN 500

⁸⁵⁴ QAIN 600

6. The legality principle in the prosecution process justifies the positive formulation.

By contrast some of the reasons several interviewees chose for adopting the negative formulation include:

1. It avoids long court lists and expensive and unnecessary litigation;
2. There is no good reason why somebody should be dragged through the criminal courts unless it is in the public interest to do so;
3. The opportunity principle in the prosecution process justifies it; and
4. Criminal sanction *Ultimum remedium* fits well with the negative formulation.

5.9 Conclusion

There are several important findings which emerged from the interviews which will now be discussed.

It was agreed that section 140(2) of the 1981 Criminal Procedure Law needs to be further amended by adding several other justifications for the discontinuance of criminal matters, such as where the accused is a first time offender, where the maximum penalty is a nominal fine, and where the victim forgives the accused or for reasons of humanity (e.g. a terminal illness). By implementing these changes the prosecution system would be more efficient and just.

Another suggestion was to justify discontinuance based on public interest considerations. Several justifications were given why only the *Jaksa Agung* had the power to discontinue criminal matters. They are, firstly, it focuses the exercise of this power in the *Jaksa Agung* as head of the prosecution which limits in a cautionary way the exercise of that power; secondly, by doing that, it in turn tends to avoid abuse of power and selective enforcement; thirdly, the Indonesian prosecution system is based on the legality principle; fourthly there is the classic perspective. With regard to the meaning of the phrase 'public interest', it was found that most of Indonesian interviewees still explained its meaning based on an elucidation of section 35 (C) of the 2004 Prosecutorial Law and further argued

that there are no fixed parameters to it and those that exist are not expressed in clear and comprehensible language. The elucidation itself was criticized as being difficult to understand. Some interviewees suggested that inclusionary guidelines for assessing or defining the public interest should be created.

Most Indonesian interviewees agreed that the Indonesian prosecutorial system should become more discretionary. In fact, the Draft of the Criminal Procedure law included a discretionary model to discontinue criminal matters. Even though some interviewees believed that there would be no impediments in implementing such a system, others disagreed. Several impediments were identified and included: firstly, the Indonesian public would not understand a prosecution system based on the discretion to discontinue criminal matters; secondly, legal impediments including the potential abuse of power, corruption, the disparity between different cases based on similar facts, and lack of human resources to affect such a change; and thirdly, a cultural impediment based on the perception that punishment is better than rehabilitation.

Several reasons were identified from the interviewees' opinions regarding the changes to the New Draft. They are:

1. For practical reasons – that petty crime and the humanity principle should be considered in discontinuing criminal matters (e.g out of court settlements);
2. Prosecutorial discretion is in keeping with the modern way of thinking;
3. *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2 year 2012) which showed the need for change and that not all criminal matters justify prosecution in criminal courts to their conclusion;
4. The changing paradigm from the legality principle to the opportunity principle;
5. The changing paradigm from the crime control model to the due process model;
6. Section 140 (2) lacks current relevance;

7. The accumulation of experience in dealing with petty crimes shows that prosecuting them to finality is not necessarily just or fair; and
8. The ineffectiveness of the prison system, particularly given that bail is limited.

Furthermore, from the interviews it can be seen that there are several reasons for government reluctance to pass the draft legislation, including arguments based on the perceived need to unify the criminal law and criminal procedure law; that not all institutions accept the need for change; that there is little political will on the part of either the government or the legislature to enact changes to the law; that both criminal law and criminal procedure law needs deep and serious research; and lastly, there are inherent problems with the current draft which need to be resolved before it becomes law.

The findings show that the Indonesian prosecutor is not independent both individually and institutionally firstly, because of the existing *lembaga rentut*; secondly, because of the existing unity principle; thirdly, the prosecution is part of the government of the day; fourthly, the *Jaksa Agung* has power to decide prosecutorial policy; fifthly, because prosecutorial promotion is decided by senior prosecutors; and sixthly, because of the inherent corruption in the prosecutorial body.

The ability of a prosecutor to discontinue a criminal case is a fundamental part of Australian criminal law. Several circumstances were identified that justify the DPP discontinuing criminal matters. They are: firstly, that there is no reasonable prospect of conviction and secondly, that the public interest leads to the conclusion that the matter should be discontinued. A number of considerations are taken into account when exercising prosecutorial discretion to discontinue a criminal matter, including:

1. The probable result;
2. The cost involved in pursuing the prosecution;
3. The amount of time taken doing the prosecution;
4. The availability of court resources; and
5. The intention of parliament in creating the particular offence.

It should be noted that caution needs to be taken when considering the cost of prosecutions because the 'public view of the system' (trust and confidence in the system to pursue justice) is of paramount importance to its continuing functioning.

There are several ways of avoiding corruption in the Australian prosecution system when it comes to the exercise of discretion to discontinue a criminal matter. They are:

1. The status of the DPP as equal to that of a Supreme Court judge;
2. The independence of the DPP;
3. Care in selecting the DPP from among the ranks of highly qualified and experienced lawyers;
4. The structural control over prosecutorial discretionary decision making to discontinue a criminal matter and the accountability of all prosecutors to the DPP;
5. The role of a strong and ethical legal profession;
6. Highly trained lawyers who are accountable to the profession for their conduct;
7. Monitoring mechanisms such as the Ombudsmen;
8. The view among all interviewees that the exercise of discretion must be treated as a significant power which must be assigned parameters through the use of guidelines;
9. An appeal court system;
10. Transparency in the exercise of discretion;
11. An appropriate salary; and
12. The random assignment of cases to individual prosecutors and their acceptance that they are subject to the control and direction of the DPP.

Support for both the positive and negative interpretations of the public interest were espoused by those interviewed. Based on the interviews, a positive formulation was considered appropriate for several reasons:

1. It fits well with the principle of equality before the law and also avoids discrimination;

2. It promotes order in society;
3. It is considered a safer formulation than the negative formulation;
4. The negative formulation was not an option;
5. The public interest discontinuance function should be exercised only in exceptional circumstances; and
6. The legality principle in prosecution processes.

In contrast, some interviewees chose the negative formulation because:

1. It promotes shorter court lists and is less expensive;
2. There is no reason why any person should be dragged through the criminal courts unless it is in the public interest to do so;
3. The opportunity principle; and
4. The criminal sanction is *Ultimum remedium* which fits better with the negative formulation.

Chapter 6

Discussion

6.1 Introduction

In this chapter the findings from the interviews are discussed as they relate to each of the research questions and based on the literature.

The first section deals with the ‘circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Indonesia’. It focuses on the *Jaksa Agung*’s power to set aside criminal matters because, as a matter of doctrine (Mandatory Prosecution System), an ordinary prosecutor lacks the power to do so. However, some of those interviewed argued that an ordinary prosecutor could exercise discretion to discontinue, based on section 140 (2) of the 1981 Criminal Procedure Law. This argument is discussed in the first section of the chapter.

The second section discusses the ‘circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Australia’. This part focuses on the Director of Public Prosecution’s (hereafter the DPP’s) power in the State of Victoria to set aside criminal matters. It also discusses the Victorian DPP’s guidelines which are applicable to any exercise of discretion to discontinue criminal matters.

The third section discusses whether there is ‘a discretionary prosecutorial model which is suitable for adaption to the Indonesia mandatory prosecutorial model’, and focuses on the models outlined in Chapter 4: the ‘simple drop’, the ‘public interest drop’, the ‘plea bargain’, the ‘conditional disposal’, the ‘penal order’ and the ‘negotiated case settlement’.

The fourth section discusses the ‘independence and accountability of the Indonesian prosecutor’ and the mechanisms, including legislative changes, which would need to be implemented in Indonesia to ensure that a discretionary prosecutorial model enhances both prosecutorial independence and accountability and thus mitigate against arbitrary decision making.

The fifth section discusses whether there are any ‘impediments for moving Indonesia towards a more discretionary model’. Several interviewees identified various possible impediments and made short and long-term suggestions as to how they could be dealt with.

6.2 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Indonesia

It was indicated in the research findings (see 5.1 The decision to discontinue criminal matters in Indonesia) that the prosecutorial decision to discontinue criminal matters based on section 140 (2) of the 1981 Criminal Procedure Law (current Indonesian criminal procedure law) is intended to give legal certainty to victims or witnesses of the crime by mandating that a prosecutor must prosecute all criminal matters brought before him or her (i.e. the legality prosecution principle). As discussed in Chapter 4 (see 4.2.1.2. Mandatory Prosecution Systems), this Mandatory Prosecution System (MPS) which is based on the legality principle is designed to minimize discretion and consequently a prosecutor is precluded from taking a pro-active diversionary role.⁸⁵⁵ From the countries surveyed, only in Indonesia do current laws strictly adhere to the MPS model where any prosecutorial decision making is a one-stage evaluation (see Table 4.1 Brief summary of discretion to prosecute in surveyed countries). However, the MPS model was criticised by some interviewees as not being relevant to Indonesia’s current situation because:

1. The legal system inadequately protects people who have dealings with the law;
2. Justice is not accommodated by the current system and justice is rarely present;
3. Maintaining the MPS model may produce legal certainty and order, but the law has other purposes which are not served by that model such as justice and utility; and

⁸⁵⁵ Julia Fionda, above n 301, 9.

4. In the limitation to grant bail the overcrowding of prisons becomes one of the main reasons to consider a more discretionary prosecutorial model.

These criticisms by different interviewees highlight the difficulty facing the prosecution in Indonesia in not being able to filter out cases which need not be prosecuted, such as in the *sandal jepit case* or the *cocoa picker case*.⁸⁵⁶ In those cases the prosecutor could not discontinue them because there was no permissible reason for doing so. As a result, individual justice could not be tailored to protect the poor and any other minority group in Indonesia.

Overcrowded prisons in Indonesia are a major problem. The issue of bail once an offender has been charged is in the hands of the investigator who can grant bail if a surety is provided. However, the legality principle means that bail is not often granted. The implementation of a presumption of bail where a court rather than the investigator decides whether or not it is granted, may be more efficient than the present system and mitigate against corruption. Another possible change which should reduce the prison population is to move towards a more discretionary prosecution model within a set of guidelines or principles.

From the criticisms above it is evident that those interviewees would support the proposed reform (the Draft of the Indonesian Criminal Procedure Law) which moves Indonesia from a MPS model to a more discretionary one. They would also argue such a move is rational (see 4.2.1.2. Mandatory Prosecution Systems), as it enables a criminal justice system to respond differentially to different factual situations and hence achieve individualized justice.

⁸⁵⁶ In Indonesia, there have been cases in which the hard application of the prosecution system has resulted in a 'tortured 15 years-old boy being sentenced to a period of imprisonment for stealing old sandals' which were worth not more than 2000 rupiahs (A\$10) and an 'aged women (55 years old) was prosecuted and incarcerated for two months for stealing three cocoa fruits worth approximately 2100 rupiahs'. The resources of the criminal courts would probably have been better allocated if the prosecution had chosen not to proceed with these cases. In both cases, the community signalled through the media and by petition, that neither case should proceed. Reny Sri Ayu, 'Sandal Jepit Butut Seret Siswa SMK ke Meja Hijau', *Kompas.com* (on line), 27 December 2011 <<http://regional.kompas.com/read/2011/12/27/06271577>> BEY and Abdur Rahman, 'Dimejahijaukan, Ambil Tiga Biji Kakao Senilai Rp 2.100', *Info Indonesia* (on line), 17 November 2009 <<http://infoindonesia.wordpress.com/2009/11/17/dimejahijaukan-ambil-tiga-biji-kakao-senilai-rp-2-100/>>.

In supporting a MPS model⁸⁵⁷ the current reasons for discontinuing criminal matters in Indonesia must be based on section 140 (2) of the 1981 Criminal Procedure Law. These reasons are circumscribed and strictly exercised and there is a total prohibition to use other reasons. However, several interviewees argued that an ordinary prosecutor can exercise discretion when there is lack of supporting evidence and where a matter is declared to be a civil matter rather than a criminal matter or ‘the case is closed by law’ – a reason based on section 140 (2) of the 1981 Criminal Procedure Law.

Very senior judge argued that:

The legal maxim *unus testis nullus testis* means that one witness cannot provide sufficient evidence; or in other words, a single witness is not enough to corroborate a story. That is one reason to discontinue a matter. A second reason for discontinuance can occur where it is decided that it is a civil rather than a criminal matter. However, the argument that the case is closed by law is limited and is based on section 76, 77 and 78 *KUHP* (Indonesian Criminal Law code). In practice there is discretion in both situations.⁸⁵⁸

One of the Indonesian law professors interviewed had a different argument, saying that a prosecutor has discretion when interpreting ‘the case is closed by law’, as in the Soeharto case. The law professor explained:

The Soeharto case was discontinued based on ‘the case is closed by law’ reason. In the Soeharto case, a doctor who examined him reported that he can only speak not more than three words and only can remember not more than five words. So if the matter had been brought to trial, his (Soeharto’s) rights as an accused person and his ability to defend himself would have been jeopardized.⁸⁵⁹

These arguments are further explained as follows. Weighing evidence is an act of discretion because it involves judgment and choice in order to decide whether there is sufficient corroborative evidence. Similarly, deciding whether a case is criminal or civil or deciding that a case should be closed by law are both acts of discretion. Davis called these choices or acts ‘the exercise of discretion’ where an officer decides what to do, or not to do, or decides what is desirable in the

⁸⁵⁷ See section 15 Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (‘1981 Criminal Procedure Law’). It states that Penuntut umum menuntut perkara tindak pidana yang terjadi dalam daerah hukumnya menurut ketentuan undang-undang (the public prosecutor shall prosecute a criminal case occurring in his jurisdiction in accordance with the provisions of law)

⁸⁵⁸ QAIN 1100

⁸⁵⁹ QAIN 600

circumstances, after considering the facts and the applicable law.⁸⁶⁰ However, the exercise of discretion in Indonesia is strictly confined. Decisions have to be made about ‘what is sufficient corroborative evidence’, or ‘what is a criminal case’ and ‘when is a case closed by law’. According to Indonesian law, ‘sufficient evidence’ means that there must be corroborating evidence – one witness is not enough.⁸⁶¹ A ‘criminal case’ means a case where a person or a legal entity is accused of breaching a criminal statute, because according to section 1(1) of the KUHP (Indonesian Criminal code) ‘no act shall be punished unless by virtue of a prior statutory penal provision.’⁸⁶² Deciding whether an action is considered to be a breach of a criminal statute is an act of judgment and a choice made by the discretionary decision-maker.

‘Closed by law’ refers to several sections in the KUHP. Section 76 deals with double jeopardy, s 77 deals with the situation where the accused is dead and s 78 deals with lapse of time. Section 76 (1) states:

Kecuali dalam hal putusan hakim masih mungkin diulangi, orang tidak boleh dituntut dua kali karena perbuatan yang oleh hakim Indonesia terhadap dirinya telah diadili dengan putusan yang menjadi tetap. Dalam artian hakim Indonesia, termasuk juga hakim pengadilan swapraja dan adat, di tempat-tempat yang mempunyai pengadilan-pengadilan tersebut (Except for the cases where judicial verdicts are subject to revision, no person shall be prosecuted again by reason of an act which the verdict of an Indonesian judge with respect to him has become final. Indonesian judges shall be understood as judges of the Adat Law tribunal at places where such tribunals exist.)⁸⁶³

Where it is found that the principle of double jeopardy has come into play a judge must discontinue the case.

Section 77 of the KUHP states that: ‘*Kewenangan menuntut pidana hapus, jika tertuduh meninggal dunia* (The right to prosecute shall lapse by the death of the accused.)’⁸⁶⁴

⁸⁶⁰ KC Davis, above n 242, 4.

⁸⁶¹ Section 183 *Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) (‘1981 Criminal Procedure Law’).

⁸⁶² Section 1(1) *Kitab Undang-Undang Hukum Pidana or KUHP* (Law No. 1 of 1946 on Criminal Code) (Indonesia) (1946 Criminal Code).

⁸⁶³ Translation is taken from the Penal Code of Indonesia (1982), Directorate General of Law and Legislation Ministry of Justice. (Copy of the document is available from the researcher if needed).

⁸⁶⁴ Ibid.

In absentia court processes or criminal trials without the appearance of the accused are not allowed in Indonesia. Thus if prosecutor know that the accused is dead then he or she must discontinue the prosecution.

Section 78 (1) KUHP states that:

Kewenangan menuntut pidana hapus karena daluwarsa:

1. mengenai semua pelanggaran dan kejahatan yang dilakukan dengan percetakan sesudah satu tahun;
2. mengenai kejahatan yang diancam dengan pidana denda, pidana kurungan, atau pidana penjara paling lama tiga tahun, sesudah enam tahun;
3. mengenai kejahatan yang diancam dengan pidana penjara lebih dari tiga tahun, sesudah dua belas tahun;
4. mengenai kejahatan yang diancam dengan pidana mati atau pidana penjara seumur hidup, sesudah delapan belas tahun.

(The right to prosecute shall lapse by lapse of time:

- 1st, after one year for all misdemeanors and for any crime committed by means of the printed media;
- 2nd, after six years for a crime for which a fine, custody or imprisonment has been imposed of not more than three years;
- 3rd, after twelve years for all crimes for which temporary imprisonment for more than three years has been imposed; and
- 4th, after eighteen years for all crimes for which capital punishment or life imprisonment is imposed.)⁸⁶⁵

According to section 78, prosecutions must be terminated depending on the type of crime and sentence combined with the time which has elapsed since the penalty was imposed. Arguably, there is no prosecutorial discretion in these situations. This leaves the prosecutor with the discretion to discontinue for lack of corroborative evidence or by making the decision that the case is not of a criminal nature. However, in practice, these two reasons are rarely used by Indonesian prosecutors to discontinue criminal matters. Most cases which reach the prosecutor's desk are supported by corroborative evidence and involve criminal matters. If that were not the case, a prosecutor would not accept the matter as a complete matter.⁸⁶⁶ So the first filter of criminal cases starts while still in the

⁸⁶⁵ Translation taken from the Penal Code of Indonesia (1982), Directorate General of Law and Legislation Ministry of Justice. (Copy of the document can be provided by the researcher if needed)

⁸⁶⁶ See section 110 (2) Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana (Law No. 8 of 1981 on Criminal Procedure) (Indonesia) ('1981 Criminal Procedure Law'). It states that Dalam hal penuntut umum berpendapat bahwa hasil penyidikan tersebut ternyata masih kurang lengkap, penuntut umum segera mengembalikan berkas perkara itu kepada penyidik disertai

hands of the investigator. Even if the investigator thinks that there is sufficient evidence to prosecute, a prosecutor still has the power to ask the investigator to continue finding evidence which the prosecutor thinks will be needed at trial. Similarly, the prosecutor can reject the results of an investigation if he or she thinks that the case is not a criminal matter.

Most cases which end up on the prosecutor's desk are complete matters ready for trial no matter how weak or strong the evidence, provided there is corroborative evidence. Suspicion of corrupt conduct may emerge when prosecutors argue that the case should be discontinued because there is insufficient evidence or that the matter is not of a criminal nature. As a result, after the prosecutor accepts a dossier from the investigator as a complete matter, it is likely that the case will end up before a court for final decision. So in Indonesia the likelihood of conviction is not an important consideration when deciding whether or not to prosecute a case. By contrast, the Australian system puts the 'reasonable prospect of a conviction' as one of the main considerations when taking into account whether it is in the public interest to prosecute a person (see 5.5 Decision to discontinue criminal matters by the DPP in Australia).

As can be seen from the interviews, Indonesian critics of the MPS model asserted that the ability of a prosecutor to discontinue criminal matters in Indonesia today is both inadequate and insufficient and not in keeping with current circumstances. To some extent these views are reflected in the amending section 140(2) of the 1981 Criminal Procedure Law which adds several other reasons for discontinuance including where the offender is a first time offender, where the maximum penalty is a fine, where the victim forgives the offender, or where consideration of humanity justify discontinuance. Another suggestion is for the prosecution to discontinue criminal matters based on public interest considerations. The criteria for ascertaining those considerations in the countries surveyed are discussed in Chapter 4. How that discretion to drop a case is confined, structured and reviewed by the courts can be contrasted with the power

petunjuk untuk dilengkapi (Where the public prosecutor believes that the results of the said investigation remain incomplete, the public prosecutor shall promptly return the dossier of the case to the investigator with instructions for its completion).

of the *Jaksa Agung* to set aside a criminal matter. As indicated above, the legal basis for dropping cases is different between the *Jaksa Agung* and the ordinary prosecutor. In Indonesia different legal terminology is also used. Where an ordinary prosecutor decides not to prosecute a criminal matter, that decision is called a *Penghentian Penuntutan* (Prosecutorial discontinuation). The prosecutor does this by issuing a *Surat Ketetapan Penghentian Penuntutan* known as an *SKPP* (Discontinuation Prosecution Letter). Where the *Jaksa Agung* decides to discontinue, it is called a *Penyampingan Perkara demi kepentingan umum* (a decision to set aside a criminal matter based on the public interest). The *Jaksa Agung* then issues what is called a *Surat Ketetapan Mengesampingkan Perkara Demi Kepentingan Umum* (A letter based on the public interest to set aside a criminal matter). Some Indonesian scholars denote this power as a ‘*deponering*’,⁸⁶⁷ or a ‘*seponering*’,⁸⁶⁸ with reference to the Dutch system. It is common for Indonesian scholars and the public using the term ‘*deponering*’ to explain the power of the *Jaksa Agung* to set aside criminal matters as based on the public interest. However, this has been criticized because it is incorrect terminology. *Seponering* or *seponeren* is the correct terminology which means *terzijde leggen* (to set aside) *niet vervolgen* (not to prosecute), as Darmono explains.⁸⁶⁹

As indicated in Chapter 4 and the research findings in Chapter 5, the *Jaksa Agung*’s exercise of discretion to set aside criminal matters in the public interest is not based on clear guidance. There is no single statute or document which gives a clear explanation as to what is considered to be in the ‘public interest’. The interpretation of this expression is solely based on the *Jaksa Agung*; understanding about this can potentially be influenced by improper political motivations. In this regard, Indonesia needs to create a system which enhances transparency. The Indonesian legal system needs to publish guidelines which set the parameters for considering what is in the public interest and which give

⁸⁶⁷ Djoko Prakoso, *Eksistensi Jaksa di Tengah-Tengah Masyarakat* (Prosecutor Existence amongst Society) (1985, Ghalia Indonesia) 77.

⁸⁶⁸ Darmono, *Penyampingan Perkara Pidana Seponering dalam Penegakan Hukum* (Set aside a criminal matter Seponering in enforcing the law) (2013, Solusi Publishing), 50.

⁸⁶⁹ *Ibid* 44.

guidance when a decision not to continue with a prosecution is taken. This will assist in ensuring that a decision not to prosecute is not influenced by factors such as:

1. the race, religion, sex, national origin or political associations, activities or beliefs of the offender, or any other person involved;
2. personal feelings concerning the offence, the offender or a victim;
3. possible political advantage or disadvantage to the Government or any political group or party; and
4. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Guidelines such as these are used by the Victorian DPP to reduce bias in prosecution decision making.⁸⁷⁰ In order to reduce any perception of improper political motivation in any *Jaksa Agung* decision to set aside a criminal matter, the Indonesian system needs to create procedures where presidential instructions to prosecutors must be documented in writing, as suggested in Chapter 4 (4.3.1.8 Transparency in Prosecution decisions).⁸⁷¹

It should be noted that before the *Jaksa Agung* sets aside a criminal matter, he or she must seek suggestions and opinions from other government institutions. This procedure should be credited as part of the transparency model within the Indonesian system. However, it is not clear whether, for example, if the *Jaksa Agung* asks for suggestions and opinions from four government institutions and three of them are against discontinuation, he still has the power to set aside the criminal matter. How many government institutions are considered to be sufficient for a discontinuance? For example, in the corruption case of two *Komisi Pemberantasan Korupsi Republik Indonesia* (the Indonesian Eradication Corruption Commission herein after called KPK) leaders, the *Jaksa Agung* set

⁸⁷⁰ Victoria Director of Public Prosecutions, *Policy Number 2, Prosecutorial Discretion, Improper Considerations*. Last updated 24 November 2014.

⁸⁷¹ Secret instructions from the President to the *Jaksa Agung* were revealed in one of the Indonesian Constitutional Court Decisions No 49/PUU-VIII/2010. In one 'off the record' interview, one of the Indonesian interviewees provided similar information that *Jaksa Agung* often ask the President for direction in prosecution decisions especially in high profile cases. See also OC Kaligis, *Deponing Teori dan Praktek (Deponing Theory and Practice)* (2011, Alumni) 294.

aside the case after seeking suggestions and opinions from the *Mahkamah Agung Republik Indonesia* (the Indonesian Supreme Court), the *Dewan Perwakilan Rakyat Republik Indonesia* (the Indonesian Legislature), the *Mahkamah Konstitusi Republik Indonesia* (the Indonesian Constitutional Court) and the *Kepolisian Negara Republik Indonesia* (the Indonesian National Police).

The *Mahkamah Agung Republik Indonesia* opinion was that the *Jaksa Agung* should be permitted to exercise his or her discretion to set aside the matter based on the opportunity principle even though a final and legally binding decision from the court had been made. The full opinion and suggestion for that case is as follows:

Mahkamah Agung RI dalam surat Ketua Mahkamah Agung RI Nomor 152/KMA/XI/2010 tanggal 18 November 2010 pada intinya menyatakan apabila Kejaksaan Agung berpendapat berdasarkan analisa obyektif, memandang suatu perkara harus dikesampingkan karena kepentingan umum, maka berdasarkan asas oportunitas yang dianut hukum acara pidana kita, maka Jaksa Agung dapat “mengesampingkan” perkara yang bersangkutan. Walaupun dalam perkara tersebut sudah ada putusan hakim yang berkekuatan hukum tetap, namun apabila Jaksa Agung berpendapat ada alasan untuk mengesampingkan perkara tersebut demi kepentingan umum, maka putusan yang berkekuatan hukum tetap tersebut, tidak dapat dilaksanakan (non executable) (In a letter to the Indonesian Supreme Court number 152/KMA/XI/2010 dated 18 November 2010 the Kejaksaan Agung (the Office of Jaksa Agung) has decided to set aside the criminal matter based on the public interest and the opportunity principle which is followed by our Criminal Procedure Law. The Jaksa Agung can set aside the criminal matter even though on that matter a legally binding decision exists. That binding decision is now considered as non-executable.)⁸⁷²

This kind of consideration is arguably improper because a binding court decision can be changed by the *Jaksa Agung*. Internationally, any court decision cannot be changed by external powers, as a guarantee of judicial independence.⁸⁷³

The *Dewan Perwakilan Rakyat Republik Indonesia* gave their opinion and suggestion to the *Jaksa Agung* and indicated that the *Jaksa Agung* had to explain ‘what public interest criteria’ were used to set aside the decision and what the anticipated implications of such a decision were. It should be noted that the majority groups in the *Dewan Perwakilan Rakyat Indonesia* disagreed with the

⁸⁷² See the Decision to set aside a criminal matter by The Indonesian Jaksa Agung number: Tap – 002/A/JA/01/2011 (*Surat Ketetapan Mengesampingkan Perkara Demi Kepentingan Umum*). (Copy of the document is available from the researcher if needed).

⁸⁷³ See *Findlay v. The United Kingdom*.

plan to set aside the decision. In his decision, the *Jaksa Agung* mentioned one reason for setting aside the decision which was that the administration of the *KPK* would have been disrupted and as a result the public would suffer loss if the decision remained. It should also be noted that the case involved corruption allegations where both the *KPK* leaders were accused of abusing their power. Internationally, setting aside any corruption case cannot be justified.⁸⁷⁴ Human rights' violations and corruption are both considered as serious matters where setting aside a corruption matter will most likely be viewed as being against the public interest.

The *Mahkamah Konstitusi Republik Indonesia* refused gave their opinion and suggestion to the *Jaksa Agung*. Their letter stated that the *Mahkamah Konstitusi Republik Indonesia* cannot give opinions and suggestions because they never give legal opinions except when it comes to their own court decisions. On the other hand, the *Kepolisian Negara Republik Indonesia* (Indonesian National Police) allowed the *Jaksa Agung* to set aside the case based on the public interest. However, in its letter it did not outline what criteria had been used in deciding that it was in the public interest to set aside the decision.

These cases involving the two *KPK* leaders demonstrated that in Indonesia it was considered appropriate for a court decision to be set aside by another institution which was outside the court structure. Corruption cases cannot be set aside because of the seriousness of the allegations. Furthermore, the government institutions involved did not provide adequate explanations to justify the utilization of the 'public interest' principle. Arguably, the parameters of the 'public interest' are uncertain and unclear. Furthermore, the perception remains, whether or not it is true, that the *Jaksa Agung* was acting under secret instructions

⁸⁷⁴ Report of the International BAR Association Human Right Institute, *Separating Law and Politics: Challenges to the Independence of Judges and prosecutor in Egypt* (February 2014) <www.ibanet.org/Document/Default.aspx?DocumentUid=15887C66-917B-4456-9C02-56300CD66590>. This report asserted that:

Under international standards, prosecutors should ensure that abuse committed by state officials is properly investigated. More specifically, prosecutors should 'give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

from the President to set aside the decision and the *Jaksa Agung* may have felt unable to violate those instructions for fear of losing his or her position in the cabinet.

In summary, since the Indonesia system follows the MPS model an ordinary prosecutor has limited discretionary powers. They can exercise discretion when they consider that there is insufficient corroborative evidence for the matter to go to trial or where the matter is a civil rather than a criminal one. By contrast, the Indonesian *Jaksa Agung* can exercise prosecutorial discretion to set aside a criminal matter based on very unclear guidance as to what is in the public interest. It is suggested that Indonesia needs to publish guidelines which can be utilized by prosecutors and *Jaksa Agung* when exercising discretion and those guidelines should provide the parameters for what is and is not in the public interest. As suggested in Chapter 4, the published guidelines should not be too broad or too narrow. Further, where the President has given instructions in any criminal matter those instructions must be in writing and publicly available. Ideally, the President ought not to be able to give instructions in any criminal matter, as the ability to do so give the impression that the President is above the law.

6.3 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Australia

This section focuses on the power of the Victorian Director of Public Prosecutions (hereafter the DPP) to set aside criminal matters. It discusses the Victorian DPP's guidelines and similar policies of other states and the Commonwealth Director of Public Prosecution's policies on this matter. Those persons interviewed in Victoria were asked about their knowledge regarding the Australian system in general but some only made specific reference to the system in Victoria. In addition, some documents regarding the office of the DPP and its policies in other states such as New South Wales and at the Commonwealth level are referred to in Chapter 4 (see notes on Table 4.1 Brief summary of discretion to prosecute in surveyed countries). However, in order to limit the scope of this research and because the researcher was located in Victoria, most emphasis has been placed on a study of the Victorian DPP.

Interviewees suggested two main circumstances in which the Victorian DPP could discontinue criminal matters. They were: where there is no reasonable prospect of a conviction, and where it was in the public interest to discontinue a criminal matter (see 5.5 Decision to discontinue criminal matters by the DPP in Australia). These reasons were compared with the DPP policy on prosecutorial discretion.⁸⁷⁵ The policy sets out the criteria used by the DPP when considering whether or not to discontinue a criminal matter because there is no reasonable prospect of gaining a conviction, and because it is in the public interest to discontinue a criminal matter.

There are factors in the Evidence Act 2008 (*Vic*) to be considered in assessing whether there is a reasonable prospect of a conviction including: the availability of witnesses;⁸⁷⁶ whether witnesses are competent and compellable;⁸⁷⁷ and also the reliability of any admissions.⁸⁷⁸ Other criteria for assessing whether there is a reasonable prospect of gaining a conviction can be found on the Director's Policy on Prosecutorial Discretion.⁸⁷⁹

As indicated in the previous chapter, the DPP's policy concerning the reasonable prospect of conviction does not follow the '51 per cent rule'. This rule has been criticised as the percentage may be too high and because it is

⁸⁷⁵ See Director of Public Prosecutions Victoria, *Director's Policy on Prosecutorial Discretion* last updated 24 November 2014 <<http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>>.

⁸⁷⁶ Section 65 of the Evidence Act 2008 (*Vic*) provides information about how criminal proceedings should be conducted if a person who made a previous representation is not available to give evidence about an asserted fact.

⁸⁷⁷ See sections 12-19 of the Evidence Act 2008 (*Vic*). In these sections for example, a prosecutor needs to consider the capacity of a witness to give evidence based on his or her competence. If the court found that the witness is not competent because of one of two reasons which are mentioned in section 13 (1) then it must be excluded. If this happens then it will weaken the prosecution case which might reduce the reasonable prospect of conviction.

⁸⁷⁸ Section 85 of the Evidence Act 2008 (*Vic*).

⁸⁷⁹ See Director of Public Prosecutions Victoria, *Director's Policy on Prosecutorial Discretion* last updated 24 November 2014. <<http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>>. It is mentioned in paragraph 'Reasonable Prospect of Conviction' that more than ten factors needs to be considered in assessing reasonable prospect of conviction in prosecution decision making, such as conflict of key witnesses, any possible line of defence and the existence and reliability of any forensic or medical evidence.

inappropriate to express it in such a potentially rigid mathematical form (4.3.1.3. Confine and structure prosecutorial discretion using guidelines).

After the DPP has taken into account whether there is a reasonable prospect of conviction then consideration must be given to whether it is in the public interest to continue the matter. The DPP's policy sets out a list of general public interest criteria which were common in the countries surveyed except for Indonesia, but they vary from country to country (see Table 4.3 for several examples of what is considered as public interest in the countries surveyed). Arguably differences arise because of the diverse situations and conditions in those countries, as discussed in 4.3.1.9. The public interest criteria in the surveyed countries were considered. As previously suggested, Indonesia needs to generate and publish guidelines which can be used to assess whether it is in the public interest to discontinue criminal matters. Drafting these criteria is beyond the scope of this thesis; however, the criteria used in Victoria and the other countries surveyed can be drawn on as a starting point. What is important is that any drafted criteria are legally enforceable, morally acceptable, logical, possess demonstrable beneficial effects, and incorporate the needs of both the powerful and unrepresented groups in Indonesia, as mentioned in Chapter 4.

In the Victorian DPP policy, apart from the general public interest criteria, there are also particular criteria which require special consideration. These include child offenders, offenders with cognitive impairments including intellectual disabilities, and those with acquired brain injuries or mental illnesses or personality and neurological disorders.⁸⁸⁰

The Victorian DPP's policy, and this is true in other similar policies in Australia, follows the principles enunciated by the former Attorney-General in the UK, Lord Shawcross.⁸⁸¹ As indicated in Chapter 4 (4.2.1.3. Discretionary

⁸⁸⁰ See Director of Public Prosecutions Victoria. *Director's Policy. Prosecutorial Discretion* last updated 24 November 2014. <<http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>>.

⁸⁸¹ See Director of Public Prosecutions Victoria. *Director's Policy. Prosecutorial Discretion* last updated 24 November 2014. <<http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>>. These guidelines mention that the public interest principle was enunciated by Sir Hartley Shawcross in 1951, as Attorney-General of the United Kingdom, and is equally applicable in Victoria.

Prosecution Systems), those policies emphasise that as a matter of the public interest not all criminal offenders should automatically be the subject of criminal prosecutions. The public interest criterion is the ultimate consideration when deciding whether or not to prosecute. Even where there is a reasonable prospect of a conviction it may not be in the public interest to continue with the prosecution. Both these criteria are used as the core consideration of the two-stage evaluation system (discussed in 4.3.1.1. One-stage evaluation or two-stage evaluation systems). It is argued in this thesis that Indonesia needs to incorporate the two-stage evaluation system in its future reforms. As previously argued in Chapter 4, implementation of the two-stage evaluation process in the Indonesian legal system, as the core idea in the DPS model, is inevitable and would provide a rational basis on which to organize the prosecution bureaucracy. The one-stage evaluation system is less rational because it can only be effective where financial and personnel resources are unlimited and even then tends to produce unfair consequences, particularly for members of minority groups.

When it comes to the formulation of public interest considerations in the decision whether or not to prosecute, both negative and positive formulations are supported by the research findings in Chapter 5 (see 5.7 the formulation of public interest in the prosecution system). Both formulations can be chosen as future policy for Indonesian criminal procedure reforms. The current proposal in the New Draft of the Criminal Procedure Law follows the positive formulation because it emphasizes the obligation on the state to prosecute all criminal cases⁸⁸² unless several conditions (public interest considerations) are satisfied, as stated in sections 42 (2) and 42 (3) of the New Draft (see 4.2.2.2. The Public Interest Drop). If the Indonesian reforms use this formulation then it is important that the Criminal Procedure Law be continually updated as to what has to be considered and included in the public interest criterion. This is because prosecutors (and other administrative officers) will meet new situations and conditions which might not cover the pre-existing public interest criterion. This might create circumstances where the law does not match the current situation and injustice could result. As a

⁸⁸² See section 43 (1) of the New Indonesian Criminal Procedure Law.

result, what occurred in the *sandal jepit* case and the *cocoa picker* case will be repeated because the law that established the criteria for determining what is in the public interest is inadequate. In addition, changing criminal procedure law has proved to be difficult. It took more than 35 years to reform the first colonial heritage criminal procedure law (HIR) when Indonesia had its first national Criminal Procedure Law (1981 Criminal Procedure Law/KUHAP). It remains uncertain when the New Criminal Procedure Law (KUHAP) will be implemented. The reason for the delay was traversed in Chapter 5 (see 5.3 Discretionary model in the Draft of Criminal Procedure Law).⁸⁸³ Changing criminal procedure law means altering the status quo from which some obtain benefits and strongly oppose any change. This must be considered if Indonesia decides to follow the positive formulation of public interest.

The negative formulation might seem appealing, as Lord Shawcross mentioned: 'It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution...'.⁸⁸⁴ This formulation has been followed in Victoria Australia⁸⁸⁵ where public interest criteria are not in statutory form but are published as guidelines which are reviewed annually. It can be argued that such guidelines are not as strong as those which appear in statute. The main question then becomes is there any sanction for breaching the guidelines? The precise legal effect of the guidelines in Victoria is unclear because there is no Australian decision on those guidelines, as Refshauge has argued.⁸⁸⁶ This might happen in the Indonesian situation if the guidelines are not considered as law because they only apply for internal organizational purposes.⁸⁸⁷ However Refshauge further argued that the

⁸⁸³ These included: political and governmental stagnation or lack of will; the expressed need to unify the criminal procedure law; not all criminal justice institutions accepted the need for change; before change occurs there needs to be deeper consideration of criminal law and criminal procedure law, as well as the need for further research before change is legislated.

⁸⁸⁴ For the complete paragraph see discussion on 4.2.1.3. Discretionary Prosecution Systems

⁸⁸⁵ See Director of Public Prosecutions, Victoria Policy on Prosecutorial Discretion.

⁸⁸⁶ Richard Refshauge, 'Prosecutorial Discretion - Australia' in Garrick et al. (eds.), *The Convergence of Legal Systems in the 21st Century* (The Australian Institute of Foreign and Comparative Law and contributors, 2002) 364.

⁸⁸⁷ See section 7 *Undang-Undang Nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* (Law No.12 of 2011 on Law Making) (Indonesia) ('2011 Law Making').

usual sanction for not complying with guidelines is that the decision will be nullified for failure to have regard to relevant considerations. Thus if Indonesia chooses to use published guidelines to formulate the public interest then it is important that a section of the future Criminal Procedure Law clearly states the legal effect and consequences of not complying with the published guidelines.

In the Victoria Director's policy on prosecutorial discretion, there is no list of considerations which must be undertaken in order to decide whether or not to prosecute. Based on interview findings (see 5.8 Conclusion), there are several considerations which should be taken into account when exercising prosecutorial discretion to discontinue criminal matters, including:

1. The probable result;
2. The cost involved in pursuing the prosecution;
3. The amount of time taken to do the prosecution;
4. The availability of court resources; and
5. The intention of parliament in creating the particular offence.

It should be noted that caution needs to be exercised when considering the cost of prosecutions because it is important that the public confidence in the continuing functioning of the prosecutorial system is enhanced and preserved. Arguably, however, the prosecution service needs to operate in a cost-effective and efficient manner. This means to provide value for money. However, this should not be paramount: justice and fairness must always be the main consideration. It is argued that Indonesian policy makers should ensure that the prosecutorial bureaucracy is as effective and efficient as possible but should not jeopardize the pursuit of justice, as stressed in Chapter 4.

The only considerations in the Director's policy are related to what might be called improper considerations in the exercise of discretion, including race, religion, sex or sexual orientation, national origin and political association. The policy also notes that the activities or beliefs of the offender or any other person involved should not be a consideration in any exercise of discretion. So the prosecutor's personal feelings, beliefs or biases concerning the offence, the offender or a victim should not influence or taint the decision. Finally, the policy notes it would be an improper consideration for a prosecutor to take into account

any possible political advantage or disadvantage to the government or any political group.

The Director's policy on prosecutorial discretion point 9 (Discontinuance) states that a criminal matter may be discontinued at any time except during a trial, whether or not an indictment has been filed. This policy is based on section 177 (2) of the Criminal Procedure Act 2009 (*Vic*) which states that:

A prosecution may be discontinued (a) at any time except during a trial (b) whether or not an indictment against the accused has been filed.

Both a prosecutor and a defence lawyer can raise questions whether discontinuance should be filed or not. As mentioned in the policy 'the question as to whether discontinuance should be filed may be raised on application by the defence or by the prosecution at any time before the trial.'⁸⁸⁸

The policy also stresses that the decision to discontinue a prosecution must be determined based on an evaluation of there being a reasonable prospect of conviction and on public interest criteria and this decision can only be made by the Director.⁸⁸⁹ Thus it is clear that neither a permanent prosecutor employed by the DPP nor a freelance prosecutor briefed by the DPP can discontinue a prosecution. This power resides at the highest level in the hands of the DPP alone. By doing this, corruption can be minimised if not eliminated because the DPP is an independent statutory person who is employed for a period of ten years and has the status of a Justice of the Supreme Court, thus making improper influence unlikely. The DPP is nevertheless accountable to the parliament, as discussed in Chapter 4 (see 4.2.3.3. Accountability in prosecutorial decision making).

⁸⁸⁸ See point 9 Director of Public Prosecutions Victoria, *Director's Policy. Prosecutorial Discretion* last updated 24 November 2014. <<http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>>

⁸⁸⁹ Senior Barrister (QAIN 1500) interviewed in this research explained the permanent prosecutor and freelance prosecutor in relation to power of discontinuance of prosecution as follows:

The ability to commence and continue prosecution in most Australian states is in the statutory body of the director of public prosecutions. That body has the sole prerogative of continuing or discontinuing prosecutions who therefore need to distinguish between a permanent prosecutor of the Queen who as employee of the office and pursuant to contract to the government has specific rights under the legislation and the freelance prosecutor, (who is a) member of the independent BAR. An independent BAR prosecutor cannot discontinue prosecution without permission from the DPP. So he or she must confer with the DPP before seeking discontinuance of any prosecution. Therefore, it's my first point; a freelance prosecutor has no discretion it is based on the Director.

The policy also explains that the Director can enter discontinuance by way of a ‘special decision’ within the meaning of the Public Prosecutions Act 1994 (Vic):

1. if the Director decides to file a discontinuance after a Crown Prosecutor or any other legal practitioner advises that the prosecution should continue;
2. if the decision is in relation to an offence involving life imprisonment;
3. where the decision is in relation to a matter of high public profile or notoriety; and
4. when the decision is one which, for any other reason, the Director believes should be a special decision.

According to section 45 of the Public Prosecution Act 1994 (Vic) there is a special body called the Director’s Committee ‘to assist’⁸⁹⁰ the Director when making a ‘special decision’. This is an advisory body and consists of the Director, the Chief Crown Prosecutor and the Solicitor for Public Prosecutions.⁸⁹¹ It does not always need to meet because the Director can ask the Chief Crown Prosecutor and the Solicitor for Public Prosecutions to give written advice. This advice is not binding on the Director. If the Director makes a ‘special decision’ according to section 45F of the Public Prosecution Act 1994 (Vic), he or she must as soon as practicable submit to the Attorney-General, for laying before parliament, a statement in writing setting out the decision and the reason or reasons for it. Before making a ‘special decision’, the Director is required to consider the views of the informant and the victims, although these views are not determinative. The policy states:

The views of the informant and victims should be sought and recorded before discontinuance is filed. Their views should be taken into account but are not determinative. The informant and victims should be informed of the decision to enter discontinuance before it is publicly announced.⁸⁹²

⁸⁹⁰ Section 45C of the Public Prosecution Act 1994 (Vic).

⁸⁹¹ Section 45 (2) of the Public Prosecution Act 1994 (Vic).

⁸⁹² See point 12 Director of Public Prosecutions Victoria, *Director’s Policy. Prosecutorial Discretion* last updated 24 November 2014. <http://www.opp.vic.gov.au/getattachment/5b830306-a17b-4ada-9078-6982539d44ac/2-The-Prosecutorial-Discretion.aspx>.

In relation to victim's rights, section 24(C) of the Public Prosecution Act 1994 (*Vic*) states that the Director must have regard to those rights. As indicated in Chapter 4, it is arguable that there will be more acknowledgement of victim's rights as a result of a Victorian Law Reform Commission recommendation which is similar to what has occurred in the United Kingdom (see 4.3.1.7. Judicial review for prosecutorial decision making).

In summary, the Victorian DPP can discontinue criminal matters if there is no reasonable prospect of gaining a conviction or if it is in the public interest to do so. The DPP must avoid taking into account improper considerations such as race, religion, sex, national origin or political association, or activities or beliefs of the offender, or any other person involved. In addition, the DPP must avoid taking any decision based on personal feelings concerning the offence, the offender or a victim. To do so would taint any decision as would making a decision with a view to any political advantage or disadvantage to the Government or any political group or part of a group. Within that framework, decisions should be effective and efficient without jeopardizing justice.

Setting criteria to discontinue criminal matters can be incorporated into Indonesian reforms. This will involve utilizing the two-stage rather than the one-stage evaluation system which most of the countries surveyed use (see 4.3.1.1. One stage-evaluation or two-stage evaluation system). Indonesia also needs to clearly write into its policy what are regarded as improper considerations in prosecution decision making in order to avoid any abuse of power, as has occurred in the Victorian DPP policy. In addition, the proposed Indonesian policy should include guidelines including that a prosecution can be discontinued if there is no likelihood of gaining a conviction or if it is in the public interest to do so. When it comes to making any decision to discontinue a prosecution based on the availability of resources or the amount of time taken, or on the grounds of efficiency, these guidelines should have a caveat that a prosecution should continue if justice requires it.

The delineation between the 'ordinary' prosecutorial decision to discontinue a criminal matter and the 'special decision' could also be considered when reforming the Indonesian system. It would be important to articulate in plain

language what are to be included as ‘special decisions’. The inclusion of bodies similar to those of the Director’s Committee in Victoria or the Board of the Prosecutor General in the Netherlands could be considered to enhance transparency and independence, equivalent to the DPP especially when an instruction (whether in an individual case or in general) emanates from the government (see 4.3.1.8. Transparency in Prosecution decisions). As previously indicated, the *Jaksa Agung* can ask for suggestions from other Indonesian institutions when making a decision to set aside criminal matters. However, arguably this process tends to lack transparency especially where there is a possible secret - but denied - instruction from the President. It has been previously argued in this thesis that any instruction from the President to the *Jaksa Agung* needs to be in writing and publicly available.

6.4 A discretionary prosecutorial model suitable for adaption to the Indonesian system

As indicated in Chapters 4 and 5, Indonesia is inevitably moving towards the DPS (Discretionary Prosecution System). This section discusses what model is suitable for any future Indonesian reform. Several models have been discussed and conclusions were made in Chapter 4 regarding each of them. As discussed in Chapter 5, there are a number of reasons why Indonesia should introduce a DPS:

1. For practical reasons, matters involving petty crimes and where the humanity principle applies should be considered for discontinuance or for out of court settlements;
2. Younger Indonesians in particular are more prone to accept modern ways of thinking;
3. The *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2, 2012) shows that a need for change is recognized and not all criminal matters need to be brought before the court;
4. The changing paradigm from the legality principle to the opportunity principle;
5. The changing paradigm from the crime control model to the due process model;

6. Section 140 (2) lacks relevance in the 21st century;
7. The accumulation of experience concerning how petty crime should be handled; and
8. The ineffectiveness of the prison system.

In addition, the Indonesian prosecution system needs to become more effective and efficient without jeopardizing justice, as occurred in the Netherlands and Germany, in order to rationalize and streamline their prosecution service, as was discussed specifically in Chapter 4 and more generally in Chapter 3. In those countries prosecutorial discretion has inevitably become part of the administration of justice. Furthermore, the move from a MPS to a DPS can be explained as part of the general convergence of legal systems as a direct result of internationalization.

The current criminal justice system in Indonesia is both inflexible and inefficient largely because section 140 (2) of the 1981 Criminal Procedure Law still follows the MPS. The Indonesian Supreme Court has tried to make the trial process shorter by issuing regulation *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2 years 2012).⁸⁹³ According to this regulation, long trials for insignificant criminal matters burden the court and waste the court budget, as well as adversely affecting the public perception to the judiciary.⁸⁹⁴ In general, this regulation concerns the proportionality of a maximum five year prison term for petty crimes such as stealing under 2.500.000 rupiahs (AUD 250). This regulation suggests that when the maximum penalty is three month's imprisonment a prosecutor should not put the accused in detention and continue with the prosecution. However, given the general acceptance of the legality principle in Indonesia and the fact that this regulation does not bind the prosecution service, arguably it will prove to be ineffective. It does however signal the need for change in Indonesia.

⁸⁹³ See *Perma nomor 2 tahun 2012* (Supreme Court regulation number 2 years 2012). (Copy of the document is available from the researcher if needed).

⁸⁹⁴ *Ibid.*

It is not clear why some of those who were interviewed argued that the reason for moving to a DPS is the changing paradigm from the crime control model to the due process model. Both models are discussed in 4.2.1.1. 'Packer Models and Prosecution systems'. It was indicated that the crime control model based system could benefit from the use of a higher degree of dispositional discretion at an early stage because it would make the system more effective and efficient. However, it should be noted that since its first reform (HIR to KUHAP) the Indonesian system has followed a hybrid system of both the crime control model and the due process model, as discussed in 4.2.1.1.

As previously indicated in this chapter, overcrowded prisons are a severe problem in Indonesia. Prison *alumnae* are seldom rehabilitated and as a result recidivism is common. This is the likely explanation why some interviewees argued that the Indonesian criminal justice system is ineffective. For this reason it is better to find other solutions. Moving to a DPS would seem to be a logical strategy as would a presumption of bail and passing bail decisions from investigators to the judiciary. As discussed in Chapter 4 (see 4.2.2.3. Conditional Disposal) a conditional disposal model could be used where prosecutors have discretion to decide the type and terms of suitable conditions. However, as stressed in Chapter 4, what are suitable conditions and how the state will react to them still needs further research which is beyond the scope of this thesis. Conditions used in the countries surveyed (see 4.2.2.3. Conditional Disposal) are further discussed later in the thesis.

As previously mentioned, the models for prosecution decision making include: the 'simple drop', the 'public interest drop', the 'conditional disposal'; the 'plea bargain', the 'penal order', and the 'negotiated case settlement'. Other models are beyond the scope of this research and this might become a limitation of this study.

As discussed in Chapter 4, the simple drop model is not an option for Indonesian reform because it is based on the MPS which is not strictly followed in most modern countries, even in Germany where it originated. The utilization of this model in Indonesia is arguably the main reason why the criminal justice system is inflexible. The reasons which are commonly used as part of the simple

drop model for discontinuing a criminal matter are based on the public interest drop and include: that the accused has died, has previously been convicted or acquitted on the same charge (double jeopardy), or the statute of limitations has expired. The rationale for discontinuing in such cases is arguably that it would be unfair to the accused or be a waste of court time and resources to pursue these matters. It is argued that any reform to the Indonesian system should include these reasons for discontinuance.

The current Indonesian proposed reform as discussed in Chapter 4 incorporated the public interest drop model. Based on the proposal, the main reasons for the public interest drop as indicated in section 42 (3) of the New Draft of the Indonesian Criminal Procedure Law are:

1. the crime is minor in nature;
2. the maximum sentence for the crime is four years;
3. the criminal sanction is a fine;
4. the suspect's age when the crime was committed was above seventy years;
and
5. the suspect has paid compensation.

As indicated in Chapter 4, these reasons are too narrow and lack flexibility, and need to be updated. The public interest considerations within the Indonesian New Draft of Criminal Procedure Law need to be ruled out from any proposed reform. It is argued rather that detailed criteria for assessing the 'public interest' should be included as published guidelines which are annually reviewed. Such guidelines would enhance flexibility and transparency. Furthermore, the conditions for release in the New Draft need to be expanded and explained by reference to published guidelines.

As discussed in Chapter 4 (4.2.2.3. Conditional Disposal), the current proposal within the Indonesian system suggests that the prosecutor can impose conditions when discontinuing prosecutions. However, the proposals do not stipulate in clear language the types of conditions which can be imposed. This thesis argues that conditional release can be beneficial and form part of any future reform and should be the subject of future research.

Plea bargaining is the next model. As indicated in Chapter 4 (Plea bargaining in civil law), plea bargaining is unknown within the current Indonesian system although it is explicitly followed in the current proposal for reform by adopting what is known as the *jalur khusus* (the special path). It is argued in this thesis that the *jalur khusus* through which a plea bargain between the prosecutor and the accused can occur needs to be ruled out because it is invisible and may produce injustice and result in further corruption in Indonesia.⁸⁹⁵ As an alternative, the penal order model could be used to shorten the criminal process, as discussed in 4.2.2.5. Penal Order. Two models of penal orders have been discussed in this regard (i.e. those with or without court involvement). It was stressed in 4.2.2.5. Penal Order that if the accused is dissatisfied with a penal order decision, a court adjudication should be available to reexamine the case by means of an appeal in order to protect the rights of the accused to defend themselves before an impartial court. As discussed in 4.2.2.5. Penal Order, it is acknowledged that in the Netherlands a penal order can be exercised for crimes which carry a statutory prison sentence of six years or less without court involvement. In order to decide the types of crimes which are suitable for penal orders and whether they need court involvement further research is needed, which is beyond the scope of this thesis. However, if the *jalur khusus* is chosen then it should acknowledge that a potential plea bargain between the accused and the prosecutor has occurred. As was discussed in Chapter 4, there are several ways of making plea bargaining within the *jalur khusus* more transparent and accountable. What is important is to ensure through the generation of policy guidelines that the innocent are not coerced into pleading guilty by the reward of more lenient sentences.

In summary, six models of prosecutorial decision making to discontinue criminal matters have been discussed – see particularly, Chapter 4 (see 4.2.2. Types of prosecution decision to discontinue criminal matters). Several models

⁸⁹⁵ See Mack and Anleu for a discussion about the disadvantages and advantages of plea bargaining in common law systems. The main critics of plea bargaining argue that it is invisible and can rely on inducements or coercion, which can produce unjust outcomes. The supporters of plea bargaining stress the usefulness and inevitability of plea bargaining in order to reduce court delays. Kathy Mack and Sharyn Roach Anleu, above 134.

were identified, any of which could be considered as part of the reform of Indonesian law. They are: the public interest drop, conditional disposal and the penal order. Reasons such as: the accused has died, has previously been convicted or acquitted on the same charge (double jeopardy) or the statute of limitations has expired are used when considering the public interest to discontinue cases. Both types of plea bargaining (with or without court involvement) are discussed in 4.2.2.4. Plea bargaining or negotiated case settlements are not favoured in this thesis because of the possibility of coercion inducing a guilty plea and because of the incentive to further corruption.

From this discussion several conclusions for Indonesian reform can be clearly drawn. They are:

- a. There should be policy which clearly states in writing that the prosecution decision whether or not to prosecute is based on a two-stage evaluation. They are ‘reasonable prospect of conviction’ and ‘public interest’, as argued in this chapter (see 6.2 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Australia);
- b. There must be published policy guidelines for what is known as ‘improper considerations’ in prosecutorial decision making;
- c. The public interest drop should be utilized;
- d. Conditional disposal as proposed in the current reform should be supported;
- e. What is considered as both the ‘public interest’ and the types of ‘state reaction’ in conditional disposals needs to be written and published in the form of guidelines which are annually reviewed; and
- f. Penal orders should be incorporated into the reforms because they involve a shorter process than that for the *Jalur Khusus* as was mentioned the New Draft of the Indonesian Criminal Procedure Law.

6.5 Independence and accountability of the Indonesian prosecutor

The research findings in Chapter 5 (see 5.8 Conclusion) show that the Indonesian prosecutor is not independent either individually or institutionally because:

1. of the existing *lembaga rentut*;
2. of the unity principle;
3. the prosecution is part of the government of the day;
4. the *Jaksa Agung* has the power to decide prosecutorial policy;
5. prosecutorial promotion is decided by senior prosecutors; and
6. of the endemic corruption problems in the prosecutorial body.

These findings can be explained by looking at the nature of the Indonesian Attorney-General's Office (*Kejaksaan Republik Indonesia*).

6.5.1 Indonesian Attorney-General (*Jaksa Agung*)

This section discusses who the *Jaksa Agung* is and what powers he or she has. The *Jaksa Agung* is appointed and dismissed by the Indonesian President. According to section 19 of the 2004 Prosecutorial Law, the requirements to become the *Jaksa Agung* are:

1. Indonesian citizenship;
2. Loyalty to *Pancasila* (Indonesian ideology) and the 1945 Indonesian Constitution;
3. A law degree;
4. Physical and mental health; and
5. Must be dignified, honest, impartial and of a high profile.

These requirements are limited, so the *Jaksa Agung* can be appointed from outside the Indonesian prosecutorial body. This has been criticized for two reasons: firstly, someone who comes from outside the prosecution system is likely to find it difficult to manage it because of lack of experience of doing prosecution business; and secondly, there is likely to be resistance from inside the organization because most of public prosecutors (*Jaksa*) have life experience in

prosecution business and therefore may see the outsider as an intruder. However, some argue that an outside candidate is needed in order to be able to reform the organization.⁸⁹⁶

The Indonesian prosecution system has been criticized as a corrupt body needing reform. Harlina citing *Kompas* an Indonesian newspaper mentioned that beside the police, the Indonesian prosecution body is the most untrusted institution because of endemic corruption.⁸⁹⁷ In Chapter 1 it was noted that the corruption is so endemic that it has been characterized as the judicial mafia of Indonesia (see 1.3.2 Indonesian *Mafia Peradilan*). When President Soeharto chose a candidate with a military background as the *Jaksa Agung* the impartial Indonesian Human Rights Monitor criticised this decision because it entrenched military power in a body which has as its head the Indonesian President who is the chief of the armed forces.⁸⁹⁸

The *Jaksa Agung* is thus clearly a political appointment. The *Jaksa Agung* has an equal status to a minister of the Government or incumbent and sits in cabinet.⁸⁹⁹ The *Jaksa Agung* is also directly answerable to the President.⁹⁰⁰ This means that the *Jaksa Agung* is politically dependent on the Government and can be easily politically influenced. Based on the decision of the Indonesian Constitutional Court No 49/PUU-VIII/2010⁹⁰¹, the tenure of the *Jaksa Agung* ends when the tenure of the President ends, or alternatively is terminated by the President in his or her tenure period. This ensures that the *Jaksa Agung* is

⁸⁹⁶ The impartial Indonesian Human Rights Monitor, *Jaksa Agung Sepantasnya non Karir dan Bukan dari Partai Politik* (*Jaksa Agung* should be appointed from outside the organisation and from outside political parties) (2010). <<http://www.imparsial.org/id/2010/jaksa-agung-sepantasnya-non-karier-dan-bukan-dari-partai-politik.html>>. (23 September 2010).

⁸⁹⁷ Indah Harlina, *Kedudukan dan Kewenangan Komisi Pemberantasan Korupsi dalam Penegakan Hukum* (Structures and Powers of Corruption Eradication Commission in The Legal Enforcement) (2008) Dissertation, Indonesia University, 21-22.

⁸⁹⁸ Impartial, the Indonesian Human Rights Monitor, *Jaksa Agung Sepantasnya non Karir dan Bukan dari Partai Politik* (*Jaksa Agung* should be appointed from outside the organisation and from outside political parties) (2010). <<http://www.imparsial.org/id/2010/jaksa-agung-sepantasnya-non-karier-dan-bukan-dari-partai-politik.html>>. (23 September 2010).

⁸⁹⁹ Ersyiwo Zaimaru, 'The role and Function of the Indonesian Prosecution Service in Criminal Justice', *Resource Material Series* No.53, 202.

⁹⁰⁰ Peraturan President Republik Indonesia Nomor 38 Tahun 2010 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (Section 1 (2) of the 2010 Presidential Regulation Number 38 about The Indonesian Prosecutor Organization)

⁹⁰¹ Indonesian Constitutional Court Decision No 49/PUU-VIII/2010.

dependent on the Government. Thus it cannot be said that the Indonesian prosecution body is independent even though, according to section 2 (2) of the 2004 Prosecutor Law, the *Kejaksaan* (the Public Attorney) performs prosecutions on behalf of the state and must perform those duties in an impartial manner and be independent of other influences.

As discussed in Chapter 4, it is common among civil law based countries that the prosecution service is controlled by the executive. The Indonesian prosecution service is in fact not independent and the public must be informed so that transparency is enhanced. Section 2 (2) of the 2004 Prosecutor Law is deceptive because it does not reflect reality. As a comparison, the Dutch prosecution service is not considered to be independent because the Minister of Justice is politically accountable for the policy of the prosecution service. Nevertheless, the Minister can be held to account in Parliament for intervening or failing to intervene in this policy.⁹⁰² As part of a move towards democracy in the Indonesian system, the *Jaksa Agung* can be questioned by the Indonesian Parliament (*Dewan Perwakilan Rakyat*) but he or she as a matter of law is only answerable to the Indonesian President.⁹⁰³

The powers of the *Jaksa Agung* are stated in section 35 of the 2004 Prosecutorial Law. As the top leader, the *Jaksa Agung* enacts and implements policy within the *Kejaksaan* by issuing *Peraturan Jaksa Agung* (*Jaksa Agung* circulars) which are intended to Standardize Operating Procedures (SOP) within the *Kejaksaan* (the Office of the Attorney-General). For example, in handling general criminal cases the *Jaksa Agung* has created circular *Peraturan Jaksa Agung Republik Indonesia Nomor: PER-036/A/JA/09/2011* (*Jaksa Agung* circular Number: PER-036/A/JA/09/2011). This circular provides specific and technical information for all prosecutors so they can understand prosecution policy; for example, according to section 13 of *Peraturan Jaksa Agung Republik Indonesia Nomor: PER-036/A/JA/09/2011*, a prosecutor who prosecutes criminal matters

⁹⁰² Peter J. P. Tak, above n 164, 51.

⁹⁰³ Peraturan Presiden Republik Indonesia Nomor 38 Tahun 2010 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (Section 1 (2) of the 2010 Presidential Regulation Number 38 about The Indonesian Prosecutor Organization)

can be one prosecutor or a member of a team of prosecutors. Each prosecutor or team of prosecutors exercises powers to prosecute criminal matters based on a formal letter that is known as a *Surat Perintah Penunjukan Jaksa* (Letter of order to appoint *Jaksa*). The appointed prosecutor or prosecutors then have duties to exercise their powers according to the *1981 Criminal Procedure Law*, which makes a communication with an investigator with regard to the handling of evidence and of a detainee, and makes a report as to whether a case can be prosecuted at trial. There are other *Peraturan Jaksa Agung* which function as guidelines for prosecutors in exercising their powers. The *Jaksa Agung* controls almost all technical aspects of the prosecution through these circulars. However, they are not published.

6.5.2 Structure of *Kejaksaan*

The main Indonesian prosecution service is the *Kejaksaan Republik Indonesia* (the Office of the Attorney-General) and is a government body.⁹⁰⁴ The Indonesian prosecution service is hierarchical in nature and is divided into the *Kejaksaan Agung* (the Attorney-General's Office), the *Kejaksaan Tinggi* (the Provincial Attorney-General's Office), and the *Kejaksaan Negeri* (the District Attorney-General's Office). All three make up a nation-wide organization. The *Kejaksaan Agung* office is located in Jakarta and is headed by *Jaksa Agung* (the Attorney-General).

There are thirty-one *Kejaksaan Tinggi* located in the Indonesian provinces. At the lowest level, there are three hundred and ninety eight *Kejaksaan Negeri* and eighty-four *Cabang Kejaksaan Negeri* (the Sub-District Attorney-General's Office). The *Cabang Kejaksaan Negeri* exists because there are special conditions based on geographic and demographic factors or the heavy workload of the services.⁹⁰⁵ According to the 2011 Annual Report of *Kejaksaan RI*, the offices are 'all charged with exercising the prosecutorial power of the state, and all form part

⁹⁰⁴ In special cases such as corruption matters, the *Komisi Pemberantasan Korupsi* (Corruption Eradication Commission) prosecutes the matter after careful investigation.

⁹⁰⁵ See section 7 *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

of and constitute an integral and inseparable entity.⁹⁰⁶ This is sometimes referred to as the principle of indivisibility or what is known as the *een en ondeelbaar* within *Kejaksaan Republik Indonesia* (the Office of the Attorney-General) as discussed in Chapter 4 (see 4.2.2.1 Simple drop). As also discussed in Chapter 4 (see 4.3.1.5.Senior supervision), senior supervision over prosecution decision making exist hierarchically in the sense that no official decision is merely an individual one. Every prosecution decision including whether to continue or discontinue cases or the specific criminal charges and indicated sentences in the indictment must be discussed with the *Lembaga Rencana Tuntutan/Lembaga Rentut* (Prosecutor Advisory Body). This body is used by a senior prosecutor to supervise prosecutor decision making. In this sense arguably an individual prosecutor never makes a prosecution decision because that decision is controlled by the senior prosecutor.

The Deputy of the *Jaksa Agung* and several younger *Jaksa Agung* (*Jaksa Agung Muda* hereafter “JAM”) support the *Jaksa Agung* in running every day business.⁹⁰⁷ There are six JAM officers in the Attorney-General’s Office: JAM *Pembinaan* (Internal Matters), JAM *Intelijen* (Secret Service), JAM *Tindak Pidana Umum* (General Criminal Law), JAM *Tindak Pidana Khusus* (Special Criminal Law), JAM *Perdata dan Tata Usaha Negara* (Civil and Administrative matters), and JAM *Pengawasan* (Monitoring). There is one office for Education and Training which also supports the Attorney-General’s Office. Prosecutions for general criminal law offences and specific criminal law offences are handled by the JAM *Tindak Pidana Umum* and the JAM *Tindak Pidana Khusus* which is also within the Office of the Attorney-General. See the structure of the Office of the Attorney-General below.⁹⁰⁸

⁹⁰⁶ Public Prosecution Service of the Republic of Indonesia, *Annual Report 2011*, 6.

⁹⁰⁷ Section 18 *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No16 of 2004 on Prosecutorial) (Indonesia) (‘2004 Prosecutorial Law’).

⁹⁰⁸ Attached document Peraturan Jaksa Agung Republik Indonesia Nomor: PER-009/A/JA/01/2011 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (Number III on the Jaksa Agung circular PER-009/A/JA/01/2011 about the Indonesian Prosecutor Organization)

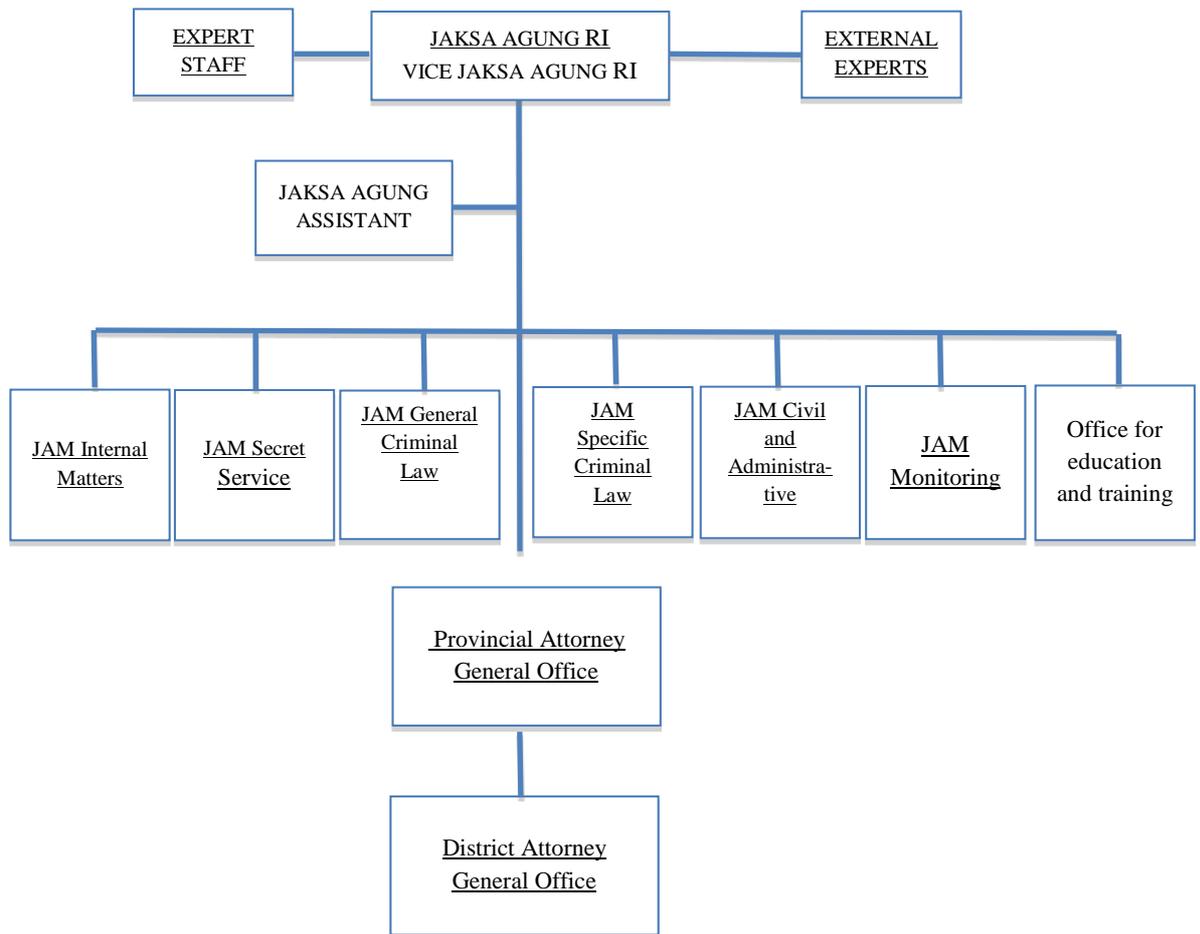


Figure 6.1 Structure of the Office of the Attorney-General

6.5.3 Recruitment

There are two actors who are responsible for appointing the Indonesian prosecutor - the Indonesian President and the *Jaksa Agung* (the Attorney-General). All of the highest positions such as the *Jaksa Agung* and JAM members are appointed by the Indonesian President although those of a lower level are appointed by the *Jaksa*

Agung.⁹⁰⁹ As previously mentioned, the *Jaksa Agung* is answerable directly to the President. In Victoria Australia, the DPP is appointed by the Governor according to the Constitution Act 1975(Vic) section 87AB(1). After the appointment, the DPP is independent of the government and the Governor. The Governor cannot easily remove the DPP because the grounds of the suspension must be laid before each of the two Houses of Parliament.⁹¹⁰ Once the DPP is appointed for an initial ten year period, his or her status is equal to that of a Supreme Court judge.⁹¹¹

The President can at any time remove the *Jaksa Agung* and all his or her elites as he wishes without providing any cause. The *Jaksa Agung* can easily replace a disobedient *Jaksa Penuntut Umum* (Prosecutor) because the prosecution process is based on the unity principle (*een ondeelbaar*). According to supplementary documents to the 2004 Prosecutor Law, the unity principle is used to replace any prosecutor when he or she has fails to perform his or her duties.⁹¹²

6.5.4 Promotion

In Australia, the DPP is the highest office-holder of prosecution business but he or she can be promoted to the Supreme Court as a judge of that court after the end of the tenure period. It could be argued that the Government of the day could influence the DPP by offering a position on the Supreme Court. However, most successful DPP's become Supreme Court judges because they have demonstrated their capacity for ethical and professional independence of thought and practice.

The situation is different in Indonesia where appointment and promotion of Indonesian prosecutors is structured according to presidential regulation where the President is the ultimate controller of all Indonesian prosecutors. This structure ensures the dependence of the *Kejaksaan* (the Attorney-General's Office) on the Indonesian President.

⁹⁰⁹ See section 8, 23, 24 and 28 *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) ('2004 Prosecutorial Law').

⁹¹⁰ Constitution Act 1975 (Vic) s 87 AE.

⁹¹¹ Constitution Act 1975 (Vic) s 87 AC.

⁹¹² See supplementary document section 1 (3) *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (2004 Prosecutorial Law).

6.5.5 Enhancing transparency within Indonesian prosecution decision making

As discussed in Chapter 4, most of prosecution services in surveyed countries are controlled by their respective executives. As a result, political influence can easily enter into prosecution decision making. It was stressed in Chapter 4 (see 4.3.1.8. Transparency in Prosecution decisions) that prosecutorial discretion should be exercised independently and freely from political influence. Therefore, if Indonesian prosecutors are to be given discretion to discontinue criminal matters the prosecution service needs to be granted independence and its actions become transparent. If, on the other hand, the Indonesian prosecution service continues to be controlled by the President then it is suggested that any instruction from the President especially in regard to individual cases must be in writing. This will enhance transparency in prosecutorial decision making because secret instructions will be prohibited and come to be considered as a form of corrupt practice. If possible, a body similar to the Board of the Prosecutor General in the Netherlands should be implemented at a national level in Indonesia and have to provide an annual review of prosecution decision-making policy. This body could form a forum so that members of the Board and the executive (the President or his or her representatives) could discuss general and specific prosecution decision-making policy. The members of the Board could include very senior prosecutors, legal academics and other senior professionals such as senior lawyers. Such a Board could canvass opinions or suggestions when specific Presidential instructions exist. At a provincial level, a similar body to the DPP's committee in Victoria Australia could assist the *Kajari* (The District Attorney-General's Office) in deciding what might be included in any special decision in prosecution decision making.

In Australia, lessons have been learnt as to how to avoid prosecutorial corruption⁹¹³ However, not all those lessons are applicable to the Indonesian situation because Indonesia does not have a DPP or equivalent. Providing a similar body in Indonesia would entail further comprehensive research. However several general lessons could enhance the independence and accountability of the Indonesian prosecution service. They include:

1. Mechanisms for avoiding improper political influence should be established. In this regard, any political influence from the executive should be prohibited. However, if it remains, then it should be in writing and publicly available;
2. Prosecutor decision making should be controlled by ensuring that discretionary decisions are only made at the highest level in the prosecution service;
3. There should be an appeals system available to individuals who are affected by prosecutorial decision making, especially where the decision is to discontinue a criminal matter. In this regard, victims of crimes should have input into any proposed discontinuance;
4. A strong and ethical legal profession should be promoted and encouraged; and
5. Other monitoring mechanisms such as the office of Ombudsman should be created and fostered.

⁹¹³ They are:

1. The independence of the DPP, particularly from improper political interference;
2. The status of the DPP as equal to that of a Supreme Court judge enhances independence;
3. Assiduous care in the selection of the DPP from the most eminent ranks of the legal profession;
4. Structural control over prosecutorial discretionary decisions to discontinue criminal matters so that the final decision rests with those of the rank of DPP;
5. The role of a strong and ethical legal profession and other monitoring mechanisms such as the office of Ombudsman;
6. Treating the exercise of discretion as an important exercise of power to be given to only office bearers of the rank of DPP; and
7. An appeals court system.

6.6 Impediments to granting Indonesian prosecutors discretion to discontinue criminal matters

This issue was raised by the fifth research question. The research findings are interesting. The Draft of the Criminal Procedure law includes a discretionary model to discontinue criminal matters. Several impediments had been identified by interviewees including:

1. The general public has no knowledge of a system which uses discretion;
2. There was concern about the quality of human resources available in the prosecution system;
3. There was concern that discretion exercised by those who are untrained can lead to abuse of power and corruption;
4. Where discretion is exercised by untrained prosecutors it can lead to disparity, where similar cases are dealt with differently;
5. There is interesting observation concerning cultural impediments in that that the retention of the MPS favours punishment over rehabilitation; and
6. Finally, there is the difficulty of motivating parliament to bring about the change.

The fifth research question classified impediments concerning a move to prosecutorial discretion based on social, cultural, political, economic, or legal factors. The following section discusses those factors and their duration.

6.6.1 Social or cultural impediments

A significant identified impediment was that the general public has no knowledge of a system that uses prosecutorial discretion. As discussed in Chapter 4, the current Indonesian prosecution system is based on the MPS which has been used since independence 50 years ago. Prosecutorial discretion in this system is strictly limited. The only experience in exercising discretion to set aside criminal matters is exercised by the *Jaksa Agung* (the Indonesian Attorney-General) with the associated controversy, as discussed in section 6.1 particularly in the *Bibit-Candra* cases (top leaders of the KPK).

Another cultural impediment which was identified during interviews was that the MPS favours punishment over rehabilitation. Some may believe that punishing the wrong doer, particularly through incarceration, is the only way of restoring public order without understanding that the sentencing process has multiple aims including deterrence and rehabilitation. Jail may not always be a good solution for either the offender or society at large. The escalation of recidivism is one of the examples of this problem. Both specific and general deterrence and rehabilitation need to be considered when determining what specific state sanction should to be imposed. In the final analysis, the public must have confidence that the administration of justice will be conducted fairly and impartially. The public will have difficulty in trusting the prosecutor if they do not know anything about the process, the reasoning or the factors which may influence prosecutor decisions. As mentioned in Chapter 4 (see 4.2.3.3. Accountability in prosecutorial decision making) in discussing the DPP policy, ‘Justice must not only be done, but must be seen to be done’.

6.6.2 Political impediments

The difficulty of motivating parliament to bring about change might be considered as a political issue and as the main impediment to reforming the criminal procedure law in Indonesia. There are those who want to preserve the *status quo* and there are those who resist change because they do not want to lose or reduce their power. On the other hand, it is evident from the fact that Indonesia has a Draft Procedure Law that some groups see that proposal as beneficial to them and to Indonesia. As a result, the parliamentary forum becomes a battle between these competing interests with those who want to preserve the *status quo* at present holding the balance of power and resisting the full implementation of the Draft Procedure Law.

6.6.3 Economic and legal impediments

It is interesting that none of the interviewees considered the economic implications of a move to a DPS. Arguably such a system can have indirect

economic benefits because it can produce a more rational and flexible justice system, as mentioned by Jallow:

Its (the DPS) necessity springs from the practical need for a selective, rather than an automatic approach to the institution of criminal proceedings, thus avoiding the over-burdening and perhaps clogging of the machinery of justice.

Discretion is essential to the operation of any system of criminal justice for, without it, the system would grind to a halt – it would be paralysed and would lack any flexibility or ability to adapt to particular circumstances.

Similarly, with an emphasis on resource implications and individual justice, Crase asserts that discretion is a necessary and effective aspect of any criminal justice system because:

Prosecutors are better suited to adapt the criminal law to new circumstances given that it will not always be possible to formulate statutes specific enough or adapt the statutes quickly enough to meet changes in public attitudes;

Discretion is needed to limit the number of prosecutions because of limited resources available to the government, both in terms of time and money; and

Discretion in prosecution is necessary to achieve the individualized justice so valued in our criminal justice system.⁹¹⁴

However, interviewees identified two impediments to the introduction of a DPS into Indonesia; they are: that if it was introduced without the necessary training for prosecutors then it might lead to further corruption and a disparity between decisions to discontinue criminal matters.

Prosecutors, or any other administrative officers who exercise discretion, must be well equipped, with sufficient knowledge of when and how to exercise discretion. Without such knowledge and training abuse of power and corruption could flourish. As indicated in Chapter 1, the main concern in giving discretion to prosecutors is corruption, which is still a major problem in Indonesia especially with regard to the judicial mafia and is a serious matter which needs to be handled with extraordinary measures. The Indonesian system sees corruption as an extraordinary crime which needs to be handled extraordinarily. As indicated in Chapter 1, countries which have special anti-corruption bodies like the KPK acknowledge that their corruption problem is very serious. The Indonesian KPK must be supported to reduce corruption cases. Only the KPK successfully brings

⁹¹⁴ Brandon K. Crase, 'When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion' (2007), *The Georgetown Journal of Legal Ethics* 475, 481.

high profile cases (high level police officers, high level prosecutors, very senior judges, politicians, and other government high level decision makers, including Ministers). As discretion potentially can be used as corrupt practice, sufficient knowledge for prosecutors before exercising discretion is important. Thus training for prosecutors is important before giving them discretion. For this a substantial budget would be required because in Indonesia there are 9481 prosecutors, comprising 6713 males and 2768 females.⁹¹⁵ Training in the exercise of discretion should also become part of undergraduate legal training in Law Schools. Convincing the government to allocate funds for such widespread training may prove difficult.

6.6.4 Short-term suggestions

It is suggested that to avoid social, political, cultural and legal impediments the Indonesian prosecution services need to become more accessible and transparent to the public. To achieve this end, prosecutorial guidelines and other policies must be published and accessible to the general public, both in hard copy and electronic form.

Since government resources are limited, it is suggested that the economic advantages of a DPS be stressed and used to encourage the government (the executive) and the parliament to create a meeting of experts to discuss prosecutorial discretion in one forum and to make recommendations. This might also be a solution for overcoming the political impediment for changing the system. It is possible that the recommendations may be rejected by the opponents, but both the recommendations and the reasons for the rejection can be used for further research.

To reduce possible corruption, this study suggests that prosecutorial discretion needs to be confined, structured and reviewed in order to enhance accountability and transparency and for *mafia peradilan* (judicial mafia) corruption within the Indonesian system to be addressed. As discussed in Chapters 1 and 3, corruption undermines the rule of law.

⁹¹⁵ According to the Attorney-General's Office Republic of Indonesia, *Annual Report 2014*.

6.6.5 Long-term suggestions

It is suggested that the Indonesian people need to be systematically informed about any move from the MPS to the DPS. This can be achieved by national media campaigns and educational seminars run by each District Attorney-General's Office and the legal profession and by encouraging experts in prosecutorial discretion to visit Indonesia and run seminars.

6.7 Conclusion

Several conclusions have been made in this chapter including:

1. Since the Indonesia system follows the MPS, ordinary prosecutors have limited discretionary power. They exercise discretion when considering the sufficiency of evidence and in deciding whether the issue is either civil or criminal. But such discretion is rarely exercised. In contrast, the Indonesian *Jaksa Agung* can exercise prosecutorial discretion to set aside criminal matters based on unclear guidance as to what is in the public interest. It is suggested that Indonesia needs published guidelines for what is considered to be in the 'public interest' when discontinuing criminal matters. As discussed in Chapter 4, the published guidelines which set out the criteria for the public interest should be proportional. The guidelines should not be too broad or too narrow. In order to enhance transparency, all Presidential instructions to prosecutors should henceforth be in writing and available to the public;
2. As a matter of formulation of public interest considerations in the decision whether or not to prosecute, either negative or positive formulations are supported;
3. There are two circumstances under which the Victorian DPP may discontinue criminal matters. These are where there is no 'reasonable prospect of conviction' and where it is in the 'public interest' to do so. As part of the DPP's published policy, 'improper considerations' in prosecution decision making are stressed. These include where a

decision is based on race, religion, sex, national origin or political association, the activities or beliefs of the offender or any other person involved, or the prosecutor's personal feelings concerning the offence, the offender or a victim, or where there is a possible political advantage or disadvantage to the Government or any political group; Furthermore, effective and efficient prosecution decisions without jeopardizing justice also become important considerations;

4. Setting criteria to discontinue criminal matters like those used in Victoria Australia can be useful for the reform of the Indonesian prosecution system. This means utilizing a two-stage evaluation system in prosecution decision making instead of a one-stage evaluation system which most of the countries surveyed use (see 4.3.1.1. One stage evaluation or two stage evaluation system). The Indonesian system also needs to clearly articulate and publish its prosecutorial policy including what considerations should be taken into account when prosecutors exercise their discretion to discontinue criminal matters. Doing this should avoid any abuse of power as occurs with the Victorian DPP policy and guidelines. Achieving an effective and efficient prosecution service without jeopardizing justice should become the focus for Indonesian reform where only those cases which will probably result in a conviction or where the public interest mandates it be pursued. The amount of time taken pursuing the prosecution and the availability of resources should be considered but not if justice demands that the prosecution continue;
5. Dividing between ordinary prosecutorial decisions to discontinue criminal matters and special decision for discontinuance can also be used as a model for reform. In this regard, the Indonesian system would need to spell out the criteria for establishing what amounts to special considerations to discontinue criminal matters. Both the DPP's Committee in Victoria and the Board of Prosecutors General in the Netherlands could be used as models for reform when instructions

(whether in an individual case or in general) come from the government. These models enhance transparency;

6. All instructions from the President to the *Jaksa Agung* need to be in writing and available for public scrutiny;
7. Several suggestions for reforming the Indonesian MPS can be made.
 - (1) There should be a published policy that clearly states that any prosecution decision about whether or not to prosecute is to be based on a two-stage evaluation process; that is, that there must be a ‘reasonable prospect of conviction’ and the prosecution must be in the ‘public interest’.
 - (2) The published policy must list the ‘improper considerations’ which must not be taken into account in prosecution decision making.
 - (3) The public interest drop should be used as an inevitable part of discretion in prosecutorial decision making.
 - (4) Conditional disposal as proposed by the current Indonesian reforms is supported.
 - (5) Both what are considered as being in the ‘public interest’ and the types of ‘state reaction’ in conditional disposal need to be included as part of the published guidelines which should be annually reviewed
 - (6). Penal orders are a recommended part of any reform in Indonesia because they are shorter than the *Jalur Khusus* which is mentioned in the New Draft of the Indonesian Criminal Procedure Law;
8. A similar body to the Board of Prosecutors General in the Netherlands should be created at a national level to annually review prosecution decision-making policy. This body can become a forum in which the members of the Board and the executive (the President or his or her representative) can discuss general and specific prosecution decision-making policy. The members of the Board should be very senior prosecutors, legal academics and other senior professionals such as senior lawyers. The Board could also be used for providing opinions or suggestions when any President’s instructions exist;
9. At a provincial level, a similar body to the DPP’s Committee in Victoria Australia could be created to assist the *Kajari* (The District

Attorney-General's Office) to decide what might be included as special decisions in prosecution decision making;

10. Mechanisms to avoid improper political influence should be instituted. In this regard, any political influence from the executive should be prohibited. However if that is not the case then any instruction from that source should have to be made in writing;
11. Prosecutor decision making should be controlled by treating discretionary decisions as a high-level decision-making process;
12. An appeals system for individuals who are adversely affected by any prosecution decision, especially a decision to discontinue a criminal matter, should be available. In this regard, special attention needs to be given to victims of crime;
13. The role of a strong and ethical legal profession and other monitoring mechanisms such as the office of the Ombudsman and anti-corruption bodies needs to be enhanced;
14. Social, cultural, political, economic, or legal impediments were explained in sections 6.5.1 Social or cultural impediment, 6.5.2 Political impediment and 6.5.3 Economic and law impediments;
15. Short-term suggestions to remedy the impediments in 14 above include: (1) It is suggested that from a social and cultural perspective the Indonesian prosecution services need to be transparent and accessible to the public. All guidelines and other policies must be published and accessible to the public; (2) With regard to any political impediment, it is suggested that both the government (the executive) and the parliament create a committee of experts who should meet to discuss prosecutorial discretion in a forum as well as make further recommendations for reform. It is possible that the recommendations may be rejected by opponents but both the recommendations and any rejection could be used as a basis for further research; (3) There are economic and legal impediments in the current Indonesian legal system. Economic impediments could be minimized by ensuring that anti-corruption agencies exercise the full force of the law. Legal

impediments can be minimized by ensuring that law students and practicing lawyers including prosecutors are strained in the exercise of discretion. To reduce possible corruption, this study suggests that prosecutorial discretion needs to be confined, structured and reviewed, to enhance accountability and transparency; and

16. From a long term perspective the Indonesian people need to be informed about any move towards a DPS by active socialization that is promoted and held in each District Attorney-General's Office, by a continuing and active educational process using the national media and the school system, and by the promotion of active discussion among the professions and academics.

Chapter 7

Conclusion

7.1 Introduction

This thesis set out to answer the question whether or not the Indonesian criminal justice system could be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia. The thesis argues that this could be done in Indonesia provided it moves to eliminate corruption and that the discretion is limited, confined, structured, and reviewable, to enhance both transparency and accountability.

Chapter 1 described how corruption remains a major problem within the Indonesian system. It is openly acknowledged in the legal profession that *Peradilan* mafia-like elements currently control court decisions through the various law enforcement institutions, including the *Polri* (the investigation institution) the *Kejaksaan* (the prosecution) and the *Pengadilan* (the judiciary). Adding to or widening prosecutorial discretion to discontinue criminal matters might exacerbate this *Mafia peradilan* problem within the Indonesian system unless corruption is addressed. The most trusted body to combat this problem is the Indonesian Corruption Eradication Commission (the *Komisi Pemberantasan Korupsi/KPK*). Most of the high profile corruption cases to date involve very senior police officers, prosecutors, famous lawyers and judges and, as a result of the work of the *KPK*, many have been prosecuted. The work of the *KPK* in this regard must be supported and its independence from government accepted and enhanced.

It is true that most civil law countries reviewed in this study utilize a more discretionary model and have largely abandoned the MPS, as described in Chapter 4. This move has been made partly because they abandoned a more extravagant version of the rule of law or the principle of strict adherence to legality in the *rechtsstaat* to provide more room for the utilization of discretion. This has been partly driven by the development of the regulatory state which created and

enlarged discretion to better enable bureaucrats and technocrats to co-ordinate more complex and integrated social, economic and political systems including the prosecution decision-making bureaucracy, as discussed in Chapter 3. Another explanation is the convergence of legal systems, as explained in Chapter 4, so that discretion in prosecution decision making has now come to be used in most civil law countries to rationalize their bureaucracies to better achieve justice.

Indonesia as a civil law country has been impacted by this global convergence and prosecutorial discretion to discontinue criminal matters. It has formed part of the proposed reform in the New Draft of the Criminal Procedure Law. Arguably increasing discretion may result in a serious threat to the Indonesian rule of law because of endemic corruption. Hence, the prosecutorial discretionary model to discontinue criminal matters within the New Draft of Criminal Procedure Law needs to be confined, structured and subject to review to enhance both transparency and accountability. To achieve this end several suggestions have been made in this thesis. Publishing guidelines that consist of criteria and factors which need to be considered when exercising discretion, as in both in the Netherlands and in Victoria Australia is strongly recommended. The policy document needs to clearly state that the exercise of discretion must consist of a two-stage evaluation process (i.e. the sufficiency of evidence test and the public interest test) and must be reviewed annually. As discussed in Chapter 4, prosecutorial discretion needs to be exercised by a prosecutorial service which must be independent and free from political influence or interference. This necessarily means a complete separation between the Indonesian President (the executive) and the prosecution service. This kind of model has been implemented in Victoria (Australia) by making the Office of the Director of Public Prosecutions a separate prosecution service which is independent of government. Alternatively, if the Indonesian President (i.e. the executive) is to retain the power to control the Indonesian prosecution service as occurs in all civil law countries surveyed, then the Indonesian system needs to ensure that any instructions or orders from the President are in written form, contain reasons and are publicly available for scrutiny. This should enhance transparency and limit unscrupulous political interference in the prosecution service. Furthermore, a similar body like

the Director's Committee in Victoria which assists the DPP and the Board of Prosecutors General in the Netherlands could be considered as an addendum to further enhance transparency within the Indonesian criminal justice system.

The following section summarises the answers to the research questions posed as part of this thesis and draws conclusions.

7.2. Conclusions and suggestions

Five subsidiary questions were considered in order to answer the overarching research question, 'Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia'? These questions are addressed here sequentially.

1. To what extent does Indonesian law confer discretion for a prosecutor to discontinue criminal matters, and what factors, if any, are taken into account when exercising that discretion?

As far as the first subsidiary question is concerned, a limited discretion to discontinue criminal matters is currently exercised by ordinary prosecutors when considering the sufficiency of evidence and in deciding whether the issue is either a civil or criminal matter (see 6.1 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Indonesia). By contrast, a broad discretion is exercised by the Indonesian *Jaksa Agung* (see 4.3.1.9. Public Interest in surveyed countries) to set aside criminal matters when exercising the *asas oportunitas* (the opportunity principle) or the *deponeering/seponeering*, because the Indonesian system lacks a clear public interest criterion (see 5.1 Decision to discontinue criminal matters in Indonesia).

2. To what extent does law in Victoria, Australia confer the discretion for prosecutors to discontinue criminal matters, and what factors, if any, are taken into account when exercising that discretion?

In relation to the second subsidiary research question, this thesis has shown that the 'reasonable prospect of conviction' test and the 'public interest' test (as part of two-stage evaluation in prosecutorial decision making to discontinue criminal matters) are used in Victoria Australia (see 5.5 The decision to discontinue criminal matters by the DPP in Australia). The Victorian DPP

policy also provides guidelines for assessing whether improper considerations in prosecutorial decision making have been taken into account. These include decisions based on race, religion, sex, national origin or political association, the activities or beliefs of the offender or any other person involved, or the prosecutor's personal feelings concerning the offence, the offender or a victim, or where there is a possible political advantage or disadvantage to the Government or any political group. Furthermore, effective and efficient prosecution decision making without jeopardizing justice has become an important consideration in applying this policy (see 6.2 Circumstances and considerations for exercising prosecutorial discretion to discontinue criminal matters in Australia).

3. What features of discretionary prosecutorial models are suitable for adaption to the Indonesia mandatory prosecutorial model?

In relation to the third research question, specific features of the Discretionary Prosecution System were identified. Firstly, this system places emphasis on a two-stage evaluation process in prosecution decision making (see Table 4.1 Brief summary of discretion to prosecute in surveyed countries and Table 4.2 Structure prosecution service). Secondly, the discretionary power should be exercised by an independent prosecution service (4.3.1.8. Transparency in Prosecution decisions) (see also 6.4.5 Enhancing transparency within Indonesian prosecution decision making). Ideally, political influence in prosecutorial decision making must be avoided. However, if political influence is allowed then mechanisms to enhance transparency need to be implemented to minimize inappropriate political influence. Instructions or orders must be in written form, contain reasons and be publicly available (4.2.3.4. Independence and accountability in prosecutorial decision making in Indonesia). The creation of a special body to assist when special considerations come into play or when executive instruction exists might further enhance transparency (see 6.4.5 Enhancing transparency within Indonesian prosecution decision making). Suggestions are made below in respect of a special body in the Indonesian context.

Thirdly, published guidelines to assist in prosecutorial decision making which are reviewed annually are preferred to unpublished guidelines (see 4.3.1.3.

Confine and structure prosecutorial discretion using guidelines), because published guidelines can be used by all parties when determining whether prosecutorial discretion has been appropriately exercised. In addition, if this model of prosecution decision making is adopted in Indonesia then decisions to discontinue criminal matters under the proposed new Indonesian criminal procedure law can be assessed to test their fairness to all parties. The public interest drop and conditional disposal are common to most models of prosecution decision making to discontinue criminal matters (see 4.2.2.2. Public interest drop and 4.2.2.3. Conditional disposal). Plea bargaining, which might occur when implementing the *Jalur Khusus* model (Special Path model) within the proposed reform, also uses a discretionary system (4.2.2.4.2. Plea-bargaining in civil law). However, penal orders are preferable to the *Jalur Khusus* model because of their shorter duration (see 4.2.2.5. Penal Order and 6.3 A discretionary prosecutorial model which is suitable for adaptation to the Indonesia system), as explained by Luna and Wade:

... a penal order is requested by the prosecution through a standardized application form containing a brief summary and a suggested punishment, accompanied the government's case file. Based upon the written information, the court either accepts the prosecution's request or rejects it outright, with the latter triggering the traditional process and a full trial.⁹¹⁶

4. What procedures, including legislative changes, would need to be implemented in Indonesia to ensure that a discretionary prosecutorial model enhances both the independence and accountability of prosecutors and mitigates against arbitrary decision making?

The answers to subsidiary questions 1, 2 and 3 have indicated the need for limiting discretion to discontinue a criminal matter and enhancing both the independence and accountability of the prosecutor. As far the fourth research question is concerned, mechanisms to avoid improper political influence should be instituted. In this regard, any political influence from the executive should be prohibited. However, if that is not possible then any instructions should be made in writing, contain reasons and be publicly available as mentioned in the previous

⁹¹⁶ Erik Luna and Marianne Wade, above n 513, 1449.

conclusion. This means that legislative change needs to be proposed to the current *2004 Prosecutorial Law*⁹¹⁷ to prohibit political influence from the executive (the President) or if that is not possible then any instruction must be in written form and publicly available. There should be a section within the proposed amendment which stresses that prosecution decision making should be enhanced by treating discretionary decision making as a high-level decision-making process (6.4.5 Enhancing transparency within Indonesian prosecution decision making). An appeals system for individuals who are adversely affected by any prosecution decision, especially a decision to discontinue a criminal matter, should be available, and special attention needs to be given to victims of crime. The current review system for victims within the Indonesian system known as *Praperadilan* (pre-trial) needs to be supported, as it also exists in the German system known as *Klageerzwingungsverfahren* (an appeal court). Moreover, the role of a strong and ethical legal profession in Indonesia and other monitoring mechanisms such as the office of the Ombudsman, the *Komisi Kejaksaan* (Prosecutor Commission) and the anti-corruption body need to be enhanced and their jurisdiction expanded to cover all Indonesian provinces (see 1.3.3 Cause of Indonesian corruption problems, 3.2.5.9 Anti-Corruption Body and Freedom of Information law, and 6.4.5 Enhancing transparency within Indonesian prosecution decision making).

5. What factors, including social, cultural, political, economic, or legal, may act as an impediment to any changes to prosecutorial discretion in Indonesia and how could those impediments be dealt with?

In relation to the fifth research question, the proposed change to a more discretionary model within the Indonesian system might face social, cultural, political, economic, and legal impediments. Short and long term suggestions were offered in Chapter 6 to address the impediments which were found in this research.

Social-cultural impediments are one concern (see 6.5.1 Social or cultural impediments). The general public has no knowledge of a system that uses

⁹¹⁷ *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (2004 Prosecutorial Law).

prosecutorial discretion because the Mandatory Prosecution System has been used since independence and was also used by the Dutch colonial administration. Culturally, some may believe that punishing the wrong doer, particularly through incarceration, is the only way of restoring public order without understanding that the sentencing process has multiple aims including deterrence and rehabilitation. Community education programs seem to be needed in this context. Moreover, the Indonesian people still perceive *Jaksa* (prosecutors) as corruptible and also perceive that there are corruption problems within *Kejaksaan* (the Indonesian Attorney-General's Office). These beliefs need to be addressed by the President supporting and funding anti-corruption mechanisms in Indonesia.

Political impediments (6.5.2 Political impediments) might become a serious barrier to changing the Indonesian system. There are those who want to preserve the *status quo* and those who resist change because they do not want to lose or reduce their power. Several suggestions have been made including the adoption of overseas models, but it will be difficult to successfully transplant these models without political support. This politico-legal issue, especially in the areas of criminal procedure and judicial institutions, need to be addressed, as discussed in Chapter 2 (see 2.4 Possible legal transplant).

The last identified impediment for changing the system is the 'economic and legal impediment' (6.5.3 Economic and legal impediment). It was found that training for prosecutors in implementing proper discretionary decision making will require a significant budget increase. There are 9481 prosecutors across all Indonesian jurisdictions. However this should not be exaggerated because a discretionary prosecution system may have economic advantages such as savings in terms of human resources, time and money.

Suggestions for dealing with the impediments identified above have been made. In order to avoid social, cultural and legal impediments, the Indonesian prosecution service needs in the short term to be made more accessible and transparent to the public. Since government resources are limited, it is suggested that the economic advantages of a DPS be stressed and used to encourage the government (the executive) and the parliament to convene a meeting of experts to discuss prosecutorial discretion and which would be designed to make

recommendations for change. Such a forum might provide a partial solution to any political impediment for changing the system. It is possible that the recommendations may be rejected by opponents, but both the recommendations and the reasons behind them could be the basis for further research (see 6.5.2 Political impediments).

To reduce possible corruption, this study suggests that prosecutorial discretion needs to be confined, structured and reviewable, in order to enhance accountability and transparency. This may help deal with perceptions that the *mafia peradilan* (judicial mafia) effectively run the country.

As discussed in Chapters 1 and 3, corruption undermines the rule of law. A long term suggestion to overcome the problem is that the Indonesian people need to be systematically informed and educated about any move from the Mandatory Prosecution System to the Discretionary Prosecution System. This can be achieved by national media campaigns and educational seminars run by each District Attorney-General's Office and the legal profession and by encouraging experts in prosecutorial discretion to visit Indonesia and run seminars.

The next section provides further suggestions.

7.3 Further suggestions

As described above, factors that might become impediments for changing the system of prosecution within Indonesia have been identified and conclusions reached which are based on the research findings contained in Chapter 5 and the literature review throughout this thesis, especially in regard to the problem of corruption, discretion and the rule of law and prosecutorial discretion. This part provides further suggestions for possible transplanting concepts and models that were mentioned in earlier chapters.

7.3.1 Further suggestions on corruption problems

As discussed in Chapter 1, the causes of corruption have been identified and arguably these are at least partially addressed by the Indonesian government through comprehensive reforms and the anti-corruption body known as the KPK.

Other external controls need to be undertaken to ensure that the *Kejaksaan* (prosecution body), the Ombudsman and the *Komisi Kejaksaan* (Prosecutor Commission) are more accountable and transparent. The last mentioned body was created in 2005 and was which revised by *Peraturan President RI Nomor: 18 Tahun 2011 tentang Komisi Kejaksaan Republik Indonesia* (2011 Presidential Regulation Number 18 on Prosecutor Commission Republic of Indonesia). This body is intended to supervise, evaluate and make recommendations to the *Kejaksaan*. In terms of bureaucratic reform of the *Kejaksaan*, this remains an ongoing process where the *Komisi Kejaksaan* made a *nota kesepahaman* (Memorandum of Understanding or MOU) with the *Jaksa Agung* which was signed on 19 Mei 2011 *tentang Mekanisme Kerja Antara Kejaksaan Republik Indonesia dengan Komisi Kejaksaan Republik Indonesia dalam Pelaksanaan Pengawasan, Pemantauan dan Penilaian atas Kinerja dan Perilaku Jaksa dan Pegawai Kejaksaan* (MOU between *Jaksa Agung* and *Komisi Kejaksaan* (Prosecutor Commission) on Working Mechanism between *Kejaksaan Republik Indonesia* (the Indonesian AttorneyGeneral's Office) and *Komisi Kejaksaan Republik Indonesia* (the Indonesian Prosecutor Commission) on Supervising, Monitoring and Assessment of Performance and Behaviour of Indonesian prosecutor and Staff at the Indonesian Attorney-General's Office).

As identified by Wagner and Jacobs⁹¹⁸, the legal structure in Indonesia gives prosecutors 'little discretion to actually investigate and prosecute corruption cases effectively' (see 1.3.3.1 Suggested solutions for Indonesian corruption). As a result, the additional case load involved with the strict application of a MPS effectively impedes the investigative and prosecutorial process and encourages corrupt practices. One of the solutions is to give more discretion to prosecutors which may potentially enhance flexibility and if the corruption bodies are politically supported may contribute to combating corruption within the prosecutorial and investigative systems. However this discretion needs to be confined, structured and reviewable to enhance transparency and accountability.

⁹¹⁸ Benjamin B. Wagner and Leslie Gielow Jacobs, 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations' (2008), 30 *University of Pennsylvania Journal of International* 183, 201.

Thus the concept of discretion itself should not be perceived as a source of problems within the *Kejaksaan* as a DPS could be used as a tool to combat corruption in Indonesia. This needs further extensive research to identify the types of discretion and how to limit this discretion, but the issue of prosecutor decision making to discontinue corruption matters is not supported in this thesis because it is against public interest, as discussed in Chapter 4.

7.3.2 Further suggestions on prosecution system

Chapter 4 identified several suggestions to reform the Indonesian prosecution system. These are explained as follows:

7.3.2.1 Two-stage evaluation and published guidelines

The principle recommendation from this research is that Indonesian prosecution decision making should be changed from a single-stage evaluation process which is based on the sufficiency of evidence to a two-stage evaluation process (i.e. the sufficiency of evidence and the public interest). This follows similar developments in the countries surveyed. Moreover it makes the current proposal for reform of the Indonesian Criminal Procedure Law more comprehensive and clear. It is therefore suggested that there should be a section within the proposal which mentions that:

Prosecution decisions as to whether to prosecute or not are to be based on a two-stage evaluation process, namely the sufficiency of evidence and the public interest. What is considered as sufficiency of evidence and the public interest are further explained in published guidelines which must be reviewed annually.

The Victorian DPP guidelines in this regard can be used as a template for Indonesia (the Netherlands also has guidelines in the context of a legal system similar to Indonesia). However, as mentioned in Chapter 4, to generate such guidelines there is a need for further research which takes into account the Indonesian situation. Various examples of what is considered as the public interest have been identified, based on the countries surveyed, and can be used as a starting point for further research (see Table 4.3 Several examples for what is considered as the public interest in the surveyed countries). In order to facilitate

this change, the current criteria of public interest⁹¹⁹ as proposed in the draft Indonesian Criminal Procedure Law need to be reconsidered to facilitate flexibility for future policy change.

7.3.2.2 Prosecutorial independence

It is strongly recommended that the prosecution service must be independent of political influence. This was discussed in Chapter 4 (see 4.2.3. Independent and Accountable Prosecutor). The current Indonesian prosecution law (2004 Prosecutorial Law) is misleading in claiming to be independent⁹²⁰ because the prosecution service is controlled by the executive (the President). This leads at very least to a perception of bias.⁹²¹ For this reason it is recommended that Presidential control over the prosecution service be dismantled. In its place the head prosecutor should be appointed by statute for a finite term (say ten years) and be independent of the executive. What is proposed is similar to that enjoyed by the prosecution service in Victoria. If Presidential control over the *Kejaksaan* is inevitable or considered to be preferable in the Indonesian context, then further safeguards to ensure transparency and to avoid political influence need to be implemented. To achieve this end, the Indonesian 2004 Prosecutor Law needs to be amended. Firstly, the amendment should repeal the word *merdeka* (independent) or other words that give a false perception that the prosecutorial body is independent; and secondly, there should be a new section which states that when the Indonesian President gives instructions to the prosecution service, they must be in written form, contain reasons and be publicly available in both hard copy and electronic form.

⁹¹⁹ See section 42 (2) and 42 (3) of the draft Indonesian Criminal Procedure Law is based on five criteria; that is, the crime is minor in nature; the maximum sentence for the crime is four years; the criminal sanction is a fine; the suspect's age when committing the crime is above seventy years; and the suspect has paid compensation. See also 4.2.2.2 The Public Interest Drop.

⁹²⁰ See section 2 *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (2004 Prosecutorial Law).

⁹²¹ See section 6 and section 19 *Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia* (Law No. 16 of 2004 on Prosecutorial) (Indonesia) (2004 Prosecutorial Law).

7.3.2.3 Special bodies

Two bodies need to be considered and adapted to the Indonesian situation. They are the Director's Committee in Victoria Australia and the Board of Prosecutor's General in the Netherlands. These bodies provide direct input into prosecution decision making in terms of special considerations or instructions. The *Komisi Kejaksaan* (Prosecutor Commission) exists within the Indonesian system and plays a significant role as an external control designed to make the *Kejaksaan* more transparent and accountable. However this Commission does not have the necessary power to provide direct input into prosecution decision making. Conversely, the Board of Prosecutors in the Netherlands can provide suggestions or opinions when directions from the executive are given. The Commission also annually reviews and publishes guidelines for prosecutors. On the other hand, the Director's Committee (Victoria) makes suggestions to the Victorian Director of Public Prosecutions in special cases. When considering reforms to the Indonesian prosecutorial system both these bodies should be taken into account so that the Indonesian system becomes more transparent and accountable. Thus further reform of the 2004 Prosecutor Law needs to be undertaken so that the perception of corruption in the prosecution system gives way to public acceptance that the system is no longer corrupt.

7.3.2.4 Models of decision making to discontinue criminal matters

As previously indicated a penal order is unknown in the Indonesian system and is not part of the current proposal for criminal procedure reform. This proposal introduced a new model known as *Jalur Khusus* (Special Path) to shorten the criminal process. However, as discussed in Chapter 4 (see 4.2.2.5. Penal order), it is suggested that instead of using the *Jalur Khusus*, a penal order model be used. To achieve this end the 2004 Prosecutor Law needs to be amended accordingly. The models used in the countries surveyed in this thesis can be used in Indonesia with further adaptation to the current situation. Penal order is considered more appropriate as it is used in countries surveyed such as Germany, France, the Netherlands and Australia. As indicated in Chapter 4, the *Jalur Khusus* within the

2004 Prosecutor Law is considered to be inherently defective because it masks secret plea bargaining between the prosecutor and the accused which potentially can be used to coerce the innocent into pleading guilty or rewarding the guilty party with an unduly lenient sentence.

7.3.3 Transplanting foreign models into the Indonesian system

The recommendations are subject to the feasibility of transferring transplants into Indonesia. As discussed in Chapter 2, transplanting an overseas model of criminal procedure and institutions is possible. This is mainly because of the convergence of legal systems - whether civil or common law - where both systems see the practical need for change and a move away from particular ideologies. Chapter 3 describes the general concept of the Rule of Law which is similar to the concept of the *Rechtsstaat* or *Negara Hukum*. Each of the countries surveyed had similar aims in confining, structuring and reviewing their public official discretion to avoid abuse of power or corruption. In the countries surveyed, as far as prosecution decision making is concerned, the MPS is not strictly observed largely because of the development of the regulatory state. In Indonesia a more rational prosecution decision-making process without jeopardizing justice is demanded, as discussed in Chapter 4 (see 4.2.1.2. Mandatory Prosecution Systems). Discretion is needed because:

1. it is impractical to totally eliminate discretion;
2. discretion can help the prosecution system to adapt to new factual situations and circumstances and to the regulative state; and
3. the exercise of discretion can achieve individualized justice.

However adopting these overseas models might face social, cultural, political, economic, and legal impediments as discussed in Chapters 1 and 6. It is true that some countries surveyed in this thesis have a similar legal background. Some have a historical background which arises for colonisation. Indonesia, for example, has borrowed its legal system from the Netherlands. However, every borrowing or transplanting of systems used in overseas models needs to be relevant to the unique situation in Indonesia, otherwise the borrowed model might not fit and have unintended consequences.

7.3.3.1 Possible outcomes following legal transplantation

It is expected that changing the Mandatory Prosecution System to a Discretionary Prosecution System will produce a more rational prosecution system which will be better tailored to the pursuit of justice. The suggested two-stage evaluation process is expected to work as a filter so that not all cases will have to be processed through a criminal trial. Also, the suggestion that the published guidelines are annually reviewed may provide parameters in the exercise of prosecutorial discretion and create a more dynamic legal system because the guidelines can be tailored to suit the Indonesian situation and because persons criminally charged will not have to be held in custody awaiting trial. As indicated above, prosecutorial discretion should be implemented independently as occurs with the DPP in Victoria Australia where no one is considered to be above the law. The current system in Indonesia where the President controls the *Kejaksaan* (i.e. the prosecutorial body) makes it impossible for the President to be prosecuted by the *Kejaksaan*. Furthermore, as discussed in Chapter 4, an independent prosecution system basing its decisions on published guidelines may ensure that cases are not brought which ought not to be brought, either because there is no evidence to support the charge or because the charge is based on corrupt or false evidence. More importantly, decisions not to prosecute will be made where there is evidence to support them and they are in the public interest.

7.3.3.2 Implementation of the discretionary prosecution system

If the Discretionary Prosecution System is to be transplanted in Indonesia it needs to be included in current proposals of the Indonesian Criminal Procedure Law. Further amendments of the 2004 Prosecutor Law for making the prosecution system more independent, accountable and transparent are also required. Moreover, it is important that before implementing borrowed concepts like the Discretionary Prosecution System, the participants in the criminal justice system - including the police, prosecutors, law students, lawyers and judges - need to be trained in the operation of the system, particularly the application of the

guidelines. By teaching law students the concept, that knowledge should prepare them for careers in the legal profession and especially in criminal justice.

7.3.3.3 Domestic obstacles

One of the biggest concerns in transplanting a discretion model into Indonesian prosecution decisions is corruption. This domestic problem might become an obstacle because there are those who will be wedded to the *status quo* and will be opposed to change as they see themselves as owning the system already in place. There will also be those who are opposed because their positions enable them to obtain illegitimate benefits. If not hedged in with protections such as a viable anti-corruption system enforceable throughout Indonesia, a change to a DPS may generate an environment in which corruption can proliferate.

7.4 Implications and research contributions

7.4.1 Implications

An important implication of this research is that it may give rise to law reform in Indonesia such as the proposed amendments to the 1981 Criminal Procedure Law (Indonesian Criminal Procedure Law) and the 2004 Prosecutor Law (Indonesian Prosecutor Law) to make the prosecution system more transparent and less corruptible. Furthermore, it has been recommended in this thesis that further research should be undertaken into the concept of the 'public interest'. What is recommended here is that in Indonesia the parameters of this concept need to be identified so that it can be tailored to Indonesian circumstances. Furthermore, law reformers in Indonesia need to consider whether a special body like the Director's Committee in Victoria Australia and the Board of Prosecutor's General in the Netherlands should be considered and, if applicable to Indonesia, implemented. With changes of this kind the government and the President have to be supportive and provide a budget so that the necessary research can be undertaken and the necessary training and education put in place to

enable successive generations to benefit from the enhanced transparency and accountability of the prosecution system.

7.4.2 Research contributions

7.4.2.1 Academic contributions

A major contribution to academic knowledge is the understanding of legal regulative practices concerning prosecutorial decision making in Indonesia. The field research will contribute to existing empirical studies and theoretical debates on a number of academic issues which have emerged in the literature concerning comparative law, *Hukum Acara Pidana* (criminal procedure law), *Hukum Pidana Korupsi* (corruption law), criminal justice, administrative law, the rule of law, and an understanding of the principles which underpin the Mandatory Prosecution System and the Discretionary Prosecution System. This knowledge is important to the legal profession in Indonesia since a New Draft of the Criminal Procedure Law recommends a move towards a DPS.

In addition, the research contributes to the study on legal transplantation. Similar to other emerging countries, there is a demand to improve legal systems by employing legal principles from other jurisdictions. This research suggests that legal transplantation is not a simple task. The findings indicate that though some rules have been incorporated in Indonesia for a long time, they cannot be developed due to the different local circumstances of the donor and recipient jurisdictions.

The study particularly focuses on law and regulation in the Indonesian local context. Although there are several studies to date on prosecutors and related law in Indonesia, there are no studies relating to legal transplantation in the context of the Indonesian prosecution system. There are also no studies which compare the Indonesian and Australian prosecutorial systems. Therefore, this thesis is intended to be an authoritative reference for Indonesian prosecutors who see the need for change in that legal system. It is anticipated that this thesis will provide a unique understanding about how to manage a prosecution system and make it accountable.

7.4.2.2 Practical contributions

The research set out to make a contribution to understanding the development of law and policy in Indonesia concerning prosecutorial decision making and practice. As a result, it should be beneficial to future law reform in Indonesia. The research indicates that Indonesian law does not provide for effective decision making which has as its end the pursuit of fairness, equity and justice. As a result, Indonesia needs to focus on both reforming the law in the books as well as ensuring it is implemented in practice. Firstly, it is important to understand that adopting an Australian model or international standards does not guarantee that the criminal justice process will be more effective or fair. Secondly, Indonesia has to realise that law reform is not limited to copying legislation and processes from other jurisdictions. The research also suggests how Indonesia may shape its own model for prosecution decision making and its practicability must be taken into consideration. As the rules on prosecution discretion interconnect with other rules and processes, reform without the acknowledgement of the effect to and from other legal concepts and people cannot be successful. To enhance the role of prosecutors and better decision making by them, reforms of other relevant legal institutions are also required. Importantly, legal agents who apply and adopt the rules must have a sufficient knowledge of the borrowed rules or concepts.

The study is also relevant to the development of legal and regulatory frameworks in other developing states which have inherited legal institutions from the period of colonisation. These include the possible outcomes of legal transplantation, the implementation of the adopted rules, and domestic obstacles. It is therefore important to consider whether the principles applied in developed countries are able to solve the problems of emerging countries. The formal rules which are theoretically sound in one jurisdiction may not function well in practice in another jurisdiction. This thesis provides an Indonesian study of how to design an effective legal model in prosecution decision making. It is also be relevant to

understanding the limitations of the use of legal and regulatory transplants in those jurisdictions.

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Appendices

Appendix A: Interview questions

For participants in Indonesia

1. In Indonesia, three (3) reasons can be used to discontinue criminal matters based on section 140 (2) *1981 Criminal Procedure Law* (the matter is not criminal in nature; the paucity of evidence and the case is closed by law). Why do you think that only these reasons have been given? Do you think that these reasons are adequate or sufficient today for a country undergoing rapid change and development?
2. Does the Soeharto case which was discontinued on the basis of the humanity principle (ie because he was seriously ill) fit within the three reasons? Do you think humanity principle should become one of considerations taken into account when discontinuing criminal matters?
3. According to section 35 (c) *2004 Prosecutorial Law* the Attorney General can exercise the discretionary power to set aside criminal a matter based on the public interest. Why is it the case that only the Attorney General has that the power?
4. What is the meaning of ‘public interest’? Remember that the *2004 Prosecutorial Law* is silent on this matter?
5. In the Australia and the Dutch justice systems, the ‘public interest’ is well defined. Do you think it is either a good idea, or practicable, to have this as one of the reasons for discontinuing criminal matters in Indonesia?
6. Do you think the Indonesian prosecutorial system should be changed to become more discretionary such as happens in the Netherlands and in Australia?
7. Are you aware of some of the factors which can be taken into account by prosecutors in the Netherlands when exercising their discretion to discontinue criminal matters? (If the answer to this question is ‘No’, then tell the interviewee what those factors are and then ask question 8.

8. What are, if any, are the impediments to changing the system in Indonesia to one in which prosecutors do have discretion to discontinue criminal matters?

Factors	Reasons	Short term suggestions	Long term suggestions
9. Social			
10. Cultural			
11. Political			
12. Economic			
13. Legal			

14. In The New Draft of the Indonesian Criminal Procedure Law, the decision to discontinue criminal matters can be categorized as more discretionary in nature. Based on your experience and knowledge, what are the reasons for the recommended changes?
15. Do you think that the changes recommended in the New Draft are sufficient? Would you recommend other changes? If you have recommended more changes, what are they? Please explain them.
16. After more than ten years the changes recommended in the New Draft have not been implemented? Do you know why that is the case? Are there social, political, or economic reasons which might explain why the New Draft has not been implemented?
17. Do you think Indonesian Prosecutors are Independent? Please explain?
18. Hierarchically who controls Indonesian prosecutors?
19. Prosecutors in Indonesia are individually independent but institutionally dependent. Is this assertion correct? If not, why not?

For participants in Australia

1. The ability of a prosecutor to discontinue a criminal case seems to a fundamental part of Australian criminal law. Do you agree? Under what circumstances should a prosecutor be entitled to discontinue a criminal case and what considerations ought he or she have in mind when doing so? Are any guidelines for the exercise of that discretion provided to prosecutors in Australia?
2. According to section 35 (c) *2004 Prosecutorial Law* the Indonesian Attorney General can exercise the discretionary power to set aside a criminal matter based on the 'public interest'. In Indonesia, the 'public interest' is defined as the 'interest of the nation and of the interest of the society at large'. There is no further explanation of this concept in the Supplementary Document of the *2004 Prosecutorial Law*. Only the Attorney General has this very limited discretionary power and it is seldom invoked. What do you think might be entailed by the expression the 'interest of the nation and of the interest of the society at large'?
3. In the Indonesian literature concern is expressed that if prosecutors are given the discretion to discontinue criminal matters this has the potential to lead to corruption. How is corruption in this context avoided in Australia and more particularly Victoria?
4. What training do those practicing in the criminal jurisdiction in Australia, and more particularly in Victoria, undertake to ensure that the exercise of discretion to discontinue a criminal matter is made so that irrelevant factors are not taken into account? Are there any checks and balances to ensure that this discretion is appropriately exercised and to obviate possible corruption in the exercise of that discretion?
5. In Indonesia, only the Attorney General can exercise discretion to discontinue a criminal matter and this can only be undertaken on the basis that this is done in the 'interest of the nation and of the interest of the society at large'. No other prosecutor in Indonesia has any discretion at all to discontinue a criminal matter. What do you think might be any possible impediments to changing from a 'mandatory prosecutorial system' to one in which

prosecutors do have discretion to discontinue criminal matters? Social, Cultural, Political, Economic, and Legal factors, short term suggestions and long term suggestions.

6. Based on your knowledge and experience about criminal prosecution systems, which below statements are suitable for modern prosecution system (please explain)
 - a. A prosecution must be held unless the public interest demanded it be waived.
 - b. A prosecution case should be discontinued unless public interest demanded it continue.

Appendix B: Information for participants involved in research

INFORMASI KEPADA PARA PESERTA PENELITIAN (*INFORMATION FOR PARTICIPANTS INVOLVED IN RESEARCH*)

Anda diajak untuk berpartisipasi (You are invited to participate)

Anda diajak untuk berpartisipasi dalam penelitian yang berjudul Apakah bisa Sistem Peradilan Pidana Indonesia dibuat menjadi lebih bagus dengan mengganti system yang mewajibkan penuntutan dengan system diskresi dalam penuntutan sebagaimana digunakan di Australia? (*You are invited to participate in a research project entitled Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia?*)

Proyek ini dilakukan oleh pelajar peneliti Taufik Rachman sebagai bagian program PhD di Universitas Victoria dibawah supervisi Dr Edwin Tanner dari Akademi Hukum dan Keadilan (*This project is being conducted by a student researcher Taufik Rachman as part of a PhD study at Victoria University under the supervision of Dr. Edwin Tanner from The College of Law & Justice*).

Penjelasan tentang proyek (*Project explanation*)

Fokus penelitian ini adalah perbandingan antara system penuntutan di Australia dan di Indonesia dalam hal menghentikan perkara pidana. Hal yang akan dibandingkan adalah substansi, struktur dan budaya hukum dari kedua Negara. Peraturan perundang-undangan, kasus hukum, pedoman penuntutan, peraturan internal institusi yang terkait dengan penghentian penuntutan di kedua Negara diperhatikan. Pembelajaran difokuskan pada analisa kritis dan evaluasi terhadap independensi institusi penuntut umum di kedua Negara, begitu juga dengan kultur hukum yang memfasilitasi menejemen kasus-kasus pidana yang begitu banyak. Secara objektif, penelitian ini berusaha menemukan keuntungan dan kekurangan dari kedua system dan apa yang bisa dipelajari dari perbandingan tersebut.

Sebagai bagian dari pencarian teoritis maupun filosofis, penelitian ini berusaha untuk menemukan posisi seimbang antara asas legalitas dan asas oportunitas dalam menghentikan perkara pidana.

This research mainly focuses on a comparison between the Australian and Indonesian criminal prosecution systems in discontinuing criminal matters. It will compare the legal substance, structure and culture of both countries. It will look at the relevant legislation, case law, prosecutorial guidelines, and institutional circulars, relating to the discontinuance of criminal matters in both countries. The study will focus on critically analyzing and evaluating the independence of the prosecutorial institutions, in both countries, as well as the legal culture which facilitates the management of the criminal case workload. The objective of the study is to discover the advantages and disadvantages of both systems and what can be learned from the comparison.

As a theoretical and philosophical quest, this research tries to find the balancing position between the legality principle and the expediency principle in discontinuing criminal matters.

Apa yang perlu saya lakukan? (What will I be asked to do?)

Anda diajak untuk berpartisipasi dalam wawancara yang berdurasi kurang lebih empat puluh lima menit. Wawancara tersebut terkait pandangan anda tentang system penuntutan di Indonesia sekarang dan kemungkinan perubahannya untuk lebih meningkatkan independensi dan akuntabilitas penuntut umum di Indonesia. Namun, jika anda tidak nyaman dalam menjawab satu atau beberapa pertanyaan dalam wawancara, anda boleh memilih untuk tidak menjawab pertanyaan tersebut.

You are invited to participate in an interview which takes about forty five minutes. The interview is about your perspective on the current Indonesian prosecution system to discontinue criminal matter and the possibility for change to enhance both the independence and the accountability of the Indonesian prosecutor. However, if you are uncomfortable with one or any other questions in the interview, you do not have to answer the question which you do not want to.

Apa yang akan saya dapatkan dari partisipasi? (What will I gain from participating?)

Jawaban anda yang didasarkan atas pengetahuan dan pengalaman terhadap pertanyaan akan sangat berkontribusi untuk mengidentifikasi halangan baik itu secara social, budaya, politik, ekonomi atau hukum untuk merubah system penuntutan di Indonesia terutama terkait penghentian penuntutan. Jawaban anda juga berkontribusi dalam hal bagaimana suatu system menghadapi jumlah kasus pidana yang banyak dan mengatasi isu-isu diskriminasi didalamnya.

Your answer to the question which based on your knowledge and experience will contribute significantly to indentify social, cultural, political, economic or legal impediment for changing the current Indonesian prosecution system to discontinue criminal matter. It also contributes how the system deal with criminal cases workload and solve the discrimination issues in the system.

Bagaimana informasi yang anda berikan akan digunakan? (How will the information I give be used?)

Informasi yang anda berikan akan ditulis di tesis PhD yang disimpan di Akademi Hukum dan Keadilan Universitas Victoria. Beberapa informasi mungkin digunakan untuk publikasi jurnal akademis. Tanggapan anda terhadap pertanyaan akan tetap rahasi dan anda atau organisasi anda tidak akan disebutkan karena berpartisipasi dalam proyek penelitian ini jika diharapkan.

Your information will be written in the PhD thesis which will be available in the College of Law & Justice Victoria University. Some of the information may be used for academic journals publication. Some response to question will be remaining confidential and you or your organization will not be named as having participating in the research project if it required.

Apakah resiko yang mungkin muncul dalam berpartisipasi di proyek ini? (What are the potential risks of participating in this project?)

Dalam interview, resiko yang muncul sangat kecil. Namun, anda diperbolehkan untuk mengajukan pertanyaan kepada para peneliti jika anda merasa tidak nyaman dan butuh informasi lebih lanjut terkait penelitian. Anda bebas untuk tidak menjawab pertanyaan dan tidak akan disebutkan sebagai orang yang membuat pernyataan jika anda harapkan demikian. Lebih lanjut, anda bisa menarik diri sewaktu-waktu dengan alasan apapun juga tanpa prasangka buruk.

In the interview, a minimal risk may occur. However, you may raise any issue with the researcher if you feel uncomfortable and need further information regarding the research. You are free not to answer any question and will not be mentioned as the author of any statement if you want to. Further, you may withdraw at any time and any reason without prejudice.

Bagaimana proyek ini akan dilakukan? (How will this project be conducted?)

Penelitian ini adalah penelitian doctrinal dengan kombinasi diskusi teori hukum. Analisa hukum dan interpretasi, pendekatan sejarah hukum, pendekatan kasus hukum Indonesia, begitu juga dengan studi perbandingan adalah metode utama dalam penulisan tesisnya. Pendekatan komparasi digunakan untuk membandingkan implementasi kekuasaan penuntutan di berbagai yurisdiksi yakni Indonesia dan Australia. Hal ini focus untuk mengidentifikasi perbandingan kekuasaan penuntutan berdasarkan struktur, budaya dan substansi, begitu juga melihat kecocokan untuk Indonesia.

Penelitian ini juga menggunakan wawancara dengan pelaku penting di dalam system Indonesia dan Australia. Wawancara dengan pelaku penting di Indonesia dianggap sangat penting. Pelaku penting yang dimaksud adalah Jaksa Agung atau yang mewakili, Kapolri atau yang mewakili, Ketua Mahkamah Agung atau yang mewakili, Ketua Mahkamah Konstitusi atau yang mewakili, politisi, tiga professor Indonesia dan tiga professor Australia. Perkiraan sepuluh sampai lima belas pelaku penting akan di wawancarai. Mereka akan diwawancarai menggunakan Bahasa Indonesia. Wawancara akan direkam jika ijin diberikan. Jika ijin tidak didapatkan, maka setelah wawancara peneliti menulis hasil pertemuan berdasarkan ingatan. Pada dua kondisi tersebut, yang diwawancarai di tawari transkrip hasil wawancara. Transkrip kemudian diterjemahkan kedalam bahasa Inggris. Hasil terjemahan kemudian di edit dan diperiksa oleh seseorang yang berbicara dan fasih menulis bahasa Indonesia dan Bahasa Inggris Australia. Terjemahan akhir kemudian dianalisa menggunakan perangkat lunak yang bernama Nvivo.

This research is doctrinal legal research combined with legal theoretical discussions. Legal analysis and interpretation, legal historical approach, Indonesian case approach, as well as comparative studies are the main methods employed in this thesis. A comparative study will be used in order to compare the implementation of prosecutorial power in various jurisdictions, i.e. Indonesia and Australia. It will focus on identifying the differences in prosecutorial powers based on their structure, culture and substance, as well as look at their compatibility for Indonesia.

This study will also use interviews with significant players within the Indonesian and Australian legal systems. Clearly interviews with significant players in Indonesia are critical. The players include the Attorney General (Jaksa Agung) or delegate, the Head of Police (Kapolri) or delegate, the Head of Supreme Court (Ketua Mahkamah Agung) or delegate, the Head of Constitutional Court (Ketua MK) or delegate, politicians in legislative law commission, three Indonesian law professors, and three Australian law professors. It is anticipated that between 10 and 15 people can be interviewed. They will be interviewed using Bahasa Indonesia. Audio recordings will be made, if permission is granted. If it is not granted, then immediately after the interview the researcher will write up the meeting from memory. In both situations, interviewees will be offered transcripts of the interviews. The transcripts will then be translated by the author into English. The translations will then be edited and checked by a person who speaks and writes fluent Bahasa Indonesian and Australian English. The final translations will then be analysed using the Nvivo software program.

Siapa yang menjalankan penelitian ini? (Who is conducting the study?)

Penelitian ini dilakukan oleh (*The study is conducted by*)

The College of Law & Justice Victoria University

Dr. Edwin Tanner (Edwin.Tanner@vu.edu.au)

Dr James Mcconvill (James.Mcconvill@vu.edu.au)

Taufik Rachman (taufik.rachman@live.vu.edu.au)

Pertanyaan apapun terkait peran serta anda dalam proyek ini dapat disampaikan kepada Peneliti utama yang disebutkan diatas. Jika ada pertanyaan atau ketidakpuasan dalam hal bagaimana anda diperlakukan, anda dapat menghubungi Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4781.

Any queries about your participation in this project may be directed to the Chief Investigator listed above.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4781.

Appendix C: Consent form for participants involved in research

FORM PERSETUJUAN UNTUK BERPARTISIPASI DALAM PENELITIAN (*CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH*)

INFORMASI KEPADA PARTISIPAN (*INFORMATION TO PARTICIPANTS*):

Kami mengharapkan anda untuk berpartisipasi dalam penelitian yang berjudul Apakah bisa Sistem Peradilan Pidana Indonesia dibuat menjadi lebih bagus dengan mengganti system yang mewajibkan penuntutan dengan system diskresi dalam penuntutan sebagaimana digunakan di Australia?

Fokus penelitian ini adalah perbandingan antara system penuntutan di Australia dan di Indonesia dalam hal menghentikan perkara pidana. Hal yang akan dibandingkan adalah substansi, struktur dan budaya hukum dari kedua Negara. Peraturan perundang-undangan, kasus hukum, pedoman penuntutan, peraturan internal institusi yang terkait dengan penghentian penuntutan di kedua Negara diperhatikan. Pembelajaran difokuskan pada analisa kritis dan evaluasi terhadap independensi institusi penuntut umum di kedua Negara, begitu juga dengan kultur hukum yang memfasilitasi manajemen kasus-kasus pidana yang begitu banyak. Secara objektif, penelitian ini berusaha menemukan keuntungan dan kekurangan dari kedua system dan apa yang bisa dipelajari dari perbandingan tersebut. Sebagai bagian dari pencarian teoritis maupun filosofis, penelitian ini berusaha untuk menemukan posisi seimbang antara asas legalitas dan asas oportunitas dalam menghentikan perkara pidana.

Resiko yang mungkin muncul sangatlah kecil karena ketidaknyamanan untuk menjawab pertanyaan adalah resiko yang mungkin muncul selama wawancara berlangsung.

We would like to invite you to be a part of a study into Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia?

This research mainly focuses on a comparison between the Australian and Indonesian criminal prosecution systems in discontinuing criminal matters. It will compare the legal substance, structure and culture of both countries. It will look at the relevant legislation, case law, prosecutorial guidelines, and institutional circulars, relating to the discontinuance of criminal matters in both countries. The study will focus on critically analyzing and evaluating the independence of the prosecutorial institutions, in both countries, as well as the legal culture which facilitates the management of the criminal case workload. The objective of the study is to discover the advantages and disadvantages of both systems and what can be learned from the comparison. As a theoretical and philosophical quest, this research tries to find the balancing position between the legality principle and the expediency principle in discontinuing criminal matters.

The potential risk might be minimal since uncomfortable for answering the questions is the only possible risk throughout the interview.

**PERNYATAAN DARI PARTISIPAN
CERTIFICATION BY SUBJECT**

Saya, _____

Alamat, _____

I, _____

of _____

Dengan ini mengakui bahwa saya paling tidak berumur lebih dari 18 tahun dan saya secara sukarela memberikan persetujuan untuk ikut serta dalam penelitian yang berjudul Apakah bisa Sistem Peradilan Pidana Indonesia dibuat menjadi lebih bagus dengan mengganti system yang mewajibkan penuntutan dengan system diskresi dalam penuntutan sebagaimana digunakan di Australia? Ang diselenggarakan oleh Universitas Victoria oleh Dr Edwin Tanner.

Dengan ini mengakui bahwa keobyektifan dari penelitian beserta resiko dan kaidah-kaidah pengamannya terkait dengan prosedur sebagaimana penelitian ini harus dilakukan, telah sepenuhnya dijelaskan kepada saya oleh: Taufik Rachman

Dan bahwa saya dengan bebas memberikan persetujuan untuk ikut berpartisipasi pada procedure yang disebutkan dibawah ini:

- Wawancara dimana jawaban akan direkam dalam tape perekam; ataupun jawaban akan direkam dalam bentuk catatan

Saya mengakui bahwa saya telah diberikan kesempatan untuk bertanya serta diberikan jawaban dan saya memahami bahwa saya bias mundur dari penelitian ini sewaktu-waktu dan pengunduran diri tersebut tidak akan membahayakan saya dalam bentuk apapun juga. Saya juga telah diberikan informasi bahwa informasi yang saya berikan akan disimpan dan dijaga kerahasiaannya.

certify that I am at least 18 years old and that I am voluntarily giving my consent to participate in the study:*

Can the Indonesian criminal justice system be enhanced by replacing the mandatory prosecution system with a discretionary one, like that used in Australia? being conducted at Victoria University by: Dr. Edwin Tanner

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by: Taufik Rachman, and that I freely consent to participation involving the below mentioned procedures:

- *An interview in which the answer will be recorded on an audio tape; or in which the answer will be recorded in the form of note taking*

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way. I have been informed that the information I provide will be kept confidential.

Menandatangani
Signed:

Tanggal
Date:

Pertanyaan apapun terkait peran serta anda dalam proyek ini dapat disampaikan kepada Peneliti
Dr. Edwin Tanner
+61399191805 or Edwin.Tanner@vu.edu.au

Any queries about your participation in this project may be directed to the researcher
Dr. Edwin Tanner
+61399191805 or Edwin.Tanner@vu.edu.au

Jika ada pertanyaan atau ketidakpuasan dalam hal bagaimana anda diperlakukan, anda dapat menghubungi Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4781.
If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4781.