THE DEVELOPMENT OF THE PROSECUTOR'S JURISDICTION IN THE CRIMINAL JUSTICE SYSTEM OF INDONESIA

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I. INTRODUCTION

Formerly, in 1605 the Indonesian Archipelago was colonized by the Dutch and in 1512, prior to the Dutch colonization, several Indonesian territories, especially Moluccas and Sumatera, were under the control of Portugal.

To carry out their colonization of Indonesia, the Dutch administration set up the Dutch East India Company (Verenigde Oast Indische Companie). With the establishment of the Company, not only did they succeed in eliminating the Portuguese administration, but they also became a prominent trader controlling the spice trade in Indonesia and managed to expand their power over the territory. The Dutch then gradually took over the administration, legislation and judicature[1] of the areas which they ruled. The Dutch East India Company formulated various rules of the law, appointing officers to protect their interests and also formed distinct legal bodies. Initially, in the area under their rule, the Dutch East India Company put into effect the same laws applicable to all walks of life, i.e., Dutch law. But since the circumstances did not permit and opposed reality (many rebellions broke out), the Indonesian people were subject to the customary law, which as far as it was concerned that the Dutch Law did not apply.[2] Indonesia declared independence on 17 August 1945.

Indonesia was colonized by the Dutch for more than 340 years. So bearing in mind the long period of said colonization, it is understandable that the Dutch legal system has a very strong influence on Indonesian law.

Up to now, there are still many legacies of Dutch law remaining valid in Indonesia, including the Civil Law Code, the Commercial Law Code, the Civil Procedure Code, and the Penal Code as well as many others, which make up a total of about 300. In order to adopt all the existing provisions of the law before the birth of Indonesia (17 August 1945), Article II of the Interim Regulations of the 1945 Constitution states that all existing provisions of law shall remain applicable unless superseded by new laws.

In Indonesia, the term prosecutor as we know now as "Jaksa" has its origin traced to the Sanskrit word "Adhyaksa".[3]

At the time when the territories of Indonesia were being divided into several governments, among the duties of a prosecutor was to double up as a judge and, more often than not, a prosecutor also acted as a defence counsel.

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1 Supomo and Djoko Sutono, Sejarah Hukum Adat/ History of the Prescriptive Law in Indonesia, 1609-1948, Djambatan Publisher, Jakarta, Indonesia.

2 Kima Windu Sejarah Kejaksaan Republik Indonesia 1945-1985/Forty Years' History of Prosecution, Republic of Indonesia 1945-1985, Attorney General of the Republic of Indonesia, Jakarta, 1985.

3 Mr. Tresna, R Peradilan di Indonesia/Court in Indonesia, Pradnya Paramita, Jakarta, 1978.

The Dutch colonial administration distinctively separated the duties of the prosecutor, judge and defence counsel. However, the duties of a prosecutor as we now have, experienced various developments.

The Dutch put into effect the Criminal Procedure Code for the first time in Indonesia through Law No. 23/1847. Based on this law, the courts hearing cases involving Indonesians were different from those for Dutch citizens.

Nevertheless the prosecution of criminal cases at both judicial bodies were handled by prosecutors.

Apart from that, in accordance with the law, prosecutors are duty bound to defend the rule of law and carry out the decision of the court. After that, the duties of prosecutors developed further to include the powers to conduct investigation and further investigation. In fact, the said power further was extended to include the following:

(1) power to exclude certain matters in public interest,
(2) power to file an appeal,
(3) power to file cassation to the Supreme Court in the interest of the law, whether in criminal or civil matters,
(4) representing the country and government in criminal and civil matters,
(5) applying to a judge to place someone in the hospital,
(6) applying to a judge to dissolve a corporate body, and
(7) petitioning for the annulment of a marriage.

On 8 March 1942 the Japanese Army took over administration from the Dutch and Indonesia.

At that time there were six different public courts in Indonesia namely:

- The Supreme Court (Saikoo Hooin),
- The Appellate Court—High Court (Kootoo Hooin),
- The Court of First Instance (Tihoo Hooin),
- The Police Court (Keizai Hooin),
- The District Court (Ken Hooin), and
- The Municipal Court (Gun Hooin).

These courts were respectively assigned with a prosecutor placed administratively under the charge of the Head of Prosecutors[4] instead of a Resident (Head of Administration).

II. INDONESIA BOARD OF PROSECUTORS AFTER INDONESIA'S INDEPENDENCE ON 17 AUGUST 1945

In the text of the Constitution, not even a word was used assertively or directly to describe specifically the prosecution. However, this does not mean that the persons drafting the Constitution failed to turn their attention on the existence of the prosecution. The Board of Prosecutors, which was formed at the time when Indonesia was established, is still recognized and its existence remains as it was by virtue of Article II of the Interim Regulations.

Under the circumstances after independence, the priority for the formation of the Board of Prosecutors was as important as the formation of the Board of Judiciary.

Since it is in unity with the board of judiciary, it was best that both the judiciary and prosecution be put under the Justice Department. The criminal procedure code currently prevailing adopted the criminal procedure code left behind by the Dutch. The New Indonesian Criminal Procedure Code has been in effect since 1941.

Based on the laws contained in the Criminal Procedure Code, the Board of Prosecutors, consisting of all prosecutors, is placed under the charge of the Attorney

[4] Article 3 Osamu Seirei No. 3 1942; Act of Indonesia No. 1 1942.

General; but at provincial level, it is headed by Chief Public Prosecutor.

Prior to this, the Board of Prosecutors was under the Interior Minister, and at district level, all prosecutors were under the Regent.[5]

Bearing in mind that the prosecution's organization is not autonomous, it is understandable that the local board of government has a strong influence over the functions of the Indonesian prosecution.

The position of the Indonesian Board of Prosecutors saw another change upon the enactment of the Emergency Law No. 1/ 1951. At that time, the Board of Prosecutors, which was originally under the Interior Department, was transferred to the Justice Department.

All prosecutors in the course of their daily prosecution duties are attached to the local court of first instance.

On 22 July 1961 with the enactment of Law No. 15/1961, the Board of Prosecutors was separated from the Justice Department to become an autonomous Board having its own organization under the charge of the Attorney General. Bearing in mind the change of status and organizational position, the date of 22 July is considered by the prosecution as an important day that marks the birthday of Indonesian Prosecution in the post-independence era.

The whole prosecution organization is placed directly under the power of the President and is accountable according to hierarchy. The Attorney General being the Assistant of President shall be appointed and retired by the President. According to the constitution, the President of Indonesia as the Head of State shall hold special powers in relation to criminal matters by ordering the Attorney General either to proceed with prosecution or withdraw prosecution by granting amnesty or abolition.

The position of the prosecution in the structure of the Republic of Indonesia vested with the executive power in the aspect of justice has inherently taken root since the era of the Governments of Majapahit, Mataram and Cirebon.

During the colonial rule of the Dutch, the main tasks of the Board of Prosecutors were to protect the political, economic and security interests of the colonialists. However, during the independence, the prosecutors became the protectors of the Republic of Indonesia against the colonialists and other troublemakers.

After the Indonesian army had succeeded in dispelling the remnants of the supporters of the Dutch administration in 1950, several of the supporters were later tried after undergoing investigation and then faced with prosecution by the Attorney General of the Republic of Indonesia.

For that reason at the time of hearing cases involving military personnel, both the prosecutor and the judge hold honorary military ranks, so much so that the Attorney General is also acting as the Military Attorney General. The organizational relationship with the police apparatus is also different when compared to the present setting.

The police apparatus carries out the investigation of criminal cases functionally under the supervision of the prosecution because the police investigation status is to act in assistance to the prosecution.

As such the police apparatus, even though having its own organization, when carrying out its duties in investigation, will invariably obtain instructions from the prosecution.

The position of the police investigation apparatus as assistant to the prosecution until 1961 was actually efficient and effective in handling criminal cases because in the course of conducting

[5] A. G. Pringgodiado, Sejarah Pembuatan Undang-Undang Dasar 1945/History of drafting the 1945 Constitution, Legal and Comunity Magazine, Year 3, No. 2, May 1952.

investigation, the prosecution could directly give instructions without the bureaucratic influence of the police board.

In the past the relationship between the prosecution and the armed forces, especially in the handling of criminal offenders who were military personnel, was not a problematic one because the Attorney General was also the Military Attorney General. However, in 1971, the Civil Court was distinctly separated from the Military Court, thus rendering the Attorney General only to powers of prosecution against criminal offenders from among civilians.

In 1950, there was a condition touching on the special privileges of a minister who was charged for committing an offence (forum privilegiatum). It states that a minister could only be tried in the first and last instance by the Supreme Court. For example, a minister by the name of Sultan Hamid was tried by the Supreme Court and the public prosecutor was the Attorney General.

The said special privilege stood only for a while and was later lifted because it was not compatible with the basic principle that every one has equal status before the law.[6] The position of the Attorney General as a public prosecutor in cases at the Supreme Court bears the consequences that the Attorney General must be a professional Master of Laws and from time to time he shall be obliged to appear in the Supreme Court.

In other words, the Attorney General's post is a career rather than a political post (without experience as a prosecutor).

In its further development, in fact the Attorney General has held a ministerial post. By acting as an Assistant of the President, the post of Attorney General constitutes a political post. However this matter took place after the abolition of the regulations on special privilege on a minister to be tried by the Supreme Court (Forum privilegiatum). This post which is political in nature means that it should not be held by a Master of Laws or one who has experience in prosecution work.

In fact since 1966 the Attorney General of Indonesia generally has come from the military circle, and only recently in 1990 and for the first time, the Attorney General came from the Prosecution Department itself.

III. PROSECUTION PRIOR TO THE ENACTMENT OF THE NATIONAL CRIMINAL PROCEDURE CODE

The National Criminal Procedure Code came into force on 31 December 1981 and before this Criminal Procedure Code existed, the legacy of the Dutch Criminal Procedure Code was in force.

Taking into account its history originating from the legal product of the colonial Dutch, it is understandable that it contains numerous rules to protect the power of the Dutch and too little opportunity was given to the accused to seek justice.

In other words, in this penal code, human rights, i.e., the accused's, were not accorded with the necessary guarantee.

There was a dearth of protection for the accused in respect of remand and legal advice.

The accused might be remanded for a long and unlimited period of time even though every 30 days it ought to be extended. Also there was no obligation that during questioning the accused could be accompanied by a legal advisor.

At that time, the prosecution had an extensive power because in law they could conduct further investigation on all matters apart from investigation pertaining to criminal offenses economic in nature, corruption and subversion (political

[6] Pasal 27 Undang-Undang Dasar 1945/Article 27 of 1945 Constitution: All citizens have equal status before the law and in government and shall abide by the law and the government without any exception (The equal status of everyone in law and government).

offence). The prosecutor also had the power to coordinate the investigation machinery comprising the police investigator and civilian investigator from the government sector.[7] In coordinating said investigation machinery, the prosecutor could provide supervisory instructions or request that the case be surrendered to the prosecution. As a matter of fact, the prosecutor, being the person who will appear in court, should know about or complement the facts required to prove the case. By directly giving instructions or conducting investigation himself, the case could be disposed of more expeditiously.

Other than being speedier, any setback or errors regarding its legal substance could also be avoided. However, looking at the other perspective, this system also had weaknesses because of the overlapping of powers as both the police and the prosecutor have similar powers, making it highly possible that an accused person could be investigated by the police and the prosecutor. There was no explicitness in terms of criminal action, as the prosecutor could investigate any matters.

This system although has its advantages, certainly also has its weaknesses.

A. Religious Sects

As regards the power of the prosecution, apart from conducting investigation and further investigation or prosecution, it also carries out supervision and takes action against or dissolves the religious sects that may endanger the community and nation.

According to the law, there are five religions recognized in Indonesia, namely, Islam, Protestant Chistian, Catholic Christian, Buddhism and Hinduism. Apart from the foregoing, there are religious sects which do not fall within the import of religion originating from ancestral tradition and Indonesian culture. In practice, this trend of belief often runs counter with the religion recognized by the government, thus causing many incidents of riots since the problems between the religion and this belief are very sensitive. The prosecution is duty bound to prevent the confrontation by doing lawful surveillance or dispersing said religious sects.

In order to segregate the religions recognized by the Government from the community's religious sects, the Indonesian Government has taken a different approach.

The supervision of religions recognized by the government is entrusted to the Religious Minister, while the supervision of the religious sects is carried out by the Minister of Education and Culture.

According to the law, the police also has the power to conduct supervision on religious sects, but any supervision or action by the police must be focussed on a religious sect which is nationwide in scale and poses danger to the solidarity of the nation.

B. Economic Crime and Corruption

In 1960, there were many political flare-ups in Indonesia. To address this problem, Law No. 5 of 1959 confers power to the Attorney General in the name of the President to give orders directly to the police force, as well as the power to order preventive detention up to a maximum period of one year without extension against criminal offenders who commit offenses economic in nature, corruption and threaten the security of the nation by preventing the implementation of the government's programme. Said power is extraordinary because prior to this, it was non-existent. (Bear in mind that the power has set aside the hierarchy applied in the police organization.)

The condition also deviated from the procedure code which only gives power to the prosecutor to effect remand for a

[7] Section 2 of Law No. 15/1961 regarding the main laws of prosecution.

maximum period of 30 days with an extension of 30 days after obtaining the approval of Head of Court. The government is of the opinion that the period caused the commission of too much corruption, resulting in financial loss to the state and there is no special legal provision to curb it. Since the condition was so pressing, a legal provision was regulated but only as a temporary measure until such time when a permanent legislative provision could be formulated to prevent corruption.

After it was enforced for about two years, a satisfactory result was achieved. However, since it is urgent in nature and specifically meant for the prevention of corruption, it must be replaced by permanent laws of corruption.[8]

The Corruption Law gives power to the prosecutors with the liberty to conduct investigation into corrupt acts as follows:

(1) Any person suspected of having commited a corrupt act shall be required to give evidence of assets and properties of his spouse and children as well as the assets of the company he manages.
(2) Any person questioned as a witness must give a statement.
(3) The right to refuse being a witness (right of refusal) is only given to religious officers and doctors.
(4) The prosecutor can request for all documents deemed necessary be produced before him for his knowledge.
(5) The prosecutor has the right to open, examine and seize the letters sent by post, telegram or telephone, which he suspects to be related to a case of corruption that he is investigating.
(6) The prosecutor can at all times enter the premises that he deems fit to carry out his duty. If the occupier refuses, he must be accompanied by two witnesses.

In order to speed up investigation and prosecution in the case of corruption, there are abiding conditions, namely:

(1) The corruption case must first be investigated and then prosecuted.
(2) Within three months after the accused is remanded, his case must be referred to the court.
(3) Within six months after the accused is remanded, his case must have been examined by a judge.

C. Threatening National Security

Apart from the power of the prosecutor to handle corruption cases, there is also a preventive power to place those who have the inclination to threaten the security of the nation in a certain district so that they can not carry out their activities that could endanger the interest of the nation.

This power was once applied on the leaders of the Indonesian Communist Party. The people who supported the revolution were sent to Pulau Burn, but have since been released.

Other than that, the prosecution also has been vested with the power to carry out investigation on those who commit offenses of subversion.

Even though the police also has the power to carry out investigation on subversion offenses, the majority of the subversion cases put to trial were the result of the investigation done by prosecutors.

The subversion law for the past 20 years has created controversies (conflict of opinion). The Government of Indonesia is of the opinion that the Anti-Subversion Law[9] is still relevant to prevent any

[8] Law No. 3 of 1971 regarding the Prevention of Corruption, Republic of Indonesia Government Gazette No. 39 of 1971.

[9] Law No. 11/Pnps 1963 regarding the Prevention of Subversion Activities, Government Gazette No. 23 of 1963.

potential revolution attempts with the intention of alienating themselves from a united Indonesia or to topple the Government of Indonesia for another party.

Those who wanted this law to be abolished are lawyers, human rights activists and members of non-governmental organizations. They are of the opinion that the Subversion Law is a tool to suppress the groups who do not agree with or often criticize the government policies.

The Indonesian Subversion Law is contrary to human rights because in essence the element to be controlled and tried is the opinion of a person and not the act he is carrying out. Every person is entitled to his opinion and this is universally recognized.[10] Each time during the court session of a case concerning subversion, all legal advisors in their opening statements would without hesitation raise objections that the existence of the Anti-Subversion Law is actually illegal as it is not consistent with the basic freedom that has become one of the principles in the Constitution of Indonesia. The formulation of the Subversion Law is not concrete and ambiguous, thus making it open to abuse. Since it is too abstract, there is a possibility that its application will go beyond the dimension entrusted by the legislators.

As regards the difference of opinion, it is generally said that the court has decided that the Anti-Subversion Law is de facto legal as law, which is currently in force and has not been abolished by the House of Representatives. As such all legal advisors and human rights activists adopt reasons which are material (substantial) in nature while the prosecution and the courts adopt reasons which are official in nature in order to declare that the Indonesian Anti-Subversion Law is still in force.

A subversive act includes any of the following:

(1) Toppling, damaging or undermining the authority of the lawful government or state apparatus,
(2) spreading widespread hostility or creating enmity, division, conflict, disturbance, turmoil, unrest among the people or community or between Indonesia and a friendly country,
(3) disturbing, impeding or disorganizing the industry, distribution, trade, cooperatives or transport run by the government,
(4) indulging in activities sympathizing with the enemies of Indonesia or a country which is not friendly with Indonesia,
(5) damaging or destroying buildings that function for the benefit of the public,
(6) carrying out spying activities, and
(7) committing sabotage.

The power of the prosecutor as an investigator handling subversion offenses is much wider than the power as stipulated by the law in general.

An investigating prosecutor under the Anti-Subversion Law may enter a place and search premises that are believed to be connected with subversion activities. According to general procedure, such power can only be exercised against the perpetrator apprehended at the time of committing the offence.

In investigating subversion cases, a prosecutor has the power to remand a suspect up to a period of one year without having to apply for extension from a judge.

Apart from the substance or the formulation of the subversion offence which is extensive in nature, the process of hearing should be expedited. After the case bundle has been received by the court from the prosecution, the case must be heard within 30 days.

[10] The Universal Declaration of Human Rights, Proclaimed by the United Nation on 10 December 1948.

All judges only have 30 days to study the case bundle and the case exhibits. If the judge decides on acquittal, then the prosecutor can file an appeal. A subversion case can still be heard and decided by the court even though the accused is absent or cannot be brought to appear before the court (in absentia).

D. Other

Other powers of the prosecutor also include investigation on members of the House of Representatives[11], Governor[12] and Justice of the Supreme Court[13].

Any investigation on a member of the House of Representatives must first have the approval of the President. After that the Attorney General will issue a warrant. The investigation may be carried out by the prosecutors or the police.

The procedure of investigation on a Justice of the Supreme Court is similar to the investigation of a member of the House of Representatives. In respect of the Governor, only the approval of the President is needed without having to wait for the warrant from the Attorney General. However, the outcome of the investigation must be reported to the Attorney General.

The procedure of obtaining the approval of the President and a warrant by the Attorney General shall be dispensed with if a member of the House of the Representatives, a Justice of the Supreme Court or a Governor:

(1) is arrested in the act of committing an offence,
(2) commits offenses punishhable by death based on preliminary proof, or
(3) commits offenses against the security of the nation.

IV. THE POWER OF PROSECUTORS IN THE EXECUTION OF A JUDGE'S DECISION

A decision of the court always involves two matters, either the conviction or acquittal of the accused and a determination as to the status of the case exhibits.

In respect of the status of the case exhibits, there are three possibilities, namely, return them to the witness/ accused, forfeiture to the state (to be auctioned/derive benefit therefrom) and seizure for destruction.

Executing the decision of the court, whether the person or the case exhibits, shall be the duty of the prosecutor. In executing imprisonment sentence against a person who is newly convicted by the court, the prosecutor shall take the prisoner to the prison/correctional service officer.

In regards to case exhibits, the prosecutor is obliged to return them to the witness or the accused and if the case exhibits are to be auctioned or destroyed, the prosecutor is obliged to carry it out.

In executing the decision of the court, the prosecutor is obliged to prepare a Summary of Report.

What about if the case involves a death sentence? Capital punishment is still being carried out in Indonesian, but its application is very rare and very selective. A death sentence is generally carried out after the case has gone through a process in which decisions have been made by the Court of First Instance, the Appellate Court, the Supreme Court and the President, who rejects the clemency petition.

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[11] Law No. 13 of 1970 regarding Procedure of Police Action against Member/Leader of People's Consultative Assembly and the House of Representatives, Government Gazette No. 73 of 1970.

[12] Law No. 5 of 1974 regarding Administration Law at District Level, Government Gazette No. 38 of 1974.

[13] Law No. 14 of 1985 regarding Supreme Court, Government Gazette No. 73 of 1985.

In fact there are also cases which had gone through a revisionary process by the Supreme Court. In the clemency petition to the President, the legal advisor and the accused himself will submit several points for consideration, and the Attorney General and the Minister of Justice will present their opinions.

That is why generally a death sentence is carried out five years after the accused has been convicted of an offence.

There are several conditions in executing the death sentence in Indonesia:[14]

(1) Death sentence is carried out in the Jurisdiction of the District Court that passes the sentence unless otherwise decided by the Minister of Justice.
(2) The time and place of the death sentence will be determined by the Head of Provincial Police after cousulting the opinion of the local Chief Public Prosecutor.
(3) The Head of Provincial Police shall prepare the personnel, equipment and other requirements.
(4) The prosecutor shall be informed of the execution of the death sentence three days in advance.
(5) If the condemned prisoner wishes to say something, his statement/ instruction must be put down in writing by the prosecutor.
(6) The defence counsel of the accused person may attend the execution of the death sentence.
(7) The death sentence is not carried out in public and will be carried out in as simple a manner as possible.
(8) To carry out the sencence, the Head of Provincial Police will form a team of marksmen comprising a Sergeant and twelve Corporals led by a Senior Officer.
(9) The team of marksmen will not be using their own weapons and they will be under the charge of the prosecutor.
(10) The accused shall be brought to the place of execution accompanied by a spiritual leader and his eyes will be covered with a piece of cloth.
(11) The distance between the accused and the team of marksmen is 5 to 10 meters and the prosecutor will give the command for the execution.
(12) The death of the accused will be confirmed by a doctor.

[14] Law No. 2/Pnps 1964 regarding the procedure of executing the death penalty meted out by the court in a civilian and military trial, Government Gazette No. 28 of 1964.

V. THE STATUS OF PROSECUTORS AFTER THE ENFORCEMENT OF THE NATIONAL CRIMINAL PROCEDURE CODE

In 1981, Indonesia adopted its own National Criminal Procedure Code to replace the Criminal Procedure Code left behind by the Colonial Dutch. We have already stated that the Dutch Criminal Procedure Code provided little protection for accused persons. Below are the several basic aspects found in the National Criminal Procedure Code.

A. Presumption of Innocence

Based on the presumption of innocence, the suspect should be given his rights, such as expedited questioning and be informed of his alleged act in the language understood by him, the right to prepare his defence, the right to an interpreter, getting legal aid, the right to visits by family members, and the right not to be burdened by the onus of proof, because the onus of proof lies in the public prosecutor.

B. Legal Aid at Every Stage of Questioning

The suspect is entitled to legal aid from the time he is arrested or remanded and questioned.

It is the right of the person involved in a case to have a legal advisor and to keep in contact with his legal advisor.

The legal relationship should be unimpeded, which means the suspect can put forward everything in preparation of his defence without being supervised by any officer. If there is evidence that the legal advisor abuses his right in his conversation with the suspect, then at that stage of examination the officer can give a reminder.

If said reminder is ignored, then said relationship will be limited, i.e., the relationship will be kept within sight but not within hearing. In the case the suspect commits an offence that carries a death sentence or an offence punishable with 15 years' imprisonment or more and he cannot afford his own legal advisor, then the officer handling his case shall provide him with free legal aid.

C. Limited Period of Arrest/Remand

In order to remand a person, there must be strong suspicion based on evidence that a person has committed an offence punishable with 5 years' imprisonment or more. Other reasons include the tendency of the suspect to abscond, hide or destroy case exhibits or repeat the criminal act. If the suspect thinks that the remand/arrest is illegal, he can submit an application for a pre-trial review.

The investigator may obtain a remand period of 20 days and it can be extended to 40 days by the public prosecutor.

The public prosecutor may obtain a remand for 20 days and be extended for 30 days. A judge may effect remand for 30 days and extend it twice for 30 days (60 days). The High Court (appellate court) may effect remand for a period similar to the District Court (court of first instance); whereas the Supreme Court may effect remand for 50 days and the period can be extended twice for 30 days (60 days).

D. Compensation and Rehabilitation

The suspect is entitled to claim compensation for wrongful arrest and detention. A claim for compensation is an application to obtain pecuniary compensation, while rehabilitation is a claim to obtain the right or status lost due to the questioning, arrest or remand.

The fundamental change in the National Criminal Procedure Code concerns the system which is now known as the "Integrated Criminal Justice System". This means that the law enforcers, especially the police and prosecutors, are distinctly defined in terms of their function, but between them there is a functional coordination relationship. They are clearly designated in that the police acts as the investigator and the prosecutor acts as a public prosecutor.

However, these two authorities are still mutually connected because:

(1) The investigator shall inform the public prosecutor about the commencement of an investigation.
(2) The investigator shall hand over the case bundle to an public prosecutor.
(3) The public prosecutor shall grant extension of remand to the investigator.
(4) The public prosecutor shall give instruction to the investigator, and the investigator shall complete the case bundle according to the instruction of the public prosecutor.
(5) If the investigator stops investigation, he shall inform the public prosecutor; likewise if the public prosecutor stops prosecution he shall inform the investigator.

VI. PERFECTING THE NATIONAL CRIMINAL PROCEDURE CODE

Lately the desire to refine the National Criminal Procedure Code has come to surface even though said code is only 15 years old.

It is evident that development and new demands are rapidly appearing in numbers, including new demands for justice.

When the National Criminal Procedure Code was formulated to replace the colonial Dutch Criminal Procedure Code, it managed to accommodate the growing demands presently existing so much so that the National Criminal Procedure Code can be regarded as seeped in national spirit.

However, due to very rapid developments in every sector of life in the society, more new demands keep on appearing, especially in respect of the Criminal Procedure Code. So it is imperative that these demands are accommodated in our legal system.

The new demands must be fitted in our legal system because at any point in time and at any place, the law shall serve as a vehicle towards achieving an assured dream, order and justice for the society.

A concept to streamline the Criminal Procedure Code without changing its existing fundamental concept is meant to solve the legal problems that arise from the development of the society; to improve efficiency and effectiveness; and to prevent excesses in law enforcement.

In other words, the conception of refining the Criminal Procedure Code is to optimize the Code itself.

The National Criminal Procedure Code was promulgated on 31 December 1981. It is a national legal product containing improvements devised to protect human rights in the process of the criminal law.

However, be that as it may, over a period of time, it is felt that the Criminal Procedure Code has its weaknesses and ambiguities in terms of its legal formulation, which have resulted in different interpretations and polemics among law enforcers, practitioners and academics in connection with several provisions set out in the Criminal Procedure Code.

More of these problems have cropped up lately as more and more statements are issued through the mass media by legal practitioners, academics and observers. The statements mainly seek a change and refinement of the Criminal Procedure Code to suit the developments of the society, which are becoming more progressive and complex. The ambiguity in the formulation of the legal provisions has given rise to differences in interpretations among the law enforcers, until the process of criminal justice as a system does not function as expected by the seekers of justice.

A. Recognition and Protection of Basic Rights

A constitutional state has a special feature, i.e., recognition and protection of basic rights which cannot be violated by anyone. One of the basic rights is equal status for everyone under the law without any discrimination against any group based on race, religion, sex, social culture, economic standing and others.

In a constitutional state like the Republic of Indonesia where the Pancasila (Philosophy of State) serves as a state ideology, state foundation and source of all legal sources, the protection and enforcement of human rights must be maintained so that individual interests and the public interest can remain in good balance. In discharging its duty, the state is obliged to preserve the public interest, whether all its citizens or an individual.[15]

Having regard to the said matter, the fundamental recognition and protection of human rights should be implemented in the criminal procedure without any bias between the protection of the basic rights of a suspect and protecting the interests of the public, including the victim.

[15] Prof. Senoadji Oemar, LLM, Seminar Indonesia Negara Hukum/Seminar on Constitutional State of Indonesia, May 1966, Jakarta, Indonesia.

B. Protection for the Suspect/ Accused

Protection for the suspects has been adequately provided in the Criminal Procedure Code, even though in practice there are excesses taking place in its implementation, such as torture to obtain a confession from the suspect, manipulative interrogation, detention without basis, and others. The Criminal Procedure Code has made provisions for the rights of the suspect/accused to get immediate questioning. However, in practice there are possibilities of the suspect/accused not responding to questions, or just remaining silent, although actually the answers to questions of the suspect in court are reflective of his/her rights to defend him/herself. If the suspect/accused remains silent (not answering) during questioning, that is seen to show that he/she purposely does not want to make use of his/her rights.

To avoid torture or manipulation, it is also necessary to provide in the Criminal Procedure Code the right to remain silent (not answering). It is also important to include the legal consequences for remaining silent, e.g., it is provided that the silence of the suspect/accused is indicative of his/her admission to having commited the alleged offences.

With such provisions, it is hoped that the torture of suspects/accused by interrogators can be avoided.

Not using the right to answer must also be provided so that said problem cannot invalidate the investigation report.

C. Protection for the Victim

In the Criminal Procedure Code, protection for the victim comes in term of claiming compensation against the offender and the right to reject the termination of investigation/prosecution through pre-trial review. The following aspects of victims to seek justice have yet to be provided:

- Complaint/report not immediately settled or acted upon by the investigator, and
- Dissatisfied with the prosecution carried out by the public prosecutor.

However, the right of appeal is still not being accorded to the victim because said right is against the system of the Criminal Procedure Code as the public prosecutor is said to represent the public interest which includes the victim's interest.

D. Legal Aid

Obtaining legal aid is the basic right of the suspect/accused so that he can defend himself against the alleged charge he is facing.

The Criminal Procedure Code has expressly provided that legal aid services can be accorded to a suspect/accused. However, there is no provision in respect of a suspect/accused who does not want use the services of legal aid (right to legal advisor). The suspect/accused can not latter adopt this as a ground in an apparent attempt to nullify the process of investigation and prosecution.

Under the circumstances, it has been decided that if it is clear that the suspect/accused does not wish to use the right of legal aid or legal advisor, then this cannot be a ground for the judge to invalidate the process of investigation. It is then important to provide for said legal aid solely for the suspect/accused in the interest of his/her defence counsel. As such, the legal advisor is not required to be by the witness's side during questioning, since the witness does not require any for his/her defence, but he/she has the obligation to give a true statement of he/she sees, hears and knows.

E. The Principle of a Free and Responsible Judiciary

1. Non-absolute Principle

The principle of a free judicature means that the power of the judiciary is free of any interference from another state power or free of any extraneous judicial influence. However, said freedom is not absolute in nature because the duty of the court or judge is to enforce the law and justice.

A free judiciary upholds the responsibility of creating legal certainties based on truth and justice. If the judge can not find a written law, he is required to delve into the unwritten law in order to arrive at a legal decision as a prudent person who is fully responsible towards the Almighty God, himself, society, fellow citizens and the nation.

2. Open Principle

This principle, apart from reflecting the principle of democracy, does reflect the principle of freedom and impartiality to facilitate the existence of social control. If there is an exception by having a hearing in camera for a certain case, there must also be a guarantee that the trial is still being conducted honestly.

3. Principle of Giving Preference to Justice and the Truth

In line with the principle of a free and responsible judiciary, therefore, legal consideration for the suspect/accused, victim and society must be given priority over legal certainties because not all court decisions containing legal certainties produce justice.

F. Principle of Legality

The principle of legality means that no act shall be liable to penal action unless it is based on the provisions of the law in force. In the Criminal Procedure Code, this legality principle is present in a situation where the public prosecutor shall be "obliged" to submit the case bundle to court after all requirements laid down by the law have been fulfilled.

An exception to this legality principle (case not referred to court) is confined to the Attorney General and it is limited because of public interest. In other words, this legality principle can only be excepted by the principle of opportunity.

Based on the legality principle, there is an obligation that every case referred to the court must have been asessed with enough evidence and that all the requirements have been fulfilled.

The principle behind referring cases with enough evidence and which have fulfilled the requirements shows the acknowledgement of human rights in that there is equal status for everyone under the law.

For that reason, the provision to allow the termination of investigation or prosecution must be prevented, regardless of whether the case is minor or serious.

If there is an exception, there must be a very strict limitation known as the principle of opportunity, i.e., the termination of the investigation or prosecution of a case which has fulfilled the requirements of proof can only be effected by the Attorney General on the ground of legal interest.

The legality principle pertaining to remand must reflect the spirit of the constitutional state and for that purpose the following shall be provided:

- The accused upon being detained has the right to be informed immediately of the alleged offence for which he is charged, and
- The accused shall have the right to contact his family members and legal advisor.

G. The Criminal Procedure Code Is Akin to the Principle of Expeditious, Simple and Affordable Justice

1. The National Criminal Procedure Code does not provide for any frame of time regarding the bundle of investigation papers of the civilian investigator to be in the hand of the investigator of the police for it to be handed to the public prosecutor. So, in terms of principle of benefit, not only does it prolong the bureaucratic tape but runs counter to the principle of expeditious, simple and affordable justice.

2. The Criminal Procedure Code does specify the frame of time by which the investigator should complete his investigation and what are the legal sanctions if he does not complete or is late in completing his investigation.

3. The principle of expeditious, simple and affordable justice must not only be applied at the prosecution/hearing stage, but also at the investigation stage. Thus, if the Criminal Procedure Code is to be streamlined in the future, this principle must be concretely impelemented.

4. In practice, it is shown that the criminal justice system does not cover the concept of supervision and administration.

5. The accountability concept from the outcome of investigation conducted by the public prosecutor forms a part of the integrated criminal justice system.[16] In implementing the principle of integrated criminal justice system, the outcome of investigation must be justified before an open court.

The public prosecutor shall be required to make justification because he is the one who appears in court as a public prosecutor and not the investigator.

The prosecutor shall be required to prove the act allegedly committed by the accused.

Consequences arising thereof are as follows:

- The investigator shall abide by the instruction of the public prosecutor.
- In cases where the investigator is unable to carry out the instruction of the public prosecutor, then it is necessary to introduce measures to extend the power for futher investigation by providing adequate time not only to question witnesses but also to question the suspect and to gather/seize case exhibits.

VII. INTERNATIONAL GUIDELINES AND INDONESIA JUDICIAL DOCTRINE

As guidelines to all Indonesian prosecutors in the course of their duties, the Indonesian Prosecution espouses a Judicial Doctrine known as Tri Krama Adhyaksa (The Three Principles of Conduct);[17] specifically, integrity, maturity and wisdom.

- Integrity: Loyalty originating from sense of sincerity towards the Almighty God, one's own self, family and all mankind.
- Maturity: Perfection in discharging duties coupled with the main element of sense of responsibility towards the Almighty God, family and among mankind.
- Wisdom: Wisdom in words and deeds especially in discharging one's duties and power.

In upholding said Judicial Doctrine, all prosecutors in the course of their duties must be aware that they form an inseparable part of the other prosecutors.

[16] Sujata Antonius, Master of Law, The Wisdom of Law Application and Enforcement Programme in the 7th Five-Year Development Plan, Law Development Workshop Programme 1999-2004, 20-26 November 1996, Jakarta, Indonesia.

[17] Judiciary Doctrine, Annexure to the Decree of the Attorney General of the Republic of Indonesia Number: KEP-030/3/1988 dated 23 March 1988.

They are interrelated with one another, representing one and the other, as well as reminding one another of their conduct and actions.

Every member of the prosecution must always upgrade his knowledge and capabilities. In addition, every member of the prosecution must propagate his initiative and cooperate with other law enforcement agencies.

When coming into contact with members of the public especially the seekers of justice, prosecutors must treat all men as the creation of God who have the same right and responsibility based on legal values, religion, custom, and courtesy honoured by the people of Indonesia.[18]

The Indonesian Judicial Doctrine is compatible with the international standards indicated in the United Nations Guidelines on the Role of Prosecutors.[19]

Among the important details adopted from the United Nations standard for prosecutors are the required qualifications to become a prosecutor, the status and job conditions of prosecutors, the freedom to express opinions and the right of association, the role of the prosecutors in the criminal process, prosecutor's discretion, prosecutor's relationship with other authorities and the process of investigation against a prosecutor who violates the rules.

(1) Those chosen to be prosecutors must be honest and efficient by getting the proper training and requirements.
(2) All prosecutors must always maintain the honour and status of their profession.
(3) The state must ensure that all prosecutors are able to function profesionally without unnecessary intimidation, impediment and intervention.
(4) All prosecutors have the right and freedom to voice out their opinions and put forth their unified confidence.
(5) Prosecutors are at liberty to form and join professional assemblies or other organizations which champion their interests, upgrade the profesional quality and protect their status.
(6) All prosecutors must play active roles in the criminal process by carrying out prosecution and in conducting investigation. They must also ensure the legality of said investigation, oversee the execution of the court's decision and carry out other functions expected of a protector of public interest.
(7) All prosecutors must perform their duties fairly, consistently and expeditiously and defend basic human rights.
(8) In performing their duties, all prosecutors cannot be partial and must avoid political, social, religious, racial and other kinds of discriminations.
(9) In protecting the public interest, they must be objective and give due regard to the suspects and all the victims.
(10) They must not commence and proceed with prosecution if there is no basis to frame the charge.
(11) All prosecutors are duly requested to be aware of matters concerning the prosecution of their fellow colleagues, corruptions and power abuse.
(12) In setting aside cases, prosecutor must fully appreciate the rights of the suspects and also the victims.
(13) Any complaints against prosecutors alleging deviations in profesional standard must be dealt with expeditiously and fairly. The decisions must be subject to independent review.

[18] Prakoso Djoko, LLM, The Existence of Prosecutor in the Midst of Society, Ghalia Indonesia, East Jakarta, 1985.

[19] Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.