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Conscientious Avoidance: How Knowledge in the Prosecutorial System Shapes Indonesia's Transition?

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Article

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Abstract

The prevailing view in transitional justice studies suggests that Indonesia is experiencing a political transition without justice. In this article, we attempt to examine the conscientious avoidance of criminal prosecution of past gross human rights violation cases. Through the lens of sociology of punishment, we identify three factors that shape this current penal decision: the knowledge and domination in the penal system, the human rights-focused criminal victim protection and the welfare assistance as a symbolic reparation aimed at neutralising past atrocity crimes. This research employs a narrative approach under the discipline of socio-legal studies. This article contends that the decentralised structure of knowledge within the penal system reflects the dominance and authority in penal decisions, which consist of competing groups and interests. This complexity poses challenges at the institutional level in transforming the political motives behind past atrocities into criminal justice knowledge. The evolving nature of this knowledge within the country's penal system indicates a future path for the prosecution of past atrocity crimes.

INTRODUCTION

In a joint working session with the Parliament on Jan 16, 2020, the Indonesian Attorney General stated that "…the Semanggi I and Semanggi II incidents, which was concluded by the House of Representative's plenary meeting, are not a serious violation of human rights, the National Commission of Human Rights [*Komisi Nasional Hak Asasi Manusia*/KOMNAS HAM] should not follow-up [the case] because there is no reason to establish ad-hoc court based upon the Parliament's recommendation to the President to issue a Presidential Decree on the establishment of ad hoc Court, based on Article 43 (2) of Human Rights Court Law (26/2000)."[1] On May 12, 2020, two individuals, Sumarsih and Ho Kim Ngo, filed an

[1] Haryanti Puspa Sari and Kristian Erdianto, "Jaksa Agung: Peristiwa Semanggi I Dan II Bukan Pelanggaran HAM Berat," Kompas.com, n.d.

administrative lawsuit, challenging the Attorney General based on this statement. Sumarsih is the mother of late Bernardinus Realino Norma Irmawan, one of the students who was shot to death during the Semanggi I incident in November 1998, and Ho Kim Ngo is the mother of Yap Yun Hap, a victim in the Semanggi II incident in September 1999. The Administrative Court (*Pengadilan Tata Usaha Negara*) declared the statement as an unlawful action made by a state's institution and asked the Attorney General to "make a statement regarding the handling of alleged gross human rights violations in Semanggi I and Semanggi II in accordance with the actual circumstances at the next working meeting with Commission III of the Indonesian House of Representatives, as long as there is no ruling/decision stating otherwise."[2] The Appellate Court, however, reversed such rulings in 2021.

Despite the fact that the Attorney General's statement did not convey a novel argument regarding the stagnation of past human rights violation prosecution, it is for the first time that the prosecutorial response is being challenged by the public. As an administrative dispute, this lawsuit posits the Attorney General's statement as an administrative action upon which the public can challenge based on the Law of Government Administration.[3] In this case, the Plaintiffs argue that the statement inflicts them with direct damages. The statement, they argue, ". . . obstructs the legal process to resolve a serious violation of human rights in Semanggi I and II incidents, thus infringes the interests of the victim's family to achieve justice."[4] As the statement quotes the Parliament-initiated special investigation panel in 2001, claiming that "the National Commission of Human Rights [KOMNAS HAM] should not follow up [the case investigation]," the Plaintiffs view that this direct reference reflects the Attorney General's penal attitude to not proceed with the investigation into a trial. Furthermore, they maintain, this statement shall implicate other relevant legal proceedings, including:

> "(1) delegitimisation towards the concluded investigations that have been undertaken by the National Commission of Human Rights (KOMNAS HAM); (2) creates legal uncertainties as the decision to investigate one particular case through the serious violation of human rights mechanism is solely based on the Parliament's political opinion, thus opens up an opportunity to political intervention on legal process; (3) the in-office or any future Attorney Generals will not conduct any investigations on Semanggi I and II incidents as these are not to be deemed as serious violation of human rights based on a mere quotation."[5]

This administrative case marks a perennial contention within Indonesia's penal system with regard to the nation's effort in dealing with its past. Previous studies have strongly criticised this penal response predicament as a derailment in the transition to democracy pathways.[6] For instance, Setiawan[7] and Wahyuningroem[8] have highlighted the reluctant stance

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2 Pengadilan Tata Usaha Negara Jakarta, Sumarsih et.al v. Attorney General of Indonesia (n.d.).

3 Enrico Parulian Simajuntak, "The Rise and The Fall of the Jurisdiction of Indonesia's Administrative Courts: Impediments and Prospects," *Indonesia Law Review* 10, no. 2 (2020); Adriaan Bedner and Herlambang Perdana Wiratraman, "The Administrative Courts: The Quest for Consistency," in *The Politics of Courts in Indonesia: The Judicial Landscape and the Work of Dan S Lev*, ed. Melissa Crouch (Cambridge: Cambridge University Press, 2019), 133–48.

4 Pengadilan Tata Usaha Negara Jakarta, Sumarsih et.al v. Attorney General of Indonesia, 99/G/2020/.

5 Pengadilan Tata Usaha Negara Jakarta, 99/G/2020/.

6 Kontras and ICTJ, *Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto*, 2011.

7 Ken Setiawan, "The Human Rights Courts: Embedding Impunity," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. Melissa Crouch (Cambridge: Cambridge University Press, 2019), 287–310; Ken M P Setiawan, "Ordinary Laws and Extraordinary Crimes: Criminalising Genocide and Crimes against Humanity in the Draft Criminal Code?," in *Crime and Punishment in Indonesia* (Routledge, 2020), 70–89.

of the prosecutor to follow up on the KOMNAS HAM's investigation due to the largely ambiguous provision of the Human Rights Court Law. This prosecution quandary has also been seen as a "vexatious issue" to achieve "recognition of and justice for the victims."[9] Embarking on the liberal tradition of legalism in transitioning societies, the country's experience in prosecuting past atrocities has instead promulgated a covert impunity and miscriminalisation.[10] As such, from a macro-political dynamic, as Suh argues, "[t]he multiple dimensions of social cleavages in Indonesia mean that state violence is not simply interpreted as persecution of a certain social group by the authoritarian regime; it also contains potential divisions between social groups along cleavage lines."[11]

While existing studies have relied on a *captured* theory transitional justice framed by Western democracies, it is essential to reframe past atrocities as (ordinary) crime, thus situating transitional justice less transitional.[12] That said, this article takes a different avenue to help us understand the penal issue of conscientious avoidance, borrowing from Garland, "closer to the forefront of social and political life."[13] In this sense, we suppose that the dynamics of prosecuting mass atrocities in the past cannot escape from the transformations of punishment in a particular society.[14] Explored mainly by punishment and society scholars, such sociology of punishment is grounded in the Durkheimian accounts of the expressive and communicative aspects, as well as the relationship between meanings and emotions in penal rituals.[15] This turn to the *social* enables us to shift from the autonomy of the penal process to its relative autonomy.[16] Our view therefore adopts the founding principle postulated by Garland, asserting

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[8] Sri Lestari Wahyuningroem, "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia," *Journal of Current Southeast Asian Affairs* 32, no. 3 (2013): 115–42, https://doi.org/10.1177/186810341303200306.

[9] Annie Pohlman, "A Year of Truth and the Possibilities for Reconciliation in Indonesia," *Genocide Studies and Prevention* 10, no. 1 (2016): 60–78, 69 https://doi.org/10.5038/1911-9933.10.1.1323.

[10] Robertus Robet, *Politik Hak Asasi Manusia Dan Transisi Di Indonesia: Sebuah Tinjauan Kritis*, ed. Ronny Agustinus (Lembaga Studi dan Advokasi Masyarakat (ELSAM), 2014).

[11] Jiwon Suh, "The Politics of Transitional Justice in Post-Suharto Indonesia" (The Ohio State University, 2012).

[12] John Braithwaite, "Criminology, Peacebuilding and Transitional Justice: Lessons from the Global South," in *Palgrave Handbook of Criminology and the Global South*, ed. Kerry Carrington et al. (Palgrave Macmillan, 2018), 971–90, https://doi.org/https://doi.org/10.1007/978-3-319-65021-0; Laurel E Fletcher and Harvey M Weinstein, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 163, no. 31 (2009): 165–220; Harison Citrawan, "Transitional (in) Justice as Duration," *Journal of Southeast Asian Human Rights* 6, no. 1 (2022): 101–30.

[13] David Garland, "Theoretical Advances and Problems in the Sociology of Punishment," *Punishment and Society* 20, no. 1 (2018): 8–33, https://doi.org/10.1177/1462474517737274.

[14] Joachim Savelsberg, "Punitive Turn and Justice Cascade: Mutual Inspiration from Punishment and Society and Human Rights Literatures," *Punishment and Society* 20, no. 1 (2018): 73–91, https://doi.org/10.1177/1462474517737049; Kathryn Sikkink, "The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics," n.d.; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54, no. 4 (2010): 939–63, https://doi.org/10.1111/j.1468-2478.2010.00621.x; Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, London: Yale University Press, 1996).

[15] Garland, "Theoretical Advances and Problems in the Sociology of Punishment."

[16] Harison Citrawan and Sabrina Nadilla, "Hukum, Hak Asasi Manusia, Dan Struktur Pengetahuan: Refleksi Metodologis Tentang Studi Kekerasan Massal," *Jurnal HAM*, 2020, https://doi.org/10.30641/ham.2020.11.151-167; Mark J. Osiel, *Mass Atrocity, Collective Memory and the Law* (Routledge, 2017); Citrawan, "Transitional (in) Justice as Duration."

that "penal phenomena are not to be understood as a simple reaction or response to crime, but instead have their own dynamics and determinations."[17]

RESEARCH METHODS

In framing our inquiry into the question of conscientious avoidance of prosecuting past human rights violation in Indonesia, we employ a narrative approach in socio-legal studies. As suggested by Wharton and Miller, there major strands of law and narrative are in place, namely: storytelling such as in witness testimony, narratives of legal opinion as evidence and legal narratives that "constrain and define the possibilities of legal practice."[18] It is to the third strand that this study attempts to contribute. In this framework, we understand conscientious avoidance of prosecution as a reflection of legal narratives employed by the state in exercising criminal law's normative power. In so doing, we generate our primary materials from relevant legal documents (i.e., courts' decisions and laws and regulations) and relevant studies in the fields of criminal law, human rights, criminology and sociology of punishment.

This article is organised into three main sections. First, it outlines a brief theoretical framework by exploring the dynamics of knowledge and domination within penal system. The second section highlights the importance of establishing human rights-based institutions in the country's penal system, focusing specifically on the protection of victims' rights in criminal cases. Methodologically drawing from Fine's work on reputational entrepreneurs,[19] we will later argue that the shift towards victim-centred legal prosecutions emerges as a way to mitigate the stagnation within prosecution efforts. This leads us to the final section, which discusses the current welfare assistance policies that support the victims of past atrocities, situated within the broader context of in the growing punitive measures in the country.[20] In this light, it is proposed that the rise of actuarial justice within Indonesia's penal system may offer a new direction for prosecuting human rights abusers.

ANALYSIS AND DISCUSSION

Knowledge and Domination in the Penal System

The contentious statement made by the Attorney General about the non-prosecutable human rights violations in the 1998 Semanggi I and 1999 Semanggi II shootings has evidently been somewhat consistent since the commencement of the case inquiry in 2001. The Office of the Prosecutor declared that it could not open a prosecutorial investigation until the *ad hoc* human rights tribunal was established by the President upon the recommendation of the Parliament. The main legal basis is Article 43 of the 2000 Human Rights Court Law, which regulates,

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[17] David Garland, "Concepts of Culture in the Sociology of Punishment," *Theoretical Criminology* 10, no. 4 (2006): 419–47, https://doi.org/10.1177/1362480606068873; Garland, "Theoretical Advances and Problems in the Sociology of Punishment."

[18] Robin Wharton and Derek Miller, "New Directions in Law and Narrative," *Law, Culture and the Humanities* 15, no. 2 (2019): 297.

[19] Gary Alan Fine, *Difficult Reputations: Collective Memories of the Evil, Inept, and Controversial* (Chicago, London: The University of Chicago Press, 2001).

[20] Harison Citrawan, "From Grievance to Welfare: Reshaping the Identity of Past Gross Violation of Human Rights Victims in Indonesia," *Jurnal Masyarakat Dan Budaya* 20, no. 2 (2018): 237–48, https://doi.org/10.14203/JMB.V20I2.571.

> "(1) Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an ad hoc human rights court. (2) An *ad hoc* human rights court as referred to in clause (1) shall be formed on the recommendation of the lower house of Parliament of the Republic of Indonesia for particular incidents upon the issue of a presidential decree."

By undertaking its political investigative power, the Parliament in 2001 created a special panel that resulted in the majority vote of non-occurrence of human rights violations in the Semanggi I and II incidents. In the meantime, bearing the authority to conduct a preliminary investigation on serious human rights violations, KOMNAS HAM continued its work and declared that there occurred gross violations of human rights in these two incidents. Subsequently, the preliminary investigation report was submitted to the Attorney General's Office, who then sent back the report due to the lack of jurisdiction. It is evident that this back-and-forth investigation process is due to the ambiguous provisions in Article 43. As an attempt to escape from the stalemate, a constitutional review was then filed in 2007, in which the Constitutional Court (18/PUU-V/2007) declared that

> "The DPR [Parliament] in recommending the establishment of an ad hoc human rights court must observe the results of inquiries and investigations conducted by the authorised institutions. Therefore, the DPR cannot simply assume for itself without receiving the results of inquiries and investigations by the authorised institutions, in this case, the National Commission on Human Rights as the preliminary investigator [*penyelidik*] and the AGO as investigator [*penyidik*] as stipulated by Law Number 26 of 2000."

Despite such constitutional clarification, the prosecution process stagnation still remains.

This brief historical background sheds light on how the prosecutorial power remains ambiguous in the country even after the legal and institutional reform since the reform era. It is important to remember that the decision largely rests with the prosecutor as an organising body. From the standpoint of the sociology of punishment, the choice to pursue prosecution, or not, must take into account both structural factors and the role of agency.[21] As a consequence, decision making by the agency must be understood "as the micro-sociological link between social-structural conditions and a macro-sociological outcome."[22] Building upon this theoretical construct, this article draws on theoretical hypotheses postulated by Savelsberg with regard to how the organisation of knowledge and domination affect the pattern of penal decision. In this framework, Savelsberg aptly claims that knowledge "construction and diffusion is crucial for both the reaction-to-crime perspective and etiological criminology."[23] Building upon Savelsberg's hypotheses, four theoretical axioms are particularly worth mentioning: first, that the unique ways in which knowledge production is institutionalised in a society lead to distinct dynamics of knowledge in various societal sectors and create different patterns of knowledge dissemination between those sectors.[24] Second is that "changes in knowledge development influence changes in macro-outcomes of political and legal decision-making;"[25] third is the extent and manner in which knowledge influences these macro-level outcomes depend on the unique institutional frameworks of domination in each country, particularly the level of

[21] Joachim J. Savelsberg, "Knowledge, Domination and Criminal Punishment Revisited," *Punishment and Society* 1, no. 1 (1999): 45–70.
[22] Savelsberg.
[23] Joachim J. Savelsberg, "Underused Potentials for Criminology: Applying the Sociology of Knowledge to Terrorism," *Crime, Law and Social Change* 46, no. 1–2 (2006): 35–50, https://doi.org/10.1007/s10611-006-9046-0.
[24] Savelsberg, "Knowledge, Domination and Criminal Punishment Revisited."
[25] Savelsberg.

bureaucratisation within political and legal institutions.[26] Finally, the significant direction of knowledge transformation arises from deep-rooted conflicts within social structures and among social groups.[27] These theoretical hypotheses arguably offer an alternative perspective to the often-criticised culturalist viewpoint that persists in the context of Indonesia's transitional justice trajectory.[28]

Thus, how do we situate these hypotheses in the context of knowledge production and domination in Indonesia's penal system, particularly at the Attorney General's Office? In the paragraphs that follow, we will argue that the institutionalisation of knowledge at the Office affects the legal decision-making related to the prosecution of human rights violations in the past. In so doing, we first describe the knowledge production landscape in the public sector in Indonesia and how domination is taking place in the Office's decision-making.

Prosecutorial Power Conundrum

Knowledge production in post-authoritarian Indonesia reflects a major yet ambiguous shift. Samuel and Sutopo argue that "the shift from authoritarian regime into relatively more democratic regime resulted in the freedom of speech and knowledge production, but on the other hand, it also means a shift of power from the state to the market."[29] During 1999, the transition government under President Habibie devolved considerable power towards provincial and city/regency levels through the passage of decentralisation laws.[30] On that account, there is a shift towards decentralised governance that involves "a limited but growing demand for evidence as the country is moving towards a future scenario characterised by solid democratic rule, democratic decentralisation, leadership guided by accountability to citizens, and government organisations that actively demand different types of evidence from internal and external sources."[31]

Interestingly, the judiciary is absent from the decentralisation spectrum. The Law of Local Government specifies that the Central Government retains the absolute power of judiciary matters (*urusan yustisi*), which including the Supreme Court, Attorney General's Office (AGO), Ministry of Law and Human Rights, and National Police. The prosecutorial power held by the AGO, however, has been highly contested since then. Three institutional aspects contribute to the organisation of knowledge of the AGO: constitutional aptitude, human resources, and the role of prosecutor. The issue of the constitutionality of the Law of Prosecutor has created an urgent call to redefine the status of the AGO under the Constitution. The constitutional provision on the judicial matter has been understood exclusively as the power of

[26] Savelsberg.
[27] Savelsberg.
[28] Katharine McGregor and Ken Setiawan, "Shifting from International to 'Indonesian' Justice Measures: Two Decades of Addressing Past Human Rights Violations," *Journal of Contemporary Asia* 49, no. 5 (2019): 837–61, https://doi.org/10.1080/00472336.2019.1584636.
[29] Hanneman Samuel and Oki Rahadianto Sutopo, "The Many Faces of Indonesia: Knowledge Production and Power Relations," *Asian Social Science* 9, no. 13 (2013): 289–98, https://doi.org/10.5539/ass.v9n13p289.
[30] Vedi R. Hadiz, "Decentralisation and Democracy in Indonesia: A Critique of Neo-Institutionalist Perspectives," *Development and Change* 35, no. 4 (2004): 697–718, https://doi.org/10.1111/j.0012-155X.2004.00376.x.
[31] Arnaldo Pellini, Agus Pramusinto, and Iskhak Fatonie, "Brokering Knowledge and Policy Analysis Within the Indonesian Public Sector," in *Knowledge, Politics and Policymaking in Indonesia*, ed. Arnaldo Pellini et al. (Singapore: Springer, 2018), 47–64.

the court, which left the Prosecutor dwelling in a rather ambiguous position.[32] On the one hand, the prosecutor functions within the ambit of the judicial power realm, while on the other hand, administratively, the Office belongs to the executive branch. The biggest challenge thus is to achieve the envisioned *independent* prosecutorial power. A constitutional review case in 2010 on the 2004 Prosecutor Law reaffirms the view that the prosecutor is a governmental body, thus positions the Attorney General as a member of the executive cabinet (49/PUU-VIII/2010). Over the past two decades, the relationship between the President and the Attorney General has been somewhat clumsy. As an example, Attorney General Atmonegoro only served for three months, as he was fired by President Habibie in 1999 for a highly politicised reason. In another situation, attempts to investigate the crimes committed by the late President Soeharto also led to a suspension of investigation, as instructed by the late President Wahid. At some point, the current Prosecutor's Office is romanticised by the liberal democratic period in 1950 when the well-known Attorney General Soeprapto said that "I am in the judicial service, not in the civil service," which was considered a refusal to suspend an investigation against the Minister of Foreign Affairs at the time.[33]

This organisational conundrum affects the prosecutor's human resources. As part of the government's public bodies, the Office of Prosecutors has been following the bureaucratic reform and management envisioned under the State Civil Apparatus Law (5/2014). The reform emphasises the shift from personnel to human resources management, from a closed to an open career system and safeguards the institution against political intervention. The bureaucratic reform, however, has encountered numerous obstacles. While bureaucratic reform has been implemented in various aspects of the civil servant merit system, claims Alhumami, "the existing patrimonial values governed Indonesian bureaucrats and their systems."[34] The demand to break free from a dominant-patronage model encounters challenges due to resistance to change at every levels, widespread corruption, the complexity of legal reform, and the ineffectiveness of result-oriented human resource management.[35] This is particularly reflected in the recruitment system for high-level officials (*jabatan pimpinan tinggi*) at the Office. Confirming its status as a part of the government's agency, the prosecutor is on the verge of deciding whether to retain the existing closed recruitment enshrined under the Prosecutor Law or to follow the larger bureaucratic reform pathways.[36]

The last institutional aspect is the role of the prosecutor in the criminal justice system. It is widely understood in the Indonesian penal domain that the prosecutor acts as *dominus litis*, the sole agency that controls the proceedings of a criminal case. Under Article 137 of the

[32] Khunaifi Alhumami, "Kejaksaan Republik Indonesia: Hukum Di Antara Bayang-Bayang Dua Kaki," in *Bunga Rampai Kejaksaan Republik Indonesia*, ed. Siti Aminah Tardi (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2015), 203–44.

[33] Alhumami.

[34] Nurdiana Gaus, Sultan Sultan, and Muhammad Basri, "State Bureaucracy in Indonesia and Its Reforms: An Overview," *International Journal of Public Administration* 40, no. 8 (2017): 658–69, https://doi.org/10.1080/01900692.2016.1186179.

[35] Mark Turner, Eko Prasojo, and Rudiarto Sumarwono, "The Challenge of Reforming Big Bureaucracy in Indonesia," *Policy Studies* 0, no. 0 (2019): 1–19, https://doi.org/10.1080/01442872.2019.1708301.

[36] Bambang Waluyo, "Reformasi Pembinaan Sumber Daya Manusia Kejaksaan RI," in *Bunga Rampai Kejaksaan Republik Indonesia*, ed. Siti Aminah Tardi (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2015), 1–29.

Procedural Criminal Code (*Kitab Undang-Undang Hukum Acara Pidana*), the prosecutor has the exclusive authority to continue any crime investigations to the trial proceeding at the court, known to be the legalistic principle. However, the Code's Article 139 stipulates that "[a]fter the public prosecutor has received or accepted the complete result of the investigation from the investigator, she/he shall decide whether or not the dossier of the case has already met requirements for submission to the court." Consequently, the Code opens the possibility for the prosecutor to terminate a criminal case prosecution upon three parameters: the lack of evidence, the case is not a criminal case and case closure in the name of the law. Furthermore, the Attorney General may rule out a case due to public interest. These provisions, while creating a dualistic authority to terminate or to rule out a case at the agency, arguably represent the opportunity principle in prosecutorial work.[37] This dualistic principle, between legalistic and opportunity, has been problematic in several case terminations.[38] The public interest clause has been loosely interpreted so as to conform with the sociological—and presumably political—atmosphere addressed during a criminal investigation process.[39] Bearing in mind the ambiguous position under the Constitution and the dynamics of bureaucratic management at the AGO, the dualistic principle in exercising the role of prosecutor has made the institution prone to being swamped in the political vortex.

Under the criminal justice system process, the dynamics within the AGO's bureaucracy seem to be faltering in their response to the situation regarding serious human rights violations. The AGO was called upon to fulfill its investigative role, which began with an initial inquiry by KOMNAS HAM. Consequently, the settlement process came to a halt, resulting in a formal impasse that can be traced back to the directives for the return of seven initial investigation files related to gross human rights violations cases from KOMNAS HAM, including: cases in Wasior and Wamena; Trisakti, Semanggi 1 and Semanggi 2 cases; Talangsari case; mysterious shooting cases of 1982-1985; enforced disappearances of 1997-1998; the May 1998 Riots; and the 1965-1966 communist massacre.

Table 1: ***The Pattern of Attorney General's Responses in Returning the Investigation of Gross Human Rights Violations (GHRV)***

Differences in the interpretation of authority	Incomplete in terms of technical administration (formal)	Outside, it does not fulfil the element of GHRV
1. Oath of an ad hoc initial investigator; 2. To examine the perpetrator; 3. Confiscate documents that are legalised according	1. Oath of an ad hoc initial investigator, 2. Inclusion of the phrase "based on the power of oath of office" and "*proyustisia*" in the minutes report; 3. Improved numbering in the	1. Requesting Komnas HAM to send a letter to the Indonesian Parliament recommending the establishment of an ad hoc HRC by the President; 2. AG reminds the Indonesian Parliament that TSS cases are

[37] Muhamad Yodi Nugraha, "Optimalisasi Asas Oportunitas Pada Kewenangan Jaksa Guna Meminimalisir Dampak Primum Remedium Dalam Pemidanaan," *Veritas et Justitia* 6, no. 1 (2020): 213–36, https://doi.org/10.25123/vej.3882.

[38] Tolib Effendi, "Prinsip Oportunitas Dalam Sistem Peradilan Pidana Indonesia," in *Bunga Rampai Kejaksaan Republik Indonesia*, ed. Siti Aminah Tardi (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2015), 321–53.

[39] Effendi.

Differences in the interpretation of authority	Incomplete in terms of technical administration (formal)	Outside, it does not fulfil the element of GHRV
to the original; 4. Adding evidence; 5. Re-examination of witnesses and experts.	minutes report; 4. Improvement to the minutes report.	recommended to be handled by the General / Military Courts.

***Source**: Utomo (2019)* [40]

The different perspectives of AGO and KOMNAS HAM on authority between preliminary investigators (*penyelidik*) and investigators (*penyidik)* has further delayed the prosecution of the crimes. KOMNAS HAM acts as the preliminary investigator, meanwhile, the AGO acts as both the investigator and the public prosecutor. Different things occur in ordinary criminal justice where investigators are in one agency, the Police. This indicates that although the traditions and values in criminal procedures have not changed, AGO is not accustomed to acting as an investigator.[41] Furthermore, the AGO's authority is defined by a mandatory prosecution system. This is evident in handling cases that depend solely on the available evidence, without incorporating external criteria. Implementing the Criminal Procedure Code (KUHAP) alongside the Human Rights Court Law (26/2000) clearly demonstrates the close relationship between human rights violation cases and traditional criminal offences of similar seriousness. This context requires a *discretionary* prosecution system that allows for the use of evidence based on the basic components of the crime.[42] Furthermore, the AGO operates within a mandatory prosecution framework that is limited by a hierarchical system of coordination. This situation leads to a deadlock in the procedural approach to tackling serious human rights violations, primarily due to a lack of evidence and a rigid, hierarchical coordination structure. This role is inadequate for confronting substantial human rights abuses. One aspect of the Attorney General's responsibilities that demonstrates a lack of innovation is the assignment of ad hoc investigators. While this does not fundamentally change the nature of AGO's role responsibilities, many human rights advocates view the Attorney General as the most vulnerable component in the hierarchy of human rights enforcement.[43]

This institutional context helps us understand the fact that knowledge production is highly centralised in the Indonesian penal system, providing a leeway of politics at the central government to dominate the discourse in the penal system. While the constitutional provision on judicial power rests exclusively on the court, the current prosecutorial power is longing for similar full independence and autonomy—the absence of which determines the patterns of the outcomes of punishment. Moreover, we may see that prosecutorial power is exercised in a highly bureaucratised manner. In an effort to deliberate the knowledge production and domination in the penal system, it is important to discuss further a macro-sociological level of

[40] Nurrahman Aji Utomo, "Dekonstruksi Kewenangan Investigatif Dalam Pelanggaran Hak Asasi Manusia Yang Berat," *Jurnal Konstitusi* 16, no. 4 (2019): 809–33, https://doi.org/10.31078/jk1647.

[41] Allard Ringnalda, "Procedural Tradition and the Convergence of Criminal Procedure Systems : The Case of the Investigation and Disclosure of Evidence in Scotland," *The American Journal of Comparative Law* 62, no. 4 (2014): 1133–66, https://www.jstor.org/stable/43669495.

[42] Marwan Effendi, *Kejaksaan RI Posisi Dan Fungsinya Dari Perspektif Hukum* (Jakarta: Gramedia Pustaka Utama, 2005).

[43] Hilmar Farid and Rikardo Simarmatra, "The Struggle for Truth and Justice," 2004.

legal structure, specifically on the post-reform human rights norms in the country which has largely informed the penal institutions.

Victim-Oriented Prosecution

One particular area of human rights based legal transplantation is criminal victim protection. Initiated by civil society during the reform in 1999, the victim and witness protection bill was included in the People's Representative Decree No. VIII in 2001 regarding the recommendation of policy direction on the prevention and eradication of corruption, collusion, and nepotism.[44] The urge to provide legal protection against a witness in criminal cases was supported by Indonesia's international commitment as a state party in the UN Convention Against Corruption in 2003. After years of deliberation, the Parliament then enacted the Law on Victim and Witness Protection in 2006. The main purpose of the law is "to provide security towards witnesses and victims in every criminal trial proceeding." The law also regulates several rights of a witness or victim, for instance, the right to protection of personal, family and property security; free from intimidation; assisted by a translator; obtaining a new identity and residence. In relation to the victim of gross human rights violations, the law provides additional rights of medical and psycho-social rehabilitation assistance through the works of Witness and Victim Protection Agency (*Lembaga Pelindungan Saksi dan Korban*/LPSK).

As the dominant transitional justice framework stands the victims reparation program as one of its constitutive pillars, the Indonesian experience showcases a rather different pathway, however. Regardless of the fact that the Victim and Witness Protection Law does not explicitly stipulate that witness and victim protection is a part of the integrated criminal justice system, it is hard to say that such a protection mechanism works separately from the penal system. Given the unique rationale behind the enactment of the law, this protection mechanism is not exclusively directed towards gross human rights violations, although it provides special treatment to them. The enactment of the Victim and Witness Protection Law in 2006 (revised in 2014) affirms the distinct characteristics of this crime along with other extraordinary crimes, such as terrorism, human trafficking, torture and sexual violence.[45]

In contrast to the criminal prosecution against past violations of human rights cases, the turn to victim responses has been progressive since the creation of LPSK.[46] These responses can be seen as policy alternatives undertaken by the state amidst prosecution stagnation. This shift in legal development seems to merge the procedural rights model with the service model towards victims of crimes.[47] The former model faces complexity as the strict regulation towards compensation and restitution rests on the establishment of the ad hoc human rights trials on

[44] Harkristuti Harkrisnowo, "Victims: The Forgotten Stakeholders of the Indonesian Criminal Justice System," in *Support for Victims of Crime in Asia*, ed. Wing-Cheong Chan (London & New York: Routledge, 2008), 262–88.

[45] Paul Gready, "Organisational Theories of Change in the Era of Organisational Cosmopolitanism : Lessons from Approach Organisational Theories of Change in the Era of Organisational Cosmopolitanism : Lessons from ActionAid ' s Human Rights-Based Approach," no. October 2014 (2013): 37–41, https://doi.org/10.1080/01436597.2013.831535.

[46] Betty Itha, "Sebuah Catatan: Pemberian Bantuan Bagi Korban Pelanggaran HAM Yang Berat," in *Potret Perlindungan Saksi Dan Korban*, ed. Nikmatul Hidajati (Jakarta: Lembaga Perlindungan Saksi dan Korban, 2017), 99–125.

[47] Muladi, "Hukum Pidana Dan Perlindungan Bagi Korban Kejahatan," *Jurnal Perlindungan* 4, no. 1 (2014): 3–12.

past atrocity crimes. Meanwhile, the latter model focuses on the standardisation of service and assistance, which is measurable and more beneficial for victims of crime.[48]

The practice followed by the International Criminal Court is worth investigating at the moment, as it emphasises the victim's key role in the prosecution process. This examination is based on several aspects of the Rome Statute and the Rules of Procedure and Evidence (RoPE),[49] with a particular emphasis on the court's jurisdiction and the admissibility of the case. In this context, the role and responsibilities of the Office of the Prosecutor (OTP) in collaborating with the victim or their representative are critical for gathering preliminary information and evidence while also protecting the victim. Following the preliminary examination, the OTP files a request with the Pre-Trial Chamber (PTC). At this step, the PTC is responsible for determining whether the OTP's request to conduct an investigation is admissible and in compliance with judicial jurisdiction and the case's admissibility provisions. The PTC's judgment results in a warrant to conduct an inquiry. This ruling empowers the OTP to conduct additional investigations [50].[51] In this system, it is important to note that the interaction between OTP, PTC and the victim is interwoven to commence the investigation, which is a kind of victim engagement in the case process.

Such a special treatment of victims, in fact, confirms the rather *extraordinariness* of gross violation of human rights. In Indonesia, the idea of the extraordinariness of crime creates a change in the country's penal system, which promotes a pervasive creation of special crimes (*tindak pidana khusus*) norms and institutions, presumably in order to draw its clear distinction from the common crimes ruled under the Criminal Code. As a result, such specialty entails a non-traditional mode of punishment, which then translated into the practice of crime risk assessment. The developing technologies of governance, such as crime rate records, crime-based prisons, or even risk-based corrections, manifest a suggestion of the inducement of actuarial justice in Indonesia.[52] The following final section discusses how this inducement works simultaneously with victim-oriented assistance, which results in a strategy that neutralize the idea of prosecuting past atrocities.

Welfare Assistance as Neutralisation Strategy

The concept of actuarial justice was introduced in the 1990s through the works of Jonathan Simon and Malcolm Feeley, who examined the changes in the penal system in the United States.[53] They observed a shift in penological approaches from a focus on individuals to an emphasis on groups, moving away from retribution and rehabilitation toward the incarceration

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48 Muladi.

49 The Rule of Procedure and Evidence is the procedural law of the International Criminal Court. The Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A

50 Office of the Prosecutor, "Policy Paper on Case Selection and Prioritisation," *International Criminal Court*, no. September (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

51 Office of the Prosecutor.

52 Harison Citrawan and Sabrina Nadilla, "Penal Response and Biopolitics in the Time of the COVID-19 Pandemic: An Indonesian Experience," in *Law, Humanities and the COVID Crisis*, ed. Carl Stychin (London: University of London Press, 2023), 135.

53 Malcolm M. Feeley and Jonathan Simon, "The New Penology: Notes of the Emerging Strategy of Corrections and Its Implications," *Criminology* 30, no. 4 (1992): 449–74, https://doi.org/10.4324/9781315095288.

of perceived dangerous groups.[54] At the heart of this transformation in penal philosophy is the governmentality of societal risks. However, this shift tends to influence policy development more than it results in actual changes to penal practices. Additionally, while many norms, regulations, procedures and institutions have been established to support the notion of crime risk management—particularly with regard to serious offenses—this concept is primarily implemented through the carceral system via the classification of imprisonment.[55]

The shift to focus on imprisonment creates a new perspective on extraordinary crime in Indonesia. Given the high number of extraordinary crimes after the reform, the penal system has been putting major concern on drug-related crimes, corruption and terrorism.[56] The penology of these three extraordinary crimes is also reflected in the country's long-term and mid-term development agenda.[57] These penal responses undertaken to combat deviances in Indonesia are a clear reflection of Simon's *governing through crime*.[58] In this sense, the legal rhetoric of the war on drugs, fight against corruption and combatting terrorism have been exerted in various aspects of Indonesia's social living—including education, religious activity, work environment and bureaucracy, to name a few—reflecting a form of governmentality in a Foucauldian sense.[59] The most consequential significance is that the penal system is no longer reckoning atrocity crimes as an *imminent* risk in a democratic Indonesia.

Despite the fact that there is yet a substantial guarantee for the non-reoccurrence of atrocity crimes made by the state, the demand to prosecute these crimes remains high.[60] The turn-to-victim penal response underlies the protection of fundamental freedom that enables victims and survivors to express grievances and tirelessly urge the state to resolve past atrocity cases.[61] The government's responses to such demands, nonethelss, have been focusing on the welfare assistance program, arguably as part of reparative measures towards grievances of the past.[62]

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54 Jonathan Simon, "Punishment and the Political Technologies of the Body," in *The SAGE Handbook of Punishment and Society*, 2013, 60–89, https://doi.org/10.2139/ssrn.2343795.

55 Leopold Sudaryono, "Drivers of Prison Overcrowding in Indonesia," in *Crime and Punishment in Indonesia*, ed. Tim Lindsey and Helen Pausacker (Oxon: Routledge, 2021), 179–206.

56 Ricky Gunawan and Raynov T. Pamintori, "The Death Penalty in Indonesia: Developments and Prospects," in *Crime and Punishment in Indonesia*, ed. Tim Lindsey and Helen Pausacker (Oxon: Routledge, 2021), 276–308; Tim Lindsey and Helen Pausacker, "Crime and Punishment in Indonesia," in *Crime and Punishment in Indonesia*, ed. Tim Lindsey and Helen Pausacker (Oxon: Routledge, 2021), 1–18.

57 Saldi Isra et al., "Obstruction of Justice in the Effort to Eradicate Corruption in Indonesia," *International Journal of Law, Crime and Justice* 51 (2017): 72–83, https://doi.org/10.1016/j.ijlcj.2017.07.001; Adam J Fenton and David Price, "Breaking ISIS: Indonesia's Legal Position on the 'Foreign Terrorist Fighters' Threat," *Australian Journal of Asian Law* 16, no. 1 (2015): 1–18.

58 Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy* (New York: Oxford University Press, 2007).

59 Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burcell, Colin Gordon, and Peter Miller (Chicago, 1991); Nikolas Rose, Pat O'Malley, and Mariana Valverde, "Governmentality," *Annu. Rev. Law Soc. Sci.* 2 (2006): 83–104.

60 Pohlman, "A Year of Truth and the Possibilities for Reconciliation in Indonesia."

61 Sri Lestari Wahyoeningrum, "Seducing for Truth and Justice :," *Journal of Current Southeast Asian Affairs* 32, no. 3 (2013): 115–42, https://doi.org/10.1177/186810341303200306; Kerry E Whigham, "Remembering to Prevent : The Preventive Capacity of Public Memory" 11, no. 2 (2017): 53–71; Citrawan, "From Grievance to Welfare: Reshaping the Identity of Past Gross Violation of Human Rights Victims in Indonesia."

62 Sri Lestari Wahyuningrum, "Working from the Margins: Initiatives for Truth and Reconciliation for Victims of the 1965 Mass Violence in Solo and Palu," in *The Indonesian Genocide of 1965: Causes, Dynamics and Legacies*, ed. Katharine McGregor, Jess Melvin, and Annie Pohlman (Palgrave Macmillan, 2018), 335–56.

These assistance programs, primarily executed by the LPSK, have also been exercised collaboratively by the central and local government, assisted by civil society organisations.

As we have mentioned earlier, the victim reparation mechanism has an integrative nature within the criminal justice system, wherein welfare support for victims can be viewed as a strategy for neutralisation given the conscientious avoidance of prosecutions. This means that the current penal system engages with the victims without addressing the perpetrators, reflecting a focus on the knowledge of past human rights abuses. This is evident in the efforts of reputational entrepreneurs who *seek* justice through various welfare initiatives.[63] For instance, President Joko Widodo's direct mention of rehabilitative reparations for victims and their families during the 2020 International Human Rights Day commemoration exemplifies how these reputational entrepreneurs work to counterbalance the call for justice within the penal system. This may also include the establishment of a non-judicial resolution team for past gross human rights violations through a presidential decree in 2022. In recent years, local leaders have also seized the chance to provide social assistance to victims and survivors, classifying them as vulnerable groups within their community human rights initiatives.[64] This development is clearly supported by the actions of previously mentioned institutions and some reassuring court rulings concerning the rights of victims and survivors.[65]

This significant shift in the way knowledge is structured within Indonesia's penal system appears to create a future path for addressing past gross human rights abuses. Currently, the organisation of knowledge in the penal system shows a model characterised by decentralised domination and personalism. This model indicates that control and authority within penal policies are spread out among various competing groups and interests.[66] The context surrounding the prosecutor's Office, the emphasis on victim-centred legal mechanisms and the strategy of neutralising past injustices seem to complicate the ongoing absence of criminal proceedings for atrocity crimes. Such complexity leads to challenges at the institutional level, making it difficult to convert the political motivations behind past atrocities into actionable criminal justice knowledge. The Attorney General's quoted statement at the outset of this article serves as evidence for this issue.

CONCLUSION

This article seeks to analyse the absence of prosecution against past atrocity crimes through a sociological perspective on punishment in Indonesia. While numerous studies address this issue using political and transitional justice frameworks, we contend that the stagnation in prosecutions, or we term conscientious avoidance, can be better understood through the lens of knowledge structures and changes within the country's penal system. The study identifies three

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63 Fine, *Difficult Reputations: Collective Memories of the Evil, Inept, and Controversial*.

64 Vannessa Hearman, "Contesting Victimhood in the Indonesian Anti- Communist Violence and Its Implications for Justice for the Victims of the 1968 South Blitar Trisula Operation in East Java Contesting Victimhood in the Indonesian Anti-Communist Violence and Its Implications " 3528 (2017), https://doi.org/10.1080/14623528.2017.1393943; Wahyuningrum, "Working from the Margins: Initiatives for Truth and Reconciliation for Victims of the 1965 Mass Violence in Solo and Palu."

65 Citrawan, "From Grievance to Welfare: Reshaping the Identity of Past Gross Violation of Human Rights Victims in Indonesia."

66 Joachim Savelsberg, "Knowledge, Domination, and Criminal Punishment," *The American Journal of Sociology1* 99, no. 4 (1994): 911–43.

primary explanations for such conscientious avoidance, as illustrated by the recent administrative case against the Attorney General. First, Indonesia's prosecutorial authority creates a framework for how knowledge of past atrocities is structured and organised, influenced by a centralised power dynamic. Second, the focus on victim protection within the criminal justice system has fostered a narrative surrounding the right to reparations for victims of atrocity crimes, largely modelled after Western transitional justice principles. Ultimately, the prioritisation of victims, bolstered by actuarial justice in the penal system, allows welfare support for victims to inform the understanding of atrocity crimes. This emerging knowledge ultimately contributes to a recurring pattern of the so-called conscientious avoidance.

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