

## **The Independence of the Prosecutor's Office in Realizing Restorative Justice as a Criminal Paradigm**

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**Abstract:** *The purpose of this research is to examine, know and analyze the parameters of the independence of the Attorney General in the Indonesian Criminal Justice System and the Attorney's efforts in realizing restorative justice within the sentencing paradigm. The approach method used in this paper is normative juridical. The specification of this writing is descriptive analytical. The position of the Prosecutor should be that of an independent institution with reference to a central role (pivotal position) in the criminal justice system. So that the prosecutor can determine whether a suspect can be detained or continued with prosecution before the court or can only be released. Through the settlement of criminal cases outside the Court, the Prosecutor is expected to be able to implement a restorative justice approach in carrying out his duties and functions as a public prosecutor. If the prosecutor in terms of carrying out the prosecution is not independent, then the decision handed down by the judge also has no independent implications, because the decision handed down by the judge to the defendant is based on what the prosecutor has charged the defendant with. In order to uphold the rule of law through the judicial process, the idea is currently emerging that the law enforcement process carried out by law enforcement officials is able to realize restorative justice, which is expected to better answer the demands of justice desired by the community.*

*Keywords: Independence; Prosecutor; Restorative.*

### **1. Introduction**

According to Friedman, the Attorney's position is part of the legal structure that determines whether or not the law can be properly implemented.<sup>1</sup>The Legal Structure itself consists of starting from the police, the Attorney General's Office,

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<sup>1</sup>Ardito Yudho Pratomo, Umar Ma'ruf, and Aryani Witasari, Implementation of Criminal Action Prosecution Online in Realizing Principles of Fast Prosecution, Simple & Low Cost. Journal of Sovereign Law Volume 4 Number 2, (2021), p.137

the courts and the Criminal Executing Agency (Lapas). The position of the Prosecutor should be that of an independent institution with reference to a central role (pivotal position) in the criminal justice system. For this reason, the prosecutor's task is to prosecute a suspect based on legal guilt that exists on the suspect. The prosecutor is a law enforcement officer who has a pivotal position so that the prosecutor can determine whether a suspect can be detained or continued with prosecution. before the court or can only be acquitted. Like Weigend's statement which stated that "Now prosecutors do not simply act as an intermediary between the police and the courts, deciding whether or not a case that has been suspected should also be prosecuted. Their powers extend well beyond these core responsibilities. Under certain circumstances, prosecutors may be the sole decision-makers to determine whether a criminal sanction will be imposed. They may also determine, or negotiate with the offender, the nature and severity of the sanction to be imposed."<sup>2</sup>

The Prosecutor's Office as a law enforcement agency that has functions related to judicial power and is authorized to prosecute in criminal cases often prosecutes "small" cases prosecuted based on the Criminal Code, namely the fulfillment of justice in corporal punishment as a deterrent effect on perpetrators.<sup>3</sup> Often in the process of handling these cases, law enforcement officials do not apply the legal principle in conducting examinations of their cases, namely the *ultimum remedium* principle, so that the settlement of problems always ends in court.

Settlement of criminal cases or cases through the judiciary is often too formalistic and rigid and does not provide a substantive sense of justice between perpetrators and victims of criminal acts. The idea that the settlement of criminal cases can only be carried out through the institution of the Court and the theory of retributive punishment has caused many problems and negative impacts. For this reason, a change in approach is needed, namely through the settlement of criminal cases outside the court with the principles of restorative justice. The restorative justice approach is seen as a way out for law enforcement efforts that accommodates the interests of stakeholders, considering that the conventional criminal justice system has so far tended to forget the interests of victims and society.

As a rule of law country, Indonesia should have created a law enforcement system capable of creating a sense of justice and creating harmony, peace, order and prosperity for the people. The application of restorative justice can provide benefits, among other things creating harmony in social life, restoring victims' losses and suffering, creating a fast, simple and low-cost justice system, reducing

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<sup>2</sup>T. Weigend. 2012, A judge by another name? Comparatives on the role of the public prosecutors, in *The Prosecuto in a Transnational perspective*. Oxford:Oxford University Press, p. 51

<sup>3</sup>N. Sari, Application of the *Ultimum Remedium* Principle in Corruption Crimes, *Judicial Journal*, Vol.10 Number 3, (2017), p.138

over-capacity problems that occur in prisons and correctional institutions due to over-capacity in correctional institutions<sup>4</sup>the potential for commotion, riots and even prisoner escape saves the state budget, and reduces the buildup of cases in the Courts and Attorney General's Office. Thus, it is hoped that the Attorney General's Office will be able to create changes in law enforcement, especially in cases where the loss is not that great or in small cases that can be resolved by deliberation.

The purpose of this writing is to study, know and analyze the parameters of the independence of the Prosecutor's Office in the Indonesian Criminal Justice System and the Attorney's efforts in realizing restorative justice in the sentencing paradigm.

## **2. Research Methods**

To conduct an assessment in this writing the author uses a normative juridical method, with an emphasis on literature studies.<sup>5</sup>The specifications in this study are descriptive analysis. Secondary research materials originating from laws and regulations relating to the writing carried out. The data collection used in this writing is document study which is a data collection tool that is carried out through written data.

## **3. Results and Discussion**

### **3.1. Parameters of Attorney Independence in the Indonesian Criminal Justice System**

Law enforcement in Indonesia is synonymous with the criminal justice system which is basically a system of power or authority to enforce the law. Mardjono Reksodiputro defines the criminal justice system as a crime control system consisting of police, prosecutors, courts, correctional institutions and advocates/lawyers.<sup>6</sup>

In the provisions of Article 2 of Act No. 11 of 2021 concerning Amendments to Act No. 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia it states that paragraph (1) the Prosecutor's Office of the Republic of Indonesia hereinafter referred to as the Prosecutor's Office is a Government institution tasked with implementing State Power in terms of prosecution as well as having

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<sup>4</sup>Saharuddin, Mawardi De La Cruz, Haritsah, Rahmawati, & Rommi Y Hiola, The Assimilation and Integration Rights for Prisoners as Over Capacity Prevention Effort in the Covid-19 Pandemic, *Daulat Hukum Journal*, Volume 5 Number 3, (2022), p. 231

<sup>5</sup>Soemitro, 1998, *Legal Research Methodology and Jurimetry*, Jakarta, Ghalia Indonesia, p. 24

<sup>6</sup>Mardjono Reksodiputro, Reconstruction of the Indonesian Criminal Justice System. *Journal of Lex Specialis*, Vol. 11, (2017), p.5.

other authorities determined according to the Law, Paragraph (2) states that the power of the State referred to in paragraph (1) will then be exercised "independently".

The referred to that the prosecutor's office is an institution that has a very high potential for intervention from outsiders, both from the executive and legislative sides. If the two parties really want to destroy the judiciary, it will be easy for the two institutions to do so. The legislature has wide opportunities to be able to play through making laws, and the executive is in the administrative part, such as holding money or even dismissing an Attorney General. In theory, legal experts have long been worried about law enforcement if later there is interference by other parties by using political power, experts have the belief that when law deals with political power,<sup>7</sup>

It is further said that basically independence is divided into 2 (two) aspects, namely institutional independence; and functional independence. The independence of the Attorney General is very much needed for the benefit of law enforcement by being honest, fair, responsible and transparent by upholding the principle of fair trial in the principle of equality before the law. This is mandatory because the prosecutor's office is a determining factor in the sub-system of legal structure in criminal law enforcement.<sup>8</sup> If you look at the function of the Prosecutor's Office in functioning as a Public Prosecutor, it is the prosecutor who determines whether a person can be prosecuted legally or not so that the prosecutor carries out the execution of the sentences for the defendants after a decision from the panel of judges.<sup>9</sup>

### **3.2. Attorney's Efforts in Realizing Restorative Justice in the Criminal Paradigm**

In order to uphold the rule of law through the judicial process, the idea is currently emerging that the law enforcement process carried out by law enforcement officials is able to realize restorative justice, which is expected to better answer the demands of justice desired by the community. One of them is implemented in a regulation of the prosecutor's office, namely the Attorney General's Regulation of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice issued by the Attorney General as the highest Head of Prosecution in the Republic of Indonesia.

The role of the Prosecutor is so great in various criminal justice systems in various

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<sup>7</sup>M. Talhah, Law Enforcement by the Prosecutor's Office in the Progressive Legal Paradigm. Journal of Master of Laws, Vol.1 No.1, (2005), p. 87

<sup>8</sup>I. Ghonu, Prosecutor's Independence in the Criminal Justice System in Indonesia. *Justitia Et Pax Journal of Law*, Vol.31 No.2, (2015), p.12.

<sup>9</sup>M. Yuhdi, Duties and Authorities of the Attorney General's Office in the Implementation of General Elections. *Journal of Pancasila and Citizenship Education*, Vol.27 No.2, (2014), p.95

countries, including the existence of discretionary authority in resolving cases, so in many jurisdictions in the world the Prosecutor is a "half judge" (semijudge) or a "quasi-judicial officer". That is why the Prosecutor may withdraw the indictment or terminate the case process with or without conditions. The form of discretionary prosecution can be in the form of termination of prosecution, probation of prosecution, waiver of cases, transactions, and can even be in the form of imposing a sentence with or without the approval of the court.<sup>10</sup>

With a very large role and function in the criminal justice process, the Prosecutor becomes the controller of the case handling process or *dominus litis*, as stipulated in Article 2 paragraph (1) of Act No. 11 of 2021 concerning Amendments to Act No. 16 of 2004 concerning the Attorney General of the Republic Indonesia, which states that: "The Attorney General's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution that exercises state power in the field of prosecution and other authorities based on law". As a *dominus litis*, the prosecutor is an official who has the authority to determine whether a case deserves to be prosecuted or the prosecution must be stopped. The Prosecutor's authority to stop or continue the prosecution process,

Termination of Prosecution Based on Restorative Justice stipulated in the Attorney General Regulation Number 15 of 2020 guidelines for Public Prosecutors to stop prosecutions with due observance of fairness, public interest, proportionality, punishment as a last resort, and fast, simple and low cost. As for the conditions that must be fulfilled by suspects who are entitled to obtain termination of the prosecution of cases based on restorative justice described in Article 5 PERJA No. 15 years is:

- a. The suspect is a first time offender;
- b. Criminal acts are only punishable by fines or threatened with imprisonment of not more than 5 (five) years; And
- c. The crime is committed with the value of the evidence or the value of the losses incurred as a result of the crime not exceeding Rp. 2,500,000.00 (two million five hundred thousand rupiah).

There are 2 (two) types in the method of stopping the prosecution of cases, including peace efforts and peace processes. First, peace efforts offered by the public prosecutor to both parties, namely the suspect and the victim. The flow of peace efforts begins with the summons of the victim by the public prosecutor followed by explaining the reasons for the summons. Followed by involving the families of victims/suspects, community leaders/representatives, and other related parties. During the process, if the offer is accepted then the case is

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<sup>10</sup>RM Surachman and Andi Hamzah, 1996, Prosecutors in Various Countries, Their Roles and Positions, Sinar Graphic, Jakarta, p. 7.

dismissed, if it is rejected then the case will be transferred to the court. Second, the peace process. The public prosecutor acts as a facilitator in which there is no element of partiality between the two parties between the victim and the suspect within a period of 14 (fourteen) days from the handover of responsibilities that must be fulfilled by the suspect and carried out at the prosecutor's office. This activity was carried out to settle cases peacefully and not to be followed up in court.

The Attorney General's Office also has the authority to streamline the law enforcement process provided for by law by taking into account the principles of fast, simple and low-cost trials, as well as establishing and formulating case handling policies for the success of independent prosecutions for the sake of justice based on law and conscience. The factual basis for the issuance of the Attorney General's Regulation Number 15 of 2020 is:

- 1) Viral cases ranging from the flip-flops case to the theft of 1 (one) baby milk box indicate that society currently wants law reform;
- 2) Judiciary is more cost efficient if maximum justice is achieved (benefit), if cases or conflicts between victims and defendants are resolved in the pre-delegation process (outside court), compared to after the delegation;
- 3) This concept contains the teaching that judicial behavior needs to be changed so that both the regulations (legal), the behavior of law enforcement (attitudinal) and the strategy of law enforcement (strategic) can achieve the maximization of social welfare and justice (pareto improvement).<sup>11</sup>

In the conventional criminal justice system, the victim remains silent and does not interfere in the criminal process. Restorative justice wants to rearrange the role of the victim in this way, from being passive to wait and see how the criminal justice system deals with the crimes that make them victims. Victims are empowered so that they have the personal right to participate in criminal proceedings. In other words, empowerment is carried out through meetings, in this case between perpetrators and victims or the public to discuss and actively participate in solving criminal matters (resolution of the criminal matter).<sup>12</sup>

In terms of position, the Prosecutor's Office in seeking restorative justice, in fact an independent prosecution power is only possible if in carrying out its duties and

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<sup>11</sup> Antonius De Andrade Fahik, Anak Agung Sagung Laksmi Dewi, I Made Minggu Widyantara. Implementation of the Attorney General's Office of the Republic of Indonesia Number 15 of 2020 (Case Study at the Jembrana District Attorney's Office). *Journal of Legal Construction*, Vol. 3, No. 2, (2022), p.371

<sup>12</sup> Strong Yudi Prayitno, Restorative Justice for Justice in Indonesia (Juridical Philosophical Perspective in Law Enforcement In Concreto), *Journal of Dinarnika Hukum*, Vol. 12 No. 3, (2012), p. 410.

authorities the Prosecutor's office as the holder of prosecution power is structurally separate from the executive, legislative and judicial powers and is independent from the three influences of that power. The independence of the Prosecutor's Office in the context of the Indonesian rule of law must be directed to become an independent state power, as is the independence of the judiciary. Without being balanced with the existence of an independent prosecution power, the implementation of law enforcement in the Indonesian legal state will face prolonged challenges and obstacles.

#### **4. Conclusion**

If the prosecutor in terms of carrying out the prosecution is not independent, then the decision handed down by the judge also has no independent implications, because the decision handed down by the judge to the defendant is based on what the prosecutor has charged the defendant with. The judge is not allowed to decide beyond what the prosecutor charges at trial, ideally it is the actual act that is being charged and that act that is being proven. In order to uphold the rule of law through the judicial process, the idea is currently emerging that the law enforcement process carried out by law enforcement officials is able to realize restorative justice, which is expected to better answer the demands of justice desired by the community.

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