

The Domination of the Prosecutor's Office Changes the Sentencing Paradigm Towards Restorative Justice

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Abstract. *The aim of this research is to determine and analyze the role of the Prosecutor's Office in seeking restorative justice according to authority. In this writing the author uses a normative juridical method with research specifications in the form of descriptive analysis. The position of the prosecutor is the main and strategic axis in the criminal law enforcement process. Because it plays a role from the start of the investigation (pre-adjudication stage), prosecution and examination in court (adjudication stage), up to the implementation of the court decision (post-adjudication stage). The Attorney General's Office issued prosecutor's regulation number 15 of 2020 concerning stopping prosecutions based on restorative justice. Another background to this regulation is that the Prosecutor's Regulations which were stipulated on 21 July 2020 gave the Public Prosecutor (JPU) the right to stop prosecuting cases against defendants in certain cases, if the parties involved have agreed to make peace. Termination of Prosecution Based on Restorative Justice which is regulated in Attorney General Regulation Number 15 of 2020, guidelines for Public Prosecutors to stop prosecutions by paying attention to justice, public interest, proportionality, punishment as a last resort, and fast, simple and low cost . There are 2 (two) types of methods for terminating case prosecution, including peace efforts and peace processes.*

Keywords: *Justice; Paradigm; Prosecutor; Restorative.*

1. Introduction

Law is inseparable from our daily lives, whether in the family, school, office, or in society. Every country must implement laws that can regulate its people, including Indonesia. Our constitution has expressly stated that Indonesia is a country of law as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.¹In a state of law there is power that is exercised on the basis of good law towards justice. In acting to exercise state power, the state or

¹Haposan Siallagan, (2016), Implementation of the Principles of the Legal State in Indonesia, *Sosiohumaniora*, 18 (2), p 122.

law enforcement officers must enforce the law with an orientation towards a prosperous society.

When talking about criminal law, it is inseparable from the existence of criminal law doctrine, namely: legal certainty, legal benefit, legal justice. Certainty in law can be achieved from the existence of a court decision that has permanent legal force, legal benefit can be achieved from the existence of public compliance with legal norms contained in various legal products of laws and regulations, while justice in law is very difficult to achieve compared to the other two principles in criminal law doctrine.²This is because the understanding and interpretation of the principle of justice in law is interpreted differently. Like the adage that states, "in justice there must be injustice, in injustice there must be justice".

The law that develops in Indonesia must be based on the philosophy or outlook of the nation and the foundation of the state that upholds human rights. In line with this, Criminal Law in particular has the aim of regulating and organizing the life of society in order to create and maintain public order. Criminal law efforts in overcoming crime by using sanctions cannot be separated from the judicial process or what is known as the Criminal Justice System which is regulated in the Criminal Procedure Code/KUHAP (Law No. 8 of 1981) where the main objective is to require respect for the rights of citizens.

The entire system in which there are interconnected parts is called the criminal justice system. The important thing in the criminal justice system is that there is a sub-system of prosecution carried out by the Attorney General's Office of the Republic of Indonesia. The Attorney General's Office of the Republic of Indonesia as a state institution that acts as a law enforcement officer by carrying out its functions which have the authority as a public prosecutor, the implementation of court decisions and other authorities regulated in the prosecutor's law in the corridor as a law enforcement officer.

Prosecutors have an important role in trials and prosecutors are also authorized by law to carry out prosecutions as public prosecutors acting on behalf of the State in carrying out their duties and authorities. The Republic of Indonesia's prosecutor's office is a state institution commanded by an attorney general who is elected and responsible to the President as head of state and head of government. This command system emphasizes the existence of hierarchical elements in the prosecutor's office in order to facilitate the implementation of its duties and functions. In addition to the structural positions in the prosecutor's office, there are also institutions where prosecutors work which are spread

²Ardito Yudho Pratomo, Umar Ma'ruf, and Aryani Witasari. (2021). Implementation of Criminal Action Prosecution Online in Realizing the Principle of Fast Prosecution, Simple & Low Cost. *Jurnal Daulat Hukum*, 4 (2),p 132

across all provinces and various districts/cities in order to embrace every legal problem that exists in society.³

Theoretically, a criminal case can be closed by law and its prosecution stopped based on restorative justice if several conditions are met, namely first, the suspect has committed a crime for the first time, second, the crime is only threatened with a fine or is threatened with imprisonment of no more than 5 years, and third, the crime is committed with the value of the evidence or losses caused by the crime not exceeding Rp. 2,500,000.00. In practice, criminal cases that should be resolved restoratively are still being examined in court while the case can be stopped or resolved at the investigation stage at the police or at the prosecution stage at the prosecutor's office. As a result, the burden on the courts increases and increases the burden on the prisons that accommodate inmates.

Researchers determine a theme and form a title to be continued in conducting a scientific study in the form of systematic and basic research. research objectives for knowing and analyzing the role of the Prosecutor's Office in pursuing restorative justice according to its authority.

2. Research Methods

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this study.

3. Results and Discussion

3.1. The Capacity of the Prosecutor's Office in Law Enforcement in Indonesia

The position of the prosecutor becomes the main and strategic axis in the criminal law enforcement process. The strategic role and main axis of the Public Prosecutor, because it has played a role since the beginning of the investigation (pre-adjudication stage), prosecution and examination in court (adjudication stage), until the implementation of the court decision (post-adjudication stage).⁴This characteristic is what makes the role of the Prosecutor's Office vital in many countries, including in Indonesia, where it is often referred to as the owner of the case (*dominus litis* or master of the procedure).⁵

³Septian Nanang Pangestu, and Lathifah Hanim. (2021), The Role of Prosecution Related to Prosecutor's Demand in Enforcing the Criminal Action of Narcotics. *Journal of Legal Sovereignty*, 4(1), p 43

⁴Basrief Arief, (2013), The Role of the Prosecutor's Office in the Criminal Justice System: Organizing an Integrated Criminal Justice System, Jakarta: Gaung Persada Press, p 57.

⁵Andi Hamzah, RM Surachman, (2015), Pre-Trial Justice and Discretionary Justice in the Criminal Procedure Code of Various Countries, Jakarta: Sinar Grafika, p 199.

The Attorney General's Office of the Republic of Indonesia is a government institution that exercises state power in the field of prosecution and other authorities based on the Law as well as controlling the case process (*Dominus Litis*).⁶The prosecutor's office has a central position in the law enforcement process and is the only agency that can determine whether a case in a criminal case can be submitted to the Court based on valid evidence according to the Criminal Procedure Code. In normative juridical terms, it can be proven that the public prosecutor is *Dominus Litis* in criminal law enforcement starting from the pre-prosecution stage, prosecution, and in legal efforts and execution.

The transfer of cases to the public prosecutor is because the official who is authorized by law is the Prosecutor's Office as the public prosecutor to transfer cases to the court and prosecute the defendant in court. The public prosecutor has the right and authority (*bevoegd en macht*) to complete the case files from the investigation results that are considered still lacking by the public prosecutor by conducting additional investigations assisted by the investigator based on instructions from the public prosecutor by asking the investigator to conduct additional investigations because the prosecutor's indictment must be based on accurate investigation results so that they are not easily refuted in the trial process and can be accepted by a panel of judges.

The notification of the commencement of the investigation through the issuance of a Letter of Notification of Commencement of Investigation (SPDP) and the termination of the investigation through a Letter of Order to Terminate Investigation (SP3) to the public prosecutor, shows that the Prosecutor as the public prosecutor is *Dominus Litis* as the controller or owner of the case. It does not stop there, if the investigation has been completed, the investigator still submits the case files to the public prosecutor.

It is reaffirmed that, the Prosecutor as *Dominus Litis* is an official who has the authority to determine whether a case is worthy of being submitted to prosecution or whether the prosecution should be stopped. The principle of *Dominus Litis* in question can be found in the regulation of the authority to stop prosecution held by the Prosecutor's Office.

Referring to the etymological meaning of the word "Public Prosecutor" and associated with the role of the Prosecutor's Office in a criminal justice system, the Prosecutor's Office should be viewed as *Dominus Litis* (*procuruer die de procesvoering vastselat*) namely the controller of the case process from the initial stages of investigation to the implementation of the execution process of a verdict. The principle of *Dominus Litis* is universal as stated in Article 11 of the Guidelines on the Role of Prosecutors which was also adopted by the Eight United Nation Congress on The Prevention of Crime in the 8th Crime Prevention

⁶Dio Ashar Wicaksana, et al., (2015), Anthology of the Attorney General's Office of the Republic of Indonesia, Depok: Faculty of Law, University of Indonesia, p. 197

Congress in Havana in 1990 and in Indonesia has also been explicitly recognized in the Constitutional Court Decision Number 55/PUU-X11/2013.⁷

3.2. The Role of the Prosecutor's Office in Striving for Restorative Justice in Accordance with Authority

In addition, legal policy can be interpreted as official guidelines or lines (policies) regarding laws that will be enforced either by making new laws or by replacing old laws, in order to achieve state goals.⁸ Criminal law policy can also be interpreted as a policy of a country through authorized bodies to establish the desired regulations and used to express the values and norms contained in society in order to achieve the desired goals.⁹ Therefore, in implementing "criminal law policy" an election must be held to achieve the best legislative results in the sense of fulfilling the requirements of justice and utility.

In law enforcement, it is important to pay attention to the values that underlie the life of the nation as a core philosophy which is the local genius and local wisdom of the Indonesian nation. These values are the essence of the Indonesian civilization that has existed for thousands of years which must be used as a measure of the basic values of development and legal renewal in Indonesia.¹⁰

In order to uphold the supremacy of law through the judicial process, currently there is an idea that the law enforcement process carried out by law enforcement officers is able to realize restorative justice, which is expected to better answer the demands for justice desired by the community. One of them is implemented in a regulation of the Prosecutor's Office, namely the Republic of Indonesia Prosecutor's Office Regulation 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.

As the controller of the case handling process or *dominus litis*, the Prosecutor has the authority to set aside the prosecution of criminal cases based on the principle of prosecution discretion or the principle of opportunity. The principle of prosecution discretion is related to the discretion held by the Prosecutor as a state apparatus. In carrying out their duties and authorities, law enforcement officers, such as the Police, Prosecutors, Judges, and Correctional Institutions, in addition to having to pay attention to the policies outlined by their leaders and the provisions of applicable laws and regulations, in certain situations they also have freedom or discretion. The principle of opportunity or the principle of

⁷Farid Achmad, (2019), The Urgency of Strengthening the Role of Public Prosecutors in the Indonesian Criminal Justice System, UNS Postgraduate Law Journal, VII (1), p 2

⁸Moh. Mahfud MD, (2011), Legal Politics in Indonesia, PT Raja Grafindo Persada, Jakarta, p 1.

⁹Vivi Ariyanti, (2019), Law Enforcement Policy in the Indonesian Criminal Justice System. Jurnal Yuridis, 6 (2), p 48.

¹⁰Nur Rochaeti, (2013), Prospects of Restorative Justice Based on Pancasila as a Non-Penal Means in Handling Child Delinquency in the Future. Legal Issues, 42 (4), p 498.

prosecution discretion is the basis for the Prosecutor to resolve criminal cases outside the courts using the restorative justice approach.

The application of restorative justice by the Prosecutor's Office can be done by setting aside the prosecution of criminal cases and resolving them through mechanisms outside the court. The basis for the Prosecutor in resolving cases outside the court or setting aside prosecution is by using the principle of opportunity or the principle of the policy of prosecuting.

Termination of Prosecution Based on Restorative Justice as regulated in the Attorney General's Regulation Number 15 of 2020, is a guideline for Public Prosecutors to terminate prosecution by taking into account justice, public interest, proportionality, criminal law as a last resort, and speed, simplicity, and low cost.

Termination of prosecution based on Restorative Justice is regulated in Article 4 of PERJA No. 15 of 2020 which is carried out by taking into account:

- a. the interests of the Victim and other protected legal interests;
- b. avoidance of negative stigma;
- c. avoidance of retaliation;
- d. community response and harmony; and
- e. propriety, morality and public order.

In addition, in terminating the prosecution, the Public Prosecutor considers:

- a. subject, object, category, and threat of criminal acts;
- b. background to the occurrence/commission of the crime;
- c. level of depravity;
- d. losses or consequences arising from criminal acts;
- e. *cost and benefit* case handling;
- f. restoration back to its original state; And
- g. there is peace between the victim and the suspect.

The Prosecutor's Office also has the authority to make the law enforcement process effective as provided by law by taking into account the principles of fast, simple and low-cost justice, as well as determining and formulating case handling policies for the success of prosecutions carried out independently for the sake of justice based on law and conscience. The factual basis for the issuance of Prosecutor's Regulation Number 15 of 2020 is:

- 1) Viral cases ranging from the flip-flops case, to the theft of 1 (one) carton of baby milk, indicate that society currently wants legal reform;
- 2) The courts are more cost efficient if maximum justice (benefit) is achieved, if the case or conflict between the victim and the accused is resolved in the

process before the transfer (outside the court), compared to after the transfer;

- 3) This concept contains the teaching that judicial behavior needs to be changed so that both the regulations (legal), the behavior of law enforcers (attitudinal) and the law enforcement strategy (strategic) can achieve maximization of public welfare and justice (Pareto improvement).

In the context of prosecution reform in the Prosecutor's Office, the Attorney General promised to revolutionize and reformulate the law enforcement policy in the Prosecutor's Office. The Attorney General as the controller of prosecution has the authority to issue the intended policy, to implement the principles of proper and appropriate prosecution policy (*beginselen van een behoorlijk vervolgingsbeleid* - decently prosecution or indictment policy) which is closer to the interpretation of the law in theory and practice.

The existence of the Prosecutor's Regulation that uses a restorative justice approach that upholds the values of balance, harmony, harmony, peace, tranquility, equality, brotherhood, and family is considered good because it is certainly in harmony and in accordance with the values contained in the foundation of the Indonesian state, namely Pancasila. Thus, the restorative justice approach is essentially in accordance with the spirit of the Indonesian nation which prioritizes the values of kinship, family, mutual cooperation, tolerance, forgiveness, and prioritizes an attitude that prioritizes common interests.¹¹

The effective implementation of Restorative Justice depends on two factors. First, from the community element, the success of restorative justice will be achieved if the community's mindset is not only focused on the deterrent effect of the perpetrator, but also on the recovery of the victim's losses. Second, from the side of Law Enforcement Officers (APH), cooperation between institutions is a determining factor in achieving the above goals. The concept or approach of restorative justice must be implemented in an integrated manner, meaning that it is carried out in stages starting from the investigation stage, prosecution and trial stage.¹²This is important considering that if one of these components does not apply the concept or approach of restorative justice, then restorative decisions cannot possibly be realized properly. For example, the police and prosecutors have adopted the concept of restorative justice but the judge still adheres to a legalistic mindset, in cases like this the judge will issue a very normative decision so that the correctional institution is also unable to apply the concept of restorative justice.

¹¹Henny Saida Flora, (2018), Restorative Justice as an Alternative in Resolving Criminal Acts and its Influence on the Criminal Justice System in Indonesia, *UBELAJ*, 3 (2), p 146

¹²Ahmad Faizal Azhar, (2019), Application of the Concept of Restorative Justice in the Criminal Justice System in Indonesia, *MK: Journal of Islamic Law Studies*, 4, 2, p 141

Regarding the efforts of the Prosecutor's Office in realizing the priority of restorative justice to change the paradigm of Indonesian criminal law in order to achieve effective criminal law, according to the Handbook on Restorative Justice Programmes, published by the UN in November 2006, restorative justice activities must be implemented with the following assumptions:

- 1) *That the response to crime should repair as much as possible the harm suffered by the victim*(response to crimes that must be corrected as best as possible and compensation for the suffering experienced by the victim);

This assumption emphasizes that victims must be given access to be able to become one of the parties that determines the final resolution of a crime, because the victim is the party that is most harmed and suffers the most, so that the victim can ask for efforts to repair or compensate for the losses they have experienced from the perpetrator.

- 2) *That offenders should be brought to understand that their behavior is not acceptable and that it has some real consequences for the victim and community*(the perpetrator must be brought to understand that his behavior is unacceptable and that it has real consequences for the victim and the community);

This assumption emphasizes that the perpetrator must be brought to the understanding and awareness that the crime he committed is unacceptable to society because it harms others, both the victim directly and his community. With this awareness, it is hoped that the perpetrator is willing to introspect and is willing to be responsible for the losses caused by the actions he has committed.

- 3) *That offenders can and should accept responsibility for their actions*(the perpetrator must be able to accept responsibility arising from his behavior);

With the awareness of his mistake, the perpetrator is expected to have the willingness to take responsibility. Without awareness of the mistake he made, it is impossible for the perpetrator to be willing to voluntarily take responsibility for the actions he did.

- 4) *That victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation*(the victim must be given the opportunity to express his/her wishes and participate in determining the best steps the perpetrator can take to repair the damage he/she has caused);

With access for victims to participate in resolving cases, victims can not only participate in submitting demands for compensation, but also have the opportunity to participate in raising awareness of the perpetrator and determining the best steps to repair the damage caused. Thus, there will be a mutually influential relationship between the victim and the perpetrator in

choosing the best solution as an effort to restore social relations between the two.

- 5) *That community has a responsibility to contribute to this process*(the community is expected to participate in the process).

The process of resolving criminal cases with a restorative justice approach does not only belong to the perpetrators and victims. The community is also considered to have responsibility, both in organizing the process and implementing the results, both as organizers, observers, and facilitators and part of the victims who must also benefit from the results of the ongoing process.¹³

In the process of law enforcement oriented towards restorative justice, it is seen that local wisdom or local knowledge becomes a legalistic form of law that is applied through restorative justice, so that it not only provides legal justice but also provides social justice and legal satisfaction as well as social satisfaction. This is inseparable from the concept of restorative justice which is seen as a concept of justice that prioritizes recovery of the victim's losses rather than simply giving suffering to the perpetrator. This concept emphasizes what must be done to rebuild the right relationship (re-establish just relationships) so that peace and tranquility are created in the life of society.

4. Conclusion

Termination of Prosecution Based on Restorative Justice as regulated in the Attorney General's Regulation Number 15 of 2020, guidelines for Public Prosecutors to terminate prosecution by considering justice, public interest, proportionality, criminal as a last resort, and fast, simple, and low cost. There are 2 (two) types of methods for terminating 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 informing the reason for the summons. Continued by involving the victim/suspect's family, community leaders/representatives, and other related parties. During the process, if the offer is accepted, the case is dismissed, if rejected, the case will be referred to the court. Second, the peace process.

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¹³Eva Achjani Zulfa and Indriyanto Seno Adji, (2011), *Shifting Paradigms of Criminal Justice*, Lubuk Agung, Bandung, p 75-7

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