

Legal Analysis of Termination of Prosecution by the Prosecutor Through Restorative Justice (Case Study of Attempted Theft Under Article 362 of the Kuhp in Conjunction with Article 53 of the KUHP at the District Prosecutor's Office of South Ogan Komering Ulu)

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Abstract. *This study aims to determine the role of prosecutors in law enforcement not always making prosecution efforts through court mechanisms, but prosecutors also act as facilitators in efforts to stop prosecution through restorative justice, namely resolving criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to the original state, and not revenge. This method is carried out through a normative juridical approach with research specifications used analytical descriptive research because it only describes the object that is the problem which then analyzes which in this case is regarding attempted theft which was carried out by stopping prosecution through restorative justice at the South OKU District Attorney's Office which in this case is guided by the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 Concerning Termination of Prosecution Based on Restorative Justice. The results of this study show that prosecutors with the principle of dominus litis inherent in their authority can make efforts to stop prosecution through restorative justice for the sake of legal interests by considering the subject, object, category of threat of criminal acts, background to the occurrence of criminal acts, losses or consequences arising from criminal acts, restoration to the original state and the existence of peace between the victim and the suspect and so on.*

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

1. Introduction

In this modern era, punishment is no longer viewed as *lex talionis*, which emphasizes retribution, or what is known as retributive justice. The process of retribution for a crime is closely related to the victim's perspective. This is because, due to the absence of a formal government structure, "criminal justice" or the dispute resolution process largely depends on oneself (as an individual/victim) or with the help of relatives.¹ According to Barda Nawawi Arief, if Indonesia is going to use criminal law as a means to achieve its goal of developing a complete Indonesian, it must be done with a humanistic approach. A humanistic approach to the use of criminal sanctions not only means that the punishment imposed on the offender must be in accordance with civilized human values, but also must be able to raise the offender's awareness of human values and the values of social interaction.² The development of modern law does not only emphasize the aspect of the victim alone but also pays attention to the aspect of the perpetrator of the crime because it is a very important aspect in modern law to maintain the dignity and honor of human rights, therefore the development of modern law really protects human rights even though the human is the perpetrator of the crime.

The problems that arise in the application of criminal punishment because it is considered that prison punishment is not effective in solving problems in society so that the criticism arises an alternative idea in the criminal justice system by developing what is called the perpetrator-victim relationship approach or "Doer Victims" relationship. A new approach method to replace the action or perpetrator approach or "*daad-dader straftecht*" called Restorative Justice which is considered to be able to give birth to / achieve justice, benefits and legal certainty in society, but it must also be supported by balanced implementation and effective law enforcement as the teachings once put forward by L. Friedman that the effectiveness or ineffectiveness of a law is influenced by several factors, namely the legal structure, legal substance and legal culture.

The implementation of Restorative Justice by the Republic of Indonesia Prosecutor's Office has a certain corridor limitation as a benchmark for the feasibility of a case being able or not to be stopped by prosecution as stated in Article 5 of Prosecutor's Regulation Number 15 of 2020 which essentially states that criminal cases can be closed by law and prosecution can be stopped based on Restorative Justice if the general requirements are met, namely the suspect has committed a crime for the first time, the crime is only threatened with a fine or is threatened with imprisonment of no more than 5 (five) years, and the crime is committed with the value of the evidence or the value of the loss incurred as a

¹ Lynne N. Henderson, *The Wrongs of Victim's Rights*, Scholarly Works. 1985, p. 939

² Arief, BN 2010. *Criminal Law Formulation in Legislation as a Parameter of Justice in Sentencing*. Paper in the BPHN Workshop: Development of Criminal Law in Laws Outside the Criminal Code and Criminal Law Codification Policy, Semarang, p. 10

result of the crime not exceeding IDR 2,500,000.00 (two million five hundred thousand rupiah). Furthermore, the termination of prosecution based on Restorative is carried out by fulfilling the conditions that there has been a restoration to the original state carried out by the Suspect (returning items obtained from the crime to the Victim, compensating the Victim's losses, and so on), there has been a peace agreement between the Victim and the Suspect; and the community responds positively. These requirements serve as the basis for consideration by the public prosecutor in determining whether or not the case file can be submitted to the court. In addition, the presence of Prosecutor's Regulation Number 15 of 2020 is also expected to be able to overcome the problem of overcapacity in correctional institutions and is also expected to be able to anticipate abuses of prosecutorial power.

2. Research Methods

The approach method uses normative juridical research, focusing on examining library materials, which constitute secondary data, and is also called library legal research. According to Soerjono Soekanto, normative legal research is conducted by examining library materials or secondary data alone.³ The specifications used are descriptive and analytical in nature, providing a systematic, logical explanation, analyzing it in order to study the literature, legislation, applicable legal norms and analyzing it to draw conclusions.⁴ The data sources used are secondary data consisting of primary legal materials in the form of legislation related to the legal research being conducted. The data collection method with the main activities carried out by literature studies, reviewing, analyzing and processing literature, laws and regulations, judges' decisions and articles or writings related to the problem to be studied. The data analysis method is carried out qualitatively with the data analysis method by grouping and selecting data obtained from the literature study (library research).

3. Results and Discussion

3.1. The Role of Prosecutors as Public Prosecutors in Law Enforcement in Indonesia

Law enforcement in Indonesia is synonymous with the criminal justice system, which is essentially a system of power or authority to enforce the law. Mardjono Reksodiputro defines the criminal justice system as a crime control system consisting of the police, prosecutors, courts, correctional institutions, and advocates/lawyers. Furthermore, Mardjono also believes that the criminal justice

³Soerjono Soekanto and Sri Mamudji, 2003, Normative Legal Research; A Brief Review, Seventh edition, Raja Grafindo Persada, Jakarta, p. 13

⁴ Amirudin and Zainal Asikin, 2004, Introduction to Legal Research Methods, Raja Grafindo Persada, Jakarta, p.118

system is a system within society for combating crime, an effort to control crime so that it remains within the limits of societal tolerance.⁵

The Criminal Procedure Code regulates the public prosecutor in Article 13 which states that "a public prosecutor is a prosecutor who is authorized by this Law to carry out prosecutions and implement judges' decisions. Specifically, the authority of the public prosecutor is regulated in Article 14 of the Criminal Procedure Code, including the following:⁶

- a. receive and examine investigative case files from investigators or assistant investigators;
- b. conduct pre-prosecution if there are deficiencies in the investigation by paying attention to the provisions of Article 110 paragraph (3) and paragraph (4), by providing instructions in order to improve the investigation by the investigator;
- c. granting an extension of detention, carrying out detention or further detention and/or changing the status of the detainee after the case has been transferred by the investigator;
- d. make an indictment;
- e. handing over cases to court;
- f. provide notification to the defendant regarding the day and time the case will be heard, accompanied by a summons, both to the defendant and to witnesses, to come to the appointed hearing;
- g. conduct prosecution;
- h. close the case for legal purposes;
- i. carry out other actions within the scope of duties and responsibilities as a public prosecutor according to the provisions of this law;
- j. carry out the judge's decision.

In carrying out their duties and authorities, prosecutors always act according to the law by observing religious norms, politeness, morality, and are obliged to explore and uphold the human values that exist in society, and always maintain the honor and dignity of their profession.

The central role of the prosecutor who has *Dominus litis* as the controller of a case who can determine whether or not a case is suitable to be transferred to the court

⁵Mardjono Reksodiputro, "Reconstruction of the Indonesian Criminal Justice System." *LEX SPECIALIS Journal*, Vol. 11, 2017, p. 5

⁶Law Number 8 of 1981 concerning Criminal Procedure Law

and prosecuted, because not all cases transferred by the public prosecutor must be followed up by being transferred to the District Court, the prosecutor with the principle of *dominus litis* can make efforts to stop the prosecution, as stipulated in Article 140 paragraph 2 of the Criminal Procedure Code:

"In the event that the public prosecutor decides to stop the prosecution because there is insufficient evidence or the incident turns out not to be a criminal act, or the case is closed by law, the public prosecutor shall state this in a decision letter."

Thus, the space for the public prosecutor to close the case by law provides an opportunity to resolve a criminal case not always through litigation but can also be resolved through non-litigation methods and considering the elements of humanity and justice as well as expediency. Termination of prosecution based on restorative justice as referred to in the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is a law enforcement policy based on conscience and the actualization of the *Ultimum Remedium* principle which is expected to be able to realize Justice, legal certainty, and expediency.

3.2. Criminalization in the Principles of Restorative Justice

Theoretically, Sudarto defines criminalization as a synonym for the word, punishment which comes from the basic word law, so that it can be interpreted as determining the law of an event which does not only concern the field of criminal law, but also civil law, in the sense of criminal punishment, namely punishment or the giving or imposition of a sentence by a judge.⁷ In line with this, the definition of punishment according to Andi Hamzah is a general definition, as a sanction that causes suffering or misery that is deliberately imposed on someone, while punishment is a specific definition related to criminal law.⁸

According to Herbert L. Packer, there are two conceptual views, each of which has different moral implications, namely the retributive view and the utilitarian view. The retributive view applies punishment as a negative reward for deviant behavior carried out by society by viewing punishment as retribution for mistakes made. While the utilitarian view views punishment from the perspective of benefits or usefulness, seeing the results of the imposition of punishment given with the aim of improving the attitude or behavior of the convict and preventing others from committing similar acts.⁹

From the perspective of utilitarianism theory, the concept of punishment in criminal law emphasizes that the purpose of punishment is to create the greatest

⁷Dr. Sukardi, *Restorative Justice in Indonesian Criminal Law Enforcement* (1st Edition), PT Raja Grafindo Persada, Depok, 2020, p. 207.

⁸Andi Hamzah, *"Indonesian Criminal and Penal System"*, PT. Pradnya Paramita, Jakarta, 1993, p. 1

⁹Dr. Sukardi, SH, *Op. Cit.* p. 217.

possible benefit for society as a whole. This theory emphasizes that punishment should be assessed based on its social consequences, such as crime prevention and restoration of social balance, rather than solely on the basis of retribution. In this context, punishment in criminal law is seen as a tool to achieve the happiness and welfare of society as a whole, as well as to prevent future crimes. Utilitarianism separates law from morality and emphasizes the importance of ethical evaluation in designing punishment.¹⁰

The first international meeting to discuss victims' rights in the criminal justice system. This meeting later became the forerunner to the formation of the World Society of Victimology in 1979. Then in 1985, the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This movement was also widely recognized along with the birth of the concept of Restorative Justice. The theory and practice of Restorative Justice are considered to have emerged and been formed deeply as an effort to respond to the needs of victims.¹¹ Even though it is rooted in noble values that have existed for a long time, the term 'restorative justice' was only introduced in several of Albert Eglash's writings in the 1950s and only became widely used in 1977.¹² Eglash suggests that restorative justice is a form of constructive, creative action, determined independently with assistance and opening up opportunities for group involvement.¹³ He stated that restorative justice is a form of criminal justice system that focuses on efforts to restore or remedy the detrimental effects of an individual's actions and actively involves all parties in the judicial process. He also stated that restorative justice is an opportunity for the perpetrator and victim to restore their relationship, providing the perpetrator with the opportunity to find ways to repair the damage they have caused to the victim's interests.¹⁴

3.3. Implementation of Termination of Prosecution by the South Ogan Komerang Ulu District Attorney's Office Through a Restorative Justice Approach in an Attempted Theft Case.

The principle of *Dominus Litis* positions the prosecutor as the central actor in the prosecution process, granting him full authority to determine whether to proceed with or discontinue a criminal case based on legal and fair considerations. In criminal law theory, scholars such as Gustav Radbruch and Hans Kelsen emphasize that this principle aims to maintain efficiency, accountability, and substantive

¹⁰Mega Anisa Rahmawati, "The Dimension of Criminalization from the Perspective of Legal Utilitarianism Theory," *Journal of Contemporary Studies of Law and Society* Vol. 2 No. 1, 2023, p. 6

¹¹Howard Zehr, *The Little Book of Restorative justice*, 2002, p. 31.

¹²Shadd Maruna, *The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash*, *Restorative Justice: An International Journal*, Vol 2, 2014, p. 9.

¹³*Ibid*, p. 14.

¹⁴Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, Criminal Justice Press: Helsinki, 2007, pp. 23-24

justice in the legal process.¹⁵The position of the Prosecutor's Office in criminal justice is crucial because it is the bridge that connects the investigation stage with the examination stage in court. Based on the prevailing legal doctrine, a principle is that the Public Prosecutor has a monopoly on prosecution, meaning that every person can only be tried if there is a criminal charge from the Public Prosecutor, namely the prosecutor's office because only the Public Prosecutor has the authority to bring a person suspected of committing a crime before a court.¹⁶

The implementation of the termination of prosecution by the South Ogan Komering Ulu District Attorney's Office through the Restorative Justice approach is a form of *dominus litis* in an effort to resolve criminal cases by prioritizing the restoration of relations between the perpetrator and the victim. This approach emphasizes the restoration of the original state and balances the interests of the victim and the perpetrator without being solely oriented towards legal retaliation. In the context of criminal law, Restorative Justice is not a substitute for formal criminal law, but rather a form of non-litigative resolution, carried out outside the courts with the principle of volunteerism and deliberation.

The Attorney General's Office has implemented the termination of prosecution based on Restorative Justice, taking into account as regulated in Article 4 of the Attorney General's Regulation No. 15 of 2020, which must pay attention to the interests of victims and other protected legal interests, avoidance of negative stigma, avoidance of retaliation, community response and harmony, and propriety, morality, and public order.¹⁷

In the object of this writing case, the suspect has fulfilled the act to be punished as per the elements of Article 362 of the Criminal Code in conjunction with Article 53 of the Criminal Code which states "taking something that is wholly or partly owned by another person with the intention of being owned unlawfully, the perpetrator's intention has been stated by a commencement of implementation, and the non-completion of the implementation is not solely due to his own will." In this case, the commencement of implementation in question is that the suspect Helson Winanda Bin Helmi has entered the house of the victim witness Panji Wibowo Bin Suhartono and wandered around the house to look for cash, but was then caught by the victim witness who appeared from the direction of his kitchen. So that the requirements for attempted theft carried out by the suspect Helson Winanda Bin Helmi as per Article 362 of the Criminal Code in conjunction with Article 53 of the Criminal Code, the cessation or completion of the act carried out by the suspect Helson Windanda was not due to his own will, but because he was

¹⁵Muhammad Hikmat Sudiadi, "Implementation of the Dominus Litis Principle in the Modern Criminal Justice System in Indonesia," *JILPers: Journal of Interdisciplinary Legal Perspectives* 1, no. 1 (December 2024): 5

¹⁶Laden Marpaung, *Handling of Criminal Cases*, Jakarta: Sinar Grafika, 2009, pp. 188–189

¹⁷Article 4 of the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice

caught red-handed by the victim witness Panji Wibowo or the attempt was stopped (geschorte pging).

Criminally, the suspect's actions have fulfilled the requirements for criminal prosecution. However, regarding the suspect's actions, the public prosecutor did not prosecute the perpetrator but instead terminated the prosecution because there had been or had been a settlement of the case out of court (afdoening buiten process) as stated in Article 3 paragraph 2 letter e of Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice mentioned above through restorative justice efforts.

According to the provisions of Article 6 of the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, fulfillment of the requirements for termination of prosecution based on restorative justice is used as a consideration by the Public Prosecutor to determine whether or not the case file can be submitted to the court. The conditions for the actions of the suspect that can be terminated by prosecution based on restorative justice are stated in Article 5 paragraph (1) of the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution based on Restorative Justice, namely the suspect has committed a crime for the first time, the crime is only threatened with a fine or is threatened with imprisonment of no more than 5 (five) years and the crime is committed with the value of the evidence or the value of the loss incurred as a result of the crime not exceeding IDR 2,500,000.00 (two million five hundred thousand rupiah). Apart from the provisions, this case has also taken into consideration the provisions of Article 5 paragraph 6 of the Republic of Indonesia Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution based on Restorative Justice, which states that there has been a restoration to the original state, there has been an agreement. peace between the victim and the suspect; and the community responded positively.

4. Conclusion

The prosecutor as a public prosecutor is authorized by law to prosecute and implement the judge's decision and other powers based on the law. Therefore, the prosecutor is the only one who can carry out prosecutions that have a strategic role, namely dominus litis which positions the prosecutor as a central actor in the prosecution process, giving full authority to determine the continuation or termination of criminal cases based on legal and justice considerations, also allowing for more coordinated and focused case control, so as to reduce inefficiencies due to fragmentation of authority between law enforcement agencies. Restorative Justice is the resolution of criminal cases by involving the perpetrator, victim, the perpetrator/victim's family, and other related parties to jointly seek a just resolution by emphasizing restoration to the original state, and not revenge. For the public prosecutor to be able to apply restorative justice lies

in his authority in terms of closing the case for the sake of the law. based on the provisions of the Prosecutor's Regulation Number 15 of 2020 concerning the termination of prosecution based on restorative justice. The suspect Helson Windanda has fulfilled the actions to be punished as per the elements of Article 362 of the Criminal Code in conjunction with Article 53 of the Criminal Code. However, the public prosecutor did not prosecute the perpetrator but instead terminated the prosecution by law because there had been or had been a settlement of the case outside the court (afdoening buiten proces) as per Article 3 paragraph 2 letter (e) of the Prosecutor's Regulation Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. Suggestions for the implementation of Prosecutor's Regulation number 15 of 2020 concerning the termination of prosecution based on restorative justice involving elements of the community with the termination of prosecution the community responded positively, so that a more active form of community participation is needed, for example the community is not only limited to witnesses that peace has been achieved in the prosecutor's office, but the community must also come down and supervise the agreement that both parties agreed to so that in the future there will be no more conflicts that can occur in the surrounding environment. In addition, the entire process and results of the termination of prosecution based on restorative justice must be recorded and published openly, reported periodically to the leadership of the Prosecutor's Office and supervisory institutions (such as the prosecutor's commission) so that transparency and tiered accountability can be achieved.

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