
MITIGATING THE RISK OF PROSECUTION TERMINATION BASED ON RESTORATIVE JUSTICE FROM TRANSACTIONAL ASPECTS

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ABSTRACT

Restorative justice, as a manifestation of the Prosecutor's authority and discretion in controlling criminal cases, is vulnerable to abuse of authority if it is not supported by the principle of accountability and a robust supervision system. This research aims to strengthen the authority of prosecutors in applying restorative justice by strengthening regulations at the legal level and proposing stricter criteria for crimes that fall into this category. The research method used is normative legal research, which aims to find coherence between the Prosecutor's authority and legal norms, legal concepts, and legal principles through a legislative and conceptual approach. This study finds that implementing restorative justice by prosecutors requires strengthening regulations and a more muscular supervision system to prevent abuse of authority and ensure legal certainty and justice for all parties. This study implies the need for more transparent regulations and a strict monitoring system to avoid abuse of authority in the application of restorative justice by prosecutors, ensure an accountable law enforcement system, and protect human rights.

Keywords: Risk Mitigation, Restorative Justice, Prosecution.

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INTRODUCTION

Restorative justice or restorative justice is essentially an approach to law enforcement that is based on efforts to return the losses experienced by victims of criminal acts through restitution from the perpetrators of these criminal acts as a form of accountability for their actions after a peace settlement based on an agreed agreement is reached. The Attorney General Regulation Number 8 of 2020 (PERJA No. 15 of 2020) concerning Termination of Prosecution Based on Restorative Justice is the basis for law enforcement based on restorative justice by the Prosecutor's Office of the Republic of Indonesia (Kejaksaan) as public Prosecutor based on Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia. Courses of action for End of Arraignment In light of Helpful Equity through PERJA No. 15 of 2020 being referred to is the investigator's work to carry out the tact given by procedural regulation, specifically Regulation Number 8 of 1981 concerning the Criminal Methodology Code, which was later confirmed by Law No. 11 of 2021 itself.

The provisions in the Criminal Procedure Code that serve as a reference in exercising discretion for prosecutors to carry out a restorative justice approach in the law enforcement process are more precisely traced in Article 139, which reads, "After the public prosecutor receives or receives back a complete investigation from the investigator, he immediately determines whether the case file "It meets the requirements to be able or not to be referred to court." Article 139 of the Criminal Procedure Code is an embodiment of the dominus litis principle contained in the Guidelines on the Role of Prosecutors adopted at the 8th (eighth) UN Congress on the Prevention of Crime and

Handling of Criminal Perpetrators in Havana, Cuba, in 1990. Dominus lists come from Latin dominus, which means "owner" and "case", so it can be interpreted as a prosecutor as the owner or controller of the case. As the case owner, it means that the Prosecutor is not only authorized but has the right, based on this principle, to take all actions according to the legal corridors regarding a criminal case that has occurred.

The manifestation of the Prosecutor's office as a case controller occupies a central position in law enforcement because the Prosecutor's office is responsible for formulating and controlling law enforcement policies so that they run effectively, as stated in Law No. 11 of 2021. The law situated the examiner's office as an administration foundation whose capability is connected with legal power, which activities state power in the field of arraignment, as well as different specialists given the regulation (Sunarso & SH, 2023). The examiner's establishment can likewise decide if a case can be pronounced finished or not and whether a case can be submitted to the court (Burhanuddin, 2022).

Based on the generality of existing legal norms, the implementation of restorative justice by the Prosecutor's office is carried out to produce law enforcement outcomes that are based on certainty, justice, and benefit. However, one of the obstacles faced in the implementation of restorative justice at a practical level is that there is no explicit regulation at the level of law (except Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA)) both in terms of material criminal aspects and formal criminal law in its application requires clear benchmarks to guarantee the principles of legal certainty and justice for all parties. The existence of more certain benchmarks to secure the creation of legal protection for victims and perpetrators of criminal acts, to ensure that legal actions carried out by law enforcement officials remain within the framework of the law, and to prevent abuse of authority or actions that are maladministration, and guarantee the implementation of a dignified, transparent and accountable process in a law enforcement process.

In addition to regulations that ensure greater certainty, the aspect of behavior with integrity and strengthening the implementation system is a central factor in achieving just legal certainty. One of the things that get attention in this writing is the regulations contained in Article 11 PERJA No. 15 of 2020, which reads, "If a peace agreement is not successful as intended in Article 10 paragraph (6) due to requests for disproportionate fulfillment of obligations, threats or intimidation, sentiment, discriminatory treatment or harassment based on ethnicity, religion, race, nationality or class Certain cases against suspects who have good intentions can be taken into consideration by the Public Prosecutor when carrying out prosecutions." The phrase "can be taken into consideration by the public prosecutor" means that whether or not a prosecution process will continue is within the jurisdiction of the public Prosecutor, as mentioned above, originates from the discretion of the Prosecutor's office as a government institution carrying out prosecutorial duties. Instead of law enforcement being conducted closer to achieving just legal certainty, it is feared that it will impact a transactional law enforcement process against individual law enforcement officers due to abuse of the discretionary authority given to the Prosecutor's office. The concern certainly requires mitigation efforts to maintain an accountable law enforcement system based on justice and the protection of human rights.

METHOD

The research method used is normative legal research, which aims to find the truth of the coherence between the authority and discretion of prosecutors in carrying out prosecutions with

legal norms, legal concepts, and legal principles in the task of Prosecution through a restorative justice approach. Searches based on legal science and The legal concepts referred to are also approaches in research known as the statutory and conceptual approaches. The conclusion is based on legal reasoning through a deductive thinking process after tracing various statutory provisions and the meanings and principles of the law under study.

RESULTS AND DISCUSSION

Prosecutor's Philosophy in Exercising Implementation Discretion

The rapid and dynamic development of information in the current era of information technology 6.0 has greatly influenced society's critical power in responding to various kinds of behaviour by state civil servants, including law enforcement officers. It is a characteristic of the democratic process that supports the implementation of state life based on the principle of the rule of law, which is based on the principle of equality. On the one hand, the principle of democracy provides a foundation and mechanism for power based on human equality and equality principles. On the other hand, the principle of the rule of law provides a benchmark that what governs a country is not humans but the law (Muntoha, 2009).

Thus, every government action in realizing the mandate of the 1945 Constitution of the Republic of Indonesia (UUD 1945) must rely on statutory regulations and the law. This meaning is in line with the development of the principle of the rule of law with the concept of a Welfare State, which the IVth Paragraph of the Preamble adopted to the 1945 Constitution. [4] Regarding the rule of law, Thahir Azhary revealed that, embryonically, Plato had put forward this idea when he introduced it. *Nomoi* is the third written work of his old age. In *Nomoi*, he stated that good state administration is based on reasonable regulations (laws) (Ridwan, 2006). Plato's ideas were then supported by his student, Aristotle, who stated in his book *Politica* that a good state is a state ordered by a constitution and has legal sovereignty. The elements of which include: (I) government is completed in the public interest, (ii) government is done by regulations given general arrangements, not regulations made for arbitrary reasons which overlook shows and the constitution, and (iii) established government implies government that is carried out in light of the desire of individuals, not in the form of pressure implemented by a despotic government (Ridwan, 2006).

The *Nomoi* terminology, as expressed by Plato in English, is translated with the term Norm. However, The Laws translated *Nomoi* into English (Asshiddiqie, 2022). Meanwhile, Norms in Indonesia are interpreted as norms. In this regard, Peter Mahmud Marzuki clearly stated that norms are not the same as rules, let alone written rules (Asshiddiqie, 2022). Etymologically, norms are standards of behaviour based on principles or, in Indonesian, principles (Marzuki, 2013). If the meaning of norms as law is found, the law in question is the highest law, which contains moral principles and principles. The scope of principles in legal research is actually in the realm of legal philosophy, where the theme of this subchapter is the object of study.

It is difficult to deny that in the context of administrative law, the use of discretion in running government based on the idea of the rule of law combined with a modern rule of law or welfare state is the subjective authority of the state to regulate its citizens and to achieve social welfare. In administrative law, the emphasis is on the principle of legality/validity (*legalities beginssel/wetmatigheid van bestuur*), which covers three aspects: authority, procedure, and substance. It means that the authority, procedures, and substance must be based on statutory regulations (the principle of legality) because the statutory regulations have determined the purpose

of granting authority to administrative officials, what the procedures are to achieve a goal, and regarding the substance (Parikesit, 2021). It is what is called based on ontology related to regulations in law. Suppose it is related to Law Number 11 of 2021. In that case, the discretion that prosecutors have to declare whether or not a case is appropriate to be referred to court is correlated with state policy, which has an ontological basis that prosecutors are indeed charged with the task of making law enforcement effective based on the principles of justice and expediency. Based on the principles of justice and expediency, the central position of the Prosecutor's office, which is attributed to the Attorney General as the leader and highest person responsible for the Prosecutor's office in controlling cases, is reflected in his authority to set aside cases in the public interest (Triwati, 2020).

Connected with the subject of restorative justice based on PERJA No. 15 of 2020, Article 11 relates to elements that are the basis for considering the attitude and, ultimately, the decision of the Prosecutor; its application should be subject to legal principles whose assessment must be seen more objectively. What instruments can be used as a benchmark in carrying out the function of the Prosecutor's office as a government institution that carries out prosecutorial duties? As a basis for exercising discretion for government officials, apart from the principle of legality, the general principles of good governance (*algemene beginselen van behoorlijk bestuur/AAUPB*) should also be guided. According to (Chandranegara, 2018), in the Netherlands, ABBB is seen as an unwritten legal norm that the government must always obey. ABBB is unwritten legal principles from which applicable legal rules can be drawn for certain circumstances. In legal practice in the Netherlands, ABBB has a clear place, including the principle of equality, the rule of trust, the standard of legitimate conviction, the guideline of precision, the standard of giving reasons, the disallowance of maltreatment of power (*detournement de pouvoir*), the forbiddance on acting with no apparent end goal in mind (Hadjon, 1993).

The application of the ABBB touches on the duties and authority of prosecutors as law enforcers. The Prosecutor's office is also part of the government, which carries out prosecutions and other authorities that have been determined by law. In this regard, we can observe Van Vollenhoven's view, which explains the meaning of the word "government" in a broad sense, including (1) Actions/activities of the government in a narrow sense (*bestuur*); (2) Police actions/activities (*polite*); (3) Judicial actions/activities (*rechtspraak*); and (4) The act of making regulations (*regeling, wetgeving*). Thus, the general provisions of administrative law also apply to prosecutors exercising their discretion because the Prosecutor refers to Van Vollenhoven's view that it can be taken as a judicial action.

Without adhering to the legal principles, the existence of which is regarded as unwritten norms, the significant authority held by the Prosecution in practice significantly enables arbitrary actions (abuse of power). In carrying out duties, even beyond the duties of law enforcement officers, the Prosecution is required to strictly adhere to what is stipulated in legal rules or legislation and embrace moral principles, integrity, and professionalism based on conscience. Furthermore, operationally, controlling the Prosecution's behaviour is bound by administrative law and ethical behaviour codes.

Indeed, granting authority to the Prosecution, especially regarding discretion in Prosecution, generally has similarities in each country as public officials who have prosecution authority (authority of Prosecution) and state attorneys. The term "prosecution," etymologically, originates from the Latin word *Prosecutus*, consisting of *pro* (before) and *sequi* (to follow), which can be understood as "the process of a case from beginning to end." Hence, a prosecutor or public Prosecutor is

empowered to prosecute (Surachman, 2022). Conversely, the term *nolle prosequi* is juxtaposed with *prosequi*, interpreted as not prosecuting. The action of *nolle prosequi* is known in English criminal procedure law, as well as in Northern Ireland through the statement of the Attorney General: "(I) will not prosecute (*nolle prosequi*)," then the case in question will not be prosecuted or set aside. In all stages of court proceedings, as long as the judge has not delivered a verdict in all three jurisdictions, namely the UK, the Attorney General has the authority to set aside cases by declaring "*Nolle prosequi*". However, law enforcement issues in social, economic, and cultural life impact every sector, from the economic and social aspects of society. The application of the law, even the application of criminal procedural law principles that are well known for their speed, simplicity, and low cost, only becomes a dream when faced with the fact that there has been a backlog of cases in the courts, convictions do not have a deterrent effect, and there is an excess capacity of correctional institutions, resulting in an increased burden on the state due to the accumulation of cases.

The facts correlated with these social, economic, and cultural aspects make their resolution difficult, if not impossible, to resolve by the courts. Precisely in this position, the Prosecution, as a government representative institution, examines and carries out tasks to effectively enforce the law based on its authority. In addition, law enforcement advocates are humane, and based on cultural values rooted in Pancasila, they are expected to prompt perpetrators to rectify their mistakes alongside victims and offer forgiveness.

Mitigating the Risk of Abuse of Prosecutorial Authority Regarding Implementing Law Enforcement Duties Through a Restorative Justice Approach?

Strengthening the Principles of Accountability and Supervision

More than two centuries ago, Lord Acton (John Emerich Edward Dalberg Acton), in his letter to Bishop Mandell Creighton, wrote an expression that connected "corruption" with "power", namely "power tends to corrupt, and absolute power corrupts absolutely", that "power tends to corrupt and absolute power tends to absolute corruption" (Djaja, 2010). The author feels it is relevant to express Lord Acton's statement at the beginning of this sub-chapter because it is closely related to carrying out the duties of the Prosecutor's office as a government institution that carries out the function of judicial power with all the authority it has. He has.

The terminology of corruption in the realm of science contains two meanings, namely, a general meaning in the form of a concept and a special meaning based on statutory regulations. The general meaning of corruption comes from Latin, namely *corruption* or *corruptus*, which means damage or depravity. The term corruption in several countries is also used to indicate rotten conditions and actions. Corruption is often associated with a person's dishonesty in the financial sector (Prodjohamidjojo, 2009). Corruption is rottenness, badness, depravity, dishonesty, can be bribed, deviation from purity, words that have an insulting or slanderous nuance, bribery, *niet ambtelijk* corruptive, nasty, deep. In Indonesia, corruption is an evil act that involves embezzling money, receiving bribes, and so on (Prodjohamidjojo, 2009).

Meanwhile, corruption is any act that meets the formulation of an offence contained in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999. Corruption crimes are based on regulations. The law includes elements that include, among other things, acts that are against the law, enriching oneself, another person or group and causing harm to state finances, including acts that are categorized as bribery.

Looking further into Lord Acton's statement, a very close relationship exists between instruments of power and authority and corruption. Any authority that is not exercised correctly or deviates from what it should be will give rise to an act of corruption. That is why Robert Klitgaard provides a formulation with a mathematical model, namely $(C=M+D-A)$, so Corruption = Monopoly Power + Discretion by Official - Accountability, so that criminal acts of corruption occur because of the monopoly of power and discretion (the right to deviate from a policy), but in conditions of the absence of accountability (Kristian & Gunawan, 2015). Klitgaard's formulation turns out to be not only relevant but also biting when reflected on the use of authority possessed by law enforcement officials, including the Prosecutor's office. Without accountability in using authority, prosecutors not only commit disgraceful, depraved, or foul acts but also open up space for criminal acts of corruption in the form of bribery in exercising their authority and discretion.

The implementation of the authority and discretion of an accountable prosecutor to prevent and combat corruption, in reality, is an issue and concern of the Prosecutor's institution, including regarding prosecution policies using a restorative justice approach, of course. At least this was acknowledged by Sanitiar Burhanuddin, who expressed the following sentence:

"When drafting this PERJA, we also thought about not letting this PERJA open up opportunities for prosecutors to play games and be exploited. Because this can be played out and negotiated, this implementation must be subject to rigorous, measurable control and supervision, and there are minimal sanctions for prosecutors who play around with these rules in the field. We have committed to that since we started working on issuing PERJA No. 15 of 2020. The potential for deviation is everywhere. Moreover, RJ is very ripe. Why do I say ripe? To be honest, in the minds of our people, when we look at prosecutors, a slanted assessment will emerge. Even though trust is now increasing, I am quite satisfied, but there are always people who are called unscrupulous people. I will guard against it because this is the face of the Prosecutor's office. This is no joke. If anyone tarnishes RJ, we will take action against him." (Kristian & Gunawan, 2015).

Sanitiar Burhanuddin's statement above is indeed firm. However, operationally, further elaboration is required to realize just law enforcement. Achieving a fair legal certainty in its implementation cannot be separated from the principles of the rule of law and democracy. The principles of the rule of law and the principles of democracy are realized in the form of good governance, which includes, among others, the principles of accountability, transparency, and responsibility. If traced, the meaning of accountability is embodied in Article 3, paragraph (7) of Law Number 28 of 1999 concerning Clean and Free from Corruption, Collusion, and Nepotism State Administration as follows: "Accountability principle means a principle that explains that every activity and the final results of state administration activities must be accountable to the community or people as the highest sovereign of the state by applicable laws and regulations."

The principle of accountability in the Prosecutor's Law, as stated in Article 37 of Law No. 16 of 2004, is carried out by submitting accountability reports to the president and DPR. Although the performance accountability report has been formally submitted to the President and DPR, performance accountability must be accompanied by the principle of transparency, which implies that in every performance produced by the Prosecution, this institution also has a positive obligation to the public to convey information as long as the information is related to public information; for example, concerning finances or budget utilization, performance achievements that have been produced, a performance that has not reached targets, backlogged cases that have not been resolved, the amount of state financial returns successfully returned, the number of suspects who

have not been executed, and so on. Why is this part of the information that needs to be conveyed? Because the Prosecution represents the public as an agent for legal interests in the form of Prosecution by the arrangements in the constitution. Thus, the public can also monitor the implementation of the Prosecution's duties through mass media proportionally.

Beyond that, further elaboration on the principles of the rule of law and the principles of democracy involves a monitoring system. The discourse on monitoring in practice is very familiar with the term "check and balance system." The monitoring mechanism carried out internally by the prosecution institution is inherent supervision. Inherent supervision is carried out by structural/superior officials over their subordinates up to two levels down to direct all activities of each work unit so that the Prosecution's strategic plan can be achieved effectively and efficiently (Effendy, 2013). The inherent supervision conducted by structural officials indicates the functioning of administrative law to control the behaviour of the prosecution apparatus in carrying out their duties. Thus, structural administrative officials conduct supervision by strengthening administrative guidelines and serving as role models for members of work units performing functional duties in the field of Prosecution and other tasks. This inherent supervision can be considered a preventive effort to prevent abuse of authority in duties and obligations.

As for enforcement, functional supervision applies, namely, a series of activities carried out by internal government supervisory agencies over the internal work units of the organization itself. Functional supervision is conducted to enforce professional ethics and maintain the institution's dignity and nobility from its apparatus's reprehensible behaviours. Regarding upholding values, the policies to be considered are upholding values and the emergence of effects for violators with the imposition of proportional (heavy) sanctions against those who commit reprehensible acts. Functional supervision includes general inspection, monitoring inspection, special inspection, case inspection, leadership inspection, audit, review, evaluation, and clarification.

The Valencia Case: An Example of Discretion Without Accountability

The message from the Attorney General, Sanitary Burhanudin, regarding law enforcement, which is now popular among the Adhyaksa community and the public, is justice based on conscience, which is not found in books but in the hearts of prosecutors. The statement reinforces the stagnation of positive law-based law enforcement, which has been almost ingrained. However, casuistically, some cases related to the prosecution process are scrutinized by the public because they undermine the sense of justice due to the inconsistency of specific individuals in implementing prosecution policies.

One example highlighted in this writing is the case of domestic violence (DV) prosecuted against Valencia, a housewife accused of scolding her husband, who is said to drink excessively often. As a disclaimer, the case presented here is not intended to assess quantitatively or qualitatively the condition of law enforcement using restorative justice by the Prosecution but only to highlight the importance of risk mitigation related to efforts to prevent the abuse of authority in law enforcement, which opens up opportunities for the implementation or non-implementation of restorative justice.

Article 45 (1), as charged, carries a maximum prison sentence of 3 (three) years or a maximum fine of Rp 9,000,000.00 (nine million Indonesian Rupiah). When linked to PERJA No. 15 of 2020 regarding formal requirements regulating the threat limit below five years, it meets the criteria for restorative justice. However, what is essential to consider in prosecuting PERJA No. 15 of 2020 is the social and humanitarian mosaic that heavily colours the case.

Following the viral coverage of Valencia on social media, the Prosecution, under the leadership of Attorney General Sanitiar Burhanuddin, withdrew its indictment during the trial after the defendant's plea agenda. The Prosecutor read the withdrawal of the indictment by Attorney General ST Burhanuddin in the trial at the District Court (PN) Karawang on Tuesday, November 23, 2021. "This is the right and authority of the Attorney General as the highest public Prosecutor who controls prosecution cases throughout the Republic of Indonesia. Yes, this is the first time (it has been done)," said Leonard Ebenezer, Head of the Legal Information Center, in his statement at the time.

Burhanuddin withdrew Valencya's 1-year prison sentence demand and demanded acquittal due to conscience and a sense of justice. In addition, the decision has been carefully processed by the Deputy Attorney General for General Crimes (Jampidum). The leadership of the Prosecution also took administrative action against prosecutors and structural officials in response to public sentiment regarding handling cases deemed inhumane, namely by transferring one official to the West Java High Prosecution Office based on the Decree of the Attorney General of the Republic No. KEP-IV-781/C/11/2021.

The resolution of the Valencya case by withdrawing the Prosecution's demand embodies the spirit of restorative justice. However, withdrawing the Prosecution at the adjudication stage or when the files have already entered the court departs from the discourse of restorative justice commonly practised by the Prosecution, as stipulated in PERJA No. 15 of 2020. Nevertheless, despite being seen as inconsistent, this step is still imbued with the spirit of upholding justice. It can serve as a reference for the future by the Prosecution to consider aspects beyond the provisions regulated by PERJA No. 15 of 2020, as long as the legal application based on the facts in a case presented to prosecutors can be accounted for. However, accountability related to case handling, including an inherent supervisory system, must be correctly attributed to structural officials within the Prosecution in this Valencia case. The condition is feared to be just the tip of the iceberg, thus necessitating improvements in the supervisory system and case handling procedures, especially for cases that qualify for restorative justice efforts.

CONCLUSION

Based on the description presented above, it can be seen that the position of the Prosecutor's office as a government institution that has authority and discretion in carrying out prosecutions is based on the ontology that the Prosecutor's office is a form of state sovereignty, which holds the function of carrying out policies, to secure, control and make effective all matters related to legal interests as the lifeblood of government. Controlling, making effective, and harmonizing legal laws with non-legal aspects such as economic, social, and cultural aspects must go hand in hand. Therefore, the authority given to the Prosecutor's office is the absolute authority which, in terms of its implementation, must be carried out by legal norms, legal principles, values of justice and public interests without ignoring moral responsibility or accountability based on statutory provisions.

Mitigating the risk of abuse of authority in prosecutions using a restorative justice approach is done by strengthening administrative and legal instruments in the form of accountability and transparency. In addition, in implementing a restorative justice approach, the internal monitoring system continues to be carried out consistently with the support of institutional policies, which provide a deterrent effect for perpetrators who violate existing ethics.

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