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Review Article

Restructuring the Termination of Prosecution in the Criminal Jurisdiction System of Indonesia

Raymond Ali[1*], Muhammad Said Karim[2], Andi Muhammad Sofyan[2], Achmad Ruslan[2]

[1]Attorney General of the Republic of Indonesia
[2]Faculty of Law, Hasanuddin University, South Sulawesi, Indonesia

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***Corresponding author:** Raymond Ali

Abstract

The current system of Indonesia for the Termination of Prosecution is deemed ineffective and efficient and has not reached a number of issues that touch the aspect of justice as has been universally applicable in both countries that adhere to civil law and common law systems. The research is a normative-juridical research, using a statute, conceptual and case approaches. The results show that the implementation of the concept of terminating prosecution, both based on the principle of legality and adjudicating cases in the public interest (principle of opportunities) is currently considered ineffective, therefore most cases are transferred to courts which are subsequently examined and decided by judges. It causes the criminal justice system not running in a simple, fast and inexpensive manner and led to an increase in the number of prisoners living in prisons and having to get maintenance from the state. The termination of prosecution using the principle of opportunity needs to be delegated authority from the Attorney General to the Public Prosecutor, especially in relation to the consideration that there has been a settlement between the suspect and the victim as well as crimes committed by vulnerable groups.

Keywords: Attorney; Criminal Law; Jurisdiction; Prosecution.

INTRODUCTION

As a subsystem in the criminal justice system, a central role of prosecutor is owned in the prosecution, where the public prosecutor deals directly with investigators, courts (judges and clerks), prisons and confiscated property storage warehouse [1]. Given the urgency of the prosecution, it is not surprising that the public prosecutor has a role as *dominus litis* or the ruler of cases in the criminal justice system. The success or failure of the judicial process is greatly influenced by the success at the prosecution stage [2]. The function of *dominus litis* is also recognized by most countries that adhere to civil law and common law legal systems. Even in countries that adhere to civil law and common law legal systems, investigations only function to gather facts that lead to suspicions, while prosecution serves to determine what articles are appropriate to be suspected of being accused [3].

In Indonesia, the termination of prosecution can be performed in a diversion process. This is as regulated in Act No. 11 of 2012 concerning the Juvenile

[1]The public prosecutor in contact with investigators when providing instructions for completing case files, returning or certifying case files as complete and accepting responsibility for suspects and evidence. The public prosecutor is in contact with the court (judge and clerk of law), namely when submitting case files and receiving decisions regarding detention or holding of hearings. Furthermore, the public prosecutor in contact with the correctional institution officers when detaining the defendant during the prosecution stage until the verdict had permanent legal force and when conducting the execution of a court decision that had permanent legal force. The public prosecutor is in contact with officers of *Rumah Penyimpanan Barang Sitaan* (RUPBASAN), namely when placing evidence during the ongoing judicial process.

[2] Butt, S. (2011). Anti-corruption reform in Indonesia: an obituary?. *Bulletin of Indonesian Economic Studies*, *47*(3), 381-394.

[3] Hellmann, O. L. L. I. (2015). "The Institutionalisation of Corruption: The Neglected Role of Power." In *th PSA Annual International Conference Sheffield*, vol. 30. 12-43.

Criminal Justice System which states that the diversion process can occur at the stage of investigation, prosecution and examination process in court with conditions as stipulated in article 7 paragraph (2) of Act No. 11 of 2012 which states that diversion can be exercised in a criminal act committed is punishable by imprisonment of under 7 (seven) years and not a repeated offender (recidivist). This diversion is the implementation of the concept of restorative justice in a legal system in Indonesia where case settlement considers the principle of social balance in society, namely a balance between the interests of victims and perpetrators where the main objective is to settle juvenile cases out of court in order to avoid deprivation of freedom from children.

By the termination of prosecution based on the principle of very limited opportunity being the authority of the attorney general, it makes public prosecutors rarely use discretionary powers to determine whether a criminal case cannot be transferred to court based on reasons of public interest [4]. It is happened to the case of *Nenek Minah* (55 years) who was convicted of stealing 3 (three) cocoa from PT. Rumpun Sari Antan in mid-August 2009, whose purpose is to collect cocoa seeds in her garden in Sidoharjo, Darmakradenan village, Ajibarang subistrict, Banyumas district. The foreman of plantation named Sutarno rebuked and then Minah, who had not had the chance to bring the cocoa to her house, then apologized and returned three cocoa. The problem is the management of PT. RSA 4 instead reported Minah to the police of Ajibarang and the case was transferred to District Prosecutor Office of Purwokerto for trial at the District Court of Purwokerto, Banyumas district.

After the case was transferred from the police to the attorney, her status was placed under house arrest and during trial process, *Nenek Minah* traveled 25 kilometers from her house to the District Court of Purwokerto with a cost of *ojek* and public transportation is Rp. 50.000 for one go. Once, *Nenek Minah* was given money from the prosecutor in the amount of Rp. 50.000 for return. *Nenek Minah* was sentenced of 1 month and 15 days with a probation period of 3 (three) months.

The next case is *Lanjar Sriyanto* in a traffic accident, his motorcycle hit a car. His wife died, while he became a suspect in the cause of his wife's life, and later in prison. Even more bitterly, he was forced to lie to his only child, Samto Warih Waluyo (10 years). Lanjar and his family agreed not to tell the truth about what happened to Warih, a fifth grade elementary school boy, that Lanjar was in prison and threatened with a 5 year sentence on the charges of Article 359 of the Criminal Code.

To resolve this problem, the Attorney General's Office of the Republic of Indonesia has also issued the regulation of the Prosecutor of the Republic of Indonesia No. 15 of 2020 concerning Termination of Prosecution Based on *Restorative Justice* which basically explains that in certain cases, namely cases where the suspect has committed a criminal act for the first time, the criminal act is only punishable a fine or punishable by imprisonment of not more than 5 (five) years and the criminal act is committed with the value of the evidence or the loss incurred as a result of the criminal act of not more than Rp. 2.500.000,00 (two million five hundred thousand rupiah), then the prosecution can be terminated on the grounds of the interests of the law if there has been an after-court settlement (*afdoening buiten process*) in the form of a peace agreement between the suspect and the victim.

With the *a quo* provision, only certain criminal cases where there is conciliation have the possibility to be terminated at the prosecution stage, while for other criminal cases, for example cases where the defendant is elderly, certain criminal cases which cost the state to pay for it [5]. The process of settlement of the case is greater when compared to the value of recovering state financial losses, etc., continues until the examination and decision of the district court even though the criminal charges and criminal decisions are in the form of probation, resulting in an inefficient, inhuman judicial process and criminal proceedings are detrimental to interests that are even greater than those that are protected [6].

Considering the problems above, the current system of Indonesia for the Termination of Prosecution is deemed ineffective and efficient and has not reached a number of issues that touch the aspect of justice as has been universally applicable in both countries that adhere to civil law and common law systems, so reform is needed. The termination of prosecution in effect, so that an effective termination of prosecution concept can reduce the buildup of cases in court and reduce the number of prisoners in prisons.

[4]Njoto-Feillard, G., & Azali, K. (2016). *Is a New Entrepreneurial Generation Emerging in Indonesia?*. SEAS Yusof Ishak Institute. http://hdl.handle.net/11540/9160.

[5] Luhut M.P. Pangaribuan. (2009). *Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia*, Jakarta: Universitas Indonesia, p. 109

[6]Alhumami, K., Arie, M., Musakkir, Sampurno, S.S. (2020). Attorney's Independence in Implementing Law Enforcement Duties: Challenges and Development, *Journal of Law, Policy, and Globalization*, Vol. 95, 106-112

METHOD OF RESEARCH

The research is a normative-juridical research, using a statute, conceptual and case approaches [7]. Research instruments as a means of collecting legal materials are obtained through literature study, legislation and interviews. Existing data from various sources were analyzed by using *content analysis techniques*.

Implementation of the Concept of Termination of Prosecution Based on the Principle of Legality

Implementation of adjudication of cases in the public interest by the Attorney General based on the elucidation of article 35 letter c of the Law on the Public Prosecutor's Office of the Republic of Indonesia after considering the suggestions and opinions of State power agencies related to the matter the termination of prosecution based on the principle of opportunity is very rare. Data from the General Crime of the Attorney General's Office of the Republic of Indonesia in 2019, nationally there are 10 cases that have been ruled out in the public interest. Meanwhile, in 2018 there were 14 cases with the same resolution.

At the High Prosecutor's Office of West Java, in 2018 and 2019 there was no termination of cases at all using the principle of opportunity. The cause of the low number of cases being sidelined for the public interest was based on an interview with the Head of Person and Property Pitoyo explained:

> *Main reason for the small number of cases that are set aside for the public interest is that the Public Prosecutor does not have the authority to adjudicate cases in the public interest. But the Attorney General has the authority to adjudicate in the public interest, so that if the public prosecutor is going to use these means to stop the case, the process will be long and bureaucratic, so that for certain cases the public prosecutor prefers to delegate cases to be prosecuted with probation.*

The practice of adjudication of cases in the public interest also does not work effectively. This is because the public prosecutor does not have the authority to adjudicate cases in the public interest and prefers to delegate cases to court even though they will be charged with probationary charges. In practice, the adjudication of cases in the public interest often occurs in cases involving big names on a national scale.

Based on the results of research, it is found that criminal cases with certain qualifications such as the defendant are elderly, cases are classified as light and not difficult in the proving process, etc., it is still delegated to district courts with regular examination procedures, where after the proving process, the public prosecutor also submits charges probationary punishment and on the said case the panel of judges also issued a probationary sentence with a settlement period of up to 5 (five) months, which is a long time and requires considerable energy and cost. In connection with the principle that the criminal justice system must be implemented in a simple, fast and low cost manner, the implementation of such a criminal justice system is completely inversely proportional (*a contrario*)[8].

In a model of criminal justice system, one of the models is *crime control model* (CCM), promises a simple, fast and low cost judicial process with an emphasis on the professionalism of law enforcers. Especially in countries where the crime rate is very high, CCM is a rational alternative solution to reduce the crime rate in that country.

This CCM still refers to the adversarial system where the position between law enforcers and defendants and their legal advisors is equal. Thus it is not identical that the *crime control model* is inquisitorial which is confidential in nature and opens up great opportunities for human rights violations to the suspect or defendant. It can be justified if the prosecutor acts like a judge, particularly in plea bargaining, but the plea bargaining process is actually based on the consent of the defendant who is obliged to be accompanied by a legal advisor.

CCM with the principle of *presumption of guilt* which is the opposite of the presumption of innocent does not mean that CCM model justifies law enforcers based on the principle of presumption of guilt to commit human rights violations to the accused. That is a big mistake in interpreting the concept of the presumption of guilt. This principle is basically just a point of view from a law enforcer to see a criminal case. If according to law enforcers based on their assessment of the results of the investigation, at least 2 (two) pieces of evidence have been fulfilled, then the investigator is allowed to determine the suspect and detain the suspect, while waiting for the suspect to be processed in court and to obtain a criminal verdict with permanent legal force.

Meanwhile, by the principle of *presumption of innocent*, even though the suspect has committed a criminal act and at least 2 pieces of evidence have been fulfilled according to the finding of investigator, the investigator is still not allowed to detain the suspect because it has the potential to violate human rights,

[7] Irwansyah, 2020, *Penelitian Hukum*; *Pilihan Metode & Praktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta, p. 61-63

[8] Butt, S., & Lindsey, T. (2010). Judicial mafia: The courts and state illegality in Indonesia. In *The state and illegality in Indonesia* (pp. 189-213). Brill.

unless a judge decision has permanent legal force that proves it legally and convincingly that the defendant is guilty, then according to the principle of the presumption of innocent the accused can be subject to a *dwang middelen* in the form of detention.

According to the author, a simple, fast and low-cost criminal justice system can be implemented using an aqusatorial-based crime control model method. The professionalism of law enforcers creates a minimum level of error in the criminal justice process. Even if there is accidental miscarriage of justice from law enforcers, and even then with a small percentage, there is still room for the injured party to file a lawsuit in court for compensation and rehabilitation. With the termination of prosecution with certain qualifications, cases do not need to be delegated to the court which results in the settlement of criminal cases undergoing a long, costly, time-consuming and energy-consuming process.

An Ideal Conception of Termination of Prosecution in Justice System of Indonesia: A Comprehensive Study

In order to find an ideal conception of termination of prosecution in Indonesia in order to achieve a criminal justice system that is simple, fast and low cost and can effectively reduce the number of cases being tried and the number of prisoners in prisons, a legal reconstruction process is needed by reorganizing the legal system already exist, but it is deemed ineffective for later in such a way that a new legal concept is developed which is better than the old system. This is why legal reconstruction is also called the repair doctrine [9].

In conducting a legal reconstruction, the main principle is that the law to be improved must be the legal requirement of the community in creating order, balance and justice. Furthermore, improvements and revisions to the old legal norms are carried out through reforming the sociological side and legal comparisons of countries that have succeeded in implementing an effective and efficient legal system to obtain new legal norms which are expected to not conflict with the basic norms or philosophical side based on the ground norm, namely Pancasila as stated in the Preamble to the 1945 Constitution. For this reason, this study will conduct a legal comparison in order to find an effective and efficient system of termination of prosecution.

As a method in order to find solutions to answer problems related to what is the effective form of terminating prosecution that can guarantee the implementation of a simple and fast trial while still prioritizing the principles of justice, certainty and benefit, a legal comparison is needed.

In this research, comparison of law was performed on the criminal procedural law systems of countries, both civil- and common law, which based on their experience have successfully used the termination of prosecution as a means of realizing a simple, fast and low cost criminal justice system. In this research, we will look at the criminal procedural law systems of England, Finland, France and Germany.

England

England as a *common law* country has an adversarial-based criminal procedure law system. In contrast to other European countries which generally adhere to inquisitorial-based civil law? In UK, the police have full discretion to decide whether or not to prosecute a criminal case. If the police decide to prosecute, the case will be submitted to the *Crown Prosecutor Service* and then the Crown Prosecutor Service can determine whether the case will proceed to trial or not. Thus, both the police and the CPS have the authority to "divert" the case from the court.

The difference between the authorities of the police and the CPS to terminate the prosecution is in the "public interest" dimension. This means that CPS has the authority to determine the termination of cases based on reasons of public interest. The reason for terminating the prosecution was because "public interest" was that the case was too small for prosecution, including consideration of the cost-effectiveness required to settle the case.

Finland

Every year in Finland, 5.000 cases are resolved through mediation and half of them are sent by the public prosecutor to be resolved through mediation.

Mediation has been used in the settlement of cases in Finland since 1983. This mediation is not part of the criminal justice system but a system that complements the criminal justice system. In certain cases where there is a victim, prior to the prosecution process, the public prosecutor can send the case to the mediation institution to settle the dispute between the accused and the victim. The agreement between the defendant and the victim regarding the settlement of the case will be a reason to determine whether the case will be prosecuted or not, or an excuse for not being convicted by the court or even a reason to change the sentence of the convicted person.

Mediation can be done any time, namely from the time it is found that a criminal act has occurred until the execution of the criminal case. Principally, this mediation was voluntary carried out by both parties, namely the defendant and the victim. Mediation

[9] Andi Hamzah, "*Posisi Kejaksaan dalam Sistem Ketatanegaraan RI",* National Symposium "Hari Bhakti Adhyaksa". Held by Pusat Litbang Kejaksaan Agung. Jakarta: 20 July 2000.

initiatives other than the defendant or victim can also be from the public prosecutor or the police.

Ultimately, the mediation process will lead to a written agreement. The agreement contains the form of crime; the content of dispute resolution includes how the criminals agree to repair the damage, the time and place for restitution including the consequences for violating the agreement.

France

In France, the legal system is based on the Act dated January 4, 1993, it is known as the "*mediation penale*". There are 2 (two) types of mediation, namely: mediation for crimes and mediation for minor offenses. In its duties, in addition to enforcing criminal law, the criminal justice system also functions to ensure that losses suffered by victims will be resolved. Therefore, the duties of the public prosecutor, apart from prosecuting, also require the perpetrator of the crime to provide compensation to the victim and, with the consent of both parties, initiate mediation between the perpetrator of the crime and the victim.

Mediation for minor offenses, this is not a strict form of mediation, but a form of "*financial settlement*" outside the court, which in the Netherlands is known as "*Transaction*".

In a criminal case, when the victim has been identified, the public prosecutor must then bid to the perpetrator of the crime that he is obliged to compensate for the damage that has been caused by the crime he has committed, unless the perpetrator of the crime can show that the losses have been compensated by him. The public prosecutor must require that the completion of the proposal is not more than 6 (six) months and then the public prosecutor notifies the victim about the existence of the proposal.

After being signed by the public prosecutor, the prosecutor submitted this proposal to the perpetrator through the police officer. When receiving the proposal, the suspect is explained about his rights, namely that he can be accompanied by a legal advisor before agreeing and signing the proposal. After the proposal is signed by the suspect, the proposal is submitted to the public prosecutor and the suspect is given a copy or an official copy.

After the proposal is accepted by the public prosecutor, the public prosecutor then asks for a decision from the Chief Justice of the proposal. In examining and examining the proposal, the head of the court has the authority to summon the accused, the victim who if necessary they are accompanied by their legal adviser to then determine the contents of the proposal. The determination was then conveyed to the defendant and the victim and there was no opportunity to file a legal remedy against the ruling.

Germany

In Germany, the public prosecutor, in principle, does not have the authority to settle cases out of court. However, prosecutors often engage in negotiations designed to settle criminal cases with consent. These negotiations can occur with the defense in the context of preparing a penal order (*strafbefehl*), namely a written decision designed by the public prosecutor and issued by the court without a trial. This penal order can be used to adjudicate cases with criminal penalties, suspension of driving licenses, and/or probation with a period of not more than 1 (one) year. In the issuance of the penal order, the consent of the defendant is not required, but the defendant can make the penal order ineffective by filing an appeal and asking that a trial be held. In the process of issuing a penal order, the public prosecutor and the defendant or their legal adviser will discuss the appropriate sanctions in order to enable the defendant to receive the penal order. Many defendants had a strong desire to settle their cases without a trial, and then the lawyer approached the public prosecutor who handled the case to get the possibility of a penalty order being dropped. Particularly in corruption cases, there are often many negotiations before the draft penal order is accepted by both parties to be drafted and submitted to court. Courts actually have the power to reject penal orders, but this is very rarely done.

The public prosecutor always participates in negotiations in determining sentences before or during the trial. Since 1980, forms of *plea bargaining* in Germany have developed rapidly even though there is no legal basis for it. In many cases, the defense and judge are involved in negotiations where the defendant offers a confession and the judge expresses his desire to hand down a light sentence. Although these negotiations are initiated by lawyers and judges, prosecutors often enter the negotiation process and have veto power. If he decides to appeal the judgment resulting from the negotiation, he can waive the efficiency advantage if the case is resolved by negotiation. This form of negotiation is widely opposed by legal experts, but accepted by legal practitioners. "Deals" often occur in various kinds of cases, mostly in drug cases and corruption cases, but it should be remembered that this is not an attempt to avoid court proceedings, because in Germany there is little possibility for case settlement out of court.

Based on a comparative study of the concept of termination of prosecution in several countries, it can be concluded as follows:

1. Termination of a case in the preliminary examination stage can be done by the investigator and the public prosecutor, only the difference is that the investigator is authorized to stop a case for juridical reasons (there is insufficient evidence, certain cases are not criminal acts or cases are terminated by law,

but the public prosecutor has the authority to terminate the case. cases not only for juridical reasons but also based on reasons of public interest (public interest or opportunity);

2. Termination of prosecution for a reason of public interest is exercised for small case, cases based on the consideration of the public prosecutor of the cost effectiveness needed for the settlement of the case are greater than cases are terminated, the guilt is not serious, the condition of the case according to the public prosecutor can be resolved easily or without going through a complicated process of proof, the defendant voluntarily accepted the settlement through diversion;
3. For crimes resulting in death, prosecution is not permitted on the grounds of opportunity through diversion;
4. The form of diversion through; payment of fines, social work punishment, probation, and victim-offender mediation;
5. During the prosecution phase, the public prosecutor after accepting responsibility for the suspect and evidence then sends the case to the mediation institution to settle the dispute between the defendant and the victim. The agreement or agreement to resolve the problem between the defendant and the victim is the reason for the consideration of the public prosecutor to determine whether the case will be prosecuted or not. The mediation process is time-limited, where in Finland the mediation period is 6 (six) months;
6. At the prosecution stage, the public prosecutor can also offer a claim (*plea bargaining*) to the accused, so that the defendant can determine whether to declare guilt and sign a declaration of guilt or declare his innocence. If the defendant declares his innocence, the case file will be submitted to the court for examination and decision by the court.

In terminating a case on the grounds that there is insufficient evidence, it is an irregularity when the public prosecutor is given the authority to terminate the case on the grounds that there is insufficient evidence while at the stage of determining the suspect it is certain that at least 2 (two) pieces of evidence have been fulfilled. Then when the case file is declared complete (P-21), the public prosecutor has also stated that at least 2 (two) pieces of evidence are fulfilled in material evidence and that the administrative requirements are fulfilled in accordance with the criminal procedural law on formal evidence.

Likewise, for the termination of a case on the grounds that a certain case is not a criminal act, it is odd if the public prosecutor is given the authority to stop the case, while at the stage of determining a suspect, the investigator and examination of case files are carried out at the pre-prosecution stage by the public prosecutor, either investigator or public prosecutor has declared the fulfillment of at least 2 (two) pieces of evidence which state that the case has been fulfilled with elements of criminal offense (*wederrechtelijkheid*).

Therefore, in order to terminate a case on juridical grounds based on the principle of legality, namely that there is insufficient evidence and the case is not a criminal act to be carried out effectively and efficiently, in the opinion of the author, the authority to terminate an investigation on the grounds that there is insufficient evidence and against certain cases is not constitutes a criminal act only within the authority of the investigator. However, in order to maintain the objectivity of case handling and in accordance with the domicile doctrine of the public prosecutor, the investigator shall only exercise the authority to stop investigations for these two reasons after obtaining considerations from the public prosecutor.

The termination of prosecution using the opportunity principle needs to be delegated authority from the Attorney General to the Public Prosecutor, particularly in relation to the consideration of conciliation between the suspect and the victim as well as criminal acts committed by vulnerable groups.

CONCLUSION

The implementation of the concept of terminating prosecution, both based on the principle of legality and adjudicating cases in the public interest (*principle of opportunities*) is currently considered ineffective, therefore most cases are transferred to courts which are subsequently examined and decided by judges. It causes the criminal justice system not running in a simple, fast and inexpensive manner and led to an increase in the number of prisoners living in prisons and having to get maintenance from the state. The termination of prosecution using the principle of opportunity needs to be delegated authority from the Attorney General to the Public Prosecutor, especially in relation to the consideration that there has been a settlement between the suspect and the victim as well as crimes committed by vulnerable groups.

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