

IMPLEMENTATION OF UNWRITTEN LAW AS A BREAKTHROUGH IN CRIMINAL LAW ENFORCEMENT IN INDONESIA

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ABSTRACT

Based on the constitution, the State of Indonesia is a state of law not based on a single absolute power. Thus, the Indonesian government has limited powers and is not allowed to take actions outside the applicable legal norms. This means that in Indonesian constitutional practice, the law should rule power and not vice versa. However, in reality, the condition of law enforcement in Indonesia is very poor and far from expectations. There is discrimination against justice seekers where ordinary people with all limited resources always lose to the buttocks who own capital and can buy and play with the law at will. As a result, a sharp sword term appears below, but blunt upwards. To overcome these problems, it is necessary to develop the role of the prosecutor's office to also apply unwritten laws not only written to various forms of criminal cases. Thus, the needs of the community from the aspects of welfare and justice can be realized.

Keywords: *Prosecutor, Criminal Case, Unwritten Law, Customary Law*

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INTRODUCTION

Indonesia is a country based on the law so all activities of people's lives must always comply with and obey the applicable laws (Hidayat, 2016). This is as stated in the constitution which is the result of amendments. Every citizen must thus understand and not break the law. Every citizen will know their rights and obligations and understand the law by studying the applicable rules and laws (Usman, 2015). The law is expected to be a protector and guide for every community in order to run a good life.

However, the current legal condition is increasingly worrying if you look at the current situation of law enforcement as a result of several social gaps such as political background, and one's position and position in society (Sholahudin, 2015). As a result, we often hear the term sword of justice that is sharp and only pointing downward, but blunt upward, which if interpreted roughly the law only applies to small people and the lower class but does not apply to those who have power or money (Biroli, 2015). Therefore, the concept of legal principles must be expanded immediately, meaning that laws and regulations must not be the only guide for judges in giving decisions.

According to the provisions of Article 1 of the Draft Criminal Code, Indonesian criminal law is based on the idea of legality, which is further affirmed by prohibiting the use of comparable interpretations. However, with the passing of a law in society (*living law*), the notion of legality can be reversed (Widayati, 2016). Thus, if the requirements of Article 1 paragraph (4) are not applied carefully, law enforcement can get caught up in comparison. While the analogy in article 1 paragraph 2 of the Criminal Code Bill is prohibited from using. The strict provisions of article 1 actually create contradictions between each point (*interminis contradictions*), in other words, the framers of the law are less consistent.

Each law forms a system: it has its own vocabulary to express various concepts, its rules are arranged in groups, it has techniques for expressing rules as well as interpretations, limited by the belief that laws can be applied (Mitendra, 2018). Customary laws are thus characterized as broad norms or as broad principles that exist in society as an unwritten legal system (Susylawati, 2009).

The unstructured form of customary law exists because community organizations are not strong enough to support the existence and operational capacity of law (Arliman, 2018). This is because society is managed by people known as charismatic leaders who give the community an impersonal organized structure. Thus, the implication is the absence of a certain value of unwritten law in traditional societies (Abbas, 2017).

Moreover, the customary law system does not have a specific governing institutional framework. Because various policies in the framework of governance in society are only perceived as a reflection of the leader's personality, not representing a certain state system (Wulansari & Gunarsa, 2016). It also shows that, given the shortcomings or weaknesses of the formation of state law in society, the interests of the person or family are outside the legal system. The role of individuals or families clearly shows efforts to disseminate social norms to the next generation and then in implementing controls and sanctions based on customary rules (Wulansari & Gunarsa, 2016).

Such differences are not addressed within indigenous peoples through adjudication procedures, meaning judicial proceedings and the imposition of court decisions by third parties on the basis of the legitimacy of government authority known as judges. Since the functions of indigenous peoples and legal institutions are not very complex, it can be said that everyone is a legal expert in community life. This means that people always know some conventional information, known as local wisdom, that exists in literary works. It is something that is appropriately assessed both for some materials and for some methods that must be assessed and that people have never seen in society (Manarisip, 2013). From this fact, the term original law was born to describe the unwritten law that grew to characterize the customs of local communities. But as the world itself continues to evolve, new life changes have made customary and unwritten laws affect national laws (Aditya, 2019).

Furthermore, developing countries such as Indonesia mainly use colonial law. Therefore, new laws and regulations have a very significant role in developing the law. But it must be realized that it is impossible to adjudicate all problems or things that occur in society. As Djasmani (2011) said, however, law is a powerful weapon to reach out to society (law as an instrument of social engineering). Therefore, the duty of law in a country lies in ensuring that changes are made in an ordinary manner that can be supported by legislative or judicial decisions or both.

The expert said that laws and regulations or court decisions, or a mixture of both, play a very important role in helping the role of law in the development of a country. Therefore, the role of the legal apparatus, especially the Prosecutor's Office, in the application of unwritten law in criminal cases in Indonesia must be examined.

METHOD

Normative and juridical legal research techniques, namely research using literature research, are the methodology used by the author in this study. It solely provides secondary

legal data, especially regarding the issues mentioned in this article. Normative juridical law research is a literature research, this study explores the role of the prosecutor's office in the implementation of unwritten law in criminal cases in Indonesia. Literature research means that this research is sourced from documents and laws, or other research to meet conclusions (Hadisuprpto, 2011).

RESULTS AND DISCUSSION

As the highest prosecution institution, the Prosecutor's Office of the Republic of Indonesia plays an important role in the rule of law and justice. In carrying out its duties and authorities, the prosecutor's office always acts based on religious laws and norms, decency, explores and upholds human values that live in society, and while maintaining the honor and dignity of the profession. the existence of the Prosecutor's Office in Indonesia as law enforcement is very significant. Thus, they must be competent to carry out law enforcement activities in community life (Effendy, 2005).

The duty of the prosecutor's office as the front line in law enforcement has attitudes and strategies, as a government entity that exercises state authority in prosecuting and as a law enforcement agency and as an agent of justice. Thus the power of the prosecutor's office can be directly felt as a judicial body. Therefore, the duty of the prosecutor's office is required to maintain the value of justice as one of the pillars in enforcing the law (Effendy, 2005).

Thus, Indonesia's integrated criminal justice system is an important aspect of the country's law enforcement system and consists of four subsystems: police; prosecutor; court; and prison. As a branch of the judiciary, the Prosecutor's Office has the duty to try and has laws that are very crucial in the enforcement process. The power of the prosecutor's office can touch directly the community as a judicial institution. Therefore, the function of the Prosecutor's Office as the leading institution in law enforcement must be able to maintain the ideals and principles of justice in society (Paripurna & Heniarti, 2019).

Criminal justice in society addresses the issue of crime. In social tolerance, the criminal justice system seeks to control crime by demonstrating various crime control tactics. A successful system is one in which most public reports and complaints fall into the category of cases where criminals are held accountable by due process and punished. In short, the system designed to deal with criminal activity and limit crime within the tolerance of society is the criminal justice system (Syahrin, 2018). The main institutions known as: police, prosecutors, courts and prisons are elements in the system that work together. These subsystems are often influenced by their different goals in the criminal justice system and forget their common goals as a whole (Hatta, 2008).

The procedural design of the criminal justice system can be divided into three stages, namely: a. pre-adjudication stage; b. adjudication stage; and c. Post-adjudication stage (Ardhyansah, 2020). These three sequences show procedural design, but it is unclear which stage is most dominant. If referring to the discussion notes in the preparation of the Criminal Procedure Code in 1981, friction and conflict between the investigative authority (investigator/police power) and the prosecution authority (prosecutor's power) already exist. If integration in the work system can run well, then the essence of punishment will be realized, namely: Social Welfare (individual/social protection) and Social Defense (community

protection). In social welfare, the core objectives of punishment are to: crime prevention, public shelter, community recovery through: conflict opplossing and vredemaking.

For everyone in Indonesia, the process of fair law enforcement is not simple, because fair values, honesty and a sense of nationality are the main difficulties for its enforcement. The value of justice is a universal value. The values of justice, honesty, and a sense of nationality in an effort to eliminate legal confusion and injustice must receive more attention. These principles should thus be taught and practiced to the next generation from an early age so that they become long-term change efforts and regulations. Thus, in the near future, changes and breakthroughs are modifications of previous laws and regulations (Dwisvimiari, 2011).

With regard to prosecution by prosecutors, as mentioned above, there are two principles of prosecution according to the Indonesian criminal procedure law, namely: the principle of legality, which requires the public prosecutor to prosecute people who are proven to have violated the law. Then there is the principle of opportunity, which states that the public prosecutor is not forced to prosecute someone even though it is proven that the person has committed a punishable crime (Iqbal, 2018).

In criminal law, the Public Prosecutor also has preventive and repressive functions, while the Public Prosecutor functions as a State Prosecutor in the field of state administration and also civil. In the preventive field, the function of the Prosecutor's Office is to increase public awareness, monitor the safety of public access, maintain the safety of the circulation of printed goods and supervise the flow of trust. From the repressive side, the procuratorate conducts prosecutions, supervises the course of the court, execution of verdicts and others.

Through this task, the prosecutor's office has a strategic position and role in law enforcement in the criminal justice process. The prosecutor's office will thus screen the examination and examination procedures in the proceedings. The Prosecutor's Office must be able to carry out law enforcement in this strategic position, as well as being authorized by laws and regulations to carry out the duties of public prosecutors and execute court decisions with permanent legal force (Effendy, 2005).

Applicable laws cannot always be limited by norms, because they always develop dynamically, grow, and change, including whether or not an action is allowed. From the previous elaboration, the laws that live in society are written and unwritten. In addition to legal uncertainty, formal legal recognition of living law will add complexity to the legal system of a country that basically wants uniformity (Irianto, 2009). Moreover, in the field, law enforcement is also found that does not run professionally and proportionately. Many major cases are left hanging and not transferred to court. On the other hand, there are also small cases that easily proceed to trial without considering other aspects, such as expediency. Instead, it considers the formal correctness and adjudication process that is believed to have met the standards of procedural process, so the case must proceed to trial.

Due to the rigid implementation of the Public Prosecutor to apply written law without considering the living law, there are court cases that hurt the sense of justice of the community. the weak and the poor. For example, the case of Prita Muliasari in Tangerang, Stella Monica in Surabaya and Baiq Nuril in Mataram. Prita's problem is that only complaining about the services she received at Omni Hospital in Tangerang and leaked on social media received great attention from the public, legal practitioners, legal experts, who basically protested the filing of Prita's case to the court. Moreover, when the Prosecutor continued to file a cassation to the

Supreme Court for Prita Muliasari's acquittal, it also became the focus of legal practitioners. A similar problem also occurred in the case of Stella Monica in Surabaya who was considered defaming a beauty clinic, even though all she did was conversations with friends via whatsapp. The case of Baiq Nurul, who was accused of violating the ITE Law by spreading lewd chats of school principals who had been sentenced to acquittal by the Mataram district court, but the prosecutor from West Nusa Tenggara continued to appeal and finally Baiq Nuril was found guilty and sentenced to 6 months in prison and a fine.

From some of the cases above, it can be seen that the Public Prosecutor in carrying out his duties in the judicial process should not only focus on the rule of law, but also on expediency, by prioritizing conscience. Attorney General Basrief Arief's statement prioritizing conscience was also conveyed at the commemoration of Bhakti Adhyaksa Day on July 22, 2011, that law enforcement officials must improve professionalism, moral integrity, and prioritize everyone's conscience. law enforcement and avoiding reprehensible deeds. On the same occasion, the Attorney General also gave a daily order, "Continuing to improve intellectual and spiritual qualities that are based and prioritize conscience in every authority, responsibility and duty as a Prosecutor's institution is the main support for justice seekers."

When compared to the authority of the Indonesian prosecutor's office and the Dutch prosecutor's office, there are differences. Dutch prosecutors have the Principle of Opportunity or the Principle of Excretion. In 1813, French law, the Penal Code and the penal code, remained in force for some time after Dutch independence. In addition, there are a number of criminal cases under the criminal prosecution system in the Netherlands. In essence, the public prosecutor can choose whether or not to try a case. On the basis of "public interest", the Public Prosecutor may set aside a case. This approach can be used in court matters at all levels. The procuratorate has two powers, namely the power of opportunity; and the second is the authority to order the police to order the case or not.

Based on the above facts, under the pretext of public interest, the Dutch State Prosecutor's Office has the authority to try or not try a case. This authority actually also belongs to the Attorney General of the Republic of Indonesia who reaffirmed that he has the responsibility and authority to exclude cases based on public interest.

CONCLUSION

The Prosecutor's Office as a public prosecutor has a strategic role in applying unwritten law to criminal cases in Indonesia because this institution has been regulated in normative laws and regulations in both the field of prosecutors and law enforcement. These tasks are not only formalities in the criminal justice system but actually must also be able to contribute to creating legal certainty and a sense of justice in society. In law enforcement, it is not entirely the responsibility of judges and courts, but prosecutors as public prosecutors are also required to apply the law as straight as possible both written and unwritten.

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