

## THE ROLES OF PUBLIC PROSECUTOR IN IMPLEMENTING UNWRITTEN LAW ON CRIMINAL CASES IN INDONESIA

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### ABSTRACT

As a modern state, the Constitution of 1945 as the Constitution of the Republic of Indonesia has resolutely determined that one of the characteristics of Indonesian government system is the application of law principles and not the application of state sole power. Under the provisions of the Constitution, Indonesian government has a limited power and is not allowed to conduct arbitrer actions. The basic legal principles adopted must be reflected in the practices of state administration. That is, in practice of the Indonesian state administration, the law should control the power and not the other way around. However, in reality the conditions of law enforcement in Indonesia has been very alarming. In addition, discrimination against justice seekers is also increasingly visible due to various social conflicts of interests and fraud considerations such as social or political background and one's position in the social strata. Consequently, the sharp sword of justice is only going downwards, but blunt upwards. To overcome these problems, it is necessary to develop the role of public prosecutor to apply not only written law, but also unwritten law against various forms of criminal cases. By doing so, a prosperous society both in terms of welfare and justice can be realized.

**Keywords:** *The role of the prosecutor, unwritten law, criminal case, Indonesia.*

### A. Introduction

Conditions of law enforcement in Indonesia at this time, is already very alarming, and therefore the rigid application of the legal principle is no longer acceptable<sup>629</sup>. In addition, discrimination against justice seekers is also increasingly visible due to various social considerations such as political background and one's position and status in the society. Consequently, the sharp sword of justice is only going downwards, but blunt upwards. Therefore, the concept of legal principle<sup>630</sup> should immediately be expanded, meaning that legislation should not the only guideline for the judges in giving verdicts.

This is also in line with the concept of the Draft Code of Criminal Law of 2011 (hereinafter referred to as the Draft-Criminal Code), in Article 1 point (3) it was formulated, that: "the provisions referred in point (1) Without prejudice to the law of life in a society that determines that someone should be convicted even if such actions are not stipulated in the legislation".<sup>631</sup> Furthermore, in Article 1 point (4) explained,

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<sup>629</sup>Basically the principle of legality is also termed as "principle of legality", "legaliteitbeginsel", "non-retroactive", "de la legalite" or "ex post facto laws". In Indonesia, the provisions of the principle of legality is regulated in Article 1 paragraph (1) of the Criminal Justice Act (Criminal Code) that specifies: "No one can be convicted of an event other than the strength of the provisions of criminal laws that preceded it." PAF Lamintang and C. Djisman Naidoo formulate with terminology as, "No one can be punished unless an action based on criminal provisions under the laws that have been held first". P.A.F. Lamintang and Djisman Naidoo, *Indonesian Criminal Law*, Bandung: Sinar Baru, 2010, p. 1. Andi Hamzah translates the terminology, "No works (feit) which can be convicted other than by the strength of the provisions of criminal law that preceded it". Andi Hamzah, *Principles of Criminal Law*, Jakarta, 2005, p. 41 and Andi Hamzah, Academic Paper Bill Book of The Law of Criminal Procedure Law, the Panel Discussion Paper 27 years of the Criminal Procedure Code, Indonesia Room, Shangri La Hotel, Jakarta, 26 November 2008, p. 12.

<sup>630</sup>Utrecht long ago had also objected to the implementation of the principle of legality in Indonesia. The reason is a lot of action that should be convicted were not convicted because of the principle of legality. It also blocks the enactment of the Criminal Customary Laws which are still alive and will live in Indonesia. Furthermore Utrecht said, that: "there are several objections towards *nullum delictum* principle namely the principle of *nullum delictum* was less protecting collective interests (collectieve belangen). The result of *Delictum principle* is it can only punish those who committed an act which by law explicitly defined as a violation of public order. So, there is the possibility of someone who has committed an act which in essence is a crime, but it is not regulated by law as a violation of public order, then he can not be punished. See Utrecht, *The Series of Lectures Essence of The Criminal Law*, Jakarta: Faculty of Law, University of Indonesia, 1958, pp. 195-198.

<sup>631</sup>Bill Criminal Code of 2011.

that: "the validity of the living law within society as referred in point (3) is to the extent it is consistent with the values of Pancasila and/or the general principles of law recognized by the nation's community".<sup>632</sup>

Under the provisions of Article 1 point (1) until point (4) of the Criminal Code draft, then it can briefly be said, that the Indonesian Criminal Law is based on the principle of legality and it is further reinforced by the ban of using the analogy interpretation. Nevertheless, the principle of legality can be overridden by passing a law in the society (living law). Thus, the provisions of Article 1 point (4) is, if not careful in its application, then law enforcement can get stuck in the analogy.<sup>633</sup> While the analogy<sup>634</sup> in draft Article 1 point (2) of the Criminal Code draft is banned for use. The strict provisions of Article 1 actually make contradiction among each point (contradiction interminis), in other words, legislators are less consistent.

Thus, if National Criminal Code is later enacted, it would have significantly opened breach opportunities of the principle of legality. The existence of unwritten law or law that lives in the community (living law) can not be neglected, even the result of the 1945 Constitution second amendment of Article 18B point (2) has limitedly defined, that: "The State recognizes and respects traditional society with its rights along with its traditional rights as long as they are in accordance with the development of society and the principles of the Unitary Republic of Indonesia as regulated by law". Therefore, the principle of legality at this time is starting to weaken, as is stated by the Barda Nawawi Arief, that: "the principle of legality in the Indonesian Criminal Code is based on the idea/basic value "rule of law ". However, in reality the principle of legality is subjected to various forms of softening/smoothing or shifting/expansion and face various challenges, namely:<sup>635</sup>

1. The softening/smoothing process first contained in the Criminal Code itself, namely the presence of Article 1 paragraph (2) of the Criminal Code;
2. In the practice of jurisprudence and the development of the theory, it is known as the theory against material law.
3. In the positive law and its development in Indonesia (the temporary Constitution of 1950; Law No. 1 Drr. 1951; Act No. 14 of 1970 jo. Act No. 35 of 1999; and the concept of the New Penal Code ), the principle of legality is not solely defined as "delictum crimen sine lege", but also as "crimen sine delictum ius" or not solely be seen as a formal principle of legality, but also as a material legality principle, namely by recognizing customary criminal law, a living law and obeyed by the public or the unwritten law that serves as one of the law sources.

Nevertheless, it seems that the development policy of national law is still thickened with the hegemony of modern law which is loaded with its positive reasoning models. The fact is visible from several indications, namely:

- a) Development of national law which focused on policy legislation in the form of legislation;
- b) Law enforcement is emphasized more on the aspects of legal certainty, the procedural aspects and often legalistic-formalistic in nature."<sup>636</sup>

Accordingly, the Indonesian legal system which is currently touted as the "National Law", was not built based on the identity of Indonesia, but imposed from the concept of foreign nations (not developed from within but imposed from outside). So the historical development of Indonesian law is mixed transplantation, transformation, penetration or any other attempts that lead to influx of foreign legal systems (modern legal system/Europe) into an established and genuine local legal system (customary legal system/traditional), so it will contribute to the difficulties and prolonged polemical. Thus, it is obvious that wearing traditional Western model of state law (constitutional state) in developing countries is not receptio in

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<sup>632</sup>*Ibid.*

<sup>633</sup>Analogy is to provide interpretation on a rule of law by giving figurative words in these regulations in accordance with its legal principles, so that an event which can not be entered, then is considered to be in accordance with these regulations.

<sup>634</sup>Analogy is not allowed in criminal law, since the principle of legality prescribed in Article 1 of the Criminal Code, that person can not convicted criminal, except when under the terms of legislation that existed before the criminal events happened.

<sup>635</sup>Barda Nawawi Arief, *Selekta Capita of Criminal Law*, 2nd edition, Bandung: Citra Aditya Bakti, 2010, pp. 11-12.

<sup>636</sup>Al. Wisnubroto, *Qua Vadis: Indonesian Legal Order*, 1st edition, Yogyakarta: University of Atma Jaya, 2010, p. 52.

complexu perfectly, "but only partly acceptance of the west concept of constitutional law (construction and positive norms are well understood and accepted), but the idea and the intention is basically detached and do not get caught".<sup>637</sup>

In addition, each country has its own legal system because each legal form a system.<sup>638</sup> Therefore, Rene Devid emphasized that: "Each law in fact, constitutes a system: it has a vocabulary used to express concepts, its rules are arranged into categories, its has techniques for expressing ruling and interpreting them, it is limited to a view of the social order itself which determines the way in which the law applied and shapes the very function of law in that society".<sup>639</sup>

If the statement by Rene Devid is then analyzed and criticized, it can be understood that each law forms a system: it has its own vocabularies to express various concepts, its rules are organized into groups, it has techniques for revealing the rules as well as interpretation, it was constrained by the views of the social order itself that determines how the law is applied and formed a real function of law in the society. Therefore, the rules of customary law as a system of unwritten law is known as the general norm or in the form of general principles which exist in society.<sup>640</sup>

These principles actually are not difficult to be explicitly formulated in the standard form. Moreover, these principles or norms are generally accepted as instructions to differentiate about what is good and what is bad and can only be stored in the memory of most of the community leaders to later be interpreted according to the needs that often varies from case to case. Meanwhile, since they are not written, the customary law system doesnot have a structured form.

The unstructured form of customary law exists because the society organisation is not powerful enough to support the existence and the operational capacity of the law. The orderly life in the society happens more because it is controlled by individuals who are recognized as charismatic leaders rather than giving the impression that the people have been controlled by an impersonal organization system. Thus, the implication in traditional society is there is no certain value of the unwritten law.<sup>641</sup>

In addition, there is also no concrete institutionalised governmental structures which organise the local legal system. Consequently, the various policies in the framework of the government power implementation in society will only be seen as a reflection of the leader's personality character, instead of reflecting the certain state system. It further means that the prominent appearance of individuals or family is beyond the legal system, as the result of the absence or weakness of state legal establishment within the society. The role of individuals or family clearly shows the efforts to disseminate social norms to the next generations and then in implementing controls and sanctions on the basis of customary rules and regulations.

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<sup>637</sup> *Ibid.*, Citing the opinion of Soetandyo Wignyosoebroto, *Law: Paradigms, Methods and Dynamics of the Problem*, Jakarta: ELSAM and Huma, 2012, p. 406.

<sup>638</sup> According to Hartono Sunarjati, currently there are some legal systems which affect the other legal systems, such as: a. Legal systems of traditional customs (a.1. Customary Law); b. Anglo-Saxon systems; c. Legal systems of mainland Europe (Continental); d. Legal Scandinavian systems; e. Systems of Islamic law; f. Legal systems of Communist/Socialist. See Sunarjati Hartono, *Selekta Capita of Comparative Law*, Bandung: Penerbit Alumni, 2006, p. 31.

<sup>639</sup> Rene David, John E.C. Briery, *Major Legal Systems in the World Today*, Stevens & Sons, 2nd ed., 2008, p. 18.

<sup>640</sup> Customary Law system is also adopted by several countries including Mongolia and Sri Lanka, and Indonesia is also categorized as country that adopt customary law. While the system of religious law is a legal system that is based on the provisions of a particular religion which are commonly contained in the Scriptures, as applied in countries with religious law system such as Saudi Arabia, Iran, Sudan, Syria, and the Vatican. Besides these countries, several other countries are also implementing the mixture of Anglo-Saxon legal system, for example Pakistan, India and Nigeria that implements most of the Anglo-Saxon legal system, but also enforce customary law and religious law. See Sunarjati Hartono, *Op. Cit.*, p. 118.

<sup>641</sup> Adegium law stating *Ubi Sociates Ibi Ius, Fiat Iustitia Ruat Caelum*, and others assert, that even in the simple society where law as a social institution has clearly become a *sine qonditio quanon* for the sustainability of the society. However, does it mean that the existing law in a society has become something that is systemic, in other words whether the existing legal community has awakened into the legal system? To answer this question, it is needed to ascertain first of what is meant as a legal system and so is used as benchmarks, because what might be found in a society is the scattered and unrelated law, or if they do not support each other, it could have they weaken each other. Therefore, Chief Justice O.W. Holmes stated, enforcing the law, not just a matter of logic, but also a matter of experience (the life of the law has not been logic but experience). See Satjipto Rahardjo, *Dissecting Progressive Law*, 2nd edition, Jakarta: Kompas, 2007, p. 4.

Therefore, the settlement of disputes through adjudication ways, namely proceedings and imposition of judicial decisions by third parties on the basis of the legitimacy of government authority called judicial body, is not found in the traditional communities. Since the traditional community life has not been too complex and neither its legal institutions, it might be said that everyone in the community life is a law expert.<sup>642</sup> It means that everyone in the community is always aware about at least part of traditional knowledge that is in the literature called the local knowledge. What should be judged and what have never seen by the people in the community are something properly judged, either regarding the particular materials or the particular procedure. From this fact is the occurrence of the original legal term to describe an unwritten law that evolved as part of the local traditional community. However, because the world itself keeps developing, the changes to a new life have made the customary law and unwritten law affect national laws.

In addition, developing countries such as Indonesia mostly inherited colonial legislation. Hence the development of the law through new laws and regulations plays a very important role. But it must be understood that not all issues or disputes that occur in the community are brought to court for settlement. However, as what is stated by S.Tasrif, that the law is "a powerful tool to achieve the renewal of society (Law as a tool of social engineering)",<sup>643</sup> a theory that has been developed by Roscoe Pound've, a former Dean of the Faculty of Law, Harvard University for many years. Thus, the role of law in a country development is to ensure that the changes occur in an orderly way that can be helped by legislation or court decisions or a combination of both.

What is stated by the S.Tasrif, that legislation or court decisions or a combination of both is very instrumental in assisting the law's role in a country development, and thus it is necessary to study of role of law apparatus, especially the Public Prosecutor in applying unwritten law of the criminal case in Indonesia.

## B. Problems

Based on the description that has been presented on the background, the issue discussed in this paper is "Does the public prosecutor has specific role to apply the unwritten law of the criminal case in Indonesia?"

## C. The Role of Public Prosecutor in Implementing Unwritten Law

Prosecutor of the Republic of Indonesia as the highest prosecution agency in the legal field, has a major role in upholding the rule of law and justice. As specified in Article 8 (4) of Law No. 16 of 2004 on the Prosecutor of the Republic of Indonesia, that: "In carrying out its duties and authorities, prosecutors always act based on the law and the religious norms, decency, and morality, as well as shall explore and uphold human values that live in the community, as well as continue to maintain the honor and dignity of the profession".

Related with that, based on the preamble weigh in letter (a) of Act Number 16 of 2004 on the Prosecutor of the Republic of Indonesia, also has determined explicitly and limitedly, that: the Unitary Republic of Indonesia is a constitutional state based on Pancasila and the Constitution of the Republic of Indonesia Year 1945, and thus the law enforcement and justice is one prerequisite in achieving national goals.

Therefore, according to Soerjono Soekanto, legal and law enforcement are factors of law enforcement that can not be ignored, because if are ignored it will lead to failure to achieve the expected law enforcement.<sup>644</sup> Thus, the presence of the prosecutor's office as a law enforcement agency has a central position and strategic role in Indonesia as law based country, because the prosecutor becomes a filter between the process of investigation and inspection process in the court. Thus, their presence in public life should be able to carry out the law enforcement duties.

At the time when Het Herziene Inlandsch Reglement (HIR) was still valid as in the Indonesian Criminal Procedure Code, the investigation is considered part of the prosecution. Such authority makes the

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<sup>642</sup>There is an opinion that Indonesian law, with all its limitations, has awakened into a system. Indonesian legal norms, that has been tested over a century with various dynamics of society and is proven valid. Since the formal legal education conducted in Indonesia, the Indonesian legal system has been the subject of study. Almost no one calling for a 'revolution' in the law, but many called for reforms in the fields of a particular law. Thus the legal crisis that is often touted, perhaps not a crisis in the legal system as a whole, but the crisis in the law enforcement. See Sunarjati Hartono, *Op. Cit.*, pp. 137-139.

<sup>643</sup>S.Tasrif, *Response to the working paper Prof. Dr. Mochtar Kusumaatmadja, SH*, in Mochtar Kusumaatmadja, *Legal Concepts in Development*, Collection of Papers, 2nd edition, Bandung: Alumni, 2006, p. 35.

<sup>644</sup>Soerjono Soekanto, *Factors that Affect The Law*. Jakarta: Eagles, 2013, p. 5.

Public Prosecutor (Attorney) as coordinator of the investigation, even the prosecutor can conduct its own investigations. However, after the replacement of HIR with Act Number 8 of 1981 About the Code of Criminal Procedure (Criminal Procedure Code), then the prosecutor authority with regard to the investigation as provided in Article 39 as stated in HIR was almost entirely repealed, added with the enactment of Act number 30 of 2002 on the Corruption Eradication Commission (KPK), the authority in the field of prosecution is no longer fully prosecutor authority.<sup>645</sup>

As a government agency implementing state power in the prosecution, and as the authorized body in law enforcement and justice, the prosecutor's role as the frontline in law enforcement has an important and strategic position. Therefore, every Public Prosecutor in carrying out its role must always take the oath/promise as specified in Article 10 paragraph (2)/second section in the Act Number 16 of 2004 on the Prosecutor, which states: "I swear/promise that I will always uphold and enforce the law, truth and justice, and to always perform the duties and authority thoroughly, objectively, honestly, courageously, professional, and fair, and not to discriminate positions, ethnicity, religion, race, gender and certain groups and I will perform the obligation, and are fully responsible to God Almighty, community, nation, and the State". Thus, as the judicial institution, the authority of the prosecutor can be directly perceived by the public. Therefore, as one of the spearheads in law enforcement, the prosecutor's role is expected to uphold the values of justice.

Accordingly, the integrated criminal justice system in Indonesia is the integral part of the law enforcement system and consists of four sub systems, namely: the Police; Prosecutor; Courts and Prisons. Prosecutors as one of the sub-systems of criminal justice have authority in the field of prosecution and plays a very crucial part in the process of law enforcement. As a judicial institution, the authority of the prosecutor can be directly perceived by the public. Therefore, the role of the Prosecutor as one of the spearheads in law enforcement must be able to uphold the principles and values of justice in society.

According to Mardjono Reksodiputro, the Criminal Justice System is a system in a society to tackle the crime problem. Tackling here can mean efforts to control crime within the limits of public tolerance. This system is considered successful, if the majority of reports and complaints of people who become victims of crime can be solved by taking the suspect to court and was found guilty.<sup>646</sup> In short, the criminal justice system is a system built to tackle crime, an effort to control crime within the limit of public tolerance.<sup>647</sup>

Thus, the scope of the criminal justice system are as follows: a. Prevent people becoming victims of crime; b. Resolve crimes, so that the public is satisfied, because justice has been upheld and the guilty party is convicted; and c. Try to keep those who had committed crimes not to repeat his actions. The components that work together in the system are primary institutions known as: police, prosecutors, courts and prisons.<sup>648</sup> Each of these sub-systems within the criminal justice system is often influenced by the each goals and forget about their common goal of the whole system which has been outlined in the government criminal policy.

Related with the Mardjono Reksodiputro explanation, 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.<sup>649</sup> These three sequences are showing the procedural design, but it is unclear which stage is the most dominant one. If referring to the notes from the discussion during preparation of the Criminal Procedure Code in 1981, the friction and collision between the authority of the investigation (investigator/police powers) with the authority of the prosecution (prosecutorial/public prosecutor powers)

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<sup>645</sup>With the enactment of Act Number 8 of 1981 About the Code of Criminal Procedure (Criminal Procedure Code), then there has been a very important change namely the change for the investigator authority, become 1. Police: a. In the field of investigation, the police received a portion of general crime investigators; b. Police have the authority to conduct additional investigations; c. Police has a role as coordinator and supervisor of Civil Servant Investigators. While the authority of Attorney: a. In the field of investigation, attorneys have a portion as a special criminal investigators which includes corruption and economic crimes, albeit temporary; b. For general crime investigation, police holding full authority, while the prosecutor was not authorized.

<sup>646</sup>Mardjono Reksodiputro, *Indonesian Criminal Justice System: The Role of Law Enforcement Against Crime*. Jakarta: UI-Press, 2007, p. 84.

<sup>647</sup>*Ibid.*

<sup>648</sup>Mardjono Reksodiputro, *Develop Integrated Approaches to Criminal Justice System*, Jakarta: UI-Press, 2007, p. 140.

<sup>649</sup>*Ibid.*



were already there.<sup>650</sup> Therefore, if the work integration system does not run well, then there are drawbacks that might be resulted:

- a) Difficulty in assessing own success or failure of each institution, related with their common duties;
- b) Difficulties in completing its own inherent problems as a sub system of the Indonesian criminal justice system; and
- c) Responsibilities of each agency becomes less clear, because each agency pays little attention to overall effectiveness of the criminal justice system.

Conversely, if the 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 purpose of sentencing is to: crime prevention, public shelter, restoration of the community through: the settlement of the conflict (conflict opplosing) and bring a sense of peace (vrede-making).<sup>651</sup>

While for social defense, the sentencing objectives, are to: promote the convicted (resocialization/rehabilitation), relieve guilt, and the most important thing is the sentence is not intended to dehumanize (protection against arbitrary sanctions/retaliatory). Moreover, the principle of justice itself has varied meaning according to the scope, but in general, the principle of justice focuses on the proportion or balance.<sup>652</sup>

The process towards a just law enforcement for all Indonesian people is not easy, because the biggest challenge for law enforcement is to create fair value, honesty and sense of nation. The value of justice is a universal value. In an effort to eradicate the legal uncertainty and injustice, the values that should be given more attention is the value of fairness, honesty and sense of nationality. Therefore, these values should be taught and applied early to the younger generation, thus it will be a long term change efforts and are impressed as normative. So, the changes and breakthroughs that can be implemented in the near future are the change in the old rules and regulations.

On the other hand, the political will of Indonesia nation in improving law needs to be translated into real action so all components of the national legal system are based on Pancasila and the 1945 Constitution, with support facilities and adequate funding. Duty to bring legal ideals and principles of national law to the reality is a hardwork that should be addressed conceptually and directly planned.

Related with the prosecution by the public prosecutor as described above, there are two principles of prosecution according to criminal procedural law in Indonesia, namely: The principle of legality, which obliges the prosecutor prosecute those who are considered sufficient grounds, that the person concerned has done violation towards the law. Then the principle of opportunity, that the prosecutor was not required to prosecute a person, although obviously the person concerned has committed a criminal offense which can be punished.<sup>653</sup>

Therefore, based on Article 2 point (1) of Act Number 16 of 2004 on the Prosecutor of the Republic of Indonesia, they are responsible to implement the state power in the field of prosecution in addition to carrying out other functions granted by law. Thus, the function of the prosecutor in the penal law includes aspects of both preventive and repressive aspects, while in civil and state administration, prosecutor's office serves as the State Attorney. Functions of the prosecutor in the preventive aspect, as seen in the provisions of Article 30 point (3) of Act Number 16 of 2004 on the Prosecutor of the Republic of Indonesia, are to increase public awareness, to enforce security policies, to secure the circulation of printed materials, to monitor the flow of trust, to prevent abuse, and to conduct research and development in terms of statistical criminal law. In the repressive aspects, as seen in Article 30 point (1) of Act Number 16 Year 2004 regarding the Prosecutor of the Republic of Indonesia, the prosecutor serves the prosecution in a criminal case, carries out the judges' and court's decisions, supervises the implementation of conditional release decisions, completes the required file from Investigator Indonesian National Police (INP) or Civil Servant Investigators.

Through such functions, in the process of criminal justice, the prosecutor's existence as law enforcement agencies have a strategic position and role in a constitutional state. That's because the

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<sup>650</sup>*Ibid.*, p.145.

<sup>651</sup>Barda Nawawi Arief, *Loc. Cit.*

<sup>652</sup>The Liang Gie, *Theories of Justice*, Yogyakarta: Liberty, 1979, p. 25.

<sup>653</sup>Djoko Prakoso and I Ketut Murtika, *Know the Indonesian Prosecutor Agencies*, Jakarta: Bina Aksara, 1987, p. 29.

prosecutor is responsible for the filtering the investigation and inspection process in the trial. With this strategic position, the prosecutor as a functional official who is authorized by law to act as a public prosecutor and implementing a court decision that has permanent legal force, as well as other authorities under the law, should be able those carry out law enforcement duties.

Examining the position and function of a public prosecutor within the framework of law enforcement, it is important to link it with the ideals of law (*rechtsidee*) adopted in society, because essentially the existence of the prosecutor in the law enforcement process is also for achieving the law. It is as said by Marwan Effendy, that: Position and function of the prosecutor in the law enforcement process, as reflected in the Act Number. 5 of 1991 and Act Number 16 of 2004 on the Prosecutor of the Republic of Indonesia, the prosecutor is oriented to the achievement of law enforcement for justice seekers, both for public government, namely the rule of law, justice and prosperity for the people of the law.<sup>654</sup>

Law who live in the community can not always be limited to norms, because it is constantly evolving dynamically, growing, and changing, including about whether or not an act is prohibited. As described in the previous section, the living law in society is in the form of written and unwritten. In addition to legal uncertainty, formal legal recognition of the living law will add to the complexity of the legal system of a country that basically want uniformity.

Moreover, it is also discovered in the field that law enforcement is not run professionally and proportionately. Many major cases are left hanging and not being transferred to the court. On the other hand, there is also a small case that easily proceed to trial without considering about the other aspects, such as usefulness. Instead, it considers more on on the formal truth and the adjudication process which is believed has met the standard procedural process, so that the case should proceed to trial.

In the explanation of the Law of the Republic of Indonesia Number 16 Year 2004 concerning the Prosecutor of the Republic of Indonesia, in the General section, paragraph 6 has determined, that in carrying out the functions, duties, and powers, the Prosecutor of the Republic of Indonesia as the government agency implementing state power in the prosecution should be able to embody legal certainty, the rule of law, justice and righteousness under the law and heeding religious norms, decency, and morality, and shall explore human values, law and justice in society.

Both in the provisions of Article 8 paragraph (4) of Law Attorney of the Republic of Indonesia, as well as the explanation open opportunities for Public Prosecutor to break the dominance of the legality principle in carrying out their duties as law enforcement officers. This is reflected from the clause that reads, "shall explore human values, law and justice in society (the living law). But in practice these provisions are not followed, shackled at the mindset to consistently apply the written law (the legality principle).

Due to rigid implementation for the Public Prosecutor to apply the written law without considering the legal rules outlined in the legislation to heed/dig law which live in the community (the living law), then there are court cases that wound the sense of justice of the weak and the poor. For example, Prita Muliasari case was submitted to the Court for allegedly committing intentionally and without right to distribute and/or transmit and/or make accessible electronic information and/or electronic documents which have a charge of insult or defamation against Dr. Heng Gosal, Sp.PD and Dr. Grace H. Yarlen Nela working at Omni International Hospital in Tangerang.

Handling Prita case received enormous attention by the public, legal practitioners, legal experts, which basically protesting the submission of Prita's case to the trial court. Moreover, when Public Prosecutor filed a cassation to the Supreme Court against the Tangerang District Court decision that freed Prita Muliasari, it was also under the spotlight of the legal practitioners. Even the Attorney General Basrief Arief deplored the attitude of Public Prosecutor who has submitted the Cassation.

The statement of regrets of the Attorney General Basrief Arief, confirms that Public Prosecutor in carrying out his duties in the judicial process must not only focusing on the rule of law, but also on expediency, by promoting conscience. In other words, the public prosecutors also must be brave to break the written laws and to apply unwritten laws, according to what has been mandated by Article 8 (4) and the General Explanation Section 6 of Act Number 16 of 2004 on the Prosecutor of the Republic Indonesia. Statement of the Attorney General Basrief Arief promoting conscience is also delivered at the celebration of Bhakti Adhyaksa Day 51, Friday, July 22, 2011, that the law enforcement apparatus have to enhance professionalism, moral integrity, as well as put forward the conscience of every law enforcement and avoid

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<sup>654</sup>Marwan Effendy, *The Prosecutor of The Republic Indonesia, The Position and Function From a Legal Perspective*, Jakarta: Gramedia Pustaka Utama, 2005, p. 153.

misconduct. On the same occasion the Attorney General also provides daily orders, "Keep improving the quality of intellectual and spiritual based and prioritize conscience in every authority responsibility and duty as Attorney institution is the main support for justice seekers."<sup>655</sup>

There are differences if we compare between the authority of Indonesian Public Prosecutor and Netherlands Prosecutors. Netherlands Prosecutors have Principle of Opportunity or Principle of Discretionary Power. After the Netherlands became independent in 1813, French law namely the Code d'instructive Criminelle (Code of Criminal Procedure) and the Penal Code still continued to be valid for a certain period. In addition, the prosecution system in the Netherlands makes it possible to *sepot* criminal case. Basically, the principle of opportunity allows Prosecutor for choosing prosecute a case or not. Prosecutors may waive prosecution of a case (case) with the basis "the public interest". This principle can be done at any level of the court case. So that in the Netherlands, the Prosecutor has two (2) a combination of major powers, namely: First is the power of opportunity; and the second is the power of attorney to instruct the police to investigate a case or not.<sup>656</sup>

Based on the above situation, the Netherlands' Prosecutor has the authority to prosecute or to not prosecute a case under the pretext of the public interest. The authority actually is also owned by the Attorney General in Indonesia and it is stipulated in Article 35 letter c Act Number 16 Year 2004 About the Prosecutor of the Republic of Indonesia, which confirms that the Attorney General has the duty and authority to exclude cases based on the public interest. The elucidation of Article 35 paragraph explained that what is meant by "public interest" is interests of the nation and/or the public interest. Shelving the case as referred in this provision is the implementation of the principle of opportunity, which can only be done by the Attorney General after considering the advice and opinions of bodies of state power that have a relationship with these problems.

#### D. Conclusion

Based on the above, it can be concluded as follows:

1. Prosecutor as a public prosecutor has a strategic role in applying unwritten law against criminal cases in Indonesia, because this institution normatively has been stipulated in the legislation both the field of prosecution and law enforcers. The tasks are not merely a formality in the criminal justice system, but in fact also should be able to play an active role in creating a sense of fairness and legal certainty in the life of society and state.
2. In law enforcement, it is not entirely the responsibility of judge and court, but the attorney as a public prosecutor is also highly charged to apply the law as it should be, not only written law, but also unwritten law.

#### E. Recommendations

The following are some possible recommendations that might address the problems that have been raised in the above discussion:

1. The new code must address the dilemma of the public prosecutor when they are faced with two sided cases. It means that when the case is convicted based unwritten law but it is not if based on legality principle. Thus the new penal code needs to be specified in order to answer this sort of deviation. Then, what so called as 'public interest' and the justice goal in seeking material truth can be achieved.
2. In addition, the establishment of national legislation should be defined functionally. That is, the new law should substantially and completely meet the needs of the community. Thus, the rights and obligations are created in accordance with the purpose for achieving a prosperous society, both in terms of welfare and justice.

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<sup>655</sup>Remarks from General Attorney of Republic of Indonesia, Friday, July 22, 2011, the speech was also delivered by all Chief Prosecutors throughout Indonesia at the celebration of Bhakti Addhyaksa Day.

<sup>656</sup>[www.Peradin.or.id/Geogle](http://www.Peradin.or.id/Geogle) Chrome, 09 June 2015.



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