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RESEARCH ARTICLE

FUNCTIONAL DIFFERENTIATION IN CRIMINAL CODE: THE ROLE OF PROSECUTORS AS CASE CONTROLLERS IN INDONESIAN LAW

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Abstract

The principle of functional differentiation adopted by the Criminal Procedure Code can potentially cause significant problems in the future, especially for the Prosecutor's office, which will cause many free verdicts due to the loss of ammunition of evidence presented by the Public Prosecutor. By using normative and empirical legal research methods (combined), normative legal research is carried out using a statute approach, a historical approach, and a comparative approach. This paper will discuss the position of the Prosecutor's Office as a *dominus litis* in the Criminal Procedure Code if combined with an integrated criminal justice system that contains the principle of functional differentiation. The position of the Prosecutor's Office as the controller of the case (*dominus litis*) after the enactment of the Criminal Procedure Code cannot be fully applied in the investigation process. Because they cannot be directly involved in the investigation, as in the validity period of the HIR, it is necessary to build more open communication from the beginning of the investigation. It will be perfect if it is built continuously by eliminating the sectoral egos of each institution.

Introduction:-

Based on the Dutch system, which adheres to the Continental European tradition, Indonesian law formulates its arrangements on the written legal system; what can, cannot / is prohibited to do are all regulated in the laws and regulations.(Pangaribuan, Mufti, And Zikry 2017) The issuance of Law Number 8 of 1981 concerning the Criminal Procedure Law, also known as the Criminal Procedure Code (KUHAP), is a renewal of the criminal procedural law. (Hamzah 2005)The relationship between the Investigator and the Public Prosecutor has changed, namely the period of Het Herziene Inlandsch Reglement (HIR) or before the Criminal Procedure Code and the period after the enactment of the Criminal Procedure Code. (Rozi 2017)During the HIR period, the authority to investigate all criminal acts was with the Prosecutor (magistrate), while the Police acted as an "Assistant Prosecutor" or Hulp Magistrate; the investigation at that time was part of the prosecution.(Sobirin and Ahmad 2020)After enacting the Criminal Procedure Code, the investigation is arranged separately from the prosecution. In general criminal cases, the Police act as the Sole Investigator Coordinator and Supervisor of the Civil Service Investigator (PPNS) for particular/specific criminal cases. In comparison, the Prosecutor's Office only has the authority to perform duties in the field of prosecution and investigation for particular/specific criminal acts.

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At the evidentiary stage at trial, the Public Prosecutor is the responsible party. The existence of errors in the investigation process may result in the Defendant not being proven guilty at trial and declared free by the Judge.A free verdict in a case would create a negative stigma that the Prosecutor has failed in handling a quo case. In contrast, this matter creates legal uncertainty on the Defendant's side. It may also indicate that the investigation was engineered and that the Defendant was under pressure or tortured in giving testimony at the investigation.In addition, the Pretrial granted by the Court is related to legal action taken by the Investigator due to the lack of control/supervision from the Public Prosecutor over the investigation. Promoting the principle of functional differentiation impacts the lack of checks and balances between agencies on the settlement of the cases it is handling.

The principle of functional differentiation adopted by the Criminal Procedure Code can potentially cause significant problems in the future, especially for the Prosecutor's Office institution.(Mufrohim and Herawati 2020)The Prosecutor's Office, which only examines based on the case file alone without being allowed to participate in the investigation directly, can cause an obstacle when proving at trial. The result arising from the principle of functional differentiation is illustrated from several cases that led to the acquittal of the Panel of Judges because the Witness/Defendant revoked the Minutes of Examination (BAP) a quo.The revocation of the Witness/Defendant's BAP was due to pressure or fabrication of the case at the investigation stage carried out by the Police as the Investigator.

The above incident is detrimental to the Public Prosecutor and the Defendant himself because for the Public Prosecutor with the Witness/Defendant to revoke his BAP will directly reduce the evidentiary power in the trial.The weak evidence of the Public Prosecutor will give rise to many free verdicts due to the loss of evidence ammunition that the Public Prosecutor can present. There is a question that arises with the adoption of the principle of functional differentiation in the Criminal Procedure Code. What is the position of the Prosecutor's Office as a *dominus litis* in the Criminal Procedure Code if combined with the integrated criminal justice system in which the principle of functional differentiation is contained?

The point is that if it departs from the understanding that the *dominus litis* is the controller of the case, then the extent of the stage of the examination process can be viewed as the *dominus litis* of the Prosecutor's Office. This question is a consequence when the relationship between the Police Investigator and other Investigators, and the Public Prosecutor at the investigation stage is limited to functional coordination.Thus, it requires a close linkage of the Public Prosecutor to the case charged, not limited to examining the case file alone or merely giving instructions to the Investigator.

The functional differentiation principle's weakness needs to be reviewed and readjusted as part of a single unit or system. This principle is so that law enforcement officers do not work alone, wait for each other, and even hinder the legal process. Returning to the criminal justice system can be realized or implemented in 4 sub-systems, namely (1) investigative power, (2) prosecution power, (3) power to adjudicate and impose decisions or crimes, and (4) power to "implement decisions or crimes." Thus "judicial power (in the field of criminal law)" is exercised by the four bodies or institutions as stated above. The four bodies can be referred to as "judicial bodies."

An independent and independent judicial power must also be manifested in the criminal law enforcement process, not only in "judicial power or the power to judge." There is no meaning if the independent and independent judicial power exists only in one of the sub-systems of the Criminal Justice System (i.e., the "power to judge" system). An independent and independent judicial power must be manifested in the whole process of the criminal justice system. Furthermore, judicial power also needs to be built on coordination between the judiciary and other law enforcement institutions such as the Police and the Prosecutor's Office which needs to be further enhanced and strengthened so that the centralism of the interests of each institution can be avoided.

Research Methods:-

An in-depth study of the plan to change the Criminal Procedure Code, especially those that regulate the mechanism of investigation and prosecution, is needed to improve the current situation.This research is normative and empirical legal research (combined). Then in terms of normative legal research, it is carried out using an approach with a statute approach, a historical approach, and a comparative approach. (Marzuki 2007)

Discussion:-

In its development, the Public Prosecutor's Institution / Prosecutor's Office was adopted by the Netherlands, which had the same legal system as France (European Continental). Then the Netherlands incorporated it into its criminal procedural law in 1848.

The implementation of the Criminal Procedure Law during the HIR period can be divided into 2 (two) groups, namely:

1. Interim examination (voorbereidend or voorlopigh onderzoek), which includes the obligations of the Prosecutor and the Police.
2. Examination at trial (onderzoek ter terechtzitting), in which the Prosecutor's office also took an important part.(Soetrisno 1953)

The position of the Indonesian Prosecutor's Office is to continue what has been regulated in the Indische Staatsregeling (IS), which in its position places the Attorney General's Office side by side with the Supreme Court.(Pilok 2013)The provisions in the IS, which regulate the position of the Prosecutor's Office, are the same as the provisions in the Dutch Constitution.

Since enacting the Criminal Procedure Code, the relationship between the criminal justice sub-systems, namely the Police, prosecutors, and courts, has been compartmentalized. The compensatory resulted from the separation of powers and powers of investigation, prosecution, and examination and proof in Court. This condition is different from the application before the Kuhap, which is based on HIR.This Pre-prosecution mechanism has a direct impact on the limited active role of the public Prosecutor in following or directing the course of the investigation. The role of the public Prosecutor is minimized to examine the file of the investigation results and provide instructions if there are any deficiencies.

In Law No. 8 of 1981 concerning the Criminal Procedure Code, there are important principles, one of which is the principle of functional differentiation. This principle affirms the division of duties and authorities of law enforcement officers based on an institutional basis. This condition is also closely related to the principles of "clarification" and "modification" of functions and authorities between law enforcement officers. Thus, in criminal procedural law, there is no overlapping or biased authority or authority that goes beyond the duties and functions of the agency.

The beginning of functional differentiation is used as a means of horizontal coordination and joint checking between law enforcement, especially between the Police as investigators and prosecutors as public prosecutors. Based on article 1 points 1 and 4 in conjunction with article 1 point 6 letters and in conjunction with article 13 of the Criminal Procedure Code, there is a transparent clear, and precise division between the functions and powers of the Police as investigators and prosecutors as public prosecutors as well as implementing court decisions. However, this principle does not mean only an emphasis on separating agencies and functions in criminal proceedings. The effect of functional differentiation that is very important is the operation of all sub-systems in the criminal justice system.

The principle of strict functional differentiation in the division of authority and agencies raises structural, functional, and mechanical problems in the judicial system. First, the Indonesian Police's point of view results in the accumulation of reports and complaints that must be followed up. This situation causes investigative tasks to be less than optimal, such as the slow delivery of notification letters for the start of the investigation and the back-and-forth of case files. In this condition, for prosecutors, the principle of functional differentiation has narrowed the spectrum and perspective of prosecutors in combating crime. This condition is because the Prosecutor is not directly involved in the investigation process.

Second, constraints on functional differentiation arise at the court level. In the trial process in Court, there is nothing more than confirming and verifying the truth of the contents of the Minutes of Examination (which are not binding). For the Suspect and the complainant/complainant, the principle of functional differentiation has harmed their rights because the case cannot be processed based on a fast, simple, and low-cost trial.

A. Constraints on the Relationship between Investigators and Public Prosecutors

The obstacles faced by the Public Prosecutor in pre-prosecution practice are as follows:

1. There is a Back-and-Forth Process of Case Files from Investigators to Public Prosecutors thatNever Finish

The liability of the prosecution rests with the Public Prosecutor; therefore, if, according to the Public Prosecutor, the case file is not complete for the prosecution to be carried out, then the Public Prosecutor must return it to the Investigator authorized to investigate for perfection. (Manan 2010)There was a back-and-forth process of the case file between the Investigator and the Public Prosecutor. This process did not go through due to the communication and coordination and the lack of a harmonious relationship between the two, so every time the Public Prosecutor gave instructions to complete the case file, the Investigator was always unable to carry out the instructions properly.

Similarly, the Investigator feels he has tried to complete the case file following the instructions. However, the Public Prosecutor always feels that the case file is still incomplete or the Investigator has not been able to fulfill the instructions of the Public Prosecutor.In response to this, the Attorney General has issued a Circular to minimize the occurrence of back and forth of case files from the Investigator to the Public Prosecutor, namely the Attorney General's Circular Number: SE-004/A/JA/02/2009 dated February 26, 2009, which was updated with Jampidum Circular Number:SE-3/E/Ejp/12/2020 dated December 16, 2020, and a Memorandum of Understanding (MoU) between the Attorney General of the Republic of Indonesia and the Chief of Police of the Republic of Indonesia Number: NK/34/X/2021, Number: 11 of 2021 dated October 11, 2021, which in essence is the Public Prosecutor and Investigator optimizing the coordination and consultation forum in handling cases.

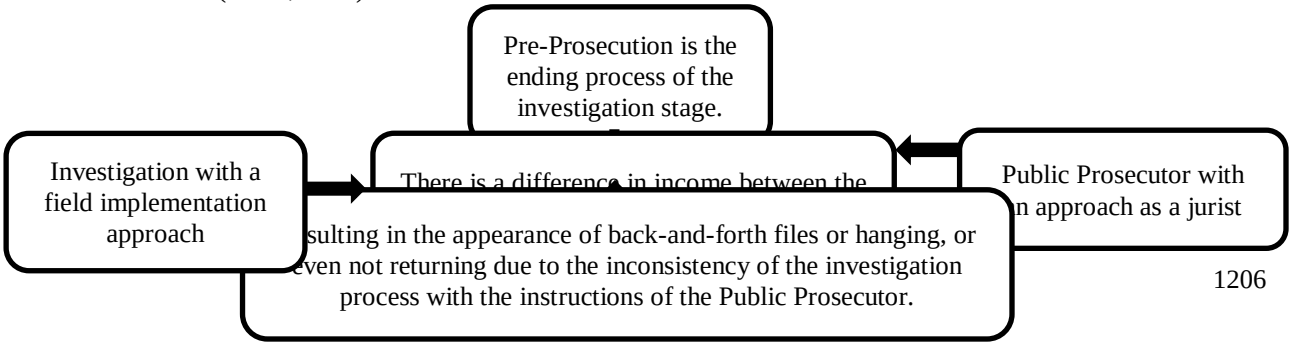
2. Less Harmonious Coordination between the Public Prosecutor and the Investigator
Often the disharmonious coordination between the Investigator and the Public Prosecutor leads to a lengthy process of resolving a case being handled. This lack of harmonious coordination is due to the lack of communication between the Public Prosecutor and the Investigator handling the case.A rigid and formal communication style, wherever possible, should be minimized to speed up handling cases. The relationship between the Investigator and the Public Prosecutor in the Criminal Procedure Code is principally based on functional differentiation, which is a foothold in the relationship between sub-systems/agencies in the Criminal Procedure Code.

According to Yahya Harahap, implementing this functional differentiation is directed at the relationship between the Investigator and the Public Prosecutor. Thus giving rise to the "clarity" of the investigation function that only belongs to the Police. Meanwhile, the Public Prosecutor does not have the authority to intervene in the investigation process. (Harahap 2004)

3. The Investigator Has Exceeded the Time Limit in Completing the Incomplete Case File
The problem of investigators working has exceeded the time limit the Public Prosecutor gave in completing incomplete case files per the instructions given. It is still happening. This problem can cause the case to be unresolved and abandoned, so it is not by the principles of fast, simple, and low-cost trial.The compartmentalization of functions for investigators and public prosecutors in the Criminal Procedure Code causes the non-integration of one function with another.Indonesia's Criminal Justice System, which is only fixated on the context of case files, results in case files that continue to hang indefinitely.

4. The Investigator does not Properly implement the Case File that the Public Prosecutor has instructed
The Investigator, who had received back the case file, which was judged to be incomplete by the Public Prosecutor, did not carry out the instructions that had been appropriately given. This shows that the Investigator did not have good faith in carrying out his duties to complete the incomplete case file.There is still the idea that following the instructions of the Public Prosecutor will position the Investigator as if it were under the Public Prosecutor (hulp magistrate).(Brando Aiba, Tommy F. Sumakul 2021)

The inequality of views between the Investigator and the Public Prosecutor is further aggravated by extra-legal factors in the relationship between the two. According to Daniel S. Lev. the relationship between the Investigator and the Public Prosecutor is a competition for "fortune."(Lev, 1990)When depicted in a flowchart, results will be obtained as below:(Lantu, 2015).



From the illustration, if the pre-prosecution is placed as the ending process of the investigation, it will not solve the root of the integration problem between the Investigator and the Public Prosecutor. In carrying out the investigation process, the Investigator uses an approach with a field implementation framework.

After the investigation is completed, the investigation results with the approach used by the Investigator, then as if "tested" by the Public Prosecutor with the approach of a jurist. So it is inevitable that many cases will not be in sync because the Investigator's and the public Prosecutor's points of view use different glasses.

Then for the discrepancy in the investigation results, the Public Prosecutor asked the Investigator to complete the investigation from the Public Prosecutor's point of view. Furthermore, this is the problem that arises; it turns out that the instructions given by the Public Prosecutor will significantly overhaul the investigation results, while the time given according to Article 138 of the Criminal Procedure Code is only 14 (fourteen) days.(Sibuea and Putri 2020)

How could the Investigator complete as the Public Prosecutor wanted and suddenly changed the investigation results with an approach like the Public Prosecutor, in which the investigation has been compiled for so long with the Investigator's approach model? Automatically this incompatibility causes many cases that end up being difficult for the Investigator to complete, and finally, the aggrieved is the Suspect/victim.

The problem is, is there any sanction that can be imposed on the Investigator if he violates the time limit provisions? The absence of binding sanctions on the Investigator causes uncertainty in the completion of handling a criminal case. This condition made the Suspect's right to be tried immediately before the trial and the victim's right to hold the Suspect accountable unclear and vague.

The Public Prosecutor cannot take action/impose sanctions on the Investigator because the Investigator is not subordinate to the Public Prosecutor. The relationship between the Investigator and the Public Prosecutor is collaborative, an equal one, not a sub-ordinative one such as superiors and subordinates. Those who can impose sanctions are the immediate superiors, so the Public Prosecutor can send a letter to the investigating superior to act on his subordinates for negligence or willfulness in not resolving the case.

5. Locus Delicti Criminal Acts More Than One Place

In a criminal act, it is not uncommon for the place of occurrence of criminal acts / *Locus delicti* committed by the Suspect in more than one place. So this creates confusion for the Investigator and Public Prosecutor in determining the loc*us delictie* of the occurrence of criminal acts committed by the Suspect / Perpetrator of the criminal act.

In a case, it is not uncommon for the perpetrator, alone or with other perpetrators, to commit their crimes in more than one place. This condition is not just within the scope of one village/ village; it may be that the place where the crime occurred reaches more than one district or province. The situation is cross-border because the current trend of criminal acts occurs borderless / does not know the boundaries of time and place.

So sometimes the Investigator, in deciphering his *locus delictie*, is still vague/ambiguous/unclear, not even connected or lacking his *locus delictie*. (Tampoli, 2016)This condition is by the Public Prosecutor; if the *locus delictie* is unclear/uncertain, it is feared that the Suspect/his attorney will question it both in the process of investigation, prosecution, and even at the examination at trial, which results in the release of the Defendant from the charges.

6. Case Files Returned for Completion by Investigators Are Not Returned to the Public Prosecutor

In practice, there are still many case files from the investigation that have not been completed to the Investigator to be completed with instructions. However, the Investigator's file is not followed up on or returned to the Public Prosecutor.This situation will undoubtedly hinder the process of resolving the case. Although there is already a pre-prosecution, in reality, the attitude of blaming each other arises both on the side of the Investigator and the Prosecutor's Office if a problem arises in the law enforcement process. The Investigator will quickly say that he has investigated to the fullest, but the Public Prosecutor still returns the file.

Meanwhile, the Public Prosecutor complained that the Investigator often did not follow the instructions given by the Public Prosecutor, and even the Investigator often did not return the file. The Investigator also said that the non-

return of the file was due to the clues given by the Public Prosecutor often be challenging to fulfill. In the meantime, the Public Prosecutor is contrary to the view that the instructions are already apparent.

Theoretically, it is not necessarily that every case investigated must be declared complete by the Public Prosecutor and proceed to the prosecution stage. However, the number of 44,273 cases, referring to the provisions in Article 138 Paragraph (2) of the Criminal Procedure Code, the Investigator should be obliged to complete the instructions to complete the case file within 14 (fourteen) days and submit it back to the Public Prosecutor.If it turns out that the Investigator is unable to complete the, then the Investigator should, to ensure legal certainty take a stand to stop the investigation of the case.(Ichsan Zikry, Adery Ardhan 2021)

Related to the principle of *dominus litis*, the Public Prosecutor should determine which case files are worthy of being transferred to the trial and which case files can be stopped. This condition becomes ambiguous if it turns out that the Police Investigator who takes the role of *dominus litis* sorts out which cases can be completed /stopped at the investigation level and which cases will be sent to the Public Prosecutor.

7. The Public Prosecutor Does Not Master the Problem Completely
In each case that is investigated, the Prosecutor's Office has appointed a prosecutor who investigates the case with the aim that the Prosecutor studies the file assigned to him. The prosecution carried out by the Public Prosecutor must be thoroughly prepared so that it can prove a case at the trial stage.

However, the prosecution would not have been successful if the basis for the prosecution, namely the examination files derived from the investigation by the Police, could not be accounted for. At the pre-prosecution stage, the Public Prosecutor should know a case thoroughly, but in practice, the Public Prosecutor is only limited to examining the file provided by the Investigator.

8. Weak Horizontal Oversight from Public Prosecutors to Investigators
In guaranteeing the human rights of each individual, a Public Prosecutor cannot prosecute a person without strong and unmistakable evidence and a legal basis. This situation is based on the right of everyone to get equal treatment before the law and get recognition, guarantees, protection, and legal certainty.

Therefore, a prosecutor must genuinely become a law enforcement instrument that can carry out prosecution functions without violating human rights principles as stipulated in the Universal Declaration on Human Rights and Law Number 39 of 1999 concerning Human Rights as positive law in force in Indonesia today, as well as being an executor of court decisions.(“Pasal 4 Peraturan Jaksa Agung Nomor PER-067/A/JA/07/2007 Tentang Kode Etik Jaksa.,” n.d.)

B. Implementation of the Prosecutor's Office as the Controller of The Case (Dominus Litis)
The theory of criminal law, "The principle of *dominus litis*, asserts that no other body has the right to prosecute than the Public Prosecutor. This principle is absolute and monopoly because the Public Prosecutor is the only institution that owns and monopolizes the prosecution and settlement of criminal cases (Sasongko, 1996). In criminal proceedings, the Public Prosecutor has the authority to prosecute or not prosecute cases. The Public Prosecutor is also the one who has the authority to stop a criminal process. The consequence is that it is the Prosecutor's duty to monitor the investigation's steps. That is why Article 109 of the Criminal Procedure Code requires any Investigator to immediately contact or notify the Prosecutor once it begins to conduct an investigation.

The duties and authorities of the Public Prosecutor based on the Criminal Procedure Code, such as prosecuting criminal cases within his legal area, must notify the Investigator and change his indictment letter. (Perbawa 2014)There is still often coordination between the Prosecutor's Office and the Police, not institutional, affecting the prosecution process. The authority of the Prosecutor as a *dominus litis* is universal.

As a result, the investigation process only becomes the territory of the Investigator, and there are no checks and balances in the exercise of such authority, which the Public Prosecutor should carry out as the *dominus litis* or controller of the case.The position and function of the Prosecutor's Office as a *dominus litis* is powerfully illustrated in the provisions of the HIR.As a result, the investigation process only becomes the territory of the Investigator and there are no checks and balances in the exercise of such authority, which the Public Prosecutor should carry out as the *dominus litis* or controller of the case.

The position and function of the Prosecutor's Office as a *dominus litis* is powerfully illustrated in the provisions of the HIR.The change in the system from HIR to KUHAP will undoubtedly have a direct impact on the rights of suspects and victims because, without checks and balances in the use of authority, there will be a vast space for abuse of authority and or very large arbitrariness for investigators in carrying out investigations. (Santoso 2000)

The pre-prosecution mechanism, which was expected to be a means of checks and balances, turned out to be one of the sources of problems. This condition is not too surprising because the process of forming a pre-prosecution mechanism is indeed fraught with political interests.(Dewinta, Haeranah, and Azisa 2019)Strengthening the role of the Public Prosecutor as a *dominus litis* in pre-prosecution is necessary. Building more open communication from the beginning of the investigation will be excellent if it is built on an ongoing basis; all can be achieved on the achievement of integrability, not in the name of the sub-system through which it passes. (Nugroho 2017)

Conclusion:-

The emergence of various obstacles in the implementation of the Criminal Procedure Code cannot be separated from the principle of compartmentalization and functional differentiation. This principle separates the authority between sub-systems into function boxes, causing the handling of a case, namely the process of alternating the case file from the Investigator to the Public Prosecutor which is not completed,poorly harmonious coordination between the Public Prosecutor and the Investigator, the Investigator has exceeded the time limit in completing the case file is incomplete, the case file that the Public Prosecutor has instructed is not well implemented by the Investigator, the locus delicti of criminal acts is more than one place, the case file returned to be completed by the Investigator is not returned to the Public Prosecutor,weak horizontal oversight from the Public Prosecutor to the Investigator. In addition, the position of the Prosecutor's Office as the controller of the case (*dominus litis*) after the enactment of the Criminal Procedure Code cannot be fully applied in the investigation process because it cannot be directly involved in the investigation during the validity of the HIR. It is necessary to build more open communication from the beginning of the investigation will be very good if it is built continuously by eliminating the sectoral egos of each institution.

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