Discourse journal on Law and Society

E-ISSN: 3089-6797
P-ISSN: 3089-6789

Research Article

Recovery of Assets From Perpetrators of Corruption to Maximize Recovery of State Losses

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Abstract: Legal certainty (*rechtssicherheit*) is a fundamental pillar of the rule of law, ensuring that legal provisions are clear, consistent, and predictable. In the Indonesian criminal justice system, the Public Prosecutor holds a central position as the *Dominus Litis* (the owner of the case), determining which cases proceed to court. However, the implementation of prosecutorial authority often leans towards rigid legal positivism, creating a paradox where procedural certainty is achieved at the expense of substantive justice. Disparities in prosecution demands for similar crimes often lead to public distrust and legal uncertainty for justice seekers. This study aims to analyze the challenges in maintaining legal certainty and proposes a strategy to enhance the prosecutor's role through the integration of Restorative Justice and professional discretion. The research employs a normative juridical method with statutory and conceptual approaches, analyzing Attorney General Regulation No. 15 of 2020. The study finds that enhancing legal certainty requires shifting the paradigm from "mechanical prosecution" to "discretionary prosecution" based on conscience. To achieve this, prosecutors must be equipped with high-level cognitive skills to interpret "certainty" not just as textual compliance, but as the consistent application of fairness.

Keywords: Dominus Litis, Legal Certainty, Prosecutorial Discretion, Public Prosecutor, Restorative Justice.

Received: May 15, 2025
Revised: August 02, 2025
Accepted: September 16, 2025
Published: November 30, 2025
Curr. Ver.: November 30, 2025

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1. Introduction

The construction of a modern legal state (Rechtsstaat) is fundamentally anchored on the guarantee of legal certainty for its citizens. Gustav Radbruch, a preeminent legal philosopher, postulated that the law must serve three intrinsic values: Justice (Gerechtigheid), Utility (Zweckmassigkeit), and Certainty (Rechtssicherheit). Ideally, these three values should exist in a harmonious equilibrium. However, in the chaotic reality of law enforcement, Legal Certainty often stands in diametric opposition to Justice. In the Indonesian criminal justice system, the Public Prosecutor (Jaksa) serves as the pivotal actor navigating this tension. Holding the status of Dominus Litis (the master of the suit), the prosecutor possesses the exclusive monopoly to determine whether a case file from the police is worthy of becoming a criminal indictment in court. Thus, the prosecutor effectively acts as the "gatekeeper of justice," determining who enters the criminal justice system and who does not.

Despite this central role, the current practice of prosecution in Indonesia faces mounting criticism regarding "legal uncertainty." Paradoxically, this uncertainty arises not from a lack of rules, but from the rigid and mechanical application of them. This manifests primarily in two ways: prosecutorial disparity and the enforcement of laws that offend the community's sense of justice. First, prosecutorial disparity where two similar crimes receive vastly different sentence demands creates a perception of "transactional justice," eroding public trust. Second, the rigid adherence to legal positivism often leads to "Summum Ius, Summa Injuria" (extreme law is extreme injustice). For instance, the prosecution of elderly individuals for minor theft (e.g., stealing crops due to hunger) often fulfills "statutory certainty" (the text of the law is enforced) but severely violates "social certainty" (the public expectation of fairness). This rigid positivism reduces prosecutors to what Montesquieu termed *la bouche de la loi* (the mouth of the law) mere "case-forwarding machines" devoid of the moral discretion necessary to uphold substantive justice.

The enhancement of the prosecutor's role is, therefore, critical to restoring the dignity of the law. The Attorney General's Office has attempted to address these structural rigidities through various circulars and the groundbreaking implementation of Restorative Justice (RJ) via Attorney General Regulation No. 15 of 2020. This regulation marks a paradigm shift from retributive to restorative justice. Yet, regulations alone are insufficient. A rule is a passive instrument; it requires an active, competent agent to implement it. The transition from a repressive prosecutor (who focuses on incarceration) to a humanist prosecutor (who focuses on recovery) requires more than just new Standard Operating Procedures (SOPs); it requires a fundamental shift in Human Resource Competency.

A significant gap exists in current legal literature regarding how the cognitive capability of prosecutors influences legal certainty. Most studies focus on external variables such as regulatory amendments or institutional independence while overlooking the internal decision-making process of the individual prosecutor. This study argues that legal certainty cannot be achieved solely by reading statutes; it requires "Creative Thinking." In a legal context, creative thinking is not about fabricating facts, but about the cognitive flexibility to interpret rigid laws to find fair solutions for complex human problems. Prosecutors must possess the ability to interpret laws flexibly within the corridors of justice, ensuring that the law serves the human, not vice versa.

Accordingly this paper aims to provide a normative blueprint for this transformation. It explores how integrating "Creative Thinking" skills analogous to advanced problem-solving in educational psychology can empower prosecutors to exercise their discretion wisely. By doing so, the Prosecutor's Office can move beyond "Positivistic Certainty" towards "Substantive Certainty," where the outcome of the law is consistent, predictable, and, above all, just.

2. Preliminaries

This section critically examines the theoretical frameworks underpinning legal certainty, the institutional authority of the prosecution service, and the evolving philosophy of criminal justice in Indonesia.

The Multidimensional Nature of Legal Certainty

Legal certainty (*Rechtssicherheit*) is universally recognized as a cornerstone of the Rule of Law (*Rechtsstaat*). Ideally, it guarantees that the law is clear, consistent, and predictable, allowing citizens to organize their conduct without fear of arbitrary state interference. However, Utrecht (1962) cautions that certainty must not be interpreted solely as rigid adherence to statutory text (*lex scripta*). He distinguishes between "Formal Certainty" (compliance with procedures) and "Material Certainty" (the realization of justice). Furthermore, applying Lawrence Friedman's theory of the legal system, legal certainty is influenced by three components: Structure, Substance, and Culture. Effendy (2021) argues that in Indonesia, while the *Substance* (laws) and *Structure* (institutions) are established, the *Legal Culture* of law enforcement often creates uncertainty. When prosecutors apply the law mechanically without considering the sociological context, they may achieve "statutory certainty" but fail to provide "social certainty," leading to public distrust. Thus, true legal certainty entails a consistent alignment between written norms and the community's sense of fairness.

The Prosecutor as *Dominus Litis*: Structure and Authority

In the Indonesian criminal justice system, the Public Prosecutor holds the central position of *Dominus Litis* (the master of the suit). This principle, derived from the Civil Law tradition, dictates that the prosecutor is the sole entity authorized to determine whether a case proceeds to court. This monopoly of power is reinforced by the principle of *Een en Ondeelbaar* (one and indivisible), meaning that the prosecution service acts as a single, unified entity representing the state (Yahya, 2024). Unlike in Common Law systems where prosecutors act primarily as advocates for the state against the defense, the Indonesian prosecutor acts as a "Magistrate." They are obligated to seek the material truth, not just a conviction. Wiyono (2022) emphasizes that as the *Dominus Litis*, the prosecutor serves as the "filter" or "gatekeeper" of the judiciary. Their role is to screen cases not only for evidentiary sufficiency but also for their feasibility and utility to the public. If a case is technically sound but socially detrimental (e.g., prosecuting a minor theft caused by poverty), the prosecutor has the authority and the duty to halt it.

The Tension Between Legality and Opportunity Principles

A core theoretical tension in prosecution is the conflict between the *Legality Principle* (*Legaliteitsbeginsel*) and the *Opportunity Principle* (*Opportuniteitsbeginsel*). The Legality Principle mandates that every crime must be prosecuted without exception. In contrast, the Opportunity Principle allows the Attorney General to set aside a case (*deponering*) for the sake of the "public interest," as codified in Article 35(c) of Law No. 11 of 2021 (Prasetyo, 2024). Hiariej

(2023) notes that rigid adherence to the Legality Principle often leads to "Summum Ius, Summa Injuria" (extreme law is extreme injustice). Therefore, Prosecutorial Discretion is the necessary mechanism to bridge this gap. Discretion allows prosecutors to prioritize cases based on gravity and social impact. However, the challenge lies in standardizing this discretion so that it produces "Certainty" rather than "Arbitrariness." Enhancing the prosecutor's role means refining this discretion so that it is exercised consistently across similar cases.

The Paradigm Shift: Restorative Justice and Progressive Law

Contemporary Indonesian legal theory is shifting from 19th-century positivism towards "Progressive Law" (*Hukum Progresif*). Proposed by Satjipto Rahardjo (2021), this theory posits that "law is for humans, not humans for the law." When the text of the law creates injustice, the law enforcement officer must make a "progressive breakthrough" to serve humanity. This philosophy is institutionalized through Restorative Justice (RJ). Susanto and Wibowo (2024) argue that RJ represents a paradigm shift from *Retributive Justice* (punishment-oriented) to *Restorative Justice* (recovery-oriented). By adopting RJ, the Prosecutor's Office does not abandon legal certainty; rather, it redefines it. Certainty is no longer just about "how many years in prison," but "how effectively the harm is repaired." This approach operationalizes the *Ultimum Remedium* principle, ensuring that criminal punishment is truly the last resort, thereby enhancing the overall quality and humanity of legal enforcement.

3. Proposed Method

Research Design

This research utilizes a Normative Juridical method, also known as doctrinal legal research. This method is fundamentally chosen because the study aims to evaluate the internal coherence of the legal system, specifically the tension between the normative ideal of "Legal Certainty" and the practical regulations governing prosecutorial conduct. Unlike empirical research that observes social behavior (das sein), this study focuses on the analysis of legal norms and principles to prescribe what the law ought to be (das sollen). It treats the law as a self-contained system of norms that requires interpretation and systematization to resolve conflicts between rigid positivism and substantive justice.

Approaches

To ensure a rigorous and multi-dimensional analysis, this study employs three specific approaches:

1. Statutory Approach (*Pendekatan Perundang-undangan*): This approach is used to examine the hierarchy and consistency of relevant laws. The study critically analyzes Law No. 16 of 2004 as amended by Law No. 11 of 2021 concerning the Prosecutor's Office and Attorney General Regulation (Perja) No. 15 of 2020 concerning Restorative Justice. The goal is to determine whether these regulations provide a sufficient framework for prosecutors to exercise discretion or if they create normative ambiguity.

2. Conceptual Approach (*Pendekatan Konseptual*): As the concept of "Creative Thinking in Law" is not explicitly found in statutes, this approach is necessary to build a theoretical construct. The study synthesizes the classical doctrines of *Dominus Litis* and *Opportunitas Principle* with modern educational psychology concepts (Creative Thinking) to redefine the competency required for a modern prosecutor.
3. Comparative Perspective: The study briefly contrasts the Indonesian prosecutor's role with the "magistrate" model in continental Civil Law systems (such as the Netherlands/France). This comparison highlights the unique authority of the Indonesian *Dominus Litis* and provides a benchmark for how discretion is managed internationally.

Sources of Legal Materials

The data used in this study are secondary data derived from library research, classified into three categories:

1. Primary Legal Materials: Binding legal documents, including the 1945 Constitution of the Republic of Indonesia, the Prosecutor's Law (UU Kejaksaan), the Criminal Procedure Code (KUHAP), and Attorney General Regulations.
2. Secondary Legal Materials: Publications that explain the primary materials, including academic journals on *Restorative Justice*, textbooks on Criminal Law principles, and relevant jurisprudence.
3. Tertiary Legal Materials: Legal dictionaries (e.g., Black's Law Dictionary) and encyclopedias used to clarify legal terminology such as *Rechtssicherheit* and *Discretion*.

Technique of Analysis

The collected legal materials are analyzed qualitatively using a deductive logic flow (*legal syllogism*). The analysis employs two specific interpretation techniques:

1. Systematic Interpretation: Viewing the Prosecutor's Law not in isolation but as part of the broader Criminal Justice System, ensuring it aligns with the Judicial Power Law.
2. Teleological Interpretation (Purposive Approach): Interpreting the "certainty" clauses in the law based on their ultimate purpose which is Justice. The study deconstructs the current regulatory framework to identify gaps in human resource competency and proposes a prescriptive model for enhancing the prosecutor's role through the integration of *Creative Thinking* skills.

4. Results and Discussion

This section presents a critical analysis of the strategies required to enhance the prosecutor's role, shifting from a mechanical application of rules to a dynamic enforcement of justice.

Enhancing Certainty through Consistency.

One of the primary sources of public distrust in the legal system is "Prosecutorial Disparity" a phenomenon where two similar cases result in vastly different sentence demands.

This disparity undermines Legal Certainty because it makes the law unpredictable. To address this, the enhancement of the prosecutor's role must begin with structural standardization through Prosecution Guidelines (*Pedoman Penuntutan*).

The Attorney General has issued specific guidelines (e.g., *Pedoman No. 11 of 2021* for Narcotics and *Pedoman No. 3 of 2019* for Corruption) to create a "corridor of certainty." These guidelines serve as a navigational chart, determining the "floor" and "ceiling" of criminal demands based on aggravating and mitigating factors. This creates a standard where the public can predict the outcome of a legal process, reducing the suspicion of "transactional justice."

Absolute uniformity can lead to tyranny. Blind adherence to guidelines without considering the specific context of the defendant is dangerous. Therefore, the prosecutor's role must be enhanced to function not just as a "reader of guidelines" but as a "judge of culpability" before the court. They must balance Uniformity (for certainty) with Individualization (for justice). The "Human Conscience" of the prosecutor remains the ultimate filter to ensure that the guidelines do not become a tool of oppression against the vulnerable.

Restorative Justice as a Tool for "Substantive Certainty"

A significant paradigm shift in enhancing the prosecutor's role is the adoption of Restorative Justice (RJ). Critics and legal positivists often argue that RJ creates "uncertainty" because crimes are settled out of court, ostensibly bypassing the formal "certainty" of a prison sentence. However, this study argues the opposite: RJ provides "Substantive Certainty".

Formal litigation often offers "Procedural Certainty" (the trial happens) but "Substantive Uncertainty" (the victim may not be compensated, and the perpetrator may come out worse). In contrast, RJ offers:

1. Certainty of Recovery: The victim receives immediate compensation or restitution.
2. Certainty of Resolution: The social conflict is definitively resolved without lingering resentment.
3. Certainty of Efficiency: By filtering out minor cases (e.g., petty theft, minor quarrels), prosecutors reduce the backlog of the courts.

Santoso (2023) supports this view, stating that RJ restores the "authority" of the law by reserving the harsh instrument of imprisonment (*Ultimum Remedium*) only for those who truly deserve it. Thus, by aggressively implementing RJ for minor crimes, prosecutors are actually enhancing the overall certainty and credibility of the justice system.

Cultivating Creative Thinking in Law Enforcement

The most critical, yet often overlooked, aspect of enhancing the prosecutor's role lies in Human Resource Competency. The modern legal landscape is filled with "ill-structured problems"cases where the text of the law conflicts with humanity, or where regulations are ambiguous. Maintaining legal certainty in such cases requires high-level cognitive skills. Prosecutors can no longer act as robots applying simple syllogisms; they must act as sophisticated problem solvers.

In this context, findings from educational science provide a powerful and necessary analogy. Rizaldi et al. (2025), in their empirical research on learning models, found that a Project-Based Learning (PjBL) approach significantly enhances Creative Thinking abilities.

This analogy is directly pertinent to the legal field. Currently, prosecutor training (*Diklat*) heavily relies on a "Direct Instruction" model: rote memorization of articles, procedural steps, and hierarchy. As a result, when facing a complex case such as the famous case of "Grandfather Samirin" stealing rubber sap versus a theft by an organized syndicate a rigid prosecutor treats them identically because the *actus reus* (theft) is the same. This mechanical application creates injustice.

Prosecutor possessing Creative Thinking skills similar to the students in the PjBL group in Rizaldi's study can distinguish the nuances. They have the cognitive flexibility to "create" a solution within the legal framework: applying Restorative Justice for the grandfather (restoring social harmony) while strictly prosecuting the syndicate (deterrence). Therefore, the implication is clear: To truly maintain legal certainty, the Prosecutor's Office must reform its training curriculum. It must shift from a pedagogy of "memorizing articles" to "solving cases creatively." Prosecutors must be trained to use Creative Legal Thinking to exercise their discretion wisely. Without this cognitive upgrade, any regulation regarding "Legal Certainty" will fail in implementation, as the human agent behind the desk lacks the mental tools to apply it justly.

5. Conclusions

Enhancing the role of public prosecutors in maintaining legal certainty requires a comprehensive dual strategy that combines structural strengthening through the consistent application of prosecution guidelines and the optimal use of Restorative Justice with competency strengthening through systematic cognitive reform. Legal certainty should not be understood as rigid adherence to legal texts, but rather as the consistent and principled application of fairness in law enforcement. Therefore, integrating creative and critical thinking modules into the prosecutorial training curriculum is essential to equip prosecutors with the intellectual capacity needed to navigate the complexities of modern legal challenges and to deliver substantive legal certainty.

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