

Position of Prosecutors in Resolving General Criminal Offenses Based on Restorative Justice

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Abstract. *A restorative justice approach can be a way to solve conflict problems between parties and restore peace in society because retributive or rehabilitative approaches to crime in recent years are no longer considered satisfactory. Philosophically, the implementation of the restorative justice paradigm in the criminal system is in accordance with the values that live and develop in Indonesian society which were inherited from the ancestors of the Indonesian people, as reflected in the values of Pancasila and shown in the characteristics of customary law in each country. regions in Indonesia. This research uses a sociological juridical approach. The results of this research are: (1) The position of the prosecutor in resolving general crimes based on restorative justice is regulated in prosecutor's regulation no. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is absolute because the Prosecutor as the dominus litis or ruler of the case in the criminal process, has the authority to carry out prosecutions. to court or not, either with conditions or without conditions. The legal basis for implementing restorative justice by the Prosecutor's Office is regulated in Law Number 16 of 2004 jo. Law Number 11 of 2021 and Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice; (2) Obstacles for prosecutors in resolving general crimes based on restorative justice are not yet optimal, because there are still obstacles in terms of: (a) legal substance: due to the absence of legal certainty in formal criminal law, in Indonesian judicial practice the termination of prosecution by Prosecutors only have discretion in terminating prosecutions, restorative justice has been implemented based on Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, even the Criminal Procedure Code as the main rule in the law enforcement process also does not regulate the application of restorative justice; (b) legal structure: lack of understanding by prosecutors regarding restorative justice, so that there are still*

prosecutors who have not implemented a restorative justice approach in resolving the criminal cases they handle, and the bureaucratic structure of the prosecutor's office is still characterized by a unified command structure; and (c) legal culture: there are still people who reject criminal law enforcement based on restorative justice because of high egos, public distrust of the Prosecutor's institution and doubts the professionalism and integrity of Prosecutors, perpetrators who want not to admit their mistakes, victims who do not want to participate, not achieved agreement and lack of binding power of the decision.

Keywords: *Crime; Justice; Prosecutor; Restorative.*

1. Introduction

The Republic of Indonesia as a country of law based on the constitution (the 1945 Constitution of the Republic of Indonesia), then this means that the power of its government, the rights of its people and the relationship between the power of the government and the rights of its citizens are regulated by law. A country based on law places law as the highest thing, or known as the term supremacy of law. The supremacy of law must not ignore the three basic ideas of law, namely justice, benefit and legal certainty.¹

Law as a reality in society because it regulates the behavior of people's lives and is made by authorized institutions. Law is made through a certain process and is a decision of authorized officials and contains a network of values that exist in the lives of society.²The law functions to create and maintain order and peace in community life, therefore there is the adage *ubi societas ibi ius* (where there is society, there is law).³

The existence of law always goes hand in hand with the existence of society, or vice versa if there is no society there can be no law, and if there is a society without law, what will happen is a wild society that is uncontrolled, because all wrong actions from society are not prevented and there are no sanctions. Every interaction between humans can cause friction that leads to disputes and hostility. To resolve friction so that it does not escalate into hostility, the role of law is very much needed. The function of the law itself is to regulate society, and if the function of the law is achieved then prosperity will be realized.⁴

¹Abdul Aziz Hakim, *The State of Law and Democracy in Indonesia*, Pustaka Pelajar, Yogyakarta, 2011, p. 8.

²Kurniawan Tri Wibowo and Erri Gunrahti Yuni Utaminigrum, *Implementation of Restorative Justice in the Criminal Justice System in Indonesia*, Papas Sinar Sinanti, Jakarta, 2022, p. 1.

³Jonlar Purba, *Law Enforcement Against Minor Criminal Acts with Restorative Justice*, First Edition, Jala Permata Aksara, Jakarta, 2017, p. 4.

⁴Mudakir Iskandar Syah, *Law and Social Sciences*, First Edition, Tatanusa, Jakarta, 2017, p. 2.

A violation of criminal law in the form of a criminal act is understood as a conflict between individuals that causes harm to the victim, society and the offender himself, and among these three groups, the interests of the victim of the crime are the main part, because the main criminal act is violating the victim's rights.⁵

The Prosecutor's Office as a government institution that exercises state power in the field of prosecution must be able to realize legal certainty, legal order, justice, and truth based on law and respect religious norms, decency, and morality, and must explore the values of humanity, law, and justice that exist in society.

The implementation of restorative justice, even though there is a legal umbrella for the Prosecutor's Office, namely the Prosecutor's Regulation Number 15 of 2020, there are still obstacles in its implementation, one of which is because the paradox of the community's culture still exists which considers that every criminal act must be repaid with imprisonment/punishment. In addition, the behavior of forgiving the perpetrators of criminal acts by the victims has not yet become a culture and is associated with the suffering experienced by the victim due to the criminal acts committed by the perpetrators, and there are no sanctions for law enforcement officers who do not implement restorative justice.

These obstacles can affect the effectiveness of the implementation of the restorative justice approach in handling criminal acts by the Prosecutor's Office. Hans Kelsen stated that the effectiveness of the application of a legal rule is if the rule is generally accepted by the community in general, and if there is one part of the legal rule that cannot be applied only to one particular case, so it is an exception, it does not mean that such a legal rule is an ineffective legal rule.⁶

Despite these obstacles, the restorative justice approach is a way of handling criminal cases that is much needed today. The restorative justice approach is also in line with the concept of progressive law. The concept of progressive law comes from the basic assumption that law is for humans, progressive law has a great goal in the form of human welfare and happiness, so that law is always in the status of "law in the making". Law does not exist for itself and is not final.⁷

The progressive legal approach in the criminal justice process is not an easy matter because investigators, public prosecutors or judges in the context of the Indonesian criminal justice system are accustomed to, and have even become a legal culture, with the paradigm of "rule-bound" or "bound by the rules", especially bound by state law, while progressive law chooses "liberation" from the bonds of state legal norms that bind.⁸

⁵Jonlar Purba, op.cit., p. 61.

⁶Munir Fuady, *Grand Theories in Law*, Third Edition, Kencana Prenada Media Group, Jakarta, 2014, p. 126.

⁷Jonlar Purba, op.cit., p. 67.

⁸Ibid.

Efforts to apply the concept of restorative justice in the criminal justice process in Indonesia, then the desire and effort to free oneself from the norms or principles in national criminal law that are binding becomes a necessity. This means that norms or principles that are not binding can still underlie the processes even with a meaning that is in line with the acceptance of the concept of restorative justice.⁹

The position and role of the Prosecutor's Office as a state institution that exercises state power through law enforcement, especially in the field of prosecution, is expected to play a greater role in upholding the supremacy of law, protecting public interests, and enforcing human rights through a restorative justice approach.

2. Research Methods

The approach method used in this research is the sociological legal method, namely, in addition to using legal principles and principles in reviewing, viewing and analyzing problems, this research also reviews how they are implemented in practice.¹⁰ which in this case is related to the position of the prosecutor in resolving general crimes based on restorative justice.

3. Results and Discussion

3.1. Position of Prosecutors in Resolving General Criminal Offenses Based on Restorative Justice

Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 is one of the long waits of justice fighters who have often been victims of the rigidity of the implementation of criminal law norms in force in Indonesia. This often relates to the implementation of criminal punishment which only refers to the principle of legality alone, even though it often ignores the objectives and functions of the law. For this reason, the Implementation of the implementation of Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice provides space for every settlement of criminal cases through restorative justice. by paying attention to the requirements and mechanisms as regulated.¹¹

In the Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, termination of prosecution is carried out based on justice, public interest, proportionality, criminal as a last resort and fast, simple and low cost. The regulation explains that the one who has the authority to prosecute a case in the interests of the law is the Public

⁹Ibid., p. 68.

¹⁰Ronny Hanitijo Soemitro, *Legal Research Methodology and Jurimetrics*, Ghalia Indonesia, Jakarta, 1990, p. 33.

¹¹Mirdad Apriadi Danial, et al., *Implementation of Perja Number 15 of 2020 Concerning Termination of Prosecution Based on Restorative Justice*, *Jurnal Pro Hukum Journal of Legal Research*, University of Gresik Volume 11 Number 1, June 2022, pp. 15-25

Prosecutor, where the closure of a case in the interests of the law is carried out in the following cases: the defendant dies, the criminal prosecution has expired, there has been a court decision that has permanent legal force against a person for the same case (*nebis in idem*), the complaint for a criminal complaint is withdrawn or withdrawn; or there has been a settlement of the case outside the court (*afdoening buiten proces*).¹²

Bambang Poernomo stated that law enforcement in modern society is not only interpreted in a narrow sense, but also in a broad sense, such as in Indonesia where law enforcement is linked to human elements and their social environment.¹³

The law enforcement process is an effort made to overcome criminal acts through the criminal justice system. The term criminal justice system was first introduced as a reaction to the failure of the working mechanism of law enforcement officers and law enforcement agencies in overcoming criminal acts and reducing crime rates. This failure gave rise to the idea of the need for a "system approach" in the mechanism of criminal justice administration. This systemic approach in criminology and crime prevention theory is known as the "criminal justice system model".¹⁴

The discretionary authority held by the Prosecutor has been regulated by the Criminal Procedure Code. The Criminal Procedure Code systematically regulates the authority of each component driving the criminal justice system, including the Prosecutor. The duties and functions of the Prosecutor in the criminal justice system are as a Public Prosecutor. The authority of the Prosecutor as a Public Prosecutor has experienced ups and downs along with changes in laws and regulations that form the basis for determining authority and implementing its authority when associated with the doctrine and tradition of prosecution.

The principle of *dominus litis* is known in the doctrine of prosecution, where the authority to prosecute is the monopoly of the Prosecutor. The Prosecutor is *dominus litis* or the master of the case, where the Prosecutor has the authority to prosecute or not to the Court.

The role and function of the Prosecutor is very large in the criminal justice process, so the Prosecutor becomes the controller of the case handling process or *dominus litis*. The Prosecutor's *dominus litis* cannot be separated from the

¹²Ahmad Jamaludin, Termination of Prosecution by Prosecutors Based on Restorative Justice at the Cimahi Prosecutor's Office, *Journal of Legal Enhancement*, Vol. 5, No. 1 April 2022, pp. 1-18

¹³Muhammad Dani Hamzah, Law Enforcement in Traffic Accident Criminal Cases Causing Loss of Life, in *Jurnal Daulat Hukum* Vol. 1. No. 1, 2018, url: <http://jurnal.unissula.ac.id/index.php/RH/article/view/2563/1920>.

¹⁴Cristina Soerya, et.al., Position of the Attorney General's Office as a Law Enforcer in the Criminal Justice System, Attorney General's Office of the Republic of Indonesia Research and Development Center, Jakarta, 2001, p. 11.

overall prosecution issue.¹⁵ Prosecution is an action by the Public Prosecutor to refer a criminal case to the competent District Court, in the manner and in accordance with the law, with a request that it be examined and decided by a Judge in a Court hearing.¹⁶

As *dominus litis*, the prosecutor is the official who has the authority to determine whether a case is worthy of being submitted for prosecution or whether prosecution should be stopped.¹⁷ The authority of the Prosecutor to stop or continue the prosecution process also means that the Prosecutor is free to apply criminal regulations regarding which cases will be charged and which will not, in accordance with the Prosecutor's own conscience and professionalism.

Based on the provisions in the articles of the Prosecutor's Regulation Number 15 of 2020, there is legitimacy for the authority to implement restorative justice by the Prosecutor's Office, and this authority must be given to the Prosecutor in order to realize a sense of justice in society. The Prosecutor as the holder of *dominus litis* (controller) is very worthy of being given the authority to implement restorative justice and can set aside cases for the public interest, because the Prosecutor is the one who is given the authority to determine the submission of cases to the Court.

The existence of the authority to resolve criminal cases through restorative justice, then this opens the door for prosecutors to make legal discoveries in carrying out their duties and authorities, which is also in line with the provisions of Article 8 paragraph (4) of Law Number 16 of 2004 in conjunction with Law Number 11 of 2021, which states that: "In carrying out their duties and authorities, prosecutors always act based on the law and conscience by respecting religious norms, politeness, morality, and are obliged to explore and uphold the values of humanity that live in society, and always maintain the honor and dignity of their profession."

The implementation of the restorative justice approach by the Prosecutor's Office is not only related to the supremacy of law, but also related to the supremacy of morals. Law enforcers, especially prosecutors, must truly internalize and implement restorative justice in carrying out their duties in handling cases by prioritizing the values of justice that live in society, because the law will side with justice if the actors who are state tools to enforce the law no longer experience a moral crisis. Moral law enforcement officers are the pillars that manifest legal values so that the law can truly stand side by side with truth and justice.

¹⁵Jan S. Maringka, *Prosecutorial Reform in the National Legal System*, First Edition, Sinar Grafika, Jakarta, 2017, p. 55.

¹⁶Harrys Pratama Teguh and Usep Saepullah, *Theory and Practice of Special Criminal Procedure Law; Postponement of Death Execution for Death Row Convicts in Indonesia (Cases: Corruption, Drugs, Terrorism, Murder and Politics)*, First Edition, Pustaka Setia, Bandung, 2016, p. 195.

¹⁷Dermawan Wicaksono, SH, Interview, as Head of the Intelligence Section of the Semarang Regency District Attorney's Office, January 20, 2024.

3.2. Obstacles of Prosecutors in the Implementation of Integrated Assessments of Handling Narcotics Cases in the Criminal Justice System

The obstacle for prosecutors in resolving general crimes based on restorative justice in terms of legal substance is due to the absence of legal certainty in formal criminal law. Efforts to resolve criminal cases outside the court by prosecutors through a restorative justice approach are essentially a mechanism or legal system that has many advantages, so it is worthy of being applied in the criminal justice system in Indonesia. The application of restorative justice in resolving criminal cases by the prosecutor's office has basically been able to reduce the high crime rate that occurs in society, although there are still obstacles in its implementation, so it cannot be said to be effective.¹⁸

As a system, the effectiveness of resolving criminal cases outside the court through a restorative justice approach is greatly influenced by the elements that form the system in question. Therefore, the implementation of a criminal case resolution system outside the court through a restorative justice approach will be influenced by several factors, as are the factors that influence other law enforcement efforts.

The implementation of restorative justice in handling criminal acts by the Prosecutor's Office, there are obstacles for prosecutors in resolving general criminal acts based on restorative justice, this is due to the following factors:

1. Legal substance (statutory regulations);

In the criminal laws and regulations in force in Indonesia, there are indeed provisions that explicitly (firmly) regulate the application of restorative justice in the criminal justice system, including Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. According to this regulation, prosecutors must seek to resolve juvenile criminal cases through restorative justice.

Due to the absence of legal certainty in formal criminal law, in the practice of justice in Indonesia, the termination of prosecution by the Prosecutor is limited to Discretion in terminating prosecution, restorative justice has been applied based on the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice in resolving cases classified as minor crimes, in addition it has also been regulated in Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Attorney General of the Republic of Indonesia, among others regulated in:

- a. Article 8 paragraph (4) of Law Number 16 of 2004 in conjunction with Law Number 11 of 2021
- b. In carrying out his duties and authorities, the Prosecutor always acts based on the law and conscience by respecting religious norms, politeness,

¹⁸Dermawan Wicaksono, SH, Interview, as Head of the Intelligence Section of the Semarang Regency District Attorney's Office, January 20, 2024.

morality, and is obliged to explore and uphold the values of humanity that exist in society, and always maintain the honor and dignity of his profession.

- c. Article 30C letter c and letter d of Law Number 16 of 2004 in conjunction with Law Number 11 of 2021
- d. Article 34A of Law Number 16 of 2004 in conjunction with Law Number 11 of 2021

Doubts about the authority of the Prosecutor's Office in implementing restorative justice have been dispelled by the revision of Law Number 16 of 2004. These doubts are perhaps due to the legal system adopted by Indonesia still prioritizing written legal rules, so that the authority of the Prosecutor to set aside the prosecution of criminal cases must be expressly regulated in a statutory regulation.

2. Legal structure;

The legal structure here is the law enforcement apparatus and its institutions that drive the legal system as regulated in the legal substance (statutory regulations). The legal structure in this case is the Prosecutor's Office and its apparatus, especially the Prosecutor, who has not fully understood restorative justice, so that there are still Prosecutors who have not implemented a restorative justice approach in resolving criminal cases handled,¹⁹ because there has been no provision of education and training in handling criminal cases oriented towards a restorative justice approach by the Prosecutor's Office, so that the application of restorative justice by the Prosecutor's Office is still not optimal.

The next obstacle is that in the bureaucratic structure of the Prosecutor's Office, there is still a strong unity of command structure, so that the dominance of the leadership is very strong in making a prosecution policy (discretion). Whereas in various countries, each Prosecutor has independence in handling each case. Therefore, the Prosecutor in the Netherlands is called Officer van Justitie which means judicial officer, in France it is called Magistrate the same as Judge, while in the United States the term Officer of the Court is known which also includes the Public Prosecutor. The role of the leadership in this case is to create prosecution guidelines that must be followed by all Prosecutors in carrying out their duties and functions, as well as to carry out supervision.²⁰

The emergence of unity of command in the organizational structure of the Prosecutor's Office, seems to be influenced by a number of factors. There are at least 3 (three) factors that influence the emergence of this, namely:²¹

¹⁹Dermawan Wicaksono, SH, Interview, as Head of the Intelligence Section of the Semarang Regency District Attorney's Office, January 20, 2024.

²⁰Bambang Waluyo, *Functional Design...*, op.cit., p. 261.

²¹Ibid., pp. 261-264.

- a. The emergence of the concept of “unity of command” was a negative excess of the configuration of the political system during the New Order era which was dominated by military circles;
- b. There is a misconception regarding the principle of “the Prosecutor’s Office is one and indivisible” which in the original language (Dutch) is “open bar ministrie is en ondel baren de procureur general an het hoofd” (The Prosecutor’s Office is one and indivisible with the Attorney General at the top);
- c. Past experience, where prosecutors often abused their authority when this authority was given independently to each prosecutor's apparatus.

3. Legal culture.

Legal culture can be interpreted as the behavior of society related to the law, in this case what is meant by law is the legal regulations that regulate the resolution of criminal cases with a restorative justice approach by the Prosecutor.

There are still people who reject criminal law enforcement based on restorative justice.²²The rejection is due to the high ego of the community (the parties) to resolve the problem through the judicial process. Another reason that exists in the community is that the assumption of the purpose of punishment currently applied in Indonesia since the enactment of criminal law and the sanctions given in accordance with the theory of retributive has been embedded in the culture of society. As a result, the shift in the purpose of punishment towards restorative justice is very difficult to do.

4. Conclusion

The position of the prosecutor in resolving general criminal acts based on restorative justice is regulated in the prosecutor's regulation no. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice which is very absolute because the prosecutor as dominus litis or the master of the case in the criminal process, has the authority to prosecute in court or not, either with or without conditions. The legal basis for the application of restorative justice by the Prosecutor's Office is regulated in Law Number 16 of 2004 in conjunction with Law Number 11 of 2021 and Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Obstacles for prosecutors in resolving general criminal acts based on restorative justice are not yet optimal, because there are still obstacles in terms of: (a) legal substance: due to the absence of legal certainty in formal criminal law, in the practice of justice in Indonesia, the termination of prosecution by the Prosecutor is only limited to discretion in terminating prosecution, restorative justice has been implemented based on the Regulation of the Prosecutor's Office of the

²²Dermawan Wicaksono, SH, Interview, as Head of the Intelligence Section of the Semarang Regency District Attorney's Office, January 20, 2024.

Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, even the Criminal Procedure Code as the main rule in the law enforcement process does not regulate the application of restorative justice; (b) legal structure: lack of understanding by Prosecutors regarding restorative justice, so that there are still Prosecutors who have not implemented a restorative justice approach in resolving criminal cases handled, and the bureaucratic structure of the Prosecutor's Office is still thick with a unitary command structure; and (c) legal culture: there are still people who reject criminal law enforcement based on restorative justice because of high egos, public distrust of the Prosecutor's Office and doubts about the professionalism and integrity of the Prosecutor, perpetrators who do not want to admit their mistakes, victims who do not want to participate, no agreement is reached and lack of binding power of the decision.

5. References

- Abdul Aziz Hakim, 2011, *The State of Law and Democracy in Indonesia*, Pustaka Pelajar, Yogyakarta,
- Ahmad Jamaludin, *Termination of Prosecution by Prosecutors Based on Restorative Justice at the Cimahi Prosecutor's Office*, *Journal of Legal Enhancement*, Vol. 5, No. 1 April 2022,
- Cristina Soerya, et.al., 2001, *Position of the Attorney General's Office as a Law Enforcer in the Criminal Justice System*, Attorney General's Office of the Republic of Indonesia Research and Development Center, Jakarta,
- Harrys Pratama Teguh and Usep Saepullah, 2016, *Theory and Practice of Special Criminal Procedure Law; Postponement of Death Execution for Death Row Convicts in Indonesia (Cases: Corruption, Drugs, Terrorism, Murder and Politics)*, First Edition, Pustaka Setia, Bandung,
- Jan S. Maringka, 2017, *Prosecutorial Reform in the National Legal System*, First Edition, Sinar Grafika, Jakarta,
- Jonlar Purba, 2017, *Law Enforcement Against Minor Criminal Acts with Restorative Justice*, First Edition, Jala Permata Aksara, Jakarta,
- Kurniawan Tri Wibowo and Erri Gunrahti Yuni Utaminigrum, 2022, *Implementation of Restorative Justice in the Criminal Justice System in Indonesia*, Papas Sinar Sinanti, Jakarta,
- Mirdad Apriadi Danial, et al., *Implementation of Perja Number 15 of 2020 Concerning Termination of Prosecution Based on Restorative Justice*, *Jurnal Pro Hukum*, *Journal of Legal Research*, University of Gresik Volume 11 Number 1, June 2022,
- Mudakir Iskandar Syah, 2017, *Law and Social Sciences*, First Edition, Tatanusa, Jakarta,

Muhammad Dani Hamzah, Law Enforcement in Traffic Accident Criminal Cases Causing Loss of Life, in *Jurnal Daulat Hukum* Vol. 1. No. 1, 2018,

Munir Fuady, 2014, *Grand Theories in Law*, Third Edition, Kencana Prenada Media Group, Jakarta,

Ronny Hanitijo Soemitro, 1990, *Legal Research Methodology and Jurimetrics*, Ghalia Indonesia, Jakarta,

Interview with Dermawan Wicaksono, SH as Head of the Intelligence Section of the Semarang District Prosecutor's Office