

## The Authority of the Prosecutor's Office in Efforts to Realize Restorative Justice

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**Abstract:** *The aim of this research is to determine and analyze the role of the Prosecutor's Office in efforts to realize Restorative Justice. In this writing the author uses a normative juridical method with research specifications in the form of descriptive analysis. The existence of the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 is a form of embodiment of progressive resolution of criminal cases where law enforcement is not just the black and white words of the regulations (according to the letter), but according to the spirit and deeper meaning (to very meaning) of a statute or law in a broad sense. The prosecutor's authority to stop prosecution based on restorative justice is a breakthrough in resolving criminal acts. The Prosecutor's Office issued Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The role of the Public Prosecutor is no longer limited to transferring cases to court but can act as a mediator between the parties involved in the case. If the parties to the case have found an agreement and have fulfilled the requirements in Prosecutor's Regulation Number 15 of 2020, the Public Prosecutor can terminate the prosecution and release the defendant from prison.*

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

### 1. Introduction

Indonesia is a country of law this is clearly stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Every human being has the desire to live in an orderly, harmonious, and consistent manner with society and longs for a society that obeys applicable laws. However primitive and however modern

a society is, it must have laws.<sup>1</sup>Therefore, the existence of law is universal. Law cannot be separated from society, but rather has a reciprocal relationship.

The purpose of law is to create peace based on harmony between order and tranquility.<sup>2</sup>The objective of this law will of course be achieved if it is supported by legal duties, namely harmony between legal certainty and legal comparability, so that it will result in justice.<sup>3</sup>

In the development of criminal law, the term restorative justice is known. This development is because the retributive system that has been applied so far has not been able to fully fulfill the sense of justice for the community. Criminal law according to retributive justice is an orientation of justice aimed at violators and solely because of their violation of the law, violation of criminal law is a violation of state rights so that the victim of the crime is the state, so that the concept of retributive justice does not provide a place for protection for victims. Considering that victims of criminal acts can not only experience material losses but are very likely to experience immaterial losses.

Restorative justice is an effort or a new model approach in Indonesia that is very close to the principle of deliberation which is the soul of the Indonesian nation itself. Criminalization is a last resort (*ultimum remedium*) that can be avoided if the conflict that arises in society can be resolved by both parties by prioritizing the sense of justice of both parties in dispute. Restorative justice provides the best solution in resolving private crime cases between people (*natuurlijkepersonen*) or legal entities (*recht personen*) by prioritizing the core problem of a crime. An important solution to note is the improvement of the social order of society that is disrupted by criminal events.<sup>4</sup>

Until now in Indonesia there are still no laws and regulations governing the settlement of criminal cases by prioritizing the fulfillment of restorative justice other than the law on the juvenile criminal justice system. However, the Attorney General's Office of the Republic of Indonesia as a government institution that exercises state power in the field of prosecution, has issued regulations that can resolve criminal cases by prioritizing the fulfillment of justice on the basis of humanity and based on conscience as stated in the Regulation of the Attorney General's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

In Perja No. 15/2020, it contains the authority of the Prosecutor to stop prosecution based on restorative justice as a breakthrough in resolving criminal

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<sup>1</sup>Anirut Chuasanga and Ong Argo Victoria, (2019), *Legal Principles Under Criminal Law in Indonesia and Thailand*, Jurnal Daulat Hukum, 2 (1), p 131

<sup>2</sup>Edmon Makarim, (2007), *Compilation of Telematics Law*, Pustaka Pelajar, Yogyakarta, p 39.

<sup>3</sup>Sri Praptini, Sri Kusriyah, and Aryani Witasari, (2019), *Constitution and Constitutionalism of Indonesia*, Journal of Legal Sovereignty, 2 (1), p 7

<sup>4</sup>Rufinus Hutahuruk, (2013), *Combating Corporate Crime Through a Restorative Approach: A Legal Breakthrough*, Sinar Grafika, Jakarta, p 107.

acts. Restorative justice is an approach to resolving criminal acts that is currently being widely voiced in various countries. Through the restorative justice approach, victims and perpetrators of criminal acts are expected to achieve peace by prioritizing a win-win solution, and emphasizing that the victim's losses are replaced and the victim forgives the perpetrator of the crime.

Researchers determine a theme and form a title to be continued in conducting a scientific study in the form of systematic and basic research. objectives for knowing and analyzing the role of the Prosecutor's Office in efforts to realize Restorative Justice.

## **2. Research Methods**

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this study.

## **3. Results and Discussion**

### **3.1. Scope of the Prosecutor's Office in Carrying Out Law Enforcement**

In the General Explanation of Law of the Republic of Indonesia Number 11 of 2021 Concerning Amendments to Law of the Republic of Indonesia Number 16 of 2004 Concerning the Attorney General's Office of the Republic of Indonesia, it is stated, among other things, that the enactment of this Law is for the renewal of the Attorney General's Office, so that its position and role as a government institution is more solid and can carry out state power in the field of prosecution, which is free from the influence of the power of any party. In another sense<sup>5</sup>, The Prosecutor's Office, in carrying out its duties, should be independent and free from the influence of government and other powers in its efforts to realize legal certainty, legal order, justice and truth by respecting religious norms, decency and morality, and is obliged to explore the values of humanity, law and justice that exist in society.

The principle of *dominus litis*, which emphasizes that no other body has the right to make a determination other than the Public Prosecutor, which is absolute and monopolistic, because the Public Prosecutor is the only institution that has and monopolises the prosecution and resolution of criminal cases, even judges cannot request that criminal cases that occur be submitted to them, judges in resolving cases are only passive and await demands from the public prosecutor.

Understanding the formulation of the provisions of Article 14 of the Criminal Procedure Code, which regulates the authority of the Public Prosecutor in the

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<sup>5</sup>Ardilafiza, (2010), Independence of the Prosecutor's Office as an Executor of Prosecutorial Power in the Indonesian Constitutional System, Center for Constitutional Studies, Faculty of Law, University of Bengkulu, Constitutional Journal, III (2), p 93

prosecution handling the criminal case is that in addition to his main duties as a public prosecutor, the Prosecutor can directly conduct an investigation in certain circumstances. The second is supervision carried out by the public prosecutor on others as regulated in Article 37 of the Criminal Procedure Code.<sup>6</sup>From the above definition, it can be stated that the definition of "prosecutor" correlates with the aspect of "position" or "functional official", while the definition of "public prosecutor" correlates with the aspect of "function" in conducting prosecution and implementing the judge's decision in court. Therefore, starting from the aspect of "position" or "functional official".<sup>7</sup>

In the working system of the law, there is a policy approach, proportionally the Public Prosecutor in dealing with events that occur and determining what should be qualified as a criminal act or not, must pay attention to the purpose of law enforcement through prosecution as part of the criminal justice system or part of criminal procedural law, namely to seek and find material truth".

The position of the Public Prosecutor in General Crimes depends on the police investigator, the Public Prosecutor only formally examines the case files, does not know the process of compiling files and procedures for obtaining evidence, it becomes a problem if in court the defendant withdraws his statement in the BAP. The public prosecutor must be responsible for or prove his indictment. There is also often a back and forth of case files between the police investigator and the public prosecutor. Actually, this can be avoided from the start if the public prosecutor is involved in the process of compiling the case files. While the position of the prosecutor in special crimes such as corruption is involved from the start in compiling the case files if the initial investigation process is from the prosecutor's office. However, the prosecutor must also be professional and proportional in determining someone's status as a suspect, do not appear to be looking for someone's fault. If not enough evidence is found, it must be stopped immediately. If the evidence is sufficient to ensnare someone as a suspect, the process must be continued immediately. This is where the principle of *dominus litis* really has a central role for the public prosecutor as the controller of the case process. The principle of *deponering* also shows that the public prosecutor truly has the principle of *dominus litis*, where in the principle of *deponering* the public prosecutor has the authority to set aside a case for the sake of the public interest.

### **3.2. The Role of the Prosecutor's Office in Efforts to Realize Restorative Justice**

Settlement of cases through the judicial system that culminates in a court verdict is a law enforcement towards the slow lane. This is because law enforcement is through a long distance, also through various levels starting from the police,

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<sup>6</sup>Andi Hamzah, (1984), Introduction to Criminal Procedure Law in Indonesia, Ghalia Indonesia, Jakarta, p77.

<sup>7</sup>Lilik Mulyadi, (2007), Normative, Theoretical, Practical and Problematic Criminal Procedure Law, PT. Alumni, Bandung, p 63.

prosecutors, district courts, high courts and even to the Supreme Court. In the end, it has an impact on the accumulation of cases that are not small in number in court.<sup>8</sup>

In addition, the imposition of criminal penalties, no matter how light, is essentially a revocation of basic human rights. Therefore, the use of criminal penalties as a means of criminal politics must be based on reasons that can be justified philosophically, legally and sociologically.<sup>9</sup>

One form of renewal in Indonesian Criminal Law is the regulation of criminal law in the perspective and achievement of justice to the improvement or restoration of conditions after the event and the criminal justice process known as restorative justice which is different from retributive justice (emphasizing justice in retaliation) and restitutive justice (emphasizing justice in compensation). When viewed from the development of criminal law and the nature of modern criminalization, it has introduced and developed what is called the Perpetrator-Victim Relationship approach or "Doer-Victims" Relationship. A new approach that has replaced the approach of actions or perpetrators or "daaddader straftecht". Legal experts have introduced a formula for justice, especially in enforcing human rights, that there are 3 aspects of the approach to building a legal system in the context of modernization and legal renewal, namely the structural aspect (structure), substance (substance) and culture (legal culture) all of which are worthy of running integrally, simultaneously and parallel.<sup>10</sup>

Restorative justice is different from the criminal justice system because it prioritizes the principles of mediation and reconciliation as a mechanism for resolving a criminal case.<sup>11</sup> After a crime has occurred, restorative justice seeks to rebuild existing relationships, not limited to relationships between the perpetrator and the community. In concept, restorative justice does not use the principle of who wins and who loses in the criminal justice system. However, restorative justice<sup>12</sup> trying to find a middle way of communication between all parties related to the crime to achieve a collective resolution of the handling of criminal acts. In practice, restorative justice is believed to provide better justice guarantees for all parties including the community.

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<sup>8</sup>Henny Saida Flora, (2018), Restorative Justice as an Alternative in Resolving Criminal Acts and its Influence on the Criminal Justice System in Indonesia, UBELAJ, 3 (2), p 144.

<sup>9</sup>Usman H, (2011). Analysis of the Development of Criminal Law Theory, Jambi Journal of Legal Studies, 2 (1), p 67.

<sup>10</sup>Kristian & Christine Tanuwijaya, (2015), Settlement of Criminal Cases with the Concept of Restorative Justice in the Integrated Criminal Justice System in Indonesia, Jurnal Mimbar Justitia, 1 (02), p 595

<sup>11</sup>Nefa Claudia Meliala, (2015). Restorative Justice Approach: Efforts to Involve Direct Participation of Victims and Perpetrators in Resolving Criminal Cases, Unpar Law Journal, 3 (1), p 115

<sup>12</sup>Muladi, (2012). Implementation of the "Restorative Justice" Approach in the Juvenile Criminal Justice System, Jakarta: IKAHI, p 59

Furthermore, the prosecutor as a public prosecutor who has the duty to refer cases to the court in accordance with the authority of prosecution is familiar with the principle of prosecution discretion where the prosecutor can prosecute or the prosecutor can not prosecute. The prosecutor's authority not to prosecute is based on the principle of opportunity or commonly called the "principle of prosecution discretion" (discretionary prosecution). This principle allows the prosecutor not to prosecute a criminal case, if the prosecution is not appropriate or if the prosecution will harm the public or state interest, even though the witnesses and evidence are sufficient.<sup>13</sup>

In response to this, the prosecutor's office issued Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The role of the Public Prosecutor is no longer limited to referring the case to court but can also be a mediator between the parties to the case. If the parties to the case have reached an agreement and have met the requirements in Prosecutor's Regulation Number 15 of 2020, the Public Prosecutor can terminate the prosecution and release the defendant from prison. The application of restorative justice in Prosecutor's Regulation Number 15 of 2020 is indeed not intended for every general crime, but only for minor crimes with the provisions applicable in this Prosecutor's Regulation.

The existence of the Prosecutor's Regulation that uses a restorative justice approach that upholds the values of balance, harmony, harmony, peace, tranquility, equality, brotherhood, and family is considered good because it is certainly in harmony and in accordance with the values contained in the foundation of the Indonesian state, namely Pancasila. Thus the restorative justice approach<sup>14</sup>in essence, it is in accordance with the spirit of the Indonesian nation which prioritizes the values of kinship, family, mutual cooperation, tolerance, forgiveness, and an attitude that prioritizes common interests.

Termination of prosecution based on Restorative Justice is regulated in Article 4 of PERJA No. 15 of 2020 which is carried out by taking into account:

- a. Victim's interests and other protected legal interests;
- b. avoidance of negative stigma;
- c. avoidance of retaliation;
- d. community response and harmony; and
- e. propriety, morality and public order.

In addition, in terminating the prosecution, the Public Prosecutor will consider:

- a. subjects, objects, categories and threats of criminal acts;

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<sup>13</sup>Ahmad Faizal Azhar, (2019). Application of the Concept of Restorative Justice in the Criminal Justice System in Indonesia, MK: Journal of Islamic Law Studies, 4 (2), p 134

<sup>14</sup>Marlina, (2010), Introduction to the Concept of Diversion and Restorative Justice in Criminal Law, Medan: USU Press, p 35

- b. background to the occurrence/commission of the crime;
- c. level of depravity;
- d. losses or consequences arising from criminal acts;
- e. *cost and benefit* case handling;
- f. restoration back to its original state; And
- g. there is peace between the victim and the suspect.

The conditions that must be met by a suspect who is entitled to receive termination of prosecution based on restorative justice as explained in Article 5 of PERJA No. 15 of 2015 are:

- a. The suspect committed a crime for the first time;
- b. Criminal acts are only punishable by a fine or are punishable by imprisonment of no more than 5 (five) years; and
- c. The crime is committed with the value of the evidence or the value of the loss caused by the crime not exceeding Rp. 2,500,000.00 (two million five hundred thousand rupiah).

There are 2 (two) types of methods for terminating prosecution, including peace efforts and peace processes. First, peace efforts offered by the public prosecutor to both parties, namely the suspect and the victim. The flow of peace efforts begins with the summons of the victim by the public prosecutor followed by informing the reason for the summons. Continued by involving the victim's/suspect's family, community leaders/representatives, and other related parties. During the process, if the offer is accepted, the case is dismissed, if rejected, the case will be referred to court. Second, the peace process. The public prosecutor acts as a facilitator who has no element of bias between the two parties between the victim and the suspect with a period of 14 (fourteen) days from the handover of responsibility that must be fulfilled by the suspect and is carried out at the prosecutor's office. This activity is carried out in order to resolve the case peacefully and not be followed up in court.

In the implementation process, restorative justice is carried out through the district attorney's office in each district/city with several stages that must be carried out. First, each case resolution must involve the victim by communicating for further summons. Furthermore, the Prosecutor's Office makes an official summons to the victim and the parties involved. Investigators and Prosecutors also coordinate intensively in advance. Then, the Prosecutor appointed by the Head of the District Attorney's Office acts as the Public Prosecutor in criminal cases if the criminal case goes through Stage II, namely the transfer of the suspect and evidence by the Investigator to the Public Prosecutor. The Investigator requests time before the detention period expires, the length of detention is 20 days at the Investigator level. However, the Investigator can

request an extension or additional detention period to the Prosecutor's Office for 40 days. So the Investigator can carry out detention for 60 days.<sup>15</sup>

The mechanism or procedure for peace in terminating prosecution based on restorative justice is contained in the provisions of Article 7 to Article 14 of the Republic of Indonesia Attorney General's Regulation No. 15 of 2020. These provisions have regulated the initial to final stages of terminating prosecution through peace between the suspect and the victim. The initial stages regarding the efforts made by the public prosecutor can be seen in the provisions of Article 7 paragraph (1) to (3) of the Republic of Indonesia Attorney General's Regulation No. 15 of 2020 which states:

- 1) The Public Prosecutor offers peace efforts to the Victim and the Suspect;
- 2) Peace efforts are carried out without pressure, coercion and intimidation;
- 3) Peace efforts are made at the prosecution stage, namely when responsibility for the suspect and evidence is handed over (stage two).

In the provisions of Article 7 of the Indonesian Attorney General's Regulation, it can be seen that peace efforts are carried out by the public prosecutor. The public prosecutor then asks the parties about restorative approaches. However, it should be noted, as stated in paragraph (2) of the provisions of the article, the parties who carry out and decide to take restorative justice steps are required not to be in a state of coercion and under the slightest pressure when deciding on this policy.

In the provisions of Article 8 paragraphs (1) to (7) of the Republic of Indonesia Attorney General's Regulation No. 15 of 2020 it is stated:

- 1) For the purposes of peace efforts, the Public Prosecutor shall summon the Victim legally and properly by stating the reasons for the summons.
- 2) If it is deemed necessary, peace efforts can involve the victim/suspect's family, community leaders or representatives, and other related parties.
- 3) The Public Prosecutor informs the intent and purpose as well as the rights and obligations of the Victim and the Suspect in the peace efforts, including the right to reject the peace efforts.
- 4) If the peace efforts are accepted by the victim and the suspect, the peace process will continue.
- 5) After the peace efforts are accepted by the Victim and the Suspect, the Public Prosecutor makes a report on the peace efforts received to the Head of the District Attorney's Office or the Branch of the Head of the District Attorney's Office to be forwarded to the Head of the High Prosecutor's Office.

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<sup>15</sup>Zainudin Hasan, (2021), Termination of Prosecution of Criminal Acts of Embezzlement as an Implementation of the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 Based on Restorative Justice, JHM, 2 (1), p 11



- 6) In certain cases that receive special attention from leaders and the public, the reports as referred to in paragraph (5) are also submitted to the Attorney General in a hierarchical manner.
- 7) In the event that the peace efforts are rejected by the Victim and/or Suspect, the Public Prosecutor:
  - a. record the failure to achieve peace efforts in the minutes;
  - b. make a note of opinion that the case is referred to the court, stating the reasons; and
  - c. submit case files to the court.

Regarding the peace mechanism between the suspect and the victim, the provisions of Article 10 paragraph (1) to (6) of the Indonesian Attorney General's Regulation No. 15 of 2020 state:

- 1) In the event that a peace process is achieved, the Victim and the Suspect will make a written peace agreement before the Public Prosecutor.
- 2) The peace agreement as referred to in paragraph (1) is in the form of: a. agreeing to make peace accompanied by the fulfillment of certain obligations; or agreeing to make peace without being accompanied by the fulfillment of certain obligations.
- 3) The peace agreement as referred to in paragraph (1) is signed by the victim, the suspect and 2 (two) witnesses with the knowledge of the public prosecutor.
- 4) In the case of a peace agreement accompanied by fulfillment of the obligations as referred to in paragraph (2) letter a, the Public Prosecutor shall make a report of the peace agreement and a memorandum of opinion after the obligations have been fulfilled.
- 5) In the case of a peace agreement without fulfillment of the obligations as referred to in paragraph (2) letter b, the Public Prosecutor shall make a report of the peace agreement and a memorandum of opinion.
- 6) In the event that the peace agreement is unsuccessful or the fulfillment of obligations is not carried out in accordance with the peace agreement, the Public Prosecutor:
  - a. record the failure to reach a peace agreement in the minutes;
  - b. make a note of opinion that the case is referred to the court, stating the reasons; and
  - c. submit case files to the court.

The use of out-of-court settlements does feel odd in the enforcement of criminal law based on the principles of *ius punale* and *ius puniendi*. The principle of *ius punale* gives the state the right to implement the provisions of criminal law, both

material and formal, through state apparatus.<sup>16</sup>Meanwhile, the principle of *ius puniendi* gives the state the right to impose a criminal penalty on someone who has been proven guilty by the court and to execute or implement the court's decision. Referring to these two principles, the idea was born that the criminal case resolution system can only be carried out through the court.

This concept ultimately causes problems that have an impact on the judicial institution, in the form of a backlog of cases and the performance of Judges and Prosecutors is questionable, because all cases from light to heavy must be prosecuted by the Prosecutor and examined by the Judge. Such facts seem to indicate that the Indonesian Prosecutor's Office adheres to the principle of the obligation to prosecute all criminal cases (mandatory prosecution), then the prosecution of criminal cases carried out by the Prosecutor is sometimes considered by the public to be inappropriate because the losses suffered by the victim are too small or the perpetrator himself is considered sociologically by the public not worthy of being processed in Court.

With restorative justice, the Public Prosecutor learns to listen and understand, closer to the community. The Public Prosecutor does not only match the actions and put them into normative legal boxes, but should place the incident proportionally, then think of a way to resolve the case as fairly as possible.

#### **4. Conclusion**

The Prosecutor's Office issued Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The role of the Public Prosecutor is no longer limited to referring cases to court but can also be a mediator between the parties to the case. If the parties to the case have reached an agreement and have met the requirements in Prosecutor's Regulation Number 15 of 2020, the Public Prosecutor can terminate the prosecution and release the defendant from prison. The application of restorative justice in Prosecutor's Regulation Number 15 of 2020 is not intended for every general crime, but only for minor crimes with the provisions applicable in this Prosecutor's Regulation.

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<sup>16</sup>Eva Achjani Zulfa, (2010), Loss of the Right to Sue: Basis for Elimination, Mitigation and Aggravation of Criminal Sentences, Ghalia Indonesia, Jakarta, p 37.

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