

## **Restorative Justice the Limitations of Authority of Police and Prosecutors in the Criminal Justice System**

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### **Abstract**

This study discusses the limits of authority of the police and prosecutors in implementing restorative justice in criminal cases. The Indonesia National Police, the Attorney General Office of the Republic of Indonesia, have implemented the principle of restorative justice as a form of dealing with criminal cases. The Indonesian National Police makes further regulations for each law enforcement agency with the principle of restorative justice which will be used as a guide in handling criminal cases, including Circular Letter of The Chief of Indonesia National Police No. SE/8/VII/2018 of 2018, The Chief of Indonesia National Police Regulation No. 6 of 2019, the Attorney General Regulation No. 15 of 2020. To analyze and understand restorative justice and the limitations of the police and prosecutor's authority in the criminal justice system, this study uses a normative legal research method, the data obtained through a literature study. The results show that restorative justice must be accompanied by an understanding of the concept of police discretion, because there is a relationship between discretion and restorative justice. The statement of reconciliation between the perpetrator and the victim contained in the statement letter should be the basis for investigators to terminate the investigation (SP3) other than those stipulated in Article 109 of the Criminal Procedure Code and the case is considered completed in Law Number 16 of 2004 concerning the Attorney Office of the Republic of Indonesia, in Article 35 letter c. The Attorney General of the Republic of Indonesia has released a regulation concerning Termination of Prosecution Based on Restorative Justice as contained in the Attorney General Regulation Number 15 of 2020. Based on this regulation, the public prosecutor has a strong legal basis for terminating prosecution of defendants in certain criminal acts and if between the victim and the defendant have an agreement to make peace.

Kajian ini membahas batasan kewenangan kepolisian dan kejaksaan dalam menerapkan restorative justice perkara tindak pidana. Kepolisian Republik Indonesia, Kejaksaan Republik Indonesia, telah melaksanakan prinsip restorative justice sebagai salah satu bentuk di dalam menangani

perkara tindak pidana. Polri membuat peraturan lebih lanjut untuk masing-masing lembaga penegak hukum dengan prinsip keadilan restoratif yang akan digunakan sebagai pedoman dalam melakukan penanganan perkara tindak pidana, antara lain yakni Surat Edaran Kapolri No. SE/8/VII/2018 Tahun 2018, Peraturan Kapolri No. 6 Tahun 2019, PERJA No. 15 Tahun 2020. Untuk menganalisa dan memahami restorative justice dan Batasan kewenangan kepolisian dan kejaksaan dalam sistem peradilan pidana, penelitian ini menggunakan metode penelitian hukum normatif datanya diperoleh melalui studi kepustakaan. Hasil penelitian menunjukkan bahwa, restorative justice harus dibarengi dengan pemahaman terhadap konsep diskresi kepolisian, karena antara diskresi dengan restorative justice memiliki keterkaitan. Pernyataan perdamaian antara pelaku dan korban yang tertuang dalam surat pernyataan seharusnya menjadi dasar bagi penyidik untuk melakukan penghentian penyidikan (SP3) selain yang diatur dalam pasal 109 KUHP dan perkara dianggap selesai. didalam Undang-undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia, pada Pasal 35 huruf c. Jaksa Agung Republik Indonesia telah merilis peraturan tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif yang tertuang dalam PERJA Nomor 15 Tahun 2020. Berdasarkan peraturan tersebut, penuntut umum memiliki dasar hukum yang kuat untuk dilakukannya penghentian penuntutan kepada terdakwa dalam beberapa tindak pidana tertentu dan jika antara korban dengan terdakwa ada kesepakatan untuk berdamai.

**Key words:** *Restorative Justice; Police; Attorney Office; justice system.*

## **Introduction**

Currently, law enforcement agencies in Indonesia such as The Indonesian National Police, Attorney Office of the Republic of Indonesia, the Supreme Court and the Indonesian Ministry of Law and Human Rights have implemented the principle of restorative justice as a form of handling criminal cases. In 2012, the four law enforcement agencies had made a mutual agreement, namely the Memorandum of Understanding on the Implementation of Adjusting the Limits of Minor Crimes and the Amount of Fines, Quick Examination Procedures and the Implementation of Restorative Justice which was compiled and stated in Number 131/KMS/ SKB/X/2012, Number M-HH-07.HM.03.02 of 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012. Based on this, the principle of restorative justice is used as a principle that regulates handling in resolving criminal cases. This Mutual Agreement that has been created is the basis for the settlement of a criminal case by applying the principles of restorative justice. The Joint Agreement regarding the above memorandum, state institutions such as the

Supreme Court, the Attorney General Office, the Indonesian National Police make further regulations for each law enforcement agency with the principle of restorative justice which will be used as guidelines in handling criminal cases, including Circular Letters. The Chief of Indonesia National Police No. SE/8/VII/2018 Year 2018, The Chief of Indonesia National Police Regulation No. 6 of 2019, the Attorney General Regulation No. 15 of 2020, the Decree of the General Director of General Court Office of the Supreme Court No. 1691/DJU/SK/PS.00/12/2020. The arrangements made by each of the law enforcement agencies above, in essence discuss the principles of restorative justice used in resolving criminal cases that begin at the time of investigation, prosecution until the final stage of trial in court.<sup>1</sup>

The Criminal Procedure Code adheres to the principle of mutual coordination, namely the division of duties of each law enforcement officer. The police are located as investigating agencies and the public prosecutor office is the public prosecutor and executing officer, while judges are state judicial officials authorized to adjudicate Article 1 point 8. Although the Criminal Procedure Code divides authority institutionally, the Criminal Procedure Code itself contains provisions that establish law enforcement agencies in a cooperation relationship which is focused not only on clarifying the duties of authority and work efficiency but is also directed to build a team of law enforcement officers who are burdened with tasks. and the responsibility of supervising each other in a checking system between them. This system does not only cover inter-agency law enforcement officials, police, prosecutors, and judges, but is extended to prison officials, legal advisors, and the families of suspects/defendants.<sup>2</sup>

## **Methodology**

This type of research uses normative research or library research. Therefore, in this study, library materials are basic data which in research science is classified as primary data.<sup>3</sup> This research is also known as qualitative research.<sup>4</sup> This research is a literary study that relies on primary and secondary law. This study uses descriptive analysis in explaining restorative justice and the limits of the authority of the police

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<sup>1</sup>Fakultas Hukum et al., "Konsep Penanganan Perkara Tindak Pidana Dengan Restorative Justice Yang Mengedepankan" Vol. 3, No. 1 (2022), p. 191-95.

<sup>2</sup>M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan Criminal Procedure Code Penyidikan dan Penuntutan* (2<sup>nd</sup> Edition, Jakarta: Sinar Grafika, 2000), p. 49.

<sup>3</sup>Soekanto and Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali, 2003), p. 23-24.

<sup>4</sup>R. Bogdan and Steven Taylor, *Introduction to Qualitative Research Methods* (John Wiley dan Sons, 1984), p. 42.

and prosecutors in the criminal justice system. This research uses a conceptual approach, which is to examine all the literature on restorative justice as well as the limitations and powers of the police and prosecutors in restorative justice such as laws, journals, research reports, internet, newspapers, books and scientific articles.

## **Discussion**

Restorative Justice is a concept of sentencing, but as a concept of sentencing it is not only limited to the provisions of criminal law (formal and material).<sup>5</sup> This is emphasized by the term integrated justice, namely justice for the perpetrators, justice for victims and justice for the community. The characteristics of restorative justice are the Just Peace Principles or justice based on peace between perpetrators, victims, and the community. This principle is based on the idea that peace and justice are basically inseparable. Peace without justice is oppression, justice without peace is a new form of persecution or oppression.

It is called the Just Peace Principles or Just Peace Ethics because the approach in restorative justice applies the basic principles of restoring damage to those who have suffered losses due to crime, providing opportunities for perpetrators and victims to be involved in restoring the situation, giving courts and the community a role to protect public order and preserve a just peace. Goals to be achieved through a cooperative process that involves all parties (stakeholders).<sup>6</sup>

### **1. Restorative Justice and its development**

Restorative justice is seen by many people as a philosophy, a process, an idea, a theory and an intervention. Restorative justice is a judiciary that emphasizes reparation for losses caused or related to criminal acts. Restorative justice is carried out through a cooperative process that involves all parties (stakeholders). Restorative justice is an alternative or other way of criminal justice by prioritizing an integrated approach to perpetrators on the one hand and victims/communities on the other as a unit to find solutions and return to the pattern of good relations in society. Restorative Justice is an approach model that emerged in the era of the 1960s in an effort to resolve criminal cases. In contrast to the approach used in the conventional criminal justice system, this approach emphasizes the direct

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<sup>5</sup>Rudi Rizky, *Refleksi Dinamika Hukum (Rangkaian Pemikiran dalam Dekade Terakhir)* (Jakarta: Perum Percetakan Negara Indonesia, 2008), p. 4.

<sup>6</sup>Sefriani, *Urgensi Rekonseptualisasi dan Legislasi Keadilan Restoratif di Indonesia* (Jurnal Rechts Vinding Vol. 2 No 2, August 2013), p. 279.

participation of perpetrators, victims and the community in the process of resolving criminal cases.<sup>7</sup>

James Dignan describes the historical side of restorative justice, saying that *the term restorative justice is usually attributed to Albert Eglash (1977), who sought to differentiate between what he saw as three distinct forms of criminal justice. The first is concerned with "retributive justice", in which the primary emphasis is on punishing offender for what they have done. The second relates to what he called "distributive justice" in which the primary emphasis is on the rehabilitation of offenders. The third is concerned with "restorative justice", which he broadly equated with the principle of restitution* (Dignan, 2005:94). Therefore, the discussion about restorative justice cannot be separated from Albert Eglash who in 1977 divided three categories of criminal justice, namely retributive justice, distributive justice, and restorative justice. In short, the concept of restorative justice was first introduced by Albert Eglash.

However, long before Albert Eglash put forward his ideas, the civilizations and traditions of Ancient Arabia, Greece, Ancient Rome and Hindustan had actually recognized a special restorative justice in the crime of homicide. Even though at that time we did not use the term restorative justice, at least there was a restorative approach. Likewise, among Buddhists, Taoists and Confucians who have long advocated restorative justice in solving their legal problems, through the motto "he who atones is forgiven" meaning he who redeems, is forgiven. As emphasized by John Braithwaite, restorative justice is grounding in traditions of justice from the ancient Arab, Greek, and Roman civilization, Indian Hindus, Taoist, and Confucian that accepted a restorative approach even to homicide, for whom "he who atones forgiven" (Braithwaite, 1998:323).<sup>8</sup>

In the last twenty-five years, restorative justice has become a global and dynamic legal concept in criminal justice. More than 80 countries in the world use restorative justice in resolving a criminal case. The United Nations (UN) Juvenile Justice Working Group defines restorative justice as a process for all parties related to a particular crime and sitting together to solve problems and think about how to overcome the consequences in the future. Restorative justice is the re-establishment of justice through new consensus (agreement) values. Restorative justice requires the perpetrator to take personal responsibility for his actions and then actively work to repair the damage that has caused harm to the victim and society.<sup>9</sup>

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<sup>7</sup>A A Ramdlany, "Restorative Justice Dalam Hukum Pidana Islam Perspektif Filsafat Hukum Islam," 2021, <http://digilib.uinsby.ac.id/51259/>.

<sup>8</sup>Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Jurnal Media Hukum* Vol. 25, No. 1 (2018). p. 111-23.

<sup>9</sup>Chindya Pratisti Puspa Devi. "Restorative Justice Pada Hukum Pidana Anak Indonesia Dalam Perspektif Hukum Islam."

The international community has provided guidelines on criminal justice regarding innovative, comprehensive, and integral approaches to increasing the use of restorative justice. To redesign the implementation of justice more effectively, the United Nations congress can be one of the inspirations for reforming judicial policy. The restorative approach has actually been known and practiced in Indonesia within the scope of Indonesian customary law, such as in Papua, Bali, Toraja, Batak, Minangkabau and other traditional communities that still hold strongly to their culture. If a criminal act occurs by someone, dispute resolution is carried out in the customary community internally without involving state officials. The measure of justice is not based on retributive justice in the form of revenge (an eye for an eye) or imprisonment but is based on conviction and forgiveness (restorative justice).<sup>10</sup>

## 2. Restorative Justice in the Police

The police is a subsystem in the criminal justice system which is sufficient to determine the success and work of the entire system in providing services to the community. This is because the police is a subsystem that is directly related to criminals and the community, so that the duties and responsibilities of the police can be said to be greater than other subsystems. The Police as one of the law enforcement officers obtain their authority based on the Law of the Republic of Indonesia Number 2 of 2002 concerning the State Police of the Republic of Indonesia Based on Article 1 point 1. In this Law, what is meant by the police are all matters relating to the functions and institutions of the police in accordance with the laws and regulations.<sup>11</sup>

The police have the main task of maintaining public security and order, enforcing the law, and providing protection, shelter, and community services. Community services provided to the community are contained in the task of law enforcement carried out by the police. In Article 14 paragraph (1) letter g of the Law of the Republic of Indonesia Number 2 of 2002 states that:

Dalam melaksanakan tugas pokok sebagaimana dimaksud dalam Pasal 13 Kepolisian Negara Republik Indonesia bertugas melakukan penyelidikan dan penyidikan terhadap semua tindak pidana sesuai dengan hukum acara pidana dan peraturan perundang-undangan lainnya.<sup>12</sup>

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<sup>10</sup> Mira Maulidar, "Korelasi Filosofis Antara Restorative Justice Dan Diyat Dalam Sistem Hukum Pidana Islam," *At-Tasyri': Jurnal Ilmiah Prodi Muamalah* 13 (2022), p. 143-55.

<sup>11</sup> Ruslan Abdul Gani, "Pendekatan Restorative Justice Melalui Tesis Pembimbing.," 2018.

<sup>12</sup> Pasal 14 ayat (1) huruf g, Undang-undang Republik Indonesia Tentang Kepolisian Republik Indonesia, Undang-Undang Republik Indonesia Nomor 2 Tahun 2002, Lembaran Negara Republik Indonesia Tahun 2002 Nomor 2, Tambahan Lembaran Negara Republik Indonesia Nomor 4168.

Meaning: In carrying out the main tasks as referred to in Article 13, the National Police of the Republic of Indonesia is tasked with conducting investigations and investigations of all criminal acts in accordance with the criminal procedure law and other statutory regulations.

Furthermore, according to Article 8 of the Criminal Procedure Code, it is explained that if the investigator has finished carrying out an investigation, the investigator is obliged to submit the case file to the public prosecutor. Completion and submission of case files if they are considered complete, the investigator submits the responsibility of the suspect and evidence.

Several other sources of law that regulate restorative justice, such as the jurisprudence of the Supreme Court in the decision of case no. 1600 K/Pid/2009. The large number of cases that are resolved by peaceful means outside the courts have prompted the police to issue regulations on restorative justice to provide certainty for police officers in carrying out their duties. One of the rules regarding restorative justice is contained in the Letter of the Chief of Indonesia National Police No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009, regarding Case Handling Through Alternative Dispute Resolution (ADR). The police as community partners have made policies and strategies in resolving a criminal case, one of which is Bhabinkamtibmas (*Bahayangkara Pembina Keamanan dan Ketertiban Masyarakat* or Bhayangkara as Community Security and Order Supervisor) who is placed in the village area. The function and role of Bhabinkamtibmas related to restorative justice is to become a mediator and facilitator in mediating and facilitating efforts to solve problems that occur in the community. After the mediation reaches an agreement and peace, the results of the mediation in the form of a peace agreement are listed in writing, and the results are legally binding on both parties. The implementation of Restorative Justice does not aim to ignore positive law but with the conditions and situations in the field so that the Indonesian National Police Officers take police discretionary steps as regulated in Indonesian Law Number 2 of 2002 concerning The Indonesian National Police to maintain the situation and condition of the community and fulfill a sense of justice. by prioritizing construction.<sup>13</sup>

To give police members an understanding of the concept of restorative justice, it must be accompanied by an understanding of the concept of police discretion, because there is a relationship between discretion and restorative justice.

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<sup>13</sup>Prima Anggara et al., "Penerapan Keadilan Restoratif Pada Tindak Pidana Pendahuluan di Dalam Perkembangannya Penyelesaian Perkara Tindak Pidana Ringan Melalui Sistem Peradilan Yang Menekankan Pada Pembalasan Tidak Memberikan Kepuasan dan Keadilan di Pihak Korban Maupun Terdakwa" 3, no. 3 (2019): 468-77.

The statement of peace between the perpetrator and the victim contained in the statement letter should be the basis for the investigator to terminate the investigation (SP3) other than what is stipulated in Article 109 of the Criminal Procedure Code and the case is considered clear. If the termination of the investigation (SP3) is met with resistance, the SP3 either with public complaints to the leadership or through pretrial legal channels and if the applicant is granted by the district court judge, the statement of peace will be revoked, and the case file will be continued.

### **3. Restorative Justice in the Attorney Office**

The Attorney Office in the criminal justice system works after there is a delegation of cases from the police. The Attorney Office is a government agency in the field of prosecution and other tasks determined by law. Article 13 of the Criminal Procedure Code states that:

*Penuntut umum adalah jaksa yang diberi wewenang oleh undang-undang ini untuk melakukan penuntutan dan melaksanakan penetapan hakim (Public prosecutors are prosecutors who are authorized by this law to carry out prosecutions and carry out judges' decisions).<sup>14</sup>*

Article 13 of the Criminal Procedure Code mentioned above is also contained in Article 1 number 2 of the Law of the Republic of Indonesia Number 16 of 2004 concerning the Attorney Office of the Republic of Indonesia, whereas prosecution according to the Law is an act of prosecution to delegate the case to the competent State Court in matters and according to the method regulated in the Criminal Procedure Code with a request that it be examined and decided by a judge in a court session. Conducting pre-prosecution is the authority possessed by the Prosecutor in resolving a criminal case as found in Article 14 letter b of the Criminal Procedure Code, where in conducting pre-prosecution the Prosecutor conducts research on the case files sent by the investigator to the public prosecutor to examine the completeness of the case file, both formal and material completeness in order to carry out a prosecution. In other words, pre-prosecution is not yet included in the scope of prosecution but is still within the scope of investigation.

In the Criminal Code it is explained, if an attorney general has the authority to stop a lawsuit if a case being handled has expired, the evidence related in the case is not strong, and the defendant in the case being handled has experienced (*nebis in idem*). In addition to being regulated in the Criminal Code

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<sup>14</sup>Pasal 13, Kitab Undang-undang Hukum Acara Pidana, Undang-undang Republik Indonesia Nomor 8 Tahun 1981, Lembaran Negara Republik Indonesia Tahun 1981 Nomor 76, Tambahan Lembaran Negara Republik Indonesia Nomor 3209.

(KUHP), it is also regulated in Law Number 16 of 2004 concerning the Attorney Office of the Republic of Indonesia, in Article 35 letter c. The Attorney General of the Republic of Indonesia has released a regulation regarding Termination of Prosecution Based on Restorative Justice as stated in the Attorney General Regulation Number 15 of 2020, stipulated July 21, 2020. Based on this regulation, the public prosecutor has a strong legal basis for terminating the prosecution of the defendant in certain criminal acts and if the victim and the defendant reach an agreement to make peace.

The existence of The Attorney General Regulation No. 15/2020 is expected to be able to make encouraging news for the people of Indonesia who have thought that minor criminal cases are not appropriate to be processed, especially until they are tried in court. This is said to be inappropriate, considering the costs incurred during the investigation process until the trial in court are not in accordance with the value of the loss caused by the crime. Moreover, among the defendants or victims, there is a desire to make peace. If the case is continued until it gains legal force, it is feared that it will hurt the sense of justice in the community so that it does not reflect the benefits of the law itself. In addition, with the enactment of this Regulation of the Attorney Office of the Republic of Indonesia, it is hoped that it will be able to overcome the problem of overcapacity that occurs in Correctional Institutions.<sup>15</sup>

The above regulation also delegates authority to public prosecutors in terminating prosecutions based on restorative justice. This can be used as an alternative in the settlement of criminal acts. Restorative Justice has been widely voiced by various countries around the world because Restorative Justice can be used as an approach in handling criminal cases. Through the Restorative Justice approach, it is hoped that an agreement will be reached to make peace by using the nature of a win-win solution, both between victims and perpetrators of criminal acts and vice versa. The existence of Prosecutor's Regulation Number 15 of 2020 which gives prosecutors the authority to stop prosecutions based on restorative justice is a breakthrough in the settlement of criminal acts.

## **Conclusion**

Regulations regarding restorative justice in the current provisions of Indonesian criminal law are contained in the Circular Letter of the Chief of Indonesia National Police, Regulation of The Chief of Indonesia National Police, The Attorney General Regulation No. 15/2020, Decree of the General Director of

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<sup>15</sup>Hukum et al., "Konsepsi Penanganan Perkara Tindak Pidana Dengan Restorative Justice Yang Mengedepankan."

General Court Office of the Supreme Court. Meanwhile, the principle of restorative justice in dealing with criminal acts is regulated based on Articles 3 to 5 in the Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice which regulates matters that must be fulfilled by public prosecutors to close cases for the sake of law and to terminate prosecutions based on restorative justice. The regulation related to the provisions and requirements contained in The Attorney Office Regulations is in line with the Supreme Court Regulation Number 02 of 2012 concerning Adjustment of the Limits of Minor Crimes and the Amount of Fines in the Criminal Code.

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DOI: 10.35673/al-bayyinah.v4i2.2594

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