

# Juridical Review of Comparative Prosecution Systems in Indonesia and the United States of Prosecutors Based on Restorative Justice

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## ABSTRACT

Prosecutors are state institutions that carry out prosecutions. Knowledge of the criminal law prosecution system is needed to optimize the performance of law enforcement officers at the prosecutor's office so that justice, legal certainty and benefit can be realized. The main problem is how to apply the termination of prosecution based on Restorative Justice at the prosecutor's office and how the Criminal Case Judgment Legal System in Indonesia compares to that in the United States. This study aims to optimize the application of the termination of prosecution based on Restorative Justice at the prosecutor's office and compare the legal system for terminating criminal cases in Indonesia compared to the United States. The normative juridical research method is used in this study. The results show that the steps to optimize the prosecution system by democratizing include disclosing regulations and developing mechanisms that must be carried out gradually in all areas of public life so that the performance of public authorities is monitored. In addition, it is necessary to reform criminal law policies through laws, law enforcement, and legal culture to optimize the performance of law enforcement officers at the prosecutor's office. This study concludes that optimization of implementation can be achieved through several strategies, such as increasing the integrity of bureaucratic reform, strengthening anti-corruption culture, and strict, consistent, and integrated law enforcement. There are many similarities between the structure of law enforcement in America and Indonesia in general, although there are differences in the main tasks and functions in detail.

**Keywords:** *Termination of Prosecution, Prosecutor, Restorative Justice*

## 1. INTRODUCTION

The Prosecutor's Office is a state institution which carries out state power in law enforcement by adhering to the statutory regulations and policies set by the government [1]. The Prosecutor's Office should be an independent institution that has a central role reference in the justice system. For this reason, the assignment of the prosecutor is to prosecute a suspect based on the legal guilt of the suspect. Prosecutors are law enforcement officers who have a central position (pivotal position) that enables them to determine whether a suspect can be detained, or the case should be forwarded to prosecution before a court, or the suspect should be released. [2]–[5].

Indonesia is a state of law. The practice of the rule-of-law concept in Indonesia is a concrete form of the implementation of constitutional mandate. The 1945 Constitution of the Republic of Indonesia as a result of the 4th amendment as the constitution of the Unitary State of the Republic of Indonesia is the highest positive law applicable in the Indonesian legal system. A state of

law is based on law and justice for its citizens, where all authority and actions of state equipment or authorities are solely based on law or regulated by law. This will reflect justice for the social life of the citizens [6].

Roman law was the forerunner of the legal system of Continental Europe. However, despite being the spirit of the Continental European legal system, the influence of Roman law is very strongly felt in the development of the Anglo Saxon legal system since many of the creators of the rules in the Anglo Saxon legal system first studied the Roman legal system or the Continental European legal system. Because of this, the Continental European legal system is usually referred to as the Romano-German legal system, which is also often called the civil law system. Continental European legal systems developed in European countries, such as

France, Italy, Germany, Austria, Switzerland, and, as well as Latin American countries, several Arab countries, North Africa, Turkey, and Madagascar.[7] Theoretically, the debate about the use of social values as a measure in determining whether or not an act is considered unlawful has been put forward by Werner Menski. According to Menski, the positivistic view that assumes only state law can resolve disputes in society is an insufficient and unsatisfactory view. [8]

Restorative Justice is an approach that emphasizes the restoration of disadvantage caused or incurred expenses by criminal behavior. Recovery of this loss will be obtained through a collaborative process involving all stakeholders.[9] Actions and programs that reflect restorative goals will be able to solve crimes by identifying and taking steps to recover losses, involving all stakeholders, and changing the traditional relationship between society and government in dealing with crime. The above concepts are part of the principles of Restorative Justice as outlined in the Declaration of Basic Principles of Justice of Crime and Abuse of Power, 1985. The basic principles of Restorative Justice were later developed by The United Nation Commission on Crime Prevention and Criminal Justice as an international guide to form countries that run Restorative Justice programs. [10]

The independence of the prosecutor's office is urgently needed to enforce the law with integrity and restore public confidence in the current relatively poor law enforcement system in Indonesia. Independence itself means freedom or not being under the control/supervision of other institutions [11], [12]. Lawrence M. Friedman divides the components in forming legal culture into 3 (three) parts, such as: structure, substance and culture [13]. In terms of the legal system at the prosecutor's office, the structural component relates to the prosecutor's institution to be created, for example an institution that is free of corruption and independent. With the standards/objectives to be achieved, the prosecutor's office can carry out its duties with integrity, honesty and obedience. The substance component is the content aspect of the legal system itself which contains norms in the embodiment of legislation. With the dual obligation of prosecutor's office, the reconstruction of the substance is needed to make an independent and free prosecutor's office. Meanwhile, the cultural component is the values and attitudes that bind the system that determines the place of the system in the midst of the nation's culture, such as the legal awareness of the community in law enforcement. The culture of the prosecutor's office requires legal awareness among prosecutors, starting with binding legal regulations, law-making bodies, law enforcement agencies/sanctions, and the community [14].

This happens because all cases, both big and small, heavy and light, are resolved by a judicial mechanism that leads to imprisonment. Other alternatives such as the concept of Restorative Justice certainly need to be

considered. In Indonesia, this concept has been applied in courts dealing with children's cases.

The primary goal of restorative justice is restoration, and the second goal is compensation. This concept can be interpreted that the process of law enforcement or overcoming criminal acts through. The restorative approach is the process of resolving criminal acts which includes compensation for victims (author: or other forms of compensation or restitution) through certain methods agreed by the parties involved.[15]

John Braithwhite argues that restorative justice is a process in which all parties involved in a particular violation collectively seek solutions on how to deal with the consequences of the violation and its implications in the future. Furthermore, John Braithwaite said that restorative justice aims to restore harmony or balance because the law has been enforced [16].

In Indonesia, tax cases that use the concept of restorative justice are resolved: (1) with the principles of restorative justice in law enforcement; and (2) through tax collection efforts, tax audits, and investigations of criminal acts in the taxation sector [17].

The policy direction that comes through the Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is a milestone that emphasizes the need for conscience and sensitivity to balance the applicable law by paying attention to the value of justice that lives in society. The success of applying this restorative justice provision is greatly influenced and determined by the integrity of the Prosecutor. On November 19, 2021, the Deputy Attorney General for General Crimes has terminated prosecutions based on restorative justice in 426 cases.

Restorative Justice has been widely applied in various developed countries globally, such as the United States. One of the advantages of implementing this model is to reduce the burden of correctional institutions in accommodating prisoners. In 2015 the United States District Court for the District of Hawaii Pretrial Services Office collaborated with Hawa'i Friends of Restorative Justice (HFRJ), a small Honolulu non-profit, to provide and measure the outcomes of a reentry planning circle process for incarcerated individuals who were either facing a federal prison sentence or had been sentenced to federal prison. In 2017 the pilot was expanded to individuals on probation under the court's jurisdiction. This article uses a case the authors worked on to examine the reentry planning process and the pilot project [18].

However, it is not easy to realize a restorative justice approach in the criminal system in Indonesia, which is still influenced by mainstream retributive justice, with the basic theory that a criminal act is a violation of the rules made by the state. So that case settlement only focuses on the perpetrator. At the same time, the victim's rights are represented by country. Until now, the Restorative Justice model, which is part of progressive law, is still a debate among legal experts

and has not been able to be applied systemically by law enforcement officials.

## 2. RESEARCH METHODS

This is juridical normative research which aims to describe a situation that is the object of research in a systematic, factual and accurate manner based on the provisions of normative law. This research was conducted based on secondary data, namely references related to the object or research material, which included primary legal materials. In this study, the primary law used was the 1945 Constitution of the Republic of Indonesia, Law no. 8 of 1981 concerning the Criminal Procedure Code, and the Law of the Republic of Indonesia Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia.

Data collection in this research was carried out through document study, where data was collected from literature or scientific writings according to the object under study. The data was then analyzed using normative analysis techniques that presented a discussion based on applicable legal provisions such as legislation.

## 3. PROBLEM FORMULATION

- 1) How is the termination of prosecution based on Restorative Justice at the prosecutor's office carried out?
- 2) How does the Criminal Case Termination Legal System in Indonesia compare to that in the United States?

## 4. DISCUSSION

### 4.1 Termination of Prosecution Based on Restorative Justice at the Prosecutor's Office

According to Article 14 of the Criminal Procedure Code, the authority of the public prosecutor includes:

- a. Receive and examine investigation case files from investigators or assistant investigators;
- b. Conduct pre-prosecution if there are deficiencies in the investigation by taking into account the provisions of Article 110 paragraph (3) and paragraph (4), by providing instructions in the context of completing the investigation from the investigator;
- c. Provide an extension of detention, carry out further detention or detention and or change the status of the detainee after the case has been delegated by the investigator;
- d. Make an indictment;
- e. Delegate the case to court;
- f. Deliver notification to the defendant regarding the provisions on the day and time the case will be heard, accompanied by a summons, both to

the defendant and to witnesses, to come to the session that has been determined;

- g. Carry out prosecutions;
- h. Close the case for the sake of law;
- i. Carry out other actions within the scope of duties and responsibilities as a public prosecutor according to the provisions of this law;
- j. Carry out the judge's decision.

Based on Article 140 Paragraph (2) letter a of the Criminal Procedure Code, the public prosecutor can stop the prosecution for technical reasons and policy reasons. Termination of prosecution for technical reasons, namely circumstances that cause the public prosecutor to make a decision not to sue, can be done if:

1. the evidence is not sufficient;
2. the incident is not a criminal act;
3. the case is closed for the sake of law.

Termination of prosecution for policy reasons allows the prosecutor to dismiss a case even though there is sufficient evidence to be transferred to the court, in the public interest or individual interests and based on unwritten law (opportunity principle). Based on article 77 of the Criminal Procedure Code, the Attorney General has the authority to overrule for the following reasons:

1. Dismissal of cases on the principle of opportunity may be carried out for the following reasons:
  - a. in the interest of the state (*staatsbelang*);
  - b. in the interest of society (*maatschappelijk belang*);
  - c. for personal interests (*particular belang*).
2. Dismissal of cases on the basis of a criminal law assessment may be carried out if it is related to:
  - a. the loss of the right to sue caused by *nebis in idem*; the death of the defendant; expiration; amnesty/abolition;
  - b. revocation of complaint;
  - c. insufficiency of reason to sue.
3. Dismissal of cases on the basis of legal interest, as regulated in the Circular Letter of the Attorney General of the Republic of Indonesia Number SE-001/JA/4/1995 dated 27 April 1995 concerning Guidelines for Criminal Prosecutions, including instructions for terminating conditional criminal charges, can be done if :
  - a. the defendant has paid the compensation for the losses suffered by the victim;
  - b. the defendant is not old enough; or
  - c. the defendant is a student

To answer problems related to the settlement of criminal cases that always lead to imprisonment, a solution was recently made regarding the authority of the public prosecutor to stop prosecution based on the

concept of Restorative Justice, i.e. Attorney General's Regulations No. 15 of 2020. This effort needs to be appreciated because in the concept of Restorative Justice, perpetrators, victims, and the community are involved in the process of resolving these criminal cases. The considerations in Attorney General's Regulations No. 15 of 2020 concerning the termination of prosecution based on Restorative Justice are:

- a. that the Prosecutor's Office of the Republic of Indonesia as a government institution that exercises state power in prosecution must be able to realize legal certainty, law order, justice, and truth based on law; respect religious norms and decency; and explore the values of humanity, law, and justice that live in society;
- b. that the settlement of criminal cases by prioritizing Restorative Justice which emphasizes recovery back to its original state, balance of protection, and the interests of victims and perpetrators of criminal acts that are not oriented to retaliation is a legal necessity of society and a mechanism that must be built in the implementation of prosecution authority and system renewal of criminal justice;
- c. that the Attorney General has the duty and authority to streamline the law enforcement process provided for by the law by taking into account the principles of fast, simple and low-cost justice, as well as to establish and formulate case handling policies for successful prosecutions that are carried out independently for justice based on law and conscience, including prosecution using a Restorative Justice approach carried out in accordance with the provisions of the legislation;
- d. that based on the considerations as referred to in letters a, b, and c, it is necessary to stipulate a Prosecutor's Regulation concerning Termination of Prosecution Based on Restorative Justice.

The principles used in the termination of prosecution based on Restorative Justice include:

- a. justice;
- b. public interest;
- c. proportionality;
- d. punishment as a last resort; and
- e. speed, simplicity, and economy.

The public prosecutor has the authority to close a case for the sake of law based on Article 3 paragraph (2) if:

- a. the defendant dies;
- b. the criminal prosecution has expired;
- c. there has been a court decision that has permanent legal force against someone in the same case (*nebis in idem*);
- d. complaints for criminal offenses are withdrawn; or

- e. there has been a settlement of cases out of court (*afdoening buiten proces*). According to article 3 paragraph (3), the settlement of cases outside the court by the public prosecutor can be carried out with provisions for certain criminal acts, or a maximum penalty of fines is paid voluntarily in accordance with the provisions of laws and regulations, or there has been restoration to its original state through a Restorative Justice approach.

Based on Article 4 paragraph (1) the termination of prosecution based on Restorative Justice is carried out by taking into account:

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

(2) Termination of prosecution based on Restorative Justice as referred to in paragraph (1) shall be carried out by considering: subject, object, category, and threat of criminal act;

- a. background of the occurrence of the crime;
- b. degree of disgrace;
- c. losses or consequences arising from criminal acts;
- d. costs and benefits of the case handling;
- e. restoration to its original state; and
- f. peace between the victim and the suspect.

Based on Article 5 paragraph (1), criminal cases can be closed for the sake of law and the prosecution can be terminated based on Restorative Justice if the following conditions are met:

- a. The suspect has never committed a crime before;
- b. The criminal act is only threatened with a fine;
- c. The criminal act is only threatened with imprisonment of not more than 5 (five) years;
- d. The crime is committed with the value of the evidence or the value of the loss of not more than Rp2,500,000 (two million five hundred thousand rupiah)

(2) Regarding criminal acts related to property, if there are criteria or circumstances that are casuistic in nature according to the consideration of the Public Prosecutor with the approval of the Head of the Branch of the District Attorney or the Head of the District Attorney's Office, termination of the prosecution to be carried out on the basis of Restorative Justice with due regard to the conditions as referred to in paragraph (1) letter a, accompanied by either letter b or letter c.

(3) If a criminal act is committed against a person, body, life, and independence of a person, the provisions as referred to in paragraph (1) letter c may be excluded.

(4) If the criminal act is committed due to negligence, the provisions in paragraph (1) letter b and letter c may be excluded.

(5) The provisions as referred to in paragraph (3) and paragraph (4) shall not apply if there are criteria/conditions of a casuistic nature which according to the consideration of the Public Prosecutor with the approval of the Head of the District Attorney's Branch or the Head of the District Attorney's Office do not allow the termination of prosecution based on Restorative Justice.

(6) In addition to fulfilling the terms and conditions as referred to in paragraph (1), paragraph (2), paragraph (3), and paragraph (4), termination of prosecution based on Restorative Justice is carried out by meeting the following conditions:

1. The suspect has carried out restoration to the original state by:
  - a. returning the goods obtained from the crime to the victim;
  - b. compensating for the loss of the victim;
  - c. compensating for costs incurred as a result of criminal acts; and/or
  - d. repairing the damage caused by the consequences of the criminal act;
2. There has been a peace agreement between the Victim and the Suspect; and
3. Society responds positively

(7) If there is an agreement between the Victim and the Suspect, the condition for recovery to the original state as referred to in paragraph (6) letter a may be excluded.

(8) Termination of prosecution based on Restorative Justice is excluded for cases of:

- a. crimes against state security, the dignity of the president and vice president, brother countries, heads of brother countries and their representatives, public order and morality;
- b. criminal acts that are punishable by a minimum criminal threat;
- c. narcotics crime;
- d. environmental crime; and
- e. criminal acts committed by corporations.

The procedure for conciliation in the termination of prosecution based on restorative justice is stated in Articles 7 to 14 of Attorney General's Regulations No. 15 of 2020. In the event that the suspect is detained and a peace agreement is realized as stated in Article 14, the suspect is released in accordance with Article 15 of Attorney General's Regulations No. 15 of 2020.

#### ***4.2 Comparison of Legal Systems for Termination of Criminal Cases in Indonesia and in the United States***

Indonesia prosecution is divided into two stages: the pre-prosecution stage and the prosecution stage. In the United States prosecution is also divided into several stages, which are generally known as the Initial Appearance and Preliminary Hearing stages. These two stages are initial examinations by the

prosecutor's office to establish whether the case can proceed to court, or it is sufficient to stop at the prosecutor's office by settling the case outside the trial, or it can be terminated with proper reasons.

In Indonesia, since the enactment of the Criminal Procedure Code, the Prosecutor or Public Prosecutor has no authority to carry out case investigations because according to the law, that authority belongs to the police and certain civil servants. Therefore, Indonesia adheres to a "closed system", meaning that the possibility of the Prosecutor or Public Prosecutor conducting an investigation is closed, although the term "closed" term is incidental in serious cases, especially when related to evidence and juridical technical problems. Indonesia might be the only country in the world that adheres to a closed system, in which there is also a distinguished separation between investigation and prosecution, although in practice, the Prosecutor is still authorized to conduct investigations for special cases in the economic sector (Law No. 7 of 1955 concerning Investigations, Prosecution and Justice for Economic Crimes) [19], [20].

The difference is, while in Indonesia the pre-prosecution stage is in the scope of the investigation and the prosecution stage is in the prosecutor's office scope, in the United States the process before prosecution belongs to the prosecutor's scope, where the report on the results of the investigation has been submitted from the police to the prosecutor's office. In both Indonesia and the United States, the prosecution process is the sole authority of the prosecutor's office. In making the indictment, the Indonesian prosecutor's office has full authority, while in the United States, the indictment is obtained after the United States prosecutor shows evidence and testimony in a criminal case to the Grand Jury.

In the Indonesian criminal prosecution system, when the terms "suspect" and "defendant" are used is clear, while in the United States, the use of these terms depends on the stage of the process. In the Indonesian prosecution system, the term "suspect" used before the case is bestowed to the public prosecutor, and after the case is bestowed to the public prosecutor "defendant" begins to be used until there is a binding judge ruling that makes the defendant a "convict." In the prosecution system of the United States, charges are formally made at the time of prosecution in court after the Preliminary Hearing or Grand Jury proceedings. After the process, the charges will be examined in court to be ruled by the judge. Thus, the term "defendant" is more appropriate to use for the accused party.

In the United States, because the country adheres to the Dual Sovereignty doctrine, prosecution is allowed in every sovereignty. The US has two sovereignty, federal and state, and each sovereign may sue a suspect in one case in accordance with the jurisdiction of each sovereign law without violating the principle of *nebis in idem*. On the other hand, Indonesia does not adhere to Dual Sovereignty. The United States has two public prosecutors, namely the Federal Attorney

and the State Attorney who represent each of its sovereignty, while Indonesia only has a Sole Prosecutor as the representative of the Indonesian state [21]. Table 1. shows the comparison of Legal Systems for

Termination of Criminal Cases in Indonesia and in the United States.

**Tabel 1.** The comparison of Legal Systems for Termination of Criminal Cases in Indonesia and in the United States.

<b>Indonesia</b>	<b>United States</b>
The prosecution stage in Indonesia recognizes two stages of prosecution, there are pre-prosecution and prosecution.	The prosecution by the United States of America is divided into two prosecutions there are prosecutions from federal prosecutors and prosecutions from state prosecutors. Each component of the judicial system of the United States is divided into two sovereigns, namely federal sovereignty and state sovereignty, each of which sovereigns exercise their respective discretion. The stages of prosecution are Initial Appearance, Preliminary Hearing and Grand Jury.

## 5. CONCLUSION

The Prosecutor's Office in Indonesia, which is institutionally under executive power and in terms of the authority to carry out its duties and functions, is part of the judicial power so that the Prosecutor's Office is vulnerable to intervention other powers in exercising its power. Prosecutor's office about its role as a government agency. Therefore, optimizing the prosecution system with democratization includes disclosure of regulations and the development of mechanisms that must be carried out gradually in all areas of public life so that the performance of public

authorities is monitored. In addition, it is necessary to reform criminal law policies through laws, law enforcement, and legal culture to optimize the performance of law enforcement officers at the prosecutor's office. This study concludes that optimization of implementation can be achieved through several strategies, such as increasing the integrity of bureaucratic reform, strengthening an anti-corruption culture, and strict, consistent, and integrated law enforcement. There are many similarities between the structure of law enforcement in America and Indonesia in general, although there are differences in the main tasks and functions in detail. Indonesia as part of the judicial power which is pure and free from interference from political power is expressly stated in the articles of the 1945 Constitution of the Republic of Indonesia or by revising the Law. Law No. 16 of 2004 concerning the Prosecutor's Office

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