



Juridical implication and binding authority of dropping charge based on restorative justice

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Abstract

Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) is the basis for the implementation of the criminal justice system in Indonesia. The issuance of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is a new norm that is not contained in the norms of the Criminal Procedure Code. This study aims to explain the juridical impact and legal force binding termination of prosecution based on restorative justice. The research method used in this research is normative juridical research by examining the application of legal principles to the issuance of the Prosecutor's Office Number 15 concerning Termination of Prosecution Based on Restorative Justice. The results showed that the termination of prosecution based on restorative justice had broken through the formal legal system of the Criminal Procedure Code but had a positive impact on the implementation of the principle of a simple, fast, and low-cost trial, and the termination of prosecution based on restorative justice had binding legal force because it was the prosecution's discretion and legal remedies could not be taken for the sake of the realization of legal certainty. It is recommended that the regulation on prosecution discretion and the prosecutor's authority to conduct penal mediation be standardized in a regulation equivalent to the law so as not to cause multiple interpretations in its implementation.

Keywords: dropping of charge, restorative justice

Introduction

Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) is a formal law of the criminal justice process to defend the material criminal law (KUHP) and other criminal laws outside the Criminal Code. KUHAP is a complementary means of implementing material criminal law. The Criminal Procedure Code is the main basis for the criminal justice system starting from the investigation, prosecution, trial examination, and Execution. There are several principles in the Criminal Procedure Code, including the principle of legality. Juridically in the criminal justice system, the termination of prosecution based on restorative justice is not regulated in the Criminal Procedure Code, because the termination of prosecution has been regulated in a limited manner, namely insufficient evidence or not a criminal act, based on Articles 76, 77, and Article 78 of the Criminal Code. KUHP prosecutors also have the authority to close cases by law or set aside such as: "Nebis in idem Suspect/defendant dies Expires or (expires time)".

The issuance of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, is one of the policies of law enforcement and justice that responds to legal developments in society. The extension of the object of termination of prosecution for the sake of law based on restorative justice is by prioritizing the principle of recovery with the provision that the suspect has committed a crime for the first time, the maximum penalty is 5 (five) years, and the maximum loss is Rp. 2,500,000,000.00 (two million five hundred thousand rupiahs). The process of implementing the termination of the prosecution is based on the settlement of cases out of court. Practices like this sometimes seem to have annulled the nature of the principle of legality which is the principle of criminal procedural law. The purpose of this research is to find out how the duties and authorities of the prosecutor in the prosecution process and how the authority of the prosecutor in terminating prosecution in criminal cases.

Termination of prosecution of cases as stated in the Prosecutor's Regulation of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is an important matter to be studied from the perspective of the criminal justice system. This can be seen in several writings, among others. Muhaimin stated that this was against the principle of legality ^[1]. Some state that the termination of prosecutions like this is an effort to avoid overcapacity in correctional institutions ^[2]. Some of these writings have not reviewed the juridical impact of the application of the termination of the prosecution and how the binding force is.

Based on the above phenomenon, the purpose of this article is to analyze the juridical impact and legal force binding the termination of prosecution based on restorative justice.

Research Method

Under the formulation of the problem posed in this article, the method used is the normative juridical method, by examining the application of legal principles to the issuance of Prosecutor's Regulation No. 15 concerning Termination of Prosecution Based on Restorative Justice. Therefore, the materials used consist of primary legal materials in the form of legislation, secondary legal materials in the form of literature in the form of books and scientific journals related to this paper. As well as tertiary legal materials in the form of encyclopedias and legal dictionaries. The data will be analyzed using qualitative analysis.

Results and Discussion

The settlement of cases outside the judiciary above which leads to termination of prosecution is usually carried out for civil cases only, not for criminal cases, but based on the current legislation in Indonesia, in principle criminal cases can be settled out of court. For example, the mediation process regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System^[3].

The background of the penal mediation effort in the Criminal Justice System is based on thoughts that link the ideas of pragmatism and criminal law reform (penal reform). The thought of penal reform includes the concept of victim protection, harmonization, restorative justice, and overcoming the rigidity of formalities in the current criminal justice system. The search for other alternatives to imprisonment (alternative to imprisonment/alternative to custody) to avoid the negative effects of the current Criminal Justice System and the existing criminal system. Furthermore, the reason for pragmatism is to reduce the stagnation or accumulation of cases (the problems of court case overload) as well as to simplify the judicial process^[4].

In the criminal justice system, the juridical process to prove the guilt or innocence of a person against a criminal act/case is called the criminal justice process. The criminal justice process is carried out by and in a system called the criminal justice system. The criminal justice system, consists of institutions that are administratively independent and have their respective authorities but have the same goal, namely law enforcement^[5]. These institutions consist of the Police (Investigation Stage), Prosecution (Prosecutor), and Courts (Trial), which these institutions work based on their respective duties and authorities based on the provisions of the legislation.

Barda Nawawi Arief as quoted by Yoyok Ucur Suryono and Dadang Firdiiyanto explained^[6].

The law enforcement system is essentially identical to the judicial system because the judicial process is essentially a law enforcement process. The law enforcement system or judicial system is an integral part of various subsystems or components consisting of legal substance, legal structure, and legal culture.

The Criminal Justice System in Indonesia works under the country's Penal Policy. The penal policy accentuation gave birth to judicial independence, theoretically covering: the crime control model, due process model, family model, and Guardians model.

Due Process Model (*dader strafrecht*) which emphasizes the examination of errors before an impartial court followed by placing a person (suspect/defendant) who is based on equality before the law and takes formal factors into account, so that it does not pose a threat to a person's human rights. This concept is in line with consensus theory which states that every member of society agrees on basic norms that determine right and wrong. Meanwhile, the crime control model is right with *Daadstrafrecht* which states more of a repressive function than as a method for the efficiency of law enforcement based on the principle of speedy and thoroughness. In enforcement, it prioritizes administrative models, such as managerial models whose emphasis is on the quality of finding administrative facts that lead to the release of a suspect from prosecution and his willingness to declare himself guilty.

The authority to terminate the prosecution which has been regulated in a limited manner in the Criminal Procedure Code is because there is not enough evidence or it is not a criminal act. If we look more closely, the termination of the prosecution in question will rarely be carried out, because the reasons as stated in the Criminal Procedure Code are the same as the authority to terminate the investigation at the time of the investigation. The Criminal Procedure Code recognizes the existence of a pre-prosecution, meaning that when the case file is sent to the public prosecutor and it turns out that after being examined by the public prosecutor, the case file does not have enough evidence and is not a crime, the case file will be returned to the investigator, and of course, the investigator will determine his attitude based on the authority to stop the investigation.

In the Criminal Procedure Code, there are several principles, both expressed and implied in the norms of the Criminal Procedure Code system. The principle that is a concern and is always associated with the efficiency and effectiveness of criminal justice is the principle of a simple, fast, and low-cost trial.

From the explanation above, it is clear that the principle of fast, simple, and low-cost justice is the ideal of national law, which must be realized by all criminal justice subsystems in particular.

The fundamental issue of the issuance of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is related to the existence of the realization of the principle of simple, fast, and low-cost justice. The Attorney General has the duty and authority to streamline the law enforcement process by formulating 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.

Cessation of prosecution based on restorative justice is also an answer to the problem of Overcrowding. Solving the problem of overcrowding can be realized by building new prisons or reducing the number of occupants.

Meanwhile, several international instruments recommend rationalizing sentencing policies, including the use of alternatives to prison by trying to reduce the number of prisoners who are sentenced to long prison terms.^[7]

In its development, it turns out that the concept of stopping prosecution based on restorative justice cannot be ruled out even though it has to break through the principles of formal legality of the Criminal Procedure Code. The concept has also developed and can be applied in the criminal justice system, and has received a positive response from the community because law enforcement does not only consider aspects of certainty but what is more important is justice and the benefits of the law in society.

That the termination of prosecution based on restorative justice has logical consequences for the criminal justice system as the implementation of simple, fast, and low-cost justice principles and as an effort to suppress overcrowding, and the accumulation of cases in court (the problems of court case overload). Concerning law enforcement and justice, the policy steps to terminate prosecutions are based on restorative justice in the context of realizing substantive justice in society.

According to Tongat in his book the basics of Indonesian criminal law in the perspective of renewal as quoted by Ikbal, "the provisions on the reasons for stopping the prosecution of criminal acts in the Criminal Code Bill are intended to realize the value of justice and legal certainty under the values that live in Indonesian society itself".

The law is a manifestation of legal certainty which aims to create predictability. The purpose of this goal is for everyone to know what actions may and may not be taken next so that the law is beneficial for everyone to avoid the arbitrariness of the government because, with the existence of general rules, individuals can know what may be charged or done by the government. State against the individual^[8].

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law is implemented properly. Legal certainty expects that efforts to regulate law in legislation are made by authorized and authoritative people and are carried out wisely. So that the positive law has a juridical aspect that guarantees legal certainty and functions as a rule that must be obeyed^[9].

Normative legal certainty is when the rules made are clear (does not cause multiple interpretations), logical and certain. Clear rules and become a system of norms that do not conflict with other norms. Enforcement of the law consistently, clearly, consistently, and without being influenced by subjective circumstances is the meaning of legal certainty. Legal certainty and justice are not just moral demands but factually characterize the law. An uncertain and unjust law is not just a bad law^[10].

The termination of prosecution in the Criminal Procedure Code has been limited in a limited manner based on the provisions of Article 140 Paragraph (2) of the Criminal Procedure Code, due to technical reasons or the objective and subjective elements of a crime being not fulfilled. The impact of the termination of prosecution for technical reasons is that legal remedies in the form of pretrial can be taken. Meanwhile, the termination of prosecution based on restorative justice, which is based on the aspect of recovery, and the agreement of the parties with the concept of settlement of cases outside the court is not regulated in the Criminal Procedure Code.

The reason for terminating the prosecution based on the settlement of criminal cases outside the court, if examined, already existed based on Article 82 of the Criminal Code. The right to sue for an offense for which the main criminal threat is none other than a fine can be removed with the approval of the appointed official by general rules has been paid.^[11] The provisions of this article are useful because the formulation of the article will provide rational thought and also for legal certainty, especially for perpetrators of criminal acts. In tax cases, the concept of restorative justice is carried out with (1) the principles of restorative justice in law enforcement; and (2) the implementation of the principles of restorative justice in tax law enforcement in Indonesia, through tax collection efforts, tax audits, and investigations of criminal acts in the taxation sector^[12].

Regarding the principle of legality, in its development, changes have also been made, especially as stipulated in the RKUHP. The principle of legality gets exceptions as stipulated in Article 2 "laws that live in a society which considers an act to be an act are prohibited from being applied in a limited manner with certain restrictions, namely under the values of Pancasila and or general legal principles recognized by the people of nations. ". Article 2 of the RKUHP is an exception to the principle of legality, by accommodating customary criminal acts in fulfilling the sense of justice that lives in certain communities. Inclusion of living law in society to withdraw unwritten law or customary law into formal law.

It should be noted that constitutionally the 1945 Constitution never stated that legal certainty was identical with legal certainty. By always using the words law and justice simultaneously, it shows that the essence of law enforcement is not only law enforcement, but also contains a substantive meaning, namely supremacy/enforcement of material substantive values, in other words, it is not just a formal but substantive certainty of law enforcement, especially with affirmations. that the state judiciary applies and enforces law and justice based on Pancasila and the judiciary is carried out for the sake of justice.

Furthermore, from the perspective of the Indonesian criminal justice system, the principle of opportunity is defined as a legal principle that authorizes the attorney general to prosecute individuals or corporations in the public interest. Opportunity or deponering (setting aside cases in the public interest). The legal basis for the principle of opportunity is Article 35 letter c of the Prosecutor's Law, which stipulates that the Attorney General has the duty and authority to override cases in the public interest.

The principle of opportunity is also a general law principle that applies universally in various countries, such as the Netherlands, France, Belgium, the Russian Federation, Sweden and Japan, South Korea, and Thailand^[13].

The principle of opportunity is attached to all prosecutors as case controllers (*dominus litis*) in the criminal justice system.

Whereas in countries where the prosecution generally has a discretionary function, the issuance of laws and regulations must be able to provide guidelines for improving fairness and consistency in approaches to decision-making in the prosecution process, including the institution and elimination of prosecution.

Settlement of criminal cases outside the court is commonplace in legal practice in Indonesia, although the formal legality of the settlement is not known. However, the existence of case settlement outside the court is increasingly accepted by the community, because it is considered more capable of accommodating a sense of justice in society. This is because so far the law is considered blunt up and sharp down. Therefore, people prefer to settle cases through peaceful means known as penal mediation.

Settlement of cases through penal mediation has begun to be recognized in the Indonesian legal system, one of which is in Aceh. Aceh is a special area that is given the authority to apply customary law. The concept of customary law in Aceh has begun to be standardized in the form of a written regulation, namely Qanun Number 9 of 2008 concerning the Guidance of Customary Life and Customs. Cases that fall into the category can be resolved through customary institutions, law enforcement officers including the prosecutor's office as the controller of criminal cases must provide opportunities for traditional institutions to resolve the case through customary courts. Settlement through non-formal channels/institutions has binding legal force and no further legal action can be submitted.

In-Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, diversion is known. The implementation of diversion with a restorative justice approach, if the agreement is successfully reached, it will be followed by a request for a determination to the head of the local district court, then after that, the investigation or prosecution is stopped based on the authority of each institution of the criminal justice sub-system.

The latest developments respond to legal developments in society, based on the provisions of Article 32 of Law Number 16 of 2004 concerning the Prosecutor's Office, namely "...the prosecutor's office may be assigned other duties and authorities based on the law", one of the tasks and other authorities referred to is the diversion authority as referred to in paragraph (1). In the Juvenile Criminal Justice System Act. Then the Attorney General of the Republic of Indonesia in carrying out his duties and authorities based on Article 35 letters a and b of Law Number 16 of 2004 concerning the Prosecutor's Office has issued Prosecutors' Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

Based on Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, the opportunity for settlement of cases outside the court by prioritizing the principle of recovery and the agreement of the parties, which is carried out by peaceful means or penal mediation and leads to the termination of prosecution is even wider. The concept of law enforcement based on justice based on conscience received a positive response from the community in the process of substantive justice enforcement following the laws that live in society. Thus, small cases whose impact is not so big will no longer reach the courts.

This step forward taken by the Attorney General of the Republic of Indonesia is in the context of effective law enforcement and justice, as well as the realization of the principle of a simple, fast, and low-cost justice system. This is also done because the prosecutor is the controller of criminal cases, as the party who has the case that can determine whether or not a case can be delegated to the court.

Termination of prosecution based on restorative justice is precisely said to be a waiver of cases for the sake of law that lives in society, because the implementation of termination of prosecution based on restorative justice is based on reasons of wisdom by taking into account the sense of justice in the community, not because of technical legal reasons that dismiss the claim such as insufficient evidence or not being a criminal act.

In Civil law countries that also adhere to the principle of opportunities such as the Netherlands and Japan, the prosecutor has the right to sue and not to sue if the prosecution cannot be carried out or is not feasible or is not desired by the public or the government. In Japan, the Prosecutor may suspend the prosecution if according to his or her judgment there is no need for prosecution due to the behavior, age, condition of the perpetrator of the crime, the severity and severity of his actions, or the conditions resulting from it. The positive consequence of the application of this provision is that more than 50% (fifty percent) of cases related to the property (eg theft) committed by old actors are usually terminated by the prosecutor. Even Norway prosecutors can pass sentences without court intervention.

In a country with an Anglo Saxon legal system such as England, the Prosecutor of England and Wales will refer to Article 10 of the Prosecution of Offences Act of 1985 which stipulates "that to proceed with a case there must be sufficient and correct evidence. Can be expected to result in a sentence by a judge, while the prosecution must be in the public interest". As such, the UK Prosecutor may waive a case for policy reasons such as a less significant crime, the perpetrator being old, juvenile, or mentally ill, and for technical reasons. Whereas in the United States, prosecutors (eg US Attorneys, County Attorneys, and District Attorneys or State Attorneys) can be said to be independent in exercising their discretionary powers from the investigation stage to the post-trial process. His decisions in the field of prosecution are "almost completely free from the scrutiny of another person or entity". The prosecutor is given the authority to terminate the case by compromising the indictment or plea bargaining and the suspect admits his guilt (plead guilty) before he is tried. If the offer of compromise is accepted by the prosecutor, the prosecutor will reduce the original charge or will ask the court to impose a lighter sentence. Unlike in Britain, both sides often use and offer each other such compromises. In the Philippines, the Fiscal Office (Philippine Prosecutor's Office) has long been involved in diversion. In cases of fraud and criminal

cases due to negligence, it is possible to seek reconciliation between the suspect and the victim or by paying compensation to the victim, and this is another alternative for prosecution. As for other criminal acts, the prosecutor's decision to use or not to prosecute is based on the acquisition of evidence. In another case in Thailand, there is no legal provision that authorizes the Prosecutor to interfere with investigating officers who are carrying out criminal investigations. However, the Thai Criminal Procedure Code stipulates that after the investigator submits the case file to the Prosecutor, the investigator is obliged to heed the discretion of the Prosecutor regarding the termination of the investigation or additional investigation and the decision to prosecute or not to prosecute the case. Thai prosecutors can be said to have broad discretionary powers. Even if there is insufficient evidence, he or she may submit the case in question to the court. On the other hand, for any reason, he may stop the prosecution even if the evidence is sufficient to result in a sentence by the judge. Undeniably, the act of stopping prosecution has long been used by the Thai Prosecutor's Office.

Some of the comparative studies above show the existence of prosecutorial discretion as to the controller of criminal cases, in civil law countries with the same legal system as in Indonesia, such as Norway, prosecutors even have the authority to give sentences without interfering with the courts, either because of insufficient technical evidence or for discretionary reasons. Then comparative studies are also carried out in Anglo-Saxon countries, such as in America, prosecutors have the discretionary power from the investigation stage to the court by making a compromise on the charges (plea bargaining) so that the suspect may admit his guilt (plead guilty) before he is tried.

Reviewing the implementation of the termination of prosecution based on restorative justice, its implementation involves all interested parties in the case including the investigator through the RJ-3 letter (the notification letter for the implementation of restorative justice is also an invitation for investigators to follow the process). After the peaceful implementation, followed by the issuance of the Decision Letter for Termination of Prosecution (SKP2) which in the letter clearly states the reasons and conditions that are met for the implementation of the termination of the prosecution based on restorative justice along with the status of evidence that has been legally confiscated at the investigation stage. If a suspect was previously detained, he was immediately released from detention on the same day, the same applies to the implementation of the status of the evidence as stated in SKP2 (returned/confiscated to be destroyed or confiscated for the state). Then followed up with the issuance of SKP2 and the order was carried out by the prosecutor as a prosecutor and also as a peace facilitator, then the head of the local district attorney sent a notification letter (RJ-15) to the chairman of the local district court as well as to the investigating agency of the origin of the case.

As described above about prosecution discretion, Indonesia has been a Member of the International Association of Prosecutors (IAP) since 2006, at The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 in Alternative prosecution chapter explained:

“Based on the provisions of state national law, prosecutors are required to give careful consideration in determining the abolition of prosecution, to stop the trial of a case because of certain conditions or even without conditions, even to transfer criminal cases from the criminal justice system to non-formal justice, with full consideration of the rights suspect and victim. States should fully explore the possibility of adopting criminal case settlement schemes outside of formal justice to ease the excessive burden of courts, as well as to avoid the stigmatization of detention, indictment, and pretrial sentences, as well as the possible adverse effects of imprisonment, to achieve the above objectives”.

Thus, internationally, Indonesian prosecutors also have the discretionary authority to prosecute cases outside the court as the holder of the *dominus litis* mandate, to streamline law enforcement and justice based on the values that live in society. The Deputy Attorney General for General Crimes stated that "the termination of prosecution based on restorative justice has binding legal force and cannot be taken legal action, because it is the discretion of the prosecution and the policy of the prosecutor as the public prosecutor and case controller".

In the Prosecutor's Law Revision Bill which was ratified on December 7, 2021, into law, one of the important points of change relates to the addition of the prosecutor's authority to carry out penal mediation, and the authority to apply the use of peaceful fines in tax crimes, customs crimes or criminal acts. other economies.

The adoption of the concepts of stopping prosecution for reasons of the prosecutor's discretion by promoting legal principles that live in society is not unfounded and can be accepted because that is the concept of law enforcement that is desired in society. In the RKUHP and KUHP there is already an acknowledgment of the concept. So that later if the RKUHP and RKUHAP are ratified, such concepts will occupy a strategic place in the law enforcement process, especially in the settlement of criminal cases.

Conclusion

That the cessation of prosecution based on restorative justice has broken through the formal legality of the Criminal Procedure Code, but its implementation has a positive impact on law enforcement and justice and is the embodiment and implementation of simple, fast and low-cost judicial principles.

That the termination of prosecution based on restorative justice is based on the settlement of cases outside the judiciary by promoting the concept of restoring real justice enforcement in society, and its implementation is at

the discretion of the prosecution as the controller of criminal cases (*dominus liti*), so that its implementation has binding legal force and cannot be legal efforts are made for the realization of legal certainty.

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