

Niet Ontvankelijke Verklaard (NO) decision in Indonesian criminal justice system

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Abstract

Law number 8 of 1981 on Criminal Code Procedure have given limitation on decision which can be decided by judge in criminal justice process. On practice level it turns out the judge. In Indonesian criminal justice system often practice the decision out of provision criminal code procedure, in the form of decision of Niet Ontvankelijke Verklaard (NO) or demand (criminal procedure) cannot be received with various reasons of consideration which form the background.

This research has purpose to study and analyse whether decision of NO or demands (criminal procedure) is not acceptable in line with the principles of the Indonesian Criminal Justice System. The research method which used is the Normative Juridical Method, by studying the legal basis for implementation the NO decision in the Indonesian Criminal Justice System. The research results show that NO decision in the criminal case because of expired reasons and *ne bis in idem*, still in compliance with the principles of the Indonesian criminal justice system the purpose to reach or fill legal emptiness. The NO decision gives the right and logical base as a further filter to realize legal certainty for them who looking for justice. However, NO decision in criminal cases are other than the reasons for expire and *ne bis in idem* are not appropriate in practice, both in term of legal certainty and the principles of fast justice, simple, low cost. Because, in principle, Indonesian criminal justice system has given space for decisions on cases that are formally flawed in the form of intermediate decisions, which more certain and have legal effort institutions.

Keywords: No decision, criminal justice system

Introduction

Law number 8 of 1981 about Criminal Code Procedure is a legal protection implementation of the Indonesian criminal justice system in addition to other laws as complement to the norm of Criminal Code Procedure itself and a response to development and justice. Criminal Code Procedure as *the rule* be in session of court, adheres strictly to 3 (three) principles of *legality*, they are *Lex Certa* which means written, *Lex Scripta* which means clear, and *Lex Scripta* which means that is must not be interpreted other than what is clearly written^[1]. In this sense the norms are formulated in Criminal Code Procedure should not be interpreted liberally. Police, prosecutors, and judges in exercising their authority are bound by the provisions of Criminal Code Procedure norms.

Judges as one of the sub-system of criminal justice in implementing their authority are bound by the provisions of the Criminal Code Procedure norms, in addition to the freedom of legal discovery due to the legal emptiness or in the theory of the evidentiary system^[2]. Connected with beliefs that are bound by law (*negative wetterlijke*). The product or output of the judge/court decision is the hope of justice seekers. In the terms of legality, the type of decisions in criminal cases are regulated limitative in the Criminal Code Procedure, namely as follows

1. Sentencing decisions as regulated in Article 193 of the Criminal Code Procedure, if the defendant is legally proven convince to commit a criminal act which he was charged based on valid evidence based on article 184 of the Criminal Procedure Code.
2. Free decision (*Vrijpraak*) as regulated in article 191 verse (1) Criminal Code Procedure, if the guilt alleged against the defendant is not legally and convincingly proven;

3. Decision to be released from all legal demands (*Ontslog*) as regulated in article 191 verse 2 of the Criminal Code Procedure, if the crime alleged against the defendant is proven, but the act does not constitute a criminal offence.
4. Added one type of decision at the preliminary examination (or in the other words before the examination in the main case) in the term of intermediate decision, related with the authority to adjudicate and / or whether or not the charges submitted by the public prosecutor can be accepted (Vide verse 156 Criminal Code Procedure)^[3].

Besides the types of decisions as described above it turns out that in criminal justice practice there is still one type of decision that is often decided by a panel of judges hearing criminal cases namely in the form of an unacceptable prosecution decision or often called as *NO* (Niet Ontvankelijke Verklaard). The existence of *NO* decisions is basically only known in civil cases, whereas in criminal cases such decisions are not known except for the term *OP tegenspraak* (decisions for defendants who were present at the first court hearing but subsequently did not attend without a valid reason⁴).

The practice of *NO* decision can be seen from several court decision throughout Indonesia, starting from the *judex factie* court level to even the *judex juris* court level, with various considerations including^[5]

1. Such the Supreme Court Decision Number 490 / Pid / 2017, claims cannot be accepted due to errors in the application of the law relating to errors in complaint offenses or the time limit has passed.
2. Semarang District Court Decision Number 102/Pid.Sus/2017/PN.Smg, the prosecution cannot be

accepted because the public prosecutor cannot present the defendant for appropriate or legitimate reasons.

3. Serang District Court Decision Number 853/Pid.Sus/2022/PN Srg November 7th 2022 the prosecution could not be accepted because the public prosecutor was unable to present victim witnesses and was associated with the public prosecutor's lack of seriousness in carrying out the prosecution.
4. Madiun District Court Decision Number 206/Pid.B/2014/PN.Mad Jo Supreme Court Decision Number 272 K/Pid.Sus/2015 the claim cannot be accepted because the investigation of the claim cannot be accepted because the investigation is illegal on the grounds that the examination does not meet the requirements required or determined by law.

Some of the *NO* decisions above, show that the *NO* decisions still exists and is practiced by all panels of judges in Indonesia, for various reasons, although the type of *NO* decision is in principle unknown in criminal cases. Because Indonesia is a legal state which lays the foundation for every action of law enforcement officials to be based on written law, in this case Criminal Code Procedure, thus the *NO* decision on the one hand is considered to have violated the legality of the norms regulated by the criminal code procedure. On the other pragmatic side, the rule of *NO* decision is enough to minimize the backlog of cases in court. This has at least caused chaos in law enforcement, thus, there is a need for an in-depth study of the legal position of the *NO* decision in the Indonesian Criminal Justice System, whether in line with the principles of the Indonesian criminal justice system.

Research Method

Based on the problem formulation propose in this article the research method used is the normative juridical method by examining the legal basis for implementing the *Niet Ontvankelijke Verklaard (NO)* Decision in the Indonesian criminal justice system. Therefore, the sources used consist of primary legal materials in the form of statutory regulations, secondary legal materials in the form of literature such as books and scientific journals related to this article. As well as tertiary legal materials in the form of encyclopaedias and legal dictionaries. Data will be analysed using qualitative analysis.

Result and discussion

As described above, Criminal Code Procedure is the legal protection for the implementation of the Indonesian criminal justice system in addition to other laws as a complement and form of response to the development of the Indonesian criminal justice system. As formal law to maintain material law (Criminal Code), Criminal Code Procedure has a legality principle, which consequence is that each criminal justice sub system is subject to the authority granted by the criminal code procedure norms.

The principle of strict legality of the criminal procedure code is projected as a form of hope for guaranteed legal certainty in the process of the Indonesian justice system. Besides, the aim of the Indonesian criminal justice system is to utilize the system to tackle crime both through penal and non-penal means. Countermeasure through penal means are usually carried out by formulating criminal law norms which contains elements of the legal system, both

substantive, structural and cultural in society. The norms that have been successfully formulated will be operationalised through the criminal justice system^[6].

Discussed legal certainty as one of the goals of the Indonesian criminal justice system, is a form of protection of human rights in a just criminal justice process. Certainty is a matter (situation) that is certain, terms or conditions. The essence of the law is certain and fair. The law as guide to behaviour must be certain and the law is fair as a guide to behaviour must support and order that is considered reasonable. Therefore, the law can carry out its function because it is fair and implemented with certainty. So, question with legal certainty can only be answered normatively, not sociologically^[7].

Limitative types of court decision that have been regulated by the Criminal Code Procedure consist of

1. Final decision consisting of: sentencing decision, acquittal, and release from all legal demands.
2. The decision is not final decision, in SPPI practice, the form of decision that is not a final decision can be in the form of a determination or interrupted decision are often referred by the Dutch term "*tussen vonis*"^[8]. this type of decision refers to the provisions of Article 148, Article 156 verse (1) of the Criminal Procedure Code, namely in cases after the case has been delegated and if the defendant and/or his legal advisor submit objections/exceptions to the indictment of the prosecutor/ public prosecutor. This form of determination or final decision can formally end the case if the defendant and/or legal advisor and public prosecutor have accepted what was decided why the panel of judges. However, materially, the case can be reopened if the prosecutor/public prosecutor puts up resistance or *verzet* and then the resistance/*verzet* was justified so that the high court ordered the district court to continue examining the case in question^[9].

The type of this decision is limited from the perspective of legal certainty with logical consequences, there are no other types of decision other than the types of decisions described above. For each type of case submitted by the public prosecutor to be tried by a panel of judges, the final result must be a decision as described above.

At the practical level, there are times when the types of decisions that have been determined by the Criminal Code Procedure are not very relevant when applied in concrete cases. This causes judges to be based on their freedom and are also guaranteed by statutory provisions^[10] constructs that types of decisions such as *Niet Ontvankelijke Verklaard (NO)* or the public prosecutor's demands are unacceptable, which is actually unknown in the Indonesian criminal justice system. *NO* is usually known in civil cases in the form of the Lawsuits cannot be accepted because the formal record is that the power of attorney submitted is invalid, the Lawsuits is filled by a party who has no legal interest, prematur Lawsuits, Lawsuits beyond competence, Lawsuits for *obscuur libel*, Lawsuits for *error in persona*, and Lawsuits outdated^[11].

The practise of *NO* decisions in criminal cases are essentially legal assessments carried out by judges using *Argumentum Per Analogiam*, (analogy)^[12], which is a method of legal discovery where the judge looks for the more general essence of a legal event or legal action that is either regulated by law or for which there are no regulations

by relying on civil cases. However, this interpretation is not always appropriate in the criminal justice process, because procedural law, especially criminal procedural law, adheres to the principle of limited interpretation, even if it is interpreted it must be limited/Authentic interpretation ^[13] is limited to being regulated by existing the norms.

From the several cases described above, *NO* decision in criminal cases in the form of claims can be accepted in the form of consideration, in the form of claims that cannot be accepted due to errors in the application of the law relating to errors in complaint offenses or the deadline has passed, because the public prosecutor cannot present the defendant for appropriate or legal reasons, related with the public prosecutor's lack of seriousness in carrying out the prosecution, and because the investigation is invalid on the grounds that the examination does not fulfil the requirements required or determined by law.

Responding to the widespread practice of *NO* decisions by judges in criminal cases, Supreme Court through Circular Letter of the Supreme Court of the Republic of Indonesia Number 2 of 2019 concerning The Implementation of the Formulation Result of 2019 Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties for the Court, the criminal chamber's formulation section states "The public prosecutor's prosecution is declared unacceptable if the criminal case has expired or there is a *ne bis in idem* situation, then the judge's decision state that the public prosecutor's prosecution cannot be accepted".

The steps taken by the Supreme Court are positive steps, to ensure that there are no gaps in law enforcement. Institutionally and the criminal justice sub-section has the authority to make legal discoveries to administer justice to uphold law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the Legal State of the Republic of the Indonesia ^[14]. It is hope that the legal norms that have been established by the Supreme Court are a form of response to developments in the criminal justice system, in fact showing the essence of legal certainty is the main thing that must be considered in the formal legal process, because formal procedural law must be written.

Through this circular letter The Supreme Court has set limits on the application of Decision on *NO* Criminal Cases. Cases which in fact have expired, and *ne bis in idem* are appropriately constructed as a decision in the form of *NO* or the claim cannot be accepted, because the reason for the *NO* decision is not related to the main case, however, it is more about not fulfilling the formal requirements of the case. In Articles 76 and 78 of the Criminal Code Procedure, the reasons for dropping criminal charges are explained. So that such a *NO* decision is appropriate and in accordance with the needs of the criminal justice system which covers the development of law enforcement and justice.

According to theory in the law of prosecuting criminal cases, situation on that result in a decision of *NO* due to *ne bis in idem* and outdated will rarely occur, because in principle of prosecution law, the prosecutor will use *his opportunity* authority first, before the case is brought to court and the prosecution is stopped. This mean that there is a circular from The Supreme Court regarding claim that cannot be accepted or other terms *NO* due to expired reasons and *ne bis in idem* is a further filter to create legal certainty for justice seekers.

However, the case is different for the type of *NO* decision other than for reasons that are not expired and *ne bis in idem*, such as not being able to present the defendant or being associated with the public prosecutor's lack of seriousness in carrying out the prosecution, and because the investigation was illegal, in the author's opinion, the reasons for the *NO* decision for such legal circumstances is inappropriate. Judges who construct *NO* decision for such reasons have gone far beyond the limits of Criminal Code Procedure which has been regulated in a limited way with the authority make decisions.

Even if it is related to the theory of the judges decision, namely the theory of balance, the judge must consider the balance between fulfilling the conditions determined by law the interests of parties related to the case, such as the interests of society, the interests of the defendant, as well as the interest of the victim ^[15]. The *NO* decision in a criminal case for reasons that are not expired and *ne bis in idem* as outlined above is contrary to this theory, because the judges construct the decision. *NO* in this criminal case does not pay attention to the statutory provisions in the Criminal Code Procedure and The Supreme Court circular letter relating to types of criminal decisions.

Although it is argued that the *NO* decision product in criminal cases is the essence of the judge's freedom in giving decisions based on Article 5 paragraph (1) of law number 48 of 2009 regarding judicial power "Constitutional judges and justice are obliged to explore, follow and understand the legal values and sense of justice that exist in society", is less relevant to be associated. With the *NO* decision, the file being returned to the public prosecutor has provided a space for legal uncertainty for the parties, after the *NO* decision, the prosecutor will again transfer the case to court, after completing the formal requirements, so that cases that are decided on *NO* will have no end and cause legal uncertainty.

Such as the decision of the Banda Aceh District Court in a fraudulent investment case based on determination number 316/Pid.Sus/2022/PN Bna, in its decision, the panel of judges found the prosecution unacceptable and return the case file to the public prosecution on the reasons that the prosecutor was unable to read out the criminal charges after the trial had been postponed several times, it is also associated with the public prosecutor's lack of seriousness in handling the case ^[16]. In the end the prosecutor again transferred the case to the Banda Aceh State Court and was successfully proven so that the defendant was also convicted. This certainly does not have a good impact on the fulfilment of legal certainty, especially fulfilling the principles of fast justice, simple, low cost. In fact, in principle, when it comes to the case in question, the judge is only bound by the public prosecutor's indictment as a basis for judging, so that the judge can decide on the punishment from the start against the defendant, based on the results of the court examination without having to determine case *NO*. Regarding the freedom of this judge, Soepomo argued, "That judges carry out their duties based on the custom of being bound custom and free". Judges are willing to review a case and explore it in depth then think about whether the decision taken in the past can still be maintained with changes in society due to the growth of a new sense of justice in society ^[17]. These bound are free customary freedoms are intended to relate to the subject matter, related to *strafmach* or the types of punishment appropriate to be

imposed or a fact that leads to reasons for forgiveness and justification. This does not lead to a type of decision that falls outside the limitative provisions of the Criminal Code Procedure.

In line with Elfi Marzuni's opinion in her thesis stated "The application of the principle of freedom of judges in making decisions in criminal cases is not absolute in nature, because it is limited by law, both material criminal law which adheres to the principle of legality and formal criminal law as a guide for judges in examining and deciding cases"^[18]. Elfi Marzuni's opinion provides justification that the judges's freedom in making a decision in a criminal case is not free at all, but must be in line with written law and not go too far from the principles of written law.

Conclusion

A *NO* decision in a criminal case in the form of a claim that cannot be accepted for reasons of expiration and *ne bis in idem*, is still in line with the principles of the Indonesian criminal justice system in order to reach or fill legal gaps. The *NO* decision provides the right basis, and logical as a further filter to create legal certainty for justice seekers. However, the *NO* decision in a criminal case is for reasons other than expiration and *ne bis in idem* after the examination of the main case is not appropriate to practice, both in term of legal certainty for litigants, and in term of fulfilling the principle of speedy justice, simple low cost, because in principle the Indonesian criminal justice system has provided space for decision on cases that are formally flawed before the examination of the main case in the form of a decision rather than a final decision which is more certain and has a legal remedy institution.

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