The Reconstruction of Principles Legality of Terminating Prosecution by Restorative Justice in the Salatiga Prosecutor's Office

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Abstract. The first emersion of the Regulation of Prosecutor General Number 15 of 2020 about the termination of prosecution based on Restorative Justice is expected to be able to resolve the crime in a peaceful way between the performer and the victim. During the run out of PERJA (the head of attorney general office regulation) in Salatiga State Prosecutor's Court there were two cases that were stopped its prosecution based on Restorative Justice using the Statute for the Termination of Prosecution (SKPP). The termination of the prosecution (SKPP) still allows for prejudicial legal efforts, thus creating legal uncertainty. This condition is different from the diversity in the criminal justice system of children that is not possible pre-jurisdiction. While the termination of the prosecution is based on restorative and diversified justice, both is the same and the same is the execution of restorative justice. This study examines what should be the basic of termination of the prosecution based on restorative justice. This research is a jurisprudence research which using normative with methods of collection of data of library studies by using qualitative descriptive analysis. The conclusion of this research is creating legal certainty which should be the termination of the prosecution based on restorative justice refers to the basis of opportunity, not for the sake of the interests of the law as in Article 140 (2) of the legal constitution. For future, there is necessary to extend meaning of the basis of opportunity as the basis for the termination of prosecution based on the Restorative Justice in order to legal certainty.

Keywords: opportunity's fundamentals, reconstruction, restorative justice.

1. Introduction

Criminal law is one strategy for preventing crime. According to the retributive paradigm, [1] the offender is treated as a passive victim during the legal sanctioning process.[2] With the growth of significant crimes on a national and international level, retributive justice is becoming more dominant.[3] According to the retributive paradigm, crimes must be punished either through legal action or the criminal justice system.

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In reality, case resolution through litigation may not always proceed as planned and desired. In fact, the criminal justice system's use of litigation to resolve disputes creates a number of new issues, such as the persistent retaliatory nature of the punishment paradigm.[4] According to Packer, if employed arbitrarily and indiscriminately, or if enforced in a generalized and coercive manner, criminal sanctions might be seen as a (threatened).[5] Therefore, restorative justice emerged during its development. Restorative justice was developed as a attributive justice system's inability to satisfy society's overall sense of justice.[6]

For example, 15-year-old AAL from Palu, Central Sulawesi, stole flip-flops. There was also the incident involving Minah, who was charged with stealing three cocoa pods in Banyumas Regency.[7] Due to the low loss value in the flip-flop theft case and the elderly age of the culprit in the Minah's grandmother case, the community felt that it was improper to prosecute both instances in criminal court. Restorative justice should be used as a top priority in these situations to end the crime.

In order to implement restorative justice throughout the prosecution stage, The Office of the Minister of Justice of the Republic of Indonesia has issued Regulation No. 15 of 2020 of the Minister of Justice on Termination of Restorative Judicial Prosecutions. Justice must be restored.

The Attorney General's Regulation is used in Attorney General's Office to conduct restorative.[8] The termination of prosecution based on restorative justice is included in concluding the case in the interest of the law or through a Decree of Termination of Prosecution (SKPP).

According to KUHAP Article 140 paragraph (2), the prosecutor "may discontinue prosecution" of a matter. This means, prosecutor cannot bring an investigation submitted by the investigator to a court hearing. However, the goal of this action is not to end or derail a criminal case. As a result, there must be separation between the suspension of prosecution and the dismissal of a case,[9] " what is implied by end of arraignment does exclude the saving of cases in the public interest, which the power of Head legal officer."

According to Perja 15/2020, the end of case on basis of restorative justice is the prosecution termination, not the setting aside (deponering) of the case. Peace agreements based it can be canceled through pretrial, resulting in legal confusion about the status of the parties, particularly suspects in criminal charges.

2. Problems

a. How is the prosecution termination in Restorative Justice implemented at Salatiga District Attorney's Office?

b. How is the best legal basis for ending a case based on restorative justice in order to achieve legal certainty

3. Method

This study employs juridical sociology, which examines humans or societies as subjects. [10] The goal of the legal approach is to get an awareness of the legal laws pertaining to the policy prosecution's policy termination by Restorative Justice. Sociological and empirical approach's goal is to comprehend the legal ramifications of restorative justice-based prosecution termination in the community, particularly in the jurisdiction of Salatiga Attorney's Office. This study looks at positive legal theories that are appropriate in Indonesia. The study focused on Salatiga City, which the Setara Institute predicts will be one of Indonesia's most tolerant cities in 2020.[11] The focus of this research is on criminal offenses deterred by restorative justice in Salatiga Attorney's Office. To examine preparation of study outcomes, an analytical descriptive approach was applied. This research is descriptive in the sense that it gives a full, detailed, and systematic presentation of legal theories. As a result, the sources are legal materials from the primary, secondary, and tertiary levels.

4. Discussion

4.1. Implement Restorative Justice Prosecution at the Salatiga County Attorney's Office

Law is hope in achieving justice, that considered equal before the law and enjoy the same treatment.[12] Accordingly, the Radburch view mentioned by Alexy asserts that legal fairness is very important.[13] One way to achieve these legal goals is to use restorative justice strategies to resolve disputes. Restorative justice is an alternative to the traditional, flawed justice system,[14] which is seen as incapable of redressing conflicts in society[15] and ignores the needs of the victims.[16] Restorative justice values empowerment, honesty, respect, participation, volunteering, healing, restoration, personal responsibility, inclusivity, collaboration, and problem solving. Ethicalization, healing, empowerment, and transformation are other principles.[17]

From the point of view of prosecutor authority, the prosecutor is tasked with proving that the defendant is wrong in front of the court as a public prosecutor, but on the other hand, in the origin Criminal Code, point 7, states that "Prosecution is the action of prosecutor to submit a criminal case to the court so that it can be examined and decided by a judge at a court session."

The prosecutor has a monopoly on prosecution, which means that no other institution has the right to do so. The principle is called dominus litis, come from the Latin meaning owner and litis meaning case or claim.[18] One of dutiy of the dominus litis is to screen criminal cases and decide whether or not it is necessary to proceed to the trial stage by considering the objectives of the law.[19]

The screening of a case for whether or not it can be continued to the trial process has implications for the ability of criminal case to be terminated by Prosecutor. Attorney General Regulation Number 15 of 2020 concerning termination of prosecution by restorative contains the Prosecutor's authority to terminate prosecution based on restorative justice; this is a legal breakthrough in resolving criminal acts. The restorative justice concept puts victims and perpetrators on equal footing in order to create a mutual peace agreement.[6]

Attorney office of Salatiga, has prosecuted 462 (four hundred and sixty-two) criminal cases in January 2021 through December 2022.[20] The submission of case files to trial through the Salatiga District Court is one of the authorities possessed by Prosecutor at Salatiga Attorney's Office. In other law enforcement, According to the Data of General Crime in the Prosecutor at Salatiga Attorney's Office during the period January 2021 to December 2022 has also succeeded in seeking termination of prosecution based on restorative justice in 2 (two) cases. These crimes were discontinued based on restorative justice after peace was reached between the suspect and the victim of the crime with the facilitator of the Prosecutor at the Salatiga Attorney's Office. The two criminal charges were stealing, which was suspected of breaking Article 362 of the Criminal Code, and domestic violence (KDRT),

The purpose of terminating the prosecution by Restorative Justice is not only limited to achieving a peace agreement, but achieving the truth, especially material truth. [21].The justice in question is restorative justice. Based on Article 4 of Perja 15/2020, there are 3 (three) conditions to stop the prosecution by Restorative Justice:

a. The criminal offense was only committed once (not repeated);
b. The punishment does not exceed 5 years of imprisonment; and
c. The loss is not more than Rp.2, 500, 000,-.

There are three requirements of terminating of prosecution by Restorative Justice, such as: [19]

a. Punishment requirements are expanded if the criminal offense is related to property;
b. The value of public loss may increase if the criminal offense involves person, body, life or freedom; and
c. Criminal punishment and loss value requirements can be expanded if the criminal offense is related to negligence.

The presence of Perja 15/2020 can be considered as a new breakthrough in legal substance. The aim is to eliminate the rigid understanding of positivism and encourage progressive law through the idea of restorative justice that involves the perpetrator,

victims, their families, and other parties to work together to reach a fair settlement that emphasizes restoring the original state rather than retaliation.[21]

The prosecutor facilitates restorative justice, promoting peace between perpetrators and victims through a voluntarily conducted process without pressure or threats. Successful peace agreements are documented in writing.

This peace agreement serves as the basis for Prosecutor to problem a Decree of Discontinuation in prosecution (RJ-14). However, the Cessation of Prosecution can be revoked if:

a. At a later date, the investigator and public prosecutor find new reasons; or
b. A pre-trial decision or a pre-trial decision together with a final decision of the Court of Appeal declares that the termination of prosecution is invalid.

During the enactment of Perja 15/2020, the Prosecutor at Salatiga Attorney's Office has discontinued prosecution based on restorative justice in 2 (two) criminal cases. The first was a theft case and the second was a domestic violence case. In the theft case, the suspect stole a wallet containing approximately Rp.655, 000 (six hundred fifty five thousand rupiah). At the prosecution stage the suspect returned the loss suffered by the victim, so the public prosecutor at Salatiga Attorney's Office discontinued the prosecution based on restorative justice for the crime.

The Salatiga Attorney's Office dropped the second domestic violence case on restorative justice grounds. The case involved a child beating his biological mother. After reconciliation efforts, the suspect apologized and the victim voluntarily accepted the mistake.

Empowerment, honesty, respect, participation, volunteering, healing, restoration, personal responsibility, inclusion, cooperation, and problem-solving are all used in implementing restorative justice. Other guiding ideas include moralizing, healing, empowering, and transforming.[22]

In addition to the realization of justice, this restorative justice approach also realizes legal benefits, where it can be seen the resolution of case by restorative justice, there is a restoration of good relations between the perpetrator and the victim, as an example of the return of good relations between the mother as a victim and the suspect as her son to be re-established in an effort to resolve criminal acts based on restorative justice at the Salatiga Attorney's Office. In the crime of theft, with the peace process facilitated by the Public Prosecutor, the suspect of the crime of theft and his victim have a good relationship because of this. The reestablishment of good relations between the perpetrator and the victim is because in the process, the victim can express his desire to get compensation for the losses he received and provide an opportunity for the perpetrator to be able to compensate for the losses suffered by the victim. This is important, because

the process of punishment with a conventional approach does not provide space for the parties involved to play an active role in solving problems between both.

However, restorative justice as the discontinuance of Prosecution at the Salatiga Attorney's Office allows the discontinuation of prosecution to realize the values of Justice and Legal Benefit. However, restorative justice prosecution discontinuance allows a case that has been discontinued to be re-prosecuted if the pretrial decision states that the case should still be prosecuted. As a result, one of the legal objectives of restorative justice prosecution termination has not been achieved.

Basically, pretrial is needed in the criminal justice system to protect human rights and suspects in preliminary examination the investigation and prosecution level from unfair actions from officer. The Criminal Procedure Code has authorized parties with legal standing to file a pretrial motion for the termination of prosecution.[23] According to number 80 of Criminal Code, investigators, public prosecutors, or interested third parties (owners of legal status) have the right to file a pretrial application regarding the termination of prosecution. This request must be submitted to the head of the district court and accompanied by reasons. Constitutional Court of Indonesia's decision No. 76/PUU-X/2012. stated that interested third parties in KUHAP are directly affected victims, i.e. those who are materially and spiritually harmed by criminal acts, as well as indirectly affected victims, i.e. those affected by corruption where the wider community feels indirectly harmed.

4.2. The Ideal Legal Foundation as a foundation for Prosecution Termination Based on Restorative Justice to Create

Legal Certainty Principle prosecution is principle of legality and opportunity (legaliteits en het Opportuniteits Beginsel).[24] Under legality principle, The Prosecutor is required to prosecute criminal acts. This means that the Prosecutor is required to proceed with prosecution in cases where there is sufficient evidence. However, under the principle of opportunism, the Public Prosecutor has the authority to request a case to the court, either conditionally or unconditionally. Therefore, in this case, the Prosecutors cannot prosecute someone for a criminal offense if it would be detrimental to public interest.

According to the Law, the Prosecutor as a Public Prosecutor can conduct prosecutions, execute judge decisions, and exercise other powers granted by the Law.[25] The public prosecutor can refer anyone charged with a criminal act to the court to prosecute them. Therefore, the prosecutor has the authority to determine whether or not to file charges.

Prosecutor has exclusive authority in conducting prosecution with the view that there are grounds to discontinue prosecution if he or she believes there are grounds to decline prosecution.[24] The Prosecutor does not prosecute for policy reasons or "setting aside the case". This is due to the fact that the Public Prosecutor does not only look at the criminal offense itself, but also how the criminal offense impacts the community. He only

looks at the criminal offense based on criminal law regulations. The Public Prosecutor is trying to determine how big the incident is and how to solve it. In other words, Even if there is enough evidence to go to court, the prosecutor may dismiss the case. This authority is used in the public or individual interest based on an unwritten legal basis called the principle of opportunity.[26]

Although KUHAP (Criminal Code Procedures) does not explicitly explain the Attorney General's opportunistic authority, it explains that the Attorney General has the authority to set aside cases. There are three categories of case setting aside on the basis of opportunity, namely on the basis of criminal law assessment, on the basis of legal interests, and on the basis of opportunity.

Therefore, Prof. J. M. Van Bemmelen states that there are three reasons why prosecution is not conducted, [27] such as:

a. For the State Interest

When some aspects of the problem may cause disproportionate pressure in the community, it is in the interest of the state to expect a prosecution, which if prosecuted will result in the community becoming suspicious, causing great harm to the state.

b. For the wider community interests

Prosecution is not carried out because the act cannot be held socially accountable. Aside from that, this includes avoiding punishment based on societally evolved idea.

c. Self-interest

Where there is a desire from vested interest to discontinue prosecution because it relates to the matter that is considered minor. If prosecution is not carried out due to vested interests, it could be detrimental.

The Attorney General has had the jurisdiction to set aside cases since the passage of Law Number 15/1961 on the Fundamental Provisions of the Public Prosecution Service of the Republic of Indonesia. This jurisdiction was eventually expanded into Article 35 letter c of Law of the Republic of Indonesia No. 5 of 1991 about the Prosecutor's Office of the Republic of Indonesia, which states that the Attorney General is responsible for carrying out the functions outlined in the Law.

Furthermore, as an application of the concept of opportunity, the general attorney has the authority to set aside a case. This can only be done by the Attorney General after considering the recommendations and opinions of the bodies of state power relating to the matter. Meanwhile, Article 14 paragraph (h) of KUHAP allows the public prosecutor to close a case in the public interest, without explaining what can be considered as public interest, and the general explanation section of the article does not provide a more detailed definition of public interest.[28]

Actually, the amount of public interest required to realize the principle of opportunity is not a new issue. The term "state, nation, or society" is not defined in Article 35 letter c of the Indonesian Prosecutor's Office Law. As a result, multiple interpretations have emerged from legal practitioners, legal academics, and the general public.[29]

The explanation of the statutory provisions shows that the definition and purpose of the public interest to be protected by principle of opportunity is very unclear. In other words, public prosecutors must selectively discontinue criminal cases in the public interest so as not to victimize victims. The public interest standard of how the domain of the principle of opportunity should be protected currently often leads to vagueness in deponering a criminal case.

Thus, the definition of the public interest component must be explained based on this issue. First, an element of state interest. Krasner considers the state as all the roles and institutions that move towards goals that are distinct from the interests of a particular group in society.[29]

Meanwhile, in the Kamus Besar Bahasa Indonesia (KBBI), "Nation" is defined as a collection of people who are the same in terms of language, customs, descent, and historical struggle.[30] The state interests can be defined as all interests, including the interests of the nation and state itself. These include national political, economic, educational, spiritual, and welfare interests.[31]

The general interest of the community at large is the next component, as it shares common traditions, systems and legal rules, communities are formed in close relationships and often lead to collective living, i.e. working together to achieve certain goals.[32] Unpopular government practices, such as refusing to pursue some instances, might lead to changes in case waivers.. This is because the policy does not bring justice to the community. Therefore, there is a public reaction asking the government to stop prosecuting the case because it threatens the security and public order. So, the prosecution of this case may not be carried out in this situation.[33]

In addition, Andi Hamzah stated that the standards for the application of this principle in Japan and the Netherlands are trivial cases, old age, and reimbursed losses. This principle was established because of the possibility of the imposition of certain conditions, such as paying a fine, might occur. In contrast, in Germany, the setting aside of cases is unconditional. It is only necessary to seek the judge's approval, because they believe in the law. Very often, permission is granted.[34]

In contrast, the Norwegian Public Prosecution Service, since 1887, has adopted the principle of opportunism by giving judges wide latitude; judges in that country even have the authority to impose out-of-court sentences (UNAFEI Report, 1986)[24]. In certain cases, prosecutors even have the authority to set aside cases so that prosecutors in Norway are called semi judges.[35]

In view of the above, several countries that adhere to the principle of opportunism have defined the setting aside of cases based on various reasons in the context of prosecutorial discretion, especially in relation to out-of-court settlement efforts (afdoening buiten proces), as set out in Criminal Code, Article 82.

Restorative justice is considered a discretionary power exercised by the prosecution during the prosecution phase. According to Article 30 C of Law 11/2021, in addition to performing the functions and powers mentioned in Article 30, Article 30A and Article 3OB, the Ministry of Public Affairs is authorized to participate in and actively handle criminal cases involving witnesses and victims, as well as the rehabilitation, compensation and compensation process; conduct criminal mediation, confiscate judgment enforcement to pay fines and replace.

According to Gustav Radbruch in Lewaoods, the primary goal of legal certainty is to maintain peace and order.[36] Legal certainty, for example, requires that a law be enforced even if its application is unfair. The existence of legal certainty protects those seeking justice against arbitrary actions.[37] As a result, in order to comprehend the importance of legal certainty, we must examine the relationship inside the applicable positive legal instruments.[38]

In addition, restorative justice can enable the resolution of cases through the discontinuation of prosecution. Van Apeldoorn argued that not all offenses need to be prosecuted in court, especially if the consequences of the criminal offense are very insignificant.[39]

By incorporating interested parties, including law enforcement authorities, the emergence of Perja 15/2020 is a type of reconciliation between victims and perpetrators. [40]

In KUHAP, the discretion of Public Prosecutor/Prosecutor only regulates the Attorney General who can set aside a case as a form of implementation of the principle of opportunism. This is unlike the globally recognized principle of opportunism, which is defined as "The public prosecutor may prosecute or not prosecute with conditions or without conditions a case to court" (the public prosecutor may choose, with conditions or without conditions, to prosecute to court).[24]

Meanwhile, in Indonesia, case setting aside or deponering in the form of case settlement through restorative justice is an establishment or creation of new law (rechtsvinding), so it is still necessary to consider it carefully, because the law requires justice or legal equality. This case setting aside is one of the policies that are seen as full of controversy from various perspectives.

According to what the author has described, as a follower of the principle of opportunity, Indonesia must fully implement the principle by broadening the definition and scope of the principle of opportunity of the Prosecutor or Public Prosecutor in the Law or other regulations with a legitimate legal basis. Furthermore, it is critical to define

the term "public interest" in circumstances involving both private and public interests.The existence of Perja 15/2020 on terminating of Criminal Cases based on Restorative Justice is actually a major step taken by the Prosecution Service to maintain the order and security of the state and society. In practice, it is sometimes clear that a person commits a crime for social or psychological reasons. Thus, if a person is prosecuted in advance, they will not do so

5. Conclusion

Salatiga Attorney's Office has terminated prosecution based on restorative justice for 2 (two) criminal offenses out of 462 (four hundred and sixty-two) cases that were prosecuted by the Salatiga District Court within the last two years, from January 2021 to December 2022. The offenses were theft and domestic violence. The termination of prosecution based on restorative justice is said to create justice and benefit for the parties. Despite, it has not been able to achieve legal certainty because the decision to stop the prosecution based on restorative justice is still canceled by a pretrial decision.

An ideal legal foundation for the termination of prosecution based on restorative justice to create legal certainty is by expanding the mean of the principle of opportunity, it means the principle of opportunity is not only in the interests of the public and society but also in the interests of individuals. The use of the principle of opportunity in the interests of the individual is become the basic on terminating prosecution based on restorative justice. Therefore, it is necessary to take concrete steps in the form of amendments of legislation, such as the Law on the Prosecutor's Office of the Republic of Indonesia or other regulations relating to the principle of opportunity. By expanding of the scope of the principle of opportunity to include individual interests, the termination of prosecution based on restorative justice has a strong legal basic to create legal certainty over the termination of prosecution based on restorative justice carried out by the Prosecutor

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