Termination of Prosecution Based on Restorative Justice as an Expansion of the Meaning of Case Waiver

Tolib Effendi, Dominikus Rato, Bayu Dwi Anggono

Faculty of Law, Trunojoyo University, Madura
Faculty of Law, University of Jember
Faculty of Law, University of Jember
te.effendi@trunojoyo.ac.id

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Abstract

The Criminal Procedure Code (KUHAP) and the Attorney General's Act give the public prosecutor and the Attorney General the authority to terminate prosecution, close cases in the interests of the law and set aside cases in the interests of the public. After Prosecutor's Regulation Number 15 of 2020 brings new problems because there is a termination of prosecution based on restorative justice which was previously unknown in both the Criminal Procedure Code and the Attorney General's Act. The purpose of this paper is to determine the position of termination of prosecution based on restorative justice as an extension of the meaning of termination of prosecution, closing cases in the interests of the law or setting aside cases in the interests of the public, and to determine the legal consequences of termination of cases based on restorative justice. The research method used is doctrinal research to find consistency and legal certainty in the termination of prosecution based on restorative justice.

Keywords: Deponeering; Prosecutor; Restorative Justice; Termination Prosecution.

Introduction

The Prosecutor's Office is the only institution that has the authority to prosecute (dominus litis). This authority is as stated in Article 1 point 7 of the Criminal Procedure Code concerning the definition of prosecution. Prosecution is defined as the action of the public prosecutor to transfer a criminal case to the competent district court. The Prosecutor's Office is an institution that functions as a dividing door between the investigation stage and the trial examination stage.[1] The prosecutor's Office, in addition to having the authority to prosecute, also has the

[1] Marwan Effendy, *The Indonesian Prosecutor's Office: Its Position and Function from a Legal Perspective* (Jakarta: Gramedia Pustaka Utama, 2005), 2.

authority to close a case in the interests of the law, stop prosecution and set aside a case in the interests of the public. Specifically, the setting aside of a case in the interests of the public is only held by the Attorney General as the public prosecutor. The authority held by the Prosecutor's Office is distributed in two regulations, namely in Article 140 paragraph (2) letter a of the Criminal Procedure Code of Law Number 8 of 1981 concerning Criminal Procedure Law (hereinafter referred to as the Criminal Procedure Code) and in Article 35 letter c of Law Number 16 of 2004 concerning the Prosecutor's Office (hereinafter referred to as the Prosecutor's Law).

The existence of the authority to prosecute on the one hand and the authority to stop, close cases and set aside cases, on the other hand, is a dualism in the prosecution system in Indonesia that has been going on for a long time. In the literature on criminal procedure law, two principles/principles can be identified in prosecution, namely legality and opportunity. The legal basis that is often referred to about the principle/principle of legality in prosecution is as regulated in Article 137 of the Criminal Procedure Code. Article 137 of the Criminal Procedure Code reads, "The Public Prosecutor has the authority to prosecute anyone accused of committing a crime within his/her jurisdiction by referring the case to a court that has the authority to try it". Meanwhile, Article 140 paragraph (2) letter an of the Criminal Procedure Code reads, "If the public prosecutor decides to stop the prosecution because there is insufficient evidence or the incident turns out not to be a crime or the case is closed by law, the public prosecutor states this in a decision letter" can be interpreted as an exception to the principle of legality. Moreover, the provisions contained in Article 35 letter c of the Attorney General's Law which reads, "The Attorney General has the duty and authority: ... c. to set aside cases in the public interest". In the explanation of the article, it is stated that setting aside a case as referred to in Article 35 Letter c of the Attorney General's Law is an implementation of the principle of opportunity and can only be carried out by the Attorney General after considering the advice and opinions of state authorities that have a relationship with the problem.

Dualism in this prosecution system must distinguish between opportunity as a principle and opportunity as an exception, but this dualism makes the prosecution

process complicated because a case can be reviewed many times to reach the trial examination stage (for example, the Bibit-Chandra case which after several pretrial processes was finally set aside by the Attorney General). Indonesia adheres to the principle of opportunity in a negative sense, meaning that the implementation of this principle is carried out in a limited manner. Dualism in this prosecution system has the potential to become even more complex with the enactment of the Republic of Indonesia Attorney General's Regulation (Perja) Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. In one of its considerations, this prosecutor's regulation was formed by prioritizing restorative justice that focuses on restoring the original state and the balance between the protection and interests of victims and perpetrators of criminal acts by not only orienting on revenge but also on renewing the criminal justice system. The termination of prosecution based on restorative justice in Perja Number 15 of 2020 is intended to improve positive criminal law in Indonesia by developing or reforming criminal law and developing or renewing fundamental thoughts/concepts/ideas that do not only prioritize norming in their articles.[2]

2023, based on data from the Attorney General's Office's Case Management System, information was obtained on the number of cases received on the Notification of Commencement of Investigation (SPDP) of 165,760 cases, with the majority of cases 81,472 (49%) being criminal cases against people and property.[3] Of the 165,760 cases, 2,459 cases have been terminated based on Restorative Justice as referred to in Perja Number 15 of 2020 with details of 2,261 cases of State Security and Public Order and Other General Crimes (Kamnegtibum and TPUL), 274 cases of People and Property (OHARDA) and 124 cases of Narcotics and Other Addictive Substances.[4] In East Java itself, in the same period (2023) there were 335 cases resolved through restorative justice with several indicators including 1) condition of the suspect (first time committing a crime); 2) type of crime (threatened

[2] La Ode Awal Sakti, "The Concept of Balance in the Enforcement of Prosecution Termination Based on Restorative Justice," *The Enlightener* 7, no. 4 (2021): 586.

[3] Prosecutor's Office of the Republic of Indonesia, "Case Handling Information," accessed September 27, 2024, https://cms-publik.kejaksaan.go.id/.

[4] Prosecutor's Office of the Republic of Indonesia, "Book IV Annual Report 2023" (Jakarta: Attorney General's Office of the Republic of Indonesia, 2024), 42.

with a fine or threatened with imprisonment of not more than 5 (five) years); 3) value of loss (the crime is committed with the value of evidence or the value of loss caused by the crime of not more than IDR 2,500,000 (two million five hundred thousand rupiah).[5]

From data sourced from the annual reports of the East Java High Prosecutor's Office and the Attorney General's Office of the Republic of Indonesia, there is a use of different terms, where the Attorney General's Office uses the term "termination of prosecution cases based on restorative justice" while the East Java High Prosecutor's Office uses the term "cases that can be restored or cases resolved using restorative justice (Restorative justice)". The use of two different terms from one institution brings uncertainty to the status of the case, considering that the official term used in Perja Number 15 of 2020 is Termination of Prosecution based on Restorative Justice, which means that the case is at the prosecution stage and the case is terminated with consideration of restorative justice. In the 2023 East Java High Prosecutor's Office annual report, there were 357 cases proposed for restorative justice, but only 335 cases were approved for restoration because they did not meet several cumulative requirements in terms of 1) the condition of the suspect; 2) the type of crime committed; and; 3) the number of losses incurred.[6]

When viewed from the nomenclature of the use of terms in Perja Number 15 of 2020, the restorative justice referred to in this formulation is the termination of prosecution, however, if referring to the provisions of Article 3 paragraph (2) of this regulation, the term case closure is used in the interests of the law, where previously the regulation on case closure in the interests of the law had been regulated in Chapter VIII of Book I of the Criminal Code concerning the elimination of the authority to prosecute and carry out criminal penalties for three reasons, namely ne bis in idem, the suspect/defendant died, and for reasons of the expiry of the case.[7] Based on the description above, the formulation of the problem

[5] East Java High Prosecutor's Office, "2023 Annual Performance Report" (Surabaya: East Java High Prosecutor's Office, 2024), 42.

[6] East Java High Prosecutor's Office, 42.

[7] Tolib Effendi, *Basics of Criminal Procedure Law: Its Development and Renewal in Indonesia* (Malang: Setara Press, 2014), 137.

that will be studied in this paper is::

1) Is the termination of a case based on restorative justice grounds an extension of the meaning of termination of prosecution, closing a case by law or setting aside a case for the sake of public interest?
2) What are the legal consequences of terminating a case based on restorative justice grounds?

Several previous studies have discussed restorative justice in this prosecution stage. Of these studies, several studies examine the application of restorative justice in each region such as research by Iwan Kurniawan, Rodliyah and Ufran.[8] researching the requirements, implementation and obstacles in the application of restorative justice at the West Nusa Tenggara High Prosecutor's Office, research by Akbar Priagung and Kristiyadi [9] Researching the application of restorative justice in the prosecution stage as a legal reconstruction in the Purworejo District Attorney's Office, research by James Maubila, Debby F. Ng. Fallo and Heryanto Amalo[10] research in the North Central Timor District Attorney's Office area, as well as research from Irabiah, Beni Suswanto and Muhammad Ali Alala Making [11] Also researched the application/implementation of restorative justice in the Kotamobagu District Attorney's Office. Another study that has a study close to this research is research by Rian Dawansa and Echwan Iriyanto.[12] , which examines the termination of prosecution with Restorative Justice as an expansion of the form of termination of prosecution as referred to in Article 140 paragraph (2) of the Criminal Procedure Code and the control mechanism through the Pretrial Institution

[8] Iwan Kurniawan, Rodliyah, and Ufran, "Implementation of Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Study at the West Nusa Tenggara High Prosecutor's Office)," *Journal of Education and Development* 10, no. 1 (2022): 611.

[9] Akbar Priagung and Kristiyadi, "An Analysis of the Concept of Restorative Justice as a Legal Reconstruction (Study on the Termination of Prosecution at the Purworejo District Attorney's Office)," *Verstek: Procedural Law Journal* 10, no. 3 (2022): 534.

[10] James Maubila, Debby F. Ng. Fallo, and Heryanto Amalo, "Juridical Analysis of Prosecution Termination Based on Restorative Justice (Case Study of Prosecution Termination at the North Central Timor District Attorney's Office)," *Artemis Journal of Law* 1, no. 1 (2021): 314.

[11] Irabiah, Beni Suswanto, and Muhammad Ali Alala Mafing, "The Application of Restorative Justice at the Prosecution Level (Case Study at the Kotamobagu District Attorney's Office)," *Perspective* 27, no. 2 (2022): 134.

[12] Rian Dawansa and Echwan Iriyanto, "Termination of Prosecution Based on Restorative Justice," *Unissula Law Journal* 39, no. 1 (2023): 13.

against the termination of prosecution on the grounds of restorative justice. The main difference with this research is that this research does not directly lead to the expansion of the termination of prosecution as referred to in Article 140 paragraph (2) of the Criminal Procedure Code, but rather systematically examines the meaning of termination of prosecution, closing of cases for the sake of law, and setting aside of cases for the sake of public interest, or other forms of termination of cases, and the legal consequences of the termination of the case on the grounds of restorative justice. The approach and discussion with previous research are completely different with certainly different results.

Research Method

This research uses a doctrinal research method, namely literature-based research that focuses on the analysis of primary legal materials and secondary legal materials. Doctrinal research aims to provide a systematic exposition of the legal rules that regulate a particular area of law. One of the objectives of doctrinal research is to find consistency and legal certainty. In this study, the position of termination of prosecution as regulated in Perja Number 15 of 2020 will be studied with termination of prosecution and closure of cases for the sake of law in the Criminal Procedure Code and the waiver of cases in the Prosecutor's Office Law. The primary legal materials in this study are the Criminal Code, Criminal Procedure Code, the Prosecutor's Office Law and Perja Number 15 of 2020, while the secondary legal materials are related literature, and research results in previously published journals.

Results and Discussion

Perja Number 15 of 2020 has the official title Termination of Prosecution Based on Restorative Justice. Restorative justice basically measures justice no longer based on retaliation from the victim to the perpetrator. This retaliation is not only in the form of physical, psychological or punishment but the painful act is healed by providing support to the victim and providing conditions for the perpetrator to be responsible. Responsible, with support and assistance from family

and society. Restorative justice can also be interpreted as a fair resolution involving the perpetrator, victim and other parties together, resolving criminal acts and their impacts by emphasizing restoration to the original state.[13] Restorative justice differs from retributive justice, where the restorative justice model views a crime as a conflict between the perpetrator and the victim so that a fair solution is sought that aims to restore.[14]

Restorative justice began to be widely introduced in the Western world after an experiment on reconciliation between victims and perpetrators of crime in 1974 in Kitchener, Ontario. Since then, in the 1990s at least more than 300 restorative justice programs were reported in North America and more than 500 programs in Europe. In 2000, in Canada alone, there were more than 400 restorative justice programs implemented. In the same era, restorative justice programs were reported to have been implemented in several countries such as New Zealand, Singapore, Australia, Great Britain, Ireland, South Africa, the United States and so on.[15]

In the report of the 11th United Nations Congress in Bangkok, Thailand in 2005 (Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice Bangkok, 18-25 April 2005) there was a general agreement on the need for innovative approaches in the justice process, including the use of alternatives to prison for minor crimes, especially for new offenders, juvenile offenders, and drug addicts. Furthermore, in the 12th UN Congress in Brazil in 2010 (Report of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice Salvador, Brazil, 12-19 April 2010) it also recommended that member states evaluate and reform their criminal justice policies by developing comprehensive strategies, reducing the use of prison sanctions and increasing the use of alternatives

[13] Reynaldi Sinyo Wakkary, Jolly Ken Pongoh, and Deizen D. Rompas, "Implementation of the Principle of Restorative Justice in the Prosecution System Based on Prosecutor's Regulation Number 15 of 2020," *Lex Crimen Journal* X, no. 9 (2021): 116.

[14] Candlely Pastorica Macawalang, Rodrigo F. Rompis, and Tonny Rompis, "The Application and Influence of Restorative Justice as an Alternative to Resolving Criminal Offenses in the Indonesian Criminal Justice System," *Lex Crimen* X, no. 5 (2021): 142.

[15] John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002), 8.

to prison..[16]

In general, restorative justice is defined as a process or approach to resolving a case or conflict that arises as a result of the crime in question. All parties are involved together to solve the problem or criminal case, including solving the problem of how to handle the consequences in the future.[17] The main goal of restorative justice is to empower victims, where perpetrators are encouraged to pay attention to recovery. Restorative justice emphasizes meeting the emotional and social material needs of the victim.[18]

The adoption of the concept of restorative justice in Perja Number 15 of 2020 as one of the reasons for terminating prosecution is actually not new in the Indonesian criminal justice system. In its considerations, Perja Number 15 of 2020 refers to the Criminal Procedure Code and the Prosecutor's Law, which means that this regulation refers hierarchically to the Criminal Procedure Code and the Prosecutor's Law. Article 2 of Perja Number 15 of 2020 reads, "Termination of prosecution based on restorative justice is carried out based on ...", while Article 3 paragraph (1) reads, "The public prosecutor has the authority to close the case in the interests of the law". In criminal procedure law, closing a case in the interests of the law is part of the reasons for terminating prosecution.

The main legal basis for terminating prosecution is stated in Article 140 paragraph (2) letter a of the Criminal Procedure Code which reads, "If the public prosecutor decides to terminate the prosecution because there is insufficient evidence or the incident turns out not to be a criminal act or the case is closed by law, the public prosecutor states this in a decree". Based on Article 140 paragraph (2) letter a of the Criminal Procedure Code, the public prosecutor can stop the prosecution for three reasons, namely 1) there is insufficient evidence; 2) the incident is not a crime; and 3) closed by law. There is no further explanation in the Criminal Procedure Code or in the general explanation and explanation of each

[16] Kurniawan Tri Wibowo and Erri Gunrahti Yuni Utaminingrum, *Implementation of Restorative Justice in the Criminal Justice System in Indonesia* (Jakarta: Papas Sinar Sinanti, 2022), 39.

[17] Dahlan Sinaga, Teguh Prasetyo, and Jeferson Kameo, *Restorative Justice as a Rule of Law* (Depok: RajaGrafindo Persada, 2023), 39.

[18] Eriyantouw Wahid, *Restorative Justice and Conventional Justice in Criminal Law* (Jakarta: Trisakti University, 2009), 4.

article regarding the meaning of closed by law, so a method that can be accounted for is needed to translate the meaning using systematic interpretation, namely by interpreting the meaning contained in the Criminal Code.

Chapter VIII of the Criminal Code regulates the Elimination of the Right to Sue and the Loss of the Right to Execute Criminal Procedure. In Chapter VIII of the Criminal Code, there are ten articles, Articles 76 to 85. The elimination of the right to sue and the loss of the right to execute can be caused by the following:

a) Nebis in idem, that the case has been decided by the court and has permanent legal force (gewijsde) (Article 76 of the Criminal Code);
b) The suspect/defendant/convict dies (Articles 77 and 83 of the Criminal Code);
c) The case has expired (Verjaring) (Articles 78 – 81 and Articles 84, 85 of the Criminal Code); and
d) There is a settlement of the case outside the trial, using the payment of a fine for the violation committed (Article 82 of the Criminal Code) (Afdoening buiten process).

The enactment of Perja Number 15 of 2020 eliminates the systematic interpretation previously carried out on Article 140 paragraph (2) letter a of the Criminal Procedure Code. This occurs because based on Article 3 paragraph (2) of Perja Number 15 of 2020, it is regulated that the closure of a case in the interests of the law is carried out in the event of:

a) The defendant dies;
b) The criminal prosecution has expired;
c) There has been a court decision that has permanent legal force against a person for the same case (ne bis in idem);
d) Complaints for criminal acts of complaint are withdrawn; or
e) There has been a settlement of the case outside the court (afdoening buiten process).

When compared, between the systematic interpretation of Article 140 paragraph (2) letter a of the Criminal Procedure Code against the provisions of Chapter VIII of the Criminal Code with the provisions stipulated in Article 3 paragraph (2) of Regulation Number 15 of 2020, there are similarities and

additional reasons for closing the case in the interests of the law in Regulation Number 15 of 2020. That the termination of prosecution based on restorative justice as stipulated in Regulation Number 15 of 2020 seems to be an expansion of the meaning of closing the case in the interests of the law. The term is used because the formulation in Article 3 paragraph (2) of the Regulation does expand the meaning of closing the case in the interests of the law, but in reality, is the termination of prosecution based on restorative justice appropriate to be stated as one of the reasons for closing the case in the interests of the law.

Article 140 paragraph (2) letter a of the Criminal Procedure Code as the main basis for terminating prosecution does not differentiate between terminating prosecution and closing a case in the interests of law closing a case in the interests of law is one of the reasons for terminating prosecution. The Criminal Procedure Code implicitly differentiates between terminating prosecution and closing a case in the interests of law. This implied meaning can be seen in Article 14 letter h of the Criminal Procedure Code concerning the authority of the public prosecutor, one of which is to close a case in the interests of law. The authority of the public prosecutor is not listed as the authority to stop prosecution, whereas Article 140 paragraph (2) letter a of the Criminal Procedure Code states the authority of the public prosecutor to stop prosecution, where closing a case in the interests of law is one of the reasons for terminating prosecution. If closing a case in the interests of law is part of terminating prosecution, why is it that what is listed in the authority of the public prosecutor is not terminating prosecution, but rather closing a case in the interests of law?

In Article 77 of the Criminal Procedure Code, concerning pretrial authority, one of the authorities is to examine and decide on cases regarding the validity or otherwise of terminating prosecution.[19] Article 77 of the Criminal Procedure Code does not mention the authority to hold a pretrial hearing on the grounds of closing

[19] This provision has been carried out by judicial review and has been decided by the Constitutional Court Decision Number 21/PUU-XII/2014 and the Constitutional Court Decision Number 130/PUU-XIII/2015 which expands the pretrial jurisdiction by adding 3 new scopes, namely: a. whether the search is valid or not; b. whether or not the determination of the suspect is legal; and c. SPDP was not given to the suspect. See Constitutional Court Decision No. 21/PUU-XII/2014 and Constitutional Court Decision No. 130/PUU-XIII/2015

the case for the sake of the law, but rather mentions the termination of the prosecution. If the meaning of Article 77 of the Criminal Code is simply translated, that closing a case in the interest of law is part of the termination of prosecution, then can the reason for closing a case in the interest of law be pretrial, considering that in the Criminal Code, the meaning of closing a case for the sake of law is systematically translated into Chapter VIII of the Criminal Code which automatically abolishes the right to prosecute and carry out a crime.

Based on this description, the Criminal Procedure Code implicitly distinguishes the meaning and consequences of the termination of prosecution and closing the case for the sake of the law, so Perja Number 15 of 2020 is appropriate if it gives a title about the termination of prosecution, but it becomes inappropriate if later in its content it states as an extension of the meaning of closing the case for the sake of the law, namely the settlement of cases outside the trial (*afdoening buiten process*).

There is one more form of authority possessed by the Prosecutor's Office in addition to the two forms that have been described, namely the case waiver (*deponering*). The waiver of the case is generally recognized as the implementation of the principle of opportunism in prosecution. M. Yahya Harahap said that the Criminal Procedure Code tends to prioritize the principle of legality, while the principle of opportunism is only an exception that can be used in a limited way.[20] In contrast to the previous opinion, Vrij stated, that not prosecuting a criminal case can be expanded by the existence of careless reasons or elements called *subsociale*, or dangerous elements of an act or can also be called social benefits or public interest. This reason is then known as *a seponering*.[21] In Dutch, there are two terms used, namely *deponeeren* and *seponeeren*, both of which have the meaning of not demanding or waiving aside.[22] Countries in Europe and America adhere to the principle of a pure legality system, some adhere to a pure opportunistic system, and

[20] M. Yahya Harahap, *Discussion of Problems and Application of the Criminal Code: Investigation and Prosecution* (Jakarta: Sinar Grafika, 2008), 38.

[21] Tolib Effendi, "Re-Evaluation of the Prosecution System in the Criminal Code," *Journal of Legal Media* 19, no. 1 (2012): 114.

[22] Otto Cornelis Kaligis, *Deponeering Theory and Practice* (Bandung: Alumni, 2015), 4.

some adhere to a partial or even mixed system, In Indonesia, as stated by M. Yahya Harahap mentioned above, the principle of opportunism is considered an exception to the principle of legality. In Indonesia, the waiver of cases in the public interest owned by the Attorney General has been regulated both in Law Number 15 of 1961 concerning the Main Provisions of the Prosecutor's Office of the Republic of Indonesia, Law Number 5 of 1991 concerning the Prosecutor's Office of the Republic of Indonesia and in Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia. This authority is in the hands of the Attorney General and can be used for the sole reason of the public interest.

When viewed from the point of view of its authority, it is clear that the provisions in Perja Number 15 of 2020 are not a form of waiving the case, because the termination of the prosecution can be carried out by the public prosecutor, not the Attorney General. However, related to the reason, whether restorative justice can be interpreted as a form of public interest. In the explanation of Article 35 letter b of the Prosecutor's Law, it is stated that the public interest is the interest of the nation and state and/or the interests of the wider community. In the consideration section of Perja Number 15 of 2020, it is stated that the prosecutor's office must be able to realize legal certainty, legal order, justice and truth based on the law and heed religious norms, politeness and decency and are obliged to explore the values of humanity, law and justice that live in society.

In Article 2 of Perja Number 15 of 2020, it is stated that the termination of prosecution based on restorative justice is carried out based on: a. justice; b. public interest; c. proportionality; d. criminal offences as a last resort; and e. fast, simple and low cost. Based on the considerations and principles used in the termination of prosecution based on restorative justice, the public interest is also used as one of the principles. At the technical level, according to Article 5 paragraph (6) letter c, in the section on the conditions for the termination of prosecution based on restorative justice, there are cumulative conditions that must be met, namely: a. there has been a restoration to the original state committed by the suspect; b. there has been a peace agreement between the victim and the suspect, and c. the community responded positively. From some of these provisions, there are

indications that the community or expanded its meaning as a public interest carries an important role as an indicator of whether or not the termination of the prosecution can be carried out. Returning to the meaning of restorative justice, by involving the perpetrator, victim and society as a whole, restorative justice is an innovation in the settlement of criminal cases. Restorative justice is a concept to design a criminal justice system that prioritizes the needs of the community and victims by utilizing the existing criminal justice system.[23]

In terms of authority, the Attorney General can only set aside the case after taking into account the suggestions and opinions of the state power bodies that have a relationship with the issue as referred to in Article 35 letter b of the Prosecutor's Law and its explanation. However, the termination of prosecution based on restorative justice is also not necessarily under the authority of the public prosecutor, but is tiered, namely the Head of the High Prosecutor's Office, and even to the Attorney General. This provision is as referred to in Article 12 paragraph (4) of Perja Number 15 of 2020 which reads, "*The Head of the High Prosecutor's Office determines the attitude of approving or rejecting the termination of the prosecution based on restorative justice in writing accompanied by consideration within a maximum of 3 (three) days from the receipt of the request*". Furthermore, in Article 12 paragraph (5) of Perja Number 15 of 2020 regulates, "*In certain cases that receive special attention from the leadership, the Head of the High Prosecutor's Office asks for approval from the Attorney General while still paying attention to the time as referred to in paragraph (3)"*. In the East Java region, in 2023 there will be 357 cases proposed for restorative justice, but only 335 cases have been approved for restoration because they do not meet some cumulative requirements.[24]

Seeing such conditions, the termination of prosecution based on restorative justice regulated in Perja Number 15 of 2020 is appropriate if it gives a title about the termination of prosecution, but it has different conditions and authorities from the termination of prosecution as stipulated in the Criminal Procedure Code, and it

[23] Lukas Permadi Orlando Beremanda, "The Principle of Restorative Justice in Stopping Prosecution through Compensation and Restitution," *Pampas Journal of Criminal Law* 4, no. 2 (2023): 279.

[24] East Java High Prosecutor's Office, "2023 Annual Performance Report," 42.

is not appropriate if later in its content it states as an extension of the meaning of closing the case for the sake of legal interest, namely the settlement of cases outside the trial (*afdoening buiten process*) as part of the termination of the prosecution. The termination of prosecution based on restorative justice also fulfils some principles in setting aside cases for the sake of the public interest, and in terms of the authority of both is not attached to the public prosecutor but to a higher authority, namely the Chief Prosecutor and/or the Attorney General.

Based on this description, the termination of prosecution based on restorative justice cannot be called an extension of the meaning of the termination of prosecution in the Criminal Code, including the expansion of the meaning of closing the case for the sake of law as part of the termination of prosecution. The termination of prosecution based on restorative justice actually has a tendency to be interpreted as an extension of the waiver of the case, although it cannot be precisely said to be the waiver of the case. There are at least three reasons why the termination of prosecution based on restorative justice tends to be interpreted as an extension of the exclusion of the case, namely: 1) the existence of a principle in the public interest/community or at least for the benefit of both parties, namely the perpetrator and the victim; 2) the authority to stop the prosecution based on restorative justice is not necessarily under the authority of the public prosecutor but from a higher authority, namely the Chief Prosecutor and/or the Attorney General; and 3) the consequences of the termination of prosecution based on restorative justice to the case, both cases are considered to have been completed or settled.

Legal Consequences for the Termination of Prosecution Based on Restorative Justice in Perja Number 15 of 2020

In the previous section, it has been explained that the termination of prosecution based on restorative justice as stipulated in Perja Number 15 of 2020 tends to be interpreted as an expansion of the meaning of the abandonment of the case, although it is also inappropriate to be said to be a complete abandonment of the case. However, if given the choice of whether the termination of prosecution based on restorative justice is an extension of the termination of the prosecution or

the closure of the case for the sake of the law which is also one of the reasons for the termination of the prosecution or the extension of the abandonment of the case, then the choice is to extend the abandonment of the case.

As is well known, each form of termination of the case, both the termination of the prosecution, the closure of the case for the sake of the law and the waiver of the case has legal consequences in the form of pretrial. In the previous section, it has been briefly mentioned about pretrial, namely, institutions regulated according to the provisions of Article 1 point 14 of the Criminal Procedure Code jo Article 77 of the Criminal Procedure Code with the scope of including: 1) whether or not the arrest, detention, termination of investigation or termination of prosecution is legal; 2) compensation and/or rehabilitation for a person whose criminal case is stopped at the level of investigation or prosecution. In addition to this scope, there is an additional scope as stipulated in the Constitutional Court Decision Number 21/PUU-XII/2014 and the Constitutional Court Decision Number 130/PUU-XIII/2015 which expands the pretrial jurisdiction by adding 3 new scopes, namely: 3) whether the search is lawful or not; 4) whether or not the determination of the suspect is legal; and 5) SPDP was not given to the suspect.

Based on the provisions in Article 1 point 14 juncto Article 77 of the Criminal Procedure Code jo the decision of the constitutional court, what is clearly the scope of pretrial is the termination of prosecution. Termination of prosecution that is considered invalid can be requested for a pretrial lawsuit to the district court. This is then consistently considered as an implicit statement in the Criminal Procedure Code that shows the difference between the termination of prosecution and the closure of the case in the interest of the law. The closure of a case in the interest of law cannot be categorized as one of the reasons for the termination of prosecution, because the closure of a case in the interest of law using a systematic interpretation in Chapter VIII of the Criminal Code cannot be filed for legal remedies or other actions according to the law, especially pretrial. There are at least four reasons for closing a case in the interest of the law according to Chapter VIII of the Criminal Code as described in the previous section, namely: 1) *ne bis in idem*; 2) the suspect dies; 3) expiration of the case; and 4) the existence of an out-of-trial case settlement

(*afdoening buiten process*). How is it possible for a case to be pre-trial if the case turns out to *be ne bis in idem*, or the suspect has died, or the case has expired or the case has been resolved outside the trial? This difference in consequences then becomes the basis for distinguishing between the termination of prosecution and the closure of the case for the sake of the law.

Perja Number 15 of 2020 does not regulate clear legal consequences. In their research, Rian Dawansa and Echwan Iriyanto stated that the termination of prosecution based on restorative justice is possible to make pretrial efforts, although this possibility is very small because there has been an agreement between the perpetrator and the victim and has gone through a process in stages.[25] If the termination of prosecution based on restorative justice can be submitted pretrial, who are the parties to be sued pretrial, considering that the decision to approve or not to terminate the prosecution based on restorative justice is carried out in stages from the District Attorney's Office to the High Prosecutor's Office, even in certain cases up to the Attorney General? The second problem is who has the right to file a pretrial lawsuit, because the two parties have agreed to reconcile, and the peace agreement has been formulated in written form as stipulated in Article 10 of Perja Number 15 of 2020.

The main purpose of the pretrial institution is to control the mechanism and concrete manifestation of *habeas corpus* which is the substance of human rights to protect the public against the application of coercive efforts carried out by state apparatus such as the police and the prosecutor's office,[26] But if the pretrial institution does not have the authority to exercise its jurisdiction, then can the effort to stop the prosecution based on restorative justice be Done? If the pretrial institution is indeed intended to uphold human rights, but the pretrial cannot apply its jurisdiction to the dismissal of cases by the attorney general based on the public interest. This is as stipulated in the explanation of Article 77 of the Criminal

[25] Rian Dawansa and Echwan Iriyanto, "Termination of Prosecution Based on Restorative Justice," 27.

[26] Pratiwi Rhiany Siar, "Pretrial Legal Politics in the Context of Law Enforcement after the Issuance of the Constitutional Court Decision Number 98/PUU-X/2012," *Lex Administratum* VII, no. 1 (2019): 78.

Procedure Code which states, that what is meant by the termination of prosecution does not include the assistance of cases for the public interest which is the authority of the Attorney General.

The termination of prosecution based on restorative justice can be interpreted as an extension of the waiver of cases for several reasons as described in the previous section, so that pretrial efforts cannot be made against the termination of prosecution based on restorative justice. In Rudi Pradisetia Sudirdja's research in 2019, he gave a proposal to strengthen the authority of the public prosecutor, not necessarily through the Attorney General to set aside the case for certain reasons. The study provides examples of the case of Grandma Minah, the case of Kolil and Basar and the case of Grandma Aisyah.[27] After the existence of Perja Number 15 of 2020, certain reasons can be accommodated to stop the prosecution based on restorative justice. Therefore, the termination of prosecution based on restorative justice has the consequence that pretrial efforts cannot be carried out with several considerations, including 1) that this concept is an extension of the case waiver so that the case is declared completed or resolved so that for the sake of legal certainty it cannot be reopened; 2) the pretrial has no authority to exercise its jurisdiction other than against the termination of prosecution.

Conclusion

There are at least three reasons why the termination of prosecution based on restorative justice tends to be interpreted as an extension of the exclusion of the case, namely: 1) the existence of a principle in the public interest/community or at least for the benefit of both parties, namely the perpetrator and the victim; 2) the authority to stop the prosecution based on restorative justice is not necessarily under the authority of the public prosecutor but from a higher authority, namely the Chief Prosecutor and/or the Attorney General; and 3) the consequences of the termination of prosecution based on restorative justice to the case, both cases are considered to have been completed or settled. The termination of prosecution based on restorative

[27] Rudi Pradisetia Sudirdja, "Strengthening the Authority of the Public Prosecutor through the Waiver of Criminal Cases for Certain Reasons," 302.

justice has the consequence that pretrial efforts cannot be carried out with several considerations, including 1) that this concept is an extension of the waiver of the case so that the case is declared completed or resolved so that for the sake of legal certainty it cannot be reopened; 2) the pretrial has no authority to exercise its jurisdiction other than against the termination of prosecution.

Bibliography

Book

A'an Effendi, Dyah Ochtorina Susanti, and Rahmadi Indra Tektona. *Doctrinal Law Research*. Yogyakarta: LaksBang Justitia, 2019.

Dahlan Sinaga, Teguh Prasetyo, and Jeferson Kameo. *Restorative justice as a rule of law*. Depok: RajaGrafindo Persada, 2023.

Eriyantouw Wahid. *Restorative justice and conventional justice in criminal law*. Jakarta: Trisakti University, 2009.

John Braithwaite. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press, 2002.

Kurniawan Tri Wibowo and Erri Gunrahti Yuni Utaminingrum. *Implementation of Restorative Justice in the Criminal Justice System in Indonesia*. Jakarta: Papas Sinar Sinanti, 2022.

M. Yahya Harahap. *Discussion of Problems and Application of the Criminal Code: Investigation and Prosecution*. Jakarta: Sinar Grafika, 2008.

Marwan Effendy. *The Indonesian Prosecutor's Office: Its Position and Function from a Legal Perspective*. Jakarta: Gramedia Pustaka Utama, 2005.

Otto Cornelis Kaligis. *Deponeering theory and practice*. Bandung: Alumni, 2015.

Tolib Effendi. *Fundamentals of Criminal Procedure Law: Its Development and Renewal in Indonesia*. Malang: Setara Press, 2014.

Journal Articles

Akbar Priagung and Kristiyadi. "An Analysis of the Concept of Restorative Justice as a Legal Reconstruction (Study on the Termination of Prosecution at the Purworejo District Attorney's Office)." *Verstek: Journal of Procedural Law* 10, no. 3 (2022): 531–39.

Candlely Pastorica Macawalang, Rodrigo F. Rompis, and Tonny Rompis. "The Application and Influence of Restorative Justice as an Alternative to Resolving Criminal Acts in the Indonesian Criminal Justice System." *Lex Crimen* X, no. 5 (2021): 142–50.

Irabiah, Beni Suswanto, and Muhammad Ali Alala Mafing. "The Application of Restorative Justice at the Prosecution Level (Case Study at the Kotamobagu District Attorney's Office)." *Perspectives* 27, no. 2 (2022): 131–38.

Iwan Kurniawan, Rodliyah, and Ufran. "Implementation of Attorney General's Regulation Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice (Study at the West Nusa Tenggara High Prosecutor's Office)." *Journal of Education and Development* 10, no. 1 (2022): 610–18.

James Maubila, Debby F. Ng. Fallo, and Heryanto Amalo. "Juridical Analysis of Termination of Prosecution Based on Restorative Justice (Case Study of Termination of Prosecution at the North Central Timor District Prosecutor's Office)." *Artemis Journal of Law* 1, no. 1 (2021): 312–20.

La Ode Awal Sakti. "The Concept of Balance in the Implementation of Termination of Prosecution Based on Restorative Justice." *The Enlightener* 7, no. 4 (2021): 585–92.

Lukas Permadi Orlando Beremanda. "The principle of restorative justice in the termination of prosecution through compensation and restitution." *Pampas Journal of Criminal Law* 4, no. 2 (2023): 277–86.

Pratiwi Rhiany broadcasts. "Pretrial Legal Politics in the Context of Law Enforcement After the Issuance of the Constitutional Court Decision Number 98/PUU-X/2012." *Lex Administratum* VII, no. 1 (2019): 78–86.

Reynaldi Sinyo Wakkary, Jolly Ken Pongoh, and Deizen D. Rompas. "Implementation of the Principle of Restorative Justice in the Prosecution System Based on Prosecutor's Regulation Number 15 of 2020." *Journal of Lex Crimen* X, no. 9 (2021): 116–26.

Rian Dawansa and Echwan Iriyanto. "Termination of prosecution based on restorative justice." *Unissula Law Journal* 39, no. 1 (2023): 12–30.

Rudi Pradisetia Sudirdja. "Strengthening the authority of the public prosecutor through the waiver of criminal cases for certain reasons." *Journal of Litigation* 20, no. 2 (2019): 291–313.

Tolib Effendi. "Re-Evaluation of the Prosecution System in the Criminal Procedure Code." *Journal of Legal Media* 19, no. 1 (2012): 110–24.

Laws and Regulations

Criminal Code (KUHPidana)

Law Number 8 of 1981 concerning the Criminal Procedure Law (KUHAP)

Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia

Regulation of the Prosecutor of the Republic of Indonesia Number 15 of 2000 concerning the Termination of Prosecution Based on Restorative Justice

Other Resources

Prosecutor's Office of the Republic of Indonesia. "Book IV Annual Report 2023." Jakarta: Attorney General's Office of the Republic of Indonesia, 2024.

East Java High Prosecutor's Office. "2023 Annual Performance Report." Surabaya: East Java High Prosecutor's Office, 2024.

Prosecutor's Office of the Republic of Indonesia. "Case Handling Information." Accessed September 27, 2024. https://cms-publik.kejaksaan.go.id/.