

Legal Certainty in the Authorization's Authority to Discontinue Prosecution Based on Restorative Justice

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ABSTRACT

A person who has committed a crime or crime can basically be charged before a court to be tried according to the crime or act committed by that person. As an institution that has prosecutorial authority, the prosecutor's office has no choice not to continue the legal process. The public prosecutor has the authority to prosecute anyone who has been named a defendant with a minimum requirement of two pieces of sufficient evidence. In its development, the implementation of the prosecutor's function as a prosecutor in court uses a new approach to resolve criminal cases more simply, easily and effectively. This can be seen with the issuance of Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The problem is what is the concept of restorative justice in Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and what is the legal certainty in Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. This research uses normative juridical methods and a conceptual approach which is carried out by elaborating on statutory regulations related to living law using concepts, theories and doctrines developed in contemporary criminal law scholarship to produce a synthesis that shows the correlation and relevance of these regulations to the objectives of legal reform. substantive crime. Restorative justice is the resolution of criminal cases involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair resolution by emphasizing restoration to the original condition, and not retaliation. The granting of authority to the prosecutor's office through the Prosecutor's Regulations does not contain legal certainty and is contrary to the authority of the prosecutor's office which originates from the law.

Keywords: Legal Certainty, Termination of Prosecution, Restorative Justice.

ABSTRAK

Seseorang yang telah melakukan suatu tindak pidana atau suatu kejahatan, pada dasarnya dapat dituntut di muka pengadilan untuk diadili sesuai dengan tindak pidana atau perbuatan yang dilakukan oleh orang tersebut. Sebagai lembaga yang mempunyai kewenangan penuntutan, kejaksaan tidak mempunyai pilihan untuk tidak melanjutkan proses hukum. Jaksa penuntut umum memiliki kewenangan untuk melakukan penuntutan kepada siapapun yang telah ditetapkan sebagai terdakwa dengan syarat minimal dua alat bukti yang cukup. Dalam perkembangannya, pelaksanaan fungsi jaksa sebagai lembaga penuntut di pengadilan menggunakan pendekatan baru untuk melakukan penyelesaian perkara pidana dengan lebih sederhana, mudah dan efektif. Hal tersebut terlihat dengan dikeluarkannya Peraturan Kejaksaan Republik Indonesia Nomor 15 Tahun 2020 Tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif. Permasalahannya adalah bagaimana konsep keadilan restoratif dalam Peraturan Kejaksaan Nomor 15 Tahun 2020 Tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif dan bagaimana kepastian hukum Peraturan Kejaksaan Nomor 15 Tahun 2020 Tentang Penghentian Penuntutan Berdasarkan Keadilan Restoratif. Penelitian ini menggunakan metode yuridis normatif dan pendekatan konseptual yang dilakukan dengan mengelaborasi peraturan perundang-undangan terkait dengan hukum yang hidup menggunakan

konsep, teori, dan doktrin yang berkembang dalam keilmuan hukum pidana kontemporer untuk menghasilkan sintesis yang menunjukkan korelasi dan relevansi pengaturan tersebut terhadap tujuan pembaruan hukum pidana yang substantif. Keadilan restoratif adalah penyelesaian perkara tindak pidana dengan melibatkan pelaku, korban, keluarga pelaku/korban, dan pihak lain yang terkait untuk bersama-sama mencari penyelesaian yang adil dengan menekankan pemulihan kembali pada keadaan semula, dan bukan pembalasan. Pemberian kewenangan kepada kejaksaan melalui Peraturan Kejaksaan sangat tidak mengandung kepastian hukum dan bertentangan dengan kewenangan kejaksaan yang bersumber dari undang-undang.

Kata Kunci: Kepastian Hukum, Penghentian Penuntutan, Keadilan Restoratif.

A. BACKGROUND

Criminal law enforcement is carried out based on the criminal justice system. According to Mardjono Reksodiputro, the criminal justice system is a system in a society for dealing with crime problems.¹ Meanwhile, Muladi stated that the criminal justice system is a judicial network that uses material criminal law, formal criminal law, and criminal law implementing crimes.² The criminal justice system is essentially a way to apply criminal law concretely. To achieve the objectives of the criminal justice system, Mardjono Reksodiputro put forward four components of the criminal justice system, namely the police, prosecutor's office, court and correctional institutions.³ It is hoped that the four components of the criminal justice system can work together and form an integrated criminal justice system (Integrated Criminal Justice System).⁴

In enforcing criminal law, prosecutors act as prosecutors in court. Every person who violates the criminal law will be prosecuted by the prosecutor in court as a form of criminal responsibility but by upholding the principle of presumption of innocence. The duties of the prosecutor are as stated in the provisions of Article 1 number 6 letters (a) and (b) of the Criminal Procedure Code, "The prosecutor is an official who is authorized by this law to act as a public prosecutor and implement court decisions that have obtained permanent legal force." In this provision we can see that the prosecutor has two functions, namely the prosecution function and the executive function. In addition, according to the provisions of Article 2 paragraph (1) of Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia states "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to in this law as the prosecutor's office, is a government institution that exercises state power in the field of prosecution and other authorities based on Constitution". The

¹Setiadi, H. Edi, *Sistem Peradilan Pidana Terpadu dan Sistem Penegakan Hukum di Indonesia*. Prenada Media, 2017. Hlm. 18

²Syahrin, M. Alvi. "Penerapan Prinsip Keadilan Restoratif Dalam Sistem Peradilan Pidana Terpadu." *Majalah Hukum Nasional* 48.1 (2018): 102.

³Setiadi, *Op.cit.*, Hlm. 24

⁴*Ibid*

public prosecutor has the authority to prosecute anyone who has been named a defendant with a minimum requirement of two pieces of sufficient evidence.

In its development, the implementation of the prosecutor's function as a prosecutor in court uses a new approach to resolve criminal cases more simply, easily and effectively. This can be seen with the issuance of Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perja No. 15/2020). Restorative justice is a model of punishment imposed by a court based on restoring the victim's rights.⁵ Based on Article 1 number 1 Perja No. 15/2020, defines that "Restorative Justice is the resolution of criminal cases by involving the perpetrator, the victim, the family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration back to the original condition, and not retaliation". If so, the application of the concept of restorative justice means a concept of resolving criminal problems by prioritizing the interests of victims of criminal acts. Meanwhile, the interests of victims referred to here are losses experienced by victims as a result of criminal acts.

With the enactment of Perja No. 15/2020 has had implications for legal uncertainty regarding criminal law enforcement in Indonesia. Based on the background description above, it shows how important it is for this research to be carried out as input for law enforcers so that they can enforce the law, especially criminal law, consistently and with consequences. In order to produce these recommendations, the author conducted research with the title "Judicial Review of Termination of Prosecution for Reasons of Restorative Justice (Analysis Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice).

B. RESEARCH METHODOLOGY

This research was conducted using normative legal research methods (normative law research) using normative case studies in the form of legal behavioral products, for example reviewing laws. According to Irwansyah, Normative Legal Research has a tendency to image law as a prescriptive discipline, only looking at law from the perspective of norms, which of course are prescriptive.⁶ Meanwhile, Jonaedi Efendi believes that normative legal research can also be called doctrinal legal research.

In this research, law is often conceptualized as what is written in statutory regulations (law in book) or law is conceptualized as rules and regulations which are a benchmark for society's behavior

⁵Syahrin, M. Alvi, *Op.Cit.*, Hlm. 98

⁶ Irwansyah & Ahsan Yunus, *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel (edisi revisi)*, Mirra Buana Media, Yogyakarta, 2021, Hlm. 97

towards what is considered appropriate.⁷ So in this research the author uses normative legal research methods, because the problems in the author's research occur in legal norms and are analyzed normatively.

C. FINDING & DISCUSSION

1. Concept of Termination of Prosecution Based on Restorative Justice

Regarding the concept of restorative justice, Jeff Cristian, an international penitentiary expert from Canada, stated that restorative justice was actually practiced by many people thousands of years ago, long before the birth of formal state law like today, which was then called modern law.⁸ The pioneer of restorative justice from the United States, Howard Zher, defines Restorative Justice as "a process that involves parties concerned about a specific violation and jointly identifying losses and fulfilling obligations and needs and placing change as a right that must be accepted."⁹ For Van Ness the goal of restorative justice is to restore security to the community of victims and perpetrators who have resolved their conflicts.¹⁰

Thus, the concept of restorative justice is not a new concept, although in modern times this concept is used because it is considered to be able to resolve criminal cases. Referring to Howard Zher's opinion, this means that only special violations can use a restorative justice approach. Of course, what is meant by special offenses here has its own regulations regarding the criteria under which a criminal act can be classified as a special criminal act. Many say that the restorative justice approach is increasingly developing for the reason of covering the weaknesses of the retributive system which is considered not to pay attention to the interests of victims. In a retributive system it is as if the state is the victim of a crime, so the state demands retribution from the perpetrators of the crime. The development of the use of a restorative justice approach is considered to be able to pay attention to the losses experienced by victims, both material and immaterial. The definition of restorative justice is an effort to provide a restoration of relationships and atonement for mistakes that the perpetrator of a crime (his family) wishes to carry out against the victim of the crime (his family) (peace efforts) outside of court with the aim and purpose of eliminating legal problems that arise as a result of the crime. This criminal act can be resolved properly by reaching agreement and agreement between the parties.¹¹

⁷ Jonaedi Efendi & Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris*, Prenadamedia Group, Depok, 2018, Hlm. 124

⁸ Candra, Septa. "Restorative Justice: suatu tinjauan terhadap pembaharuan hukum pidana di Indonesia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 2.2 (2013), Hlm. 270.

⁹ *Ibid*

¹⁰ Eddy O.S Hiarij, *Prinsip-Prinsip Hukum Pidana (Edisi Refisi)*, Cahaya Atma Pustaka. Yogyakarta. 2016, Hlm 237

¹¹ Hanafi Arief, dkk, "Penerapan Prinsip Restorative Justice dalam Sistem Peradilan Pidana Di Indonesia", *Jurnal Al'Adl, Volume X Nomor 2, Juli 2018, Hlm. 1.*

The concept of restorative justice views crime as behavior against society, not crime against the state. In conventional case resolution, generally the perpetrator of the crime faces the state to be held accountable for the criminal act he committed. Even though the victim is the party who has a direct interest in the perpetrator and the victim should receive compensation or restore the situation. In the concept of restorative justice formulated by Douglas, he said "Restorative justice is a criminal justice concept that views crime as a violation of people, not as a violation of the state, and creates an obligation to the victim and to the community to make things right. It focuses on the crimes harm rather than on the broken rules and emphasizes redress for the victim and community for the effects of the wrong doing over punishment imposed by the state. The restorative justice model may provide for appropriate dialogue, direct or indirect, between the victim and offender in the form of victim-offender mediation". The concept put forward by Douglas shows how important the role of a victim and society is, of course with the aim of obtaining a just solution to the problem, not only looking at the justice of the victim, but also considering aspects of justice for the community and also the perpetrator. This concept is far from the concept of revenge as the classic goal of punishment, so it can cause stigma or give rise to hatred towards the perpetrator, while on the other hand it also ignores the losses experienced by the victim. In the concept of restorative justice, this is done by approaching the victim, community and perpetrator, then identifying the various losses experienced and then placing the burden on the perpetrator to provide compensation, or in other forms of action that are deemed to be able to restore the victim's condition. Thus, the concept of restorative justice does not aim to provide punishment to the perpetrator in the form of punishment, but to provide responsibility to the perpetrator of the crime due to the actions he has committed which have harmed other people.

This is what differentiates conventional justice from restorative justice, which lies in providing punishment in conventional justice, while placing responsibility on the perpetrator in restorative justice. Apart from that, the positive impact felt from the implementation of restorative justice is not only experienced by the perpetrators of criminal acts, but has a wider impact, namely for victims and the surrounding community by prioritizing dialogue between the parties to understand each other's conditions.¹² The restorative justice approach is often associated as part of the implementation of punishment that is *ultimum remedium*. The nature of criminal law is *ultimum remedium*, which means a last resort is taken when there are no other efforts to resolve the case.¹³ Satjipto Rahardjo stated that resolving cases through the judicial system which culminates in a court verdict is a slow track of law

¹² Destri Tsurayya Istiqamah, *Op.cit.*, Hlm. 14-15

¹³ Henny Saida Flora, *Keadilan Restoratif Sebagai Alternatif Dalam Penyelesaian Tindak Pidana Dan Pengaruhnya Dalam Sistem Peradilan Pidana Di Indonesia*, Hlm. 144.

enforcement.¹⁴ So the concept of restorative justice is no less important in enforcing criminal law in Indonesia, even though it is a new concept in enforcing Indonesian criminal law. It must be acknowledged that resolving cases using a restorative justice approach is much beneficial, especially criminal acts involving children in Indonesia can be resolved using a restorative justice approach, this is regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Article 1 point 6 of Law 11/2012 defines "restorative justice is the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration back to its original condition. , and not retaliation." The definition in this law is the same as the definition contained in Article 1 number 1 of the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020.

According to Law 11/2011, the juvenile criminal justice system is obliged to prioritize a restorative justice approach (Vide Article 5 paragraph 1 Law 11/2012). Article 5 paragraph (2) of Law 11/2011 goes on to state: (2) The Juvenile Criminal Justice System as referred to in paragraph (1) includes: a. criminal investigation and prosecution of children carried out in accordance with the provisions of statutory regulations, unless otherwise specified in this Law; b. Juvenile trials conducted by courts within the general justice environment; and c. guidance, mentoring, supervision and/or assistance during the process of carrying out a crime or action and after undergoing a crime or action. The two legal rules above have different scopes where Law 11/2012 applies in the judicial process for children who are in conflict with the law. Children in conflict with the law, hereinafter referred to as children, are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal act (Vide Article 1 point 3 of Law 11/2012). With the issuance of Perja 15/2020, prosecutors have new authority, namely the authority to stop prosecutions based on restorative justice. In fact, Article 1 point 3 of the Perja states that the Public Prosecutor is a prosecutor who is authorized by law to carry out prosecutions and carry out the judge's decisions. This means that prosecutors actually have the task of prosecuting, but based on Perja 15/2020, prosecutors can set aside this task for reasons of restorative justice. Termination of prosecution based on restorative justice is carried out on the basis of: a. justice; b. public interest; c. proportionality; d. punishment as a last resort; and e. fast, simple, and low cost.

Termination of prosecution based on Restorative Justice is carried out by taking into account: a. Victim's interests and other protected legal interests; b. avoidance of negative stigma; c. avoidance of retaliation; d. community response and harmony; and e. propriety, decency and public order. Criminal cases can be closed by law and prosecution terminated based on Restorative Justice if the

¹⁴ *Ibid*

following conditions are met: a. the suspect has committed a crime for the first time; b. criminal offenses are only punishable by a fine or punishable by imprisonment for not more than 5 (five) years; and c. The criminal act is committed with the value of the evidence or the value of the loss incurred as a result of the criminal act not exceeding IDR 2,500,000.00 (two million five hundred thousand rupiah). In Article 5 Paragraph (8) of Perja 12/2011 there is an exception, the article reads: "Termination of prosecution based on Restorative Justice is excluded for cases: a. criminal acts against state security, the dignity of the President and Vice President, friendly countries, heads of friendly countries and their representatives, public order and decency; b. criminal acts that are punishable by a minimum penalty; c. narcotics crime; d. environmental crimes; and e. criminal acts committed by corporations." The author will explain the weaknesses of this restorative justice approach further below.

2. Legal Certainty for Termination of Prosecution Based on Restorative Justice

When a statutory regulation has been agreed to become a valid legal product, it becomes a law that binds all parties and must be enforced. Law enforcement is a function possessed by law enforcement officials, which in the Indonesian legal system has the concept of a criminal justice system consisting of the police, prosecutor's office, judiciary, and correctional institutions which have the function of enforcing criminal law. Criminal law enforcement is a crime prevention effort that uses criminal law as a tool to overcome crime as part of criminal policy.¹⁵ Efforts to overcome crime with criminal law are carried out in order to achieve the ultimate goal of criminal policy itself, namely providing community protection in order to create order and prosperity.¹⁶ In criminal law enforcement, legal certainty in criminal law enforcement can be realized from the practices of law enforcement officers who carry out their functions consistently and consistently

In a legal state with a civil law system concept, legal certainty is an important aspect that needs to be considered. The aspect of legal certainty is important because in a civil law system, law formally originates from statutory regulations, customs and jurisprudence.¹⁷ According to Utrecht, legal certainty has two meanings. First, there are some general legal rules that tell individuals what actions to take, and second, there are forms of criminal law protection against government abuse. As a rule, the public knows what actions the nega can take against individuals.¹⁸ Indonesia is a legal country with a civil law concept because legislation is the main source of law. Legislative regulations are sought as

¹⁵ Ariyanti, Vivi. "Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia." *Jurnal Yuridis* 6.2 (2019), Hlm. 37

¹⁶ *Ibid.*

¹⁷ Peter Mahmud Marzuki, (*Edisi Revisi*) *Pengantar Ilmu Hukum*, Prenadamedia Group, Jakarta, 2020, Hlm. 258

¹⁸ Jumiati, Agatha, and Ellectrananda Anugerah Ash-shidiqqi, *loc.cit*

a source of all aspects of law, both as a basis for the formation of state law, a basis for the authority of state institutions, a basis for community behavior and other matters related to efforts to create a just and prosperous state.

Criminal law enforcement is the application of criminal law in concrete cases which is a function of the criminal justice system. According to Remington and Oblin, the Criminal Justice System can be interpreted as the use of a systems approach to criminal justice administration mechanisms, and criminal justice as a system is the result of interactions between statutory regulations, administrative practices, attitudes or social behavior.¹⁹ Hagan differentiates the criminal justice system from the criminal justice process. According to him, the criminal justice process is defined as every stage of a decision that confronts a suspect in a process that leads to a criminal determination for him. What is meant by the criminal justice system is the interconnection between the decisions of each agency involved in the criminal justice process.²⁰

In an integrated criminal justice system, the components that work together in the criminal justice system are the police, prosecutors, courts and correctional institutions. Below the author will explain legal issues from the aspect of legal certainty in criminal law enforcement regarding the enactment of Perja 15/2020, where the prosecutor's office is one of the institutions that plays a role in the integrated criminal justice function in enforcing criminal law.

a. The Prosecutor's Office is a government institution whose authority is granted by law

In Article 1 number 1 of Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, provides a definition of the Prosecutor's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution whose function is related to judicial power which exercises state power. in the field of prosecution and other authorities based on law. Following the figure, Article 1 point 2 defines a prosecutor as a civil servant with a functional position who has specialties and carries out his duties, functions and authority based on law. The thing that needs to be underlined in this definition is that the authority of the prosecutor's office is based on the law, so in that sense the authority of the prosecutor's office is only as far as the authority granted by the law on the prosecutor's office.

In enforcing criminal law based on Article 1 number 1 above, it can be seen that the function of the prosecutor is to carry out prosecutions. The prosecution is carried out by the public prosecutor, which in Article 1 point 3 of Law 11/2021 regulates, the Public Prosecutor is a

¹⁹ Syahrin, M. Alvi. "Penerapan Prinsip Keadilan Restoratif Dalam Sistem Peradilan Pidana Terpadu." *Majalah Hukum Nasional* 48.1 (2018), Hlm. 101

²⁰ *Ibid*

prosecutor who is authorized by this law to carry out prosecutions and carry out the judge's determination and other authorities based on the law. Following point 4 of the article, it states that Prosecution is the action of the Public Prosecutor to delegate a case to the competent District Court in the terms and according to the manner regulated in the criminal procedural law with a request to have it examined and decided by a judge at a court hearing. A similar understanding can be found in Article 1 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP). According to Article 30 paragraph (1) of Law 16/2004, it is stated that in the criminal field, the prosecutor has the following duties and authorities:

- 1) Carrying out prosecution;
- 2) Carry out judge's determinations and court decisions that have obtained permanent legal force;
- 3) Supervise the implementation of conditional criminal decisions;
- 4) Carrying out investigations into certain criminal acts based on law;
- 5) Complete certain case files and for this reason can carry out additional examinations before being handed over to court, the implementation of which is coordinated with investigators.

Based on the provisions above, in the field of criminal law the Prosecutor's Office has the duties and authority as stated in the article above, so the question is what the position of Perja 15/2020 is, which is the legal umbrella for prosecutors to stop prosecutions based on restorative justice. It should be remembered that the Prosecutor's Office has a position under the government which carries out prosecutorial functions and other functions provided by law. Based on its position as a government institution whose authority is granted by law, as in Law 16/2004, as well as its amendments to Law 11/2021, it does not explicitly provide a basis for the prosecutor's office to carry out case resolution through a restorative justice approach. This is problematic in terms of legal certainty in criminal law enforcement, where the Prosecutor's Office has its own authority which is based on prosecutorial regulations and is not based on law. The prosecutor's authority to terminate a prosecution based on restorative justice reasons should be regulated in law and not through Prosecutor's Regulations, because Prosecutor's Regulations are technical regulations or implementing prosecutorial functions based on law.

b. Avoidance of negative stigma cannot be used as a reason to stop prosecution

Article 4 paragraph (1) of Perja 15/2020 regulates the requirements for implementing restorative justice, namely "Termination of prosecution based on Restorative Justice is carried out by taking into account: a. the interests of victims and other protected legal interests; b. avoidance of negative stigma; c. avoidance of retaliation; d. community response and harmony; and e. propriety, decency and public order. In criminal law enforcement, there is a principle that is firmly

held, namely the presumption of innocence.²¹ In the general explanation, point 3c of the Criminal Procedure Code reads "Every person who is suspected, arrested, detained, charged, and/or brought before a court hearing must be considered innocent until a court decision declares his guilt and obtains permanent legal force."²² This means that a person can only be said to be guilty if it has been proven legally and convinces the judge so that he is declared guilty by the trial judge. Based on this, the application of restorative justice to avoid negative stigma is not a legally based reason, because negative stigma from society is a necessity, whereas basically a person is declared guilty if it has been proven legally and convincingly based on the judge's decision. This means that if a person who has committed a criminal act continues to be processed in court, it will actually clear the defendant's good name if it turns out that his intention was not proven based on at least two valid pieces of evidence that the judge believes.

Likewise, the reason for avoiding retaliation is wrong in this case, because in the criminal context not only is punishment imposed with the aim of retaliation, but also for reasons of criminal responsibility. A person is criminally responsible according to the law when he is deemed capable of being legally responsible for his actions. The concept of criminal responsibility as put forward by Simons as quoted by Eddy O.S Hiariej, criminal responsibility is defined as a psychological condition, so that the application of criminal provisions from a general and personal perspective is considered appropriate.²³ Simons further said that the basis for responsibility in criminal law is a certain psychological condition of the person who commits the criminal act and the existence of a relationship between that condition and the act committed in such a way that the person can be blamed for committing the act.²⁴

- c. The material content of Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is contradictory.

Legal regulations at any level must be in harmony and not contradict each other. The result of conflicting or contradictory legal regulations creates legal uncertainty which can indicate that the implementation of these legal regulations does not have legal certainty. Regarding this matter, Nurhasan Ismail believes that the creation of legal certainty in statutory regulations requires requirements relating to the internal structure of the legal norms themselves. These internal requirements are:

²¹ Andi Hamzah, *Hukum Acara Pidana Indonesia (Edisi Kedua)*, Sinar Grafika, Jakarta, 2018. Hlm. 14.

²² *Ibid*

²³ Eddy O.S Hiariej, *Op.Cit.*, Hlm. 156.

²⁴ *Ibid*

- 1) There is clarity of the concepts used. These legal norms contain descriptions of certain behavior which are then combined into certain concepts.
- 2) The presence of clarity in the hierarchy is considered important, because it concerns whether it is legal or not, as well as whether it is binding or not binding in the laws and regulations that are made. The clarity of this hierarchy can provide direction as a form of law that has the authority to form certain statutory regulations.
- 3) There is consistency in statutory legal norms. This means that the provisions contained in a number of statutory regulations are related to one particular subject and do not conflict with one another.²⁵

As with other provisions in Perja 15/2020 which do not fulfill the principle of legal certainty, namely the provisions of Article 5 paragraph (1) which regulates that: "Criminal cases can be closed by law and prosecution terminated based on Restorative Justice if the following conditions are met: a. the suspect has committed a crime for the first time; b. criminal offenses are only punishable by a fine or punishable by imprisonment for not more than 5 (five) years; and c. The criminal act is committed with the value of the evidence or the value of the loss incurred as a result of the criminal act not exceeding IDR 2,500,000.00 (two million five hundred thousand rupiah). Furthermore, the provisions of Article 5 paragraph (8) regulate that "Termination of prosecution based on Restorative Justice is excluded for cases: a. criminal acts against state security, the dignity of the President and Vice President, friendly countries, heads of friendly countries and their representatives, public order and decency; b. criminal acts that are punishable by a minimum penalty; c. narcotics crime; d. environmental crimes; and e. criminal acts committed by corporations"

There is a contradiction between the provisions of Article 5 paragraph (1) letter b, namely that if the perpetrator is threatened with imprisonment for no more than 5 (five) years, whereas the provisions of Article 5 paragraph (8) letter b provide exceptions for criminal acts that are punishable by criminal penalties. minimum. These provisions are inconsistent and conflicting, it is possible that in enforcing the law the public prosecutor may charge the defendant with a lower sentence or the sentence may not be maximum, so that the sentence could be imposed under five years if the case goes through a judicial process, so that it does not contain fair legal certainty, If the threat of a five year sentence is seen as a standard, namely according to an article in the criminal law, because in practice a defendant can carry out a criminal prosecution of less than five

²⁵ Hutagaol, Christin Natalia. *Perlindungan Hukum Bagi Korban Kekerasan Seksual Di Perguruan Tinggi Berdasarkan PERMENDIKBUD Nomor 30 Tahun 2021*. Diss. Universitas Kristen Indonesia, 2022, Hlm. 19-20

years, likewise the trial judge has the authority to impose a sentence of less than five years. So the reason is that the perpetrator is threatened with imprisonment for no more than 5 (five) years, it does not provide an objective definition so it does not contain aspects of fair legal certainty.

- d. Termination of Prosecution Based on Restorative Justice is contrary to the principle of presumption of innocence

Presumption of innocence is defined as the principle of presumption of innocence. This means that a person is considered innocent before a court decision declares him guilty and has legal force. The opposite of this principle is what is called the principle of presumption of guilt, which is defined as the principle of presumption of guilt. This means that a person is considered guilty before a court decision declares him guilty. Eddy O.S Hiariej explained these two principles as follows: "The principle of presumption of innocence is a direction for law enforcement officers on how they should act further and put aside the principle of presumption of guilt in their behavior towards suspects. In essence, the presumption of innocence is legal normative and is not oriented towards final results. Meanwhile, the principle of presumption of guilt is factually descriptive. This means that, based on the existing facts, the suspect will ultimately be found guilty. Therefore, a legal process must be carried out against him starting from the inquiry, investigation, prosecution, up to the court stage." If you follow the opinion above, a person suspected of committing a criminal act must be processed and proven guilty in a trial. The principle of presumption of innocence is firmly held in criminal law enforcement, so what is the position of this principle in criminal law enforcement with a restorative justice approach? In the general explanation, point 3c of the Criminal Procedure Code reads "Every person who is suspected, arrested, detained, charged, and/or brought before a court hearing must be considered innocent until a court decision declares his guilt and obtains permanent legal force." Meanwhile, according to Article 8 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it states "Every person who is suspected, arrested, detained, prosecuted or brought before a court must be considered innocent before there is a court decision stating his guilt and has been obtain permanent legal force.

In criminal law enforcement, a defendant can only be declared guilty and subject to criminal sanctions if it has been proven legally and convincingly by the judge who is trying it after going through the stages of investigation, investigation, proof of the charges at trial, until prosecution and finally the judge based on two valid pieces of evidence. plus the belief states that a person has been legally and convincingly proven to have committed a criminal act.

Restorative justice is a concept of criminal law enforcement, the main concern of this concept is the interests of the perpetrator, victim and society. Resolving cases using a restorative justice

approach is resolving cases outside of court (afdoening buiten process).²⁶ Settlement of cases through restorative justice is carried out with efforts to restore the original situation.²⁷ This reinstatement effort became a reason to stop the prosecution. Meanwhile, Article 5 paragraph (6) of Perja 15/2020 regulates: "In addition to fulfilling the terms and conditions as intended in paragraph (1), paragraph (2), paragraph (3), and paragraph (4), termination of prosecution based on Restorative justice is carried out by fulfilling the following requirements: a. There has been a restoration to its original condition by the suspect by: 1. returning the items obtained from the crime to the victim; 2. compensate victims' losses; 3. reimburse costs incurred as a result of criminal acts; and/or repair damage resulting from criminal acts. b. there has been a peace agreement between the victim and the suspect; and c. the community responded positively. Meanwhile, Article 5 paragraph (7) states "In the event that the Victim and Suspect agree, the requirement for restoration to its original state as referred to in paragraph (6) letter a can be excluded."

Such a situation creates a conflict with the principle of the presumption of innocence which requires that a person be processed legally to prove whether they have indeed committed a violation of criminal law or not. The consequence of the restorative justice approach is that the suspect is presumed guilty outside of court, even though the suspect is a person who, because of his actions or circumstances, based on preliminary evidence should be suspected of being the perpetrator of a crime.²⁸ This means that a suspect must first be proven through a court decision to be declared guilty so that he can be charged with criminal responsibility and/or provide compensation to the victim. This does not provide legal certainty where there is a shift from the principle of presumption of innocence to the principle of presumption of guilt because in the restorative justice approach the actions can be held accountable in the form of returning the victim to its original state, so that the suspect is deemed guilty without having to be based on a decision. a court that has permanent legal force.

If a restorative justice approach is used, it does not mean ignoring the principle of presumption of innocence. In the author's opinion, solving problems using a restorative approach must not exclude sufficient evidence to prove whether the suspect has indeed committed a criminal act or not, so that the judicial process continues to be carried out to prove that the suspect is proven guilty of committing a criminal act. Once proven, only then can the judge choose whether to reconcile the parties involved in the legal case, or place the burden on the suspect/defendant to provide compensation without having to impose criminal sanctions. The author considers an idea like this to be appropriate, because it continues to carry out the judicial process so that the defendant can be legally and convincingly proven

²⁶ Vide Pasal 3 ayat (2) huruf 3 Perja 15/2020

²⁷ Vide Pasal 3 ayat (3) huruf b Perja 15/2020

²⁸ Vide Pasal 1 angka (4) Perja 15/2020.

in court. As for the imposition of sanctions or sentences, the trial judge can choose whether it is criminal, or simply by charging the defendant the compensation that has been experienced by the victim.

D. CONCLUSIONS AND RECOMMENDATIONS

The concept of restorative justice in Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice is the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair resolution by emphasizing restoration to the original state, and not retribution. With the issuance of Perja 15/2020, prosecutors have new authority, namely the authority to stop prosecutions based on restorative justice. Legal Certainty in Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, the Prosecutor's Regulation contains several problems in the function of the prosecutor's office. The prosecutor is a government institution whose function is related to judicial power which carries out state power in the field of prosecution and other authorities based on law. However, with the existence of Perja 15/2020, the prosecutor's office has new authority beyond the authority granted by law, namely terminating prosecutions based on restorative justice. This is problematic in terms of legal certainty in criminal law enforcement, where the Prosecutor's Office has its own authority which is based on prosecutorial regulations and is not based on law.

The authority of the prosecutor's office comes from the law, so that the prosecutor's office cannot create its own authority outside of what is regulated in the law. The authority of the prosecutor's office to terminate a prosecution based on restorative justice must be regulated by law. Termination of prosecutions based on restorative justice based on Perja 15/2020 is not in line with the principle of presumption of innocence as regulated in the Criminal Code and the Judicial Power Law. However, this provision may be excluded if the termination of prosecution based on restorative justice is regulated at the statutory level.

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