

Legal Certainty in Restorative Justice as Law Enforcement for Criminal Acts in the New Normal Period

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Abstract

The Covid-19 Pandemic has made the situation of society must change in order to maintain public health. The rules that have been in effect so far, the perpetrators of the criminal act will undergo an investigation by the police and the prosecutor's office before entering the trial process. During the trial process, the police searched for evidence of the suspect's actions until they got all the evidence. The police investigator submission the case to the prosecutor and carry out after the evidence is complete. With the covid-19 pandemic, covid 19 can be transmitted more easily by having close encounters with other suspects in detention centers. For health reasons, there is no transmission. It is necessary to reduce the number of people who enter detention centers. Moreover, for the time being, the Detention Center occupants have a number that exceeds the capacity, so that it is very prone to transmission. While the suspect must act as a deterrent to their actions. It is necessary to protect the human rights of the perpetrator. In the Indonesian legal system that has the principle of presumption of innocence provides legal certainty with the decision of the judge. So that the termination of the prosecution submitted by the prosecutor will make the public feel the legal certainty to be ruled out. This is a matter that wants to be examined to provide understanding for the public about the attorney general's regulation number 15 of 2020 on the termination of prosecution as restorative justice. The research method uses a normative approach by using research on the criminal procedure law, other implementing regulations, and reference books that support the protection of the criminal's human rights during the Covid-19 pandemic.

Keywords

human rights; perpetrators;
restorative justice



I. Introduction

Pandemic conditions that occur today cannot be estimated when the time will stop. The assumption that occurs when a pandemic occurs that with the correct handling will be able to stop immediately. But with the fact that what is happening today the virus has mutated so that the situation cannot be said to improve. So that the condition of society in general is still easily exposed to Corona Virus 19. The government has made rules to close or restrict the movement of people from between regions or from other countries to the country of Indonesia. The mutated virus is still outside Indonesia but with the movement of people from abroad to Indonesia, the virus also follows the Human Movement. This is prevented by the Indonesian government so that the virus does not spread to the public. The Indonesian nation has suffered many losses due to the presence of this virus. Many people and health workers have fallen ill and died from contracting it. The government has also spent little money to cope with the first attack of Covid 19 since 2020 either in the form of treatment or free

vaccines for all levels of society. Sihombing (2020) state that Covid-19 pandemic caused everyone to behave beyond normal limits as usual. The outbreak of this virus has an impact especially on the economy of a nation and Globally (Ningrum, 2020). The problems posed by the Covid-19 pandemic which have become a global problem have the potential to trigger a new social order or reconstruction (Bara, 2021).

So much effort has been made by the government since Indonesia enter the country with the most co-sufferers based on the task force to accelerate the handling of Covid-19 since April 15, 2020, The government designated Covid-19 as a non-ala disaster, nationally through Presidential Decree No. 12 of 2020 on the Determination of Non-Natural Disasters. The Ministry of Law and Human Rights issued Regulation of the Minister of Law and Human Rights Number 10 of 2020 concerning the provision of assimilation and Integration Rights for Inmates and Children in order to prevent and counter the spread of Covid-19. Soon another decision was issued from the Ministry of Justice and Human Rights to support the over-capacity of prisons. The policy is in the form of Decree of the Minister of Law and Human Rights No. 19 of 2020 concerning the Release and Release of Prisoners and Children through Assimilation and Integration in order to Prevent and Counter the Spread of Covid-19. Despite the overwhelming opposition to the policy, there are still inmates who do not make the most of this particular assimilation and release while still committing crimes. However, based on data compiled by the Ministry of Law and Human Rights on the percentage of repeated actions or recidivist only 0.05% so it can be said to have decreased from the previous year.

The rapid spread of the virus has led to a lot of changes that the government has to make so as not to fall victim to more and more victims. In addition to the rules issued by the ministry of Law and Human Rights, the government also issued other rules. The first regulation to take precautions, namely the prosecutor who issued the Regulation of the Attorney General No. 15 of 2020 concerning the Termination of Prosecution as a Restorative Prosecutor. The Attorney General's regulation in theory in criminal procedural law is a resistance to the principle of legality that provides legal certainty to the public. Similarly, the director general of the Supreme Court also issued guidelines for the implementation of restorative justice almost simultaneously. Government agencies that are supposed to enforce justice precisely make policies to apply restorative justice to perpetrators of criminal acts. Seeing the existence of different applications for legal certainty for the community, the problem discussed in this study is whether restorative Justice can be a means of law enforcement in this pandemic period.

II. Research Methods

The research method used is normative juridical research method with analysis approach. Where in this analysis approach is to know the meaning contained by the term used in the rule. In this study also used a statutory approach where the legislation used is related laws and regulations relevant to this research. The legal material used is the primary legal material, namely the Criminal Law Book, Attorney General Regulation No. 15 of 2020 concerning the termination of prosecutions based on Restorative Justice and guidelines for the application of Restorative Justice in the General Justice environment issued by the Supreme Court. Meanwhile, for secondary legal material using reference books and journals related to the subject matter of this study.

III. Discussion

The current state of society is in dire need of attention from the government, because there is not enough understanding from the community about the need to keep a distance so as not to spread the disease quickly. The slightest contact between people who have contracted the virus and the sick will result in infection. But the people affected by economic problems due to the pandemic are also not few so that they are forced to commit crimes to continue their lives. Economic necessity makes them reckless to commit crimes, it is not impossible they are the first time to commit a crime. Or even the crimes committed are not major crimes either, seeing the urgent economic needs. Crimes committed even if the reason for economic compulsion is still a mistake so that in accordance with the law - the law must still be processed with criminal procedural law.

Various types of justice in enforcing legal certainty, but in this new normal restorative justice can be the right choice. Because not all crimes require imprisonment or confinement as punishment for suspects who commit. There are two factors that cause prison or confinement is not the main choice at the time of this pandemic condition, namely:

1. The prison's capacity is already exceeding that. Full prison conditions will facilitate the transmission of diseases between prison inmates. Based on the data of the Directorate General of Corrections, the capacity of correctional institutions / prisons d / prisons throughout Indonesia is 130/000 people, but the reality that occurs the number of prison inmates exceeds 270,000 people
2. At the time of the pandemic there were many crimes of an economic nature so it is possible that the perpetrators were new to committing crimes. The urge to commit a crime comes from the need to be met so that the compulsion to commit a crime to maintain life. Different meanings for criminals who have repeatedly committed crimes, there is no deterrent effect. If the new perpetrator meets a crime's experienced then they will transfer knowledge from the experienced to the new perpetrator. There is no longer a deterrent effect, but there will be a repeat of the crime by new perpetrators or old perpetrators will recruit new perpetrators into crime groups.

Criminal purposes according to contemporary theory have the development of several theories, namely: the theory of deterrent effect put forward by Wayne R. Lafa which conveys that one of the purposes of criminal is as a deterrence effect so that the perpetrator no longer repeats his wrong actions. Similarly, it is conveyed that in the theory of Education also states that criminal aims as an education to the public about good or bad deeds. The same is said by Plato, *nemo prudens punit, quia peccatum, sed ne peccetur*, which means that a wise man does not punish for sin, but rather so that no more sin. There is no denying that the public's concern that the suspect will re-commit his crimes with the termination of the prosecution.

In this study it was found that there are arrangements regarding the application of restorative justice imposed when new normal conditions are listed in Prosecutor Regulation No. 15 of 2020 concerning Termination of Prosecution based on Restorative Justice and Guidelines for the application of Restorative Justice in the scope of The General Judiciary. Therefore, it will be explained further about the application of restorative justice as legal certainty in the new normal. Legal certain that becomes the legal purpose of the enforcement of the regulation as the main

3.1 Based on Attorney General Regulation Number 15 of 2021 concerning Termination of Prosecution based on Restorative Justice

This attorney general regulation is effective from July 21, 2020, a few months after the Government of Indonesia determined that Indonesia is included in non-natural disasters. Prosecutor's regulation made to provide an opportunity for the suspect to improve himself and the condition of the community in his neighbourhood who has suffered losses because of the crimes he committed. But the public's concern for legal certainty that the suspect must be aware of his mistakes and because his mistakes have resulted in others suffering. Suffering as a result of the actions committed by the suspect, that such acts are prohibited by law. The law has stated that people can be found guilty if the act has been ordered not to be committed or a prohibition that must be adhered to. The law always contains 4 (four) main things, namely:

1. Gebod, which regulates commands, where the behavior ordered to be carried out
2. Verbod, which regulates prohibitions, where there is a prohibition to do a particular act
3. Sanctie, where there is a criminal threat to those who violate the order given or violate the prohibition to commit certain acts.
4. Vrijstelling, the dispensation not to carry out orders to be executed or dispensation for the enforcement of prohibitions.

The fulfillment of elements of the law means that the perpetrator has fulfilled the criminal deliberations. But the existence of this Attorney General's Regulation casts doubt on the existence of legal certainty. Attorney General Regulation Number 15 of 2020 will not only stop the prosecution of the perpetrator's actions, but set criteria and conditions that must be met by the suspect. The position of the perpetrator has become a suspect because it has been determined by investigators because there has been sufficient evidence. The determination of the perpetrator as a suspect is in the process of investigation conducted by investigators in the police. After the evidence is complete, the police investigators submit all evidence along with the suspect to the prosecutor so that it can be processed in the future. Prosecutors who forward files and documents submitted by investigators to be forwarded into an indictment, but here prosecutors have other rights besides the task to prosecute suspects until the court process.

Prosecutors have the authority to stop prosecutions on the basis of opportunity. The principle of opportunity is the authority of the prosecutor to stop or continue the prosecution of a case in the presence of the public interest that must be put first. There is a public interest that must take precedence resulting in the prosecution of the perpetrator must be stopped even though there has been a victim who has died. On the contrary, if there is a public interest that wants prosecution to the perpetrator should be continued even though there is still a lack of evidence.

The authority of prosecutors to stop prosecution either by the principle of opportunity or by the existence of restorative justice is actually in violation of the principle of legality. Where the principle of legality in criminal law provides certainty that an act will not be able to be sorted unless based on the provisions of legislation that existed before the act was done. If there is a change in the laws and regulations after the action is done, then against the accused applied the most favorable provisions for the perpetrator. The principle of legality is listed in the Penal Code (wetboek van strafrecht / WVS) article 1. The principle of legality provides a legal certainty that anyone who commits a mistake or crime must be held accountable for his actions based on applicable regulations. With the rules that govern it, every action is considered to have legal consequences. The enforcement of legal certainty through the principle of legality remains the basis for the Attorney General's Regulation to stop prosecution by providing specific criteria and conditions for

a. Conditions for Termination of Prosecution

The Attorney General's regulation provides criteria on who can be granted termination of prosecution and provides the conditions listed in article 4 that there are interests of victims and legal interests that must be protected. If the victim's interests are not protected or in other word the victim states that the losses incurred have not been reimbursed by the perpetrator

To note in the termination of prosecution based on Attorney General Regulation No. 15 of 2020 in Article 4 paragraph (1) are:

- a. The interests of the victim 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

Looking at one of the purposes the criminal is to give a deterrent effect and the perpetrator can learn not to repeat his mistakes. Moreover, by seeing that one of the conditions that must be met by the attorney general's regulations is the perpetrator or suspect or the first time to commit a crime and or a crime committed is also a crime with losses below Rp. 2,500,000,00 (two million five hundred thousand rupiahs). So that the consequences of the act that is done include acts in minor crimes, even with criminal threats in the form of fines or imprisonment that is not more than 5 (five) years. The category of acts that can be classified as minor crimes where the act can still be forgiven by the victim and has the opportunity to be able to make reconciliation between the victim and the perpetrator. Atonement is one of the conditions that must be met in order to be stopped prosecution by prosecutors. It is contained in The Attorney General Regulation Number 15 2020.

This arrangement can be seen in Article 4 paragraph (2) in order to carry out the paragraph (1) by having to consider the following:

1. Subjects, objects, categories and threats of criminal acts
2. Background on the occurrence of, the conduct of criminal acts
3. Accident rate:
4. Losses or consequences arising from criminal acts
5. Cost and benefits of handling cases
6. Recovery Back to its original state: and
7. Peace between victims and Suspects

Article 4 states that losses or consequences resulting from criminal acts committed by perpetrators must be a separate consideration. The suspect has an obligation to recover the condition of the victim or his family in its original state, because the losses that must be borne by the victim is the result of the perpetrator's actions. One of the most important conditions is the reconciliation between the victim and the suspect, no matter how deep the level of accident that has been experienced by the victim due to the treatment of the suspect. Meanwhile, the first step of the prosecution termination process conducted by the public prosecutor is a prerequisite that must be done first by the suspect against the victim. The first step is a condition that must be met by the suspect first so that the efforts to stop the prosecution can continue. The prerequisites referred to are written in Article 4 in the regulation of the attorney general number 15 of 2021 which is also a condition of the combined non-conditions that can be chosen to run or not. All such conditions must be carried out in full and not partially.

The requirements that must be met are not optional that can be chosen to run or just one to do, but all of these are a unity of conditions that cannot be separated. For example, the background of the occurrence or conduct of criminal acts, it is necessary to see if there is a mensrea or intention contained before doing the act, whether there is a mature plan or just

because of a momentary encouragement because of factors of economic needs. If there is evil intentions that have been planned carefully and carefully, then the suspect in him has a seed of evil so that the apology to the suspect by the victim is considered unable to recover the evil intentions of the suspect. Similarly, when viewed from the level of accident behavior of the suspect that resulted in the victim suffered a fairly high loss, not in the nominal sense of the price of goods, but how the suspect committed the crime. For example, by being rude, frightening or even carrying out an attack, the victim will experience trauma that cannot be calculated economically for the losses suffered.

Different circumstances if the suspect commits theft but does not damage the victim's condition, does not mean eliminating the element of error, but provides an example of how the suspect in committing a criminal offence with the degree of consequences arising from the act. Violence committed by the suspect when committing a crime will leave a mark, but if when committing a crime the suspect does not commit violence then it can be estimated that the victim can still forgive the suspect. So that when there is an apology and there is a recovery of the victim's condition as before, it can be ensured that the process of peace between the suspect and the victim can be done. Although the peace process usually exists in civil / private cases in the form of dading, but in the cessation of prosecution based on restorative justice this must be done.

Guilt for committing a criminal offence listed in the criminal code (Criminal Code) provides a side of legal certainty over the rule. The Criminal Code provides certainty that acts that violate orders or prohibitions are regulated there will be penalties / sanctie. Punishment or criminalization can be in the form of imprisonment or confinement or fines that in the sense of providing a deterrent effect for the convicted. The fines paid by the convicted will go to the state not to make a recovery to the victim. On the victim's side there are still conditions that need to be improved, this is something that has not received attention from the state. The state is still in the state of providing legal protection in the form of retaliating against suspects who have committed crimes to victims.

Retaliation by the state to the perpetrators of such crimes is on criminal purposes with absolute theory, but for the time being this new normal condition must be rethought that retaliation is not solely by granting imprisonment or solitary confinement. Retaliation can also be in the form of restoring the victim's condition as before and apologizing to the victim and family, and this can be more effective because the Indonesian nation still has noble values with eastern culture and customs. Apologizing and recovering losses for the victim's condition as before is an effort that is not easy because the perpetrator must accept whatever the victim did as an effort to replace what has been taken by the suspect

The rule that is the basis of legal certainty as stated by Hans Kelsen that the applicable law guarantees certainty for every individual who interacts in society so as not to harm each other. If any party is harmed by the actions of others then based on the applicable rules must be held accountable for their actions. There are two parties who feel harmed by the termination of prosecution by the prosecutor, namely the victim and the police. The community feels aggrieved by the termination is because the termination is feared that there is no justice on their side. Justice understood by the public is when the perpetrators who have harmed their interests turned out after the case was handed over to the Prosecutor's Office, the case was stopped. In pre-trial is also given the opportunity for the police in case of termination of prosecution by the prosecutor.

The second party is the police who have run the investigation process until the investigation. The process of finding a legal event, finding evidence and determining the suspects carried out by the police with a long time and not a small cost. In accordance with the Criminal Procedure Law (KUHAP) and the regulation of the Chief of Police of the Republic stating that there are stages that must be undertaken to get justice for the community.

b. Criteria for Offenders that can be granted Termination of Prosecution

The suspect that obtains the termination of the prosecution from the Public Prosecutor must meet the criteria set out in Article 5 paragraph (1) of the Regulation of the Attorney General Number 15 of 2020, namely:

- a) Suspects for first time in crime
- b) The crime is only threatened with a fine or threatened with a prison sentence of not more than 5 years and
- c) Criminal acts are committed with the value of evidence or the value of losses incurred as a result of criminal acts not more than Rp.2.500.000 (two million five hundred thousand rupiah).

These criteria must be met alternatively on letter a and one of the letters b or c by the suspect as the second step to the attempt to stop prosecution by the prosecutor. With one of the criteria that cannot be met by the suspect, then the termination of the prosecution cannot continue. Prosecutors can see if the criteria can be met or not by the suspect. This can be seen in article 5 paragraph 2 which explains as follows:

(2) For criminal acts related to property, in the event that there are criteria or circumstances that are kasuistic which according to the consideration of the public prosecutor with the approval of the head of the state prosecutor's branch or the head of the state prosecutor can be stopped prosecution based on restorative justice is carried out while paying attention to the conditions as referred to in paragraph (1) letter a accompanied by one of letter b or letter c.

What cannot be denied is the criteria of the suspect who is the first to commit a criminal offence, so that the criminal purpose as a deterrent effect or as a function of education must be fulfilled, so that from the side of the suspect is expected not to repeat his actions again. Criteria are seen from the side of the legal subject as stated above, but there is a side of the legal object that will be regulated in Article 5 paragraph (3) namely:

(3) For crimes committed against persons, bodies, lives, and freedom of persons provisions as referred to in paragraph (1) letter c may be excluded.

(4) In the event that a criminal offence is committed due to negligence, the provisions in paragraphs (1) letter b and letter c may be excluded.

Deeds done because of negligence (culpa) is different from the act done because of deliberateness (dolus) where there is an intention manifested by the perpetrator. So that the person who has had evil intentions (mens rea) in manifested by deeds (actus reus) must be punished. As for the perpetrator who committed the act because of negligence of doing because of accident, there is no element of deliberateness and intention contained in it. Legal certainty for acts that are done deliberately will be excluded got a termination of prosecution from the Procecutor, the process will continue. Exceptions to paragraphs (3) and (4) for negligence that occur are casuistic will be considered specifically with the consideration of the public prosecutor who obtained the approval of the head of state prosecutor to be stopped by restorative justice. (6) In addition to fulfilling the terms and conditions as referred to in paragraphs (1), (2), (3), and (4), termination of prosecution based on Restorative justice is carried out by fulfilling the following conditions:

There has been a recovery back to the original state that has been done by the Suspect by:

1. Returning goods from a crime to the victim
2. Indemnify victims
3. Reimburse the costs arising from the consequences of criminal acts; and/or
4. Repair damage caused by the consequences of criminal acts.
 - a. There has been a peace agreement between the victim and the Suspect;
 - b. The community responded positively

The requirement to return goods, reimburse victims, reimburse costs incurred due to the actions of the perpetrator and compensate for the damage caused by the perpetrator is to reach a peace agreement between the victim and the perpetrator. The return to its original condition is to get a positive response from the community, so that if there is a termination of prosecution of perpetrators of criminal acts there will be no turmoil in the community.

3.2 Based on the Guidelines for the Application of Restorative Justice in the Scope of the General Judiciary issued by the Supreme Court

The new normal era provides opportunities for restorative justice to develop rather than distributive justice that has been more often done and understood by the community. The definition of Restorative Justice in the guidelines for the application of restorative justice in the general judicial sphere is the settlement of criminal cases involving perpetrators, victims, families of perpetrators / victims and other parties associated with jointly seeking a fair settlement to emphasize the restoration of the original state, and not retaliation. In the guidelines for the application of restorative justice by the Ministry of justice and human rights is only included in the legal process of the event in court in order to give consideration with restorative aspects of justice on the verdict. Awarding a verdict with restorative justice considerations instead of distributive justice that actually gives a punishment that is commendable to the actions committed by the accused. So there is no longer a recovery of the victim's condition but the victim does not get recovery, just get a sense of legal justice only because there is a judge's impartiality to give punishment to the perpetrator.

Restorative Justice is actually an alternative solution to criminal cases that in the mechanism of criminal justice procedures focus on criminal justice that change into a process of dialogue and mediation involving perpetrators, victims, families of perpetrators / victims, and other parties concerned to jointly create a fair and balanced criminal agreement or settlement for the victim and perpetrators by putting forward the recovery of the original state, and returning to the relation both in the community. Restorative justice conception used in the general judicial sphere is not for all forms of crime, only for some form of criminal offense. The form of crime that gets restorative justice is for minor [10], crimes committed by children, crimes committed by women, criminal offenses of perpetrators, addicts and victims of narcotics with special consideration. The purpose of the issuance of this guideline is to make it easier for the court to understand and implement the application of Supreme Court concerns, Circular Letter of the Supreme Court, encourage the application of restorative justice in the verdict and the fulfillment judicial principles that are fast, simple and light cost with balanced justice. The differences in legal subjects in the restorative justice guidelines of the attorney general's regulations are defendants and suspects. At this point there is no deviation of the principle contained in the guidelines for the application of restorative justice conducted by the judge.

Efforts or policies made by the state in conducting crime prevention and countermeasures must be made with an integral approach that has a balance of penal and non-penal. Based on the opinion of Barda Nawawi who conveyed that the most strategic policy is through non-penal means because it is more preventive and because penal policy has limitations that are fragmentary / simplicity / not structural functional; symptomatic / not causative / not eliminative; individualistic or offender – oriented / not victim – oriented; more repressive / non-preventive; must supported by infrastructure with high cost. The application of restorative justice can reduce the criminalization of perpetrators but also provide recovery to victims, so there is no need to always provide distributive justice. Distributive justice gives more funding to the perpetrator but does not provide recovery to the victim. Funding actually incurs high costs that must be borne by the state.

It is easier to run non-penal facilities in preventing and tackling crimes committed by the community because of its preventive nature in the event that it will not be done again by suspects. The suspect understands that there is an element of error in his behavior, so that if the suspect commits because of incomprehension or ignorance then the prosecutor's efforts to stop the prosecution will fulfill the criminal purpose of providing education for the suspect so as not to do the act again. This is important because often the perpetrators of crimes that have undergone criminal proceedings have committed repeated crimes so that in and out of prison or commonly referred to as recidivists.

Restrictions on the types of criminal acts in the guidelines for the application of restorative justice indicate that wrong doing remains an element of being taken into account in criminal acts. Circumstances committed by the accused with specificity

V. Conclusion

The implementation of Restorative Justice in this new normal period provides legal certainty to the community. Even with restorative justice this can better improve the community because the perpetrator provides space for the perpetrator to improve himself and the perpetrator is given the opportunity to be able to improve the condition of the victim as before. There is no element of legal certainty that is kept by this rule because the perpetrator who has the intention to deliberately commit a crime will remain in the criminal code in accordance with the applicable rules. For perpetrators who should be given the opportunity to learn to improve themselves because the crime committed is an accident or a form of light crime action. The community can help improve the mental condition of the perpetrator by not giving negative stigma and giving forgiveness, because the real perpetrator is part of the community as well.

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