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Assessing the Non-Judicial Criminal Case Settlement: A Comparative Approach

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Abstract

The abandonment of daily standards of conduct as abuse of authority for self-interest becomes something that violates the behavior of bureaucrats in development. Recently, the person is allergic to hear the term development whereas it contains a positive change. Type of the research is a normative legal research. The results of the research show that the role of judges in in legal discoveries to realize a justice is very required, given the legislation that cannot accommodate all contemporary legal issues. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. The weaknesses of these legislation require a concept of legal discovery by the judge even though in certain cases is limited to justice. This study concludes that the basis of thinking of penal policy for developing a non-judicial criminal case settlement mechanism is to bring about justice through the simplification of the criminal justice system and the application of the expediency principle. It is different from the Indonesian criminal justice system because it is very inefficient, not in accordance with the fast, simple, and low cost of legal principles. This study suggests a solution that is the simplification of the criminal justice system and the application of the expediency principle, namely requiring public prosecutors to highly consider the public interest in determining to implement a non-judicial criminal case settlement mechanism so that law enforcement resources become more focused on handling more serious cases.

Keywords: Criminal Law; Criminal Justice System; Judge; Law Enforcement

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1. Introduction

A minor crime must be resolved with the same mechanism as the serious criminal offense, which is one of the forms of the irony of justice. In order to reduce such problem of justice's irony, some countries have developed a variety of non-judicial criminal case settlement mechanisms for minor cases. Another consideration of the urgency of developing such mechanism is that the criminal justice system in each country is generally only capable of processing a small portion of all criminal offenses.[1] If a state investigates, prosecutes, adjudicates and penalizes all perpetrators, every stage of the criminal justice system will not be able to handle or process such crimes entirely. Therefore, the police and the public prosecutor who will bring the perpetrator into the criminal justice system shall exercise discretion to determine which cases to proceed or to terminate the prosecution. If the prosecution continues, it will be decided which cases are with the judicial sanctions and which ones are with the extrajudicial sanctions.

However, law must not be seen as a finite scheme, but it must continue to move, change, adapt to the dynamics of human life. Therefore, the law must continue to be reviewed and explored through progressive efforts to reach the truth and a noble goal of justice. Humans as main actors behind legal life are not only required to be able to create and making the la), but also the courage is able to breaking the law when the law is unable to present the spirit and substance of its existence, namely creating harmony, peace, order and community welfare.[2]

Nowadays, in fact, the law is understood only limited to the formulation of laws, the law enforcers are forced even some safely put themselves only into law horn without any space and willingness to act progressively. The community is also forced to obey all legal provisions, even though the law has deprived

[1] UN Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment,* UN Publication, New York, 2007, p.14

[2] Satjipto Rahardjo, *Penegakan Hukum Progresif*, Kompas, Jakarta, 2010, Page. 1. Compared to John Rawls. 1999. *A Theory of Justice (Revised Edition*). The Belknap Press of Harvars University Press: Cambridge.

them of their independence, suppressed their basic rights, even to become a tool of the ruler crime against the people. The law is not only *ordegenic* (order/rule), but also *criminogic* (crime). Legislation products that certainly have noble intentions and objectives, actually in its implementation can cause distortions in the established community structure and prove beneficial.[1]

In this context, the systematic solution to such irony of justice matters is legal policy to developing a non-judicial criminal cases settlement mechanism for minor cases in the Indonesian criminal justice system.[2] Such implementation rests on the regulation of its prosecution discretion by the public prosecutor. Thus, this paper analyzes the legal issue in the basis of thinking of penal policy to develop the non-judicial criminal case settlement mechanism. The analyzes result of this basis of thinking is expected to provide a prescription in the form of vision and new policy direction for developing that settlement mechanism for minor criminal offense cases in Indonesian criminal law.

The ongoing corruption undermines important factors in the prevention and prosecution of corruption such as dishonesty, disparagement, inaccuracy, unauthorized acts, no moral independence, no moral courage, unlawful acts, embezzlement in office and abuse of authority by officials which leads to the State or regional losses. A negative phenomenon caused by the absence of strict and forceful criminal sanctions on the rules of procurement is also related to the role of government bureaucracy and bureaucrats or individuals in the bureaucracy to prevent and eradicate corruption in the procurement of government goods and services. Corruption is the abandonment of certain standards of conduct by the authorities for self-interest. The abandonment of daily standards of conduct as abuse of authority for self-interest becomes something that violates the behavior of bureaucrats in development. Recently, the person is allergic to hear the term development whereas it contains a positive change.

The analysis on the basis of thinking of penal policy to develop the non-judicial criminal case mechanism settlement is heuristically conducted in the search of relevant legal principles to the nature of the idea, meaning and objective of the non-judicial settlement mechanism for minor cases, with regard to the factual moment, that is the fact of the penal policy for this settlement mechanism.[3] The results of the searching process indicate that the expediency principle is the main basis of thinking of the penal policy to develop the settlement mechanism for minor criminal offenses. In addition, the other relevant principles are namely the principle of opportunity, the principle of fast, simple, and low cost criminal process, as well as the principle of *ultimum remedium*.

2. Comparison of the Expediency Principle in the Criminal Law of the Netherlands

The traditional view toward the importance of punishment is to prevent the occurrence of danger or the risk of danger to others, accordingly, actions that are contrary to moral values with no harm to others are not expedient to punish.[4] Another view holds that `danger' itself is an inseparable situational concept from the moral value, due to the fact that the concept of 'danger' can be interpreted as all actions violating legitimate rights and interests among others, including their moral, cultural, and political interests.[5]

In addition to that ‘dangerous’ aspect, an action is expedient to punish when public realizes and approves it for its wrongfulness, its contradiction to the shared values commitment.[6] Thus, the onset of the public interest is the basis of expediency of an action categorized as a crime (criminalization). At this stage of penal policy (criminalization or decriminalization), the expediency principle plays an important role to prevent such action with more harmful impact to the community rather than when it is not categorized as a crime.

[1] *Ibid.* Page. 4

[2] Legal policy can be seen as the development of a new vision of the law place and role in the modern life and to form a law-governed state and civic society. For more discussion see Alexander Vasilyevisch Malko, et.all, `Legal Policy as a Means to Improve Lawmaking Process`, in *Astra Salvensis,* an VI, No. 11, 2018, p.834.

[3] Sidharta, `Heurestika dan Hermeneutika: Penalaran Hukum Pidana`, in Jufrina Rizal and Suhariyono AR (editor), *Demi Keadilan: Antologi Hukum Pidana dan Sistem Peradilan Pidana: enam dasawarsa Harkristuti Harkrisnowo,* Pustaka Kemang, Jakarta, 2016, p.9-10.

[4] See e.g. Joel Feinberg, `Harmless Wrongdoing`in*Moral Limits of the Criminal Law,* Oxford University Press, 1988.

[5] See e.g. D. N. MacCormick, *Legal Right and Social Democracy,* 1982, also Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law (Part 2. Criminalization*), 7th ed., Oxford University Press, Oxford, 2013, p.6

[6] See e.g. R. A. Duff, *Answering for Crime: Responsibility and Liability in The Criminal Law* (L*egal Theory Today*), Hart Publishing, 2000.

The next important role of the expediency principle is at the stage of implementing the penal policy. When making the decision not to prosecute, the public interests should be truly taken into account. Even though an act has been categorized as a criminal offense, when it is performed in such a manner or under such conditions, its nature can be categorized as a minor crime. Accordingly, the public prosecutor should consider whether the public interest still demands perpetrators to be prosecuted and punished.
Due to the policy to align the enforcement on materials on criminal law with the public needs and also to utilize the limited law enforcement capacity available to work within the principles of effectiveness, the law enforcement in the Netherlands has some degree of freedom to adopt a policy of terminating the prosecution. Such freedom is based on the acceptance of the expediency principle in the Netherlands criminal law. Based on this expediency principle, the basis of the law enforcement is dependent on the main criterion, the public interest, in applying this principle.[1]

In 1926 the expediency principle was included in the *Wetbook van Strafvordering* (Sv.) in Article 167 Sv. declaring that 'public prosecutors should decide to prosecute when it is an important prosecution based on the results of the investigation. Furthermore, the prosecution can be terminated on the basis of public interest".[2]

The principle of legality rigidly obliges to prosecute all crimes with sufficient evidence, seen as a "traditional paradigm" that has been gradually replaced with a new one during the 17th century.[3] Conditions leading to the paradigm shift are because of the immense dysfunction of the criminal justice system, resulting in a very powerful social protest; consequently, a crisis of confidence in law enforcement occurs, as well as the rapid population increase. The Court and the Prosecutor's Office must address these social effect issues and take them into account for its actions in criminal law.

The expediency principle has been interpreted in a "positive sense" with the basic premise that a duty to prosecute is performed only if the public interests desired, so the requirement legitimacy that is the legal order interest and the onset of the requirement legality. Therefore, the prosecution policy of a crime must be directed to enforce the law not only in the rule (*wethandhaving*) but also in the implementation of the law in general that is to realize legal order (*rechtshandhaving*). This concept means implementing the expediency principle in a positive sense, in extending the stage from the implementation to the investigation.[4]

The formulation of Article 167 Sr. states that "public prosecutors should decide to prosecute when it is considered important based on the results of the investigation. The prosecution can be terminated on the basis of the public interest." This leads to perceiving that the Netherlands accepts the expediency principle in 'a negative sense' meaning that this principle is the basis for terminating the prosecution process. This is different from the UK known to follow the common law tradition with an adversarial prosecution system; hence, the expediency principle is accepted in a "positive sense" meaning that the basis to prosecute is to consider the public interest.

Andrew von Hirsch disagrees with AC`t Hart who only focuses his attention on the stage of prosecution, since the expediency principle is on the wider thinking of criminal sanctions. This thought could affect the later stages of criminal proceedings, such as the imposition of criminal sanctions.[5] The expediency principle not only underlies the discretion of the authority of the public prosecutor in making decisions to prosecute or not, but also acts as a related guide to the prevention and social benefits to prosecute.[6]

This principle argues against the traditional legal principle that it is obliged to prosecute when there is sufficient evidence.[7] This rigid law enforcement in such conditions leads to adverse social conflicts, and

[1] Willem Geelhoed, *Het Opportuniteitsbeginsel en Hetrecht van de Europese Unie : Een Onderzoek Naar de Betekenis van Strafvorederlijke beleidsvrijheid in de Geeuropeaniseeide rechtsorde,* Kluwer, Deventer, 2013,p. 412

[2] Peter J. P. Tak, *Methods of Diversion Used By the Prosecution Service in the Netherlands and Other Western European Countries,* presented in the forum International Senior Seminar Visiting Experts` Papers number 135, by United Nations Asia and Far East Institute (UNAFEI) for the Prevention ofCrimes and the Treatment of Offender at January 12 – 16 Februari 2006, resource material series No.74.

[3] A.C't. Hart, *Criminal Law Policy in Netherland,* inJan van Dijk, Dkk, (ed.), *Criminal Law in Action: an overview of current issues in western societies*, Kluwer Law and Taxation Publishers, Deventer, 1988, p.75.

[4] *Ibid.*

[5] Andrew von Hirsch, *Expediency, Policy and Explicit Norms in Criminal Justice,* in Jan van Dijk. *Ibid*.p.111

[6] *Ibid.*

[7] See e.g. Wolfgang Naucke, *Strafrecht: Eine Einfuhrung,* 3rd ed. Metzner Verlag,Frankfurt, 1980, p.168-173.

further burdens the resources of the law enforcement system. The expediency principle practically offers the solution, by allowing the public prosecutor to undertake discretionary or non-prosecution conduct based on the degree of the priority.

When it is still necessary to prosecute, the expedient prosecution mechanisms in accordance with the criminal offenses must be applied and should be corresponding to consistent ways with the principles of effective case handling. The objective is to achieve the purpose of punishment, prevention, and restoration in a balanced way, with regard to the condition of criminal offenses. As shown in the application of transaction mechanisms (*afdoening buiten process*) in the cases of Ballas Nedam, KPMG Accountant NV and SBM Offshore.[1] Therefore, The expediency principle in the criminal procedure law in the Netherlands is manifested with simplifying the criminal justice system by developing various non-judicial settlement mechanisms for criminal cases, namely transaction or *afdoening buitenprocess* under Article 74 paragraph (1), paragraph (2), and 74a, 74b, 74c *wetbook van strafrecht* (Sr.), as well as penal order under Article 257 a-h *Wetbook van Strafvordering* (Sv.).

3. Comparison of the Expediency Principle in the Criminal Law of the United Kingdom

Different from the Netherlands with its inquisitorial prosecution system, the United Kingdom is a country with an adversarial prosecution system as in the common law tradition accepting the expediency and opportunity principles. This means that the basis to exercise discretionary of the prosecution authority is not only granted to the public prosecutors or senior officials but also is consistent in its system. In fact, the decision to prosecute or not is not exclusively become the responsibility for the public prosecutor. Many decisions to avoid prosecution are made by the police; as a result, it is difficult to control and supervise.[2]

From the history of the prosecution system in the UK, it can be observed the consistency of discretion of prosecution authority in its legal system. Initially, a specialized agency to prosecute was not present in this country, prosecutions were also be able to perform by individuals personally or privately, thus raising the issue of efficiency and difficulty to prove the wrongdoing and to punish perpetrators, and often to provoke judges to act actively like public prosecutors, violating the principle of judicial impartiality.[3]

Based on Marian Statutes 1555, Justices of the Peace (JPs) is established as the public prosecutor, elected by the Royal Commission for each county and city with the task of the law enforcement against crimes in the UK.[4] Each JPs' individual is also with a very important responsibility in the process of terminating the non-judicial settlement for criminal offenses, ordering the suspects' detention, prosecuting to the court, and releasing suspects held in custody on the basis of suspension of proceedings on bail. Moreover, the Police is also responsible for a case prosecution by which they may appoint several experienced local lawyers, as a result, there is no uniformity and certainty for controlling the prosecution policy nationwide.[5]Not until October 1986, did the Crown Prosecution Service perform its function to prosecute in the UK, as reaction to a series of Police actions violating the sense of justice in which they manipulate evidence and press the suspects, so CPS must review first before the Police prosecute, as regulated in Article 23 paragraph (8) Prosecution of Offenses Act of 1985.[6]

The Attorney General can terminate the ongoing prosecution process usually initiated by private parties

[1] Report Netherlands Government of Organization for Economic Cooperation and Development (OECD), *The Netherlands: Follow-Up to The Phase 3 Report & Recommendations,* May 2015

[2] See e.g. Despina Kyprianou, *Comparative Anaysis of Prosecution Systems (Part II) : The Role of Prosecution Services in Investigation and Prosecution Principles and Policies,* p.19, downloaded www.law.gov.cy at October 17, 2011. See also J. Fionda, *Public Prosecutors and Discretion: A Comparative Study*, Clarendon Press, Oxford, 1995.

[3]Sarah J. Summers, *Fair Trials, The European Criminal Procedural Tradition and The European Court of Human Rights,* Hart Publishing, Portland, 2007, p.35.

[4]John H. Langbein, `The Origins of Public Prosecution at Common Law`, in *American Journal of Legal History,* vol.XVII, 1973, p.318.

[5]Jacqueline Hodgson, `The Democratic Accountability of Prosecutors in England and Wales and France: Independence, discretion and managerialism`, in Langer, Maximo, Sklansky, David Alan (eds), *Prosecutors and Democracy: A Cross-Nation Study,* Cambridge University Press, Cambridge, 2016, p.12.

[6]Erik Luna and Mariane Wade, `Prosecutors as Judges`, in *Washington and Lee Law Review*, vol.67.Issue 4, article 6, January 9, 2010,p.1438

when the prosecution is considered as unimportant and in conflict with the interests of the kingdom.[1]Such authority from him is a procedural instrument that cannot be reviewed by the court. This is based on the theory of the separation of prosecutorial powers, meaning that the executive has the authority to control over the case handling and under the factual circumstances. With more burdens in the criminal justice system, the public prosecutor should prioritize certain prosecutions among several cases. Therefore, based on the common law tradition, the UK prosecution system provides wider space for the application of discretionary authority to prosecute for terminating the case on the basis of the public interest based on the expediency principle.[2]

Under Article 23 of the Criminal Justice Act of 2003, the police and prosecutors may not prosecute a criminal offense when it is assessed as a minor crime by outlining terms and criteria to exercise the discretion of the prosecution authority. The former is to ensure that the perpetrator is guilty indeed and certainly get punished once the prosecution is exercised, because the cautioning letter is actually a plea of guilt that can be recorded by the court. This warning mechanism is used by the police to resolve almost 30% of all cases reported.[3]

The UK Government has issued the Code for Crown Prosecutors in 2000 under Article 10 of the Prosecution of Offices Act (POA) of 1985 to regulate the use of non-judicial settlement mechanisms. This code determines the two conditions prior to the prosecution, which must be met, namely, the fulfillment of the evidential test as of the onset of the realistic prospect of conviction of the indictment, and such prosecution may only be exercised when required by the public interest (the public interest test).[4]

The requirements of the public interest test include the perpetrators' offense rate (the role of participation, the planning), the danger to the victim, the public impact. Furthermore, the public prosecutor should notice whether the prosecution is the expediency response for the crime, that is to achieve the purpose of punishment, prevention and restoration, in a balanced manner under criminal conditions, and prosecutions must be in accordance with consistent ways with the principles of effective case handling, such as the adoption of the mechanism of Deferred Prosecution Agreement (DPA) applied by the CPS and Serious Fraud Office (SFO) in the cases of Rolls Royce, Standard Bank, and XYZ Limited.[5]

The other criterion for applying the non-judicial case settlement mechanism is based on the Crime and Disorder Act 1998. Accordingly, the police can terminate the process of criminal procedural law further by issuing a "Cautioning" against adult offenders, and the letter of "Reprimand and Warning" for juvenile offenders. The "Cautioning" to the adult perpetrator is provided by the police when the sufficient evidences present as the basis to prosecute, and the perpetrator acknowledges his or her wrongdoing, and the offender approves the established procedure. In addition, the perpetrator must also meet the followings, old or weak enough, mentally ill, and suffering from some physical or mental illness.

4. Conclusion

Based on the comparative analysis on penal policy in the Netherlands and UK to develop non-judicial criminal case settlement mechanism, this study concludes that the basis of thinking of penal policy for developing a non-judicial criminal case settlement mechanism is to bring about justice through the simplification of the criminal justice system and the application of the expediency principle. It is different from the Indonesian criminal justice system because it is very inefficient, not in accordance with the fast, simple, and low cost of legal principles. This study suggests a solution that is the simplification of the criminal justice system and the application of the expediency principle, namely requiring public prosecutors to highly consider the public interest (public interest test) in determining to implement a non-judicial criminal case settlement mechanism so that law enforcement resources become more focused on handling more serious cases.

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[2]Peter J. P. Tak, *Op. Cit*., p.57.

[3]*Ibid*.

[4] Gary Slapper and David Kelly, *The English Legal System,* fifth edition, Cavendish Publishing Ltd,London, 2001, p.425.

[5] Organisation for Economic Cooperation and Development (OECD), *Implementing The OECD Anti-Bribey Convention, Phase 4 Report : United Kingdom,* h.75, downloaded www.oecd.or/corruption, March 25, 2017.

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