



Volume 35 No 2, May 2020  
DOI: 10.20473/ydk.v35i2.16878

Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan  
Surabaya, 60286 Indonesia, +6231-5023151/5023252  
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id

Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)  
by <http://e-journal.unair.ac.id/index.php/YDK/index> under a Creative  
Commons Attribution-NonCommercial-ShareAlike 4.0  
International License.



FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

Article history: Submitted 19 May 2019; Accepted 18 October 2019; Available Online 26 December 2019.

## The Difference in Meaning for the Dismissal of Charges, Postponement of Charges and Waiver of Dispute

Adi Al Fatah Wallad

Adi.alfatah@yahoo.com

Adi and Associates Law Firm

### Abstract

The development of the authorities which have the right stop a certain prosecution and case overriding in Indonesia has led to multiple interpretations, especially relating to the policy of the public prosecutor to postpone prosecution on grounds of public interest. Postponement of a prosecution or investigation should not be known in Indonesian criminal procedure law, but this practice is applied several times when it is related to one of the personnel of the KPK. In fact, the Attorney General once issued a decision to set aside the case of Bibit and Chandra after the pretrial ruling stated that the prosecution of the two men was invalid. Some of these problems have led to the blurring of the concept of stopping and delaying the prosecution and overriding of the case. The termination of the prosecution aims to stop the prosecution process while the delay in the prosecution does not stop the prosecution process but rather to delay it for a certain period of time or until the cessation of the commotion in the community and the case overriding aim to provide legal immunity against perpetrators of criminal offenses which should be based on sufficient evidence to be submitted to the court hearing but not submitted on grounds of public interest.

**Keywords:** Dismissal; Postponement; Waiver; Criminal Charges; Waiver of Dispute.

### Introduction

At the present date, there arises new problems that continue to disadvantage victims of criminal acts, namely the existence of cessation of prosecution and case exclusion. Termination of a prosecution is not limited to termination of a prosecution through a Decision on Termination but also includes cessation of the prosecution for a certain period of time. Based on Article 140 paragraph (2) letter a of Law Number 1 of 1981 concerning Criminal Procedure Code hereinafter referred to as the Criminal Procedure Code, the public prosecutor is given the authority to continue prosecution under the grounds that there exists a lack of evidence or such

issue is not a criminal issue or the issue is closed by law. In relation to the cessation of prosecution under the grounds that there exists a lack of evidence and that issue is not a criminal issue, both reasoning provide some form of legal uncertainty as before the occurrence of a case delegation to the public prosecutor from the investigator, such crimes must be examined first and foremost and declared as complete by the public prosecutor. With the existence of prior examination and a declaration from the public prosecutor, the legal consequences is that the public prosecutor has acknowledge the existence of enough evidence and the fact that the issue at hand is a criminal issue. However, public prosecutors are still given the right to cease a prosecution under the grounds that there exists not enough evidence or that the issue is not a criminal issue. Based on these occurrences, there exists a need to examine the reasons for the cessation of prosecution especially those related to the amount of evidences and the scope of criminal act invoked. Aside from such, closing the case for the sake of law requires further research due to its legal uncertainty as to the criteria or cause of effect.

In the practice of cessation of a certain case for the sake of law, the main reason utilized by the Court is usually the expiry of charges such as that used in the case of Novel Baswedan. There exists one issue that often occurs in the practice of law enforcement which occurs due to conflicting institutional roles and contributions in criminal cases. These conflicts often involve the law enforcement body of the National Commission for Eradication of Corruption (hereinafter “KPK”). The law enforcement invoked to KPK personnel is often directed towards the criminalization of KPK personnel. However, not the same can be said otherwise. The existence of conflict often draws the attention of the people. Thus, the president as the Head of State and Head of Government will present measures to ‘intervene’ through ordering the cessation or the postponement of legal proceedings for a certain period of time under the grounds of public interest. This request for cessation or postponement is often set for an unspecified time that is often not written in the decisions. Thus, making it especially difficult for the injured party to take legal effective legal measures.

The cessation or postponement of criminal proceedings will often create legal uncertainty and provide an advantage for individuals who have allegedly committed criminal acts, because there exists more chances for the charge to reach its expiry date. This clearly goes against the principles of criminal law, as criminal law must not provide those who have committed criminal acts. This also contradicts the Indonesian constitution which highly upholds legal supremacy. Furthermore, the cessation or postponement of legal proceedings for a certain period of time often does not consider the interests of the injured parties as this could also be one of the grounds invoked to eradicate existing charges. Even within Indonesia's applicable criminal procedural law, it has yet to recognize the cessation or postponement of legal proceedings for a certain period of time through a concrete provision. Thus, this act of cessation or postponement must be tested from an approach that considers the perspective of the victims injured by the occurrence of this crime. Referring to current conditions, there exists a possibility that the act of stopping an investigation or prosecuting is conducting merely to avoid criminal charges through expiry. A recent case, that involving Novel Baswedan, whereby investigations were stopped several times by instruction or order of the president, which is then put to a halt by the State's Attorney General under the grounds of expiry of charges. The Pre-Trial chambers have stated that the cessation of charged imposed on Novel Baswedan is concrete evidence that the cessation of criminal proceedings can be used for political interests by the State's Attorney General, whereby it is also further supported by the President and his will as well as proving that the authority to cease a criminal charge can also be used for other purposes.

Aside from being able to stop criminal charges, the State's attorney general as the leader and the person held responsible for the highest Courts, based on Article 35 paragraph (c) of Law Number 16 of the Year 2004 regarding the Judiciary (State Gazette of the Republic of Indonesia year 2004 Number 67, State Gazette of the Republic of Indonesia Number 4401, hereinafter "Judiciary Act") provide the authority by the use of legislations to postpone criminal cases under the grounds of public interests. In principle, the authority that is attached to the State's attorney

general to postpone certain cases is needed when such decisions protect a wider interest. However, the execution and mechanism conducted by the State's attorney general often postpone cases under unjustified grounds. This ambiguity in the mechanism for postponing a certain criminal case presents legal uncertainties and justice for the injured party. The main justification for postponement, which is the existence of a public interest, is also very vague as there exists no legislation which regulates a clear criteria and leaves room for the State's attorney general to provide a subjective interpretation. Based on the aforementioned introduction, the main issue discussed below is the difference between the cessation, postponement and waiver of disputes.

### **Prosecution is an Important Element in the Criminal Justice System**

Prosecution becomes the second phase in the criminal justice system after the results of investigations conducted by investigators are declared to be complete by the investigating prosecutors. The results of the investigation will be used by the public prosecutor as a basis for making the indictment and submitting the case to the court, or in other words the public prosecutor will be responsible for the results of the investigation in a court hearing. Prosecution is an important element in the criminal justice system because it is the form of legal protection given by the state to the people who are victims of criminal. Thus, the actions of the public prosecutor in filing criminal complaints against the defendant in the trial can be considered as the government's attitude towards the prevention and eradication of criminal acts. Providing an indictment as stated in Article 1 paragraph 7 of the KUHAP is a public prosecutor's action to submit a criminal case to the competent district court in the matter and in the manner stipulated in this law with a request to be examined and decided by a judge at a court hearing. There are several criminal law experts who express their opinions on the definition of prosecution, such as:

- a) Wirjono Prodjodikoro put forward the definition of prosecution, namely demanding a defendant before a criminal judge to submit a case of an accused with his case file to the judge with a request that the judge examine and then

decide the criminal case against the defendant.<sup>1</sup> The definition of prosecution according to Wirjono Prodjodikoro is almost the same as the understanding contained in the Criminal Procedure Code because the meaning of prosecution is only limited to the act of bringing a case to court. Wirjono Prodjodikoro did not include the act of investigation as part of the prosecution but limited the prosecution to the case of the case being transferred to the court.

- b) Van Bemmelen defines prosecution and separates it into two definitions, namely:
- a. In the broadest sense, prosecution includes the actions of the public prosecutor that is not only all means intended to connect the judge to the case, but also a preliminary examination conducted by the police or prosecutor is considered an act of prosecution provided the suspect is informed that there is an intention to make a claim against him.<sup>2</sup> The meaning of prosecution in the broad sense put forward by van Bemmelen shows that the police and prosecutors are an inseparable system. Investigations carried out by investigators are very dependent on the assessment of prosecutors researchers whether it is complete or not. Likewise, the prosecution carried out by the prosecutor is very dependent on the results of the investigation conducted by the investigator because the public prosecutor, in filing a claim against a defendant, also depends on the results of the investigation. Therefore, the investigation should be interpreted as part of the prosecution.
  - b. In the narrow sense, prosecution is the submission of a criminal case to the Court.<sup>3</sup> The use of the term 'case submission' is not appropriate to describe the prosecution because it is the public prosecutor who has the obligation to prove criminal acts and the wrongdoings of the accused. However, the judge is not bound by the demands of the public prosecutor regarding whether the defendant's actions are proven or not and the length of the criminal or type of punishment that will be charged to the defendant.
- c) Jan Rummelink put forwards the understanding that a prosecution is any act before the judgement of the court, except the act of investigations. Jan Rummelink believes that in principle, it is the same as the definition of prosecution in the Criminal Procedure Code but he also stressed that all actions of the public prosecutor before the judge's decision are part of the prosecution. Separation of the prosecution action from the investigation is logically acceptable but as a system that works continuously, the investigation should be a legal action in order to prepare the prosecution. Based on the actions of the public prosecutors as stated in Article 14 of the KUHAP, the pre-prosecution process can be considered as the prosecution process. Article 14 of the KUHAP also regulates the authorities of the public prosecutor in conducting the pre-prosecution process, bearing in mind the provisions of Article 110 paragraph (3) and paragraph (4), providing clues to perfect the investigation of investigators. Jan Rummelink's view in the

---

<sup>1</sup> Wirjono Prodjodikoro, *Hukum Acara Pidana Di Indonesia* (Sumur 1983).[34].

<sup>2</sup> Van Bemmelen, *Hukum Pidana I* (Penerjemah: Hasnah ed, Bina Cipta 1991).[192].

<sup>3</sup> *ibid.*

definition of prosecution further puts such a definition in a vague position. This is due to the fact that public prosecutors also has the authority to conduct pre-prosecution processes that is in relation with the investigation.

- d) Moeljatno stated that the act of prosecution is if the prosecutor has sent a list of cases to the judge accompanied by a letter of demand, if the defendant is detained and, regarding the period of detention, requests an extension to the judge because it has been fifty days. It can be assumed that the prosecutor has considered sufficient reason to request for that demand and if one of the prosecutors notifies the judge that a case will be brought to him.<sup>4</sup>

Most experts strictly separate the prosecution from investigation and investigation. This separation has resulted in the consequence that the investigation processes are not part of the prosecution even though in the context of exercising the authority of the prosecution, the public prosecutor was involved in the investigation process or known as pre-prosecution process. Pre-prosecution is an act of the prosecutor to monitor the progress of the investigation after receiving notification of the start of the investigation from the investigator, studying or examining the completeness of the investigation results received from the investigator and providing instructions for completion to be able to determine whether the case file can be transferred to the court or to the prosecution stage.<sup>5</sup> When referring to the opinion expressed by Jan Rummelink, the pre-prosecution action is part of the prosecution even though the authority is bestowed exclusively to the investigator. The different parts of investigations and the process of prosecution is inseparable due to the existence of a very high institutional ego. Thus this results in reluctance when investigators, in this case the police, are working under the public prosecutor. In order to accelerate the process of handling criminal cases to provide legal certainty and justice, investigators should be under the coordination of public prosecutors. Ideal conditions in law enforcement that prioritize efficiency and effectiveness will also reduce the occurrence of differences of opinion between investigators and public prosecutors in terminating the investigation or prosecution as well as differences of opinion in handling cases.

---

<sup>4</sup> Rusli Muhammad, *Hukum Acara Pidana Kontemporer* (Citra Aditya Bakti 2007).[76].

<sup>5</sup> Andi Muhammad Sofyan and Abd. Asis, *Hukum Acara Pidana Suatu Pengantar* (Kencana Prenada Media 2017).[165].

Institutional Ego in certain circumstances has even hindered the handling of cases because investigators and public prosecutors feel they have no relationship between superiors and subordinates, so there is no obligation to obey the instructions of the research prosecutors. For example, in the case of the Batam City National Land Agency corruption case which, according to the Riau Islands Province Regional Police, provided a loss of the country amounting to Rp1,500,000,000.00, but according to the Riau Islands High Prosecutor's Office, the case was a violation of administration and taxation.<sup>6</sup> The difference in opinion between the two law enforcement institutions has caused no resolution of the problem, causing legal uncertainty for the parties related to the case. This issue should get the attention of the legislators in the context of the reformation of the Criminal Procedure Code so that the institutional ego of law enforcement officials can be minimized in the context of accelerating law enforcement while continuing to uphold legal certainty and justice.

Prosecution is a means of providing legal certainty and justice for perpetrators and victims of criminal acts. Prosecution will provide legal certainty for the perpetrators of criminal offenses that have been committed and victims of criminal acts obtain justice through the existence of efforts to prosecute the perpetrators of criminal acts. The purpose of the prosecution is to obtain a determination from the public prosecutor regarding the existence of sufficient reasons to sue a defendant before a judge.<sup>7</sup> Before delegating a criminal case to the court, the public prosecutor first assesses whether a case file has met the requirements relating to evidence to be presented to a judge in a court. Initially, the public prosecutor was the only party authorized to assess the actions of investigators but with the expansion of the pretrial authority through the decision of the Constitutional Court, the implementation of the authority of the investigation could also be tested through

---

<sup>6</sup> batampos.co.id, 'KPK Sorot Kasus Badan Pertanahan Nasional Batam' (*batampos.co.id*, 2018) <<https://batampos.co.id/2018/04/05/kpk-sorot-kasus-badan-pertanahan-nasional-batam/>> accessed 7 January 2019.

<sup>7</sup> *ibid.*

the pretrial institution. The public prosecutor assesses in order to determine whether the case file is complete and if it is incomplete, the public prosecutor will provide instructions for the investigator to complete the case file. The pretrial institution aims to test the validity of the use of the authority of the investigation, especially in the case of determining a suspect.

In addition, the prosecution also aims to protect the rights of every individual including the victim and the perpetrator.<sup>8</sup> Prosecution is a means for the victim to hold the perpetrator accountable through the public prosecutor. Although in the practice of the trial, the public prosecutor in submitting a claim does not seek the views of the victim. As for the prosecution, it becomes a means for the perpetrators of criminal acts to submit their defense and/or take responsibility for the actions or mistakes that have been charged to them. The official authorized to prosecute is the public prosecutor. The public prosecutor has the authority to prosecute anyone who is charged with committing a crime in his jurisdiction by passing the case to the court authorized to adjudicate.<sup>9</sup> The prosecutor is in charge of representing the country to prosecute a criminal.<sup>10</sup> The Public prosecutor, based on Article 1 paragraph 6 letter b of the KUHAP states that the prosecutors are given the right by the law to conduct prosecutions and execute judicial decisions. The universal position and function of public prosecutors are similar in each country, as one of the law enforcement bodies of a State.<sup>11</sup>

The judicial system is a case handling system from the time a party is injured until the judge's decision is implemented.<sup>12</sup> Public prosecutors are one of the state's tools to control society so that there is no chaos due to criminal acts. The public

---

<sup>8</sup> Suharto RM, *Penuntutan Dalam Praktik Peradilan* (Sinar Grafika 2007).[19].

<sup>9</sup> Article 37 of the KUHAP.

<sup>10</sup> Ahmad Sulchan and Muchamad Gibson Ghani, 'Mekanisme Penuntutan Jaksa Penuntut Umum Terhadap Tindak Pidana Anak' (2017) 1 Ulul Albab <<http://jurnal.unissula.ac.id/index.php/ua/article/view/2218>>.[112].

<sup>11</sup> Yesmil Anwar and Adang, *Sistem Peradilan Pidana, Konsep, Komponen Dan Pelaksanaannya Dalam Penegakan Hukum Di Indonesia* (Widya Padjajaran 2011).[190].

<sup>12</sup> Anang Priyanto, 'Citra Hakim Dan Penegakan Hukum Dalam Sistem Peradilan Pidana Di Indonesia' (2005) 2 Jurnal Civics Media Kajian Kewarganegaraan <<https://journal.uny.ac.id/index.php/civics/article/view/4374>>.[5].



prosecutor in every prosecution must reflect and be based on a sense of justice for victims of criminal acts and the community as the party that gives the public prosecutor the confidence to represent him in upholding the law. The prosecution process does not always get a good response from the community because of the relative nature of justice so it is difficult to fulfill the sense of justice of all elements of society. In addition, the majority of Indonesian people still enjoy or are happy with punishment so that they tend to want each criminal offender to be charged with a relatively high or maximum crime. The public prosecutor certainly has an obligation to educate the public that punishment or punishment is no longer the best solution in dealing with crime or crime. Various alternatives or approaches in criminal law show that the use of criminal sanctions is not effective in crime prevention and prevention.

In connection with the prosecution authority attached to the public prosecutor in this case the prosecutor and the public prosecutor in the KPK, in recent times received serious attention from the public, academics and legal practitioners. Terminating the prosecution and overriding the case are 2 (two) authorities attached to the prosecutor's office and receiving the spotlight because they are considered to be in accordance with the purpose and purpose of the said authority. In addition, there are practices in postponing prosecutions for reasons of public interest that have an impact on the expiration of the prosecution's expiration. In the practice of stopping prosecution by law is the expiration of prosecution as used by the Prosecutor's Office in terminating the NB case. There is one problem that often occurs in law enforcement practices in Indonesia that arises because of conflicts between institutions which initiate parallel proceedings against one of the agency's personnel. This conflict always involves the KPK law enforcement agencies. Every law enforcement against KPK personnel is always directed at the efforts to criminalize KPK personnel but not vice versa. The existence of this conflict also usually gets the attention of the public so that the President as the Head of Government and the Head of State take several actions to "intervene" with the law enforcement by ordering the termination or postponement of law enforcement for a

certain period of time for reasons of public interest. Termination or postponement of law enforcement for an unclear time period is not contained in the decree making it difficult for the parties concerned to take legal remedies as the injured party.

### **Postponement of Law Enforcement**

Termination or postponement of law enforcement for a certain period of time will tend to cause legal uncertainty and even provide benefits for those suspected to commit criminal offenses because it will be very possible for the criminal prosecution time period to expire. This is clearly contrary to the criminal law itself because criminal law is not allowed to provide benefits for the perpetrators of criminal acts. This also contradicts the Indonesian constitution which upholds the rule of law. Termination or postponement of law enforcement for a certain period of time is increasingly beneficial for criminal offenders because the concept of prosecution regulated in the Criminal Procedure Code is a concept of prosecution in the narrow sense. On this basis, the discussion on the concept of prosecution in formal Indonesian law must be reviewed to formulate prosecutions that reflect justice and legal certainty.

In addition, the suspension or postponement of law enforcement for a certain period also tends not to pay attention to the interests of those who are victims of criminal offenses because it can be used as an excuse to stop prosecution. As for the criminal procedure law in force in Indonesia, there is no stopping or postponing law enforcement for a certain time so it needs to be explicitly regulated on that matter. Termination or postponement of law enforcement in the public interest deserves to be tested from the perspective of the approach of victims of crime as the most disadvantaged party. Referring to the current condition, there is a possibility of terminating the investigation or prosecution solely to avoid criminal prosecution in ways that are legally justified, such as to invoke that the charges are expired. The most recent case is the NB case in which investigation was stopped several times based on instructions or a presidential order which was finally stopped by the Attorney General on the grounds of criminal prosecution having expired. The

pretrial has declared the termination of the prosecution of the NB case invalid and determined the date of the trial but the Prosecutor's Office did not carry out the pretrial decision. The NB case is clear evidence that the power to stop prosecution can be used for political purposes from the Prosecutor's Office where the Attorney General is appointed by the President so that it has an interest in carrying out policies in accordance with the president's wishes and at the same time proving that the authority to stop prosecution can be used for other purposes.

The aforementioned conditions will truly disadvantage the victims of a criminal act that is allegedly committed by NB and showcases the existence of an element of vulnerability in criminal cases caused by expiry. Expiration of a criminal charge can occur due to the fact that the perpetrator of a criminal act has escaped or there exists the emergence of new criminal acts. This condition results in the occurrence of expiry and the cessation of an investigation and/or criminal charge for a short period of time under the reason of public interest. This condition also provides a reason to conduct research and renewal of the concept of prosecution. Renewing the concept of prosecution is not merely to avoid the expiry of charges but also to provide legal certainty and justice in law enforcement. The renewal of the concept of prosecution including regulating the relevant authority and the waiver of charges must be based on the principles of criminal law which is to not provide an advantage to those who commit criminal acts. The principles of criminal law invokes that all criminal law actors must be held liable for their criminal acts in accordance with relevant procedural law.

Limiting criminal charges, as regulated within the provisions of the KUHAP, reduces legal protection towards victims and law enforcers. The development of criminal law also provides its own difficulties to law enforcers if the concept of prosecution currently present in the KUHAP is still maintained. If this concept is maintained, then criminal acts that would fall under the definition of organized crimes will often be unprosecuted under the grounds of expiry. There exists several criminal law acts that have developed by its method, quality, quantity which creates an urgency for stopping prosecution under the grounds of expiry.

The criminal act of corruption is one of the criminal act that imposes its own challenges when applying this ‘expiry’ cause. The development of current corruption law presents a high threshold in regards to the burden of proof for elements that involve the loss of State funds.

The different difficulties in the burden of proof for certain criminal acts presents a different threshold for expiry for general criminal acts and special crimes. One of the examples of the application of expiry that should be treated differently is when it is applied to the act of corruption and the act of fraud. This difference also ascertains that between general crimes and special crimes, the expiry should be treated differently. The expiry of charges and the parties authorized to conduct the cessation of prosecution does receive quite a bit of attention in the criminal law world as it relates to the protection of victim rights and the discretionary authority of the judiciary. The use of this discretionary authority in law enforcement must be minimalized to ensure the legal certainty and justice towards all parties of a criminal dispute.

Aside from the authority to cease prosecution, the attorney general as the leader of the judiciary, based on the provisions of Article 35 paragraph c of the Judiciary Act, is provided with the authority prescribed by law to waive charges for the sake of public interest. In principle, the authority attached to the attorney general to waive prosecutions is crucial in protecting a greater good interest. However, its implementation and mechanism is still unclear. This ambiguity in the mechanism of the waiver of prosecution charges presents legal uncertainty and injustice, especially to the victims of criminal acts. The main requirement, which is the existence of a public interest, is still very vague because existing regulation does not clearly define a criteria and leaves room for interpretation for the attorney general to subjectively interpret these criteria in accordance with the needs of the case. This absolute authority that is attached to the attorney general in conducting the waiver for prosecution must be attached with the regulating mechanism and criteria that is clear, to avoid the misuse of such authority. If the mechanism and criteria in case overriding are not clearly regulated in statutory regulations, the

Attorney General's authority in overriding cases will always cause debate in the community. Debate in law enforcement will reduce the level of public confidence in law enforcement and criminal law so that the unclear mechanism and criteria of public interest in overriding cases must be immediately clarified in the legislation.

The Constitutional Court in several cases relating to the review of Article 35 letter c of the Judiciary Act agreed that the exercise of the Attorney General's authority in setting aside cases tends to be misused because of absolute absolutes. There is no legal remedy that can be carried out by the parties concerned with the Attorney General's authority in setting aside the case. Some cases involving the leadership of the Corruption Eradication Commission (KPK) are evidence of weaknesses in the case overriding authority inherent in the Attorney General. The waiver of disputes also tend to incur losses for victims of crime, especially in case offenses without consideration of the public interest. One form of overriding the case that caused debate was the policy of Attorney General Muhammad Prasetyo decided to issue a *seponering* (case overriding) for the case which ensnared former KPK leaders Abraham Samad and Bambang Widjojanto. The decision of Attorney General Muhammad Prasetyo further proves the tendency of the authority to set aside cases for political purposes because before the decision was made the DPR Law Commission stated that there was no public interest in setting aside the cases of former KPK leaders Abraham Samad and Bambang Widjojanto. With reference to the decision of the Constitutional Court, with the decision of the DPR Law Commission stating that there is no public interest in disregarding the case of former KPK leaders Abraham Samad and Bambang Widjojanto, the Attorney General should not have issued a case adjudication decision for the public interest.

In fact, the Attorney General continued to set aside the case of former KPK leaders Abraham Samad and Bambang Widjojanto so that the reasons for the public interest in overriding the case were blurred. The decision of the Attorney General is indeed contrary to the opinion of the House of Representatives but the decision cannot be tested in any institution because the criminal procedure law in force in Indonesia does not provide an opportunity to test the decision of the Attorney

General in the case overriding. The consideration of state institutions that provide opinions on whether or not there is a public interest in a case that the Prosecutor General will override should be binding and not merely a formality.

The authority of the prosecutor's office in stopping prosecution and the Attorney General's authority to make the case overriding decision for the public interest should be reviewed. Termination of the prosecution is the authority of the public prosecutor regulated in Article 140 paragraph (2) letter a of the Criminal Procedure Code. The authority to stop prosecution was established with a slight marginalization of the case delegation from the investigator to the public prosecutor. There are several reasons for stopping the prosecution regulated in Article 140 paragraph (2) letter a of the Criminal Procedure Code, namely that there is not enough evidence, the incident or action was not a criminal offense and the case was closed for law. Reasons for insufficient evidence and events or actions that are not criminal offenses are counterproductive to the provisions or process of investigation until the case is submitted to the public prosecutor. Under the provisions of the Criminal Procedure Code, investigators in the case of starting an investigation are required to submit a notice of commencement of the investigation to the public prosecutor. Submitting notice of the commencement of this investigation relates to the position of the public prosecutor to provide instructions for investigators in conducting investigations. This process shows that the involvement of prosecutors in investigations should be sufficient to assess whether a case under investigation is a criminal offense or not and whether the evidence is sufficient. With the involvement of prosecutors in the investigation process, it is sufficient to be used as a basis to override the authority to stop the prosecution on the grounds that there is insufficient evidence or an event or the act is not a criminal offense because the prosecutor already has sufficient time to judge a case of sufficient evidence or an event or act of a criminal offense.

In addition, before a case file is received by a public prosecutor, it is always preceded by a case file investigation by the public prosecutor or the prosecutor's office relating to the completeness of the investigation case file. The completeness of the

investigation case file is not limited to the completeness of the file requirements but also relates to the evidence and whether or not the incident or act can be categorized as a criminal offense. If the prosecutor considers that the case is insufficient evidence and / or the event or act is not a criminal offense, then he has the authority to give instructions to the investigator. With the research process carried out by the public prosecutor who was followed up by the receipt of the case file which was declared complete, the legal consequence was that the public prosecutor had also agreed that the case was sufficient evidence and could qualify as a criminal offense. If in the future the public prosecutor declares termination of the case on the grounds that there is insufficient evidence or is not a crime, the statement is not in line with the statement of the complete case file that has been stated in the receipt of the case file.

As for relating to the authority of the public prosecutor to stop the case on the grounds that the case was closed for the sake of law can also lead to legal uncertainty and injustice. Indonesian laws and regulations, especially the Criminal Procedure Code, do not provide a clear definition of the meaning and scope of a case closed by law so that it will cause different interpretations and is highly dependent on the subjectivity of the public prosecutor as the party in charge. Cases closed by law should be interpreted according to the laws and regulations must be declared as such by reason of expiration of the prosecution or the suspect or the defendant died. In connection with the reason of death, this cannot be used or provide benefits for the perpetrators of crime, in contrast to the expiration of criminal prosecution.

Termination of the prosecution for the reason that the prosecution has expired in recent times has come under the spotlight because the public prosecutor has stopped the Novel Bin Salim Baswedan case on the grounds of expiration. The use of expiry as a reason for stopping a prosecution is permissible in legislation but the process of exceeding the period of criminal prosecution is the problem. The expiration of the criminal prosecution of Novel bin Salim Baswedan occurred because of several temporary stops on the case. Recurring termination of a case is certainly contrary to the laws and regulations because without a clear legal basis and tends to harm victims of crime allegedly committed by Novel bin Salim Baswedan.

Moreover, the termination of the Novel Bin Salim Baswedan case for a certain period of time without limitation is also established without a clear legal product so that it immediately removes the right of the victim of a criminal offense to take legal action against the termination of the case for a while.

With the existence of a number of criminal cases that have been terminated by the law enforcement process for a while then it is necessary that the institutions that form legislation regulate the suspension of law enforcement temporarily and legal remedies for such termination. This arrangement will provide legal certainty and justice for the victim because there exists a method for victims to propose legal remedies for the temporary cessation of the prosecution. In addition, if the termination should also abolish the expiration of the prosecution because the prosecution was not carried out not because of the inability of law enforcers but because there was an urgent reason for a temporary suspension to prevent noise or commotion in the community because of the existence of pro and contra groups for law enforcement. Thus, the temporary termination of the case will not provide benefits for the perpetrators of criminal acts and losses for victims of criminal acts.

The cessation of prosecution for a certain period of time or delaying the prosecution is unrecognized in principle by any judicial system in the world, as there exists no strong legal bases for such actions and it has even been used to weaken the criminal justice system. Criminal law is a field of law that presents the most assertive and push-forward sanctions that cannot be delayed for political reasons. Delaying a prosecution will also contradict the principles of equality before the law and legal certainty. The delaying prosecution policy with the reason to prevent noise due to the existence of groups that are pros and cons should be a bad precedent for the Indonesian legal system but such practices have already taken place. This condition is concluded as a bad precedent because the pros and cons in society can prevent law enforcement, meaning that law enforcement can depend on the presence or absence of pros and cons in society. With this precedent, there is no choice for legislative institutions other than establishing new authority for



public prosecutors to postpone prosecution on the grounds of preventing noise or commotion in the community. Delaying prosecutions with a reason to prevent chaos or commotion in the community should not provide benefits for the perpetrators of criminal acts. The advantage that a criminal offender can obtain in the event of a delay in prosecution is the expiration of authority to file criminal charges. Because the concept used is a delay in stopping the prosecution, the legal consequences, the expiration of the prosecution for the case has elapsed. Terminating the expiry excuse will provide legal certainty for criminal law enforces and as a form of legal protection to victims of criminal acts.

The termination of the prosecution is very different from the postponement of the prosecution because the cessation of the prosecution aims to stop the prosecution process while the prosecution delay does not stop the prosecution process but instead delays for a certain period of time or until the cessation of the commotion in the community. Termination of a prosecution will free a person from the status of a suspect or defendant whereas postponement of a prosecution will not free a person from the status of a suspect or defendant. In addition, in stopping the prosecution, a person whose prosecution is terminated must obtain rehabilitation of reputation while in the postponement of the prosecution there is no rehabilitation of reputation because the case is still ongoing. Given these differences, legal action against the cessation of prosecution and delay in prosecution should also be different. Legal remedy for stopping the prosecution is to submit a request for legality testing to the pretrial institution, whereas for the postponement of the prosecution, the legal action cannot be submitted because the case is still only being postponed on the grounds of preventing widespread commotion.

In addition to the authority to stop prosecution, the attorney general in this case the attorney general also has the authority to override cases as a form of implementation of the principle of opportunity in prosecution. The principle of opportunity provides an opportunity for public prosecutors not to prosecute

criminal cases in the Court.<sup>13</sup> The overriding of the case implies that although there is sufficient evidence to file a lawsuit against the perpetrators of the crime, the attorney general as the leader and the highest person in charge of the prosecutor's office shall lead, control the execution of duties, and the prosecutor's authority as referred to in Article 18 paragraph (1) of the Judiciary Act, has the authority to set aside the case for reasons of public interest. The public interest as a reason for overriding the case is still being debated even though the attorney general as the authority holder has used his authority in several cases. Disregarding a case for reasons of public interest can be simply interpreted as giving impunity to someone who has committed a criminal offense that should have been brought before a court hearing. Providing immunity for a criminal offender should be a form of giving benefits to the criminal offender which is contrary to criminal law because criminal law does not provide benefits for the criminal offender. The authority of the attorney general in putting aside a certain criminal case under the grounds of public interest has received various criticism for a long time since it is mostly used for the president's political interests.

This accusation is very reasonable because the cases that have been set aside by the attorney general are cases that can result to a negative image of the president if the case continues. Political reasons in the use of case overriding authority are very contrary to public interest reasons as the main requirement. Thus, the parameters or criteria of public interest in overriding cases must be regulated clearly and firmly so as not to cause debate in the community. In addition, there is no legal effort to test whether the attorney general's decision to set aside the case in the public interest so that the authority becomes absolute.

Based on the analysis above, there is a very basic difference between stopping the prosecution, delaying the prosecution and overriding/waiver of the case. The

---

<sup>13</sup> Arin Karniasari, 'Tinjauan Teoritis, Historis, Yuridis Dan Praktis Terhadap Wewenang Jaksa Agung Dalam Mengesampingkan Perkara Demi Kepentingan Umum' (Universitas Indonesia 2012).[1].A. Zainal Abidin F, 'Sejarah Dan Perkembangan Asas Oportunitas Di Indonesia', *Simpodium Masalah-masalah Asas Oportunitas* (1981).[21].

termination of the prosecution aims to stop the prosecution process while the delay in the prosecution does not stop the prosecution process but rather to delay it for a certain period of time or until the cessation of the commotion in the community and the case overriding aim to provide legal immunity against the perpetrators of criminal offenses which should be based on sufficient evidence to be submitted to the court hearing but not filed on grounds of public interest. The legal consequences for terminating the prosecution, delaying the prosecution and setting aside the case differ so that the legal remedies that can be submitted are also different. As stated earlier, the cessation of the prosecution can be submitted through legal institutions pretrial institutions while the case overriding in the public interest cannot be tested through any institution because it is the absolute authority of the attorney general as the leader and highest responsibility of the prosecutor's office leading, controlling the execution of tasks, and the authority of the prosecutor's office.

### **Conclusion**

The termination of the prosecution aims to stop the prosecution process while the delay in the prosecution does not stop the prosecution process but rather to delay it for a certain period of time or until the cessation of the commotion in the community and the case overriding aim to provide legal immunity against the perpetrators of criminal offenses which should be based on sufficient evidence to be submitted to the court hearing but not filed on grounds of public interest. The legal consequences for terminating the prosecution, delaying the prosecution and setting aside the case must differ so that the legal remedies that can be submitted are also different. As stated earlier, the cessation of the prosecution can be submitted through legal institutions pre-trial institutions while the case overriding in the public interest cannot be tested through any institution because it is the absolute authority of the attorney general as the leader and highest responsibility of the prosecutor's office leading, controlling the execution of tasks, and the authority of the prosecutor's office.

### Bibliography

A. Zainal Abidin F, 'Sejarah Dan Perkembangan Asas Oportunitas Di Indonesia', *Simposium Masalah-masalah Asas Oportunitas* (1981).

Ahmad Sulchan and Muchamad Gibson Ghani, 'Mekanisme Penuntutan Jaksa Penuntut Umum Terhadap Tindak Pidana Anak' (2017) 1 Ulul Albab <<http://jurnal.unissula.ac.id/index.php/ua/article/view/2218>>.

Anang Priyanto, 'Citra Hakim Dan Penegakan Hukum Dalam Sistem Peradilan Pidana Di Indonesia' (2005) 2 Jurnal Civics Media Kajian Kewarganegaraan <<https://journal.uny.ac.id/index.php/civics/article/view/4374>>.

Andi Muhammad Sofyan and Abd. Asis, *Hukum Acara Pidana Suatu Pengantar* (Kencana Prenada Media 2017).

Arin Karniasari, 'Tinjauan Teoritis, Historis, Yuridis Dan Praktis Terhadap Wewenang Jaksa Agung Dalam Mengesampingkan Perkara Demi Kepentingan Umum' (Universitas Indonesia 2012).

batampos.co.id, 'KPK Sorot Kasus Badan Pertanahan Nasional Batam' (*batampos.co.id*, 2018) <<https://batampos.co.id/2018/04/05/kpk-sorot-kasus-badan-pertanahan-nasional-batam/>> accessed 7 January 2019.

Rusli Muhammad, *Hukum Acara Pidana Kontemporer* (Citra Aditya Bakti 2007).

Suharto RM, *Penuntutan Dalam Praktik Peradilan* (Sinar Grafika 2007).

Van Bemmelen, *Hukum Pidana I* (Penerjemah: Hasnah ed, Bina Cipta 1991).

Wirjono Prodjodikoro, *Hukum Acara Pidana Di Indonesia* (Sumur 1983).

Yesmil Anwar and Adang, *Sistem Peradilan Pidana, Konsep, Komponen Dan Pelaksanaannya Dalam Penegakan Hukum Di Indonesia* (Widya Padjajaran 2011).

**HOW TO CITE:** Adi Al Fatah Wallad, 'The Difference in Meaning for the Dismissal of Charges, Postponement of Charges and Waiver of Dispute' (2020) 35 Yuridika.