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Legal Reconstruction of Expired and *Ne bis in idem* Prosecution Authority in Criminal Code Based on Justice Value

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Abstract

The main problem discussed in this research is to find out What Are The Weaknesses Of Expired And *Ne bis in idem* Prosecution Authority In Criminal Code and How Is The Legal Reconstruction Of Expired And *Ne bis in idem* Prosecution Authority In Criminal Code Based On Justice Value and this problem are researched using the socio-legal research method which relies on the qualitative data obtained by the author in the field where the results are processed using data triangulation to obtain relevant and accurate analysis. The results of the study shows that the factors that Both the expiry provisions stipulated in Articles 78 to 81 of the Criminal Code and the principle of *ne bis in idem* which are included in Article 76 (1) of the Criminal Code have not been able to meet the value of justice due to the lack of a specific elaboration regarding the reasons that became the basis for the abolition the right of criminal prosecution and the abolition of the authority to prosecute the crime of murder because in the perspective of the expired contained in Criminal Code, it can abort criminal prosecution. Because of this problem, A Legal Reconstruction is needed. as proposed by the author which focuses on two Elaborating the grace period as the reason for the abolition of authority according to the criminal code in the Criminal Code as seen in Article 78 of the Criminal Code.

Keywords: Legal Reconstruction, Prosecution, Criminal Code, Justice Value.

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INTRODUCTION

Indonesia is a country that based its constitution on the law (Rechstaat). This is in accordance with the mandate in the 1945 Constitution of the Republic of Indonesia Article 1 Paragraph (3) which reads "*The State of Indonesia is a state of law*". This implies that the state in carrying out any action must be based on law and can be legally accounted for.

Judging from the interests it regulates, the law is divided into two kinds of law, namely public law and private law. Public law is a law that has a public interest that moves in the same lines with social life. Private law is a law that has a special interest in establishing relationships in society. Criminal law in the division of conventional law includes the field of public law. This means that criminal law regulates the relationship between citizens and the state and focuses on the public interest or public interest [1].

According to the provisions of Article 10 of the Criminal Code, there are several types of crimes that can be imposed on someone who has committed a crime. The types are distinguished between the main punishment and additional punishment. The main punishments consist of capital punishment, imprisonment, confinement, fines, and imprisonment. While additional punishment consists of revocation of certain rights, confiscation of certain goods that are announced by the judge's decision.

The basic rules of authority to carry out criminal prosecutions are held with the aim of creating legal certainty for a person as the subject of law, so as to avoid uncertain conditions in the face of criminal prosecution. In carrying out criminal prosecutions against perpetrators of criminal acts, the Criminal Code also regulates the abolition of the authority to prosecute and carry out crimes, this is regulated in the first book of the Criminal Code, Chapter VIII regarding general rules.

The Criminal Code Book I Chapter VIII discusses the abolition of the authority to prosecute and

carry out criminal acts (*Vervel van het recht totstrafvordering en van de straf*) where only the state has the authority to hold the right to carry out a crime against anyone who has been declared guilty by the state and sentenced for the crime. The Criminal Code contains things that cause the state to lose the right to prosecute criminal acts against the perpetrators of the crime, namely:

1. Because the act has been decided by the court with a decision that has permanent legal force (Article 76)
2. By the cause of death of the maker (Article 77)
3. Because the time has passed or has expired (Article 78-80)
4. Settlement outside the court, namely by paying the maximum fine and fees when the prosecution has started (Article 82 for violations that are only punishable by a fine).

In criminal law, there are several reasons that can be used as a basis for judges not to impose criminal penalties on perpetrators or defendants who are proposed by the court because they have committed a criminal act. Even though the current Criminal Code regulates the reasons for the abolition of the authority to prosecute criminal acts, the Criminal Code itself does not provide an understanding of the meaning of the reasons for the abolition of the right to prosecute. A person who has committed a criminal act can basically be prosecuted before the court to be tried, and if in a trial it can be proven that the criminal act he is accused of, he or she will then be decided guilty so that a criminal can be imposed in accordance with the criminal threat of the criminal regulation that he or she violated. However, in reality, this is not always the case, because there are things that according to law, the right to carry out criminal prosecutions becomes invalid [2]. The basic rules of the right to carry out criminal prosecutions are held, with the aim of creating legal certainty for a person, so as to avoid uncertain or uncertain conditions in the face of criminal prosecution. Regarding the abolition of the authority or right to prosecute this crime, it is regulated both in the Criminal Code and outside the Criminal Code, namely in the 1945 Constitution.

Except for the justification that eliminates the unlawful nature of the act and the excuse for forgiveness that eliminates the criminal responsibility of the perpetrator thereby eliminating the punishment of the perpetrator, there are also reasons that precede the reason for the abolition of the crime where if this reason is accepted, the prosecutor cannot prosecute. Those reasons are: the reason with the place where the Criminal Code is applied (*locus delicti*). This then answers the question of whether the acts committed by the suspect are within the scope of the Criminal Code because it must be remembered that in Articles 2-8 of the Criminal Code, if indeed the act was committed in the article above, then the prosecution cannot be carried out.

These problems are what urges the author to study it further in research with the main problem as follows:

1) What Are the Weaknesses of Expired and *Ne bis in idem* Prosecution Authority In Criminal Code?
2) How Is the Legal Reconstruction of Expired and *Ne bis in idem* Prosecution Authority In Criminal Code Based On Justice Value?

METHOD OF RESEARCH

This type of research is a kind of empirical juridical, or referred by field research that examines the provisions of applicable law and what happens in reality in society [3]. Juridical empirical research is legal research on the enactment or implementation of normative legal provisions in action at any particular legal event that occurs in society. Or in other words, a research conducted on the actual situation or real conditions that occur in the community with the intention of knowing and finding the facts and data needed and to differentiate with previous research whether it is intended or not [4], after the required data has been collected then leads to the identification of the problem which in turn leads to problem solving.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses Of Expired And *Ne bis in idem* Prosecution Authority In Criminal Code

The term Expiration in the field of criminal law is the lapse of time that causes the loss or cancellation of the right to sue or carry out a sentence against someone who has committed a crime. In the perspective of the Criminal Code, this means that basically all perpetrators (in a broad sense) of a criminal act must be prosecuted before a criminal court trial, but either in general or specifically, the law determines the waiver and or elimination of prosecution in certain cases, for example, before the expiration occurs. This is as emphasized in Article 78 of the Criminal Code that the right to sue for a crime is nullified because it has expired.

The basis of these provisions is the same as the basis of the provisions the *ne bis in idem* principle in Article 76 paragraph (1) concerning the principle of *ne bis in idem*, namely for legal certainty for every criminal case where one criminal case can only be prosecuted once. this means that one cannot be prosecuted for the same act twice so that the maker is not forever disturbed by the peace of his life indefinitely by the threat of prosecution by the state. A person who is guilty of committing a crime, in order to avoid prosecution by the state, requires to always be alert to everyone, hide, avoid open public relations, all of which make his life uneasy. The restlessness of life for so long before the expiry date ends is basically a mental affliction, which is no different from suffering as a result of undergoing a sentence imposed by a court. In addition to reasons for legal certainty, the principle

of the passage of time is also based on the difficulty factor in uncovering cases [5].

Filing a criminal complaint is basically in the form of work to uncover an event as it actually happened (*materialele waarheid*) at the time of the incident that has passed. Disclosure of the incident requires evidence that is determined and regulated according to the provisions of the law, both regarding the types and the method and system of their use. The longer the time passes, the more difficult it will be to obtain these pieces of evidence. The longer the memory of a witness will decrease, disappear, or even forgot about the event he or she has seen or experienced. Likewise, objects that can act as evidence, the longer time passes, the bigger the possibility that some cause may make the object be destroyed, lost, or no longer exists. With the passage of a long time, the success can even be reduced lead to the failure of prosecution work [6].

One more thing that is important, is that with the passage of time, the mental suffering of both the victim and his family as well as the community as a result of a crime, will decrease which will eventually disappear or be forgotten from memory. If viewed from the theory of retaliation, it becomes no longer important to uncover a case that has been forgotten by the community. Even though in modern times, the theory of retaliation is considered by many to be outdated, it is still a matter of legal consideration. The legal basis for the abolition of the right to prosecute a criminal offense due to expiration is regulated in Articles 78 to 81 of the Criminal Code.

In the realm of criminal law, the principle of *ne bis in idem* means that a person cannot be prosecuted because of an act (event) for which the judge has decided already (Article 76 (1) of the Criminal Code). The true meaning of *ne bis in idem*, is used with the term "*nemo debit bis vexari*" (no one for his actions can be disturbed or harmed a second time) which in the Saxon Numbers literature translates to "*No one could be put twice in custody for the same offense*". The rationale or reason of this principle is [7]:

a) To maintain the dignity of the court (not to undermine the authority of the State);
b) For a sense of certainty for the defendant who has received a decision.

Every decision that has been handed down by the judge against the defendant, whether it is a sentence that is a punishment or another decision is a form of accountability given by law to a defendant who has been legally proven and based on strong evidence has committed or not committed a crime. Every accused who has been proven to have committed a crime can only be held accountable for the events or criminal acts he has committed, and cannot be held accountable for crimes he or she has never committed, and also only has the right to serve the sentence imposed by the judge for the events and crimes he or she had committed.

The Criminal Code is the main source for positive law that applies in the country of Indonesia, where it explicitly states that in Article 76, the defendant is only allowed to be examined in a trial for once against a criminal event that he or she committed and the Criminal Code explicitly prohibits the defendant from being examined and tried again a second time for the same crime. The application of the principle of *ne bis in idem* in criminal cases is to have a specific purpose. The objectives include [8]:

a) To not let the government repeatedly talk about the same criminal act so that in a criminal event, there are several decisions that are likely to reduce people's trust in their government;
b) Once a person as a defendant must be given peace of mind, one should not be allowed to continue feeling threatened by the danger of being prosecuted again in an event that has been decided once.

Thus, it is clear that the purpose of applying the principle of *ne bis in idem* in criminal cases is to provide legal protection for the defendant so that he cannot be prosecuted and tried again in the same criminal case and event and which has previously been decided and also to prevent the government from repeating it, or in other words, re-examining cases that have been examined previously which in the end may lead to several different decisions.

Regarding the judicial review, it is contained in Article 60 paragraph (1) of Law no. 8 of 2011 namely Amendments to Law No. 24 of 2003 concerning the Constitutional Court in which the application of the principle of *ne bis in idem*, namely to the content of paragraphs, articles, and/or parts of laws that have been tested, cannot be requested for re-examination. The implementation of the principle of *ne bis in idem* was reaffirmed in the Circular Letter of the Supreme Court No. 3 of 2002 concerning the handling of cases relating to the principle of *ne bis in idem*. Regarding this problem, Article 76 paragraph (1) of the Criminal Code stipulates that, "*except in the case that the judge's decision may still be repeated, a person may not be prosecuted twice because of an act that an Indonesian judge against him has tried with a final decision. In the sense of Indonesian judges, including judges of the autonomous and customary courts, and in places that have these courts*". Meanwhile, Article 76 paragraph (2) of the Criminal Code states that, "*When the final decision comes from another judge, then against that person and because of the crime, no prosecution may be held in terms if: 1) the decision is in the form of acquittal from charges or escape from prosecution. lawsuits; 2) the decision is in the form of a sentence and has been served in its entirety or has been*

pardoned or the authority to carry it out has been nullified because it has expired".

Based on the article above, there are two *adages* contained in it. First, *nemo debit bis vexari* which means that no one can be bothered with being prosecuted twice for the same case. In general, this adage came to be known as *Ne bis in idem* which more or less means, a person cannot be prosecuted a second time before a court with the same case. Second, *nihil in lege intolerabilius est (quam) eandem rem diverso jure censeri*. That means, the law does not allow the same case to be tried in multiple courts [9].

A court decision that has permanent legal force means that there has been an examination of the subject matter of the case. If the decision relates to absolute competence or relative competence, the decision relating to the validity of the indictment is not a decision that has definite legal force. Further consequences, if the case is tried again, it cannot be said to be *ne bis in idem*. So it is concluded that in order to be used as the basis or valid reasons for the existence of "*ne bis in idem*" in terms of fighting a case that is submitted, it must meet the requirements based on the same reasons, whether it is about the problem, the object, the object, or even the trial and the reasons, so that it can be said as *ne bis in idem*.

2. Legal Reconstruction Of Expired And *Ne bis in idem* Prosecution Authority In Criminal Code Based On Justice Value

In order to answer the research constraints above, the author then proposes a theory of the need for legal reconstruction of the Expired and *Ne bis in idem* Prosecution Authority In Criminal Code so that it can meet the demand of Justice Value.

The theory as mentioned by the author above rose because there is a delay in the expiration of the grace period due to the delay in prosecution due to a pre-judicial dispute (disputes that must be decided first) is different from stopping the expiration of the grace period due to criminal prosecution.

The difference in the calculation of expiration, in the Criminal Code, is basically also contained in Articles 79 to 1-3, namely:

a) Regarding counterfeiting in general or counterfeiting of currency, the grace period starts on the day after the counterfeited or damaged currency is used;
b) Regarding crimes in Articles 328, 329, 330, and 333, the grace period begins on the day after the person directly affected by the crime is released or died;
c) Regarding the violations in Articles 556 to 558 a, the expiration period begins on the day after the list containing the violations, according to general rules, is transferred to the Office of the Registrar of a Court, transferred to that office.

The things that need to be understood in the expiration regulation are as follows:

a) The expiration date is stipulated in Article 78 (1), namely: (1) For all printing violations and crimes: after 1 year; For crimes punishable by fines, Jail, or imprisonment for a maximum of 3 years: the expiration date is after 6 years; (2) For crimes punishable by imprisonment for more than 3 years, the expiration date is 12 years; (3) For crimes punishable by death or life imprisonment: the expiration is after 18 years.
b) When the Expiration Begins (Passed Time) According to article 79, the expiration grace period begins on the day after the act is committed, except in certain cases referred to in the article concerning the *vorduurende delict* (the offense continues/ repeated).
c) Termination of the grace period According to article 80 (1) the grace period is stopped/prevented (*gestuit*) if there is a prosecution (*daad van vervolging*).

From the perspective of the Criminal Code, the expiration of the Criminal Code can abort a criminal prosecution. Expiration itself has a grace period that has been determined in Article 78, where there is no clear information about the expiration period that can abort a crime because, in criminal law, the expiration period is left entirely to the judge even though the abolition of the authority to prosecute the crime of murder due to expiration is already contained in Article 78 jo 338 KUHP.

Based on Article 78 point (3) of the Criminal Code, the authority to demand punishment is abolished because it has expired, for crimes punishable by imprisonment for more than three years, the expiration date is twelve years. The length of time that a person who commits a crime has passed cannot be prosecuted because it has expired, so in this case, it depends on the severity of the punishment imposed on the crime committed. This can be seen in the provisions of Article 78 paragraph (1).

Then, in relation to the *ne bis in idem* principle, a criminal case that is prosecuted and tried again can only be declared as a *ne bis in idem* case if it has fulfilled certain conditions. According to M. Yahya Harahap [10], the element of *ne bis in idem* can only be considered attached to a case, it must meet the conditions stipulated in Article 76 of the Criminal Code, namely:

a) The case has been decided and tried with a positive decision, namely the criminal act that was charged to the defendant has been examined in the matter of the case in court, then on the results of the examination the judge has handed down a verdict;

b) The decision handed down has obtained permanent legal force.

Therefore, in order for a case to be attached to the element of *ne bis in idem*, there must be these two (2) conditions.

In a criminal case, a court decision or a judge's decision that is positive towards a criminal event committed and charged can be in the form of:

a) Sentencing;
b) The verdict of acquittal (vrisjpraak);
c) Decision Free from all claims (ontslaag van rechts vervolging)

Although one of the conditions for a criminal case decision to be declared *ne bis in idem* is that the decision has permanent legal force, but not all types of judge decisions that have permanent legal force and then against the defendant and the same criminal case cannot be prosecuted and tried again or declared as a criminal case that has been ruled by *ne bis in idem* principle.

Therefore, the decision should be handed down in a criminal case as it is not based on a positive decision on the criminal incident that is charged to the defendant but is outside the criminal event, namely in the form of a decision handed down from a formal perspective or a negative decision where the verdicts are [11]:

a) Decision stating the indictment is null and void;
b) Decision stating the indictment cannot be accepted;
c) Decision stating that the court is not authorized to judge.

As a result of the passage of time, a criminal act committed by a person that has been expired cannot be prosecuted. Thus, the perpetrators of criminal acts cannot be brought to justice so that the perpetrators can move freely. Criminal acts that have been committed are no longer investigated or processed. The impact of the abolition of this prosecution is based on the consideration that the perpetrator during their life who has been in hiding with limited space for movement and independence, has become an indication of punishment for his actions. Another consideration is that if the criminal act is prosecuted, Then the law enforcers will have difficulty in finding and recording all the evidence as it is difficult for the perpetrators to be asked for clear and correct information because they may have forgotten a lot about the incident.

Crimes that have been committed by someone cannot be prosecuted because of the expiration date as in the provisions of article 78 paragraph (1), which stipulates that the right to sue for a crime is nullified because time has passed, namely: for all criminal offenses and crimes committed by printing, after one year. Meanwhile, criminal acts that are punishable by a fine, jail, or imprisonment for a maximum of three years, are declared expired after six years. For crimes punishable by imprisonment of more than three years, expired after twelve years; and for crimes punishable by death or life imprisonment or temporary imprisonment for a maximum of twenty years, expired after eighteen years.

Reflecting on this, the legal reconstruction proposed by the author focuses on two things, namely:

a) Elaborating the grace period as the reason for the abolition of authority according to the criminal code in the Criminal Code as seen in Article 78 of the Criminal Code which reads: 1) The authority to sue for abolishing the sentence because it has expired 2) For people who at the time of committing the act were not yet eighteen years old, each expiration grace period is reduced to one third.
b) To describe the grace period as the reason for the abolition of authority according to the criminal code in the Criminal Code as stated in Article 78 of the Criminal Code which reads: 1) The authority to sue for a penalty is abolished because it has expired 2) For people who at the time of committing the act were not yet eighteen years old, each expiration grace period is reduced to one third.

CONCLUSION

1. Both the expiry provisions stipulated in Articles 78 to 81 of the Criminal Code and the principle of *ne bis in idem* which are included in Article 76 (1) of the Criminal Code have not been able to meet the value of justice due to the lack of a specific elaboration regarding the reasons that became the basis for the abolition the right of criminal prosecution and the abolition of the authority to prosecute the crime of murder because in the perspective of the expired contained in Criminal Code, it can abort criminal prosecution. Expiration itself has a grace period that has been determined in Article 78, yet there is no clear information about the expiration period that can abort a crime because in criminal law the expiration period is left entirely to the judge and the abolition of the authority to prosecute the crime of murder due to expiration is in Article 78 jo 338 KUHP. Based on Article 78 point (3) of the Criminal Code, the authority to demand punishment is abolished because it has expired, for crimes punishable by imprisonment for more than three years, the expiration date is twelve years. The length of time that a person who commits a crime has passed cannot be prosecuted because it has expired, so in this case, it depends on the severity of the punishment imposed on the crime committed as can be seen in Article 78 paragraph (1) of the law.
2. The Legal Reconstruction proposed by the author focuses on two things. First, Elaborating the grace period as the reason for the abolition of authority according to the criminal code in the Criminal

Code as seen in Article 78 of the Criminal Code which reads: 1) The authority to sue for abolishing the sentence because it has expired 2) For people who at the time of committing the act were not yet eighteen years old, each expiration grace period is reduced to one third. Second, to describe the grace period as the reason for the abolition of authority according to the criminal code in the Criminal Code as stated in Article 78 of the Criminal Code which reads: 1) The authority to sue for a penalty is abolished because it has expired 2) For people who at the time of committing the act were not yet eighteen years old, each expiration grace period is reduced to one third.

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