



Effectiveness of Conditional Criminal Implementation as an Alternative to Restorative Justice

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Abstract

Restorative Justice is a model for resolving criminal cases that prioritizes restoration of victims, perpetrators and society. The main principle of Restorative Justice is the participation of victims and perpetrators, so that there is a guarantee that children or perpetrators will no longer disturb the harmony that has been created in society. The formulation of the problem in this research is (1) What are the Main Principles of Fulfilling Conditional Sentences in Restorative Justice through the Existing Legal Basis in Indonesia (2) What are the Obstacles in Implementing Conditional Sentences as an Alternative to Restorative Justice from a legislative perspective. The method used is descriptive. The results of this research are that there are at least four main principles of restorative justice, each of which will be fulfilled as follows: The principle of providing space for perpetrators and victims to find solutions together; Principles Reaching an agreement to recover victims; Principles of Supervision of Agreement Implementation; Principle of involvement of the state and community in the implementation of recovery for defendants and victims. This obstacle will be discussed normatively or looking at the obstacle from the perspective of statutory regulations, which can be described as follows: The Public Prosecutor is Obligated to Submit Legal Remedies if the Judge Imposes a Conditional Sentence; Absence of Sentencing Guidelines for Judges (Disparity); Supervising Observer Judge Cannot Impose Sanctions; Very limited involvement of Bapas and/or community members

Keywords: *Conditional Sentence; Restorative Justice*

Introduction

Completion of criminal acts in Indonesia is always synonymous with imprisonment. In fact, recent imprisonment has actually created new problems, such as causing excess capacity in correctional institutions and being considered unfriendly to the rights of victims. This situation then encouraged the birth of the idea of restorative justice, which wants punishment not only aimed at treating the perpetrator but also restoring the victim's rights. The resolution of criminal acts with prison sentences ultimately creates problems for the world of law enforcement. For example, in 2016 it was reported that the IIA Bengkulu Prison experienced excess capacity of up to 184% (one hundred and eighty four percent). At that time the prison was filled with 473 inmates and 230 detainees, even though the normal capacity was only 250 people. The same condition is also experienced by the Manna Bengkulu Class IIB Detention Center, which has excess capacity of up to 112% (one hundred and twelve percent) of the normal capacity

of 100 people, now occupied by 179 prisoners and 35 detainees.¹

In fact, if we are guided by the Criminal Code (KUHP), there are methods of punishment that the Supreme Court can use to realize restorative justice. One of them is probationary punishment or what is better known as conditional punishment which is regulated in Article 14a - Article 14f of the Criminal Code. According to W.P.J. Pompe, conditional punishment is not a basic type of punishment, as stated in Article 10 of the Criminal Code, but conditional punishment is only a method of carrying out the crime.²A similar opinion was also conveyed by Mukhlis and colleagues regarding the definition of conditional punishment not as a basic punishment, but as a criminal imposition system, where the main punishment determined in the decision is carried out with the application of certain conditions.³One of these conditions is known as a special condition that requires the perpetrator of the crime to compensate for the losses suffered by the victim.

In the Criminal Code, if the judge imposes a maximum prison sentence of one year or imprisonment, the judge can order that the sentence must not be served, subject to special conditions that may be determined.⁴This is known as a conditional sentence. Conditional punishment means not carrying out a prison sentence because only the conditions are carried out, namely that within the specified time the convict cannot commit a criminal act.⁵Thus, the defendant has been sentenced to a definite sentence, the implementation of which has been postponed with conditions, so that there has been a process of stigmatization of the perpetrator of the crime through the judge's decision delivered in a trial open to the public.

This stigmatization can encourage perpetrators to become pessimistic about their future in life because they feel humiliated and isolated from society, so they feel frustrated and in the next stage have the potential to commit another crime. Therefore, conditional punishment as an alternative to deprivation of liberty in the Criminal Code still does not provide enough protection for perpetrators of criminal acts. In addition, conditional punishment is not a basic sentence and is only a method of carrying out the crime, so this does not provide a solid basis for judges in implementing it. As stated by Barda Nawawi Arief, the provisions governing conditional punishment have so far been unable to overcome the rigid nature of the system of formulating prison sentences in an imperative manner, because conditional punishment is only a way of administering it (*strafmodus*) and not regarding the selection of the type of punishment (*strafsoot*).⁶

Conditional sentences as regulated in the Criminal Code cannot yet be implemented effectively as an alternative means of implementing imprisonment. Therefore, the Criminal Code Bill regulates criminal supervision (probation) which has been widely developed in several countries. Supervision penalties are regulated in the Draft Criminal Code, Articles 79–Article 81. Supervision penalties are an alternative to short-term imprisonment, which replaces conditional penalties in the Criminal Code. Supervision sentences are imposed on defendants who commit criminal acts which are punishable by a maximum imprisonment of 7 (seven) years. With the regulation of criminal supervision, the direction of development of the purpose of punishment has shifted from carrying out punishment as a form of retaliation against the perpetrator, changing to protecting individual perpetrators of criminal acts. However, the implementation of criminal supervision needs to pay attention to the interests of victims so that the objectives of punishment for restorative justice can be realized.

¹Directorate General of Corrections, "All Prisons Are Overcrowded"

²Muladi, *Conditional Criminal Institution*, Alumni, Bandung: 2004, p. 63

³Mukhlis, Tarmizi, Aindal Hadi, *Criminal Law*, Syiah Kuala University Press, Banda Aceh: 2009, p. 40

⁴Article 14a of the Criminal Code.

⁵Eyreine Tirza Priska Doodoh, *Study of Conditional Sentencing and Supervision According to the Criminal Code*, Thesis Article, *Lex et Societatis*, Vol. 1/No. 2/Apr-Jun/2013, p. 97.

⁶*Ibid*

In line with this, with the termination of prosecutions based on restorative justice as a legal breakthrough, of course there is a new role for the Prosecutor in implementing the termination of criminal cases that are terminated based on restorative justice, where the duties of a Prosecutor are based on Article 1 paragraph (6) letter a of the Criminal Procedure Code, Prosecutor is an official who is authorized by this law to act as a public prosecutor and implement court decisions that have obtained permanent legal force." Furthermore, the definition of a prosecutor according to Article 1 paragraph (1) of Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, namely: "A prosecutor is a functional official who is authorized by law to act as a public prosecutor and implement court decisions that have obtained permanent legal force and other authority based on law". This new method will certainly provide a new role for prosecutors in the process of handling criminal cases.

The justice that has been taking place in the criminal justice system in Indonesia is retributive justice. Meanwhile, what is hoped for is restorative justice, namely this justice is a process where all parties involved in a particular crime jointly solve the problem of how to deal with the consequences in the future. Restorative Justice is a model for resolving criminal cases that prioritizes restoration of victims, perpetrators and society. The main principle of Restorative Justice is the participation of victims and perpetrators, so that there is a guarantee that children or perpetrators will no longer disturb the harmony that has been created in society. The formulation of the problem in this research is (1) The main principles of fulfilling conditional sentences in restorative justice through the existing legal basis in Indonesia (2) Obstacles in implementing conditional sentences as an alternative to restorative justice from a legislative perspective. The method used is descriptive qualitative.

Discussion

1. Main Principles of Fulfilling Conditional Sentences in Restorative Justice Through Existing Legal Basis in Indonesia

Enforcement of criminal law which focuses on retaliation is gradually changing. Criminal law is no longer used as retaliation against people who violate the law. Criminal law is used as a tool to tackle crime itself. Efforts to overcome crime or criminal policy are a rational effort by society to overcome crime⁷. Crime prevention efforts or criminal policies are essentially part of the protection and efforts to achieve community welfare so that crime prevention is not only the responsibility of law enforcement officials but is a joint responsibility between the community and the government.

In realizing justice, the Prosecutor's Office makes discretion in the form of the Attorney General's Regulation concerning Termination of Prosecution Based on Restorative Justice as a form of realizing more humane law enforcement. Restorative justice is the goal of justice to be achieved by restoring people to their original condition, balancing protection, the interests of victims and perpetrators of criminal acts that are not oriented towards retribution. This change in view is a reform of criminal law policy which leads to a change in the aim of punishment which is no longer retribution, but eliminates stigmatization or labeling as a perpetrator. crime and relieve the perpetrator of guilt. Article 1 point 1 of the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice states "Restorative Justice is the resolution of criminal cases involving the perpetrator, the victim, the family of the perpetrator/victim, and other related parties. to jointly seek a just solution by emphasizing restoration to the original state, and not retaliation.

In its approach, the Prosecutor's Office is a case control institution. The prosecutor's office has a very dominant function as the holder of the dominus litis principle, controlling the case process which determines whether or not a person can be declared a defendant and brought to court based on valid

⁷Ahmad, Ruben. (2017). The Nature of the Existence of Criminal Sanctions and Punishment in the Criminal Law System. *Legality: A Journal of Law*, 5(2), 79–104

evidence according to the law.⁸ The main function of the Prosecutor's Office in criminal justice is as a Public Prosecutor and Executor of Court Decisions which have permanent legal force, as stated in Article 1 points 1, 2, 3 as well as Article 2 paragraphs (1) and (2) of Law no. 16 of 2004 concerning Republic Prosecutor's Office No. Article 1 paragraph (6) letter A of the Criminal Procedure Code (KUHAP) also states that: "The prosecutor is an official who is authorized by law to act as a public prosecutor and carry out court decisions that have obtained permanent legal force." . Furthermore, Article 1 paragraph (6) letter B of the Criminal Procedure Code also states that: "The Public Prosecutor is the Prosecutor who is authorized by this Law to carry out prosecutions and carry out the judge's determination." The role of the Prosecutor in handling criminal acts is based on the duties and authority of the Prosecutor's Office as regulated in Law no. 16 of 2004 concerning the Republic of Indonesia Prosecutor's Office. has also regulated the duties and authorities of the Prosecutor's Office as specified in Article 1 number (1) which reads: The Prosecutor is a functional official who is authorized by law to act as a public prosecutor and implementer of court decisions that have obtained permanent legal force and other authorities based on law. -invite

The Prosecutor's Office of the Republic of Indonesia is a government institution that exercises state power in the field of prosecution in order to realize legal certainty, legal order, justice and truth based on law and pay attention to religious norms, politeness and decency, and is obliged to explore the values of humanity, law and justice that live in society. Prosecutors are the most powerful officials in the criminal justice system. Their discretionary decisions play a very significant role in contributing to detention, plea-bargaining decisions, deciding whether someone will be charged with a crime, and standards for prosecution.

With the large number of prisoners and the detention centers and correctional institutions being overcrowded, they require special solutions to overcome this, so it is hoped that the resolution of criminal cases must prioritize restorative justice which emphasizes restoration to its original state and balances the protection and interests of victims and perpetrators of criminal acts that are not oriented towards retribution. is a legal need of society and a mechanism that must be built in the implementation of prosecutorial authority and reform of the criminal justice system⁹. This restorative justice focuses on the idea that victims' needs must be addressed, perpetrators must be encouraged to take responsibility, and those affected must be included in the process. Restorative justice expands the circle of stakeholders in criminal acts beyond the government and perpetrators to include victims and community members¹⁰

For decades, the Prosecutor's Office has had to bring small cases to court. In this small matter, the losses arising from the financial aspect are not significant in amount. The perpetrators were also poor people, including the elderly, who even had to be supported to enter the courtroom. However, now a regulation has finally been issued that can win the public's sense of justice and make the Prosecutor's Office feel proud in upholding justice. These regulations are the Republic of Indonesia Prosecutor's Regulations Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. This regulation is a response from the Prosecutor's Office of the Republic of Indonesia to the direction of development policy in the legal sector which has been proclaimed by the government as a national priority issue in the 2020-2024 National RPJM and is stipulated in Presidential Regulation Number 18 of 2020. Regulation The Prosecutor's Office regarding restorative justice as a national priority program was one of the recommendations of the 2019 National Prosecutor's Office working meeting where the Deputy Attorney General for General Crimes viewed the restorative justice approach as a new framework of thinking, which could be used in responding to criminal acts for enforcers. law.

⁸Ramadhani, Gita Santika. (2021). The Role of the Prosecutor's Office in Realizing Restorative Justice as a Crime Prevention Effort. *PROGRESSIVE: Law Journal*, 15(1), 77-91

⁹I Nyoman Triarta Kurniawan, I Made Wirya Darma. Breakthrough in Criminal Law Through Termination of Prosecution in General Criminal Cases Based on Restorative Justice. *Vyavahara Duta: Volume Xviii, No.2, October 2023*

¹⁰Nelson, Febby Mutiara. (2020). Due Process Model and Restorative Justice in Indonesia: A Conceptual Study. *Journal of Criminal Law and Criminology*, 1(1), 92-112.

As stated in Article 14a of the Criminal Code which states that, "If the judge imposes a maximum prison sentence of one year or imprisonment, not including substitute imprisonment, then in his decision the judge can also order that the sentence must not be served, unless there is a decision at a later date. the judge determines otherwise, because the convict committed a crime before the probation period specified in the order expired, or because the convict during the probation period did not fulfill special conditions that may be specified in the order."

Based on this article, in general conditional punishment can be interpreted as a system of sentencing by a judge whose implementation depends on certain conditions. This means that the criminal sentence imposed by the judge is determined not to need to be carried out, but replaced by a probation period whose length is determined by the judge. This applies as long as the conditions determined by the judge in his decision are not violated by the convict.¹¹

So that the criminal sentence imposed only takes effect and must be carried out in full if the conditions that have been determined are violated or not fulfilled by the convict while the criminal probation period has not expired. Conditional sentences in legal practice are called probation/trial sentences. Looking at Article 14a of the Criminal Code, a conditional sentence can be determined by a judge when:

1. The judge imposes a prison sentence of not more than one year or imprisonment not including additional compensation.
2. The judge, after going through a thorough examination process, feels confident that he can carry out sufficient supervision over the convict in terms of complying with the general conditions and special conditions that have been determined.
3. There are also reasons or circumstances which are the reasons for the decision to be made.

Can conditional punishment fulfill the principles of restorative justice? To answer this question, the author will compare the principles of restorative justice and how to fulfill them through the legal basis that exists in Indonesia today. Meanwhile, taking into account the opinions of experts regarding the principles of restorative justice, the author is of the opinion that there are at least four main principles of restorative justice, each of whose fulfillment will be explained as follows:

1. Principle: Provide space for perpetrators and victims to find solutions together. SKDJU 1691 emphasizes that when handing over court files, it ensures that the victim and perpetrator can be present at the trial. This concerns the judge being able to ensure communication between the perpetrator and the victim during the examination process. Article 165 of the Criminal Procedure Code opens up space for communication between the defendant and witnesses (including victim witnesses). This is also reaffirmed regarding the provisions of cross-examination which in essence the judge can confront each other with the statements of witnesses where the defendant is also allowed to ask questions (communicate). This process can be used as a means of discussion between the defendant (perpetrator) and the victim and their family who are used as witnesses in the examination process. In this way, it is possible for the defendant and victim to find an agreement regarding the solution they agree on. Of course, with the judge as an intermediary.

2. Principles Reaching an agreement to recover victims

SKDJU 1691/2020 explains that after reading the indictment the judge seeks peace between the parties. As explained in the previous point, this is possible during the witness examination process. Apart from that, SKDJU also explained that if the defendant and victim reach an agreement, this will be a separate consideration in the decision. If we refer to Muladi's opinion, the existence of an agreement to pay compensation is one of the grounds that the judge can impose a light sentence on the defendant and then ultimately impose a conditional

¹¹ <https://sippn.menpan.go.id/berita/54006/rumah-lahan-negara-besar-iib-pelaihari/mengenal-sekilas-tangan-pidana-bercondition>

sentence.¹² Then how is this agreement realized in the judge's decision? SKDJU 1691/2020 does not explain, but if we pay attention to Article 14c Paragraph (1) of the Criminal Code, regarding special conditions for conditional sentences, it is possible that a form of peace agreement between the defendant and the victim can be stated as special conditions for conditional sentences. The most obvious example was implemented in decision 157/Pid.B/2014/PN Blk which imposed a special condition in the form of the defendant being obliged to pay compensation to the victim in the amount of Rp. 85,000,000.00- (eighty-five million rupiah) within 2 (two) year.¹³

3. Principles for monitoring the implementation of agreements

Through Article 14d of the Criminal Code Jis. Article 270 and Article 276 of the Criminal Procedure Code, the agreement that has been outlined as a special condition for a conditional sentence will be supervised directly by the Prosecutor and Supervisory Judge and Observer. This will of course accommodate the principle of restorative justice which requires that the victim's recovery be carried out fully, so as not to cause conflict in the future. Even in special crimes such as juvenile criminal cases, the Father also has the obligation to supervise children who are sentenced to crime.¹⁴ An example of a supervision order applied to a conditional sentence can be seen from decision number 2/Pid.Sus-Anak/2014/PN Grt., which ordered the Bapas to supervise the defendant during the conditional sentence period.¹⁵

4. Principle of involvement of the state and community in the implementation of recovery for defendants and victims

Through Article 14d Paragraph (2) of the Criminal Code and Article 14e of the Criminal Code, the judge in his decision can order certain parties to be involved in implementing conditional sentences, either to supervise or to help the defendant fulfill the conditions set by the judge in his decision. This provision certainly opens up space for parties who according to the judge have a role that is beneficial not only for the defendant but also for the victim. As in decision number 2/Pid.Sus-Anak/2015/PN Pli. Who ordered the Father to provide guidance to the perpetrator during the conditional sentence period even though the child has been returned to his parents.¹⁶

Another example of a conditional sentence could involve the Defendant and/or victim in a life of togetherness with special conditions regarding the Defendant's behavior based on Article 14c Paragraph (2) of the Criminal Code. A concrete example of the application of special conditions involving communities can be seen in the decision of the Menggala District Court No. 18/Pid.Sus-Anak/2021/PN Mgl, which basically orders children to be involved in the community by cleaning the At-Taqwa Mosque for 1 year, at least twice every month for a duration of two hours.¹⁷

From the analysis above, it can be concluded that conditional punishment can fulfill the principles of restorative justice. With a conditional sentence, a defendant who changes status to a convict does not have to be sent to prison, so he can try to fulfill special conditions or try to restore the victim's rights. This also gives criminals the opportunity to show their qualities to society, that they try to correct their mistakes so that in the end they can be accepted back into society.

¹²Muladi, Op. Cit. p. 198.

¹³23 Bulukumba District Court Decision Number 157/Pid.B/2014/PN Blk., p. 35. <https://bangunan3.mahkamahagung.go.id/direktori/bangunan/1956c84225ad9c786236c9519f1>

¹⁴See Article 87 of Law Number 11 of 2012 concerning the Juvenile Justice System

¹⁵Garut District Court Decision number 2/Pid.Sus-Anak/PN Garut, p. 41, <https://bangunan3.mahkamahagung.go.id/direktori/angkatan/e5a6f093e75db1c27e08a354cd8af6e1.htm>

¹⁶Pelaihari District Court Decision Number 2/Pid.Sus-Anak/2015/PN Pli, p. 24, <https://angkatan3.mahkamahagung.go.id/direktori/angkatan/d455f7c3ca7d61dd058dfc19ebf62d4b.html>

¹⁷27Menggala District Court Decision Number 18/Pid.Sus-Anak/2021/PN Mgl., p. 32, <https://bangunan3.mahkamahagung.go.id/direktori/besar/zaebf34c913836d2bec5313134363134.htm>,

Efforts to utilize conditional punishment are very important, in connection with the plan to establish a humane Indonesian criminal law, which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia as a replacement for the colonial criminal code that is still in force today.¹⁸ Efforts are made to utilize conditional punishment so that the regulation and application of conditional punishment can fulfill the set of criminal objectives in the form of prevention (general and specific), community protection, maintaining community solidarity and retribution.

However, in practice, there are very few conditional sentences imposed by judges. Based on the results of research conducted by a team from the Faculty of Law, Brawijaya University, at the Malang District Court, the imposition of conditional sentences as an alternative punishment to imprisonment by judges is small. In 2010, of the criminal cases handled, there were 28 cases that received prison sentences of less than 1 (one) year, but only 1 case received a conditional criminal sentence. Furthermore, from 2011 to 2013, of the 431 criminal cases handled, only 3 cases were given conditional sentences.¹⁹

Based on the results of this research, there are juridical and non-juridical factors that prevent judges in court from handing down conditional criminal decisions as an alternative to imprisonment, including:²⁰

- 1) Juridical factors, related to the provisions regarding conditional sentences in the Criminal Code, where in the Criminal Code it is stated that defendants who can be sentenced to conditional sentences are defendants who are sentenced to prison for no more than one year.
- 2) Non-juridical factors, in terms of practical factors, are as follows:
 - a. The defendant was already detained, so the judge thought that imposing a short prison sentence would be lighter and more effective for the defendant because the short prison sentence imposed by the judge would be reduced by the length of time the defendant was detained during the trial process for the case.
 - b. In the public prosecutor's indictment, the defendant is required to be sentenced to prison, so that in this case, if he is sentenced to a conditional sentence, it is possible for the public prosecutor to make an appeal, which of course will make the defendant suffer longer due to his unclear status.
 - c. The absence of a peace agreement or forgiveness from the victim to the perpetrator encourages judges to avoid using conditional sentences, which they fear will cause turmoil and a sense of injustice for victims and the public who consider conditional sentences to be lighter than prison sentences.
 - d. Based on the severity of the crime committed by the defendant along with the factors and background that accompany the criminal act in the case, the judge still has to examine in more depth the background of the crime committed by a defendant, the evil and criminal nature of the defendant, and the environment in which the crime occurred, so that sometimes judges tend to be careful in imposing conditional sentences.

2. Obstacles in Implementing Conditional Sentencing as an Alternative to Restorative Justice from a Legislative Perspective

The Prosecutor's Office as one of the branches of state power which is responsible for the implementation of state power in the field of prosecution, must be able to realize legal certainty, legal order, justice and truth in accordance with the law, while still upholding religious norms, decency and decency, as well as paying attention to the intersection between human values, law, and the sense of

¹⁸Muladi, *Conditional Criminal Institution*, Bandung: PT Alumni, 2008, p. 119

¹⁹Sonda Tallesang, Ismail Navianto, Abdul Madjid, "Basis of Judges' Considerations in Imposing Conditional Criminal Decisions as an Alternative to Imprisonment (Study at the Malang District Court)", *Student Journal of the Faculty of Law, Brawijaya University*, Malang, April 2014.

²⁰Ibid

justice that lives in society. In Indonesia, the existence of prosecutorial power is intrinsically linked to the concept of *Dominus Litis*. According to Satjipto Raharjo, taking a problem to court and asking a judge to issue a decision is a slow method of enforcing the law. This is because there are several layers involved in law enforcement, starting from the police to the Supreme Court. This ultimately has an impact on the accumulation of quite a few cases.

In communities that use restorative justice, everyone involved works together to make things better. This approach must take into account community concerns and have the primary goal of eliminating future criminal behavior. This prevents stigmatization and makes justice a considerate reaction to crime. The final outcome of criminal resolution, including the provision of assistance and the creation of new possibilities for all parties involved, must be overseen by existing community systems.

This obstacle will be discussed normatively or looking at the obstacle from the perspective of statutory regulations, which can be described as follows:²¹

1. The Public Prosecutor is Obligated to Submit Legal Remedies if the Judge Imposes a Conditional Sentence;

Based on Point 7 Paragraph (6) of the Attorney General's Guidelines Number 3 of 2019 concerning Criminal Prosecution in General Crime Cases (hereinafter referred to as "Guidelines 3/2019"), when the Public Prosecutor or Public Prosecutor charges the defendant with imprisonment or a fine, however, if the judge decides that the defendant does not need to serve a sentence or the judge imposes a conditional sentence, the prosecutor is obliged to submit legal action. This will be an obstacle because when legal action is proposed, there is a possibility that the conditional sentence imposed at the first instance will be changed by a judge at the appellate or cassation level. This is because among judges themselves there is no agreement regarding the appropriate punishment to be imposed on criminals, because until now there are no guidelines for judges regarding the appropriate method of calculating the penalty (see point 2 below).

2. Absence of Sentencing Guidelines for Judges (Disparity);

Article 12 letter (a) of the Criminal Code only explains that the prison sentence is a minimum of 1 (one) day and a maximum of life. Likewise with other basic crimes such as deductions and fines, the Criminal Code only mentions the shortest and longest time periods. There are no specific guidelines or guidance on how to determine the appropriate penalty between this time period. Nimerodi Gulo and Ade Kurniawan in their research explained that the absence of these guidelines causes disparities, where the application of punishments is not the same as the same criminal act, where this phenomenon does not have a clear justification.²² The link between the issue of Disparity and Conditional Sentencing is that in order to impose a conditional sentence, Article 14a of the Criminal Code, the judge must first determine the basic sentence to be imposed on the defendant, for example a maximum prison sentence of one year. Meanwhile, there are no guidelines to calculate or determine how a crime can be punished with a one year sentence. For example, there was a disparity which caused the failure to apply conditional sentences, which occurred in decision 157/Pid.B/2014/PN Blk which applied conditional sentences because the defendant was only sentenced to three months in prison, but was later canceled by Decision Number 81/PID/2015/PT Mks which changed the sentence becomes imprisonment for 1 (one) year, 3 (three) months, so that a conditional sentence cannot be applied. This shows that even though in the same case the judges actually had different opinions, furthermore in this case

²¹Good Sujatmikoa, Milda Istiqomah. Encouraging the implementation of conditional sentences following the Decree of the Director General of the General Justice Agency Number 1691/Dju/Sk/Ps.00/12/2020 as an alternative to restorative justice. *Bina Mulia Hukum Journal* Volume 7, Number 1,

²²Nimerodi Gulo and Ade Kurniawan Muharram, Disparity in Criminal Sentencing, *Journal of Legal Issues*, Volume 47 No. July 3, 2018, p. 216.

unfortunately the appellate level judges themselves did not explain the reasons for the change or their calculations as to why the prison sentence which was originally three months was changed to one year and three months.

3. The Observing Supervisory Judge Cannot Impose Sanctions

Based on Article 276 Jo. Article 280 Paragraph (4) of the Criminal Procedure Code, in the event that the court imposes a conditional sentence, the implementation is carried out with supervision and observation by the Supervising Observer Judge or Wasmat Judge. Article 277 of the Criminal Procedure Code explains that every court must have a judge who is tasked with assisting the head of the court to supervise and observe the implementation of court decisions, with the aim of ensuring that decisions that have been handed down are implemented properly. Then, based on Article 278 of the Criminal Procedure Code, the prosecutor as executor of the decision must report the results of the implementation of the decision in the form of a Minutes of the Implementation of the Decision to the court through Judge Wasmat, including regarding the prosecutor's duties in supervising the implementation of conditional sentences as stated in Article 14d Paragraph (1) of the Criminal Code. However, if we look closely based on Articles 280, 281, 282 and 283 of the Criminal Procedure Code, in the event that Judge Wasmat finds irregularities in the implementation of the decision, he is only authorized to convey suggestions to the head of the correctional institution and then report the matter to the head of the court. Simply put, Judge Wasmat does not have any authority whatsoever in the event that the prosecutor's obligation to supervise or carry out a conditional sentence is not carried out by the prosecutor. So this supervisory and observation task seems to be something that has no legal consequences.

4. The involvement of the Fathers and/or the community is very limited. Based on Article 14d Paragraph (2) of the Criminal Code, the judge can order the involvement of certain institutions or parties to help or accompany conditionally convicted criminals to fulfill the conditions set by the judge in the decision. So access to institutions other than the supervising prosecutor who is given direct authority in Article 14d Paragraph (1) of the Criminal Code, must be ordered or explicitly mentioned in the judge's decision. In fact, if we pay attention to Article 6 Paragraph (3) of Law Number 12 of 1995 concerning Corrections, which states that fathers have an obligation to provide guidance to conditionally convicts. This of course creates a clash of norms, because this authority can only be exercised if it is expressly ordered by the judge in a decision as stated in Article 14d Paragraph (2) of the Criminal Code. If it is not stated, simply the judge does not see or require certain parties to be involved in carrying out the conditional sentence.

5. Dualism in the Authority of Case Examining Judges and Observer Supervisory Judges

Based on Article 14e Jo. Article 14f Paragraph (1) of the Criminal Code, the judge who decides the case at the first instance or the judge examining the case, after a conditional criminal decision is handed down, still has the authority to change the special conditions and/or extend the probation period. Apart from that, the judge examining the case can also issue an order for the convict to serve the main sentence if the convict does not fulfill the specified conditions. This provision conflicts with the provisions of the Criminal Procedure Code regarding the authority to implement and supervise decisions in criminal cases. Based on Article 1 Paragraph (6) letter a and Article 270 of the Criminal Procedure Code, prosecutors are given the authority to implement the contents of a judge's decision which has permanent legal force. Further details regarding supervision and observation have been determined in CHAPTER XX of the Criminal Procedure Code. In fact, the task of supervision and observation is the responsibility of the chairman of the court, but to assist with this task, a supervisory judge and observer or what is more often called Wasmat Judge is appointed. This of course causes dualism, namely that based on the Criminal Code, conditional criminal cases are reported to the judge examining the case, while the Criminal Procedure Code, which is the source of criminal procedural law, determines that the implementation of the decision is supervised and reported to the Wasmat Judge. Furthermore,

until now there is no legal basis that regulates how a case examining judge can issue a decision or determination regarding a case that he has declared finished and closed after reading the verdict. If we compare it with civil procedures, based on Article 195 HIR, the authority in a case related to monitoring and implementing decisions rests with the head of the court. The same thing is actually also adhered to in criminal procedural law as stated in the General Explanation Point 3 letter j of the Criminal Procedure Code, namely that the principle of monitoring the implementation of decisions in criminal cases is determined by the head of the court.

Conclusion

1. By paying attention to expert opinions regarding the principles of restorative justice, the author is of the opinion that there are at least four main principles of restorative justice, each of the fulfillment of which will be explained as follows: The principle of providing space for perpetrators and victims to find solutions together; Principles Reaching an agreement to recover victims; Principles of Supervision of Agreement Implementation; Principle of involvement of the state and community in the implementation of recovery for defendants and victims. Conditional punishment can fulfill the principles of restorative justice. With a conditional sentence, a defendant who changes status to a convict does not have to be sent to prison, so he can try to fulfill special conditions or try to restore the victim's rights.
2. This obstacle will be discussed normatively or looking at the obstacle from the perspective of statutory regulations, which can be described as follows: The Public Prosecutor is Obligated to Submit Legal Remedies if the Judge Imposes a Conditional Sentence; Absence of Sentencing Guidelines for Judges (Disparity); Supervising Observer Judge Cannot Impose Sanctions; Very limited involvement of Bapas and/or community members

References

- Ahmad, Ruben. (2017). The Nature of the Existence of Criminal Sanctions and Punishment in the Criminal Law System. *Legality: A Journal of Law*, 5(2), 79–104.
- Angga Mahendra. (2021). Legal Protection for People with Disabilities in the Perspective of Human Rights in Indonesia. *International Journal*, 10, 539-547.
- Directorate General of Corrections, "All Prisons Are Overcrowded".
- Muladi, Conditional Criminal Institution, Alumni, Bandung: (2004), p. 63.
- Mukhlis, Tarmizi, Aindal Hadi, Criminal Law, Syiah Kuala University Press, Banda Aceh: (2009), p. 40.
- Malik, Faissal, Syawal Abduladjud, Dewa Gede Sudika Mangku, Ni Putu Rai Yuliantini, I Gusti Made Arya Suta Wirawan, and Putu RonnyEyreine Tirza Priska Doodoh, Study of Conditional Sentencing and Supervision According to the Criminal Code, Thesis Article, *Lex et Societatis*, Vol. I/No. 2/Apr-Jun/2013, p. 97.
- Nur. (2013). Prospects for Restorative Justice Based on Pancasila as a Non-Penal Means in Overcoming Child Delinquency in the Future. *Legal Issues*, 42(4), 492–502.
- Nelson, Febby Mutiara. (2020). Due Process Model and Restorative Justice in Indonesia: A Conceptual Study. *Journal of Criminal Law and Criminology*, 1(1), 92–112.

Bulukumba District Court Decision Number 157/Pid.B/2014/PN Blk., p. 35.
<https://bangunan3.mahkamahagung.go.id/direktori/bangunan/1956c84225ad9c786236cffb7c9519f1>.

See Article 87 of Law Number 11 of (2012) concerning the Juvenile Justice System.

Garut District Court Decision number 2/Pid.Sus-Anak/PN Garut, p. 41,
<https://bangunan3.mahkamahagung.go.id/directory/angkatan/e5a6f093e75db1c27e08a354cd8af6e1.htm>.

Pelaihari District Court Decision Number 2/Pid.Sus-Anak/2015/PN Pli, p. 24,
<https://angkatan3.mahkamahagung.go.id/direktori/angkatan/d455f7c3ca7d61dd058dfc19ebf62d4b.html>.

Menggal District Court Decision Number 18/Pid.Sus-Anak/2021/PN Mgl., p. 32,
<https://angkatan3.mahkamahagung.go.id/direktori/angkatan/zaebf34c913836d2bec5313134363134.htm>.

Ramadhani, Gita Santika. (2021). The Role of the Prosecutor's Office in Realizing Restorative Justice as a Crime Prevention Effort. *PROGRESSIVE: Law Journal*, 15(1), 77-91. Rochaeti,.

Muladi, Conditional Criminal Institution, Bandung: PT Alumni, (2008), p. 119.

Sonda Tallesang, Ismail Navianto, Abdul Madjid, "Basis of Judges' Considerations in Imposing Conditional Criminal Decisions as an Alternative to Imprisonment (Study at the Malang District Court)", *Student Journal of the Faculty of Law, Brawijaya University, Malang*, April 2014.

Good Sujatmikoa, Milda Istiqomah. Encouraging the implementation of conditional sentences following the Decree of the Director General of the General Justice Agency Number 1691/Dju/Sk/Ps.00/12/2020 as an alternative to restorative justice. *Bina Mulia Hukum Journal* Volume 7, Number 1,.

Nimerodi Gulo and Ade Kurniawan Muharram, Disparity in Criminal Sentencing, *Journal of Legal Issues*, Volume 47 No. July 3, 2018, p. 216.

Legislation

(1945) Constitution.

Criminal Procedure Code (KUHAP).

Law Number 16 of (2004) concerning the Prosecutor's Office of the Republic of Indonesia.

Republic of Indonesia Prosecutor's Regulation Number 15 of (2020) concerning Termination of Prosecution Based on Restorative Justice.

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