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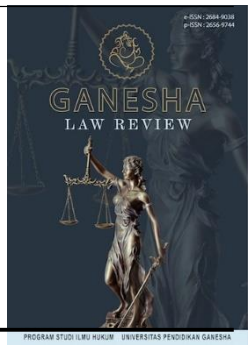

THE IDEAS OF RECHTERLIJK PARDON AS A RESTORATIVE JUSTICE APPROACH: FROM VENGEANCE TO RECOVERY?

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Abstract

After the rebirth of the discourse on ratifying the Draft Criminal Code (RKUHP) on September 24, 2019, which will be confirmed in the plenary session of the House of Representatives of the Republic of Indonesia (DPR RI), however, the emergence of this information to the surface related to the ratification of the RKUHP gave a negative response by the community, especially for activists and students. It is because some of the contents of the RKUHP are considered controversial and have multiple interpretations, which are feared to create legal uncertainty in Indonesia. Sentencing through imprisonment for anyone who violates has implications and a domino effect (domino effect) related to the phenomenon of over-capacity in Correctional Institutions. One solution to overcome this is to apply rechterlijk pardon through a restorative justice approach. This research is descriptive with the type of juridical-normative research. The type of approach used is the statutory approach and the conceptual approach. The results can provide the reform of the criminal law system, which initially focused on retributive to focus on the goal of restitution. Therefore, there is an urgency to ratify the RKUHP, which has the idea of rechterlijk pardon to change the paradigm from retaliation to recovery, as a manifestation of the restorative justice approach in Indonesia.

Kata kunci:
Rechterlijk Pardon, Keadilan Restoratif, Sistem Peradilan Pidana

Abstrak

Pasca lahirnya kembali wacana pengesahan Rancangan Kitab Undang-Undang Hukum Pidana (RKUHP) tepat pada tanggal 24 September 2019, yang akan disahkan dalam sidang paripurna Dewan Perwakilan Rakyat Republik Indonesia (DPR RI). Akan tetapi, munculnya informasi ini ke

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permukaan terkait adanya pengesahan RKUHP memberikan respon yang negatif oleh masyarakat, khususnya bagi kalangan aktivis dan mahasiswa. Pasalnya beberapa materi muatan dari RKUHP dianggap kontroversial dan multitafsir, yang mana dikhawatirkan akan memberikan ketidakpastian hukum di Indonesia. Pemidanaan melalui penjara kepada setiap orang yang melanggar, memberikan implikasi dan efek domino (domino effect) terkait adanya fenomena over capacity di Lembaga Pemasyarakatan (Lapas). Salah satu solusi yang bisa mengatasi hal tersebut, ialah dengan menerapkan rechterlijk pardon melalui pendekatan restorative justice. Penelitian ini bersifat deskriptif dengan jenis penelitian yuridis-normatif. Jenis pendekatan yang digunakan adalah pendekatan peraturan perundang-undangan (statue approach) dan pendekatan konseptual (conseptual approach). Hasil dapat memberikan reformasi sistem hukum pidana, yang awalnya berfokus pada penestapaan (retributive) menjadi fokus pada tujuan pengembalian keadaan. Maka dari itu, terdapat urgensi pengesahan RKUHP yang memiliki gagasan rechterlijk pardon untuk mengubah paradigma dari pembalasan menuju pemulihan, sebagai manifestasi pendekatan restorative justice di indonesia.

INTRODUCTION

After the rebirth of the discourse on ratifying the Draft Criminal Code (*RKUHP*) on September 24, 2019, which will be confirmed in the plenary session of the House of Representatives of the Republic of Indonesia (DPR RI) (Tello, 2019), however, the emergence of this information to the surface related to the ratification of the *RKUHP* gave a negative response by the community, especially for activists and students (Ramadhan, 2019). It is because some of the contents of the *RKUHP* are considered controversial and have multiple interpretations, which are feared to create legal uncertainty in Indonesia (Nandy, 2019). Based on the critical notes from Kontras, there are 7 (seven) substance criticisms of the *RKUHP* as follows (Kontras, 2019): The *RKUHP* has a repressive and imprisonment perspective that opens up space for criminalization beyond the colonial-product Criminal Code (over-criminalization); The *RKUHP* has not taken sides with vulnerable groups, especially women and children; *RKUHP* threatens government development programs, especially health, education, family resilience, and community welfare programs; The *RKUHP* develops a constitution (constitutional disobedience) that threatens freedom of expression and suppresses the democratic process; The *RKUHP* contains many rubbery and unclear articles that encourage criminalization practices, including intervention in the private sphere of the community; *RKUHP* threatens the existence of independent institutions; and *RKUHP* does not involve participation and participation in various institutional and community sectors. The points above become the basis for rejection, why the *RKUHP* is not feasible to be ratified and should be rejected so that there is no uncertainty about criminal law in Indonesia.

The rejection of the ratification of the *RKUHP* provides a long estuary in the renewal of criminal law in Indonesia, where Indonesia is still using *Wetboek van Strafrecht* (WvS) for almost a century or known as the Criminal Code (*KUHP*), which incidentally is a derivative of the Dutch East Indies colonial era in 1915 (effective from

1918) (Sahbani, 2017). Since the promulgation of Law Number 1 of 1956 concerning the Regulation of Criminal Law, various changes turned out to be the original translation of the Dutch East Indies government's WvS with a colonial nuance (Santoso, 2019).

The constellation of the birth of the discourse on the ratification of the *RKUHP* was greeted with joy, which gave a positive signal of the political will (Shiffman, 2003) of the legislators to complete the 'state work' which had been absent for 59 years after the National Law Seminar I was held which discussed the *RKUHP*. This draft has gone through 7 changes to the presidency and 20 changes to the Minister of Justice/Minister of Law and Human Rights (*Menkumham*), as well as a team of experts who have died individually (Rustandi, 2021).

Quoting Muladi's words press conference who was the former Minister of Justice and the Drafting Team for the 2019 *RKUHP* (Indonesia.GO.ID, 2019), "I've been studying this issue for 35 years, the criticisms made by the press, social media, and certain experts are (seem) sporadic and baseless. RKUHP this is a total re-codification, not an amendment, not a revision to dismantle the 103-year-old Dutch colonial influence". Don't let it fail, you can postpone it. But if it fails, it means we (in fact) love colonialism". There is the term "failure to understand, fail to conclude," which implicitly verbis gives the meaning that misunderstanding in interpreting a problem can lead to inaccuracies in picking up a common thread in a phenomenon (Fadli et al, 2021). Mass downstream of information can give logical fallacy in the form of Argumentum Ad Populum, which means that people do not know and have the capacity to be stimulated with information and a turbulent atmosphere. In the context of the problem, Based on the RKUHP, it does not mean that there is an error/inaccuracy in the norm. However, education and socialization may only be needed so that the public can adequately receive all the available information.

Reading and interpreting statutory norms is complex and cannot be interpreted as limited to literal, grammatical aspects. However, one must also use interpretation methods, one of which is a systematic interpretation by linking one norm with another legal norm so that it becomes a complete meaning in a single unit (Asyhadie, 2012). Therefore, strengthening the purpose and concept of legal development must be maintained to create order and progressive steps in creating supremacy in the concept of the rule of law (Ansori, 2017). Conceptually, the philosophers from ancient Greece have developed the rule of law. In his famous work *The Republic*, Plato argues that there is a desire to create an ideal state to achieve goodness based on wisdom. For this reason, the power must belong to people who know best, namely, a philosopher (*the philosopher-king*). However, in his book *the Statesmen* and the Law, Plato states that what is possible is the second form (*the second best*) which places the law supremacy (Asshiddiqie, 2006).

A government that can prevent the decline of one person's power is a government by law. Therefore there is an adage that states, "*Inde Datae Leges Bifortior Omnia Posset*" (Aaron, Felimeth & Horwitz, 2009), which means "*Laws were created to limit power so that the strong do not have unlimited power*." In line with Plato, the aim of the state, according to Aristoteles, is to achieve the best life that can be achieved through law supremacy in the social order (Yusro, Hilmy & Azmi, 2020). Coherence, as stated in the constitution, precisely in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (*UUD NRI 1945*), is that "the State of Indonesia is a state of law." The state's role in protecting the law reflects the embodiment of security and public order, as stated by Roscoe Pound that "law as a tool of social engineering." the *Staatgrundgezets* have implications to contribute to the obligation of the state to protect all its people. The existence of these obligations can be crystallized through the form of legal protection for the people, especially concerning law enforcement in the public

sphere, so to realize this goal, it is necessary to have a coercive rule (*dwingen recht*) so that the rights and obligations are by the predetermined corridor. According to Simons, these rules can be realized through the formation of norms in criminal law, namely the state's rules to determine whether an act is mandatory or prohibited, and the violators are subject to sanctions in the form of legal offenses (*rechtdelicten*) (Sofyan & Azisa, 2016).

The primary purpose of the existence of criminal law is to maintain security, order and peace in society (Siregar, Mubarak & Zulyadi, 2019). Violators are subject to criminal sanctions to provide misery to those who violate (Muhaimin, 2019). The punishment was carried out intentionally because of an unlawful act by a criminal actor (*dader straafrecht*) (Suyanto, 2018). Conceptually, the model of giving sanctions as punishment is retributive justice. This model emphasizes the giving of suffering to the offender as a result of his actions. The emphasis of retributive justice is to give retribution in the form of suffering to the perpetrators of criminal acts (Nugroho, 2013). According to Sudarto, the goal of law that focuses on statute is the goal of the classical law school, which is retributive and repressive (Sholehuddin, 2018). The concretization of the granting of these statutes is through introducing violators to various forms of punishment, such as capital punishment, imprisonment, confinement, fines (immediate punishment) and revocation of certain rights, confiscation of certain goods, and announcement of judge's decision (additional punishment) (Article 10 of the Indonesian Criminal Code). As time passes, the concept of punishment does not provide benefits to return offenders to the community as intended by correctional institutions (Darwin, 2019). It happens because the concept of retributive justice emphasizes retaliation and suffering for violators, not the point of preparing that person to be accepted back into the social environment (Andriyanti, 2020).

Sentencing through prison for anyone who violates has implications and a domino effect related to the phenomenon of over-capacity in Correctional Institutions (*Lapas*). Referring to data as of September 12, 2021, from the Directorate General of Corrections, Ministry of Law and Human Rights of the Republic of Indonesia, the total of inmates in prisons throughout Indonesia is 271,007 people, while the prison capacity itself is only for 134,835 people (Kusnandar, 2021). Based on these data, it is reflected that there are prison residents who exceed the limits of the ideal capacity. The phenomenon of overcapacity certainly impacts all the problems, especially regarding the rights of every prison inmate who lives in it. In line with the reality of prison overcapacity in Indonesia, based on a report from the Institute for Criminal Justice Reform (ICJR), there have been thirteen prison fires in the last three years. Referring to the ICJR report, it can be seen that ten fires occurred due to the overcapacity of the prison. As a result of the fire, of course, caused casualties for the residents of the Correctional Institution (Sari, 2021).

This overcapacity problem is a latent problem that has not been resolved until now. It is because the Indonesian criminal system (criminal justice system), through the penal policy, does not distinguish punishment for serious and minor crimes (Kenedi, 2017). Thus, as long as it is a criminal act according to the existing rules, the perpetrator is subject to punishment in the form of imprisonment. However, imprisonment has no standard for imposing a fair sentence (Alhakim, 2022). For this reason, there is an urgency for reform in the legal order as a solution to accommodate the needs and create legal goals in society (Lasmadi, Sari & Disemadi, 2020). Nonet and Selznick argue that the law must position itself as a means responsive to the public's needs and aspirations. Where the law is open, it is necessary to promote acceptance of social changes and accommodate public participation to create justice.

Talking about justice, of course, cannot be separated from the law's purpose of

the law, as stated by Gustav Radbruch that the purpose is to create certainty, justice, and benefit (Tanya et al, 2017). However, according to Mahfud MD, legal certainty is a top priority to maintain the normativity of legal binding, which can have implications for aspects of justice and usability. In the current criminal law context, the certainty aspect is necessary because of the principle of legality. Anslem von Ferubach (Hiariej, 2014) formulated that *nulla poena sine lege; nulla poena sine crimine; nullum crimen sine poena legali* (Setyo, 2014) and later refined into *nullum delictum noela poena sine previa lege poenale* (Rubai et al, 2015). However, the question is, has the existing criminal law fulfilled the aspects of justice and usability?.

RESEARCH METHOD

This research is descriptive with the type of juridical-normative research (Disemadi, 2022; Marzuki, 2009). The type of approach used is the statutory approach and the conceptual approach (Marzuki, 2009). A *statutory approach* is an approach that refers to the provisions of laws and regulations such as the Criminal Code (*Wetboek Van Strafrecht*), the Draft Criminal Code and other related laws and regulations. The conceptual approach is used to understand the theories and concepts that can be used as the basis for this research. The data used in this study is secondary data divided into primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data was obtained through library research collection techniques, which were then analyzed qualitatively (Disemadi, 2022; Ibrahim, 2007).

RESULTS AND DISCUSSION

Regulation of *Rechterlijk Pardon* in the RKUHP in Indonesia

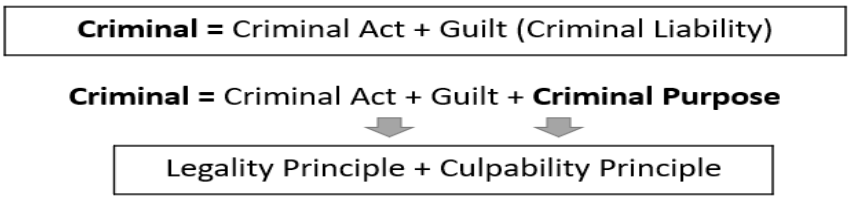
The problem of overcapacity in Correctional Institutions (*Lapas*) is a separate homework for the government because this can have implications for the health and effectiveness of prison inmates. One solution to overcome this is to apply for a *rechterlijk pardon* through a restorative justice approach. It can provide the reform of the criminal law system, which initially focused on retributive to restoring the situation (restorative) (Maulidah & Jaya, 2019). *Rechterlijk pardon*, also called Non-imposing of penalty, is where a defendant is proven guilty but not sentenced by the Panel of Judges (Pujinoto, Mashdurohatun & Sulchan, 2020). The definition of *non-imposing penalty/rechterlijk pardon/dispensa de pen*a (Farikhah, 2021) has the same goal: to declare a person legally and convincingly proven but not to impose a sentence (Rosidi, 2021). The idea of *rechterlijk pardon* is not yet known in the criminal law system in Indonesia, but it is mentioned in the Draft Criminal Code (*RKHUP*) (Rosidi, 2021). The Judicial Pardon arrangement is not explicitly stated verbis, but the judicial institution has a mechanism for forgiveness. It is as stated in Article 56 Paragraph (6) of the *RKUHP*, which states that "The lightness of the act, the personal circumstances of the maker, or the circumstances at the time the act was carried out or what happened later can be used as a basis for consideration not to impose a criminal or take action taking into account the terms of justice and humanity". So, in this case, judges have the discretion and discretion not to impose criminal penalties by considering the aspects of justice and humanity. Aspects of justice and usability are the main parameters, so judges are not arbitrary. These two parameters become one of the manifestations of Pancasila as a *philosofische grondslag* (Monitasari, Furqon & Khaerunnisa, 2021) in the Indonesian criminal justice system, which is by the ideology and worldview (*Weltanschauung*) (Maerani, 2015).

On the other side of the aspect of justice and usability, the RKUHP also provides qualifications that are requirements for a criminal offense that can be forgiven (Saputro, 2016). These requirements are regulated in Article 72, paragraph (1) of the RKUHP,

which consists of several things, as follows: The defendant is under 18 (eighteen) years of age or over 70 (seventy) years; The defendant has committed a crime for the first time; The loss and suffering of the victim are not too significant; The defendant has paid compensation to the victim; The defendant was not aware that the crime committed would cause significant loss; The crime occurred because of a powerful incitement from the others; Victims of crime encourage criminal acts; The crime is the result of a situation that is impossible to repeat; The personality and behavior of the accused ensure that he will not commit another crime; Imprisonment will cause great suffering for the defendant or his family; Non-institutional coaching is expected to quite successful for the defendant; The imposition of a lighter sentence will not reduce the seriousness of the crime committed by the defendant; and The crime occurred in the family; or It happened by negligence.

The limitations of the legal corridor above provide preventive measures so that judges do not act arbitrarily with their decisions. Of course, these requirements must be applied rigidly to avoid the tendency and subjectivity of judges in deciding cases. It is where there is a vacuum in the norm, which needs to be further regulated. Several countries in the world have also implemented it and provided practical benefits in enforcement in these countries (Farikhah, 2021). However, these requirements can still be regulated and adapted to social conditions, legal politics, and other aspects of present and future needs so that the law can keep up with the times (*het recht hink achter de feiten aan*) (Rahardjo, 2010).

The purpose of a rechterlijk pardon is not limited to avoiding imprisonment in the short term. It also prevents punishments that are not justified/necessary from the view of needs and objectives. It also has to protect the community and the goal of rehabilitating the perpetrator (Hakim, 2019). Thus, the purpose of the existence of a judicial pardon institution is twofold, including (Saputro, 2016): Alternative penal measures to imprisonment and Judicial corrective to the legality principle. It provides a change in the paradigm of criminal law, which initially focused on criminal acts (*strafbaarfeit*) plus errors (*schuld*), became criminal acts (*strafbaarfeit*) plus errors (*schuld*) and added criminal objectives (*doel van het strafrecht*) as follows:



Picture 1. Changes in Criminal Purpose

***Rechterlijk Pardon's* Idea in the *RKUHP* as a Manifestation of the Restorative Justice Approach Model in Indonesia: From Retaliation to Recovery**

It is in line with the spirit built into the concept of the Restorative Justice approach that the justice referred to here is not justice, which means punishing according to the actions of the perpetrator alone. Instead, it is a justice that aims to restore the situation and focuses on benefits (Ernis, 2016). The Restorative Justice approach is a justice process that is fully implemented and achieved by the community. The needs and safety of victims (*slachtoffer*) and criminals (*dader strafrecht*) are the main concerns of the Restorative Justice process. The main objective is to restore the victim's loss (*stachoffer*) and the recognition of the criminal offender (*dader strafrecht*) for the loss due to the crime committed (Garcia, Disemadi & Arief, 2020). Because punishment in certain forms of crime is not the best solution to solve problems, especially crimes in which harm/damage is caused to the victim, and the community

can still be restored (Prayitno, 2012). Thus, conditions that have been damaged can be returned to their original state (recovery) and the achievement of criminal objectives.

In line with Satjipto Rahardjo's view, the philosophy of "law for humans, not humans for law" means that humans are anthropocentric subjects from the formation and application of the law. Therefore the law can be separated from subjective human interests towards a progressive objective view to create order and restoration in society, which in this context has also been accommodated in the criminal objectives set out in the *RKUHP* (Rahardjo, 2006). The criminal objectives in the *RKUHP* have been regulated in Article 55 Paragraph (1), which states that sentencing has the following objectives: Preventing the commission of criminal acts by enforcing legal norms for the protection of society; Socializing the convicts by conducting coaching so that they become excellent and valuable people; Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of peace in society; and elease the guilt of the convict.

This criminal objective will later change the paradigm of modern criminal law, which initially focused on criminal acts and mistakes. Later, they will also consider the purpose of the crime before making a sentencing decision. Applying a *rechterlijk pardon* will undoubtedly bring benefits, especially as an evaluation material from the experience of cases in Indonesia (Barlian & Arief, 2017). So later, the adage "the law is sharp downwards, but blunt upwards" will not be created because several cases, such as the theft of flip-flops, firewood, and others, do not seem to fulfill the sense of justice when a sentence is carried out (Herista & Barlian, 2020).

The idea of *rechterlijk pardon* is in harmony with Indonesia's original legal heritage, namely the customary law system in Indonesia, which has long applied a similar concept. Customary law that grows in society (living law) can reflect the development of law in Indonesia (Hadikusuma, 2014). The norms of law formation are not only limited to the top-down concept, which is centralized but can also apply to the bottom-up concept, which is more participatory (Irawan, 2017). As a preference for consideration through customary law in Indonesia, there are tabulations of several village communities that apply a concept similar to rechterlijk pardon, including (Farikhah, 2018):

No.	Culture	Settlement Agency	Description
1.	*Batak Karo*	*Purpur Sage*	This institution gathers the disputing parties in one place where the dispute will be resolved later through family deliberation. Family relations in the Karo Batak are solid, so the resolution of conflicts that occur is also resolved through kinship. In resolving the conflict, the process will be led by the *sangkep enggeluh* (the third completeness of life/bond), who is still a relative of the disputing party. This peace process will lead to an admission of guilt and willingness of the parties to promise to forgive each other.
2.	*Minangkabau*	*Balai Khusus Nagari* (Nagari Exclusive Hall)	In Minangkabau, the consensus is the highest king. The trial of the heads of the people is the highest judicial apex in the Nagari; at a lower level in court, the

			assembly of the local leaders will act as the judge. The judge's obligations in resolving cases are: 1. Reconcile those who differ; 2. Bringing both parties together; 3. Investigate witnesses; 4. Establish and pronounce decisions; 5. Fear *Allah* (God); 6. Decide based on justice; 7. Decision-making by consensus.
3.	*Aceh*	*Tuha Peut* and *Sayam*	A collection of community leaders who institutionalized, in the event of persecution or fights between the Acehnese people who seek to bring about peace between the two disputing parties, which is marked by bloodshed. In its development, it is used not only to resolve bloody disputes but also to resolve criminal cases that occur in Acehnese society.
4.	*Jawa*	Discussion/conference	1. Legal disputes that occur between the two parties are resolved peacefully between them directly without involving the families of both parties, government officials, police, and courts; 2. Legal disputes that occur between the two parties are resolved amicably or amicably within a limited scope between the two parties without involving local government officials, the police, or the courts; 3. Legal disputes that occur between the two parties are resolved amicably or in a family manner within a limited scope between the two parties by involving the families of both parties and local government officials at the level of the neighborhood unit; 4. Legal disputes between the two parties are resolved amicably or in a family manner within a limited scope between the two parties by involving the families of both parties and local government officials at the level of the neighborhood unit and ward, without involving the police and courts.

CONCLUSION

Based on the description above, it can be seen that there is urgency in the

ratification of the RKUHP. The existence of misconceptions in the community that results in rejection needs to be resolved through education and socialization of the RKUHP content material. In addition, the resolution of overcapacity in prisons in Indonesia impacts the effectiveness and efficiency of the institution's role. The current pandemic state has even further encouraged the need for solutions to overcome these problems. Therefore, the idea of rechterlijk pardon in the RKUHP can be an alternative solution for the manifestation of a restorative justice approach, which will later provide proportionality of benefits by restoring the situation between the actions of the criminal (*dader strafrecht*) and the victim (*stachtoffer*). So that later, they will be able to create reforms in the criminal justice system in Indonesia.

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