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The Importance of the Opportunity Principal to Optimise the Penal System: A Case Study of Indonesia

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The outdated Indonesian Penal Code means that only six of the 33 Indonesian provinces are free from prison overcrowding. Therefore, the authors propose that the 'principle of opportunity' must be applied to waiver unnecessary prosecutions. This study's sociological juridical data were obtained from Indonesian penitentiary institutions, as primary data, and relevant legislation, as secondary data. The data were analysed using qualitative research methods. The results of this study indicate that for the principle of opportunity to be effective, the definition of 'public interest' must be reconstructed. The term should refer to lower class people or those aged 70 years and above, and cover minor cases only. The minor cases may include those resulting in no more than four years of penal sanctions until losses have been replaced, where penal sanctions are fines only or where offences can be penalised by a maximum of one year in prison and/or until the loss has been replaced.

Keywords: *Reconstruction, Opportunity principle, Penal law, Indonesia.*

Introduction

Humans, as social beings, make mistakes and may act in ways which harm other human beings. Therefore, to overcome this, the penal law exists. The penal law is the law governing crimes, and violations of the public interest. Such acts are threatened with punishment, as a restitution for causing suffering (Rosman, Edi & Alfin, Aidil & Bustamar, 2019). The penal law system is deeply rooted, not only in Indonesia, but also in all other countries because this is one of the most effective ways to maintain social order. However, that does not mean the

system is without its weaknesses. To highlight the weaknesses of the penal system, especially in Indonesia, we will first explain how the current Indonesian Penal system works.

The Indonesian Penal system codes include the '*Kitab Undang Hukum Pidana*'(Indonesian Criminal Code), commonly known as KUHP, which is the material penal law, and stipulates what is permitted, and what is forbidden; and the '*Kitab Undang Hukum Acara Pidana*'(Indonesian Criminal Procedure Code), commonly known as KUHAP, which contains the formal penal law or penal system procedures. Additionally, Indonesian-Specialised Law, such as Law Number 20 of 2001, is applied in cases involving corruption.

Problems arise when applying these two codes, especially the KUHP, because they are quite old, and the codes stem or are translated directly from the *Wetboek van Strafrecht voor Nederlands-Indië* (Criminal Code for the Dutch East Indies), which was passed by the Netherland Colonial Government in 1915 through the *Staatsblad* (Dutch Statute Book) of 1915, Number 732.

This, of course, creates problems because the law is severely outdated and is not in accordance with today's community. Many minor cases are still processed in the courts, which has resulted in an explosion of the number of penitentiary residents, as seen in the table below (DITJENPAS, 2020).

Table 1: Data on Residents of Penitentiary Institutions in Indonesia, per Province, and until April 2020

No	Regional Office (Kanwil)	Total	Total of Prisoner & Inmate	Capacity	% Over Capacity	Details per Technical Implementation		Total
						Over Capacity	Not Ove Capacit	
1	KANWIL ACEH	5,863	7,54	4,09	84	18	7	26
2	KANWIL BALI	2,294	3,001	1,518	98	8	2	11
3	KANWIL BANGKA BELITUNG	1,663	1,968	1,348	46	4	3	7
4	KANWIL BANTEN	7,831	9,945	5,197	91	9	3	12
5	KANWIL BENGKULU	1,761	2,301	1,632	41	4	3	7
6	KANWIL D.I. YOGYAKARTA	907	1,249	2,01	0	1	8	9
7	KANWIL DKI JAKARTA	9,999	16,381	5,791	183	8	0	8
8	KANWIL GORONTALO	662	842	888	0	3	2	5
9	KANWIL JAMBI	3,069	3,774	2,256	67	9	2	11
10	KANWIL JAWA BARAT	16,805	20,659	15,816	31	25	8	33
11	KANWIL JAWA TENGAH	8,964	11,541	9,258	25	35	11	46
12	KANWIL JAWA TIMUR	17,953	25,286	12,846	97	33	6	39
13	KANWIL KALIMANTAN BARAT	3,519	4,663	2,529	84	10	3	13
14	KANWIL KALIMANTAN SELATAN	6,83	8,594	3,467	148	13	1	14
15	KANWIL KALIMANTAN TENGAH	3,116	3,876	2,344	65	9	3	12
16	KANWIL KALIMANTAN TIMUR	9,155	11,186	3,586	212	12	1	13
17	KANWIL KEPULAUAN RIAU	3,641	4,139	2,733	51	7	2	9
18	KANWIL LAMPUNG	5,675	7,713	5,348	44	15	1	16
19	KANWIL MALUKU	888	1,276	1,365	0	6	9	15
20	KANWIL MALUKU UTARA	796	1,033	1,477	0	4	6	10
21	KANWIL NUSA TENGGARA BARAT	1,807	2,536	1,269	100	7	2	9
22	KANWIL NUSA TENGGARA TIMUR	2,09	2,722	2,87	0	8	10	18
23	KANWIL PAPUA	1,943	2,374	2,267	5	5	6	11
24	KANWIL PAPUA BARAT	460	848	1,004	0	3	5	8
25	KANWIL RIAU	9,185	11,338	4,257	166	13	2	15
26	KANWIL SULAWESI BARAT	540	767	1,022	0	2	5	7
27	KANWIL SULAWESI SELATAN	6,436	9,453	5,843	62	21	3	24
28	KANWIL SULAWESI TENGAH	2,24	2,938	1,609	83	9	3	12
29	KANWIL SULAWESI TENGGARA	1,546	2,296	2,146	7	4	4	8
30	KANWIL SULAWESI UTARA	1,618	2,218	2,153	3	6	8	14
31	KANWIL SUMATERA BARAT	3,992	5,239	3,217	63	18	5	23
32	KANWIL SUMATERA SELATAN	10,343	13,1	6,605	98	18	2	20
33	KANWIL SUMATERA UTARA	21,079	30,635	12,574	144	35	4	39
Total		174,67	233,431	132,335	76	382	140	524

As seen in Table 1, the red-coloured Table indicate that the penitentiary institutions in the provinces are at overcapacity, and of the 33 provinces in Indonesia, only six (indicated with a blue-colored table) are free from overcapacity. If this problem persists, it may create further

issues and complications, as penitentiaries are supposed to serve as rehabilitation institutions. Therefore, the inability to 'rehabilitate' problematic people may cause further problems within the society (Marlina, 2020).

To tackle this issue, the Government has already undertaken many alternatives, such as using a non-penal law. However, among many other alternatives, one which must be considered, is the utilisation of the principle of opportunity in penal law (Iqbal, 2018). This principle has long existed (Prosecutor's Office Act, 2004) although, it is rarely used in the penal system in Indonesia. The article, which reads: "the prosecutor has the duty and authority to set aside the case in the public interest", means that the principle can authorise the prosecutor to rule out an ongoing case, in the public interest.

It is rarely used because the definition of 'public interest' is still vague, and because of that, if the principle is applied by the judge incorrectly, it may result in the 'haves' evading penal sanctions (Seraya, 2013). This was seen in the Penal case of Chief Executive of Indonesian Corruption Eradication Commission (KPK) who had their case ruled out in favor of the 'public interest'(Bibit & Hamzah,2010).

This deviation from the principles of the rule of law has a severe impact on the protection of human rights, which require comprehensive protection and without discrimination in terms of ethnicity, religion, race or social class. This is because presently, there is no exact legal definition of the 'public interest' in Indonesia.

The authorities could choose not to prosecute penal cases during the period before Indonesian independence, based on the principle of '*nolle prosequi*'(to be unwilling to pursue), which is a prerogative right of the Attorney General before the case was forwarded to the court, as stated by C. Hamton in Poernomo (1994). Therefore, during penal proceedings, there were always several alternatives to forwarding such cases to the court (Tretyak, 2018).

As a result of the combination of conditions described, the authors chose to study the importance of the principle of opportunity to optimise Indonesia's penal system. If the principle is used correctly, it could contribute to the optimisation of the penal system in Indonesia.

Methods

This legal research was conducted from a juridical empirical perspective, which is both analytical, and descriptive. The advantage of this approach is its practical nature, which requires seeing the reality directly in the field (Napalkova, 2019). Therefore, the data used in this study was observational data, which was obtained from Indonesian penitentiary

institutions as primary data, and it was supported by a literature review, and relevant legislation as secondary data.

Furthermore, to ensure the accuracy of the results obtained, the research results were analysed using qualitative methods that assess and describe the data numerically by using expert theories, legal regulations, and logic to draw relevant conclusions (Arslanov, K.M., 2019).

Results and Discussion

The Application of the Opportunity Principle in Penal Law

In several countries, including those that adhere to the Anglo Saxon system, and those that adhere to the Continental European system, some adhere to the principle of opportunity, and some do not. For example, in The Australian State of South Australia, although it is included in the Anglo Saxon family, according to Chris Summer in Hamzah (2008), the Attorney-General is more inclined to apply the principle of legality, meaning that the prosecutor does not rule out cases, as in South Korea. France, and Belgium do not even recognise the principle of opportunity and legality, but following the French revolution, the public prosecutor was permitted to overrule a penal case by declaring unwillingness to further pursue the case against the defendant (*classer sans suite*).

The Netherlands was the country which officially adopted the principle of opportunity and brought it to Indonesia. In the Netherlands, the principle of opportunity means that 'public prosecutors may decide to prosecute or not prosecute on condition or without conditions'. This indicates that the public prosecutor's position is immensely powerful, due to their freedom to prosecute or not, and based upon their individual decision alone as more than fifty percent of penal cases are not forwarded by prosecutors to the court (Tak,2003). The outlines of penal cases that are rejected in the Netherlands broadly includes:

a. cases disregarded for policy reasons, which includes minor cases, the defendant's age (elderly), and the damage incurred (trivial offence, age, and the amount stolen).
b. for technical reasons, including a lack of evidence, and past time.
c. because a case is combined with other cases.

In Indonesia, the scope of a case is related to matters of the public interest, but only those mentioned in the first point above. Meanwhile, regarding the third point, the author agrees with Andi Hamzah. In Indonesia, if there is a case that is combined with other cases (multiple offenses done in a single unlawful act or commonly known as *Concursus*) then the court will decide to choose only one punishment which is the heaviest (Chalmers, Damian & Davies, Gareth & Monti, Giorgio, 2018). Several countries in the Asia Pacific region also

apply the principle of opportunity, including Thailand, Cambodia, and Japan, which have similar penal codes to the Netherlands. That is, namely countries with civil law traditions that endow the public prosecutor with a very broad authority. In Thailand, Cambodia, and Japan, this is performed by imposing a delay in the prosecution or realising the charge, if it is considered that it is not necessary due to the nature of the offence, age, and the defendant's environment. The weight and circumstances of the offence, and the circumstances after the offence has been committed are also considered.

This situation adheres to the theory of penal purpose, which not only considers the nature of an offence, but also the consequences of forwarding a prosecution to the court (Kondrashova, 2016).

In Norway, which officially adheres to the principle of opportunity based on the Law of 1887, the termination of prosecution is similar to a conditional crime because the termination of prosecution is dependent upon certain conditions. A prosecution is not required when the defendant can be instructed not to commit an offence over a certain period to obtain a termination of prosecution. The application of the principle of opportunity is broadly based on the consideration that 'the prosecutor is sufficient to state that there are special circumstances to set aside cases, both objective (offence), and subjective (offender)'.

In Turkey, the '*principle of opportunity location*' or '*the principle of discretionary prosecution*' provides the prosecutor with an opportunity not to prosecute penal cases, particularly when prosecutions have been improperly conducted or where prosecutions will harm the public or Government interests, individuals included (Hakeri, 2008).

The principle of opportunity is also practised broadly or in a limited sense by the Attorney General's Office of the Philippines, Singapore, Malaysia, Brunei Darussalam, and Myanmar among others, which are countries with common law systems or an Anglo-American legal system.

The British Prosecutor's Office (*Crown Prosecution Service*), which was formed in 1986, may prevent prosecution for policy reasons, if the criminal act is minor, the culprit is old or is still a teenager. Of course, the British Attorney must prevent the prosecution for technical reasons, other than inadequate evidence and witnesses, and expired time limits. The British Attorney General may halt cases which have already been brought to court by applying the '*Nolle Prosequi*' law (will not sue) and by notifying the court that the case will not be prosecuted (Anders, Mary & Christopher, F. Scott, 2011).

The Application, Weaknesses, and Reconstruction of the Opportunity Principle in Penal Practices in Indonesia

The application of the principle of opportunity to halt the prosecution of certain cases which occur in Indonesia aims to protect the interests of the nation, the State, and the society, as a whole. However, it has developed into an instrument to promote various interests, both politically, and economically. This is indicated by the termination of several cases in Indonesia, such as the Indonesian bank liquidity assistance (BLBI) case, and the corruption case involving the Regional People's Representative Assembly (DPRD) member of Sukoharjo in 1999, and his procurement of motorised vehicles that involved several KPK leaders. The ambiguity of purpose, when preventing prosecution by applying the principle of opportunity, is due to the prosecutor's dual position as a State apparatus in the structural field, and as law enforcement in the functional field. This dualistic position certainly influences the decision-making about halting prosecutions across the two positions because the two positions influence each other.

In practice, the dominant position of the prosecutor is as an actor in the State apparatus, as proven in the case of the KPK Chairman, which was mentioned above. The initial evidence was considered sufficient, the causal relationship between the perpetrators and acts had been proven, but due to vertical pressure, the case prosecution was prevented on the grounds that there was insufficient evidence, and a warrant was issued to stop the investigation (SP3). This indicates that the law aims only to suppress lower class people, as the phrase states "downward law is greater than upward law" or the law that weighs upon lower class people or the poor is heavier than that applied to upper class or rich people. Therefore, the legal treatment of rich people is soft, while the law applied to the poor is more strict or is a hard law (Susanti, 2014).

If this reality is due to applying the law to bring about order, then this will become a common thread underpinning that order. This situation will also increasingly alienate the positive legal paradigm, which states that the purpose of the law is certainty. The pattern of preventing prosecution by applying the principle of opportunity, as indicated by the prosecution mentioned above, promotes uncertainty, even though the behavioural pattern guiding lawful conduct is clear; namely, the law as positive law. This description indicates that when prosecutors in Indonesia execute their authority to conduct prosecutions, they are subject to a conflict of interest caused by the dual position of the prosecutor because the Government, and the judiciary are not clearly separated.

This situation must be reformed if the prosecutor's institution wants to be neutral, and independent when performing law enforcement duties. Independence does not mean that there is no interference or influence but refers to an institution's authority to carry out its

functions. The influence of the executive cannot be seen in various cases, especially in corruption cases, yet, the inequality of treatment is strongly felt by the community during all stages of the legal process, and not least in the prosecution of a criminal case involving the State apparatus related to the bureaucratic elite, politicians, and conglomerates. In the motor vehicle corruption case involving the DPRD of the Sukoharjo District, and the *Sjamsul Nursalim* case (CNN, 2019), the involvement of the ruling elites was significantly dominant. There was even an attempt to justify the Government's legitimacy by issuing a Presidential instruction to block the *Sjamsul Nursalim* case. Subsequently, the case was not forwarded to the court by the public prosecutor. The case was blocked by the prosecution (Criminal Procedure Code,1981) with three options: namely: the alleged act was not a penal act, there was insufficient evidence, and it was in the interest of the law. This third reason was used by the Attorney General to issue a 'Decree to Stop Prosecution' (SKPP).

The essence of the termination of a penal case, which is based on legal interests, is regulated by Article 78 of the Penal Code, and follows three elements. Firstly, the penal case the case had never been decided before (*ne bis in idem)* . Secondly, the defendant dies, and thirdly, the case in question has exceeded the time permitted or has expired. The legal considerations that became the basis for the termination of the case above (Bibit & Hamzah,2010) have, from the outset, indicated that political considerations dominate legal considerations. The law is used to provide legitimacy to political interests. This case has since been proven legally flawed because the provisions of the law were annulled by the Government Regulation Number 4 of 2009. This is very strange in a State order based on law because the regulation stipulates lower rules prevail over higher rules, whereas according to *Hans Kelsen's* theory, in Bryan, Ian & Langford, Peter & McGarry (2019), lower rules must not contradict higher rules, let alone change them. This situation provided an opportunity for the executive, and the President to take action in this case, which was both political, and juridical in nature.

In his speech on 23 November 2009, the President of the Republic of Indonesia implicitly ordered the resolution of the KPK leadership case outside the court through SP3, SKPP, as well as by setting the case aside for the public interest. The Attorney General is subordinate to the President in the hierarchical structure, as stipulated in Article 8, paragraph 2 of Law Number 16 of 2004, which stipulates that the prosecutor acts on behalf of the State and is responsible to these hierarchy channels (Krismiyarsi, 2017). This provision provides space for the Attorney General to act on directives, orders or similar from the President, in a hierarchical manner. However, according to the provisions of Article 2, paragraph 1, and paragraph 2 of Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia, in paragraph 1 the Attorney General's Office of the Republic of Indonesia is a government institution that implements State power in the field of prosecution and other authorities, based on the Law. The State power, as referred to in paragraph 1, shall

be exercised independently, ensuring that its functions, duties, and authorities are executed independently of the influence of governmental powers, and the influence of other powers.

This provision indicates that implementing the State's power in the field of prosecution must be independent, especially if it is associated with the provisions of Article 37, paragraph 1. It states clearly that the Attorney General is responsible for independent prosecutions to uphold justice based on law, and conscience. In the case of *Bibit* and *Chandra*, the Attorney General's halting of prosecution, and based on law according to the provisions of Article 50 of the Penal Code, deviated from the principles of the Indonesian State based on Indonesian Law Number 16 of 2004. The Constitution of the Republic Indonesia in 1945 clearly stipulates that the State of Indonesia is a rule of law nation, and in line with these provisions, one of the important principles of the rule of law is the guarantee of each citizen's equality before the law (Widodo, 2018). Therefore, every person has the right to the guarantees, protection, and certainty of law that is fair, as well as equal treatment before the law. However, the social reality of penal sanctions in Indonesia indicates that discrimination remains, and that people who carry out activities related to the State, such as state officials, enjoy greater protection, and dispensation when compared to people who are not involved in State activities, such as ordinary people.

The achievement of the above objectives must, in principle, involve the implementation of penal policy. The penal policy is an applied theory that ensures the application of the principle of opportunity is a just penal law. The legal policy, in the sense of legal politics, must function a tool or instrument that works in a particular social system, and legal system to achieve a goal for the benefit of the community or the State. The law not only supports the interests of the State apparatus (bureaucracy) but is limited to the interests of power alone. In practice, so far, the State bureaucracy, including prosecutors, are not compelled to obey the law, but to emphasise their representation of power. However, the empowerment of the bureaucracy (*bureaucratic engineering*) must develop in parallel with community empowerment (social engineering) (Widodo, 2019).

This has consequences for law enforcement today, which tends to prioritise law and order over penal justice science, and which emphasises harmonisation with the interests of society. As a result, many claims have failed or been deliberately thwarted by the public prosecutor to protect certain interests. This reality has resulted in a sceptical view that bureaucracy is congruent with corruption, so that *mutatis muntandis,* the termination of penal cases on the grounds of personal interest, is justified by referring to the public interest. The various analyses above indicate that the application of the principle of opportunity is not a monopoly of the judiciary alone but is also an executive institution. In certain penal cases, the executive agency can terminate a case through a 'pardon' provided by the President, in their capacity as the 'Head of State'. Therefore, an analysis of the facts demonstrates that the principle of

equality before the law, the principle of legal certainty, and the principle of justice, as a principle of the rule of law, are essentially, not applied in Indonesia. This is especially the case in regard to the termination of prosecution based on the principle of opportunity. In other words, discrimination still occurs when applying the principle of opportunity under penal law.

The non-neutrality of the law certainly affects the rule of law, including the application of the principle of opportunity, which is adjusted to serve the interests that encompass the law, including the influence of the authorities, political influence, economic influence, and cultural influence. These interests influence legal culture at an applied level. That is why in the writer's terms, the legal theory underpinning the law enforcement system in Indonesia, including the application of the principle of opportunity, is a 'chameleon', because the application of the law will always be adjusted according to the influence and desire of the interested parties.

The prosecution is the sole authority of the prosecutor's institution, which executes this prerogative according to the mandate of the Act. This conception is in accordance with the principles of the Indonesian State based on law and is not based on mere authority. This principle is essentially contained in the principle of formal legality, which requires that every action be based on existing legal rules. The legal reconstruction that is needed to better understand the principle of opportunity in penal law in Indonesia must be based upon the value of justice. Therefore, a formulation of rules is required, which should then be reconstructed to protect the suspect's right not to proceed to the next stage, namely prosecution (Setiawan, 2018).

This can work if preventing prosecution based on the principle of opportunity is executed by the prosecutor, as a State apparatus in the structural field, and the prosecutor as law enforcement in the functional field. This dualistic position certainly has an influence in making prosecutions and in stopping prosecutions, as well as an influence between the two positions because the two are in conflict with one another. In practice, the dominant position is the prosecutor as a State apparatus. Therefore, if the law values the role of justice in society, it is necessary to have a legal reconstruction of justice, so that the law applied to the lower class or poor people is not more strict than the law applied to the upper class or rich. The reconstruction of justice in the 'public interest' should be applied in:

a. minor or light cases
b. with defendants aged 70 years and above, to penal sanctions of less than four years in duration, and/or the loss has been replaced.
c. when penal threats only incur a fine.

d. when penal sanctions do not exceed one year in prison, and the loss has been replaced.

These recommendations related to the principle of penal procedural law, namely the principle of rapid processing at a low cost, are appropriate given the increasingly complex duties and responsibilities of the Attorney General, and their delegation of authority as justified by the rule of law. According to the author, these changes are reasonable based on the authority given to all the prosecutors who have served within the Republic of Indonesia, on the basis that the cases occurred in various regions, and cultures, and where the best-informed prosecutor has served in the region concerned. Only in this case, should a *deponer* or application of the principle of opportunity be considered in consultation with the Attorney General, upon request.

Conclusion

The regulation permitting the halting of prosecution — the principle of opportunity — should not be ruled out, as it has its use. This is in accordance with Law Number 23 of 2014 concerning Regional Governance. A concrete definition of the 'public interest' must be agreed for application to minor cases. Specifically, to defendants aged 70 years and above; to penal sanctions of less than four years in duration, and/or the loss has been replaced; and when penal threats only incur a fine; and when penal sanctions do not exceed one year in prison and the loss has been replaced.

Currently, the termination of prosecution using the principle of opportunity is subject to the authority of the Attorney General, but it should become an integral authority granted to every prosecutor's institution in each region, which is also known as the principle of decentralisation. The application of the principle of opportunity should not be limited to specific criminal acts, but should include all penal acts committed by each Indonesian citizen, to eliminate the impression that the law only protects the interests of certain citizens.

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