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THE CONCEPT OF RECHTERLIJK PARDON AS A CRITIQUE ON THE EFFECTIVENESS OF IMPRISONMENT IN INDONESIA

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This paper discusses a large number of criticisms on the effectiveness of imprisonment, which in reality cannot decrease the level of criminality in a particular country so that other alternatives are required to solve this problem. Moreover, this research revealed that judges in Indonesia tend to determine the imprisonment verdict on the criminal act with a criminal charge of under five years. The concept of Rechterlijk Pardon which will be applied in the Draft of the Indonesian Criminal Code (RKUHP) and has been implemented in several countries are also one of the alternative penal measures to imprisonment and judicial corrective to the legality principle, which in the end is expected that this concept aims at decreasing the level of existing criminality.

Keywords: Rechterlijk Pardon, prison punishment, imprisonment, Indonesia.

КОНЦЕПЦИЯ ПРАВА ПОМИЛОВАНИЯ КАК КРИТИКА ЭФФЕКТИВНОСТИ ТЮРЕМНОГО ЗАКЛЮЧЕНИЯ В ИНДОНЕЗИИ

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В данной статье рассматривается большое количество критических замечаний по поводу эффективности тюремного заключения, которое в действительности не может снизить уровень преступности в конкретной стране, поэтому для решения этой проблемы требуются альтернативы. Кроме того, исследование показало, что судьи в Индонезии по обвинению в уголовном преступлении, как правило, приговаривают к тюремному заключению сроком до пяти лет. Концепция права помилования, которая предложена в проекте Уголовного кодекса Индонезии и которая была реализована в нескольких странах, также является одной из альтернативных мер наказания в виде лишения свободы с целью исправления и соблюдения принципа законности,

что в конечном итоге, как ожидается, приведет к снижению уровня существующей преступности.

Ключевые слова: право помилования, тюремное наказание, лишение свободы, Индонезия.

Introduction

The draft of Indonesian Criminal Code (RKUHP) has come to the final stage of its formulation. This formulation, among others, is based on the needs of criminal law improvement, including in Indonesia, which currently encounters criminalization problems. According to Muladi, to all intents and purposes, the use of criminal law is not always an obligation, if a prevention act which is non-criminal law still has a strategic position, in fact holds, a key position, then it needs to be intensified and made effective [7, p. 159]. According to A. Ross and B.N. Muladi, prevention, or more generally the influencing of behavior, is only adequate answer when the question is posed as one of the aims of penal legislation. Retribution, i.e., the requirement of guilt as a precondition and measure of punishment, is the only adequate answer when the question is posed as one of what restrictive moral consideration limits the state's right to use as a means of influencing behavior [13, p. 60-61].

In addition, there is an influence of global criminal law development mainly after the United Nations Congress has been conducted several times regarding the prevention of crime and the treatment of offenders. In this case, the discourse about criminal law experiences a significant improvement. One of them is the conviction orientation, which is more "human" towards criminal offenders in the form of treatment. This corresponds to various purposes of conviction which has been developing from the past until present which is perceived by H. Packer to have a tendency towards more rationale direction; starting from retributivism theory to utilitarianism theory which aims to satisfy all parties [8, p. 37-58].

According to S. Roeslan, the essence of "the purpose of conviction" is the situation being fought for to be able to achieve, both officially formulated first and

can be fought for unofficially and without explicitly stated [12, p. 27]. Meanwhile, according to J. Hogarth, "looking backward" to the offense for purposes of punishment, to 'looking forward' to the likely impact of the sentence on the future behavior of the offender, on the potential offender in the community at large" [3, p. 4].

Restrictedly, there are only 3 types of criminal verdicts in Indonesia, namely: imprisonment (*veroordeling*), acquittal (*vrijspraak*) and free from all lawsuit (*onslag van recht vervolging*). Within only these 3 types of the verdict, the questions emerge are 1) how the verdict is determined by the judge in the problem faced between the law certainty and justice?; 2) how if the defendant is stated as guilty and proven legally and ensuring according to the Criminal Code, however, the judge perceives that the act should not be sentenced?; 3) how if the judge based the justice value gives *Rechterlijk* Pardon to the defendant on their criminal act which corresponds to the principle of legality.

Ideally, the court is the place to obtain justice, in which in practice, court is place to separate the guilty and not guilty people. However, the reality is not always in line with its normative ideas whereas many criminal cases are actually "inappropriate" to be submitted to the court, mainly when faced with the development of social, economic, and cultural aspects in the plural society and various interest as well as diverse needs. This is among others is caused by a too small value of loss, related to trivia issues, offenders who are supposed to obtain a specific treatment (*younger and older offenders*), or cases with charges above 5 years which is against the values of humanity and justice which live in the society and in fact, solutions are needed to be found.

In the development of conviction theory related to the judge's verdict in the last couple of years obtains a significantly strong criticism from the experts of criminal law. It is often because the judge's verdict is considered to be contradictory with the interpretation of justice since such decisions are merely based on the principle of legality. Meanwhile, this principle of legality in criminal law theory has shifted into no liability without fault (*geen straf zonder schuld*) or known as dualistic

theory in criminal law or in which the concrete form of this theory is the implementation practically to the judge's duty in determining the verdicts by prioritizing the aspect of justice in society.

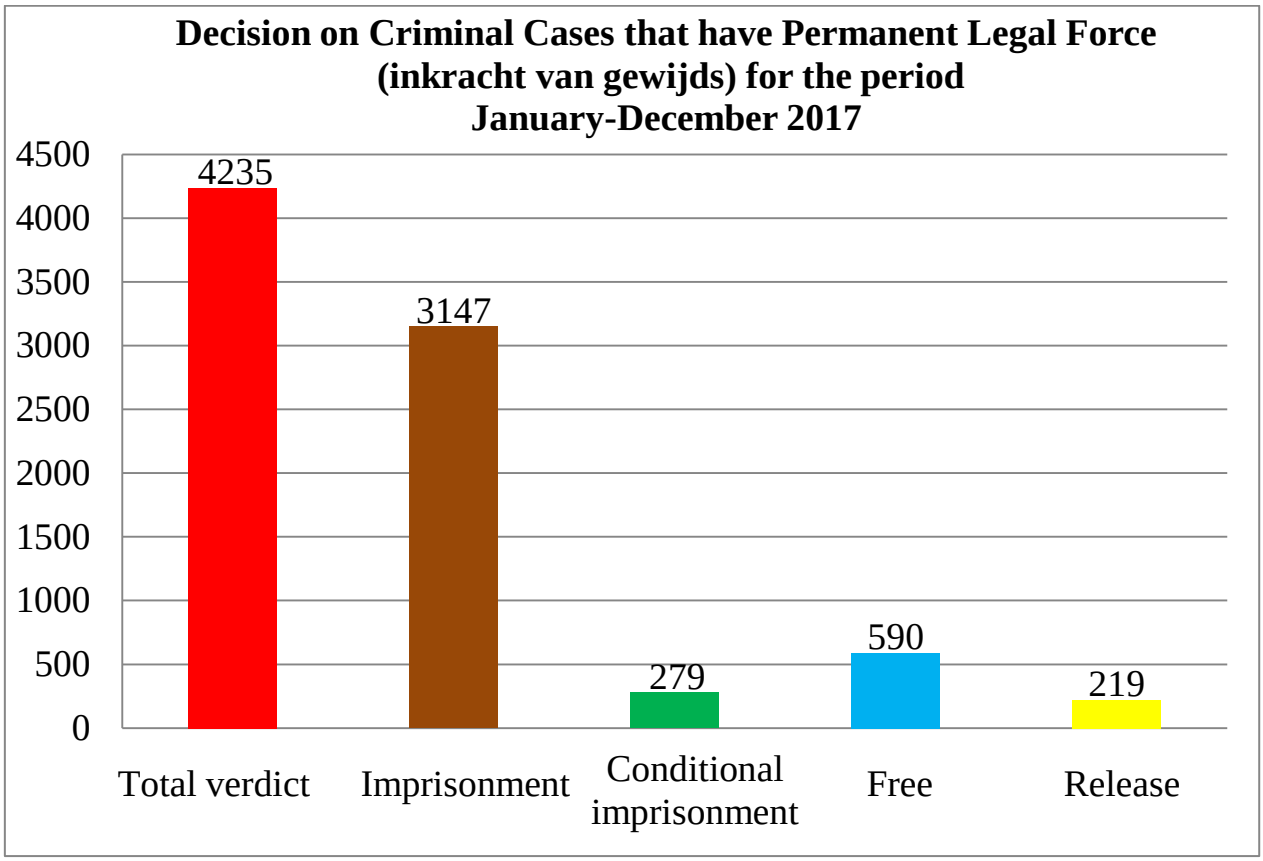
Furthermore, there are also judge's verdicts which are particularly unique and bother the value of justice in society, among them, are the verdict on Grandma Aminah, the thief of three cacao fruits in Banyumas, who was criminally charged with 1 month and 15-day sentence, watermelon and sandal theft, and other similar cases. The problem is on the requirement of the criminal imposition which cannot place the "criminal imposition" in a dynamic order according to the feeling of social law and certain condition in the self of the maker of criminal acts.

Finally, RKUHP has included the regulation regarding *Rechterlijk* Pardon institution in Article 56 paragraph 2. This regulation gives a possibility for the judge not to conduct criminal imposition on the defendant who has been proven to perform a criminal act; even though not in *explicit verbis* stated that there is an existence of verdict in the form of *Rechterlijk* Pardon. However, with the existence of this *Rechterlijk* Pardon concept, it is expected that it can be beneficial in reducing the crime rate in Indonesia, which is increasingly high.

Results and discussion

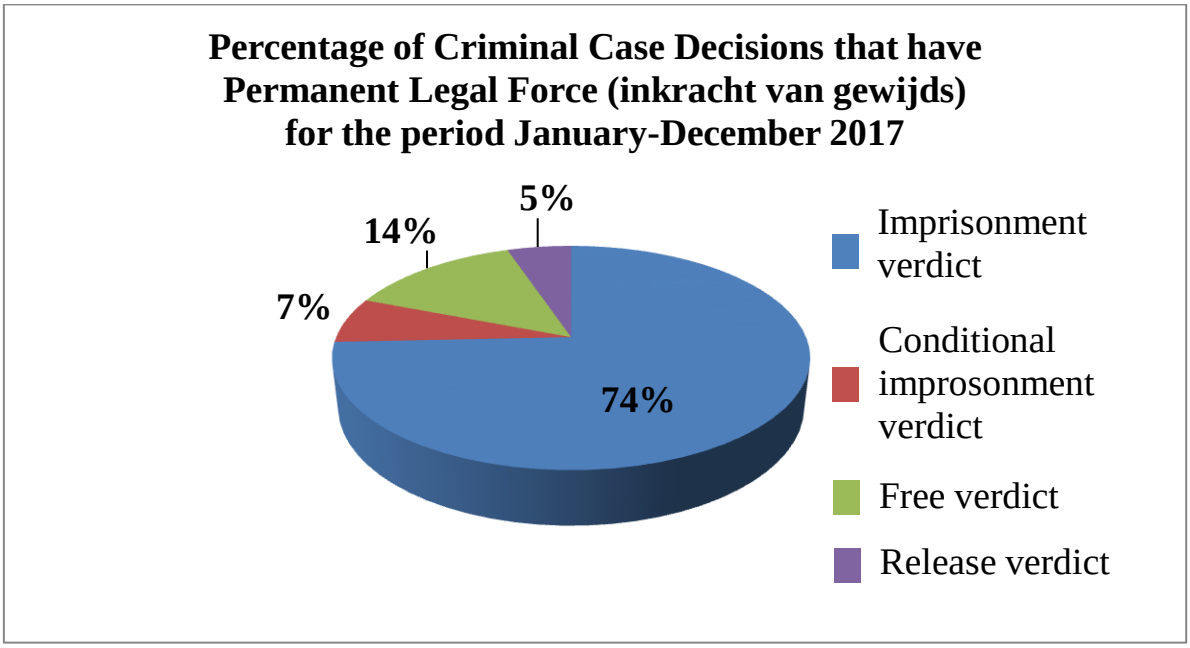
Based on the research of the researcher, in the period of January-December 2017, there were 4235 criminal cases as seen in the graphic 1 below:

Graphic 1.



Source: Supreme Court Directory dated on 2 January 2019.

Graphic 2.



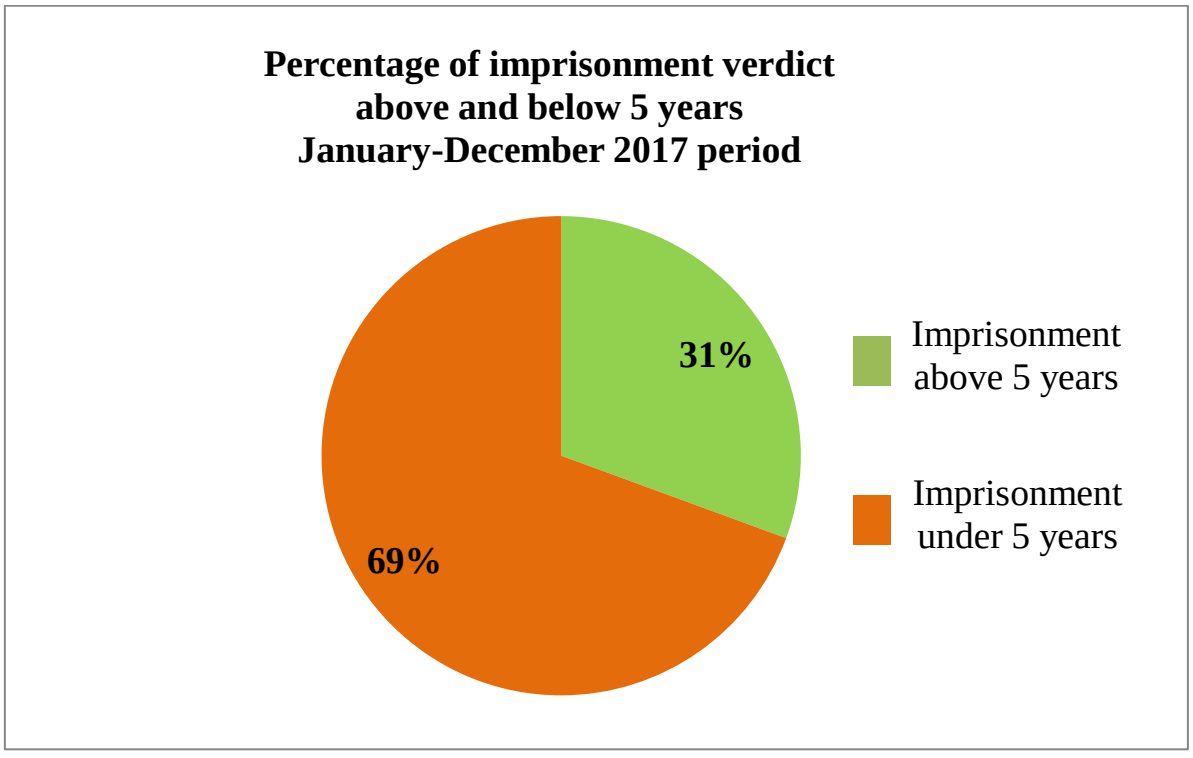
Based on the above explanation, it can be concluded that the criminal justice system in Indonesia, both in the level of *Judex Factie* (District Court and High Court) and the level of *Judex Juris* (Supreme Court), tend to finalize the criminal cases with

imprisonment verdict. Even though in the imprisonment verdict has a conditional criminal verdict, this type of verdict has a relatively small percentage, which is only around 7% of the overall existing criminal verdict types.

The tendency to impose this verdict turns out to be directly proportional to the number of crimes which is continuously increasing each year. This means that the high number of imprisonment verdict eventually does not positively impact on decreasing the crime rate in society.

When it is correlated with the imprisonment verdict, the majority of the verdict is determined on the cases which have main criminal charge of below 5 five years and not above 5 five years. In the scientific context, the concept of *Rechterlijk* Pardon, which later on will be formulated in RKUHP has a significant role in overcoming this problem.

Graphic 3.



Source: Supreme Court Directory dated on 2 January 2019.

Currently, many countries have implemented a concept of *Rechterlijk* Pardon institution. Those countries include France, Netherland, Greece, Greenland, Somalia, Uzbekistan and Portugal [4, p.135]. Even the Netherland as the origin country of KUHP and KUHAP (Criminal Procedure Code) has implemented the decree

regarding *Rechtelijk Pardon* since 1983 or only 2 years after the implementation of KUHAP in Indonesia. Fundamentally, this "institution" is the "imprisonment guide", which is the basic of the flexibility idea to avoid the inflexibility of the verdicts released by the judges. It can also be stated that the existence of *Rechterlijk* Pardon guide functions as a security valve (*veiligheidsklep*) or emergency exit (*noodeur*) [16].

Rechterlijk Pardon institution is one of the new ideas which is regulated RKUHP in Indonesia. This *Rechterlijk* Pardon idea was initially unknown in the long history of RKUHP formulation. This idea began to be formulated by RKUHP drafting team in the draft of 1991, which is positioned in Article 52 paragraph 2. In the final draft of 2018 edition, the *Rechterlijk* Pardon was regulated in Article 56 paragraph 2, even though inexplicitly stated that *Rechterlijk* Pardon, in the substance of the article is affirmed that the decree of Article 56 paragraph 2 is related to the principles of *Rechterlijk* Pardon.

In addition, according to Mardjono Reksodiputro, the expectation to include the concept of *Rechterlijk* Pardon in the RKUHP came from Roeslan Saleh. Besides the concept of forgiveness, Roeslan Saleh also proposed the justice clause. The point is that if the judge feels that there is a contradiction between legal certainty and justice, then the judge must refer to justice. According to Mardjono, the concept of Roeslan Saleh which underlies Bismar Siregar (ex-supreme judge) statement has included the regulations of *Rechterlijk* Pardon in RKUHP.

The proof that Bismar upholds *Rechterlijk* Pardon in finalizing criminal cases is reflected from his analysis on the decree of Supreme Court Number 1824/K/Pid/1986. In this decree, the Supreme Court assembly "only" charges the defendants (children) of bicycle thieves with probation. However, the Supreme Court assembly also obliges the defendant to ask for an apology to the bicycle owner at least one month since the verdict is determined. "The cassation decision has brought about a spirit of renewal, which should be considered by the judges", said Bismar as quoted from his book entitled "Bunga Rampai Hukum dan Islam". Bismar stated that punishment accompanied by an apology is in accordance with Pancasila, which is

based on the Belief in the one and only God. The religions in Indonesia also teach the importance of apology compared to revenge in solving a problem. Bismar quoted Quran 16: 126 and Bible Matthew's New Testament (5:44) [see: 15, p. 71].

Furthermore, RKUHP has included the regulation regarding *Rechterlijk* Pardon institution in the criminal justice system according to Article 56 Paragraph 2 RKUHP, which states that: "The lightness of the deed, the personal condition of the maker, or the lightness of the situation at the time of the action or later, it can be used as a basis for not imposing criminal acts or taking actions taking into account aspects of justice and humanity".

This Article does not give any further explanation regarding the existing phrase; among them regarding to "the light of criminal act", "lightness of the defendant personal circumstance", "the lightness of circumstances at the time of the act was conducted or what occurs then" and the phrase of "the aspects of justice and humanity". However, the decree regarding the existence of *Rechterlijk* Pardon institution in KUHP is one step forward in the criminal justice system in Indonesia.

Meanwhile, according to Barda Nawawie, in the decree of *Rechterlijk* Pardon, RKUHP does not give a specific limitation or criteria related to the intention of "the lightness of the act". Meanwhile, this uncertainty is the form of weakness from the regulation of *Rechterlijk* Pardon institution, which will be contrary to the principal of legal certainty. However, he also argued that there is no concrete regulation on the intentions of those phrases including "the lightness of act" is intended not to limit the authority of the judge in determining *Rechterlijk* Pardon only to a certain offense [see: 1].

As a form of amnesty, with the existence of *Rechterlijk* Pardon, someone's fault will not be charged with imprisonment. There is a limitation which obtain 'a facility' of *Rechterlijk* Pardon based on Article 72 paragraph 2 RKUHP, is not applicable to criminal act which is charged with imprisonment of five years or more or charged with a specific minimum imprisonment or a certain harmful criminal act in society or detrimental to the country's finances or economy. Furthermore, the

judge's wisdom will assess each case regarding the implementation of this *Rechterlijk* Pardon.

Based on Article 72 RKUHP, the requirements to obtain this *Rechterlijk* Pardon 'facility' are limited as follow:

1) The defendant is under 18 (eighteen) years old or above 70 (seventy) years old.

2) It is the first time the defendant committed the crime.

3) The disadvantage and suffering of the victim is not relatively significant.

4) The defendant has paid the compensation to the victim.

5) The defendant did not realize that the crime he/she has committed would cause a significant disadvantage.

6) The occurred criminal act is caused by the significantly strong incitement from others.

7) The criminal act victim encourages the criminal act.

8) The criminal act is the effect of a certain circumstance which cannot be possibly repeated.

9) The defendant's personality and behavior ensure that he/she will not perform other criminal acts.

10) Imprisonment will cause significant grief for the defendant and his family.

11) Non-institutional counseling is estimated to be sufficiently successful for the defendant.

12) The determination of the lighter charge will not decrease the severity of the criminal act performed by the defendant.

13) The criminal act occurs in the realms of the family; and/or occurring due to the absence.

14) Not applicable for the criminal act charged with imprisonment of five years or more or charged with specific minimum imprisonment or a certain criminal act which is significantly harmful to society or the country's financial or economy.

The purpose of *Rechterlijk Pardon* is not only to avoid short imprisonment verdict, but also a punishment that is not justified/needed to be seen from the point of

needs, both the needs of protecting society and to rehabilitate the perpetrator. Therefore, the purposes of the existence of *Rechterlijk* Pardon institution are the alternative penal measures to imprisonment and judicial corrective to the legality principle [14].

Along this time, many strong criticisms on the presence of imprisonment are unable to cause a deterrent effect for the individuals who committed criminal acts due to its effectiveness. The existence of a statement that an individual does not become better but worse after experiencing imprisonment, especially when the imprisonment is charged to children or adolescents, however it is often stated that prison is the higher education for crime or the factory of crime [see: 10].

Meanwhile, in the outline, criticisms against imprisonment contain moderate and extreme critiques. Fundamentally, moderate critiques still maintain imprisonment, but its usage is limited. Otherwise, the extreme critiques expect the abolition of imprisonment at all [1, p. 37].

The extreme critique requires the abolition of imprisonment is included in the prison abolition in International conference on prison abolition (ICOPA) which was held the first time in May 1983 in Toronto. Furthermore, in the conference 1987 in Montreal the term prison abolition has been changed into penal abolition [11, p. 84-85].

One of the figures of prison abolition is Herman Bianchi, who stated that "the institution of prison and imprisonment are to be forever abolished, entirely and totally. No trace should be left off this dark side in human history" [11, p. 5]. According to Hazairin, prison does not give significant benefits in law enforcement in this country. This function is to limit the freedom of the criminal act perpetrator at such particular time. Prison becomes the place for the criminals to relax for a while after committing the crime. Therefore, it becomes the cave of the criminals to enjoy their satisfaction after committing a crime or to avoid the tantrum of the people who hate them [2, p. 2].

Hazairin also studied the regulation regarding imprisonment as one of the primary crimes included in the Article 10 KUHP/Wvs from the Netherland which is

based on the principles of concordance evict the roles of customary law and religious law which have been regulating the order of Indonesian society life [2, p. 28]. The fact is that, Indonesian customary laws are more than 250 types and religious law does not regulate about imprisonment, but the form of charge determined in the customary law such as death penalty, exile, beating, or compensation; in which the implementation is adjusted with the characteristics of each region.

As a part of the criminal sanction, imprisonment has resulted in a negative effect on the personal aspect of the convicted person. The negative effect occurs during the sentence and after being released. The negative effect which is experienced mostly in prison are the limitations of freedom both in terms of communication and fulfilling physical and biological needs, and decreased security feeling since the jailer still perform beating to the prisoners. While the adverse effects after serving a sentence show the existence of society's perspective tends to suspect and reject ex-prisoners in the society. Besides, there is a doubt in the self of the prisoners, whether they can have normal life as like working while there are back to the society [9, p. 120].

Meanwhile, regarding the moderate perspective on imprisonment, it can be categorized into three critiques, namely from the perspectives of "*strafmodus*", "*strafmaat*" and "*strafsoort*". Related to the "short prison" then it will correlate with the critique above on "*strafmaat*", which is seen from the perspective of the length of imprisonment, mainly intended to limit or decrease the use of short prison [1, p. 28].

Regarding the critiques against "*strafmaat*", which perceives from the length of imprisonment, Andenaes states that short-term imprisonment at least has one significant benefit which is the sentence, is short term so that the suffering and cost are less. However, in addition to the benefit, there are some real limitations that short-term imprisonment does not support the function of prison effectively in terms of the defendant is incapable (*incapacitative function*) and in its function as the infrastructure of general deterrent is absolutely lacking compared to the longer term of prison [7, p. 80]. Andenaes also stated that almost one hundred years had been thought about a renewal of sentencing to avoid short-term imprisonment. Such kind

of short-term imprisonment will not provide a responsibility to rehabilitate the offender, but it is sufficient to brand him as a prison stigma and make unpleasant contacts [1, p. 40-41].

In terms of short-term imprisonment, it is stated by Manuel Lopez Rey in the fourth UN congress (1970) that short-term imprisonment is present due to a limited time will exclude the prospect rehabilitation. He estimated that the population of global prisons in 1970 in a day was between 1.5-2 million and around 1.3 million is less than six months and in many cases is less than three months. Imprisonment is only appropriate for serious/ heavy crimes which need long-term rehabilitation, while for the light criminal act perpetrators are better to be solved with an imprisonment alternative [5].

Moeljatno states that although it has been centuries, people charge imprisonment to people who commit crimes, crimes are still performed by people [6, p. 15]. This indicated that imprisonment could not prevent the existence of crime, so it is not a remedy for the criminals. How is it possible for criminals to be analogized with sick people, and the imprisonment gives grief of revenge on the crime performed is made as to the remedy for those who are sick? To be able to cure it, there needs to observe the causes of the disease. What is needed is not imprisonment of causing a suffering as a revenge on the crime being committed, but acts. Other alternatives besides imprisonment are useful to overcome the increasingly high crime rate.

Furthermore, Moeljatno states that the perspective that imprisonment is merely revenge on the committed crime and now is abandoned, and has been indeed remorse is more complex [6, p. 15]. Other and more essential facets make a society which has been shaken more harmonious after a crime is committed by one party, and on the other hand, educating the people who committed the crime so that they can be useful society member. Imprisonment should change, it should no longer be as physical torture and humiliating human grace as a revenge of the committed crime, but it includes overall infrastructure which is perceived as appropriate and can be practiced in a certain society. The imprisonment regulation should be efficient to impact the

decrease in the intention to commit such crimes. In the practical order, displacement should be able to prevent the increase in the crime rate in society.

Having a new characteristic from the crime pillar and imprisonment, then there is no wonder that government always campaigns the presence of sentencing alternative, for example, in the form of social work in RKUHP. The form of this sentencing is expected to be able to decrease the population pressure, which currently occurs in the detention centers (Rutan) and correctional institutions (Lapas) in Indonesia.

This pressure is not only regarding the number of population in the detention center and correctional institutions, but also a pressure to increase the number of human resources in the Ministry of Law and Human Rights due to the inability to control the population in detention centers and correctional institutions. Besides, the emergence of awareness that sentencing the perpetrators of light crime in the correctional institution has harmed the country finances. Based on this, even though it is sufficiently challenging to abolish imprisonment progressively against the crime perpetrators; however, those efforts towards the direction must be performed, among them is in RKUHP and RKUHAP. Including the concept of *Rechterlijk* Pardon is one of the efforts towards the direction.

Also, the concept of *Rechterlijk* Pardon is also in line with the aim of imprisonment which will be stated explicitly in the Article 55 paragraph 1 and 2 RKUHP which states that imprisonment aims at:

a. Preventing the criminal act by upholding the legal norms for social counseling.

b. Socializing the defendants by holding a counseling so that they can be excellent and useful;.

c. Completing the emerged conflicts by the criminal acts, recovering balance, and raising peace in society.

d. Freeing up the guilty feeling in the defendants.

e. That the imprisonment is not intended for making people suffer and humiliating human grace.

As a comparison, the Netherlands has implemented the concept of *Rechterlijk* Pardon in its criminal justice system currently which is able to suppress the current criminal rate, this is reflected from the vacancy of prisons in the Netherlands due to the number of prisoners who occupy the prisons is limited. Even since 2004, the government of the Netherlands has closed 24 correctional institutions due to lacking prisoners to occupy them. Therefore, they import the prisoners from other countries such as Norway to overcome the social problems due to the emergence of new unemployment from the jailers of the correctional institutions. However, is it caused by the presence of a decree regarding the newly introduced *Rechterlijk* Pardon in the criminal justice system in the Netherlands since 1983. This certainly needs further research, but the fact is that since this decree is implemented, the crime rate in the Netherlands is decreasing.

Eventually, the results of the research which have been stated above related to the implementation of *Rechterlijk* Pardon concept which is in line with the aims of imprisonment become one of the alternatives which can be used to decrease the crime rate which is day bay day is increasing.

Conclusion

Based on the research results, the tendency of correctional institutions in Indonesia to solve the criminal acts by imprisonment verdict is relatively high, moreover when compared to two other verdicts, which is free verdict and release verdict, even the majority of the imprisonment verdict is against the cases which has the main charge of under five years and not above five years. However, the tendency to determine this imprisonment verdict is in line with the number of crimes which is continuously increasing. This means that the higher number of imprisonment verdicts does not positively affect the decrease in the crime rate in society.

The high number of strong criticisms on the effectiveness of imprisonment, both extreme and moderate, including several international conventions which have changed the prison abolition system becomes penal abolition can be certainly realized by presenting other alternative solutions for the crime perpetrators with the final aim is to decrease the criminal rate.

The concept of *Rechterlijk* Pardon, which means a judge in a specific phenomenon, can give forgiveness to a defendant who is proven to be guilty based on the fundamental values of humanity and justice. This concept has been widely implemented in several countries, besides the presence of several international conventions on the displacement aims, which are more human to the offenders and the interests of the victims. This is also in line with the taste of justice in imprisonment to a more rational direction, the direction which is in line with the theory of utilitarianism, which aims at satisfying all parties. Meanwhile, its pragmatic purpose is that imprisonment is not in line with the decrease in criminality rate.

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