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Renewal of '*Strafsoort*' and '*Strafmodus*' in the New Indonesian Criminal Code: Effort to Address Overcrowding

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ABSTRACT

Prison overcrowding is an issue that continues to burden the criminal justice system, with negative consequences for human rights and the effectiveness of prisoner rehabilitation. This article explores how the "Handbook on Strategies to Reduce Overcrowding in Prisons" published by UNODC provides strategies to address prison overcrowding. It also explains the importance of considering the availability of prison quotas for judges before imposing prison sentences. Furthermore, the renewal of the concept of *strafsoort* (type of punishment) and *strafmodus* (method of execution of punishment) in the context of the New Criminal Code (National Criminal Code) is used as a strategic effort to reduce prison overcrowding. Based on an analysis of relevant legal sources, this article examines how alternatives to imprisonment can be implemented to prevent overcrowding, promote rehabilitation, and lead to restorative and rehabilitative justice. The findings suggest that reforms that focus on diversifying sentencing and managing sentences with a more humanist approach could be a significant solution to the problem of prison overcrowding in Indonesia's justice system.

1. Introduction

The issue of prison overcrowding presents a significant challenge to the functioning of the criminal justice system. This issue is encountered by numerous nations globally, including the United States, China, Turkey, Russia, Thailand, and Indonesia.[1] The

[1] Daniel Wolfe and Roxanne Saucier, 'In Rehabilitation's Name? Ending Institutionalised Cruelty and Degrading Treatment of People Who Use Drugs', *International Journal of Drug Policy*, 21.3 (2010), pp. 145–48, doi:https://doi.org/10.1016/j.drugpo.2010.01.008.

United Nations Office on Drugs and Crime (UNODC) defines prison overcrowding as a broad metric that pertains to the relationship between occupancy rates and the overall capacity of correctional facilities. According to this straightforward formula, overcrowding refers to a condition in which the population of inmates exceeds the designated capacity of the correctional facility. The degree of overcrowding is characterized by the proportion of the occupancy rate that exceeds 100 percent.[2]

According to the elucidation provided by UNODC, numerous factors contribute to the phenomenon of prison overcrowding; in the context of Indonesia, the scarcity of alternatives to incarceration serves as a significant contributing factor. Article 10 of the Criminal Code outlines fundamental punitive measures, including the death penalty, imprisonment, confinement, fines, and forfeiture.[3] Furthermore, there exists no framework to administer the primary sanction alongside alternatives. Judges, conversely, predominantly opt for imprisonment, as it is regarded as the most fitting paradigm of punishment. In addition to the notion that incarceration serves as a deterrent against criminal behaviour, it is only through imprisonment that the objectives of punishment with a retributive focus can be realised. The function of punishment ought not to be confined to retribution, nor should it disregard individuals' rights. Instead, it must encompass restorative, rehabilitative, and corrective objectives that look towards the future.[4]

The imposition of lengthy prison sentences has led to a significant disparity between the current population of incarcerated individuals and the optimal capacity of correctional facilities. As of March 24, 2023, the population of individuals confined within correctional institutions in Indonesia stood at 265,897. The figure surpasses the maximum capacity of correctional facilities in Indonesia, which stands at merely 140,424 individuals. Consequently, the level of overcrowding stands at 89.35%.[5] The disproportionate number of inmates relative to the prison's capacity engenders a multitude of issues, including restricted access to healthcare services, heightened potential for violence among residents, and a dearth of rehabilitation opportunities.

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[2] Tim Lindsey and Nicholson Pip, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam*, First (Bloomsbury Publishing, 2016).

[3] Eugene E Mniwasa, 'The Anti-Money Laundering Law in Tanzania: Whither the Ongoing "War" against Economic Crimes?', *Journal of Money Laundering Control*, 24.4 (2021), pp. 869–907, doi:https://doi.org/10.1108/JMLC-09-2020-0099.

[4] Sherman L. and Strang H., *Restorative Justice: The Evidence* (Smith Institute, 2007).

[5] Arthur Hartmann and Sophie Settels, *Comparative Statistics in the Field of Restorative Justice*, in *Comparative Restorative Justice* (2021), doi:10.1007/978-3-030-74874-6_13.

This circumstance not only obstructs the process of social reintegration but also exacerbates the financial strain on the state budget allocated for the upkeep of correctional institutions.[6]

The issue of prison overcrowding in Indonesia and various other nations has garnered significant attention from the United Nations, as evidenced by the release of the "Handbook On Strategies To Reduce Overcrowding In Prisons" by the United Nations Office on Drugs and Crime. The handbook elucidates the factors contributing to prison overcrowding. It delineates the strategic measures necessary to mitigate this issue, highlighting the constrained application of alternatives to incarceration in several nations as a significant contributor to the problem. This arises from the constrained presence of legal frameworks addressing various sentencing options. Consequently, judicial bodies find themselves with limited alternatives, contingent upon the gravity and characteristics of the transgression. Options that consider the socio-economic status and rehabilitation requirements of the offender are frequently lacking.[7]

Beyond the constraints imposed by legislation governing alternative penalties, numerous additional elements contribute to the preference for incarceration over other forms of punishment. The factors at play include: (1) a deficiency in confidence regarding the efficacy of alternative punishments; (2) an absence of requisite infrastructure and organisational frameworks to facilitate collaboration among criminal justice agencies in implementing alternative punishments; (3) the necessity for oversight of offenders by specialised administrative entities, such as probation systems, which are hindered by insufficient funding, personnel, and training; and (4) a lack of public endorsement coupled with apprehension that punitive authorities and politicians may be viewed as lenient towards crime. In light of these considerations, it is imperative to focus on identifying solutions that encompass legislative measures, policy development, and their effective execution.[8]

An examination of the punishment system in Indonesia reveals a prevailing

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[6] Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan, 2002).

[7] Annemieke and Wolthuis, 'Restorative Justice Experiences from the Netherlands', Jakarta, 2022; Howard Zehr, 'Commentary: Restorative Justice: Beyond Victim-offender Mediation', *Conflict Resolution Quarterly*, 22.1–2 (2004), pp. 305–15, doi:10.1002/crq.103.

[8] Christoph Willms and Rehzi Malzahn, *The 'Deadly Embrace' of Restorative Justice in Germany*, in *Restorative Justice at a Crossroads: Dilemmas of Institutionalisation* (2024), doi:10.4324/9781003320647-10; Tony F. Marshall, 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Policy and Research*, 4.4 (1996), pp. 21–43, doi:10.1007/BF02736712.

tendency to prioritise imprisonment, even in instances of minor criminal offences.[9] This analysis is grounded in the framework of punishment in Indonesia, characterised by a retributive approach, wherein incarceration serves as a means of retaliation. Historically, the introduction of imprisonment in 19th-century Europe marked a significant shift in the prevailing paradigm of punishment, transitioning from a focus on retribution to an emphasis on resocialization and rehabilitation. Nevertheless, this initiative has been misconstrued, emphasising incarceration as a punitive measure while neglecting the essential aspects of capacity and facility elements that are integral to the objectives of correctional institutions.[10]

This paper explores the insights provided by the "Guidebook on Strategies to Reduce Prison Overcrowding," published by the UNODC, which outlines various strategies aimed at mitigating prison overcrowding. Furthermore, it is essential to analyse Indonesia's approach to mitigating prison overcrowding via the New Criminal Code, while also considering the insights provided by this guidebook.[11] Consequently, the evolution of punitive measures within the New Criminal Code is anticipated to yield greater efficacy in its implementation, aimed at fulfilling the aims of contemporary penal philosophy (emphasizing restorative, rehabilitative, and corrective justice), while simultaneously addressing the pressing issue of prison overcrowding.[12]

Numerous investigations within the global academic discourse indicate that reforming the penal system by diversifying both the types of punishment and their modes of implementation constitutes a significant approach to addressing the issue of prison overcrowding. In their qualitative literature review, Widodo and Ekawahyu Kasih (2025) highlighted the efficacy of non-custodial measures, including probation, community service, and electronic monitoring, which have demonstrated a capacity to lower recidivism rates while enhancing social reintegration. Nonetheless, this study also underscored several obstacles to implementation, including constrained

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[9] Georg Rusche and Otto Kirschheimer, *Punishment and Social Structure*, in *Punishment and Social Structure* (2017), doi:10.4324/9781315127835.

[10] Angela Y Davis, 'Crime and Punishment, Changing Attitudes Toward*', in *Encyclopedia of Violence, Peace, & Conflict (Second Edition)*, ed. by Lester Kurtz, Second Edi (Academic Press, 2008), pp. 476–88, doi:https://doi.org/10.1016/B978-012373985-8.00041-6.

[11] Leandro Mancano and Deborah Russo, 'Punishment of Criminals', in *Encyclopedia of Violence, Peace, & Conflict (Third Edition)*, ed. by Lester R Kurtz, Third Edit (Academic Press, 2022), pp. 539–51, doi:https://doi.org/10.1016/B978-0-12-820195-4.00160-6.

[12] Wendy Zeldin, 'Netherlands: Harsher Punishments for Serious Traffic Offenses', 2017.

resources and societal opposition to alternative forms of punishment.[13]

In the interim, Rusito, Gunarto, and Sri Endah Wahyuningsih (2020) posited that restorative justice practices may serve as a viable alternative to incarceration. However, it is noteworthy that numerous models continue to inadequately prioritise the requirements of victims and the social reintegration strategies for offenders.[14] This underscores the necessity for enhanced regulatory frameworks to ensure that rehabilitative and corrective objectives are effectively realised. The investigation carried out by Nadia Utami Larasati and her associates (2022) scrutinised the discourse surrounding alternative punishment within the Draft Indonesian Criminal Code, with a specific focus on social work and probation. This research highlights the need for a well-prepared legal framework, adequate infrastructure, and skilled personnel within correctional institutions to effectively implement this alternative form of punishment.[15] The findings from these three studies suggest that strategies aimed at alleviating prison overcrowding cannot rely exclusively on reducing inmate populations. Instead, they must focus on reforming punitive measures to adopt a more humane and rehabilitative approach, while also considering the needs and interests of victims, offenders, and the broader community.

2. Research Method

This research employs a qualitative approach, utilizing a literature study method that focuses on the exploration, compilation, and thorough examination of secondary sources, including statutes and regulations, legal literature, prior research reports, and relevant academic articles.[16] The qualitative approach was selected for its capacity to facilitate a thorough understanding of socio-legal phenomena by interpreting both the text and the contextual elements surrounding the issue of prison overcrowding.[17] The data acquired is

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[13] Tom Daems, 'Compatible Victims? Prison Overcrowding and Penal Reform in Belgium', *International Journal of Law, Crime and Justice*, 36.3 (2008), pp. 153–67, doi:https://doi.org/10.1016/j.ijlcj.2008.04.001.

[14] David J Cornwell, *Criminal Punishment and Restorative Justice: Past, Present, and Future Perspectives* (North American distributor, International Specialised Book Services, 2006).

[15] Ahmad Syaufi, Diana Haiti, and Mursidah, 'Application of Restorative Justice Values in Settling Medical Malpractice Cases', *International Journal of Criminology and Sociology*, 10.0511 (2021), pp. 103–10, doi:10.6000/1929-4409.2021.10.14.

[16] Januar Rahadian Mahendra, Supanto, and Devi Triasari, 'The Role of Victim Trust Funds in Addressing Unpaid Restitution Human Trafficking: Lessons US and Europe', *Indonesian Journal of Crime and Criminal Justice*, 1 (2025), pp. 89–107, doi:10.62264/ijccj.v1i1.123.

[17] Ponco Hartanto, Ricky Ricky, and Vincent Ariesto Gunawan, 'Using Indonesian Corruption Law for Eradicating the Yogyakarta Sultanate Land Mafia: A Legal Formulation Study', *Indonesian Journal of Crime and Criminal Justice*, 1.1 (2025), pp. 23–53, doi:10.62264/ijccj.v1i1.122.

not subjected to statistical processing; instead, it is examined through descriptive-analytical and interpretative methods, aiming to deliver an in-depth understanding of the factors contributing to the overcapacity of correctional institutions and to pinpoint strategies for addressing this issue.[18] This examination aims to investigate the concept of reforming punishment within the National Criminal Code, particularly about the emergence of novel forms of punishment and methods of implementation presented as alternative solutions within the punitive framework. Consequently, this research methodology aims not only to elucidate legal phenomena but also to provide an analytical framework that can be applied within the context of criminal policy in Indonesia.

3. Results and Discussion

Prison Management According to UNODC: Strategies for Addressing Overcrowding

The "Handbook On Strategies To Reduce Overcrowding In Prisons" outlines a range of approaches, including implementing alternatives to incarceration and considering prison capacity when enforcing pretrial detention and sentencing practices. The UNODC guides for nations to establish legal frameworks that facilitate the resolution of cases without resorting to punitive measures, particularly incarceration.[19] Measures of this nature may encompass the provision of adequate discretion for law enforcement and prosecutorial entities to redirect suitable cases away from the criminal justice framework, the expansion of diverse alternatives at the pretrial phase, the restriction of pretrial detention practices, the implementation of non-custodial penalties as substitutes for brief incarceration for minor and non-violent infractions, and the introduction of alternative sentencing options to imprisonment in other relevant circumstances.[20]

At this juncture, Indonesia possesses an array of legal frameworks that serve as references for alternative resolutions to criminal matters, circumventing the need for trial and detention procedures. The explicit incorporation of restorative justice into the criminal justice framework is exemplified by its initiation within the juvenile sector, as established by Law No. 11/2012. This legislation mandates that all law enforcement officials, at every stage of the examination process, must prioritise restorative justice and

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[18] Randi Solhjell, 'How Acts Become Hate Crime: The Police's Documenting of Criminal Cases', *International Journal of Law, Crime and Justice*, 72 (2023), p. 100574, doi:https://doi.org/10.1016/j.ijlcj.2022.100574.

[19] M Musa, Elsi Elvina, and Evi Yanti, 'Criminal Social Work To Overcome Overcapacity In Post-Pandemic Prisons', *Yuridika*, 38.1 (2023), pp. 51 – 72, doi:10.20473/ydk.v38i1.37962.

[20] Erin M. Kerrison, 'Exploring How Prison-Based Drug Rehabilitation Programming Shapes Racial Disparities in Substance Use Disorder Recovery', *Social Science & Medicine*, 199 (2018), pp. 140–47, doi:10.1016/j.socscimed.2017.08.002.

implement diversion strategies.[21] The stipulation of imprisonment for a duration not exceeding seven years, applicable to non-recidivist offenders as outlined in Article 7 of the Juvenile Justice System Law, enables the resolution of juvenile criminal cases through a diversion process. This process is characterised by its deliberative nature, engaging children in conflict with the law, law enforcement officials, victims, and community leaders in meaningful dialogue. In this context, minors who commit criminal offences may be exempt from court examination and imprisonment sentences.[22]

In addressing various cases, law enforcement officials adhere to established protocols for resolving criminal matters through restorative justice practices. The Indonesian National Police has established Regulation Number 08 of 2021, which delineates the protocols for addressing crimes through the lens of restorative justice. The prosecutor's office is governed by the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020, which pertains to the Termination of Prosecution Based on Restorative Justice. The Supreme Court has issued BADILUM Decree No. 1691/DJU/SK/PS.00/12/2020, which is subsequently governed by the Supreme Court Regulation of the Republic of Indonesia No. 1 of 2024, outlining the Guidelines for Adjudicating Criminal Cases Based on Restorative Justice.[23]

Nevertheless, the variability in regulations surrounding restorative justice as an alternative to traditional criminal case resolution presents distinct challenges. Challenges associated with implementing restorative justice emerge within law enforcement agencies. Reciprocal allegations and fault-finding arise when the implementation of case resolution through a restorative justice framework by various institutions seemingly affects others, potentially undermining the ongoing processes of criminal procedural law. Certain victims initiated pretrial motions challenging the termination of cases conducted by both the Police and the Prosecutor's Office, which the Court subsequently upheld. Consequently, the author posits that it is essential to establish a distinct legal framework for restorative justice, providing comprehensive guidelines for law enforcement officials

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[21] Andrew Marc Conroe, 'Moments of Proximity: Former Political Prisoners, Postmemory and Justice in Indonesia', *Asian Studies Review*, 41.3 (2017), pp. 352 – 370, doi:10.1080/10357823.2017.1334760.

[22] Liesbeth Naessens, 'Addressing the Needs of People in Prison: The Case of Prison Work; [Tegemoetkomen Aan de Noden van Mensen in de Gevangenis: Gevangenisarbeid Als Casus]', *European Journal of Social Work*, 23.6 (2020), pp. 933 – 944, doi:10.1080/13691457.2020.1805586.

[23] Debbie Ann Loh, Emma Plugge, and Marie-Claire Van Hout, 'Continuity of Opioid Substitution Treatment between Prison and Community in Southeast Asia: A Scoping Review', *International Journal of Drug Policy*, 112 (2023), p. 103957, doi:https://doi.org/10.1016/j.drugpo.2023.103957.

to execute alternative resolutions in criminal cases.[24]

Furthermore, there are regulations about the resolution of alternative criminal cases through a restorative justice framework. Law No. 1 of 2023, which pertains to the Criminal Code, introduces a range of punitive measures in Indonesia that extend beyond the traditional confines of imprisonment. According to Article 65 of the New Criminal Code, the principal forms of punishment include imprisonment, closure, supervision, fines, and community service. The sequence in which they are referenced reflects the gravity or leniency of the penalty. It is essential to note that, to address overcrowding, Article 57 stipulates that "In cases where a criminal offence is subject to alternative main punishments, the preference shall be for the imposition of a lighter main punishment, provided it is deemed appropriate and can facilitate the objectives of punishment."[25] This indicates that incarceration is not an obligatory form of punishment that must be given precedence; therefore, the judge possesses the discretion to assess the penalty by considering the principles of proportionality about the offender's actions. The application of proportionality by judges in the realm of punishment has the potential to mitigate the injustices arising from disparities in the imposition of various types or magnitudes of criminal sanctions.[26]

Alongside the necessity for alternative forms of punishment to address overcrowding, judges must consider existing prison capacity when determining the imposition of a prison sentence. This pertains to the entitlement of detainees to be maintained in conditions that uphold human dignity, encompassing the necessity for sufficient space and accommodation.[27] Judges ought to consider the preparedness of the correctional facility to accommodate inmates who are to serve brief sentences. Should the judge maintain that the prison fails to meet the requisite standards for habitation, it follows that there ought to be enforceable legal consequences.[28] For instance, both the Human Rights

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[24] Loh, Plugge, and Van Hout, 'Continuity of Opioid Substitution Treatment between Prison and Community in Southeast Asia: A Scoping Review'; Andrew Marc Conroe, 'Moments of Proximity: Former Political Prisoners, Postmemory and Justice in Indonesia', *Asian Studies Review*, 41.3 (2017), pp. 352 – 370, doi:10.1080/10357823.2017.1334760.

[25] M Musa, Elsi Elvina, and Evi Yanti, 'Criminal Social Work To Overcome Overcapacity In Post-Pandemic Prisons', *Yuridika*, 38.1 (2023), pp. 51 – 72, doi:10.20473/ydk.v38i1.37962; Conroe, 'Moments of Proximity: Former Political Prisoners, Postmemory and Justice in Indonesia'.

[26] Wayne Kondro, 'Class-Action Lawsuit Threatened by Canadian Female Prisoners', *The Lancet*, 354.9196 (1999), p. 2144, doi:https://doi.org/10.1016/S0140-6736(05)77054-9.

[27] Pan Mohamad Faiz, 'The Dissolution of Political Parties in Indonesia: Lessons Learned from the European Court of Human Rights', *Journal of Legal, Ethical and Regulatory Issues*, 22.4 (2019), pp. 1–10.

[28] Xavier Tracol, 'The Two Judgments of the European Court of Justice in the Four Cases of Privacy International, La Quadrature Du Net and Others, French Data Network and Others and Ordre Des Barreaux

Committee and the European Court of Human Rights have, in numerous instances, determined that suspended prison sentences should be granted to applicants who have experienced detention, particularly when the state has failed to uphold conditions that align with human dignity.[29]

In a similar vein, in May 2011, the United States Supreme Court mandated that California release a significant number of prisoners as a consequence of overcrowding conditions. A federal judge has ordered the release of 40,000 inmates over the next two years. The state currently houses 148,000 inmates within facilities that were initially intended to accommodate only 80,000 individuals.[30] California subsequently sought the intervention of the Supreme Court, contending that the incarcerated individuals might present a threat to public safety. Nevertheless, the Supreme Court determined that the cap was essential "to address violations of prisoners' constitutional rights".[31]

In light of the significance of addressing prison capacity, the ensuing strategic measures warrant consideration: Initially, there should be a prohibition in both legal and practical terms against the incarceration of individuals—whether pre-trial or sentenced—in facilities that fail to meet internationally and nationally recognised standards for the accommodation and care of prisoners, particularly in situations of overcrowding.[32] Furthermore, in suitable circumstances, decisions regarding pre-trial detention or incarceration may be substituted with alternative measures, or sentences may be deferred until such a time as prison capacity permits. In certain nations, waiting lists exist for incarceration facilities, similar to other public services, with inmates being admitted only when accommodations are available. Third, courts must ensure that the international and, in most nations, constitutional rights of prisoners to housing that aligns with the principles of human dignity are upheld throughout every phase of the judicial process. As guardians of the constitution, courts are duty-bound to address the realities of prison conditions and

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Francophones et Germanophone and Others: The Grand Chamber Is Trying Hard', *Computer Law & Security Review*, 41 (2021), p. 105540, doi:https://doi.org/10.1016/j.clsr.2021.105540.

[29] Engin Yıldırım and others, 'Non-Compliance of the European Court of Human Rights Decisions: A Machine Learning Analysis', *International Review of Law and Economics*, 76 (2023), p. 106167, doi:https://doi.org/10.1016/j.irle.2023.106167.

[30] Don R Willett, 'SUPREME STALEMATES: CHALICES, JACK-O'-LANTERNS, AND OTHER STATE HIGH COURT TIEBREAKERS', *University of Pennsylvania Law Review*, 169.2 (2021), pp. 441 – 536 <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85128983281&partnerID=40&md5=79539ec2fb42f673abab551da8ea0ed5>.

[31] Nurjihad Nurjihad and Ariyanto Ariyanto, 'Electronic Trial At The Supreme Court: Needs, Challenges And Arrangement', *Jurnal Jurisprudence*, 11.2 (2022), pp. 170–86, doi:10.23917/jurisprudence.v11i2.16348.

[32] Pilar Domingo, 'Judicial Independence: The Politics of the Supreme Court in Mexico', *Journal of Latin American Studies*, 32.3 (2000), pp. 705–35, doi:10.1017/S0022216X00005885.

ascertain that the facilities utilised for housing prisoners adhere to both international and national standards. Fourth, it would be prudent to formulate policies that mandate criminal justice institutions, aside from prisons, to assume responsibility for the financial burdens associated with imprisonment prior to trial, such as by distributing the expenses of pre-trial detention. Implementing such a measure would establish a compelling financial incentive for the institutions primarily responsible for managing court cases to ensure that trials proceed without undue delays.[33]

With the implementation of the new National Criminal Code, the option of imprisonment has been relegated to a position of lesser significance in the hierarchy of sentencing alternatives. The data indicate that rigorous standards supplement the protocols governing incarceration. This is articulated in Article 70, paragraphs (1) and (2) of the New Criminal Code. Nevertheless, the directive against imposing this punishment emphasises the context and behaviours exhibited by the offender (*daad-daader strafrecht*). However, it fails to incorporate the necessity for judges to take into account the available capacity of detainee facilities within correctional institutions. Consequently, the option to accommodate detainees during periods of prison overcrowding remains viable. Furthermore, there exists no regulation indicating that correctional institutions may deny admission to prisoners on the grounds of inadequate facilities to uphold the rights of convicts.[34]

The author contends that the judge ought to impose a prison sentence while being cognisant of the available quotas within the correctional facility, and additionally, to contemplate the application of alternative forms of imprisonment should the prison reach capacity. In light of the previously discussed strategic measure, if the prison reaches capacity, it may be prudent to implement a waiting period for the execution of sentences, allowing for consideration of alternative punitive measures. In this instance, one might propose a sanction involving community service, alongside the potential for a supervisory measure if feasible.[35]

What considerations arise regarding individuals convicted of serious offences that carry a sentence exceeding five years? The author posits the necessity of categorising

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[33] Bert Niemeijer and Machteld Pel, 'Court-Based Mediation in the Netherlands: Research, Evaluation and Future Expectations.', *Dickinson Law Review*, 110.2 (2005), pp. 345–79.

[34] Muhamad Khalif Ardi and others, 'The Imperative Is to Restrict Customary Criminal Offenses after Implementing Indonesia ' s New Criminal Code', *Wacana Hukum*, 29.2 (2023), pp. 130–45, doi:10.33061/wh.v29i2.9829.

[35] Anna Tomza, 'Is There Any Morality Here? Richard Posner's Economic Approach to Judge Behavior', *Studia Iuridica Lublinensia*, 31.3 (2022), pp. 255–69, doi:10.17951/sil.2022.31.3.255-269.

serious offenders, specifically distinguishing between those who commit victimless crimes and those whose actions inflict harm or jeopardise the safety of the state. Individuals responsible for serious crimes without direct victims, such as corruption and money laundering, may experience a delay in their incarceration, during which they could be subjected to community service as a form of punishment.[36] In the interim, individuals who commit grave offences that inflict harm upon victims and jeopardise the security of the state must be promptly incarcerated. This necessitates that the state establish specialised correctional facilities for serious offenders, equipped with adequate capacity and stringent security measures. For inmates who have completed half of their sentence, a transfer to standard correctional facilities with less stringent security protocols may be considered. This initiative also aims to mitigate the issue of overcrowding within the highly secure correctional facility.[37]

Moreover, it is imperative to establish a regulation that empowers the director of the detention centre or the administrator of the correctional facility to suggest alternatives to detention or punitive measures for suspects or offenders when a perilous situation is identified for the detainee. According to Section 63A of the South African Criminal Procedure Act No. 51 of 1977, the Head of the Correctional Centre is permitted to petition the court for the release of specific awaiting prisoners if the prevailing conditions within the prison pose a significant threat to the human dignity, physical health, or safety of the accused. Through diligent efforts, the issue of overcrowding can be addressed with strategic measures while also ensuring the rights of individuals held in detention centres or prisons are respected.

Application of New Strafsoort and Strafmodus in the New Criminal Code: Lessons from Several Countries

A primary justification for reforming the application of the Dutch Criminal Code (*Wetboek van Strafrecht*) lies in the inflexibility of the available forms of punishment (*strafsoort*). Furthermore, the inflexible framework of criminal enforcement (*strafmodus*) and the exceedingly restricted application of alternatives suggest that the Dutch Criminal Code leans more towards retribution than rehabilitation, encompassing both the

[36] Maryja Šupa, Vytautas Kaktinas, and Aistė Rinkevičiūtė, 'Computer-Dependent or Computer-Assisted? The Social Context of Online Crime in Lithuanian Court Judgements', *International Journal of Law, Crime and Justice*, 73 (2023), p. 100577, doi:https://doi.org/10.1016/j.ijlcj.2023.100577.

[37] Abdul Kholiq, 'Amicus Curiae: Position and Role in Issuing Decisions by Judges as an Effort to Achieve Substantive Justice', *Veteran Law Review*, 6.2 (2009), pp. 164–75.

restoration of the victim's state and the reform of the offender after the offense.[38]

The strict application of primary punitive measures, particularly incarceration, yields numerous consequences. The phenomenon of recidivism, characterised by the recurrence of criminal behaviour following the completion of a prison sentence, warrants careful examination. This phenomenon also contributes to the overcrowding observed in prison institutions or detention centres.[39] Consequently, UNODC emphasises the necessity of adopting alternative forms of punishment beyond incarceration. The utilisation of alternatives to incarceration presents the benefit of diminishing recidivism rates, thereby contributing to a long-term decrease in the prison population.[40] A multitude of research findings indicate that the rates of reoffending tend to be reduced in instances where alternative non-prison sentences are employed, as opposed to traditional prison sentences.[41]

Throughout history, the advocacy for the adoption of alternatives to incarceration has been present since the 12th ICOPA congress, which urged nations globally to integrate such alternatives into their Criminal Code frameworks. The subsequent mandate was accompanied by the UN Resolution in December 1990, leading to the establishment of the "Tokyo Rule," which incorporated the provisions of the "Standard Minimum Rules for Non-Custodial Measures" (SMR for Non-Custodial).[42] Non-custodial measures, which do not confine offenders within correctional facilities and thus avoid any deprivation of liberty, can be implemented at every phase of the criminal justice process. This includes the pre-trial stage (encompassing investigation and prosecution), the judicial process (trial), and the post-trial phase (execution of court decisions).[43]

The UNODC offers guidance for lawmakers in the development of criminal regulations that incorporate alternative forms of punishment. Initially, it is imperative to establish legislative frameworks that govern the diverse modalities of early release, while also implementing measures to enhance the efficacy and utilization of such schemes.

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[38] Eddy Rifai, 'An Analysis of the Death Penalty in Indonesia Criminal Law', *Sriwijaya Law Review*, 1.2 (2017), pp. 190–99, doi:10.28946/slrev.Vol1.Iss2.44.pp191-200.

[39] Tom Daems, 'Compatible Victims? Prison Overcrowding and Penal Reform in Belgium', *International Journal of Law, Crime and Justice*, 36.3 (2008), pp. 153–67, doi:https://doi.org/10.1016/j.ijlcj.2008.04.001.

[40] Jennifer Furio, *Restorative Justice: Prison as Hell Or a Chance for Redemption?* (Algora Publishing, 2002).

[41] Nanang Nurcahyo and others, 'Reform of the Criminal Law System in Indonesia Which Prioritizes Substantive Justice', *Journal of Law, Environmental and Justice*, 2.1 (2024), pp. 89–108, doi:10.62264/jlej.v2i1.91.

[42] Brenda Morrison, 'Restorative Justice in Education: Changing Lenses on Education's Three Rs', *Restorative Justice*, 3.3 (2015), pp. 445–52, doi:10.1080/20504721.2015.1109367.

[43] Makoto Ibusuki, 'On Implementing a Therapeutic Jurisprudence-Based Criminal Justice System in Japan', *International Journal of Law and Psychiatry*, 63 (2019), pp. 63–67, doi:https://doi.org/10.1016/j.ijlp.2018.07.007.

Secondly, it is imperative to examine the procedures and frameworks governing decision-making to ensure that the bodies responsible for release decisions operate independently, possess ample and trustworthy information regarding offenders, and utilize practical tools for needs and risk assessment to render fair, consistent, and appropriate judgments.[44] Third, it is imperative to minimise the likelihood of incarceration due to parole violations by empowering competent authorities to exercise discretion in their responses, tailored to the specifics of each case. Fourth, establishing frameworks that facilitate organised collaboration among all entities tasked with the imposition and oversight of sanctions.[45]

Furthermore, the Model Criminal Code has been unveiled, a product of collaborative efforts between the United States Institute of Peace (USIP), the UNODC, and various other stakeholders. Article 54 of the Model Criminal Code regarding the Substitution of Principal Punishment with Alternative Punishment delineates that: Initially, when the court imposes a sentence of imprisonment not exceeding three years, whether for a singular offence or multiple offences, prior to the deduction of the period of detention as outlined in Article 51(4), the court possesses the discretion to replace the principal sentence of imprisonment with an alternative sentence. Secondly, in assessing whether an alternative sentence is more suitable than the standard sentence of imprisonment, the court must consider (a) the severity of the criminal offence committed; (b) the seriousness of the consequences resulting from the criminal offence; (c) the level of criminal responsibility of the individual convicted; (d) the aggravating and mitigating factors outlined in Article 51; and (e) the character and personal circumstances of the individual convicted.[46]

By the guidance provided by UNODC and the Model Criminal Code, the New Code (National Criminal Code) includes stipulations regarding alternative forms of punishment. This is evident in the newly established penal category and mode of punishment. The revisions in the New Criminal Code regarding criminal reform serve as a measured response to the critiques surrounding the use of imprisonment. Barda Nawawi posited that moderate criticism regarding imprisonment can be delineated into three primary categories: criticism from the standpoint of *straftsoort*, criticism from the standpoint of strafmodus, and criticism from the standpoint of *strafmaat*. Critique from the standpoint of penal classification pertains to the utilisation or implementation of

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[44] Masahiro Suzuki, 'Victim Recovery in Restorative Justice: A Theoretical Framework', *Criminal Justice and Behavior*, 50.12 (2023), pp. 1893–908, doi:10.1177/00938548231206828.

[45] Femke and Wijdekop, 'Restorative Justice Responses to Environmental Harm (IUCN Report)', n.d.

[46] 'Book Review Essay: Juvenile Restorative Justice In Perspective', *Contemporary Justice Review*, 9.1 (2006), pp. 109–13, doi:10.1080/10282580600565393; Jacqueline Joudo Larsen, *Restorative Justice in the Australian Justice Criminal System*, Research and Public Policy Series No. 127 (Canberra, n.d.).

incarceration as a form of punishment, exhibiting a propensity to restrict or diminish the application of imprisonment in a more discerning and constrained manner. Critique from the standpoint of *strafmodus* encompasses various dimensions of the execution of incarceration, including the coaching or therapeutic frameworks, as well as the institutions responsible for their implementation. In the interim, critiques from the perspective of penal measures underscore the length of incarceration, emphasising initiatives aimed at diminishing or constraining the use of brief imprisonment terms.[47]

The category of punishment within the New Criminal Code (National Criminal Code) is outlined in Article 65, which specifies that the principal forms of punishment include imprisonment, closure punishment, supervision punishment, fines, and community service. Supervision, punishment, and community service orders represent innovative approaches to implementing punitive measures in Indonesia. The imposition of these two penalties is at the discretion of the judge, supplementary to the measures of imprisonment, fines, and exile.[48]

The adoption of this penal measure aligns with the recommendations of the UNODC, which aim to address the issue of overcrowding within Indonesia's correctional facilities. Furthermore, the clarification of the New Criminal Code (National Criminal Code) indicates that the forms of exile punishment, supervision punishment, and social work punishment serve fundamentally as alternatives to incarceration. The application of these three forms of punishment represents a progressive evolution from the conventional short-term deprivation of liberty, as it allows the judiciary to impose measures that facilitate the convicts' journey towards absolution from their guilt.[49]

The implementation of imprisonment in the future will face significant challenges, as judges must take into account the stipulations outlined in Article 70 of the New Criminal Code (National Criminal Code) when determining whether to impose such a sentence. Furthermore, the New Criminal Code introduces new forms of punishment, as detailed in the elucidation of Article 65 paragraph (1). It outlines that closure punishment, supervision punishment, and social work punishment serve as alternative models for implementing penalties, distinct from traditional imprisonment. The incorporation of this form of punishment stems from the recognition within criminal law that considers the

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[47] T. Marshall, *Restorative Justice: An Overview* (Home Office, 1999); Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley Publishers, 2007).

[48] Gordon Bazemore and Mara Schiff, *Juvenile Justice Reform and Restorative Justice* (Willan, 2013), doi:10.4324/9781843926368.

[49] Howard Zehr, 'Commentary: Restorative Justice: Beyond Victim-offender Mediation', *Conflict Resolution Quarterly*, 22.1–2 (2004), pp. 305–15, doi:10.1002/crq.103.

balance of interests between the actions and contexts of those who commit criminal offenses (*daad-daaderstrafrecht*). Furthermore, while the judge possesses the discretion to select from various alternative penalties, this decision is invariably guided by the overarching objective of punishment, favouring the less severe option when it effectively serves that purpose.[50] This provision addresses the inflexibility inherent in the establishment of a singular penalty, which appears to confine the judge to the exclusive option of imposing incarceration. Furthermore, this provision aims to prevent the imposition of brief periods of incarceration.

In the future, the enactment of the New Criminal Code, effective January 2, 2026, will transform the approach to punishment. It will shift from a retributive model, which contributes to prison overcrowding, to a restorative framework aimed at reinstating the original circumstances for both the offender and the victim. Imprisonment is reserved exclusively for grave criminal offences that carry a sentence exceeding five years. Such offences are subject to a distinct minimum penalty, particularly those deemed highly perilous or harmful to societal well-being, as well as those that adversely affect the financial integrity or economic stability of the state. Nonetheless, the author observes that the implementation of penal types and modalities within the New Criminal Code necessitates reinforcement through the provisions of the new Criminal Procedure Code (KUHAP). To ensure that the evolution of formal criminal law aligns with the advancements in material criminal law.

4. Conclusion

The phenomenon of prison overcrowding in Indonesia can be attributed to the prevailing reliance on incarceration within judicial rulings, a situation exacerbated by the lack of well-defined alternatives to punitive measures. Revised Penal Legislation (National Penal Code)- The implementation of a broader range of penalties and methods within the system presents an opportunity to shift the framework of punishment from a retributive approach to one that is restorative and rehabilitative. This approach has the potential to alleviate the issue of prison overcrowding, promote the reintegration of offenders into society, and diminish the likelihood of recidivism. Nevertheless, the successful execution of these reforms necessitates modifications to the Criminal Procedure Code (KUHAP) as well as the preparedness of both infrastructure and human resources. A comprehensive approach that fosters

[50] Leena Kurki, 'Restorative and Community Justice in the United States', *Crime and Justice*, 27 (2000), pp. 235–303, doi:10.1086/652201; Dorothy Vaandering, 'Relational Restorative Justice Pedagogy in Educator Professional Development', *Curriculum Inquiry*, 44.4 (2014), pp. 508–30, doi:10.1111/curi.12057.

collaboration among law enforcement entities and community engagement is essential to facilitate the effective implementation of criminal law reforms, ultimately striving for a more compassionate correctional framework.

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