

Reforming the Indonesian Penal System for Misdemeanor Cases

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ABSTRACT

Recently, many criminal cases experienced by the community have been brought to court and captured the attention of the general public. However, criminal acts such as theft may actually cause minimum harm to the victim when the objects of the crime have a low value. The perpetrators of these crimes did harm their victims, but in reality, the Indonesian criminal law system in its empirical aspect still lacks implementation of legal objectives namely; legal certainty, justice and benefit. Therefore, there is a need for the criminal system in Indonesia to no longer rely on criminal sanctions, but opt to administrative sanctions, civil sanctions, and restorative justice approaches (Restorative Justice) instead. The method used in this study is a qualitative socio-legal approach, based on literature data and cyber media. This paper use two approaches: the social approach and the normative juridical approach. This writing concludes that in current conditions, criminal law no longer reflects ultimum remedium, but rather primum remedium. Therefore, the legislative and executive institutions should consider administrative sanctions, civil sanctions, and restorative justice approaches in misdemeanor cases. This idea should also be incorporated in the Indonesian Criminal Code Bill.

Keywords: *criminal law, misdemeanor cases, legal objectives, restorative justice.*

1. Introduction

Indonesia is a constitutional state, this is stated in Article 3 of the 1945 Constitution of the Republic of Indonesia which reads "Indonesia is a state based on law". It is hoped that the law can serve as a guideline for running the country, and can also manipulate people's lives so that actions are prohibited and actions that are permitted. So Indonesia has the power to control people's actions to achieve positive values.

These legal rules are made so that no citizen can be taken over by other people or the state as the enforcer of the law. It is time for the law in Indonesia to change from imposing sanctions on imprisonment or imprisonment to administrative sanctions, fines, and social work (cleaning sewers, roads, public facilities, or places of worship).

Administrative sanctions, fines and social work cannot be applied to all criminal cases. There are several criminal acts that can cause great harm to individuals, legal entities, and the state. Such as killing or eliminating the life of another person intentionally, removing the assets of a legal entity so that it is difficult for the legal entity to operate, and treason against the state.

2. Research Methods

The method used is normative juridical, namely analyzing the Criminal Code, Law No.2 of 2002 concerning the Indonesian National Police, and Law Number 16 of 2004. So that administrative sanctions, fines, and social work can be applied to the Draft Criminal Code.

3. Formulation of the problem

To examine reform of the criminal system in Indonesia, 2 (two) problem formulations will be drawn.

1. How is the concept construction of punishment without imprisonment?
2. What is the legal framework for the application of non-prison sentences in criminal cases in Indonesia?

4. Writing purpose

The purpose of this paper, among others, is to analyze the conceptual model of a punishment without imprisonment. Besides, it also aims to analyze the legal framework for implementing non-prison sentences in Indonesia.

5. Results and Discussion

A. Construction of the Concept of a Prison-free Criminal System

Knowing the definition of confinement is the first step to exploring the object to be studied. Criminalization is explained as the imposition of punishment by the judge which is a concretization/ realization of the criminal provisions in the Law which are something abstract¹. Criminalization is used as an instrument of punishment provided by government authorities and is the most common response to crimes and irregularities that occur in society². The most common form of punishment was a prison.

Based on the definition of punishment above, it is explained that punishment is the application of punishment to the perpetrator of the crime. The position of punishment has a role in following up on lawbreakers. The applicable criminal system becomes an instrument of a threat to the community so that they do not commit the violated act. This means that punishment is not only repressive but also a preventive instrument. This is explained by Remelink that punishment as a criminal sanction is intended to protect legal norms, so that as long as legal norms have not been violated, criminal sanctions only have a preventive function, but when a violation occurs, the working power of criminal sanctions changes and at the same time becomes repressive.³

The very rapid dynamics of the law have resulted in criminalization needing to undergo reform. The punishment mechanism which is imprisonment needs a change to a more humane punishment. The views of Plato and Aristotle as ancient philosophers can be used as the basis for a more humane construction of punishment. Plato and Aristotle stated that the imposition of punishment was applied not on the basis of having committed evil, but in order not to commit a crime, this is fact that criminal law has a preventive or preventive nature so as not to commit crimes or violations.⁴

The essence of criminal imposition according to Plato and Aristotle is more directed not because of crime as the main source, but as a form of prevention. This is not in line

¹ Wirjono Prodjodikoro, *Asas Asas Hukum Pidana di Indonesia*, Refika Aditama, Jakarta, 2003, Hlm. 23

² Terance Miethe dan Hong Lu, *Punishment: A Comparative Historical Perspective*, Cambridge University Press, Cambridge, 2005, Hlm. 1

³ J. Rimmelink, *Pengantar Hukum Pidana Material 1*, Maharsa Publishing, Yogyakarta, 2014, Hlm. 7

⁴ Plato and Aristoteles on Andi Hamzah, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 1994, hlm. 27

with the prison system which is identical to the system of retaliation. The application of prison is more to lock up, there is a very little process of coaching so that criminals are aware of their actions. the process of confinement to the room is considered less effective as prevention. So that the current criminal system must have the right role, especially in fostering criminals. The goal is that in the future it can act as a preventive instrument, namely to prevent criminals from making mistakes and to prevent other people from imitating crimes.

The imprisonment process in a criminal system that is no longer relevant needs reform. Prison in the sentence should be put on the choice of priority. This is closely related to the application of the *ultimum remedium* concept, namely punishment as a last resort. Namely, criminal law with harsh sanctions is said to have a subsidiary function, meaning that if other legal functions are lacking, then criminal law is used⁵. Based on this concept, the prison process is not implemented as the main step. Prison is only used as a last resort if the main effort in following the crime is ineffective. So that the author constructs a criminal system without prison as a reform of the criminal system.

The need for reform in punishment cannot be separated from the theory that has been developed. First, Absolute Criminal Theory (*Vergeldings Theorien*). Andeneas stated that absolute punishment is the primary goal of the crime. This conviction was carried out in order to satisfy demands for justice⁶. The basis of this theory is retaliation. According to this absolute theory, every crime must be followed by punishment - it cannot be - without bargaining. A person is convicted of having committed a crime, so that by doing so he cannot see any possible consequences arising from the imposition of the sentence.

Absolute retaliation that is retaliatory in the end there is a shift in the system. A system of retaliation that is considered less humane results in the emergence of relative punishment (*Doel Theorien*). The British philosopher Jeremy Bentham (1748-1832), is a figure whose opinion can be judged as the basis of this theory. According to Jeremy Bentham, humans are rational creatures who will consciously choose pleasure and avoid distress. Therefore a punishment must be assigned to each crime in such a way that the trouble will be heavier than the harm caused by the crime. So that the objectives of this relative punishment are⁷: (1) preventing all violations; (2) prevent the most sinister offenses; (3) suppress crime; (4) reduce losses/costs as little as possible.

Thus, in essence, punishment is the protection of society and retaliation for acts of violating the law. Apart from that, Roeslan Saleh also argued that crime contains other things, namely that punishment is expected as something that will bring harmony and punishment is an educational process to make people acceptable again in society.⁸

The problem with the combined punishment theory finally arises because there is no protection from crime victims. So that again appears a theory of Restorative Justice. This theory has a principle of punishment which also does not prioritize prison. Besides, this theory also has a follow-up process for victims as a form of protection.. Liebman defines restorative justice as follows: Restorative justice has become the term generally used for an approach to criminal justice (and other justice systems such as a school disciplinary system) that emphasizes restoring the victim and community rather than punishing the offender. Besides Bagir Manan also stated about Restorative justice. According to Manan,

⁵ Nur Ainiyah Rahmawati, *Hukum Pidana Indonesia: Ultimum Remedium Atau Primum Remedium*, Recidive Vol. 2, No. 1 Januari – April, Tahun 2013, Hlm. 40

⁶ Johannes Andenaes dalam E. Utrecht, *Hukum Pidana I*, (Jakarta:Universitas Jakarta, 1958), hal. 157.

⁷ Muladi and Barda Nawawi, *Teori dan Kebijakan Pidana*. (Bandung: Alumni, 1992) . Hlm. 30-31.

⁸ *Ibid*, Hlm. 22

restorative justice is a rearrangement of the criminal system that is more just, both for the perpetrators, victims, and the community.⁹

Based on the definition of restorative justice above, it means that punishment cannot escape in protecting the victim. In the process of punishment, sometimes the fate of the victim is neglected. Many victims' losses were not resolved. Finally, through restorative justice, there is space that does not only enforce the law for the perpetrators of the crime but still has to protect the victim to recover both material and formal losses.

The explanation of the theory above is the basis for the outline of criminal reform from the nature of retaliation to the formation and protection of victims. The theoretical basis is the basis for the construction of punishment without imprisonment in this paper. Criminalization without imprisonment is carried out to protect people's rights and dignity as human beings so that they can learn from their mistakes through more humane actions.

One of the problems that arise from the imprisonment approach is the overcrowding condition. The number of people in prison has increased and has rendered many prisons overcapacity, unfit prisons, and even led to swelling of the state budget. This phenomenon occurs throughout the world, where over the past 15 years, its population is estimated to have increased by almost 25 to 30 percent. In Europe, in 2012, the average prison population was 125.6 prisoners per 100,000 population and in 2013 it increased to 133.5 prisoners per 100,000 population¹⁰. In the United States, from 1992 to 2007 the number of prisoners had steadily increased from 505 per 100,000 to approximately 756 per 100,000. 1 in 100 adults was imprisoned and approximately 2.2 billion children were arrested in 2007.⁸⁷ Meanwhile Indonesia, in January 2017, the number of prisoners and prisoners in detention centers and prisons reached 206,878 people and increased to 42,595 people, which in August 2018, the number reached 249,473 people's.¹¹

There are several options to be made in reforming the criminal system that does not prioritize prison, namely (1) Supervision Criminal; (2) Criminal Fines (3) Criminal Social Work. However, the prison must still exist as an option. However, it must be implemented as a last resort. This is based on the *Ultimum medium*. non-prison sanctions are the primary measures that need to be implemented. If these efforts are found to be ineffective in tackling the perpetrators of the crime, then imprisonment must be imposed. However, the prison must still prioritize the principle of restorative justice. The prison that was implemented was not only confined to a room. However, there must be a process of guidance as a form of recovery so that criminals can correct their mistakes so that in the future they can become good human beings and can contribute to people's lives.

B. Legal framework for the application of non-prison sentences in criminal cases in Indonesia

According to the language, the word criminal law is a translation of the Dutch term *strafrecht* which comes from a combination of the word *straf* which means punishment and the word *recht* which means law. Thus *Strafrecht* literally means the law of

⁹ Bagir Manan dalam Albert Aries, 2006, *Penyelesaian Perkara Pencurian Ringan dan Keadilan Restoratif*, Majalah Varia Peradilan, Tahun XX. No. 247, (Penerbit Ikatan Hakim Indonesia, Juni 2006). Hlm. 3

¹⁰ D.A Andrews dan James Bonta, *Rehabilitating Criminal Justice Policy and Practice dalam Psychology, Public Policy, and Law*, Vol 16 No. 1, 2010, Hlm. 4

¹¹ Giorgia Stefani, et.al., *Reducing Prison Population Advanced Tools of Justice in Europe*, Comunita Papa Giovanni XXIII, Rimini, 2013, Hlm. 6

punishment.¹² Indonesian criminal law is a legacy from the Dutch colonial period in Indonesia, which at that time was still called the Dutch East Indies.

This criminal law applies based on Article II of the transitional rules of the 1945 Constitution before the amendment which reads "that all state institutions and legal regulations that existed at that time were still valid as long as they had not been replaced by new ones according to the 1945 Constitution itself. After the amendments to the Constitution which was carried out in 1999 to 2002, criminal law in Indonesia is still in effect due to the absence of new criminal law regulations made by the legislative and executive bodies.

The criminal law that is in the criminal law book also cannot accommodate the need for regulations needed by the state to regulate people's lives, so rules that regulate traffic, regional regulations, and many other regulations contain elements of imprisonment or imprisonment.

In the process of implementing criminal law, there are several policies or powers of state institutions such as the discretion which is owned by the National Police and which is owned by the Attorney General. Discretion is an authority given by law to law enforcement officials, in this case especially the police to act in special situations in accordance with the judgment and conscience of the agency or the officers themselves. Discretion is actually the completeness of the regulatory system by the law itself. Discretion in the Black Law Dictionary comes from the Dutch language "Discretionair" which means wisdom in deciding an action based on provisions of regulations, laws or applicable law but on the basis of wisdom, consideration or justice.¹³

Thomas J. Aaron defines discretion as: discretion is power authority conferred by law to action on the basic of judgment of conscience, and its use is more than idea of morals than law. Which can be interpreted as a power or authority exercised based on law based on considerations and beliefs and emphasizes moral considerations more than legal considerations.¹⁴

Discretion is needed because the scope of the rules does not cover comprehensively and in detail how each official can carry out his duties, powers and responsibilities in the field, so there is a need for subjective consideration and policies from the relevant public officials for the smooth running of his duties and the policy is taken with an attitude of caution.

In the framework of carrying out duties in the field of criminal proceedings, the POLRI has the authority to carry out other actions in the form of investigations and investigations which are carried out as follows:

- a. not against a legal rule;
- b. is in line with a legal obligation that requires the action to be carried out;
- c. must be appropriate, reasonable, and included in the environment of his position;
- d. reasonable consideration based on compelling circumstances; and
- e. respect human rights.¹⁵

¹² Bunyana Sholihin, *Supremasi Hukum Pidana di Indonesia*, UNISIA, Vol. XXXI No. 69. September 2008, hlm 3.

¹³ Faal, M, *Penyaringan Perkara Pidana Oleh Polisi (Diskresi Kepolisian)*, Jakarta, Pradnya Paramita. 1991, hlm 91.

¹⁴ Ibid. hlm 16.

¹⁵ Iqbal Felisiano dan Amira Paripurna, Profesionalisme Polri dalam Penerapan Wewenang Diskresi Dalam Kasus Tindak Pidana Pencurian (Studi Kasus Pencurian Kakao, Pencurian Biji Kapuk, dan Pencurian Semangka), *Yuridika* Vol. 25 No. 3, September–Desember 2010. Hlm 249.

Discretionary rights are also contained in article 18 paragraph (1) and (2) Law No.2 of 2002 concerning the Indonesian National Police which states, in the public interest POLRI officials in carrying out their duties and powers can act according to their own judgment, which is carried out in the situation is very necessary with due observance of the laws and regulations, as well as the POLRI professional code of ethics.

Actually this is in accordance with the theory put forward by Morris. In fact, the criminal justice system is nothing but a crime containment system. It is hoped that not all want every violation to be processed through the criminal justice system. These things that are not serious in nature can be resolved outside the criminal justice system, for example minor offenses can be resolved with administrative fines or other cases of a very vague nature can be carried out by means of coaching, for example submitted to parents or given a strong warning, especially when the case is still at the investigation level.¹⁶

This opinion aims to provide efficiency in law enforcement in Indonesia, because it would be very ineffective if the courts were from the first level to the final court. As well as the police and the prosecutor's office are full and preoccupied with minor cases which should be resolved by an agreement with the parties without denying the rights of the injured parties.

It is used as the authority possessed by the Attorney General to set aside cases, and is regulated in Article 35 letter c of Law Number 16 of 2004 concerning the Republic of Indonesia Attorney which reads "Attorney General has the duty and authority to set aside cases in the public interest". Based on the explanation in this Article, it is stated that what is meant by public interest is the interest of the nation and state or the interests of the community. This provision is an implementation of the opportunity principle that can only be carried out by the Attorney General after taking into account the suggestions and opinions of state power agencies that have a relationship with the matter. Waiver of a case is based on the principle of opportunity, in other words, a case is put aside even though there is sufficient evidence.¹⁷

According to this principle, the public prosecutor is not obliged to sue someone who has committed an offense if according to his considerations it will harm the public interest. So the public interest of someone who commits an offense is not prosecuted. In this case, Lemaire said that today the principle of opportunity is commonly regarded as a principle that applies in this country, even though it is an applicable unwritten law.¹⁸

The practice of waiving criminal cases in Indonesia is currently explained by RM Surachman and Andi Hamzah as the power not to prosecute is justified in terms of terminating prosecution for technical reasons and terminating prosecution for policy reasons. In subsequent developments, only the Attorney General has the authority to implement this policy in order to prevent abuse of power.¹⁹

It can be stated that if there is sufficient evidence to convict a suspect, and the prosecutor feels that there will be more harm to the public interest if the prosecution is carried out, then the case will be put aside (principle of opportunity). The principle of opportunity is the prosecution discretion owned by the prosecutor's institution, which in its implementation only lies with the attorney general.

¹⁶ Ibid. hlm 249.

¹⁷ Diska Kurnianto, Agna Susila, Yulia Kurniawati, Pelaksanaan Diponering Dalam Perspektif Asas Equality Before The Law, Vol 13 No. 1, Maret 2017. hlm 6.

¹⁸ Andi Hamzah, *Hukum Acara Pidana*, Sinar Grafika, Jakarta, 2010. hlm 17.

¹⁹ Surachman, Andi Hamzah, *Jaksa Diberbagai Negara Peranan dan Kedudukannya*, Sinar Grafika, Jakarta, 1995. hlm 36.

Only two policies in Indonesia, namely the discretion owned by the National Police and in the past that owned by the Attorney General, can override or stop the legal process that applies to suspected perpetrators of criminal acts so that they do not proceed to court. This is also based on the subjective opinion of the law enforcers.

So it is time for the state through the legislative and executive institutions to reform criminal law, especially when discussing the draft of criminal code. Misdemeanor are less harmful unlike other criminal acts such as taking someone's life, treason against the state, and stealing a large amount a lot so that it causes a person to be unable to continue his life or a legal entity whose business operation is disturbed. The imprisonment or imprisonment penalties can be shifted to administrative sanctions, fines, and social work.

Shifting imprisonment or imprisonment sanctions into administrative sanctions, fines, and social work can reduce the full quota amount in prisons in Indonesia. The state as a tool that carries out the legal process can save state budget expenditures from the process of investigations, trials, and financing prisoners in prisons. This also has the effect of reducing the gathering of criminal offenders in prisons to share knowledge about the new modus operandi of other crimes.

6. Conclusion

Therefore, based on the research conducted, the conclusions that can be drawn are as follows:

1. The current framework in Indonesian penal system is no longer reflects *ultimum remedium*, but rather *primum remedium*. Misdemeanor is actually less harmful than other criminal acts, hence there should be an option to consider imposing other sanctions rather than imprisonment. This will lead to the protection of the people's rights and dignity as human beings so that they can learn from their mistakes through more humane actions.
2. There are currently 2 (two) alternatives rather than imposing criminal sanctions for misdemeanor cases in Indonesia, namely the discretion by the Police and *depowering* by the Attorney General. However, due to the increasing numbers of crime cases that lead to an imprisonment, there should be a clear provision that provide an alternative sanctions such as administrative sanctions, civil sanctions, and/or restorative justice approaches instead. This can become a consideration for the legislative and executive institutions in the effort of reforming the Indonesian penal code.

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