

Sentencing Alternatives as a Solution for Prison Overcrowding in Indonesia

Ahmad Tholabi Kharlie¹, Mara Sutan Rambe², Erwin Hikmatiar³

Abstract—This study analyzes the formulation of regulations and policies for sentencing alternatives in the penal system as an effort to reform criminal law in Indonesia. The sentencing alternatives refer to here are social work law and restorative justice. Imprisonment, for example, is a type of criminal sentences which is always addressed to all types of crimes although many parties have criticized it considering it is ineffective in realizing the goal of sentencing, identifying perpetrators of crimes and protecting society from the crimes. This raises the view concerning the need for an alternative to imprisonment in the way the goal of sentencing can be realized. Social work as an alternative to imprisonment, for instance, is expected to deter the perpetrators from committing other crimes in the future and be ashamed of they have done (perpetrator-oriented approach). In the meantime, victim restitution is intended to avoid the perpetrators to feel guilty about the victims and eliminate conflicts between them (victim-oriented approach). In short, both social work and restitution as alternatives to imprisonment are thus expected to realize the goals of sentencing which cannot be achieved by imprisonment.

Index Terms— Sentencing Alternatives, Overcrowding, Correctional Institution

¹ Ahmad Tholabi Kharlie is a Constitutional Law lecturer in the Faculty of Sharia at Syarif Hidayatullah State Islamic University, Jakarta.

² Mara Sutan Rambe is a criminal Law lecturer in the Faculty of Sharia at Syarif Hidayatullah State Islamic University, Jakarta.. Email: msrambe@uinjkt.ac.id

³ Erwin Hikmatiar is a researcher at the Center for National Constitution and Legislation Studies (*Pusat Studi Konstitusi dan Legislasi Nasional/POSKOLEGNAS*) at Syarif Hidayatullah State Islamic University, Jakarta.

1 Introduction

Crimes and criminal matters have changed over time. Over the centuries, their existence has been debated by experts. If viewed from the social development theory, such change is a natural thing as humans will always try to improve their welfare by basing themselves on their past experiences. The discussion of criminal acts according to the Criminal Code (*Kitab Undang-Undang Hukum Pidana/KUHP*) in the original Dutch text uses the term *strafbaarfeit* and *delict*. Both terms are translated into Indonesian, as known in the study of criminal law and statutory regulations, with various terms such as criminal acts, criminal offences, criminal incidents, punishable acts, and any acts subjected to legal actions.

Besides criminal acts as parts of criminal law, criminal sentences also become an issue that often attracts public attention. This is because they have become justice barometer in criminal law enforcement. The issue concerning the justice system in law enforcement practices does not merely focus on its existence as a philosophical matter. Another issue also occurs on how the philosophy is applied in real and measurable life. To this end, the justice in criminal law is not a matter of taste or feeling of the public prosecutors or judges based on the legal authority they have, but a matter of sense of justice for society that needs to have clear, firm and measurable instruments.

The types of crimes become a complex problem in criminal conviction because only by identifying them, criminal justice can be finally decided as the implementation of the public's view of life about justice in criminal law (philosophy of criminal law and sentences), which is suitable or appropriate to impose on perpetrators of crimes. Therefore, discussing the issues on criminal sentences is inseparable from the philosophy of criminal law, politics of criminal law and social and criminal policies).

The imposition of criminal sentences must always maintain sense of justice. Through such imposition, conflicts are expected to end. As the result, the goals of the criminal law including prosperity, peace, and balance among societies will be achieved. In the meantime, the objectives of modern criminal law always lead to liberation, fostering and protecting the community. Sudarto mentions that "the criminal law of a nation is a very important indication to see the level of its civilization because the way a nation views on ethics (social order), society, and religiosity and morals is implied." Such thoughts are renewed in Indonesia and included in the existing criminal law. The renewal of criminal law is not merely improving the existing law. According to A. Radbruch: "renewing criminal law does not mean improving it, but replacing it with something better instead"

In this case, Roeslan Saleh states: "criminal law reform essentially implies an effort to carry out a reorientation and reform to criminal law according to the central socio-political, socio-philosophical and socio-cultural values of the Indonesian people which underlie the social, criminal and legal policies in Indonesia."

Apart from various opinions concerning the urgency of reforming the Criminal Code (KUHP), it can prominently be seen that the criminal sanctions such as fines in the Criminal Code are considered to be very incompatible with current needs, both in terms of currency values and criminalization objectives; and Criminal Stelsel in the Criminal Code is even a reflection of the civilization of a nation.

To this end, it is very interesting to recall what Muladi once mentioned: "applying the criminal law formulated more than one hundred years ago in dogmatically juridical terms in the present social context will clearly give a 'bad image' to the criminal justice system." In addition, Barda Nawawi Arief states that: "If viewed from the criminal law policy, the phenomenon of imprisonment which seems 'wasteful' certainly contradicts to the tendency recognized by the international world today, avoiding imprisonment as far as possible by implementing selective and limitative policies, as a result of the growing strength of criticism and sharp highlight on the application of imprisonment as a sentence. "

Barda Nawawi Arief's statement is in line with what has happened in prisons in Indonesia. The Ministry of Law and Human Rights confirms that prison institutions in Indonesia experienced over capacity in 2018. This refers to a total of 255 thousand detainees and prisoners. According to the Minister of Law and Human Rights, Yasonna Laoly, the number of detainees and prisoners is more than the capacity of detention rooms. "The total number of detainees and

prisoners is about 256.273 with only 125.712 rooms available. According to Laoly, 241.402 or 94 percent of the detainees and prisoners are men, while 14.325 or 6 percent of them are women. In addition to the overcapacity, Laoly also mentions that the meal costs will reach IDR 1.79 trillion in 2019. This happens because the number of prisoners has increased, even exceeding the capacity of penitentiaries and detention centers.

1.1 CRITICISM AND URGENCY OF PRISON REFORM

In enforcing the criminal law against any acts that violate it, one of the criminal sentences used most often as a means to deal with such acts is deprivation of physical liberty (imprisonment) which is custodial in nature. However, in its development, many have questioned the use of imprisonment as a means to reduce crimes. When viewed in term of its objectives to achieve, Herman G. Moeller argues there are conflicting matters in its philosophy including:

1. The objectives of imprisonment; to guarantee the safety of prisoners and to provide opportunities for them to rehabilitate.

2. The nature of the above objectives often results in dehumanizing the prisoners and ultimately causing them some losses as they are way too long in the institution. Consequently, they are unable to continue their lives and to be productive in society.

Moeller adds the nature of the objectives often leads to dehumanization and brings losses for productivity.

If the concept of imprisonment is intended to retaliate or alienate the prisoners judging from their conviction, it turns out that prisons are unable to serve as an institution that can reduce crime. However, the development of the Penitentiary system in developed countries, such as the Netherlands and the United Kingdom, shows a significant movement that leads to ignoring the imprisonment system. In the Netherlands, for instance, various studies show that people are not worried about imprisonment, but are instead afraid of administrative sanctions, such as the permanent revocation of identity card, professional permit, and alike. This indicates that the concept of imprisonment in the criminal system is no longer effective. Therefore, there is a need for a new system that is expected to accommodate these interests.

The holding cells and detention cages are not as strong as iron. Prison has been weak since the beginning, just as weak as the Indonesian criminal law system which copies the Netherlands a country that has no cultural ties to the soul of this nation. The existence of prison serves as hotels or guesthouses for travelers, as a place to rest and plan and then travel the next day. Prison does not give benefits for the law enforcement in this country.

Its function as a place to restrain the capability or power of the perpetrators of crimes is only useful at the time being. It seems to be a place for them to stay for a moment after committing a crime, just like a snake that can sleep longer in a cave after attacking and eating its prey. In another word, prison has become a cave for criminals to enjoy their time after committing a crime or to avoid the tantrums of those who hate them. The regulation on imprisonment as one of the main sentences is mentioned in article 10 of the Criminal Code. The Dutch had introduced imprisonment system to Indonesian when they colonized them and implemented their *Wetboek van Strafrecht* in the colonized country. *WvS* is the one that has finally displaced the role of customary and religious laws which once regulated the life order of the Indonesian people.

In addition, the prison is also a safe place to use drugs and distribute them. Illicit drug trafficking in Penitentiaries and Detention Centers remains rampant even though the implementation of death sentence for drug trafficking has been carried out on several cases. President Joko Widodo stated in his speech that Indonesia has reached the stage of drug emergency. He would not grant pardon or clemency for convicted drug dealers. In addition, based on the national statistics, there have been 4.5 million people affected by drugs in Indonesia and there are 1.2 million people who cannot be rehabilitated considering that they suffer from severe condition. The results of a survey and investigation by the National Narcotics Agency (*Badan Narkotika Nasional/BNN*), shows 60 percent of drug trafficking in Indonesia is controlled behind bars.

Hazairin further explains that the criminal justice system is very ineffective. He has discovered various deficiencies such as financial problems, budget, legislation, rehabilitation, and so on. He has seen so many deficiencies that the prison is no longer relevant and needs to replace.

Hazairin adds that this country is required to close all prisons and would rather make them as homes for thousands of homeless people who are live in the streets or under bridges. The state budget which is initially allocated for prisons every year can be transferred to the homeless. As long as there are prisons, it means the country is more concerned with criminals. It feeds the criminals, but starves the homeless.

1.2 SENTENCING ALTERNATIVES AS A SOLUTION FOR OVERCROWDING PRISONS IN INDONESIA

In various countries, the criminal law thinking has developed. In its development, conservative legal thinking is fully left to a country. Countries that represent autocracy tend to reject a change as they prefer conservative thinking. Here, the law is only considered as a tool to maintain security and order. On the contrary, democratic countries tend to welcome and accept new forms of thinking. In Indonesia, for example, the development of criminal law is still at the low level and has not properly been implemented. It is clearly seen that the Indonesian law is under the shadow of colonialism, especially the Criminal Code (KUHP) which depends on the Dutch legal system forming the Indonesian law.

The criminal law reform, especially in criminal proceedings in term of non-custodial sentences is certainly not a baseless idea. If viewed from the sentences that are currently implemented, they are in fact ineffective to deter the criminals from committing another crime. There are many perpetrators who commit new crimes. In the meantime, if seen from the capacity of penitentiaries, over capacity happened in 2018 as stated by the Ministry of Law and Human Rights. This refers to the total number of prisoners and detainees reaching 255 thousand people.

According to the Minister of Law and Human Rights, on the one hand, the number of prisoners and detainees is more than the capacity of the available detention rooms. The total number of prisoners and detainees is equal to 256.273 people while the capacity of detention rooms can only accommodate 125.712 rooms. According to the Minister, 241.402 or 94 percent of the detainees and prisoners are men, while 14.325 or 6 percent of them are women. In addition to the over capacity, the Minister also mentions that the meal costs will reach IDR 1.79 trillion in 2019. This happens because the number of prisoners has increased, even exceeding the capacity of penitentiaries and detention centers.

On the other hand, the Institute for Criminal Justice Reform (ICJR) mentions the Penitentiaries and Detention Centers in Indonesia showed no sign of a decline in the number of prisoners and detainees in the last 5 years. The latest data from the Directorate General of Correctional Affairs in August 2018 records the condition of detention centers and prisons in Indonesia stands at 199%. This means the number of the detention centers and prisons has nowadays exceeded its capacity by almost 100% in comparison. The following table illustrates the prison conditions in Indonesia in the past 5 years

According to the above data, which is processed from the penal system database, it appears that imprisonment is very dominantly used as a sentence and tends to be overused in the criminal justice system in Indonesia.

In addition to the issues on criminal sentences, criminal law is directly in contact with human rights, especially the right to freedom or independence, which is in this case limited by imprisonment or confinement. In certain circumstances, it can revoke a person's right to life. Since the process, it has the potential to cause violations to Human Rights by force such as arrest, detention, search warrant, seizure and interrogation.

Because of its association with human rights, criminal law is very sensitive to any violations. When Montesquieu, J. J. Rousseau and John Locke pioneered the French revolution, they demanded the codification of laws, especially criminal law. With such codification, the public can identify which actions are accepted and which ones are prohibited to create legal certainty.

The legal needs and the role of law have changed and developed from time to time. Such change and development in the sense of the Criminal Law reform has experienced three stages. In the first stage, for instance, the criminal law is no longer integrated with the authorities, but it has become their instrument of control. As the second stage, the law is based on humanity. In the third stage, it is oriented to science and technology in the way the concept of benefits, certainty and justice in the field of law is upheld. The development of criminal law in latter stage is in line

with Indonesia's national goals, which emphasize that the law is directly in contact with social welfare as the goal of the modern legal state, the welfare state. The Founding Fathers of Indonesia as a state have got brilliant thought on the goals of the modern state since 1945, where the principle of the welfare state is included in article IV of the 1945 Constitution as one of Indonesia's national goals, promoting social welfare.

A crime is basically an inseparable part of human life in the world. All human activities including political, social and economic activities can lead to a crime. To this end, the existence of crime does not need to be regretted, but efforts to overcome them must be sought. According to G Peter Hoinagels, to reduce crimes as hard as possible prior to the existing situations and conditions, criminal politics can be applied as follows:

1. The application of criminal law;
2. Prevention without punishment;
3. The influence of public view of crime and punishment through mass media.

Therefore, crimes can generally be prevented with two efforts, criminal law and non-criminal law. Efforts to reduce them through the criminal line, on the one hand, focus more on the repressive nature (an action is taken after a crime occurs). On the other hand, non-criminal efforts focus on the nature of preventives (creating wisdom before criminal acts).

2 RESULTS AND DISCUSSION

Crime prevention through criminal law is an activity that is preceded by the identification of criminal acts (criminalization) and the determination of sanctions that can be imposed on perpetrators of the acts. Sentences in criminal law are sanctions that must be paid for any actions that have harmed victims and society in general. Such condition actually often distances the criminal law from its objective, social welfare. To that end, the determination and imposition of sanctions should be carried out with serious considerations, hoping that the criminal law will protect the state interest, victims and perpetrators of crimes.

In 1975, William Rentzmann, a Danish Director General of Correctional Affairs, proposed 23 sentencing alternatives. Some of them are common in the Western European legislation such as criminal fines and conditional sentences, but some are new and are still limited. In 1985, a list of sentencing alternatives was again issued and applied by the member states of the European Council. Some of the alternatives seem to be revocation of certain rights listed in the legislation, so that judges have a wider selection of decisions in imposing sanctions. However, in reality, this system is not widely applied and consequently causes the revocation of these rights to not be perceived as a crime which is comparable to a short prison sentence.

The UN Minimum Standards for Non-custodial measures (Tokyo Rules) encourage alternatives for detention and imprisonment, as a step to reduce prison overcrowding and to meet the needs of social reintegration for perpetrators of crime in the community more effectively. This step requires the availability of various non-custodial sentences in criminal law which are suitable for various types of violations, and applicable to any individual cases of each violator. This availability is clearly needed as a first step to increase the use of sentencing alternatives in reality

The alternatives or non-detention policies may include:

1. Criminal Supervision

Muladi mentions that "in criminal supervision, the perpetrators of crime with certain criteria (actions and circumstances) are decided to have an opportunity to return to the community to be good human beings and useful for their community under the supervision, assistance, support and guidance from supervisory officials." In this case, there are efforts to prevent and protect them from bad influences that could occur if they are put in prison.

In addition, the perpetrators of crime who are subject to criminal supervision are also given the opportunity to live their lives normally as an individual, family member, community member and citizen while remaining to be under parole to carry out the conditions determined by the court .

Muladi adds the sentencing alternatives in term of criminal supervision (parole or probation) has advantages if viewed from the person being charged, as follow:

- a. providing an opportunity for the person being charged to improve themselves in the

community as long as their welfare in this case is considered more important than the risk that may be suffered by the community if they are being released. In order to give such opportunity, the most important requirement is their mental health.

- b. allowing them to continue their life as a human being, which is in accordance with the values that exist in society.
- c. preventing the stigma caused by deprivation of independence.
- d. Financially, granting probation or parole for the person being charged to have correctional activities outside the institution will be cheaper than having them within the institution.

2. Social Work

Social work, also known as "a community service order" comes from Europe. It is a type of criminal sentences for the perpetrators of crime by doing useful work to avoid deprivation of liberty. This type of sentencing has been known in Germany since the Middle Ages, and is imposed on the perpetrators who are sentenced to pay fines but are unable to do so, so they are obliged to do some work which is beneficial to society such as building canals and city walls without paychecks. At the end of the nineteenth and the early twentieth centuries, social work began to be listed as an alternative to deprivation of liberty and fines in criminal legislation in European countries, including Germany, Switzerland, Italy and Norway.

In its development, it has undergone modernization, eliminating its nature as a work by force and changing its appearance as a "voluntary obligation" in order to avoid deprivation of liberty. It has also played as an alternative to short-term prison sentence under framework of conditional sentencing.

Basically, social work as an alternative to imprisonment will eliminate the negative impacts of life in prison and give a chance for the person being charged to prove themselves as their social work can be directly seen by the community and give them benefits. In practice, such social work can happen in hospitals, orphanages, elderly homes, schools or other social institutions, and is adjusted to their profession, expertise and skills. This can also reduce prison overcrowding, which greatly affects the prison construction.

In addition to the two sentencing alternatives, there are, in fact, many concepts that offer non-imprisonment penalties such as fines, compensation, restorative justice and so on.

3 CONCLUSION

Imprisonment has nowadays been applied in various criminal sanctions. If, for example, it is intended to retaliate or alienate the perpetrators of crime, it will not be able to play as an institution that can reduce crime and prison overcrowding at the same time. Various phenomena indicate that the concept of imprisonment in the criminal system is proven ineffective. Therefore, there is a need for a new system that is expected to be able to overcome problems without prison sentence such as criminal supervision, social work, fines, compensation and restorative justice.

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