Paradigm of Shifting Imprisonment to Non-imprisonment in Indonesia Crimination

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Abstract. Imprisonment in our Criminal Code (KUHP) is currently still in the main form of criminal sanction, imprisonment as regulated in the Criminal Code (KUHP) as the dominant choice of criminal sanctions in tackling crime has always received criticism, because in its implementation it does not fulfil with the purpose of punishment. Meanwhile, the current prison sentence is still far from the values of justice, while the Criminal Code Bill has not been ratified. There needs to be an alternative form of criminal sanctions other than imprisonment so that the purpose of punishment can be achieved, then the idea of a criminal outside of prison or what is known as a non-imprisonment is appear. The purpose of this research is to analyse the paradigm shift from imprisonment to non-imprisonment. The research method used is normative juridical. The results of this research are the paradigm shift from imprisonment to non-imprisonment has been carried out by many countries in the world, especially European countries such as the Netherlands, In Indonesia itself, the idea of non- imprisonment began to emerge which is actually started in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, and has even been stated in the Criminal Code Bill. Many problems arise related to the implementation of imprisonment, which are still overcapacity, causing overcrowding. It is felt that non-imprisonment has not fulfilled the intended purpose of punishment. The emergence of the idea about non - imprisonment is expected to be an alternative form of criminal sanctions other than imprisonment. With various alternative forms of non-imprisonment, it is expected that imprisonment will no longer be the main crime and punishment in our country fulfil a sense of justice.

Keywords: alternative criminal · imprisonment · non-imprisonment

1 Introduction

Nowaday the discussion about the purpose of criminalization continues to grow and becomes a serious concern, especially regarding the legitimacy of the existence of criminal law itself. Van der Hoeven, a Professor of Criminal Law at Leiden University, said that criminal law experts cannot explain the basics of the right of criminal and also the purpose of punishment [1].

The problem of the purpose of punishment in the Draft Criminal Code (RKUHP) is one of the most important materials that will emphasize the purpose of punishment in Indonesia.

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Sudikno Mertokusumo revealed that, ultimum remedium is a legal term that is commonly used and is defined as the application of criminal sanctions which are the ultimate (last) sanction in law enforcement [2]. However, in reality, there are still many laws that use the primum remedium principle, where there is no other alternative but to punish convicts with criminal sanctions.

Moreover, the tendency of punishment in Indonesia which is still oriented towards imprisonment, so that it becomes a separate problem when faced with one of the causes of overcrowding [3].

For this reason, non-imprisonment for certain light cases needs to be reviewed in criminal law as a primum remedium regarding current conditions in society. That is, criminal law no longer reflects the ultimum remedium, but rather the primum remedium. This allows the function of law enforcement officials to seek settlement of cases outside the court so that there is no overcrowding of residents.

2 Research Method

This type of research is normative legal research. This research was conducted by analyzing the relevant laws and regulations, which were carried out to solve the legal issues faced, a know-how activity and not just know about. As stated by Morris L. Cohen, legal research is a process of discovering the laws that exist in society [4].

3 Result

The concept of non-imprisonment is also known as non-imprisonment and there are several other terms related to non-imprisonment in various countries, including alternative to imprisonment, non-custodial measures, non-cutodial penalties, prison alternatives, or alternative sanctions. The terms have long been used interchangeably to reflect the same character in the array of types of sentences executed outside prison [5].

This has become one of the most important developments in criminal policy in the last few decades. The concept and form of non-imprisonment punishment has also been widely accepted and regulated in the criminal justice system in various countries. This non-imprisonment sentence also allows law enforcers to provide alternative punishments by taking into account the individual needs of the perpetrator in accordance with the crime committed. Non-imprisonment refers to a response or measure designed to avoid the application of imprisonment in several stages of the criminal justice system [6].

The emergence of the concept of non-prison punishment is influenced by changes in expert perceptions of crimes and their punishments. The philosophical justification of imprisonment, along with the emergence of the concepts of “deterrence” and “retribution” in the discussion of “reform” or “rehabilitation” is the main source of inspiration for the emergence of non-imprisonment sentences. Another very important influence on non-prison sentences is the emergence of doubts about the ability of prisons to rehabilitate prisoners. Then many jurists doubted it, such as adherents of the classical adherents who argued that imprisonment was the most appropriate method of punishing someone [7].

Before the idea of non-imprisonment came into existence, classical adherents argued that imprisonment was the most appropriate method of punishing someone. Some experts do not agree with this approach and argue that imprisonment has negative characteristics and consequences, thus requiring a new concept to avoid this negative impact, namely a form of non-imprisonment and non-imprisonment. The concept of non-imprisonment punishment does not prevent the reintegration of prisoners into society but rather facilitates it. On the other hand, imprisonment actually complicates efforts to integrate prisoners into society when they are free [8].

Non-imprisonment sentences are considered appropriate for perpetrators with certain characteristics. The characteristics of the perpetrators can be used to assess the appropriate punishment for them by evaluating their conditions. These characteristics include: whether the perpetrator is a recidivist, has a high probability of not repeating a crime, what is the history of their previous actions, whether the perpetrator regrets his actions, and their status in society.

The differences from these experts then produce a formulation, in which there is a division in implementing non-criminal punishments against criminals, namely only certain crimes that can be included in the category of non-imprisonment sentences. There are two criminal sanctions (criminal sanctions), the basis of which is, prevention or prevention in order to protect the public from crime; and repression, which is meant to punish criminals. Its main objective is to fight crime without having to impose prison sentences or give punishments without restricting one's freedom (insolation measures) [9]. In a more operational level, non-imprisonment in the criminal justice system will provide flexibility that is consistent with the nature and nature of a crime, the background of the perpetrator, the aim of protecting the community and avoiding unnecessary use of imprisonment. This non-imprisonment sentence must also be applied from before the trial until after the verdict is given.

4 Discussion

In general, crime aims to provide special suffering (bijzonder leed) to violators, so that violators can feel the consequences of their actions or what is called absolute theory. From this absolute theory, a theory of punishment emerged, namely a relative theory that pivots on three main objectives of punishment, namely: preventive, deterrence, and reformative. Then, a theory emerges, which in the combined theory holds that the purpose of sentencing can be plural by articulating between the functions contained in the absolute theory, and the functions contained in the relative theory. The point is that the purpose of a criminal regulation will live in the types of punishment that become its embodiment.

Ultimum remedium is a legal term that is commonly used and is defined as the application of criminal sanctions which are the final (last) sanctions in law enforcement. This ultimum remedium is not only a term, but also a legal principle, as contained in Indonesian criminal law which states that criminal law should be used as a last resort in terms of law enforcement [10].

Furthermore, the ultimum remedium according to Prof. Dr. Wirjono Prodjodikoro, S.H. states that, norms or rules in the field of constitutional law and state administrative

law must first be responded to with administrative sanctions, as well as norms in the field of civil law must first be responded to with civil sanctions. Only if administrative sanctions and civil sanctions are not sufficient to achieve the goal of straightening the social balance, then criminal sanctions are also held as a last resort or ultimum remedium [11].

Meanwhile, according to Nur Ainiyah Rahmawati, the ultimum remedium is used to consider the use of other sanctions before criminal sanctions are imposed. So that if other settlement functions are deemed less effective, then criminal law will be used [12].

In this case, the concept of ultimum remedium should be taken seriously, because almost every criminal law contains criminal sanctions which tend to cause a shift in the application of sentencing efforts to primum remedium. Various considerations are needed, both in terms of expediency in order to create an appropriate punishment and in accordance with the application of sanctions in solving problems. Do not let criminal sanctions do not end with the restoration of justice by a criminal act.

The abolitionist view assumes that the criminal justice system contains structural problems or defects, so that the basics of the system's structure must be relatively changed. In the context of the criminal sanctions system, the values that underlie the abolitionist notion still make sense to seek alternative sanctions that are more appropriate and effective than institutions such as prisons [13]. Among the thinkers of abolitionism such as Fillipo Gramatica and Olof Kinberg, where they carried out a revolutionary movement against the view of punishment that emphasized physical suffering, namely using criminal means.

In the perspective of Hulsman, abolitionism sees the criminal justice system or the criminal justice system as a social problem by considering the criminal justice system provides suffering, the criminal justice system cannot work in accordance with its goals and ideals, the criminal justice system is not controlled and the approach used in the criminal justice system is fundamentally flawed. This abolitionist thinking refers to external factors from criminals, because people commit crimes not only due to their internal problems, but more due to external problems which then affect themselves, so that what is needed is not punishment (punishment) against themselves, but action (treatment) improvement in psychological factors [14].

This abolitionism thought can be used as the basis for a paradigm shift in the provision of criminal sanctions, from a physical punishment model to a psychological punishment model, this aims to provide a legal balance that leads to the upholding of the values of justice and order because the use of criminal sanctions in tackling crime is a legacy. From our past savagery (a vestige of our savage past) [15]. According to the Institute for Criminal Justice Reform (ICJR), there are 5 (five) types of non-prison punishments projected, namely Supervision, Fines, Social Work, Imprisonment in Installments (Installment Crime), and Judicial Pardon (Rechterlijk Pardoon).). The projection of non-imprisonment punishment is a preference for alternatives to criminal deprivation of liberty that needs to be adhered to both in regulation and in its implementation, in which several forms of non-prison punishment are expected to reduce dehumanization and losses for inmates due to difficulties in integrating into society [16]. For example, in Article 85 of the RKUHP, the supervisory punishment which according to the RKUHP is that the condition for a defendant to be subject to a supervision punishment is if he

commits a crime punishable by a maximum imprisonment of 5 (five) years and does not apply to a criminal offense punishable by a special minimum imprisonment.

In Indonesia, criminal provisions are increasing every year. But unfortunately, law enforcement against various criminal provisions is experiencing various limitations, both law enforcement (police, prosecutors, judges) and also the budget. This of course makes it difficult for them to be able to enforce the criminal law. Moreover, the majority of the new criminal provisions are threatened with inefficient imprisonment for spending too much of the budget. Imprisonment has also not been able to restore the losses suffered by the victim. Therefore, economic analysis in the formulation of criminal policies needs to be used more often to produce more efficient criminal policies. Profit and loss analysis (cost and benefit analysis) to overcome the scarcity or limitations (scarcity) in the enforcement of criminal provisions [17].

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