

JURIDICAL REVIEW OF SOCIAL WORK CRIMINAL SANCTIONS AS A FORM OF *RESTORATIVE JUSTICE* IN THE REFORM OF PIDANA LAW IN INDONESIA

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Abstract

This study aims to analyze the social work criminal sanctions as a form of restorative justice in criminal law reform in Indonesia. The research method used is normative juridical. The results showed that 1) the concept of social work criminal sanctions as the implementation of restorative justice; Criminal social sanctions are part of the manifestation of restorative justice. The urgency of implementing restorative justice is currently considering the effectiveness of criminal sanctions in Indonesia which tend to have a deterrent effect on the perpetrators. Through social work criminal sanctions, it will trigger the emergence of shame for the prisoners and guilt for the actions committed, 2) regulation of social work criminal sanctions in the reform of criminal law in Indonesia; Criminal social work (community service order) which has been adopted into the Draft Criminal Code is a form of criminal sanction that makes social work punishment as another alternative to the deprivation of freedom / freedom.

Keywords: Crime, Social Work, Restorative Justice, Criminal Law Reform

A. INTRODUCTION

In essence, legal reform, especially criminal law reform, has a meaning, namely efforts or efforts to reorient and reconstruct / reform criminal law which must synergize with socio-philosophical values, socio-political values, and socio-cultural values. These central values live in Indonesian society and underlie social policies, criminal policies, and/or law enforcement policies. ¹

The orientation regarding correctional should be in line with the change in the concept of correctional objectives from the concept of retribution (retribution) to the concept of rehabilitation (improvement). Such a concept is illustrated by the emergence of the idea of changing the prison institution (historically referred to as a prison house) into a penitentiary (Lapas). But in reality criminal deprivation of liberty brings education of crime by criminals. Prisons are often used as a place of learning for criminals to make criminals more professional. With the emergence of more professional criminals this ultimately causes an increased burden on society because it can pose a greater threat. The sanctions given to perpetrators also have a negative effect in the form of dehumanization, namely exile from society as long as the convict loses his independence. ²

Efforts to find alternatives to the crime of deprivation of liberty began with the fact that the crime of deprivation of liberty is increasingly disliked, both with humanitarian considerations, with philosophical considerations, and with economic considerations. For example, with humanitarian considerations, the criminal reason for deprivation of liberty is increasingly disliked because it has a major negative impact not only on prisoners, but also on their families and people whose lives depend on them. Philosophical considerations are a shift in the philosophy of punishment which was originally oriented towards retribution to become coaching. Economic considerations see that the costs that must be incurred to finance the implementation of the crime are not small. Covers the inmate's living expenses.³

The draft Draft Criminal Code Bill (RUU KUHP) began to move no longer focusing its attention on efforts to impose sanctions for violators as a reference or measure of justice, but also developing alternative sanctions that take into account the impact of a crime by adding several alternative criminal sanctions, one of which is in the form of social work crimes. Social work is proposed as one type of criminal / basic punishment and has a position as an alternative to imprisonment. The existence of the idea of social work in the Criminal Code Bill is inseparable from the factors of *prison overcrowding*, the ineffectiveness of prisons as rehabilitation institutions and the negative effects produced by prison sentences (such as imprisonment and stigmatization).⁴

This social work criminal sanction in its application and concept certainly still pays attention to the public aspect so that the public interest is not harmed by changes in the aspect of social work criminal sanctions. This social work criminal sanction is certainly expected to be a way to change the character of criminal law as a sanction law, even though between the parties there has been real peace or compensation. The criminal principle as ⁵*the ultimate remedium* is certainly expected to continue so that existing problems are resolved with certainty without any injury to human rights. The author in this article also highlights that the concept of social work crime is part of the effectiveness of criminal law in Indonesia.

B. DISCUSSION

1. The Concept of Social Work Criminal Sanctions as an Implementation of *Restorative Justice*

Social work criminal sanctions are actually not widely known in the legal system in Indonesia. Social work crime is a type of crime that must be carried out by convicts outside the institution by doing social work, this social work crime is not paid because of its nature as *a penalty*. Social work criminal sanctions are better known in countries that use the ⁶*common law legal system*. In Indonesia itself adheres to the civil law legal system. In several countries such as Russia, France, the Netherlands and Portugal have also applied social work criminal sanctions in the applicable Criminal Code.

Before discussing further about social work criminal sanctions in Indonesian positive law, it is necessary to first understand the criminal law situation in Indonesia. Criminal law in Indonesia is currently in a condition that is not in accordance with the principle of *ultimum remidium*. It

is still common for Indonesians who expect or even use criminal law as their first step in solving their legal problems instead of being the last resort. This of course can result in the conviction of someone not because of criminal acts or malicious intent, but simply a forced attempt to solve the problem without agreement. Even though the criminal law actually regulates what actions are prohibited according to the law.⁷

Restorative justice is a form of case resolution approach by involving perpetrators of crimes, victims, families of victims or perpetrators, and other related parties to find a fair solution by emphasizing restoration to the original state and not retribution. One of the figures who introduced this contemporary theory was Wayne R. Lafave. According to Lafave, criminal justice aims to restore justice known as *restorative justice*.⁸

Social work and restitution crimes are not yet known in the current Criminal Code. However, restitution is well known in the Criminal Law outside the Criminal Code, including in Law Number 26 of 2000 concerning Human Rights Courts, which in Article 35 states that as follows: 1) Every victim of gross human rights violations and their heirs can get compensation, restitution and confidentiality. 2) Compensation, restitution and rehabilitation as referred to in paragraph (1) shall be included in the amr of the decision of the Human Rights Court. 3) Provisions regarding compensation, restitution and rehabilitation are further regulated by Government Regulations.⁹

Restorative Justice returns conflict to the most affected parties such as victims, perpetrators and their community interests and gives priority to their interests. *Restorative Justice* also emphasizes human rights and the need to recognize the effects of social injustice in simple ways to restore them rather than simply giving perpetrators formal or legal justice and not getting any justice.¹⁰

The social work crime to be imposed fulfills the elements of coaching and provides protection to the community. Elements of coaching oriented to individual perpetrators of criminal acts. With social work crimes, convicts avoid negative impacts such as stigmatization, loss of self-confidence so that convicts have self-confidence that is indispensable in the lodging process. The convict can also lead his life normally. The existence of this freedom gives the convict the opportunity to continue to carry out obligations to his family. Convicts can also avoid the process of dehumanization and automatically socialize with society.¹¹

Criminal social sanctions are part of the embodiment of *restorative justice*. The urgency of implementing *restorative justice* is currently considering the effectiveness of criminal sanctions in Indonesia which tend to have a deterrent effect on perpetrators. Through social work criminal sanctions, it will trigger shame for prisoners and guilt for the actions committed. With psychological pressure on perpetrators through social work sanctions, it is hoped that perpetrators can realize their actions and not repeat their actions. This is where recovery will appear to the perpetrator. Unlike the theory of retaliation, which seems to have been less effective, after all, the current state of the Penitentiary is ¹²*over capacity*, so there is a need for other criminal alternatives, such as social work sanctions.

This social work crime is presented in the framework as an alternative or offered from the short-term deprivation of liberty crime. Thus, knowing the criminal application of deprivation of liberty, especially short-term imprisonment in practice, is very important. From this knowledge, it can be seen to what extent social work crime has the opportunity to be applied as a criminal alternative. Social work crime is considered important to be developed in the reform of criminal law in Indonesia which changes people's views about punishment that begins with deprivation of freedom of movement or wants to turn into promising sanctions that are indeed binding as well as criminal sanctions of deprivation of independence but not emphasized on sanctions that deprive someone of freedom.^{13 14}

2. Regulation of Social Work Criminal Sanctions in Criminal Law Reform in Indonesia

Changes to the Criminal Code carry a number of implications on correctional conditions. The major mission of changing the Criminal Code is the decolonization of the colonial legacy, democratization of criminal law, consolation of criminal law, and adaptation and alignment in various criminal law developments both nationally and internationally. Where in simple terms, if things go ideally, it can be stated that projections of correctional conditions and policies will be better. Another major mission of the reform of the Criminal Code is to protect society within the framework of penal purposes, where one of the characteristics is to avoid the approach of imprisonment (deprivation of liberty) as the main approach.^{15 16} Social work crime is an alternative form of imprisonment mandated by the "Tokyo Rules" so that it can be included in the Criminal Code of every country in the world. The crime of social work "a community service order" originated in Europe, which is a crime imposed on perpetrators of criminal acts by doing useful work to avoid the crime of deprivation of independence. This type of crime has been known in Germany since medieval times, and is imposed on criminals who are sentenced to fines but cannot afford to pay them, so they are obliged to carry out a job that is beneficial to people's lives such as building water canals and city walls without pay. Then in the late 19th century and at the beginning of the 20th century the criminal social work / community service order began to be listed as an alternative to the crime of deprivation of liberty / freedom and fines in a criminal law in European countries, including Germany, Switzerland, Italy and Norway.¹⁷

Social work crime in its development has undergone modernization, namely eliminating its nature as a forced labor crime and changing its appearance as "a voluntarily undertaken obligation" in order to avoid the crime of deprivation of independence, and can be an independent crime or as an alternative to short-term imprisonment within the framework of a conditional sentence "suspended sentence". Social work / community *service order* as an alternative to the crime of deprivation of independence (prison) will eliminate the negative impact of life in prison and will cause shame on the convict himself, because his social work can be directly seen by the community, in addition to his social work directly brings benefits to society. The criminal form of social work can be carried out in hospitals, orphanages, nursing homes, schools and other social institutions, which as much as possible will be adjusted to the profession, expertise and skills of the convict. This crime will also reduce the overcrowding of prisons which greatly disrupts the continuity of formation in prisons.¹⁸ The current Criminal

Code does not yet recognize the term social work crime. However, it has been formulated in the Criminal Code Bill. The draft Criminal Code then regulates the categorization of criminal types into 3 (three) broad categories, namely principal crimes, additional crimes and crimes that have special properties. Then in the types of criminal there are some changes. Significantly, such changes can affect correctional conditions and policies. Regarding the main crime, Article 65 paragraph (1) of the Criminal Code Bill states that the main criminal forms are: a) imprisonment; b) criminal cover-up; c) criminal surveillance; d).criminal fines; and e).social work crime.^{19 20}

The 2019 Criminal Code Bill, in Article 85 already includes an alternative to imprisonment under 6 months. In the Criminal Code Bill, judges can choose social work crimes to become criminal sanctions when judges will impose imprisonment under 6 months or fines that do not exceed category II (two) or Rp. 10,000,000.00 (ten million rupiah). The social work crime (community service order) which has been adopted into the Criminal Code Bill is one form of criminal sanctions that have been carried out previously by European countries such as the Netherlands and the United Kingdom which make social work crimes as an alternative to the crime of deprivation of independence / freedom. Defendants who commit crimes/crimes with the threat of imprisonment less than 5 (five) years ago then the judge imprisonment not exceeding 6 (six) months or fines not exceeding the fine with category/group II can be sentenced to social work. There are several considerations for the criminal conduct of this social work, namely: a) the defendant's confession of the crime/crime committed; b) the defendant's employability; c) the consent of the defendant after the explanation of the purpose / purpose and all matters related to social work crimes; d) the social history of the accused; e) protection of the work safety of the defendant; f) the religious and political beliefs of the accused; and g) the defendant's ability to pay a criminal fine.²¹

The criminal implementation of social work may not be commercialized, and can be imposed on the defendant for a maximum of 240 (two hundred forty) hours and a minimum of 8 (eight) hours. Social work crimes are carried out for a maximum of 8 (delapn) hours during a day and can be carried out gradually within a maximum period of 6 (six) months while still supervising the activities / activities of the convict in working on their source of livelihood or income and / or other useful activities.²² If the convict is unable to fulfill either all or half of his obligation to carry out the social work crime without a valid / justifiable reason, the convict will be ordered to: a) repeat all or part of the social work crime; b) carry out all or half of the imprisonment replaced by social work penalties; or c) pay all or half of the fine replaced by social work or replace the unpaid fine by imprisonment.²³ For the criminal implementation of social work, supervision is carried out by prosecutors and guidance is carried out by community supervisors. The judgment on social work crimes must also include:

- a) The length of imprisonment or the amount of the actual fine decided by the judge;
- b) The length of the social work crime that must be carried out, by including the number of hours per day and the period of completion of the social work crime; and
- c) Sanctions/punishments if the social work crime imposed is not carried out by the convict.

Based on these articles, social work / community service order is one of the main types of crime that also functions as an alternative to short-term imprisonment, which is a maximum of 6 (six) months, as well as a substitute for a fine that does not exceed category II, which according to the provisions of Article 79 of the Criminal Code Bill has a maximum fine of Rp. 10,000,000.00 (ten million rupiah). Criminal fines according to the article consist of 8 categories, namely categories I to VIII, with a maximum fine of Rp. 50,000,000,000.00- (fifty billion rupiah).

In the RKUHP, which until the time the author discussed it in this paper was still in the discussion stage in the DPR, it was explained that social work sanctions are regulated in Article 65, where social work crimes are part of the principal crime. In the draft Criminal Code based on the September version, social work crimes are included in the category of crimes that are specific to certain crimes specified in the law under Article 64 letter c.

Social Work Crime in the September 2019 version of the Draft Criminal Code, is further regulated in Article 85 which reads as follows:

"Social work crimes can be imposed on defendants who commit crimes that are threatened with imprisonment of less than 5 (five) years and the judge imposes a maximum prison sentence of 6 (six) months or a maximum fine of category II."

Category II Criminal Fines referred to in the September 2019 version of the Draft Criminal Code are regulated in Article 79 which reads as follows:

"The maximum penalty fine is determined based on: a. category I, Rp1,000,000.00 (one million rupiah); b. category II, Rp10,000,000.00 (ten million rupiah); c. category III, Rp50,000,000.00 (fifty million rupiah); d. category IV, Rp200,000,000.00 (two hundred million rupiah); e. category V, Rp500,000,000.00 (five hundred million rupiah); f. category VI, Rp2,000,000,000.00 (two billion rupiah); g. category VII, Rp5,000,000,000.00 (five billion rupiah); and h. category VIII, Rp50,000,000,000.00 (fifty billion rupiah)."

From these 2 (two) provisions, it can be seen that social work crimes only apply to crimes with threats under 5 (five) years and fines with categories that can still be categorized as light levels of Rp. 10,000,000 (ten million Rupiah). If the criminal fine determined by the judge in the court decision cannot be paid by the defendant within the specified period, confiscation can be carried out in accordance with the provisions of Article 81 paragraph 3.

If the provisions in Article 81 paragraph 3 cannot be fulfilled by the defendant, it can be replaced by undergoing social work in accordance with the existing provisions of Article 82 paragraph 1 which reads as follows:

"If the confiscation and auction of wealth or income as referred to in Article 81 paragraph (3) is insufficient or impossible to carry out, the unpaid fine is replaced by imprisonment, supervision, or social work with the provision that the fine does not exceed the category II fine."

In Article 82 paragraph 2 letter c, it is affirmed that the length of the social work crime as a substitute crime, which is a minimum of 8 (eight) hours and a maximum of 240 (two hundred forty hours) can be reduced if during the period of serving a substitute crime, the fine is paid.

In the articles contained in the draft Criminal Code, it is seen that social work is an alternative option to fines, if these fines cannot be implemented or paid by the defendant. Therefore, social work crime is not the main choice in punishment in Indonesia, but is an alternative option for criminal defendants whose threat is under 5 (five) years and which has been decided by the judge not more than 6 (six) months in prison and is contributive in nature and determined by the judge in a court decision.

The provision of social work crimes imposed by judges on defendants was also carried out with full humanity. The humanity intended in this Draft Criminal Code is to adjust the development of politics, law and national life in Indonesia. That the purpose of this Draft Criminal Code is to respect human rights. This is confirmed in the section Weighing point b which states that:

"The national criminal law must be adapted to legal politics, circumstances, and the development of life in society, nation, and state that aims to respect and uphold human rights, based on the One and Only God, just and civilized humanity, Indonesian unity, citizenship led by wisdom in consultation / representation, and social justice for all Indonesian people;"

Also in Article 85 paragraph 2 of the Draft Criminal Code which states that:

"In imposing a social work crime as referred to in paragraph (1), the judge must consider: a. the confession of the defendant to the Criminal Act committed; b. the work ability of the defendant; c. the consent of the defendant after being explained about the purpose and all matters related to social work crimes; d. the defendant's social history; e. protection of the work safety of the defendant; f. the defendant's religious and political beliefs; and g. the defendant's ability to pay the penalty."

With these two articles, it is quite clear that the draft Criminal Code and the concept of social work crime have a harmony of spirit in it. Both carry human rights as their spirit, but are also limited by clear provisions in other articles related to social work crimes in the draft Criminal Code. However, because social work crime is only limited to the concept outlined in the draft Criminal Code, there is no implementing regulation on social work crimes.

There are several conditions stipulated in the provisions of Article 86 paragraph (2) of the Draft Criminal Code that still need explanation. Some of these conditions are requirements regarding the recognition of the convicted person for the criminal act committed. This requirement is necessary because social work crimes must basically be carried out with the convict's own consent. If for a crime that has been charged, the convict does not want to give a confession even though the judge's decision has been handed down, it is difficult for social work to be applied because social work crimes cannot be carried out forcibly.

While relating to the legal working age requirements of convicts, it can be argued that this requirement is actually related to the prohibition of doing work for child labor. In this case, it is necessary to pay attention to various legal instruments both national and international.

Social work crime is an unpaid work because its function as a criminal "*work is penalty*", therefore in its implementation it must not contain commercial things. The criminal implementation of social work can be carried out, among others, in hospitals, nursing homes, orphanages, educational institutions, other social/public institutions, in accordance with the competence of the convict.

Another requirement that needs attention is related to the provisions in Article 86 Paragraph 3 that the criminal implementation of social work may not be commercialized. This provision actually relates to the essence of the social work crime itself, namely that social work crime must be a form of coaching, not to be commercialized. Social work crime itself in the perspective of criminal law in Indonesia should not be included in the commercial aspect, therefore the implementation of social work crime is purely to realize the theory of restorative justice, so that in the end social work crime is more of a coaching than just punishment without any deterrent effect for the convict.

Based on the concept of crime as restorative justice which aims to return conflict to affected parties such as victims and perpetrators, *restorative* justice also emphasizes human rights and the need to recognize the impact of social injustice in simple ways to restore them rather than simply giving the perpetrator formal or legal justice and the victim does not get any justice.²⁴

Social work crime contains elements of community protection because there have been real criminal actions from the government, in accordance with the cultural values of Indonesian *bangasa*, namely doing actions that have social value because they are carried out in a society that does not prioritize profit. During the course of carrying out the crime, prisoners will be fostered and guided in terms of forming their attitudes and behavior. If the convicted person commits another crime, the court is likely to impose imprisonment and/or fines and will not reimpose the social work crime.

C. CONCLUSION

Social work crime or also called community service is a manifestation of the theory of restorative justice. The application of social work crime can be a new breakthrough in the Indonesian criminal law system which still puts forward the theory of retaliation. The relationship between the concepts of social work crime from the discussion above is more related to the idea of crime as restorative justice than to the theory of retribution. The approach to legal subjects who commit criminal acts that makes the concept of social work crime in the Criminal Code Bill in Indonesia more accepted as a criminal manifestation as restorative justice, rather than directly to provide consequences for their actions. The provision of social work crimes must be directed to provide a deterrent effect and a sense of remorse to the convict so as not to repeat his actions. The imposition of criminal punishment for social work is more directed towards the psychological aspects of human beings. Not only limited to committing

social work crimes, but also a contribution to the state for the actions committed by the accused. In many countries in the world, such as Malaysia, the Netherlands, to Portugal, have implemented social work or service crimes with various arrangements. The arrangement aims to ensure that the social work criminal sanctions imposed on convicts are appropriate. In Indonesia, the criminal discourse on social work has only been outlined in the latest Draft Criminal Code.

The author formulates the conclusion into the following **points**:

- 1) Social work crime is expected to continue to be the embodiment of the theory of restorative justice, which aims not to avenge criminal acts, but to return and put back conflicts from existing cases to related parties, such as perpetrators and victims.
- 2) Social work crimes can also be used as part of the main crime, namely prison. Social work crimes can be given in verdicts where the convict must serve a prison sentence first before carrying out social work crimes.
- 3) Social work crime is also expected to be a means of coaching, which can provide new skills to convicts that can be used when returning to society after completing their sentence.
- 4) Indonesia in implementing the new Criminal Code can emulate the system and approach that has been carried out in countries that apply social work crimes in their criminal law systems.

Footnotes:

- 1) Barda NawawiArief, *Potpourri of Criminal Law Policy (Development of the Drafting of the New Criminal Code)* (Jakarta: Prenada Media Group, 2011).p. 29
- 2) Asiyah Jamilah and Hari Sutra Disemadi, "Social Work Crime: Prison Overcrowding Mitigation Policy," *IUS Journal of Law and Justice Studies* VIII, no. 1 (2020).p. 27
- 3) Jamilah and Disemadi.pp 28-38
- 4) Sani Siti Aisyah, "Development of Social Work Ideas as an Alternative Criminal Form in Indonesia," *Indonesian Journal of Criminology* 14, no. 1 (2018): 25.
- 5) Mudzakkir, "The Development of Victimology and Criminal Law," *Paper delivered at Indonesian Criminal Law and Criminology Training (MAHUPIKI), at University Club UGM Yogyakarta 23-27 February 2014,* 2014.
- 6) Gatot Sugiharto, "The Relevance of Social Work Criminal Determination Policy in the Penal System in Indonesia" 7, no. 1 (2016).p. 83
- 7) Leden Marpaung, *Principles of Theory of Criminal Law Practice*. (Jakarta: Sinar Grafika, 2014), p. 23.
- 8) Eva Achjani Zulfa, "Basic Concepts of Restorative Justice, delivered in the Criminal Law and Criminology Training Event "Principles of Criminal Law and Criminology and Current Development Yogyakarta, 23-27 February 2014.," *Cooperation between Faculty of Law UGM and Criminal Law and Criminology Society,* 2014.p. 14
- 9) Iskandar Wibawa, "Social Work Crime and Restitution as an Alternative to Prison in Indonesian Criminal Law Reform," *Journal of Legal Media* 24, no. 2 (2017).

- 10) Van Ness, "Institute for Community Studies and Advocacy (ELSAM), "Penalties, Crimes, and Actions in the 2005 Draft Criminal Code," *Position Paper Advocacy Bill Series #3*, 3, no. 3 (2005).p. 14
- 11) Sugiharto, "The Relevance of Social Work Criminal Determination Policy in the Indonesian Penal System."
- 12) Teguh Prasetyo, *Criminalization of Criminal Law* (Bandung: Nusamedia, 2010), p. 34.
- 13) Aisyah, "Development of the idea of social work as an alternative form of crime in Indonesia."
- 14) Wafdah Vivid, "Integrating Criminal Social Work in the National Legal System," *Justitia Law Journal* 1, No. 2 (2017), <https://doi.org/10.30651/justitia.v1i2.1148>.
- 15) Barda Nawawi Arief, *Potpourri of Criminal Law Policy (Development of the Drafting of the New Criminal Code)* (Bandung: Citra Aditya Bakti, 2014), p. 35.
- 16) Miko S. Ginting, Syahrial M. Wiryawan, and Erasmus A.T. Napitupulu, *Analysis & Projection: Implications of the Draft Criminal Code on Correctional Conditions and Policies* (Jakarta: Institute for Criminal Justice Reform, 2018).p. 47
- 17) Wibawa, "Social Work Crime and Restitution as Alternatives to Prison in Indonesian Criminal Law Reform."p. 109
- 18) *Ibid*
- 19) Arief, *Potpourri of Criminal Law Policy (Development of the Drafting of the New Criminal Code)*.
- 20) R. Soesilo, *The Criminal Code (KUHP) and its commentaries are complete article by article*. (Bandung: Politeia, 2009), p 32.
- 21) Muhammad Fajar Septiano, *Social Work as an Alternative to Short-Term Imprisonment* (Malang: Faculty of Law, Universitas Brawijaya, 2014), p. 20.
- 22) "Article 85 Paragraph (2) of the 2019 Criminal Code Bill" (2019).
- 23) Ginting, Wiryawan, and Napitupulu, *Analysis & Projection: Implications of the Draft Criminal Code on Correctional Conditions and Policies*.pp. 17-18
- 24) Ness, "Institute for Community Studies and Advocacy (ELSAM), "Penalties, Crimes, and Actions in the 2005 Draft Criminal Code."p. 14

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