MONETARY SANCTION IN INDONESIAN CRIMINAL LAW SYSTEM: CURRENTLY AND IN THE FUTURE

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ABSTRACT

The current Penal Code of Indonesia that is the heritage of Dutch administration is much influenced by the classical school which is characterized by the deterrence effect and placed imprisonment as the main sanction. The consequence is a high rate of imprisonment and over-capacity in the prison. Such a condition will result in problems such as high budgeting for running incarceration and difficulties in conducting rehabilitation in the prison. In current modern criminal law, there are ideas to find alternatives to imprisonment, especially with a monetary sanction. This article is discussing the criminal law policy on monetary punishment in the Indonesian Criminal Law System, both in current criminal law legislation and in the Bill of Penal Code. The study proves that imprisonment is the main character of criminal punishment while monetary sanction is still an alternative to imprisonment. To make the next Penal Code will help overcome the effect of incarceration and be useful for society, it should accommodate a new type of monetary sanctions and put them as the primary type of criminal punishment not only as an alternative to imprisonment.

Keywords: Criminal Law Policy, Criminal Punishment, Monetary Sanction, Bill of Penal Code of Indonesia.

INTRODUCTION

As an important part of criminal law, the sentences and sentencing system usually subject to changes that follow the dynamic of society since it's so closely related to human rights and dignity. Sentences and sentencing systems as an end part of the criminal justice system sometimes will impact the freedom, wealth, and the life of a human being. The development of legislation on punishment also followed and reflects the development of the nation as a whole and sometimes they are viewed as one indicator stage of the civilization of a nation (Charles & Packer, 1970)

The history of criminal punishment and sentencing systems cannot be separated from the influence of other disciplines such as philosophy, sociology, and criminology that has provided for the study of criminal law and introduces theories on criminal law and punishment. Those theories try to answer some delicate questions in criminal law and punishment, especially related to the objectives of criminal law or punishment and the reason for criminal punishment. The history of criminal punishment that has been begun since classical school tries to find reason and argument for criminal punishment and system. The Classical school of Criminology for example introduced that the infliction of punishment as a method of crime control so that its proponents were more focused on crime prevention rather than punishing crime (Thilakarathna, 2019).

In general, the rationale for criminal punishment can be classified into backward-looking; retributivism, and forward-looking: deterrence, rehabilitation, and incapacitation (Materni, 2013). If for example, Classical School proposed that, criminal punishment was aimed at revenge, other theories introduced that criminal punishment introduces the concepts of rehabilitation, that's to improve the criminal. In the next development, criminal law scholars try to find a more realistic and human for the objectives of criminal law and punishment. The current development even introduces more idealistic and progressive theories of criminal punishment such as theory social defense and abolitionism theory (Ruggiero, 2011).

The development of the concept and theory related to crime and punishment then has helped to shape criminal law both in civil law and common law systems especially in sentences and sentencing systems. Those theories have also become guidance in criminal law reform. Since the theory tries to find the best and use it always tries to criticize the existing legal norm to build a foundation for a new one. In the sentence and sentencing system, the theories to find the best sentence and sentencing system for both individual interest (the wrongdoer and the victim) and the public. If in the beginning, criminal punishment was mainly directed to physical punishment, such as the death penalty, incarceration, and many other types of punishment, the in the long run there is an idea to search for substitution or alternatives physical punishment especially alternative to incarceration. There were also ideas to provide sanction that cannot be classified as a criminal sanction, that so-called as treatment (Cherry, 2001).

There are some reasons, why there should be a policy to find an alternative to imprisonment. One of them is that the use of imprisonment is rising throughout the world, while there is little evidence that it's increasing use in improving public safety. The overcrowded will influenced the process of rehabilitation and will need a lot of budget for the cost of imprisonment (Zyl-Smit, 2007).

The latest development in the sentence and sentencing system is a punishment that is aimed at the property or assets of the offender. It is also called as monetary or financial punishment. This kind of punishment may be used as a substitution for jail (Friedman & Brittany, 2019). This idea of monetary sanction cannot be separated from the thinking of the utilitarianism. Bentham, a proponent of utilitarianism for example assumes that penal policies and punishments are necessary so they should be created and applied only in the interest of advancing a greater 'good' through the maximization of total pleasure within society (McHugh, 2008). Besides, the study of economics and the law and law and economics has also introduced the idea of an alternative to imprisonment based on economic consideration. Any legal policy, especially criminal punishment should be taken based on economic consideration. The studies on the economic aspect of law are based on the economic utility of law, such as the principle of rational maximize, principle efficiency, and cost and benefit analysis of law (Schlegel et al., 2000).

The idea to find an alternative to imprisonment in Indonesia is has been adopted in the current Penal Code of Indonesia which has been enforced since Dutch administration. Its application is still limited to fine. It is also limited to a small number of crimes especially petit crime or contravention. Besides in Penal Code, Indonesia also develops its criminal law outside the penal code, the so-called special criminal law. Since it is easier to draft and enact special criminal law, dozens of new laws have come into force since its independence. Those special criminal laws have adopted some new types of alternatives to imprisonment, mostly monetary sanction. Those laws for example Law of Economic Crime, Law of corruption, and banking law.

Even though Indonesia has had a Penal code and several special criminal laws, the aspiration to have a new penal code to replace, colonial criminal code, never goes out. Since in early independence, as part of legal reform, the government has established a special body to draft several laws to replace the old laws, including the Penal Code (Arief, 2011). The idea is that to have a criminal law codification that in line with that philosophy of the nation, the so-called Pancasila. However, the new code should also adopt new development in criminal law. It means that the new codification incorporated both internal and external aspects of thinking in criminal law especially in the sentence and sentencing system (Sutrisno, 2011). Since 1963 Indonesia has been able to draft a bill of the Indonesian Penal Code. However, due to some constraints, the bill has not yet been passed by the legislative body.

The latest development is still under the hearing in Indonesia People Representative Body (DPR). In response to the new development, the Bill has accommodated the new development of the sentence and sentencing system, especially about the monetary sanction in its formulation. However, the question is whether the new Penal Code of Indonesia has optimally accommodated monetary sanction formulation that will bring impact on minimizing the number

of the prisoner and bring advantages for the public in general. Since the hearing in process of legislation is the most strategic phase, the legislative body should receive many input and sources to be considered in the process of operationalization or functionalization and concretization of criminal law (Arief, 2008). The legislative body should adopt the idea from various stakeholders in society to create a responsive and progressive Penal Code (Ridwan, 2013). Therefore, this article is discussing the criminal law policy regarding the monetary sanction in the current criminal law of Indonesia and the Bill of Penal Code.

METHOD

The research method used in this research normative legal research. It means that this search collected secondary data, especially legislation related to monetary sanction. The sources collected by applying content analysis, and by analyzing the formulation of sentence and sentencing system in the both in current criminal law legislation and the Bill Penal Code of Indonesia. The analysis then discussed with the legal principle and theories in criminal law especially legal principles and theories related to the sentence and sentencing system. The research is also studying the synchronization of law both vertical and horizontal synchronization of law related to sentence and sentencing system.

ANALYSIS AND DISCUSSION

Criminal Law Policy in Criminal Law Reform

The legal policy is the most important factor in directing the legal development of a country. The goals of a nation are usually set forth by a nation through legal policy both through the state's constitution and subordinate laws. The legal policy is taken by state organs both through legal reform, by taking new dimensions, development, and aspiration of the people. The above-mentioned understanding is limited to the formation of law or lawmaking, especially by the legislative body. However, besides legal policy that talks about lawmaking, the science of legal policy that also talks about various circumstances and aspects related to the formal direction of law, such as the political, cultural, and social background of designed rules (M.D, 2010).

It is understood that legal policy is not only limited to law-making activity but also related to selecting and enforcing the law to achieving the purpose of a nation. Therefore, legal development should always adopt the aspiration of the people and the real condition of the people of a state. In turn, it will form a legal system, a national legal system in which Criminal law is part of the legal system. The term criminal law policy is also known as penal policy, criminal law policy. Sudarto said that a legal policy covers efforts to realize good legislations and to enforce good legislations (Arief, 2008).

In the meantime, Mulder stated that criminal law policy is the policy to decide:

- How far is existing criminal law should be reformed or renewed;
- What should be done to avoid a criminal act;
- How the investigation, prosecution, trial, and execution of punishment should be performed (Arief, 2008).

The current criminal law system of Indonesia can be traced back to the legal policy of the Dutch administration that occupied Indonesia for hundreds of years. The main, legal policy of the Dutch government was divided citizens into several groups, the so-called dualism policy. The Dutch constitution in Indonesia, so-called Indisische Staatreegeling (IS) divides citizens into three groups. They were the Europeans, the Far-Easterner, and the Indigenous. The European is Dutch and other European origins. The Far-Easterner is Chinese, Indian, and other

Asian origins, while the Indigenous is of Indonesian origin. For each group, it was enforced by different laws. For the European, Dutch laws were enforced, while the Far-Easterner, they must accept Dutch laws, except certain areas, such married law, they may apply their laws. For the indigenous, their laws were enforced. But in a certain area, such trade Dutch laws could be used. However, the Dutch government also introduced unified law such as criminal law. Through a Queen Decision of Criminal law of East India (Royal Decree of Criminal Law for the Dutch Indies (Stbl. 1915 No. 732) a penal code came into force for the first time on 1 January 1918. The penal code is still in force until today (Farid, 1995).

In its next journey, the Penal Code of Indonesia has experienced some small alterations and changes due to social, cultural, and political considerations. Since Indonesia is a very pluralistic country, many critical issues must be considered, to avoid disintegration. A small issue may trigger social and political escalation and, and result in social unrest. One important issue is that Indonesia is how to replace the colonial criminal law regime with a new one that absorbs Pancasila as state philosophy (Marbun, 2014).

The hope for having its own national Penal Code was formally appeased in the first national conference on legal development 963 in Jakarta (Moeljatno, 1985). One of the recommendations of the conference is an exclamation to draft a bill of national Penal Code as soon as possible. Through the establishment especially body, so-called the National Law Development Body, the government appointed a committee to draft the new Penal Code in 1963. One crucial step happened in 2009 when the government of Indonesia submitted the draft to the House of Representatives. In 2019, the government and house of representatives have reached an agreement to pass the bill that year. However, once again the Bill received the largest rejection from many segments of society, especially students, by doing a demonstration in front of the House of Representatives building. That event even has asked for several victims to die shot. Once again, the hope to have a new Penal Code seems still uncertain.

In the meantime, besides trying to pass a new penal code, the government has enacted much special criminal law, since it is easier to reach an agreement with the legislative. These sectoral laws are not necessarily criminal law, but administrative laws but then they strengthen with criminal sanction and procedure. Therefore, those laws have some specialty and deviation from general criminal law that exists in the penal code.

The specialty and deviation of special criminal laws also happen in the sentence and sentencing system. The differences can be found in the type of criminal punishment, and system punishment. Some new types of punishment are, for example, restitution, revocation of license, and put e-company under a trustee (Supanto, 2010). Since quit many special laws are related to economic crime, there are also some new types of criminal sanction that has an economic aspect, such as accumulation system and minimum sanction are introduced to a certain crime. Such kind of sanctions can be classified into economic or monetary sanctions.

Criminal Punishment in Indonesia Criminal Law System

The discussion on criminal punishment or sentencing systems is the most important aspect of criminal law. The substance criminal law consists of three main elements, criminal act, criminal liability, and criminal sanction, thus criminal punishment is the final process of Criminal Justice. Since traditionally, a criminal sanction can be understood as a reaction to a criminal act, by imposing the suffering to the wrongdoer (Meyer, 1968). Therefore, it must meet the seeker of justice.

The study concerning the criminal punishment always experiences development, starting from the Classical School with revenge theory up to the thinking of the Social Defense movement that wants to eliminate criminal sanction and replace it with a non-punitive sanction. However, a most scholar of criminal law seems still agree that criminal punishment is needed as one instrument in controlling society, peace, and order and providing justice, but with some improvement and modification. This idea is realistic, as Packer said that: “the criminal sanction

is indispensable: we cannot now and in the foreseeable future get along without it. Moreover, a criminal sanction is still currently one of available means to face the danger of crime: criminal sanction is the best available device we have for dealing with gross and immediate harms and the threat of harms" (Charles & Packer, 1970).

The need for reform in criminal punishment should be reached by reforming the substantive criminal law of each country. The reform should absorb people's aspirations and new development in every aspect of society. Friedmann said that "the law is just like a complex organism in which structure, substance, and culture interact with each other. To clarify the background and effect of each part of the system, the role of various elements of the system is needed (Roper & Friedman, 1976). That why the new Penal Code so urgent for Indonesia to reform its criminal law sentence and sentencing system.

Criminal Punishment System in Current Criminal Law of Indonesia

The provision on sentence and sentencing in the Indonesian Criminal Law System is currently reflected in the Penal Code of Indonesia and some Special Criminal Law. The current Penal Code of Indonesia is characterized and much influenced by Classical School. However, it has been also influenced by the idea of the Modern School especially in the idea of the double-track system. The system introduced a non-punitive sanction beside the punitive sanction. The non-punitive sanction, which is also called as treatment. Which is more rehabilitation oriented.

Criminal punishment in the Penal Code of Indonesia consists of a type of punishment, the size of punishment, and the implementation of punishment. The type of criminal punishment in the Penal Code is found in Article 10. It consists of primary punishment and additional punishment. The primary punishment consists of the death penalty, imprisonment, detention, and fine. While additional punishment consists of revocation of certain rights, seizure of special property, and promulgation of the judge's decision. From the existing type of punishment only fine and seizure of property that can be classified as monetary punishment.

The primary punishment adopts the so-called alternative principle which means that only one type of punishment can be rendered by the court. Since fine mostly placed as an alternative to incarceration, fine only has a small chance to be passed by the judges. Therefore, monetary sanction just will only be chosen if it is placed as an independent punishment or become the primary punishment. Such regulation has been adopted in minor crime or contravention. With such formulation, monetary sanction has only limited function in the application of sentence and sentencing system in the Penal Code. The effect is that it will cause that incarceration (prison and detention) will always dominate the sentence and sentencing in the Indonesian Criminal Law System, and it may result in a higher rate of overcapacity in prison.

Besides in Penal Code, criminal law is also found in special criminal law that is enacted to face the need to anticipate the development in society. After the independence of Indonesia, hundreds of special criminal laws have been enacted by Congress. Such development has also resulted in changes in the idea of criminal punishment, both types of punishment and size of punishment, or the purpose of punishment and implementation of punishment.

The first special criminal law that has brought some changes in sentence and sentencing is Emergency Law No, 7 of 1955 regarding the Prevention of Economic Crime. This law has also criminalized some acts that were only categorized as administrative violations. One important policy relates to the sentence and sentencing system in this law is that it has introduced some new principles, types, and approaches in viewing criminal sanction. Such new development exists in this law then has been followed by much special law enacted after this law. Some new developments relate to sentence and sentencing has been adopted in Emergency Law No. 7 of 1955. They are:

1. The adoption of the concept of a double-track system that introduces treatments (non-punitive sanction) besides criminal sanction. Some of the sanction can be classified as monetary sanctions such as placing a company under supervision or order to repair damages caused by action beside criminal sanctions.

2. The adoption of the cumulative principle which makes judges can impose both incarceration and fines at the same time.
3. The adoption of the new types of additional punishment, such as revocation of gain or profit by a company and order to close a company.
4. The adoption of the concept of corporate crime and corporate liability which makes it possible to give criminal sanctions to a company or other legal entities (Article 15).

This special criminal law has shifted legal policy in sentence and sentencing system in the Indonesian criminal law system. It can be concluded that special criminal laws have enhanced the role of monetary sanction in sentencing systems, especially in crimes related to economic activity. However, the problem is still the same. Most of the monetary sanction is still placed as an alternative to incarceration. Therefore, the implementation of monetary sanctions wholly depends on the prosecutor and the judge's consideration. However, such a new policy has brought new and big insights in understanding the essence of criminal punishment. Such a formulation of criminal sanction has become the model and followed in the legislation of the next special criminal laws.

Formulation of Monetary Sanction in the Bill of Penal Code

The last development of the legislating process of this penal code is that it has been heard by the House of Representatives. The process was canceled due to the protest by due to a reservation to some substances of the Code (ICJR, 2015). The people's expectation of the Bill of Penal Code is that it would accommodate the new condition in society.

The main idea that exists in the Bill is that how to post criminal law could be functioned in achieving the national goals to realize social prosperity. The criminal law and criminal sanction should be functioned as the ultimate cure or the last resort, not as a premium cure. The most important idea is that the Bill provides the purposes of criminal punishment. Article 52 of the Bill states that the goals of criminal sanction are to prevent criminal offenses, rehabilitate the convicted, to solve the conflict arising from the crime, and to build repentance and in any condition, criminal punishment may not degrade human dignity. The objectives of the punishment have adopted several theories of punishment, such as the theory of social defense, rehabilitation, conflict resolution, and the harmony or balance of society (Rifai, 2017). The purposes of criminal sanctions have accommodated the ideas of monetary sanctions.

The bill has also adopted new types of punishment, both in primary sanction and additional sanction. The primary sanction consists of imprisonment; confinement; surveillance; fine; and social work. Social service sanction can be categorized as a monetary sanction as long as it could be converted into monetary values (Eva Achjani Zulfa, 2006). A new type of additional sanction that can be classified as a monetary sanction is the revocation of certain rights and to be posted in some occupations, the publication of judge verdict; the restitution; revocation of certain license; and Fulfillment of adat or local custom obligation (Putra Jaya, 2016).

Another important development in terms of monetary sanction is that the Bill also introduces the so-called capitalization of criminal sanction. The policy opens possibilities for the judge to choose fine for almost all classification of crime. It means that fine become an alternative for jail punishment. The policy classifies all crimes into eight categories (from the petit crime to the most serious crime, with fine from Rp. 1 million up to Rp.50 billion).

Once again, even though most of the types of crimes may be punished with a fine based on its category, the position of a fine is still as an alternative to incarceration. As long the prosecutor and the judge still prefer to impose imprisonment, the monetary sanction wouldn't have an effective role in the sentencing system. However, reservation arises on the implication of monetary sanction in some most serious crimes such as corruption, narcotic/drug abuse, and money laundering (Sahetapy, 2017).

From the analysis of each type of crime, it can be concluded that the fine is still an alternative to imprisonment. It is not limited to a serious crime but also a minor crime. It is

suggested that a small crime, which is punishable for up to one year in jail, should be punished with fines as an independent sanction. However, in some types of crime, a fine has been placed as an independent sanction. There are still many crimes punishable less than six years in jail that are treated with imprisonment but fine as an alternative. For such crimes, it will be appropriate if the sanction is fine and imprisonment as an alternative

Another issue that should be considered in The Bill is the regulation on the accumulation system in primary sentences, especially the accumulation between imprisonment and fine. This system is only regulated in several crimes. It means that the judge will have limitations to apply a monetary sanction. The formulation of accumulation sentences for primary sanction should also place other types of crime that it is more possible to be applied by the judge in rendering the sanction. For crimes in which the victim is individual, the restitution will be applied as a primary sanction and not only as an alternative one. This policy will be able to minimize the use of imprisonment.

Since the confiscation of certain asset or compensation which is not optimally accommodated in the Bill, its implementation wholly depends on the judge. This will be a discouraging factor in the optimization of the implementation of monetary sanctions. With this current formulation, the Bill could not be optimally accommodated the philosophy of utilitarianism and the idea of a double-track system. Therefore, the criminal law policy in the Bill is not so different from the old one which places imprisonment as the main characteristic of criminal sanction, while monetary sanction still functions as an alternative.

CONCLUSION

The Indonesia criminal law system both in current criminal law legislation still place the monetary sanction as an alternative to imprisonment. Only to a limited number of offenses monetary sanction can be imposed as an independent type of punishment. The formulation also provides authority to prosecutor to ask the judges to impose imprisonment or fine. Such a formulation of monetary sanction would not support the idea to overcome over-capacity in Indonesian Prison. The idea of the categorization of fine as an alternative to imprisonment would also not encouraged the role of monetary sanction in the Bill of Penal Code, because it is still placed monetary sanction as an alternative to imprisonment. Therefore, to function monetary sanction as mechanism to decrease the over capacity of prison, firstly, monetary sanction should be placed as main and independent type of punishment. So that the prosecutor must seek fine and other kind of monetary sanctions in its prosecution. Secondly there should be more offenses that can be punished with monetary sanction. Lastly, the prosecutors and judges should prioritize monetary sanction in their prosecution and judgment.

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