

Anticipation of Probation Implementation as the Type of Sentence in the Draft of Indonesian Penal Code

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Abstract— Suspended sentence in Indonesian Penal Code is the implementation of imprisonment and one of the alternative for judges when they do not impose imprisonment. In practice, suspended sentence has rarely been handed down because in the community's view it seems similar to acquittal, so that it does not have a deterrent effect. Suspended sentence supervisors are executor prosecutors and, if at any time they violate the provisions of both general and special conditions, the convicted person can be detained and put again in prison. So far suspended sentence implementation has not been effective and not well-structured. Minimum implementation of suspended sentence is a separate problem, particularly in the Draft of Penal Code used as a type of criminal sanctions called probation (supervision). The inclusion of probation in the Draft of Penal Code requires a good strategy and anticipation in the future implementation. Efforts can be made in the form of integrating the implementation system in an integrated and patterned manner, and it is possible to be combined with electronic monitoring that can be put on convicted persons. Electronic monitoring has been implemented in several countries as a tool to monitor convicted persons, for example in the form of bracelets. Thus, supervision is easier and more effective, so that it is expected to achieve the goal of punishment. The aim of this study was to anticipate the implementation of criminal offenses by formulating probation in the Draft of Penal Code as a new type of crime. The research method used was the study of documents / literature. The data obtained were analyzed descriptively and perspectively.

Keywords— *Anticipation, Implementation of probation, the Draft of Indonesian Penal Code*

I. INTRODUCTION

National criminal law reform which has been started since 1963 was not intended at all to produce a "patchwork" Penal Code (using evolutionary, global or a compromise approaches between the two), but it is expected that the formation of a national Penal Code with an Indonesian personality that highly respects religious and customary value, is modern and also in accordance with international values, standards, principles, and trends recognized by civilized nations in the world. [1]. It is commonly known that the Penal Code in force today is a Dutch heritage and not in accordance with the values of the Indonesian people as an independent country, particularly related to imprisonment and suspended sentence.

At present, various criticisms on the type of imprisonment considered inhumane and the resulting impacts demand the presence of an alternative other than imprisonment. In the Penal Code, suspended sentence is an alternative to imprisonment and confinement when the judge, in certain circumstances and conditions, does not impose imprisonment.

The implementation of imprisonment still has many shortcomings that must be corrected, so that the punishment imposed on the perpetrators of crime does not have a negative effect on the offenders and their families. [2] One of the avoidance of the negative impacts is suspended sentence because it is more lenient or at least alleviates the convicts.

The term of suspended sentence in the Penal Code is similar to probation in the Draft of the Penal Code.

Suspended sentence is regulated from Article 14 point a to Article 14 point f of the Penal Code. Article 14 point a paragraph (1) of the Penal Code explains that, when a judge gives a maximum sentence of one year imprisonment or confinement, not including a substitute confinement, he, in his decision, may also order that the sentence should not be applied [3] and replaced with suspended sentence. In judicial practices so far, suspended sentences are quite rare and even if imposed only for minor categories of crime and the implementation has not been running optimally.

The implementation of suspended sentence has not been well-structured so far. For example, the problem of supervision over the implementation of suspended sentence tends to be procedural; an agreement between a prosecutor and the convict seems to have been resolved, even though there needs to be ascertained whether the convicted person has complied with the conditions stipulated in carrying out his criminal offense. Supervision is needed so that the convicted person feels a criminal sanction that must be served by complying with the conditions that have been decided by a judge. When it is not applied, the criminal objective will not be achieved and not have a significant impact on the convicted person.

Considering that matter, probation now appears in the Draft of the Penal Code, such as the other types of criminal sanctions. Referring to the implementation which is not

optimal and worried to have the same obstacles as suspended sentence, it must be anticipated. So far, the barriers to suspended sentence are also related to the perception of society in which people who are sentenced to suspended sentence seemed to be released from punishment, which is not the case. In addition, the formulation of probation in the Draft of the Penal Code certainly requires capable and trained organizations and human resources to oversee its implementation. Then, regarding the implementation of suspended sentence in force so far has not been going well, so in the future it is necessary to anticipate the implementation of probation as a new type of criminal sentence in the Draft of the Penal Code.

Based on the background stated above, the focuses of the study in this study were limited to two problems, as follows:

1. How is the conduct of probation in Indonesian criminal law currently in relation with sentencing objectives?
2. How to anticipate the implementation of probation in the Indonesian Draft of the Penal Code in the future?

II. RESEARCH METHOD

The method used in this study was normative legal research. In normative legal research, a statutory and conceptual approach is used. Normative legal research is a legal research that places law as a building of norm system. The norm system is about the principles, norms, rules of laws and regulations, court decisions, agreements, and doctrines (teachings). [4] Because this research was a normative legal research, the type of data used was secondary data. The data studied were in the form of primary legal materials, such as the Law (Penal Code), jurisprudence, treaties and so on.

Then, the secondary legal material were in the form of documents or draft of legislation, for example the Draft of the Penal Code, the Draft of Government Regulation, the Draft of Ministerial Regulation, and so on. The tertiary legal materials were in the form of Indonesian encyclopedias, legal dictionaries, Indonesian Dictionary (KBBI), magazines, and so on.

III. RESULT AND DISCUSSION

A. THE IMPLEMENTATION OF SUSPENDED SENTENCE IN INDONESIAN CRIMINAL LAW AT PRESENT IN RELATION WITH SENTENCING OBJECTIVES

The issue of sentencing, especially in Indonesia, is rarely found in the discussion in Indonesian language literature as if it were considered to be a self-perpetuating process, namely a judge's duty in carrying out part of his overall duties. [5] Sentencing is very important in criminal justice system because it can determine rationally and at the same time as a guide to determine criminal sanctions and their implementations. Sentencing issue cannot be separated from criminal system because it is related to other sub-systems.

Sentencing system is identical to criminal law enforcement system which consists of the sub system of Criminal Law of Substantive Material, the sub-system of Formal Criminal Law, and the sub-system of Penal Code Implementation. The three sub-systems are a unified criminal

system because it is impossible for criminal law to be operationally / enforced concretely only with one of the sub-systems. [6] In particular, the legal system for implementing sentences, especially suspended sentence, is an interesting thing.

Suspended sentence or what Indonesian practitioners often call as a trial sentence is derived from the words *voorwaardelijk veroordeling*, which actually is better if the words are translated as suspended sentence. [7] In other words, it is also called the sentence implementation (strafmodus) of the type of imprisonment sanctions or confinement.

People are sentenced, but the sentence does not need to be carried out, except when it turns out that the convicted person before the trial period commits a criminal action or violates the agreement held by the judge to him. Therefore, the decision to impose the sentence remains, but the execution of the sentence is not carried out. [8] Thus, its nature is that sentence execution is deferred, while the convicted person correct himself by doing good until a specified legal period expires.

The purpose of this type of sentence is to provide an opportunity for the convicted person so that in the trial period he will improve itself by not committing a criminal event or not violating the agreement given to him with an award when successful. The law imposed on him will not be carried out for ever. [8] In this way, the convicts will be avoided in prison or detention institutions.

In the history of the growth of criminal sanctions carried out conditionally at the beginning of the past century (the nineteenth century), the United Kingdom and the United States of America, carried out a system of criminal proceedings. In the first phase, the defendant was only found guilty and also set a probation period. If the convicted person did not correct his mistakes in this probation period by violating the conditions or even committing violations again, in the second phase he received a criminal decision to run. [9] This means that during the probation it is highly dependent on the convict who must improve himself and not violate the conditions set in the judge's decision. If that is not conducted, it will be subject to imprisonment or confinement.

Suspended sentence and alternative forms of freedom deprivation sentence which are almost the same as probation have the following advantages: [10]

1. First, suspended sentence will provide an opportunity for the convicted person to improve himself in the community. The welfare of the convicted in this matter is considered as more important than the risk that may be suffered by the community if the convict is released in the community;
2. The second advantage is that suspended sentence allows the convict to continue the daily habits of his life as a human being, which is in accordance with the existing values in society;
3. The third benefit is that suspended sentence will prevent the occurrence of stigma caused by freedom deprivation sentence.

As stated above, when the convicted person fulfills the conditions decided by the judge, the convicted person benefits by not carrying out imprisonment. Required conditions are general and special conditions. The general condition for not

committing any crime and the special conditions are usually determined by the judge who decides the case. However, in its implementation, it is sometimes not effective so that the impact is not very good on the convict and community's views.

The supervision of suspended sentence is carried out by the executor, namely the prosecutor. In practice, the supervision by the prosecutor is not working properly. It seems that the supervision is only a formality. In the organization of the Public Prosecutors' Office, there is no special section that deals with this crucial suspended sentence.[11]

After an agreement between the convicted and the prosecutor, the problem seems to be resolved. In other hand, the prosecutor may order an institution with legal entity or the leader of a shelter or certain officials to provide assistance and support to the convicted person in meeting special conditions.[11]

According to Article 14 of the Penal Code, suspended sentence is regulated by law. The law is the State Gazette of 1926 Number 251 in conjunction with that of number 486, which has been effective since January 1927, amended by the State Gazette of 1934 Number 172. Therefore, since 1927 this suspended sentence institution was held in Indonesia, whereas in the Netherlands it has been held since 1915. The hope of this institution in Indonesia faces major obstacles because as stated by Schepper in his *prea advies* (T.1929 Number 129 P.310), the situation in the Netherlands is different because there has already been an established reclassification institution there, but in Indonesia it has not been existed yet. [11] These institutions specifically deal with the community in assisting people who have just been out from prison or to oversee suspended sentence. Based on that, in the implementation of suspended sentence, this institution becomes important so that the convicted person truly becomes a good community and is ready to be returned in the midst of the community.

Reclassification organization and supervision management for suspended sentence in Indonesia still needs to be improved. Moreover, if later in the national Penal Code, the suspended sentence is changed to a probation, the organization and knowledge of the officers assigned to conduct the supervision need to be neatly arranged and adequate. The rules must not take effect far faster than the ability of the persons implementing it so that the rules will only be dead letters on a paper. [11] In addition, there is an assumption in the community that this suspended sentence is the same as an acquittal so that the convicted person is outside the institution.

According to Andi Hamzah, in Indonesia where suspended sentence is rarely imposed, it may not account for up to 1% of minor crimes. If later the probation has been applied to replace this suspended sentence, it must consider:[11]

1. Eliminating all the existing weaknesses in suspended sentence;
2. Only minor crimes which are subject to probation;
3. Supervision must be effective and intensive;
4. Not endangering public interest.

Based on the matters above, every criminal sanction imposed has a purpose. For example, imprisonment aims to

deprivation of freedom and suspended sentence is just the opposite, which is to avoid the sentence of deprivation of freedom. However, in practice, sometimes these sentence objectives are not achieved, so effective supervision is needed.

In relation with the purpose of sentencing, Barda Nawawi Arief [12] states that the purpose of sentencing essentially contains two main aspects, as follows:

1. The aspect of community protection against criminal acts. These first basic aspects include: a. Prevention of crime; b. Protection (security) of the community; c. Restoration of community balance. Conflict aplosing and making a sense of peace (vrede-making).
2. Protection / fostering aspects to individual perpetrators of criminal acts (aspects of criminal individualization). This second main aspect can include the objectives of; a. Rehabilitation, reeducation, re-socialization of the convict not to commit acts that damage / harm oneself or others/ society; in order to have the moral of Pancasila. b. Freeing guilt; c. Protecting the offender from the imposition of arbitrary or inhumane sanctions or reprisals (sentences are not intended to narrate and demean human dignity).

Considering the above objectives, the imposition of suspended sentence aims at fostering convicted persons by re-socializing and educating people so that they are virtuous and not doing harmful actions. In short, it aims to protect the interests of individual perpetrators of crime by providing opportunities to improve themselves outside the institution (non-custodial).

The purpose of suspended sentence is to improve or change the perpetrators of criminal acts so that they become better and more useful in the community. The targets achieved in criminal objectives must pay attention to the interests of the community / victims and individual interests. If the suspended sentence supervision is not optimal, it is impossible to achieve that goal. The act of someone who has committed a crime must be punished accordingly to the perpetrators, with the hope that the imposition of criminal sanctions is expected to make the people afraid of committing criminal acts.

B. ANTICIPATION OF THE PROBATION IMPLEMENTATION IN THE DRAFT OF INDONESIA PENAL CODE IN THE FUTURE

Anticipation is a preparation that must be performed against future shadow or forecast. The image here is related to the implementation of probation if the Draft of the Penal Code is passed into law. Looking back during the enactment of the Penal Code at present, the implementation of suspended sentence has not run well with various obstacles as explained in the first problem. Anticipation is needed because the issue of criminal conduct lacks attention and is considered not so important. The same thing was stated by JE Sahetapy; it seems that this problem is so easy that it is adequate to be given a review in the form of just a few sentences. [13] In other hand, the implementation of sentencing is so important to carry out criminal sanctions to be effective and in accordance with their objectives. the rules made must not be only norms which are not implemented.

The issue of sentencing implementation is hardly addressed. Even if it will be discussed, where should it be started? And if it is also agreed upon, whether the discussion of sentencing implementation must be independent from sentence objectives, which are closely related to the meaning, form, and nature of the sentence. [13] When viewed from a criminal system, the purpose, form and nature of a sentence should be a unitary system, interrelated and should not be separated because probation is a type of sentence that has the goal which is to avoid the sentence with the nature of deprivation of freedom. The issue of probation should be discussed thoroughly, even to the institution that will oversee it. It is noteworthy that the emergence of probation into a type of sentence is a new spirit to avoid imprisonment with a high cost.

The use of imprisonment has major economic and social equity costs. [14] In addition, imprisonment also requires relatively large and trained human resources in order to be able to educate prisoners to be good human beings and noble deeds. It is known that imprisonment has a great effect on the convict, his family, and the state. Thus, it is reasonable to formulate probation in the Draft of the Criminal Code as a new type of sentence and provide alternative sentence choices for judges in a trial.

According to Michelle S. Phelps, probation is a cost-effective alternative to prisons. [15] In the current Penal Code, there is an alternative for the implementation of imprisonment or confinement called suspended sentence. Meanwhile, to ease the implementation of sentencing after serving a prison sentence, it is conditional acquittance/ parole. In the Draft of the Penal Code, suspended sentence or probation has become a separate sentencing type. The order of types of sentences in the Draft of the Penal Code of 2018 regulated in Article 70 point a consist of; imprisonment, cover sentence, probation, fines and social work.

Based on this matter, probation is no longer the implementation of imprisonment. Probation has become a separate type of sentence from other principal sentence in the Draft of the Penal Code. The definition of probation is explained in the Draft of the Penal Code of 2015 formulated in Article 79. It is explained that the defendant who commits an offense threatened with imprisonment for a maximum of 7 (seven) years can be subject to probation. Then, in the explanation, probation is associated with the threat of imprisonment. Probation is an alternative form of imprisonment and is not intended to be a serious sentence. Therefore, what can be controlled by probation is for the criminal acts which are in the light category.

Furthermore, the development of probation is regulated in Article 85 of the Draft of the Penal Code of 2018 with a few changes with the provision that those who can be imposed by probation with the threat of imprisonment for a maximum of five years (initially in the Draft of the Penal Code of 2015, the threat of punishment is 7 years). Probation is an implementation of sentence individualization with the justice or interests for criminal offenders very important to be considered in addition to the interests of the community.

It is understood that fairness to convicted offenders should be important and not just a marginal concern. [16] Sentence shifting that was initially directed at criminal acts

turn into people (sentence individualization) so that the interests of the convicted are considered. Probation is a form of sentence individualization, and its implementation must follow the development of science and technology. It is a form of supervision or control to the convict who is serving his sentence with an electronic device or electronic monitoring. This electronic monitoring has even been used by other countries to monitor detainees.

Electronic Monitoring (or tagging) was first developed in the United States from the early 1980s and in 1995 it was piloted in three regions in England and Wales. With the introduction of the Crime and Disorder Act 1998 it was further extended as an alternative to custody there on a much wider scale (Smith 2001). [17] Then, electronic monitoring has been carried out for quite a long time in other countries and it is not impossible that someday Indonesian law enforcement will use it in anticipation of the implementation of probation in the Draft of the Penal Code. The electronic monitoring model can be mentioned in the judge's decision or regulated in the implementation of the sentence implementation and of course adapted to the needs of the convicted person.

It should be noted that carrying out probation still uses human labor, but electronic supervision is only as a tool in carrying out the task. The use of electronic monitoring must consider various things, for example, it must be adjusted to the interests and comfort of the convicted person including the ability of these tools, such as distance and frequency. The shape can be a wristband, attached to the feet and so on.

With increasing frequency, the application of certain alternatives to imprisonment is paired with the use of various forms of electronic monitoring of the sentenced person's behaviour. Clearly, actual implementation of electronic monitoring as a system of monitoring the application of alternatives to imprisonment is very different from country to country. In some (UK, France, Spain), it is a consolidated way of monitoring people in home detention or other alternatives to prison. [18] Therefore, if this is implemented in Indonesia, it will save human resources to supervise the implementation of probation, which of course must be adjusted to regulations and human rights.

We could use for example, in particular for women, some types of electronic tags used in the UK. Another example is electronic monitoring where an alarm sounds when the convict exits the monitoring area. [18] When the alarm rings, the supervisor will take action because it is considered to have violated the provisions agreed upon earlier. In addition to supervising probation, electronic monitoring can also be applied to the suspects who are not detained as what has been done by other countries.

One of the most interesting cases is France, where electronically monitored house arrest has become an autonomous type of pre-trial measure and not only a form of judicial supervision since November 2009. The measure involves the obligation to wear an electronic bracelet and the prohibition of leaving home (or a specified residence) except at times or for reasons specified by the judge.... Since the 2009 law, the bracelet may be equipped with a portable receiver (GPS) in some cases which can locate the person at any time. [18]

In Greece, electronic monitoring (as a special case of house arrest) was introduced in 2013. It may be applied only upon request of the accused and provided if he has a fixed place of residence. [18] Then, electronic monitoring has been carried out to monitor house arrest, detention prior to trial or for monitoring probation.

Based on that matter, if electronic monitoring applies in Indonesia, it must also be accompanied by other actions, such as revoking the passport of the convicted one so as not to flee abroad or may not be in a place where there is no signal to avoid surveillance (for example, underground, in water and so on). In addition, the use of electronic monitoring certainly cannot be applied for all criminal convicts of probation, but it must be chosen selectively and very carefully.

IV. CONCLUSION

As stated above, the following conclusions can be drawn. First, the implementation of probation regulated by the Penal Code has not been going well. The institutions that supervise are not optimal, and the public views that probation is considered to release the convicted person. The impact of probation objectives to avoid the sentence of deprivation of freedom has not been achieved. Second, to avoid the same problem after the enactment of probation in the Draft of the Penal Code must be anticipated. The supervision must be well-patterned and systemized so that the sentence goal is achieved. To help oversight in the implementation of this sentence is possible using electronic monitoring tools as used by other countries. The use of electronic monitoring must be used carefully and adjusted to the circumstances of the convicted person.

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