

December 9th 2016



The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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UNISSULA PRESS

ISBN. 978-602-1145-41-8

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SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA

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ABSTRACT

Corruption in Indonesia had caused big destruction for existence of a state. Not only cause state finance detriment but also corruption has taken social and economical right of people in common. This kind of crime is very difficult to be eradicated because sometimes it is done systematically and involve authorized people. We can feel how big and extraordinary of corruption impact. It is worthy if corruption is categorized as extraordinary crime that must be eradicated extraordinarily in which one of those is by social working. Problem identification of this problem are 1) how is social working model for corruptor? and 2) how social work penalty as a way in eradicating corruption in Indonesia? Method of approach used in this research is juridical normative approach with secondary data as its source. Based on analysis, it can be concluded that it is necessary to implement heavy punishment for corruptor by social working because it can create a deterrence effect. Social working penalty also can be a solution is corruption eradication in Indonesia. Social working penalty is do a good deed to people and create social working.

Key words : social working penalty, eradication, corruption

A. INTRODUCTION

Corruption does not merely harm the nation and the state, but also damages the mentality of the people, both its government officials and society. The corruption is no longer prevails, but has entrenched into all layers of the nation's elite, from central to remote areas. This condition vividly showed how bad the social impact humanity arising from this incredible-categorized crime is. This is because corruption is not only detrimental to the public in general or a form of treason of people mandate, but also a moral crime that could threaten the future generation, disrupt the stability, credibility and image of the nation in the international community.

The categorization of corruption as an extraordinary crime has been also stated in various international conventions. The Convention Against Transnational Organized Crime in 2000 (United Nations Convention Against Transnational Organized Crime) categorized corruption as a serious crime, transnational and declared the war against corruption as a transnational organized crime. The same thing was also found in the

Anti-Corruption Convention held in 2003 (United Nations Convention Against Corruption) stating that corruption is a “transnational crime”. In the Convention of Anti-Corruption in 2003, corruption is not only a national dimension, but also internationally includes a wide coverage; therefore, the serious action should be taken considering that the characteristic of corruption crime is a serious crime.

The existence of the Anti-Corruption Convention in 2003 was reformatory and reconstructive effort of legal institution of anti-corruption to empower, assist, support the state institutions as the victims of corruption acts and national law institution of anti-corruption in preventing and eradicating the corruption. Similarly, in the International Covenant on Civil and Political Rights, it suggested that a specific and serious crime such as corruption as “the most serious crime.”

It should be recognized that the existence of government agencies concerning the corruption cases have not functioned effectively and efficiently in eradicating corruption. This is compounded by indications of the involvement of law enforcement officers in the handling of corruption cases¹. The eradication of corruption uses the instrument of criminal law, does not only add the parties charged with corruption laws, but also those who are charged with corruption laws are also given the maximum sanction². The maximum criminal sanctions are not only intended in the form of imposition of aggravated punishment duration but also can provide variety kinds of other criminal sanctions, such as community service sanction.

Prof. Achmad Ali has also reminded us that punishment is impossible to eliminate evil from this earth, but at least the punishment can be the manifestation of the sense of justice of the victims. The punishment including the idea of adding a community service for the corruptor in Corruption Laws is intended to realize the objectives of the law, namely peace, justice, expediency and legal certainty³. Therefore, the implementation of the idea of adding community service order is a possible in the law enforcement system of corruption in Indonesia as part of the criminal justice system, and it is believed it will give a tremendous effect to the prevention of corruption crimes.

¹ Mahrus Ali, 2016, *Hukum Pidana Korupsi*, UII Press, Yogyakarta Press, p. 199

² Yudi Kristiana, 2016, *Pemberantasan Tindak Pidana Korupsi Perspektif Hukum Progresif*, Thafa Media, Yogyakarta, p. 59

³ Bachtiar, Urgensi Penerapan Ide Pidana Kerja Sosial Bagi Koruptor, <https://tiar73.wordpress.com/2015/05/15/urgensi-penerapan-ide-pidana-kerja-sosial-bagi-koruptor/>, (accessed on December 1st, 2016, at 08:42 p.m.)

B. DISCUSSION

1. The Reasons that Can be Proposed of the Necessity of Community Service Order for Corruptors

a. The idea of balance

First of all, it is worth to propose that the concept of the Criminal Code (Law System of Material Criminal) is motivated by a variety of basic ideas that can be broadly called “the idea of balance”. This idea of balance includes⁴:

- 1) Mono-dualistic balance between “public interest” and “individual interest”
- 2) The balance between protection/interest of offender (criminal individualization idea) and victim of crime, balance between “objective” (action/outward) and “subjective” (person/inner) aspect/factor.
- 3) The balance between the criteria of “formal” and “material”
- 4) The balance between “legal certainty”, “flexibility/elasticity”, and “justice”.
- 5) The balance of national and global/international/universal values.

Starting from the idea of balance of mono-dualistic, the objectives of punishment according to the concept are directed at two principal objectives: the people protection and individual protection/coaching⁵. The application of this idea also departs from the fact that the approach to the punishment concept of imprisonment for corruption offenders has failed to give the maximum deterrent effect. Although, the Laws of Corruption have given the threat of criminal sanctions, but instead of being decreased, it is increasing now. The logic of positive law seems to be failed to explain the phenomenon of corruption, where people have lost a sense of guilt, shame, and fear to commit the crime of corruption.

This indicates that the punitive approach of punishment should be balanced by the social sanctions that actually touches on a tremendous shame for the offenders and also provides lessons for people not to have corruptive mentality. The punitive approach with expropriation should be parallel with the concept of social sanction such as community service order. This community service order is believed to be a way out of the worsened corruption situation. This idea will not necessarily be interpreted as a form of “revenge”, it is “fostering” the corruption

⁴ Barda Nawawi Arief, 2015, *Pidana Mati Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, Pustaka Magister, Semarang, p. 25-26

⁵ *Ibid*, p. 26

offenders and other people in order not to commit the corruptive acts while restoring the balance in society due to corruptive deeds which injures the sense of justice.

b. The Community Service Order as seen from the point of views of Pancasila and Human Rights

If it is seen as a whole, Pancasila contains balanced values among its pillars. However, when it is viewed in partial (merely focus on each pillar), there are two contrary arguments; one side says that the community service order is in contradiction with Pancasila, meanwhile on the other side it is not. Therefore, both arguments either accepting or rejecting the idea of community service order are based on the Pancasila.

It can be also seen in the study conducted by the Faculty of Law of UNDIP in cooperation with the Attorney General in 1981/1982. The research reported that there is a tendency among those who are pros and cons to make Pancasila as “justification”⁶. In the same boat, the community service order will inevitably raise the pros and cons among the society.

Admittedly, the pros and cons would be widely open, especially with regard to the potential reduction of the human rights issues. However, the implementation of the idea of community service order for corruption offenders is not related to the goal of reducing human rights criminals as an attempt of “revenge” for acts committed. It is merely a moral conviction that the crimes they have morally committed are atrociously heavy crime, arising restless, and wounding the society justice morality. The addition of community service order for the corruptor is precisely to maintain a balance in society due to the impacts arising from the corruption.

The community service order can be also seen from the human resource point of view. It is similar to “the right of personal liberty (Article 4 of the Human Rights Act) or the right of liberty (in the preamble of the Constitution 1945), which also cannot be diametrically confronted with the community service order. Since when they are confronted diametrically, it means that the imprisonment is also in contradiction to the Constitution 1945 and the Human

⁶ Research Report “Ancaman Hukuman Mati Dalam Sistem Pemidanaan”, in Cooperation between General Attorney and Faculty of Law of UNDIP, in Barda Nawawi Arief, 2015, *Pidana Mati Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, Pustaka Magister, Semarang, p. 33

Rights Act because the imprisonment is essentially the deprivation of liberty/freedom⁷.

Our Constitution basically guarantees the constitutional rights of every citizen of recognition, security protection and equal legal certainty and treatment before the law (Article 28D paragraph (1) of the Constitution 1945), as well as the right to freedom from torture or treatment degrading degree human dignity (Article 28G (2) of the 1945 Constitution), and the right to be free from discriminatory treatment on any basis and the right to protection against such discriminatory treatment (Article 28 paragraph (2) of the Constitution 1945).

Rights essentially contain two faces, namely rights in the sense of “human rights” and rights in the sense of “community rights”⁸. However, these constitutional rights must be linked to conditions in which everyone is obliged to respect the others’ human rights in the orderly life of society, nation and state (Article 28J paragraph (1) of the Constitution 1945) and everyone in running the rights and freedoms shall be subject to restrictions established by law with the sole purpose to ensure the recognition and respect for the rights of freedom of others (Article 28J paragraph (2) of the Constitution 1945).

Referring to the provisions of the constitution and associated with the implementation of the idea of community service order for the corruptor, the Article 28J can be use as the theoretical foundation of justification. Article 28J is an exception in the rights and freedoms of a person. In other words, Article 28J is *lex specialist* of the provisions of the aforementioned Articles. Therefore, the argument proposing the application of the idea of community service order can and/or potentially reduce a person's rights is not appropriate, because if that's the case, all types of punishment is essentially a form of human rights violation, but it becomes valid because permitted by applicable law.

c. Seen from the penal policy point of view

According to Barda Nawawi Arief, penal policy can also be referred to as “penal politic”. In foreign literature, the term “penal politic” is often known by various terms, such as "penal policy", "criminal law policy" or "strafrechtspolitik". Furthermore, Barda Nawawi Arief said that the definition of

⁷ *Ibid*, pp. 33-34

⁸ Barda Nawawi Arief, 2014, *Bunga Rampai Kebijakan hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*, Kencana Prenadamedia Group, Jakarta, p. 57

penal policy or penal politic can be seen from the politics of law and politics of crime⁹.

Crimes are included into criminal policy areas. This criminal policy is also not separated from the broader policy i.e. social policy which consists of social welfare policy and social defense policy¹⁰. The use and choice of criminal sanctions (including community service order) in the penal policy, it is basically a part of the criminal policy and social policy i.e. policies to achieve prosperity and efforts or policies to prevent and control the public protection.

d. Seen from the point of view of the law reformation effort in Indonesia

Law reform efforts in Indonesia which has been started since the inception of the Constitution 1945 cannot be separated from the foundation and at the same national goals to be achieved as was formulated in Constitution 1945 preamble¹¹. The national goals set out in the Fourth Paragraph of Constitution 1945 preamble opening affirms that:

Pursuant to which, in order to form a Government of the State of Indonesia that shall **protect** the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general **prosperity**, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice, Indonesia's National Independence shall be laid down in a Constitution of the State of Indonesia, which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in the One and Only God, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, so as to realize social justice for all the people of Indonesia.

From the formulation of Constitution 1945 preamble, it has two main national goals, namely:

1. Protect the whole people of Indonesia
2. And in order to advance general **prosperity**

⁹ *Ibid*, p. 26

¹⁰ *Ibid*, p. 77

¹¹ Barda Nawawi Arief, 2015, *Tujuan dan Pedoman Pemidanaan (Perspektif Pembaharuan dan Perbandingan Hukum Pidana)*, Pustaka Magister, Semarang, hal. 34

Thus, there are two keywords of the national goals namely “**social defense**” and “**social welfare.**”The national goal is a general policy which forms the basis and the purpose of the politics of law in Indonesia. This is exactly what should be the basis and purpose of any legal reform, including reform of criminal law, in this case the goal the eradication of corruption in Indonesia.

2. The Community Service Order as the Solution in Efforts to Fight Corruption in Indonesia.

The community service order is a new kind of criminal punishment in Indonesia which has been implemented and applied in different countries. Based on both theoretical and practical study of the community service order implemented in European countries, it is an alternative to criminal deprivation of liberty. Etymologically the term “criminal social work” is derived from the two phrases “criminal” and “social work.” Social work or community service order is a form of criminal punishment where the criminal convicts undertaken by outside agencies with social work specified¹². In European countries, this social work is well-known as community service order.

In simple terms “community service order” can be interpreted as a punishment in the form of social work. The community service order is different from the kind of criminal deprivation of liberty, in this case the sentence is undertaken outside of the prison by conducting the determined social works. Theoretically, the community service order contains several dimensions, namely¹³ :

- a. The trends of implementation of community service order as the alternative short-term punishment of freedom in European Countries either as a criminal standalone or as a conditional criminal punishment is to make punishment of community service as an alternative to short-term punishment of freedom, meaning that the community service order will only be imposed on the accused person that shall be punished by deprivation of short term freedom.
- b. The community service order as an alternative sanction if the fine is not paid. The community service order in several countries such as Italy, Germany and Switzerland can be used as a penal alternative when there is a defendant by the judge fined then cannot pay these fines, therefore the he/she must the community service order.

¹² Tongat, 2001, *Pidana Kerja Sosial dalam Pembaharuan Hukum Pidana*, Djambatan, Jakarta, p. 7

¹³ Muladi, 1995, *Kapita Selekta Sistem Peradilan Pidana*, Universitas Diponegoro, Semarang, p.139

- c. The community service order in the framework of clemency in some European countries like the Netherlands and Germany, the community service order may become requirement of applying for clemency. The clemency may be imposed or applied to a prisoner on condition that the convicted criminal should do the community service order.
- a. The notion of Prof SatjiptoRahardjoabout social capital punishment.

Prof SatjiptoRahardjohas initiated death which is not physical, but social. He defineditas “social capital punishment”.It is described that¹⁴:

From the sociological point of view, person can be called still alive physically, but at the same time experiencing social death. It happens when someone in such social conditions but freedom to have social activitiesare deprived, for instance:

- a. A perpetrator who was sentenced life imprisonment twice without possibility of remission or parole, or
- b. The perpetrator who was exiled to Siberia without a ticket to return

The person who was sentenced such that, they are physically alive but probably his/her agony is heavier and longer, especially in terms of social distress; the convicts are isolated from their social routines.

The notion of Prof.SatjiptoRahardjoabout the “non-physical” death penalty can actually be also addressed to the corporation. The social sanctions aimed at isolating a person from social life, as expressed by Prof. SatjiptoRahardjo above are also known in criminal code by the term of banishment. In some Foreign Criminal Code (Estonia, Kosovo, Vietnam), there are types of expulsions punishment¹⁵. In Islamic law and various customary sanctions are also known, for example, in Aceh there isan expulsion from society Gempong". In Gayo, it is called “Parak”; meanwhile in Bali, it is called “kesepekang”¹⁶.

- b. Seen from criminal and penal policies point of view

Seen from the criminal and penal policies point of view, the policy of selecting/determining the type of sanction/facilities (criminal) to combat the crime could have been changed. Sudarto once stated that the criminal is not a sure

¹⁴ Barda Nawawi Arief, 2015, *Pidana Mati Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, Op. Cit, p. 76

¹⁵ Diatur dalam Pasal 54 KUHP Estonia dan KUHP Kosovo, dalam KUHP Vietnam dalam Pasal 28

¹⁶ Barda Nawawi Arief, 2015, *Pidana Mati Perspektif Global, Pembaharuan Hukum Pidana dan Alternatif Pidana Untuk Koruptor*, Op. Cit, p. 77

thing, cannot be changed, but can be changed in accordance with the development of society¹⁷. Efforts/movements seeking an alternative punishment is not only focused on imprisonment, but it is also focused on other types of criminal punishment including social work.

The movement “alternative to imprisonment” is not only focused on the efforts to avoid/replace but also ease the implementation of imprisonment. These efforts include:

- 1) The imprisonment is changed into the community service order or the imprisonment and the community service order cumulatively. This social works are in the form of community service order. The accused person should take embarrassing or daunting sanction in the humanity boundaries (in the specific range of time being showed in the public area for several times; given a label or wearing a t-shirt with “CORRUPTOR” sign written on it).
- 2) Undergoing the social work as a street sweeper, cleaning dirty rivers, cleaning the shallow gutter shallow.
- 3) Being exiled from public life or imposed of non-physical death sentence or social capital punishment according to the terms given by Prof. SatjiptoRahardjo

In this context, the community service order is not paid since it is work as a penalty, therefore the implementation of this criminal should not contain any commercial thing.

c. Seen from the sentence purposes and guidelines point of views

In this concept, the purpose and guidelines of sentencing have been formulated which based on the following considerations¹⁸:

- (1) The penal code system is an integrated purposive system and the punishment is merely a tool/means to achieve the goals.
- (2) The punishment in an integral part (sub-system) of the whole penal code system in addition to other sub-systems, namely sub-systems of criminal responsibility (fault) and criminal

¹⁷ Sudarto, 1986, *Kapita Salekta Hukum Pidana*, Alumni, Bandung, p. 106

¹⁸ Barda Nawawi Arief, 2011, *Perkembangan Sistem Pemidanaan di Indonesia*, CV Elangtuo Kinasih, Pustaka Magister, Semarang, pp. 47-48

- (3) The formulation of objectives and guidelines of sentence are intended as a control function as well as providing basic/philosophical foundation, rationality, motivation, and justification of punishment.
- (4) Seen functionally/operationally, the sentence system is a series of processes through the formulation stage (legislative policy), the application phase (judicial policy), and the execution stage (administrative/executive policy). Therefore, in order to achieve the entanglement and coherence between the three stages, as an integrated sentence system, formulation of objectives and guidelines of sentence is needed.

The same case in an effort to reform penal code, the community service order is also included in the draft of penal code draft 2013 Chapter III Punishment, Crime and Action, Paragraph 10 Community Service Order, Article 86:

- (1) If the imprisonment to be sentenced not more than six (6) months or fined not more than fine in the Category I, therefore the imprisonment or a fine can be replaced by a community service order.
- (2) In the punishment of community service as referred to in paragraph (1), it needs to consider the following matters:
 - a. Recognition of the defendant on criminal acts committed
 - b. Age employability defendant in accordance with the provisions of the legislation
 - c. The defendant approval after being explained about the purpose and all matters relating to community service order
 - d. Defendant social history
 - e. Defendant work safety protection
 - f. Defendant religious believe and politic
 - g. The ability of defendant to pay the fine
- (3) The implementation of community service order should not be commercialized
- (4) The community service order is sentenced for:
 - a. Two hundred and forty hours for a defendant who was aged 18-years old and over, and
 - b. One hundred and twenty hours for the defendants who are under 18-years old

- (5) The community service order referred to in paragraph (3) is sentenced for 7 hours minimally
- (6) The implementation of community service order can be repaid within a period of 12 months regarding the convict activities in carrying out his/her livelihood and/or other beneficial activities
- (7) If the convicted person does not meet all or part of the obligations of the community service order without a valid reason, the convict was ordered:
 - a. Repeating the whole or part of the community service order
 - b. Undergoing the imprisonment wholly or partly replaced by the community service order
 - c. Pay all or part of the fines replaced by the community service order or undergoing the imprisonment in lieu of unpaid fines.

Therefore, it can be concluded that the community service order can fulfill the purpose of punishment in the form of community protection and rehabilitation of offenders. As a result, it is irrelevant if the community service order is in accordance with the purpose of punishment.

C. CONCLUSIONS

Based on what have been discussed aforementioned, it can be concluded that:

1. The community service order is required for the corruption offender as seen from the point of views of the idea of balance, Pancasila, Human Rights, criminal law policy and legal reformation efforts in Indonesia. Therefore, the community service order is needed. This can be defined as the social sanction for the corruption offender. This social sanction for the corruption offender becomes one of the ways in emerging the wary effect and ashamed of being corruptive.
2. The community service order as the solution of eradicating the corruption crimes in Indonesia, therefore the legislators needs to immediately formulate the concept of Criminal Code Draft as the alternative of imprisonment. In this concept of Criminal Code, the procedure regulations can be included to make the community service order is ideal in Indonesia and can be applied effectively. This is because the provisions contained in the concept of Criminal Code Draft look so general and still need the implementation procedures. It also suggests that it needs a new agency that bases the implementation of community service order all over regions in Indonesia.

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