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***URGENCY OF CONDITIONAL CRIMINAL PUNISHMENT AS ONE OF THE GUARANTEES OF RIGHTS PRISONERS HUMAN RIGHTS***

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**ABSTRACK**

The development of criminal law today has undergone many changes. This is to balance the growth and progress of society. Social problems are also increasing, such as limited access to justice, decent living, decreasing employment opportunities, minimal human resources, so that more and more unemployment is increasing the crime rate. Nowadays, the nature of imprisonment that is to break the spirit of the convicts is no longer an absolute choice. Given the sadness experienced by the convicts because they have to serve a prison sentence is considered inappropriate and contrary to human rights. The method used in this research is a normative legal approach, which aims to obtain normative knowledge regarding the relationship between one regulation and another and its practical application. The presence of conditional sentencing institutions as regulated in Articles 14a to 14f of the Criminal Code provides an alternative choice for prosecutors and judges in prosecuting and deciding a crime, so that the implementation of the sentence is not only carried out in prison, but it is possible to carry out punishment outside prison with a maximum sentence of one year, in the form of attempted crimes with certain conditions and special conditions by the judge. The efforts of the conditional sentence institution must be carried out in a real way, so that the convicts feel that they benefit from the opportunity to improve themselves in the community, considering that if they have to do it within the prison walls, which are afraid of the imprisonment process, it will not succeed as the purpose of punishment.

**Keyword:** *Conditional Sentence, Human Rights, Prisoner*

## **A. INTRODUCTION**

The rapid development of the world and the unpreparedness of the government and society in a developing country in responding to the limited employment opportunities, lack of human resources and lack of access to welfare, comfort, peace and justice, increasing unemployment rates and high crime rates both in quantity and quality and the demands of life that are uncompromising, are big and fundamental problems that must be resolved one by one by the government.

Meanwhile, demands for respect and fulfillment of human rights are also one of the crucial issues that need to be considered, considering that the purpose of establishing a country is to improve the welfare of its people, so when citizen's basic rights are not fulfilled, the country can be blamed and jointly responsible, including a sense of security from criminal acts.

The various issues mentioned above are one of the reasons for the increasing crime rate, both conventional and non-conventional crimes, with various modes of operation, and the government through its law enforcement apparatus is required to be more prepared and more professional in dealing with crime, both preventive and repressive.

In the development of criminal law today, the imposition of imprisonment is no longer a favorite choice, considering that there is an alternative choice, non-institutional punishment, which is the utilization of conditional punishment as regulated in Article 14a-14f of the Criminal Code, although in practice this type of punishment has not been widely used, because prosecutors and judges are very selective and limit themselves in demanding or imposing conditional punishment, but this type of punishment provides benefits for society (the State) and the prisoners themselves.

Prosecutors and judges prefer to demand and impose sentences with imprisonment in the form of deprivation of liberty, so that the effectiveness of the purpose of punishment itself is not optimal, and results in the crime rate in the community not decreasing and increasing the number of criminals. This is because the punishment received by prisoners is not in accordance with human dignity, so that the socialization of prisoners in Correctional Institutions, which is called "prisonization", is not as expected and even makes prisoners tend to become recidivists, so that the number of prisoners in Correctional Institutions exceeds capacity.

Such conditions in correctional institutions are certainly not good for prisoners, overcrowded cells can cause new problems such as impaired health, the spread of diseases such as HIV/AIDS, sexual harassment, narcotics, gangsterism and others. The current prisoner development strategy must be more oriented towards efforts to integrate criminals into society. This means that the punishment of deprivation of liberty which unnaturally isolates prisoners from society must always be avoided as much as possible, which has proven to have fatal consequences, both for themselves and for society.

Even though at the beginning of its development was often said that conditional punishment was a method of implementing punishment, nowadays conditional punishment tends to grow as a stand-alone punishment, namely as a punishment that is applied like other punishments.

## **B. Literature review**

### **1. Definition of a criminal act.**

According to Moelyatno, a criminal act is an action which is stated by criminal law as an act which is violated and accompanied by the threat of sanctions in the form of certain criminal penalties for anyone who violates the prohibition and will be called a crime.

It can also said that a crime is an action that is prohibited by legal rules and is threatened with punishment, as long as it is seen first that the prohibition is directed at the perpetrator (i.e. a situation or incident that arises from a person's behavior. While the threat of punishment is directed at the person who caused the incident).<sup>1</sup>

Simon, a criminal law expert, provides a formulation of strafbaarfeit which has several elements, including:<sup>2</sup>

1. A human action (Meselijk Handelingen). By Handelingen it is meant not only Een Doen (action) but also Een nallaten (results)
2. This act is an act and can be prohibited and punishable by law
3. The act must be carried out by someone who can be held responsible for doing it.

Criminalization in its form is associated with sanctions in the form of punishment to someone who has committed a crime, the sanction is in the form of suffering given to someone who has violated the law. Criminal punishment is currently very controversial because criminal sanctions contain "horror" because the manifestation of this sanction according to Herberl L. Packer is a legacy of our barbarity in the past<sup>3</sup> or also a relic of barbarism<sup>4</sup>

Talking about criminal law, it cannot be separated from the existence of sanctions. Mudzakir stated that the function of sanctions is to:<sup>5</sup>

1. Formulate prohibited actions

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<sup>1</sup> Moelyatno, *Principles of Criminal Law*, Rieneke Cipta, Jakarta, 1981, p. 45.

<sup>2</sup> Ibid.

<sup>3</sup> Herbert L. Packer, *The Limits Of Criminal Sanction*, Stanford University Press, California, 1986

<sup>4</sup> JCSmith, Hogan, Brian, *Criminal Law 4 th Edition*, Butterwood. London, 1957

<sup>5</sup> Teguh Prasetyo and Abdul Halim Barkatullah, *Criminal Law Politics*, Student Library, Jakarta, 2005, p. 82

2. Determination of the threat of criminal sanctions to legal subjects (to individuals or corporations)
3. Criminal sentencing stage
4. Stages of execution of punishment

Seeing this reality, then the view of humanity and social problems must seek other criminal alternatives compared to criminal punishment. Because basically criminals are special humans who have organic and mental abnormalities, therefore the behavior they do is deviant behavior.<sup>6</sup>

## **2. Conditional criminal provisions in the Criminal Code**

The development of Indonesian criminal law, which is derived from criminal law during the Dutch East Indies era with several changes adjusted to the principles of independent Indonesia, has been increasingly humanized and as far as possible applied in a way that contributes to the re-socialization of perpetrators of criminal acts. Thus, punishment is no longer merely an application of suffering, but has more positive value.

In Indonesian criminal law, this development can be seen, among others, in the inclusion of articles 14a-14f into WvS1915 in 1926 (S.1926-251 jo. 486) along with its implementing ordinance (S. 1926-487) on Conditional Punishment (voowaardelijke veroordeling). The conditional punishment is not the main detention, but rather a method of implementing judgment, as is unconditional penalty.

Article 14a of the Criminal Code states that conditional sentence can only be imposed if the following conditions are met:

1. In a decision that imposes a prison sentence, as long as the duration is not more than one year. So in this case, the sentence can be imposed in relation to a prison sentence, on the condition that the judge does not want to impose a sentence of more than one year. What is decisive is not the sentence threatened for the crime committed, but the sentence that will be imposed on the defendant.
2. Conditional punishment may be imposed in connection with imprisonment, with the provision that it does not include imprisonment in replacement of a fine. Regarding

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<sup>6</sup> Saparina Sadli, *Social Perception Regarding Deviant Behavior*, Bulan Bintang, Jakarta, 1976

imprisonment, there are no restrictions, because the maximum imprisonment is one year.

3. In cases involving criminal fines, a conditional sentence may be imposed, with the limitation that the judge must be convinced that paying the fine will truly be felt as a burden by the defendant.

Furthermore, in Article 14b of the Criminal Code, a probationary period of three years is stipulated for crimes and violations mentioned in Articles 492, 504, 506 and 536 of the Criminal Code and two years for other violations.

Article 14c of the Criminal Code stipulates that in addition to the general requirement that the convict will not commit a criminal act, the judge may stipulate a special requirement that the convict within a shorter period of time than the probationary period must replace all or part of the losses caused by the criminal act. In addition, other special requirements may also be stipulated regarding the convict's behavior that must be met during the probationary period or during part of the probationary period.

The above conditions may not reduce the freedom of religion or political freedom of the convict. If the general or special conditions are not met, then based on Article 14f paragraph (1) of the Criminal Code, the judge, upon the recommendation of the authorized official, orders the execution of the verdict.

Article 14d of the Criminal Code regulates the official who is given the task of supervising that the requirements are met, namely the official who has the authority to order the execution of the verdict, if later there is an order to execute the verdict. Then in Article 14d paragraph (2) of the Criminal Code it is stipulated that in order to provide assistance or help the convict in fulfilling the special requirements, the judge can make it mandatory for an institution in the form of a legal entity, or the leader of a shelter or a certain official.

### **C. RESEARCH METHODS**

Considering the explanation above, this research uses a normative legal research type with a legal approach that originates from:

1. The primary legal source that serves as binding material for the problems studied in this case is Law Number 1 of 1946 concerning the Criminal Code.

2. Secondary legal sources, namely data materials that provide explanations for primary legal data materials, in this case the results of research and scientific works.
3. Tertiary legal sources, namely data materials that provide information about primary and secondary law, such as legal dictionaries, encyclopedias, magazines, mass media and the internet.

This research is also a clinical legal research, which is an effort to find out whether the law applied is appropriate to solve a particular case or problem. The results of clinical legal research do not have universal validity, they only apply to certain cases, because the goal is not to build a theory, but to test existing theories in certain concrete situations.

## **D. DISCUSSION**

### **1. Conditional sentence**

The history of the growth of conditional criminal sanctions was first implemented in the 19th century in the United States and England, in its development it has gone through several stages. The first stage the defendant was only declared guilty and a probationary period was also determined, and if it turns out that during the probationary period he was declared guilty and he did not correct his mistake by violating the conditions or even committing another violation, then in this phase he will receive a criminal decision that must be carried out.<sup>7</sup>

During the probation period he has been found guilty and is expected to be able to correct his mistakes, therefore the judge may not determine the punishment for him. This sentencing system provides an opportunity for criminal offenders to be able to correct their mistakes not in the prison walls, but during this period it provides an opportunity for lawbreakers to serve their probation in society with supervision from officials/government so that they really become good.

The development of the late 19th century in France and Belgium carried out the imposition of conditional criminal sentences that were different compared to the United States and England, because in the first phase the suspect was found guilty but was also sentenced. However, the implementation of the sentence was postponed until the predetermined probationary period, if during the probationary period he committed a crime then the previously determined sentence must be carried out by him.

The conditional sentence system implemented in Belgium and France are differentiates it from the United States and England systems. The difference lies in the first phase, especially regarding the guilty verdict and sentencing. In addition, the

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<sup>7</sup> Aruan Sakidjo and Bambang Poernomo, *Criminal Law*, Ghalia Indah, Jakarta, 1990, p. 110

difference also exists in the second phase, namely regarding supervision of the implementation of the conditional sentence.

The main purpose of imposing conditional sentences in France, Belgium, the United States and England is to allow convicts who have committed crimes are still live outside the prison walls, because it is feared that if the suspect lives together with other prisoners, there will be bad consequences from different imprisonments in prison. In the Netherlands, the implementation of conditional punishment is enforced in straffwetboek S.247-1915 using a conditional punishment system which is a combination of the French/Belgian system and the United States/England system, this system is then known as Voorwaardelijke veroordeling. The purpose of voorwaardelijke veroordeling is to postpone criminal decision that is imposed can be postponed, this is to improve the convict during the probation period which is supervised by authorized officers/government in his efforts to become a good person.<sup>8</sup>

During the probation period, a reclassering body was created as a body for efforts to become a good person, where in this institution education is carried out outside the prison walls in the midst of society until the probationary period ends.

From this first, the institution of conditional punishment was then included in the Dutch Straffwebock in 1915, and was further refined in 1935. The result of this refinement was that criminal punishment was imposed in the first phase, but the convict was given a probationary period. If during the probationary period the defendant committed another criminal offense, then the criminal sentence must be carried out.

The Dutch Straffwetboek codification in 1915 in Indonesia initially did not recognize voorwaardelijke veroordeling, then with several changes voorwaardelijke veroordeling entered Indonesia with S.851 jo.486/1926 which came into effect on January 1, 1927. The changes to voorwaardelijke veroordeling were then known as "Conditional Criminal Procedure", was due to the condition of the Indonesian nation which was still a colony of the Kingdom of the Netherlands so the Reclassering institution was not known due to limited funds and human resources.

During the period of conditional punishment, it was included in Straffwetboek S.247-1915, the reclassering body was completed and worked well, during the Dutch East Indies era, the condition of the law enforcement apparatus was lacking and its functioning was not optimal.

Judges must be careful when making decisions regarding prisoners in accordance with Article 14a paragraph (4) which stipulates that the imposition of conditional sentences can be carried out based on the results of an examination that has been carried

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<sup>8</sup> Ibid, p. 114

out carefully by the judge. Judges must also determine the form of supervision and determine the form of agreement when the convict carries out his probationary period.

Guidelines for determining conditional sentences in the Criminal Code (KUHP) are determined in Article 14 sub a paragraph (1) and (2), Is the judge imposes a conditional sentence on the defendant who is sentenced to a maximum of one year in prison or imprisonment or a fine. The judge imposes a prison sentence or imprisonment limited to only one year, because generally the crime committed is a minor crime which is only sentenced to one year.

The imposition of imprisonment by the judge in a conditional sentence does not include imprisonment as a substitute for a fine (substitute imprisonment), but connected to the primary sentence (main sentence). Also includes a fine with restrictions, if the fine is without restrictions, it will be very detrimental to the prisoner.

Conditional sentences contain preventive requirements that have a negative aspect in the form of not committing mistakes and crimes during the probation period, this is intended to free the prisoners from prison walls. In addition, the imposition of conditional sentences has a positive impact on prisoners, namely regarding the optional requirements that can only be subject to conditional sentences, criminal acts with a penalty of three months, imprisonment and criminal acts contained in articles 492,504,505,506,536 of the Criminal Code (KUHP)

The success of a conditional criminal act depends on good or bad supervision of the authorized apparatus/government, the form of supervision of criminal acts is different from the supervision of judges on decisions that have permanent legal force. However, supervision in conditional sentences does not have to be absolute, depending on the probation period, whether or not they violate the law again.

Conditional punishment is one of the alternative ways of implementing a prison sentence. Criminals who are sentenced to imprisonment of no more than one year with careful consideration from the judge, can be sentenced to a conditional sentence with the consideration that the perpetrator will be aware and can improve himself in the midst of society during the probation period that has been determined.

The strategic factor that is very important in determining the success of conditional sentences in carrying out its function to fulfill the objectives of punishment based on the principles of humane criminal law is the necessity of having a standard for implementing conditional sentences in Indonesia.<sup>9</sup>

In serving a conditional sentence imposed by a judge, a convict must truly and seriously use the probationary period to correct his deviant behavior, considering that at

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<sup>9</sup> Muladi, *Conditional Criminal Institution*, PT Alumni Bandung, 2004, p. 99



the time of the verdict, the judge usually determines the general conditions, the convict during the probationary period may not commit a crime, or an act that prohibited by its nature, and the judge also has the freedom to determine special conditions that must be met by the convict.

## **2. Rejection of Criminal Sanctions**

Various agreements on the ineffectiveness of criminal sanctions in overcoming community crime have given rise to the view of rejecting criminal sanctions, the campaign to reject criminal sanctions is a manifestation of frustration from the community because of the ineffectiveness of criminal law in reducing crime rates.

A very famous anti-crime campaign is the abolition punishment, was stated that criminals are the embodiment of abnormality and immaturity. Therefore criminals should be treated not punished.<sup>10</sup>

Therefore, the idea arose that criminal sanctions should be replaced with social protection laws, later on the punishment will replace the applicable criminal law. The main purpose of social protection laws is to integrate criminal law violators into the social order and not imprisonment, therefore it is suggested to eliminate criminal sanctions and replace them with social sanctions.

One form of protection law is conditional punishment which is mandated as the utilization of alternative criminal actions, it is used to eliminate imprisonment. The problem of the utilization of alternative criminal actions has become an international view and has become a universal problem

## **3. Advantages of Implementing Conditional Sentences**

Conditional sentences and other alternative forms of deprivation of liberty that are almost the same, such as probation, have the following advantages. First, Conditional sentences will provide an opportunity for convicts to improve themselves in society. As long as the welfare of the convict in this case is considered more important than the risks that may be suffered by society, if the convict is released into society. It is very important to note that the main requirement is to eliminate the convict's concerns about the possibility of being put into a correctional institution, at the beginning of planning the implementation of conditional sentences. In order to provide this opportunity, the most important requirement is the mental health of the convict.

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<sup>10</sup> Muladi and Barda Nawawi Arief, *Criminal Law Theories and Policies*, Alumni, 2005, p. 95

The second advantage is conditional punishment allows the convict to continue his daily habits as a human being, which are in accordance with the values that exist in society. These habits include carrying out his work duties, carrying out his obligations in the family, participating in recreational activities and other actions that will be beneficial for him as a member of society and vice versa this is also very beneficial for society.

The third benefit is conditional sentences will prevent the stigma that results from the crime of depriving freedom, which according to Richard D Schwartz and Jerome H. Skolnik.<sup>11</sup> Referred to as one of the extra-legal consequences that are taken into account in the policies of law enforcers. This stigma is often felt by the family as well. In relation to this, the family of the convict must provide assistance to the executor of the conditional sentence and this assistance can be in the form of sympathy, positive encouragement for the convict, assistance in the form of material and discipline.

If the advantages are discussed from the perspective of the person who is subject to conditional punishment, then from the perspective of society, conditional punishment has the following advantages. First, in determining whether to impose a conditional punishment or a sentence of deprivation of liberty, then one of the main considerations is to extent the main elements of community life benefit from the provision of conditional punishment. This can be observed from the economic participation that benefits community life. Likewise, the participation of convicts in family life is something that is very valuable from a community perspective.

The second benefit viewed from the perspective of society is that financially, conditional punishment form of outside-institutional guidance will be cheaper compared to guidance within the institution. Then when viewed from the perspective of the executor of conditional punishment, the advantage is that with conditional punishment outside the institution, the officers implementing conditional punishment can use all facilities available in the community to rehabilitate conditional prisoners. These facilities can be in the form of assistance in guidance from the local community, government or private employment services and so on. In this case, the advantages of conditional punishment over the penalty of deprivation of liberty are apparent.

Although not yet supported by in-depth research, it seems that criminal law scholars in Indonesia also consider the existence of conditional sentences important. This is evident from the opinion in the Workshop on the Problem of Renewal of the National Criminal Law Codification (Book II) in 1982, which stated that the possibility of imposing supervision sentences should be expanded. This supervision sentence is a new type of principal sentence that is non-custodial in nature which is expected to replace conditional sentences (Article 14 as/d 14 f of the Criminal Code). The difference between the two lies in its implementation. This supervision sentence can be said to be an

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<sup>11</sup> Rihard D. Schwartz and Jerome H, *The stigma of "Ex-Con" and the Problem of Reintegration, in: Corrections: Problems and Prospects, Pretice Hall, Inc., Englewood Cliffts, New Jersey, 1975, p. 127*

alternative to the sentence of deprivation of liberty. In relation to the view on the importance of conditional sentences (or something similar, for example probation) as one of the links in the legal system, what must be eliminated in this case is the impression that conditional sentences are an act of generosity, a grant of forgiveness, or an exemption, because within the framework of the causes of the crime of the perpetrator of the crime and efforts to neutralize these causes, the role of supervision in coaching outside this institution becomes a dynamic condition to solve problems.<sup>12</sup>

## **E. CLOSING**

### **1. Conclusion**

The influence of conditional punishment on the purpose of punishment in the form of protection, is to save the convict from the suffering of the penalty of deprivation of liberty, especially the short-term one with all its consequences. The reason is very important if there is really no need to worry that the guilty person will repeat a rather serious crime. By preventing the convict from the bad influence of the penalty of deprivation of liberty, society will be protected from the possibility of the emergence of more serious crimes, which actually do not need to happen. Furthermore, by providing an opportunity for the convict to improve himself in society, which can be optionally assisted by a reclassering institution, this is a reflection of the "defense sociale nouvelle" school of thought which prioritizes the recognition of the use and development of a sense of responsibility which is an important part of every human being including perpetrators of criminal acts.

### **2. Suggestion**

In order to empower conditional sentences in their role as a very important alternative to the punishment of deprivation of liberty, and to support the idea of placing conditional sentences as a stand-alone principal punishment, it is necessary to create standards for the implementation of conditional sentences, which include the principles of application, personal examination reports, conditions for conditional sentences, the end of conditional sentences, cancellation of conditional sentences and administration, services and personnel for the implementation of conditional sentences.

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<sup>12</sup> Howard Abadinsky, *Probation and Parole : Theory and Paractcie Prentice. Inc.* Englewood Cliffs, New Jersey, 1997, p 130,131.

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