

Conference Paper

Conceptualization of Setting Community-based Correction as a Form of Convict Fostering Based on Restorative Justice Principles in Correctional Institutions

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Abstract.

The high rate of recidivism in Indonesia is caused by the legal paradigm and politics of society which place imprisonment as a *premium remedium*. Consequently, various problems arise in prisons, such as prison overcapacity and other problems. The government has made an effort to countermeasures by issuing a new Correctional Law and Criminal Code which carries a new sentencing paradigm through restorative justice; however, the panitentiary has not had a breakthrough that is in line with the new paradigm. Community-based correction which was first recognized in New Zealand is deemed appropriate to be applied in Indonesia with adjustments according to philosophical, sociological, and juridical foundations to fill the void in norms in arranging community-based correction as a form of fostering prisoners in jails. This study is a normative legal research with a literature study. This study uses statute, case, fact, and comparative approaches. Community-based correction implemented in New Zealand bears similarities to the fostering of convicts implemented in Indonesia, such as probation, parole, work release, and residential center or the halfway house program. In the future, the concept of fostering convicts based on the principles of restorative justice will be implemented using the pattern of community-based correction. Community-based correction is conceptualized in two forms, namely as an alternative to conviction and an alternative to imprisonment. As an alternative to conviction, the concept can accommodate the implementation of supervision and social work punishments that are regulated in the new Criminal Code. As an alternative to imprisonment, community-based correction can take the form of optimization of the function of open prisons by providing an opportunity for convicts with a maximum sentence of three years to be placed in open prisons from the start of serving their sentence.

Keywords: community-based correction, conviction, imprisonment, restorative justice

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Published 5 January 2024

Publishing services provided by
Knowledge E

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Selection and Peer-review under the responsibility of the 4th INCLAR Conference Committee.

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1. INTRODUCTION

Recidivism or relapse of criminal acts is still frequently found in criminal cases uncovered by the police to date. Recidivism is generally understood as a broad term that refers to a relapse of criminal behavior, also due to a rearrest, reconviction and reimprisonment. Nevertheless, in a more specific context, recidivism is defined as the tendency of individuals or groups to repeat disgraceful acts despite that fact they have already been sentenced for committing those acts [1].

The quite high rate of recidivism in Indonesia also becomes the focus of special attention and is a shared responsibility. Based on data from the Ministry of Law and Human Rights as of February 2022 which was uploaded on its official social media account, out of a total of 268,001 detainees and convicts, the recidivism rate in Indonesia has reached 18.12% [2]. In fact, almost all crimes handled by the Indonesian Criminal Justice System always end up in prison.

The criminal law politics and paradigm in society placing criminal law as a *premium remedium* is not the right decision. Criminal law is considered as the main means in law enforcement with the aim of creating a deterrent effect to the perpetrators of criminal law violations. This is certainly contrary to the principle of crime as *ultimum remedium* which means that criminal law must be used as a last resort in law enforcement if there is another alternative to resolve cases other than the implementation of the criminal law rule [3]. As a consequence, prisons in Indonesia are over-occupied.

Theoretically, it can be claimed that prison overcapacity can lead to prisonization. In essence, prisonization also has a negative impact, especially on accidental offenders, newcomers to the world of crime. This is reflected in the fact that prisons have grown into places of pollution which in essence prison proponents try to avoid, because in these places accidental offenders are devastated through their experiences with chronic criminals. Even the good personnel had failed to remove the enormous disrepute from these prisons [4].

The emergence of various legal problems in Indonesia encourages the renewal of the concept of criminal law. However, development in the field of law, particularly the renewal of criminal law, should not only build legal institutions but must also include the development of the substance of legal products which are the results of a legal system in the form of criminal law regulations and are cultural in nature, that is to say, attitudes and values that influence operation of the legal system [5].

Several countries with a continental system, such as France, New Zealand and Saudi Arabia, have abandoned sentencing as the only means of enforcing their criminal law.

Especially for criminal acts, where the “damage” caused by crimes, they can still be restored so that the “damaged” condition can be restored to its original state. This concept is known as restorative justice. New Zealand also implements restorative justice in the system of fostering criminal offenders. The policy is implemented by implementing a more community-oriented sentence. As a result, around 26,847 convicts underwent a community-based conviction and only 7,605 convicts were placed in Correctional Institutions [6].

In his speech at the virtual 2021 Annual Report Special Session at the State Palace in Jakarta on Tuesday, 22 February 2022, the President of the Republic of Indonesia again requested the Supreme Court to prioritize the implementation of restorative justice in criminal cases [7]. The encouragement for efforts to implement the concept of restorative justice is also addressed to other law enforcement agencies such as the Police, the Attorney General’s Office, and the Courts. Penitentiary as a criminal justice subsystem organizing law enforcement in the field of treatment of prisoners, children and inmates is also encouraged to do the same.

In order to obtain optimal results, reintegration model as a goal of correctional institutions must ideally contain four stages, namely prison-based rehabilitation, transitional service, community after care, and post-supervision certification as “normal” (final fostering until the perpetrators are considered able to socialize and get their rights as citizens) [8].

Motivated by the idea, the concept of restorative justice emerges which is linked to the pattern of fostering convicts in correctional institutions [8]. The pattern of fostering involves the community as the container for the approach. The pattern is known as community-based correction. Community-based correction is a type of fostering program for convicts while they are serving their remaining sentences. Prisoners are granted the opportunity to return to society with special supervision. This is in line with the principle of restorative justice as proclaimed in the Criminal Code (*KUHP*) which was just promulgated through Law Number 1 of 2023 concerning the Criminal Code which accommodates new types of sentencing such as criminal surveillance and punishment in the form of social work. The sentencing model is an alternative punishment. Thus, sentencing does not always remain in the form of placing the perpetrators of crimes in Correctional Institutions.

Based on the explanation above, setting of community-based correction as a form of fostering convicts is intended as an effort to accommodate the principles of restorative justice which have been set forth in the form of alternative punishment in Indonesia. The absence of implementing rules and regulations (formal law) in the Law Number 1 of 2023

concerning the Criminal Code (material law) that has been existing to date can lead to legal uncertainty. Grounded by the condition, in the present study we examine the forms of fostering that can be implemented to accommodate alternative criminal forms in the principles of restorative justice in Indonesia. This relates to reconstruction of a national penal system that is oriented towards the basic ideas of reintegration and rehabilitation and is based on the ideology of the Indonesian people, that is to say Pancasila, the 1945 Constitution of the Republic of Indonesia and other laws and regulations as sources of law in Indonesia [9]. For this reason, conducting a further study regarding the urgency of setting community-based correction as a form of fostering convicts based on the principles of restorative justice in correctional institutions is necessary.

2. METHODOLOGY/MATERIALS

This study uses the normative legal research, a legal research conducted by studying literature or secondary data [10]. Normative legal research serves to provide juridical arguments whenever void, ambiguity and conflict of norms occur [11]. This study also uses four approaches: statute approach, case approach, fact approach and comparative approach. It also uses several sources of legal materials, such as primary legal materials, secondary legal materials and tertiary legal materials. These legal materials were collected through literature studies and then processed using a description technique and an argumentation technique.

3. RESULTS AND DISCUSSION

3.1. Setting Community-based Correction as a Form of Convict Fostering based on the Principles of Restorative Justice in Correctional Institutions in Positive Law in Indonesia.

In Indonesian positive law, punishment should not eliminate the human power of the convict in acquiring new values and adjustments. Imposition of punishment on a person abusing the freedom to commit violations should indeed be maintained, but at the same time the perpetrator must be directed through educational sanctions (treatment) to achieve a fuller form of human being [12]. The step in imposing sanctions as well as educating convicts is by applying the community-based correction model. community-based correction is a type of fostering program for convicts while they are serving their criminal past, in that, they are given the opportunity to return to society with special supervision. Moving from that point of view, in Indonesian correctional system

there are several forms of fostering programs that are similar to the community-based correction method. However, the implementation of this fostering program has not fully covered the principles stipulated in community-based correction by not accommodating the opportunity for the community to participate in the program from the start when convicts are serving their sentences. In comparison with the existing fostering programs in Indonesian correctional institutions, there are various forms of fostering programs that are part of community-based correction. They are as follows:

1. Probation Program

Probation (conditional sentence) is a form of punishment that can be imposed by a judge based on the nature of the crime. Imposition of conditional sentences must be executed in careful consideration. That is why it is determined in article 14 a-f of the Indonesian old criminal code (criminal code as stipulated by Law Number 1 of 1946 concerning Criminal Law Rules and Regulations) which specifies that a conditional sentence shall only be imposed if the judge, based on the investigation having been conducted, believes that sufficient supervision can be carried out to meet the general term and condition, which is the convict will not commit offenses and a special term and condition if any [13]. In conditional sentences, the convict has never served his or her sentence, unless he or he has violated the general terms and conditions or special terms and conditions determined by the judge [13]. However, in the new Criminal Code as promulgated into Law Number 1 of 2023 concerning the Criminal Code, conditional sentence is no longer implicitly regulated for conditional sentences. There is a new type of criminal punishment which in their understanding is similar to the conditional sentence. Article 65 of Law Number 1 of 2023 concerning the Criminal Code states the main criminal sanction comprises imprisonment, cover-up, supervision, fine and social work. Supervision punishment is fostering given outside the correctional institution or prison which is similar to conditional sentence set forth in the *wetboek van strafrecht* (old Criminal Code). It must be noted that how criminal procedures for supervision and criminal procedural law are carried out has not been explained in detail; hence, the format for enforcement of criminal supervision must be conceptualized from an early age so that the implementation of supervision punishment can run effectively, including the institution that supervises the convicted supervision [14].

2. Parole Program

Parole is a term that is often found in criminal proceedings in Indonesia. It can run concurrently with the prison sentence system in a cell, convicts obtain their titles

to parole after serving two-thirds of the execution in prison. If the minister grants parole, the general term and condition is a convict does not commit a crime or other evil act during the probation period. Parole right can be withdrawn at any time in the event that the convict has committed an evil act or an act contrary to the terms and conditions specified. The relevant minister may determine special terms and conditions but may not limit religious and other state freedoms. If a convict has violated the agreement and the terms and conditions specified in the release letter, the convict may be recalled to serve the remainder of his/her sentence and his/her parole may be revoked at the advice of the prosecutor at the place where the convict resides with consideration of social assistance at the Correctional Center where the convict is serving his/her parole period [13].

3. Work Release Program

In Indonesian criminal law, work release is known as social work assimilation. Assimilation also aims to remove the bad image of post-convict imprisonment and to prevent social rejection of an ex-convict. Assimilation is divided into two types [15]:

(a) Assimilation in the Correctional Institution

This is meant to receive special visits from family and community groups that support and are involved in the implementation of the convict fostering program.

(b) Assimilation outside the Correctional Institution

Assimilation outside the correctional institution includes to work for a third party, to work independently like working as a barber, and to work in motor vehicle repair shops or to do community service activities.

4. Residential Center Halfway House Program

Open prison (open camp) emerged as a consequence of improving the correctional system that had been implemented in closed correctional institutions. To date, fostering and correction process in prisons is performed through the initial stage – screening which is carried out when a convict enters the prison. At the time when a convict has finished serving his or her sentence, he or she may be placed in an open prison. Correctional Institution, in this case the open correctional institution, as part of the integrated criminal justice subsystem, carries out the duties and responsibilities of being an advanced fostering institution. In other words, the open prison appears an example of prison that prioritizes community-based correction

[16]. Open prison is a model of community-based correction which is made as a fostering form based on the principles of restorative justice in Indonesia today.

3.2. Setting Community-based Correction as a Form of Convict Fostering based on the Principles of Restorative Justice in Correctional Institutions in the Future.

The overcrowding of convicts in correctional institutions in Indonesia is caused by several factors, including the high rate of crimes coupled with recidivism, the policy of making imprisonment as a *premium remedium*, and the implementation of fostering programs in correctional institutions that has not been optimal.

The condition of overcrowding of convicts is a principle obstacle that affects the obstacles to the establishment of convict fostering in Indonesia until now. According to Woolf, prison management must be attentive to eight factors causing the crisis, such as: (1) high prison population; (2) excess capacity; (3) bad conditions in prison (for both inmates and prison officials); (4) understaffing; (5) riots between prison staff; (6) poor security; (7) the “toxic mix” of long-term and life-long prison sentences and mentally disturbed prisoners; and (8) riots and other damage from control over prisoners [17].

The overcrowding condition of convicts in prisons which is described as chockablock has brought about various other negative impacts. This does not reflect the principle of equality of treatment and services that should be provided to convicts without discriminating against individuals, an act which in turn creates conflict in correctional institutions [18].

Criminal Code which is still valid in Indonesia until today also shows that there is over-criminalization and over-use of imprisonment. It can be seen from the formulation of criminal law in the old criminal code as well as the development of criminal law formulations outside the old criminal code. In Article 10 of the old criminal code, the main type of punishment is determined – death penalty; imprisonment; prison sentence, cover-up punishment and fines. Of the several types of punishment, provisions for the criminal punishment in Book II of the old CRIMINAL CODE can be described as follows: 1) capital punishment was applied 10 times; 2) imprisonment was applied 485 times; 3) prison sentence was applied 37 times; 4) and fine was applied 123 times [19]. This indicates that the type of punishment that is widely used in book II of the old Criminal Code is imprisonment which reaches 485 (74%), both as the main punishment, as an alternative punishment and as a replacement punishment. Prison sentence in terms of years as a principal sentence is used 274 times, with a count of years or life imprisonment

292 times, as an alternative criminal threat from other criminal threats is 26 times. When broken down by length of imprisonment, the types of punishment can be described as follows: 1) imprisonment of less than 5 years is 227 times; 2) imprisonment of 5 to 10 years is 126 times; 3) imprisonment of 10 to 15 years is 46 times; imprisonment of 20 years is 7 times; and imprisonment for life is a total of 23 times [19].

Philosophical foundation of criminal law reform is its aim to achieve the goal of national law by the Indonesian people as an independent and sovereign nation. Setting community-based correction is an integral part of the form of social defense with criminal law enforcement and criminal reform which is carried out with the aim of protecting society from anti-social acts that endanger and are detrimental to the community. It also functions to provide protection to the public from the dangerous nature of a person, protection from abuse of sanctions or reactions by law enforcers and members of the public in general, and protection from disturbing the balance or harmony of various interests and values as a result of a crime. Victims in this case also include victims of “abuse of power”, who must receive protection in the form of “access to justice and fair treatment, restitution, compensation and assistance” [20].

Sociological basis of legal reform is that it is implemented with the aim of meeting the needs of the law itself. The internal condition of Indonesian society is developing rapidly in line with developments occurring in the international world and is supported by demands for legal certainty and justice that are too strong that it causes the need for encouragement to regulate the concept of fostering prisoners in the form of community-based correction. How the philosophy of imprisonment inherited by the Dutch colonialists shifted into a philosophy of correctionalism serves as the evidence of the sociological capacity of the Indonesian people for change. Over time, by setting community-based correction, the sociological community of Indonesia will place itself as part of the moral and social responsibility in the field of fostering convicts so that convicts can be more acceptable in society.

Juridical basis of Law Number 22 of 2022 concerning Corrections which is currently in effect and Law Number 1 of 2023 concerning the Criminal Code which will take effect in 2026 serve as the juridical bases for a new paradigm of conviction in Indonesia. Prioritizing community-based correction as a form of fostering convicts in correctional institutions in the reform of criminal law in the future is important to do given the increasingly overcrowded and ineffective conditions of correctional institutions in coaching provision as a goal of the correctional system. In community-based correction, prisoners are encouraged to mingle with the community from the very beginning of the fostering process.

The problem having arisen so far is convicts are given the opportunity to be close to the community only at the end of their fostering phase as stipulated in Government Regulation Number 31 of 1999 concerning Fostering and Guidance of Correctional Assisted Inmates. What is more, this regulation of the government was made as a formal law from its material law, which is the current Law Number 12 of 1995 concerning Corrections. However, with the promulgation of the new Law Number 22 of 2022 concerning Corrections, a formal law regulating the fostering and guidance of prisoners must be immediately formed and community involvement must be accommodated in every stage of the convict fostering programs.

In Indonesia, future convict fostering programs through community-based correction can be divided into two alternative categories – conviction and imprisonment. By conviction, convicts do not have to be put in a correctional institution and the conviction can be transferred to other forms of punishment such as supervised punishment and social work punishment as explained above. It is also a form of restorative justice. In the case of community-based correction being an alternative to imprisonment, community-based correction can be interpreted into community-based fostering program to minimize the impact of imprisonment experienced by both convicts and the correctional institution itself. Implementation that can be taken in the future is through optimizing open correctional institutions that have so far been owned by Indonesia.

Based on the Circular of the Director General of Corrections Number: KP 10.13/3/1 dated 8 February 1965, convicts who can be placed in open prisons are those who are at the low security stage, that is, the limit of 2/3 of the actual sentence [21]. On the contrary, when looking at the developments taken place in the social and cultural life of the community, such open prison operations still do not provide opportunities for convicts to mingle with society. For this reason, it is deemed necessary to develop an open prison operation by providing opportunities for convicts with a minimum imprisonment sentence, such as a maximum of three years, to participate in their training from the beginning in open prisons. Thus, community-based correction for inmates in open prisons can have a positive impact not only on the prisoners themselves but also on the image of the correctional institution, in addition to eliminating community's stigma of prisoners by inviting them to get involved and see directly the fostering programs in open prisons which are easier accessed by the public.

The proposition needs to be supported by renewal of the existing rules and regulations either through government regulations or the Circular of the Director General of Corrections Number: KP 10.13/3/1 dated 8 February 1965 whose existence is too old without a review to its suitability with the developing needs of the community. When

referring to the renewal of the operation of open prisons as a place for implementing community-based correction for inmates, Mc. Carthy argues there is a need for operational guidelines for open prisons or what is internationally known as the halfway house [22]. Operational guidelines concern issues related to the following matters:

1. Target Population Selection

According to McCarthy, selection of the target population to be placed in the halfway house is the most important part in supporting the success of the program. He states there are 6 aspects that need to be considered in selecting the participants. They are as follows:

(a) Geographic Location

Operationalization of open prisons will be more successful if the convicts placed in the open prisons come from the same area as the open prison itself. This is related to the different geographical conditions of an area, one of which is in terms of the general livelihoods of the people in the area. For instance, convicts being placed in open prisons who participate in convict fostering program in the plantation sector will not be suitable if the convicts come from coastal areas, because that is suitable with fishermen. For this ground, the government must establish at least one open prison in each region so the suitability between the needs and the availability of the convict fostering program can be accommodated.

(b) Age

The age of convicts who will be placed in open prisons must also be taken into account. The age of each convict cannot be too young because it will not be relevant for fostering in a job that is training in nature and also cannot be too old because they cannot do their job optimally.

(c) Sex

Adjustment regarding convicts in open prisons must also take into account the gender, at least in the segregation of camps in open prisons.

(d) Length of Stay

The length of time convicts stay in open prisons needs to be considered in order to measure the success of the fostering program being held. For this reason, it is necessary to have a minimum duration limit, for example one month and a maximum of, for example, 3 years. Malcolm Gladwell in his book entitled "Outliers - The Story of Success", put forward a theory known as the

law of 10,000 hours. According to the law of 10,000 hours, a person becomes an expert at anything after 10,000 hours of doing the activity he/she is devoted to. With this theory, a convict who is placed in an open prison to train a skill within themselves needs a maximum of 3 years, assuming that the duration of the training is 8 hours a day. This is the final limit, because more than 3 years a person does not need retraining activities.

(e) Dangerous Convict

A dangerous convict is not encouraged to become target population in an open prison on the ground that they could endanger other participants or the public. Therefore, in the future, consideration of the results in the imposition of imprisonment for a maximum of 3 years can be used as a reference and assessment that the convict is undangerous.

(f) Dependence on Narcotics and Alcohol

Prisoners with dependence on narcotics and alcohol cannot be made participants in open prisons. Prisoners with these criteria need to be given a rehabilitation program, not open prisons.

2. Location and Site Selection

Selection of location for the open prison needs attention. This is aimed at facilitating prisoners' return to society. Getting a convict to return to good condition and be a responsible person is a shared responsibility that involves convicts, officers and the community together. For this reason, the location of open prisons should not be in remote areas because it reduces the opportunity for inmates to relearn social values.

3. Personnel and Training

Although the supervision of prisoners in open prisons is still carried out by prison officers, as is currently running, open prisons are run together with volunteers and the community. For this reason, the skills of officers placed in open prisons must still be trained in accordance with the existing fostering programs and the officers should become facilitators of the relationship of prisoners with the volunteers or the community.

4. Security

According to McCarthy, the halfway house is designed as a facility with minimum security and to reflect the normal conditions of society. However, supervision of participants is still carried out with a personality approach by both officers of the open prison and the community.

On that account, the the setting of community-based correction to be a form of convict fostering program based on the principles of restorative justice in correctional institutions in the future needs to be regulated in government regulations both regarding community-based correction as alternative method of punishment and as imprisonment.

4. CONCLUSION AND RECOMMENDATION

On the basis of the description in the discussion the pervious section, some conclusions are drawn. First, positive law in Indonesia has not arranged community-based correction as a form of convict fostering program based on the principles of restorative justice in correctional institutions. However, when referring to its application in other countries, there are several forms of fostering programs that are similar to community-based correction, such as the probation program, the parole program, the work release program, and the residential center halfway houses program.

Second, setting community-based correction as a form of convict fostering program based on the principles of restorative justice in correctional institutions in the future can be an alternative choice of conviction and imprisonment. Community-based correction as an alternative conviction can accommodate the transfer of imprisonment to other forms of punishment that are accommodated in the new Criminal Code, such as supervised punishment and social work punishment. On the other hand, community-based correction as an alternative to imprisonment can be implemented by optimizing the functions of open prisons which provide opportunities to return to society for convicts with a maximum sentence of three years. However, this policy must take into account the safety and danger factors for convicts in the operation of open prisons and it should be implemented from the first time a convict has served his/her sentence. To achieve this, it is necessary to have a new arrangement either through government regulations, ministerial regulations or circulars as technical guidelines for the placement of convicts in open prisons.

Established on the findings of this study, some recommendations are offered. First, setting community-based correction as a form of convict fostering based on the principles of restorative justice in correctional institutions in Indonesian positive law should be

accommodated on an ongoing basis in new Government Regulations as the implementing regulation of Law Number 22 of 2022 concerning Corrections. Implementation of the act must take into account political developments and legal culture in the community and support government programs in prioritizing the principles of restorative justice in Indonesia and the form of support for the reconstruction of the national criminal law that has been implemented by the government through Law Number 1 of 2023 concerning the Criminal Code.

Second, setting community-based correction as a form of convict fostering effort based on the principles of restorative justice in correctional institutions in the future should be contained in laws and regulations as an alternative to punishment and imprisonment. As an alternative method of conviction, community-based correction is regulated in the form of supervised punishment and social work punishment with the active involvement of the community in assisting their supervision. As an alternative method of imprisonment, community-based correction must be regulated implicitly in laws and regulations by providing broad opportunities for convicts with a maximum sentence of three years in prison to be placed in open prisons so that they can develop their potential and not take away the opportunity for restoration to return to functioning in a healthy manner in society.

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