

Individualisation of Punishment: Challenging the Deterrence and Just Deserts Penal Theories in Handling Terrorists

Nurhidayat¹

¹*Program Pascasarjana Doktorat Departemen Kriminologi, Fakultas Ilmu Sosial dan Ilmu Politik Universitas Indonesia*

ABSTRACT: This paper aims to critique the tendency of some Indonesian law enforcement which uses deterrence and just deserts theories to justify the punishments towards terrorists as a form of crime control. Though multiple existing literatures have explained the lack of impact of using deterrence and just deserts theories in controlling crime. Deterrence theory is not applicable due to its 'blind' nature and how punitive it is, whereas just deserts theory, though it has brought the element of proportionality still hasn't answered the need to handle how terrorists as a criminal. This paper proposes individualized punishing in response to terrorists. Individualised punishment aims to solve the root problem on why a person got involved with terrorism through correctional process. Thus, individualized punishment is the way to 'fix' terrorists as criminals.

KEYWORDS -terrorism, deterrence, just deserts, individualized punishment

I. INTRODUCTION

Terrorism is a crime that continuously garner high priority from the Indonesian government since the Bali Bombing I incident in October 2002. This bombing took 200 lives and left hundreds other hurt. To respond to terrorism, some countries such as the United States used war model, whereas some others—including Indonesia, adopted the law enforcement model. The consequence of choosing the law enforcement approach is how terrorism becomes a criminal offence that has to be processed through criminal justice system; starting from investigation, prosecution, to correction. Each terrorist has to be held responsible for their crime with the punishment which has been decided its form and severity according to the existing law. The majority of said punishment involves imprisonment and correctional processes.

Correction in Indonesia is identical to a rehabilitative process which objective hinges on social reintegration, but unfortunately, said sentiment cannot be judged by a reigning judge in making verdicts. In their research on the verdicts of terrorism cases, Center for Detention Studies found that though the Supreme Court have underline that the goal of Indonesian sentencing is to rehabilitate, there are still many judges that stress upon deterrence effect and the proportionality of punishment and the crime (just deserts) as main factors to deliberate verdict on terrorists [4][9]. These findings show that there is a discontinuity between the objective of punishment and the final objective of correction. Consequently, the duration of crime sanction given by the judge does not allow terrorists to reform and it finally led to repeat their offence after they are free. Previous researches have found that deterrent effect or just deserts in punishments do not have significant impact on crime control. This paper aims to discuss the incompatibility of deterrence theory and just desert in handling terrorist and its effect on the potential recidivism of convicted terrorists.

II. LITERATURE REVIEW: PENAL THEORIES

Penal theory is a reflection of society's perspective on crime, criminals, and how to respond to them. It cannot be taken out of the societal context in which said theories first came to be and how it develop. In general, there are four penal theories based on rationalisation or the objective of punishment. Said theories are just deserts and deterrence theories.

Just Deserts Theory

This theory came from the concept of just deserts, in which punishment have to be proportionate to the criminal's mistakes. This theory is driven by the pre-existing excess and the failure of rehabilitation's dream [10]. Believers of this theory understands that punishment is justified as an appropriate moral response towards crime: those who are guilty of criminal charges deserve to be condemned; this condemnation has to be delivered

through 'harsh behaviour' which is believed to push the criminals to seriously consider said condemnation, but the amount of said harsh behaviour has to be proportionate to the level of crime, respecting the criminal as a moral agent [1]. The premise of this theory is that an individual is and has to be treated as a responsible moral agent though they can be wrong. The political premise is that all individual has to be respected as a moral agent: offenders are worthy of punishment, but they do not lose all rights on faith and possesses the right to not be punished disproportionately to their crime.

Proportionality is the key concept of this theory. There are two forms of proportionality. Cardinal proportionality refers to the severity of punishment, it conditions that a punishment cannot be more severe than the crime itself: the punishment of five-year imprisonment for a petty theft is clearly not proportionate, just as months-long punishment for serious crime such as homicide is not appropriate. Ordinal proportionality refers to the level of relative seriousness of multitude of offences; as an example, to what extent is rape more serious than mugging. In its practice, a lot is hanging on the offender's evaluation, especially from the law enforcer and the social assumption of traditional crime such as street crime compared to new offences such as commercial fraud and environmental pollution. Theoretically, ordinal proportionality needs a some sort of a scoring scale that can be used to evaluate the seriousness of each crime along with factors that may increase or decrease its punishment that are integrated to said scale.

Deterrence Theory

Deterrence theory sees crime prevention through the threat of criminal sanction as the reason to punish. First offence may be punished lightly or even unpunished, whereas recidivists may incur heavier punishments due to the undeterred element in the second offence. The seriousness of offence becomes less important than preventing repeat offences. The trace of this approach can be detected in the actions taken towards recidivists and what constitutes as 'dangerous offences' in contemporary punishing.

In deterrence theory, much of the focus is on the general deterrence effect for the people which involves calculating punishments based on what will deter other people from doing the same offence. Utilitarian scholars such as Bentham and economic theory expert Posner developed the thoughts in which criminals are threatened with extremely heavy punishments, even more than what is deemed necessary [11]. The understood premise is that most of criminals are rational and calculating individual—a premise that may be questioned by criminologists. The political premise is that the greater good for the many represents the highest value and the punished individual is only one against thousands or even millions of law-abiding individuals. Thus, it is justified to punish one person harshly to effectively prevent other people from offending, therefore ignoring the aspect of proportionality.

III. DISCUSSION

As shown by previous researches, the effectiveness of punishments based on deterrence and just deserts are not supported by substantial evidence. But within the context of punishing terrorists in Indonesia, the majority of judges still use these theories as the main factors for their deliberation to punish terrorists. There are huge shortcomings in punishing terrorists in Indonesia shown by the number of recidivisms occurring in convicted terrorists. Institute for Policy Analysis of Conflicts found that 90 ex-convicted terrorists are involved once more with their terrorist groups after correctional processes [5]. Thus, this paper will challenge the compatibility of using deterrence or just deserts as the basis for punishing terrorists.

From deterrence side, punishments done to utilise deterring effects will not be effective due two reasons. First, it cannot solve the root problem or the criminogenic factor that causes someone to be involved with terrorism in the first place. Second, it goes against what justice stands for since all terrorists are considered equally at fault.

As an example, if we are to punish everyone involved in terrorism as heavily as possible—such as 15 to 20 years of imprisonment or even lifelong sentences and death sentence—without factoring the role they play in the act of terrorism, the severity of their crime, and the whydunnit aspect, then it can be said that justice is not served in the criminal justice system. Fair punishment is dealt when the punishment itself suits the severity of losses caused by the crime, as understood by believers of just deserts theory.

Moreover, there is no guarantee that with punishing someone as heavily as the system can will deter the terrorist from doing it again. Heavy punishments unaccompanied by rehabilitation process or guidance will only borne the feeling of anger and the desire for revenge. Repressive punishments that are 'blind' in nature can be used by terrorist groups as a fuel to enact rebellion and recruiting new members. Whereas for the convicted terrorists, imprisonment can increase their status in their militant groups. As if after imprisoned, their status will be 'better' due to the sentiment that they have undergone a huge trial given by the 'enemy' group (the law enforcement). Thus, adding to the findings of previous researches, the act of deterrence does not go hand-in-hand with crime control.

From the just deserts side, it has been previously mentioned that a fair punishment is one that is proportionate to the criminals' crime. This is the core belief of the just deserts theory. But in practice, the application of this theory is not entirely accurate. In punishing, other than seeing the criminals' offence, we also need to consider the characteristics of the offender; such as the factors which caused them to do crime. Punishments dealt out purely based on just deserts will borne uniform punishments, whereas criminals are individuals with different needs. Thus, fair punishment is not only proportional, but also individualised.

Individualised punishments redefine responsibility based on faults to responsibility based on the characteristics of criminals. In judging a case, judges are expected to deliberate the motifs and objective of someone who's done a crime, how the crime is done, the offender's life history and socioeconomic background, and the offender's actions after doing said crime. With individualisation of punishment, the objective is not only serving justice, but also rehabilitating the criminals to achieve social reintegration.

Individualising punishment is born amidst the development of modern penal theories. Someone's accountability is no longer based on subjective charges, but on the severity of the criminal. Punishment is determined to be no longer effective to prevent crime because moral responsibility is no longer the base for sentencing. Punishments have to be determined scientifically based on the severity of danger posed by the offender towards society and the motifs underlying the offenders' actions. Scientific determination here refers to how a judge is expected to give room for psychologist, anthropologist, sociologist, criminologist, and psychiatrist when sentencing. This is so the judge can diagnose and categorise offender in a criminal classification so that the offender can undergo suitable treatment for their condition. The existence of the offenders' individual factors will make it that people who'd done the same crime with similar effects to society, or doing said crime together, be sentenced differently than one another.

As an example, those who went together to Syria to join ISIS can be sentenced differently to one another. In social defence theory, each criminal has to receive different treatments suited to their conditions to heal certain social conditions [6]. To illustrate, a person who went to Syria to join ISIS but refuses to take arms will be handled differently than those who joined ISIS to war. This comparison already exists in Indonesia. In the case of Dwi Joko Wiwoho, he had succeeded in going to Syria and had undergone military training, but he had refused to take arms for ISIS' sake, thus he received lighter punishment than others who had the full intention to take arms [6].

With individualised punishment, the duration of imprisonment is not determined by the crime, but by the time needed to rehabilitate criminals, hence there is no set duration like ones championed in the classical approaches [6]. Individualised approach requires experts from various fields to be involved in penal processes [2]. Obviously, it will be difficult to demand judges to master the previously mentioned expertise, hence the existence of a post titled Pembimbing Kemasyarakatan (Correctional Guide—PK) within Indonesia's criminal justice system. The PK's role is to objectively evaluate criminals and report them in a Penelitian Kemasyarakatan (Correctional Research—Litmas). One of the Litmas' purposes is to be used as a deliberating factor for a judge to determine criminal sanction for criminals, but in so far, the role of Litmas is only limited on cases involving children.

IV. CONCLUSIONS

Punishments based on deterrence and just deserts are ineffective as a response to terrorists. Deterrence approach underlines the pain of punishment and deterring effect gave birth to an equally heavy punishments to all criminals without considering the role they play in the crime. This blind sort of punishments may potentially cause grudge and gave way to an even bigger radicalisation in the terrorist groups. Whereas the just deserts approach, though it has solved the blind nature of deterrence approach with its proportionality principle, is still unable to deliberate the differing needs and characteristics of each individual criminals. An individual who had done similar crimes with similar effects may not incur the same sentence due to the different needs to handle them. The time needed for the handling process should also be considered in sentencing, so the convicted criminals will not repeat their offences once they are free.

To solve the limitation of deterrence and just deserts-based punishments, an approach that is able to identify the problems of each offender as unique individuals and determine the accurate solutions is needed. Thus, this paper concludes that an individualised punishment approach, where each punishment is individually tailored to the criminals' profile—which includes the root problems of why they do crime, their socioeconomic background, psychological condition, and so on—can potentially answer the challenges faced by deterrence and just deserts-based punishments. Obviously, individualised punishments are much more complicated than deterrence and just deserts-based punishments. But individualised punishment rings closer to Indonesia's vision of rehabilitating terrorists rather than the deterrence and just deserts-based punishments that places a much higher emphasis on punishment for the sake of punishing.

REFERENCES

- [1]. Ashworth, A. (2005). *Sentencing and Criminal Justice*. Cambridge: Cambridge University Press.
- [2]. Barnes, H. E., Teeters, N. K. (1951). *New Horizons in Criminology*. Prentice Hall
- [3]. Clark-Moorman, K., Rydberg, J., &McGarrell, E. F. (2019). Impact Evaluation of a Parolee-Based Focused Deterrence Program on Community-Level Violence. *Criminal Justice Policy Review*.
- [4]. D’Alessio, S. J., &Stolzenberg, L. (2019). Should Repeat Offenders Be Punished More Severely for Their Crimes? *Criminal Justice Policy Review*.
- [5]. Goei, G., Maulana, I., & de Santo, C. (2019). *Pola PemidanaanTindakPidanaTerorisme di Indonesia*. Jakarta: Center for Detention Studies. Retrieved from <https://drive.google.com/file/d/1Rlq5BZNbQRZSOAMOK-rUowXvQ-034qm1/view>
- [6]. Institute for Policy Analysis of Conflict (IPAC). (2020). *Terrorism, Recidivism, and Planned Releases in Indonesia*. Jakarta: IPAC. Retrieved from http://cdn.understandingconflict.org/file/2020/09/Report_66_ipac.pdf
- [7]. Jeffery, C. R. (1959). The historical development of criminology. *J. Crim. L. & Criminology*, 50, 3.
- [8]. Klein, J. L., & Cooper, D. T. (2019). Punitive Attitudes Toward Sex Offenders: Do Moral Panics Cause Community Members to Be More Punitive? *Criminal Justice Policy Review*.
- [9]. Liedka, R. V., Meehan, A. J., & Lauer, T. W. (2019). CCTV and Campus Crime: Challenging a Technological “Fix”. *Criminal Justice Policy Review*.
- [10]. Lucas, J. W., & Jones, M. A. (2019). Disciplinary Segregation on Institutional Rule Violation Rates. *Criminal Justice Policy Review*.
- [11]. Maulana, I., de Santo, C., &Indriana, D. (2021). *AnalisisTindakPidanaTerorisme di Indonesia: StudiPutusan 2016-2020*. Jakarta: Center for Detention Studies. Retrieved from <https://drive.google.com/file/d/1dxTC9xWAh9w6iVjGRMfKS9KWkxvofIM/view>
- [12]. von Hirsch, A. (1976). *Doing justice : the choice of punishments : report of the Committee for the Study of Incarceration*. New York: Hill and Wang.
- [13]. Walker, N., & Walker, N. (1991). *Why punish?* (Vol. 107). Oxford: Oxford University Press.