



## Alternative Punishment In The Criminal Justice System

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**Abstract.** *The urgency of alternative punishment as a substitute for imprisonment related to the purpose of punishment is driven by sharp criticism and dissatisfaction with prison sentences, especially short-term sentences, which are considered to have more negative effects (having the nature of suffering and not developing the perpetrators of criminal acts) and are no longer effective in improving the perpetrators. and tackling crime. In realizing its objectives, punishment must uphold a person's honor and dignity, punishment must also be able to make people fully aware of the actions they have committed and cause them to have a positive and constructive mental attitude towards efforts to overcome crime and the punishment is felt to be fair both to the convict and to victims or by society. Purpose theory (utilitarian) is the basis for the purpose of punishment, namely that punishment is not to decide the absolute demands of justice. So in essence there are two main aspects in the purpose of punishment which are legal interests that are to be protected in a balanced manner, namely the interests of society and the interests of the individual (perpetrator of the crime). As well as using punishment in accordance with the modern school of punishment, this school requires individualization of punishment to carry out rehabilitation and resocialization of individuals and perpetrators of criminal acts. Social work penalties can be imposed by a judge in order to minimize overcrowding in correctional institutions by implementing Article 20 of the Criminal Code or through sociological teleological interpretation of the law by harmonizing with existing regulations and not conflicting with applicable legal rules through procedures for investigating correctional institutions that experience excessive capacity. first to be submitted to the Minister of Law and Human Rights.*

**Keywords:** *Alternative Law, Criminal Justice System, Sentencing.*

### INTRODUCTION

Criminal Law is a law that regulates violations and crimes against the public interest, is coercive and can be imposed, this coercion is necessary to maintain and regulate the balance of the original situation which in criminal law is accompanied by sanctions or suffering as regulated in criminal law (Strafrecht) and contained in in the Criminal Code (Wetboek van Strafrecht).

Criminal law is also part of the overall law that applies in a country, other parts of law are: civil law, constitutional law and governance, agrarian law, labor law, and so on. This specificity can be seen from the nature of sanctions that threaten protected legal interests. Criminal sanctions can take away human life, freedom and property owned by legal subjects.

Meanwhile civil sanctions usually take the form of compensation, costs and interest, as well as administrative sanctions in the form of license revocation or fines. The unique characteristics make criminal law seen as having a harsh and cruel character. Therefore, criminal law is also used to support certain programs in both legal fields. Provisions in

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marriage, environmental, taxation and agrarian laws are examples of the many laws and regulations that include in one of their articles "criminal provisions". Criminal provisions are nothing other than to support the state's duties in certain fields (Zaidan, 2015: 10).

The harsh and cruel nature of criminal sanctions creates contradictions and paradoxes, meaning that criminal (law) is not liked or hated, therefore it is tried to be avoided or not used, but on the other hand, it is actually used. The current phenomenon can be seen from the many provisions of the law which contain "Criminal Provisions". The contradictory and paradoxical nature continues as long as the legislators believe that to enforce the law it is necessary to establish sanctions as a guarantor so that the provisions made are effective.

Ironically, sanctions fall on the choice of imprisonment and fines, but in practice the more dominant sanction is prison. What is more worrying is that even the smallest case will definitely result in criminal sanctions in the form of deprivation of liberty. Determining criminal sanctions theoretically begins with determining which actions are prohibited because they are considered detrimental to legal interests or criminalization. If the criminalization process for these acts has been completed, legislators are then faced with many alternatives to protect the legal interests that are regulated through legal sanctions that are threatened against violators.

However, in practice, legislators seem to be faced with a situation without alternatives, so that the choice is always given to the criminal sanction of deprivation of liberty. In these two cases there are things that need to be separated, criminalization is the process of determining actions that are declared as prohibited, but as far as the type of sanctions that will be threatened or that will be imposed is concerned, this is the area of law enforcement (Sudarto, 1981: 106).

In relation to criminal sanctions, the type of punishment for deprivation of liberty in the form of imprisonment is a type of punishment that is often imposed on perpetrators of criminal acts by judges. Along the way, in connection with the development of the purpose of punishment which is no longer only focused on efforts to suffer, but has led to efforts to improve it in a more humane direction, the prison sentence has attracted a lot of criticism from many parties, especially regarding the issue of effectiveness and the negative impact that caused by the application of the prison sentence.

The essence of this prison sentence is the deprivation of the defendant's right to freedom as explained by PAF Lamintang that: The crime of deprivation of liberty or imprisonment has been known since the sixteenth or seventeenth century, at that time the punishment was carried out by closing the convicts in towers, in castles or in forts. This punishment was originally

imposed on them in the form of the death penalty, but later it was also imposed on them in the form of deprivation of liberty, either temporarily or for life.

Prison sentences are growing increasingly rapidly, when the death penalty has been abolished in many countries and replaced by deprivation of liberty (Lamintang, 2010: 56). Imprisonment is currently experiencing a "period of crisis" because it is one of the "less popular" types of punishment, so that there is a lot of sharp criticism aimed at this type of punishment for deprivation of liberty, both from the point of view of its effectiveness and from the other negative consequences that accompany it. or related to the deprivation of someone's freedom (Nawawi Arief, 2002: 207). Although normatively there are no limitations or definitions regarding the crime of deprivation of liberty in the Criminal Code. Deprivation of liberty with its respective variants such as imprisonment or imprisonment is a universal type of punishment.

Deprivation of liberty is a form of punishment imposed on a person by placing him in a certain place so that he loses his freedom to be or go to or from a certain place based on his own will (Hadiati, 1995: 27). Of the many criticisms that have been leveled by several groups and criminal law experts, there is a criticism that is quite interesting to note from a criminal political perspective, namely the statement that people do not become better but instead become worse after serving prison sentences, especially if This prison sentence is imposed on children or teenagers. In connection with this, it is often stated that prisons are crime colleges or crime factories. Specifically, regarding the latter, there is even an article by Ramsey Clark entitled "Prison Factories of Crime" (Nawawi Arief, 2010: 46).

Based on the fact that supervision punishment, combined punishment and social work punishment have proven to be effective in reducing crime rates in other countries, Indonesia can actually implement these alternative punishments to reduce the accumulation of prisoners in prisons and crime. This alternative punishment has also been deemed to fulfill the purpose of punishment by upholding legal norms for the sake of protecting society, and also by using sentencing guidelines judges cannot impose prison sentences based on certain considerations, one of which is the guilt and motive of the perpetrator, so that the purpose of punishment is not only as a written rule that has no useful value.

Based on the description above, the problem formulation is:

1. What is Alternative Punishment in the Criminal Justice System?
2. How is Social Work Crime as an Alternative Punishment in the Criminal Justice System?

## **LITERATURE REVIEW**

### **Judge's Policy**

Based on the opinion of Eugene J. Benge, policy is a statement regarding the lines that serve as guidelines for making decisions and the direction of action that is determined to handle various kinds of problems that arise, while based on Satjipto Rahardjo's opinion, policy as a principle is the heart of legal regulations which are the reasons the birth of a legal regulation (*ratio legis*) which becomes the grand design and basic design in the implementation of the implementation of the development of tasks and functions of leadership work in government and organizations.<sup>1</sup>

Referring to the judge's authority, the judge's policy is everything that includes his authority to take discretion in deciding cases as stated in Article 5 of Law Number 48 of 2009 concerning Judicial Power which confirms that judges explore, follow and understand legal values. and a sense of justice that lives in society. Because of this, a judge's decision on a case is a reflection of the policy he has implemented so that it should be based on the principles of justice, expediency and legal certainty in order to achieve the goal of good law application. Guidelines for judges in handing down a decision in examining a case require a consideration.

The judge's consideration is a judge's view which becomes a benchmark in calculating aggravating and mitigating factors, which are obtained from the facts revealed during the judicial process. It can be said that this consideration is an argument which is the basis and material for formulating the opinion of the panel of judges in making a legal analysis in formulating a criminal sentence in the decision against the defendant, and in this case the judge's decision would be better based on 3 elements of the legal function, including the element of certainty. law (juridical), elements of legal expediency (sociological), and elements of justice (philosophical).<sup>2</sup>

In their duty to judge, judges weigh based on two categories, namely categories seen from the perspective of juridical considerations and categories seen from the perspective of non-juridical considerations.<sup>3</sup>

Juridical considerations are the judge's considerations that are based on factors that have been revealed during the examination process at trial and must be determined as matters that must be included in the decision of the panel of judges because the provisions are regulated in

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<sup>1</sup>Dey Ravena and Kristian. *Criminal Policy (Criminal Policy)*. Kencana, Jakarta: 201, pp.. 23-24.

<sup>2</sup>Sandra Salamon. *The Judge's Basic Considerations in Imposing a Detention Order for a Defendant Who Has Not Obtained a Legally Enforceable Decision from the Perspective of the Criminal Justice System*. Pagaruyuang Law Journal, Volume 4 Number 1, (July 2020), p. 5.

<sup>3</sup>Rusli Muhammad. *Portrait of the Indonesian Judicial Institution*. Raja Grafindo Persada, Jakarta, 2016, p. 124

law. In this case, the juridical considerations include, among other things, the public prosecutor's indictment, witness statements, the defendant's statements and uncovered evidence.

Non-juridical considerations are considerations that are based on circumstances which are the driving factors for the commission of a criminal act by the perpetrator or the circumstances of the perpetrator which are not the driving factors for the commission of a criminal act, and which are non-juridical considerations in deciding by the judge. among other things, the background of the defendant's actions, the consequences of the defendant's actions, the defendant's personal condition, the defendant's socio-economic situation, and the defendant's religious factors.

Excessive capacity can be used as a consideration in handing down a decision by the panel of judges in terms of non-juridical considerations which include social, if the conditions of the correctional institution can influence the training process that will be carried out by the defendant.

When a law is incomplete or unclear to decide a case, that is when the judge must search for and find the law (*rechtsvinding*). This legal discovery can be done by exploring the legal values that develop in society. There are two methods of legal discovery, the first is by using the method of interpretation and the second is by using the legal construction method Finally, the decision is known as jurisprudence.<sup>4</sup>

### **Penal System**

As stated by Barda Nawawi Arief regarding the punishment system, LHC Hulsman also stated that the punishment system or the sentencing system is a statutory rule relating to criminal sanctions and punishment or the statutory rules relating to penalties and punishment.<sup>5</sup>

There are several theories of punishment, including:

#### 1. Retributive theory or absolute theory.

This theory is used in Indonesia, which considers the aim of punishment to be solely retaliation, in which case the main aim of retaliation does not contain other means such as the welfare of society. As well as making guilt the only condition or reason for a crime whose punishment is adjusted to the defendant's fault. Crime in this theory looks backwards, which is a pure condemnation and the aim is not to improve or educate and re-socialize the perpetrator of the crime.

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<sup>4</sup>Rachmad Abduh and Ida Hanifah. Certainty Of Jurisdiction Law in Civil Law System. Translation from Randwick International of Social Science (RISS) Journal, Volume 1 Number 2 July 2020., p. 271.

<sup>5</sup>Barda Nawawi. Development of the Penal System in Indonesia. Magister Library, Semarang, 2015, p. 1

## 2. Utilitarian theory.

In this theory, it is assumed that the aim of crime is prevention, where prevention is not the final goal but only as a means of achieving a higher goal, namely the welfare of society. In this case, only violations of the law that can be blamed on the perpetrator, such as intentionally or culpably, qualify for the imposition of a crime.

In this theory, punishment looks at the future and is prospective in nature, punishment can contain an element of reproach, but neither the element of reproach nor the element of retaliation can be accepted if it does not help prevent crime in the interests of the welfare of society.<sup>6</sup>

Based on a comparison of the impact of using the old criminal system with the current social situation, the criminal system currently used by Indonesia as finalized in the new National Criminal Code is in accordance with current developments and social conditions so that it is necessary to reform the criminal system which can adapt to the values of noble values as well as the social conditions and situations that exist in Indonesia so as to achieve the goal of punishment in a better direction and not merely as punishment or retaliation but for prevention and ensuring the common welfare of both the convict and the community.

According to Barda Nawawi Arief, efforts to reform criminal law or what can also be called penal reform are actually included in the field of criminal policy (penal policy) which is closely related to law enforcement policy (law enforcement policy), criminal policy (criminal policy) and policy. social (social policy). This means reforming criminal law in essence:

- 1) Criminal law reform is part of a policy which is one of the rational efforts to renew legal substance to make law enforcement more effective.
- 2) Criminal law reform is part of a policy which is a rational effort with the aim of overcoming and eradicating various crimes in order to achieve the objectives of the law, namely protecting society,
- 3) Criminal law reform is part of a policy which is a rational effort to overcome humanitarian problems in order to achieve and support national goals, namely social defense and social welfare.
- 4) Criminal law reform is part of a policy which is an effort to review and reassess the main points of thought, socio-philosophical values, basic ideas, socio-political and socio-

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<sup>6</sup>Syamsul Fatoni, *op.cit*, p. 59

cultural which in this case are the basis for criminal policy and legal policy so far because it is not a reform of criminal law if the value orientation of the criminal law that is aspired to is the same as the value orientation that existed in previous criminal law regulations which were inherited from the colonialists, namely the Criminal Code or Wvs.<sup>7</sup>

Thus, criminal law reform must be pursued by taking an approach that is oriented towards policy making or a policy-oriented approach while also taking a values-oriented approach or what can also be called a value-oriented approach.<sup>8</sup>

## **RESEARCH METHOD(S)**

1. The research method is descriptive analytical, namely describing the problems and facts that occur based on positive legal norms, namely the laws related to this research.
2. The normative juridical approach method is to use positive legal norms relating to Alternative Punishments in the Criminal Justice System.
3. Data analysis was carried out qualitatively, meaning without using numbers and statistical formulas.

## **FINDINGS AND DUSCUSSION**

### **Discussion alternative Punishment in The Criminal Justice System**

Alternative punishment is a concept of punishment that is carried out to replace a criminal sentence so that it is more effective because it is caused by certain factors that make it possible to apply alternative punishment as a substitute punishment.<sup>9</sup>

These alternative sentences are often associated with non-imprisonment sentences, this is because basically most of the alternative sentences are intended to replace prison sentences, and apart from that, the alternative sentences are also continuous with conditional sentences or substitute sentences, and if alternative sentences or substitute sentences have been imposed, then the punishment is Sentences imposed on defendants such as imprisonment or confinement do not need to be served, but only to carry out a replacement sentence.

Based on this idea, the drafters of the National Criminal Code came up with several alternative forms of punishment which are expected to reduce dehumanization and losses for prisoners due to the difficulty of increasing integrity during the training period in correctional

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<sup>7</sup>Ibid, p. 15-16

<sup>8</sup>Ibid, p. 17

<sup>9</sup>Erasmus Napitupulu, et al. Sentence Without Prison: Arrangement, Implementation, and Projection of Alternatives to Non-Imprisonment in Indonesia. Institute for Criminal Justice Reform, Jakarta, 2019, p. 86

institutions. Other types of alternative punishments are supervision punishment, social work punishment, fine, imprisonment in installments, and judicial pardon.<sup>10</sup>

Social Work Criminal is an adoption of community service criminal as per the concept of punishment in the Juvenile Criminal Justice System Law which has been made the main criminal and has been regulated in Article 65 and Article 85 of the Criminal Code (National Criminal Code) in which the punishment is imposed. by the judge, it can be used as an alternative punishment to replace a prison sentence of not more than 6 months or a fine not exceeding a category II fine.<sup>11</sup>

Social work has also been regulated in Article 1 point 18 of the Minister of Law and Human Rights Regulation Number 21 of 2016 concerning Amendments to the Regulation of the Minister of Law and Human Rights Number 21 of 2013 concerning Conditions and Procedures for Granting Remission, Assimilation, Leave to Visit Family, Conditional Release, Leave Before Release, and Conditional Leave, which states that social work is an activity carried out by prisoners to provide services to society without receiving compensation for services or wages.

Social work also has similarities with the regulations in Article 20 of the National Criminal Code which states that it is permissible to release prisoners who are threatened with imprisonment or imprisonment for less than 1 month to be outside the detention center after work time under supervision assisted by a prosecutor or community counselor, and according to R. Soesilo that this article is applied when the prison houses are full.

Social work crime is an alternative form of punishment that can replace imprisonment which has been mandated by the "Tokyo Rules" with the aim of being implemented in the concept of every legal regulation in every country. Social work crime is a short-term deprivation of liberty that does not focus on deprivation of liberty but can be an opportunity to implement alternative punishments.<sup>12</sup>

This form of social work crime is carrying out various social activities, for example cleaning the environment, helping workers in nursing homes, and so on which are carried out within a certain period of time with the applicable terms and conditions as regulated in Article 85 of the National Criminal Code.

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<sup>10</sup>*ibid*, p. 86

<sup>11</sup>Barda Nawawi. *Anthology: Criminal Law Policy, Development of the Concept of the New Criminal Code*. Prenadamedia Group, Jakarta, 2016, p. 111.

<sup>12</sup>Asiyah Jamilah. *Social Work Crime: Policies for Combating Prison Overcrowding*. IUS Journal of Law and Justice Studies, Volume 8 Number 1 (April, 2020), p. 5.



The aim of social work punishment itself is rehabilitation and restoration. Rehabilitation in this case is the same as restoring an attitude of responsibility for the perpetrator and developing an attitude of self-confidence so that he can return and carry out activities with the community without any feeling of burden due to the criminal act he has committed, while the aim in the context of restoration is to enable restitution. conditions have improved among the parties involved, including perpetrators, victims, the community and related agencies, especially the government, in overcoming the problem of excess capacity in correctional institutions.

In this case, the social work crime is considered to be an alternative punishment in lieu of imprisonment which is punishable by the defendant for less than five years and the judge in this case imposes a prison sentence of six months or a fine of category II.

Judges in imposing social work sentences are obliged to consider several things, including:

1. The defendant's confession of the crime committed
2. The defendant's work ability
3. The defendant's consent after explaining the purpose and all matters relating to social work punishment;
4. Defendant's social history;
5. Protection of the defendant's work safety;
6. The defendant's religious and political beliefs; And
7. The defendant's ability to pay criminal fines.

The social work sentence imposed on the defendant is a minimum of eight hours and a maximum of two hundred and forty hours which can be carried out a maximum of eight hours per day and can be carried out in installments within six months considering the activities of the convicted person in carrying out his livelihood and/or activities. other things that are beneficial to him, and in this case the social work crime carried out must not be commercialized and, in its implementation, there must be supervision which can be carried out by the prosecutor and guidance carried out by community guidance.

The judge who imposed a social work sentence against the defendant must be included in the court decision. And the court decision as referred to in Article 85 paragraph 6 also contains an order that if the convict, without a valid reason, does not carry out all or part of the social work crime, the convict is obliged to:

- a. Repeat all or part of the social work crime;
- b. Serving all or part of the prison sentence replaced by the social work sentence; or

- c. Pay all or part of the fine which is replaced by a social work sentence or serve a prison sentence as a substitute for the unpaid fine.

Court decisions regarding social work penalties must also contain:

1. The length of imprisonment or the amount of the fine actually imposed by the judge
2. The length of time the social work sentence must be served includes the number of hours per day and the time period for completing the social work sentence; And
3. Sanctions if the convict does not carry out the social work sentence imposed.

A correctional institution is a place that functions as a forum for training prisoners with the aim of implementing the court decisions that have been handed down against them, so that this correctional institution can also be called the end of the settlement process from the judicial stage because correctional institutions have the authority to carry out social tasks in an effort to resocialize. The convicts can later return to society with a different mindset and become more useful individuals by providing them with education that includes the morals and norms that apply in society. In reality, currently there are still limited facilities for detention for suspects or defendants who should be detained in state detention centers, but in practice this is carried out in correctional institutions, so that correctional institutions double as state detention centers.<sup>13</sup>

The most important factor in the process of training prisoners in correctional institutions is the community besides the officers, so that the law of interaction is important, namely cooperation between correctional institution officers, prisoners and the community.

The aim of correctional services in general is to develop homeless people, namely prisoners, so that after serving their criminal term they can become better human beings and not commit any further violations of the law and can live safely in this world and the hereafter. Correctional objectives can be divided into two, including:

1. The short-term goal is to guide prisoners to become better people in the future through coaching programs carried out while in correctional institutions which require situations, infrastructure, tools, both material and non-material, namely related to psychological and religious education which must be accompanied by skill and honesty.
2. The long-term goal is to develop prisoners so that after they leave the correctional institution they do not violate the law again.<sup>14</sup>

Achieving the objectives of the criminal justice system, which are related to criminal objectives as special prevention, such as preventing prisoners from committing crimes in the

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<sup>13</sup>Kadri Husin. *Criminal Justice System in Indonesia*. Offset Graphic Sinar, 2015, Jakarta, p. 125-126.

<sup>14</sup>SR Sianturi and Mampang. *Penitentiary Law in Indonesia*. Ahaem-Petehaem Alumni, 2016, p. 101-103

future, is something that is the responsibility of correctional institutions. However, if we look at the condition of correctional institutions which are currently used as a forum to develop prisoners into good individuals, it is very inappropriate due to the many inhibiting factors such as the problem of excess capacity which makes it crowded in 1 (one) room in a correctional institution.<sup>15</sup>

There have been many criticisms of the existence of imprisonment, which is one of the main crimes as regulated in Article 10 of the Criminal Code, a legacy of Dutch colonialism as a form of criminal politics, especially regarding various types of minor crimes that are worthy of consideration, including those related to:

- 1) The effectiveness of prison sentences in this case became the center of attention at the 5th UN Congress in 1975 regarding the prevention of crime and the Treatment of Offenders, in which there was a report stating that in many countries there was still a crisis of confidence in the effectiveness of prison sentences as well as a tendency to ignoring the ability of prison institutions to support reduction and control in order to minimize crime.
- 2) The deprivation of a person's freedom as a result of being imprisoned in prison has an impact on the socio-economic life of his family and this is something quite serious to consider.
- 3) Imprisonment causes a degradation of human dignity and self-esteem related to things that result in a deviation from morals and norms such as the occurrence of homosexual relations and causes deprivation or loss of self-confidence for a prisoner.
- 4) If a prison sentence is imposed on a perpetrator who is still a child or teenager, it will make him not become better, but instead become even worse.<sup>16</sup>

## **CONCLUSION AND RECOMMENDATION**

1. The urgency of alternative punishment as a substitute for imprisonment related to the purpose of punishment is driven by sharp criticism and dissatisfaction with prison sentences, especially short-term sentences, which are considered to have more negative effects (having the nature of suffering and not developing the perpetrators of criminal acts) and are no longer effective in improving the perpetrators. and tackling crime. In realizing its objectives, punishment must uphold a person's honor and dignity, punishment must also be able to make people fully aware of the actions they have committed and cause them to have a positive and constructive mental attitude towards efforts to overcome crime and the punishment is felt to be fair both to the convict and to victims or by society. Purpose theory (utilitarian) is

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<sup>15</sup>Evan. Privatization, Prisons ; Efforts to Overcome the Penitentiary Crisis in Indonesia. Capulis, Yogyakarta, 2016, p. 53

<sup>16</sup>Syamsul Fatoni. Op. Cit., p. 107

the basis for the purpose of punishment, namely that punishment is not to decide the absolute demands of justice. So in essence there are two main aspects in the purpose of punishment which are legal interests that are to be protected in a balanced manner, namely the interests of society and the interests of the individual (perpetrator of the crime). As well as using punishment in accordance with the modern school of punishment, this school requires individualization of punishment to carry out rehabilitation and resocialization of individuals and perpetrators of criminal acts.

2. Social work penalties can be imposed by a judge in order to minimize overcrowding in correctional institutions by implementing Article 20 of the Criminal Code or through sociological teleological interpretation of the law by harmonizing with existing regulations and not conflicting with applicable legal rules through procedures for investigating correctional institutions that experience excessive capacity. first to be submitted to the Minister of Law and Human Rights.

### **Suggestion**

1. Social work punishment is a type of punishment that must be served by convicts outside the institution by carrying out social work. This social work sentence is not paid because of its nature (work as a penalty).
2. In the National Criminal Code, the formulation regulations regarding social work crimes have been formulated in Article 88 of the National Criminal Code. Social work penalties can be imposed on perpetrators of criminal offenses who are threatened with imprisonment for no more than 6 months or a fine of no more than a Category I fine.

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