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ABSTRACT

One attempt to eradicte crime is to use the criminal sanction, most of the means used is imprisonment. Meanwhile, in its development, imprisonment as a state facility of confinement for conficted criminals has got harsh critisicm from many legal exerts. A lot of criticism directed against this kind of criminal forfeiture is the independence, both seen from the effectiveness as well as the views of other negative consequences accompanying the sanction.

In the concept of the draft of the new Criminal Code of 1982, it is filed a new criminal sanction, i.e. a sanction of supervision as an alternative to the imprisonment. Imprisonment and supervision or criminal scrutiny is in fact two concepts that are philosophically opposed, because on the one hand, imprisonment needs a convicted person imprisoned inside the institution, and on the other hand the criminal supervision requires the convicted person undergoing outside the institution (in the community), but remains under supervision.

The two opposing concepts cause particular consequenses, either weaknesses or advantages. In order to compensate the weaknesses, it is needed a kind of criminal sanction as a balance between imprisonment and supervision.

A limited imprisonment is a kind of imprisonment which is expected to achieve a balance between the interests of protection or security of society and the interests of the individual. Furthermore, it can be compromised or exploit the positive impacts (the opposite also means avoiding negative impacts) from imprisonment on the one hand and criminal supervision on the other hand.

Key words : Policy, Formulation, Limited Imprisonment.

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I. Introduction

1.1. Background of the Study

One of the criminal sanctions most often used in eradicating crimes is imprisonment. From the historical point of view,[2] the use of imprisonment as "a way to punish" criminals just began at the end of eighteenth century which is sourced in the individualism. By the development of individualism and humanism, such kind of imprisonment has important role and shifting the role of death punishment and the cruel beatings.

Also, among the various types of crime, imprisonment is a kind of criminal sanctions the most widely prescribed in the criminal legislations so far. Meanwhile, in its development, it has got harsh criticism from many legal experts.

A lot of criticism directed against this kind of criminal forfeiture of the independence, both seen from the effectiveness as well as the views of other negative consequences accompanying or relating to the forfeiture of one's independence. The harsh criticism is not only directed against the imprisonment according to the traditional view of making the doer in pain, but also against the imprisonment according to a more modern view of humanitarian nature and emphasis on the improvement of the offenders (reform, rehabilitation and re-socialization).

In the midst of a wave of "crisis period" of imprisonment, many countries still retain imprisonment in their criminal justice system. Indonesia is one of the countries that still retains imprisonment, and Indonesia attempts to make updates and look for alternative forms of imprisonment. The reform effort is based on the good political, sociological and practical reasons. [3]

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[2] R.A. Koesnoen, *Politik Penjara Nasional*, (Bandung : Sumur, 1961), page 7, 8 and 130.

[3] Sudarto, Masalah-masalah Dasar Dalam Hukum Pidana Kita in : *Hukum and Hukum Pidana*, (Bandung : Alumni, 1977), pages 70-72

Indonesia continues to organise alternatives from the criminal seizure of freedom, among others in the form of an increase in a non-institutional imprisonment. At the same time, it should be attempted a theoretical framework of the purpose of the imprisonment in accordance with the philosophy of life of the Indonesian people based on Pancasila and the 1945 Constitution, which is based on the principle of equilibirum and harmony between individual and social life.

In the concept of the Indonesian new Criminal Code, book I of 1982, it is filed a new type of criminal sanction, in the form of supervision as an alternative to imprisonment and the criminal supervision is retained in draft of the new Criminal Code book I in 2010. This may include criminal supervision to defendants who commit criminal acts which are threatened with imprisonment of not longer than seven years or less (article 3.04.10, which became Article 66 of the draft) This type of crime under article 77 of the draft of Criminal Code 2010 can be imposed to the convicted person, keeping in mind the circumstances and his deeds, for its construction supervised enough. According to Sudarto, the criminal supervision is similar with what is known in the United Kingdom as the Probation and can be equated with the conditional imprisonment.[4]

Imprisonment and criminal supervision or scrutiny is in fact two concepts that are philosophically opposed because on the one hand, the imprisonment wants a convicted person is imprisoned in a confinement, whereas the criminal scrutiny requires the convicted person undergoes the sanction outside the institution (in the community) although he or she is still under control. The two concepts are contraditory with different consequences.

If both of the sanctions are implemented, then there needs to be a type of criminal sanctions as a means of stabilisation and coordination between imprisonment

[4] Sudarto*, Pemidanaan, Pidana and Tindakan. A* Paper on "Lokakarya Masalah Pembaharuan Kodifikasi Hukum Pidana Nasional", (Jakarta : BPHN, , 1982), page 16.

and criminal scrutiny. The Limited Imprisonment is expected to neutralize the consequences of imprisonment on the one hand and criminal scrutiny on the other hand, so that it can balance the interests of the community protection and the interests of the individual protection.

So, the concept of limited imprisonment can combine such concepts that are philosophically contradictory each other. The reasons are, first, the combination of aspects of supervision and containment. Second, blend or merge on two goals from penology i.e. Prevention (deterrence) and reintegration, which it has been separated strictly in the theory.

1.2. Statement of the Problems

1. What is the background of formulation policy of the limited imprisonment?
2. How is the regulation of formulation policy of the limited imprisonment in the Indonesian Legislations ?
3. How should the pattern of formulation policy of the limited imprisonment be provided?

I. Research Methods

The research uses normative legal method, especially dealing with the formulation policy of the limited imprisonment in the Indonesian Legislations.

According to Soerjono Soekanto, one of methods in legal research is normative legal research, which studies law as a norm.[5] A legal research is conducted in order to produce an argumentation, a theory, or a legal concept as a prescription in solving a legal problem.[6]

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[5] Soerjono Soekanto and Sri Mamuji, *Metode Penelitian Normatif*, Rajawali, 1995, page 2.
[6] *Ibid.,* page 35

This research uses some approaches: a) *Philosopical approach* b) *conceptual approach*); c) *historical approach*; d) *Statute approach*; and e) *Comparative approach* Gutteridge states that legal comparison is a method of study as well as a legal research. [7]

The legal materials analyzed in this study are: primary, secondary, and tertiary legal meterials. These materials are collected by conducting literary studies through finding legal sources concerning the concepts, doctrines, and legal rules which can lead the researcher into a clear discussion, analysis, and conlusion.

The legal materials which lead into theoretical studies in the forms of principles, concepts, views, doctrines, as well as the substance of legal rules are analyzed qualitatively.

Furthermore, dealing with literary studies, comparative studies is conducted by comparing the regulations of some states concerning with limited-period in imprisonment. By this study, the differences and similarities on regulating such a topic can be known and valued whether the rule from other countries can be taken with some adjustments and how far the similarities occurs.[8]

II. Results and Discussions

A. The Background of the Formulation Policy of the Limited Imprisonment

The notions of combinations between imprisonment and scrutiny is known as "*combined incarceretion and probation* or "*mixed or Split sentence".*[9]

The mixed system is called by Barda Nawawi Arief with some terms, such as "in-between imprisonment"[10], "detention imprisonment."[11] , "mixed-imprisonment "[12], and "limited imprisonment ".[13].

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[7] G.W. Paton, dalam Peter Mahmud Marzuki, *ibid*, page 132.

[8] Soedarto, *Perbandingan Hukum Pidana (Hukum Pidana Inggris)*, FH UNDIP, 1981, page

[9] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana.* PT. Citra Aditya Bakti, Bandung 1996, page 230.

This kind of imprisonment is a *shock probatian* which is purported :

1. To stress to the criminals in a harsh discipine that must be exercised over the criminals in a close confinement .
2. To give a chance in evaluating the needs of the criminals in detail and help them with a beneficial training as well as a better education;
3. To give a better protection to the society ;
4. To provide an individual shock in facing realities of imprisonment through confinement to the criminals.

By this *shock probation,* the court is given the following means :

1. The judges could impress the criminals that the crimes so serious that they can undergo a long period confinement.
2. The judges can order to release the criminals in order to get a *community-based treatment*
3. It can be a means to get a just compromise between imprisonment and release in some appropriate cases.
4. It can be a means for the judges to decree a treatment which is oriented in bettering behavior while the criminals are still burdened with responsibility with detterence imprisonment determined by the public policy.
5. It can be a means to protect the criminals who are confined in a period of time from bad environment outside the prison.

Therefore, it is expected that through limited imprisonment, the benefits can be enjoyed by the offenders, the judges, as wells as the society as a whole.

B. The Policy of Formulation of Imprisonment in Indonesian Legislations

1. The Regulation of Imprisonment in Indonesian Penal Code

Imprisonment is the most numerous type of criminal sanction laid down in criminal legislation. Of all the provisions of the Indonesian Penal Code containing formulation of a number of crimes, it is examined that 587 imprisonment contained in 575 delict formulation (approximately 97,96%), either formulated in a single or alternatively formulated with other criminal types.

Comparing with other types of criminal sanction, this data is obtained: From the 587 delict formulation in the Indonesian Penal Code, there are 776 types of

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[10] Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara.Baand Penerbit Universitas di Ponegoro, Semarang, 1996,* page 135.

[11] *Ibid.*

[12] *Ibid.* page 136.

[13] *Ibid.* page 137.

criminal sanctions consisting of : 13 of death punishment (1,68%), 575 of imprisonment (74,10%), 42 of confinement (5,41%) and 146 of fines (18,81%).

From the data, it can be seen that the imprisonment is pretty much set by lawmakers, but it is not found the reason or bases of setting imprisonment as one of the types of criminal sanctions to tackle the problem of crimes. So far, it was never questioned why the crime needs to be solved with the use of criminal sanctions in prison. Thus, the use of imprisonment and criminal law sanctions as one means of criminal politics is considered reasonable.

2. The Regulation on the Kinds of Sanction in the Legislations outside Indonesian Penal Code

Furthermore, the diagram below features the regulations on sanctions outside Indonesian Penal Code.

Table 4.
The composition of Criminal Sanction in the Various Legislations outside the Indonesian Penal Code

No	Laws	Criminal Sanction					
		Death penalty	Impriso nent	Certain period imprison ment	Confine-ment	fines	Subsidia ry penalty
1	Law No. 5 of 1997	1	1	17	-	16	1
2	Law No. 26 of 2000	4	5	7	-	-	-
3	Law No. 20 of 2001	1	2	13	-	12	-
4	Law No. 23 of 2004	-	-	10	-	10	1
5	Law No. 12 of 2006	-	-	5	-	4	-
6	Law No. 21 of 2007	-	1	24	1	24	2
7	Law No. 21 of 2008	-	-	12	-	12	-
8	Law No. 22 of 2009	-	-	18	44	58	1
9	Law No. 35 of 2009	8	12	56	3	54	2
10	Law No. 8 of 2010	-	-	9	3	8	2
11	Law No. 6 of 2011	-	-	31	4	29	-
Total		14	21	202	55	227	9
Precentage		2,6%	4 %	38,2%	10,4%	43	1,7 %

Sources: Primary Data Processed

From the table above, it can be seen that : 1) the most types of crime is imprisonment (55,4%) consisting of the life imprisonment, imprisonment for a specific time and criminal confinement. 2) in viewing each of the corresponding laws, imprisonment is still the most criminal sanction stated, except in two laws, Law No. 22 of 2009 on Traffic and Highway and Transportation, and Law No. 35 of 2009 on Narcotics. 3) The new type of main criminal sanction is not regulated, just in the Law on Narcotics there is some actions in the forms of:

- Medication, treatment, and rehabilitation in a rehabilitation institution for the addicted persons or junkies (Article 53 to 59),
- expulsion and prohibition of entering the territory of Indonesia for foreign nationals who commit the crime of narcotics (expulsion and prohibition of entering the territory of Indonesia for foreign nationals who commit the crime of narcotics 146).

From 11 (eleven) Laws that have been studied, the reasons or bases for regulating imprisonment, fines, and confinement in order to eradicate the crimes, their effectivities, as well as the essences of the sanction can be traced through the minutes of legislature's sessions, consideration section, and the explanation section of the Law. However, this study will focus on the consideration of each Law, whereas the study in the minutes of legislature's sessions is not conducted as the limitation of time suffered by the researcher.

The reasons of the uses of criminal sanctions are not specifically stated, but it seems having been covered in the discussion on the bases of certain sanctions. In short, in the practice of Laws so far, it has no specific discourses why some criminal acts are resolved with such kind of criminal sanctions.

3. The Regulation of Criminal Sanction in the Draft of Indonesian Penal Code

The formulation of the sanctions in the Draft of Indonesian Criminal Code consists of "penal sanction" and "treatment". Each of these sanctions consists of:

a. Penal sanctions:

a.1. Main Penal Sanctions:

1. imprisonment
2. confinement
3. scrutiny sanction
4. fines
5. doing social works

a.2. Additional Penal Sanctions

1. removal of certain rights
2. deprivation of certain items and bills
3. court judgement
4. payments of damages
5. fulfilment of *adat* law obligation

a. 3. Specific Penal Sanctions

b. Treatment

b. 1. For people who do not or less able to charge (the action was imposed without criminal sanction):

1. hospitalized in a mental illness hospital
2. submission to the Government
3. submission to someone being able to take care

b.2. For the people who are in general able to charge (disposing together with the criminal sanction):

1. revocation of driving licence
2. seizure of profits earned from crime
3. repairment of the consequences of criminal acts
4. work training
5. rehabilitation
6. treatment in an institution

In the draft of Indonesian Criminal Code, there is no longer criminal confinement in the main penal sanction, in which according to the pattern of the Criminal Code usually threatened for misdemeanor. The types of additional criminal sanction and treatment undergo an addition/expansion. A slightly prominent from the addition is the inclusion or the formulation in explicit form for an additional criminal sanction such as "fulfilling an adat obligation". The inclusion of this type of criminal sanctions are to accommodate sanctions which has been imposed by the unwritten law.

B. The Regulation of Criminal Sanctions in Some Other Countries

1.1. The Regulation of Shock Probation in Ohio

In Ohio, it is known one of sanctions called *shock probation.* This term is also known as c*ombined incarceration and probation* or *mixed or Split sentence.* In various forms of modification, this mixed criminal sanction can be found in some States in the United States such as in Maine, California, and Wisconsin.[14]

[14] Faul C. Friday, david M.Petersen, Harry E. Allen, in Barda Nawawi Ariep, *Op.Cit*. page 138.

In Ohio, *Shock Probatioan Law* is regulated in the Ohio Revised Code, 2947.06.1 of 1965. This Law is one of examples on the availableness of the procedure of releasing criminals easily enforced in the United States. This *shock probation* program is a unique attempt to compromise elements consisted in the criminal justice system, between supervision and containment which have never been combined previously.

In Ohio, shock probation is not a part of original penalty. It is a program of reconsideration of the court. Firstly, the offender who has been detained, prosecuted, and judged. The judges, using information available in the invvestigation report in the supervision department about the doer, have a number of options, such as: :

1. Place the offender on probation ;
2. Sentence the offender to a stay in a community-based correctional facility ;
3. Sentence the offender to prison;

At this point, the offenders themselves or through their lawyers or through a direct action of the court, can be released through a shock probation. If the shock probationnya is accepted, the offender will be under supervision of the supervision department and obey the regulation which is used to regulate persons under supervision.

Categories of offenders that are considered not eligible to shock probation are the offender who was convicted of murder, arson, theft in a dwelling not occupied, incest, sodomy, rape, deliberate violence to rape or deliver poisons.

4.2. The Regulation on the Conditional Sentence in Swedia**.**

In Swedia, a conditional sentece firstly introduced in the penal law through Swedish Legislature in 1890. Then the provisions and requirements in

the conditional sentences was being enforced in 1906 (Art of 22nd June 1906). The implementation of the conditional sentence was set through *The Conditional Sentence and Probation Act*, 22nd June of 1939, which came into force in 1944.

Based on The Conditional Sentene and Probation Act 22nd June of 1939, s.2. there are two alternatives for Swedish court: When someone is prosecuted for a criminal offence and on the bases of considerations relating to character and personal circumstances of the offender, and assumed reasonably that without the sentence he or she can be prevented to do further criminal acts. The first alternative is to delay the removal of public sentence and the second was imposing a certain sentence and then delaying the implementation of the sentence.

The delay period is determined by the discretion of the Court to a maximum of three years. When the perpetrator of a criminal act fails to comply with any of the obligations, the Court may order an extended period of time to a further two years if it is needed. (s.5 dan s.12 (3) *The Conditional Sentence and Probation Act* 22nd June 1939).

Then about the terms of the delays, the Criminal Law of 1939 provides in detail about the certain requirements which are obligatory in nature in order to apply all cases of delay in the form of either criminal delay and delay implementation of the imposition the criminal sanction.

The S. 11 Act 1939 provides that a the requirements of the sentencing delay can be changed in order to adjust with the doer.

4.3. The Regulation on the Conditional Sentence in Denmark.

Denmark creates the first codification on the criminal law in 1683 which is called Danske Lov. In 1866 it is codified a separate criminal law and came into force until 1933, a criminal code which has been established in 1930.

The big amendments on the criminal sanctions in Denmark occured in 1973, through the Law No. 320, dated on 13 June of 1973, which removed imprisonment sentence for the children, working institutions, detainment for security reasons, and imprisonment for *treatment*.

By the amendments, sanctions provided in Denmark are: 1) imprisonment 2) confinement 3) fines 4) Delayed sentencing 5) detainment for security reasons, 6) seizure, and 7) revocation of rights

There are two kinds of delayed sentence: 1) the judgment of the delaying sentence, and 2) the enforcement of the delaying sentence.

The detainment and the delaying sentence can be merged, in these situations:

a. The judges determined that criminal detention must be undergone for the maximum of 3 months and the rest is suspended. ;
b. The judges determine the length of sentencing period in prison and the rest is made uncertain. The period which has to be experienced is for maximum 3 (three) months whereas the rest can be converted into imprisonment if the offender cannot fulfill the requirements.. This policy was introduced since 1961.

C. The Pattern of the Formulation of Limited Imprisonment in the Future

1. The Pattern of the Formulation of Limited Imprisonment

In the future, if the limited imprisonment would be a kind of penal sentencing, (*straafsort*), which can be used as a means in eradicating crimes, this limited imprisonment should be included first into the main sentence which is equal to other main sentences in the Article 65 of the Draft of Indonesian Criminal Code.

Article 65 paragraph (1) of Draft of Indonesian Criminal Code provides the kinds of sentencing:

(1). Main sentences, consisting of :

a. imprisonment ;

b. confinement;

c. supervision;

d. fines;

e. doing social works

(2). The order of sentences as mentioned in the subsection (1) determines the weight of criminal sentencing.

It is stated in the Article 66 that the death sentence is a main sentence which is specific in nature and is always threatened alternatively. Furthermore, Article Pasal 67 par (1) provides additional sentences consisting of :

a. Removal of certain rights ;
b. Seizure of certain goods ;
c. Court Judgment
d. Damages/ compensation
e. Fulfilling local obligation/*adat* law.

Based on the article 60 paragraph (2) that the sequence sentences as referred to paragraph (1) determining the weight of sentences, limited imprisonment might be properly posited as the main sentence which is under imprisonment sentence or over the confinement sentence, so that the sequence as follows:

The main sentences consist of: a. Imprisonment ; b. Limited Imprisonment ; c. Confinement ; d. Supervision ; e. Fines ; f. Doing social works.

The reasons of placing the limited imprisonment under the imprisonment is that it is a partially custodial sentence and the rest is supervision or non custodial.

2. The Pattern of Duration of the Limited Imprisonment (The Weight of the Crimes)

In determining the amount or duration of sentences, the criminal justice system. The Draft of the Indonesian Criminal Code is still maintaining minimum and maximum system as contained in the Criminal Code (WvS) which is still in force. It is still maintaining "indefinite system" or maximum system" for each crime.

To the imprisonment, the draft of Indonesian Criminal Code also adheres to the pattern of life imprisonment, and the imprisonment prison for a given period, equal to the previous Criminal Code (WvS). To the imprisonment in a given time, the pattern as follows: the common minimum pattern is 1 day, specific minimum varies between 5-1 years, common maximum pattern is 15 / 20 years and specific maximum pattern is varies based on the seriousness of the crimes. Specific minimum pattern according to the concept at first at between 3 months to 7 years, but in its development it has undergone a change between 5 months to 1 year.

As it has described above, the minimum period in shock probation in Ohio is 30 days to 130 days, whereas the duration of detention can be combined with the

delayed sentence with the requirement that they has undergone the imprisonment for 3 months and the rest period will be delayed.

Based on the comparison above, it can be argued that limited imprisonment would be included in the type of sanctions qualified the less-serious crime which would be sentenced below 1 (one) year and if compared with the qualifications of a criminal offence in the draft of Criminal Code, the limited imprisonment is qualified as less serious crimes which is sentenced with fines in category I and II.

The length or duration of the limited imprisonment can be determined in three years maximum, similar to the under-supervision sentence according to the Article 78 paragraph (2) of the Draft of Penal Code and it is imposed to the offences which are sentenced with maximum 7-year imprisonment.

3. **The Guidance for Applying the Limited Imprisonment**

To obtain the exemption of sentences through a shock probation, the violators of law have to fulfil some requirements. The law offenders who have been arrested, prosecuted, and has become an inmate, the judge, by getting information about lawbreakers who are available in the report of investigation in the Department of Supervision, has a number of available options:

a. Putting the lawbreaker under supervision;
b. Punishing the violators of law to live in community – agency of rehabilitation;
c. Punishing the violators of law in a state prison.

Furthermore, the prisoners themselves or through their lawyers or through direct acts of the court can be released through shock probation. It needs a standard of the policy, first, it must be certain the kinds of criminal acts which can undergo a shock probation; second, the judges must provide a procedure of applying the shock probation.

III. Conclusions

a. Limited Imprisonment is needed in order to combine concepts which are philosophically opposed with sentencing. First, it combines an aspect of supervision and of confinement. Second, it combines the purposes of penology, of *deterrence reintegration*, which is separated strictly in theory.

b. Imprisonment is a kind of criminal sanction which is most provided within Indonesian Criminal Code as well as in the legislations outside the Code as a means to eradicate crimes

c. In the future, the limited imprisonment can be a kind of main sentencing and equal to other main sentences with limited length period imprisonment, such as in Ohio - 30 days minimum and 130 days maximum. This limited imprisonment fits to the serious crimes which are threatened to be sentenced for 1 year to 7 year imprisonment with the formulation alternatively and it can be imposed maximum for 3 year, similar to the supervision sentencing.

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