

TOWARDS
THE CORRECTIONAL CONDITIONS
AND POLICIES



# Analysis & Projection of the Implication of Draft Criminal Code towards the Correctional Conditions and Policies

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ISBN: 978-602-6909-77-0

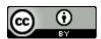
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# Issued by:

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Published for the first time on:

**March 2018** 

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# **Forewords**

The reformation towards Criminal Law Code (*Kitab Undang-Undang Hukum Pidana*) (hereinafter referred to as "KUHP) by its drafter constituted the foundation of a building called the national criminal law system. Further, the reformation promotes fundamental mission, namely: decolonialization of KUHP as legacy of colonial regime, domocratizatin of criminal law, consolidation of criminal law, and adaptation as well as harmonization with the current national and international development. The implementation and elaboration of such fundamental mission is both limited and holistic amendment of the criminal law paradigm incorporated in the current KUHP.

The reformation of Draft Criminal Code is expected to achieve 4 (four) matters, namely: the prevention and control of criminal; correctional of the perpetrators; prevention of abuse of power; and conflict resolution within the society. These four benchmarks are placed within the framework of social defence through punishment. Therefore, the substance contains in Draft Criminal Code should result in significant changes to the social defence which shifted the current paradigm of national criminal law.

This change, indeed, will affect number of aspects, one of the most notorious aspect is on the conditions and policies of correctional. Through both paradigm and substantial changes, the projection on the condition and policy of correction will also be affected following this reformation. The changes on conditions and policies of correctional will eventually impact the correctional centre and policies.

For this purpose, mapping on the substantive changes in the Draft Criminal Code in this study is important and significant to analyse the changes that will be occurred towards the conditions and policies of correctional.

**Institute for Criminal Justice Reform,** 

Anggara Executive Director

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# CHAPTER I INTRODUCTION

# 1.1. Background

The reformation towards KUHP by its drafter constituted the foundation of a building called the national criminal law system. Further, the reformation promotes fundamental mission, namely: decolonialization of KUHP as legacy of colonial regime, domocratizatin of criminal law, consolidation of criminal law, and adaptation as well as harmonization with the current national and international development. The implementation and elaboration of such fundamental mission is both limited and holistic amendment of the criminal law paradigm incorporated in the current KUHP.

Draft Criminal Code may become a legislative product with the most lengthy deliberation process in the history of Indonesia. The progress for reformation of KUHP has never been ceased since the National Law Seminar is held in 1963. It was started in 1964, the Draft Criminal Code was signed by at least 13 (thirteen) Ministers in law affairs. Currently, Commission III at the House of Representative (Dewan Perwakilan rakyat/DPR) has set the target to conclude the deliberation of Draft Criminal Code in the end of 2017. The Draft Criminal Code is expected to replace the WvS or *Wetboek van Strafrect* or commonly known as Dutch KUHP, which is considered as legacy of colonialism regime.

Currently, the Draft Criminal Code which has been rendered by the Government to DPR has entered the final round of deliberation. Several substances have been agreed by deliberation team. Other substances are still subject of the debate or further discussion.<sup>3</sup> The current deliberation position is that the Government and the House has concluded the deliberation for Book I of Draft Criminal Code on general provisions, and are currently deliberating Book II of Draft Criminal Code. However, several provisions in Book I of Draft Criminal Code are still subject to further improvement by Deliberation Team or Synchronization Team.<sup>4</sup>

The Academic Paper of Draft Criminal Code states that, the reformation and development of criminal law cannot be performed in ad-hoc basis, for it must be fundamental, holistic, and systematically, in the form of recodification which covers 3 (three) core issue of criminal law, namely: 1) formulation of criminal

<sup>&</sup>lt;sup>1</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Kencana, Jakarta, 2017, Page. 103

<sup>&</sup>lt;sup>2</sup> See: https://news.detik.com/berita/d-2938876/komisi-iii-dpr-targetkan-ruu-kuhp-selesai-dibahas-tahun-2017, accessed on 19 Februari 2018, on 13.28 WIB

<sup>&</sup>lt;sup>3</sup> Documentation on the deliberation process of Draft Criminal Code can be accessed at reformasikuhp.org

<sup>&</sup>lt;sup>4</sup> The deliberation process as per January 2018. See, Anggara at all, *Distribusi Ancaman Pidana dalam RKUHP dan Implikasinya*, Jakarta, Institute for Criminal Justice Reform, 2016, Page 1.

act; 2) criminal responsibility, be it as natural person or corporation; and 3) punishment and measures that can be enforced.<sup>5</sup>

From the abovementioned formulation, it can be concluded that the reformation of Draft Criminal Code is founded in the objective of "social defence" and "social walfare". The objective for "social defence" through the enforcement of criminal law can be further elaborated as follows:

- 1. Defence of social from anti-social actions which harm and endanger the society, thus the aims of the punishment is to prevent and control the offences.
- 2. Defence of social from dangerous nature of a person, thus the aims of the punishment is to correct the perpetrators and to change and influence his/her attitude to be obedient to the law and become goods and usefull citizen.
- 3. Defense of social from the abuse of sanction or reaction of law enforcer or general society, thus the aims of the punishment is to prevent abusive action or measure.
- 4. Defense of social from the threats towards balance and harmonization of interest and value as the result of criminal offences, thus the enforcement of criminal law must able to settle the conflict triggered by criminal offences, able to recover the balance and preserve the peace in society. Social defence in this context covers protection to victim of crime, which become appearant after the world war II. Victim for this purposes, includes the victim of abuse of power, which must obtain protection in the form of access to justice and fair treatment, restitution, compensation and assistance.

Therfore, from the abovementioned objectives, it can be concluded that the reformation of Draft Criminal Code is expected able to accommodate the followings 4 (four) aspecs:

- (i). Prevention and control of criminal offences;
- (ii). Correction to the perpetrators;
- (iii). Prevention of abusive actions; and
- (iv). Conflict resolution in the society.

These four benchmarks are placed within the framework of social defence through punishment. Therefore, the substance contains in Draft Criminal Code should result in significant changes to the social defence which shifted the current paradigm of national criminal law.

This change, indeed, will affect number of aspects, one of the most notorious aspect is on the conditions and policies of correctional. Through both paradigm and substantial changes, the projection on the condition and policy of correction

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<sup>&</sup>lt;sup>5</sup> Muladi and Diah Sulistyani, *Pertanggungjawaban Pidana Korporasi*, PT Alumni, Bandung, 2013, as cited by Badan Pembinaan Hukum Nasional, *Naskah Akademik Rancangan KUHP*, Jakarta, Badan Pembinaan Hukum Nasional, page 2

<sup>&</sup>lt;sup>6</sup> Ibid.

will also be affected following this reformation. The changes on conditions and policies of correctional will eventually impact the correctional centre and policies.

Changes to the conditions and policy of correctional will affect the correctional center and its policy. Thus, mapping on the substantive changes in the Draft Criminal Code in this study is important and significant to analyse the changes that will be occurred towards the conditions and policies of correctional.

The research on general provisions stated in Book I of Draft Criminal Code is not only aiming to analysis each substance of changes. In bigger scope, the analysis on Book I of Draft Criminal Code is to review the paradigm and concept of punistmenet (where the concept of correctional cannot be separated) as incorporated in the Draft Criminal Code. The significance of the swift from the imprisonment-punishment approach to non-penalty approach can be founded in Book I of Draft Criminal Code. If this concept is implemented effectively, it surely reduces the number of inmates in Detention Center (Rumah Tahan/Rutan) or Penitentiary (Lembaga Pemasyarakatan/Lapas). On the other side, such alternative mandates new role for insitusion related to correctional system.

Besides general provisions, further analysis is also performed towards the distribution of punishment. This cannot be sperated from the projection of conditions and policies of the correctional. There are 2 (two) possistion that will be further elaborated in regards to punishment, namely: i) does the Draft Criminal Code form new criminalization and ii) is there any increase on punishment (especially imprisonment) in the Draft Criminal Code?

Answer for both questions will lead to the analysis on the consequences to condition and policies of correctional. The most logical consequences is related to the role and allocation of resource of correctional. The changes may result in two conditions, namely the emerge or deletion of role of the correctional-related institutions.

If the condition result in the emerge of new role, thus it must be followed with the allocation of resrouces and issuance of new policies. To a certain extend, such allocation of resource may become burden if it not responded with adequate rediness to overcome the conditions.

Towards several concept of changes and alternative mechanism incorporated in the Draft Criminal Code, the surrounding obstacles and challenges are also need to be discussed. This become the initial respond if the Draft Criminal Code is enacted and followed with changes on the correctional policies, thus such policies may resolve and encourage the effectiveness of such new mechanism and concept.

#### 1.2. Research Problems

There are 3 (three) fundamental problems that will be answered in this study, namely:

- 1) What is the policy direction of punishment in Draft Criminal Code?
- 2) How the criminal punishment, especially imprisonment, is distributed in Draft Criminal Code?
- 3) What is the implication of punishmen policy and distribution of criminal punishment towards the correctional?

# 1.3. Purpose and Benefit

Purpose of this study is to elaborate the implication projection of Draft Criminal Code towards the conditions and changes of policies of correctional. This projection is elaborated from Book I on General Provisions and Book II on Criminal Offences in Draft Criminal Code. From the analysis on Book I will be obtained picture on the direction and policies of punishment in Draft Criminal Code. Meanwhile, analysis on Book II will answer whether such punlishment direction and policies in Book I is in accordance with the provisions on criminal offences in Book II.

Severals concept and alternative mechanism beside inprisonemnt which introduced by Draft Criminal Code, as well as its implementation obstacles and chalanges is also become object of this study. Therefore, it is expected that the purpose of this study can be achieved, namely the projection of future conditions of correctional upon the enforcement of Draft Criminal Code.

Benefif of this study is to elaborate the big picture and recomendaton to correctional-related institutions to respond the changes in KUHP. The significane changes of Draft Criminal Code will lead to significant changes to the conditions and policies of the correctional. To a certain extend, such situation mau become burden or disinsentive if it not overcome accordingly. Moreover, the benefit of this study is to potray the allocation of reserouce to the correctional as the result of changes on the KUHP.

# 1.4. Research Usability

The usability of this research is to provide recommendation to policy maker related to the correctional affairs.

#### 1.5. Research Method

The research is conducted by using descriptive method and focused to explore data and information on the phenomenom that will be faced due to the changes of KUHP and its implication to the condition and policies of correctional. Meanwhile, in respect of the format, this research is prepared by using prescriptive approach. Through this approach, besides giving detail on the phenomeonon, the research will also provide recommndation for improvement towards issues being discussed.

The utilization is performed toward data which has been available before, one of the main source is study prepared by *Institute for Criminal Justice Reform (ICJR)*.

Further, as the basis for conclusion, this research is using inductive technic by linking the analysis that has been elaborated with related regulations and policies.

# 1.6. Research Systematical

This research will discuss the implication projection of the enforcement of Draft of KUHO towards the conditions and situation of correctional. This research comprises of the following matters:

# **CHAPTER I Introduction**

This chapter will elaborate the background of the research and identification of problem which will be ansrewed by this study. Also, this section will discuss the usability and research method used to prepare this study. This study is intended to be used, especially, by policy maker to prepare Draft Criminal Code by taking into consideration the situation and condition of the correctional.

# **CHAPTER II Policy Direction of Punihsment in Draft Criminal Code**

This chapter will discuss the direction of policy in Draft Criminal Code. This policy direction is presented through in-depth analysis towards Book I of Draft Criminal Code. The substances that will be discussed is limited only to the substances that are limited to the situation and conditions of the correctional. There are eleven substances that will be discussed in this chapter, from type of crimes until the mechanism for the granting of clemency.

#### **CHAPTER III Criminal Punishment in Book II of Draft Criminal Code**

The distribution of criminal punishment, especially imprisonment, will significantly affect the situation and conditions of the correctional. Thus, this chapter will discuss the criminal punishment, especially imprisonment in Draft Criminal Code. This can be depicted from the projection of criminal punishment incorporated in Book II of the Draft Criminal Code.

# CHAPTER IV Analysis on the Implication of Changes on KUHP Towards the Correctional

This chapter will elaborate the implication projet of criminalization policy direction which is combined with the distribution of criminal punishment in Draft Criminal Code. The analysis on the criminal policy direction is aimed to answer the question whether or not the criminalization policy in the form of imprisonment is still being preserved. Further, the analysis on the distribution of criminal punishment in Draft Criminal Code is aimed to answer the the spread of criminal punishment and it consequences to the correctional.

# **CHAPTER V Closing**

This chapter comprises of conclusion on the study elaboirated form Chapter I to Chapter IV. Besides, this cahapter also contains recommendation based on the analysis presented in this study.

# **CHAPTER II**

# POLICY DIRECTION OF PUNIHSMENT IN DRAFT CRIMINAL CODE

The changes on KUHP leads to number of consequences, and one of the most fundamental consequences is towards the condition and policy of the correctional. This part will discuss the General Provisions (Book II) of the Draft Criminal Code which related to the condition of the correctional .

Based on the categorization of provisions contained in Book I of the Draft Criminal Code, there are 10 (ten) changes category which relevant to the condition and policy on the correctional that will be discussed in this part, namely:

- A. Type of punishment
- B. Death penaly/
- C. Measures
- D. Punishment and Measure towards Juvenile
- E. Enforcability of and changes to decision
- F. Punishment leniency and aggrevating factors
- G. Dismisall of Prosecution and to Serve Penalties
- H. Statutory limitation
- I. Mechanism for alternative punishment
- J. Parole

#### 2.1. Type of Punishment

Draft Criminal Code remains categorize the type of punishment into two big boxes, namely main punishment and additional punishment. However, in terms of type of crimes, there are number of changes have been made. Significantly, those changes will affect the condition and policy of the correctional.

In respect of main punishment, Artticle 66 (1) of the Draft Criminal Code lists type of main punishment, which comprises of:

- a. inprisonment;
- b. exile:
- c. special Supervision;
- d. fines; and
- e. social works.

Meanwhile, Article 68 (1) of Draft Criminal Code regulates the provisions on additional punishment. The Draft Criminal Code states that additional punishment comprises of:

- a. revocation of certain rights;
- b. confiscation of certain goods and/or receivables;

- c. annoucment of decision;
- d. indemnify; and
- e. fulfilment of local customary liability or other obligation in accordance with the relevant living law.

# 2.1.1. Inprisonment

Inprisonment in Draft Criminal Code ca befor imposed for a lifetime period or certain period of time.<sup>7</sup> Inprisonment for certain period of time is imposed for the maximum of 15 (fifhteen) years consecutively or for the minimum of 1 (one) day. This provision will be waived if the criminal offences subject to specific minimum inprosinment provision.

According to the Elucidation of the Draft Criminal Code, besides adopting the specific-maximum principle, the Draft Criminal Code is also acknowledge the specific-minimum principle. The later means that for every type of criminal offences there is an upper threshold for the punishment, while for the lower threshold punishment, the general provision on minimum punshiment is applied. The general provision for minimum period for imprisonment is one day. The provision on the specific-minimum system is intended for crimes that may disturb the society.

For perpetrators, he/she can only be imposed for imprisonment for a maximum of 15 (fifteen) years. However, the judge may impose 20 (twenty) years of imprisonment consecutevly if the criminal offence is punishable by death pentaly of Life imprisonment or if the offences fall under crimes with severity. There is, however, a limitation to judge in any event should not impose inprisonemnt for more than 20 (twenty) years.

One of the salient provisions introduced by the Draft Criminal Code in light of this imprisonment punishment is the instalment plan for serving the imprisonment as regulated in Article 73 (1) of Draft Criminal Code. This provision states that if the judge sentences the perpetrators with 1 (one) year or less than 1 (one) year of imprisonment, the judge may choose for the perpetrators to serve the punishment through instalment plan.

The applicability of instalment plan for service imprisonment punishment can only be granted if the judge found serious conditions or the potential consequences that are very worrying if the perpetrators serve the punishment consecutively. This instalment plan may be performed for maximum of 2 (two) days in a week or 10 (ten) days in a month, provided that the length period of the instalment must not more than 3 (three) years.

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<sup>&</sup>lt;sup>7</sup> Article 70 (1), Draft Criminal Code.

#### 2.1.2. Exile

Exile is imposed to perpetrator who commit criminal offences punishable by imprisonment however due to the personality or the actions of the perpetrators, he/she is imposed with exile punishment. Article 78 of Draft Criminal Code states that exile punishment is imposed to defendant who committed criminal offences triggered by venerable intention.

However, the exile punishment cannot be imposed if the action is committed in such a way or based on the result of the action, that imprisonment will be appropriate to be imposed. The elucidation of the Draft Criminal Code states that exile is one of main punishment, and it essentially is an enforcement of special imprisonment.<sup>8</sup> Thus, this type of punishment is not specifically regulated in any criminal offences provision.

The consideration in imposing exile is based on the motive of the perpretrators. In this case, the action is trigerred by venerable intention. This type of criminal offences is often related to political criminal offences. The term venerable intention is determined by the judges and must be elaborated in the consideration of the decision.

### 2.1.3. Supervision Punishment

Supervision punishment is regulated in Article 79 of Draft Criminal Code, which is imposed to defendant who commit criminal offences punishable by at least 7 (seven) years of imprisonment. Supervision punishment may be imposed by considering the personality and the action of the perpretartors.

According to the Elucidation of Draft Criminal Code, the enforcement of supervision punishment is closely related with the imposition of imprisonment. This superivision punishment similar to non-custodial imprisonment or probation punishment as currently regulated in KUHP. This punishment is an alternative for imprisonment punishment and is not intended for severe criminal offences. The supervision punishment may only be imposed for maximum of 3 (three) years.

If a person is imposed with supervision punishment, the following requirements must be satisfied:

- a. The perpretrators will not commit other crimes;
- b. the perpretrators within shorter period than the superivisoon punishment term must compensate all or partial of loss incurred due to the criminal offences; and/or
- c. The perpretrators must perform or not commit certain action without prejudice to the freedom for religion or politic.

<sup>&</sup>lt;sup>8</sup> See Academic Papares of Draft Criminal Code, Op. cit, page 48 and Elucidation of Draft Criminal Code, Article 78 (1).

Article 80 (4) of Draft Criminal Code states that the monitoring towards the implementation of supervision punishment is performed by Correctional Center at the Ministry of Law and Human Rights. If during the monitoring period the perpretrators commit unlawfull action, the Correctional Center may submit recommendation to supervisory judges to extend the supervision period in a time not more than 2 (two) times of the supervision punishment period which has not been served.

However, if during the monitoring period, the perpetrators show good behaviour, thus the Correctional Center may submir recoemdnation to supervisory judge to shorthen the supervision punishment. The supervisory judges may then redefine the period of supervision punishment after taking into consideration information from related parties.

Other condition is where the perpretrators, during the period of supervision punishment, commiting criminal offences and is imposed criminal punishment other than death penalty or imprisonment, the supervision punishment must still be served. If the perpretrators is imposed with imprisonment, the enfocement of supervision punishment is postponed and will be resumed after the perpretrators has served the imprisonment.

According to the Elucidation of Draft Criminal Code, the imposition of supervision punishment is solely based on the discretion of the judges and by taking the personaly and the action of the perpretrators into consideration. This supervision punishment is generally imposed to first offender. The period of punishment is maximum of 3 (three) years.

The monitoring mechanism towards the implementation of supervision punishment is performed by development officer at Correctional Center at the Ministry of Law and Human Rights. <sup>10</sup> In performing its duty, this officer may request assistance from regional government, social institution, or certain individual. <sup>11</sup>

The development officer is authorized to request extention or shorten the supervision period to supervisory judge. The request to extend is submitted if, during the supervision period, the convict shows the potential of unlawfull action. However, the request to shorthen the supervisory period is submitted if the convict shows improvement behaviour. The extention of supervision period must not greater than 2 (two) times of the intial supervison period.

In essence, the changes on the supervision period are constituted changes to the punishment. Thus it must be decided by taking the statement of the convict, development officer, or other related parties into consideration.<sup>12</sup> If, during serving the supervision punishment, the convict is required to perform certain

<sup>11</sup> Ibid.

<sup>&</sup>lt;sup>9</sup> Article 80, Elucidation of Draft Criminal Code.

<sup>&</sup>lt;sup>10</sup> Ibid.

<sup>&</sup>lt;sup>12</sup> Ibid.

work, he/she is eligible for payment, which will be shared to the convict, victim, or State.<sup>13</sup>

#### 2.1.4. Fines

Fines are the imposition of sanction in the form of mandatory payment of money by convic based on court decision. In the Draft Criminal Code, finesare determined based on specific categorization, as follows:

- a. category I: IDR 10,000,000 (ten million rupiah);
- b. category II: IDR 50,000,000 (fifty million rupiah);
- c. category III: IDR 150,000,000 (one hundred fifty million rupiah)
- d. category IV: IDR 500,000,000 (five hundred million rupiah);
- e. category V: IDR 2,000,000,000 (two billion rupiah); and
- f. Category VI: IDR 15,000,000,000 (fifteen billion rupiah)

Article 82 of the Draft Criminal Code states that in the absent of spesifc-minimum provision in the criminal punishment, thus the minimum fine is set for IDR 100,000 (one hudred thousand rupiah). The punishment in the form of fine is related to the policy of the correctional if the fine is unable to be settled. The Draft Criminal Code provides that if the foreclose of asset or income is impossible, thus the unpaid fine can be subtitled to be punishment in the form of social works, supervision punishment, or imprisonment, as long as such fine is not greater than fine under category I.

The length of period for the subtition of unsettled fine is as follows:

- a. For substitute punishment in the form of social works, the applicable provision is Article 88 (3) and (4). Article 88 (3) and (4) states that the social work is prohibited to be comecialized. Further, the social work punishment is imposed for maximum of two hundred forty hours for 18 (eighteen) years of age or more defendant and one hundred twenty hour for less than 18 (eighteen) years of age.
- b. For supervision punishment, the minimum period is 1 (one) month and maximum period is 1 (one) year.
- c. For substitute punishment in the form of imprisonment, the minimum period is set for 1 (one) month and maximum period is set for 1 (one) year, which can be added for another 1 (one) year 4 (four) months. If there is additional punishment due to simultaneous criminal offences or the present of severity criminal offences committed by juvenile.

The period of substitute punishment is calculated based on size of each fines, namely IDR 15,000 (fiftheen thousand rupiah) or less, is equal to:<sup>14</sup>

a. one hour of social works;

<sup>&</sup>lt;sup>13</sup> Ibid.

<sup>&</sup>lt;sup>14</sup> Article 85 (3), of Draft Criminal Code.

# b. One day of supervision punishment or imprisonment.

If after serving the substitute punishment, partially of the punishment is fines, the period of substitute punishment is deducted accordingly. If the foreclose of asset or income cannot be conducted, thus for unpaid fine under category I will be substituted with the minimum imprisonment for 1 (one) year and for maximum period as charged for the criminal offences in question.<sup>15</sup>

If a criminal offence is only punishable by fine, then towards such criminal offences may be also imposed with additional punishment or special measure. Likewise, towards individual who has been imposed with fines in number of times, due to criminal offences which punishable by fines, may also be subject to inprisonemnt of maximum of 1 (one) year or supervision punishment along with fines. 17

#### 2.1.5. Social Works

Social works punishment is imposed if the imprisonment punishment which is being charged is less than 6 (six) months or if the fines is not greater than fine under category I.<sup>18</sup> Social works punishment is imposed for maximum of 240 (two hundred forthy thousand) hours for 18 (eighteen) years of age or above defendant and 120 (one hundred twenty) hour for less than 18 (eightee) years of age defendant.<sup>19</sup>

There are number of consideration for enforcing the social works punishment, namely:<sup>20</sup>

- a. the confesion of defendant on criminal offence that has been committed;
- b. productivity age of defendant is in accordance with the prevailing laws and regulations;
- c. the defendant has agreed with the punishment after being informed the purposes and information related to the social works punishment;
- d. social history of the defendant;
- e. Protection of the defendant's work safety;
- f. Religion and political believes of the defendant; and
- g. The ability of defendant to settle the fines.

The implementation of social works punishment may be performed through instalment mechanism for maximum of 12 (twenty) months by taking into consideration the activity of convict to perform his/her livelihood and/or other

<sup>&</sup>lt;sup>15</sup> Article 86 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>16</sup> Article 60 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>17</sup> Article 60 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>18</sup> Article 88 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>19</sup> Article 88 (4), Draft Criminal Code.

<sup>&</sup>lt;sup>20</sup> Article 88 (2), Draft Criminal Code

activity.<sup>21</sup> If the convict fails to satisfy all or partial of the obligation of social work without permissible reason, the convict will be ordered to:<sup>22</sup>

- (i). Repeat all or partial of the social work;
- (ii). Undergo all or partial of imprisonment punishment which has been subtitied to social work punishment;
- (iii). Pay all or partial of fines which has been substituted to social work due to the failure to settle the fines.

#### 2.1.6. Additional Punishment

Article 68 (10) Draft Criminal Code provides the arrangement projection in relation to additional punishment. This additional punishment is imposed jointly with main punishment as either separated or jointly with other additional punishment. The additional punishment under the Draft Criminal Code comprises of:<sup>23</sup>

- a. revocation of certain rights;
- b. foreclose of certain goods and/or receivable;
- c. announcement of court decision;
- d. indemnity; and
- e. fulfilment of local customary liability or other obligation in accordance with the relevant living law.

# 2.2. Death Penalty

In Draft Criminal Code, death penalty is not listed as main punishment. Death penalty is classified as special main punishment and is always charged with other alternative punishment.<sup>24</sup> According to Article 89 of Draft Criminal Code, such alternative arrangement is to palced death penalty as last resort to protect the society.

The special nature of death penalty, according to Elucidation of Draft Criminal Code, is intended to show that death penalty must be charged and imposed in strict and selective manner. During the imposition of death penalty, judge must always deeply consider whether the case in question can be imposed with other alternative punishment, namely Life imprisonment or maximum of 20 (twenty) years of inprisonemnt. If there is a doubt on the use of the alternative punishment opition, thus the judge may impose conditional death penalty in case in question.

The conditional death penalty is essentially a death penalty that subject to postponement for 10 (ten) years of probation period, if:<sup>25</sup>

<sup>&</sup>lt;sup>21</sup> Article 88 (6), Draft Criminal Code.

<sup>&</sup>lt;sup>22</sup> Article 88 (7), Draft Criminal Code.

<sup>&</sup>lt;sup>23</sup> Article 68 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>24</sup> Article 67, Draft Criminal Code.

<sup>&</sup>lt;sup>25</sup> Article 91 (1) Draft Criminal Code.

- a. The reaction from the society towards the convict is massif;
- b. the convict shows regretfull action and there is possibility for improvement:
- c. The involvement role of the convicts is not substantial; and
- d. There is leniency reason for the convict.

If the abovementioned requirement is satisfied, the the Ministry whose responsible in the field of law may change the death penalty into one of the alternative punishment, namely Life imprisonment or maximum of 20 (twenty) years of imprisonment. The 10 (ten) years of probation period is counted since the clemency application is refused.

The execution of death penalty can only be implemented if the celemency application submitted by the convicts is refused. This is because, according to the Elucidation of Draft Criminal Code, the death penalty is considered as heavy punishment and cannot be fixed in the event of mistake. Besides, the Elucidation of Draft Criminal Code also states that this provision is incorporated by considering the fact that Indonesia has entered into the Convention for the Safeguards Quaranteeing Protection on the Rights of those Facing the Death Penalty Economic and Social Council Resolution 1984/50.<sup>26</sup>

If, during the probation period, the convict shows positive attitude, the death penalty may be change to life imprisonment or maximum of 20 (twenty) years of inprisonemnt. Ground for this change is Decree of Minister of Law and Human Rights.

If the application for clemency is refused and the execution is not performed for 10 (ten) years, and such situation is not due to the escpae of the convict, thus the death penalty may be changed to life imprisonment or maximum of 20 (twenty) years of inprisonment by Minister of Law and Human Rights, based on Presidential Decree.<sup>27</sup>

Furthermore, other arrangement related to death penalty is that the implementation of death penalty towards pregnant woman or mental illness convicts must be postponed until such woman has gave birth or the mental illness convict is declared healthy.<sup>28</sup>

#### 2.3. **Special Measures**

Measure under Draft Criminal Code is related with the criminal accountability matters. Draft Criminal Code devides this matter into three categories, namely: (i) incapacity individual due to mental illness, mental disorder, mental retardation, or other mental disabilities, and (ii) people who are capable to be held accountable and are intended to provide protection to the community.

<sup>&</sup>lt;sup>26</sup> Article 91 (4), Draft Criminal Code.

<sup>&</sup>lt;sup>27</sup> Article 92, Draft Criminal Code.

<sup>&</sup>lt;sup>28</sup> Article 90 (4), Draft Criminal Code.

Towards individual who cannot be held accountable may be subject to special measures.<sup>29</sup> Meanwhile, for perpetrators under the second category, the judge may choose whether to reduce the punishment imposed or impose special measures.<sup>30</sup>

According to Elucidation of Draft Criminal Code, the determination on whether an individual may be held accountable is based on the intelligence of the perpetrators. The intelligence factor will be the basis to drive whether the perpetrators will commit legal or illegal action. In the state of criminal inaccountable, such condition can only be explained based on medical reason. Thus, judge must not rely solely on his/her own assessment. The judge is obliged to summon expert to explain the condition.<sup>31</sup>

Elucidation of Draft Criminal Code details the definition of criminal inaccountable, as follows:  $^{32}$ 

- a. is unable to achieve a purpose consciously;
- b. is unable to control the intention; or
- c. Is unable to understand and comprehend the unlawfull nature of his/her action.

Meanwhile, less accountable means the unstability of individual's mental to direct his/her intention or purposes. In this state of mind, such individual is considered unable to understand the unlawful nature of his/her action. Consequently, the punishment may be reduced. However, judges may also imposed special mesure in the form of mental hospital treatment or present the convict to the state for further measure.<sup>33</sup>

This system is referred to as, under the Draft Criminal Code, double-tract system, in which, beside imposing punishment, the perpetrators may also imposed to special measure. Other noteworthy aspect in the Draft Criminal Code is that the imposition of special measure is based on the condition of perpetrators at the time of the criminal offence is committed, and not during the punishment or special measure is imposed.

The imposition of special measure under the Draft Criminal Code may in the form of:<sup>34</sup>

- a. hospital treatment:
- b. handover to the state; or
- c. handover to other parties.

Other measures that can be imposed simultenously with main punishment are:35

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<sup>&</sup>lt;sup>29</sup> Article 41, Draft Criminal Code.

<sup>&</sup>lt;sup>30</sup> Article 42, Draft Criminal Code.

<sup>&</sup>lt;sup>31</sup> See Article 41 and Article 42, Elucidation of Draft Criminal Code.

<sup>&</sup>lt;sup>32</sup> Article 41, Elucidation of Draft Criminal Code. S

<sup>&</sup>lt;sup>33</sup> Article 42, Elucidation of Draft Criminal Code.

<sup>&</sup>lt;sup>34</sup> Article 103 (1), Draft Criminal Code.

<sup>35</sup> Article 103 (2), Draf of KUHP.

- a. revocation of driving license;
- b. foreclose of asset gathed from criminal offences;
- c. mandatory repair any result of the criminal offencese;
- d. work training;
- e. rehabilitation; and/or
- f. treatment in certain insitutions.

In relation to the imposition of measures, the objective and guidance of criminal punishment as stated in Draft Criminal Code must be taken into account. The objective of criminal punishment under the Draft Criminal Code is:<sup>36</sup>

- a. preventing criminal offences by enforcing legal norm to protect the society;
- b. correcting the convics by arranging the correctional measure to be a better person;
- c. Settling the conflict which arisen as the result of criminal offences, repair the sustainablity, and preserve peace in the society; and
- d. Releasing the guilty feeling of the convict.

Further, the punishment is not intended to create pain or degrade human dignity. Meanwhile, the guidance of punishment is referred to the consideration that must be present when imposing the punishment, namely:<sup>37</sup>

- a. wrongdoing of the perpetrators;
- b. intention and objective of the criminal offences;
- c. inner attitude of the perpetrators;
- d. whether the criminal offences has previously medidated or not;
- e. method in performing criminal offences;
- f. the character and action of the perpetrators subsequent after committing criminal offences;
- g. biography, social and economic condition of the perpetrators:
- h. the affect of criminal punishment to the future of the perpetrators;
- i. the affect of criminal punishment to victim and family of the victim;
- j. forgivness from the victim and/or his/her family; and/or
- k. Respond of the society towards the criminal offences.

Further, the non-severe of the criminal offences, personal condition of the perpetrators, or the condition when the criminal offencese is committed or the subsequent condition after the criminal offense is occurred, may be taken into consideration when imposing the criminal punishment or measures based on justice and human rights aspects.

One of the measures which related with the condition and policy of the correctional is depicted in Article 106 of the Draft Criminal Code. The special measure in the form of handover to government, for adults, is performed for the

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<sup>&</sup>lt;sup>36</sup> Article 55, Draft Criminal Code.

<sup>&</sup>lt;sup>37</sup> Article 56, Draft Criminal Code.

interest of public. The court decision will determine the place and procedure to perform the special measures. However, the Draft Criminal Code does not stipulate further the palce, process, as well as the mechanism of this handover, nor the party that will responsible to accept or maintain such handover.

Besides, the special measures which have direct relation with the condition and policy of the correction is special measure in the form work training. Article 111 (1) of the Draft Criminal Code states that to impose special measure in the form of work training, the judges must consider the following matters:

- a. the benefit for the perpretrators;
- b. the ability of the perpetrators dan/and
- c. Type of work training.

Other form of special measures which also relate to the condition and policy of the correctional is rehabilitation. This measure is imposed to perpetrator who satisfies the following criteria:<sup>38</sup>

- a. is in state of addicted to alchol, narcotics, psicotrapics, and other addictive substances; and/or
- b. is having sexual disorders or mental illness.

The rehabilitation may be conducted in medical or social rehabilitation institution, be it owned by the government or private. Further provision in this matter will be stipulate in a Government Regulation.

# 2.4. Criminal Punishment and Special Measures for Juvenile

The Draft Criminal Code states that children under 12 (twelve) years of age who is committing criminal offences must not be held responsible.<sup>39</sup> Punishment and special measures for juvenile can only be imposed for individual between 12 (twelve) years of age and 18 (eighteen) years of age.<sup>40</sup>

For criminal offences committed by juvenile, the investigarors, prosecutors, and judges, must prioritize the settlement thorugh diversion mechanism.<sup>41</sup> This diversion is undergone if the offense is punishable by less than 7 (seven) yars of inprisonement and it does not constitute subsequent criminal offences by the perpetrators.<sup>42</sup>

In performing the diversion, the following matters must be taken into account:<sup>43</sup>

a. intrest of the victim;

<sup>&</sup>lt;sup>38</sup> Article 112 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>39</sup> Article 115 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>40</sup> Article 115 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>41</sup> Article 117 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>42</sup> Article 117 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>43</sup> Article 118 (1), Draft Criminal Code.

- b. walfare and accountability of the juvenile;
- c. avoidance of negative stigma;
- d. avoidance of retaliation effect;
- e. social stability; dan/and
- f. appropriateness, moral value, and social order.

The diversion is obtained based on the consensus between the victim and/or victim's family with the perpetrators and his/her family. This requirement, however, does not apply if the following condition is occurred:<sup>44</sup>

- a. the criminal offences is punishable by fine under category I;
- b. the criminal offense is classified as light infringement;
- c. the losses suffered by the victim is not more than the relevant provincial minimum wage threshold.

For children under 12 (twelve) years of age who commited or allegedly commited a criminal offense, the investogarors, community advisor, and professional social worker must take the decision to:<sup>45</sup>

- a. handover the children to his/her parent; or
- b. enrol the children to education program, development, and counselling in government institution or Social Walfare Organization Institution at social service office, be at central or regional level, for maximum of 6 (six) months.

According to the Draft Criminal Code, criminal punishment that can be imposed of juvenile is main punishment and additional punishment. 46 The main punishment may in the form of:47

- a. Warning
- b. conditional punishment (counselling outside the institution, community services, or supervision);
- c. work training/
- d. counselling within an institution; and
- e. Inprisoment.

Punishment in the form of warning is performed by giving advice or notification to the children for not repeating his/her action and to avoid any other unlawfull action.<sup>48</sup>

Further, conditional punishment constitutes a punishment which is subject to certain condition as set in the decision. This condition must not reduce the

<sup>&</sup>lt;sup>44</sup> Article 118 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>45</sup> Article 120, Draft Criminal Code.

<sup>&</sup>lt;sup>46</sup> Article 121, Draft Criminal Code.

<sup>&</sup>lt;sup>47</sup> Article 122, Draft Criminal Code.

<sup>&</sup>lt;sup>48</sup> Elucidation of Article 124, Draft Criminal Code.

freedom for religion or politic of the children. The condition, both general and special condition which must be satisfied within a certain period of time, is determined by the judges. If the conditions failed to be satisfied, the punishment period may be extended.<sup>49</sup>

The place to serve the conditional punishment in the form of non-institutionalized coaching is determined by the judges by taking the necessity of the children into account. The place for this couseling is government-owned education or development institution or other institution determined by the judges. $^{50}$ 

Non-institutionalized coaching may include the obligation to perform the following action:<sup>51</sup>

- a. participate in coaching and couseling session organized by officials;
- b. therapy in psychiatric hospital; or
- c. participate in teraphy for abusire of alcohol, narcotic, psychotropic, and other addictive susbtances.

The Elucidation of Draft Criminal Code states that, the non-institutionalized coaching is intended to give coaching to the juvenile, both for the purpose of healing due to the inability or unlikely to responsible for his/her action or due to mental retard. Moreover, this type of punishment is also intended for children with healty mind to acquire skill which will be benefit for his/her life.<sup>52</sup>

If during the counselling period, the juvenile violates the specific condition which has been determined, the officer will recommend the supervisory judge to extend the counselling period which must not greater than 2 (two) times of the counselling period which has not been served.<sup>53</sup>

If the judge imposes the punishment in the form of community service, prosecutor and community advisor will place the children in public service institution which is owned by the government or private entities. This decision will be based on reaseach in the society which is conducted after performing risk and necessity assessment of the children.<sup>54</sup>

During the period of punishment in the form of community service, the children remain in his/her family. This is conducted under the condition that all the counselling requirement which has been imposed by the court must be satisfied by the children with the mentoring form his/her parent/guardian. The implementation of this decision is adjusted with the necessity and condition of the children.<sup>55</sup>

<sup>51</sup> Article 127 (1), Draft Criminal Code.

 $<sup>^{\</sup>rm 49}$  Article 125 and 126, Draft Criminal Code.

<sup>50</sup> Article 126, Draft Criminal Code.

<sup>&</sup>lt;sup>52</sup> Elucidation of Article 127, Draft Criminal Code.

<sup>&</sup>lt;sup>53</sup> Article 127 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>54</sup> Article 128 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>55</sup> Article 128 (2). Draft Criminal Code.

Further, if the court decision obliges for counselling (superivision punishment), the prosecutor and community advisor must place the children in supervision institution. The supervision punishment that can be imposed to the children is for the minimum period of 3 (three) month and maximum period of 2 (two) years. $^{56}$ 

In relation to the punishment in the form of work training, the implemention of such punishment is conducted by government or government in cooperation with private entity. The work training is performed on business day and must not interfere with the right for study of the children. The minimum period of work training is 3 (three) months and maximum of 1 (one) year.<sup>57</sup>

Th work training is presented for minimum duration of 1 (one) hour and maximum duration of 3 (three) years in 1 (one) hour. This arrangement is determined in the court decision by taking into consideration the necessity of the children. Punishment in the form of work training is performed in institution that organizes work training in accordance with the age of the children.<sup>58</sup>

For children that have beem imposed with punishment in the form of counselling in an institution must be placed in work training institution or counselling institution in accordance with the court decision. The work training institution or counselling institution is constituted the living place for the children. If the work training institution or counselling institution does not have education facility, the Correctional Center may enter into cooperation with:

- a. education insitution
- b. religious affair institution; or
- c. Other institution in accordance with the children's necessity.<sup>59</sup>

The counselling for children inside the institution is performed until the children reach 18 (eighteen) years old. For children who has served at least  $\frac{1}{2}$  (half) of his/her couseling period in the institution and the children is well behaved during such period, then he/she entitle for parole.<sup>60</sup>

Inprisonment can only be imposed to children as ultimate measure. The imprisonment is imposed in the event the children have committed severe criminal offence or offences which are conducted along with violance. Punishment in the form of limitation of freedom may be imposed to children for maximum period of  $\frac{1}{2}$  (half) of the maximum punishable inprisonment for adult. Further, the specific minimum imprisonment does not applicable for children. If the criminal offense is punishable by death penalty or life

<sup>58</sup> Article 130, Draft Criminal Code.

 $<sup>^{56}</sup>$  Article 129 (1) and (2), Draft Criminal Code.

<sup>&</sup>lt;sup>57</sup> Article 130, Draft Criminal Code.

<sup>&</sup>lt;sup>59</sup> Article 131, Draft Criminal Code.

<sup>&</sup>lt;sup>60</sup> Article 132 (1) and (2), Draft Criminal Code.

imprisonment, then the maximum period of inprisonement that can be imposed to children 10 (ten) years.61

The imprisonment of children is performed in Juvenile Counseing Institution. The Draft Criminal Code states that further provisions in regards to form and procedure for the implementation of main punishment for juvenile will be regulated in Government Regulation.<sup>62</sup>

Meanwhile, the additional punishment that can be imposed to children is in the form of foreclose of profit generated from the criminal offenses or customary punishment.63

In regards to the special measure, for children that unable or unlikely to be held responsible for his/her action as regulated in Article 41 and Article 42 of Drft of KUHP, may subject to the following special measure:

- a. handover the children to parent/guardingan;
- b. handover of the children to other party;
- c. treatment in psychiatric hospital;
- d. treatment in Social Walfare Institution
- e. mandatory enrolment in formal education and/or training organized by government or private entity;
- f. revocation of driving license; and/or
- g. correction of the result of the criminal offense.

#### 2.5. **Enforcability of and Changes to the Decisions**

Draft Criminal Code stipulates that the convicts who serve inprisonemnt or exile and has already in detention, the decision is in force since the final and binding court decision is rendered. Meanwhile, for convicts which has not been detained, the decision is in force since it being executed.<sup>64</sup>

The court decision shall state that the arrest and detention periods which has been served by the defendant before the final and binding decision will be subtracted whooly or partially from the defined inprisoment period or imprisonment as the substitution of fines. This provision also applies for convict which is currently in prison for several criminal offences and has been punished for other actions.65

If the convicts which is currently serving his/her period in penitentiary apply for clemency, then the period from the application is submitted until the Presidential Decree as the respond of the application is issued, does not suspend

<sup>&</sup>lt;sup>61</sup> Article 133 and Article 134, Draft Criminal Code.

 $<sup>^{62}</sup>$  Article 133 (2) and Article 135, Draft Criminal Code.

<sup>&</sup>lt;sup>63</sup> Article 136, Draft Criminal Code.

<sup>&</sup>lt;sup>64</sup> Article 62, Draft Criminal Code.

<sup>&</sup>lt;sup>65</sup> Article 63 (1) and (2), Draft Criminal Code.

the implementation of punishment that has been imposed, unless the president stated oterwhise.<sup>66</sup>

For convicts who are outside the penitentiary and submitting clemency application, the period of time between the submissions of application until the Presidential Decree is issued does not counted as period of serving the punishment. If the convicts escapte, then the fugitive period does not considered as period of serving the punishment.<sup>67</sup>

In regads to the changes and adjustment of decision, Article 58 of Draft Criminal Code open the possibility for crimnan decision or special measure that has secured final and binding force to be changed or adjusted by considering the development of the convicts and purpose of punishment.

Draft Criminal Code states that the changes or adjustment of decision must not heavier than the original decision and subject to approval from the convicts. The changes or adjustment may in the form of:

a. revocation or termination of the remaining punishment or special measure period;

b. substitution to other type of punishment or special measures.<sup>68</sup>

The changes or adjustment of this decision is imposed thorugh decision based on application. The changes or adjustment is imposed based on the request from the convicts, parent, guardian, or legal counsel of the convicts or based on the request from prosecutor or supervisory judge. The changes or adjustment of the decision does not override the authority of Ministry of Law and Human Rights to grant remission to the convicts.<sup>69</sup>

If the application for changes or adjustment is refused by the court, then the new application can only be submitted after 1 (one) year of the refusal. However, in the present of special circumstances that should be considered before the 1 (one) year grace period is matured, and then the provision on this waiting period does not apply. $^{70}$ 

The Elucidaion of Draft Criminal Code states that the changes and adjustment of this decision shows one of the utliamte function of punishment which focuses on the improvement of the convicts. The standard used for this purposes is the improvement of conicts during his/her development period, which refers to positive progress that has been achived to support others positive outcome.<sup>71</sup>

# 2.6. Punishment Leniency and Aggrevating Factors

<sup>&</sup>lt;sup>66</sup> Article 64 (1), Draft Criminal Code

<sup>&</sup>lt;sup>67</sup> Article 64 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>68</sup> Article 58 (4), Draft Criminal Code.

<sup>&</sup>lt;sup>69</sup> Article 58, Draft Criminal Code.

<sup>&</sup>lt;sup>70</sup> Article 58 (5), Draft Criminal Code.

<sup>&</sup>lt;sup>71</sup> Elucidation of Articlr 58, Draft Criminal Code.

The Draft Criminal Code states several leniency factors of punishment, namely;<sup>72</sup>

- a. attempt in commiting criminal offense
- b. assist for the occurance of criminal offence;
- c. voluntary surrender to officer after committing criminal offense
- d. the criminal offense is committed by pregnant woman
- e. voluntary provisio of adequate compensation or repair to cover damage as the result of criminal offense;
- f. the criminal offense is committed during unstable state of mind;
- g. criminal offense is committed by the producer as referred to in Article 40; or
- h. other factors sourced from the living law.

The criminal warning system adopted by the Draft Criminal Code is the reduction for 1/3 (one third) of the special maximum or minimum punishment for certain criminal offence. For criminal offense punishable by death penalty or life imprisonment, the maximum punishment is set for 15 (fiftheen) years of imprisonment.<sup>73</sup>

Article 140 (3) of Draft Criminal Code states that basedon certain consideration, the leniency of punishment may in the form of changes to the type of punishment from heavier punishment to lighter punishment. According to the Elucidation of Draft Criminal Code, these provisions are intended to provide legal certainty to judges to impose punishment in the present of leniency factor.

On the other hand, the Draft Criminal Code also stipulates factors that may aggrevate the punishment, covering:<sup>74</sup>

- a. infringement of duty punishable by a criminal or a criminal offense committed by a civil servant by misusing the authority, opportunity or facility which is granted due to his/her position;
- b. the use of national flag, song anthem, or symbol when committing the criminal offense;
- c. misuse of expertise or profession to perform criminal offence;
- d. criminal offense which is committed by adult along with children below 18 (eighty) years old;
- e. the criminal offense is committed in an alliance, jointly, with violent, in cruelty manner, or has been premeditted;
- f. the criminal offense is commoted in the event of chaos or natural disaster;
- g. criminal offense is committed during the state of emergency;
- h. repetition of similar criminal offence; or
- i. other factor source from living law in the society.

<sup>&</sup>lt;sup>72</sup> Article 139, Draft Criminal Code.

<sup>&</sup>lt;sup>73</sup> Article 140, Draft Criminal Code.

<sup>&</sup>lt;sup>74</sup> Article 141, Draft Criminal Code.

The aggrevating punishment system adopted by Draft Criminal Code is by adding 1/3 (one-third) of the maximum punishment. If in a case, leniency and aggrevating factors are present, then the maximum punishment will be aggrevated first, then it will be reduced by 1/3 (one-third).<sup>75</sup> Article 143 (2) of Draft Criminal Code states that, based on certain consideration, judges may waive the provision on leniency and aggrevating factor of punishment.

#### 2.7. Dismisall of Prosecution and to Serve Penalties

The Draft Criminal Code elaborates several grounds for dismissing the prosecution, namely:<sup>76</sup>

- a. the final and binding decision has been rendered;
- b. the defendant is death;
- c. statutory limitation;
- d. out of court settlement;
- e. the maxium fines has been paid voluntarily for criminal offense which punishable by the maximum fine under category I II;
- f. the maximum fines has been paid voluntarily for criminal offense which punishable by the maximum inprisonemnt of 1 (one) year or fine with the maximum amount state in category III:
- g. the presiden grant amnesty or abolition;
- h. the prosecution is droped as it has been transferred to other state based on agreement;
- i. absent of report or the report has been revoked, for criminal offense based on report; or
- j. the imposition of opportunity principle by General Attorney.

Emanwhile, the execution of punishment is dismissed in the event of:<sup>77</sup>

- a. the convict is death;
- b. statutory limitation;
- c. the convict receive clemency or amnesty;
- d. rehabilitation; or
- e. the handover of convict to serve the punishment in other country.

#### 2.8. **Statutory Limitation**

The Draft Criminal Code states that the statutory limitation in serving the punishment is counted from the date of court decision is enforceable. If the convict escapes during his/her period, the statutory limitation is counted from the date of escape. Further, if the parole to the convict is revoked, the statutory limitation is counted 1 (one) day upon the revocation.<sup>78</sup>

<sup>&</sup>lt;sup>75</sup> Article 143, Draft Criminal Code.

<sup>&</sup>lt;sup>76</sup> Article 152, Draf of KUHP.

<sup>&</sup>lt;sup>77</sup> Article 160, Draft Criminal Code.

<sup>&</sup>lt;sup>78</sup> Article 163. Draft Criminal Code.

The statutory limitation in serving punishment may be suspended for two reasons, namely:<sup>79</sup>

- a. the implementation of the punishment is suspended based on laws and regulations; or
- b. the freedom of the convicts has been deprived although it based on court decision in different criminal offense.

Specifically for death penalty, according to Article 162 (3) of Draft Criminal Code, this type of punishment does not subject to any statutory limitation.

#### 2.9. Mechanism for Alternative Punishment

The Draft Criminal Code states that punishment in the form of inprisonement, as far as it possible, should not be imposed if the following conditions are present:<sup>80</sup>

- a. the defendant is below 18 (eighteen) years old or above 70 (seventy) vaers old:
- b. the offense is the defendant's first ever criminal offense;
- c. the losses suffered by the victim is not substantial;
- d. the defendant has compensate the victim;
- e. the defendant did not realize the criminal offense would result in substantial losses:
- f. the criminal offense was committed due to the strong encouragement from other party;
- g. the victim encourages the defendant to commit the criminal offense;
- h. the criminal offense was resulted from the condition that would impossible to occur again;
- i. the personality and behaviour of the defendant are convicing that he/she will not commit other criminal offense;
- j. the imprisonment will result in fundamental pain to the defendant or his/her family;
- k. non-institutional counselling is expected to be effective for the defendant;
- l. the imposition of lighter punishment will not reduce the severa nature of the criminal offense;
- m. the criminal offense is occurred whihtin family; or
- n. the criminal offense is the result of negligence.

Note that, the abovementioned provisions do not apply for criminal offeses which punishable by more than 5 (five) year of inprisoment or punishable by specific minimum punishment. Also, certain criminal offense which very harmful or prejudice the society, disadvantage or harm the financial or economic of the state.<sup>81</sup>

<sup>&</sup>lt;sup>79</sup> Article 163 (4), Draft Criminal Code.

<sup>&</sup>lt;sup>80</sup> Article 72 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>81</sup> Article 72 (2), Draft Criminal Code.

#### **2.10.** Parole

Draft Criminal Code states that convicts which has served at least 2/3 (two-third) of the imprisonment imposed, provided that the 2/3 (two-third) will not less than 9 (nine) months, and the defendant shows good attitude, may entitle for parole. The defendant will considered as Correctional Client by the Ministry whose responsibilities in law and human rights affairs.<sup>82</sup>

The Elucidation of Draft Criminal Code states that the convicts that may entitle for parole is specific to convicts with the inprisoenmtn period at least  $1 \frac{1}{2}$  (one and half) years. After the convicts has served the inprisonemnt period of 9 (nine) months at the Penitentiary and show goods attitude, the convicts may be granted parole with the aim that the convicts may be developed and re-integrate with the society. Thus, during serving the period in the institution, the development result of each convict must be monitored. 83

If the convict is committed several criminal offenses which requires him/her to serve several inprisonement consecutively, thus for the purpose of parole, such punishment may be combined and considered as a single punishment.<sup>84</sup>

During the implementation of the parole, a probation period and requirement will be determined. The requirements that must be satisfied by convicts during the parole are:

- a. the Correctional Client must not commit in any criminal offense; and/
- b. the Correctional Client must or must not commit certain action, without limiting the freedom for religion and politics.<sup>85</sup>

The requirement for not commiting a criminal offense during the probation period is a general requirement. Meanwhile, the special conditions during the probation period are referred to certain acts that should be avoided or must be done by the convicts, for example, according to the Elucidation of Draft Criminal Code, convicts must not dring alcoholic beverages. These special requrements shall not diminish the right of convicts to adhere with and observe worship in accordance with their religion and belief. The above requirements may be changed, deleted, or subject to new requirement, which are solely aimed for the development of the convict.<sup>86</sup>

The probation period is equal to the remaining period of imprisonment that has not been served plus 1 (one) year. For convict who is dataind as suspects or defendants in other cases, the detention period is not counted as probation.<sup>87</sup>

<sup>&</sup>lt;sup>82</sup> Article 74 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>83</sup> Article 74, Draft Criminal Code.

<sup>&</sup>lt;sup>84</sup> Article 74 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>85</sup> Article 75 (1), Draft Criminal Code.

<sup>&</sup>lt;sup>86</sup> Article 75 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>87</sup> Article 74 (4) and (5), Draft Criminal Code.

Parole can not be withdrawn after 3 (three) months upon the maturity of the probation period. This provision does not apply if prior to the 3 (three) months, the Correctional Client is charged for committing a criminal offense during the probation period and the charges expire because the court decision on the criminal case has has obtained permanent legal force.<sup>88</sup>

Decisions on parole are determined by minister whose responsible and duty is in law and human rights affair, after receiving feedback form correctional observer team and supervisory judge. In the event of a violation of any of the requirements, the correctional center will notify the supervisory judge.<sup>89</sup>

If the Correctional Client violates the requirements imposed, the supervisory judge may propose to minister whose responsible and duty in law and human rights affairs to revoke the parole. The supervisory judge who proposes the revocation may order the police to keep the prisoner in custody and such action must be notified to minister whose responsible and duty in law and human rights affairs.<sup>90</sup>

The detention shall be conducted no later than 60 (sixty) days. If the detention is followed by a temporary suspension or withdrawal of a parole, the Correctional Client is considered to continue serving the criminal offense from the moment of detention. The period between the time of commencement of parole and serving the punishment will not be counted as serving the punishmenta criminal.<sup>91</sup>

The probation, supervision, and development period of the correctional clients are conducted by correctional centers at minister whose responsible and duty in law and human rights affairs. Further provisions concerning the procedures for the implementation of the parole will be stipulated in a Government Regulation. 92

<sup>&</sup>lt;sup>88</sup> Article 76, Draft Criminal Code.

<sup>&</sup>lt;sup>89</sup> Article 77, Draft Criminal Code

<sup>&</sup>lt;sup>90</sup> Article 77, Draft Criminal Code.

<sup>&</sup>lt;sup>91</sup> Article 77 (6), Draft Criminal Code.

<sup>&</sup>lt;sup>92</sup> Article 77, Draft Criminal Code.

# **CHAPTER III**

# CRIMINAL PUNISHMENT IN BOOK II OF DRAFT CRIMINAL CODE

Although the qualification of felony actions (book II) and infringement actions (book III) as currently regulated in KUHP is no longer adopted, the Draft Criminal Code remain uses a weighted punishment pattern that is divided into very light, heavy or serious, and severe or very serious level of crimes. This weighting refers to the criminal punishment which is imposed in the Draft Criminal Code where crimes punishable by 1-7 years are considered as heavy or serious crimes.<sup>93</sup>

Furthermore, the Academic Paper of Draft Criminal Code states that although there is no longer classification of the division of felony and infringement as a qualification of criminal offense, however the weight classification of offense is remain exist, as follows:<sup>94</sup>

First, the o "very light" offense is referred to the offence which is punishable by a single fine which is light in nature (category I or II). The offences in this category comprised of offenses that were punishable by less than 1 (one) year of imprisonment or light fines or new offenses which according to the weight assessment is punishable by less than 1 (one) year of imprisonment.<sup>95</sup>

Second, the "heavy" offense is referred to offenses that basically should be punishable by 1 (one) up to 7 (seven) years of imprisonment. Offense in this group will always be set in alternative punishment in the form of fines which is heavier than the first group, namely fine under category III or IV. Offense in this group is also subject to special minimum punishment.<sup>96</sup>

Third, the "severe/very serious" offense is referred to offense which punishable by more than (seven) years imprisonment or with heavier penalty (death penalty or life imprisonment). In order to demonstrate the severe nature, the imprisonment for this group of offense is only punishable by single punishment or for certain offenses can be accumulated with fine under category I V or subject to special minimum punishment.<sup>97</sup>

<sup>&</sup>lt;sup>93</sup> Academic Paper of Draft Criminal Code, *Badan Pembinaan Hukum Nasional, Op.cit,* page. 177

<sup>&</sup>lt;sup>94</sup> Academic Paper of Draft Criminal Code, *Badan Pembinaan Hukum Nasional, Loc. Cit.* 

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

This is in line with the notion that as far as possible the punishment in the form of deprivation of freedom is avoided by setting preferences on alternative to imprisonment such as fines and conditional punishment (supervision punishment). Therefore, the Academic Paper of Draft Criminal Code states that the Standard Minimum Rules for the Treatment of Prisoners which have been adopted by UN Congress I should be applied as a guide to develop alternative to imprisonment and programs of institutionalization of corrections. 98

Therefore, the Draft Criminal Code implements several important requirements to affirm alternative punishment as opposed to deprivation of liberty punishment, namely:99

- a. defendant is below 18 (eighteen) years old or above 70 (seventy) yaers old;
- b. the offense is the defendant's first ever criminal offense;
- c. the losses suffered by the victim is not substantial;
- d. the defendant has compensated the victim;
- e. the defendant did not realize the criminal offense would result in substantial losses;
- f. the criminal offense was committed due to the strong encouragement from other party;
- g. the victim encourages the defendant to commit the criminal offense;
- h. the criminal offense was resulted from the condition that would impossible to occur again;
- i. the personality and behaviour of the defendant are convicing that he/she will not commit other criminal offense;
- j. the imprisonment will result in fundamental pain to the defendant or his/her family;
- k. non-institutional counselling is expected to be effective for the defendant;
- l. the imposition of lighter punishment will not reduce the severa nature of the criminal offense:
- m. the criminal offense is occurred whihtin family; or
- n. the criminal offense is the result of negligence.

However, the imposition of alternatives punishment outside the deprivation of freedom punishment is being limited with the conditions which would make Judges difficult to implement such alternatives. These conditions include, it can only be imposed to criminal offenses which are not punishable by more than 5 years of imprisonment or is not subject to special minimum punishment or

<sup>100</sup>Ibid.

<sup>&</sup>lt;sup>98</sup> Academic Paper of Draft Criminal Code, *Loc.cit*, Page 55.

<sup>&</sup>lt;sup>99</sup> Anggara, dkk, *Distribusi Ancaman Pidana Dalam RKUHP dan Implikasinya, loc.cit,* page. 9.

greatly harm or danger the public or endanger the state's finances and economies. 101

# 3.1. Mapping of Punishment Pattern<sup>102</sup>

In the previous study, ICJR (Institute for Criminal Justice Reform) has been mapping the pattern of punishment in the Draft Criminal Code. The methods in performing the weighting are as follows:

- a. In the process of mapping, the punishment pattern is depicted by researching the criminal offenses which are regulated not based on articles but based on criminal offense. Therefore, the number of criminal provisions in the Draft Criminal Code can be less than the number of criminal offense set forth in the Draft Criminal Code.
- b. In addition, this mapping also indexes any criminal offenses that contain criminal punishment, regardless of whether they can be imposed through single, alternative, and cumulative manner.
- c. The mapping also provides a weighting of criminal offense for articles that refer to other articles.

# 3.2. Quantity of Articles and Criminal Offences

The Draft Criminal Code contains 555 articles incorporated in Book II on Criminal Offenses. These 555 articles contain 1,251 criminal offenses. In quantity, the criminal provision in Book II of the Draft Criminal Code is considerable due to the following aspects:

- a. The number of criminal provisions that are currently regulated outside the KUHP are included in the Draft Criminal Code without reharmonization between the provision contained in the Draft Criminal Code.
- b. There are several articles that contains number of criminal offenses (with paragraphs)
- c. There are several paragraphs that contain number of criminal offenses.

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<sup>&</sup>lt;sup>101</sup>Article 72 (2), Draft Criminal Code.

<sup>&</sup>lt;sup>102</sup> The review of the distribution of criminal punishment in Draft Criminal Code has been previously conducted by the Institute for Criminal Justice Reform (ICJR). Furthermore, it can be seen in Anggara, et al, *Distribusi Ancaman Pidana dalam Rancangan KUHP dan Implikasinya*, Jakarta: Institute for Criminal Justice Reform (ICJR) 2016. This section is only further processed from previous studies.

# 3.3. Type of Criminal Punishment

From 1,251 criminal offense contained in the Draft Criminal Code, it can be seen that the number of criminal offenses that punishable by imprisonment ranked at the highest (1,154), followed with fine (882). This pattern indicates the use of imprisonment is still the primary choice to respond to criminal offense. The number of customary and rehabilitation punishment are very low compared to the imprisonment punishment.

There are 80 of additional criminal punishment incorporated in Draft Criminal Code. It is followed by 44 provision for life imprisonment and 37 provisions for death penalty. There are only 3 provisions on rehabilitation punishment and 1 provision for customary punishment.

Criminal Offe	1,251 Offense					
inprisonmen t	Fines	Additional Punishme nt	Life impris onmen t	Death Penalty	Rehabilitatio n	Customary Punishme nt
1.154	882	80	44	37	3	1

Source : Anggara, dkk, *Distribusi Ancaman Pidana dalam Rancangan KUHP dan Implikasinya*, Jakarta: Institute for Criminal Justice Reform (ICJR), 2016..

By considering that the government is willing to reduce the pressure on RUTAN (Detention Center) and LAPAS (Correctional Center), such objective will be difficult to realize due to the distribution of criminal punishment adopted in the Draft Criminal Code.

# 3.3.1. Death Penalty

The death penalty in the Draft Criminal Code is incorporated in 37 criminal provisions. The Draft Criminal Code shows a consistent pattern, in which death penalty is grouped as a special crime that is entirely punishable in alternatively manner. The Draft Criminal Code at least shows 3 (three) patterns of death penalty arrangement in alternatively manner, covering:

- a. death penalty or life imprisonment;
- b. death penalty or imprisonment and fines;
- c. death penalty or life imprisonment or imprisonment and fines.

28 provisions of which contain alternative arrangements in the form of death penalty, life imprisonment or imprisonment. 7 (seven) provisions contain death penalty or life imprisonment or imprisonment and fines. Lastly, 2 (two) provisions in the form of death penalty, imprisonment, and fines.

Death Penalty in Draft Criminal Code				37
Death penalty, li	fe	Death penalty or	life	Death penalty,
imprisonment	or	imprisonment	or	imprisonment, and
imprisonment imprisonment and		fines		
_		fines		
28		7		2

Source : Anggara, et all, *Distribusi Ancaman Pidana dalam Rancangan KUHP dan Implikasinya*, Jakarta: Institute for Criminal Justice Reform (ICJR), 2016.

#### 3.3.2. Inprisonment

In the Draft Criminal Code, the proportion of criminal offense punishable by single model in the form of imprisonment is significant, namely more than 50%. This is contrast with criminal offense punishable by cumulative and alternative models.

This picture shows that the Draft Criminal Code has not moved from the dominant and current approach, namely imprisonment approach. This is further corroborated by the use of a special minimum punishment pattern that in considerable amount as contained in the Draft Criminal Code.

From 1,107 provisions on imprisonment punishment in the Draft Criminal Code, 737 adopt punishment model that can be imposed with death penalty, life imprisonment, imprisonment and fines. Meanwhile, 370 of them are criminal offenses that are punishable only with imprisonment.

#### 3.3.3. Life imprisonment

There are two model for life time imprisonment punishment, namely cumulative and alternative models. From 7 seven provisions on life imprisonment, 6 of them adopt cumulative models of life imprisonment and fines. In the meantime, 1 provision contains an alternative model, namely life imprisonment or imprisonment and fine.

#### 3.4. Special Minimum-Maximum Pattern

The provision of this special maximum penalty relates to the obligation of the judge to impose the minimum amount of punishment to perpetrator who commits certain offense. A special minimum criminal pattern shows that criminal offenses in Draft Criminal Code are, in essence, considered as serious offense.

Therefore, this provision is intended to allow the judge to grant a minimum punishment to the perpetrator. Considering the imprisonment approach is still

dominant, also with this special minimum pattern, the judge will face difficulties in choosing other types of punishment besides the deprivation of freedom.

1,164 provisions in the Draft Criminal Code adopt maximum imprisonment. Meanwhile, 328 provisions contain minimum imprisonment punishment.

In the context of the determination of the maximum punishment, there are several periods of time grouped by the Draft Criminal Code. The Draft Criminal Code contains at least 13 (thirteen) groups which are punishable by maximum punishment in the Draft Criminal Code. By using the weighting of offense as embodied in the Draft Criminal Code, the types of offenses which are considered lightweight are very few. Instead, severe criminal offense takes the first place with 621 offense, followed by serious crimes with 532 offense.

In the Draft Criminal Code, the provision which impose punishment in the form of 5-year of imprisonment is become the most massif provisions compared with provision which set less than 5 years of imprisonment. This shows that there will be great affect in relation to the economic and social impacts to States for preparing legal counsel service (especially in the context of pro bono) to the public.

The main approach to imprisonment in the Draft Criminal Code can also be confirmed by looking at the comparative criminal prison patterns and fines. There are 370 offenses punishable only with imprisonment. Meanwhile, 66 offenses are punishable only with fines.

Thus, the intention of the drafters of the Draft Criminal Code to avoid deprivation of freedom punishment becomes difficult to realize. Since the Draft Criminal Code essentially places imprisonment as the main tool to combat crime. The placement of this imprisonment basically can have long-term economic and social impact for the State.

#### 3.5. Supervision Punishment.

The Draft Criminal Code states that for defendants who commits a criminal offense punishable by imprisonment for a maximum of 7 (seven) years may be subject to supervision punishment. The imposition of the supervision punishment must take the perpetrator's circumstances and action into consideration, and can be imposed for maximum period of 3 (three) years.

As explained earlier, this supervisory process is undertaken by ministries whose duties and responsibilities in law and human rights. If, during the supervision period, the convict is committing unlawful action, the supervisory institution may propose the supervisory judge to extend the supervision period for a time that does not exceed the maximum of 2 (two) times of unserved supervision period.

If during such supervision, the convicted person shows good behavior, a proposal may be submitted to the supervisory judge to shorten his/her supervision period. Based on the results of the supervision, the supervisory judge may change the period after hearing the parties.

In relation to the above provisions, the distribution of imprisonment punishment with a maximum term of 7 (seven) years, which means criminal offense that may be switched to supervision punishment, is considerably a lot, namely 632 criminal offense.

#### **3.6.** Exile

Exile punishment may be imposed to individual who commits criminal offense which punishable by inprisonemnt, however there is consideration on the personal situation and action of the perpetrators. The exile punishment is imposed to defendant who commits criminal offense for worthy reason. The imposition of this exile punishment is solely discretion of the judge.

#### **3.7.** Fines

Criminal punishment is a form of punishment by imposing a sum of money that must be paid by a convict based on a court decision. Article 82 of Draft Criminal Code states that, in the absent of special-minimum provision, then the minimum amount of fine is set for Rp 100,000 (one hundred thousand rupiah).

Fines punishment in Draft Criminal Code is categorized in the following group:

- a. category I: R 10,000,000 (ten million rupiah);
- b. category II: Rp. 50,000,000 (fifty million rupiah);
- c. category III: Rp. 150,000,000 (one hundred and fifty million rupiah);
- d. category IV: Rp. 500,000,000 (five hundred million rupiah);
- e. category V: Rp. 2,000,000,000 (two billion rupiah); and
- f. category VI: Rp. 15,000,000,000 (fifteen rupiahs).

Fines punishment relevant to the correctional policies when fines imposed cannot be paid. The Draft Criminal Code provides a mechanism if the foreclose of asset and receivable is not possible, then the unpaid fines shall be replaced by a social work, supervision, or imprisonment, provided the fines does not exceed fine under Category I.

The length punishment to substitute unpaid fines is as follows:

a. for a social work punishment, the provisions in Article 88 (3) and (4) shall apply. The provisions of Article 88 (3) and (4) states that social work punishment should not be commercialized. In addition, a social work punishment is imposed for a maximum of two hundred and forty hours for a defendant who is 18

- (eighteen) years of age and above and one hundred and twenty hours for a defendant under the age of 18 (eighteen) years.
- b. for supervision punishment, the period of time shall be no more than 1 (one) month and no later than 1 (one) year.
- c. for a imprisonment, the minimum period is for 1 (one) month and a maximum is set for 1 (one) year and 4 (four) months. If there is aggravating factors due to incarceration or due to a criminal offense that is committed by juvenile.

The calculation of the duration of the substitute punishment is based on the size of each fine punishment amounting to Rp15,000 (fifteen thousand rupiah) or less, which is equal to:

- a. One Hour of Social Work Substitute Punishment;
- b. One Day of Substitute Supervision Punishment or Imprisonment.

If, after undergoing the substitute punishment, part of the fines is paid, then the duration of substitute punishment is reduced by equivalent size. If the collection of assets or receivable cannot be made, then for a penalty of a fine under category I I which is not paid is substituted with the minimum imprisonment of 1 (one) year and the maximum period as charged by the criminal offense in question.

If a criminal offense is only punishable by a fine, then towards such offense may be imposed additional punishment or measure. Similarly, persons who have been repeatedly sentenced to fines for criminal offenses punishable by a fine shall be subject to imprisonment of a maximum of 1 (one) year or a imprisonment along with a fine.

The placement of fines by using this category model is considered strategic to reduce the impact of punishment in the forms of deprivation of freedom, especially as an alternative to punishment of deprivation of freedom in the short term. However, the fine punishment is also related with social work punishment, either as a substitute criminal or as a stand-alone criminal form. Therefore, the social work punishment can only be applied if the offense is punishable by imprisonment of less than 6 (six) months or a fine which is not exceeding category I.

#### 3.8. Social Work.

The implementation of social work punishment may be imposed for an offense punishable by not more than 6 (six) months imprisonment or a fine which is not exceeding category I. Criminal punishment in this category may be replaced by a social work punishment.

Based on the distribution of punishment in Draft Criminal Code, it can be seen that the criminal punish offense that can be imposed with social work is very small (only 59 criminal offense). This is based on the fact that the number of criminal offense that are subject to fine under category I amounting to 48 offenses and the offense that are punishable by maximum 6 (six) months of

imprisonment are only 11 offense. The total number of main punishment crimes (life imprisonment, imprisonment, exile, supervision, fines, and social work) amounted to 2,711 criminal offenses.

#### **CHAPTER IV**

# ANALYSIS ON THE IMPLICATION OF CHANGES ON CRIMINAL CODE TOWARDS THE CORRECTIONAL

#### 4.1. Description of Correctional

Currently, the number of prisoners and detainee inhabiting the Penitentiary (Rutan/ Lapas) is 233,857 people. Meanwhile, the total capacity is only able to accomidate 124,117 people. The difference between the number of occupants with a total capacity is maounting to 109,740 people. By percentage that constitute 88% of total capacity. The gap between the number of occupants with this capacity is called the overcrowded or overcrowding situation.

Table
The Inrease of Detainee and Inmates in State Detention Center and
Peterniary in National Level from 2013 – February 2017

Remarks	Year				
	2013	2014	2015	2016	Feb-
					2017
Detainee or Inmates					
Detainee	51.395	52.935	57.547	65.554	66.322
Inmates	108.668	110.469	119.207	138.997	143.095
Amount of Inhabitant	160.063	163.404	176.754	204.551	209.417
Capacity	111.857	114.921	119.797	119.797	119.860
Difference of	48.206	48.483	56.957	84.757	89.557
Occupant with					
Residential Capacity					
Overcrowding	43%	42%	47%	71%	75%

Source : Appendix to Regulation of the Minister of Law and Human Rights No. 11 of 2017 on Grand Design for the Control of Overcrwoded Issue in Detention Center and Correctional Center.

Based on the above table, from 2013 to February 2017 it can be seen that, there was significant increase of detainee and convicts in detention center and penitentiary in Indonesia each year. The average growth rate of the number of detention center and penitentiary reached 12,338 people per year, with the highest number inhabitants in 2016 which was reaching 27,797 prisoners and inmates.<sup>103</sup>

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<sup>&</sup>lt;sup>103</sup> Appendix to Regulation of the Minister of Law and Human Rights Number 11 of 2017 on the Grand Design for the Control of Overcrowded Issue in State Detention Center and Penitentiary.

As of Monday, February 5, 2018 at 15.00 Western Indonesia Time, overcrowded Penalty rates reached 109,740 or 88% of the total capacity. This overcrowded situation has significant impact on many aspects, from the socioeconomic aspect to the health of the penitentiary. In general, it can be concluded that the current situation is still a disincentive for the correctional.

First, economic impact. The economic impact can be divided into two aspect, namely the impact to the state and the impact to the residents and their families. In regards to impact to the state, we can take one small example, namely the cost of one meal inhabitants in the correctional center. Assuming that a one-time meal cost Rp15,000, then the total cost for meal will be 233.857 x Rp15.000 = Rp3.507.855.0000, -. This is considered excessive amount state expenditure.

In addition, in the Regulation of the Minister of Law and Human Rights Number 11 of 2017 on the Grand Design for the Control of Overcrowded Issue in State Detention and Penitentiary, also highlights the this economic burden. It says that the prison population numbers create a huge financial burden on the government and large spending on social cohesion. The imposition of imprisonment toward large segment of society result in significant burden on the state budget, thus this burden should be overcome, because the burden of a large population of detainee or convicts may reduce government funds which should have been channeled for health, social services, housing, and education.104

A number of studies have shown that the use of prisons disproportionately affects people living in poverty. When the family members of the breadwinner are imprisoned, the sudden loss of income can have a major impact on the family's economic condition. Even when they are released, they are often have no prospect in finding a job because of their criminal record. Former inmates generally experience socioeconomic exclusion and are vulnerable to the cycle of poverty, marginalization, crime, and endless prison sentences. Thus, prisons/detentions contribute to the impoverishment of prisoners and their families.105

Studies also show that children of imprisoned parents are likely to experience conflict with law and once they are arrested, they are more likely to commit crimes again. Thus, the cycle is expanded, creating the next victim and reducing potential economic performance in the future. 106

Second, the impact on inhabitant safety. With this overcrowded situation, the range of supervisory control of officers decreased due to the increasing number of people to be monitored so that the quality of supervision is lowered. This result in the emergence of an orderly situation (extortion, threats, etc.). To overcome this usually the officers use and utilize informal leaders among residents to minimize security disturbances. Such circumstances are strictly prohibited by the Standard Minimum Rules (point 6, paragraph 1), as they may

<sup>&</sup>lt;sup>104</sup> Appendix to the Regulation of Minister, *Op. cit*.

<sup>&</sup>lt;sup>105</sup> *Ibid*.

<sup>106</sup> Ibid.

lead to situations of abuse of authority by such informal leaders. However, such things are still performed in order to maintain security (there is a safe but not orderly situation).<sup>107</sup>

Third, the impact on health. The increase imprisonment towards narcotics users has been confirmed to be directly proportional of HIV/AIDS prevalence in detention or correctional center. This is allegedly occurring through the illicit narcotics of illicit traffic (with all modes operandi) smuggled into detention or correctional center and unsafe sexual practices that occurred in detention or correctional center.

Overcrowded in detention or correctional center result in the poor condition of prisoners' health, in which the more detainee or convicts, the bigger possibility for their health condition become worse. The main reason is because with the large number of prisoners, the carrying capacity of sanitation and the environment will be limited and worse, eventually will reduce the quality of life of the detention or correctional center's residents. 108

Another excess is due to the declining quality of service because the available facilities (toilet, bathroom, etc.) are used in excess manner beyond it capacity. This in will culminate in pressure and tension that is easily to ignite the emotions of residents. In addition, the declining quality of health due to the fact that each room has to be filled twice as much as its capacity (especially in big cities), resulting in air circulation and environmental sanitation that is not conducive to preserve health in environment. The impact will be easily spread of disease. Moreover, the study in Europe states that the prevalence level of HIV/AIDS transmission in prison is 6 times higher than the spread in the community. Meanwhile, the prevalence of infection in prisons is 8 times higher compared with the level of transmission in the community. 109

Fourth, the impact on human rights. The overcrowded issue has become the common problem in a number of countries and it is, indeed, a serious humanitarian problem as it automatically leads to poor detention standard, which in number of times is degrading the human standard. Thousands of people have been forced to live for a long time in a crowded room, with limited space to move, sit or sleep. Trapped in a cramped room, often in poor hygiene conditions and no privacy, makes the experience of deprivation of freedom (which under normal circumstances has already been depressed) feels much worse. This situation erodes the dignity of humans and damages the physical and mental health of the prisoners and the prospects of their reintegration.<sup>110</sup>

On the other hand, the Correctional Center also faces many internal challenges. One of them is the shortage of Human Resources (HR) as Correctional Officer at the State Detention and Penitentiary. Based on the data of the Directorate

<sup>&</sup>lt;sup>107</sup> Didin Sudirman, *Op.cit* 

<sup>&</sup>lt;sup>109</sup> Didin Sudirman, *Op.cit*.

<sup>&</sup>lt;sup>110</sup> Appendix to the Regulation of Minister, *Op. cit.* 

General of Correctional, in November 2016, the amount of Human Resource personnel is 30,132 people, consisting of 23,707 males and 6,425 women.<sup>111</sup>

Of the total number of correctional officers mentioned above, 14,584 of them serve as as security at the state detention or penitentiary. This number of security officers is further divided into 4 (four) security shifts, so the strength ratio between security officers with detainee or convicts is 1:58 in the sense that 1 security guard must supervise and keep 58 prisoners and prisoners.<sup>112</sup>

This is coupled with the growth of correctional officers who will undergo a significant increase in pension every year. Until 2018, at least the number of correctional officer that will face pensions amounted to 2,441 prisoners.<sup>113</sup>

In addition, there is the problem of insufficient availability of residential space in state detention and penitentiary. One of the main causes of this overcrowded condition occurs due to the limitations of residential space and infrastructure facilities owned by state detention or penitentiary.<sup>114</sup>

According to data from the Directorate General of Corrections in 2016, the available shelter capacity is reserved for 119,797 detainee and prisoners. However, the Directorate General of Corrections admits that the construction of residential space and infrastructure facilities is not a priority at the moment. The alternative as a short-term solution undertaken by the Directorate General of Corrections currently in suppressing the overcrowded occupancy of state detention center and penitentiary is by redistributing the prisons. Based on the data, in one month as many as 2,800 inmates moved.<sup>115</sup>

Further, another important aspect, which is emphasized in the Regulation of the Minister of Law and Human Rights No. 11 of 2017 on the Grand Design for the Control of Overcrowded Issue in State Detention and Penitentiary, is overlapping purpose of correctional stated in several laws and regulations.<sup>116</sup>

According to the data, from the beginning of the reformation era until 2016, there has been 563 (five hundred and sixty three) regulations produced by the government and the House of Representative, in which there were more or less 154 (one hundred and fifty four) laws and regulations contains criminal rules and provisions.<sup>117</sup>

During that period, based on the results of the mapping, there were 1,601 (one thousand six hundred one) actions which are categorized as a criminal offense, with the proportion of 716 (seven hundred and sixteen) actions constituted a newly introduced criminal offense in Indonesian criminal law. An important note

<sup>111</sup> Ibid.
112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid.
116 Ibid.
117 Ihid.

is that most of the new criminal offense formulated during the period of 1998-2016 is punishable by imprisonment.<sup>118</sup>

No less than 654 actions (91, 34%) are classified as a criminal offense with imprisonment sanctions, while detention punishment are only imposed in 45 criminal offenses (6.28%) and about 17 actions (2.37%) are classified as criminal offense punishable by fines. The duration of imprisonment imposed ranging from 1 day to 5 years can be found in nearly 65% of new criminal offenses annually, followed by 18% for a 5-10 year of imprisonment, 9% for 10-15 year of imprisonment, and 4% for imprisonment with the duration 15 years and above. 119

In the Appendix to the Regulation of the Minister of Law and Human Rights, it is clearly stated that the vision of Indonesian regulations which tends to use imprisonment as punishment is one of the basic reason to the current overcrowded conditions in detention and penitentiary. As another example, in the Draft Criminal Code which is currently being discussed in the DPR, almost all criminal punishment have been increased significantly, some of which can even lead to overcriminalization that result in imprisonment and eventually overcrowded issue. Such as, defamation offense which is under Draft Criminal Code punishable by 5 (five) years of imprisonment or adultery which is also punishable by 5 (five) years of imprisonment.<sup>120</sup>

The question is now; how does the Draft Criminal Code project the imprisonment punishment? And what are the implications for the situation and conditions of the correctional? Whether the overcrowded as situation mentioned in the Appendix to the Regulation of the Minister of Law and Human Rights, is caused by the imprisonment approach (as also contributed by Draft Criminal Code) is valid?

#### 4.2. Draft Criminal Code and the Implication towards Correctional

Changes to the KUHP bring a number of implications on the condition of the Correctional. The major missions of the changes of KUHP are the decolonization of the KUHP, the legacy of the colonial, the democratization of criminal law, the consolidation of criminal law, and the adaptation and harmonization of various national and international criminal law developments. If it works ideally, it can be stated that the projection of conditions and policies of the correctional will be better.

Another major mission of the KUHP reform is to protect the public within the framework of the purpose of punishment. In which, one of the characters is to avoid the approach of imprisonment (deprivation of independence) as the main

<sup>119</sup> Ibid.

<sup>118</sup> Ibid.

<sup>120</sup> Ibid.

method. Therefore, the Draft Criminal Code introduces various concepts that are claimed to be non-imprisonment approaches (non-penal policies).<sup>121</sup>

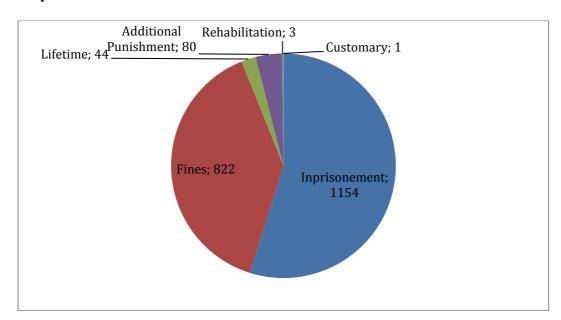
This non-penal approach will certainly have a positive impact on the correctional. The question is whether the big mission becomes the main essence in the Draft Criminal Code.

# 4.3. Inprisonment Remains the Main Approach

Categorically, Draft Criminal Code and the current KUHP are both still recognize 2 (two) types of punishment, namely principal and additional criminal. The main difference is in arrangement of the punishment of each type offense. Other contrast is related to death penalty which is positioned as a special main punishment and charged in alternative manner in the Draft Criminal Code.

#### 4.3.1. Description of Inrisonment Punishment in Draft Criminal Code

In the Draft Criminal Code there are 555 criminal articles with 1,251 criminal offense. In detail, there are 37 criminal provisions in the Draft Criminal Code which contain death penalty. Then, it's followed by 1,154 imprisonment sentences. Furthermore, fines punishment with 822 provisions. The life imprisonment with 44 provisions. Additional punishment with 80 provisions, rehabilitation with 3 provisions, and customary punishment with 1 provision.



**Graphic I: Distribution of Punishment in Draft Criminal Code** 

When compared to the criminal punishment structure adopted in the KUHP, the criminal punishments in the Draft Criminal Code significantly increase. In the

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<sup>&</sup>lt;sup>121</sup> See Academic Paper of Draft Criminal Code.

current KUHP there are 10 provisions on death penalty while in Draft Criminal Code there are 37 provisions. Then the most significant is the imprisonment punishment, where in the KUHP there are 485 offenses punishable by imprisonment, while in the Draft Criminal Code there are 1,154 provisions imprisonment punishment. This pattern confirms that imprisonment punishment is still the commont action to respond to criminal offense.

Criminal Code		Draft Criminal Code		
<b>Death Penalty</b>	Inprisonment	Death Penalty	Inprisonment	
10	485	37	1.154	

Source: Anggara, et. all, *Distribusi Ancaman Pidana dalam Rancangan KUHP dan Implikasinya*, Jakarta: Institute for Criminal Justice Reform (ICJR), 2016.

This significant spike may derive from the drafting model of the Draft Criminal Code that merges Books I and II of the KUHP. The substance of felony and infringement in Books I and II in the KUHP are merged into 1 (one) book in Draft Criminal Code, namely Criminal Offense. This merger raise the notion of imprisonment approach to combat criminal offense. Whereas, under the concept adopted by the KUHP, criminal punishment is not only imposed in the form of imprisonment but also detention. There are significant different between imprisonment and detention, especially in regards to the duration period.

The second aspect that confirms the Draft Criminal Code still prioritize the imprisonment approach is the fact that there are 370 offenses which are punishable only by imprisonment. Meanwhile, there are 737 offenses that can be sentenced to death, life imprisonment, imprisonment, or fines.

Compared to the substance of the KUHP, there are 274 offenses that punishable by imprisonment as the main punishment. 292 imprisonment punishment in measured in year period and life imprisonment, and 26 offenses where imprisonment may be imposed in alternative manner with other type of punishment.

In addition, in the Draft Criminal Code there are 44 offenses punishable by life imprisonment. From the 44 offenses, 6 offenses are life imprisonment plus a fine with a cumulative model. This means both punishments will be applied simultaneously. Then 1 offense life imprisonment or imprisonment or fine with alternative placement model (option).

The implication of imprisonment as the main approach in the Draft Criminal Code is potentially resulting in the increase of inhabitant in the correctional center. The significant increase of quantity of imprisonment punishment in the KUHP to the Draft Criminal Code is surely, parallel with the increase of convicts to the Correctional. Institutionally, Correctional center will be severely affected and will require support (most of all) infrastructure if this situation is passed.

The imprisonment approach in the Draft Criminal Code can also be highlighted from the duration of imprisonment perspective. The imprisonment duration of 5-15 years is ranked first with above 50% of the provision. It is then followed with the 1-5 years and 15-20 years of imprisonment. Fffenses which are subject to imprisonment for less than 1 year is ranked on the bottom of the chart.

Therefore, in addition to the significant increase flow of convicts to the correctional center, the next implication is the length of duration of convicts will stay in the correctional center. The duration of imprisonment for 5-15 years in the first rank in quantity further adds to the substantial effect to the correctional center.

In addition, this matter has 2 (two) implications, namely: first, the allocation of economic and social resources of the state to provide access to legal counsel. This provision is in line with Law Number 8 of 1981 on Criminal Procedure Law. Secondly, assuming that the perpetrators of criminal offense punishable by 5 years or above are "mandatory" to be detained, then the implication is that the number of detainees will increase. If the place of detention is carried out at the place of the correctional-related authorities (in this case RUTAN), then the unavoidable consequence is the surge of number of detainee during pre-trial.

Compared to the provisions in the KUHP, there are 9 criminal offense punishable by imprisonment in term of month, 36 offenses punishable by 9 months imprisonment. Then, 36 offenses punishable by 2 months of imprisonment, 9 offenses punishable by 3 months of imprisonment, , 5 offense punishable by 6 month of imprisonment, and 2 offenses punishable by 1 month of imprisonment.

In the duration of yearly time, there are 48 offense punishable by 1 year of imprisonment. 47 offense punishable by 4 years of imprisonment, 41 offense punishable by 7 years of imprisonment, 37 offense punishable by 2 years of imprisonment, 30 offense punishable by 5 years of imprisonment, 28 offense punishable by 12 years of imprisonment, 28 offense punishable by 15 years of imprisonment, and 23 offense punishable by life imprisonment.

If the detention punishment in the KUHP is also counted, there are 28 offenses punishable by detention as alternative punishment. Meanwhile, 9 offenses are punishable by detention as its main punishment. The total number of detention punishment in the KUHP Code is 37 offenses.

In terms of time duration of detention punishment in the KUHP, there are 10 offenses punishable by as much as 6 days of detention, 5 offenses punishable by 3 day of imprisonment, 2 offenses punishable by 12 days of detention, and 2 offense punishable by with 10 days detention. In terms of weekly duration, 2 offenses punishable by 2 weeks of detention, 2 offenses punishable by 3 weeks of detention, and 1 offense punishable by 6 weeks of detention.

Furthermore, in monthly duration, in the KUHP sets 9 offenses punishable by 3 months of detention, 7 offenses punishable by 2 months of detention, 7 offenses

punishable by 1 month of detention and 1 offense punishable by 6 months of detention. For the duration of the year, there is 1 offense punishable by 1 year of detention.

On the other hand, one of the new concepts introduced by the Draft Criminal Code is on the instalment in serving the imprisonment punishment. Article 73 Paragraph (1) of the Draft Criminal Code states that in the case of a judge imposing imprisonment for 1 (one) year or less than 1 (one) year, the judge may order for the service to be conducted by installment.

The Installment method in serving the imprisonment can only be granted if the judge considers the existence of a very serious condition or other consequences that are very worrisome if the defendant undergoes his/her service consecutively. The installment can be conducted within 2 (two) days in 1 (one) week or 10 (ten) days in a month, provided that the term of installments must not more than 3 (three) years.

This provision requires a policy response by correctional-related institutions. Especially in building an integrated database and can be updated constantly. Through this, it is expected that the record on convicts that serve his/her imprisonment through instalment can be well maintained. The recording process is also related to the allocation of resources that incurred by the penitentiary as the convict who underwent instalment of imprisonment of does not undergo the punishment on a regular basis but at certain times only.

In addition, another consequence is a more rigorous oversight mechanism for the implementation of this punishment. The Draft Criminal Code has not yet determined in more detail the procedure for the implementation of this installment. Especially, the initiative to implement the decision is with the or prosecutor as the executor. The new concept needs to be further clarified both in the form of Government Regulation and Ministerial Regulation.

However, if the imprisonment is positioned as an alternative mechanism to reduce population flows to correctional-related institutions, this will certainly not have a significant impact. The imprisonment of this installment is limited to a person imprisoned for 1 (one) year or less than 1 (one) year.

By looking to the distribution of criminal punishment in the Draft Criminal Code, offense which subject to 1 (one) year if imprisonment or less than 1 (one) year of imprisonment are not significantly higher than the quantity of other criminal punishment. Offense that subject to 1 (one) year or less than 1 (one) year of imprisonment in Draft Criminal Code are the lowest in quantity, compared to other category criminal punishment.

#### 4.3.2. Special Minimum and Maximum Principle in Draft Criminal Code

The draft Criminal Code embraces a principle or a special minimum principle, which means that for every criminal act there is a minimum punishment

sanction which must be imposed by a judge to particular perpetrators. This special minimum criminal punishment is directed against criminal offense which, by Draft Criminal Code, is categorized as serious crime.

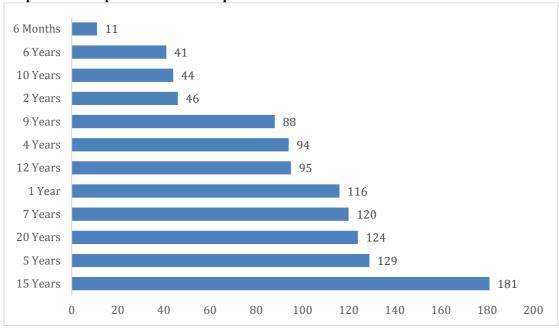
Thus, there is a certainty that the judge will give minimal punishment to the serious criminal offender. This condition will also result in difficulties by the judges to impose non-deprivation of freedom punishment. Consequently, there are serious consequences to correctional-related institutions.

In the Draft Criminal Code, there are 328 offenses charged with special minimum imprisonment, in which more than 100 offenses are punishable by specific minimum imprisonment of 3 years. More than 50 offenses are punishable by minimum imprisonment of 5 years and 4 years. Furthermore, less than 50 offenses are punishable by minimum imprisonment of 2 and 1 years.

<b>Special Minimum Punish</b>	328	
3 years	5 Years and 4 Years	2 and 1 Year(s)
100	> 50	< 50

Source : Anggara, et. all, *Distribusi Ancaman Pidana dalam Rancangan KUHP dan Implikasinya*, Jakarta: Institute for Criminal Justice Reform (ICJR), 2016.

On the other hand, the Draft Criminal Code also adopts the special maximum principle. The Draft Criminal Code contains this special maximum principle in 13 (thirteen) categories. 181 offenses are punishable by a maximum imprisonment of 15 years. 129 offenses are punishable by a maximum imprisonment of 5 year. 124 offenses are punishable by a maximum imprisonment of 20 years. 120 offenses are punishable by a maximum imprisonment of 7 years. 116 offenses are punishable by a maximum imprisonment of 1 year. 95 offenses are punishable by a maximum imprisonment of 12 years. 94 offenses are punishable by a maximum imprisonment of 9 years. 88 offenses are punishable by a maximum imprisonment of 2 years. Offenses are punishable by a maximum imprisonment of 10 years. 41 offenses are punishable by a maximum imprisonment of 6 years. Lastly, 11 offenses are punishable by a maximum imprisonment of 6 months.



Graphic II: The Special-Maximum Inprisonment Punishment in Draft Criminal Code

This distribution pattern is based on the crime gradation adopted by the Draft Criminal Code. The division based on 13 (thirteen) categories comprise of 621 offense which are considered as most serious crime and 536 offense which are considered as serious crimes (criminal offenses).

#### 4.3.3. Death Penalty in Draft Criminal Code

In the Draft Criminal Code, there are 37 offenses which are punishable by death penalty. From these 37 offenses, 28 offenses are punishable by death penalty, life imprisonment, and imprisonment. Furthermore, 7 offenses are subject to death penalty, life imprisonment, imprisonment, and fine. Lastly, 3 offenses are subject to death penalty, imprisonment, and fine.

From its characteristic, the Draft Criminal Code states that the death penalty is a special main punishment and must be imposed in alternative manner. The purposes are to create the death penalty as the last resort in protecting the society. This special characteristic shows that death penalty must be both charged and imposed in very selectively manner.

With respect to the death penalty, the judge shall thoroughly consider whether or not other type of punishment can be imposed, such as life imprisonment or a maximum of 20 (twenty) years of imprisonment. As long as there is a doubt in imposing this alternative punishment, then for such case, the judge may impose conditional death penalty.

Conditional death penalty means that the execution of the punishment may be postponed for 10 (ten) years of probation period, provided that:

- a. public reaction to the convict is mastiff;
- b. the convict shows a sense of regret and there is hope for improvement;

- c. the position of the convicted person in the participation of the crime is not substantial; and
- d. there are reliving factors.

The Minister of Law and Human Rights may change the punishment to be one of the alternative punishment, namely, life imprisonment or a maximum of 20 (twenty) years if the above conditions are met. The grace period of 10 (ten) years above is calculated from the date the application for clemency is rejected.

This capital punishment can only be done if the request for pardon from the convicted is rejected. This death penalty arrangement is intended to show that severity of death penalty and the impossibility to rectify any mistake when imposing this type of punishment. If, during the probation period, the death row inmates shows a laudable attitude and action, the death penalty can be changed based on Decree of the Minister of Law and Human Rights.

Another condition is that when the application for clemency of death row inmates is rejected and the punishment is not executed for 10 (ten) years due to the reason other than the convict is escaped by, the death penalty can be changed to life imprisonment by Minister of Law and Human Rights based on a Presidential Decree.

The Draft Criminal Code also stipulates that the execution of death penalty shall be delayed if the convict is pregnant women or mentally ill persons. The delay is made until the woman gives birth or the mentally ill person is cured.

The consequence to the correctional from this death penalty arrangement is that the achievement of correctional purposes by the correctional center is measured by the success in shifting the death penalty to a life imprisonment or a maximum of 20 (twenty) years for 10 (ten) years-probation period.

Likewise, the success in shifting the paradigm of correctional to be coaching and protection will be shown from the successful implementation of the change of death penalty punishment to be other type of punishment. The Draft Criminal Code has determined 10 (ten) years for the penitentiary to empower the convicts to be better persons.

Besides, the consequences for the correctional-related institutions are that there are 37 offenses in Draft Criminal Code which subject to 10 (ten) years of probation period should the judge impose death Penalty. This means that, during this period the convicts will serve his/her time in the correctional center.

#### 4.3.4. Special Criminal Offense Incorporated in Draft Criminal Code

The codification drafting method, which is the incorporation of provisions into a systemactial and comprehensive book is also contributed to the spread of imprisonment punishment in the Draft Criminal Code. Certain criminal offenses which currently regulated outside the KUHP, is now incorporated in the KUHP,

which ultimately result in the increase of criminal punishment, especially imprisonment in the Draft Criminal Code.

Such criminal offense including terrorism, terrorism financing, technology and informatics, environment, sever human rights violation, narcotic and psycitropics, copyrights, patent, trademark, insurance, trust in business, and corruption. The imprisonment punishment is also vary, for instance terrorism offense with violence or threat of violence is subject to minimum inprisonemnt of 3 (three) years and maximum of 15 (fiftheen) years.<sup>122</sup>

The similar arrangement is also applied for genocide. In Draft Criminal Code this criminal offense is punishable by imprisonment for minimum period of 5 (five) years and maximum period of 20 (twenty) years.<sup>123</sup> Other example is corruption offense which is referred to the action to increase the self-wealthy or other's in unlawfull manner, which is punishable by imprisonment for minimum period of 4 (four) years and maximum period of 20 (twenty) years.<sup>124</sup>

Besides codification reason, the increase of inprisoment punishment in the Draft Criminal Code is also trigerred due to criminalization towards certain action. For instance, criminaliation for contempt of court, criminal offense on religious life, the new scope of adultery, homosexual fornification. Disturbance of trial as one type of contempt of court offense is punishable by maximum of 5 (five) years of inprisoment.<sup>125</sup>

### 4.3.5. Fines (May Not) Become Alternative

Fine is essentially may be seen as alternative punishment beside inprisoment for criminal offense with certain characteristic. This is il ine with the vision of Draft Criminal Code which intends to minimize the imposition of deprivation of freedom punishment. However, the Draft Criminal Code is still preserve the inprisoment punishment compared to fines.

The Draft Criminal Code contains 370 criminal offenses which are only punishable by imprisonment.Of 66 criminal offenses are punishable only by fines. In total, the Draft Criminal Code contains 822 criminal punishments, in the form fines which is imposed separately or together with other criminal punishment.

From the 822 criminal punishments, it can be concluded that fines is still become substitute for other types of punishment (especially imprisonment), be it through comiulative or alternative imposition. There are only 66 offenses which are punishable by fine only.

Besides, for unsettled fines the Draft Criminal Code still use imprisonment as substitute punishment. Draft Criminal Code states that if the foreclose of assets

<sup>&</sup>lt;sup>122</sup> See Article 250, Draft Criminal Code.

Article 400, Draft Criminal Code.

Article 687, Draft Criminal Code.

<sup>&</sup>lt;sup>125</sup> Article 328, Draft Criminal Code.

and receivable is impossible, the fines will be substitute with social work, supervision, or imprisonment, provided that such fine is not greater than fine under category I.

:

Below is detail on the period of imprisonment as subtitle punishment for unsettled fines:

- a. For social works, is imposed for maximum of two hundred fourty nours for convicts who has reach 18 (eighteen) years of age or above and one hundred twenty hours for convicts who below 18 (eighteen) years of age.
- b. supervision punishment, is imposed for minimum of 1 (one) month and maximum of 1 (one) year.
- c. inprisoment, is imposed for minimum of 1 (one) month and maximum of 1 (one) year, which can be added for another 1 (one) year 4 (four) months.

If after serving the substitute punishment partial of the fine has been settled, the period of substitute punishment will be deducted accordingly. If the foreclose of asset or receivable is imposed, then for unsettled fine amounting above I will be substituted with inprisoment for minimum period of 1 (one) year and maximum period as charged by the criminal offense in question.

Towards criminal offenses which are only punishable by fines, additional punishment or measure can also be imposed. Likewise, for individual who has been committing repetitive criminal offenses and imposed with fines for committing offenses which punishable only by fines, may subject to imprisonment for maximum of 1 (one) year or supervision along with fines punishment.

From 822 offenses that contains fines punishment in Draft Criminal Code, 461 offenses are related to Fine under IV. Of 266 offenses subject to Fine under II. 95 offenses subject to Fine under V. 91 offenses are punishbale with fine under III. 48 offenses subject to Fine under I. Lastly, of 26 offense subject to Fine under Category VI.

This classification of fine is based on the category of offense adopted by the Draft Criminal Code. Fine under Category I and II are punishment for offense classified as light offense. Fine under Category III and IV are punishment for offense classified as serious crime. Fine under Category V is punishment for offense classified as most serious crime. Finally, Fine under Category VI are punishment for offenses which are punishale by death penalty, life imprisonment, inprisoment for maximum of 20 yaers, and offenses related to corporation.

In relation to the opportunity to impose social work punishment, then it seems to be impossible. Within the Draft Criminal Code, there are only 48 offenses which punishable by Fine under Category I. Wherease, the condition to impose social work is that the punishment must be below 6 months and fine under category I. In total, there are only 59 offenses which are punishable by below 6 month of imprisonment, thus the imposition of social work will be limited.

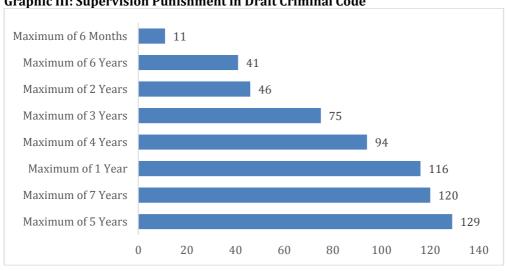
Therefore, the non-inprisonemnt approach (other than imprisonment or deprivation of freedom) in Draft Criminal Code is in doubt. Especially, due to the arrangement on subsiadary or substitute punishment beside fines is still place inprisoment as substitute punishment for unsettled fines. By this reason, the chance for prioritizing the imprisonment punishment is appearnt. Consequently, the population in penitentiary will be increased.

#### 4.3.6. Pattern of Supervision Punishment in Draft Criminal Code

Supervision punishment is a punishment imposed to defendat who commit offense which subject to imprisonment for maximum of 7 (sevel) years. The imposition of this punishment is by considering the personal situation and the action of the perpretrators.

In Draft Criminal Code at present version, the supervision punishment is similar to conditional imprisonment which adopts non-custodial nature or uses a probation period. This type of punishment is placed as alternative to inprisoment and is not imposed to serious crime. This supervision punishment is imposed for maximum of 3 (three) years.

In Draft Criminal Code, there are 632 offenses that allow the imposition of supervision punishment. In other words, there is possibility to change the imprisonment punishment to supervision punishment for 632 offenses. Of the 632 provisions, 129 of them are offenses punishbable by a maximum of 5 years. 120 offenses are subject to maximum imprisonment of 7 years, 116 offenses with maximum of 1 year of imprisonment, 94 offenses with maximum imprisonment of 4 years, 75 offenses with maximum imprisonment of 3 years, 46 offenses with maximum imprisonment of 2 years, 41 offenses with maximum imprisonment of 6 years, then 11 offenses with maximum imprisonment of 6 months.



**Graphic III: Supervision Punishment in Draft Criminal Code** 

Further, conditions that must be satisfied to impose supervision punishment are:

- a. the convict will not commit any further offenses;
- b. the convicts, within certain time shorter than the supervision punishment period must indemnify all or partial of the losses incurred due to the offenses; and/or
- c. the convicts must or must not perform certain actions without limiting the freedom for religion and politic.

The correctional-related institutions that are authorized to implement the supervision punishment are Correctional Center at the Ministry of Law and Human Rights. In performing its duty, the officer may request for assistane to regional government, social institution, or certain individuals

The Correctional Center is responsible to supervise and assess the fulfilment of the condition for supervision punishment served by the convict. If the convict committed unlawful action, then the Correctional Center may request to the supervisory judge to extend the supervision period which must not longer than 2 (two) times of the remaining supervision period.

However, if the Correctional Center found that the convict has shown good attitude, the officer may request to supervisory judge to shorten the supervision period. The supervisory judge then may change the punishment period after hearing the respond from the convict.

Other condition is that if the convict, during serving the supervision punishment, commited unlawfull action and imposed with death penalty or non-inprisoment punishment, the supervision punishment is still in force. Then if the convict is imposed with inprisoment, the supervision punishment will be postponed and will be resumed if the convict has finised serve the inprisoment.

According to the Elucidation of the Draft Criminal Code, the changes on the supervision perid is essentially refered to the changes towards the punishment being imposed. Thus, it must be decided by hearing the respond form the convicts, development officer, or other individual deemed necessary. If during the implementation of supervision punishment, the convict is require to perform certain work, in which he/she obtain payment, such income may be utilize by the convict, victim, or chanelled to the state.

#### 4.3.7. Possibility for the Implementation of Social Works Punishment

Beside supervision punishment, the possibility to shift the inprisoment or deprivation of freedom as alternative punishment is by imposing the social work punishment. This punishment is one of the salient features introduced by the Draft Criminal Code.

Social work punishment may be impose if the inprsoment period imposed is not more than 6 (six) month or the fine is not more than fine under Category I. This

social work may be imposed for maximum of 240 (two hundred forty) hours for convicts who are 18 (eighteen) years of age or above and 120 (one hundred twenty) hours for convicts who below 18 (eighteen) years of age.

Several considerations used to impose this social works is:

- a. the confension of the convict toward his/her offese;
- b. the convict is in productive age pursuant to laws and regulations;
- c. the convics consent to serve the social work after obtaing information related to the punsment;
- d. life background of the convict;
- e. work safety of the convict;
- f. releigion and believe of the convict; and
- g. the ability for the convit to pay the fine.

The implementation of social work may be performed in instalment basis for maximum period of 12 (twelve) montsh by considering the activity of the convicts in performing his/her daily work and/or other usefull activity.

If the convict fails to satisfy all or some of the obligation to perform social work without valid reason, then the convict will be ordered to:

- (i). repreat all or partial of the social work;
- (ii). serve all or partial of the inprisoment which has been subtitited to social work; or
- (iii). pay all or partial of the fines which has been substituted to social work or serve inprisoment to substitute unsettled fines.

By looking to the design of arrangement adopted by Draft Criminal Code, the implementation of the social work is very limited. The social works as punishment can only be imposed to criminal offense which is punishable by inprisoment for less than 6 months and fines below Category I. Consequently, there are only 59 offenses in the Draft Criminal Code that can be punished with social work punishment.

This portion only constitutes 2.7% of criminal offenses in Draft Criminal Code. 59 offenses punishable by social work, compared to 1,198 of inprisoment provisions, 822 fines provisions, 636 supervision punishments. Thus, the implementation of this supervision punishment is limited compared to other type of punishment. Therefore, it is difficult to decrease the number of punishment which deprivate the freedom through social work punishment. Further, one of the requirements to impose social work is the ability for the convict to pay fine.

The Draft Criminal Code does not regulate in detail the authority which will be responsible to organize the social work punishment. However, by considering the characteristic of the punishment, this will become the new role for the correctional-related institutions. If this is the case, then there will be additional responsibility by the Correctiona Center in relation to the social work. Besides

this new role, the correctional-related institutions will also require to coordinate with other institution, should the social work punishment is performed outside the Correctional Center.

#### 4.4. Alternative Mechanism besides Inprisonment

The Draft Criminal Code still incorporates the inprisoment or punishment in the form of deprivation of freedom as the main approach. Quantity wise, the Draft Criminal Code contains 1,154 inprisoment punishment. Of these 1,154 provisions, 370 provisions impose inprisoment as the only punishment. Further, 44 provisions are liftetime imprisonment.

In light of period, the inprisoment punishment for 5-15 years is still dominating the Draft Criminal Code with more than 50%, and then followed by 1-5 years of inrisoment, and 15-20 years of inprisoment. Lastly, the inprisoment for less than 1 year is at the bottom of the chart.

This punishment is directly related to the possibility for the imposition of alternative form of punishment beside deprivation of freedom in Draft Criminal Code. One of the solution is the implementation is through installmen service of inprisoment. This instalment can be imposed towards offences which are punishable by 1 year or less inprisoment.

Besides, the limitation to implement alternative punishment other than depreviation of freedom is due to concept of special minimum imprisonment in Draft Criminal Code. Through this concept, the judges are obliged to impose imprisonment in the minimum period as determined by the law.

In Draft Criminal Code, there are 328 offenses which are punishable by using speciam minimum imprisonment period. 100 offenses are subject to minimum inprisonment of 3 years. 50 offenses are subject to minimum imprisonment for 5 and 4 years. Less than 50 offenses are subject to imprisonment for 2 and 1 years.

The possibility to minimize the imposition of punishment that deprivate the freedom can be seen from the arrangement of fines punishment in Draft Criminal Code. There are 822 provisions on fines in Draft Criminal Code. 66 of these provisions state fines as the only punishment.

However, the imposition of fines as alternative to imprisonment (deprivation of freedom) is also restricted, considering the use of imprisonment punishment as substitute punishment for unsettled fines. There are 3 possibilities for unsettled fines, namely social work, supervision, and imprisonment.

In respect of supervision punishment, which can only be imposed to offenses punishable by 7 years of inprisonment maximum, its regulated in 632 provisions Draft Criminal Code. Meanwhile, social work, which can be imposed to offenses punishable by less than 6 months of imprisonment and fine under Category I, its

only regulated in 59 provisions or 2.17% of the criminal punishment in Draft Criminal Code.

In term of requirements, the imposition of supervision punishment must fulfil the following conditions:

- a. the convict will not commit any further criminal offenses;
- b. the convicts, within certain time shorter than the supervision punishment period must indemnify all or partial of the losses incurred due to the offenses; and/or

terpidana harus melakukan perbuatan atau tidak melakukan perbuatan tertentu tanpa mengurangi kemerdekaan beragama dan kemerdekaan berpolitik./the convicts must or must not perform certain actions without limiting the freedom for religion and politic.

Further, the implementation of social work punishment must satisfy the following requirements:

- a. the ability of the perpetrators to settle fine.
- b. the confension of the convict toward his/her offese;
- c. the convict is in productive age pursuant to laws and regulations;
- d. the convics consent to serve the social work after obtaing information related to the punsment;
- e. life background of the convict;
- f. work safety of the convict:
- g. releigion and believe of the convict; and
- h. the ability for the convit to pay the fine

Other mechanism which is placed as laternative to imprisonment or deprivation of freedom is through special measure. As elaborated in the Acadamic Paper of Draft Criminal Code, the Draft Criminal Code adopts double track system. However, the Draft Criminal Code uses the measure system in accordance with the criminal accountability of the defendant.

The Draft Criminal Code devides the criminal accountability into 3 (three) categories, namely:

- a. people who can not be accounted due to mental disorders, mental illness, mental retardation, or other mental disability;
- b. people who are less able to be accountable due to the mental disorders, mental illness, mental retardation, or other mental disability; or
- c. people who are accountable and are intended to provide protection to the community.

Towards perpretrators which fall under first category, namely unaccountable persons, he/she can only be subject to measure. Meanwhile, towards the second

category, the judge may choose between reducing the imposed punishment or imposing a measure.

The imposition of special measure under the Draft Criminal Code may in the form of:

- a. hospital treatment;
- b. handover to the state; or
- c. handover to other parties

Other measures that can be imposed simultenously with main punishment are:126

- a. revocation of driving license;
- b. foreclose of asset gathed from criminal offences;
- c. mandatory repair any result of the criminal offencese;
- d. work training;
- e. rehabilitation; and/or
- f. treatment in certain insitutions

One of the actions related to conditions and policies of the correctional is as specified in Article 106 of the Draft Criminal Code, which measure in the form of handovering to the state. The measure to handover the perpretarators to the state is performed for the public interest.

The handover to the state is conducted based on court decision which must outline the place and the procedure for such measure. However, the Draft Criminal Code does not set further provision on the place, process, or the mechanism for this measure, nor the parties who responsile to receive and develop the person.

Further, antoher measure that relates with the condition and policy of the correctional is measure in the form of work training. Article 111 (1) of Draft Criminal Code states that the imposition of mandatory work training by judge must consider the following matters:

- a. the benefit for the perpretrators
- b. the ability of the perpetrators; and
- c. type of work training.

Other measure that relates with the condition and policy of the correctional is rehabilitation. This measure is imposed towards perpretarators that stasify the following criteria:

- a. is in state of addicted to alchol, narcotics, psicotrapics, and other addictive substances; and/or
- b. Is having sexual disorders or mental illness

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<sup>&</sup>lt;sup>126</sup> Article 103 (2), Draf of KUHP.

The rehabilitation can be performed in medical or social rehabilitation institution, owned by the government or private. Further provisions on this measure are regulated in a Government Regulation.

A particularly important note regarding this system is that the imposition of this measure is determined at the time of the criminal offense is committed as opposed to the conditions of the offender at the sentencing time or measure nor the at the period when serving the punishment. Such arrangements do not accommodate opportunities for changes in the conditions of the offender at the time of sentence/ measure or while serving the sentence/measure.

#### 4.5. Punishment and Measure towards Juvenile

The correlation beween the juvenile justice system in the Draft Criminal Code and correctional is in the alterative mechanisms other than criminal punishment or any applicable measure. The criminal system and this measure will result whether or note the criminal punishment will be prioritizing in responding the criminal offense committed by children. In addition, the criminal system and this measure rely upon the role of the correctional-related institutions, as these two will lead to the allocation of correctional resources.<sup>127</sup>

The Draft Criminal Code states that children below 12 (twelve) years of age who commit criminal offense cannot be held accountable. Punishment and measure for children can only be imposed towards individual who is between 12 (tweleve) to 18 9eighteen) years of age. There is a disparity between Draft Criminal Code with Law No. 11 of 2012 on Juvenile Justice System (Juvenile Justice System Law) in regards to provision on age.

In Draft Criminal Code, the admitted age to be held accountable for criminal punishment is between 12 (twelve) to 18 (eighteen) years old. This provision is similar with the Juvenile Justice System Law. 128 However, the Juvenile Justice System Law further states that specific to children below 14 (fourteen) years of age may only be imposed with a measure.

Thus, although the criminal investigation is performed towards children above 12 (twelve) years old, the main punishment may only be imposed towards children who has reach above 14 (fourteen) years of age. Meanwhile, the Draft Criminal Code does not accommodate this principle.

For any crime committed by a child, any investigator, prosecutor, and judge in examining a child shall prioritize the diversion mechanism. However, such mechanism is exercised only if the offense is threatened with imprisonment for less than 7 (seven) years and is not a repeat of a crime.

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<sup>&</sup>lt;sup>127</sup> In depth study on the juvenile justice system can be found on Erasmus A.T Napitupulu, *Pemidanaan Anak dalam Rancangan KUHP,* Jakarta, *Institute for Criminal Justice Reform*, 2015. <sup>128</sup> Article 1 (3). Juvenile Justice System Law.

Article 116 of the Draft Criminal Code states that by considering the purpose and guidance of criminalization as referred to in Article 55 and Article 56, for the best interests of the child, the trial before the court may be suspended or terminated upon hearing the considerations from the investigator, prosecutor and correctional officer.

The postponement according to Article 116 paragraph (2) of the Draft Criminal Code shall be conducted on the condition that the child will not commit a crime and/or a child within a certain period shall indemnify all or any of the losses incurred as a result of his/her actions. Elucidation of Article 116 R of the Draft Criminal Code states that the basic consideration of such arrangements pursuant to the child's live that is still sensitive and unstable, so as much as possible that the child as a criminal offender is excluded from examination in court.

Conceptually, Article 11 of Draft Criminal Code is appropriate for the benefit of the child. However, it becomes ambiguous when the legislators try to relate it to Article 55 and Article 56 of the Draft Criminal Code which adopts the general concept of punishment (not just to children).

Article 117 Paragraph (1) Sub-Paragraph a of the Draft Criminal Code states that a diversion is conducted in the event that a criminal offense is punishable by imprisonment for less than 7 (seven) years. The Article 117 paragraph (1) of the Draft Criminal Code is closely related to Article 9 of the Juvenile Justice System Law. The Juvenile Justice System Law also sets the less than 7 years of imprisonment as requirement. In the elucidation of the article, it is explained that the diversion is not intended to be applied to serious offenders, such as murder, rape, drug trafficking, and terrorism, which are punishable by more than 7 (seven) years of imprisonment.

An important note to this provision is that the Indonesian criminal law does not recognize the term of "serious criminal offense". Neither in the existing KUHP or Draft Criminal Code set this type of classification. In addition to "serious crimes", the Criminal Code also contains provisions that use terminology whose qualifications are not recognized in Indonesian criminal law. The Article 134 of the Draft Criminal Code states that imprisonment is imposed in the case of a child committing a serious crime or a crime accompanied by violence.

This diversion mechanism can also be implemented if there is an agreement based on the consent of the victim and/or the victim's family and the willingness of the child and his/her family. This provision does not apply if:

- a. a criminal offense punishable by fine under Category I;
- b. minor crime;
- c. the victim's loss is not more than the applicable minimum wage of the province where the crime is committed.

d.

For children who has not reached 12 (twelve) years of age when committing or allegedly committing a criminal offense, investigators, community advisor, and professional social workers make the decision to:

- a. return the child back to the parent guardian; or
- b. to include the child to an education, coaching and mentoring programs organized by government agencies or Social Welfare Organizer at the institutions that manage the social welfare affiars, at both central and regional levels, for a maximum period of 6 (six) months.

The requirement for securing victim consent in this case would become a problem. Article 117 of the Draft Criminal Code states that the diversion is the transfer of the settlement of a child's case from the criminal justice process to outside the court proceeding. In other words, the Draft Criminal Code seeks to prioritize the interests of children for not dealing with the judicial process. However, on the other hand, diversion is subject to the interest of the victim.

Therefore, the Draft Criminal Code seems to be granted substantial role to the victims compared to the perpetrator, resulting the agreement would not be achieved if the victim reject or refuse to give his/her consent. Both The Juvenile Justice System Law and Draft Criminal Code put the success of the diversion process on the consent of the victim.

Furthermore, according to the Draft Criminal Code, a child can be imposed to principle and additional punishments. The main punishment may take form of:

- a. warning
- b. Conditional punishment (coaching outside the institution, community service, or supervision);
- c. work training;
- d. coaching within the institution; and
- e. Inprisonment.

Criminal penalty in the form of warning or advice to the child is intended to discipline the child for not repeating his/her actions and avoid any actions that are contrary or against the law. The conditional punishment is imposed under the specific conditions that are determined by the court decision.

These special conditions should not reduce the freedom of religion and politics of the child. The determination of the condition is made by the judge, both general and special condition must be met within a certain period of time. If these conditions are not met, then an extension for serving the punishment may be intiated.

The place of for serving the conditional punishment in the form of non-institutionalized coaching is determined in the court decision by considering the needs of the child. Outside counseling coaching is conducted in an education or development institution organized by the government or certain institutions designated in the judge's decision.

Punishment in the form of non-institutionalized coaching may order the child to:

- a. follow the coaching and counseling program conducted by the supervisor;
- b. following therapy in a mental hospital; or
- c. following therapy due to abuse of alcohol, narcotics, psychotropic substances, and other addictive substances.

According to the Elucidation of Draft Criminal Code, non-institutionalized coaching is intended to provide coaching to the child, either for the purpose of healing due to the inability or less ability to be held responsible as mental illness or mental retardation. In addition, this punishment constitutes a coaching for establishing a healthy life to child to acquire useful skills for his life.

If during the counseling period the child is found to be in breach of the specified conditions, the supervisor may propose to the supervisory judge to extend the term of counseling which must not exceed the maximum of 2 (two) times of the coaching period that is not yet executed.

If the judge's imposed the child with mandatory community service, the public prosecutor and the community advisor will place the child at public service institution, organized by public or private entity. This decision is determined based on the results of community research that begins with risk assessment and assessment of the needs of the children.

During serving the community service punishment, the child remains in the family environment. This punishment is subject to the conditions that it must be carried out by the child with the assistance of the parent/guardian. The Draft Criminal Code states that the punishment is served in accordance with the needs of children.

Furthermore, if the judge's decision order for mandatory supervision, (supervision punishment), the prosecutor and the community advisor will place the child in the supervisory agency. Supervision punishment that may be imposed on the child is for a minimum of 3 (three) months and a maximum of 2 (two) years.

Related to the punishment in the form of work training, the implementation of this punishment is conducted by the government or the government in cooperation with the private sector. Work training is conducted on weekdays and must not interfere with the children's rights for education. The term of employment training shall be a minimum of 3 (three) months and no later than 1 (one) year.

The training work is conducted for at least 1 (one) hour and maximum of 3 (three) hours in 1 (one) day. This must be determined in the judge's decision by taking into account the needs of the child. Work training punishment training is performed at institutions that carry out work training which is appropriate to the age of the child.

For children who are imposed with in-house counseling punishment shall be placed in a training venue or coaching institution in accordance with the judge's

decision. Work training places or counselling institutions must have special shelter for children. If the training places or counseling institution does not have an educational facility, the correctional center may cooperate with:

- a. educational institutions;
- b. religion institution; or
- c. other institutions in accordance with the needs of children.

The in-house counselling for the child is carried out until the child is 18 (eighteen) years old. Towards children who has served 1/2 (one-half) of counselling period in the institution and the child showed good attitude, then he/she will entitle for a parole.

The imprisonment can only be imposed on the child as a last resort. The imprisonment is applied to the child in the case of a child committing a serious crime or a crime accompanied by violence. Criminal restriction of imprisonment imposed on a child of at least 1/2 (one-half) of the maximum imprisonment that is threatened against an adult.

The special-minimum punishment of imprisonment does not apply to children. If a child committed a criminal offense which is punishable by death penalty or Life imprisonment, then the imprisonment is reduced to a maximum of 10 (ten) years.

The imprisonment for this child is carried out at the Children Coaching Institution. The Draft Criminal Code states that further regulation on the form and procedure of the implementation of the main punishment for children to be regulated by Government Regulation.

In relation to the action, for children who are unable or less able to be responsible as stipulated in Article 41 and Article 42 of Draft Criminal Code, then the child may be subject to the following actions:

- a. is returned to parent / guardian;
- b. is surrendered to other party;
- c. treatment in mental hospital care:
- d. care at the Social Welfare Institution;
- e. the obligation to attend formal education and / or training conducted by the government or private entity;
- f. revocation of driver's license; and / or
- g. improvement as the result of the criminal offense.

From the explanation above, it can be projected that the allocation of resource for correctional-related institutions will affect the Correctional Center (BAPAS). If the effectiveness of the diversion is increase compared to the imprisonment, then the allocation of resources to BAPAS will decrease. However, the allocation of such resources is projected to remain similar however there will be changes in

the form due to the provisions on measure punishment toward children in Draft Criminal Code.

#### 4.6. Other Mechanism

Another aspect in relation to the minimization of imprisonment punishment or deprivation of independence approach is the mechanism for the changes or adjustment of decision as adopted in the Draft Criminal Code. Article 58 of Draft Criminal Code provides an opportunity for criminal punishment and measure have obtained final legal force can be changed or adjusted in accordance with the progress of the convicts and the purpose of punishment.

Such amendments or adjustments shall be made upon the request of the consists, parent, guardian or legal counsel or at the request of the public prosecutor or the supervisory judge. The Draft Criminal Code states that the changes or adjustment of the decision should not be heavier than the original decision and must be upon the consent of the convicts. Changes or adjustments to decisions can be in the form of:

a. revocation or suspension of punishment or measures;b. replacement of punishment or measures.

The Draft Criminal Code also states that the imprisonment as far as possible is not imposed if the following circumstances are found:

- a. the defendant is under 18 (eighteen) years or above 70 (seventy) years;
- b. the offense is the defendant's first violation;
- c. the loss and suffering of the victim is not substantial;
- d. the defendant has compensated the victim;
- e. the defendant is unaware that the criminal offense will result in major losses:
- f. The crime is occurred because of a strong incitement from others;
- g. the victim encourages for the offense;
- h. the offense is the result of an unlikely event;
- i. personality and behavior of defendant assure that he will not commit another criminal offense:
- j. imprisonment shall bring great harm to the defendant or his family;
- k. non-institutionaled coaching is expected to be successful for the defendant;
- l. lighter criminal detention will not reduce the severity of the crime committed by the defendant;
- m. criminal offenses occur among families; or
- n. occurs due to negligence.

However, the above provisions do not applicable to criminal offenses punishable by imprisonment of more than 5 (five) years or threatened with special minimum punishment. Likewise, for certain criminal offenses that are very harmful or severe to the public or harm the financial or economic state.

The above provisions are in fact appropriate with the spirit of Criminal Code reformation, which is the democratization of criminal law and seeks to no longer prioritize the imprisonment as the main punishment. However, the changes or adjustment of court decision is can only be conducted based on a request. Thus, the probability for the application of this mechanism is very limited.

Especially, when it compared to the imprisonment approach in the Draft Criminal Code, then this provision will not be a counterweight. A combination between unequal positions as it can only be obtained through an application, with the strong provisions on imprisonment approach, will still lead to the frequent use of imprisonment as punishment. In other words, it is unlikely that there will be any change or adjustment to the verdict.

The limited small chance for the application of alternative mechanisms to avoid imprisonment is also caused by the enforcement of the applicable conditions. The conditions where alternative mechanism cannot be applied for criminal offense punishable by 5 (five) years imprisonment, result in the unlikeliness of the implementation of this mechanism. This is because the largest duration of imprisonment punishment in Draft Criminal Code is ranging from 5 to 15 years.

# 4.7. Implication of Draft Criminal Code towards Correctional-Related Institutions

The correctional system will affect two correctional-related institutions, namely Penitentiary (LAPAS) and Correctional Center (BAPAS).

As has been discussed in the previous section, that the imprisonment is become the main punishment under the Draft Criminal Code. This imprisonment approach will have an impact on the resources of LAPAS responsible for guiding the prisoners.

On the other hand, other mechanisms (alternatives) other than imprisonment or deprivation of liberty punishment are predicted to be unable to compensate for the spike in the crime of deprivation of liberty.

Indeed, through the alternative mechanisms introduced by the Draft Criminal Code, the expectation of reducing or at least a strengthening the imposition of punishment in the form of deprivation of freedom is coined. However, the detail arrangement shows that the alternative mechanism has not been able to achieve the objective to reduce or minimize the influx of people to prison.

In addition to the potential of surge in population flows, several provisions in the Draft Criminal Code also have an impact on the role and authority of the correctional-related institutions. Some of these roles already existed, on the other hand some other roles emerge as the consequences of the arrangement in Draft Criminal Code.

First, related to death penalty punishment. In the Draft Criminal Code, death penalty is declared as a special punishment and will always be charged with alternative punishment. According to Article 89 of the Draft Criminal Code, this alternative arrangement constitutes a last resort to protect the community.

The special character of death penalty according to the Elucidation of Draft Criminal Code shows that the death penalty should be imposed in selective manner. In its decision, judge must always consider deeply whether, for the case in question, an alternative punishment in the form of Life imprisonment or maximum imprisonment of 20 (twenty) years imprisonment can be imposed. If there is any doubt about the possibility of using of one of the alternative punishment, then the judge has the chance to imposed conditional death penalty.

The conditional death penalty in question means that the death punishment can be postponed with a trial period of 10 (ten) years. If the conditions are met, then the Minister responsible for in field of law may change the punishment to be one of the alternative punishment in the form of Life imprisonment or maximum of 20 (twenty) years. The changes to the punishment must be stipulated in a Decree of the Minister of Law and Human Rights.

From this death penalty provision, it can be seen that the correctional-related institutions have the role and authority to supervise the behavior of prisoners who imposed with death penalty and are undergoing a probation. The second role and authority rests with the Minister of Law and Human Rights to issue a decision to convert the death penalty to be a Life imprisonment or imprisonment for a maximum of 20 (twenty) years.

From this capital punishment arrangement, the allocation of resources will have an impact to the Penitentiary (LAPAS) as correctional-related institutions. The role of LAPAS in this matter is to provide coaching for prisoners up to 10 (ten) years' grace period. Another role of LAPAS is in assessing whether the convicted person will be executed or not. In addition, there is another role of the Minister of Law and Human Rights in the issuance of the decree to change the capital punishment to a lifetime sentence or imprisonment for a maximum of 20 (twenty) years.

The second role is related to the implementation of imprisonment. The imprisonment punishment as a form of deprivation of liberty is predicted to be still the priority punishment. On the other hand, other mechanism and alternative punishment are not capable of offsetting the possibility of imposition of deprivation of liberty punishment.

An entirely new role under the Draft Criminal Code granted to correctional-related institutions, especially Penitentiary (LAPAS) is to supervise the implementation of imprisonment installment. Article 73 paragraph (1) the Draft Criminal Code states that in the case of a judge imposing a 1 (one) year imprisonment or less than 1 (one) year, the judge may determine the punishment to be severed through an installment.

Article 73 paragraph (2) of the Draft Criminal Code states that the instalment of imprisonment can only be granted if the judge considers the existence of a very serious condition or other cause that are very worrisome if the defendant serve his/her punishment in a row. The instalment can be implemented for 2 (two) days in 1 (one) week or 10 (ten) days in a month, provided that in any time the duration of installments must not exceed 3 (three) years.

Furthermore, there is also implication to the application of fines punishment. This fine punishment related to the correctional-related institutions if such fines failed to be settled. There are 3 (three) options if the penalty imposed cannot be paid, namely the imposition of social work, supervision, and imprisonment. The imprisonment as the result of unpaid fines punishment will impact LAPAS.

Supervision punishment may be imposed for a criminal offense punishable by a maximum imprisonment of 7 years, means there are 632 criminal offenses in the Draft Criminal Code that can be imposed with this punishment. Meanwhile, towards social work punishment, which can be imposed for offenses punishable by less than 6 months of imprisonment and fine under Category I, it can only be imposed towards 59 offenses, which only constitutes 2.17% of the total number of offenses in the Draft Criminal Code. Thus, the likelihood for the imposition of imprisonment remains large.

In the context of supervision punishment, an entirely new role to correctional-related institutions is to oversight and proposes recommendation to the supervisory judge. Supervision punishment is imposed to a defendant who commits a criminal offense punishable by imprisonment of a maximum of 7 (seven) years. The imposition of supervision punishment is supervisory consideration is conducted by considering the personal circumstances and actions of the defendant.

The correctional-related institutions that are responsible for the implementation of supervision punishment is BAPAS. BAPAS plays a role in supervising and assessing the fulfillment of supervision conditions by the convict. If the convicted person violates the law, BAPAS may propose to the supervisory judge to extend the supervisory period as long as it does not exceed 2 (two) times of supervision period that has not been served.

On the contrary, if the BAPAS found that the convict is showing good behavior, then it can be proposed to the supervisory judge to shorten his/her supervision period. The supervisory judge may then change the period of supervision upon hearing the parties

In relation to the system and mechanism of measure, the Draft Criminal Code also grants some roles to the correctional-related institutions, in this case is the Correctional Center (BAPAS), and one of is on the punishment and measure for juvenile.

The Draft Criminal Code states that for any offenses committed by a child, any investigator, prosecutor and judge in examining a child shall seek for diversion mechanism. However, such diversion is exercised only if the offense committed

is threatened with imprisonment for less than 7 (seven) years and is not a repeat of a crime.

This diversion mechanism can also be implemented if there is an agreement based on the consent of the victim and/or the victim's family and the willingness of the child and his/her family. This provision shall not apply if:

- a. a criminal offense punishable by a fine under Category I;
- b. minor crime;
- c. the value of the victim's loss is not more than the applicable minimum wage in the relevant province.

For children who has not reached 12 (twelve) years of age when was committing or suspected of committing a criminal offense, investigators, community advisor, and professional social workers shall decide to:

- a. return the children to the parent/guardian; or
- b. send the children to education, coaching and mentoring programs in government agencies or Social Welfare Organization that manage social welfare affair, at both central and regional levels, for a maximum period of 6 (six) months.

The place for execution conditional punishment in the form of non-institutionalized coaching punishment is determined in the court decision by considering the needs of the child. Outside counseling is educational and coaching institutions organized by the government or certain institutions stated in the judge's decision.

Non-institutionalized coaching punishment may in the form of:

- a. mandatory participation in coaching and counseling program conducted by the supervisor;
- b. mandatory therapy in a mental hospital; or
- c. mandatory therapy due to abuse of alcohol, narcotics, psychotropic substances, and other addictive substances.

If the judge imposed community service punishment, the public prosecutor and the community advisor will place the perpetrators in a public service institution, both public and private. This is determined based on the results of community research which responsible to assess any possible risk of the punishment and the needs of the children.

During the period community service punishment, the child remains in the family environment, Provided that all conditions for coaching as has been decided by the court has been fulfilled by the child with the assistance of his/her parent/guardian. Implementation of the decision is performed in accordance with the needs and conditions of the child.

Furthermore, if the judge's decision is to follow the coaching program (supervision punishment), the prosecutor and the community advisor will place the child in the supervisory agency. Supervision punishment may be imposed

towards the child for a minimum of 3 (three) months and a maximum of 2 (two) years.

In relation to the crime in the form of work training, the implementation of the punishment is performed by the government or the government in cooperation with the private sector. Work training is conducted on weekdays and must not interfere with the children's learning rights. The term of employment training shall be for a minimum of 3 (three) months and no more than 1 (one) year.

The training work can be organized for at least for a period of 1 (one) hour and maximum 3 (three) hours in 1 (one) day. This time period must be stipulated in the judge's decision by taking into account the needs of the child. Punishment in the form of work training is conducted at institutions that carry out work training which is in accordance with the age of the child.

The coaching for the child in the institution is carried out until the child is 18 (eighteen) years old. Towards a child who has served 1/2 (one-half) of his/her counseling period in the coaching institution, and the child is showing a good attitude, then he/she is entitled for a parole.

The imprisonment can only be imposed on the child as a last resort. The imprisonment is applied to the child in the case of a child is committing a serious crime or a crime accompanied by violence. The limitation of imprisonment period imposed on a child of is for maximum of 1/2 (one-half) of the maximum imprisonment that is punishable to adult perpetrators.

The special minimum criminal imprisonment period does not apply to children. If a criminal offense committed by a child is a criminal offense punishable by death penalty or Life imprisonment, then the imprisonment is set for maximum imprisonment of 10 (ten) years.

The imprisonment for child is carried out at the Children Coaching Institution. The Draft Criminal Code states that further regulation on the form and procedure of the implementation of the main punishment for children to be regulated by Government Regulation.

In addition, the role of correctional-related institutions can be seen by the imposition of measure in the form of the handover of perpetrators to government, action in the form of work training, and placement on rehabilitation center. The imposition of measure according to Draft Criminal Code may in the form of:

- a. mental hospital care;
- b. handover to the government; or
- c. handover to other party.

The act of handovering the perpetrators to the government is governed by Article 106 of the Draft Criminal Code. The act of handovering to the government, for adults is performed for the benefit of the community. Through

the judge's decision it is determined where and how the action should be executed. However, the Draft Criminal Code does not specify further about the place, process, or mechanism of such handover. Including who is responsible for accepting and fostering the handover of the person. Further, other measure which is related to the conditions and policies of correctional is measure in the form of work training.

Likewise, the rehabilitation is also a form of measure that relates with the conditions and policies of the correctional. This measure is imposed to criminal offenders who:

- a. addiction to alcohol, narcotics, psychotropic substances, and other addictive substances; and/or
- b. have a sexual disorder or who have a mental disorder.

This rehabilitation can be performed in a medical or social rehabilitation institution, whether its owned by government or private entity. The provisions concerning this action are further regulated by Government Regulation.

#### CHAPTER V

#### **CLOSING**

#### 5.1. Conclusion

Imprisonment punishment is still the main approach in responding to criminal offenses. This can be seen from the dominance of imprisonment based on quantity in the Draft Criminal Code. The amount is even greater than the current KUHP. In the KUHP, there are 485 criminal offenses punishable by imprisonment, while in the Draft Criminal Code the amount reached 1,154 criminal offenses.

In light of duration, in the Draft Criminal Code, the imprisonment with a term of 5-15 years is ranked first with rates the above 50 percent, followed by the imprisonment for period of 1-5 years and 15-20 years respectively. Lastly, the criminal offenses punishable by imprisonment for less than 1 year are ranked at the lowest chart.

The special minimum principle adopted by the Draft Criminal Code also contributes to the possibility that imprisonment will remain use as the main approach. With the existence of a special minimum principle, the chances of a judge to impose punishment in other form beside deprivation of freedom would be difficult. This situation will have significant implications to the correctional system. In addition, the quantity of criminal offense that can be charged with minimum imprisonment is significant, reaching 328 criminal offenses, where 100 of these offenses are charged with minimum imprisonment for 3 years.

On the other hand, the alternative type of punishment introduced by the Draft Criminal Code does not in line with the effort to reduce the punishment in the form of deprivation of freedom. One example is the installment for serving imprisonment. The Installment (which can only be applied for imprisonment for 1 or less than 1 year) is ranked in the lowest rank compared to other type of punishment based on its quantity.

Another example is the social work punishment. The possibility for the imposition of social work punishment is not significant compared with imprisonment. In other words, social work punishment cannot be the answer to the efforts in reducing imprisonment. In the Draft Criminal Code, social work punishment can only in imposed towards 59 criminal offenses. Meanwhile, the imprisonment amounted to 1,154 offenses.

Therefore, with imprisonment still being positioned as the main approach and the alternative punishment have not been able to keep up with it, the most important consequence to the penalization is the rapid rate of entry of people to the correctional-related institutions. If there is no reinforcement of correctional-

related institutions, then this situation can potentially be a chaos and lead to disincentives on its own penitentiary.

This situation has not been counted with an possibility for a surge in the flow of people into correctional-related institutions due to trial detention. Assuming that criminal offenses which are charged with 5 or above 5 years are "mandatory" to be detained, the implication is that the number of detainees will increase. If the detention is organized by correctional-related authority (in this case RUTAN), then the unavoidable consequence is the skyrocketing number of trial detainees.

In addition to the flow of people entering correctional-related institutions, another projection is the increase or change of role of correctional-related institution due to several new concepts in the Draft Criminal Code. First, the instalment for servising the imprisonment. The Draft of KUHO introduces the imprisonment of this installment scheme which requires the correctional-related authority to supervise and establish good record system.

Second, is related to death penalty. The Correctional-Related Institutions play a role in coaching the death row inmates for a period of 10 (ten) years before it is decided to be executed or not. In addition to the coaching process, the correctional center is in responsibility to issue recommendations on whether the convict should be executed or not. The recommendation that will be given is actually a measure based on the success the coaching in the correctional center. If the recommendation states that the convict should not be executed, then the coaching in Correctional Center is successful.

Third, is on the unsettled fines punishment. From 822 criminal offenses in the Draft Criminal Code, only 66 offenses punishable by singe punishment (in form of fine). The consequence of not paying the fine would be a substitute punishment in the form of inprisonment.

Fourth, is related to the supervision punishment, which will affect the Correctional Center. A new role for the Correctional Center is to oversee the implementation of supervision punishment and assess the fulfillment of conditions to decide whether or not the supervision punishment will be extended. Correctional Center is responsibility to recommend to the Supervisory Judge to decide whether the criminal sanction is extended or not.

Fifth, is related to the social work punishment. The Draft Criminal Code does not clearly specify who will be the authority for the social work punishment. However, if we see that the social work is essentially a form of punishment, then the Correctional-Related Institutions will be likely to responsible for this matter role. For that, it should be explained further who and how the mechanism of application of this social work punishment.

Sixth, is related to the double tract system adopted by the Draft Criminal Code which refers to the punishment and measure that will affect to the Correctional-Related Institutions. Some of the measures result in the responsibility being granted to the Correctional including hadovering child offender, work training,

and rehabilitation. In addition, there is also a Correctional role if the measure is performed towards children in the penitentiary.

#### 5.2. Recommendation

In Regards to the above analysis and projections, there are several recommendations that need to be considered seriously. The most important recommendation is that the legislators (in this case the Government and the House of Representatives) should be able to review the use of imprisonment as the main approach. This is because the current alternative punishments are not able to counterweight the use of imprisonment approach.

The big possibility of the use of imprisonment punishment approach will have direct impact on the surge of people flowing into the correctional-related institutions. In addition to a review of the imprisonment provisions in the Draft Criminal Code, it is necessary to encourage the strengthen the Penitentiary in relation to the new situation and condition following the enactment of the new KUHP in the future.

Some of these strengthening include institutional strengthening, be it the infrastructure, the number of personnel, mechanisms and accountable workflows, as well as adequate budgetary resources. In the context of supervision it is necessary to emphasize on the effort to strengthen the correctional-related institutions by building an integrated database which should be continuously updated. This is to respond several new punishment and measure, such as, instalment imprisonment, which requires role of the correctional.

In addition, the reinforcement that needs to be made to the Correctional-Related Auhtorities is to encourage the accoutanbility of authority related to supervision and issuance of recommendation. In most types of punishment and measure, the Correctional has a significant role for monitoring and issuing recommendation, including during the instalment imprisonment, death penalty, supervision punishment, social work, to remission, release and conditional leave. Therefore, the consequence is to develop more detailed and accountable indicators in the monitoring and issuing recommendation.

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## **Profile of Writers**

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# **Profile of Institute for Criminal Justice Reform**

**Institute for Criminal Justice Reform** or ICJR, is an independent research institution on criminal law reform, criminal justice reform, and general law reform in Indonesia.

One of the crucial challenges that Indonesia has to encounter during its transition era is reforming the law and criminal justice in line with the democratic direction of the nation. In the past, criminal law and criminal justice had been the supporting tools of authoritarian rule, and also utilized in the interest of social engineering. Now, it is time to change the orientation and instrument of criminal law as tools of authoritarian power, to supporting tools for the democratic political system and for the protection of fundamental human rights. These are the challenges in reforming the criminal law and criminal justice during the current transition stage.

Therefore, to respond to the aforementioned challenges, Indonesia needs well-planned and systematic reform efforts. A grand design of reform in criminal justice and law in general should be initiated. The criminal justice system has been a strategic key point in establishing the Rule of Law framework and respect for human rights. Furthermore, to have a proper functioning democracy, the concept of the Rule of Law must be institutionalized. Thus, the reform of criminal justice system to orient it towards human rights protection is the "conditio sine quo non" along with the process of institutionalized democratic reform of the transition era.

Steps in transforming law and criminal justice system to be more effective is currently in progress. However, such measure must be supported with wider involvement. *Institute for Criminal Justice Reform* (ICJR) is taking the initiative to support those measures. Provide support to establish a recognition towards Rule of Law and simultaneously preserve the human rights culture within the criminal justice system. These are the reason of existence of ICJR.

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