THE PHILOSOPHY OF SENTENCING IN INDONESIA BASED ON DIGNIFIED JUSTICE

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ABSTRACT

There are some problems related to what the judges do in finaling conviction/sentence to criminals. This is because the weakness in Indonesian criminal law policies which have not enlisted guide lines in it. Besides, the criminal law exists now is too out of date and can not keep up with the changes in its society. The sentencing system rellies on indefinite sentencing, the high sentencing disparity and over criminalization. Much worse, the philosophy of sentencing in Indonesian criminal law tends to be ambiguous. The conviction/sentence given is oriented more to the seizure of freedom. This then will respond a need to build up a philosophy of sentencing which value more human dignity based on dignified justice. Research method used is a literature study by legal qualitative approach. The result of this analysis shows that the most important point in the philosophy of sentencing is – conviction/sentence should not be tormenting and degrading the human dignity dignified by the law. From society's point of view, crime has to be seen as a social phenomenon. It is where social defence seeks society protection from general and special preventive aspects. By taking into consideration -the victim and society protection aspects- then the elaboration of sentence individualization, the double track system, the treatment model and the deinstitutionalization sentencing, will bring out the philosophy of sentencing built and integrated into the whole insight of the criminal law. Substantially, the philosophy of sentencing based on dignified justice can be seen as a harmonious application of Pancasila. It means conviction/sentence has to be oriented on justice by divinity, civilized treatment, developing social integration, prudent act and gaining social defence and welfare.

Keywords: Philosophy, sentencing, Indonesia, Dignified Justice.

INTRODUCTION

In dealing with the philosophy of sentencing by judges and their rights for independence, it opens a highly space of discretion. This disparity of sentencing is a two-sided matter. In one hand it is considered as ordinary for the judge's independence. But on the other side, it might distort justice thus will create injustice and imbalance caused by the irrationalities for the gap existing in similar crimes commited. This will result in significanlty different sentences given to the similar acts of crime. The overloaded prisons, the effect of short time seizure of freedom, the shortage of coaching given and the sentences contradicted to public sense of justice, those are problems that always follow the application of criminal law. Thus, matters related to proper adjudgement and conviction are important in gaining the aim of criminal law. Some reflection in sentencing is undetachable from its basic concept, we call it the philosophy of sentencing.

Today's criminal law especially KUHP contains some weakness. It uses indefinite sentencing system. This system determines laws that threaten to give general and special maximum sentencing to the crimes committed, while it also provides some indepence and prudence to the judges to decide the level of the sentences given. In specific criminal laws excluded from KUHP, Indonesian Criminal Law contains definitive sentencing. In this system, the sentencing and conviction given are already definitely detailed, related to the level of sentencing given to every crime committed. Its specific minimum sentencing has qualitative rate and it causes restriction to the judges in convicting a sentence according the law enforcement provided.

Indonesia KUHP now contains norm and penalty only. It has not included guide lines for sentencing. This weak criminal law substance in lex generalis, thus will result in judges only work on criminal law-oriented basis. This will lead to targeting the act of crime only, not the doer or the actor of crime. The judges then just focus on principle of legality emphasizing to the act and the penalty. This kind of perspective is so classical school oriented. It will end up with sentencing a crime as retaliation when it meets the aspects of the criminal law.

The rigidity in Indonesian Penal Law is obvious in its imperative character for the formulation of sentencing/conviction which is oriented to imprisonment only. It considers only the act of crime. The absence of guidelines for sentencing, gives out a narration that KUHP does not follow the idea of individualised sentencing. Individualised sentencing actually makes room for the law to be independent in observing the criminal's characteristics and convicting the right sentence for the criminal, not for their acts of crime. Imprisonment has become a paradigm of cast-iron certainty for the judges to give sentencing based on KUHP, while Indonesia adheres to double track system, system which means sentencing by penalty and action/ treatment system (a seizure of freedom/imprisonment). The judges have no flexibility in dealing with the phylosophy of sentencing that enables some possibilities for justice. Sentencing then is not retaliation oriented only, but it is also a choice to consider the aspects of the actor of crime, and even the suffer of the victim and the society protection.

The weakness of the criminal law described above, will result in juridical problems. The penalty/sentence given is not flexible to the changes in society, which include: injustice, discriminative law (as said the eye of a knife, sharp downward blunt upward), the overload prison and over criminalised cases. These problems then open some justification to the judges independence widely. They are able to choose the kinds of sentencing (strafsoort) and the level of sentencing (strafmaat). This will produce some decisions which tend to have disparity and discrimination. This is due to the indonesian criminal law weaknesses caused by the absence of sentencing guidelines (straftoemeting leidraad).

Those descriptions above are the reasoning of this study. We need to build the appropriate philosophy of sentencing based on dignified justice. The formulated problem is 'how the character of the philosophy of sentencing based on dignified justice is like'

METHOD OF RESEARCH

In this legal research, the author used a qualitative approach. The purpose of this descriptive study is to define a systematic analysis of the philosophy of sentencing by combining the already existing theories. Therefore, we gathered theories related to this study. The usage of sentencing theory is aimed to create a reformation in sentencing by means of philosophical analysis. We also use a literature study to analyze and apply the theories available now.

DISCUSSION

THE AIM OF SENTENCING

The judgement function of investigation process, especially in criminal law, has some measurement to determine:

1. The fulfillment of criminal act factors in its objective aspects.
2. The existence or the non-existence of the defendant's guilt in its subjective aspects of the crime.
3. The fulfillment of the juridical factors, either its subjective or objective aspect of the crime. It will lead to the analysis on how the sentences are given by the judges.
4. The judges's prudence in convicting the sentences. They have to take into consideration the function of correction, whether the sentencing might be able to improve the criminal's behavior.

The judges's consideration in sentencing crimes, has to support the aim of sentencing which actually holds it's very basic objectives that is the philosophy of sentencing.

The philosophy of sentencing from Emmanuel Kant cannot be detached from his view that sentencing is a 'Katagorische Imperatief'. It means, a person has to be sentenced by the judge for commiting a crime. Sentencing is not considered as a means of reaching some goals. It should give justice that creates balance between the crime done and the disadvantages resulted. And the balance between the sentence given and the disadvantages someone suffers from[1]. Kant's idea corresponds to retributive theory, where sentencing is given merely for commiting crimes.

The concept of sentencing tries to justify the conviction of sentencing as a means to obtain a more functional sentencing. It leads to the coming outs of sentencing theory in traditional point of view, they are [2]:

1. Absolute/retributive theory (retaliation) where sentencing is considered as a retaliation to the person committing crime.
2. Relative/utilitarian theory (aim/goal) where sentencing is not merely a retaliation to the person committing crime, but also contains other benefits.

School of criminal law which practices retributive sentencing is the classical one that believes in indeterminism view. Human has free will. Committing crime is a choice of human's free will. Criminal law based on action (daad strafrecht) tends to give retaliation to the human free will in doing crimes, by giving a definite sentencing or conviction. And focusing in the action will leave no rooms for considering commutation or aggravation in giving sentences to the criminals. On the other hand, retributive theory grants retaliation to the victims by balancing/considering the criminals guilt and the level of sentencing given. Theory of retaliation is meant to emphasize on the disgraceful action done by the criminal.

The philosophy of justice and sentencing were put forward by Sue Titus Reid, using justice /equal reward approach. They are based on the two previous theories: prevention and retribution. In retribution theory, the offender will be investigated and sentenced equals to the crimes they have commited. This step is also based on the study which underlines that the appropriate sentencing might prevent the criminals in repeating crimes in the future. Gerry Ferguson stated that the equal sentencing should be proportional with the offender's crime and the damage caused by them.[3]

Utilitarian theory is utility oriented towards the criminals. And goal-oriented study is closely related to utilitarian theory presented by Jeremy Bentham. Jeremy Bentham described the four goals of sentencing[4] :

1. Preventing all kinds of offenses
2. Preventing the most malicious offenses
3. Suppressing crimes
4. Suppressing the damage caused to the lowest

In preventing crimes, there is a widely known –a special deterrence theory-, which is aimed to prevent the criminal from repeating crime in the future. This is also known as a deterrent effect. The other one is general deterrence theory, which is aimed to give the same effect in a bigger scope in society. This goal-oriented theory gives emphasize on rehabilitating the criminals. Criminal law school that affects the retributive theory is the classical one that sticks to indertiminitive concept. Here, sentencing and conviction is definitively given. There is no need to consider commutation and aggravation system related to the criminal's conditions such as biological factors, age, mental state or certain aspects that caused the crimes. This study/school refers to retaliation/payback to the crimes done.

There are some arguments about sentencing theory that refers to retributive goals and the one that refers to rehabilitative goals, which are very relevant up to now. The criticism to rehabilitative treatment which is contradictory to the still ongoing rigid sentencing that resulting the seizure of freedom, then lead to the need of bringing up the importance of law sentencing principle. Indeterminate sentencing which leaves room for the judges to being independent, is considered unfair because it gives no

[1] Gunawan, TJ. (2018). *Konsep Pemidanaan Berbasis Nilai kerugian Ekonomi* , rev ed. Jakarta : Kencana, 73

[2] Muladi, Nawawi Arief, Barda. (1992). *Teori-Teori dan Kebijakan Pidana.* Bandung : Alumni, 11-19. see Muladi. (2008), Lembaga pidana bersyarat, Bandung : Alumni, 49-52.

[3] Prasetyo, Teguh. (2010). *Kriminalisasi Dalam Hukum Pidana*. Bandung : Nusa Media, 29-30.

[4] Sholehuddin, M. (2007) *Sistem Sanksi Dalam Hukum Pidana: Ide Double Track system dan Implementasinya.* Jakarta : Raja Grafindo Persada, 40.

determination. On the other hand, the reason for determinative sentencing that gives punishment, should proportional to the crime committed. It means that punishment should fit the offender. When the domain about sentencing theory is linked to its goals, it will lead to an argument about the aims of retributive theory, utilitarian/deterrence theory, rehabilitative theory, integrative theory and social defence theory. It will also include some movements/concepts that insist on the elimination of sentencing empowered by the abolitionists.

Indonesian KUHP has not included the aim of sentencing in its articles. The aims of sentencing is closely related to the aim of criminal law itself. Richard D. Schwartz and Jerome Skolnick stated that sentencing is meant to prevent recidivism, to deter criminals from repeating the similar crimes and to provide an outlet to retaliatory motives. John Kaplan mentioned that there are reasons for justifying the sentence. They are: avoidance of blood feuds, educational effects and peace keeping function[5].

Bassiouni [6]has an opinion that the goals achieved by sentencing, is generally manifested in social interests which contain certain aspects that need to be protected, such as:

1. Maintaining orderly society
2. Protecting society from unnecessary crimes, damage or danger done by offenders
3. Promoting rationalization to law offenders
4. Maintaining/keeping the integrity of basic views regarding social justice, human dignity and individual justice

H. L. Packer [7] mentioned that legislative policy related to penitentiary law is the main item should be included in sentencing/conviction policy. One of the sentencing policies that takes big effect in the judges giving sentencing is the policy about sanctioning in the form of sentencing or act.

Alf Ross stated in his book that the concept of punishment is meant to achieve two goals [8]:

1. Punishment is aimed to inflicting sufferings upon the crime executor
2. Punishment is an expression of disapproval to an action being executed

In modern view, the sentencing is not action oriented only, because it only considers the norm of fulfilling its juridistic aspects. Modern view prefers observing and investigating the criminal's whole (mental) state, social aspects and even the victim's side. It considers that human free will is influenced by its own state and surroundings. It cannot be hold responsible or sentenced. When sentencing is the only option, still it has to put the criminal's behavior into consideration. This modern view demands on practicing individualized sentencing related to their goals of re-socialising the criminals. The rehabilitative coaching to this criminal in the perspective of individualized sentencing, will lead to the rehabilitative study or medical treatment in modern view. The development of this rehabilitative model will emphasis on identifying the causes of the crime. It will be offender/doer oriented rather than offenses/action oriented. We focus on the offender and the offense (daad dader strafrecht). The study of rehabilitative theory is executed for example in sentencing children offending the law. They are put under the government social service supervision to restore their social aspects.

Whereas neo classic school acknowledges the principle extenuating circumstances. They started making policies based on objective condition and considering individualized rehabilitation for the offender. Neo classic view emphasizes the human free will and believes in individualized rehabilitation for the offender.[9] This view was initiated by classic view which later being influenced by the modern view. Neo classic view is closely related to individualized sentencing as a modification of human free will and legal liability doctrines. The extenuating factors as physical condition/age, surrounding or mental state, are viewed as circumstances that support the offender's behavior and malicious intention. It also considers experts testimony to asses the legal liability.

THE PHILOSOPHY OF SENTENCING AND THE DIGNIFIED JUSTICE

The view of sentencing philosophy based on dignified justice is a modern view against retributive system. Dignified justice puts the emphasize on human dignity. It sees crimes as a social fact attached to human act/problem. Crimes are social phenomenon experienced by individuals or society.

And the judges are justice which are oriented to legal justice, moral justice and social justice. [10]The concept of justice in an adjudicative field, is identical to legal acts that enable to accommodate rights and responsibilities appropriately. It also gives suitable punishment. Legal practitioners (as lawyer, advocate, prosecutor, judge and academics dealing with teachings, research and community service in their universities) are not counted as promoting scientific/legal contributions when they are not practicing their legal enforcement based on a widely researched and competent legal theories/principles.[11] Truth and justice become a legal aim being stand up for by law enforcements.

The theory of dignified justice uses the principles exist in doctrines or clauses in the legal system based on Pancasila as the main and initial legal system. They are then becoming the main research and study in theory of dignified justice [12]. This theory studies its legal system, so it is meant to aim justice in its whole system. This dignified justice puts positive legal system as a material object that defines Pancasila as the nation's philosophy [13]. Sentencing philosophy goes hand in hand with the judge's role in convicting the sentence. By means of dignified justice, judges are demanded to be conscientious and professional in enforcing law and justice for the society.

The orientation of modern criminal law goes to monodualistic balancing. It means balancing between community and individual interests, based on daad dader strafrecht. Daad dader strafrecht is criminal law that considers the objective aspects of

[5] Muladi, Barda Nawawi Arief , Op.cit, 19.
[6] Ibid, 166
[7] Packer, H.L. (1968). *The Limits of the crminal Sanction.* California : Stanford University Press., 13-15.
[8] Muladi , Barda Nawawi Arief, Op.cit, 4.
[9] Muladi, Op.cit , 29,33,42.
[10] Indonesia Supreme Court of Justice. (2006). *Pedoman Perilaku Hakim (Code of Conduct of judge). Jakarta :* Pusdiklat MA RI, 2.
[11] Prasetyo, Teguh., (2015). *Keadilan Bermartabat Perspektif Teori Hukum. Bandung :* Nusa Media., 6.
[12] *Ibid,* 12.
[13] *Ibid,* 40.

the offense (daad) and the subjective aspects of the offender (dader) [14]. The aspects of sentencing aim is started with monodualistic balance that leads to community protection aspect. It goes together with direct victim protection or wholy community protection caused by the offense and the offender.

The idea about balance that becomes the foundation of philosophy of justice, is described by Barda Nawawi as follows :

1. Monodualistic balance between social and individual interests
2. Balance between law offender and victim protection
3. Balance between objective (the offense) and subjective (the offender) aspects
4. Balance between the criteria of formal and material
5. Balance between legal definition, legal flexibility and justice
6. Balance between national and universal values[15]

The crimes being charged by the prosecutor plays an important role in the judge's consideration. It should be elaborated in proving the fulfilment of criminal acts. The other important factors are considered external, such as humanity, damage, the offender's motive/mental state and the effect of the offense to the victim.

It has been proved that KUHP has some weakness in its policies. It focuses only in the formulation of sentencing based on retaliation to the offender (daad strafrecht) and neglects the offender's aspect. This definitive sentencing does not view more to the individualized sentencing of the offender. Actually, the offender is merely a human offender. It will be much better if the sentencing given opens a possibility of educating and encouraging the offender to be a better self [16]. That is the importance of reflecting the basic idea of criminal law policies with Pancasila that underlines the moral basic of human rights.

The reconstruction of KUHP by accommodating the principles of sentencing is significant. It contains the clauses which come to the judge's considerations in convicting sentences. The policy of sentencing requires the judge to observe the offender and the effect to the victim intensely. In modern view this leads to dader strafrecht, for example the principle of ultimum remedium/ultimate remedy.

The formulation of sentencing philosophy enlisted in Indonesian RKUHP learns that there is an acknowledgement to circumstances that incorporate the offender and objective condition. All these factors will cause RKUHP to integrate the utilitarian retributive theory. It deals with prevention and rehabilitation in the same time. That is why the effect to the victim/community, the effect of the sentence to the offender in the long term, the forgiveness from the victim/family and the community's view towards the crime will be thoroughly observed.

Terminology in philosophy of sentencing based on dignified justice has some individual sentencing reviews. It provides independence to the judges to choose and convict sentences or acts suitable for the offender, even though the alternative is the seizure of freedom.

Helbert L. Packer [17]stated that:

1. Criminal sentence is indispensable, meaning we cannot manage without it, now or in the foreseeable future
2. Criminal sentence is the best available means in dealing with blatant and urgent threats/harm
3. Criminal sentence is either a prime patron or threat of human freedom. Humanely and wisely used, it works as a patronage. Being used the opposite, it becomes a threat.

The judge prudence in convicting sentences can be quoted from the above explanation. If the sentence is convicted appropriately it will also result in an appropriate rehabilitation of law offender. But then if it is applied the opposite, it will lead to threatening human rights.

The philosophy of sentencing is a basic idea on how the sentence is imposed. When we apply philosophy of sentencing based on Pancasila, then the sentencing is not only oriented to the legal liability of the law offender. It has also to be oriented to rehabilitating the effects and damage suffered by the victim or community.

Christiansen stated that "the conception of problem" in crime and punishment is an essential part of the culture of any society. W. Clifford also has the same opinion. The very foundation of any criminal justice system, consists of the philosophy of given country [18]. Brian Z. Tamanaha proposed in his theory of mirror thesis. It says that law is a reflection/mirror of its society and the idea of law function is to keep order in society [19]. In such a way Pancasila is a head start to balancing individual and community rights. It will bring a dimension of integral policy in criminal law. Thus there will be a practice of integral sentencing that covers structural and functional aspects. Philosophy of sentencing based on dignified justice with Pancasila as its strength will provide protection to human, community and nation rights.

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[14] Nawawi Arief, Barda. (2010). *Perumusan Pidana Dalam Peraturan Perundang-undangan sebagai parameter keadilan dalam penjatuhan pidana*, makalah lokakarya BPHN: *perkembangan Hukum Pidana Dalam Undang_undang di Luar KUHP dan kebijakan Kodifikasi Hukum Pidana*, Semarang, Nov 2010, 99

[15] Nawawi Arief, Barda . (2010). *Kapita Selekta Hukum Pidana.* Bandung : Citra Aditya Bakti. 2010.

[16] Herbert L.Packer, Op.Cit.`

[17] Ibid. 167.

[18] Ibid. 167.

[19] Tamanaha, Brian, Z.. (2006). *A General Jurisprudence of Law and Society.* Oxford : Oxford University Press

THE CHARACTERISTICS OF DIGNIFIED JUSTICE SENTENCING

1. Philosophy of sentencing opens a new view towards substantial justice based on 'belief in God's divinity"

In sentencing, judges should not perform only formal legality principle as in 'nullum delictum sine lige'. They also have to perform 'nullum delictum sine ius' which implements material legality principle. This principle has resources from positive law, sense of justice of living law existing in community and unwritten law sources acknowledged by community. The judges then are not expected to take into account to sentencing aiming to the seizure of freedom only. They have to provide possibility to do judicial correction to legality principle. For instance, a penalized customary sanction might be considered to be forgiven or reconciled. The judges should be able to dig further the values exist in a community in applying legal principle in real occurance through legal founding. The judges are demanded to convict sentences by their consciences and substantial moral value as written in their vow 'For the sake of justice by my belief in God's divinity not justice by law'. Philosophy of sentencing is one that leads to either substantial or procedural justice. Procedural justice is only founded on procedure as the core of justice. It is restricted only to what the law says. It does not concern with formal justice. Substantial justice underlines its principle on the value of virtues, the basic and authentic moral virtues of justice seeker. It might be contradictory with the ongoing norms, because it is not formal justice oriented but essential justice oriented.

2. Philosophy of sentencing develops the concept of sentencing which leads to restorative philosophy and justice not retributive justice.

The fulfilment of sentencing as a retribution in deterrence and prevention-oriented sentencing, has a means of coercive and repressive method called penalty. But actually, does not provide any possibility for the victim to gain access of justice. It is due to crime is identified as an offense towards community or nation. The aspects of general and extraordinary prevention for community protection should cover a direct victim protection. If it fails to do so, the sentencing then is merely emphasizing on restitutive justice.

Restorative justice gives emphasize on the media of repairment, reconciliation and restoration as its main goal. Repairing damage and conflicts will encourage the offender to be responsible in fulfilling the victim's direct protection violated by the offender. The judges should be aware that the sentencing given is aimed to fix the conflicts caused by the crime committed.

Non-custodial action in the judge's view of sentencing has come to Tokyo Rules (UN standard minimum rules for non-custodial measures) attention in minor cases such as :

a. Verbal sentence like warning, reprimand and conditional discharge.
b. Economic sentence and money related penalties such as fines.
c. Restitution for victim or compensation from the government.
d. Suspended sentence.
e. Probation and judicial supervision.
f. Community service order.
g. House captive
h. A mixture of the above actions

The perspective in UN standard minimum rules for non custodial measures is also referred by Indonesia KUHP by adopting the judge's authority to pardon (rechterlijke pardon) by : not giving the sentence, accommodating community service order and restituting.

Philosophy of sentencing also considers adopting the instruments of human rights acknowledged by international laws. There is also a declaration on the protection of individuals against torture or other cruel/inhuman degrading treatment and punishment. It underlines the characteristic of sentencing that highly values human right and dignity. Sentencing in Pancasila's principles is absolutely not in the wretched kind.

3. Philosophy of sentencing is oriented to the protection of human right and dignity by means of individualized sentencing.

Individualized sentencing is meant to be a rationalization to the offender. The sentence given has to correspond with their characteristic and condition. It also leaves the judges for prudence in giving sentencing, its strictness and its flexibility in its implementation.

Philosophy of sentencing practiced by the judges should be conducted with humanistic aspect that values justice seeker's rights, either from the offender or the victim side. That way, both the victim, community and offender will benefit from justice.

Individualized sentencing can be put into a framework of providing justice seeker's rights. This is done, for instance by using underlining principle that sentencing should be appropriately given to the offender. The judges might consider:

a. the circumstances of the offenses committed by the offender.
b whether the offender shows some remorse about the offense committed.
c. whether the offender compensates the damage to the victim.
d. the characteristic, mental state, age or physical condition of the offender.
e. the consequences the offender will undergo from his sentencing.

The judge's sentencing should stay prudent to respect human rights. Principally, human right oriented sentencing, is not always implemented by primitive and deinstitutional imprisonment. In some extraordinary cases, public sense of justice will opt for imprisonment. On the other hand, in minor cases, imprisonment will turn to be a destructive action leads to offending public sense of justice.

Individualized sentencing does not mean to deny imprisonment. Sentencing covers two aspects. They are :

a. Incarceration sentencing/imprisonment, means sentencing by seizure of freedom. It includes imprisonment for some period of time and followed by probation period.

b. Non-Incarceration sentencing/non imprisonment, means sentencing in a form of fines, restitution, probation, or community-based sentencing.

Individualized sentencing requires flexibility by humanistic approach. It centers itself in compassion towards others. In this context the judges philosophy of sentencing will open possibility to give an annulment or revocation of sentencing to gain valuing human right in justice.

Sir Rupert Cross stated that "A change in the penal system endeavour penal reform if it is aimed directly or indirectly at the rehabilitation of the offender, or if it is objected to avoid, suspend or reduce punishment on humanitarian grounds."[20]

Basically, Sheldon Glueck has formulated four principles in in determining whether the offender is worth giving individualized sentencing process [21]:

a. The treatment/sentence imposing feature of the proceedings must be sharply differentiated from the guilt finding phase.
b. The decision as to treatment must be made by a board of tribunal specially qualified in the interpretation and evaluation of psychiatric, psychological and sociological data.
c. The treatment must be modifiable in the light of scientific reports of progress.
d. The right of the individual must be safeguarded against possible arbitrariness or other unlawful action on the part of the treatment tribunal.

4. The philosophy of sentencing is not supposed to be a retributive justice model but a rehabilitative (treatment) one.

The appropriate philosophy of sentencing should the one that encourage the spirit of rehabilitating the offender and bringing up deterrent effects. Sentencing that cures like a medical treatment, can be taken as an alternative to seizure of freedom. It will lead to a possibility of out of prison sentencing (deinstitutionalized sentencing).

Individualized sentencing is related to rehabilitative theory as defined by John Kaplan ".....The rehabilitative ideal teaches us that we must treat each offender as an individual whose special needs and problems must know as fully as possible in order to enable us to deal effectively with him.[22]" Albert Camus said that sentencing as punishment, should not omit the offender's human power in gaining new values and adjustment. The implementation of punishment to someone who misuses his freedom to commit offenses still has to be executed. But at the same time the offender has to be directed through educative-rehabilitative treatment to promote himself to be a better being[23]. Johannes Andenaes stated that "If one bases the penal law on the concept social defence, the task will then be to develop it as a rationally as possible. The maximum result must be achieved with the minimum expense to society and the minimum of suffering for the individual. In this task, one must build upon the result of scientific research into causes of crime the effectiveness of the various form of sanction. [24]

The discourse about alternative sentencing of out of prison sentencing has been enhancing since 1970. The idea of deinstitutionalized sentencing is related to the theory of social integration that underlines the practice of imprisonment. It means that, if we put sentencing as a means of rehabilitating the offender to his community, then the ideal one should be done within the community itself. Deinstitutionalized sentencing opens a discussion related to human and his freedom. The reinforcement of restorative justice also increases along with the criticism about imprisonment which is contra productive to the deterrence effects wanted. Even in jail the criminals learn more about many crimes. Sentencing should be oriented to rehabilitative effort.

CONCLUSION

The philosophy of sentencing based on dignified justice, refer to the nation's philosophy, Pancasila. Law reform should obtain those as its underlining basic. KHUP was built based on individual and liberal values. It is different from Pancasila that has some kind of kinship principle. The reformation of law substance in material penalty law, should engage those principles in Pancasila.

The philosophy of sentencing based on dignified justice should attached to Pancasila as the nation's principle as the main source of laws. Pancasila is founded with its five precepts, they are:

1. Belief in God's divinity
2. Refine humanity
3. Unity
4. Democracy and deliberation
5. Justice and fairness

Based on those principles, then the philosophy of sentencing is defined as:

1. It is oriented at justice based on the belief of God's divinity. It is in line with the judges in giving verdict: For justice based on God's divinity.
2. It should value human right and dignity. Sentencing should not deprive human, but rehabilitate them. Individualized sentencing is a concept that still values the offender as human. Besides that, it also considers the aspect of direct victim protection, with the alternative of seizure of freedom.

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3. It is oriented to social integration aspects. It brings healing/rehabilitation for the offender and the conflicts cause by the offense in the community. The sentencing restores the malicious offender and brings peace to the community and the victim as a social rehabilitation. Public sense of justice then will lead the philosophy of justice to be used by the judges in considering the effect of crimes to community.
4. It is also oriented to prudence and wisdom that take sides with populist and humanist values.
5. It is oriented to building social justice value, for the sake of the community benefit. Then the social and offender rehabilitation become an effort of bringing social defence and welfare.

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