

The Philosophical Basis of Setting Specific Minimum Imprisonment against Serious Crimes on the KUHP in the Framework of the Renewal of Criminal Law

Diah Ratu Sari Harahap^{1*} Koesno Adi² Made Sadhi Astuti² Nurini Aprilianda³

1. Doctorate Candidate of Law Faculty, Brawijaya University, Malang, Indonesia

2. Professor of Criminal Law, Barwijaya University, Malang

3. Lecturer of Law Faculty, Brawijaya University, Malang

Abstract

The crimes of morality in law No. 1 Year 1946 on the book of the Law of Criminal Law (KUHP) are set in Article 281-303. On this article not set specific minimum imprisonment (vacancy norm). This kind of crime in the criminal law specifically and some foreign KUHP as well as in the draft KUHP regulated minimum imprisonment. There is no specific minimum imprisonment came in evil morality gives rise to a sense of unfair to victims and the community. In the practice of law, the judge dropped the length of imprisonment varying between one and a verdicts with the other for the type of crime the same decency. Based on the background of basic philosophical problems formulated setting specific minimum imprisonment in article about the crimes of morality, setting minimum imprisonment threat specifically against the perpetrators of the crime of decency expected in the days to come. This research is the legal research using the statutory approach, concepts and comparisons. After doing research, the philosophical basis of the results obtained setting specific minimum imprisonment in article about the crimes of morality is the basis of Justice, basic protection and the principle of respect for human rights. Setting minimum imprisonment threat specifically against the perpetrators of the crime of decency expected in the foresee able future should refer to the special criminal legislation, the criminal law of foreign countries and the design of the book of the law of criminal law which regulates the special minimum imprisonment of evil morality as well as the legal expert opinions that support setting specific minimum imprisonment of evil morality.

Keywords: crime, criminal law, human rights, decency crimes

1. Introduction

In the activities of community life of the common law offence particularly violation of criminal law in the form of a crime. In the positive criminal law in Indonesia a crime set forth in the second book in the book of the law of criminal law as a source of general criminal law.

Crimes in the Book of the Act of Criminal Law (KUHP) can be classified according to the legal interest protected are:

1. A crime against State security
2. Crimes against decency
3. Crimes against honor
4. Crimes against life
5. Crimes against the body
6. Crimes against property

The threat of criminal penalties for the perpetrators of crimes as provided for in Article 10 of the Book of the Act of Criminal Law (KUHP) is a criminal to death, imprisonment, confinement and a fine. In this study the focus is imprisonment for perpetrators of serious crimes are set forth in the book of the law of criminal law. The term refers to crimes of opinion Chairul Huda in his use of the term "serious" for the term "weight". Similarly in the draft KUHP Year 2015 used the term "criminal acts very heavy/very seriously".

According to Chairul Huda, the degree of the seriousness of the crime in the civil law system is determined by the weight of the sanction in a criminal offence. Thus, the degree of seriousness of a criminal offence prescribed by the law. Meanwhile, in the common law system, it is not only determined by statutory law, but in common law crime is dictated by precedent. In the event that the latter is indeed the necessary level of seriousness of a criminal offence as a criminal imposition of limits, if the precedent that exists is deemed no longer relevant. Given the weight of criminal ringannya handed over entirely to the subjectivity of judges. (Chairul Huda, 2044)

The seriousness of a crime related to the how to perform a criminal act, the view of the public against criminal acts committed with the plan. Meanwhile in the Draft of KUHP, delict classification is as follows:

1. Offence (delict) deemed "very mild" i.e. that is only liable to a criminal fine of light weight (Category I or II) singly. Offence grouped here is delik once threatened with imprisonment/confinement under one (1) year or fine light or delict - new offence according to assessment does it weigh under 1 (one) years

in prison.

2. Offence that is considered "heavy" i.e. offence is essentially worth threatened with imprisonment over 1 (one) year up to 7 (seven) years. Offence grouped here will always alternated with criminal fines heavier than the first group, namely a fine of Category III or IV. Offence in this group there is also a special minimum threat.
3. Offence deemed "particularly severe/very seriously", namely the threatened offence with imprisonment above 7 (seven) years or threatened with criminal more heavy (i.e. the criminal to death or life imprisonment). To demonstrate the nature of heavy imprisonment for offence in this group only threatened singly or for a particular offence can be combined with criminal fines Category V or given a minimum specific threats.

Based on the above criteria, meaning crime criminal threats his prison between 1 and 7 years serious crimes are categorized as either crimes against state security, morality, honor, life, body or property. However, in practice law enforcement judges there to drop to a very low penalty to the perpetrators. This is caused by a criminal he arranged because no specific minimum. (BPHN, 2015)

Among the above crimes there are arranged in a special criminal law, such as crimes of morality governed also in Act Number 35 Year 2014 as a change in the Act Number 23 of the Year 2002 on the Protection of Children. Crimes against the body arranged also in Act No. 23 of the Year 2004 on the Elimination of Domestic Violence. In both special criminal legislation the criminal threats his prison set minimum.

As a comparison, on the book of the law of foreign criminal law for serious crimes over the threat of criminal locked set minimum limit. Likewise in the design of the KUHP there area set of minimum imprisonment. In this study performed a comparison of the threat of imprisonment against the evils of promiscuity as one form of moral crimes in the annals of criminal law legislation that applies now in Indonesia with similar crimes is regulated in special criminal legislation i.e. the child protection act and the Act of Abolition of domestic violence and in the book the laws of foreign criminal law, namely Austria. The KUHP as a source of general criminal law should be the guidelines for special criminal law, then it should be in the book of the law of criminal law set the minimum special criminal.

The problem that arises is what is the philosophical basis of setting specific minimum imprisonment against serious crimes in the legislation and what is the purpose of setting specific minimum imprisonment against serious crimes in the upcoming KUHP.

2. Research Methods

This research aims to find out and analyse the philosophical basis of setting specific minimum imprisonment in article about the evils of decency. In addition to knowing and analyze the setting of minimum imprisonment threat specifically against the perpetrators of the crime of decency expected in the days to come. This research with emphasis on the normative nature of the legislation as the primary legal materials equipped with secondary and tertiary legal materials. The approach used is approach legislation, comparative approach concept and approach. The collection of legal materials is through the study of librarianship completed with fieldwork in the form of an interview. Legal materials have been obtained were analyzed qualitatively.

3. Result and Discussion

A. Basic Philosophical Setting Specific Minimum Imprisonment Against Serious Crimes in Legislation

A philosophical basis of legislation can be seen in section preamble. In the section that is contained in the values and the values it contained principles that should be reflected in the articles of the trunk of her body. Here is a part of the preamble of the Act are examined. Preamble the legislation of the Republic of Indonesia Number 23 Years 2004 on the Elimination of Domestic Violence:

- a. That every citizen has the right to get a sense of security and freedom from all forms of violence in accordance with the philosophy of Pancasila and the Constitution of the Republic of Indonesia Year 1945;
- b. That the victims of domestic violence, most of whom are women, have to get protection from the State and/or the community in order to be spared and freed from violence or threats of violence, torture or degrading treatment, the degree and the dignity of humanity

Preamble the Act of the Republic of Indonesia Number 35 Year 2014 as a change in the Act Number 23 Year 2002 on the Protection of Children:

- a. That the unitary State of the Republic of Indonesia guarantees the well-being of each of its citizens, including the children's protection for which is a basic human right;
- b. That each child has the right to survival, grow and develop as well as the right to protection from violence and discrimination as mandated in the Constitution of the Republic of Indonesia Year 1945
- c. That in order to improve the protection of child adjustment need to be made to some of the provisions in

the Act Number 23 Year 2002 on the Protection of Children;

Preamble the Draft Book of Law Criminal Law Year 2015 says that business renewal of criminal law in Indonesia should be based on national goals to be achieved by the nation of Indonesia as a sovereign and independent State. KUHP currently in force is a product of the law of the Netherlands East Indies colonial Government, which needs to be adjusted. The fourth Preamble paragraph NRI Year 1945 should be used as a benchmark for the implementation of the renewing. In other words the renewal of criminal law should be a means to protect the whole nation of Indonesia and all the spilled blood of Indonesia, promote the general welfare, the intellectual life of the nation, and carry out the order of the world which is based on freedom, eternal peace and social justice. Material criminal law should be adapted to the national law, the State of politics, the development of the life of a nation and a country which aims at respecting and upholding human rights and creates a balance of religious moral values based on the divinity of the one true God, humanity, nationality, populist and social justice for all the people of Indonesia.

In the form of a basic table is contained in the legislation above and is the basis of philosophical of the Act are as follows:

Table 1. Philosophical Basis In The Act For Child Protection, Legislation the Removal of Domestic Violence and The Draft KUHP Year 2015

Legislation	The Basis Of The Security	The Basis Of The Protection	The Basis Of The Justice
Undang-undang Republik Indonesia Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga	✓	✓	
Undang-undang Republik Indonesia nomor 35 tahun 2014 sebagai Perubahan atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak		✓	
Rancangan Kitab Undang-Undang Hukum Pidana Tahun 2015		✓	✓

Source: Primary and Secondary Legal Materials, Processed, 2017

Based on the above table it appears that philosophical basis embodied in the Act of the Republic of Indonesia Number 23 Year 2004 on the Elimination of Domestic Violence is a basic principle of security and protection. Philosophical basis embodied in the Act of the Republic of Indonesia Number 35 Year 2014 as a change in the Act Number 23 Year 2002 on the Protection of Children is a fundamental protection. The philosophical basis of the draft contained in the book of the law of criminal law is the basis of the Edition Year 2015 of the protection and the principle of Justice. This shows that the basic security, basic protection and the principle of fairness is the basis for setting the philosophical articles third Act included special minimum imprisonment arrangements. This means a special minimum imprisonment needs to be set up in the book of the law of criminal law. In addition to giving security, protection and justice for victims, families of the victims and the community, which is better is because the book of Criminal law is a source of general criminal law should be the guidelines for the preparation of special criminal legislation including in terms of setting specific minimum imprisonment.

B. Goal Setting - Specific Minimum Imprisonment Against Serious Crimes In The Annals Of Criminal Law Forthcoming

The following is a comparison of imprisonment arrangements against crime of morality (especially promiscuity) as one of the crimes set forth in the book of the law of Criminal Law by Act Number 35 Year 2014 about changes in Act Number 23 Year 2002 on the Protection of The Child and with the Book of the Law of Criminal Law Austria. In Article 285 of KUHP, whoever by violence or threats of violence to force a woman has sex with him outside of marriage, is liable for committing rape, with the longest imprisonment 12 years.

In Act No. 35 Year 2014 about changes in the Act Number 23 Year 2002 on the Protection of Children:

Article 76 D: any person prohibited from engaging violence or threats of violence to force children perform coitus with him or with others.

Article 81 (1): any person who contravenes the provisions as referred to in article 76 D are convicted with imprisonment the shortest 5 (five) years and the longest 15 (fifteen) years and a maximum fine of Rp 5 billion (five billion rupiahs).

To in Article 491 of the Draft KUHP Year 2015:

- (1) are convicted for committing the crime of rape, the shortest with imprisonment of three (3) years old and 12 years old:
 - a. men who perform coitus with women outside of marriage, contrary to the will of the woman;
 - b. men who perform coitus with women outside of marriage, without the consent of the woman;
 - c. male promiscuity with women who perform with the consent of the woman, but the agreement achieved through threats to be killed or wounded;

- d. female promiscuity with women who perform with the consent of the woman because of the women believe that the man is herrightful;
 - e. men who perform coitus with female aged under 18 (eighteen) years of age, with his approval; or
 - f. men who perform coitus with women, though it is known that the woman in the unconscious or helpless.
- (2) are also doing criminal acts of rape, if in the circumstances referred to in subsection (1):
- a. men enter his genitals into the anus or mouth women; or
 - b. male inserting an object which is not part of his body into the vagina or anus of the woman.
- (3) If one of the criminal acts referred to in Article 491 resulted in heavy injuries or resulted in the death of a person then the makers of crime are convicted with imprisonment most short 3 (three) years and the longest 15 (fifteen) years.

In the Act of Criminal Law of Austria (Andi Hamzah, 1987) :

Article 125: someone with malicious threats, actually doing violence or by deception inducing occurrence for anesthesia, making a woman cannot oppose him and abused while he was in this condition for coitus outside marriage do heavy delict of rape.

Article 126: criminal to rape is heavy imprisonment from five to ten years. If the violence is so detrimental to the victim in terms of her health or even his soul, then the criminal will be dropped is over ten to twenty years. If it causes the death of heavy delik victims, then the criminal will be dropped is heavy imprisonment for life.

In the form of a table setting of the threat of imprisonment against the evils of promiscuity in the rules above look as follows:

Table 2.

Comparison of Imprisonment Against The Crimes Of Promiscuity In The KUHP Indonesia, The Act No. 35 Year 2014 About Changes In The Act Number 23 Year 2002 On The Protection Of Children, The Criminal Law Act Of Austria and The Draft Of The KUHP 2015

Legislation	Special Minimum Imprisonment	The maximum Imprisonment
Kitab Undang-undang Hukum Pidana Indonesia Pasal 285 : Barangsiapa dengan kekerasan atau ancaman kekerasan memaksa seorang wanita bersetubuh dengan dia di luar pernikahan	-	12 Year
Undang-undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang-undang Nomor 23 tahun 2002 tentang Perlindungan Anak Pasal 76 D : Setiap orang dilarang melakukan kekerasan atau ancaman kekerasan memaksa anak melakukan persetubuhan dengannya atau dengan orang lain. Pasal 81 ayat (1) : Setiap orang yang melanggar ketentuan sebagaimana dimaksud dalam Pasal 76 D	5 Year	15 Year
Kitab Undang-undang Hukum Pidana Austria Pasal 125 : Seseorang yang dengan ancaman-ancaman yang berbahaya, benar-benar melakukan kekerasan atau dengan tipu daya membujuk terjadinya pembiusan, membuat seorang wanita tidak dapat menentangnya dan menyalahgunakan selagi ia dalam kondisi ini untuk persetubuhan di luar nikah melakukan delik berat perkosaan Pasal 126 : Jika kekerasan tersebut sangat merugikan korban dari segi kesehatannya atau bahkan jiwanya	5 Year More than 10 Year	10 Year 20 Year
Rancangan Kitab Undang-undang Hukum Pidana Tahun 2015 Pasal 491 (1) : Dipidana karena melakukan tindak pidana perkosaan Pasal 491 (3) : Jika salah satu tindak pidana sebagaimana dimaksud dalam Pasal 491 mengakibatkan luka berat atau mengakibatkan matinya orang.	3 Year 3 Year	12 Year 15 Year

Source: Primary and Secondary Legal Materials, Processed, 2017

Based on the above table it appears that on the book of the KUHP Indonesia not set specific minimum

imprisonment but only the maximum imprisonment alone while in Act Number 23 Year 2004 on the Elimination of Domestic Violence, The Act Number 35 Year 2014 about changes in The Act Number 23 of the Year 2002 on The Protection of Children, The Criminal Law Act of Austria and Draft Criminal Law Act Year 2015 set minimum imprisonment. No specific minimum imprisonment came out in the KUHP lead judge can drop very low imprisonment as on court ruling Number 343/Pid. B/2013/PN BJ. In this case the accused was charged with the primary assertion: article 285 of the KHP and Article 289 subsider charges KUHP. Public Prosecutor demands, among others, as follows:

- a. Declare the defendant guilty of committing a criminal offence "violence or threat of violence to force women who were not his wife slept with him" and as set forth in Article 285 of The KUHP were threatened in the indictment the Prosecutor General;
- b. Dropping a criminal against defendants with imprisonment for 1 (one) year, reduced for Defendants in custody, with the command to let the defendants remained in detention.

In an award judge declares amar, among others:

1. Declare the defendant is proven legally and convincingly guilty of committing criminal acts "with the threat of violence to force womenot his wife have intercourse".
2. Drop the criminal against the defendant therefore with imprisonment for 9 (nine) months.

On this Court ruling appears that imprisonment imposed against the perpetrators of extremely low from the maximum limit that is 12 years old. This can lead to not achieve deterrent effect because not enough getting coaching during her punishment. Furthermore, it was feared because of imprisonment result is not enough to make the perpetrator deterrent then potentially lead to perpetrators repeated his actions. On the other hand, the punishment is too light for the perpetrator cause injustice to victims. The evil of promiscuity that is usually their victims are women and children resulting in the suffering and profoundfor victims. Not only physical but also psychological suffering and death. Moreover if the resulted in pregnancy for victims. A heavy punishment for the offender will make victims feel Justice Party.

Another thing that can happen if in an article of the criminal threats locked not set minimum especially is that the judge can drop a different length of imprisonment for the same kind of thing. This is called the overthrow of disparity of criminal occurrence. Circumstances like these also give rise to injustice

In accordance with that expressed by J.J. Rousseau in the theory of Social Contract that every citizen is entitled to legal protection and citizens depend on the protection of the law. Get a sense of security and protection is a human right for each citizen of the then ruler should make regulations so that the right person is not violated by others. Regulations concerning the rights set forth in the Constitution and implemented into the rules below, among others, in legislation and in particular in this study is the KUHP. This can be accomplished through policy formulation that is drawing up the necessary legislation for tackling crime. Given the recent increased promiscuity crime in quantity and in quality then it is appropriate that a legislative fix to the threat of imprisonment in the book of the law of criminal law by setting up special with minimum imprisonment. Plus more due to special criminal laws that govern similar crimes have arranged special minimum imprisonment in criminal threats then the KUHP as a source of general criminal law should govern also for being the guidelines for legislation under it.

If there is a minimum threshold in particular then judges not to dropcriminal prison is too lightweight for the offender and thus party victims obtain justice. The victims are usually women and children which is a people who are weak, then it is not fair if they feel the suffering resulting from crimes committed by the offender but the culprit punished lightly. Not only the victims but also society parties feel satisfied if knowing that the perpetrator has been punished heavily.

According to the theory of the purpose of sentence, from the side of the perpetrator, setting a minimum imprisonment of specialized expected deterrent abusers can make if he dropped a heavy punishment by the judge. The construction of the old in the correctional facility is expected to successfully make the offender repents and not to repeat his actions. Whereas the community, with heavy imprisonment out to the perpetrators of the then society feel protected. Based on the theory of the purpose of over throw of criminal deterrent effect, for the perpetrators of serious crimes such as crimes of promiscuity is the appropriate action because according to the type of crime. Beside that, according to the theory of the purpose of overthrow of criminal sentencing that must also be in accordance with the cultural values. This means because the offender has violated the values of culture, he deserves heavy punishment meted out thus penalty available there should be a minimum limit.

References

Books

- Andi Hamzah, *KUHP Austria, sebagai Perbandingan*, (Jakarta: Ghalia Indonesia, 1987) BPHN, *Rancangan KUHP 2015*
- Ahmad Samawi (2007), *Pendidikan Hak Asasi Manusia*, Jakarta: DIRJEN DIKTI KEMENDIKNAS RI
- Barda Nawawi Arief (1994), *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*,

- Badan Penerbit Universitas Diponegoro, Semarang
Chairul Huda (2004), *Kesalahan dan Pertanggungjawaban Pidana (Tinjauan Kritis terhadap Teori Pemisahan Tindak Pidana dan Pertanggungjawaban Pidana)*, Disertasi Program Doktor Ilmu Hukum Universitas Indonesia, Jakarta
John Rawls (1999), *A Theory of Justice: Revised Edition*. Cambridge: The Belknap Press of Harvard University Press
Made Sadhi Astuti (1997), *Pemidanaan terhadap Anak sebagai Pelaku Tindak pidana*, (Malang, IKIP Malang
Muladi dan Barda Nawawi Arief (1984), *Teori-teori dan Kebijakan Pidana*, Bandung: Alumni, 1984

Laws

- Republik Indonesia, Undang-Undang No. 1 Tahun 1946 tentang Kitab Undang-undang Hukum Pidana
Republik Indonesia, Undang-undang Republik Indonesia Nomor 35 Tahun 2014 Tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak
Republik Indonesia, Undang-undang Republik Indonesia Nomor 34 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga