Ratio Legis Journal
Volume 1 Nomor 1, March 2022, (50-58)

Pattern of Weighting in Cases Outside the Criminal Code

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Abstract
The purpose of this study is to find out and analyze the pattern of criminal threats, especially the pattern of criminal aggravation in the law, as a consideration for experts in the formulation of laws in the future.The approach method used is a normative juridical approach, through the principles of both legal issues, theories, concepts and regulations related to the problem.. The result of this research is the pattern of weighting due to additional elements, which can be in the form of behavior (planning) or events arising from certain behaviors or consequences (severe injuries or death). In this case, the threat of general criminalization is actually not just a "sanction" that can be imposed by a judge that has been stipulated in the law, but is also a moral justification for criminalization, especially regarding what and what kind of punishment is appropriate and fair.
Keywords : weighting pattern; case; criminal threat.

1. Introduction

When we can find a general criterion about what is the basis for determining an act as a crime (criminalization). Without it being able to determine it, generally countries will be in a state of overcriminalize and overpunish, as indicated by Dauglas Husak as ".....too much punishment, too many crimes"[1]. A situation that, according to him, has included a large democracy like the United States. It turns out that the current growth of criminalization has been seen as directly proportional to the general tendency of the state to "accumulate" power, which in current ideology is seen as negative.

This causes the need for a certain standard or measure to determine that the number of crimes and the light weight of the sanctions are deemed too few, sufficient, or appropriate.[2]. A quantitative measure that is not very commonly used as an approximation in law. On the one hand, this is necessary to avoid accusations that criminal law is merely a deliberate manipulation of certain values by those in power, as Freiberg said.[3]. Criminalization in abstracto can become an unpatterned legislative policy, especially when the legislators fail to refer to the basis for criticizing an act or fail to stipulate it.

The formulation of a crime, at least contains the formulation of: (1) the legal subject who is the target of the norm (addresssaat norm); (2) prohibited actions (strafbaar), either in the form of doing something (commission), not doing something (omission) and causing consequences (events caused by behavior); and (3) criminal threats (strafmaat), as a means of imposing the enforcement or compliance with these provisions. So far, there are no guidelines that provide clear

[1]Husak, D. (2008). *Overcriminalization; the Limits of the Criminal Law*, New York: Oxford University Press, p.
[2]Husak. Ibid.
[3]Merckx, D. (2006). Sanctioning Economic Crime, Brussels: VUB University Press, p. 190.

enough boundaries on how to formulate and relate the three aspects of the crime above, except for theoretical discussions which are still being debated here and there between one expert and another. Law No. 12 of 2011 concerning the Establishment of Legislation (as a refinement of Law No. 10 of 2004), Indeed, it has provided guidelines in the drafting of a statutory regulation, but although it has been mentioned more or less, it has not provided a comprehensive reference on how to formulate a "criminal act". Both when it becomes part of the "Criminal Provisions" in the administrative law (ordnungswidrigkeinten-recht), as well as when formulating it in the criminal law.

One of the things that has caught the attention of experts and the public in general is related to the formulation of "criminal threats" or "strafmaat". By borrowing the term from David Givens, that crime both before and after it is committed always gives "crime signals".[4], then the state declares the same as "criminal". Crime signals are stated by the legislators before the crime with "criminal threats", while after the crime is carried out through the "criminal imposed" by the judge. This is a representation of "disgrace" against a crime and its maker.

Attention to this matter is becoming increasingly important, considering that the results of regulatory activities (regeling) after Indonesia's independence, especially those formulated as Criminal Law, are a reflection of Indonesia's original criminal law. The fact that in the Criminal Law is still often used severe criminal sanctions, such as life imprisonment and the death penalty, causing the spotlight questioning the philosophical foundations adopted by the development and renewal of Indonesian criminal law, cannot be avoided. Post-modern thoughts about crime, do not seem too imprinted, which puts Indonesia back into classical schools, at least neo-classical schools. Contrary to the tendency of countries to hold a moratorium on the use of capital punishment, before the introduction of "guided discretion" on this matter[5], Indonesia actually capitalizes on the use of the ultimate sanction. Attention to this matter is sharpened in relation to the "pattern" of criminal weighting, namely when compared with general criminal acts contained in the Criminal Code with the Criminal Law, namely the weighting of crimes committed against criminal acts that have various elements, so that the exceptions from the criminal system seem justified. Without an adequate pattern, there will be a problem of criminal disparity that can disturb the sense of justice. Not to mention the consequences of criminal offenses without a certain pattern, can result in the shift of a criminal act from a non-arrestable crime to an arrestable crime. In other words, as Tim Newburn points out, this distinction no longer exists.[6] Due to the tendency to fade the definition of serious crime, at the level of legislation. It is not surprising that the absence of the use of patterns in this case can have an impact on the emergence (potential) of discriminatory practices in law enforcement.

Based on the description above, the purpose of this study is to find out and analyze the pattern of criminal threats, especially the pattern of criminal

[4]Givens, D. (2009). *Crime Signals; How to Spot a Criminal Before You Become a Victim,* New York: ST. Martin's Griffins, p. 3.
[5]Bohm, RM (2010). *Ultimate Sanctions; Understanding the Death Penalty through Its Many Voices and Many Sides,* New York: Kaplan Publishing, p. vi.
[6] Newburn, T. (2007). *Criminology*, Portland: Willan Publishing, p. 4.

aggravation in the law, as a consideration for experts in the formulation of laws in the future.

2. Methods

The approach used in this research is a normative juridical approach. The normative approach is an approach through principles in the provisions of both legal issues, theories, concepts and regulations related to problems.The normative juridical research method is library law research which is carried out by examining library materials or secondary data.[7]. The data obtained from both field studies and document studies are basically level data that are analyzed descriptively and qualitatively. The data analysis used in this research is qualitative normative.

3. Results And Discussion

According to Barda N. Arief, the pattern of criminal penalties is a guideline for making or drafting a criminal offense for legislators, which is distinguished from a sentencing guideline which is a guideline for judges in imposing a crime.[8] The pattern of punishment (including the pattern of criminal aggravation) is basically an implied symptom of criminal threats contained in the formulation of criminal acts in the legislation.[9] By which the intention of the legislator can be known with regard to the number and type of punishment that should be imposed on a criminal act maker.

The pattern of weighting of criminal threats in the Criminal Code can be divided into two categories. First, in the general category of criminal weighting as regulated in the General Rules of Book I of the Criminal Code. In this case, the Criminal Code uses a uniform "pattern", for example weighting due to concurrent, either due to idealist concursus, realist concursus or voortgezette handling. In this case, the criminal penalty is determined to be one-third heavier than the criminal threat contained in the formulation of the offense which contains the heaviest criminal threat. The pattern of criminal aggravation by adding a third prison sentence is heavier because of the concurrent existence in many cases also followed by the Criminal Code Bill.[10]. The use of this pattern is maintained as a reflection of the acceptance of utilitarianism, so that pure cumulation is used on a limited basis. Unlike the case with the United States, which uses pure cumulation (zuivere cumulatie)[11] For each form of concurrent, so it tends to be retributive based in determining the crime. Second, in the special category of criminal aggravation which is regulated in the rules on criminal acts (crimes and violations) in the formulation of offenses contained in Book II and Book III of the Criminal Code.

The second group is a weighting in a special category that is not uniform, namely the weighting of criminals is carried out both by increasing the quality and

[7] Soekanto, S. dan Mahmudji, S. (2003) *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo Persada, p. 13.
[8] Arief, B.N. (1996). *Bunga Rampai Kebijakan Hukum Pidana*, Bandung: Citra Adtya Bhakti, p. 167-168
[9] Ibid.
[10] Ibid., p. 175
[11] Abidin, A. Z. dan Hamzah, A. (2006). *Bentuk-bentuk Khusus Perwujudan Delik dan Hukum Penitensier*, Jakarta: Raja Grafindo Persada, p. 238.

quantity of the criminal threat. The weighting occurs because of a change in the type of crime, for example a change in the type of imprisonment to a death penalty in premeditated murder. Here the pattern of weighting criminal threats in the Criminal Code is to use a scheme, that in the case that the specific maximum in a criminal act is the same as the general maximum for imprisonment, the punishment that is threatened changes to a more severe type of punishment (death penalty).

The weighting of the criminal amount can also be done by adding a special maximum amount. In this case the weighting is carried out because of the special element (which can be in the form of behavior or consequences) from the staff of a crime. The most interesting example of this is in the case of persecution, which if detailed the weights will be illustrated as follows: 1. persecution, punishable by imprisonment of 2 (two) years; 2. Mistreatment that results in serious injury, is punishable by imprisonment of 5 (five) years; 3. Persecution that results in death, is punishable by imprisonment of 7 (seven) years; 4. Planned persecution, punishable by imprisonment of 4 (four) years; 5. Maltreatment with a plan that results in serious injury, is punishable by imprisonment of 7 (seven) years; 6. maltreatment with a plan that results in death, sentenced to 9 (nine) years in prison; 7. Seriously injure, punishable by imprisonment of 8 (eight) years; 8. Serious injury resulting in death, is punishable by imprisonment of 10 (ten) years; 9. Serious mistreatment which is premeditated, is punishable by imprisonment of 12 (twelve) years; 10. Serious mistreatment resulting in death is punishable by imprisonment of 15 (fifteen) years.

From the description above, there is a pattern that the weighting is due to additional elements, which can be in the form of behavior (planning) or events arising from certain behaviors or consequences (severe injuries or death), by adding the threat of imprisonment to 2 (two) to 3 (three) years is heavier when compared to the formulation of the offense which has a more general character. Weighting can also be done because of the specificity of the time, method, place, tool or in certain circumstances, such as in the act of theft with weighting as referred to in Article 363 of the Criminal Code. In this case, the weighting is also carried out by adding a heavier penalty (two years) to the maximum, especially from the criminal threat of theft, as referred to in Article 362 of the Criminal Code.

- General Weight

  In general, in certain criminal laws, the offense of trial, assistance and conspiracy to commit a criminal offense is aggravated by the criminal threat, when compared to generally similar offenses that are threatened in the Criminal Code. In an evil conspiracy to commit a criminal act, it is also threatened with a more severe punishment in the Criminal Law outside the Criminal Code, which is threatened with the same punishment when the act is actually realized. In contrast to the general case against conspiracy in the Criminal Code, for example, providing assistance to the enemy in wartime is punishable by imprisonment of 15 (fifteen) years, while conspiracy against it is only punishable by imprisonment of six years.

  It is different in the case of the crime of spreading terror, the same crime is threatened with a completed crime even though it is still in the preparation stage, such as "planning" or "raising funds" for the implementation of a criminal act of spreading terror. In this case, considering that the equivalent of the offense

was not found at all, there was a "jump" in the weight of the crime, namely from a non-criminal act to a criminal act. No sufficient basis was found to convict it with the same punishment when the act was perfectly committed as a crime of spreading terror. In this case the criminal threat is actually not just a "sanction" that can be imposed by a judge who has been stipulated in the law, but is also a moral justification for criminalization, especially regarding what and how appropriate and fair punishment.[12]. Eradication of terrorism with a law enforcement approach that stems from the desire to respect human rights[13], after the military and intelligence approach is considered to lack respect for human rights, it also requires justification, including against terrorism which is "justified" from religious teachings.[14]. When in the Criminal Code the determination of a criminal offense for a trial offense, for example, is based on his "evil will".[15]which has turned out, which is considered less dangerous when compared to the completed offense so that it is threatened with a lighter sentence, then this is not the case with attempted terrorism. Likewise, corruption and other crimes outside the Criminal Code. This can be interpreted that in the view of the legislators, even though it is still at the level of attempted corruption and terrorism, it is considered as dangerous as a completed offense.

- Criminal Quality Weighting

  Basically the weighting of criminal threats by increasing the quality of the criminal in the Criminal Law outside the Criminal Code. The weighting when compared to crimes similar to those contained in the Criminal Code. In the crime of spreading terror, for example, anyone who intentionally uses violence or threats of violence creates an atmosphere of terror or widespread fear of people or causes mass casualties by seizing freedom or losing the lives and property of others. , or cause damage or destruction to strategic vital objects or the environment or public facilities or international facilities.

  The weighting with the "at average" pattern looks very ambiguous in the ITE Law, if this law can be seen as a Criminal Law outside the Criminal Code. In the Criminal Code, criminal acts of violating decency (threatened with 1 year and 6 months of imprisonment), humiliation (threatened with 9 months of imprisonment), and threats (threatened with 4 years of imprisonment), which if committed through information technology, in the ITE Law, the punishment is increased for 6 (six) year. The funny thing is, in the formulation of the offense against the ITE Law, there is actually a criminal offense (that is, being threatened with the same punishment (six years) for gambling (10 years in prison) and extortion (9 years in prison), as stipulated in the Criminal Code.

  This pattern of flattening is found quite a lot in administrative laws that have criminal provisions. Some violations of certain administrative obligations or prohibitions, which are seen at first glance have different levels of reproach from one another, but are assigned the same strafmaat. This may be a form of misunderstanding of the legislators regarding the "crime signals" that carry a criminal threat.

[12] Yanuar, P. M. (2007). *Pengembalian Aset Hasil Korupsi*, Bandung Alumni,, p. 85.
[13] Nainggolan, P. P., ed. (2002). *Terorisme dan Tata Dunia Baru*, Jakarta: Sekwan DPR RI, p. 115.
[14] Reich, W. ed. (2003) *Origins of Terrorism*, Jakarta: Raja Grafindo Persada, p. 131.
[15] Abidin, AZ Op.Cit., p. 23.

In this case, what is very troubling is the application of a "pattern" of weighting criminal threats in Criminal Law outside the Criminal Code at this average, causing several acts which are punishable by imprisonment in the Criminal Code, which is seen from the amount that is not the general maximum that can be threatened with imprisonment. , in this Criminal Law, it is aggravated to a type of crime that is heavier than the previous type of punishment (death penalty). This is of course contrary to the pattern of criminal weighting specified in the Criminal Code. Second, the criminal charges in this Criminal Law are due to the specificity of the offense. In the criminal act of corruption, the criminal charge is carried out because of "certain circumstances", which according to Andi Hamzah, "this particular situation" should be contained in the formulation of the offense (Article 2 paragraph (2) and is not placed in the explanation[16].

- Criminal Quantity Weighting

  The weighting of the quantity of crime in the Criminal Law is quite a lot when compared between the general offenses in the Criminal Code and the offenses in particular. The crime of pornography which in the Criminal Code is punishable by a maximum imprisonment of one year and four months but has been drastically increased in terms of the quantity of the crime to a maximum of 12 (twelve) years, for anyone who produces, makes, reproduces, reproduces, disseminates, broadcasts, imports, export, offer, trade, rent, or otherwise provide pornography. The drastic increase in the quantity of crime is reflected in the crime of domestic violence which is punishable by a maximum imprisonment of 6 (six) years and 8 (eight) months, which is increased in this Criminal Law to 10 (ten) years in prison.

  It is illustrated that the legislators do not use certain "patterns" in carrying out criminal penalties. Criminal penalties tend to be carried out more than similar weighting patterns carried out by the Criminal Code, namely adding a maximum, especially 1/3 (one third) heavier or by adding between 2 (two) to 3 (three) years of the generalist offense.

- Weighting with Changes in Criminal Threat Model

  The Criminal Code only recognizes a single criminal threat model or alternative criminal threats[17]. That is, it is only possible to impose one principal penalty for one offense (single penalty). Several laws outside the Criminal Code have deviated from the general pattern of criminal threats in the Criminal Code, by using the cumulative threat model (which is marked by the conjunction "and" between the two types of punishment threatened) or the alternative-cumulative combination model marked by the conjunction " and/or" (between the two types of punishment that are threatened). With cumulative threats, judges are bound to impose both types of penalties at once (double penalties), which can be considered as a criminal offense. Likewise, in the case of criminal threats using the alternative-cumulative model, the judges impose a cumulative penalty. Without specific guidelines, it is not allowed to impose two sentences that are threatened with maximum cumulative alternatives, which will cause such a punishment to be aggravated.

[16] Hamzah, A. (2004). *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional*, Jakarta: Pusat Studi Hukum Pidana Universitas Trisakti, p. 103.
[17]Barda, Op. Cit., p. 180.

The problem is, on the subject of corporate crime, only the principal criminal offense can be imposed in the form of a fine, and the type of criminal deprivation of liberty can not be imposed. In view of this construction, there will be difficulties in imposing criminal penalties (only) against corporations in terms of the crimes committed which threaten cumulatively with different types of crimes. Even though one of the criminal threats in the formulation of a criminal offense is a fine, but still with the cumulative threat model the judge "must" impose both. As a result, criminal threats against the corporation become "non-applicable". Will result in such a criminal aggravation. The problem is, on the subject of a corporate crime, only the principal punishment can be imposed in the form of a fine, and the type of criminal deprivation of liberty can not be imposed.

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The pattern of criminal penalties using the cumulative criminal threat model is also used in the Law on the Elimination of Trafficking in Persons. Compare the slave trade in the Criminal Code which is punishable by imprisonment as the only crime punishable by (twelve years) aggravated in a special law to a maximum of 15 (fifteen) years in prison and a fine of up to Rp. 600,000,000.00 (six hundred million rupiah). In this case, it is also not illustrated what is used by the legislators as a pattern of criminal threats by using a single criminal threat model, cumulative punishment or alternative-cumulative punishment. However, It should be noted that developments in the Criminal Law that include corporations as the subject of offenses can actually be a factor behind why in various laws outside the Criminal Code, including the Criminal Law Law outside the Criminal Code, an alternative-cumulative criminal threat model is held which can increase the power of the criminal justice system, deterrence criminal sanctions and deterrent nature. Considering the effectiveness of fines for corporations is considered low because it can be circumvented by making it a cost of business and if the fines are too burdensome, corporations can file for bankruptcy.[19].

Several laws outside the Criminal Code use specific minimums for criminal threats, while this system is not recognized in the Criminal Code. The use of such a model can also be seen as a criminal offense. With this system, the law determines not only the maximum penalty that a judge can impose, but also the minimum. This is to limit the independence of judges who are indeed too free to impose penalties between the general minimum and the general maximum. Unfortunately, there is no general pattern to determine which offense is the minimum that is determined outside the Criminal Code in the threat of the offense. According to Barda N. Arief, in the Criminal Code Bill, setting the minimum is carried out by considering the

[18]Chairul Huda, Op.Cit., hlm. 13.
[19] Hutauruk, R. H. (2002). *Penanggulangan Kejahatan Korporasi*, Jakarta: KPG, p. 100.

consequences of the offense concerned on the wider community (among others: causing danger/public unrest,[20].

Generally, the law places the minimum threat outside the Criminal Code "ahead" of the maximum threat in particular. Thus, it is determined: "... shall be sentenced to a minimum imprisonment... and a maximum ...". Likewise for fines, it is determined: "...shall be punished with a minimum fine ... and a maximum of ...". However, this is not the case with Law no. 26 of 2000 concerning the Court of Human Rights. The minimum threat in particular is mentioned before the maximum threat in particular, as mentioned in Article 36, which stipulates:

> "Everyone who commits the acts as referred to in Article 8 letters a, b, c, d, and e, shall be sentenced to death or life imprisonment or to a maximum of 25 (twenty five) years and a minimum of 10 (ten) years".

Indeed, if we pay attention, such mention is influenced by the alternative threat model. When the punishment is threatened alternatively, the most severe punishment is the one mentioned first. The main criminal sequences mentioned in Article 10 of the Criminal Code determine the severity (Article 69 of the Criminal Code). Thus, the death penalty is mentioned before life imprisonment, and life imprisonment is mentioned before the short sentence.

4. Closing

The pattern of weighting is due to additional elements, which can be in the form of behavior (planning) or events arising from certain behaviors or consequences (severe injuries or death), by adding the threat of imprisonment to 2 (two) to 3 (three) years which is heavier if compared to the formulation of the offense which has a more general nature. Weighting can also be done because of the specificity of time, method, place, tool or under certain circumstances. In this case, the threat of general criminalization is actually not just a "sanction" that can be imposed by a judge that has been stipulated in the law, but is also a moral justification for criminalization, especially regarding what and what kind of punishment is appropriate and fair. as well as the weighting of the criminal quality,

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Constitution

[1] 1945 Constitution of the Republic of Indonesia
[2] Criminal Code (KUHPidana)
[3] Law No. 12 of 2011 concerning the Establishment of Legislations
[4] Law Number 11 of 2008 concerning Information and Electronic Transactions
[5] Law No. 26 of 2000 concerning the Human Rights Court