

## THE IMPLEMENTATION OF CONCURSUS CRIMINAL OFFENSE SANCTIONS RELATED TO ARTICLE 12 PARAGRAPH 4 OF THE CRIMINAL CODE

Nursolihi Insani

University of Pamulang, Indonesia

dosen00816@unpam.ac.id

### ABSTRACT:

**Legal certainty is something that absolutely must exist in law enforcement. In the application of a definite law, it must be clear first the legal rules that regulate one thing with another so that things do not happen that cause legal uncertainty. In its journey, it is sometimes difficult to distinguish between a Concursus offense and a single offense, even the imposition of sanctions is contrary to the basic provisions, namely article 12 paragraph 4 of the Criminal Code. Therefore, the criminal system for imposing criminal penalties in Concursus offenses has various types, where these types are based on Article 12 of the Criminal Code. This study aims to provide an understanding that the application of sanctions in the Concursus offense is not at all contrary to Article 12 of the Criminal Code. The method used is normative juridical, with a conceptual approach. The goal to be achieved is that in understanding the Concursus offense there is no mistake, so that the author's intention to say that there is no uncertainty in the rule of law is correct and easy to understand in a simple way.**

**KEYWORDS: Concursus, Certainty, Criminal Code**

### INTRODUCTION:

Indonesia as a country that has Pancasila as the highest source of law or as the source of all sources of state law [1] makes this country uphold the law. Where the law has the aim of providing justice for every citizen, besides that

legal certainty is in the spotlight in this country, considering the implementation of the legality principle "Nullum Delictum Nulla Poena Sine, Praevia Lege Poenali" according to the definition contained in Article 1 paragraph 1 of the Indonesian Code of Law. The Criminal Code (hereinafter abbreviated as KUHP) states that no act can be punished if there is no legal rule that regulates it beforehand. Making the law must be full of initial certainty, namely there are legal rules so that someone can get justice. Finally, the purpose of the law is to benefit the widest possible society.

Humans have many necessities of life, to meet the needs of life, humans need material, there are humans who can fulfill their needs because they are self-sufficient, some are looking for shortcuts by violating the law. Many legal actions are usually carried out, such as theft, robbery, and so on.

It is possible that the act carried out will lead to other actions, such as for example someone who is committing an act of theft, is caught by someone else, so that out of panic, the intention arises to abuse the victim or kill the victim. Other actions such as if someone commits immoral acts against a woman, causes other actions, such as taking the victim's belongings (call it theft), and also ending the victim's life. In the law in Indonesia, actions that are carried out simultaneously and at the same time are also called *Samenloop* which in Dutch is also known as *Samenloop Van Strafbaar Feit* or *Concursus* [2] In Indonesian it is translated as a concurrent crime. Which later in this paper is called "*Delik Concursus*" (Concursus Offense)

In the Criminal Code, Concursus is regulated in Articles 63 to 71 of the Criminal Code. Among these articles are also divided into several kinds of concursus offenses, namely Concursus Idealis, Continuing Actions and Concursus realis [3]

So far, many think that, when someone commits an act at once, then in imposing the punishment by adding up the criminal sanctions. However, in this Concursus act, of course, the sentence is not imposed in the usual way, because a judge in making a decision is constrained by a rule that cannot impose a criminal sentence for a certain period of time exceeding 20 years. Therefore, in order to understand more precisely about the concursus offense, it cannot be separated from the articles governing the Concursus of criminal offenses [4]. From this discussion, it will clear up misunderstandings of society that someone who commits several acts at once, the punishment is not imposed by adding up all the articles.

#### **PROBLEMS:**

The focus of this paper is, in fact, there are differences of opinion between the application of concursus offense sanctions, even though if it is understood properly, it will find legal certainty for the perpetrators, and certainty for the judge in giving a decision on the act committed. For this reason, in this paper, we try to equate the views on the application of sanctions in concursus offenses, by linking them in article 12, more specifically paragraph 4, in Book I of the Criminal Code.

#### **RESEARCH METHODOLOGY:**

The writing of this law is of a normative juridical type [5], with the consideration that the focus of this research is on the offense concursus, which is misunderstood by most people.

The type of writing itself is descriptive analysis [6] with a conceptual approach [7]. The

scope of this writing is in the area of criminal law, with primary legal material from the criminal law code of conduct and from related books, and secondary legal material from legal journals, legal news, previous research which can provide more explanations regarding legal materials.

#### **RESEARCH RESULTS:**

Concursus or concurrent criminal offenses means that there are two or more criminal offenses committed by one or more people where the act committed the first time has never been sentenced to a criminal witness or between the first act and subsequent criminal offenses has not been hindered by a court decision [8].

According to Mahrus Ali, concursus is the occurrence of two or more criminal offenses committed by one person where the first act committed has not been subject to criminal sanctions, or between the initial criminal offense and the subsequent criminal offense has not been hindered by a judge's decision [9] In the criminal offense committed first or earlier, the judge has given a decision by giving criminal sanctions to the perpetrator, even partially or completely. So it cannot be said to be a concurrent action.

Concursus or other terms are *somenloop* in Indonesian called a combination of criminal offenses, by law it has been regulated in Book I of the Criminal Code (hereinafter abbreviated as the Criminal Code) in Chapter VI specifically in Articles 63 to 71 of the Criminal Code, which relates to with the regulation regarding the severity or severity of the sanctions that can be given by a judge to an accused who has committed more than one unlawful act, namely whose actions have been submitted to the judge for joint examination [10].

In concursus offenses, it must be noted whether a person only commits one act that is prohibited by law or he commits more than one prohibited act, so it is necessary to focus on the

conditions that must exist to declare an act to be included in a concursus offense, as following:

- a. There are 2 (two) or more offenses committed.
- b. Two/or more criminal offenses are only committed by one person/or two persons in terms of participation.
- c. The first criminal offense with subsequent criminal offenses has not been tried or has not been limited by a judge's decision or
- d. The first criminal offense with other criminal offenses will be tried at the same time.

The main problem in the concursus offense is the calculation of the severity of the criminal sanctions that will be given to someone who has committed several violations of criminal law. Basically, the concursus offense is based on the heaviest criminal sanctions. However, in practice there are no difficulties, because judges, when faced with this type of action, rarely impose the heaviest criminal sanctions [11]

#### **TYPES OF CONCURSUS OFFENSES:**

The classification of concursus offenses in the Criminal Code is clearly regulated in Articles 63 to 71. Where this concursus offense is divided into 3 forms, namely Idealist Concursus, Realist Concursus and Continuing Actions. The division of this offense aims to provide convenience in the provision of criminal sanctions and the calculation of sanctions for several criminal offenses committed by an alleged perpetrator.

The first will be discussed in the Concursus Idealis, also called concurrent regulations, where a person who in fact only commits one criminal offense, but one criminal offense that he commits when viewed from the point of view of the rule of law can be considered the same as having committed two or more criminal law rules [12]

Put forward by I Made Widnyana, in this idealistic concursus offense when someone commits an act but with one act it has violated several rules of criminal law and is subject to the

heaviest criminal threat. Therefore, it is also called concurrent criminal law [13] Simons argues, if a person is suspected of committing a criminal offense, but only commits one act that is prohibited by law and by taking that action, the act also fulfills the elements of several criminal rules, or in other words if by committing that one act, the person in fact, they have committed several criminal offenses, then there is what is called a multiplicity of actions or in other languages it is called Concursus idealis (eendaadse samenloop), by Van Hamel it is also called samenloop van strafbepalingen [10]

The criminal imposition system in the concursus offense is using the Absorption system, in the formulation of Article 63 paragraph 1 of the Criminal Code, to be able to realize an idealistic offense concursus in essence, if someone commits one violation and the act violates more than one legal rule. then the criminal sanction imposed on that person is the heaviest type of crime from the act committed. Meanwhile, paragraph (2), if the act committed is included in the special law, the general law rules must be set aside (*lex specialis derogat lex generalis*). The condition for the occurrence of an idealist concursus is that there are people who commit one act (*feit*) and fulfill more than one offense formulation [14]

Then there is a combination of several actions or also called Concursus realis, where if someone commits several actions, and each of these actions stands alone as a crime [15] These actions do not have to be congenial and do not have to be related. Concursus realis occurs in the case of several facts, which must be viewed as independent acts and each of them is a criminal event, committed by one or more people and between the time of occurrence of each of these facts has not been limited by a court decision that has permanent legal force [16]

Simons said, if a person is suspected of having committed more than one prohibited act, and by committing the act, that person has committed more than one criminal offense, then there is what is called *meerdaadse samenloop* or *Concursus realis* or what Van Hamel also referred to as *samenloop van delikten* [10] This realist *concursus* is regulated in Articles 65 to 71 of the Criminal Code. In the formulation of paragraph (1) Article 65 and Article 66 of the Criminal Code, it can be concluded that every act in conjunction with one another must be seen separately and independently, this is the special characteristic of concurrent acts. Finally, there is a continuing action which in Dutch is called *voortgezete handeling*. This can happen if a person commits several actions, both crimes and violations, and the actions committed have such a relationship that they must be viewed as continuing actions [17]

Van Bemmelen's view, to determine whether several behaviors can be considered as one continuous action or not is usually not so easy, because all these behaviors usually also consist of a large number of small actions [10]

While Pompe argues, some of these behaviors can be said to have resulted in several similar criminal offenses, if the criminal offenses that have been produced have the same qualifications, for example some of these behaviors have resulted in a murder, an assault, a theft and so on [10] The elements of continuing action (*Voortgezete Handeling*) are [12]

- a. There are several actions even though they are in the form of Violation or Crime.
- b. Between one action and another there is a relationship in such a way that it must be seen as a continuous action. The act here is in the form of an act that gives birth to a criminal offense, not merely a physical act or also an act that is not an element of a criminal offense.

Regarding the second element, namely between one act and another there must be a relationship in such a way, there is no further information in the law. Three conditions for the existence of *voortgezete handeling* that must be met, which at the same time also describes "there is a relationship" as the main characteristic of the continuing action, are:

- a. There must be a will.
- b. The crimes committed must be of the same type.
- c. The time gap between committing one crime to the next (sequentially) should not be too long

#### **CALCULATION OF THE LENGTH OF PUNISHMENT FOR CONCURSUS OFFENDERS:**

In the case of *Concursus* or concurrent criminal offenses, the sanctions that can be imposed on the perpetrators are the principal crimes as stipulated in Article 10 letter a of the Criminal Code. The main punishment as stated in Article 10 letter a is imposed for the perpetrators of criminal offenses who commit criminal offenses concurrently, each criminal offense is carried out, the punishment is different

In the main punishments mentioned is imprisonment, which in Article 12 of the Criminal Code which is called "imprisonment is for life or for a certain time" (paragraph 1).

It is re-limited in paragraph (2), which states "imprisonment for a certain period of a minimum of one day and a maximum of fifteen consecutive years".

In paragraph (3) "imprisonment for a certain period of time may be imposed for 20 consecutive years in the case of crimes for which the judge may choose between the death penalty, life imprisonment, and imprisonment for a certain period of time, or between life imprisonment and imprisonment for a certain period of time. imprisonment for a certain period of time, as well as in the event that the fifteen

years limit is exceeded because of additional punishment due to combination, repetition or because it is stipulated in articles 52 and 52a".

In paragraph (4) "the prison sentence for a certain time **may not exceed twenty years**".

Judging from the general rules in book I of the Criminal Code, it means that in imposing penalties on concursus offenses violators must also adhere to these rules. The Criminal Code recognizes four systems (stelsel) in concursus offenses, namely the absorption system, accumulation system, limited accumulation system, and sharpened absorption.

The Absorption System emphasizes the system of giving punishment, which if someone commits several criminal offenses, each of which is threatened with various sanctions, only one sanction is imposed, namely the heaviest criminal sanction [11] For example, A is arguing with B, then A pushes B with all his might towards the glass of a shop window, so that B suffers injuries due to being hit by the broken glass. The action that A did fulfills the formulation of the offense of persecution, also fulfills the formulation of the offense of vandalism. Therefore, the punishment that can be imposed based on this absorption system is about persecution whose criminal provisions are heavier than the criminal provisions regarding destruction of goods.

The cumulative system means that if there is an act that is threatened with punishment for every act committed, then all of them are dropped. According to Satochid Kartanegara, if a person commits several acts in criminal law, they are threatened with separate punishments, then based on this system [18]

"On that person, only one sentence is imposed, namely the heaviest punishment among the penalties imposed on the offense, but that one sentence is added by one third"

For example: In a span of 5 years someone commits theft, molestation, and murder. Theft is

punishable by imprisonment for a maximum of 5 years as regulated in Article 362 of the Criminal Code, persecution is punishable by a maximum imprisonment of 2 years and 8 months as stipulated in Article 351 of the Criminal Code, and murder is regulated in Article 338 of the Criminal Code, punishable by a maximum imprisonment of 15 years. These three actions when accumulated become a total of 22 years and 2 months.

However, this cannot be immediately applied to the perpetrators of the crime. The heaviest punishment here is a prison sentence of 15 years which is applied to the crime of murder and a third of 15 years is 5 years, so that the maximum sentence that can be imposed on the perpetrator of this crime is 20 years even though cumulatively the person deserves to be imprisoned for 22 years and 2 months.

Lastly there is a sharpened absorption system, this system is a variation of the accumulation system. In this system which is imposed there are all the penalties that are threatened for each act committed, but the amount of all of them is reduced so that it cannot exceed the heaviest punishment and is added by a third [11] Satochid Kartanegara, said, if someone commits several types of actions that cause several types of offenses, each of which is threatened with its own punishment, then if using this system [18]

"All the punishments that he threatens for each of these offenses must be imposed on that person, but the amount of the punishment must be reduced, i.e. the amount must not exceed the heaviest punishment among the penalties imposed on these offenses plus a third."

#### **ANALYSIS OF CONCURSUS CRIME CASES:**

The author cites a heartbreaking event towards the end of 2021, a rape case committed by an islamic boarding school (pesantren) teacher with the initials HW, who raped his

female students. Here are the facts obtained from the incident:

- a. Herry Wirawan is an educator, religious teacher who educates female students.
- b. Herry carried out his depraved actions against dozens of female students. The female students came from several areas in West Java, namely Garut, Ciamis, and Sumedang.
- c. Herry committed molestation in various places, namely the TM Islamic Boarding School Foundation, Synergy Complex Foundation, MH Islamic Boarding School, Basecamp, TS Bandung Apartment, Hotel A, Hotel PP, Hotel BB, Hotel N, and Hotel R.
- d. Herry carried out this depraved act from 2016 to 2021. This means that it has not been detected for five years and will only be revealed in June 2021.
- e. The boarding school where Herry serves tends to be closed. The female students who stay at the boarding school rarely interact with the local residents. They only look out if they want to eat at the stalls around the boarding school.
- f. The Islamic boarding school where Herry serves has been registered at the Ministry of Religion of West Java. The West Java Ministry of Religion admits that it was mistaken, even though it has been intensely monitoring the activities of Islamic boarding schools in West Java.
- g. On June 2, 2021, after the perpetrator of the molestation was arrested and detained, the Islamic Boarding School Madani Boarding School at the Wildlife Foundation Complex, Cibiru District, Bandung City was closed [19]

In connection with this case, it can be seen that the perpetrator carried out several actions that were carried out at different times, but the actions were the same. The first is the criminal offense of obscenity which is carried out in various places within a certain period of time, children who are born and then economically

exploited, the rights of the students in terms of freedom are deprived.

We discuss one by one, in terms of the crime of rape, which is included in Article 285 of the Criminal Code: "Anyone with violence or threats of violence forces a woman to have sex with him outside of marriage, is threatened with rape with a maximum imprisonment of twelve years." From this article there are 2 acts committed in one incident, namely violence and rape, which in this concursus offense the punishment system is absorption. Where violence is included in the persecution in article 351, the criminal threats vary depending on the consequences.

Furthermore, the deprivation of independence, by not allowing students to socialize with the outside world, can be subject to Article 333 paragraph (1) of the Criminal Code: "Anyone who intentionally robs another person of independence against the law or continues such deprivation of independence, is threatened with a maximum imprisonment of eight years." . In this article, HW can be sentenced to 8 years in prison, called a single crime.

Ultimately, the child who is born is used for economic exploitation. Talking about children, the victims turned out to be children, where the regulation on child protection is contained in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Where there is a special article that regulates it, namely Article 81 paragraphs (1) and (2) which reads:

"(1) Anyone who intentionally commits violence or threats of violence forcing a child to have sexual intercourse with him or with another person, shall be punished with imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp. 300,000. .000,00 (three hundred million rupiah) and at least Rp. 60,000,000.00 (sixty million rupiah).

(2) The criminal provisions as referred to in paragraph (1) shall also apply to anyone who intentionally commits a trick, a series of lies, or persuades a child to have sexual intercourse with him or with another person.”

Then this law also regulates economic exploitation, contained in article 88, which reads: "Everyone who exploits children economically or sexually with the intention of benefiting themselves or others, is sentenced to a maximum imprisonment of 10 (ten) years and / or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah).”

Based on article 63 paragraph 2 in chapter VI of the Criminal Code which states that: "... if an act is included in a general criminal code, it is also regulated in a special criminal rule, then only the special one will be applied". Then the special rules used are the Child Protection Act. The acts committed are included in the *realis concursus*, with a limited cumulative punishment system. What is violated is Article 81 with a penalty of 15 years and a fine of 300 million, and Article 88 with a sentence of 10 years with a fine of 200 million.

If it is accumulated, the sentence that will be received is 25 years, but not like that in the applicable law in Indonesia, because it is contrary to Article 12 paragraph 4 of the Criminal Code if you add up all of them, which is more than 20 years in prison. So here we use the calculation of the *concurus realis* offense of article 66 paragraph 1, namely article 81 of the heaviest crime of 15 years, plus a third of 15 years, 5 years, so 15 plus 5 years, the total is 20 years, with the included fine, according to article 66 paragraph 2.

Imposing criminal sanctions to someone who commits a criminal offense, it must be observant to see whether it is a single crime or includes a *concurus* offense. Because by naked eye it can be seen that a person has committed a criminal offense, but in reality what has been violated are several criminal rules. Article 12

itself mentions a matter called imprisonment, which is specifically highlighted in Article 12 paragraph 4 of the Criminal Code.

Article 12 paragraph 4 requires a defendant not to be sentenced to more than a maximum sentence of 20 years in prison. If you look at it, of course, giving criminal sanctions for *concurus* offenses will be very contradictory, from the examples discussed above, when you don't use the calculations in article 66 paragraph 1, when you add up the criminal sanctions will exceed 20 years, which is 25 years in prison. This is already out of the general rules in the Criminal Code, because the Child Protection Act does not regulate the maximum issue of punishment, so it still refers to Book I on general rules in the Criminal Code.

So, by formulating the heaviest criminal + (1/3 x the heaviest penalty), it will not conflict with article 12. It will be different if the previous act has binding legal force, it is no longer called a *concurus*, but an action that is left behind. Of course, in this case, look again at the sanctions that are being carried out by someone who commits an act, if the sanction he is undergoing is 6 years, in the case of being left behind, the sanction is 5 years, then it can be imposed, because it has not exceeded 20 years, as the maximum punishment. If the person concerned commits several acts in the *concurus* offense, the maximum sentence of which is 20 years, then if it is known that there were other acts before the decision, which are included in the remaining act, the judge cannot impose a sentence on the defendant, can only state that the defendant committed a criminal offense. , but to impose the sentence, the judge has exhausted his rights.

#### **THE FOLLOWING READS ARTICLE 71 OF THE CRIMINAL CODE:**

"If a person, after being sentenced, is found guilty again for committing a crime or other

violation before a criminal decision is made, then the punishment previously calculated in the sentence will be imposed using the rules in this chapter regarding cases being tried at the same time."

It is different if the act left behind by the defendant has a death penalty or life imprisonment. This is of course not tied to the punishment that has been imposed previously, of course as long as it is indeed threatened in a criminal offense that will be tried later.

### **CONCLUSION:**

Observing the provisions of Article 12 of the Criminal Code, we can understand that in granting a decision to a defendant, it must not exceed the maximum criminal sanction, which is 20 years. Imprisonment for a certain time may not exceed 20 years, life imprisonment or death penalty.

The provisions of the *concursum* offense in the sanctions system vary, depending on the act committed. If the act committed is one act at a time but violates two criminal sanctions, then it is included in the idealistic *concursum*, the application of which uses an absorption system, which seeks the heaviest punishment. If the act committed by a person is repeated with the same type of action or someone who commits several acts of a different type but in a not too distant period of time and has not been limited by a court decision with permanent legal force, then it is included in the *concursum realis* offense. the application of the sanction later is the heaviest punishment plus 1/3 of the heaviest punishment.

If at any time after the court's decision has been rendered and it has permanent legal force, it is later discovered that the person who has been terminated has also committed an act related to the action that has been decided, it is called a *laggard* act, in which the application of the sanction may not exceed 20 years if accumulated

with a previously decided punishment. It will be different if the act left behind has a witness to the death penalty or life imprisonment.

In practice, it is better if the prosecutor as a public prosecutor is also obliged to pay attention in making indictments and indictments, because these two things become the basis for judges in providing legal certainty to the defendant. Mistakes in applying the types of offenses and sanctions to a defendant will result in the decision being null and void.

It should also be noted that the provisions of this *concursum* offense are closely related to the Legality Principle in Article 1 paragraph 1 of the Criminal Code (no action can be punished, unless there has been a statutory regulation that previously regulated it), to provide legal certainty to the parties. The most important thing is also related to the principle of *Nebis In Idem*, which means that it can be found in Article 76 paragraph 1 of the Criminal Code "Except in the case that the judge's decision may still be repeated, people may not be prosecuted twice because of the actions that the Indonesian judges have tried against him with a decision that becomes permanent. In the sense of Indonesian judges, including judges of the autonomous and customary courts, in places that have these courts". Law enforcers are required to be more careful in applying the rule of law, and see whether a person's actions are single or several actions. Do not even later in the provision of criminal sanctions will actually create legal injustice, even though the law is certain.

Understanding Book I of the Criminal Code as a guide in implementing material and formal legal rules is the right way to provide certainty as well as justice and legal benefits for all parties



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