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Questioning the Criminalization of Personal Data Protection

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Abstract

The elements of "*melawan hukum*" and "*yang dapat mengakibatkan kerugian Subjek Data Pribadi*" in criminalization related to personal data protection open up room for multiple interpretations. Normative legal research methods with a statutory and conceptual approach through the collection of primary and secondary legal materials which are analyzed prescriptively are chosen to answer the specified legal issues. The result, first, is that the element "*melawan hukum*" must be interpreted as "*melawan hukum secara formal*" and cannot be used to criminalize actions that are actually protected by law, for example, regarding the press. In law enforcement, the element "*melawan hukum*" must be stated in the indictment and proven at trial. Second, the element "*yang dapat mengakibatkan kerugian Subjek Data Pribadi*" is formulated formally and is not a criminal complaint. This formulation has multiple interpretations regarding potential losses as to what needs to be concreted, thus adding to the vulnerability in terms of fulfilling impartial criminal justice.

Keywords:

Criminalization; Personal Data Protection.

Introduction

Indonesia has a legal policy regarding the protection of personal data after the promulgation of *Undang-Undang Republik Indonesia Nomor 27 Tahun 2022* (Law of the Republic of Indonesia Number 27 of 2022, hereinafter referred to as "*UU No. 27 Tahun 2022*" on October 17, 2022. As usual, *UU No. 27 Tahun 2022* contains a criminalization policy (hereinafter referred to as "criminalization") which can be found in Chapter XIV which contains 7 (seven) articles.

Criminalization raises the central issue of efforts to determine what actions should be made into criminal acts and what sanctions should be used or imposed on

the offender.[1] Criminalization is part of criminal law policy, namely efforts to create criminal laws and regulations that are appropriate to the circumstances and situations at one time and for the future.[2]

In detail, this effort is realized through, first, the stage of determining criminal acts and penalties by the legislators. The product of this stage can be called legislative policy or criminalization policy. Second, the stage of awarding punishment by the court. The product of this stage can be called judicial policy. Third, the stage of carrying out the crime by the authorized implementer. The product of this stage can be called executive policy.[3]

In this business, 3 (three) important principles must be taken into account. First, the principle of legality which requires criminal law to be as strict and certain as possible so that people know in advance which constitutes a criminal act. Second, the principle of subsidiarity requires criminal law to be placed as *ultimum remedium*, not as *primum remedium*. Third, emphasize the establishment of a clearer and simpler criminal law system for justice and appropriate punishment.[4]

In drafting *UU No. 27 Tahun 2022*, several parties invited to a hearing by the *Dewan Perwakilan Rakyat Republik Indonesia* (House of Representatives of the Republic of Indonesia) suggested that the formulation of criminal offenses (and their penalties) be reviewed, even deleted (specifically prison sentences). Apart from the reasons for prioritizing ultimum remidium (the principle of subsidiarity), the conduciveness of the business world is worth considering. The party in question is *Asosiasi FinTech Indonesia* (AFTECH), *Asosiasi Penyelenggara Telekomunikasi Seluruh Indonesia* (ATSI), *US-ASEAN Business Council*, dan *Asosiasi eCommerce Indonesia* (idEA). However, it is still being formulated and promulgated, thereby (increasingly) adding to the list of criminal acts in Indonesia.

[1] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana, 2011), 30.

[2] Sudarto, *Hukum Dan Hukum Pidana* (Bandung: Alumni, 1983), 161.

[3] Muladi and Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (Bandung: Alumni, 2010), 144.

[4] Salman Luthan, “Asas Dan Kriteria Kriminalisasi,” *Jurnal Hukum* 16, no. 1 (2009): 5–6.

Table 1: Formulation of Criminal Acts in *UU No. 27 Tahun 2022*

Article 67 paragraph (1)	Article 67 paragraph (2)	Article 67 paragraph (3)	Article 68
"*Setiap Orang yang dengan sengaja dan melawan hukum memperoleh atau mengumpulkan Data Pribadi yang bukan miliknya dengan maksud untuk menguntungkan diri sendiri atau orang lain yang dapat mengakibatkan kerugian Subjek Data Pribadi sebagaimana dimaksud dalam Pasal 65 ayat (1) … .*"	"*Setiap Orang yang dengan sengaja dan melawan hukum mengungkapkan Data Pribadi yang bukan miliknya sebagaimana dimaksud dalam Pasal 65 ayat (2) … .*"	"*Setiap Orang yang dengan sengaja dan melawan hukum menggunakan Data Pribadi yang bukan miliknya sebagaimana dimaksud dalam Pasal 65 ayat (3) … .*"	"*Setiap Orang yang dengan sengaja membuat Data Pribadi palsu atau memalsukan Data Pribadi dengan maksud untuk menguntungkan diri sendiri atau orang lain yang dapat mengakibatkan kerugian bagi orang lain sebagaimana dimaksud dalam Pasal 66 … .*"

Several necessary notes regarding the formulation of criminal offenses above, first, the element "*setiap orang*" can only be applied to individuals and corporations, not to public bodies, including the government, so that the aspect of applying the principle of equality in forming criminalization policies becomes a problem. Second, the element of "*melawan hukum*" is not explained, for example, violating the law materially or formally. This element has multiple interpretations and is contrary to legal policies regarding the press, elections and public information disclosure. Third, the element "*yang dapat mengakibatkan kerugian Subjek Data Pribadi*" which is not defined as a criminal complaint or ordinary criminal act. Fourth, the element of "*mengungkapkan Data Pribadi yang bukan miliknya*" has the potential to interfere

with journalistic work. It also does not fail to distort the disclosure of monitoring results for candidates for public officer.

In addition, considering the criminal provisions found in it, *UU No. 27 Tahun 2022* can be referred to as administrative law which contains criminal provisions or commonly called administrative criminal law. According to Topo Santoso, so that all state administrative provisions can apply effectively, a law enforcement policy has been developed by functionalizing aspects of criminal law in administrative regulations, giving rise to administrative criminal law. The problem is, first, criminalization in *UU No. 27 Tahun 2022* is not "installed" as an *ultimum remedium*. Second, the criminal system is not arranged alternatively (using the word "*atau*"), but rather mixed (using the phrase "*dan/atau*"). Third, administrative sanctions are not used as or are a substitute for criminal sanctions.

Without reducing the urgency of some of the issues found, this article only questions, first, the "*melawan hukum*" element which is not explained as being against the law materially or formally. This element has multiple interpretations and is contrary to legal policies regarding the press, elections and public information disclosure. Second, the element "yang dapat mengakibatkan kerugian Subjek Data Pribadi" is formulated formally and is not defined as a criminal complaint or ordinary criminal act.

Normative legal research methods are used to answer the formulation of legal issues in this article. The approach used is a statutory approach and a conceptual approach. Primary and secondary legal materials are used taking into account the available non-legal materials. The material collection technique is carried out through documentation techniques (library study). The analysis in this article is prescriptive.

Melawan Hukum

Kitab Undang-Undang Hukum Pidana 1946 (The 1946 Indonesian Criminal Code, hereinafter referred to as "*KUHP 1946*") clearly adheres to the principle of legality. The main doctrine is that no act can be punished without first being regulated in criminal legislation. One meaning is that the state can enforce criminal law against

legal subjects who commit a criminal act when it has previously been determined by criminal legislation that the criminal act is prohibited from being committed.

The phrase criminal legislation above emphasizes that these regulations must be stated in writing. In other words, the formulation of the principle of legality in the *KUHP 1946* only recognizes the existence of the validity of written legal sources as a basis for declaring an act (*feit*) as an act that can be punished (*strafbaarfeit*). As a consequence, only the principle of formal legality is recognized, that is, law is defined as mere law, in this case the *KUHP 1946*.

From a legal perspective, an act does not have the character of being against the law until the act is given a prohibited character by including it as prohibited in statutory regulations. This means that the prohibited nature originates from its inclusion in statutory regulations. This formal view is also adopted by the *Mahkamah Agung Republik Indonesia* (Supreme Court of the Republic of Indonesia, hereinafter referred to as "*MARI*") as in its consideration of decision No. 30 K/Kr/1969, dated June 6, 1970, "in every criminal act there is always an "element of the unlawful nature" of the alleged acts, even though the formulation of the offense is not always included (dalam setiap tindak pidana selalu ada "unsur sifat melawan hukum" dari perbuatan-perbuatan yang dituduhkan, walaupun dalam rumusan delik tidak selalu dicantumkan)".[5]

However, in criminal law, there are 2 (two) opinions regarding going "*melawan hukum*" (*wederrechteijkheid*). First, the nature of formally violating the law, namely actions that fulfill the formulation of the law, unless there are exceptions that have been determined in the law as well. For this opinion, going against the law means going "*melawan hukum*", because the law is the law.[6] In criminal justice practice, judges remain bound by the formulation of the law, so that what must be proven is only what is expressly formulated in the law in the context of evidentiary efforts.

Second, the "*sifat melawan hukum secara materiil*" (*material wederrechtelijkeheid*), that is, it is not necessarily the case that an act that meets the formulation of the law is against the law. According to this opinion, what is called law

[5] Adami Chazawi, *Pelajaran Hukum Pidana 1* (Jakarta: Rajawali Pers, 2020), 86–87.
[6] Sofjan Sastrawidjaja, *Hukum Pidana (Asas Hukum Pidana Sampai Dengan Alasan Peniadaan Pidana)* (Bandung: Armico, 1995), 150.

is not only law (written law), but also includes unwritten law, namely the rules or realities that apply in society.[7] Dalam hal ini, perlu kiranya untuk menentukan apakah perbuatan si pelaku merupakan perbuatan yang dipandang tercela atau tidak oleh masyarakat.

In criminal justice practice, breaking the "*melawan hukum secara materiil*" will come into contact with the sense of justice that exists in society. The measure of the "*sifat melawan hukum secara materiil*" terms lies in whether an act is considered reprehensible or not by society, which is assessed by the judge through the facts at trial based on philosophical, juridical and sociological considerations. This practice is known to have a positive function as a result of teachings about the "*sifat melawan hukum secara materiil*" which is prevented from being implemented considering the existence of the principle of legality that applies to the Indonesian criminal law system.[8]

In doctrine, the "*melawan hukum secara materiil*" in its negative function places material legal sources (things, criteria or norms outside the law) that can be used as a reason to negate or eliminate (negative) the "*melawan hukum*" of an act.[9] The *MARI*'s uses this doctrine, among others, in *MARI*'s Decision No. 42/K/Kr/1965, January 8, 1966; *MARI*'s Decision No. 43K/Kr/1973, dated July 23, 1973; and *MARI*'s Decision No. 81K/Kr/1973, dated December 16, 1976.[10]

Meanwhile, the "*melawan hukum secara materiil*" in its positive function places material legal sources (things, criteria or norms outside the law) that can be used to state (positively) an act is still seen as a criminal act even though according to the law, it is not a criminal offense.[11] The *MARI*'s used this doctrine, among others, in *MARI*'s Decision No. 275K/Pid/1983, dated December 29, 1983; *MARI*'s Decision

[7] Ibid., 151.
[8] Sudharmawatiningsih, "Sifat Melawan Hukum Materiil Dalam Tindak Pidana Korupsi (Respon Terhadap Putusan Mahkamah Konstitusi)," *Jurnal Ilmiah Hukum dan Dinamika Masyarakat* 5, no. 1 (2007): 11–20.
[9] Barda Nawawi Arief, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan* (Bandung: PT Citra Aditya Bakti, 2011), 8.
[10] Ibid., 16.
[11] Ibid., 8.

No. 2477K/Pid/1988, dated March 20, 1993; and *MARI*'s Decision No. 1571K/Pid/1993, dated January 18, 1995.[12]

Undang-Undang Republik Indonesia Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi (Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Corruption Crimes) as amended by *Undang-Undang Republik Indonesia Nomor 20 Tahun 2001* (Law of the Republic of Indonesia Number 20 of 2001) actually adheres to the doctrine of "*melawan hukum*" both materially and formally. Also, adhering to the doctrine of the "*melawan hukum secara materiil*" in its positive function with the criterion that actions that are not regulated in law are seen as "disgraceful acts" because they are not in accordance with a sense of justice and are not in accordance with the norms of social life in society.[13] However, the decision of the Mahkamah Konstitusi Republik Indonesia (Constitutional Court of the Republic of Indonesia) Number: 003/PUU-IV/2006, dated July 25, 2006, decided that "*sifat melawan hukum materiil*" was no longer adhered to in the legal norms governing criminal acts of corruption in Indonesia.[14]

According to Andi Hamzah, breaking the "*melawan hukum secara materiil*" must only be meant in a negative sense. This means that if there is nothing against the law (material), then it is the basis for justification. When imposing a crime, it must only be used to "*melawan hukum secara formil*". This means, only those that conflict with written positive law, for reasons of the principle "*nullum crimen sine lege stricta*" stated in Article 1 paragraph (1) of the *KUHP 1946*. If it is allowed to implement positive "*melawan hukum secara materiil*", it will endanger legal order, and legal arbitrariness could even arise.[15]

From the two opinions above, it can be interpreted, firstly, that both those with a material view and those with a formal view actually share the view that a person cannot be punished for an act that is not regulated by law, as regulated in Article 1 paragraph (1) *KUHP 1946*. Second, they share the view that "*melawan hukum*" must be proven if it has been explicitly stated as an element of the formulation of a

[12] Ibid., 16.
[13] Ibid., 10.
[14] Read more, Mahkamah Konstitusi Republik Indonesia, *Putusan Mahkamah Konstitusi Republik Indonesia Nomor: 003/PUU-IV/2006, Tanggal 25 Juli 2006* (2006).
[15] Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2021), 130–131.

criminal act.[16] This meaning actually further emphasizes that "*melawan hukum*" in the context of criminal law cannot be separated from the consequences of adhering to the principle of legality in the *KUHP 1946*.

Furthermore, a discussion regarding the urgency of including the element "*melawan hukum*" in the formulation of criminal acts needs to be addressed in this article. The element "*melawan hukum*" needs to be included in the formulation of a criminal act, because there are definitely similar acts that are not against the law, so that if the element "*melawan hukum*" is not included in the formulation, the person who has the right to commit the act will also be punished. The stance of the creators of the *KUHP 1946* is very reasonable and understandable considering that criminal law regulates the nature of going against formal law in terms of punishment, as is clearly stated in Article 1 paragraph (1) of the *KUHP 1946*.[17]

On the other hand, if the "*melawan hukum*" element is not mentioned in the formulation of the criminal act, then it does not need to be included in the indictment, so it does not need to be proven in court.[18] In a contrario, if the element "*melawan hukum*" is included as one of the elements in the formulation forming a criminal act and is not proven at trial, then the verdict is acquittal (*vrijispraak*). So, the element "*melawan hukum*" as one of the elements in the formulation of a criminal act must be included in the indictment and that is what must be proven.[19]

Referring to the doctrine of "*melawan hukum*" above, first, the element of "*melawan hukum*" in criminalization related to the protection of personal data (*UU No. 27 Tahun 2022*) should be interpreted as formally of "*melawan hukum*". This means that legal subjects can be punished based on the articles in *UU No. 27 Tahun 2022*. In other words, matters outside the provisions of *UU No. 27 Tahun 2022* cannot be used as a basis for declaring that a legal subject has committed a criminal act related to the protection of personal data.

[16] Shinta Agustina et al., *Penjelasan Hukum: Sifat Melawan Hukum Dalam Kasus Korupsi* (Jakarta: Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), 2016), 59.
[17] Chazawi, *Pelajaran Hukum Pidana 1*, 88.
[18] Ibid.
[19] Look, Hamzah, *Hukum Pidana Indonesia*, 131.

Second, the inclusion of the element "*melawan hukum*" in every criminalization in *UU No. 27 Tahun 2022* confirms that there are similar acts that are not unlawful outside of *UU No. 27 Tahun 2022*. The meaning, for example, is that the act of "*mengungkapkan Data Pribadi yang bukan miliknya*" by a journalist in the context of responsible journalistic work cannot be called a criminal act according to *UU No. 27 Tahun 2022*, because *Undang-Undang Republik Indonesia Nomor 40 Tahun 1999 tentang Pers* (Law of the Republic of Indonesia Number 40 of 1999 concerning the Press) protects it.

Third, the element of "*melawan hukum*" is clearly stated in every criminalization related to the protection of personal data (*UU No. 27 Tahun 2022*). As a consequence, law enforcers must include in the indictment as well as be able to prove the element of "*melawan hukum*" when there is a legal subject who is suspected of committing a criminal act within the scope of *UU No. 27 Tahun 2022*. Thus, if the "*melawan hukum*" element is not proven at trial, then the verdict is acquittal (*vrijispraak*).

Tindak Pidana Aduan

The *KUHP 1946* divides criminal acts, among other things, into "*tindak pidana biasa*" (ordinary criminal acts or *gewone delicten*) and "*tindak pidana aduan*" (criminal acts of complaints, commonly called "*delik aduan"* or "*klacht delicten"*). The "*tindak pidana biasa*" are criminal acts that are not "*tindak pidana aduan*" and to prosecute them there is no need for a complaint.[20] The "*tindak pidana biasa*" can be processed without the consent or report of the injured party (victim). In practice, even though the victim has reconciled with the suspect, the legal process cannot be stopped and continues until court.

Meanwhile, the "*tindak pidana aduan*" is a criminal act that can only be prosecuted if it is complained about by a person who feels aggrieved. The articles in the *KUHP 1946* that are included as criminal complaints are Article 284 of the *KUHP 1946*, Article 287 of the *KUHP 1946*, Article 293 of the *KUHP 1946*, Article 319 of the

[20] Moch Choirul Rizal, *Buku Ajar Hukum Pidana* (Kediri: Lembaga Studi Hukum Pidana, 2021), 141.

KUHP 1946, Article 320 of the *KUHP 1946*, Article 321 of the *KUHP 1946*, Article 332 of the *KUHP 1946*, Article 335 of the *KUHP 1946*, Article 367 of the *KUHP 1946*, and Article 369 of the *KUHP 1946*. Then, regulations regarding complaints in the case of criminal acts that can only be prosecuted based on complaints can be found in Article 72 of the Criminal Code, Article 73 of the *KUHP 1946*, Article 74 of the *KUHP 1946*, and Article 75 of the *KUHP 1946*.[21]

Article 72 of the *KUHP 1946* determines, as long as the person is affected by a crime which can only be prosecuted based on a complaint, and the person is not yet 16 (sixteen) years old and is still not an adult, or as long as he is under custody due to something other than extravagance, then his legal representative in civil cases who has the right to complain. If there is no representative, or the representative himself must be complained about, then the prosecution is carried out based on the complaint of the supervisory guardian or supervisory guardian, or the panel that is the supervisory guardian or supervisory guardian; also possibly on the complaint of his wife or a blood relative in a straight line, or if there are none, on the complaint of a blood relative in a deviated line up to the third degree. Meanwhile, Article 73 of the *KUHP 1946* stipulates that if the person affected by the crime dies within the specified time limit, then without extending the time period, prosecution will be carried out based on complaints from their parents, children or surviving husband (wife), unless it turns out that the person who died did not want it. prosecution.

Article 74 of the *KUHP 1946* stipulates that complaints may only be submitted within 6 (six) months after the person entitled to complain becomes aware of the crime, if they reside in Indonesia, or within 9 (nine) months if they reside outside Indonesia. If the person affected by the crime has the right to complain while the time limit has not yet expired, then after that time, complaints may still be submitted only for the remainder of the time limit. The expiry period is excluded in the case of obscene acts as regulated in Article 293 of the *KUHP 1946*, namely the grace period is 9 (nine) months if you are in Indonesia or 12 (twelve) months if you are outside Indonesia.

[21] Ibid., 135–138.

Article 74 of the *KUHP 1946* contains the principle "*omnes actiones in mundo infra certa tempora habent limitationem*", which means that every case has a time limit for filing a lawsuit. The reason is, first, from the perspective of material criminal law, there is no longer a need for punishment by society because of the passage of time. Second, from the perspective of formal criminal law, in this case the problem of evidence, the limited ability of human memory and natural conditions that allow evidence to disappear or have no evidentiary value. As time passes, perhaps the evildoer will change for the better. This argument is more or less the same as the purpose of regulating statute of limitations in the *KUHP 1946*.[22]

Then, Article 75 of the *KUHP 1946* stipulates that the person who files a complaint has the right to withdraw it within 3 (three) months after the complaint is submitted. This provision on whether a complaint may be withdrawn provides the possibility that after the complaint is submitted, the complainant changes his or her mind, because, for example, the person making the complaint has apologized and expressed regret, then the complainant can withdraw the complaint as long as it is within 3 (three) months after the complaint was submitted. The consequence is, first, the public prosecutor loses his authority to carry out prosecutions. Second, if the application process has been carried out in court, the charges will be withdrawn. Third, if the indictment is continued, the judge must decide to stop the process.[23]

In criminal law, "*tindak pidana aduan*" are divided into 2 (two) types. First, the "*tindak pidana aduan absolut*" (criminal act of absolute complaint or *absolute klacht delicten*), namely a criminal act that is caused by the nature of the crime, so this criminal act can only be prosecuted if it is complained of, for example Article 284 of the *KUHP 1946*[24]. Second, the "*tindak pidana aduan relatif*" (crime of relative

[22] Alodia Pandora, "Analisis Pertimbangan Hakim Mengadili Delik Aduan Turut Serta Melakukan Zinah Yang Telah Kedaluwarsa (Studi Putusan Mahkamah Agung Nomor 360/K/MIL/2017)," *Verstek: Jurnal Hukum Acara* 9, no. 1 (2021): 55–62.

[23] Muhammad Yusuf Siregar et al., "Analisis Putusan Hakim Peradilan Pidana Terhadap Pencabutan Perkara Delik Aduan (Studi Putusan Mahkamah Agung No. 1600/K/PID/2009)" 1, no. 1 (2014): 186–199.

[24] Article 284 of the *KUHP 1946* regulates, "(1) *Diancam dengan pidana penjara paling lama sembilan bulan: 1. a. seorang pria yang telah kawin yang melakukan gendak (overspel), padahal diketahui bahwa Pasal 27 BW berlaku baginya; b. seorang wanita yang telah kawin yang melakukan gendak, padahal diketahui bahwa Pasal 27 BW berlaku baginya; 2. a. seorang pria yang turut serta melakukan perbuatan itu, padahal diketahuinya*

complaint or *relatieve klacht delicten*), namely a crime which is basically a criminal act, but is caused by a very close family relationship between the victim and the perpetrator or accomplice of the crime, so the crime can only be prosecuted if the complaint is made by the victim, for example, Article 367 paragraph (2) of the *KUHP 1946*[25].[26]

Quoting from a book by P.A.F Lamintang, considerations on why certain criminal acts in the *KUHP 1946* require complaints can be found in *Memorie van Toelichting*:[27]

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bahwa yang turut bersalah telah kawin; b. seorang wanita yang telah kawin yang turut serta melakukan perbuatan itu, padahal diketahui olehnya bahwa yang turut bersalah telah kawin dan pasal 27 BW berlaku baginya (Threatened with a maximum imprisonment of nine months: 1. a. a married man who commits overspel, even though it is known that Article 27 BW applies to him; b. a married woman who commits gendak, even though it is known that Article 27 BW applies to her; 2. a. a man who participates in committing the act, even though he knows that the person involved is married; b. a married woman who participates in committing the act, even though she knows that the person who is also guilty is married and article 27 BW applies to her). (2) *Tidak dilakukan penuntutan melainkan atas pengaduan suami/istri yang tercemar, dan bilamana bagi mereka berlaku Pasal 27 BW, dalam tenggang waktu tiga bulan diikuti dengan permintaan bercerai atau pisah meja dan ranjang karena alasan itu juga* (Prosecution is not carried out but based on complaints from husbands/wives who are contaminated, and if Article 27 BW applies to them, within a three month grace period followed by a request for divorce or separate tables and beds for that reason as well). (3) *Terhadap pengaduan ini tidak berlaku Pasal 72, 73, dan 75* (Articles 72, 73 and 75 do not apply to this complaint). (4) *Pengaduan dapat ditarik kembali selama pemeriksaan dalam sidang pengadilan belum dimulai* (The complaint can be withdrawn as long as the examination in the court session has not begun. (5) *Jika bagi suami-istri berlaku Pasal 27 BW, pengaduan tidak diindahkan selama perkawinan belum diputuskan karena perceraian atau sebelum putusan yang menyatakan pisah meja dan tempat tidur menjadi tetap* (If Article 27 BW applies to a husband and wife, the complaint will not be heeded as long as the marriage has not been dissolved due to divorce or before the decision states that the separate table and bed are permanent)."

[25] Article 367 paragraph (2) of the *KUHP 1946* regulates, "*Jika dia adalah suami (istri) yang terpisah meja dan ranjang atau terpisah harta kekayaan, atau jika dia adalah keluarga sedarah atau semenda, baik dalam garis lurus maupun garis menyimpang derajat kedua maka terhadap orang itu hanya mungkin diadakan penuntutan jika ada pengaduan yang terkena kejahatan* (If he is a husband (wife) who has separate tables and beds or separate assets, or if he is related by blood or marriage, either in a straight line or a second degree deviation, then prosecution can only be held against that person if there is a complaint that they are involved in a crime)."

[26] Sastrawidjaja, *Hukum Pidana (Asas Hukum Pidana Sampai Dengan Alasan Peniadaan Pidana)*, 142. According to W.P.J. Pompe, in absolute complaint crimes it is sufficient if the complainant only mentions the incident, whereas in relative complaint crimes the complainant must also mention the person he suspects has harmed him. Look, P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Bandung: Sinar Baru, 1984), 209.

[27] Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, 208.

> *Menurut Memorie van Toelichting, disyaratkannya suatu pengaduan pada beberapa tindak pidana (disesuaikan oleh penulis) tertentu adalah berdasarkan pertimbangan bahwa ikut campurnya penguasa di dalam suatu kasus tertentu itu mungkin akan mendatangkan kerugian yang lebih besar bagi kepentingan-kepentingan tertentu dari orang yang telah dirugikan daripada kenyataan, yakni jika penguasa telah tidak ikut campur di dalam kasus tersebut. Sehingga keputusan apakah seseorang yang telah merugikan itu perlu dituntut atau tidak oleh penguasa, hal tersebut diserahkan kepada pertimbangan orang yang telah merasa dirugikan* (According to *Memorie van Toelichting*, the requirement for a complaint for certain criminal acts (adjusted by the author) is based on the consideration that the intervention of the authorities in a particular case may cause greater harm to the particular interests of the person who has been harmed than is actually the case, namely if the authorities have not interfered in the case. So, the decision whether someone who has caused harm should be prosecuted or not by the authorities is left to the consideration of the person who has felt harmed.

The concept of "*tindak pidana aduan*" will touch, among other things, a discussion of the private and public dimensions of applicable law. The criteria are, first, the legal interests being protected. If the substance of a legal field is more oriented towards providing protection for individual interests, then that legal field is said to be private law. Second, the position of the parties in the eyes of law (state). If the parties involved in a lawsuit before state law have an equal position and are individual, this is referred to as private law. Third, the party who defends interests. If the party who maintains an interest in a violation of law before state law is an individual, then this area of law is called private law.[28]

It turns out that the element "*yang dapat mengakibatkan kerugian Subjek Data Pribadi*" in Article 67 paragraph (1) of *UU No. 27 Tahun 2022* does not confirm

[28] Yasser Arafat, "Penyelesaian Perkara Delik Aduan Dengan Perspektif Restorative Justice," *Borneo Law Review* 1, no. 2 (2017): 127–145.

that it is a "*tindak pidana aduan*". In this way, all provisions regarding "*tindak pidana aduan*" regulated under the *KUHP 1946* cannot be applied in law enforcement for violations of Article 67 paragraph (1) of *UU No. 27 Tahun 2022*. This means that anyone can report to investigators the alleged occurrence of a criminal act that could result in loss to the subject of personal data, as within the scope of the regulations of *UU No. 27 Tahun 2022*, there is no expiry date for complaints, as is the case in "*tindak pidana aduan*".

In fact, when referring to the conception of the private and public dimensions of an applicable law, criminalization in Article 67 paragraph (1) of *UU No. 27 Tahun 2022* can be said to fall under private law. The reason is that the phrase "kerugian Subjek Data Pribadi" is sufficient to describe, firstly, the orientation of the protection is towards individuals. Second, the position of "subjek data pribadi" in *UU No. 27 Tahun 2022* is in an equal position and of course individual. Third, legal interests that are maintained before the state, especially criminalization in Article 67 paragraph (1) of *UU No. 27 Tahun 2022*, is personal interest. These three descriptions can actually be a benchmark to confirm, and should be, Article 67 paragraph (1) of *UU No. 27 Tahun 2022* is formulated as a "*tindak pidana aduan*".

However, Article 67 paragraph (1) of *UU No. 27 Tahun 2022* turns out to be a formally formulated criminal act. This can be seen from the use of the word "*dapat*" in the element "yang dapat mengakibatkan kerugian Subjek Data Pribadi". A criminal act with a formal formulation does not question the consequences of committing the criminal act. This means that as long as an action fulfills the elements as formulated in the article which is included as a criminal act with a formal formulation, the perpetrator can be punished regardless of whether there are consequences or not.[29] The division of criminal acts with formal and material formulations is important for teachings, including trial (*pogging*) and inclusion (*deelneming*). Regarding attempts to commit a criminal act with a formal formulation, for example, the attempt is deemed to have occurred when part of the prohibited act is carried out.[30]

[29] Rizal, *Buku Ajar Hukum Pidana*, 125.
[30] Sastrawidjaja, *Hukum Pidana (Asas Hukum Pidana Sampai Dengan Alasan Peniadaan Pidana)*, 136.

This means that, without the need for any loss to occur or the potential for loss to occur, it is sufficient reason for the personal data subject to report an alleged violation of Article 67 paragraph (1) of *UU No. 27 Tahun 2022* to investigators. However, such a regulation, which is also not confirmed as a criminal act of complaint, opens up a gap for multiple interpretations regarding potential losses as to what needs to be concreted so that it can fulfill the elements forming the criminalization formula in Article 67 paragraph (1) of *UU No. 27 Tahun 2022*. Such loopholes will add to the complexity of fulfilling impartial criminal justice.

Conclusion

Criminalization related to the protection of personal data still remains a problem and needs to be interpreted. First, the element "*melawan hukum*" in *UU No. 27 Tahun 2022* must be interpreted as formally against the law, so that it cannot be used to criminalize legal subjects who commit acts similar to those prohibited in *UU No. 27 Tahun 2022*, but is protected by other laws, such as the press. Furthermore, in law enforcement, the element "*melawan hukum*" must be included in the indictment and proven at trial.

Second, Article 67 paragraph (1) *UU No. 27 Tahun 2022* turns out to be a formally formulated criminal act. Such an arrangement, which is also not confirmed as a criminal act of complaint, opens up the possibility of multiple interpretations regarding potential losses as to what needs to be concreted. This gap will threaten the provision of impartial criminal justice. In the future, efforts to concretize potential losses in criminal acts related to personal data protection need to be accelerated.

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