



THE EXISTENCE OF COMPLAINT OFFENSE DELICT AND COMMON DELICT IN NORMATIVE AND EMPIRICAL PERSPECTIVES

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Abstract

*Regulations regarding complaint offense delict and common delict in substantive criminal law in Indonesia are dependent on the type of delict. There are two types of delicts in relation to case processing, namely complaint offense delict and common delict. In common delict, the case can be processed without the consent of the victim. On the other hand, complaint offense delict is divided into absolute complaint offense delict and relative complaint offense delict. To determine whether a delict falls under complaint offense or common delict, it can be determined by reading the article or chapter in the Indonesian Criminal Code (KUHP) where the criminal act is stated. If the article or chapter does not state that it is a complaint offense, then it is considered a common delict, which must be prosecuted *ex officio* (without a complaint). Complaint offense delicts can result in undisclosed crimes, such as in Article 369 of the Criminal Code. Therefore, if the complaint offense delict in that article is treated as a common delict (not a complaint offense), the person who holds the secret may suffer further losses because their secret will be exposed. The victim must choose whether to file a complaint, risking the disclosure of their secret, or not. Therefore, this delict remains mostly hidden as a hidden crime. Another example is the potential disruption of someone's civil interests if a complaint offense, especially in cases of adultery, is treated as a common delict.*

Keywords: Criminal Law, Common Delict, Complaint Offense.

1. INTRODUCTION

Criminal act is an act that is prohibited by a legal provision accompanied by a threat (sanction) in the form of a specific punishment for anyone who violates that prohibition. It can also be said that a criminal act is an act that is prohibited and punishable by law, as long as it is understood that the prohibition is directed at the act itself (a condition or event caused by a person's behavior), while the criminal threat is directed at the person who caused the event.¹ Criminal acts are distinguished into two categories, namely complaint offense and common offense. Complaint offense is a criminal act that can only be prosecuted if there is a complaint from the affected or injured party. Complaint offense is further divided into two types, namely absolute complaint offense and relative complaint offense. The first type is a delict that absolutely requires a complaint for prosecution, such as defamation regulated in Article 310 of the Indonesian Criminal Code (KUHP). The second type is a delict committed within the family environment, such as theft within the family as stipulated in Article 367 of the KUHP. On the other hand, common offense is a delict that does not require a complaint for prosecution, such as murder, theft, and embezzlement.²

According to R. Soesilo, complaint offense refers to a delict that can only be prosecuted if there is a complaint from the victim of that delict. For example, defamation (Article 310 of the Indonesian Criminal Code), adultery (Article 284 of the Indonesian Criminal Code), and theft within the family (Article 367 of the Indonesian Criminal Code) are considered complaint offenses. On the other hand, common offense refers to a delict that, due to its nature, must be prosecuted by the government without requiring a complaint. For instance, murder (Article 338 of the Indonesian Criminal Code) and assault (Article 351 of the Indonesian Criminal Code) are considered common

¹ Moeljatno, *Asas-asas Hukum Pidana*, Rineka Cipta, Jakarta, 2008, hlm. 59.

² Mahrus Ali, *Dasar-dasar Hukum Pidana*, Sinar Grafika, Jakarta, 2011, hlm. 103.

offenses.³ The determination of a delict as a common offense or complaint offense is a matter of policy. In matters of policy, it involves various factors, considerations, and alternative choices. Therefore, the presence or absence of prominent private interests is just one factor among many that needs to be taken into account, and it is not the sole determining factor.⁴

Based on the description above, this study chooses the theme of complaint offense and common offense in the normative order and their implementation in the enforcement of substantive criminal law with the title "The Existence of Complaint Offense Delict and Common Delict in Normative and Empirical Perspectives." The main issues in this study are: First, how is the regulation of complaint offense and common offense in substantive criminal law in Indonesia? Second, what is the existence of complaint offense and common offense in the implementation of substantive criminal law in Indonesia?

2. IMPLEMENTATION METHOD

This research is a normative legal research. The data collection method used in this study is through literature review by examining relevant literature related to the research object. Data analysis in this research is conducted systematically based on the research issues outlined qualitatively.

3. RESULTS AND DISCUSSION

3.1 Regulation of Complaint and Common Offense Delict in Substantive Criminal Law in Indonesia

Complaint offense delict can be understood as a situation where the police or public prosecutor can only take action against a violation that has occurred after receiving a report or claim from the party who feels aggrieved.⁵ On the other hand, common offense, as referred to in this study, means that the police or public prosecutor can take action against a violation that has occurred without the need for a report or claim from the party who feels aggrieved.

According to Wirjono Prodjodikoro, law consists of a series of regulations regarding the behavior of individuals as members of society, and the sole purpose of law is to establish safety, happiness, and order in society. Criminal acts can be differentiated based on certain criteria, namely:

1. According to the Indonesian Criminal Code (KUHP) system, a distinction is made between crimes (*misdrifven*) contained in Book II and offenses (*overtredingen*) contained in Book III.
2. Based on their formulation, a distinction is made between formal criminal acts (*formeel delicten*) and material criminal acts (*materieel delicten*).
3. Based on the intention, there is a distinction between intentional criminal acts (*doleus delicten*) and criminal acts committed without intent (*culpose delicten*).
4. Based on the nature of the act, there is a distinction between active/positive criminal acts, also known as commission offenses (*delicta commissionis*), and passive/negative criminal acts, also known as omission offenses (*delicta omissionis*).
5. Based on the timing and duration, there is a distinction between instantaneous criminal acts and criminal acts that occur over a long period or are continuous.
6. Based on their source, there is a distinction between general criminal acts and specific criminal acts.
7. From the perspective of the subject of law, there is a distinction between common criminal acts (*communia delicten*) that can be committed by anyone, and specific criminal acts (*propria delicten*) that can only be committed by individuals with certain personal qualifications.

³ R. Soesilo, *Pokok-pokok Hukum Pidana: Peraturan Umum dan Delik-delik Khusus*, Politea, Bogor, 1984, hlm. 24.

⁴ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*, Kencana, Jakarta, 2011, hlm. 282.

⁵ Sudargo Gautama dan Rizawanto Winata, *Hak Atas Kekayaan Intelektual (HAKI): Peraturan Baru Desain Industri*, PT. Citra Aditya Bakti, Bandung, 2004, hlm. 64.



8. Based on the requirement for a complaint in the prosecution, there is a distinction between common offenses (*gewone delicten*) and complaint offenses (*klacht delicten*).
9. Based on the severity of the prescribed punishment, there is a distinction between simple criminal acts (*eencoudige delicten*), aggravated criminal acts (*gequalificeerde delicten*), mitigated criminal acts (*gequalificeerde delicten*), and privileged criminal acts (*geprivilegieerde delicten*).
10. Based on the legal interests protected, criminal acts can vary depending on the protected legal interests, such as crimes against life and body, property offenses, forgery offenses, defamation offenses, offenses against morality, and so on.
11. In terms of the number of acts required to constitute an offense, there is a distinction between single criminal acts (*ekelovoudige delicten*) and composite criminal acts (*samengestelde delicten*).⁶

From the above description, it is known that one type of criminal act is differentiated based on the requirement for a complaint in the prosecution, namely common offenses (*gewone delicten*) and complaint offenses (*klacht delicten*).

Complaint offenses (*klachtdelict*) are criminal acts that can only be prosecuted based on a complaint from the interested or affected party. For example, defamation, adultery, and extortion. The number of complaint offenses in the Indonesian Criminal Code (KUHP) is not significant. The determination of who is considered an interested party depends on the type of offense and the existing provisions. For adultery, for example, the interested parties are the respective husband or wife. There are two types of complaint offenses: absolute complaint offenses, where prosecution is solely based on a complaint, and relative complaint offenses, where there is a special relationship between the perpetrator and the victim, such as theft within the family (Article 367, paragraphs (2) and (3) of the KUHP). Some time ago, there was a proposal to no longer classify adultery as a complaint offense but as a common offense. However, this proposal faced opposition, as it could have more severe consequences. In the process of apprehension, a layperson can make an arrest if the perpetrator is caught red-handed, meaning caught in the act. On the other hand, in cases of book or cassette piracy, and similar offenses, which were previously considered complaint offenses under the new Copyright Law, they are now classified as non-complaint offenses.⁷

Until now, copyright infringement has been classified as a complaint offense (*klachtdelict*). This means that investigation and prosecution by the police and related agencies, as well as the imposition of criminal sanctions, can be carried out by the public prosecutor based on complaints from the affected parties, including creators, license holders, members of the public as consumers, and the state as the recipient of taxes. This complaint offense takes the form of an absolute complaint offense (*absolute klachtdelict*), which means that criminal proceedings can only be initiated if there is a complaint. However, with the enactment of Law No. 19 of 2002, copyright infringement has become a common offense that can be criminally punishable for anyone who commits it. This change was made by the government as an effort to respect intellectual property rights (IPR), considering that copyright infringement has become an illegal business that harms creators and affects tax revenue/foreign exchange income for the country, as well as international perception of Indonesia as a "paradise" for pirates.⁸

Essentially, in a criminal case, the processing of the case is determined by the type of offense involved. There are two types of offenses in relation to case processing: complaint offenses (*delik aduan*) and ordinary offenses (*delik biasa*). In ordinary offenses, the case can be processed without the consent of the victim. This means that even if the victim withdraws their report to the authorities, the investigator is still obligated to process the case. In contrast, in complaint offenses, the offense can only be processed if there is a complaint or report from the victim. According to

⁶ Kukuh Tirta S, *Pengertian Tindak Pidana*, dalam: <http://m.kompasiana.com/post/hukum/2011/10/18/pengertian-tindak-pidana/>, diakses tanggal 3 Maret 2023.

⁷ Teguh Prasetyo, *Hukum Pidana*, PT RajaGrafindo Persada, Jakarta, 2007, hlm. 61.

⁸ Teguh Sulistia dan Aria Zurnetti, *Hukum Pidana: Horizon Baru Pasca Reformasi*, PT RajaGrafindo Persada, Jakarta, 2011, hlm. 275.

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Mr. Drs. E Utrecht in his book *Criminal Law II*, in complaint offenses, the prosecution of the offense depends on the consent of the victim. In complaint offenses, the victim can withdraw their report to the authorities if there has been a reconciliation between them. R. Soesilo divides complaint offenses into two types:

1. Absolute complaint offenses are offenses that can only be prosecuted if there is a complaint, as specified in articles: 284, 287, 293, 310, and so on, 332, 322, and 369. In this case, a complaint is required to prosecute the offense, so the request in the complaint must state: "...I request that this incident be prosecuted." Since it is the incident itself that is prosecuted, anyone involved (perpetrators, instigators, accomplices) in the incident must be prosecuted, and this type of complaint offense cannot be divided. For example, if a husband files a complaint regarding adultery (Article 284) committed by his wife, he cannot demand that the other man who committed adultery with his wife be prosecuted, but he does not want the prosecution against his wife (because he still loves her).
2. Relative complaint offenses are offenses that are usually not complaint offenses, but if committed by specified family members as stated in Article 367, they become complaint offenses. These relative complaint offenses are specified in articles: 367, 370, 376, 394, 404, and 411. In this case, the complaint is required not to prosecute the incident itself, but to prosecute the individuals who are guilty in the incident. Therefore, this type of complaint offense can be divided. For example, if a father's belongings are stolen (Article 362) by his two children named A and B, the father can file a complaint against only one of the two children, for example, A, so B cannot be prosecuted.⁹

For complaint offenses, a complaint can only be filed within six months from the date the eligible person becomes aware of the crime, if residing in Indonesia, or within nine months if residing outside Indonesia (see Article 74 paragraph [1] of the Indonesian Criminal Code). The person who filed the complaint has the right to withdraw the complaint within three months after it was filed (see Article 75 of the Indonesian Criminal Code). Furthermore, R. Soesilo explains that a withdrawn complaint cannot be filed again. However, for the crime of adultery under Article 284, the complaint can be withdrawn as long as the incident has not yet begun to be examined in a court hearing. In practice, before the examination hearing begins, the judge still asks the complainant whether they maintain their complaint. If they do, the examination will proceed. In essence, in complaint offenses, criminal proceedings can only take place with the consent of the victim. If the complaint is later withdrawn within the three-month period after it was filed, the legal process will be terminated. However, if three months have passed and the complaint is not withdrawn or an attempt is made to withdraw it after the three-month period, the legal process will continue. Except for the crime of adultery (see Article 284 of the Indonesian Criminal Code), the complaint can be withdrawn as long as the incident has not yet begun to be examined in a court hearing.¹⁰

According to Winarno Budyatmojo, to determine whether an offense is a complaint offense or an ordinary offense, one can read the article or chapter in the Criminal Code where the offense is listed. If the article or chapter explicitly states that it is a complaint offense, then it falls under that category. If there is no such statement in the article or chapter, then it is considered an ordinary offense, which must be prosecuted by the authorities without a complaint.¹¹

3.2 The Existence of Complaint and Common Offense Delict in the Implementation of Substantive Criminal Law in Indonesia

Complaint Offense Delict can result in an undisclosed crime, as exemplified by the classification of offenses regulated in Article 369 of the Criminal Code, which states:

⁹ Diana Kusumasari, Adakah Delik Aduan yang Tetap Diproses Meski Pengaduannya Sudah Dicaput?, dalam: <http://m.hukumonline.com/klinik/detail/lt4edef75d5869e/adakah-delik-aduan-yang-tetap-diproses-meski-pengaduannya-sudah-dicaput>, diakses tanggal 3 Maret 2023.

¹⁰ *Ibid.*

¹¹ Winarno Budyatmojo, *Hukum Pidana Kodifikasi*, LPP UNS dan UNS Press, Surakarta, 2009, hlm. 85.



- (1) Whoever, with the intention of benefiting themselves or others unlawfully, threatens to disclose a secret in order to force a person to give up their property or someone else's property in whole or in part, or to incur a debt or cancel a debt, shall be punished with imprisonment for a maximum of four years.
- (2) This crime is only prosecuted upon the complaint of the affected person.

According to Andi Hamzah, if this complaint offense (Article 369 of the Criminal Code) is treated as a regular offense instead of a complaint offense, the person who holds the secret might suffer even more because their secret will be exposed. The victim has to choose: to file a complaint and risk the secret being revealed to the public or to refrain from doing so. That is why this offense often remains hidden and classified as a hidden crime.¹²

Another example is the potential disturbance to someone's civil interests if the complaint offense in cases of adultery is treated as a regular offense. This is as expressed by Barda Nawawi Arief, as follows: From a policy perspective, individual interests, especially those of the family members (husband/wife/children) affected by the adultery scandal, should indeed be considered. However, these individual/family interests should be proportionately weighed and not overly dramatized. Dramatized reasoning, for instance, suggests that if it were treated as a regular offense, the police could simply apprehend someone suspected of being involved with someone other than their spouse, and if they could be prosecuted without a complaint, the husband/wife and children would feel ashamed and devastated. This is an exaggeration because it assumes that the police or the applicable criminal procedural law are so naive as to arrest/process someone without minimal evidence. There are many other offenses that are not complaint offenses, yet the police do not act recklessly or arbitrarily by apprehending someone based on mere suspicion. The issue of feeling ashamed and devastated is merely an incidental consequence. Regardless of the offense committed (such as theft, fraud, embezzlement, rape, corruption, and so on, which are all non-complaint offenses), if the perpetrator is brought to court, the family members (husband/wife/children, etc.) will also feel "ashamed and devastated." Even in the case of adultery (which is treated as a complaint offense), if the wife files a complaint and demands action against her husband, the incidental impact would still exist.¹³

Another explanation is found in the Law on the Elimination of Domestic Violence, where only a few articles of the offense of Domestic Violence (classified as mild) are considered complaint offenses, while the rest are considered regular offenses (based on Article 15 of the Law on the Elimination of Domestic Violence). However, in practice, due to the difficulty of proving and finding witnesses, they are treated as complaint offenses. In order to achieve justice and legal certainty, it is necessary to clarify that acts of domestic violence are not only "complaint offenses" but also "general criminal offenses." By designating acts of physical, psychological, sexual violence, and neglect within households as complaint offenses, it aims to prioritize the interests of the victims. However, in certain cases, such as physical violence and sexual violence, it may be beneficial to reclassify them as regular offenses or general criminal offenses. The consideration for changing complaint offenses to regular offenses is based on the consequences and impact of the criminal acts, which can be proven not only based on the victim's complaint. It is the state's obligation to protect its citizens whose human rights have been violated.¹⁴

Based on the above, the following recommendations are proposed:

1. The articles that fall under regular offenses and complaint offenses (both absolute and relative) should be categorized in separate chapters to make it easier for the public to determine the legal steps they should take, especially for criminal acts classified as complaint offenses.
2. There is a need for substantive, structural, and cultural changes in the legal approach to determining whether an offense should be classified as a regular offense or a complaint offense.

¹² Andi Hamzah, *Delik-delik Tertentu (Speciale Delicten) di dalam KUHP*, Sinar Grafika, Jakarta, 2009, hlm. 86.

¹³ Barda Nawawi Arief, *Op. Cit.*, hlm. 245.

¹⁴ http://www.pps.unud.ac.id/thesis/pdf_thesis/unud-174-1549542702-3.%20bab%20i.%20ii.%20iii.%20iv.%20v.pdf, diakses tanggal 3 Maret 2023.

It is important to avoid the perception that there is no distinction between criminal law and civil law, because when considering the aspect of sanctions, criminal sanctions inflict more suffering on individuals compared to civil sanctions. Additionally, in certain criminal acts, it may be more appropriate for them to be classified as regular offenses rather than complaint offenses in order to protect human rights and uphold justice.

4. CONCLUSION

The conclusions from this study are as follows:

- a. The regulation of complaint offenses and regular offenses in substantive criminal law in Indonesia depends on the type of offense. There are two types of offenses in relation to case processing: complaint offenses and regular offenses. In regular offenses, the case can be processed without the consent of the victim. On the other hand, complaint offenses are divided into absolute complaint offenses (which can only be prosecuted upon complaint, as stated in articles such as 284, 287, 293, 310 and subsequent articles, 332, 322, and 369) and relative complaint offenses (which are usually not complaint offenses, as stated in articles such as 367, 370, 376, 394, 404, and 411). To determine whether an offense falls under complaint offenses or regular offenses, it can be determined by reading the articles or chapters in the Criminal Code (KUHP) where the offense is listed. If there is no statement in the article or chapter indicating it as a complaint offense, then it falls under regular offenses, which are prosecuted *ex officio* (without a complaint).
- b. Complaint offenses can lead to undisclosed crimes, as exemplified in Article 369 of the Criminal Code. Therefore, if the complaint offense in that article is categorized as a regular offense (not a complaint offense), the person who holds the secret might suffer more because their secret could be exposed. The victim must choose whether to make a complaint with the risk of their secret being revealed to the public or not. Hence, this offense tends to remain hidden as a hidden crime. Another example is the potential disruption of someone's civil interests if complaint offenses, particularly in cases of adultery, are treated as regular offenses.

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