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SCHOOL OF POLITICAL AND SOCIAL SCIENCE
Bandar Lampung University, Indonesia

Icon-LBG 2016

The Third International Conference on Law, Business and Governance

PROCEEDINGS

Hosted by
Faculty of Law, Faculty of Economics and Faculty of Social Science
Bandar Lampung University (UBL)



Icon-LBG 2016

THE THIRD INTERNATIONAL CONFERENCE
ON LAW, BUSINESS AND GOVERNANCE 2016

20, 21 May 2016
Bandar Lampung University (UBL)
Lampung, Indonesia

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Organized by:



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PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the Third International Conference on Law, Business and Governance (3th Icon-LBG 2016) organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 46 technical papers were received for this conference.

The participants of the conference come from many well known universities, among others : International Islamic University Malaysia, Unika ATMA JAYA, Shinawatra University, Universitas Sebelas Maret, Universitas Timbul Nusantara, Universitas Pelita Harapan, Universitas Bandar Lampung, Universitas Lampung.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also grateful to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

Bandar Lampung, 21 May 2016

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PUNISHMENT SYSTEM POLICY IN THE PREVENTION EFFORT TO CRIMINAL ACT OF MURDER (CASE STUDY OF MURDER UNDER DRUNKENNESS)

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Abstract

Research on punishment system policy in the prevention effort to criminal act of murder (case study of murder under drunkenness) which aims to answer problems about: (1) How punishment system policy to criminal act of murder which is currently at? (2) How punishment system policy to the criminal act of murder in the future? This research uses a juridical-normative as the main approach and comparative approach, namely the punishment system policy to the criminal act of murder (case study of murder under drunkenness) that exist in the Criminal Code with that is in the concept of the Criminal Code and also comparison problems the criminal act of murder under drunkenness between the concept of the Criminal Code of other countries. Punishment system policy to the criminal act of murder in Criminal Code currently does not mention the issue of commission and omission are clearly so in the punishment matter of criminal act of murder under drunkenness uses of the principle of judge consideration.

Keywords: Punishment System Policy, Criminal act of Murder, Drunkenness

1. INTRODUCTION

1.1. Background

Indonesia as a country based on Pancasila law that aims to protect and create welfare for the people of Indonesia, then it is proper if the law is used as a rule, in which everyone is subject and obedient without exception. As revealed by Barda Nawawi Arief, that: "Business law reform in Indonesia has been started since the inception UUDNRI 1945 can not be separated from the foundation and at the same objectives as formulated also in the Preamble UUDNRI 1945 in brief is" to protect all the people of Indonesia and to promote general welfare based on Pancasila ".¹

One of the criminal offenses committed by the public is a criminal act of murder. Murder criminal offense is one that substantially deviate behavior contrary to legal norms and the norms of religion, as well as endangering the livelihoods and lives of the people. In the criminal act of murder which was subjected to the perpetrator is the soul of a person's life that cannot be replaced by anything. The criminal offense is contrary to Article 28A UUDNRI 1945 which reads: "Everyone has the right to live and to defend life and living". When seen in the book of the Law of Criminal Law, hereinafter referred to as "Criminal Code" that set The provisions of criminal offenses directed against the man's life in Book II Chapter nineteenth Penal Code which consists of thirteen chapters, namely from Article 338 to Article 350 Criminal Code.²

In this case, due to drunk unconscious person should be more scrutiny to how severe the level of unconsciousness that person. Because lately a lot of mass media reported on criminal acts of murder and other crimes caused by drunkenness. According Muhtadi understanding drunk can be interpreted as a psychological condition that can be identified in the form of the common symptoms include slurred speech, balance chaotic, poor coordination, face blush, red eyes, and behavior-behavior other strange, that a person who used to get drunk sometimes referred to as a alcoholics or heavy drinkers.³

¹Barda Nawawi Arief, 2001, *Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan*, Bandung, PT.Citra Aditya Bhakti, pg. 73.

²P.A.F., Lamintang, Theo Lamintang, 2012, *Delik-Delik Khusus Kejahatan Terhadap Nyawa, Tubuh, dan Kesehatan*, Jakarta, Cetakan Kedua, Sinar Grafika, pg. 11

³Muhtadi, 2004, *Ilmu Kedokteran*, Semarang: Unissula Press, pg. 93

A problem how to assess one's deeds are done in a drunken state. Alcohol can cause intoxication (poisoning, anesthesia) of the brain. Drinks as if lead psychoseacuut, with signs characteristics, among others euphorie (great feeling, joy), lost kotrol morale, lack of self-criticism, feeling great, looking trivial to hazards, concentration a bit, which means that the state of the soul has the ability to be responsible.⁴

Problematic criminal system policy in the fight against the crime of murder (homicide case study in a drunken state) was interesting authors to study it more deeply. Therefore, in this article the authors formulate legal formulation of the problem:

1. What policies criminal system the crime of murder in force today?
2. What policies criminal system the crime of murder in the future?

2. REASEARCH METHOD

Legal research conducted by examining the literature or secondary data called a normative legal research include: A study of the principles of law; Research on the systematics of the law; Research on the degree of vertical and horizontal synchronization; Comparative law; legal history. So the research used by the author is a normative juridical approach.⁵ The research method of data using measures to identify the legal facts about the system of criminal liability criminal offense of murder in a drunken state to collect materials relating to the crime of murder in a drunken state. Data analysis is conducted qualitatively by analyzing the juridical is trying to provide the data and assess it then analyzes the problems that exist with regard to the policy system of punishment in the fight against the crime of murder in a drunken state with criminal law as well as give suggestions to overcome problems efforts to address the problems arising in criminal acts mainly committed murder in a drunken state.

3. DISCUSSION

System Policy Criminalization Crime Murder The Moderate Applicable Current

a). Criminalization system Crime Murder According to the Criminal Code

In the Criminal Code now in effect, does not clearly explain the purpose and sentencing guidelines. Oemar Senoaji as quoted by Sudarto, said that the Indonesian legal system is basically written that is a consequence of the legality principle is the principle fundamentail in state law. Although the application of criminal law in Indonesia based on the principle of legality, but in the Judicial Power Law 48 of 2009 mentioned:

- a. Article 5 (1) "Justice and Constitutional Justice shall explore, and understand the values of law and justice in the society";
- b. Article 50 paragraph (1) "The court's decision in addition must contain reasons and grounds of this decision, also includes specific articles and legislations concerned or the source of unwritten laws which serve as the basis to judge.

When looking at the provisions of the articles of the Criminal Code, it will be in line with the opinion of Soedarto stating, "The definition of a criminal is suffering imposed on those who commit acts that meet certain conditions". Thus, the Indonesian Penal Code is still referring to the Dutch legal system, which requires retaliation against any violations committed by the offender.

Basic shape and crimes against life that is a deliberate intention in the killing or take the life of someone either accidentally or deliberately planned regular. Namely intentional killing ordinary purpose or intent to kill arise spontaneously, and deliberately planned the purpose or intention or desire to kill a premeditated, planned in a state of calm and quiet implemented anyway. In the Criminal Code, the mistakes in the criminal act of taking the life of others in the form of deliberately (*dolus*) and unintentional (*culpa*) described in the Penal Code book II of crime. However, the importance of an event it is their intention that is manifested through the actions undertaken to completion and fulfillment of the elements of intent or negligence that elements of the offense can be imposed (criminalized).⁶

⁴Sudarto, *Hukum Pidana1*, *Op.Cit.* pg. 100

⁵Peter Mahmud Marzuki, 2007, *Penelitian Hukum Cetakan Kedua*. Jakarta, Kencana Prenada Media Group, pg. 35

⁶P.A.F. Lamintang, Theo Lamintang, *Delik-Delik Khusus Kejahatan terhadap nyawa*, *Op.Cit.*, pg. 11

b). Implementation Criminalization Crime Murder (taking the life of others) In Case Drunk

Abuse of liquor is the cause of the killings, rapes, fights, traffic accidents and other criminal acts. In conjunction with the criminal offense of murder, fueled by drunkenness or under the influence of liquor can be classified as follows:⁷

- a). The drunken killer who committed the murder involuntarily. for killing drunk so reasonable condition his mind was not aware if he kills someone else.
- b). The drunken killer who committed murder deliberately. preceded by the intention to kill the victim, namely that the perpetrator had the courage to kill.
- c). Killer drunk really drunk, so that the condition of his mind was still conscious mind (although not 100%), but he was still conscious when he killed another person.

To determine the existence of the soul that are defective in growth and a troubled mind because of illness, much needed cooperation among the relevant parties, the expert in psychiatry (psychiatrist or mental health), which in the trial came in the form *Visum et Repertum Psychiatricum*, to be revealed the doer of the deed (suspect) as documentary evidence that can be justified. Here's an example of the case of murder in a drunken state; DECISION No. 908 K / Pid / 2006 Othniel LAYABA were drunk fired pistol towards Ismail Pellu who was passing by on a motorcycle so that the bullet on himself and died.

Based on the analysis of the judge, in ruling No. 908 K / Pid / 2006, the verdict sentencing, the judge will first consider the aggravating factors and mitigating the defendant as described in the ruling. In Article 1 (1) of Emergency Law No. 12 In 1951, criminal liability for the offender without the right to use firearms, ammunition or explosives is something imprisonment of 20 years, whereas in Article 338 of the Criminal Code, the perpetrator shall be sentenced to imprisonment of 15 years.

In its decision, the supreme court judge declared the defendant Othniel Layaba alias Otis has been proven legally and convincingly guilty of committing a criminal act "without the right to use firearms, ammunition or something explosives" and murder in accordance with the first charge and the second the primary of Public Prosecution has proved, and convict the defendant to imprisonment for nine (9) years of reduced period of detention already served by the defendant. Because the appeals of the evidence when it Othniel drunk only by witness statements and not based on "post mortem psikiatricum" (examination of mental health for the benefit of law enforcement).

It can be deduced by the authors of the explanation for the decision of the above that the drunk is not defined in the criminal punishment for the consideration of the judge drunk only be used as an element of information, criminal punishment was decided the judge only focused on clauses set out in the Criminal Code so drunk here is not considered as a reason underprivileged responsible to be punished separately.

System Policy Criminalization Crime Murder In The Future

a). System Policy Criminalization Crime Murder In Criminal Code draft Concept 2012

In contrast to the existing Criminal Code. Inside there is a separate chapter on the concept of "accountability for criminal". The general principles fundamental to criminal accountability this is the principle of "no punishment without fault" (principle culpabilitas). This principle is a principle of humanity is formulated explicitly in Article 37 of the draft as a couple of the legality principle (social principle) and is the embodiment of the idea of balance monodualistik. Formulation of Article 37 paragraph (1) concept, which reads: "No one who commits an offense is liable without fault". Besides the general principle of "no punishment without fault" in Article 37, the concept also formulated the concept of the provision of Article 39 as follows:⁸

- (1) The act can be imprisoned is the act of intentionally to do, unless the laws and regulations expressly determine that an offense committed by negligence can be imprisoned.
- (2) A person can only be justified to the effect of certain criminal offenses by the Act aggravated criminal threat, if he should find out the likelihood of these effects or at least there was negligence.

Elucidation of Article 39 paragraph (2) above for the principle that criminal liability can only be imposed on those who commit acts intentionally. Criminal responsibility of the person who did the act because of negligence, only to be exceptional along defined by the Act. As well as in Article 39

⁷A. Hanafi, 2004, *Azaz-azaz Hukum Pidana Islam*, Jakarta, Bulan Bintang, pg.108

⁸Barda Nawawi Arief, 2012, *Perkembangan Asas-Asas Hukum Pidana Indonesia (Perspektif Perbandingan Hukum Pidana)*, Semarang, Universitas Diponegoro, pg.48

paragraph (3) is intended to regulate the issue of "accountability for the result unwanted or unintended" which remains oriented towards the principle of error, although in the form of soft errors which are not regulated in the Criminal Code today.⁹

In addition, in the chapter on criminal liability concept is also silent on the matter "inability responsible", the issue of accountability for the consequences is not intended / desired / unintentional "erfolgshaftung" and the problem of apostasy (error / dwaling / mistake) all of which are not regulated in the Criminal Code this time, described in Article 40 of the draft as follows: "Any person who commits an offense at the time suffering from a mental disorder, mental illness or mental retardation, cannot be accounted for and punished, but can not be sanctioned".

To be able to say that a person can be responsible decisive factor is their minds. In the event that not able to be responsible, reasonable circumstances maker criminal offense is not functioning normally. Not normal function of sense, caused by changes in mental functions resulting in mental health disorders. So the maker of a criminal offense cannot afford those responsible for certain reasons that can only be explained in terms of the medical. For that judges are required to present an expert witness to explain it, so that the offender was seen or assessed as not able to be responsible.

Mentioned in the article 40 of the Criminal Code regarding the concept of "person suffering from mental disorder". In this case a drunken state can be classified into the chapter. Drunk people medically categorized disturbed mental state even though it did not occur permanently, in other words the mental disorders that occur are temporary. Because at the time the effects of the alcohol is gone, they always come back sane.

For those who consume excessive alcohol, the impact of temporary mental disorders can lead to behaviors that tend be a criminal offense. Ranging from minor criminal offenses such as vandalism and theft of goods to the felonies that can bring casualties. Madness (mental disorder) while (temporary insanity) can be separated from the legal argument that severe criminal penalties. A lighter sentence against the abuse of excessive alcohol consumption might be a consideration of the judge in giving alternative sentences are applied. An explanation of the issue mentioned in article 41 the concept of the Criminal Code of 2012 as follows:¹⁰ "Any person who commits an offense at the time less accountable because of mental disorder, mental illness, or mental retardation, lacked or punishment may not be sanctioned."

In Article 41 the concept of what is meant by "less accountable" is the mental instability on someone to direct the will or his will within the framework of accountability. In such case, the crime of criminal offenses maker rated as less able to realize the nature of the law against acts committed or to act based on the conviction that can be imprisoned. In connection with the murder of the problem (taking the life of others) in a drunken state other than incapacity responsible identifies problems that have been mentioned in the article above, in the draft penal code also explains the problems of criminalization (of sentences) against the perpetrators which eliminates the lives of others. On the concept of the Criminal Code 2012 is described in article 580 paragraph (1) and (3) the following:

- 1) Every person who robs the life of another person, shall be punished for murder with a minimum imprisonment of 3 (three) years and a maximum of 15 (fifteen) years.
- 2) The murder followed, accompanied, or preceded by an offense committed with intent to prepare or facilitate its implementation, or to detach themselves or other participants of the criminal in the case caught red-handed, or to ensure mastery of goods obtained unlawfully, shall be punished with imprisonment for life or a term of imprisonment of five (5) years and a maximum of 20 (twenty) years.

While the chapter on negligence causing death is described in article 600 paragraph (3) concept. The description of the above article as follows: "Any person who because of negligence resulting in the death of another person, shall be punished by imprisonment of at least one (1) year and a maximum of 5 (five) years or fined at least Category III Rp120.000.000,00 (one hundred and twenty million rupiah); and most Category IV Rp12.000.000.000,00 (twelve billion) ".

Regarding the regulation in Article 600 paragraph (3) of the Criminal Code provides formulation concepts of understanding and elements of negligence clearly whether the element in question negligence

⁹*Ibid*

¹⁰Barda Nawawi Arief, 2011, *Pembaharuan Hukum Pidana Dalam Perspektif Kajian Perbandingan*, Bandung, PT. Citra Aditya Bakti, pg. 274

conscious or unconscious negligence. Thus, in dealing with criminal offenses, especially on the issue of the murder of the culprit in a drunken state, judges must be consideration of whether the offense is purely because they do not accidentally get drunk, or accidentally intoxicate themselves, so that in the interpretation of the judge could make it as an excuse to lighten criminal punishment and as a reason criminal burdensome.

b). System Policy Criminalization Crime Murder In Comparative Study

In this case the need for a comparative study of law with other countries in the implementation issues of intent and negligence as well as its application to the crime of murder as well as how the imposition of criminal homicide (taking the life of others) in a drunken state set in various countries so as to find a new legal analysis that can be used as a consideration in criminal punishment. Study comparison with some countries is as follows:

Penal Code (Penal Code) England eliminates another person's life (murder) in a drunken state entered into Involuntary manslaughter is murder without Malice Aftorethouht caused by:¹¹

Tort cause of death (unlawful act causing death). In Britain, a hangover can be used as a defense argument if it resulted in disturbed (insanity). Someone who visits from the medical angle is not sufficient as a basis for a defense. The lack of health of his soul must be such that it affects accountable according to the law. Homicide Act 1957 confirms that if the "mitigating factors" such (mitigating factors) proved in a murder case deliberately (first degree murder), accused only convicted of murder due to negligence or manslaughter is punishable by within a certain time up to the maximum limit of a lifetime .Thus, the defendant can be imprisoned for less than the maximum limit.

Texas Penal Code explains the drunk who caused the death of another person in section 49.08. Intoxication manslaughter is an unlawful killings committed not with malicious intent previously thought drunk. In the prosecution in Article 49 paragraph (8) drunk does not excuse the defense.¹²

Criminal Code of Australia issues intoxicated (drunk) in question is drunk is because myself it cannot be considered as a defense argument occurrence of a crime and if drunk that is brought on by another or by necessity and obtain the pressure of other people, then drunk can be used as an excuse defense in accordance with the applicable provisions in the Criminal Code of Australia.¹³

In the explanation of Article 51 of the Criminal Code of Queensland drunk in use as consideration of an element of a criminal offense, which is used by the judge to assess whether the drunk is intentional or unintentional by someone so the judge can decide whether the person has a state of mind or intent to commit a criminal act.¹⁴

Indian Penal Code regarding drunk is done by myself in a charge of criminal likened people who under normal circumstances, unless a drunken state was created by someone else. If in the case of drunk by yourself and kill another person then that person will be sentenced to criminal murder in accordance with the Penal Code of India, the formulation of a drunken state in India application is similar to the formulation of a drunken state in Indonesia however, the explanation of drunk not described explicitly in the Penal Code current.¹⁵

Penal Code Canada only describes problems caused by drunk no element of self defense and if they interfere with drunken state of mind of others to cause death there drunk factor into the assault element which could lead to their weighting criminal punishment.

4. CONCLUSION

1) System Policy Criminalization Crime Murder (Murder In Case Drunk) Applicable Nowadays.

In the existing Criminal Code the crime of murder described in Article 338- 340 Criminal Code, which only describes the elements of murder were committed intentionally in this case the murder was unintentional only implicitly described in the sections that describe the problem as well as the murder described in Article 359 of negligence that led to the death of others. Regarding the murder in a drunken state a key highlight in this research, there is no understanding or explanation of such offenses in the Criminal Code that applies today just based on the interpretation and consideration of the judge in

¹¹Barda Nawawi Arief, , *Pembaharuan Hukum Pidana Dalam Perspektif Perbandingan Hukum Pidana*, Op.Cit. pg.90

¹²Penal Code Of Texas

¹³Criminal Code Act 1995 Australia, Division 8 – Intoxication

¹⁴Criminal Code Act No. 37 of 1995 Queensland

¹⁵The Indian Penal Code, 1860, Section 86

imposing punishment to the perpetrators of drunk who committed the crime of killing other people, such as decision No: 1883 k / pid / 2010 as well as the decision No. 908 k / pid / 2006 used as an example by the author.

2) Policy criminal system the crime of murder (murder in a drunken state) to come.

The lawmakers in order to formulate the perpetrators were drunk eliminating the lives of others or kill others in the Criminal Code now applies not apply regarding the crime, is expected in the formulation RKUHP there is an explanation of the crime of murder in a drunken state by adopting or refer to the law contained in the provisions of Article regarding criminal acts in a drunken state in some other countries, by adding in Article 357 criminal Code draft concept which was originally only one chapter alone into two Articles as follows:

- a. Any person, drunkenness blocking traffic in public , disturbing the peace, threaten the safety of others, or at the time of doing the work that should be drunk to operate very carefully to not cause danger to life or health of another person, shall be punished with a maximum fine of Category I. (six million rupiah).
- b. If a drunk person is done deliberately and take the life of another person, shall be punished by a fine of category III (one hundred and twenty million), or a term of imprisonment of five (5) years and a maximum of 20 years.

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