

FORMULATION OF CRIMINAL PROVISIONS IN ESTABLISHMENT OF REGIONAL REGULATION DESIGN IN CIANJUR REGENCY

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ABSTRACT

Legal development of laws and regulations, especially regional regulations, is marked by the formulation or formulation of criminal provisions. Therefore, the regional regulation is one of the law products, so in order to be binding in general and having effectiveness in the imposition of sanction of criminal law formulation policy should refer to the principles of criminal provisions in general. This paper examines how the procedures for drafting local regulations in Cianjur regency and the formulation of criminal provisions. This research uses normative juridical approach method with descriptive analytical research specification. The result of this research is the formation of the draft of regulation in Cianjur regency in accordance with Law no. 12 of 2011 on the establishment of legislation starting from the preparation of academic texts, public hearings and FGDs and the preparation of substantial draft of local regulations, especially the formulation of criminal provisions that refer to the provisions of criminal law.

Keyword: Criminal Provisions, Legal Drafting, Local Regulations.

INTRODUCTION

Indonesia as a constitutional state is described in the 1945 Constitution. As a State of law, in the administration of the State government is certainly not independent of laws and regulations as a positive law prevailing in Indonesia. Law is a set of rules of conduct prevailing in society (Martosoewignjo, 1992).

Cianjur Regency is geographically located in the centre of West Java Province, with a distance of approximately 65 km from the Capital of West Java Province (Bandung) and 120 Km from the State Capital (Jakarta), and is located between 6021-7025 South Latitude and 106042-107025 east longitude. While the population of Cianjur Regency result of population census in 2012 is approximately 2,210,278 inhabitants.

Cianjur Regency covers an area of 350,133 hectares. In 2011 the area of wetland reached 65,978 hectares and the land area of 172,466 hectares and the land area is not Agriculture 111,689 hectares, with the limits are as follows:

1. North: Bordering Regency of Bogor and Purwakarta Regency.
2. West: Bordered by Sukabumi Regency Area.

3. South: Bordering the Indonesian Ocean.
4. East: Borders with Regency of Bandung and Garut Regency.

The natural condition of Cianjur Regency is located at the foot of Mount Gede with an altitude of about 7-2962 m above sea level. Cianjur Regency is divided into 3 regions: Northern Region, Central Region and Southern Region with 32 sub districts, 354 villages and 6 urban villages in Cianjur.

In accordance with the mandate of Pancasila and the 1945 Constitution (UUD 1945), the administration of the state is based and regulated in accordance with the provisions of the constitution, as well as other legal provisions, namely the Constitution, the Law, the Government Regulation, the Regional Regulations, as well as other legal provisions determined democratically and constitutionally (Surachmin, 2012).

In terms of legislation as a consequence of the State law of Pancasila then through Act No. 12 of 2011 has been established type and hierarchy of Laws and Regulations in Indonesia based on the principle of *Lex Superior Derogat Legi Inferiori* (Syamsuddin, 2013).

The systematic techniques of drafting legislation are set forth in Act No. 12 of 2011 on the Establishment of Legislation Regulations, in particular on criminal provisions in annex II Sub C.3. Although there are already general guidelines, in practice legislative drafting has so far impressed the existence of various variations in formulating criminal provisions, both on the types of criminal sanctions and the formulation system, the severity of criminal sanctions and the rules of application including subjects subject to criminal sanctions (Arief, 2012).

Special regulation in the regions, then the 1945 Constitution Article 18 Paragraph (6) implies Local government has the right to enact regional regulations and other regulations to implement autonomy and assistance tasks. In the substance of the constitution above it is clear that local governments are given the authority to make regulations in the form of local regulations and other regulations.

Local government officials in carrying out their duties, authorities, obligations, and responsibilities as well as on constitutional powers can set regional policies that are formulated, among others, in local regulations, regulations of regional heads, and other regional provisions. This is reflected in Law no. 23 of 2014 on Regional Government. Therefore, it is necessary to evaluate and analyse the policy of legislation in formulating criminal provisions, both in legislation practice so far, and in the future prospect. This evaluation needs to be done because the formulation policy of criminal jurisdiction with juridical (juridical formulation weakness) can be one of the limiting factors of criminal law enforcement at application stage (judicial policy) and execution stage (executive or administrative policy). Penalization patterns are legislative guidelines for legislators (Arief, 2010). This shows the greater role of legislation one of them because it is easily recognizable and there is legal certainty (Manan, 1992).

Regional Regulations in general is a medium for the Regional Government to put forward proposals, policies and/or aspirations and expectations of the community for regional development purposes. It is expected that the Regional Regulation can set rules that can support regional development in a more advanced direction. But in fact many local regulations have not been able to facilitate the development process for the progress of the area (Kurnia, 2007). In this case Eugene Ehrlich put forward a very rational idea, that there is a difference between positive

laws on the one hand and living law on the other. Therefore, a positive law will have effective valid power when it contains, or is in harmony with the laws that live in society (Rasjidi, 1991).

All legislation should be based on philosophical, sociological and juridical foundations (Lubis, 1989). This is in line with the opinion of Astawa (2012), he added that in addition to the philosophical, sociological, juridical foundation there is also a political basis and economic foundation.

Local regulations are part of a particular policy. This is in line with Saleh (1984) opinion that the law is not only a part of a particular policy. The same is also stated by Arief (2010), that the law is not only a tool to implement the policy but also determine, outline or design a policy.

The biggest obstacle in the development of laws and regulations is the lack of clarity on the political direction of national legislation. Based on the above problems the importance of the study of local regulation is formulation of criminal provisions. Therefore, the local regulation is one of the law products, so in order to be binding in general and have effectiveness in the case of imposition of sanction it can be adjusted with the opinion of Friedman (2009), said that “*sanctions are ways of applying a norm or regulation.*”

Judging from the criminal law system, from the point of view of formulation policy can raise juridical problem if in the special rule there is no provision which regulates special things that deviate, different or not yet regulated in general rule of KUHP. The weakness of the criminal law formulation policy will have an effect on criminal law enforcement policies and crime prevention policies (Arief, 2010).

According to the current criminal law system, legislation outside the Criminal Code can make the provision diverging or different from the general rule of the Criminal Code; this is certainly not a problem as it is possible with Article 103 of the Criminal Code. Furthermore it is necessary to understand the position of placing material criminal law and formal criminal law, which in practice has not been evenly understood among lawmakers. Based on the above description, the authors conduct research on the formulation of criminal provisions in the draft regulation of Cianjur regency. In relation to the above, the authors will examine two issues, namely: how the procedures of drafting local regulations in Cianjur regency and the formulation of criminal provisions in local regulations in Cianjur regency?

DISCUSSION

Drafting of Regional Regulation of Cianjur Regency

Indonesia adheres to the principles and concepts of Pancasila contained in the Preamble of the 1945 Constitution (Wahid, 2009). Indonesia is a state based on law (“*rechtstaat*”). The main objective of the state law is to organize order (Zulkarnaen and Utami, 2016). Law is a set of rules of conduct prevailing in society (Martosoewignjo, 1992). Aristotle argues that the concept of the rule of law is a contrast with the concept of the rule of man (Hadjon, 2003), in the modern constitutional state, one of the characteristics of the rule of law (the rule of law or “*rechtstaat*”) characterized by the limitation of power in the administration of state power (Tamahana, 2004). The restriction was done by law which became the basic idea of modern constitutionalism

(Asshiddiqie, 2006). Then one as the deciding factor in holding power is the norm or law (Nuraeny and Utami, 2016).

Kusumaatmadja (1976) said that law as a means of community renewal, serves as a channel of human activities in the direction of development desired. While the state law according to Manan (1996), is already a common type of state owned by nations in the world today.

A more straightforward statement on the state of the law is provided by F.R. Bothlingk who says "*De staat, waarin de wilsvrijheid van gezagsdragers is beperkt door grenzen van recht*" (country, where freedom of will power holder is limited by law). It further states that in order to realize the limitation of the holder of power, it is realized by means of "*Enerzijds in een binding van rechter en administratie aan de wet, anderzijds in een begrenzing van de bevoegdheden van de wetgever*" (on the one hand the relationship of Judges and government to the law invite, and on the other hand the limitation of authority by the legislator).

Attamimi (1992), citing Burkens, said that a law state ("*rechtsstaat*") is simply a state that places law as the basis of state power and the exercise of that power in all its forms is exercised under the rule of law. In a state of law, everything must be done according to the law. The law states that governments should be subject to the law, not the law that must be subject to government (Wade, 1971). This opinion is in line with the concept of the legal state Tak (1991).

The law serves as the protection of human interests (Octora, 2011). The problem of law enforcement in Indonesia is a very positivistic way of thinking law/perspectives of legislation (Kristian, 2014). As a manifestation of the theory of the above law state, all life activities must be regulated by law both written law and unwritten law. This also applies to the role of the regional in particular the making of the regional regulation.

Local legislation is a legislation established by the DPRD (Regional People's Legislative Assembly) with the consent of the Regional Head, through the second amendment of the 1945 Constitution, the regional regulation obtaining its constitutional foundation is used to implement autonomy and assistance tasks. Furthermore, Law no. 12 Year 2011 outlines the content of the regional regulation is all content in the framework of: (1) the implementation of autonomy and assistance tasks; (2) accommodate special conditions of the region; (3) further elaborate the higher legislation (Hamidi and Mutik, 2011).

In formulating legislation including local regulations, it should be based on good foundation principles that are in line with the opinions of Purbacaraka and Soekanto (1985), including; the principle of clarity of purpose, the institutional principle or the appropriate organ of formation, the principle of conformity between the type and matter of charge, the principle can be exercised, the principle of use and power, the principle of clarity of the formula and the principle of openness. Furthermore, the law should be based on a nation's view of life that is moral or ethical values that contain good and bad values (Ranggawijaya, 1998). This is to sharpen the legal considerations in the judge's decision (Marwan, 2012).

The drafting of regional regulations should be accompanied by academic texts. According to Alexander (2004) which is referred to the early academic manuscript script that makes the ideas of regulation and material content of certain field legislation. The form and content of the academic texts contains the idea of arranging a certain subject matter of law which has been viewed holistically-futuristically and from various aspects of science, complemented by

references which include: urgency, conception, foundation, legal basis, principles used as well as thoughts about norms -norms that have been poured into the forms of the articles by proposing several alternatives, presented in the form of a systematic description and can be accounted for in science and in accordance with the politics of law that has been outlined.

Academic text is the text of the research result or the study of law and other research results on a certain problem that can be scientifically justified about the arrangement of the problem in a Draft of Law, Draft of Provincial Regulation, Draft of Regency or City Regulation, as solution to the problem and the legal needs of the community.

The local government of Cianjur Regency are preparing the academic script in cooperation with the universities. Preparation of draft local regulation in Cianjur Regency based on the local legislation program. The stages in the drafting of the regional regulation in Cianjur regency begins with the planning, preparation, discussion, determination, enactment and dissemination.

Criminal Provisions in the Draft Regulation of Cianjur Regency

In local regulations, one part of the systematic body of the body is the provision of sanctions. Sanctions provisions can be regulated in local regulations if necessary either criminal sanctions, civil sanctions or administrative sanctions. The term "*criminal provisions*" which will be discussed in this paper is in a narrow sense, that is the rule or provision of material criminal law (substantive) which focuses on formulative policy stages or legislative policy stages, namely the formulation of criminal law (stage of legislative formulation or process) (Arief, 2010).

Bassiouni (1978) suggests that there are three stages in criminal law enforcement policy, namely formulation phase (legislative process), application stage (judicial process) and execution stage (administrative process). The legislation/formulation process is a strategic preliminary planning stage of the law enforcement process "*in concreto*".

Hulsman (1978) argues that the sentencing system is the statutory rules relating to penal sanctions and punishment. The position of criminal provisions in regional regulations can be seen from two angles, namely from the systematic point of legislation and from the point of the whole criminal law system.

Article 238 paragraph (2) of Law no. 23 of 2014 on Regional Government stipulates that regional regulations may contain a maximum of six months imprisonment or a maximum fine of Rp. 50,000,000 (fifty million rupiah). Whereas in paragraphs (3) and (4) local regulations may impose sanctions threats that are restored in their original state and administrative sanctions. Administrative sanctions include: oral reprimands; written warning; temporary suspension of activities; termination of activities; temporary revocation of permits; permanent revocation of permits; administrative fines; and/or other administrative sanctions in accordance with the provisions of legislation.

Penal provisions in the form of a maximum fine of Rp. 50,000,000 (fifty million) or confinement for every 6 (six) months for each violator of the local regulation is very important to deter the perpetrators of criminal acts. Because the low threat of criminal sanctions, especially fines sanction, is one of the causes of obstacles to enforcement of local regulations. With very low fines people will easily break local regulations.

In practice, criminal provisions in regional regulations generally specify two types of criminal penalties against criminal offenses for violations of local regulations, namely: imprisonment and/or fines. For prison there are also variations of criminal threats: three and six months in prison. But what needs to be considered and studied is how to set criteria for violations to be penalized or imprisoned according to the level of violation. It is very unfair that all forms of offenses are subject to the same criminal or penalty (Fauzan et al., 2018).

In formulating the Criminal provisions, especially in the Regional Regulations, there are several matters that must be considered namely the criminal formula should be based on the general principles of criminal law. In formulating a criminal penalty must comply with elements of the mention of criminal subjects, any mention of the nature of a criminal act, any mention of a criminal penalty, any mention of the duration of a crime or the amount of a fine.

Formulation of criminal sanction provisions in the regulation of Cianjur Regency among others.

Table 1 FORMULATION OF CRIMINAL SANCTION		
No	Local Regulation	Substance Article
1	Local Regulation No. 2 of 2017 concerning retribution of permits to hire foreign workers.	Article 23 Mandatory Levies that do not carry out their obligations so that financial losses. The area shall be subjected to a maximum imprisonment of 3 (three) months or a fine of not more than 3 (three) times the amount of an outstanding fee which is not or less paid.
2	Local Regulation No. 3 of 2016 on the management of Regional Property.	Article 91 1. Any regional losses resulting from negligence, misuse or violation of the law on the management of Regional Assets are settled through claims of compensation in accordance with the provisions of laws and regulations. 2. Any party resulting in a regional loss as referred to in paragraph (1) may be subject to administrative sanctions and/or criminal sanctions in accordance with the provisions of legislation.
3	Regional Regulation number 3 of 2015 on non-smoking areas	Article 26 1. Any person who violates the provisions referred to in Article 12 shall be liable to a maximum fine of Rp. 1,000,000 (one million rupiah). 2. The criminal act as referred to in paragraph (1) is a violation.

Table 1 FORMULATION OF CRIMINAL SANCTION		
4	Local Regulation number 1 of 2013 on control of telecommunication towers.	Article 62 1. Any person /body that violates the provisions of Article 2 paragraph (1), Article 13, Article 19 paragraph (2), Article 21 paragraph (1), Article 23, and Article 59 shall be liable to a maximum imprisonment of 3 (three) months or a maximum fine of Rp. 50,000,000 (fifty million rupiah). 2. The levy of levies that do not carry out their obligations so that the financial losses of the regions shall be punished by imprisonment for a maximum of 3 (three) months or the most fine many 3 (three) times the amount of levy payable. 3. Crime as intended in paragraphs (1) and paragraph (2) is a violation. 4. The fine referred to in paragraph (2) shall constitute state revenue.

In this regard, Paulscholten argues that criminal law provides extraordinary sanctions, both to some general rules of law, as well as to the rules of administrative law (Prins, 1983). Criminal provisions basically cover the entire system of punishment. According to Jarebog (1988), the entire criminal law system is criminalization, sentencing, execution of punishment.

Harmonization of the Concept of State Law and Living Law in the Establishment of Regional Regulation Drafts

Regional regulation draft as a media for harmonization and synchronization of the meeting of state law concepts (state law) and laws that live in society (living law), In the context of law formation as outlined in the legislation. This means that in making legislation and policy making must be bottom-up oriented. Every creation of a legal product must first observe social phenomena, trends and uniqueness of the community itself. These processes are very important in order to accommodate the soul from the law that lives in the community (Hamidi and Mutik, 2011).

Wirjono (1989), said that the need for reinventing law is actualized, namely finding and rebuilding law outside state law, namely reinventing folk law, indigenous law, customary law and customary law and self-regulation or inner-order mechanism in the context of social control (legal order) in society. Furthermore, another thing that can be done by the government is to recognize and if necessary accommodate the customary laws of the community. With the draft regional regulations, facts that are considered problematic are solved jointly by the government without prioritizing certain groups.

Harmonization of local regulations is an effort to make the regional regulation in accordance with other equal regulations, which in turn is synchronized with higher-level

regulations. Harmonization of these regional regulations is very important to be carried out before they are implemented or are still in draft form. Harmonization and synchronization of the draft regional regulations in Cianjur Regency is carried out by the Legal Department of the Cianjur Regency Government. Harmonization of regional regulation designs is not carried out in all stages of the formation of legislation but is only limited to the planning stage, the preparation stage and the discussion stage. Harmonization in the Legal Section of the draft, regional regulations only in the aspect of the substance of the regulatory design and the technical aspect of drafting regional regulations. The harmonization is carried out in a legal consultation forum between the government and stakeholders. The legal consultation forum is a means for the community to participate in the process of forming regional regulations.

CONCLUSION

The formulation of the draft regulation in Cianjur Regency is in accordance with Law no. 12, year 2011 on the establishment of legislation starting from the preparation of academic texts, public hearings and FGDs and the drafting of substance of draft local regulations, while in formulating criminal provisions of some local regulations that refer to general principles of criminal law provisions and in formulating threats the criminal has fulfilled the elements of the mention of criminal subjects, the mention of the nature of a criminal act, the mention of a criminal penalty, the mention of the duration of the criminal or the amount of the fine, in addition there are still some regional regulations in the formulation has not fulfilled the elements of writing criminal provisions.

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