

FORMULATION OF ASYMMETRIC CRIMINAL SANCTIONS: INDONESIAN EXPERIENCE

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ABSTRACT

This study aims to analyze the formulation of criminal sanctions in the job creation law cluster based on the concept of punishment. It is a normative legal research with statutory and conceptual approach. The findings of this study are 1) formulation of criminal sanctions in the job creation law put aside the provisions stipulated in the law for the formation of laws and regulations that criminal provisions are placed in specific chapters, rather than spread out in various chapters; 2) there is no pattern in the formulation of criminal sanctions in the job creation law, which is reflected in the non-uniform use of the term threatened and without the phrase being threatened in the formulation of the norm of criminal sanctions, in addition to that there is ambiguity about the reference article regulating the qualifications of criminal acts; the occurrence of disparity in sanctions that the impact caused by a criminal act should be equivalent to the imposition of criminal sanctions.

Keywords: *Omnibus Law; Punishment; Criminal Sanction;*

INTRODUCTION

Indonesia took a courageous step by enacting the Job Creation Law by using the omnibus law method, an uncommon method and not even known at all in the Law on the Establishment of Laws and Regulations in Indonesia. The use of the omnibus law method is expected to be a solution to the hyper-regulation experienced in Indonesia (Azhar, 2019) with a total of 42 thousand laws and regulations (Siagaan, 2021), a fairly large number with potential conflicts of norms or regulations.

In fact, the government's desire to resolve hyper-regulatory issues through the omnibus law method in the formation of the Job Creation Law has not gone as expected, as the formation process seems to override the formal aspects, which is the stages of forming laws and regulations in Indonesia including the planning stage; preparation stage; discussion stage; stipulation stage; validation stage; and promulgation stage. The formation of the Job Creation Law has drawn an upsurge of protests and criticisms due to its formation that is considered not to involve in public participation (Dahwir, 2020), whereas in principle, the formation of a law and regulation in a democratic manner requires public participation as its main feature (Wantu, Nggilu, Kasim, & Badu, 2020). In addition, the establishment of the Job Creation Law is also considered to have many substantial or material drawbacks.

From the various material issues of the Job Creation Law, this paper focuses on the aspect of formulating criminal sanctions which not only disregards the provisions of the formulation of criminal sanctions based on the Law on the Establishment of Laws and Regulations, but also in the asymmetric formulation between the norms of criminal sanctions and the conception of punishment (*penitensier*).

Formulation of Formal Asymmetric Criminal Sanction

The Job Creation Law stipulated by the House of Representatives (DPR) and the President of The Republic of Indonesia contains 15 chapters and 174 articles, but substantially, the law contains amendment, annulment, and revocation of 1,239 articles and 79 laws related to development and investment (Latifah, 2020).

The existence of criminal sanctions in a law has an important function and significance, especially in the context of enforcing the law. In the context of the job creation law, the formulation of criminal sanctions is contained in more than half of the number of chapters as shown in the table below:

Table 1.

Arrangement of Criminal Sanctions in the CHAPTER of the Job Creation Law

No. CHAPTER	CHAPTER Title	Criminal Sanction Arrangement	
		Any	Not Any
1	General Provisions		√
2	Principle, Purpose and Scope		√
3	Improving the Investment Ecosystem and Business Activities	√	
4	Employment	√	
5	Ease, Protection and Empowerment of Cooperatives, Micro, Small and Medium Enterprises	√	
6	Ease of Doing Business	√	
7	Research and Innovation Support	√	
8	Land Procurement	√	
9	Economic Zone	√	
10	Central Government Investment and Ease of National Strategic Projects	√	
11	Implementation of Government Administration for Supporting Job Creation		√
12	Supervision and Development		√
13	Miscellaneous Terms		√
14	Transition Terms		√
15	Closing		√

From table 1, it can be viewed that the arrangement of criminal sanctions is contained in 8 chapters from a total of 15 chapters in the Job Creation Law. Interestingly, if it is related to the Law on the Establishment of Laws and Regulations, especially in Appendix II No. 61 and 62 that basically explain that the corpus of laws and regulations contains material on the content of laws and regulations, which are formulated in an article or several articles, and are clustered into: a) general provisions, b) regulated subject matter, c) criminal provisions (if needed), d) transitional provisions (if needed), and e) closing provisions, the Job Creation Law does not place criminal provisions in the specialized chapters referred to in Appendix II in question, but is

spread out into 8 chapters. This condition indicated that the Job Creation Law violates the formal provisions for the formation of a law.

Formulation of Asymmetrical Criminal Sanction with Punishment Concept

In the formulation of criminal sanctions that are spread out into 8 (eight) chapters as mentioned above, several notes are considered as asymmetrical formulations with the concept of punishment, as follows:

Unclear reference to criminal acts.

In the concept of formulating criminal sanctions, aspects to be considered such as articles, paragraphs or even letters in a regulation containing criminal sanctions must clearly qualify the criminal act that is subject to criminal sanctions, for example, the formulation of Article 78 p. 196 on Job Creation Law, which states that:

“Those who violates the provisions of Article 50 paragraph (1) is threatened with imprisonment at most 10 years and fine at most 5 billion”.

Article 50 paragraph (1) constitutes an act that will be subject to criminal sanction of imprisonment at most 10 years and a fine at most 5 billion. In contrast to the regulation of criminal sanctions in other articles, which do not clearly qualify which acts will be subject to criminal sanctions, this can be seen in the formulation of Article 46 paragraph (1), paragraph (2), and paragraph (3) as follows:

Paragraph (1): “The owner and/or user of the building who does not comply with the provisions of the law shall be threatened with imprisonment for a maximum of 3 (three) years or a fine at most 10% of the value of the building if it results in the loss of others’ property.”

Paragraph (2): “The owner and/or user of the building who does not comply with the provisions in the law shall be threatened with imprisonment for a maximum of 4 (four) years or a fine at most 15% of the value of the building if it results in others’ accident leading to lifetime disability.”

Paragraph (3): “The owners and/or users of the building who do not comply with the provisions in this law shall be threatened with imprisonment for a maximum of 5 (five) years and a fine at most 20% of the value of the building if it results in others’ death.”

The three paragraphs above indicate the difference with Article 78, in the case of Article 78 refers explicitly to Article 50 paragraph (1) regulating the qualifications of criminal acts that will be subject to criminal sanctions, it is opposed with Article 46 paragraph (1), paragraph (2) and paragraph (3) that does not refer to articles or even paragraphs that regulate the qualifications of criminal acts, but uses a very general norms (which does not comply with the provisions of this law).

By observing the conceptual aspects, especially the concept of punishment, the formulation of criminal sanctions in the law must pay attention to several important aspects, as follows (Fauzan, Djumadi, & Ardhanariswari, 2008):

Designation of criminal subject, for example every person;

Designation of the nature of criminal act, whether intentional or negligent.

Consideration of intentional or negligence nature in violating criminal provisions will still be turned back to the tribunal judge institution, meaning that the judge who will later investigate and administer justice will have the authority to assess and decide whether there is a hint of negligence and/or intentional intent;

Designation of the act punishable by criminal sanction, by referring to the article, or articles that are punishable by criminal sanction;

Designation of the type of criminal act whether it is a crime or violation;

Designation of the length or magnitude of the maximum threat. For corporal punishment, it is stated at the longest, while for fines it is stated at the most;

Formulation of criminal provisions must state explicitly whether the imposed punishment is cumulative, alternative, or alternative cumulative.

In short, the formulation of criminal sanctions in Article 46 paragraph (1), paragraph (2) and paragraph (3) without referring to articles or even paragraphs regulating the qualifications of criminal acts is an asymmetric form of formulating criminal sanctions with the concept of punishment.

Disparity between criminal acts and imposition of criminal sanctions.

Having explained in the theoretical study, that in the concept of punishment, especially the one proposed by Utrecht, the concept of punishment includes types of sanctions; severity of the sanctions; the length of time that the sanction is served; and how the sanctions are implemented. The formulation of criminal sanctions whether light or severe needs to consider the impact caused by such criminal act, in the event that the criminal act only has a minor or light impact, then the imposition of criminal sanctions should be lighter; on the contrary, if the impact caused by the criminal act is greater, then the imposition of sanctions should certainly be more severe.

In the context of the job creation law, the formulation of criminal sanctions will also be found containing disparity in criminal sanctions, it can at least be found in the formulation of Articles 111 and Article 103. Article 111 states that: *the officials granting environmental approval who issue environmental approval without Amdal or UKL-UPL as referred to in Article 37 shall be sentenced to a maximum imprisonment of 3 (three) years and a fine at most Rp. 3,000,000,000 (three billion rupiah)*. In the event that the article is compared with the formulation of Article 103 stating: *Every official who issues business permits related to plantations on the customary land of customary law communities as referred to in Article 17 paragraph (1) shall be convicted with imprisonment for a maximum of 5 (five) years and a fine at most Rp. 5,000,000,000 (five billion rupiah)*.

In case of the two articles are compared, it is reflected that the *adresar* is an official with administrative actions of licensing and approval in which the scope of Article 111 is licensing without Amdal, UKL-UPL, while Article 103 is business permit on customary land of customary law communities, but the imposition of criminal sanctions is different, as imprisonment and fines in Article 111 are lighter than Article 103, even though the possible impact is much greater, i.e. the environmental impact, due to the issuance of a business without an Amdal, UKL-UPL.

These two articles indicates that there is a disparity in the formulation of criminal sanctions, in which impact imposed by legal actions does not become a mature consideration of the legislators in formulating the severity of criminal sanctions.

Ambiguous use of the minimum and maximum criminal sanctions.

In the formulation of criminal sanctions, not only in the job creation law, but also in other laws, there is ambiguity and non-uniformity regarding the use of minimum and maximum criminal sanctions. In the job creation law, there are many articles containing criminal sanctions that only formulate the longest imprisonment and maximum fine, but more than a few articles on criminal sanctions containing criminal sanctions with the phrase of imprisonment for the shortest and the longest, and maximum and minimum fine. For example, the 3 formulations of articles that make the range of criminal sanctions both imprisonment and fines are:

Article 109 states that: *Anyone who carries out business and/or activity without the approval of the central government that results in victims/damage to health, safety, and/or environment shall be convicted with a minimum imprisonment of 1 year and a maximum of 3 years, as well as a fine at least Rp. 1,000,000,000 (one billion rupiah) and at most Rp. 3,000,000,000 (three billion rupiah)*.

Article 88 states that: *Those who produce and/or distribute untested tools and machines that cause damage to environmental functions or endanger others' lives shall be convicted with imprisonment for a minimum of 3 months and a maximum of 11 months and a fine at least Rp. 50,000,000, and at most 500,000,000.*

Article 82 paragraph (1) states that: *An individual intentionally cuts down trees in a forest area that is inconsistent with the permit; logging in forest areas without business permit; illegal logging in forest areas shall be convicted with imprisonment for a minimum of 1 year and a maximum of 5 years, and a fine at least Rp. 500,000,000 and at most Rp. 2,500,000,000.*

The three examples of these articles indicate the arrangement of the range of criminal sanctions with the shortest-longest phrase, and the minimum-maximum, but thing to be observed is the lack of clear criteria, what kind of qualifications for actions need to be made for the range of criminal sanctions reflected through the shortest-longest phrase, and the minimum-maximum, whether the range of criminal sanctions is required for an act that falls within the qualification of violation or crime, it becomes unclear, thus it is certain that the arrangement of criminal sanctions in the job creation law further strengthens the uniformity of the formulation of criminal sanctions including formulation of the range of criminal sanctions.

In addition to the ambiguity as described above, another ambiguity lies in the technical formulation of criminal sanctions, where in some articles the phrase of threatened is not used, while other articles use the phrase of threatened. From many articles containing criminal sanctions in the job creation law, there are at least two articles using the phrase of threatened, as follows:

Article 46 paragraph (1) states that: *every owner and/or user of building who does not comply with the provisions in this law is threatened with imprisonment for a maximum of 3 (three) years or a fine at most 10% of the value of the building if it results in a loss of others' property.*

Article 78 paragraph (1) states that: *those who intentionally violates the provisions as referred to in Article 50 paragraph (1) is threatened with a maximum imprisonment of 10 years and a fine at most 5,000,000,000 (five billion).*

The two articles indicate the technical ambiguity of the formulation of criminal sanctions or even the criteria at which the use of the phrase of threatened should be stated and when it should not be stated. The deficiency of clear criteria and guidelines (Achiani, 2011) in the formulation of this criminal sanction was also acknowledged by Mudzakir in a study manuscript he made in collaboration with the National Legal Development Agency (Mudzakkir, 2008).

CONCLUSION

Formulation of criminal sanctions in the cluster of job creation law punishment reflects 2 conditions, i.e., *first*, the arrangement of criminal sanctions deviates from the provisions of the formation of laws and regulations, in which criminal sanctions are spread over 8 (eight) chapters of 15 chapters, whereas based on Law 12 of 2011 criminal sanctions should be placed in a specific chapter on criminal provisions; *second*, formulation of asymmetric criminal sanctions with the concept of punishment, where in addition to errors and mistakes in the technical formulation, there is also an unclear reference to the qualifications of acts that are subject to criminal sanctions, disparities in the imposition of sanctions with potential impacts caused by criminal acts.

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