

Functionalization Of Criminal Sanctions In The Relation With Administrative Sanction (A Review Of Indonesian Election System)

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Abstract: In the post-reformation era in Indonesia, there is a trend of increasing productivity in legislations and it can be seen from the various Administrative Laws (despite not in a consistent growth). Administrative laws are all regulations that govern the nation to execute their duties and obligations as public and state servants. For identify whether a regulation belongs to administrative laws or not, there are at least two criterions: the first is title approach and the second is content approach. This research has chosen Law Number 8 Year 2012 as an object of study considering that the law was passed in the post-reformation era, which is regulating general election as a very central point of democracy and as an indicator of a democratic state. Functionalization of criminal sanctions in administrative laws basically is to combining two legal systems and disciplines of administrative laws and criminal laws has delivered problems in their implementation, but all of them are ignored without any solution. Criminal sanctions that are essentially *ultimum remedium* have changed to a substantial coercive tool that in the end has weakened the criminal sanctions themselves in their practical implementations. Some of un-uniformities of criminal sanction system are that there are laws implementing special *strait minima* (minimum penalty), there are laws using *strait maxima* (maximum penalty), there are laws using special cumulative penalties and incisive cumulative penalties, and there are laws using double track system. Any development of law that deviates away from its principles and theories will push its legal implementation away from its true direction and in the end of the day it will depart far away from the essence of legal development.

Index Terms: Minimum 7 keywords are mandatory, Keywords should closely reflect the topic and should optimally characterize the paper. Use about four key words or phrases in alphabetical order, separated by commas.

1 INTRODUCTION

The Indonesian state based on law (*rechtsstaat*), not based on mere power (*machtsstaat*)” as mandate of the 1945 Constitution of the Republic of Indonesia. It means that the law superior and became commander of the state (supremacy of law). Supremacy of the law is a basic model in the western democratic order. This rule requires citizens and governments to be matter to known and standing law. This also calls for generality in the law. This principle of supremacy of law is a further establishment of this principle of equality previous to the law, means that laws should not be prepared in respect of particular individuals. Law is defined as a collection of rules, which regulates the organization of state and nation. It can be seen from the developments taking place in various countries, both developed and developing countries as the law is a very important instrument, even some countries have applied the rule of law. In the state of modern society, the law can be used as a means of social engineering. In case, the concept of a constitutional state ideology rooted in the rule of law. The need to establishment a constitutional state has been agreed and determined at the time of Indonesian People's Consultative Assembly (MPR) issued a writ No. III/MPRRI/2000 regarding the legal source and the sort order of legislation, which in the

dictum as consideration (a) letter asserts as follows: “...based on the nation's history and towards to the future challenges, the Indonesian people have come to the conclusion, that in the implementation of national and state, the rule of law must be implemented in earnest.” In accordance with the mandate of the MPR's decree, then Indonesian authority has made the rules regarding the establishment of laws and regulations as stipulated in the Law No. 10 Year 2004, which is refined by the Law No. 12 Year 2011. At the same time, another development is the birth of the law which regulates the administrative aspects. In line with administrative law specifications by Philip M. Hadjon, that the law in administration has a very broad scope of coverage –covering all aspects of economic life, social, political and others. The law on administrative aspect should be a formalization of the ideals of the nation and state of Indonesia as a prevent to any government actions which is contrary to law. Administrative sanctions as well as the characteristics of administrative law, among others:

- a. *Bestuurdwang* (Government coercion),
- b. The recall decision (decree) favorable (permits, payments, subsidies)
- c. The imposition of administrative fines,
- d. The imposition of money forced by government (*dwangsom*).

At practical level, functionalization of criminal sanctions on the administrative law is expected that the law can be applied effectively. Even the administrative law sanctions it has a characteristic that it can effectively applied in advance by not embracing the presumption of innocent principles. Meanwhile, the criminal sanctions should be positioned as the "ultimum remedium" also known as the "ultimate weapon" or the last option. Nowadays, the law makers seems as they are away from the application of administrative sanctions which are the administrative law's typical itself, and actually more effective than another sanctions. In the case of the legislation power to make a law, John

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Austin, as a major thinker analytical jurisprudence interpreting the law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Austin also teaches that the law properly so called positive law and every law or rule is a command or, rather laws or rules, properly so called, are a species of commands. Furthermore, "command" in view of Austin, described that, "if you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an apple in case I comply not with you wish, the expression or intimation of you wish is a command". In line with Austin's view above, legal role in the era of globalization today is very important, especially for people who crave a more dynamic enforcement (*rechtstoepassing*). On legislation perspective, I Gde Pantja states that the law is a legislative act or deed laws established by the legislature, because in the process of its formation is determined by the role of the legislature as a representative of the people. Therefore, in the context of criminal sanctions, then the arrangements set out in the election law is related to the implementation of the tasks and obligations of the government or equipment of the State in the implementation of the general election as mandated to the law. Election law placing criminal sanctions in the hope that it can encourage adherence society, participating, and election management in creating a peaceful and objective election. Placement of criminal sanctions has created several prohibited actions and/or required by the law, thus becoming a new offense (*delik*) which was then named as the general election criminal offense for offenders threatened with criminal sanctions. Based on the premise as stated above, objective of this research is to understand the essence of the legal reasoning of forming legislation (law makers) to merely put criminal sanction to the administrative law. Particularly in the Law No. 8 of 2012 regarding the Election of Members of the House of Representatives, Regional Representatives Council and Regional House of Representatives. The trend has led to the functionalization of criminal sanctions on any legislation concerning administrative laws.

2 METHOD OF RESEARCH

The type of research used in this paper is normative legal research or also known as "*Rechtsdogmatik*" by reviewing the legal arrangements concerning the objective of this research. In line with the type of research, ie normative legal research, the approach used in this paper is statute approach and conceptual approach. The data being used include secondary data consisting of primary law materials in the form of laws and regulations, tertiary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as tertiary law materials in the form of language dictionaries, scientific law dictionary, as well as the Black's Law Dictionary. After obtaining the data, then the primary data was collected and subsequently performed proportionally grouping data using qualitative analysis techniques.

3 RESULTS AND DISCUSSION

The fourth paragraph of the Preamble of the Constitution of Indonesia stated that:

"...and then, to form a Government of the State of Indonesia that protects all Indonesian people and the entire land of Indonesia and to develop the welfare of

the people, the life of the nation, and participate in the world orderliness based on freedom, eternal peace and social justice, National Freedom of Indonesia is prepared in a Constitution of the State of Indonesia, formed in a structure of the State of the Republic of Indonesia with people sovereignty based on the One Supreme God, Just and civilized humanity, Indonesian unity and democracy lead by wisdom in deliberation amongst representation, and by realizing a social justice to all Indonesian people."

Manifestations of the Preamble above further mandated into Article 1 paragraph (2) of Constitution which that "The sovereignty shall be in the hand of the people and implemented according to the Constitution". Sovereignty of the people, guaranteed by the Constitution where the people are the real owners of the country with all its authority to carry out all the functions of state power, both in the legislative, executive, and judiciary, based on "One Supreme God". In association as a democracy state, can be seen from the extent to which the active role of the people in the organization of the state, both at the central and local government. Representatives of the people meaning of *the people, by the people, and to the people*. As well as Asshiddiqie's view who stated that a manifestation of the idea of popular sovereignty, in a democratic system must be guaranteed that people fully involved in the planning, organizing, and implementing. Public participation in decision-making and management of government becomes an indicator of people's sovereignty, but it's not intended that all the people should be involved directly, but it's necessary to institute a representative of the people in charge to receive and convey the aspirations of society; formulate regulations as a foothold in the governance; and do budgeting in accordance with the will and needs of the community. Implementation of the sovereignty of the people meaning that Indonesian as a state requires political parties to implement the functions of political recruitment, socialization politic, or a means of improving the intellectual and character formation and voting behavior. Political parties play an important role in implementing democracy in accordance with the will and desires of the community in general, under the Constitution as a consequence of Indonesia as a constitutional state. General election shall be held by a General Election Commission (re: KPU) which is national, permanent, and independent in nature. General Election Commission also knowing as an *auxiliary state's bodies* or *Auxiliary state's organ*. In association with Robert A. Dahl's view in their "procedural democracy," book stated that as the size of an election that meets the principles of democracy:

First, inclusiveness, meaning that every person who has grown to be included in the election; second, equal vote, meaning that every voice has the same rights and values; Third, effective participation, meaning that everyone has the freedom to express their choice; fourth, enlightened understanding, meaning that in order to accurately express their political choice, everyone has a strong understanding of and ability to decide his choice; and fifth, final control of the agenda, that is considered a democratic election when there is space to control or supervise the elections.

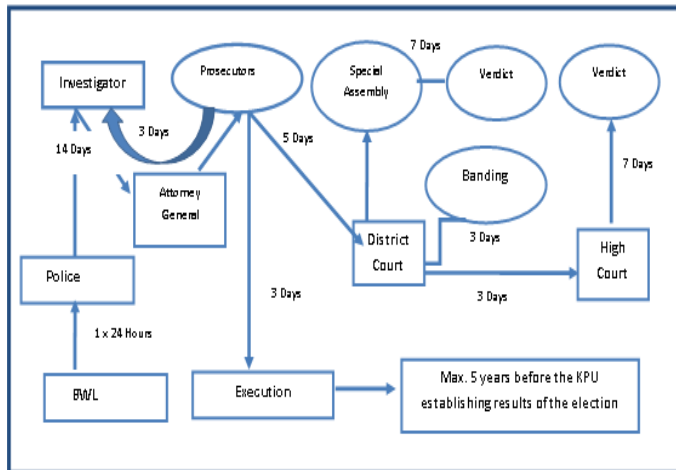
The existence of a general election becomes the main indicator of a democratic state, because through the election,

the people can determine their representatives in organizing the state. The desire to give judgment against all forms of violations of the election, expected by lawmakers will be able to promote the establishment of elections truly democratic. As one of the sanctions is expected to be trigger in law enforcement of elections are functionalization of criminal sanctions. Historically, crime prevention using the instruments of (criminal) law is the most old, as old as human civilization itself "*older philosophy of crime control*". But seen as a "matter of policy", some are questioning whether the crime needs to be addressed, prevented or controlled with the criminal sanctions instrument. This rejection as has been mentioned before by H.L. Packer who argues that the criminal sanctions were "a vestige of our savage past" that should be avoided. The issue of criminal sanctions law is closely related to the philosophy of punishment. But how exactly the relationship between philosophy and conviction? Theoretically, there are two approaches that seem contradictory by "philosophical" on one side, and "legal mind" on the other side. The philosophical focus on the issue of why we convict. While on the other hand, legal experts and experts in penology focuses on the issue of whether the punishment was managed efficiently, prevent or rehabilitate. Referring to the theories of punishment that exist, there is a tendency that the punishment is done through a reductionist approach as a control or a tool of state to mitigate or reduce the aberrant action of the perpetrators by isolating actors or make the perpetrators caught in order not to do so. Another approach is to reply actors with moral response for perpetrators of criminal acts. At the moment, the most popular type of punishment is deprivation in the form of isolation in prisons. Seen from the criminalization viewpoint, the criminal judiciary system is considered to have failed in creating deterrent effect for perpetrators of criminal acts; in fact, State Detention Houses (*RUTAN*) and Correctional Institutions (*LAPAS*) are no longer effective solutions to the convicts' reintegration and resocialization process; rather, there has been a shift in the function of correctional institutions whereby they are becoming academy of crime, a place where convicts "improve" their skills in committing criminal acts. Theory of punishment continues to move looking for the right model to overcome evil behavior and uphold truth and justice through sanctions, also known as criminal sanctions. Philosophy of punishment is a philosophical foundation for formulating basic fairness, if there is a violation of criminal law. Philosophy of justice in criminal law there are two strong influence that justice is based on the philosophy of retaliation (retributive justice) and justice based on the philosophy of restoration or recovery (restorative Justice). The restorative justice approach in criminal (penal) case settlement is considered as a new method, although most of the patterns being applied have been rooted in the values of local wisdom of primitive people. In accordance to the characteristics of restorative justice theory, then according to Van Nes expressed his opinion as follows:

"Crime is primarily conflict between individuals resulting in injuries to victims, communities and the offenders themselves; only secondary is it law breaking; The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes. The Criminal justice process should facilitate active participation by victims, offenders and their communities. It should not be dominated by government to the exclusion of others".

Meanwhile, at the practical level many people who translate 'Criminal' as 'punishment', where the punishment not only exist in the criminal law, but almost in every field of law also impose penalties to violators of the norm. Moreover, the criminal has been associated even as a punishment. In accordance with the General Election on democratic system in Indonesia, requires the existence of political parties as an extension of the hands of the people to channel their aspirations in elections has earned its own place in this country. Political parties become absolute prerequisite for a democratic system that have been asserted in Indonesia. Therefore, democracy and political parties in a democracy are like two sides of a coin, which can not be separated between one and the other side. The general election is a form of political participation of the people in a democratic country, then honesty, fairness and transparency of elections will reflect the quality of democracy in a country. As stipulated in Article 1 point (1) of Law No. 8 of 2012 concerning the General Election which has mentioned that the election is a means of implementation of the sovereignty of the people who carried out direct, general, free, confidential, honest, and fair in the Republic of Indonesia based on Pancasila and Constitution of the Republic of Indonesia. Based in such view, it's shows that how the election becomes very important in the life of the state in Indonesia as a democratic state. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Election processes are always tinged with anomalies or phenomena that injured idealistic values of these elections. Therefore, there is a need for a scientific investigation process for the purpose of determining the implementation of the direct democracy itself. Since the beginning up to the last election in 2014-was always a violation of the norms of the election. Practically, the most violations almost happened in every election are money politics cases, the bubbling vote, or other forms of violation on election process. Money politics for the example, either in the Indonesian Criminal Code and the Law No. 8 of 2012 concerning the General Election have been asserted that "money politics" is a criminal offense in addition to other forms of criminal acts in election activities. Having all these new laws and legal institutions, albeit already quite a good achievement is worth nothing, if we don't prepare the right personnel to do the job. Therefore, capacity building for the implementation of all aspects and at all levels of the new constitutional and legal institutions are a must, lest Indonesia will become a democratic state under the Rule of Law on paper only (law in text), and not in reality as expected. That issues is the basis for the idea to create a rule that is expected to effectively prevent various issues in the elections, mainly related criminal offenses on election process. Election criminal offense in Indonesia has been progressing, with the development of criminal acts are increasingly wide-ranging election, including election of the offenses that can lead to criminal sanctions. In accordance with criminal sanctions in the Law No. 8 of 2012 regarding the General Election, with due regard to the views Barda Nawawi, then briefly be said, that the crime of election is seen as something illicit act and should be completed as soon as possible. Therefore, if the settlement process is protracted, can impede the electoral process and injure the principles of democracy itself. Instead, the crucial points of the policy of criminalization become "blurred" if the legal process runs must be accelerated. As we

can read on the Chapter XXI of the settlement of election crimes has been arranged as described on the Table 1.

Table 1. The Settlement of Election Crime Process

Note: KPU: General Election Commission
 Source: Secondary data, edited, 2015.

Based on the description in Table 1 above indicate that in order to resolve the matters included in the criteria for the crime of election, it takes at least 45 (forty five) days. This time the setting is still unclear because: *First*, didn't set explicitly whether that meant working days or holidays should be calculated; *Second*, whether the time has also been taken into account against the barriers associated with distance and geographical conditions of the region; *Third*, related to the establishment the Panel of Special Judge (Majelis Hakim Khusus), it is means should be set against the formation mechanism must also be established by decree which also takes administrative requirements. The reason of the length of time needed to complete election violations, then the application within 45 (forty five) days was uncertain on practical level. Another thing to be conveyed is supposed to lawmakers know and understand the philosophical of administrative sanctions other than criminal provisions. According to data collected by the authors shows that there are an increase in the number of violations of the 2014 election than the 2009 election, but on the other hand, the number of law enforcement regarding election violations decreased over the time. Functionalization of criminal sanctions in administrative laws basically is to combining two legal systems and disciplines of administrative laws and criminal laws has delivered problems in their implementation, but all of them are ignored without any solution. Criminal sanctions that are essentially *ultimum remedium* have changed to a substantial coercive tool that in the end has weakened the criminal sanctions themselves in their practical implementations. Some of un-uniformities of criminal sanction system are that there are laws implementing special *straff minima* (minimum penalty), there are laws using *straff maxima* (maximum penalty), there are laws using special cumulative penalties and incisive cumulative penalties, and there are laws using double track system. Any development of law that deviates away from its principles and theories will push its legal implementation away from its true direction and in the end of the day it will depart far away from the essence of legal development.

4 CONCLUSION

The essence of criminal sanctions on the Law No. 8 of 2012 regarding the General Election is as set out in the dictum considers that to realizing a democratic election. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Therefore, the essence of the establishment of this law on the practical level-shifted and become more inclined simply to enforce the law substance contained in the Law No. 8 of 2012. Thus, functionalization of criminal sanctions is not only used to encourage compliance levels of society, but rather serve not as "*ultimum remedium*". Last but not least, philosophical consideration of the functionalization sanction the Law No. 8 of 2012 seems more likely to see the process of electoral administration in the criminal side as the law enforcement process against the law, and did not look the essence of the democratic process on the side of the administration to bring more quality implementation and meets the democratic principles.

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