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ESTABLISHMENT PROCESS OF RESPONSIVE REGIONAL REGULATION IN HANDLING THE COVID-19 IN BALI

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Abstract

Following the hierarchy of Rules in Indonesia, the regional regulation is a type of rules that happen to be at the lowest order and it is considered to be the authority of regional government. It is common to find out that the implementation of community expectation is not effectively applied. It happened due to several factors. Hence, this study was aimed to provide recommendations on the mechanism for the more responsive establishment of the regional regulation, especially in terms of handling the Covid-19 Pandemic in Bali considering that Bali as a tourism area relies on this sector for its economy. This was normative legal research with social jurisprudence approach, which examine and analyze the law in society using social science as its basis. The study indicated that with regard to the construction of a good and responsive regional regulation, it can be carried out in stages as stipulated in the provisions of Article 15 Paragraph (5) of the Minister of Home Affairs Regulation No. 80 of 2015 is to determine the Priority Scale. In addition, a sociological approach must first be carried out to optimally capture the expectations of the local community.

Keywords: Establishment, Responsive, Regulation, Bali, Covid-19.

I. INTRODUCTION

I.1 Background Of The Problem

The phenomenon of the shrunken of public trust in the ability of the law to meet a substantive sense of justice, is due to the chaos of authority that is too identic with political interests and barely upholds public expectations as so-called community expectations. The separator line between law and politics is quite unclear, which is can be seen throughout the process of advocacy and legal decision which contact directly with contradictory public issues (public facts).

This concern was also expressed by Philippe Nonet and Philip Selznick who expressed a high-risk view of law and order.(Ahmadi, 2018) They expressed three models or basic statements in relation to law in society, namely First, law as a servant of repressive power; Second, the law as a separate institution capable of taming repression and protecting the integrity of the law itself; and finally, the law as a facilitator of various responses to the needs and aspirations of the community.(Ahmadi, 2018)

In the context of the COVID-19 outbreak which has been designated by WHO as a global pandemic, the Indonesian government has made adjustments to its national law as a form of commitment in the capacity of the state as a subject of international law. (Sriwulan, 2020) It does affect some regional policies throughout the Republic of Indonesia. Following the issuance of Presidential Instruction Number 6 of 2020 concerning Discipline Improvement and Law Enforcement of Health Protocols in the Prevention and Control of COVID-19, Instruction of the Minister of Home Affairs Number 4 of 2020 concerning Technical Guidelines for Drafting Regional Head Regulations in the Framework of Implementing Discipline and Law Enforcement of Health Protocol as an Effort for Prevention and Control of COVID-19 in the regions, there are several regional regulations that need to be adjusted. Hence, the Governor of Bali, I Wayan Koster, then stipulated the Bali Governor Regulation Number 46 of 2020 concerning the Implementation of Discipline and Law Enforcement of Health Protocol as an Effort to Prevent and Control Covid-19 in the New Era of Life Order.

As an actualization at the regional government level after the governor regulation as mentioned above, the Governor of Bali has again issued various policies for handling COVID-19. The various policies referred to must be obeyed by the entire community, even at the *Banjar* level, where the *Banjar* is a form of administrative division of the administrative area at the level of the community unit, the community begins to carry out strict security in their respective areas. The existence of

excessive action in certain areas is a form of distortion due to the lack of clarity in local regulations and lack of education regarding the prevention and control of this virus. All business places were strictly limited in their activities, even in the early days, tourist destinations were completely disabled.

As time goes on, the struggle with this virus has increased the number of people affected by the virus. More importantly, the affected community is not just about health matters. The increasing number of infected people and deaths is indeed very worrying, but new social problems are starting to become unstoppable. The government will find it difficult to close some places, such as markets, because many people derive their income from there. Especially for people who depend on the tourism sector such as Bali, when this pandemic policy was set, many of them experienced a drastic shrunken in the economic sector and even lost their source of income altogether.

The policies that have been set are deemed to be only able to target the health sector, neglecting about the economic impact which will certainly have an impact on social life. This is not a new problem in the establishment of the regulations, this has even become a culture even at the level of the legislation which is built on Pure Legal Theory. This culture will influence each other.

Pure Legal Theory is a cognitive legal theory developed by Hans Kelsen (Wardiono, Dimiyati, and Rochman, 2018), which at that time influenced the legislative culture of European countries and their former colonies including Indonesia. The culture of normative legislation that causes legal products to be separated

from their context. Pure Legal Theory is a general legal theory, meaning that it is not intersect with a particular legal system, this theory also considers the product of legislation from a cognitive perspective and last, the theory does not allow any intersection between law and facts. (Kelsen, 2020)

Therefore, this articles further analyze and examine the cause of the separation of many legal products with contexts including the community expectations as the target of a legal policy through two main research questions: First, how is the construction of the establishment of responsive Regional Regulations in the context of handling COVID-19 in Bali? Second, what are the obstacles faced by the law makers of Regional Regulations, especially the Regulations set by the Governor in the COVID-19 Era to accommodate the implementation of community expectations, especially in Bali?

Previous research was conducted in 2020 by Ardika Nurfurqon who analysed "*Analisis Kebijakan Pemerintah Daerah Dalam Penanganan Covid-19: Perspektif Hukum Administrasi*". (Nurfurqon, 2020) In this study, the focus of the study is on policies taken by the government, both central and local governments, as an effort to reduce the number of spread of Covid-19 from an administrative law perspective. This study also examines the regional policies of West Bandung Regency in dealing with the Covid-19 pandemic. Similar research was also carried out in 2020 by Anak Agung Putu Wiwik Sugiantari and Lis Julianti who examined "*Penanggulangan Covid-19 Berbasis Desa Adat Dalam Perspektif Perlindungan Hukum Terhadap Aparatur Desa*". (Agung Putu Wiwik S,

2020) The focus of the study in this research is regarding the rescue of the Customary Village apparatus as implementers in the field as the front guard regarding efforts to deal with Covid-19. This research also examines the need for clear arrangements as a form of guarantee for the security of the Village Adat officials in carrying out their duties.

Based on the abovementioned, it seems there are similarities in the discussion topics that discuss about the implementation of community expectation in regulation products of the government in handling Covid-19, however, the focus of the study on this research is different. This research examines the establishment of responsive Regional Regulation in the context of handling Covid-19 in Bali and also the constraints faced by the Law Makers of Regional Regulations, especially regulation stipulated by the Governor in the Covid-19 era to accommodate the implementation of community expectation in Bali.

I.2 Research Method

This was normative legal research with social jurisprudence approach, which examine and analyze the law in society that using social science as its basis. (Fajar and Achmad, 2013) Normative legal research is defined as research on the implementation of legal principles, legal systematics and the level of synchronization in the society. The location of the research was carried out in the Province of Bali and using primary data and secondary data as its sources. The data was collected through document studies, tracing laws and regulations as primary data and it also supported by observations as secondary data. The results of the analysis of this study will be presented in an analytical descriptive manner.

II. DISCUSSION

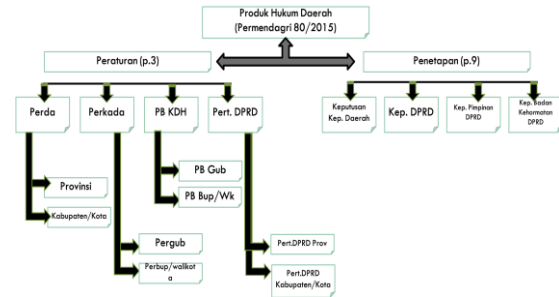
A. Construction of Establishment of Responsive Regional Regulation in the Context of Handling Covid-19 in Bali

The juridical basis that first formally laid down regional regulations as a type of legislation was the People's Consultative Assembly (hereinafter MPR) through MPR Decree Number III/MPR/2000 concerning Sources of Law and Order of Legislation which was a substitute for MPRS Decree Number XX/MPRS/1966 concerning DPR-GR Memorandum regarding the Orderly Sources of Law of the Republic of Indonesia and the Order of Laws and Regulations of the Republic of Indonesia. It is regulated under the provisions of Article 2 of MPR Decree No. III/MPR/2000 that the hierarchy of laws and regulations shall be: (Aditya and Winata, 2018)

- 1) Constitution of the Republic of Indonesia of 1945;
- 2) People's Consultative Regulation in Lieu of Law;
- 3) Law;
- 4) Government Regulation in Lieu of Law;
- 5) Government Regulation;
- 6) Presidential Decision;
- 7) Regional Regulation.

In accordance with the MPR Decree No. III/MPR/2000, the types and hierarchy of rules and regulation in Indonesia also

stipulated in Article 7 of the Law Number 12 of 2011 concerning Making Rules (Law No. 12 of 2011 Concerning Making Rules State Gazette of the Republic of Indonesia No. 82 of 2011, 2011), as follow:



- a. Constitution of the Republic of Indonesia of 1945;
- b. People's Consultative Council Decree;
- c. Law/Government Regulation in Lieu of Law;
- d. Government Regulation;
- e. Presidential Regulation;
- f. Province Regulation; and
- g. Regency/Municipality Regulation.

There are several regional regulations are enacted, however many of them are deemed ineffective and not in accordance with the objective of regional autonomy. In addition, the ineffectiveness of a regulation in the region is also due to deviating from the needs of legal development in the region both in the short, medium and long term

or also known as Regional Long-Term Development Plan or *Rencana Pembangunan Jangka Panjang Daerah* (hereinafter RPJPD) and Regional Medium-Term Development Plan or *Rencana Pembangunan Jangka Menengah Daerah* (hereinafter RPJMD).¹

The ideological basis of the establishment of regional regulations as a form of legal product in the region is to guarantee legal certainty for the establishment of regional legal products with definite procedures and methods. Hence, there will be standards in terms of policy formation in the regions to avoid any conflict with upper laws and regulations, as well as avoiding conflict with public interest and/or decency.² Regional regulation is actually only a kind of regional legal products. There are several other regional legal products which is shown within the table as follow:

¹ One of the procedures in the preparation of the Provincial *Promperda* as stipulated in the provisions of Article 15 Paragraph (5) of the Minister of Home Affairs Regulation No. 80/2015 is to determine the Priority Scale, which fall to four criteria, namely: (1) higher order of laws and regulations; (2) Regional Development Plan (RPD); (3) Implementation of regional autonomy and assistance tasks; (4) Regional Community Aspirations.

² This ideological/philosophical basis is contained in the preamble considering Letter (a) Permendagri Number 80 of 2015 concerning the Establishment of Regional Legal Products.

In order to actualize the proportional division of affairs between the center and the regions, it can be examined through three main criteria, namely externality, accountability, and efficiency, which must be implemented cumulatively. (Imroh, 2018) Externalities, means that the authorized government of any obligation that shall be carried out by the government shall be determined based on the impact caused by the government activity, hence there won't be any overlap within the process. Accountability, means that in the event that there will be an impact caused in the community within the region, it will be the authority of regional government. Lastly, in terms of efficiency, shall defined as in any event of government affairs, both central and regional, shall be focusing on the economic scale.

All those three criteria aim to strengthen the relation between both the central government and regional government. It also applies in the context of the embodiment of regulation in the central government to make adjustments that have been adapted to the needs of each region. Given that every community in each regional has their own needs, then it is very important to carry out a context analysis to optimize the implementation of community expectation in a regional legal product, especially within the

governor's regulation which issued in handling the pandemic in Bali.

A context analysis is a kind of analysis of community expectation and the implementation of the expectation within the legal product. (Putra, 2020) There are two criteria in order to carry out a context analysis, namely:

- 1) The suitability of a product of legislation with the needs of the community;
- 2) The characteristics of the object to be regulated through a product of legislation.

This kind of analysis can also be applied in the establishment of regional regulation. With regard to the construction of establishment of a good and responsive regional regulation, there are several steps that can be taken: (Putra, 2020)

1. Planning the Regional Regulation through *Prolegda*, along with the Regional House of Representatives (hereinafter DPRD) that shall be in accordance with the preparation of the RPD, one of which is prioritizing the legal development in the regions;
2. Development of Regional Regulation Planning Arrangements, where

the basis for its establishment must be based on higher regulations, hence there are no conflicts of norms in the future;

3. The criteria for determining the priority of the Regional Regulation, this must be able to answer the problem of the context from a philosophical, epistemological perspective according to positive law and other legal sources, and ontologically related to the benefits of a regulation to get closer to legal objective in the region;
4. Academic Draft of a bill, the three things abovementioned related to context problems will be able to be accommodated by a regional regulation if the stage of preparing academic draft of a bill is carried out due to the right way and standard;
5. The participation of (von Benda-Beckmann, 2002) the community, it really crucial to involve the community in the event of establishment of regional regulation. According to idea of Progressive Law Theory mentioned by

Prof. Satjipto Rahardjo, it is stated that "The law is for human beings, not the other way around" hence the effectiveness should not be questioned. The law is formed by relying on the aspiration of the community shall be applied effectively compare to the law which does not involve the community in its establishment.

In the event of handling the pandemic situation in Bali, the active participation shall involve all the stakeholders in the tourism sector as a top priority and then followed by the community from any other sectors. The other sectors that are affected by the enactment of a regional regulation, for instance the education and economic sectors are also crucial. However, among all those things, a priority scale shall be determined, hence, it is hoped that the fulfillment of community expectation can be carried out in more objective and fair manner.

In handling the pandemic situation in Bali, both the Central Government and the Regional Government is conducted within the concept of legal pluralism. Legal pluralism is known as the condition where the enforceability of law more than one legal system. The concept of legal pluralism shows the condition that more than one legal system or institution is prevail in various relationship and activities.(von

Benda-Beckmann, 2002) One of the laws that applies in Indonesia is customary law.

According to Griffiths, there are two types of legal pluralism, namely "*weak legal pluralism*" and "*strong legal pluralism*".(Griffiths, 1986) The concept of "*weak legal pluralism*" recognizes state law as the superior, while other laws are united in a hierarchy under state law. This concept is also known as state legal pluralism. While, the concept of "*strong legal pluralism*" views all the existing legal systems as being equal in society, hence there is no hierarchy which shows that one legal system is actually higher than the other.(Irianto, 2003)

Furthermore, Werner Menski with the pluralist triangle concept emphasized that there are 3 (three) main elements, namely the element of society, elements of the state and elements of values and ethics that interact and influence each other. It is a combination of "state law (positivism), society (socio-legal approach) and natural law (moral/ethic/religion)".(Pasaribu and Sirait, 2018) In the context of legal practice especially in the establishment of rules and regulation in handling Covid-19 in Bali, there shall be 3 (three) main elements of the pluralism triangle which connected to one and another namely the interaction and negotiation between community law, state law, and religious law. Hence, it is important to establish any rules or regulation as a legal product, especially in the context of

handling the Covid-19, which suitable for the community by adjusting the prevail law within the community as well.

According to Jerome Frank, the ideals of a more responsive law start from the ideal or objective of the main struggle of legal realism.(Barzun, 2010) One of its characteristics is the emphasis on the importance of a legal evaluation which is reviewed from the point of view of the impact as well as its effect on society.(Barzun, 2010) A sociological and even multidisciplinary approach is needed to evaluate local regulations and make existing laws more responsive.

Many doctrines are misunderstood, for instance the term "Law as a tool of social engineering", which is widely translated and then used as a doctrine in creating legal products in this country from its originator, Roscoe Pound. According to his reference entitled *Jurisprudence*, Volume I (1959: 350-358) for naming eight concepts from his Sociological School, Pound never uses the term "Social Engineering" but uses the term "The Program of The Sociological School", which is summarized by Achmad Ali as follows:(Ali, 2010)

1. The study of real social influence comes from legal institutions, legal teachings and principles of law;
2. Conducting sociological studies in

preparing the law-making;

3. Conduct studies on ways to make legal teachings more effective in action;
4. Studies using juridical methods/legal matters, psychological studies on judicial, administrative, legislative, and legal processes, lastly philosophical studies on ideas;
5. For adherents of the sociological school of legal history, when conducting legal studies, they are not only focused on how legal teachings are formed and developed but also on what social influences have been caused by past doctrines on the law and how these influences arise;
6. Introduce the importance of individual application of the teachings of the law, the settlement of cases fairly and according to reason;
7. In common law countries, a Minister of Justice who in America is called the Department of Justice functions as a legal advisor to state officials, represents the state in civil cases, and

becomes a defender in criminal cases, especially at the appeal level;

8. All of the things described above are only a kind of means to be able to strive more effectively so that the goal of the rule of law is achieved.

In order to establish a responsive law, it is clear that an active participation and aspiration from the society is a must. It is in accordance with the theory of Regulatory Compliance, which stated by Sutinen and Kuperan. (Sarawa and Mas' ud, 2020) According to this theory, it is known that people's adherence to law is influenced by various factors, including psychological factors and sociological factors of society itself. (Sarawa and Mas' ud, 2020) This theory also emphasizes that compliance with rules and regulation is related to the influences of the environment through socialization, which is the linkage between an individual and the society. Here, the society play a huge role. It is shows that the influence of the environment is an important factor that could influence each person decisions towards compliance. (Sarawa and Mas' ud, 2020).

Based on abovementioned, it is known that the influence of the environment is an important factor that could influence each person decision towards compliance. Therefore, in terms of directing the establishment of responsive laws in general and in

particular the establishment of regulations in the regions must be *bottom-up*, meaning from the implementation of the expectations and needs of the community on the law, not top-down, namely rigidly following legal policies at the center and then crudely applied within the area. Hence, the active participation and aspirations of society is needed in the establishment of any regulations, which includes the establishment of regional regulation in the context of handling the Covid-19 in Bali.

B. Constraints Faced by the Law Makers of Regional Regulations, especially Regulation Stipulated by the Governor in the Covid-19 Era to Accommodate the Implementation of Community Expectation in Bali

In the event of accommodating the implementation of community expectation in Bali, there shall be a connection between national and regional regulation especially in the context of handling Covid-19 in Bali. The arrangement and establishment of the rules and regulation in handling the Covid-19 shall be seen from the regulation which made by each customary village in Bali. This arrangement is in accordance with "the Progressive Legal Theory" stated by Satjipto Rahardjo. (Rahardjo, 2010) Referring to the idea of Satjipto Rahardjo's, the establishment of regulation must be examined in

its contextualization with the reality of space and time. (Mukminto and Marwan, 2019) Hence, law is not only seen as a form of regulation but also a unity of ideas, culture and aspiration to be realized for the welfare of mankind. (Mukminto and Marwan, 2019)

Along with that idea, it is understood that the arrangement and establishment of rules and regulations should not be stagnant, but it shall follow the needs and seeks to pay more attention to justice in society for the achievement of human welfare itself. (Marilang, 2017) Therefore, the community will obey the regulation since it is in accordance with the value that lives within the community.

As mentioned in the introduction of this paper, the regulations enact by the Regional Head, which in this case have been stipulated in the form of a Governor Regulation and its derivatives in the form of circulars in the context of handling Covid-19 in Bali, and other forms are only deemed capable of fulfilling aspects in the health sector only. This could be due to several things, namely:

1. Tendency to over-generalize. This means that there is a lack of effort to look at policies in other regions that have proven better results or can even make comparisons with other countries that also depend on the tourism

sector such as Bali. The point is that legal regulations are getting lower in substance and their scope must be more specific, not only in procedural matters in the process of forming a rule of law, but more than that it must be able to adapt and implement the expectations of the community in the region.

2. Putting the doctrine under the desired social outcome or impact. This means that it is still very difficult for regional heads to form a Regional Head Regulation (*Perkada*) or even other regional legal products that are not interfered with by political interests both at the center and at the regional level, individual interests, and self-integrity instead of prioritizing legal integrity.
3. There is a discretion that is not evaluated. This means that if the authority of regional heads in exercising discretion is not consistently evaluated, then there is the potential for the creation of laws that are only according to their wishes, even legal institutions and institutions are deliberately made very vulnerable to various pressures in the political environment.

Regulations are deliberately problematic, because when this happens, officials and citizens can act arbitrarily. (Ali, 2010)

Responsive local government will produce local legal products that are definitely responsive. Therefore, it is important to have a better understanding and consistent commitment in applying the principles that are upheld by Responsive Institutions both at the central and regional levels. Responsive institutions will put social pressures as a source of knowledge and opportunities for self-evaluation. (Ali, 2010) There are several principles shall be followed, *inter alia*: (Ali, 2010)

1. Sovereignty of purpose;
2. Obligations and courtesy;
3. The principle of balanced legal and political participation; and
4. The principle of fairness to competence.

The most crucial thing in the context of the need to be able to absorb the aspirations of the community must be done at an early stage, namely when planning a regional legal product in whatever form it takes. Since the enactment of Law No. 10 of 2004 until the enactment of Law 12 of 2011 as

a juridical basis, from the beginning it has been necessary to involve the community or participation of a public nature. (Dwiyanto, 2003)

The main obstacle to this suboptimal expectation is that the planning process is still rigid and runs within a formal mechanism. If this process is carried out correctly, then the regional legal products that will be produced will be effective because they are in accordance with the needs of the community.

Based on the abovementioned, it can be understood that there shall be a good relation between central and local government in accommodating the implementation of community expectation in Bali in terms of handling the Covid-19. It is important to have a better understanding and commitment in applying the principles that are upheld by Responsive Institution. The ability to be able to absorb the aspiration of the community shall be done from the beginning. Hence, the legal product which establish by the central and regional government is in accordance with the need of each region and its community.

III. CLOSING

With regard to the construction of a good and responsive regional regulation, it can be carried out in stages as stipulated in the provisions of

Article 15 Paragraph (5) of the Minister of Home Affairs Regulation No. 80/2015 is to determine the Priority Scale, which fall into four criteria, namely: (1) higher order of laws and regulations; (2) Regional Development Plan (RPD); (3) Implementation of regional autonomy and assistance tasks; (4) Regional Community Aspirations. In addition, a sociological approach must first be carried out to optimally capture the expectations of the local community. In order to suppress various obstacles in the formation of regional legal products, namely in the form of responsive regional regulations, it must be carried out by upholding and consistently applying the principles, namely: the principle of sovereignty of purpose, the principle of obligation and courtesy, the principle of balanced legal and political participation, and the principle of fairness to competence. Hence, the legal product which establish by the central and regional government

is in accordance with the need of each region and its community.

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