

Comparative Study on Criminal Provisions on Regional Regulations Concerning Exclusive Breastfeeding

TISA WINDAYANI

Faculty of Law, Atma Jaya Catholic University
Jl. Jenderal Sudirman Kav. 51, Jakarta
tisa.windayani@atamajaya.ac.id

ABSTRACT

Infant's right on exclusive breastfeeding has been protected on Law No. 36/2009 on Health. One of the measurements in its protection is by using criminal provision. It is stated in Art. 200 and 201, each of which has criminal sanction to those obstructing the exclusive breastfeeding program. As an effort to implement this national policy, quite a numerous provinces or even lower administrative regions had issued regulations concerning the same matter. Some of them have criminal provision as well, as can be seen in City Regulation of Cirebon No. 4/2016 on Early Initiation and Exclusive Breastfeeding and also in the City Regulation of Semarang No. 5/2014 on Early Initiation and Exclusive Breastfeeding. This paper will assess specifically the criminal provisions on those

regional laws in a comparative perspective. The selection of the two laws is based on the preliminary study which found a quite unique form of criminal provisions on each laws. The analysis is also based on art 200 and 201 Law No. 36/2009 and its derivative regulations as a normative measurement in national level, with which the two regional laws must be in line to. This research found that there are quite a significance differences between the two laws especially regarding the form of action that is criminally regulated. Variation also found on how the two laws fulfil what is demanded by the national criminal policy.

Keywords: breastfeeding law; criminal law protection on breastfeeding; regional breastfeeding law.

I. INTRODUCTION

Exclusive breastfeeding for the first six months of life of the infants is strongly suggested by the WHO. This is because tremendous research have shown its benefit. One research shows that exclusive breastfeeding for 6 months is associated with a lower risk of gastrointestinal infection and no demonstrable adverse health effects in the first year of life¹. A WHO Collaborative Study reported that exclusive breastfeeding pro-

fects infants from diarrhoea and also from deaths due to acute respiratory infection². In relation to allergies and atopic disease a research conclude that for infants at high risk of developing atopic disease, there is evidence that exclusive breastfeeding for at least 4 months compared with feeding intact cow milk protein formula decreases the cumulative incidence of atopic dermatitis and cow milk allergy in the first 2 years of life³. Moreover, there is a research proving the benefit of breastmilk in relation to the prevention of HIV transmission to the infant. Non-exclusive breastfeeding more than doubles the risk of early postnatal HIV transmission. The risk of post-natal HIV transmission before 4 months was significantly lower among 613 women who reported exclusive breastfeeding, compared to among 121 who reported non-exclusive breastfeeding⁴. The benefit of exclusive breastfeeding is not only for infants but also for mothers. Exclusive breastfeeding and concomitant suppression of menses significantly reduce the risk of postpartum relapses in multiple sclerosis. Fifty-two percent of women with multiple sclerosis who did not breastfeed or began regular supplemental feeding within two months postpartum, 87 percent had a postpartum relapse, compared with 36 percent of the women with multiple sclerosis who breastfed exclusively for at least two months postpartum⁵.

The exclusive breastfeeding in Indonesia is regulated on Law Number 36/2009 on Health in article 128. This article assured that infant has the right to be exclusively breastfed during the first six months of life. However, exemption based on medical reasons may be allowed. Regarding to par 2 of the same article, during the exclusive breastfeeding period, all parties related to it including families, government and the society are required to give a full support to the mothers by providing a suffice time and special facilities. Moreover, it is explained in par 3 that the special facilities stipulated in par 2 be held in working and public places. As an effort to guarantee the enforcement of what is specified in Art 128, a criminal establishment is set up on Art 200 and 201. In the first one, a penal sanction of maximum of one year imprisonment and a fine of maximum of one hundred million rupiahs might be imposed to anyone who hinder the exclusive breastfeeding

program. While the second one regulates criminal sanction if the action, as it is stipulated in Art 200, is done by a corporation. Those include the imprisonment and fine to the management, the tripled of the amount of maximum fine that might be imposed to the corporation, and the additional sanction of revocation of the business permit and or corporate legal entity. All of these articles are intended to protect the implementation of the so called exclusive breastfeeding program. This is one of the representation of what is stated in the consideration part of the law no 36/2009 which declare that health deemed as human rights and is one of the key elements of welfare. In line with all the studies elaborated in the beginning of this article, proving that exclusive breastfeeding is essential for infant's health and for some extent, for the mothers, it is become well-grounded to give serious attention and well protection to it, as to guarantee the welfare of those two groups of the society. This atmosphere could be perceived by, off course, the existence of criminal law upon the matter. By it, the state has decided to have further interference to the protection of the rights sourced from exclusive breastfeeding program. This is in line with the general-nature of the criminal law as the representation of state's responsibility to preserving security and orderliness as well as protecting the people's right⁶. The use of criminal law to regulate the society concerning certain activities is not obligatory but as one alternatives from the available regulatory instruments⁷. However, criminal law must be used to efficiently because criminal punishment is the fiercest legal punishment and may inflict stigma towards the subjects of the punishments⁸.

Since 2004, Indonesia had been adopting the concept of regional autonomy which, fundamentally, is based on Art 18 of UUD 1945 as constitution for Indonesia. By then, quite many of governmental matters are being decentralized to the regional authority, and one of them is health matter. It is stated in art 12 of Law No. 23 of 2014 On Regional Autonomy. According to this article health is mandatory matter of regional government which falls under the category of concurrence governmental matters. This means that there is some kind of division between the central and regional government in the management of the respected mat-

ters. The authority of regional government to create regional law is constructed from the attributive power given by the regional autonomy law⁹. Thus, the policy formulated in the regional law have to be in line with national policy.

In relation to exclusive breastfeeding, numerous regional government have created law in order to protect the breastfeeding right as well as to give a rather specific regulations upon the matter. However, not all of them using criminal law as a tool to ensure the enforcement. This research focus on three regional laws that support exclusive breastfeeding in which criminal instrument is used. Those are:

1. City Regulation of Kabupaten Wajo No. 8 /2016 Concerning Early Initiation and Exclusive Breastfeeding
2. City Regulation of Kab. Semarang No. 5/2014 on Early Initiation and Exclusive Breastfeeding
3. City Regulation of Cirebon No.4/2016 Concerning Early Initiation and Exclusive Breastfeeding

This paper discusses the criminal provisions from the three laws in comparative perspective. Analysis is based on the principles related to the formulation of criminal provision, as well as on how the criminal provision on each of the three regional regulations reflects the Art 200 and 201 of Law no. 36/2009 as the national benchmark, upon which the three laws should in line to.

2. DISCUSSION

THE EXCLUSIVE BREASTFEEDING LAWS

2.1. Exclusive Breastfeeding Law in National Level

As mentioned above, exclusive breastfeeding is regulated on Art 128 and its criminal measurement is on Art 200 and 201. The two criminal provisions state that the form of the act that could be sanctioned is "hindering the implementation of exclusive breastfeeding program". In defining the phrase exclusive breastfeeding program, Art 200 and 201 refer to Art 128 par 2 which said to be the obligation of families, central government and regional government, as well as the member of society to give full support in the implementation of the program. It is also said that

the form of the support is giving suffice time and special facilities. Those are the only elaboration given by the provisions. Moreover, as a response to what is normatively set out on this national level, the government created Government Regulation No. 33 of 2012 on Exclusive Breastfeeding. The regulation obligate the management of working place to give appropriate opportunities for mothers to nurse the baby or to express breast milk during the working hour period¹⁰. Moreover, Art 30 also states that management of working places and public places have to provide special facilities for nursing. Special for working places, the implementation of the obligation should also taking into account the condition and capability of the respected corporation. However the regulation does not provide any detailed information regarding how the special facilities must be. It is determined however that those information shall be regulated by a minister regulation.

On 2013, government issued Regulation of Minister of Health No. 15/2013 concerning The Procedure in Providing Special Facilities for Nursing and or Expressing Breast Milk. This regulation defines special facility for nursing called nursing room, as a room space equipped by items used for nursing, expressing breast milk, keeping expressed breast milk, and or for lactation consultation¹¹. Besides obligate the management of working and public places similarly as regulated on the Government Regulation No. 33/2012, this minister regulation also specifies detailed criterion of nursing room. Because one of the supports that is demanded on Art 200 and 201 as referred to Art 128 par 2 is special facilities, which has been defined in Art 1 Minister Regulation No 15/2013 as nursing room, so all of the requirements related to it become mandatory. As a consequence, if any of those requirements is not fulfilled, then it can be said to be violating the art 200 or 201. In detailed, these are the standard of nursing room according to Art 12 of Minister Reg No.15/2013 – that a minimum standard for a nursing room is to be equipped by table and chair, washbasin, and a hand soap. The second aspect in art 200 and 201 is opportunity to breast feed the baby or to express breast milk which is slightly elaborated in the Minister Reg no 15/2013 on Art 6. It is stated that every management of

working places and public places must give an appropriate opportunity for mothers to nurse her baby or to express breast milk during the working hour.

2.2. Criminal Provision on City Regulation of Kabupaten Wajo No. 8/2016 Concerning Early Initiation and Exclusive Breastfeeding.

Kabupaten Wajo is a second administrative districts in the Province of South Sulawesi. The city has approximately 400.000 population. It also has fourteen administrative district. This Regulation No. 8/2016 is aimed, off course, to guarantee the fulfilment of the right of the infants to undergo early initiative to breastfeed and also to guarantee the implementation of exclusive breastfeeding. This is stated in art 4 of the regulation. The regulation also allows exemption to mothers for not having to breastfeed the baby in condition where there is medical indication that the mother is not capable to nurse, absent of the mother, and mother is separated from the baby¹². This aspect is quite different with what is specify in Law No. 36/2009, since it only mention medical indication as the reason for exemption. Another issue that is also special from the regulation is the article concerning somewhat a detailed information on expressing breast milk, which can be found in art 12-art14. Regarding the criminal provision, the regulation has one article only that is art 35. It is mentioned in this article what are the conducts that are criminally prohibited, and what are the sanctions. The article said that every person who violate certain obligations listed in the article would be imposed by the penal sanction. Those obligations are:

1. On Art 16:

- a) par 1: Health workers and health facilities have to provide information and education to the mother and the family about early initiative to breastfeed and exclusive breastfeeding since the period of pregnancy up till the end of exclusive breastfeeding period.
- b) Par 2:
The information and education referred in par 1 inclusive of:
 - i) the benefit and advantageous of early initiation to breastfeed and exclusive breastfeeding

- ii) expressed breast milk, how to express breast milk, how to store expressed breast milk, how to feed the express breast milk to the baby.
- iii) mother's nutrition, preparation and maintaining breastfeeding
- iv) risk of additional supplementary food to the infant age 0-6 months
- v) difficulties to convert from the decision for not giving breast milk
- vi) guide on how to breastfeed appropriately

2. On Art 17

- a). Par 1:
Regional government implement early initiation program and exclusive breastfeeding in order to accelerate and to achieve the goal of exclusive breastfeeding.
- b). Par 2:
The implementation of the early initiation to breastfeed program and exclusive breastfeeding as referred by par 1 has to be coordinated by the assigned SKPD.
- c). Par 4:
Further directive concerning the implementation of early initiation to breastfeed program and exclusive breastfeeding is regulated by Head of Kabupaten (Bupati) Regulation.

3. On Art 18

- a) Par 1:
in a condition where exclusive breastfeeding is not possible based on reasons specified in Art. 10, baby may be fed by formula.
- b) Par 2:
In the application of what is stated in par 1, health workers are obligate to give explanation as well as demonstration on the utilization and the technical procedure of formula feeding. This should be presented to the mother and the family.

4. On Art 19

- a). Par 1:
every health workers and health facilities are prohibited to give formula and or any other product that might potentially obstruct the exclusive breast feeding practice, unless by the reasons allowed on Art. 10.

b). Par 2:

every health workers and health facilities is prohibited to receive or to promote formula and or any other product that might potentially obstruct the exclusive breast feeding practice

The penal sanction stated in the article is a confinement of maximum of six months or a fine of maximum of fifty million rupiahs. However, it is stated in par 3 of the article that another penal sanction regulated by any other legislation might be imposed where applicable.

In relation to Art 200 and 201 of Law No 36/2009, this regulation of Kab. Wajo specifies in Art 22 that the management of working places as well as public places have to support exclusive breastfeeding program (Par 1), and the par 2 of the article said that those two managements have to provide lactation room. Moreover, concerning to the "opportunities for mother to express breast milk during working hour period", it is clearly stated in art 25 as an obligation for management of working places. However, there is no criminal sanction attached to the violation of this duties. This make another difference with its national level law in Art 200 of the Law on Health which, on the other hand, criminalize these two particular conduct.

2.3. Criminal Provision on City Regulation of Kab. Semarang No. 5 year 2014 on Early Initiation and Exclusive Breastfeeding

Kabupaten Semarang is one of the lower administrative area of the Province of Central Java. The regulation of Kab Semarang No 5 year 2014 gives definition on what the lactation room is – a special room used for nursing, expressing and storing breast milk, equipped by minimum facilities consist of table, chair, washing basin, and breast milk storage¹³. However, there is no stipulation in this regulation which clearly express that the lactation room defined is indeed a representation of the so called special facilities. So in order to make connection between the existence of "lactation room article" in this regulation and the special facilities demanded by art 128 in the national law on health, it would need to go first to the explanation on art. 1 of Minister of Health Regulation No. 15 year

2013. The regulation also clearly emphasize that every mother who give birth has to breastfeed her baby exclusively¹⁴, even though there is exemption for this based the following conditions:

- a. Medical indication where exclusive breastfeeding is not possible¹⁵;
- b. Absent of the mother
- c. Mother is separated from the baby.

Moreover in Art 17 Par 1 management of working places and public places is said to have obligation to support the exclusive breastfeeding program. While in Par 2, the two managements are obligated to provide special facilities to nurse and or expressing breast milk with taking in account the condition and capability of the corporation/management of working places. Special for management in working places, Art 21 demands them to give a suffice opportunity to nurse exclusively or to express breast milk during working hours in the working place. Those two stipulations is emphasized by the existence of criminal provision guarantying its enforcement. It is on the Art 31 of the regulation, which specifies that every person who violate what is ruled in Art 17 Par 2 and Art 21 would be imposed by criminal sanction of the confinement of maximum of 3 months or a fine of maximum of fifty million rupiahs. In the Par 3 of the article, it is said that beside the criminal sanction stipulated in par 1 of this article, another criminal sanction might also be imposed where applicable.

As can be seen, what is comprised in the criminal provision in Art 31 is very much similar and in line with the criminal provision in art 200 of Law No. 36 year 2009.

2.3. Criminal Provision on City Regulation of Cirebon No.4 year 2016 Concerning Early Initiation and Exclusive Breastfeeding.

Cirebon is a port city on the north coast of the Indonesia island of Java. It is located in the province of West Java near the provincial border with Central Java¹⁶. The criminal provision in this regulation is on art 48 that states every management of working places and public places who violates what is stipulated in art 29 Par 1, 2 and 3, shall be sanctioned according to the legislation applied. So it can be seen

in here that art 48 only refers to art 29 as a source of conduct which violation could be penalized. In details, here are art 29 par 1,2 and 3 ruled about:

a. Par 1

the management of working places and public places have to give support to exclusive breastfeeding program. This paragraph does not provide any further explanation about what it means by "giving support". However in par 4 of the same article there is elaboration on it. It says that the support referred by par 1 consist of:

- i) providing of special facilities to nurse and or expressing breast milk
- ii) providing of suffice time and opportunity to exclusively breastfeed or to espress breast milk during working hours in the work place.
- iii) creation of internal policy and regulation that support exclusive breastfeeding
- iv) facility of well-trained counsellor lactation

b. Par 2

Working places as referred by par 1 included:

1. Government owned corporation
2. Regional government owned corporation
3. Private corporation
4. Working places owned by government
5. Working places owned by private

c. Par 3

Public places as referred by par 1 inclusive of:

1. Health facilities
2. Hotel
3. Recreational facilities
4. Bus/land transportation terminal
5. Train stations
6. Airports
7. Harbour
8. Shopping centres
9. Sport facilities
10. Camps for refugees
11. Other public facilities

There are some notes that can be given from what is stated in art 48:

1. The conduct refer by art 48 in art 29 par 1 is not definite. That makes a further referring to another clause, in this case is par 4, of the same article be-

coming unavoidable. On the other hand, there is a special article (art 30) which regulate administrative sanction to the violation of 3 out of 4 duties owned by management of working places and public facilities stipulated in par 4. Those are:

- Duty to provide special facilities
- Duty to make internal policy and regulation to support exclusive breastfeeding implementation
- Duty to provide well-trained lactation consultant.

2. What is stated in par 2 and par 3 of article 29 is actually an elaboration of the term "working places" and "public facilities". Therefore it is not a definition nor explanation about any conduct that can be criminalized.

Moreover, this regulation of Cirebon also provide definition on special facilities to nurse and or to express breast milk in art 1, as - nursing room equipped by facilities to nurse, expressing breast milk, storing breast milk, and or lactation consultation. In relation to the exemption of mother's obligation to exclusively breastfeed, it is stated in article 9 that there are 3 conditions where it may apply; medical indication, an absent of the mother and condition where mother is separated from the baby.

3. Comparative Analysis

This part will demonstrate a comparative analysis on the three city regulations, specially the criminal provisions. The analysis will be based on two aspects. Firstly, it will be measured by some criterion on how a criminal provision is said to be proper; secondly, it will be seen on how the provision harmonize with the criminal provision on the national level law.

There are countless definitions regarding the concept of crime or criminal conduct. According to Prof Bambang Poernomo, a criminal conduct is an act which is prohibited by a criminal law or regulation and which is threaten by a penal sanction to any person committed the act¹⁷. In a view of its form and nature, criminal conduct is an act that violates the law, which also harm and obstructing orderliness in the society¹⁸. Prof

Satochid has given a more comprehensive definition of it. He explained that criminal conduct is an act that is against the criminal law, offensive to legally protected public or individual interest, socially unfavourable in nature¹⁹. Substantive criminal law, according to Barda Nawawi Arief, comprises of 2 essential aspects²⁰:

1. What type of conduct that reasonably penalized
2. What are the requirements, attached to the conduct, that necessarily being fulfilled to penalized a person
3. What type of penal sanction which is deemed suitable for the conduct.

In relation to the formulation of the provision, there are at least 3 elements that should be resided in a criminal provision, which are:

1. The legal subject, which become the target of the provision
2. The prohibited act, either in form of commission, omission or causing a criminally prohibited result.
3. The penal sanction as a tool to enforce what is stipulated in the provision²¹.

Formularizing a criminal provision clearly and accurately is very essential, otherwise it will jeopardize the legal certainty which potentially make an unfair result in its implementation and placing the provision as disadvantageous for the society²².

Moreover, in relation to the function of criminal law in the society, scholars opinion prefer the utilization of the law as *ultimum remedium* instead of *primum remedium*, specially if it is related to conducts that are inherently bad in moral perspective. Van Bemmelen contained that criminal law should be viewed as an *ultimum remedium*, which means that its utilization should be limited since the type of sanction that it comprises will inflict miserableness to the person imposed²³. Criminal law has a what is said to be "mean" sanction compares to other field of law, thus as a tool of social control its function is secondary where other tools of law is deemed ineffective²⁴.

3.1. Comparison on three regulations based on principles of a well-grounded criminal provision
The discussion in this section will be preceded by a summary of the types of conduct from the three regulations.

In City of Regulation of Kab. Wajo, the conducts are:

- violation of the duty owned by health workers and health facilities to give information and education about early initiation to nurse and exclusive breastfeeding since the period of pregnancy until the of exclusive breastfeeding period
- violation on the duty owned by health worker and health facilities to give information and education listed
- violation on the duty owned by regional government to implementation early initiation exclusive breastfeeding program.
- in art 17 par 2, it is stipulated that the implementation of exclusive breastfeeding should be coordinated by a working body named SKPD. And in the criminal provision, the violation of this duty will also be sanctioned.
- moreover in par 4, there is an order to make a further regulation in the form of Bupati Regulation. What should be noted is that this order is also included in one of the duty protected by criminal provision.
- in art 18 par 1, there is a clause saying that when it is not possible to breastfeed exclusively, formula may be given to the baby. This is listed as one of the condition which violation of it will be sanctioned.
- violation of duty owned by health workers to demonstrate and give suffice explanation regarding the usage and serving the formula to the baby.
- violation of prohibition for health workers ant health facilities to give formula or any other product which potentially obstructing the exclusive breastfeeding
- violation of prohibition for health workers and health facilities to receive or to promote formula and or any other product which potentially obstructing exclusive breastfeeding.

While in City Regulation of Kab. Semarang there

are two conducts listed:

- violation of duty owned by the management of working places and public places to provide special facilities to nurse and to express breast milk.
- violation of duty owned by the management of working places and public places to give suffice time and opportunity to nurse or expressing breast milk during working hours in the working place.

While in City Regulation of Cirebon, there are three conducts specified:

- in art 29 Par 1 it is stated that management working places and public places have to support exclusive breastfeeding program, and the violation of it is threatened by criminal sanction.
- in art 29 Par 2 and Par 3, explanation is given by what it meant by the management of working places and management of public places respectively. As can be seen, this is more like a definition of the subject than an action, however art 48 refers to them as a form of action upon which violation can be penalized.

a. Comparison Based on the Nature of Ultimum Remedium.

Discussion concerning criminal law should always take into account of its role in the society. It has been elaborated above that criminal law should be functioned as ultimum remedium. As this discussion is about regional regulations – criminal provision on exclusive breastfeeding- which is rooted from its national legal source, the respected national provision should be examined first to make sure of its compliant to the said principle. The art 200 and 201 as criminal provisions made referring to Art 128 Par 2 as its form of conduct. It has been explained that the forms of conducts stated in Art 128 Par 2 are the duties owned by families, management working place and public facilities to provide suffice time and special facilities to nurse and expressing breast milk. Where violation of theses duties will be penalized. Considering the main goal of regulation on exclusive breastfeeding program is to guarantee its implementation on the ground that it is an essential factor of infant's health, it can be said that the protec-

tion by criminal law towards the mothers rights to do activities – as granted by art 200 and 201- that will support mother's success of exclusive breastfeeding is something essential as well. Further question related to that argument is "whether mother's need of support as specified in art 200 and 201 is essential enough as to make it deserve for criminal protection, on the view of ultimum remedium?" To answer this concern, a comprehensive research has to be done, which clearly a different emphasis from this research. Nevertheless, some research have conclude the importance of what criminally protected in art 200 and 201 ; special facilities to nurse and express breast milk and providing suffice time and opportunity to nurse or express breast milk during working hours in the working places. A research shows that not having adequate breastfeeding facilities at the workplace was also a risk factor for breastfeeding discontinuation²⁵. An unfavourable working environment, especially for fab workers, can make it difficult to implement breastfeeding measures.²⁶ As to focus on the topic of this paper– the regional regulations – the art 200 and 201 will be deemed as suffice to be exist as criminal provision. Thus, regional regulations that in line to those two will also considered in the same manner.

From the three regulations, the one owned by Kab. Wajo has the most varieties of conduct. It has 8 different forms of conduct, while the regulation of Kab. Semarang only has 2 forms of conduct and regulation of Cirebon has 3 of it. However, there are at least two of the conducts stipulated in regulation of Kab Wajo that are not in line with the nature of ultimum remedium of the criminal law, those are forms of action stipulated in art 17 par 2 and par 4. As elaborated in the beginning of this sub section, criminal law should be functioned as the last legal tools in the society and only applied to conduct which inherently bad in moral view. It should also be used when other means of law is considered ineffective. Art 17 par 2 is about the requirement for coordination, by SKPD, in the implementation of exclusive breastfeeding program. While par 4 contains order to create further directive in the form of Bupati Regulation. The violation of these two are not necessarily showing the moral quality of the

offender. Since the action itself (not having coordination with SKPD or failing to create a further directive) does not required somebody with a defect in moral. Moreover, considering the nature of the criminal sanction, where in this case is confinement of maximum of six months or fine of maximum of 50 million rupiahs, it is indeed jeopardizing the essence of justice if a person who merely because not having coordination with the SKPD, or the SKPS themselves who is in fact not having the said coordination, has to suffer from the realization of confinement or having to pay the fine. On the other hand, all of the conducts specified in regulation of Kab. Semarang fulfil the nature of ultimum remedium. Those conducts are all similar to what art 200 of the national health law. As for regulation of Cirebon, the ultimum remedium is partially fulfilled. The Art 29 Par 1, which formulation is actually too broad and unspecific, is helped by a further detailed given in par 4 of the same article. Point a and b of Par 4, as a references of duty stated in par 1, can be said to fulfil ultimum remedium, since those two talk about support in a form of providing special facilities to nurse and or expressing breast milk and support in a form of providing a suffice time and opportunities to nurse and or expressing breast milk during working hours in a work place. The two duties are similar with duties implied in Art 200. Additionally, the two duties that supposed to be realized by the two managements is in fact essentials for the success of exclusive breastfeeding. On the contrary, point c and d of Par 4 of Art 29 is far from the nature of the fulfilment of ultimum remedium. Point c and d talk about duty owned by management of working place and public place to create internal regulation to support exclusive breastfeeding and duty to provide well-trained lactation counsellor respectively. Fundamentally, those are not the kinds conduct that the criminal law exist for. Logically, the conducts are not directly affecting the success of exclusive breastfeeding as oppose to the duty to provide special facilities and suffice time to nurse. Thus, that is no need to criminalize its violation. Still in the scope of Art 29, Par 2 and 3 of it also is not suitable to be criminalized. The two paragraph consist of an elaboration of the definition of working places and public fa-

cilities. So it is not even a conduct. From the perspective of definition of crime or criminal conduct, that a crime should constitute an act, it is very obvious that Par 2 and 3 are not supposed to be enforced by criminal law.

b. Comparison Based on the Types of the Conduct

Viewed from the principle of type of conduct elaborated in the beginning of this sub section, all of the two conducts stipulated in regulation of Kab. Semarang can be said fulfilling the type of omission as one of the possible type of prohibited act demanded to be satisfied. For regulation of Kab. Wajo, notes should be given to Art 18 Par 1, which allows to give formula to baby when the exclusive breastfeeding is not possible. Substantively, this formulation is not satisfying the requirement of prohibited act, since it is not a commission nor omission, let alone a conduct causing prohibited result. It is rather a stipulation of prerequisite condition that should exist in order to be allowed to undergo for the respected solution. In the case of regulation of Cirebon, the conducts in Art 29 Par 2 and 3 barely meet the principle of prohibited act. This is because, as elaborated in the previous part, what is stipulated in the two paragraphs are not conducts, they are in fact a mere elaboration of definitions. So it will not be possible to fall within the three alternatives of commission, omission or conduct causing a prohibited result. Moreover, Par 1 of Art 29 is rather ineffective to be a conduct referred by a criminal provision on Art 48. This is because the broad, yet unspecific, formulation of par 1 of the article. So, as to be able to grasp a firm explanation regarding the "duty to support exclusive breast feeding program" one should refer to Par 4.

From the description given on the sub section a and b, it can be concluded that comparatively, the criminal provision of the regulation of Kab Semarang is the most well-grounded provision. This is based on the following reasons:

1. Criminal provision on regulation of Kab Semarang is considerably the most persuaded to fit to the principle of ultimum remedium. While the other two, regulation of Kab. Wajo and Cirebon, are almost

similar in position. The two regulations consist of both stipulations acceptable to *ultimum remedium* and stipulations that are not.

2. Criminal provision on regulation of Kab Semarang is the only one that suits the principle of the prohibited act, since all of the conduct stipulated fall on the category of omission as one of the categories concerning prohibited act for criminal provision. While, again, its two counterparts cannot be said as fully meet the standard of prohibited act. Each of those two has stipulation that difficult to be identified as conduct, as to make them fall outside the category of commission, omission or conduct causing a prohibited act.

c. Comparison based on the subject of the criminal provision

Criminal provision should state clearly the subject to whom the provision is targeted. In the regulation of Kab Wajo, the subject targeted consist of:

- i) health workers
- ii) health facilities
- iii) regional government/authority

The provision itself, uses the term "every person" to refer to subject targeted. The fact that the subject consist of two different variant plausibly deemed as the logic behind the use of that term, so as to make sure that the term will covers both.

While in the regulation of Kab Semarang, the subject targeted consist of:

- i) the management of working places
- ii) the management of public facilities

The designation of the subject in the provision uses the term "every person". It is become questionable since the variant of the two subjects could easily be integrated in the formulation of the provision, as in the case of the regulation of Cirebon explained below. Moreover, this respected provision simply consist of only two types of conduct which straightforwardly attached to each of the subjects. By that reason, the designation is possibly to have been more direct.

While in the regulation of Cirebon, the subject targeted consist of:

- i) the management of working places
- ii) the management of public facilities

In the respected provision, the phrase used is "every management of working places and public facilities". The use of that phrase has made the provision be easily understood in terms of to whom the provision is stipulated for, and how it relates to the conduct referred.

From the description it can be seen that provision on the regulation of Cirebon is the most provision which has a well-defined subject to whom the provision is targeted. While the phrase "every person" used in the provision of the regulation of Kab Wajo could be levelled as "modest" and understandable, on the ground that it has three different variant of subjects with a more complex variation of the conducts for each subjects. Lastly, provision on the regulation of Kab Semarang takes the most complicated way to refer to its subject.

d. Comparison based on the penal sanction

The last element constitutes a criminal provision is the penal sanction. Each of the three regulations has different sanction in the context of its severity. The description of each has been described in section 2. The provision on the regulation of Cirebon is the only one which does not have a specific sanction. Instead, it refers to another sanction on the related applicable legislation. Thus, referral to the art 200 and 201 in national health law will be the main and only sanction imposed. On this ground, it can be concluded that the sanction will be confinement of maximum of 1 year and fine of maximum of one-hundred million rupiahs. On the other hand, its other two counterparts have their own specific sanction as explained in section 2.

3.2. Comparison Based on How the Provision Reflects the Art 200 and Art 201 as National Law.

Art 200 and 201 as criminal provisions consist of conduct that is refers to art 128 par 2. The description of those three articles has been provided on section 2. Types of conduct that stipulated in each of the criminal provisions of the three regional regulations have also been elaborated on the same section. From those

three, the conducts stipulated in criminal provision on the regulation of Kab. Semarang is the most similar to the conducts stipulated in art 200 and 201. Both specify a). violation of duty to provide special facilities to nurse and express breast milk, and b). violation of duty to provide suffice time and opportunity for mothers to nurse or expressing breast milk. However there is a slight difference between the two regarding the subject targeted by the provision. Article 200 subjects to families, government, regional government, and the society, while in the provision on the regulation of Kab Semarang, the subjects are only the management of working places and the management of public facilities.

Related to regulation of Wajo Regency, quite a significance differences could be found in comparison with art 200 and 201. The differences are both in the types of the duty and the subject targeted. The type of conduct stipulated in both regulations are very different. None of the conduct stipulated in art 200 and 201 is stipulated in any of criminal provision on the regulation of Wajo Regency. Moreover, the subjects targeted is also different. Criminal provisions on regulation of Kab. Wajo apply to health workers, health facilities, and regional government. While art 200 and 201 apply to families, government, regional government, society, and corporation.

Lastly, comparison made between criminal provision on the regulation of Cirebon and art 200 and 201 has found a slight differences between the two groups. There are some of the conducts stipulated in criminal provision on the regulation of Cirebon that are not stipulated on art 200 and 201, while all of the two types of conduct stipulated in art 200 and 201 are all included in the detailed explanation regarding the conduct in criminal provision in the regulation of Cirebon.

4. CONCLUSION

Based on the discussion and analysis above, it can be concluded as follows:

1). Criminal provision on regulation of Semarang Regency is considerably the most persuaded to fit to the principle of *ultimum remedium*. Moreover, the

regulation also only one that suits the principle of the prohibited act, since all of the conduct stipulated fall on the category of omission as one of the categories concerning prohibited act for criminal provision. The other two, regulation of Wajo Regency and Cirebon, are almost similar to position in the context of *ultimum remedium*. The two regulations consist of both stipulations acceptable to *ultimum remedium* and stipulations that are not. In relation to the principle of prohibited act, each of those two has some stipulation that difficult to be identified as conduct, as to make them fall outside the category of commission, omission or conduct causing a prohibited act.

2). In comparison with art 200 and 201 as the national benchmark for criminal provision related to exclusive breastfeeding, the regulation of Kab. Semarang is the most similar to the conducts stipulated in art 200 and 201. The criminal provision that least similar to art 200 and 201 is the one in regulation of Kab. Wajo. Additionally, the criminal provision on the regulation of Cirebon occupies the middle position since there are some of the conduct are similar to art 200 and some are not.

ENDNOTES

- ¹ Michael S Kramer et al, Infant Growth and Health Outcomes Associated With 3 Compared With 6 mo of Exclusive Breastfeeding, *The American Journal of Clinical Nutrition*, Vol. 78 Issue 2 Aug 2003, pg.291, <https://doi.org/10.1093/ajcn/78.2.291>.
- ² WHO Collaborative Study Team on the Role of Breastfeeding on the Prevention of Infant Mortality. Effect of breastfeeding on infant and child mortality due to infectious diseases in less developed countries: a pooled analysis. *Lancet* 2001;355:451–5
- ³ Frank R. Greer, MD, et al, Effect of Early Nutritional Interventions on The Development of Atopic Disease in Infants and Children: The Role of Maternal Dietary Restriction, Breastfeeding, Timing of Introduction of Complementary Foods, and Hydrolyzed Formulas, *Pediatrics* vol 121 no. 1, Jan 2008, pg. 188, Downloaded from <http://pediatrics.aappublications.org/>
- ⁴ Kuhn L, Sinkala M, Kankasa C, Semrau K, Kasonde P, et

- al (2007) High Uptake of Exclusive Breastfeeding and Reduced Early Post-Natal HIV Transmission. *PLoS ONE* 2(12): e1363. doi:10.1371/journal.pone.0001363.
- ⁵ Langer-Gould A, Huang SM, Gupta R, et al. Exclusive Breastfeeding and the Risk of Postpartum Relapses in Women With Multiple Sclerosis. *Arch Neurol.* 2009;66(8):958–963. doi:10.1001/archneurol.2009.132
- ⁶ Titis Anindyajati et al, The Constitutionality of Criminal Sanctions Norms As Ultimum Remedium in The Making of Laws, *Jurnal Konstitusi* Vol. 12 No.4, 2015, Pg.873.
- ⁷ Salman Luthan, Ad Criteria of Criminalization, *Jurnal Hukum Ius Quia Iustum*, Vol 16 No 1, 2009, Pg. 3.
- ⁸ Ibid.
- ⁹ Maria Farida Indrati in Yulanto Araya, Law Enforcement in Local Regulation According to Community Claim, *Jurnal Legislasi Indonesia* Vol 10 No. 4, 2013, Pg. 343.
- ¹⁰ Art 34 Government Regulation No. 33/2012
- ¹¹ Art 1
- ¹² Art 10
- ¹³ Art 1
- ¹⁴ Art 8
- ¹⁵ Art 9
- ¹⁶ <https://en.wikipedia.org/wiki/Cirebon>, downloaded on 5 April 2018.
- ¹⁷ Bambang Poernomo, *Asas-asas Hukum Pidana*, Jakarta, Ghalia Indonesia, 1992, page 130.
- ¹⁸ Moeljatno, *Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana*, Jakarta, Bina Aksara, 2001, page 19
- ¹⁹ Satochid Kartanegara, *Hukum Pidana Bagian Pertama*, Jakarta, Balai Lektur Mahasiswa, 2001, page 4
- ²⁰ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung, 2002, page 28
- ²¹ Septa Candra, *Perumusan Ketentuan Pidana Dalam Peraturan Perundang-Undangan di Indonesia*, *Jurnal Hukum Prioris*, Vol. 3 No.3, 2013, page 113.
- ²² Ibid.
- ²³ Van Bemmelen in PAF Lamintang, *Dasar-Dasar Hukum Pidana di Indonesia*, Bandung: Citra Aditya Bakti, 1997, page 17
- ²⁴ Sudarto seperti dalam Tongat, *Dasar-Dasar Hukum Pidana Indonesia Dalam Perspektif Pembaharuan*, Malang: UMM Press, 2009, page 23
- ²⁵ Amin et al.: Work related determinants of breastfeeding discontinuation among employed mothers in Malaysia. *International Breastfeeding Journal* 2011 6:4.
- ²⁶ Chen YC, Wu Y-C, Chie W-C. Effects of work-related factors on the breastfeeding behavior of working mothers in a Taiwanese semiconductor manufacturer: a cross-sectional survey. *BMC Public Health.* 2006;6:160. doi:10.1186/1471-2458-6-160.

REFERENCES

- Amin et al.: Work related determinants of breastfeeding discontinuation among employed mothers in Malaysia. *International Breastfeeding Journal* (2011)
- Anindyajati, Titis, et al.: The Constitutionality of Criminal Sanctions Norms As Ultimum Remedium in The Making of Laws, *Jurnal Konstitusi* Vol. 12 No.4 (2015)
- Araya, Yulanto.: Law Enforcement in Local Regulation According to Community Claim, *Jurnal Legislasi Indonesia* Vol 10 No. 4 (2013)
- Arief, Barda Nawawi.: *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bakti, Bandung (2002)
- Candra, Septa.: *Perumusan Ketentuan Pidana Dalam Peraturan Perundang-Undangan di Indonesia*, *Jurnal Hukum Prioris*, Vol. 3 No.3 (2013)
- Chen YC, Wu Y-C, Chie W-C. Effects of work-related factors on the breastfeeding behavior of working mothers in a Taiwanese semiconductor manufacturer: a cross-sectional survey. *BMC Public Health.* (2006) doi:10.1186/1471-2458-6-160.
- Gould, Langer, Huang SM, Gupta R, et al.: Exclusive Breastfeeding and the Risk of Postpartum Relapses in Women With Multiple Sclerosis. *Arch Neurol.* (2009) doi:10.1001/archneurol.2009.132
- Greer, Frank R, MD, et al.: Effect of Early Nutritional Interventions on The Development of Atopic Disease in Infants and Children: The Role of Maternal Dietary Restriction, Breastfeeding, Timing of Introduction of Complementary Foods, and Hydrolyzed Formulas, *Pediatrics* vol 121 no. 1 (2008) Downloaded from <http://pediatrics.aappublications.org/>
- Kartanegara, Satochid.: *Hukum Pidana Bagian Pertama*, Jakarta, Balai Lektur Mahasiswa (2001)
- Kramer, Michael S Kramer et al.: Infant Growth and Health Outcomes Associated With 3 Compared With 6 mo of

-
- Exclusive Breastfeeding, *The American Journal of Clinical Nutrition*, Vol. 78 Issue 2 (2003) <https://doi.org/10.1093/ajcn/78.2.291>
- Kuhn L, Sinkala M, Kankasa C, Semrau K, Kasonde P, et al.: High Uptake of Exclusive Breastfeeding and Reduced Early Post-Natal HIV Transmission. (2007) *PLoS ONE* 2(12): e1363. doi:10.1371/journal.pone.0001363
- Lamintang, P.A.F.: *Dasar-Dasar Hukum Pidana di Indonesia*, Bandung: Citra Aditya Bakti, (1997)
- Lancet-WHO Collaborative Study Team on the Role of Breastfeeding on the Prevention of Infant Mortality. Effect of breastfeeding on infant and child mortality due to infectious diseases in less developed countries: a pooled analysis. (2001)
- Luthan, Salman.: *Ad Criteria of Criminalization*, *Jurnal Hukum Ius Quia Iustum*, Vol 16 No 1 (2009)
- Moeljatno.: *Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana*, Jakarta, Bina Aksara (2001)
- Poernomo, Bambang.: *Asas-asas Hukum Pidana*, Jakarta, Ghalia Indonesia (1992)
- Tongat, *Dasar-Dasar Hukum Pidana Indonesia Dalam Perspektif Pembaharuan*, Malang: UMM Press (2009).