



Recent Developments and Changes in the Governance of Regional Legal Products in Indonesia: Supervision, Evaluation and Clarification Mechanisms

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After Constitutional Court Decision No. 137/PUU-XIII/2015, the issue of cancelling regional regulations can only be reached through a judicial review mechanism by the supreme court. The minister of home affairs and the governor no longer have the authority to cancel regional regulations. Meanwhile, regional regulations are the authority of regional governments in carrying out regional autonomy. In the context of the unitary state, the central government has the right to supervise regions, including the formation of regional regulations. This research will focus on the weaknesses and strengths of existing mechanisms and the construction of weaknesses. Through a non-doctrinal approach, it was concluded that in the context of the unitary state, the central government still has the right to carry out regional regulations through evaluation and clarification mechanisms. It also has the authority to provide register numbers as its final control. The advantage is that at present, the supervision of regional regulations is quite strong and effective. The weakness is the potential accumulation of cases of cancellation of regional regulations (both provincial and district/city regulations throughout Indonesia). Philosophical supervision of regional construction emphasises legal certainty. The effectiveness of time is involved with the smooth running of local government, strengthening competence in mastering local regulations and the number of judges in the supreme court.

Key words: *Supervision, developments, change, governance, regional legal products, Indonesia.*



Introduction

Indonesia is a unitary state in the form of a republic with a decentralised system. Regional governments carry out the broadest autonomy outside the realm of government. This is determined as central government affairs by law. In this case, the responsibility of implementing governmental tasks in a unitary state basically rests with the central government. Regions exercise this authority due to the handover of functions to the regions. The principle of regional autonomy and decentralisation in power relations between the central government and regional governments is one way to realise democracy in the Indonesian state. According to Article 1, paragraph 6 of Law Number 23 of 2014 concerning regional government, the definition of regional autonomy is the right, authority and obligation of an autonomous region to regulate and manage their own government's affairs and the interests of the local community in accordance with statutory regulations (Baharudin, 2016).

The existence of local-level legislation is essentially the result of the implementation of the principle of decentralisation in the administration of regional government. It is also an inseparable part of the unity of the national legal system (Sukriono, 2013). The formation of regional regulations must include stages of planning, drafting, discussing, stipulating, and promulgating, which are guided by the provisions of laws and regulations.

According to Masriani (2009), supervision of regional governments is carried out by the government, including (1) supervision of the implementation of regional government affairs and (2) supervision of regional regulations. In the administration of government affairs by regions, the central government has the right to provide guidance and supervision. Supervision of the implementation of local government is intended to ensure that local government runs in accordance with the plans and provisions of applicable laws and regulations. In the preparation of regional regulations, the government supervises the drafting of regional regulations in terms of preventive supervision (supervision of the regional draft regulations governing taxes), regional levies, and regional budgets. These are then approved by regional heads. They are evaluated by the minister of the interior (Mendagri) for the Provincial Draft Regulation and by the governor of the Regency/City Draft Regulation. Repressive supervision means that each regional regulation must be submitted to the minister of home affairs for the province and the governor of the regency/city. This is done to obtain clarification of the perda that is contrary to public interests, higher regulations and hampering people's economic access. This is cancelled according to the prevailing mechanism. Regulations that contradict this can be cancelled by each supervisor. However, the mechanism for cancelling this Regional Regulation through the minister of home affairs and the governor is considered to be incompatible with the constitution, namely Article 24 A paragraph (1) of the 1945 Constitution of the Republic of Indonesia and in the Law on



Regulations that do not recognise the governor's decision as a type and hierarchy of regulations legislation so that the authority to examine the regulations under the Act is the supreme court.

With the Constitutional Court Decision No.137/PUU-XIII/2015, the cancellation of regional regulations can only be reached through a judicial review mechanism by the supreme court. The minister of home affairs stated that the cancellation of the regional regulation was the executive area to study it because the Regional Regulation was a product of the regional government, namely between the Regional Head and the Regional Parliament (Humas Puspen Kemendagri, 2017). However, because the decision of the Constitutional Court has inkracht and is final, the decision of the Constitutional Court (MK) obtained permanent legal force and no legal remedies can be taken. This has had a profound influence on the regulation of regulatory policies, in particular the mechanism for oversight of regulations by the Ministry of Home Affairs and the governor, and the longer time in issuing decisions related to the cancellation of the perda. It is interesting to do research and study the weaknesses and strengths of the supervision of regional regulations after the Constitutional Court Ruling Number 137/PUU-XIII/2015. It is also interesting to see the reconstruction of the supervision of regional regulations in the context of the Unitary Republic of Indonesia after the decision of the constitutional court number 137/PUU-XIII/2015.

Research Method

This research uses a non-doctrinal approach, where the methods of approach are the concept approach, the legislative approach and the empirical approach. The data sources concern primary data and secondary data. Primary data was obtained by conducting interviews with several informants and conducting focus group discussions. Secondary data was obtained in the form of legislation and documents. Qualitative analysis is used to discuss and analyse data to answer research problems and to find conclusions.

Supervision of Regional Regulations after the Ruling of the Constitutional Court

In the implementation of regional autonomy, each autonomous region has regional autonomy. This concerns the rights, authority and obligations of an autonomous region to regulate and manage their own government affairs and the interests of the local community in accordance with statutory regulations. Therefore, the autonomous regions regulate and manage their own lives as an organic part of the unitary state of the Republic of Indonesia. Autonomous regions are zelfstansing (independent), but not onfhankelijk (free).

Regions have wide-ranging autonomy. However, this does not mean a region is free to exercise its authority, and government supervision is still exercised. Freedom and autonomy

can be seen as autonomous supervision or control of the tendency toward excessive centralisation. Instead, supervision is a form of control of excessive decentralisation. It is done so that there is no autonomy without supervision of the system.

The existence of local-level legislation is essentially the result of the implementation of the principle of decentralisation in the administration of regional government. This means regional governments have the right to form regional regulations. This is an inseparable part of the unity of the national legal system.

In connection with the problem of supervising regional regulations, especially after Constitutional Court Decision Number 137/PUU-XIII/2015, it can be explained that based on a decision, the governor no longer has the authority to cancel district/city regional regulations. This was followed by Constitutional Court Decree Number 56, Year 2015, where the minister of home affairs no longer has the authority to cancel provincial regional regulations. The impact is that the authority to cancel regional regulations becomes the authority of the supreme court.

Following up on the regulation of regional regulation supervision as a technical guideline, the Regulation of the minister of home affairs No. 120 of 2018 concerning the establishment of regional legal products was issued. The intended policy directs the guidance and supervision of regional legal products through preventive measures. These are in the forms of evaluation, facilitation and assignment of register numbers. The repressive efforts, regarding the minister of home affairs Regulation in the form of cancellation of regional regulations, have been removed and replaced with clarification of regional regulations. Clarification of regional regulations on outputs is a recommendation to amend local regulations or replace regional regulations in the following year's regional regulations (a planning program). In Central Java Province, for example, preventive measures in the form of facilitation and clarification of regional regulation drafts are shown in Table 1.

Table 1
Facilitation and Evaluation by the Ministry of Home Affairs (MHA)

Year	Facilitation	Evaluation
MHA	11	4
2018	12	3
2019*		
Governor		
2018	277	65
2019*	105	24
*until August		

Source: Central Java Province Legal Bureau, 2019.

Table 1 shows that preventive supervision efforts through facilitation and evaluation are quite numerous in quantity. They require qualified human resources and mastering as well as understanding of the drafted local regulation, regional regulation and regional legislative assembly. This is very important so that the local regulation is sufficiently in accordance with higher laws. In turn, the potential for judicial review is small.

Data on the cancellation of local regulations in Central Java in 2016 indicated there were 3 regulations by the minister. At the provincial level, the Governor of Central Java, in 2016, cancelled 148 local regulations and 3 local regulations. The large number of local regulations cancelled shows the quality of many local regulations that are problematic. Regarding the quantity, one province categorised many regulations that were cancelled. At present, the cancellation of regulations is under the authority of the supreme court. The amount of regulations must be very large, so whether the supreme court can complete the task of cancelling the perda optimally and on time is of concern.

The constitutional court's decision and the existence of Permendagri No. 120 of 2018 precisely concerns the strengthening of guidance and preventive supervision. The hope is that regulations can be monitored from the beginning so that no regulations are stipulated by violating the provisions of higher legislation that must be cancelled or recommended to be revoked/replaced. This construction is very much in accordance with the concept of the unitary state that we adopt in the constitution and apply in Indonesia. Regional governments, in carrying out the broadest possible autonomy, have the right to determine regional regulations and other regulations to carry out autonomy and co-administration tasks. Where the authority in exercising such autonomy is given by the central government, the granting of authority to establish statutory regulations is attributed. This is because it is given by the law. As a consequence of this authority, there must be supervision in the implementation of regional government and the formation of regulations at the regional level. Existing guidance and supervision are more preventive, so they remain under the control of the central government because there is no autonomy without a supervision system.

The authority to cancel regional regulations is no longer the authority of the minister of home affairs for provincial regulations and the governor for district/city regulations. After the constitutional court's decision, the cancellation of regional regulations must go through the judiciary through a judicial review mechanism to the supreme court. The effort to cancel regional regulations by the supreme court is a separate but complementary part of efforts to foster and supervise local regulations (regional legal products). This regards the judicial review process that goes along with the constitutional process in the formation of regional regulations in the form of executive review and legislative review.



Reconstruction of Governance of Regional Regulation

Post Constitutional Court Decision Number 137/PUU-XIII/2015 and Constitutional Court Decision Number 56/PUU-XIV/2016 have legal implications for the development of regional legal products by the minister of home affairs and the governor. They indicate that the minister of the interior and the governor no longer have authority to revoke regulations. In Central Java, for example, in 2016 (before the constitutional court's decision) there were around 148 district/city regulations that were cancelled by the governor of Central Java. This is only one province. In Indonesia, there are 34 provinces, so the judicial review or annulment of regulations after the constitutional court's decision has the potential to accumulate or is very much in the supreme court. This is what needs to be anticipated for the accumulation or number of submissions of local government cancellations through judicial review.

Before the constitutional court's decision, the mechanism for the cancellation of the perda, in addition to being carried out by the governor for regency/city regulations and the minister of home affairs for provincial regulations, was also already regulated through the judicial review mechanism. This is regulated in Article 9, paragraph 2 of Law No. 12 of 2011 concerning the formation of laws and regulations. This concerns laws and regulations under the judicial review to the supreme court. Hierarchically, regional regulation is one type of statutory regulation in the act. In reality, there are very few judicial reviews of the perda to the supreme court.

After the constitutional court's decision, all annulment of perda must go through judicial channels, namely through judicial review to the supreme court. Actually testing the legislation is one mechanism to maintain consistency between laws and regulations. Theoretically, the formation and testing of laws and regulations rests on the teachings of Hans Kelsen, namely the theory of tiered legal norms (stufenbautheorie), in which legal norms contained in a regulation may not conflict with the legal norms governed by the rules that are hierarchically above it (Soeprapto, 1998). A valid norm is created in a certain way that is determined by other norms.

Within this framework, the teachings of stufenbautheorie can be used as a foothold for conducting a judicial review. The supreme court and the constitutional court, as executors of judicial power, can play an objective role in exercising control over legislative and executive legal actions in the effort to apply tiered legal norm theory in the testing of laws and regulations.

In the context of a rule of law, such as in Indonesia, the cancellation of a perda is theoretically appropriate through the judicial route. This is because it will be more objective philosophically because it is carried out by an institution that is independent and free from

conflict of interest. On the other hand, in the philosophical context of the unitary state, regional governments have the authority to form local regulations. This is because they are attributed. The substance of these regulations is the exercising of authority given by the central government, so it is also natural that the authority of this authority (central government) can cancel the regulations.

Indonesia is not only a state of law but also applies the concept of a unitary state. The pattern of relations of regional government units in a unitary state with the central government is dependent and sub-ordinate. In a federal state, it is independent and coordinative (Nurcholis, 2007). Preventive supervision measures as stipulated in Permendagri No. 120 of 2018 are appropriate. Proven preventive supervision from the minister of the interior and the governor is quite effective but needs to be reorganised, especially in relation to the problem of cancelling local regulations in the supreme court. The supreme court, which must examine the submission of the annulment of regional regulations (both provincial, district and city regulations), naturally requires considerable and qualified human resources so as to not impede the implementation of government and legal certainty in the regions.

As the theory put forward by Lawrence M. Friedman (Friedmann, 1975; Friedman, 1984) suggests, the success of law enforcement always requires the functioning of all components of the legal system. The legal system, in Friedman's view, consists of three components: (1) The legal structure component, which means judges must truly master the subject and be quick in handling. (2) Legal substance components are rules, norms and patterns of real human behaviour in the system. They include products produced by people who are in the legal system. The regulation on the judicial reviews of regulations must be given certainty and prompt time. (3) Components of legal culture mean in the culture of law, the discussion is focused on efforts to shape the legal awareness of the community. This forms an understanding of the community to meet a sense of justice that is non-discriminatory, responsive or not.

Conclusion

After Constitutional Court Decision No. 137/PUU-XIII/2015, the cancellation of the perda is no longer the authority of the minister of the interior and the governor. It is now the authority of the judiciary, namely the supreme court through a judicial review mechanism. The advantage is that, at present, the supervision of regional regulations is quite strong and effective. There are potential weaknesses in the case of cancellation of regional regulations in the supreme court. This is because they handle the cancellation of regional regulations throughout Indonesia (both provincial and district/city regulations).

The philosophical construction of regional regulation supervision must prioritise legal



certainty and the effectiveness of time for the smooth running of regional government. Constructions that are built include regulatory aspects or legal subjects. Changes must be made to ensure certainty about the time and legal structure. The number of judges must be increased to handle the cancellation of local regulations and increase the quality and competence related to the subjects of various contents of local regulations. This should be done so that the cancellation of local regulations is carried out correctly.



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