

Supervision of Establishment of Local Regulation

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Abstract

The Regional Regulation (Perda) is one of the regional regulations jointly determined by the Regional Head and DPRD to regulate regional affairs as stated in Law Number 23 of 2014 concerning Regional Government juncto Law Number 11 of 2020 concerning Job Creation. Regional legal products in the form of stipulations and regulations, regional legal products in the form of regulations are regional regulations and regional head regulations. The problem that will be examined in this research is the authority in the formation of regional legal products in further regulating the provisions of other laws and regulations, the aspect of supervision is very necessary. In this regard, how is the supervision of regional legal products, both Perda and Perkada. The method used is doctrinal or normative legal research. The results of this study indicate that the Regional Regulation contains material for the implementation of regional autonomy and assistance tasks; and further elaboration of higher statutory provisions while the Regulation of the Regional Head is an elaboration of the regional regulation in the context of implementing the Regional Regulation, because the Regional Regulation expressly orders to make implementing regulations of the Regional Regulation in the form of the Regional Head Regulation. The implementation of supervision of regional regulations is carried out by means of preventive supervision and repressive supervision, that regional regulations and regional head regulations are prepared based on the authority and substance of their content that does not conflict with the public interest and higher laws and regulations.

Keywords: Regional Law and Supervision Products.

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INTRODUCTION

Based on the provisions of the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (1) that "The State of Indonesia is a Unitary State in the form of a Republic." This means that according to Soehino, in a unitary state (eenheidsstaat) all government authorities are placed in one government and centered on government organs (Soehino, 1993). In the Constitutional System of the Republic of Indonesia, the unitary state is divided into Provinces and Regencies/Cities, as stipulated in Manan Article 18 of the 1945 Constitution, and according to Bagir Manan Article 18 of the 1945 Constitution which forms the basis for the formation and structure of regional government, it also indicates that the administration of regional government is based on a decentralized system, so that regional government units that are formed and structured as autonomous regions have the authority to carry out government affairs based on the distribution of power from the government.

With the delegation of authority given to the regions, and based on the matters that form the basis of regional autonomy, it also involves the authority to regulate regional household affairs, including the regulation of regional level regulations. In this regard, According to Kranenburg, the authority to form laws and regulations from these government units obtains authority based on a determination from the Government through the national legislature which has the authority to form laws (Bagir Manan, 1994). As a form of further regulation, it is regulated by Law Number 23 of 2014 as amended by Law Number 9 of 2015 concerning Second Amendment to Law Number 23 of 2014 Regional Governments are formed and compiled for Provincial Regions, Regency Regions and City Regions. The provisions of Article 18 of the 1945 Constitution above have made clearer the meaning of the regional autonomy system since the amendment to the 1945 Constitution of the Republic of Indonesia (Kranenburg, 1980).

Accordingly, it is in line with the decentralized system according to Dasril Radjab: with a decentralized (autonomy) system, the territory of the Republic of Indonesia is divided into autonomous regions. Each autonomous region has regional autonomy, namely the rights, powers, and obligations of the autonomous region to regulate and manage its own government affairs and the interests of the local community in accordance with statutory regulations. Therefore, autonomous regions regulate and manage their own lives as an organic part of the Unitary State of the Republic of Indonesia. These autonomous regions are *zelfstansing* (independent), but not *onfhankelijk* (Dasril, 2005).

However, regions having broad autonomy do not mean that they are free to exercise their authority, and supervision from the government is still carried out, as in the opinion of Bagir Manan: Supervision (*toezicht*, supervision) is an element that cannot be separated from freedom of autonomy. Between freedom and autonomy on the one hand and supervision on the other, are two sides of one coin in a unitary state with an autonomous (decentralized) system (Bagir Manan, 2001). Autonomous freedom and independence can be seen as monitoring or controlling the tendency of excessive centralization. On the other hand, supervision is a control against excessive decentralization. There is no autonomy without a supervisory system. Such supervision includes supervision by the government of Regional Regulations.

Through the handover and/or delegation and addition of government affairs by the Government or the Regional Government at its upper level to become the affairs of an autonomous region, and government affairs that have been submitted/delegated and are located in the region result in the region having the freedom to form laws and regulations at the regional level. Furthermore, how to supervise the further regulation of regional regulations, according to Bagir Manan, includes how to limit the authority, duties and responsibilities of the regions to regulate certain government affairs.

Supervision is very important, because it is one of the efforts to ensure the implementation of governance and harmony between the administration of government by the regions and the government, as well as to ensure the smooth running of government administration in an efficient and effective manner within a unitary state. Supervision of the authority to administer regional government based on its known nature, among others, supervision of regional legal products.

In Article 1 number 17 of the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products, the Regulation of the Minister of Home

Affairs Number 120 of 2018 is clearly stated that Regional Legal Products are legal products in the form of regulations including Regional Regulations or other names, Regional Regulations, DPRD Regulations and in the form of stipulations include Regional Head Decrees, DPRD Leadership Decisions and DPRD Honorary Body Decisions.

Based on Article 2, and Article 3 of the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products, the Regulation of the Minister of Home Affairs Number 120 of 2018 states that "Regional Legal Products are in the form of regulations and stipulations." Regional legal products in the form of regulations consist of:

- a) local regulations;
- b) *Perkada*; and
- c) DPRD regulations.

Furthermore, in Article 4 of the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Legal Products in the Junto Region of the Regulation of the Minister of Home Affairs Number 120 of 2018 it is stated that Regional Regulations consist of Provincial Regulations; and Regency/City *Perda*, and Article 6 *Perkada* consists of Governor's Regulation; and Regent/Mayor Regulations, as well as Article 8 DPRD Regulations consisting of Provincial DPRD Regulations; and Regency/City DPRD Regulations.

Just like laws and regulations which are legal products from the central government, regional regulations can also delegate the formation of regional head regulations (*perkada*) to implement regional regulations. This is stated in Law 23 of 2014 concerning Regional Government Article 246 paragraph (1) which states that in order to implement a *Perda* or under the power of legislation the regional head shall stipulate a *Perkada*. However, Regional Head Regulations that have been ordered to exist by Regional Regulations are often ignored by the Regional Government. It may even be forgotten if technical arrangements that are not regulated in a regional regulation must be regulated in a regional head regulation.

Basically, the existence of a Regional Head Regulation which is a delegation from a Regional Regulation is in the context of implementing Regional Regulations, because the Regional Regulations expressly order to make implementing regulations of Regional Regulations in the form of Regional Head Regulations. However, often the Regional Head Regulations whose existence is delegated by Regional Regulations are actually ignored by the Regional Government. The delegation given by the Regional Regulation was not immediately followed up with the issuance of a Regional Head Regulation. The agency that is the initiator (*Stakeholder*) of the existence of a

Regional Regulation, considers its responsibilities to have been completed with the promulgation of the proposed Regional Regulation. Whereas in the Regional Regulation it is ordered that technical arrangements that are not regulated in the Regional Regulation will be further regulated by a Regional Head Regulation.

Article 1 number 5 of the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products juncto the Regulation of the Minister of Home Affairs Number 120 of 2018 concerning Amendments to the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products states that the Regulation of the Regional Head, hereinafter referred to as Perkada is a regional head regulation and/or a regent/mayor regulation. Meanwhile, Article 1 point 6 of the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products juncto the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products states that the Joint Regulation of Regional Heads is a regulation stipulated by two or more regional heads.

METHOD OF RESEARCH

This research is included in the category of doctrinal legal research or often also called normative juridical research (HS. Salim, 2013), namely legal research that examines and analyzes legal norms that have been set by the authorized official for it (Mukti and Yulianto, 2013). 2010). Referring to these opinions, this type of research includes normative research, because the research will examine the legal norms that govern the process of forming regional legal products, namely Perdsa.

Based on the opinion of Johny Ibrahim, in normative legal research several approaches can be used, where some of these approaches can be combined with the intended approaches (Johny Ibrahim, 2008). Referring to this opinion, this research uses a statutory approach, and an analytical approach. The reason for using this approach is that normative research must of course use a statutory approach, because what will be studied are various legal rules that are the focus as well as the central theme of the research.

DISCUSSION

In the general supervision system, including supervision of local regulations, this is known as preventive. This comes from the word "preventive" which means a preventive action, meaning that before a regional regulation is enacted, supervision is carried out in the form of prevention so that the relevant regional regulation does not conflict with general principles. The formation of regional regulations and do not conflict with the laws and regulations at the top level and the public interest (Gokkel and Van der wal, 1971).

The supervision of regional legal products can be carried out by determining certain criteria. In the Legal Studies literature, since the time of Indonesia's independence and the enactment of laws governing regional government, there have been special or certain criteria some call them objective - normative benchmarks and based on certain articles in Law Number 22 of 1948. , Law Number 1 of 1957, Law Number 18 of 1968, Law Number 5 of 1974 and certain criteria for regional regulations. In certain laws and regulations, such as Law No. 11 Drt/1957, Law No. 12/1957, and Law No. 18/1997, it has been expressly stipulated that the new local regulations on taxes and levies may apply after the previous approved by the competent authority. This means that so far, although not all types of regional regulations require prior approval from the authorized official, there are provisions that regulate certain matters so that new regulations can take effect after approval from the authorized official.

Every regional regulation formation has also been required, based on Article 28 paragraph (5) Number 22 of 1948, that it must not conflict with laws or government regulations or regulations of a higher level. In Article 38 paragraph (1) of Law Number 1 of 1957 and Article 50 paragraph (1) of Law Number 18 of 1965 it is determined that, in addition to a regional regulation, it must not conflict with a higher level statutory regulation, nor must it conflict with the law public interest. Meanwhile, Article 39 paragraph (1) of Law Number 5 of 1974 stipulates that a regional regulation may not conflict with the public interest and statutory regulations or higher level regional regulations. Likewise, the latest provisions in Law Number 23 of 2014, the Regional Law Products referred to are those which: a) may not conflict with the public interest; b) other regional regulations and c) higher laws and regulations. The regulation of the content of the regional regulations explicitly becomes the reason for the competent authorities in the context of implementing repressive supervision of Regional Legal Products, but this reason is not regulated and determined explicitly (Kuntana, 1983).

General supervision as regulated in Article 10 paragraph (1) of Government Regulation Number 12 of 2017 concerning the Guidance and Supervision of the Implementation of Regional Government, it is stated that the supervision of the Province is carried out by the Minister while the general and technical supervision of the Regency/City is carried out by the Governor. Furthermore, the provisions of Article 10 paragraph (2) of Government Regulation Number 12 of 2017 concerning the Guidance and Supervision of the Implementation of Regional Government General supervision includes:

- a) division of government affairs;
- b) regional institutions;
- c) staffing in Regional Apparatus;

- d) regional finance;
- e) regional development;
- f) public services in the regions;
- g) regional cooperation;
- h) regional policies;
- i) regional heads and DPRD; and
- j) Other forms of supervision in accordance with the provisions of the legislation.

Regarding general and technical supervision of Regional Regulations and Regional Regulations based on the provisions of Article 10 paragraph (2) letter h Government Regulation Number 12 of 2017 concerning Guidance and Supervision of Regional Government Administration is a regional policy.

According to Soehino, the implementation of supervision of regional regulations by authorized officials so far has not only paid attention to specific criteria, and the reasons for preventing the implementation of such supervision, it is also carried out based on the specified criteria, including in the form of a letter from the Minister of Home Affairs associated with the requirements technical and statutory processes or the external form of a regional regulation. The implementation of supervision of this regional regulation only changes the composition of the preamble and language, while formal and material principles as well as "general criteria" as well as principles of good governance are generally ignored.

The implementation of supervision so far has not been explicitly determined by local regulations that do not require supervision, so that in practice to obtain legal certainty for the regions, it seems that all local regulations are submitted for ratification and as a condition for enactment or enactment of a local regulation in accordance with the applicable legal order.

Likewise, the nature and form of the implementation of supervision of local regulations follows the decisions determined or made by authorized officials who obtain attribution from the law and also act as representatives of the government in the form of guidelines, guidance, direction and consultation, so that the implementation of supervision of local regulations do not follow the provisions. at the statutory level, but subject to the rules issued or applicable in an organizational environment where the authorized official is the executor of the principle of deconcentration.

The expansion of the nature and forms of implementation of the supervision of regional regulations so far has made a regional regulation in accordance with the applicable legal order and almost no local regulation carried out with repressive supervision, because it is contrary to the public interest and higher laws and regulations. In other words, with the implementation of supervision of regional

regulations, the formation and enactment of regional regulations so far have almost no conflict with the public interest and higher laws and regulations (Bagir Manan, 1995).

The nature and forms of implementation of such supervision have also made the authority of autonomous regions to regulate government affairs to be highly dependent on authorized officials, so that there is no freedom and independence of regions to form regional regulations in the context of regional autonomy. In other words, regional autonomy does not exist in the regions, but lies with the authorized officials, so that they have created a hierarchical relationship with the Government or the regional government at the top level in the formation of the regional regulations where the authorized officials are located.

Based on Law Number 23 of 2014, there is no hierarchical relationship between Regency and City Regions and Provinces. The nature and form of the implementation of supervision of regional regulations has been eliminated and more emphasis is placed on preventive supervision in order to give autonomy to autonomous regions in making decisions, where regional regulations do not require prior approval from authorized officials as at the time Law Number 5 of 1974 came into effect. However, the Regional Head as a representative of the government continues to provide guidance and supervision to the Regency and City Regions. This means, even though the Regency and City Regions have no relationship with the Provincial Regions, but in the practice of governance, the Regency and City Regions will still have coordination, cooperation and/or partnership relationships with the Provincial Regions and the Government in their respective positions. Relations within the unitary state still exist, because to determine the authority over a government affair it cannot be determined with certainty that all authorities in a particular government field are only in one Regency, City, Province and Government Region, but each one still needs mutual coordination so that their respective powers do not conflict with each other.

A. Preventive Monitoring

Preventive supervision is defined as temporary prevention, is interpreted as preventing something from happening and its authority is placed on the authorized official. In general, supervision has a broad meaning, namely a process, method of controlling, maintaining and inspecting by providing instructions or guidelines for carrying out an activity. According to Bagir Manan, that: "The term "supervision" is often equivalent to the term "toezicht" (Netherlands), "supervision" and "control" (Dutch and English). or supervision not with control. Because control, except for the purpose of supervision, also means controlling, directing, regulating, and managing. Meanwhile, supervision in

the field of decentralization basically does not have the meaning of participating in directing, let alone participating in regulating or managing. Supervision on decentralization whether or not local government decisions are in conflict with higher laws and regulations or with the public interest.

In scientific decisions there are many formulations of the concept of supervision, but in the context of the relationship between the authority of regional government affairs (perda) which is handed over to autonomous regions by the government which has governmental power in a unitary state, preventive supervision can be interpreted as a limitation on regional authority regarding certain matters. Based on the vertical division of government power which is determined and regulated in laws and regulations. Local governments in carrying out government affairs that are obtained based on the principle of decentralization, do not mean they can do whatever they want without control from the (central) government, but there are several things that must be considered by local governments.

This government supervision generally concerns the supervision of authorities in certain fields in the regions, so that there is a harmonious relationship of authority or in line with the public interest, higher laws and regulations, and other regions. Therefore, in the distribution of authority based on a decentralized system, certain government affairs are regulated and determined as a form of restrictions, what are the duties, functions, obligations, and authorities of the regions, so that between regions and the government there is a relationship of authority in the context of stability in run the government. Supervision of regional regulations is carried out, apart from ensuring that services (in certain fields) are the same for all the people (azaz equal treatment); ensure the uniformity of certain actions (the principle of uniformity), as well as to maintain the relationship between the government and the regions and to ensure the integrity of the state and the unity of the government.

The preventive supervision mentioned above has a broad meaning which is carried out by the government through authorized officials as an effort to maintain harmonious and harmonious relations between the government and the regions and between regions in administering the government.

Preventive supervision of regional regulations is a consequence and responsibility of the government in exercising government power which holds a "monopoly" of government power, so that the government determines certain ways, for example in the form of preventive supervision, on the authority of government administration at the local government levels so that government affairs can be carried out in

an organized manner. Orderly, government through the directions of authorized officials.

Preventive supervision is carried out in order to ensure that the authorities between the government and the regions do not conflict. The government determines methods/forms of preventive supervision on the implementation of regional authority in regulating certain government affairs, so that there can be order in the administration of government authority between the government and autonomous regions. This orderly authority of the government. None other than in the context of law and order in general. In other words, preventive supervision of the formed regional regulations has no juridical shortcomings, but the government's actions to form the regional regulations will become valid after approval from the competent authority in order to adapt and compare with other forms of legislation. In order to be accepted as part of legal order and have legal provisions and influence legal relations. However, there are those who argue that preventive supervision of regional regulations as a follow-up to strengthen or to see further the legitimacy of a regional regulation formation process, so that preventive supervision is not only realized by granting or rejecting the ratification of regional regulations, but in various forms of decisions by authorized officials. In this case, the agency/official authorized to carry out preventive supervisory actions can be viewed in the context of researching and evaluating the requirements for the formation of a regional regulation both formally and materially. According to Bagir Manan that: In development, supervision in the sense of "toezicht" or "supervision" experiences developments such as "guidance", "guidelines", "guidance", determining the conditions that must be followed. This development causes supervision is no longer just "checking" or in the context of "maintaining balance". Supervision of a certain quality becomes a kind of "interference" in the regional authority to regulate and manage their own household.

In practice, the formal and material requirements in the formation of regional regulations as statutory regulations are always considered by the competent authorities, so that the reasons for implementing preventive supervision of regional regulations are broad, and cannot even be separated from the nuances of "political" actions attached to authorized officials. As the implementation of the principle of regional deconcentration.

Based on this fact, the reasons for preventive supervision of regional regulations cannot be separated from the realization of policies from the government on the basis of the interests of the government, provinces and other regions, so that preventive supervision of regional regulations is carried out, among others, in the context of:

- a) Coordination: preventing or seeking resolution of disputes of interest;
- b) policy supervision: adjusted policies from lower government officials to higher ones;
- c) Quality control: control over the technical competence and quality of decision-making and actions of lower government officials;\
- d) Financial reasons: increasing appropriate and balanced policies of lower government officials;
- e) Protection of the rights and interests of citizens: in certain situations a special protection may be required for the interests of a citizen.

The reasons for preventive supervision of the authority to administer regional government affairs can be part of the general government's duties. However, due to the orientation of giving autonomy to regions in development which includes various aspects, the regions are obliged to carry out the course of development as a means to achieve community welfare, so that the implementation of preventive supervision of regional regulations cannot be separated from the orientation of development implementation. This means that the implementation of preventive supervision of regional regulations is not only limited to reasons of interest and other regional regulations, but can involve the policies of the Government, regions, provinces, other regions, and the regions themselves in the context of implementing development. In such circumstances, to ensure the authority of the right to regulate from an autonomous region, preventive supervision of local regulations is a "placet" right, namely a right to prevent or confirm a decision to have or not have binding power by a government agency different from the body that makes the decision. The decision of the government agency that has the right of placet has binding force and is final and cannot be withdrawn and is disputed in a court of law.

B. Repressive Control

After being formed by the regional government (local government) and meeting the requirements for formation and obtaining ratification, it can be enforced. The enactment of this regional regulation is through an announcement in the regional gazette. The announcement or promulgation of regional regulations is carried out so that regional regulations can be implemented (applied) and have legal force to apply and are generally binding. If the implementation brings problems, then the regulation can be tested. Testing of regional regulations is carried out, as applies to laws and regulations in general. The test is carried out both formally and materially.

Although the right to test laws and regulations is generally attached to the judicial function (based on legislation and jurisprudence), in its development the testing of laws and regulations is not only a monopoly and is a judicial function but testing of these laws and regulations can distinguished by judicial review and

non-judicial testing (political control – political review).⁸ Judicial testing is carried out by judicial bodies in general, while non-judicial tests are tests carried out by bodies with political characteristics such as the DPR and DPRD.

Bagir Manan is of the opinion that in addition to the two forms of testing, there are also forms of testing carried out by state administrative bodies/officials such as the authority of the Minister of Home Affairs or the Regional Head (authorized official) to cancel a regional regulation which can be said to be an administrative review or in a statutory regulation. -Laws on local government are known as repressive oversight. This repressive supervision by the authorized official contains the suspension/delay or cancellation of decisions of autonomous regions (Perda and Regional Head Regulations) which can be carried out for an indefinite period of time, if the competent authority considers it to be contrary to the public interest, laws and regulations higher invitation, other local regulations.

Facilitation of draft regional regulations and regional head regulations that are submitted to the Directorate of Regional Autonomy at the Ministry of Home Affairs through the Directorate of Regional Legal Products. Article 89 paragraph (1) of the Regulation of the Minister of Home Affairs Number 80 of 2015 that facilitation by the Minister of Home Affairs is carried out no later than 15 (fifteen) days after the receipt of the draft Regional Regulation, draft Regional Regulation, draft Regional Head Joint Regulation and draft DPRD Regulation, then in Article 89 paragraph (2) it is emphasized that if within the said grace period the Minister of Home Affairs does not provide facilitation, then the draft Perkada will continue with the stipulation stage. However, in the Regulation of the Minister of Home Affairs Number 120 of 2018 concerning Amendments to the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Establishment of Regional Legal Products. The provisions of Article 89 paragraph (2) are deleted/eliminated so that there is no further confirmation of the time limit for the facilitation process. As a result of the abolition of the time limit for the facilitation process, there is a legal vacuum.

CONCLUSION

Based on the discussion above, it can be concluded that supervision of Regional Legal Products can be carried out through two forms of supervision, namely: Preventive Supervision is defined as temporary prevention, is interpreted as preventing something from happening and its authority is placed on the competent authority. Even though preventive supervision is not explicitly stated, it is normatively stated in Law Number 23 of 2014, that Regional Legal Products must meet the following criteria: a). must not conflict with the public interest; b) other regional regulations and c)

higher laws and regulations. Repressive Supervision is supervision of Regional Legal Products that have been made. This repressive supervision relates to the formation of a Regional Regulation based on the formal requirements for formation and ratification, as well as the enforcement of a Regional Legal Product in accordance with formal legality. Tests on Regional Legal Products can be carried out, as applicable to statutory regulations in general. The test is carried out both formally and materially.

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