

The Existence of the Governor's Supervision of Regional Regulations and Regional Head Regulations of Regency/City in Indonesia

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ABSTRACT

The governor's authority as supervisor of Regional Regulations and Regulations of the Head of Regency/City Regions weakened after the Constitutional Court Decision Number 137/PUU-XIII/2015. This paper examines the nature of the governor's authority over the regional and regional head regulations based on the Constitution 1945 and examine the ideal form of the regulations. We used a normative juridical method with conceptual and statutory approaches. The result indicates that the regulation of the governor's supervision has been weakened legally. It is expected that an ideal legal concept will be obtained regarding the governor's supervision of Regional and Regional Head Regulations of Regency/City in Indonesia.

Keywords: Regional Regulation/
Regional Head Regulation,
Supervision, Unitary State.

INTRODUCTION

By the Constitutional Court's Decision Number 137/PUU-XIII/2015, the governor's supervisory on Regional Regulations and Regional Head Regulation Regency/City becomes interesting to study. The legal issue is when a Regional Regulation is suspected to be contrary to the amendment to Article 251 of Law Number 23 of 2014 concerning Regional Government, which was altered through Article 176 Point 2 of Law Number 11 of 2020. It shows that the cancellation is no longer performed by the governor or the Minister of Home Affairs but must be carried out by a judicial review.

The supervisory norms corrected by the Constitutional Court are an essential part of the Indonesia government system, which puts forward the unitary state principle as in Article 1, paragraph 1 of the 1945 Constitution. Although there was a dissenting opinion on this Constitutional Court Decision, the Central Government followed up by enacting the Minister of Home Affairs Regulation Number 120 of 2018, where the executive review in the form of cancellation was replaced with a form of clarification. Also, it contained recommendations for changes or revocation of regional regulations. However, with the amendment of Article 251 of Law No. 23 of 2014 through Article 176 Number 2 of Law Number 11 of 2020, the executive review is no longer known in Law Number 23 of 2014. In contrast to Article 99 of Law Number 1 of 2022, it recognizes executive review but is no longer carried out by the governor but is directly handled by the Central Government. This is contrary to the thought construction of Law Number 32 of 2014, which gives full authority to the governor as a government representative to regencies/cities as contained in Point 4 of the Official Elucidation of the Act.

Governor supervision, both preventive and repressive clarification, on regional legal products are necessary. Because of the broad autonomy embraced in our 1945 constitutional, it must be accompanied by quality supervisory legal instruments to limit and/or direct the freedom of autonomy which is actualized through the establishment and/or implementation of regional regulations and district/city regulations to remain within the scope of national law. Of course, supervision that uses national legal parameters is regulated at boundaries or carried out without impeding the freedom to create and innovate local communities to manage their regional economic development towards a civil society.

LITERATURE REVIEW

Supervision of Local Regulation and Regional Head Regulation of the Regency/City is one of the basic elements that are always a part of every legal formation of the regional government. There are at least seven basic elements that build regional government entities, as described in the Academic Paper on the Draft Law on Regional Government (Ministry of Home Affairs, 2015), namely: government affairs, institutional, personnel, regional finance, regional representatives, public services, and supervision.

According to Asshiddiqie (as cited in Huda, 2009), such supervision is logical in a unitary state so that an understanding can be developed that the superior government has the authority to exercise control over subordinate government units. Likewise, Manan (as cited in Zarkasi, 2001) stated that the instrument of supervision (*toezicht*) is an element that cannot be separated from the freedom of autonomy. Autonomous freedom can be seen as controlling the tendency of excessive centralization. On the contrary, oversight is control over excessive decentralization. Therefore there is no autonomy without a supervisory system.

Manan's concept above provides an explanation of the entire amendment to Article 18 of the 1945 Constitution, where the law of broad autonomy remains a sub-system in the unitary state system. Jimly (2016) uses the term "division," where Article 18, paragraph 1 of the 1945 Constitution contextually means a vertical or territorial division of power. Then, Jimly (2020) concludes that Indonesia, as a unitary state, has a single unitary state government system with the highest position along with various regulatory instruments that are set and enacted for all Indonesian people.

The construction of the basic norm above makes Indonesia characterized by broad autonomy. Therefore, a balance is needed between the freedom and restriction of autonomy, which is actualized through the governor's supervision. In this context, Wahidin (2013) equates it with the "Pendulum", that setting the right boundaries between freedom and restriction is the essence of regional management. Moreover, Hart and Gamers (as cited in Huda, 2009) stated that supervision becomes the "binder" of unity, so the autonomy pendulum does not move too far, reducing and threatening unity. But on the other hand, if the "ties" are pulled too tight, the freedom of decentralization will diminish and may even be cut off. If that happens, supervision will no longer be on the side of decentralization. Instead, it will become the "shackles" of decentralization.

RESEARCH METHOD

Our research applied a normative juridical method with statutory and conceptual approaches. The management and analysis of the data were carried out in a qualitative descriptive manner. Motoda and Kimbal (2020) state that the presentation of qualitative research data is in, for example, a chart between categories and a brief description. Furthermore, the researcher uses Statute Approach which reviews all regulations and laws related to the legal issues under study. Here, the researcher studies whether consistency and conformity in the legal ratio of the governor's legal position as a government representative to oversee Regional Regulations and Regulations of the Head of Regency/City with the 1945 Constitution. For Conceptual approach is needed to examine the views of legal experts, as well as trying to find conceptual ideas on the existence of the governor's supervision of Regional and Regional Head Regulations of Regency/City.

RESULTS

The existence of supervision as described above was significantly corrected through the Decision of the Constitutional Court of the Republic of Indonesia Number 137/PUU-XIII/2015. This has been implemented in the Minister of Home Affairs Regulation Number 120 of 2018, where there is an additional form of verification in preventive supervision to strengthen the form of facilitation. However, such verification is only applied on draft Regional Regulations. In contrast, there is no control tool for the draft Regional Head Regulations to ensure that the facilitation results on the draft Regulation Head Regulations have been followed up before being stipulated by the regent/city.

Changes also occur in repressive supervision, where the form of cancellation is replaced with the form of clarification. That form is the final result of recommendations for improvement or revocation of Regional Regulations and Regional Head Regulations with a maximum period of time until the enactment of the formation of Regional Regulations for the following year (Article 127C of Regulation of the Minister of Home Affairs Number 120 of 2018). This long period of time can be considered not to guarantee legal certainty (*rechtszekerheid*) for the community.

In addition to changes in the supervision regulations, there are also changes to Article 250 paragraph 1 of Law Number 23 of 2014. It was amended by Article 176 point 2 of Law Number 11 of 2020 states that the amendment is no longer recognized as "elements of public interest". This resulted in inconsistencies with other articles in Law Number 23 of 2014, which still identifies "elements of public interest". As for Article 315, paragraph 3 of Law Number 23 of 2014 is still recognized the governor's cancellation of the Regional Head Regulation. Likewise, amendments to Article 251 of Law Number 23 of 2014 still recognize the governor's cancellation of the Regional Head Regulation after Constitutional Court Decision No. 137.PUU.XIII/2015. It was corrected through Article 176 Number 3 of Law Number 11 of 2020, where this Article is no longer mandatory or coercive (*dwingend rechts*) but has been changed to additional provisions (*aanvullenrechts*) or in the form of guidelines. Thus, the governor's repressive supervisory mechanism on Regional Head Regulations of Regency/City is no longer recognized in Law Number 23 of 2014, in contrast to Article 99 of Law Number 1 of 2020, which recognize as an administrative review of the regional regulation on regional levies and taxes. But it is no longer the governor's authority but is directly handled by the Central Government. This provision is a counterproductive normative meaning contained in Point 4 Elucidation of Law Number 23 of 2014, where the President assigns the development and supervision of regional autonomy implementation (regency/city) to the governor.

The description above indicates that the regulation of the governor's supervision has been weakened legally. Therefore, it is necessary to seek the ideal legal concept of the governor's supervision, both preventively and repressively. In this case, it is necessary to design a legal pattern for internal supervision carried out in an integrated manner, both in structural and substantive order. Therefore this paper examines the nature of the governor's authority based on the Constitution 1945 and the implementation of supervision regulations after the Constitutional Court Decision Number 137/PUU-VIII/2015. Not only that, but the researcher also examines the ideal form of governor's supervision.

DISCUSSION

The existence of the Governor's Supervision of Regional Regulation and Regional Head regulation of Regency/City based on the 1945 Constitution

In essence, the governor's supervision originates from the President as the holder of executive power. In exercising his power, the Constitution limits its power. Thus, including his relationship with the governor is hierarchical, where the President needs to derive his supervisory powers from the governor. With this mandate power, the relationship between the governor and the Regency/City Government is hierarchical. For that reason, this supervision is within the internal scope (internal supervision).

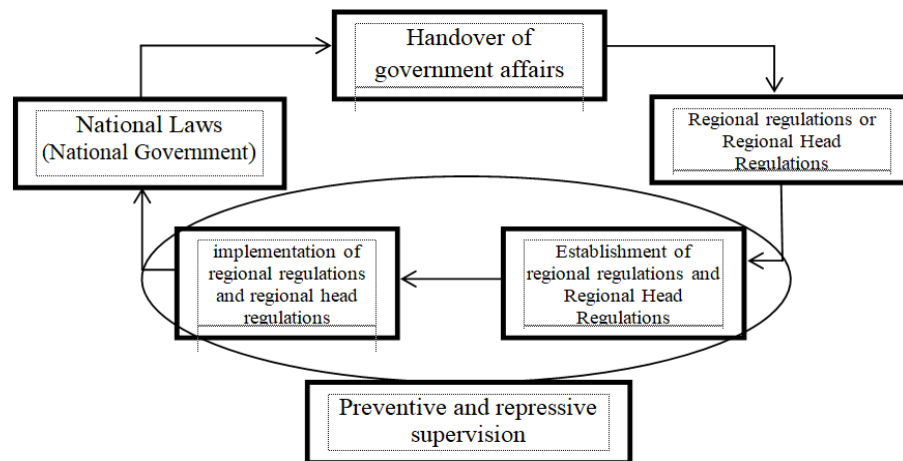
In the context of internal control, the governor has the authority to limit and/or direct the formation and/or implementation of Regional Head Regulation of Regency/City allowing them remain in the corridors of the national legal system. Therefore, the governor has a noble task as an intermediate power in the government hierarchy. More specifically, they are also maintaining a balance between the principles of the autonomy and unitary states through supervisory instruments. Thus, philosophically control will be a tool for maintaining the integrity of Indonesia through the enforcement of the national legal system and directing that the implementation of autonomy has the value of the benefit (*doelmatigheidstoetsing*) for the public interest (social justice). Wahidin (2013) stated

that managing the right boundaries between freedom and restrictions is the core of regional management.

The balance between the principle of a unitary state and regional autonomy is basically to actualize the value of justice itself. Bringing the two sides together, but if these two sides function for the same purpose and goal, namely the realization of social justice, then that is the true value of balance. This thought construction is patterned on "the parable of the Talent (bags of gold)", which depicts the master giving the trust of managing his bags of gold to his three servants according to his ability (*Indonesian Bible Society*, 2011, Matthew. 25:14-30). When the time came to be held accountable, the first and second servants made a profit, but the third servant was not because he did not manage it. As a result, the first and second servants get a higher award and position, while the third servant gets a penalty, and the talent he does not manage is handed over to the first servant.

In the context of government administration law, the parable above conceptually illustrates that granting autonomous power to regions is asymmetrical and adjusted to the potential of the region concerned (real autonomy). Moreover, the granting of autonomous power contains responsibility. The logical consequence is that regions that do not carry out their responsibilities properly are subject to sanctions and/or the regions concerned are combined with other more successful regions. Furthermore, granting autonomous powers is responsible for the consequences of supervision. The three concepts mentioned above can be illustrated in the form of a diagram below.

Figure 1. Regional Autonomy Implementation Cycle



As depicted in the diagram above, interrelated elements must run systematically in a cycle, where the national law underlying the implementation of regional autonomy must be actualized in harmony in the formation and/or implementation of Regional Regulation and Regional Head Regulation. Accordingly, it will produce full power to actualize the implementation of productive regional autonomy for the welfare of the people.

Implementing the Governor's Supervisory Authority of Regional Regulation and Regional Head Regulation Regency/City Post-Constitutional Court Decision No. 137/PUU-XIII/2015

The construction of thought that became a legal consideration in the Constitutional Court Decision Number 137/PUU-XIII/2015 significantly influenced the formulation of policies and supervision. The legal considerations, as adapted by Sholikin (2017),

essentially state that Regional Regulations are local and the executive authority to cancel Regional Regulations from Regency/City is considered opposed to the logic of the law rule, where the authority to cancel is in the Supreme Court. Furthermore, the governor's decision to invalidate regional regulations is not under the Indonesia's regulations and laws and based on Law Number 12 of 2011. There are four other judges who have dissenting opinions in this decision, which essentially states: 1) that as a unitary state, Indonesia has a unified legal system. 2) The authority to form Regional Regulations is Attribute van Wetgevingsbevoegheid, not delegates van wetgevingsbevoegheid. 3) The cancellation of the Regional Regulation by Decree is possible because the President is the highest government person in the state.

Based on the legal considerations and differences, both have reasonable legal reasons. Thus, a "middle way" approach is necessary to connect the two different opinions conceptually. This approach produces the following:

- 1) The Regional Regulations are "local" as a product of legislation (legislation act), but structurally the Regional Regulations are an executive product (executive act).
- 2) Regional Regulations bind the community. Therefore, it is juridically reasonable to cancel them through a material review process. However, structurally, the governor can take repressive actions by providing recommendations for changes or revocation of regional regulations that are considered flawed.
- 3) The authority to form Regional Regulations is attributed to *van wetgevingsbevoegdheid* based on Article 18 paragraph 6 of the 1945 Constitution. Still, the authority exercised by autonomous regions is based on the delegation from the President and based on Article 4 paragraph 1 of the 1945 Constitution.
- 4) The treatment of Regional Head Regulations needs to be equated with Regional Regulations. It is because Regional Head Regulations are binding on the public.

After the Constitutional Court Decision Number 137/PUU-XIII/2015 above, it is necessary to analyze the implementation of supervision based on Minister of Home Affairs Regulation Number 120 of 2018. There are some obtrude revisions of these regulations. The first one is in the preventive supervisor, which aims to control the follow-up to the facilitation results of the Regional draft Regulation. This verification does not apply to the draft Regional Head Regulation, so there is no control over it. The second one is under repressive supervision. The government will continue to maintain it by changing the form of cancellation to a form of clarification, where the final result is a recommendation containing changes or revocation of the Regional Regulation. Meanwhile, the form of cancellation of Regional Head Regulations is still being applied.

The mechanism for canceling the Regional Head Regulation which is still valid in effect based on Article 251 of Law Number 23 of 2014, there was a very significant correction based on Article 176 number 3 of Law Number 11 of 2020. Initially, Article 251 of Law Number 23 of 2014 consisted of 8 paragraphs and was coercive (*dwingen recht*). After being amended, the Article becomes one and is only additional (*aanvullenrechts*). Thus, the executive review mechanism is no longer known in Law Number 23 of 2014, so the provisions for the cancellation of the Regional Head Regulation as regulated in Minister of Home Affairs Regulation Number 120 of 2018 lose their legal basis. In contrast to Article 99 of Law Number 1 of 2022, repressive supervision of Regional Regulations concerning Regional Taxes and Levies is positively regulated but is no longer carried out by the governor but has been handled directly by the Central Government. This provision is counterproductive to the meaning contained in point 4 of the Elucidation of Law Number 23 of 2014, where the President delegates his authority to the governor to carry out guidance and supervision to the Regions. Thus, the

supervisory authority should not be withdrawn but strengthened juridically by providing technical instructions for quality supervision procedures.

Governor's Supervision of Regional Regulations and Regional Head Regulations of Regency/City Ideally

The results of the research on the application of legal norms of supervision after the Constitutional Court Decision 137/PUU-XIII show the need to develop a legal concept of governor supervision through the development of an integrated supervision regulation, both in the structural order and in the substantial order and supported by electronic facilities (based on digital).

In the structural order, it is necessary to establish a regional regulatory agency with duties and functions to supervise. The establishment of this institution is in line with the concept initiated by President Jokowi to form an institution that handles national regulations, which he expressed in the Presidential Candidate debate (Media Indonesia, 2019). The considerations are the existence of overlapping regulations, being out of sync with higher regulations, and even many discriminatory regulations issued by local governments, so it is necessary to form a regulatory agency. Therefore President's proposal has been normalized in Law Number 15 of 2019. With this national regulatory agency, *Mutatis Mutandis* will also be formed regional regulatory agencies that have the authority, among others: 1) to carry out regulatory reforms. 2) coordinate the entire process of forming regional regulations, 3) provide facilitation (guidance) and become the center of consultation for all district/city regional governments in regional legal products; and 4) supervise the formation and/or implementation of Regional and Regional Head Regulations.

The establishment of this institution must also be balanced with substantive integration of all supervisory regulations under the governor's authority, to be handled professionally by regional regulatory bodies. In the substantive order consisting of preventive supervision and repressive supervision. Building an integrated legal norm is necessary, namely harmonization of the drafting of the Regional Regulation which is currently handled by the Ministry of Law and Human Rights, will later switch to the regional regulatory body as in Article 58 paragraph (2) of Law Number 15 of 2019; 2) . Draft facilitation of the regulations will be carried out passively and actively. Passively, carried out as stipulated in the Regulation of the Minister of Home Affairs Number 120 of 2018. Actively, carried out in guidance, such as providing technical guidance or cooperation for certain regional regulations financed by the State Revenue and Expenditure Budget; 3) Evaluation of certain Regional Regulations such as regional income and expenditure budgets, spatial planning, regional levies, and taxes, will be carried out in an integrated manner through an evaluation team, where the regulatory agency acts as a coordinator with team members consisting of relevant agencies, functional officials, and experts (academics).

In repressive supervision, it is necessary to give a form such as clarification which does not end with annulment but in the form of recommendations for changes or revocation of regional regulations and Regional Head regulations that are considered defective. Therefore, it is necessary to reformulate Article 251 of Law No 23 of 2014 with the formula concept as follows:

- (1) The Governor is obliged to submit Regional Regulations and Governor Regulations to the Minister. The regents/mayors must submit them to the governor in seven days after promulgation for clarification.

- (2)The clarification is conducted by the Minister of Home Affairs for Provincial Regulations and Governor Regulations, Governor for Regional Regulations and Regional Head Regulations of Regency/City.
- (3)The clarification is carried out within fifteen working days as of the Regional Regulation and Regional Head Regulation receipts.
- (4)The result of the clarification, which states that it is not appropriate, will then be issued a recommendation letter to the regional government to make changes or cancellations.
- (5)At the latest seven working days from the receipt of the recommendation, the Regional Head must stop the implementation of the Regional Regulation and/or Regional Head Regulation or articles recommended to be changed or cancelled. This is because the Regional Head and/or or the Regional People's Representative Council changes or cancels hem based on statutory regulations.
- (6)If the provincial government and district/municipality governments do not implement the Clarification results, the Minister of Home Affairs or the Governor submits a request for a review of the regulation to the Supreme Court.
- (7)If the application for review is declared invalid, then in seven working days after the decision is read out. After that, the Governor or the Regent/Mayor must stop the implementation of the regulation and amend or revoke the relevant regulation.
- (8)If the administrator of the Provincial Government or Regency/Municipal Government does not implement the decision, then the relevant Regional Regulation or Regional Head Regulation is declared to have no legal force by law.

The concept of drafting the norms for legal supervision above will later be carried out by a regulatory agency that will coordinate both with the national regulatory agency that regulates the supervision of norms, standards, guidelines, and criteria, as well as with the Supreme Court. In the context of revocation, the recommendation for amendment is not heeded by the district/city government.

In addition to the concept of integrating supervision above, supervision in "Industrial Revolution 4.0 (4IR)" needs to be done electronically (digitalization). As stated by Epicor (n.d.), Industry 4.0 is the new phase of Industrial Revolution, focusing on automation, interconnectivity, real-time data, and machine learning to a great extent. In government stewardship, digitalization is an opportunity for the government to serve the community and increase participation. Public collaboration in producing public services through digitizing public administration and business process automation is known as Government 4.0. (National Information and Communication Technology Council, 2018). The benefits are; that preventive surveillance documentation will be recorded accurately and confirmed quickly by interested parties, and open access for the community to participate actively in forming regions law products. In this case, public consultation conducted in cyberspace will provide efficient and effective value because it can be followed openly by all members of the local community.

CONCLUSION

The governor's supervision of Regional Regulations and Regulations of the Head of Regency/City Areas has been weakened legally. Therefore, it impacts the government representative to fully supervise the formation and/or implementation of Regional Regulations and Regional Head Regulations of Regency/city. The suggestion, the governor's supervision needs to be strengthened juridically through an integrated supervision system. Both structurally through the establishment of a regional regulatory body or substantially through the implementation of the stages of the supervisory mechanism.

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DECLARATION OF CONFLICTING INTERESTS

The author declares no potential conflicts of interest.

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