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CLASSIFICATION AND FORMULATION OF LOCAL REGULATION PRODUCTS BASED ON SUITABILITY OF LEGISLATION TYPE, HIERARCHY, AND LEGAL SUBSTANCE IN INDONESIA

Indonesia is a country which implemented local autonomy and have principle refers to the power of localities to legislate and regulate the behavior of residents. Based on that condition, local government has various policy matters which may cause problems in the formation of local regulation products. Until now, there are still uncertainty of standards and criteria on the establishment of Local Regulations and Local Head Regulations (governors, regents, mayors regulation) which may overlap one another and, as a result, finally revoked.

This research paper is considered essential to conduct as there are numerous Local regulations with type, hierarchy, and legal substance which having technical characteristics and similarities with Local Head Regulations. In the other hand, many Local Head Regulations which should be organized in Local Regulations are somehow made in the form of Local Head Regulations.

The merit of legislation principles based on law state is closely related with the formulation of local regulation products in the form of Local Regulations and Local Head Regulations. The authors discover a number of issues supporting the research objects, especially when creating the initiative Local Regulations. There were tendency of Council members to set up a technical issue in the form of Local Regulations in order that there would be no leeway to grant the authority to Local Head Regulations. Meanwhile, in other regions, there are a number of Local Head Regulations adopted into Local Regulations as their content materials are considered as the Local Regulations.

Keywords: Local Regulation; Local Head Regulation; Principle of Legislation type; Hierarchy and Legal Substance.

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Классификация и формирование законодательных актов правового регулирования местного самоуправления с учетом типа, структуры и содержания законодательства Индонезии

Проанализированы нормативно-правовые акты и правовая база местного самоуправления в Индонезии (регулирование деятельности губернаторов, регентов, мэров), которые по своему типу, структуре и юридическому содержанию повторяют друг друга. Рассмотрены проблемы, связанные с правовым регулированием местного самоуправления.

Ключевые слова: местное правовое регулирование; правовая база местного самоуправления; тип законодательной нормы; структура; правовое содержание.

Introduction. Legislation is an integral part or a sub-system of a legal system. As a sub-system, legislation cannot stand on its own regardless the state legal system. In its formation, legislation must be modeled on the basis of sound formation of legislation to avoid errors and defects in the norm formation.

In the context of local autonomy, there are two principles of power derived which are immunity and initiative[1]. Initiative give authority to established local regulation products (Local Regulations and Local Head Regulations) as a part of Local

[1] Gordon L Clark, *A Theory of Local Autonomy,* Annals of the Association of American Geographers, Vol. 74, No. 2 (Jun., 1984), Taylor & Francis, Ltd., p. 195.

Government's authority to manage and organize their own internal matters. Ideally, as the organizer of the local administration, local Government cannot be separated from its tasks to nurture the peace and order of society in its territory and should be capable of forming participative-accommodating legal products based on the conditions of the communities in which the rule to take effect. However, in reality it is not the case. The great authority given in the local autonomy raises the question of new sub-system of legislation. The turning point is that there is a shift from the concept of rule of law into practical thought to political state. Such shift to political state can be analogized with a train which does not stand on the «rails» of applicable law. Whether or not, a local Government which have an effective function are depends highly on the quality of its legal arrangement.

Literature Review And Formulation of the problems. Indonesia's founding fathers proudly states Indonesia is a country of law, even democratic country of law. According to C.F. Strong, the essence of democracy is not separated from the people and their sovereignty, as mentioned below:

«*By democracy we mean «that form of government in which the rulling power of a state is legally vested, not in any particular class or classes, but in the members of a community a whole... the term of democracy here in the sense of the rule of the majority of the community as a whole, including «classes» and «masses»*[1].

On the basis of the foregoing, then democracy should still be implemented, yet it must comply with and follow the rails of law. There can be no freedom before the applicable law[2]. In relation to the formation of legal products in Indonesia, there are Article 7 of Law No. 12 of 2011 concerning the Formation of Legislation which states that:

1) Type and hierarchy of Legislation consist of:

a. 1945 Constitution of the Republic of Indonesia;

b. Statute of the People's Consultative Assembly;

c. Law/Government Regulation in lieu of Law;

d. Government Regulation;

e. Presidential Regulation;

f. Provincial Regulation; and

g. Regulation of Regency/Municipality.

2) The legal power of Legislation follows the hierarchy as referred to in paragraph (1).

Meanwhile, in Article 8 it is stated that:

1) The type of Legislation other than those mentioned in Article 7 paragraph (1) includes those regulations established by the People's Consultative Assembly, House of Representatives, Regional Representatives Council, Supreme Court, Constitutional Court, Supreme Audit Agency, Judicial Commission, Bank of Indonesia, Ministers,

1 C.F. Strong, *Modern Political Constitusional; An Introduction To The Comparative Study of Their History And Existing Form*, sixth edition, London:Sidgwick&Jackson Limited, 1963, p. 30.

2 W. Riawan Tjandra and Kresno Budi Darsono *Legislative Drafting (Teori dan teknik Pembuatan Peraturan Daerah),* Yogyakarta: Atma Jaya, 2009, p. 23.

Agencies, Institutions, or commissions of the same level which are established under the Law or the Government on the order of the Law or the Government on the order of the Law, Provincial Legislative Council, Governor, Regency/Municipality's Legislative Council, Regent/Mayor, Village Head or those of equivalent level.

2) The existence of Legislation as referred to in paragraph (1) is acknowledged and it has the legal force of equivalent level as long as it is ordered by higher Legislation or established under the proper authority.

These Articles 7 and 8 above provides a figure of how Local Regulations are included into the order of legislation, while Local Head Regulation can be included into the sequence of legislation as long as it is ordered by higher-level Legislation or established under certain authority (Article 8 paragraph 2). It means position of higher level is an element of governmental implementation which have the function to achieve certain goal in terms of work system of an organization. On that basis, the position give an authorized and able to guarantee the continuity of rights and obligations[1].

The regulation products Regional Government could generate include: Local Regulation, Local Head Regulation or Decision of Regional Heads (*Regeling* and *Beschikking*). Meanwhile, the content material of Provincial Local Regulations and Regency/Municipality Government Regulations as referred to in Article 14 of Law No. 12 of 2011 concerning the Formation of Legislation specifies the content material in the context of the implementation of local autonomy and assistance task and to accommodate regional-specific conditions and/or further elaboration of higher-level Legislation.

Based on that condition, it found problems about how the mechanism of government to classified, established and supervised the local regulation products relating with the suitability of legislation type, hierarchy, and legal substance in Indonesia.

Purposes and Objectives. The absence of clear standards and criteria in the formation of local regulation products (Local Regulations and Local Head Regulations) increases the questions on the type, hierarchy and legal substance. This paper is intended to examine legal aspect and principles, with a juridical normative approach in several stages. *First*, it identifies problems on legislation types, hierarchies, and legal substance of local regulation products; *second*, it analyzes legislation theories and formulating results into a naval theory as guidance to determine the legal substance of local regulation products which contain norms, standards, procedures and criteria in classifying and formulating local regulation products based on the suitability of their type, hiearchy, and content material to determine those for Local Regulations and Local Head Regulations; *third*, it synchronizes and adapts theories based on the legislation type, hiearchy, and content material

[1] Tedi Sudrajat and Zainal Muttaqin, *Reconstruction The Patterns of Authority Relations Between Head of Local Government and Secretary of Local Government on Promotion of Civil Servants,* Jurnal Dinamika Hukum, Vol.16 No.2 (May 2016), Purwokerto Indonesia:Faculty of Law Universitas Jenderal Soedirman, p. 205.

suitability for Local Government environment. This research aims to figure out a new theory in the concept of local autonomy, which may prevent an overlap between Local Regulations and Local Head Regulations to create legal certainty.

Results.

Comparation with Netherlands Regarding Establishment and Supervision of Local Regulation Products.

When it viewed from the aspect of *staatsvorm* (form of state), the structure of the Netherlands have a form of unitary state (*eenheidsstaat*) which is centralistic (*gedecentraliseerde eenheidsstaat*), divided into 12 (twelve) provinces and each province divided further into smaller regions, namely municipal government regions (*gemeente*).

The emphasis of local governments in the Netherlands lies in *gemeente*; this constitutes an effort to realize the principles of welfare state for common people (*bonum publikum*). *Gemeente* as the lowest-rank autonomous government unit is clearly in direct contact with the government's attempt to carry out all forms of services.

To the actions of regional governments in making Local Regulations, the central government can perform preventive and repressive supervisions. Preventive supervision (*voortoezicht*) is structural and specific in nature which is done in case:

A consideration or supervision is carried out before the lower level government makes any decision.

A consideration or supervision is performed after local government makes a decision, yet, such decision has not been effective and has no legal consequences and it is called *middentoezicht* supervision. Examples of middentoezicht are validation and announcement or enactment.

On the other hand, the central government can also perform repressive supervision after a decision is issued and has legal consequences (*rechtsgevolgen*) in both fields of regional autonomy or assistance. This repressive supervision is done through cancellation (*verneitiging*). Postponements of cancellation through repressive supervision is spontaneous because the authorities, in canceling it, may take their own initiative without having to wait for any third-party stakeholders. Such cancellation is immediately effective without having to go through any delay.

Repressive supervision is limited by *administratie beroep* mechanism, where when to certain decisions a cancellation can be asked to the court, then it cannot be cancelled through repressive supervision. The Law on *gemeente* and the Law on province govern, among others, their conflicts with Law and general public interest.

The supervision and review system in the Netherlands itself does not follow such model as judicial review as in the United States or France. The Netherlands uses administrative judicial model. The legal system of the Netherlands does not recognize the mechanism for reviewing the constitutionality of a Law. The Netherlands adheres to the teachings that a Law could not be challenged (*de wet is onschenbaar*)[1].

[1] Jimly Assidhiqqie and M. Ali Safa'ah, *Teori Hans Kelsen tentang Hukum,* Jakarta: General Secretariat and Registrar of The Constitutional Court, 2006, p. 129.

Based on such teachings, in the Netherlands a supervision of a Regional Regulation is mainly done by the central government in the form of preventive supervision (*executive preview*) and repressive supervision (*executive review*).

Comparation with England Regarding Establishment and Supervision of Local regulation Products.

The local government in England is (legally) subordinate to the central government. The local government can only manage and organize an administration the Law has given to them. Law constitutes the only way to obtain authority, duty and responsibility to manage and organize a government affairs.

Even though a region's authority is determined by the Law, it does not necessarily mean that the regional government in England solely acts as an apparatus or a representative of the central government in regions. The regional government is an independent agency. Each has and exercises the power established by the Law. However, it is not entirely separated from the central government which in many, increasingly advanced ways influence the regional government to exercise their power.

The authority and responsibility to manage and organize a government affairs is obtained through *Public General Act* and through *Local Act* or *Private Act*. In the first way, i.e. through *Public General Act*, there are three possibilities for regions to have the right to manage and organize government affairs, namely:

A law which governs, in general, regional administration (for example *Local Government Act*, 1072; *London Government Act*, 1974), determines various authorities, duties and responsibilities of the region. These provision applies to all regional governments subjected to the Act, such as to create Local Regulations , to represent in a court or to make an agreement.

A sectoral law which determines that a region is given the authority, duty and responsibility to manage and organize certain affairs. Example of this includes *Public Health Act, Education Act*, and so on.

Also included in this way is *Adopted Acts*. A government affairs is classified as the matter to be managed and organized by a region under this Law[1].

The second way is through *Local Act* or *Private Act*. A region is entitled to apply a bill related to the management and organization of government affairs by the region to the parliament. The third one is through *Provisional Order Confirmation Act*. In this way, a Minister, according to his/her authority, legalizes a provisional statute which determines that a government affairs to be managed and organized by a region. Fourthly, they have *ministerial* (or *Special*) *Orders*. A regional government submit a draft (*put forward schemes*) that needs confirmation from the corresponding minister, unless if the parliament rejects it[2]. In terms of legislation, the council has 2 (two) authorities, namely:

[1] Bagir Manan, *Dasar-Dasar Konstitusional Peraturan Perundang-undangan Nasional* Faculty of Law of Andalas University, 1994, p. 45–46.

2 *Ibid*., p. 48.

To create *Standing Orders*. These *Standing Orders* are applicable only internally (*internal rules*), in a sense that it does not serve as a norm that is binding externally which results in the raise of the rights and obligations for the society.

To make *bye laws*. There are some elements of *bye laws*, they are:

Bye laws are regulations (*laws*) or holds the position of *local rule*;

Bye laws are applicable to and in certain areas of a region government;

Bye laws are made by a regional government, namely a *council* based on the authority specified by an Act;

Bye laws always need confirmation from the Minister (preventive supervision), either by Minister of Home Affairs or a Minister in charge of those matters (content material) set forth in a *bye laws*[1].

To the actions taken by a regional government (both *county* and *district*) a supervision is performed by the central government by either the executive, legislative or executive board. The legislative supervision is done by the parliament. The authority to make an Act lies with the parliament; all authorities of a region to control and manage a service function originate from the parliament. In this way, the Parliament monitor the regional government. In relation to tax, only the parliament holds the authority to charge and establish a tax. Only parliament could give the authority to collect tax to a regional government. Administrative (executive) supervision is carried out by the central government, whihc includes all areas, making the regional government looks like a part of the central government.

The supervision can be done in two actions namely confirmation and approval. A confirmation to *bye laws* does not simply examine its aspects of law, it also review whether the target to be achieved by the *bye laws* is something necessary from the perspective of local situation and the wisdom rationally. An approval is something given to a draft or proposal submitted by a region. Unlike the legislative and executive supervision, in the context of supervision by judicial authority, England as a country that adheres to the supremacy of parliament, does not recognize *judicial review* to any Law made by the parliament.

In the context of supervising Local Regulations , England knows and practices *executive preview* to a legislation draft including Local Regulations. Some Laws specifies that any region to perform the function of a service is required to first submit the draft or proposal of the said service (stipulated in the form of a law product) to the Minister for his/her approval. Only after obtaining the approval could the service function given to the region be administered[2].

Model of Supervision to create Classification and Formulation of Local regulation Products in Indonesia According to the Comparison of Law and Principle of Suitability of Type, Hierarchy and Legal Substance of Legislation.

The supervision principle contained in a unitary state, according to Bagir Manan, is that the central government has the authorities to more intensively

[1] Bagir Manan, 1994, *Dasar-Dasar Konstitusional Peraturan Perundang-undangan Nasional...op. cit*. p. 63.

[2] *Ibid*., p. 52–56.

intervene with problems in regions. The Central Government is responsible for ensuring the integrity of unitary state, ensuring that the same services are given to all people of the state (*equal treatment*), ensuring the uniformity of action and administration in certain areas. Restrictions on the freedom of a region to manage and organize its local affairs with some obligations are the logical consequence destined for the adherence to the principles of country of law[1].

From the perspective of the relations between the Central Government and Local Government, supervision constitutes a unity «fastener», in order of the autonomy freedom does not move too far that it reduces even threatens the unity. Sir William O. Been and J.F. Garner stated that «... *if local autonomy is not to produce a state of affairs bordering on anarchy, it must subordinated to national interest by means devised to keep its actions within bounds*»[2]. When the «fastener» is drawn too hard, the spirit of decentralization freedom will be reduced and perhaps even disconnected. When it happens, supervision is no longer one side of decentralization, rather it has become a «shackle» to decentralization. Therefore, supervision should be accompanied by restrictions. These restrictions will include the restrictions of type or form of supervision, which also contains the restriction of procedures for conducting the supervision, and the officials or agency authorized to perform the supervision.

In relation to the comparison with the Netherlands and England, Indonesia ought to use two types of standard supervision to the autonomous government unit namely preventive supervision (*preventief toezicht*) and repressive supervision (*repressief toezicht*). This supervision is related to the legal products and specific actions of regional government organs. Preventive supervision is associated with the authority to confirm (*goedkeuring*), including that which relates to the content material of regulations in regions against the principle of suitability of types, hierarchy and content material of the legislation as set forth in Law Number 12 of 2011**.** The implication includes the authority to cancel or delay.

Considering the foregoing, the existence of a Local Regulation, Local Head Regulation, and Decision of Local Head, in essence, constitutes the consequence of applying the principle of decentralization in the organization of local government and is an integral part of the unity of national legal system. As a legislation product at provincial or regency/municipality and the work of two institutions, i.e. Local Head and Local Legislative Council, who were both elected directly by the people through general election and regional election, these legislation products could not be simply canceled unilaterally by the decision of Central Government (executive), rather it should be by the Supreme Court.

The criteria to review these local regulations include:

They conflict with the law (*stijd mer heth recht*), such as:

[1] Bagir Manan, *Beberapa Hal di Sekitar Otonomi Daerah Sebagai Sistem Penvelenggaraan Pemerintahan,* Padjadjaran Magazine , Vol. V 1974, Bina Copyright, Bandung, 1974, p. 34–37 goes.

[2] Sir William O. Been – J.F. Garner, *Introduction to the Law of The Local Government and Administration,* Buttemorths, London, 1973, p. 297.

– Conflicting with all regulations stipulated by higher government apparatus;
– Conflicting with the general principles of good governance;
– Conflicting with the general principles of good regulations in order to prevent them from being misused.

They conflict with common interests (*stijd met algemeen spotted*), conflict with an interest which, in the opinion of the government apparatus authorized to cancel them, is more valuable than the interest governed in the decision which is canceled or conflicting with the general policy exercised by the central government.

Conclutions. Local head regulation is essentially a result of the implementation of the principle of decentralization in local government and as an integral part of the unity of the national legal system. Local Regulation as product legislation at the provincial and district/city and is the result of two institutions (Regional Head and the Regional Representatives Council) were elected by the people, the products such legislation can not be done by a unilateral decision of the central government (executive) but by the Supreme Court. The tool to test the legal substance are (1) contrary to general principles of good governance, and contrary to the general principles of good regulation; (2) contrary to the public interest.

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Класифікація та формування законодавчих актів правового регулювання місцевого самоврядування з урахуванням типу, структури та змісту законодавства Індонезії

Індонезія – країна, яка впровадила місцеву автономію і має законодавчі норми щодо повноважень місцевої влади здійснювати законодавчу владу і регулювати дії її громадян. Таким чином органи місцевої влади мають право вирішувати різні політичні проблеми, що може негативно позначитися на формуванні законодавчих актів місцевого правового регулювання. На даний момент все ще існує невизначеність щодо стандартів і критеріїв створення нормативно-правової бази місцевого самоврядування (регулювання діяльності губернаторів, регентів, мерів), які можуть повторювати один одного і, як наслідок, повинні бути остаточно скасовані.

Актуальність цієї статті визначається насамперед тим, що існує безліч місцевих нормативно-правових актів, які за своїм типом, структурою та юридичним змістом подібні правовій базі місцевого самоврядування. Водночас багато нормативно-правових актів, що визначають функції та статус керівних осіб, які повинні бути відображені в місцевій нормативно-правовій базі, складено у формі правової бази місцевого самоврядування.

За своєю суттю законодавчі принципи, на яких базується правова держава, пов'язані з розробкою законодавчих актів, що знаходить своє відображення у формі місцевої нормативно-правової бази та правової бази місцевого самоврядування. Автори виділяють низку проблем, пов'язаних з об'єктом дослідження, які виявляються при створенні законодавчої ініціативи щодо місцевого правового регулювання. Члени Ради місцевого самоврядування, як правило, були схильні створювати різні технічні проблеми у вигляді місцевої нормативно-правової бази з тим, щоб не давати повноважень правовій базі місцевого самоврядування. У той же час в інших регіонах країни існує низка нормативно-правових актів місцевого самоврядування, інтегрованих в місцеву нормативно-правову базу, оскільки їх зміст розглядається як місцева нормативно-правова база.

Ключові слова: місцеве правове регулювання; правова база місцевого самоврядування; тип законодавчої норми; структура і правовий зміст.

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