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# The Impact of The Decision of the Constitutional Court Number 91/puu-xviii/2020 on The Establishment of Regional Regulations Concerning Levies Building Approval

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### **Abstract**

Government Regulation Number 16 of 2021 concerning Implementing Regulations of Law Number 28 of 2002 concerning Buildings orders the establishment of a Regional Regulation concerning Retribution for Building Approval within a period of 6 (six) months. Before all Regional Governments had time to form a Regional Regulation on Building Approval Levy, the Constitutional Court issued Decision Number 91/PUU-XVIII/2020 on the Review of Law Number 11 of 2020 concerning Job Creation. The decision does not justify the establishment of implementing regulations of Law Number 11 of 2020 concerning Job Creation for 2 years until the law is finish repaired. So, what is the impact of the Constitutional Court's Decision Number 91/PUU-XVIII/2020 on the formation of Regional Regulations concerning Retribution for Building Approval? How does the Ministry of Home Affairs see the problem of the Regional Government that has not yet formed a Regional Regulation on Retribution for Building Approval? How are the Policy Regulations that have been issued by the Ministry of Home Affairs seen from the Science of Legislation? Through the normative juridical method, it was concluded that the Constitutional Court's decision caused new turmoil for the Regional Government which at that time was still adapting to the new system. The Ministry of Home Affairs then issued Instruction Number 68 of 2021 which ordered the Regional Government to continue the process of forming a regional regulation implementing the Job Creation Law. However, after that, the Minister of Home Affairs along with 3 other Ministers actually issued a Circular Letter which actually extended the time period for the formation of the Regional Regulation concerning Retribution for Building Approval until 2024. From a legal perspective, about Instruction Number 68 of 2021 seems to be interpreted as a follow-up to the Decision of the Constitutional Court Number 91/PUU-XVIII/2020, although there are also policy regulations in the form of a Joint Circular of 4 Ministers provide a time limit who different from Government Regulation Number 16 of 2021 concerning Implementing Regulations of Law Number 28 of 2002 concerning Buildings.

**Keywords:** *Constitutional Court Decisions, Building Approval, Regional Regulations*

### **A. Introduction**

The decision of the Constitutional Court Number 91/PUU-XVIII/2020 has had an impact on the establishment of a Regional Regulation on Building Approval Levy ("Perda PBG Retribution"). This is because in the Constitutional Court's ruling which states that, "Law Number 11 of 2020 concerning Job Creation ("The Job Creation Law") is still valid until an amendment is made with a grace period of 2 years". However, in the 7th Order, the Constitutional Court stated that, "suspending all strategic and broad-impact actions/policies, and it is also not justified to issue new implementing regulations relating to the Job Creation Law." While the provisions for the formation of the Regional Regulation on PBG Retribution are in the amendment to



Law Number 28 of 2002 concerning Buildings ("Building Law") and in the amendment of Law Number 28 of 2009 concerning Regional Taxes and Levies ("Regional Taxes and Levies" ) contained in the Job Creation Act.

The PBG provisions have actually changed the previously existing concept, namely the provisions for the Building Permit (IMB). This is because different from the IMB provisions as a permit that needs to be owned by building owners before or after constructing a building, the PBG provisions are more of a licensing rule that regulates how buildings should be built. The PBG provisions also include standards for planning, monitoring, and utilizing the construction of the building itself.

After the provisions of the PBG levy are regulated in the law, then the provisions of the PBG levy are followed up through Government Regulation Number 16 of 2021 concerning Implementing Regulations of Law Number 28 of 2002 concerning Buildings ("PP Building"). Through the PP Building, the Regional Government is required to provide PBG within a period of 6 months as stated in Article 347 paragraph (2) of the PP Building which states that, "Regental/municipal governments must provide PBG within a period of no later than 6 (six) months. six) months after this Government Regulation comes into force."

The PP Building itself is said to come into effect when the government regulation is promulgated on February 2, 2021. This means that the Regional Government actually only has until before June 1, 2021 to complete the formation of the Perda on PBG Retribution. Unfortunately, many regions have not yet succeeded in completing the formation of the PBG Retribution Regulation. The condition of many regencies/cities that have not followed up on the Perda on PBG levies has had a significant impact on the community. This is because the regulation on the formation of the Regional Regulation on PBG Retribution is important because previously the Regional Government was prohibited from withdrawing the levy if it did not have a Regional Regulation that regulated the PBG Retribution. As stated in the Ministry of Home Affairs Circular Number 011/5976/SJ released in October 2021.

In the midst of the preparation of the Perda on PBG Retribution, the Constitutional Court issued its Decision on November 4, 2021, one of which was to "suspend all actions/policies that are strategic in nature and have a broad impact, and are not justified in issuing new implementing regulations relating to the Job Creation Act." ." The presence of this Constitutional Court Decision some time ago caused new turmoil for the Regional Government which at that time was still making adaptations in implementing the Job Creation Law and its existing implementing regulations.

Based on the description above, several questions arise that become the formulation of the problem in this paper, namely, how is the impact of the Constitutional Court Decision Number 91/PUU-XVIII/2020 on the formation of Regional Regulations concerning Retribution for Building Approval? How does the Ministry of Home Affairs see the problem of the Regional Government which has not yet formed a Regional Regulation on Retribution for Building Approval? How are the Policy Regulations that have been issued by the Ministry of Home Affairs seen from the Science of Legislation?

## **B. Method**

This paper uses a normative juridical research method. Normative Juridical Research is a legal research method. The focus of this method is using library materials or mere secondary materials as materials. The legal materials used are Primary Legal Materials and Secondary Legal Materials. Regarding primary legal materials as binding legal materials, which are used such as the 1945 Constitution of the Republic of Indonesia, Law Number 12 of 2011 concerning the Establishment of Legislations (as amended by Law Number 15 of 2019) - legislation", the Job Creation Law, the Constitutional Court Decision Number 91/PUU-XVIII/2020, several Government Regulations as implementing the Job Creation Act, and 3 Policy Regulations relating to the regulation of the formation of the PBG Retribution Regulation and the Constitutional Court Decision Number 91/ PUU-XVIII/2020.

Meanwhile, Secondary Legal Materials are in the form of legal publication materials, such as books, scientific journals, articles, and other writings relating to the position of the Constitutional Court Decision, the position and implications of the Instruction of the Minister of Home Affairs, and the relationship between the two legal positions.

### **C. Results and Discussion**

#### **1. Impact of the Constitutional Court's Decision: The Provisions for the Establishment of the Perda on the Formation of PBG Retribution**

The impact of the Constitutional Court Decision Number 91/PUU-XVIII/2020 on the implementation of PBG in the regions can be seen from the service for PBG requests submitted by the community. In practice, there are people who submit reports to the Ombudsman of the Republic of Indonesia in West Java Province. The report referred to is related to the licensing mechanism that is not in accordance with the understanding of the Reporting Party who has conducted an independent review. In the report, the Reporting Party regrets that the local Perda has not been adjusted to the PP on Buildings as a derivative of the Job Creation Law, in particular for the newly required permits. This causes the Applicant to have to prepare additional requirements and the licensing process is increasingly valid and does not end.

In response to this, the technical office clarified that the local government had not followed up on all the requirements in the PP Building. This is because the Regional Government has not replaced and is still enacting a Regional Regulation (Perda) which regulates the obligation to fulfill the requirements for IMB management. However, his party also conveyed obstacles in the form of the absence of derivative regulations from the PP Building A building that becomes a technical guide for the Regional Government in implementing the issuance of PBG.

Based on the report, the Indonesian Ombudsman for West Java Province said that the Regional Government had not been able to issue a Perda on PBG Retribution which was formed as the executor of the PP Building because it was constrained by the 7th Amar of the Indonesian Constitutional Court Decision Number 91/PUU-XVIII/2020 which stated, "suspending all actions/ policies that are strategic in nature and have a broad impact, and it is also not justified to issue new implementing regulations relating to the Job Creation Law."

Based on the case above, it is necessary to examine the extent to which the impact of the Constitutional Court's Decision reaches the provisions for the

establishment of PBG levy regulations in the regions. This is considering that what is suspended by the Constitutional Court is related to all strategic and broad-impact actions/policies; and what is not justified is the issuance of new implementing regulations relating to the Job Creation Law. In order to assess the reach of the Constitutional Court's Decision 91/PUU-XVIII/2020, it is necessary to first look at the theory of John Locke and Montesquieu who have separated state power by dividing the powers of the Legislature, Executive Power, and Judicial Power. As the power that implements the laws formed together with the Legislative Powers, the Executive Powers are given the opportunity to further regulate laws in implementing regulations, one of which is in the hierarchy of the Indonesian legal system mentioned by Prof. A. Hamid S. Attamimi in the form of a government regulation.

The government regulation in this case the PP Building has been included in the realm of Executive Power as a form of Executive power to implement the Job Creation Act. The review of the Job Creation Law carried out by the Judicial Power is in line with the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia which has rigidly determined that, "The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the Basic Law..." Based on these provisions and related to the authority to form a PP on Buildings that are in the Executive Power, it can be seen that the Constitutional Court Decision Number 91/PUU-XVIII/2020 covers matters regulated in the Copyright Law. Just work. This includes delegation or attribution of legal product formation which is rigidly regulated in the Job Creation Law.

Therefore, the reach of the ruling of the Constitutional Court Decision Number 91/PUU-XVIII/2020 which does not justify the issuance of new implementing regulations only relates to the delegation or attribution of the formation of legislation that is rigidly regulated in the Job Creation Law. Meanwhile, based on the non-retroactive principle, legal products that have been formed from the start with reference to the delegation or attribution authority of the Job Creation Law remain valid.

Including in this case the delegation for the formation of the Regional Regulation on PBG Retribution which has been regulated in the PP Building remains valid because it is not included in the 7th order of the Constitutional Court Decision Number 91/PUU-XVIII/2020. Since the provisions for the establishment of this Perda on PBG Retribution are considered to remain in effect, on December 20, 2021, the Acting Secretary General of the Ministry of Home Affairs submitted his response to the Constitutional Court Decision 91/PUU-XVIII/2020, namely the Ministry of Home Affairs urges Local Governments to immediately make regional regulations related to PBG issuance fees.

He said that because the Constitutional Court's decision did not cancel the articles in it so that the provisions of the Job Creation Law remained in effect, the Ministry of Home Affairs prepared a draft Instruction for the Minister of Home Affairs (currently it has been ratified as Instruction of the Minister of Home Affairs Number 68 of 2021) which contains the essence that all activities that have been carried out In progress, such as the one regarding PBG, this must still be implemented, continued, including changes to regional regulations. The above statement is also supported by the reason

of the Ministry of Home Affairs, because there is not a single article in the Job Creation Law that has been annulled by the Constitutional Court.

This has an impact on the obligations in the PP on Buildings that remain in effect, including the obligation for the Regional Government to provide PBG within a period of 6 (six) months. This provision can be seen in Article 347 of the PP on Buildings which states that, "Perda and Perkada as referred to in Article 249 paragraph (1) and paragraph (3) are prohibited from contradicting the provisions of higher laws and regulations, the principle of establishing laws and regulations. good principles, the material principle of the content of laws and regulations, and court decisions."

## **2. Steps by the Minister of Home Affairs to Follow Up on the Job Creation Law and the Decision of the Constitutional Court 91/PUU-XVIII/2020**

As a follow-up to the implementation of the Job Creation Law and the Constitutional Court 91/PUU-XVIII/2020, particularly with regard to the regulation of the PBG Levy in the regions, the Minister of Home Affairs has taken a number of steps to encourage the Regional Government to immediately follow up on the provisions of the regulation of the PBG Levy. The steps referred to can be seen from several Policy Regulations that were formed, including the following:

First, within 2 weeks before the Constitutional Court Reads its Decision, the Minister of Home Affairs in October 2021 has issued a Circular Letter of the Minister of Home Affairs Number 011/5976/SJ concerning the Acceleration of Preparation of Basic Requirements for Business Licensing Regulations, Implementation of Building Approval Services and Building Approval Fees, and Levies for the Use of Foreign Workers ("SE Minister for Accelerating Regulatory Preparation").

In the Ministerial Decree for the Acceleration of Regulatory Preparation, the Minister of Home Affairs expressly requires that PBG provision services be provided by the Regional Government within a time limit of 6 (six) months according to the time referred to in Article 347 of the PP on Buildings above. Even in the SE it is explained that if the services were provided before the PBG Retribution Regulation was enacted, the levy could not be collected (free). The Minister also in his circular letter stated that so that the Regional Government does not lose the potential of regional revenue, the Regional Government needs to immediately stipulate a Regional Regulation on PBG Retribution.

Second, not long after the SE Minister of Home Affairs mentioned above was issued on October 21, 2021; and not long after November 4, 2021, the Constitutional Court issued its Decision, on December 21, 2021, the Minister of Home Affairs issued the Instruction of the Minister of Home Affairs Number 68 of 2021 concerning Follow-up to the Decision of the Constitutional Court Number 91/PUU-XVIII/2020 on Formal Judicial Review -The Job Creation Law ("Instruction of the Minister to Follow Up on Constitutional Court Decisions") which instructs Regional Heads to immediately make adjustments, either in the form of making changes, revoking, or drafting new Regional Regulations with the DPRD and/or Regional Regulations as a follow-up to the Job Creation Law and other legal products that have been promulgated/stipulated earlier. The Ministerial Instruction further strengthens the Regional Government to continue the formation of the Regional Regulation on PBG Retribution.

In the implementation of the Ministerial Instructions to Follow Up on the Decisions of the Constitutional Court did not fully produce results, this is because two months later from the issuance of the Ministerial Instructions, on February 14, 2022, out of 508 Regencies/Cities, it was found that there were still 421 Regencies/Cities that had not followed up on the Perda. PBG levies. As a result, a number of regions stopped new IMB issuance services. It is even stated in other sources that if the Regional Government continues to collect IMB fees, the Regional Government has the potential to violate the provisions contained in Law Number 23 of 2014 concerning Regional Government ("Local Government Law").

However, the failure of the Regional Government was not dealt with firmly by the Central Government. Whereas the amendment to the Regional Government Law in the Job Creation Law expressly states that it prohibits the existence of a Regional Regulation that is contrary to/not in line with higher laws and regulations. This is as known in the Amendment to Article 250 of the Regional Government Law in the Job Creation Law which states that, "Perda and Perkada as referred to in Article 249 paragraph (1) and paragraph (3) are prohibited from contradicting the provisions of higher legislation, the principle of establishing good laws and regulations, the principle of material content of laws and regulations, and court decisions."

In the absence of the establishment of a Perda on PBG Retribution for less than a period of 6 (six) months as required in Article 347 of the PP on Buildings, it is appropriate to mention that the Perda on PBG Levies that was formed for more than the required period of 6 (six) months is suspected to be contradictory/incompatible with the provisions of PP Building. As a result, the Central Government should be able to take firm action against the Regional Government by imposing administrative sanctions as stipulated in the Amendment to Article 252 of the Regional Government Law in the Job Creation Law which states that, "(1) Provincial or district/city regional government administrators who still enforce regulations that are not in accordance with with the provisions as referred to in Article 250 is subject to sanctions. (2) The sanctions as referred to in paragraph (1) are in the form of administrative sanctions."

The problem is that the administrative sanctions are not given by the Central Government to the Regional Government. This is a question for the Central Government, then why does the Central Government require the Regional Government to present a Perda on PBG Retribution with a rigid period of only 6 (six) months? Then why did the Central Government and the DPR RI make changes to the provisions of administrative sanctions on the implementation of regional regulations that are contrary to/not in line with higher laws and regulations? If in the end, the Central Government itself does not carry out the mandate of the Job Creation Act firmly.

Whereas in the principle of the formation of good laws and regulations as regulated in Article 5 of the Law on the Establishment of Legislations it clearly states that one of the principles includes "can be implemented". The purpose of the principle as explained in the explanation, namely, "every establishment of legislation must take into account the effectiveness of these laws and regulations in society, both philosophically, sociologically, and juridically." Based on the above principle, with the Central Government not taking strict action against the Regional Government, the question is whether the Central Government intentionally did not impose

administrative sanctions on the Regional Government because the Central Government did not question the fact that the provisions for the establishment of the Perda on PBG Retribution were not implemented within the 6 (six) month time limit.

The Central Government's intentional disregard for the delay in the formulation of the Regional Government Regulation on PBG Retribution is increasingly visible from the establishment of the Third Policy Regulation, namely the Joint Ministerial Circular which was formed by the Minister of Home Affairs together with the Minister of Finance, the Minister of Public Works and Public Housing (Minister of PUPR), and the Minister of Investment. /Head of the Investment Coordinating Board (BKPM) on February 25, 2022, Number: 973/1030/SJ, Number: SE-1/MK.07/2022, Number: 06/SE/M/2022, and Number: 399 /A.1/2022 concerning Acceleration of Implementation of Building Approval Levies addressed to Governors, Regents, and Mayors throughout Indonesia ("SEB 4 Minister for Acceleration of Implementation of PBG Levies").

In SEB 4 of the Minister, it is stated that the Perda on IMB Retribution or Perda on Certain Licensing Fees can still be used even though there is no PBG Perda until January 5, 2024. This SEB revokes the Ministerial Decree for the Acceleration of Regulatory Preparation which had previously affirmed the provisions of the PP on Buildings which required the Regional Government to establish a Perda on PBG Retribution within a period of 6 (six) months. Interestingly in the Joint Ministerial Circular, it does not explain the legal basis for determining the period until January 5, 2024, even the Constitutional Court Decision Number 91/PUU-XVIII/2020 is not mentioned in the Joint Circular Letter.

### **3. Analysis of Legislation on Policy Regulations that have been issued**

Based on the three Policy Regulations above, it is important to analyze several aspects, including: First, the scope of the content of the Policy Regulations. The existence of the 3 Policy Regulations mentioned above, namely the SE Minister for the Acceleration of Regulatory Preparation, the Ministerial Instruction for Follow-up to the Decisions of the Constitutional Court, and the SEB 4 the Minister for the Acceleration of the Implementation of PBG Charges, has led to a number of questions regarding the scope of the content of the three Policy Regulations.

The question is intended to confirm whether it is justifiable that the three Policy Regulations can reach the content that currently exists? Prof. A. Hamid S. Attamimi conveyed one of the characteristics of the Policy Regulation regarding its content. Prof. A. Hamid S. Attamimi also stated that, "Policy Regulations contain material content related to the authority to form decisions in the sense of *beschikkingen*, the authority to act in the field of private law, and the authority to make plans (*plannen*) that do exist in government institutions. In connection with the three characteristics of the content material of the Policy Regulations presented by Prof. A. Hamid S. Attamimi above, then the Policy Regulations that have been formed above unfortunately do not fully fulfill these characteristics. This is because SEB 4 of the Minister for the Acceleration of the Implementation of PBG Charges is actually not in line with the provisions of the PP on Buildings which stipulates that the Regional Government provides PBG within a period of 6 (six) months. Even though the provisions of the PP on Buildings are still in effect, even though the Constitutional Court has given its decision on the Job Creation Law.

Apart from that, what also deserves to be a question is, can the Minister's Instruction follow up on the Decision of the Constitutional Court? This is certainly important to understand because the follow-up to the Constitutional Court's decision on judicial review as stipulated in Article 10 paragraph (2) of the Law on the Establishment of Legislation states that, "the follow-up to the decision of the Constitutional Court as referred to in paragraph (1) letter d carried out by the DPR or the President." The reference to paragraph (1) letter d referred to in the law is, "The decision of the Constitutional Court which is the content material that must be regulated by law." Therefore, it should be brought to common attention that the Policy Regulations established by the Minister, in particular on the Instructions of the Minister to Follow Up on Constitutional Court Decisions and SEB 4 of the Minister for the Acceleration of Implementation of PBG Charges, need to be reviewed so that their formation is in line with the applicable provisions.

Second, Determination of the form of Policy Regulations used by the Central Government. Based on the three Policy Regulations above, it is necessary to pay attention to whether the selection of the form of the Policy Regulation is correct? This is because in the Appendix to the Regulation of the Minister of Home Affairs Number 42 of 2016 concerning Administration of Service Scripts within the Ministry of Home Affairs, it is stated that, "The Minister's Instruction is an official text containing orders/directions regarding the implementation of policies of a statutory regulation." Meanwhile, the Ministerial Circular in the Attachment to the Ministerial Regulation states, "it is an official document containing notifications, explanations and/or instructions on how to carry out certain things that are considered important and urgent.

Based on the definitions of the two Policy Regulations above, the substance of the Instructions of the Minister to Follow Up on the Decisions of the Constitutional Court and SEB 4 of the Minister for the Acceleration of the Implementation of PBG Retributions deserves to be questioned. This is because the Instructions of the Minister to Follow Up on the Decisions of the Constitutional Court which should contain orders/directions regarding the implementation of policies of a statutory regulation, but instead clearly labels it as "Following Up on the Decisions of the Constitutional Court" which clearly does not constitute the implementation of policies of a statutory regulation. invitation.

Not only that, SEB 4 of the Minister for the Acceleration of the Implementation of PBG Levies which should contain "notices, explanations and/or instructions on how to carry out certain things that are considered important and urgent," but in fact contains new norms that are not in line with the contents of the PP Building. This is because in SEB 4 the Minister for the Acceleration of the Implementation of PBG Levies actually provides relaxation for Regional Governments in providing PBG in the form of Regional Regulations until 2024, while in the PP Building clearly requires the Regional Government to provide PBG within a period of only (six) months ( until August 2, 2022). This shows that SEB 4 of the Minister for the Acceleration of the Implementation of PBG Retribution is contrary to the PP on Buildings because it determines the time period that is different from the statutory regulations.



#### **D. Conclusion**

The implementation of PP Building in the region is currently a problem, especially for some regional governments that have not yet formed a regional regulation on PBG levies after the Constitutional Court Decision Number 91/PUU-XVIII/2020. This is due to the Constitutional Court's Decision No. 91/PUU-XVIII/2020 which does not justify forming implementing regulations of the Job Creation Law so that it has an impact on understanding that it is not allowed to form Regional Regulations that run PP Building. This problem raises the question whether the Constitutional Court can prohibit the formation of legislation implementing a law, which in principle is the authority of the government? Based on this question, it is concluded that the Constitutional Court as a judicial institution only has the authority to decide when the law contradicts the 1945 Constitution.

The Minister of Home Affairs took a number of steps to formulate policy regulations in the context of following up on the Job Creation Law and the Constitutional Court Decision Number 91/PUU-XVIII/2020, including the SE Minister for the Acceleration of Regulation Drafting which emphasized that Regional Governments are required to implement the period of formation of the Regional Regulation on PBG Retribution within a short period of time. a period of 6 (six) months; then formed a Ministerial Instruction to Follow Up on the Decision of the Constitutional Court which strengthened the Regional Government to continue the formation of the Regional Regulation on PBG Retribution. However, not long ago, together with 3 other Ministers, the Minister of Home Affairs issued SEB 4 of the Minister for the Acceleration of the Implementation of PBG Levies which is not in line with the PP on Buildings because it gives the Regional Government time to form a Regional Regulation on PBG Levies until January 5, 2024.

Based on the statutory analysis of the three Policy Regulations, there are two notes, first, SEB 4 of the Minister for the Acceleration of the Implementation of PBG Retribution is not in line with the provisions of the PP on Buildings which stipulates that the Regional Government provides PBG within a period of 6 (six) months. Even though the provisions of the PP on Buildings are still in effect, even though the Constitutional Court has given its decision on the Job Creation Law. In addition, the Minister's Instruction should not be an option to follow up on the Constitutional Court's Decision. Second, the presence of SEB 4 by the Minister for the Acceleration of the Implementation of PBG Charges and the Instructions of the Minister for Follow Up on the Constitutional Court's Decisions are not in line with the definitions of the two Policy Regulations.

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