

Overlapping Authority on the Cancellation of Local Regulation (An Erroneous Logic of Local Autonomy)

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ABSTRACT

This research is based on the phenomenon of weak supervision on local law products. As a result, the province of Central Java became the region with the largest cancellation of local regulation in Indonesia, which is as many 90-local regulations cancelled. The cancellation of local regulation implicates the obstacles in the implementation of development and district and municipal programs in Central Java-Indonesia. The purpose of this research was to analyze the authority of the region in order to avoid overlapping authority on the cancellation of local regulation by the Governor as the representative of the Central Government. The method of writing uses a normative approach with qualitative analysis to detect the level of synchronization and harmonization of the application of local regulations. The results indicate that the cancellation of local regulation by the Governor as the representative of the central government shows an erroneous logic of the implementation of local autonomy. Ideally, the cancellation of local regulation is performed "one gate", i.e by the Supreme Court (judicial institution only) through the authority of judicial review.

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1. Introduction

Local regulation is one of legal products in the region. Local regulation is a regulatory instrument that must be integrated with the national legal system. This is a consequence of the local autonomy system itself characterized by self-reliance which implies that the region has the right to regulate and manage its own household affairs. Its own government is defined as part of a unitary state, and the local government is not a State which has its own sovereignty as in the federal state system.¹

Practically, the implementation of local autonomy, especially in forming regional legal products, there is a need for supervision and it is expected to be a means to create

¹ Nurcholis, H. (2007). *Teori dan Praktik Pemerintahan dan Otonomi Daerah*. Jakarta: PT. Grasindo, p. 314.

checks and balances system of governance to the lowest level.² Therefore the existence of local regulations holds a strategic role for legal certainty, which is a necessary to create a conducive business climate and stability of the country.³

The phenomenon of local regulation cancellation in 2016 is almost reaches 40 thousand local regulations.⁴ The province of Central Java, Indonesia, contributed to the cancellation of local regulations that divided into 3 (three) regions namely Region I: 28 local regulation, Region II: 29 local regulation and Region III: 33 local regulation. Total local regulation canceled by the Governor of Central Java reached 90 local regulations. This became our concern. Why the local regulation canceled? and is there an erroneous logic of local autonomy?

The cancellation of local regulations by the Governor shall not occur if the facilitation is performed as the provisions of article 1 No. 24 of the Regulation of Domestic Affairs Minister No. 80 of 2015 on the Formation of Regional Legal Products, in which facilitation as a form of guidance in the form of guidance and technical guidance, direction, supervision, assistance and cooperation and monitoring and evaluation conducted by the Minister of Domestic Affairs to the province as well as the Minister of Domestic Affairs and/or governor to the district/municipality on the content of the draft of regional legal product in the form of a regulation before it is established. If there are 90 local regulations in the province of Central Java in 2016 is absolutely canceled by the Governor, then the facilitation function is questionable?

The absolute cancellation is the comprehensive cancellation of the material of local regulation. The public service especially for licensing will be greatly disturbed by the absolute cancellation of the local regulation in the absence of a new local regulation immediately. Whereas, the new local regulation requires a relatively long time in its creation.

2. Method of the Research

This research uses qualitative and quantitative data. Empirical data is collected from several regions that have been canceled of local regulation, such as: the local regulation of Tegal, Purbalingga, Banjarnegara and Banyumas. Strategies used in collecting data from several sources and then documenting data in archives and some study cases. For example, data generated through interviews has been analyzed and reflected in each in-depth interview, in each question is divided in various sessions. Thus, the selection of relevant materials and integrated interpretation during an interview with stakeholders is tailored on the theme.

3. Overlapping Authority and Implication of Local Regulation Cancellation

The cancellation of local regulations will bring implication is not only concerning the individual but also the institution, *the first*; the credibility of institution decreases, disadvantages from financial aspect, the time and energy by the local government and

² Butt, S. & Parsons, N. (2014). "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?" *Indonesia* 97(1): 55-85. Cornell University Press. Retrieved August 19, 2017, from Project MUSE database.

³ Sutrisno, B. (2016). "Constitutionality Degree of Indonesia Local Regulation in Political Law Perspective," *Rechtsidee*, 3(1), 41-52. doi: <http://dx.doi.org/10.21070/jjhr.v3i1.131>

⁴ Source: Data Bureau of Legal in Secretary of Region, the Central Java Province 2016.

the local representatives House. Consider the cancellation of local regulation of district/municipal both absolutely or relatively, the mechanisms is similar to the propose of new local regulation, *the second*; sociological consequences of local regulations cancellation for the community will be many local government programs that are hampered so that it further from the realization of community welfare and service to the community can be disrupted.

This section will discuss the identification of examples of local regulations cancelled by the Governor in region III of Central Java Province.

Table 1. The Cancellation of Local regulation by Governor’s Decree

| Local Regulation | Deviations | Governor’s Decree |
|--|---|--|
| Local Regulation No. 11 of 2010 on Mineral Mining in Banjarnegara Regency | Local Regulation of Banjarnegara No. 11 of 2010 is contrary to the attachment of Roman I letter C figure 2 of Act No. 23 of 2014 on the local government Jo Act No.9 of 2015 on the second amendment Act No. 23 of 2014 on local government which states that local regulations do not have the authority and management of minerals. | No. 180/88 of 2016 on the cancellation of Local Regulation of Banjarnegara Regency |
| Local regulation of Purbalingga district No. 18 of 2012 on Management and Licensing of Mineral Mining, and Replacement Retribution of Print Cost of Mining Information Map | Local Regulation of Purbalingga No. 18 of 2012 is contrary to the appendix Roman I letter CC No. 2 Act No. 23 of 2014 on local government with its amendment state that the local government does not have the authority for mineral mining management. | No. 180/89 of 2016 on the cancellation of Local Regulation of Purbalingga Regency |
| Local Regulation of Tegal Regency | Chapter XXVI Article 104 of Local Regulation is contrary to Chapter I letter C of Appendix II of Act No. 12 of 2011 on the Establishment of Laws and Regulations. | No. 180/84 of 2016 on the cancellation of Local Regulation of Tegal Regency |
| Local Regulation of Banyumas Regency No. 6 of 2011 on Replacement Retribution of Printing Cost of Identity Card and Civil Registration Certificate | Local Regulation of Banyumas No. 6 of 2011 is contrary to Article 79A of Act Number 24 of 2013 on the amendment of Act No. 23 of 3006 on population administration stating that the process and issuance of the Population Document is free of charge. | No. 180/90 of 2016 on the cancellation of Local Regulation of Banyumas Regency |

Source: Processed from Central Java Governor’s Decree, 2016

As Table 1 above, the cancellation of local regulations by the Governor as the representative of the central government in the region. According to Thomas Merrill,⁵ is considered as a doctrine of *separation of power* that separating the independence judicial power of. Also, in Indonesia embraces the separation of powers between the *Executive*,

⁵ Manning, J.F. (2011). “Separation of Power as Ordinary Interpretation,” *Harvard Law Review*, 124: 1939-1946.

Legislative and Judiciary, then the position of government is executive that have a function to implementing the government.⁶ In the table, the analogy of the writer, the Governor is not only the implementer of the government but also in the domain of judicial (judicial function). Ideally, local regulations that contradict either the higher regulations or its material are contrary to the public interest, may be filed through the judiciary by appealing to the Supreme Court to petition judicial reviews as the agency authorized to assess and review it, not through the Governor.

The cancellation of local regulations by the Governor indicates ineffective government facilitation function before the local regulation is established. If the cancellation of local regulations is not accompanied by new regulations, the writers argue that public services will also be hampered if the regional regulations are canceled concerning public interest or public services.

The mechanism of supervisory on district/municipal legal products prior to 2016 shall be guided by the Regulation of Domestic Affairs Minister No. 1 of 2014 on the Establishment of Legal Products in the form of clarification that is the assessment and evaluation of the Local Regulation and Local Parliament to know whether it contrary to the public interest, morality and/or higher legislation. Clarification on region legal products in practice does not work effectively. It is proved by the number of local regulations in Central Java Province which was canceled by the governor as the representative of the Central Government in the region through the Governor's Decree of Central Java.

Limitations of evaluation mechanisms that can only be implemented on certain types of regional legal products only and limited to certain regional regulations alone, make the Minister of Domestic Affairs establish the Regulation of Domestic Affairs Minister No. 80 of 2015 on the Establishment of Regional Legal Products, in accordance with the provisions of Article 88 that gives other preventive measures that can be pursued through region legal product development in the form of facilitation.

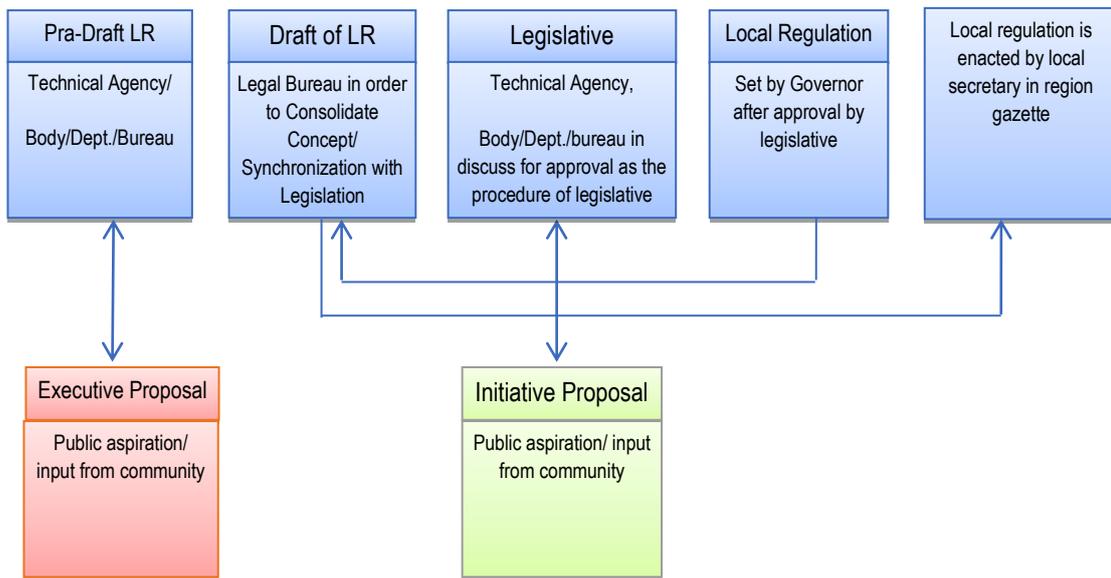
In Article 1 figure 24 of the Regulation of Domestic Affairs Minister No. 80 of 2015 on the Establishment of Regional Legal Products, that facilitation is a form of guidance, technical guidance, direction, supervision, assistance and cooperation, monitoring and evaluation that performed by the Ministry of Domestic Affairs to provincial and also Ministry of Domestic Affairs and/or governor to district/municipal on the content of draft laws on regional laws in the form of regulations before established.

The cancellation of local regulation absolutely (almost up 50%) the content of material is cancelled, may disrupt service to the public. Public service is an activity or series of activities in order to fulfill the needs of services in accordance with legislation for every citizen and citizen of goods, services, and/or administrative services provided by public service providers (Article 1 paragraph 1 of Act No. 25 of 2009). Public services are required by applying the principle of *equal treatment*, meaning that all citizens have the right to obtain equal services according to standards set by the government/local government and fair and non-discriminatory. This is in line as Barzelay puts it in "*Breaking through Bureaucracy*" that the people are bored and fed up with the greedy and slow working bureaucracy.

⁶ Agussalim, A.G. (2007). *Pemerintahan Daerah Kajian Politik dan Hukum*. Bogor: Ghalia Indonesia, p. 261

According to Reismans,⁷ law is a decision process derived from an authoritative institution, therefore the law in this case as local regulations must adapt to the expectations demanded and can be enjoyed by the community. The main function of the law is to determine the sources of ways the making of law, both materially and symbolically, means that the law can be applied to society as well as to determine procedures for law-making.⁸ Justice and happiness in the making of local regulations is difficult to measure because it is relative but at least in the context of legal formation in order to avoid overlapping authority.⁹

Chart 1. Ideal mechanism of local regulations drafting



As chart above, pre-draft of local regulations are prepared by the relevant technical agencies, for example the Local Tax is prepared by the Regional Revenue Service, while the Local Retribution is prepared, among others by the Education Service, the Health and Social Welfare Service, etc. After that, the drafting of local regulation is coordinated by the Bureau or the Legal Department with the relevant agencies, among others: technical agencies preparing pre-local regulation drafting, Bureau of Finance, Revenue Service and bureau of Government. In this synchronization, it is demanded for harmonization and facilitation. Then, the drafting of local regulation is considered to covering the material as regulated is submitted by the executive for approval by local representative.

The Local Representatives discusses the proposed draft of the local regulation from the executive through the stages referring to the procedure of local representative respectively through the Plenary Session I: Introduce of the Governor; Plenary Session II: General Scenery of Faction and Governors' Opinion; Plenary Session III: Governor's

⁷ Reismans, M. (2009). "Jurisprudence of Suspicion," *The Yale Journal of International Law*, 34: 505-506.

⁸ *Ibid.*

⁹ Sukmariningsih, R.M. (2014). "Penataan Lembaga Negara Mandiri dalam Struktur Ketatanegaraan Indonesia," *Jurnal Mimbar Hukum*, 26(2): 181-353.

Response to the General Scenery of Faction; Discussion: through Special Committee; and finally, Plenary Session IV: Final Opinion of Faction, in order for approval by local representative for signature and then legally enacted.

The applicable law (as a result of legislation) is not always a reflection of the society concerned. Local regulations in the area were impressed into law to be “forced” because it does not conform to the spirit and characteristics of the society.¹⁰ The problematic of local regulation formation is indicated by the fact that the authorized institution to arrange the local regulation is still not sufficient to produce products of high quality local laws. Legisprudence theory may open new perspectives on the validity of norm or legitimacy of norm and by course using this approach the quality of local regulations will be more qualified.

Referring to the process of making the local regulation, if implemented comprehensively, fulfilling formal and material aspects of the making of local regulations, the phenomenon of local regulation cancellation can be avoided absolutely. Hence, in the end, the local government is also disadvantaged.

4. Conclusion

Ideally, the cancellation of local regulations is done by the judiciary, the Supreme Court through by judicial review or the ability of the Court to declare a Legislative or Executive act in violation of the Constitution. Each trial process of Supreme Court has the authority to assess and decide whether the local regulation is contradictory or there are deviations. The writers argue that in the process of forming the local regulation already there are stages of facilitation that is part of supervision system in the implementation of local government before it established, so that ideally there will be no cancellation of local regulation by the Governor absolutely. Therefore, the cancellation of local regulation in absolute, the mechanism is similar to the submission of new local regulations. It is expected that with the judicial review, the community will get the legal certainty in the licensing service, cost charging to the community. There was an overlapping authority to the governor as a representative of the central government and erroneous logic in meaning the local autonomy.

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¹⁰ Arie, M. (2016). “An Approach of Legisprudence Theory to Assess the Quality of Local Regulation,” *Hasanuddin Law Review*, 2(3), 371-384. doi: <http://dx.doi.org/10.20956/halrev.v2i3.699>

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