

Factors Inhibiting the Local Regulation-Revoking System in Indonesia

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ABSTRACT

This research was very important to find out the factors inhibiting the Local Regulation revoking system existing in Indonesia. This study was a juridical sociological research, describing the fact existing in the field to be connected later to the existing rule. Data source employed consisted of primary data obtained by method of collecting data closely related to primary and secondary law materials. The author also used statute approach. This study would provide accurate information related to Local Regulation Trial ending up with revocation or whether or not a Local Regulation trialed through Supreme Court (Judicial Reviewer) is valid, because there is a sufficiently complex problem. Previously, many Local Regulations have been revoked by Republic of Indonesia's Ministry of Interior (Executive Reviewer); this number was even more than that revoked by Supreme Court. It became a new problem to the trialing system existing in Supreme Court because the trialing system existing still has weaknesses, particularly in trialing Local Regulation today, recalling the issuance of Constitution Court's decree No. 56/PTU/MK about the authority of revoking Local Regulation in Indonesia reverting to Supreme Court. Thus, the constraint arising included the legislation existing in Indonesia that should be improved in relation to Local Regulation trialing system either formally or materially and the problem of Local Development, Investment, and Local Regulation Supervision in regions.

Keywords: *Local Regulation in Indonesia, Judicial Review*

1. INTRODUCTION

During the enactment of Local Government Regulation in 1999, Region has a large authority of planning, formulating, implementing, and evaluating the policy corresponding to community's need and demand. Since then, in addition to serving as regulation maker, Region (Regional Government) serves also as the executor of regulation in the development at regional level [1]. The principle of local autonomy organization is to give the region the discretion to determine its own life way, to govern, and to deal with the community's interest corresponding to legislation [2]. One of Local Government's instruments of implementing its own household to make its autonomy actually real and accountable is Local Regulation. It is accommodated in Law Number 23 of 2014 about Local Government, particularly Article 136 Clause (2) stating that Local Regulation is developed in the attempt of organizing provincial and regency/municipal local autonomy, and assistance task. Furthermore, clause three (3) states that Local Regulation is a further elaboration of higher legislation, by taking the individual Regions' typical characteristic into account.

Therefore, the region due to the spirit of local autonomy increases the development of Provincial and Regency/Municipal Local Regulation. However, those Regional Legal Products are putatively problematic. There were at least 3,143 Local Regulations revoked and revised by Ministry of Interior in 2016. Before the presence of Constitution Court's Verdict Number 56/PTU/MK in 2017, the supervision of Local Regulation can be conducted by two institutions with two winning models: the supervision by Supreme Court or called Judicial Review and the one by Government, in this case Department of Interior (Executive Reviewer). It is this Government's supervision that ends up with the revocation or the suspension of each local regulation that has been enacted officially (Promulgasika), Repressive supervision [3].

However, on april 5, 2017, Constitution Court's Verdict Number 56/PTU/MK was issued, stating that the trial of Provincial and Regency/Municipal Local Regulations is returned to Supreme Court, while nearly thousand local regulation were revoked in 2016, with an excuse that they inhibit investment due to some articles in contradiction with the higher law. Article 251 clauses 7 and 5 of Law Number 23 of 2014 about Local Government related to the

revocation conducted by Ministry of Interior was revoked for it is unconstitutional or is in contradiction with UUD 1945 (1945 Constitution). This trial in Supreme Court is called Judicial Review.

The implication of Constitution Court's Verdict is that Supreme Court becomes the only place to trial Local Regulation and whether or not it is ready to accommodate thousands Local Regulation that later will apply for judicial review. In Indonesia, Judicial Review itself is designated by Indonesia's State Constitution, the third Amendment to the 1945 Constitution, exactly in Article 24A, stating that Supreme Court is authorized to trial legislation against the law, and has other authorities given by the Law and in Article 24 C, stating that Constitution Court is authorized to trial the law against the 1945 Constitution.

Some studies on Judicial Review can be explained, Judicial Review does not function to fail or to make the popular majorities legal. Otherwise, it is a practice changing the equality of power between many political movements fighting for the pluralistic democratic power [4]. Judicial Review is the regulation process investigated from institutional choice perspective, pertaining to the allocation of optimal function institution within society [5]. Some scholars argue that evidence-based judicial review of legislation can have two versions or two different meanings, particularly in their approach to how the court should be satisfied with the development of constitution based on empirical foundation rather than on speculation [6].

For that reason, considering the background above, the author tries to explore the factors inhibiting the Local Regulation trialing system, recalling that judicial review plays an important role in the quality of local legal product and impacts on the region.

This study was a juridical sociological research, addressing the reality or the data existing in practical field to be connected later to the enacted legal provision [7]. Data source employed consisted of primary data obtained by method of collecting data closely related to primary (e.g. books on Local Regulation trialing system) and secondary law materials constituting the binding law material consisting of 1945 Constitution, Legislation related to Local Regulation, and Supreme Court's Regulation about the Right to Judicial Review.

Technique of collecting data used in this study was field work, in which the data was obtained by means of observing directly the location and conducting interview with those related in Republic Indonesia's Ministry of Interior and Supreme Court, and Head of Regency's Legal Product Supervision Sub Division of Central Java.

Data analysis was conducted using descriptive qualitative method for the data obtained through either library research or field work, by describing the results obtained just the way they are. Furthermore, the data is arranged neatly, thereby producing output as expected and corresponding to the objective of research to draw a conclusion later.

2. RESULTS AND DISCUSSION

2.1 Factors Inhibiting Local Regulation Revoking System in Indonesia

2.1.1 Hierarchy of Legislations in Indonesia

The existence of Local Regulation, as a type of *reggeling* product prevailing in Indonesia, has gotten strong legality position as the reflection of the provision of Article 7 of Law No.12 of 2011 about the Development of Legislation at lower position [8]. This hierarchy is called "*stufenbaut des recht*" taught by Hans Kelsen, in which positive law or legislation is constructed in multiple levels and layers. The lower regulation should derive from and should not be counterproductive to the higher regulation, called "*lex superior derogat legi inferiori*" in legal science [8].

Considering the *stufentheory* system adhered to by Indonesia, the local government's authority related to local autonomy, the authority becoming either obligatory or optional affair of provincial and regency/municipal local government, can be the material contained in local regulation as long as not in contradiction with higher legislation and public interest [9].

Local Regulation may not be in contradiction with public interest, other regulations, and other legislations. This stipulation can be considered as the bordering frame or corridor in developing Local Regulation. This bordering frame is important to show that although the region has the right or the authority of governing its own domestic affair, as included into legal decision in the form of Local Regulation. However, such the authority is not in the sense of an independent and sovereign governmental unit, but remains to be in the frame of unitary state and legislation system nationally [10].

Local Regulation is a form of decision made by the authorized regional ruler that is written in the form of regulation. So, Local Regulation is a law that should contain content material in the attempt of organizing local autonomy and assistance task, and accommodate region-specific condition and/or further elaboration. Higher legislation, according to Soehino, is the material that can be contained or governed in local regulation, i.e. materials or matters burdening the people, for example, tax and local retribution, materials or matters reducing the freedom of population, such as "establishing prohibitions and obligations usually followed with threat or criminal sanction and materials or matters limiting the rights of people (population), for example "concerning the control of equivalent line during parking, and other materials and matters specified in equivalent and higher legislations, should be governed in Local Regulation [11].

Therefore, according to Yance Arizona, this existence of Local Regulation is on the lowest level, so that its content material should see the rules above and theoretically having narrow flexibility level

because it may not deviate from the uncountable borders of national regulation [12].

2.2 The Revocation of Local Regulation in Indonesia

Interview with the Head of Local Regulation Product division of Central Java Province shows that there were thousands Local Regulations revoked in 2015 and 2016 nationally in Indonesia, and it attracts Central Java Province's attention, because the President of Republic of Indonesia deregulated non-pro-investment rules and rules inconsistent with higher regulation, and cut long bureaucracy in 2015, and then Ministry of Interior revoked at least 3 Local Regulations of Central Java Province [13]. Basically, local autonomy gives the community development a big opportunity at local level, distributes development evenly between areas, and opens a new niche to the improvement of economic activity. Thus, anything the local government makes can be assessed easily by the community. It is this objective condition that encourages the Ministry of Interior to revoke 2,246 and 1,501 Local Regulations during 2002-2009 and 2010-2014, respectively, and 139 Local Regulations during November-May 2015. A total of 7,029 Local Regulations have been revoked up to May 2015 [14].

Considering the revocation of thousands local regulation, the trialing system in Supreme Court is very different from that in Constitution Court. Meanwhile, considering the Principle of Basic Justice Law, the trial is opened, transparent, and accountable in nature, but the trial in Supreme Court is far from it; that is why one party applying for judicial review to Supreme Court gets only a decision stating whether or not the Local Regulation is Revoked.

The author also conducted an interview with a staff in Local Regulation product supervision and evaluation division in Ministry of Interior. The result of interview showed that the staff justified the revocation of thousands local regulations, but it was done actually against the rules in contradiction with the higher rule, for example, the investment-related Local Regulation.

2.3 The Local Regulation Trialing System in Indonesia

"Judicial review" is defined as the application for trialing Local Regulation filed to Supreme Court at norm trial level, and formally it is in the form of application only. There are three trials of legal norm: trial conducted by justice institution (judicial review), trial that is conducted by political institution (political review) and trial conducted by state officials or state administrative institution (administrative review) [16]. In Indonesia, regulation concerning judicial review is governed further in Supreme Court's Regulation (Perma) Number 1 of 2011 about the Right to Judicial Review [17].

The application for objection is filed to District Court, the process of which is not different; the difference lies on where the application is filed. When the lawsuit is filed to the local District Court, when the document has been

completed, in the following day after the registration is filed to the Registrar of District Court it will be submitted to the Registrar of Supreme Court to be forwarded to the Chairperson of Supreme Court in order to assign the Chamber of Supreme Judges after the document of application has been completed.

The assignment of Chamber is conducted by the Deputy of Head of State Administration Division on behalf of the Chairperson of Supreme Court. Then, it is also explained that the application for judicial review to Supreme Court can be divided into several sections: if Supreme Court argues that the application for objection is reasonable because the legislation is contradictory, Supreme Court in its verdict states that if the legislation applied for objection is not legitimate and is void generally, and instructs the corresponding institution to revoke it and argues that the application for objection is not reasonable, Supreme Court will decline the application for objection [17]. The verdict will be effective 90 (ninety days) after the Supreme Court's verdict has been sent to State Administrative Institution or Official issuing the Legislation; if in fact the corresponding official does not implement its obligation, for the sake of law, the legislation has no legal power.

Judicial Review, according to Von Staden and Andreas, should be guided using normative subsidy principle in which ideally the government is the heart of democracy" [18]. A right democracy, according to Lever related to Annabelle judicial review does not require the judge to protect the legislators' rights, despite democratic government and controversial and speculative virtuosity. Therefore, democratic justification for judicial review is not dependent on complex and surely on controversial justice interpretation and evaluation in contradiction with legislative assessment (evaluation) [19].

The result of interview with Assistant of State Administrative Chamber, Dr. Mahfhu Efendi in Republic of Indonesia's Supreme Court, shows that judicial review still has many weaknesses recalling the evolution of trialing system existing in Constitution Court and good principles in legislating [20].

3. CONCLUSION

Factors inhibiting the Local Regulation trialing system are inseparable from the hierarchy of legislation, recalling that Local Regulation is on the lowest level and thereby its content material may not be contradictory with the rule above (higher rule). In addition, there is a supervision ending up with the revocation of Local Regulation constituting the government's attempt of harmonizing the higher rules, particularly concerning the investment problem for the sake of regional development. In relation to the trialing system due to the revocation of Local Regulation, Supreme Court is the only place for trialing Local Regulation, the outcome of which can be the revocation or the enactment of such local product.

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