

DILEMMA EXECUTIVE CONTROL: DEVELOPMENT OF REGIONAL REGULATORY CANCELING MODELS

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Abstract: The Law Number 23 of 2014 concerning Regional Government clearly states that the Minister of Home Affairs with instruments in the form of a Ministerial decree bears the authority to annul regional regulations which deemed contrary to the provisions of the higher laws, public interests and/or decency. However, the Constitutional Court (MK) through Decision No. 137/PUU-XIII/2015 and MK's Decision No. 56/PUU-XIII/2016 has restrained the authority of the Minister of Home Affairs to annul the Regional Regulation (perda). This is an interesting discussion, some consider that it actually weakens the role of the central government to control local governments, on the other hand, justifying that authority belongs to the Supreme Court. Interesting problems of this research is what is the actual relations of authority between local and central government? Then what is the ideal model for the annulment of regional regulations so that the central government has a role in exercising control (executive control) of regional regulations before and after regional regulations come to be applied? This research was conducted using a normative juridical method, namely a research method that refers to the norms of legal norms contained in statutory regulations. This research resulted that there is a decentralization and decencentration relationship between the central and local governments. In order to anticipate these problems, the ideal model for cancellation of regional regulations to accommodate the authority of the central government is to separate regional regulation according to the content or material.

Keywords: Central Government; Regional Government; annulment of Local Regulations

Abstrak: Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah menyebutkan bahwa Menteri Dalam Negeri dengan instrumen berupa Keputusan Menteri, diberikan kewenangan untuk membatalkan Peraturan Daerah yang dianggap bertentangan dengan ketentuan peraturan perundang-undangan yang lebih tinggi, kepentingan umum dan atau kesusilaan. Faktanya kemudian, Mahkamah Konstitusi (MK) melalui Putusan No. 137/PUU-XIII/2015 dan Putusan MK No. 56/PUU-XIII/2016 telah mengampulasi kewenangan Menteri Dalam Negeri untuk membatalkan Peraturan Daerah. Ini merupakan diskusi yang menarik, sebagian menganggap bahwa ini malah justru melemahkan peran pemerintah pusat untuk mengontrol pemerintah daerah, di sisi lain malah mengamini bahwa kewenangan demikian adalah milik Mahkamah Agung. Adapun permasalahan yang mendasari penelitian ini adalah bagaimana sebenarnya hubungan kewenangan antara pemerintah daerah dengan pemerintah Pusat? Kemudian bagaimana model ideal pembatalan peraturan daerah agar pemerintah pusat tetap punya peran dalam melakukan kontrol (*executive control*) terhadap peraturan daerah, sebelum maupun setelah peraturan daerah berlaku? Penelitian ini dilakukan dengan metode yuridis normatif yakni metode penelitian yang mengacu pada norma-norma hukum yang terdapat dalam peraturan perundang-undangan. Penelitian ini mendapati bahwa adanya hubungan desentralisasi dan dekonsentrasi antara pemerintah pusat dan pemerintah daerah. Untuk mensiasati kedua bentuk hubungan tersebut, model pembatalan peraturan daerah yang ideal untuk mengakomodir kewenangan pemerintah pusat adalah dengan pemisahan perda sesuai dengan konten atau materinya.

Kata kunci: Pemerintah Pusat, Pemerintah Daerah, Pembatalan Perda

Introduction

The Constitutional Court within its verdict Number 137/PUU-XXI/2015 and No.56/PUU-XIII/2016 has been revoked the authority of central government for annulling Regional regulation which is considered contradict legislation. This topic becomes viral when the President of Republic of Indonesia ordered Minister of Home Affairs to annul around three thousands (3000) Regional regulations which are considered contradict higher regulations. It means annulling Regional regulation must go through a judicial review to the Supreme Court. For instance, the Regional Regulation of Aceh Province No. 11/2013 about State Property, Regional Regulation of Asahan Regency No.11/2011 about Regional Tax, Regional Regulation of Banjarmasin City No.4/2013 about Donation from Third Party, and many more.

Regional regulations essentially could be the complements from distribution of executive power. It means, the objective of regional regulations is the embodiment of autonomy region for creating the balance of power in its enforcement. The basic assumption of regional government in their regulations does not have the sovereignty. Which is different from the federals, the states in federal country have their sovereignty.¹

The logic conclusion from the exposure above is that the regional regulations which are the form of the regional autonomy that both of them cannot be separated from the concept of unitary and law state embraced by the Republic of Indonesia. Besides creation of

the materials inside the regional regulations, another important issue is how to annul them.

Contention arose when Law No. 23 of 2014 about Regional government state that Minister of Home Affairs with Ministerial Regulation, have authority for annulling Regional regulation which contradicts higher rule of law provisions, public interest and/or decency. Act 9 (2) Law No. 12 of 2011 about Establishment of Legislation stated that if there is the law under law considered contradicting the legislation, the review must be taken by Supreme Court. The interpretation in that act emphasizes act 24A in 1945 Constitution stating the Supreme Court has authority to review a regulation under the law. However, Law No. 23 of 2014 allowed the annulment of Regional regulation which contradicts higher regulation can be done by Minister of Home Affairs or the Governor. At this rate the Supreme Court is the judicial power which is the supervision of legal norms under the law to the law including Regional regulation and Regulation of Regional Head as the law of that region.² The problem becomes more complicated when the annulment of Regional regulation inside Law No. 23 of 2014 is only used Ministerial regulation.

Inside the Law No. 12 of 2011, it is clear that Ministerial Regulation is not included in the hierarchy of legislation, so it is not sure where is the position of Ministerial Regulation, it can be higher or lower than Regional regulation, even in province, the regency or the city, however the hierarchy between the regional regulations of province and the regency or the city are clear enough. This hierarchy

¹ Eko Prasjo, Irfan Ridwan Maksum dan Teguh Kurniawan, *Desentralisasi dan Pemerintahan Daerah: Antara Model Demokrasi dan Efisiensi Struktural*, (Jakarta: DIA FISIP UI, 2016), h. 3.

² Sri Soemantri, *Hukum Tata Negara Indonesia (Pemikiran dan Pandangan)*, (Bandung: Remaja Rosdakarya, 2014), h. 253.

means every kind of legislation is based on the principle that lower legislation is not allowed to contradict the higher legislation.

Another contention possibly arose if we look at Law No.12 of 2011 act 8. It is explained that Ministerial Regulation recognized its existence and has the power of law as long as related to higher legislation or formed by authority. Based on that statement Ministerial Regulation may be higher than Regional regulation as long as that Ministerial Regulation regulated by Legislation. Based on that statement Ministerial Regulation may be higher than Regional regulation as long as that Ministerial Regulation regulated by Legislation.

After a long time, Constitutional Court finally revoked the authority of Minister of Home Affairs and Governor for annulling municipal regulation by its verdict No. 137/PUU-XIII/2015 dan No. 56/PUU-XIV/2016. One of the reasons of this petition is there are some parties that questioning if Minister of Affairs has authority for annulling Regional regulation.

This verdict revoked the authority of Minister of Home Affairs to annul Regional regulation in province or municipality. Meanwhile, the annulment of Regional regulation by the minister of home affairs according to Law No. 23 of 2014 and Law No. 32 of 2004 described as central government control to the region even the region have an autonomous right. It can be explained further according to the explanation of Law No. 23 of 2014:³

“Granting an autonomy to the region is based on principal of unitary state. In the

unitary statesovereignty is only exist at the central government. Because of that the implementation of regional government will remain in the hands of the national government. The regional government in unitary state is an unity with the national government. Along with it, the regional policies are integrated with the national policy. The differences are how the region can utilize the potentation, innovation, competitiveness, and creativity for national goals at regional stage”

In the verdict, Justices of Constitution Court had different point of view. Four of them which were Arif Hidayat, I Dewa Gede Palguna, Maria Farida Indarti and Manahan MP Sitompul had dissenting opinion in viewing the authority of Minister of Home Affairs for annulling Regional regulation. It shows that the regulations itself still being controversy.

It is important for us to reconstruct the relationship between the central government and regional government. Including between the province and the regency or the city.

Research Method

In order to answer the research questions that have been described above, The author used qualitative methods which is library research discussing the Phenomenon of Executive Control: Development of Regional Regulatory Canceling Models as a study.⁴ Considering that the research is purely literary in nature, the data in this research is obtained by conducting a study of various literatures consisting of books, journals, laws, and regulations, or the results of previous research that have a bearing on the object of

³ Undang-Undang No. 23 Tahun 2014. Undang-Undang Pemerintahan Daerah, LN No. 244 Tahun 2014, TLN No. 5587, Umum.

⁴ Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek*, (Jakarta: Rineka Cipta, 2005), p. 10.

discussion.⁵ The data collection method was carried out by using content analysis on the The Law Number 23 of 2014 concerning Regional Government.

Relation Between Central Government And Regional Government

Indonesia is a republic unitary state.⁶ One of the consequences of the establishment of a country are the presence of government. Through paragraph 18 Constitution of The Republic of Indonesia 1945 Indonesia claim itself as unitary nation by Article No.18 of Republic of Indonesia Constitution 1945 which state The Republic of Indonesia diverted as provinces and the provinces diverted again as regencies and cities, then every regencies and cities have their own regional government.

Government etymologically can be interpreted as doing work to order, which means it has four elements, consisting of two parties, those who are governed and govern and the relationship between them.⁷ The definition of government can be defined as government in the legislative, executive and judicial fields. Meanwhile, the government is only represented by the executive sector as the organizer of the state administration. The government is the holder of office (official = *ambtsdrager*) government (to exercise the authority or power inherent in the environment of positions). According to Law No. 23/2014 about Regional Government, the Central Government is the President of the Republic of Indonesia who holds the power

of government of the Republic of Indonesia assisted by the Vice President and ministers as referred to in the 1945 Constitution of the Republic of Indonesia.

Different from our perspective about the central government, the definition about regional government in Republic of Indonesia are severally changed following the evolutions of the regulations. Within the Law No.22/1999 about Regional Government state the regional governments are the head of regional with the other autonomy devices as the regional executive. Then, the Law No.32/2004 state, the regional government are the governor, regent or mayor, and regional stakeholders as the administrator of regional government. However the Law No. 23/2014 as the latest regulation about Regional Government state the Regional Government is the Head of Regional as the administrator who lead the regional government business carry out the regional autonomy.

Explanation above bring us to the misinterpreted "regional autonomy" which need to correct. Indonesia is different from the federals which have countries inside the country. Because of that Indonesia government embrace the desentralisation system based on the autonomy.⁸ Regional Governments are not allowed to have sovereignty and separated with the state. The regional government position is within the hierarchy of the unitary state system. It means the regional governments are under the central government control. The existence of regional governments are only as sub division from the central government.⁹

⁵ Mestika Zed, *Metode Penelitian Kepustakaan*, (Jakarta: Yayasan Obor Indonesia, 2007), p. 3.

⁶ Undang-Undang Dasar Negara Republik Indonesia tahun 1995, Ps. 1.

⁷ Inu Kencana, *Ilmu Negara Kajian Ilmiah dan Keagamaan*. (Bandung: Pustaka Reka Cipta, 2013), h. 46.

⁸ M. Laica Marzuki, "Hakekat Desentralisasi dalam Sistem Ketatanegaraan Republik Indonesia, *Jurnal Konstitusi Majalah Konstitusi RI*, Vol. 4, No. 02, Maret 2017. h. 3.

⁹ Hanif Nurcholis, *Teori dan Praktik Pemerintahan*

The law 23/2014 defines an autonomous region as a legal community unit that has territorial boundaries that have the authority to regulate the Government and interests of the local community according to their own initiative based on the aspirations of the people in the system of the Unitary State of the Republic of Indonesia. The autonomous region itself is closely related to regional autonomy, where each autonomous region has the right, authority and obligation to manage government affairs by itself, this is what is called regional autonomy.

Epistemologically, the word autonomy is coming from “*auto*” and “*nomus*” which means “independent” and “law or rule”, those words are coming from Greek. In Dutch, autonomy called “*zelfregering*” which means Independent Government and Van Vollenhoven divide it to *zelfwetgeving*, *zelfuitvoering*, *zelfrechtspraak*, and *zelfpolitie*.¹⁰ Meanwhile, regional autonomy in Van Der Pot’s view is *eigenhuisholding* which can be interpreted as running and working on its own interests.¹¹

Soepomo stated that regional autonomy as a principle means respecting regional life according to history, customs and distinct characteristics in the level of a unitary state. Each region has a different history and special characteristics. Therefore, the government must keep all matters that intend to formalize all regions in one regulatory model.¹² The implementation of regional autonomy in Indonesia is carried out by

applying the principles of decentralization and deconcentration.

Indonesia’s decentralization reforms began in 1998 when the New Order regime collapsed and reformed. In 1999, Indonesia enacted Law no. 22/1999 concerning Regional Government. The existence of this law cannot be separated from the situation at that time where all parties had the right to reform all sectors of government. Article 4 Paragraph (1) Law no. 22/1999 states that in the context of implementing the principle of decentralization, provinces, regencies and municipalities, which have the authority to regulate and manage the interests of the local community on their own initiative according to community aspirations. Furthermore, Paragraph (2) states that the regions as mentioned in Paragraph (1) are each independent and do not have a hierarchical relationship with each other.¹³

This article describes the absence of a link among the central government and districts/cities and provinces and districts/cities. In other words, there is no relationship among the President, the Governor and the Regent/Mayor. The loss of the relationship as mentioned above, of course, creates confusion in the relationship between the Governor and the Regent/Mayor because the role of the Governor is only to coordinate and not be authorized to directly regulate and manage districts and or cities. In fact, coordination is an important thing in administrative law in exercising the authority to carry out functions jointly without gathering or pulling authority into one complete control. This chaotic relationship even seems to resemble the concept of federalism, let’s take the

dan *Otonomi Daerah*, (Jakarta: Gramedia Widiasarana Indonesia, 2005), h. 60.

¹⁰ S.H. Sarundajang, *Arus Balik Kekuasaan Pusat ke Daerah*, (Jakarta: Pustaka Sinar Harapan, 2000), h. 33.

¹¹ H.M. Laica Marzuki, *Berjalan-jalan di Rumah Hukum, Pikiran-pikiran Lepas*, (Jakarta: Kompas, 2005), h. 125.

¹² H. Rozali Abdullah, *Pelaksanaan Otonomi Luas dan Isu Federasi sebagai Suatu Alternatif*, (Jakarta: Raja Grafindo, 2010), h. 11.

¹³ Republik Indonesia, Undang-Undang No. 22 Tahun 1999 tentang Pemerintahan Daerah, Lembaran Negara Tahun 1999 Nomor 60.

example of the United States. Where the area is divided into small states which have their own existence even though in the end there is still subordination with the federal authority which they state in the supremacy clause.¹⁴

The relationship between the central government and regional governments in this Law is clearly contrary to the spirit of Article 18 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that the Unitary State of the Republic of Indonesia is divided into provinces and provincial areas are divided into districts and cities, each province, district and city has a regional government which is regulated by law. The word “shared” which is attached to the mention of Article 18 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia clearly shows the connectivity that should be established between the central and regional governments.

Slightly different from the previous law, Law no. 32/2004 concerning the Regional Government trying to connect the “disconnected” relationship. However, it seems that these efforts have not been followed by improvements in other sectors and have even created new problems. There are recorded as many as 22 strategic issues which become crucial discussions in this law.¹⁵

¹⁴ *Supremacy clause* is in Article VI part 2 of the United States Federal Constitution which states: *This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the Authority of United States.....*”

¹⁵ From the academic text of the Regional Government Law Bill prepared by the Ministry of Home Affairs in 2011, there are 22 important issues that become material for revisions to the issue of Law no. 32 of 2004 is the formation and arrangement of autonomous regions; Division of government affairs; Regions characterized by islands; Regional Head Election; The role of the governor as representative of the central government; Regional leadership meetings; Regional Apparatus; District problems; Regional apparatus problems; Regional regulation issues (perda); Regional development; Regional

Even though the government through this law has managed to slightly shift the broadest possible autonomy that was applicable in the previous law. Only then did Law no. 23/2014 concerning Regional Government comes to replace the previous law and is still in effect today. Law no. 23/ 2014 is trying to improve some of the black records of the previous law. Some problems have not yet been resolved, in fact, specifically regarding the relationship between the central and regional governments, this law is deemed no longer to reflect the widest possible autonomy. As mandated by Article 18 Paragraph (5) of the 1945 Constitution of the Republic of Indonesia, however, it seems centralistic.

A political scholar from The Australian University, J.A.C Mackie in 1980 tried to reconstruct the relationship between the central government and local governments in Indonesia using the approaches of centripetalism and centrifugalism.¹⁶ The purpose of this approach is that the relationship of authority between the central government and local governments can be described using the degree of indication where the position of a country is. A country is said to be carrying out centripetalism maneuvers, namely when the country increasingly leads to a centralistic character. Conversely, centrifugalism maneuver is when the state increasingly leads to the character of federalism which indicates the disintegration of the nation.

Finance; Public service; Society participation; Urban area problems; Special area problems; Cooperation between regions; Village problems; Guidance and supervision; Legal action against local government officials; Regional innovation problems; The problem of the regional autonomy consideration council.

¹⁶ Eko Parsojo, *Konstruksi Ulang Hubungan Pemerintah Pusat dan Pemerintah Daerah di Indonesia: Antara Sentripetalisme dan Sentrifugalisme*. Pidato Pengukuhan sebagai Guru Besar Tetap Depok FISIP UI, Depok, 2006. h. 4.

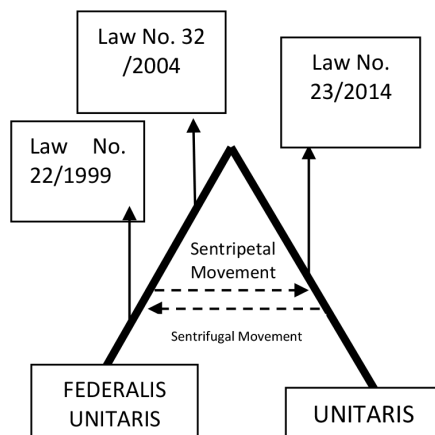


Diagram A.1 manuver of sentripetalisme and sentrifugalisme¹⁷

If reflected on the explanation of the relationship between the central government and local governments that have been explained previously, then the maneuvers that have been carried out by Indonesia since Law no. 22/1999, Law no. 32/2004 to Law no. 23/2014, can be illustrated by the movement diagram of the triangle pendulum below:

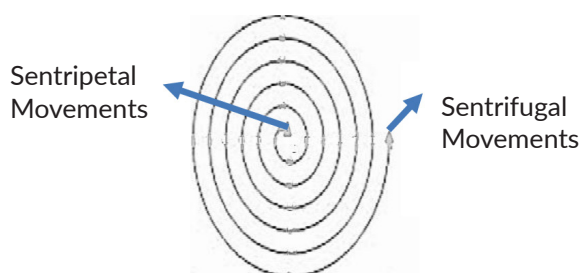


Diagram A.2 Manuver sentripetal dan sentrifugal UU No. 22 Tahun 1999 hingga UU No. 23 Tahun 2014.¹⁸

The next stage of this presentation is to discuss the relationship between the authorities owned by two of them. The authority possessed by regions in Indonesia cannot be separated

from the three principles of regional autonomy, namely the principles of deconcentration, decentralization and the task of assistance. However, the broadest possible autonomy is often only associated with the principle of decentralization.

Law No. 23/2014 concerning Regional Government states that decentralization is the transfer of central government affairs to autonomous regions based on the principle of autonomy.¹⁹ The government of any country, especially with a very large area, cannot determine its own policies. Even if this is possible, the policies taken will be less or even ineffective. This will have an impact on other government programs which will also be inefficient. This proves that the transfer of authority from the central government to the regions, both political and administrative in nature, is very necessary. This leads us to one form of power sharing, namely the distribution of authority carried out by the central government to regional governments.

In a unitary state system, the issue of decentralization is an interesting issue where there is an issue of centralization which often overshadows the unitary state. Theoretically, centralization is the opposite of decentralization. Although centralization and decentralization have opposite meanings, in practice in Indonesia, a strict separation of the two cannot be enforced. Both are likened to the two ends of a line. If expressed in a more concrete form, we can see that no matter how rigid the application of decentralization or centralization is, the point of equilibrium will not be reached if the burden is only on one end. So that there is no possible centralization if there is no decentralization and vice versa.²⁰

¹⁷ Modified by the author individually in Eko Parsojo, "Reconstructing the Relationship between Central Government and Local Government in Indonesia: Between Centripetalism and Centrifugalism."

¹⁸ Visualisasi penulis dari Pidato Pengukuhan Eko Prasojosebagai Guru Besar Tetap Depok FISIP UI 2006

¹⁹ Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah. Ps. 1 Angka 8.

²⁰ S.H. Sarundajang, *Arus Balik Kekuasaan Pusat ke Daerah*, (Jakarta: Pustaka Sinar Harapan, 2010), h. 81.

In addition to decentralization, deconcentration also reflects on regional autonomy in Indonesia. Indeed, deconcentration is a principle that cannot be separated from the centralization. Deconcentration is the delegation of part of Government Affairs which is the authority of the Central Government to governors as representatives of the Central Government, to vertical agencies in certain areas, and / or to governors and regents / mayors as the person in charge of general government affairs.²¹ From this understanding, it is clear that deconcentration is only a “transfer”, this word indicates that there are still shadows of centralization in it.

Decentralization and deconcentration are the two foundation principles of regional autonomy. The existence of these two principles has implications for the sharing of rights between the central government and local governments. According to F.P.C.L. Tonnaer, government authority is considered as the ability to enforce positive law and thus create a legal relationship between the government and citizens.²² Juridically, authority is the legal right and power of the government, so in the concept of a rule of law (*rechstaat*) all government actions that originate from its authority must be based on the principle of legality. The division of authority between the Central Government and Regional Governments currently refers to the provisions in Law no. 23/2014 concerning Regional Government. The classification of governmental affairs is specifically regulated in Article 9 which includes absolute government affairs, concurrent government affairs and general government affairs, namely:

a. *Absolute Government Affairs*, intended as a governmental affair which fully falls under the central authority.²³ Therefore it is not related to the principle of decentralization or autonomy. Absolute Governmental Affairs which fully fall under the authority of the Central Government in Article 10 paragraph (1), which are:

- 1) Foreign Affairs Policy;
- 2) Security;
- 3) Justitia;
- 4) National monetary and fiscal;
- 5) Religion.

b. *Concurrent Government Affairs*, Article 9 paragraph (3) Law no. 23/2014, concurrent government affairs are intended as governmental affairs that are divided between the central government and local governments, namely provinces and districts/cities.

c. *General Government Affairs*

Government Affairs which becomes the authority of the President as head of government.

Regional Regulatory Order

The existence of regional regulations is a part of the authority given by the central government to regional governments to manage their own households. This is the result of the specificity of certain regions that are not regulated by the laws and regulations above it or there are even parts of the above laws and regulations that must be further elaborated through regional regulations to implement other regulations of a higher degree.²⁴

²¹ Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah, Ps.1 angka 9.

²² Ridwan HR, *Hukum Administrasi Negara*, (Jakarta: Raja Grafindo, 2011), h. 70.

²³ Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah, Ps. 9 Ayat (2).

²⁴ Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, (Yogyakarta: PSH FH UII, 2002), h. 136.

This matter seems to be the same as what is mandated by Article 14 of Law No. 12/2011 concerning the Formation of Legislative Regulations. In simple terms, the classification of perda according to the explanation above is

- a. Regional Regulation contains regarding the implementation of regional autonomy and co-administration;
- b. Regional Regulation contains the special condition of the region;
- c. Regional Regulation contains further elaboration of higher-level statutory regulations;

The regional regulations that contain the implementation of regional autonomy and co-administration are regional regulations related to concurrent government affairs. Where concurrent government affairs are very synonymous with regional government administration which is driven through the principles of decentralization, deconcentration and assistance tasks.

Meanwhile, regional regulations that contain special conditions for a region are regulations that regulate the uniqueness of an area, both from a cultural perspective and other things that make a region different from other regions. This regulations are of course very specific and often contains substances that regulate something that is impossible to find in other regions in Indonesia.

Regional Regulation contains further elaboration of higher-level laws and regulations, in simple terms it can be linked to the substance of the regional regulation which contains central government affairs, both absolute and general central government affairs that have been regulated in higher laws and regulations is only to clarify the meaning, purpose and purpose of the higher laws and regulations.

Regional Cancellation: Authority And Ideal Model

The relationship between the central government and local governments in the cancellation of regional regulations in the era of the current law has drawn controversy involving four important actors, namely the President, the Minister of Home Affairs, the Supreme Court and the regional government itself. Pre-Constitutional Court Decision, the concept of canceling local regulations in Article 251 of Law no. 23/2014 on Regional Government states that provincial regulations and governor regulations are canceled by the minister and stipulated by a ministerial decree and district / city regulations and regent / mayor regulations are canceled by the governor and stipulated by a governor's decree. It seems that this kind of relationship does seem odd when seen with the naked eye.

AF Leemans argues that there are three hierarchical models that describe the relationship between the central government and local governments²⁵ one of which is the fused / single hierarchy model. This model is very close to the hierarchical model used in Indonesia where administrative boundaries coincide with regions of the autonomous region.²⁶

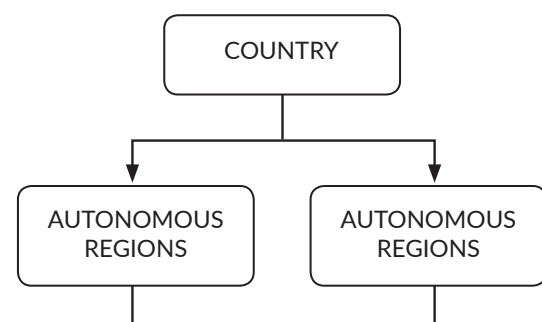


Diagram C.1. kerangka *fused/single model* oleh Leemans.

²⁵ A.F. Leemans, *Changging Patterns of Local Government*, (The Hague: IULA, 1970), h. 52

²⁶ Kardin M. Simanjuntak. "Implementasi Kebijakan Desentralisasi Pemerintahan di Indonesia". *Jurnal Bina Praja* Vol. 7, No. 2, Juni 2015, h. 114.

Such explanation can be found in Article 1 number 9 of Law no. 23/2014 which states that the governor is the representative of the central government. Number 13 then states that the governor's working area also includes the central government working area (administrative area). The governor is also an autonomous regional head.²⁷ Referring to this theory, it seems that institutionally, the cancellation of district/city regulations by the governor is indeed inappropriate. It is clear that the governor and the regent do not have hierarchical relations as an institution, their relationship is limited to coordination. It is different from the central government towards provincial and district/city governments which have hierarchical institutional relationships. This pattern indirectly reconstructs the principles of deconcentration and decentralization.

Next is the level of legislation. This concept is actually very clearly stated in Article 7 of Law no. 12/2011 that the provincial and district/city regulation are in the lowest two sequences, respectively. Another discourse then emerged regarding the cancellation of regional regulations, is it possible to use the minister of home affairs' decree to cancel the regional regulations in Article 7 of Law no. 12/2011 itself does not include ministerial decrees in the hierarchy of laws and regulations. We can answer this by using the Stufentheori or legal norms level theory. Hierarchy theory states that the legal system is a system of rungs with tiered rules. The relationship between norms governing the actions of other norms and other norms can be called a super-relationship and subordination

²⁷ Article 59 jo. Article 4 of Law no. 23 of 2014 concerning regional government which states that the governor is the head of a province where the province has the status of a region and also an administrative region.

in a spatial context.²⁸ As Kelsen put it:²⁹

"The unity of these norms is constituted by the fact that the creation of the norm—the lower one—is determined by another—the higher—the creation of which is determined by a still higher norm, and that this regressus is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity".

According to Hans Kelsen, a legal norm always originates and is based on the norms above it, but below the legal norms it also becomes the source and becomes the basis for the lower norms. In terms of the structure / hierarchy of the norm system, the highest norm (Basic Norm) becomes the place where the norms depend on it, so that if the Basic Norm changes, the existing norm system will be damaged.³⁰ This concept clearly has an impact on the cancellation or validity of a legal norm. Logically, when referring to the Stufentheori, the cancellation or invalidity of a legal norm must originate from or originate from the norms above it. Or it is also possible to use the same level norms according to the *lex posterior derogat legi priori* principle. However, does the minister of the home affairs have no hierarchical relationship with the local government? In fact, the authority possessed by the Minister of Home Affairs is the authority that comes directly from the President.

We recognize that there are three concepts of authority to carry out state administrative actions that come from attribution, delegation and mandate. Attribution authority is the

²⁸ Jimly Asshiddiqie dan Safa'at, M. Ali, *Theory Hans Kelsen Tentang Hukum*, (Jakarta: Sekretariat Jendral & Kepaniteraan Mahkamah Konstitusi RI, 2006), Cet. ke-1, h.110.

²⁹ Hans Kelsen, *General Theory of Law and State*, diterjemahkan oleh Anders Wedberg, (Massachusetts, USA: Harvard University Printing Office Cambridge, 2009), h.124.

³⁰ Maria Farida Indrati, *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*, (Jakarta: Kanisius, 2002) h. 42.

authority that comes from statutory regulations. Where the implementation is carried out by the official or agency stated in the statutory regulations.³¹ Philipus M. Hadjon stated that attribution is the authority attached to a position as opposed to the authority delegated.³² The authority of delegation is the delegation of authority from one governmental organ to another. Delegation is always preceded by an attribution of authority.³³ Delegation is the delegation of authority by an organ that is appointed to carry out something to one other organ, so that from then on (after being delegated) the organ exercises the authority delegated on its behalf and is carried out according to its own opinion (the appointed institution). If in attribution there is a granting of authority (which did not exist and then created), then in the delegation there is a delegation of authority (which already exists).³⁴ In the mandate, there is no grant or transfer / delegation of authority, only representatives. In this case the recipient of the mandate acts on behalf of and in accordance with the beauty of the person who gives the mandate.³⁵ This is also expressed by Law no. 30/2014 concerning Government Administration.

Article 4 of the 1945 Constitution of the Republic of Indonesia states that the President is the holder of government power according to the Constitution. Article 17 of the 1945 Constitution of the Republic of Indonesia also states that

the President is assisted by state ministers. This means that the Minister is an assistant to the President in carrying out his duties. Article 4 of Law no. 39/2008 concerning State Ministries increasingly emphasizes that each ministry is in charge of certain affairs in government. More specifically, Presidential Regulation No. 11/2015 assures that the Ministry of Home Affairs has the task of carrying out affairs in the field of domestic government to assist the President in administering the state.

The implication of the relationship between the president and the minister of home affairs is the delegation of powers the president has. Although the delegation of authority is often implicit in the laws and regulations, this is unique in Law no. 23/2014 there is no explicit delegation to cancel regional regulations, but the law grants this authority by attribution to the Minister of Home Affairs. The authority possessed by the Minister of Home Affairs is basically legitimate authority. His status as assistant to the President further strengthened his position as part of the central control over the regions (executive control).

However, it seems that the power of the minister of home affairs to overturn regional regulations is distorted. This distortion is caused by the legal product used by the minister of home affairs to cancel regional regulations, namely only in the form of a ministerial decree of the home affair. The previous explanation illustrates that the cancellation of a regional regulation must use statutory instruments that are above it or parallel to it or can use the mechanism for cancellation of a regional regulation through the Supreme Court.

To accommodate these various problems, to reinforce the presence of the central government as executive control, a new model for cancellation of regional regulations is needed. The model offered is the calcification of

³¹ Basuki Winamo, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi*, (Jakarta: Raja Grafindo, 2008), h. 70.

³² Philipus M. Hadjon, dkk., *Pengantar Hukum Administrasi Indonesia: Introduction to the Indonesian Administrative Law*, (Yogyakarta: Gadjah Mada University Press, 2008), h. 130.

³³ Indroharto, *Usaha Memahami Undang-Undang tentang Peradilan Tata Usaha Negara*, (Jakarta: Pustaka Harapan, 1993), h. 68.

³⁴ Agussalim, *Pemerintahan Daerah Kajian Politik dan Hukum*, (Bogor: Ghalia Indonesia, 2007), h. 106.

³⁵ Agussalim, *Pemerintahan Daerah...*, h. 107.

regional regulations according to the material they contain. In the previous discussion, it has been discussed that the content of regional regulations consists of the first implementation of regional autonomy and assistance tasks, the second contains specific regional conditions and the third perda contains further elaboration of higher-level statutory regulations. Particularly for regional regulations that involve further elaboration of higher-level statutory regulations, the authority to cancel them must rest with the central government. Meanwhile, the regional regulations that regulate the specificity of their area are still in the hands of the Supreme Court.

However, the use of legal instruments or legal products to cancel them is not supposed to use

an instrument of the minister of home affairs, using a presidential regulation as was the case in Indonesia through Law no. 32/2004 seems to be the ideal alternative. This is because presidential regulations are in a hierarchical order of laws and regulations, which are above regional regulations. But as a consequence, the minister of home affairs can no longer be given the authority to cancel regional regulations at any level, both at the provincial and district / city levels.

As an example, the following is a table of regional regulations whose content is an elaboration of the above laws and regulations, which are marked by a mandate / delegation by the statutory regulations to form a regional regulation as its translation.

(Tabel C.1. Regional Regulation delegated directly by the Legislation higher than Regional Regulation itself)

LAWS	REGIONAL REGULATIONS
Article 27 of Law No. 22 of 2009 about Traffic and Road Transportation	<ol style="list-style-type: none"> Bandung District Regulation No. 14 of 2013 about Traffic Alert Tools, Traffic Signs and Road Marks Cilegon City Regulation No. 10 of 2005 about Placement of Traffic Signs, Road Marks and Traffic Alert Tools Sumenep District Regulation No. 6 of 2008 about the Implementation of Traffic and Transportation
Article 65 of Law No. 28 of 2009 about Regional Retribution	<ol style="list-style-type: none"> Capital City Jakarta Provincial Regulation No. 5 of 2012 about Parking Medan City Regulation No. 10 of 2011 about Tax of Parking
Article 10 of Law No. 32 of 2009 about the Protection and Environmental Management	<ol style="list-style-type: none"> South Kalimantan Provincial Regulation No. 2 of 2017 about Environmental Protection Plan and Management of Environment at South Kalimantan Province Bali Provincial Regulation No. 1 Year 2017 about the Protection and Environmental Management
Article 28 Presidential Decree 17 Year 2010 about Education Management and Implementation	<ol style="list-style-type: none"> Trenggalek District Regulation No. 1 of 2017 about the Implementation of Education Bandung City Regulation No. 2 of 2018 about Education Management and Implementation
CHAPTER II Presidential Decree No. 55 of 2016 about General Provisions and Procedures of the Regional Tax Collection	<ol style="list-style-type: none"> Malang City Regulation No. 16 of 2010 about Regional Taxes Bungo District Regulation No. 7 of 2012 about Entertainment Taxes

As some regional regulations which are not a direct delegation of the higher regulation are:
(Tabel C.2. Regional Regulation that is not a direct delegation of the higher legislation)

NO	REGIONAL REGULATIONS
1	Banjarmasin City Regulation No. 19 of 2014 About Preservation Local Arts and Culture
2	Solok City Regulation No. 6 of 2005 On Combating and Prevention of Immoral Deeds in Solok
3	Special Province of Aceh Regulation No. 5 of 2000 on the Implementation of Islamic Sharia
4	Perda Kabupaten Konawe Selatan No. 3 Tahun 2016 Tentang Penertiban Hewan Ternak dalam Wilayah Kabupaten Konawe Selatan South Konawe Regulation No. 3 of 2016 about Control of Livestock in Region of South Konawe
5	Gorontalo Provincial Regulation No. 2 of 2016 about the Implementation of Indigenous Institute

Conclusions

The form of the relations between the central and the provincial government is where the province as an autonomous region and also the administrative area of the central government coincide in the use of the principles of deconcentration and decentralization (fused/single hierarchy model). Meanwhile, the form of relationship between the central and district/city governments is the district/city government as an autonomous region. In fact, governors and regents/mayors have a unique relationship. Normatively, the relationship between the two is not hierarchically related, but area. The implication is that the provincial and district/city governments stand independently and coordinate each other.

There is an error in the authority to cancel a pre-decision by the Constitutional Court, where the authority to cancel regional regulation lies with the governor in the form of a governor's decision. They do not normatively have a hierarchical relationship even though the regions do. Uniquely, the minister of home affairs institutionally has the authority to control local governments, including canceling regional regulations (executive control). However, the only legal products used as "cancellation" of regional regulations are only ministerial decrees. The use of presidential regulations (perpres) is an alternative legal instrument considered more appropriate in accordance with the standard

theory or legal norm level theory. In order to accommodate those problems and to return accommodating the existence of the central government as executive control through the cancellation of regional regulations, it is necessary to separate the regulations according to the content or material. Where the central government must have the authority to cancel regulations which contains an explanation or extension of the statutory regulations above the regulations.

The concept of a unitary state in Indonesia carries the president as the head of government while the minister is the assistant to the president in carrying out governmental duties in accordance with statutory regulations. The implication is that the minister of interior acts as assistant to the president in carrying out domestic government affairs. Implicitly, although not stated normatively, the minister of the interior has a stake on behalf of the central government in regional government affairs. For this reason, the model of cancellation of regional regulations offered in this study is expected to be an inspiration to then be able to restore the position of the ministry of interior as executive control after the regulation is enacted to the public.

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