CONTESTATION OF THE EFFICIENCY AND EFFECTIVENESS PRINCIPLES ON THE LOCAL REGULATIONS TOWARD THE COMMUNITY PROTECTION

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Abstract

The sustainable national law development is expected to guarantee people's need on the legislation which protects the community. Local Regulation (Perda) has a strategic position as an instrument of the regional autonomy implementation in terms of national development decentralization. The Regional regulation formulation must observe the principles of good legislation including the principle of efficiency and effectiveness. The research focuses on the form of contestation between the principles of efficiency and effectiveness on a Regional regulation for community protection. The problems are analyzed by applying the theory of law enactment. From the analysis, it shows that the legal arguments include: The occurrence of contestation between the principles of efficiency and effectiveness on the Perda enactment is caused by the absence of community protection as stated in Regional regulation; The principles contestation in Perda results in conflict between legal norms and legislation.

Keywords: efficiency and effectiveness, contestation, protection.

Abstrak

Pembangunan hukum nasional yang berkelanjutan diharapkan dapat menjamin kebutuhan masyarakat akan peraturan perundang-undangan yang mengayomi masyarakat. Peraturan Daerah memiliki kedudukan strategis sebagai instrumen pelaksanaan otonomi daerah dalam semangat desentralisasi pembangunan nasional. Pembentukan Perda wajib memperhatikan asas-asas pembentukan peraturan perundang-undangan yang baik di antaranya meliputi asas kedayagunaan dan kehasilgunaan. Fokus permasalahan yaitu bentuk kontestasi antara asas Kedayagunaan dan Kehasilgunaan sebuah Perda terhadap Pengayoman pada masyarakat. Permasalahan akan dianalisis menggunakan teori kekuatan keberlakuan suatu peraturan perundang-undangan. Berdasarkan hasil pembahasan diperoleh argumen: Terjadinya kontestasi antara asas Kedayagunaan dan Kehasilgunaan atas keberlakuan Perda disebabkan oleh tidak terayominya masyarakat sebagaimana kewajiban dalam materi muatan Perda Kontestasi asas dalam Perda menyebabkan terjadinya pertentangan antara norma hukum dalam peraturan perundang-undangan.

Kata kunci: kedayagunaan dan kehasilgunaan, kontestasi, pengayoman.

Introduction

To materialize a state of law, Indonesian government is obliged to implement a national law development which are sustainable, well-planned, integrated and comprehensive under a national law system. The sustainable national law development is expected to guarantee the protection of rights and obligations of all Indonesian people to fulfill their need. As a state of law, all aspects of state and nation life must be based on law.

An Indonesianist, Daniel S Lev, in his book "Hukum dan Politik Indonesia, Kesinambungan dan Perubahan" (Indonesia Law and Politics, Sustainability and Change) describes how law is only ruled by politicians' interests without concerning the justice seekers. Lev also describes the slow progress of Indonesian national law system.[1] His description is an anomaly from the mandate of constitution which has to be ended.

[1] Feri Amsari. Daniel S Lev, tentang Sebuah Negeri yang Bukan Negeriku. *Jurnal Konstitusi*, Vol. 2 No. 3, December 2013, p. 190.

A citizen must obey the rule of state and have the right to get protection and public services from governance. The governance ought to execute the administration in accordance with justice principles.[2]

National law system and its sub system elements are interdependent to achieve an orderly national law especially in law development sector based on mandate of constitution. The 1945 Constitution is a crystallization of state ideals and legal ideals of Republic of Indonesia. The preamble of constitution contains state's reasons, goals and mission based on Pancasila, which is as basic value (*Grundnorm*), that has been a philosophy and life perspective of Indonesian people.[3]

The Article 22 A of The 1945 Constitution mandates that the legislation will be further governed in Law. The legislation is an effort to design and make law which consists of several steps such as: planning, designing, drafting, discussion, ratification or determination and enactment. Formation of law must observe principles of goal clarity, institutional, suitable types, hierarchy, and content material to be implemented, efficacy, clarity of formulation and openness. These principles are crucial as guide for lawmakers to avoid ambiguous and multi interpretative content. Moreover, any rule of law is made in accordance with its objectives.

Besides, the draft of legislation should also takes account of the following principles including protection, humanity, nationality, kinship, Bhinneka Tunggal Ika, justice and equality in law and government, order and legal certainty, and/or balance, harmony.[4] Regional regulation is a type of legislation and is part of the national legal system based on Pancasila. The Regional Regulation has a very strategic position because it is given a clear constitutional basis as stipulated in Article 18 paragraph (6) of the 1945 Constitution. Material content of the Regional Regulation is in the context of regional autonomy and assistance tasks, and accommodates the special conditions of the region and further elaboration of the Regulations, legislation and may not contradict with higher laws and the public interest.[5] Regional regulation as a product of legislation plays an important role as a direct contact with people's daily activities in an area such as a regional regulation related to local taxes and regional retributions, a regulation on trade business permits, and a regulation on building permits.

Based on the explanation above, the focus of problem is form of contestation between efficiency and effectiveness of perda and protection principle towards people as well as the enforcement of regional regulations in terms of the strength of the enactment of a law.

Discussion

Regional regulation is a strategic instrument in implementation of regional autonomy in accordance with spirit of national development decentralization. Roles of perda in regional autonomy are: *first*, as policy instrument in implementation regional autonomy and co-administration broadly and full of responsibility; *second*, as a facility for channeling people's aspiration in region; *third*, as means of transformation in improving acceleration of regional development; *fourth*, as executor of the higher law.

In order to actualize role of perda in implementation of regional autonomy (otoda), the local governance must be responsive and accommodating on social will. The existence of government is an urgency on people's life process. No matter how small the community is, even an individual, they need government service. Undoubtedly, many life aspects are strongly related to the functions of government.[6]

Regional regulation is divided into provincial perda and regional/city perda. The formu-

[2] Muhammad Iqbal. "Urgensi Civic Education dalam Membangun Budaya Demokrasi Menuju Masyarakat Madani Indonesia". *Jurnal Ilmiah Syariah Juris*, Vol. 14 No. 1, June 2015, p. 8

[3] Yudi Latif. Pembukaan Undang-Undang Dasar Sebagai Cita Negara dan Cita Hukum. *Ketatanegaraan Journal*, Vol. 1, December 2016, p. 137

[4] Article 6 paragraph (1) 1945 Indonesian Constituion No. 12 Year 2011 of Forming Legislation

[5] Zarkasi A. "Establishment of Regional Regulations Based on Legislation", *Journal of Inovativ Law*, Vol. 2 No. 4, 2010, p. 119

[6] Arifin. "Eksistensi Perda dalam Sistem Hukum Nasional dan Implementasinya terhadap Otonomi Daerah". *Jurnal Legal Opinion*, Vol. 3 No. 1, January 2015, p. 3

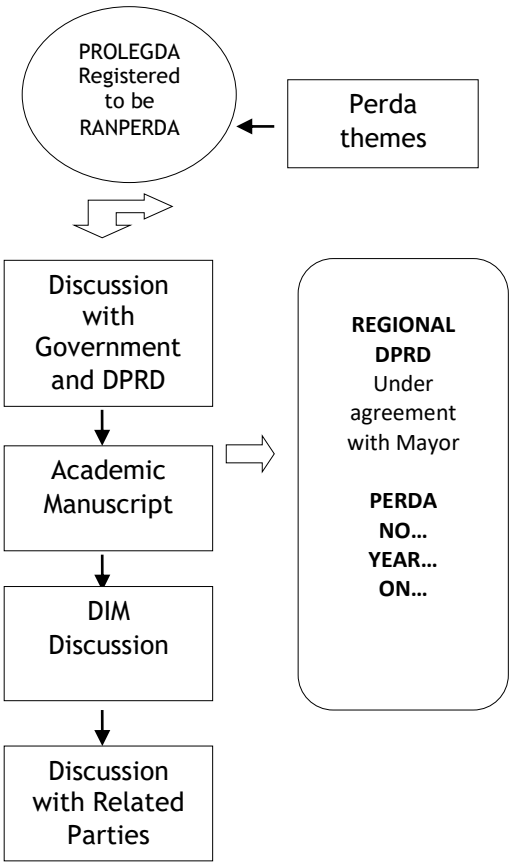
lation of perda is completed through several processes such as planning, formulating, proposal in Regional Legislation Program (Prolegda), discussion, ratification or determination, and legislation. Its formulation must observe several law principles such as higher law is more prioritized than hierarchically lower (*lex superiori derogat legi inferiori*) a specific regulation is more prioritized than the general one (*lex specialis derogat legi generale*) and the newest rule is more prioritized than the older one (*lex posteriori derogat legi priori)*.

Based on Law Number 12 Year 2011 on the Formulation of Legislation, a regional law is possible to include criminal provisions in its content material as a coercive action of the law enforcement for crimes. Criminal provisions that is allowed in Perda is imprisonment for 6 (six) months at most or the maximum fine 50.000. 000 (fifty million rupiahs).[7]

The decision of the maximum penalty limit for violating perda reflects the principle of accountability and responsibility in realizing good governance in the region. Accountability can be a goal that reflects democratic values and can also be a way to develop a more effecttive and efficient organization. Accountability is the key to ensure that this power is used appropriately and in accordance with the public interest.[8]

Planning and drafting of reginal Regulation is carried out through a City Regional Legislation Program (Prolegda). Prolegda is an instrument planning program for the establishment of a city regulation structured and planned in an integrated way and systematically. The substance of Prolegda is the program to form a district/municipal regulation with the Regional Regulation Draft (Ranperda) without numbers and years that contain the material of the provisions that are regulated as well as the relation between Ranperda and other laws and regulations. A District/City Ranperda contains: background and objectives; the target to be materialized; the subject matter, scope, or object to be regulated; and the range and direction of the arrangement.

Chart 1. The Cycle of Regional Legislation Program Making



Value Contestation in the Applicability of Regional Regulations

The term contestation can be interpreted as a dispute to obtain something desired. Thus, contestation may occur in any field including values for the enactment of a local regulation and the needs of the people to be protected by the Government through pro-people public policies. The legal substance that is generally regulated in perda is the provisions related to the Social Life of the Community, Taxes and Levies, Licensing, Environment and Government.

As an instrument for the implementation of regional autonomy, Regional regulation plays a role in maximizing the contribution of the community through the potential sources of increasing Regional Original Revenue (PAD). Optimization of Regional Original Revenue sources

[7] Provisions of Article 15 paragraph (2) Law No. 12 Year 2011 of Forming Legislation

[8] Andi Safriani. "Telaah terhadap Asas Akuntabilitas dalam Pengelolaan Keuangan Daerah". *Jurnal Hukum Jurisprudentie,* Vol. 4 No. 1. June 2017, p. 32

in a region can be seen through a number of Regional Regulations that governs regional financial management such as local taxes and regional retributions as well as a number of licensing forms regulated by the region. For example, Regional regulations on regional taxes regulate a number of types of local taxes whose purpose is none other than to maximize regional Regional Original Revenue.

As the implementation of decentralization development as a mandate for reform, there have been a number of dynamics in the implementation of regional autonomy and issues concerning regional regulations. Regional Regulation is an instrument in the implementation of regional autonomy to determine the direction and policies of regional development and its supporting facilities. Issues after issue arises in regard to the stipulation and implementation of this regulation, until then the Government (Central) is overwhelmed to carry out supervision until its cancellation.[9]

In the era of regional autonomy, a number of negative phenomena are still developing, including the existence of a law that has just been ratified and has not been effectively implemented, and replaced by a new law that is less relevant to the needs of the community. Regional regulations issued are revoked by the Central Government because they are contrary to the higher regulations.[10] A number of perda, both Provincial and District/City Regulations, are considered to be contrary to the public interest. As a result, a number of problematic regulations were revoked by the Minister of Home Affairs. Starting from 2002 to 2009, there were 406 District/City Regulations which were revoked by the Minister of Home Affairs. The cancellation of hundreds of troubled Regional Regulations was caused by a lack of guidance in the formation of the Regional Regulation and the aspirations of the Regional Government and Regency/City DPRD on the will of the people.

Guidance on District/City Regional Governments is carried out by the Governor as the representative of the Central Government. The Governor conducts guidance on general and technical matters on public services in the regions, regional finance, regional heads and DPRD in the formation of Regional Regulations, division of government affairs, regional institutions, staffing on regional apparatus, regional establishment, regional policies, and forms of other guidance in accordance to the laws and regulations.[11]

Table 1. Provincial and City/District Regulation, Revoked/Revised by Minister of Home Affairs

Year	Quantity
2011	351
2012	173
2013	107
2014	47
2015	9

Source: Ministry of Home Affairs RI, Managed Data

After the enactment of Law Number 23 Year 2014 concerning Regional Government, the authority to revoke problematic regional regulations is carried out in stages. The problematic Provincial Regulation is removed by the Minister while the problematic Regency/City Regulations such as conflict with higher regulations, public and/or moral interests are revoked by the Governor as a representative of the Central Government. Substantive issues that are often encountered in a number of regional regulations include interruption of peace and public order and disruption of economic activities to improve people's welfare.

Table 2. Provincial and City/District Regional regulation, Revoked/Revised by Governor

Year	Quantity
2011	274
2012	170
2013	94
2014	74
2015	28

Source: Ministry of Home Affairs

[9] Muhammad Suharjono. Pembentukan Perda yang Responsif dalam Mendukung Otonomi Daerah. *Jurnal Ilmu Hukum*, Vol. 10 No. 19, February 2014, p. 22.

[10] Iza Rumesten R.S. "Model Ideal Partisipasi Masyarakat dalam Pembentukan Perda", *Jurnal Dinamika Hukum,* Vol. 12 No. 1, January 2012. p. 135

[11] Agus Kusnadi, "Re-Evaluasi Hubungan Pengawasan Pusat dan Daerah Setelah Berlakunya UU No. 23 Tahun 2014 tentang Pemerintahan Daerah", *Jurnal Arena Hukum,* Vol. 10 No. 1, January 2017, p. 70.

As part of the legislation, Regional Regulation is bounded to the norms on how to form a good regulations. Forming regulations should pay attention to the base of efficiency and effectiveness. A perda must be effective and efficient which means that it is expected to create something beneficial like the improvement of Regional Original Revenue in a region.

One of the significant potentials of Regional Original Revenue is Regional Taxes including the imposition of local taxes on restaurants and food stalls (culinary businesses). In the area where the author lives, there is the Regional Regulation of Palopo City Number 2 Years 2011 concerning Regional Taxes in which each restaurant business owner must pay a tax of 10 (ten) percent. Since the enactment of the regional regulation in 2011 it has not been effective because only a small portion of culinary business owners pay taxes that much. Furthermore, the tax rate is calculated regularly with varying amounts starting from Rp.500,000 (five hundred thousand rupiah) up to Rp.1,500,000 (one million five hundred thousand rupiah) by looking at the scale of the business. The discourse on the adoption of this local regulation to restaurant owners has started for a long time, but there is always ups and downs in the implementation including the amount of resistance of restaurant owners to pay taxes which they think are too large.

The implementation of decentralization development is a manifestation of the spirit in implementing regional autonomy. The goal of developing national law is to guarantee the protection of the rights and obligations of all Indonesian people within the framework of the rule of law. Protection of rights and obligations for the people by the Government is actually a form of protection given by the authorities to its people. When people feel themselves protected, their lives will be more peaceful. Philosophically, the ideals of the implementation of regional autonomy are the achievement of people's welfare. The nature of welfare to be achieved is in line with the Utilitarianism view that carries the law benefit as the main purpose. According to the Utilitarianism, the aim of law is the greatest happiness for the greatest number.

Regarding the national phenomenon on the number of Regional Tax Regulations that sparks controversy and resistance of the community certainly invites concern. It is because in practice the Regional Regulation serves as a means and vehicle for accommodating the aspirations of the people in the region. Besides, there has also been a conflict or clash between legal norms (conflict of norms) in the provisions of Constitution of the Republic of Indonesia Number 12 Year 2011 concerning the Establishment of Legislation. According to the provisions of Article 5 letter "e" it stated that in forming the Laws and Regulations must be carried out based on the principle of Establishing good laws and regulations, namely efficiency and effecttiveness. On the other hand, the provision of Article 6 letter "a" states that the material contained in the Law must reflect the principle of Protection.

Based on legislation quality, the formation of the regional regulation still shows its weaknesses especially in terms of regional levies, local taxes, investment and basic services in the regions. Therefore, the practice of political legislative in the formation of a research-based local regulation is an absolute requirement to produce quality local regulations that have a legal basis both legally and academically.[12]

Regional Regulation as a Means of Transformation in Improving Development Acceleration.

Regional regulation as an implementation instrument of regional autonomy plays role as a platform of transformation in increasing development acceleration in the region. Regional government is supposed to be responsive to-wards the needs of social law. As the function of law is to be *a tool of social engineering*, then to meet society needs of law, government should make

[12] Ria Casmi Arrsa, "Restorasi Politik Legislasi Pembentukan Peraturan Daerah Berbasis Riset". *Jurnal Rechtsvinding,* Vol. 2 No. 3, December 2013, p. 406.

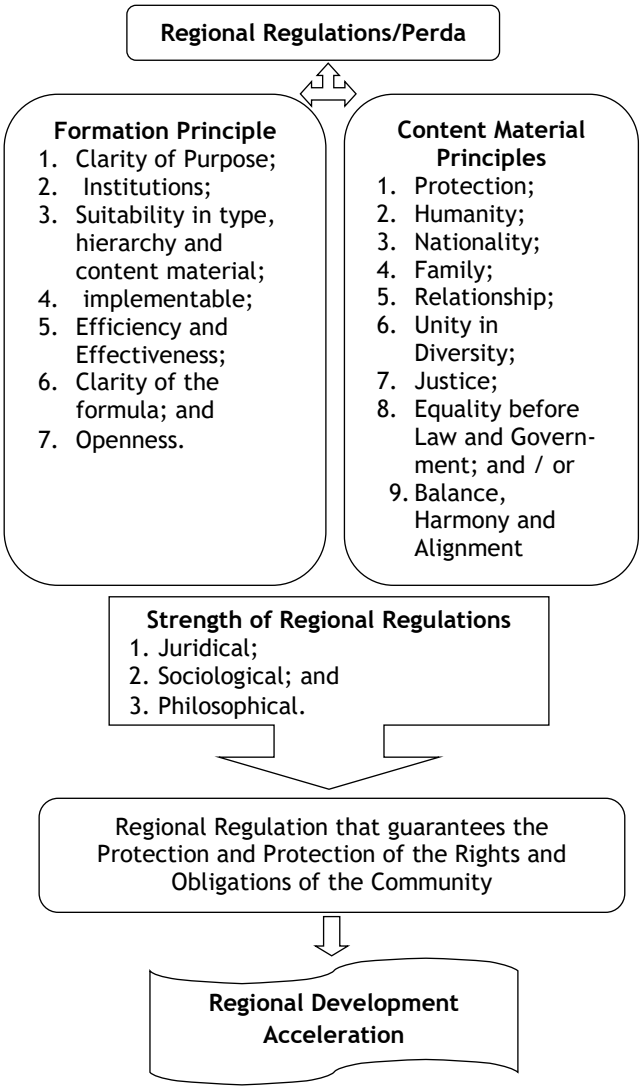
good constitutive rules in which that fulfil law principle in the forming of constitutive regulation.

A good regulation must have the power of juridical, sociological and philosophical enforcement. In juridical aspect, the perda has fulfilled the conditions of formation with a definite, basic, standard and binding method for all concerned parties. Sociologically, local regulations have become a reality in society. According to Roscoe Pound, the main function of the law is as a tool of social engineering which include the protection of public interests, social interests and personal interests proportionally. A regional regulation has the power of philosophical enforcement if the legal principles contained in the Regional Regulation are in accordance with the legal ideals of the community *(rechtsidee)* so that the community accepts the presence of the regional regulation and implements its provisions.

Conclusion

From the description above, the author draws several conclusions: *first*, the occurrence of contestation between the efficiency and effectiveness principles in law enforcement is caused by the uncontrolled community as the obligation to fulfill the principle of patronage which is the material norm of the content of the law and legal ideals *(rechtsidee)* as a philosophical basis for the formation of regional regulations; *second*, contestation of values in the Regional Regulation causes a conflict of norm at Constitutions of the Republic of Indonesia Number 12 Year 2011 on the Establishment of Legislation, between the provisions of Article 5 letter "e" which regulates the principle of efficiency and effectiveness as the principle of establish-ing good regulations and the provisions of Article 6 paragraph (1) letter "a" which regulates the principle of protection in the material the contents of a law. There is a legal disparity between text and context.

Chart 2. Conceptual Framework for the Realization of Regional Regulations as a Transformation Forum in Improving Development Acceleration



Suggestion

Local law enforcement is an effort to accelerate development in the region through increasing Regional Original Revenue (PAD), however, the community also needs protection from the Government. Thus it takes a policy in the formulation of a regional regulation of which content really reflects the community's protection. Although a local regulation is demanded to be efficient and effective, it does not mean to ignore the interests of the community to be pro-tected.

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