

CHAPTER 2

LITERATURE REVIEW

A. Legislation in Indonesia

In Indonesia, there are various terms relating to legislation such as law, legislation, and regulation. In Dutch law, some legal terms that used such as *wet*, *wetgeving*, *wettelijke regels*, or *wettelijke Regeling (en)*. The word legislation is derived from *wettelijke regels*. It is in contrast with the term state regulation which is translated as *Staatsregeling*, *staats* means the state and *regeling* is rule. The term legislation is also derived from “law”. Law does not have the connotation to ‘*wet*’, since the term ‘law’ has its own meaning. The meaning of state regulation is written regulation established by official or special institution, while the legislation is meant as the procedures of making of state regulation.⁵

When talking about Indonesian legislation, the author should also discuss its hierarchy. The hierarchy of legislation is an idea developed by Hans Kelsen. According to Adolf Merkl in “*das doppelte rechtstanztheorie*”, the legal norm has two faces i.e the legal norm which is based on higher law and the one which has to be followed by

⁵ Solly Lubis, 1989, *Landasan dan Teknik Perundang-undangan*, Bandung, Mandar Maju, p. 1-2.

lower law. Legal norms have validity period (*rechkracht*) which depends on the legal norms itself, so that if the legal norms in the higher law are revoked, the legal norms at the lower is revoked or erased as well.⁶ Thereby, Kelsen did not talk about law as a reality, but law as a discipline; what happens with law in practice is different from the norm on positive law. It is beyond ethical aspects, political, or sociological that may arise in practical of law.⁷

Since the independence of Republic of Indonesia, the problem of hierarchy of legislation is unclearly regulated.⁸ Regarding the essence of hierarchy, Hans Kelsen then explained the relation of norms which says the relation of norms which create another norm and then may represent super relationship and sub ordination. The norm is determined and created another norm that could be superior and inferior norm.⁹

In the bellow paragraph, it is shown hierarchy of legislation based on People Consultative Assembly Decree No. XX of 1966, People Consultative Assembly Decree No. III of 2000, Law No. 10 of 2004, and Law No 12 of 2011 as follows :

⁶ Maria Farida Indrati, 1998, *“Ilmu Perundang-Undangan*, Yogyakarta, Kanisius, p. 25.

⁷ Zainal Arifin Hoesein, 2009, *Judicial Review di Mahkamah Agung RI “Tiga Dekade Pengujian Peraturan Perundang-undangan”*, Jakarta, Raja Grafindo, p. 21.

⁸ Titik Triwulan dan Ismu Gunadi Widodo, 2010, *Hukum Tata Usaha Negara & Hukum Acara Peradilan Tata Usaha Negara Indonesia*, Surabaya, Kencana, p. 428.

⁹ Enny Nurbaningsih, “Hirarki Baru Peraturan Perundang-Undangan”, *Mimbar Hukum*, X, (2004), p. 34.

1. People Consultative Assembly Decree No. XX of 1966 on Source of Law and Hierarchy of Legislation

- the 1945 Constitution
- People Consultative Assembly Decree
- Law / Government Regulation in Liew of Law
- Government Regulation
- Presidential Decree
- Other regulations, such as Ministerial Regulation, Ministerial Instruction and others

2. People Consultative Assembly Decree No. III of 2000 on Source of Law and Hierarchy of Legislation

- the 1945 Constitution
- People Consultative Assembly Decree
- Law
- Government Regulation in Liew of Law
- Government Regulation
- Presidential Decree
- Local Regulation

3. Law No. 10 of 2004 on Formation of Legislation

- the 1945 Constitution
- Law / Government Regulation in Liew of Law

- Government Regulation
- Presidential Regulation
- Local Regulation

4. Law No 12 of 2011 on Formation of Legislation

- the 1945 Constitution
- People Consultative Assembly Decree
- Law / Government Regulation in Lieu of Law
- Government Regulation
- Presidential Regulation
- Local Regulation

B. Overview on Local Regulation

In the light of local autonomy, the region has the right and authority to regulate and manage of government affairs and public interests. Therefore, local government has the authority local regulation. In implementing the content of local regulation, local autonomy should accommodate the region conditions and elaborates legislation or higher regulation.¹⁰

¹⁰ I Gde Edi Budiputra, Dualisme Pembatalan Peraturan Daerah Provinsi dengan Peraturan Presiden dan Peraturan Menteri Dalam Negeri”, *Jurnal Magister Hukum Udayana*, IV (May, 2015). p.3.

Based on Article 1 Point (7) Law No. 12 of 2011 on Formulation of Legislation, local regulation can be divided into Provincial Local Regulation and City/Regency Local Regulation. Provincial Local Regulation is established by Regional House of Representative of Province and Governor with collective consent. City/Regency Local Regulation is established by Regional House of Representative of City/Regency and Regent or Mayor with collective consent.

Local regulation in the era of local autonomy has a strategic position for local government. On making process of local regulation, it should be based on principle of good legislation¹¹, as follows:

a. Clarity of Purpose

The establishment of local regulation must be clear in objective to be achieved;

b. Properly Official

Should be made by official and authorized institution. null and void if be made by other official/institution who are not authorized;

c. Compatibility, Hierarchy, and Material Content

The establishment of local regulation is should be noticed of substance or content;

¹¹ See Article 5 Law No. 12 of 2011 on Formulation of Legislation

d. Implementable

Every local regulation must be considered to be effective on society and with philosophical, juridical and sociological aspect;

e. Usability

The establishment of local regulation is needed and useful to regulate of society;

f. Clarity of Formulation

Local regulation must fulfill requirements such as preparation, systematics and choice of words or terminology and clear legal language, in order to avoid mis interpretation;

g. Openness

The process of establishment of local regulation is started from planning, preparation, and drafting. Further it is discussed transparently with stakeholders. Thereby whole of society has opportunity to give comment and suggestion.

Local regulation is one of legislations in Indonesia which is made based on the principles described above. The principles of substance of local regulation from higher legislation are not contrary to principle of Republic of Indonesia.¹²

¹² See R. I., *Law No 23 of 2014* “Local Government” Article 237 Paragraph (1).

C. Local Regulation Review in the Legislation System after Amendment of the 1945 Constitution

After amendment of the 1945 Constitution, there are many changes that occur in Indonesian constitutional system. One of changes is judicial power. Before amendment, judicial power only belonged to the Supreme Court. After the amendment, judicial power can be conducted by the Supreme Court and the Constitutional Court, as regulated in Article 24 of the 1945 Constitution.¹³

The idea of judicial review in Indonesian appeared when a draft of the 1945 Constitution was discussed in the session of Indonesian Independence Preparations Investigative Board (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*) in 1945. Prof. Mohammad Yamin, a legal expert as well as a member of BPUPKI, proposed the inclusion of judicial review to the effect that the Supreme Court would have the power to determine whether a law is contradictory to the 1945 Constitution. However, Yamin's suggestion was rejected by Prof. Dr. Soepomo, a constitutional drafter, because the Constitution being discussed did not adopt Trias Politica while substantive reviews could only be found in countries adopting Trias Politica. Additionally, Indonesia had not have experts with necessary

¹³ Muwahid, "Sistem Ketatanegaraan Indonesia Pasca Amandemen UUD 1945", *Al-Qanun*, XIII, (Desember, 2010), p. 492.

experiences in judicial review to rule on such matters, according to Soepomo.¹⁴

The implementation of legislation review is affected by two factors: unsynchronyze regulations and political factors, including the state power system. Both of these factors, since 1999-2002 have been removed, according to amendment of the 1945 Constitution on supporting for the implementation of legislation the constitutional system especially state power adopted separation of power there is checks and balances.¹⁵

D. Supervision of Central Government to Local Regulation

Indonesian dictionary explains that the term supervision comes from the word “beware” means to look at something carefully and thoroughly. In the supervision, there is no activity except giving a report based on the actual reality.¹⁶ There are various forms of legal product controlling such as a legal norm control mechanism. Control may exercise through political supervision, administrative control or

¹⁴ Moh. Mahfud MD, 2009, “The Role of The Constitutional Court in The Development of Democracy in Indonesia”, (Presented in the World Conference on Constitutional Justice, Cape Town, January 23-24, 2009), retrieved from http://www.venice.coe.int/WCCJ/Papers/INA_Mahfud_E2.pdf at Friday, 17 Maret 2017 4.13 P.M.

¹⁵ Zainal Arifin Hoesein, 2009, *Judicial Review di Mahkamah Agung RI “Tiga Dekade Pengujian Peraturan Perundang-undangan”*, *op. cit.* p.317.

¹⁶ Sujanto, 1986, *Beberapa Pengertian di Bidang Pengawasan*, Jakarta, Ghalia Indonesia, p.2.

legal control conducted by state institutions which authorities have been regulated by laws and regulations.¹⁷ According to Prayudi supervision is process of comparing the activities such as runing, implementing, and planning.¹⁸ Based on Law No. 5 of 1974, there are two forms supervision to local regulation, namely preventive and repressive supervision. Based on Law No. 22 of 1999 it only emphasizes the repressive supervision.

Supervision of local regulation has relationship between central and local government; supervision would be more important and has strategic position on keeping of government in unitary of state. Supervision would be meaningful as the bond between central and local government.¹⁹

Two types on supervision of local autonomy are preventive supervision (*preventief toezicht*) and repressive supervision (*repressief toezicht*). The control of local regulation is given in term of contents and action of local government institution.²⁰

Preventive supervision is supervision given by higher government to lower government on decision product. Based on the

¹⁷ Jimly Asshiddiqie, 2014, *Perihal Undang-Undang*, Jakarta, Rajawali Press, p.7.

¹⁸ S. Prayudi Atmosudirjo, 1995, *Hukum Administrasi Negara*, Jakarta, Ghalia Indonesia, p. 84.

¹⁹ Fajri Nursyamsi, “Pengawasan Peraturan Daerah Pada Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah”, *Padjajaran Jurnal Ilmu Hukum*, II (2015), p. 529

²⁰ *Ibid.*, p. 20

nature, preventive supervision is conducted after designation a local regulation before applying it into the society (promulgation). It is explained in Number 7 Law No. 32 of 2004 on local government that preventive supervision of local regulation is conducted to particular draft namely local tax, local retribution, local budget, change local budget, and spatial. Enactment of draft that has been mention above should fulfill requirements made by central government.²¹

Repressive supervision is supervision conducted by higher government to lower government on decision product. Supervision is carried out after having government decision or there has been government action. Repressive supervision can be revocation of local regulation if it is contrary to higher legislation. Urgent circumstances can be suspended the provisions that have been issued before the revocation of local regulation.²²

²¹ Jum Anggriani, 2011, *Pelaksanaan Pengawasan Pemerintah Pusat Terhadap Peraturan Daerah*, Universitas Tama Jagakarsa, Jakarta, p. 3.

²² Farhan Bestyaradi, 2014, “Kewenangan Pemerintah Pusat Terhadap Pembatalan Peraturan Daerah” (Skripsi Sarjana tidak diterbitkan, Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah), p. 44.