

CHAPTER FOUR

FINDING AND ANALYSIS

A. Role of Regional Offices of the Ministry of Law and Human Rights in the Regulations Making-Process in the Special Region of Yogyakarta

The Ministry of Law and Human Rights is one of the ministries established to assist the tasks of the President (executive) related to the implementation of government duties in the field of law. It also concerns the legal substance, legal system and its development. Government duties in the field of law include a very strategic role to actualize the law functions, enforce the law, create a legal culture, and form fair legislation which is consistent, non-discriminatory, not gender-biased and pay attention to human rights.³⁷

Regional Offices have the task of carrying out the duties and functions of the Ministry of Law and Human Rights in the provincial area based on the Minister of Law and Human Rights policy and the provisions of the legislation.

The duties of the Regional Office of the Ministry of Law and Human Rights cover the following matters, namely:

³⁷ Suhariyono, Peranan Kantor Wilayah Departemen Hukum dan Hak Asasi Manusia Dalam Penyusunan Prolegda, Dalam Bimbingan Teknis Proglam Legislasi Daerah, Jakarta, 2007, p.41.

1. Actualizing the legal function in the form of legislation in the regions that are fair, consistent, non-discriminatory, and not gender bias;
2. Paying attention to the implementation of respect, fulfilment and protection of human rights;
3. Cooperating with institutions in the regions in harmonizing the substance of human rights in regional regulation;
4. Assisting (consultative) the implementation of the establishment of legislation at the regional level in terms of the substance of the rules.³⁸

The Regional Offices perform the following functions:

1. Organizing planning, program control and reporting
2. Implementing the services in the field of general law administration, intellectual property rights, and provision of legal information
3. Implementing the facilities for designing regional legal products, developing legal culture and legal counselling, as well as consulting and legal assistance.
4. Coordinating the operational implementation of technical implementation units within the Ministry of Law and Human Rights in the field of immigration and the correctional field.
5. Strengthening human rights services in the context of realizing respect, fulfilment, promotion, protection and enforcement of human rights.
6. Implementing the administrative affairs within the Regional Office.³⁹

³⁸ The Minister of Law and Human Rights Regulation Number 28 of 2014 Article 2.

The overall tasks and functions of the Regional Office of the Ministry of Law and Human Rights as mentioned above are the logical consequences of the tasks' implementation as an extension of the Minister in the region. Therefore, the Regional Offices must have serious preparation and have the qualification of legal personnel to carry out the tasks mandated by the above provisions. The success and failure of the development of laws and regulations in the regions depend fully on the Head of Regional Offices.⁴⁰

Related to the establishment of local regulations, the subdivision which oversees the task is the Subdivision for Facilitation of the Formation of Regional Legal Products. This subdivision is included in the Legal Services and Human Rights Division in Law.

The task of the subdivision is preparing materials for the development and controlling the implementation of technical duties, cooperation, monitoring, evaluation, and preparing reports of technical duties implementation in the field of facilitating legal analysis and evaluation in the regions, facilitating the preparation of regional law products and academic texts, drafting facilitation and harmonization of regional legal products, facilitating the formation of regional legal products, mediating consultations,

³⁹ The Republic of Indonesia Minister of Law and Human Rights Regulation Number 28 of 2014 Article 3

⁴⁰ Taufik H Simatupang, "Peran Perancang Peraturan Perundang-Undangan Kantor Wilayah Kementerian Hukum dan HAM Dalam Rangka Harmonisasi Peraturan Daerah", *Jurnal Ilmiah Kebijakan Hukum*, Volume 10 (1), March 2017, Jakarta, p.17.

and mapping of regional legal products as well as technical guidance, guidance, and development of draft legislation in the region.⁴¹

Among Regional Office activities in order to facilitate the establishment of regional legal products are:

1. Mediation and consultation;
2. Compilation and harmonization of regional legal products;
3. Inventory of regional legal products;
4. Development of legislative designers in the region.

In order to carry out the duties and functions of the Regional Office in the field of facilitating the formation of regional legal products, the activity of inventorying regional legal products is very important because it can be used as a basis for developing the management and service of a database of regional legal products. In addition, the arrangement of the database is expected to increase the role of Regional Offices in the field of facilitating the formation of regional legal products further.

The strategic position of the Regional Office of the Ministry of Law and Human Rights in the implementation of facilitating function in designing regional legal products is stated in three Articles as stipulated in the Law Number 12 Year 2011 concerning the Establishment of Legislation.

⁴¹ The Ministry of Law and Human Rights Regulation Number 28 of 2014 Article 49.

1. Article 36 paragraph (3) states that: The preparation of the Provincial Legislation Program in the Provincial Government environment is coordinated by the law firm and can include vertical agencies related.
2. Article 58 Paragraph (2) mentions that: Harmonization, rounding, and strengthening the conception of the Draft Provincial Regulation originating from the Governor are coordinated by the law firm and can include vertical agencies from the ministry that administers government affairs in the field of law.
3. Article 98 says that: paragraph (1) Each stage of the Establishment of the Laws and Regulations includes the Draft of Laws and Regulations, and paragraph (2) Provisions regarding the participation and guidance of the Designers of the Laws as referred to in paragraph (1) shall be regulated by Government Regulation.

Furthermore, Article 75 of the Presidential Regulation Number 87 of 2014 concerning the Implementation Regulation of Law Number 12 Year 2011 concerning the Establishment of Legislation Regulations mentions that:

1. The Provincial Regional Secretary assigns the head of the legal bureau to coordinate harmonization, rounding up and consolidation of the draft Provincial Regulation.
2. In coordinating harmonization, rounding up and strengthening the conception as referred to in paragraph (1), the head of the legal bureau can

include vertical agencies from the ministry that administers government affairs in the legal field.

Similar statements can also be seen in Article 5 paragraph (2) of the Government Regulation Number 59 of 2015 concerning the Participation of Designers of Legislation in Establishing Legislation and its development, which states that: The participation of Designers in the establishment of Legislation is carried out in stages of planning, drafting, discussion, ratification, and enactment. While the establishment of legislation stages according to the Law No. 12 of 2011 concerning the establishment of legislation are planning, drafting, discussion, ratification, and enactment⁴². It means that the Designers' participation is involved in all stages of Legislation establishment.

In each stage of legislation formation which carried out by the Government, the House of People's Representatives, as well as the Regional Representative Board are mandated to involve into the legislation drafters in each process of establishing legislation from the planning process until the enactment. The legislation drafters are civil servants who are given duties, responsibilities, authorities, and rights, in full officials authority to carry out activities in drafting the Draft of and or other legal instruments in accordance

⁴² The Law Number 12 Year 2011 Article 1 Paragraph (11).

with the provisions of Legislation Regulations laws and or other legal instruments in government agencies.⁴³

The following are the stages of establishing legislation, namely:

1. Planning

Planning for the preparation of Regency or City Regional Regulations is carried out in the Regency or City legislation program. Provisions which are concerning the planning for the preparation of Provincial Regulations are referred to Article 32 to Article 38 and apply mutatis mutandis to the planning of drafting Regency or City Regional Regulations. The Regional Legislation Program is a planning instrument program for the establishment of Provincial Regulations/Regency or City Regional Regulations which are arranged in a planned, integrated and systematic manner.

Planning for drafting other legislation is the authority of the institution, commission or agency and it is adjusted to their needs. Provincial Regulation Planning is carried out in the Provincial Regional Legislation Program. Regional Regulation Program establishment is carried out by the Provincial House of People's Representatives and Provincial Government and it is scheduled for a period of one year based on the priority scale of the Provincial Regulation establishment.

⁴³ The Ministerial Decree No. 41 / KEP / M.PAN / 12/2000.

The Regional Regulation Program establishment is compiled or proposed by a combination of opinions from executive bodies and legislative bodies. Executives bodies are regional apparatus, law bureaus, and regional agencies. Meanwhile, legislative bodies are commissions, joint commissions, factions, or board fittings. Those agencies discuss the establishment of a regional regulation program planning meeting. Regional offices of Ministry of Law and Human Rights drafter are invited to provide analysis of the extent to which the urgency of the title or proposal is feasible or not to be included.⁴⁴

2. Preparation

Preparation of Provincial Regulations Draft from the Provincial House of People's Representatives or Governor must be accompanied by an explanation and or academic draft of a bill.

Article 1 of Article 12 of the Law No. 12 of 2011 states that the academic draft of a bill is a text of research findings or legal studies and other research results on a particular problem that can be scientifically accountable for regulating the problem in a Legal Draft, Draft Provincial Regulation, or Draft Regulation Regency/City Region as a solution to the problems and legal needs of the community.

Harmonizing, rounding, and strengthening the draft conception of Provincial Regulations from the Governor are coordinated by the law firm

⁴⁴ Muh. Isnaini Raharjo, Prospective Designers of Laws and Regulations of the Yogyakarta Province law firm, as respondent.

and can involve vertical agencies from the ministry which organize government affairs in the legal sector, called the Ministry of Law and Human Rights.⁴⁵

The process of drafting local regulations is carried out by experts or academics whose duty is to review and submit proposals for draft regional regulations into academic draft of a bill. The role of the ministry of law and human rights regional office here is as a facilitator to provide input, discuss, improve, propose a work frame of reference, direct, and examine arguments, boundaries or other things that need to be investigated then submit it into the draft, as well as to watch over at the systematic rules of writing that refer to the Law.⁴⁶

3. Discussion

The discussion of the Regional Regulation Draft based on the Minister of Home Affairs regulation number 80 Year 2015 is carried out through two levels, namely:

- a. Level I discussion at commission meetings, joint commission meetings, Legislation Board meetings, Budget Board meetings, or Special Committee meetings.

The level I discussion begins with an introduction to deliberation, namely delivery related to the urgency of the regional draft bill. Then, a discussion of the problem inventory list is carried out. So that,

⁴⁵ The Law Number 12 Year 2011 Article 58 Paragraph (1)

⁴⁶ Muh. Isnaini Raharjo Prospective Designers of Laws and Regulations of the Yogyakarta Province law firm, as respondent.

Ministry of Law and Human Rights Regional Office can issue fatwas or studies reviewing the draft regulations in accordance with the rules. Ministry of Law and Human Rights Regional Office as a vertical agency is also a mediator between the executive and the legislative to eradicate the conflict of interest.

b. Level II discussion at plenary meetings.

Level II discussion is decision-making at plenary meetings with the schedule of reports' submission containing processes, opinions, and results of level I discussion, statements of approval or rejection in the meeting, and the last final opinion submission.

In addition to political bargaining, the formation of legislation is also inseparable from the role of legislators in the process of drafting a regulatory product. In its preparation, many local regulations are influenced by other interests which are certainly impartiality with the interests of the nation and it tends to be harm. Then, a legislation designer has a very important role in carrying out his functions and duties to formulate legal norms under a national legal system and paying attention to the development of the society.

The drafters of legislation are the front lines or architects of national legal development, especially in drafting or designing legislation. The competence of a designer of legislation can be seen from the ability in designing or formulating a social problem into a legal norm and firm legislation so that it can be easier to be understood by the users of legislation.

This kind of legislation can facilitate the implementation and application of the Laws and Regulations in the society.⁴⁷

In terms of establishing a statutory regulation, the drafters of legislation have a strategic role, and they are required to understand and carry out their roles well. Below are the Regional Office Designer's Roles in the overall stages of legislative formation, to:

1. Determine the choices desired by policy makers;
2. Formulate the substance consistently or obey the principle;
3. Formulate substances that do not cause interpretation (ambiguous);
4. Formulate substances that are fair, commensurate, or not discriminatory;
5. Ensure that regulations design can be carried out easily by the implementer;
6. Ensure that regulations design does not dispute the laws and regulations or violate the public interest;
7. Ensure that regulations are designed to solve problems faced by policy makers;
8. Be a mediator in resolving overlapping authority and arrangements in discussions at inter-departmental levels or between institutions; and
9. Negotiate or use psychological approaches to policy makers to achieve the desired goals.

⁴⁷ Arrista Trimaya, "Performance Parliament Legislation Function of 2009-2014", *Journal Legislasi Indonesai*, Volume 10 (3), 2013, September, Jakarta, p.250

Based on their duties and functions mentioned above, the drafters of legislation are expected to be able to minimize the cancellation of local regulations in the region and produce fair regional regulation, the certainty of usefulness that is acceptable and beneficial to the society. Therefore, the harmonization process is needed to realize adequate Regional Regulation. Harmonization is an effort to harmonize, adjust, strengthen and round up the conception of draft legislation with other laws and regulations, both higher, equal and lower, and other things besides legislation, so that they are arranged systematically, not conflicting or overlapping.

In Article 250 of the Law Number 23 Year 2014 concerning Regional Government, the Regional Regulation can be revoked through a judicial review mechanism if it is contrary to the provisions of the higher legislation, contrary to the public interest and or contrary to the decency. It is in contrary to the public interest if there is:

1. The interruption of harmony between community members
2. Disruption of access to public services
3. Disruption of peace and public order
4. Disruption of economic activities to improve community welfare; and/or
5. Discrimination against ethnicity, religion and beliefs, race, intergroup, and gender.

Related to many cancellations of Regional Regulations, the Minister of Law and Human Rights stated that the Regional Office of the Ministry of Law

and Human Rights is also responsible if there is a cancellation of the Regional Regulation in the region.⁴⁸ The statement can be understood if it is related to the main tasks and functions of regional offices in the field of legal development, but the responsibility referred by the Minister of Law and Human Rights is certainly not directly considered as the Regional Offices' responsibility for the cancellation of regional regulations, but they are morally responsible.⁴⁹

It is caused by the position of Regional Offices in the region which is indeed not part of the regional government, unlike the position of the Ministry of Law and Human Rights at the central government. At the central level, the Ministry of Law and Human Rights is indeed in charge to coordinate harmonization, round up and strengthen the conception of draft legislation coming from the President as stated in Article 47 of the Law Number 12 Year 2011. Regional Offices of the Ministry of Law and Human Rights in the region do not have this coordination function. The coordination function in the context of harmonization, rounding, and strengthening the conception of

⁴⁸ Fauzi Iswahyudi, "Keikutsertaan Perancang Perundang-Undangan dalam Pembentukan Peraturan Daerah", *De Legis Lata*, Volume 1 (1), January-Juni 2016, Regional Office of Ministry of Law and Human Rights in, North Sumatra, p. 99.

⁴⁹ Rudy Hendra Pakpahan, Pengawasan Peraturan Daerah Dikaitkan dengan Tugas dan Fungsi Kantor Wilayah Kementerian Hukum dan Hak Asasi Manusia, [https://www.academia.edu/4915699/Pengawasan Perda Dikaitkan Dengan Peran Kawil Kemenkumhan](https://www.academia.edu/4915699/Pengawasan_Perda_Dikaitkan_Dengan_Peran_Kawil_Kemenkumhan), accessed on 29 April.

Regional Regulation draft is carried out by the law bureau or legal department of the provincial, district or city Regional Government.⁵⁰

The role of the Regional Office Designer as referred to the Law number 12 of 2011 should be involved in each stage of drafting the draft regulation, but in the absence of mandatory instructions from the Law, it requires Regional Office Designers to actively participate in all stages of drafting the Regional Regulation. Regional Office Designers are only waiting for invitations from the Regional Government or Regional House of People's Representatives and seem passive when it is not invited to attend the drafting of the Regional Regulation meetings. The Regional Government and Regional Legislative also have no obligation to invite the Regional Office of the Ministry of Law and Human Rights.⁵¹

With the designer's involvement in each stage of laws and regulations drafting process, it can be seen that the role of the Designer of the Laws and Regulations (legislative drafter) is very strategic. The need for designer legislation is increasingly important to avoid problems which are commonly found in statutory regulation. These problems are the emergence of multiple interpretations of articles or paragraphs in law and regulation, no clear arrangements provided so that the community has different understandings,

⁵⁰ Reza Fikri Febriansyah, "Harmonisasi Peraturan Perundang-Undangan dalam Mendukung Pembangunan Nasional, Direktorat Hukum dan HAM" *Journal Legislasi Indonesia*, Volume 12 (5) 2015, Jakarta, p.192.

⁵¹ Chintya Insani Amelia, First Designer of Regional Office of Ministry of Law and Human Right, as respondent.

many types of overlapping laws and regulations, lower laws and regulations contrary to the higher, and existing regulations are difficult to implement in the field.

It can be analysed that the majority of Regional Office Designers have been optimally involved in the Regional Government or Regional House of People's Representatives at each stage of drafting the Regional Regulation. The results of the study show some facts obtained from the Regional Government or Regional House of People's Representatives as mentioned below.

First, Regional Government or Regional House of People's Representatives have already known the existence of the Regional Office Designers and actively invited and summoned designers from the regional offices to attend the meetings at each stage of the formation of regional regulations.

Second, Regional Government or Regional House of People's Representatives have already mastered the substance, techniques for designing, harmonizing and syncing the regulations that include adjusting legislation, government decisions, judges' decisions, legal systems and legal principles with the aim of increasing legal unity, legal certainty, justice and comparability, usefulness and legal clarity, participation of the Legislative Designer without blurring and sacrificing legal pluralism anytime they involve Regional Office Designers.

Third, the person who comes to the meeting is the same person from the first stage meeting to the last stage when Regional Office Designers are invited.

It means that the position of Regional Office Designers in showing the results (performance) of the activities carried out is already sufficient.⁵²In theory, the factors or indicators of knowledge and skills are adequate. This is in line with the opinion of Keith Davis as seen in Mangkunegara which explained that formulating the role is highly dependent on people's knowledge and abilities (ability = knowledge + skill). Psychologically, they are the ability of potential and reality capabilities. Consequently, people will certainly be needed by the Regional Government or Regional House of People's Representatives if both the ability of potential and reality capabilities above the average with adequate education or knowledge. In addition, the harmonization tendency carried out by the regional office which is technical means conducting a review of the draft Regional Regulation sent to the Regional Office. The reviewing related to the history of the Regional Regulation bill draft, starting from the titles and proposals of the Regional Work Unit, the research process, and the making process academic draft of the bill was already known and involved by the Regional Office Designers.

B. Obstacle Factors During the Regional Regulations Making Process in the Special Region of Yogyakarta

⁵² Lia Kusuma Handayani, Head of Subdivision of Assessment and Supervision of Legal Products of Yogyakarta Provincial House of People's Representatives as respondent.

Since the enactment of the Law Number 22 Year 1999 concerning Regional Government which was later replaced by the Law Number 32 of 2004, and finally amended again by the Law Number 12 of 2008, the system of government in Indonesia provides broad freedom for regions to organize regional autonomy. The definition of decentralization contained in the law mentions several important elements, namely the element of the surrender of authority both regulating authority, and managing authority. These two elements constitute the substance of regional autonomy.

The implementation of regional autonomy is emphasizing the importance of democratic principles, increasing community participation, and becoming equitable justice by considering the various aspects relating to the potential and diversity between regions. The implementation of regional autonomy is considered very important because the challenges of regional, national, and international development in various fields of economy, politics and culture increase continuously and require the implementation of regional autonomy which is wide, real and accountable to the regions proportionally.

The implementation of regional autonomy is realized by regulating, sharing, and utilizing the respective resources as well as the balance of the central and regional finances, in accordance with the principles of democracy, community participation, equity and justice, and the potential and diversity between regions. Nevertheless, the spirit of freedom contained in the concept of regional autonomy turned out to be deviated because of the political ego of

regional governments, for example by issuing policies that are contrary to the policies of the central government. Even though the Regional Regulation is one of the types of legislation under the Law, it should not in conflict with the higher level of regulations. Then the locally political ego between the Provincial Government and Provincial House of People's Representative make the process of Regional Regulation longer and dissolve.⁵³

According to the Minister of Law and Human Rights of Republic of Indonesia Regulation Number 28 of 2014 concerning Organization and Work Procedures of Regional Offices, Regional Offices have the task of carrying out the duties and functions of the Ministry of Law and Human Rights within the provincial area based on Ministerial policies and statutory provisions.

From the duties and functions of the Regional Office of the Ministry of Law and Human Rights, there are many issues that need to be coordinated and synergized with the Regional Government, especially tasks and functions which are not delegated to the regions, so that the objectives and functions can be achieved. For example, the function of regional legal products design facilitation which needs coordination. The word coordination itself is easy to say, but it is difficult to be implemented.

In drafting the Regional Regulation according to the Regional Government guided by the Minister of Home Affairs Regulation Number 15

⁵³ Muh. Isnaini Raharjo Prospective Designers of Laws and Regulations of the Yogyakarta Province law firm, as respondent.

of 2006 concerning the Types and Forms of Regional Legal Products and Ministry of Home Affairs Regulation Number 16 of 2006 concerning Procedures for Preparing Regional Legal Products, both Ministerial Regulations also are not explicitly mentioned about the role of the Regional Office of the Ministry of law and human rights.

In the provisions of the Law Number 10 of 2004 concerning the Establishment of Legislation, even there is no regulation related the involvement of vertical agencies, in this case, the Regional Office of the Ministry of Law and Human Rights in the process of drafting regional regulations. After the enactment of the Law Number 12 of 2011 concerning the Establishment of Legislation which is a substitute for the Law Number 10 of 2004, the role of Regional Offices has been formulated, although the nature is still limited and passively awaiting an invitation from the authorities in the formation of regional regulations. This is because of some provisions stating that harmonization, rounding and stabilization in the Regional Legislation Program can include vertical agencies. Actually, this provision is reflected in several provisions contained in the Act.⁵⁴

The role of the Regional Office of the Ministry of Law and Human Rights should be not limited into a passive role waiting to be included, but it has to broaden into active to be involved in regional regulations making

⁵⁴ The Law Number 12 Year 2011 Article 36 Paragraph (3) states: "The preparation of the Provincial Prolegda in the Provincial Government environment is coordinated by the law firm and can include related vertical agencies."

process directly.⁵⁵ This is important considering that the Regional Office of Law and Human Rights not only contributes substantially to regional regulations but also harmonizes with regulations legislation that has a higher hierarchy. So, inconsistencies between local regulations and other laws and regulations can be minimized.

As explained above, the role of the Ministry of Law and Human Rights are strongly needed to maintain regional regulation. The problem is the Ministry of Law and Human Rights infrequently promote their importance role in regional regulation-making the process. The consequence is there are some persons that do not concern enough to be involved in the Ministry of Law and Human Rights Regional Office in regional regulation-making the process.⁵⁶

Meanwhile, another factor that has become the obstacle in the regional making process is lack of maximizing function of the professional organization of legislative designers. The impact of long-vacuum profession organization of legislation designer can decrease the quality of legislation designer itself and there is no professional code of ethics that could maintain the independency in performing their profession.⁵⁷

⁵⁵ Chintya Insani Amelia, First Designer of Regional Office of Ministry of Law and Human Right, as respondent.

⁵⁶ Lia Kusuma Handayani, Head of Subdivision of Assessment and Supervision of Legal Products of Yogyakarta Provincial House of People's Representatives as respondent.

⁵⁷ Chintya Insani Amelia, First Designer of Regional Office of Ministry of Law and Human Right, as respondent.