



## Changes in norms create legal uncertainty in the formation of regional legal products

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### Abstract

Article 18 paragraph (6) of the 1945 Constitution which states that regional governments have the right to enact regional regulations and other regulations to implement regional autonomy and assistance duties apparently does not provide flexibility for regional governments to form legal products, due to guidance and supervision from the central government as a reflection of a unitary state that has ties between the central government and regional governments. Constitutional Court Decision Number 137/PUU-XIII/2015 and Constitutional Court Decision Number 56/PUU-XIV/2016 which revoked the repressive supervisory authority of the Minister of Home Affairs in the form of the right to cancel Regional Regulations require the central government to change its supervision method to preventive. Changes in norms based on changes in supervision policy through the Regulation of the Minister of Home Affairs Number 120 of 2018 concerning Amendments to the Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Formation of Regional Legal Products actually make the process of forming regional legal products ineffective and efficient. Meanwhile, laws and regulations require that the content of laws and regulations reflect legal certainty and the formation of effective and efficient regional legal products. This study aims to examine and analyze the implications of changing norms in the Minister of Home Affairs Regulation Number 120 of 2018 and the legal uncertainty it causes.

**Keywords:** Supervision, local law products, regional government, central government

### Introduction

Laws and regulations become an instrument inherent in the legal system in the Indonesian state. Laws and regulations as a written norm (law), in the context of the Indonesian legal state become the basis for state administration and as guidelines (Khudzaifah Dimiyati, 2015: 15) <sup>[12]</sup>. Problems will arise in state life if there is a law made only for the benefit of certain groups. So that the aspect of people's justice that should be the main goal of law formation is neglected. So that the laws made actually complicate people's lives or in relations between government institutions. In such conditions, the essence of the law itself certainly changes (Yogi Prasetyo, 2023: 29-43) <sup>[21]</sup>. As a result, the law will only be a tool to achieve interests, regardless of the purpose of the law itself, it can stigmatize government arbitrariness in policy making.

Relations between institutions which is one of the main fields of study of constitutional law that studies the relationship both vertically and horizontally, constitutional law is law related to state organizations where the object of regulation is the authority of state organs and the relationship between one state organ and another state organ (Aminuddin Ilmar, 2014: 31) <sup>[2]</sup>. So that relations between state institutions must also be regulated in a good legislation. One of the requirements of good legislation is the fulfillment of the purpose of law in it, it must be realized that law is formed because of considerations of justice (*gerechtigheit*) in addition to legal certainty (*rechtssicherheit*) and expediency (*zweckmassigkeit*) (Darji Darmodiharjo & Sidarta, 2006: 154) <sup>[7]</sup>. The three ideals of the law are an inseparable whole.

Law in the form of laws and regulations that do not have legal certainty cannot be used as a guide in solving various legal problems that should be their responsibility. Legal certainty can be realized through good and clear norms in a

law and its application will also be clear. In other words, legal certainty means the fitting of the law, its subject and object and the threat of punishment (Susanto, 2016: 20) <sup>[19]</sup>. One of the reasons for the implementation of regional government is because the central government cannot possibly know all the interests and needs of the scattered people, so only the local people know the needs, interests and problems faced, so there are a number of government affairs that are more efficient and successful if carried out by the regions (Husni Jalil, 2008: 18-19) <sup>[10]</sup>. Therefore, in running the government, of course, local governments have their own laws and regulations, where their authority has been regulated in Article 18 paragraph (6) of the Indonesian Constitution.

The Minister of Home Affairs based on the authority obtained from Law Number 23 of 2014 to conduct guidance and supervision of regional legal products, and in accordance with his duties and functions to carry out policy formulation, policy implementation, general guidance, provision of technical guidance and supervision, implementation of monitoring, evaluation, and reporting in the field of regional legal products as stipulated in Presidential Regulation Number 11 of 2015. Therefore, the Minister of Home Affairs issued Regulation of the Minister of Home Affairs Number 80 of 2015 concerning the Formation of Regional Legal Products which contains technical arrangements related to procedures for the formation of regional legal products as well as guidance and supervision mechanisms.

One of the things regulated in the Minister of Home Affairs Regulation Number 80 of 2015 is regarding the facilitation of regional legal products. Facilitation is a coaching action in the form of providing technical guidelines and instructions, directions, technical guidance, supervision, assistance and cooperation as well as monitoring and

evaluation carried out by the Minister of Home Affairs to provinces and the Minister of Home Affairs and / or governors to districts / cities on the content of draft regional legal products in the form of regulations before they are determined to avoid cancellation.

Constitutional Court Decision Number 137/PUU-XIII/2015 and Constitutional Court Decision Number 56/PUU-XIV/2016 stated that the cancellation of Regional Regulations by governors or ministers was contrary to the 1945 Constitution, and the justified cancellation mechanism was through judicial review by the Supreme Court. Prior to the Constitutional Court Decision, the central government could cancel Regional Regulations and Regional Head Regulations through *executive review*, *executive review* is the authority of the upper Government (Central to Province represented by the Home Minister and Province to Regency/City represented by the Governor) in examining laws and regulations, especially at the regional level. Legal developments that occur in the end make the *executive review* method considered inappropriate and must be implemented through the *judicial review* method. Because indeed in this case the executive seems to go too deep into the judicial realm.

The implication of the Constitutional Court Decision is the change in supervision policy on regional legal products that were previously repressive with the *executive review* method to shift to a preventive approach, the Central Government based on the remaining authority it has must be able to ensure the conformity of the draft Regional Regulation material before the Regional Regulation is determined and promulgated, the supervision mechanism is also called *Executive preview*.

The impact of the policy change is that the Minister of Home Affairs also made changes to norms in the Minister of Home Affairs Regulation Number 80 of 2015 with Minister of Home Affairs Regulation Number 120 of 2018. One of the striking changes is the removal of provisions in Article 89 paragraph (2) of the Minister of Home Affairs Regulation Number 80 of 2015 which states that if after the deadline of 15 days exceeded the results of facilitation have not been obtained, then the process of forming regional legal products can proceed to the next stage. Where the draft regional regulation is continued with the stage of mutual agreement between the regional head and the Regional People's Representative Council (DPRD) and the draft regional head regulation, the draft DPRD regulation is continued with the determination stage into a regional head regulation or DPRD regulation.

Such normative construction becomes awkward and full of uncertainty, because the provisions in Article 89 paragraph (1) which provides a time limit for the implementation of facilitation for 15 days regulated by the previous Minister of Home Affairs Regulation were not changed in the Minister of Home Affairs Regulation Number 120 of 2018, so it becomes a question for what time limit is set if there are no implications after the time limit is passed. This vagueness is very contrary to the diction used in consideration considering letter a of the Minister of Home Affairs Regulation Number 120 of 2018 which states its purpose to ensure legal certainty for the formation of regional legal products. Given that Minister of Home Affairs Regulation Number 80 of 2015 as amended by Minister of Home Affairs Regulation Number 120 of 2018 is one of the guidelines in the formation of legal products in the regions,

it should not have any loopholes for criticism and must be able to provide solutions to the dynamics in the formation of regional legal products.

The vagueness of the formulation that results in uncertainty certainly causes problems for Regional Governments, so it deserves further research to prove the loss of legal certainty aspects as an implication of changing norms in the Minister of Home Affairs Regulation Number 120 of 2018. Because although the law has the purpose of creating justice, it can also cause what is called legal chaos (Ahmad Ali, 2009:4) <sup>[1]</sup>.

The objectives of this study are to know how the concept of supervision of regional legal products, knowing the implications born as a result of changes in norms in the Minister of Home Affairs Regulation Number 120 of 2018, and knowing whether changes in norms in the Minister of Home Affairs Regulation Number 120 of 2018 cause legal uncertainty in the formation of regional legal products.

## Research Methods

The types of Research used in This research is normative law, namely research carried out by reviewing literature materials or secondary data as basic material in researching traceably on regulations and literature related to problems (Soerjono Soekanto & Sri Mamudji, 2006: 13-14) <sup>[18]</sup>.

The Research Approach used in this study is a historical approach, this approach aims to find legal rules from time to time in order to understand the philosophy of these legal rules and study the development of these legal rules (Khusbul Vibhute & Filipos Aynalem, 2009: 32) <sup>[13]</sup>, based on the order of periodization or history behind it. Then a statutory approach was used. This approach is carried out by examining laws and regulations related to or related to the problem at hand and finally used also the Conceptual approach, this approach departs from the views and doctrines that develop in legal science.

This research uses *qualitative* analysis, namely understanding data by collecting, filtering, analyzing and concluding data obtained during research systematically.

## Results and Discussion

### The Concept of Supervision of Regional Legal Products.

C.F. Strong stated that the essence of a unitary state is its inseparable sovereignty, or in other words the undivided power of the central government (C.F Strong, 1958:80) <sup>[5]</sup>. Because the authority of autonomous regions to regulate and manage their own lives is an organic part of the Unitary State of the Republic of Indonesia. The autonomous regions are *zelfstansing* (independent), but not *onfhankelijk* (independent) (Dasril Radjab, 2005: 121) <sup>[8]</sup>.

Supervision of local legal products may be important in a unitary state. Supervision is needed to maintain the freedom possessed by local governments so that the pendulum of autonomy does not move far beyond the circulation line so that it can threaten the *unitary order* in state management. Therefore, the authority to form regional regulations must still be in accordance with the role of local governments in the context of a unitary state, so that their implementation is limited by the power of the central government. However, this concept often causes problems in the relationship between the Central Government and Regional Government (Fajri Nursyamsi, 2015: 523) <sup>[9]</sup>. However, no matter how much autonomy is given to the Regions, the final responsibility for the implementation of Regional

Government will remain in the hands of the Central Government (Riski, 2020: 129) <sup>[16]</sup>.

Regarding supervision of regional legal products, the regulation is contained in Law Number 23 of 2014 concerning Regional Government. Unlike Law Number 12 of 2011 concerning the Establishment of Laws and Regulations which focuses more on the procedures for formation, Law Number 23 of 2014 prioritizes guidance and supervision of regional legal products. Article 8 of Law Number 23 of 2014 states that guidance and supervision by the Central Government on the implementation of Government Affairs by provincial regions is carried out by ministers/heads of non-ministerial government institutions. Guidance and supervision by the Central Government on the implementation of Government Affairs by districts/cities are carried out by the governor as a representative of the Central Government. And guidance and supervision nationally are coordinated by the Minister of Home Affairs.

Then in Government Regulation Number 12 of 2017 concerning Development and Supervision of Regional Government Administration, supervision of Regional Government Implementation which includes the formation of regional legal products is defined as businesses, actions, and activities aimed at ensuring the implementation of Regional Government runs efficiently and effectively in accordance with the provisions of laws and regulations. The supervision of regional legal products is carried out by a layered method. Where the draft Regional Regulations, Regional Head Regulations, and/or DPRD Regulations are evaluated or facilitated. Especially for the draft Regional Regulation, it is also added with the stage of applying for a Regional Regulation register number. Where in accordance with the provisions in Law Number 23 of 2014, Regional Regulations that have not received a register number cannot be determined and promulgated in the Regional Gazette.

Regarding the implementation of facilitation of regional legal products, Government Regulation Number 12 of 2017 also states that facilitation is carried out efficiently and effectively to increase regional capacity in the implementation of regional government. Efficient is an effort that requires the completion of work on time, quickly, and satisfactorily, without incurring excessive costs or resources, while effective means there is an effect. So the Central Government should be consistent with the regulations that have been formed.

### **Implications Born as a Result of Changes in Norms in Minister of Home Affairs Regulation Number 120 of 2018.**

After the change in norms in the Minister of Home Affairs Regulation Number 120 of 2018, the formation of regional legal products is fraught with uncertainty, because local governments cannot apply for Regional Regulation register numbers before obtaining facilitation results, where facilitation results can be obtained in a short time, but not infrequently facilitation results can only be received long after the facilitation implementation deadline is exceeded. Likewise with Regional Head Regulations and DPRD Regulations, considering that the repressive approach with *the executive review method* can still be applied to regional legal products other than Regional Regulations, because the Constitutional Court Decision only revokes the authority of the Minister of Home Affairs and the Governor to cancel Regional Regulations, then the Government Regions must

also implement and wait for the results of facilitation to avoid cancellation after the regional head regulation or DPRD Regulation is determined, in addition to changes in norms in the Minister of Home Affairs Regulation Number 120 of 2018 stating that the implementation of facilitation of regional legal products other than regional regulations is also mandatory. It becomes a little problematic considering the Regional Head Regulation and DPRD Regulation which in Article 8 of Law Number 12 of 2011 is stated to be recognized for its existence and has binding legal force as long as it is ordered by higher laws and regulations or formed based on authority. In this case, the status becomes the same as the Ministerial Regulation, but why can the examination of regional head regulations be carried out with *an executive review* mechanism while ministerial regulations are tested by *judicial review* by the Supreme Court. Because regional legal products are a reflection of the authority of regional heads which certainly have a negative impact on public assessment and trust in the government if the policies that have been issued are then canceled again by the higher government.

Based on an interview with Syarifah Masyithah who is the head of the district / city legal development and supervision section at the Aceh provincial law bureau. Referring to the Minister of Home Affairs Regulation Number 80 of 2015, if the governor through the law bureau cannot complete the facilitation within 15 days, the district/city government can proceed with submitting the application for a register number, and the provincial government must also provide the submitted register number. Unlike the case after the issuance of Minister of Home Affairs Regulation Number 120 of 2018, the Regency / City government must wait for the results of the facilitation to apply for a register number, because the results of the facilitation are a requirement for submitting an application for a register number. The same applies between the Aceh provincial government itself and the ministry of home affairs.

Furthermore, Muhammad Milsa, head of the legal section of the regional secretariat of Aceh Jaya Regency, in an interview with the author revealed that the formation of regional legal products is often constrained by a facilitation process that is too long, sometimes it becomes dilemmatic when a draft regional legal product has a high level of urgency. Moreover, during the leadership of non-definitive regional heads who require permission for discussion and signing, it is difficult to predict when a regional legal product can be determined.

The central government's preventive policy as outlined in the Minister of Home Affairs Regulation Number 120 of 2018 although often criticized, as long as it does not conflict with higher laws and regulations as well as legal principles, it cannot be blamed. However, one of the changes in norms in the Regulation of the Minister of Home Affairs Number 120 of 2018, namely the elimination of provisions in Article 89 paragraph (2) of the Regulation of the Minister of Home Affairs Number 80 of 2015, greatly creates legal uncertainty in its implementation, in addition to changes in other norms that actually hinder the implementation of regional government.

Keep in mind that the right in the form of authority to do something is also accompanied by obligations, because authority is different from power, as Bagir Manan stated that power only describes the right to do or not to do, while authority at the same time means rights and obligations

(Ridwan H.R, 2013: 71) <sup>[15]</sup>. The authority in essence is to limit so that the State administrator in carrying out the government can be limited in its authority so that it does not apply arbitrarily. The mistake that often occurs by authority holders is to only prioritize the rights obtained but override the obligations that accompany them.

### Legal uncertainty in the formation of regional legal products.

One of the important elements of the rule of law proposed by Scheltema is the principle of legal certainty. The law aims to bring certainty in human relations i.e. ensure predictability and also aims to prevent that the strongest rights from applying (Tjandra W. Riawan, 2008: 15) <sup>[20]</sup>. In addition, legal certainty is important to avoid the emergence of absolutism practices in the administration of government (Ayu Putriyanti, 2015: 183) <sup>[4]</sup>.

Legal certainty is one of the purposes of the law itself (C.S.T Kansil, 1989: 205) <sup>[6]</sup>, as the legal adagium is mentioned *Ubi jus incertum, ibi jus nullum* which means where there is no legal certainty, there is no law. Where in legal certainty contains the meaning of a state's legal apparatus that is able to guarantee the rights and obligations of every citizen. In the case of the formation of regional legal products, the statement also means that local governments in forming their legal products in addition to having the obligation to obtain guidance and supervision from the central government, local governments also have the right to form regional legal products as stipulated in Article 18 paragraph (6) of the Indonesian constitution, the right to form these legal products is also of course followed by the right to obtain an effective and efficient process in formation of regional legal products.

Based on the new norm, it can be seen that the Minister of Home Affairs based on his authority still wants to conduct comprehensive supervision of the draft regional legal products even though the specified deadline has been exceeded. Then changes were also made by refining the provisions in Article 101 of the Minister of Home Affairs Regulation Number 80 of 2015 which only mentions the provision of register numbers for Regional Regulations that are evaluated, but in the Minister of Home Affairs Regulation Number 120 of 2018 it is refined by also adding the obligation to submit register numbers for facilitated Regional Regulations, as it is known that the provision of register numbers is the last form of supervision to a draft Regional Regulation before it is enacted and promulgated.

Legal uncertainty in the process of forming regional legal products can be indicated by the inability to estimate the time needed to form a legal product, as explained earlier, Scheltema stated that legal certainty aims to ensure predictability which means everything can be predicted. In addition, one of the fundamental things of legal certainty as expressed by Gustav Radburch is that a norm must be formulated in a clear way so as to avoid errors in meaning, in addition to being easy to implement (Satjipto Rahardjo, 2012: 19) <sup>[17]</sup>. This statement means that the vagueness of a norm will affect its implementation, so that clarity of formulation is made fundamental to legal certainty. The same thing was also expressed by Jan M. Otto who requires legal certainty with the availability of clear or clean and consistent legal rules (Arief Sidharta, 2006: 85) <sup>[3]</sup>.

Then based on the triangle theory proposed by Robert B. Seidmann explained that lawmakers, implementers, and

those affected by regulations, have a close relationship like a triangle. So that in formulating regulations, it is certainly influenced by feedback from implementing agencies and affected parties (Marhaendra Wija Atmaja, 2016: 10) <sup>[14]</sup>. In this case, the formation of good laws and regulations should not only accommodate the interests of the regulators.

Law Number 30 of 2014 concerning Government Administration states that every decision and/or action must be based on the provisions of laws and regulations and the General principles of Good Government. Where the general principle that includes among them is legal certainty. Likewise, the regulation in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations also states that the content of laws and regulations must reflect the principle of legal certainty. In addition, Article 28D paragraph (1) of the 1945 Constitution states that everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law.

So it would be wiser if the Minister of Home Affairs reformulates his preventive supervision policy in the form of facilitation of regional legal products by changing the current norms by providing legal certainty in the formation of regional legal products. Jimly Ashiddiqie argues that in order to reform towards the realization of state ideals that are paradigm or legal insight, the law and the legal system itself also need to be reformed first. It was simultaneously followed by political reforms, economic reforms, and socio-cultural reforms. In reality, it is legal reform that is instrumental in the realization of the idea of political, social, and economic reform (Kamaruddin Jafar, 2019: 33) <sup>[11]</sup>.

### Conclusion

Supervision of the formation of regional legal products is indeed needed to maintain harmony and synchronization of policies of the Central Government with Regional Governments, as a reflection of a unitary State. On the side to avoid disruption of public interest or conflict with higher laws and regulations.

Changes in supervision policy followed by changes in norms through Minister of Home Affairs Regulation Number 120 of 2018 which prioritizes a preventive approach in supervising regional legal products as a result of Constitutional Court Decision Number 137/PUU-XIII/2015 and Constitutional Court Decision Number 56/PUU-XIV/2016 which revoked the repressive supervisory authority of the Minister of Home Affairs in the form of the right to cancel Regional Regulations, The *judicial review* mechanism is certainly not as simple as *the executive review* mechanism that can cancel Regional Regulations only by issuing a decree of the Minister of Home Affairs for Provincial Regional Regulations or a Governor's Decree for District/City Regional Regulations. However, the change in norms actually creates legal uncertainty in the formation of regional legal products, especially with the elimination of provisions in Article 89 paragraph (2) of the Minister of Home Affairs Regulation Number 80 of 2015, which causes the predictability of the time needed to form regional legal products to be uncertain.

Legal uncertainty in the Minister of Home Affairs Regulation Number 120 of 2018 in addition to harming local governments, also contradicts the principles and objectives of law, legal theories, and laws and regulations. In its efforts to maximize supervision of regional legal products, the central government should consider the

interests of local governments, because laws and regulations also require the formation of regional legal products to be carried out effectively and efficiently.

Minister of Home Affairs Regulation Number 120 of 2018 should be refined again to provide legal certainty and guarantee predictability in the formation of regional products, for reform towards the realization of state ideals that are paradigm or legal insight.

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