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ARRANGEMENT OF REGIONAL REGULATION CONTENT MATERIAL AS THE NATIONAL LEGAL SUB-SYSTEM

Jalaluddin M. Isa

Tadulako University
JL. Soekarno Hatta KM. 9, Bumi Tadulako Tondo, Palu, Central Sulawesi, 94111, Indonesia
Telp./Fax: +62-821-90510655 Email: jalaluddin.isa1959@gmail.com

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Abstract

Arrangement of the content material of regional regulation as part of the legislations sub-system adjustment in Indonesia must be directed in tone with the direction of national law development. In accordance with the National Long-Term Development Plan (RPJPN, 2005-2025), the development of national law is directed at the realization of a solid national legal system based on the Pancasila and the 1945 Constitution of the Republic of Indonesia which includes the development of legal material, legal structures, legal culture legal apparatus, legal facilities and infrastructure that can guarantee order, legal certainty, justice, truth and protection of human rights. The discussion in this article aims to raise a number of important relevant issues to be used as material for evaluation in structuring the content of the regional regulations as a sub-system of national law. The research method used in this study is legal research using a legislative approach and a conceptual approach. It is concluded that the regulation of the content material of the regional regulation as a sub-system of national law is not only placed in the legal sense as a mere system of order, thus creating a relationship of tension between the central government and the regional government, it but must be placed in a legal sense as a fluid relationship so that the determination of the content of the regional regulation is also fluid, for the good of the community and the government as a whole.

Keywords: *Arrangement; Development of National Legal System; Material Content of Regional Regulation*

INTRODUCTION

Since the Reform Era, the demand for improvement of the national legal system has continued to move, in the context of presenting and building a country that makes the people happy[1]. Especially now, we are faced with a situation wherein carrying out local autonomy and co-administration tasks, the local government is increasingly creative in making regional regulations (hereinafter called Perda). On

[1] Enny Nurbaningsih. (2015). *Arah Pembangunan Hukum Nasional yang Mengharmoniskan Tuntutan Global dan Nilai-Nilai Kebangsaan Indonesia.* Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, Paper presented at DIKLAT Lemhanas, Tuesday, 23 June 2015, p. 3.

the other hand, we are confronting the problem of the many Perda being canceled by the central government because they are considered to be contrary to higher laws and public interests. The Head of BPHN, Enny Nurbaningsih emphasized that legal development can be achieved if all the scope associated with it can function as a means to renew society (social engineering). However, social engineering needs to be supported by in-depth studies of the laws that live in the community (Living Law) and the level of community readiness in addressing the updates that will be made accordingly.

If we are consistent with the direction of national law development, then the regulation of Perda as a national legal subsystem will include the arrangement of legal material, legal structures, legal culture that can guarantee order, legal certainty, justice and truth for society, the business world, and in the administration of government and in facing the global world development, especially in the face of the Asean Economic Community (AEC) free market enactment. Perda is not only considering as national elements but also must have an eye for globalization with regard to the world of business and investment.

After more than a decade of reform took place (1998-2015) the spirit of carrying out legal reforms had not fulfilled the demands of ever-expanding justice. All aspects of the legal system, both material aspects, and legal substance, for example, the synchronization and consistency of legal norms, both vertically and horizontally, integrity and professionalism of law enforcers and the legal culture of society, are still far from expectations[2].

Moreover, related to the development of legal material for Perda in realizing the development of the national legal system, on one hand, we are faced with the problem of overlapping, inconsistency, and multiple interpretations issues. On the other hand, the local government is increasingly creative in establishing Perda in order to carry out local autonomy. In connection with the development of legal structures which closely related to the regulation of the Perda, we are faced with the problem of institutions authorized to supervise Perda on the hand of the Supreme Court of the Republic of Indonesia (judicial review) and on the central executive government (executive review). Furthermore, from the aspect of the development of legal culture in relation to the ar-

[2] Hamdan Zoelva. (2015); "Prospek Negara Hukum Indonesia: Gagasan dan Realita (*Prospects of the Constitutional State of Indonesia: Ideas and Reality*)" *Jurnal Hasanuddin Law Review*, 1 (2): 178-193.

rangement of the Perda, it is faced with the problem of the culture of the local government which tends to make the Perda as an instrument to increase locally-generated revenues. This is felt to be very burdensome for the business world and can lead to legal uncertainty for the community, especially in supporting a conducive business climate in facing the imposition of a free market for the ASEAN Economic Community (AEC). This issue must be addressed immediately if we want to become the householder in our own country.

Throughout 2016, the government has canceled 3.143 problematic Perda. Thousands of Perda are considered full of issues and hamper national capacity, obstructing the competition and on the contrary to the spirit of diversity and unity[3]. The Central Government should not be able to simply cancel the Perda, especially when the Perda was made to implement local autonomy which contained many elements of local content material. Because the substance of local autonomy is the local independence in managing its own potential to accelerate the realization of community welfare. However, on the contrary, the central government has the right and obligation to ensure that the Perda made by the local government does not hamper national economic growth. So there is a force of attraction between the central and local governments that have estuaries for the same purpose, which is the achievement of people's welfare.

In this case, the government (Joko Widodo-President of the Republic of Indonesia) revealed that there were four criteria for the Perda that were canceled. First, Perda that hampered local economic growth by extended the bureaucratic path; second, Perda that impede licensing and investment; third, Perda that hinder the ease of doing business; fourth, Perda that are contrary to higher laws and regulations[4]. These four criteria used by the central government in canceling Perda are highly related to the content material issues of the Perda itself, so that without reducing the importance of the discussion of institutional arrangement and legal culture for the establishment of Perda, the focus of this paper is aimed at discussing the regulation on the material content of the Perda.

The choice of focus on this paper is made (besides considering the criteria put forward by the government mentioned

[3] Nancy Junita and Edi Suwiknyo. (2017). Available from: http://kabar24.bisnis.com/read/20170406/16/643053/pemerintah-tak-bisa-batalkan-perda-bagaimana-3.143-perda-yang-dibatalkan. [Accessed September 30, 2017].

[4] *Ibid.*

above) in accordance with the results of the abstraction of the provisions of Article 18 of the 1945 Constitution of the Republic of Indonesia which stated:

(1) The Unitary State of the Republic of Indonesia is divided into provincial regions and those provincial regions are divided into regencies (*kabupaten*) and municipalities (*kota*), whereby every one of those provinces, regencies, and municipalities has its regional government, which shall be regulated by laws.
(2) The regional governments of the province, the regency, and the municipality shall regulate, and manage their own government affairs according to the principles of autonomy, and duty of assistance.
(3) The regional governments exercise the widest autonomy, save to government affairs determined by law as the affairs of the Central Government.
(4) The regional governments are entitled to determine regional regulations and other regulations for the execution of the autonomy and the duty of assistance.

Then the provisions of Article 236 of Act Number 23 of 2014 concerning Regional Government, as the implementation of Article 18 of the 1945 Constitution of the Republic of Indonesia, that (1) To carry out regional autonomy and duty of assistance, regional government form Perda; (2) Perda as referred to in Paragraph (1) is formed by the Regional People's Representatives Council (DPRD) with the agreement of the Regional Head; Paragraph (3) The Perda as referred to in Paragraph (1) contains load material:

a. Implementation of regional autonomy and duty of assistance; and
b. Further elaboration of the provisions of higher laws and legislation.

Furthermore, in the provisions of Paragraph (4), this Act determines that in addition to the content material as referred to in Paragraph (3) the Perda may contain local content material in accordance with the provisions of the legislation.

Article 237 of this Act stipulates that (1) The principle of formation and content of Perda are guided by the provisions of legislation and legal principles that grow and develop in the community insofar as they do not conflict with the principles of the Unitary State of the Republic of Indonesia.

Based on the aforementioned provisions, it is illustrated that the arrangement of the content of Perda in Indonesia will be related to the issue of Perda as a sub-

national legal system, implementation of regional autonomy, implementation of duty of assistance, entry of local wisdom as content material for Perda and application of content material principles of regulations and legislation.

Theoretically, legal order will meet legal irregularities, and vice versa, meaning that there are dynamics in the development of law. Therefore, to discuss these legal issues, aside from departing out of legal theories as a system of order, it will also be seen from the aspects of Chaos Theory from law perspective which are considered capable of describing the legal irregularities[5].

The essence of Chaos Theory is (1) social relations, including legal relations formed based on power relations, (2) those who make the relation does not have the same or equal strength, and (3) at the time of the implementation of each relation base on their opinions subjectively. Those three things that cause chaos.

However, the chaotic atmosphere will eventually return to order because of strange attractors which in the legal dimension are law and state power. Chaos basically exists in freedom-based relationships that cross the boundaries of order. If the attracting power succeeds in restoring the chaos so that harmony between order and freedom is created, peace is achieved which is the goal of the law[6]. The phenomenon of the cancellation of the Perda shows that there is a dynamic in the law from idealized order which creates disorder and eventually returns to order for the principles of the content material of the laws and regulations.

This paper is not intended to thoroughly and comprehensively examine from all aspects of the changes in the legal system. But at least it can offer a framework that aims to raise a number of important relevant issues to be used as material for evaluation in structuring the content of the Perda as a sub-system of national law. The discussion of the legal structure and legal culture related to the supervision and establishment of the Perda will be discussed together even though it is in a limited portion with a discussion on the arrangement of the contents material of the Perda.

Methods

The research method used in this study is legal research using a legislative approach and a conceptual approach. Sources of legal material include primary

[5] Amir Syarifudin and Indah Febriani. (2015). "Sistem Hukum dan Teori Hukum Chaos (Legal System and Chaos Theory)" *Jurnal Hasanuddin Law Review*, 1 (2): 296-306.

[6] *Ibid.*

legal material and secondary legal material. The source of primary legal material was taken from the search for official government documents in the form of laws, regulations, and legislation, also monograph of the session on the discussion of legislation. Sources of secondary material in the form of all publications about the law relating to the object of this research, including textbooks, legal dictionaries, legal journals and comments on the cancellation of Perda carried out by the central government. The analysis technique used is a systematic interpretation by abstracting or concretizing the content of Perda as national legal subsystem to find a relatively renewable concept in structuring legal regulations in Indonesia.

ANALYSIS AND DISCUSSION

The Arrangement of Content Material of Perda as National Legal Sub-System

The country of Indonesia is a constitutional democratic law state. Consequently, in arranging Perda as national legal sub-system other than paying attention to the principles of the rule of law and democracy, the state also must pay attention to the structure and form of the state in accordance with the 1945 Constitution of the Republic of Indonesia. Therefore, in arranging the contents of the Perda, we must pay attention carefully to the provisions of Article 1 in the 1945 Constitution of the Republic of Indonesia which stated: (1) the State of Indonesia is a Unitary State in the form of a Republic; (2) Sovereignty shall be vested in the hands of the people and be executed according to the Constitution. (3) The State of Indonesia is a state based on law. This provision showed the structure and form of the state, principles of democracy and the state of the law in Indonesia can be used as a framework for structuring the content of Perda as a national legal sub-system.

The composition and shape of the country of Indonesia is a unitary state, in the form of a republic. In a unitary state in the form of a republic it is not known to have a state within the state, but there are local government units within the state in the form of de-concentration and decentralization. The phrase "republic" implies that public interest is held in the form of de-concentration and decentralization.

In line with the provisions of Article 18 of the 1945 Constitution of the Republic of Indonesia mentioned above, Hans Kelsen stated that the state is a legal building[7], so when we make the regulations and

[7] Satjipto Rahardjo. (2009). "*Negara Hukum Yang membahagiakan Rakyatnya*, Cetakan II". Yogyakarta: Genta Publishing, p. 6.

legislation, it must be in accordance with the construction or state structure and the form of state that we adopt. In the concept of a unitary state, which is in the form of a republic such as the State of Indonesia, in addition to the central government that can make legal regulations, the regional governments (provinces, regencies/municipalities) also can make Perda as a national legal sub-system. In the position of Perda as a national legal subsystem, the content of Perda cannot be contrary to regulations made by the central government. In a unitary state in the form of a republic, the legal building is a unitary system called the national legal system.

To further explain the Perda as a national legal sub-system, the System Theory is used which sees the law as a system of order. The System Theory born from the post-Cartesian science method denotes a history of human intellectual exploration in finding the most appropriate way to learn a complex entity (or system) is an organic method which is later better known as a systematic methodology[8]. In ancient Roman times, Menenius Agrippa had used this method to explain the nature of the state. He argues that the state as a living entity, as an entire whole, and as a unity composed of various inseparable parts[9]. Therefore, all legal products produced by formal legal sources (made by the state-legislation) are all a system[10].

According to Lily Rasjidi, one of the main reasons for the presence of this approach (system approach) is to always consider the factors of an object's internal and external relations. Law as a complex entity or system must be seen as wholeness and a whole intact, as a unit composed of various inseparable parts that form a system (elements as parts of the others). This approach allows legal problems not only seen internally (normatively) but externally which allows the presence of theoretical legal science such as legal history, legal sociology, political law, and legal philosophy to contribute justification for normative premises.

The product of legal provisions produced by formal legal sources is a whole system[11]. If we are consistent with such understanding, then the legal regulations do not stand alone but related to each other, even those rules in all societies are legal system altogether, a system that is the basis of every logical relation of its parts.

According to Bellefroid, the legal system is a series of unified legal regula-

[8] Lily Rasjidi. (2003). "*Hukum Sebagai Suatu Sistem"*. Bandung: Mandar Maju, p. 1-5.

[9] *Ibid*.

[10] Abdul Latif. (2010). "*Politik Hukum"*. Jakarta: Sinar Grafika, p. 42.

[11] *Ibid*.

tions arranged in an orderly manner according to its principles[12]. Legal definitions are elements of legal regulations, so these legal regulations are elements of the legal system. All legal regulations in a state can be seen as a legal system.

Speaking of the legal system in relation to the Indonesia national legal system, of course, it is intended to be a positive Indonesian legal system, a legal system that applies in Indonesia. The system as previously stated is generally interpreted as a unit consisting of elements that are related to each other and affect each other as a whole and meaningful being[13]. Basically, a legal system is a formal structure[14] of applicable legal principles and the underlying principles which in turn are based on the 1945 Constitution of the Republic of Indonesia and inspired by the Pancasila.

The aforementioned limits or definitions reflect a formal structure of applicable law in Indonesia along with the structural foundation and philosophy that make it a positive legal system that applies in Indonesia. Thus it can be said that the notion of the legal system includes both the formal structure and the contents. Based on this understanding, the Indonesia state's written legal system covers all types and hierarchies of laws and legislation in Indonesia, as stipulated in Article 7 Paragraph (1) of Act Number 12 of 2011 concerning the Formation of Legislation consisting of:

a. The 1945 Constitution of the Republic of Indonesia;
b. Decree of the People's Consultative Assembly;
c. Legislations/Government Regulation In Lieu Of Law;
d. Government regulations;
e. Presidential decree;
f. Provincial Regulation; and
g. Regency/Municipality Regulation.

Then in Paragraph (2) of this Act determines that the legal force of the legislation and regulations is in accordance with the hierarchy as referred to in Paragraph (1). Thus, to make arrangements for the content material of the Perda as a national legal sub-system, the first step that must be taken is to systematize the law (juridical construction) on the legal system in Indonesia. Systematization of law (juridical construction) is a science that describes the contents of the current law that explains the definitions of legal regulations and which regulates/construct legal

[12] Surojo Wignjodipuro. (1985). "*Pengantar Ilmu Hukum: Himpunan Kuliah"*. Jakarta: Gunung Agung, p. 78.
[13] Mochtar Kusumaatmadja dan B. Arief Sidarta. (2000). "*Pengantar Ilmu Hukum: Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum*, Buku I". Bandung: Alumni, p. 121-133.
[14] *Ibid*.

regulations according to its principles in a legal system.

How is legal systematization done? The systematization of law is carried out by -first and foremost- processing, enhancing and upgrading specific legal regulations or legal regulations from lower levels (i.e. Perda) to a higher level or more general in nature of legal regulations, which then if possible, is improved again to become higher or more general. In this way, finally, legal regulation is found which has more power so that it can also cover other matters than those listed in the legal regulations of a low or special level which are processed and enhanced again. How to attract special or low-level legal regulations into a higher-level regulation or more commonly are called juridical construction.

Regulations that are of a higher level or of a more general nature (i.e. the 1945 Constitution of the Republic of Indonesia) are essentially the legal basis of a specific of lower-lever of legal regulations. By withdrawing specific legal regulations to a higher level, so that they are transformed into general legal regulations, the number of legal regulations becomes smaller to a certain amount than the main legal rules (*hoofdregels*) that can't be improved or enhanced anymore.

The basic legal regulations (*hoofdregels*) that are no longer possible to improve or enhance are the legal principles. Above these legal principles, there are no more legal regulations as a form of the foundation of these legal principles, moreover, these legal principles are the basis of various legal regulations of the lower levels.

The legal principle is non-eternal because the principle of this law is found and concluded (directly or indirectly) from the legal regulations in force at that time, which essentially contain/comprise elements rather than the legal principles in question. The legal regulations themselves are not permanent, but always follow changes in the development of the sense of justice that live in the society, so then the legal principles that originate from them are also non-permanent.

In the case of exceptions, viz. regarding the principles of law which also constitute the principles of decency, the principles by which their power does not recognize the deadline or territorial boundaries. These principles, besides being the basis of legal justice (*recht vaardigheid*), is also a connection (*schakel*) between law and moral or in other words, are channels for morals to enter the law.

Legal principles have a very important role in the formation of law because it provides guidance to lawmakers in establishing the law. But in stipulating legal regulations, legal principles are not the only factor to be considered, the more determining factor is the real need in an orderly society. This obvious need is not fixed, but follows the development of the community's life itself, also depending on the time and place of the country concerned.

Hans Kelsen sees the legal system as a pyramid structure. The basis of his theory is the validity and legality (*legaliteit*) proposition of something that principles/rules lie in higher principles/rules[15]. Hans Kelsen as the main character of legal positivism views the law as a mere order, as a logical system, as a systematic building, as an orderly system, which is linear, mechanistic, and deterministic[16].

In relation to the hierarchy of legal norms, Hans Kelsen put forward a theory regarding the norm level (*Stufentheorie*). Hans Kelsen argues that legal norms are tiered and layered in a hierarchy, in the sense that a lower norm is valid, sourced and based on a higher norm, and so on until a norm cannot be traced further and its existence is hypothetical and fictitious, namely the basic norm (*Grundnorm*). The basic norm which is the highest norm in a norm system is no longer formed by a higher norm, but the basic norms are determined by the community as a basic norm which is a place of dependence for the norms that are below it so that a basic norm is presupposed in nature.

The theory of legal norms from Hans Kelsen was inspired by one of his students named Adolf Merkl who argued that a legal norm always had two faces (*das doppelte rechtsantlitz*). According to Adolf Merkl, the legal norms upward are sourced and based on the norms above, but downward they also become sources and become the basis for legal norms below them, so that a legal norm has a validity period (*rechtskracht*), because the validity period of a legal norm depends on the legal norms that are above it. If the legal norms above are revoked or erased, basically the legal norms under them will be revoked or erased as well[17].

Based on the theory of Adolf Merkl, in his *Stufentheorie*, Hans Kelsen also ar-

[15] Surojo Wignjodipuro. (1985). "*Pengantar Ilmu Hukum: Himpunan Kuliah"*. Jakarta: Gunung Agung, p. 99.

[16] Achmad Ali. "*Dua Catatan Hukum Akhir Tahun 2000, Memasuki Tahun 2001: Hakikat Ilmu Hukum dan Solusi Keluar dari Keterpurukan Hukum Di Indonesia"*, dalam Laica Marzuki. (2002). 50 Tahun Usia, Karya Pilihannya dan Komentar Berbagai kalangan Tentang Achmad Ali. Makassar: Universitas Hasanuddin. p. 23-55.

[17] Maria Farida Indrati S. (2007). "*Ilmu Perundang-Undangan: Jenis, Fungsi dan Materi Muatan"*. Yogyakarta: Kanisius, p. 41-42.

gues that a legal norm is always sourced and based on the norm above it, but below the legal norm also become a source and become the basis for norms that are lower than that. Thus, based on this system of the *Stufentheorie* we can draw the boundaries of the content material of all types and hierarchies of laws and regulations, including Perda as a type of regulation.

In terms of legal theory (legal positivism) which views the law as a system of order, the content of the Perda is the implementation of regional autonomy and duty of assistance, where both the Perda as the implementation of regional autonomy and duty of assistance should not conflict with higher legislation. However, in its implementation, it cannot be avoided that there are norm conflicts between Perda and higher legislation. Throughout 2016 (as stated in the previous section) the government had canceled 3.143 problematic Perda. Thousands of Perda are considered to be problematic and hamper national capacity by the central government, inhibiting speed to win the competition and on the contrary to the spirit of diversity and unity. This norm conflict considered by the central government to cause chaos in the law as a system of order. It appeared from the implementation of regional autonomy as the right of the regional government to carry out the widest possible autonomy, except for government affairs which by law were determined as the affairs of the Central Government.

The cancellation of these Perda shows the dominance of the central government towards the regional government. The central government is stronger than the local government, so the pendulum of autonomous swing seems more reflective on the central government than in the local governments. The central government had their own reasons for the Perda cancellation, but whatever the reason is, it raises the question whether there is still regional autonomy as a way of the government to accelerate the realization of community welfare in the local level. It is true that if we look at law only as an order that merely relies on the power of authority it is difficult to describe the entire legal problem we faced because such a legal system is only based on legal certainty from the power of authority which is then automatically read/interpreted as useful and fair.

In this context, if viewed from the Chaos Theory, the canceled Perda are considered to cause disorder of law at the national level. The central government have overtaken the boundaries of freedom (regional independence) provided by leg-

islation (order), so that the central government as the representation of implementing law and the state (unitary state) acts as a pulling force (strange attractor) from the chaotic atmosphere, so it finally returned to order, re-creating harmony between the Perda made by the regional government as a whole national legal system with higher legislation made by the Central Government.

The state and the Central Government as a representation of implementing law acts as a strange attractor by doing cancellation of the Perda that hinder regional economic growth and extend the bureaucratic path; hinder licensing and investment; hinder the ease of doing business; and Perda that conflicted with higher legislations and regulations.

It is possible to view the case of Perda cancellation from the perspective of Chaos Theory because the Central Government act as the strange attractor which intend to restore the state of chaos and disorder to become a peaceful and orderly condition. However, in the framework of democratizing the administration of government, the methods for revoking the Perda that were carried out directly by the central government were felt to be inappropriate, because they violated the law principle that ones should not be judges in their own cases. Moreover, the assessment of whether the Perda inhibits regional economic growth is subjective interpretation from the Central Government point of view.

According to the Chaos Theory, the establishment of Perda and the cancellation of it pose as a legal relationship formed based on power relations. In this case, the power relations between the regional government and the central government, which is not reflected in formal (legal) relations. Thus, there is a gap between formal relations and real relations. Both sides (the central and regional government) are making the relations unbalance, consequently arises the fight of strength from each party. At the time of implementing the relations (the establishment and cancellation of the Perda), each party subjectively based it on their own opinions. This situation causes the disorder. The regional government said that the content of the law (Perda) they made was in accordance with the implementation of regional autonomy, on the other hand, the central government said that the regulation was hampering economic growth, contradictory with higher legislation and had to be canceled. This situation gave rise to an asymmetrical state which by Charles Sampford in his book The Disor-

der of Law was called "social melee" something of a fluid social relationship.

This Perda cancelation also related to the legal structure of Perda supervision. Who is most appropriate in having the authority to overturn the Perda if it is considered to hinder economic growth, extend the bureaucratic pathway, hinder the ease of doing business, inhibit licensing and investment, contrary to higher laws and regulations? If we obey the principle that we cannot be judges in our own cases, then the cancellation of the Perda must not be carried out by the central government but must be carried out through a court, in this case through review mechanism at the Supreme Court of the Republic of Indonesia. For example, should there be an investor/entrepreneur who feels that his constitutional rights have been harmed with the enactment of a Perda regulation, then he should be able to propose the approval of the Perda to the relevant law to the Supreme Court of the Republic of Indonesia. Instead of lobbying the central government so that the Perda that are considered to inhibit investment is canceled by the central government. Because if the latter is used by the investor/entrepreneur to remove obstacles in their business activities, it is not impossible that a Perda will be canceled even though the Perda actually benefits the acceleration of the realization of community welfare in the regions as the main goal of implementing regional autonomy.

In the study of Chaos Theory, the legal culture of local governments that tend to be creative makes Perda as a means of increasing local income and improving community services must be viewed proportionally. Because in the rule of law state concept, all government actions must be based on law and legislation. Perda was made to provide a legal basis for the implementation of regional autonomy. In the future, certain Perda is considered to inhibit economic growth by the central government and the business world, or in other words, it is considered that content material of the Perda is inconsistent or contradictory to higher laws and regulations, so a mechanism is available to overcome those inconsistencies.

The mechanisms for overcoming inconsistencies are: 1) the application of statutory principles, namely: (a) the higher law excludes lower law, (b) the recent law excludes the prior laws; 2) reviews on formal and material law; 3) revisions or changes made by the creator (legislative review); 4) interpretation by judges and state administrative bodies; 5) legal construction carried out by judges which can

be in the form of analogy and legal refinement[18] (*Rechtsverfijning*).

This mechanism can be applied by selecting one of the available mechanisms as mentioned above, in accordance with the legal problems faced. For example, with regard to Perda that are considered contrary to higher laws and regulations, then we can choose the formal and material review mechanism at the Supreme Court of the Republic of Indonesia (judicial review). So the towing power is transferred from the central government (executive) to the court (judiciary). In this case, the Supreme Court of the Republic of Indonesia. Another mechanism is through legislative review within the DPRD with the approval of the regional government. Such methods will have far more legal certainty, be useful and fair compared to the direct cancellation carried out by the Central Government. As such, we do not violate the principle that ones shall not be judges in their own cases.

The Arrangement of Perda Content Material as Implementation of Regional Autonomy and Duty of Assistance

In initiating the discussion in this section, I again stated the provisions of Article 18 Paragraph (5) that the regional government carries out the widest possible autonomy, except for government affairs which are determined by law as central government affairs. Then in Article 18 Paragraph (6) that the Regional Government has the right to stipulate Perda and other regulations to implement autonomy and assistance tasks. Furthermore, these provisions are explained in Article 236 of Act Number 23 of 2014 concerning Regional Government, as the implementation of Article 18 of the 1945 Constitution of the Republic of Indonesia, that (1) To carry out regional autonomy and duty of assistance, regional government form Perda; (2) Perda as referred to in Paragraph (1) is formed by the DPRD with the agreement of the regional head; Paragraph (3) The Perda as referred to in Paragraph (1) contains load material:

a. Implementation of regional autonomy and duty of assistance; and
b. Further elaboration of the provisions of higher laws and regulations.

Based on the aforementioned provisions, the arrangement of the material contents of the Regional Regulation cannot be separated from the provisions on the distribution of government affairs between the central government and the regional government as stipulated in Article

[18] Amir Syarifudin and Indah Febriani, *Op., cit*.

9 of Act Number 23 of 2014 concerning Regional Government, which determines that (1) Government affairs divided into absolute government affairs, concurrent government affairs, and general government affairs. (2) Absolute government affairs as referred to in Paragraph (1) are government affairs that are fully become the authority of the central government. (3) Concurrent government affairs as referred to in Paragraph (1) are government affairs which are divided between the central government and the provincial and regency/municipality regions. (4) Concurrent government affairs submitted to the regions form the basis of the implementation of regional autonomy. (5) General government affairs as referred to in Paragraph (1) are government affairs which are the authority of the President as the head of government.

Absolute Government Affairs is regulated in Article 10 of this Act determined that (1) Absolute government affairs as referred to in Article 9 Paragraph (2) include: a. Foreign policy, b. Defense, c. Security, d. Law enforcement, e. National monetary and fiscal; f. Religion. (2) In carrying out absolute government affairs as referred to in Paragraph (1), the Central Government: a. Carry it out by itself, or b. Delegate authority to vertical institutions in the region or governors as representatives of the Central Government based on the de-concentration principle.

Concurrent government affairs are regulated in Article 11 of Act Number 23 of 2014 concerning Regional Government, stipulated that (1) Concurrent government affairs as referred to in Article 9 Paragraph (3) which are the authority of the region consisting of Mandatory Government Affairs and Preferred Government Affairs. (2) Mandatory Government Affairs as referred to in Paragraph (1) consists of Government Affairs related to basic services and government affairs which are not related to the basic services. (3) Mandatory government affairs related to basic services as referred to in Paragraph (2) are compulsory government affairs, which some of the substance are part of basic services.

Then Article 12 is determined that (1) mandatory government affairs relating to basic services as referred to in Article 11 Paragraph (2) include: a. Education, b. Health, c. Public works and spatial planning, d. Public housing and residential areas, e. Peace, public order, and protection of society and f. Social matter. (2) Government affairs which are not related to basic services as referred to in Article 11 Paragraph (2), covering: a. Labor, b. Em-

powering women and protecting children, c. Food, d. Land, e. Environment, f. Administration of population and civil registration, g. Empowering communities and villages, h. Population control and family planning, i. Transportation, j. Communication and informatics, k. Cooperatives, small and medium enterprises, l. Investment, m. Youth and sports, n. Statistics, o. Culture, p. Library and Archives.

Article 12 Paragraph (3) stipulated that Preferred Government Affairs as referred to in Article 11 Paragraph (1) include: marine and fisheries, tourism, agriculture, forestry, energy and mineral resources, trade, industry, and transmigration.

Article 13 Paragraph (1) the division of concurrent government functions between the Central and Regional Governments and the Regency/Municipality Region as referred to in Article 9 Paragraph (3) is based on the principles of accountability, efficiency, externalities, and national strategic interests. (2) Based on the principle referred to in Paragraph (1) the criteria for Government Affairs which are the authority of the Central Government are:

a. Government affairs which are located across provincial or cross-country areas.
b. Government affairs whose users are cross-provincial or cross-country.
c. Government affairs which the advantage and disadvantage are cross-provincial or cross-country.
d. Government affairs that use resources more efficiently if carried out by the Central Government and/or
e. Government affairs whose role are strategic for national interests.

Article 13 Paragraph (2) stipulates that based on the principles as referred to in Paragraph (1) the criteria for Government affairs which are under the authority of the Provincial Region are:

a. Government affairs which are located across regencies/municipalities;
b. Government affairs whose users are across the regency/municipality area;
c. Government affairs which the advantage and disadvantage across regencies/cities and/or;
d. Government affairs where the use of resources is more efficient if carried out by the Provincial Region.

Article 13 Paragraph (3) is determined that based on the principle as referred to in Paragraph (1) the criteria for Government Affairs which are under the authority of the regency/municipality region are:

a. Government affairs located within the regency/municipality area;
b. Government affairs that are users in the regency/municipality area;
c. Government affairs which advantage or disadvantage are only within the regency/municipality and/or;
d. Government affairs where the use of resources is more efficient if carried out by the regency/municipality.

Article 14 Paragraph (1) stated that the implementation of Government Affairs in the fields of forestry, marine affairs, energy, and mineral resources is shared between the central government and the provincial government. (2) Governmental affairs in the forestry sector as referred to in Paragraph (1) relating to the management of a regency/municipality forest park are the authority of the regency/municipality area. (3) Government affairs in the field of energy and mineral resources as referred to in Paragraph (1) relating to the management of oil and gas shall become the authority of the Central Government. (4) Government affairs in the field of energy and mineral resources as referred to in Paragraph (1) relating to the direct use of geothermal energy and regency/municipality regions shall become the authority of the regency/municipality area. (5) The producing or non-producing regency/municipality obtaining profit sharing from the administrator of government affairs as referred to in Paragraph (1). (6) The determination of Regency Region producing the calculation of maritime profit sharing which is within the boundary of 4 (four) miles is measured from the coastline towards the open sea and/or towards the islands waters. (7) In the case of the regency/municipality boundary, as referred to in Paragraph (6) less than 4 (four) miles, the boundary of the territory is divided in equal distance or measured in accordance with the principle of the midline of the adjacent area.

Article 15 of this Act stipulates that: (1) The division of concurrent government affairs between central, provincial, regencies/cities governments listed in the Appendix which is an integral part of this Act. (2) Concurrent administration affairs that are not listed in the Appendix of this Act or under the authority of each level of government structure that determination using the principles and criteria of concurrent government affairs division as referred to in Article 13. (3) Concurrent government affairs referred to in Paragraph (2) shall be determined by presidential decree. (4) Changes to the concurrent government affairs division between the

regional and central government and the provinces of regencies/municipalities as referred to in Paragraph (1) which does not lead to the transfer of government affairs at the level of concurrent or other government organization determined with government regulation. (5) The changes referred to in Paragraph (4) can be carried out as long as it is not contrary to the principles and criteria of concurrent government affairs division as referred to in Article 13.

By reading the full the provisions of Article 9 up to Article 15 of this Act, we can pull an abstraction that government affairs consist of absolute government affairs, concurrent government affairs, and general government affairs. Absolute Government Affairs is a government affair which is entirely under the authority of the central government. General government affairs are government affairs which are the authority of the President as head of government.

Note from the author that absolute government affairs and general government affairs have no implications for the implementation of regional autonomy as widely as possible, because proportionally this matter will be present in the region through the duty of assistance and implementation of de-concentration. The content of the Perda in the implementation of co-administration and de-concentration is concerning the procedures for executing absolute and general government affairs so that the potential for the emergence of higher legislation conflict can be avoided.

It is different from concurrent government affairs case. Concurrent government affairs are still shared between the central government and the provincial and regency/municipality governments. Concurrent government affairs submitted to the regions are the basis for the implementation of regional autonomy. This kind of division is indicated as contradictory to Article 18 Paragraph (5) the 1945 Constitution of The Republic of Indonesia that the regional government carries out the widest possible autonomy, except government affairs which are determined by law as central government affairs. Based on the provisions of Article 18 Paragraph (5), the regional government should be able to carry out the broadest possible autonomy, except for absolute government affairs, but with the provisions of Article 9 Paragraph (2) of Act Number 23 of 2014 mentioned above has made regency/municipality affairs become less legal because it is still divided between the central government, the provincial government based on the principle of accounta-

bility, efficiency, externality, and national strategic interests.

The application of these principles is interpreted by the central government subjectively and is felt to be very detrimental to the implementation of autonomy to the greatest extent, especially to the regency/municipality government. For example, the application of the principle of externality that determines the distribution of concurrent functions will be seen from the breadth, magnitude, and range of impacts arising from the administration of a government affair. Indeed, in terms of management (formal legal relations), it seems that this kind of division is more flexible, but in terms of legal substance, it does not provide legal certainty. Because almost all concurrent affairs have a broad impact, even the physical impact is felt more by the regency/municipality community, but it can be interpreted formally as a nationally impacted law.

In such a context, it is difficult to apply the principles of formation and content of legislation as well as content material that has local quality in determining the content of the Regional Regulations in the formulation of Perda consistently. This is one of the reasons for norm conflicts between Perda and higher legislations resulting in cancellations made by the central government.

Based on the legal facts mentioned above, the argument is that the law cannot only be seen as an order or kilter but must be seen on the other side, the law must be seen as disorder too so that the law tends to be liquid. By placing the law like that, the cancellation of the Perda which is considered to hinder economic growth based on the interpretation of the central government will be better understood by the regional government. However, it would be better if the cancellation was done through review mechanism through in a court, i.e. the Supreme Court of the Republic of Indonesia.

CONCLUSION

The regulation of the content material of the Perda as a sub-system of national law is not only placed in the legal sense as a mere system of order, thus creating a relationship of tension between the central government and the regional government, it but must be placed in a legal sense as a fluid relationship so that the determination of the content of the Perda is also been fluid, for the good of the community and the government as a whole.

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