

THE CONCEPT OF CENTRAL GOVERNMENT OVERSIGHT OF REGIONAL REGULATIONS IN THE FRAMEWORK OF REGIONAL AUTONOMY BASED ON THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

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Abstract

Oversight of regional regulations (Perda) by the central government, which involves multiple institutions, is currently carried out by various bodies including the executive, legislative, judicial branches, and state agencies formed by the President. In the executive branch, oversight is conducted by several central agencies such as the Ministry of Home Affairs, the Ministry of Law and Human Rights, the Ministry of Agrarian Affairs and Spatial Planning, and the Ministry of Finance. Legislative oversight is performed through the Regional Representative Council (Dewan Perwakilan Daerah). However, the question arises whether oversight of Perda should involve multiple central government agencies. Isn't it the case that involving several institutions in overseeing Perda can make the regulation-making process inefficient? On the other hand, local governments need specific regional regulations, such as tax regulations, regional retribution regulations, and spatial planning regulations, to be enacted promptly according to higher laws. Yet, these regulations are often delayed due to the lengthy processes of harmonization, evaluation, and facilitation. Therefore, the concept of central government oversight of Perda that is needed today is preventive-coordinative oversight. This concept means that to maintain consistency and coherence between Perda and higher regulations, central government oversight should focus on prevention from the planning and drafting stages. This should be done in coordination with the Ministry of Law and Human Rights, which represents the central government in harmonizing higher legislation with regional regulations. With this approach, the potential for disharmony between Perda and higher laws can be prevented from the outset. Meanwhile, the Ministry of Home Affairs will no longer conduct evaluations of Perda but will only provide registration numbers for the Perda.

Keywords: Regional Regulation; Central Government; Regional Autonomy.

INTRODUCTION

Article 18, paragraph (6) of the 1945 Constitution of the Republic of Indonesia explicitly states: "Regional governments have the right to establish regional regulations and other regulations to implement autonomy and delegated tasks." This article encompasses several key variables: First, regional governments, as state institutions mentioned in the constitution, have the right to establish regional regulations as applicable legislation in their areas. Second, in addition to regional regulations (Perda), regional governments have the right to establish other regulations, such as regulations by regional heads. Third, the existence of regional regulations and other regulations serves as instruments for implementing regional autonomy and delegated tasks.¹

Although the constitution grants regional governments the authority to establish regional regulations, this authority is not absolute and unrestricted. The authority of regional governments is limited by the scope of regional regulation content as regulated by the central government in various implementation laws, such as Law Number 22 of 1999 on Regional Government, Law Number 32 of 2004 on Regional Government, and Law Number 23 of 2014 on Regional Government.

Law Number 22 of 1999 on Regional Government outlines the content of regional regulations as "... the implementation of regional autonomy and further elaboration of higher legislation." Article 70 of Law Number 22 of 1999 restricts the content of regional regulations, stating: "Regional Regulations must not contradict public interest, other Regional Regulations, or higher legislation." This restriction seems to indicate that the central government "restricts" the constitutional right of regional governments to create regional regulations by limiting their content to avoid conflict with public interest. Furthermore, the first autonomy law in the reform era began overseeing the existence of regional regulations through oversight and annulment mechanisms. Oversight was conducted by requiring regional governments to submit regional regulations and regional head decisions to the central government no later than fifteen days after their enactment. Annulment occurred through mechanisms to cancel Regional Regulations and Regional Head Decisions that contradicted public interest or higher legislation and/or other legislation².

Five years after the enactment of Law Number 22 of 1999, in 2004, the DPR and the President introduced a new policy with the enactment of Law Number 32 of 2004 on Regional Government, which repealed Law Number 22 of 1999. Article 136, paragraph (3) of Law Number 32 of 2004 stipulates that the content of regional regulations is further elaboration of higher legislation, taking into account the characteristics of each region. Paragraph (4) limits the content of regional regulations by prohibiting contradictions with public interest and/or higher legislation. The prohibition of regional regulation content that must not conflict with public interest and/or higher legislation is enforced through oversight mechanisms.

Ten years after the enactment of Law Number 32 of 2004, in 2013, the DPR and the President enacted Law Number 23 of 2014 on Regional Government, which also replaced Law Number 32 of 2004. Article 236 of Law Number 23 of 2014 on Regional Government states that the content of regional regulations consists of: a) the implementation of regional autonomy and delegated tasks; b) further elaboration of higher legislation; and c) regional regulations may include local content in accordance with the provisions of legislation.

Another interesting development in the oversight of regional regulations (Perda) is the multi-institutional nature of oversight, involving the executive, legislative, and judicial branches, as well as state agencies established by the president. In the executive branch, oversight of regional regulations is carried out by several central agencies, including the Ministry of Home Affairs, the Ministry of Law and Human Rights, the Ministry of Agrarian Affairs and Spatial Planning, and the Ministry of Finance. Legislative oversight is conducted through the Regional Representative Council (DPD). Judicial oversight is carried out by the Supreme Court through judicial review. Recently, oversight has also been undertaken by the Pancasila Ideology

Development Agency (BPIP). The essence of oversight of regional regulations by the central government, the DPD, and the Supreme Court is to ensure that the content of regional regulations does not contradict higher laws. However, the question arises whether oversight of regional regulations should involve multiple central government agencies. Could the involvement of multiple agencies make the process of forming regional regulations ineffective, especially when regional governments need specific regulations, such as tax regulations and spatial planning regulations, to be enacted promptly as required by higher laws? Often, delays in enacting these regulations are due to lengthy processes of harmonization, evaluation, and facilitation. The various models and institutional developments in central government oversight of regional regulations raise serious questions from philosophical, juridical, sociological, and theoretical perspectives. From a philosophical perspective, a fundamental issue is that regional governance cannot be separated from the values of Pancasila, which serve as the base value and legal value for the rule of law and regional governance. The values contained in the third principle, Unity of Indonesia, mandate that governance and legislation must ensure the preservation of national unity. Regional regulations that conflict with higher legislation have the potential to contradict this principle of national unity. On the other hand, the philosophy of people's sovereignty in the fourth principle cannot be realized if local people, through their regional heads and local parliament (DPRD), cannot exercise their rights to regulate local affairs based on the specificity and aspirations of their regions through regional regulations.

Juridically, there are issues related to Article 18, paragraph (5) of the 1945 Constitution, which grants regional governments the right to establish regional regulations to implement regional autonomy and delegated tasks. However, Law Number 23 of 2014 on Regional Government authorizes regional governments to oversee regional regulations through preventive oversight facilitated by the Ministry of Home Affairs, with the requirement that if this oversight is not performed, the regional government will not receive a registration number required for publication. Additionally, Law Number 2 of 2018 on Amendments to the MD3 Law grants the DPD the authority to oversee draft regional regulations (Raperda). This creates a normative conflict between Article 18, paragraph (5) of the 1945 Constitution and Law Number 23 of 2014 and Law Number 2 of 2018. From a sociological perspective, there is a lack of legal certainty and freedom for regional governments and local communities concerning applicable regional regulations. Regional governments do not have the freedom to create regional regulations based on local aspirations and conditions. This leads to disharmony in the relationship between the central and regional governments and to a lack of trust among local communities towards the central government. Further implications could endanger national unity and cohesion.

Ultimately, the juridical, legal, and sociological issues of central government oversight of regional regulations lead to theoretical problems. The theory of a unitary state, including national legal unity, is at odds with the theory of regional autonomy, which advocates for regional freedom and aspirations in creating regional regulations. The theoretical foundation of regional regulation oversight is unclear: is it executive review, executive preview by the Ministry of Home Affairs, legislative review by the DPD (Law No. 2 of 2018), or judicial review by the Supreme Court?

METHOD

The method used in this research is normative research. The approaches used in this research are the legislative approach, the historical approach, and the conceptual approach. The legislative approach involves reviewing various regulations related to the oversight of regional regulations. The historical approach examines regulations related to the oversight of regional regulations from Indonesia's independence to the latest legislation. The conceptual approach involves examining and developing a new concept for the oversight of regional regulations by the central government. The analysis is conducted using qualitative juridical analysis.

RESULTS AND DISCUSSION

1. Institutional Oversight of Regional Regulations by the Central Government

According to Ni'matul Huda, oversight of draft regional regulations (Raperda) by the central government is carried out through four types of oversight. First, preventive oversight, which has two models: 1) oversight of drafts of regional regulations related to regional taxes, regional levies, the Regional Expenditure and Revenue Budget, and Spatial Planning before they are approved by regional heads, with **evaluations** carried out by the Minister of Home Affairs for provincial drafts and by the Governor for district/city drafts (executive preview); 2) Approval from the Minister of Home Affairs or the Governor for the draft regional regulations. Second, repressive oversight, which involves the cancellation of all regional regulations by the government through Presidential Regulation (executive review)³. Third, repressive oversight carried out by the Minister of Home Affairs or the Governor involves the cancellation (executive review) of draft Regional Expenditure and Revenue Budget (APBD) regulations set by the Governor/Regent/Mayor without considering the evaluations from the Minister of Home Affairs and the Governor for districts/cities. Fourth, judicial review, which is a legal action against Presidential Regulations that annul regional legal products at the Supreme Court.

Based on the research findings, oversight of regional regulations by the central government is conducted through various institutions, including the Ministry of Home Affairs, the Ministry of Law and Human Rights, the Ministry of Finance, the Ministry of Agrarian Affairs and Spatial Planning, and the Regional Representative Council (DPD).

a. Oversight of Regional Regulations by the Ministry of Law and Human Rights

The involvement of the Ministry of Law and Human Rights in the oversight of regional regulations is regulated by Article 58 of the Republic of Indonesia Law Number 13 of 2022 on the Second Amendment to Law Number 12 of 2011 on the Formation of Legislation. According to Article 58, the involvement of the Ministry of Law and Human Rights in the oversight of regional regulations is conducted through the processes of harmonization, finalization, and conceptual consolidation of the draft provincial regulations. Article 58, paragraph (2) clearly specifies that "Harmonization, finalization, and consolidation of the conceptual draft of provincial regulations as referred to in paragraph (1) are carried out by vertical agencies of the ministry or institution that administers government affairs in the field of the formation of legislation." In practice, the oversight of regional regulations by the Ministry of Law and

Human Rights is carried out by representatives of the Ministry of Law and Human Rights located in the provinces.

b. Oversight of Regional Regulations by the Ministry of Home Affairs

The mechanism for overseeing regional regulations under Law Number 23 of 2014, which emphasizes executive review, was subsequently corrected by the Constitutional Court through decision 56/PUU-XIV/2016. According to the Constitutional Court, the "provincial regional regulations" mentioned in Article 251, Paragraph 7, and Article 251, Paragraph 5, of Law Number 23 of 2014 on Regional Government are inconsistent with the 1945 Constitution and do not have binding legal force. Since 2017, the Minister of Home Affairs no longer has the authority to annul provincial regional regulations, nor does the governor, as the regional head, have the authority to annul district/city regional regulations.

Article 245 of the Draft Provincial Regional Regulations, which covers RPJPD (Long-Term Regional Development Plan), RPJMD (Medium-Term Regional Development Plan), APBD (Regional Revenue and Expenditure Budget), amendments to the APBD, accountability for APBD implementation, regional taxes, regional levies, and regional spatial planning, must be evaluated by the Minister before being enacted by the governor.

Due to the lack of authority for the Minister of Home Affairs and the governor to annul regional regulations, in 2018, the Minister of Home Affairs implemented a legal policy by enacting Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 120 of 2018 on Amendments to the Regulation of the Minister of Home Affairs Number 80 of 2015 on the Formation of Regional Legal Products. The essence of this change relates to the oversight of regional regulations by the central government through preventive oversight via a facilitation mechanism. This mechanism is mandatory for provincial governments; without facilitation, the draft regional regulations will not receive a registration number. Draft regulations without this number cannot be enacted by regional heads and cannot be published in the regional gazette.

c. Oversight of Regional Regulations by the Ministry of Finance

The Ministry of Finance is involved in the oversight of regional regulations in the form of evaluating regional regulations. According to Article 245, Paragraph (1), of the Draft Provincial Regional Regulations, which covers RPJPD, RPJMD, APBD, amendments to the APBD, accountability for APBD implementation, regional taxes, regional levies, and regional spatial planning, must be evaluated by the Minister before being enacted by the governor.

Article 245, Paragraph (2) specifically regulates the involvement of the Ministry of Finance in evaluating Draft Provincial Regional Regulations concerning regional taxes and levies through coordination with the Ministry of Home Affairs. The coordination mechanism between ministries is clearly outlined in Law Number 1 of 2022 on Central and Regional Financial Relations. Article 198, Paragraph (2) stipulates that Draft Provincial Regional Regulations concerning taxes and levies, which have been jointly approved by the Provincial DPRD and the governor, must be submitted to the Minister of Home Affairs and the Minister of Finance no later than 3 (three) working days from the date of approval.

The substance of the coordination for evaluating taxes and levies by the Ministry of Finance involves evaluating from the perspective of national fiscal policy. The results of the evaluation, coordinated with the Ministry of Finance, may include approval or rejection of the draft regional regulations. The evaluation results are conveyed by the Minister of Home Affairs to the governor for the draft provincial regulations within a maximum of 15 (fifteen) working days from receipt of the draft, with a copy to the Minister. If the evaluation results in rejection, it must be accompanied by reasons for the rejection.

d. Oversight of Regional Regulations by the Ministry of Agrarian Affairs and Spatial Planning

The involvement of the Ministry of Agrarian Affairs and Spatial Planning in overseeing regional regulations includes coordinating evaluations of Draft Provincial Regional Regulations concerning regional spatial planning. According to Government Regulation Number 21 of 2021 on the Implementation of Spatial Planning, the evaluation of provincial spatial planning regulations involves approval of the substance by the Minister of Agrarian Affairs and Spatial Planning. Article 62, Paragraph (1) regulates the mechanism for issuing substantive approval through cross-sector discussions involving the ATR Ministry along with other ministries/agencies, provincial regional governments, Provincial Regional Representatives Council, and all relevant stakeholders. Cross-sector discussions are conducted to integrate sectoral programs/activities, national strategic activities, boundary areas, coastal lines, and forest zones.

e. Oversight of Regional Regulations by the DPD

In 2018, the DPR and the President enacted Law Number 2 of 2018 on Amendments to Law Number 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional Representative Council (UU MD3). Article 249, Paragraph (1) letter j stipulates that the DPD (Regional Representative Council) has the authority to monitor and evaluate draft regional regulations and regional regulations. This authority raises constitutional and theoretical questions about the DPD's role in oversight and evaluation of draft and enacted regional regulations. Constitutionally, there are questions regarding the source of the DPD's authority to evaluate and oversee draft and enacted regulations, given that the DPD's role is to provide advice to the DPR in the legislative process, oversight, and budgeting. Theoretically, it raises questions about whether the DPD's oversight falls into the category of legislative review, considering that the DPD does not fully exercise legislative power—this function is carried out by the DPR RI. Indonesia does not have legislative oversight of regional regulations; instead, oversight takes the form of executive review by the central government.

The involvement of the DPD in overseeing regional regulations represents a new type of oversight within the regional regulatory oversight system by the central government. The oversight mechanism by the DPD, as established by Law Number 2 of 2018 on Amendments to Law Number 17 of 2014 on the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional Representative Council, is

specified in Article 49, letter j, which grants the DPD the authority to "conduct monitoring and evaluation of draft regional regulations and regional regulations." The implementation of Article 49, letter j, is further detailed in Regional Representative Council Regulation Number 4 of 2022 on Monitoring and Evaluation of Draft Regional Regulations and Regional Regulations. Monitoring and evaluation involve gathering, observing, identifying, analyzing, and reviewing draft and enacted regional regulations to assess their potential conflict with legislative principles for recommendation purposes. Article 24 specifies that the DPD institution responsible for oversight of regional regulations is the Regional Legislative Affairs Agency (BULD), which conducts evaluations of draft and enacted regional regulations as follow-up to the monitoring results. BULD delves into the evaluation results to ensure continuity in regulatory formation, accuracy and appropriateness in formation, and technical implementation needs of regional regulations in line with legality and legal certainty principles, and to identify draft regulations that may cause legal disharmony or inefficiencies in regional governance.

f. Oversight of Regional Regulations by BPIP

In 2022, the Agency for Pancasila Ideology Development (BPIP) enacted BPIP Regulation Number 4 of 2022 on Pancasila Value Indicators. This BPIP regulation is related to the oversight of regional regulations by the central government in several ways. First, BPIP is a central government agency established by the president. Second, Article 1 defines Pancasila Value Indicators as the manifestation and actualization of the values contained in Pancasila as the source of all national legal sources. Article 2 specifies that Pancasila Value Indicators are used as guidelines in the formulation of policies and regulations by state institutions, ministries/agencies, regional governments, and village governments. This includes policy and regulation formulation, as well as the monitoring and review of policies and regulations. Article 3 of the BPIP regulation states that the formulation of regulations as referred to in Article 2 must be aligned with Pancasila Value Indicators by the BPIP.

2. Ideal Concept of Central Government Oversight of Regional Regulations

Based on Law Number 23 of 2014 on Regional Government, oversight of regional regulations is carried out through several types of oversight. The types of oversight are as follows: **First, Executive Preview/Preventive Oversight** this is done in two ways: 1. Registration Number Submission: Governors are required to submit draft Provincial Regional Regulations to the Minister within 3 (three) days of receiving the draft from the provincial DPRD leadership to obtain a registration number. Similarly, regents/mayors must submit draft Regional Regulations to the governor, as the representative of the central government, within 3 (three) days of receiving the draft from the regency/city DPRD leadership to obtain a registration number. 2. **Regulation Evaluation**: Draft Provincial Regional Regulations regarding RPJPD, RPJMD, APBD, changes to APBD, APBD implementation accountability, regional taxes, regional levies, and spatial planning must be **evaluated** by the Minister before being enacted by the governor. Draft Regional Regulations for regencies/cities covering similar topics must be evaluated by the governor before being enacted by the regent/mayor. Evaluated drafts are followed by the issuance of a registration number if approved. **Second, Executive**

Review/Repressive Oversight this includes two forms:

- 1) **Administrative Sanctions** Governors must submit Provincial Regional Regulations and governor regulations to the Minister within 7 (seven) days after enactment. Similarly, regents/mayors must submit reGENCY/city Regional Regulations and regent/mayor regulations to the governor within 7 (seven) days after enactment. A governor who fails to submit these documents to the Minister faces administrative sanctions, such as a written warning from the Minister. Similarly, regents/mayors who do not submit their regulations to the governor face administrative sanctions in the form of a written warning from the governor.
- 2) **Regulation Cancellation**, that conflict with higher laws, public interest, or morality can be canceled by the Minister for Provincial Regional Regulations and governor regulations. Regional Regulations and regent/mayor regulations that conflict with higher laws, public interest, or morality are canceled by the governor. If the governor fails to cancel these regulations, the Minister may do so. Cancellation may be accompanied by administrative sanctions and/or a suspension of evaluation of drafts for regional government authorities who continue to enforce canceled regulations.

Third, Objections, if regional government authorities disagree with the cancellation of Provincial Regional Regulations or governor regulations, they can file an objection with the President within 14 (fourteen) days of receiving the cancellation decision. Similarly, if reGENCY/city government authorities disagree with the cancellation of reGENCY/city Regional Regulations or regent/mayor regulations, they can file an objection with the Minister within 14 (fourteen) days of receiving the cancellation decision.

The mechanism for overseeing regional regulations under Law Number 23 of 2014, which emphasizes executive review, was later corrected by the Constitutional Court through Decision 56/PUU-XIV/2016. According to the Constitutional Court, "provincial regional regulations" as stated in Article 251 Paragraph 7, as well as Article 251 Paragraph 5 of Law Number 23 of 2014 on Regional Government, are in conflict with the 1945 Constitution and do not have binding legal force. Since 2017, the Minister of Home Affairs no longer has the authority to annul provincial regulations, and similarly, governors as regional heads no longer have the authority to annul reGENCY/city regulations.

Due to the fact that the Minister of Home Affairs and governors no longer have the authority to annul regional regulations, the Minister of Home Affairs in 2018 implemented a legal policy by enacting Regulation Number 120 of 2018 on Amendments to Regulation Number 80 of 2015 on the Formation of Regional Legal Products.

The essence of this change is linked to central government oversight of regional regulations through preventive oversight via a facilitation mechanism. This mechanism must be conducted by provincial governments; without facilitation, draft regulations will not receive a registration number, and drafts without a number cannot be enacted by the regional head or published in the regional gazette.

Another interesting development in regional regulation oversight was the enactment in 2018 of Law Number 2 of 2018 on Amendments to Law Number 17 of 2014 on the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and the Regional People's Representative Council (MD3 Law). Article 249 Paragraph (1) letter j stipulates that the Regional Representative Council (DPD) has the authority to monitor and evaluate drafts of regional regulations and regulations.

Given the current lack of clarity regarding the oversight of regional regulations, the author proposes a concept for central government oversight of regional regulations, namely **preventive-coordinative** oversight. This concept means that to maintain consistency and coherence between regional regulations and higher laws, central government oversight of regional regulations should include prevention from the planning and drafting stages, coordinating with the Ministry of Law and Human Rights in the region as the institution representing the central government in harmonizing higher laws with regional regulations.

This concept aims to prevent potential legal disharmony between regional regulations and higher laws from the outset. Meanwhile, the Ministry of Home Affairs no longer conducts evaluations of regional regulations but only provides registration numbers. Therefore, coordination between the Ministry of Home Affairs and the Ministry of Law and Human Rights is crucial for the success of this concept.

CONCLUSION

Based on the results of the analysis and discussion, it is concluded that: (1) The essence of central government oversight of regional regulations is essentially about maintaining the coherence of national legal norms, implementing regional autonomy, and the special characteristics of regions. The coherence of norms is based on the idea that regional regulations and higher laws are part of a unified legal system that must be consistent and not contradict one another. Regional regulations, as a type of regulation at the lowest hierarchical level, must not conflict with higher laws. However, within the framework of regional autonomy, regions have the freedom to regulate themselves according to their characteristics, which also needs protection by the state.; (2) The regulation of central government oversight of regional regulations has experienced massive dynamics. There are several types of oversight: Executive Preview/Preventive: Done through two methods, 1) registration number submission and evaluation. Second, Executive Review/Repressive done through annulment of regulations by the Minister and the governor. Third, Oversight by DPD through legislative review; (3) The concept of central government oversight of regional regulations is preventive-coordinative. This concept means that to maintain consistency and coherence between regional regulations and higher laws, central government oversight should involve prevention from the planning and drafting stages, with coordination with the Ministry of Law and Human Rights in the regions. This helps prevent potential legal disharmony between regional regulations and higher laws from the beginning. The Ministry of Home Affairs no longer evaluates regional regulations but only provides registration numbers.

Footnotes

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