

Analysis on Regional Autonomy associated with the Legislative Process in Perspective of Sociology of Law

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Abstract

The spirit of reform demanded an overhaul of the constitutional system in Indonesia, coloring the utilization of existing state instruments and leading to the integration and execution of duties and functions of the government. Law No. 32 of 2004 on Regional Government is the basis of the implementation of good and clean governance principles (Good and Clean Governance), reflecting the desire of the government to implement good governance in local government administration. After the fourth amendment to the Constitution of the Republic of Indonesia of 1945 (UUD 1945), the concept of a centralized unitary state with political and economic resources under the control of the political elite in the center turned into a decentralized unitary state by giving space to the affected regions to manage their own affairs. Good governance is expressed through the principles of democratization as well as the limitation of power. This principle of separation of power, both horizontally and vertically, is closely related to regional autonomy as expressed through equal relations between the central and regional governments.

I. Introduction

Indonesia is a state of law (*Rechtstaat*)¹. As a state that is guided by law, all aspects of life, including the communal, national and state governments, should be based on the law, on the principles of Pancasila as well as on the Constitution of the Republic of Indonesia of 1945 (UUD 1945)². The legal system is continental law, a legacy of the Dutch colonial period. The concept of the state of law manifests that it is law that guides all daily life, not politics or economics.

The continental legal system prioritizes written law as the core of the legislation³ within the legal system. Therefore, Indonesia is trying to formulate the law in written form. However, in practice, it also acknowledges the existence of other legal systems, such as religious law, customary law, while also recognizing jurisprudence as well as the judge's authority to find the law.

¹ Article 1, Paragraph 3, Constitution of the Republic of Indonesia (UUD) of 1945.

² The state becomes the foundation of hope of society to collectively achieve certain goals that were normatively outlined by *the founding fathers* and generally set forth in the Constitution. See, Samsul Wahidin, *Dimensi Kekuasaan Negara Indonesia*, 1st publish, Pustaka Pelajar, Yogyakarta, 2007 page. 6.

³ Regulation is different from legislation; regulation refers to policies as the elaboration of legislation, while legislation is the underlying law made at the will of people. *Ibid*, page 15-16.

To realize the formulation of written law, especially regulation and legislation⁴, an orderly arrangement is required. Formation of regulations and legislation is basically a system that includes stages that are interwoven and inseparable from each other. The stages are planning, formulation, discussion, ratification, enactment, and dissemination⁵.

The formulation of regulations and legislation has to be based on existing regulations and legislation. This refers to Law No. 12 of 2011 on the Formulation of Regulation and Legislation, the Presidential Regulation No. 61 of 2005 on Procedures for the Preparation and Management of the National Legislation Program, the Presidential Regulation No. 68 of 2005 on Procedures to Prepare Draft Laws, Draft Government Regulations to Revise Laws, Draft Government Regulations, and Draft Presidential Regulations, as well as the Presidential Regulation No. 1 of 2007 on the Ratification, Promulgation, and Dissemination of Regulations and Legislation.

It is undeniable that there is regulations and legislation formulated by the legislative⁶ both at central as well as regional government level that are not aligned with the principles of the formulation of regulation and legislation. Consequently, these regulations and legislation are not always implemented by communities. In line with Jimly Asshiddiqie's view⁷ that legal norms, which are to be outlined in the draft regulation and legislation, have to be well prepared based on careful thoughts and reflections that are solely in the public's interest, instead of the interest of a person or a class.

The planning stage is the first step to achieve sound regulation and legislation. One of the activities in the planning process of formulating regulation and legislation is the preparation of academic papers. Through study and preparation of academic papers, it is expected that formulated regulation and legislation meets the expected goals and is implemented and enforced properly.

In Law No. 10 of 2004 on the Formulation of Regulation and Legislation, academic research was not part of the process of formulating the Draft Law. The provision of academic papers can be found in article 1, paragraph 7 of the Presidential Regulation No. 68 of 2005 on Procedures to Prepare Draft Laws, Draft Government Regulations to Revise Laws, Draft Government Regulations, and Draft Presidential Regulations stating that: *"The academic paper is a scientifically accountable manuscript regarding the conception which contains background, the goal of the draft, objectives to be achieved and the scope, range, object or direction of the regulation of a draft law"*.

⁴ Regulation and Legislation are written rules established by state agencies or the authorities and the general binding. See article 1 angka 2 Undang-Undang No. 10 Tahun 2004 tentang Pembentukan Peraturan Perundang-Undangan.

⁵ Article 1 Nr 1 of Law No. 10 of 2004 about the Formulation of Regulation and Legislation.

⁶ The concept of *Latum* is taken from Latin and means to "make or issue". The term *leges* is also taken from Latin and means "law". This law is intended to be formal interpretations, legal forms made by legislatures laws in general is the representative body elected by the mechanism of democratic election in the country concentered. Samsul Wahidin, *Dimensi...*, Op. Cit., page. 37-38.

⁷ Both law and morality regulate human behavior, but law limits itself to outward behavior, whereas morality also covers inner attitudes. This is the difference between law and morality, which was emphasized by the German philosopher Immanuel Kant. See K. Bertens, *Etika*, 9th edition, PT. Gramedia Pustaka Utama, Jakarta, 2005, page. 43

II. Regional Autonomy In the Perspective of the Sociology of Law

From a sociologic perspective, an academic paper is prepared by examining the reality of society, including the needs of the community with respect to legal and socio-economic aspects as well as values engrained in society such a sense of justice. The objective of this sociological study is to avoid creating legislation that is disconnected from its social roots in the community.

Many regulations and legislation that have been enacted were later rejected by society, a reflection of the lack of strong social roots as basis for formulating written laws; specifically regulation and legislation, for which an orderly arrangement is required. The formulation of regulation and legislation is a system with interwoven stages that are inseparable from each other. The stages are planning, preparation, discussion, ratification, enactment and dissemination.

The House of Representatives in its legislative function⁸ is central and strategic in the process of developing new legislation to meet the targets of the National Legislation Program (Prolegnas).

Article 18A of UUD 1945 states that the law gives the freedom to regions to develop themselves as their constitutionally guaranteed right of autonomy. The right of autonomy of the regions⁹ is given to each region that has been deemed capable by law to manage their own households.

Proliferation of administrative regions occurs in each region as the juridical implication of legal reform in Indonesia¹⁰; merging or elimination of a region is regulated by the law.

From the point of view of the legal government reforms, decentralization of regionals governments¹¹ and being granted autonomy is the main agenda of each region. But in fact, there are discrepancies between what is envisioned by the law and the legal facts. There are several reasons for the central government to decentralize¹² power to regional governments, as outlined by Samodra¹³: (1) In political aspects, decentralization is intended to engage citizens in the policy process, both for the regions' own benefit as well as for the benefit of local political support and national policy development through

⁸ Article 20 No. 1 of UUD 1945

⁹ The term autonomy comes from the Greek words *autos*, which means "in itself", and *nomos*, which means "law". Autonomy is related to the division of duties and responsibilities of the authorities to regulate and manage the affairs of the central and local governments. One manifest of this division is that regions will be responsible for several government affairs, through submission, recognition or as transfer to their disposal. See Ni'matul Huda, *Hukum Pemerintahan Daerah, Ctk. Pertama*, Nusa Media, Bandung, 2009, page 83-84.

¹⁰ Reform is a systematic process of integrated and comprehensive effort aimed at the realization of good governance. See *Sedarmayanti, Reformasi Administrasi Publik, Reformasi Birokrasi, dan Kepemimpinan Masa depan*, 1st edition, Refika Aditama, Bandung, 2009, page. 67.

¹¹ Decentralization is defined as the transfer of power by the government to the autonomous regional governments to regulate and administrate the affairs of government in the Unitary State System of Indonesia (NKRI). Article 1, Local Government Law No. 32 of 2004.

¹² Authority is a condition that includes two parts: those who hold power and those who are subject to the power. Power is defined as the ability to influence others. Samsul Wahidin, *Dimensi*, Op. Cit., page. 1.

¹³ Samodra, W, *Good Governance Dan Otonomi Daerah Dalam Mewujudkan Good Governance Melalui Pelayanan Publik*, Gadjah Mada University Press, Yogyakarta, 2005, page17.

democratic processes in bottom layers. (2) In terms of management of government, decentralization can improve the effectiveness, efficiency, and accountability, especially in the provision of public services. (3) In cultural aspects, decentralization helps to pay attention to exclusivity and privileges of a region, such as geography, demographics, economic, cultural, or historical backgrounds. (4) In terms of the interests of the central government, decentralization can overcome the weakness of the central government in monitoring programs. (5) In terms of accelerated development, decentralization can increase positive competition between regions in providing services to the public, such as encouraging local governments to innovate in order to improve the quality of services to the community.

III. Formulation of the Problems

1. What is the mechanism and legislative process to form a region in Indonesia?

IV. Research Purposes

How is the mechanism and legislative process linked to the duties and authority of the House of Representatives based on formal juridical?

1. Law No. 27 of 2009 on MD3 (MPR DPR DPD and DPRD);

Duties and Powers of the House of Representatives of the Republic of Indonesia

Article 71

Parliament has the duty and authority to:

- a. establish laws that are discussed with the President for approval together;*
- b. approving or not approving the replacement government regulation legislation proposed by the president to become law;*
- c. receive a bill proposed by the Council relating with local autonomy, central and local relations, the establishment and expansion and merging of regions, management of natural resources and other economic resources, as well as relating to the financial balance between central and local;*
- d. discuss the draft law referred to in letter c with the President and the Council before taken a joint agreement between the House and the President;*
- e. discuss a draft law proposed by the President or the House of Representatives relating to regional autonomy, central and local relations, the establishment and expansion and merging of regions, management of natural resources and other economic resources, and financial balance between central and local, by including taken DPD before a joint agreement between the House and the President;*
- f. DPD taking into consideration the draft law on the state budget and draft laws relating to taxes, education, and*
- g. discussed along with the consideration of the President and the Council approved the draft bill on the state budget proposed by the President,*

and i. discuss and act on the results delivered by DPD supervision of the implementation of Law on regional autonomy, the establishment, expansion, and merger of regional, national and local relationships, management of natural resources and other economic resources, the implementation of the state budget, taxes, education, and religion;

2. On the Formulation of Regions and Special Areas; Law No. 12 of 2008 on the revision of Law No. 32 of 2004.

FORMATION OF REGIONS AND SPECIAL AREAS:

Part One

Establishment of Regions

Article 4

(1) The establishment of the area as referred to in Article 2 paragraph (1) shall be determined by law

(2) the establishment of regional legislation referred to in paragraph (1) include the name, area coverage, the limits of the capital, the authority held government affairs, the appointment of the acting head of the region, charging membership of Parliament, the transfer of personnel, funding, equipment, and documents, as well as the region.

(3) The establishment of the area may be merging some regions or areas bersandingan part or division of a region into two or more regions.

(4) Expansion of the region into two (2) or more regions as referred to in paragraph (3) can be done after reaching the minimum age of governance.

Article 5

(1) The establishment of the area as referred to in Article 4 should be qualified administrative, technical, and physical territorial.

(2) administrative terms referred to in paragraph (1) for the province include the approval of regency / city and Regent / Mayor who will be coverage of the provinces, provincial parliament approval of the parent and the Governor, as well as the recommendation of the Minister of the Interior.

(3) administrative terms referred to in paragraph (1) for the district / city include the approval of regency / city and Regent / Mayor is concerned, the approval of Parliament

and the provincial governor and the recommendation of the Minister of the Interior.

(4) technical terms referred to in paragraph (1) includes the factors that form the basis of factors that include the establishment of regional economic capacity, potential regions, socio-cultural, socio-political, demographic, wide area, defense, security, and other factors that enable the autonomous areas.

(5) physical terms as referred to in paragraph (1) shall include at least five (5) county / province and city for the establishment of at least 5 (five) districts for the establishment of the district,

and 4 (four) districts for the establishment of the city, the capital of candidate sites, facilities, infrastructure and governance.

Article 6

- (1) The area can be removed and merged with other areas if the area in question was not able to hold the regional autonomy.
- (2) Removal and autonomous regions after merging through the process of evaluation of the regional administration.
- (3) Guidelines for the evaluation referred to in paragraph (2) Government Regulation.

Article 7

- (1) Elimination and merging of regions referred to in Article 6 paragraph (2) and its consequences are set by law.
- (2) Changes in limits of the area, change the name of the region, naming parts of the earth, and such a change of name, or transfer of capital that does not result in the removal of an area
Government Regulation.
- (3) The change referred to in paragraph (2) shall be upon the recommendation and approval of the relevant region.

Article 8

Procedures for the establishment, abolition, and the incorporation of the area referred to in Article 4, Section 5, and Section 6 is regulated by the Government.

Special Areas

Article 9

- (1) To carry out certain governmental functions that are specific to the national interest, the government can set a special area inside. provincial and / or district / city.
- (2) certain governmental functions referred to in paragraph (1) for free trade and / or free port established by law.
- (3) certain governmental functions other than those referred to in paragraph (2) shall be regulated by a Government Regulation.
- (4) To establish special areas referred to in paragraph (2) and paragraph (3), the Government shall involve the relevant region.
- (5) Regions may propose the formation of a special area as referred to in paragraph (1) to the Government.
- (6) The procedure for determining specific areas as referred to in paragraph (1), paragraph (2), subsection (3), subsection (4), and paragraph (5) Government Regulation.

V. Conclusion

The idea of regional autonomy is closely linked to the democratization of political life and governance in the region. For regional autonomy to function as intended, regions

have to have the authority to manage and regulate their own households as a unitary state system. In this context, the democracy applied in Indonesia applies the principles of *Pancasila*¹⁴, instead of the principles of liberal democracy. In countries with liberal democracy, the market has a greater role than the government, even though in practice the government also uses its power to regulate the market. The implementation of regional autonomy based on decentralization does not mean regions are free to determine what they need. Their needs can only be realized in accordance with central government policies – policies included in regulation and legislation. However, it is undeniable that there are market-friendly policies. Democracy in Indonesia is not unfree democracy but meant to uphold justice and social welfare.

1. *Good governance* has become a benchmark in governance. The implementation of good governance is a prerequisite in realizing the aspirations of society to reach the goals and ideals of the nation. Goals and ideals should at least not be contrary to the principles of good governance as implementation of government policies. The principles of good governance are:
 - a. Participation
 - b. Enforcement of the law
 - c. Transparency
 - d. Equality
 - e. Responsiveness
 - f. Insight into the future
 - g. Accountability
 - h. Supervision
 - i. Efficiency and effectiveness
 - j. Professionalism

2. *Good Governance in Regional Autonomy*

The enforcement of autonomy in regional government systems has been implemented since 2001 (as per Law No. 22 of 1999 on Regional Government) and in was adjusted in 2004 using Law No. 32 of 2004 as a revision of the previous law. In both laws, the Government has introduced decentralization within regional government systems as a consequence of the previous centralized system. With the change in the policy system, regional governments have the authority to plan, formulate, and implement development policies and programs in accordance with aspirations of the communities. The system of regional autonomy should be combined with good and clean governance, free from corruption. Through this shift of power, communities' aspirations and needs in the regions can be realized in accordance with the law.

¹⁴ Five Principles of Republic of Indonesia; 1. Belief in the one and only God, 2. Justice and civilized humanity, 3. The unity of Indonesia, 4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, 5. Social justice for all of the people of Indonesia. Wikipedia, *Pancasila (politics)*, http://en.wikipedia.org/wiki/Pancasila_politics, access 22 September 2014, 11.00 am.

