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When Saragih. Implications of Regional Regulations Cancellation Based on Law Number 23 of 2014 about Local Government and Law Number 5 Of 2004 about The Supreme Court

Implications of Regional Regulations Cancellation Based on Law Number 23 of 2014 about Local Government and Law Number 5 Of 2004 about The Supreme Court

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ABSTRACT: Cancellation of Regional Regulations is the authority of the government represented by the Supreme Court in carrying out the supervisory function both preventively and repressively. The annulment function is carried out to provide legal certainty so that the law can have a strong meaning and identity. The purpose of this research is to produce a strong understanding of the mechanism for canceling regional regulations by the Supreme Court on the basis of filing a judicial review of the materials of regional regulations that have been running, and their implications for legal certainty. The method used in this study is a normative juridical method through a review of the literature which is considered relevant to this research. Based on the results of this study, it was concluded that the mechanism for implementing the Supreme Court's decision regarding the cancellation of the Regional Regulation as stated in Article 8 paragraph (2) of Supreme Court Regulation No. 1 of 2011, followed up by implementing the decision no later than ninety days after the decision was sent to the Regional Government. The implication is that the cancellation of a regulation by the Supreme Court directly or indirectly has binding legal force.

Keywords: Judicial review, Supreme Court, Cancellation, Regional Regulation.

I. INTRODUCTION

Indonesia is a unitary state that divides its legal authority according to the government hierarchy. Each of these government hierarchies has its own autonomy, and is given the authority and is charged with the obligation to make rules or legislation that can specifically be applied in their respective regions. The benefits of this division of autonomy are to optimize service quality, empowerment, and a competitive atmosphere

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between regions (1–3). The authorities and obligations of the Regional Government in managing and regulating their area are stated in Law Number 23 of 2014 concerning Regional Government. The law states that each region is given the widest possible authority to manage its area, absorb people's aspirations, and utilize its natural and human resources for the benefit of society.

In realizing the desired welfare achievement, the Regional Government is expected to be able to form Regional Regulations in accordance with the local wisdom, customs and habits of their respective communities, while aligning these regulations with national interests. Thus, strong synergy can be formed between Regional Regulations and national goals, without putting aside the characteristics of the people in the regions (4–6). In carrying out its regional autonomy system, Indonesia divides governmental affairs into three groups namely absolute, concurrent and general groups. Absolute affairs are affairs that are not included in the autonomy agenda and are only taken care of by the Central Government, concurrent affairs are mandatory and optional government affairs divided between the Central and Regional Governments according to their respective capacities, while general affairs have a portion that is more handled by Regional Governments (7–11). Therefore, the position of the Regional Government in managing their respective regions has become more strategic.

Regional Regulation is a legal product prepared and issued by the Regional Government consisting of Governors/Mayors/Regents and DPRD. Regional Regulations are legal rules governing certain procedures, behaviors and regulations in general aspects that are binding. Even though it is unique to each region, the contents of the Regional Regulation are not allowed to have conflicts with higher laws, and the interests of the general public in the area. The rules contained in the Regional Regulations are designed in such a way as to provide strong support for the Regional Government in physical and social development activities (7–11). Because of its close relationship with social and community formation, regional regulations must be properly planned and drafted. The function of regional regulations is as an instrument and legal basis for the implementation of regional policies, a functional part of higher regulations, a reflection of regional characteristics and specificities, and a development tool in realizing regional welfare.

In addition to its strategic position and being a reflection of regional uniqueness, Regional Regulations are also prepared with specific material. According to Bunga (2019), Materials that are generally contained in regional regulations cover a number of aspects, namely burdens on the population such as levies or taxes, reduction of freedom, restrictions on rights, and materials that are derivatives of higher statutory regulations. Article 14 of Law Number 12 of 2011 regulates the normative aspects of the formation of Regional Regulations. In that article it is stated that the material for Regional Regulations is formed based on the aspirations, conditions and special circumstances of a region, as well as a reflection of higher statutory regulations (13–15). Contradictions of Regional Regulations with higher laws or public interest will open space for the Central Government represented by the Supreme Court to cancel these Regional Regulations.

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Cancellation of regional regulations is one of the functions of the central government in implementing the supervisory function of government affairs in the regions and regulations issued by regional heads as an effort to implement government activities in the regions. The form of supervision can be carried out in the form of evaluative or verification. In addition, this supervision is intended to create synergy between Regional Regulations and Government Regulations and Laws. In order to have a positive impact on community development in the region, regional regulations should be intended as instruments to protect and protect the community at large. Therefore, the legal content is not only aimed at fulfilling a juridical function, but also a sociological function (the hopes and desires of the community) and a physiological function (guaranteeing justice) (16–19).

Regional Regulations that are considered to contain conflicts with public interests and laws and regulations that have a higher position can be canceled through testing on two instruments of authority, namely the Supreme Court with a judicial review, and the Ministry of Home Affairs with an executive review system (20–23). The authority given to these two government instruments, then gave rise to the dualism controversy of cancellation, and reduced public satisfaction due to reduced legal certainty. Meanwhile, the principle of legal certainty states guarantees regarding the implementation of legal elements in an appropriate and balanced manner, without conflict, and can be understood by anyone who uses them. In addition, legal certainty is also a guarantee for the community that all members of society can be treated fairly without any gaps and arbitrariness. The dualism of authority at both the Supreme Court and the Ministry of Home Affairs has indirectly minimized the power of legal certainty for the people, especially when there is a conflict over the legitimacy of regional regulations between the two government instruments.

II. METHOD

The research method used in this research is normative juridical method. Normative juridical research is a scientific research method carried out by taking library materials as the main material (24). Indirectly, this research will be carried out by examining the statutory approach that applies as a source of law. With this normative juridical approach, legal texts will become the main source of data in research (25). As additional data, in this study principles, discrepancies, systematics, inventories, and legal remedies are additional sources that will be used as material for research considerations.

III. RESULTS

The cancellation of regional regulations raises the consequence of not applying these regulations as a basis for government action (*bestuur handelingen*), and loses binding legal force as a rule (*rechtsnorm*). As a consequence, the Regional Government has the obligation to follow up on the cancellation decision within a period of no later than ninety days after the cancellation decision was sent. The order for the revocation of the Regional Regulation is issued by the State Administrative Officer.

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The Supreme Court is required to have good accuracy in determining the feasibility of canceling regional regulations. In other words, the Supreme Court is required to have the ability to distinguish whether an act of power has an impact on the birth of law or not. If the law being reviewed is declared not to fulfill certain parts of the entire process of forming a law determined by law, then the consequence is that the norms contained therein are considered as prepositions that do not contain legal nature from birth (*nullity*), which is in the legal tradition in Indonesia. referred to as null and void.

Judicial review case testing ¹ by the Supreme Court only covers material aspects, namely assessing whether a statutory regulation being tested is contradictory or not with higher statutory regulations. While the formal aspect does not exist in the test, namely assessing a statutory regulation its formation through the methods as determined/regulated in the applicable statutory regulations or not. This is guided by the procedural law contained in the Supreme Court Regulation Number 1 of 2011 concerning Right to Judicial Review.

¹ The authority of the Supreme Court to examine Regional Regulations was born from an authority called judicial review. In such circumstances, the Supreme Court is an institution that exercises judicial power that is authorized to resolve conflicting norms arising from the birth of a legal product under a law, including regional regulations and regional head regulations. The Supreme Court, in carrying out its judicial review authority, is passive, meaning that it is waiting for an objection filed by the parties whose rights have been harmed by the enactment of regulations under the law.

¹ Thus, the Supreme Court Regulation Number 1 of 2011 narrows the judicial review authority of the Supreme Court, which is authorized by the Constitution and laws to examine the material and formal regulations of laws and regulations, to only carry out material reviews of the contents of laws and regulations. This means that the Supreme Court does not examine or examine the formal aspects of the preparation and formation of statutory regulations under the law. The Supreme Court Judge's decision only considers aspects of authority and substance which are based on higher laws and regulations.

The cancellation of governor regulations and regent/mayor regulations should ⁵ be carried out through a judicial review mechanism at the Supreme Court. In a unitary state, it is fitting for the government at a higher level to be given the authority to supervise regulations (including regional regulations and regional head regulations) issued in the regions. The implementation of this supervision can be carried out by providing guidance to the regions through strengthening the executive preview or testing a legal norm before it becomes legally binding in general.

Judges have the goal of upholding truth ³ and justice and in their duties are obliged to always uphold the law. Law, however, requires morals, as the imperial adage *quid leges leges sine moribus* meanings what is a law if it is not accompanied by morality. Judges have a big role, not only as mouthpieces of laws and regulations but also as agents of legal change as stated by the sociological jurisprudence school. Judges can be a law as a tool of social engineering ³ for enforcing regional rights to realize regional empowerment. Decisions made by judges in court ideally do not create new problems in the community, meaning that the quality of judges' decisions has an important effect on the community

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environment and affects the authority and credibility of the court institution itself. The reality on the ground is that there are still many judges' decisions in the judicial process which actually create new polemics and do not solve problems. Even though ideally the judge's decision that was born should be able to resolve the case.

Cancellation decision that reads absolutely null and void has juridical consequences, that an event that is in a legal product or caused by a legal product since its entry into force is deemed to have never existed, so it must be returned to its original state. Talking about the absolute annulment of a legal product, it can be analyzed that the absolute annulment of a legal product is a regulation or decision.

III. DISCUSSION

In the absence of annulment of Provincial Regulations and Regency/City Regional Regulations by the central Government which are contrary to the provisions of higher laws and regulations, public interest, and/or decency, the Central Government only has preventive supervision or executive preview which is carried out before the draft regional regulation is stipulated. The form of preventive supervision itself based on Law no. 23 of 2014 and Minister of Home Affairs regulations No. 80 of 2015, which is carried out by evaluating and facilitating. Evaluation itself is carried out on a number of other instruments such as regional taxes, regional levies, regional spatial planning, industrial development plans, and the establishment, deletion, merger, and/or change of village status to sub-district or sub-district to village. While facilitation is carried out on draft Regional Regulations other than those being evaluated.

The evaluation and facilitation will only be in the form of recommendations given by the Minister of Home Affairs or the Governor as the representative of the central government. These recommendations can later be used as material for consideration by the local government whether to continue the draft Regional Regulation to be enacted as a Regional Regulation or not to continue as a Regional Regulation. If the Regional Regulation is recommended not to be continued because it is contrary to the provisions of higher laws and regulations, public interest, and/or decency, but the regional government continues until the said Regional Regulation is enacted, then said Regional Regulation with all the consequences that are contrary to the provisions higher laws and regulations, public interest, and/or decency.

The attribution authority of the Supreme Court can theoretically be delegated to the judicial institutions under it. Regarding delegated authority, this is still a problem in Indonesia, namely the Supreme Court is bound by the principle that "a person or institution who receives delegated authority must exercise that authority himself, may not be further sub-delegated. If the Supreme Court is not allowed to delegate some of its authority further to other institutions, then this will be very burdensome for the people in areas that are disadvantaged by the enactment of Regional Regulations, where they must submit a judicial review right to the Supreme Court in Jakarta. On the other hand, the Supreme Court so far still has outstanding cases at the cassation level that must be implemented immediately.

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Right to Examine (*Toestingrecht*) both in the literature and in practice there are two kinds of rights to examine (*Toestingrecht*), namely: determined/regulated in the applicable laws and regulations or not. Formal testing is related to procedural issues and with regard to the legality of the competence of the institution that makes it. The right to formally examine is the authority to assess whether a legislative product such as a law, for example, is incarnated through procedures as determined or regulated in the applicable laws and regulations or not. For example, Regional Regulations are formed (stipulated) by the Regional People's Legislative Council/DPRD together with Governors, Regents or Mayors.

A legal product cannot be called a Regional Regulation (Regional Regulation) if it is only stipulated by the Governor, without being approved by the DPRD. The right to examine the material (*materiele toestingrecht*): an authority to investigate and assess the contents of whether a statutory regulation is in accordance with or contradicts a higher degree of regulation, (*lex superior derogate lex infriore*), and whether a certain power (*verordenende macht*) has the right issued a certain regulation. Material testing relates to the possibility of contention in the material of a regulation with other regulations that are higher or concerning the specificities of a rule compared to generally accepted norms.

IV. CONCLUSION

The implication of canceling a regional regulation by the Supreme Court based on a judicial review application is that the regional regulation is not valid. In addition, decisions have binding force (*erga omnes*) because the authority of a decision issued by a judicial institution lies in its binding power. The decision of a Judicial review case must be a decision that is binding on the parties and must be obeyed by everyone. With this principle, it is reflected that decisions have binding legal force and because of the nature of public law, they apply to anyone – not only the parties to the litigation. Based on the provisions of Article 8 paragraph (2) Supreme Court Rules No. 1 of 2011 the time limit for following up on a decision is 90 (ninety) days from the date the decision was sent. With this provision, it can be seen that the procedural law for judicial review in the Supreme Court applies the principle of *contrarius actus*, meaning that a decision on the judicial review right on a rule or norm that is granted by the Supreme Court is not immediately declared null and void/has no binding legal force, but is handed over to a legal entity. or the state administration official who issued the said statutory regulation to revoke it (including changing, replacing or canceling). In addition to the decision to cancel regional regulations issued by the Supreme Court, a judicial review cannot be submitted. Notification of the contents of the decision along with a copy of the Supreme Court Decision is sent by registered letter to the parties, or in the case of an application submitted through the District Court/State Administrative Court, a copy of the decision is sent through the relevant District Court/State Administrative Court.

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