



## Disbursing obesity of local regulation through program harmonizing local regulation formation

Eka NAM Sihombing<sup>1</sup>

<sup>1</sup> Faculty of Law, University Muhammadiyah of North Sumatera, Medan, Indonesia

### Abstract

Since Decision of the Constitutional Court Number 137 / PUU-XIII / 2015 and Number 56 / PUU-XIV / 2016, the Minister of Home Affairs and the Governor is not authorized to cancel the Local Regulation. Both Constitutional Court Decisions cannot be denied to be one of the obstacles for the central government to suppress the growth rate of overlapping local regulations, so that necessary steps to disbursing obesity of local regulations starting from the upstream or since the planning stage. One of the steps that can be taken to obstruct obesity rate of Local Regulation is by conducting harmonization activities at planning stage that is harmonization to draft Program of Formation of Local Regulation.

**Keywords:** disbursing obesity, local regulation, harmonizing

### Introduction

Inauguration of the State of Indonesia as a State of Law as set forth in Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia has consequences that the government should be based on the law, this is in line with Julius F Stahl proposed that there are 4 (four) important elements of the concept of State law (*rechtsstaat*), namely <sup>[1]</sup>: *first*. human rights protection; *secondly*. power sharing; *third*. governance under the Act; and *fourth*. State Administrative Court. Thus, all activities of national and state life must be based on the law (in this case the written law). Furthermore, Maria Farida argued that In the Preamble of the 1945 Constitution of the Republic of Indonesia implied a meaning, that the State of Indonesia is a state based on law (*rechtsstaats*) in meaning the state of the board (*verzorgingstaats*) <sup>[2]</sup>. This is reflected in the fourth paragraph in the Preamble of the 1945 Constitution <sup>[3]</sup>.

With the duty of the State in carrying out the general welfare, the formation of various regulations in the State of the Republic of Indonesia becomes very important, because the State's intervention in dealing with the welfare of the people in various fields organized by the formation of the rules of the State can no longer be avoided <sup>[4]</sup>. This condition causes any organs of legislative regulators in authority to have an interest in giving birth to various types of legislation in order to accommodate the development of community law, which in turn has an impact on the birth of various types of legislation that even tend to be uncontrollably recorded more or less there are about 62,000 rules in Indonesia so it is considered obesity

regulation <sup>[5]</sup>. Therefore, the current Government has tried to suppress the obesity of regulation is no exception in the region. In 2016 the Central Government through the Minister of Home Affairs canceled 3,143 local regulations and local head regulations due to contradictory to higher laws and regulations, hampered local economic growth and extended bureaucratic lines, hampered licensing and investment processes and impeded ease of business <sup>[6]</sup>. However, since the Decision of the Constitutional Court Number 13 / PUU-XIII / 2015 and Number 56 / PUU-XIV / 2016, the Minister of Home Affairs and the Governor is not authorized to cancel the Local Regulation <sup>[7]</sup>. Both Constitutional Court Decisions can

<sup>5</sup> Look at : *Ada 62.000 Aturan, Indonesia Dianggap "Obesitas Regulasi"* on <https://nasional.kompas.com/read/2017/11/10/19062511/ada-62000-aturan-indonesia-dianggap-obesitas-regulasi> accessed on April, 8 2018.

<sup>6</sup> Look at : *Jokowi: 3.143 Perda Bermasalah Telah Dibatalkan*, President Joko Widodo announced that the Ministry of Home Affairs had canceled 3,143 regional regulations and regional head regulations. These regulations are considered problematic. <https://nasional.kompas.com/read/2016/06/13/17215521/jokowi.3.143.perda.bermasalah.telah.dibatalkan#page1> accessed on April, 8 2018.

<sup>[7]</sup> The authority for the cancellation of local legislation is stated in Article 251 of Law Number 23 of 2014 concerning Local Government as amended several times, the latest by Law Number 9 Year 2015 on the Second Amendment to Law Number 23 Year 2014 on Local Government, Decision of the Constitutional Court Number 137 / PUU-XIII / 2015, the phrase "Regency / Municipal Regulation and" in the provisions of Article 251 paragraph (2) and paragraph (4), the phrase "Regency / Municipal Regulation and / or" in Article 251 paragraph (3), and the phrase "the organizer of the Regency / Municipal Government can not accept the decision on the cancellation of the Regency / City Regulation and" Law Number 23 Year 2014 on Local Government is contradictory to the 1945 Constitution of the State of the Republic of Indonesia and has no binding legal force. Thus neither the Minister of Home Affairs nor the Governor is no longer authorized to cancel the Local Regulation of the Regency / City, while the cancellation of the law should be done through the mechanism of judicial review in the Supreme Court. After the decision of the Constitutional Court Number 137 / PUU-XIII / 2015, the Constitutional Court on June 14, 2017 also issued a decision of the Constitutional Court Number 56 / PUU-XIV / 2016 on Tests on Law Number 23 Year 2014 on Local Government. The Decision of the Constitutional Court Number 56 / PUU-XIV / 2016 also complement the Decision of the Constitutional Court Number 137 / PUU-XIII / 2015, so that the central

<sup>1</sup> Ahmad Redi (2018), *Hukum Pembentukan Peraturan Perundang-undangan*, Jakarta, Sinar Grafika, p. 38.

<sup>2</sup> Maria Farida I.S., (2007), *Ilmu Perundang Undangan (Jenis Fungsi dan Materi Muatan)*, Yogyakarta, Kanisius, p. 1.

<sup>3</sup> "... to establish an Indonesian state government that protects the whole Indonesian nation and the whole of Indonesia's blood sphere and to promote the common prosperity, to educate the life of the nation, and to carry out the world order based on freedom, eternal peace and social justice"

<sup>4</sup> Maria Farida IS, *Loc.cit.*

not be denied to be one of the obstacles for the central government to suppress the growth rate of local regulations that potentially overlap, so that necessary steps to obstruct obesity of local regulations starting from the upstream or since the planning stage.

## Analysis and Discussion

### 1. Harmonization and Synchronization of Legislation Regulations

Lon F Fuller in his book *The Morality of Law* as cited by Ahmad Redi<sup>[8]</sup> reveals 8 (eight) things that cause the failure of legislation, 8 (eight) failure is avoided if there is an emphasis on the contents of legislation with 8 (eight) eight certain moral requirements which include<sup>[9]</sup>:

1. Law Should be general
2. They Should be promulgated, that citizens might know the standards to which they are being held
3. Retroactive rule-making and application should be minimized
4. Laws should be understandable
5. Free of contradiction
6. Laws should not require conduct beyond the abilities of those effected
7. They should remain relatively constant through time
8. They should be a congruence between the laws as announced and their actual administration

One of the emphasis of moral requirements that is not less important as proposed by Fuller above to avoid the failure of legislation is free of contradiction (that legislation should not conflict with legislation either vertically or horizontally).

Conflict between laws and regulations is one of the main factors of invalidity of legislation in Indonesia, this is marked by the many cancellation of legislation conducted by the authorized institution due to contradicting the higher legislation.

Legislation established by ignoring the consistency of various laws and regulations, will lead to inter-regulatory disharmony that ultimately affects the usefulness of these laws when applied to the community. Whereas to achieve the free of contradiction, it is necessary to harmonize efforts in the stages of formulation of legislation<sup>[10]</sup> starting from the planning stage. Harmonization derived from the word "harmonization" according to Kusnu Goesniadhie is an effort or process to realize harmony, compatibility, harmony, compatibility and balance between various factors in such a way that these factors produce unity or form a whole of the law as part of a system. Thus, harmonization means the activities to harmonize or harmonize. Furthermore, Wicipto Setiadi argues that harmonization is to harmonize, adjust, consolidate and

---

government no longer has the authority to cancel the local regulations, both provincial and regency / municipal regulations. (to more see at : Eka NAM Sihombing, *Perkembangan Kewenangan Pembatalan Peraturan Daerah Dan Peraturan Kepala Daerah*, in *Jurnal Yudisial* Jilid 10, Publish 2 Year 2017, p.217-234)

<sup>8</sup> Ahmad Redi, *Op.Cit* p.44-45.

<sup>9</sup> *Ibid*

<sup>10</sup> Under the provisions of Article 1 Sub-Article 1 of Law Number 12 Year 2011 concerning the Formation of Laws and Regulations, it is stipulated that the formation of Laws and Regulations is the drafting of Legislation covering the stages of planning, drafting, discussion, ratification or stipulation.

round up the conception of a draft regulation with other laws, higher, equal, or more low, and other matters other than statutory regulations, so systematically arranged, not contradictory or overlap<sup>[11]</sup>. This is a consequence of the hierarchical system of legislation<sup>[12]</sup> as stated in the provisions of Article 7 of Law Number 12 Year 2011 on the Formation of Legislation.

There are at least 3 (three) reasons why it is necessary to harmonize the laws and regulations, namely<sup>[13]</sup>:

1. Hierarchically arranged legislation is an integral part of the national legal system. Legislation as a system or sub system of a larger system must meet the characteristics, among others, there is mutual interest and interdependence and is a whole round.
2. Laws and Laws under the Act can be tested by judicial authorities. Harmonization of legislation is very strategic in its function as a preventive measure to prevent the submission of a petition for judicial review of legislation to a competent judicial power.
3. To produce good legislation. Harmonization of draft legislation is intended to prevent from the outset of overlapping and disharmony of potential legislation.

**The harmonization aspects are as follows<sup>[14]</sup>:**

#### 1. Material matter aspect

##### Material aspects include

- a. The harmonization of material conceptions of the draft of legislation with Pancasila
- b. The harmonization of material conception of the content of draft laws and regulations with the 1945 Constitution
- c. Harmonization of material conceptions of draft laws and regulations with legal principles
- d. Harmonization of material concepts contents of statutory and horizontal legislation draft.

#### 2. Aspects of drafting techniques

The standard and standard formulation of rules and regulations besides creating a common perception of various technical aspects also increases the efficiency of discussion of draft laws and regulations.

In the context of the formation of a Local Regulation, harmonization is an activity which should be carried out in stages before approval. This is a consequence of the hierarchical system of legislation in Indonesia which places the position of Local Regulation<sup>[15]</sup> at the bottom, so that in the harmonization of the draft local regulations must be in line with various laws and regulations up to the level of the 1945 Constitution.

---

<sup>11</sup> Bayu Dwi Anggono, *Harmonisasi Peraturan Perundang-Undangan di Bidang Penanggulangan Bencana*, in *Journal Mimbar Hukum* Volume 22, Number 2, June 2010, p. 386.

<sup>12</sup> *Ibid*

<sup>13</sup> Qomaruddin dan Nasruddin, *Op. Cit* p.9-14

<sup>14</sup> *Ibid* p.14-19.

<sup>15</sup> The provisions of Article 7 of Law Number 12 Year 2011 states that: (1) Types and hierarchies of Legislation consist of: a. 1945 Constitution of the State of the Republic of Indonesia; b. Decision of the People's Consultative Assembly; c. Law / Government Regulation in Lieu of Law; d. Government regulations; e. Presidential decree; f. Provincial Regulations; and g. Regency / City Regulations. (2) The legal power of the Legislation shall be in accordance with the hierarchy as referred to in paragraph (1).

### 3. Harmonization at the local regulation planning stage

It has been elaborated that in the process of formulating the Local Regulation, harmonization activities shall be carried out in the planning stages of the formulation of local regulations. As it is known together that the planning stage is the key to achieving the achievement of the desired goal. According to M. Solly Lubis Planning is part of the subsystem of the management system (management), the specificity of the nature of planning is the dominance of the planning function for the overall management success. According to strategic political views, management has a strategic value, itself planning as part of course also has the nature and strategic meaning<sup>[16]</sup>. Conversely, if planning as a preliminary step of strategic value management, great hope that the overall management will be of strategic value<sup>[17]</sup>. Planning is basically a means, technique or method to achieve the desired objectives precisely, directed and efficient in accordance with the available resources<sup>[18]</sup>.

Preparation the Planning Program of Local Regulation<sup>[19]</sup> is a planning instrument of program of formation of the Provincial Regulation or Regency / City Regulation which arranged in a planned, integrated, and systematic manner. As a planning instrument that is crucial to the achievement of objectives, then in the preparation must be guided by the provisions of relevant legislation. During this stage, the planning stage, especially at the stage of Preparation the Planning Program of Local Regulation tend to ignore the relevant legislation, causing various problems, among others:

1. That the local regulation program only contains a list of local draft regulation titles without being based on in-depth reviews as outlined in the description, explanation or academic draft of the draft local regulations<sup>[20]</sup>.
2. Preparation of explanations or explanations and / or academic texts is not done prior to Preparation the Planning Program of Local Regulation, because the financing of the formation of new local regulations is budgeted after the Preparation the Planning Program of Local Regulation, whereas the process of formulating local regulations starts from the planning stages preceded by the preparation of explanations or explanations and / or academic texts and Preparation the Planning Program

<sup>16</sup> Solly Lubis (2011), *Serba-Serbi Politik dan Hukum*, Jakarta-Sofmedia, p. 67.

<sup>17</sup> *Ibid*

<sup>18</sup> Sjafrizal (2015), *Perencanaan Pembangunan Daerah dalam Era Otonomi*, Jakarta - Rajagrafindo Persada, p. 24.

<sup>19</sup> Based on the provisions of Article 403 of Law Number 23 Year 2014 on Local Government: "All provisions concerning the local legislation program and local legislation already existed before this Law shall be enacted shall be read and interpreted as the formation program of Local Regulation and the formation of a local regulation, as long as it is not contradictory to This Act ". In the provisions of Law Number 23 Year 2014 no definitive definition of Preparation the Planning Program of Local Regulation was established, therefore the definition of Preparation the Planning Program of Local Regulation should refer to the provisions of Article 1 number 10 of Law Number 12 Year 2011 on the Formation of Legislation which states that: Local Legislation Program hereinafter referred to as Program local regulation is a planning instrument for the formation of Provincial Regulations or District Regulations which are arranged in a planned, integrated, and systematic manner ". to more see at : Eka NAM Sihombing, *Problematika Penyusunan Program Pembentukan Peraturan Daerah*, in *Jurnal Legislasi Indonesia*, Volume 13 Number 03 Tahun 2016, p.285-295.

<sup>20</sup> *Ibid*, p.293-294.

of Local Regulation. Therefore, after the formation of a local regulation, it is only started to make explanations or explanations and / or academic manuscripts of

3. Draft local regulations, and sometimes even explanations and / or academic manuscripts are made after drafting the draft local regulations, whereby explanations or explanations and / or academic texts adjust the draft local regulations otherwise<sup>[21]</sup>.
4. The draft of local regulations in the Preparation the Planning Program of Local Regulation that are not in accordance with the content material<sup>[22]</sup> which ultimately lead to disharmony with various laws and regulations<sup>[23]</sup>.

The disharmony between the local regulations and various other legislative rules can actually be minimized as early as possible through harmonization activities on Preparation the Planning Program of Local Regulation design. Surely this raises the question, why should it be harmonized with Preparation the Planning Program of Local Regulation design? Is not Preparation the Planning Program of Local Regulation draft that will be stipulated in the DPRD Decree only contains a list of the order of the Draft Local Regulation to be established in the current year? What will be the materials for harmonizing activities?

To answer the question, it will first be parse various provisions related to Preparation the Planning Program of Local Regulation. Based on the provisions of Article 33 jo. Article 40 of Law Number 12 Year 2011 states that the Program local regulation (read: Preparation the Planning Program of Local Regulation) contains a program for the formulation of provincial, regency / municipal regulations with the title of provincial, regency / municipal regulation draft, the material to be regulated and its relationship with the legislation, other invites. Material to be regulated and its relation to other laws and regulations concerning the draft of provincial, regency / municipal regulation draft, which includes: a. Background and purpose of compilation; b. Goals that want to be realized; c. Principal thoughts, scope or objects

<sup>21</sup> *Ibid*

<sup>22</sup> Normatively, the material content of local regulations can be seen in the provisions of Article 14 of Law Number 12 Year 2011 on the Formation of Laws and Regulations. In the article it is explained that the content of the content of provincial regulations as well as regency / municipal regulations contain content in the context of the implementation of autonomy local and co-administration tasks and accommodate special local conditions and / or further elaboration of the higher laws and regulations. Furthermore Sihombing & Marwan elaborated that: "The content material in the context of local autonomy and co-administration entails the meaning that the formation of local regulations should be based on the distribution of functions between the government, provincial and district / municipal governments as regulated in Law No. 23 of 2014 Local Government and other legislation. In relation to the content material in order to accommodate the special conditions of the region, it implies that the local regulations as a rule that abstracts the values of the community in the region containing the content of the values identified as the special condition of the region. In connection with the further elaboration of the legislation higher meaning that juridically the formation of local regulations is sourced to higher legislative regulations. In other words the formation of local regulations should be based on the delegation of the higher legislation". To more see at : Eka NAM Sihombing dan Ali Marwan (2017), *Ilmu Perundang-Undangan*, Medan, Pustaka Prima, p.137.

<sup>23</sup> This is based on the experience of the author during the duty of being a Regulatory Designer at the Local Office of the Ministry of Justice and Human Rights of North Sumatra since the year 2010 s/d at this time.

to be arranged; and d. Reach and direction settings. The material set forth which has been through review and alignment is set forth in academic texts. Furthermore, the provisions of Article 56 paragraph (2) jo. Article 63 of Law Number 12 Year 2011 states that the draft of local regulations derived from DPRD and Head of Region accompanied by explanation or description and/or academic script. The formulation indicates that it should be at the time of the formulation of the formation of local regulations, the results of assessment and alignment in the form of explanations or explanations and/or academic draft of the draft local regulations have been there first.

The result of this assessment and alignment is needed to know the foundation of the formation and the urgency of a matter regulated in the form of local regulation so that it becomes the priority scale in the formation program of the local regulation, in addition to the formulation matrix of the formation program of local regulation as referred to in Attachment I of Regulation of the Minister of Home Affairs Number 80 Year 2015 there is one column which contains whether a draft local regulation is accompanied by an academic paper or accompanied by a description or explanation<sup>[24]</sup>.

If the above provisions are adhered to during the preparation of Preparation the Planning Program of Local Regulation, then harmonization activities can be carried out at that stage, using the materials of the assessment and alignment set forth in the academic texts, explanations and / or information. So far, based on the provisions of Law Number 12 Year 2011 and Ministry of Home Affairs Regulation Number 80 Year 2015, the harmonization activities of the draft new regulations are implemented after Preparation the Planning Program of Local Regulation is set, so the result is less than optimal. It is possible that when harmonized, it is found that a draft local regulation is not in accordance with its cargo material, whereas a series of stages has been passed (at least the stage of preparation) which certainly has implications on the financing of those stages which have been budgeted in the current year's APBD.

Next question, who is involved in Preparation the Planning Program of Local Regulation harmonization activities? Referring to the provisions of Article 36 paragraph (1)<sup>[25]</sup> jo. Article 40 of Law Number 12 Year 2011 and Ministry of Home Affairs Regulation Number 80 Year 2015, it is better that DPRD Parties shall coordinate the activities of harmonizing Preparation the Planning Program of Local Regulation by involving the vertical institution in the region conducting government affairs in the field of Law in the region. The result of harmonizing activities of Preparation the Planning Program of Local Regulation shall be observed jointly by the organs of local regulation, if the result of a local regulation is not in accordance with its cargo material, it shall be followed by the abolition of the draft regulation on Preparation the Planning Program of Local Regulation design.

<sup>24</sup> Eka NAM Sihombing, *Problematika.....Op. Cit.* p.293.

<sup>25</sup> Preparation of Provincial Program local regulation between Provincial DPRD and Provincial Local Government shall be coordinated by Provincial DPRD through Provincial DPRD Provincial apparatus which specially handles the legislation.

## Conclusion

Based on the above description it can be concluded that harmonization activities are carried out in order to harmonize, adjust, consolidate and round out the conception of a draft regulation with other laws, higher, equal, or lower, and matters other than statutory regulations, so arranged in a systematic, not contradictory or overlap. This is a consequence of the hierarchical system of legislation in Indonesia. Harmonization activities in the context of the formation of a local regulation should begin at the planning stage, especially at the stage of preparing Preparation the Planning Program of Local Regulation by using the material of the assessment and alignment poured as outlined in academic texts, explanations and / or information.

In order that harmonization of Preparation the Planning Program of Local Regulation has legitimacy it is necessary to consider changes in the various laws and regulations related<sup>[26]</sup> to Preparation the Planning Program of Local Regulation harmonization mechanism. So it is expected that this simple solution can suppress the obesity rate of the local regulation.

## References

1. Ahmad Redi. *Hukum Pembentukan Peraturan Perundang-undangan*, Jakarta, Sinar Grafika, 2018.
2. Eka NAM. Sihombing dan, Ali Marwan. *Ilmu Perundang-Undangan*, Medan, Pustaka Prima, 2017.
3. Maria Farida IS. *Ilmu Perundang Undangan (Jenis Fungsi dan Materi Muatan)*, Yogyakarta, Kanisius, 2007.
4. Sjafrizal. *Perencanaan Pembangunan Daerah dalam Era Otonomi*, PT. Rajagrafindo Persada-Jakarta, 2015.
5. Solly Lubis. *Serba-Serbi Politik dan Hukum*, Edisi 2, Cetakan I, PT. Sofmedia-Jakarta, 2011.
6. Qomaruddin dan Nasruddin. *Modul Diklat Jabatan Fungsional Perancang Pertama (Pengharmonisasian, Pembulatan dan Pemantapan Konsepsi, Peraturan Perundang-undangan)*, Depok, Badan Pengembangan Sumber Daya Manusia Hukum dan HAM, Kementerian Hukum dan HAM RI, 2013.
7. Bayu Dwi Anggono, *Harmonisasi Peraturan Perundang-Undangan di Bidang Penanggulangan Bencana*, dalam *Jurnal MIMBAR HUKUM*, 2010, 2(2).
8. Eka NAM Sihombing, *Problematika Penyusunan Program Pembentukan Peraturan Daerah*, dalam *Jurnal Legislasi Indonesia*, Volume 13 Number 03 Tahun 2016.
9. Eka NAM Sihombing, *Perkembangan Kewenangan Pembatalan Peraturan Daerah Dan Peraturan Kepala Daerah*, dalam *Jurnal Yudisial* Jilid 10, Terbitan 2 Tahun 2017
10. <https://nasional.kompas.com/read/2017/11/10/19062511/ada-62000-aturan-indonesia-dianggap-obesitas-regulasi> accessed on 08 April 2018
11. <https://nasional.kompas.com/read/2016/06/13/17215521/jokowi.3.143.perda.bermasalah.telah.dibatalkan#page1> accessed on 08 April 2018.

<sup>26</sup> Arrangement on Procedures for the preparation of Program Forming of Perda can be seen in Law Number 12 Year 2011 concerning the Formation of Laws and Regulations, Law Number 23 Year 2014 on Local Government, Presidential Regulation No. 87 of 2014 on the Implementation of Laws Of Law Number 12 Year 2011 concerning the Formation of Laws and Regulations, Regulation of the Minister of Home Affairs Number 80 Year 2015 on the Formation of Local Law Products.