Harmonization of Special Autonomy Norms in the Establishment of Special Regional Regulations

Martinus Guntur Ohoiwutun[1], Marthen Arie[2], Achmad Ruslan[3], Zulkifli Aspan[4]
[1,2,3,4] Faculty of Law, Hasanuddin University, Indonesia
*** Corresponding author E-mail: etnirmangal@gmail.com**

Abstract

Special Autonomy for the Province of Papua is the granting of wider authority for the Province and the people of Papua to regulate and manage themselves within the framework of the Unitary State of the Republic of Indonesia. The wider authority also means greater responsibility for the Province and the Papuan people to administer the government and regulate the utilization of natural resources in the Papua Province for the greatest benefit of the Papuan people as part of Indonesia by following the laws and regulations. This study aims to examine the harmonization of special autonomy norms in forming special regional regulations. This research is normative legal research. The technique of collecting legal materials is done through library research, collecting documents, laws, and regulations, and as a complement to legal materials, interviews are carried out. Legal materials that have been described by the subject matter are then systematized, explained, and then given arguments so that the whole forms a logically interconnected unit. The results showed that the absence of organic regulations caused the Papuan Regional Governments who were authorized to form Perdasus (Governor of Papua, DPRP, and MRP) to have difficulty exercising their authority. So that it leads to unclear processes and content materials that can be regulated by Perdasus. For example, when the Papuan local government wants to stipulate a Perdasus material regarding a special land clearing permit that is valid in Papua, it can still be considered by the center as contradicting a ministerial regulation that regulates the same thing.

Keywords Regional regulations; special; Papuans

DOINumber:10.14704/nq.2022.20.8.NQ44744 **NeuroQuantology2022;20(8):7212-7227**

INTRODUCTION

Special Autonomy for the Province of Papua is a way of granting wider authority to the Province and the people of Papua to regulate and manage themselves within the framework of the Unitary State of the Republic of Indonesia. The wider authority also means greater responsibility for the Province and the Papuan people to administer the government and regulate the utilization of natural resources in the Papua Province for the greatest benefit of the Papuan people as part of Indonesia in accordance with the laws and regulations. This authority also means the authority to empower the socio-cultural and economic potential of the Papuan people, including providing an adequate role for indigenous Papuans through representatives of custom, religion, and women. The role

*e*ISSN1303-5150

played is participating in formulating regional policies, determining development strategies while respecting the equality and diversity of Papuan people's lives, preserving Papuan culture and natural environment, which is reflected in the change of the name Irian Jaya to Papua, regional symbols in the form of regional flags and regional anthems as a form of actualizing the identity of the Papuan people and acknowledging the existence of ulayat rights, customs, indigenous peoples, and customary law.[1]

Hikmahanto Juwana stated that to overcome the gap between law and politics, the following things are needed: first, the need for a multi-disciplinary approach to law. The problem of making laws and regulations faced by Indonesia must be recognized and accepted by the legal community as a problem that cannot exclusively be solved with a legal approach. Even the legal community has to admit that a solution based on a legal science approach will not suffice. The problem of legislation must be found a solution in the context of the study of *Law and Development* which opens up opportunities for various disciplines to play a role. Even legal experts who are involved in finding solutions to law enforcement problems must have knowledge other than law, especially social science. Second, the formation of law must prioritize welfare. Welfare of the legislators must receive special attention for the intended welfare, so that the influence of money in legislation can be minimized.[2]

Forming laws and regulations is basically pouring public policy into the form of legal norms that bind citizens. A legal norm contained in the legislation can be in the form of an order (*gebod*), prohibition (*verbod*), licensing (*toestemming*) or exemption (*vrijstelling*). [3] In formulating legal norms, in addition to paying attention to legal principles (*rechtsbeginsel*) which will provide the *ratio legis* or general purpose of a statutory regulation, also pay attention to the right forming organ, the suitability between the type and material of the content of the legislation and the clarity of the formulation.[4] In relation to Papua's special autonomy, the laws and regulations as provisions for this autonomy have been amended several times, so that reconstruction is needed to design a special autonomy framework model for Papua which is treated differently in its Perdasus materials.

Perda is basically a product of local government legislation or is the result of a compromise between the Regional People's Representative Council (DPRD) and the regional head which must not conflict with the applicable legal provisions. Therefore, neither the DPRD nor the regional head individually have the authority to stipulate a regional regulation, but must go through the existing mechanism, which is determined by the regional head with the approval of the DPRD in advance.

In reality, there are problems, namely that the central government aims to achieve justice, equality and more treatment, but in reality, let alone being realized, there are even some newly formulated content materials that cannot be fully accepted by the central government. Because it is against the law, while it is known that there

[1] PenjelasanUmumUndang-UndangNomor 21 Tahun 2001 tentangOtonomiKhususBagiProvinsi Papua (Lembaran Negara Republik Indonesia 2001 Nomor 135, TambahanLembaran Negara Republik Indonesia Nomor 4151).

[2] HikmahantoJuwana, *PenegakanHukumdalamKajian Law and Development: Problem danFundamenbagiSolusi di Indonesia*", kampus UII, Yogyakarta, 2013, pg.18-21.

[3] AA Oka Mahendra, *Refomasi Pembangunan HukumdalamPerspektifPeraturanPerundang-Undnagan*, Ed, Soekedy, DepartemenHukumdan HAM Republik Indonesia, Jakarta, 2006, pg. 88.

[4] *Ibid*.

*e*ISSN1303-5150

are no theories stated lower regulations can override higher regulations in the framework of special autonomy.[5]

Every society always has a "*rechtsidee*", which is what the community expects from the law, for example the law is expected to guarantee justice, benefit, and order, as well as welfare. The ideal of law or *rechtsidee* grows in society's value system about good and bad, their views on individual and social relations and so on, including views on the unseen world. All of this is philosophical, meaning that it involves a view of the essence or nature of things. The law is expected to reflect the value system both as a means of protecting values and as a means of realizing them in people's behavior.[6]

In general, the principle of national law cannot be ruled out in the Perdasus, although Papua's autonomy is special, it does not specify which are special and which are not. Normatively the provisions of laws and regulations through Law No. 21 of 2001, already in harmonization of law, it's just that many articles are still ambiguous, so it needs to be clarified, by revising Law No. 21 of 2001 or through a Government Regulation.

For Papua Province, Perdasus and Perdasi are always held in consultation with all parties. And this has become a common understanding that the contents of the Perdasus and Perdasi must be communicated. However, the problem lies in who the constituents of the material are, because sometimes they can't be sorted out properly. For example, for the forest, people who live in the forest are invited. Because it could only be limited to a communication forum, but is it true that the subject being the target of this regulation is here to convey his aspirations. Public consultation is only a matter of formality. Because from the start the constituents who were invited have not been able to represent the community regarding this regulated material.

So far, the formation of the Perdasus rarely involved the community, either in the form of hearings or directly involved in the process of forming the Perdasus. This is because there is no mechanism made by the provincial government and the DPRP so that every Perdasus formation starting from the planning, preparation, technical preparation, formulation, discussion, stipulation/ratification and dissemination process does not involve the community. This causes the implementation of the Perdasus often creates problems in the implementation of the regulation. In fact, the main spirit of the Perdasus is how to improve the welfare of the Papuan people within the Unitary State of the Republic of Indonesia.

In the case of the formation of a good special regional regulation, of course, it must take into account the special conditions of Papua.[7]"*The local regulation of both provincial and district/municipal whose formation made by Parliament together with Regional Head shall refer to the higher legislation and public interest as precise, as known in the establishment of local regulations, the local governments must pay attention to the specific conditions of the region in order to regulations produced can become effective*". (Regional regulations both provincial and district/city

[5]HasilwawancaradenganYuzak Reba padatanggal 14 November 2020.

[6]HamzahHalimdan Kemal RedindoSyahrul Putra, *Cara PraktisMenyusundanMerancanganPertauran Daerah (SuatuKajianTeoritisdanPraktisDisertai Manual) KonsepsiTeoritisMenujuArtikulasiEmpiris)*, Kencana, Jakarta, 2009, pg. 8.

[7] AndiBauInggit AR, A. PangerangMoenta, MarwatiRizadanHamzahHalim, *Local Regulation Review in Realizes Legal Order of the Local Governance*, Journal of Law, Policy and Globalization, Volume 59, 2017, pg. 218, https://www.iiste.org/Journals/index.php/JLPG/article/view/36173/37169, downloaded May 2, 2022.

whose formation is made by the DPR together with the Regional Head must refer to higher laws and the local public interest, as is known in the formation of regional regulations, regional governments must pay attention to special regional conditions so that the regulations that are produced can be effective).

In accordance with the provisions of Article 96 of Law No. 12 of 2011 states that the public has the right to provide input orally and/or in writing in the formation of laws and regulations which is carried out through public hearings, work visits, outreach and/or seminars, workshops and/or discussions. The right of the community to provide input in the formation of these laws and regulations (including Perdasus and Perdasi) can be exercised by individuals or groups of people who have an interest in the substance of the draft legislation. Therefore, to make it easier for the public to provide input, both verbally and/or in writing, every draft of legislation must be easily accessible to the public. However, specifically regarding draft laws and regulations (including Perdasus and Perdasi) must be easily accessible by the public. In practice, it turns out that it is not easy to get access to every draft regulation document. Whereas the draft should be given free of charge to the public to provide input to DPRD members so that the resulting legal product is more participatory so that in its implementation it does not harm the interests of the community.

Based on the description above, the problem in this research is how to harmonize the norms of special autonomy in the formation of special regional regulations. The purpose of this research is to examine the harmonization of special autonomy norms in the formation of special regional regulations.

RESEARCH METHODS

type of research used in this research is normative legal research. This study used several approaches, namely the statutory *approach* and the *conceptual approach*.

The sources of legal materials in this study consisted of primary legal materials and secondary legal materials. Analysis of legal materials is carried out by constructing juridical by doing analogies and reversal of propositions, related to the formation of regional regulations formed by special regional governments. Further analysis of legal materials is carried out in a systematic way to find the link between a legal concept or legal proposition between equal and unequal laws and regulations.

DISCUSSION

Conceptually, legal harmonization is an effort or process that wants to overcome the boundaries of differences, contradictory matters and irregularities in the effort or process of realizing harmony, conformity, harmony, compatibility, balance between legal norms in legislation. Harmonization of law is defined as an effort to process the adjustment of legal principles and systems, in order to realize legal simplicity, legal certainty and justice.[8] Harmonization of law as a process and formation of laws and regulations, overcoming contradictory matters and irregularities between legal norms in laws and regulations, so that harmonious laws and regulations are formed, in the sense of being in harmony, harmony, balance, integrity, and consistency, and obey the principles. The systematic step of harmonization of national law, based on the paradigm of Pancasila and the 1945 Constitution which gave birth to a state administration system

[8] Novianto M. Hantoro, *SinkronisasidanHarmonisasiPengaturanMengenai Peraturan Daerah, sertaUjiMateriPeraturan Daerah PusatPengkajianPengolahan Data danInformasi (P3DI)*,SekretariatJenderal (SETJEN) DPR RI, Jakarta, 2009, pg. 76.

with two fundamental principles, the principle of democracy and the principle of the rule of law idealized to realize a national legal system with three components, namely legal substance, legal structure and its institutions, and legal culture.

In a legal system consisting of statutory regulations as interrelated sub-systems cannot stand alone apart from the legal system. Harmonization of laws and regulations has a very important role in maintaining harmony and preventing the overlapping of laws and regulations with one another which can result in the creation of conditions of legal uncertainty so as to ensure the achievement of legal objectives, namely devoting to the state's goals to create prosperity and happiness for all. his people. Given the hierarchy of laws and regulations and applicable legal principles, there are several types of harmonization of laws and regulations. Vertical harmonization, namely harmonization of legislation carried out against other laws and regulations in different hierarchies. Horizontal harmonization, namely harmonization of laws and regulations carried out against laws and regulations that are in the same and equal hierarchy.

The argument above shows that ambiguous articles are objects that must be a concern for further harmonization so that there is clarity and certainty in the law. This is in line with the general theory of laws and regulations in which every legal product that is passed must meet the *first criterion,*the concept of *lex scripta*, namely that legality relies on written law. *Second*, the concept of *lex stricta,*namely that the written law must be interpreted rigidly, should not be expanded so as to harm the subject of the perpetrator of the act. The rigidity makes the method of legal discovery extending. *Third*, the concept of *lex certa*, which puts forward the importance of certainty as the first legal goal that must be achieved before people talk about other values such as justice and expediency. The path that must be taken is through a deliberation approach to reach consensus and is mandatory for traditional leaders and government institutions in the regions with the central government. If forced to go through legal efforts to review the law to the Constitutional Court.

Prior to the Constitutional Court Decision Number 137/PUU-XIII/2015, based on Article 251 of Law No. 23 of 2014,[9] the

[9]Article 251 of Law Number 23 of 2014 concerning Regional Government (State Gazette of the Republic of Indonesia of 2014 Number 244 Supplement to the State Gazette of the Republic of Indonesia Number 5587), regulates:

(1) Provincial regulations and governor regulations that contradict the provisions of higher laws and regulations, public interest, and/or morality are canceled by the Minister.
(2) Regency/Municipal regulations and regulations of regents/mayors that contradict the provisions of higher laws and regulations, public interest, and/or morality are annulled by the governor as the representative of the Central Government.
(3) In the event that the governor as the representative of the Central Government does not cancel the Regency/City Perda and/or regent/mayor regulations that are contrary to the provisions of higher laws and regulations, public interest, and/or decency as referred to in paragraph (2), the Minister cancels Regency/City regulations and/or regent/mayor regulations.
(4) The cancellation of provincial regulations and governor regulations as referred to in paragraph (1) is stipulated by a Ministerial decision and the cancellation of district/city regulations and regents/mayor regulations as referred to in paragraph (2) is stipulated by a governor's decision as the representative of the Central Government.
(5) No later than 7 (seven) days after the decision to cancel as referred to in paragraph (4), the regional head must stop the implementation of the Regional Regulation, and then the DPRD together with the regional head revoke the said Regional Regulation.
(6) At the latest 7 (seven) days after the decision to cancel as referred to in paragraph (4), the regional head must stop the implementation of the Perkada, and then the regional head revokes the said Perkada.
(7) In the event that the provincial administration cannot accept the decision to cancel the Provincial Regulation and the governor cannot

*e*ISSN1303-5150

Ministry of Home Affairs canceled several provisions of Perdasus No. 1 of 2011 concerning the Restoration of the Rights of Papuan Women Victims of Violence and Human Rights Violations on the grounds that they are contrary to higher laws and regulations, public interest and/or decency. Several provisions were annulled, namely:[10]

1. In Article 1 paragraph (17) what is meant by Papuan women are women who are indigenous Papuans, in Article 8 letter a it states that in providing guarantees for the restoration of victims' rights, it is carried out with the aim of giving acknowledgment and accountability for the occurrence of violence and violations. Human rights against Papuan women, as well as Article 10 paragraph (2) states that the authority of the Regional Government includes the provision of sources of funds and human resources as well as institutions and supporting facilities for the restoration of the rights of victims as a form of state responsibility in carrying out the obligation to provide protection, empowerment and upholding the human rights of Papuan women. These provisions are discriminatory because they are specifically for indigenous Papuan women. This is contrary to Article 6 Letters b, f and h of Law Number 12 of 2011 concerning the Formation of Legislation which must reflect the principles of humanity, diversity in diversity and equality in law and government.
2. Article 17 paragraph (3) states that the special commission consists of a maximum of 15 (fifteen) people who come from elements of the Regional Government, MRP, DPRP, Regional Office of the Ministry of Law and Human Rights, religious institutions, traditional institutions, women's non-governmental organizations, representatives National Human Rights Commission and universities. This is contrary to Article 54 paragraph (2) of Law Number 32 of 2004 concerning Regional Government where DPRD members are prohibited from holding concurrent positions.
3. The regulation in Article 18 has a mechanism, where the authority regulated in the article does not regulate the subject matter of authority.

From the perspective of the Ministry of Home Affairs, in this case the Directorate of Regional Legal Products, views that the content of the Perdasus contradicts higher laws and regulations, public interest and/or morality, but the political aspect prevents the Ministry of Home Affairs from touching the content material. The Ministry of Home Affairs only looks at the administrative aspects of the Perdasus.[11] From this perspective, Perdasus has a political aspect that influences the Central Government so

accept the decision to cancel the governor regulation as referred to in paragraph (4) for reasons that can be justified by the provisions of the legislation, the governor may file an objection to the President no later than 14 (fourteen) Days since the decision to cancel a regional regulation or governor's regulation is received.

(8) In the event that the administration of the regency/city Regional Government cannot accept the decision to cancel the Regency/City Perda and the regent/mayor cannot accept the decision to cancel the regent/mayor regulation as referred to in paragraph (4) for reasons that can be justified by the provisions of the legislation. , the regent/mayor may file an objection to the Minister no later than 14 (fourteen) Days since the decision to cancel the Regency/City Perda or the regent/mayor regulation is received.

[10]Attachment to the Decree of the Minister of Home Affairs Number 188.34-4780 of 2016 concerning the Cancellation of Several Provisions from the Regional Regulation of the Province of Papua Number 1 of 2011 concerning the Restoration of the Rights of Papuan Women Victims of Violence and Human Rights Violations.

[11]Discussion results at the Ministry of Home Affairs on April 27, 2021.

*e*ISSN1303-5150

that it does not carry out the supervisory function of Perdasus.

As explained above, it can be seen that if there is a Perdasus that is contrary to the law or higher legislation, then legal remedies can be taken by examining the Perdasus and/or making amendments to the Perdasus to replace several articles that are considered contrary to national law. . *Judicial review* as a legal effort to test the constitutionality or test the consistency of a statutory regulation under the law with the law by the judiciary, is a legal conception that has a long history in different legal systems. The main form is based on the idea of a hierarchy of legal norms that place the basic norm (*fundamental norm*) as the highest law in the norm system, controlling and becoming a source of legitimacy for the regulations below which are formed as the concretization of these basic norms. All norms whose validity can be traced to one basic norm and the same basic norms form a system of norms, constitute a normative order. The basic norm is the source of the same validity for all norms belonging to the same order and is the reason for the same validity for the validity of the norm.[12] Meanwhile, according to Gerhard van der Shyff, *judicial review* is needed in order to measure/determine lower legal norms against higher legal norms:[13] "*At its core, the act of judicial review entails measuring the congruency or compatibility of what may be termed common or ordinary legal norms with higher legal norms. Legal norms cannot only be divided horizontally between various categories or topics, such as the law of contract or tort but also vertically in various hierarchies such as between constitutional and non-constitutional norms. From a hierarchical point of view, higher norms are determinative of the validity of lower ordinary norms*.(In essence, a judicial review action is needed to measure the congruence or compatibility of what can be called higher legal norms. Legal norms can not only be divided horizontally between various categories or topics, such as contract or tort law but also vertically across various hierarchies such as constitutional and non-constitutional norms. From a hierarchical point of view, higher norms determine the validity of lower norms).

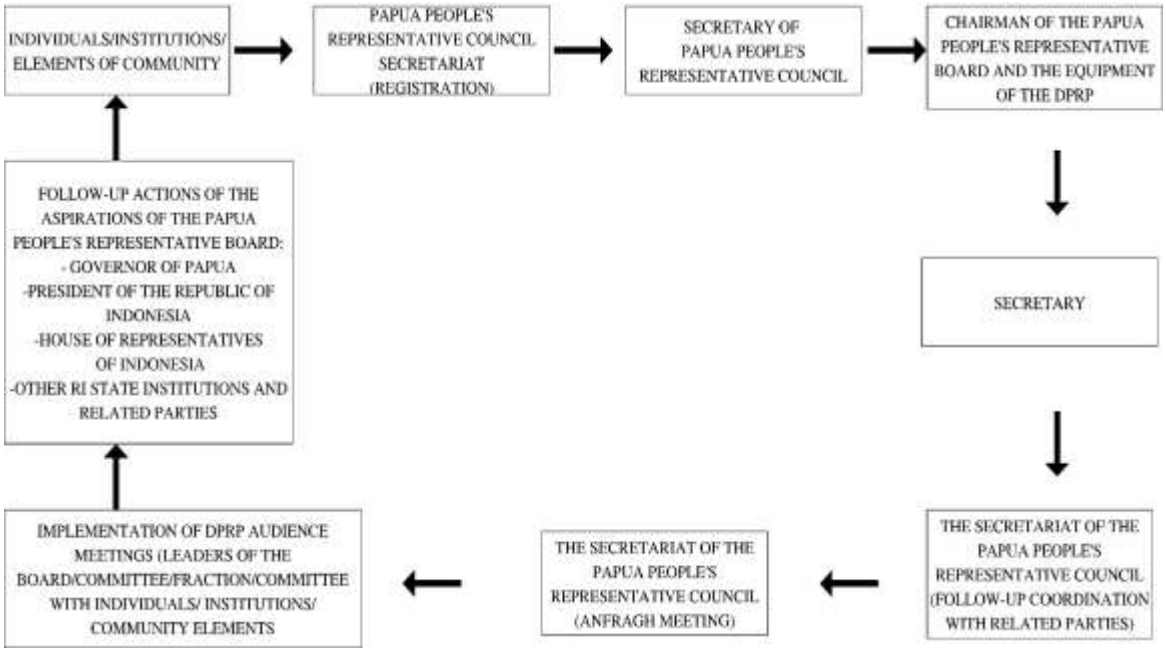
The problem of conflicting norms can in technicality be prevented if the Perda in the Prolegda or Propemperda is well planned. The planning aspect is one of the important factors, therefore, the formation of special legislation (Perdasus) must start from planning. Prepared in a planned, integrated, and systematic manner, and supported by definite ways and methods, and standards that bind all institutions authorized to make laws and regulations.

The aspirations of the people through the Perdasus can be channeled, depending on the extent to which the capacity of members of the DPRP, the Governor, and the MRP can capture those aspirations or not, including the presence of expert staff in the three institutions. At the current position, it is still not clear between the aspirations of the Papuan people and political issues, meaning that the people's political aspirations are more dominant than aspirations in other fields, which should be balanced. Chart 1 below describes the mechanism for the absorption of public aspirations in the DPRP as follows:

[12] MaruararSiahaan, *UjiKonstitusionalitasPeraturanPerundang-Undangan Negara Kita: MasalahdanTantangan*, JurnalKonstitusi, Volume 7, Nomor 4, Jakarta Agustus 2010, pg. 25.

[13] Gerhard van der schyff, *Judicial Review of Legislation, A Comparative Study of the United Kindom , The Netherlands and Sout Africa*, Springe, London, 2010, pg. 5

Chart 1
The mechanism for the absorption of public aspirations in the Papuan DPR
In accordance with Article 115 of DPRP Regulation Number 1 of 2014 concerning Rules of Conduct



Referring to the General Guidelines for the Management of Public Aspirations and Complaints of the DPR RI in 2010 it is explained that aspirations are strong wishes from the community which are conveyed to the People's Representatives in Parliament in the form of statements of attitudes, opinions, hopes, criticisms , input, and suggestions related to the duties, functions, and authorities. And related to absorbing aspirations, it is defined as board activities carried out by listening, paying attention, studying, receiving and reviewing aspirations, both those that develop in the community and those that are reported to the People's Representatives.[14]

Reducing the understanding of the absorption of aspirations above, the absorption of aspirations for the community in the regions can be interpreted as the activities of the DPRD, and the Regional Government to hear, accept, and absorb various aspirations, needs, demands, and interests of the people in the regions. This is of course intended so that government policies and/or legal products of local regulations are in accordance with the needs of the local community. It is undeniable that the facts show that the absorption of aspirations is very dependent on the capacity of legal subjects to understand and understand what the desires and demands of the local community are, even though the community expresses their aspirations, there is a possibility that the local government misinterprets this or even local governments often turn a blind eye to these aspirations. This is also likely to occur in the issue of making a regional regulation on Papua's Special Autonomy where the human resource capacity of the regional

[14] Wasistiono, Sadudan Yonatan Wiyoso, *MeningkatkanKinerjaDewanPerwakilan Rakyat Daerah (DPRD)*, Fokusmedia, Bandung, 2009, pg. 32

*e*ISSN1303-5150

government has not been able to reach the desires of the people in the region.[15]

The legal product of a regional regulation must not only contain political values but must be based on the desire to enforce legal protection for the rights of local people and provide legal certainty in this regard. So that it is unlawful for the rule of law to be made only for partial interests, be it the interests of political parties, colleagues or certain groups. This is in line with Mahfud MD's opinion, a *representative* is a person or group who has the ability or obligation to discuss and act on behalf of a larger group.[16] Whereas the DPRD is a representation of the regional community in parliament so that it is only natural that the legal products issued are for the broadest interests of the people in the region, not only for the interests of certain groups. The content material is very dependent on the legal politics that exist in political institutions (DPRP, Governor, and MRP), as I said it is still dominated by politics compared to the real interests of the Papuan people. Meanwhile, the legal hierarchy is sufficient.

Conceptually, according to Daniel S. Lev, law and politics are conditions in which the law works in a certain political situation. It was further stated that the most decisive in the legal process is the conception and structure of political power. Law is more or less always a political tool, and that the place of law in the state, depends on the political balance, the definition of power, the evolution of political, economic, social ideology.[17] Although then the legal process referred to above is not identified with the intention of establishing law, in practice it is often the process and dynamics of law formation that experience the same thing, namely the conception and structure of political power that prevails in society which largely determines the formation of a legal product. This is not uncommon for the content of the Regional Regulations related to Papua Special Autonomy where the process of making it is sometimes very dependent on the legal politics that exist in political institutions (DPRP, Governor, and MRP), where the decision-making process is still very much dominated by politics compared to other political institutions. the real interests of the Papuan people while justice itself can only be realized if the political activities that produce legal products are indeed in favor of the values of justice itself.

By looking at the history of the formulation of the provisions for the establishment of the Perdasus as a manifestation of special autonomy which was initially claimed to be able to answer various welfare and humanitarian issues in the Papua Province, the truth is now beginning to be doubted. In fact, by Ann Seidman and Robert B. Siaidman, laws are designed to facilitate development or transition with state intervention of different levels, namely directly, indirectly and more indirectly.[18] When compared with other regions, special autonomy for the Papua Province is not sufficient to eliminate economic, political, and cultural discrimination in the Papuan people. The hope to accelerate change, especially for development, appears that the content material that has been formed has not answered the legal needs of the community and has no impact on change,

[15] Suwandi, *Menggagas Format Otonomi Daerah*, Nusamedia, Jakarta, 2005, pg. 71

[16] Moh.Mahfud MD, *PolitikHukum di Indonesia*, Raja GrafindoPersada, Jakarta, 2009, pg. 43.

[17] Daniel S Lev, *HukumdanPolitik di Indonesia*, LP3ES, Jakarta, 1990, pg. 76.

[18] Ann Seidman and Robert Seidman. 2002. *PerancanganUndang-UndangUntukPerubahanSosial yang Demokratis: BukuPanduanUntukAnggotaParlemen*, First Concept, Guidebook, Printed for Workshop on Building the Legislative Function Capacity of DPR-RI: Methodology in Discussing Draft Bills, 6 & 7 June 2002, Jakarta, Organized by the ELIPS Project in collaboration with the Legislative Body of DPR-RIpg. 11.

*e*ISSN1303-5150

because the norms formed are contrary to higher norms.

The Perdasus, which is one type of regional regulation in the hierarchy of laws and regulations in Indonesia, is not a statutory regulation capable of resolving conflicts or various social problems that occur in the implementation of Otsus policies. This is because Otsus is only an instrument of development policy whose elaboration is further regulated in the Perdasus.

The following are several Perdasus which contradict the spirit of the Special Autonomy Law, among others:

1) Perdasus No. 3/2008 concerning the Implementation of the Rights and Obligations of the MRP *conjunction* with Perdassus No. 4/2008 concerning the Implementation of the Duties and Authorities of the MRP *conjunction* Perdasus No. 4/2010 concerning Election of MRP Members *conjunction* PP No. 54/2004 on the MRP is reduced to just an "approval agency", not having real political authority as a representative institution for the Papuan people in formulating policies. Even the formulation of the MRP seems too late because it is feared that it will become a *superbody* in Papua. The MRP is considered to have no political power, so it is considered equivalent to the Customary Council (DA) or the Indigenous Community Alliance Council (DPMA) or the Indigenous Community Institution (LMA). This means that this is contrary to the spirit of Special Regional Autonomy given to Papua. The authority to be involved in the Perdasu Formation Program process should also be given.
2) Perdasus No. 1/2007 concerning the Distribution of Special Autonomy Funds, however, this regulation cannot be enforced because it is contrary to the procedures for managing regional finances. It is feared that using the Perdasus could potentially be considered a criminal act of corruption. The governor of Papua at that time, Barnabas Suebu, emphasized that if we used the Perdasus, we would be accused of corruption and all of us would go to jail.[19] There is no *grand design* regarding the stages of Papua's development, so it is unclear about the flow and source of funds in Papua, whether the Special Autonomy Fund, the General Alkasi Fund (DAU) or the Special Allocation Fund (DAK).
3) Perdasus No. 21/2008 concerning Sustainable Forestry Management in Papua, in which the Papuan Government issues a business permit for the utilization of indigenous peoples' timber forest products. There are 18 permits with a land area of 78,040 hectares. However, these permits cannot be implemented because the Perdasus or other regulations do not regulate the criteria, standards and procedures (NSPK) for their implementation. The Special Autonomy Law also does not provide a mandate in the form of technical regulations to formulate related matters. In addition, this Perdasus has a weakness, where the issuance of permits is not preceded by the recognition of indigenous peoples and the certainty of customary territories, so that this Perdasus is considered not to be implemented in the Papuan context.
4) Papua Province Perdasus Number 25 of 2013 concerning Revenue Sharing and Financial Management of the Special Autonomy Fund as amended the last time by Perdasus Number 13 of 2016, where the absence *of a grand design* , among other things, has an impact on

[19] "OtsusBukanSekedarUang:",*SuaraPerempuan Papua,* dalam http suaraperempuanpapua org/, downloaded on March 1, 2022.

*e*ISSN1303-5150

the preparation of the Perdasus which is not in line with the spirit of Law Number 21 of 2001. Examination results The 2019 BPK revealed that the Papua Province Perdasus Number 25 of 2013 as last amended by Perdasus Number 13 of 2016 concerning Revenue Sharing and Financial Management of the Special Autonomy Fund stipulates a minimum limit for the allocation of funds for the people's economy at 25% which should not need to be set because the minimum limit is these areas are not a top priority for Otsus. Meanwhile, the fields of education, health, and infrastructure which are the main priorities of Otsus are set at a minimum of 30%, 15%, and 20%, respectively.[20] In addition, article 78 of the Special Autonomy Law mandates an evaluation every year and the first time it should be carried out 3 (three) years after this law comes into effect, which should have been stated explicitly in the Perdasus, however, it is not explained about the party given the task and authority to carry out the task. carry out the evaluation.This evaluation is not an evaluation of the implementation of the Special Autonomy Law as a whole, but is more focused on: (1) measuring the effectiveness of the implementation of the special autonomy policy (2008); (2) identifying the problems and achievements of Otsus in the regulation and implementation of the "specificity" of Papua and develop a strategy for improvement (2011); (3) measuring the effectiveness of governance in achieving the target of accelerated development and affirmation of OAP (2013); and (4) emphasizing on changes in the approach of the Papua and West Papua Province governments in formatting the relationship between special autonomy and regional autonomy (2018). In the absence of the stipulation of the party evaluating the Perdasus, no party has the authority to monitor and evaluate the implementation of the Special Autonomy Law, including the government.

5) Perdasus No. 23 of 2008 concerning the Ulayat Rights of Customary Law Communities and Individual Rights of Community Citizens, as implementing regulations to better protect the existence of customary law communities and their ulayat rights. This Perdasus as a derivative regulation of the Papua Special Autonomy Law should refer to the Papua Special Autonomy Law, but the fact that the articles of Perdasus No. 23 of 2008 are proven to describe, create new definitions, change the status of rights and harm the interests of indigenous Papuans beyond what is formulated in the reference law, for example, Article 2, Article 3, Article 6. In the Perdasus, it appears as if the existence of communities and customary rights on land can only be recognized if there is an acknowledgment from the governor. Instead, the government is placed as the actual owner of the Papuan territory compared to the Papuan people themselves. Indigenous Papuans (AOP) are considered immigrants who existed before the 1945 Constitution, the Agrarian Law, and the Special Autonomy Law. Although it is not explicitly stated about the government's authority to refuse to issue a stipulation on the existence of indigenous peoples, the governor's acknowledgment that

[20]Audit Board of the Republic of Indonesia, *Pendapat BPK: Pengelolaan Dana OtonomiKhususPadaProvinsi Papua dan Papua Barat*, 2021,pg. 14.

*e*ISSN1303-5150

precedes the recognition of indigenous Papuans is an attempt to kill the existence of indigenous peoples.

6) Perdasus Number 14 of 2016 concerning Procedures for Election of MRP Members is contrary to the Special Autonomy Law. Article 24 of the Special Autonomy Law stipulates that "the selection of members of the MRP is carried out by members of the indigenous peoples, religious communities and women's communities". However, Article 5 Paragraph 2) letter e of Perdasus 14 of 2016 stipulates that the election of MRP members "has a mandate from indigenous community groups and women's community groups at the district/city level, as well as the provincial-level security institutions". The content of the Perdasus article above emphasizes that the right to elect each member of the MRP is a representative from each group, without involving the indigenous Papuan community as a whole. In fact, Article 5 of Perdasus 14/2016 provides political rights for members of indigenous peoples, religious communities, and women's communities to vote.

However, the authors tend to differ in viewing this that the granting of special autonomy authority and how that authority is then exercised are actually two different things. It is also undeniable that the granting of special autonomy authority is a middle way in meeting the demands of the basic needs of the Papuan people while maintaining the integrity of the framework of the Unitary State of the Republic of Indonesia. it is observed that the problem lies not in the special autonomy, but in how it is implemented through the Perdasus; lies in how the process of forming the Perdasus has been problematic from the start. So the right question is not whether Papua's special autonomy deserves to be continued or not. But on how to harmonize the Perdasus norms with regulations that are higher in the hierarchy so that this Perdasus can then be carried out to the maximum. Or there is a need for implementing regulations from Law No. 21 of 2001 so that it becomes the norm for Perdasus, because Perdasus is regarded as a mere Perda. Levels of Law No. 21 of 2001 which was carried out with the Perdasus, of course, there was a norm vacuum, where there was a break in the level of norms that should have been formed by government regulations or presidential regulations as a liaison with Perdasus.

There are two models of harmonization of norms that are commonly practiced in legal countries, namely first, vertical harmonization. And second, horizontal harmonization. Vertical harmonization is an effort to harmonize lower legal norms with higher legal norms. For example, between Perdasus and government regulations. Because if there are norms in the Perdasus that are contrary to government regulations, then of course the Perdasus cannot be implemented. The Ministry of Home Affairs is only limited to clarifying the norms established to cancel, of course, through a judicial review. So far, the category of problematic regional regulations refers to two important things, namely regional regulations that are contrary to the public interest, and regulations that contradict higher laws and regulations.

At this point, the writer needs to reiterate that special autonomy is the solution with the least risk to resolving the Papua conflict. However, the central government still has an interest in maintaining the unitary state model. So that no matter how wide the decentralization is given, it must not go beyond what is determined by the center as the national interest. This is very reasonable because the overall government responsibility lies with the central government.

*e*ISSN1303-5150

The logical consequence of the principle of a unitary state is that the power of government is in the hands of the Central Government. Because the 1945 Constitution also mandates the adoption of a decentralization policy, part of the government's power is handed over to the regions in the spirit of decentralization. However, regardless of the extent of decentralization (including asymmetric decentralization) given to the regions, the ultimate responsibility for administering government power remains with the Central Government. Therefore, local governments in formulating regional policies should not conflict with national policies. This is intended to create synergy and harmony between central and regional policies.

Even though in practice no one has ever submitted a material review of the Perdasus. Regarding the cancellation of the Perdasus, there are two main things, namely first, if there is a difference in principle between the national interest and the substance of the Perdasus, then the Perdasus must be clarified and the political and legal approach taken by the Ministry of Home Affairs. Second, take other legal remedies through a material trial at the Supreme Court of the Republic of Indonesia. The judicial review of this Perdasus is still within the scope of duties and authority of the Supreme Court as regulated in Article 24A paragraph (1) of the 1945 Constitution, stipulating: The Supreme Court has the authority to try at the level of cassation, examine the legislation under the law against the law. law, and has other powers granted by law. In the practice of administering regional governments, there has never been a material review of the Perdasus nor has there been a material review of the substance of the Perdasus.

Regarding horizontal harmonization, this is done between one regulation and another but is at the same hierarchical level in the legislation. This is important to do to avoid conflicts between regulations of the same level and in the context of realizing legal certainty in society. Because if not, the potential for chaos will be difficult to avoid. People will do something and take refuge in rules that benefit them, even though these rules are detrimental to other parties. And he can't be blamed for it. Because what he did was indeed allowed in one other rule. The same logic certainly applies to the Perdasus.

The problem of harmonizing the material content of draft legislation, including the Perdasus horizontally, is intended to avoid overlapping and contradicting each other because this will create legal uncertainty and ambiguity in its application. In the implementation of horizontal harmonization, of course, various related equal laws and regulations need to be studied carefully so that the conception of the material content of laws and regulations that are closely related to each other is in harmony. Therefore, in forming the Perdasus, it is certainly necessary to coordinate with the relevant agencies, which substantially control the content and hierarchy of the Perdasus and its relation to other national laws and regulations.

Regarding this horizontal harmonization, in the practice of a modern state of the law, the concept of omnibus law has developed, namely a government and legislative policy, which is intended to overcome various kinds of legal regulatory problems, where the arrangement departs from the fact that there has been an overlapping of rules, which caused by the large number of legal products that regulate a particular issue. Indonesia itself as a new legal state is practicing this (omnibus law) with Law Number 11 of 2020 concerning Job Creation. However, if you look at the practice of foreign countries, this has been done for a long time. For example, America has been practicing omnibus law since 1988. In practice, the omnibus law in the United States is a new law that amends

eISSN1303-5150

several previous laws, including the regulations established in the judicial precedent at once. The term omnibus law will have different meanings in the United States and Indonesia because the Indonesian legal system originates from civil law, where the regulations are collected in one code so that all laws are in that code. The legal system and concrete conditions that occur in society must be a concern in using omnibus law as a way to overcome disharmony in-laws and regulations. A new law that is made will override several laws that are related and intersect with each other. The addition of several laws is carried out so that the objectives of making the omnibus law can be achieved without large costs. However, the implementation of omnibus law will require a legal system that can improve itself through judges' decisions in court based on concrete events.

In the context of the research that the author proposes, this omnibus law is expected to provide a definite material reference regarding the contents of the Perdasus. This omnibus law also opens the possibility for a Perdasus to compile several other Perdasus which regulate similar legal issues so that there is no overlap, for example between the procedures for carrying out the duties, powers, rights, and obligations of the Papuan People's Assembly.

Like the process of a government state policy in general, the legislative process also includes various levels of completion, such as the stages of preparation, determination, implementation, assessment, and reintroduction of finished products. However, the various levels of the legal process that need to be well understood by a statutory expert (wetgevingsambtenaren or wetgevingsjuristen) are the level of preparation and the level of stipulation.

Regional regulations, like other laws and regulations, have the function to create legal certainty (rechtszekerheid, legal certainty). For the functioning of legal certainty, statutory regulations must meet certain requirements, including consistency in the formulation whereas, in the same statutory regulations, systematic relationships must be maintained between the rules, the standard structure and language, and the existence of a harmonized relationship between various laws and regulations. invitation.

Harmonization of regulations has urgency in relation to the principle that lower laws and regulations must not conflict with higher laws and regulations so that the basic thing in drafting regional regulations is their conformity and synchronization with other laws and regulations. As it is also emphasized in the provisions of Article 7 paragraph (1) and paragraph (2) of Law No. 12 of 2011 that the legal power of laws and regulations is following the hierarchy, namely the grading of each type of legislation based on the principle that the legislation lower legislation may not conflict with higher laws and regulations.

CONCLUSION

Referring to Law No. 21 of 2001 has never been stated in detail that related to sectoral matters concerning the lives of Papuans, it can be specifically regulated in the Perdasus a quo authority of Law No. 21 of 2001 also did not produce any other organic regulations (whether in the form of government regulations, presidential regulations, or ministerial regulations) to guarantee this. All existing organic regulations are only derivatives of Law No. 32 of 2004 and Law No. 23 of 2014 which is of a general nature. This causes the Papuan Regional Governments who are authorized to form Perdasus (Governor of Papua, DPRP, and MRP) to have difficulty exercising their authority. The problem of interpretation of norms and the absence of organic regulations linking Law No. 21 of 2001 and this Perdasus resulted in unclear processes and content that could be regulated by the Perdasus. For example,

when the Papuan local government wants to stipulate a Perdasus material regarding a special land clearing permit that is valid in Papua, it can still be considered by the center as contradicting a ministerial regulation that regulates the same thing.

Reference

[1] AA Oka Mahendra, Refomasi Pembangunan HukumdalamPerspektifPeraturanPerundang-Undnagan, Ed, Soekedy, Ministry of Law and Human Rights Republic of Indonesia, Jakarta, 2006.
[2] AchmadRuslan, TeoridanPanduanPraktikPembentukan PeraturanPerundang-Undangan di Indonesia, Rangkang Education, Yogyakarta, 2013.
[3] Audit Board of the Republic of Indonesia, Pendapat BPK: Pengelolaan Dana OtonomiKhususPadaProvinsi Papua dan Papua Barat, 2021.
[4] Daniel S Lev, HukumdanPolitik di Indonesia, LP3ES, Jakarta, 1990.
[5] Gerhard van der schyff, Judicial Review of Legislation, A Comparative Study of the United Kingdom, The Netherlands and Sout Africa, Springe, London, 2010.
[6] HikmahantoJuwana, PenegakanHukumdalamKajian Law and Development: Problem danFundamenbagiSolusi di Indonesia", kampus UII, Yogyakarta, 2013.
[7] HamzahHalimdan Kemal RedindoSyahrul Putra, Cara PraktisMenyusundanMerancanganPeraturan Daerah (SuatuKajianTeoritisdanPraktisDisertai Manual) KonsepsiTeoritisMenujuArtikulasiEmpiris), Kencana, Jakarta, 2009.
[8] Moh. Mahfud MD, PolitikHukum di Indonesia, Raja GrafindoPersada, Jakarta, 2009.
[9] Novianto M. Hantoro, SinkronisasidanHarmonisasiPengaturan MengenaiPeraturan Daerah, sertaUjiMateriPeraturan Daerah PusatPengkajianPengolahan Data danInformasi (P3DI), SekretariatJenderal (SETJEN) DPR RI, Jakarta, 2009.
[10] Suwandi, Menggagas Format Otonomi Daerah, Nusamedia, Jakarta, 2005.
[11] Wasistiono, Sadudan Yonatan Wiyoso, MeningkatkanKinerjaDewanPerwakilan Rakyat Daerah (DPRD), Fokusmedia, Bandung, 2009.

PeraturanPerundang-Undangan:

[12] 1945 Constitution of the Republic of Indonesia
[13] Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua (State Gazette of the Republic of Indonesia 2001 Number 135, Supplement to the State Gazette of the Republic of Indonesia Number 4151) as amended by Law Number 35 of 2008 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2008 concerning Amendments to Law Number 21 of 2001 concerning Special Autonomy for the Papua Province to become a law (State Gazette of the Republic of Indonesia of 2008 Number 112, Supplement to the State Gazette of the Republic of Indonesia Number 4884).
[14] Law Number 12 of 2011 concerning the Establishment of Legislative Regulations (State Gazette of the Republic of Indonesia 2011 Number 82 Supplement to the State Gazette of the Republic of Indonesia Number 5234) as amended by Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislations (State Gazette of the Republic of Indonesia 2019 Number 183 Supplement to the State Gazette of the Republic of Indonesia Number 6398).
[15] Law Number 23 of 2014 concerning Regional Government (State Gazette of

the Republic of Indonesia of 2014 Number 244 Supplement to the State Gazette of the Republic of Indonesia Number 5587) as amended several times, most recently by Law Number 9 of 2015 concerning the Second Amendment to Law Number 23 of 2014 concerning Regional Government (State Gazette of the Republic of Indonesia of 2015 Number 58 Supplement to the State Gazette of the Republic of Indonesia Number 5679).

Sumber Lain:

[16] AndiBauInggit AR, A. PangerangMoenta, MarwatiRizadanHamzahHalim, Local Regulation Review in Realizes Legal Order of the Local Governance, Journal of Law, Policy and Globalization, Volume 59, 2017, pg. 218, https://www.iiste.org/Journals/index.php/JLPG/article/view/36173/37169, downloaded May 2, 2022.

[17] Ann Seidman and Robert Seidman. 2002. PerancanganUndang-UndangUntukPerubahanSosial yang Demokratis: BukuPanduanUntukAnggotaParlemen, First Concept, Guidebook, Printed for Workshop on Capacity Building for Legislative Functions of DPR-RI: Methodology in Discussing Draft Bills, 6 & 7 June 2002, Jakarta, Organized by the ELIPS Project in collaboration with the Legislative Body of DPR-RI.

[18] MaruararSiahaan, UjiKonstitusionalitasPeraturanPerundang-Undangan Negara Kita: MasalahdanTantangan, JurnalKonstitusi, Volume 7, Nomor 4, Jakarta Agustus 2010,

[19] “OtsusBukanSekedarUang:”,SuaraPerempuan Papua, in http suaraperempuanpapua org/, downloaded on March 1, 2022.

eISSN1303-5150