

Problematics Implementation of Interruption Permission in the Regions

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ABSTRACT: After the enactment of the Regulation of the Minister of Home Affairs Number 19 Year 2017 on Revocation of Regulation of the Minister of Home Affairs Number 27 Year 2009 concerning Guidelines for Determination of Disturbance Licenses in the Regions, the Minister of Home Affairs shall follow up by issuing Circular Letter Number 500/3231 / SJ on Follow-up Regulation of the Minister of Home Affairs Number 19 of 2017. Based on the provision in point 2 of this Circular Letter, the Regional Government of Regency / City is required to immediately revoke the Regional Regulation related to the permit of disruption and levy of the permit license since the Regulation of the Minister of Home Affairs Number 19 Year 2017 is stipulated and not to collect the license fee disruption due to inhibiting investment climate in the region. Both of these provisions, when viewed from the hierarchical system of legislation is not an appropriate solution in solving the problems related to the implementation of permit disruption in the region, the two provisions have the potential to cause juridical problems.

In order to avoid the more complex problems related to the implementation of the regional disturbance permit, it is better to consider accelerating the revocation of Hinder Ordonnantie with its own revocation law and to eliminate material related to the permit of disturbance through amendment to Law Number 28 Year 2009 regarding Regional Tax and Levy area which is then followed up with the revocation order of all Local Regulations related to permit disruption.

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I INTRODUCTION

Statement of Indonesia as a constitutional state in the 1945 Constitution of the State of the Republic of Indonesia must of course be realized. Efforts to realize the state based on the law and to realize the life of the state, the law becomes the director, the engineer and the designer of how the legal community to achieve justice. In this regard, it is necessary to establish a regulation which must be adapted to the development of society and not contrary to the prevailing laws and regulations. Including in establishing a business entity, so that the business entity is not contrary to the laws and regulations, then there must be a permit from the Government¹.

In principle, the necessary permissions in establishing, establishing and operating an enterprise is²:

1. Principal licenses, such as trading business licenses (SIUP), company registration signs (TDP), taxpayer registration number (NPWP);
2. Industrial licenses, in accordance with the field of business;
3. Basic Permits, such as a disturbance permit (HO), building permit (IMB), and so on; and
4. Employment permits, such as company regulations, employment contracts, foreign worker permits, and so forth

With so many licenses that must be taken care of when going to open a business entity and also associated with many agencies, then the government needs to set rules related to the licensing. Licensing in trying to be a supporter and not an obstacle in the development of business activities.

To realize the matter has been enacted Presidential Regulation No. 91 of 2017 on Accelerating the Implementation of Business. One of the important matters set out in the Presidential Regulation is related to the reform of licensing regulations. Ordering the Minister / Head of Institution, Governor and Regent / Mayor to

¹ Ramlandan Muhammad Yusrizal, *Hukum Perizinan; Proses Pendiriandan Pendaftaran Perusahaan dalam Praktek*, (Ratu Jaya, Medan, 2012), p. 1.

² Gatut Susantadan Anggun Pesona, *Cara Mudah Mengurus Surat-Surat dan Dokumen Penting*, (Raih Asa Sukses, Jakarta, 2009), p. 11.

evaluate the entire legal basis for the implementation of the licensing process which is the authority, including for micro, small and medium enterprises.

In relation to the evaluation process on the legal basis of business licensing and to support the demands of ease of business in Indonesia, the Minister of Home Affairs subsequently revoked the Regulation of the Minister of Home Affairs No. 27 of 2009 on Guidelines for Determination of Nuisance Permits in Regions that have been amended by Regulation of the Minister of Home Affairs No. 22 of 2016, through the Regulation of the Minister of Home Affairs Number 19 of 2017 on Revocation of Regulation of the Minister of Home Affairs Number 27 Year 2009 on Guidelines for Determination of Nuisance Permits in the Region.

The permission interference known as HO (Hinder Ordonantie) is set in Hinder Ordonantie Staatblad Year 1926 No. 226 which has been amended and supplemented with Staatblad No. 1940. 450. This regulation is then reversed in the form of regional regulations that would be different in each district/city.³

To provide clear and detailed guidance for local government in carrying out the permit of this disturbance and then promulgated the Regulation of the Minister of Home Affairs Number 27 Year 2009 on Guidelines for Determination of Nuisance Permits in the Region. In Article 1 sub-articles 2 and 3 and Article 3 it is determined that the disturbance is all misconduct and / or conditions that are uncomfortable or interfere with the health, safety, tranquility and / or welfare of the public interest continuously. While permit disruption is the granting of business / activity license to an individual or a body in a certain location which may cause harm, loss and disturbance, not including place of business / activity determined by Central Government or Local Government.

According to this the Regulation of the Minister of Home Affairs, the permit of interference becomes a necessity because almost all activities / efforts however small will have an impact on the surrounding environment. License disruption can also be said as an attempt to improve order, supervision and regulation of the disruption arising from a business. In addition, the permit disruption is also a form of participation of entrepreneurs against development in the region⁴.

With the cancellation of the Nuisance Permit Guideline in the Area certainly raises the question, especially for local governments that have already established local regulations on permit disruptions and set a levy on permit disruption. Based on this, the authors will review further related to the problematics of regional disturbance licensing arrangements after the revocation of Guidelines for Determination of Nuisance Permits in Regions under the Regulation of the Minister of Home Affairs No. 19 of 2017.

II FORMULATION OF THE PROBLEM

Based on the background described above, it can be identified the issues that will be discussed in this paper, namely: What is the problem of arrangement of permission permit after the revocation of the Regulation of the Minister of Home Affairs concerning Guidance for Determination of Nuisance Permits in the Region?

III THEORETICAL FRAMEWORK

According to Kaelan M.S. Theoretical basis in a study is the basis of operational research. Theoretical basis in a research is a strategic means to provide realization of research implementation. In this connection, the theory used by analytical knives in this paper is the theory of the level of legal norms (stufenbau theorie) put forward by Hans Kelsen. In theory Hans Kelsen argues that the legal norms are tiered and multilayered in a hierarchy in the sense that a higher norm applies, is sourced and based on higher norms, and so on until norms that can not be traced further and are hypothetical and fictitious, namely Basic Norms (Grundnorm).

“The grundnorm is not constitution, it is simply the presupposition, demanded by theory, that this constitution ought to be obeyed.”⁵

Basic Norm is the highest norm in a norm system is no longer formed by a higher norm, but the Basic Norm is stipulated first by the community as the Basic Norm which is a hanger for the norms under it, so that a Basic Norm said to be pre-supposed⁶.

According to Hans Kelsen a norm of law is always sourced and based on the norm on it, but under the rule of law it also becomes the source and the basis for the lower norms thereof. In the case of the arrangement /

³ Ramlandan Muhammad Yusrizal, *Hukum Perizinan...*, Op. Cit., p. 34.

⁴ *Ibid.*, p. 35.

⁵ R W M Dias, *Jurisprudence*, Fifth Edition, Butterworths London, 1985, p. 362

⁶ Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan : Jenis, Fungsi, dan Materi Muatan*, (Kanisius, Yogyakarta, 2010), p. 41.

hierarchy of the norm system, the highest norm (Basic Norm) becomes the place of dependence of the norms below, so that if the Basic Norm is changed it will become damaged the system of norms beneath it⁷. Contextually in the hierarchical system of legislation is known by three fundamental principles.⁸ The three principles referred to are, among others, the *lex superior de rogatlex inferior*, *lex specialist derogatlexgeneralis*, *lex posterior de rogatlex priori*⁹. Based on the study of jurisprudence the three principles referred to is an important pillar in understanding the construction of laws and regulations in Indonesia in detail can be explained that¹⁰:

a) *The principle of superior lex superior de rogatlex inferior, higher rules will override the lower rules when setting the same substance and contradictory.*

b) *The principle of lex specialist derogatlexgeneralis, a more specific rule will overrule the general rule when setting the same substance and contradictory.*

Thus, in any formulation of legislation should pay attention to the hierarchical system of legislation, so as to create harmony between laws and regulations established by various laws and regulations that are higher and equal.

IV DISCUSSION

1. License of Disturbance in various Laws and Regulations

In a modern society, the frenetic activity of both small and large businesses is inevitable. These activities certainly cause various impacts, including disruption for the community around the business activities. To overcome this, of course the Government is obliged to protect the health, safety and public welfare for the community in the form of permit disruption and supervision of the permit.

Disturbance License Known By HO (Hinder Ordonantie) Arranged In an amended Hinder OrdonantieStaatsblad of 1926 No.226 which entered into force on 1 August 1926 and underwent several changes and additions ie with Stbl 1927-No. 499 then changed again with stbl. 1932 - No. 80 and No. 341, until most recently with Stbl. 1940-No. 14 and No. 450 issued in 1941. While in the Secretary of Government Secretary dated April 18, 1928 No. 792 / II (B 11129) is warned of the ways to enforce certain provisions of this interference law. Fifty years later, long after Indonesian independence, the Minister of Home Affairs issued Rule No. 7 of 1993 on Building Permits and Nuisance Permits for Industrial Companies which subsequently changed the national approach to those issues. As time passes, the Regulation of the Minister of Home Affairs Number 7 of 1993 is subsequently revoked and declared invalid by the Minister of Home Affairs Regulation No. 27 of 2009 on Guidelines for Determination of Nuisance Permits in the Region.

Based on Article 1 Figures 2 and 3 and Article 3 of the Regulation of the Minister of Home Affairs Number 27 of 2009 determines that disturbance is any unpleasant conduct or condition or constantly harping health, safety, tranquility and or welfare of the public interest. License of interference, hereinafter referred to as permit, is the granting of a business or activity permit to an individual person or a certain location agency that may cause harm, loss and disruption, excluding the place of business / activity determined by the central or local government.

The criteria for disruption in the determination of the HO permit under article 3 of the Minister of Home Affairs Regulation No. 27 of 2009 consists of:

1. Environment, including disturbance to the function of soil, ground water, river, sea, air and disturbance sourced from vibration and or noise;
2. Social society encompasses the threat of moral decline and or public order;
3. The economy includes threats to the decline in the production of local businesses and / or the decline in the economic value of fixed objects and movable objects located around the business premises.

Under the above provisions HO permit becomes a necessity because almost all of its small business activities will have an impact on the surrounding environment. HO permits can also be said to be an attempt to improve the order of supervision and regulation of the disruption caused by business other than that the HO permit also becomes a form of participation of the entrepreneurs towards the special development in their area.

In the framework of the implementation of HO licensing, the Regional Government based on the provisions of Law Number 28 Year 2009 regarding Regional Tax and Regional Retribution is authorized to collect levy permit permits. The object of levy permit permit is the granting of business / activity permit to an

⁷ *Ibid*, p 42.

⁸ JazimHamidi, dkk, *TeoridanHukumPerancanganPerda*, (UniversitasBrawijaya Press (UB Press) CetakanPertama, Malang, 2012), p. 19.

⁹ *Ibid*

¹⁰ *Ibid*

individual or Agency which may cause danger, loss and / or disturbance, including continuous supervision and control of business activities to prevent disorders of order, safety or health. general, maintaining environmental order, and meeting occupational safety and health norms¹¹.

Thus, in principle, the provisions on permit disruption and retribution for granting of interference permits arranged in Hinder Ordonantie and Law Number 28 Year 2009 are de jure still valid. However, the fact that occurred in the field shows that the Local Government is asked to no longer carry out the granting of interference permit and collection of permit levy disruption due to the issuance of Regulation of the Minister of Home Affairs Number 19 Year 2017 on Revocation of Regulation of Minister of Home Affairs Number 27 Year 2009 concerning Guidance of Determination of Disturbance License in Region and Circular Letter Number 500/3231 / SJ concerning Follow Up of Regulation of the Minister of Home Affairs Number 19 of 2017 which seems to exclude both the higher Legislation Regulations. (Hinder Ordonantie and Law Number 28 Year 2009).

2. Problems of the Regulation of the Minister of Home Affairs Revocation on Guidelines for Nuisance Permits in the Region

After the enactment of the Regulation of the Minister of Home Affairs Number 19 Year 2017 on Revocation of Regulation of the Minister of Home Affairs Number 27 Year 2009 concerning Guidelines for Determination of Disturbance Licenses in the Regions, the Minister of Home Affairs shall follow up by issuing Circular Letter Number 500/3231 / SJ on Follow-up Regulation of the Minister of Home Affairs Number 19 of 2017. Based on the provision in point 2 of this Circular Letter, the Regional Government of Regency / City is required to immediately revoke the Regional Regulation related to the permit of disruption and levy of the permit license since the Regulation of the Minister of Home Affairs Number 19 Year 2017 is stipulated and not to collect the license fee disruption due to inhibiting investment climate in the region. Both of these provisions, when viewed from the hierarchical system of legislation is not an appropriate solution in solving the problems related to the implementation of permit disruption in the region, the two provisions have the potential to cause juridical problems.

As is known, the provisions on permit disruption are set in an Ordonantie. Ordonantie is one type of legislation that prevailed in the Indies in the IndischeRegeling (IS) period. The prevailing Ordinantie in Indonesia shall be equal to the law, so in its reference it should still use the name of the type of legislation as originally, for example in the mention of Hinder Ordonantie should be called the Nuisance Ordinance instead of the Nuisance Act¹².

Thus, the amended 1923 No26 Destructive Ordinance that came into force on 1 August 1926 and underwent several changes and additions with Stbl 1927-No. 499 then changed again with stbl. 1932 - No. 80 and No. 341, until most recently with Stbl. 1940-No. 14 and No. 450 issued in 1941 is hierarchically based on the Law¹³. The position of the Nuisance Ordinance as equalized by the Act shall have consequences for all provisions of the legislation concerning the permit of disturbance whose grade is under the Nuisance Ordinance shall be sourced and based on the Nuisance Ordinance, not the other way around. However, the provisions of the Regulation of the Minister of Home Affairs Number 19 of 2017 concerning the Revocation of Regulation of the Minister of Home Affairs Number 27 Year 2009 on Guidelines for Determination of Disturbance Licenses in the Region, waive both the Law¹⁴. Moreover, the request for revocation of Regional Regulation related to the permit of disturbance in the region is done by a Circular Letter which in fact is not a legislation.

The provisions of Regulation of the Minister of Home Affairs Number 19 of 2017 and the Circular Letter of the Minister of Home Affairs Number 500/3231 / SJ based on the system of hierarchical system of laws regulated in Article 7 of Law Number 12 Year 2011 can not necessarily be the basis of revocation or cancellation Local regulations related to permit disruption in the area, this is due to the existence of Hinder

¹¹ Based on the General Elucidation of Law Number 28 Year 2009, the Distribution License of Nuisance is extended to include continuous supervision and control of business activities to prevent disturbances of public order, safety or public health, maintaining environmental order and meeting occupational safety and health norms.

¹² *Ibid.*

¹³ The provision of Article 7 of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations states that: (1) The types and hierarchy of legislation consist of: a. The Constitution 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 Hierarchy of Legislation in accordance with the hierarchy as referred to in paragraph (1)

¹⁴ Ordinance of Disturbance and Law Number 28 Year 2009 on Regional Tax and Levy.

Ordonnantie and Law Number 28 Year 2009 on Regional Taxes, especially that regulate the levy permit permit still valid until now. So it is natural, if there are some areas that still apply the Local Regulation related permission disturbance. Especially now the Minister of Home Affairs and the Governor based on the decision of the Constitutional Court Number 137 / PUU-XIII / 2015 and Number 56 / PUU-XIV / 2016 is not authorized to cancel the Regional Regulation¹⁵.

V CONCLUSION

It is understood that the presence of the Regulation of the Minister of Home Affairs Number 19 Year 2017 on Revocation of Regulation of Minister of Home Affairs Number 27 Year 2009 concerning Guidance of Determination of Disturbance License in Region and Circular Letter Number 500/3231 / SJ on Follow Up of Regulation of Minister of Home Affairs Number 19 Year 2017 is one step undertaken by the Government in order to encourage the acceleration of simplification of licensing and ease of doing business in Indonesia, and also we know together that the current Nuisance Ordinance is a colonial legacy legislation that is definitely no longer in accordance with the dynamics of law and regulations -invitation. So it should be considered for immediate renewal, this is in line with one of the internal functions of legislation proposed by BagirManan is the integration function of legal system pluralism¹⁶.

However, do not let the goodwill of the Government is injured by the wrong move which resulted in the controversy of the validity of a regulation that has been issued because the request for the revocation of the regional regulations for permit disruption is not done with the system and the applicable law. In order to avoid the more complex problems related to the implementation of the regional disturbance permit, it is better to consider accelerating the revocation of Hinder Ordonnantie with its own revocation law and to eliminate material related to the permit of disturbance through amendment to Law Number 28 Year 2009 regarding Regional Tax and Levy area which is then followed up with the revocation order of all Local Regulations related to permit disruption.

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¹⁵ The authority for the cancellation of regional legislation is stated in Article 251 of Law Number 23 of 2014 concerning Regional Government as amended several times, the latest by Law Number 9 Year 2015 on the Second Amendment to Law Number 23 Year 2014 on Regional 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 Regional 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 Regional 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 No. 23 of 2014 on Regional Government. This Decision of the Constitutional Court Number 56 / PUU-XIV / 2016 complements the Decision of the Constitutional Court Number 137 / PUU-XIII / 2015, so that the central government no longer has the authority to cancel the regional regulations, both provincial and regency / city regulations. See at : Eka NAM Sihombing, [PerkembanganKewenanganPembatalanPeraturan Daerah Dan PeraturanKepala Daerah](#), in *JurnalYudisial* Volume 10, Issue 2 Year 2017, p.217-234)

¹⁶ The pluralism of the legal system prevailing to this day is one of the colonial legacies to be reorganized. Renewal of the national legal system is in order to integrate the various legal systems so that arranged in a harmonious order of each other. See at: Eka NAM Sihombingdan Ali Marwan, *Op.Cit*, p. 124.

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