

A CHANCE TO DEFEND REGIONAL HEADS IN THE PROCEDURE OF REGIONAL HEAD DISMISSAL AS A MANIFESTATION OF THE PROPORTIONALITY PRINCIPLE

Mohammad Syaiful Aris

Faculty of Law, Airlangga University, Indonesia
syaiful@fb.unair.ac.id

Iqbal Fauzurrahman

The University of Western Australia, Australia
24127854@student.uwa.edu.au

Bagus Oktafian Abrianto

Faculty of Law, Airlangga University, Indonesia
bagusoa@fb.unair.ac.id

Xavier Nugraha

Faculty of Law, Airlangga University, Indonesia
nugrahaxavier72@gmail.com

Stefania Arshanty Felicia

Faculty of Law, Airlangga University, Indonesia
stefaniaarshantjf@gmail.com

Abstract

The existence of regional autonomy in Indonesia is implemented through regional leaders who have the authority to run local government. When carrying out their duties, regional leaders are supervised by other state institutions as a form of checks and balances in government power. Hence, the procedure to dismiss regional leaders regulates to involve the Regional People's Representative Assembly, the Supreme Court, and the President through the Minister of Home Affairs as a form of right to dismiss. However, the existence of the proportionality principle in the procedure to dismiss regional leaders,

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through the right given to regional leaders to defend themselves, has yet to be regulated in the law. This article talks about two things: **first**, the procedure to dismiss regional leaders, and **second**, the legal consequences and the position of a chance to summon regional leaders to explain and defend themselves in the procedure to dismiss regional leaders. This article aims to find the importance of proportionality principles in the procedure to dismiss regional leaders. The method used in this article is legal research, with statutes, conceptual, and case approaches. The results of this research show that although the procedure to dismiss regional leaders has been regulated in law, applying the proportionality principle only exists in jurisprudences. Hence, *an ius constituendum* is needed to determine legal consequences and certainty regarding the procedure to dismiss regional leaders.

Keywords: Procedure to dismiss regional leader; proportionality principle; regional leader.

Introduction

With the mandate of the principle of autonomy following the provisions of Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter written as UUD NRI 1945), the implementation of regional autonomy is then present in the implementation of regional government in Indonesia.¹ As followed up in Article 1 Number 6 of Law Number 23 of 2014 on Regional Government as last amended by Article 176 of Law Number 11 of 2020 on Job Creation, regional autonomy is the right, authority, and obligation of autonomous regions to regulate and manage their own Government Affairs and the interests of local communities within the NKRI system. The essence of regional autonomy cannot be separated from the noteworthy element of freedom as a subsystem of a unitary state.² Thus, the realization of regional autonomy is based on legal references and globalization needs that can provide broader and more

¹ M Zaini Harfi, "Politik Hukum Pembentukan Desa Menurut Undang Undang Nomor 6 Tahun 2014 Tentang Desa," *Jurnal IUS Kajian Hukum Dan Keadilan* 4, No. 3 (December 2016): P. 407, <http://jurnalius.ac.id/ojs/index.php/jurnalIUS/article/view/369>.

² Sri Winarsi and Wilda Prihatiningtyas, *Buku Ajar Pemerintah Daerah* (Surabaya: Universitas Airlangga, 2005), p.66, http://all.fh.unair.ac.id/index.php?p=show_detail&id=13512.

real authority and responsibility to the regions in regulating, utilizing, and exploring potential sources of wealth in their respective regions.³

The realization of the optimal implementation of regional autonomy certainly requires the existence of Regional Governments that are given authority, which is then manifested through the existence of regional heads.⁴ This is in line with the provisions in Article 1 paragraph 3 of the Regional Government Law, namely, the Regional Government is the regional head as an element of the Regional Government organizer who leads the implementation of government affairs, which are the authority of the autonomous region. According to Article 59 paragraph (2) of the Regional Government Law, the regional heads are governors for provinces, regents for regencies, and mayors for municipalities. Thus, inseparable from the principle of autonomy in the 1945 Constitution of the Republic of Indonesia, it is absolute for the Central Government to transfer some of the rights and authorities to the Regional Government, namely the head of the region, to regulate and manage the region without intervention from other parties.⁵

The existence of power or authority possessed by regional heads certainly needs to be limited. Following the legal maxim, power tends to corrupt, but absolute power corrupts absolutely, as expressed by British historian Lord Acton, the tendency to abuse power possessed will indeed always exist.⁶ When looking at the course of regional autonomy in Indonesia, the term 'little kings' attached to regional heads arises due to regional heads who do not use the people's mandate based on regional autonomy.⁷ This cannot be separated from 'broad

³ Ibid, p.33

⁴ Muhammad Rezza Meirani, "Efektivitas Pemungutan Pajak Bumi Dan Bangunan Di Kota Pontianak Berdasarkan Peraturan Daerah Kota Pontianak Nomor 4 Tahun 2012," *Gloria Yuris* 4, no. 3 (2010).

⁵ Desi Sommaliagustina, "Implementasi Otonomi Daerah Dan Korupsi Kepala Daerah," *Journal of Governance Innovation* 1, no. 1 (April 2019): p.44, <http://ejournal.uniramalang.ac.id/index.php/JOGIV/article/view/290>.

⁶ M Laica Marzuki, "Konstitusi Dan Konstitusionalisme," *Jurnal Konstitusi* 7, no. 4 (May 2016): p.4, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/741>.

⁷ Boy Anugerah and Jacob Junian Endiartia, "Reorientasi Identitas Demokrasi Indonesia Di Era Pasca Reformasi: Sebuah Ikhtiar Mewujudkan Daulat Rakyat," *Jurnal Lemhannas RI* 6, no. 2 SE-Articles (August 2020), p.35, <http://jurnal.lemhannas.go.id/index.php/jkl/article/view/119>.

autonomy' as the principle upheld in the Regional Government Law.⁸ The meaning of 'broad autonomy' actually opens opportunities for regions to develop their potential according to regional initiatives and capabilities, which regional heads must utilize.⁹ Thus, there are often regional heads who abuse the authority they get based on the broadest possible autonomy, thus demanding supervision of the implementation of the authority of the regional head concerned.

This supervision must be manifested in real terms to authorized entities following the law. In the context of supervision of regional heads, supervision comes through the functions and rights of DPRD's as a manifestation of the concept of *checks and balances* on the implementation of the authority of regional heads, including discretion.¹⁰ The matter of DPRD supervision in Article 42 paragraph (1) of the Regional Government Law is listed in three forms: the implementation of regional regulations, APBD, and local government policies in implementing development programs and regional cooperation. The DPRD's supervision of the local government, namely the head of the region, should be the supervision of a representative political institution over a public institution to ensure that the local government's public policies are following the public interest.¹¹ However so that this supervisory function does not seem like a 'toothless tiger' or mere formality and does not conflict with the legal maxim: "*lex neminem cogit ad vana seu inutilia peragenda*",¹² it is also given

⁸ M Rendi Aridhayandi, "Peran Pemerintah Daerah Dalam Pelaksanaan Pemerintahan Yang Baik (Good Governance) Dibidang Pembinaan Dan Pengawasan Indikasi Geografis," *Jurnal Hukum & Pembangunan* 48, no. 4 (December 2018): p.884, <http://jhp.ui.ac.id/index.php/home/article/view/1807>.

⁹ H Jumahari Jahidin, "Fungsi Dan Wewenang Dewan Perwakilan Rakyat Daerah Provinsi Berdasarkan Azas Otonomi Daerah Seluas-Luasnya," *Law Review* 19, no. 2 (November 2019): p.209, <http://ejournal.kemenparekraf.go.id/index.php/jki/article/view/165>.

¹⁰ Yoga Partamayasa, "Kewenangan Impeachment Oleh DPRD Terhadap Kepala Daerah," *Yustika* 23, no. 1 (2020), p.55, <https://www.neliti.com/publications/494703/kewenangan-impeachment-oleh-dprd-terhadap-kepala-daerah>.

¹¹ Muhammad Farid Ma'ruf, "Kompetensi Anggota DPRD Dalam Pelaksanaan Fungsi Pengawasan Terhadap Pemerintah Daerah Kabupaten Gresik," *Jurnal Administrasi dan Kebijakan Publik* 4, no. 1 (2019), p.58.

¹² Victor Manuel Avilés Hernández, "Tópicos de La Interpretación Constitucional," *Revista de Derecho Publico* 67, no. 1 (2005), p.194.

the authority for the DPRD to have the right to express an opinion which could potentially contain a proposal to dismiss the regional head or also known as impeachment.¹³

The dismissal of the regional head is regulated in Article 80 of the Regional Government Law. In essence, this law distinguishes the procedure for dismissing regional heads. The dismissal of the governor and/or deputy governor is proposed to the President, while for regents and/or deputy regents or mayors and/or deputy mayors, it is proposed to the Minister of Home Affairs. The dismissal is carried out based on the Supreme Court's decision on the opinion of the DPRD stating that the regional head and/or deputy regional head has violated the oath/pledge of office. Specific procedures are regulated in carrying out the dismissal of the regional head. When these procedures are not carried out, there are juridical consequences, namely, the dismissal can be said to be procedurally flawed.

One noteworthy procedure is the summoning of the regional head by the DPRD. It is closely related to using the right of interpellation, the right of inquiry, and the right to express an opinion by the DPRD. However, there is a legal vacuum (*leemten in het recht*) regarding the summoning of the regional head by the DPRD to consider the dismissal of the regional head concerned. In Government Regulation of the Republic of Indonesia Number 12 of 2018 on Guidelines for the Preparation of Rules of Procedure of the Regional House of Representatives of Provinces, Regencies, and Cities (hereinafter PP No. 12 of 2018), indeed in Article 72, it is stipulated that "(1) In a plenary meeting regarding the explanation of the Regional Head: a. The Regional Head is present to provide an explanation; and b. every Member of the DPRD can ask questions.", but this arrangement still raises at least 2 (two) problems, namely **first**, is the provision of this opportunity an obligation or a right of the DPRD? **Second**, even if it is true (*quod non*), the provision of the opportunity is an obligation that must be carried out. However, in accordance with the adages *Titulus est lex* and *rubrica est lex*, it can be seen that the article a quo is only related to the right of interpellation of DPRD. In contrast,

¹³ Partamayasa, "Kewenangan Impeachment Oleh DPRD Terhadap Kepala Daerah.", p.56.

the investigation starts when DPRD exercises the right of inquiry, as stipulated in Article 73 paragraph (2) of PP No. 12/2018.¹⁴

The existence of a legal vacuum that leads to legal problems can be seen in the case of the dismissal of the Regent of Jember in 2020, as stated in the Supreme Court Decision Number 2 P/KHS/2020 dated 8 December 2020. The Jember Regency DPRD considered that the Regent of Jember did not come after being summoned by the DPRD to attend the Plenary Meeting. However, the Regent of Jember considered that the summons made by the DPRD were given at an inopportune time, so the opportunity provision needed to be more substantive. In addition, another case related to the provision of opportunities to regional heads in plenary meetings, namely the dismissal of the Karo Regent in 2014, which was decided in the Supreme Court Decision Number 1 P/Khs/2014 dated 13 February 2014.

Therefore, this paper will analyze the position of providing an opportunity to summon the regional head in the process of dismissing the regional head and the juridical implications of providing this opportunity concerning the validity of the submission of the dismissal of the regional head. Thus, two problem formulations will be discussed: **first**, the procedure for dismissing the regional head, and **second**, the legal consequences and position of providing an opportunity to summon the regional head in the process of dismissing the regional head. This study aims to explore the importance of the principle of proportionality in the procedure for dismissing the regional head by providing an opportunity to summon the regional head. The research method used in this research is legal research, with a *statute*, *conceptual*, and *case* approach.

¹⁴ Article 73 paragraph (2) of PP No. 12/2018 stipulates that: "The proposal for the right of inquiry as referred to in paragraph (1) is accompanied by a document containing at least: a. policy material and/or implementation of laws and regulations to be investigated; and b. reasons for the investigation." From these provisions, it can be seen that one of the materials that must be included in the proposal of the right of inquiry is related to the reasons for the inquiry, so it can also be understood that the right of inquiry is equivalent to an inquiry. For the rest, see Meri Yarni dan Yetniwati, "Pelaksanaan Hak Angket Dewan Perwakilan Rakyat Daerah (DPRD) Kota Jambi", *Jurnal Ilmu Hukum*, vol. 2, no. 3 (2012).

Several writings align with the topics raised in this article, so to ensure that this article is original, the differences between these articles will be described. Similar articles are:

1. The article entitled "Kekosongan Hukum Acara dan Krisis *Access to Justice* dalam Kasus-Kasus Pemberhentian Kepala Daerah/Wakil Kepala Daerah di Indonesia", written by Arasy Pradana A. Azis in the *Journal of Law and Development*, Volume 49, Number 1, 2019;
2. The article entitled "Kompetensi Anggota DPRD dalam Pelaksanaan Fungsi Pengawasan Terhadap Pemerintah Daerah Kabupaten Gresik", written by Muhammad Farid Ma'ruf in the *Journal of Public Administration and Policy*, Volume IV, Number 1, April 2019;
3. The article entitled "Pemberhentian Kepala Daerah Ditinjau Dari Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah", written by William Boyke Gosal, Toar Neman Palilingan, and Englien R. Palandeng in the *Lex Administratum Journal*, Volume 9, Number 4, 2021.

The three articles only discuss the dismissal of regional heads in the normative context, the regulated procedures and practices, and one related Supreme Court Decision. Compared to this article, there is a novelty in the discussion of the need for opportunities for regional heads in the procedure for dismissing regional heads based on the principle of proportionality.

Dismissal Procedures for Regional Heads in Indonesia

The procedure for dismissing regional heads in Indonesia is closely related to the existence of the authority of the legislative, executive, and judicial branches of power. The legal basis for the regulation is reflected in Paragraph 5, Articles 79 to 89 of the Law on Regional Government. This provision regulates who is authorized to dismiss the regional head, the reasons for dismissing the regional head, and several exceptions to the application of this provision. In addition to the Local Government Law, the procedure for dismissing a regional head is inseparable from the regulations regarding the DPRD Plenary Meeting, as regulated in Government Regulation No. 12/2018.

In emphasizing the authority between branches of power in the dismissal procedure of regional heads, the main components regulated

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in the Regional Government Law are the DPRD, the Supreme Court, and the President through the Minister of Home Affairs. According to Article 79 of the Local Government Law, in essence, the dismissal of the regional head and/or deputy regional head is announced by the leader of the DPRD in a plenary meeting, proposed by the leader of the DPRD to the President through the Minister for governors and/or deputy governors, and to the Minister through the Governor for regents and/or deputy regents or mayors, to issue a determination of dismissal then. Then, Article 80 paragraph (1) of the Regional Government Law, authorizes the Supreme Court to examine, hear, and decide on the DPRD's opinion regarding the proposed dismissal of the regional head. The new system regulated in the Regional Government Law is indeed considered more complex because it involves more parties as a form of affirmation of the *check and balance* function between interested elements of power at the regional level.¹⁵

First, the DPRD has the right to propose the dismissal of the regional head. This right arises from the parliament's function to oversee and control the running of local government. In Article 106 of the Local Government Law, the Provincial DPRD is given the right of interpellation, the right of inquiry, and the right to express an opinion. The manifestation of these three rights is the supervisory function, which, according to Jimly Asshidiqie, DPRD supervision of the local government (regional head) itself tends towards political supervision.¹⁶ These rights and functions manifest with a plenary meeting to express an opinion, which is generally preceded by an inquiry.¹⁷

Concerning the exercise of this right, in determining if there are irregularities in the running of regional government by the regional head, there are several points of the determination made by the DPRD. The point of consideration is to submit a statement of opinion, by which the DPRD can ask for accountability to the Regional Head. If it

¹⁵ Arasy Pradana Azis, "Kekosongan Hukum Acara Dan Krisis Access To Justice Dalam Kasus-Kasus Pemberhentian Kepala Daerah/Wakil Kepala Daerah Di Indonesia," *Jurnal Hukum & Pembangunan* 49, no. 1 (April 2019): p.3, <http://jhp.ui.ac.id/index.php/home/article/view/1908>.

¹⁶ Ma'ruf, "Kompetensi Anggota DPRD Dalam Pelaksanaan Fungsi Pengawasan Terhadap Pemerintah Daerah Kabupaten Gresik.," p.57.

¹⁷ Azis, "Kekosongan Hukum Acara Dan Krisis Access To Justice Dalam Kasus-Kasus Pemberhentian Kepala Daerah/Wakil Kepala Daerah Di Indonesia.," p.4

is not acceptable, the DPRD can propose dismissal.¹⁸ Article 80 paragraph (1) letter b of the Law on Regional Government stipulates that the opinion of the DPRD to dismiss the regional head is decided through a plenary meeting of the DPRD attended by at least three-fourths of the total number of DPRD members and the approval of two-thirds of the total number of DPRD members present.

Second, the Supreme Court is authorized to examine, hear, and decide on the opinion of the DPRD regarding the dismissal of the regional head. One of the authorities of the Supreme Court, according to Article 24A paragraph (1) of the 1945 Constitution, is the authority granted by law. Thus, following the authority granted by Article 80 paragraph (1) of the Regional Government Law, the position of the Supreme Court has functioned to provide juridical legitimacy to the opinion of the DPRD, which initiates the process of dismissing the regional head.¹⁹ This is because the Supreme Court is a body that exercises judicial power, which when carrying out its duties, is free from the influence of government power and other influences.

The existence of the Supreme Court's authority in the process of dismissing a regional head is limited to the opinion of the DPRD based on allegations of violation of the oath/pledge of office, failure to carry out obligations, violation of specific prohibitions, and committing disgraceful acts by the regional head.²⁰ However, until now, the Supreme Court has not released a Supreme Court Regulation, which is the basis for regulating the mechanism and procedural process in the case of DPRD opinion review related to the dismissal of regional heads. This is a concern given the legal vacuum that seems to be ignored²¹, even though this procedural mechanism is also important to be regulated in the procedure for dismissing regional heads.

Third, there are the President and the Minister of Home Affairs as executive institutions in the procedure for dismissing regional heads. In exercising its authority to dismiss regional heads, the relationship between the executive and representative institutions should be

¹⁸ Ma'ruf, "Kompetensi Anggota DPRD Dalam Pelaksanaan Fungsi Pengawasan Terhadap Pemerintah Daerah Kabupaten Gresik.", p.62

¹⁹ Azis, "Kekosongan Hukum Acara Dan Krisis Access To Justice Dalam Kasus-Kasus Pemberhentian Kepala Daerah/Wakil Kepala Daerah Di Indonesia.", p.2.

²⁰ Ibid, p.3.

²¹ Ibid, p.6

adequate, proportional, and balanced. The President comes with administrative authority regarding the appointment and dismissal of a person with state and administrative positions. Under the provisions of Article 80 paragraph (1) letters d, e, and f of the Regional Government Law, the President, upon the proposal of the DPRD leadership that the Supreme Court has decided, must dismiss the Governor and/or Deputy Governor; while the Minister dismisses the Regent and/or Deputy Regent or Mayor and/or Mayor. However, the position of authority of the President and the Minister in the dismissal of regional heads has been commented on as not realizing a less democratic form of regional autonomy. This is considering that when the determination of the regional head is entirely in the hands of the community through direct regional head elections, the regional head's dismissal is centered on the President in a final manner.

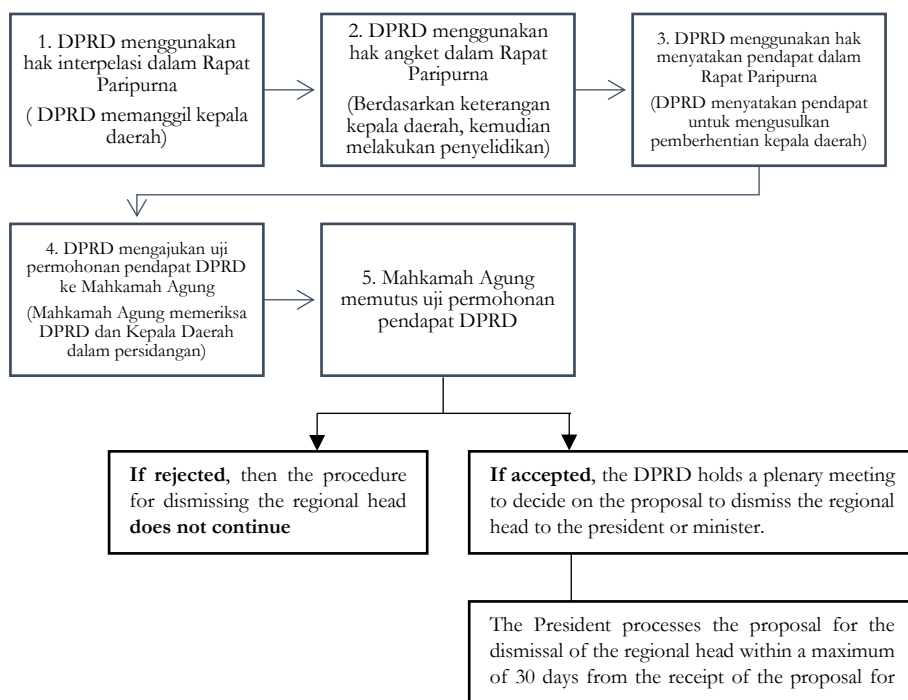
There are various reasons for the dismissal of regional heads, as stipulated in the Regional Government Law. In Article 78 paragraph (1) of the Local Government Law, the regional head and/or deputy regional head stops due to death, personal request, or dismissal. More specifically, in this article, the reasons for the dismissal of a regional head due to dismissal are described in Article 78 paragraph (2) of the Regional Government Law, as follows:

- a. expiration of his/her term of office;
- b. unable to carry out duties on an ongoing basis or permanently absent for 6 (six) consecutive months;
- c. declared to have violated the oath/pledge of office of the regional head/deputy regional head;
- d. does not carry out the obligations as referred to in Article 67 letter b;
- e. violate the prohibition as referred to in Article 76 paragraph (1), except for letters c, i, and j;
- f. committing misconduct;
- g. assigned to specific positions by the provisions of laws and regulations;
- h. using false documents and/or information as requirements during the nomination of the regional head/deputy regional head based on evidence from the institution authorized to issue documents; and/or
- i. getting the sanction of dismissal.

When analyzed, the reasons for the dismissal of regional heads are divided into juridical reasons and ethical reasons. In the juridical reason point, the prominent reason is the abuse of power committed by the regional head. Meanwhile, on the point of ethical reasons or leadership ethics, which emphasizes competence and personal integrity. These two reasons are included as reasons for the dismissal of regional heads, considering that they will influence the political dynamics in regional government.²²

It can be seen in the flow chart below to facilitate understanding of the procedure for dismissing regional heads.

Figure 1 Flow of Procedure for the Dismissal of a Regional Head



²² William Boyke Gosal, Toar Neman Palilingan, and Engeliem R Palandeng, “Pemberhentian Kepala Daerah Ditinjau Dari Undang-Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah,” *Lex Administratum* IX, no. 4 (2021), p.114-115.

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Source: Results of the author's analysis

Legal Effects and Position of Providing an Opportunity to Summon the Regional Head in the Process of Terminating the Regional Head

The Supreme Court is a state judicial institution that participates in the procedure of dismissal of regional heads after being proposed by the DPRD, which is to examine requests for judicial review of the DPRD Decision on the Right to Express Opinion against the regional head concerned, has two decisions with permanent legal force (*inkracht van genjtsde*) regarding cases of allowing regional heads to submit explanations (self-defense) in the procedure for dismissal of regional heads by the DPRD. Although Indonesia is not a country with a Continental European system, not Anglo-Saxon, so it does not follow the principle of *stare decisis et qujeta non movere* (the decisions of previous judges bind judges)²³ but as with the legal maxim *res judicata pro veritate accipitur* (a matter decided must be accepted as true)²⁴, and *judicia sunt tanquam juris dicta, et pro veritate accipiuntur*²⁵ (a decision is an application of the law and is accepted as the truth), it remains important of course to understand the application of the law through a judge's decision with permanent legal force regarding the opportunity to submit an explanation (self-defense) in the procedure for dismissing a regional head by the DPRD, which is not regulated in existing laws and regulations. The two decisions are Supreme Court Decision Number 2 P/Khs/2020, dated 8 December 2020 on the dismissal of the Regent of Jember Regency, and Supreme Court Decision Number 1/P/Khs/2014, dated 13 February 2014, on the dismissal of the Regent of Karo Regency.

In Supreme Court Decision Number 02 P/KHS/2020, the Petitioner, namely the Jember Regency DPRD, filed a request for a review of the Jember Regency DPRD Decision Number 8 of 2020 on

²³ Hanafi Arief, *Pengantar Hukum Indonesia* (Yogyakarta: PT. LKiS Pelangi Aksara, 2016), p.16.

²⁴ Azadeh Sadeghi, "A Study on the Nature of Res Judicata With A Comparative Approach," *Comparative Law Review* 12, no. 1 (June 2021), p.1, https://jcl.ut.ac.ir/article_82752_47ca52b66bbd0a7f3dcfedd91cfbc241.pdf.

²⁵ James A Ballentine, "Ballentine's Law Dictionary /" (Indianapolis: The Bobbs-Merril Company, 2005), p.257, <https://advance.lexis.com/api/search?q=&>

the Right to Express an Opinion of the Jember Regency DPRD against the Regent of Jember, against the Respondent, namely the Regent of Jember, Faida, held as the Regent of Jember for the 2015-2021 Period. The legal facts are that the Jember Regency DPRD has exercised its right to interpellation, the right to inquiry, and the right to express an opinion, exercised through three plenary meetings of the Jember Regency DPRD. The DPRD of Jember then found through the Inquiry Committee, that the Regent of Jember had violated the provisions of the Law on Regional Government, with the main issues concerning the non-obtaining of the Civil Servant Candidate formation quota for the Government of Jember, the mutation policy of the Government of Jember that was contrary to the law, the issuance of Regulations of the Regent of Jember that allegedly violated the law, and other policies that had a broad impact on the community.

In this decision, the Regent of Jember, through his attorney, filed a defense in the Supreme Court. One of the main points of defense argued by the Regent of Jember was that the Regent, **as the head of the region, was not allowed to present an explanation in the forum of the right of interpellation.** The Jember Regency DPRD argued that the opportunity to explain had been given by inviting the Regent of Jember to attend the Plenary Meeting of the Jember Regency DPRD on 23 December 2019, but the Regent did not attend or send his representative to the session. The Jember Regent's good intentions to request the rescheduling of the plenary meeting were ignored by the Jember Regency DPRD because the Regent was not authorized to organize and reschedule the DPRD plenary meeting.

The Supreme Court's legal reasoning in response to the arguments of the Petitioner and Respondent was based on the principle of proportionality as stipulated in the Law on Regional Government. That, by not giving the Jember Regency DPRD the opportunity for the Regent of Jember to attend and explain himself in the forum of the right of interpellation, according to the Panel of Judges of the Supreme Court, this cannot be justified by law. This is because the existence of the right of interpellation, the right of inquiry, and the right to declare the DPRD are rights granted by the Law on Regional Government to oversee government administration in the regions. Thus, according to the Panel of Judges of the Supreme Court, the DPRD of Jember Regency violated the principle of proportionality because it did not

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prioritize the balance between the rights and obligations of state administrators. Therefore, the Supreme Court, in its decision, rejected the request for a judicial review of the Jember Regency DPRD so that the Regent of Jember continues to serve in his position.

In Supreme Court Decision No. 1 P/KHS/2014, the Petitioner, the Karo Regency DPRD, filed a petition to review the Decision of the Karo Regency DPRD No. 13/2013 on the Right to Express the Opinion of the Karo Regency DPRD on Alleged Violations of Ethics and Regulations Committed by Dr. (HC) Kena Ukur Karo Jambi Surbakti, against the Respondent, the Regent of Karo, who was held by Dr. (HC) Kena Ukur Karo Jambi Surbakti as Regent of Karo for the 2011-2016 Period. In essence, the Karo Regency DPRD used the right of interpellation, the right of inquiry, and the right to express an opinion, all of which were used through the Plenary Meeting of the Karo Regency DPRD. Some of the reasons for the DPRD to propose the dismissal of the Karo Regent are the violation of moral ethics and based on the actions of the Karo Regent, who became the administrator of the Foundation, made mutations, promotions, and demotions, as well as tax policies, which the DPRD of Karo Regency considered to violate the applicable laws and regulations.

When the request for judicial review from the Karo Regency DPRD was sent to the Karo Regent through the letter of the Registrar of State Administration of the Supreme Court of the Republic of Indonesia Number 01/PER-PSG/I/01 P.KHS/TH.2014, until the specified period, no answer was given by the Karo Regent. Therefore, the Supreme Court responded to the request for judicial review in the Legal Consideration under the arguments of the Karo Regency DPRD only. The Supreme Court thinks **that the DPRD of Karo Regency has allowed the Regent of Karo to defend himself in a Plenary Meeting with the agenda of the Right of Interpellation (expressing an opinion), which the Regent of Karo did not attend, so he sent the Regional Secretary to submit a written answer.** Therefore, the Supreme Court addressed this fact as an indication that the Karo Regent was not serious in responding to allegations that disrupted the course of government, disturbed the people of Karo Regency, and did not respect the existence of the Karo Regency DPRD institution. Thus, in its decision, the Supreme Court granted the request

for a review of the opinion of the Karo Regency DPRD so that the Regent of Karo could then be dismissed from office.

In analyzing these two decisions, as decisions on the procedure for dismissing regional heads, it is necessary to underline that both the examination of the accountability of the regional head by the DPRD, as well as the opinion meeting on the dismissal of the regional head, are both carried out in the forum mechanism for the right of interpellation. Under the provisions of Article 72 of PP No. 12/2018, in the plenary meeting on the right of interpellation, the regional head is present to explain and, if absent, can assign relevant officials to represent. It shows that there should be an opportunity to defend themselves for the regional head to attend the plenary meeting. The presence of the head of the region is necessary for the implementation of the right of interpellation, considering that Article 159 paragraph (2) of the Local Government Law defines the right of interpellation (in the context of the Regency/City DPRD), is to request information from the regent/mayor regarding important and strategic regency/city Regional Government policies and have a broad impact on the life of society and the state. Thus, the presence of the head of the region is essential to provide information to the DPRD before responding to the next realm, namely the right of inquiry and the right to express an opinion.

The existence of an opportunity for the regional head to defend himself in the procedure for dismissing the regional head is arguably a manifestation of the principle of proportionality in the Principles of Regional Government Administration. The Principle of Proportionality, as stipulated in Article 58 Letter e of the Regional Government Law, is a principle that prioritizes the balance between the rights and obligations of state administrators. When defined lexically, the word 'proportionality' comes from the word 'proportional', which, according to the Big Indonesian Dictionary, means according to proportion, comparable, balanced, and balanced.²⁶²⁷ This understanding of the principle of proportionality does not only exist at the level of government law but also in civil law. In the realm of civil law, especially contract law, proportionality means that in the exchange of rights, there is a guarantee that the differences in interests between the parties are

²⁷ "Proporsional," Kamus Besar Bahasa Indonesia (Online), <https://kbbi.kemdikbud.go.id/entri/proporsional>, accessed on 16 July 2023.

resolved in a balanced manner according to their shares or proportions.²⁸ Therefore, it can be understood that balance is the essence of the principle of proportionality.

In measuring the extent of the balance between rights and obligations, proportional justice stems from the philosophical element in the legal principle: “Justice consists of treating equals equally and unequal unequally, in proportion to their inequality”.²⁹ As quoted from the opinion of Kai Moller, a law lecturer at the London School of Economics and Political Science, which was later analyzed by Faiq Tobroni, from a human rights review, this principle of proportionality is used to resolve conflicts of rights or interests between parties in a balanced manner, by considering four indicators, namely the existence of a legitimate legal objective, rational achievement, necessity, and balance.³⁰

When viewed from the side of the DPRD, which has the right to dismiss the regional head, the DPRD should also have an obligation to listen to the regional head who will be dismissed. Likewise, when the regional head has been given the obligation to comply with the provisions stipulated in the laws and regulations, especially in the context of the dismissal of the regional head, it is appropriate that the regional head is given the right to be heard in his defense at the DPRD plenary meeting. However, the procedure for providing an opportunity to defend oneself for the regional head is not explicitly stated in the Law on Regional Government. Nevertheless, it can be indirectly said that **the position of providing an opportunity for the regional head to defend himself/herself in the procedure for dismissal of the regional head at the DPRD level is a must**, given that after all the provisions of PP No. 12 of 2008 regulate that the presence of the regional head is required in the plenary meeting.

The obligation to provide an opportunity for the Regional Head to defend himself in the procedure for dismissing the regional head at the DPRD level is arguably logical because if you look at the *legal policy* related to the procedure for dismissing a leader, for example, the Board

²⁸ Faiq Tobroni, “Asas Proporsionalitas Sebagai Moderasi Pandangan Hukum Diametral,” *Jurnal Yudisial* 11, no. 3 (December 2018): p.313, <http://jurnal.komisiyudisial.go.id/index.php/jy/article/view/313>.

²⁹ *Ibid.*

³⁰ *Ibid.*

of Directors of a Limited Liability Company, the same arrangement can be found. Article 105 paragraph (2) of Law Number 4 of 2007 on Limited Liability Companies as amended by Article 109 of Law Number 11 of 2020 on Job Creation (hereinafter referred to as the Limited Liability Company Law) stipulates that; "The decision to dismiss a member of the Board of Directors as referred to in paragraph (1) is taken **after the person concerned has been allowed to defend himself in the GMS.** (emphasis by the author). This means that the provision of an opportunity for the Board of Directors to defend themselves is imperative (*dwingendrecht*), so if the opportunity is not given, it can make the dismissal of the directors invalid.³¹ Therefore, if it is analogous, that the legal consequences of dismissing the board of directors without being allowed to defend themselves make the dismissal of the board of directors invalid, then the legal consequences of not allowing the regional head to attend the Parapiurna meeting, should also make the dismissal of the regional head invalid (*in casu*: not acceptable by the Supreme Court).

The provision of the obligation to defend the members of the Board of Directors in a Limited Liability Company can be said to be more precise and provide more legal certainty (*rechtszekerheid*), considering that it is regulated directly by law rather than the process of dismissal of regional heads. In addition, members of the Board of Directors who are not allowed to defend themselves can apply for the cancellation of the GMS with the agenda of dismissing directors by filing a lawsuit to the District Court so that if the Court cancels it, the decision becomes invalid and void. The lack of opportunity for the Board of Directors to defend themselves at the GMS, which results in the dismissal becoming null and void, can be seen in the Sidoarjo District Court Decision Number 111/Pdt.G/2017/PN SDA. One of the *ratio decedendi* (legal considerations by the judge) of Sidoarjo District Court Decision Number 111/Pdt.G/2017/PN SDA is: "that in this case, in the opinion of the Panel, the **self-defense mechanism in the GMS regulated in the provisions of Article 106 paragraph (5) of the Company Law is imperative, and cannot deviate from that method and is** not justified by a written defense, in **other** words, the **rights granted by the Limited Liability Company Law (UUPT) to**

³¹ Yahya Harahap, *Hukum Perseroan Terbatas*, 6th ed. (Jakarta: Sinar Grafika, 2016), p.422.

members of the board of directors/directors in a company to be dismissed *in casu*, must be allowed to defend themselves in the EGM forum, meaning that in person the defense of the Board of Directors must be submitted in the EGM forum (thickening by the author);" The decision was later confirmed in the Surabaya High Court Decision Number 69/PDT/2019/PT SBY.³² The two decisions described earlier show that the regional head, the regent, was not present at the plenary meeting regarding the DPRD's right of interpellation. In the case of the Regent of Jember, the absence of the Regent or his representative at the DPRD interpellation plenary meeting was attempted to be responded to by submitting a letter requesting rescheduling to the DPRD of Jember Regency. This should have been a consideration for the DPRD of Jember to not proceed to a right of inquiry meeting or even a right of expression meeting to dismiss the Regent of Jember. Moreover, when considering that, in principle, the right of interpellation is to obtain information from the head of the region, if the head of the region or his representative is not present, then the element of information from the head of the region is lost. Thus, it is correct that the Supreme Court responded that the actions of the Jember Regency DPRD did not fulfill the principle of proportionality.

Compared to the case of the Karo Regent, although the Karo Regent was not present, he sent an official representative by bringing a written answer to the DPRD interpellation rights meeting. When referring to Article 13 paragraphs (1) and (2) of Government Regulation No. 16/2010 on Guidelines for the Preparation of Regulations of the Regional House of Representatives on the Rules of Procedure of the Regional House of Representatives, which at the time of this case was still in effect and has now been replaced by PP No. 12/2008, the regional head can be present to provide a written explanation, or if he

³² In Article 46 jo. 47 of Law Number 14 of 1985 on the Supreme Court as amended twice by Law Number 3 of 2009, it can be understood that the time limit for filing a cassation appeal is 14 (fourteen) days, and when it is not filed within 14 (fourteen) days, the litigant is deemed to have accepted the decision. Surabaya High Court Decision Number 69/PDT/2019/PT SBY was decided on 30 April 2019, and based on the Sidoarjo District Court Case Graduation Information System, after 14 (fourteen) days from 30 April 2019 there were no cassation legal efforts, so the Surabaya High Court Decision Number 69/PDT/2019/PT SBY has permanent legal force. For the rest, see http://sipp.pn-sidoarjo.go.id/index.php/detil_perkara

is not present then assign the relevant officials to represent him. Thus, the opportunity to defend himself was provided by the Karo Regency DPRD and used by the Karo Regent during the dismissal procedure of the regional head at the DPRD level and subsequently processed by the inquiry proper procedure and the right to express an opinion. Therefore, the Karo Regency DPRD did not violate the principle of proportionality, which was regulated in Article 20 paragraph (1) letter e of Law Number 32 of 2004 on Regional Government and has now been amended by the 2014 Regional Government Law.

Although it appears as if there is an inconsistency between Supreme Court Decision Number 2 P/Khs/2020 on the Dismissal of the Regent of Jember Regency and Supreme Court Decision Number 1/P/Khs/2014 on the Dismissal of the Regent of Karo Regency, there are differences. The difference between the dismissal of the Regent of Karo and the Regent of Jember is that when the dismissal procedure of the Regent of Karo rolled into the judicial realm, namely in the request for judicial review at the Supreme Court, the opportunity to defend himself by answering the arguments of the Karo Regency DPRD against him, the Regent of Karo did not respond at all. It can be said that the Regent of Karo has waived his rights (*rechtsverwerking*). Meanwhile, the Regent of Jember continued to react to the DPRD's request for judicial review in the Supreme Court. That is why the Supreme Court granted the request for a review of the opinion of the Karo Regency DPRD, judging that the Karo Regent did not answer concerning the evidence attached by the Karo Regency DPRD.

The explanation of the two cases of filing for the dismissal of the regent shows the legal consequences of violating the principle of proportionality because the regional head is not allowed to provide an explanation at the plenary meeting level of the right of interpellation in the procedure for dismissing the regional head. Following the opinion of the Supreme Court in Decision Number 2 P/KHS/2020, the substance of the Jember Regency DPRD Decision Number 8 of 2020 is not legally sound because it is not supported by data on the delivery of the Regent's opinion, both in the interpellation rights forum and the inquiry rights forum. It shows that the legal consequence when the procedure for dismissing a regional head at the DPRD level does not provide an opportunity for the regional head to defend himself is that the Supreme Court rejects the DPRD's opinion.

In the context of the regional head's right to explain or defend himself in the dismissal procedure of the regional head, the concept of waiver can be used as an analysis to review whether or not the dismissal procedure of the regional head at the DPRD level is carried out. The concept of waiver is defined as a condition in which one's rights are lost, and rights arise in other people due to the passage of time due to not performing legal actions as an obligation that a person must carry out.³³ This concept is well known in customary law and jurisprudence that decides land dispute cases. Even so, the concept of *rechtsverwerking* can be used as a principle that supports the implementation of the due process of law principle in other areas of law, as long as it is under the objectives of protecting the interests of the parties in the lawsuit, providing legal certainty, preventing protracted and detrimental cases, and striving for consistency with the principles of easy, fast, and low-cost justice.³⁴ Thus, in the context of the dismissal of a regional head, if the regional head concerned waives his right not to explain when allowed to defend himself, he is considered to have waived his rights.

When compared to the concept of dismissal of Directors in Limited Liability Companies, there are also arrangements related to the waiver of the right to provide an opportunity to defend themselves, Directors who are dismissed through the General Meeting of Shareholders. This waiver is an exception to the imperative provisions regarding the provision of opportunities for the Board of Directors to defend themselves in the GMS, which is a manifestation of the old maxim: “*omnis regula suas patitur exceptiones*”³⁵ (Every rule of law is subject to the exception of the rule of law itself). This exception is regulated *expressis verbis* in Article 105 paragraph (4) of the Limited Liability

³³ Lego Karjoko Tri Prastyo Wahyu Santoso dan Hari Purwadi, “Konsep Rechtsverwerking Dalam Putusan Pengadilan”, Prosiding, Seminar Nasional Dan Call for Paper,” Seminar Nasional dan Call for Paper (2019): p.5, <https://cybercampus.unair.ac.id/files/24000/b80f5a9b512b91d9a25c54ab23a155be.pdf>.

³⁴ Agung Hermansyah, “Rekonstruksi Konsep Rechtsverwerking Di Luar Sengketa Tanah,” Hukum Online, last modified 2021, accessed on 15 July 2023. <https://www.hukumonline.com/berita/a/rekontruksi-konsep-rechtsverwerking-di-luar-sengketa-tanah-lt60b06161ad438?page=2>.

³⁵ Eni Kuswati, Andi Asrifan, and Latina Sententia, *Ungkapan, Definisi, Jargon, Istilah, Peribahasa Dan Idiom Dalam Bahasa Latin – Inggris – Indonesia* (Bandung: CV. Media Sains Indonesia, 2021), p.1202.

Company Law, that "(4) The provision of an opportunity to defend **oneself** as referred to in paragraph (2) is **not required if the person concerned does not object to the dismissal** (emphasis by the author)." From Article 105 paragraph (4) of the Limited Liability Company Law, it can be understood that the most **important thing is not the self-defense of the dismissed Directors, but the provision of opportunities to the Directors** is the most **important**, so when the opportunity has been given, but the Directors do not exercise their rights, because they do not object to their dismissal, it is not a problem.

Opportunity to defend themselves for the relevant Member of the Board of Directors who is dismissed by the General Meeting of Shareholders. This is regulated in Article 105 paragraphs (2), (3), and (5) of the Limited Liability Company Law. In accordance with the explanation of 105 paragraph (3) of the Limited Liability Company Law, the self-defense shall be in writing. The only exception to this self-defense clause is if the Member of the Board of Directors does not object to the dismissal plan, as stipulated in Article 105 paragraph (4) of the Limited Liability Company Law. It implies that there is a requirement to provide an opportunity for Members of the Board of Directors to defend themselves, as the provision of such opportunity is compelling or imperative so that if there is no opportunity for self-defense, the decision to dismiss a Member of the Board of Directors in a Company cannot be taken.³⁶

To realize a law that reflects the legal maxim: "*ractionem diei non recipit lex*³⁷" (the law has no flaws), there are several recommendations for the regulation of the procedure for dismissal of regional heads, which explicitly contains the provision of opportunities for self-defense, both through direct presence to provide explanations in the DPRD plenary meeting, as well as the provision of responses in the application for judicial review of DPRD decisions at the Supreme Court level. Providing an opportunity for self-defense through direct attendance at

³⁶ Felicia Darlene, "Analisis Yuridis Pemberhentian Anggota Direksi Dengan Tanpa Didahului Adanya Pembelaan Diri Dalam Rups [Juridic Analysis Regarding Termination Of The Board Of Directors Without Self Defense In The General Meeting Of Shareholders]," Notary Journal 1, no. 2 (October 2021): p.142, <https://ojs.uph.edu/index.php/NJ/article/view/3881>.

³⁷ I Made Gede Wisnu Murti, "Melihat Berbagai Sistem Hukum Di Dunia Dalam Kajian Pengantar Ilmu Hukum," Jurnal Komunitas Yustitia 4, no. 3 (2021), p.960.

the DPRD plenary meeting needs to be emphasized at the level of Government Regulations and their derivatives and in the law. In addition, it should be stipulated that the norm of allowing the regional head is imperative (*in this case*: an obligation) which has juridical consequences when the regional head is not given the opportunity, then the dismissal of the regional head is invalid (*in this case*: cannot be accepted by the Supreme Court). Then, in the request for review of the DPRD's decision in the Supreme Court, it is necessary to regulate the procedural law regarding the examination procedures in the trial to provide legal certainty regarding the legal consequences of the presence or absence of the Petitioner (DPRD) and Respondent (regional head) which can affect the Supreme Court's decision. In addition, if the regional head wishes to waive his/her right to self-defense, then the waiver must be explicit and in a straightforward form so that no party is harmed. By regulating these provisions, the fulfillment of the principle of proportionality in government administration will be better and more precise, especially in the procedure for dismissing regional heads.

Conclusion

The procedure for dismissing regional heads in Indonesia is only specifically accommodated in Law Number 23/2014 on Regional Government. However, several technical arrangements have yet to be regulated with certainty in this law, specifically in terms of providing an opportunity to summon the regional head to provide information as a form of self-defense. Therefore, there are several circumstances where the regional head does not attend the DPRD Plenary Meeting, which initiates the procedure for dismissing the regional head. The Supreme Court responded to this in several cases of dismissal of regional heads. In essence, the principle of proportionality must be upheld as the basis for providing an opportunity for regional heads who are proposed to be dismissed by the DPRD as a form of balance between the branches of regional government power in Indonesia. As a suggestion, in the future, it is necessary to regulate in the *ius constituendum* the technical procedures for the dismissal of regional heads, which contains legal consequences for the presence or absence of regional heads in the relevant procedures.

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