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Regulation of Utilization of Regional-Owned Property

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Abstract
The utilization of regional-owned property is an activity included within the regional government's task and authorities as the representative of the region as the owner of the property. The activity does not cause a transfer of ownership pertaining to the property. Therefore, it does not require any approval from the Regional House of Representatives (DPRD), with the provision that all expenses have been funded in ongoing Regional Government Budget (APBD).
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1. Introduction

Territorial decentralization system embraced by the Constitution of Indonesia – called UUD NRI 1945 is undoubtedly to form an autonomous region independently in nature.[1] As the autonomous region independently, the region is qualified as a public law agency that possesses its own property (wealth) and has authority to manage the property for the sake of its governmental tasks to accelerate the realization of the society's prosperity. The wealth possessed by the public law agency is a pre-requisite (*condition sine quanon)* for the establishment of the governmental tasks. Therefore, the establishment of the governmental tasks as a form of territorial decentralization could not be separated from fiscal decentralization, which is the transfer of wealth (financial resources) to the region. For the purpose of the fiscal decentralization, the region is given the authority to manage the financial resources independently that is required for the government task establishment for public service interests.

It is normatively (*positief-recht)* that management of regional wealth can be executed in accordance to Regional Government Budget system (hereinafter referred to APBD), either in the form of money, marketable securities, or regional-owned property (hereinafter referred to BMD). The exception of the management of regional wealth is segregated regional wealth. Regarding to BMD, the management is governed by the Law No. 1 year 2004 concerning the National Treasury, the Governmental Decree No. 27 year 2014 concerning the State-owned/Regional-Owned Property Management, and the Minister of Internal Affairs Decree No. 19 year 2016 concerning the Guidelines of Regional-Owned Property Management.

In the context of management cycle of BMD,[2] there are several crucial points that need to be looked at carefully, particular the utilization of BMD. It is crucial because at this point the third parties involve or are involved including their legal acts. It means that the legal acts are not only considered as a public law act, but also as a two-side of private law act, or even the combination of both. Therefore, in regards to the utilization of BMD, BMD's manager must be extremely careful in doing such legal acts.

As the representative of public law agency,[3] the regional government in doing their private law acts in regards to the utilization of BMD, has always been said as an antecedent of the public law activity that generally is transformed into a statutory provisions that has function as a controlling instrument towards the private law acts conducted by the government as the representatives of the public law agency. Therefore, there have been several public laws that slip in and influence the private law acts conducted by the regional government as the BMD's manager. For example of it is the procurement of goods and services as governed into the Presidential Decree No. 54 year 2010 concerning the Government's Procurement of Goods and Services as amended a couple of times. The last amendment is the Presidential Decree No. 70 year 2012 concerning the Second Amendment of the Presidential Decree No. 54 year 2010. However, regarding the utilization of BMD, such specific rule does not exist yet. The absence of a specific regulation on the other hand gives freedom to the

[1]According to the wealth theory (*deolvermogens theorie*), an autonomous region purpose as a public law agency is to possess possess the wealth that is separated from the wealth of the other legal subject. See Jimmy Asshiddiqqie, *Kemerdekaan Berserikat, Pembubaran Partai Politik, dan Mahkamah Konstitusi,* Secretary General and Registrar of the Indonesian Constitutional Court, Jakarta, 2005, p. 71.
[2]Management Cycle of regional-owned property is a series of activities or the action that includes the planning and budgeting, procurement, usage, safekeeping, maintenance, administration, development, supervision, and control.
[3]Regional Government is a governmental position or a body of government that does not possess an independent wealth. However, it is a part (tools) of the region as a public law agency. The public law agency is the one that possess their own wealth, not the body of the government. Further explanations in regards to the legal position of the government could be read at Aminuddin Ilmar, *Hukum Tata Pemerintahan*, Unhas, Makassar, 2013, pp. 96-104.

manager of BMD to conduct any activities relating to the utilization act in accordance to their own creativity. The creativity will turn into a benefit for the region and the people who live in the region. It implies that the manager of BMD is able to conduct the utilization of BMD in accordance to their preference.

From the aspect of public law regarding to the utilization of BMD, it could be said that the Presidential Decree No. 27 year 2014 concerning the Management of State-Owned/Regional Owned Property and the Minister of Internal Affairs No. 19 year 2016 concerning the Guidelines of Regional-Owned Property provide enough regulation and guidelines related to the criterion, forms, and procedures for the establishment of BMD in order to eliminate the potential of regional loss. However, from the perspective of private law, its act further is an agreement relating to adjustment of interests of the parties (BMD's Manager and the third parties). The private law is very likely to violate the regulation. This assumption is strengthened by the argument that the BMD utilization act is an exclusive domain for the high ranking officials of BMD manager, instead of the domain of Regional House of Representatives (hereinafter referred to DPRD). In doing the utilization of BMD, therefore, the BMD manager believes that it is not necessary to ask for approval, opinions, or considerations, or even confirmation to the DPRD because it is not explicitly governed within the statutory provision.

In line with the utilization of BMD normatively, there are no regulations that explicitly say that the act must be conducted by the agreement or the consideration/consultation, or even the opinion of DPRD. Then is the act of BMD utilization completely off or exists outside of the jurisdiction of DPRD? If the regional government especially the officials of the government to do the function of BMD manager perceives affirmatively. Is this a mistake that could distort the purpose of BMD utilization? Therefore, the focus on the article is to require accurately the legal perspective of the utilization of BMD.

2. Legal Instrument of Utilization of Regional-Owned Property

BMD is one of the most important element in running the government and public service. Basically, no region does not have asset. The ownership of asset, therefore, is a part or an element of the region as a public law agency. The region is a different public law agency or could be distinguished from the private law agency. In regards to it, Jimly Asshiddiqie explains that the essential difference between the public law agency and the private law agency must not be seen from the perspective of the subject that forms them only.[1] As Kansil's opinion,[2] it is said the public law agency if the formation is conducted by public authority. On the other hand, the private law agency is a legal agency founded by individual. If it is only based on the subject that found them, then, private universities, for instance, could not be called as a public law agency, even though the universities run the public function in nature. As Jimly Asshiddiqie stipulates,[3] therefore, the distinction between the agencies could be seen from the perspective of legal interest that is represented by them or on the purpose of their activity. If the legal interest that is being represented or the activity that is running is a public in nature, then, the legal agency can be referred as the public law agency.

In relation to the region as a public law agency, the represented interest of the region is a public interest. It means that the region activities are able to be run publicly and privately in the framework of interest of its representation, which is the public interest.

The legal instrument utilized by the region is determined by legal acts type conducted by the region. In terms of it, the region is represented by the regional government to do its activity or to represent the public interests. If the legal acts conducted in the public law area, statutory provisions, resolutions (*beschikking*), and decision (*concreetnorm*) are used as the legal instruments.[4] Meanwhile, the legal instrument in the private law areas is an agreement (*overeenkomst*) with various forms.[5]

The legal acts conducted by regional institution in the public law area furthermore (constitutional law/administrative law) are represented by the position of the institution, which contains a particular authorities. The administration of the position in the regional areas is manifested into 2 (two) categories of government's organ, namely the regional government and DPRD. Each the regional institution is moving dynamically through the officer with using the authorities that is adhered to the position to reach particular goals. In the context of a legal act conducted by the region in the scope of the private law area, it is represented by the region and the one who is representing is the regional government.[6]

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[1]Jimly Asshididiqie, op cit, pp. 77-78.
[2]C.S.T. Kansil and Cristine S.T. Kansil. *Pokok-Pokok Hukum Perdata*, Pustaka Sinar Harapan, Jakarta, 2002, p. 13.
[3]Jimly Asshiddiqie, op cit, pp. 77-78.
[4]W.F. Prins dan R. Kosim Adisapoetra, *Pengantar Ilmu Hukum Administrasi Negara*, Pradnya Paramita, Jakarta 1983, p. 44.
[5]Tthere are at least 3 (three) forms of agreement that could be used by the government (regional) – called an ordinary private agreement, private agreement with a particular requirements, agreement in regards to the public authorities, and agreements in regards to the policies of government. See Ridwan HR, *Hukum Administrasi Negara,* Raja Grafindo Persada, Jakarta, 2006, pp. 23—237.
[6]*Ibid,* pp. 71-72.

The usage of public legal instrument is a basic function from the government's body including the regional government. It can be even called as the first and foremost instrument in exercising the tasks of the government. The private legal instrument is used, if the public law is difficult to reach especially in order to achieve effectiveness and efficiency of public services. According to Indroharto, the usage of the private legal instrument has several benefits. It is because the private legal instrument can always be applied not only for all interests and needs, but also it can be applied for all parties to determine the content of their agreement on their own freely.[1]

In line with government's doctrine based on law, all legal acts conducted by the government must be supervised by DPRD. Therefore, every usage of the legal instruments by the regional government, both public and private, shall be applied with the scope of DPRD's supervision, including the supervision of the utilization of BMD. This supervision is intended by the regional government in accordance to all legal norms. The most important thing, then, is the supervision is manifested in the event of providing protection of public interests that must be conducted by the regional government.

However, the form of DPRD's supervision needs to be explained. The questions arise to the form of supervision - Should it have an approval? Does the approval of DPRD manifest of the supervisory function of DPRD? - It is true that the approval of DPRD is the manifestation of the supervisory function. Although it is not determined normatively, it does not mean that the acts are not or are outside the jurisdiction of DPRD's supervision.

There are other forms of DPRD's supervisory function, called providing consideration or consultation or opinions. Practically, they could be done in accordance to the procedures that has been established in DPRD's rules. However the transformation into internal rules of DPRD must be preceded by statutory provision (regulation) hierarchically that impetrates the providing of consideration or consultation, or opinion. Without the higher regulation (provisions), the determination process of DPRD's supervisory function therefore could not be based on the internal regulation of DPRD *an sich*.

3. Regulations of Regional Properties Utilization

The utilization of BMD is a part of BMD management. As a part of the BMD management, the utilization acts become an element of power of the utilization itself. Article 5 of the Presidential Decree No. 27 year 2014 *juncto* Article 9 the Minister of Internal Affairs Decree No. 19 year 2016 stipulate that the regional leaders (governor/mayor) are the BMD management power holder, including the utilization of BMD. This power is really wide and is almost impossible to run by the regional leaders alone. Therefore, the regional leaders can utilize the officials under their power to assist them managing the process of BMD. The officials are: i) regional secretary as the manager; ii) head of regional office (hereinafter referred to SKPD) that has the BMD management function as administrative officials; iii) head of SKPD as the user; iv) administrative officials of property utilization; v) manager of property management; vi) manager of property usage; and vii) manager of property support.[2]

According to Article 78 subsection (4) the Minister of Internal Affairs Decree No. 19 year 2016, the utilization of BMD is conducted without requiring the approval DPRD. This is because the utilization does not cause any transfer of ownership of the property. To some extent, there is several BMD transfer that do not require the approval of DPRD as stipulated in Article 55 subsection (3) the Presidential Decree No. 27 year 2014 *juncto* Article 331 subsection (2) the Minister of Internal Affairs Decree No. 19 year 2016. In the context of management of BMD, DPRD do not get involved in the transferring process only, but it gets involved to all stages of BMD utilization, called the planning of BMD as *the first stage*. The planning of BMD is then transformed into planning and work design (hereinafter referred to RKA) of SKPD. The RKA is formed by the SKPD to be compiled into APBD planning, and will then be discussed with the regional leaders along with DPRD to gain an approval. So, at the stage of planning of BMD (budgeting), DPRD gives its approval (or does not gives the approval) towards the compilation of RKA SKPD. This authority of DPRD related to the budgeting according to the Law No. 23 year 2014 concerning the Regional Government is conceived as a form of the embodiment of budgeting function.[3]

Beside the budgeting function, DPRD has a function as a supervisory task towards the execution of APBD, including the management of BMD and assessment of the accountability of the program. In the context of supervision towards the management of BMD especially in the utilization stage, DPRD according to the Minister of Internal Affairs Decree No. 19 year 2016 does not require its approval. However, if referring to the President Decree No. 50 year 2007 concerning the Procedures of Regional Cooperation, approval of the DPRD becomes a

[1]Indoharto, *Usaha Memahami Undang-Undang tentang Peradilan Tata Usaha Negara* (*Buku II*), Pustaka Sinar Harapan, Jakarta, 1993, pp. 112-113.
[2]Brilliant Yehezkiel, et.al., 'Analisis Pengelolaan Barang Milik Daerah', *Jurnal EMBA*, Fakultas Ekonomi dan Bisnis Universitas Sam Ratulangi, Manado, Vol. 5 No. 2 June 2017, p. 1177.
[3]Article 99 juncto Article 152 UU Law No. 23 year 2014.

an obligatory element. Article 9 of the Presidential Decree No. 50 year 2007 clearly states that '*Regional cooperation plan that burdens the region and the people shall acquire the approval from DPRD with the condition that the cooperation cost has not been budgeted yet within the APBD of the ongoing year and/or using and/or utilizing the regional asset*'.

Such condition as stipulated in Article 9 as mentioned above shows dis-harmony between the President Decree No. 50 year 2007 and the Minister of Internal Affairs Decree No. 19 year 2016. To bridge the dis-harmony, *lex superiori derogate legi inferiori* as a principle can be assumed to solve the dis-harmony. However, it must be noted that both the regulation (the Presidential Decree No. 50 year 2007 and the Minister of Internal Affairs Decree No. 19 year 2016) are not independent in nature but they delegate in the sense of executing the higher regulation. The President Decree No. 50 year 2007 delegates from the Law No. 32 year 2004, which has been replaced with UU No. 23 Tahun 2014 concerning the Regional Government. The Minister of Internal Affairs Decree No. 19 year 2016 itself delegates from the President Decree No. 27 year 2014 concerning the Management of State/Regional Owned Property, in which the President Decree No. 27 year 2014 is a procedural regulation of the Law No. 1 year 2004 concerning the National Treasury.

It can be said therefore that either the *lex superiori derogate legi inferiori* principle or the *lex posterior derogat legi priori* is inapplicable to bridge the dis-harmony. It is because it consists of two different legal regimes, namely the regional government legal regime and the public financial legal regime (state/region). Thus, the relevant legal principle to be turn into an instrument of solving the dis-harmony is the *lex specialis derogat legi generali* principle. In this context, the regional government legal regime *in casu* the Law No. 32 year 2004, which has been replaced with UU No. 23 Tahun 2014 concerning the Regional Government *juncto* the Presidential Decree No. 50 year 2007 are *lex specialis*. In terms of it, G.J. Wolhoff states that the legal of the regional government is a constitutive guideline the regions.[1] If there is other statutory provision (regulation) except UUD 1945 that is substantively contradicting with the statutory provisions concerning the Regional Government, the provision (regulation) must be *cast-aside*.[2] This process is conducted to ensure that the authority of the regional government given by the regional government regime is not violated or is being pulled back by another legal regime. If it takes place, the autonomy (regional) will lose its meaning.

Meanwhile, some experts also argue that the Presidential Decree No. 50 year 2007 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016 do not have to be faced one another. The argumentation is based on the reason that both regimes regulate an entirely different thing. The Presidential Decree No. 50 year 2007 governs the regional cooperation, either between regions or between the region and third parties (legal body other than the region). The form of cooperation between the region and the third parties can be classified into 4 (four) major points, namely contract of services and procurement, construction contract, rehabilitation contract, and layover contract.[3] If we compare between the Presidential Decree No. 27 year 2014 and the Minister of Internal Affairs Decree No. 19 year 2016, there is similarities from the perspective of cooperation, namely the construction contract (hereinafter referred to BGS or BSG), meanwhile the form of cooperation of BMD utilization in the form of rent, KSP, and KSPI as regulated in the procedural regulation of the Law No. 1 year2004 is not found in the President Decree No. 50 year 2007, which is the procedural regulation of the Law on the Regional Government.

At this point, the similarity of cooperation regulated by both legal regimes does not show any indication of overlapping authorities of regulation. It could even be said that they are "*continuum*" in nature. Both cooperative contexts are related with the BMD utilization, even though the cooperation as stipulated into the Presidential Decree No. 50 year 2007 does not always require the BMD utilization. In this context, the cooperation as meant in the President Decree No. 50 year 2007 or in the Presidential Decree No. 27 year 2014 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016, has connection one another.

The indication of overlapping regulation can be seen when the President Decree No. 50 year 2007 entails the region cooperation to utilize the regional assets through the approval of DPRD. Whereas the Presidential Decree No. 27 year 2014 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016 does not require the approval of DPRD. If both regulation are said "*continuum*", the question arise "why does the President Decree No. 50 year 2007 entail the approval of DPRD?; and, why does the Presidential Decree No. 27 year 2014 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016 not require the approval?"

The consideration for BGS utilization as mentioned in Article 34 subsection (1) the Presidential Decree No. 27 year 2014 stipulates that the region requires a construction and facility in the event of performing the tasks and function of SKPD. The consideration of article 34 is also seen in Article 219 subsection (1) the Minister of

[1]See Jimly Asshiddiqie, *Perihal Undang-Undang di Indonesia,* Secretary General and Registrar of Indonesian Constitutional Court, Jakarta, 2006, p. 92.
[2]Bagi Manan, *Teori dan Politik Konstitusi*, Directorate General of Higher Education, National Education Department, Jakarta, 2001, p. 142.
[3]See Attachment I of the Minister of Internal Affairs Decree No. 22 year 2009.

Internal Affairs Decree No. 19 year 2016. Article 219 (1) states that either BGS or BSG essentially is executed with the consideration of SKPD to require a construction and facility for the establishment of the regional government to do its task and function to do the public services. It means that from the perspective of the cooperation to utilize BMD, either the President Decree No. 50 year 2007 or the Presidential Decree No. 27 year 2014 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016, have connection to establish the Regional Government. From the perspective of the cooperation funding to utilize BMD, it is burdened to APBD. Both of the types of the cooperation are to utilize BMD burden the region Therefore, it must acquire the approval of DPRD, unless the expenses have been previously budgeted within the APBD in the ongoing year.

It is realized that the Presidential Decree No. 50 year 2007 is the source of dis-harmony as discussed above due to the using of sentence of "*and/or utilizing the regional asset*". Therefore, the interpretation of the sentence must be functional with the spirit of avoiding any potential risks of loss of the region. It means that the approval of DPRD can be said as a manifestation of supervisory function towards the BMD management conducted by the regional government. It becomes *ratio-legist* of Article 9 the Presidential Decree No. 50 year 2007. Along with the functional interpretation, then, the approval DPRD towards the cooperation of utilization of BMD is only required if the cost of it has not yet accounted in APBD in the ongoing year. The approval of DPRD itself becomes the basis of APBD amendment to accommodate the budget allocation for the execution of cooperation to utilize BMD.

4. Conclusions

It can be concluded that the Presidential Decree No. 27 year 2014 *juncto* the Minister of Internal Affairs Decree No. 19 year 2016 has clearly stipulated the tasks and authorities of regional government and DPRD in their activity to utilize BMD. The Regional Government *in casu* the regional leader then holds the authority to manage BMD including BMD utilization activity. DPRD itself is an institution to supervise the BMD utilization through approval mechanism (giving or not). The functional interpretation can be applied to set up the position of DPRD's approval that is only needed when the cost of the BMD utilization activities has not been accounted yet within APBD of the ongoing year.

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