



# Constitutionality of Monitoring and Evaluation of Regional Regulation Drafts and Regional Regulations by Regional Representative Council

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Article	Abstract
<p><b>Keywords:</b> Constitutionality; Monitoring and Evaluation; Draft; Regional Regulations, Regional Representative Council</p> <p><b>Article History</b> Received: Jun 11, 2021; Reviewed: Jul 12, 2021; Accepted: Apr 10, 2022; Published: Apr 13, 2022.</p>	<p><i>This research examines the constitutionality and legal implications of the DPD's new powers and duties in monitoring and evaluating regional regulation drafts in terms of the function of the DPD. The research method uses a normative approach and qualitative descriptive analysis. The results of the research and discussion show that the addition of the authority and duties of the DPD to carry out monitoring and evaluation constitutionally has no legal basis, so that the arrangement can be deemed unconstitutional. On the other hand, if the new authority arrangement for the DPD is seen as not contrary to the Constitution, then this will set a precedent, so that the addition of the authority of the Regional Representatives Council is not only within the purview of supervision, but it can also be carried out within that of legislation, without making changes to the constitution and simply through the Law. In terms of the legal implications of the authority and a new task of DPD to set the scope of monitoring and evaluation, monitoring and evaluation models, and overlapping authorities to conduct monitoring and evaluation with those in the Central Government, DPD cannot give any follow-up to monitoring results. Thus, restructuring the tasks and authority of the DPD in the constitution and the statute is a must.</i></p>



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## INTRODUCTION

After the Amendment to the 1945 Constitution there were quite basic changes related to state institutions, especially those related to parliament. Article 2 Paragraph (1) of the 1945 Constitution states that the MPR consists of members of the DPR and members of the DPD (Brilliant Gustama et al., 2022). Regional representative councils

as regional representatives replace regional delegates. The existence of the DPD in a representative institution was previously filled by the regional representative and group envoys in the MPR (Dalimunthe, 2017). As a new institution, the DPD is not a representative of the DPRD-central DPRD, but it is an independent institution and is elected directly through general elections through non-party channels or an independent path. The DPD emerging from the amendments to the 1945 Constitution are regulated in Article 22 C and Article 22 D concerning duties and authority of DPD. Article 22 C regulates the composition and procedures for filling DPD members and shows that DPD members elected through elections and the number of members of the Regional Representative Council from each province show equal proportions.

Article 22D regulates several important matters. First, the DPD basically does not have the power to make laws and can only submit bills to the DPR. This provision is related to Article 20 Paragraph (1) and Paragraph (2) stating, *“The House of Representatives holds the power to make laws and each bill is discussed by the House of Representatives and the President for mutual agreement”*. First, this is because Article 20 Paragraph (1) was made before the DPD was established (First Amendment, 1999). Article 20 Paragraph (1) should be reviewed at the time the DPD is formed, more so when viewed from the idea of two chambers, so that an incongruent substance comes out when viewed from its position as a representative institution. In other words, the DPD does not have the power to make political decisions. Second, article 22 D Paragraph (2) seems to allow the DPD to participate in discussing the law, and seemingly, this provision gives a role to the DPD. The provisions of the DPD to participate in the discussion means that members of the DPR have the power to make laws. Third, Article 22 D Paragraph (3) implies that the supervisory function of the DPD is not imperative. The results of the supervision cannot be followed up by the DPD because the results of the supervision are submitted to the DPR.

Law of the Republic of Indonesia Number 2 of 2018 concerning Amendments to the MPR, DPR, DPD and DPRD Law (hereinafter stated as MD3 Law), Article 249 paragraph (1) letter j, stating “monitoring and evaluation of regional regulation drafts and regional regulations” adds to the duties and authority of the Council to conduct an evaluation of the regional regulation drafts and regional regulations. Is the addition of duties and authorities an expansion of the meaning of the DPD's authority in the field of supervising the implementation of rules as stipulated in Article 22 D paragraph (3) with Article 249 paragraph (1) letter e of Act number 2 of 2018?

Jimly Asshiddiqie argues that the constitution is the most fundamental law and the highest in nature, because the constitution itself is a source of legitimacy or the basis for authorizing other forms of laws (Hamzani, 2014). The constitution is a basic law that can be in the form of written and unwritten basic laws serving as the basis for the administration of a country. K.C. Wheare defined that Constitution has two meanings (Wico et al., 2021). In a broad sense, it is the overall constitution of a

country's constitutional system, in the form of a collection of regulations that form and regulate the government of a country, while in the narrow sense, constitution is a collection of state governance rules contained in a document.

Representative councils, or parliaments, generally run 3 (three) functions:

- 1) Legislative function, which refers to law making and treaty ratification involving foreign countries.
- 2) Supervisory function performed by representative councils to oversee the executive (the government).

It is intended that representative council function is congruent with the mandate of the law, and to demonstrate this function, the representative councils are given the following rights:

- a. The right of interpellation (right to ask for information);
  - b. The right of inquiry (right to conduct an investigation);
  - c. The right to ask;
  - d. The right to change (Right to make changes);
  - e. The right to submit a bill
- 3) Means of Political Education, which is intended to open people's mind to the problem relating to the public interest through discussions and policies implemented by representative councils published in the mass media to raise people's awareness of their rights and obligations as citizens (Ardiansyah, 2017)(Al-fatih, 2020)

Legislation in a broad sense includes legislation in a narrow sense which is defined as the process and product of making laws (*the creation of general legal norm by special organ*) and regulations (*regulations or ordinances*). Legislation in a broad sense includes the delegation of rulemaking power by the laws. The process of legislating the formation of laws (*legislative act, parliament act, Act of Parliament*) involve representative bodies. Legislative function is performed by the legislature either individually or "*together with the head of State*". Carl J. Friedrich in Fatmawati states that if the parliament serves as representative assemblies, then legislation is its main function (Tukan & ALW, 2018).

The theory of legislation is one of the most important theories to analyze the process of drafting. This theory is used to assess the products of legislation regardless of whether or not they are in line with the theory of legislation. The term legislative theory comes from an English translation, namely legislation of theory, or it is called *theorie van de wet* in Dutch or the theory of making or compiling laws (Langbroek et al., 2017). According to Kamus Besar Bahasa Indonesia, the word legislation means making laws, implying that legislation is defined as lawmaking. Jimly Asshiddiqie stated that the function of legislation includes 4 activities: the initiative to form laws, the discussion of bill, approval of bill validation, and granting binding approval or

ratification of international treaties or agreements and other binding legal documents (Yusrizal, 2018).

Legislation function refers to lawmaking. This function refers to a regulatory function of the people's representative councils, or this is the authority to determine regulations that are binding and restricting for citizens (Darmono, 2007). The regulatory function is more reflected in lawmaking (*wetgevende functions/law making function*) (Yusrizal, 2018). The most important functions of representative bodies consist of legislative and supervisory functions, where the former refers to lawmaking, while the supervisory function is to supervise activities or actions carried out by the executive (Yusmiati, 2018). The supervision consists of political, legal, and administrative aspects (Mamang, 2020).

Furthermore, the theory of regional autonomy implies that the region has the independence and freedom to regulate and manage a region according to the conditions and potentials of the region. In this context, the freedom to make decisions in accordance with the aspirations of the region itself is necessary for a region. Therefore, regional independence is an important matter, taking no intervention from the central government.

Decisions of the Constitutional Court Number 92/PUU-X/2012 and Number 79/PUU-XII/2014 highlights no consideration of the judge who associates DPD legislative authority to authority and the task of DPD for monitoring and evaluation of regional regulation drafts and regional regulations. This is a new form of supervision carried out by representative institutions in Indonesia, especially the DPD. From the above background, this study raises two issues, namely the constitutionality and legal implications of the DPD's powers and duties to monitor and evaluate the regional regulation drafts and regional regulations from the aspect of the DPD function. The purpose of this study is to examine and analyze the constitutionality of monitoring and evaluation of the Regional Regulation drafts/Regional Regulations by the DPD and its legal implications in terms of the aspect of the function of the DPD. The analysis of the research results referred to several theories such as the constitution, representative council functions, and legislative understanding, legislative functions, and monitoring functions.

## **METHOD**

Legal science is a prescriptive science that studies the values of justice, legal objectives, legal concepts, legal norms, and the validity of rules. Legal science establishes standard procedures, provisions, and signs in implementing rules as an applied science (Sonata, 2015). The normative research studied is the law in the form of norms, using a theoretical approach, a legal approach and a conceptual approach. The research data were analyzed descriptively and qualitatively (Hutchinson & Duncan, 2012).

This research used primary and secondary legal materials. Primary legal materials included the 1945 Constitution of the Republic of Indonesia, Law Number 17 of 2014 concerning the MPR, DPR, DPD and DPRD, Law Number 2 of 2018 concerning the Second Amendment to the MD3 Law, Law No. 12 of 2011 concerning the Establishment of Legislation Junta Law no. 15 of 2019 concerning Amendments to Law No. 12 Year 2011 on the Establishment of Legislation as well as other relevant laws and regulations, while the secondary legal materials involved books, papers, research results, journals, articles and others as supporting materials for data analyses from normative studies and legal dictionaries for translating foreign terms.

a. Legal material collection techniques

The legal materials were obtained from library/digital library research, and sources from the internet.

b. Legal Material Analysis

Both the primary and secondary legal materials were inventoried, grouped, and reviewed with a statutory approach to acquire basic knowledge of the legal materials. To refine the analysis, content and comparative analyses of the legislation relating to the type and hierarchy of legislation were conducted. The method of interpretation of the law was also performed by using a systematic or dogmatic interpretation, interpreting the law by comparing one statutory regulation with other statutory regulations which contain elements of similarity or regulate the same matters.

## RESULTS AND DISCUSSION

### Constitutionality of the powers and duties of DPD allowing monitoring and evaluation of Regional Regulation Drafts and Regional Regulations

The DPD has new powers and duties to monitor and evaluate regional regulation drafts and regional regulations, as stipulated in Article 249 paragraph (1) letter J of the Law of the Republic of Indonesia No. 2 Year 2018. These provisions increase the authority of the DPD to conduct monitoring and evaluation. With the existence of duties and authorities, is this authority an extension of the meaning of the DPD's authority in the field of supervising the implementation of laws as regulated in Article 22D Paragraph (3) of the 1945 Constitution?

The meaning of implementation is defined as the process, method, act of carrying out plans, decisions, and so on (Lailam, 2018). So, the implementation of statute requires implementing regulations. Unlike the legislation, implementing regulation making does not involve the legislature. Basically, the authority to make laws, including its implementing regulations, lies in the hands of the legislature, and the executive has the power to carry it out. However, a regulation needs to be delegated because of the urgency of enactment of a rule, the need for detailed arrangements, requiring special skills, and arrangements that must be in accordance with the character

of each region. In addition, practically, the mechanism for making a long and complicated decision does not allow the House of Representatives (DPR) to make it independently (Benedetto, 2018).

Therefore, the addition of the powers and duties of DPD constitutionally has no legal basis or not in accordance with Article 22 D of the 1945 Constitution, which is related to the meaning of the authority of the DPD itself in the constitution, which, in essence, is an institution that makes and oversees statute, not a Regional Regulation draft and Regional Regulation, so that the arrangement may contravene the constitution. Mahfud MD stated that the law is a political product that may contain matters contravening the constitution (Eddyono, 2018). The following are two conditions that can cause the law to contain matters that contravene the constitution:

- 1) The government and the DPR as legislative bodies that make laws on the basis of their own political interests or the dominant group in them. As a political product, the law is nothing but a crystallization (legislation) of competing political wills whose products may conflict with the constitution. It is in this context that a judicial review is needed to clean the law from elements of political interests that are contrary to the Constitution;
- 2) Government and the DPR as political institutions, in fact, are mostly filled by people who are not legal experts or are less accustomed to thinking according to legal logic. Recruitment is conducted on the basis persona and success of gaining political support without taking into account their expertise in law. With these facts, it is highly possible for politicians in the legislature to make the law whose substance is contrary to the constitution due to their misunderstanding. As a consequence, a judicial review is needed by the judiciary to clean the law from various contents that are contrary to the constitution

Following the dynamics of democracy and the rule of law through the Constitutional Court's decision is very important, as in line with K.C. Wheare's statement implying that constitutional change can be made through interpretation by the courts (*judicial interpretation*) (Wico et al., 2021). Based on these considerations, it is relevant to also pay attention to the development of a state of law and democracy through the decisions of the Constitutional Court of the Republic of Indonesia.

The presence of the Constitutional Court is in the context of check and balance against DPR. The understanding of constitutionalism prevents the occurrence of constitutional deviations caused by legislative products, *wet, Gesetz* made by parliament. Hans Kelsen argued that *verfassasungs gerichtshof* has a legislative function, like parliament. Parliament is positive legislator making legislation, *wet, Gesetz*, while *verfassasungs gerichtshof* acts as a negative legislator. This is related to the limitation of power (restraint of power), restricting the supremacy of parliament (Jati, 2013). On the other hand, if the regulation on the addition of authority to the DPD is deemed not contradictory to the Constitution, then this will set a precedent, so that the new duties and powers of

the DPD are not only in the field of supervision, but can also be carried out in the field of legislation without making changes to the constitution, but it simply involves the statute.

Furthermore, Law Number 2 of 2018, specifically Article 249 paragraph (1) letter e states that "DPD can supervise the implementation of the law..." So, the condition where the DPD can supervise the implementation of the law can mean that one type of regulation implementing the law is a regional regulation, a regional legal product as the elaboration of higher laws and regulations, containing the regulations of special conditions of local areas in the implementation of regional autonomy and co-administration tasks. Formally, Regional Regulations are made by regional heads and DPRD. Materially, Regional Regulations are legal formulations of local wisdom, based on the conditions and needs of each region. Regional regulations in terms of their contents and the mechanism for their formation are similar to laws (Rahmawan, 2018).

The formation of Regional Regulations is a constitutional mandate in Article 18 paragraph (6) of the 1945 Constitution (Briliant Gustama et al., 2022). Therefore, the formation of regional regulations is a regional right that comes from the attribution and delegation authority, prioritizing the needs and aspirations of the local community (local wisdom) so that there is a diversity of arrangements within the corridors of the Unitary State. Therefore, it is necessary to supervise the regions within their authority to form regional regulations. This oversight is solely just to keep what was to become the regional authority in accordance with juridical, social and philosophical objectives. This authority also needs to be monitored so that the deviations that occur can be controlled because the consequences of such deviations are perceived by the local community governed by the regulation. Article 1 number 1 of the DPD Regulation No 3 states that "*Monitoring observes activities, identifies, and collects regional regulation drafts and regional regulations potentially contrary to the principle of the establishment of legislation*".

The activity is demanding and new for the DPD, which is unlikely to work independently but must cooperate with the institutions or local legislative bodies. The form of supervision carried out by the DPD is either preventive or repressive, or is it included within the purview of legislative review or legislative preview supervision? So far, the authority of the DPR and DPD, known as legislative review, is only found at the level of the law. Article 1 number 2 of DPD Regulation No. 3 of 2019, states that "*evaluation analyzes and reviews bills and regional regulations region to be material recommendation*".

Conducting evaluations can be categorized as legislative preview towards a regional regulation draft and legislative review of the regional regulation. However, the results of the analysis and the study only offer a recommendation, not providing a final decision on how to follow up on the regulation draft and the legislation referred to. That is, the activities of the DPD conducting monitoring and evaluation are still not independent recalling that the results are not more than just recommendations submitted to the DPR and the Government. The task and the new authority of the

DPD, therefore, represent a job that does not result in a final decision because they are dependent on other state institutions.

In addition, if it is related to the principle of regional autonomy, it is not in accordance with Article 18 of the 1945 Constitution in the sense that the DPD's authority to conduct evaluation and monitoring will have the potential to reduce regional independence in forming regional regulations, which is in the hands of the DPRD and the regional government, while in fact DPRD is not subordinate to the DPD, but a separate organization with a relationship between organizations not intra-organizational. The supervision of the DPD will reduce the freedom and independence of the region in carrying out regional autonomy. Regional governments in carrying out autonomy will have limited space to manage their regions in accordance with the potential and needs of local communities. The formation of the DPD is not congruent with the original intent as regional representatives to channel regional aspirations which are manifested in the form of a law, not in the form of regional regulations.

#### **Legal implications for the authority and duties of the DPD to monitor and evaluate the Regional Regulation Drafts and Regional Regulations**

The new authority and task of the DPD is to conduct monitoring and evaluation, giving rise to the following legal implications:

*First*, determining the scope of authority can be carried out by DPD because Law Number 2 of 2018 principally regulates the duties and authorities of the DPD in general. The determination of this scope is important because no further arrangements have been found regarding in which areas the DPD can perform its duties. *Second*, it is necessary to clarify the model for monitoring and evaluating regional regulations that can be carried out by DPD to avoid overlapping powers and duties with the Central Government which can also supervise regional regulations (Rahmawan, 2018).

DPD should determine the ideal format regarding the implementation of new tasks and this measure should be carried out selectively. For example, in terms of problematic matters that cannot be resolved by the Regional Government and the Ministry of Home Affairs and due to a priority scale, DPD should focus on five areas in line with Article 22 D of the 1945 Constitution. Although the scope of the five areas is not clear, it will be easier for both the DPD and the DPR to interpret them.

*Third*, the authority to supervise regional regulations and regulation drafts has been carried out by the central government. In carrying out supervision, the central government has strong authority because the regional government is part of the unitary state. Therefore, the monitoring authority needs to be harmonized with the *raison d'être* of the formation of the DPD institutional, namely the representation of the aspirations and the interests of the people in the region, and the DPD has an integration function in realizing the unity of Indonesia based on Pancasila and fighting for the aspirations and interests of the region.



*Fourth*, in terms of the results of supervision and the form or legal force of the supervision carried out by the Regional Representative Council, Article 24 paragraph (1) and (2) of DPD Regulation No. 3 of 2019 implies that the work of DPD only results in a recommendation, not a final decision so that it has no legal force. That is, the task of the DPD is not independent because the results are only in the form of recommendations submitted to the DPR and the Government, while the President is asked to respond to the recommendations.

*Fifth*, the authority of the DPD RI in carrying out evaluation and monitoring is very broad and does not hold any binding legal consequences so that it indicates that it does not reflect legal uncertainty due to unclear norms and multiple interpretations. Good legislation is made through simple, clear, and consistent methods for easier comprehension and implementation, which is expected to lead to legal certainty (Putuhena, 2013).

Sixth, additional powers and duties will create new problems because they conflict with the powers and duties of the Minister of Home Affairs and the Governor, as regulated in Article 245 of the Regional Government Law. The Central Government through the Minister of Home Affairs and governors as representatives of the Central Government have the task of supervising regional regulations in stages. The Minister supervises Provincial Regulations and governor regulations that are contrary to the provisions of higher laws and regulations, public interest, and/or morality, and the governors supervise district/city regulations (See Article 251 paragraph (1) and paragraph (2) of Law Number 23 Year 2014 on Regional Government, LN No. 244, and Supplement No. 5587). So, the cancellation of provincial regulations and governor regulations is carried out by the Minister and Regency/City regional regulations and regent/mayor regulations by a Governor as a representative of the Central Government. Apart from being contained in Article 245 of the Regional Government Law, the Governor's authority to supervise regional regulations is also set forth in Article 17 paragraph (1) of Law Number 6 of 2014 concerning Villages stating that a regional regulation at the district/city level whose content is related to changes in the status of a village or sub-district must obtain a registration number from the governor and a village code from the minister.

The supervisory authority by the Minister of Home Affairs and the Governor on Regional Regulations belongs to the preventive supervision model. The Minister and the Governor can pass or reject the validation of a regional regulation draft. However, this authority is limited, in the sense that it can only evaluate a regional regulation draft and a regional regulation that governs certain subject matters. According to Bagir Manan, related to the supervision of the autonomous government, there are two models of supervision, namely repressive and preventive supervisions (Hapsoro & Ismail, 2020).

In principle, the preventive supervision model is carried out on regional regulations that govern a number of certain subject matters previously set through laws and regulations, meaning that this supervision should take place before the establishment of laws and regulations (Hapsoro & Ismail, 2020)). Meanwhile, repressive supervision is carried out on all regional regulations that are deemed contrary to higher level laws and regulations or contrary to the public interest. This indicates that the supervision may take place following the occurrence of the problem.

*Seventh*, the supervision of regional regulations in Indonesia is not only carried out by the Minister of Home Affairs and the Governor, but also by Supreme Court as regulated in Article 24A paragraph (1) of the Constitution and Article 31 paragraph (1) and (1) of Law Number 5 of 2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court. So, the supervision carried out by the Supreme Court of the regional regulations includes repressive supervision because it has legal consequences for canceling or declaring a regional regulation invalid if it contradicts the law above it (*lex superiori de rogat lex inferiori*).

*Eighth*, the results of the monitoring and evaluation conducted by DPD in the form of recommendations submitted to the President and DPR, poses no binding legal effects and does not reflect the legal uncertainty (*rechtsonzekerheid*) due to unclear norms and multiple interpretations. In addition, there is uncertainty over which supervision model to use and whether the supervision is preventive or repressive.

*Ninth*, strict supervision can have an impact on good regulatory products of in accordance with the hierarchy of the formation of laws and regulations. On the other hand, overly strict supervision is carried out through three models, namely from the executive agency by the Ministry of Home Affairs then the legislative body by the Regional Representatives Council and the judiciary by the Supreme Court, so that when viewed from the theory of supervision of regional regulations, this will slow down the region to progress because, on the one hand, the making of a regional regulation product only goes through two initial stages namely preventive supervision, coupled with, if any, a review of regional regulations to the Supreme Court so that the ideals of granting regional autonomy in the context of granting the widest possible autonomy deserve to be questioned (Hardianto & Herwati, 2020).

According to Bagir Manan in Hanif Hardianto and Ratna Herawati, supervision is an element inextricable from the freedom of autonomy (Hardianto & Herwati, 2020). Between freedom and independence, autonomy on the one hand and supervision on the other, are two sides of a coin in a unitary state with an autonomous system. Freedom and independence of autonomy can be seen as the supervision or control of the tendency of excessive centralization. Instead, surveillance is control of excessive decentralization, so it can be said there is no autonomy without supervision.

## CONCLUSION

Constitutionally, there is no legal basis for the authority and duties of the DPD to monitor and evaluate regional regulation drafts and regional regulations, so the arrangement may be called unconstitutional. On the other hand, if the regulation on the addition of authority to the DPD is deemed not inconsistent with the Constitution, then this will set a precedent, so that the addition of the authority of the DPD is not only in the field of supervision, it can also be carried out in the field of legislation without making changes to the constitution or the Constitution but simply through a law. If it is related to the principle of regional autonomy, this is not in accordance with Article 18 of the Constitution, and the authority of the DPD in conducting the evaluation and monitoring will have the potential to negate regional independence in forming regional regulations which are left in the hands of the DPRD and regional governments.

The legal implications imply that it is essential to firmly regulate the scope of the monitoring and evaluation. Moreover, the model is not yet clear and there is overlapping supervision carried out by the Central Government and the governor. Some other points to take into account are the legal force of the results of supervision, and the condition where the DPD is not a decision maker of the results of supervision because the results are presented to the DPR and the President, which does not reflect legal uncertainty (*rechtsonzekerheid*). Thus, it is necessary to reorganize the duties and authorities of the DPD and make decisions independently on the results of its supervision.

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