



## Legal Implications of the Authority of Acting Regional Heads Based on Policy Regulations

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### Abstract

*The expansion of the authority of acting regional heads following the enactment of Circular Letter (SE) Number 821/5492/SJ actually raises legal issues. The legal issues include the legal certainty of the Circular Letter, which is a policy regulation and not externally binding, and is in conflict with statutory regulations. This research focuses on the legal implications of the authority of acting regional heads to dismiss and transfer ASN based on legal products in the form of SE, where the authority of acting regional heads is based on Law No. 10 of 2016. This research is a normative legal study that emphasizes a conceptual and legislative approach. Research findings indicate that the existence of Circular Letter (SE) Number 821/5492/SJ, which expands the authority of acting regional heads, has implications that create legal uncertainty. The recommendation from this research is that amendments to Law Number 23 of 2014 are necessary to clearly regulate the authority of acting regional heads.*

**Keywords:** Legal Implications; Authority; Acting Regional Head; Policy Regulations.

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### INTRODUCTION

Acting regional head is a regional head position that is temporary in nature or for a certain period of time.<sup>1</sup> In general, the position of a regional head official is authorized to carry out the duties and functions of a regional head because the term of office of the directly elected regional head has ended and the regional head election process is still ongoing.<sup>2</sup> To fill the "vacancy" of the regional head, the acting regional head is considered relevant to become a temporary regional head. At the momentum of the simultaneous regional head elections (Pilkada serentak) in 2024, in Indonesia there are 273 acting regional heads including: 189 acting regents, 28 acting governors, and 56

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<sup>1</sup> Emmanuel Ariananto Waluyo Adi and Theresia Rachelita Devia Irani, "Reflections and Expectations of Democracy in The Implementation of Regional Autonomy: Long - Term Potential for Appointment of Acting Regional Heads," *Pledoi: Jurnal Hukum dan Keadilan* 2, no. 1 (2023): 50–68.

<sup>2</sup> Mochammad Tommy Kusuma, Elva Imeldatur Rohmah, and Nafi Mubarok, "Pengisian Kekosongan Jabatan Kepala Daerah Menjelang Pemilihan Serentak 2024," *Sosio Yustisia : Jurnal Hukum dan Perubahan Sosial* 2, no. 2 (2024): 1–33.

acting mayors.<sup>3</sup> The existence of an acting regional head is expected to ensure that the function of the regional government, especially the authority of the regional head, can continue to be optimally implemented in the community even though the definitive regional head has not been officially appointed because the regional head election process is still in progress.

The acting regional head for the Governor is appointed from a middle high position, while the Regent and Mayor are appointed from a pratama high position.<sup>4</sup> This is intended so that the acting regional head has the quality and capacity to carry out his duties and authorities. The regulation regarding the acting regional head is regulated in Law No. 10 of 2016 concerning the Second Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors into Law.<sup>5</sup> In addition to being regulated in Law No. 10 of 2016, on September 14, 2022, the Minister of Home Affairs issued Circular Letter (SE) Number 821/5492/SJ.<sup>6</sup> The contents of the circular are that the acting regional head has the authority to dismiss and transfer ASN. Legally, the position of this circular is very weak. This circular is not included in the legislation. The circular is only a policy regulation (beleidsregels) which is only binding internally.<sup>7</sup> The Circular Letter will not be able to have legal implications externally. This certainly has legal consequences related to the authority of the acting regional head to dismiss and transfer ASN through the legal product of the Circular Letter.

This study specifically aims to analyze the legal implications of the authority of acting regional heads to dismiss and transfer ASN based on a legal product in the form of a circular whose authority is based on Law No. 10 of 2016. Research discussing acting regional heads has actually been carried out by several previous researchers, such as: Anugrah's research (2023) which analyzed the relevance of appointing the

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<sup>3</sup> Hasan A.M., "Mendagri Tito Ingatkan Kembali Pj Gubernur, Bupati Dan Walikota Terkait Persiapan Pilkada Serentak Tahun 2024," 2024, [https://babelprov.go.id/siaran\\_pers/mendagri-tito-ingatkan-kembali-pj-gubernur-bupati-dan-walikota-terkait-persiapan-pilkada-serentak#:~:text=Lebih lanjut%2C di jelaskan Mendagri,orang dan Walikota 56 orang](https://babelprov.go.id/siaran_pers/mendagri-tito-ingatkan-kembali-pj-gubernur-bupati-dan-walikota-terkait-persiapan-pilkada-serentak#:~:text=Lebih lanjut%2C di jelaskan Mendagri,orang dan Walikota 56 orang).

<sup>4</sup> Novia Salfat Anggraini and Hernadi Affandi, "Dismissal of Acting Provincial Heads in Indonesia Based on the Transparency Principle Perspective," *Lex Journal : Kajian Hukum dan Keadilan* 8, no. 1 (2024): 61–69.

<sup>5</sup> Raissa Safatiara and Citraresmi Widoretno Putri, "Juridical Review of The Issuance of Ministerial Regulations Without Any Delegation From The Law ( Case Study of the Regulation of the Minister of Home Affairs Number 4 of 2023 on Acting Governor , Acting Regent , and Acting Mayor )," *Journal of Law, Politic and Humanities* 4, no. 5 (2024): 1154–1163.

<sup>6</sup> Nurmalita Ayuningtyas Harahap, "Mewujudkan Sistem Meritokrasi Pasca Lahirnya Kewenangan Penjabat Kepala Daerah Untuk Memutasi Pegawai Negeri Sipil (Tinjauan Terhadap Surat Edaran Menteri Dalam Negeri Nomor 821/5492/SJ)," *Ius Quia Iustum* 31, no. 3 (2024): 512–535.

<sup>7</sup> Cholida Hanum, "Analisis Yuridis Kedudukan Surat Edaran Dalam Sistem Hukum Indonesia," *Humani* 10, no. 2 (2020): 139.

TNI/Polri as acting regional heads.<sup>8</sup> Another study was conducted by Widad (2023) who analyzed parameters based on democratic values in the appointment of regional heads.<sup>9</sup> Further research was conducted by Pratama, et al. (2024) which showed that the appointment of regional heads by the central government is a form of centralization of power so that there needs to be a participatory legal reformulation that ensures that the aspect of democratization is an important aspect in the appointment of regional heads.<sup>10</sup> Based on the three previous studies, the study that discusses the legal implications of the authority of the acting regional head to dismiss and transfer ASN based on a legal product in the form of a Circular Letter whose authority is based on Law No. 10 of 2016 as the focus of this study is an original study. This is because the three previous studies above do not discuss the legal problems of Circular Letter (SE) Number 821/5492/SJ.

## RESEARCH METHOD

This research, which focuses on the analysis related to the legal implications of the authority of regional heads to dismiss and transfer ASN based on Circular Letter (SE) Number 821/5492/SJ, is a normative legal research that focuses on the analysis of legal products of statutory regulations and analysis of policy regulations.<sup>11</sup> The primary legal materials in this study are: Law No. 23 of 2014 and Law No. 10 of 2016. Secondary legal materials include journal articles, books, and research results that discuss the authority of regional head officials. The non-legal materials used are language dictionaries. The analysis of legal materials is carried out prescriptively by focusing on legal analysis to produce a legal solution to the legal issues that have been presented.<sup>12</sup> The approach used is a conceptual and statute approach.

## ANALYSIS AND DISCUSSION

### A. Legal Implications of the Authority of Acting Regional Heads According to Law No. 10 of 2016

Understanding related to legal implications is an important aspect before studying the legal implications of the authority of the Acting Regional Head According to Law

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<sup>8</sup> Fajrian Noor Anugrah, "Relevansi Penunjukan Anggota TNI/POLRI Sebagai Penjabat (PJ) Kepala Daerah," *Jurnal Kebijakan Pembangunan* 18, no. 1 (2023): 121–134.

<sup>9</sup> Zaqil Widad, "Parameter Demokrasi Dalam Penunjukan Penjabat Kepala Daerah," *At-Tanwir Law Review* 3, no. 1 (2023): 88–109.

<sup>10</sup> Poppilea Pratama, Alfani Aldi, Nur, Insan Tajali, Erwinta, "Problematika Pengangkatan Penjabat Kepala Daerah Sebagai Dampak Penetapan Pilkada Serentak Tahun 2024," *Jurnal Hukum Bisnis* 13, no. 1 (2024): 1–13.

<sup>11</sup> Prasetijo Rijadi Jonaedi Efendi, *Metode Penelitian Hukum Normatif Dan Empiris* (Jakarta: Kencana, 2022).

<sup>12</sup> Emad Mohammad Al Amaren et al., "An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of the Legal Science Research," *International Journal of Multidisciplinary Sciences and Advanced Technology* 1, no. 9 (2020): 50–55.

No. 10 of 2016. In the realm of legal science, understanding is not just a cognitive meaning, but understanding is a concept, as a basis for researchers to study the object to be studied.<sup>13</sup> Legal implications have a different meaning from legal consequences. As is known, the term commonly used in legal practice is legal consequences.<sup>14</sup> This is reasonable, considering that the laws and regulations in Indonesia, more often use the term legal consequences than other terms. Article 1 number 9 of Law No. 51 of 2009 concerning the second amendment to Law No. 5 of 1986 states the elements of state administrative decisions, namely:

1. Written determination.
2. Issued by a State Administrative Body/Official.
3. Concrete, individual, and final in nature.
4. Contains State Administrative legal actions.
5. Causes legal consequences for a person or a private legal entity.

The term used in state administrative decisions is legal consequences, as stated above. Legal consequences when examined from the aspect of administrative law contain the meaning, "consequences that can give rise to and loss of rights and obligations for a person or civil legal entity."<sup>15</sup> If a person is appointed as a civil servant, then the legal consequences are that he will have rights and obligations in accordance with the laws and regulations on civil service. However, if he is dishonorably dismissed, then the rights and obligations as a civil servant that he has enjoyed so far will be lost. If this legal consequence is related to the loss of a person's rights and obligations, then the Government Agency or Official who issued the decision that resulted in the loss of those rights and obligations will potentially be sued.<sup>16</sup>

Implications, effects and consequences are terms that are often used interchangeably without understanding the meaning of the differences between the three. In legal science, terms are not just mentions, but terms that contain a meaning. According to Philipus M. Hadjon, terms that contain meaning in law are called legal concepts.<sup>17</sup> To

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<sup>13</sup> A'An Efendi and Dyah Octorina Susanti, *Logika & Argumentasi Hukum* (Jakarta: Kencana, 2020).

<sup>14</sup> Bambang Heriyanto, "Problematika Penyelesaian Perkara 'Fiktif Positif' Di Pengadilan Tata Usaha Negara," *Palar | Pakuan Law Review* 5, no. 1 (2019): 38-56.

<sup>15</sup> Jeffrey A. Pojanowski, "Neoclassical Administrative Law," *Harvard Law Review* 133 (2019): 852.

<sup>16</sup> Erna Dwi Safitri and Nabitus Sa'adah, "Penerapan Upaya Administratif Dalam Sengketa Tata Usaha Negara," *Jurnal Pembangunan Hukum Indonesia* 3, no. 1 (2021): 34-45, <https://ejournal2.undip.ac.id/index.php/jphi/article/view/10232>.

<sup>17</sup> Tatiek Srii Djatmiati Hadjon, Philipus M, *Argumentasi Hukum*, 5th ed. (Yogyakarta: Gadjah Mada University Press, 2011).

explain the concept of law, legal theory is needed.<sup>18</sup> According to Jazim Hamidi, there are quite basic differences between implications, consequences and consequences.<sup>19</sup> The word consequence itself has the meaning of something that becomes the end or result of an event, condition or condition that precedes it. The word consequence means the result of an act or agreement with the previous one. The result and consequence refer to the same meaning, namely the direct, strong and explicit result.<sup>20</sup>

Legal consequences also contain the meaning of the birth of a person's rights and obligations and the loss of a person's rights and obligations. For example, if someone passes the Civil Servant Candidate (CPNS) test and his CPNS Decree (SK) has been issued, then he has new rights and obligations as a CPNS. The obligations he has are the same as civil servants in general. A person must carry out the obligations that have been determined by the laws and regulations governing civil servants. In addition, he also has rights that are regulated in the laws and regulations. His rights include receiving a monthly salary of 80%.

After being a civil servant for one year, he will follow a series of stages to become a civil servant. After he becomes a civil servant, his right to receive a salary becomes 100%. He is also entitled to receive allowances as stipulated in the laws and regulations. A civil servant will not only receive his rights and obligations, but a civil servant will also be threatened with losing his rights and obligations if he violates the prohibitions and obligations as stipulated in the laws and regulations. The loss of rights and obligations because he violates the prohibitions and obligations can have direct and indirect consequences.<sup>21</sup> These direct consequences are usually called legal consequences, while indirect consequences are called legal implications.<sup>22</sup>

Discussing about the legal implications of authority, it cannot be separated from the theory of authority and the theory of responsibility. The theory of authority will be closely related to the theory of responsibility, because every authority carried out by a government official will also bring consequences to the responsibilities that will be

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<sup>18</sup> Jeff Pojanowski, "Reevaluating Legal Theory," *Yale Law Journal* 130, no. 6 (2021): 1288–1651.

<sup>19</sup> Jazim Hamidi, *Revolusi Hukum Indonesia: Makna, Kedudukan, Dan Implikasi Hukum Naskah Proklamasi 17 Agustus 1945 Dalam Sistem Ketatanegaraan RI* (Jakarta: Prentice Hall, 2006).

<sup>20</sup> Tunggul Anshari SN Hananto Widodo, Sudarsono Moh Fadli, "The Legal Politics of the Inquiry Rights of the House of Representatives Post 1945 Constitutional Amendment," *Journal of Law, Policy and Globalization* 85, no. 123–132 (2019).

<sup>21</sup> Aris Maulana, Fibria Indriati, and Kemal Hidayah, "Analysis of Bureaucratic Reform Through Delayering of Government Institutions in Indonesia," *Jurnal Borneo Administrator* 18, no. 2 (2022): 155–170.

<sup>22</sup> Hananto Widodo, Pudjiastuti, Budi Hermono, Dita Perwitasari, Dicky Eko Prasetyo, "Implications of Regional Representative Council Supervision Arrangements According to the 1945 Constitution of the Republic of Indonesia," *Journal of Law, Policy and Globalization* 143, no. 1 (2024): 1–9.

borne by the official concerned.<sup>23</sup> The relationship between authority and responsibility can be seen in the theory of sources of authority or how to obtain authority. In the treasury of constitutional law and administrative law, sources of authority consist of at least three, namely attribution, delegation and mandate.<sup>24</sup> Attribution means that the authority held by a government official is directly derived from laws and regulations. Meanwhile, delegation means that the authority held by a government official is the result of delegation and responsibility or accountability lies with the official who receives the delegation. Mandate is also not the original authority of a government official, but it has significant differences with delegation.

In delegation, the responsibility or liability lies with the recipient of the delegation. Meanwhile, in a mandate, the responsibility or liability lies with the mandate giver. The argument that the mandate is the responsibility or liability of the mandate giver, because the mandate recipient only acts on behalf of the mandate giver. Thus, the mandate recipient is only the technical implementer of the mandate giver. The original authority remains with the mandate giver. The authority of the acting Regional Head, be it the Governor, Regent and Mayor has implications that are not simple. As is known, the authority of the acting Regional Head is very different from the authority of the Regional Head, when viewed from the source of authority. The authority of the Regional Head is based on attribution, because the authority is directly obtained from Law No. 23 of 2014. Many argue that the Regional Head and the acting Regional Head are the same. This means that the authority they have is the same. In fact, the acting Regional Head and the Regional Head are different.

Theoretically, legality and legitimacy are closely related. Legality, if linked to the principle of democracy, will be based on legitimacy.<sup>25</sup> When compared to the problem of the vacancy of the President and/or Vice President, the vacancy of the President and/or Vice President will be resolved immediately, because there is a constitutional guarantee related to the position of President and/or Vice President. If the President dies or resigns, the Vice President will replace him as President until the end of his term of office. If the President and/or Vice President are both permanently incapacitated, the Minister of Home Affairs, Minister of Defense and Minister of Foreign Affairs as a triumvirate will replace the President's duties until a definitive President is elected by the People's Consultative Assembly. Related to the term of office of the Re-

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<sup>23</sup> Enny Agutina, "Kewenangan Wakil Menteri Di Indonesia Ditinjau Dari Hukum Administrasi Negara," *Jurnal Hukum Media Bhakti* 2, no. 1 (2020): 119-130.

<sup>24</sup> Dicky Eko Prasetyo Hananto Widodo, "Penataan Kewenangan KPU Dan Bawaslu Dalam Melakukan Pengawasan Dan Menangani Sengketa Proses Pemilu," *Perspektif Hukum* 21, no. 2 (2021): 17-38.

<sup>25</sup> Budiono Kusumohamidjojo, *Teori Hukum: Dilema Antara Hukum Dan Kekuasaan*, 1st ed. (Bandung: Yrama Widya, 2016).

gional Head who has ended, the regulations have indeed provided a way out by appointing an acting Regional Head. However, because the acting Regional Head is not democratically elected, the acting Regional Head is weak in terms of legitimacy.

The source of authority of the acting Regional Head comes from delegation, because he is appointed by the Minister of Home Affairs. Therefore, the acting Regional Head must carry out instructions from the Minister of Home Affairs. In terms of constitutional practice, so far, the regional government has had a hierarchy with the central government, in this case the Ministry of Home Affairs. It can be said that almost all regional governments refer to the regulations set by the Minister of Home Affairs. The hierarchical path between the regional government and the Ministry of Home Affairs is because in the regions there is no known practice of separation/division of powers, as occurs at the central government level. In the central government, there is indeed a division of powers between the legislative, executive and judicial branches. The three main branches of power carry out checks and balances on each other.<sup>26</sup>

Although the regions also recognize the existence of the Regional People's Representative Council, both at the provincial and district/city levels, the Regional People's Representative Council is not recognized as a regional legislature, as is the People's Representative Council of the Republic of Indonesia. The division of power at the regional level occurs when associated with the relationship between the Central Government and the Regional Government.<sup>27</sup> Thus, the division/separation of powers at the regional level does not recognize the horizontal separation of powers model, but the vertical separation/distribution of powers. The relationship between the Central Government and the Regional Government which places the position of the Central Government stronger than the Regional Government within the framework of the Unitary State of the Republic of Indonesia, does not mean that the Regional Government has no authority at all. In the theory of Regional Government, there are 3 main principles in the implementation of Government in the regions.

The three main principles are as confirmed in Law no. 23 of 2014 are as follows<sup>28</sup>:

- a. Decentralization is defined as the transfer of Government Affairs by the Central Government to autonomous regions based on the Principle of Autonomy.

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<sup>26</sup> Tanto Lailam, Putri Anggia, and Irwansyah Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (2022): 693-719.

<sup>27</sup> Dicky Eko Prasetyo, "Sejarah Dan Eksistensi Pembentukan Peraturan Daerah," *Sol Justicia* 5, no. 2 (2022): 158-159.

<sup>28</sup> Umar Ma'ruf, *Politik Hukum Otonomi Daerah & Pemilihan Kepala Daerah*, 1st ed. (Semarang: Unisula Pres, 2020).

- b. Deconcentration is defined as the delegation of part of the Government Affairs that are the authority of the Central Government to the governor as the representative of the Central Government, to vertical agencies in certain regions, and/or to the governor and regent/mayor as those responsible for general government affairs.
- c. Assistance tasks are assignments from the Central Government to autonomous regions to carry out part of the Government Affairs that are the authority of the Central Government or from the Provincial Government to the Regency/City Region to carry out part of the Government Affairs that are the authority of the Provincial Region.

The definition of the principle of decentralization is the transfer of government affairs by the Central Government to autonomous regions based on the principle of autonomy. This principle of autonomy emphasizes the freedom of regions to manage their regions. Therefore, not all regional government affairs are within the authority of the Central Government. When viewed from the principle of autonomy, the acting regional head is not the Regional Head, because he is appointed by the Central Government. The acting regional head does not have independent or attributive authority. The acting regional head in carrying out his authority will be very dependent on the delegation given by the Minister of Home Affairs.

On September 14, 2022, the Minister of Home Affairs issued Circular Letter (SE) Number 821/5492/SJ. The contents of the SE are that acting regional heads have the authority to dismiss and transfer ASN. Legally, the position of this Circular Letter is very weak. This Circular Letter is not included in the laws and regulations. The Circular Letter is only a policy regulation (beleidsregels) which is only binding internally. The Circular Letter cannot have legal implications externally. This Circular Letter of the Minister of Home Affairs certainly cannot be used as a basis for acting regional heads to dismiss and transfer ASN. The authority to dismiss and transfer ASN can only be carried out by Officials who have the authority. Meanwhile, acting regional heads do not have the authority to dismiss and transfer ASN.

## **B. Legal Problems of Acting Regional Heads in Exercising Their Authority**

The source of authority held by the acting regional head is delegation. Thus, the Minister of Home Affairs can replace the acting regional head, if the acting regional head fails to achieve the target set by the Minister of Home Affairs. Unlike the Acting Regional Head, the Regional Head cannot be replaced arbitrarily by the Minister of

Home Affairs, because the Regional Head has strong legitimacy. The strength of the Regional Head's legitimacy is because the Regional Head is elected democratically.<sup>29</sup>

In the practice of administrative law, a Government Official who has attributive authority will have more freedom in exercising his authority. The discretionary authority of an Official also comes from attributive authority.<sup>30</sup> The authority of an Official to delegate his/her authority to another party also comes from attributive authority. Unlike attributive authority, in delegated authority an Official cannot re-delegate the authority that he/she has received through delegation. In administrative law and constitutional law there is the principle of *delegatus non potest delegare*. This principle implies that the recipient of the delegation is not authorized to delegate again without the consent of the giver of the delegation.<sup>31</sup>

In the practice of regional government, the Governor as the Head of Region often delegates some of his affairs to the Deputy Governor and Regional Secretary. As is known, the Governor's duties are so many, and the Governor's workload is so dense. Thus, the Governor delegates some of his authority to the Regional Secretary. What is delegated is the Governor's authority in terms of signing the Governor's Decree, which is regulated in Article 115 paragraph (3) of the Regulation of the Minister of Home Affairs No. 80 of 2015 concerning Regional Legal Products.

The implementation of authority also occurs in the field of licensing and non-licensing services to the Head of the Service. This happened in Boolang Mongondow Regency, North Sulawesi Province. The delegation is regulated in Boolang Mongondow Regent Regulation Number 40 of 2018 concerning the delegation of authority for the implementation of licensing and non-licensing services to the Head of the Investment and Integrated One-Stop Service Office of Boolang Mongondow Regency. The practice of delegation of authority by the Regent also occurs in several regions such as North Bengkulu and South Bangka. This kind of delegation practice will not be a problem if it is carried out by the Regional Head, be it the Governor, Regent or Mayor. However, this will be a problem if the delegate is an Acting Governor, Regent or Mayor. The problem lies in the source of authority held by the acting regional head. The authority held by the acting regional head is delegation. Meanwhile, based on the principle of *delegatus non potest delegare*, the acting regional head cannot re-delegate the authority he has received.

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<sup>29</sup> Susi Ramadhan Amancik, Putra Perdana Ahmad Saifulloh, Zainal Amin Ayub, Sonia Ivana Barus, "Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia," *Jambura Law Review* 6, no. 2 (2024): 304-338.

<sup>30</sup> Abdul Latif and Hery Chariansyah, "Discretionary Policy (Freies Ermessen) of State Administrative Bodies or Officials in Government Administrative Law," *Journal of Social Research* 3, no. 2 (2024): 473-486.

<sup>31</sup> Moh. Fadli, *Peraturan Delegasi Di Indonesia*, 1st ed. (Malang: UB Press, 2011).

The problem of delegating the authority of the acting regional head to other agencies is very important here, because in practice, Regional Heads, be they Governors, Regents and Mayors, often delegate some of their authority, especially in terms of licensing. Delegating some authority is a normal thing in the practice of regional government, because the burden of work of the Regional Head is indeed very large. The regulations regarding the delegation of authority as carried out by the Regent before being replaced by the Acting Regent are still in effect, so that the Head of Service who receives the delegation can still carry out his authority, because the Regent's Regulation which is the basis for the delegation has not been revoked. The problem arises if there are other areas of duty that need delegation but have not been delegated by the previous Regent to the Head of Service or other Regional Apparatus Organizations.

Another problem is related to the legal product that will be the legal basis for the Head of Service to receive delegation. So far, the legal basis for the delegation of part of the authority of the Governor, Regent and Mayor is the Regulation of the Regional Head, be it the Governor's Regulation, Regent's Regulation and Mayor's Regulation.

Article 7 paragraph (1) of Law Number 12 of 2011 states that the types and hierarchy of Legislation consist of:

- a. The 1945 Constitution of the Republic of Indonesia.
- b. Decrees of the People's Consultative Assembly.
- c. Laws/Government Regulations in Lieu of Laws.
- d. Government Regulations.
- e. Presidential Regulations.
- f. Provincial Regulations; and
- g. Regency/City Regulations

Meanwhile, Article 8 paragraph (1) states that, "Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Audit Board, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions or commissions of the same level which are established by Law or by the Government on the orders of Law, Provincial People's Representative Council, Governor, Regency/City People's Representative Council, Regent/Mayor, Village Head or equivalent."

In Article 8 paragraph (1) there is no term or nomenclature for the Acting Governor Regulation, Acting Regent Regulation and Acting Mayor Regulation. Thus, the acting regional head, be it the Governor, Regent or Mayor, cannot issue legal products in the form of Acting Governor Regulation, Acting Regent Regulation and Acting Mayor Regulation. However, between the acting regional head, be it the Acting Governor, Acting Regent or Acting Mayor, are different from the Regional Head, be it the Governor, Regent and Mayor. Thus, the one who has the authority to issue legal products of the Regional Head Regulation is the Regional Head, not the acting regional head. Therefore, the acting regional head does not have the authority to issue Regional Head Regulations, because he is not the Regional Head.

The problem of the Regional Head Regulation is not only related to the issue of delegating the authority of the acting regional head to the Head of the Service and other Regional Apparatus Organizations, but also related to the implementation of Regional Regulations. In the theory of legislation, there are two forms of legislative products, namely laws for the central level and regional regulations for the regional level, both provincial and district/city.

Because these Laws and Regional Regulations are legislative products, where their formation is jointly between the Government and the Legislature, these legislative products require elaboration of the laws and regulations below them. Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states "The President stipulates Government Regulations to implement laws properly." Hierarchically, the position of laws is higher than Government Regulations, but legal norms in laws are more abstract than Government Regulations. Thus, for legal norms in laws to be more concrete, Government Regulations are needed to elaborate on the legal norms contained in the laws. Government Regulations have more concrete legal norms than laws, therefore the legal norms regulated in Government Regulations are more technical in nature, such as regulating mechanisms and procedures.

Regional Regulations are also not concrete in terms of legal norms, in the sense that they still require elaboration from other laws and regulations to make the legal norms in Regional Regulations more operational.<sup>32</sup> The laws and regulations that can elaborate on Regional Regulations are Regional Head Regulations, be it Governor Regulations, Regent Regulations or Mayor Regulations. The absence of authority for acting regional heads, be it Acting Governors, Acting Regent and Acting Mayors will certainly be a problem in itself when viewed from the perspective of legislation in Indonesia. On the one hand, Regional Regulations require implementing regulations in the form of Regional Head Regulations to elaborate on Regional Regulations. Howev-

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<sup>32</sup> Dicky Eko Prasetyo, "Sejarah Dan Eksistensi Pembentukan Peraturan Daerah," *Sol Justicia* 5, no. 2 (2022): 151.

er, on the other hand, the Regional Head is no longer in office and has been replaced by an acting regional head who attributively does not have the authority to form Regional Head Regulations.

The existence of this Regional Head Regulation is very much needed by the Regional Head, because in this era of the welfare state, the Regional Head has the task and authority to improve the welfare of his people.<sup>33</sup> The elaboration of Regional Regulations through the Regional Head Regulation is also to meet the standards of legal principles in the field of administrative law. Thus, in carrying out its authority to prosper its people, a sufficiently strong legal basis is needed as the basis for its authority.

The acting regional head will certainly have great difficulty if he must exercise his authority based only on Regional Regulations. The acting regional head must certainly form regulations as derivatives of the Regional Regulations. Regional Regulations cannot solve problems in the field that are increasingly complex from day to day. Therefore, the acting regional head needs the authority to form Regulations that are at the same level as the Regional Head Regulations so that the implementation of the Regional Regulations can be carried out properly.

The limited authority held by the acting regional head will be a dilemma. On the one hand, the acting regional head has limited authority because he is not a Regional Head who has the attribution of authority. However, on the other hand, the acting regional head must take steps to make the region he leads better. When the acting regional head takes steps to make the region he leads better, then these steps will certainly have the potential to violate the law. Violations of the law committed by the acting regional head certainly have the potential to reap lawsuits from the injured party. Although in this era of the welfare state, Government Officials are equipped with discretionary authority in carrying out their authority, but not in the sense that the use of this discretionary authority is without any legal basis at all.<sup>34</sup>

In classical responsibility theory, the concept of responsibility is divided into three, namely:

- a. Political responsibility.
- b. Legal responsibility, this legal responsibility consists of responsibility for violations of the law and responsibility for implementing the law.

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<sup>33</sup> Khudzaifah Dimyati et al., "Indonesia as a Legal Welfare State: A Prophetic-Transcendental Basis," *Heliyon* 7, no. 8 (2021): 1-8, <https://doi.org/10.1016/j.heliyon.2021.e07865>.

<sup>34</sup> Surya Mukti Pratama and Hario Danang Pambudhi, "Kebijakan Kepala Daerah Dalam Kerangka Sistem Otonomi Daerah," *Jurnal Analis Hukum (JAH)* 4, no. 1 (2021): 120-130, <https://journal.undiknas.ac.id/index.php/JAH/article/view/2951>.

c. Moral responsibility.

This theory of responsibility has now shifted to just two, namely personal responsibility and job responsibility.<sup>35</sup> Official responsibility is concerned with the legality (legitimacy) of governmental actions. Meanwhile, personal responsibility is concerned with the functional approach or behavioral approach in administrative law. The distinction between official responsibility and personal responsibility for governmental actions has consequences related to criminal responsibility, civil liability and state administrative liability (TUN). Personal liability relates to the personal error (faute personnelle) of a person who is part of the government. In relation to state liability, because of the element of faute personnelle, the employee can be sued in a public court for his own error. Meanwhile, errors in office (faute de service) occur because there is an error in the use of authority, and only relates to service.<sup>36</sup> Public officials protect themselves by arguing that there is a principle of separation of powers that prohibits general courts from accepting complaints about government actions that deviate. If there is a party who is harmed, the lawsuit must be submitted to the Administrative Court.

Although faute de service limits itself only to the service aspect, it does not mean that outside the service aspect it cannot bring consequences related to liability. TUN liability can occur if the actions of the acting regional head conflict with Article 53 paragraph (2) of Law No. 9 of 2004 concerning the second amendment to Law No. 5 of 1986 concerning State Administrative Courts.

The reasons that can be used in a lawsuit as referred to in paragraph (1) are:

- a. The State Administrative Decision being challenged is contrary to the prevailing laws and regulations.
- b. The State Administrative Decision being challenged is contrary to the general principles of good governance.

If Circular Letter Number 821/5492/SJ is used as a legal basis for acting regional heads to dismiss and transfer ASN, then it is certain that the Decision issued by the acting regional head will potentially reap lawsuits. In any case, the Circular Letter cannot be used as a legal basis for acting regional heads in using their authority. Moreover, this Circular Letter is legally clearly contradictory to Government Regulation Number 49 of 2008. Although in theory, this Government Regulation is problem-

<sup>35</sup> Hananto Widodo, Dicky Eko Prasetyo, and Fradhana Putra Disantara, "Relasi Kekuasaan Antar Presiden Dan Wakil Presiden Dalam Sistem Ketatanegaraan Republik Indonesia," *Pandecta Research Law Journal* 15, no. 1 (2020): 13–25.

<sup>36</sup> Teguh Satya Bhakti, *Pembangunan Hukum Administrasi Negara Melalui Pemberdayaan Yurisprudensi Pengadilan Tata Usaha Negara* (Bandung: Alumni, 2022).

atic, because this Government Regulation regulates the authority of acting regional heads because the previous Regional Head resigned not because his term of office had expired, but this Government Regulation is still in effect and contains a prohibition for acting regional heads to transfer personnel. This Government Regulation does regulate the permission to transfer personnel if written approval is obtained from the Minister of Home Affairs. Politically, the existence of acting regional heads can potentially become a tool for the Central Government, which is part of the central government, to carry out political consolidation ahead of the Regional Head Election. Thus, the mutation carried out by the acting regional head can be suspected as part of an effort to consolidate politics from the interests of certain parties. In Law Number 10 of 2016, Regional Heads are prohibited from carrying out mutations before their term of office ends.

Article 71 paragraph (2) of Law Number 10 of 2016 concerning the Election of Governors, District Heads and Mayors states:

"The Governor or Deputy Governor, Regent or Deputy Regent, and Mayor or Deputy Mayor are prohibited from replacing officials 6 (six) months before the date of determination of the candidate pair until the end of the term of office unless they receive written approval from the Minister."

Article 71 paragraph (2) is strengthened by Article 71 paragraph (3) which states:

"The Governor or Deputy Governor, Regent or Deputy Regent, and Mayor or Deputy Mayor are prohibited from using their authority, programs, and activities that benefit or harm one of the candidate pairs, either in their own region or in other regions within 6 (six) months before the date of determination of the candidate pair until the determination of the elected candidate pair."

Although Article 71 paragraph (2) and paragraph (3) are addressed to Regional Heads who will enter the end of their term of office, the message of this Article can be a spirit for acting regional heads not to do things regulated in Article 71 paragraph (2) and Article 71 paragraph (3). Acting regional heads according to Law 10 of 2016 are designed to replace the duties of Regional Heads whose term of office has expired temporarily until the inauguration of the definitive Regional Head as a result of the 2024 Regional Head Election.

Acting regional heads are appointed by the Minister of Home Affairs who is part of the Central Government's authority. In post-reform political practices, there is often a non-linearity in the political configuration between the center and the regions. If the center is controlled by coalition A, then it is not automatic that the coalition pattern in

each region is the same. Therefore, acting regional heads are suspected by some parties as a tool to win Candidates who are Candidates from the central coalition.

If the acting regional head is indeed politically positioned as a winning team for one of the Candidates, then the acting regional head will be sued. The lawsuits filed by ASN who were dismissed and transferred are not only on the grounds that their policies are contrary to laws and regulations, but also contrary to the general principles of good governance, namely the principle of impartiality and the principle of not acting arbitrarily. The problems of the acting regional head began with the debate regarding the authority of the acting regional head. There is not a single regulation that regulates the authority of the acting regional head. Therefore, in order to achieve legal certainty, changes should be made immediately to Law Number 23 of 2014 to clearly regulate the authority of the acting regional head. However, the acting regional head needs a clear legal basis in exercising his authority.

## CONCLUSION

The legal implication of the authority of the acting regional head is that it must refer to Law No. 10 of 2016, so the existence of Circular Letter (SE) No. 821/5492/SJ which expands the authority of the acting regional head is inappropriate. Legal efforts to expand the authority of the acting regional head should be through a revision of Law No. 10 of 2016, not by issuing policy regulations in the form of Circular Letter (SE) No. 821/5492/SJ.

The legal problems of acting regional heads in exercising their authority after the ratification of Circular Letter (SE) Number 821/5492/SJ cause confusion and legal uncertainty. This is because there is not a single regulation that regulates the authority of acting regional heads. This study recommends that to achieve legal certainty, changes should be made immediately to Law Number 23 of 2014 to clearly regulate the authority of acting regional heads. This is because acting regional heads need a clear legal basis in exercising their authority.

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