



## Delegation of Governor Regulation in Ensuring Utility and Justice

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### Abstract

*Delegation means delegation of authority to make Law and Regulations. Article 246 paragraph (1) of Act No. 23 of 2014 on Regional Government stipulates that "to implement the Regional Regulation or over the power of Law and Regulations, the Head of Region shall pass the Head of Region Regulation." The words "implement" and "over the power" which contains ambiguity of command cause philosophical problem related to the validity value. It becomes a sociological problem if such delegation cannot predict the dynamics of society. Furthermore, it becomes a juridical problem due to the existence of vague norm which creates multi interpretation which could potentially miss the aim of delegation of regulation. Specifically, this article has specific aims to examine philosophically concerning the need for delegations of authority to regulate, examine and find the direction of regulation in the delegation of regulation to governor regulation in ensuring utility and justice. This is a normative legal research with literature study which employs statute, philosophy, theories, conceptual and contextual approaches. The study so that with regard to the philosophical basis, delegation of regulation to Governor Regulation is needed to formulate technical and detail norms, the urgent factor contained herein as well as brief discussion and The direction of regulation to the Governor Regulation in the Regional Government Act to implement Regional Regulation or over the power of law and regulations. Such direction is based on command from the higher law and regulations, or established based on delegation.*

### 1. Introduction

Delegation of authority means delegation of authority in which the authorized party<sup>1</sup> (*delegataris*) will exercise it on its responsibility.<sup>2</sup> Article 246 paragraph (1) of Act Number 23 of 2014 on Regional Government as amended several times and lastly by Act Number 9 of 2015 on the Second Amendment to Act Number 23 of 2014 on Regional Government, stipulates that in order to implement the Regional Regulation or

<sup>1</sup> Andi Kasmawati. (2010). Implikasi Hukum Kebijakan Desentralisasi dalam Hubungan Kewenangan antar tingkat Pemerintahan Negara Kesatuan, *Jurnal Hukum*, 17(4), h. 553-554.

<sup>2</sup> C. Van Der Vlies. (2005). *Buku Pegangan Perancang Peraturan Perundang-undangan (Handboek Wetgeving)*, Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan Hak Asasi Manusia RI, p. 80.

over the power of Law and Regulations, the head of region shall establishes the head of region regulation. The meaning of the Head of Regional Regulation shall be stipulated in Article 1 number 26 of Regional Government Act which further refers the head of region regulation as governor regulation and regent or mayoral regulation.

Article 18 paragraph (6) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Indonesian Constitution), which constitutes as the relevant provision to the establishment of Law and Regulations, states that, "Regional Government shall have the right to establish Regional Regulation and other Regulations to implement its autonomy and assistance tasks".<sup>3</sup> The provision on the hierarchy of Law and Regulations can be found in Article 7 paragraph (1) of Act Number 12 of 2011 on the Establishment of Law and Regulations regulates the type and hierarchy Law and Regulations which consists of:<sup>4</sup>

- a. 1945 Indonesian Constitution;
- b. Decree of the People's Consultative Assembly;
- c. Act/Government Regulation in Lieu of Act;
- d. Government Regulations;
- e. Presidential Decree;
- f. Provincial Regional Regulations; and
- g. Regency/City Regional Regulations.

Law and Regulations outside the hierarchy are provided for in Article 8 paragraphs (1) and (2).<sup>5</sup> Article 8 paragraph (2) of Act Number 12 of 2011 on the Establishment of Law and Regulations stipulates that:<sup>6</sup>

“(2) The existence of Law and Regulations as referred to in paragraph (1) are recognized and have binding legal force to the extent commanded by higher Law and Regulations or established by virtue of authority.”

Therefore in order to have binding legal force, such Law and Regulations shall meet the following element under the above provision of Article 8 paragraph (2), namely:

1. commanded by higher Law and Regulations; or
2. established by virtue of authority.

The elucidation of Article 8 paragraph (2) explains that the meaning of “by virtue of authority” is the administration of certain government affairs in accordance with the provisions of Law and Regulations. Delegation of regulation to governor regulation can be found in Article 246 paragraph (1) of Act Number 23 of 2014 on Regional Government which determines that in order to implement the Regional Regulation or over the power of Law and Regulations, the Head of Region shall stipulate Head of Region Regulation. This provision indicates that the functions of the Governor Regulation are to:

- a. implement Regional Regulation; and

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<sup>3</sup> Retno Saraswati, (2009). Perkembangan Pengaturan Sumber Hukum dan Tata Urutan Peraturan Perundang-undangan di Indonesia, *Media Hukum*, 9(2), p. 9-10.

<sup>4</sup> Retno Saraswati, (2013). Problematika Hukum Undang-undang No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan, *Yustisia*, 2(3), p. 98-99.

<sup>5</sup> Zaka Firma Aditya & M. Reza Winata, (2018). Rekonstruksi Hierarki Peraturan Perundang-undangan di Indonesia, *Negara Hukum*, 9(1), p. 80-81.

<sup>6</sup> Bayu Dwi Anggono, (2018). Tertib Jenis, Hierarki, dan Materi Muatan Peraturan Perundang-undangan: Permasalahan dan Solusinya, *Masalah-Masalah Hukum*, 47(1), p. 5-6.

b. implement the power of Law and Regulations.

The wording of "to implement" has some meanings: (1) there is a strict command and (2) without strict command, however, the substance requires implementation rules. In the Law Dictionary the wording "over the power" means power granted to perform an act on behalf of the authorizer,<sup>7</sup> which indicates further elaboration of the higher Law and Regulations and the substance shall be regulated under the Regional Regulation. The wordings of "to implement" and "over the power" contain ambiguity of command and uncertainty on the substance in relation to the implementation. Substance-related to the regional autonomy<sup>8</sup> and assistance task is not justified to be delegated. Such understanding shows further elaboration of the higher Law and Regulations. From the wordings of "to implement" and "over the power" it is noted that the existence of such command would provide an opportunity for a Governor Regulation to be established without any command, since in the delegation of regulation there shall be a command so that the scope of the regulated material and the Law and Regulations are clear; and vagueness concerning the substance on the implementation of regional autonomy which is not justified to be delegated,<sup>9</sup> but shall be regulated in the Regional Regulation. Based on the Layers of Legal Science proposed by J. Gijssels and Marck Van Hoecke which contains legal philosophy, legal theory and legal dogmatic,<sup>10</sup> the vague legal norms contain in Article 246 paragraph (1) of Act Number 23 of 2014 on Regional Government appears that the delegation of authority to regulate is quite problematic.<sup>11</sup>

The philosophical problem that arises in relation to the formation of Law and Regulations, seen from the opinion of Gustav Radbruch,<sup>12</sup> is belong to the dualism of *das sein* and *das sollen* by constructing the third scope which is should be *die kultur* that lies between the natural reality and the atmosphere of absolute values that cannot limited by time.<sup>13</sup> Satjipto Raharjo relying on the view Gustav Radbruch revealed that validity is the validity of the law and its relation to the basic values of the law. The law is required to fulfil various works which according to Radbruch is referred to as the basic values of law namely justice, utility (*zweckmaszigkeit*), and legal certainty.<sup>14</sup> By using the recognition injustice approach, Anthony D'Amato<sup>15</sup> is easier to find the

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<sup>7</sup> Charlie Rudayat, (2014), *Kamus Hukum, Bandung*: Pustaka Mahardika, p. 284.

<sup>8</sup> Andi Mattalata, (2009). Politik Hukum Perundang-undangan, *Jurnal Legislasi Indonesia*, 6(4), p. 580.

<sup>9</sup> Muhammad Suharjono, (2014). Pembentukan Peraturan Daerah yang Responsif dalam Mendukung Otonomi Daerah, *DIH Jurnal Ilmu Hukum*, 10(19), p. 23-24.

<sup>10</sup> B.A. Sidharta, 2009, *Refleksi tentang Struktur Ilmu Hukum*, Cetakan Ketiga, Bandung: Mandar Maju, p. 218.

<sup>11</sup> Ni Luh Gede Astariyani & Made Nurmawati (2017). Drafting the Substance Materials of the Regional Regulation of Badung Regency on Public Service, *Udayana Journal of Social Sciences and Humanities*, 1(1), p. 42.

<sup>12</sup> Theo Huijbers, (2017), *Filsafat Hukum Dalam Lintasan Sejarah*, Cetakan Keduapuluhdua, Yogyakarta: Kanisius, p. 161.

<sup>13</sup> Habib Adjie, (2006). Filsafat Ilmu-ilmu Hukum, *Jurnal Hukum Pro Justitia*, 24(4), p. 371.

<sup>14</sup> Ni Luh Gede Astariyani, I Ketut Sudiarta & Cok. Istri Diah WPD (2019). Legal Hermeneutics in the Preparation of a Case in the Province of Bali, *Udayana Journal of Social Science and Humanities*, 3(1), p. 37.

<sup>15</sup> Anthony D'Amato, (1995), *Analytic Jurisprudence Anthology*, Anderson Publishing Co. p. 251 dalam Ni Luh Gede Astariyani, (2018). Ringkasan Disertasi Delegasi Pengaturan kepada

injustice rather than to explain what is justice in order to find the meaning of justice and not a question of what is justice but who suffers because of such injustice.

Theoretical problems are examined from the opinion of I.C Van Der Vlies. There are two sources of the Law and Regulations establishment authority, namely: attribution and delegation.<sup>16</sup> Delegation of regulation to Governor Regulation based on Article 8 paragraph (2) of Act Number 12 of 2011 on the Establishment of Law and Regulations requires "... has binding legal force as long as it is commanded by higher Law and Regulations or established by virtue of authority." It shall be commanded by the higher Law and Regulations indicates the need for delegation. The meaning of it shall be established by virtue of authority, based on the Elucidation of Article 8 paragraph (2) of Act Number 12 of 2011 on the Establishment of Law and Regulations, is to perform administration of certain governmental affairs in accordance with the provisions of the Law and Regulations. Those two meanings require the existence of delegation of authority to regulate. A theoretical problem arises when there is circumstance in which a substance must be governed in the form of a Governor Regulation but there is no delegation of regulation. Another theoretical problem arises when the substance of a Governor Regulation is not a substance within the framework of the delegation, however, such substance is still stipulated in the form of Governor Regulation. The theoretical problem related to the delegation of authority to regulate in the Government Regulation happens when there is any establishment of Governor Regulation which contains substance to implement the attribution authority meanwhile it is noted from the above explanation that the establishment of Government Regulation is based on the delegation authority.

The sociological problem is the inability of the legislature to predict of which dynamics of society that needs to be regulated under the law when the delegation was born. Therefore, the Law and Regulations output are often not in time to follow the development of society. Hence, the legislature delegates some of its legislative authority to the executive body so that the executive body also establishes Law and Regulations.<sup>17</sup> This is a revolutionary development of *Trias Politica* theory from Montesquieu which places the government as the only executor (command) of the Acts.<sup>18</sup> In its development, the delegation of authority to regulate does not only exist from the legislature to the executive but also from the legislature to the legislature. This development is apparent in the provision of Article 8 paragraph (1) of the Act on the Establishment of Law and Regulations. This article stipulates that in addition to the delegation the authority to regulate from the legislature to the executive there is also such delegation from the legislature to the legislature. The development of such delegation of authority to regulate can be seen in the establishment of the House of Representative Regulation and the Regional Representative Council Regulation.

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Peraturan Gubernur menjamin Kemanfaatan dan Keadilan, pada Program Doktor Ilmu Hukum Universitas Udayana, p. 15.

<sup>16</sup> I.C Van Der Vlies, *Op.Cit*, p. 80.

<sup>17</sup> Maria Farida Indrati Soeprapto, et.al., (2008). *Laporan Kompendium Bidang Hukum Perundang-undangan*, Cetakan Pertama, Jakarta: Departemen Hukum dan Hak Asasi Manusia RI Badan Pembinaan Hukum Nasional Pusat Penelitian dan Pengembangan Sistem Hukum Nasional, p. 39.

<sup>18</sup> H.A.S. Natabaya, (2006). *Sistem Peraturan Perundang-undangan Indonesia*, Jakarta: Konstitusi Press, p. 35-36.

The legal dogmatic problem is examined from the provision concerning the delegation of authority to regulate in Article 64 of Act Number 12 of 2011 on the Establishment of Law and Regulation. Such article stipulates that the provisions on the drafting techniques of Law and Regulations as referred to in paragraph (1) are listed in Appendix II which is an inseparable part from this Act. Delegation of authority to regulate can be found in number 198 and number 200 of Appendix II from Act Number 12 of 2011 on the Establishment of Law and Regulations.

Problem related to the establishment of Governor Regulation appears at the time when the formulation of legal norms in such regulation is not based on a Regional Regulation and is not based on the power of the higher Law and Regulations. Governor Regulation of Bali No. 31 of 2014 on Public Service Implementation can be said as one example of the Governor Regulation that is established without delegation of authority to regulate to the Governor Regulation. Delegation of regulation to the Governor Regulation indicates the existence of vagueness or vague norm which can be seen in Article 246 of Act Number 23 of 2014 on Regional Government related to the meaning "to implement the Regional Regulation or over the power Law and Regulations". Based on the existence of such vague, thus it becomes relevant to study this problems which results is presented in this article entitled "Delegation of Governor Regulation in Ensuring Utility and Justice".

Some of the problems that will be discussed in this research as follows: 1) What are the philosophical basis related to the need for delegation of regulation? 2) How about the regulation direction to the Governor Regulation in the Regional Regulation Act and the Establishment of Law and Regulations Act?

## **2. Research Methods**

This article is a normative legal research with started from the existence of the vague and non-synchronized norms.<sup>19</sup> This research uses statute, philosophical, theoretical, conceptual approaches by reviewing the views on delegation. This research uses the sources of primary legal material, secondary legal materials which are documents or legal materials that support primary legal material such as research results that have any relevance to the research.<sup>20</sup> The legal materials are collected by conducting documentary study in which such primary, secondary and tertiary legal materials<sup>21</sup> are also supported by interviews. Interviews are conducted on informants who related to the establishment of the Governor Regulation. The technical analyses of the legal materials used in this research are the description, interpretation, systematization, argumentation and evaluation techniques. At the description stage, exposure and determination of the meaning of the studied-rules of the law are conducted. With regard to the research on delegation of regulation to the Governor Regulation, the authentic, grammatical and hermeneutical interpretations are used.

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<sup>19</sup> Andri Gunawan Wibisana, (2019). Menulis di Jurnal Hukum: Gagasan, Struktur, dan Gaya, *Jurnal Hukum & Pembangunan*, 49(2), p. 472-473.

<sup>20</sup> Depri Liber Sonata, (2014). Metode Penelitian Hukum Normatif dan Empiris: Karakteristik dari Metode Meneliti Hukum, *Fiat Justisia Jurnal Ilmu Hukum*, 8(1), p. 25.

<sup>21</sup> Ahmad Zuhdi Muhdlor, (2012). Perkembangan Metodologi Penelitian Hukum, *Jurnal Hukum dan Peradilan*, 1(2), p. 198-199.

## **Theoretical Basis**

### **The Rule of Law State Theory**

The pioneer of the liberal Rule of Law State is Immanuel Kant who introduced the concept of *rechtstaats* and later on further developed by F.J.Stahl,<sup>22</sup> who expressed the elements of the rule of law state are:<sup>23</sup> 1) recognition of human rights protection; 2) Separation or split of power; 3) Government run under the Law (*wetmatig bestuur*); 4) The existence of state administrative court in charge of handling cases that violate the law committed by the government.

Brian Z. Tamanaha rejects that the concept of the rule of law is final and there is only one absolute concept of being one standard.<sup>24</sup> Brian Tamanaha divides the concept of 'rule of law' in two categories, "formal and substantive". Each category, the "rule of law" in the formal sense and the "rule of law" in a substantive sense.<sup>25</sup>

Adriaan Bedner, a Leiden University scholar develops a study framework or approach to the study on the rule of law. He argues there are three elements that must be considered in the study of the rule of law, namely:<sup>26</sup> the first category: procedural elements; second category: substantive elements; and third category: control mechanism.<sup>27</sup>

The rule of law theory in relation to the Delegation of Regulation to the Governor Regulation in ensuring utility and justice is used to state that Indonesia is a rule of law state that positioning law as the highest reference in the administration of state and government. Its was reflected by the one of judicial ruling or decision with Supreme Court of Indonesia Decision Number 39 P/HUM/2018 regarding Judicial Review towards norms of Article 30 Paragraph (3) Aceh Governor Regulation Number 5 Year 2018 concerning Practical of Jinayat Procedural Law.

The Delegation of the Law and Regulations to the Governor Regulation to examine the obscurity of legal norms and the non-synchronized or conflict of norms with the application of the legal theory of Tamaha and Adriaan Bedner, indicates that in the rule of law state, the instruments of government to perform are not only law but also the existence of substantial factors which direct state into social welfare state by placing substantive equality, welfare and community maintenance as the key indicators.<sup>28</sup> Formal Legality, which includes the characteristics of (i) the principle of rule written in advance and is not retroactive; (ii) is general in meaning to everyone; (iii) clear; (iv)

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<sup>22</sup>I Gede Yusa & Bagus Hermanto, (2017). Gagasan Rancangan Undang-Undang Lembaga Kepresidenan: Cerminan Penegasan dan Penguatan Sistem Presidensiil Indonesia, *Jurnal Legislasi Indonesia*, 14(3), p. 314.

<sup>23</sup>Muhammad Fadli, (2018). Pembentukan Undang-undang yang Mengikuti Perkembangan Masyarakat, *Jurnal Legislasi Indonesia*, 15(1), p. 51.

<sup>24</sup>Satjipto Raharjo, (2009), *Lapisan-Lapisan Dalam Studi Hukum*, Malang: Bayu Media, p. 60.

<sup>25</sup>Marjanne Termorshuizen-Atz, (2004), *The Concept Rule Of Law*, dalam JENTERA- Jurnal Hukum ; *Rule Of law*, Edisi 3 - Tahun II, p. 83-90.

<sup>26</sup>Yance Arizona, (2010), *Negara Hukum Bernurani*, Gagasan Satjipto Rahardjo Tentang Negara Hukum Indonesia, Jakarta: Epistema Institute, p.7.

<sup>27</sup>Adriaan Bedner, (2011), *Satjipto Rahardjo Dan Hukum Progresif Urgensi Dan Kritik*, Jakarta: Epistema, HUMA, p.139 -186.

<sup>28</sup>Maruarar Siahaan (2010), Uji Konstitusionalitas Peraturan Perundang-undangan Negara Kita: Masalah dan Tantangan, *Jurnal Konstitusi*, 7(4), p. 9-10.

public; and (v) is relatively stable.<sup>29</sup> Therefore, under “formal legality”, ideally, the law predictability is very preferred. Hence the law in the alternative approach as part of the government instrument must not only must be certain (legal certainty) and made democratically, but must also ensure justice and expedient for the people’s welfare.

### **Hierarchy of Norms Theory**

The *stufenbau* theory proposed by Hans Kelsen states that the hierarchy of legal norms and the chain of validity of the relationship of legal norms<sup>30</sup> are the relationship of top and subordinate or hierarchy. In relation to this research, the *stufenbau* theory is used to analyze the delegation of regulation to Governor Regulation in ensuring utility and justice which is seen from the hierarchy of Law and Regulations as well as from the hierarchy of legal norms. Delegation of regulation to the Governor Regulation places that the legal norms shall be sourced from the Regional Regulation and over the power of the higher Law and Regulations.

### **The Establishment of Law and Regulations Theory**

The establishment of Governor Regulation contains three elements, namely: legal norm (*rechtsnormen*), applicable outside (*neer buiten werken*); and is general in a broad sense (*algemeenhead in ruinezin*). The establishment of Law and Regulations is essentially the legal norms that applicable outside and which are general in a broad sense. The basic proper category principle of Law and Regulations from A. Hamid S.Attamimi is based on the opinion of Van der Vlies. The categories of Van der Vlies as explained by A. Hamid S.Attamimi<sup>31</sup> include both formal principles and material principles. The establishment of Governor Regulation should be based on a clear objective principle, the proper organ/institutional principle, the principle of the need for regulation. That is very relevant to review the delegation of regulation to Governor Regulation in ensuring utility and justice. The principles of the establishment of Law and Regulations, especially the proper institutional and organizational maker are crucial to the basis of the assessment.<sup>32</sup>

In relation to the delegation of regulation to the Governor Regulation, the establishment mechanism is necessary to be seen with due regard to the delegation of authority to establish the Governor Regulation based on the theory of Law and Regulations and the science of Law and Regulations.

### **Delegation of Law and Regulations Theory**

The sources of authority in the establishment of Law and Regulations are based on the authority of attribution and delegation, in which according to I.C. Van Der Vlies are as follows:<sup>33</sup>

1. Attribution is the creation of authority and it is given to an organ.

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<sup>29</sup> M. Ilham F. Putuhena, (2012), Politik Hukum Perundang-undangan dalam Upaya Meningkatkan Kualitas Produk Legislasi, *Jurnal Rechtsvinding*, 1(3), p. 344-345.

<sup>30</sup> Syihabudin, (2003). Kajian terhadap Jenis dan Tata Urutuan Peraturan Perundang-undangan Indonesia, *Jurnal Hukum*, 10(23), p. 53-54.

<sup>31</sup> M.F.I. Soeprapto, *Op.Cit.*, p. 40-41.

<sup>32</sup> A. Bedner, *op.cit.*, p. 141.

<sup>33</sup> I.C. Van Der Vlies, *op.cit.*, p. 78-79.

2. Delegation is understood by a person as the receiver of the delegation of authority so that the party who receives the authority (*delegetaris*) will implement it with his own responsibility.

Based on this understanding, the delegation in the establishment of a Governor Regulation means a shift in competence and even includes its sequence, the release and acceptance of an authority, both of which are at the discretion of the party who surrenders the authority. The one who gives the delegation shall have an authority that is not currently used while the one who receives the delegation also has authority and such authority is expanded with what is delegated.<sup>34</sup> The basis of the authority of the establishment body and the substance is a benchmark in the delegation, in the sense that not all substance must be formally regulated under the legislation, but the legislation concerned can also be delegated to the delegated legislation.

### **The Utility Concept**

The finality or the law substance concept is something that fosters the value of kindness and benefit among people. This value according to Gustav Radbruch constitutes as an ethical value and this value gets its shape in the attitude of society according to obligations and provides benefits in life.<sup>35</sup> Utility evolved in *Utilitarianism* first developed by Jeremy Bentham.

Based on Jeremy Bentham's,<sup>36</sup> the delegation of regulation would appear to the bad or good of law and shall be measured from the good or bad consequences of the law. A legal provision can only be judged as good in value if the consequences resulting from its application are the good, the greatest happiness, and the suffering diminished. On the contrary it is judged to be bad if its application results in unfair, disadvantageous, and only increases in suffering. The purpose of law is the welfare of the greatest for the majority of the people or for all people, and legal evaluation is based on the consequences resulting from the process of law enforcement. Based on that orientation, therefore the substance of the law is the provision on the regulation of the creation of the state welfare.

### **The Justice Concept**

According to Aristotle, justice is divided into two kinds, namely the "*distributief*" justice and the "*commutatief*" justice.<sup>37</sup> *Distributief* justice is justice that gives each person a portion according to his accomplishments. Commutative justice gives as much to everyone without discriminating his achievements in this regard as to the role of exchange of goods and services.<sup>38</sup> The delegation of regulation is associated with Aristotle's view of justice in which justice as a gift of equality right but not generalization. Aristotle distinguished the equal right according to the proportional right. Equal right is seen by people as an equal unit or container. It is understandable that all persons or every citizen before the law are equal. Proportional equality gives

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<sup>34</sup>Fitria Esfandiari, (2019). Problematika Pendelegasian Peraturan Presiden dalam Hierarki Peraturan Perundang-undangan di Indonesia, *Legality: Jurnal Ilmiah Hukum*, 26(2), p. 270-271.

<sup>35</sup>T. Huijbers, *op.cit.*, p.163.

<sup>36</sup>A. Bedner, *op.cit.*, p. 151.

<sup>37</sup>T. Huijbers, *op.cit.*, p. 140.

<sup>38</sup>Winda Wijayanti, (2013). Eksistensi Undang-undang sebagai Produk Hukum dalam Pemenuhan Keadilan bagi Rakyat (Analisis Putusan Mahkamah Konstitusi Nomor 50/PUU-X/2012), *Jurnal Konstitusi*, 10(1), p. 182-183.



each person what is his due in accordance with the abilities and achievements he has done.

Anthony D'Amato with his recognition injustice approach is easier to find the injustice than to say what is justice in understanding to find the meaning of justice and not a question of what is justice but who suffers because of injustice. Anthony D'Amato states, "We can all agree on what is unjust, whereas we find it hard to say what justice is."<sup>39</sup> The law must realize justice because injustice is not desired. John Rawls<sup>40</sup> argues that justice is the main focus of the legal system and justice cannot be sacrificed because based on his book there are these two principles, namely first, each person is to have and equal to the most extensive basic liberty compatible with a similar liberty for others; and second, social and economic inequalities are to be arranged so they are both (a) reasonably expected to be everyone advantage and (b) attached to positions and offices open to all.

John Rawls's<sup>41</sup> views upon the two principles of justice are as follow: giving equal right and opportunity to the widest freedom of the broadest extent of equal freedom for everyone; and able to regulate the socio-economic disparities that occur so as to provide mutual benefits. Based on John Rawls's thought and with regard to the delegation of regulation, it appears to put forward the principle of difference which demanding the regulation of the basic structure of society.<sup>42</sup> This means social justice must be fought for two things: 1) To make corrections and improvements to the inequality condition experienced by the weak; and 2) each rule must position itself as a guide to develop policies.

### 3. Result and Discussion

#### 3.1. The Basis of The Delegation of Regulation

##### 3.1.1. Delegation of Law and Regulations From the Rule of Law State Perspective

Article 1 Paragraph (3) of the 1945 Indonesian Constitution states that, "The State of Indonesia is a rule of law state."<sup>43</sup> Theoretically, delegation represents the delegation of authority to establish Law and Regulations as one of the legal products. Delegation of Law and Regulations is formally set out in the Attachment II of Act Number 12 of 2011 on the Establishment of Law and Regulations. The formal basis of the delegation shows the concept of rule by law where the law is interpreted as an instrument of government action.<sup>44</sup> It then develops in the form of formal legality, where the concept of law is

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<sup>39</sup>T. Huijbers, op.cit., p. 142.

<sup>40</sup>J. Rawls, *A Theory of Justice*, London: Oxford University press, (1973), as translated into *Bahasa* by U. Fauzan dan H. Prasetyo, (2006), *Teori Keadilan*, Yogyakarta: Pustaka Pelajar, p. 72.

<sup>41</sup>*Ibid.*, p. 72-73.

<sup>42</sup>Ahmad Fadlil Sumadi, (2015). Hukum dan Keadilan Sosial dalam Perspektif Hukum Ketatanegaraan, *Jurnal Konstitusi*, 12(4), p. 859-860.

<sup>43</sup>Sadhu Bagas Suratno, (2017). Pembentukan Peraturan Kebijakan berdasarkan Asas-asas Umum Pemerintahan yang Baik, *Jurnal Lentera Hukum*, 4(3), p. 166.

<sup>44</sup>Ferry Irawan Febriansyah, (2016). Konsep Pembentukan Peraturan Perundang-undangan di Indonesia, *Perspektif*, 21(3), p. 225-226.

defined as a common, clear, prospective and definite norm.<sup>45</sup> The basis of the delegation of the viewpoint of the rule of law state is also apparent in the implementation of Regional Government. Such thing can be found in the provision of Article 58 point a of Act Number 23 of 2014 on Regional Government which regulates the Principle of Implementation of Regional Government as follow: legal certainty, orderly state organizers, general interest, openness, proportionality, professionalism, accountability, efficiency, effectiveness and justice.

Adriaan Bedner's opinions in relation to the basis of the delegation of the rule of law state's point of view are: Firstly, the procedural element in the establishment of Law and Regulations is a government instrument used by the government to run the government. Secondly, the substantive element in the form of the delegation basis is valid. It constitutes as an assertion that the norm has a binding force against the person whose conduct is governed.<sup>46</sup> Thirdly, the establishment of the Governor Regulation as an institutional element that includes the supervisory and implementation body mechanisms. The basis of the delegation from the viewpoint of the rule of law state appears in some of the above explanations that the role of legislators who have delegation authority to establish Law and Regulations should be based on the existence the basis for the establishment of Law and Regulations as well as within the scope of the rule of law state.

### **3.1.2. Basis for the Delegation of Regulation**

The executive power besides enforcing the rules also performs the function of delegation in the establishment of Law and Regulations.<sup>47</sup> Delegation is not a new thing. Delegation has been developed since the XIX century that is during Henry the VIII in England. The nature of the delegation is the delegation of authority. This is because the basic legal norms are usually set forth in the constitution or the highest law. Implementation of delegation of regulation in axiological way aims to provide certainty, benefit and justice for the community.

Legal validity is seen from 3 things, namely: philosophical validity,<sup>48</sup> Sociological doctrine of validity,<sup>49</sup> and Juridical doctrine of validity.<sup>50</sup> According to the view of Gustav Radbruch and Satjipto Raharjo, it is noted that it is important to take into account the validity of the law and its relation to the basic values of justice, utility

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<sup>45</sup>Bisariyadi, (2016). Pergulatan Pahama Negara Kesejahteraan (Welfare State) dan Negara Regulasi (Regulatory State) dalam Perkara Konstitusional, *Jurnal Hukum Ius Quia Iustum*, 23(4), p. 537-538.

<sup>46</sup>Jimly Asshiddiqie & M. Ali Safa'at, (2006), *Teori Hans Kelsen Tentang Hukum*, Jakarta: Konstitusi Press, p. 36.

<sup>47</sup>Sukardi & E. Prajwalita Widiati, (2010). Pendelegasian Pengaturan oleh Undang-undang kepada Peraturan yang Lebih Rendah dan Akibat Hukumnya, *Yuridika*, 25(2), p. 105-108.

<sup>48</sup>Hamzah Halim & Kemal Redindo Syahrul Putera, (2010), *Cara Praktis Menyusun & Merancang Peraturan Daerah (Suatu Kajian Teoritis & Praktis disertai Manual) Konsep Teoritis menuju Artikulasi Empiris*, jakarta: Kencana Prenada, p. 12.

<sup>49</sup>*Ibid*, p. 25.

<sup>50</sup>*Ibid*, p. 24.

(*zweckmaszigkeit*) and legal certainty.<sup>51</sup> Based on that opinions the basis of the juridical delegation of regulations is still set forth in the consideration.

### **3.2. Delegation of Regulation to Governor Regulation in the Regional Government Act and the Establishment of Law and Regulations Act**

#### **3.2.1. Direction of the Delegation of Regulation to Governor Regulation in the Regional Government Act**

Minutes of the Special Committee Meeting on the Law and Regulations concerning Local Governments of the Second Trial Period, Thursday 21 September 2012, the Chairman of the meeting, H. Totok Daryanto, discusses the Problem Inventory List (*Daftar Inventarisasi Masalah/DIM*). Furthermore, the cluster system was agreed to be used to discuss the DIM. After being studied and classified, the Problem Inventory List on the Draft of Regional Government Act is divided into 15 (fifteen) clusters, namely: 1) Cluster 1 Title, consideration and general provisions, 2) Cluster 2 the regional government power, division of territory and structuring 3) cluster 3 government affairs and administration of regional government affairs, 4) Cluster 4 regional apparatus and civil servants, 5) Cluster 5 Regional Regulation and Head of Region Regulation, 6) Cluster 6 regional development and local finance, 7) Cluster 7 public service, 8) Cluster 8 community participation, 9) Cluster 9 urban area, special area and village, 10) Cluster 10 regional cooperation and dispute, 11) Cluster 11 training and supervision as well as legal action against regional government apparatus, 12) Cluster 12 innovation area, 13) Cluster 13 Regional Autonomy Advisory Council, 14) Cluster 14 criminal provisions, and 15) Cluster 15 other provisions, transitional provisions and closing conditions.<sup>52</sup>

In relation to the 5th cluster regarding the Regional Regulation and Governor Regulation, this part emphasizes the authority of regional government in regional government organizers by establishing the Regional Regulation as the legal basis for the region in carrying out regional autonomy in accordance with the condition and aspirations of the community and the specificity of the area.

Regarding the delegation of regulation to Governor Regulation based on Article 246 paragraph (1) of Act Number 23 of 2014 on Regional Government, it is necessary to understand the two meanings of legal norms in the article namely: the word "implement" and "over the power". "Implement", according to the Indonesian General Dictionary has meaning of *melakukan; menjalankan; mengerjakan; mempraktekkan; menyampaikan*<sup>53</sup> (free translation: to do; run; perform; practice; deliver). Thus, "implement" can have two meanings namely to execute in the sense that there is a strict command and in the sense without strict command but the substance itself requires the implementation rules (in the explicit and implicit sense).

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<sup>51</sup>Satjipto Raharjo, *Op.Cit.*, p. 19.

<sup>52</sup>Risalah Rapat Panitia Khusus, *Rancangan Undang-Undang Tentang Pemerintah Daerah*, Masa Persidangan ke II Kamis 22 September 2012, p. 79, see also Kementerian Dalam Negeri Republik Indonesia, 2011, *Naskah Akademik Rancangan Undang-Undang Pemerintahan Daerah*, p. 172.

<sup>53</sup>W.J.S.Poerwadarminta, (2008), *Kamus Besar Bahasa Indonesia*, Cetakan 28, Jakarta: Balai Pustaka dan Departemen Pendidikan Nasional, p. 650.

The "without strict command" sense leads to the existence of vague norm. The meanings of without a strict command are: Firstly, the arrangement command exists but does not expressly determine the form of Law and Regulations that is chosen to cover the arrangement of the delegated provisions; Secondly, the arrangement command does exist, but the agency which received the delegation of authority or the form of regulation that should be established for the disposal of substance in the delegated provisions is not clearly stated; Thirdly, such arrangement command does not mentioned or specified in the relevant Law/Regional Regulations, but the need for such arrangements is tangible and inevitable in the context of enforcement of the provisions of the Law and/or Regional Regulation itself. Even if it is not for the ignorance or negligence of the legislators, it should be that further regulation on such matters should be regulated so that the concerned provisions of the law can be implemented as a form of delegation.

### **3.2.2. Direction of the Delegation of Regulation to Governor Regulation in the Establishment of Law and Regulations Act**

Article 22A of the 1945 Indonesian Constitution basically stipulates that "Further provisions concerning the procedure of the establishment of law shall be further regulated by Act." However, the scope of the content of the Establishment of Law and Regulations Act is expanded not only in the form of Act but including other Law and Regulations based on the idea that Indonesia is a rule of law state.

The direction of delegation of regulation to the Governor Regulation in the Establishment of Law and Regulations Act is that the Governor Regulation is not stipulated in the provision of Article 7 paragraph (1) of Act Number 12 of 2011 on the Establishment of Law and Regulation, however, the type of regulation is provided for in Article 8 paragraph (1). Article 8 paragraph (1) actually does not expressly state the type of legislation in the form of "Governor Regulation", but the phrase of "... regulations set by the Governor ..." as stated in the above, reflects the existence of the Governor Regulation as one type of legislation. In addition the provision on binding force is provided for in Article 8 Paragraph (2) which states that the Law and Regulations as meant in paragraph (1) are acknowledged to exist and have binding legal force as long as it is commanded by a higher Law and Regulations or established under the authority.

## **4. Conclusion**

Based on the above analyses and discussions upon the three raised legal issues, there are two conclusions as follow:

First, the philosophical basis of the delegation of regulation are as follow: the legislators cannot formulate technical or detail norms in accordance with the needs of society development in the establishment of Law and Regulations; the establishment of Law and Regulations that is based on the delegation authority is more technical in relation to the regulated content; the existence of urgency factor and relatively long discussions in the legislature level which are in contrast to Law and Regulations which are established by the delegation of regulation which is much faster; and in the

delegation of regulation, there is the existence of elasticity factor to make changes in Law and Regulations so that the utility and justice can be achieved.

Second, the direction of the delegation of regulation to the Governor Regulation can be seen from 2 (two) directions of regulation, namely: the direction of regulation in the Regional Government Act is stipulated in Article 246 paragraph (1). It stipulates that in order to implement the Regional Regulation or over the power of Law and Regulations, the Head of Region shall establish Head of Region Regulation. Based on this Article, it is necessary to understand two meanings of the legal norms namely: "to implement" and "over the power"; and the direction of regulation in Article 8 paragraph (2) of Act on the Establishment of Law and Regulation. It regulates the establishment of Law and Regulations and states that have binding power as legislation as long as commanded by the higher Law and Regulations; or established by authority. The direction of regulation is also regulated in number 198 to 216 of the Attachment II of Act Number 12 of 2011 on the Establishment of Law and Regulations.

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