

The Right Man on the Right Job: Does the Local Regulation Support it? The Empirical Evidence from Central Java, Indonesia

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Abstract: *The implementation of decentralization reflects demands for many local governments in Indonesia as freedom from a previously centralized system. The public trust in government had been declined across the country. For instance, the inefficient bureaucracy has contributed to degradation in local investments. It, of course, is necessary to create local regulations which reflect local aspirations.*

The objective of this study is to describe and explain the local law that regulates a charging position as well as formulates a strategy for the establishment of regulations in accordance with local needs and conditions. For answering in an objective way, I utilized empirical data and interviews analyzed with the normative approach.

The research verified that the most of local governments in Central Java Province had have a set of requirements local regulations, material contents, mechanisms and procedures related to the local needs and conditions. However, the law reduces possibility the problem of filling the structural positions, and produce professionalism officers within the capacity to realize the good governance.

Keywords: *regulation, apparatus, competency, effectiveness, Central Java.s*

1. INTRODUCTION

The complexity of regional government adds a long list of constitutional issues in Indonesia.¹ There are several filling of positions that recently disturb the public, such as the recruitment of structural positions in many regions. The recruitment is not conducted by an objective and professional manner. Instead, there is no any right man on the right position appointed by the Head of Regional Government as head of legal department (Head of Legal Bureau) and it is even more tragic that a veterinarian can post as council secretary.

Today, the paradigm has changed from the system of centralization to decentralization in the country, as people's desire, that the centralization is not more applicable in the democratic atmosphere since 1998. Nevertheless the state of affairs of law altered the governmental system, but to some degree, the fact reveals such inherent antagonism because much regional legislation in regions, for example on local governing authority in the area, is orientated to personal connections and interests of certain groups. The argument from emergency assumes that Regulations aimed for establishing of a democratic government and a professional bureaucracy certainly must begin to construct the agenda of the central government in general, and regional or municipality government in particular. It could be asserted that Governors, Regents or Mayors or even regional apparatuses must be the basic element to the regional administration.²

¹ Regional government, in this paper, means in the level of regional/municipal governments led by the head of regional government called a head of regional, namely Regent (*bupati*) or Mayor (*walikota*). A regency (*kabupaten*) is headed by the Regent and a City (*kota*) is headed by the mayor, including the level of provinces headed by Governor (*Gubernur*).

² See article 1 point (3) Act of the Republic of Indonesia No. 32 Number 32 of 2004 concerning Regional Government.

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In regard to licensing, supervision, guidance, enforcement and sanction organized by the institution, while the structural appointment should explicitly be laid down in regulations armed with justice and equity to avoid the excessive ego attitude of a power. Ideally, the charge occupying the structural position in regions is governed by law such regional regulations.³ In line with this law, one who accepts office should sign a contract whereas the regulation orders how those can get into office proposed by the legislature and he or she is usually chosen by the executive through discussions. That stands to reason that no rule regulates it. By virtue, the function of the regional regulation provides the guidance to recruit structural officials in connection with required posts.

The setting of mechanisms and procedures related to determining and contract positions is a legal action as response to article 133 of Act No. 32 of 2004 on Regional Government. This article contains guidance essentially for the Regent and Mayor in the recruitment of structural position in order to generate local officials who are capable and professional. Rawls's theory of justice suggests that the most important purpose of law is to embody and ensure justice for the people and in order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government.⁴ Then, Frederick Pollock argues that law presupposes ideas, however rudimentary, of justice. But, law being once established, just, in matters of the law, denotes whatever is done in express fulfillment of the rules of law, or is approved and allowed by law. Again, legal justice must be based on moral justice within its range, and its strength largely consists in the general feeling that this is so. Were the legal formulation of right permanently estranged from the moral judgment of good citizens, the State would be divided against itself.⁵ And it cannot be separated between politics and legislation in fact that a contextual conditions on legislation to be born, contextual conditions is indicative of the fact, real, and events that occurs in the community.

Jeremy G. Waldron emphasizes that if a law is changed every time by a new idea in according with the wish of some politicians, that law then would forfeit its main objective in the public life. It, consequently, becomes a little more than an evanescent and incoherent array of dicta and decrees.⁶ Therefore, the substance of Indonesian law is merely depicted the political interest.⁷

However, both centralization and decentralization are used to develop the legal infrastructure during the New Order era.⁸ Due to the political pressure at that time, the law was no more prominent controlled by the executive, referred to the President, and the most significant weakness in term of the political centralization was stronger rather than in term of the political decentralization, thus, this would be devastating for the effectual products of legislation. Thus, the life of law under the New Order, in other words, reflects merely the will of the ruler (government) rather than the will of people.

People expect that the law consists of not only general norms but also morally norms. The law is then as a tool of social engineering, and to control the behavior of people, either.⁹ According to

³ Regional regulation means province, regency or city regulation.

⁴ John Rawls, *A Theory of Justice*, Harvard, MA: The Belknap Press of Harvard University Press, 1999, pp. 10.

⁵ Frederick Pollock. *A First Book Of Jurisprudence For The Common Law Student*, Fourth Edition, London: Macmillan and Co., 1918, pp. 32-33.

⁶ See Jeremy G. Waldron, chapter 16 with the title of "Legislation" in "*The Blackwell Guide to the Philosophy of Law and Legal Theory*", edited by Martin P. Golding and William A. Edmundson, UK: Blackwell Publishing Ltd, pp. 237.

⁷ Every bill is deliberated by the executive and legislature for obtaining joint approval either regional or national.

⁸ New Order (in Indonesian: *Orde Baru*) is the term used for the government of the second Indonesian President Suharto. Under the "New Order" was purposed to achieving and maintaining political order, economic development, and the removal of mass participation in the political process, there was no democratic life.

⁹ Roscoe Pound, *The Ideal Element in Law*, Calcutta: Liberty Fund, Inc, University of Calcutta Press, 1958, pp.234.

H.L.A. Hart, the justice is traditionally thought of maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated into “Treat like cases alike”, however, we need to add to the latter and treat different cases differently.¹⁰ The bad law is created through a top-down, and this is because of a desire to hurt people and society’s expectations which could be accommodated in the legislation formed by the legislature, in this case, related with regional or municipality regulations containing justice, utility and legal certainty according to law.

The formulation in law-making process implies, explicitly, that law should, in general, harmonize the expectation of people and government in a single container. Consequently, not only legal certainty can be written in provisions but also justice and utility for people through regulations enacted by the authority, referred to the government and the legislative, in a single manner.

Again, the Indonesian governmental paradigm altered from centralized to decentralized governance influences strongly the formation of laws and regulations, particularly in the reforming of national legal system. There is some plausibility in this charge. On the one hand the development of national law, which previously used the pattern of top-down approach, is like a deflection for interests of the authority, lacked guarantees of the justice, utility and legal certainty. On the other hand the bottom-up approach meets aspirations of people. This approach is properly being applied in this time. And therefore, the government just gives the aspirations to the legislature. The task of the legislature is to enact such regulations based on the will of people.

Beside the new paradigm, Indonesia has also already begun to more democratic recently. However, Indonesia has not yet been able to change significantly the formation and implementation of legislations because the politic plays a key role in it. This fact approves that the law is merely in the hand of the political will. But according to Hans Kelsen, the theory of constitutional law is true, not quite the same as the corresponding concept of political theory. In addition, provisions in law-making process must be underlying on the general norms passed by the political theory.¹¹ Those norms are, in this case, regulating on the creation and the competence for the functional officials. Thus, the law needs supports from the politic.

Law can be overlapped by political interests. It brings some consequences that the law could not serve the people because, *prima facie*, it already requires the existence of the democratic life in various legislations such regional regulations that can change the authoritarian character. The democratic will in regulations is not easy, especially if provisions set out in the regional regulations hampered by restrictions of the authority, and this will, consequently, be difficult to be realized. It should be required occasionally to encourage the legislature in order to change the authoritarian paradigm to the democratic paradigm. Then, it must be started from the formulation of legislations, and it serves the political situation in Indonesia into the democracy, either.

The Political changing can objectify the democratic paradigm as well as the political world has changed the system of governance from centralization to decentralization started with the release of Act No. 22 of 1999 concerning Regional Government. This Act is not relevant any more to give supports the administrative system in the autonomous areas. It needs, thus, to be amended by Act No. 32 of 2004 on Regional Government and Act No. 12 of 2008 on the Second Amendment of Act No. 32 of 2004.

The idea creating the regional autonomy is to make the state apparatus far away from political interests and also to establish regulations that reach the democratic government and the professional bureaucracy. A retaining step of regulations can described as efforts to create the professional bureaucracy, effectively and efficiently. Finally, it becomes a very important agenda of the government to be realized as soon as possible.

2. OBJECTIVES

The objective of this study is to describe and explain the local law that regulates a charging position as well as formulates a strategy for the establishment of regulations in accordance with

¹⁰ H. L. A. Hart, *The Concept of Law*, second edition, New York: Clarendon Press-Oxford, 1994, pp. 159.

¹¹ Hans Kelsen, *General Theory of Law and State*, Translated by Anders Wedberg, New York: Russel & Russel. 1973. pp. 258-259.

local needs and conditions. The scope of the research has been done in several regencies as well as cities in Province of Central Java.

3. METHODS

The method of the research is based on the empirical data supported by the normative approach, both statute and conceptual.

4. RESULTS AND DISCUSSION

The regional regulation such as regency or city regulation (*Perda*) is one of the types and hierarchy of rules under province regulation laws, according to Act No. 12 of 2011 concerning on the Making of Laws and Regulations as a guide to make the formation of laws.¹² Nevertheless the range of its entry is restricted to concern in local regions. In law, local interests are stipulated in every law as products of the regency/city regulation by the regional legislature. Further, this law could be a part of the national law system as well as the regional government is a part of the national government. The legal structure is neither associated with the formal competences as autonomous regions nor looks simply at interests of the related regions. It must be based more on the unity of governance and national interest wholly. The principle is closely related to the normative vertically consistency. However, it still opens to give the diversity of the substance to be stipulated into regency/city regulations but it do not excogitate the normative vertically relationship.

Indonesia has wide territories, islands, tribes, and cultures. Of course Indonesia has many big problems if the central government, in the hands of the President, governs and controls all of the problems across the country from the capital, Jakarta. In additions to some difficulties of a finding law can embrace needs of the very heterogeneous Indonesian, for examples in the scope of races, ethnics, cultures or religions and languages in many different communities. Now regional regulations will indicate the practice of democracy in regions and indeed, their formulating is not contrary to the principle of the unitary state of the Republic of Indonesia, the national law or municipal law is needed as a normative supervision to assist the central government in the name of the autonomy.

Professionalism of filling positions in good governance, of course, cannot be separated from a result of the leadership of one who has been entrusted to lead the governmental organization armed with the power according to his duties and functions. Meanwhile, to achieve effectiveness and efficiency in the organization, in other words the government needs to improve the quality and professionalism of civil servants who have competency and ability to hold and perform the professional value and ethic. The bureaucratic implementation of clean and good regional autonomy, can should conform the demand of community, namely in public services.

For reasons I described above, our judgment will no doubt to take into account the importance to the empowerment of civil servants who post structural positions should hold and perform the professional value and ethic in their daily service to the public. Thus, the requirements for the structural positions of the civil servants in the region are guaranteed by the legal certainty in the process of the filling-positions in the structural position.

The substance on the transfer and dismissal appointment of civil servants in the structural position is to objectivity guarantee, and then the personnel placing in a certain position must comply with the requirements and sense of fairness to all parties. This should be set in regional regulations as soon as possible to achieve the professionalism of civil servants. Such regulations that regulate also removal, dismissal, benefit in the structural position with respect to impersonal values, openness, and systematic for coaching and career development of the civil servants. For instance, one regional wishes the legislature to make regulations concerning the requirements of structural

¹² Currently, Article 7 paragraph 1 of Act No. 12 of 2011 on the Making of Laws and Regulations bears the hierarchy of law as follows: a. Constitution of the Republic of Indonesia of 1945; b. People's Consultative Council Decree; c. Law/Government Regulation In Lieu of Law; d. Government Regulation; e. Presidential Regulation; f. Province Regulation; and g. Regency/Municipality Regulation.

positions which are stipulated in Local Regulations. As soon as possible, those regulations should be coordinated by discussions and joint approval between the local executives namely Mayor or Regent and the Regional House of Representative. In my view, why we do not have to wait for the Government Regulation in which instructs to make regulations at local levels. It can be asserted, the importance and function concerning the requirements for the structural positions would be better governed by the local legislations, as respond to realize the public service. This way, surely, can be in the form of the concept of law that the law is meaning of serving justice.¹³ The law gives fairness for all parties, without discrimination process.¹⁴ Thus, the law must be coherent with expressing of justice and fairness. This concept is based on Dworkin's concept of law as called "law as integrity", that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of community's legal practice."¹⁵

As I have ever researched in one district in Province of Central Java, at least I noticed some aspects of the filling positions, how the process did not follow the standard norms in accordance with the Governmental Regulation No. 100 of 2000 concerning Regional Apparatus Organization Guideline. I argue, for example, an officer was not appointed in accordance with the Rank Order List (ROL) or do not match the results presented by the Advisory Board Position for the Rankings (ABPR), nevertheless in this case that Mayor or Regent has authority to determine the post. The regency or city regulation requires a responsive load based on the higher material laws or regulations and it is not contrary to the interests of people who will be adhered by the organizers of the regional government including Regent or Mayor in determining structural policies of filling positions, particularly in Province of Central Java.

Act No. 43 of 1999 on Principles of Employment

Act No. 43 of 1999 on Ordinance of Civil Service is promulgated through State Gazette of 1999 and this Act is revision of Act No. 8 of 1974. The civil service is managed by a national Civil Service Agency or *Badan Kepegawaian Negeri* (BKN). Pursuant to Article 17 paragraph (2), this article prescribes: "*The appointment of civil servants in a position held by the principles of professionalism in accordance with the competence, work performance, and levels of rank assigned to the post, and other objective conditions, regardless of sex, race, religion, race or class*". Currently, this article has not yet been implemented in regulations to support provisions of Act No. 43 of 1999. In addition, the legal principal instructs that higher laws or regulations must be laid down in lower laws or regulations, however, that principal is not explicitly mentioned by in any provision. Relying upon the system, the authority must set down by the local regulation on appointment, transfer and dismissal, for example, the position of echelon II is attributed to the Regent or Mayor, the substance of the job requirements to determine the structural position by the contract. Hans Kelsen does say such concept as known "*der Stufenbau der Rechtsordnung*"¹⁶, the lower norm is determined by the higher one or the higher norm must be laid down in lower norm. It can be asserted that a stipulated regulation or one of its elements by the authorized regional government should be set down in the regency or municipality law and regulation. Thus, if it could be in reality, then, the local regulation becomes a "responsive regulation", because the regulation could fill not only legal vacuum but also met the will of people that desired to have structural positions performed by professional officials. The question is why we must need such the charge material of Occupation Regulation. Here, I give my idea to solve the problem, and the idea must be made in the Regulation on the Filling Position or Title Structural Specification and Contracts for the responsibility of officials to perform the state administration in government tasks, particular in "public service". The regulation will be requiring the professional skills according to competency, work performance, and power level specified for the post as well as other objective requirements, regardless of sex, race, religion, race or class. But it also provides the legal protection for citizens, if the attitude or action of the administrative state officials does

¹³ Peter Mahmud Marzuki, *An Introduction to Indonesian Law*, Setara Press, Malang, 2011, p. 39.

¹⁴ *Id.*

¹⁵ Ronald Dworkin, *Law's Empire*, Cambridge, Massachusetts, The Belknap Press of Harvard University Press, 1986, p. 225.

¹⁶ Hans Kelsen, *Reine Rechtslehre*, Wien, Österreichische Staatsdruckerei, Nadruck, 1992, pp. 228.

not meet the law to serve the public. Every citizen has right to be served and this is obligation that must be performed by the state officials.

The spirit bureaucratic reformation must be implied in many local regulations to reduce misbehavior of state officials or civil servants, especially today that many Regents or Mayors gain their post by the regional general election. They usually spent all their money to be the winner so that they would like to get their money back through the recruiting of the structural position, as known “bargaining position”. Therefore, the idea is to be purposed in preventive action to clean up corruption (*korupsi*), collusion (*kolusi*), and nepotism (*nepotisme*) commonly called “KKN”.

The regional regulation concerning material Charging Title or Position Determination and Structural Contract is expected to improve quality or competency for every state official or civil servant. Now it requires the skill standards to be successful because the candidates of Regent of Mayor must promote their vision and mission in their campaign program, but not just be a slogan. The vision and mission will be interesting to attract attention of voters. This idea can be useful for the future regional heads but also for the incumbent to build up the governance based on the principle of good governance and far away from KKN.

The substance of regional regulations reflects either appreciation or respect for the accomplishments, commitments and capabilities for civil servants carrying out the office duty. It realize the objectivity of the official assessment to structural performance, and it could also be a reference in developing career planning and development of regional civil servants to eliminate the attitude of “like and dislike”.

Regulation of the Minister of Home Affairs No. 53 of 2011

The minister of Home Affairs has issued Regulation of the Minister of Home Affairs No. 53 of 2011 on the Formulation of Regional Legal Products; the legal products are pursued to circumstances and necessities of local laws and must be based on the philosophical, sociological and judicial perspective. Prior to previously studies, the formation became essential in implementing the philosophical perspective whereas it must be not contrary against *Pancasila* as the state fundamental norm of Indonesia under the Indonesian legal system. The *Pancasila* serves as a source of all Indonesia law. Due to its critical status in the Indonesian legal system, it philosophically dictates all Indonesian legal rules to emanate each of its elements in respective area of law so concerned.¹⁷ One of *Pancasila*'s elements is democracy under the guidance of wisdom arising out of representative consensus, that is to say, then, people's participation shall be guaranteed by both regulation and management of the household affairs between regions. The structural titles of civil servants are intrinsically arranged by the local elites.

Therefore, the participation of legislatures regulating the recruitment of structural positions should be implemented into local regulations, what I mean by this matter that the content of local regulations is to encourage the implementing of the idea of regional autonomy and *medebewind* (assisting tasks) as well as the content specifies needs of local government and endorses the regulations. Moreover, realizing the central government policy, it shall be national discretion, may not fix all of the needs in a purely regional. The arrangement of official recruitments which cover load material structural in the determination on the mechanism and structural position by the contract, then it will provide guidance to the Mayor or Regent in order to implement Governmental Regulation No. 100 of 2000 on the Appointment of Civil Servants in Structural Title. In addition, that the guidance is to be a guidance for the Head of Regional Government to determine Regulation on organizational structures and working arrangements in Districts of Province of Central Java. In general, the philosophical foundation considers the formulation of regional Regulation supported with the sociological perspective. This perspective shall be used, for example, for considering the process of legal drafting in regions. It is not only a legal matter, but also a connection related to several factor such as economy, politic, social, culture, religious and so on. True, we also shall involve experts from another discipline, as known inter-discipline study, to assist the regional legal drafting and that is to gain legitimacy from people. Thus, it is a

¹⁷ Peter Mahmud Marzuki, *supra* note at. 72.

necessity to look forward that the inter-discipline is benefit to support the main stream of the normative perspective in law.

In respond to the sociological perspective, the substantial recruitment of structural positions stipulated in the local regulations can be prescribed from, as follows:

- a. Appointment of civil servants in structural positions always solves never-ending problems, i.e. “like and dislike” factor can be diminished. The allegation indicates a discrepancy between competence and expertise to a given structural position. Similarly, the dismissal did not see the official achievements. Consequently, it seems prudent to view that the discontentment causes several conflicts that eventually become “line hurt” of the civil servants.
- b. Many a civil servant who has proved the good ethic has considerable work experiences, rank high enough, competent, but he or she is never promoted in a structural position. They mostly say no or do not want to have a close proximity to the proposer, official or authority. According to my observation, it can be asserted that one will be elected by the authority in a structural position that he or she must be tested in fit and proper test to show his or her commitment to the achievement of performance.
- c. The recruitment model of leadership by way of “fit and proper test” hosted by an independent team is traditionally accepted by the society.

We now have ample evidence to change the shifting paradigm from absolute prerogative to semi prerogative. It can embody the spirit of the bureaucratic reform that the officials should take their commitments concerning their performance but they should be sworn before. The fit and proper test can minimize principally opportunities to do the KKN because the environment of echelon III is a conspiracy place to gain a structural position. The test gives more satisfied for parties as well as civil society and a positive perspective to embody the governmental authority. It makes perfect sense to perform rule of law prescribed in article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia that Indonesia is a state based on law.

With reasonable conviction, some regional authority of provinces, regencies (*kabupaten*) and municipalities (*kota*) are an inseparable unity within the frame of the Unitary State of the Republic of Indonesia and cannot be separated with the concept of rule of law adopted by the State of Indonesia, the substantive law of the State or in the broad sense. The state is not only responsible for the security of all citizens, but also responsible for their welfare. It is academically referred to term as known “*welvaartsstaat*” or “welfarestate”. A state in administrative task bears upon the claimed right to the public as called “public service” including regional authorities are required to provide service for all people in their areas. This notion is as an answering to point (a) of the consideration provision of Act No. 32 of 2004 concerning Regional Administration, as follows: “*that to run regional governments in accordance with the mandate of the 1945 Constitution of the Republic of Indonesia, regional government which govern and manage administrative affairs on their own in accordance with the principles of autonomy and assistance task are directed towards speeding up the creation of public welfare through the improvement of services, public participant, regional competitiveness based on the principles of democracy, equitable distribution, justice, and peculiarity of regions within the frame of the Unitary Republic of Indonesia.*”

Thus people can easily be on the watch for the structural officials, if there is any contract and specific regulation. Not only the people who could be fined just for being late to pay taxes but it can also be in effect to give a moral warning to the government. If the government can be of service to people seriously.

Then, it must start from adequate regulations and official attitudes supported by the responsive character. The public confidence is declined by the regional government. According to WEF, there are no barriers to investment in Indonesia; about 21% of the investment is inefficient caused

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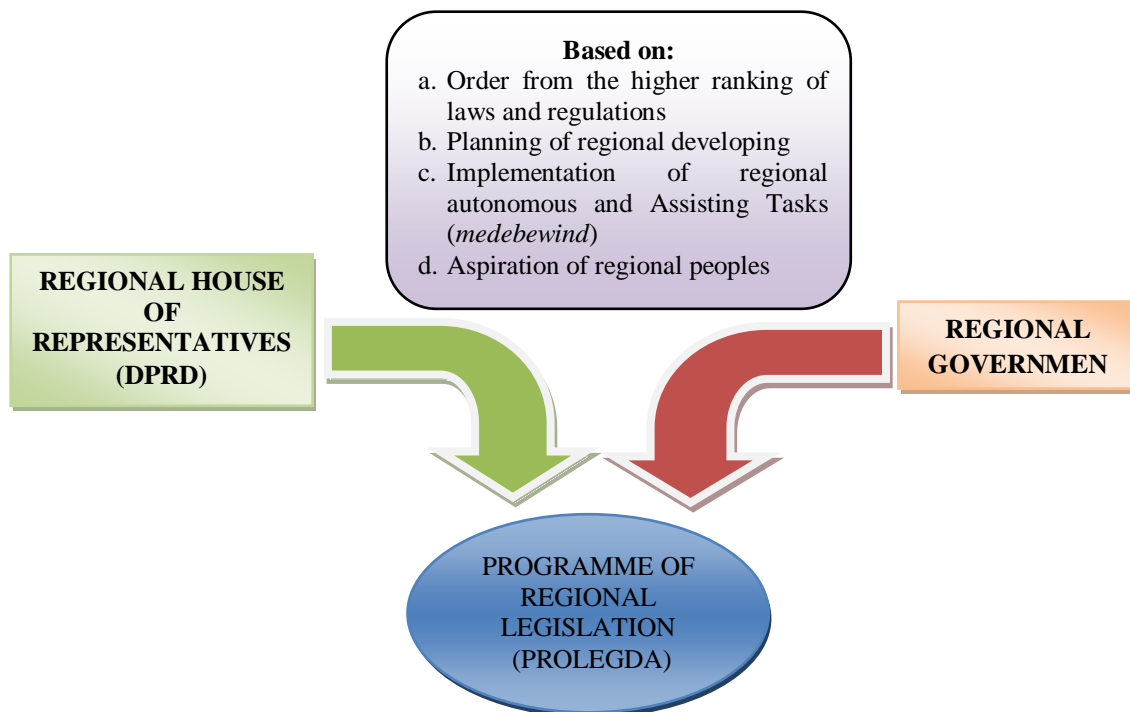
by bureaucracy.¹⁸ Not infrequently that the state apparatus does omit to handle some complaints conveyed by the people, for instance, the permitting process needs much more time, too costly and complicated, tragically supported by a weak rule of law. The placement of certain positions is not in accordance with the competence which has an impact on policy making. The regional regulation is a right problem solving to make a better legal system in order to support the bureaucratic performance.

Furthermore, the result of the study show several things, that the most areas, either districts or cities in Province of Central Java have not been having any regional regulation concerning the filling of the structural position to realize justice and equity to people. The law gives a way out to solve the filling of the structural position to carry out the good governance. And therefore, if the government does not take this matter seriously, then it does not take law seriously either.¹⁹

5. CONCLUSION

The development of laws controlled by other institutions should have the function of monitoring and enforcement and then it will foster the substantial excess of ego attitude. As a result, the society is one of institutions that have right to watch the law which cannot work potentially in the filling of structural position under the regional regulation. The existence of those regulations would tend to set norms in which severely do not restrict parties in it. The regional regulations can certainly reduce the problem of the filling of structural position and they create the professional officers in accordance with the capacity or competency of field and in achieving of good governance either.

The mechanism of legal drafting in connection with the regional regulation.



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¹⁹ Cf. Ronald Dworkin, *Taking Right Seriously*, Cambridge, Massachusetts, The Belknap Press of Harvard University Press, 1978, p. 205.

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