CHAPTER TWO

LITERATURE REVIEW

A. Legislation

Indonesia regulates the legislation making process as stated in the Law Number 12 of 2011 concerning the Establishment of Legislation. There are many definitions of legislation. Bagir Manan said that legislation is a state or government written decision that contains instructions or behavioural patterns that are general and binding.[6] According to Attamimi legislation is state regulations, at the central and the regional levels which are formed based on legislative authority, both in the form of attribution and delegation.[7]

While Maria Farida Indrati mentions the term "legislation" (*wetgeving or gesetzgebung*) has two different senses, namely:[8]

1. The legislation is a forming process of state regulations, both at the central and regional levels;
2. The legislation is all state regulations which are the result of the formation of regulations, both at the central and regional levels;

In the legislation making process, there are several general principles, including:[9]

[6] Bagir manan, (1992), *Dasar-Dasar Perundang-Undangan Indonesia*, Ind-Hill-Co, Jakarta, p. 18.
[7] Rosjidi Ranggawidjaja, (1998), *Pengantar Ilmu Perundang-Undangan Indonesia*, Mandar Maju, Bandung, p. 19
[8] Maria Farida Indrati Soeprapto, (2006), *Ilmu Perundang-Undangan, Dasar-Dasar dan Pembentukannya*, Kanisius Press, Yogyakarta, p. 3

First, the legislation does not apply retroactively. This principle can be read in Article 13 *Algemene Bepalingen van Wetgeving* which translated as follows: "The law is only binding for future action and does not have retroactive force." Article 1 Paragraph (1) of the Criminal Code, which reads as follows: "there is no action can be criminalized, except the action that has been regulated in the legislation." From this principle, it can be concluded that the law may only be used against events referred to in the law and occurred after the law is declared valid.

Second, the law as a tool to maximally achieve spiritual and material welfare for the person and the community (*welvarstaat* principle).

Third, higher laws override lower laws (*lex superiori derogate legi inferiori*). According to this principle, laws and regulations in the lower level may not conflict with the laws and regulations in the higher level when it regulating the same matter. The consequences of the legal principle of *lex superiori derogate legi inferiori* are:

1. The laws made by higher authorities have a higher position as well;
2. Lower laws may not conflict with higher law;[10]
3. Invitation law can only be revoked, changed, or added by or with equal legislation or a higher level.

[9] Ni‟matul Huda, (2011), *Teori & Pengujian Peraturan Perundang-Undangan*, Nusamedia, Bandung, p. 12

[10] Umar Said Sugiarto (2013) Pengantar Hukum Indonesia, Sinar Grafika, Jakarta, p.62

If the principle is not obeyed, it will lead to uncertainty and disorder of the legal system. It can even cause chaos or confusion in the legislation.[11]

Fourth, special laws override general laws (*lex specialis derogate legi generalis*). According to this principle, if there are two kinds of provisions of the same level of legislation or the same position which are valid at the same time but it contradict each other, then the judge must apply or use the specific law as a legal basis, and override the general one.[12]

Fifth, the latest laws override the previous laws (*lex posteriori derogate legi priori*). The point is that the previous (old) law becomes unapplicable if there is a new law enactment regulating the same object and have the same position in the hierarchy of Indonesian legislation system.[13]

The establishment of good laws and regulations must be based on the principles as stated in the Law on the Establishment of Legislation, namely:

1. Clarity of purpose;
2. Forming by appropriate institutions or officials;
3. Harmony with the types, hierarchies, and material content;
4. Can be implemented;
5. Usefulness;
6. Clarity of formulation; and

[11] Amiroeddin Sjarif (1987) Perundang-Undangan Dasar, Jenis, dan Teknik Membuatnya, Bina Aksara p.78-79.
[12] Umar Said Sugiarto (2013) Op.Cit.,p.64.
[13] Ibid., p.64-65.

7. Openness

The content of the material contained in regulation must reflect the following principles:

1. Protection;
2. Humanity;
3. Nationality;
4. Family;
5. Mediation;
6. *Bhinneka Tunggal Ika*;
7. Justice;
8. Equality of position in law and government;
9. Public order and legal certainty; and/or
10. Balance, harmony and conformity.

The types of legislation are contained in the hierarchy of legislation that applies in Indonesia. The hierarchy of legislation is mentioned in Article 7 paragraph (1) of the Law Number 12 of 2011 concerning the Establishment of Legislation, types of legislation consist of:

1. The 1945 Constitution of the Republic of Indonesia;
2. The Decree of the People's Consultative Assembly;
3. Act/Laws and Government Regulation in Lieu of Law;
4. Government Regulation;
5. Presidential Regulation;

6. Provincial Regulation; and
7. District / City Regulation.

Furthermore, the types of legislation also exist in Article 8 paragraph (1) of the Law Number 12 of 2011 concerning the Establishment of Legislation except the types have been mentioned in Article 7 paragraph (1) of the Law Number 12 of 2011 concerning on the Establishment of Legislation. Those are regulations which stipulated by the People's Consultative Assembly, the House of People's Representatives, Regional Representatives Board, Supreme Court, Constitutional Court, Indonesian Supreme Audit Institution, Judicial Commission, Bank of Indonesia, Minister, agency, institution or commission which established by Law or Government Regulation in Lieu of Law, Provincial House of People's Representatives, Governor, Regency / City House of People's Representatives, Regents / Mayors, Village Heads or equivalent. In Article 8 paragraph (2) of the Law on Establishment of Legislation, those regulations are recognized and have binding and legal force as they are ordered by higher legislation or established based on legal authority.

The order of legislation hierarchy is often associated with the teachings of Hans Kelsen regarding *Stuffenbau des Recht* or The Hierarchy of Law. Hans Kelsen argues that legal norms are tiered and multi-layered in a hierarchy of arrangements. A lower legal norm is sourced and based on higher norms. The higher legal norm is based at higher norm, and so on. The norm,

that cannot be sourced further and is hypothetical and fictioned, is called basic Norm (*Grundnorm*).[14]

Based on this definition, the lower level of norms should not conflict with a higher level of norms. Basic norms which are the highest norms in the hierarchy system are not formed by its higher norm but are determined in advance by the community as a Basic Norm. Basic Norm is a guide for the norms below it so that a Basic Norm is said to be pre-supposed.

Hans Kelsen's theory was developed by Hans Nawiasky in his book Allgemeine Rechtslehre. He argued that in accordance with Hans Kelsen's theory, a legal norm from any country is always layered and tiered. The norms below that apply are based and derived from higher norms, also higher norms are based and derived from more higher norms, up to the highest norm called Basic Norms. Hans Nawiasky also argues that the legal norms are not only multilayered and tiered, but they are also grouped.

Hans Nawiasky classifies legal norms in a country into four major groups, namely:

1. *Staatsfundamentalnorm* (State Fundamental Norms);
2. *Staatsgrundgesetz* (Basic / State Rules);
3. *FormellGesetz* ('formal' law);

[14] Hans Kelsen (1945) *General Theory of Law and State*, Russell & Russell, New York, p.35.

4. *Verordnung & Autonome Satzung* (Implementing rules & rules autonomous).[15]

The four groups of legal norms almost always exist in the arrangement of legal norms even though each state has terms and number of legal norms that are different in each group.

Based on Hans Kelsen's Stufenbau theory, Indonesia's legal structure consists of:[16]

1. The provision which contains basic norms;
2. Legislative provisions that define basic norms;
3. Provisions established by the government as a rule
4. Implementation provision; and
5. Organic provisions for operationalizing in detail the regulations
6. Regional government provision.

The legal norm system that applies in Indonesia is the same as the theory of Hans Kelsen, namely Stuffenbau Theory which generally can be grouped in four levels of legislation, called:[17]

1. *Staatsfundamentalnorm*: Pancasila (Opening of the 1945 Constitution);

[15] Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan*, Dasar-Dasar dan Pembentukannya, p. 27.
[16] Jimly Asshiddiqie & M. Ali Safaat, 2006, *Teori Hans Kelsen Tentang Hukum*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, p. 171.
[17] Yuliandri (2010) *Asas-Asas Pembentukan Peraturan Perundang-Undangan Yang Baik*, Raja Grafindo, Jakarta, p. 21.

2. *Staatsgrundgesetz*: Body of the 1945 Constitution, The Decree of the People's Consultative Assembly, and the State Administration Convention;

3. *FormellGesetz*: Law and Government Regulation in-lieu of Law;

4. *Verordnung & Autonome Satzung*: hierarchically from Government Regulations to lowest Regional Regulation.

The legal power of each statutory regulation is in accordance with the hierarchy of laws and regulations mentioned in Article 7 paragraph (1) of the Law on the Establishment of Legislation Regulations.

The theory on the hierarchy of the legislation according to Bagir Manan contains several principles, namely:

1. Lower level legislation must be sourced or have a legal basis from a higher level of legislation;

2. The contents or material of the lower level laws and regulation may not deviate or conflict with the higher level of laws and regulations, except if the higher laws are made without authority (*onbevoegd*) or exceed the authority (*deternement de pouvouir*).

3. The existence of mechanisms to maintained and guaranteed that principle is not violated.

B. Regional Regulation

Article 18 paragraph (1) of the 1945 Constitution states that the Unitary State of the Republic of Indonesia is divided into province and regencies or cities. Each province, district, and the city has a Regional Government which is regulated by Law. Regional Government is regulated in the Law Number 22 of 1999 concerning on Regional Government which produce a regional regulation. The existence of Regional Regulations is the form of authority delegation from the central government to the regional governments to manage themselves because in order to implement the Regional Government it needs further regulations in the form of Regional Regulations.

According to the Law No. 32 of 2004 concerning on Regional Government, Regional Regulation is a legislation that is formed by Regional House of People's Representatives and the Regional Heads both Province and Regency / City.[18] In accordance with the provisions of Law Number 12 of 2011 on Establishment of Legislation, it states that the Regency / City Regional Regulations are legislative regulations which established by the Regency / City Regional House of Representative by agreement with the Regent / Mayor.[19]

[18] The Law Number 32 of 2004 on Regional Government.
[19] The Law Number 12 of 2011 on Establishment of Legislation

Regional regulations are made based on the Act or further elaboration of the higher level legislation in order to perform the regional autonomy. In order to implement Regional Regulations and other applicable laws, the regional head enacts the regional head decision.[20] According to Bagir Manan, Regency / City Regional Regulations are legislation established by the House of People's Representatives Regency / City and approved by the Regents / Mayors. Those regulations regulate the interests of the society or governmental order which manages the functions of district/city government in the field of autonomy and the task of development.[21]

Regarding the scope of Regional Regulations, the Law Number 10 of 2004, states that Regional Regulations include:[22]

1. Provincial Regional Regulations are made by the Provincial House of People's Representatives together with the Governor.

2. Regency / City Regional Regulations are made by the Regency / City House of People's Representatives together with the Regent / Mayor.

3. Village Regulations or the same level regulation is made by the Village Representative Body together with the Village Head.

[20] Soebono Wirjosoegito (2004) *Proses & Perencanaan Peraturan Perundangan*, Jakarta: Ghalia Indonesia, p. 14.
[21] Bagir Manan, Op.Cit.
[22] The Law Number 10 of 2004 on Establishment of Legislation Article 7 paragraph 2.

The Establishment of Regional Regulation Program is an instrument that includes a legal planning mechanism. This is important to keep the regulations consistent with the objectives, underlying legal ideals, and in accordance with the direction of regional development.[23] Regional Regulation is one of the tools in order to carrying out social transformation and also democracy as an embodiment of regional communities. Regional Regulation is able to respond on the rapid changes and the current challenges in the era of autonomy and globalization. Therefore, it is create the good regional governance as part of sustainable development in the region.[24]

Regional Regulations as a form of Legislation is part of the development of a national legal system. Good regional regulations can be realized if it is supported by the right methods and standards. It is important to support good technical establishment of legislation, as stipulated in the Law Number 12 of 2011.[25]

The material content of this Regional Regulation is in the context of implementing regional autonomy and co-administration tasks and accommodating the special conditions of the region and/or further elaboration

[23] Eka N.A.M. Sihombing, *Journal Legislasi Indonesia*, Volume 13 (8), 2016, Regional Office of Ministry of Law and Human Rights in the North Sumatra, Medan, p. 288.

[24] Siti Masitah, 2014, Urgensi Prolegda dalam Pembentukan Peraturan Daerah, *Jurnal Legislasi Indonesia*, Volume 11 (4) December 2014, p. 427.

[25] Sofiana Hanjani, 2014, *Pelaksanaan Perda Kabupaten Sleman Nomor 11 Tahun 2004 tentang Penggunaan Fasilitas Pejalan Kaki (Trotoar) oleh Pedagang Kaki Lima di Sepanjang Kawasan UGM (Di Area RSUP Prof. Dr. Sardjito*), Undergraduate Thesis, Universitas Muhammadiyah Yogyakarta, Yogyakarta, p. 9.

of the higher legislation.[26] The contents of Regional Regulations are attribution material which is regulated in laws and regulations above.

In general, the material contained in the regional regulations is grouped into: general provisions; subject matter arranged; criminal provisions (if necessary); transitional provisions (if necessary); and closing conditions. The material content of regional regulations can regulate the existence of criminal provisions. However, based on Article 15, the Law Number 12 of 2011 concerning the Establishment of Legislation, the criminal provisions which are the subject matter of regional regulations are limited, namely, they can only regulate criminal provisions in the form of criminal penalties no later than 6 months in prison and a maximum fine of Rp.50,000,000.00.[27]

Establishment of Regional Regulations is a process of making Regional Regulations which basically started from the planning, discussion, preparation, formulation, discussion, approval, and enactment by dissemination technique. The discussion and ratification of the Regional Regulation Draft into Regional Regulations should be guided by the Laws and Regulations. In the formation of Regional Regulation it is necessary to have well preparation, including knowledge of material that will be regulated in Regional Regulations, knowledge of how to pour the content into Regional Regulations briefly and clearly with good and easily understood terminology,

[26] Muhammad Suharjono, "Pembentukan Peraturan Daerah yang Responsif dalam Mendukung Otonomi Daerah", *Jurnal Ilmu Hukum*, Volume 10 (19), February 2014, East Java, p.26

[27] Harry Alexander (2006) *Panduan Perancangan Peraturan Daerah Di Indonesia*, PT.XSYS Solusindo, Jakarta, p. 26.

arranged systematically without abandoning the procedures in accordance with the rules of Indonesian language in the preparation of the sentence.[28]

The process of establishing a Regional Regulation consists of three stages, namely:

1. The process of preparing a draft Regional Regulation which is a process of drafting and designing within the Regional House of People's Representatives or within the Regional Government (in this case the draft regional regulation initiative proposes). This process includes the preparation of initiative drafts, academic drafts and legal drafts;

2. The process of getting approval through a discussion process in the Regional House of People's Representatives;

3. The process of ratification by the Regional Head and the enactment by the Regional Secretary.

Aspects of authority are expressly required in the provisions of Article 1 of the Law Number 12 of 2012 the establishment of legislation states that "Legislation is a written regulation that contains generally binding legal norms and established or stipulated by state institutions or authorized officials through the procedures stipulated in legislation."

[28] Leo Agustino, "Pembatalan 3.143 Peraturan Daerah" *Jurnal Ilmu Pemerintahan*, Volume 3 (1), April 2017, University of Sultan Ageng Tirtayasa, Banten, p.14.

The authority to form a Regional Regulation is in the Regional Head and Regional House of Representatives. Regional regulations are stipulated by the Regional Head after obtaining approval from the Regional House of People's Representatives. Regarding the basis of the authority for the establishment of a Regional Regulation regulated in Article 18 paragraph (6) of the 1945 Constitution, it says that a regional government shall have the right to adopt regional regulations as well as other rules to implement autonomy and the duty of providing assistance.

In order to carry out the authority to form a Regional Regulation, the Minister of Home Affairs Regulation Number 80 of 2015 concerning the Establishment of Regional Legal Products states that the guarantee of legal certainty in establishing regional legal products requires definite guidelines, standard and methods. It is how to eliminate the conflict of regional regulation with the higher legislation, public interest and/or decency. This the Minister of Home Affairs Regulation Number 80 of 2015 was issued in order to implement the provisions of Article 243 paragraph 3 of the Law Number 23 Year 2014 concerning Regional Governments that give minister to regulate further on the standard of the guidelines on establishing regional regulation.

C. Conception of Roles

There are several role theories have been explained by experts, for example, a sociologist named Robert Park from the University of Chicago described that society has the role to organize, integrate, and direct the strengths of individuals into various functions. Throughout this role, people are aware of who they are. They may be classified as a child, parent, teacher, student, male, female, Islamic, Christian and so on. The concept of people depends on people's role in society. So, it is necessary to go further in learning role theory.

The role is an orderly series that is caused by a position. People as social beings have a tendency to live in groups. In group life, there are interactions among members within the community. The growth of interaction among members is interdependent. In that community, people's life is called a role. It is a dynamic process of status. If a person exercises his rights and obligations in accordance with his position, he carries out a role. The difference between position and role is in the interest of science. Both cannot be separated because one depends on the other and vice versa[29]

Roles in general has similar meaning with the work capacity or ability of the institution or employee. In the theory of factor or indicator, the ability of employees is influenced by knowledge and skill factor. This is also

[29] Bruce J. Bidlle and Edwin J. Thomas (1966), *Role Theory: Concept and Research*, John Wiley and son, inc., Ney York

supported by Keith Davis' opinion as seen in Mangkunegara which stated that knowledge and skill are needed to formulate an ability. Psychologically, the ability of employees consists of potential abilities and reality abilities. As the consequences, employees who have above average ability with adequate education or knowledge in carrying out their jobs during daily work are going to be easier to achieve the expected performance. Therefore, employees need to be placed in jobs that are in accordance with their expertise (the right man in the right place, the right man on the right job)[30].

Based on the explanation above, it can be interpreted that a role is associated with the task of the Ministry of Law and Human Rights Regional Office. The role here does not mean as individual rights and obligations, but it means the task and authority of the Ministry of Law and Human Rights Regional Office.

D. Ministry of Law and Human Rights

The Ministry of Law and Human Rights is one of the ministries which is formed to assist the tasks of the President (executive) related to the implementation of government duties in the field of law, and also concerning the substance and legal system and its development. Government duties in the field of law include a very strategic role to actualize the functions of law, enforce the law, create a legal culture, and form legislation that is fair,

[30] Riduwan (2002), *Skala Pengukuran Variabel-variabel Penelitian,* Alfabeta, Bandung, p.35.

consistent, non-discriminatory, not gender-biased and paying attention to human rights.[31]

Regional Offices as an extension of the Ministry of Law and Human Rights act as legal advisers as well as coordinators of harmonization and synchronization of draft laws and regulations in the regions. It can be seen from the provisions of Article 2 paragraph (3) point 24 of the Government Regulation Number 25 of 2000 which states that part of the authority of the Minister of Justice and Human Rights is carried out by the Regional Office of the Department. Therefore, decisions taken regarding regional regulations are also the responsibility of the Regional Office.

[31] Suhariyono (2007) *Peranan Kantor Wilayah Departemen Hukum dan Hak Asasi Manusia Dalam Penyusunan Prolegda,* Dalam Bimbingan Teknis Proglam Legislasi Daerah, Jakarta, p.41.