



REVIEW ARTICLE

DELEGATION TO REGULATE IN THE GOVERNOR REGULATION ON CULTURAL PRESERVATION
AND ENVIRONMENTAL PROTECTION FOR BALINESE CULTURAL TOURISM

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ABSTRACT

In Bali province, tourism is one of the leading sectors in addition to agriculture as well as small and medium industries. Tourism in Bali has grown and developed in such a way hence makes big contributions to regional development and Balinese people. Provincial Government develops tourism in the form of cultural tourism which constitutes the delegation to regulate in the form of Regional Regulation and Governor Regulation. The delegation to regulate in the Governor Regulation on cultural preservation and environmental protection for Balinese cultural tourism is based on Balinese culture specifically the Hinduism teachings and the philosophy of *Tri Hita Karana*. In relation to that, such bases are used to actualize tourism in Bali furthermore creates a reciprocal dynamic relationship between tourism and culture that makes them evolve in synergy, harmony and sustainable in order to provide welfare to the society as well as cultural and environmental sustainability.

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INTRODUCTION

As the major leading sector in Bali tourism contributes to the regional development and the Balinese people both directly and indirectly. Tourism is the overall activities related to tourism and is multidimensional and multidisciplinary emerging as a manifestation of the needs of everyone and the countries as well as the interaction between tourists and the local community, fellow travellers, Government, Local Government, and employers. The development of this sector is part of steps in creating society welfare through a well prepared planning. In such planning activity, legal instruments are therefore needed as legal basis. In the local government level the legal instrument used is the Regional Regulation and the Head of Regional Regulation. Such legal instruments show the presence of the delegation of authority. The paradigm of the delegation of authority in the Laws and Regulations making process (*delegatie van wetgevingsbevoegdheid*) is the delegation of authority to make Laws and Regulations conducted by the higher Laws and Regulations towards upon the lower Laws and Regulations. In Article 246 paragraph (1) of Law No. 23 of 2014 on Regional Governance (hereinafter called as the Law on Regional Governance) provides that to carry on the Regional Regulation or on the authority of Laws and Regulations, the Head of Regional issues the Head of Regional Regulation.

Pursuant to Article 1 number 26 of the Law on Regional Governance, such Head of Region Regulation refers to the Governor Regulation and the Regent/Mayor Regulation. The provision of Article 8 paragraph (2) of Law No. 12 of 2011 on the Making of Laws and Regulations states (hereinafter referred to as the Law on the Making of Laws and Regulations) stipulates that "The laws and regulations as referred to in paragraph (1), its existence is recognized and has legal binding power as long as ordered by the higher Laws and Regulations or formed based on the authority". Various attempts were made by the Provincial, Regency/City and the whole society in Bali to develop local potentials to make domestic and foreign tourists remain interested in visiting this island of Gods. As mentioned previously, tourism developed in Bali is a cultural tourism which becomes one of the distinctive uniqueness compared to other destinations in Indonesia. Determination of the cultural tourism development in accordance with the Regional Regulation of Bali Province No. 2 of 2012 on Balinese Cultural Tourism which replaces the Regional Regulation of Bali Province No. 3 of 1991 on Cultural Tourism is considered to be no longer compatible with the policy of national tourism as stipulated in the Law No. 10 of 2009 on Tourism. Article 32 of Regional Regulation of Bali Province No. 2 of 2012 on Balinese Cultural Tourism provides authority related to the delegation to regulate in the form of Governor Regulation. Based on this delegation to regulate, therefore the Provincial Government of Bali issued the Governor Regulation No. 58 of 2012 on Program of Cultural Preservation and Environmental Protection (Heritage

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and Protection) jo. Governor Regulation of Bali Province No. 41 of 2013 on the Amendment of the Governor Regulation No. 58 of 2012 on Program of Cultural Preservation and Environmental Protection (Heritage and Protection) For Balinese Cultural Tourism. Such Governor Regulation is an effort to preserve and protect the values of Balinese culture from any repercussions due to the rapid development of tourism. Based from the above aforementioned, it is noted that the regulation on Balinese culture is really important to be studied therefore this article further discusses the delegation to regulate in the Governor Regulation on cultural preservation and environmental protection for Balinese cultural tourism.

Delegation to regulate

The ontology of the delegation to regulate is the Governor Regulation which is issued to perform the Local Regulation or on the authority of the Laws and Regulations or in any other figures. The Epistemology that is used moves from the blurred norm by using normative legal research. Axiology placed on the existence of the Governor Regulation as a form of delegation of the Regional Regulation and on the authority of Laws and Regulations within the framework of certainty, usefulness and justice. In general, the Regional Regulation contains norms or rules that must be obeyed by both the government apparatus itself and its citizens (I Wayan Parsa, 2009, p.3). In the view of Gustav Radbruch, the legal validity can be seen from the 3 (three) following matters:

- *philosophical validity* (Kurt Wilk, 1950).
- *Sociological doctrine of validity* (*Ibid.*).
- *Juridical doctrine of validity* (*Ibid.*).

The view of Gustav Radbruch shows that delegation to regulate requires the existence of validity bases which are philosophical validity, sociological validity and juridical validity in order to fulfill the delegation to regulate. Based on the theory of the delegation to regulate, in addition to the provision on the delegation of authority to regulate, can be used as a platform to discuss the issues concerning the Governor Regulation to implement a Regional Regulation and on the power of Laws and Regulations as well as the Regional Regulation itself, with regard to the matter in question, there is no provision on the delegation of authority to regulate in the form of Governor Regulation. Regulate is a rule or rules of conduct to regulate which composed of: regulation (*Regeling*) can be found in the Laws and Regulations (*algemeen verbindende voorschriften*), internal regulations which enforcement is for internal matters (*interne regelingen*) and policies (*beleidsregel*) (Hamid S. Attamimi, 1993). The delegation of authority in the making of Laws and Regulations (*delegatie van wetgevingsbevoegdheid*) is the delegation of authority to make Laws and Regulations performed by the higher Laws and Regulations to the lower Laws and Regulations.

Actually, the delegation of authority in the making of Laws and Regulations constitutes an order from the higher Laws and Regulations to the lower Laws and Regulations in accordance with the hierarchy of Laws and Regulations. Such delegation is often to be done because there are things that cannot be defined directly in the higher Laws and Regulations due to its

nature which easily to be changed or too technical. Heinrich Triepel defines delegation as:

Under delegation im Sinne des offentliche Rachtverstehe ich den Rechtsakt, durch dender Inhaber einer staatlichen order gemeindliehen Zustandigkeit, also der Staat, die gemeinde selbst order einen der Staats, der Gemeindeorgane seine Komptetenz ganz orderzum teil auf ein anderes subject ubertgt (Latiet, Mustamin, Abdul et al., 2004).

(free translation: delegation within the meaning of public law is the legal action of party who holds the state authority therefore the state or municipal is delegating its competence, wholly or in part to the other legal subjects). Based on such understanding, delegation means a shifting of competence and even including the details, delegating and receiving of an authority, both on the will of the party who delegates that authority. The party who performs delegation shall have a present authority which is trusted meanwhile the party who receives such delegation also has the authority which is expanded to what is being delegated. Basis of the authority and the substance is a benchmark in a delegation in the sense that not all the substance must be formally regulated in the Laws, but the Laws in question can delegate legislation to the lower Laws and Regulations that is lower (delegated legislation).

However that does not mean there is no limit of delegation, as Bagir Manan and Kuntana Magnar limit the delegation into as follows:

- Regulation of delegation of a substance of the Laws and Regulations can only be determined by Laws;
- Sometimes, the principle of there should be no sub-delegation upon the regulation of delegation (*delagatus non potest delegare*) is valid;
- Certain material substance should not be delegated by Law as an organic Law;
- The substance of a delegation regulation can only regulate the delegated matters and shall not conflict with the other higher Laws and Regulations. Therefore, the form of and the scope of the delegation regulation shall be clearly regulated in the Laws that give such delegation. If the material substance of the delegation is beyond the material substance of delegation, therefore the regulation in question is *null and void* (*van rechtswegw nietig, void*) as it is determined by the officials or institutions that are not authorized (Bagir Manan & Kuntana Magnar, 1997).

In the Annex of the Law on the Making of Laws and Regulations, Chapter II Specific Matters, Sub Chapter A the Delegation of Authority, on its Article 198 stipulates that the higher Laws and Regulations can delegate the authority to regulate furthermore to the lower Laws and Regulations. According to Article 200, the delegation of authority to regulate shall contain explicitly:

- The scope of the regulated substance; and
- The type of the Laws and Regulations.

Based on the explanation above, there are two important things to be noted as follow:

- There should be no delegation to regulate which nature is general. Every delegation to regulate shall mention explicitly the principal points set out in the delegation Laws and Regulation. For example is that the regulating of the organizational structure and working procedures and so on are to be mentioned. With regard to such mere mention, for example, matters that are not quite set out in this Law shall be further regulated in the implementing Regulations (Government Regulation, Presidential Regulation, Governor Regulation and so on).
- Each provision of the delegation to regulate shall mention explicitly the form of the delegation Laws and Regulations.

Delegation to regulate in the governor regulation on cultural preservation and environmental protection for balinese cultural tourism

Article 18 paragraph (1) of the 1945 Constitution of the Unitary State of the Republic of Indonesia regulates that “The Unitary State of the Republic of Indonesia shall be divided into provinces and those provinces shall be divided into regencies and municipalities, each of which shall have regional authorities which shall be regulated by Law.”

In relation to Regional Governance, Article 1 number 2 of the Law on Regional Governance stipulates that, “Local Government is the implementation of government affairs by the regional government and People’s Legislative Council of the Region in accordance to the autonomy principles and duty of assistance with the principle of broadest autonomy within the system and the principle of the Republic of Indonesia as stipulated in the 1945 Constitution of the Unitary State of the Republic of Indonesia”.

In this context, governance can be defined as a process or the entire system and mechanism of governance. Thus the word government has narrower scope of definition than the word governance. The meaning of government can be said to refer only to the executive institution in order to implement the national and local Laws and Regulations which contain the state policy in a region and regional governance policy. The executive function, historically, is associated with the function to implement regulations that contain normative rules (Jimly Asshiddiqie, 2006, p.293).

Article 65 of the Law on Regional Governance stipulates the duties and authorities of a Head of Region as follow:

In carrying out the duties referred to in paragraph (1) the Head of Region has authorities to:

- Submit the draft of Regional Regulation;
- Issue a Regional Regulation which jointly approved by the People’s Legislative Council of the Region;
- Issue the Head of Region Regulation and the Head of Region Decision;
- Take certain action in urgent circumstance which is needed by the Region and/or the society;
- Carry out other authorities in accordance with the provisions of the Laws and Regulations.

In the regulatory order, the authority to make is in the hand of the Head of Region. The basis of the Head of Region’s authority as such according to Article 246 paragraph (1) of the Law on Regional Governance is as follow: In order to implement the Regional Regulation or on the authority of the Laws and Regulations, the Head of Region issues the Head of Region Regulation. From the provision of Article 246 paragraph (1) as such, then the legal products that can be made by the Head of Region is the Head of Region Regulation. The Head of Region Regulations has function to regulate matters which are general in nature. Furthermore, there are four patterns of the delegation of authority to regulate to be showed below. These patterns are seen from the standpoint of materials that are delegated in the further delegation (sub-delegation). Those four are as follow:

- **The first pattern:** If part of the basics of the delegated substance is already set out in the Laws and Regulations that delegate it but such substance shall only be regulated in the delegated Laws and Regulations and cannot be further delegated to the lower Laws and Regulations (sub-delegation), hence uses the phrase as follows: further provision concerning... is regulated with... (number 201 of the Appendix of the Law No. 12 of 2011 on the Making of Laws and Regulations).
- **The second pattern:** If part of the basics of the delegated substance is already set out in the Laws and Regulations that delegate it but such substance is allowed to be furthermore delegated (sub-delegation) hence uses the phrase as follow: further provision concerning... is regulated with or based on... (Number 202 of the Appendix of the Law No. 12 of 2011 on the Making of Laws and Regulations).
- **The third pattern:** If the delegated substance has not been regulated yet in the Laws and Regulations that delegate it and such substance shall only be regulated in the delegated Laws and Regulations and cannot be further delegated to the lower Laws and Regulations (sub-delegation) hence uses the phrase as follow: provision concerning... is regulated with... (Number 203 of the Appendix of the Law No. 12 of 2011 on the Making of Laws and Regulations).
- **The fourth pattern:** If the delegated substance has not been regulated yet in the Laws and Regulations that delegate it and such substance shall only be regulated in the delegated Laws and Regulations and such substance is allowed to be furthermore delegated (sub-delegation) hence uses the phrase as follow: provision concerning... is regulated with or based on... (Number 204 of the Appendix of the Law No. 12 of 2011 on the Making of Laws and Regulations).

There are some important things need to be noted in relation to the patterns of the delegation of authority regulated in the Law on the Making of Laws and Regulations as explained above, namely:

- The explained patterns of delegation are means to control how the substance is regulated in the implementing regulations;
- The second and fourth patterns are the application of the principle of *delegates non potest delegari* (delegate

potestas non potest delegari) which means that the party who receives delegation is not authorized to delegate again without the consent of the party who grants the delegation. Delegation in the second and fourth patterns are indicating the agreement from the maker of the Laws and Regulations that granting the delegation;

- Such patterns of delegation also show that the delegation of authority to regulate shall be explicitly determined in the higher Laws and Regulations. Where the absence of such firmness, then there is no point in formulating the patterns of the delegation. The patterns of delegation as such exist because of the explicit provisions concerning the delegation of authority to regulate in the higher Laws and Regulations.
- Tourism business in the development of the Balinese cultural tourism shall fulfill three things, namely: (a) characterized by the Balinese culture; (B) has a vision to preserve Balinese culture; and (c) participates in the development of Balinese culture. The development of tourism destination shall be done by considering: (a) local wisdom as the Balinese belief that is based on *Tri Hita Karana* and inspired by Hinduism teachings; (b) the cultural preservation and environment, such as traditions, Balinese customs, and the rules on the environment; (c) the economic potential of the society such as providing the opportunity for local businesses both in the field of handicrafts and agricultural products to exhibit their works at the hotels, restaurants and other tourist attractions; and (d) the sustainability of tourism business.

The role of the *Desa Pekraman* (Customary Village) and other traditional institutions in the development of Balinese cultural tourism is to work together with the local government to prevent tourism activities that do not correspond to the cultural tourism in Bali. Nevertheless, the tourism policy which solely taken due to economic approach and which ignores the environment as well as the interests of local communities need to be anticipated. The concept of cultural tourism has indeed applied by the Balinese people, especially in the context of their daily cultural life in the community, such as implementing *silakrama* (daily meeting), ceremonial worship to God and the universe in their daily life, which all of it is proven by the perseverance of the Balinese society.

The agencies or tourism operators will do all sorts of efforts to be able to survive, develop its business in today's strict competition without considering the impact to be resulted in the future. Several bad results arise from such engagement which will bring negative influence to all parties are the emergence of environmental pollution caused by the nature of tourism business and the sanctity of holy places become tarnished. With regard to such matter, hence the concept of *Tri Hita Karana* plays an important and vital role to provide awareness to all operators or people who are involved in this tourism sector to think about how to maintain a balance between their businesses and the natural surroundings which will lead to a harmony in business and culture. *Tri Hita Karana* itself is the Balinese philosophy of life that includes three elements that create balance and harmonious relationship between human beings and God, human beings and human beings, as well as human beings and their environment is

source of prosperity, peace and happiness of human life. At first it may felt difficult to be understood, however, the concept of *Tri Hita Karana* will give a very broad guidance to people who are involved in tourism sector to embrace the harmony in tourism which is for the good of the future tourism in Bali. Thus this concept of *Tri Hita Karana* actually is not only can be used in the tourism sector but can also be used in other sectors as to thank God the creator of this world for this beautiful environment, society and peacefulness. Various tourism development activities often impact on the environmental degradation and culture, such as the conversion of agricultural land, soil and water pollution, environmental damage, and the modification of culture. Upon this condition, tourism is certainly required to provide more positive interactions and contribute to the natural and cultural preservation. Along with the trend of the global, regional and national community to get back to nature, the interest of the society to travel to places with beautiful of natural resource is getting bigger.

Such interest encourages the development of alternative tourism or tourism which promotes the values of natural, social and community values which allows local people and tourists to enjoy together the positive and beneficial interactions among them. Many of the forms of the alternative tourism as such have been developed in Bali. As examples are the agro tourism, spiritual tourism, rural tourism and ecotourism. Agro tourism is tourism activity that pays great attention to agricultural and plantation sectors such as the strawberry garden in Bedugul. Meanwhile spiritual tourism is a tourism activity which invites tourists to travel to the holy places for conducting spiritual activities like praying, yoga, meditation, concentration, and other terms in accordance with the beliefs of each people. Rural tourism is a tourism activity that brings tourists to enjoy the countryside as a place to rest, to study the visited region (such as learning to dance, painting, sculpturing) and to get different life experiences from their respective areas. The concept of the development of rural tourism is in line with a program called *Bali Mandara* which is initiated by the Governor of Bali to create 100 rural tourism in Bali. The development of rural tourism is considered to be one of the strategies in breaking the poverty cycle in the countryside. Ecotourism is a form of alternative tourism which pays great attention to the preservation of tourism resources or travelling with nature with responsibility by doing environmental conservation to improve the local welfare.

Those aforementioned principles concerning commitment and responsibility towards environmental conservation and cultural preservation; sensitive and respect the values of social, cultural and religious traditions of the local community; obey the applicable Laws and Regulations; its development is based on the approval of the local community through consultation; and well balanced as well as harmony management system are in accordance with the concept of *Tri Hita Karana*.

The scope of Balinese Cultural Tourism is part of the national tourism development which is outlined in 4 (four) clusters, namely:

Tourism Business: In the development of Balinese cultural tourism, tourism business shall fulfill three things, namely: (a)

characterized by the Balinese culture; (B) has a vision to preserve Balinese culture; and (c) participates in the development of Balinese culture. The development of tourism destination shall be done by considering:

- Local wisdom, for example Balinese belief that is based on *Tri Hita Karana* and inspired by Hinduism teachings;
- Cultural and environmental sustainability, such as traditions, Balinese customs, and the rules on the environment;
- The economic potential of the community as providing the opportunity for local businesses both in the field of handicrafts and agricultural products to exhibit their works at hotels, restaurants and other tourist attractions; and
- The sustainability of tourism businesses.

Destination

Bali Tourism Destinations is an integral tourism destination which consists of a number of regional tourism, special regional tourism attraction and other areas that have tourist attraction in accordance with the Spatial Plan of Bali Province.

Promotion: The promotion of tourism in Bali is performed by the Provincial Government together with the Regional Tourism Promotion Agency of Bali and Institutions/other agencies. Other than doing the promotion as such, the Provincial Government of Bali also promotes tourism in Bali through direct and indirect promotions. Examples of the direct promotions are joining events inside and outside the country, doing road show and conducting sales mission. Meanwhile the indirect promotions are done through the print and electronic media as well as the distribution of brochures.

Institutional: Tourism Institutional is institutional which establishment is facilitated by the government whose members consist of the private sector (where the finance is used to assist the development of Balinese Cultural Tourism). In order to support the development of a competitive tourism business, then Indonesia Bali Tourism Industry Association is established. Such establishment was independently conducted which membership is consisted of: (a) tourism entrepreneurs; (b) tourism business associations; (c) professional associations; and (d) Other associations that are directly related to tourism. Indonesia Bali Tourism Industry Association serves as a partner of the local government and a place for any communication and consultation of its members in the implementation and development of tourism in the form of activities such as: (a) establishing and enforcing a code of conduct of the Indonesia Bali Tourism Industry Association; (b) channeling the aspirations and maintaining harmony and the interests of its members in the framework of its participation in the development of tourism in Bali; (c) improving relations and cooperation between tourism entrepreneurs in Bali with tourism entrepreneurs in Indonesia and other countries for the purposes of tourism in Bali; (d) preventing unfair competition in the field of tourism; and (e) organizing service standards and quality control system of tourism industry in Bali. Delegation to regulate in the Governor Regulation No. 58 of 2012 on Program of Cultural

Preservation and Environmental Protection (Heritage and Protection) jo. Governor Regulation of Bali Province No. 41 of 2013 on the Amendment of the Governor Regulation No. 58 of 2012 on Program of Cultural Preservation and Environmental Protection (Heritage and Protection) For Balinese Cultural Tourism regulates that preservation and protection are all efforts to maintain and protect the values of the Balinese culture of repercussions caused by the rapid development of tourism. According to the above Governor Regulation, "Balinese Cultural Tourism" is Balinese tourism that is based on Balinese culture spirited by the teachings of Hinduism and the philosophy of *Tri Hita Karana* as main potential. In relation to that, such bases are used to actualize tourism in Bali furthermore creates a reciprocal dynamic relationship between tourism and culture that makes them evolve in synergy, harmony and sustainable in order to provide welfare to the society as well as cultural and environmental sustainability. Article 2 of the Governor Regulation as such stipulates that the Cultural Preservation and Environmental Protection for Balinese Cultural Tourism aim to:

- preserve and protect the art, culture and the environment from the impact of tourism development;
- provide safety, comfort and protection for foreign tourists during their visit in Bali;
- increase the number of tourist arrivals to Bali;
- related to the preservation of cultural, environmental and health insurance for foreign tourists then levy is implemented to foreign tourists that visit Bali; and
- Protect the safety of the foreign tourists that visit Bali.
- The scopes of such cultural preservation and environmental protection (Heritage and Protection) for Balinese cultural tourism are including guarantee of the Balinese culture preservation; guarantee of the environmental preservation; and guarantee of safety insurance for foreign tourists that visit Bali. The guarantee of the Balinese culture preservation includes efforts in the preservation of Balinese culture in relation to the occurred impact. Such efforts are as follows: (a) Governor coordinates with people who are engaged in tourism sector in preserving Balinese culture; (b) Governor provides guidance to the public; (c) Governor provides protection towards Balinese culture in accordance with the authority he owns. In addition to those three, the Provincial Government may cooperate with third parties in order to fund the preservation of Balinese culture. Guarantee protection Cultural Preservation Program and the Environmental Protection includes protections : (a) any foreign tourists that visit Bali receive security protection therefore they feel comfort in Bali; (b) protection of such safety and comfort is set in the form of insurance; (c) regarding the insurance, the provincial government cooperates with companies that engaged in insurance sector based on the Program of Cultural Preservation and Environmental Protection (Heritage and Protection) for Balinese Cultural Tourism conducted by the Head of Bali Provincial Tourism Office.

Conclusion

Based on the aforementioned explanation, Governor Regulation is form of delegation to regulate from the Regional

Regulation which is explicitly delegated by the Regional Regulation to Governor Regulation. Delegation to regulate in the Government Regulation of Bali Province on Cultural Preservation and Environmental Protection (Heritage and Protection) is an effort to preserve and protect the values of Balinese culture from the rapid impacts of tourism in Bali. The Balinese cultural tourism is actually based on the Balinese culture which is spirited from the Hinduism teachings and the concept of *Tri Hita Karana* (relationship between human beings and God, human beings and human beings, human beings and environment) which goals are to create reciprocal dynamic relationship between culture and tourism while protecting and maintaining them as well as to provide welfare to community. As suggestion, all interested parties and community are encouraged to conduct cultural preservation and environmental protection to prevent any bad impacts that may be occurred from tourism activities. Last but not least, the regional governments shall also develop and improve their coordination to other tourism entrepreneurs in preserving Balinese culture.

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