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The Duality of Administrative and Communicative Powers in Legislative Drafting: Evidence from East Java

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Abstract

The classical legal concept within executive and legislative scopes is no longer adequate to help understand the strategic measures taken by the Provincial Government of East Java and the potential of communicative actions of the DPRD of the Province of East Java. The making of autonomous regulations tends to be exclusive and overlooks the involvement of the public as the origin from which the procedures of legislative drafting began. The legal thought introduced by Habermas came as a solution to legislation-related issues, but it seems to be accepted only by the dialogue between legislators and the executive body. This article aims at analyzing the interaction that takes place between discourse theory and the duality of administrative and communicative powers by Habermas relating to the strategic measures taken by the Provincial Government of East Java. A normative-juridical method was used, involving the literature study of legal concepts and the data revealing the performance of the Legal Bureau of the Provincial Government of East Java. Communicative measures exist in the construction of autonomous regulations while facilitating

measures and evaluations of autonomous regulations set by the regency or municipality represent a strategic example.

KEYWORDS *Habermas, Discourse Theory, Legislative Drafting, Administrative Power, Communicative Power*

Introduction

Legislative drafting often reflects the public interest and state power¹ through legal terms. Legal drafters hold dual roles as both the subject of legal drafters and parties to which legislation is addressed. In the technical scope of the government in terms of decentralization and regional autonomy, legal drafters are facing theoretical hurdles when the origin of draft legislation mostly and technically comes from the executive body instead of the legislative one. Ideally, legislative programs are sourced from the legislative body rather than the executive one.² The executive body sets administrative programs as mandated by rules.³ Legislative drafters serve the legislative body, not the executive one while it builds the perspective believing that the rules made are addressed to the drafters per se.

The classical legal theory introduced by Jean Jacques Rousseau (1950)⁴ held a concept implying that executive parties are symbolically described as active leaders like a king, but they remain passive like a state. The core of Rousseau's idea explains that the government can fulfill its right when it orders with the consent of those being ordered. Public sovereignty acts more like a source of authority to give order to the members of the public as outlined in the

¹ Sidik Sunaryo, "Formal Genus of the Value of Justice in Indonesia," *Legality: Jurnal Ilmiah Hukum* 29, no. 2 (June 2021): 223–36, <https://doi.org/10.22219/ljih.v29i2.16609>.

² Fahmi Afrizal Kaisupy, Wahab Tuanaya, and Marno Wance, "Peran Anggota Legislatif Dalam Pembuatan Peraturan Daerah Kabupaten Seram Bagian Barat," *Moderat: Jurnal Ilmiah Ilmu Pemerintahan* 6, no. 2 (2020): 410–35, <https://doi.org/10.25157/moderat.v6i2.3411>.

³ Shohib Muslim et al., "The Meaning of "strength Executive" in the Constitutional Court Decision for the Execution of Fiduciary Securities," *Legality: Jurnal Ilmiah Hukum* 31, no. 1 (March 19, 2023): 1–20, <https://doi.org/10.22219/LJIH.V31I1.23244>.

⁴ Jean-Jacques Rousseau, *The Social Contract and Discourses*, GDH Cole (Editor) (New York: E.P. Dutton and Company, Inc, 1950).

legislation.^{5,6,7} The executive body lies in paradoxical behavior,⁸ which shows an active action of setting the programs to allow for the drafting of legislation as the practice of giving order to the public and passive responses to political aspirations gained from the legislative.

John Locke in *The Second Treatise of Government* (1824) shared classical legal theory implying that legislation expresses the intention of the legislative body, but it seems to have shifted away from facts.⁹ Within a national scope, the origin of legislative drafting mostly comes from civil servants and other sources, including political parties, non-governmental organizations at a regional scope, and civilians.¹⁰

Furthermore, the main problem of legislative drafting lies in crafting clear, comprehensive, and effective laws while also adapting to evolving societal needs and legal contexts.^{11,12,13} Challenges often encountered in legislative drafting include: 1). Complexity and Length: Legislation can become overly complex and lengthy, making it difficult for lawmakers, legal professionals, and the public to understand and interpret. Long and convoluted laws may lead to ambiguity, loopholes, and unintended consequences; 2). Clarity and Precision: Legislative language must be precise and unambiguous to ensure consistent interpretation and application. Ambiguities or vague terminology can lead to confusion, disputes, and legal challenges; 3). Consistency and Coherence:

- 5 Saikho As'ali, "Kewenangan Penerbitan Akta Perceraian Bagi Yang Beragama Islam," *Mimbar Keadilan*, September 2018, <https://doi.org/10.30996/mk.v0i0.1607>.
- 6 Ryan Muthiara Wasti, "Pengaruh Konfigurasi Politik Terhadap Produk Hukum Pada Masa Pemerintahan Soeharto di Indonesia," *Jurnal Hukum & Pembangunan* 45, no. 1 (February 2016): 76, <https://doi.org/10.21143/jhp.vol45.no1.10>.
- 7 Ilham Dwi Rafiqi, "Criticisms toward the Job Creation Bill and Ethical Reconstruction of Legislators Based on Prophetic Values," *Legality: Jurnal Ilmiah Hukum* 29, no. 1 (March 2021): 144–60, <https://doi.org/10.22219/ljih.v29i1.14991>.
- 8 Martin Lodge and Kai Wegrich, "The Rationality Paradox of Nudge: Rational Tools of Government in a World of Bounded Rationality," *Law & Policy* 38, no. 3 (July 2016): 250–67, <https://doi.org/10.1111/lapo.12056>.
- 9 John Locke, "Economic Writings and Two Treatises of Government [1691]," *The Works of John Locke in Nine Volumes*, (London: Rivington, 4 (1824).
- 10 Ann Seidman, Robert B Seidman, and Nalin Abeyeskere, *Penyusunan Rancangan Undang-Undang Dalam Perubahan Masyarakat Yang Demokratis: Sebuah Panduan Untuk Pembuat Rancangan Undang-Undang* (Elips, 2002).
- 11 Sholahuddin Al-Fatih et al., "Understanding Delegated Legislation in The Natural Resources Sector," *BESTUUR* 11, no. 2 (December 19, 2023), <https://doi.org/10.20961/BESTUUR.V11I2.78125>.
- 12 Sholahuddin Al-Fatih et al., "The Hierarchical Model of Delegated Legislation in Indonesia," *Lex Scientia Law Review* 7, no. 2 (November 12, 2023): 629–58, <https://doi.org/10.15294/LESREV.V7I2.74651>.
- 13 Sholahuddin Al-Fatih et al., "Rethinking Delegated Legislation in Indonesian Legal System," *Jurnal Hukum Novelty* 14, no. 2 (December 27, 2023): 240–51, <https://doi.org/10.26555/NOVELTY.V14I2.A27517>.

6 Ensuring that new laws align with existing legal frameworks and international standards is essential for maintaining coherence and avoiding contradictions. Inconsistencies between laws or provisions can confuse and undermine the legal system's effectiveness; 4). Accessibility and Transparency: Laws should be accessible to the public and written in a way that is understandable to non-lawyers. Complex legal language and dense formatting can hinder access, public awareness and participation in the legislative process; 5). Flexibility and Adaptability: Laws must be flexible enough to accommodate changing circumstances and emerging issues. However, overly rigid or prescriptive language can impede adaptation and innovation, leading to outdated or ineffective regulations; 6). Stakeholder Consultation:¹⁴ Involving relevant stakeholders, such as experts, affected communities, and interest groups, in the drafting process is crucial for producing laws that address diverse perspectives and needs. However, balancing competing interests and incorporating feedback can be challenging; and 7). Political Considerations: Legislative drafting often involves navigating political dynamics, including competing interests, ideological differences, and partisan agendas. Striking a balance between political priorities and the public interest while maintaining the integrity of the legislative process can be a delicate task.¹⁵

Addressing these challenges requires skilled drafters with law, policy analysis, and communication expertise. It also requires robust consultation, review, and revision processes to ensure that laws meet their intended objectives and serve the interests of society as a whole, included in the drafting of regional regulations. In terms of regulation-making at a regional level, the productivity of Regional House of Representatives (henceforth referred to as DPRD) in making regional regulations is lower than that of the executives since there is a perspective believing that executives understand issues that need regulations better.¹⁶ The executive body demonstrates paradoxical attitude by facilitating and evaluating recommendations of the regulations proposed to the legislative body without any legitimation coming from the public recognizing the power it carries.

6 The concept of executive and legislative bodies seems inadequate to help understand the practices of autonomous regulation-making. In terms of the classical legal theory, regional governments are directly and theoretically seen as

13 14 Ibnu Sina Chandranegara, "Bentuk-Bentuk Perampangan Dan Harmonisasi Regulasi," *Jurnal Hukum IUS QUIA IUSTUM* 26, no. 3 (September 1, 2019): 435–57, <https://doi.org/10.20885/IUSTUM.VOL26.ISS3.ART1>.

12 15 Zaka Firma Aditya and Muhammad Reza Winata, "Rekonstruksi Hierarki Peraturan Perundang-Undangan Di Indonesia (Reconstruction of The Hierarchy of Legislation in Indonesia)," *Negara Hukum* 9, no. 1 (2018): 79–100, <https://doi.org/10.22212/jnh.v9i1.976>.

17 16 Widharto Ishak, "Analisis Kinerja DPRD Dalam Penyusunan Peraturan Daerah Kota Palu," *Katalogis* 4, no. 10 (2015).⁷

10 the executive and the DPRD as the legislative.¹⁷ The executive is theoretically understood as an implementer to a legislative order after the autonomous regulations gain validity and are open to public cognizance. In post-reform, the process of legislative drafting is not restricted to the relationship between the executive and legislative bodies, but it has also reached social complexity. The proposal of legislative drafting can be derived from communities that carry the vigor of advocacy of policy, DPRD, and regional government although the process of legislative drafting and the making of regional regulations at provincial or regency/municipal levels are lawfully under the authority of the DPRD.

6 Legislative drafting at a regional level has experienced transformation.¹⁸ Initially, it departed from political relations between regional governments and DPRD, further reaching rational actions taken by the public at a regional level. Public dialogues about regional regulation drafting of water resources, for example, can grow into public opinions and political aspirations to be further passed to the DPRD and regional governments simultaneously, thereby legitimizing consensus into autonomous regulations.

10 Jürgen Habermas introduced the term dualism of administrative and communicative powers.^{19,20} The implementation of the discourse theory of Habermas as an alternative to settle disputes²¹ represents relatively new legal knowledge never used to discuss legislation. Discussion on the legislation still refers to the perspective theory of legal systems introduced by Friedman,²² dispute resolution methods such as ROCCIPI (Rule, Opportunity, Capacity,

52 17 Hendra Wijayanto, "Transparansi Anggaran Pendapatan dan Belanja Daerah (APBD Melalui Penerapan E-Budgeting (Dalam Perspektif Teori Good Governance)," *The Indonesian Journal of Public Administration (IJPA)* 1, no. 1 (May 2015): 72–88, <https://doi.org/10.52447/ijpa.v1i1.79>.

50 18 Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Legality: Jurnal Ilmiah Hukum* 25, no. 2 (2017): 247–60.

7 19 Jürgen Habermas, "Faktizität Und Geltung. Beiträge Zur Diskurstheorie Des Rechts Und Des Demokratischen Rechtsstaats," *Tijdschrift Voor Filosofie* 57, no. 1 (1995).

66 20 Francisco Budi Hardiman, *Demokrasi Deliberatif: Menimbang Negara Hukum Dan Ruang Publik Dalam Teori Diskursus Jurgen Habermas*, vol. 4 (Kanisius, 2009).

29 21 Tri Harnowo, "Penerapan Teori Diskursus Habermas Sebagai Alternatif Penyelesaian Sengketa," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 32, no. 1 (February 2020): 55, <https://doi.org/10.22146/jmh.45145>.

31 22 S Sudjana, "Penerapan Sistem Hukum Menurut Lawrence W Friedman Terhadap Efektivitas Perlindungan Desain Tata Letak Sirkuit Terpadu Berdasarkan Undang-Undang Nomor 32 Tahun 2000," *Al Amwal (Hukum Ekonomi Syariah)* 2, no. 2 (2019): 78–94.

Communication, Interest, Process, and Ideology),²³ and normative legal principles in legislative drafting. The law concerning legislative drafting has not been fully understood as two-way communication between the members of the public and state power.²⁴

The legal thought of Habermas attempts to settle disputes in legislative drafting that is seemingly legitimated through the procedure of discussion between the legislature and executive body (Hardiman, 2009:89-123). First, the term administrative power does not position regional governments as the subjects that hold the authority to make laws, but they are rather related to one type of power apart from social actions. Administrative power is theoretically linked to strategic and professional ways involving administrative programs of lawmaking at the regional level to bring about collective objectives gathered from the members of the public. Second, the term communicative power does not position DPRD as a political unity that holds the power to make autonomous regulations without actively communicating with the public it represents. This power is theoretically linked to communicative actions taking place between the members of the DPRD, political parties, non-governmental organizations, and political aspirations representing the public in regional scope. Departing from the experience of the authors in managing the legislative mechanism in regional areas, particularly in the Legal Bureau of the Provincial Government of East Java, this research finding indicates that the Provincial Government of East Java has constructed the mechanism needed to draft regional regulations. From 2014-2018, there had been 66 (sixty-six) proposals for draft regional regulation. The Provincial Government of East Java (with 34 proposals) mostly proposed draft regional regulations, compared to the number of proposals submitted by the DPRD of the Province of East Java (22 proposals). The Provincial Government of East Java through the Legal Bureau has formed a team of facilitators responsible for organizing administrative activities to allow for corrective actions for the proposals regarding autonomous regulations at the regency/municipality level. Legislative processes in East Java do not expect normative argumentation believing that the DPRD as an executive body of the Province of East Java holds the highest power in regional legislative drafting or the executive body of the Provincial Government as the implementor of regional regulations. The facts regarding the administrative actions of the Provincial Government of East Java in constructing the

²³ Ni Putu Niti Suari Giri, "Lembaga Negara Pembentuk Undang-Undang," *Jurnal Komunikasi Hukum (JKH)* 2, no. 1 (February 2016), <https://doi.org/10.23887/jkh.v2i1.7283>.

²⁴ Dodi Jaya Wardana and Hasnan Bachtiar, "Public Participation in the Law-Making in the Digitalization Era," *Indonesia Law Reform Journal* 2, no. 3 (December 2022): 289–98, <https://doi.org/10.22219/ilrej.v2i3.23764>.

mechanism to make regional regulations will be more profoundly discussed in the discourse of the duality of administrative and communicative powers.

This research endeavors to explore the intricate interplay between administrative and communicative powers within the context of regional legislative drafting within the Province of East Java. Its primary objective is to advocate for legal drafters in autonomous regions to embrace the principles of autonomous legislative drafting, drawing upon the theoretical framework surrounding administrative and communicative powers as a novel conceptual lens.

The methodological approach adopted in this study is twofold, encompassing both a normative-juridical analysis and a legal-empirical inquiry²⁵, with a conceptual framework²⁶ informed by the discourse theory pioneered by Habermas. Secondary data were sourced empirically, primarily derived from the operational activities of the Legal Bureau of the Provincial Government of East Java. This dataset comprises statistical-descriptive information, supplemented by qualitative insights gleaned from discussions pertaining to regional regulatory proposals.²⁷

Through a meticulous conceptual analysis of legal principles, this research scrutinizes the secondary data, contextualizing it within the discourse on the duality of administrative and communicative powers. By elucidating empirical evidence, this study sheds light on the procedural intricacies inherent in the drafting of Regional Regulations within the East Java region.

Navigating Administrative and Communicative Powers: A Study of Legislative Drafting in East Java

The issue of regional regulation in East Java Province could encompass a range of concerns, from economic development and infrastructure to social welfare and environmental sustainability. Here are a few potential areas where regional regulation might pose challenges or require attention in East Java:

- 1). Economic Development: East Java is a significant economic hub in Indonesia, with manufacturing and agriculture industries. Ensuring regional regulations support and stimulate economic growth while balancing environmental concerns and social equity is crucial. Land use planning, business permits, taxation, and investment incentives may all fall under this category;

²⁵ Anom Surya Putra, "Ponggok: Inspirasi Kemandirian Desa: Menjelajahi Badan Hukum BUM Desa," *Yogyakarta: LKiS*, 2020.

²⁶ Sholahuddin Al-Fatih and Ahmad Siboy, *Menulis Artikel Karya Ilmiah Hukum Di Jurnal Nasional Dan Internasional Bereputasi* (Malang: Inteligencia Media, 2021).

²⁷ Sholahuddin Al-Fatih, *Perkembangan Metode Penelitian Hukum Di Indonesia*, 1st ed. (Malang: UMM Press, 2023).

2). Infrastructure Development: As one of the most populous provinces in Indonesia, East Java faces constant pressure to develop and maintain infrastructure to support its growing population and economy. This includes roads, bridges, ports, airports, utilities, and public transportation. Regional regulations must address infrastructure projects' planning, funding, and implementation while considering issues like land acquisition, environmental impact, and public safety; 3). Environmental Protection: East Java has diverse ecosystems, including forests, coastal areas, and agricultural lands. Balancing economic development with environmental conservation and sustainability is a significant challenge. Regional regulations must address deforestation, pollution, waste management, water resources management, and biodiversity conservation; 4). Social Welfare and Equity: Ensuring that economic development benefits are shared equitably among all residents of East Java is essential for social stability and cohesion. Regional regulations might need to address affordable housing, healthcare access, education, social assistance programs, and labour rights; and 5). Governance and Transparency: Transparent and accountable governance is critical for effective regional regulation. Ensuring that regulations are developed, implemented, and enforced fairly and consistently can help build trust between the government and citizens. This might involve enhancing transparency, public participation in decision-making, anti-corruption efforts, and capacity building for local government officials. Addressing these challenges requires collaboration among various stakeholders, including government agencies, businesses, civil society organizations, and communities. It also requires a careful balance between promoting economic development and ensuring long-term social and environmental sustainability.

The Provincial Government of East Java is principally pragmatic and tends to discover to what extent current regulations can be realized to reach collective objectives of the execution of regional autonomy and co-administration tasks. The government of East Java performs administrative activities that manage the teleological contents of law regarding lawmaking. This action focuses more on the success of bringing about collective objectives of the regional government in the constitution.

The collective objectives of the regional government represent the execution of regional autonomy and co-administration tasks according to:

- a. The fundamental norm of Article 18 paragraph (6) of the 1945 Constitution of the Republic of Indonesia implying that regional governments have the authority to set regional regulations and other regulations to execute regional autonomy and co-administration tasks.
- b. The authority given to a Regional Head to propose draft regional regulation and set the regional regulation that has been approved by the

10 DPRD as intended in Article 65 paragraph (2) point a and point b of Law
5 Number 23 of 2014 concerning Regional Government;

- 5 c. The execution of authority to make regional regulations governed in Law
16 Number 12 of 2011 concerning lawmaking that generally governs subject
20 matters and procedures in regional legislative drafting;
- d. The legal principles of Article 2, Article 3, and Article 9 of the Regulation
of Minister of Home Affairs Number 80 of 2015 concerning Legislative
Drafting at a Regional Level, stating that regulatory products in regional
areas include regulations and decrees in the form of a regional regulation,
a regulation of a regional head, joint regulations of regional heads, Decree
of DPRD, Decision of the Head of DPRD, and Decision of Honorary
Council of DPRD. Of all the types of regulatory products at the regional
level, regional regulations hold different qualifications as autonomous
regulations set by autonomous regional areas to perform the authority
centralized by the Central Government through Law concerning Regional
Regulation.

3 For a legitimate administrative practice, the Provincial Government of
3 East Java not only refers to the Law and its delegated laws containing collective
objectives of autonomous legislative drafting. The Provincial Government of
East Java serves as a governmental organization that changes collective decisions
regarding autonomous regulation-making from planning, drafting, discussion,
stipulation, promulgation, and public cognizance. All the stages required in
autonomous regulation-making in East Java indicate that the Provincial
Government of East Java articulates its power as:

- a. The capability to influence the will of the DPRD and the public in the
making of autonomous regulations; and
- b. The bureaucratic capability to mobilize the approval given by the DPRD
and the public to achieve collective objectives of executing autonomous
regulations and co-administration tasks.

Ideally, the scrutiny of draft autonomous regulations can take place
within the pragmatic discourse, meaning that the regional governments and the
public share equal rights and voices in autonomous areas to discuss the drafting
of autonomous regulations. They have the freedom to express their thoughts
honestly without any coercion²⁸ affecting the processes and procedures of
argumentation at planning, drafting, discussion, stipulation, promulgation, and
public cognizance (Figure 1. The Mechanism of Regional Regulation Drafting
as proposed in Provincial Government).

26 ²⁸ Catur Wido Haruni, "Constitutionality of Monitoring and Evaluation of Regional
Regulation Drafts and Regional Regulations by Regional Representative Council,"
Legality: Jurnal Ilmiah Hukum 30, no. 1 (April 2022): 103–15,
<https://doi.org/10.22219/ljih.v30i1.20532>.

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At the first stage—planning—the Provincial Government of East Java drafts the program to set regional regulation (henceforth referred to as Propemperda) as regulated in Article 11 to Article 13 of the Regulation of Minister of Home Affairs Number 80 of 2015 concerning Legislative Drafting at the Regional Level. The drafting of Propemperda starts with a written statement from a governor addressed to all instruments of the Provincial Government regarding the Table of Contents of Propemperda, which is further passed to the Legal Bureau. If these instruments propose a draft regional regulation, the Table of Contents should include the title of the draft, the main idea, and the subject matters regulated. Conversely, if no draft regional regulation is proposed, this Table of Content can be left blank. Following the submission of the Table of Contents to the Legal Bureau, a work meeting of the drafting of Propemperda takes place and is attended by regional instruments that submit the proposal for the draft. This meeting discusses the conception of the draft proposed in Propemperda. This meeting results in proposals for several draft regional regulations to be passed to the DPRD for a further process that yields the Decision of the DPRD regarding Propemperda as the final result.

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Second, in the drafting process, the Governor forms a drafter team responsible for drafting a regional regulation included in the Propemperda. Proposers must prepare academic drafts for regional regulations proposed regarding the amendment to particular regional regulations, regional budget, and revocation of regional regulations set forth in an explanatory draft. Drafters could also invite researchers and/or experts representing universities or mass organizations based on the need for the discussion on academic draft and draft regional regulation. In terms of pragmatic discourse, researchers and/or experts do not represent the public physically but they both take over public view to enable the academic draft and the draft regional regulation to meet the collective objectives of the regulations. In this case, the theory of legal discourse serves as the ice breaker to relax the rigidity of the procedure reflected in the physical presence of all power of political deliberation, in which the responsibility of researchers and/or experts must be rational and communicative for the sake of collective objectives.

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The chairperson of the drafters reports to the Secretary of the Province regarding the development and/or issues faced in the drafting process of the regional regulation for further hints and decisions. The chairperson reports the result of the drafting to the Legal Bureau for harmonization, rounding off, and conception stipulation. The result is then reported by the Legal Bureau to the Governor to be further passed to the DPRD for a deliberation process or discussion.

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Third, at the discussion stage, the draft regional regulation is further discussed by Provincial DPRD and the Governor to seek joint agreement. This process takes two session stages:

- 1) Stage-one session involves:
 - a. The explanation from the Governor in a plenary session on the drafting of a regional regulation
 - b. The general view given by factions regarding the draft regional regulation
 - c. The responses and/or answers given by the Governor to the general view of the factions; and
 - d. The discussion in a commission session, commission collaboration, or special committee together with the governor or an official appointed to represent the discussion.
- 2) Stage-two session involves:
 - a. Decision-making in the plenary session preceded by:
 - i) The submission of a report by the chairperson of the commission/the chairperson of commission collaboration/the chairperson of the special committee representing the views of the factions and the results of the discussion; and
 - ii) The oral request of approval from the members by the chairperson of the plenary session
 - b. The final thought of the Governor

In 2015, the draft regional regulations were submitted to the Minister of Home Affairs via the Directorate General of Regional Autonomy to provide required facilitators. These facilitators were provided by the Minister of Home Affairs through the Directorate General of Regional Autonomy within 15 days after a draft regional regulation was received. The draft proceeded to the two-stage session when no facilitators were provided.

Fourth, at the stage of validity/stipulation and promulgation, the governor must report the draft regional regulation proposed to the Ministry of Home Affairs no later than three days after the draft is received from the Provincial DPRD following the joint agreement given by both the Governor and DPRD. This stage takes place to obtain a registration number for the regional regulation proposed. The registered regulation is then signed by the Governor within thirty days after the draft is jointly approved by DPRD and Governor. The regional regulation signed by the Governor should proceed to an evaluation. If the governor does not sign the registered draft, this draft is considered valid as a regional regulation and must be promulgated in the Regional Gazette. The draft must be declared valid with the statement “perda ini dinyatakan sah” (this regional regulation is declared valid) given on the last page of the Regional Regulation before the Draft Regional Regulation is promulgated. The Regional Regulation with no registration number cannot be approved by the Governor and outlined in the Regional Gazette as the media

for the official publication of the Provincial Government of East Java, and it implies that a Regional Regulation holds legal force.

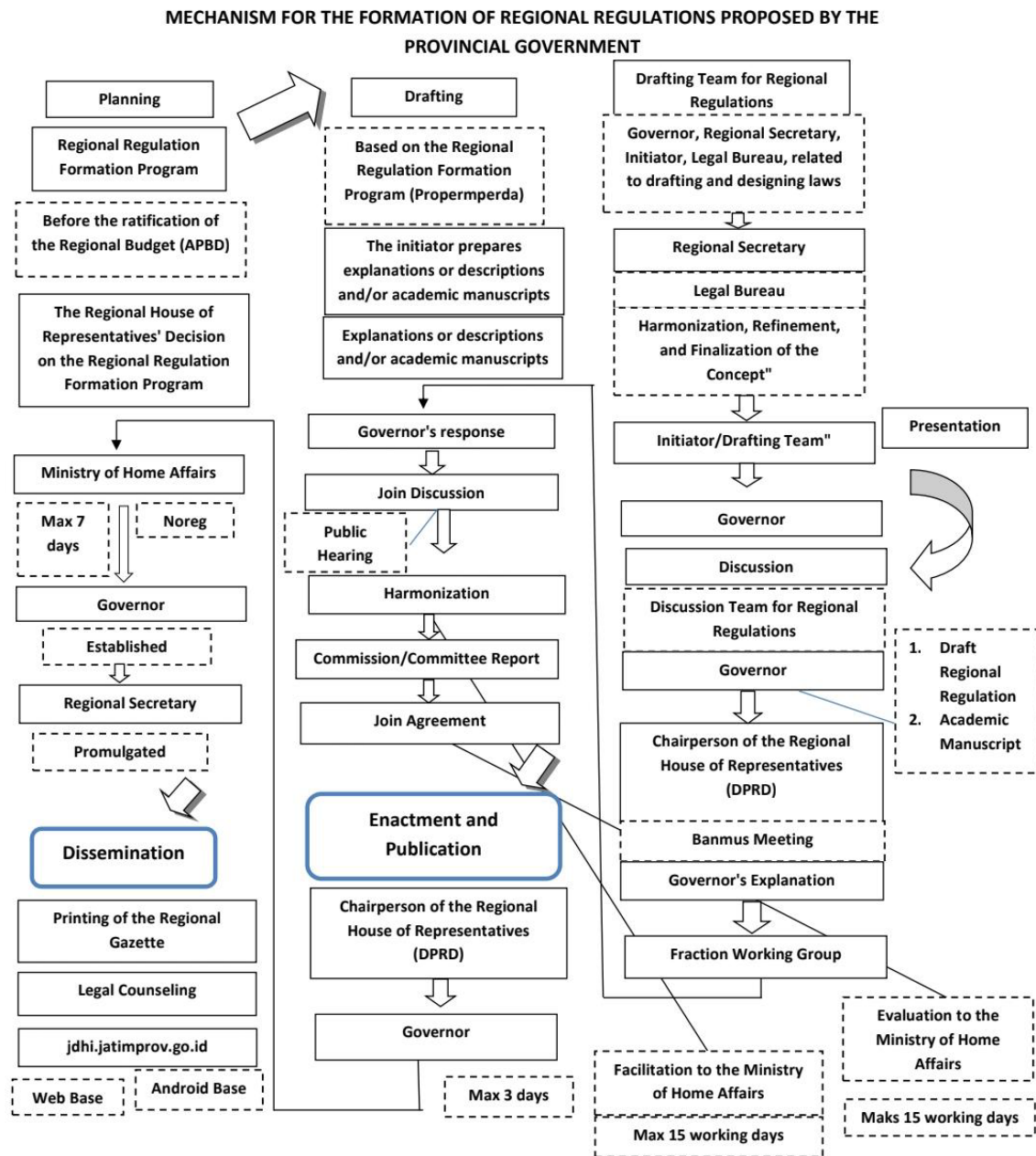


FIGURE 1. The Mechanism of Regional Legislative Drafting from the Proposal of Provincial Government

Fifth, in terms of public cognizance of the draft Regional Regulation, This public draft is the copy of the draft that has been authenticated and promulgated in the Regional Gazette and the Addendum to the Regional Gazette. The Regional Regulation is inserted in the documentation and law-related information network (JDIH).

All the stages of the legislative drafting in the Province of East Java, as explained earlier, provide a clear picture of the executive body as a political

60 institution responsible for lawmaking. In terms of collective objectives of regional autonomy and co-administration tasks, the executive body only represents part of this picture from the legislative body regarding lawmaking.²⁹ 3 The administrative tasks carried out by the Provincial Government of East Java should be aligned with strategic choices that allow the authority of the governor and DPRD to pragmatically communicate. The experience gained by the author working in the Legal Bureau of the Provincial Government of East Java brings further to the following theoretical reflections: 3

- a. The Legal Bureau operates as part of the administrative authority of the Provincial Government of East Java in maintaining the efficacy and precision of all the draft regional regulations;
- b. The Legal Bureau receives a mandate from the communicative power to remain active in doing strategic actions in response to the proposals for draft regional regulations not only within the scope of the Provincial Government but should reach further to the draft regional regulations from autonomous regency/municipality. 3

22 Thus, in terms of the mechanism of the deliberation on autonomy setting, the power of the Provincial Government and the Provincial DPRD of East Java is discussed as an executive body, while the legislative scope will be considered more with the action theory. The Provincial Government is considered an executive body that refers to administrative power. The actions taken in the legislation are referred to as strategic measures aiming to maintain the efficacy and precision of all the drafting of autonomous regulations. The power held by the DPRD is referred to as a legislative body intended to use communicative power, and all actions running in the legislation are referred to as communicative measures that delegate mandate to the executive body according to the process of deliberation that took place earlier, involving the consideration of all arguments raised by people in regional areas.

The executive body of the Provincial Government and legislative body representing the DPRD at a provincial level of East Java hold joint reference in communicative practices of setting autonomous regulations. The communicative power in an autonomous region contributes to legislative drafting in a pragmatic scope. Both the communicative and administrative powers are inseparable,³⁰ none is higher or lower than the other, and they are

17 ²⁹ Zainul Jumadin and Yusuf Wibisono, "Konflik Politik Antara Gubernur Dan Dprd Dki Jakarta Dalam Proses Penetapan APBD 2015," *Populis: Jurnal Sosial Dan Humaniora* 4, no. 2 (March 2021): 249, <https://doi.org/10.47313/pjsh.v4i2.698>.

21 ³⁰ Shafira Anindia Alif Hexagraha and Savitri Nur Setyorini, "Tinjauan Terhadap Konsep Keadilan Spasial Dan Partisipasi Masyarakat Dalam Perencanaan Dan Pengendalian Pemanfaatan Ruang Pada Program Normalisasi Ciliwung Di Provinsi DKI Jakarta," *Jurnal Hukum & Pembangunan* 49, no. 2 (2019): 349–75, <https://doi.org/10.21143/jhp.vol49.no2.2008>. 54

understood and not isolated from the demands of the public sphere, while the thoughts expressed by the public will grow further in the legislative program that takes place with the rsssrelated ties between communicative and administrative powers.

On the other hand, the responsibility held by the Provincial Government and the DPRD of the Province of East Java is not only restricted to formulating interests and transforming them into legal terms, but it also visualizes the sovereignty of the people as the practical fundament in the formulation of the legislative terms. Within such a context, setting legislation serves as a room for communication,³¹ sopinion-building, and political aspirations representing people and the consensus of related parties. This research attempts to reflect the leadership experience of the author in the Legal Bureau of the Provincial Government of East Java during which facilitation, evaluations, communication, and assistance to build autonomy regulations at the regency/municipal level take place.

Within the scope of the theory introduced by Habermas, the legislative body gains new insight by relating the discussion to the action theory. The regional governments at the regency/municipal level and the DPRD in regency/municipal areas in East Java seem to have effectively implemented the authority to make regional regulations at the regency/municipal level and this legislative drafting certainly involves public participation. The autonomous regulations set, produced, and enforced by the Regional Governments in both regencies and municipalities cannot be taken as an absolute truth although these absolute autonomous regulations always represent public sovereignty.³² This sovereignty is understood as the rationality of the formation of autonomous regulations between administrative and communicative powers, while the actions involve the ways political communication, facilitation, and evaluations are performed.

First, administrative and communicative powers are jointly binding in terms of conducting political communication as legitimated in Article 87 paragraph (2) of the Regulation of Minister of Home Affairs Number 80 of 2015, implying that the mentoring of legislative product drafting is given in the form of regeling (regulations) at regency/municipal level by the Governor. The Governor Regulation of East Java Number 35 of 2017 concerning the Mechanism of Facilitation in Draft Regional Regulation at the regency/municipal level of East Java is provided to legitimate facilitation-related

³¹ Saptono Jenar, "Analisis Penetapan Daerah Tertinggal Tahun 2020-2024 Dan Rencana Aksi Nasional Percepatan Pembangunan Daerah Tertinggal Tahun 2020," *Indonesia Law Reform Journal* 2, no. 1 (March 2022): 1–17, <https://doi.org/10.22219/ilrej.v2i1.19528>.

³² Abustan Abustan, "Implementasi Demokrasi Dan Legitimasi Penjabat Kepala Daerah Di Indonesia," *Indonesia Law Reform Journal* 2, no. 3 (November 2022): 274–87, <https://doi.org/10.22219/ilrej.v2i3.22202>.

practices with the rationality of public sovereignty. Since the initiation of the facilitation, the administrative and communicative powers have had a strategic consensus implying that the technocratic drafting of regional regulations at the regency/municipal level does not require any evaluations. This is to ensure that no impeding issues take place in the programs run in autonomous regions:

- a. Regional Long-Term Development Plan
- b. Regional Medium-Term Development Plan
- c. Regional Budget, Changes in Regional Budget, and Responsibility regarding the Spend of Regional Budget;
- d. Regional Taxes;
- e. Regional levies;
- f. Regional Spatial Planning;
- g. Industrial Development Plan; and
- h. Establishment, revocation, amalgamation, and/or transfer of the status of a village to sub-district, or sub-district to village.

Second, political communication of the facilitation begins with the submission of a proposal for the facilitation of draft regional regulation by local governments at the regency/municipal level, addressed to the governor through the Legal Bureau with the following attachment:

- a. Five copies of the draft Regional Regulation at the regency/municipal level;
- b. A copy of the report of Discussion approved with an original stamp on the drafting of Regional Regulation at the regency/municipal level between regional regulation drafters in the DPRD or Special Committee of the DPRD, or another name with the Head of Legal Division;
- c. The Decision of DPRD regarding the program of regional legislative drafting; and
- d. Academic draft.

Third, the facilitator establishment with the members involving the representatives of the Legal Bureau and Regional Instruments within the scope of the Provincial Government requires the team to:

- a. Set the schedule of the session on the facilitation of the regional regulation planning at the regency/municipal level;
- b. Hold the session on the facilitation of regional regulation planning at the regency/municipal level; and
- c. Draft the concept of the facilitation result of regional regulation planning at the regency/municipal level.

The facilitation requires the team to invite regents/mayors. The facilitation result is declared in the form of a letter issued by the governor concerned, setting forth the governor's recommendation stating that the substances and the materials of regional regulation planning in the regency/municipality:

- a. Do not contravene laws above them, public interest, morality, and do not impede investment in regional areas; or
- b. Contravene laws above them, public interest, and morality, and impede investment in regional areas.

In 2014, facilitators turned down or accepted the draft regional regulation of regency or municipality with normative grounds indicating that it contravened higher laws or the regional/municipal government did not hold any authority. These grounds might also be related to the implementation of task distribution to the responsible and concurrent government and the recommendation of regulation with the discretion of a regent/mayor concerned, instead of the autonomous regulation as a result of the consensus between the DPRD and the governments at regency/municipal level (Table 1. Dismissal of Regional Regulation Drafting 2014-2018 by Facilitators).

TABLE 1. Results of Analysis conducted by Facilitators regarding Draft Regional Regulation 2014-2018.

No.	Regency/Municipality	Draft Regional Regulation	Ground for Dismissal
64	Pamekasan Regency	Regional Regulation of Pamekasan Regency Number 17 of 2014 concerning Water Resource Management	Contravening the laws above it
57	Bangkalan Regency	Regional Regulation of Bangkalan Regency Number 5 of 2014 concerning the Management of Non-metallic Mineral and Rock Mining	Regency/Municipal Government that no longer holds authority
56	Pasuruan City	Regional Regulation of Pasuruan City Number 12 of 2015 concerning Settlement of Losses of Regional Areas	The substantive matters of the Regional Regulation of Pasuruan City Number 12 of 2015 concerning the settlement of Losses relevant to the substance of legislation and added only with the methods of settlement of
8	Jombang Regency	Draft Regional Regulation concerning Management of Zakat, infaq, Shodaqoh	The implementation of the management of zakat, infaq, shodaqoh under the Regent Regulation

No.	Regency/Municipality	Draft Regional Regulation	Ground for Dismissal
5	Mojokerto Regency	Regional Regulation of Mojokerto Regency Number 9 of 2015 concerning the Fifth Amendment to Regional Regulation Number 12 of 2008 concerning the Organization and Work Scheme of Inspectorate, Regional Development planning agency, and Regional Technical Agency of Mojokerto Regency	Management of or Changes in Regional Instruments to Run concurrent governmental administration that can be carried out after governmental administrative mapping as intended in Law Number 23 of 2014 concerning Regional Government
6	Pasuruan Regency	<ol style="list-style-type: none"> Regional Regulation of Pasuruan Regency Number 1 of 2016 concerning Village Asset Management Regional Regulation of Pasuruan Regency Number 3 of 2016 concerning Village Finance 	In accordance with the provision of Article 45 of the Regulation of Minister of Home Affairs Number 1 of 2016 concerning the Management of Village Assets stating that village assets are governed under Regent Regulation according to the provision of Article 43 of the Regulation of Minister of Home Affairs of 2014 concerning Village Finance stating that village finance is regulated under Regent Regulation
7	Trenggalek Regency	Riparian Zone	In accordance with Addendum point C of Law Number 23 of 2014 concerning Regional Regulation, indicating that regencies only have the authority to manage the natural resources within a regency area
8	Surabaya City	Regional Regulation Number 3 of 2016 concerning the Ban on Alcoholic Drinks	Contravening higher laws

No.	Regency/Municipality	Draft Regional Regulation	Ground for Dismissal
9	Banyuwangi Regency	<ol style="list-style-type: none"> Control over the Distribution of Subsidized Fertilizers Natural Resources Management 	<ol style="list-style-type: none"> The major points regulated in this Draft are not within the authority of the Regency of Banyuwangi This Draft governs river zones that should be under the authority of the Provincial Government
10	Jember Regency	<ol style="list-style-type: none"> The Management of Zakat, Infaq, and Sodaqoh Quran Recital and Writing 	<ol style="list-style-type: none"> Religious affairs that represent absolute affairs of the government Religious affairs that represent absolute affairs of the government
11	Tulungagung Regency	The Organization of Tourism-aware Community	The substantive matters governed were copied from the Guidebook of Tourism-Aware Community that should be governed under Regent Regulation
38	Madiun Regency	The Amendment to Regional Regulation Number 10 of 2010 concerning Building Permit	The substantive matters as part of the Draft Regional Regulation concerning Building
18	Kediri City	Ban on loan shark practices	Under the authority of the Central Government
42	Pacitan Regency	The guidelines of program drafting regarding regional legislative drafting	In accordance with the provision of Article 36 paragraph (4) and paragraph (5) of Law Number 12 of 2011 concerning lawmaking adequately governed under the Regulation of Regional Head
15	Bojonegoro Regency	Draft Regional Regulation concerning Limited Liability Company of Sharia-based Rural Bank in Bojonegoro	Establishment of a Sharia-based Rural Bank as a Limited Liability Company that requires the request of permit issuance to the Financial Services Authority prior

No.	Regency/Municipality	Draft Regional Regulation	Ground for Dismissal
			to the drafting of this regional regulation
16	Gresik Regency	Regional Regulation concerning Taxpayer Registration at branch office/central office for entrepreneurs in Gresik Regency	Contravening Presidential Regulation Number 70 of 2012 concerning goods/services procurement for the government and impeding investment since it requires lengthy bureaucratic processes and is costly
17	Pamekasan Regency	Draft Regional Regulation concerning Organization and Work Scheme in State Nursing School in Pamekasan Regency	Contravening higher laws
18	Ponorogo Regency	Regional Regulation of Ponorogo Regency Number 7 of 2015 concerning Monitoring of Procurement, Distribution, and Use of Subsidized Fertilizers in the Agricultural Sector	The substances governed in this regional regulation relate to the matters under the authority of the Central Government
19	Probolinggo City	Draft Regional Regulation of Probolinggo City concerning Administration of Religious-based Character Building	This draft governs the absolute authority contravening Article 10 paragraph (1) of Law Number 23 of 2014 concerning Regional Regulation without any further processes as recommended
20	Malang City	Draft Mayor Regulation of Malang City concerning Delegation of Authority to Issue a Permit in Manpower by the Mayor to the Chief of Manpower Agency	<ul style="list-style-type: none"> • This draft is not processed further as recommended since it is not set forth in the regional regulation governing manpower. • In accordance with Article 13 paragraph (2) point b stating that “an agency and/or a government official

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No.	Regency/Municipality	Draft Regional Regulation	Ground for Dismissal
			gains authority through a delegation process if stated in a Government Regulation, Presidential Regulation, and/or Regional Regulation.”
11 21	Pasuruan Regency	Draft Regional Regulation concerning Authority according to the Right of Origin of village-based Local Authority	In accordance with the Regulation of Minister of Home Affairs Number 44 of 2014 Article 21 Paragraph (1) stipulated under the Regulation of Regional Head
27 22	Pasuruan Regency	Draft Regional Regulation concerning Water Resource Management	In accordance with the Regulation of the Minister of Public Works and Public Housing Number 4/PRT/M/2015 concerning Criteria of Setting River Zone implying that the river zone of Welang-Rejoso in Pasuruan Regency is controlled under the provincial authority
24 23	Probolinggo City	Draft Regional Regulation of Probolinggo City concerning Administration of Religious-based Character Building	This draft governs absolute authority contravening Article 10 paragraph (1) of Law Number 23 of 2014 concerning Regional Regulation without any further process as recommended

Based on the data from Table 1 above, it was found that at least 23 districts and cities in East Java had draft regional regulations that were not for several reasons. Administrative stages of facilitation and evaluations have been set as above, agreed upon, and performed jointly by administrative and communicative powers in East Java. In such a context, this research implies that the assessment of the substantive matters and the materials of the draft of regional regulations at the regency/municipal level does not only focus on the

science of dogmatic law such as the theory of the hierarchy of norms.³³ The facilitators also need to be open to the use of a sociological assessment benchmark such as a legal pragmatic approach :³⁴

- a. To what extent the social issues that are resolved with the regulation concerned affect the people in a regional area;
- b. General strategies proposed by the government of the regency/municipality to be further applied to resolve social issues;
- c. Financial resources, human resources, and physical resources that the government of the regency/municipality believes will settle social issues;
- d. The difficulty level of draft regional regulation-making relating to the fact that drafters of autonomous regulations mostly are not fully aware of legal terms, political aspirations, and public opinions in regional areas.

Legislative drafting of autonomous regional regulation products is understood as a legal institutionalization of the communication procedures between state power³⁵ (especially administrative and communicative powers) and the members of the public. The performance of facilitators can still reach the formation of political aspirations within the mechanism of facilitation and evaluations, thereby leaving opportunities to reach the formation of informal political aspirations existing in society. People in the regency/municipal areas of East Java should have more freedom to express their views on social issues governed by particular regional regulations because their right is guaranteed by the legislation concerning lawmaking. Certainly, improvement in the mechanism of the formation of an internal Legal Bureau is required to ensure that they better understand the law serving as a connecting tool between public interest and needs and the interest of the government at the regency/municipal level.

The facilitators represent no one but they can recommend an autonomous regulation to be revoked. This possibility leads further to another problem whether this matter is not taken as a dogmatic oligarchy of legal knowledge. Law is legitimating as long as political deliberation can be reached

³³ Hans Kelsen, "Pure Theory Of Law, Translated by Max Knight, Berkeley" (Los Angeles, London University of California Press, 1967). J Gijssels and J Van Hoecke, "Wat Is Rechtsteorie? Antwerpen/Zwolle" (Kluwer/Tjeenk Willink, 1982).

³⁴ Seidman, Seidman, and Abeyeskere, *Penyusunan Rancangan Undang-Undang Dalam Perubahan Masyarakat Yang Demokratis: Sebuah Panduan Untuk Pembuat Rancangan Undang-Undang*.

³⁵ Iwan Sulistiyo and Widayati Widayati, "Implementasi Asas Keterbukaan Dalam Proses Pembentukan Peraturan Daerah Dalam Rangka Otonomi Daerah Di Kabupaten Kendal," *Jurnal Daulat Hukum* 1, no. 1 (March 2018), <https://doi.org/10.30659/jdh.v1i1.2633>; Rahendro Jati, "Partisipasi Masyarakat dalam Proses Pembentukan Undang-Undang Yang Responsif," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 1, no. 3 (December 2012): 329, <https://doi.org/10.33331/rechtsvinding.v1i3.88>.

by the facilitators.³⁶ Discussions among citizens about water resources, village assets, village finance, and counseling between teenagers and university students need to be measured in terms of the quality of the arguments by the Legal Bureau. Legal Bureau indirectly gives access to open communication with citizens, which can be seen as a tool of indirect control over government institutions at the regency/municipal level. The DPRD in the regency/municipality has also set legislative programs and stipulated autonomous regulations. Political communication is openly given by facilitators, and this issue is certainly no longer a theoretical problem, but it is a practical problem.

Conclusion

The discourse theory of Habermas discusses the executive and legislative institutions put into an action theory. The understanding of executive and legislative within the scope of classical law has been too concrete in labeling the provincial government as an executive institution and the DPRD as the legislative one. As a result, autonomous regulation-making tends to be exclusive but often overlooks the public as the origin from which lawmaking departs. The discourse of the duality of administrative and communicative powers brings about a new perspective believing that researchers and practitioners involved in the making of autonomous regulations no longer see the process as a technical aspect of legislative drafting for the public interest.

Public sovereignty is not a slogan, but more like a principle of discourse procedure of legislative drafting in autonomous regions. The process of autonomous legislative drafting departed from the public discourse in regional areas. The discourse in regional areas relating to interest and daily needs has covered the mechanism of legislative drafting in autonomous areas. The provincial government and the Provincial DPRD of East Java have the mission to bring about sovereignty as planned, and they act within communicative and strategic scopes. Communicative actions take place within the mechanism of autonomous legislative drafting, while the actions taken by facilitators and the evaluations of autonomous regulations at the regency/municipal level serve as a strategic example. This has resulted in the consensus in the form of legitimation of public need and interest in autonomous regulations in order to achieve collective objectives.

This research, however, is still restricted to the duality of administrative and communicative powers. The connection between the legislation and court verdicts, however, needs to be further explored. If the legislative programs are

³⁶ Dekki Umamur Ra'is, "Peta Inklusi Sosial dalam Regulasi Desa," *Reformasi* 7, no. 2 (2018), <https://doi.org/10.33366/rfr.v7i2.803>.

set by the administrative power, the judicial power will serve as a conflict resolution between the government and the public. This research is widely open for development through the research on the discourse of the implementation of regulations regarding several cases and disputes handled by judicial institutions.

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The Duality of Administrative and Communicative Powers in Legislative Drafting: Evidence from East Java

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Abstract

The classical legal concept within executive and legislative scopes is no longer adequate to help understand the strategic measures taken by the Provincial Government of East Java and the potential of communicative actions of the DPRD of the Province of East Java. The making of autonomous regulations tends to be exclusive and overlooks the involvement of the public as the origin from which the procedures of legislative drafting began. The legal thought introduced by Habermas came as a solution to legislation-related issues, but it seems to be accepted only by the dialogue between legislators and the executive body. This article aims at analyzing the interaction that takes place between discourse theory and the duality of administrative and communicative powers by Habermas relating to the strategic measures taken by the Provincial Government of East Java. A normative-juridical method was used, involving the literature study of legal concepts and the data revealing the performance of the Legal Bureau of the Provincial Government of East Java. Communicative measures exist in the construction of autonomous regulations while facilitating

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