

PUBLIC'S PARTICIPATION IN FORMULATING LOCAL ACTS

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Abstract

Public's participation in the process of legislation of local government ordinances is an important aspect for the sake of accommodating and representing public's interest. Moreover, the said participation is also considered as a reflection of the justice and fairness.

Key words: *Public's Participation, Legislation Process Of Local Ordinances*

Introduction

Based on the local autonomy regulated by Law No.32/2004 concerning Local Ordinance, the region is granted the authority and responsibility to regulate and manage the local people's interest through the people's aspiration in accordance with the laws and regulations. Through the authority to regulate and manage the interest of people, the local ordinance will attempt to elevate the economic condition that is appropriate with the needs and ability that the region has.

In order to enhance the welfare, the local ordinances have the authority to make policy aimed at giving service, opening wider participation of public, creativity and public empowerment. This model of policy making could accommodate more the public's aspiration as the autonomy reduces the gap between public and the policy makers. In that way the autonomous local ordinance could respond quickly to the public's demands. This also means that the local variety, tribes, religion, social and culture values and other potencies are validly admitted.

The authority transferred to regions is overwhelmingly accepted which turns then into the creation of various local acts as the result of the local ordinance's interests instead of the public's. In fact, many of the regulations are not in concordance with the higher level of law or regulation and therefore become the problematic ones, besides the fact that many are not easily implemented as many refusals coming from the public. More over, such regulations were also taken to the Supreme Court to have the judicial review.

As commonly known, public's participation in policy making, either as material, regulation or service provider, is of importance as by such involvement, they will be more accommodated and they will not lose anything. However, what can be seen for real is the different story: the public is not involved much as proven from many of the policies are not in the public's side.

According to Law No 10/2004 regarding the formulation of Laws and Regulations, the materials for local acts is all the materials concerning the execution of local autonomy and assisting functions, and accommodating the specific local condition together with the more advanced explanation of the higher level of acts.

The effort to make the regional public policy take a side of the public has been done by many parties. One of the efforts is advocating on the reformation of the local

acts. With the existence of such advocacy, the institutionalization of the public policy is expected to be more in public's side.

Reforming the regulations in the participative region encounters many problems such as conflict of interest, the weak network capacity, law comprehension, limited knowledge on the nature of the problems, etc. The most serious problem actually is the absence of the rules regulating the presence of public's participation in the formulation of local acts. Along the time, the public's participation has depended on the willingness of government bureaucracy and the members of Local Parliament.

To make the public policy on people's side through advocacy is the struggle which is ever encouraged as by doing so, the policy will be on people's side and will become fair policy. The absence of the space for public's participation will enlarge the risk for deviation of the objective. Together with bureaucracy staff and DPRD, the public's participation should always be encouraged.

The emergence of the local acts of Bantul Regency No 6/2007 concerning Monitoring, Controlling, Distributing, and selling prohibition in Bantul Regency could be the good example of the law product as it touches directly the public's life. This is the firmest policy that has been made ever. Other interesting fact is that it mentions the prohibition on selling and distributing the liquor, the prohibition which is not attributed to any higher level of other regulation.

Nevertheless, considering the fact that Bantul is supported by its tourism business, the business in which alcohol or liquor is the part of, releasing such policy is not the simple way.

On the other hand, Bantul whose vision is listed as *PROJOTAMANSARI* which means: democratic, welfare and religious has the obligation to create the religious area. This obligation will encounter the fact that liquor has been important part of tourism business of the area as the religion strongly prohibits the use of liquor.

In fact the liquor has spread all over Bantul area, both produced by factory and by society themselves. The liquor can be easily found on beach or in food kiosks. The local ordinance through *SATPOL PP* / Police Unit under Local Government had made inspection and swept the liquor products for many times, especially when it is near to Ramadan (the holly month of Islam), but still the people cannot be stopped.

This fact actually is the real problem when Bantul is busy in creating the religious atmosphere in its town. Besides, the liquor use will result in the emergence of crimes. It is getting worse when the law to regulates the liquor distribution is not available yet.

This condition ignites the new conflict among people as one group of people have acted to sweep the liquor distribution by themselves. This "street law" appears as the people disbelieve the law servant and because they believe that the liquor distribution is getting more and more widely spread. This group is somehow encountered by other group of people who disagree with.

Concerning this situation then it is the right matter that the local ordinance finally made a policy concerning the liquor so that they can protect the public's morality, the part of actions to realize the vision of Bantul Regency.

Based on the above discussion, the problem that will be elaborated in this paper is concerning the urgency of public's participation in policy making.

THE FORMULATION OF PARTICIPATORY LOCAL ACTS

The Democratic Law State

According to Aristoteles, a good state or country is the one which is ruled by constitution and has law authority. There are at least three elements of the constituted country: government for public's interest, second, the government is based on the law formulated from the common acts, still considering the convention and constitution. Third, the government is supported by the people, unlike the *despotic*¹ government, compelling the people to support them.

According to Julius Stahl schools, the main principals of democratic law-based state are ²: 1. Based on individualistic human rights; 2. to protect the human rights, the state needs trias politica of Montesquieu together with their variation; 3. government based on law (*wetmatig bestuur*) in the *materiil Reschstaat* in addition to the principle of *doelmatig bestuur* in *Sociale verzogingstaat*; 4. If the government is suspected to violate human rights then they must be trialed by administration trial.

Meanwhile, AV. Dicey, English scholar, revealed the three government elements under the law ³: 1. Supremacy of Law, it means that law is the most powerful element in Legal State.. 2. Equality before the law. It means the equality in terms of law position for all citizens, either as the individual or as state apparatus. 3. Constitution based on individual rights, it means that the constitution is not the source of the human rights. Mentioning the human rights in the constitution confirms that the constitution guarantees the rights.

Furthermore, Sri Sumantri noted that some important elements of one state are⁴: 1. The government should serve their rights and obligations based on law. 2. The guarantee on human rights (citizen's rights); 3. The power sharing . 4. The monitoring and trial bodies (*rechterlige controle*).

In the frame of Law, the law has the highest position, there is equality before law and governance, and the implementation of legislation principles in the real life. However, the law itself should be served and built based on the democracy principles as essentially, the law supremacy stems from people's sovereignty. In other words, the Legal state should be built and developed on the basis of democracy principles and people sovereignty.⁵

¹. Ridwan HR, *Hukum Administrasi Negara*, PT Rajagrafindo Persada, Jakarta, 2007, hlm. 9-10

². Padmo Wahoyon, "Asas negara Hukum dan Perwujudannya dalam Sistem Hukum Nasional" in *Politik Pembangunan Hukum nasional*, cited by Muh. Busyro Muqoddas, et al, UII Press, Yogyakarta, 1992, page 40-41

³. Dahlan Thaib, *Kedaulatan Rakyat, Negara Hukum, dan Konstitusi*, Liberty Publisher, Yogyakarta 1999, page 24.

⁴. Khairuddin tahmid, *Demokrasi dan Otonomi Penyelenggaraan Pemerintahan Desa*, Publication Department of Faculty of Syariah of IAIN Raden Intan, Bandar Lampung, 2004, page 9.

⁵. Ibid, page 9.

⁶. Abdi Yuhana, *Sistem Ketatanegaraan Indonesia Pasca Perubahan UUD 1945 Sistem Perwakilan di Indonesia dan Masa Depan MPR RI*, Fokus Media, Bandung, 2007, page 34.

⁷. Baharuddin Lopa, *Pertumbuhan demokrasi Penegakan Hukum dan Perlindungan Hak Asasi Manusia*, PT Yarsif Wataampone, Jakarta, 1999, page 7

Epistemologically, the word democracy stems from Latin words; *demos* means people, *cratos* means governance. Therefore, democracy means governance by people⁶. According to Baharudin Lopa⁷, basically, democracy means government on the basis of people's demands and people sovereignty. To reach those objectives, the rights of equality and freedom should be guaranteed.

According to J.B.H.M Ten Berge as cited by Ridwan HR, he mentioned the principles of Legal State and of democracy as follows: (1) Legislative Principles; (2) Human Rights Protection; (3) Government tied by Law; (4) Monopoly by the government to guarantee the Law enforcement; (5) Control from independent Judge. Meanwhile, the democracy principles are: 1) political representatives; 2) political responsibility; 3) authority distribution; 4) Monitoring and Control; 5) honesty and government accountability before public; 6) People are allowed to protest.⁸

Almost all theorists –even from classical era—always stress on the fact that the authoritative party in democracy is people or *demos*, *populus*. Therefore, *demos* should be powerful in the political practice, at least in the two first stages: first, agenda setting: the stage of problem formulation and, second, deciding the outcome, the decision stage.⁹

In brief, in the democratic law state, people play very important role in formulating problems, and deciding policy.

Legislation Function in Regions.

There is a shift on the application of legislation function in the regions. The local ordinance used to have the authority to formulate the local acts with DPRD /Local Parliament agreement. Nevertheless, at the present, DPRD has the authority to formulate such regulations together with Local Head based on the following acts; a. Law No 10/2004 concerning the Formulation of Laws and Regulations, Article 26 states that the draft of local acts stem from Local Parliament/ DPRD or Governor or Regent/Mayor, each of them functions as the Province Head, Regency or City Head; b. Law No 32/2004 concerning the Local Ordinance, Article 41 states that DPRD has legislation, budgets and control. Meanwhile, Article 42 states that on legislative function, DPRD has obligation and authority to : 1) Formulate the Local acts discussed together with Local Head toward the similar agreement; 2) Discuss and Pass the draft on the local acts on Local Budget together with the Local Head; 3) Monitor the implementation of local acts and other regulations including the regulation on Local Head, Regional Budget Planning / APBD, Policy of Local ordinance in executing the regional development program and international cooperation in the regions; c. Law No 22/2003 concerning the order and Position of MPR, DPR, DPD and DPRD. 1) in Article 61 letter a Law No 22/2003 (for the provincial DPRD) and Article 77 letter a of Law No.22/2003 (for Regency / City DPRD), DPRD has legislation, budget and monitoring function; 2) in Article 62 (Provincial DPRD) and Article 78 (Regency/ City)states that one duty and authority of

⁸ Ridwan HR, Op.Cit., page 9-10

⁹ Afan Gafar, *Politik Indoensia Transisi Menuju Demokrasi*, Pustaka Pelajar, Yogyakarta, 2004, page

DPRD is to formulate the Local acts discussed with Governor or regent / Mayor to meet the unanimous agreement.

From the above discussion on the laws, it is clear that DPRD has the authority to create the local acts discussed with Governor/ Regent/Mayor toward the unanimous agreement. Therefore, DPRD should be able to produce policies which can meet people's expectancy and is perceived as fair policies. In addition to that, Local Parliament / DPRD has the right to determine to what extent the public can participate in formulating the local acts.

In general, the implementation of legislation function in a region can be seen from its implementation in the regional level, from the formulation process and local policy discussion, the established policy product (local acts), and how the regulations are implemented. In fact, not all regions have the program of local legislation. This fact is supported by S. Soelarso¹⁰ who found that provincial Local Parliament / DPRD, A regency and city do not have any program of local legislation. Even, it is also found that there is one DPRD and local ordinance who do not academic text but own the local acts. This condition is critical as the absence of such program is equal to the absurd direction of regional policy, and unclear regional policy planning.

Local acts

As the autonomy region, the local ordinance is authorized to formulate local acts in order to execute the local autonomy matters and assisting functions. In accordance with Law No 10/2004 concerning the Formulation of Laws and Regulations, what is meant by local acts is the laws and regulations created by DPRD with the agreement of Local Head. The local acts is the further explanation of the higher laws and regulations and functions also to execute the higher Laws and Regulations by considering the specific characters of the region. The local acts must not contradict with the public's interests, the higher laws and regulations and other Local acts¹¹.

Soehino, as cited by B. Hestu Cipto Handoyo mentions that the content materials of the local acts cover: 1. Materials giving public some obligations, such as tax, and local acts; 2. Materials that prohibit or limit the public's freedom, such as prohibiting or giving obligations accompanied with threats or penal infringement; 3. Materials limiting the public's rights such as controlling of line / *garis sepadan*. 4. Materials or some matters determined in the same level of laws and regulations, while for the higher ones, it should be regulated by the local acts.¹²

¹⁰ S. Soelarso is the Executive Director the Local Parliament /DPRD Association of All regencies in Indonesia, cited by Tempo Interaktif, Jakarta.

¹¹ Suko Waluyo, *Otonomi Daerah Dalam Negara Hukum Indonesia, Pembentukan Peraturan Daerah Partisipatif*, Faza Media, Jakarta, 2006, page 127.

¹² B. Hestu Cipto Handoyo, *Peinsip-prinsip legal Drafting & Desain naskah Akademik*, Universitas Atmajaya Yogyakarta, 2008, page.128

¹³ Suko Waluyo, *op.cit.*, page 127

The Formulation Process of Local acts

The formulation process of local acts covers the formulation of local acts which basically start from planning, discussion, formulation technique, formulation, explanation, legislation, law making, and distribution. Such preparation is based on the laws and regulations. The local acts would be more operational if is not only bounded on legality principles as meant by article 136 -147 Law No. 32/2004 but completed with the comprehensive research on the subject and the object of law, following the academic text.¹³ The academic text actually is the media for public's participation in the process of policy formulation. Further, it is the media where the reasons, facts, and background of certain policies for local acts are displayed. The text explains the philosophical, sociology, legislative, politics, ecology, economics, and other aspects related to the policy.¹⁴

The draft on local acts can be initiated by Regional Head or Local Parliament (DPRD). Seeing from the discussion process of draft on local acts, according to Government Regulation No 25/2004, it can be found out that the draft process on Local acts covers four stages as follows: a. the General Meeting / *Paripurna* concerning the draft of local acts from Local Head.; 2) explanations from . the General Meeting / *Paripurna* by the head of committee or Special committee on the draft of local regulation and or the amendment of local acts on the basis of DPRD initiative.b. The discussion on the second level, covers : 1) the draft of Local acts from Local Head including: a) General View/ *pemandangan umum* by the fractions on the draft of Local acts on the basis of Local Parliament's opinion; b) the answers of the fractions on the opinion of Local Head. C. The discussion on the third level including the discussions in the joint commission / *gabungan komisi* or special committee conducted together with Local head or the appointed Apparatus ; d. The discussion on the fourth level, including: 1) Policy decision on the general meeting following: a) the meeting report of the third stage; b) the final opinion of Fraction; c) Decision making, 2) the foreword of the local head for the decision making.

The Public's Participation in the Formulation of Local acts.

The starting point of the Local acts drafting is on the public's effectiveness and efficiency. The public's participation is dealing with producing useful inputs and perception of citizen and public whose interest is aimed at enhancing the quality of decision making, as by involving them, the policy makers will be able to understand the interests, the needs and the values of public and use all of them to be the considerations of one united concept.¹⁵

The public participation in formulating laws and regulations is regulated in Article 10 Law No. 10/2004 that public has the right to give the initiatives in the forms of written and spoken ideas regarding the establishment and discussion of law draft and

¹⁴ Mahendra Putra Kurnia, et al., *Pedoman Naskah Akademik Perda Partisipatif*, Kreasi Total Media, Yogyakarta, 2007, page.71.

¹⁵.Mahendra Putra Kurnia, et.al., op.cit., page 72

local acts draft. Furthermore, article 39 verse 1 of Law 32/2004 reveals that the public has the right to participate in the preparation or in the discussion of local acts draft.

The participation is meant as the involvement of all non Local Parliament parties and the local ordinance in drafting and formulating the draft of the local acts (Perda). There are two sources of participations: first, from non Local Parliament and local ordinance elements, such as police, district court/ *Kejaksaan*, Department of Justice, universities, etc. Second, from public, either from individual or from some experts that have the experiences or from the group of people such as Non Government Organization. Involving non Local Parliament members to (i) select knowledge, skills, or people's experiences so that the local acts can meet the requirements of the good laws and regulations; (ii) guarantee the local acts to be concordance with the real life of society; (iii) grow the sense of belonging or sense of responsibility toward the regulation.¹⁶

According to Bagir Manan, the participation can be conducted through¹⁷: (1) involvement in team or in the working committee of local acts formulation. (2) public hearing or invitation for the formulation meetings. (3) the reliability test to the certain parties to get the proper responses. (4) The workshop of the previous *Raperda* before discussed formally by Local Parliament. (5) *Raperda* publication to have the proper responses from the public.

From the above discussions, to formulate the necessary local acts that can fulfill public's demand, indeed the public themselves should participate in the formulation of the regulations including: (1) the involvement in the formulation of local acts. In this stage, public involves in the working committee/team dealing with the preparation on academic text, sounding their ideas either in the written or oral form or even in mass media form addressing to the team initiator. The question is; to what extent is the commitment of the stakeholders to be transparent before the public in terms of the related problems, so that the public can give the necessary contribution. (2) The involvement in the process of local acts formulation. This process occurs between Local Parliament and Local Ordinance. In this stage, the draft must be exposed to public to give them opportunity to contribute their aspiration. The presence of the public actually is still a dilemma as it depends on the Local Parliament or Local Ordinance. (3) The involvement of the execution on local acts. The public's participation can be monitored from the public's obedience toward the policy. The public will obey the policy if their aspirations are already represented within it. They will do the vice versa if they think that the policy causes them loss. In this case, the public can sound their voice to the institution in charge of formulating the policies, so that the institution may revise the policies. Other alternative way is that the judicial review can be conducted as according to Ni'matul Huda¹⁸, the judicial review is regulated by Supreme Court in Law No. 4/2004 Article 11 verse (2) letter b and (3) confirms that the Supreme Court has the authority to review the laws and regulations lower than acts */undang-undang*. Through cassation or through the supreme court, one can have the statement of ineffectiveness of certain law as a result of judicial review.

¹⁶ Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, PSH Fak, Hukum UII, Yogyakarta, 2001, page.85

¹⁷ Ibid, page.85-86.

¹⁸ Ni'matul Huda, *Negara Hukum, Demokrasi & Judicial Review*, UII Press, Yogyakarta, 2005, page.115

Another problem of realizing the participatory local acts is the absence of the clear regulation concerning the public participation on the formulation of laws and regulations (local acts). In Article 53 of Law No. 10/2004 that people have the rights to give the inputs in both written and oral form regarding the establishment and discussion on the law draft and local act draft. Then, Law No.32/2004 as already amended for several times with the last amendment was conducted by releasing Law No.12/2008, Article 139 stated that people have the rights to give inputs both in written and oral form in terms of preparation and discussion on the local act draft.

Conclusion

The more advanced the development of a country and the more complex the problems of live will indeed need the laws and regulations that can accommodate and represent the interests of public, in addition to mirror the fairness before the public. To realize this is the real challenge for those in charge of participatory law formulation.

The public's participation will enhance the quality of policy and spur the law makers to make the feasible local acts which is in accordance with the public's needs and expectation and can minimize the protests stemming from the unsatisfied public.

Regarding the absence of the acts regulating the public's participation in formulating the local acts, the commitment of the law makers in regional area to encourage the local participation, in this case is of Local Head and Local Parliament/DPRD should be elevated.

References

- Abdi Yuhana, *Sistem Ketatanegaraan Indonesia Pasca Perubahan UUD 11945 Sistem Perwakilan di Indonesia dan Masa Depan MPR RI*, Fokus Media, Bandung, 2007
- Afan Gafar, *Politik Indonesia Transsisi Menuju Demokrasi*, Pustaka Pelajar, Yogyakarta, 2004.
- Baharuddin Lopa, *Pertumbuhan Demokrasi Penegakan Hukum dan Perlindungan Hak Asasi Manusia*, PT Yarsif Wataampone, Jakarta, 1999.
- Bagir Manan, *Hubungan Antara Pusat dan Daerah Menurut UUD 1945*, Penerbit LSH Jakarta, tahun 1994.
- _____, *Menyongsong Fajar Otonomi Daerah*, PSH FH UII, Yogyakarta, 2001.
- B. Hestu Cipto Handoyo, *Prinsip-Prinsip Legal Drafting & Desain Naskah Akademik*, Universitas Atmajaya Yogyakarta, 2008,
- Dahlan Thaib, *Kedaulatan Rakyat, Negara Hukum, dan Konstitusi*, Penerbit Liberty Yogyakarta 1999.
- Khairuddin Tahmid, *Demokrasi dan Otonomi Penyelenggaraan Pemerintahan Desa*, Seksi Penerbitan Fak. Syariah IAIN Raden Intan, Bandar Lampung, 2004.
- Mahendra Putra Kurnia, dkk., *Pedoman Naskah Akademik Perda Partisipatif*, Kreasi Total Media, Yogyakarta, 2007
- Ni'matul Huda, *Negara Hukum, Demokrasi & Judicial Review*, UII Press, Yogyakarta, 2005.
- Padmo Wahyono, "Asas Negara Hukum dan Perwujudannya dalam Sistem Hukum Nasional" dalam *Politik Pembangunan Hukum Nasional*, Penyunting Muh. Busyro Muqoddas, dkk, UII Press, Yogyakarta, 1992.

Ridwan HR, *Hukum Administrasi Negara*, PT Rajagrafindo Persada, Jakarta, 2007.

Suko Waluyo, *Otonomi Daerah Dalam Negara Hukum Indonesia, Pembentukan Peraturan Daerah Partisipatif*, Faza Media, Jakarta, 2006.

Undang Undang nomor 32 Tahun 2004 tentang Pemerintah Daerah

Undang Undang Nomor 10 Tahun 2004 tentang Pembentukan Peraturan Perundang-undangan