

THE IMPLEMENTATION OF REGULATORY IMPACT ASSESSMENT AS THE EFFORT TO GUARANTEE THE PUBLIC'S PARTICIPATION IN LOCAL RULES FORMATION

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Regulatory Impact Assessment (IRA) terlembagakan secara independent sebagai sebuah control terhadap pemerintah daerah, baik dalam bentuk rancangan peraturan atau dalam bentuk ketetapan. RIA memandu alasan dan logika dalam proses pelebagaan peraturan tanpa mengubah mekanisme dan lembaga-lembaga yang berkaitan dengan pengeluaran peraturan.

Kata kunci: Regulatory Impact Assessment, Partisipasi Publik, Pemerintah Daerah.

Introduction

As already stated in 1945 constitution, the amended verse 1¹ Article 18, Republic of Indonesia is divided into regions and provinces. The province is divided into district and city which has its own local ordinance ruled by the acts. As a consequence of the local autonomy, each local ordinance has the right to determine the local rules and other regulations to execute the autonomy and assisting tasks.

The laws regulating the local ordinance as meant by the previous article are which are Law No. 32/2004 stated on State Paper of Republic of Indonesia in 2004 Number 125. The 1945 constitution (Article 18 verse 6) together with Law concerning local ordinance transfer the authority to local ordinance to formulate the local acts and other executive regulatory / *peraturan pelaksana*.

¹ Article 18 (1)

Giving the autonomy to local and authority to implement the local acts is meant to give more rooms to regions suitable with its condition in addition to reduce the distance between the local regulator and people in his area. Therefore, the communication will be more intensive between the two. It means that people can participate in the formulation of local acts.

The quality of the local acts become the important indicator of the performance of governance in the regional level.² The bigger local authority enables the local ordinance to apply various kinds of local acts targeted to regulate economy and social activities in the regional level. The problem occurs when in fact, many regulations, according to the central government, are not in line with the target of the autonomy transfer.

The local autonomy is transferred to accelerate the welfare condition of the local people. Unfortunately, due to some minor interests, the so called acts fail to support the sustainable development in the regional levels.

Some problems occur when the policy of local autonomy starts to apply.³ the capacity of the local parliament and A regency level ordinance to bear the responsibility and to execute the development planning in all over the areas is questioned. Some facts are found in random that there are some potential problems related to local economy policy: 1. The disharmonious status of local policy against other local acts; 2. The disharmonious policy of local autonomy against national and Indonesia's international obligation on law and human rights; 3. Certain business practices on giving the privileges to State Local Enterprises (BUMD); 4. Failure to legalize or implement the local acts as signaled by national law (for instance: the legislation of democratically selected Village Representative Body);

At the same time the absence of deep and thorough analysis on the local acts will limit the opportunity of the local ordinance to learn the innovative and positive development process in the local level. In brief, we can admit that we don't have any idea on the performance of the local ordinance which generate big impacts to people's live.

In line with the democracy principles, where the people representatives are democratically selected by the people, the people representatives are expected to maintain

² Agus Dwijanto et.al, *Kinerja Tata Pemerintahan di Indonesia*, Yogyakarta: Pusat Studi Kependudukan dan Kebijakan Universitas Gadjah Mada (PSKK UGM)-Kemitraan, 2007, page 10.

³ Word Bak Institute, *Perda Review Project*, September, 2004, in [http:// www.justiceforthepeople.or.id](http://www.justiceforthepeople.or.id)

the communication with the people related to the formulation and the establishment of local policy stated in local acts. The rooms and media for people should be given in order to enable them participate in the formulation and the establishment of the local acts which is the message of Law No 10/2004 concerning the Formulating Laws and Regulations, Article 53.⁴ The Article says: “ People have the rights to give the inputs to”

This is also confirmed by Law No.32/2004 Article 139 (1) that people have the right to give inputs in either written and oral form in preparing and establishing the drafts on local acts.⁵

From the above notifications of the two articles of both the Law, it is understood that people have the rights to participate in the process of the establishment of local acts. These articles make the government aware of being open and provide the media and rooms for people to get involved in the law establishment.

As the representative democracy has been considered as no longer accommodating people’s ideas and demand, the two institutions of local acts regulators are expected to have open management, therefore the good willing to serve democracy becomes the real action.⁶

Local people basically cannot be apart from the government as the authority for the local ordinance means the authority for the local people. Meanwhile, local or region has variety of concepts that are sociology, politics and demography. These concepts can be found in the local ordinance regulations which mention that a region is a lawful society that has borders of areas and has rights to administer and manage the governance and local people’s need based on people’s aspiration within Republic of Indonesia.⁷

Based on the above discussion, the nature of the autonomy region is the local people which means that the key is on the public’s participation. In this context, the urgent matter is related to the policy making and its implementation in the form of local acts.

⁴ Article 53 Law No 10/2004 concerning the formulation of Laws and Regulations.

⁵ Article 139 verse (1) Law No.32/2004 concerning local ordinance.

⁶ PM.Hadjon,” Keterbukaan Pemerintahan dan Tanggung Gugat Pemerintahan”, Paper, presented on the VII- National Law Seminar with the theme: Law Reformation to Civil Society. Held by Badan Pembinaan Hukum Nasional: National Law.....-Department of Justice of Republic of Indonesia, Jakarta 12-15 October 1999, page 5.

⁷ Article 1 number 6 Law.No 32/2004

Though Law No 10/2004 and Law Number 32/2004 in addition to Internal Affair regulations has referred to the public's participation in local acts process, from the initiation to the legislation, the people's participation is still far from perfect. In fact, the room for participation is still closed. Following this is the inability of the public obeying the local acts as the people failed to internalize the rules with their own awareness. Therefore, the room for public's participation should be opened wider, and this should be encouraged by the local ordinance as the actor of policy formulation.

This paper will study the opportunity for public's participation through Regulatory Impact Assessment (RIA) as the institutionalized method in local ordinance. The discussions and determination of the local acts can take two ways theoretically, that are through Regional representative institution and Head of Local ordinance. As the two institutions are pointed by public then the public can withdraw their trust once the two institutions cannot longer be accepted by the people. On the other hand, the two institutions have the obligation to create the openness in governing as the basic principle of democratic government.

DEFINITION AND PARTICIPATION PRACTICE

The governance practice at the end of the second millennium urges the spirit toward good Governance. This trend is also the result of the demands on universal values related to democracy, transparency, and respect on human rights including the rights to have the right information. The governance requires the accountability of public management and policy while opening widely the opportunity for public's participation. The consequence of the transparency is that people should have the access to participate in the process of policy making.

Nevertheless, during the new order, the public's participation was wrongly understood as merely giving their belonging, such as land, money and time for the sake of the development. In the frame of democracy, participation should have wider and advance meaning in that people should be involved in decision making process covering: planning, decision making, implementation, observation, and evaluation.

The discourse of public's participation had been an issue since New Order. The fact is however still far away. Then when the local authority is realized through Law No 22/2002 concerning the Local Ordinance which is now renewed with Law No 32/2004 the public's participation is expected to be increased as through the local authority, public and policy makers are not longer significantly separated.⁸

It is commonly known that public is actually the real stakeholder of all the public policies besides local ordinance and Local Parliament / DPRD as they are the subjects who understand and feel their own needs and real life. Besides the juridical and philosophical basis, the fact that people have the rights to participate in policy making would be the important sociology basis in formulating public policies.

It is assumed that the public policies are actually the efforts to solve the public problems then the policies should somehow be oriented to public needs. The consequence is that the solutions should be from the public themselves not merely from the policy makers' assumption. The real-condition based policy will be accepted and conducted effectively among the public.

At least three benefits of involving public in policy making are:⁹

1. The creation of the better public policy.

The public's participation serves the good foundation for policy making and guarantees the effective implementation as public is also involved in the policy making process.

2. The increase of Public Trust to executive and legislative body.

The public involvement on policy making generates the opportunity for the public to understand the government's planning, to get the opportunity to be heard, and to give the inputs in the policy. All these facts will lead to the wider acceptance to any policy. Therefore, both the executive and legislative body will gain more public trust and public legitimating.

⁸ Sad Dian Utomo, "Partisipasi Masyarakat dalam Pembuatan Kebijakan" in Lutfi Mustofa, Otonomi Daerah: Evaluasi dan Proyeksi, Yayasan Harkat Bangsa dan Partnership for Governance reform in Indonesia, Jakarta, 2003 page 267.

1. *Ibid*, page 268

⁹*Ibid.*, page 268

3. Efficiency of sources.

As public acceptance is highly increase then the sources once provided for anticipating the public refusal can now be used for other strategic matters such as to improve the quality of public service.

The effort to involve the public can be done through public hearing. However, the public hearing is criticized to be merely based on the skills instead of on the real experiences. Besides, it is still questioned as it does not guarantee the public acceptance.

Participatory Policy

At least there are two policy models which are considered constructive in framing the mechanism of public policy making which are: “policy as the struggle of people’s needs” and the model of “policy as the social marketing process”. Both of them will be discussed as follows: ¹⁰

a. Policy as the struggle for public’s interest

By not thinking in beaurocratic-judicial frame of thought, the public policy formulation does not rely on the active role of state apparatus. It does not mean that a country is excluded from the policy process. What important here is the politic process, not merely the beaurocratic one. Political process here means the public political process in public policy formulation.

The policy process, according to its supporter (system theory as the example) is a process of demanding and supporting the policy ideas which should be considered by the government. In this case the role of the policy makers is merely limited to respond the demand and the support of the public. Actually, during the process, the politic

¹⁰ Purwo Santoso, a paper on Multistakeholder Workshop, *Membangun Mekanisme pembuatan Kebijakan Daerah yang Partisipatif* held by Jogjakarta Transparency, in cooperation with Independent Legal Aid Institute (ILAI) and Partnership for Governance Reform in Indonesia, Yogyakarta: January 20, 2003

institutions had provided the area to accommodate the variety of interests among public. Thus the priority formulation and the bargaining can be conducted by the public referring to the rules of the game and the procedure.

The appearance of this institutional capacity enables the related parties to avoid the possible conflicts. The public also understand the importance to respect the procedures so that the public policy process can spot the real target. This situation can “force” the disagreeing party to eventually agree with the policy. When it happens then, the policy will not longer rely on the legalized government policy, rather it will legitimate the process of policy making.

The fact that policies can benefit some parties and make the others loss is not the issue according to society centric framework. The unsatisfied parties will struggle for their interest. Thus, the policy process will be dynamic as beauracrat mechanically responds the support or demand of the public.

b. Policy as the social marketing process.

The second model is an excerpt of advanced industrialized country’s experiences that have developed the liberalism as the main pillar of the administration. The public awareness to their political rights has been the guidance to serve the law, and indeed the policy process can be simplified into responding the demand and the support of the society. If this model is meant to be the reference basis then the basic requirements should be available which is the adequate institutional capacity.

The articulation and the interest aggregation are conducted by political party. It means that this model is based on the political party. Unfortunately, this condition cannot be fulfilled easily by the public of Indonesia, given to the fact that the active-non active role of the government is unavoidable. Considering the situation, the first model can be the good choice with some modifications.

The model that combines the two previous models is created by J.A Altman in that the beauracracts are expected to play the active role in the policy making without eliminating importance of the public consent.

The policy of formulating Laws and Regulations.

After the amendment of 1945 constitution, the main policy of Laws and Regulations also faces the basic changes. In 2001, the new acts regulating the law process of Republic of Indonesia had been created. The so called act is Law No. 10/2004 regarding the law formulation.¹¹ With this, then all the previous laws and regulations are not longer used formally.

Article 5 mentions that the formation of laws and regulations should be based on the good principals¹² which can be classified into two categories:¹³ First, formal principle as it is associated with the format, category, media, institution, formulation techniques, etc. Second is the ten principles determined by Article 6, verse (1) which will be categorized as material principal that is the principal that must be included in every material of laws and regulations.

The seven formal principles that are stated in Article 5 of Law No 10 / 2004 covers the principles of : (a) clarity of objective; (b) institutional or the right formulation body; (c) concordance between type and material; (d) feasibility; (e) functionality and effectiveness (f) clarity of formulation and (g) openness.

Meanwhile the ten material principles as stated in Article 6, verse (1) includes: paternalistic; humanity; nationalism; kinship; *kenusantaraan* (related to being Indonesian citizen) ,unity in diversity / *bhineka tunggal ika*; fairness; the equality of rights before law and governance; involvement and law, and or balancing, concordance, and harmonious.¹⁴

The Form of Laws and Regulations

The Law No 10/2004 concerning the formulation of Laws and Regulations of State Draft year 2004 No 53 Article 7 (1), the kinds of regulations and hierarchy of laws and regulations are as follow: a. The 1945 Constitution of Republic of Indonesia; b. Law /

¹¹ Jimly Asshidiqie, *Pokok-pokok Hukum Tatanegara pasca Reformasi, Jakarta, PT.Buana Ilmu Populer, 2007, page 266.*

¹² Article 5, Law No.10/2004

¹³ Jimly Asshidiqie, *Op.Cit, page 269*

¹⁴ Article 6, Law No. 10/2004

Government Regulation on Substituting Law; c. Government Regulations; d. President Regulation; e. Local Acts.

Based on the mentioned article, then the local acts are indeed the lowest form of law in the hierarchy of laws and regulations of Indonesia. The implication of this condition is that the local acts will have the clear position, the institution which makes it, content and testing materials.

Article 7 verse (2) Local Acts as meant by verse (1) letter e covers: a. The Province Regulation is created by Local Parliament / DPRD together with Governor; b. Regency's regulation/city regulation is created by Regency Parliament / Regency/City DPRD together with a Regent / mayor. c. Village regulation / the same level of regulation, created by Village Representative Body (or by other name) together with Chief of Village (or with other name).

Besides the Local acts, the product of the local law is the regulation made by the Local Head or by the Local Head's decision. Both of the law products are the executive regulatory / *Peraturan Pelaksana* of local acts, where the material is strongly prohibited to be contradicting either with public interests, Local acts and the higher law and regulations.¹⁵

In accordance to the theme, the paper will discuss more about the law products of a region that is a regency/city or province's regulations.

Regulatory Impact Assessment = A Concept Offered

RIA (Regulatory Impact Assessment) is the method that systematically and consistently studying the effects of government's actions, communicating the information to the policy makers.¹⁶ Basically RIA is employed to examine a policy in terms of: relevancy between the public needs and target of policy, the need on Government intervention, efficiency of input and output, effectiveness of policy target and its result, the sustainability between public's needs and the result of before and after the implementation of a regulation. RIA method is expected to enhance the present

¹⁵ Article 146 Law No.32/2004

¹⁶ Asian Development Bank, Regulatory Impact Assessment (RIA) Guide Book, Jakarta: 2002, page 7.

regulation, support the business environment, especially the regulation related to a business and to generate the welfare to public as the regulation's impact.¹⁷

The main demand of RIA is as follows: (1) to give the sound reason of the need on government intervention (2) to give the reason that regulation is the best alternative; (3) to provide the reason that regulation can maximize the social benefits with the minimum cost; (4) to demonstrate that the adequate consultation has been done; (5) to confirm that obedience mechanism and adequate implementation have been decided.¹⁸ These five targets can be illustrated as follows:

1. Formulation of Problem
2. Identification of Policy Target
3. Identification of the Alternative Problem Solution
4. Analysis on Benefits and Costs
5. Communication with Stakeholders
6. Determining the best option of a policy.
7. The formulation on Policy Implementation

The brief explanation of the stages of RIA method used by the policy makers to formulate a policy and to review the present policy.¹⁹

Stage 1: Formulation of Problem

It is understood that in order to solve a problem, a policy is made by government. In this stage then an analyst will find out: Do Government really understand about the real problems? Are the problems really exist? Or it is merely the symptom? Is there any basic problem? What are the precise causes of a problem? And what are the stakeholders' perception on that matter?

Stage 2: Identification of Policy Target

¹⁷ Nasokah, *Reformasi Regulasi menuju Penciptaan Iklim Usaha yang Kondusif*, Opini, Suara Merdeka, April 16, 2006

¹⁸ *Ibid*

¹⁹ Asian Development Bank, Op.Cit, page 23-40

In this stage, an analyst attempts to find out the target that a government tries to achieve through the policy. In some cases, the target is indeed to solve the identified problems. However, should the problems are very complicated, the government will create the policy aimed at solving part of the problems, instead of the whole ones. Therefore, an analyst should identify the clear target of the policy.

Some questions in this stage are: what is the target of the policy? Is the policy intended to solve some parts or the whole parts of a problem?. In addition to that, analyst will find out whether the government holds the authority to make the policy and whether the policy is consistent with other acts and laws.

Stage 3: Identification of the Alternative Problem Solution

In this stage, the policy analyst will review the alternative development of alternative policy that can be used to reach the target and identified group. The focus of the review in this stage is to find out whether government has considered all options (alternative policies).

The policy analyst should also observe whether the better alternatives are available or not? What if the government opt the policy of doing nothing? By considering those alternatives then we can compare and consider the better alternative together with its result.

Stage 4: Analysis on Benefits and Costs

In this stage, the policy analyst does the assessment on the benefits and cost (benefits and loss) for each option or important alternative action from the view of government, public, costumers, business actors, and economy as a whole.

Stage 5: Communication with Stakeholders

The good policy is the policy which is ever communicated to the stakeholders, mainly to the executors in the field. The consultation should be done from the very beginning of formulation to implementation and monitoring the policy implementation. In this model, the consultation has started from the problem formulation, from which it is understood

that government handle the right problems and that toward the problem, they are in the same perception with the public, business actors and other stakeholders.

The consultation in this stage then is to find out some ideas about the alternatives, especially to find out the best option while testing if certain option is feasible. In the stage of cost/benefit analysis, the consultation is primarily intended to receive the important input on costs (loss and difficulties) and benefits of each option, besides to confirm if the cost is really used.

Stage 6: Determining the best option of a policy.

Having considering some alternative options of policies together with the calculation of cost and benefits of the option, the next stage is to find out the best policy to reach the target and to solve the identified problems. The function of the analysis in this stage is to confirm that government has compared all the cost/benefits and has chosen the most efficient and effective option.

Stage 7 : The formulation of Policy Implementation.

Having selecting the option, the next stage is formulating the strategy to implement the policy in the field. The implementation strategy covers the policy administration, policy dissemination, and policy implementation.

Conclusion

RIA is a method to evaluate a policy, a method whose purpose is to assess systematically the negative influence and either the on-going or suggested positive regulation. However, the RIA method can be used for two purposes: First, as a filter for any suggested local acts. The ideas for local acts should be assessed whether they must be solved by local acts or could be handled by other instrument. It is important to note if the problem is the real public problem. Second purpose is to analyze and review the impacts of certain local acts. Can the policies really solve the problems and to what extent they generate the impacts.

To ensure the implementation of this method as the policy formulation method, I offer three options: (1) RIA is perceived as the *ansich* method, as it merely functions to

guide the thinking activity without changing the mechanism and the institutions; (2) RIA is entitled to the institution that formulates the local acts both in the level of executive and legislative; (3) RIA will be institutionalized independently as the quality control of all local acts, of the present policies or the suggested one.

It is understood that there are still many options of methods that can be used during the formulation and evaluation of regulation. RIA is only another method to assess whether a policy which has been well formulated by involving stakeholders and considered as the good policy is actually the policy that supports and develops many parties, not the vice versa, inhibiting people to do business and to elevate their welfare. Then I believe, RIA can ensure the participatory process and confirm the real substance of the policy being made.

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