The Urgency of Community Participation in the Establishment of a Local Regulation

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ABSTRACT

One of the realizations of the implementation of local autonomy is the authority to establish a local regulation. The establishment process should involve the community to provide inputs both in oral and written form in order to obtain an aspirational local regulation. However, in its implementation, the establishment of local regulation that ignores community participation is often found. This is contrary to the principle of democracy in the rule of law. This research used a normative legal method and analytical prescriptive approach. The theory employed to answer the research problems was the theory of democracy. Community participation in the establishment of local regulation is not fulfilled because of the community’s ignorance of the mechanisms and the forms to participate. As a result, the local regulation produced does not represent local people’s aspirations. A local regulation which is not aspirational is difficult to implement and is potential to be cancelled through a judicial review. The purpose of this study is to see the importance of community participation in making local regulations. Since one of the good ways of producing a Local Regulation is through the involvement of the community in the process.

Keywords: Community participation, establishment regulation, local regulation

INTRODUCTION

Decentralization as a principle in constructing local government in the Republic of Indonesia will produce authorities and rights to the community...
of the local region (Joeniarto, 1992). Such authorities and rights allow a local government to take care of its own domestic affairs without further regulation by the Central Government (Nasution, 2003).

The government agencies should not be managed as an enterprise but they should have a role in promoting democracy, supporting the market, providing public services and performing good governance. Moreover, decentralization and regional autonomy have also brought a new phenomenon, in which many local governments are newly formed and established. There are now nearly 400 local governments (more than previously reported at a total of 300) as a result of decentralisation and regional autonomy in Indonesia. A new local government is usually more open and innovative in governing the work and is more adaptive to change than the previous centralized local government. As a new local government, they do not have the expertise and resources similar to the old local government, thus it requires more guidance from the central government in terms of good governance policies (Yunus et al., 2016).

Allowing a local government to take care of its own domestic affairs implies that everything related to the local affairs becomes the concern of the local government (Noor, 2012). Nevertheless, such affairs exclude the authority of the central government as stipulated by the law as regulated in Article 10 of Law Number 9 of 2015 on Local Government.

For local affairs, the Local Government is given an authority to establish a local regulation (Yusdiyanto, 2012). Establishing local regulation is a manifestation of the local government’s authority and independence in regulating its domestic affairs (Rawasita, 2009). Thus, the local regulation making under this circumstance will be a participatory local regulation, with the process of involving the community for inputs both in oral and written form (Indrati, 2005).

Community involvement is considered important because it is a realization of implementing a democratic country (Suseno, 1987). In addition, involving the community will result in a responsive or populistic local regulation, i.e. the local regulation that reflects the sense of justice and meets the community expectations (Tjandra & Darsono, 2009). In formulating the regulation, full participation of social groups or individuals within the community plays an important role (Mahfud, 2001).

Furthermore, community participation becomes a power to check and balance the interests of the government and society (Kusumah, 1986). Consequently, the established local regulation will really meet the requirements of good legislation. Such a process of participation will foster a sense of ownership and responsibility for the established local regulation (Sirajuddin, 2007).

In its realization, the establishment of the local regulation often ignores the rights of the community to participate in providing input (Muhiddin, 2013). The exclusion of the community from participating would be contrary to the principle of a democratic state.
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(Meyer, 2012). This is related to the right to express opinions as stipulated in Article 28 E of the 1945 Constitution. Participation in expressing opinions is carried out in legislation forums for the establishment of the local regulation (Manan, 2001).

When a local regulation is established without community participation, such regulation will be difficult to implement. In addition, such regulation will impede the efficiency of the Local Government and is potential to be cancelled through a judicial review to the Supreme Court.

This study aims at seeing how urgent public participation in making the Local Regulation, in case of creating an aspirational Local Regulation. Since ignoring community participation in local regulation-making is against the principle of a democratic state.

Formulation of the Problem

Currently, Indonesia is undergoing a process of reform and regional autonomy. In the process, a negative phenomenon is developing particularly in the field of legislation, both at the provincial, district and city levels, where community participation has not been optimally involved in making the Local Regulations.

In fact, the community participation’s main objective is to be able to take part meaningfully in the process of governing the region. Officially, the right to participate will be violated if the local government ignores such participation. Community participation is very important since the implementation of the local regulation will have an impact on the area and the life of the community.

Therefore, the problem of this research is formulated as: “How is the urgency of community participation in the establishment of local regulation and how is the legal effect of the establishment of non-participatory local regulation?”

Literature Review

Democratic State Theory (Popular Sovereignty). In this theory, there are 2 (two) terms which must be first understood, namely: sovereignty and people. Sovereignty is the supreme authority in a state which applies to all territory and peoples of a certain state. While the people of a state are all those who are in the territory of the state and subject to the power of the state (Sudarsono, 1991).

The theory of popular sovereignty emerged in the Renaissance era which bases the law on reason and ratio. In the 18th century, Jean Jacques Rousseau introduced his theory that the basis of the existence of a state was a “social contract” held by and between members of society to establish a state. Rousseau’s theory was put forward in his book entitled Le Contract Social. This theory is the basis of the ideology of popular sovereignty which teaches that the state is based on the will of the people, so all the rules are the manifestation of the people’s will. (Sudarsono, 1991).

The relationship between the people and the power of the state commonly developed based on two theories: 1) direct
democracy theory, where the sovereignty of the people can be done directly in the sense of the people themselves who exercise the supreme power they have, and 2) indirect democracy theory (representative democracy). In today’s modern world with the complexity of problems, the doctrine of representative democracy becomes more popular. Usually, the implementation of this sovereignty is called a representative institution (Asshiddiqie, 1994).

Regarding the theory, Indonesia adheres to popular sovereignty. The owner of the ultimate supreme power is the people. That power must be realized from the people, by the people, and for the people. Based on the Constitution, the exercise of popular sovereignty is channelled and organized according to constitutional procedures established in the law and the constitution (constitutional democracy).

Therefore, the realization of democracy must be regulated by law. The embodiment of democracy requires legal instruments, effectiveness and leadership examples, support from the community education system, and socio-economic welfare which is growing more evenly and equitably (Asshiddiqie, 2004).

The principle of popular sovereignty (democracy) and the rule of law (nomocracy) should be held concordantly as two sides of a coin. For this reason, the Constitution of the Republic of Indonesia should cover the fundamental belief that the law rules the state and the democratic state is based on laws where both the law and the state are inseparable from each other. They both are the real manifestations of the belief that Indonesia is a whole nation with the principle of the Almighty God (Belief in the One and Only God).

The democratic principle is not only contained in the central government but must also be realized in the structure of local government as mentioned in Article 18 of the 1945 Constitution, covering a principle that a regional governmental unit should be constructed in the state government system. This principle requires social participation in overseeing the local governing, as well as participating in the formulation of legislation including the Local Regulation (Manan, 1993).

**MATERIALS AND METHODS**

This is standard legal research aiming at normative regulations. This study is closely related to the library review because the standard legal research requires secondary data from the library review. The nature of the research is descriptive-analytical. This means that this study illustrates how a legal provision in the context of legal theories in the presentation describes the various issues related to the urgency of community participation in the establishment of local regulation. The data was secondary data consisting of (a) primary legal materials in the form of legislation, (b) secondary law materials in the form of writings, both books and articles containing comment or analysis related to the subject matter, and (c) tertiary legal materials in the form of dictionaries. The data was collected using literature reviews and document analysis.
RESULTS AND DISCUSSIONS

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Participation is defined as taking part in an activity (Departemen Pendidikan Nasional, 2007). When associated with the establishment of local regulation, it is defined as the community participation in the establishment of local regulation (Departemen Hukum dan Hak Asasi Manusia RI, 2009). Such participation is the right of people guaranteed by the law as regulated in Article 96 of Law Number 12 of 2011 and Article 237 Paragraph (3) of Law Number 9 of 2015.

The right of the community to participate in the establishment of local regulation is a form of Human Rights (Saragih, 2011) which is the right to express opinions as regulated in Article 28 E Paragraph (3) of the 1945 Constitution. In this respect, Human Rights provide recognition of the participation of the community in government affairs. The actualization of the role of the community in the realm of government will create public empowerment (El-Muhtaj, 2008), including participation in the establishment of local regulation.

Direct community participation will certainly have important impacts, such as avoiding the opportunity for manipulation of the community involvement and clarifying what is desired. In addition, it will add value to the legitimacy of the local regulation. Another added value is increasing public awareness and political skills (Abe, 2005).

The establishment of non-participatory local regulation will result in ineffective local regulation (Piliang et al., 2003), in the sense of not achieving the intended objectives. Besides, such local regulation will not be implemented (Wiratraman, 2010), in the sense of being unworkable or failure since its early establishment. Furthermore, such local regulation is unresponsive, in the sense of getting a prominent rejection from society since its drafting until its enactment (Halim, 2013). Finally, such local regulation will not solve social problems but instead creates new problems for society (Sihombing & Hasibuan, 2017).

Therefore, community participation in the establishment of a local regulation can be optimized into several principles. First, it creates an effective publication obligation (Patlis, 2004). Second, it creates information and documentation obligations which are systematic, free and accessible (Badan Pembinaan Hukum Nasional, 2011). Third, it creates a guarantee of open and effective procedures and forums for the community to be involved in overseeing the process since the planning stage (Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, 2014). Fourth, it creates a procedure that guarantees the public opportunity to propose a draft of local regulation (Warouw, 2014). Fifth, it provides a guarantee of an appeal to the public if the process of a local regulation establishment is not done in a participatory manner (Dewan Perwakilan Daerah Republik Indonesia, 2012). Sixth,
it creates an adequate time frame for all the establishment process: drafting, discussing the draft and dissemination of the formulated local regulation (Pambudi, 2006). Seventh, it creates clear and adequate accountability for the local regulation makers that deliberately close the opportunity for the community to participate (Makhfudz, 2012).

The main objective of community participation in the establishment of local regulation is to make the community able to give meaningful influence to the government process in a broad sense (Kurnia, 2007). So legally, the right of the community to participate will be violated if the local regulation makers do not open a space for that (Isra, 2010). In other words, the purpose of participation in the process of a local regulation establishment is to raise the community sense of ownership and responsibility because the applicable local regulation is made by them so that their compliance can be improved (Santosa, 2001).

In addition to providing space for the community to know the possible implications of the establishment of a local regulation since the early process (Surbakti, 1992), involving the community to participate in the establishment of a local regulation is also needed to ensure that their interests are not ignored by the local regulation makers in accordance with the principles of a democratic state (Nonet & Selznick, 2007).

In a democratic state, community participation in the activity of society members to act as individuals in order to influence government decision-making (Budiardjo, 2008). Participation can be either individual or collective, organized or spontaneous, constant or sporadic (Thohari, 2011). The statement above explicitly emphasizes that participation could not only be done formally but also informally (Marzuki, 2010).

The community participation in the establishment of local regulation is the implementation of the consensus principle, i.e. the community agreement to carry out their obligations and bear the consequences caused by such local regulation (Vlies, 2005). Consensus should, therefore, involve the community in the process of preparing and discussing the local regulation that will be formulated (Attamimi, 1990). As a result, the desired goal can be achieved, i.e. the establishment of an aspirational local regulation.

The implementation of the consensus principle is regulated in the provisions of Article 5 and Article 96 of Law Number 12 of 2011 which require community participation in the establishment of legislation, including the establishment of local regulation.

The elucidation of Article 5 states that the community participation is made possible in the planning, drafting, discussion, approval and enactment stages. Meanwhile, Article 96 determines that community participation can be done through public hearings, business trips, socialization, seminars, workshops and discussions. Therefore, the efforts to strengthen the community participation in
the establishment of a local regulation can be done through three stages, among others are:

First, at the stage of planning and preparing the local regulation draft (Huntington & Nelson, 1994), four forms of community participation can be realized which is participation in the form of research (Sastropoetro, 1986), participation in the form of a discussion, workshop and seminar conducted as the follow-up of the research findings (Dahl, 2001), participation in the form of an initiative proposal submission, and participation in the form of designing a local regulation (Sunarno, 2006).

Second, at the stage of discussing the local regulation draft, three forms of community participation can be realized: participation in the form of public hearings with the Local People’s Representative Assembly (Griadhi & Utari, 2008), participation in the form of providing an alternative local regulation draft (Saifudin, 2009), participation in the form of providing inputs through both printed and electronic media (Gauraf, 2002).

Third, at the stage after becoming a local regulation, community participation is realized with respect to the authority of the Supreme Court. The community can conduct a judicial review on the local regulation to the Supreme Court if they feel that their constitutional rights are violated by the enactment of such local regulation (Hamidi, 2011).

The above-mentioned opinions are in line with Yuliandri (2011) who argued that in the process of establishing a sustainable and participatory legislation, several efforts should be made, including the need to plan the legislation establishment through the preparation of academic texts, the existence of public or community participation in the legislation establishment, and the existence of conformity between the content material and the requirements of legislation establishment.

Community participation is one of the absolute requirements to obtain a participatory local regulation. Thus, ignoring community participation should be regarded as a factor leading to a formally flawed local regulation that can be reviewed to the Supreme Court.

Finally, it can be affirmed that the urgency of public participation in the formation of a Local Regulation is to fulfil the Human Rights of the citizens as stipulated in the Constitution. Therefore, involving the community in making Local Regulations is a concrete manifestation of the government’s commitment to recognize and protect Human Rights, so as to obtain a participative Local Regulation.

Legal Effects of Non-Participatory Local Regulation

Legal thinkers understand that legislation is a binding contract between a community and a state, or a contract made among the community members to form a government (Palmer, 2006). It presupposes the community to empower the state and then develop a democratic system. Democracy is a mechanism for fulfilling individual choice which is done collectively. This instrument allows all members of the community to
raise normative questions about whether the existing institutions really reflect orderliness (Syahrizal, 2006).

This explains that on the one hand, the state institutions should be able to articulate the people’s choices properly. On the other hand, state institutions enlighten people’s ignorance (Mahfud, 1999). Thus, the state institutions that exercise the sovereignty of the people should be able to provide the best assistance to resolve the various problems arising in society (Putra et al., 2014).

Therefore, the establishment of a local regulation should provide a space for the community to participate. If there is no space for the community to participate, then the local regulation will be conservative or elitist which is the local regulation that reflects the social vision of the political elite. In addition, such local regulation tends to reflect the desires of the Government and tends to be positivist-instrumentalist which is closed to the demands of groups and individuals in the community (Trijono, 2013), Power offers an individual the latitude to act according to what he or she wants. Those authorities also often force individuals or members of society to follow what they decide. Individual points and opinion are often dismissed by the powerful and therefore, those in power commit abuses.

A conservative or elitist local regulation has legal consequences to be cancelled (Siahaan, 2012). The cancellation can be done through a judicial review to the Supreme Court. The Supreme Court is authorized to conduct a judicial review of subordinate law against the Law, as regulated in Article 24A Paragraph (1) of the 1945 Constitution.

The judicial review of legislation in Indonesia has two models, including the review of law against the Constitution, and the review of subordinate law against the law. Then, the benchmark of the review is the Constitution and the Law (Hasibuan, 2017).

When closer attention is addressed to the hierarchy of legislation as regulated in Article 7 Paragraph (1) of Law Number 12 of 2011, the benchmark of the local regulation review shall be the law. this means that the process of establishing local regulation should not be contrary to the one determined by the law (Widjaja, 2010).

The hierarchy of legislation as stated by Hans Kelsen on stufenbau des rechts theory says that the lower norm is determined by the higher norm, and the basic norm becomes a consideration for the overall truth of the rule of law (Purbacaraka, 1979) (Figure 1).

Stufenbau des rechts theory put forward by Hans Kelsen has been developed by his disciple, Hans Nawiasky, who said that a legal norm in a country was always levelled. The levels were (i) fundamental norms of the state, (ii) basic rules of the state, (iii) laws, and (iv) implementing regulations and autonomous regulations (Asshiddiqie & Safa’at, 2006) (Figure 2).

Law Number 12 of 2011 and Law Number 9 of 2015 give the right to the community to participate in the establishment
of local regulation to provide input. If the established local regulation does not provide a space for the community to provide input, it means that the established local regulation contains a process contrary to the law. It can result in the cancellation of the local regulation through a judicial review to the Supreme Court.

The Supreme Court is authorized to declare invalid legislation under the Act, including a local regulation, if it is substantially contrary to a higher regulation or if the process of its establishment does not meet the applicable provision as regulated in Article 31 of Law Number 3 of 2009 on Supreme Court.

The cancellation of local regulation to the Supreme Court cannot be separated from the concept of Rechtsstaats (the rule of law). Allen and Thompson (2003) presented four basic judicial reviews which are the prerogative order, illegality, procedural impropriety and irrationality. Regarding the second reason, illegality can be specified into several principles that can be used individually or collectively as a proposition to conduct a judicial review. First, an authority must not exceed its jurisdiction by purporting to exercise powers which it does not process. Second, an authority must direct itself properly to the law. Third, an authority must not use its power for an improper purpose. Fourth, an authority must take into account all relevant considerations and disregard all irrelevant considerations. Fifth, an authority to which the exercise of a discretion has been entrusted cannot delegate the exercise of its discretion to another unless clearly authorized to do so. Sixth, an authority must not fetter its discretion. Seventh, an authority acts unlawfully if it fails to fulfil a statutory duty. Eighth, an authority must not excessively interfere with fundamental rights.

A judicial review is one of the instruments created to oversee the deviations of state power (Wood, 1996). Supervision is important because it can be used as an early...
detection tool for potential abuse of power (Huda, 2005). The deviation of state power is often poured into the product of law and is manipulation as well as a violation through the instrument of rules of those in power (Komisi Yudisial Republik Indonesia, 2002).

Therefore, the judicial review authority granted to the Supreme Court to cancel a local regulation is a safety net for the constitution in order not to be distorted in its practice (Fuady, 2001).

In addition, the formation of non-participatory local regulations will certainly have an impact on business and other economic activities. Principally, the regulation, in this case, the local regulation, can be grouped into 3 (three) categories, firstly the Local Economic Regulations which regulate the framework for economic, corporate and market players, secondly the Local Social Regulations that formulate the health, safety, and environmental standards as well as the mechanisms for their realization, and thirdly the Local Administrative Regulations pertaining to formalities and government administration (den Hertog, 1999).

Hence, local regulation making is the authority of the local government as stipulated in the Regional Autonomy Law of 1999 where the district/city government gains wider authority in issuing regulations. This is based on the regulation concerning the establishment of local regulation for a sustainable local autonomy as regulated in the Law Number 9 of 2015 on local government.

Although hierarchically the status of local regulations is under the national regulations, the local regulations become the spirit of local autonomy implementation in which the local government has the authority to regulate and administer its trade and industry, including business licenses and levies. However, in many cases, the local regulation does not solve the problems and is often contrary to the higher laws and regulations. TKED study in 2011 proves that about 72% of local regulations bring problems because they are formed without considering the community participation, and the substances often give burdens to people, particularly to the business actors (Ford Foundation & Komite Pemantauan Pelaksanaan Otonomi Daerah, 2013).

Thus, the non-participatory local regulations will give a burden to the business sector, which in turn will have an impact on the welfare of the people in fulfilling their economic rights.

CONCLUSIONS

Establishing a local regulation without community participation will result in a non-aspirational local regulation, and is contrary to the principle of a democratic state. A non-aspirational local regulation will be difficult to be implemented because it does not provide solutions for the society and even causes social problems and can be cancelled through a judicial review to the Supreme Court. The cancellation of a local regulation will impede the efficiency of the local government.
There should be a strengthening action through the Code of Conduct of the Local People’s Representative Assembly as well as the Decree of the Head of Local Government in each region that provides certainty about at which stage the community can participate in the establishment of local regulation and how the mechanism is. Therefore, to obtain an aspirational local regulation, the space for the community to participate should be given in three stages: at the stage of planning and preparing the local regulation draft, at the stage of discussing the local regulation draft, and at the stage of after becoming a local regulation.

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REFERENCES


Badan Pembinaan Hukum Nasional. (2011). Hasil pertemuan berkala XX kegiatan jaringan dokumentasi dari informasi hukum wilayah Jawa Barat di Palembang [The results of the regular meeting XX of documentation network activities from legal information in the West Java region in Palembang]. Jakarta, Indonesia: BPHN.


Departemen Hukum dan Hak Asasi Manusia RI. (2009). Panduan praktis memahami perencangan...
peraturan daerah [A practical guide in understanding the design of local regulations]. Jakarta, Indonesia: Dirjen Perundang-undangan.


Community participation in determining the direction of policy priorities in the formulation of legislation. Jakarta, Indonesia: Badan Pembinaan Hukum Nasional, Kementerian Hukum dan Hak Asasi Manusia RI.


the drafting of laws and regulations]. Jakarta, Indonesia: Dirjen Peraturan Perundang-undangan Departemen Hukum dan HAM.


