

Efforts To Improve The Quality Of Public Participation In The Formation Of Regulations Legislation

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Abstract

In the midst of many laws made in fast track legislation with minimal or all-formal public participation, the Constitutional Court finally strengthened public participation through the Constitutional Court decision No.91/PUU-XVIII/2020 and Law No. 13 of 2022 concerning the Second Amendment to Law No. 12 of 2011 concerning Formation of Legislation. The purpose of this research is to find out what rights are guaranteed by the law against public participation in the formation of laws. The method used in this research is juridical-normative with a statutory, statutory approach. The Constitutional Court decision requires meaningful participation, firstly the right to be heard, secondly the right to be considered, thirdly the right to be explained. The terms of meaningful participation are then explicitly stated in the explanation of Law No. 13 of 2022 concerning the Second Amendment to Law No. 12 of 2011 concerning Formation of Legislation.

Keywords : *Rights; Public Participation; Meaningful Participation*

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I. INTRODUCTION

The portrait of the formation of laws in Indonesia today, both formally and materially, is still vulnerable to misappropriation, one of which is by not involving public participation as it should, this shows the absence of transparency in the process of forming laws. As a result of this, there are problems in the form of corruption of legislation, products of laws whose legitimacy is weak to *Judicial Review*. Public participation in the process of forming laws is an important element, because laws that are formed in a participatory manner are in line with the principles of a democratic rule of law and responsive to the legal needs of the community. In line with this, Mochtar Kusumaatmadja¹ since the 1970s suggested that laws need to be placed "as a means of community renewal", responsive to the legal needs of the community.

The formal rule of law (*rechtstaat*) as proposed by Julius Stahl, has four important elements, namely the protection of human rights, the division of powers, government based on law and administrative justice.² The consequences of Indonesia as a state of law as stipulated in Article 1 paragraph (3) of the NRI Constitution of 1945 require that every action or policy of the government as a stakeholder must be based on applicable laws or regulations. This is in line with the concept of a country that adheres to the Continental European *legal system (Civil Law)* Laws and Regulations are an important instrument for the development of Indonesian law because written legal regulations are the main source of the rule system.³ With a position that can later regulate and even

¹Mochtar Kusumaatmadja, *Law, Society and National Legal Development*, (Bandung: Bina Cipta, 1998), pp. 12-13.

² Jimly Asshiddiqie, *Fundamentals of Post-Reformation Constitutional Law* (Jakarta: Jakarta: PT Bhuana Ilmu Popular, 2008), p. 304.

³ Bagir Manan & Kuntana Magnar, *Some Issues of Indonesian Constitutional Law* (Bandung: Bandung: Alumni, 1997), p. 101.

force everyone, the legal product of the Law should be made together, involving *stakeholders*, not just a few people who do not adequately represent the wishes or expectations of the public.

In relation to the formation of this participatory law, it contains two meanings, namely "process" and "substance". Process is a mechanism in the formation of laws that must be carried out transparently so that the public can participate in providing inputs in regulating problems. Substance is the material to be regulated must be intended for the benefit of the wider community so as to produce a democratic law with a responsive / populist character.⁴ Thus, participation, transparency and democratization in the formation of laws are an integral and inseparable unity in a democratic country.⁵

As the holder of sovereignty, the people or the public should have the most important role in every policy making, as the constitutional guarantees in Article 1 paragraph (2) of the 1945 NRI Constitution which states "*Sovereignty is in the hands of the people and is exercised according to the Basic Law*"⁶, the legal consequences are that the community has a role in every joint of the nation and state, one of which is the guarantee of involvement in the process of forming laws. More specifically, Article 96 of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations also regulates public participation, where the public has the right to provide oral or written input which can be delivered in the form of public hearings, work visits, socialization and seminars, workshops and/or discussions.⁷ Normatively, the guarantee of participation is quite strong, but in practice it leaves a question mark because it is often not in line with the *rules of the game*, some examples of controversial laws due to the non-fulfillment of public participation requirements, there are MD3 Law, KPK Law, Ciptaker Law and many more.

With various practical issues of law formation in Indonesia, finally the Constitutional Court (MK) also participated in strengthening public participation as the most essential thing in making policies or laws. Through the Constitutional Court decision No.91/PUU-XVIII/2020, it then requires *meaningful participation*, namely; *First*, the fulfillment of the right to be heard, *second*, *the right to be considered*, third, *the right to be explained*. Through this decision, Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations was also passed. It is none other than to strengthen the position of the mandate of *meaningful participation* decided by the Constitutional Court.

Because of seeing the importance of public participation in every corner of policymaking, the author is interested in exploring and examining further how the development of public participation arrangements in Indonesia today until the Constitutional Court decision with *meaningful participation* material, which will then be described by the author. Departing from this in the future through strengthening public participation arrangements (*das sollen*) should also be maximized by all parties, especially the House of Representatives and the Government so that it can be parallel to the *practice of formation (das sein)* to realize the formation of democratic and responsive legislation.

II. PROBLEM FORMULATION

Moving on from the thoughts that have been conveyed above, the author takes the following formulation of the problem: (1) What is the urgency of public participation in the formation of democratic laws, and (2) how to strengthen public participation through Constitutional Court decisions requiring *meaningfull participation* and Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations;

III. RESEARCH METHODS

The research used in writing this article is normative legal research and *principles used in legal disciplines*.⁸ According to Peter Mahmud Marzuki "Legal Research is a process to find legal rules, legal principles,

⁴Saifuddin, "Public Participation in the Formation of Laws and Regulations," in *Development of Legal Politics: A Study of the Influence of Political Configuration on Legal Products in Indonesia*, (Yogyakarta: FH UII Press., 2009), p. 5.

⁵ Saifuddin, p 5.

⁶ "Constitution of the Republic of Indonesia Year 1945" (n.d.), Article 1 paragraph 2.

⁷ Dermina Dalimunthe, "The Process of Law Formation According to Law No.12 of 2011 concerning the Establishment of Laws and Regulations," *Yurisprudencia* 3, no. 1 (2017): Article 96.

⁸ Amiruddin and Zainal Asikin, *Introduction to Legal Research* (Jakarta: Rajawali Pers, 2018), p. 33.

and legal doctrines to answer the legal issues faced"⁹, the data used in this study is data in the form of analyses using approaches such as conceptual approach, *statute approach*, and *case approach*. There are 2 (two) sources of legal materials in this study, namely primary legal materials and secondary legal materials.

The type of research used in this study is *Doctrinal Research*. This type of research is used to analyze applicable laws and regulations (positive law) to find formal juridical truth.¹⁰ The primary legal material in this study consists of the Constitution of the Republic of Indonesia Year 1945 (UUD NRI 1945), Law Number 13 Year 2022 concerning the Second Amendment to Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations and Constitutional Court Decision No.91/PUU-XVIII/2020,

IV. DISCUSSION

The urgency of public participation in the formation of democratic laws

Governments in developed countries have moved towards democratic and participatory models of governance. The public is given the flexibility and space to enter the process and determination of government policies. Participatory governance provides opportunities for people to be aware of the problems they face and their potential. So that later development is expected to touch the community more, development becomes more effective and efficient in the use of its resources, the community is more responsible for the development and utilization of development results, the community can learn through the development process, create solidarity in the community, and form the characteristics of an independent community and able to decide things that affect its future.¹¹

The word participation meaning comes from the words *pars and capere*, *pars means part*, while *capere* means to take. Participation is adapted from English, namely participation, which means taking part or participation.¹² Participatory ideas pay more attention to the inclusion of broader rights such as relations between states and communities and provide opportunities for people in decision-making. A development will be more successful if the community has and creates a commitment to participate as development actors and is supported by community members who can be used as role models, directors, guides and motivators. Therefore, citizen participation is needed because they are actually implementers of various existing development activities. In order to create community participation, it is important to do several things such as: it can benefit the community; can be understood its meaning by society; carried out according to the context and intent, carried out honestly, openly, and accountably, and certainly must involve the community in its implementation.¹³

Public participation is one of the factors that reduce the possibility of the interests of institutions and groups polluting the Law. Public participation ensures that laws are drafted only by a political elite. A legislator parliament has a better chance of gaining strong upstream legitimacy than a commission of experts. However, parliament is so vulnerable in nature, because it can be pestered by the interests of political parties and the interests of parliament itself.¹⁴

According to Dian Utomo, the benefits of public participation in public policy making, in this case, are the process of Law Formation, namely:¹⁵

1. Provide a better foundation for public policy making.
2. Ensure more effective implementation because citizens know and are involved in public policy making.
3. Increase citizens' confidence in the executive and legislature.
4. Resource efficiency, because with public involvement in public policy making and knowing public policy, the resources used in public policy socialization can be saved.

⁹ Peter Mahmud Marzuki, *Legal Research Revised Edition* (Jakarta: Kencana, 2013), p. 35.

¹⁰I Made Pasek Diantha, *Normative Legal Research Methodology in the Justification of Legal Theory* (Jakarta: Prenada Media, 2016), p 95.

¹¹Arafah Yunita and Haryo Winarso, "Increasing and Strengthening Community Participation in the Smart City Context," *Journal of Governance* Vol 22 No (2020): p 55.

¹² Arafah Yunita and Haryo Winarso, p. 55.

¹³ Arafah Yunita and Haryo Winarso, p. 55.

¹⁴ Riza Multazam Luthfi, "The Relationship Between Community Participation, Law Formation and Judicial Review," *Al-Daulah Journal* Vol. 5, No (2015): pp. 168-193.

¹⁵ Riza Multazam Luthfi, pp. 168-193.

The urgency of public participation in the discussion of laws and regulations, according to Sirajuddin, includes:¹⁶

1. Capturing knowledge, expertise, or experience of the community so that the laws made meet the requirements of good laws;
2. Guarantee laws and regulations with the reality that exists in society, foster a sense of *belonging*, sense of responsibility, *and accountability of the Law*;
3. Fostering *trust, respect and public recognition of the DPR and the government*.

Public involvement in the formation of laws, will benefit the framers of laws. *First*, the framer of the law will know the needs and how to meet the needs of the community appropriately. *Second*, there is mutual trust between the framers of the law and the community, so that harmonious relations are built. *Third*, increase public awareness and role in the implementation of laws.¹⁷

The relationship between public participation and legal products can be explained as Afan Gaffar categorizes it into two regime models, namely democratic and undemocratic as follows:¹⁸

Table 1: Relationship between Regime Type and Legal Product Characteristics

No	Regime Types	Product Characteristics Legal	Mechanism
1	Democratic	a. Populist b. Progressive c. Limited Interpretation	Pluralistic/Competitive
2	Non Democratic	a. Elitist b. Concervative Open to Interpretation	Centralistic/Non Competitive

From the table above, it can be explained as follows: *First*, for a democratic regime the formation of laws is carried out by various parties. That is, community involvement is not only there but also high because of the existence of political pluralism in society, both those who are members of political parties and *pressure groups*, mass media, non-governmental organizations etc. The existence of this community involvement will result in populist and progressive legal products that provide *space* It is little for the executive to give further interpretation to all the rules. *Second*, for undemocratic regimes the formation of laws is carried out by the main elites in a country, namely top bureaucrats, military leaders and businessmen for non-socialistic countries; while for socialist countries the formation of laws is carried out by party leaders plus a number of militaries. The legal product is elitist, *concervative* and open to new interpretations with further regulation.¹⁹

On the basis of an understanding of the relationship between the regime and the above legal products, especially those related to democratic regimes, the problem is even more interesting when it is associated with the existence of representative democracy and participatory democracy. Departing from the existence of these two types of democracy, both representative democracy and participatory democracy will give birth to interesting problems in the formation of laws. Both have their own strengths and weaknesses.²⁰

¹⁶ Sirajuddin et al., *The Right of the People to Control the State*, (Malang: Malang Corruption Watch and YAPPIKA, 2006), p. 119.

¹⁷Muhammadiyah, "Public Participation as a Strategy to Realize Good Governance of Regional Autonomy," *Journal of Government Science* Vol. 3, No (2013): p 61.

¹⁸ Yep. Busyro Muqaddas et al, (Editor), *The Politics of National Legal Development* (Yogyakarta: Yogyakarta: FH UII Press, 1992), p. 116.

¹⁹ Yep. Busyro Muqaddas et al, pp. 106-107.

²⁰ Saifuddin, "Public Participation in the Formation of Laws and Regulations," p. 3.

V. Strengthening Public Participation through Constitutional Court Decisions Requiring Meaningfull Participation and Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations

The formation of laws is part of the activity in regulating society.²¹ In principle, all parties in the state structure as well as outside the state structure, can initiate the idea of the Establishment of Laws and Regulations.²² *The United Nations Development Programme* (UNDP) defines participation as a characteristic of the implementation of *good governance* is the involvement of the community in decision making either directly or indirectly through representative institutions that can channel their aspirations. Such participation is built on freedom of socialization and speech and constructive participation.²³ Indeed, the formation of good laws and regulations is carried out by providing a middle space for community participation.²⁴

Normatively, in Article 96 of Law No. 12 of 2011 concerning the Establishment of Laws and Regulations, the public has the right to provide oral and/or written input in the Establishment of Laws and Regulations. Oral and/or written input can be done through public hearings, work visits, socialization and seminars, workshops, and/or discussions.

Regarding the stages of formation, Law No. 12 of 2011 states that the Establishment of Laws and Regulations includes the stages of planning, drafting, discussing, ratifying or determining, and promulgation. In each stage of formation, it must uphold the principle of openness, so that all levels of society have the widest possible opportunity to provide input in the context of the Formation of Laws and Regulations.

Further developments in the context of strengthening or improving the quality of public participation of the Constitutional Court (MK) also made the Constitutional Court decision No.91/PUU-XVIII/2020 which contained meaningful participation material meaningful, *first, the fulfillment of rights with their opinions (right to be heard), second, the right to be considered, third, the right to be explained.*²⁵ So that these three conditions apply *conditio sine qua non* in the formation of the Law.

In connection with this change, it is certainly a must for the rule of law, because law is dynamic. As Soedikno Mertokusumo stated that the law governs events but often the events have developed far, while the law has not changed. Therefore, it is not surprising that there is an expression *het recht hinkt achter de feiten aan*, which means that the law is behind its events. What is meant by law here is by itself written law or statute. Changes in legislation must go through procedures, so they cannot be done at any time to adjust the circumstances.²⁶ Legal change is always felt necessary starting from the gap between circumstances, events, and relations in society, and the law that governs it. However, the rules of law cannot be separated from the things they regulate, so when the things they should have arranged have changed in such a way, of course, changes in the law are required to adjust so that the law is still effective in its regulation.²⁷

Legal reform needs to be carried out comprehensively, covering all components in the legal system which according to Friedman consists of substantial components, structural components and cultural components. There is a very close attachment between the renewal of the substantial component and the cultural component. The substantial component should be built on the cultural component of the nation. Therefore, the ²⁸ presence of

²¹Satjipto Rahardjo, "Democratic Law Drafting, Paper in the Seminar 'Looking for the Ideal Model for Democratic Law Preparation and the Congress of the Indonesian Sociology of Law Association'" (Semarang: Faculty of Law, Undip, 1998), p. 3..

²²Jimly Asshiddiqie, *Constitutional Law and the Pillars of Democracy* (Jakarta: Constitution Press, 2005), p. 315.

²³Aleksius Jemadu, *Global Politics in Theory & Practice* (Yogyakarta: Graha Ilmu, 2008), p. 142.

²⁴Maria Farida Indrati, *Statutory Science: The Process and Techniques of Its Preparation: Revised Edition* (Yogyakarta: Kanisius, 2020, 2020), p. 287.

²⁵ Constitutional Court, "Constitutional Court Decision No. 91/PUU-XVII/2020" (Jakarta, 2020), p. 393.

²⁶ Soedikno Mertokusumo, *Know the Law of a Keeper*. (Yogyakarta: Liberty, 1996), p. 99.

²⁷Siti Malikhatun Badriyah, *Legal Discovery in the Context of the Search for Justice, First Print* (Semarang: Diponegoro University Publishing Board, 2010), p. 46.

²⁸Putera Astomo, "Lawrence M. Friedman, The Legal System A Social Perspective, in Putera Astomo's Journal 'The Formation of Laws in the Framework of National Law Reform in the Democratic Era', Journal of the Constitution," *Journal of the Constitution*, Volume 11, (2014): pp. 13-14..

Meaningful Participation in the form of Constitutional Court decisions is enough to contribute greatly to changes in the components of the legal system, especially materially or substantially.

The fulfillment of *meaningful participation* as a benchmark for a legal product has been perfectly arranged formally so that it also materially meets the sense of justice desired by the community. The concept of meaningful participation originated in a dispute developed by the South African Constitutional Court in the doctors for life case in 2006.²⁹

The impact of the concept of *meaningful participation* in the judges' consideration in Constitutional Court Decision No. 91/PUU-XVII/2020 is more or less accommodated in Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. In the Law, there are changes, one of which is in Article 96 which regulates public participation. The changes in question are quite significant, namely initially in Article 96 of Law Number 12 of 2011 only had 4 paragraphs, then changed in Article 96 of Law Number 13 of 2022 to 9 paragraphs. The outline of the amendment to Article 96 is detailing the nomenclature in the original 4 paragraphs and the addition of advanced mechanisms in the new 5 paragraphs.³⁰

The provisions of Article 96 amended in Law Number 13 of 2022 are as detailed as follows:³¹

1. The community has the right to provide input orally and/or in writing at every stage of the Establishment of Laws and Regulations.
2. The provision of public input as referred to in paragraph (1) is carried out online and/or offline.
3. The community as referred to in paragraph (1) is an individual or group of people who are directly affected and/or have an interest in the material content of the Draft Laws and Regulations.
4. To facilitate the public in providing input as referred to in paragraph (1), every Academic Paper and/or Draft Laws and Regulations can be easily accessed by the public.
5. In exercising the rights referred to in paragraph (1), the framer of the Laws and Regulations informs the public about the Establishment of Laws and Regulations.
6. To fulfill the rights as referred to in paragraph (1), the framer of laws and regulations may conduct public consultation activities through:
 - a. public hearings;
 - b. working visits;
 - c. seminars, workshops, discussions; and/or
 - d. other public consultation activities.
7. The results of public consultation activities as referred to in paragraph (6) are taken into consideration in planning, drafting, and discussing the Draft Laws and Regulations.
8. The framer of laws and regulations can explain to the public the results of the discussion of community input as referred to in paragraph (1).
9. Further provisions regarding public participation as referred to in paragraphs (1) to paragraph (8) are regulated in DPR Regulations, DPD Regulations, and Presidential Regulations.

From the above amendments, Fitriani Ahlan Sjarif then explained the points verse by verse after the changes, as follows:³²

1. Addition of nomenclature for each stage in paragraph (1);
2. New arrangements regarding online and/or offline public participation in paragraph (2);
3. Communities entitled to provide input are defined as directly affected and/or have an interest in paragraph (3);

²⁹Indonesian Center for Legislative Drafting (ICLD), "Efforts to Rush to Accommodate the Form of Law Introduced by Law Number 11 of 20220 concerning Job Creation in the Drafting System of Laws and Regulations, ICLD Critical Note or Second Amendment Bill to Law No. 12 of 20," 2022, p. 3..

³⁰Fitriani Ahlan Sjarif, "'The Meaning of Meaningful Participation in Regulatory Clearance'," *Indonesian Journal of Legislation* vil. 17 No (2020).

³¹ The House of Representatives of the Republic of Indonesia and the Government, "Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Laws and Regulations" (2022), Article 96.

³² Fitriani Ahlan Sjarif, "'The Meaning of Meaningful Participation in Regulatory Planning',."

4. Ensuring that the public has the right to easy access to academic manuscripts and/or draft laws and regulations in paragraph (4);
5. The obligation of the framer of laws and regulations to inform the public of the formation of laws and regulations in place of the provisions of paragraph (2) *huruf c* regarding socialization;
6. Reduction of socialization mechanism provisions and addition of other public consultation activity mechanisms in paragraph (6);
7. Accommodation of the results of public consultations as consideration in planning, drafting, and discussing draft laws and regulations in paragraph (7);
8. Stipulation that the framer of the regulation can explain the results of the discussion of community input to the community in paragraph (8);
9. Provisions for delegation of implementing regulations regarding public participation into DPR Regulations, DPD Regulations, and Presidential Regulations in paragraph (9).

In addition to the article above, we can also see in the general explanation of Law Number 13 of 2022 which also states expressly related to points of change. Things that need to be improved include:³³

- a. adding omnibus methods;
- b. correct technical errors after mutual agreement between the DPR and the President in plenary meetings and before ratification; and
- c. strengthening meaningful community engagement and *participation*;
- d. form laws and regulations electronically;
- e. change the support system from researchers to other functional officials whose scope of duties is related to the Establishment of Laws and Regulations;
- f. change the technique of preparing Academic Manuscripts; and
- g. change the technique of drafting laws and regulations.

Further explained the points of community / public participation, namely strengthening meaningful community involvement and participation carried out in an orderly and responsible manner by fulfilling three prerequisites; namely first, the right *to be heard*; second, the right to be considered; *and third, the right to obtain an explanation or answer to the opinion given (right to be explained)*.³⁴

From this normative improvement effort, then every formation of laws and regulations must now be informed and space is opened to explain to the public, because this is the right of every citizen which is even guaranteed by the constitution. By referring to the Constitutional Court Decision, the fulfillment of *meaningful participation* must at least be fulfilled starting from the stage of submitting the bill, discussion and mutual agreement between the House of Representatives and the President. This is important and even mandatory because the law orders to ensure democratization of regulation formation and produce responsive, populist and progressive legal products.

VI. CONCLUSION

From the results of the discussion above, regarding "Efforts to Improve the Quality of Public Participation in the Formation of Legislation", the author provides the following conclusions:

Public participation is very fundamental in the formation of regulations, because without openness with meaningful public participation space, legal products or laws will lose legitimacy by themselves and the points of mandate of meaningful participation in the Constitutional Court decision as above and Law Number 13 of 2022 have very clearly strengthened the legal position of public participation at every stage of formation regulations, starting from the stage of submitting bills and the role of the House of Representatives and the Government (President) as the *leading sector* forming regulations is to ensure the realization of *meaningful participation* for the public is fulfilled optimally, none other than this as *conditio sine qua non* in the formation of democratic and *legitimate regulations*.

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³⁴ DPR RI and Government, Explanation.

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