Meaningful Participation in Legislative Drafting as a Manifestation of a Democratic Rule of Law

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Abstract

Public participation has a significant role in the law-making process. As a manifestation of a democratic legal state, it acts as a direct form of check and balance from the people. The problem discussed in this study are: 1) what is the urgency of meaningful participation in forming legislation as a manifestation of a democratic rule of law? and 2) what are the obstacles to meaningful participation in forming legislation as a manifestation of a democratic rule of law? The research uses the normative juridical method with a statute and case Approach. Subsequent to the decision of the Constitutional Court Number 91/PUU-XVIII/2020, public participation would be more meaningful (meaningful participation), with at least 3 (three) requirements, namely: the right to be heard; second, the right to be considered; and third, the right to be explained.

Keywords: meaningful participation, the rule of law; democracy; legislative drafting.

A. Introduction

Article 1, paragraph 3 of the 1945 Constitution of the Republic of Indonesia, hereinafter referred to as UUD NRI of 1945, explicitly
states that Indonesia is a state based on law. Consequently, the rule of law means that law (nomoi) is the key to the life of the nation and state. Accordingly, it is also important to properly run the government and achieve good governance. Therefore, the existence of a good and responsive law is undoubtedly expected always to uphold constitutional values and democratic values and be able to fulfill the needs of human rights.

In Indonesia, the manifestation of democratic values is part of the government’s obligation to fulfill and protect human rights, one of which is the participation of the people in forming the legislation. Indeed, there is no shortcut to achieving this state, and the process takes a long time, followed by extraordinary precedents that have to take place first. Historically, this happened in Indonesia to achieve the state of law. The process began from the collapse of the authoritarian era during “Order Baru,” which then led to the era of “Reformasi” in 1998, followed by 4 (four) amendments to the constitution, UUD NRI of 1945. is the goal of reform. From this process, the people have been made aware that the President, a part executive branch, used to have a relatively vital and extensive role in the formation of laws and regulations, but after the amendment to the constitution of the republic of Indonesia, has now been shifted to becomes the complete authority of the House of Representatives of the Republic of Indonesia (DPR RI), a part legislative branch.

Based on the theory of separation of powers, one of the duties and authorities of DPR RI is to enact laws with the joint approval of the President. Meanwhile, the current President only has the right to propose a bill. To further detailed the functions and duties of each branch of power according to the separation of powers are DPR RI of the legislative branch, the President of the executive branch of power, and the Constitutional Court and the Supreme Court of the judicative branch.

As previously explained about the importance of law, ideally, the law-making process has to follow accommodative or participatory principles by making the people be involved in it. Therefore, it can confidently be called a democratic state based on law. However,
some particular elite groups can easily exploit the law-making process to diminish or even eliminate people’s participation, especially the poor and marginalized, because of their lack of access or power. Former Constitutional Justice Laica Marzuki stated that laws could be *misdadiger rechts*, which are essentially laws that eliminate people’s rights and obstruct the independence or welfare of the people.¹

To anticipate the problems above, it becomes essential to accommodate people’s involvement and participation in the law-making process. It is a direct manifestation of checks and balances, between constituents and government officials, for a bill before it becomes law. Based on the decision of the Constitutional Court Number 91/PUU-XVIII/2020 on November 25th, 2021, regarding the formal review of Law Number 11 of 2020 on Job Creation, qualifications for public participation have to be meaningful (*meaningful participation*). This affirmation ensures that public participation and involvement are correctly done. From the perspective of state institutions, the position of the Constitutional Court is a form of control and balance; therefore, its decision must be obeyed and implemented.

Based on the brief description above, the author is interested in studying and analyzing these 2 problems: 1) what is the urgency of meaningful participation in forming legislation as a manifestation of a democratic rule of law? and 2) what are the obstacles to meaningful participation in forming legislation as a manifestation of a democratic rule of law?

This research uses a normative legal research method, based primarily on secondary data.² This research also uses Statute and Case Approach.³

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3. Mohammad Agus Maulidi and others, “Politik Hukum Materi Muatan Per-
B. Urgency of Meaningful Participation in the Legislative Drafting as a Manifestation of a Democratic Law State

Historically, the idea of the rule of law was proposed by Plato, a philosopher in the era of Ancient Greece. In his book the Republic, he believes that to achieve the ideal state and goodness; then it is necessary to find someone who understands what goodness is (the philosopher-king). While in his other book, the Statement, to achieve the second-best ideal state, the supremacy of law is needed. Therefore, a preventive measure against the degradation of power carried out by a person is the government on the basis of law.\textsuperscript{4} Meanwhile, Aristotle, a student of Plato, proposed the idea of the rule of law, which in essence still with the concept of the polis, believed that the one who runs a country is not human, but honest thoughts and decency, which are the key factors to determine a good or bad law produced in a country. If this concept can be properly implemented, a rule of law can be created, because of its orientation towards the perfection of its citizens based on justice.\textsuperscript{5}

The idea behind the rule of law is that every action done by the government or society should be based on law, as a preventive measure against abuse of power.\textsuperscript{6} It means that every government action must obey the boundaries set by the law to become the norm in statutory regulation.\textsuperscript{7} Conceptually there are differences in the background and the legal system that supports it between \textit{rechtstaat} and the concept of the \textit{rule of law}. Historically, the concept of \textit{rechtstaat

\textsuperscript{7} Fauzi Iswari, “Aplikasi Konsep Negara Hukum Dan Demokrasi Dalam Pembentukan Undang-Undang Di Indonesia,” \textit{JCH (Jurnal Cendekia Hukum)} 6, no. 1 (2020): 127–140, p 130.
developed through rapid changes or great turmoil in the continental European legal system (civil law), while the rule of law developed through slow changes in the Anglo-Saxon legal system (common law).

Friedrich Julius Stahl is one of the figures who introduced the concept of rechtsstaat in the modern Continental European system (civil law) with characteristics including:
1) The existence of protection of human rights; 2) Division or separation of powers (trias politica) to guarantee human rights; 3) Government based on regulations; 4) Administrative court for disputes settlement. Whereas in the Anglo-Saxon system (common law), Albert Venn Dicey in his magnum opus Introduction to the Law of the Constitution gave three important characteristics related to the concept of The Rule of Law, namely: 1) Supremacy of Law; 2) Equality before the Law; 3) Due process of Law.

When viewed historically, the conception of the rule of law stem from the people’s desire to escape and reject the arbitrary system created during the government administration at that time. Thus, the rule of law is a correction of the state power (Polizeistaat). The state based on law, apart from the concept of rechtsstaat and the rule of law, is also related to nomocracy. The term nomocracy is derived from two words, nomos means the norm, and kratos means power. Essentially, the term nomocracy means the rule of law is the highest power. This concept parallels what happened in Indonesia, where other than being a state based on law, Article 1, paragraph 2 of the 1945 Constitution of the Republic of Indonesia also states that sovereignty is in the hands of the people and is implemented according

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9 Ibid.
to the Constitution. It means that the principle of the supremacy of law and the rule of law emanates from the sovereignty of the people. Therefore, the principle of the rule of law, its initial construction and development is based on the sovereignty of the people or the principles of democracy. In addition, Indonesia as a democratic country is a manifestation of a welfare state.

Mahfud MD explains that the correlation between the rule of law and democracy can be likened to two sides of a coin: the legal quality of a country determines the quality of its democracy. This means that, in theory, democratic countries would produce laws that are democratic or populist, or responsive. In contrast, authoritarian or non-democratic governments would create non-democratic, elitist, or orthodox rules. Similarly, Lin Lincoln emphasized that a country based on a democratic system as its political system must make the people the holder of the highest sovereignty.

The system of democracy being run in a political system will also affect the quality of democracy itself, one of which is in the context of its legislative drafting. An issue of the manifestation of democracy that needs to be addressed is the extent to which public participation is accommodated. If the law-making process negates or even nullifies public participation, it would be safe to assume that the resulting legal product does not accommodate people’s wishes or aspirations but solely for the interest of those who hold power. In general, the law should be made based on the values that develop or grow in the community (bottom-up not top-down). Therefore, it ensures that the laws and regulations made could fulfill the needs of the community, not the needs of the elite.

The Black’s Law Dictionary describes the law-making process/legislative drafting as the act of giving or enacting laws, the power to make laws, the act of legislating, preparation and enactment of laws, and the making of laws via legislation, in contrast to court-made laws, formulation of rule for the future, laws enacted by the lawmak-

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12 Iswari, *op.cit.*, p 129.
13 Maulidi and others, *op.cit.*, p 33.
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Meanwhile, Sally Wehmeier explained that legislation is law or set of law passed by a parliament, and the process of making passing laws: legislation will be difficult and will take time.\(^{15}\)

Article 1 Number 2 of Law Number 1 Law Number 12 of 2011 on Legislative Drafting as amended by Law Number 15 of 2019 on the Second Amendment to Law Number 12 of 2011 on Legislative Drafting describes the legislation as written regulations that are generally legally binding norms formed or enacted by state institutions or authorized government officials through procedures laid out by the laws and regulations. In addition, 2 (two) principles in Article 5 of Law Number 12 of 2011 regarding the procedures for legislative drafting, namely: the principle of enacting good laws and regulations; and the principle of the material content of laws and regulations. These principles dictate the quality of a legal product, including the extent of public involvement or participation. Therefore, it ensures whether the law is being made really for the people’s needs or not. In response, Next A. Hamid S. Attamimi explained that in legislative drafting in Indonesia, especially those that aim to achieve a welfare state for Indonesia, the principles above should embody:\(^{16}\) a. Indonesian legal ideals; b. the principle of the state based on law and the principle of government based on the constitutional system; c. other principles.

Article 96 of Law Number 12 of 2011 on Legislative Drafting as amended by Law Number 15 of 2019 states that the public has the right to provide input verbally and in writing in the law-making process, which can be done in several ways, namely: a. General Hearing; b. Work Visit; c. Socialization Events, Seminars, Workshops, and/or Discussions. Thus, we can infer that public participation has one of

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\(^{15}\) *Ibid*, p 381.

the most significant roles in the law-making process.

Based on the principle of enacting good laws and regulations, it can be concluded that public participation is a manifestation of the principle of transparency. Article 5 letter g of Law Number 12 of 2011 on Legislative Drafting affirms this idea because the principle of transparency entails that in the law-making process, starting from the planning, drafting, discussing, ratifying, enacting, and promulgating, have to be transparent and open. It means that all levels of society have a broad opportunity to provide input during the law-making process. Thus, it is clear that the role or participation of the people is very much needed.

In regard, M. Hadjon asserts that being open whether, “openheid” or “openbaarheid”, is crucial to achieving an excellent and democratic government. *Openheid* means the mental attitude of a willingness to provide information and accept the opinions of others, while *openbaarheid* is showing a state of openness.\(^\text{17}\) Next, Nonet and Selznick explained the importance of public participation in the law-making process, especially involving as many levels of society as possible, either individually or in community groups.\(^\text{18}\) Last but not least, Hemi Lavor Febrinandez, legal researcher at The Indonesian Institute (TII), expressed: First, transparency in the discussion process aims to give the people the means to participate by expressing their opinions; Second, the substance or content of the rules should be for the benefit of the wider community, to make a democratic and responsive legal.\(^\text{19}\) The idea explained is aimed so that the laws and regulations enacted are indeed to answer the wishes of the people or are based on the value that lives in the community, then the legal


products are indeed what they need.

A statutory regulation can be effective for the people if public participation is a prerequisite in its formation. It is because the people would generally accept the laws and regulations enacted. The benefits include: 20) 1) increasing the legitimacy and quality of laws and regulations; 2) increasing the chances of success in its implementation; 3) improving compliance with the implementation of laws and regulations; and 4) expanding a form of partnership with citizens. In addition, community participation can also forge a real relationship between the House of Representatives and the President, with the people as their constituents. This system is identical to what is adopted in the State of Indonesia, namely the representation system. Therefore, with public participation, the people certainly hope to get their welfare through legislative drafting.

The Constitutional Court of the Republic of Indonesia (MK RI) in their Decision Number 91/PUU-XVIII/2020 regarding the formal review of Law Number 11 of 2020 on Job Creation, believed that legislative drafting should be done meaningfully (meaningful participation). This decision is made to ensure proper public participation and involvement. More meaningful public participation has to fulfill at least three requirements: first, the right to be heard; second, the right to be considered; and third, the right to be explained. Public participation is primarily intended for community groups directly affected or concerned about the bill being discussed.

More meaningful public participation explained above has to be included, at least during the following stages: 1) submission of the bill; 2) joint discussion between the House of Representatives (DPR) and the president, and joint discussion between the DPR, the President, and the DPD as long as the bill is related to Article 22D paragraph 1 and paragraph 2 of the 1945 Constitution of the Republic of Indonesia; and 3) mutual agreement between the DPR and the President. The Constitutional Court’s decision on the formal review of Law Number 11 of 2020, is the actualization of the check and bal-

20 Jati, op.cit., p 335.
ances function between the branch of government power. From the perspective of the system of state institutions, after the amendment of the 1945 Constitution of the Republic of Indonesia, there is no longer any state institution that has the title of the highest institution among other state institutions, for instance, the People’s Consultative Assembly during the pre “reformasi” era. Therefore, the decision of the Constitutional Court must be implemented in legislative drafting.

Legislative drafting does not merely make regulations because new problems often emerge after a bill is passed. In response, Gustav Radbruch proposes the purpose of the law in his three classical views: 1) justice (philosophical); 2) legal certainty (juridical); and 3) beneficial for society (sociological). Therefore, public participation cannot be ignored during the law-making process because it often affects the implementation of the law.

C. Barriers to Meaningful Participation in the Legislative Drafting as a Manifestation of a Democratic Rule of Law

As a democratic state based on law, public participation in Indonesia would have a crucial role in the law-making process. However, it is without a doubt that it would often encounter several obstacles during its implementation. This is mainly because the institutions with authority to enact laws and regulations (the House of Representatives with the joint approval of the President) would have their inherent motive in mind. Whereas, looking at the power they have, the legislative branch has a significant position because the law passed would determine the fate and welfare of the people. In the context of people’s sovereignty, the legislature represents the people.

Legislative drafting is also inseparable from the role of political

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parties because it will later determine the legal politics of legislation. Theoretically, political parties exist and develop as an instrument to bridge the people and the government. Philippe C. Schmitter shares the same idea; he argues that in the consolidation of democracy, there are 3 (factors) that have an essential role that can bridge the interests of the people, namely political parties, interest groups, and social movements. Therefore, Indonesia as a country that adopts political parties in its state system, should not be undermined its importance, because the candidate for state institutions, such as the House of Representatives (legislative branch) and the President (executive branch), have first to be proposed by political parties. In addition, it also functions as a control or supervision for the government (checks and balances).

Going by the definition, Carl J. Friedrich explains that A political party is a group of organized people who aim to seize or maintain control over the government for their party’s leader and exercise other assignments given by members of the party. Meanwhile, Miriam Budiarjo describes political parties as organized groups in which each member has the same orientation, values, and ideals. Therefore, the similarities among its members can become legal politics and then manifest into the political configuration.

Both political configuration and legal politics underlie legislative drafting, whether a policy at the practical or operational levels. The causalities between politics and law create a perspective that law is a political product. Instead, because policies are inseparable from politics, the law functions as a control to prevent any policies made from being arbitrary.

Democracy, a dynamic and fluid political system, inherently

varies in forms. Therefore, making it susceptible to creating an arbitrary government, especially in exercising its authority to make policies. Naturally, it is necessary to limit the use of democracy. Robert A Dahl, for instance, suggested that there are 5 (five) criteria for running a democratic system:

1. Effective participation, meaning that before a policy is implemented by the state, all people must have an effective opportunity to give their views on it.
2. Equality of vote, every people must have an equal and effective opportunity to vote, and all votes must be counted equally.
3. A clear understanding, meaning that every citizen should be allowed to access relevant alternative policies.
4. Oversight of the Agenda, state policies are always open to change if the people demand it.
5. Adult inclusion, meaning that all or at least the majority of adults who are permanent residents should have full citizenship rights as indicated by the four previous criteria.

In Dahl’s opinion, it is transparent that in running a democratic system, the involvement or participation of the people is a crucial aspect of establishing the government’s policies. This is because the people, as the giver of the mandate, certainly would not want to be limited only as objects of a policy in the legislation but for their participation in the administration of the state to be a necessity.

Padmo Wahjono believed that the primary policies would determine the law’s direction, form, and content. Legal politics is also the policy of state administrators regarding the criteria used for prohibiting something, which includes drafting, implementing, and enforcing the law. In addition, Satjipto Rahardjo suggested that legal

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politics is about choosing the proper method for achieving a social goal with specific laws in society, which includes answering several fundamental questions, including. First, what are the objectives to be achieved through the existing system? Second, in what ways and which ones are considered the best for achieving these goals? Third, when and how the law needs to be changed? And Fourth, can a common and established pattern is formulated to assist in developing the process of selecting goals and ways to achieve these goals properly?

Mahfud MD also views legal politics as a line for official policy on the law that will be enforced either by making new laws or by replacing old rules to achieve state goals. From these conceptions of legal politics, an understanding that law is a political product is made. Therefore, the character of the legal product will essentially follow the political configuration that gave birth to it. In addition, Mahfud MD also explained three frameworks or patterns regarding the relationship between politics and law. First, the law is the determinant of politics in the sense that political activities are regulated by and must be subject to legal rules. Second, politics is the determinant of law because the law is the result of the crystallization of interacting and (even) competing political wills. Third, politics and law as a social subsystem are in a position where the degree of determination is balanced. Even though the law is a product of political decisions, once a law is passed, all political activities must be subject to legal rules.

Legal politics is inseparable from a political configuration, identical to a regime or power. Because the character of a legal product from its legislative drafting process will be reflected in the political configuration itself. The political configuration is divided into 2 (two)

namely the democratic and authoritarian political configurations. The resulting legal product is divided into responsive or autonomous characters and repressive or conservative or orthodox characters. Responsive or autonomous legal products come from the democratic political configuration. While repressive or conservative, or orthodox legal products come from the authoritarian political configuration.

The lack of meaningful community participation, apart from the obstacles mentioned above, is also due to the obstacles regarding the performance of the House of Representatives. One of the few is the inability to pass a certain number of bills (RUU) set in the National Legislation Program (Prolegnas) either in the annual or quinquennial target. Prolegnas itself is an instrument for national legislative drafting. Two things that mainly attract the public’s attention are quantity and quality. The quantity entails how many laws are enacted that do not reach the target, while the quality focuses on the quality of the law. Indicators of quality can be observed from how many times Constitutional Court declares laws unconstitutional through judicial review.

Based on data in 2020, the annual priority bills passed by the House of Representatives of the Republic of Indonesia (DPR) and the Government are lower than the legislative achievements in 2019 and 2010 (the second year of President Susilo Bambang Yudhoyono’s administration). The achievements of the 2020 legislation were ratifying 3 (three) laws, 6% (six percent) of a total of 50 (five) bills that became priorities in the national legislation program (PROLEGNAS) in 2020. Meanwhile, in 2019 the achievements were at 22% (twenty-two percent) and reached 23% (twenty-three percent) in 2010. The lack of achievement in 2020 is not only due to the low number of laws passed but also too many bills (RUUs) being prioritized, up to 50 (fifty) bills. Meanwhile, since 2014, the priority laws passed have never exceeded 20 (twenty) bills, so it is not an exaggeration to think that the Prolegnas in 2020 is unrealistic.32

There are several instances of laws that recently gained public attention. This is due to the lack of public involvement or participation in the law-making process, including the revision of Law Number 30 of 2002 on the Corruption Eradication Commission (RUU KPK) into Law Number 19 of 2019, with a relatively fast process. Ironically even the KPK, the institution that primarily implemented the regulation, was not asked for input. Another instance is the revision of Law Number 24 of 2003 on the Constitutional Court into Law Number 7 of 2020, with its enactment happening only within 7 (days) of work. The change is arguably insubstantial because only emphasizes the tenure of constitutional judges.\footnote{33 Agus Sabhani, “Partisipasi Masyarakat Dalam Pembentukan UU Menurut Pandangan MK,” https://www.hukumonline.com/berita/a/partisipasi-masyarakat-dalam-pembentukan-uu-menurut-pandangan-mk-lt-61fa4a0f548c2/, 2/2/2022 accessed 20/7/2022.} Whereas a more pressing issue for the revision of the a quo Constitutional Court Law is not included, like the authority to adjudicate constitutional complaints, reviewing laws and regulations, which are currently divided into 2 (two) powers of judicial power institutions (the Constitutional Court and the Supreme Court). Empirically many people’s experiences in seeking justice, their requests have not been received because the authority has yet to be regulated.

In addition, there is Law Number 7 of 2017 on General Elections, which is considered to negate public participation, especially Article 222, which regulates the presidential threshold requirements for nominating the president and vice president. This article has been requested 14 (fourteen) times for a material review by the Constitutional Court,\footnote{34 Yustinus Paat, “MK Tolak JR Presidential Threshold 14 Kali,” Berita Satu, https://www.beritasatu.com/news/879145/mk-tolak-jr-presidential-threshold-14-kali, 15/1/2022 accessed 20/7/2022.} and the constitutional judges granted the request, despite the dissenting opinion from the judges. The fact that so many requested it reflects the participation or even the desire for public participation has not been met with a positive response from the House of Representatives and the President as the government official tasked to draft and propose revisions or bills.
One phenomenal case that gained significant public attention due to its lack of public participation or involvement is the promulgation of Law Number 11 of 2020 (omnibus law). Apart from the method used for omnibus law (umbrella law) is not regulated in the Law on Legislative Drafting, but there is also a significant lack of public participation. So, the Constitutional Court gave it a conditionally unconstitutional decision. However, this decision also created confusion for the people because even though the a quo Law is declared unconstitutional, the law remains in effect within its 2 (two) years correction period.

The above instances of obstacles and laws that lack public participation happened because those who have the authority to draft legislation often inappropriately interpret the phrase public participation into the assumption that public support for laws enacted equates to public participation.

D. Conclusion

The democratic rule of law, in general, can be interpreted as every action of the government, or the people should be based on laws made or stipulated with public participation. The decision of the Constitutional Court Number 91/PUU-XVIII/2020 regarding the formal review of Law Number 11 of 2020 on Job Creation, suggested that it is not merely that there were people involved or participated but, as the constitutional judges explain in the decision, during the law-making process should be done meaningfully (meaningful participation). The more meaningful community participation has to fulfill at least three requirements, namely: first, the right to be heard; second, the right to be considered; and third, the right to be explained. Even though the Constitutional Court has decided on meaningful participation, it seems that its application still experiences obstacles. Several reasons such as legal politics manifested in the political configuration, public distrust of government official’s performance, for instance, their achievements of the National Legislation Program and several laws passed, including the KPK Law, the Constitutional
Court Law, the Election Law, and the phenomenal Job Creation Law. Meaningful participation, according to the Constitutional Court Decision Number 91/PUU-XVIII/2021 regarding the formal review of Law Number 11 of 2020 on Job Creation, should be a point of improvement for the law-making process by swiftly accepting, and involving the community to participate. Hence, the laws passed will later be able to answer the challenges, needs, and solutions to the problems that exist within the community. So that the welfare of the people, as Indonesia also adheres to the concept of the welfare state, could become a reality.

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