

**Proceeding - Kuala Lumpur International Business, Economics and Law Conference 9,**

**April 16 - 17, 2016. Hotel Putra, Kuala Lumpur, Malaysia.**

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## THE POLITICS OF LAW ON THE FORMATION OF RESPONSIVE, PARTICIPATIVE, AND POPULIST LEGISLATION

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### ABSTRACT

The state power to form legislation will threaten citizens' freedom if there is no control towards it. This paper will discuss the efforts to aim the formation of legislation which respects citizens' freedom and creates people's welfare. The legislature must pay attention to and guide certain principles in establishing legislation. At first the legislature must set the politics of law to be achieved from the formation of legislation. The good politics of law on the formation of legislation should at least reflect the responsive, participative and populist politics of law. It is formed by seeing legal needs comes from the community, giving an opportunity to the public to show their opinions on all provisions which will govern and bind them, and preventing the formation of legislation which impedes freedom of speech as the characteristic of democratic states.

Keywords: Politics, Law, Legislation.

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## INTRODUCTION

One of the principles should exist in a constitutional state is law-based government. It is in line with the International Commission of Jurists (ICJ) stating that the main principles of constitutional state are: (1) the state should be subject to the law; (2) the government must respect individual rights under the rule of law; (3) the judge should be guided by the rule of law, protect and execute without fear, without partiality, and oppose any government or party interference towards their freedom as a judge.<sup>2</sup>

The principle of "state should be subject to the law" can also be defined in the narrow sense as state or government should be based on the legislation in managing its power. As stated by Julius Stahl, the concept of constitutional state or *rechtsstaat* includes four important elements, namely: (1) protection of human rights; (2) separation of powers; (3) government based upon the rule of law; (4) state administrative courts.<sup>3</sup>

Historically one of the constitutional state principals, i.e. government based upon the rule of law, will threaten citizens' freedom if there is no control towards it. It is happened because legal products (legislation) are influenced by politics, especially during their formation. According to Moh. Mahfud MD, legislative activity (the formation of legislation) and executive activity (legislation under the rule of law) have more political decisions compared to real legal works.<sup>4</sup>

Political influence in the formation of legislation will not bring problems when the existing political configuration is democracy because the character of the legal products tends to be responsive/populist,<sup>5</sup> however, it will bring problems when the existing political configuration is authoritarian because the character of the legal products tends to be conservative/orthodox/elitist.<sup>6</sup>

Therefore, this paper will discuss the efforts to be conducted by the legislature to avoid the formation of legislation which have a tendency to take sides and give an advantage to certain party/group or the ruling group. The paper will also review the efforts to avoid the formation of repressive legislation threatening citizens' freedom, as well as to ensure the effective enactment of legislation in order to realize people's welfare.

## I. DISCUSSION

### A. The Regulating Power by the Legislature

From the branches of state authorities, i.e., legislative, executive, and judicial powers, the power to establish legislation is the branches of legislative and executive power. The legislative branch is the main organ of legislative product formation (although in Indonesia it is formed by mutual consent from the President as the chief executive), meanwhile the executive branch acts as a secondary institution in the formation of legislation (mainly legislation under the law). According to A Hamid S Attamimi, the regulating power by the legislature is called "*pouvoir legislatif*", meanwhile the regulating power possessed by the executive to run and regulate the Acts referred to "*pouvoir réglementaire*".<sup>7</sup>

In connection to the lawmaking power in Indonesia, there is a change occurred simultaneously with the amendment of the 1945 Constitution. Prior to the amendment, Article 5 (1) of the 1945 Constitution states that "The president has the authority to make laws with the consent of the House of Representatives (DPR)". This provision becomes the main legal basis for the formation of legislation in the constitutional system of the 1945 Constitution before the amendment.

<sup>2</sup> Mukthie Fadjar, *Tipe Negara Hukum*, (Malang: Bayu Media, 2004), hlm. 41

<sup>3</sup> Jimly Asshiddiqie, *Cita Negara Hukum Indonesia Kontemporer*, Orasi ilmiah Pada Wisuda Sarjana Hukum Fakultas Hukum Universitas Sriwijaya Palembang, 23 Maret 2004 dimuat dalam *Jurnal Simbur Cahaya No. 25 Tahun IX Mei 2004*, hlm. 3

<sup>4</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia*, (Jakarta: LP3ES, 1998), hlm. 8

<sup>5</sup> *Ibid*, hlm. 376

<sup>6</sup> *Ibid*

<sup>7</sup> A. Hamid S. Attamimi, *Peranan Keputusan Presiden RI dalam Penyelenggaraan Pemerintahan Negara. Disertasi*, (Jakarta: Fakultas Pascasarjana Universitas Indonesia, 1990), hlm. 35

According to Harjono, before the amendment of the 1945 Constitution, the law-making process known as the legislative process is within the scope of government authority and its organ is the President.<sup>8</sup> In addition to Article 5 of the 1945 Constitution, the formation of laws is also set in Article 20 (1) stating that "every law requires the House of Representatives' approval". Compared to the formulation of Article 5 of the 1945 Constitution, the formulation of Article 20 of the 1945 Constitution does not mention the word "holds the authority", so it is clear that the 1945 Constitution before the amendment adopts the system that the lawmaking power is held by the President and the House of Representatives gives the approval.<sup>9</sup>

Prior to the amendment, Article 21 of the 1945 Constitution gives the right to the House of Representatives members to propose the bills (RUU)<sup>10</sup>. There is a different position between President and House of Representatives members in the formation of laws. The President has the authority to make laws as referred to Article 5 of the 1945 Constitution before the amendment, meanwhile the House of Representatives members have the right to submit the bills. As the lawmaking power holder, the President has a greater power than the House of Representatives. According to Harjono, as the power holder, the President is the center of law-making process from the beginning until the establishment of the Laws.<sup>11</sup>

After the amendment of the 1945 Constitution, there are some drastic changes to the legislative function. Saldi Isra states that those drastic changes can be recognized by radical changes in Article 5 (1) of the 1945 Constitution from "The president has the authority to make laws with the consent of the House of Representatives (DPR)" to "the President has the right to submit the bills to the House of Representatives (DPR)".<sup>12</sup> As a result of the amendment, the President's dominance in the law-making process has gone away. Then, the amendments of Article 5 (1) and Article 20 of the 1945 Constitution are as follows: (1) the House of Representatives has the authority to make laws; (2) every bill shall be discussed by the House of Representatives and the President to reach mutual assent; (3) if a bill does not obtain mutual assent, the bill cannot be resubmitted during the same session of the House of Representatives; (4) The President shall sign into Law those Bills that have obtained mutual assent; and (5) If a Bill has not been signed by the President within 30 days after it achieved mutual consent, the Bill may legitimately become Law and must be enacted as Law.<sup>13</sup>

Furthermore, Saldi Isra explains that Article 20 (1) of the 1945 Constitution after the amendment can be regarded as an effort to put the legislative function as the exclusive right of the legislature by stating that the House of Representatives has the authority to make laws.<sup>14</sup> According to Jimly Asshiddiqe's view, the amendment of the 1945 Constitution has changed the legislative power or law-making power from the President to the House of Representatives. The Articles which can reflect those changes are the provisions of Article 5, especially Paragraph (1) juncto Article 20 Paragraph (1) through (5) clearly specifying the legislative function is in the House of Representatives, meanwhile the President is the chief executive.<sup>15</sup>

Based on the 2015 evaluation, the regulating power owned by the legislature, i.e. the House of Representatives, is not maximum and effective. The branch of legislative power which is responsible to form legislation has not been able to bear responsive, participative, and populist laws.

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<sup>8</sup> Harjono, "Pembuatan Undang-Undang Menurut Undang-Undang Dasar", dalam Rofiqul-Umam Ahmad, M.Ali Safa'at, dan Rafiuddin Munis Tamar (Ed), *Konstitusi dan Ketatanegaraan Indonesia Kontemporer, Pemikiran Prof. Dr.Jimly Asshiddiqie, S.H dan Para Pakar Hukum.* ( Jakarta: The Biography Institute, 2007), hlm. 131.

<sup>9</sup> *Ibid*, hlm. 132

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*

<sup>12</sup> Saldi Isra, "Agenda Pembaharuan Hukum: Catatan Fungsi Legislasi DPR", *Jurnal Hukum Jentera*, Edisi 3-Tahun II, November 2004. hlm. 61.

<sup>13</sup> *Ibid*.

<sup>14</sup> Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia.* ( Jakarta: Rajawali Pers, 2010), hlm. 210.

<sup>15</sup> Jimly Asshiddiqe, "Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945", Makalah disampaikan pada Seminar Pembangunan Hukum Nasional VIII, Diselenggarakan oleh Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia RI, Denpasar, 14-18 Juli 2003, hlm.7



Of the 39 bills (RUU) in the 2015 National Legislation Program (Prolegnas), the House of Representatives (DPR) is only able to form three Acts, i.e., the revision of Election Act, the revision of Local Government Act, and Guarantee Act. There are several bills related to the public's interest failed to be completed in 2015, i.e., the revision of the Prohibition of Monopolistic Practices and Unfair Business Competition Act, the revision of Oil and Gas Act, the revision of Mineral and Coal Mining Act, the revision of Placement and Protection of Indonesian Migrant Workers Act, the revision of Industrial Dispute Settlement Act.

The effect of the unfinished bills categorized as populist will affect the fulfillment of people's economic and social rights as guaranteed by the 1945 Constitution. Because although a constitutional state is not solely identical with the Act, it is the main source of law in a constitutional state such as Indonesia.

According to Vincent Crabbe, the Act, as the main source of law, is a medium for the state authorities to achieve the government's objectives in the fields of economic, cultural, political and social. Furthermore, the Act also has a function as a means of alteration because it is created or formed to encourage economic, social, and cultural changes in society.<sup>16</sup>

## 2.2 The Regulating Power by the Executive

According to the Act No 12/2011 on the creation of legislation, it mentions the types of legislation in which its formation becomes the authority of the executive power (especially the President). Article 7 of the Act No. 12/2011 states government regulation and presidential decree is the legislation which can be made by the President.

Government regulation is legislation set by the President to enforce the Acts accordingly.<sup>17</sup> Then, presidential decree is legislation set by the President to enforce higher legislation or to run governmental authority.<sup>18</sup>

The government regulation draft comes from the ministries and/or non-ministerial government institutions (LPNK). To discuss the government regulation draft, the initiating ministries and/or non-ministerial government institutions (LPNK) create inter-ministerial and/or inter-LPNK committee. The harmonization, unification, and consolidation of the government regulation draft conception will be coordinated by the minister regulating the legal affairs.<sup>19</sup>

The arrangement of the presidential decree draft comes from the ministries and/or non-ministerial government institutions (LPNK) as long as the draft contains materials instructed by the law, materials to implement the government regulation, or materials to run governmental authority.<sup>20</sup> In the arrangement of the presidential decree draft, the initiator creates inter-ministerial and/or inter-LPNK committee. The harmonization, unification, and consolidation of the presidential decree draft conception will be coordinated by the minister regulating the legal affairs.<sup>21</sup>

In contrast to the legislature, the executive can be regarded as having a better performance in running their regulating power in 2015 although there remain some notes. In 2015, 142 government regulations have been made. Some government regulations having a high significance value in supporting economic and social development, human rights protection, and law enforcement are the Government Regulation No. 2/2015 on the Regulation for Implementing the Act No. 7/2012 on Social Conflict Management, the Government Regulation No. 4/2015 on Placement and Protection of Indonesian Migrant Workers, the Government Regulation No. 14/2015 on 2015-2035 National Industrial Development Master Plan, the Government Regulation No. 16/2015 on Procedures for Collection and Utilization of Society's Donation For Poverty Reduction.

<sup>16</sup> VCRAC Crabbe, *Legislative Drafting*, (London: Cavendish Publishing Limited, 1994), hlm.2

<sup>17</sup> Pasal 5 ayat (2) UUD 1945

<sup>18</sup> Pasal 4 ayat (1) UUD 1945 menyebutkan: *Presiden Republik Indonesia memegang kekuasaan pemerintahan menurut Undang-Undang Dasar.*

<sup>19</sup> Pasal 54 UU 12/2011

<sup>20</sup> Pasal 13 UU 12/2011

<sup>21</sup> Pasal 55 UU 12/2011

In 2015, there are 157 Presidential Decrees enacted as Law. Some Presidential Decrees which demonstrate a commitment to support economic development and community empowerment especially in economic and social sectors are the Presidential Decree No. 1/2015 on Jatigede Dam's Social Impact Management, the Presidential Decree No. 6/2015 on Creative Economy Agency, the Presidential Decree No. 38/2015 on Cooperation between the Government and Business Entities in Infrastructure Development, the Presidential Decree No 148/2015 on the Fourth Amendment of the Presidential Decree No. 71/2012 on Land Acquisition for Public Facilities.

One of the government responsiveness in running their regulating power is when they successfully enacted the Government Regulation No. 92/2015 on the Second Amendment of the Government Regulation No. 27/1983 on the Implementation of Criminal Law Procedures Code (KUHAP). Some provisions of the Government Regulation No. 27/1983 perceived to be unjust and no longer appropriate with people's development have been changed, including the compensation for victim of wrongful arrest/miscarriage of justice which is previously established Rp 5 thousand - Rp 1 million, and Rp 5 thousand - Rp 3 million (if the victim of wrongful arrest/miscarriage of justice is injury/disability/death). According to the Government Regulation No. 92/2015, it is changed to Rp 25 million -Rp 100 million, Rp 25 million - Rp 300 million (if the victim of wrongful arrest/miscarriage of justice is injury/disability), and Rp 50 million - Rp 600 million (if the victim of wrongful arrest/miscarriage of justice is death).

In addition, the Government Regulation No. 92/2015 also contains several important things, e.g. the compensation must be paid for a maximum of 14 days after the court submit the application to the Ministry of Finance, whereas the previous provision is not limited by time so the execution can take for many years. The changes in the amount of compensation stated in the Government Regulation No. 27/1983 after nearly 32 years is a form of protection, advancement, enforcement and fulfillment of human rights by the state as guaranteed by the 1945 Constitution, considering there are many victims of wrongful arrests/miscarriage of justice especially the rabble who do not receive their rights from the state. The fulfillment of people's demand so that the state (through the President) changes the amount of compensation and the term of payment as stipulated in the Government Regulation No. 27/1983 also reflects the implementation of democratic constitutional state principle with its main characteristic of the recognition of popular sovereignty and public participation in the formation of legislation.

Besides their positive record, the government also made a mistake in 2015 by enacting an elite and non-populist presidential decree (Perpres), i.e., the Presidential Decree No. 39/2015 on Car Purchase Allowance Facility for State Officials. Although it is finally annulled by the President after receiving sharp criticism from the public, the Presidential Decree which increases the car purchase allowance by 85 percent inevitably shows that the government ever made a non-participative and non-populist regulation.

### 2.3 Making the Responsive, Participative, and Populist Regulation

To avoid the formation of repressive legislation which threatens citizens' freedom and to ensure the effective enactment of legislation, Montesquieu states that the legislature must pay attention to and guide certain principles in establishing legislation.<sup>22</sup> According to A. Hamid. S Attamimi, a good principle of law-making process serves as guideline and guidance to pour the contents of regulations into an appropriate shape and composition so that it has a proper method of formation and in line with the formation process and procedure that have been determined.<sup>23</sup> According to Philipus M. Hadjon, the functions of the good principle of law-making process are the basis for reviewing the establishment of law (formal judicial review) and the prevailing law (material judicial review).<sup>24</sup>

A. Hamid S. Attamimi divides legal principles in the formation of legislation into two general categories: (1) the principle of formal law, and (2) the principle of material law. The principle of formal law relates to "the how" of a

<sup>22</sup> Montesquieu, *The Spirit of Law, Dasar-Dasar Ilmu Hukum dan Ilmu Politik* (diterjemahkan dari Montesquieu, *The Spirit of Laws*, University of California Press, 1977), Penerjemah Khoiril Anam, (Bandung: Nusa Media: 2010), hlm. 361-362

<sup>23</sup> A. Hamid. S. Attamimi, *Peranan op,cit*, hlm.113

<sup>24</sup> Philipus M. Hadjon, "Analisis terhadap UU No.10 Tahun 2004 tentang Pembentukan Peraturan Perundang-undangan", makalah dalam Seminar Hukum Nasional "Implementasi UU No.10 Tahun 2004 dalam legislasi daerah berdasarkan UU No.32 Tahun 2004", Bagian Hukum Tata Negara, Fakultas Hukum Universitas Airlangga, Surabaya, 21 Mei 2005, hlm.3.

regulation, meanwhile the principle of material law relates to "the what" of a regulation.<sup>25</sup> According to A. Hamid S Attamimi, formal principles include: 1. the principle of clear purposes; 2. the principle of the need for regulations; 3. the principle of proper organs/institutions; 4. the principle of proper content materials; 5. the principle of implementability; and 6. the principle of recognizability, meanwhile material principles include: 1. The principle of suitability with the legal aspiration and fundamental norm of the state; 2. The principle of suitability with State Constitution; 3. The principle of law-based state and; 4. the principle of suitability with Constitutional System-based government.<sup>26</sup>

In addition to guiding a good principle of law-making process, the legislature must set the politics of law to be achieved from the formation of legislation. According to Satjipto Raharjo, the politics of law is defined as an activity to select and determine the method to be used to achieve the social and legal objective in society.<sup>27</sup> The definition of the politics of law also emphasizes the desired objectives of the legislature, i.e., to set the desired regulation which is expected to be used to express what is contained in the society and to achieve what is aspired.<sup>28</sup>

Determining the direction and purpose of law-making process is important because legislation can be seen as a document which will guide the process and behavior in society.<sup>29</sup> Many institutions and other authorities in society actually serve to provide such guidance. There are other customs, habits, and legal norms. In the context and tradition of the modern law and state, however, legislation has advantages over other norms.<sup>30</sup> Those advantages are called legality and legitimacy usually only given to legislation as a document produced by the legislative power as the only entity in the modern state authorized to make laws.<sup>31</sup>

The good politics of law on the formation of legislation should at least reflect the responsive, participative, and populist politics of law. The formation of responsive legislation means if there is a legal need mainly comes from the public to form legislation (new or amendment) which is appeared significantly, the state authorities must follow it immediately.

Responsive legislation becomes a necessity, considering every legal norm sets forth in the legislation should reflect people's demand which is in accordance with the reality of legal awareness in society. Therefore, legislation should be strictly based on the reality of legal awareness in society.<sup>32</sup>

Participative means the idea of the formation of legislation does not always come from the state authorities, but it can arise from the public. Moreover, the process of drafting and discussion must involve the public to give their opinions either directly or indirectly through information technology device. They should be given an opportunity to give their opinions on all provisions which will govern and bind them.

Ann Seidman defines participation as the parties affected by stakeholders' regulations (interest parties) must have the widest opportunity to provide feedback, criticism and involve in the process of making government's decisions.<sup>33</sup> Moreover, Lothar Gundling suggests several reasons for the need for public participation in policy making, as follows: a. Informing the administration, b. Increasing the readiness of the public to accept decision, c. Supplementing judicial protection, d. Democratizing decision-making.<sup>34</sup>

<sup>25</sup> A Hamid S Attamimi, *Peranan...op.cit*, hlm. 335

<sup>26</sup> *Ibid*

<sup>27</sup> Satjipto Raharjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2000), hlm:35

<sup>28</sup> Soedarto, *Hukum Pidana dan Perkembangan Masyarakat dalam Kajian Hukum Pidana*, (Bandung: Sinar Baru, 1983), hlm, 20.

<sup>29</sup> Satjipto Rahardjo, *Membedah Hukum Progesif*, (Jakarta: Penerbit Buku Kompas, 2008), hlm. 95

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> Jimly Asshiddiqie, *Perihal Undang-Undang*, (Jakarta: Konpres, 2006), hlm. 171

<sup>33</sup> Ann Seidman, Robert B. Seidman, dan Nalin Abeyserkere, *Penyusunan Rancangan Undang-undang Dalam Perubahan Masyarakat Yang Demokratis*, ( Jakarta : Proyek ELIPS Departemen Kehakiman dan Hak Asasi Manusia Republik Indonesia, 2001), hlm.8.

<sup>34</sup> Yuliandri, *Asas-Asas Pembentukan... op.cit*, hlm. 187

Populist means the state authorities must avoid the formation of legislation intended only for the benefit of certain institutions or groups because it will contradict to the public reason. The formation of legislation must not suppress the public's right to criticize the legislative, executive and judicial power, considering the public control through a responsible freedom of speech is the characteristic of a democratic constitutional state and explicitly guaranteed by the constitution.

Legislation should be populist. Jean Jacques Rousseau in *DuContract Social* stated that legislation is the general will (*volonté générale*), so the adresat is always general. Because legislation is created from the general will, it will create a common goal, i.e., public interest<sup>35</sup>. Therefore, if there is legislation in a particular society which does not reflect public interest, e.g., it does not come into force equally to all people, the legislation must be considered injustice.<sup>36</sup>

### III. CONCLUSION

The existence of legislation in order to achieve the main objective of constitutional state, i.e., people's welfare, is very important because legislation is a means to create a legal order in the society. Therefore, the main objective of law-making process in constitutional state is to create a conducive atmosphere in people's life, i.e., the condition of legal system which supports society's welfare needs a responsive, participatory, and populist legislation.

The formation of responsive, participative, and populist legislation will reflect some characteristics as follows: It is carried out by *first*, seeing the legal need mainly comes from the public to form legislation. *Second*, the idea of the formation can come from the public, and they should be given an opportunity to deliver their opinions on all provisions which will govern and bind them. *Third*, avoiding the formation of legislation which will impede public opinion as one of democratic state characteristics.

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<sup>35</sup> Jean Jacques Rousseau dalam Maria Farida Indrati, S. "Upaya Meningkatkan Kualitas Peraturan Perundang-undangan di Indonesia", *Jurnal Legislasi* Volume 4 No.2- Juni 2007. hlm.23.

<sup>36</sup> *Ibid*, hlm.24

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