

STRATEGIC ROLE OF ACADEMIC DRAFTS IN THE DRAFTING OF LOCAL REGULATIONS

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A. Preface

Decentralizing some part of the Central government affairs to the local governments was a certainty as the implementation of autonomy principle. Affairs beyond what has been set as the affairs of central government¹ is given to local government to manage their own household affairs². It is also supported by the principle of deconcentration and co-organizing task. Deconcentration and co-organizing is conducted as not all of the governmental powers and duties can be performed by using the principle of decentralization. In addition, as a consequence being a unitary state, it is not possible to decentralize all of government's power and become the autonomy of the local government.

The management of the local government household affairs are not detached from the existence of the signs that local government is part of the Unitary State of the Republic of Indonesia. Therefore in the attempts to regulate the affairs of the household; the local government should always taking into account the national interest. Local governance in conducting governmental affairs has a relationship with the Government and with other local governments.³

In regulating the affairs of their household, the local government has the right to establish local regulations.⁴ However, in formulating the local regulations there are signs that need to be considered, because there is the authority of the Central Government to annul local laws that diverge or conflict with higher regulations and/or public interest.⁵ Therefore, in making local regulations, local governments should be more cautious as there are a lot of signs to be considered.

The formulation of legislation (modern), including local regulations are connected with other supporting elements, namely a variety of data and information, among others, the condition of the past as lesson learned,

current issues that need to be resolved and conditions that wants to be reached (aspiration of ideal future).

Data and information will only be obtained from the results of observation, assessment and research. Supported by a variety of opinions from experts and comparison of practices that occur both in Indonesia and other countries (as a comparison) would greatly assist the drafters of legislation to develop a provision that is expected to realize the harmony between expectations (*das sein*) with the fact in the field (*das sollen*).

Therefore the drafting of local regulations require planning and prudence in its formulation. The role of research and study that are compiled in the form of academic draft is essential to support the formulation of local regulations to avoid possible conflicts with higher regulations or with the public interest. Aside from that, the existence of research and study before formulating local regulation will enable it to avoid overlapping with existing local law.

The formulation of the local regulation is still felt less or has not yet pass through the planning process of a good legislation drafting. It is marked by the discovery of a lot of problematic legislation because the core substance is still controversial, ambiguous, overlapping each other and are not consistent, either vertically or horizontally; have not shown the commitment and the character that are responsive to the human rights issues, vulnerable and marginal people, the value of gender justice; and it's formulating process that is less aspiring and participatory. Various research and studies towards problematic local regulation has been done.

Ministry of National Development Planning has found as many as 3091 problematic local regulations that is supposed to be annulled or revised since it hampers the economy. As of July 2009, it was found 246 problematic regulations. While in 2008 there were 1033 problematic

¹ Government affairs that are the affairs of central government, foreign politics, defense and security, justice, monetary and religious affairs.

² 18 (5) the Constitution of the Republic of Indonesia 1945, stated "Local Government run special autonomy as wide as possible, except for affairs which are determined by the constitution as the affair of the central government.

³ See the provision of 2 (4) Law No.31/2004 on Local Government.

⁴ 18 (6) UUD Indonesian Constitution of 1945, stated that local government has the right to implement the local regulation and other regulations to apply the autonomy and assisting tasks.

⁵ Article 145 (2) stated that the local regulations which collides with public interest and/or other higher legislation could be annulled by the government.

regulations. The year 2008 was the largest, while the years 2001-2006 there are 1039 regulations, and in 2007 as many as 773 local regulations. So there are a total of 3091 problematic local regulations throughout the year 2001-2009.

Based on the records of the Local Autonomy Implementation Monitoring Committee (KPPOD) almost 5,000 local regulations which govern various sectors are considered unfriendly for investment. Until May 2010 there are 4885 local regulations recommended to be annulled. According to KPPOD, transportation sector is the most problematic regulations, as many as nearly 600 local regulations, followed by around 549 regulations are within industrial sector and trade. Meanwhile, North Sumatra Province is rated as the most unfriendly investment with more than 300 problematic local regulations.

Ministry of Finance has also assessed, at least 15 sectors in the local regulations require the attention of the President. The fifteen sectors are: administration and population, culture and tourism, energy and mineral resources, marine and fisheries, health, manpower, communications and information, cooperatives and SMEs, environment, public works, transportation, industry and trade, plantations and forestry, agriculture, as well as third-party donations. Until the end of December 2009, the Ministry of Finance has proposed 3735 annulations of local regulations to the President⁶

In the mean time, based on a study conducted by the local Regulations Drafting Facilitation Directorate, DG of Legislation towards 4000 local Regulation in 31 Provinces, 50 districts/cities which were established in 2004 and 2005, data showed that most of the formulation of local regulation has not been made in accordance with the technical guide of drafting a legislation as stipulated in Law Number jo 12/2011 on the Drafting of Legislation.

The existence of problematic local regulations has shown a stage of the drafting of local regulations that were carelessly done. The above-mentioned problems, among others, were caused by the drafting of legislation which ignores the importance of having an in depth materials or comprehensive research, synchronization and harmonization process with other legislation, as well as lack of dissemination of legislation in order to open the access and increase community participation in the formulation of laws.

A good legislation, in this case the local regulation, is not only based on the sectoral demand but also has to be based on the needs of the community. Therefore, in order for the local regulation to perform as it is planned, it needs to be based on a research or further studies on various aspects which will be poured as norm.

In-depth studies were conducted to determine, among others, problematic issues in the society, what should be regulated, whether the provisions would be realistic enough or not, how is the supporting infrastructure to enforce the rules, how they are interrelated and in harmony with the existing laws and regulations, is there a potential collision, and how it relates to treaties or international conventions, and so on. This information is essential so that the drafting of regulations will be more realistic in drafting the local regulations. Later on everything must be poured in academic drafts.

B. Strategic Role of Academic Drafts in the Drafting of Local Regulation

Legislative drafting, particularly Laws, in general, is divided into 3 (three) stages namely Pre-Legislation, Legislation, and post-legislation stage⁷. Preparation of academic draft is a part of the pre-legislation; therefore it is often overlooked because it is often seen just as complementary terms.

In drafting the local regulation, the pre-legislative stage are very crucial in the efforts to create a harmonious and synchronized local regulations, either vertically or horizontally. Disregarding the pre-legislative stage will cause a lot of local regulations that are considered problematic, since it is considered to conflict with a higher regulatory or public interest.

Legislative drafting of future local regulations must go through the planning stages of drafting the local regulations through Prolegda, that is preceded by the drafting of academic drafts, which is based from the results of deep research and study.

The drafting of local regulations which is accompanied by academic draft should be regarded as one unit, so harmony of systematic between a local regulation drafts with its academic will be acquired. Formulating the academic draft which precede the preparation of local regulation draft will avoid any local regulations to conflict

⁶ <http://halamanadiirawan.blogspot.com/2010/08/perda-bermasalah-masih-banyak.html>

⁷ Ahmad Ubbe, SH.MH. The Mechanism of Legal Research in the Drafting of regulation. On the pre legislation stage is through the process of: (i) Planning of the drafting of regulation (RUU), (ii) preparation of the compilation of the regulation draft which consist of review, research and making of academic draft, (iii) technique and the mechanism of regulation draft, (iv) drafting of regulation.

The legislation process will consist of: (i) Discussion of regulation draft by the parliament and the government, (ii) stated, issuance, and the legislation. While the after legislation stage will through the process of: (i) Documenting the regulation, (ii) Spreading of the regulation draft, (iii) guidance, (iv) implementation of regulation. The Consultative Meeting Of Implementation Of Law In The Department Of Law And Human Rights Paper, BPHN, Cisarua Bogor 20 – 22 June 2005, pg 14.

with a higher provisions, overlap with other regulations and local regulations that are not so much significant in supporting the development of the region.⁸

At the Central level, in practice, the presence of the Academic draft is often asked in the discussion of the law. At this point, it is almost certain that in the discussion in the House of Representatives, there are academic draft that complement a Bill draft. Therefore, in the planning stage, academic draft is used as a requirement by the National Law Development Agency (BPHN) in proposing the priority Bills from technical ministry, in addition to other requirements, namely: the draft of the Bill, has passed through the inter-ministerial meetings, and has been harmonized. The existence of academic draft was decided to be one of the technical criteria in limiting the large number of the proposed Bill from the government.

The existence of academic draft for the formulation of local regulation draft that will go to "Prolegda", will continue to be encouraged. Formulation of complex and cross-cutting in nature of local regulation draft must be accompanied by its academic draft to facilitate the discussion between the local governments with the local Parliament, as made in drafting legislation at the central government.

The existence of the Academic draft in every local regulation drafting is essential to provide an overview of research results and scientific assessment which underlay any proposed legislation design which will be filed and in the same time showed that the local regulation concerned are not prepared for momentary interest, the sudden need, or because of non in depth thoughts. At least there are two risks if legislation does not fit the needs of society or the material does not correspond or conflict with higher legislation. First, the law, if applied, is ineffective or even opposed by the community. Second, it could be sought judicial review to be annulled, both executive and judicial review.

Besides the above-mentioned academic aspect, there are other considerations to be the reason for formulating the local regulation academic draft, namely because the position and function of the local regulation itself which is very strategic in the implementation of local autonomy. Local regulation as an integral part of the legislation in national legal systems has a fairly strong position since it has a constitutional basis in the 1945 Constitution, and further elaborated in Law Number jo 12/ 2011 on the Establishment Legislation.

On the other side, Local regulation function as a policy instrument to implement regional autonomy and assistance task, it is an implementing regulation which implement the higher legislation, as a container for specificity and diversity of the region as well as the voice of the people in the region, and as a tool for development in enhancing the development and the welfare of local communities.

Academic draft in the process of Bill formulation is a portrait or a map of various issues related to legislation that will be published. From that portrait, it can be determined whether these regulations would institutionalize what is already there and running in the society (formalizing) or make a contrary so that it can change society (law as a tool for social engineering).⁹

Data and supporting information for the purpose of drafting local regulations can be formulated in the form of "Academic draft" to help the drafter of the regulation on the arising problems that, the goals will be achieved, what provisions are related, how is the the arrangement, what materials should be in it , when does it come into force, what agency should enforce it, what mechanisms will be used and etc. as supporting materials.

Currently, for the sake of uniformity of academic formulation, the format of academic draft has been regulated by of the Minister of Law and Human Rights RI Decree No.M.HH-01.01.01/2008 on Guidelines for the Formulation of legislation Academic Draft. By ministry decree, it is expected that the format of formulation of academic draft of legislation, especially legislation and regulations will already have guidelines.

C. Platform for Academic Draft Preparation

Good academic draft will be based on, at least, philosophical, juridical, sociological and other relevant basis, such as the foundation of political, economical and so on. Given this premise, the drafting of local regulations will avoid potential conflict with the philosophical value which lives in society, in harmony with higher laws and regulations and in accordance with the legal needs of society.

The Philosophical foundation for a local regulation is the cornerstone philosophy or view which becomes the basic ideals of a problem when poured into the

⁸ Romli Atmasasmita, states that there are a lot of regulations that are overlapping with each other. Not only are those, a number of regulations not necessarily needed. It is caused by spontaneous making of regulation "just like a fire fighters, it is assumed that with regulations everything is over" Hukum online.com, Monday 24 January 2011

⁹ Hikmahanto Juwana, The Making of Academic Draft as a Condition in the Drafting of Regulation, Annual Meeting of Government Prolegnas Paper, year 2006, Cisarua Bogor, 2006, pg 2.

legislation. Philosophical basis is essential to avoid a conflict of legislation drawn up by the intrinsic values and noble living which lives in the midst of society, such as ethical, customs, religion and others values.

Juridical basis is the provision of law which becomes the basis for making laws and regulations. Juridical basis consists of the basic terms of formal and material juridical basis. In terms of formal legal basis is the foundation that comes from other legislation that gives authority for an agency to make rules. While the juridical basis of the material terms of the basic laws that govern the problem (object) to be regulated. Thus the legal basis is very important to provide a foothold for drafting regulations to avoid legal conflicts or conflict of regulation with higher legislation and support the harmonization of regulation.

Sociological basis is used to examine the reality of society relating to the legal needs of the community, socioeconomic aspects and values of life which are developing (public sense of justice). Sociological basis aims to avoid a legislation to be pulled out from its social roots in the community. Neglecting sociological values can be seen from the fact that the legislation after enacted is rejected by society. It was a reflection of legislation that does not have strong social roots.

D. Formulation of Academic Draft in the Context of Participatory Local Regulation

Community participation is a manifestation of democracy. Public participation in Formulating the local regulation is set forth in Article 53 of Law Number 12/2011 on the establishment of legislation, namely that the community has the right to give input, either in oral or written within the framework of the preparation or discussion of the local regulation draft with particular procedures as stipulated. Aside from that, community participation is also a manifestation of a good governance in accordance with the principles of good governance¹⁰.

One of the roles of academic draft is as a bridge of communication between stakeholders (community elements as stakeholders), law-making institution (Parliament and Government) and the drafter. From the point of stakeholders, academic draft is a real medium for public participation in the process of establishment or formulating the legislation, even the formulating or

establishment of academic draft initiatives themselves can be derived from the public¹¹.

The tendency of public opinion is to understand that the legislation as a product in favor of the government or political interests alone, therefore in their implementation, people do not have the draft of ownership and animate for the legislation. Therefore academic draft are expected to be used as a filter instrument, a bridge and can be used to minimize the political interests from the parties who formulate the legislation, in which academic draft which were made with research-base will collect and accommodate the needs and expectations of society scientifically, therefore the people will have the sense of ownership and will animate that legislation.

In the making of academic draft, the party who will be affected by the regulation such as the relevant agencies, experts and so on can be involved as early as possible to give opinion on what and how problematic issues can be settled or regulated. In the academic draft, harmonization and synchronization of relevant legislation are also conducted as early as possible to prevent overlapping of regulation.

The Regional Office of Ministry of Law and Human Rights RI could be involved mainly in the harmonization and synchronization of national legislation relating to the substance of the drafting of local regulation. Harmonization and synchronization of related legislation from the process of formulating the academic draft will greatly help the drafter of local regulations to formulate legal norms so it will not conflict with higher regulations.

The existence of academic draft in the regulation drafting is very strategic and is an inevitable necessity, to form a good regulation.

This is due to in the development of nations and people of Indonesia; it is not possible to have complete legal rules that regulate all matters. Meanwhile the flow of change that people want is very strong, especially for legislation products which are responsive and inspirational. In a democratic society, there are a lot of demands that the existence of a legislation is not just the sheer will of the ruler, but it is necessary to have public spaces which will enable the people aspirations to be accommodated in the drafting of the substance of legislation. With academic draft, the public spaces (community) are widely open and people are free to give their aspirations and express their

¹⁰ Jazim Hamidi dkk, Pembentukan Peraturan Daerah Partisipatif, (Jakarta: Prestasi Pustak, 2008), hal. 50-52.

¹¹ Article 5 (2) Presidential Regulation No. 68/2005 stated:

"The Formulation of Academic Drafts as mentioned in article (1) is done by the drafter along with the department which jobs and responsibility is in the field of regulations and the implementation could be done by university or other third party that have the skill to do so."

appreciation toward the substance of legislation that will and are being regulated¹².

Involvement of stakeholders in the preparation of academic draft is a form of public participation in formulating the local regulation. It is also in accordance with the mandate of Law Number 12/2011 on the Establishment of Regulation, and Law No. 32/2004 on Local Government. With the public participation, it is expected that:

1. Local Regulation may capture the knowledge, expertise or experience of public in order that the drafted local regulation is truly eligible and in accordance with the interests and needs of the community. Various policies or regulations will be more in line with reality and are more likely to live up to the expectations of local communities.
2. Local Regulation may develop community trust, respect and recognition towards the local regulation, so it will encourage local communities to comply better with the regulations and policies or socially responsible.
3. Local regulation may guarantee that the local regulations are in accordance with the existing fact that it is in the community and will foster a sense of belonging and a sense of community responsibility.
4. Local regulation may empower local governments to democratize the policy-making process and be more accountable to their voters. Open consultation with stakeholders, such as universities, NGOs, and the general public, enabling the "checks and balances" to be part of the process.

E. Forms of Stakeholder Involvement in the Establishment of Local Regulation

In the context of regional autonomy, the 1945 amendments provide juridical opportunities for regions to stipulate local regulations and other regulations to implement the autonomy and assisting task. The Law No.

32/2004 on Local Government also determines a great flexibility for regions to manage their own household. The broad authority must be understood to aim for prosperity and common social justice therefore, for the benefit of the community; the community should be invited together in formulating the draft of local regulation, without prejudice to the existence of people's representatives in parliament. Therefore it needs common wisdom of Local Government, Parliament and the public in making local regulations by making academic draft before formulating local regulations.

Public involvement in the formulation of academic draft by involving the parties who will be subjected with local regulations so it will be acceptable by the community, vertical agencies in the area for harmonization purpose with higher legislations, related agencies for the sake of harmonization and synchronization with the equal legislation and ease its implementation in the field.

F. Closing

The Formulation of legislation in the region in particular local regulation will become more complex which is in line with the development of state administration and development of society. The drafting of regulations in the future should be conducted more carefully by following the stages of formation of a good legislation.

In the pre-legislative stage, the formulation of academic draft for local regulations have a very strategic role to prevent the drafting of conflicting local regulation with higher legislation and contrary to the legal needs of the community as early as possible.

At every stage since the beginning of the drafting of local regulations, it should involve as many stakeholders and relevant parties as possible. The Involvement of stakeholders in the drafting of local regulations should be able to represent the interests of society at regional and national level in maintaining the unity of Indonesia. The inclusion of vertical agencies in the region for government affairs that is not the affairs of central government should become consideration.

¹² E. Rial. N, "Urgensi Penyusunan Naskah Akademik Dalam Pembentukan Peraturan Perundang-Undangan", [Http://Pusdiklat - Fh - Uii. Net / Pusdiklat / User_ Files / Karier_ Detail. Php ? Kode = 28&Awal = 0&Page = 1](http://Pusdiklat - Fh - Uii. Net / Pusdiklat / User_ Files / Karier_ Detail. Php ? Kode = 28&Awal = 0&Page = 1)