



Volume 33 No 3, September 2018

DOI: 10.20473/ydk.v33i3.8914

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Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA



Article history: Submitted 4 February 2018; Accepted 14 Juny 2018; Available Online 1 September 2018

Efficient Public Participation in the Local Law-Making Process

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Abstract

Getting the public to participate in the government's policy reflects a sense of control in democracy. However, constructing a mechanism of participation in legal provisions could be dilemma. It is important to realize that involving citizen in local government decision making particularly in law-making process has a fundamental difficulties; the essence of participation itself (openness and transparency) and the need to be efficient. This essay formulated an effective mechanism of public participation by juxtaposing steps in the local legislative process with the criteria of efficiency. This discussion is trying to encompass citizen participation from the initiation of a policy until it is enacted as a local legislation. Then in the next step, it will assess the elements that constitute an efficient drafting process. This article will consider such factors that are; financial cost; human resources or effort; wasted time; risk of failure; progress. The hypothesis is that not all of the means of public participation are efficient. The ideal notion of public participation put weighs on Local Authorities. What is needed to be underlined in this discussion is, to maximize the advantage of citizen involvement, it is important to look at the sequence where it should be held and what is the content. Moreover, the process of public participation should reflects principles namely: discovery, education, measurement, persuasion and legitimization. **Keywords:** Local Legislation; Local Government; Public Participation; Public Consultation.

Introduction

What is it that local governments do? Broadly their tasks are two-fold: to provide local public services (such as refuse collection) and to implement national welfare policies.¹ This basis analysis applies to Indonesia as well. Based on the Law on the Local Government, the urge of local government is for two reasons; to provide better public service and to accelerate democratization by involving public in the decision making process.² As the lower tier of government, local authority is asked to get in touch with citizen on a daily basis. In fact, the actual interaction between administrative and citizens occurs at this level. Therefore, at this level, the issue of citizen participation is essential.

Based on J.J. Rousseau, a participatory system contained two key concepts; first, 'participation' for Rousseau is defined as participation in the making of decisions and second, as in theories of representative government, it is a way of protecting private interests and ensuring good government.³ Rousseau's ideal system is designed to develop responsible, individual social and political action through the effect of the participatory process.⁴ That is to say in the participatory system communication between the government and the citizen reflects an obligation, rights and ultimately it is also a control.

Moreover, the power vested in the local government is not merely delegation from the national level. Local government owned its legitimation. It has an independent foundation. In many ways, the elected local government is the miniature of democracy of the state. Furthermore, it is a reflection of the national government.

"Elections are central to the democratic method because they provide the mechanism through which the control of leaders by non-leaders can take place; 'democratic theory is concerned with the processes by which ordinary citizens exert a relatively high degree of control leaders. The democratic relationship is only one of a number of social control techniques that in fact

¹ Rod Hague and Martin Harrop, *Comparative Government and Politics* (7th edn, Palgrave Macmillan 2007).[298].

² See the preamble and elucidation (explanatory memorandum) of Law of The Republic of Indonesia number 32/2004 on Local Government.

³ Carole Pateman, *Participation and Democratic Theory* (CUP 1970).[8].

⁴ *ibid.*

co-exist in modern democratic politics and this diversity must be taken into account of in a modern theory of democracy”.⁵

Regarding the notion of participation, Norman Wengert explored it in many angles.

“The first perception is participation as policy. The second perception is participation as strategy. Since government is designed to serve people, the views and preferences of people are necessary inputs to responsive decisions. This is to say that participation also part of communication. The next is participation as conflict resolution where in some situations participation is urged as a way to reduce tensions and resolve conflicts. Lastly, it is participation as therapy that participation has also been directed to overcoming the adverse effects of racial prejudice and other forms of discrimination”.⁶

However, local governments also have characteristic weaknesses. In order to truly represent the ideas of “democracy” and “participatory system” they are often too small to deliver services efficiently. They are limited by financial autonomy⁷ and time. It is important to realize that involving citizen in local government decision making particularly in law-making process has a fundamental difficulties; the essence of participation itself and the need to be efficient.

According to the study conducted by OECD, there are several challenges faced by many countries (especially Indonesia) in realizing good public consultation. *First*, there are no guidelines that can be used as a reference in organizing public consultations, including no mechanism to assess the success of holding public consultations; *Second*, long established government paradigm which consider their role is higher than society therefore public consultation is not essential (optional); *Third*, public ignorance and public awareness of the importance of participating in government.⁸

This article attempts to formulate an effective mechanism of public participation by juxtaposing steps in local legislative process with the criteria of

⁵ *ibid.*[24-25].

⁶ Norman Wengert, ‘Citizen Participation: Practice in Search of A Theory’ (1976) 16.23 Nat. Resources J.[25-27].

⁷ Rod Hague and Martin Harrop (n 1).*Op.Cit.*[294].

⁸ James Sheppard, ‘Konsultasi Publik Dalam Pembentukan Peraturan Perundang-Undangan’, *APEC Workshop – Bali 27-28 November 2014* (Directorate for Public Governance & Territorial Development OECD 2014).

efficiency. What is meant by ‘local legislative process’ and ‘law-making process’ in this article includes five stages of policy process; Initiation, Formulation, Implementation, Evaluation, and Decision.⁹ This discussion is trying to encompass citizen participation from the initiation of a policy until it is enacted as a local legislation. This essay will consider Indonesia as a case study.

Before applying the criteria of efficiency to the actual local legislative process in Indonesia this essay will first look at the concept of citizen participation and what the law achieves by the participation itself. Then in the next step, we will assess it with the elements that constitute an efficient drafting process. This article will consider these factors in list of; financial cost; human resources or effort; wasted time; risk of failure; progress.¹⁰ The hypothesis is that not all of the means of public participation are efficient. In order to maximize the advantage of citizen involvement it is urgent to look at the sequence when the participation held and what is the content.

Public Participation, Citizen Involvement or Public Consultation: What Are These?

There are phrases that are usually heard in the discussion regarding participation of the citizen in government activity. Those terms are such as “public participation”, “citizen involvement”, “citizen participation” or “public consultation”. Public consultation’ commonly refers to a mechanism or stages in a drafting process. In other word, the term “consultation” is more operational and it has had its working definition while the others are broadly used in relation to the theory of democracy and participation. What we should emphasize is that the terms are used in the context of fundamental political decisions with respect to government structure and the content of public programs, referring the importance of “consent of the governed” as a prerequisite of the social compact.¹¹

⁹ Constantin Stefanou, ‘Drafters, Drafting and the Policy Process’ in’, *Drafting Legislation; A Modern Approach* (Constantin, Ashgate 2008).[323].

¹⁰ Noor Azlina Hashim, ‘Consultation: A Contribution to Efficiency of Drafting Process in Malaysia’ (2012) 14 EJLR.[164].

¹¹ Norman Wengert (n 6).*Op.Cit.*[23].

The red line between these phrases is the expression of taking into account the public directly—because participation can be indirect or by representation—in order to put an impact on government decision with openness and transparency¹² as its nature. Improving public participation in the government’s policy making is believed as an investment for better policy. Citizen participation allows government to tap new sources of policy-relevant ideas, information and resources in making decisions. Equally important, it contributes to building public trust in government, raising the quality of democracy and strengthening civic capacity.¹³ Furthermore, Harlow and Rawlings note in *Law and Administrations* that consultation has a threefold purpose; (i) to put the administration ‘in full possession of the facts and viewpoints which bear on the particular matter’; (ii) ‘to enable those affected, from powerful groups to ordinary individuals, to state their case against the proposed action and to urge that it be modified or dropped’; (iii) for public explanation.¹⁴ Correspondingly, Walters, Aydelotte and Millers summarized five objectives of consultation as the following;

“Discovery: which means a search for definitions, alternative or criteria; Education: to inform and educate the public about an issue and proposed alternatives; Measurement; to assess public opinion on a set of options; Persuasion: to persuade the public towards a preferred option; Legitimization: to comply with public norms or legal requirements”.¹⁵

These explanations sounds ideal, but how could this brilliant scheme be put into practice? Constructing citizen participation in a provision in legislation could be dilemma. An examination of law regarding citizen participation results in an impression that they are very broad. If this notion is enforced strictly then this can cause considerable administrative disruption. However, to allow breaches of the requirements to go unchecked renders the statutory and common law

¹² Machmud Aziz, ‘Penguujian Peraturan Perundang-Undangan Dalam Sistem Perundang-Undangan Indonesia’ (2010) 7 *Jurnal Konstitusi*. [122].

¹³ OECD, ‘OECD Public Management (PUMA) Policy Brief No. 10’ (*OECD*, 2001) <<http://www.oecd.org/governance/public-innovation/2384040.pdf>> accessed 11 March 2013.

¹⁴ Carol Harlow and Richard Rawlings, *Law and Administration* (CUP 2009). [170].

¹⁵ Noor Azlina Hashim (n 10). *Op. Cit.* [156].

requirements meaningless and any value attached to the notion of the consultation and participation is reduced.¹⁶

In operationalizing this notion, Organization for Economic Co-operation and Development (OECD) has designed a working definition. It defined broad relations between government and citizen into three schemes of interactions.

“Information: a one-way relation in which government produces and delivers information for use by citizens. It covers both ‘passive’ access to information upon demand by citizens and ‘active’ measures by government to disseminate information to citizens. Consultation: a two-way relation in which government provide feedback to government. It is based on the prior definition by government of the issue on which citizens’ views are being sought and requires the provision of information. Active participation: a relation based on partnership with government, in which citizens actively engage in the policy-making process. It acknowledges a role for citizens in proposing policy options and shaping the policy dialogue although the responsibility for the final decision or policy formulation rests with government”.¹⁷

Likewise, Page identifies three separate types of consultation: *indirect consultation* of committees, advisory and other bodies known to be interested; *a staged consultation exercise*, based on an explanatory or exploratory paper, often published on the Internet; and at *large consultation* by politicians and civil servants testing their ideas informally at the development stage.¹⁸

How is it Going at the Local Level?

The structure and purpose of an open democratic system is to provide rational political analysis of policy, evaluate the results and possibly to change the law in consequence.¹⁹ The notion of citizen involvement is also expressed explicitly in the Law on Legislative Drafting²⁰ as well as Law on Local Government.²¹ By norms, public participation in law-making process is mentioned in many regulations.

¹⁶ Katharine Thompson, ‘General Duties to Consult The Public: How Do You Get The Public to Participate?’ (2002) 11 Nottingham L. J.[33].

¹⁷ *ibid.*

¹⁸ Carol Harlow and Richard Rawlings (n 14).*Op.Cit.*[171].

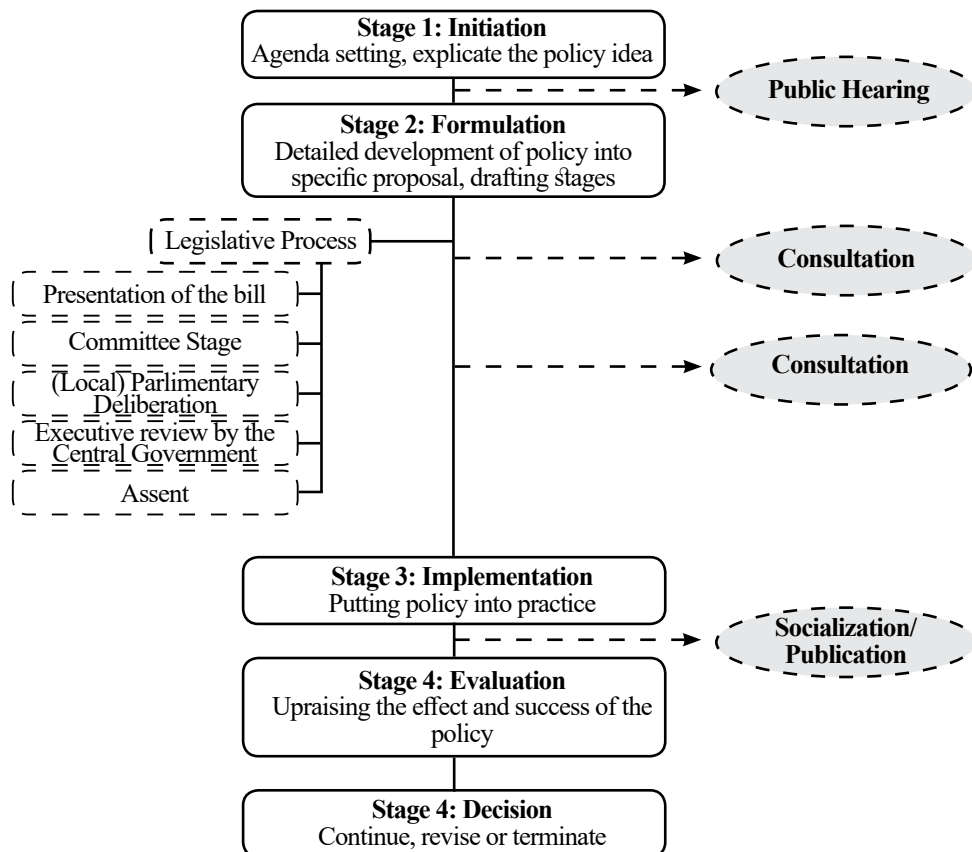
¹⁹ Heinz Schäffer, ‘Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process’ (2001) 22 Statute Law Review.[132].

²⁰ See article 96 of the Law of The Republic of Indonesia Number 12/2011 on Legislative Drafting

²¹ See article 150 of the Law of The Republic of Indonesia Number 32/2004 on Local Government

Participating in the law-making process is a citizen’s right. The provision states that public of which has interest to the substance of the draft bill shall have rights to give input both written and/or verbal in the drafting process via public hearing, dissemination or seminars held by the government. What the law mean by “public” in this scheme of participation is either individuals or groups of people who will be most affected by the upcoming policy and other people as well. The fundamental problem of this provision is that there is no explicit obligation to government to conduct the consultation or to what extend the public consultation should be measured. Therefore, it is urgent to discuss on what manners public consultation should be carried to contribute positively through the whole law-making process.

Figure 1: The stages of the public participation in the policy process²²



²² Constantin Stefanou (n 9).[323].; adapted from Rod Hague and Martin Harrop (n 1).[256 and 309].; also see G. Mahler, *Comparative Politics and Institutional and Cross Cultural Approach* (Pearson 2003).[table 4.9].

The figures above attempts to combine the stages of the policy process and the legislative process with stages of different approach of citizen participation. The first scheme of participation is held in the initiation process where the local government communicates their agenda setting to the most affected groups. As the initiative could come either from executive or legislative,²³ the policy idea could be as a result of public complaint expressed to the legislature in public hearing.

The next sequence of consultation is held in the middle of legislative process when the draft is discussed in the local parliament. This consultation scheme could be flexible following the debates. The time spent in this stage varies according to the bills. Likewise, the public consultation might occur frequently. Consultation materials in this sequence are in the form of a local draft bill. Interest groups, academics and experts are invited to give their views on the draft.

The last scheme of public participation is via socialization or publication of the enactment of legislation. Socialization of the new enactment means two things. First, it creates an obligation for the government to get the role occupant and law implementing agencies aware of the new regulation. For the citizens, this means the rights to be informed. If we connect these four schemes to the definition of governments-citizen relations by the OECD we could see that the first sequence is the model of “active participation”. Likewise, consultation is the two-way relationship and the last scheme is a one-way relationship.

However, local governments have limited resources. In one hand it is burdened with task loads as a result of residual decentralization.²⁴ On the other hand, local government should meet the challenges of strengthening its relationship with the citizen as well as improve the quality of policy making by

²³ See article 56 of the Law of The Republic of Indonesia Number 12/2011 on Legislative Drafting

²⁴ See article 10 of the Law of The Republic of Indonesia number 32/2004 on Local Government. It is stated that all government concerns rests to the local authority with the exception to foreign policy; defense; security; judiciary; fiscal and monetary; and religions.

improving public participation.

A. More Efficient Mechanism

Local government needs to find a balance between facilitating participation and taking decisions efficiently. Using the criteria of efficient drafting process²⁵ we are now arriving at the assessment of the means of public participation I mentioned before. There are five criteria I would apply. Those criteria are asking firstly, whether wasted financial cost is minimized; secondly it asks whether wasted human resources or effort is minimized; then thirdly whether wasted time is minimized. The next question is about the risk of failure whether or not the risk is minimized. Lastly, it is asking about whether the progress is unobstructed (clear-sailing). The table below checks the relevancies of the notion of participation with criteria of efficiency listed in the left columns.

Figure 2: Table of Assessment on the Efficiency of Public Participation Modes

Criteria of Efficiency	Public Hearing	Consultation	Consultation (Academics)	Publication
Wasted financial cost is minimized	yes	no	yes	yes
Wasted human resources or effort is minimized	yes	not significant	yes	yes
Wasted time is minimized	yes	not significant	yes	yes
The risk of failure is minimized	yes	no	yes	no
Progress is unobstructed or no delay (Clear-sailing)	cannot be measured	cannot be measured	yes	yes

It has agreed that public participation is essential. If it is bypassed the draft bill might not be successful. It could be possible that the draft bill rewind to the early stage. Indeed, the law-making process costs not only money but also resources

²⁵ Noor Azlina Hashim (n 10).*Op. Cit.*

and time. With the risk of repeating the process due to rejection from stakeholders, omitting public hearings before the formulation stages would be contra productive with the need to be efficient. Furthermore, maximizing public hearing to develop the policy idea would contribute to narrowing the drafting instructions. If the drafting instruction is clear the formulation stages would be more efficient.²⁶ At this point it is not clear whether public hearing would make the policy run smoothly. This is still in the very beginning of the agenda and it is too early to justify the influence of public hearing in the 'clear sailing' criteria. Therefore, we still put a question mark on this.

Another key point to discuss is the consultation forum in the middle of formulation process. I divide this type of consultation into two which are consultation inviting public or interest group, and consultations inviting academics. In my view, involving the public in this consultation would not be able to carry significant input at this stage, as what to discuss is the draft bill. Drafting bills requires technical skill. In order to criticize the draft it requires sufficient understanding as well. Public consideration of the draft would lead to criticism at the policy and not the draft which means taking the stage one step backward.

We should not forget that in the second stage the draft bill goes through parliamentary deliberation. That is to say that actually the member of local parliament has reflected a representation of public voice or public opinion in overlooking draft bill. Allowing the debate to take place without the need to hold direct public involvement in the middle would reduce waste of financial cost, time, and human resources. It is important to realize that the legislature after all is representing their constituents. There is no need to double the public consultation in this sequence. Thus, it is the task of the academics and experts to criticize the draft bill.

Involving academics in the consultation would benefit the process in the sense that risk of failure is minimized and make the progress of the draft bill unobstructed.

²⁶ G.C. Thornton, *Legislative Drafting* (Butterworths 1996).[129].

The role of the academics in this stage is at least two folds. Firstly, they have the technical proficiency to criticize the draft minimizing the risk of being defective. Secondly, they take on the role as mediator when there is a gap between policies agreed in the public hearing with the actual draft bills.

The last mode of citizen participation discussed is socialization as one way to publish the local legislation. In socialization, the executive and the legislature explain to the public what the new rules they should be aware. In this stage, citizens are passive. They are there to be informed so this step is factually not a participation process due to the fact that any public inputs will not change the policy. Even though it seems to be one-way communication, socialization is urgent to make the new enactment is well understood. In some cases, the new legislation cannot even be enacted because it takes some time to get the role occupant and law implementing agencies aware of the changes brought by the new regulation. This sequence contributes to the efficiency in the long-term implementation of the local legislation.

Conclusion

Getting the public to participate in the government's policy reflects a sense of control in democracy. Citizen involvement is a sign of openness and transparency. It is essential to let the citizens understand what the government is doing as it is not the aim of the government to shock the citizen with new law or new policies. However, constructing a mechanism of participation in legal provisions could be dilemma.

As stated in the introduction, this essay formulated an effective mechanism of public participation by juxtaposing steps in the local legislative process with the criteria of efficiency. Clearly, the ideal notion of public participation weighs Local Authorities. The analysis of the criteria of efficiency and the means of public participation shows that not all of them are efficient. What I want to underline in this discussion is, to maximize the advantage of citizen involvement, it is important to look at the sequence where it should be held and what is the content. Policy choices should be clear in public hearings if we would like to boost the efficiency

of the formulation stage. Therefore, in the public hearing governments should be ready with alternative policies offer especially to the most affected groups. Without paying attention to these two considerations, public participation would just leave the problem unsolved and rewind the process over and over again which at the end makes democracy inefficient and costly.

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HOW TO CITE: Ekawesstri Prajwalita Widiati, 'Efficient Public Participation in the Local Law-Making Process' (2018) 33 Yuridika.