LAW AND PUBLIC PARTICIPATION IN INDONESIA

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Abstract: *In order to achieve the goal of a welfare state, a law is needed as the legal basis for the state. One of the fundamental laws in democracy is that it is the people themselves who must form laws to achieve common goods. The purpose of this research is the role of community participation in the process of law making in the context of a democratic society. Through normative research will understand the role of public participation in the process of law making in the context of a democratic society. The results showed that The law is a product of general will, so the community as the holder of sovereignty must remain involved in its formation. Legitimate law is the expression of the sovereign will. The law is needed by the state in order to achieve the state's goal, namely to organize a general welfare state for its people.*
Keywords: *Community participation, Law Making, Democratic Society*

Introduction

The modern state in the 19th century was a state with the aim of a welfare state or what was called a material law state. The purpose of the state to organize public welfare requires various regulations to regulate the government's very broad intervention in managing the welfare of the people in the legal, social, political, economic, cultural, environmental, and defense and security fields (Indrati, 2011). To be able to carry out its duties perfectly, the state requires a clear legal basis as the basis for freedom and limits on state movement to organize and maintain public welfare. To quote Rousseau that the social contract has given existence and life to body politics (the state), which requires legislation so that body politics has the ability to coerce and move (Rousseau, 1999). Law is an act of general will which only pays attention to the common interest (public interest). Law is actually a condition of society as an association. People who are subject to the law, must create the law, the association has the right to determine the condition of society. Apeldoorn (2011) said that social life as an orderly society is the embodiment of law, which

is something from the law that is seen from the outside. Law is that society too, and human life itself. Quoting Satjipto Rahardjo's opinion in Progressive Law that the law is for humans not the other way around (Rahardjo, 2009), thus citizens as holders of sovereignty must remain involved in the lawmaking. Constitutional Court in Decision No. 91/PUU-XVIII/2020 regarding the formal review of Law No. 11 of 2020 concerning Job Creation, says that community participation must be carried out meaningfully (meaningful participation), not only using formal legal rules in the form of laws and regulations, in order to achieve genuine community/public participation and involvement. Community or popular participation is a reflection of the principle of people's sovereignty as stated in the normative provisions of the 1945 Constitution of the Republic of Indonesia. Habermas interprets the classical principle of popular sovereignty as the reciprocal relationship of administrative power and communication, popular sovereignty as a communication procedure (Hardiman, 2019). Based on the background described above, the problem to be studied can be formulated, namely what is the role of community participation in the process of law making in the context of a democratic society.

Result and Discussion

Law Making

Legislative activity can be characterized as a combination of political and legal practice, where the political aspect has the final say. The final stage of the legislative process is when the House of Representatives (DPR), after deliberation, makes a decision on the bill that is submitted to the DPR, deciding whether to accept or reject the bill. The debates that preceded these decisions, both in official bodies and in the public sphere, were not based on legal arguments but on political arguments (Tuori, 2002). Nonet and Selznick (2001) give three typologies of law in relation to political power, which have different characters. First, a political system with a repressive law character, where the law is subject to political power. The rule of law and judges who apply these laws lawfully and serve strong political interests are personally weakly bound by legal constraints. Second, autonomous law, where the law is independent from politics and curbs political power. This is the idea that underlies most contemporary understandings of the rule of law. In an autonomous legal regime, the courts are institutionally separate from the political sphere, the court decides cases and punishes offenses solely according to official legal rules or precedents, which apply equally to all litigants, rich or poor, politically favored or neglected socially. The government is bound by the rule of law. However, both judges and legislators in autonomous law, fail to address the disadvantages that poorer, less educated, and underrepresented citizens face in negotiating complicated and expensive legal system rules and procedures. According to Marc Galanter, in his empirical literature, he argues that the rich are in front, even though the judges are completely neutral. Third, the tension between substantive justice and autonomous law creates a political system with a responsive legal character. If autonomous law emphasizes legal formalism or legal regularity, responsive law is sensitive to the real losses experienced by the poor and seeks to make everyone equal before the law, either by providing assistance or by adjusting a rule. Nonet and Selznick say law is a facilitator to address social needs and aspirations.

Of the three types of law/laws described above, Nonet and Selznick provide a summary of the three characters as follows:

Table 1 Three Types of Law

	Repressive Law	Autonomous Law	Responsive Law
ENDS OF LAW	Order	Legitimation	Competence
Legitimacy	Social defense and raison d'etat	Procedural fairness	Substantive justice
Rules	Crude and detailed but only weakly binding on rule makers	Elaborate; held to bind rulers as well as ruled	Subordinated to principle and policy
Reasoning	Ad hoc; expedient and particularistic	Strict adherence to legal authority; vulnerable to formalism and legalism	Purposive; enlargement of cognitive competence
DISCRETION	Pervasive; opportunistic	Confined by rules; narrow delegation	Expanded, but accountable to purpose
Coercion	Extensive; weakly restrained	Controlled by legal restraints	Positive search for alternatives, e.g., incentives, self-sustaining systems of obligations
Morality	Communal morality; legal moralism; "morality of constraint"	Institutional morality; i.e., preoccupied with the integrity of legal process	Civil morality; "morality of cooperation
Politics	Law subordinated to power politics	Law "independent" of politics; separation of powers	Legal and political aspirations integrated; blending of powers
Expectations Of Obedience	Unconditional; disobedience per se punished as defiance	Legally justified rule departures, e.g., to test validity of statutes or orders	Disobedience assessed in light of substantive harms; perceived as raising issues of legitimacy
Participation	Submissive compliance; criticism as disloyalty	Access limited by established procedures; emergence of legal criticism	Access enlarged by integration of legal and social advocacy

Public participation in lawmaking as described above is closely related to the political configuration , which is generally divided into two contradictory concepts, namely (Mahfud MD, 2014):

1. A democratic political configuration is an arrangement of a political system that opens up opportunities for full public participation to actively participate in determining general choices.
2. An authoritarian political configuration is an arrangement of a political system that favors the state to play a very active role and take almost all initiatives in state policy-making.

In order to qualify as a democratic or authoritarian political configuration, three indicators are used of how the three pillars of democracy work, namely the role of political parties and representative bodies, freedom of the press and the role of the executive. In a democratic political configuration, the output of the formation of laws has a

responsive/populistic legal character, where access to public aspirations is expanded by integrating support from both a legal and social perspective. The process of law-making is participatory, inviting as much community participation as possible through social groups and individuals in society; and aspirational, which contains materials that are generally in accordance with the aspirations or wishes of the community. In an authoritarian political configuration, the legal products are oppressive where they pay little attention to or tend to ignore the interests of the community, or deny the legitimacy of the community. The most obvious form of repression is the uncontrolled use of coercion to enforce orders, suppress deviations, or crush protests. Bullying is also often carried out subtly and indirectly by encouraging and exploiting passive consent (Nonet & Selznick, 2001). In addition, the authoritarian political configuration also produces autonomous legal products, although autonomous law is a source to tame repressive (oppressive) powers through legal order, known as the slogan a government of laws and not of men. The main source of the transition from repressive law to autonomous law is the search for legitimacy. Autonomous law implements the Rule of Law, like AV Dicey's theory, which emphasizes legal formalism or legal regularity. Community participation follows the established procedure, because the procedure is the heart of law. This raises demands for legal legitimacy that pay more attention to substantive justice than procedural justice.

Democracy and Republic

People's sovereignty cannot be separated from democracy, which etymologically comes from the Greek, demos (the people) and kratos (government), which is a form or method of implementing people's sovereignty. The people can be directly involved in the administration of government, either through representatives or a combination of both.
Rousseau (1999) distinguished several types of government based on the number of members. First, if sovereignty entrusts the responsibility of government to the whole people or the majority of the people, so that more citizens can participate in government than just ordinary citizens, this government is called a form of democratic government. Second, if the government is limited to a small number, so that there are more citizens than members of the government, this form of government is called aristocracy. Third, centralizing the entire government in the hands of an official, as a source of power for the other party, which is called a monarchy or royal government. Although there are three general forms of government, they can take as many different forms as the state has citizens. In a government of many people or democracy, it is very important to share power, especially legislative power (law-making) and executive power, because it is not good if the power to make laws and the power to run the law are in the same hands. This according to Rousseau can be dangerous where the public interest can become the interest of the individual.

In contrast to Rousseau, Montesquie (1989) divides government into three basic characteristics, namely republican, monarchy and despotic, where republican government is where the people as a body, or only part of the people, have sovereign power which is called democracy; monarchy is where only one rules, but with fixed and established laws; whereas, in a despotic government, one alone, without law and without order, attracts all things with a will and desire that can change suddenly. The nature of the law will follow the nature of each government and therefore become the first basic law (fundamental laws).

One of the fundamental laws in democracy is that the people themselves must make laws. Legitimate law is the expression of the sovereign's will (Cohen, 2010). In an aristocratic government, where sovereignty is in the hands of some of the people, democracy is in the body of the nobility, and the people (demos) have no meaning. In royal government, the king is the source of political and civil power. A despotic government does not have fundamental laws, where one person feels he is everything, and the other person is nothing, who does not want to be bothered with administrative matters, and leaves general affairs to the prime minister who has the same power as him.

The social contract as the basis of democracy is a political society in which every member of society places his personal interests and power, jointly under the supreme direction of the general will. In Emile, as quoted by Joshua Cohen, Rousseau describes the Republic as follows: "Good social institutions are those that best know how to denature man, to take his absolute existence from him in order to give him a relative one and transport the I into the common unity, with the result that each individual believes himself no longer one but part of the unity and no longer feels except within the whole." Durkheim also said that each individual will vanishes into a common, general will, which is the basis of society.

The word republic comes from the Latin phrase res publica which means public business or commonwealth, and refers to the system of government established by Rome in 509 BC which continued to function until the end of the first century, when, though never officially abolished, de facto replaced by a semi-hereditary military dictatorship (the Roman imperial system of government) (Fronda, 2015). Republican features feature a separation of powers, an elected judge who wields a lot of power, a strong Senate, and, perhaps most importantly, a weak popular assembly in which the political influence of every citizen is reduced through a complex system of group voting schemes. Madison in The Federalist Paper, defines a republic as a government which (a) is essential to obtain all its powers directly or indirectly from a large institution called the people, and (b) is sufficient that the people who run the government are appointed, either directly or indirectly, by the people, and they keep their promises according to the appointed term of office (Hamilton t al., (2009). In a meeting of the Investigative Agency for Preparatory Work for Indonesian Independence (BPUPKI), on July 10, 1945, the discussion on the form of the state experienced a fairly tough debate, choosing between a republican form of state or a monarchy, or other forms. Muhammad Yamin explained that the people's power and the distribution of people's power cannot be arranged in a monarchy, but can only be in the form of a republic. Sukiman further said that the Head of State in principle is not hereditary and must be elected for a certain period of time, which is a republican principle (Sekretariat Negara RI, 1995). Finally in a ballot, fifty-five (55) votes for the republic, six (6) royal votes, two (2) miscellaneous and one (1) blank vote. Article 1 paragraph (1) of the 1945 Constitution stipulates that the State of Indonesia is a unitary state in the form of a republic. This article did not change during the amendment to the 1945 Constitution which was carried out in 1999 – 2002. Sovereignty rests with the people and is implemented according to the Constitution (Article 1 paragraph (1), third amendment, 1945 Constitution of the Republic of Indonesia).

Democracy and republic are two principles that are closely related, as Rousseau (1999) said that the general will form a public person or also called body politics or republic. As a conclusion of the relationship between democracy and the republic, it can

be seen in Robertus Robet's understanding of the republic, which said that a republic is a collective political community organized by a government based on democratic principles, including a system of representation held with an agreement to serve the achievement of shared goals of living together. both under the principle of law and equality (Robert, 2021).
Public Participation

The Indonesian state administration system as regulated in Article 1 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is implemented based on three principles, namely res publica, democracy and legality. Res publica or republic and democracy as explained earlier is a government of many people for the common good. Democracy, which is the basis of a republic or body politics, is framed in a state of law where its implementation is based on the prevailing laws and regulations.

Common goods in democracy and republic can be understood in four basic concepts, as follows (Cohen, 2010):

1) Distributive/Aggregative. Common goods must be understood in terms of the common interests of community members, and the need for attention to the interests of each member, carried out by giving equal consideration to each member.
2) Equality/Common Good. The social contract establishes among citizens an equality so that all citizens commit under the same conditions and all should enjoy the same rights. This commitment is the main guide in further collective decision making. The idea of the common good or also called the common interest is the basis for understanding the general will that individuals who are ready to impose on others the conditions they desire, are ready to live in those conditions and are thus committed to advancing the common good.
3) Content of the Interests: Self-Development and Independence. Regarding the content of interests are the interests of individuals who make up the common good, Rousseau limits the reach of common interests to the interests of personal security and protection of resources, namely the interests he expresses that provide the basis for social contracts. Thus, the aim of political associations is the preservation and prosperity of their members. The protection of individual/personal independence comes from limiting behavior based on law, and the law is justified by referring to the common good. Restrictions that do not have a common good justification, these regulations cannot be accepted as a representation of contributions to the common good. These regulations are arbitrary and are not permitted, because they are not supported by reasons that are consistent with the common good.
4) Baselines for the Common Good. Rousseau supports a substantive understanding of general will which by its nature is directed to the common good which is interpreted not as an aggregate. Rousseau did not think that citizens need to be protected from the general will, because the general will is always right and always tends to the common good. The supreme governing role of the general will would advance their respective basic interests, taking the abstract condition of equality as the baseline.

The meaning of participation according to the Black's Law Dictionary is the act of taking part in something, such as a partnership, a crime, or a trial (Garner, 2009). Public participation is the act of the community/public in a state administration activity, one of which is the law-making. Law is an act of general will, legitimate law is the expression of the sovereign will. Cohen (2015) cites Demosthenes' opinion that behind the law stands demos, and that it is only through demos' commitment to the rule of law that sovereignty has meaning. Although the people through general elections have elected their

representatives to sit in the People's Representative Council (DPR), according to Locke, the legislative power, which must be supreme in any government framework, is only a fiduciary power to act for certain purposes or certain ends, the supreme power is still within the people to abolish or change the legislature, when they find legislative action to be contrary to the trust placed in them (Locke,1988). Community participation as regulated in Article 96 of Law no. 12 of 2011 concerning the Establishment of Legislations can be done through (a) public hearings, (b) working visits, (c) socialization, (d) seminars, workshops, and/or discussions. What is meant by the community in this case are individuals or groups of people who have an interest in the substance of the draft legislation. Maria Farida said the people whom are "vulnerable" to the regulation (Farida, 2011). Draft laws and regulations must be easily obtained by the public, so that the public can easily provide input verbally and/or in writing.

Meaningful participation opens up opportunities for full public participation to actively participate in determining general choices through communicative participation as stated by Habermas in the discourse theory of communication. The communication discourse that is built is openly intersubjective, reflective in nature, which demands rational and argumentative reasons. This deliberative communication basically has a strong constitutional foundation in the Unitary State of the Republic of Indonesia. Substantively, deliberative democracy is contained in the fourth principle of Pancasila (the philosophical basis of the state): "People who are led by wisdom in deliberation/representation". Thus, the community will accept legitimate laws rationally through the discourse process of forming opinions and wills. The lack of public participation in the law-making process has the potential to produce laws with a repressive character such as Law no. 19 of 1969 concerning the Structure and Position of the People's Consultative Assembly (MPR), the DPR and the Regional People's Representative Council (DPRD), a legal product during the New Order era, a despotic government. Article 10 of Law no. 19 of 1969 regulates the formation of the DPR which is not entirely based on the general election mechanism which is directly elected by the people, but is partially appointed by the President. Of the total members of the DPR as many as four hundred and sixty (460) people, three hundred and sixty (360) people are elected through general elections and one hundred (100) people are appointed. The members of the DPR who are appointed are the Working Group of the Armed Forces and the Working Group not the Armed Forces. This is possible because the 1945 Constitution does not explicitly (expressive verbis) regulate the formation of the DPR through general elections. Also influenced by the authorities' interpretation of the provisions of Article 2 paragraph (1) of the 1945 Constitution which stipulates that the membership of the MPR consists of members of the DPR plus delegates from regions and groups. Groups may include Armed Forces, as stated in TAP MPRS No. XXII/MPRS/1966 recognizes the term “classification that exists in society”, must be interpreted to include Armed Forces. With the presence of Armed Forces members in the DPR, it can be imagined the dead of the people's voice if there are objections on the proposed Bills. So that the students’ term emerged at that time for the DPR as "Rubber Stamps" or "Rubber Stamp Institutions" on the political wishes and desires of the government or the executive (Marbun, 1992). Cohen (2015) said Athenians were reluctant to entrust the legal domain to any institution that did not represent the people themselves.

In the Reformation era, with the spirit of democratic governance, in the third amendment to the 1945 Constitution, Article 22E of the 1945 Constitution of the Republic

of Indonesia explicitly stated that general elections were held to elect members of the DPR. This provision was followed up with the issuance of Law no. 22 of 2003 concerning the Position Structure of the MPR, DPR, Regional Representatives Council (DPD) and DPRD (MD3), in Article 16 that the DPR consists of members of political parties participating in the general election who are elected based on the general election results. All members of the DPR, totaling five hundred and fifty (550) people, are the result of general elections, no members are appointed as regulated in previous Law no. 19 of 1969. It can be said that Law no. 22 of 2003 is a responsive legal product that respond to the aspirations of the people. Community participation which only looks on the legal-formal perspective can produce autonomous legal products. Quoting Luc J. Wintgen, "As a necessary condition for a norm's existence, the legality of a norm at the same time involves its legitimacy. A norm is legitimate if and only if it satisfies the conditions for legality of the legal system to which it belongs". A law is legitimate if it meets the requirements of the legality of the legal system in which the norm is located. The mechanism for community participation was carried out in accordance with the provisions of Article 96 of Law no. 12 of 2011. The DPR and the Government have held various public hearings, working visits, socialization, seminars, workshops, and discussions with various stakeholders, as happened with Law no. 11 of 2020 concerning Job Creation. The people's objections on the Bill, which was mutually agreed by the DPR and the Government, were answered by the DPR and the Government with "welcoming people who object on the Job Creation Law to submit a judicial review to the Constitutional Court" (Shalihah & Akbar, 2020). The Constitutional Court in Decision No. 91/PUU-XVIII/2020 states that the formation of Law no. 11 of 2020 concerning Job Creation is contrary to the 1945 Constitution of the Republic of Indonesia and has no conditionally binding legal force. Below are presented several laws which were jointly approved by the DPR and the President, met the requirements of legality and legitimacy, but were declared unconstitutional by the Constitutional Court and, therefore, have no legal binding.

Table 2 Laws Agreed by DPR and President but Declared Not Having Binding Legal Force by Constitutional Court

Law	Constitutional Court Decision
No. 20 of 2002 on Electricity	No. 001-021-022/PUU-I/2003, on material and formal review
No. 9 of 2009 on Educational Legal Entity	No. 11-14-21-126-136/PUU-VII/2009, on material review
No. 7 of 2004 on Water Resources	No. 85/PUU-XI/2013, on material review
No. 17 of 2012 on Cooperative	No. 28/PUU-XI/2013, on material review
No. 11 of 2020 on Job Creation	No. 91/PUU-XVIII/2020, on formal review

According to Muchammad Ali Safa'at, there were four violations of the constitution at the time of the undemocratic law formation. First, it violates the principle of popular sovereignty because it negates the role of the owner of the highest power in the formation of legal products that will become the basis for administering the state and determining the fate of citizens. Second, denying the position of the law as the main legal product that must be formed democratically. Third, denying the existence of the legislators themselves, the

DPR and the President, as democratic institutions that must always listen, pay attention to, and consider the aspirations of the people they represent. Fourth, allowing the formation of laws solely as an arena of struggle and domination of power that sacrifices justice for the protection of citizens' rights (Safa'at, 2020).

Conclusion

The law is a product of general will, so the community as the holder of sovereignty must remain involved in its formation. Legitimate law is the expression of the sovereign will. The law is needed by the state in order to achieve the state's goal, namely to organize a general welfare state for its people. Philippe Nonet and Philip Selznick provide three typologies of law, namely laws that are oppressive, laws that are autonomous and laws that are responsive. Community participation is a reflection of the principle of people's sovereignty as stated in the normative provisions of the 1945 Constitution of the Republic of Indonesia. Habermas interprets the classical principle of popular sovereignty as the reciprocal relationship of administrative power and communication, people's sovereignty as a communication procedure. Meaningful community participation is deliberative communicative participation that has a strong constitutional foundation in the Unitary State of the Republic of Indonesia, namely in the fourth precept of Pancasila: "People who are led by wisdom in deliberation/representation". Thus, the community accepts legitimate laws rationally through a discussion process so that it gives birth to laws that are responsive.

As the normative provisions in Article 1 of the 1945 Constitution of the Republic of Indonesia, which provides the basis for the Indonesian state administration system based on the principles of res publica, democracy and legality, public participation in the formation of laws has a very important role. The basis of the republic is democracy, the government of the people through representatives to achieve common goods or common interest. The regulation and implementation of community participation is not only legal-formal, but the people are really involved and communicative, which among other being able to easily access any proposed Bills, and to be able to provide input orally or in writing. The proposed Bills are hardly found on the website of the DPR of the Republic of Indonesia.

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