



An Approach of Legisprudence Theory to Assess the Quality of Local Regulation

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Abstract: *The applicable law (as a result of legislation) is not always a reflection of the society concerned. Local regulations in the area were impressed into law to be “forced” because it does not conform to the spirit and characteristics of the society. The formation of local regulation is increasingly complex and complicated when the process and its substance beside cannot be separated from the political process, it is also cannot be separated from social processes. The problematic of local regulation formation is indicated by the fact that the authorized institution to arrange the local regulation is still not sufficient to produce products of high quality local laws. Legisprudence theory may open new perspectives on the validity of norm or legitimacy of norm and by course using this approach the quality of local regulations will be more qualified. Although a political approach is more into the heart in the legislative process but legislation and regulation can be an important object. Legal theory is not only a basis on enforcement or implementation of the rule of law, but it is very useful theory in law-making.*

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INTRODUCTION

Cicero (106-43 SM) says “*ubi societates ubi ius*”,¹ which means where there are societies there is a law, show that the law cannot be separated from society. The law also serves the people and not the people to serve the law, but be wise again to say the law contains a character and society spirit. However, the fact indicates that the law is slow to follow the development of society. This situation raises the *adagium* “*law is*

not society”. Indeed, this is the fundamental problems of legislation where the applicable local regulation is often problematic on legal substances that are not accepted by society. The characteristics of legal structure are also problematic due to the weakness of law enforcement, and also legal culture of society.

In the implementation of local autonomy, the law should play an optimal role. However, that law can play an optimal role in promoting decentralization and local autonomy necessary local regulation in the

¹ E.K.M. Masinambow (ed.). (2000). *Hukum dan Kemajuan Budaya*. Jakarta: Yayasan Obor Indonesia, pg. 52-53.

form of systematic, both in content and its process. This means that every region requires a qualified legal system.

In this paper, a matter to be analyzed is the quality of Local Regulation that is not only academic interest but also for the sake of Local Government and Regional Representatives Council (DPRD) or societies. The objectives are to build a new framework in order to evaluate the existence and performance of the existing legislation system. The need for strong legislation system is a major requirement and basis for strengthening local autonomy.

Legally, the autonomous region has the attributive authority, the authority to make the local regulation for organizing their household. Although the authorities to make the local regulation, but in fact the local regulation design are made do not have a strong and systematic legislation system. In addition, the local regulation is a regulation that required the material to be more concrete. In terms of theory, local regulations have narrower flexibility due must not conflict with higher regulations.

The formation of local regulation is increasingly complex and complicated when the process and its substance beside cannot be separated from the political process, it is also cannot be separated from social processes. The problematic of local regulation formation is indicated by the fact that the authorized institution to arrange the local regulation is still not sufficient to produce products of high quality local laws. This inability is due to the Regional Representatives Council (DPRD) and the local government does not know the substance of arrangement and

good law making.

A reason is that most of the substance of local regulation is similar to other area. In terms of making is mostly do ‘*copy and paste*’, do not need to read the reference, do not need to do research or inventory a problem, just change or add words then just a few days finished a local regulation. Almost all districts/cities make local regulations is controversial. In addition, do not conduct research as the condition and needs of society are not significantly different from a local regulation with local regulation in other area. Satjipto Raharjo calls this condition as “*legislation elitism*”, because in its making process is influenced by forces and political interests (*field of political force*) of a group of elite.

The findings of the Ministry of Finance in 2009, showed 14.000 existing local regulations, there are more than 4000 is problematic and should be repealed. However, the Ministry of Domestic Affairs is only repeal 1800 of local regulation from total that should be recommended by the Ministry of Finance.² Furthermore, according to the Ministry of Domestic Affairs, in 2002 - 2009 has canceled 1.878 local regulations. In 2010, the Ministry of Domestic Affairs has clarified 3000 local regulations, and found that 407 of them are problematic. In 2011, the Ministry of Domestic Affairs has clarified 9000 local regulations and found 351 of them are problematic. A region with the most problematic local regulation is North Sumatera, as many 217 local regulations.³ The

² Source: Hukum Online. Available from: <http://www.hukumonline.com/berita/baca/lt4fd6012ab167c/pemerintah-belum-cabut-ribuan-perda-bermasalah>, Accessed on 11 June 2015

³ Muhammad, R. Gani. (2012). “Perda Bermasalah,

question that arises is whether the design of local regulation in the region is wrong? Or *mindset* of policy makers and policy recipient has not changed?

For that, the necessary reform of the making process of local regulation by using *legisprudence theory* as a parameter or tools to assess the quality of both substance and process of a local regulation. Legisprudence theory become a main point in the making of the rule of law, although the legislation theory became the basis of the questions the making of a rule, but so far almost no legal theory approach is used to investigate the issue of the making of rules. Legal theory became the basis of the implementation and/or law enforcement (jurisprudence), and it is less used in the process of establishing the rules (legislation).

Legisprudence theory is a *corner stone* for the making of rules, because of the aspects of scientific approach; it is a *basic truth*, because through legisprudence theory the considerations of ethical and social into the rules to be made, and source to support ethical, moral and social values. A Centre of Law and Indonesian Policy Studies see social responsibility of law regulation (*socially responsible law making*), as an approach to local regulation making. Socially responsible local regulations are rules of law that is efficient and effective for the society. For that, local regulations should be able to overcome the social problems that exist in society, and not just to meet the desires or to favor certain groups. To produce such local laws, it takes a good rule-making process,

because the quality of (substance) a good regulation that is determined by a good process, because the substance of rule of law is the result of process.

ANALYSIS AND DISCUSSION

Local Regulation Cannot Be Separated to the Character and Spirit of Society

Two characters of local regulation of local autonomy is (i) *legal self-sufficiency* and (ii) *actual independence*, which politically means *self-government* or *condition of living under one's own laws*. Both of characteristic stated that the region has *legal self-sufficiency* that is *self-government* is governed by *self-legal*. By interpretation of *self-sufficiency* and *actual independence*, this will determine the region is able to organize and manage their own household.

Local regulations as a basis in local governance, always brings to the relationship between the center and local within a country in the form of a unitary state. To achieve the goal of local autonomy, the making of local regulations is to accommodate the interests and local needs with regard to the interests of society and the special characteristics of the region and refer to other regulations in the hierarchy of legislation.

Local regulation is a means for local governments in the implementation of local autonomy. According to Article 1 paragraph (6) of Act No. 23 of 2014 concerning Local Government is “right, power and obligations” of autonomous regions to set up and administer self-government and local interests in accordance with the legislation. Then, Article 236 paragraph (1) provides that “*local regulation is established for the*

Proses & Mekanisme Penetapan”. Paper presented on “Sosialisasi Perda Bermasalah di BPK Perwakilan Sumatera Barat”, 7 June 2012

implementation of the autonomy of provinces, districts/cities and auxiliary task". According to Article 236 paragraph (4): local regulations referred to in paragraph (1) are a further elaboration of the higher legislation by taking into account the special characteristics of each region. Furthermore, in Article 237 paragraph (1) stipulated that the principle of the making and content material is prohibited contrary to the principle of law that grow and develop in society; common interests and/or higher legislation.

Referring to the above provisions, local regulations as legal product is "*attribution of authority*". At least, there are 3 (three) function and role of local regulation, namely: First, as a basis in the implementation of local governance; Second, as a basis in the implementation of local governance; and third, as a purpose to accommodate the interests and needs of the region with regard to the interests of society and the special characteristics of region.

Problematic of the Making of Local Regulation

Recently, a debate about *jurisprudence* and *legisprudence* that *mainstream* and *non-mainstream* are very interesting. One is the debate about the impossibility of a theoretical approach on the rulemaking. Political approach is more into the heart in the legislative process. As a result, legal theory (*jurisprudence*) is ignored in the law-making process. Legal theory as if only base on enforcement or implementation of the rule of law alone. In my mind, mainstream of *jurisprudence* and *legisprudence* shows reasoning and sustainable approach. The root of jurisprudence

paradigm is the tradition of classical legal theory that is more focused on the structure and function of a regulation. While, *legisprudence* departed from a legal theory in investigating legislation matters. The entry of legal theory in the law-making process will certainly spread interdisciplinary nets, so the quality of a regulation would be better.

The entry of legal theory in the law-making can be done through the "*construction method*". Paul Scholten said that for construction must be met three conditions, namely (i) include the positive material, i.e, a rule is constructed to be positive in the sense accepted by society and in accordance with the development of society, (ii) not contradictive, in the sense that the rules made it must in accordance with the legal system that is logical, and (iii) aesthetic, in the sense of a rules notice in terms of simplicity, clear and easy to understand.⁴ Construction was done that as an analogy or *a contrario* must pass what is called by J.W. Harris as "*the rule systematizing logic of legal science.*" In addition, Harris,⁵ mention four principles, i.e the principle of *exclusion*, *subsumption*, *derogation* and *non-contradiction*. On the terms mentioned by Scholten and Harris, I believe legisprudence theory is more suitable to be used as a paradigm of a new theory for the making of local regulation because legisprudence theory approach is more democratic, holistic, and accommodate the phenomenon of region diversity and community in Indonesia.

⁴ Shidarta. (2006). *Karakteristik Penalaran Hukum Dalam Konsteks Keindonesiaan*. Bandung: CV. Utomo, pages. 218-219

⁵ J.W. Harris. (1982). *Law and Legal Science: An Inquiry into the Concepts Legal Rule and Legal System*. Oxford: Oxford Clarendon Press, p. 10; See also on Shidarta, *Ibid*, p. 219

Legislation-making beside cannot be separated from the political process, it is also cannot be separated from social process. Political and social perspectives have been often used as two different sides, even though the law problem is a social problem. These two poles cannot be approached dichotomous. According to the author, legal products are a political process and also political product for the preparation of legal products is done by legislation, as a political process.

The making of legislation is also a social process. Geofferey Samuel,⁶ said that the law-making must be based on facts that occurred in the society, because the knowledge of law consists of knowledge of the rules and fact construction. Why in making the rules must be the truth of the facts? Larry Alexander and Emily Sherwin said among other things that, a rule must be sensitive to the presence of the people and respond to the needs of society, the purpose of the rule is to establish order in the society, so that the recognition and society's needs to be able to be accommodated by the rule.⁷

On the other hand, political perspective is often distinguished by law, even though the law actually comes from political science. Two perspectives are known in legislation science (*Gesetzgebungswissenschaft*) as an approach that is a mirror reflecting the

portrait of the interaction between social life and politics are similar in the making of local regulations.⁸

To realize the interaction of both these perspectives in the making of local regulation (legislation) is using legisprudence theory approach as a paradigm of thinking in assessing the quality of local regulations. Legisprudensi theory approach is very important to be conceived and executed by the Parliament and the Government in general and the Regional Representatives Council (DPRD) and local government in particular to formulate the rule of law is strong and responsive.

The problem is how the interaction of social and political life takes place in the local regulation making process? In a political perspective, the making of local regulation to release a rule that only concerned with mere political context is dangerous, because the basic policy or applicable policy into a rule of law is always be influenced by ideology and political interests of regional elites. Likewise, separating law in political context can also adversely impact to the quality of rule of law itself.

In a legislative perspective, it is worth noting the opinion of Philippe Nonet and Philip Selznick with a very intelligent saying; good law is legal in character and in spirit responsive, the law as a means of response to the needs and aspirations of the society. This is line with the statement of the US' famous judge Oliver Wendell Holmer

⁶ Geofferey Samuel. (2007). *Epistemology and Method in Law*, Kent Law School UK, Juridische Bibliotheek University Utrecht. p. 115

⁷ Larry Alexander and Emily Sherwin. (2001). *The Rule of The Rules, Morality, Rules, and the Dilemmas of Law*. Duke University Press. Durham and London, p. 53; Compare with Thomas J. Emerson. (1985). "Law as a force for Social Progress", *Connecticut Law Review*, 8, 14. According to Emerson, 'law is a means to foster and society welfare'.

⁸ Article 1 paragraph 1 of Act No. 12 of 2011 on the Making of Legislation is set about the meaning of legislation making is "making of legislation that includes the stages of planning, preparation, discussion, approval or stipulation and promulgation.

that the life of the law has not been logic, it has been experience. Therefore, to get local regulations that are responsive to the needs of community's law required public participation in the legislation making process.

Legisprudence Theory Approach

A word '*Legisprudensi*' in the tradition of Benelux countries in Europe called '*legisprudence*', which is synonymous in the Latin language, '*legis/lex*' (*law*) and '*prudentia*' (*wisdom, knowledge*), which means *legislative jurisprudence* or *theory of legislation*. Actually, legisprudence theory approach is the main idea for analysis of legal theory in the making of legislation (*legisprudence as a new theory of legislation*). The expansion of study object of this legisprudence is shifted from the law-making in an interdisciplinary dimension, such as politics, sociology and law.

Legisprudence theory looks it necessary to use the legal theory in the making of law. The root of legisprudence is solving jurisprudential tradition that rooted in the classical legal theory that focuses on the structure, function and application of a regulation by the judge. Legisprudence theory that developed in the field of legislation making is a new approach (*a new theoretical approach to legislation*) for the balance between politics and law.⁹ In the statement of Luc J. Wintgenst, that legisprudence approach expands the study of legal theory by including the

study of legislation making.

Legisprudence theory becomes urgent because the reality shows that recently the entire of local regulation drafting process to be in conditions that are not representative and legitimate. Local regulation continues to be impressed into *luxurious* items that belong only to elites in the region. There are 5 (five) assumptions why legisprudence theory becomes main idea of thinking to the making of law. *First*, legisprudence theory is a theory that emerged from the legal framework that is responsive, which can also be used as a new approach to grow a theory and principles of legislation and the principles of legislation-making. *Second*, legisprudence theory is matching basic policies and top-down legislation enforcement. *Third*, legisprudence theory is believed to be able to synergize the weakness of the theories of functional structural, elite democratic and participatory democracy. *Fourth*, legisprudence Theory is a theory built by adjusting specificity, diversity and social conditions in accordance with legal developments. *Fifth*, it is an approach that are more likely phenomenological and positivism and characterizes using triangulation of concepts, methods, management and facts.

Related this, Larry Alexander and Emily Sherwin,¹⁰ said that legislation must meet several things, i.e: *First*, sensitivity, a rule that was made to be sensitive to the presence of the people and respond to the needs of society, the purpose of the rule is to establish order in the society, so that the recognition and community needs to be able to be accommodated by the rule. *Second*, positivism,

⁹ This legisprudence theory is being developed by legal experts, especially in mainland of Scandinavia, one of which is a conference organized by the *Benelux-Scandinavian Symposium on Legal Theory* in 1998. This symposium creates a new study that examines the link between law theory and legislation. See Luc J. Wintgenst. (2006). "Legisprudence as A New Theory of Legislation", *Ratio Juris*, 19(1), page. 3

¹⁰ Larry Alexander and Emily Sherwin. (2001). *Op.Cit.*, pg. 53-61.

a rule that was made should be considered to be included in the content material that will be established. *Third*, exclusionary. According to Joseph Raz, the rule of law can be understood as a reason to act, meaning that the rule of law to function as a “*second order*” which exclude the reasons set “*first order*” of moral consideration process. *Fourth*, sanctions, a way that makes it possible to narrow the gap is to apply sanctions for breaking the rules. *Fifth*, cheating, one reason concerns the occurrence of fraud in the rules because it can affect the quality of law and morality discussions.

Basic Concept of Legisprudence Theory in Legislation

Legislation is a branch of legal theory (*legisprudence*) should be interpreted widely, ie, from theoretical and practical perspectives. Legisprudence theory in the making of legislation is mostly associated with political institutions. In other words, the making of law (legislation) is a political product. Article 236 paragraph (2) of Act No. 23 of 2014 provides the legislative authority to the Regional Representatives Council by mutual consent of local governments.

The authority as mentioned above is a manifestation of the principle of “*people sovereignty*” that originated from the social-contract theory as stated by Thomas Hobbes, John Locke and J.J. Rousseau. A principle in the making of law is the principle of “*social-contract*”. The legislation includes local regulations should be a social contract. Why local regulations should meet the principle of social contract? In order for local regulation that made it contains a law that could provide

the common good.¹¹

According to the Social Contract theory of Roesseau, good and strong country is a country reflects the people’s sovereignty. The will of the individual must submit to the general will. The main question is whether the political decisions regarding the making of local regulations on political institutions such the Regional Representatives Council has reflected the “*general will*” as desired by Roesseau? The concept of “*general will*” of Rousseau is no longer at the present time as Rousseau said as follows: “*There is a frequently much difference between the will of all and the general will.*”

In the statement of Rousseau above, it can be said that the political decision in the Regional Representatives Council concerning the law-making is no longer a “*general will*” but more precisely as an “*internal statement*”. Political decisions concerning the making of legislation in the Parliament, and also in the Regional Representatives Council are frequently ultimately determined are not based on the rational needs as people’s needs but decided by “winning” and “losing” politically.¹²

The activities of parliament and/or Regional Representatives Council in the law-making process as mentioned above, shows the low of national law product quality or local regulations produced. The solution, many laws do *judicial review* in the Constitutional Court, and many local regulations examined in the Supreme Court, as well as hundreds or even thousands of local regulation was can-

¹¹ Mark. C. Murphy. (2007). *Philosophy of Law, The Fundamentals*. Oxford: Blackwell Publishing. p. 16

¹² Achmad Yani. (2011). *Pasang Surut Kinerja Legislati*. Jakarta: PT RadjaGrafindo Persada, p. xv

celebrated by the central government because it is considered problematic both technically-juridical, sociological and substance. According to the legisprudence theory, see legislation solely as political process is also very dangerous.

Furthermore, output of the activities of legislation is a legal product. Legisprudence approach gives contribution on the birth of a rule of law, such local regulation. The purpose is to try to balance and/or match political with legal. Legislation cannot exist without a political product. Although the making of legislation is a political process, but the product or output of political process is still a legal product, and when it becomes a legal product, politics must be subject to the rule of law as the output of the process. In this context, Bernard L. Tanya Bernard, et al, elaborates the Socrates' view that the value of justice is a matter that should be the content of the rule of law, while the rule of law is a form that must protect a justice.¹³ Recently, local regulation prevail both local regulation of provincial and district/city in Indonesia is solely a vehicle for the interests of group, power, party and economy. Regional legal products produced through a political process that is not a form of "general will" as in view of Rousseau.

The highlighted interesting thing of legisprudence theory is *law* and *power*, often occurs in the drama of the making of legislation in both executive and legislative institutions. Van Apeldorn notes some understand that the law is *power*. *First*, the Sophists in Greece said that justice is benefited for a

stronger person. *Second*, Lassalle said that the constitution of a country is not written constitution is only a piece of paper, but the relations of real power in the country. *Third*, Gumplowics said that the law is based on the conquest of the weak by the strong; the law is the structure of definition formed by the strong to maintain power. *Fourth*, some followers of positivism also said that compliance with the law is nothing as the submission of the weak to the will of the strong.¹⁴

Therefore, to assess the quality of a legal product, the region must prioritize justice. Why? The answer, *first*, local governments in carrying out widely local autonomy should be within the framework of people's welfare in the region (*social welfare paradigm*). *Second*, the law morally is cannot be responsible binding power loss, and *third*, justice cannot be separated from the paradigm that a legal product is responsible socially and are made in a process that is also responsible socially.¹⁵ Socially responsible local regulation is a rule that can be run, efficient and effective for the society. Therefore, the rule of law is responsible socially both process and substance, and technical and juridical able to overcome the social problems that exist in society.¹⁶ This statement is in line with the view of H. L. A. Hart in his work "*the concept of law*" that law is a social issue. This further assures us that the legal problems that exist in the society are a social problem. To produce such a rule, it takes a process of local regulation making that en-

¹³ Bernard L. Tanya, et al., (2013). *Teori Hukum: Strategi Tedrtib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, p. 38

¹⁴ LJ Van Apeldorn. (1985). *Pengantar Ilmu Hukum*. Jakarta: Pradnya Paramita, pg. 68-81

¹⁵ Reny Rawasita Pasaribu, et al., (2009). *Menilai Tanggungjawab Sosial Peraturan Daerah*. Jakarta: Pusat Studi Hukum & Kebijakan Indonesia, p. 11

¹⁶ *Ibid*

sure that the regulations resulting from the synergy of political and social processes that can produce a quality local regulation because it can resolve the social problems that exist. As a legal product, certainly local regulation cannot be separated with the government system and the national legal systems.¹⁷ This system restricts the quality of local legislation, for example about the substance of matter that may be set forth therein, and also a formal matter to be followed. Its formal problem must be attached to Act No.12 of 2011 on the Making of Legislation.

To produce such regulation that the making process of local regulation should give priority to basic principles, i.e participation (Article 237 paragraph (3) of Act No. 23 of 2014), including the principle of transparency, effective and efficient a legal rule (paragraph 4). Article 96 of Act No. 12 of 2011 on the Making of legislation regulates the right of communities to provide input either oral or written in order to the preparation or discussion of laws and regulations. Similarly, in Article 239 paragraph (1) of Act 23 of 2014 stipulated that the planning of regulation is done in the program of local regulation making.

Community participation is also increasingly important in achieving good governance. Philip M. Hadjon, illustrates that openness both “*openheid*” or “*openbaarheid*,” are very important for the implementation of good governance and democratic. Hadjon strongly believes in openness of government as a constitutional principle concerning the implementation of powers

properly and modern. As noted again by Hadjon, around the 1960s that the concept of participation associated with the concept of democracy and emerging a concept of democracy so-called participation-democracy.¹⁸

This is the important role of the process of legislation making that promotes the basic principle of participation. Habermas call it *deliberative democracy*. According to Habermas, the rules of legitimate law are accepted in the society and always pay attention to the laws in the society.¹⁹ Similarly, it is illustrated by Larry Alexander and Emily Sherwin, a rule made to be sensitive to the presence of people and address community’s needs. The purpose of rules is to establish order in the society, so that the recognition and community needs to be able to be accommodated by the rule.²⁰

Law-making as a social product in tune with the structural-functional theory of Talcott Parsons stated that the society itself is composed of various subsystems are interrelated and each influences the other on a reciprocal basis. In fact, each influence only occurs in any political subsystems that do

¹⁷ Article 237 paragraph (3) of Act No. 23 of 2014 concerning Regional Government.

¹⁸ It is associated also with the participation or community involvement in public decision making process, it is stated in Article 28F of the 1945 Constitution that every person has the right to communicate and obtain information to develop personal and social environment, and the right to seek, obtain, possess and store information by using all available channels. It required a guarantee for all persons in obtaining information. This is necessary, because the right to information is particularly important as the implementation of state is necessary for public scrutiny, so that it can be accounted for. See also the provisions of Act No. 14 of 2008 concerning Openness of Public Information.

¹⁹ Jurgen Habermas. (1996). *Between Facts and Norms: Contribution to Discourse Theory of Law and Democracy*. Translated by William Rehg. Massachusetts: MIT Press, pg. 28-29

²⁰ Larry Alexander and Emily Sherwin. 2001. *Op.Cit.*, pages. 54-56

not involve other sub-systems. The process of local regulation making as the perspective of “*law operation model*” from Seidman stating that the making of law will be influenced by *field of social forces*. The making of local regulation as a social product is also appropriate to the Padgorecki’s view that the making of law should consider “*public opinion*”. In a sense, it is important the existence of a continuous process to discuss these norms in the society such as the concept of structural-functional by Talcott Parsons, law operation model by Robert Seidman, public space by Jurgen Habermas and social forces by Padgorecki show how powerful of social processes in the making of local regulation that needs to be done through formal forums such as a forum of Public Hearing in the Regional Representatives Council, socialization and mass media.²¹

In the perspective of administrative law, every local regulation refers to the public policy; it is also arranged as to where, in what way, how the government uses its authority, where the use of authority was set up in the form of legal instrument.²² If the field of administrative law is stipulated in a law, then includes the basics (i) norms of command, (ii) norms of prohibition, (iii) norms of permit, and (iv) norms of dispensation. In more detail the material of public policy in the making of local regulation shall contain:

- a. Who in the setting of norms, i.e person or entity that commanded, prohibiting, permitting and gave dispensation.

- b. What is set to public about the actions commanded, prohibited, permitted or dispensation.
- c. When and where action of commands, prohibitions, permits and dispensations applied.

Based on the legal aspects of state administration, it is understood that the making of local regulation is a “public policy”, because the making of law emphasis on a process to decide what to do and/or not done by the government. Public policy contains the desired objectives of the government. Thomas R. Dye said that the nature of public policy is *whatever government chooses to do or not to do*.²³ In particular the notion of public policy is the strategy of various measures to achieve the desired goal by a rule of law.

For example, what goals want of an arrangement. Actually, public policy would help find the content of law to be set out in a rule of law. Here the most ideal relationship between law and public policy. The relationship of law making and public policy are mutual support and reinforce one another. A legal product without public policy in it, for example, only through the method of *copy and paste*, then legal products will lose their substance. Instead of a public policy process without any law legalization will be weak in the application of policies.

²¹ L.J. Van Apeldorn. *Loc.Cit.*

²² Lembaga Administrasi Negara. (2006). *Kajian tentang Central Oversight Body Dalam Bidang Pengembangan Hukum di Indonesia*. (Report), Jakarta, pages 93-94

²³ Related to the making of local regulation as basis of this public policy, Thomas R. Dye explains that public policy which ever governments choose to do or not to do. Government do many thinks, they regulate conflict within society, they organize society to carry on conflict with other societies, they distribute a great variety of symbolic reward and material services to member of ... public policies may be regulative organizational, distributive, or extractive or all these things at once. Thomas R. Dye. (1978). *Understanding Public Policy*. Engliwood Cliffs: Prentice hall, Inc., pg. 3-4

Barclay and Birkland support this that the relationship between law and public policy is public policy generally should be formalized in the form of law, and the law is essentially a result of public policy. From this basic understanding we can see a very close relationship between them clearly.

The Application of Legisprudence Theory

My belief shows that by using legisprudence theory as a new approach to measuring the quality of local regulations in Indonesia, there are 6 (six) things that determine, as follows:

First, the substance of local regulation that describes whether the regulation is made in conformity with the norms prevailing in society. An important element to assess the quality of local regulation is a moral criterion. Other criteria that can be used to assess the substance of local legislation is a political criterion, whether the local regulation can be accepted or rejected by the society. The quality of local regulations should also take into consideration the principle of legality (*rechtmatigheid*), i.e the principle of legislation-making, and the principles of legislation substance. Besides, the quality of local regulation is also measured the extent of considering the principle of expediency (*doelmatigheid*), i.e include the principle of common interest, diversity and community needs.²⁴

Second, the quality of local regulation in terms of legislation technique is shown in the formal structure of rules and the com-

pleteness of the norm. The rationale and argumentation of these legislation techniques is expressed in the form of subject, operator, object and conditions of norm. Structure and completeness of the norms contained in the Appendix of Act No. 12 of 2011 concerning the Establishment of Legislation, which is categorically identified in section (i) title, (ii) introduction, (iii) body structure, and (iv) conclusion and its explanation.

Third, legal sentence. To assess the quality of local regulation is legal sentence. Legal sentence or legal language serves as a means to convey information legal rules of law makers to the law recipient (*stakeholders*). Linguistic functions in preparing the text of the rule of law because it allows people to understand the substance of the rule of law. From the aspect of *legislative drafting*, there are two things to note in the making of legislation, i.e (i) the drafting of sentence, and choice of words. Things that should be concerned in making a legal sentence are:

- a. Sentence structure that is easily understood.
- b. Sentences should not be too long.
- c. One sentence, one idea.
- d. Do not use compound sentence, and
- e. Use positive sentences.

Furthermore, the choice of words is strongly associated with the legal sentences that need to be considered in the choice of words for a legal sentence is

- a. Choice of words is appropriate with the meaning of legal sentence.
- b. Using equivalent/synonym.
- c. Clear words so legal sentence can be understood correctly.

²⁴ See Act No. 12 of 2011 concerning the Establishment of Legislation that is clarity of purpose, institutional or right-forming organs and the suitability of the type and content of material, can be implemented, usability, clarity, formulation and openness

These both things have important role in improving the quality of local regulation, because it strongly affects the quality of local regulation, such as the legal uncertainty caused by different interpretations, including a general description and explanation chapter by chapter will not more causing problems in its application.

Fourth, communications of legislation especially in relation to the communicating process of local regulation drafting to the public. This factor is not less important in assessing the quality of local regulation. To know the quality of local regulation in terms of legislation communication are characterized by problems span of time between the drafts until ratification. It is assumed, the longer time to achieve it, then more quality in a local regulation. The meaning of longer time is a condition when the process of local regulation making is done through public forums such as, research, public discussions, seminars debate in the Regional Representatives Council and others, the information submitted will be closer to the substance and the better local regulation making process.

Fifth, legislative procedure is a process that must be taken in the making of legislation. Act No. 12 of 2011 on the Establishment of Legislation stipulates that, the making of legislation must through the stages of planning, preparation, preparation, formulation, discussion, approval, promulgation and dissemination.²⁵ In addition, Academic Paper

factor is closely associated with the legislative procedures, because the academic paper is strongly affects the quality of local regulations. In addition, the academic paper can also be used as a reference (*model law/legal borrowing*) related to the draft of local regulation.²⁶ Thus, to establish the law in a region, preferably local law be retained and then developed according to their needs. For example, referring to local regulation of other region is similar to the draft of local regulations to be made, but remain to consider the culture of the local community. Therefore, the academic paper in the law-making process also affects the quality of local regulation.

A thing that is very important in this process is the discussion of the drafting of local regulation, ie how a draft of local regulation discussed. Level of discussion as mentioned above can be illustrated as follows: *Firstly*, the dynamics of local regulation drafting, members of legislator is more silent, even spoke impressed narrow, less argumentative and less analytical. But if the minor things such as the use of sentences and use punctuation in the drafting of local regulation are more highlighted by members

²⁵ Article 1 (1) of Act No. 12 of 2011 on the Establishment of Legislation. However, in the annex of this law is explained that the stages in the making of legislation would be implemented in accordance with the requirements or conditions as well as the types and hierarchies of specific legislation whose establishment is not regulated by this law.

²⁶ Relating to the definition of *model law* and/or *legal borrowing*. This method is very important to be developed by the local government for the realization of a decentralized government and local autonomy. Compare with Cheryl W. Gray, that in order to advance the economic development of a country, then the thing to do is to do the transplant system of legal system, economic system and political system. See Cheryl W. Gray, (1997). "Reforming Legal Systems in Developing and Transition Countries", *Finance and Development*, 34, 14-16; Furthermore, the Model Law in the understanding of legal transplants, written also by Soetandyo Wignjosoebroto, in his article entitled "Dari Hukum Kolonial ke Hukum Nasional, Dinamika Sosial Politik dan Perkembangan Hukum di Indonesia." See Soetandyo Wignjosoebroto. (2008). *Hukum dalam Masyarakat: Perkembangan dan Masalah*. Malang: Bayumedia Publishing, pages. 98-99

of legislature, so the discussion became longer and focused on the minor things, while more substantial thing is ignored. *Secondly*, other facts are found the method of discussion of local regulation draft is inconsistent because it caused anyone interested parties or whose interests are represented. For example, specific local regulation is discussed for about a week and then immediately approved. The following local regulation about protocol position financial of regional representative council members is discussed only three days approved without any debate are considered. However, if the drafting of local regulation on the establishment of budget revenue and expenditure, it is clearly as the public interest is longer about three to four months, in terms of the rules, the revenue and expenditure should be established no later than 31 August the current year.²⁷

Sixth, legislation management, which includes monitoring and evaluation, as proposed by Julius Cohen,²⁸ that legislation may be evaluated in terms of: (1) whether its avowed purpose or purposes have been efficiently achieved; (2) whether it is consistent with other expression of overall legislative policy; and (3) whether it is morally justifiable.

CONCLUSION

Given the role of local regulation is very important in the implementation of local autonomy, then its formation process needs to be planned in a program of legislation. The various legal instruments required can be established in a systematic, planned and orga-

nized based on priorities which are prepared based on the method and certain parameters and inspired by the vision and mission of local government concerned. *Legisprudence* theory may open new perspectives on the validity of norm or legitimacy of norm and by course using this approach the quality of local regulations will be more qualified. Although a political approach is more into the heart in the legislative process but legislation and regulation can be an important object. Legal theory is not only a basis on enforcement or implementation of the rule of law, but it is very useful theory in law-making.

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²⁷ Reny Rawasita Pasaribu, *et al.*, *Op. Cit.* pages. 153-154

²⁸ Julius Cohen. (1982). "Legisprudence: Problems and Agenda." *Hofstra Law Review*, 11: 1163.

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