



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"



IMAM AS SYAFEI BUILDING
 Faculty of Law, Sultan Agung Islamic University
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

UNISSULA PRESS

ISBN. 978-602-1145-67-8

September



2017

The 3rd PROCEEDING

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Diterbitkan oleh :
UNISSULA PRESS

ISBN. 978-602-1145-67-8

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Hal i-x, 1-391

Cetakan Pertama Tahun 2017

Penerbit UNISSULA PRESS

Jl. Raya Kaligawe Km. 4 Semarang 50112

PO BOX 1054/SM,

Telp. (024) 6583584, Fax. (024) 6594366

ISBN. 978-602-1145-67-8

INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

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"LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

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Nagoya University, Japan
2. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
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Indonesia, September 05th 2017

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

International Conference

5
September
2017

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6. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Organized by : **Faculty of Law UNISSULA**
Semarang-Indonesia

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

Jl. Raya Kaligawe Km. 4 PO. BOX.1054 Telp. (024) 6583584 Fax.(024)6582455
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AND CALL FOR PAPER
“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.

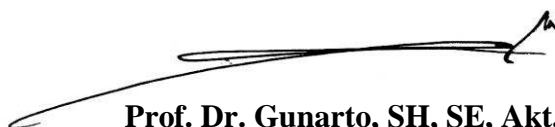
Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

TABLE OF CONTENTS

Front Page	i
Information of the International Seminar	ii
Committee Composition	iii
Preface	iv
Greeting From The Dean Faculty of Law	vi
THE IMPACT OF ARTICLE 3(1) OF MALAYSIAN CONSTITUTION TOWARDS JUDGMENT MADE IN CIVIL COURT	
Ahmad Zaharuddin Sani Sabri	1
INTANGIBLES INTELLECTUAL PROPERTY DEVELOPMENT CONCEPTS AS BANKING PRINCIPLES IN INDONESIA	
Anis Mashdurohatun	11
THE HISTORICAL DEVELOPMENT OF THE FRENCH LEGAL SYSTEM	
Hilaire Tegnan	23
JAPANESE CONSTITUTION AND STATE SYSTEM	
Shimada Yuzuru	29
POWER AND PROCESSES UNDER THE THAI CONSTITUTION 2017”	
Henning Glaser	38
JURIDICAL NORMATIVE REVIEW OF DIFFERENT RELIGIOUS MARRIAGE	
Doni Adi Supriyo	38
THE IMPLEMENTATION OF ROLES AND FUNCTIONS OF REGIONAL HOUSE OF REPRESENTATIVES (DPRD) BASED ON LAW STATE FRAMEWORK TO ACHIEVE GOOD GOVERNANCE	
Agus Sukadi	65
OPTIMALIZATION OF THE ROLE OF THE DPRD (Regional House of Representative) IN THE PREPARATION OF REGIONAL REGULATIONS	
Budi Alimudin	81
THE PROGRESSIVE LEGAL THEORY IN THE IMPLEMENTATION OF LAW ENFORCEMENT BY THE LAW ENFORCER (POLICE, PROSECUTOR, JUDGE)	
Teguh Santoso	99

CRIMINAL POLICIES IN LEGAL ACCOUNTABILITY AGAINST FACILITATION OF HEALTH SERVICES AND HEALTH PERSONNEL IN DISTRIBUTION AND SALES OF HARD DRUGS FOR SALE WITHOUT PRESCRIPTION DOCTORS Teguh Santoso	99
CRIMINAL POLICIES IN LEGAL ACCOUNTABILITY AGAINST FACILITATION OF HEALTH SERVICES AND HEALTH PERSONNEL IN DISTRIBUTION AND SALES OF HARD DRUGS FOR SALE WITHOUT PRESCRIPTION DOCTORS Yadi Supriyadi.....	111
RECONSTRUCTION OF PATIENT LEGAL PROTECTION HOSPITAL IN USE OF X-RAY IN THE HEALTH BASED FIELD OF JUSTICE Andhika Yuli Rimbawan.....	127
CORRUPTION ASSET RECOVERY THROUGH STATE CIVIL LAWSUIT Sujono.....	139
THE EFFECTIVENESS OF GUIDANCE OF CHILD PRISONERS IN ADULT PRISON Wilsa	147
URGENCY OF VOTERS PARTICIPATION ON THE REGIONAL HEAD ELECTION IN THE STATE OF DEMOCRACY (Study: Voters Participation On Governor and Vice Governor Election in Indonesia in2015) Dewi Haryanti	152
COMPARATIVE RULES ON DETENTION IN SOME COUNTRIES Dewi Haryanti	158
THE DEVELOPMENT OF LAW OF BUYING AND SELLING LAND IN INDONESIA Lilik Warsito	169
INDONESIAN LEGAL DEVELOPMENT PROGRESSIVE LAW APPROACH TO BUILD THE LAW IN INDONESIAN SENSE Wendra Yunaldi	179
REMOTE SENSING TO THE INDONESIAN SURFACE OF THE FOREIGN SATELLITE AND THE SOVEREIGNTY OF INDONESIA Ruman Sudradjat.....	186
THE CONSTRUCTION OF THE RAHN SYARIAH LAW IN THE LEGAL SYSTEM OF WARRANTIES OF INDONESIA Suryati	194
THE DEVELOPMENT OF ISLAMIC LAW IN THE LEGAL SYSTEM IN INDONESIA Sumarwoto	194

CONTRACT ABOLITION DUE TO UNDUE INFLUENCE (LAW RECONSTRUCTION OF OBLIGATION THE CIVIL CODE IN INDONESIA) Bahmid	210
FIDUCIARY GUARANTEE PROBLEMATIC WITH OBJECTS INVENTORY IN CREDIT AGREEMENT LathifahHanim and MS.Noorman.....	214
LEGAL POLICY OF INVESTIGATOR IN CASE SETTLEMENT CRIMINAL VIOLENCE IN THE HOUSEHOLD Anwar Sanusi Simanjuntak.....	222
INDUSTRIAL RELATIONS COURT'S VERDICT IN THE CASE OF CERTAIN TIME WORKING AGREEMENT (PKWT) BECOME UNCERTAIN TIME WORKING AGREEMENT (PKWTT) (Analysis of Industrial Relations Court's Verdict Number : 37/G/2011/PHI.Mdn) MangarajaManurung	222
DOMESTIC COMPANY LAW "PMDN" AFTER SHARE PURCHASED (ACQUIRED) BY FOREIGN CITIZENS OR FOREIGN LEGAL AGENCIES M. IrfanIslamiRambe	245
GUARANTEE OF RICE FARMS HAVE NOT YET BEEN HARVESTED IN SIMALUNGUN REGENCY RiduanManik.....	245
LEGAL PROTECTION OF CONSUMERS IN CONSUMER FINANCING AGREEMENTS Imelda Mardayanti	267
THE AUTHORITY OF PERFORMING A DEATH PENALTY ACCORDING TO THE DOCTRINE OF LOVE OF JESUS CHRIST IN THE BIBLE Dame Pandiangan.....	278
CRIMINAL ACCIDENT OF NARCOTICS, APPLICATION OF LAW NUMBER 35 YEAR 2009 AND JUDICIAL DECISIONS IN THE COURT COUNTRY KISARAN Muhammad SalimFauziLubis	283
ISLAMIC LAW STUDY ABOUT DAM TAMATU' HAJJ FOR INDONESIAN JAMAAH HAJJ FOR PEOPLE'S CONSULTATION Muthoam	290
IS RICH AND POOR UNIFORM IN PATENT LAW AbdThalib.....	299

PREVENT VIOLENT ONLINE VIDEO GAMES THROUGH LEGAL CONSTRUCTION Yenny AS, Charlyna S. Purba, Hendrik	309
COMMUNITY PARTICIPATION IN THE FORMATION OF LOCAL REGULATION BASED ON JUSTICE (Analysis of Political Interaction and Law) NursidWarsonoSetiawan	314
THE ROLE OF POLITICAL PARTIES IN RECRUITMENT OF CANDIDATES FOR REGIONAL HEAD AND DEPUTY REGIONAL HEADS BASED ON LAW NO. 32 YEAR 2004 (CASE STUDY IN PURBALINGGA AND CILACAP) Anton Budiarto	324
THE BASICS AND THE FUNCTIONS OF FINGERPRINTS OF MURDER PERPETRATORS AchmadSulchan, Annisa	343
RECONSTRUCTION OF DIFFERENT TYPES OF MENS REA TO PROVE CORRUPTIONBASED ON JUSTICE VALUES ArifAwaludin	349
PRINCIPLES OF FAIR LAND REGISTRATION (STUDY OF PUBLIC SERVICE OF LAND REGISTRATION IN INDONESIA) Shalman	355
INDEPENDENCY AND IMPARTIALITY OF AD HOC JUDGE INDUSTRIAL RELATIONS COURT (PHI) IN RESOLVING DISPUTES ResyDesifaNasution	378
CONSTRUCTION WORK CONTRACT IN GOVERNMENT BASED VALUE OF BENEFIT MokhamadHilman.....	387
SHARIA ECONOMICS DISPUTE RESOLUTION IN RELIGIOUS COURT INSTITUTIONS Amanah	400
WOMEN PROTECTION POLICY FROM PHYSICAL VIOLENCE BASED ON JUSTICE VALUES HadjarHandokojati	417
LEGAL ANALYSIS ON THE IMPLEMENTATION OF DIRECT APPOINTMENT OF PROCUREMENT SERVICESOF GOVERNMENT’S PROJECT HumalaSitinjak.....	424
RECONSTRUCTION ON CORRUPTION ACT AND SHIFTING BURDEN OF PROOF ON THE SETTLEMENT OF CORRUPTION IN INDONESIA IbnuHadjar.....	434

COMPARATIVE RELIGIOUS APPROACH IN THE DEVELOPMENT OF NATIONAL CRIMINAL LAW SYSTEM Sri EndahWahyuningsih.....	443
LEGAL STUDY OF DECISIONSSUPREME COURTS NUMBER: 85 K / Pid.Sus / 2012Contract Abolition Due to Undue Influence (Law Reconstruction of Obligation the Civil Code in Indonesia) Ismail.....	449
THE EXISTENCE AND RECONSTRUCTION OF SALE AND PURCHASE FIQH MADHAB SYAFI'I IN GLOBALIZATION ERA (Sale and Purchase Practice Study in PondokPesantrenTahfidzul Qur'an Al-Asy'ariyahWonosobo Central Java and PondokPesantren Al-Munawir Krapyak Jogjakarta) Machfudz.....	457
RECONSTRUCTION OF LEGAL SANCTIONS ON BUILDING FAILURE IN LAW NO.2 YEAR 2017 ON CONSTRUCTION SERVICES BASED ON THE VALUE OF BENEFIT SubhanSyarief	466
THE CONSTRUCTION OF RESIDENTIAL SERVICES AND CIVIL REGISTRATION BY THE GOVERNMENT OF PEMATANGSIANTAR CITY IN PERSPECTIVE OF PUBLIC SERVICES LAW NO: 25 2009 PandapotanDamanik.....	485
CRIMINAL RESPONSIBILITY AND CIVIL RESPONSIBILITY ACCORDING TO COMMON LAW FOR A MAN WHO HAS SEXUAL INTERCOURSE BEFORE LEGAL MARRIAGE MangembangPandiangan	485
INTERNATIONAL SEMINAR PHOTOS	512

COMMUNITY PARTICIPATION IN THE FORMATION OF LOCAL REGULATION BASED ON JUSTICE (Analysis of Political Interaction and Law)

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ABSTRACT

The formation of local regulations is a very complex process. It is clearly seen even the rule of law is exist, but it is full of political interactions. With regulations relates to legislation and a relatively democratic political configuration, local legislation should have given rise to aspirational local regulation.

Community participation is one of the important elements that must be considered in the formation of Local Regulation which is based on justice (Perda).

Law no. 12 of 2011 on the Establishment of Laws and Regulations, in Article 96 clearly stipulates the Participation of the Community in the Formation of Legislation including Perda. This community participation is one of the most important forms of political participation in the context of creating good governance. Therefore, the implementation of community participation in the formulation of legislation including local regulations must be regulated more clearly.

Keywords: Local regulations, community participation, justice, good governance.

I. INTRODUCTION

The Republic of Indonesia, based on the 1945 Constitution of the State of the Republic of Indonesia, it is a Unitary State (eenbeindsstaat). In Article 1 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it is affirmed. "The State of Indonesia is a unitary State of the Republic"

The authority for the formation of a local regulation is one of the forms of regional autonomy in regulating the affairs of the regional household or the affairs of regional government. The Regional Government is a strategic instrument as a means of achieving the objectives of decentralization. In the context of regional autonomy, the existence of local regulations in principle has the role of encouraging decentralization maximally¹. From the point of view of political empowerment, the goal of decentralization can be seen from two sides, namely local government and central government. The objective of decentralization

¹IReny Rawasita, et.al., Menilai Tanggung Jawab Sosial Peraturan Daerah, Pusat Studi Hukum dan Kebijakan Indonesia (PSHK), Jakarta, 2009, h. 60.

from local government side is to realize political equality, local accountability and local responsiveness. Meanwhile, the purpose of decentralization from central government side is to realize political education, provide training in political leadership and create political stability.²

Community participation in the drafting of local regulations is a right of the community, which can be undertaken both in the preparation stage and in the discussion phase. In the context of human rights, every right of the community creates obligations to the government. Thus, it must be clear about the obligations of the Regional Government to fulfill the right to public participation in the drafting of the law. From the above explanations, it can be seen that the obligation is in the DPRD (Regional House of Representative). This is indicated by the explanation that "the right of the people in this provision is carried out in accordance with the DPRD Code of Conduct." Based on the explanation, the community participation in the drafting of the law is at the stage of preparation and deliberation of the draft local regulation (Perda) in Regional House of Representative (DPRD). However, it can be seen that the preparation stage of the draft local regulation is not fully applicable in accordance with the DPRD Rules. Because, the preparation of the draft Perda can also be done by the Head of Region, moreover, the local regulation draft on APBD only comes from the Head of Region. Therefore, it still needs clarity on the obligation to fulfill the right of the community participate in the formation of local regulations, both at the preparation stage and discussion.

Based on the description above, it can be drawn some problems are:

1. What is the importance of public participation in the formation of a law?
2. What is the implementation of community participation in the formation of a local regulation?

II. DISCUSSION

In the process of Legal Formation in local area, the central theme of this study departs from the assumption that in the process of formulating local regulations (Perda) Soenobo

².Syarif Hidayat, Desentralisasi untuk Pembangunan Daerah, Jentera: Peraturan Daerah edisi 14 Tahun IV, Oktober-Desember 2006

Wirjosoegito calls the law as a 'local regulation' (in the broad sense)³, which is almost similar to Jimly Asshiddiqie's equation who said that Perda is 'local legislation'.

Justice according to John Rawls is as a theory of justice, Political liberalism and the law of Peoples. Talking about justice issues in relation to law is inseparable from the problem of law objectives. The purpose of the law as stated by Van Apeldoorn is: to regulate the interaction of life in peace. The law calls for peace. The so-called legal order, they call peace (vrede). The judge's decision, called vredeban (vredegebod), a crime means a violation of peace (vredebreuk), criminals declared non-peaceful (vredeloos), that is excluded from legal protection. Peace between people is defended by law by protecting certain human interests, honor, freedom, soul, property and so on against the disadvantage.⁴

Some of the concepts of justice put forward by the American Philosopher at the end of the twentieth century, John Rawls, such as Theory of justice, Political Liberalism, and The Law of Peoples, gave considerable influence to the discourse of justice⁵⁷. John Rawls, as the "liberal-egalitarian of social justice" perspective, argues that justice is the main virtue of the presence of social institutions. However, policy for the whole society cannot rule out or challenge the sense of justice of any person who has gained a sense of justice, especially the weak community for justice seekers.

Thus, justice has been described by Aristotle in "Rhetorica". The Romans translated it with: *iussuumcuique*tribuere. Justice should not be regarded equally as meaning of equality. Justice does not mean that everyone gets the same share. Aristotle has also taught him. He knows two kinds of justice "commutatief". Justice distributief is justice that gives each person according to his services. Another theory of justice can be put forward here is the theory of Justice according to John Rawls.

The purpose of the law governs the social intercourse of life as stated by van Apeldorn above is felt on the idea that the interests of the human classes are always at odds with each other. This conflict of interest will always lead to disputes, even the wars between everyone against all, if the law does not act as an intermediary for the maintenance of peace, and the law of preserving peace by considering contradictory interests that strictly and strike a balance

³SoenoboWirjosoegito (2004) Proses dan Perencanaan Peraturan Perundangan.Ghalia Indonesia, Jakarta, h. 36.

⁴Pan MohamadFaiz, 2009, Teori Keadilan John Rawls, dalam Jurnal Konstitusi, Volume 6 Nomor 1 (April 2009), h. 135

among them, since the law can only attain the goal (to organize a peaceful relationship of life) if it leads to fair rule, meaning the rules by which everyone gets as much as it can be.

Justice according to Jhon Rawls is such as a Theory of justice, Political liberalism and The law of Peoples. Talking about justice issues in relation to law is inseparable from the problem of law objectives. The purpose of the law as stated by Van Apeldoorn is: to regulate the interaction of life in peace. The law calls for peace. The so-called legal order, they call peace (vrede). The judge's decision, called vredeban (vredegebod), a crime means a violation of peace (vredebreuk), criminals declared non-peaceful (vredeloos), that is excluded from legal protection. Peace between men is defended by law by protecting certain human interests, honor, freedom, soul, property and so on, against the disadvantage.⁶

John Rawls is seen as a "liberal-egalitarian of social justice" perspective, arguing that justice is the main virtue of the presence of social institutions. However, policy for the whole society cannot rule out or challenge the sense of justice of any person who has gained a sense of justice, especially the weak community for justice seekers.

1. The essence of the importance of public participation in the formation of a law.

Philipus M. Hadjon (1997: 4-5) argues that the concept of community participation is related to the concept of openness. In the sense it is without governmental openness, it is impossible for the community to participate in government activities. According to Philipus M. Hadjon, openness, both "openheid" and "openbaar-heid" are very important for the implementation of good and democratic governance. Thus, openness is seen as a constitutional principle concerning the proper exercise of authority.

Community participation in Law no. 12 of 2011 on the Establishment of Laws and Regulations set forth in Chapter X Article 96 stating that

- (1) The public is entitled to provide input oral and/or written in the Formation of Legislation.
- (2) The oral and/or written input referred to in paragraph (1) may be done through:

⁶.Van Apeldoorn, 2004.*Pengantar Ilmu Hukum*. Diterjemahkan oleh OetaridSadino. PT. PradnyaParamita, Jakarta. .10

- a. public hearing meetings;
 - b. work visit;
 - c. socialization; and / or
 - d. seminars, workshops, and / or discussions.
- (3) The communities referred to in paragraph (1) shall be individuals or groups of persons having an interest in the substance of the Draft Laws.
- (4) In order to facilitate the public in providing oral and / or dull input as referred to in paragraph (1), every Draft of Law and Regulation must be easily accessible by the community.

The concept of participation is related to the concept of democracy, as Philipus M. Hadjon (1997: 7-8) notes that around the 1960s came a concept of democracy called democracy of participation. In this concept the people have the right to decide in the process of government decision making. In the concept of democracy, the principle of openness or participation is one of the minimum conditions, as Burkens puts it in a book entitled *Beginselen van de democratischerechtsstaat* (Philipus M. Hadjon 1997: 2): 1. Basically everyone has the same right in free and secret elections;

1. Basically everyone has the right to be elected;
2. Everyone has political rights in the form of the right to freedom of opinion and assembly;
3. A representative body affects the decision-making by means of "(mede) beslissing-recht" (the right to participate in the decision or through the authority of the supervisor;
4. The principle of openness in decision making and the nature of an open decision;\
5. Respect for the rights of minorities.

The principle of openness as one of the minimum requirements of democracy is revealed also in the opinion of Couwenberg and Sri Soemantri Mertosoewignjo. According to S.W. Couwenberg, the five democratic principles underlying *rechtsstaat*, two of which are principles of accountability and the public principle (*openbaarheidsbeginsel*); others are: the principle of political rights, the principle of the majority, and the principle of representation (Philipus Hadjon 1987: 76). Same with that, Sri Soemantri M. (1992: 29) argues that the idea of democracy manifests itself in five things, two of which are: the government must be open

(openbaarheid van bestuur) and the possibility of the interested people to express their complaints about acts of action considered harmful.

It is clear that in the understanding of democracy is in the principle of openness, which is related to the principle of community participation, as also put forward by Franz Magnis-Suseno (1987: 289-293), that the understanding of democracy or the sovereignty of the people contain meaning, state government remains under the control of society. This control through two means: directly through the election of the representatives of the people and indirectly through the openness (publicity) of decision-making. First, the election of the people's representatives has consequences for accountability. Because, if parties want to be re-elected in the next election, they cannot simply plot the trust of their supporters, so they have to account for it. Second, decision-making is a must. Because the government acts for the sake of and on behalf of the whole society, the whole society is entitled to know what it does. Not only is it entitled to know, it is also entitled to participate in the decision-making process.

Community participation is increasingly important in the decision-making process after campaigning for governance by the World Bank and UNDP. One of the characteristics of good governance or good governance is participation. Further UNDP means participation as a characteristic of good governance implementation is community involvement in decision making either directly or indirectly through representative institutions that can channel their aspirations. The participation is built on the basis of freedom of socializing and speaking and participating constructively (Hetifah Sj Sumarto, 2003: 3).

In line with this understanding, Ann Seidman, Robert B. Seidman, and Nalin Abeyserkere (2001: 8) interpret the participation as follows: that parties affected by a decision set by the stakeholders-have the widest opportunity to give input, criticism and take part in decision-making governance. The notion of participation is not much different from the meaning of political participation given by Samuel P. Huntington and Joan M. Nelson, namely that political participation is the activity of citizens acting as individuals, which are meant to influence the making of decisions by governments (Mariam Budiardjo 1981: 2).

The notion of political participation as a citizen activity is involved in the decision-making process, in public policy literature in the Netherlands called *inspraak* or direct political participation (H.H.F.M Demen and J.J.A. Thomassen, 1983: 229-262, 245-249). The most important feature of direct political participation is not through the process of

representation, but citizens directly relate to the decision-makers. Associated with the opinion of Hbert McClosky, that political participation is the voluntary activities of the citizens through which they take part in the electoral process of the rulers, and directly or indirectly, in the process of public policy formation (MiriamBudiardjo, 1981: 1). Clearly, direct political participation is one form of political participation and other forms can be called as indirect political participation.

From the above explanation it clearly shows that in the decision-making process, including decision-making in the form of local regulations, there is a right of the community to participate in the process of drafting local regulations, ie giving input orally in writing in preparation and discussion of the law.

According to Sad Dian Utomo (2003: 267-272), the benefits of public participation in public policy making, including in the making of local regulations are:

1. Provide a better platform for public policy making.
2. Ensure more effective implementation as citizens know and engage in public policy making.
3. Improve citizen trust to the executive and legislative.
4. Efficiency of resources, because with the involvement of the public in public policy making and knowing public policy, the resources used in the socialization of public policy can be saved.

In accordance with the idea of a legal state, then the participation of the people in the drafting of the law should be clearly regulated in a certain legal rule. The main point of the state of law, according to Bagir Manan (2003: 245) is that law is the supreme source (rule of law) in regulating and determining the legal relations mechanism between state and society or between community members with each other. The law has two meanings, namely written law and unwritten law. Father of the Government of Indonesia, acknowledged the existence of unwritten law, as once stated in the Preamble of the 1945 Constitution: "Constitution is the basic law written, while beside it the Basic Law also applies the basic law that is not written, is the basic rules arising and preserved in the practice of state administration, although not in writing".

3. Implementation of community participation in making a law

Some things that can be done in relation to the implementation of community participation in the formation of local regulations, among others: the conduct of Public Hearings or other meetings aimed at absorbing the aspirations of the community, visits by members of parliament to get input from the community, or holding seminars or similar activities in order to conduct assessment or follow up on various researches to prepare a Draft of Local Regulation. However, in practice there are still some interpretations of who is meant by the term society, some interpret every person in general, every person or institution concerned, or any non-governmental organization. Maria Farida Indrati S. (2007: 262-265) argues that what is meant by society is every person in general, especially people who are "vulnerable" to the regulation, every person or related institution, or any related non-governmental organization. Regarding the extent to which the community can participate in the formulation of legislation (in this case the Law and Local Regulations), it can depend on the circumstances of the legislators themselves because the Constitution and various laws and regulations have established which institutions can forming the legislation. If a law has been able to accommodate the aspirations of the wider community, of course, the participation of the community would not be overly enforced. Therefore, it is necessary to improve the quality of DPRD members as well as all levels of Government who have the task of forming a Perda (Local Regulation)

III. CONCLUSION

3. Summary

From the description above, it can be concluded that

1. The essence of the importance of public participation in the formation of local regulations is to:
 - a. Provide a better foundation for public policy making in creating a good governance.
 - b. Ensure more effective implementation because citizens know and engage in public policy making.
 - c. Improve citizen trust to the executive and legislative.

- d. Efficiency of resources, because with public involvement in public policy making and public policy knowledge, resources used in the socialization of public policy can be saved.
2. Implementation of community participation in the formation of a local regulation can be done by:
 - a. Providing feedback or opinion opinions in General Hearing Meetings or other similar meetings.
 - b. Providing inputs to DPRD members during their working visit.
 - c. Attending seminars or similar activities in order to conduct an assessment or follow up on various studies to prepare a Draft Local Regulation.

2. Suggestions

This paper gives suggestions as follows

1. Forms of community participation should be clearly regulated in legislation.
2. Participation of the public should really be considered by the DPRD in the formation

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