

# CHAPTER I

## INTRODUCTION

### A. Background of Research

Law is a form of communication between the government and the people. Therefore, the norms established in the law-making process must be clear and free from errors. In this process, one of the crucial elements is public participation, which is the right that must be fulfilled in the drafting and explanation stages of the law-making process.<sup>1</sup> Public participation is a democratic process that involves people thinking, deciding, planning, and playing an active role in the development and operation of services that affect their lives.<sup>2</sup>

Article 96 of Law Number 12 of 2011 on the Formation of Legislation (Law Number 12/2011) explains that the public has the right to fully provide input at every stage of the law-making process.<sup>3</sup> This shows that people have the right to participate in the law-making process.

There are two components that are connected to each other, and those components are Process and Substance. "Process," in this case, refers to the procedure that must be carried out openly and honestly, which ultimately results in public participation in providing input to address a problem.<sup>4</sup> While

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<sup>1</sup> Dodi Jaya Wardana, Sukardi Sukardi, and Radian Salman, "Public Participation in the Law-Making Process in Indonesia," *Jurnal Media Hukum*, Vol. 30, No. 1 (2023), p. 69-71.

<sup>2</sup> Aulia Akbar et al., "Spatial Knowledge: A Potential to Enhance Public Participation?," *Sustainability*, Vol. 12, No. 12 (2020), p. 5025.

<sup>3</sup> Ekawestri Prajwalita Widiati, "Efficient Public Participation in the Local Law-Making Process," *Yuridika*, Vol. 33, No. 3 (2018), p. 391.

<sup>4</sup> Dadi Ahmadi and Atie Rachmatie, "Public Participation Model for Public Information Disclosure," *Jurnal Komunikasi: Malaysian Journal of Communication*, Vol. 35, No. 4 (2019), p. 310-311.

the term "substance" refers to the material that is regulated for the purpose of advancing the general welfare of society, towards development law. However, the absence of public participation in the current law-making process is a cause of dispute, despite the image.<sup>5</sup>

In recent years, the law that has caused controversy in the public is the Bill promulgated by the House of Representatives (DPR). When the Job Creation Bill was promulgated, it became Law Number 6 of 2023 on Job Creation (Law Number 6/2023) until the issuance of the Constitutional Court Decision Number 40/PUU-XXI/2023 regarding the constitutionality of the Job Creation Law, until now there is still a polemic.<sup>6</sup> Assessing the many consequences of the passage of the Law, the Constitutional Court (MK) stated in one of its findings that the Job Creation Law is considered formally flawed and conditionally unconstitutional. This is due to the fact that the process of formulating the law does not include public participation.<sup>7</sup>

There are several indications of violations of Law Number 12/2011 that require public participation in the regulation making stage, namely, the process of forming laws is not always carried out in a transparent and open manner and the public cannot supervise and participate effectively. The public is not allowed to provide input orally and/or in writing, their right to participate in

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<sup>5</sup> M R Bakry and A Erliyana, "The Substance of Good Governance Principles on Government Decisions in Indonesia," *Law and Justice in a Globalized World*, 2018, p. 48.

<sup>6</sup> Agus Raharjo, "The Constitutional Court Rejects Five Lawsuits on the Job Creation Law, Here Are the Details," *Republika*, 2023, <https://news.republika.co.id/berita/s1wouj436/mk-tolak-lima-gugatan-uu-cipta-kerja-ini-detailnya>.

<sup>7</sup> Dodi Jaya Wardana, "Non-Participatory Lawmaking and Its Impact on Democracy," *Justitia Law Journal*, Vol. 7, No. 1 (2023), p. 15.

the law-making process is not recognized, and the community cannot effectively supervise the law-making process so that the laws formed are not always in accordance with the interests of the community. The House of Representatives and the Regional Representative Council (DPRD) are also indicated to have violated Law Number 12/2011 in several cases. For example, the DPR and DPRD do not provide opportunities for the public to participate effectively.

Taking into account the Constitutional Court's Decision Number 91/PUU-XVIII/2020, the Constitutional Court provides an explanation of meaningful public participation. "Based on the legal basis that has been formed, Number 11 of 2020 on Job Creation (Law Number 11/2020) *a quo* is improved to meet definite, standard and standard ways or methods, as well as the fulfillment of the principles of law formation, as mandated by Law Number 12/2011, especially regarding the principle of openness must include maximum and more meaningful public participation, which is the embodiment of the constitutional order in the 1945 Constitution Article 22A."<sup>8</sup>

On page 393 of the Constitutional Court Decision Number 91/PUU-XVIII/2020, there are three conditions that must be met in order to create meaningful public participation. First, the fulfillment of the right to be heard. Second, the right to be considered. Third, the right to get an explanation or

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<sup>8</sup> Agus Sabhani, "Community Participation in the Formation of Laws According to the Constitutional Court's View," Law Online.Com, 2022, <https://www.hukumonline.com/berita/a/partisipasi-masyarakat-dalam-pembentukan-uu-menurut-pandangan-mk-lt61fa4a0f548c2/?page=1>.

answer to the opinion given (right to be explained).<sup>9</sup> Meanwhile, the Constitutional Court's order in Decision Number 91/PUUXVIII/2020 is not to issue a Government Regulation in Lieu of Law (Perppu), but to order the drafters of the law to improve the process of forming Law Number 11/2020 in terms of improving the use of certain, standard, and standard methods, fulfilling more meaningful public participation. However, through Law Number 6/2023, it proves that the President and the House of Representatives have ignored the Decision.<sup>10</sup>

According to the Constitutional Court, regarding the principle of openness, the trial revealed the fact that the drafters of the law did not provide maximum space for public participation. Despite various meetings with various public groups, the meetings have not discussed academic texts and materials to change *the a quo* law. The public involved in the meeting also did not know exactly what material changes would be included in Law Number 11/2020.<sup>11</sup>

This is not in line with Article 96 of Law Number 12/2011, academic texts and the Job Creation Bill cannot be easily accessed by the public. Based on Article 96 paragraph (4) of Law Number 12/2011, access to the draft law must make it easier for the public to provide input orally and/or in writing,

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<sup>9</sup> Suyono Sanjaya, The Meaning of the Concept of Meaningful Public Participation in the Decision of the Constitutional Court (MK) No. 91/PUU/XVIII/2020 Formal Test of Law No. 11 of 2020, in *Proceedings of the International Conference on Law, Economy, Social and Sharia (ICLESS)*, Vol. 1, (2022), p. 70–71.

<sup>10</sup> Rian Saputra, M Zaid, and Devi Triasari, "Executability of the Constitutional Leg's Formal Testing Decision: Indonesia's Omnibus Law Review," *Journal of Law, Environment and Justice*, Vol. 1, no. 3 (2023), p. 244–58.

<sup>11</sup> Agus Cholik, Elaboration of the Meaning of Community Participation in the Formation of Laws and Regulations After the Decision of the Constitutional Court Number 91/PUU/XVIII/2020, in *Proceedings of the International Conference on Law, Economy, Social and Sharia (ICLESS)*, Vol. 2, 2024, p. 425.

where the public has the right to participate in lawmaking by providing input at every stage.<sup>12</sup> However, public rejection of the amendment shows that public participation is still lacking, and some even see the need to optimize public participation. The process of making laws also needs to be observed in the formal legislation process, apart from being limited to the preparation of legal materials that are guided by the formation of good regulations. In this context, the existence of public participation also needs to be considered in realizing a more democratic life.<sup>13</sup>

Comparatively, another country that has established a robust mechanism to facilitate public participation in lawmaking is South Africa. The South African Constitution emphasizes public participation, requiring the legislature to facilitate involvement in the lawmaking process. Public hearings and filings are an integral part of their legislative procedures.<sup>14</sup>

Therefore, the lack of public participation in Indonesia can lead to a perception of illegitimacy and a decrease in trust in the legislation process. The House of Representatives and the House of Representatives need to comply with the legal requirements for public participation to increase transparency, accountability, and public trust in the legislation process.<sup>15</sup> Strengthening public

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<sup>12</sup> Wahyu Hindiawati, "Public Participation in the Formation of Regional Regulations to Realize the Welfare State of Indonesia," *JHK: Journal of Law and Justice*, Vol. 1, No. 2 (2024), pp. 26–35.

<sup>13</sup> Libang Kompas, "Public Asks DPR-Government to Involve Civil Society During the Revision of the Constitutional Court Law," Kompas, 2024, <https://www.kompas.id/baca/polhuk/2024/05/26/jajak-pendapat-kompas-publik-minta-dpr-pemerintah-libatkan-masyarakat-sipil-saat-revisi-uu-mk>.

<sup>14</sup> M Phooko, "A Call for Public Participation in the Treaty-Making Process in South Africa: What Can South Africa Learn from the Kingdom of Thailand?," *South Africa Journal of Comparative and International Law*, Vol. 53, No. 1 (2020), p. 22.

<sup>15</sup> Hindiawati, "Community Participation in the Formation of Regional Regulations to Realize the Welfare State of Indonesia."

participation mechanisms can also lead to more informed and effective legislation that reflects the needs and concerns of a wider population. Therefore, based on the background described above, this study aims to evaluate **"PUBLIC PARTICIPATION IN LAW-MAKING PROCESS: A COMPARATIVE STUDY BETWEEN INDONESIA AND SOUTH AFRICA"**.

### **B. Problems Formulation**

The author addressed two questions that needed to be answered in accordance with the study background details mentioned above:

1. What are the implications of the Constitutional Court's Decision Number 91/PUU-XVIII/2020 for the function of public participation in the law-making process in Indonesia?
2. How do the mechanism, level of participation, and effectiveness of public participation in the law-making process between Indonesia and South Africa?

### **C. Objectives of Research**

In light of the research issue that was outlined earlier, the following are the objectives of this research:

1. To evaluate how the Constitutional Court's Decision Number 91/PUU-XVIII/2020 has changed the ways in which the public can engage in and influence the legislative process in Indonesia, and to assess the effectiveness of these changes in enhancing transparency and democratic participation.

2. To compare the mechanisms, levels of participation, and effectiveness of public involvement in the law-making processes of Indonesia and South Africa, and to identify best practices that could improve public engagement in both countries.

#### **D. Benefits of Research**

Given the objective of the research described above, there are some benefits of this research, namely:

1. Theoretical Aspects

The research will contribute to the understanding of how judicial decisions impact democratic engagement by providing insights into the theoretical framework of public participation in law-making. By evaluating the Constitutional Court's Decision Number 91/PUU-XVIII/2020, the study will enrich existing theories on the role of judicial interventions in enhancing democratic processes and transparency.

2. Practical Aspect

The research will offer actionable recommendations for DPR and civil society organizations in Indonesia and South Africa. By comparing public participation mechanisms, it will help identify practical strategies and best practices that can be implemented to improve public involvement in legislative processes, leading to more transparent and inclusive governance plants.