

PERDA PROGRESSIVE : AN ALTERNATIVE TO FULFILLMENT OF POOR PEOPLE RIGHTS OF HEALTH IN LOCAL AUTONOMY

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Abstract

Autonomy system based on act No. 32 /2004 directed the effort to accelerate the realization of the people's welfare. Level of welfare can be measured through human development index consist of two main indicators, that are health and the economy. Autonomy will be encourage government local accountability and increased sensitivity to provide public goods and services. Accountability and sensitivity of local government based on Perda which is form of local legislation.

However, the fact shown that there has been a gap between perda and social condition materialized in the form of poverty. Perda can not guarantee the health rights for the poor in term of freedom, availability, affordability, acceptability and quality. In addition, there is lack on the quantity of perda and quality of perdas a legal framework to ensure the good services provided by local government.

The fulfillment of the health poor rights is requiring progressive perda encompassing the aspects of authority, procedure and substance of perda. The morality of perda progressive can be achieved through the empowerment for the poor using a rights-based approach. The empowerment shall be conducted through the formulation of perda progressive aiming right enhancement, rights awareness, rights enablement, and rights enforcement. The effort is requiring the principles of responsiveness, as the principle of material formulation and implementation of perda progressive, within the framework of purposive law.

Keywords: Perda Progressive, Health Rights, The Poor.

1. BACKGROUND

Autonomy goals outlined in Act 32 of 2004 is to accelerate the realization of public welfare through service improvement, empowerment and community participation. The correlation between the regional autonomy accelerated regional development based on the fact that the area is more aware of potential and needs. Autonomy to encourage public participation, the creation of local government accountability lokal and increase sensitivity.¹ Enhance the ability of local government autonomy in providing goods and services through the basic service functions under its authority. Increased government capacity, assumed to expand public arena to make a choice on goods and services that are available. Furthermore, to contribute to the realization of the individual value and the prosperity of society (social welfare). Efforts to achieve the common good can not be separated from decentralization and autonomy. Autonomy of local government authority shall consist of affairs and the affairs of choice. Orentasi implementation of the affair is that the services to be more precise, close and fast that happened acceleration welfare.

The level of welfare of the people can be measured by the Human Development Index which includes three indicators: education, health, and economy. The three indicators are determinant factors that influence each other and form a vicious circle and become a fundamental obstacle in realizing the people's welfare. Therefore, government should be able to play its role as regulator and provider through economic development policies are pro-poor.² It is the responsibility of governments to ensure freedom and justice for the poor to participate in economic development as a result of accessing basic rights of citizens.

¹ Syarif Hidayat, *Desentralisasi untuk Pembangunan Daerah* – dialog kelompok positivist dan relativist, Jentera, Edisi 14 Tahun IV, oktober-desember 2006.

² W. Friedmann, *The State and The rule of Law in A Mixed Economic*, Steven and Son, London, 1973.

Through the authority to regulate, government can seek product innovation policy that takes the form of legislation. Regulations are instruments that drive change for the better, ie closer to the functions of local government services to be accessible by the public. Regulation is an important cornerstone in local government governance dialectically related to the welfare of the people. Regulation is an instrument for integrating economic facts (which include poverty) with ideas of justice. Regulation is a legal framework to ensure the availability, keteraksesan and quality of service. Therefore it takes effort to establish legislation / regulation that the formation of open space and guarantee access for the poor for services held by local governments.

Efforts to create wealth and reduce poverty, the law requires a progressive character. Substance of the law should describe keberpihakan on the poor. Progressive thinking can be realized in the formation of legislation as a means of poverty reduction, both in the process of formation and substance. Character's progressive legislation closely related to aspects of supply and demands. Both aspects require academic foundation and a platform for action in relation to the function of law as an instrument of education and health service delivery is pro-poor.

Based on the description above, the issue will be studied in this paper is:

- a) Basis Academic and platform for action legislation Progressive Health
- b) The character of the substance Progressive health regulations

2. DISCUSSION

2.1 Platform and Platform for Action Academic Regulation Progressive Health

The dynamics of the development of law, Sulistyowati Irianto³ argued that there has been a failure of the movement "law and development" which was launched in the 1960s and the movement of "rule of law" which aims to build a legal system that "business and investment friendly"⁴ new legal structures built only be based on the values of the rule of law solely for the benefit of investors.

Legal development has created an environment asymmetry between law and society is laden with injustice and inequality both in the social, economic, and political. Imbalance between the legal and social conditions manifest in the form of powerlessness, isolation, vulnerability, security, and sustainability of livelihoods.⁵ The form of inequality is linked with order (order) is united with the totality of human life symbolized as justice.⁶ This is a big problem, for it takes effort to correct the weaknesses in the system applicable law.

According Satjipto Rahardjo⁷ "The law is an institution that leads man to life a fair, prosperous and make people happy". In an attempt to overcome the failure of legal development and the rule of law Satjipto Rahardjo⁸ offers a conception of law sebasgai progressive correction of the legal system weaknesses. Simple real progressive laws, which it acquires, either in the way of thinking and acting within the law, so as to allow it to flow only legal duty to serve mankind finish.

Progressive moral law is siding with the poor communities who face limited access to legislation. Alignments embodied in the form of positive regulation in the legal system that is oriented to the happiness of the people. Law is an institution that aims to deliver a fair man to life, prosperous and make people happy.⁹

Progressive legislation of morality can not be separated from its existence as a product of administrative law, which is subject to the principle of legitimacy in governance include the authority, procedure and substance.¹⁰ Formation of oriented legislation to provide the legal framework to implement the service and the fulfillment of the constitutional rights of the people. Legal framework is built based on the basic thoughts on the welfare of the people-oriented, especially the poor.

³ Sulistyowati Irianto, *Menuju Pembangunan Hukum Pro-keadilan Rakyat, dalam Sosiologi Hukum Dalam Perubahan*, editor: Antonius Cahyadi dan Donny Danardono, Yayasan Obor Indonesia, Jakarta, 2009.

⁴ *Ibid.*

⁵ Amartya Sen, *Development As Freedom*, Anchor Books, NewYork,1999.

⁶ Satjipto Rahardjo, *Mendudukan Undang-Undang Dasar – suatu pembahasan dari optik Ilmu Hukum Umum*, Badan Penerbit Undip, Semarang, 2007. p. 43

⁷ Satjipto Rahardjo, *Mendudukan Undang-Undang Dasar – suatu pembahasan dari optik Ilmu Hukum Umum*, Badan Penerbit Undip, Semarang, 2007. p. 43

⁸ Satjipto Rahardjo, *Hukum Progresif*..... p. 17.

⁹ Satjipto Rahardjo, *Hukum Progresif - Sebuah Sintesa Hukum Indonesia*, Gentha Publishing, Yogyakarta, 2009.

¹⁰ Philipus M Hadjon, *Fungsi Normatif Hukum Administrasi dalam Mewujudkan Pemerintahan Yang Bersih*, Pidato peresmian penerimaan jabatan Guru Besar, 10 Oktober 1994. p. 7

Regulations requiring progressive platform for action contrary to the conditions of the poor. Progressive Mind regulations keberpihakan basic local regulations on the poor. Keberpihakan action is the basis for a progressive step in the fulfillment of their constitutional rights. Progressive steps performed within the framework of the government's actions are subject to the principle of legality which includes authority, procedure and substance.¹¹ Validity of principles are requirements that must be met in order to ensure legal certainty in realizing alignments through local regulations. Fundamental norms that underlie the validity of local regulations is the establishment of the principles of law as the foundation for building products morality laws. The principles include the principle of formal and material principles set out in Article 5 and Article 6 of Law no. Article 10 of 2004 and Act No. 137 and 138. 32 of 2004.

Mapping as well as the type of substance and the development of local regulations that are abstract and general (law) in the field shows that the dynamics does not run parallel with the rapidly changing dynamics of the central legal products, both with local government and legal regime sectoral legal regimes. Development of local regulations went very slow and lags behind the development of the legal regime governing sectoral aspects of a substantial nature and functional. Orentasi formation more regulation on the "budgetary" and forget about the service aspect.

The deficit resulted orentasi local regulations and legal reasoning process deficit as a legal framework for education and health services closer to the people. Guidelines issued by the central government, which is accepted as the final scheme and understood positivistic-legalistic and forget the essence of local autonomy that the region's autonomy. Understanding the cause missing or character development "local responsiveness" the substance of the law.

Inequality between substance regulation and state regulation of social materialized in the form of poverty. Poverty is characterized by a malfunction of law to guarantee the right to health. Guarantee the fulfillment of these rights requires legal characters that can penetrate the conditions of powerlessness, isolation, vulnerability, security, and sustainable livelihoods.

Regulation is the legal framework of local government social policy in health service delivery. Government social policy is a form of protection, respect, and fulfill the right to education and health. Studies conducted indicating that the material content regulations generally do not provide (a) guarantee minimum standards, (b) support the standard of living, (c) the reduction of inequality, and (d) promote social integration.

As a product of administrative law, legislation requiring progressive foundation principle of legality. In relation to the provision of educational services and health authorities and institutional arrangements on the supply side of the legality of a government. Local authority sourced from two legal regimes, namely a) the legal regime sectoral and b) local government law regime. In relation to these two legal regimes, government officials are often trapped in a narrow perspective that only government saw the authority of local government legal regime alone. Formulation of the progressive character of the area law of authority should be done through the process of balancing and mendinamisasi decentralization and centralization.

Formulation of local authority regulation is a process of consolidation and harmonization in the implementation of various laws and regulations in the area. It also coordinated the affairs of government in local governance. Consolidation and harmonization process is done by accommodating the obligations and responsibilities of local government set out in the sectoral laws.

Progressive character must also be realized in the formulation of regional offices function as the executive element of autonomy. Health service organizations are not only characterized by bureaucracy, but also the professionalism or organization that can integrate with the structural organization of the functional organization. Governments do not develop official function as facilitators and community empowerment. It also does not integrate the service functions which are the responsibility and obligation of government as stipulated in the sectoral laws.

Decentralization implies a paradigm shift in health care that should be observed by the government. The duties and obligations related to service assurance berassaskan on the principle of freedom, guarantees the availability, security and assurance kebersesuaian keteraksesan right to health care. Decentralization of health provides an opportunity for the region to empower self-motivated, kompetensial develop quality human resources, foster initiative and creativity, and to increase community participation, including the

¹¹ Philipus M Hadjon, *Fungsi Normatif Hukum Administrasi dalam Mewujudkan Pemerintahan Yang Bersih*, Pidato peresmian penerimaan jabatan Guru Besar, 10 Oktober 1994. p. 7

increase in the funding of health services.¹² That responsibility implies accountability both horizontally and vertically.

Realization of the right to health is realized in the form of services, should consider the unique characteristic of health care, namely¹³

- a) The existence of uncertainty (uncertainty) when someone needs medical care,
- b) There is an imbalance of information (information asymmetry), which means that When a person sick, the decision to use the services in accordance with their needs kesehatan yang no doctor's hands.
- c) The impact on other parties (externalities) is that health issues have an impact not only on individuals but also on the wider community.

Besides health care also has another unique characteristic of the social, humanitarian, and labor intensive.¹⁴ The importance of law in the provision of services, related to the conditions of the poor and the unique characteristics of the health care field. Regulation should meet the challenges of changing the system of autonomy within the framework of the fulfillment of the constitutional rights of citizens.

2.2 Substance Regulation Progressive Character Education and Health

Siding with the poor requires an attitude and responsive action. But the basic idea is not provided for in Article 20 of Law no. 32 of 2004 which regulates the principles of organization of local government. The idea is also not reflected in Article 137 and Article 138 of Law No. 32 of 2004 which regulates the principles of formal and material principle the establishment of law and Article Articles 5 and No. 6. 10 of 2004 which regulates the principles of formal and material principle the establishment of legislation. Relative to the necessary efforts to improve legislative politics (local) to improve the law. Regulation should ensure both individual and social justice. Substance of the law must be able to be an instrument to increase the capacity of the poor.

Legal empowerment of the poor is the most basic things. Recognition and guarantee of the fulfillment of such rights requires an approach in the formation of legislation. Therefore, the formation of regulation should be done with a rights-based approach. Increased capacity is a side demands that the poor must be carried out by the government. Regulation is an instrument to do the legal empowerment of the poor. So that the substance of legislation will include four essential elements, namely¹⁵ a) increase the rights, b) awareness of rights, c) possibility fulfillment, and d) the enforcement of rights.

Improved rights aims for a more equitable distribution of resources. In modern legal systems equity (equity) is a very fundamental principle in welfare. According to Oscar Schater¹⁶ use equity can be divided into five, namely: a) Equity as a base individualization of justice is meant to dilute the rigid law. b) Equity as a basis for the use of the principle of fairness, reasonableness, and trust or good faith. c) Equity as a basis certain principles contained in the legal reasoning that is connected to the fairness and reasonableness, d) Standards for the fair allocation and distribution of resources and benefits. e) Equity as a synonym for the widely used concept of distributive justice to justify the request and economic arrangements and the distribution of the social wealth.

Equity has a meaning that resources are closely related to the idea of justice. However, the fundamental problem to realize the idea of justice through equitable distribution of the benefits of limited resources, often denied on the grounds of efficiency. In connection with the Gary L. Gaile¹⁷, that "Efficiency and equality are Generally Recognized to be the two major goals of regional policy". In connection with these two in development planning both aspects can be combined and accommodated through efficiency terms.

Resource distribution mechanism which held through various forms of ministry in the form of social-oriented policies to reduce poverty. In the context of human rights, social policy towards the poor is done with a rights-based approach. Fulfillment of basic rights to build on the empowerment of the poor. Thus the social policies that do not can only caricature or based on needs.

¹² Usman Abu bakar, Pendidikan Nasional Memasuki Era Otonomi daerah, dalam Edy Suadni Hamid dan Sobirin Malian, Memperkokoh Otonomi Daerah; kebijakan, Evaluasi, dan Saran, Yogyakarta, UII Press, 2004. P. 233.

¹³ Roem Topatimasang dkk, Sehat itu Hak – Panduan Advokasi Kebijakan p. 88-90.

¹⁴ Roem Topatimasng dkk, Sehat itu Hak – Panduan Advokasi Kebijakan p. 90

¹⁵ USAID, Legal Empowerment of The Poor-from concept to assessment, March 2007, www.ssrn.com, accessed 4/18/ 2010

¹⁶ Oscar Schater, International Law In Theory And Practice, Dordrecht; Martinus Nijhoff, 1992. p. 55

¹⁷ Gary L. Gaile, Efficiency: A Comparison Of A Measure Of Efficiency With An Entropic Measure Of The Equality Of Discrete Spatial Distributions. Stable URL: <http://www.jstor.org> Accessed: 09/12/2009 21:30

It takes a pro-poor policy design is done in order to empower the poor through policy-oriented distribution of resources. In an effort to create equity, Susan Rifkin¹⁸ build a framework that includes Capacity building; Human rights; Organizational sustainability; Institutional accountability; Contribution; Enabling environment (choice framework). Substantially to the material realizing that pro-poor legislation is largely determined by the commitment of policy makers, to formulate a law in norms. Formulation of legislation is done in conjunction with priorities or mainstreaming fulfillment of the rights of the poor through the guarantee of freedom, availability, keteraksesan, acceptance, and quality RPJPM as set out in the framework of the political economy of local government. Guarantees are made within the framework of the implementation of local government responsibilities are defined in the substance of the law.

Formulation of the rule is done primarily to use the standards norms are flexible so that it can reflect the social sensitivity (responsiveness) to the problems of the poor local governments. Flexible standard norm which aims to open space for the officials discretion to make policy that bureaucratic obstacles faced by the poor can be eliminated. Value of government responsiveness to the poor conditions. Responsiveness principle serves as a meta-norm in the formation of legislation.

Measure of responsiveness in the implementation of the principle of the establishment of local regulations can be formulated based on the fulfillment of the elements in the human ESC rights as formulated by the Committee on Economic, Social and Cultural Rights. Expectations of responsiveness is the foundation principle of the poor to obtain their rights. He is an "inner morality of law" as a condition of good regulation. In the context of purposive law, the principle of responsiveness are cornerstones in the formation and reasoning positive law aimed at the public good. The principles serve as an attempt to;

- a) Putting ideas siding with the poor in the political economy framework agreed upon by all the actors role as regional policy mainstreaming.
- b) Enforce the unity and sovereignty of the substance aspect of freedom, availability, accesibility, acceptability and quality of resources required in the provision of services through a process of conformity authority, legislation, regulations and standards issued by the government norms.

Concretization of the principle of responsiveness in the substance of the law embodied in the form of guarantees for freedom, availability, acceptability and quality keteraksesan through arrangements with respect to the distribution and allocation of resources, as well as the delivery of services. Substance of the law will show the character responsive to the limitations of the conditions of the poor in the form of flexible standards contained in the formulation of the norm. Flexible standards relating to open space for the discretion of the service provider. Space is given to the officer discretion based on the ethical accountability. Responsibility meant is that the officer must consider the consequences that can be expected from the actions and therefore must consider a variety of interests and values that exist in the governance of society.

3. CONCLUSION

On the basis of the above description may put forward the following conclusions;

- 3.1 Moral law is the foundation of progressive academic in creating alignments for the poor who face limited access to legislation. Law is an institution that aims to deliver a fair man to life, prosperous and make people happy. Ontologikal foundation aegis progressive law is the law.
- 3.2 Regulations requiring progressive platform for action contrary to the conditions of the poor. Progressive steps performed within the framework of the government's actions are subject to the principle of legality which includes authority, procedure and substance. Progressive character is also manifest in the formulation of regional powers and functions of local agencies as implementing elements of autonomy. Thus the substance of regulation can integrate the service functions which are the responsibility and obligation of government as stipulated in the sectoral laws. Regulation is the legal framework of local government in the implementation of social policies in education and health services.
- 3.3 Progressive character of the substance of legislation regulations include four essential elements, namely an increase in rights, rights awareness, possibility fulfillment of rights, and the enforcement of rights based on the principle of responsiveness as the establishment of the principle of substantive law. Concretization of the principle of responsiveness manifested in the form of guarantees of

¹⁸ Jalpa Ratna Dan Susan B. Rifkin, Equity, Empowerment and Choice- From Theory to Practice in Public Health, www.sagepublications.com accessed: 12.20, Nopember ,2009. *Susan Rifkin has developed the CHOICE framework in order to explore the relationship between health equity and community empowerment based on Amartya Sen's (1999) concept of development as freedom.*

freedom, availability, acceptability and quality of accessibility relating to the distribution and allocation of resources, as well as the delivery of services.

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