

## The Practices of Licence and Politics of Local Leader Elections in Indonesia

Edi Rohaedi<sup>1</sup>, R. Muhammad Mihradi<sup>2</sup>

<sup>1</sup>Departement of Law, Faculty of Law, Universitas Pakuan, Indonesia

<sup>2</sup>Departement of Law, Faculty of Law, Universitas Pakuan, Indonesia

**ABSTRACT:** *The notion of democratic law state adhered by Indonesia is based on the Article 1, Section 2 and 3 of the 1945 Constitution of the Republic of Indonesia. Consequently, every act of the government must be confined by law that is arranged through the process of democracy. In the society, the practice of law require instrument, one of them is the instrument of licence. Through the instrument of licence, ever activity of the society would be controlled and be given sanction if violation occurs. This is technically arranged, one of which is regulated in the Law Number 30 of 2014 on Government Administration. The problem that emerged is that the violation of licence system that are not only intentional but also followed by politics motive after Pemilihan Umum Kepada Daerah (Pilkada) or Local Leader Elections. Many licences system violations occur as the impact of the local leader elections that stems from the demand from several businessman that support the candidates during the campaign period. Consequently, licence issuance becomes part of political transaction which result in wide impact to the life of the society.*

**KEYWORDS:** *Practice of Licence, Correlation, Political Local Leader Elections*

### I. INTRODUCTION

Indonesia is a democratic law state. This principle is reflected on Article 1, Section 2 and 3 of the 1945 Constitution of the Republic of Indonesia. The adherence to the principle of democratic law state brings two consequences. First, every single action, both done by the government or the citizen, is regulated and bound by the law. Second, the law must be assured to have gone through the procedure and mechanism of democratic public participation. Therefore, there will be unity between legality (boundaries formed by the law) and legitimacy (the law formed based on democracy)[1].

In relation to the narration above, Fransisco Budi Hardiman critically examined the need for law to be the “safety belt” of democracy that is portrayed in two perspectives. On the one side, law and democratic procedure protect politics system and social power which is reflected by the pressure from the extraparliament mass that implement direct democracy and could easily shift into group anarchism and egoism. On the other side, law and democratic procedure protect individual and their private space from the intervention of power. Law and democratic procedure will ease the creation of intermediary layer that act as the mediator between the politics system and the citizen [2].

The follow up from the constitutional stipulation on democratic law state above is arranged further by various laws and regulations, in accordance with the character, field, and context of the prospective arrangements. In the implementation, oftentimes, it is inevitable that there is a relation between the establishment and enforcement of law with politics. Occasionally, the struggle in the enforcement of law stems from the factor of politics interest from the elite that is not compatible with the spirit of law enforcement. In the context of licence law, many studies found that there is variable of bad regional head leader elections which is full of concession, negotiations and money politics. This results in a weak enforcement of licence grant by the authorities. The plethora of cases related to the violation of licence law in mining area is suspected to be caused by the brokers or investors who fund the candidates of the local leader elections. Consequently, the moment when the candidates take office, they will be demanded to loosen licence procedures that leads to economic benefits to repay the favor of the investors.

## II. THE CONCEPT OF LICENCE AND LEADER LOCAL ELECTION POLITICS

### Concept, Definition, and Purpose of Licence

In concept, the emergence of licenceregime is intended as the instrument of control for citizen activities in order to avoid harm to public order. According to experts, such as N. M. Spelt and J.B.J.M ten Berge, licence is “an agreement from the authority that is based on law or government regulations for a certain circumstance that deviates from the provision of prohibition law”. Meanwhile, Van der Pot formulates “licence as a decision that allows a certain act (that is not prohibited by the law maker) to be done” [3]. In the positive law, the nomenclature for licence is standardized on Article 1, Section 19 of the National Law Number 30 of 2014 on Government Administration which defines licence as “decision of government official in authority that act as a form of agreement of Citizen Request in accordance with the laws and regulations”.

The purpose of licence issuance are as follows: (a) to oversee particular activities; (b) to prevent harm to environment; (c) to protect particular goods; (d) to divide limited goods; and (e) to oversee through the selection of individual and activities [4]. In another perspective, Emanuel Sujatmokostated that licence act as tool to control activities done by the community, especially in order to monitor and provision of guidance as an effort to foster the community. Licence also play a role in reducing freedom, limiting rights and putting burden to community, so that the arrangement of licence must be set in the form of laws and regulations [5].

The context of licence also relates to the theory of authority or power. The theory or concept of authority plays an important role in administration law. According to Philipus M Hadjon, citing Black’s Law Dictionary, authority is the power over law, the right to order or act, the right or power of public official to obey the law in order to carry out the public obligations. Authority itself could be identified from the source, which are attribute authority delegation authority, and mandated authority. Indrohartoexplains that attribution authority occurs when a new government authority is given based on the provision in the law and regulations. This means that the authority born from the the law and regulations. Meanwhile, delegation authority is a transfer of authority to another government body. The side who give or transfer the authority is called as *delegans*. While the side accepting the authority is called *delegataris*. In the mandated authority, there is no transfer of authority, the official given the mandate (*mandataris*) act for and on behalf of the mandate giver (*mandans*) appointed another official (*mandataris* to act on behalf of *mandans* (mandate giver) [6]. All the concepts and theories discussed above have been adopted into a positive law by the Law Number 30 of 2014 on government administration.

Eventually, the implementation of licence service requires law enforcement. The enforcement of licence service is arranged under the administration law which principally, according to P. Nicolai, relates to two things, which are: (a) the supervision of government body to be able to perform compliance to or based on the law that is stipulated in a written agreement and supervision on decision which put obligations to individual and (b) the implementation of authority on sanction (government) [7].

In terms of supervision, Paulus E Lotulungidentifies three characteristics of supervision towards executive body. First, external control and internal control. External control is done by an institution that carry out the supervision function from the outside while internal control is the observing body which is the part of the institution under supervision. Court process is an example of external control and inspectorate is an example of internal control. Second, *a priori* control and *a posteriori* control. *A priori* control is a supervision toward the government or executive prior to the occurrence of dispute, while *aposteriori* control conducted after the occurrences of dispute or after the act being supervised is done. Third, social politic control and legality control. In general, social politics control is a form of supervision oriented on goals that have been determined. Meanwhile, legality control is a supervision from the aspect of law or legality [8].

Beside supervision, sanction is also important in the implementation of administration law. According to Philipus M Hadjon, it is meaningless to put obligations and prohibitions to the citizen in the law and regulations if the government apparatus (state administration) could not force the rules of those obligations and prohibitions. Sanction, therefore, is the instrument that enforce the rules [9].

In the law of state administration, the use of administrative sanction is the implementation of government authority which comes from the rules of administrative law. In general, giving authority to the government to establish particular norms of administrative law. In addition, the government is given the authority to implement the norms through applying sanction for them who violate the norms of those administrative law [10].

### Politic of Local leader Election

In the post reformation era, there was a draft of law that desire democracy to be institutionalized. One of them is through the regional head leader elections. There are three benefits in institutionalizing the politics through direct regional head leader election. First, the strengthening of legitimacy of the regional head since the election is done by real voters. Second, direct Regional Head Elections is able to establish and realize local accountability because the chosen candidates would be encouraged to increase their accountability. Third, the achievement of

local accountability would result to optimization of balance between the checks and balances among democratic institutions in the local region [11]. Thus, this was reflected in many laws related to local government and the election of regional head.

According to the history, during the New Order, there was a disappointment towards the quality of regional head elections. First, since the enactment of Law Number 1 of 1954 to the Law Number 5 of 1974 on Principles of Regional Government, regional head was chosen by the Regional Representative Council. Meanwhile, the processes of appointment and discharge were done by the President (for Level 1 Regional Head) and the Minister of Home Affairs (for Level 2 Regional Head). In the Post New Order era, the amendment of the 1945 Constitution of the Republic of Indonesia, especially Article 8, results in the election of regional head to be done democratically. In the context of legislative politics, democracy is reflected in the construction of law that, in the last statement, defines democratic as 'elected directly as by the citizen' [12].

However, the implementation is not always in accordance with the concept of direct local leader election. There are many cases where regional head leader elections failed to realize local democracy. This stems from the emergence of local strongmen both within the government institution or even from the outside that results to the existence shadow government. These local strongmen offer politics concession to the regional head that lead to informal economy practice [13]. This triggers the emergence of practice where businessmen offer funding to the candidates. Consequently, at the time when the candidate is elected, the businessmen will demand pay back in form of ease in dealing with licence regulations (even violating the licence) as a form of gratitude for winning the local leader election which was funded by the businessmen.

### III. THE CORRELATION BETWEEN THE PRACTICE OF LICENCE AND POLITICS OF LOCAL LEADER ELECTIONS

The arrangement of regional head leader elections is stated in the Law Number 10, of 2016 (second amendment of Law Number 1 of 2014) on the elections of governor, regent and mayor. However, in the implementation, violation still occur. The candidature of regional head in Indonesia politics system, both that is done by incumbent or new candidate, require a huge amount of cost. It is hard to deny that the politics of local leader election in Indonesia has not been free from money politics, so that constituent would choose a particular candidate of regional head if they were given money. This result to the rise of politics clientelism, "the practice of exchange of material resources or benefits (money, goods, jobs or position, public services, contracts with government institution, etc.) with political supports (votes, campaign funds, support, etc.) [14]". The study on the business licence of mining sector during 2009 to 2014 in South Kalimantan, especially in Tanah Bumbu Regency, showed that there were practice of corruption, collusion and nepotism. The 'mafia' of mining and abuse of power were strongly related to the cost for political elites or actors who fight for the political power as in local and legislative election [15].

In relation with the mining licence, the provision of Article 37 of Law Number 4 of 2009 on Mining has arranged that *Izin Usaha Pertambangan* (Mining License) is issued by the followings: (a) Regent/Mayor, if the jurisdiction of the proposed Mining License is located within one Regency/City territory; (b) Governor, if the jurisdiction of Mining License is located in cross-territory area of Regency/City in one (1) province after obtaining recommendation from the local Regent/Mayor in accordance to the requirements in the law and regulations; and (c) Minister, if the territory of the proposed Mining License is located in a cross-province area after obtaining recommendation from the Governor and local Regent/Mayor in accordance with the requirements of the law and regulations. Based on Article 36, Mining License comprises of two phases, which are Mining License for Exploration and Mining License of Operation and Production. The requirement for these two phases of Mining License is arranged in the Law Number 4 of 2009.

According to the dissertation of M Uhaib in 2014, many anomalies were found regarding the licence for mining [16]. First, there are many cases of licence issued without the consideration on spatial planning or natural environment conservation which results to the occurrences of conflicts between the community and mining companies and massive clearances to the forest conservation area. Second, licences that are issued near to the time of the local leader election of Regent or Governor as what happened in South Kalimantan. Third, overlapping licences that are abandoned and potentially becomes bargaining game between the authorities and businessmen. Fourth, the abandonment of law violation in large cases that attract public attention to arises and results in huge state loss stems from the practice of corruption, collusion, nepotism and mafia in the mining sector continues.

Result patterns of the above study affirm the findings of Kompas, 19 December 2014, in which 44.66 percent or 4,877 Mining License of 10,918 Mining License were problematic (non-clear and non-clean). Such contexts also strongly affirm Syarif Hidayat's research which captured the symptoms of 'shadow state' that has been occurring in regional area for a long time. Therefore, the dependency of private sectors or businessmen on the government causes their positions to be determined by the interests of other parties such as patron-client relationship patterns as described above [17].

How is the relation between mining licences and the politics of local leader election? First, as described in the anomaly pattern number two above, licences given ahead of the elections are the reflection of alleged political interests in the election. Second, the research by Leo Agustino's shows that the local politics of Indonesia in the post-reformation era is a combination of *premanism* or groups of thugs and money politics. In this context, there are local bosses and local strongmen who have roles outside the formal field of the government with unexpected capabilities, such as influencing formal government decisions and policies. After the election, the policies that relates to the decision of physical and non-physical project tenders, including licences, are frequently made not based on company qualifications but it is more of a "pay back services of pre-election politics, besides clientelism and cronyism". Therefore, it is unsurprisingly that during the election the real battle is only between money temptation and/or violence threats; where in the local leader election process, the local businessman and 'white collar thugs' take a central role and position [18].

Third, the emergence of this problematic local leader election above came from the high cost politics starting from renting a boat (supporting political parties), branding costs (marketing politics) to money politics which all will be compensated through the disposal of licences when the intended candidate is elected. There is research that discuss this topic of political cost. According to Leo Agustino and Indah Fitriani, in order to do a campaign, a counselor candidate in the area spent 200 million to 6 billion rupiahs. That amount is still less than the cost of regional head elections. Moreover, the cost of renting a *boat*, in general, could reach above 2 billion rupiahs, depending on the size of the party's votes in the regional parliament [19].

Based on writer's analysis, regardless of the political approach, government put efforts in building a healthy ecology of licence service such as the issue of Ministerial Decree Number 24 of 2006 on Implementation Guidelines of One-Stop Integrated Service. The regulations aim to direct the regionals to reduce the complication in bureaucracy. In addition, One-Stop Integrated Services allow the licence service process to be brief, transparent in cost, and avoiding illegal levies where the community could monitor the progress of licence issuance especially with the development of information technology systems nowadays [20]. However, the implementation of integrated licence is still inadequate if the politics of the election remain corrupted. The integrated service of licence issuance could be easily distorted by various policies that reduce the quality of licence objectives including as the control of public activities.

Furthermore, a case study in Mataram shows that the implementation of integrated licence services experiences frequent technical obstacles such as the limited budget for meetings in the licence institution which limits the funds only for 48 meetings a year. In addition, Illegal licence broker still exists which is still in attempt to be eradicated through Mataram's *ssaber pungli* team (a team that investigates and deals with illegal levies). Finally, inadequate work facilities also become a challenge in providing integrated licence services [21].

Local democracy is not always compatible with law enforcement, especially when the intended democracy is not supported by community empowerment and supported by a harmonious state system. The democracy in developed countries (Western Europe, the United States, Canada and Japan) has experienced complex problems regarding the relations between state and businessmen. In that situation, multinational companies often times ruin democracy to its roots until the democracy itself is gone. Politicians are elected by the people but once elected they have no concern over their constituents. They are busy serving multinational companies instead. Whatever the companies asked for is granted: corporate tax reduction, labor union control and various import and export facilities provision. These policies, according to I Wibowo, are not beneficial to voters. Poverty, environmental damage, employee termination, and education destruction must be borne by the powerless voters. In this sense, sovereignty belongs to multinational companies instead of the people. They let democratic process to elect leaders. Once the leaders are elected, the companies easily conquer them (president, prime ministers, parliamentarians, parliament members) by alluring them with large amounts of money. Collusion between rulers and businessmen (global corruption) eventually extinguish democracy itself [22].

I. Wibowo's analysis notes reveal several things. First, adopting democracy by reforming the licence issuance system is inadequate because the constitutional system, public participation and cultural values need to be considered as well. Second, money politics is the main problem that harms democracy and it must be eliminated if democracy and law are to be upheld simultaneously. Third, political and legal dimensions are inseparably interconnected. Reforms and approaches in both politics and legal are needed in order to make licence issuance process more substantial to reduce technical licence issuance procedures.

The above-mentioned explanation confirms the need of critical legal studies in the enforcement of licence law. Critical legal theory views both positive law formation and its application which makes the influence of a process laden with political contents and political interests is inevitable. Therefore, there are always possibilities for biased legal products to exist due to hidden interests that are facilitated by the law. As in the above-mentioned case, the licence issues are no longer based on law but contain hidden interests as the result of corrupt regional head leader elections politics. According to this situation, critical legal theory approach always criticizes the rules of law which are based on liberal paradigms such as equality of law because it is often not neutral in fact. It only benefits elite and those who have economic capacity. In fact, law is not something that

occurs naturally, but it is a result of various processes of interaction and negotiation interests among factions in society [23].

Eventually, in the future, responsive laws that are sensitive to groups affected by a policy need to be developed in order to encourage equality in the society by providing rules that suit the needs of the public. According to Nonet and Selznick, responsive law is a law that facilitates social needs and aspirations. Therefore, law has a commitment to ensure public needs can be accommodated [24]. Consideration also must be paid implications so that community will not be harmed. In terms of licences, the law design needs to consider the root of the problems in the society such as corrupt regional head leader election, politics and technical issues that prevent a good and optimal licence process. Predictably, continual impact will arise if reformation is not made in the licence sector, such as damage to environment ecology as the result of the weak law enforcement and sanctions. Similarly, people need to pay large amount of costs due to uncertain licence process governance.

The improvement of licence law enforcement must be done at two levels. The first level improvements will be a cost-saving election, simple political parties and strengthening of anti-money politics system. This certainly can be done through the reformation of law and regulation at all levels. In order to realize this, commitment from both legislators and bureaucrats is needed to ensure healthy regional head leader elections. Public participation also needs to be optimized to supervise the process of transparent, effective, efficient, cost-saving, and democratic regional head leader elections. At the second level improvements, government officials' integrity in the regions needs to be strengthened in order to enforce licence rules in a professional, excellent, and impartial manner. It also includes the sustainable and adequate improvements of the One-Stop Integrated Service office licence system. Certainly, integrated licence improvements need to consider technical matters such as coordination strengthening, budget sufficiency, and supportive work facilities. In addition, optimization of government official's integrity needs to consider the reward and punishment approach by giving appreciation for those who work professionally, disciplined and with integrity. On the contrary, sanctions are given to those who violate work ethics and laws and regulations. This can only be done if all stakeholders including politicians and the public can ensure bureaucracy neutrality since it is difficult to rely on bureaucratic professionalism without its neutrality.

#### IV. CONCLUSION

Licence law enforcement cannot be separated from the context of norms in the regulations regarding supervision arrangements (both external and internal) and sanctions implementation (administratively). Moreover, the implementation of licence law must consider attribution, delegation and mandate as the dimension of authority based on the Law Number 30 of 2004 on Government Administration. One of the facts that licence law enforcement is frequently not up to excellence is because it is influenced by the high cost regional head leader elections so that a prospective candidate must provide a large amount of money which one of the ways is to be funded by local bosses or strongmen. It causes violations committed by local bosses and strongmen in licence area are difficult to deal with since the local officials deliberately avoid handling it. This fact shows that there is a strong correlation between politics and law which as well affirms the critical legal theory that assumes law is never neutral—law always contains elite's interests. Therefore, a reformation must be done from the perspective of correlation between law and politics needs, especially by considering responsive law to be adopted so that the law does not only apply normatively. In this sense, law would possess sociological legitimacy in the form of public needs that are accommodated and responded adequately.

#### REFERENCES

- [1] F. B. Hardiman, *Dalam Moncong Oligarki: Skandal Demokrasi Di Indonesia* [In the Oligarchic Snout: Scandal of Democracy in Indonesia]. Yogyakarta: Kanisius, 2013.
- [2] F. B. Hardiman, *Demokrasi dan Sentimentalitas* [Democracy and Sentimentalist]. Yogyakarta: Kanisius, 2018.
- [3] S. Pudyatmoko, *Perizinan: Problem dan Upaya Pembinaan* [Licence System: Problem and Efforts of Improvement]. Jakarta: Grasindo, 2009.
- [4] Sri Pudyatmoko *ibid*, pp. 11-15.
- [5] E. Sujatmoko, "Perizinan Daerah (Suatu Analisis Terhadap Perda Kotamadya Tingkat II Surabaya Nomor 7 Tahun 1992 tentang Izin Mendirikan Bangunan) [Regional Licence System (An Analysis towards Level II Municipal Regulations in Surabaya Number 7 of 1992 on Building Licence]", *Jurnal Yuridika Universitas Airlangga Surabaya*, No. 4 Tahun XII, p. 59, Juli-Agustus 1997.
- [6] N. B. Minarno, *Penyalahgunaan Wewenang Dan Tindak Pidana Korupsi Dalam Pengelolaan Keuangan Negara* [Abuse of Authority and Corruption in the State Finance Management]. Surabaya: Laksbang Mediatama, 2009.
- [7] Ridwan HR, *Hukum Administrasi Negara* [Government Administration Law]. Jakarta: Rajagrafindo Persada, 2006.

- [8] P. E. Lotulung, *Beberapa Sistem tentang Kontrol Segi Hukum Terhadap Pemerintahan* [Systems of Legal Control towards Government]. Jakarta: Bhuana Ilmu Populer, 1986.
- [9] Ridwan HR, Op.Cit, p.313.
- [10] Ridwan HR, Ibid, pp.313-314.
- [11] L. Agustino, *Politik Lokal dan Otonomi Daerah* [Local Politics and Regional Autonomy]. Bandung: Alfabeta, 2014.
- [12] Y. Hasyimzoem, *Hukum Pemerintahan Daerah* [Local Government Law]. Jakarta: Rajawali Pers, 2017.
- [13] Y. Hasyimzoem, dkk, Ibid.
- [14] E. Aspinall dan W. Berenschot, *Democracy for Sale (Pemilu, Klientelisme dan Negara di Indonesia)* [Democracy for Sale (Elections, Clientelism and State in Indonesia)]. Jakarta: Yayasan Pustaka Obor Indonesia, 2019.
- [15] M. Uhaib, *Politik Bisnis Tambang Dalam Persekongkolan Pemilihan Umum Kepala Daerah Kalimantan Selatan* [The Politics of Mining Business in the Local Leader Election Conspiracy of South Kalimantan]. Yogyakarta: Genta Press, 2016.
- [16] M. Uhaib As'ad, Ibid, p. 117.
- [17] M. Uhaib As'ad, p. 41, p. 113.
- [18] L. Agustino, *Pemilihan Umum Kepala Daerah dan Dinamika Politik Lokal* [Regional Head Leader Elections and Local Political Dynamics]. Yogyakarta: Pustaka Pelajar, 2009.
- [19] L. Agustino dan I. Fitriani, *Korupsi: Akar, Aktor dan Locus* [Corruption: Roots, Actors and Locus]. Yogyakarta: Pustaka Pelajar, 2017.
- [20] M. B. Mulyadi, "Pelayanan Perizinan Terpadu Dalam Meningkatkan Investasi dan Pertumbuhan UMKM [One-Stop Licence Services in Improving Investment and Growth of Small Micro Medium Enterprises (UMKM)].", *Jurnal Hukum Mimbar Justitia*, FH Universitas Suryakencana Cianjur, Vol.4 No.1, p. 118, Juni 2018.
- [21] A. K. Widi, "Implementasi Perizinan Penanaman Modal di Kota Mataram [Implementation of Investment Licence in Mataram City]", *Jurnal Dialogia Iuridia*, Fakultas Hukum Marantha University Bandung, Volume 9 Nomor 2, pp. 29-31, April 2018.
- [22] I. Wibowo, *Negara dan Bandit Demokrasi* [State and Bandit of Democracy]. Jakarta: Penerbit Kompas, 2010.
- [23] I. Kasim, "Mempertimbangkan Critical Legal Studies Dalam Kajian Hukum Indonesia [Considering Critical Legal Studies in Indonesian Law Research]", *Jurnal Ilmu Sosial Transformasi: Wacana*, edisi 6, Tahun II, pp. 23-26, 2000.
- [24] P. Nonet dan P. Selznick, *Toward Responsive Law: Law and Society in Transition*. USA: Transaction Publisher, 2009.