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POST-LEGISLATIVE SCRUTINY IN INDONESIA: A MISCONCEPTION AND PROPOSED SOLUTIONS[1]

CONTROLO PÓS-LEGISLATIVO NA INDONÉSIA: UM EQUÍVOCO E SOLUÇÕES PROPOSTAS

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Abstract: The post-legislative scrutiny's problem lies in the misunderstood definition of evaluation, the implementing agency, and in the drafting of review questions in the evaluation process. This article argues, first, that the definition of monitoring and evaluation of law is reviewing law effectiveness, not including its legal or ideological compatibility with the constitution as in a preparatory process of law-making or a judicial review. Second, the evaluating agency should be both the legislature and the president, who hold equal law-making power in the case of Indonesia. Third, the review questions can be drafted from the law-making process indicated not only in Hansard, academic drafts (white paper), and meeting minutes, but also in the law-purpose provisions stipulated under the reviewed law. The authors will also conduct comparisons to other countries' practices in proposing PLS for Indonesian legislative drafters and governmental stakeholders.

Keywords: post-legislative scrutiny, assessment, review questions, Indonesian law, evaluation.

Resumo: O problema do controlo pós-legislativo reside na má compreensão da definição de avaliação, do organismo que executa, e da elaboração de perguntas de análise no processo de avaliação. Este artigo argumenta, em primeiro lugar, que a definição de controlo e avaliação da lei consiste em analisar a eficácia da lei e não a sua compatibilidade legal ou ideológica com a Constituição, como acontece num processo preparatório de elaboração da lei ou numa revisão judicial. Em segundo lugar, a entidade que faz a avaliação deve ser tanto o Parlamento como o Presidente, cujo poder legislativo, no caso da Indonésia, é o mesmo. Em terceiro lugar, as questões

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para avaliação podem ser elaboradas a partir do processo legislativo, do projeto académico (livro branco) e das atas das reuniões, mas também das disposições relativas à finalidade da lei estipuladas na lei avaliada. Os autores também farão comparações com as práticas de outros países na proposta de PLS para os *drafters* legislativos indonésios e os *stakeholdres* governamentais.

1. Introduction

Post-legislative scrutiny (henceforth PLS) is an *ex-post* law assessment, as the objective of its evaluation is to measure how law is implemented and how effective it is. The evaluation of law and regulation hinges on two primary approaches depending on the timing of the assessment – whether it takes place before or after the enactment of a legislation. On the one hand, when the evaluation takes place before passing a bill, such evaluation is known as *ex-ante.* On the other hand, *ex-post* evaluation involves assessing a law to determine the extent to which its intended goals are achieved and how effective its implementation has been. If the law falls short of achieving its objective, the evaluation provides information and facts that lead to the consideration of alternative policies (Norton, 2019: 340-357).

There are major challenges that should be solved by implementing post-legislative scrutiny. Review is a long-term undertaking that requires significant resources, yet its necessity persists for the purpose of achieving improved regulation in a continually changing society. The challenges lie in a lack of political will, limited legislative sessions, funding shortages, and difficulty in accessing government data (Doust, Hastings, 2019: 231-257). First and foremost, post-legislative scrutiny must be a genuine priority for the legislature, given the absence of sanctions for neglecting evaluation. The lack of political will may be exacerbated by the fact that the legislature suffers from inertia, implying a reluctance to enact new laws even when they are aware of the need to do so (Eyal-Cohen, 2021). Second, evaluation incurs public expenses by covering costs associated with consultation, public hearing, experts, and funding the comprehensive study for collecting empirical data and evidence (De Vrieze, Norton, 2020: 349-361). Third, the legislature has limited time in session, making it challenging to allocate sufficient time in conducting review. being an integral part of the legislative cycle, serves as a valuable lesson learned to inform the advancement of subsequent legislations, guiding revisions, improvements, or even repeals as necessary (Smismans, 2015: 6-26).

Notwithstanding, Indonesia just adopted post-legislative scrutiny in the law-making cycle[5]. Contrary to practices in the UK, Indonesia's post-legislative scrutiny is performed not only by both bicameral houses of legislature, but also the president, as Indonesia's law-making power lies jointly on the House of Representatives and the President. Furthermore, at its inception, Indonesia's post-legislative scrutiny faces challenges in terms of practical evaluation and the formulation of review questions, given that these issues have not been regulated or addressed.

This article is divided into three parts. The first part discusses the law-making power in Indonesia, which is very unique and distinct. The characteristics of law-making in Indonesia come from the fact that its constitutional law, and how the government branches are structured, are not in accordance with the famously well-known Montesquieu's or John Locke's separation of power and three branches of government. Rather, Indonesia subjects its structure of government to customary law. Part II shows the brief discussion on evaluation as a part of parliamentary oversight power rather than law-

5 Law on Legislation Making Number 12 of 2011.

making power. Part III discusses the long but brief history on the evaluation of law in Indonesia dating back to the 1960s, to the newly post-legislative scrutiny introduced in 2019. Part IV tries to convey the framework for how each law-maker, namely the legislature and the president, should carry out the evaluation and answer some mandated questions of review.

Part I

Indonesia's law-making power: when the legislature and the President jointly make law

Each law requires a joint approval from the House of Representatives (the House) and the President. Unlike other presidential systems in many countries, Indonesia has a unique and different law-making process requiring approval from the President for each bill to become law.[6]. Such a proposition comes from the *adat* law (customary law) of the government of the *desa* (village). Indonesia is rich in diverse *adat* laws establishing that the *kepala desa* (head of village government) holds executive power and is a member of *Rapat Desa* (assembly of villages). The *kepala desa,* however, jointly performs law-making power with the *Rapat Desa,* having members from the elderly established generation (*sesepuh* or *pinisepuh*), former officials (*Dewan Morokaki*), religious leaders, landlords, and people's representatives.[7]. Therefore, Indonesia's founding persons equated *kepala desa* with the President and *Rapat Desa* with the legislative body.

The House of Representatives and Regional Representatives Council (the RRC) are bicameral legislative bodies in Indonesia. To become a law a bill does not need to be approved by the RRC. The power of approving a bill to become a law is exclusively assigned to both the House and the President. The RRC, however, has the right to propose any bill if regarding "regional autonomy, the relations of central and local government, formation, expansion and merger of regions, management of natural resources and other economic resources, and draft law related to the financial balance between the center and the regions." Moreover, the RRC also has the right to oversee the implementation of the aforementioned, as well as laws regarding tax, education, and annual budget. Hence, the RRC has a constitutionally minor power in Indonesia's law-making, considering its limited power in exercising legislative power.

The power and role of the President in law-making is as equal and vital as the House's. Aside from budget bills, any bill can be proposed either by the House or the President. To become law, a bill should be discussed jointly by the House and the President, as the Indonesian Constitution of 1945 so explicitly provides. In practice, the President generally appointed a minister or ministers to administer and represent him/herself to attend and join in such discussion. Therefore, the President is actively involved in all stages of law-making until a bill is signed into law. Furthermore, as head of state, the President ratifies an approved bill to become a law.

6. Constitution of the Republic of Indonesia Year 1945, Art. 21.

7. Soetardjo Kartohadikoesoemo, *Desa* (PN Balai Pustaka 1984).

PART II

Post-legislative scrutiny is a part of oversight power, not law-making power

Both houses of parliament (*i.e.* the House and the RRC) have the right to oversee or supervise the implementation of laws. As mentioned above, the RRC has limited competence on how the law can be overseen, while the House has no limitation of on how law can be supervised by them. To be noted, the evaluation of law is theoretically included in the oversight power of the legislative branch. Further discussion on it will be argued below.

The House has the right to oversee or supervise the implementation of law by the President (*i.e.* the executive branch). The Indonesian Constitution of 1945 explicitly provided the House and the RRC with the power to oversee the executive (Indonesia Constitution, Art. 20A and 22D). In Indonesia's constitutional law, oversight power theoretically has board meaning. Oversight power means the right of the legislature to supervise the President on (1) how policies are made, (2) how policies are performed, (3) how state budget is allocated and spent on, (4) how the government works, and (5) how politically public officials are appointed (Asshiddiqie, 2006: 36). Furthermore, oversight power can be theorized as the House's ability to evaluate the implementation of any law and any policy, scrutinizing whether such a law has been implemented by legislature's standard and intent which the President carried it out (Rockman, 1984: 415). It does not preclude oversight on the policy on annual budget spending. By the House committees' sessions and other legislative meetings, such oversight powers are executed continuously on a day to day basis. Continual legislative oversight is a means or tool for ensuring and supervising that any purposes and objectives of any law are correctly and timely executed by the President and its ministers (Kusnardi, Saragih, 1978: 75). Moreover, not only does the House oversee the policies authorized by law, it also oversees any implementation of government policies (Yamamoto, 2007). Hence, PLS is theoretically part of the oversight power.

Indonesian law makes no reference that evaluation of law (*i.e* post-legislative scrutiny or PLS or *Peninjauan dan Pemantauan Undang-Undang*) is an integral cycle of law-making. Indonesia's law-making cycle starts from planning, preparation, discussion, endorsement, enactment or issuance, and lastly to promulgation. Rather, the law only refers to PLS as a means of building a sustainable law-making process[8]. Hence, by definition, PLS is a distinct process from law-making. Such an understanding, however, is not uniform; there is some disagreement as to whether PLS is a part of the law-making cycle (Taufik, 2021; Lumbantoruan, 2021). Therefore, PLS cannot be said as a law-making power, but as a part of oversight power.

On the other hand, post-legislative scrutiny is determined to be a part of the supervising function of the House. Under the Indonesian Constitution of 1945, the House has three functions, namely the functions of legislating,

8. Sustainable law-making has been stated in Consideration part, "to strengthen a sustainable legislation making, it is necessary to regulate and improve the mechanism of legislation making from planning to monitoring and review." *See* Law on Amendment to Law on Law Making, Law Number 15 of 2019.

budgeting, and supervising. Every function has its own means to perform. The supervision function has two means, first by evoking parliamentary right to submit questions, to propose suggestions, and to express suggestions. Moreover, there is a new means for the House to perform its supervision function, namely post-legislative scrutiny. The supervisory function enables the House to oversee and evaluate an enacted law, meaning that the House will oversee whether the law has met its purposes and objectives. Therefore, post-legislative scrutiny is set to be a concrete means to oversee the implementation of law. The House prescribes a designated under-parliamentary body to perform PLS.

PART III

Evaluation of law: from the evaluation of compatibility to post-legislative scrutiny

1. Evaluation tends to identify compatibility of content and procedural compliance

The spirit of evaluating law, commencing in the 1960s, began by the mandated evaluation of laws enacted during the period of political instability that ranged from 1959 to 1966, during which the constitution reverted from the Temporary Constitution of 1950 to the Constitution of 1945. Such evaluations were narrowly and solely intended to assess the compatibility of its provisions with the people's aspirations at the time after the revolution era. It is widely known that the late 1960s was the new beginning of Soeharto's 31-year-*Orde Baru*, the longest presidential term in Indonesia history, setting up the agenda of implementing the Constitution of 1945 consistently and purely. That means any law that had been brought into force before should be evaluated. The spirit of evaluation should be acknowledged; however, it is limited to its compatibility to the people's aspirations and not aim to measure whether the objectives and purposes have been met.[9].

In 2014, Law on Legislature set out a new task for *Badan Legislasi,* the House's committee, to evaluate the law..[10] However, the law does not further regulate on how such a new task would look like. Moreover, in 2018, the same body set a new task for the Regional Representative Council (the RRC) to evaluate proposals of regional regulation and the corresponding enacted

9. Indonesia's People's Consultative Assembly, Ketetapan MPRS No. XIX/MPRS/1966 tentnag Ketetapan Majelis Permusyawaratan Rakyat Sementara tentang Penindjauan Kembali Produk-Produk Legislatip di Luar Produk MPRS yang Tidak Sesuai Dengan Undang-Undang Dasar 1945.

10. Law Number of 2014 on People's Consultative Assembly, House of Representatives, Regional Representative Council, and Regional House of Representative, Art.105 para (1) word f.

regional regulation. Once more, that evaluation from RRC outweighed in identifying the compatibility of procedure and its material content.[11].

Any law should satisfy many principles of legislation-making, one of them being the principle of efficiency and effectiveness, a crucial factor for the validity of law. Under Indonesia's legislative drafting guide, there are many principles that need to be followed, while the contradiction to these principles is considered a formal flaw in law-making. The principle of efficiency and effectiveness requires any law to be necessary to society, providing benefits to most.[12]. Any judicial review of a can be filed on the ground of violating principles of legislation-making. Many judicial decisions determined that if any law evidently violates principles of legislation-making, such a law will be entirely void and shall cease to have effect by then.[13]. This article reasonably implies that the principle of efficiency and effectiveness has a vital role in guiding any law to be as effective as possible.

2. Introducing post-legislative scrutiny in Indonesia

The establishment of Law Number 15 Year 2019 introduces post-legislative scrutiny, known as *pemantauan dan peninjauan undang-undang*, as a new mechanism for evaluating law. Indonesia's *pemantauan dan peninjauan undang-undang* is theoretically based on the practice of post-legislative scrutiny (PLS) in the United Kingdom. A proposal for the implementation of post-legislative scrutiny had its moment in 2019 when the House passed Law Number 15 Year 2019, establishing a novel and obligatory mechanism for reviewing laws. However, the understanding of post-legislative scrutiny indicates a lack of uniformity about two things: who will perform it, and its objectives.

3. Who will perform post-legislative scrutiny?

Post-legislative scrutiny is set up for being conducted by three bodies: the legislative branch, composed by Indonesia's Regional Representative Council (the RRC), the House of Representative (the House), and lastly the President. However, from those three bodies, the House became the only body which has regulated on how post-legislative scrutiny works. It draws many critiques denouncing such assignments. Critics offer three scenarios on the construction of the evaluating agency that should ensure that the review will be studied and reviewed empirically. The scenarios range from the creation of a centralized body at a national level, sectorally reviewed by every governmental body, to a hybrid approach combining the former two scenarios (Lumbantoruan, 2021). Hence, post-legislative scrutiny in Indonesia has no coordinated system that performs it between the House, the RRC, and the President. The legislative branch, consisting of the House

11. Peraturan Dewan Perwakilan Daerah Republik IndonesiaNomor 3 Tahun 2019 tentang Pemantauan dan Evaluasi Rancangan Peraturan Daerah dan Peraturan Daerah, Appendix I.

12. Law Number 12 of 2011 on Legislation Making, Art. 5 letters of c.

13. Indonesia's Constitutional Court Decision Number 91/PUU-XVIII/2022.

and the RRC, operates with a system that functions independently of and is not in direct correlation with the executive branch. It is understandable because the results from the MEM conducted by the House would only internally followed up by using it as a consideration to make *Prolegnas*.[14] which does not have a direct effect on the President.

Regardless, we will first discuss post-legislative scrutiny conducted by the House. If we look at the academic draft of Law Number 15 Year 2019, we will find that there are two different bodies, each designated with its own understanding of the objective of the evaluation, as mentioned above. On the one hand, the *Baleg* would exclusively conduct an evaluation regarding the doctrinal aspect of laws such as the compatibility of provision and ideological aspect. On the other hand, the *komisi* (committee of the legislature) would only conduct review of laws for its empirical aspects such as its impact and benefits. However, such a separation does not show up in the Law Number 15 Year 2019, which provides that *Baleg* is the sole body designated to perform post-legislative scrutiny for the House. The position of *Baleg* could be stated as "special parliamentary body" designated to carry out tasks to evaluate the select committee's work, a role carried out by similar bodies in many countries (Russell, Benton, 2011). Therefore, there are already two House bodies that perform post-legislative scrutiny.

Although the *Baleg* is the sole body of the *DPR* that performs the MEM, the House designated one more body to perform post-legislative scrutiny, making the process trickier. That committee is *Pusat Pemantauan Pelaksanaan Undang-Undang*, the Center for Monitoring of Laws (CML). First, the position of CML is just a subdivision of the House's General-Secretariat, so it has been positioned to be a supplementary body.[15]. Second, there is no difference between the evaluation conducted by CML and that of the *Badan Legislasi*. Hence, the CML's tasks overlap with the *Baleg*'s when it comes to post-legislative scrutiny.

Third, the discussion shifts to the President, who has not yet enacted a manual or guidance on performing post-legislative scrutiny. This guidance is still in the process of being promulgated.[16]. Nevertheless, there is a guidance from *Badan Pembinaan Hukum Nasional*, a governmental body, which draws guidelines to evaluate law. This is a general guidance which does not cater to a specific type of legislation.[17]. Law Number 13 Year 2019 allows the President to create delegated legislation providing technical and practical

14. *Prolegnas Prioritas,* abbreviated from *Program Legislasi Nasional Prioritas*, is an annual order of bill which shows whichever bill is being prioritized to be enacted a year ahead of time. A bill not included in *Prolegnas* would not, unless special conditions are satisfied, be debated and approved in such a year. See Rakyat (2020).

15. Expertise Board of the House of Representative is a parliamentary body under which positioned in General-Secretariat of the House of Representative. *See* Badan Keahlian DPR, *Tentang Badan Keahlian DPR* (Badan Keahlian DPR), https://www.dpr.go.id/bk/tentang, accessed in 27 September 2022.

16. By 28 September 2022, the author has been invited to join a team designated to draft Presidential Regulation on post-legislative scrutiny as a delegated regulation from Law Number 15 of 2019. Therefore, it concludes that manual or guidance on performing the president-post-legislative scrutiny has not yet been enacted.

17. Badan Pembinaan Hukum Nasional (Bphn), *Pedoman Evaluasi Peraturan Perundang-Undangan* (Bphn 2020).

regulation regarding post-legislative scrutiny. Until now, however, such delegated regulation has not yet been made. It does not mean there is an absence of evaluation from the executive. In fact, Bphn has performed by utilizing six dimensions of evaluation as their criteria. However, this six dimensions are not explicitly intended to be the criteria for post-legislative scrutiny despite being enacted in 2020 – approximately a year after the introduction of post-legislative scrutiny.

Thirdly, this article cannot go further in discussing how the RRC delivers post-legislative scrutiny, due to the fact that the RRC has also not yet regulated post-legislative scrutiny. On the contrary, the RRC tends to regulate first regarding the evaluation for regional regulation instead of delivering post-legislative scrutiny. Both are the same in terms of performing evaluation; however, the difference lies in that the latter only evaluates law (*undang-undang*), while the former scrutinizes regional regulations which are hierarchically below the law.

4. What are the objectives of post-legislative scrutiny?

Tracing back from the academic draft of Law Number 15 Year 2019, the MEM is deemed to be having three objectives: The first is evaluating compatibility of provisions from the secondary to primary legislation, examining and urging the establishment of delegated or secondary legislation, and testing the ideological compatibility. The second objective is to assess the impacts, benefits, and goal fulfilment. The last objective is assessing how the stakeholders, police officers, governmental officers, and judges interpret the evaluated law.[18]. To note, in the UK, however, examining whether or not delegated legislations have been made have been criticized as an exaggeration of post-legislative scrutiny. The critic reasons that PLS to the secondary legislation does not fall within the scope of PLS (Norton, 2019: 15). Instead, PLS has two dimensions, firstly examining whether or not laws have effect and lastly whether or not the intended objectives have been met (WESTMINTER FOUNDATION FOR DEMOCRACY, 2019: 3).

In contrast, the minutes of the parliamentary session debating Law Number 15 Year 2019 show a different view regarding the understanding of post-legislative scrutiny. Members of parliament tend to utilize post-legislative scrutiny as a mechanism to prevent the excess of regulation caused by the absence of legislature's scrutiny over any enactment of secondary legislation.[19]. Moreover, the parliamentary session states that post-legislative scrutiny should be used for testing the compatibility of provisions between

18. Legislation Committee of the Indonesia's House of Representatives 'Naskah Akademik Rancangan Undang-Undang tentang Perubahan Atas Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan 31 Agustus 2019'. Accessed from https://www.dpr.go.id/dokakd/dokumen/RJ1-20191028-022123-8433.pdf on June 29th 2022.

19. *Badan Legislasi* DPR RI (2019), https://www.dpr.go.id/dokakd/dokumen/RJ3-20190214-030935-9368.pdf, accessed in 1 July 2022.

the primary and secondary legislation in order to avoid any inconsistency of provisions.[20].

That confusion is falsely but officially reaffirmed by *Peraturan DPR* (standing orders) citing that post-legislative scrutiny is a study for evaluating the content's compatibility with secondary legislation, which the primary regulation (an act of parliament or *undang-undang)* delegates thereto.[21]. The House's understanding seems to nullify the fact that the objective of monitoring and evaluation of law is to evaluate primary legislation. In principle, there is equal importance in evaluating both primary and secondary legislation simultaneously. The importance could be even stronger when the most impactful provisions are regulated under secondary legislation.

It must be emphasized that the RRC and the President have not yet enacted delegated regulation on post-legislative scrutiny as required by law, enacting post-legislative scrutiny. Shortly, we cannot conclude what the RRC and the President mean with post-legislative scrutiny's objectives and how the final result would look like. That is why this article only showed the House's point of view.

Nevertheless, as previously mentioned, post-legislative scrutiny only examines the empirical aspect of laws (law in action), such as their impacts and benefits. Notwithstanding, the final provisions of Law Number 15 Year 2019 define it as an activity of observing, noting, and assessing the implementation of promulgated laws, and by doing so, the level of satisfaction on intended result, impacts, and benefits will be known.[22]. From said definition, two fundamental understandings can be inferred. Firstly, post-legislative scrutiny is translated as "*Monitoring and Review*", a term that does not have separate meanings and is rather a single compound term with one single meaning. Secondly, the objective of post-legislative scrutiny should be the empirical aspect of laws (law in action) such as their impacts and benefits. Therefore, by definition, in Indonesia, post-legislative scrutiny should never be reviewing the compatibility of provision from secondary to primary legislation. Nor should it be even reviewing its ideological dimension which can be deemed as doctrinal.

Between the *BPHN* and the *CML,* both use different approaches and methods to evaluate laws. The former uses six dimensions as their review questions, which make up a 100-scale grade. From the total grades, it divides the results into three categories of urgency for consideration. Grades above 70 classify in the most urgent category, those between 40-70 are deemed urgent, and scores below 40 fall into the less urgent category. The category of urgency is a matter for getting the evaluated laws to be listed on

20. *Badan Legislasi* DPR RI (2019), https://www.dpr.go.id/dokakd/dokumen/RJ3-20191021-100903-1568.pdf, accessed in 2 July 2022.

21. Peraturan Dewan Perwakilan Rakyat Republik Indonesia Nomor 2 Tahun 2020 tentang Pembentukan Undang-Undang.

22. Post-legislative scrutiny is translated to be "Monitoring and Review" meaning an activity to observe, record, and evaluate the implementation of the prevailing Laws so that they are recognized as the achievement of the planned results, the impacts, and their benefits for the Unitary State of the Republic of Indonesia. *See* Law Number 15 of 2019 on Amendment to Law on Legislation Making, Art.14 (14).

Prolegnas, meaning it will have a bigger chance to undergo revision immediately. However, every dimension has a distinct proportion of grades because it has a different grade-proportion.

By contrast, although it has no specific parameter to be utilized, the CML uses the theory of effectiveness by Soerjono Soekanto and the three-factor legal system by Lawrence Friedman. That statement can be inferred from many reports of evaluation that are publicly accessible on the CML's website. The evaluation reports below are the reports that have been published in 2019 or after the promulgation of Law Number 15 Year 2019.

PART IV

Workable framework and mandated questions of review in evaluation

The House of Representatives, the RRC, and the President of the Republic of Indonesia are the three institutions that should collectively perform post-legislative scrutiny. Under Indonesia's Constitution of 1945, an act of parliament (*undang-undang)* is made by the *DPR* with the approval of the President. By that fact, any proposal to revise a law needs to be agreed by both, which also entails an obligation to review the laws that they both have already made. Nevertheless, the general approach in institutionalizing the evaluating body is by appointing expert(s) or designating an independent body to do research and make a report, which will be delivered to the legislature. In doing so, the legislature holds public hearings to obtain testimonies from stakeholders and interested groups on the evaluated law's implementation regarding its benefits, impacts, and how effective it is.

The executive will perform a preliminary evaluation in order to obtain empirical data, an area in which they excel, providing a better understanding of the execution compared to the legislature. It becomes commonly known that the legislature lacks empirical data due to two facts. First, the legislature does not implement the laws, as that is in the power of the executive, and the legislature is forbidden from do so. Second, the executive has a lot more expertise regarding detailed information and data. The executive also has profound and excellent human resources from the lower to the central government (Isra, 2018: 177-178).

A preliminary evaluation, containing the fulfilment of the objectives of laws, will be delivered to the legislature for political judgment by organizing a public hearing. Every law generally stipulates which ministry or bureau is in charge of implementing such laws. Hence, the implementing agency, charged with creating the laws, is the agency that should be making a report of preliminary evaluation. In such a report, it is necessary to report which problems they faced, but at the same time, such problems need to simultaneously be answered and accompanied with the solutions. The reports and its proposed solutions are going to be delivered to the legislature before the *Prolegnas* is made. The legislature may be aided by the annual report from the Indonesian Audit Board (*Badan Pemeriksa Keuangan).* Annually, the *BPK* audits all governmental agencies on fiscal spending. That audit is an accountability to the legislature; thus, the report of the audit should be known to the legislature.

The role of governmental bodies outside the legislature is fundamentally critical. The legislature lacking certain expertise shall be substituted by a preliminary evaluation made and delivered by governmental bodies or bureaus. The preliminary evaluation is a prerequisite for meaningful and successful sunset review, representing one out of ten principles for such reviews (Adams, 1976). The State of Colorado in the United States of America has quintessentially practiced in authorizing and designating the Department of Regulatory Agency, a state's governmental department, to make preliminary evaluations before performing sunset review (Saputro, 2022). It is worth noting that sunset review resembles post-legislative scrutiny in terms of when it takes place and its objectives of.

Before performing a public hearing, the preliminary evaluation, its solution, and other data in connection with the evaluation should be publicly and easily accessible by the public. It guarantees that the public will actively and intellectually be aware about which issues are being discussed (Valentina, 2017). The same is a prerequisite for meaningful participation, as it is a constitutionally guaranteed right of citizens to meaningfully participate in the law-making process.[23].

This article argues that the effectiveness of legal theory affects and guides the way the reviews list many review questions. First, the definition has stated that the monitoring and review.[24] is an activity of observing (*mengamati*), meaning that monitoring and review should be an empiric-oriented research. Soekanto argues that observation is the oldest method of research. He also contends that observation serves as complementary to library research. Therefore, data resulting from observation may fill the absence of information or data from library research. Fundamentally, observation mainly identifies the empirical human behavior regarding the enactment of laws. Hence, answers to questions such as how society responds and whether it fully or partly obeys the rules, and to what degree society obeys the law, would be found by executing observation (Soekanto, 1985).

Secondly, the definition also states the objectives of Indonesia's post-legislative scrutiny are to evaluate the fulfilment of the intended goals. As mentioned herein, the understanding of these objectives is the purpose intended by the legislature. However, the intended objectives are not always obviously stipulated in the laws. Instead, theycan be derived from the structure or other part of the laws. Seidman argues that such some parts of laws show or imply the intended objectives of laws. To name a few, we are able to find such objectives in the title, the preamble, the general principle section, and the definitional section. Moreover, the research papers or reports from the preparatory process can also be used to find the intended objective of laws (Seidman et al., 2001). Therefore, the authors conclude that intended objectives can be drafted or found within the text of the laws, since Seidman's argument corresponds to the structure of Indonesia's legislation.

This article argues that the guidelines below for drafting review questions should primarily come from the text of laws as a legally binding norm.

23. Constitutional Court Decision, 2020, pp. 392-3.

24. In Bahasa, Indonesia been referred to as "Pemantauan dan Peninjauan".

Pursuant to legislative drafting guidelines, the legally binding norms are stipulated in the "Body" part (*Batang Tubuh*) containing articles. It means that any provision in the laws that is not stipulated in the articles has no binding effect at all. Regardless, any information that is attached in the laws, although stipulated outside the articles, still can be used as complementary guides to draft review questions. Lastly, the preparatory documents such as meeting minutes, Hansards, and academic draft (white paper) would also serve the complementary guides. Hence, here are the guides to draft the review questions:

1. Review questions from the Provision about objectives and scopes of the laws

Articles in laws may include a provision exclusively determining the scope and the objective of such laws. It is not legally mandatory, but in many cases we may find such a provision. For instance, the Job Creation Law of 2020 has determined its objectives consisting of four goals. Article 3 of the Job Creation Law of 2022 states that the law is made in order to (1) create as many jobs as possible for the people by simplifying business processes, especially for small and medium enterprises, (2) guarantee the right of the people to work and be fairly paid for their work, (3) revise business regulations, and (4) revise regulation regarding investment, and nationally strategic programs. Many more laws may include the same provisions. Hence, the review question can be made from them.

Furthermore, laws may also determine the principles that should be guiding the implementation of such laws. Many laws that have been promulgated tend to have principles in their provision. This tendency may help the evaluator to draft some review questions by basing them on such provisions. To illustrate this, the Environmental Protection and Management Law of 2009, Article 2, names many principles that should be followed. The principles of these laws *inter alia* are the principle of preservation, sustainability, state responsibility, and polluter pays. Therefore, by looking at the principles, it can fairly be inferred that the principles may be the review questions to be asked in the evaluation process. In the other words, the evaluation should provide and reiterate the implementation of all principles.

This first guide is the most recommended, as provisions concerning principles and objectives are part of laws and therefore are legally binding.

2. The Explanatory Consideration of Laws (*Konsideran*)

Every law has its own explanatory consideration reiterating its background and basis for making such laws. Under legislative drafting guides, the inclusion of explanatory consideration is mandatory in every law, especially in an act of parliament (*undang-undang*). By law, every consideration must include three bases – philosophical, sociological, and juridical – for making a law.

Philosophical basis identifies Indonesian values, based on *Pancasila's* values, that need to be codified into laws. Moreover, this basis also serves to argue that any provision in the laws will not contradict or violate the *Pancasila* as the ideological foundation of Indonesia's statehood and nationhood. The sociological basis will argue that there is a need from society to pass the bill into the act of parliament. This basis mainly focuses on proving that the bill will satisfy public interest. Lastly, juridical basis provides arguments that this bill will tackle the problem that has taken root or grown in society. If there is no law or a law to be revised, then, these argyments would be the juridical basis.[25].

In Seidman's words, this guide refers to the title, the preamble, or the definitional section of laws. Therefore, many questions can be made from explanatory consideration taking account its explanation about the basis and the background behind the enactment of laws. In other words, sentences of explanatory consideration can be changed from statement to whether-type questions.

3. Elucidation (Mainly in General Elucidation)

Every law, especially an act of parliament (*undang-undang*), has always been accompanied with Elucidation attached to the laws. Such Elucidation differs from appendix, annex, or schedules which will never be mandatory but are optional. Elucidation is an official interpretation to the law being explained. However, anything in the Elucidation part shall always be deemed to have no legal effect to the provision stipulated in the laws. Elucidation will always be an explanation telling a meaning of a term but it shall not extend, narrow down, and/or add any meaning, revise or contradict the provisions of laws.[26]. Therefore, we will be able to create many questions based on the information in the Elucidation, mainly in the part of General Elucidation.

4. Academic Draft (*Naskah Akademik* or White Paper)

Mertokusumo (2004) argues that the objectives of laws can be known by interpreting the law through an historical lens. Historical interpretation examines the preparatory documents of law-making and meeting minutes that record the debate or discussion of members of parliament. In doing so, we will understand the meaning and objectives of laws as intended by the legislature as law-maker. That argument is the same as Seidmand's words stating that the intended objective can be inferred from a research paper or report from the preparatory process of law-making. Therefore, the authors recommend making review questions from the academic draft.

Academic draft (*Naskah Akademik*) is a mandatory scientific report study serving the scientific research for legislating any law, especially the passing of acts of parliament or *undang-undang*. The academic draft consists of many chapters, but the chapter on which this part

25. Law Number 12 of 2011 on Legislation Making, Law Number 12 Year 2011. Appendix II.

26. Law Number 12 of 2011 on Legislation Making, Law Number 12 Year 2011. Appendix II.

focuses is the second. The second chapter provides data and background problems which serve as reasons why such laws are enacted in the first place. On the other hand, review questions serve to learn the implementations and effect of the enactment of laws. Therefore, review questions should include the basic questions regarding whether the prior problems have been solved by implementing laws. If solved, then the laws can be deemed effective. But not, the laws need to be revised or even improved.

Part V

Conclusion

1. Pursuant to the definition in Law Number 15 Year 2019, post-legislative scrutiny in Indonesia should only examine and assess empirical results such as the benefits and impacts of laws, and evaluate whether or not the intended goals or objectives have been met. The PLS will do nothing regarding examining the compatibility of secondary legislation to the act of parliament (*undang-undang*). Nor will the PLS assess and evaluate the compatibility of secondary legislation to ideological value (the *Pancasila*'s value).

2. Indonesia's House of Representatives, the Regional Representatives Council, and the President should jointly perform the PLS. Not only may the House be provided with the preliminary evaluation from governmental bodies or bureaus, but also may be aided by a financial report containing the examination of governmental spending from the Indonesia Audit Board. Such a preliminary evaluation and report serves as complementary to the work of the House in terms of preparing and performing PLS.

3. The stakeholders may make and find review questions from the four sources. Every source listed herein is constitutively made pursuant to legally binding effect. Review questions can be made from; (1) provision about objectives and scopes of the laws in the "Body" part of laws, (2) explanatory consideration of laws (*konsideran*), (3) elucidation, and (4) academic draft (*naskah akademik*).

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