

LOCAL LEGISLATIVE DRAFTING IN THE UNITARY STATES: A COMPARISON BETWEEN INDONESIA AND PHILIPPINES

Ekawestri Prajwalita Widiati

prajwalita.widiati@yahoo.com

Institute of Advanced Legislative Studies, School of Advanced Study, University of London

Abstract

Local authorities can be found in federal and unitary states. It is the spearhead of the states to enhance a more prosperous and democratic society which provides a range of services in the daily basis. This essay attempts to look at how the national government in unitary states designs local bill-drafting process by doing comparative analysis between Indonesia and Philippines using bill drafting process by Seidmans. By looking at the bill drafting process this essay is trying to figure out the variation of coordination between elements in the local government. Philippines, in this comparative study applied a more radical distribution of power than Indonesia. In Indonesia, however, the relation between the local legislative and executive in the bill-drafting process shows a weak separation. This article conclude that by figuring out the variation of coordination between elements in the local government, at least in Indonesia and Philippines it is seen that coordinated activities in the local legislative process reflects the chosen methods of distributing power taken by the states.

Keywords: local authorities, government, local legislative, legislative drafting.

Abstrak

Pemerintahan Daerah dapat ditemukan baik di bentuk negara Federal maupun Kesatuan. Pemerintah Daerah merupakan ujung tombak negara untuk mewujudkan pemerataan kesejahteraan serta upaya demokratisasi melalui penyelenggaraan otonomi dan pelayanan public dalam skala kecil yang langsung bersentuhan dengan masyarakat sehari-hari. Artikel ini mencoba menelisik bagaimana pemerintah pusat di negara *unitary/kesatuan* mendesain pembagian kekuasaan secara vertical. Untuk menjawab isu hokum tersebut essay ini membandingkan pembentukan peraturan daerah sebagai salah satu instrument penting dalam pelaksanaan pemerintahan daerah di dua yurisdiksi yang berbentuk negara kesatuan yakni Philipines dan Indonesia menggunakan kriteria ‘*bill drafting process*’ menurut Seidmans. Artikel ini berkesimpulan bahwa Philipines mengimplementasikan pembagian kekuasaan dalam pemerintahan daerah yang lebih radikal persis seperti konsep pembagian kekuasaan yang diterapkan di tingkat pusat sehingga mekanisme review terhadap peraturan daerah dilakukan oleh lembaga legislatif di tingkat yang lebih tinggi. Sedangkan Indonesia sedikit berbeda karena Indonesia melihat bahwa pemerintahan daerah adalah bagian dari kekuasaan eksekutif sehingga mekanisme review dilakukan oleh pemerintah pusat.

Kata kunci: pemerintah daerah, pemerintah, peraturan daerah, perancangan undang-undang.

Introduction

Local government is urgent both in Federal or Unitary states. It is the lowest level of elected territorial organization within the state.¹ Local government is the spearhead of the states to enhance a more prosperous and democratic society. It provides a range of services and represents the general interest of specific area. Local government should, nevertheless, be valued in a democracy more highly than the numerous other bodies that also shape aspects of urban and rural life.²

Even though local authorities can be found in federal and unitary states, we could see there is a different feature in between. Multiple levels of governance are integral to a federation whereas in a unitary system sovereignty resides solely with the center, with lower levels existing at its pleasure.³ In federations, local government is the preserve of the states, creating diversity but also reducing coherence.⁴ In unitary government, however, the central government controls over all aspects in the states both domestic and foreign affairs. In this hierarchical arrangement national government fully designs the competence of the local level government. The main idea is that the autonomy of local authority in the unitary states is a derived powers not inherently owned.⁵

As the size of jurisdiction may put some problem in managing such a huge territory, unitary states tend to decentralize its power. The decentralization has evolved to enhance a more effective and efficient governance. Moreover, decentralization attempts to entail people in the basis of local units more responsive and participative in solving their local problems. In terms of decentralization, the relationship between the local governments with the center in unitary states is interesting; Hague and Harrop argue that the operation of multilevel governance in practice within unitary states reveals contrasting notions of states authority.⁶

Knowing that the relations between central and local government in the unitary states is in contrast with the notion of sovereignty, I would like to look more deeply on what happened in the local legislation drafting process. Logically, local legislation is prominent issue as it is the tool to operationalize the decentralized authority into enforceable policy. The central government, surely, has established the framework enabling the local administrative exercise its tasks by legislating. Therefore, it is interesting to look at local bill drafting process in the local government to see in what sequence the national government expand and draw its power. Ann Seidman criteria of bill-drafting process are relevant to be the basis of the analysis. This is

¹ Rod Hague and Martin Harrop, *Comparative Government and Politics: An Introduction*, Palgrave: Macmillan, 2007, p. 294.

² J.A. Chandler, *Local Government Today*, England: Manchester University Press 2009, p. 1

³ Hague and Harrop (n 1), p. 282.

⁴ *Ibid*, p. 296.

⁵ Raul P. Gonzales, *Case Studies on Decentralization : Worked Paper*, prepared for SDA Technical Consultation on Decentralization (TCD) FAO HQ ROME, Philippines 16-18 December 1997 on behalf of the Asian NGO Coalition for Agrarian Reform and Rural Development.

⁶ See Hague and Harrop (n 1), p. 298.

because the drafting process reflects coordinated activities between the initiators, the prioritizing authority and the behaviors of the drafter.⁷ In other words, by asking these following questions we wish to capture the variation of coordination between central and local government in the unitary states. As we would like to discover this feature, a comparative analysis is chosen as a means of bringing to light how legal institutions are connected, diversified and transposed.⁸ In doing the comparative analysis, I would like to ask the compared jurisdictions the questions as follows.

How do ideas for new legislation enter the system-and from where?; Who preliminarily explicates these idea-and how?; Who decides, and by what criteria and procedures, to spend scarce drafting resource on some bills-and not others?; Who employs what procedures to ensure that bills meet formal standards, and do not contradict other laws?; Who does what kinds of research to determine the bills' details?; And how do input and feedback institutions grant to some people and not others, the power to supply information to those preparing bills-about facts, various theories, and various groups' claims and demands?.⁹

Indonesia and Philippines may relevant to be compared. These two jurisdictions share similarities in the form of unitary states and applying decentralization. Moreover, Indonesia and Philippines experienced the similar historical background in the past. Both have started the decentralization in 1990s after a notable revolution in the country. While Philippines implements devolution as the methods for distributing power from the center, Indonesia choose to apply decentralization.

This essay will attempt to look at how the national government in unitary states designs local bill-drafting process by doing comparative analysis between Indonesia and Philippines based on criteria as mentioned above. By looking at the process the essay is trying to figure out the variation of coordination between elements in the local government. If it is captured then it possibly that the coordinated activities in the local legislative process reflects the chosen methods of distributing power.

The early decentralization story

The debate on the necessity of decentralization in Indonesia had started one year after "Reformasi 1998" when the people massively impeached Soeharto's regime in his term of office. Offered in the situation where change is highly demanded, this concept was seen as a solution to overcome central government domination as experienced in the past. However, the early implementation of first mode of decentralization shocked people because the local level government became uncontrolled. Decentralization focused on municipalities, consequently provincial government seemed powerless and lost function to supervise. Moreover, issue on

⁷ Ann Seidman, Robert B Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, London: Kluwer, 2001, p. 25.

⁸ See Esin Örucü, 'Unde Venit, Quo Tendit Comparative Law?' in Andrew Harding and Esin Örucü (eds), *Comparative Law in the 21st Century*, The Hague The Netherlands: Kluwer, 2002, p. 15.

⁹ *Ibid*, p. 21-22.

revenue shares between central and local authority was unclear. As a result, corruption moved from central government to local government as the management of local resources is dominated by the local administrative. In this sense, the concept of decentralization was challenged and said as an attempt to “federalize” Indonesia. On that time, there were also demands to move back into centralized system.

There was retention that by giving local government more power Indonesia becomes federalism which will be in contrast with the commitment to be unitary all the time. It should be noted that unitary is the chosen system for the state and it is unchanged whenever the constitution is amended. Following up this idea, the Laws number 22/1999 then was repealed with Laws number 32/2004 which modify the decentralize system for Indonesia. Indonesia applies residual theory in deriving powers between central and local government. Local government enjoy full authority to manage all matters except; foreign policy, defense, security, judiciary, fiscal & monetary and religion. The vertical distribution of power is implemented based on the principles of wide-ranging autonomy, productivity and responsibility. This includes the authority to enact local regulation.¹⁰

What was happened in Philippines more or less the same. Philippines also experienced a tradition of centralization. After periods of Spanish and American colonization, Philippines had been led by Ferdinand Marcos under dictatorship until ground swells of citizen subvert his regime. This moment is well-known as “people power” movement.

Following the overthrow of the Marcos dictatorship in 1986, a strong sense of optimism accompanied the ascendancy to power of Corazon Aquino. The Local Government Code of 1991 represents the most radical and comprehensive policy instrument of the Aquino administration to further its “people power agenda.” With its avowed objective of reversing the centrist tendencies of the Marcos and other previous administrations, the Code incorporates; a) decentralization of government structures and minimum government intervention; b) an expanded role for the private sector as the prime engine for sustained growth; and c) Greater involvement of people in the decision-making, planning and implementation of programs through community organizations and NGOs.¹¹

Decentralization in Philippines is the mandate of the 1987 Philippine Constitution. Further, Philippines enacted The Local Government Code (LGC) 1991 which decentralized governance by devolving powers and function to local government units (LGU) and by strengthening the mechanism for people’s participation in governance.¹²

While Indonesia practices the concept of decentralization, Philippines practices devolution. In this term, Philippines implements a more radical form of decentralization¹³ rather than Indonesia. Unlike the Philippines that divides the territorial organization into 3;

¹⁰ Article 18 subsection (5) & (6), The Constitution of the Republic of Indonesia 1945.

¹¹ Gonzales (n5)

¹² See LOCAL GOVERNMENT CODE OF THE PHILIPPINES (1991).

¹³ See Hague and Harrop (n 1) 292-293. Methods for distributing power away from the center; there are deconcentration, decentralization and devolution.

Provincial, Municipals/Cities and Barangays, Indonesia only divide it into 2 levels Provincial, Kota/Kabupaten (Cities).

A Local Legislation's Origins

How do ideas for new legislation enter the system-and from where?

In Indonesia, local legislation is enacted by the elected Governor and the local representatives (DPRD Provinsi) in the provincial levels or by the Mayor together with the local representatives in the city levels (DPRD Kota/Kabupaten). Local legislation in Indonesia shall reflect delegated-instruction from upper level legislation in the hierarchy and accommodate particularity of the region.¹⁴ A new local legislation, first of all enters the system from public servant who trying to improve service for example parking system, public transport or health service. Furthermore, as the local representative has rights to initiate a new bill, the idea could be from public complaint for instance, insurance for elderly people, traditional market protection and waste management. Lastly, local government should propose a bill as delegated from the national level. In this case, it mostly relates to licensing.

In Philippines, legislative authority at the local level is vested in the Sangguniang or the local legislative body.¹⁵ There are three levels of local level government and Sangguniang as well. SangguniangPanlalawigan is on provincial government followed by SangguniangPanlungsod on Cities and Sanggunian Bayan for municipalities. Also, there are subunits inside the cities or municipalities called Barangay. Legislative body in Barangay is called Sangguniang Barangay. All steps of local legislation cycle mainly conduct in these bodies. However, the local chief executive, except in Barangay level, has once veto power to ground any ordinance passed by Sangguniang that is ultra vires to public welfare.¹⁶

The Concept Paper

Who preliminarily explicates the legislative idea-and how?

The second criteria served by Ann Seidmann is on who preliminarily explicates the idea of legislation and how? It could be explained here that for years in many places in Indonesia, local representative very rare proposed a bill on their initiatives. Most of the time executive did that. Even though the representatives has secretariat that could help them in drafting, they often lack of competency and resource. Therefore, "the idea" always comes from the executive. Only recently, in some metropolitan cities which has reputable University, the local representative body invite academics to suggest them a concept paper. In terms of both sides proposed the same bill, the representative drafts should be the main draft to discuss.¹⁷ Even though, the Laws on Local Government provide the solution, the actual process was not simple. This is, however,

¹⁴ Article 14 Laws of The Republic of Indonesia number 12/2011 on Legislative Drafting.

¹⁵ LOCAL GOVERNMENT CODE OF THE PHILIPPINES (1991), art. 48.

¹⁶ LOCAL GOVERNMENT CODE OF THE PHILIPPINES (1991), art. 55.

¹⁷ Article 140 subsection (2) Laws of The Republic of Indonesia number 32/2004 on Local Government.

put some drawbacks because then they compete each other to show which one has worked “more productive”. As a consequence, the local political situation becomes a bit unstable which further results in the delay of legislation process.

In Philippines, the legislation making which may entitle as ordinances crafting starts with preparation of Legislative Agenda (LA). In the LA, Sanggunian plan the priority policies and legislative measures throughout their term of office based on what define in Executive-Legislative Agenda (ELA). Clearly, LA serves as the guideline for Sangguniang in identifying, analyzing also drafting the ordinance.

Prioritization

Who decides, and by what criteria and procedures, to spend scarce drafting resource on some bills-and not others?

Then, come into the next step which is prioritization. In this point, Indonesia and Philippines show a relatively similar feature. The concept paper is proposed in a list of legislation project for a year. In the beginning of the year, the Mayor/Governor sits together with local representatives to assent the Local Legislation Program.

As mentioned before, prioritization in local government in Philippines is undertaken by the local legislative body on the basis of Executive-Legislative Agenda (ELA). ELA is an integrated plan that contains the major development thrusts and priorities of both the executive and legislative branches towards a common vision for the locality.¹⁸ In Indonesia, actually neither mechanism nor criteria applied for prioritizing local legislation. In this phase, it is the work of the Mayor or Governor to present all relevant reasons to convince the representatives about the order. In time, the list might be revised if there is an urgent delegated legislation project interrupt the priority.

Research and Drafting for the Legislation

Who employs what procedures to ensure that bills meet formal standards, and do not contradict other laws? And who does what kinds of research to determine the bills' details?

Now we are going to discuss the more technical issues on drafting the local bills. According to the Laws of the Republic of Indonesia on Legislative Drafting, each draft bills should be attached with research paper. The research paper should contain identification of the exact problem to solve by legislating; scope and substance; conformity and compliance with hierarchical of laws; draft of each provisions and explanatory memoranda. Draft bill from the Mayor or Governor of course, drafted by civil servant who employs in the law division.

The same as explained in Ann Seidmann books, civil servant in doing this task typically conduct the empirical research anything further than what they can find in a law library¹⁹ or

¹⁸ Sheila Espine-Villaluz, *Local Legislators' Toolkit*, Philippines-Canada Local Government Support Program LGSP, 2004, p. 10.

¹⁹ Seidmann (n 7) 24.

simply reproduced or even they have a template on that. As the representative in the committee stage could hire academics to held a research and draft the norms, it is undeniable that academics do much better in approaching the problems. But, as it not all academia aware about drafting technique they often cannot preserve the consistent style. Also they tend to take neutral position rather than trying to look at policy maker points of view. To intercede this, academia usually act as mediator who guide the executive and representative to narrow the final draft before it is announced to public and passed in deliberation forum. Philippines do this mechanism more open. As it requires technical knowledge, Sangguniang at all levels of local government may include civil society groups in the local government for a sponsorship or through a people's legislative initiative to gather research-based information and to prepare the draft.²⁰

Access to the Drafting Process

How do input and feedback institutions grant to some people and not others, the power to supply information to those preparing bills-about facts, various theories, and various groups' claims and demands?

Obviously, the answer for this question in both jurisdictions is the same. Both provide the mechanism to involve citizen in the local legislative process. This is to inform the interest group and make them aware of the new bill as it demands a social acceptability.²¹In Philippines there is a committee hearing, LA formulation and budget hearing to gather advice on position paper. Similarly, in Indonesia the pre-legislative consultation stage is more flexible. It usually held by the local executive before the reading process or even in the middle of reading process the hearing could be accommodated.

Local government, after all, is the miniature of the states. Local authorities are designed similarly with the central government. Even though both countries apply a presidential system, Philippines seem to keep its strong presidential system trough out the local level authorities. It can be seen on how the local chief executive has veto power alike the system in the central.

While the President exercises supervision over local authorities in general, the competency to review local ordinances is conducted by the local level legislative bodies. The Local Government Code 1991 determines duties of the upper level Sangguniang to review ordinances. For example; SangguniangPanlalawigan (provincial legislative) reviews ordinances which approved by SangguniangPanlungsod/Sangguniang Bayan in city/municipal level; likewise Sangguniang Panlungsod/Sangguniang Bayan reviews ordinance approved by Sangguniang Barangay the lowest level on local government units.²² The Sangguniang in the upper level reviews to determine whether the ordinances made within the scope of prescribed powers.²³

²⁰ Espine-Villaluz (n 17) 11.

²¹ *Ibid*, p. 281.

²² LOCAL GOVERNMENT CODE OF THE PHILIPPINES (1991), art. 56.

²³ LOCAL GOVERNMENT CODE OF THE PHILIPPINES (1991), art. 16-18.

The Comparative Digest**Table 1.A Comparison between Indonesia and Philippines on bill-drafting process in the Local Government**

Criteria	Indonesia	Philippines
Levels of local government unit	Provinsi Kota/Kabupaten	Provincial City/Municipalities Barangays
A Bill's Origin	Both Executive and Legislative body (Mostly Executive)	Legislative body
The Concept Paper	Mostly Executive	Legislative body
Prioritization	Held by the executive and legislative in a joint session	Explicate on the Legislative Agenda (LA) by the legislative based on Executive-Legislative Agenda (ELA)
Drafting the Bill	Civil servant	Legislative body Civil society groups People's organizations
Research	Civil servant Academia (in some cases)	Civil society groups People's organizations
Who Has Access?	Interest groups Public (<i>trough pre-legislative consultation</i>)	Interest groups Civil society groups People's organizations NGO Private sector (<i>trough committee hearing, LA hearing and budget hearing</i>)

However, Indonesia does it different way. Decentralization is the vertical distribution of executive power. Local legislative (DPRD) and local executive (Governor and Mayor) are both elements of local government. The constitution vests the executive power to the President and there is no relation between local legislative bodies with central legislative body. The implementation of the decentralization is supervised by the President exclusively. Therefore, the president has authority to review and even repeal the local level legislation through executive review mechanism.²⁴ The central government applies two parameters in reviewing; conformity with national legislation system and national interest. Moreover, local legislation in Indonesian practices not only to accommodate particularity of the region but also as a delegated legislation.

Looking closer to the organization of local government, clearly it is not about sovereignty or checks and balances power. The position of the executive and legislative in the local drafting process is more on cooperating and coordinating. It is on how to address social problems, endorsing local development and other administrative matter without forgetting the pillars of

²⁴ Article 145 Laws of The Republic of Indonesia number 32/2004 on Local Government.

democracy and objectivity. In the process, both states tend to involve as much as elements of local citizens such as academics, NGO, social interest group and people organization.

Conclusion

This essay tried to look at how the national government in unitary states designs local bill-drafting process. By choosing the methods of devolution, Philippines, in this context applied more radical distribution of power than Indonesia. The separation of power in the local level in Philippines is stronger than Indonesia because the local legislative and executive exercise exactly as vested upon them like in the national system but in the smaller region.

In Indonesia however, the relation between the local legislative and executive in the bill-drafting process shows a weak separation. This is because Indonesia chose to apply the methods of decentralization which means that both local legislative and executive are parts of local government. Therefore, they should “work-together” to execute the delegated power.

In addition it is also noticed that through the local legislative drafting process the central governments encourage many elements to contribute. The Philippines open the access to NGO and civil society groups in the local bill-drafting. Similarly, the local legislative process in Indonesia enabling the academics serves a strong influence to the legislation. Instead of gaining more participation, this mechanism attempts to minimize the conflict in the local level. So, the local administrative will be able to focus on providing public services and implementing national welfare policies.

Having compared local government systems in Indonesia and Philippines, this article conclude that by figuring out the variation of coordination between elements in the local government, at least in Indonesia and Philippines it is seen that coordinated activities in the local legislative process reflects the chosen methods of distributing power taken by the states. As this essay has only compared two jurisdictions, further research might be conduct to enrich the discussion concerning local government issues.

Bibliography

- Alder J, *Constitutional and Administrative Law*, 5th edition, Palgrave Macmillan, 2005.
- Chandler J A, *Local Government Today*, 4th edition, Manchester University Press, 2009.
- Espine-Villaluz S, *Local Legislators' Toolkit*, Published by Philippines-Canada Local Government Support Program (LGSP), 2004.
- Gonzales R P, “Case Studies on Decentralization : Philippines” Working Paper, prepared for SDA Technical Consultation on Decentralization (TCD) FAO HQ ROME 16-18 December 1997 on behalf of the Asian NGO Coalition for Agrarian Reform and Rural Development.
- Goodnow F J, *Comparative Administrative Law*, Washington D.C. Beard Books, 2000.

Hague R and Harrop M, *Comparative Government and Politics: An Introduction* 7th edition, Palgrave Macmillan 2007.

Seidman A, Seidman RB and Abeysekere N, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, London: Kluwer, 2001.

Örücü E, 'Unde Venit, Quo Tendit Comparative Law?' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century*, The Hague The Netherlands: Kluwer, 2002.