When Do Articles on Decentralization and Human Rights in Indonesian Constitutions Matters?

Andy Omara(✉) and Gunawan Tauda

Constitutional Law, Gadjah Mada University, Yogyakarta, Indonesia
{andy.omara,gunawanatauda}@mail.ugm.ac.id

Abstract. Decentralization and human rights are two principles that are often included in a constitution. Conceptually, decentralization provides better opportunity for local governments to develop their regions based on their best knowledge on the ground. The constitutionalization of Human rights is a balance mechanism against the government powers. Human rights require government responsibility to protect every individual. Further, decentralization and human rights are meant to be advancing democracy because both decentralization and human rights place individuals and smaller unit of government in advance. While advancing democracy through decentralization and human rights is the intention of the founding fathers, does this really happen in the real world? In the context of Indonesia, this is not always the case. What is written in the constitution is not automatically implemented. This paper argues the constitutional guarantee of decentralization and human rights does not guarantee proper implementation. Various factors may contribute in implementing constitutional provisions. These include how the text of the constitution is written and how the constitutional provisions are interpreted. Part I analyses the drafting of provision on decentralization and human rights in the constitution. Part II analyzes the text of the constitution particularly on decentralization and human rights. Part III focuses on how the legislature and the judiciary interpret the text of the constitution. Part IV concludes.

Keywords: Decentralization · Human Rights · The Indonesian Constitutions

1 Formulating Decentralization and Human Rights Provisions in the Constitutions: From a Brief to a Comprehensive Constitution

Existing literatures explain some important aspects of a constitution: Bruce Ackerman explains constitutional moments in constitution-making process [1], Jon Elster identifies upstream and downstream constraints on constitutional making process [2]. Wheare as cited by Brandt at all differentiated two types of a constitution: First, a constitution contains a general and foundational principles which can be used as a guidance in governing a country [3]. Within the first type, a constitution is normally brief and concise.

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It expresses basic principles [4] yet it does not include the details. The details are normally regulated in the form of law and regulations. A constitution within this type is an aspirational document rather than set of rules. Second, a constitution shall contain many aspects in a great detail regarding how to manage a country. This type of constitution contains ample constitutional principles and elaborative legal document in managing the country. This type of constitution is regarded as set of rules that can be enforced.

How about the situation in Indonesia? In drafting a constitution, there is a tendency that the drafters of the constitution are moving from a brief constitution to a more elaborative one. This can be seen from the increasing numbers of topics and articles that are included in the updated Constitution.

In drafting the first Constitution, the founding fathers tend to adopt the first method. They wrote relatively a concise constitution consisting 37 Articles. Two factors contribute to in the formulation of brief constitution. First, the situation during constitutional drafting was not peaceful. Indonesia was struggle for independence. This situation is coupled by the fact that during constitutional drafting there are some provisions that rise significant debate among constitutional drafters such as judicial review and human rights provisions. To avoid long and winding discussion, most of the drafters agreed to regulate the basic principles and not go to the details. This approach reflects constitutional deferral [5]. The details shall be regulated in the form of law. This strategy helps the drafters minimize the differences and as a result it saves time in the making of the constitution. In the end, the constitutional drafters acknowledged that the constitution they made was a provisional constitution that can be amended latter on.

1.1 Drafting Decentralization and Human Rights in the First Constitution

Nora Hedling in *The fundamentals of a Constitution* explains some dimensions of a constitution including how are constitutions made, change and replaced? there are various ways to make, change, and replace a constitution ranging from rigid constitution to flexible constitution [6]. How did the constitutional drafters formulate articles on decentralization and human rights in the first constitution? When drafting provision on decentralization, the majority of the drafters agreed to include several basic principles (1) Indonesia shall adopt unitary state not federalism, (2) The territory of Indonesia shall be divided into smaller regions, and (3) the recognition of distinct and special regions existed in Indonesia [7]. These three important principles show how brief article of Decentralization in the first constitution as it did not explain how the relation between local and central government is constitutionally regulated. The one and only article explaining the relation between regional and central government is Article 18: "The division of Indonesia into large and small areas, with the form of arrangement government is determined by law, by observing and remembering the basis of deliberation in the state government system, and the rights of origin in special areas" [8].

Similar to provision on decentralization, the drafters of the first constitution also provide basic principles of human rights protection. However, the reasons why they come up with basic protection of human rights in the constitution is significantly different compared to formulating provisions on decentralization. Unlike the formulation of decentralization provisions where majority of drafters were in agreement, there was diverse views regarding the importance of human rights to be included in the constitution.

There are two contradictory views regarding the need to adopt human rights provision in the constitution. The first view that it is important to include human rights provision in the constitution. Human rights provision is a mechanism to limit government powers as well as to protect individuals from government actions [9]. The second viewed that it is not necessary to adopt human rights provisions in the constitution. This is because doing so reflected the adoption of individualism which contradicted with the family principles adopted by Indonesia [10]. These two contradictory views finally settled by including few provisions on human rights without providing any mechanism to uphold such provisions if there is violation. The final version of provisions concerning human rights does not expressly stated the frase "human rights." However, it includes certain rights which closely associated with human rights i.e. civil and political rights and economic social and cultural rights. The 1945 Constitution recognized freedom of expression (art.28), religious freedom (art.29), the right to work (art.27), the right to a reasonable standard of living (art. 27), the right to education (art. 31), and guarantee for the poor (art. 34).

1.2 Drafting Decentralization and Human Rights Provision in the Most Recent Constitution

There are significant differences between formulating provisions concerning decentralization and human rights provisions the first constitution and the most recent constitution. Unlike the first constitution where the drafters started from scratch, the drafters of the most recent constitution do not start from nothing. They formulated a new constitution by amending the existing constitution. The situation they faced is also different. They are not in war even though there was economic and political turbulence in 1998 which triggered political and constitutional reforms.

With regard to decentralization, there was major change in the updated constitution. The Old constitution regulates decentralization in one article i.e. Article 18. The updated Constitution added two more provisions, articles 18A and 18 B. More foundational principles mentioned in the updated constitution such as regional head election, the existence of local parliament, decentralization, regional autonomy and duty of assistance, the recognition of distinct regions, and special regions [11]. The division of regions in Indonesia into provinces, regencies and municipalities are explicitly mentioned in the new constitution. This is different from the old constitution which only mentioned Indonesia is divided into smaller regions. It does not expressly mention provinces, regencies, and municipalities.

With regard to human rights provisions, the drafters of the new constitution are relatively coherent in viewing the importance of having elaborative constitutional provisions. They acknowledged that a brief constitution did not provide solid constitutional basis. They provided different views regarding the method of inserting human rights provisions in the constitution. The challenge is how to include many human rights in a constitution but at the same time it remained concise. One group believed that it was necessary to include wide-ranging of human rights articles in the constitution [12]. Another group asserted that articles on human rights should remain simple [13]. They believe that the details shall be in the form of law and regulation --not necessary in the constitution.

2 The (Un) Intended Consequences of Having Brief v. Comprehensive Constitutional Provisions of Decentralization and Human Rights

Under the old constitution, decentralization is regulated in Article 18 which stipulates "The division of Indonesia into large and small areas, with the form of arrangement government is determined by law, by observing and remembering the basis of deliberation in the state government system, and the rights of origin in special areas." Article 18 divided Indonesia territory into smaller regions however, it does not state how many levels of governments will be established in Indonesia. Article 18 does not mention principles concerning the relation between local and central government.

The vague, brief and somewhat abstract nature of Article 18 opens possibility for the lawmakers to liberally interpret the wordings the article. While Article 18 meant to be adopting decentralization and acknowledge the existence of distinct and special regions, the lawmakers did not always in the same perspective. It happened specifically in the late of Old Order era and during New Order Government. Instead of providing more room for regional authority to manage their regions, during these two eras, the sitting governments limited local government authority to manage the regions. Two Laws on Regional Governments namely the 1968 and the 1974 Regional Government Law granted significant powers to central government to control local government. Local governments are deemed as entities under central government authority and also the extension of central government. Local government did not have significant power to independently manage the regions. The lawmakers did so because the constitution did not sufficiently guarantee the decentralization for local government.

3 How the Legislature and the Judiciary Interpret the Text of the Constitution

What would be the consequences of having such brief and short provisions regarding decentralization and human rights? the short constitutional provision provides significant flexibility for lawmakers to interpret those particular articles. For example, Article 18 of the first Constitution did not expressly mention regional autonomy, duty of assistance, and local head election. Without mentioning such features, the lawmakers have more options in determining the nature of central-local government relation. This situation puts more authority of the legislature to easily adapt the law so that it will in line with recent societal development. However, it may also create uncertainty in which under the same constitution the legislature may draft different or event contradictory law which regulate the relation between local and central government.

The short and brief provisions is likely one of the reasons why under the same constitution namely the 1945 constitution Indonesia issued law concerning regional government which adopt different or event contradictory principles. For instance, the 1948 Law on local governance adopted decentralization and regional autonomy. Under the same constitution however the 14/1970 Law on regional government had different tendency in a way the law put more authority to central government.

Such situation become the concerned of the people and this is why in the 1999–2002 constitutional amendments, the drafters of the constitution added provision on local-central government relations. In the Old 1945 Constitution, there is only one provision on regional governance. The updated 1945 Constitution contained three articles namely 18, 18A and 18B. These three articles are adding more fundamental principles on central-local government relation. These include wide regional autonomy, decentralization, duty of assistance, the recognition of special and distinct regions, the division of powers between local and central government, the regional head election and financial balance between central and local government.

In such elaborative constitutional provisions, the lawmakers in formulating laws have to follow all principles adopted by the constitution. The lawmakers are guided by the constitutional principles on regional government in stipulating the regional government law. In other words, the lawmakers are constrained by the constitution in writing articles on central-local government relations. In the event the lawmakers ignore, neglect, or do not adopt the relevant constitutional principles when they draft the regional government law, there would be a constitutional mechanism that can be used by the society to questions the validity of this law through judicial review in the constitutional court. The constitutional court determines whether or not the law constitutional.

Other branch of government namely the judiciary may also be impacted by the formulation of constitutional provisions. In deciding judicial review cases the Court specifically, the constitutional court referred to the constitution. When the constitutional provisions the court refers are vague and brief, the Court will go to other relevant sources such as the minutes of the meetings to understand what exactly the meaning of particular provisions. Things may be different if the constitution elaboratively stipulate and determine certain articles of the constitution. it is likely that the court will directly refer to the articles of the constitution and not referring to other sources.

4 Conclusion

The paper has explained the importance of having constitutional provisions on decentralization and human rights and their actual implementation on the law. Constitutionalizing of decentralization and human rights are important efforts in protecting human rights and advancing democracy. Such efforts, however, do not automatically make decentralization and human rights protection are upheld in practice. The way the drafters formulate the constitutional provisions, whether brief or elaborative, significantly impacts the way it is implemented in practice. The vague, brief, and general provisions of the constitution often lead to the inconsistent implementation of the constitutional provisions. This is because the lawmakers have significant flexibility in interpreting the articles of the constitution. While such brief and general provisions may be good for the lawmakers so that they are able to adapt the rapid development in the society, such articles are often used by the lawmakers to advance their political interests rather than to advance democracy. The case of two Indonesian constitutions i.e. the Old 1945 Constitution and the updated 1945 Constitution (the 1999–2002 constitutional amendments) in establishing provisions on decentralization and human rights shows how the tendency how different method of drafting may lead to different consequences. It is likely that the more elaborative the constitutional provisions made, the more constrained placed to the lawmakers

in interpreting the constitutional provisions. Finally, the adoption of decentralization and human rights provisions matters specifically to limit the powers of state organs i.e. executive, legislature, and judiciary in carrying out their constitutional duties so that they are not abusing their powers. It also benefits the society much in protecting their rights.

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