

Legislation Newsletter

October 2008

Indonesian law making challenges

Indonesia, since 2004, has had something which other decentralised countries lack – a Law on Making Laws which applies to *all* laws made in the country. This includes primary and secondary legislation, central and local laws. It combines, in the one law, provisions about the legislative hierarchy, law making procedure, the structure of legislation and even guidelines about good drafting. The scope of the law is ambitious, and it has potential to encourage consistency of law-making procedures and consistency of drafting style at all levels of government.

However, the law, alone, will not achieve much without implementation. Major challenges now face the Indonesian law-making process in giving effect to the law and in taking up the challenges which it presents. Not the least of these is to identify what laws are in operation, and how those laws interact with each other.

While the Law on Making Laws deals with many issues of importance to legislative drafters, it does not address, in any detail at all, other issues such as use of standardised terminology, review criteria and basic “housekeeping” issues such as commencement, transitional provisions and duration of laws.

On the other hand, it introduces an important concept which is strangely missing from the laws of other countries – public involvement in the process of making Acts. Detailed requirements about the making of regulations, including regulatory impact analysis and public consultation, have become common in many

places. Much less common are public consultation requirements in relation to Acts.

The challenges of public participation

The Law on Making Laws specifies a public right to make submissions about legislation — any legislation, including Acts (Undang-Undang). Under section 53 of the Law:

The public has a right to give input, orally and in writing, in the preparation or discussion of Bills for the Central Government or Local Government.

Implementing regulations made under the Law on Making Laws also give recognition to the need for public consultation. Regulation 13 of Presidential Regulation No. 68 of 2005 specifies that:

In the process of finalising a Bill [...] the head of the responsible agency may make the Bill available to the public.



Public consultation training (Lombok 2008)

So, there is a public right to give input, and, in the process of finalising a Bill, the public may be able to read a copy. But these are sparse provisions. Notably missing is detail about

how public involvement is to be obtained. Key concepts which one might expect to find in legislation of this type are:

- identification of stakeholders;
- processes for consultation, including release of discussion papers and consideration of submissions.

Cancellation by the Central Government

The Indonesian decentralisation law of 2004 gives considerable law-making power to local governments. The power, however, does not lift local government to a place that is equal to that of the Central Government in the legislative hierarchy. That is made clear by the Law on Making Laws, which was made in the same year (2004). It specifies in article 7 that there is a hierarchy of laws:

- a. *the Constitution;*
- b. *Central Government Acts and interim laws;*
- c. *(Central) Government regulations;*
- d. *Presidential regulations;*
- e. *local laws.*

The article goes on to provide that the legal force of legislation is consistent with its place in that hierarchy. It can be seen that local laws are at the lowest level of the hierarchy.

There is another sense, too, in which local government is in a subordinate position: its laws can be cancelled by the Central Government. Provision is made for this in of the Regional Autonomy Law of 2004. The criteria are, to say the least, broad: cancellation can occur if the Minister considers that the local law is inconsistent with the public interest or with a law higher in the hierarchy – that is, any Central Government law.

Some years have now passed since this legislative regime was created. How have these provisions been implemented? A recent speech by the President of Indonesia, Susilo Bambang Yudhoyono, to the DPD (22 August 2008), placed local laws and their cancellation squarely into the context of the country's investment climate:

Local government leaders must remove obstacles to investment in order to be able to bring about economic growth [...]

Improvement of the investment climate is also supported by supervision that is taking place in respect of some local laws that create considerable economic cost. A number of local laws and draft local laws concerning local taxes have been evaluated. Some of those have been cancelled and some have been recommended for improvement. [...]

The Central Government's Minister of Finance has provided some of the detail which underlies the President's comments (*Koran Tempo* 25 August 2008). The Central Government has received 10,504 local laws. Of these, 7,298 have been evaluated. Of those evaluated, it has been decided that 2,091 (29%) should be cancelled. In other words, more than a quarter of local laws made in Indonesia are cancelled by the Central Government.

The sectoral break-up of these appears to be about equally split between transport, agriculture, industry and trade and forestry. Draft local laws to attract Central Government displeasure include proposals in public works and health sectors.

Legislation Newsletter is produced by Legislation Services, a Melbourne (Australia)-based consultancy. Our principal is Campbell Duncan.

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