

REGIONAL AUTONOMY AND LEGAL DISORDER: THE PROLIFERATION OF LOCAL LAWS IN INDONESIA*

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Since Soeharto's fall in 1998, Indonesia has transformed from one of the world's most authoritarian states to one of its most democratic and decentralised. Significant lawmaking powers have been devolved to around 1000 local legislatures and executive officials. The combined legal output of these lawmakers has added great bulk, complexity and uncertainty to Indonesia's legal system. Many new local laws have been criticised for being misdirected or unclear, violating citizens' rights, imposing excessive taxes, even breaching Indonesia's international obligations. This article examines the bureaucratic mechanisms by which the national government can exercise control over local lawmaking, allowing it to strike down local laws contravening national law or the 'public interest'. It also analyses decisions of the Indonesian Supreme Court, which has jurisdiction to decide whether local laws contradict national laws. The article shows that bureaucratic and judicial review is flawed and is used largely to review and invalidate local laws imposing illegal taxation or user charges. Laws egregious for other reasons are, this research shows, likely to escape review altogether, or to be upheld by the Supreme Court without satisfactory explanation. This undermines the rule of law, may compromise the human rights provided to citizens in national laws and could affect Indonesia's ability to comply with some of its international obligations.

I. INTRODUCTION

In 1999, Indonesia embarked upon an ambitious program of decentralisation, or 'regional autonomy' (*otonomi daerah*). This was the year following President Soeharto's resignation amid social, political and economic unrest. Soeharto's successor—his former Vice-President, Bacharuddin Jusuf Habibie—set in motion a process that, in little over one year, took Indonesia from being one of the world's most authoritarian and centralised states to one of its most decentralised and democratic.

Under Soeharto, political power had been strongly concentrated within the central government (*pemerintah pusat*). The primary function of local governments—provincial, district, city and village—was to loyally support and implement national

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policies and directives.¹ Well before Soeharto's resignation, this system had become deeply unpopular. Many provinces had long complained that Jakarta's economic, military and bureaucratic controls were excessive and that the fruits of Indonesia's natural resources—largely located in outer regions—were channelled almost entirely to the centre, particularly to the Soeharto family.² Other provinces, such as West Papua and East Timor, claimed on historical grounds that they should have never joined the Indonesian state. Some provinces, including Aceh, West Papua, East Timor and Bali, asserted that they were so ideologically, culturally or religiously distinct from the rest of Indonesia that they should not be part of it. Resistance to central control—by the Free Papua Movement (*Organisasi Papua Merdeka*, or OPM) and the Independent Aceh Movement (*Gerakan Aceh Merdeka*, or GAM) for instance—was often met with military force, leading to decades-long bloody civil wars.

The Soeharto regime was largely able to contain these objections to the parasitic and often brutal centralist state. But with Soeharto's fall, they could no longer be suppressed. They became so strong and sustained that without regional autonomy, Indonesia faced serious threats of separatism and ultimately, disintegration. On one view, the only way the central government could retain any power at all was to devolve a significant portion of it.³

Under decentralisation laws, authority was granted to two levels of regional government—provinces (*propinsi*) on the one hand, and districts (*kabupaten*) and cities (*kota*) on the other—to make their own policies and local laws. All of these tiers of local government received both legislative and executive lawmaking powers. One result of regional autonomy was therefore, an almost-immediate, drastic proliferation of lawmaking bodies, the numbers of which have continued to increase. In 1998—the year before the first batch of decentralisation laws, discussed below, was passed—Indonesia had approximately 292 local governments outside Jakarta.⁴ The number has since grown as provinces, districts and cities have split into two or more. In 2003—the year before a second batch of decentralisation laws was enacted—there were around 440 districts and cities.⁵ By 2009, there were 33 provinces and 484 districts and cities.⁶ At the time of writing then, over 1 000 bodies and individuals

¹ Edward Aspinall and Greg Fealy, 'Introduction' in Edward Aspinall and Greg Fealy (eds), *Local Power and Politics in Indonesia: Decentralisation and Democratisation* (Institute of Southeast Asian Studies, 2003) 2.

² Damien Kingsbury and Harry Aveling (eds), *Autonomy and Disintegration in Indonesia* (Routledge Curzon, 2003); World Bank, *Decentralizing Indonesia: A Regional Public Expenditure Review Overview Report* (The World Bank, 2003) 5; Timothy Lindsey, 'Indonesia: Devaluing Asian Values, Rewriting Rule of Law' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law* (Routledge Curzon, 2004) 303; Adrian Vickers, *A History of Modern Indonesia* (Cambridge University Press, 2005) 220.

³ Gabriele Ferrazzi, 'Using the "F" Word: Federalism in Indonesia's Decentralization Discourse' (2000) 30(2) *Publius: The Journal of Federalism* 63, 64.

⁴ Fitria Fitriani, Bert Hofman and Kai Kaiser, 'Unity in Diversity? The Creation of New Local Governments in a Decentralising Indonesia' (2005) 41(1) *Bulletin of Indonesian Economic Studies* 57, 58. Smaller government units, such as villages, were granted regulatory powers, albeit limited.

⁵ Ibid 57; Paul Smoke, 'The Rules of the Intergovernmental Game in East Asia: Decentralisation Frameworks and Processes' in World Bank, *East Asia Decentralizes: Making Local Government Work* (The World Bank, 2005).

⁶ See the Ministry of Home Affairs Website <<http://www.depdagri.go.id>>.

had lawmaking powers—at least 50 per cent more than in 1999 when regional autonomy was designed and put into place. This number is likely to increase further as provinces, districts, cities and other tiers of government are carved out from existing regions.

These new lawmakers have, through the laws they have passed, added great bulk and complexity to the Indonesian legal system—a system which, well before 1999, had been described as a ‘vast and extensive jungle of law’.⁷ Yet, it is impossible to estimate with certainty how many local laws have been produced because there is no central repository of them.⁸ As discussed below, local lawmakers are required to send all the laws they pass to the central government. By 2006, at least 12 000 had been sent. Yet, given the abundance of lawmakers and that many local governments do not send their local laws to the central government as required, the true number is likely to be much higher.

Some local laws have been praised for being well-written and innovative, providing impressive yet affordable services such as health care or education, or setting meaningful environmental standards.⁹ Many others, however, have been criticised for being unclear, unnecessary, misdirected, exploitative of citizens and investors, or even unconstitutional.¹⁰ For instance, studies have pointed to the propensity of local governments to use their new lawmaking powers primarily to raise revenue—through the imposition of taxes (*pajak*) and user charges (*retribusi*).¹¹ As discussed below, many of these levies appear to have been issued in breach of national law which renders them invalid, at least formally. Other local laws, usually purporting to regulate ‘public order’ (*ketertiban umum*), attempt to encroach upon the private lives of citizens imposing upon some of them alien or otherwise inappropriate concepts of morality or propriety.¹²

Many of those who favour decentralisation, including some foreign donors, espouse that decentralisation brings ‘government closer to the people’¹³ and enhances government responsiveness to the needs of its citizens.¹⁴ Policy and lawmakers in

⁷ Hans Thoolen (ed), *Indonesia and the Rule of Law: Twenty Years of ‘New Order’ Government, A Study* (Frances Pinter, 1987) 58.

⁸ This is despite the efforts of the World Bank which supports a database of, at the time of writing, around 2700 of these laws.

⁹ World Bank, above n 2, 20.

¹⁰ See David Ray, ‘Overview/Summary Paper’ (Paper presented at Decentralization, Regulatory Reform, and the Business Climate, Hotel Borobudu, Jakarta, 12 August 2003).

¹¹ *Ibid.*

¹² Robin Bush, ‘Regional “Sharia” Regulations in Indonesia: Anomaly or Symptom?’ in Greg Fealy and Sally White (eds), *Expressing Islam: Islamic Life and Politics in Indonesia* (Institute of Southeast Asian Studies, 2008) 174; Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawaii, 2008); Arskal Salim and Azyumardi Azra, *Shari’a and Politics in Modern Indonesia* (Institute of Southeast Asian Studies, 2003).

¹³ Vito Tanzi, ‘Fiscal Federalism and Decentralization: A Review of Some Efficiency and Macroeconomic Aspects’ in Michael Bruno and Boris Pleskovic (eds) *Annual World Bank Conference on Development Economics* (World Bank, 1995) 295.

¹⁴ Independent Evaluation Group, *Decentralization in Client Countries: An Evaluation of the World Bank Support, 1990-2007* (World Bank, 2008); Serder Yilmaz, Yakup Beris and Rodrigo Serrano-Berthet, *Local Government Discretion and Accountability: A Diagnostic Framework for Local Government* (World Bank Documents and Reports, 2008); Pranab Bardhan and Dilip Mookherjee, ‘Decentralization, Corruption And Government Accountability’ in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar, 2006) 161; James Manor, *The Political Economy of Democratic*

many regions of Indonesia, however, are criticised for rarely consulting with their constituents to determine whether a particular law is necessary and, if so, what it should contain. Local governments also rarely formulate regulatory impact statements that consider the likely effects of proposed laws.¹⁵ Instead, laws are conceived and enacted almost in a vacuum; and then they are ‘socialised’ (*disosialisasikan*)—that is, the government subsequently attempts to inform citizens about the new law.

Some critics point to the lack of legal drafting skills of a large proportion of local lawmakers, resulting in laws so unclear as to be unworkable; others highlight the propensity of local governments to pass laws about matters that really do not require regulation at all and might be better addressed with non-regulatory measures.¹⁶ Worse, some local laws exceed the lawmaking powers of those who create them, or contradict other local or national laws. In the words of a senior official from the national Finance Ministry:

Since regional autonomy was introduced, a phenomenon that has emerged is the tendency for regions to wish to regulate everything on the view that all objects and subjects within their territory fall within their jurisdiction and must, therefore, be subject to the wishes of the region as regulated in regional regulations. What happens next is a type of euphoria, where the region appears to no longer observe the applicable rules, including by enacting regulations which regulate issues outside of their jurisdiction.¹⁷

This article does not seek to assess the accuracy or validity of these criticisms of the content of various local laws. Rather than presuming defective local laws, it aims to describe and analyse the mechanisms under which they can be reviewed and revoked, if deemed necessary. An effective review mechanism clearly is essential. If even a small proportion of local laws suffers from these reported flaws, then ‘problematic’ laws might number in the hundreds or thousands. If, as commonly suspected, the proportion is higher, then regional autonomy is creating nothing short of legal chaos.

This article shows that the two currently available mechanisms for review of local laws—bureaucratic review by the central government, and judicial review by the national Supreme Court (*Mahkamah Agung*, or MA)—both appear to be deeply flawed. From an analysis of 500 bureaucratic review decisions and 16 Supreme Court decisions, this study shows that unless a local law seeks to impose a tax or user charge, it is highly unlikely to be reviewed. This is so even if its content breaches fundamental principles of law including human rights, or has otherwise deleterious effects for citizens. This paper begins by discussing the legal infrastructure for decentralisation focusing on the relative jurisdictions of the various levels of government, before

Decentralization (Directions in Development) (World Bank, 1999) 88–9; Roland White and Paul Smoke, ‘East Asia Decentralizes’, in World Bank, *East Asia Decentralizes: Making Local Government Work* (The World Bank, 2005) 3; Jose Edgardo Campos and Joel S Hellman ‘Governance Gone Local: Does Decentralization Improve Accountability?’, in World Bank, *East Asia Decentralizes: Making Local Government Work* (The World Bank, 2005) 237.

¹⁵ Ray, above n 10, 24.

¹⁶ *Ibid* 3.

¹⁷ Cited in Tjip Ismail, ‘Kebijakan Pengawasan atas Perda Pajak Daerah Dan Retribusi Daerah’ (Paper Presented at Decentralization, Regulatory Reform, and the Business Climate, Hotel Borobodu, Jakarta, 12 August 2003) 85, 87–8.

turning to these bureaucratic and judicial review mechanisms. It concludes with observations about effects of this proliferation of local laws upon the Indonesian legal order.

First, a note on terminology. The laws produced by all local governments—whether provincial, district or city, or legislative or executive—are referred to, in the Indonesian legal literature and media, generically as *Perda* (*Peraturan Daerah*, literally regional regulations, which I have thus far translated as ‘local law’). For the purposes of this article, however, it is important at the outset clearly to distinguish between the various types of sub-national laws. In strict legal terms, ‘*Perda*’ refers specifically only to laws passed by local legislatures, whether provincial, district or city. A reference to a provincial *Perda*, for instance, is a reference to a law enacted by a provincial parliament. By contrast, laws passed by the head of the executive arm of a local government—governors (in provinces), regents (in districts) and mayors (in cities)—are generally referred to as regulations of heads of regions (*Peraturan Kepala Daerah*) or more specifically as *Peraturan Gubernur* (governor regulation), regent regulation (*Peraturan Bupati*) and mayoral regulation (*Peraturan Walikota*). I use *Perda* as a singular and plural noun.

II. LEGAL INFRASTRUCTURE FOR DECENTRALISATION

Regional Autonomy [Law No 22 of 1999] (Indonesia) gave both districts (*kabupaten*) and cities (*kota*), rather than provinces (*propinsi*), broad and wide-ranging lawmaking autonomy (*otonomi yang luas*), except over several matters reserved exclusively for the central government (art 7).¹⁸ Other parts of Indonesia were granted ‘special autonomy’ (*otonomi khusus*) status under separate legislation.¹⁹

The 1999 Law was followed by constitutional amendments, passed in 2000. Article 18(1) of the *Constitution* now confirms that Indonesia is divided into provinces, and that these provinces are divided into districts (*kabupaten*) and cities (*kota*). Each of these three levels of government is to:

- have its own regional government (executive) (art 18(1)) and parliament with elected members (art 18(3));

¹⁸ This Law imposed deadlines, which were met, for the transfer of central government power by early 2001. *Fiscal Balance Between the Central and Regional Governments* [Law No 25 of 1999] (Indonesia) was another key statute in Indonesia’s decentralisation architecture, but is not discussed for reasons of space.

¹⁹ *Otonomi Khusus Bagi Propinsi Papua* 2000 [Law No 21 of 2000 on Special Autonomy for Papua Province] (Indonesia) and *Pemerintahan Aceh* 2006 [Law No 11 of 2006 on Governance in Aceh] (Indonesia) were enacted. For Aceh, for example, this statute applies Islamic law (*sharia*) to Muslim inhabitants. This allows: a greater role in the administration of natural resource exploitation; election of local officials; and compensation for past abuses by the security forces. Two other provinces—the Capital City of Jakarta and the City of Yogyakarta—also have ‘special’ (*istimewa*) status, but they were granted this status well before 1999. Finally, it should be noted that the Habibie government granted independence to former province East Timor (now Timor Leste) after a referendum, followed by violence between pro-Indonesia and pro-independence forces: Joseph Nevins, *A Not-So Distant Horror: Mass Violence in East Timor* (Cornell, 2005); Damien Kingsbury and Michael Leach (eds), *East Timor: Beyond Independence* (Monash University Press, 2007); James Dunn, *East Timor: A Rough Passage to Independence* (Longueville Books, 2003); Richard Tanter, Desmond Ball and Gerry Van Klinken (eds), *Masters of Terror: Indonesia’s Military and Violence in East Timor* (Rowman and Littlefield Publishers, 2006).

- manage and regulate the activities of government, as an expression of autonomy or in assisting the central government (art 18(2)); and
- have democratically-elected governors (for provinces), regents (for districts) and mayors (for cities) (art 18(4)).

Article 18(5) of the *Constitution* states that regional governments have ‘the broadest’ autonomy (*otonomi seluas-luasnya*), except over affairs reserved by statute for the central government. To fulfil this mandate, art 18(6) allows regional governments to issue *Perda*.

The 1999 statute was replaced by *Regional Governance* [Law No 32 of 2004] (Indonesia) (*Autonomy Law 2004*).²⁰ The 1999 Law had, for a variety of reasons, caused significant confusion.²¹ The primary reason for its replacement, however, was likely that the central government wished to regain power it had relinquished to cities and districts during the post-Soeharto fervour of 1999.²² The *Autonomy Law 2004* achieved this by giving greater lawmaking powers to provinces and making provincial governors official central government representatives responsible to the President.²³ The 1999 Law had given only limited (*terbatas*) lawmaking and other powers to provincial governments; it did not, for example, allow provincial governments to trump the decisions or laws of local governments in the districts and cities within the province.²⁴ In other words, provinces were not ‘naturally’ superior to districts and cities.²⁵ Provinces were confined largely to mediating disputes between districts, facilitating cross-district development, and representing the central government within the province.²⁶ Article 382(1) of the *Autonomy Law 2004* now empowers governors to ‘guide and supervise governance in districts and cities’ and to ‘coordinate the implementation of central government affairs in provinces, districts and cities’. Through governors then, the central Indonesian government primarily the Ministry for Home Affairs (MOHA) can, at least theoretically, retain control over sub-provincial policy and lawmaking. Indeed, governors have been charged with reviewing district and city laws, as discussed below.

III. LAWMAKING AND JURISDICTIONAL UNCERTAINTY

At first glance, the *Autonomy Law 2004* appears to provide local governments with jurisdiction to make laws on a wide variety of issues and require them to exercise it.

²⁰ *Fiscal Balance Between the Central and Regional Governments* [Law No 33 of 2004] (Indonesia) replaced *Fiscal Balance Between the Central and Regional Governments* [Law No 25 of 1999] (Indonesia).

²¹ Gary F Bell, ‘The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws’ (2001) 2(1) *Asian-Pacific Law and Policy Journal* 1, 21.

²² Hadi Soesastro and Raymond Atje, ‘Survey of Recent Developments’ (2005) 41(1) *Bulletin of Indonesian Economic Studies* 5, 30.

²³ *Autonomy Law 2004*, arts 37–38.

²⁴ *Ibid*, *Penjelasan* [*Autonomy Law 2004*] (Indonesia), Elucidation Point. The elucidation is the explanatory memorandum that accompanies most Indonesian statutes and government regulations. It is often determinative in the interpretation of the law, though not formally part of the law itself.

²⁵ Ferrazzi, above n 3, 73; Fitriani, Hofman, and Kaiser, above n 4, 60.

²⁶ Although handing power to the lower-tier governments was justified on democratic grounds, many viewed it as a deliberate strategy to avoid giving power to provinces. Given the size of these provinces, the areas might have been more viable as states, with potential to split from the Republic: Aspinall and Fealy, above n 1, 4.

Adopting terminology employed in art 18(5) of the *Constitution*, mentioned above, art 2(3) of the *Autonomy Law 2004* gives local governments the ‘broadest autonomy’ to pass laws about matters not reserved for the central government, in order to ‘increase the prosperity of the community, public services and regional competitiveness’. The 2004 Law also provides provincial, district and city governments with various ‘obligations’ (*urusan wajib*), including development planning, public order, public infrastructure, health, education, labour, small and medium enterprises, the environment, land affairs, public administration and investment (arts 13(1) and 14(1)).

The 2004 Law imposes two limits on regional government lawmaking. First, the 2004 Law reserves some matters exclusively for the central government: foreign affairs, defence, security, national monetary and fiscal matters, and religion (art 10(3)). The central government also has exclusive power over justice-sector matters (*urusan yustisi*), including establishing judicial institutions, appointing judges and prosecutors, determining justice-sector and immigration policy, and enacting statutes and other national laws (elucidation to art 10(3)). The central government can, however, delegate its jurisdiction over these matters to local governments (art 10(4)).

The second limitation is more significant and appears to ‘defeat the very goal’²⁷ of regional autonomy itself, at least with respect to lawmaking. The central government has retained power to pass laws relating to areas that art 10(3) does not mention, although it can also delegate that power to local lawmakers (art 10(5)). In other words, legally speaking, the central government can continue to regulate any matter over which regional governments also have jurisdiction. It is, therefore, inaccurate to talk of limitations of national lawmaking powers, or of exclusive lawmaking jurisdictions of local governments, as have some commentators.²⁸

Article 10(5) is particularly significant because in the event of inconsistency between a local law and most types of national laws, the national law prevails to the extent of the inconsistency. The *Law on Lawmaking* [Law No 10 of 2004] (Indonesia) provides, in art 7(1), a ‘hierarchy of laws’ (*tata urutan peraturan perundang-undangan*). This is a list of various types of laws and their relative authority. It is as follows:

1. The 1945 *Constitution* (*Undang-undang Dasar 1945*);
2. Statutes (*Undang-undang*)/Interim Emergency Laws (*PERPU*);²⁹
3. Government Regulations (*Peraturan Pemerintah*);

²⁷ Bell, above n 21, 29.

²⁸ Pratikno, ‘Exercising Freedom: Local Autonomy and Democracy in Indonesia, 1999–2001’ in Maribeth Erb, Priyambudi Sulistiyanto, and Carole Faucher (eds), *Regionalism in Post-Suharto Indonesia* (Routledge Curzon, 2005) 20, 25; Ismet Fanany, ‘The First Year of Local Autonomy: The Case of West Sumatra’ in Damien Kingsbury and Harry Aveling (eds), *Autonomy and Disintegration in Indonesia* (Routledge Curzon, 2003) 177. Bell, above n 21, 29 raises a potential counterargument: that art 18(5) requires the central government specifically to identify, in the Regional Autonomy Law, the areas over which it retains jurisdiction. This means that it cannot claim a general power to intervene in any matter. To my knowledge, this argument has not yet been made before the Constitutional Court.

²⁹ Article 22 of the *Indonesian Constitution* permits the President to issue Government regulations in lieu of a statute (*Peraturan Pemerintah sebagai Pengganti Undang-undang* (PERPU)) which have authority equivalent to ordinary statutes. To remain valid, these laws must be ratified by the national parliament when it next sits.

4. Presidential Regulations (*Peraturan Presiden*);
5. Regional Regulations (*Peraturan Daerah*).

Legally speaking, each type of law must not conflict with any law higher than its own type in the hierarchy; and a law can amend or revoke a law lower than its own type in the hierarchy. Put simply then, *Perda* are legally and at least formally valid, only if, when passed, they do not contradict a law higher on the hierarchy; and, once passed, a *Perda* is susceptible to being overridden by a statute, government regulation or presidential regulation, all of which are higher on the hierarchy. In practice, however, the situation is more complex, as discussed below.

IV. BUREAUCRATIC REVIEW

A. *The Legal Framework: The Regional Autonomy Law 2004 (Indonesia)*

Like its 1999 predecessor, the *Regional Autonomy Law 2004* (Indonesia) gives power to the central government to review *Perda*. For most types of *Perda*, central government review takes place after the local lawmaker has enacted the *Perda*. Regional lawmakers must send their *Perda* to the central government within 7 days of enactment. The central government is to review the *Perda* against two criteria: whether the *Perda* contravenes the ‘public interest’ (*kepentingan umum*) or contradicts a ‘higher law’ (*peraturan perundang-undangan yang lebih tinggi*) (art 145(2)).

If the central government considers that the *Perda* breaches either of these criteria, the *Autonomy Law 2004* permits invalidation by Presidential Regulation (art 145(3)). If, however, the government finds no fault with the *Perda*, then the *Perda* remains in force (art 145(7)). Significantly, the central government’s right of review expires after 60 days (art 145(3)); if it does not invalidate the *Perda* within this time, then the *Perda* continues in force by default (art 145(7)). If the central government decides so to invalidate, it must inform the relevant regional head—whether provincial, district or city—who must prevent the *Perda* from being further implemented or enforced and must revoke the *Perda* within 7 days (art 145(4)). If dissatisfied with the central government’s decision, the local lawmaker can lodge an application for review with the Supreme Court (art 145(5)), discussed below.

B. *Adding Legal Complexity: Ministerial Regulation [No 54 of 2007] (Indonesia)*

Ministerial Regulation [No 53 of 2007] purports to set out the bureaucratic review process in greater detail, and provides for the delegation of some tasks from the President to the MOHA and provincial governors. The Regulation also makes the review process inordinately uncertain and complex.

It distinguishes between provincial-level *Perda* issued by provincial legislatures and governors on the one hand, and district and city-level *Perda* issued by district and city legislatures, regents and mayors on the other. Provincial legislation and governor regulations are, in the words of the Ministerial Regulation, subject to ‘clarification’ (*klarifikasi*) by a MOHA team (arts 5 and 6(2)); by contrast, district and city *Perda*

and regent and mayor regulations, are assessed by a team established by the governor of the province in which the district or city is located (arts 7 and 8(1)).

In respect of provincial-level laws, if the MOHA's clarification team finds that a *governor* regulation fails to accord with the 'public interest, regional regulation *and* higher-level laws', then its findings '*are used as grounds for invalidation by the MOHA*' (art 6(2)) by MOHA regulation (art 6(3)) (my emphasis). By contrast, if the clarification team decides that a law enacted by a provincial *legislature* fails to accord with the 'public interest *and/or* higher-level regulation', then its findings '*are used as grounds for the Minister to propose invalidation to the President* (art 6(4))' (my emphasis). From the wording of art 6(2), then, to invalidate, the clarification team must establish that a governor regulation contradicts all three of these grounds—a remarkably high threshold. If all three are met, however, then the Minister is apparently bound to invalidate. If, however, the law under review was enacted by a provincial legislature, then only one of two grounds need be violated, and the President has discretion, apparently unbridled, to refuse to invalidate the *Perda*.

As for district and city-level *legislation*, art 8(3) of the MOHA Regulation declares that the governor's clarification team is to determine whether it contradicts the 'public interest, regional regulations *and* higher-level laws' and the team's findings '*are used as grounds by the governor to propose invalidation to the MOHA*' (my emphasis). It appears that all three grounds must be met before invalidation can be suggested.³⁰ Article 8(2) refers to precisely the same grounds and permits them to be used as a basis to propose invalidation by the MOHA, but purports to apply to 'district/city regulations' (*peraturan kabupaten/kota*). Article 8(2) seems to contain a significant drafting error.³¹ One might have expected it to refer to 'regulations issued by district/city heads' (*peraturan kepala kabupaten/kota*)—in other words, regent or mayor regulations—rather than just 'district/city regulations'. Following the letter of the Regulation, regent and mayor regulations escape the 'clarification' process altogether.

C. *Perda* Requiring Pre-Approval

Different procedures apply for the review of *Perda* that set local government budgets, impose regional taxes or user charges, or relate to spatial planning.³² These types of *Perda* need central government pre-approval. Within 3 days of the regional lawmaker agreeing upon its final draft form, *Perda* imposing tax and user charges, for instance, must be sent to the MOHA or relevant governor (depending on the level of government from which the *Perda* originated) and the national Finance Ministry.³³ The MOHA and the Governor respectively, after coordinating with the Finance Ministry,

³⁰ There is no indication as to the legal instrument the MOHA must use for the invalidation. By contrast, art 6(3) stipulates that Governor Regulations are invalidated by MOHA Regulations.

³¹ I am indebted to Nicholas Parsons for alerting me to this apparent drafting error.

³² See *Autonomy Law 2004*, arts 185–9; *MOHA Regulation* (Indonesia) No 53 of 2007 and *Regional Tax and User Charges* (Indonesia) No 28 of 2009 ('*Regional Tax and User Charges Law 2009*'). This constitutes a departure from the *Autonomy Law* [No 22 of 1999] (Indonesia), art 113, which proscribed post-enactment review for all *Perda*.

³³ *Autonomy Law 2004* (Indonesia), arts 185–6; *Tax and User Charges Law 2009* (Indonesia) art 157(1).

are to determine, within 15 days, whether the *Perda* should proceed to enactment.³⁴ If the 15-day period elapses without a determination, it is not clear whether the local government can proceed formally to enact the *Perda*, or whether such an enactment, without central government approval, will be formally invalid. What is clear, however, is that the central government under art 159 of the *Tax and User Charges Law 2009* (Indonesia), can withhold or withdraw its formal budget grants or allocations to regions if they fail to comply with these procedures. Presumably, in practice this means that local governments are hesitant formally to enact these *Perda* without prior central government approval.

If rejected, the respective lawmakers can attempt to remedy the defect, but must then send the amended draft to the Minister of Finance and the MOHA. Once formally enacted, the *Perda* must be sent again to the Ministries. The MOHA can recommend to the President that the *Perda* be invalidated (arts 157(10) and 158(1)–(2)), presumably if the defect has not, in fact, been remedied.

D. Critiques of Bureaucratic Review

Several thousand *Perda* have been reviewed, and several hundred invalidated, using these processes.³⁵ By late 2006, the central government had received over 12 000 regional laws for review,³⁶ and from 1999–2007, 1406 local laws were annulled.³⁷ By 2008, the Finance Ministry alone had received 7200 *Perda* and recommended the revocation of around 2000, most of which sought to impose an illegal tax or user charge.³⁸

However, the review process does not appear to work effectively, for several reasons. First, there are concerns that the central government allows through too many *Perda*, which on their face, contradict central government laws or breach fundamental human rights standards simply because it is unable to review all of the *Perda* it receives.³⁹ In this context, the failure to revoke occurs because the mammoth task of reviewing all *Perda* produced by Indonesia's 1000 or so regional lawmakers is conducted by relatively small MOHA and governor teams that meet only weekly and do not allocate sufficient time to the task.⁴⁰

³⁴ *Tax and User Charges Law 2009* (Indonesia) arts 157(6) and (7). See also art 80(2) of *Government Regulation* [No 65 of 2001] (Indonesia); *Government Regulation* [No 66 of 2001] (Indonesia), art 17(2); *Ministry of Home Affairs Decree* [No 53 of 2007] (Indonesia), art 15.

³⁵ Hukumonline, *Dibatalkan Lewat Perpres atau Kepmendagri? Problem Hukum Pengujian Perda* (2) (23 June 2006) Hukumonline <<http://www.hukumonline.com>>; *Depdagri Batalkan 506 Perda* (31 March 2006) Suara Karya <<http://www.suarakarya-online.com>>.

³⁶ *Hingga September 2006, Ada 66 Ranperda Ditolak* (13 October 2006) Hukumonline <<http://www.hukumonline.com>>.

³⁷ United Nations Development Programme ('UNDP'), *Enhancing Communications, Advocacy and Public Participation Capacity for Legal Reforms (CAPPLER)* (Phase II, Jakarta, 2008) 7 (copy on file with author).

³⁸ Eko Susi Rosdianasari, Novi Anggriani and Basri Mulyani, *Dinamika Penyusunan, Substansi Dan Implementasi Perda Pelayanan Publik* (2009) ix.

³⁹ Blane Lewis, 'Tax and Charge Creation by Regional Governments Under Fiscal Decentralization: Estimates and Explanations' (2003) 39 *Bulletin of Indonesian Economic Studies* 177, 178.

⁴⁰ Ray, above n 10, 18.

Second, reports indicate that some regional governments are not conveying their new *Perda* to the central government.⁴¹ This is hardly surprising given that no sanctions existed for non-compliance, at least before the *Tax and User Charges Law* 2009 (Indonesia). Estimates vary, but in the earlier days of decentralisation it seems that local governments were sending somewhere between only 30–40 per cent of their *Perda* to the central government.⁴² According to Ismail,⁴³ between August 2001 – January 2003, for example, only nine of Indonesia’s then 30 provinces, and 83 of Indonesia’s 370 districts and cities, had sent any *Perda* to the central government. The result is that *Perda*, which may well have been invalidated if submitted and reviewed, instead bypass the review mechanism altogether or are ‘picked up’ in other ways. The central government, for instance, has been informed of some *Perda*, not through the formal submission process, but rather via complaints from businesses, press reports and information from donors.⁴⁴ The central government had even approached some non-complying local governments directly, and visited the regions in question to obtain *Perda* for review.⁴⁵

Third, some local governments have refused to rescind *Perda* that the central government has invalidated. As of 2003, for example, local governments had formally repealed only 22 of the 173 *Perda* struck down by the central government.⁴⁶

E. Bureaucratic Review in Practice: Empirical Findings

500 Ministerial Decisions that invalidate *Perda* (‘Invalidation Decisions’) were, at the time of writing, available on the website of the MOHA.⁴⁷ 117 from 2006, each of which invalidated one *Perda*; 153 from 2007; and 230 from 2008.⁴⁸ All of these reviews seem to have occurred after the enactment of the *Perda* in question despite the pre-approval requirements, noted above, for particular types of *Perda* issued since the national parliament passed the *Autonomy Law 2004*.⁴⁹ An analysis of the 500 decisions reveals several trends in the review process. These are necessarily tentative and preliminary because the website’s database of laws and invalidations was, at the time of writing, incomplete.

The first trend is that the ‘public order’ ground was not invoked as the sole basis for invalidation in any of these 500 Invalidation Decisions. ‘Public order’ was used to invalidate only four *Perda*, but in each case the Invalidating Decision declared that the *Perda* breached a higher law as well as public order.⁵⁰

⁴¹ M Nur Sholkin and Siti Maryam Rodja, Interview with Janurudin (Department of Home Affairs, 23 July 2008) Hukumonline <<http://www.hukumonline.com>>.

⁴² Lewis, above n 39, 178.

⁴³ Ismail, above n 17, 89.

⁴⁴ Ray, above n 10, 18.

⁴⁵ Ismail, above n 17, 89.

⁴⁶ Ray, above n 10, 18.

⁴⁷ Kementerian Dalam Negeri—Republik Indonesia <<http://www.depdagri.go.id>>.

⁴⁸ No data was available, at the time of writing, on invalidations made in 2009 or 2010.

⁴⁹ Of course, invalidation may have occurred after enactment because the local government in question either failed to send their draft to the central government before enactment, or refused to adopt the Ministry’s suggested amendments.

⁵⁰ *MOHA Decisions* (Indonesia) No 95 of 2008; 97 of 2008; 100 of 2008 and 198 of 2008.

Second, an overwhelming majority of invalidated *Perda* imposed illegal taxes or user charges. Most were, therefore, deemed to contradict a ‘higher law’, usually the national *Regional Taxes and User Charges* [Law No 18 of 1997] (Indonesia) and its amending law [No 34 of 2000], often in combination with another national-level law prohibiting the local government imposing the levy. Given that many commentators and central government officials as well as the Indonesian media have criticised local lawmakers for using their new lawmaking powers primarily to raise revenue, it is hardly surprising that a large number of *Perda* were revoked on these grounds. However, one might have expected more *Perda* to have been invalidated for other reasons. Yet, only a handful of the 500 invalidated *Perda* were not formally characterised as imposing tax and retribution by the Invalidating Decision. These *Perda* regulated the establishment and formalisation of cooperatives,⁵¹ the provision of business permits,⁵² and even rickshaw (*becak*) licenses.⁵³ Although it was not possible to obtain copies of these *Perda*, it seems likely that they too would have imposed a fee, albeit perhaps not formally classified as tax or *retribusi* to be paid to the local government.

The third trend is that, even though the legal framework for bureaucratic review—particularly the imposition of time limits for various stages of the process, mentioned above—appears to imply that review processes should be responsive, in practice however, nothing is further from the truth. Most *Perda* invalidated by MOHA decision were enacted before the time limitations were imposed under the *Lawmaking Law* 2004 and *MOHA Regulation* [No 53 of 2007] (Indonesia).⁵⁴ Even for those *Perda* to which the time limit should apply, however, there is a lag of between 2–6 years between enactment and invalidation. The bulk of *Perda* invalidated in 2006 were issued between 2001–04;⁵⁵ in 2007, between 2000–05;⁵⁶ and in 2008, between 2001–05.⁵⁷ None of the Invalidating Decisions revoked a *Perda* issued in the same year as the decision, and only a handful of decisions invalidated *Perda* issued in the preceding year.⁵⁸

There also seems to be a significant delay between the choice to invalidate, made at the time of assessment, and the issuance of the Invalidating Decision. As mentioned, the MOHA convenes meetings to consider the validity of *Perda*. If during a meeting fault is found with one or more of the *Perda* reviewed, most are not invalidated

⁵¹ *MOHA Decisions* (Indonesia) No 155 of 2008; No 156 of 2008; 173 of 2008; 177 of 2008; 179 of 2008; 182 of 2008; 184 of 2008.

⁵² *MOHA Decisions* (Indonesia) No 27 of 2008; 143 of 2008; 215 of 2008; 217 of 2008; 48 of 2008.

⁵³ *MOHA Decisions* (Indonesia) No 120 of 2008.

⁵⁴ The *Autonomy Law* 1999 required local governments to send their laws to the central government within 15 days of enactment (art 113). It gave the central government the power to invalidate the *Perda* if it breached the public interest or another law (art 114(1) and (3)). However, the *1999 Law* did not set time limits within which the central government was required to complete the review.

⁵⁵ 26 in 2001, 24 in 2002, 14 in 2003 and 27 in 2005.

⁵⁶ 21 in 2000, 34 in 2001, 26 in 2002, 20 in 2003, 15 in 2004 and 18 in 2005.

⁵⁷ 48 in 2001, 60 in 2002, 39 in 2003, 16 in 2004 and 20 in 2005.

⁵⁸ In one case, the invalidation occurred 19 years after the *Perda*’s enactment, and there were several instances of invalidation occurring more than 10 years after the *Perda*’s enactment: *MOHA Decisions* (Indonesia) No 76 of 2008; No 48 of 2007; No 76 of 2008. These cases are, however, not of particular relevance here, given that the *Perda* which were invalidated were enacted well before the regional autonomy reforms of 1999.

immediately; rather, the MOHA seems to prefer to invalidate in batches of decisions, issued several times per year.⁵⁹ Further, the MOHA also seems to prefer invalidating similar types of *Perda* during the same batch of invalidations. For example, on 29 January 2007, the MOHA issued 34 Invalidating Decisions, 13 of which concerned *Perda* regulating cooperatives; on 29 April 2008, 30 of the 50 *Perda* invalidated concerned cooperatives. Most of these decisions employed identical wording. While judging similar *Perda* against the same criteria at the same time might make the invalidation process more efficient and consistent, this practice seems to cause significant delays in the review process. In short, unless significant reforms are instituted, it seems highly unlikely that the time limits for review imposed by the 2004 Law and *MOHA Regulation* [No 53 of 2007] (Indonesia), discussed above, will be achievable.

V. JUDICIAL REVIEW OF *PERDA* BY THE SUPREME COURT (*MAHKAMAH AGUNG*)

In light of the significant flaws in the formal bureaucratic review process, it seems essential that citizens and governments alike have recourse to review of *Perda* by an external body, beyond the time limits imposed in the bureaucratic process. Without this, *Perda* that are defective or of deleterious effect, but which have slipped through or bypassed the bureaucratic review process, will irreversibly remain on the books.

Indeed, quite apart from the Indonesian problem of flawed bureaucratic review, it seems critical that in all states in which power has been deconcentrated or decentralised, there be an independent body with power to determine legitimate disputes over the relative jurisdictions of central and regional governments. Without such a body, delineation between the functions and powers of the various levels of government will almost certainly remain unresolved, and local and central governments will stand accused, with likely regularity, of exceeding their jurisdictions and encroaching upon the lawmaking powers of the other. Such claims carry particular weight in Indonesia, where perceived excess central government controls are equated with authoritarian Soeharto-era practices. And, unless the decisions of this body are well-considered, impartial and consistent, losing parties are likely to be reluctant to abide by them.

Furthermore, without a final arbiter in these matters, the various levels of government might pass their own different laws to address the same perceived need, thereby issuing laws inconsistent with those of the other. This leaves their subjects in a precarious position: needing to choose which law to follow and which to ignore, or even having to breach one to follow another.

As mentioned, the Supreme Court is the sole institution through which local legislatures and executives can challenge the central government's revocation of their laws (art 145(5) of the *Autonomy Law 2004*). It is also provides the sole means by which citizens can challenge *Perda* that contradict national legislation, though

⁵⁹ For example, seven batches in 2006, five batches in 2007 and nine batches in 2008. On 9 January 2006, the MOHA issued 14 decisions under which *Perda* were invalidated. In the same year, it also invalidated six on the 28 February, 21 on 10 and 14 August, 15 on 21 September and 12 on 12 October.

the *Autonomy Law 2004* is not the source of this right.⁶⁰ Since the late 1970s,⁶¹ the Supreme Court has had general administrative review jurisdiction to determine whether laws below that of a statute in the hierarchy of laws are consistent with a statute.⁶² Disputes over whether a *Perda* is consistent with a higher-level law are, in essence, ‘hierarchy disputes’ though they involve a slight reconfiguration of the Supreme Court’s judicial review function: from reviewing lower laws against statutes only, to reviewing *Perda* against other national laws, including ministerial decisions. The Supreme Court has a reputation for not exercising this general review power with much vigour, though there has been a spike in review cases since the fall of Soeharto.⁶³

When the *Regional Autonomy Laws* were enacted in 1999 and 2004, the Supreme Court was the only existing institution able feasibly to perform this function. The Constitutional Court, established in 2003 largely to review national statutes against the *Constitution*, was not a viable option: it did not exist in 1999 and had been operating for only one year in 2004. The following section shows, however, that the Supreme Court has not as yet effectively performed its *Perda* review function.

VI. SUPREME COURT REVIEW OF *PERDA* IN PRACTICE

The following section identifies two major shortcomings in the Supreme Court’s judicial review of *Perda*. I have identified these from analyses of Supreme Court decisions, available on the court’s website,⁶⁴ in which the court reviewed *Perda*; and of an additional decision concerning a 2005 *Perda* from Tangerang, the official transcript of which could not be obtained, but which has been reported widely in the Indonesian domestic and international media. At time of writing, only 16 *Perda* review decisions were available online. The court has, however, certainly decided many more *Perda* challenges than this,⁶⁵ though the precise number is not evident from the case statistics the court publishes (which refer to all types of reviews, including national-level laws as against statutes).⁶⁶ The incomplete data means that the following analysis is, like the analysis of the Invalidating Decisions above, preliminary and tentative.

⁶⁰ Hukumonline, *Berangkat dari Pembatalan Perda Privatisasi Rumah Sakit: Problem Hukum Pengujian Perda (1)*, (22 June 2006) Hukumonline <<http://www.hukumonline.com>>.

⁶¹ Daniel S Lev, ‘Judicial Authority and the Struggle for An Indonesian Rechtsstaat’ (1978) 13 *Law and Society Review* 37.

⁶² *Indonesian Constitution* (1945) art 24A(1) ; *Law on Judicial Power* [No 5 of 2004] (Indonesia), art 11(2)(b); [Law No 5 of 2004], art 31(1), amending [Law No 14 of 1985] of the Supreme Court.

⁶³ Zainal Arifin Hoesein, *Judicial Review di Mahkamah Agung RI: Tiga Dekade Pengujian Peraturan Perundang-Undangan* (Rajawali Pers, 2009) 315.

⁶⁴ Direktori Putusan Republik Indonesia <<http://www.putusan.mahkamahagung.go.id/app-mari/putusan/>>.

⁶⁵ Imam Soebechi, ‘Hak Uji Materiel’ (Paper presented at the National Seminar Menuju Tata Kelola Pemerintahan Yang Baik Melalui Peningkatan Kompetensi Aparatur Pemerintah Daerah Dalam Tertib Pembentukan Peraturan Daerah (9–20 November 2007) cited in Yance Arizona, *Disparitas Pengujian Peraturan Daerah: Suatu Tinjauan Normatif* (December 2007) <<http://www.yancearizona.files.wordpress.com/2008/07/disparitas-pengujian-peraturan-daerah.pdf>>, 3. In early February 2006, for example, the Supreme Court invalidated three Jakarta *Perda* on the privatisation of hospitals, ordering that the Governor and DPRD revoke them. Hukumonline <<http://www.hukumonline.com>>.

⁶⁶ <<http://sms.mahkamahagung.go.id/perkara/statistik.php>>.

A. *Limitation Periods*

The first shortcoming is that the Supreme Court has significantly restricted the availability of judicial review for all types of laws, including *Perda*. The court can make Supreme Court Regulations (*Peraturan Mahkamah Agung*, or *Perma*) about its procedures.⁶⁷ In two such Regulations, issued in 1999 and 2004, the Supreme Court has required that applications for judicial review be lodged within 180 days of the formal enactment of the law in question.⁶⁸ The decisions studied reveal that the Supreme Court strictly observes this time restriction. Of the 16 decisions, four were lodged outside this period—one only 5 days late⁶⁹—and the court refused to hear the review, without any regard for the importance of the legal issues raised in the applications. The court's strict enforcement of this 180-day limitation seems incongruous with the time the court takes to decide *Perda* reviews.⁷⁰

Formally, Supreme Court Regulations are not permitted to touch on substantive legal rights; they are intended only to regulate administrative matters and procedures.⁷¹ Yet of course, overly restrictive procedures can significantly hamper—even prevent—the exercise of substantive rights of citizens and nowhere is this more evident than in Indonesian Supreme Court judicial review cases. The 180-day limitation period makes judicial review of *Perda* little more than a legal mirage in many circumstances. A local government might, for instance, put off implementing or enforcing a controversial *Perda* for 180 days deliberately to render it unreviewable. Or citizens might not become aware of the adverse effect of a *Perda* until 180 days after its enactment. In both scenarios, the opportunity for judicial review has passed. Even if citizens did lodge a judicial review request with the Supreme Court within time, the court may well refuse to hear the case due to lack of standing because the *Perda* would not have been applied to them or caused them any detriment. Further, even at the national level, access to legal information—such as statutes, government regulations and the like—has long been problematic.⁷² *Perda* might simply be unavailable to citizens within time.⁷³

B. *Failure to Consider the Substance of the Perda*

Like the MOHA, the Supreme Court has invalidated *Perda* that seek to impose *retribusi* or a tax. Of the cases studied, the Supreme Court upheld two challenges brought by citizens against such *Perda*, finding that the *Perda* contradicted

⁶⁷ [Law No 14 of 1985] of the Supreme Court (Indonesia), art 79.

⁶⁸ *Supreme Court Regulation* [No 1 of 2004], art 2(4); *Supreme Court Regulation* [No 1 of 1999], art 5(4).

⁶⁹ Supreme Court Decision No 04 P/HUM/2000.

⁷⁰ On average, Supreme Court decisions in these cases were issued around three years after lodgement, with the longest gaps being around 7 and 8 years (07 P/HUM/2000; 03 G/HUM/2002). There were notable exceptions: one case was resolved within 6 weeks (03 P/HUM/2009), and two within 6 months (25 P/HUM/2008; 15 P/HUM/2007).

⁷¹ [Law No of 14 of 1985] of the Supreme Court (Indonesia), art 79, Elucidation.

⁷² Gregory Churchill, *Access to Legal Information in Indonesia: Recent Progress, Current Problems and Future Prospects* (Paper presented at the Seminar on Access to Legal Information: Language, Dictionaries, Databases, Indonesian National Law Development Agency, Jakarta, Indonesia, 22–3 August 2000).

⁷³ World Bank, above n 2, 2.

the *Regional Tax and User Charges* [Law No 18 of 1997] (Indonesia) as amended by [Law No 34 of 2000] (Indonesia).⁷⁴ In these cases, the court appears to have ‘picked up’, albeit at the behest of private citizens, *Perda* that escaped MOHA detection and review. In three other cases, local government representatives challenged MOHA Decisions invalidating their *Perda* imposing *retribusi* or tax. In all three cases, the Supreme Court upheld the invalidations on the same grounds as the MOHA Decisions under review.⁷⁵ In fact, in Decision No 03 P/HUM/2009, the Supreme Court adopted the reasons, verbatim for three out of four paragraphs, provided in the MOHA Decision.⁷⁶

In other cases, the Supreme Court has upheld the *Perda* under review without indicating in its judgment that it has more than cursorily considered either the content of the *Perda*, or whether the *Perda* contradicts any higher laws. The Supreme Court’s view seems to be that beyond revenue-raising, regional governments have broad—perhaps limitless—authority to pass laws to regulate a very wide range of issues. In two of the 16 cases studied, the Supreme Court simply declared, with no explanation, that the local lawmaker had power to issue the *Perda*.⁷⁷ In the first of these, Supreme Court Decision No 03 G/HUM/2002, the applicants, who were village heads, challenged Madiun District *Perda* No 4 of 2001 on the Establishment of the Village Representative Body (VRB). This *Perda* purported to provide greater representation to women and youth in VRBs and in so doing, according to the applicants, breached MOHA Decision No 64 of 1999, which does not provide for this greater representation. The Supreme Court did not consider the substance of the *Perda*, nor the MOHA Decision, to respond to the many arguments put forward by the applicants. Rather, virtually ignoring the merits of those arguments, the court upheld the *Perda*, merely declaring that:

the content of the *Perda* regulates the Region and is within jurisdiction on the basis of Regional Autonomy ... the content of the *Perda* represents an implementation of, and is based on Law No 22 of 1999 on Regional Government.

The Supreme Court upheld the *Perda* on the following additional ground. By way of background, it is customary for any given Indonesian law in its opening paragraph to list other laws relevant to it, including the *Constitution*, statutes and pertinent regulations. If the legal instrument is itself a lower-level law, it will usually list any higher-level laws it purports to implement. The *Perda* under review in this case did not formally declare that it was implementing the MOHA Decision that the applicants claimed the *Perda* breached. For this reason alone, the Supreme Court

⁷⁴ Supreme Court Decision No 07/P/HUM/2000; 1 P/HUM/2001.

⁷⁵ Supreme Court Decision Nos 14 P/HUM/2004; 20 P/HUM/2007; 03 P/HUM/2009.

⁷⁶ The Supreme Court overturned three *Perda* that did not seek to raise revenue. In one case (Decision No 02 P/HUM/2006), a Bupati had, by his own order, sought to regulate the retirement age of particular civil servants. In the Supreme Court’s opinion, he had failed to point to a legislative basis for the order. In Decision No 02 P/HUM/2007, the Supreme Court invalidated a Governor Regulation which sought to require businesses to obtain insurance for workers for injuries suffered out of office hours, on the basis that relevant national legislation and government regulations did not require this. Finally, in Decision No 25 P/HUM/2008, the Supreme Court invalidated a *Perda* which prohibited the distribution and sale of alcoholic beverages in contravention of *Presidential Decision* [No 3 of 1997].

⁷⁷ Two cases (Decisions No 06 P/HUM/2003 and 06 P/HUM/2006) will not be discussed here. Both dealt with village administration.

declared that the *Perda* could not be said to conflict with the decision. This argument is feeble in the extreme: surely a lower-level law can breach a higher-level law even if the lower-level law does not mention that higher-level law in its opening paragraphs. If the position were otherwise, then the hierarchy would be a nullity: to avoid it, lawmakers could simply mention no higher-level laws in the opening paragraphs of their laws.

In the second of these cases—Supreme Court Decision No 24 P/HUM/2002—several citizens challenged the budget of East Nusa Tenggara Province, contained in a *Perda*.⁷⁸ Again, the Supreme Court did not consider the merits of the case and upheld the *Perda*, deciding that:

the Regions have the authority to regulate their budgets in accordance with conditions in their regions ... [T]he provisions in the budget, both outgoing and incoming, are still in the form of a plan, the realisation of which still depends on actual incoming and needs. Changes can still take place ... [T]he implementation of the budget is public policy, which cannot be reviewed through legal aspects.

In light of this statement, it is difficult to imagine the Supreme Court ever invalidating a *Perda* containing a regional budget. Such *Perda*, it seems, will always fall within the policy prerogative of local governments—something the Supreme Court will not touch. The court did not even mention the pre-approval requirements for budget *Perda*, let alone consider whether this *Perda* had met them.

In a third case, the official report of which is not available on the Supreme Court's website, the court was asked to review a *Perda* issued by the Tangerang city government. This *Perda* drew significant controversy in Indonesia and internationally after, according to press reports, it was employed to detain, on suspicion of prostitution, a waitress waiting for a bus one evening. The Supreme Court was asked to review the *Perda* against myriad national legislation, but refused to do so. It simply declared, by press release, that the Tangerang city government was free to enact such policies by way of *Perda*. The following section discusses this case in more detail.

C. Tangerang Perda Case Study

Lilis Lindawati was a 3-month pregnant mother of two. At around 8pm one night in February 2006, she went to her place of employment in Tangerang, near Jakarta's international airport, to collect her pay packet.⁷⁹ She was waiting for a bus home. A group of public-order officers arrived and pulled her into a van. She was accused of suspected prostitution on the grounds that she was alone on the street after dark, was not wearing a headscarf (*jilbab*) and was wearing make-up.⁸⁰ A tube of lipstick in her bag apparently 'sealed her fate'.⁸¹ Despite her persistent claims that she was not

⁷⁸ *East Nusa Tenggara Perda* [No 15 of 2001] (2 January 2002) on the 2002 East Nusa Tenggara Budget.

⁷⁹ Nurun Nisa, Gamal Ferdhi and Nurul Huda, *Bersama Menolak Perda Diskriminatif* (2007) Nawala: the Wahid Institute Bulletin, <<http://www.wahidinstitute.org>> 1.

⁸⁰ 'Makeup Led to Woman's Branding as Prostitute', *Jakarta Post*, 4 May 2007 <<http://www.orientexpat.com/forum/7739-indonesia-you-wear-make-up-so-you-are-a-prostitute/>>.

⁸¹ Mark Forbes and Karuni Rompies, 'Islamic Moral Drive Spreads Fear in Indonesia', *Sydney Morning Herald* (Sydney), 11 March 2006 <<http://www.smh.com.au/news/world/islamic-moral-drive-spreads-fear-in-indonesia/2006/03/10/1141701692783.html>>.

a sex worker, she was detained and after being taken before a judge, spent 3 nights in prison. Her plight attracted significant international press coverage.⁸²

Lilis Lindawati was one of several women detained under *Tangerang City Perda No 8 of 2005 on Prostitution*. This *Perda* prohibits any person whose attitude or behaviour is 'suspicious, making him or her appear to be a prostitute' from being on a road, hotel, or 'other places' in the city (art 4(1)). It also prohibits persons from working as prostitutes or running brothels (art 2(1) and (2)). The *Tangerang Perda* is one of many local laws enacted by regional governments which activists have labelled '*Perda Sharia*'—that is, *Perda* containing injunctions commonly associated with Islamic law. Examples include laws requiring women to wear a headscarf; banning gambling, prostitution and the sale of alcohol; and requiring children before moving to the next school grade, and couples before marrying, to be able to read the Koran in Arabic.⁸³

Several women who had been detained under the *Perda* asked the Supreme Court to invalidate it on several grounds. One ground was that the *Perda* implicitly discriminated against women, thereby breaching a range of 'higher-level' laws that provided for equality before the law, protection and recognition before the law, and non-discrimination.⁸⁴ Another ground was that the *Perda* contradicted Indonesia's Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP).⁸⁵ Yet another possible ground, though I have been unable to confirm whether it was argued, was that the *Tangerang Parliament* exceeded jurisdictional limitations imposed by the *Autonomy Law 2004*. The opening words of the *Perda* are as follows:

Prostitution is an act which conflicts with *religious norms* and morality and has a negative impact on the principles of community life (my emphasis).

Pointing to this statement, the applicants might have argued that the *Tangerang Perda* could be classified as a law relating to religion, a matter over which the national government has exclusive jurisdiction.

This article does not attempt to assess the strength of these arguments. The significant point is that the Supreme Court decided the case without openly considering any of them. Though the court's decision in this case is not available on its website and I was unable to obtain a copy despite concerted efforts, by all existing accounts the Supreme Court did not even mention these arguments—even if only briefly to dismiss

⁸² Karuni Rompies, 'Moral Crusaders Focus on Females', *The Age* (Melbourne), 11 March 2006 <<http://www.theage.com.au/news/world/moral-crusaders-focus-on-females/2006/03/10/1141701696120.html>>; Robin McDowell, 'Islamic Hard-liners Chip Away at Indonesia's Secular Traditions', *World Wide Religious News*, 2 March 2007 <<http://wwrn.org/articles/24464/?&place=indonesia-brunei§ion=church-state>>; Jane Perlez, 'Spread of Islamic Law in Indonesia Takes Toll on Women', *The New York Times*, 27 June 2006 <<http://www.nytimes.com/2006/06/27/world/asia/27indo.html>>.

⁸³ Bush, above n 12; Salim, above n 12; Arskal Salim and Azyumardi Azra (eds), *Shari'a and Politics in Modern Indonesia* (Institute of Southeast Asian Studies, 2003).

⁸⁴ *MA Tolak Permohonan Uji Materiil Perda Pelacuran Tangerang* (16 April 2007) Hukumonline <<http://www.hukumonline.com>>. These included Law No 7 of 1984 which ratified the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); Law No 12 of 2005 which ratified the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); and the *Human Rights Law* [Law No 39 of 1999].

⁸⁵ *Penolakan Uji Materiil Perda Pelacuran Dinilai Politis* (16 April 2007) Kominfo <<http://www.kominfo.go.id>>.

them. Supreme Court spokesperson Djoko Sarwoko announced at a press conference convened after the decision was read, that a panel of three judges—Achmad Sukarja (the Chairperson), Imam Soebechi, and Marina Sidabutar—had held that the *Perda*'s subject matter fell outside the court's jurisdiction.⁸⁶ The *Perda* was 'a political product of the executive and legislature', making it formally valid.⁸⁷ The *Perda*, the spokesperson added, was formally valid: it had been created in accordance with proper procedures, had not been rushed through and had involved 'all elements of the community'.⁸⁸

VII. CONCLUDING REMARKS

This study has revealed that many defects taint *Perda* review processes, both bureaucratic and judicial. Three defects are particularly deleterious to Indonesia's legal order.

A. *Unchecked Local Lawmaking, Unless Revenue Raising*

The first defect is that, to date the MOHA and the Supreme Court have in practice allowed local governments to pass laws regulating any subject matter—regardless of their potential ill-effects for citizens or business, or their inconsistency with higher-level laws—provided that those laws do not seek to raise revenue for local governments. *Perda* may be detrimental to local and national economies; to standards of public services such as health and education; and to the fundamental constitutional human rights of citizens. But they will generally escape bureaucratic review, unless they also impose a fee. Bureaucratic review has been used exclusively to invalidate *Perda* requiring citizens or institutions to pay a local government an impost that the central government has prohibited by statute. All 500 of the MOHA's invalidations from 2006–08 analysed in this research concerned *Perda* imposing such payments.

The central government's rationale for targeting only tax and *retribusi Perda* is unclear. One plausible explanation is that it has the human resources or budget sufficient only to detect, review and invalidate limited numbers of *Perda* and, to protect its own revenue streams, has chosen to focus upon tax and *retribusi*. Alternatively, the choice might reflect a conscious policy decision to allow local governments to pass laws unhindered, except in these areas. After all, a primary purpose of regional autonomy is to empower regions to regulate their own affairs.

This study has also shown that the Supreme Court also strikes out only tax or *retribusi Perda*, sometimes picking up *Perda* that seem to have slipped through the MOHA review process. Unlike the MOHA, however, the court has reviewed *Perda* that do not raise revenue if applicants have so requested. In these cases, however, the

⁸⁶ *MA Tolak Permohonan Uji Materiil Perda Pelacuran Tangerang* (16 April 2007) Hukumonline <<http://www.hukumonline.com>>.

⁸⁷ *Perda Pelacuran Tangerang Tak Bertentangan Dengan UU* (13 April 2007) Gatra <<http://www.gatra.com>>; *MA Tolak Uji Materiil Perda Anti Pelacuran* (14 April 2007) Jawa Pos <<http://www.jawapos.co.id>>; *MA: Perda Pelarangan Pelacuran tak Bertentangan dengan Undang-undang* (12 April 2007) Republika <<http://www.republika.co.id>>.

⁸⁸ *MA Tegaskan Perda Pelarangan Pelacuran Tidak Bertentangan dengan UU* (13 April 2007) Antara <<http://www.antara.co.id>>.

Supreme Court has allowed the *Perda* to stand. And, in some of the cases studied, the Supreme Court upheld the *Perda* without attempting to test whether the *Perda* was consistent with higher-level laws and national legal standards. Rather, the Supreme Court seemed content merely to declare that regions have power to make policy and then encase them in the legal form of a *Perda*. Indeed, it is possible tentatively to argue that the Supreme Court has simply decided these cases in favour of the highest level of government involved: the central government in disputes between central and local governments, and local governments in disputes between local governments and citizens.

By doing so, the Supreme Court shirks the responsibilities that judicial review jurisdiction carries, heightened by its self-imposed 180-day limitation period for case lodgement mentioned above. Unless its decisions better explain why potentially illegal, non-revenue-raising *Perda* should remain on the books, and unless it removes this limitation period, citizens and government are likely to, if they have not already, discount the court as a viable forum for *Perda* testing. Local lawmakers will continue to pass thousands more laws unchecked and the Indonesian legal system will descend further into legal chaos.

In the Indonesian context, this is catastrophic. Even before 'regional autonomy', Indonesia's laws and its legal system were largely dysfunctional and disrespected by citizens and governments alike. Regional autonomy has put law at risk of becoming almost entirely irrelevant. It has, in effect, given free rein to local governments to do as they please—to act unrestrained by law provided that they do not seek revenue in so doing. It is undermining much of the progress Indonesia has made at the national level since Soeharto's fall towards *Negara Hukum* (the rule of law)⁸⁹—under which the state, including local governments, must itself comply with the law when performing its functions.

B. *No Mechanisms to Resolve Conflicts of Laws*

The second defect, or rather category of defects, relates to the legal framework for regional autonomy. The legal mechanisms for the review of any type of *Perda* against other *Perda* are unclear or non-existent. Article 6(4) of *MOHA Regulation* [No 53 of 2007] allows provincial legislation to be invalidated on the grounds of public interest and breach of a higher-level law, but does not cover conflicts between legislation from different provinces such as might occur if two *Perda* from neighbouring provinces purport to regulate trade between those two provinces. Presumably, conflict between them would be abhorrent to the public interest, but the Regulation does not specify which provincial legislation should prevail over the other. Governor regulations and district/city legislation can be reviewed as against provincial *Perda*, but few of

⁸⁹ This rule of law was achieved primarily through improving judicial independence and establishing a more effective Constitutional Court: Simon Butt and Tim Lindsey, 'Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33' (2008) 44 *Bulletin of Indonesian Economic Studies* 239; Simon Butt, 'The Constitutional Court's Decision in the Dispute Between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?' in Ross McLeod and Andrew MacIntyre (eds), *Democracy and the Promise of Good Governance* (Institute of Southeast Asian Studies, 2007) 178; Simon Butt, *Conditional Constitutionality, Pragmatism and the Rule of Law* (2 May 2008), Hukumonline <<http://www.hukumonline.com>>.

these laws would meet all three grounds for invalidation—public order, conflict with a *Perda*, and breach of a higher-level law—that arts 6(2) and 8(3) of *MOHA Regulation* [No 53 of 2007], discussed above, seem to require. Worse, in what appears to be a drafting error in art 8(2) of the *MOHA Regulation*, discussed above, it is unclear whether regent or mayor regulations are reviewable at all. In any event, the MOHA seems to have unbridled discretion, in respect of all of these types of laws except governor regulations, to allow local legislative and executive instruments to stand irrespective of their conflict with other laws or higher-order norms such as human rights.

This over-complexity is compounded by a lack of clarity within the legal framework for decentralisation as to the relative authority of provincial laws on the one hand, and district and city laws on the other. One cannot distil answers simply by presuming that the laws of provincial governments take precedence because they are larger administrations: after all, the *Autonomy Law 1999* (Indonesia) gave the greatest lawmaking powers to district and city governments rather than the provinces.⁹⁰ And even though the governor of a province is responsible for ‘clarifying’ the legislative output of district and city legislatures situated in that province, he or she lacks the power to invalidate those laws.

It might be argued that because provincial *Perda* are categorised above district and city *Perda* in art 7(2) of the *Law on Lawmaking 2004* (Indonesia), provincial *Perda* are of a higher status. This is not a necessary implication, however, because the ‘hierarchy of laws’ is confined to art 7(1), which refers only to ‘*Perda*’ and does not distinguish between their various types.

C. Invalid Invalidation?

The final legal defect is perhaps the most fundamental. This study has shown that all *Perda* that the MOHA has revoked were deemed to conflict with a ‘higher law’. Yet, the legal instrument used to invalidate these *Perda*—a decision of the MOHA—is itself not mentioned in the hierarchy of laws. Although it is commonly presumed in Indonesian legal circles that because it comes from a senior central government official, a Ministerial Decision trumps a *Perda*, there is no legal basis for such a presumption. The *Autonomy Law 2004* and the *Regional Tax and User Charge Laws 2009* (Indonesia) explicitly require that *Perda* be invalidated by Presidential Regulation; and the legal instrument which purports to allow that *Perda* be invalidated by MOHA Decision—*MOHA Regulation* [No 53 of 2007] (Indonesia)—cannot override either the 2004 or the 2009 Law. The latter statutes are enacted by Indonesia’s national parliament and are, therefore, clearly of a higher legal status on the hierarchy. Ironically then, the very legality of all 500 *Perda* invalidations is itself highly questionable. Final determination of their legality would require adjudication by the Supreme Court. But, as this study has shown, that court can hardly be relied upon to intervene.

⁹⁰ The 1999 Laws also declared that the district and city governments were not subordinate to provincial governments. And, even though the *Autonomy Law 2004* gave the provinces more power, it did not formally take any power away from local governments.