The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws

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I. INTRODUCTION

A few years ago, the renowned Yale Law Journal published a very funny paper entitled “How not to Succeed in Law School.”¹ That article made fun of law schools and law teachers. One of the things it did was to give a list of course descriptions for typical law courses, for example, “Roman Law: In case you need to sue a Roman,” or “Civil Procedure: Learn about the paper wars of litigation. Discover why, every time a case is filed, another forest dies.”

When I started looking into the laws relating to regional autonomy in Indonesia, I remembered the course description given for State and Local Government: “Learn how the broadest governmental powers in America have been reserved to a city council composed of two real estate developers, a retired earthworm inspector, and a proctologist.”²

² Id. at 1696, 1697.
In 1999, Indonesia adopted two laws that promised widespread devolution of powers to the regions. More than a year and a half after the adoption of these laws and less than a few weeks before the January 2001 deadline for their implementation, exactly what powers will be transferred to the regions, as well as to which level of government they will be transferred, remains largely unclear. Recently adopted regulations have clarified some issues, but the widespread powers they purport to leave to the Central Government and the broad wording used to describe these powers could effectively reduce significantly the powers left to the regions.

More worrisome is that we remain almost entirely uncertain as to how the Central Government intends to transfer to the regions the funds, the personnel, the equipment, and the infrastructures that the regions will need to exercise their newly transferred powers. In fact, the Law on Regional Government \(^3\) ("Regional Autonomy Law") must be implemented at the latest on May 7, 2001, \(^4\) right in the middle of budget year 2001. The Central Government has announced that the Regional Autonomy Law will be implemented as of January 2001. \(^5\)

Many have analysed the political, economic, and fiscal difficulties arising out of these laws. I will occasionally, briefly touch on these issues myself as law is intrinsically linked to politics and economics. The purpose of this paper, however, will be more limited. I intend to look at the constitution, the laws and the regulations, and show their shortcomings from a legal point of view. What is the legislative intent (or intents) and do these laws achieve it? Are these laws and regulations properly drafted and sufficiently clear on how they should be implemented? Are these laws internally consistent and how do they relate to the rest of the laws in force in Indonesia?

The analysis will therefore be rather strictly legal. Many Indonesian observers will view such strict legal analysis as useless in the Indonesian context. After all, we all know that the Indonesian legal system is inefficient and that there is virtually no Rule of Law (Negara \(^3\) Undang-Undang No. 22, Th. 1999 Tentang Pemerintah Daerah [Law Number 22, Year 1999 on Regional Governments] (May 7, 1999) [hereinafter Regional Autonomy Law].

\(^4\) See Article 132 of the Regional Autonomy Law, which states that the implementing regulations and documents complementing the law should be adopted within a year of the adoption of the law and the implementation of the law should take place within two years of the adoption of the law. \textit{Id.} The law was adopted on May 7, 1999. \textit{Id.}

\(^5\) \textit{See} Minister warns of negative effects of decentralization, JAKARTA POST, Nov. 2, 2000, \textit{available at LEXIS, News}.\n
What is the point in trying to find inconsistencies and poor drafting in laws, since the laws will not be followed that closely? Some would even go as far as to say that predictions of dire consequences due to such contradictions and inconsistencies are not justified, because all Indonesian laws are deficient and things in the end somehow work out. Some may argue the analysis of the Regional Autonomy Law should be essentially political and economic, not legal, since the law is addressing political and economic issues, rather than legal ones.

I am very aware of the pressing political need for regionalisation in Indonesia. I am also very aware that many laws are often not enforceable. I believe, however, that, for many reasons, a strict, even tough, legal analysis of the Regional Autonomy Law is essential. First of all, this is the age of Reformasi (reform) and Indonesia Baru (New Indonesia). We should be encouraging the adoption of properly drafted laws that are consistent with one another and that can easily be implemented.

Second and more importantly, the Regional Autonomy Law redistributes powers between different levels of governments. Even though it is not technically a constitutional law, it has a constitutional character in that it constitutes authorities with powers and responsibilities. It is the very basis upon which others laws will be based in the future; local authorities will adopt laws based on the powers granted to them by this law. It is, therefore, extremely important that, at least, this law be clear and consistent; otherwise, all other laws will not be.

Third, in the past, when laws were unclear, one could always rely on the word of the Central Government. This was often a denial of the Negara Hukum in that people and investors would rely on Soeharto’s word rather than on the law, but it worked. This will not work anymore, as there are now many levels of government with claims of authority over the same issues, and the word of the Central Government will not bring certainty anymore. What is needed is a clear division of powers between the different levels of government, which I will argue we do not have with this new law.

Lastly, the restoration of the economy is, or at least should be, one of the priorities of all in Indonesia. An unclear and imprecise Regional Autonomy Law will hinder investment and hurt the economy. For many

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6 The concept of Negara Hukum corresponds more closely to the Continental concept of Rechtsstaat in Dutch or État de droit in French, literally translated as “State of Law” rather than as the Anglo-Saxon concept of Rule of Law.

reasons, therefore, a close, tough, and strict legal analysis of the Regional Autonomy Law is necessary.

Part IIA looks at the political and economic context that brought about the adoption of the laws on regional autonomy. Part IIB then situates the laws in the constitutional context before proceeding in detail in Part III to an analysis of the provisions on the distribution of powers between the different levels of government, the main object of this paper.

Although this article is published after the coming into force of the Regional Autonomy Law on January 1, 2001, it was written before the coming into force of the law. Most of the information in this article was correct to the best of my knowledge around the beginning of November 2000. I suspect that between that date and the coming into force of the legislation, quite a few regulations will have been adopted. These regulations will not likely alter most of the substance of this article.

II. THE CONTEXT THAT LED TO THE ADOPTION OF THE TWO MAIN LAWS

A. Political and Economic Context

There are two main laws relating to regional autonomy. The first is the Regional Autonomy Law.\(^8\) The second is the Law on Fiscal Balance between Central and Regional Governments\(^9\) ("Fiscal Balance Law").\(^10\) The former will be the main focus of this paper, but I will mention the latter very briefly.\(^11\)

\(^8\) See supra note 3.


\(^10\) Numerous editors have published both these laws. I have used the following edition: Undang-Undang Otonomi Daerah [Laws on Regional Autonomy] (Jakarta: Restu Agung, 1999), which contains both laws as well as other relevant laws and regulations. The English version I have consulted is the one published by Business News and coded as BN 6361/6362/15-9-1999 for the Regional Autonomy Law and BN 6339/23/7/1999 for the Fiscal Balance Law. Though useful, these translations have their shortcomings, so unless stated otherwise, the translations used in this paper are my own. I hope that my familiarity with English legal terminology will compensate for my many shortcomings in Indonesian.

\(^11\) Many other laws and regulations are essential for a full understanding of the regional autonomy plan. In particular, one should also look at the special law regulating Jakarta: Undang-undang No. 34, Th. 1999 tentang Pemerintahan Propinsi Ibukota Negara Republik Indonesia Jakarta [Law Number 34, Year 1999 on the Governance of Jakarta,
Both these laws were adopted under President B.J. Habibie, who took pride in having pushed the adoption of a large number of laws in very little time, something most jurists would consider to be a recipe for disaster. The government of President Abdurrahman Wahid adopted and is still in the process of adopting the regulations that complement and, in some cases, seem to indirectly amend the laws on regional autonomy.

The motivations behind the adoption of these two laws were political and economical. It is trite to say that Soeharto held Indonesia together with an iron fist and that, in this democratic transition, ethnic, political, and economic tensions have surfaced. From a political science point of view, the exceptionally high degree of centralisation of power in Indonesia is unusual, or at least surprising, given its diverse nature and the way the country is spread out. Therefore, many politicians, especially in the regions, thought that some degree of autonomy should be granted to the regions.

In fact, it seemed at the time that, unless some degree of autonomy was indeed granted, the independence movements of Aceh and Irian Jaya (soon to be called Papua once again) would go unabated. These two regions have been promised a separate autonomy plan, but, in the


14 These two provinces were meant to be granted special autonomy since the very beginning in 1999. In fact the newly amended constitution provide that “[t]he country recognises and respects some individual regional administrations that possess a special or extraordinary character, which is regulated by law” (“Negara mengakui dan menghormati satuan-satuan pemerintahan daerah yang bersifat khusus atau bersifat istimewa yang diatur dengan undang-undang”). See UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [Basic Law of the National Republic of Indonesia 1945] art. 18B (as amended) [hereinafter INDON. CONST. for the original document, and INDON. CONST. (as amended), when referring to the recently adopted amendments on Regional Autonomy]. In fact, the Higher House of Parliament recently recommended that the laws relating to the special autonomy of Aceh and Irian Jaya be issued, at the latest, by May 1, 2001. See Recommendation 1 of Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Nomor IV/MPR/2000 Tentang Rekomendasi Kebijakan Dalam Penyelenggaraan Otonomi Daerah [Decision of the People’s Consultative Assembly of the Republic of Indonesia number IV/MPR/2000 on recommendations for the implementation of regional autonomy] [hereinafter MPR’s Policy Recommendations].
meanwhile, this law will apply to them. An even more complete autonomy plan was being offered to East Timor.\textsuperscript{15} In addition to Aceh and Irian Jaya, some other resource-rich regions, such as Riau, were complaining that they were not getting their fair share of the revenues from the exploitation of their natural resources. One of their recurring recriminations against the New Order Government\textsuperscript{16} was that all the revenues from their resources ended up in Java with no benefit to them.\textsuperscript{17} It was therefore important to show that the new Indonesia would be fairer in its distribution of wealth.\textsuperscript{18} This explains the adoption of the Fiscal Balance Law with its promise of a new distribution of revenues.

We should also remind ourselves that Habibie’s government claimed to be a \textit{constitutional} government that would bring democracy in an orderly fashion without a revolution. The appearance of fully complying with the Constitution was therefore important. The Constitution states that Indonesia is a unitary state (\textit{negara kesatuan});\textsuperscript{19} accordingly, federalism would have to be rejected. In fact, to this day, a widespread, though often irrational or, at least, unreasoned belief that federalism would spell the end of Indonesian unity remains.\textsuperscript{20}

\textsuperscript{15} The adoption of the Regional Autonomy Law on May 7, 1999 took place just before the Timor debacle that was triggered by a vote for independence on August 30, 1999. East Timor’s proposed autonomy was not to be governed by the Regional Autonomy Law but by a separate law. \textit{See} Regional Autonomy Law art. 118.

\textsuperscript{16} For those unfamiliar with Indonesian politics, \textit{Orde Baru} (New Order) refers to the Soeharto regime. \textit{Indonesia Baru} (New Indonesia) seemed to have become the most commonly used expression to describe the post-Soeharto era.

\textsuperscript{17} \textit{See} Richburg, \textit{supra} note 13, at A28; Yamin, \textit{supra} note 13.

\textsuperscript{18} For resource-rich regions, however, fairness of distribution of resources is not the goal of the autonomy movement. These regions would rather keep the revenues of the region within the region, whether or not that is fair to the other regions. The MPR has, however, recommended that fairness be taken into account. \textit{See} MPR’s Policy Recommendations, \textit{supra} note 14, Recommendation 5.

\textsuperscript{19} Article 1, paragraph 1 of the 1945 Indonesian Constitution states: “The state of Indonesia is a unitary state in the form of a Republic” (“\textit{Negara Indonesia ialah negara kesatuan yang berbentuk Republik}”). \textit{INDON. CONST.} art. 1, ¶ 1. The 1949 Constitution negotiated with the Dutch provided for the “Republic of the United States of Indonesia.” It was effectively a federal constitution. Federalism was rejected, however, a year later when the 1950 Constitution was adopted. The latter remained in force until 1959, when Sukarno reinstated the 1945 Constitution. For a short overview of these constitutional changes, see \textsc{Adam Schwarz}, \textsc{A Nation in Waiting--Indonesia’s Search for Stability} 7 (2d ed. 1999).

\textsuperscript{20} This opinion might, in fact, be correct, but even people who do not understand the nature of federalism hold the view that federalism is inappropriate for Indonesia. Among the “convincing” arguments I have read in the papers lately were (1) that
There might also have been some international encouragement for regionalisation in Indonesia. Movements toward regionalisation are quite recognisable around the world.\textsuperscript{21} Therefore, aid agencies such as the World Bank and the International Monetary Fund (IMF) are familiar with the concept and could be seen, in some instances, as promoting it. In fairness, however, both the institutions mentioned seem genuinely worried about the way regionalisation is taking place in Indonesia.\textsuperscript{22}

B. \textit{The Legal Context--The Constitutional and Legal Structure}

As mentioned above, Indonesia, by its constitution, is a unitary state.\textsuperscript{23} It is important to note, however, that the 1945 Constitution is a rather vague and short document, containing only 37 articles. The unitary nature of Indonesia does not prevent the establishment of regional governments. In fact, the Constitution, as it stood at the time of the adoption of the relevant laws, mentioned such regional governments in Article 18 (then the only article in chapter 6 on regional governments):

\begin{quote}
Bab VI. Pemerintah Daerah

18. \textit{Pembagian daerah Indonesia atas daerah besar dan kecil, dan bentuk susunan pemerintahannya ditetapkan dengan undang-undang, dengan memandang dan mengingati dasar permusyawaratan dalam sistem pemerintahan negara, dan hak-hak asal-usul dalam daerah-daerah yang bersifat istimewa.}
\end{quote}

Chapter VI. Regional Government

18. The division of Indonesia into large and small regions and the structures for their governance shall be prescribe by law having regard for, and keeping in mind the principle of deliberation in the government system of the State and the traditional rights in regions which have a special character.\textsuperscript{24}

\textsuperscript{21} Some examples include the devolution in Scotland and the regionalisation in many European countries, as well as in India.

\textsuperscript{22} \textit{See, e.g.}, Indonesia: IMF asks Indonesia to review fiscal autonomy rule, \textit{REUTERS ENGLISH NEWS SERVICE}, Nov. 21, 2000, available at LEXIS, News.

\textsuperscript{23} \textit{See supra} note 19 and accompanying text.

\textsuperscript{24} \textit{INDON. CONST.} art. 18.
Since the adoption of the laws, the MPR\(^{25}\) has adopted a constitutional amendment on regional autonomy, which replaces Article 18 by three new articles (18, 18A and 18B). Articles 18 A and 18B will be mentioned later in this article. At this point, the most relevant of these three articles is the new Article 18, which reads as follows:

**Bab VI. Pemerintah Daerah**

18 (1) Negara Kesatuan Republik Indonesia dibagi atas daerah-daerah provinsi dan daerah provinsi itu dibagi atas kabupaten dan kota, yang tiap-tiap provinsi, kabupaten dan kota itu mempunyai pemerintahan daerah, yang diatur dengan undang-undang

(2) Pemerintahan Daerah provinsi, daerah kabupaten, dan kota mengatur dan mengurus sendiri urusan pemerintahan menurut asas otonomi dan tugas pembantuan.

(3) Pemerintahan daerah provinsi, daerah kabupaten, dan kota memiliki Dewan Perwakilan Rakyat Daerah yang anggota-anggotanya dipilih melalui pemilihan umum.

(4) Gubernur, Bupati, dan Walikota masing-masing sebagai kepala pemerintah daerah provinsi, kabupaten, dan kota dipilih secara demokratis.

**Chapter VI. Regional Government**

18(1) The unitary State of Indonesia is divided into provinces and these provinces into regencies and cities and each and every of these provinces, regencies and cities form a regional government in accordance with the law.

(2) The provincial, regency and city regional governments regulate and manage on their own governmental affairs according to the principles of autonomy and the duty to provide assistance.

(3) The provincial, regency and city regional governments have a Regional People’s Representative Assembly the members of which are elected through general elections.

(4) The governor, Regent and Mayor, respectively as head of the provincial, regency and city regional governments are elected democratically.

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\(^{25}\) The M.P.R. stands for *Majelis Permusyawaratan Rakyat* (People’s Deliberating Assembly), the higher Chamber of Parliament. *See INDON. CONST.* arts. 2, 3. The lower chamber is called the *Dewan Perwakilan Rakyat* (People’s Representative Council) (“DPR”). *See INDON. CONST.* arts. 19-22.
(5) Regional administrations can put in effect the broadest autonomy, except in governmental matters that by virtue of the law are defined as matters for the Central Government.

(6) Regional governments may adopt regional regulations and other regulations to implement autonomy and the duty to provide assistance.

(7) The structure and organisation of regional governments is regulated by law.  

Article 18 constitutionalises the basic structure of regional governments (18(1)), the principle of regional autonomy (18(2)), and the principle that regional assemblies and regional leaders should be democratically elected (18(3) and (4)). It also constitutionalises the fact that residual powers are with the regional governments (18(5)), which can adopt regulations (18(6)). None of these aspects are new, as all of them were part of the Regional Autonomy Law. What is new is their incorporation into the Constitution. What also remains the same is that the statutes relating to regional autonomy are constitutional, whether under the old or the new Article 18. Both the old Article 18 and the new Article 18(7) authorises the adoption of laws on regional autonomy by the Central Government.

In fact, the recent laws on regional autonomy are not the first attempt at organising and financing local governments; many other laws have been in place before them.  

26 Perubahan Kedua Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Second Amendment to the Basic Law of Republic of the State of Indonesia 1945] art. 18, in Putusan Majelis Permusyawaratan Rakyat Republik Indonesia, Sidang Tahunan [Decisions of the People’s Representative Assembly of the Republik of Indonesia, Annual Session], Aug. 17-18, 2000 [hereinafter Second Amendment to the Basic Law].  

27 See, e.g., Undang-undang No. 5, Th. 1974 tentang Pokok-pokok Pemerintahan Di Daerah [Law Number 5 of 1974 on the Fundamentals of Governance in the Regions]; Undang-undang No. 5, Th. 1979 tentang Pemerintahan Desa [Law Number 5 of 1979 on the Governance of Villages].
the center, and the fact that they have been promised more powers and financial resources.

As mentioned above, a record number of laws were adopted in very little time under the Habibie government. The urgency with which the laws relating to regional autonomy were adopted is, unfortunately, reflected all too well in the way the laws are drafted and their complete lack of coordination with other laws. As discussed below, promises of broad powers are clear in the law, but the details are left to government regulations. Not much more clarity is provided when it comes to the financing of these new regional governments. The transfer of powers to the region would require the amendment of literally hundreds of other laws and regulations presently regulating the areas that are soon to be transferred to the regions. To my knowledge, no systematic effort to review all the affected laws has been made.

III. The New Laws and Regulations Relating to Regional Autonomy

I will now look at the two main laws relating to regional autonomy. First, subsection A points to the legislative as opposed to the constitutional nature of these laws and to the fact that much of the content of the laws is provided, or to be provided, in government regulations. Subsection B looks at the distribution of powers under the Regional Autonomy Law and the recently adopted government regulations. The focus will be on the distribution of powers and little time will be spent on the very detailed government structure put in place by the law. I will look at the many shortcomings of the law. Subsection C, then, briefly discusses the Law on Fiscal Balance, and, finally, subsection D considers the unrealistic timetable for the implementation of the laws.

A. Non-Constitutional and Non-Permanent Nature of the Arrangement

As discussed above, the laws on regional autonomy are constitutional in that they were adopted constitutionally, and their adoptions were, in fact, expressly authorised by the Constitution as it stood at the time they were adopted and they are still consistent with the new amendments to the constitution. These laws are not constitutional in nature, however, in that they are not entrenched in the constitution and have no constitutional character. They can, therefore, be amended by

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28 Abdurrahman inaugurates Habibie Center, supra note 12.

29 Here, I use a limited acceptance of the word constitutional: constitutional is that which is part of the written constitution and needs a constitutional amendment to be
simple majority through the normal legislative process. This gives these laws a less permanent nature and, as some would say, a certain level of flexibility that constitutional documents do not have. This flexibility may be useful when it is realised that these laws are flawed in more than one way. As we have seen above, some general aspects of these laws have been incorporated into the Constitution, and this incorporation will be mentioned again in due course, but the laws themselves are not constitutional in nature.

More interestingly, the laws have allowed for a large degree of flexibility. Most of the details are left to government regulations and, thus, can be amended more easily than the laws adopted by Parliament. Article 12 of the Regional Autonomy Law provides that the Central Government may adopt regulations to further determine its powers and the powers of the provinces (whatever powers not assigned to the Central Government or the provinces belong to the regencies and cities).

B. The Distribution of Powers

This section looks at the distribution of powers between the central and local governments. First, I will describe the different levels of governments the law recognises. I will, then, look at the distribution of powers itself. Next, I will look at the impact of the lack of a comprehensive mode of conflict resolution. Finally, I will look at other shortcomings of the Regional Autonomy Law.

1. The different levels of government

The hierarchy of authorities or governments in Indonesia is very complex. The good thing for those who are familiar with the present hierarchy is that the new laws bring no fundamental change in the hierarchy itself. The basic hierarchical structure remains the same, with only one institution changing its name. For the benefit of those not familiar with the Indonesian hierarchy, let me briefly introduce it.

At the top is the Central Government, which the law simply refers to as the Government. Every other level of government is referred to as amended. See INDON. CONST. art. 37. In that sense, the laws on regional autonomy are not constitutional; they can be amended or repealed through the normal legislative process. Of course, one could argue that these laws create and regulate different levels of government, and that, in some way, they are constitutional. Without disagreeing with this view, I will avoid using the word constitutional in this latter acception.

See, e.g., Regional Autonomy Law art. 12.

Id. art. 12.

Id. art. 1(a).
a regional government (pemerintah daerah). There are many levels, but
the only important ones for our purposes are the Provinces (Propinsi or
Provinsi),[33] headed by a governor; and one level below them,[34] either the
regency (kabupaten),[35] in rural areas, headed by the regent (bupati) or the
city (kota)[36]; in urban areas, headed by a mayor (walikota).[37] In fact, as
we have seen, these are the only levels of regional government that are
constitutionalised by the recent amendment to the Constitution.[38] Then, at
the very local level in rural areas are the villages (desa).[39] For our
purposes, we need not describe the other levels of government between the
regency and the village.[40]

It should also be noted that the province, in addition to being an
autonomous region, is also an administrative territory for the Central
Government.[41] This means that the governor is both the head of an

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33 Both “propinsi” and “provinsi” are used to refer to the provinces, and they
both mean exactly the same thing. As you will see, the amendment to the Constitution
uses “provinsi” whereas the laws use “propinsi.” The “v” sound is not indigenous to
Indonesia, which explains why some prefer to spell the word with a “p” instead of a “v.”
Formerly, provinces were also referred to as first level regions or Daerah Tingkat I.

34 Hence, these were formerly referred to as Daerah Tingkat II, second level
Regions.

35 I use the word “regency,” but some have used the word “district.” The
advantage of “regency,” beside the fact that it is often used in Indonesia to translate
Kabupaten, is that Bupati can then be easily and elegantly translated by “Regent” rather
than “district head.”

36 The Kota used to be called the Kotamadya. Please note that Jakarta is
regulated by a separate statute. See supra note 11.

37 Article 2(1) of the Regional Autonomy Law states: “The territory of the
unitary state of the Republic of Indonesia is divided into autonomous provinces,
regencies and cities” [“Wilayah Negara Kesatuan Republik Indonesia dibagi dalam
Daerah Propinsi, Daerah kabupaten, dan Daerah Kota yang bersifat otonom”].
Regional Autonomy Law art. 2(1).

38 INDON. CONST. art. 18 (as amended); also Second Amendment to the Basic
Law, supra note 26.

39 Regional Autonomy Law art. 1(o).

40 They include the kecamatan headed by a camat and below it the kelurahan
headed by the lurah. See Regional Autonomy Law arts. 66, 67. The Regent (or the
Mayor in the case of a City) will appoint these officials. They are part of the apparatus
(perangkat) of the regency or city and are non-elected civil servants.

41 Article 2(2) of the Regional Autonomy Law provides: “The Province also is
an administrative territory” [“Daerah Propinsi berkedudukan juga sebagai Wilayah
Administrasi”]. Id. art. 2(2).
autonomous region and the representative of the Central Government in that region for the administration of programs within the powers of the Central Government.

The latter role is an example of what the law calls *dekoncentrasi*, which is defined as the delegation of powers from the Central Government to the governor as the representative of the Central Government and/or of the central administration in the region.\(^{42}\) This is opposed to *desentralisasi*, which is the devolution of powers by the Central Government to autonomous regions.\(^{43}\)

The governor’s double role as administrator for the Central Government and head of an autonomous region explains why the President is consulted on the candidates for the position of governor\(^{44}\) and why the governor is accountable to both the regional assembly and the President.\(^{45}\) The potential for conflicts of interest seems enormous. The newly amended Constitution does provide, however, that the governor must be elected democratically.\(^{46}\) Some might argue that this may remove the need to consult the President, but this is far from certain.

2. \textit{An unclear and confusing distribution of powers}

The desire to transfer powers to the regions seems to have shifted from high gear to low gear when President Abdurrahman Wahid took over from President Habibie. The Regional Autonomy Law adopted under Habibie seemed to give wide powers to the regions and to keep very little power in the Central Government, but the recent regulations of President Abdurrahman Wahid seems to have changed the deal.

a. \textit{Residual powers}

As is usually the case in documents providing for a separation of powers (whether they be constitutions or laws), the Regional Autonomy Law assigns residual powers to a specific level of government. Powers not specifically assigned to any level of government will belong to the government that has the residual powers. It does not follow that the level of government with residual powers will necessarily end up with the most

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\(^{42}\) \textit{Id.} art. 1(f).

\(^{43}\) \textit{Id.} art. 1(e).

\(^{44}\) \textit{Id.} art. 38(1).

\(^{45}\) \textit{Id.} arts. 31(2), (4).

\(^{46}\) \textit{INDON. CONST.} art. 18(4) (as amended); \textit{also} Second Amendment to the Basic Law, \textit{supra} note 26
powers. For example, Canadian provinces have widespread powers, and, yet, the residual powers are with the federal government.\textsuperscript{47} American States, which have residual powers,\textsuperscript{48} are much less powerful than their Canadian counterparts, which do not.

The Regional Autonomy Law grants residual powers to the regions. This approach has been confirmed by the Second Amendment to the Constitution, which states that the regions are completely autonomous, except in matters which the law reserves to the Central Government.\textsuperscript{49} The fact that the Regional Autonomy Law and now the Constitution grant residual powers to the regions\textsuperscript{50} is not in and of itself significant. What makes this law seem a radical shift from the past, an incredibly comprehensive move toward decentralisation, is the fact that the list of powers reserved to the Central Government seems at first very, very short.

As discussed in more detail below, the residual powers are not given to the provinces but to the regencies and cities. Article 11 states:

\begin{quote}
(1) \textit{Kewenangan Daerah Kabupaten dan Daerah Kota mencakup semua kewenangan pemerintahan selain kewenangan yang dikecualikan dalam Pasal 7 dan yang diatur dalam Pasal 9}
\end{quote}

\begin{quote}
(1) The powers of Regencies and Cities shall include all government powers other than the powers that are the object of an exception in Article 7 \cite[powers of the Central Government]{supra note 26} and those regulated by Article 9 \cite[powers of the province]{infra Section III.B.2.b}.
\end{quote}

\textsuperscript{47} See \textit{CAN. CONST.} (Constitution Act, 1867) \S 90.

\textsuperscript{48} U.S. \textit{CONST.} art. I, §§ 8, 9, 10 (referring to powers of federal Congress), amend. X (reserving non-delegated powers to the several States).

\textsuperscript{49} See \textit{INDON. CONST.} art. 18(5) (as amended); also Second Amendment to the Constitution, \textit{supra} note 26.

\textsuperscript{50} See \textit{infra} Section III.B.2.b for text of Article 7 of the Regional Autonomy Law.
(2) The sectors of government that must be implemented by the regencies and cities include public works, health, education and culture, agriculture, communications, industry and trade, investment, environment, land affairs, cooperatives and manpower.  

It is quite incredible that such important powers are delegated to the regencies and cities rather than to the provinces. Indonesia probably has more than 360 regencies and cities. I would have thought that it would have been more efficient to grant these powers to the province (officially, there are 32 provinces but, in fact, only 30 at this point, although the creation of new provinces continues to be considered). In fact, the President had announced at one point that regional powers would be transferred to the provinces rather than to the regencies and cities.

Given that the residual powers rest with the regencies and cities, to determine their powers, we need first to look at the powers of the Central Government and of the provinces. Whatever is left will be the powers of the regencies and cities.

b. Powers of the Central Government according to the Regional Autonomy Law

Article 7 defines the powers of the Central Government:

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51 Regional Autonomy Law art. 11.

52 The exact number keeps changing. In July 2000, the number was roughly 365 regencies and cities according to the then-Minister for Regional Autonomy. See Concerns over powers for local districts, SING. STRAITS TIMES, July 15, 2000, available at LEXIS, News. More than 100 requests for the establishment of new regencies have now been made. See Just how many provinces make up Indonesia?, SING. STRAITS TIMES, Dec. 7, 2000, available at LEXIS, News.

53 See Just how many provinces make up Indonesia?, SING. STRAITS TIMES, Dec. 7, 2000, available at LEXIS, News. Two provinces created by President Habibie in Irian Jaya have obtained so little popular support that they seem not to exist in fact.

54 At the time of writing this article, the author had not yet seen any amendment to the Regional Autonomy Law that would implement such a change.
The powers of the Central Government enumerated in the first paragraph are minimal, but they are, at least, quite clearly stated. It is unlikely that there will be any confusion as to what these powers include.

The only difficulty with this paragraph arises from the words “and responsibilities in other sectors.” This is an open-ended provision that might lead to confusion. The next paragraph seems to enumerate these other sectors, but, unfortunately, it does not do so exclusively. It states that these other sectors “include” (meliputi) the following, thus leaving the door open to the possibility that sectors other than those mentioned in paragraph 2 might also be included.

Indeed, other provisions of the law assign to the Central Government powers that are not mentioned in paragraph 2. For example, Article 10 clearly grants the Central Government jurisdiction over sea resources beyond twelve nautical miles, since the provinces’ territory is defined as extending only up to twelve nautical miles from the littoral so
that no province has jurisdiction over the sea beyond that point.\textsuperscript{56} This is a sector that is the responsibility of the Central Government even though it is nowhere mentioned in Article 7. Therefore, the second paragraph’s use of “include” is prudent, because it is indeed possible that the powers of the Central Government include powers other than those enumerated in Article 7.\textsuperscript{57} I should stress that these “other sectors” mentioned in the first paragraph, however, should be sectors that are provided for by law, not sectors that the Central Government of the day wants to appropriate to itself by regulation. Article 18(5) of the Constitution requires that the powers of the Central Government be defined by law (\textit{undang-undang}).\textsuperscript{58}

\section*{(2) Second paragraph of Article 7}

One thing is unusual about Article 7. Why is there two paragraphs rather than one? This must be because there is a difference between the powers enumerated in the first paragraph and those enumerated in the second paragraph. The elucidations accompanying the law make no mention of this.\textsuperscript{59}

The powers enumerated in the first paragraph include the whole of the fields enumerated, both policies and implementation. For example, foreign affairs include not only foreign policy but also all other details of implementation down to the issuance of visas, etc. There is no role for the regions in the fields mentioned in paragraph 1.

The powers enumerated in the second paragraph are at a policy level; they leave details to the regions. One could in fact try to read all of

\begin{itemize}
  \item \textsuperscript{56} \textit{Id.} art. 3. By Article 10(3), the regencies and cities will have jurisdiction over up to a third of the distance of jurisdiction of the province (usually 4 miles when the province’s maritime territory extends to the full 12 miles, i.e. when there are no other islands in close proximity). \textit{Id.} art. 10(3).
  \item \textsuperscript{57} Another example would be the power of the Central Government to settle disputes between regions (Article 89), a power which is also not mentioned in Article 7. \textit{Id.} art. 89.
  \item \textsuperscript{58} INDON. CONST. art. 18(5) (as amended); also Second Amendment to the Basic Law, supra note 26.
  \item \textsuperscript{59} From a legal point of view, elucidations or comments on the law, even if published by the Central Government, would not be binding in the interpretation of the law, but they could be useful in determining the intent of the Central Government. In fact, elucidations are not mentioned as a source of law in the recently adopted decision of the MPR regarding sources of law. \textit{See Ketetapan Majelis Permusyawaratan Rakyat Nomor III/MPR/2000 Tentang Sumber Hukum Dan Tata Urutan Peraturan Perundang-Undangan [Decision of the MPR Number III/MPR/2000 regarding Sources of Law and the Hierarchical Order of legislative rules], Aug. 18. 2000 [hereinafter Decision on Sources of Law].}\
\end{itemize}
the second paragraph’s enumerated heads as affected by the words “kebijakan tentang” (“policy on”). According to such a reading, the Central Government is responsible for:

- policies on national planning and control of national development at a macro level,
- policies on funds for fiscal balance,
- policies on the state administrative system and state economic institutions,
- policies on the development and the empowerment of human resources,
- policies on the efficient use of natural resources along with strategic high technology, conservation and national standardisation.\(^{60}\)

This reading may push the envelope, but is not unjustifiable. It would explain why the list of powers is divided in two paragraphs. In fact, other evidence demonstrates that the second paragraph should be read in this way even if the words “policies on” cannot affect all the enumerated heads.

First, some of the powers enumerated in the second paragraph would clearly conflict with the powers of the regions if they were to include the whole field. For example, Article 10 specifically provides that the regions will have jurisdiction over the management of natural resources.\(^{61}\) If the words “efficient use of natural resources” in Article 7(2) were interpreted to grant the Central Government the power to manage the resources, there would be a clear contradiction within the law. The only way to reconcile the two articles is to interpret the second paragraph of Article 7 as granting to the Central Government the power to set out policies but not the power to manage the resources.

Second, in many instances, the regulations adopted by the Central Government seem to confirm the view that the enumerated powers in the second paragraph only grant the power to set out policies. For example, in the regulations relating to the mining and energy sector, the Central Government mainly purports to grant itself the right to set out policies and standards, rather than to administer and manage resources other than oil, gas, and electricity (to some extent).\(^{62}\)

\(^{60}\) The italicised words are added to the text of the law as if the first word “policies on” affected the whole list rather than only the first category.

\(^{61}\) Regional Autonomy Law art. 10.

Of course, the distinction between policy and implementation is bound to be very confusing and generate numerous conflicts. Obviously, policies will inevitably have clear implications on the details of implementation. The distinction seems almost futile.

(3) Other powers of the Central Government

With respect to other powers of the Central Government, I have mentioned above that the Central Government has the power over sea resources beyond 12 nautical miles (Article 3) and the power to settle disputes between regions (Article 89).

c. Powers of the Central Government according to the Regional Autonomy Regulations

Article 12 grants the Central Government the power to adopt regulations.

Pengaturan lebih lanjut mengenai ketentuan sebagaimana dimaksud dalam Pasal 7 dan Pasal 9 ditetapkan dengan Peraturan Pemerintah.

This provision is not intended to allow the Central Government to amend the Regional Autonomy Law through regulations because if it were so intended, one would need much clearer language. Therefore, the regulation should elaborate on the details of the Law, but should not take exception to it. This principle is reiterated in the Decision of the MPR on Sources of Law, which stated that legislation of a lower order (government regulations for example) may not contradict legislation of a higher order (a law for example).  

63 Regional Autonomy Law art. 12.

64 See Decision on Sources of Law, supra note 59, art. 4. In some circumstances, a government regulation can amend a law, but only temporarily. Such regulation must then be approved at the first session of the DPR following the adoption of the regulation. See id. arts. 2(4), 3(4). The regulations mentioned in this paper do not fall in this category.
The Central Government adopted the main regulations, the Regional Autonomy Regulation, on May 6, 2000.65 I am not sure, however, that these regulations simply fill in the details. At times, these regulations appear to be a list of the powers the ministries refuse to transfer to the regions notwithstanding the clear wording of the Regional Autonomy Law. In certain places, the Central Government appears to be trying to undo through the regulations what the law tries to do.

First, the Regional Autonomy Regulation is very confusing because of poor drafting. The regulation does not provide any detail on the powers mentioned in paragraph 1 of Article 7 of the Regional Autonomy Law (foreign affairs, defence, etc.). The bulk of the Regional Autonomy Regulation is in one paragraph, Article 2(3), which goes on and on for page after page.66 In fact, paragraph 3 seems to take about 50% of the whole regulation (based on a rough estimate of the number of pages the regulation contains). That paragraph purports to provide details on the powers enumerated in the second paragraph of Article 7 of the Regional Autonomy Law, the powers that I argued should be limited to policies and standards.67

The Regional Autonomy Regulation is poorly drafted in many other respects. Most importantly, Article 2(3) goes on to list 20 different sectors in which the Central Government can act. These sectors do not in any way correspond to the sectors mentioned in the Regional Autonomy Law. One would have hoped that the Article 2(3) would regroup the powers of the Central Government under the enumerated heads of power listed in the second paragraph of Article 7 of the Regional Autonomy Law. For example, some of the sectors mentioned in the regulations include the agricultural sector, the mining and energy sector, and the forestry and plantation sector. These sectors are not mentioned in Article 7(2), and the Central Government does not indicate where these claimed powers fall under in Article 7(2). Are the powers over the energy sector claimed because they concern “policies on national planning and control of national development at a macro level,” “the efficient use of natural resources,” or “strategic high technology”? These questions are left unanswered because the Central Government does not indicate where these powers fall under Article 7(2) of the Regional Autonomy Law.

In fact, the list of sectors in the regulation often seems to correspond to the list of ministries in the Central Government. It reads as

65 For a full reference, see supra note 62. They were adopted in fact one day before the deadline for their adoption. See Regional Autonomy Law art. 132(1).

66 See Regional Autonomy Regulation art. 2(3).

67 See supra III.B.2.
if someone had asked each ministry what it did not want to transfer to the region and then pasted together the list without checking whether the wish list contradicted Article 7(2) of the Regional Autonomy Law. There are many examples of this. For example, how can the scheduling of the school year be a responsibility of the Central Government?\textsuperscript{68} Does this fall under “national standardisation”? We are left in the dark. Additionally, the maintenance of the National Hero Cemetery is found under the “social sector.”\textsuperscript{69} Yet, this so-called “social sector” is nowhere to be found in Article 7(2) of the Regional Autonomy Law.

In many fields where the regions had high hopes of being autonomous, the regions will, in fact, end up being simply the implementers of the Central Government’s policy if the Regional Autonomy Regulation is implemented as is. For example, in the important field of natural resources, the role of the Central Government encompasses a lot under the regulation.\textsuperscript{70} Many regions will be disappointed.

All this will create more uncertainty in the legal system. The Regional Autonomy Regulation is a maze; I simply cannot make head or tail of the Regional Autonomy Regulation and how it is supposed to be reconciled with the Regional Autonomy Law. When I look at other statutes adopted by the Central Government in the past, I am still quite unsure whether they now fall within the powers of the regions or the Central Government. In most cases, parts of the statute would fall within the powers of the regions, and parts would not. Most of the time, however, I am not exactly sure which parts.

d. \textit{Powers of the provinces}

(1) \textit{Cross border powers}

As discussed above, because the residual powers are with the regencies and cities, the provinces only have the powers specifically granted to them. Article 9(1) of the Regional Autonomy Law states:

\textsuperscript{68} See Regional Autonomy Law art. 2(3)(11)(h).

\textsuperscript{69} See id. art. 2(3)(12)(f).

\textsuperscript{70} See Article 2(3)3 of the Regional Autonomy Regulation, which reserves to the Central Government the determination of mining policies, which could turn out to be a very wide power. It also reserve the granting of business permits for oil and gas to the Central Government, as well as some role in cross province electricity. Regional Autonomy Regulation art. 2(3)3.
(1) Kewenangan Propinsi sebagai Daerah Otonom mencakup kewenangan dalam bidang pemerintahan yang bersifat lintas Kabupaten dan Kota, serta kewenangan dalam bidang pemerintahan tertentu lainnya.

This first paragraph is extremely vague. It is unclear as to what sectors cross a regency. Because roads cross regencies, are most public works on roads provincial? If a regency has no hospital and its population crosses over to the neighbouring regency to use its hospital, does that make health a provincial issue? And what exactly are these “other specific government sectors” that fall within provincial jurisdictions?

The clarifications on the Regional Autonomy Law (“Clarifications”) seem to try to elucidate this paragraph. Before looking at those, however, I should state that these government-issued clarifications are absolutely not binding and do not have the force of law. If they contradict in any way the law or the regulation they should be disregarded.

As examples of cross-regency sectors, the Clarifications mention public works, communications, forestry, and plantations. Why is forestry included but not mining? What is lacking is why these sectors are deemed provincial. What is the criterion? We are left in the dark. The regulations do not provide a definition.

(2) Powers in other specific government sectors

With respect to the “other specific government sectors” mentioned in Article 9(1), the Clarifications purport to stipulate what they are:

a. planning and control of regional development on a macro basis

b. training in certain areas . . .

71 Regional Autonomy Law art. 9(1).

72 See Penjelasan Undang-Undang No. 22, Th. 1999 Tentang Pemerintah Daerah [Clarifications on Law Number 22, Year 1999 on Regional Governments] [hereinafter Clarifications].

73 See Decision on Sources of Law, supra note 59, art. 4.
c. management of regional ports
d. environment control
e. trade and cultural/tourism promotion
f. handling of communicable disease and pests and
g. urban/rural planning of a province.  

Why these but not others? It is unclear by which authority a clarification to a regulation can purport to legislate the powers of a province especially when the clarification clearly contradicts the provision of the law itself. For example, Article 11(2) of the Regional Autonomy Law specifically states that the regencies and cities must regulate public works, communications, and the environment. The question, then, is how can the clarifications of a regulation purport to grant these powers to the provinces.

The Regional Autonomy Law does grant to the Central Government the power to adopt further regulations on Article 9, but of course only to the extent that the regulations do not directly contradict the law. This is not how the Central Government proceeded, however, at least at first, preferring to leave the matter to the Clarifications, which do not have the force of law.

Eventually, in the Regional Autonomy Regulation, the Central Government did attempt to stipulate what these provincial powers over “cross-border” matters and other sectors would comprise. In fact, the Regulation seems to grant to the province a rather large array of matters that, under the Regional Autonomy Law, should have been the responsibility of the regencies or city. Again, one could question whether this regulation granting wide powers to the provinces is ultra vires; the Regulation, in some instances, seems to directly contradict the Regional Autonomy Law. For example, the Regulation grants the

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74 See Clarifications, supra note 72.

75 See Regional Autonomy Law art. 12.

76 See id. art. 3.

77 The provinces are given jurisdiction in 20 sectors that do not seem to correspond to any specific enumerated power under the Regional Autonomy Law.
provinces many powers over agriculture and public works\textsuperscript{78} that the Law clearly reserved to the regencies and cities.\textsuperscript{79}

This whole “cross-border” / “other sectors” jurisdiction is a bit of a mess, to say the very least. It will leave investors with no clue as to where they should apply for a license.

\begin{enumerate}
\item [(3)] \textbf{Powers not implemented by regencies and cities}
\end{enumerate}

As if the distribution of powers was not yet confusing enough, Article 9(2) of the Regional Autonomy Law adds further confusion. It states:

\begin{enumerate}
\item [(2)] \textbf{Kewenangan Propinsi sebagai Daerah Otonom termasuk juga kewenangan yang tidak atau belum dapat dilaksanakan Daerah Kabupaten dan Daerah Kota.}\textsuperscript{80}
\end{enumerate}

This would mean that we will not be able to rely on the Regional Autonomy Law to know whether the province or the regency has power over a specific area. We will need to inquire as to whether the regency (or city) has exercised that power. If it has exercised the power, it has that power. If it has not, then the province has that power.

Determining which power is exercised or not will be extremely difficult. No guidance is provided as to how these powers are divided. If a regency exercises its health power to organise infant immunisations, does it inherit the whole of the health sector or is the province still responsible for hospitals? If, by immunising children, the regency suddenly inherits the entire health sector, do all the government doctors in the regency suddenly fall under the regency’s payroll? If a province has four regencies, and two of them exercise the health powers and two do not, would the province be in charge of health powers in two regencies only? If so, then does it means that tax payers from the two regencies that already have their own health services would also pay at the provincial level for health services in two other regencies? Do members of the provincial assembly who come from regencies that have their own health

\textsuperscript{78} See Regional Autonomy Regulation arts. 3(5)(1), 3(5)(14), 3(5)(15).

\textsuperscript{79} See Regional Autonomy Law art. 11.

\textsuperscript{80} \textit{Id.} art. 9(2).
service get to vote on how the health services should work in the two other regencies?

This creates what has come to be known in Canada as an asymmetric distribution of powers, because not all the provinces and all the regencies will have the same powers. In Canada, however, the asymmetry is defined in the Constitution, and, therefore, there is certainty and a certain permanency as to who is responsible for what. In Indonesia, however, the powers of the provinces and the regencies (and cities) will depend on the actual exercise of power, not on a legal delegation of powers by law. This means that the deal could be different in each and every province, regency, and city. Investors and constitutional scholars will have to check the actual legislation adopted by the regencies to determine whether they or the provinces have jurisdiction. Further, they will need to check often, because a regency could take away the powers exercised by the province simply by starting to exercise these powers anytime it feels like it.

Fortunately, there are a few exceptions to this confusion. Article 11(2) states that certain powers must (wajib) be implemented by the regencies and cities, which should mean that they cannot be implemented by the provinces. These powers include those relating to public works, health, education and culture, agriculture, communications, industry and trade, investment, the environment, land, cooperatives, and manpower. The Central Government, however, does not seem to read Article 11(2) as forbidding provincial jurisdiction in these matters, because the Central Government has stated that public works can be provincial, and that regencies can delegate these powers to the provinces.

The Regional Autonomy Regulation provides for a complex and detailed system by which regencies and cities may formally delegate their powers to the province. It requires the approval of the President. The Regional Autonomy Regulation even purports to allow the Central Government to exercise the powers delegated to a province by the regencies if the province is incapable of exercising them. This clearly contradicts the Regional Autonomy Law and maybe the Constitution,

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81 See supra Section II.B.2.d.
82 Regional Autonomy Regulation art. 4.
83 Id.
84 See id. art. 4 (i).
85 Article 7 of the Regional Autonomy Law states that the regions have all government powers except those granted to the Central Government by the law. A regulation could not grant to the Central Government a power that the law grants to the regions, even in cases where a regency has delegated this power to a province and that province does not exercise that power.
because the latter states that the Central Government powers are to be defined by law  (*undang-undang*), not by regulation. ⁸⁶ On the other hand, if a regency or city declares that it can now exercise a power that had previously been delegated to a province (or taken over by the Central Government), the power must be returned to the regency (or city). ⁸⁷

I am not sure that the Central Government has the power to adopt the above-mentioned detailed scheme of cross-delegation. The scheme was probably adopted as a complement to Article 9(2), but that article is about powers not implemented by regencies and cities and is not about cross-delegation of powers between provinces and regencies. It is also certainly not about the Central Government “stealing” powers away from the provinces and regencies and cities without any authority in the law.

(4) Powers as an administrative region

Provinces are also administrative regions of the Central Government and have delegated powers (*dekonsentrasi* as opposed to *desentralisasi*). ⁸⁸ The provinces do not exercise these powers as autonomous regions, and I will, therefore, not say more on the topic.

e. Powers of the regencies and cities

Not much need be said also with respect to the powers of regencies and cities. Whatever power is not assigned to another level of government belongs to the regencies and cities. ⁸⁹ These powers include those mentioned in Article 10 of the Regional Autonomy Law, the powers to manage national resources, responsibility for environmental protection, as well as for the exploitation and management of sea resources up to four nautical miles. ⁹⁰

f. Conclusion on the distribution of powers

The provisions of the Regional Autonomy Law and Regional Autonomy Regulation on the distribution of powers are not impressive.

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⁸⁶ INDON. CONST. art. 18(5) (as amended); also Second Amendment to the Basic Law, supra note 26.

⁸⁷ See Regional Autonomy Regulation art. 4(j).

⁸⁸ See Regional Autonomy Law art. 9(3).

⁹⁰ See *id.* art. 10(1), 10(2); supra note 56.
These provisions are confusing and contradictory, and many of the provisions of the Regulations are, in fact, probably not authorised by law (ultra vires).

If these two legal documents are implemented without amendments, those in the legal and business fields will be heading for confusing times. More importantly, these documents are unclear as to how the distribution of powers will satisfy the political and economic desires of the regions. Aceh and West Papua, for example, will not be satisfied by this maze of distributions, delegation, and appropriation of powers, which, at least in principle, grants the most important powers not to Aceh but to its eight regencies and two cities, and not to West Papua but to its nine regencies. Aceh and West Papua hopefully will be granted special autonomy eventually, but many provinces that will not be granted special autonomy will not be satisfied.

3. **Lack of conflict resolution mechanism**

There is great potential for dispute between the regions and the Central Government about which level of government has power over specific areas of government and whether a specific level of government has exceeded its powers. These documents, however, provide no satisfactory dispute settlement mechanism. Given the lack of a clear power of judicial review over government action by the regular courts, the lack of a conflict resolution mechanism in the Regional Autonomy Law is disturbing.

One provision of the Regional Autonomy Law, Article 89, does provide for the resolution of conflicts between regions.\(^{91}\) Also, another provision may curb the Central Government’s assertion of power though in a convoluted way. Article 114 allows the Central Government to cancel a regional regulation or the decision of a regional head that goes against public interest, a law of a higher rank, or other laws.\(^{92}\) Accordingly, the Central Government has the power to initiate the review of regional laws, regulations, and decisions that contradict the Regional Autonomy Law. This power might turn into a judicial review, because, if the region cannot accept the decision of the Central Government, it may file an objection.

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\(^{91}\) Article 89 provides that the Central Government must settle conflicts by discussion, but if one of the party does not accept the decision of the Central Government, then there is recourse to the Supreme Court. *Id.* art. 89.

\(^{92}\) Article 4 of the Decision on Sources of Law states that a legislation of a lower level cannot contradict a legislation of a higher level but does not provide a specific remedy. Decision on Sources of Law, *supra* note 59, art. 4. Article 114 of the Regional Autonomy Law provides the remedy.
with the Supreme Court (Mahkamah Agung), which presumably has the power to hear the case.  

Nonetheless, this conflict resolution procedure is unsatisfactory, because it can only be initiated by the Central Government against a region. The contrary is not possible, and, therefore, the powers of the provinces are not generally protected from intrusions by the Central Government. A province has no venue where it could argue, for example, that the Central Government has exceeded its powers in adopting the Regional Autonomy Regulations, as these contradict some of the provisions of the Regional Autonomy Law.

In fact, one could argue that any law of the Central Government can take away the powers of the regions, even inadvertently. Because the Central Government can cancel any law of a region that contradicts a law of a higher order, and because all laws of the Central Government are of a higher order, it might be argued that notwithstanding the promises of the Regional Autonomy Law, the Central Government may still exercise any power it wishes without having to amend the Regional Autonomy Law. After all, the Regional Autonomy Law is not a constitutional document, and any law adopted by the Central Government that exercises the powers granted to the regions can be interpreted as an implicit amendment to the Regional Autonomy Law.

This of course would defeat the very goal of the Regional Autonomy Law. To counter such an interpretation, the regions could make use of Article 18(5) of the Constitution, which provides that the regions are autonomous except in matters reserved to the Central Government by law. The argument would be that the Regional Autonomy Law has a quasi-constitutional status in that the Central Government may not exercise powers reserved to the regions without first amending the Regional Autonomy Law.

In other respects, however, the new amendment to the Constitution does not provide much help with respect to conflict resolution. Simply, the amendment states two principles on conflict resolution, but these remain vague and too general to be of much help. It states:

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93 Regional Autonomy Law art. 114(u).

94 See Decision on Sources of Law, supra note 59, art. 2 (ranking peraturan daerah (regional laws/regulations) last after all sources of law of the Central Government).

95 INDON. CONST. art. 18(5) (as amended); also Second Amendment to the Basic Law, supra note 26.
18A (1) *Hubungan wewenang antara pemerintah pusat dan pemerintahan daerah provinsi, kabupaten, dan kota, atau antara provinsi dan kabupaten dan kota, diatur dengan undang-undang dengan memperhatikan kekhususan dan keragaman daerah.*

(2) *Hubungan keuangan, pelayanan umum, pemanfaatan sumber daya alam dan sumber daya lainnya antara pemerintah pusat dan pemerintahan daerah diatur dan dilaksanakan secara adil dan selaras berdasarkan undang-undang.*

4. What else is not found in the law

   a. *Lack of mobility rights and of a prohibition of discrimination based on ethnicity, non residence and other factors*

   The implementation of regional autonomy might lead to the implementation of regional, local, or even religious, cultural, and ethnic discriminations and preferences. After all, the implementation of regional autonomy is partly due to the resentment of many non-Javanese against what they perceive as the economic exploitation of all of Indonesia by the peoples of Java. It would not be difficult, for example, to imagine that a local government in Riau would prefer to grant an exploitation licence to someone from Riau rather than to a Javanese.

   Some may not have a lot of sympathy for the large Javanese-controlled corporations that might suffer discrimination at the hands of regional authorities. Some may even see in this a certain rough justice through the return of the pendulum. Nonetheless, these kinds of discriminations should concern us, because building a fair and just legal system is difficult when one accepts as a premise that discriminations are acceptable or should be tolerated. Switch “Javanese-controlled” with “Chinese-controlled,” and already the problem becomes more obvious. It

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96 INDON. CONST. art. 18A (as amended); *also* Second Amendment to the Basic Law, *supra* note 26.
is possible, of course, to make an argument in favor of affirmative action, but this argument for positive discrimination should, at least, be made. Indeed, if affirmative action is the chosen path, the Central Government should clarify which discriminations are acceptable to undo the injustices of the past. The law should recognise which discriminations are acceptable and which are not.

Looking at small entrepreneurs or workers trying to make a living better illustrates the problem. I was particularly disturbed by the view amongst many ordinary Indonesians that regional autonomy will allow them to discriminate against people who are not from their region, and that, for example, natural resources should be reserved for people from their region. This is particularly disturbing when we realise that no matter how long one has lived in a given region, if he or she does not speak the local language, he or she is considered a stranger.\footnote{One must know the politics of languages in Indonesia to fully understand the potential for discrimination. The national language is Bahasa Indonesia, which is the language of instruction in schools which almost everyone now speaks (except some older folks and pre-school kids who may only speak their local languages). Those who are not from a particular region but live in that region will readily be identified as foreigners, because they do not speak the local language. For example, many of my Indonesian friends have lived in Yogyakarta for years, and yet they are often overcharged at stores because they do not speak Javanese.}

One telling example illustrates my concern. Regions are to be given autonomy over the management of sea resources up to 12 nautical miles from the littoral.\footnote{See supra note 56.} Even before the implementation of regional autonomy, fishermen in one of the kabupaten of Central Java have sought to exclude from “their” waters the fishermen from a neighboring kabupaten.\footnote{See Violence may flair up where it’s least expected, JAKARTA POST, Jan. 22, 1999, available at LEXIS, News. See also [Vice-President] concerned about possible conflict among fishermen, JAKARTA POST, Dec. 19, 2000, available at LEXIS, News.} Also, local authorities in Bali have effectively tried to curb commerce by Javanese in such popular place as Kuta Beach.\footnote{Kuta incident leaves hawkers out in the cold, JAKARTA POST, May 17, 1999, available at LEXIS, News.} One wonders whether these kinds of discriminations exacerbated by the implementation of regional autonomy may adversely affect transmigrants and other Indonesians who, in the future, might be seeking jobs in regions where they were not born. Many civil servants will need to be transferred to the regional authorities. Will they be welcomed if they have no link to the region?
My concerns in this respect are very much influenced by my origin. My concerns fall under a category called “mobility rights,” a term used in Canadian constitutional law. Canada is a federation where provinces have widespread powers that could allow them to effectively put barriers to the mobility of Canadians. One province could state that to be a lawyer in that province, one must have taken a course in that province, no matter how qualified that person is. Another province could require that construction workers be residents of the province to qualify for the permit to work as a construction worker, thus preventing workers from a neighbouring province from commuting to work. These kinds of rules have been held to be unconstitutional in Canada as being in violation of Section 6 of the Canadian Charter of Rights and Freedoms.101

Indonesia has no direct equivalent to this Canadian provision guaranteeing a mobility right. Including a provision on mobility in the new law on regional autonomy may have been an effective way of providing such a guarantee. Perhaps the closest provision in the Regional Autonomy Law is the reservation of religion to the Central Government,

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101 Article 6 of the Canadian Charter of Rights and Freedoms provides:

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.
which would probably prevent discrimination based on religion by local governments.

The Indonesian Constitution also lacks a clear provision on mobility. Although Article 27 of the Constitution guarantees equality between citizens, given the lack of enforcement of constitutional provisions, it is far from clear whether Article 27 will effectively guarantee equality.\textsuperscript{102} The recently adopted amendment to the Constitution provides some hope, however. Several provisions may indeed guarantee a right to mobility, at least, in principle. For example, there are provisions guaranteeing the equality of all before the law,\textsuperscript{103} the right to work,\textsuperscript{104} the right for all citizens to equal opportunity from the administration,\textsuperscript{105} more importantly, the right to chose one’s work and place of residence\textsuperscript{106} and the right not to be discriminated against.\textsuperscript{107} One must note, however, that there is no tradition of respect for or enforcement of constitutional rights in Indonesia.

b. \textit{Lack of modalities for the transfer of infrastructures and personnel to local authorities}

When responsibilities are transferred from one government to another, one must also plan for the transfer of infrastructures and, most importantly, of personnel. Those numerous institutions and people who for years were under the supervision of the Central Government will now fall under the regional governments. Schools, hospitals, whole ministries, and their personnel will be transferred. This is a huge task that may lead to a lot of instability and teething problems. In fact, an estimated 2.6 of the 4.2 million Central Government employees will be transferred to the regions.\textsuperscript{108}

With respect to personnel, the Regional Autonomy Law clearly states that “the region shall have the power to appoint, transfer, discharge,

\textsuperscript{102} \textit{INDON. CONST.} art. 27.
\textsuperscript{103} \textit{Id.} art. 28(D)1.
\textsuperscript{104} \textit{Id.} art. 28(D)(2).
\textsuperscript{105} \textit{Id.} art. 28(D)(3).
\textsuperscript{106} \textit{Id.} art. 28E(1).
\textsuperscript{107} \textit{Id.} art. 28I(2).
\textsuperscript{108} 2.6 million civil servants to be transferred: \textit{Minister, JAKARTA POST}, Oct. 14, 2000, \textit{available at LEXIS, News}. 
stipulate the pension, salaries, allowances and welfare of the personnel . . .”

The Central Government remains responsible, however, for policies regarding the state administrative system (sistem administrasi negara). Whether this grants the Central Government any responsibility with respect to appointments of government employees is unclear. Nonetheless, the Regional Autonomy Regulations adopted under the law by the Central Government purport to reserve to the Central Government the powers to:

determine the standards and procedures concerning the planning, appointment, transfer, discharge, the stipulation of pensions, salaries, allowances, welfare, rights and responsibilities along with the legal status of civil servants and civil servants in the regions.

This regulation seems to directly contradict the provisions of Article 76 of the Regional Autonomy Law quoted above. How can the Central Government establish the standards and procedures without taking the whole field away from the regions? It seems to be a good example of how the Wahid government is trying to undo the effects of the Regional Autonomy Law through regulations. Although I do have a lot of sympathy for what the Central Government is trying to do (to give itself the power to protect civil servants), the way it is trying to do it shows some disregard for the legal and constitutional order. A regulation should not negate almost completely the effect of a law. If Indonesia had a good court system able to conduct judicial review of government actions, the validity of the regulation could certainly be contested. If one does not like a law, one should amend it.

The transfer of infrastructures and human resources is provided in Article 8(1) of the Regional Autonomy Law:

The government powers handed over to the regions in the context of decentralisation must be accompanied by the delegation and transfer of financing, facilities and

109 Regional Autonomy Law art. 76 (“Daerah mempunyai kewenangan untuk melakukan pangangkatan, pemindahan, pemberhentian, penetapan pensiun, gaji, tunjangan dan kesejahteraan pegawai . . .”).

110 Id. art. 7(2).

111 Regional Autonomy Regulation art. 2(3)(19)(g) (“Penetapan standar dan prosedur mengenai perencanaan, pengangkatan, pemindahan, pemberhentian, penetapan pensiun, gaji, tunjangan, kesejahteraan, hak dan kewajiban dan kedudukan hukum pegawai negeri sipil dan pegawai negeri sipil di Daerah”).
infrastructures, as well as human resources relating to these transferred powers.\textsuperscript{112}

In case the preceding article was not clear enough, the transfer of agencies and their assets to the regions is also specifically provided by Article 129, which states that:

(2) Vertical agencies\textsuperscript{113} in the region, other than those handling foreign affairs, defence and security affairs, judicial affairs, monetary and fiscal affairs, and religious affairs as meant in Article 7 shall become regional agencies.

(3) The assets of all vertical agencies that become regional agencies as provided for in paragraph (2), are transferred and become the property of the region.\textsuperscript{114}

This provision does not grant to the Central Government the right to make regulations to facilitate this transfer. Given the incredible difficulties that are bound to arise in the division of assets, one would have expected quite a few more details and a dispute settlement process.

c. Lack of clear procedure for the approval of foreign investment

Indonesia is in desperate need of foreign investment. The present political and legal situation has discouraged investments, and this is one of the main reasons for the very slow economic recovery of Indonesia.\textsuperscript{115} Under such circumstances, one would think that fewer, not more, hurdles would be put in the way of investors, foreign or domestic. Unfortunately, the Regional Autonomy Law adds new hurdles and many new uncertainties.

\textsuperscript{112} “Kewenangan Pemerintahan yang diserahkan kepada Daerah rangka desentralisasi harus disertai dengan penyerahan dan pengalihan pembiayaan, sarana dan prasarana, serta sumber daya manusia sesuai dengan kewenangan yang diserahkan tersebut.” Regional Autonomy Law art. 8(1).

\textsuperscript{113} Vertical agencies are defined as “the apparatuses of ministries and non-ministerial government institutions in the region” (“perangkat Departemen dan atau Lembaga Pemerintah Non-Departemen di Daerah”). Id.

\textsuperscript{114} Id. art. 129.

\textsuperscript{115} Govt mulling incentives to lure back foreign investors, JAKARTA POST, May 24, 2000, available at LEXIS, News.
As if it was not difficult enough to obtain licences from the one Central Government in Indonesia, most investors will now need to get the approval of many regional authorities. Article 10 of the Regional Autonomy Law grants to the regions the power to manage natural resources in their territories, including those within their territorial waters.\(^{116}\) This includes the powers over environmental matters. Any investment that intends to exploit natural resources or which may have an environmental impact will therefore need the approval of the region.

Even more specifically, Article 11(2) provides that regional government will handle investment (penanaman modal), as well as industry and trade (industri dan perdagangan) and the environment (lingkungan hidup). This would certainly cover most foreign investments.\(^{117}\)

The transfer of investment approval to the region will not be seen as an improvement by foreign investors. The rules will vary from region to region, making it difficult to predict the result of applications for licences. The regions are also ill-equipped to deal with such applications. If this transfer of powers to regional governments were complete, it would not be so bad; investors would have to deal with regional governments instead of dealing with the Central Government. Unfortunately, it seems that, in many instances, foreign investors will have to deal with both the central and the regional governments.

Indeed, the Central Government does retain some powers that may affect investment. For example, it keeps the powers relating to foreign affairs, which means that it can enter into international agreements protecting foreign investments in Indonesia. It also retains the power to make policies on the efficient use of natural resources and strategic high technologies as well as conservation.\(^{118}\) I am far from sure whether this means that the Central Government has the power to require that investors seek a “central” license. This is what the Central Government asserts, however, in its regulations. The Central Government purports to grant itself the power to grant “principal business licenses” (inzin usaha inti) for oil, gas, and electricity exploitation,\(^{119}\) and the issuance of licenses for investment in strategic technologies.\(^{120}\) All of this creates the kind of

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\(^{116}\) Regional Autonomy Law art. 10. Article 3 defines territorial waters as those within 12 nautical miles of the littoral. *Id.* art. 3.

\(^{117}\) *Id.* art. 11(2).

\(^{118}\) See *id.* art. 7(2).


\(^{120}\) *Id.* art. 2(3)(7). What “investment in strategic technologies” means is also unclear.
complexity and uncertainty that one should avoid when seeking to attract new investments.

d. **Lack of sufficient protection against KKN and money politics**

The rules and standards of conduct of regional authorities could be the object of another paper. The Regional Autonomy Law does provide a rather detailed structure for the main regional authorities (province and regencies). In fact, that law is mainly about the form and structure of regional authorities.\textsuperscript{121}

The Regional Autonomy Law contains many of the safeguards one would expect in a law creating regional governments. For example, many officials are required to be free from any criminal convictions and to reveal their personal wealth.\textsuperscript{122} Officials are accountable to elected assemblies and may be investigated by them.\textsuperscript{123} There are also rules against conflicts of interest.\textsuperscript{124}

Other laws also provide some guidelines. For example, the provisions of the Law for a Clean State Apparatus Free of Corruption, Collusion and Nepotism\textsuperscript{125} would most certainly bind the holders of office

\textsuperscript{121} Articles 14 to 77 and 90 to 111 of the Regional Autonomy Law are devoted to the form and structure of regional administrations. This means that 86 articles out of a law that contains 134 articles (or 64\% of the articles) are devoted to the organisation of regional governments.

\textsuperscript{122} \textit{E.g.}, Regional Autonomy Law arts. 33(h), 33(k). On fresh criminal acts committed while in office, see Article 51. Treason and other acts that may lead to the disintegration of the Unitary State are specifically dealt with in Article 52.

\textsuperscript{123} \textit{See, e.g.}, \textit{id.} arts. 19(1)(a), 19(1)(c), 55.

\textsuperscript{124} Article 48, for example, states that a regional head shall not make decisions that “shall benefit himself, members of his family, his cronies (kroninya).” \textit{Id.} art. 48(b). The Regional Autonomy Law, however, fails to define the term crony.

\textsuperscript{125} Undang-Undang R.I. No. 38 Th. 1999 Tentang Penyelenggara Negara Yang Bersih dan Bebas Dari Korupsi, Kolusi Dan Nepotisme [Law Number 38 for a Clean State Apparatus Free of Corruption, Collusion and Nepotism (1999)] [hereinafter Anti-corruption Law].
That law forbids corruption, collusion, and nepotism and other corrupt practices.\textsuperscript{127} I am not the type of jurist who believes in instantaneous positivism. I do not believe that, because laws are adopted, suddenly public office holders will behave morally and will suddenly respect the rule of law. Unfortunately, there seems to be a lot of instantaneous positivism in Indonesia. The commendable enthusiasm for the rule of law may have fostered the naïve belief amongst many that all that needs to be done is to change the laws. That belief is sometimes also shared by international funding agencies. Even the IMF seemed to believe that the rapid adoption of a new bankruptcy law would solve many economic problems and alleviate corrupt practices, which of course did not happen.\textsuperscript{128}

Indonesia is unlikely to efficiently implement laws on corrupt practices anytime soon. The courts are unprepared or unwilling to apply any such law because of incompetence, self-interest, or corruption.\textsuperscript{129} The prosecutorial apparatus is inefficient or sometimes itself corrupt;\textsuperscript{130} the police are almost useless. Several factors make the risk of corruption, collusion, and nepotism even greater in the case of the soon-to-be-empowered regional authorities as opposed to the Central Government.

First, the monitoring of these authorities will be very difficult given their number. It might have been possible to monitor rather closely

\textsuperscript{126} The governor is specifically mentioned in Article 2 as one of the office holders bound by the law. \textit{Id.} art. 2. Other regional office holders would most certainly fall under the general provisions found in Articles 2(6) and 2(7). Because this anti-corruption law was adopted before the Regional Autonomy Law, newly created elected offices are not mentioned specifically.

\textsuperscript{127} \textit{See id.} art. 5.

\textsuperscript{128} The International Monetary Fund has financed a reform of bankruptcy laws in Indonesia. \textit{See generally} Timothy A. Manring, \textit{Debt Restructuring in Indonesia}, 3 SING. J. INT’L & COMP. L. 58 (1999). This reform, focusing too much on the written law, was a complete failure due mainly it seems to “ill-will or ulterior motives” (I would say more bluntly, probably corruption) on the part of the judges. \textit{See} Sebastiaan Pompe, \textit{Absen dari reformasi: the Indonesian judiciary in the face of history}, I INDON. L. & ADMIN. REV. 73, 76-77 (1997).

\textsuperscript{129} Recent court decisions in many fields have proven, time and again, that the courts are either incompetent in applying laws or, more likely, still extremely corrupt. The recent case relating to the Bank Bali scandal is proof of that. \textit{See Reform the judiciary, JAKARTA POST}, Mar. 13, 2000, \textit{available at LEXIS}, News.

\textsuperscript{130} At least, the Attorney General (\textit{Jaksa Agung}), Darusman Marzuki, seems beyond reproach, but the same cannot be said of many, if not most, of his staff. The fact that the leader of the prosecute is not corrupt is an encouraging sign.
the governments of the 30 provinces, but there are now more than 360 regencies, making their monitoring next to impossible.

Second, two years after the fall of Soeharto, the attention of the national media and the new openness of debates in Parliament have been unable to stop corrupt practices at the national level. The regional media are usually at the provincial level rather than at the regency level. Although they do report a few local items from the regencies, it is unlikely that the regencies will be submitted to the kind of media scrutiny the Central Government is now submitted to.

Third, whereas assembling a critical mass of competent politicians to scrutinise the government might be possible at the provincial level, finding competent politicians at the regency and city level will be much more difficult, given the large numbers of assemblies to be formed. One can, thus, safely assume that, at the local level, corruption and money politics will go on as usual. The law already requires that some regional officers be democratically elected, but this did not stop the practice of vote buying and collusion. In fact, when asked how the Central Government would ensure that the corruption at the Central Government level is not transferred to the local level, the then-Minister of Regional Autonomy simply said, “KKN [corruption, collusion and nepotism] is already unofficially transferred [to the regions].”

Fourth, the complex electoral process for governors and Regents leaves a lot of place for back door politicking and corrupt pressures and practices. Essentially, these officers are not directly elected by the people and are selected by the assembly after a somewhat obscure consultation process. Candidacies must first be vetted and approved by an election committee of the assembly. Then, the different factions of the assembly must put forward the candidate of their choice, along with his or her deputy. They must choose them from the previously approved list of candidates. Next, the leadership of the regional assembly along with the leadership of the factions must agree on at least two pairs of candidates. In the case of a governor, the president must be consulted.

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131 See, for example, the circumstances that led to the election of the PDI mayor of Medan—money politics is alive and well. Donna K. Woodward, Money politics popular in Medan, JAKARTA POST, Apr. 8, 2000, available at LEXIS, News.


133 Regional Autonomy Law arts. 34, 35.

134 Id. art. 36.

135 Id. art. 37.
on these selected candidates.\textsuperscript{136} Finally, the assembly submits the approved candidates to a vote.\textsuperscript{137}

In short, the regency level lacks a democratic culture and tradition, and it is unlikely that the sudden transfer of important responsibilities and the elections of leaders will lead to sudden democracy and respect for the rule of law. The local authorities are unprepared and have no record of competence in any of their new areas of responsibilities.\textsuperscript{138} I am quite pessimistic; I think that these laws could result in a grave disaster.

e. \textit{Lack of complete rules for the continuation of laws}

Article 127 of the Regional Autonomy Law states that

\begin{quote}
Selama belum ditetapkan peraturan pelaksanaan undang-undang ini, seluruh instruksi, petunjuk, atau pedoman yang ada atau yang diadakan oleh Pemerintah [Pusat] dan Pemerintah Daerah, jika tidak bertentangan dengan undang-undang ini dinyatakan tetap berlaku.
\end{quote}

This provision is simply too limited for several reasons. First, it is restricted to “instructions, directives and guidelines” and, therefore, does not cover legislation and regulations. When powers are transferred to a regional authority, it is important to state clearly that present laws and regulations adopted by the Central Government before the transfer of powers continue to apply, unless and until new laws are adopted by the regional authorities by virtue of their new powers. Unless this is done, then it remains unclear which laws continue to apply. For example, a law

\textsuperscript{136} \textit{Id.} art. 38(1). The law is silent as to what happens if the president disapproves the candidates brought to him.

\textsuperscript{137} \textit{Id.} arts. 39, 40.

\textsuperscript{138} See Experts: Regions unprepared for regional autonomy, \textit{JAKARTA POST}, Aug. 2, 2000, \textit{available at LEXIS}, News. Even more damming is the statement by the then Minister of Regional Autonomy Ryaas Rasyid that “if we were to objectively observe the situation of human resources at the local level, we might have to say that this is not the time to decentralize.” See response to question 7 in \textit{Govt-Bus. Dialogue, supra} note 132

\textsuperscript{139} Regional Autonomy Law art. 127.
adopted by the Central Government might determine that a certain office holder in Jakarta has the authority to grant a certain licence in a field of government that, on January 1\textsuperscript{st}, 2001, will belong to the regions. The continuances of law would allow that officer to continue to grant licences under the old law until a new law is adopted by a region. The lack of a provision for the continuance of laws will lead to all kinds of unexpected and unpredictable holes in the law. This principle of the continuance of laws is nowhere stated in the Regional Autonomy Law.

f. Lack of any role for the armed forces

Failure to mention the armed forces in the Regional Autonomy Law is cause for celebration. The armed forces continue to play a significant if reduced role in the legislative process of the Central Government. When it comes to regional assemblies and leaders, however, the armed forces have no specific role and are not entitled to any special representation. No seats and no positions are reserved for members of the armed forces.\textsuperscript{140} This marks the end of the \textit{dwifungsi},\textsuperscript{141} which will continue only at the central level (legally that is).

C. Three Comments on Fiscal Arrangements

I will leave to economists the discussion of the financial aspects of this restructuring of government organisations in Indonesia. This paper, in fact, does not intend to go into the details of the financing of regional governments. Though I lack the financial and economic expertise required to even understand some of these issues, I would like to make three tentative comments from a jurist’s point of view.

First, planning the proper financing of regional governments must be difficult when it is still far from certain and clear what their responsibilities will be. I sincerely have no clue how government economists planned for fiscal year 2001.

Second, before committing to the transfer of a percentage of taxes and revenues from natural resources to the regions, the Central Government should have determined in detail what the responsibilities of these governments would be and, then, should have found the best way of financing them. Usually, budgets are planned and adopted once it is clear


\textsuperscript{141} \textit{Dwifungsi} literally means double-function or two functions. It describes the fact that the army had and continues to have a political function in addition to its regular function of defending the country and maintaining order.
what government programmes will be in place and which government will administer them. Budgets should follow and support the law, not precede it. This was not the case in Indonesia; politicians discussed the proper percentages to be transferred to the regions before determining the responsibilities of the regions.

Third, the drive for regional autonomy might only help rich regions and could hurt poorer ones. A few measures in the Fiscal Balance Law try to address the need for equalisation between the regions, but, unfortunately, there seems to be very few guarantees that the poor regions will not be worse off.\textsuperscript{142}

D. Unrealistic Implementation Deadlines

I frankly cannot believe that the laws and regulations on regional autonomy are to be implemented by January 2001. I fail to see how the regional governments will be ready, the transfer of infrastructures and personnel complete and the financing in place. It seems clear, however, that the Regional Autonomy Law will come into force in January 2001. I am sorry to say that we are most probably heading for a disaster.

Also needed is a thorough study of the impact of these laws and regulations on other laws and regulations. Some foreign advisors have pointed to the need to review all legislation to ensure compliance with the new distribution of powers and new administrative structures. For example, laws authorising a minister of the Central Government to grant a certain license should be reviewed to decide whether the Central Government still has the power to grant such licenses. If not, then the regional government with that power should adopt new legislation that indicates which regional officer will have the power to issue that license. To avoid legal chaos, this should be done for each and every law, in each and every region, before the implementation of the regional autonomy laws and regulations. This simply cannot be done by January 2001. At least, the Central Government should adopt all the necessary regulations for the implementation of the law before it is implemented, as was recommended by the MPR.\textsuperscript{143} In which case, a lot of work needs to be done over the next few weeks.

\textsuperscript{142} The main thing that the Regional Autonomy Law and the Fiscal Balance Law transfer is the management of and some of the revenue from natural resources. Many Indonesian regions have almost no natural resources whatsoever (e.g. Flores) or are overpopulated for the little natural resources they have (e.g., Java and Bali). It is hard to see how they could profit from these laws. The MPR has asked that the rich regions be mindful of the need for a sense of justice and appropriateness. \textit{See MPR's Policy Recommendations, supra} note 14, Recommendation 5.

\textsuperscript{143} \textit{MPR's Policy Recommendations, supra} note 14, Recommendation 2(a).
IV. CONCLUSION

No one will deny the need for a regionalisation of powers in Indonesia. In fact, the very survival of Indonesia as we know it might depend on satisfying the desire of many regions for more autonomy. No doubt, a fairer distribution of revenues and resources must also be implemented. No one will deny the urgency and political imperatives of acting quickly in granting more autonomy to the regions. Given this urgency, it is to be expected that, to a certain extent, the laws and regulations would have some shortcomings. Under the best of circumstances, shortcomings are always unavoidable when such a tremendous legislative reform is put into place. It is extremely important when new government authorities and jurisdictions are defined, however, to make sure that the divisions of powers are as limpid as can be so that the validity of future laws is not questioned, that not every law faces as an ultra vires argument.

I should stress again that these laws are not like any other laws. In a law that provides for regional autonomy, leaving it to the Central Government to determine the content of the transfer of powers at its whole discretion will simply defeat the whole purpose of the law. Regions will not be satisfied with a delegation of powers that may be taken away by the Central Government at any time. Longer-term guaranties are necessary, and clarifying the law is one way of achieving this.

Unfortunately, as discussed, the laws and regulations that have been adopted to implement regional autonomy are flawed, unclear, and contradictory. Their implementation in 2001 would probably worsen the sad state of government administration in Indonesia. The resulting uncertainty will hurt business. Restive regions will not be satisfied and will probably feel cheated by the Central Government. In short, in my opinion, these laws and regulations, in their present state, and at least from a legal point of view, are a recipe for disaster.

In a way though, we are doomed if we do and doomed if we don’t. If the regionalisation process is stopped, or even slowed down, at this point, many local politicians will see this as a sign of the Central Government’s unwillingness to transfer powers to the regions. From a political point of view, the perception that regionalisation is going ahead at full speed is important. Legal uncertainty may therefore well be the best of very few options at this point.

Hopefully, the present government will be able to do a complete revision of the laws and regulations on regional autonomy before, if not at least soon after, their implementation without giving the impression that it is not sincere in its desire to transfer powers to the regions. I hope that
by pointing out what I perceive as the many shortcomings of the laws and regulations, I could be of some help. I hope that soon the necessary arrangements can be put in place and that the delegation of powers to the regions will go smoothly after all notwithstanding the shortcomings of the laws and regulations. We have to hope for this as the alternatives are simply too scary.