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## Regional Autonomy and Respect for Human Rights

– Indonesia's Obligation to Ensure that Women are not  
Discriminated in Local Regulations

A Minor Field Study

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# Summary

Indonesia has ratified the crucial international human rights treaties obligating states to eliminate discrimination against women – the CEDAW, the ICCPR and the ICESCR. Yet discrimination against women exists in Indonesia, especially fuelled by local regulations able to arise due to the country's strong regional autonomy. Enacted either at province, regency or city level, these regulations contradict not only the human right treaties, but also Indonesia's Constitution and national law. Numerous institutions, mechanisms and processes exist to prevent enactment of, or amend or annul, such discriminatory local regulations. Despite this, however, their numbers are steadily growing.

This thesis was conducted with the main aim of investigating if Indonesia can be considered to fulfill its international human rights obligation to ensure that women are not discriminated, taking into consideration that discriminatory local Indonesian regulations exist and assessing if the measures taken to prevent, amend or annul them are sufficiently adequate. This was accomplished through interviewing representatives from Indonesian Ministries and National Commissions plus an international human rights NGO, as well as translating Indonesian law text (a two-month research trip to the country's capital of Jakarta was partially funded by a Minor Field Study scholarship from the Swedish government agency Sida). Additional sources were textbooks, reports, news articles and, especially, official documents from the international treaty committees.

The thesis found that Indonesia does not live up to its international obligations – a conclusion reached through three separate assessments: whether or not Indonesia fulfills 1) its obligation to enact national law that prohibits discrimination of women in general (yes); 2) its obligation to prevent the enactment of local regulations that discriminate against women (no, despite the many existing possibilities for doing so); and 3) its obligation to amend and annul local regulations that discriminate against women (no, despite the many existing possibilities for doing so).

The thesis also synthesized thoughts presented to the author concerning a second research question: why local regulations that discriminate against women exist in Indonesia (lack of knowledge about human rights, cultural reasons, religious reasons, ineffective institutions and processes for prevention/amendment/annulment, and political interests) and what Indonesia can do to address this problem (most importantly increased and intelligently designed education in human rights for all members of society).

# Sammanfattning

Indonesien har ratificerat de viktiga internationella mänskliga rättigheterstraktaten som ålägger stater att eliminera diskriminering av kvinnor – CEDAW, ICCPR och ICESCR. Ändå existerar omfattande diskriminering av kvinnor i landet, underblåst särskilt av lokala regleringar som tillkommit genom den starka regionala autonomin. Dessa regleringar, antagna på provins-, region- eller stadsnivå, bryter inte bara mot nämnda traktat utan också mot landets grundlag och nationella lagstiftning. Flertalet institutioner, mekanismer och processer finns för att förhindra, ändra eller upphäva dessa lokala regleringar, men trots detta växer de ständigt i antal.

Denna uppsats primära syfte var att undersöka om Indonesien kan sägas uppfylla sitt internationella åtagande att inte diskriminera kvinnor, särskilt utifrån utgångspunkten att lokala Indonesiska regleringar som diskriminerar kvinnor existerar, samt att utvärdera ifall tagna åtgärder för att förhindra, ändra eller upphäva dessa regleringar är tillräckliga. Detta åstadkoms genom att intervjua representanter från indonesiska ministerier och nationella kommissioner, plus en internationell NGO verksam inom området mänskliga rättigheter, samt genom att översätta indonesisk lagtext (en två månader lång forskningsresa till huvudstaden Jakarta behjälptes av en Minor Field Study-stipendium från Sida). Övriga källor utgjordes av textböcker, rapporter, nyhetsartiklar och, framförallt, officiella dokument från kommittéerna för de internationella traktaten om de mänskliga rättigheterna.

Uppsatsen fann att Indonesien inte lever upp till sitt internationella åtagande – en slutsats nådd genom tre separata utvärderingar: 1) ifall Indonesien uppfyller sitt åtagande om att anta nationell lagstiftning som förbjuder diskriminering av kvinnor i allmänhet (ja); 2) ifall Indonesien uppfyller sitt åtagande att förhindra antagandet av lokala regleringar som diskriminerar kvinnor (nej); och 3) ifall Indonesien uppfyller sitt åtagande att ändra och upphäva lokala regleringar som diskriminerar kvinnor (nej).

Uppsatsen syntetiserade också tankar framförda till författaren angående en andra forskningsfråga: varför lokala regleringar som diskriminerar kvinnor existerar i Indonesien (bristande kunskaper om mänskliga rättigheter, kulturella skäl, religiösa skäl, ineffektiva institutioner och processer för förhindrande/förändring/upphävning, och politiska intressen) och vad landet kan göra för att adressera detta problem (viktigast är utökad och intelligent utformad utbildning inom mänskliga rättigheter för alla medborgare).

# Preface

Many people have aided me in the writing of this thesis. Collectively, I want to thank them all for opening their doors to me.

I am deeply thankful to Muhammad Dimas Saudian, Head of Human Rights Legislation Section under the Directorate General of Human Rights, Ministry of Law and Human Rights, for his preparation and translation of necessary documents and legislation, for arranging meetings and putting me in contact with government officials for my interviews, and for helping with interpretation work. He also deserves thanks for having patience with all my questions and for sharing his knowledge with me. The thesis would not be as in-depth without his help.

I would like to thank all my interviewees for contributing to my field study with their knowledge, experience and time, thereby giving me the most valuable material of this thesis. I hope my work can do them justice.

I am grateful to the staff at the Swedish Embassy in Jakarta for a thoroughly rewarding and interesting internship during the autumn 2013. During my time there I learned immensely about the topic of this thesis.

I extend my thanks to my contact person in Jakarta, Christian Ranheim, Head, Indonesia Office, Raoul Wallenberg Institute, for his valuable and quick guidance and input on my thesis.

I would also like to thank my supervisor Göran Melander for input and support during the course of my work.

Malmö, 27 May 2014  
Cecilia Sandqvist

# Abbreviations

ASEAN	Association of Southeast Asian Nations
CCPR	Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
DGHR	Directorate General of Human Rights
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
Komnas HAM	National Commission of Human Rights
Komnas Perempuan	National Commission on Violence Against Women
MoHA	Ministry of Home Affairs
MoLHR	Ministry of Law and Human Rights
MoWECP	Ministry of Women Empowerment and Child Protection
NGO	Non-Governmental Organization
RANHAM	National Plan of Action on Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations



# 1 Introduction

## 1.1 Background

Indonesia is the world's fourth most populous country, the world's largest archipelagic state with 6,000 inhabited islands, and the country with the world's largest Muslim population – 87.2 % out of approximately 250 million people.<sup>1</sup>

Indonesia's history of Dutch colonization stretched from the 17<sup>th</sup> century until the Japanese occupation during World War II (1942-1945). The soon-to-become first president, President Soekarno (1945-1967), declared the country an independent state in 1945. The Presidency was later taken over by General Soeharto (1967-1998). These two leaders were of differing political convictions and encouraged different practices, but they were both authoritarian: both housed little tolerance for opposition and ordained approaches of strong centralized ruling.<sup>2</sup>

During the *New Order*, the ruling period of Soeharto, local governments were only an extension of the central government, helping with implementation of national policies and regulations. Many provinces were unsatisfied with the central power, which restricted their ideological, cultural and religious freedom as well as exploiting their natural resources without sharing in the profits. After Soeharto's resignation in 1998, the *Reform Era* followed and the country was marked by riots, separatist violence and the secession of East Timor.<sup>3</sup> The new government responded with decentralization: a "regional autonomy" (*otonomi daerah*) program that granted provinces, regencies and cities autonomy.<sup>4</sup> It was stressed that this narrowing of the distance between the people and its government strengthened democracy in the country.<sup>5</sup>

However, the regional autonomy is today not solely seen to be positive for the country and its people. The decentralization gave local governments more power and influence and led to a highly increased amount of local governments and parliaments: in 2013 Indonesia had 34 provinces, 412 regencies and 93 cities<sup>6</sup>, all with legislative mandates.

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<sup>1</sup> CIA (2014).

<sup>2</sup> Brown (2003), p. 72, 185; Berkley Center (2014).

<sup>3</sup> Brown (2003), p. 185.

<sup>4</sup> Butt (2010), p. 177f; cf. Robinson (2009), p. 171.

<sup>5</sup> Komnas Perempuan (2010), p. 59.

<sup>6</sup> MoHA (2013).

Many different cultures, religions and languages co-exist in Indonesia. Many parts of the country are still remote and the culture of a given community and its traditions are sometimes stronger than the central laws and structures. This has increased the risk of local regulations being passed that contradict higher national laws or even the Constitution. Local regulations on people's private spheres are often pointing at women. The Human Rights Committee (CCPR), the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the National Commission on Violence Against Women (Komnas Perempuan) have all claimed that the regional autonomy has led to an increase in local regulations that discriminate against women, and to thereby have taken the country further away from, rather than closer to, compliance with the country's international obligations concerning human rights and gender equality.<sup>7</sup>

The sheer volume of local regulations has made it difficult for the central Government to ensure that they all respect human rights and the prohibition of discrimination set out in the international human rights treaties. Indonesia has received critique for this from the human rights treaty bodies as well as from international and national human rights organizations, all urging the Government and Parliament to revise all discriminative local regulations.

At the same time, Indonesia has put human rights on its international and regional political agenda, continues to celebrate its democratic credentials, aims to become a strong regional advocate of human rights and democracy, and had a leadership role on the establishment of Asia's first human rights body, the Association of Southeast Asian Nations's (ASEAN) Intergovernmental Commission on Human Rights, established in 2009.<sup>8</sup> The country has been praised by international leaders and dignitaries from other states for being a role model that exemplifies how even an overwhelmingly Muslim country can harbor good human rights conditions, especially in terms of women's rights.

## 1.2 Purpose and Research Questions

The purpose of this thesis is to investigate if Indonesia, with its regional autonomy, fulfills its international human rights obligation to ensure that women are not being discriminated against in local regulation.

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<sup>7</sup> CCPR (2013a), Paragraph 6; CEDAW Committee (2007), Paragraph 12; Komnas Perempuan (2010), p. III.

<sup>8</sup> Hsien-Li (2011), p. xii, 11, 139; CEDAW Committee (2012a), Paragraph 8.

The thesis seeks to answer the following research questions:

1. Can Indonesia be considered to fulfill its international human rights obligation to ensure that women are not being discriminated against in local regulations?
2. What are the reasons behind the existence of local Indonesian regulations that discriminate against women, and what can Indonesia do to solve the problem?

### **1.3 Method and Material**

The methodological approach used is a combination between the “rule-oriented approach” and the “problem- or interest-oriented approach”. The rule-oriented approach is more traditional, aiming primarily to establish *de lege lata* through identification of the application of legal norms on particular issues. The problem- or interest-oriented approach rather places a problem or an interest, instead of a valid norm, in focus.<sup>9</sup> The aims of research are thus to analyze a problem or interest, with the law as the point of departure, but additionally looking beyond the law to identify conflicts of interests that are obstacles to resolving the problems. Using the problem- or interest-oriented approach means acknowledging that law does not exist in a vacuum.

A legal dogmatic method was applied to investigate and analyze national and regional laws’ compliance or non-compliance with the right to non-discrimination of women. A wide range of sources was used here. These include: international instruments, national and local legislation, documents of the human rights treaty bodies, and reports and writings from legal scholars and human rights organizations. Documents that could only be accessed in Bahasa Indonesia were translated by Muhammad Dimas Saudian, Head of Human Rights Legislation Section under the Directorate General of Human Rights (DGHR), Ministry of Law and Human Rights (MoLHR), and former student at the Master Programme in International Human Rights Law at Lund University.

The legal dogmatic method would only get me so far, however. To really be able to answer my research questions, travelling to Indonesia to collect primary data was necessary. The data collection was done through semi-structured interviews with government officials, commissioners of the national human rights commissions and researchers from international human rights organizations. Since the interviews were qualitative in

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<sup>9</sup> Cf. Westberg (1992), p. 436.

character, different questions were asked depending on the position of the respondent. The interviews were held in English and three of them – the interviews at the Ministry of Law and Human Rights (MoLHR) and the Ministry of Home Affairs (MoHA) – were interpreted by Muhammad Dimas Saudian.

## 1.4 Delimitations

Also at the national level there are Indonesian laws that discriminate against women: the Marriage Law of 1974 appoints men to be the head of the household and is discriminatory through stating the minimum age of marriage and legalizing limited polygamy; the Indonesian Health Law of 2009 prohibits access to sexual and reproductive health services for unmarried women and girls, including access to contraception and abortion; and Law No. 44 Year 2008 on Pornography defines pornography so loosely that it discriminates and criminalizes women. There are more examples like these and they all constitute an interesting research topic, but due to time and space constraints and the fact that the interesting autonomy dimension is more difficult to adequately incorporate, they are not covered in the thesis. Moreover, national laws are legislated and abolished in other ways than regional and local laws, so those systems would need to be examined too. It is also the case that the winds are blowing in somewhat opposing directions: while for instance the Marriage Law is currently heavily debated, with amendment positive for women's rights possibly on the horizon, local discriminatory laws constitute an emerging phenomenon, often defended in the name of decentralization and democracy.

## 1.5 Terminology

*Law or national law* refers to a national law passed by the National Parliament.

*Local regulation* is used as an umbrella term for all regulations that are “below” the level of national laws, i.e. province and regency/city regulations.

*Province regulation* refers to a regulation passed both by the province parliament and the province head (Governor).

*Regency/city regulation* refers to a regulation passed both by the regency/city parliaments and the regency/city heads (Regent/Mayor).

*Regional Autonomy* is the status held by all provinces, regencies and cities in Indonesia. The provinces of Aceh and Papua hold a “special autonomy” status.

*Discrimination* is referring both to direct discrimination and to indirect discrimination, if nothing else is specifically said. *Direct discrimination* refers to when a regulation openly differs in its treatment of different individuals without a reasonable and objective justification, and *indirect discrimination* refers to when the effect of an apparently neutral regulation results in de facto discrimination, or when a situation that requires differentiated treatment receives none.<sup>10</sup>

## 1.6 Disposition

To be able to answer the first research question – *can Indonesia be considered to fulfill its international human rights obligation to ensure that women are not being discriminated against in local regulations?* – Chapter 2 examines the content and extent of Indonesia’s relevant international human rights obligation.

In order to grasp the extent of the problem that the Indonesian Government has the responsibility to rectify, Chapter 3 seeks to identify the width of the problem with local regulations that discriminate against women. The chapter also provides an illustrative example of the content of a local regulation that discriminate against women.

Chapter 4, 5 and 6 further elaborate on the first research question: Chapter 4 presents Indonesia’s national law that prohibits discrimination against women in general and stipulates the principle of gender equality; Chapter 5 presents the legislation and institutions set up by the Indonesian Government to prevent the enactment of local regulations that discriminate against women; and Chapter 6 examines the institutions and processes within Indonesia’s state apparatus that can amend or annul already enacted local regulations that discriminate against women.

To answer the second research question – *What are the reasons behind the existence of Indonesian local regulations that discriminate against women, and what can Indonesia do to solve the problem?* – Chapter 7 presents a simple synthesis of the critical opinions and forward-looking thoughts,

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<sup>10</sup> Cf. De Schutter (2010), p. 596, 625, 674.

especially stemming from the interviewees, that were encountered during the thesis work.

Chapter 8 provides the conclusions of the thesis.

## **2 The International Human Rights Obligation to Ensure that Women are not Discriminated in Local Regulations**

Below is examined the content and extent of Indonesia's relevant international human rights obligation, with the aim of beginning to answer the first research question – *can Indonesia be considered to fulfill its international human rights obligation to ensure that women are not being discriminated against in local regulations?*

### **2.1 The Human Rights Principle of Gender Equality and Non-discrimination of Women**

Indonesia became a member of the United Nations (UN) in 1950 (but had a period of withdrawal between 1965 and 1966). The UN has had the principle of equality and non-discrimination as a core value since its origins. The Charter of the UN states as one of its purposes “to achieve international cooperation in [...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to [...] sex”.<sup>11</sup> The UN has an obligation to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to [...] sex”<sup>12</sup>, and all member states have to cooperate with the UN to achieve this goal.<sup>13</sup>

The Universal Declaration of Human Rights (UDHR) states that “[a]ll human beings are born free and equal in dignity and rights,<sup>14</sup> and that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as [...] sex”.<sup>15</sup> The

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<sup>11</sup> Article 1 (3) of the Charter of the United Nations.

<sup>12</sup> Ibid, Article 55 (c).

<sup>13</sup> Ibid, Article 56.

<sup>14</sup> Article 1 of the Universal Declaration of Human Rights

<sup>15</sup> Ibid, Article 2.

Declaration further states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”.<sup>16</sup>

Indonesia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984, and the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2006.

The CEDAW defines “discrimination against women” as any “distinction, exclusion or restriction” based on the ground of sex that has “effect or purpose” to impair or nullify women’s “recognition, enjoyment or exercise” of their human rights.<sup>17</sup> The ICCPR and ICESCR lack definitions of the term “discrimination” but the CCPR has referred to the above CEDAW definition as a guideline in the application of the ICCPR.<sup>18</sup> The CEDAW definition could thus most likely also be used in the application of the ICESCR.

The ICCPR and the ICESCR prohibit discrimination based on sex in the enjoyment of the rights set out in the Covenants,<sup>19</sup> and a general prohibition of discrimination based on sex can be found in the ICCPR<sup>20</sup> as well as in the CEDAW.<sup>21</sup>

## **2.2 Obligation to Enact National Law Prohibiting Discrimination Against Women**

The ICCPR and the ICESCR obligates Indonesia to ensure that the human rights set out in the Covenants are enjoyed without distinction based on sex,<sup>22</sup> and on equal footing of men and women.<sup>23</sup>

The CEDAW obligates Indonesia to guarantee women the enjoyment of their human rights and fundamental freedoms on an equal basis with men, and specifically requires Indonesia to enact legislation for that aim.<sup>24</sup>

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<sup>16</sup> Article 7 of the Universal Declaration of Human Rights.

<sup>17</sup> Article 1 of the CEDAW.

<sup>18</sup> CCPR (1989), Paragraph 6.

<sup>19</sup> Articles 2 & 3 of the ICCPR; Article 2 (2) of the ICESCR.

<sup>20</sup> Article 26 of the ICCPR.

<sup>21</sup> Articles 2 & 3 of the CEDAW.

<sup>22</sup> Article 2 (1) of the ICCPR; Article 2 (2) of the ICESCR.

<sup>23</sup> Article 3 of the ICCPR.

<sup>24</sup> Article 3 of the CEDAW.



Additionally, the ICCPR requires Indonesia to enact legislation prohibiting discrimination based on sex in general.<sup>25</sup>

Furthermore, the CEDAW obligates Indonesia to adopt national legislation prohibiting discrimination against women, together with sanctions when appropriate, and to incorporate the principle of equality of men and women into its constitution.<sup>26</sup>

Indonesia's fulfillment of these obligations will be assessed in Chapter 4.

## **2.3 Obligation to Prevent Enactment of Local Regulations that Discriminate Against Women**

The ICCPR obligates Indonesia to respect the rights recognized in the Covenant without distinction based on sex.<sup>27</sup> This means that Indonesia is prohibited to discriminate against women in their enjoyment of their human rights, for example through legislation.

Furthermore, the ICCPR obligates Indonesia to ensure equal protection of the law,<sup>28</sup> meaning that Indonesia is prohibited to discriminate women in its legislation in general.<sup>29</sup>

The CEDAW prohibits Indonesia to discriminate against women in any act or practice,<sup>30</sup> law-making included.

The fact that legislation is so connected to a state's authority means that the state must be considered to be responsible for legislation at all levels. This brings a responsibility for the state to prevent local regulations from discriminating against women.

If for example a regency regulation obligates women to dress in a certain way, Indonesia does not *respect* the equal right of women to enjoy the right to freedom of expression, granted in Article 19 (2) of the ICCPR, and at the

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<sup>25</sup> Article 26 of the ICCPR.

<sup>26</sup> Article 2 of the CEDAW.

<sup>27</sup> Article 2 (1) of the ICCPR.

<sup>28</sup> Article 26 of the ICCPR.

<sup>29</sup> CCPR (1989), Paragraph 12.

<sup>30</sup> Article 2 of the CEDAW.

same time fails to *ensure* that women are not discriminated in the legislation.

Indonesia's fulfillment of these obligations will be assessed in Chapter 5.

## **2.4 Obligation to Amend or Annul Local Regulations that Discriminate Against Women**

In order to enable women to enjoy the rights set out in the ICCPR, Indonesia is required to "take all necessary steps", which includes "adjustment of domestic legislation".<sup>31</sup>

Concerning the obligations in the ICESCR, Indonesia's responsibility covers all branches of government (executive, legislative and judicial), at all levels (national, regency and city). Indonesia should, therefore, ensure that the provisions of the Covenant are respected in all its autonomous provinces/regencies/cities no matter the country's internal governance arrangements. In connection to this, Indonesia should ensure that legislation at all governmental levels is consistent with the provisions of the ICESCR.<sup>32</sup>

The CEDAW requires Indonesia to eliminate discrimination against women "by all appropriate means" and "without delay".<sup>33</sup> As a means for that, Indonesia must ensure legal protection for women against any act of discrimination through national courts and other institutions, and take all appropriate measures, including legislation, to amend or annul existing regulations that discriminate against women.<sup>34</sup>

Indonesia's fulfillment of this obligation will be assessed in Chapter 6.

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<sup>31</sup> Cf. CCPR (2000), Paragraph 3.

<sup>32</sup> Cf. CCPR (2013a), Paragraph 6.

<sup>33</sup> Article 2 of the CEDAW.

<sup>34</sup> Article 2 of the CEDAW.

# 3 Regional Autonomy and the Problem with Local Regulations that Discriminate Against Women

This chapter seeks to identify the width of the problem with local Indonesian regulations that discriminate against women. With the aim of illustrating the extent of the problem that the Indonesian Government has the responsibility to rectify, the chapter also gives an example such a local regulation.

## 3.1 Regional Autonomy

The 1945 Constitution regulates the division of power: The President holds the power of the Government;<sup>35</sup> the National Parliament has the power to make laws;<sup>36</sup> and the courts have the judicial power<sup>37</sup>. The legal system is based on civil law.<sup>38</sup>

As mentioned in the introduction, in 1998 a decentralization process started in Indonesia, granting provinces, regencies and cities autonomy.<sup>39</sup> The regulation on the regional autonomy was included in the 1945 Constitution by an amendment made in 2000.<sup>40</sup> The Constitution states that Indonesia is divided into provinces (*propinsi*), which are divided into regencies (*kabupaten*) and cities (*kota*). The provinces, regencies and cities shall have their own government and parliament. Their mandate is to regulate and administer matters either as an act of autonomy, or as assistance to the Government. The regional governments have the right to enact local regulations, except for the matters reserved in the constitution for the central government: international politics, defense, security, judicial policy, national monetary and fiscal affairs, and religious affairs<sup>41</sup>. The central government can delegate its jurisdiction over these areas to the local governments, but, conversely, it can also pass laws concerning matters

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<sup>35</sup> Article 4 (1) of the 1945 Constitution (cf. Pausacker – Rohan – Lindsey (2002)).

<sup>36</sup> Ibid, Article 20 (1).

<sup>37</sup> Ibid, Article 24 (1).

<sup>38</sup> Bivitri (2011), p. 2.

<sup>39</sup> Butt (2010), p. 177f; cf. Robinson (2009), p. 171.

<sup>40</sup> Ibid, p. 180.

<sup>41</sup> Article 18 of the 1945 Constitution (cf. Pausacker – Rohan – Lindsey (2002)).

outside of its exclusive authority.<sup>42</sup> This has been interpreted as to actually authorize the central government to legislate in any area it wants. In a situation where a local regulation contradicts a national law, the national would override the local.<sup>43</sup>

The legal drafting process at the local level is performed either by the local parliaments or, for regulations produced by local governments, by the “local legal bureau” or the “legal department”.<sup>44</sup> Every province government has a “legal bureau” and every regency/city government has a “legal department”. These bodies draft the local regulations for the local heads.<sup>45</sup> Local regulations presented by local heads are enacted after approval by the local parliament.<sup>46</sup>

The first regulation of the regional autonomy<sup>47</sup> gave the regencies/cities a wide autonomy, but the Government later recaptured power through the replacing law<sup>48</sup>, which also gave more power to the provinces.<sup>49</sup> Governors are now, for example, authorized to “guide and supervise governance in regencies and cities” and to “coordinate the implementation of central government affairs in provinces, regencies and cities”,<sup>50</sup> but are at the same time responsible before the President.<sup>51</sup>

The province of Aceh was during the decentralization period granted “special autonomy”. This was done because the central government wanted to make up for past violations committed by itself, and also because of a fear of losing Aceh to independence, as happened with East Timor.<sup>52</sup> Aceh’s special autonomy was first regulated in a Presidential Decree<sup>53</sup>, and later strengthened in law<sup>54</sup>. After the signing of a Memorandum of Understanding in Helsinki in 2005, the Law on the Governing of Aceh<sup>55</sup> was passed.<sup>56</sup> Aceh’s “special autonomy” goes beyond the status of “regional autonomy” and gives authority within the areas of religion, education and culture

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<sup>42</sup> Article 10 of Law No. 32 of 2004 on Regional Autonomy.

<sup>43</sup> Butt (2010), p. 181.

<sup>44</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>45</sup> Article 21 (1) of the Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>46</sup> Article 136 of Law No. 32 of 2004 on Regional Autonomy, interpreted by Komnas Perempuan (2010), p. 93.

<sup>47</sup> Law No. 22 of 1999 on Regional Autonomy.

<sup>48</sup> Law No. 32 of 2004 on Regional Autonomy.

<sup>49</sup> Butt (2010), p. 180.

<sup>50</sup> Article 38, Paragraph 1, Law No. 32 of 2004 on Regional Autonomy.

<sup>51</sup> Ibid, Article 37.

<sup>52</sup> Ichwan (2011), p. 185f.

<sup>53</sup> Presidential Decree No. 44 of 1999.

<sup>54</sup> Law No. 18 of 2001 on Special Autonomy for Aceh.

<sup>55</sup> Law No. 11 of 2006 on the Governing of Aceh.

<sup>56</sup> Hsien-Li (2011), p. 86.

(*adat*), and gives the religious leaders (*ulema*) a greater role in decision-making on regional matters.<sup>57</sup> The lawmaking process in Aceh is made by the office of Islamic Sharia, which enacts Aceh's local regulations: *qanuns*.<sup>58</sup> The provincial parliament is obliged to process the *qanuns* and guard their implementation and the Governor and regents/mayors have the task to implement them.<sup>59</sup>

The province of Papua has also been granted special autonomy, in an agreement between the central government and the local government of Papua.<sup>60</sup>

The MoHA is the responsible ministry within the central government to implement and control the regional autonomies.<sup>61</sup>

### **3.2 Surveys by the National Commission on Violence Against Women**

The National Commission on Violence against Women (Komnas Perempuan) is an independent national institution that promotes women's human rights in Indonesia. The Commission was established in 1998 by a Presidential Decree<sup>62, 63</sup> Komnas Perempuan has a mandate to monitor and publish its results to the public, and to provide recommendations to the government as well as legislative and judicial actors.<sup>64</sup>

Komnas Perempuan has commissioned surveys on local regulations around Indonesia in order to see their impact on women. No database covering all local regulations exist, so the surveys are based on the local regulations that Komnas Perempuan have access to through for example local governments' webpages and women organizations. Therefore, the number of discriminatory local regulations is probably much higher than revealed by the surveys.<sup>65</sup>

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<sup>57</sup> Ichwan 2011), p. 186; cf. Afrianty (2011), p. 38.

<sup>58</sup> Afrianty (2011), p. 39.

<sup>59</sup> Ichwan (2011), p. 203.

<sup>60</sup> Law No. 21 of 2001 on Special Autonomy for the Province of Papua.

<sup>61</sup> Article 222 (1) of Law No. 32 of 2004 on Regional Autonomy.

<sup>62</sup> Presidential Decree No. 181 of 1998, which later was replaced by Presidential Decree no. 65 and 66 of 2005.

<sup>63</sup> Komnas Perempuan (2014).

<sup>64</sup> Ibid

<sup>65</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

In Komnas Perempuan's report from 2010, 154 local regulations that discriminate against women were identified. Out of them 19 were passed at provincial level, 134 at regency level and one at city level, in 21 different provinces and 69 regencies.<sup>66</sup> According to Komnas Perempuan's interpretation, of the 154 local regulations, 63 directly discriminate against women. The directly discriminative regulations can be divided into four categories: regulation of dress code (21), prohibition of prostitution (37), regulation on immoral behavior (1) and regulation on migrant workers (4 local regulations). The rest of the identified local regulations indirectly discriminate against women. These can be categorized as: regulating religious issues (82) and limitation of the freedom of the Ahmadiyah group (a religious minority; 9).<sup>67</sup>

From the 154 discriminatory local regulations noted in 2009, the number grew to 189 in 2010, 207 in 2011 and 282 in 2012.<sup>68</sup> Out of the 282 in 2012, Komnas Perempuan interpreted 207 to directly discriminate against women. These can be categorized as: regulation of dress code (60), prohibition of prostitution and pornography (96), regulation on immoral behavior (10), separating men and women in public spaces (3) and curfew (38). The indirectly discriminatory regulations concern employment, political image and religion. The discriminatory local regulations are identified in 28 different provinces, with a high concentration in the Provinces of East Java, South Kalimantan, South Sulawesi, West Java, West Nusa Tenggara, and West Sumatra.<sup>69</sup> In August 2013 Komnas Perempuan reported that 60 new discriminatory local regulations had been passed during that year, resulting in a total of 342 discriminatory local regulations.<sup>70</sup> According to Komnas Perempuan, the number of regulations that discriminate against women continues to increase, meaning that that number of passed discriminatory local regulations is higher than the number of amended or annulled discriminatory local regulations.<sup>71</sup>

### 3.3 Reports from Human Rights Watch

Human Rights Watch (HRW) stated in its 2014 World Report that 2013 saw heightened discrimination of Indonesian women because of the government's failure to enforce human rights protections. To make up for

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<sup>66</sup> Komnas Perempuan (2010), p. III.

<sup>67</sup> Ibid, p. 27.

<sup>68</sup> Jakarta Post (2012-09-17)

<sup>69</sup> Komnas Perempuan (2012), p. 53.

<sup>70</sup> HRW (2014).

<sup>71</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

this, hundreds of local laws must be amended or abolished.<sup>72</sup> According to Andreas Harsono, Senior researcher for HRW in Indonesia, about one fifth of Indonesia's regencies now have local regulations that make it compulsory for women who work as civil servants to wear headscarf. In some areas, for example in Gorontalo Province, women are banned from working as secretaries in offices because they might provoke the male workers to immoral behavior. In North Aceh Regency women are banned from dancing and in West Aceh Regency women are banned from wearing tight pants. In Aceh Province, women within the civil service are now banned from taking the "*krinda*", a weekly physical exercise, and are instead required to attend Koranic classes. All these regulations are examples of discriminatory local regulations that contradict the international human rights treaties ratified by Indonesia.<sup>73</sup>

### **3.4 Example of an Assessment by the Ministry of Law and Human Rights of a Local Regulation that Discriminates Against Women**

Indramayu Regency Regulation on Prostitution<sup>74</sup>, enacted by the Regency of Indramayu's parliament (the Province of West Java), has been assessed by the MoLHR from a human rights perspective<sup>75</sup>, and has also been criticized by Komnas Perempuan for being discriminative against women.<sup>76</sup> The assessment of the MoLHR will now be presented to give an example of how local regulations that discriminate against women can be formed.

The Indramayu Regency Regulation on Prostitution states that "[p]rostitution' is an act where a woman offers herself to have a sexual relation with a person of the opposite sex and accepts payment in money or other forms."<sup>77</sup> "[I]t is prohibited [...] to perform, to be connected, to attempt, and to provide other persons to perform, acts of prostitution".<sup>78</sup> "The prohibition [...] shall also be applied to someone whose behavior can

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<sup>72</sup> HRW (2014).

<sup>73</sup> Interview: Harsono, HRW, 2014.

<sup>74</sup> Indramayu Regency Regulation No. 4 of 2001 on the First Amendment of the Indramayu Regency Regulation No. 7 of 1999 on Prostitution.

<sup>75</sup> Interview: Saudian MoLHR, 2014; cf. MoLHR (2013).

<sup>76</sup> Komnas Perempuan (2010), p. 37.

<sup>77</sup> Article 1 (f) of Indramayu Regency Regulation No. 7 of 1999 on the Prohibition of Discrimination.

<sup>78</sup> Ibid, Article 3.

make that person suspected of [...] acts of prostitution”.<sup>79</sup> The latter means that anyone whose behavior could raise suspicions that the person is a prostitute, is prohibited to be on public streets, hotels, bars, street corners or back streets, as well as walking or moving in vehicles back and forth to such places.<sup>80</sup>

In its assessment the MoLHR states that the definition of “prostitution” is intended only to be applied on women and that this makes the definition discriminatory against women. The Ministry further asks what kind of “behavior” that can be regarded as prostitution and expresses concern that this vague language can lead to multiple interpretations. Furthermore, the Ministry criticizes that “suspected behavior” is prohibited.

According to the MoLHR, these provisions contradict the right to liberty and security of person,<sup>81</sup> and the right to freedom of movement.<sup>82</sup> The MoLHR therefore recommended the definition of prostitution to be changed to “an act in which a person offers itself” instead of specifying “a woman”, and that further explanation should be added regarding what kind of “behavior” that can be considered to constitute an act of prostitution.

The MoLHR’s assessment has been sent to the MoHA but the latter has yet to clarify the regulation.<sup>83</sup>

Komnas Perempuan has reported that the enactment of the regulation was for the purpose of changing the image of Indramayu City towards becoming a region that is “Religious, Progressive, Self-reliant, and Prosperous”.<sup>84</sup> The regulation has frequently been used as a reference in the formulation of local regulations on prostitution in other regencies/cities.<sup>85</sup>

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<sup>79</sup> Article 4 (f) of Indramayu Regency Regulation No. 7 of 1999 on the Prohibition of Discrimination.

<sup>80</sup> Ibid, Article 6.

<sup>81</sup> The MoLHR here refers to: Article 28 (g) (1) of the 1945 Constitution, Article 30 of Law No. 39 of 1999 on Human Rights, and Article 9 of Law No. 12 of 2005 on the Ratification of the ICCPR.

<sup>82</sup> The MoLHR here refers to: Article 27 of Law No. 39 of 1999 on Human Rights and Article 12 of Law No. 12 of 2005 on the Ratification of the ICCPR.

<sup>83</sup> Interview: Saudian, MoLHR, 2014.

<sup>84</sup> Komnas Perempuan (2010), p. 35.

<sup>85</sup> Cf. Tasikmalaya Regency Regulation No. 28/2000 on the First Amendment to the Tasikmalaya Regency Regional Regulation No. 1/2000 on the Elimination of Prostitution; Tangerang Regency Regulation No. 8/2005 on the Prohibition of Prostitution; Bantul Regency Regulation No. 5/2007 on the Prohibition of Prostitution in the District of Bantul.



# 4 National Law Prohibiting Discrimination Against Women

As stated in Chapter 2, the ICCPR and the ICESCR obligate Indonesia to ensure that the human rights are enjoyed without distinction based on sex, and the CEDAW specifically requires Indonesia to enact legislation for that aim. Furthermore, the ICCPR and the CEDAW obligate Indonesia to prohibit through national law discrimination based on sex in general, and the CEDAW specifically requires Indonesia to incorporate the principle of equality of men and women into its constitution. To continue to answer the first research question – *can Indonesia be considered to fulfill its international human rights obligation to ensure that women are not being discriminated against in local regulations?* – this chapter examines Indonesia’s national legislations that prohibit discrimination against women in general.

## 4.1 The 1945 Constitution

Indonesia’s Constitution was enacted the day after the proclamation of independence in 1945, and was later reenacted in 1959. After President Soeharto’s fall in 1998, the transition to democracy started and amendments of the Constitution were made in 1999, 2000, 2001, and 2002, with the last including a chapter on human rights<sup>86, 87</sup>.

The Constitution states that “[e]ach person has the right to be free from discriminatory treatment on any grounds and has the right to obtain protection from such discriminatory treatment”<sup>88</sup>. This is a general prohibition of discrimination, in line with the ICCPR<sup>89</sup>. The Constitution confirms that “the protection, advancement, upholding and fulfillment of basic human rights is the responsibility of the State, especially the Government.”<sup>90</sup>

In Indonesia’s report on the implementation of the ICCPR, the government

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<sup>86</sup> Chapter XA, Article 28 (a-j) of the 1945 Constitution.

<sup>87</sup> Susanti (2011), p. 2f.

<sup>88</sup> Article 28 (i) (2) of the 1945 Constitution.

<sup>89</sup> Article 26 of the ICCPR.

<sup>90</sup> Article 28 (i) (4) of the 1945 Constitution.

claimed to have “ensured non-discrimination in the protection of the rights provided for in the Covenant through national legislations, particularly the 1945 Constitution (Article 28 and Chapter XA on Human Rights)”.<sup>91</sup> Additionally, concerning the non-discrimination requirement in the ICESCR, the Government has stated that it “has put in place a strong legal framework to provide guarantees for all individuals in its territory to enjoy non-discriminatory treatment in the fulfillment of their economic, social and cultural rights” and referred to the 1945 Constitution and the Law on Human Rights.<sup>92</sup> The Government stated that it “guarantees the fulfillment of the rights in the Covenant without distinction of rights between men and women” and that the wordings used in the 1945 Constitution and national law, such as “any person” or “every citizen”, means that there is no distinction of gender in the law, which ensures that “men and women are equal before the Constitution and its implementing legislations”.<sup>93</sup>

The CEDAW Committee has however stated that while “discrimination on the basis of sex is prohibited”, “there is no clear definition of discrimination modelled on article 1 of the Convention in the Constitution or in other legislation”,<sup>94</sup> and further recommended Indonesia “to incorporate a definition of discrimination into its Constitution or national legislation that conforms with article 1 of the Convention”.<sup>95</sup>

## 4.2 Law No. 39 of 1999 on Human Rights

The inclusion of the human rights chapter in the 1945 Constitution led to the enactment of Law No. 39 of 1999 on Human Rights.<sup>96</sup> The law states that “everyone has the right without any discrimination to protection of human rights and fundamental freedoms”.<sup>97</sup> The prohibition of discrimination is thus connected to the enjoyment of the rights defined in the law, in line with the provisions concerning non-discrimination in the enjoyment of the rights set out in the ICCPR and the ICESCR.<sup>98</sup> The Indonesian government also referred to this provision of prohibition of discrimination when claiming to have ensured the non-discrimination in the protection of the rights in the ICCPR.<sup>99</sup>

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<sup>91</sup> CCPR (2012), Paragraph 17.

<sup>92</sup> CESCR (2014), Paragraph 31.

<sup>93</sup> CCPR (2012), Paragraph 26.

<sup>94</sup> CEDAW Committee (2012a), Paragraph 13.

<sup>95</sup> CEDAW Committee (2007), Paragraph 9; CEDAW Committee (2012a), Paragraph 14.

<sup>96</sup> Susanti (2011), p. 2f.

<sup>97</sup> Article 3 (3) of Law No. 39 of 1999.

<sup>98</sup> Article 2 (1) & 3 of the ICCPR; Article 2 (2) of the ICESCR.

<sup>99</sup> CCPR (2012), Paragraph 18.

The human rights recognized in Law No. 39 of 1999 are divided into ten groups: the right to live; the right to establish a family and to have descendants; the right to self development; the right to justice; the right to personal freedom; the right to security; the right to welfare; the right to participate in the government; women's rights; and children's rights. A representative for the Indonesian Government has stated concerning the fulfillment of the provision in the CEDAW that "it was correct that the Constitution did not contain provisions specifically mentioning the rights of women; however, Law 39 had an entire related chapter."<sup>100</sup>

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<sup>100</sup> CEDAW Committee (2012b), Paragraph 16.

# 5 Prevention of the Enactment of Local Regulations that Discriminate Against Women

As stated under chapter two, the ICCPR prohibits Indonesia from enacting legislation that discriminates women in their enjoyment of their human rights, and discriminates women in general. The CEDAW further prohibits Indonesia to discriminate against women in legislation, both at the national and the local level, which at the same time puts an obligation on Indonesia to ensure that women are not discriminated in local regulations. This chapter will assess if Indonesia fulfills this obligation. First, the regulations that local legal drafters (i.e. the provincial/regency/city parliament and head) need to consider when making local regulations is presented. Second, the chapter describes the central government's involvement in the drafting process at province/regency/city level aimed at controlling that no local regulations are drafted that discriminate against women.

## 5.1 Prohibition to Enact Local Regulations that Discriminate Against Women

### 5.1.1 Law No. 12 of 2011 Concerning Making Rules

Law No. 12 Concerning Making Rules has to be taken into account by all legislators when drafting legislation, both “laws” as national laws and “regulations under the national law”.<sup>101</sup> The law states that “*Pancasila*”<sup>102</sup> is the fundamental basis of all sources of state law”<sup>103</sup> and that “[t]he 1945 Constitution is the basic law of the state law”<sup>104</sup>.

When drafting regulations, the legislator must consider that the regulation should:

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<sup>101</sup> Article 4 of Law No. 12 of 2011 Concerning Making Rules.

<sup>102</sup> *Pancasila* is a principle formulated in the preamble of the 1945 Constitution. It sets out the basis and ideology of the state: “Belief in God Almighty; Just and civilized humanity; The unity of Indonesia; Democracy guided by the wisdom of the Representative; and Social justice for all people of Indonesia”.

<sup>103</sup> Article 2 of Law No. 12 of 2011 Concerning Making Rules.

<sup>104</sup> Article 3 of Law No. 12 of 2011 Concerning Making Rules.

- have a clear purpose;
- be drafted by an authorized state agency/official;
- be in line with the hierarchy of rules;
- be possible to implement;
- be necessary and useful;
- have a clear formulation; and
- be drafted in a transparent process.<sup>105</sup>

The content of a regulation should reflect the following principles:

- protection (protect the public harmony);
- humanity (protect/respect human rights);
- nationality (reflect Indonesia's diversity while maintaining unity of the country);
- family (consensus in decision making);
- character of Indonesia (take into consideration the interests of the whole of Indonesia and that regulations made at the local level are part of the national legal system based on Pancasila and the 1945 Constitution);
- unity in diversity (pay attention to the diversity of the population, religion, ethnicity and class, the special conditions in the region as well as cultural life of community, nation and state);
- fairness (proportional fairness for every citizen);
- equal position in law and government (not contain provisions that are differentiating based on, among others, religion, ethnicity, race, class, gender, or social status);
- order and certainty of law; and
- balance (harmony among the interests of individuals/communities and interests of the people/nation).<sup>106</sup>

The law further regulates the “hierarchy of regulations” within Indonesia’s legal system, listing the different types of regulations and their relative authority. “Hierarchy” means that the lower regulations must not conflict with the higher regulations. The power of the rules is in accordance with the following list:<sup>107</sup>

a. Constitution of the Republic of Indonesia of 1945 (*Undang-Undang*

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<sup>105</sup> Article 5 of Law No. 12 of 2011 Concerning Making Rules; Elucidation of Law No. 12 of 2011 Concerning Making Rules.

<sup>106</sup> Article 6 of Law No. 12 of 2011 Concerning Making Rules; Article 6 in the Elucidation of Law No. 12 of 2011 Concerning Making Rules.

<sup>107</sup> Article 7 of Law No. 12 of 2011 Concerning Making Rules; Article 7 in the Elucidation of Law No. 12 of 2011 Concerning Making Rules.

*Dasar Negara Kesatuan Republik Indonesia tahun 1945).*

- b. People's Consultative Council Decree (*Majelis Permusyawaratan Rakyat, MPR*).
- c. Law/Government Regulation In Lieu of Law (*Undang-Undang/Peraturan Pemerintah Pengganti Undang Undang*): “Law” is here referring to a national law passed by the National Parliament; “Government Regulation In Lieu of Law” can be passed by the President if there is a special need for a law concerning an urgent matter and there is an unwillingness or deadlock discussion within the Parliament to pass such a law.
- d. Government Regulation: Presidential Decree (*Peraturan Presiden*); or Ministerial Decree (*Peraturan Menteri*).
- e. Presidential Regulation (*Keputusan Presiden*): A formal decision by the President, e.g. Presidential Regulation No. 24 of 2013 on the Determination on National Holiday of the 1<sup>st</sup> of May.
- f. Province Regulation: Provincial Parliament Regulation (*Peraturan daerah Provinsi*); or Governor Decree (*Peraturan Gubernur*). Regulations passed in Aceh and Papua Provinces are included.<sup>108</sup>
- g. Regency/City Regulation: Regency Parliament Regulation (*Peraturan Daerah kabupaten*); Regent Regulation (*Peraturan Bupati*); City Parliament Regulation (*Peraturan Daerah Kota*); or Mayor Regulation (*Peraturan Wali Kota*). Regulations passed in Aceh and Papua Regencies/Cities are included.<sup>109</sup>

The substance of a law should be mandated from: the provisions of the 1945 Constitution; instructions of a law; ratification of certain international treaty; a decision of the Constitutional Court; and/or “the legal needs of the people”.<sup>110</sup>

### **5.1.2 Law No. 32 of 2004 on Regional Autonomy**

Local heads/deputy local heads are prohibited to make regulations that, among other: exclusively benefit themselves, family members or certain

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<sup>108</sup> Article 7 in the Elucidation of Law No. 12 of 2011 Concerning Making Rules.

<sup>109</sup> Ibid.

<sup>110</sup> Article 10 (1) of Law No. 12 of 2011 Concerning Making Rules.

groups; violates laws and regulations; are against the public interest; or discriminate against citizens and/or other groups of people.<sup>111</sup>

The Law on Regional Autonomy also affirms the same principles for the local legislator to consider when drafting local regulations, as well as principles that should be reflected in the content of the local regulation, as those provided within the Law Concerning Making Rules.<sup>112</sup>

## **5.2 Control of the Compliance with the Prohibition to Enact Local Regulations that Discriminate Against Women**

### **5.2.1 The Ministry of Home Affairs**

As mentioned above, the MoHA is the responsible ministry for the control of the regional autonomy.<sup>113</sup> However, in the drafting process of local regulations the MoHA is authorized to conduct "evaluations" (i.e. "assessment of the draft law to determine what is contrary to the public interest, and/or legislation")<sup>114</sup>, but only on drafts concerning finance, spatial planning, local retribution and taxes.<sup>115</sup> The MoHA thus cannot utilize its evaluative mandate to local regulations that discriminate against women if they do so in technical and explicit economic matters.

### **5.2.2 The Ministry of Law and Human Rights**

The DGHR within the MoLHR has the duty to formulate and implement policies in the field of human rights,<sup>116</sup> and the function to provide technical guidance and evaluation in the area of human rights.<sup>117</sup> The DGHR houses the Sub-directorate of Human Rights Legislation and Harmonization,<sup>118</sup> which is responsible for harmonization of national and local legislation with

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<sup>111</sup> Article 28 (a) of Law No. 32 of 2004 on Regional Autonomy.

<sup>112</sup> Ibid, Articles 137 & 138.

<sup>113</sup> Article 222 (1) of Law No. 32 of 2004 on Regional Autonomy.

<sup>114</sup> Article 1 (20) of the Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>115</sup> Articles 185–191 of Law No. 32 of 2004 on Regional Autonomy (Articles 76–78 concern evaluations of drafts on provincial level and Article 81 concerns evaluations of drafts on regency/city level).

<sup>116</sup> Article 819 of the MoLHR's Decree No. M.HH–05.OT.01.01 of 2010.

<sup>117</sup> Article 820 (4) of the MoLHR's Decree No. M.HH–05.OT.01.01 of 2010.

<sup>118</sup> Article 876 of the MoLHR's Decree No. M.HH–05.OT.01.01 of 2010.

human rights.<sup>119</sup> The Sub-directorate has no direct legal mandate to intervene in the drafting process of local regulations, but when invited by the local legislator, it can assess drafts of local regulations from a human rights perspective and give input in form of recommendations.<sup>120</sup>

The MoLHR has regional offices at provincial level,<sup>121</sup> one in each province. They are independent from the provincial governments and have the possibility (and main responsibility, within the MoLHR)<sup>122</sup> to partake in the drafting process at province/regency/city level.<sup>123</sup> Within the regional offices there is a Division of Law and Human Rights Services, which is divided into two working units: a Human Rights Division and a Law Division.<sup>124</sup> The Human Rights Division promotes the RANHAM (see next chapter) and disseminates human rights education,<sup>125</sup> and the Law Division disseminates instructions to legal drafters and is the unit that may partake in the drafting of local regulations.<sup>126</sup> As for the central office of the MoLHR, the regional offices can only partake in the drafting process if invited by the legal drafters,<sup>127</sup> and such invitations are rare. Also, it is not mandatory for a local government or parliament to follow their recommendations.<sup>128</sup>

According to Zuliansyah, Head of the Human Rights Harmonization Section, DGHR, MoLHR, there is another problem besides the fact that the local legislators can ignore the recommendations from the MoLHR, namely that even regulations that have been assessed by the regional offices of the MoLHR may still contradict human rights because of lack of education in human rights concerning the staff within the Law Divisions of the regional offices of the MoLHR themselves, so they do not always carry the human rights perspective. This is a big problem because currently, the Law Divisions in the regional offices are involved in the drafting procedure but the Human Rights Divisions are not; they need to work more closely together. According to Zuliansyah, the ideal procedure would be for the regional offices to involve the MoLHR's central Section on Human Rights Legislation and Harmonization to assist in doing assessments from a human rights perspective.<sup>129</sup>

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<sup>119</sup> Interview: Saudian, MoLHR, 2014.

<sup>120</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>121</sup> Article 1276 (1) of the MoLHR's Decree No. M.HH-05.OT.01.01 of 2010.

<sup>122</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>123</sup> Article 58 (2) in Law 12 of 2011 Concerning Making Rules.

<sup>124</sup> Article 1276 (4) of the MoLHR's Decree No. M.HH-05.OT.01.01 of 2010.

<sup>125</sup> Interview: Harniati, MoLHR, 2014.

<sup>126</sup> Article 58 (2) in Law 12 of 2011 Concerning Making Rules.

<sup>127</sup> Article 21 (2) of the Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>128</sup> Interview: Harniati, MoLHR, 2014.

<sup>129</sup> Interview: Zuliansyah, MoLHR, 2014.



### 5.2.3 The National Plan of Action on Human Rights and its Committees

In 1998 a National Plan of Action on Human Rights (RANHAM)<sup>130</sup> (1999–2003) was established, which was later replaced by a second<sup>131</sup> (2004–2009) and third<sup>132</sup> (2011–2014) generation of RANHAM.

An example of a tool mandated through the RANHAM is the Human Rights Parameters for the Formulation of Local Regulations<sup>133</sup>, created jointly by the Minister of Law and Human Rights and the Minister of Home Affairs.<sup>134</sup> The primary intention with the human rights parameters was that they would be used as a tool by the RANHAM Committees when partaking in the drafting of local regulations, but the parameters are now also distributed to the local governments and parliaments to be used in drafting procedures. So far, however, the parameters have only been distributed to a few provincial-level legislators. To make the parameters effective, it is important to also give the legislators knowledge and understanding of the parameters when distributing them. For that purpose the DGHR, MoLHR, organizes training for local legal drafters in the human rights parameters. Nevertheless, it is still too early to say anything about the results of the parameters.<sup>135</sup>

Since the second generation of RANHAM, RANHAM committees have been established at national, provincial and regency/city<sup>136</sup> level for the purpose of implementing and monitoring the RANHAM. The Committees at province and regency/city level meet twice a year and assess certain draft regulations by instruction of the local legislators, and provide recommendations to be discussed in the local parliament or government. The Committees also assess draft regulations that are listed in the local legislation programs and give general recommendations on these to the governors/regents/mayors.<sup>137</sup> A circular, issued by the MoHA to support the province/regency/city RANHAM committees' involvement in human rights harmonization of local regulations, states that local draft regulations have to be consulted with the RANHAM committee at the respective

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<sup>130</sup> Presidential Decree No. 129 of 1998 on RANHAM (1999-2003).

<sup>131</sup> Presidential Decree No. 40 of 2004 on RANHAM (2004-2009).

<sup>132</sup> Presidential Decree No. 23 of 2011 on RANHAM (2011-2014).

<sup>133</sup> Joint Regulation of the Minister of Law and Human Rights and the Minister of Home Affairs No. 20/2012 and 77/2012 on Human Rights Parameters for the Formulation of Local Regulations.

<sup>134</sup> Interview: Harniati, MoLHR, 2014.

<sup>135</sup> Interview: Zuliensyah, MoLHR, 2014.

<sup>136</sup> Article 4, 6 & 8 of Presidential Decree No. 23 of 2011 on RANHAM (2011-2014).

<sup>137</sup> Interview: Zuliensyah, MoLHR, 2014.

province/regency/city level.<sup>138</sup> Even though the circular posits the consultation as an obligation, a circular does not yield much power – rather, it only suggests and encourages. The recommendations from the RANHAM Committees at province/regency/city level can be alerted to the national RANHAM Committee, which brings the additional advantage that this body can make a deeper assessment of a draft.<sup>139</sup>

The head of the regional office of the MoLHR has a reserved position as vice chairman in the RANHAM Committees at the provincial level, which strengthens the MoLHR regional offices' influence in the law-making process at the provincial level.<sup>140</sup>

According to one head of a regional office of the MoLHR, the potential of the RANHAM committees has not yet been realized, since the Committees tend to work separately from the local legislators because they do not have a legal foundation to demand to be involved in the legal drafting process.<sup>141</sup>

Until the moment of writing, the third generation RANHAM (2011–2014) is still in effect, so any evaluation of its effectiveness has yet to be published.<sup>142</sup>

## **5.2.4 The Ministry of Women Empowerment and Child Protection**

The Ministry of Women Empowerment and Child Protection (MoWECP) is specifically responsible for the implementation of the elimination of all forms of discrimination against women, as well as the enhancement of the role and status of women in Indonesia.<sup>143</sup> The Ministry serves as a focal point in policy making, facilitating cooperation and initiating mechanisms for the protection of women and girls.<sup>144</sup> The MoWECP however has more of a technical perspective and function than the other ministries as it mainly develops policies, coordinates, facilitates and monitors through the other ministries. It has the responsibility to train the other ministries in gender mainstreaming and has an advisory and monitoring role with regard to the regulations issued by other ministries.<sup>145</sup>

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<sup>138</sup> MoHA (2006), Paragraph 4 & 5.

<sup>139</sup> Interview: Zuliensyah, MoLHR, 2014.

<sup>140</sup> Ibid.

<sup>141</sup> Komnas Perempuan (2010), p. 100.

<sup>142</sup> Interview: Saudian, MoLHR, 2014.

<sup>143</sup> Presidential Regulation No. 47 of 2009 Concerning the Establishment and the Organization of the State Ministries.

<sup>144</sup> CCPR (2012), Paragraph 26.

<sup>145</sup> Interview: Sari, MoWECP, 2014.

The regional autonomy has also made it harder for the MoWECP to achieve results at the local level since it is a ‘state ministry’, meaning that it has no direct representation in the provinces/regencies/cities.<sup>146</sup> The MoWECP’s presence at local level is instead established under the authority of the local governments themselves, in the form of a Women Empowerment and Family Planning Program Agency. Therefore taking action and implementing further steps at the local level is challenging, according to Rohika Kurniadi Sari, Assistant Deputy, Section of Violence Against Women, MoWECP.<sup>147</sup>

## 5.2.5 The National Commission of Human Rights

Law No. 39 of 1999 on Human Rights established the National Commission of Human Rights (Komnas HAM). The objectives of Komnas HAM are ”to improve the protection and upholding of human rights in the interests of the personal development of Indonesian people”.<sup>148</sup>

To achieve this, Komnas HAM is tasked to study, research, counsel, monitor and mediate on human rights issues,<sup>149</sup> and has, among others, the mandate to ”study and examine legislation in order to provide recommendations concerning drawing up, amending and revoking of legislation relating to the human rights”.<sup>150</sup> The Commission does not have any special procedure for influencing the drafting of local regulation, but it can assess local legal drafts from a human rights perspective, either on the initiative from the local government or on its own initiative.<sup>151</sup>

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<sup>146</sup> Robinson (2009), p. 139.

<sup>147</sup> Interview: Sari, MoWECP, 2014.

<sup>148</sup> Article 75 of Law No. 39 of 1999 on Human Rights.

<sup>149</sup> Article 76 of Law No. 39 of 1999 on Human Rights.

<sup>150</sup> Article 89 of Law No. 39 of 1999 on Human Rights.

<sup>151</sup> Interview: Laila, Komnas HAM, 2014.

## **6 Amending and Annuling Local Regulations that Discriminate Against Women**

As stated in Chapter 2, in order to enable women to enjoy the rights set out in the ICCPR, Indonesia is required to “take all necessary steps”, which includes “adjustment of domestic legislation”. As also mentioned, the country must do so in all branches of government (executive, legislative and judicial) and at all levels (national, regency and city). The CEDAW requires Indonesia to eliminate discrimination against women “by all appropriate means“ and “without delay”. This includes an obligation for Indonesia to amend or annul existing regulations that discriminate against women. This chapter assesses Indonesia’s fulfillment of this obligation, first by examining the executive review mechanisms – the recommendations by the governors and the MoHA, the supportive function the MoLHR, and the power of amendment and annulment of the President – and then by discussing the judicial reviews by the Supreme Court. Finally, the possibility for Komnas HAM to review local regulations and give recommendations is presented.

### **6.1 Governors and the Ministry of Home Affairs**

Law No. 32 of 2004 on Regional Autonomy authorizes the Government to supervise regional administration, including local regulations.<sup>152</sup> The central government has the authority to amend or annul local regulations that contradict the public interest and/or higher laws.<sup>153</sup> This supervision is coordinated at the national level by the MoHA, and at provincial, regency and city level by the Governors.<sup>154</sup> For this purpose, the MoHA has issued Decrees to structure the supervision process,<sup>155</sup> of which the latest is

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<sup>152</sup> Article 218 (1) (b) of Law No. 32 of 2004 on Regional Autonomy.

<sup>153</sup> Ibid, Article 145 (2).

<sup>154</sup> Ibid, Article 222 (1) & (2).

<sup>155</sup> Previous regulations by the MoHA on the review of local regulations: the Ministry of Home Affairs’s Decision No. 41 of 2001, Ministerial Decree No. 53 of 2007 and Ministerial Decree No. 53 of 2011.

Ministerial Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.<sup>156</sup>

All local governments are obligated to send local regulations to the central government within seven days after they have been enacted, to make it possible for the central government to review them.<sup>157</sup> Regency/city regulations should be sent to the governor and to the MoHA, while provincial regulations should be sent only to the MoHA.<sup>158</sup> Local regulations within all regulatory areas are subjected to clarifications (in contrast to the previously discussed “evaluations” that are only made on regulations that concern economic matters).<sup>159</sup> The clarification process entails the formation of a “clarification team” by the Legal Bureau under the MoHA. The team consists of members of the MoHA and other relevant ministries, depending on the needs for clarifying the regulation at hand.<sup>160</sup> Similar “clarification teams” are also formed within the provinces, consisting of members from the relevant working units under the local governments.<sup>161</sup>

The national-level clarification team is mandated to produce clarifications on all kinds of local regulations, no matter if they are issued at provincial, regency or city level and no matter if they are issued by a local parliament or a local head.<sup>162</sup> Even though it is primarily the clarification team at the provincial level that produces clarifications on regency/city regulations, the clarification team at national level has the responsibility to clarify local regulations when a provincial clarification team is not doing so.<sup>163</sup>

The process of a clarification is “the assessment and evaluation of legislation, to determine what is contrary to the public interest, ethics, and/or higher legislation.”<sup>164</sup> “Contrary to the public interest” is defined as, among others, “a policy that leads to [...] discrimination against [...]

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<sup>156</sup> This in spite of the fact that Article 140 Paragraph 3 of Law No. 32 of 2004 on Regional Autonomy states that the review process should be further regulated by a Presidential Decree.

<sup>157</sup> Article 145 (1) of Law No. 32 of 2004 on Regional Autonomy.

<sup>158</sup> Article 88 and Article 99 (1) and (2) of the Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>159</sup> Interview: Zudan, MoHA, 2014.

<sup>160</sup> Article 89 of Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products; Interview: Zudan, MoHA, 2014.

<sup>161</sup> Article 92 of Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>162</sup> Ibid, Article 90 (1).

<sup>163</sup> Interview: Zudan, MoHA, 2014.

<sup>164</sup> Article 1 (19) of the Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

gender”.<sup>165</sup> The result of a clarification can be that the local regulation is in compliance with the public interest, and/or the higher regulation, or that it is contradicting public interest and/or higher regulations.<sup>166</sup> If a regency/city regulation is found to contradict the public interest and/or a higher regulation, the Governor should send a letter to the Regent/Mayor stating so, together with a recommendation on amendment or annulment of the regency/city regulation.<sup>167</sup> If the Regent/Mayor does not comply, the governor proposes the MoHA to issue a ministerial letter recommending amendment or annulment.<sup>168</sup> The governor then monitors the implementation of the recommendation on the amendment or annulment of the regency/city regulation<sup>169</sup> and visits the regency/city government to follow up.<sup>170</sup> The governor shall report the monitoring results to the MoHA no longer than three months after the recommendation was issued and/or any time when needed.<sup>171</sup> If the regency/city government does not follow the recommendation from the MoHA, the Governor will forward the recommendation through the MoHA to the President.<sup>172</sup>

If a provincial regulation is found to contradict the public interest and/or higher regulation, it may be annulled through a Ministerial Decree.<sup>173</sup> In reality, however, the MoHA is only sending a letter to the Governor with more or less the same content as the letters described above.<sup>174</sup> The MoHA monitors the implementation of the recommendations of amendment or annulment on all kinds of local regulations.<sup>175</sup> The local governments report to the MoHA and the MoHA regularly visits the local governments, especially provincial governments, to follow up and discuss the local regulation. Twice yearly the MoHA invites the provincial governments to a workshop on local regulations and clarifications. There also are meetings at the provincial level concerning regulations passed at the regency/city level.<sup>176</sup>

The compliance to the recommendations varies greatly. When it comes to clarifications concerning taxes, retribution etc., the local governments

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<sup>165</sup> Article 1 (21) of the Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>166</sup> Ibid, Article 90 (2) and Article 93 (2).

<sup>167</sup> Ibid, Article 94 (2).

<sup>168</sup> Ibid, Article 93 (3) and Article 99 (3).

<sup>169</sup> Ibid, Article 104 (2).

<sup>170</sup> Interview: Zudan, MoHA, 2014.

<sup>171</sup> Article 105 of the Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>172</sup> Ibid, Article 94 (4) and Article 99 (3).

<sup>173</sup> Ibid, Article 90 (3) and (4) and Article 99 (3).

<sup>174</sup> Ibid, Article 91.

<sup>175</sup> Ibid, Article 104 (1).

<sup>176</sup> Interview: Zudan, MoHA, 2014.

always corrects the regulations concerned following clarifications (such clarifications are binding, in contrast to clarifications concerning human rights)<sup>177</sup>, while clarifications pointing out conflicts with human rights meet many constraints on their compliance. The local governments usually claim that such regulation constitutes special law, based on their cultural values. This happens especially in the Aceh province, which has a strong religious culture. The MoHA therefore tries to assist the local governments and teach them to adopt more of a legal perspective, but this takes time since it is very hard to persuade them and to change the paradigm.<sup>178</sup> If the provincial government does not follow the recommendation from the MoHA, the MoHA may request the President to issue a Presidential Decree amending or annulling the local regulation.<sup>179</sup>

Komnas Perempuan conducted a survey in 2009 which found that the MoHA had pushed for the annulment of more than 2,300 local regulations on taxes and levies,<sup>180</sup> but that the MoHA had scarcely taken any responsibility to push for annulment on discriminatory local regulations.<sup>181</sup> The CEDAW Committee as well has expressed concern that the Government has annulled a number of local regulations concerning economic matters such as taxes but has failed to annul local regulations that violate human rights and discriminate against women.<sup>182</sup>

But since 2010 there has been a development in the MoHA's pattern of clarification issuance. During 2012 and 2013, the MoHA issued seven clarifications concerning local regulations discriminating against women. Among the seven are Tangerang Regulation No. 8 of 2005 on Prohibition of Prostitution, which states that "women are the ones that are prostitutes" and the Gorontalo Regulation on the Prevention of Immoral Acts, which prohibits women from going out late in the evening and obligates women to wear "decent" clothes. The revisal of those seven local regulations is still in process, but according to prof. Zudan, all local governments affected are willing to revise the local regulations except for Aceh, which is "more difficult".<sup>183</sup>

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<sup>177</sup> Article 86 (3) of Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>178</sup> Interview: Zudan, MoHA, 2014.

<sup>179</sup> Article 91 (4) of Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>180</sup> Komnas Perempuan (2010), p. 97.

<sup>181</sup> Ibid, p. 112.

<sup>182</sup> CEDAW Committee (2007), Paragraph 12.

<sup>183</sup> Interview: Zudan, MoHA, 2014.

Komnas Perempuan has another view on the willingness of the local governments. According to them, only one local government of the seven has responded. Andy Yentriyani still waits for the MoHA to take action if the local governments do not respond on the clarifications, or insist on keeping the discriminatory local regulations.<sup>184</sup>

## 6.2 The Ministry of Law and Human Rights

Although the MoLHR does not have a direct mandate or legal basis to conduct legal reviews, they wield functions and responsibilities of tasks appointed to them in the Ministerial Decree Concerning the Duties, Functions and Organization Structures<sup>185</sup> that can be exercised to assess local regulations from a human rights perspective, both in the national and regional offices.<sup>186</sup> Late in 2013, the Legal Bureau under the MoHA initiated a cooperation concerning reviews of local regulations with the Human Rights Legislation and Harmonization Section under the DGHR, MoLHR. The MoLHR assesses the local regulation from a human rights perspective and gives recommendations for amendments, whereupon it is up to the MoHA to use these in their clarifications. There is no obligation to do so, however.<sup>187</sup> Out of the seven clarifications that the MoHA issued during 2012 and 2013 concerning discrimination against women, two or three were based on the MoLHR's recommendations.<sup>188</sup> So far, the MoLHR has assessed and made recommendations on amendments on nine local regulations.<sup>189</sup> But except from the two or three regulations that were clarified by the MoHA, the others are still under process there; in terms of clarifying local regulations the MoHA is careful and restrictive.<sup>190</sup> The MoLHR also supports the MoHA in providing training and education on human rights for local legislators.<sup>191</sup>

Some of the regional offices of the MoLHR are also, to some extent, doing assessments of local regulations. From the 34 provinces, approximately 15–20 % of the regional offices review local regulations, and these are often in

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<sup>184</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>185</sup> The Ministry of Law and Human Rights' Decree No. M.HH–05.OT.01.01 of 2010 Concerning the Duties, Functions and Organization Structures of the Ministry of Law and Human Rights.

<sup>186</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>187</sup> Interview: Saudian, MoLHR, 2014.

<sup>188</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Interview: Zudan, MoHA, 2014.



provinces with big cities such as Central Java, East Java, North Sumatra, Jakarta and South Sulawesi. The central office of the MoLHR is communicating with these to avoid overlapping.<sup>192</sup> Some of the RANHAM Committees at provincial level also review local regulations, but only on a very small scale. However, according to Zuliensyah, Head of the Human Rights Harmonization Section, DGHR, MoLHR, the small amount and scale of these reviews amount to a misinterpretation, since the RANHAM Committees at the provincial level have a stronger mandate even than the regional offices of MoLHR. As stated above, the RANHAM Committee is headed by the Vice Governor, while the vice head for the RANHAM Committee is the head of the regional office of the MoLHR. This combination of people in power within the RANHAM Committee should make the RANHAM Committee strong and effective in monitoring and amending discriminative local regulations.<sup>193</sup>

## 6.3 The President

There are no specific regulations regarding the President's possibility to review discriminatory local regulations. Under the 1945 Constitution the President as head of state and head of government has the authority, obligation, and right to hold the executive power under the Constitution.<sup>194</sup>

The President can issue a Presidential Decree to amend or annul any kind of local regulation.<sup>195</sup> If the President does not issue a Presidential Decree within 60 days of the local regulation's enactment, it is automatically declared valid.<sup>196</sup> If the President does issue a Presidential Decree annulling the local regulation, the local government must stop the implementation of the local regulation within seven days and further on annul it together with the local parliament.<sup>197</sup> However, the local government can challenge the President's decision through an appeal to the Supreme Court.<sup>198</sup> If the

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<sup>192</sup> Interview: Zuliensyah, MoLHR, 2014.

<sup>193</sup> Ibid.

<sup>194</sup> Article 4 (1) of the 1945 Constitution.

<sup>195</sup> Article 91 (4), Article 94 (4) and Article 99 (3) of the Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>196</sup> Article 145 (3) of Law No. 32 of 2004 on Regional Autonomy; Article 94 (5) of Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>197</sup> Article 145 (4) of Law No. 32 of 2004 on Regional Autonomy; Article 97 of the Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>198</sup> Article 145 (5) of Law No. 32 of 2004 on Regional Autonomy; Article 98 (1) of the Minister of Home Affairs's Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

Supreme Court accepts the objection, the Presidential Decree will be declared void.<sup>199</sup>

The President has only once issued a Presidential Decree to annul a local regulation<sup>200</sup>. The Presidential Decree annulled one article in an Aceh *qanun*<sup>201</sup> stating that “a married person cannot work within the same governmental office as its spouse”. The regulation would in practice discriminate against women by pushing wives leave their jobs, for the benefit of husbands and other men.<sup>202</sup> Therefore the article was considered to be contrary to Law No. 39 of 1999 on Human Rights and the equal right to participate in governmental affairs.<sup>203</sup>

When it comes to the MoHA referrals of clarifications to the President, and requests to the President to issue Presidential Decrees that amend or annul discriminative local regulations, prof. Zudan, Head of the Legal Bureau within the MoHA, did not answer this researcher’s repeatedly asked question on how many times the MoHA has made such referrals and requests to the President.<sup>204</sup> When posing the same question to Zuliansyah, Head of Human Rights Harmonization Section under the DGHR, MoLHR, he answered “no one knows”.<sup>205</sup> Yentriyani, Commissioner, Komnas Perempuan, does not expect much from the MoHA when it comes to referring discriminative local regulations to the President.<sup>206</sup> In addition, the President actually regrets the above mentioned Presidential Decree, according to Yentriyani.<sup>207</sup> Komnas Perempuan staff has met with the President at two instances and presented the data of their research, requesting the President to take action on local regulations that discriminate against women by, among others, immediately declaring all discriminatory local regulations legally null.<sup>208</sup> Moreover, the “harmonization of policy” has been in the National Action Plan on Human Rights, RANHAM, since 2010, and has thus been reviewed and emphasized each year since, so it would be naive to say that the President does not know about the

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<sup>199</sup> Article 145 (7) of Law No. 32 of 2004 on Regional Autonomy; Article 98 (2) of Minister of Home Affairs’s Decree No. 1 of 2014 Concerning the Formulation of Local Legal Products.

<sup>200</sup> Presidential Decree No. 87 of 2006; Cf. Komnas Perempuan (2010), p. 97.

<sup>201</sup> Article 33 (2) (n) of Aceh Qanun No. 7/2006 on the Second Amendment to Qanun No. 3/2004 on the Elections of Governor/Deputy Governor, District Heads/Deputy District Heads, and Mayors/Deputy Mayors in the province of Nanggroe Aceh Darussalam.

<sup>202</sup> Interview: Saudian, MoLHR, 2014.

<sup>203</sup> Interview: Zudan, MoHA, 2014.

<sup>204</sup> Ibid.

<sup>205</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>206</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>207</sup> Interview: Madanih & Andriyanti, Komnas Perempuan, 2014.

<sup>208</sup> Komnas Perempuan (2010), p. IV.

problem.<sup>209</sup> According to Andreas Harsono, Senior researcher, HRW Indonesia, the President does not have an adequate notion of the human rights principles in the Constitution.<sup>210</sup> Phelim Kine, deputy Asia director of HRW, has criticized President Yudhoyono as well, for "all talk and no action when faced with government officials and militant groups intent on curbing the rights of women".<sup>211</sup>

## 6.4 The Supreme Court

The 1945 Constitution authorizes the Supreme Court to "review regulations that are below national law against the national law".<sup>212</sup> Thus, if a regulation at province/regency/city level is conflicting with a national law, the Supreme Court can investigate the case,<sup>213</sup> and declare a local regulation unlawful on the grounds that it is contradicting higher laws.<sup>214</sup> The Supreme Court is the only judicial body with the authority to review regulations below the level of national laws, and its decisions are the ultimate legal decisions that bind all state institutions and all citizens.<sup>215</sup>

The right to make a petition concerning a judicial review is granted to Indonesian citizens; unities of indigenous communities that are recognized as such by the Government; and public or private legal entities, who think his/her/their rights have been violated by the enactment of a local regulation.<sup>216</sup>

There previously was a time limit for when an application for a judicial review needed to be submitted to the Supreme Court (within 180 days of the enactment of the local regulation),<sup>217</sup> but it was withdrawn by the new Supreme Court Regulation,<sup>218</sup> thus abolishing local governments' possibility to "hide" a regulation violating higher laws until the time limit expired.<sup>219</sup>

A survey conducted in 2010 that looked at 16 judicial reviews of local regulations made by the Supreme Court found that as with the MoHA, the Supreme Court has however mainly focused on local regulations that

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<sup>209</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>210</sup> Interview: Harsono, HRW, 2014.

<sup>211</sup> Ibid.

<sup>212</sup> Article 24 (a) (1) of the 1945 Constitution.

<sup>213</sup> Article 9 (2) in Law No. 12 of 2011 Concerning Making Rules.

<sup>214</sup> Article 31 (1) and (2) of Law No. 5 of 2004 on the Supreme Court.

<sup>215</sup> Komnas Perempuan (2010), p. 105.

<sup>216</sup> Article 31 (a) of Law No. 3 of 2009 on the Supreme Court and Mechanisms.

<sup>217</sup> Supreme Court Regulation No. 1 of 2004 on Judicial Rights.

<sup>218</sup> Supreme Court Regulation No. 1 of 2011 on Rights to Judicial Review.

<sup>219</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

concern taxes and retributions and which are claimed to contradict the national tax law<sup>220</sup>.

Furthermore, the Supreme Court's procedure of judicial review has been subjected to critique. When the Supreme Court is processing a judicial review it often only assesses if the formal making of the regulation was correct, and does not look into the legality of the substance of the regulation, even though judicial reviews can be done on specific articles, chapters and parts of local regulations.<sup>221</sup>

An example is the judicial review of the Tangerang City Regulation No. 8 of 2005 on the Prohibition of Prostitution.<sup>222</sup> According to Komnas Perempuan, the Supreme Court undermined the integrity of the national law in its judicial review of the Tangerang regulation.<sup>223</sup> The regulation was stating that a person whose attitude or behavior is suspicious or is making him or her appear to be a prostitute, is prohibited to be on a road, hotel, or at other places in the city.<sup>224</sup> At several occasions, women were detained based on this regulation and those affected women filed a joint complaint to the Supreme Court to make a judicial review of the local regulation on the grounds that it indirectly discriminated women and thereby contradicted a range of higher laws stating prohibition of discrimination, and that it contradicted Indonesia's Criminal Code.<sup>225</sup> The Supreme Court rejected the judicial review on the ground that the formal law-making procedure had been correctly performed and fulfilled all requirements,<sup>226</sup> and that the government of Tangerang City was free to enact such policies in local regulations.<sup>227</sup> The decision was only published through a press release (the plaintiffs never received a copy of the full judgment),<sup>228</sup> and at the press conference the Supreme Court's spokesperson announced, after the decision was read, that a panel of three judges had held that the local regulation's subject matter fell outside the court's jurisdiction. The local regulation was 'a political product of the executive and legislature', making it formally valid, meaning it had been created in accordance with proper procedures, had not been rushed through and had involved 'all elements of the

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<sup>220</sup> Law No. 18 of 1997 concerning Regional Tax and User Charges or its successor Law No. 34 of 2000; Butt (2010), p. 187.

<sup>221</sup> Komnas Perempuan (2010), p. 102f.

<sup>222</sup> Interview: Zuliensyah, MoLHR, 2014.

<sup>223</sup> Komnas Perempuan (2010), p. 105.

<sup>224</sup> Article 4 of Tangerang Regency Regulation No. 8 of 2005 on the Prohibition of Prostitution.

<sup>225</sup> Butt (2010), p. 188.

<sup>226</sup> Butt (2010), p. 186; Interview: Zuliensyah, MoLHR (2014).

<sup>227</sup> Butt (2010), p. 189.

<sup>228</sup> Komnas Perempuan (2010), p. 102.

community'.<sup>229</sup> Still, the regulation was later clarified by the MoHA, who assessed the substance of the regulation and came to the conclusion that it was contradicting higher laws.<sup>230</sup>

The tendency of the Supreme Court has thus been that if the formal requirements of the drafting of the regulation have been fulfilled, then the Court does not assess the other arguments that have been brought up, concerning for example discriminatory content. The Law on the Supreme Court mentions the assessment of the material substance as a part of the judicial review, but does not regulate it as mandatory.<sup>231</sup>

Last year, Komnas Perempuan did a public examination of the Supreme Court judgments by commissioning six experts (former judges in the Supreme Court) to review the judgments. The findings of the examination showed very clearly that the Supreme Court ought to go beyond the formal aspect and also review the material substance of the regulation. This view is shared by Andreas Harsono, Senior researcher, HRW Indonesia,<sup>232</sup> and according to Andy Yentriyani, Commissioner, Komnas Perempuan, the Supreme Court judges are very much aware that they are able to assess the material substance.<sup>233</sup>

The reasons for this neglect is, according Zuliensyah, Head of Human Rights Harmonization Section, DGHR, MoLHR, that the Supreme Court wants to make the process faster and because there are strong political influence and pressure on the judges, who most of the time are former members of political parties. According to Zuliensyah, when a plaintiff is submitting a complaint to the Supreme Court on a local regulation, the judges check from which party the local head of the region that issued the regulation is. If the head comes from the same party as the judge, then probably only the formal process of issuing the regulation will be assessed.<sup>234</sup>

Additional critique from Komnas Perempuan concerns that the review procedure does not give access for discourses, discussion or input from any parties that might want to provide explanations and clarity. The process does allow invited experts to be present, but this does not occur in reality.<sup>235</sup>

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<sup>229</sup> Butt (2010), p. 189.

<sup>230</sup> Interview: Zudan, MoHA, 2014.

<sup>231</sup> Article 31 (a) (5) of Law No. 3 of 2009 on the Supreme Court and Mechanisms.

<sup>232</sup> Interview: Harsono, HRW, 2014.

<sup>233</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>234</sup> Interview: Zuliensyah, MoLHR, 2014.

<sup>235</sup> Komnas Perempuan (2010), p. 102.

According to prof. Zudan, Head of the Legal Bureau within the MoHA, the Supreme Court is very closed in this respect.<sup>236</sup>

## **6.5 The National Commission on Human Rights (Komnas HAM)**

Komnas HAM has a team within its Sub-commission on Assessment and Research that reviews local regulations indicative of violating human rights. After its assessment, the sub-commission sends a “position paper” to the related local government stating what they found in their research. If the sub-commission has identified a violation, it issues a recommendation on amendment or annulment of the regulation. If necessary, Komnas HAM also publishes the result of the review and the recommendation to the public through a media release.

Another sub-commission, the Sub-commission on Monitoring and Investigation, can also initiate monitoring and identify regulations that are indicative of violating human rights. The difference from the Sub-commission on Assessment and Research is that the Sub-commission on Monitoring and Investigation is only working with concrete cases; if someone has been discriminated by a local regulation, the person can hand in a complaint to Komnas HAM and then the Sub-commission on Monitoring and Investigation follow up by monitoring and investigating the case. Conversely, the Sub-commission on Assessment and Research identifies discriminative local regulations before cases of discrimination materialize.

Complaints handed in to Komnas HAM mostly concern regulations on land and labor, but may have a gender dimension as well. However, if the main issue is discrimination of women, the case is referred to Komnas Perempuan instead. For this reason, it is uncommon that Komnas HAM issues position papers on regulations that discriminate against women, but since the institution is obligated to do so when it deems local regulations to violate human rights, it does happen.

All of Komnas HAM’s verdicts are only recommendations, and the institution does not have any data on whether its recommendations are being followed or not (the reason stated for this is the administrative burden such follow-up would entail: the institution sends thousands of

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<sup>236</sup> Interview: Zudan, MoHA, 2014.

recommendations).<sup>237</sup> Komnas HAM currently has regional offices in 6 provinces – Aceh, West Sumatra, West Kalimantan, North Sulawesi, Maluku and Papua<sup>238</sup> – which are chosen because of the high frequency of cases in those areas. The authority of the regional offices are however only administrative: cases are handed in to the regional offices and then channeled to the national level.<sup>239</sup>

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<sup>237</sup> Interview: Laila, Komnas HAM, 2014.

<sup>238</sup> Komnas HAM (2014).

<sup>239</sup> Interview: Laila, Komnas HAM, 2014.

# 7 Reasons for the Existence of Local Regulations that Discriminate Against Women and Suggested Solutions

As has been presented in Chapters 5 and 6, there are a number of laws and institutions in place to secure harmonization of legislation and to prevent, amend and annul local regulations that discriminate against women, and as was identified in Chapter 2, local Indonesian regulations that discriminate against women still exist. This chapter seeks to answer the second research question: *What are the reasons behind the existence of local Indonesian regulations that discriminate against women, and what can Indonesia do to solve the problem?* Elaborations will be made within the fields of lack of knowledge in human rights, inefficient institutions and processes for prevention/annulment/amendment, and proposed new legislation.

## 7.1 Lack of Knowledge in Human Rights

According to Zuliansyah, Head of Human Rights Harmonization Section, DGHR, MoLHR, the main reason for the existence of local regulations that discriminate against women is that local legal drafters do not carry a human rights perspective when drafting regulations. Even though there are relevant tools to use in the drafting process, very few legal drafters really understand the human rights principles – and not all of them understand that non-discrimination is integral in human rights. Zuliansyah is of the opinion that prevention is the only solution to the problem with local regulations that discriminate against women. To prevent such regulations, there should be more training in the human rights parameters for legal drafters at the local level, both in the local government and local parliament. Zuliansyah further claims that the MoLHR needs authority and full responsibility to monitor and control the local law-making process. For this to happen the law needs to be changed.<sup>240</sup>

An example of lack of understanding of human rights is shown in Komnas Perempuan's report, stating that local legal drafters have declared that regulations on dress codes for women have the purpose of protecting

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<sup>240</sup> Interview: Zuliansyah, MoLHR, 2014.



women.<sup>241</sup> Also, regulations prohibiting prostitution have been claimed to have the purpose of protecting women from prostitution, but in fact actually criminalize women who already are victims and make it possible to arrest women based only on suspicion, depending on their clothes and behavior.<sup>242</sup>

The CEDAW Committee has expressed concerns about the lack of awareness of the Convention among Indonesia's judiciary, legal profession and law enforcement officials,<sup>243</sup> and has in its two previous Concluding Observations urged Indonesia to “ensure that the Convention and related domestic legislation are [...] well known to lawmakers in order to firmly establish a legal culture supportive of women's equality and non-discrimination in the country.”<sup>244</sup> The CEDAW Committee has further recommended Indonesia to take appropriate measures to raise awareness of the Covenant among judges, lawyers and prosecutors at all levels, especially in the autonomous regions, to ensure that its provisions are taken into account by national courts.<sup>245</sup> Amnesty International and the CEDAW Working Group of Indonesia (CWGI) have stated that there is also a lack of awareness about the CEDAW Committee's recommendations, in particular among government agencies.<sup>246</sup>

## 7.2 Culture and Religion

Culture and religion is another frequently raised reason for the issuance of discriminative local regulations. More than two thirds of the discriminatory local regulations identified in Komnas Perempuan's 2010 report used similar terms about the reason for and intention of the regulation, such as being “manifestations of religious teachings” or to “improve faith and devotion”. More than half of them specifically stated that the goal was to “give the region an Islamic character”.<sup>247</sup>

According to Komnas Perempuan, this can happen because there is no firm and holistic national consensus on the separation of state and religion.<sup>248</sup> Furthermore, it is very sensitive to criticize discriminative regulations based on religious grounds, because they are argued to be legitimized by the

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<sup>241</sup> Komnas Perempuan (2010), p. 32f.

<sup>242</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>243</sup> CEDAW Committee (2012a), Paragraph 11.

<sup>244</sup> CEDAW Committee (2007), Paragraph 9; CEDAW Committee (2012a), Paragraph 14.

<sup>245</sup> CCPR (2013a), Paragraph. 5.

<sup>246</sup> Amnesty International (CEDAW Working Group of Indonesia) (2013).

<sup>247</sup> Komnas Perempuan (2010), p. 22.

<sup>248</sup> Komnas Perempuan (2010), p. 112.

Koran; critics would be accused of being religious sinners.<sup>249</sup>

According to Andreas Harsono, Senior researcher, HRW Indonesia, surveys have show that 60 percent of Indonesians agree with requirements to wear headscarf, the practice of polygamy, and *sharia* in general,<sup>250</sup> and according to Komnas Perempuan, most of the local regulations are based on the will of the majority, without consideration towards minority groups. So if the majority is Muslim, this fact will be reflected in the local regulations. By justifying validity on the premise of majority will, some areas are resistant to critique. This is a problem with many local legislators; they don't obey the national law because they interpret the constitution in the light of their local characteristic and perspective.<sup>251</sup>

According to Rohika Kurniadi Sari, Assistant Deputy, Section of Violence Against Women, MoWECP, the root of the problem is the patriarchal culture in the country, which impacts the politics and results in policies that discriminate against women. Sari thinks that gender equality will eventually become paradigm, but that it takes time to change people's mindsets and that this is not only the government's responsibility but rather the duty of the whole civil society.<sup>252</sup> According to her, the situation is getting better for women in Indonesia, although the problem is still happening in terms of evaluating women and controlling them. The problem lies, though, mainly in how to deal with the problem at local level, where the lion's share of the problem is. Discrimination against women is a crosscutting issue that should be handled together with all executive institutions.<sup>253</sup>

### **7.3 Inefficient Institutions and Processes for Prevention/Amendment/Annulment**

The Indonesian Government has itself admitted that even though there are regulations prohibiting discrimination against women, implementing them is still challenging because of the "the vast geographical size and number of population, as well as the current decentralization process".<sup>254</sup>

The fact that so many local regulations are issued prevents the relatively small clarification teams at provincial and central level from reviewing them

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<sup>249</sup> Interview: Harsono, HRW, 2014.

<sup>250</sup> Ibid.

<sup>251</sup> Interview: Madanih & Andriyanti, Komnas Perempuan, 2014.

<sup>252</sup> Interview: Sari, MoWECP, 2014.

<sup>253</sup> Ibid.

<sup>254</sup> CEDAW Committee (2011a), Paragraph 9.

all. Reports also indicate that some local governments are not sending all their issued regulations to the governors or the MoHA, probably because there are no sanctions for non-compliance to this requirement.<sup>255</sup> A concrete suggestion by Komnas Perempuan is for the MoHA to keep a database over all local regulations that the public and other monitoring actors can access.<sup>256</sup> Prof. Zudan, Head of the Legal Bureau, MoHA, said that it takes a long time for the local government to revise a local regulation which has been clarified and recommended to be changed by the MoHA. The reasons for this are budgetary constraints and because of the procedure that for the local government to be able to discuss an amendment or annulment of a local regulation, it first needs to be included in the local legislation program.<sup>257</sup>

Komnas Perempuan has concluded from its monitoring study that discriminative local regulations have been possible to retain because of the ineffectiveness and imperfection of the national mechanisms, which are supposed to supervise the implementation of regional autonomy, including the formulation and enforcement of regional policies.<sup>258</sup> According to Komnas Perempuan's report, there are poor inter-institutional relations both vertically and horizontally in the administration of the autonomy. One example of this is the absence of a strong legal foundation in the supervisory authority of the provincial clarification teams and there is an uncertainty of the division of responsibility that makes province clarification teams reluctant to take action against discriminatory laws at the regency/city level.<sup>259</sup> The inefficient review system sends signals to the local governments and parliaments that they are free to enact local regulations that discriminate against women and do not have to expect reprisals. The problem of lack of knowledge about human rights is also present within the review mechanisms. If for example a Regency Regulation from Tasikmalaya that is discriminating women is reviewed by the clarification team in the province of West Java, it might be the case that the province itself does not understand the problem with the regency regulation and even itself has similar regulations.<sup>260</sup>

The CEDAW Committee has recommended the Indonesian Government to press upon the province/regency/city governments that the decentralization of power in no way reduces the direct responsibility of the central

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<sup>255</sup> Butt (2010), p. 183.

<sup>256</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>257</sup> Interview: Zudan, MoHA, 2014.

<sup>258</sup> Komnas Perempuan (2010), p. 96.

<sup>259</sup> Ibid, p. 98.

<sup>260</sup> Ibid, p. 95.

Government to fulfill its human rights obligations to all women within its jurisdiction.<sup>261</sup>

The MoHA has proposed a revision of the current Law on Regional Autonomy,<sup>262</sup> giving the MoHA the mandate to amend and annul local regulations instead of the President. The purpose is to enhance the effectiveness of the coordination between the central and the local governments, and the national government's control of the regional autonomy.<sup>263</sup> In the predecessor to the regional autonomy law<sup>264</sup>, the MoHA had a stronger mandate to amend and annul local regulations, so according to prof. Zudan, Head of the Legal Bureau, MoHA, "it would not be a new mandate, it will go back to the old regime". According to Zudan it was only a "law experiment" to give the mandate to the President, "but since it was not so effective, we would like to take it back".<sup>265</sup> When a new law concerning regional autonomy could be passed is uncertain, however. According to Andy Yentriyani, Commissioner of Komnas Perempuan, a revision of the Law on Regional Autonomy, giving more power to the central government, will not happen with the current Parliament.<sup>266</sup> Zuliansyah, Head of Human Rights Harmonization Section, DGHR, MoLHR, is skeptical towards Prof. Zudan's suggestion to reclaim power to the MoHA. If a revision of the Law on Regional Autonomy nonetheless would pass the parliament, giving more power to the MoHA, that law would easily be annulled by the Constitutional Court in a judicial review, since the regional autonomy is protected in the constitution.<sup>267</sup>

There is also an ongoing discussion on a potential revision of the Law on the Supreme Court<sup>268</sup>, and one of the suggestions from the Government is to reiterate the mandate of the Supreme Court's judicial reviews of local laws, specifying that the Court must assess both the formal legality and the material substance.<sup>269</sup>

A new Bill on Gender Equality based on the principles of the CEDAW has been drafted by the MoWECF with support from Komnas Perempuan.<sup>270</sup> The initiative has been welcomed by the CEDAW Committee for being a

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<sup>261</sup> CEDAW Committee (2012a), Paragraph 16.

<sup>262</sup> Law No. 32 of 2004 on Regional Autonomy.

<sup>263</sup> Interview: Zudan, MoHA, 2014.

<sup>264</sup> Law No. 22 of 1999 on Regional Autonomy.

<sup>265</sup> Interview: Zudan, MoHA, 2014.

<sup>266</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>267</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>268</sup> Law No. 3 of 2009 on the Supreme Court.

<sup>269</sup> Interview: Zuliansyah, MoLHR, 2014.

<sup>270</sup> HRW (2014).

good opportunity to incorporate the Convention into national law.<sup>271</sup> The draft was submitted to the parliament in 2009<sup>272</sup> and was intended to be enacted in 2014.<sup>273</sup> However, the draft has remained stalled in the Parliament since 2013 due to opposition from Islamist politicians.<sup>274</sup> Andy Yentriyani, Commissioner, Komnas Perempuan, has been critical to a new Bill on Gender Equality, though. Her concern is that a Bill on Gender Equality may just state the same requirements as the CEDAW, without any additional strength to enforce it, thus lacking effectiveness. Indonesia has had the CEDAW within its national legal system for thirty years, but it has not lead to the increased level of gender equality that was hoped for. According to Yentriyani, Indonesia already prohibits discrimination against women in its Constitution and national law, so there is no need for an extra law. What is needed are tools to effectively implement those laws and to sanction violators of women's rights.<sup>275</sup> There are others who have also expressed concern that even if the bill is passed, it may have been "watered down" from the original draft in order to make it pass at all, and that it thus will be ineffective – in the end only a political tool.<sup>276</sup>

## 7.4 Political Interests

According to Zuliansyah, SH, M.Si, Head of Human Rights Harmonization Section, DGHR, MoLHR, the processes supposed to ensure that no discriminatory local regulations exist are in theory quite good. The problem is that political motives often lead them into dead ends. The fact that governors, regents and mayors are not inaugurated by the president but appointed through direct elections, results in the situation where there is no pressure on the local heads to obey the President. And because there is a higher possibility that they will be elected next time if they obey the will of the people, that is what they most likely will do. Therefore, the clarification letters from the MoHA, and even the threat of Presidential Decrees amending or annulling local regulations, seem to be ignored by the local heads.<sup>277</sup>

Moreover, amending or annulling a local regulation might affect the President's political support by the local government and the political

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<sup>271</sup> UN Department of Public Information (2012).

<sup>272</sup> HRW (2014), p. 343.

<sup>273</sup> CEDAW Committee (2012c), Paragraph 4.

<sup>274</sup> HRW (2014), p. 343.

<sup>275</sup> Interview: Yentriyani, Komnas Perempuan, 2014.

<sup>276</sup> Thomson Reuters Foundation (2014-04-07).

<sup>277</sup> Interview: Zuliansyah, MoLHR, 2014.

parties in the local parliament.<sup>278</sup> Another factor to consider is that, as mentioned, a local government can challenge such a Presidential Decree in the Supreme Court. This opportunity is seen as disrespectful towards the President since the Supreme Court and the President are at the same level in the hierarchy. If such a Presidential Decree would be counteracted by the Supreme Court it would make “the President’s face look really weak”. This is diminishing the effect of the MoHA’s clarifications on the local governments, because they know that the President would not issue a presidential decree amending or annulling the local regulation anyway.<sup>279</sup>

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<sup>278</sup> Interview: Madanih & Andriyanti, Komnas Perempuan, 2014.

<sup>279</sup> Interview: Zuliansyah, MoLHR, 2014; Interview: Madanih & Andriyanti, Komnas Perempuan, 2014.

## 8 Conclusion

The thesis has sought to investigate if Indonesia, with its regional autonomy, fulfills its international human rights obligation to ensure that women are not being discriminated against in local regulations, and if not, what the reasons are that such discriminatory local regulations exist in Indonesia and what the country can do to solve the problems and fulfill its obligation.

### **8.1 The first research question – *Can Indonesia be considered to fulfill its international human rights obligation to ensure that women are not being discriminated in local regulation?***

To answer the first research question it was necessary to examine the content and extent of Indonesia's human rights obligation to ensure that women are not being discriminated in local regulations.

The answer to the first research question will therefore be presented by first stating the content and extent of this obligation, followed by an assessment of Indonesia's fulfillment of it.

#### **8.1.1 First obligation - Enacting national law prohibiting discrimination of women in general.**

The ICCPR and the ICESCR obligate Indonesia to ensure that the human rights are enjoyed without distinction based on sex, and the CEDAW specifically requires Indonesia to enact legislation for that aim. The ICCPR and the CEDAW requires Indonesia to prohibit discrimination based on sex in general through national law, and the CEDAW specifically requires Indonesia to incorporate the principle of equality of men and women into its constitution.

In its Constitution, Indonesia prohibits discrimination "on any grounds". This is a general prohibition but lacks a definition of discrimination and an explicit referral to the ground of sex. Furthermore, Indonesia prohibits discrimination in relation to the rights set out in its law on human rights,

which also lacks a definition of discrimination and a specific referral to the ground of sex, though. Considering the prohibition of discrimination in the Constitution and in national law, Indonesia must however still be regarded to have fulfilled its obligation to prohibit discrimination of women in general.

### **8.1.2 Second obligation – Preventing the enactment of local regulations that discriminate against women.**

The ICCPR prohibits Indonesia from enacting legislation that discriminates women in their enjoyment of their human rights, and in general. The CEDAW prohibits Indonesia to discriminate against women in legislation, both at national and local level, which thus obligates Indonesia's central government to ensure that women are not discriminated in local regulations.

Indonesia has enacted a Law Concerning Making Rules that has to be taken into consideration by local legislators. The law states that regulations must be in line with the hierarchy of rules, which through the mentioned provisions in the Constitution and the law on human rights thus indirectly prohibits discriminatory local legislation. The law also states that the content of regulations must reflect the principle of humanity (protect/respect human rights), and the equal position in law (not contain provisions that are differentiating based on among other gender), among others. Indonesia must therefore be considered to have prohibited, within its national law, the enactment of local regulations that discriminate against women.

Based on the reports and examples given in Chapter 2, it can be concluded that local regulations that discriminate against women, both in general and in the enjoyment of their human rights, nonetheless exist in Indonesia. The question therefore becomes whether existing measures for controlling that no discriminatory regulations are enacted are sufficiently adequate for Indonesia to fulfill its obligation even despite the existing discriminatory local regulations.

Indonesia has established the following institutions and processes as a compliment to the law, to prevent that no local regulations are passed that discriminate against women: The MoLHR can, when invited, assess drafts of local regulations from a human rights perspective and give inputs in the form of recommendations; the RANHAM Committees assess draft regulations on instruction from local legislators and provide recommendations; the MoWECP is a “state ministry” and can only partake



at the local level indirectly through other Ministries; and Komnas HAM can assess local legal drafts from a human rights perspective, either on the initiative from the local government or on its own, but its outputs are only recommendations. It must also be considered a shortcoming that the MoHA, which has the main responsibility for controlling the regional autonomy, does not have any authority to partake in the drafting process of local regulations, other than regulations concerning economic matters. In conclusion, Indonesia has established quite a few institutions and processes for controlling the drafting process of local regulations, but considering that none of these has a legal mandate to demand to be involved in the drafting process, and considering that none of them has the authority of providing legally binding comments, they are not sufficiently effective to have real impact on the local legal-drafting process.

Even though Indonesia has prohibited the enactment of discriminatory local regulations in its national law, the fact that local legislators ignore this prohibition and that the institutions existing to prevent local legislators from enacting discriminatory regulations fail at their task, conveys the conclusion that Indonesia has failed to fulfill its obligation to prevent the enactment of local regulations that discriminate against women.

### **8.1.3 Third obligation – Amending and annulling local regulations that discriminate against women**

As mentioned, in order to enable women to enjoy the rights set out in the ICCPR, Indonesia is obligated to “take all necessary steps”, including “adjustment of domestic legislation” and no matter if the legislation is national or local. As also has been mentioned, the CEDAW requires Indonesia to eliminate discrimination against women “by all appropriate means“ and “without delay”, which means that existing regulations that discriminate against women must be amended or annulled.

As with the institutions and processes for preventing local regulations that discriminate against women from being enacted, Indonesia likewise has numerous institutions and processes for amending or annulling such regulations.

Firstly, Indonesia has executive review mechanisms in the form of the governors as well as the MoHA’s possibility to “clarify” whether local regulations are contrary to the public interest, ethics, and/or higher legislation, and if so, to send recommendations on amendments or

annulment to the local government. This mechanism is however “soft”, since only recommendations can be produced. The MoHA has also received critique for selectively only having clarified local regulations concerning economic matters.

Secondly, the MoLHR can assist the MoHA in assessing the local regulations from a human rights perspective, although this is a relatively new process that so far only has had limited effect on amendment and annulment of discriminatory local regulations.

Thirdly, the President has the authority to issue Presidential Decrees that amend or annul local regulations that discriminate against women. This process is relatively powerful (with the exception that the Decrees can be declared void by the Supreme Court). What is lacking here thus seems to be political will, since this kind of decree only has been issued once.

Fourthly, the Supreme Court can make judicial reviews on local regulations that discriminate against women, assessing if the substance contradict higher laws, e.g. the Constitution or the Law on Human Rights. In reality though, this institution has failed to produce any assessment on the material substance of local regulations; only the formal legality of the regulations has been assessed.

Fifthly, Komnas HAM has the possibility to review local regulations and give recommendations to local governments, and to work on cases raised by people who have been discriminated by local regulations. Their main focus is however not women’s issues.

Deeming by these many possibilities, it would therefore seem that even if no individual possibility is very powerful or effective, at least they should be so taken collectively. Nevertheless, the record is poor when it comes to combatting local regulations that discriminate against women, not least considering that the amount of such regulations is increasing. The sheer number of different mechanisms can thus instead actually be considered to undermine the efficiency of the total system for controlling local regulations. With effectiveness lacking from these mechanisms, processes and institutions, Indonesia can thus not be considered to meet the requirements set out by the CEDAW (to eliminate discrimination against women “by all appropriate means” and “without delay”). Therefore Indonesia fails to fulfill its obligation to amend and annul local regulations that discriminate against women.

#### **8.1.4 Concluding remarks on the first research question**

As has been presented, Indonesia has much legislation and many institutions and processes to ensure that women are not being discriminated against in local regulations. The problem rather lies with their relative lack of teeth and effectiveness. Legislation and institutions are must-have tools forward in the process of eliminating local regulations that discriminate against women, but they cannot on their own change attitudes and the will to actually use the means provided to change the situation. As long as the institutions and processes are not fully utilized, the local regulations that discriminate against women still exist, and are at this time increasing in number. Thus, the reality of being unable to enjoy their human rights is further entrenched for many Indonesian women. Non-discrimination is the core value in the international human rights treaties, but the existing Indonesian institutions and processes for upholding this value cannot be considered sufficiently adequate for doing so.

Based on the analysis that Indonesia only fulfills the first of its three obligations assessed above, it must be concluded that Indonesia is not fulfilling its international human rights obligation to ensure that women are not being discriminated against in local regulations.

#### **8.2 The second research question – what are the reasons that discriminative local regulations exist in Indonesia, and what can Indonesia do to solve the problems?**

The reasons that local Indonesian regulations that discriminate against women exist in Indonesia are, simplified and summarized: a lack of knowledge in human rights; cultural and religious population compositions currently yielding significant resistance to complying with the values championed by, among others, the international human rights treaties; inefficient institutions, processes and mechanisms for prevention/amendment/annulment of discriminative local regulations; and political interests as well as political nepotism/corruption, stretching even into the judiciary.

Since one of the main problems identified by the interviewees is the lack of knowledge about human rights and the traditional perceptions on gender

issues, the key solution to the problem with local regulations that discriminate against women lies in human rights education and, specifically, education in the principle of non-discrimination. Such education should be provided to all involved institutions: to the local legal drafters; to the institutions monitoring and reviewing local regulations so that regulations that for some reason are not prevented from being enacted still can be addressed effectively; and, crucially, to the public, who ultimately are the ones who elect representatives to the local parliaments and government – the local legislators.

Popularly held current cultural and religious values are difficult to change in ways other than education (and/or societal and economic development), but addressing the corruption present throughout Indonesia would most certainly go a long way towards alleviating the situation for the country's women (at least in the long term). Government crackdowns in tandem with an increase in the public holding their officials accountable, is a must to create a virtuous circle of progress in this issue.

The responsibility for the non-discrimination of Indonesia's women thus lies within the Indonesian society as a whole. No single actor can solve the problem and no single actor constitutes the entire problem. With that said, one always needs to work first with that which one currently has; in the instance of the work to eliminate local Indonesian regulations discriminating against women, this amounts to strengthening the institutions, processes and mechanisms already in place – and to educate all relevant actors about them.

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# International Instruments

## INTERNATIONAL REGULATION

Charter of the United Nations (UN Charter).

Convention on the Elimination of Discrimination Against Women (CEDAW).

International Covenant on Civil and Political Rights (ICCPR).

International Covenant on Economic, Social and Cultural Rights (ICESCR).

Universal Declaration of Human Rights (UDHR).

## HUMAN RIGHTS TREATY BODIES

### Committee on Economic, Social and Cultural Rights (CESCR)

CESCR (2014). *List of issues in relation to the initial report of Indonesia:*

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*Interview (2014-04-01): Prof. DR. Zudan Arif Fakrulloh*, SH.MH, Head of the Legal Bureau.

## Ministry of Law and Human Rights (MoHLR)

*Interview (2014-04-04): Zuliansyah*, SH, M.Si, Head of Human Rights Harmonization Section under the Directorate General of Human Rights

*Interview (2014-04-03): DR. Harniati*, SH,LL.M, Deputy Director of Human Rights Legislation and Harmonization under the Directorate General of Human Rights.

*Interview (14-03-30): Muhammad Dimas Saudian*, Head of Human Rights Legislation Section under the Directorate General of Human Rights.

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*Interview (2014-04-08): Rohika Kurniadi Sari*, Assistant Deputy, Section of Violence Against Women.

## National Commission on Human Rights (Komnas HAM)

*Interview (2014-04-14): Siti Noor Laila*, Commissioner.

## National Commission on Violence Against Women (Komnas Perempuan)

*Interview (2014-04-02): Andy Yentriyani*, Commissioner.

*Interview (2014-03-26): Dahlia Madanih*, Coordinator of the Working Group of Women in the Constitution and National Laws; **Yulia Dwi Andriyanto**, International Advocacy, the National Commission on Violence Against Women (Komnas Perempuan).