

ARTICLE

# Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments

Petra Mahy\*

Monash University, Australia

Corresponding author. E-mail: [petra.mahy@monash.edu](mailto:petra.mahy@monash.edu)

(Received 21 April 2021; revised 24 August 2021; accepted 1 September 2021; first published online 12 April 2022)

## Abstract

Indonesia enacted a controversial 'Omnibus Law' on Job Creation in late 2020, and its implementing regulations followed in February 2021. This Law, and particularly the labour cluster of amendments within it, has been linked to Indonesia's recent 'democratic decline' or 'illiberal turn'. Many of the amendments reduce worker protections with the aim of producing a more flexible labour market. While it is these obvious amendments in favour of employers' interests that have attracted the most attention, a deeper analysis of the changes introduced by this Law reveals additional important factors at play. There has been a significant repositioning of labour regulations within Indonesia's hierarchy of legal instruments, as well as important responses to Constitutional Court judicial review cases. Overall, this deeper legal analysis produces mixed evidence for democratic decline in Indonesia.

## Introduction

On 5 October 2020, during the COVID-19 pandemic, the Indonesian National Legislature (*Dewan Perwakilan Rakyat* or DPR) passed a very controversial 'Omnibus Law'. This piece of legislation, with a massive 1187 pages, was then signed by President Joko Widodo and came into effect on 2 November 2020. It is now officially known as *Law no. 11/2020 on Job Creation (Undang-Undang no. 11/2020 tentang Cipta Kerja)*.<sup>1</sup> Representing the culmination of a signature policy of the President, this Law was aimed at simplifying overlapping regulations and boosting foreign direct investment by improving the ease of doing business. Indeed, climbing the World Bank's *Doing Business* ranking was at least partly a driver behind this policy.<sup>2</sup> The Job Creation Law introduced a new framework for business licensing and then simultaneously amended 77 existing national laws covering a very wide sweep of issues including, but not limited to: environmental

\*Senior Lecturer, Department of Business Law & Taxation, Monash University, Australia.

<sup>1</sup>Hereinafter referred to as the 'Job Creation Law' (in text) and 'Law no 11/2020 on Job Creation' (in footnotes).

<sup>2</sup>'Peringkat Kemudahan Bisnis RI Naik ke 72, Jokowi: Tahun Depan 50 [Indonesia's Ease of Doing Business Ranking Rises to 72, Jokowi: Next Year 50]' (Detik, 1 Nov 2017) <<https://finance.detik.com/berita-ekonomi-bisnis/d-3709379/peringkat-kemudahan-bisnis-ri-naik-ke-72-jokowi-tahun-depan-50>> accessed 17 Jan 2022; Pusat Analisis dan Evaluasi Hukum BPHN [BPHN Centre for Legal Analysis and Evaluation], *Laporan Akhir Kelompok Kerja Analisis dan Evaluasi Hukum Terkait Proses Memulai Usaha [Final Report of the Working Group on Legal Analysis and Evaluation of Processes for Starting a Business]* (Badan Pembinaan Hukum Nasional 2018). Note that the World Bank discontinued the *Doing Business* index in September 2021.

© The Author(s), 2022. Published by Cambridge University Press on behalf of the National University of Singapore. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

protection, spatial planning, special economic zones, small and medium enterprises, land rights, transport, energy, agriculture, fisheries, and taxation.

Changes to the labour and social security laws are also a key aspect of the Job Creation Law, and this Article will focus on this cluster of labour-related amendments. The Law has introduced a range of changes to the existing *Law no. 13/2003 on Labour*,<sup>3</sup> including on the regulation of fixed-term contracts and outsourcing, minimum wage determination, dismissals, severance pay, leave, working time, and employment of foreign workers. The Law also introduced a framework for unemployment insurance as an additional form of workers' social security scheme and amended some aspects of the *2017 Overseas Migrant Worker Law*. Subsequently, by 2 February 2021, the Law's forty-nine required implementing regulations (mostly in the form of Government Regulations) were authorised by President Joko Widodo – four among them relating to the labour cluster of amendments. These regulations were released publicly on 21 February 2021.

Several labour-related amendments introduced by the Job Creation Law, and its implementing regulations, are 'de-regulatory' or 'flexibilising' in nature. They have reduced restrictions in relation to time limits on fixed-term contracts<sup>4</sup> and the types of work that can be outsourced,<sup>5</sup> reduced severance pay calculations,<sup>6</sup> and have increased the maximum number of overtime hours that can be worked per day.<sup>7</sup> Some exemptions have been introduced for micro and small enterprises, including from needing to pay the minimum wage.<sup>8</sup> These are all important changes that are likely to have profound impacts on worker protection in Indonesia, and have garnered a great deal of resistance and critical commentary from the union movement and their supporters within Indonesia and abroad. Some other changes lean in the opposite direction, though, perhaps to lessen union opposition to the flexibilising amendments. For example, compensatory payments to workers when their fixed-term contracts end have been introduced,<sup>9</sup> as have new penalties for employers who pay wages late<sup>10</sup> and new criminal sanctions for non-payment of severance pay.<sup>11</sup> The new unemployment social security scheme also aims to partially shift the burden of dismissal costs from employers to the state.<sup>12</sup>

Several commentators have linked the Job Creation Law to larger political shifts in Indonesia which have been labelled as a 'democratic decline' or 'illiberal turn'.<sup>13</sup> While Indonesia remains

<sup>3</sup>*Undang-Undang no 13/2003 tentang Ketenagakerjaan* (Law no. 13/2003 on Labour, also commonly referred to in English as the 'Manpower Law' or 'Manpower Act'). It will hereinafter be referred to as '2003 Labour Law' in the main text. For a review of the content of this Law, see Chris Manning & Kurnya Roesad, 'The Manpower Law of 2003 and its Implementing Regulations: Genesis, Key Articles and Potential Impact' (2007) 43 *Bulletin of Indonesian Economic Studies* 59.

<sup>4</sup>Law no 11/2020 on Job Creation, art 81(15) amending Law no 13/2003 on Labour, art 59; Government Regulation no 35/2021 on Fixed-Term Contracts, Outsourcing, Working Time and Rests, and Dismissals (hereinafter 'GR 35/2021'), art 8.

<sup>5</sup>Law no 11/2020 on Job Creation, art 81(20), amending Law no 13/2003 on Labour, art 66(2); GR 35/2021, ch 3.

<sup>6</sup>Law no 11/2020 on Job Creation, arts 81(50)–(58), which deletes and amalgamates Law no 13/2003 on Labour, arts 161–169; GR 35/2021, arts 40–49.

<sup>7</sup>Law no 11/2020 on Job Creation, art 81(22), amending Law no 13/2003 on Labour, art 78.

<sup>8</sup>Law no 11/2020 on Job Creation, art 81(28), introducing Law no 13/2003 on Labour, art 90B (newly added); Government Regulation no 36/2021 on Wages, art 36.

<sup>9</sup>Law no 11/2020 on Job Creation, art 81(17), introducing Law no 13/2003 on Labour, art 61A (newly added); GR 35/2021, art 15.

<sup>10</sup>Law no 11/2020 on Job Creation, art 81(25), introducing Law no 13/2003 on Labour, art 88A(6) (newly added).

<sup>11</sup>Law no 11/2020 on Job Creation, art 81(63), amending Law no 13/2003 on Labour, art 185.

<sup>12</sup>Law no 11/2020 on Job Creation, art 82, amending Law no 40/2004 on the National Social Security System.

<sup>13</sup>See eg. Tim Lindsey & Ian Wilson, 'Ear to Asia Podcast: Episode 80: Why the Outrage Over Indonesia's New Job Creation Law' (Asia Institute, 19 Nov 2020) <<https://arts.unimelb.edu.au/asia-institute/ear-to-asia/episodes/episode-80>> accessed 17 Jan 2022; Arizka Warganegara & Paul Waley, 'Omnibus Bill Reveals Jokowi's Bedfellows', (EastAsiaForum, 28 Oct 2020) <<https://www.eastasiaforum.org/2020/10/28/omnibus-bill-reveals-jokowis-bedfellows/>> accessed 17 Jan 2022; Abdil Mughis Mudhoffir & Rafiqah Qurrata A'yun, 'Omnibus Law Shows How Democratic Process has been Corrupted' (Indonesia at Melbourne, 12 Oct 2020) <<https://indonesiatmelbourne.unimelb.edu.au/omnibus-law-shows-how-democratic-process-has-been-corrupted/>> accessed 17 Jan 2022; Marcus Mietzner, 'Sources of Resistance to Democratic

one of the most democratic nations in Southeast Asia, various democracy indexes<sup>14</sup> and academic analyses indicate a weakening in its democratic institutions in recent years. Rollbacks of democratic institutions have been driven by certain politico-business elites, while civil society organisations' ability to resist such changes has weakened. This decline began before the COVID-19 pandemic but appears to have been exacerbated by it due to social distancing requirements and the associated limiting of the ability to pressure government through public protests.<sup>15</sup>

These politically driven labour law changes that have attracted the most media coverage and commentary, however, are only the more obvious part of the suite of amendments included in the Job Creation Law. There are two other significant technical law-making issues inherent within the Job Creation Law's labour cluster and its implementing regulations. The first issue is that there has been a substantial rearrangement of labour law norms within the hierarchy of legal instruments in Indonesia. Many substantive workers' rights have been 'downgraded' from 'Law' (*Undang-Undang*) to 'Government Regulation' (*Peraturan Pemerintah*), while some other rules have been 'upgraded' from lower-level implementing regulations to Government Regulation or to Law.<sup>16</sup> Inherent within these shifts is the balance between legislative and executive law-making powers, given that implementing regulations are the domain of the executive government and are much easier to amend than Law.

The second dynamic that is playing out within these labour amendments is a dialectic between the Constitutional Court, and to a much lesser extent the Supreme Court, with their judicial review functions, and the legislative and executive branches of government. A significant number of labour law amendments in the Job Creation Law are either intended to affirm previous Constitutional Court rulings or to override them. While this may be at least partly read as a positive development indicating some maturity in Indonesia's legal system due to the responses to judicial review rulings, one Constitutional Court case was ignored entirely. And, in one important instance the legal hierarchy has arguably been used strategically to override the Constitutional Court by 'hiding' the change within the lower-level implementing regulations.

My analysis of the labour cluster in the Job Creation Law presented in this Article indicates the need to examine more deeply the technical amendments alongside the more obvious politically driven legal changes. The technical aspects of the amendments in the labour cluster provide some mixed evidence for the 'democratic decline' or 'illiberal turn' in Indonesia. The rearrangement of labour law norms within the legal hierarchy does mean a significant shift from legislative to executive power over labour regulation which may portend further, easier, reductions to worker protections in Indonesia in the future. It also appears that the Job Creation Law and its implementing regulations were drafted as an integrated package, thereby merging legislative and executive roles. The responses to previous judicial review cases are more positive as they mostly acknowledge and reinforce the role of the Constitutional Court, but as noted we also see some evidence of attempts to remove labour law rules from the jurisdiction of the Constitutional Court.

---

Decline: Indonesian Civil Society and its Trials' (2021) 28 *Democratization* 161, 173; Marcus Mietzner, 'Indonesia in 2020: COVID-19 and Jokowi's Neo-Liberal Turn' [2021] *Southeast Asian Affairs* 107; Greg Fealy, 'Jokowi in the Covid-19 Era: Repressive Pluralism, Dynasticism and the Overbearing State' (2020) 56 *Bulletin of Indonesian Economic Studies* 301; Thomas Power & Eve Warburton, 'The Decline of Indonesian Democracy', in Thomas Power & Eve Warburton (eds), *Democracy in Indonesia: From Stagnation to Regression* (ISEAS-Yusof Ishak Institute 2020); Michele Ford & Kirsty Ward, 'COVID-19 in Southeast Asia: Implications for Workers and Unions' (2021) 63 *Journal of Industrial Relations* 432.

<sup>14</sup>In the Economist's *Democracy Index*, Indonesia's overall score has fallen from a high of 7.03 in 2015 to 6.3 in 2020. In Freedom House's *Freedom in the World Index* Indonesia was ranked 65/100 in 2017 but this dropped to 59/100 in 2021. Note, however, that Indonesia's overall index score has been relatively steady in the World Justice Project's *Rule of Law Index* over the 2015–2020 period.

<sup>15</sup>Tomas P Power, 'Jokowi's Authoritarian Turn and Indonesia's Democratic Decline' (2018) 54(3) *Bulletin of Indonesian Economic Studies* 307; Mietzner, 'Sources of Resistance' (n 13) 163.

<sup>16</sup>See further discussion below in the Part on 'Reordering the Hierarchy of Labour Law Norms via the Job Creation Law'.

This Article is organised as follows: In the first two Parts, I explain the relevant background to the legal hierarchy and the judicial review processes in Indonesia. Next, I briefly trace the history of labour law in Indonesia, noting the roles of both legal hierarchy and judicial review, and then introduce the Job Creation Law in more detail. Following this, I provide key examples of where labour law rules have been reordered within the legal hierarchy by the Job Creation Law and its implementing regulations. I also provide examples of where the Job Creation Law has responded to judicial review cases. My conclusions are offered in final part of the Article.

### Law-Making and Legal Hierarchy in Indonesia

In order to understand the significance of the shifting of labour rules between different levels of legal instruments that has occurred through the Job Creation Law, a brief explanation of Indonesia's distinctive, complex hierarchy of legal instruments is first necessary here. Within this hierarchy, some of the legal instruments are legislative while other types are executive or occasionally even emanate from the higher courts. Damian and Hornick, writing in 1972, noted that Indonesia's 'basic' Laws, ie, those enacted by the National Legislature (DPR), tended to function as broad policy statements rather than as providing detailed operative rules.<sup>17</sup> The detailed rules were generally found instead in implementing regulations issued by the executive branch of government. This situation was emblematic of the executive-dominated regime during Suharto's authoritarian New Order regime (1966–1998) when the DPR was merely a rubber-stamp body. But this pattern has also largely continued in the post-New Order democratic reform era, though significant steps have certainly been taken to strengthen national and regional legislatures, and to clarify and standardise the various types of legal instruments.

The current version of the hierarchy of legal instruments reads, from highest to lowest: (i) The 1945 Constitution as amended; (ii) Decrees of the People's Consultative Assembly (*Ketetapan MPR*);<sup>18</sup> (iii) Laws (*Undang-Undang*) (or Government Regulations in Lieu of Laws); (iv) Government Regulations (*Peraturan Pemerintah*); (v) Presidential Regulations (*Peraturan Presiden*); (vi) Provincial Regulations; and (vii) District/Municipal regulations.<sup>19</sup> In terms of legal strength, it makes little difference whether a particular rule is placed in a particular type of instrument so long as lower-level regulations do not contradict those higher in the list. This list, however, is incomplete because various other executive government and judicial institutions also have the power to issue regulations,<sup>20</sup> but the exact position of such regulations in the hierarchy is left unclear. This includes the often-used Ministerial Regulations (*Peraturan Menteri*), Ministerial Decisions (*Keputusan Menteri*) and Circular Letters (*Surat Edaran*),<sup>21</sup> which have all, for example, played very important roles in labour regulation in Indonesia.

The making of Laws in Indonesia is often a slow process, especially when compared to the earlier years of the reform era. Planned Laws should be listed on the National Program for Legislation (*Prolegnas*) at the start of the five-year parliamentary term and then this list is also updated annually.<sup>22</sup> Inclusion in this list is not, however, a guarantee that a Law will make it through to enactment, with some draft bills sitting on the *Prolegnas* list for years. Unlisted bills may also

<sup>17</sup>Eddy Damian & Robert Hornick, 'Indonesia's Formal Legal System: An Introduction' (1972) 20 *American Journal of Comparative Law* 492, 511.

<sup>18</sup>Note that the MPR can now only issue decrees in very limited circumstances and the inclusion of these in the hierarchy refers to decrees from before the Reform era. MPR Decrees are also excluded from judicial review.

<sup>19</sup>Law no 12/2011 on Law-Making, art 7(1).

<sup>20</sup>*ibid*, art 8.

<sup>21</sup>Note, however, that article 8 of the Law-Making Law of 2011 specifically refers to '*peraturan*' or '*regulations*', which leaves the position of administrative decisions (*keputusan*), and circular letters unclear. The Supreme Court has refused to review these types of administrative instruments – see discussion associated with (n 46) below.

<sup>22</sup>Law no 12/2011 on Law-Making, art 20.

occasionally be considered.<sup>23</sup> The DPR often fails to meet its own legislative targets. Commentators have attributed this low productivity to a variety of interacting factors including: the multi-party and multi-Commission structures in the DPR, complicated deliberative procedures, the increasing volume of non-legislative activities of DPR representatives, the Regional Representative Council (DPD)'s attempts to increase its influence, and 'money politics'.<sup>24</sup> The public also has the formal right to provide input on draft bills and, to facilitate this, all draft Laws are supposed to be made easily accessible to all.<sup>25</sup>

Bureaucrats play key roles in legislative and regulatory drafting in Indonesia. It is useful to think of Laws as being 'framework' or 'umbrella' instruments which explicitly or implicitly require the executive government to fill gaps with implementing regulations in various forms. While bureaucrats may play a role in the drafting of Laws, especially those initiated by the President, they are usually the primary drafters of implementing regulations.<sup>26</sup> Government Regulations, for example, are drafted by the relevant ministry and become effective when signed by the President. Each national ministry has a legal division where civil servants perform the role of legislative drafters and government lawyers. Often, years may pass between the enactment of a Law and the formulation of its required implementing regulations producing legal uncertainty in the interim. In addition, given the general nature of Laws, there may be significant leeway given to the implementing regulations. The drafting of implementing regulations may become the site of bureaucratic power struggles and infighting,<sup>27</sup> where the original social groups interested in the Law are often excluded,<sup>28</sup> and the resulting regulation may differ from the original intention of the DPR. As examples, this occurred with the implementing regulations to the mandatory corporate social responsibility requirements for resources companies in the *2007 Company Law*,<sup>29</sup> and with the implementing regulations to the *2014 Village Law*.<sup>30</sup>

Prior to the Job Creation Law, Indonesia had not used an omnibus law format as a law-making strategy on this scale, though there have been a few Laws that amended multiple existing Laws at once.<sup>31</sup> Although not prohibited, there was previously no tradition of enacting omnibus laws within Indonesia's civil law system (omnibus laws are more often found in common law systems). The idea to use this format appears to have been first mooted in 2017 by the Minister for Agriculture and Spatial Planning, Sofjan Djalil, who took inspiration from his studies in the United States.<sup>32</sup> The

<sup>23</sup>Law no 12/2011 on Law-Making, art 23(2), as amended by Law no 15/2019.

<sup>24</sup>Jimly Asshiddiqie, 'UU Omnibus (Omnibus Law), Penyederhanaan Legislasi, dan Kodifikasi Administratif [The Omnibus Law, Simplification of Legislation and Administrative Codification]' (Jimly School, 2 Dec 2019) <<https://www.jimly-school.com/baca/34/uu-omnibus-omnibus-law-penyederhanaan-legislasi-dan-kodifikasi-administratif>> accessed 17 Jan 2022; Simon Butt & Tim Lindsey, *Indonesian Law* (Oxford University Press 2018) 46–47; Stephen Sherlock, 'Made by Committee and Consensus: Parties and Policy in the Indonesian Parliament' (2012) 20 South East Asia Research 551.

<sup>25</sup>Law no 12/2011 on Law-Making, art 96. See also (n 96) below.

<sup>26</sup>Law no 12/2011 on Law-Making, as amended by Law no 15/2019, arts 28(1) and 55(1).

<sup>27</sup>See eg, Wayne Palmer, *Indonesia's Overseas Labour Migration Programme, 1969–2010* (Brill 2016); Indriaswati Dyah Saptaningrum, 'Internet Regulation in Indonesia 1990–2018: An Inquiry into a Contested Regulatory Field' (PhD Thesis, University of New South Wales 2020).

<sup>28</sup>Jacqueline Vel, Yando Zakaria & Adriaan Bedner, 'Law-Making as a Strategy for Change: Indonesia's New Village Law' (2017) 4 Asian Journal of Law and Society 447, 464.

<sup>29</sup>Andrew Rosser & Donni Edwin, 'The Politics of Corporate Social Responsibility in Indonesia' (2010) 23 The Pacific Review 1.

<sup>30</sup>Vel et al (n 28).

<sup>31</sup>For example, Government Regulation in Lieu of Law no 1/2017 on Access to Financial Information for Taxation; Law no 23/2012 on Regional Administration. See also Agnes Fitriyantica, 'Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law [Harmonisation of Indonesia's Legislative Rules Via the Omnibus Law Concept]' (2019) 6 Jurnal Gema Keadilan 300, 305.

<sup>32</sup>Luhut: Istilah Omnibus Law Dikenalkan oleh Sofyan Djalil [Luhut: The Omnibus Law Term was Introduced by Sofyan Djalil] (Kompas.com, 12 Oct 2020) <<https://nasional.kompas.com/read/2020/10/12/17010251/luhut-istilah-omnibus-law-dikenalkan-oleh-sofyan-djalil>> accessed 17 Jan 2022.

justification given for the use of an omnibus law format was to streamline and clarify many overlapping Laws and regulations, as well as to push through a very large amount of legal change simultaneously without getting slowed down by DPR legislative processes. Indeed, these are the key motivations for use of the omnibus law format around the world.<sup>33</sup> The Job Creation Law also clearly specified that its implementing regulations would be mostly in the form of Government Regulations, as well as a couple of Presidential Regulations. This particularly sidelines the previous role of Ministerial Regulations which, as noted above, do not have an explicitly defined place in the legal hierarchy.

The hierarchy of legal instruments in Indonesia is, therefore, not just an organising principle – it also denotes the balance of powers between the different branches of government. As will be discussed below, there have been significant shifts in powers over labour regulation in Indonesia as a result of the labour cluster of amendments in the Job Creation Law.

### Judicial Review in Indonesia

The other piece of the puzzle that provides important background to the labour cluster of amendments in the Job Creation Law is judicial review. Indonesia has a dual judicial review system<sup>34</sup> where jurisdiction is divided between the two peak courts, the Constitutional Court (*Mahkamah Konstitusi*) and the Supreme Court (*Mahkamah Agung*). The Constitutional Court has the power to review national Laws (ie, *Undang-Undang*) made by the DPR in order to determine whether they accord with the *Constitution of the Republic of Indonesia 1945*,<sup>35</sup> including its Bill of Rights chapter.<sup>36</sup> Meanwhile, the Supreme Court has the power to review lower-level regulations.<sup>37</sup> There are some differences, however, in how these courts have approached their judicial review functions and some significant gaps remain in coverage of various regulations within the hierarchy of legal instruments. The judicial review decisions of both courts are final, and theoretically binding, but the question of executive and legislative reaction to judicial review decisions also arises.

Indonesia's Constitutional Court was established in 2003. One of the central pillars of Indonesia's democracy, in general it is felt that the Constitutional Court 'has performed its functions with professionalism and integrity'.<sup>38</sup> It has tended, especially in its early years under the first Chief Justice Jimly Asshiddiqie, to produce decisions that are more rigorous and legally supported compared to other courts in Indonesia, including the Supreme Court. That said, two Constitutional Court judges have been found guilty of accepting bribes: Chief Justice Akil Mochtar in 2014 and Justice Patrialis Akbar in 2017. As noted, the Constitutional Court can review national Laws for their constitutionality. Individual Indonesian citizens, community groups, public and private legal entities and state institutions all have legal standing to bring constitutional review challenges if they have suffered damage to their constitutional rights by the application of the impugned Law.<sup>39</sup> There are no court administration fees charged for reviews in the Constitutional Court, although parties must cover their own legal representation costs if used.

The Constitutional Court has the powers to review national Laws as a whole as to whether they comply with proper law-making processes (ie, *uji formil*) and also to review the substantive content

<sup>33</sup>Ittai Bar-Siman-Tov, 'An Introduction to the Comparative and Multidisciplinary Study of Omnibus Legislation', in Ittai Bar-Siman-Tov (ed), *Comparative Multidisciplinary Perspectives on Omnibus Legislation* (Springer 2021) 1–31.

<sup>34</sup>Pan Mohamad Faiz, 'Legal Problems of Dualism of Judicial Review System in Indonesia' (2016) 16 *Jurnal Dinamika Hukum* 187.

<sup>35</sup>Hereinafter, 'Indonesian Constitution'.

<sup>36</sup>Indonesian Constitution, art 24C(1).

<sup>37</sup>Indonesian Constitution, art 24A(1); Law no 14/1985 on the Supreme Court, art 31(2); Supreme Court Regulation no 1/2011 on Material Judicial Review.

<sup>38</sup>Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015) 6.

<sup>39</sup>Law no 24/2003 on the Constitutional Court, art 51(1); Constitutional Court Decision nos 6/PUU-III/2005 and 11/PUU-V/2007.



of Laws as to whether they adhere to the Constitution (ie, *uji materiil*). The Constitutional Court can strike down particular provisions or even entire Laws. Over time it has also developed a softer 'conditionally constitutional' type of ruling. This means that particular legal provisions are to be read according to the Court's interpretation. The Court's decisions generally have effect on the validity of the Law in question from the date of the decision, although it has in certain cases specified retroactive or future effect.<sup>40</sup> The Constitutional Court, as it is not an appeals court, can only rule on cases in the abstract and cannot make determinations regarding concrete cases of loss.<sup>41</sup> Therefore, those who bring such challenges will not be awarded damages or other restitution, and due to the prospective nature of the Court's decisions, favourable decisions often do not remedy the situation that led to the challenge.<sup>42</sup>

A key limitation of the Constitutional Court is that its jurisdiction is limited to the review of the Laws made by the DPR and it therefore does not have the power to review lower-level national regulations or regional regulations. That review power is instead given to the Supreme Court. Although the Supreme Court had these judicial review powers in previous eras,<sup>43</sup> it has only really begun to use them in the post-Suharto period. It undertakes approximately seventy to ninety judicial reviews each year – these are a comparatively very small part of the Supreme Court's overall caseload, which in 2019 amounted to a total of over 19,000 new case lodgements.<sup>44</sup> While it is clear that the Supreme Court can review regulations as to whether they accord with laws, including against the procedural requirements found in the *2011 Law on Law-Making*,<sup>45</sup> there are still many uncertainties about its review powers. The Supreme Court has often refused to review certain legal instruments such as Circular Letters (*Surat Edaran*) or administrative decisions (*keputusan*), on the grounds that they are not regulations (*peraturan*).<sup>46</sup> It is also not entirely clear whether the Supreme Court has the power to review regulations against any higher-level regulation including the Constitution, or only against Laws, or whether regulations of the same level can be reviewed against each other.<sup>47</sup> Access to the Supreme Court is also more limited; while taking a review case to the Constitutional Court is free, at the Supreme Court applicants must pay IDR 1 million (approximately US\$70) if they lose the case.<sup>48</sup> While the Constitutional Court holds in-person hearings and gives applicants an opportunity to later improve their written submissions, the proceedings at the Supreme Court are conducted entirely on the submitted paperwork.

Some leading scholars of Indonesian law, such as Simon Butt, Nicholas Parsons and Tim Lindsey, have documented that the Supreme Court has generally been reluctant to exercise its judicial review function.<sup>49</sup> It has shown this reluctance through contradictory interpretation of the rules

<sup>40</sup>Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Taylor & Francis 2018) 116; Pan Muhammad Faiz Kusuma Wijaya, 'The Role of the Constitutional Court in Securing Constitutional Government in Indonesia' (PhD thesis, University of Queensland 2016) 37.

<sup>41</sup>Faiz Kusuma Wijaya (n 40) 35.

<sup>42</sup>Hendrianto (n 40) 108.

<sup>43</sup>See discussion in Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell Southeast Asia Program 2005) 144–147.

<sup>44</sup>*Laporan Tahunan 2018: Era Baru Peradilan Modern Berbasis Teknologi Informasi* [Supreme Court Annual Report 2018: A New Era of Modern Justice Based on Information Technology] (Mahkamah Agung Republik Indonesia 2018) 75, 96; *Laporan Tahunan 2019: Keberlanjutan Modernisasi Peradilan* [Supreme Court Annual Report 2019: Continuing Justice Modernisation] (Mahkamah Agung Republik Indonesia 2019) 76–77, 96, 99.

<sup>45</sup>Law no 12/2011 on Law-Making, as amended by Law no 15/2019.

<sup>46</sup>Simon Butt, 'Judicial Reasoning and Review in the Indonesian Supreme Court' (2019) 6 Asian Journal of Law & Society 67, 74.

<sup>47</sup>ibid 73.

<sup>48</sup>Supreme Court Regulation no 2/2009 on Case Process and Management Costs in the Supreme Court and Lower Courts, art 2(1)(g). In 2018, the Supreme Court proposed increasing this amount to IDR 5 million to better cover court costs, but this does not appear to have gone ahead.

<sup>49</sup>Simon Butt & Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' (2014) 97 Indonesia 55; Tim Lindsey, 'Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction' (2018) 4 Constitutional Review 27.

on standing, regularly using technicalities to summarily dismiss cases, and its avoidance of highly political cases.<sup>50</sup> While the rules on standing are similar to those of the Constitutional Court,<sup>51</sup> the Supreme Court has interpreted these comparatively more narrowly at times.<sup>52</sup> Also, prior to 2011, applications for review in the Supreme Court needed to be lodged within 180 days of the enactment of the regulation in question,<sup>53</sup> and being out of time was a key reason for rejection of judicial review challenges in that period. Further, the Supreme Court's decisions often suffer from a 'lack of consistent, principled, and transparent judicial reasoning'.<sup>54</sup> Rifqi Assegaf, however, argues that the Supreme Court has lately increased its autonomy and become more willing to exercise its judicial review power, and in many cases has invalidated regulations that contradict those higher in the legal hierarchy.<sup>55</sup>

The judicial review decisions of both the Constitutional Court and the Supreme Court are final and binding,<sup>56</sup> however, enforcement has at times been problematic, particularly in the earlier years of the post-Suharto era. Government reaction to the Courts' rulings depend on the political will to follow constitutional principles. At times, government reactions have arguably taken advantage of the Supreme Court's more restricted approach to judicial review compared to that of the Constitutional Court.<sup>57</sup> A notable example of this occurred in relation to the *Electricity Law Case* (2003),<sup>58</sup> where the Constitutional Court found the entire 2002 *Electricity Law* to be unconstitutional. Within two months of the decision the government responded by passing a Government Regulation<sup>59</sup> that essentially replicated the invalidated Law.<sup>60</sup> Similarly, in the *Water Resources Law I Case* (2005),<sup>61</sup> the government appeared to pre-empt a Constitutional Court review by issuing a Government Regulation that had very similar content to the impugned 2004 *Water Resources Law*.<sup>62</sup> Later, in the *Water Resources II Case* (2013),<sup>63</sup> the Constitutional Court considered a series of Government Regulations made under the 2004 *Water Resources Law*. Here, the Court found that the government had ignored the previous rulings of the Court when formulating the regulations and consequently declared the Water Resources Law void in its entirety.<sup>64</sup> That decision was particularly controversial because the Constitutional Court does not have the power to review Government

<sup>50</sup>Butt (n 46) 69.

<sup>51</sup>Law no 3/2009, amending Law no 14/1985 on the Supreme Court, art 31A.

<sup>52</sup>Butt (n 46) 83–85.

<sup>53</sup>Supreme Court Regulation no 1/2004 on Material Judicial Review, art 2(4); Supreme Court Regulation no 1/2011 on Material Judicial Review.

<sup>54</sup>Butt & Parsons (n 49) 71.

<sup>55</sup>Rifqi S Assegaf, 'The Supreme Court: *Reformasi*, Independence and the Failure to Ensure Legal Certainty', in Melissa Crouch (ed), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge University Press 2019) 35.

<sup>56</sup>In the case of the Supreme Court, an upheld judicial review decision is sent to the parties involved and published. If the relevant Government Department does not respond to the decision within 90 days, then the relevant regulation becomes legally void (Supreme Court Regulation no 1/2011 on Material Judicial Review, art 8). Constitutional Court decisions are binding as soon as they are issued. They are to be communicated to the National Legislature, Regional Representatives Council, the President/Government and the Supreme Court and also published in the State Gazette within 30 days (Constitutional Court Regulation no 06/PMK/2005 on Procedural Guidelines for Judicial Review, arts 40, 41).

<sup>57</sup>Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015) 69; Simon Butt & Tim Lindsey, 'Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33' (2008) 44 *Bulletin of Indonesian Economic Studies* 239, 241.

<sup>58</sup>Constitutional Court Decision no 001-021-022/PUU-I/2003.

<sup>59</sup>Government Regulation no 2/2005 amending Government Regulation no 10/1989 on the Provision and Exploitation of Electricity.

<sup>60</sup>Butt (n 57) 70; Butt & Lindsey (n 57) 255.

<sup>61</sup>Constitutional Court Decision no 058-059-060-063/PUU-II/2004.

<sup>62</sup>Faiz Kusuma Wijaya (n 40) 161.

<sup>63</sup>Constitutional Court Decision no 85/PUU-XI/2013.

<sup>64</sup>Hendrianto (n 40) 222.



Regulations; this was justified as being a review of the Law that looked to the implementing regulations for evidence.

These are, however, relatively isolated examples. Simon Butt notes that beyond the early period of the Constitutional Court's operations, fears that it would become irrelevant due to government bypassing legislative processes and thereby bypassing the Court did not manifest, and the government has tended to comply with the Court's decisions.<sup>65</sup> As will be detailed below, the Job Creation Law, and its implementing Government Regulations, has mostly recognised relevant judicial review decisions in relation to the 2003 Labour Law, but on some issues has attempted to circumvent these rulings.

### Labour Law in Indonesia and its Challengers

Having set out the general background context to legal hierarchy and judicial review in Indonesia, in this Part, I now turn to discuss how labour law has evolved within these wider legal processes. Indonesia largely rebuilt its labour law system in the early 2000s during the democratic reform processes that followed the end of the New Order regime. Previously, Indonesian labour law had consisted of a complex patchwork of some Indonesian national laws and various lower-level executive regulations, including some which contradicted the higher-level Laws.<sup>66</sup> There was little vestigial Dutch influence in Indonesia's labour regulation; its nature was largely determined by the post-colonial authoritarian context.<sup>67</sup> The laws effectively had few protections for collective labour rights and permitted only one state-sanctioned labour union, but had a relatively well-developed series of individual worker protections. During the New Order period, there was a very brief umbrella labour law enacted in 1969,<sup>68</sup> but for the most part the operative rules were found in Ministerial Regulations. In 1997, a replacement Labour Law had been enacted<sup>69</sup> but its implementation was postponed due to widespread labour movement protests, and it never came into effect.

Then, in the Reform era beginning in 1998, the systematic rebuilding of the labour law system began when one of the first acts of President Suharto's successor, B.J. Habibie, was to ratify a number of International Labour Organisation (ILO) Conventions. This included the ILO Convention on Freedom of Association. This set the scene for a major recreation of Indonesia's labour laws. Firstly, in 2000, a trade union law was enacted allowing free unionisation and providing protections for unions and their members.<sup>70</sup> Then, a new general Labour Law was passed in 2003,<sup>71</sup> covering a wide swathe of issues including decentralised minimum wage setting, working time, leave rights, and dismissal reasons, procedures and associated payments among others. This Law included some new labour rights, but it also amalgamated and upgraded a number of the New Order and early Reform era ministerial regulations.<sup>72</sup> Despite being far more comprehensive than any previous Indonesian labour law, the 2003 Labour Law still required a substantial number of implementing

<sup>65</sup>Butt (n 46) 6, 72.

<sup>66</sup>There were some attempts to challenge lower-level labour regulations through judicial review in the Supreme Court in the 1990s on the basis that they contradicted higher-level Laws (see Appendix 2 for summaries of two of these cases). It appears that these cases were all dismissed by the Court, but they did nonetheless contribute to pressuring the government to change some of its regulations. See Douglas Anton Kammen, 'A Time to Strike: Industrial Strikes and Changing Class Relations in New Order Indonesia' (PhD dissertation, Cornell University 1997) 382–383.

<sup>67</sup>Sean Cooney et al, 'The Evolution of Labor Law in Three Asian Nations: An Introductory Comparative Study' (2014) 36 *Comparative Labor Law & Policy Journal* 23.

<sup>68</sup>Law no 14/1969 on General Provisions on Labour.

<sup>69</sup>Law no 25/1997 on Labour.

<sup>70</sup>Law no 21/2000 on Trade Unions.

<sup>71</sup>That is, Law no 13/2003 on Labour.

<sup>72</sup>This includes Minister of Labour Decision no KEP.150/MEN/2000 which included favourable rules on dismissals and severance pay for workers.

regulations to provide additional detailed rules,<sup>73</sup> and these were produced in subsequent years.<sup>74</sup>

In 2004, the trio of major labour laws was completed by an *Industrial Disputes Resolution Law*<sup>75</sup> which included the establishment of a new Industrial Relations Court. In related areas, a *Social Security Law*, which provided a framework for expanded workers' social security schemes, was also passed in 2004,<sup>76</sup> although its implementation did not actually begin until a decade later. For Indonesian overseas migrant workers, protections and rules on recruitment and processing were introduced through an initial law in 2004,<sup>77</sup> and then via an amended and more protective law in 2017.<sup>78</sup>

The 2003 Labour Law in particular was met with opposing reactions from key actors. On the one hand, labour activists and researchers have blamed its enablement of fixed-term contracts and outsourcing for the growth in these forms of non-standard employment. Employers have used these extensively to try to avoid the higher standards that attached to permanent work contracts.<sup>79</sup> On the other hand, business groups have criticised the Law for its perceived rigidities, particularly in relation to high rates of severance pay for redundancy of permanent workers and the limitations placed on the use of fixed-term contracts and outsourcing. In late 2005 and early 2006, the government under then President Susilo Bambang Yudhoyono tried and failed to introduce flexibilising reforms to severance pay, fixed-term contracts, important holidays and to promote more opportunities for foreign workers. That attempt was stymied by mass worker demonstrations across major cities in Indonesia that reached a peak on May Day 2006, causing the government to backtrack on its plans.<sup>80</sup> Later, in 2015, under President Joko Widodo, minimum wage setting was effectively centralised as a national government power under a Government Regulation on Wages.<sup>81</sup>

The other main way that the 2003 Labour Law has been challenged is through Constitutional Court reviews. It has been among the most judicially reviewed of all Indonesian Laws.<sup>82</sup> At the time of writing there have been 31 constitutional reviews of this Law (see Appendix 1 for summaries of these cases). Most of these challenges were submitted by trade unions or current or former workers, but there were also two cases submitted by the Indonesian Employers Association (APINDO), one by a lawyer, and two cases submitted by the same company director. Of the 31 cases, 12 were upheld or partially upheld, of which most were among the earlier cases, probably due to the 'low hanging fruit' in the 2003 Labour Law having been targeted more quickly. Repeat challenges to the same articles tended to fail on the grounds that the constitutional argument presented was not substantially different to that of an earlier case. Three of the failed cases were due to lack of legal standing, and the most recent case in 2020 was dismissed because the Job Creation Law had already amended the impugned article.

<sup>73</sup>See further discussion in Constitutional Court Decision no 12/PUU-I/2003.

<sup>74</sup>For example: Minister for Labour and Transmigration Decision no KEP.100/MEN/VI/2004 on Fixed-term Contracts; Minister for Labour and Transmigration Decision no KEP.102/MEN/VI/2004 on Overtime Work and Overtime Pay; Minister for Labour and Transmigration Circular Letter no SE-907/MEN/PHI-PPHI/X/2004 on Prevention of Mass Dismissals.

<sup>75</sup>Law no 2/2004 on Industrial Disputes Resolution.

<sup>76</sup>Law no 40/2004 on the National Social Security System.

<sup>77</sup>Law no 39/2004 on the Placement and Protection of Indonesian Workers Overseas.

<sup>78</sup>Law no 18/2017 on Protection of Indonesian Migrant Workers.

<sup>79</sup>Indrasari Tjandraningsih & Hari Nugroho, 'The Flexibility Regime and Organised Labour in Indonesia' (2008) 9 Labour and Management in Development 1.

<sup>80</sup>ibid 9; Benny Hari Juliawan, 'Extracting Labor from its Owner: Private Employment Agencies and Labor Market Flexibility in Indonesia' (2010) 42 Critical Asian Studies 25.

<sup>81</sup>Government Regulation no 78/2015 on Wages. This is also discussed further in the Section on 'Minimum Wage-Setting' below.

<sup>82</sup>'Sejak MK Berdiri, Ini 10 UU Terbanyak Diuji [Since the Establishment of the Constitutional Court, these are the 10 Most Reviewed Laws]' (Hukumonline, 14 Jan 2019) <<https://www.hukumonline.com/berita/baca/lt5c3c74a2844a2/sejak-mk-berdiri--ini-10-uu-terbanyak-diuji/>> accessed 17 Jan 2022.

There have also been a number of Supreme Court judicial reviews of lower-level labour regulations and administrative decisions (see Appendix 2 for case summaries). These cases are more difficult to collate systematically as they relate to various forms of legal instruments and because the Supreme Court's case database is difficult to search on the basis of legal subject areas.<sup>83</sup> Among the cases collected here, all but one of the challenges failed. This includes a number of challenges by business groups to regional minimum wage regulations (especially in East Java). There were also four separate challenges by unions to the 2015 Government Regulation on Wages which all failed due to the 2003 Labour Law having been concurrently under review by the Constitutional Court.<sup>84</sup> These labour-related cases, therefore, accord with scholars' general accounts of the Supreme Court's record of often using technicalities to dismiss judicial review cases as discussed above.

### The Enactment of the Omnibus Law on Job Creation and its Implementing Regulations

Many of the same 'rigidity' complaints about the 2003 Labour Law that triggered the law reform attempt in 2006 remerged in the labour cluster in the Job Creation Law in 2020. However, trade unions and their allies were not this time successful in blocking amendments despite again holding demonstrations both before and after the Law was passed.<sup>85</sup> As noted above, many commentators have seen this denial of public sentiment as a symptom of Indonesia's 'democratic decline' or 'illiberal turn'. They have argued that President Joko Widodo's primary concern has been with building alliances with political and business elites which has led him, and the majority of political parties holding seats in the DPR, to ignore popular protests against this Law.<sup>86</sup> For example, Marcus Mietzner argued that the Job Creation Law was undoubtedly influenced by some prominent tycoons with political roles, but that the President also actively championed the Law himself as an expedient economic policy.<sup>87</sup>

The legislative process leading to the enactment of the Job Creation Law was unusually quick in the Indonesian law-making context. The policy to produce an omnibus law was officially launched by President Joko Widodo in his second-term inauguration speech in October 2019.<sup>88</sup> The Omnibus Bill was then listed on the annual *Prolegnas* in January 2020 and submitted to the DPR in February 2020. Due to the COVID-19 pandemic, deliberations in the DPR did not begin until April 2020. The original draft labour cluster included amendments relating to foreign workers, wages, work hours, leave, outsourcing, redundancy and social security.<sup>89</sup> Despite being somewhat hampered by COVID-19 social distancing regulations and a general tightening of control over

<sup>83</sup>Mahkamah Agung Republik Indonesia, 'Direktori Putusan [Directory of Decisions]', <<https://putusan3.mahkamahagung.go.id/>> accessed 17 Jan 2022.

<sup>84</sup>Supreme Court Decision nos 67 P/HUM/2015, 69 P/HUM/2015, 70 P/HUM/2015, 34 P/HUM/2017. In all four of these cases, the Supreme Court simply dismissed outright the judicial review challenges without considering the possibility of adjournment. Article 55 of Law no 24/2003 on the Constitutional Court provides that judicial review of lower-level regulations in the Supreme Court that are being tested against Laws concurrently under review in the Constitutional Court must be stopped until the Constitutional Court issues its decision. While this article could be interpreted as allowing adjournment, the Supreme Court has tended to dismiss cases outright. See also Simon Butt, 'Aceh and Islamic Criminal Law in the Courts', in Tim Lindsey & Helen Pausacker (eds), *Crime and Punishment in Indonesia* (Routledge 2020) 550–551.

<sup>85</sup>Ford & Ward (n 13).

<sup>86</sup>See references in n 13. See also: 'Pengusaha Kuasai Parlemen: Hampir Separuh Anggota Dewan Perwakilan Rakyat Periode 2019–2024 Berasal dari Kalangan Pengusaha [Entrepreneurs Dominate Parliament: Almost Half of the Members of the National Legislature for 2019–2024 Come from Business Backgrounds]' (Tempo, 5 Oct 2019) <<https://majalah.tempo.co/read/nasional/158519/pengusaha-kuasai-parlemen>> accessed 17 Jan 2022.

<sup>87</sup>Mietzner, 'Indonesia in 2020' (n 13) 114–115.

<sup>88</sup>'Jejak Omnibus Law: Dari Pidato Pelantikan Jokowi Hingga Polemik RUU Cipta Kerja [The Trail of the Omnibus Law: From Jokowi's Inauguration Speech to the Polemic of the Job Creation Draft Bill]' (Kompas.com, 5 Oct 2020) <<https://www.kompas.com/tren/read/2020/10/05/090200165/jejak-omnibus-law-dari-pidato-pelantikan-jokowi-hingga-polemik-ruu-cipta?page=all>> accessed 17 Jan 2022.

<sup>89</sup>Esther Samboh, 'Key Points of Labor Reform in Omnibus Bill on Job Creation: What we Know so Far' (Jakarta Post, 13 Feb 2020) <<https://www.thejakartapost.com/news/2020/02/13/key-points-of-labor-reform-in-omnibus-bill-on-job-creation-what-we-know-so-far.html>> accessed 17 Jan 2022.

civil society dissent,<sup>90</sup> trade union demonstrations were organised in reaction to the draft.<sup>91</sup> In response, on 24 April 2020, President Joko Widodo announced that the deliberations on the labour cluster would be postponed.<sup>92</sup> However, the labour cluster was suddenly returned to the overall draft law on 25 September 2020, and debate resumed.<sup>93</sup> As noted, the full Law was passed just two weeks later in early October 2020. The haste, according to the Minister for Labour Ida Fauziyah, was due to the need to reduce the spread of COVID-19 among legislators.<sup>94</sup> A more cynical reading of the situation, however, suggests that the government was motivated to prevent mass labour mobilisation in opposition to the Law and thereby to prevent a repeat of the thwarted reform attempt of 2006.

Only two parties in the DPR opposed the Omnibus Bill – the Democratic Party (*Partai Demokrat*) and the Prosperous Justice Party (*Partai Keadilan Sejahtera*). Their opposition was based on various stated reasons: the lack of public participation, that the deliberations were too rushed, lack of evidence that the law would achieve its objectives, that the law was too neo-liberal, and that the COVID-19 pandemic was the true place attention should have been focused.<sup>95</sup> These objections have echoed more widely as well, and the Job Creation Law has been strongly criticised for having had no or limited public consultations as is formally required.<sup>96</sup> During the deliberations, it also emerged that the draft included a rule that the law could be amended merely by a Government Regulation – this caused great controversy for being unconstitutional, and was eventually removed as a ‘mistake’.<sup>97</sup> There have been numerous drafts circulating and even once agreed to by the DPR, for some time it was not clear exactly which draft had actually been enacted. There were also accusations of post-enactment changes to the Law,<sup>98</sup> and the DPR eventually admitted

<sup>90</sup>Mietzner ‘Sources of Resistance’ (n 13) 173.

<sup>91</sup>‘Workers Blast Lawmakers with Messages Opposing Omnibus Bill on Job Creation’ (Jakarta Post, 9 Apr 2020) <<https://www.thejakartapost.com/news/2020/04/09/workers-blast-lawmakers-with-messages-opposing-omnibus-bill-on-job-creation.html>> accessed 17 Jan 2022; ‘Desperate Workers to Hold Mass Rallies Against Job Creation Bill Despite Pandemic’ (Jakarta Post, 17 Apr 2020) <<https://www.thejakartapost.com/news/2020/04/17/desperate-workers-prepare-to-rally-nationwide.html>> accessed 17 Jan 2022.

<sup>92</sup>‘Indonesia Delays Deliberations Over Labor Issues in Omnibus Bill Amid Backlash’ (Jakarta Post, 25 Apr 2020) <<https://www.thejakartapost.com/news/2020/04/24/govt-house-delay-deliberations-over-labor-issues-in-omnibus-bill-amid-backlash.html>> accessed 17 Jan 2022.

<sup>93</sup>Nabiyla Risfa Izzati, ‘Logika Keliru Aturan Ketenagakerjaan UU Cipta Kerja [Mistaken Logic in the Labour Regulations in the Law on Job Creation]’ (The Conversation, 5 Nov 2020) <<https://theconversation.com/logika-keliru-aturan-ketenagakerjaan-uu-cipta-kerja-148368>> accessed 17 Jan 2022.

<sup>94</sup>‘Klarifikasi Menaker Soal Cuti Haid dan Melahirkan di UU Cipta Kerja [Minister for Labour Clarifies Menstruation and Maternity Leave in the Law on Job Creation]’ (Kompas.com, 9 Oct 2020) <<https://money.kompas.com/read/2020/10/09/080400726/klarifikasi-menaker-soal-cuti-haid-dan-melahirkan-di-uu-cipta-kerja?page=all>> accessed 17 Jan 2022.

<sup>95</sup>‘Alasan Demokrat dan PKS Tolak RUU Omnibus Law Ditetapkan jadi UU [The Reasons that the Democrats and Prosperous Justice Party Refused to Enact the Draft Omnibus Law]’ (Jawa Pos, 15 Mar 2021) <<https://www.jawapos.com/nasional/politik/04/10/2020/alasan-demokrat-dan-pks-tolak-ruu-omnibus-law-ditetapkan-jadi-uu/?page=all>> accessed 17 Jan 2022.

<sup>96</sup>See eg, ‘Pengesahan UU Cipta Kerja: Legislasi Tanpa Ruang Demokrasi’ [The Enactment of the Job Creation Law: Legislation without Democratic Space] (Press release, Pusat Studi Hukum dan Kebijakan Indonesia, 6 Oct 2020) <<https://www.pshk.or.id/publikasi/penge-sahan-uu-cipta-kerja-legislasi-tanpa-ruang-demokrasi/>> accessed 17 Jan 2022. Article 96 of Law no 12/2011 on Law-Making, as amended by Law no 15/2019, provides that the public has the right to provide written and oral input to legislative processes although it does not explicitly stipulate the consequences of failing to do so. See also n 25 above. The Constitutional Court has the power to judicially review entire laws for whether proper lawmaking procedures were followed (*uji formil*) (see discussion in the Part titled ‘Judicial Review in Indonesia’ above), and this is indeed one of the grounds used for the various judicial review challenges that have been lodged with regards to the Law on Job Creation.

<sup>97</sup>‘Kejutan Omnibus Law: Jokowi Bisa Ubah UU Lewat Peraturan Pemerintah [Surprise in the Omnibus Law: Jokowi can Amend the Law via Government Regulation]’ (Detik.com, 16 Feb 2020) <<https://news.detik.com/berita/d-4901159/kejutan-omnibus-law-jokowi-bisa-ubah-uu-lewat-peraturan-pemerintah>> accessed 17 Jan 2022.

<sup>98</sup>‘Omnibus Law: Apa Konsekuensi Jika Draf yang Disepakati DPR dan Pemerintah Diubah dan Tak Sesuai Prosedur Hukum? [Omnibus Law: What are the Consequences if the Draft agreed by the Legislature and Government has been Changed and Contravenes Legal Procedure?]’ (BBC Indonesia, 14 Oct 2020) <<https://www.bbc.com/indonesia/indonesia-54531508>> accessed 17 Jan 2022.

that editorial changes were indeed made to the text.<sup>99</sup> The final Law also has a couple of errors with cross-references to articles that do not exist,<sup>100</sup> and there has been much misinformation circulating about its content at least partly caused by all these drafts, rapid changes and errors.

Following the passing of the Job Creation Law, further demonstrations erupted across the country.<sup>101</sup> The government responded by attempting to counter what it called hoaxes or false information about the Law and by exhorting the public to await the implementing regulations to gain a true picture of its implications.<sup>102</sup> Opponents of the Law, including trade unions and NGOs, also quickly moved to lodge various applications for judicial review of the Job Creation Law in the Constitutional Court (see further discussion in the Postscript below).

The controversy surrounding the Job Creation Law has continued with the enactment of its implementing regulations. The Law required that these regulations be put in place within three months, ie, by 2 February 2021 – again an unusually quick enactment time. All of the required 49 implementing regulations (45 Government Regulations and 4 Presidential Regulations) were promulgated on 21 February 2021, but most were apparently signed by the President on 2 February to match the Law's own deadline.<sup>103</sup> This arguably leaves some question as to the state of the law during this two and a half week gap, exacerbated by the fact that drafts of the regulations uploaded earlier to the official internet portal did not all match the final enacted versions.<sup>104</sup> Although the four labour-related Government Regulations did go through some consultation processes with selected social groups,<sup>105</sup> the unusually short enactment period and the high degree of coordination between the labour cluster in the Job Creation Law and its implementing Government Regulations leads to the conclusion that they were carefully drafted as an integrated package with a clear plan about where to place certain substantive rules. This is evidenced by the fact that some rules were made more general or disappeared from the main Law but re-emerged in the Regulations. This issue is discussed in more detail in the following Part.

<sup>99</sup>'Uji Formil UU Cipta Kerja di MK, DPR Akui Koreksi Naskah [Formal Judicial Review of the Law on Job Creation in the Constitutional Court, the National Legislature Admits to Text Corrections]' (CNN, 18 Jun 2021) <<https://www.cnnindonesia.com/nasional/20210618114416-12-656131/uji-formil-uu-cipta-kerja-di-mk-dpr-akui-koreksi-naskah>> accessed 17 Jan 2022.

<sup>100</sup>'UU Cipta Kerja: Kesalahan 'fatal' Pasal-Pasal Omnibus Law Akibat Proses Legislasi 'Ugal-ugalan', Apakah UU Layak Dibatalkan? [The Law on Job Creation: 'Fatal' Mistakes in the Articles of the Omnibus Law Due to Reckless Legislative Processes, Should it be Cancelled?]' (BBC Indonesia, 3 Nov 2020) <<https://www.bbc.com/indonesia/indonesia-54768000>> accessed 17 Jan 2022.

<sup>101</sup>'Indonesian Police Arrest Hundreds During Protests Against Labour Law' (The Guardian, 8 Oct 2020) <<https://www.theguardian.com/world/2020/oct/07/indonesia-police-use-water-cannon-and-teargas-to-disperse-labour-law-protests>> accessed 17 Jan 2022; 'Indonesia Erupts in Protests for Third Day Over Controversial Labour Laws' (ABC News, 9 Oct 2020) <<https://www.abc.net.au/news/2020-10-09/indonesia-labour-law-protests-coronavirus-covid-19/12746812>> accessed 17 Jan 2022.

<sup>102</sup>'Daftar 7 Hoaks yang Dibantah Jokowi di UU Cipta Kerja [List of 7 Hoaxes Denied by Jokowi in the Law on Job Creation]' (Kompas.com, 10 Oct 2020) <<https://money.kompas.com/read/2020/10/10/083228826/daftar-7-hoaks-yang-dibantah-jokowi-di-uu-cipta-kerja?page=all>> accessed 17 Jan 2022; Rafiq Qurrata A'yun & Abdil Mughis Mudhoffir, 'Omnibus Law Shows How Democratic Process has been Corrupted' (Indonesia at Melbourne, 12 Oct 2020) <<https://indonesiaatmelbourne.unimelb.edu.au/omnibus-law-shows-how-democratic-process-has-been-corrupted/>> accessed 17 Jan 2022.

<sup>103</sup>Two had been enacted earlier: Government Regulation no 73/2020 on an Investment Management Agency; Government Regulation no 74/2020 on Initial Capital for an Investment Management Agency.

<sup>104</sup>'ICEL: Pemerintah Terapkan Omnibus Law dalam PP Turunan UU Cipta Kerja [Indonesian Centre for Environmental Law: The Government applies the Omnibus Law in the Government Regulations for the Law on Job Creation]' (Hukumonline, 24 Feb 2021) <<https://jurnal.hukumonline.com/berita/baca/lt6034fa2ea69df/icel--pemerintah-terapkan-omnibus-law-dalam-pp-turunan-uu-cipta-kerja?page=all>> accessed 17 Jan 2022.

<sup>105</sup>'4 PP Cipta Kerja Diundangkan, Menaker Apresiasi Semua Pihak Terlibat [The Four Job Creation Government Regulations have been Enacted, the Minister for Labour Appreciates all Involved Parties]' (Detik.com, 4 Mar 2021) <<https://news.detik.com/berita/d-5481538/4-pp-cipta-kerja-diundangkan-menaker-apresiasi-semua-pihak-terlibat>> accessed 17 Jan 2022.



### Reordering the Hierarchy of Labour Law Norms Via the Job Creation Law

The Job Creation Law, and its implementing Government Regulations, have together not only changed many substantive labour rules, but have also shifted their positions within the legal hierarchy. There seem to have been some different factors simultaneously influencing this process. Firstly, there has been an effort to standardise the forms of legal instruments used and to dispense with those that have ambiguous positions within the legal hierarchy such as ministerial regulations. Secondly, some of the key ‘flexibilising’ amendments have been ‘downgraded’ from the level of Law and placed within a Government Regulation. This gives important future rule-making power over these issues to the executive branch of government. It also removes these rules from the review jurisdiction of the Constitutional Court and places them into that of the Supreme Court, which (as discussed above) has traditionally been far less likely to approve review applications. Finally, some other general aspects of the central government’s policies, particularly on minimum wage-setting, have been upgraded to Law, while the specific details have been placed in the new Government Regulations.

The following discussion traces these legal hierarchy changes in relation to three key issues: fixed-term contracts, the calculation of dismissal pay, and minimum wage-setting. My intention here is not to cover all such shifts in the Job Creation Law’s labour cluster; rather, it is to use these selected examples to illustrate how significant movements within the legal hierarchy have occurred. In the first two examples – fixed-term contracts and dismissal payments – particular rules have been ‘downgraded’ whereby the key details are no longer found in the Law, but rather in Government Regulations. With regards to minimum wage setting, here there have been some ‘upgrades’ while remaining details have been placed in the new Government Regulation.

Note that in some other areas, changes to the position of rules within the legal hierarchy have also occurred as a reaction to judicial review. I will separately examine responses to judicial review below.

#### Fixed-Term Contracts

Indonesian labour law draws a distinction between fixed-term employment contracts (*perjanjian kerja waktu tertentu*) and permanent employment contracts (*perjanjian kerja waktu tidak tertentu*) where, in addition to security of employment term, a key difference between the two types of contract relates to dismissal payments. In general, where a contract is ended early by the employer, fixed-term workers have had the right to be paid out their wages through to the end of their contract,<sup>106</sup> while permanent workers have rights to severance and reward payments which accrue over time. The firing of permanent workers has, therefore, usually been more expensive than for fixed-term workers.

The original provisions on fixed-term contracts, dating from the New Order era, were contained in ministerial regulations.<sup>107</sup> These restricted such contracts to work that could be completed in a short period of time, or that was seasonal, non-routine or related to a new product. The maximum period of employment was two years with a possible one-year extension. Then after a 30-day hiatus, a further renewal of maximum two years was possible.<sup>108</sup> This same pattern of contract periods and renewals was then upgraded in the legal hierarchy and included in the 2003 Labour Law.<sup>109</sup> In 2004, a ministerial decision reinforced these regulations and also stipulated more clearly when an ostensibly fixed-term contract would be deemed to be permanent, including in circumstances where permitted renewal patterns were breached.<sup>110</sup> A total of four judicial review cases in the Constitutional

<sup>106</sup>Law no 13/2003 on Labour, art 62. Note that under this provision, if a worker ends a fixed-term contract early then they are theoretically liable to pay out the remaining wages to their employer.

<sup>107</sup>Minister for Labour Decision PER-05/MEN/1986; Minister for Labour Regulation PER-02/MEN/1993.

<sup>108</sup>Minister for Labour Regulation PER-02/MEN/1993, art 10.

<sup>109</sup>Law no 13/2003 on Labour, art 59.

<sup>110</sup>Minister for Labour Decision no 100/2004 on Fixed-Term Employment Contracts.

Court challenged the articles that specified when fixed-term contracts would be deemed to be permanent,<sup>111</sup> but only one of these cases – relating to the administrative procedures involved in this process – was upheld.<sup>112</sup>

Under the new Job Creation Law, fixed-term contracts may still only be used for work that is of short duration or is seasonal, and contracts which do not meet these criteria will be deemed to be permanent.<sup>113</sup> However, mention of the maximum length of fixed-term contracts has now been entirely removed from the Law, along with all restrictions on renewal. Instead, the details on maximum length and renewal have been downgraded to the implementing Government Regulation.<sup>114</sup> There is a new maximum contract term of five years which may be renewed for a maximum of a further five years.<sup>115</sup> The need for a hiatus between these two contracts has disappeared. The amendments do not specify precisely what should happen after two contract terms have been completed, but it appears that there is no longer any restriction on the number of renewals and therefore no automatic conversion to a permanent contract at any point in time.<sup>116</sup>

The new Job Creation Law has not changed the principle that where an employer brings a fixed-term contract to an end early, the worker is entitled to have their remaining wages through to the end of the contract paid as compensation.<sup>117</sup> In addition, in the Law a new form of compensation is now to be paid when the specified term of employment, or the specified completion of a certain task, has been completed.<sup>118</sup> There are no details on this compensation in the Law but, as per the implementing Government Regulation, this new additional compensation is calculated as being equal to one month's wages per 12 months of service. The compensation for more than 12 months will be calculated proportionally (ie, 24 months service would be equal to 2 months wages), and service of between 1 and 12 months will also be calculated proportionally.<sup>119</sup> This compensation is also still to be paid where a fixed-term contract is ended early by either party.<sup>120</sup> Administrative sanctions can be imposed on employers for contravention of the requirement to pay such compensation.<sup>121</sup> The time of service for the purpose of this compensation is to be calculated from 2 November 2020 when the Job Creation Law was enacted.<sup>122</sup> There is an exception for micro and small enterprises, which are permitted to pay this compensation based on agreement rather than on the stated calculation.<sup>123</sup>

The amendments in relation to fixed-term contracts lean in contradictory directions – the lengthening of maximum contract time to five years and removal of the risk of workers being deemed to be permanent no doubt work in employers' favour. But the introduction of the new form of compensation is in workers' interests, as is the removal of the 30-day hiatus between renewal of contracts. Importantly, though, the key detailed provisions on length of contract term and calculation of compensation are now found in the Government Regulation – which makes them more susceptible to change by the executive branch of government in the future.

<sup>111</sup>Constitutional Court Decisions nos 96/PUU-XI/2013, 7/PUU-XII/2014, 100/PUU-XV/2017, 72/PUU-XVI/2018.

<sup>112</sup>Constitutional Court Decision no 7/PUU-XII/2014.

<sup>113</sup>Law no 11/2020 on Job Creation, art 81(15) amending Law no 13/2003 on Labour, art 59.

<sup>114</sup>That is, GR 35/2021.

<sup>115</sup>*ibid*, arts 6, 8.

<sup>116</sup>*ibid*, art 8.

<sup>117</sup>Law no 13/2003 on Labour, art 62 – which was not amended by Law no 11/2020 on Job Creation.

<sup>118</sup>Law no 11/2020 on Job Creation, art 81(17), introducing Law no 13/2003 on Labour, art 61A (newly added).

<sup>119</sup>GR 35/2021, art 16.

<sup>120</sup>*ibid*, art 17.

<sup>121</sup>*ibid*, art 61.

<sup>122</sup>*ibid*, art 64.

<sup>123</sup>*ibid*, art 16(6).

### Calculation of Dismissal Payments

As noted above, rates of dismissal payments have long been controversial in Indonesia with employer groups viewing them as producing overly high costs. During the New Order period, employers needed to seek permission of the Regional and Central Labour Disputes Settlement Committees (P4Ds and P4P) before dismissing workers. Once permission was granted, the Committees could then direct employers to provide dismissal payments.<sup>124</sup> Over time, a series of Ministerial Regulations gradually introduced a scale for calculating dismissal payments based on time of service.<sup>125</sup>

Then, in the 2003 Labour Law, those existing provisions on dismissal calculations were upgraded from regulation to Law, with the Law mostly replicating but slightly extending the previous scheme. The base scale of severance payments (*uang pesangon*) was determined based on term of service, starting with less than one year of service requiring a severance payment of one month's wages, and finally service of up to eight years or more attracting a payment equal to nine months of wages. An additional reward payment (*uang penghargaan*) was calculated on a separate scale – starting at three to six years of service being rewarded with two months' wages.<sup>126</sup> Workers were also entitled to have unused rights paid out (*uang penggantian hak*).

Then, the 2003 Labour Law provided that the reason for ending the employment relationship determined how the base calculations of severance and reward pay were treated. For example, redundancy for the sake of 'efficiency' where the company had not experienced two years of losses, required twice the base severance payment to be made and one amount of reward pay.<sup>127</sup> Similarly, where the dismissal occurred due to merger or acquisition and the employer did not want to keep the worker in the new company, twice the base severance payment was required.<sup>128</sup> Severance paid due to the death of a worker was also required to be twice the base amount, as was retirement where the worker had not been enrolled in a pension scheme.<sup>129</sup>

In 2020, the Job Creation Law created quite a bit of worried speculation in the media regarding changes made to dismissal payment calculations.<sup>130</sup> As it turned out, it was only once the Government Regulation was released three months later that the real reduction in dismissal payments became clear. The confusion, therefore, was largely a result of the shifting position of substantive rules within the hierarchy of legal instruments. The Job Creation Law retained the base calculations of severance and reward payments from the 2003 Labour Law. The key change in the Job Creation Law, though, was that in deleting and amalgamating articles 161–169 of the 2003 Labour Law, the amendments appeared to cut the previous link between the reason for dismissal and overall dismissal payment calculations.

<sup>124</sup>Law no 12/1964 on Private Sector Dismissals, art 7(2).

<sup>125</sup>Minister for Labour Regulations no 9 and no 11/1964; Minister for Labour Decision no KEP-19/MEN/1978; Minister for Labour Decision no Per 04/Men/1986; Minister for Labour Regulation no 03/Men/1996 on Dismissals; Minister for Labour Decision no KEP-150/MEN/2000; Minister for Labour Decision no KEP-78/MEN/2001 (this regulation was briefly in place until KEP-150/MEN/2000 was revived in the face of mass labour protests).

<sup>126</sup>Law no 13/2003 on Labour, art 156.

<sup>127</sup>ibid, art 164(3).

<sup>128</sup>ibid, art 163.

<sup>129</sup>ibid, art 167(5).

<sup>130</sup>One story circulating widely in the media is that the changes reduced the calculation from 32 months to 19 months of severance pay. See eg, 'UU Cipta Kerja Ditetapkan Jokowi, Pesangon Pensiun 19 Kali Gaji Langsung Berlaku? [Job Creation Law Set by Jokowi, Severance Pay Worth 19 Times of Wages to be Implemented Immediately?]' (Bisnis.com, 6 Nov 2020) <[https://ekonomi.bisnis.com/read/20201106/12/1314367/uu-cipta-kerja-ditetapkan-jokowi-pesangon-pensiun-19-kali-gaji-langsung-berlaku#:~:text=%22%5BPesangon%20dalam%20UU%20Cipta%20Kerja,pekerjaan\)%20sehingga%20menjadi%2025%20kali.&text=Masa%20kerja%201%20tahun%20atau,uang%20pesangon%202%20bulan%20upah](https://ekonomi.bisnis.com/read/20201106/12/1314367/uu-cipta-kerja-ditetapkan-jokowi-pesangon-pensiun-19-kali-gaji-langsung-berlaku#:~:text=%22%5BPesangon%20dalam%20UU%20Cipta%20Kerja,pekerjaan)%20sehingga%20menjadi%2025%20kali.&text=Masa%20kerja%201%20tahun%20atau,uang%20pesangon%202%20bulan%20upah)> accessed 17 Jan 2022. For a correction of this misinformation, see: 'Benarkah Pesangon Dibayar Sebagian oleh Pemerintah Menurut UU Cipta Kerja? [Is it True that Severance Will be Partly Paid by the Government under the Law on Job Creation?]' (Hukumonline 4 Nov 2020) <<https://www.hukumonline.com/klinik/detail/ulasan/lt5fa242ac8f85c/benarkah-pesangon-dibayar-sebagian-oleh-pemerintah-menurut-uu-cipta-kerja-/>> accessed 17 Jan 2022.

However, this link between the reason for dismissal and the calculation of severance pay re-emerged in the implementing Government Regulation.<sup>131</sup> As noted above, this strongly suggests that the Law and Government Regulation were drafted as an integrated package. The Government Regulation sets out new severance payment calculations for various forms of redundancy and other types of dismissal, and in many cases the calculations are significantly lower than before.<sup>132</sup> For example, redundancy in the context of company merger or split where the employer does not want to keep the worker in the new company now attracts only half of the severance pay that it did previously.

On the whole, these changed calculations swing in employers' favour. However, it should be noted that employers are now liable for criminal penalties for non-payment of severance and reward payments, with sanctions set as imprisonment for a period of between one and four years and/or a fine of between IDR 100 million and 400 million (between US\$7,100 and US\$28,500).<sup>133</sup> Further, the introduction of a new unemployment social security scheme may eventually help to offset these changes by shifting the burden of dismissal from employers to the state. However, once again, the 'downgrading' of the key calculations for severance pay to the level of Government Regulation, almost returning to the legal framework of New Order times, means that these calculations would be much more easily amended by the executive in the future.

### Minimum Wage-Setting

Minimum wage-setting in Indonesia has undergone substantial political and regulatory changes in the past decades. Authority for minimum wage-setting was devolved from the central government to the provincial-level governors in the year 2000, and tripartite Wage Councils were formed as advisory bodies to the governors from 2004. The ability of trade unions to influence wage-setting through these wage councils was initially hampered by union fragmentation and difficulties in organising locally. But by 2010, unions had gained strength and were quite successful in negotiating more generous wage increases in the years 2010–2013. However, this then precipitated the central government moving to regain control of wage-setting by initially issuing a Presidential Instruction to the governors in 2013 on how to calculate wages.<sup>134</sup> The governors only complied with this half-heartedly.<sup>135</sup> Then, in 2015, under President Joko Widodo, a central Government Regulation

<sup>131</sup>GR 35/2021, arts 40–49.

<sup>132</sup>Per GR 35/2021, while all forms of employer-initiated redundancy now attract the base amount of reward payment and payment to replace any unused rights, the amount of severance pay still varies. Severance payments are to be calculated at the base rate (1.0 times) for: redundancy caused by merger or company split where employment cannot continue, corporate takeover where the worker is willing to continue employment, redundancy for efficiency to prevent loss, where the company is closing not due to losses, where the company is postponing debts not caused by losses and for constructive dismissal. Severance is to be calculated at half (0.5 times) the base amount in cases of: takeover where the worker is unwilling to continue, redundancy for efficiency reasons where the company has experienced losses, *force majeure* where the company does close, where the company closes following two years of continuous losses, where the company is postponing debts caused by losses and corporate bankruptcy. Severance is calculated at three-quarters the base amount (0.75 times) for dismissal for reason of *force majeure* where the company does not close. The Government Regulation also provides details on dismissal payment calculations for other forms of dismissal, beyond redundancy. For example, for dismissal due to a worker's violation of ordinary provisions in their contract, collective agreement or company rules, following warning letters, then they are entitled to 0.5 times the base severance pay, one lot of reward pay and payment to replace any unused rights. For dismissal for reasons of breach of 'urgent' (*bersifat mendesak*) contractual provisions (see discussion below), the worker will only be entitled to replacement of any unused rights and any separation pay as contractually agreed.

<sup>133</sup>Law no 11/2020 on Job Creation, amending Law no 13/2003 on Labour, art 185.

<sup>134</sup>That is, Presidential Instruction no 9/2013 on Minimum Wage Policy in Relation to Business Sustainability and Improving Worker Prosperity.

<sup>135</sup>Teri Caraway & Michele Ford, *Labor and Politics in Indonesia* (Cambridge University Press 2020) 59–69; Teri L Caraway, Michele Ford & Oanh K Nguyen, 'Politicising the Minimum Wage: Wage Councils, Worker Mobilization and Local Elections in Indonesia' (2019) 47 *Politics & Society* 251, 263.

effectively recentralised minimum wage-setting by mandating a formula that governors must use.<sup>136</sup> This also severely reduced the role of unions in wage-setting. As noted above, unions lodged four separate judicial review cases in the Supreme Court in relation to this 2015 regulation, but these challenges were all unsuccessful.<sup>137</sup> The central government Ministry of Labour has since issued further ad hoc advice, including a request to provincial governors not to raise wages for 2021 due to the COVID-19 pandemic (though a handful of governors ignored this).<sup>138</sup>

Under the new Job Creation Law, changes to minimum wage regulation have involved upgrading to the status of Law some key provisions in the 2015 Government Regulation on central government control over wage-setting, while placing additional details within the relevant new implementing Government Regulation.<sup>139</sup> Provincial and regional governments that make decisions on minimum wages that contradict the central government's requirements will now incur administrative sanctions.<sup>140</sup> As per the Job Creation Law, each of the 34 provincial governors is still required to set annual provincial minimum wages by following central government policy. A new, rather more complicated, formula for doing so has been stipulated in the Government Regulation. While Governors may additionally set regional (sub-provincial) minimum wages, the Government Regulation now also sets preconditions for doing so, based on economic growth figures.<sup>141</sup> By omission, the Law has removed the option to also set *sectoral* regional minimum wages, and the Government Regulation merely provides for the interim continuation of existing sectoral wage standards.<sup>142</sup> Wage Councils will still formally exist, but the Law and the Government Regulation are now reworded in such a way as to remove governors' specific duty to pay attention to the Councils' recommendations.<sup>143</sup>

Another key article on minimum wages in the 2015 Government Regulation on Wages has also been upgraded to Law. This article states that minimum wages are to be applied only to workers with less than one year of service.<sup>144</sup> This statement in the Law was confusing since the same article prohibited employers from paying below the minimum wage in general (with criminal sanctions attached).<sup>145</sup> Clarification has been provided in the implementing Government Regulation, which stipulates that the minimum wage is effective for workers with less than one year of service, and beyond this time wages are to refer to the wage structure and scale that each business must have.<sup>146</sup>

In the Job Creation Law, employers who pay wages late, either on purpose or negligently, will now be liable for fines to be paid to the worker.<sup>147</sup> The formula for calculating these fines is found in the Government Regulation.<sup>148</sup> A new fine has also been introduced in the Government Regulation for late payment of the annual religious holiday bonus, where being late

<sup>136</sup>Government Regulation no 78/2015 on Wages, art 44. See also Minister for Labour Regulation no 15/2018 on the Minimum Wage, art 3.

<sup>137</sup>See cases listed in n 84.

<sup>138</sup>Minister of Labour Circular Letter no M/11/HK.04/X/2020; '5 Gubernur ini Tetap Naikkan UMP 2021, Siapa Saja? [These 5 Governors have Still Increased Provincial Minimum Wages for 2021, Who are They?]' (Kompas.com, 4 Nov 2020) <<https://money.kompas.com/read/2020/11/04/103429726/5-gubernur-ini-tetap-naikkan-ump-2021-siapa-saja?page=all>> accessed 17 Jan 2021.

<sup>139</sup>That is, Government Regulation no 36/2021 on Wages.

<sup>140</sup>*ibid*, art 81.

<sup>141</sup>*ibid*, art 30.

<sup>142</sup>*ibid*, art 82.

<sup>143</sup>Law no 11/2020 on Job Creation, art 81(36), amending Law no 13/2003 on Labour, art 98, and removing art 89.

<sup>144</sup>Government Regulation no 78/2015 on Wages, art 42; Law no 11/2020 on Job Creation, art 81(25), introducing Law no 13/2003 on Labour, art 88E(1) (newly added).

<sup>145</sup>Law no 11/2020 on Job Creation, art 81(25), introducing Law no 13/2003 on Labour, art 88E(2) (newly added).

<sup>146</sup>Government Regulation no 36/2021 on Wages, art 24. Previously, wages beyond the first year of employment were to be set through bipartite negotiations (Government Regulation no 78/2015 on Wages, art 42).

<sup>147</sup>Law no 11/2020 on Job Creation, art 81(25), introducing Law no 13/2003 on Labour, art 88A(6) (newly added).

<sup>148</sup>Government Regulation no. 36/2021 on Wages, art 61.



will add 5 per cent of the total bonus.<sup>149</sup> In addition, individual contracts, collective bargaining agreements and/or company rules may also now specify fines that an employer must pay if they contravene any specified requirements in those contracts or rules.<sup>150</sup>

Another important and entirely new change in the Job Creation Law is an exemption from the requirement to pay minimum wages for micro and small enterprises.<sup>151</sup> The relevant Government Regulation now provides that wages in micro and small enterprises are to be based on agreement between the employer and the worker, and are to be at least equal to 50 per cent of average community consumption in the relevant Province and at least 25 per cent above the provincial poverty line.<sup>152</sup>

Overall, in relation to minimum wage-setting, previously existing re-centralising policies have been upgraded from regulation to Law, thereby entrenching the requirement that provincial governments follow central government wage calculations. Meanwhile, all the specific calculations for minimum wages, the lowest wage to be paid in micro and small enterprises, and the formula for calculation of fines are located in the Government Regulation. While this certainly follows the logic of providing specific details in lower-level instruments in the legal hierarchy, it also has the effect of making these more susceptible to future change and placing them outside the judicial review jurisdiction of the Constitutional Court.

### Responding to Judicial Review

As discussed above, there have been 31 judicial reviews of the 2003 Labour Law in the Constitutional Court, of which 12 were either fully or partially upheld. The Job Creation Law and its implementing regulations have together responded in various ways to these Court rulings. Although the causal link between the judgments and the legislative responses largely needs to be inferred here, the 'Academic Discussion Paper'<sup>153</sup> that preceded the draft Omnibus Bill did note the influence of some of these cases on the legislative drafting process in its article-by-article 'Analysis Matrix'.

These legislative responses to the judicial review cases include straight-forward affirmation, as occurred in relation to the *Late Payment of Wages Case*,<sup>154</sup> such that the Job Creation Law now acknowledges that late payment of wages for three months gives rise to the right of a worker to end the employment relationship even if the employer pays on time thereafter.<sup>155</sup> Similarly, the amendments have affirmed the Constitutional Court's decision in the *Dismissal for Marriage Case*<sup>156</sup> by removing the previous ability of employers to use contractual clauses to avoid the prohibition on dismissal of a worker for having a blood or marriage relationship within the workplace.<sup>157</sup> The Job Creation Law has also deleted article 96 of the 2003 Labour Law.<sup>158</sup> This article, which had limited workers' rights to claim unpaid entitlements to a maximum period of two years, was declared by the Constitutional Court to be null and void in the *Time Limit for Claims Case*.<sup>159</sup> Similarly, amendment to article 95 of the 2003 Labour Law relating to priority rules in case of corporate bankruptcy<sup>160</sup> affirms the *Priority Rules Case*.<sup>161</sup>

<sup>149</sup>ibid, art 62.

<sup>150</sup>ibid, arts 59, 60.

<sup>151</sup>Law no 11/2020 on Job Creation, art 81(28), introducing Law no 13/2003 on Labour, art 90B (newly added).

<sup>152</sup>Government Regulation no 36/2021 on Wages, art 36.

<sup>153</sup>Indonesian Government, 'Naskah Akademis Undang-Undang Cipta Kerja [Academic Discussion Paper for the Law on Job Creation]' (Kementerian Koordinator Bidang Perekonomian Republik Indonesia 2020) <<https://uu-ciptakerja.go.id/wp-content/uploads/2020/11/Naskah-Akademis-RUU-tentang-Cipta-Kerja.pdf>> accessed 17 Jan 2022.

<sup>154</sup>Constitutional Court Decision no 58/PUU-IX/2011 (henceforth '*Late Payment of Wages Case*').

<sup>155</sup>Law no 11/2020 on Job Creation, art 81(42), amending Law no 13/2003 on Labour, art 154A(g)(3) (newly added).

<sup>156</sup>Constitutional Court Decision 13/PUU-XV/2017 (henceforth '*Dismissal for Marriage Case*').

<sup>157</sup>Law no 11/2020 on Job Creation, art. 81(40), amending Law no 13/2003 on Labour, art 153.

<sup>158</sup>Law no 11/2020 on Job Creation, art 81(34), deleting Law no 13/2003 on Labour, art 96.

<sup>159</sup>Constitutional Court Decision no 100/PUU-X/2012.

<sup>160</sup>Law no 11/2020 on Job Creation, art 81(33), amending Law no 13/2003 on Labour, art 95.

<sup>161</sup>Constitutional Court Decision no 67/PUU-XII/2013.

In contrast, the Job Creation Law has also directly overridden the *Redundancy for Efficiency Reasons Case*,<sup>162</sup> where the Constitutional Court held that the article on redundancy for efficiency reasons was constitutional provided that it was interpreted as only occurring in the context of permanent closure of the business. The Law now specifically provides that efficiency is a permitted reason for dismissal whether or not the business closes permanently.<sup>163</sup> The Law has also entirely removed the previous ability of employers to apply to the relevant provincial governor for up to one-year exemption from paying the minimum wages.<sup>164</sup> In doing so, it removes the effect of the *Minimum Wage Exemption Case*,<sup>165</sup> where it was held that if an exemption was granted, the difference in wages still needed to be paid later and became a debt owed to the worker.

However, there was no response in the Job Creation Law to the *Union Bargaining Case*.<sup>166</sup> This case concerned article 120 of the 2003 Labour Law, which gave the one union with more than 50 per cent representation in an enterprise the right to bargain collectively. In 2009, the Constitutional Court handed down a conditionally constitutional ruling, allowing up to three unions, each with at least 10 per cent membership in an enterprise, to be proportionally represented in collective bargaining. The Court also recommended legislative change to this article to clarify its meaning. However, the Job Creation Law has not done this, thereby leaving the Court's interpretation in place. No explanation has been offered as to why this has occurred.

Some other responses to the Constitutional Court's decisions require more detailed explanation, and three examples are discussed below.

### Regulation of Outsourcing

In this first example, regarding the regulation of outsourcing (ie, use of subcontracted labour supplied by a third-party agency), politically driven amendments have been combined with a technical response to a Constitutional Court case. The amendments in the Job Creation Law are clearly intended to increase flexibility for employers to use outsourced labour and are explicitly based on the assumption that increasing outsourcing will necessarily increase job opportunities.<sup>167</sup> Yet, at the same time, somewhat contradictorily, the amendments also affirm a Court ruling aimed at protecting outsourced workers.

Since 2003, outsourcing has been specifically permitted under Indonesian labour law, but the 2003 Labour Law provided that outsourced workers could only be hired to carry out 'non-core' or support production activities.<sup>168</sup> If outsourcing was used for 'core' work, then the work was deemed to be 'insourced'.<sup>169</sup> For some years, the term 'non-core' was left only vaguely defined,<sup>170</sup> until, via a 2012 Ministerial Regulation, 'non-core' was specified as meaning cleaning services, catering for employees, security, support services in the mining and oil sectors and employee transportation services.<sup>171</sup> However, in the new Job Creation Law, there is no longer any restriction on the type of work that can be outsourced, and the related provision deeming 'core' work to the

<sup>162</sup>Constitutional Court Decision no 19/PUU-IX/2011.

<sup>163</sup>Law no 11/2020 on Job Creation, art 81(42), amending Law no 13/2003 on Labour, art 154A(1)(b) (newly added).

<sup>164</sup>Law no 13/2003 on Labour, art 90(2); Minister for Labour and Transmigration Decision no KEP-231/MEN/2003 Procedures for Suspension of Minimum Wage Implementation.

<sup>165</sup>Constitutional Court Decision no 72/PUU-XIII/2015; Agus Sahbani, 'Putusan MK ini Kabar Baik Bagi Pekerja [This Constitutional Court Decision is Good News for Workers]' (Hukumonline, 3 Oct 2016) '<https://www.hukumonline.com/berita/baca/lt57f231254dcfc/putusan-mk-ini-kabar-baik-buat-pekerja>' accessed 17 Jan 2021.

<sup>166</sup>Constitutional Court Decision no 115/PUU-VII/2009.

<sup>167</sup>Indonesian Government (n 153) 1204 (pagination based on overall pages in document).

<sup>168</sup>Law no 13/2003 on Labour, arts 64–66.

<sup>169</sup>Law no 13/2003 on Labour, arts 65(8), 66; Constitutional Court Decision no 7/PUU-XII/2014.

<sup>170</sup>Minister for Labour and Transmigration Decision no KEP.220/MEN/X/2004 on Conditions for Outsourcing Work to Another Company.

<sup>171</sup>Minister for Labour Regulation no 19/2012 on Conditions for Outsourcing Work to Another Company, art 17.

'insourced' has also been deleted. Therefore, this gives far greater freedom to employers and is likely to significantly increase the amount of outsourced work.

Previously, the 2003 Labour Law provided that the protection of workers and working conditions was the responsibility of the supplier firm and, somewhat ambiguously, that working conditions had to be at least of the same standard as in the main firm *or* in accordance with legislative minimums.<sup>172</sup> In the subsequent Ministerial Regulations, however, mention of working conditions needing to be at least the same as in the main firm was absent and the only requirement was that minimum legislative labour standards be met.<sup>173</sup> In the new Job Creation Law, this previous ambiguity has been removed, and now outsourced workers' conditions need only match the general legal minimums.<sup>174</sup> Here, then, we have a subtle amendment that again falls in employers' favour.

The outsourcing permit process has also undergone a change. Previously, an intent to subcontract work had to be reported to the local Department of Labour and outsourced work could not begin until proof of registration was received.<sup>175</sup> As per the new implementing Government Regulation, labour supply agencies will still require a permit, but this will need to come from the relevant central Government Ministry instead of the local Department.<sup>176</sup> How this requirement is eventually administered will most likely determine the effect of this on employers and their use of outsourcing.

Finally, in relation to outsourcing, there has been a response to the Constitutional Court. A 2012 Constitutional Court decision (henceforth, '*Transfer of Outsourcing Case*')<sup>177</sup> held that the rights of outsourced workers on fixed-term contracts had to be protected in the event that a labour supply service provider was changed. This is known more generally in labour law as a 'Transfer of Undertaking Protection of Employment', or TUPE. This 2012 Court decision was quickly acknowledged by the Ministry of Labour via a Circular Letter which required this protection for fixed-term contract holders. But the Circular Letter also specified that an outsourcing contract need not protect workers in the event of a change of provider if the workers involved were on permanent employment contracts.<sup>178</sup> Later, the Court's decision was also more broadly reinforced in the 2012 Ministerial Regulation mentioned above, and it did not make a clear distinction between fixed-term and permanent employment in this respect.<sup>179</sup> In the new Job Creation Law, the Constitutional Court's principle has been upgraded to Law,<sup>180</sup> where it is specified that it is fixed-term contracts that must contain protections in the event of a change of provider. In the implementing Government Regulation, this principle is reiterated, but with the additional provision that if a worker does not obtain a guarantee of continued work then it is the outsourcing company that is responsible for the worker's rights.<sup>181</sup>

<sup>172</sup>Law no 13/2003 on Labour, art 65(4).

<sup>173</sup>Minister of Labour Decision no KEP.220/MEN/X/2004 on Conditions for Outsourcing Work to Another Company, art 5; Minister for Labour Regulation no 19/2012 on Conditions for Outsourcing Work to Another Company, arts 9(2), 13.

<sup>174</sup>Law no 11/2020 on Job Creation, art 81(20), amending Law no 13/2003 on Labour, art 66(2).

<sup>175</sup>Minister for Labour Decision KEP-101/MEN/VI/2004; Minister for Labour Regulation no 19/2012, arts 5–8; Minister for Labour Regulation no 11/2019.

<sup>176</sup>GR 35/2021, art 20.

<sup>177</sup>Constitutional Court Decision no 27/PUU-IX/2011.

<sup>178</sup>Ministry of Labour and Transmigration Circular Letter no B.31/PHIJSK/I/2012 on Implementation of the Constitutional Court Decision no 27/PUU-IX/2011.

<sup>179</sup>Minister for Labour Regulation no 19/2012 on Conditions for Outsourcing Work to Another Company, art 32; Ministry of Labour and Transmigration Circular Letter SE.04/Men/VIII/2013 Aug 26, 2013 on Guide for Implementing Regulation no 19/2012; Minister for Labour Regulation no 11/2019.

<sup>180</sup>Law no 11/2020 on Job Creation, art 81(20), amending Law no 13/2003 on Labour, art 66(3).

<sup>181</sup>GR 35/2021, art 19.

### Dismissal for Criminal Misconduct

In this second example, via the Job Creation Law and its implementing Government Regulations, there has been an attempt to reintroduce provisions that had been declared null and void by the Constitutional Court in the very first judicial review of the 2003 Labour Law (*Multiple Challenges I Case*).<sup>182</sup> This set of amendments clearly makes use of the legal hierarchy to override the Court's decision.

The new Job Creation Law has amalgamated, and in the process also amended, a number of existing articles in the 2003 Labour Law on ending the employment relationship into a new article 154A. This new article 154A now covers in just one article all possible ways that the employment relationship may end including closure of the business, redundancy, constructive dismissal, dismissal for breach of contract, resignation and retirement.

Among other issues, the changes here have tried to deal with the long-standing confusion in the law regarding an employer's right to dismiss a worker for gross misconduct. This stems from the *Multiple Challenges I Case*, where the articles permitting dismissal for criminal aspects of worker misconduct were declared null and void. Dismissal for criminal misconduct was held to contravene the principle of being innocent until proven guilty, and further because the articles had potentially required the Industrial Relations Court (a civil court) to consider criminal matters. This decision created a great deal of confusion as to whether employers could dismiss workers for misconduct. In 2005, the Minister for Labour issued a Circular Letter to the effect that employers would need to wait for a court finding of criminal guilt before dismissing a worker.<sup>183</sup> Later, in 2015, the Supreme Court issued a Circular Letter declaring the opposite view – that dismissal before criminal charges had been concluded was permitted.<sup>184</sup> Decisions of the Court of Industrial Relations dealing with this issue were also mixed.<sup>185</sup>

In the new Job Creation Law, all mention of the ability of an employer to dismiss a worker for serious misconduct has now been removed. Instead, in the Law there is merely general permission to dismiss a worker for contravention of their individual contract, collective bargaining agreement and/or company rules and where the necessary warnings have first been issued.<sup>186</sup> Then, in the implementing Government Regulation, a distinction has been drawn between an ordinary contravention of such rules and a contravention which is 'urgent' (*bersifat mendesak*).<sup>187</sup> An ordinary contravention requires three warning notices and has an attached right to some severance payment. An 'urgent' contravention does not require warning notices and has no right to any severance payment.<sup>188</sup> The definition of '*bersifat mendesak*' is then provided in the Elucidation (an explanatory memorandum that is used to interpret the law or regulation but is not formally part of the law itself<sup>189</sup>) appended to the Government Regulation, which lists a number of criminal behaviours such as theft, embezzlement, drunkenness and use of narcotics, among others. These are the very criminal behaviours that had originally been listed in the 2003 Labour Law.

Therefore, this set of amendments seeks to shift conduct that is potentially criminal into the realm of civil law by framing it as breach of contract. Presumably, this will have implications for the drafting of individual employment contracts and collective agreements into the future. The

<sup>182</sup>Constitutional Court Decision no 12/PUU-I/2003.

<sup>183</sup>Minister for Labour and Transmigration Circular Letter no 13/Men/SJ.HK/I/2005.

<sup>184</sup>Supreme Court Circular Letter no 3/2015.

<sup>185</sup>For example, Central Jakarta District Court Decision no 22/G/2007 PHI.PN.JKT.PST and Supreme Court Decision no 324K/Pdt.Sus/2008. See also discussion in Teri L Caraway, 'Final Report: Labor Courts in Indonesia' (American Centre for International Labor Solidarity Paper, 2010) [paper on file with author].

<sup>186</sup>Law no 11/2020 on Job Creation, art 81(42), introducing Law no 13/2003 on Labour, art 154A(1)(k) (newly added).

<sup>187</sup>GR 35/2021, art 52.

<sup>188</sup>See also n 132.

<sup>189</sup>Butt & Lindsey, (n 24) 35.

amendments have also ‘downgraded’ this subject matter out of the Law and into Government Regulation, and hence out of the judicial review jurisdiction of the Constitutional Court and into that of the Supreme Court. Placing the list of ‘urgent’ breaches of contract in the Elucidation is a curious attempt to ‘hide’ the reintroduction of dismissal for ‘criminal’ behaviours as far down the hierarchy of legal instruments as possible. However, it should be noted that elucidations are still potentially reviewable by the relevant Court (in this instance the Supreme Court).<sup>190</sup>

### Dismissal Procedures

In this third example relating to dismissal procedures, the Job Creation Law has cleared up an inconsistency in the law, and in doing so has at least indirectly responded to additional comments (*obiter dicta*) of the Constitutional Court, but not to a direct constitutionality ruling. It is therefore difficult to demonstrate a causal link to the Court decision here, but it is still likely that the Court had some influence on the legislative changes.

In the 2003 Labour Law, Indonesia retained a procedural protection against dismissal from the earlier law of 1964.<sup>191</sup> This protection required employers to negotiate dismissal with the relevant worker and/or union and, if an agreement was not reached, to then make an application (*permohonan*) in writing to the relevant industrial dispute resolution body (i.e. the Court of Industrial Relations once it was established in 2006) for a ‘determination’ (*penetapan*) permitting them to fire a worker.<sup>192</sup> Obtaining a determination was not necessary if the worker was still in a trial period or if the worker had voluntarily resigned or retired. Workers were to remain employed with their full entitlements until a legally binding decision was reached.<sup>193</sup> Without such a court determination, within one year, workers could bring an action to the Court to dispute any purported dismissal.<sup>194</sup>

A procedural anomaly was created between this requirement to obtain a determination found in the 2003 Labour Law and the 2004 *Industrial Disputes Resolution Law*.<sup>195</sup> Labour disputes are generally required to pass through bipartite negotiations between the employer and the worker/union. Then, there is a choice between mediation or conciliation (or arbitration for interests and inter-union disputes)<sup>196</sup> before, if still unresolved, the dispute may progress to the Court of Industrial Relations. The 2004 Industrial Disputes Resolution Law briefly acknowledged the requirement that employers seek a determination for dismissal,<sup>197</sup> but it did not resolve precisely how this was supposed to interact with the general dispute resolution procedures.

In 2015, the Constitutional Court considered this inconsistency between the two laws in the *Permission to Dismiss Case*.<sup>198</sup> Although the Court entirely rejected the constitutional claim being made (and indeed the legal arguments in the claim were poorly constructed), in its reasoning it stated that a case for dismissal could not be conducted as a unilateral application (*permohonan*) for a determination but that it must be a dispute (*sengketa/gugatan*) where the views of the opposing party (ie, the worker) will be heard. The Constitutional Court did not, however, go so far as to directly interpret the provisions in the 2003 Labour Law requiring employers to obtain a determination, arguably leaving the law still unclear.

<sup>190</sup>ibid 36.

<sup>191</sup>Law no 12/1964 on Private Sector Dismissals.

<sup>192</sup>Law no 13/2003 on Labour, arts 151(3), 152.

<sup>193</sup>Law no 13/2003 on Labour, art 155(2) and Constitutional Court Decision no 37/PUU-IX/2011.

<sup>194</sup>Law no 13/2003 on Labour, art 155.

<sup>195</sup>Law no 2/2004 on Industrial Disputes Resolution.

<sup>196</sup>Note that conciliation (using a private conciliator) is never actually used in practice, and arbitration is also only very rarely used. Almost all disputes proceed instead via government mediation services.

<sup>197</sup>Law no 2/2004 on Industrial Disputes Resolution, arts 82, 96.

<sup>198</sup>Constitutional Court Decision no 20/PUU-XIII/2015 (henceforth ‘*Permission to Dismiss Case*’).



In the new Job Creation Law, the procedural requirement for an employer to obtain a determination from the Court of Industrial Relations in order to legally dismiss a worker has now been entirely removed.<sup>199</sup> As has the associated right of workers to take a case directly to the Court if they were dismissed without their employer obtaining a determination.<sup>200</sup> As per the relevant implementing Government Regulation, where a worker does not refuse dismissal, the employer must then notify the local department of Labour of this fact.<sup>201</sup> A worker who wants to refuse dismissal needs to provide their reasons in writing within 7 days.<sup>202</sup> Then, the worker will have the option of pursuing the general labour dispute resolution procedures. Workers are still to be kept employed, or suspended with full pay, until the dismissal dispute resolution procedures have concluded.<sup>203</sup> This could be for a considerable period of time, particularly if the case is appealed all the way through to the Supreme Court, although a Supreme Court Circular Letter has previously (and controversially as it contradicts a higher-level law) limited that period of paid suspension to six months.<sup>204</sup>

This change has certainly cleared up the previous uncertainty in relation to dismissal procedures and, in doing so, has essentially affirmed the reasoning in the 2015 Constitutional Court decision. However, note that the new Job Creation Law has neglected to amend the two articles (ie, articles 82 and 96) in the 2004 Industrial Disputes Resolution Law that still mention the need for an employer to obtain a determination. This 2004 Law has been scheduled on the *Prolegnas* for revision since at least 2010.

## Conclusions

The labour cluster in the Job Creation Law of 2020 and its implementing Government Regulations have enacted far more complicated legal changes than have been generally acknowledged in the resulting media coverage. Indeed, the sheer number and complexity of the changes means that arguably the 2003 Labour Law should have been fully re-issued rather than just amended as the resulting jumble of amendments will most likely impede public access to legal knowledge.

While many of the changes have certainly been flexibilising in nature and therefore swing in employers' favour, others have also been to workers' advantage. A deeper examination of the amendments has also revealed significant shifts in the placement of labour regulations within the legal hierarchy. In many instances the detailed rules and calculations previously found in the 2003 Labour Law have been downgraded to the Government Regulation level. When taking a longer-term historical view, we see that to some extent this has undone the 'upgrading' of ministerial regulations to Law that occurred during the democratisation period of the early 2000s and the enactment of the 2003 Labour Law. The Job Creation Law now places many detailed rules within the domain of the executive government and they are hence more susceptible to future change. This is particularly significant given the historical difficulties in passing legislative amendments in Indonesia – the government relied on the extraordinary times of the COVID-19 pandemic to pass the Job Creation Law.

The downward movement in the hierarchy also removes these rules from the Constitutional Court's judicial review jurisdiction into that of the Supreme Court. Those few substantive rules that have now been 'upgraded' to Law, most particularly in relation to minimum wage-setting, can be linked to the increasing re-centralisation of government powers in Indonesia and also signal

<sup>199</sup>Law no 11/2020 on Job Creation, arts 81(37), 83(39), 81(41), 81(43), amending Law no 13/2003 on Labour, art 151 and removing arts 152, 154 and 155.

<sup>200</sup>Law no 11/2020 on Job Creation, art 81(59), removing Labour Law 2003, art 170.

<sup>201</sup>GR 35/2021, art 38.

<sup>202</sup>ibid, art 39.

<sup>203</sup>Law no 11/2020 on Job Creation, arts 81(37) and 81(43), amending Law no 13/2003 on Labour, art 151, and adding art 157A.

<sup>204</sup>Supreme Court Circular Letter no 3/2015.

the continued marginalisation of trade unions from wage-setting processes. This certainly gives some credence to the link that scholars have drawn between the Job Creation Law and the ‘democratic decline’ or ‘illiberal turn’ in Indonesia. The strong impression that this Law and its implementing Government Regulations were largely drafted as an integrated package, blending legislative and executive government functions, is also troubling for democratic principles of separation of powers.

The conclusions that we can draw from the responses to Constitutional Court reviews, though, are more mixed. For the most part, these amendments have taken Court decisions seriously, either by affirming them or directly overriding them. There was only one case (*Union Bargaining Case*) that has been ignored entirely in the amendments, leaving the Court’s interpretation in place. This thereby generally affirms the role of the Constitutional Court as a crucial pillar of Indonesia’s democratic political and legal system, and this does at least mean that some principles of human rights derived from the Constitution and acknowledged by the Court have been integrated into the legislation. However, the reintroduction of dismissal for ‘criminal’ misconduct indicates some creativity in the legislative response to the Constitutional Court, and the placement of these rules within the Government Regulation and its Elucidation is reminiscent of some of the earlier evasive government responses to the Court’s decisions.

### Postscript

Since this Article was written, Indonesia’s Constitutional Court has handed down decisions in thirteen judicial review challenges to the Job Creation Law. Many of the applicants in these challenges were trade unions and other civil society organisations and individual workers. All but one of these challenges were dismissed, but the one case that (partially) succeeded is particularly significant. This decision,<sup>205</sup> announced on 25 November 2021, held that the Job Creation Law’s law-making procedures and use of an omnibus law format were conditionally unconstitutional. However, rather than declaring the Job Creation Law to be immediately null and void, the Court controversially gave the DPR a maximum time limit of two years in which to fix the Law’s defects. At the end of that time limit, if the Law is not ameliorated, then it will become permanently unconstitutional. Planning the government’s response to the Court’s decision is still ongoing, but it appears that the government will first attempt to amend the 2011 Law on Law-Making in order to specifically enable the use of omnibus law formats.

**Supplementary material.** To view supplementary material for this article, please visit <https://doi.org/10.1017/asjcl.2022.7>

<sup>205</sup>Constitutional Court Decision no 91/PUU-XVIII/2020.