A Notion of Regulatory Reform

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Submitted: February 26, 2022; Reviewed: March 21, 2022; Accepted: March 27, 2022

Abstract

The types and hierarchies of laws and regulations are constantly changing. Law Number 12 of 2011, as amended by Law Number 15 of 2019, leads to several problems. This research aims to analyse Indonesia’s laws and regulations regarding their types and material contents. This is normative legal research employing statutory, historical, and conceptual approaches. The findings of this study are as follows. First, TAP MPR should not be classified into laws and regulations as stipulated by Law Number 12 of 2011, as MPR can no longer issue any regulations after the amendment of the 1945 Constitution. Another problem lies in the absence of review if laws and regulations deviate from TAP MPR. Second, it is essential to restrict Perppu, particularly when issuing it. The President can issue Perppu at will, for there is no definition of compelling exigencies. It should merely be issued during the recess periods of DPR. Third, there is no difference between Government Regulations and Presidential Government content. Fourth, other regulations, especially Permen, prove problematic due to the silo mentality, so that they conflict with each other and even overlap higher regulations.

A. Introduction

Norms are standards of behaving in social and environmental interactions.1 Types of norms are both written and unwritten. Written legal norms are hierarchical.2 All regulations in a state as the result of law-making

2 According to the Stufenbau Theory, cited by Hans Kelsen, there is a normative order in which the reason for the norm’s validity is of a higher norm. As expressed by Kelsen, the higher norms and the hierarchy in the various levels of the norms creates the norms; Hans
are called laws and regulations. The 1945 Constitution does not stipulate the hierarchy of laws and regulations in Indonesia, including their types, material contents, and making. It does not call itself the supreme law of the land explicitly. The stipulation of laws and regulations can be found in the law.

Laws and regulations constitute statutory laws made by state institutions or officials. The authority is granted through attribution or delegation of power. The types and hierarchy of laws and regulations are:

a. The 1945 Constitution
b. People's Consultative Assembly Decrees (TAP MPR)
c. Laws/ Government Regulations in Lieu of Laws (Perppu)
d. Government Regulations (PP)
e. Presidential Regulations (Perpres)
f. Provincial Regulations
g. Regency/Municipal Regulations

TAP MPR are considered laws and regulations between the 1945 Constitution and Laws. After the amendment, the 1945 Constitution merely grants MPR three authorities, including amending the constitution, inaugurating the President, and discharging the President. There are several problems in the hierarchy, material contents, and making process. TAP MPR was derived from the status of MPR as the manifestation of the people. The change in the authorities of MPR has impacted its law-making power. MP can no longer make laws and regulations but the constitution.
One of the most controversial laws and regulations is Perppu. Perppu is equivalent to a law.\textsuperscript{12} The 1945 Constitution grants the President any authority to issue Perppu in the event of compelling exigencies.\textsuperscript{13} Due to no parameter of the compelling necessities, it highly depends on the President. The parliament shall review it to obtain the approval of the House of Representatives (DPR) in its next session.\textsuperscript{14} If DPR does not approve it, Perppu shall be revoked.\textsuperscript{15} However, owing to the absence of the parameter,\textsuperscript{16} Perppu can lead to the authoritarianism of the President until DPR eventually reviews it.

Another problem in-laws and regulations are the phenomena of delegation. They are not complete due to the hierarchy, including the level of laws. A provision in a law is further regulated in PP, from PP to Perpres or Regional Regulations (Perda), or directly through ministerial regulations (Permen). Some provisions cannot be implemented as the implementing regulations have not been made. The implementing regulations can probably contain new and substantive matters which should be stipulated by the higher regulations, even deviate from them.


\textsuperscript{13} Article 22 paragraph (1) of the 1945 Constitution. As mentioned by Simamora, this condition becomes very subjective and tends to be politically abused; Simamora, “Multitafsir Pengertian ‘Ihwal Kegentingan Yang Memaksa’ Dalam Penerbitan Perppu”; Even in the absence of a legal basis, it confuses the substance review agency, as mentioned by Huda in Ni’matul Huda, “Pengujian Perppu Oleh Mahkamah Konstitusi,” Jurnal Konstitusi 7, no. 5 (2010): 73–91, https://doi.org/10.31078/jk%25x; For this reason, it is necessary to give judicial review authority of Perppu to the Constitutional Court; Dedy Nursamsi, “Kerangka Cita Hukum (Recht Idee) Bangsa Sebagai Dasar Kewenangan Mahkamah Konstitusi Menguji Peraturan Pemerintah Pengganti Undang Undang (Perppu),” Jurnal Cita Hukum 2, no. 1 (2014): 89–100, https://doi.org/10.15408/jch.v1i1.1452; Different opinion expressed by Zairin Harahap, “Menyoal Kewenangan Mahkamah Konstitusi Menguji Perppu,” Jurnal Yudisial 7, no. 3 (2014): 311 – 328, https://doi.org/10.29123/jy.v7i3.78.

\textsuperscript{14} Article 22 paragraph (2) of the 1945 Constitution.

\textsuperscript{15} Article 22 paragraph (3) of the 1945 Constitution

One of the contributing factors in hyperregulation is tens of thousands of Permen. Each Minister issues those regulations as long as they are related to their functions. Nevertheless, the Minister's authority is granted through delegation in law-making, including delegating authority from an official or institution to a delegate. Ministers' authorities are not derived from attribution but from the President's authority as they assist the President. The silo mentality of each Minister results in tens of thousands of conflicting and inefficient Permen. Consequently, President Joko Widodo complained about the number of regulations hindering the progress made by the government. The problem becomes an open discourse on the relevance of Permen. The stipulations of a norm should be complete and end at the level of perpres. Ministers can only regulate through Permen in their ministries.

The problem above can also be found in other laws and regulations. Incomplete and conflicting regulations and the absence of implementation regulations are the other problems of laws and regulations. Consequently, several laws and regulations must be amended immediately after their enactment, for example, Law Number 23 of 1997 or revoked through judicial review.

Furthermore, the question of the institution reviewing laws and regulations emerges. The problem continues after a norm or article, or paragraph is deleted. Lower norms may not conflict with higher ones, given the regulatory hierarchy. Nonetheless, after a norm is revoked through judicial review, its implementing regulations, the number of which is more significant, cannot immediately be amended. More norms in PP, Perpres, Perda, and Permen need to be amended if a norm in law is amended.

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18 Astawa and Na’a, Dinamika Hukum Dan Ilmu Perundang-Undangan Di Indonesia.
19 Article 17 paragraph 1 of the 1945 Constitution
Currently, judicial review is exercised by two institutions, including Constitutional Court (to review laws against the constitution), and Supreme Court (review statutory rules and regulations below laws against the laws). The judicial review by Constitutional Court is also constitutional, while Supreme Court conducts a review of legality. However, according to *Stuffenbau Theory* by Kelsen, all laws and regulations may not conflict with the constitution. This research’s originality is the reason why the judicial review not solely exercised by the guardian of the constitution (Constitutional Court).

Therefore, this article provides insights into two things. First, an analysis of the problems of laws and regulations in Indonesia. Second, a notion of regulatory reform. This is normative legal research from legal positivist and socio-legal points of view. It employed a statutory approach by studying all laws and regulations related to the topic of the discussion. In addition, a historical approach was used to reveal the regulation issues' background and development. This study also employed a conceptual approach to views and doctrines in law science. The researcher can develop ideas leading to relevant legal definitions, concepts, and principles by studying the doctrines.

B. Discussion

1. Problems of Types and Hierarchy of Laws and Regulations

Laws and regulations in Indonesia are classified into several types and hierarchies. The classification is regulated in Law Number 12 of 2011 on Law-making. This law repealed Law Number 10 of 2004. The hierarchy has at least two logical consequences. First conformity between the types and material contents of laws and regulations. As there are several types of laws and regulations, every type of law and regulation must conform to material contents. The making of laws and regulations must also conform to the

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22 Article 24C paragraph (1) of the 1945 Constitution
23 Article 24A paragraph (1) of the 1945 Constitution
hierarchy. Second, the hierarchy means that each law and regulation may not conflict with higher rules.

The 1945 constitution is the ground for all laws and regulations. As the fundamental law, the constitution grants DPR the authority to make laws to regulate constitutional provisions further. Although the President, holding the power of government, is also granted such authority, Article 20A paragraph (1) of the 1945 Constitution explicitly provides that DPR has the legislative function. In other words, laws made by DPR as the legislative body and the President as the executive body are the only way to regulate constitutional norms further.

According to Law Number 12 of 2011, there are still several discourses upon laws and regulations. First, some laws contain material contents that should be regulated by lower regulations as many interests from various sectors are included. Even all professions aspire to have special laws despite existing laws on the sectors. Second, there is a phenomenon of laws and regulations to lower rules. The concept of delegation (delegated legislation) can be interpreted as delegating laws to one of the lower rules to regulate norms further. Laws frequently regulate briefly. Then, the provision is delegated to PP or Perpres, Perda, even Permen. Therefore, many regulations at various levels regulate the same matters.

Third, the excessive number of Permen. From 2000 to 2015, there were 8,331 Permen, compared to Laws (916), Government Regulation in Lieu of (49), presidential decrees (1,550), president regulation (2,258), and Government Regulation (2,446). Lastly, the lack of control by the government in terms of synchronization and harmonization of laws and regulations. This figure shows hyperregulation at the level of Permen. On average, each law is further regulated by 2-3 PP, 2-3 Perpres, and 8-9 Permen. The more detailed discussions on the problems of laws and regulations in Indonesia are as follows:

29 Synchronization and harmonization in the formulation of the laws and regulations could be defined as an effort or activity to synchronize (make it be in sync) and to harmonize (to create harmony). The harmonization is between one law and regulation with other laws and regulations of the same level (horizontal) or hierarchical (vertical); Maria Farida Indrati, “Meningkatkan Kualitas Peraturan Perundang-Undangan Di Indonesia,” Jurnal Legislasi Indonesia 4, no. 2 (2007): 25; However, the synchronization and harmonization of norms is not the main pressure point but is defeated by the transactional politics between factions in the DPR, which appears to be more dominant; Zainal Arifin Mochtar, “Antinomi Dalam
a. The Revival of the People’s Consultative Assembly Decrees (TAP MPR)

According to Law Number 12 of 2011, TAP MPRs are categorized into laws and regulations. Article 7 of the law stipulates that TAP MPR is higher than laws and lower than the 1945 Constitution. The revival of TAP MPR in the hierarchy of laws and regulations is due, among others, to several provisions of TAP MPR, which are still valid. TAP MPR No. I/MPR/2003 states that three TAP MPR are still valid, such as 1) TAP MPRS Number XXV/MPRS/1966 on the dissolution of the Indonesian Communist Party (PKI) and banning of communism, marxism, and Leninism; 2) TAP MPR Number XVI/MPR/1998 on the Politics of Economy in the Framework of Economic Democracy; 3) TAP MPR Number XVI/MPR/1998 on the Referendum in East Timor. Bagir Manan thinks that the existence of TAP MPR nowadays is based on two things. First, the implied power of MPR is recognized by the 1945 Constitution, including the authority to make legal decisions, such as inaugurating and discharging the President and the Vice President. Second, constitutional conventions are recognized as one of the sources of law, for example, TAP MPR, which was already known in the previous regimes.30

Nevertheless, the revival of TAP MPR in the hierarchy of laws and regulations causes problems, for example, the existence of TAP MPR as regulation and the classification of TAP MPR as laws and regulations. Now, MPR is unable to issue TAP MPR. Before the amendment, MPR stipulated TAP MPR as the supreme body. Before the amendment, article 3 of the 1945 Constitution provided that MPR stipulated the 1945 Constitution and Outlines of the State Policy. At that time, the doctrine of the division of power was upheld. Consequently, MPR, as the supreme body, exclusively held the people’s sovereignty and divided it among the executive, legislative, and judicial branches.

MPR is not the supreme body anymore. After the 1945 Constitution was amended, the doctrine was replaced by the separation of power. Since then, MPR has had three functions and authorities such as 1) amending and stipulating the constitution; 2) inaugurating the President and/or the Vice President; 3) discharging the President and/or the Vice President during their tenure following the constitution. Article 1 of the additional provisions of the 1945 Constitution only assigned MPR to review the materials and status of TAP MPR through TAP MPR Number I/MPR/2003.

Another problem lies in the types of TAP MPR categorized into laws and regulations. The term “ketetapan” (decree) in TAP MPR means a specific decision (beschikking). The material contents of TAP MPR were very varied as TAP MPR contains particular matters and binds all parties. It shows inconsistency in legal terms. According to Widayati, TAP MPR should be changed into “Peraturan Negara” (State Regulations) considering the material contents of TAP MPR, which are still valid (regeling). The proposal shows a consistent legal term, but it is irrelevant as MPR can no longer make TAP MPR or the regulations.

The revival of TAP MPR in the hierarchy of laws and regulations causes problems. Moreover, the revival of TAP MPR in the hierarchy of laws and regulations means that three existing TAP MPR/MPRS bind lower regulations. However, laws made after the enactment of Law Number 12 of 2011 do not contain TAP MPR/MPRS in their consideration of “mengingat” (observing), for example, the mass organizations law and Political Parties Law. Moreover, Widarto concluded that the standing of the TAP MPR is not compatible with constitutional supremacy.

In reviewing other laws and regulations against TAP MPR, there are no legal means or institutions to review TAP MPR against the 1945 Constitution or review lower regulations against TAP MPR. It should be noted that the hierarchy of laws and regulations means that lower regulations conform to higher ones.

Referring to the theory of the hierarchy of laws and regulations, Hans Nawiaskzy categorized legal norms in a state into four main groups such as Staatsfundamentalnorm (State Fundamental Norms); Staatsgrundgesetz (State Basic Laws/State Principal Laws); Formelle Gesetz (“formal” laws) and; Verordnung and Autonom Satzung (Implementing Rules and Autonomous Rules). From the perspective of the theory, in terms of the material contents, TAP MPR is closer to the basic state laws due to its essential and principal material contents and its making by the institution with authority to amend and stipulate the constitution as the basic norms.
b. Problems of Government Regulations in Lieu of Laws

Government regulations in lieu of laws (Perppu) according to Law Number 12 of 2011 are classified into laws and regulations. In the hierarchy of laws and regulations, perppu is equivalent to laws. In the formal sense, Perppu is government regulation. On the other hand, in the material sense, its contents are similar to those of laws.³⁵

The constitutional ground for Perppu is Article 22 of the 1945 Constitution. It provides that the President has the right to issue Perppu if exigencies compel. From the provision, it is highly dependent on the President to issue Perppu and interpret the “compelling exigencies." Nevertheless, the President cannot issue it at will.

One of the problems of Perppu is the timing. Perppu can be issued anytime if the President considers that the "compelling exigencies” condition is fulfilled. The Constitutional Court, in its Verdict Number 138/PUU-VII/2009, interprets the “compelling exigencies” as follows:
1. An urgency of dealing with legal issues following laws;
2. Legal vacuum; and
3. Insufficient time to make laws to fill the legal vacuum above.

Perppu is issued during the recess periods of DPR. Therefore, it shall be approved by DPR in its next session. In other words, once DPR starts the session, Perppu has to be discussed. Imagine what will happen if Perppu is issued in a session of DPR, but it is discussed in the next session. However, from the perspective of legal reasoning, the phrase "pada persidangan selanjutnya" (in its next session) in Article 22 paragraph (2) of the 1945 Constitution can be interpreted as the time to issue Perppu. It can undermine the essence of Perppu as a regulation to deal with compelling necessities so that it is a matter of urgency.

What if Perppu is issued during the session of DPR? To put it simply, if DPR is still in its session, what is needed is speedy legislation as long as there is a joint commitment between DPR and the President. Considering that law-making involves those two institutions, the commitment enables speedy legislation. For example, Law Number 17 of 2014 concerning MPR, DPR, DPD, and DPRD was amended promptly in a couple of days.

c. Confusion over Material Contents between Government Regulations and Presidential Regulations

³⁵ Article 11 of Law Number 12 of 2011 on Law-making
regulations are issued by the President to implement laws accordingly. Meanwhile, Perpres is also issued by the President to contain matters ordered by law, matters to implement a government regulation, or matters to exercise the government's authority. From both definitions, PP and Perpres are categorized into laws and regulations to implement the mandates of laws.

In addition, the elucidation broadens the scope of PP and Perpres. They not only implement mandates explicitly stipulated in laws but can also be issued to satisfy the needs of the government as long as they do not conflict with higher regulations. The elucidation of PP states, “menjalankan undang-undang sebagaimana mestinya” (to implement a law accordingly) means that government regulations are issued to implement a mandate of law or as long as required without deviating from the law. On the other hand, the elucidation of Perpres says that Perpres is issued to regulate further the mandates explicitly or implicitly stipulated in a law or government regulations.

From the definitions and elucidations above, the specific material contents of each regulation are unclear. Both PP and Perpres are issued to regulate and implement the mandates of higher regulations. Furthermore, they can still regulate matters to exercise the government's authority under the higher regulations. This problem of material contents is likely to cause obscurity and inefficiency in law-making.

Ni’matul Huda states that institutions have hierarchical laws and regulations written and made in legal orders, particularly in the civil law system. The hierarchy reflects each law and regulation so that if there is a conflict between two rules, the higher rule abrogates the lower one. In other words, each of the laws and regulations should contain certain material contents. It will help the lawmakers mandate law articles to implement the regulation, including PP and Perpres.

d. Status of Ministerial Regulations (Peraturan Menteri) and Their Grounds

Article 8 paragraph (1) of Law Number 12 of 2011 mentions several other laws and regulations. They include regulations issued by MPR, DPR, the Regional Representatives Council, the Supreme Court, the Constitutional Court, the Audit Board, the Judicial Commission, Bank Indonesia, ministers, state agencies, state institutions, or equivalent commissions established by law or the government by order of law, the Provincial House of Representatives, Governor, the Regency/Municipal House of

Representatives, Regent/Mayor, Head of Village or equivalent. Paragraph (2) of the article provides that all those regulations are legally binding if they are ordered by superior regulations or made by an authority.

In the legal doctrine, law-making is seen from the ground for authority, such as 1) attribution, in which laws and regulations grant power; 2) delegation or the transfer of an acquired attribution of power from higher regulations. One of the problems of law-making beyond the hierarchy is regulations issued by ministers or Permen. Regarding the doctrines of attribution and delegation above, ministers seem to acquire delegation from the President in particular government areas. However, according to Article 17 of the 1945 Constitution, ministers are the assistants of the President, and they have no original power for several reasons.

First, ministers are appointed and discharged by the President. They should not have original power in law-making as they are appointed without checks and balances. It will be difficult to control and oversee the regulations they make. Second, although Article 17 paragraph (3) of the 1945 Constitution provides that each Minister is in charge of specific affairs in government, it should not be interpreted as original power. The constitution does not even stipulate Permen.

Ministers’ authorities are derived from the President’s. Therefore, Article 1 (general provisions) of laws should not provide that a minister has the right to make laws. It seems as if the Minister has original power. It is the authority of the President which can be delegated or mandated to ministers. Each law always contains the same provider so that ministers regulate further. Major problems will likely arise if each minister issues regulations, hampering harmonization and synchronization.

2. Regulatory Reform

Despite improving Law Number 10 of 2004, Law Number 12 of 2011 is not flawless. Hence, reform is necessary to guarantee legal certainty. Several measures to take are as follows:

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First, TAP MPR should be excluded from the hierarchy of laws and regulations. After the amendment of the 1945 Constitution, MPR is no longer the supreme body. Article 3 of the 1945 Constitution can merely amend and stipulate the 1945 Constitution, inaugurate the President and Vice President, and discharge the President and/or the Vice President during office. In other words, TAP MPR has no constitutional ground for being regulations. Meanwhile, law-making is an authority. The exclusion of TAP MPR from the hierarchy of laws and regulations does not mean that the material contents of the existing TAP MPR are also excluded. According to their material contents, the existing TAP MPR can be inserted into other laws and regulations.

Second, the restriction on Government Regulation in Lieu of Laws or Peraturan Pemerintah Pengganti Undang-Undang (Perppu). Even though the Constitutional Court has interpreted the compelling exigencies, it highly depends on the President to issue Perppu. It is necessary to guarantee legal certainty. The regulation may only be issued during the recess periods of DPR when DPR fails to make laws.

Third, a distinction should be made regarding the material contents of government regulations and presidential regulations. The latter should only implement government regulations further and matters to exercise the government's authority. In other words, presidential regulations should be an indirect explanation of laws.

Fourth, Perpres should be limited. Their number has become excessive, and they regulate new norms. They should only regulate how to implement higher regulations.

C. Conclusion

After the amendment of the 1945 Constitution, TAP MPR has no constitutional ground as MPR is no longer the supreme body. Article 3 of the 1945 Constitution has been amended so that MPR cannot issue any regulations but the 1945 Constitution. The constitution does not stipulate TAP MPR as one of the laws and regulations. Its existence leads to problems, such as reviewing higher and lower regulations against TAP MPR.

Perppu remains a government regulation issued by the President. Nevertheless, its material contents are similar to those of laws. As a consequence, the President can amend a law using Perppu. It can even repeal or amend a law. Perppu has caused controversy as the President can issue it without sufficient ground.

The President issues government regulations with implements laws accordingly. Meanwhile, presidential regulations contain law-ordered matters to implement a government regulation or exercise government authority. It is difficult to distinguish the material contents of government regulations and perpres as they can be the implementing regulations of laws.
Permen are recognized as laws and regulations in Law Number 12 of 2011. They contain the material contents of higher regulations, including laws, as they can regulate substantive matters. Notions of reform are of paramount importance to deal with the problems abovementioned through the amendment of Law Number 12 of 2011.

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