

Ratio Legis of Presidential Regulation Arrangement in the Legislation System in Indonesia

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Abstract

This research focuses on the ratio of legislation or the purpose and objective of the inception of arrangement of the presidential regulation in the legislation system in Indonesia. This study is an analytical study on the uncertainty of material arrangement of the contents of the Presidential Regulation in the legislation system so it causes confusion in the practice of legislation. The method used in this study is normative legal research by using three approaches, namely the statute approach, the conceptual approach, and the philosophical approach. This study obtains the conclusion that the ratio of legis presidential regulation existence is closely related to the implementation of a presidential system that gives authority to the president in carrying out government, so the President who holds the power of government needs to be supported by the authority to form presidential regulations to be able to carry out his government duties optimally. To realize discipline in the law and regulation and the effectiveness of the implementation of laws and regulations, especially the presidential regulations, the government needs to establish an independent institution to conduct monitoring and evaluation of laws and regulations.

Keywords: Ratio Legis, Presidential Regulations, Legislation, Content Material, Confusion

1. Introduction

The Indonesian nation has committed that the form chosen in the state is a state of law. The conception of the rule of law implies that there is an acknowledgment of the principle of legal and constitutional supremacy, the principle of separation and limitation of power is adhered according to the constitutional system stipulated in the Constitution, the existence of the guarantee of human rights in the the Constitution, the principle of equality of every citizen in law, and guarantee of justice for everyone including the abuse of authority by the authorities.¹ The President as the public welfare administrator has the duty and authority to administer state administration in order to achieve the general welfare. In line with the implementation of its duties, the President must implement it in accordance with the Constitution as stipulated in Article 4 paragraph (1) of the 1945 Constitution. The President as the Head of Government must be given sufficient space to be able to carry out his duties. The Presidential Regulation is regulated as one type of legislations in Law Number 12 of 2011 concerning the Establishment of Legislation (hereinafter referred to as Law No. 12 of 2011). Article 7 paragraph (1) Law No. 12 of 2011 regulates the position of the Presidential Regulation under Government Regulation and above the provincial regulations. The position of the Presidential Regulation is actually also regulated in Law Number 10 of 2004 concerning the Establishment of Law and Regulations.

Regarding the content material, Article 13 and Elucidation of Article 13 of the PPP Law stipulate that:

”Content material of the Presidential Regulation contains material instructed by the Act, material for implementing Government Regulations, or material for carrying out the administration of governmental powers.”

From the arrangement of content material, it actually raises questions about the material content of the actual Presidential Regulation and its relation to the provision of delegation by law. *First*, Article 13 stipulates that the content material of the Presidential Regulation can be in the form of material instructed by the Act. This provision shows the dualism of delegation carried out by the Law in which a Law can delegate to Government Regulation or delegate to a Presidential Regulation.² This dualism of delegation can cause confusion in the practice of legislation.

Secondly, for the President the dualism of delegation can also cause confusion. If in a law there is no clear regulation or it is not explicitly instructed in the form of further regulation of a particular material, even though the implementation requires regulation, the President will be faced with two regulatory options. The President has the option to arrange the material through Government Regulations or Presidential Regulations.³ In this case,

¹Jimly Asshiddiqie, *Konstitusi dan Konstitusioanlisme Indonesia*, (Jakarta: Konstitusi Press, 2005), hlm. 68.

²Pasal 12 UU PPP mengatur bahwa Materi muatan Peraturan Pemerintah berisi materi untuk menjalankan Undang-Undang sebagaimana mestinya. Selanjutnya, ditegaskan dalam penjelasan Pasal bahwa yang dimaksud dengan “menjalankan Undang-Undang sebagaimana mestinya” adalah penetapan Peraturan Pemerintah untuk melaksanakan perintah Undang-Undang atau untuk menjalankan Undang-Undang sepanjang diperlukan dengan tidak menyimpang dari materi yang diatur dalam Undang-Undang yang bersangkutan.

³Pilihan terhadap bentuk peraturan pendelegasian ini juga didasarkan pada adanya perbedaan mengenai sifat pendelegasian Undang-Undang

once again there is no regulation of the delegation category must be by Government Regulation or Presidential Regulation.

Meanwhile, the position of the Presidential Regulation which is associated with the administration of the government get the basis of Article 4 of the Constitution which affirms that the President is the holder of governmental power. This provision which was later revealed as the basis of the authority of the President to have the power to regulate by forming regulations under the Law.

Position regulation of the Presidential Regulation as a type of legislation which is one of the contents of the material is carrying out this Government Regulation also raises questions in practice. *First*, it is related to delegation by the same official. Government regulations made by the Government are signed by the President. If following the provisions of the PPP Law, the President as the form of the Government Regulation can delegate to the Presidential Regulation which is also formed by the President himself. *Secondly*, the practice of delegation from Government Regulation to this Presidential Regulation also creates ineffectiveness in the government system, especially in the process of legislation. Although in the current legislation system, the position of the Presidential Regulation creates confusion, especially related to delegation and content, but its position as a follow-up to the provisions of Constitution that the President as the holder of governmental authority is still needed in the government system.

In addition, other issues related to the presidential regulation are related to the material of the content. Law no. 12 of 2011 does not provide clear limits on what is included in the content material of the presidential regulation. This issue creates uncertainty in practice in determining what content material is actually being part of the presidential regulation.

The existence of the Presidential Regulation in the legislation system and its content material needs to be reviewed to discuss the issue. This study is needed in order to improve the quality of the legal system, especially those related to the Presidential Regulation. In accordance with its function in the administration of government, these improvements are needed in order to solve the problems that exist in the formation of the Presidential Regulation so the Presidential Regulation can later be effective and provide benefits to the community.

Based on the background above, the writer suggests that this research is investigating (legal research). The purpose and benefit of this study are to find out the ratio of legislation and the basis of consideration of philosophy of the regulation of the Presidential Regulation as one of the laws and regulations in the PPP Law (Law on the Establishment of Laws and Regulations).

2. Research Method

The type of this research is normative legal research. The research approaches used includes the statute approach, the philosophical approach, and the conceptual approach.¹Type of legal material in this study consists of primary, secondary and tertiary legal materials. Primary sources are basic norms and laws and regulations, namely the 1945 Constitution, Law No. 12 and Presidential Regulation No. 87 of 2014. Secondary sources that include new and up-to-date scientific knowledge are books, research reports, journals , magazine. Tertiary sources are black law dictionary, abstracts and other tertiary sources.

The collection of legal material is done by studying documents or library materials in several libraries such as the Library of University of Indonesia (*Universitas Indonesia*), the Library of Defense Ministry, the State Secretariat Library and the Constitutional Court Library. Research is also conducted by collecting articles in magazines or newspapers, collecting articles in scientific journals related to research, official documents issued by the government and internet search. Processing legal materials through systematization, description and structuring. Analysis of legal material uses a prescriptive normative method. Reasoning used in this prescriptive research is deductive-inductive reasoning to obtain concepts in response to problems or research findings.

3. Results and Discussion

3.1 Level of Norms in a Hierarchy of Laws and Regulations

Legal norms in a country are in a norm system which according to Hans Kelsen has a level or hierarchy. The theory of order of legislations is always based on the teachings of Hans Kelsen, known as *Stufenbau des Recht* or the theory of law. This theory explains that the rule of law is a tiered arrangement and every lower law rule comes from a higher rule.²

kepada Peraturan Pemerintah apakah harus dinyatakan dengan tegas (tersurat) atau tidak perlu dinyatakan dengan tegas (tersirat). Hal ini juga berkaitan dengan ketentuan dalam Pasal 74 ayat (1) dan ayat (2) UU No. 12 Tahun 2011 yang mengatur mengenai penetapan batas waktu pembentukan Peraturan Pemerintah. Ketentuan ayat (2) menyebutkan bahwa "Penetapan Peraturan Pemerintah dan peraturan lainnya yang diperlukan dalam penyelenggaraan pemerintahan tidak atas perintah suatu Undang-Undang dikecualikan dari ketentuan sebagaimana dimaksud pada ayat (1)". Dalam rumusan tersebut terdapat ketentuan bahwa Peraturan Pemerintah yang dibentuk tidak atas perintah suatu undang-undang maka dikecualikan dalam pengaturan penetapan waktu. Hal ini berarti UU No. 12 Tahun 2011 mengakui bahwa Peraturan Pemerintah dapat dibentuk tanpa perintah Undang-Undang.

¹Bambang Sunggono, *Penelitian Hukum Normatif*, Bandung: CV. Mandar Maju, 2000, hlm.76.

²Untuk lebih memahami teori stufen bau des Recht, harus dihubungkan dengan ajaran Kelsen yang lain yaitu *Reine Rechtslehre* atau *The*

According to Hans Kelsen, which was later developed by Hans Nawiasky, norms in the state are hierarchically arranged, from the most common ones which are abstract to a more specific and individual level, at the top of the norm there are basic norms (*grundnorm* or *urprungsnorm* or basic norm). According to Hans Kelsen, the law is included in a dynamic norm system (*nomodynamics*) because the law is always formed and removed by institutions or authorities that form it.¹

Legal norms or in the current system of laws and regulations get validity if it is formed by the institutions or authorities that form it and based on higher norms. In this case, lower norms (inferior) can be shaped by higher norms (superior), and the law is tiered and originates from higher, valid, sourced and based norms that are higher, so eventually sourced from the highest norm.

Kelsen stated that the Constitution holds the highest place in national law, because it is the basis of the national legal system. The constitution is a fundamental law. Hans Nawiasky who is a student of Kelsen argues that the content of *Staat fundamental norm* is the norm which is the basis of the arrangement of a constitution or the basic laws of a country including the norm of its amendment.

The legal nature of *staat fundamental norm* is the requirement for the enactment of a Constitution or the 1945 Constitution. *Staat fundamental norm* of a state is the basis of its philosophical basis which contains basic rules for further state regulation. Notonagoro translated the term *Staat fundamental norm* with the state fundamental basic principle while A. Hamid S. Attamimi mentions with the term State Fundamental Norms.

Order or hierarchical arrangement of a state's legal system can be stated that postulating basic norms, constitution is the highest order in a national law. The constitution in this case is not in the formal form or an official document but rather a constitution in the material sense, namely the regulations governing the arrangement of general legal norms, especially the legislators.

3.2 Range of Content Material of Laws and Regulations

The term "content material" was firstly introduced by A. Hamid Attamimi who translated the term *het onderwerp*. The word content material was first introduced as a substitute for the Dutch word *het onderwerp* in the expression of *Thorbecke het eigenaarding der werp*.² Bagir Manan defines content material as a content that is in accordance with certain forms of laws and regulations.³ This content material can also describe the position of type of laws and regulations in a hierarchy.

Each type of laws and regulations contains certain content, one which is different from the other. This implies that substantial differentiation of types of laws and regulations are not solely based on the form, condition, and method of arrangement, and also their arrangement bodies, but also based on the contents contained in it.⁴

To get a more in-depth explanation, the author will describe and explain the types and hierarchies, and also the contents of the laws and regulations, namely:

a. Content material of the 1945 Constitution of the Republic of Indonesia

The contents of the 1945 Constitution are not regulated in Law No. 12 of 2011. The material content is a joint agreement arranged through a constitutional process regulated by the constitution or the 1945 Constitution. As it is known that the constitution is a basic contract in the state. Therefore, the substance reflects the principles of state based on the highest values or ideological state.⁵

Conceptually there are three main characters of a 1945 Constitution of the Republic of Indonesia, namely (1) as a constitution is a supreme law of the land, (2) as a constitution is a frame of work for government, (3) *a constitution is a legitimate way to grant and limit powers of government officials*. The 1945 Constitution of the Republic of Indonesia must also function as a vehicle that can accommodate the international order (the vehicle for defining the international order) into the national legal system.⁶

Its position as a basic law has the consequence that the 1945 Constitution of the Republic of Indonesia must have a basic and flexible content material.⁷ The main material in this case is intended that the content of the

pure theory of law (teori murni tentang hukum) dan bahwa hukum itu tidak lain 'command of the sovereign' kehendak yang berkuasa.

¹Hans Kelsen, *General Theory of Law and State*, (Translate by Anders Wedberg, Russell & Russell, New York, 1973), him. 112-113.

²Attamimi, *Op. Cit.*, hlm. 193-194.

³Bagir Manan dan Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia*, Edisi Revisi, (Bandung: Alumni, 1997), hlm. 145.

⁴King Faisal Sulaiman, *Teori Peraturan Perundang-Undangan dan Aspek Pengujiannya*, *Cetakan Kesatu*, (Yogyakarta: Thafa Media, 2017), hlm. 50.

⁵Konstitusi merupakan hasil kontrak politik (produk resultante) yang dibuat bersama antara warga negaradan Negara melalui suatu mekanisme yang disepakati secara bersama. Muatan UUD NRI 1945 harus mencerminkan suasana kebathinan dan spirit kebangsaan suatu negara. Di samping itu, dimensi muatan UUD NRI 1945 harus mampu meletakkan prinsip-prinsip kedaulatan rakyat, supremasi hukum, jaminan perlindungan dan penghormatan HAM, pengaturana system perimbangan kekuasaan antar lembaga (cheks and balances), pembagian kekuasaan antara eksekutif, legilsatif, dan yudikatif, dan pembatasan kekuasaan, setidak-tidaknya merupakan *main stream idea* yang harus tegas diatur dalam sebuah UUD NRI 1945.

⁶*Ibid.*, Hlm. 51

⁷Namun, Dalam perkembangannya ada yang menginginkan UUD NRI 1945 dibuat secara rinci dengan harapan ruang penafsiran semakin sempit dan penyalahgunaan kekuasaan dapat dikendalikan. Sifat ringkas atau rinci suatu konstitusi terkait juga dengan bentuk negara. Pada

Constitution contains basic principles in managing the state while the flexibility of the content material is the nature of the material in the Constitution that must be able to be applied according to developments. These two things are also the implications of the position of the 1945 Constitution of the Republic of Indonesia as the highest norm so with these two characteristics, the changes must be strictly regulated.¹

a. Content Material on People's Consultative Decree (Tap MPR)

The position of the People's Consultative Decree (Tap MPR) is again regulated in the order of the laws and regulations. The position of the People's Consultative Decree is contained in Law No. 12 of 2011. However, the position arrangement of the People's Consultative Decree in the order of the laws and regulations is not intended to be the basis for the establishment of a new People's Consultative Decree. To study the content material of the People's Consultative Decree, it must refer to the material of the constitutional history before the amendment to the 1945 Constitution of the Republic of Indonesia where the MPR still has the authority to form legal products in the form of People's Consultative Decree. The 1945 Constitution of the Republic of Indonesia also did not regulate the contents of the People's Consultative Decree. This People's Consultative Decree in the view of some experts is mentioned as a continuation of the constitutional convention.² The position of the People's Consultative Decree was a consequence of granting authority from the 1945 Constitution of the Republic of Indonesia to the MPR. The implementation of this authority is then packaged in an instrument called the People's Consultative Decree.

The existence of the People's Consultative Decree and the development of its position can be seen from the aspect, first there is an implied provision which also implies the power implied in the 1945 Constitution of the Republic of Indonesia which appears in the Articles of the 1945 Constitution of the Republic of Indonesia. *Second*, the legal form of People's Consultative Decree is a practice of constitutional administrative convention. So there is no specific arrangement that regulates the content material of the People's Consultative Decree.

b. Content material of Law

Normatively, the material content of law that is based on Law No. 12 of 2011 includes:

1. further regulation regarding the provisions of the 1945 Constitution of the Republic of Indonesia;
2. an order of Law to be regulated by law;
3. ratification of certain international agreements;
4. follow-up on the decision of the Constitutional Court; and / or
5. fulfillment of legal needs in the community.

c. Content material of a Regulation in Lieu of Law (Perppu)

Normatively, in the content material of the Perppu regulated in Law No. 12 of 2011 it is stated that the content material is the same as the content of the law. Article 11 of Law No. 12 of 2011 states that:

The material content of the Regulation in Lieu of Law is the same as the material content of the Law.

The similarity of this content material has the consequence that the Perppu's position is equivalent to the Law. Therefore, in the order of Laws and Regulations in which their position are aligned with the Law. Although the authority of its arrangement is owned by the President, the Perppu must obtain the approval of the House of Representatives when the House of Representatives conduct the plenary session after the issuance of the Regulation in Lieu of Law.³

d. Content material of Government Regulation (PP)

The position of government regulations obtains a strong legal basis from the Constitution, namely Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which stipulates that "The President sets Government Regulations to carry out the law as it should". Article 12 of Law No. 12 of 2011 explained that the material contained in the government regulation contains content material to carry out the Law as it should.

umumnya konstitusi suatu negara yang menganut bentuk Negara kesatuan adalah lebih ringkas daripada konstitusi negara yang berbentuk federal.

¹ Dari aspek bentuk, UUD NRI 1945 harus memiliki sifat derajat tinggi dalam suatu negara, yaitu di satu pihak, berada di atas segala peraturan perundang-undangan yang ada, sehingga tidak ada materi muatan peraturan perundang-undangan lain yang bertentangan dengan materi UUD NRI 1945, karena itu tidak dapat diubah seperti halnya mengubah Undang-Undang. UUD NRI 1945 harus dibentuk dan diubah oleh sebuah lembaga negara dengan cara-cara tertentu. Sifat-sifat tersebut harus dimiliki oleh suatu UUD NRI 1945 untuk mencapai derajat tinggi. Di pihak lain dan sangat penting, UUD NRI 1945 harus selalu hidup dengan kondisi jamannya (living constitution), serta legitimate, karena adanya keterlibatan masyarakat (participatory) dalam proses pembuatan dan perubahannya.

² Dalam konteks ini tidak salah jika Bagir Manan menegaskan bahwa praktek kebiasaan ketatanegaran merupakan salah satu sumber hukum tata negara dan terdapat pada setiap negara. Undang-Undang Dasar ialah merupakan hukum dasar yang tertulis, sedangkan selain Undang-Undang Dasar itu, berlaku juga hukum dasar yang tidak tertulis, yakni aturan-aturan dasar yang timbul dan terpelihara dalam praktek penyelenggaraan negara meskipun tidak tertulis.

³ Lebih lanjut disebutkan bahwa Pembatasan jangka waktu dan persetujuan DPR mengandung berbagai makna: (i) Kewenangan membuat Perppu memberikan kekuasaan luar biasa kepada Presiden. Kekuasaan luar biasa ini harus dikendalikan untuk menghindari penyalahgunaan kekuasaan dengan mempergunakan Perppu sebagai sarana. (ii) Telah dikemukakan, materi muatan Perppu merupakan materi muatan UU. Karena itu harus diajukan kepada DPR agar mendapatkan persetujuan untuk menjadi UU. (iii) Perppu mencerminkan suatu keadaan darurat. Keadaan darurat merupakan pembenaran untuk misalnya menyimpangi prinsip-prinsip Negara berdasarkan atas hukum atau prinsip-prinsip negara berkonstitusi. Dengan pengajuan Perppu secepat mungkin kepada DPR berarti secepat mungkin pula pengembalian pada keadaan normal yang menjamin pelaksanaan prinsip-prinsip negara berdasar atas hukum atau negara berkonstitusi.

Government Regulations cannot change the material contained in the Act that it carries out, cannot add, do not reduce, and do not insert a provision, and do not modify the material that is already in the Law which is the main. The content material of the Government Regulation contents can be in the form of all the provisions stated in the Act concerned, both the Act concerned is in the form of one or more than one Law.

e. Content material of the Presidential Regulation

The Presidential Regulation is not explicitly stated in the 1945 Constitution of the Republic of Indonesia. The existence of the Presidential Regulation is related to Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that the President holds governmental powers according to the Constitution. The President is the highest authority in the field of government (executive). The contents of the Presidential Regulation contain material that is ordered by law or material to carry out Government Regulations. Previously, it was not obtained in the hierarchy of laws and regulations, which was known was the Presidential Decree. Therefore, there is a legal product of the new presidential regulation since Act No. 10 of 2004. The existence of the presidential decree is seen in Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that the President holds the power of government according to the Constitution.

In connection with the uncertainties related to the determination of material contents of Government Regulations and Presidential Regulations, the researcher argues that essentially both are regulations as the elaboration of Law and have similarities in the drafting process based on Presidential Regulation Number 87 of 2014 concerning Procedures for the Implementation of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations and also legalized by the same institution, namely the President. The author proposes the equality of position/ place of the Government Regulation with the Presidential Regulation, which is not astipulated in Article 7 of PPP Law where the position of the Government Regulation is above the position of the Presidential Regulation. This position which is equal or same position also influences the electoral order from the Government Regulation to the Presidential Regulation.

However, even though they have the same position/ place, the two functions can be distinguished. Government Regulation has a more technical norm and it regulates all aspects delegated by the Law and has implications for the public. On the other hand, the Presidential Regulation has an internal content material coverage in the administration of government functions, such as regulating governmental institutions and state finances. Therefore, methodologically there must be assertiveness in the content of the Act which is then elaborated by Government Regulation or elaborated by a Presidential Regulation. It aims to realize certainty in order to determine the contents of the Government Regulation or the contents of the Presidential Regulation as the elaboration of the Law, it is not like what continues to date that there is a confusion in determining the content of the two regulations.

3.3 Dynamics of Ideas in Regulating Presidential Regulations in the Legislation System

Discussion of the Draft Law on Arrangement of Laws and Regulations (TCPPP draft) which subsequently resulted in Law No. 10 of 2004 did not mention much about the position of the presidential regulation or presidential decree according to the terms used before Law No. 10 of 2004. Information obtained is limited to the desire to make changes to the use of terms from the presidential decree to presidential regulation. The material that often appears in the document of discussion of TCPPP draft is related to the regulation regarding the content of legislation, laws and regulations enactment, regulation in lieu of laws and community participation.

The search for presidential regulations appeared in the submission of the Government's Remarks on the Draft Law on the Establishment of Laws and Regulations in the Open Plenary Session of the House of Representatives of the Republic of Indonesia on May 24, 2004. Remarks read by MA Rachman, as Minister of Justice and Human Rights ad interim mentioned that some of substantive materials discussed during the discussion of the TCPPP draft.

In the remarks, there was no explanation about the debate during the TCPPP draft discussion regarding the position of the president's regulation in the order of laws and regulations. The debate about the position of the president's regulation in order of the laws and regulations is even more prevalent when the discussion of the revision of Law No. 10 of 2004. Information on the proposed bill for amendment to Law No. 10 of 2004 stated clearly that:

The Presidential Regulation as a regulation that contains a Law order and carries out a government regulation in practice is more independent and does not contain determined material. In addition, if it is referred again to the 1945 Constitution, there is no direct mention of this type of regulation. Judging from the Presidential Regulation as an executive product (Government), the implementation is sufficiently carried out through Government Regulations.¹

The explanation shows that there is a limitation of the president's authority in arranging laws and

¹Keterangan DPR Atas RUU tentang Pembentukan Peraturan Perundang-Undangan, Rapat Kerja Pansus dengan Kementerian Hukum dan HAM, Senin 13 Desember 2010. Risalah Rapat Panitia Khusus Rancangan Undang-Undang tentang Pembentukan Peraturan Perundang-undangan.

regulations only in the form of government regulations. From these explanations there are two arguments delivered. First, related to the practice of creating more independent presidential regulations. Second, the presidential regulation is not mentioned in the 1945 Constitution. The government's desire to maintain the regulation of the presidential regulation can also be seen from the document on the Problem Inventory List of the RUU Amendment Law No. 10 of 2004.

The discussion of this presidential regulation took a long time until the Minister of Law and Human Rights expressed his disappointment. The long discussion about the presidential regulation at the special committee level ever raised the idea of delaying the discussion of the material on this presidential regulation. The discussion is proposed to enter the working committee level.¹In contrast, discussions at the special committee level will be continued in the next material. This idea was rejected by the Minister of Law and Human Rights, even to the point of not wanting to continue discussing the revision of Law No. 10 of 2004 if the material regarding the presidential regulation is pending.

The Minister of Law and Human Rights expressed his objection to continue the discussion if the material regarding the presidential regulation was not agreed in the annual meeting of the special committee with the government. This attitude shows that the government still cannot be negotiated related to the regulation of the president in the order of laws and regulations. The failure to reach an agreement on the regulation of the president found a solution regarding the limitation of the regulation that is owned by the presidential regulation. With the fear of misuse of the authority to arrange presidential regulations, a regulatory framework is needed which limits the content of the presidential regulations.

Observing from the regulation about the definition of presidential regulations and the content of the presidential regulation, it still has not set the strict limits. In fact, the provisions are actually seen to keep the problems that are confused related to the Presidential Regulation's position, including the dualism between government regulations and presidential regulations as feared in the special committee meeting. Regulatory uncertainty regarding content material is also not specifically regulated in the text of Law No. 12 of 2011. Aside from still not being fully in line with the will of the legislators in regulating the presidential regulations, in the scope of the presidential regulation there are problems in the practice.

3.4 *The Nature of Regulatory Power in Running Government*

Montesquieu gives an explanation of executive power as follows:

The executive power ought to be the hands of a monarch, having need of dispatch, is better administered by one than many; on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than a single person.

The explanation from Montesquieu principally shows that executive power is limited to the power exercised by the king, power that refers to a person not a group. This power is intended to implement the laws made by legislative power.²In its development, the position of executive power becomes very important. S.L Witman and J.J. Wuest considers executive power to be a fundamental characteristic of a government that prioritizes democratic principles. D.C.M Yardley interpretes the executive as³:

"the organ of the state which is responsible for carrying out and performing the routine administration of country.

The explanation confirms that the scope which is more specific to executive power is related to conduct administration or government of state. G.S Dinopolo asserted that the nature of the executive is the body that carries out the will of the state. Thus, the executive power can be interpreted as:⁴

First; in a broad sense, the executive body means the entire body that carries out the duties of government, including the head of state and its ministers, officials of the government, all employees and corps of police and the entire battle array of the armed forces. Second; in a limited system, the executive body means the highest governing body of the government, including the head of state and ministers which are commonly referred to the Cabinet. This executive body is the motor that moves the entire system of state activities from the center to the

¹Dalam pembahasan pembentukan undang-undang di DPR, biasanya apabila ada materi yang sulit disepakati dalam pembahasan tingkat pansus, maka pembahasannya akan dilanjutkan ke tingkat panja.

²Menarik untuk mencermati pendapat Hans Kelsen yang mengkaitkan antara kekuasaan eksekutif, legislatif dan yudikatif terkait dengan norma. Ketiga kekuasaan tersebut sama-sama berhubungan dengan norma. Dalam ulasan tentang kekuasaan negara Hans Kelsen berpandangan bahwa dalam membicarakan eksekutif sebagai pelaksanaan tidak lain adalah melaksanakan norma-norma umum, konstitusi dan hukum-hukum yang dibuat oleh kekuasaan legislatif. Namun demikian, pelaksanaan hukum ini juga merupakan fungsi kekuasaan yudikatif atau kehakiman. Kekuasaan yudikatif ini tidak bisa dibedakan dari yang disebut kekuasaan eksekutif oleh fakta bahwa hanya organ-organ eksekutif saja yang melaksanakan norma-norma. Dalam hal ini, fungsi kedua lembaga tersebut adalah sama, yaitu melaksanakan norma-norma hukum. Perbedaannya terletak dalam hal yang satu, norma-norma hukum dilaksanakan oleh pengadilan, sedangkan yang lainnya dilaksanakan oleh organ-organ eksekutif atau administratif, yakni organ yang diberikan kepercayaan untuk melaksanakan norma-norma umum. Jadi trikotomi yang lazim itu pada dasarnya adalah dikotomi yaitu perbedaan fundamental dari legislatif dan eksekutif. Fungsi eksekutif dibagi lagi ke dalam fungsi yudikatif dan fungsi eksekutif dalam pengertian yang lebih sempit.

³ D.C.M Yardley, Op. Cit., hlm. 43.

⁴ G.S. Dinopolo, *Ilmu Negara*, Jilid 2, (Jakarta: Balai Pustaka, 1975), hlm. 208.

regions, at domestic and foreign.

Hans Kelsen provides an extension of the meaning of the executive function by distinguishing into two functions, namely the political function and the administrative function. Because the division of executive power into governmental and administrative functions contains political character rather than legal character. From a legal perspective, the entire domain of executive power is administration (implementation). D. George Kousoulas states that the executive duties include:

1. As symbols and ceremonial functions;
2. Improve stability and change in an orderly manner;
3. Regarding conflicts and critical-critical times. The big task of the executive is to manage the elements that cause conflict and strength, so it can encourage and contribute to peace and social harmony;
4. Solve various complex state problems, such as inflation, monetary policy, unemployment, taxes, housing, economic growth, balance of payments, civil rights, urban crime, air safety, and etc.;
5. Control all state apparatus;
6. Create public opinion;
7. Lead the nation.

The explanation shows that executive duties developed along with the development of concepts about modern countries are very broad and varied. Colin Turpin explained that:¹

The executive powers of government are a great variety. They include powers to allocate licences, authorize certain kinds of business, make appointments to public offices, approve by-law of public bodies, make compulsory purchase orders, give directions, require informations, and award contracts, loans and subsidies. Under various default powers, ministers may take over the functions of the other public authorities.

Executive power also has authority in the field of legislation, for example it is given the authority to establish government regulations or a Presidential Regulation in administering government. Authority for executives to arrange legal products that are regulating is a necessity for the functioning of government in supporting the achievement of national goals. The authority of the executive power in arranging laws and regulations can also be seen from the formulation that governs the presidential institution. Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia regulates the following:

The President of the Republic of Indonesia holds the power of government according to the Constitution.

This provision shows that the President is the head of government. The position in the government is a form of executive power holder. Hence, it is clear that the President of the Republic of Indonesia is the Highest Administrator of the State Government, which carries out all the duties and functions of the government, in the broad sense concerning the administration, security / police, and regulation. If it is related to the formulation of Article 4 paragraph (1) of the Constitution, the government whose power is owned by the President also includes the authority to regulate or arrange laws and regulations.

3.5 Comparison of Regulation and Use of Terms for Regulations Formed by the President

The history of the types of laws and regulations in Indonesia shows the existence of presidential regulations in several regulations of this type. Even though in some regulations it is referred to Presidential Decrees which the essence is included in the regulatory material. In the MPRS Decree No. XX / MPRS / 1966 does not mention the term Presidential Decree. In the Decree, a Presidential Decree is stipulated. In the regulation of the next types of laws and regulations, namely in the MPR Decree Number III / MPR / 2000, the type of Presidential Decree is still included in the type of laws and regulations.

The type and naming of the new Presidential Regulation appears in the hierarchical arrangement of laws and regulations in Law No. 10/2004. The position of the Presidential Regulation, then is also included in the legislation through Law Number 12 of 2011 concerning the Establishment of Laws and Regulations.

In the system of legislation, when looking at the order of the arrangement referred to above, the presidential regulation is first regulated in the order of laws and regulations in Law No. 10 of 2004. In the order of laws and regulations regulated in Law No. 10 of 2004, the position of the presidential regulation is under the government regulation. Sequentially, the order of laws and regulations regulated in Law No. 10 of 2004 includes (i) the Constitution, (ii) Laws / regulations in lieu of laws (perppu), (iii) presidential regulations, (iv) regional regulations.²The previous order of laws and regulations does not regulate the presidential regulation as a form of laws and regulations. But in the previous order of laws and regulations which are regulated in MPR Decree No. III / MPR / 2000 concerning the Sources of Law and Order of Laws and Regulations it was regulated that a presidential decree is as a form of laws and regulations.³

¹ Colin Turpin, *Op.Cit.*, hlm. 385.

²Pasal 7 ayat (1) UU Nomor 10 tahun 2004 tentang Pembentukan Peraturan Perundang-undangan

³Pernyataan Menteri Hukum dan HAM dalam risalah pembahasan RUU Perubahan UU No. 10 Tahun 2004 yang menyebutkan bahwa secara substansi produk hukum yang dibentuk oleh presiden sudah terdapat dalam beberapa tahapan ketatanegaraan Indonesia. "Kemudian kalau kita melihat dari sejarah perjalanan bangsa ini bahkan sebelum Perpres kita juga mengenal di dalam TAP MPRS Nomor X Tahun 1966,

There are three main materials stipulated in the provisions regarding the definition of the laws and regulations, namely:

1. form of regulation; In that definition it is stated that the form of legislation is written.
2. establishment authority; the authority to form laws and regulations exists with state institutions or officials
3. bonding power; laws and regulations have a broad range of binding power.

One of the materials related to the understanding of the presidential decree in MPR Decree No. III / MPR / 2000 is a binding material that is applied to the public. UU no. 10 of 2004 stipulates that the presidential regulation is a statutory law that is formed by the president and has general binding power. From these two definitions, it can be seen that substantially, the regulation of presidential regulations contained in the MPR and Law No. 10 of 2004 has similarity. The similarity in question lies in the binding power that governs the public. In contrast, the term used in the MPR decree is a decision. The use of the term decision for a legal product formed by the president at that time can indeed be interpreted into two senses, namely the president's decision as a form of regulating regulation that is general binding and the president's decision as a form of *beschikking* which is the designation and binding of individuals. The use of the term decision for *regeling* and *beschikking* causes confusion in the legislative system. UU no. 10 of 2004 corrects this confusion by using the term regulation for legislation established by the president. This can be found from the statement of Hamdan Zoelva, one of the members of House of Representatives who discussed the establishment of Law No. 10 of 2004. Hamdan Zoelva's statement, is the Chairperson of the Working Committee (*Panja*) draft legislation for the establishment of laws and regulations (TCPPP), as quoted by hukumonline.com as follows:

The term Keppres does not exist, but we replace it with the term Perpres. In the past, people separated between presidential decrees that were *regeling* or regulated with a presidential decree that was *beschikking*. Therefore, now we change it to Presidential Decree, so the regulating Presidential Decree no longer exists, there is only Perpres. Thus, the Presidential Decree is only for those who are *beschikking*.

As an overview of the discussion of the order of laws and regulations at the time of the arrangement of the TCPPP draft, it can be seen from the following table:¹

kemudian begitu juga dengan pada saat kita memperlakukan pertama Undang-Undang Dasar Negara Republik Indonesia 1945 kita memberlakukan Undang-Undang Dasar Sementara, kemudian UUD RIS bahkan, termasuk kita kembali ke Undang- Undang Dasar 1945 TAP MPRS Nomor XX Tahun 1966, TAP MPR Nomor III Tahun 2000, kemudian Undang-Undang Nomor 10 Tahun 2004, di dalam sejarah perjalanan bangsa ini hampir semuanya menempatkan posisi Presiden baik itu dalam bentuk instruksi presiden, ada juga yang dalam bentuk keputusan presiden dan terakhir Undang-Undang Nomor 10 Tahun 2004 menempatkan peraturan presiden.”

¹*Ibid*

Table 1. Overview of the Order of Laws and Regulations in the TCPPP Draft

People's Consultative Decree (TAP MPR) No.III/MPR/2000	Draft Law for Order of Arrangement of Laws and Regulations
1. 1945 Constitution; 2. People's Consultative Decree; 3. Laws; 4. Regulations in lieu of laws (Perpu); 5. Government Regulation; 6. Presidential Decree; 7. Regional Regulation.	1. 1945 Constitution of the Republic of Indonesia; 2. Laws/ regulations in lieu of laws; 3. Government Regulation; 4. Presidential Regulation; 5. Non-Institution State Institutional Regulation; 6. Ministerial Regulation; 7. Non-Departement State Institutional Regulation; 8. Regional Regulation; 9. Governor Regulation; 10. Regent/Mayor's Regulation; 11. Regulation of village chief.

Presidential regulations are still included in the form of laws and regulations. Since the enactment and implementation of Law No. 10 of 2004, it began to develop the consistency in the use of the term presidential regulation as laws and regulations established by the president. Consistency in the use of the term presidential regulation remains in Law No. 12 of 2011. It is just that there is a change in the notion of a presidential regulation in Law No. 12 of 2011 compared to MPR Decree No. III / MPR / 2000 and Law No. 10 of 2004.

Table 2. Difference and Development of Definition or Limitation of Presidential Regulation

Category and Regulation	People's Consultative Decree (TAP MPR) No. III/MPR/2000	Act No. 10 Year 2004	Act No. 12 Year 2011
Term	Presidential Decree	Presidential Regulation	Presidential Regulation
Definition	Regulatory presidential decrees are made by the President to carry out their functions and duties in the form of implementing state administration and government administration.	Presidential Regulations are laws and regulations made by President	The Presidential Regulations are laws and regulations stipulated by the President to carry out the orders of higher laws and regulations or in carrying out governmental powers.

Definition in MPR Decree No. III/MPR/2000 emphasizes the existence of presidential regulations related to the implementation of the functions of state and government administrations. On the other hand, the definition in Law No. 10 of 2004 only provides definitions related to officials to form presidential regulations. Then the definition in Law No. 12 of 2011 cover wider aspect. There are two materials, namely the official to form and function of the presidential regulation, namely (i) to carry out higher laws and regulations and (ii) organize governmental power.

3.6 Source of President's Authority in Arranging Presidential Regulation

Presidential Regulation is one type of laws and regulations whose arrangement is the authority of the President. The existence of regulations in lieu of laws is contained in Article 22 paragraph (1) of the 1945 Constitution which stipulates that "In the case of forced urgency, the President has the right to stipulate regulations in lieu of laws." Next, Article 5 paragraph (2) regulates establishment of government regulations that are the authority of the President. The article stipulates that "the President establishes government regulations to carry out the law as it should be."

In the current system of laws and regulations, there is also a form of legislation that is not directly stated in the 1945 Constitution. The regulation in question is a presidential regulation. Its position with the term presidential regulation began to be known in the order of the laws and regulations of Indonesia since the establishment of Law No. 10 of 2004. Even though previously there was a Presidential Decree which was substantially the same as the presidential regulation because it had characteristics to regulate. The term presidential regulation is not mentioned in the 1945 Constitution either before the amendment or after the amendment. However, its existence is always associated with the authority of the President as the holder of government power. This presidential regulation is the president's authority to form it as a manifestation of the president's position as head of government in the administration of the state.

The power to form government regulations is the power that is owned by the President. On the other hand, the source of authority to form government regulations is the authority of the delegation given through the law. Forms of laws and regulations mentioned in the 1945 Constitution, namely the laws and regulations in lieu of

laws in conditions of forced urgency in accordance with Article 22 paragraph (1) of the 1945 Constitution, government regulations and regional regulations show a form of scope of ideas that shape legislation is closely correlated with legislative power. The authority to form laws and regulations is the authority of legislative power held by the DPR. Another form of regulations in lieu of laws which is the authority of the President is an exception to the country's emergency situation. The power to form this legislation within the limits of delegation to carry out the law can be given to the President.¹

The authority to form presidential regulations for the President in carrying out his authority as head of government is in line with the concept of the rule of law. The presidential regulation is a legal instrument that can be a means of the president in formulating his policy so it has legal certainty and can be accounted for. The realization of the state of law requires that the policies adopted by holders of power in the state must be compiled and carried out democratically. Policies that are carried out not through legal instruments or laws and regulations have the potential to create inefficiencies and legal uncertainty for the community. The absence of legal instruments in using power will result in the assumption that the law is a ruler because the policies carried out are not formulated in the form of legal instruments.

4. Conclusions and Suggestions

4.1 Conclusions

The existence of the presidential regulation is still needed to strengthen the presidential system applied in the government system in Indonesia. The ratio legis of the existence of the presidential regulation is closely related to the implementation of a presidential system that gives authority to the president in carrying out government, thus the President who holds the power of government needs to be supported by the authority to form presidential regulations to be able to carry out his government duties optimally. The existence of this presidential regulation is also in line with the concept of a constitutional state which underlies regulation in all aspects of life in society, nation and state through laws and regulations.

Although the existence of the presidential regulation has been recognized in the regulation regarding the type and order of laws and regulations, the regulation is not followed by regulation regarding the content material of the presidential regulation which is delegation. Therefore, the regulation of the existence of the presidential regulation both the order and clarity aspects of the content material needs to be clearly regulated as an effort that will contribute to the improvement of the legal system in Indonesia.

4.2 Suggestions

The presidential regulation is keep to be maintained in the legislative system in Indonesia as a type of legislation and into the hierarchy of laws and regulations. Arrangement in the type and hierarchy of laws and regulations to guarantee the position and certainty of presidential regulations as one type of laws and regulations whose authority of arrangement is owned by the president. This arrangement is also needed in order to realize a presidential system. In addition, it is necessary to improve Law No. 12 of 2011 concerning the Establishment of Laws and Regulations and followed by the revision of Perpres No. 87 of 2014 concerning Regulation of the Implementation of Law Number 12 of 2011 concerning Establishment of Laws and Regulations.

In order to support the position regulation and realize the discipline of the legislative system, especially the presidential regulation, it is necessary to regulate the content material of the presidential regulations that are delegated and also need the efforts to improve the procedure for testing the laws and regulations under the law that is the authority of the Supreme Court.

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¹ Jimly Ashiddique mengatakan bahwa kewenangan delegasi dapat dikatakan sebagai bentuk pemberian, pelimpahan, atau pengalihan kewenangan oleh suatu lembaga negara kepada pihak lain untuk mengambil keputusan atas tanggung jawab sendiri. Dalam konteks ini bilamana sebuah kekuasaan yang didelegasikan itu adalah untuk membentuk suatu jenis peraturan prundang-undangan (the power of rule making) maka dengan terjadinya pendelegasian kewenangan regulasi (delegation of the rule making) tersebut, berarti terjadi pula peralihan kewenangan untuk membentuk peraturan perundang-undangan sebagaimana mestinya. Pendelegasian kewenangan untuk melakukan pengaturan itu baru dapat dilakukan dengan tiga alternatif syarat; yaitu: *pertama* adanya perintah yang tegas mengenai subyek lembaga pelaksana yang diberi kewenangan dan bentuk peraturan pelaksana untuk menuangkan materi pengaturan yang didelegasikan, *kedua*, adanya perintah yang tegas mengenai bentuk peraturan pelaksana untuk menuangkan materi muatan pengaturan yang didelegasikan itu, *ketiga* adanya perintah yang tegas mengenai pendelegasian kewenangan dari undang-undang atau lembaga pembentuk undang-undang kepada lembaga penerima delegasi kewenangan, tanpa menyebutkan bentuk peraturan yang mendapat delegasi tersebut.

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