



Raison d'Etre Reconstruction of the Position of the Presidential Regulation in the Regulatory Hierarchy Indonesian Legislation

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Abstract

This study focuses on the issue of the position of the Presidential Regulation in the hierarchy of constitution and regulations by presenting the idea of limiting executive power in the formation of a Presidential Regulation that regulates the fulfillment of legal needs that have a broad impact on people's lives. In reviewing the intended purpose, the researcher uses a normative legal research method that is supported by a statutory approach, a historical approach, and a conceptual approach. This method is used to search for answers to the problem formulation by analyzing it. Based on the research results, it is necessary to reconstruct the existence of a Presidential Regulation in the hierarchy of constitution and regulations because it has the potential to be used as a tool for abuse of power. This is marked by the dualism between Presidential Regulations, and Government Regulations, which create confusion in the field of formation of constitution and regulations, as well as the process of forming Presidential Regulations which is shorter and easier when compared to other types of legislation in the hierarchy of constitution and regulations. Because the process of forming a Presidential Regulation deviates from the regulation regarding the formation of legislation in accordance with the constitution, so that causing hyper-regulation.

Keywords: *Hierarchy; Presidential Decree; Constitution and Regulations; Dualism*

A. Introduction

The President is the holder of executive power, who is responsible for implementing and administering the power of state government, at least this is contained in the provisions of Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (Prabandani, HW, 2015). This understanding is in line with the Executive Unitarism Theory which requires the administrative authority of government to be concentrated in one person only, thus facilitating the responsibility for the implementation of government (Titon, SK, 2020). In addition to exercising the executive power, the president as head of state as well as head of government are also inseparable with the authority to regulate, one of which is in the form of a Presidential Regulation.

Presidential Regulation is one type of legislation that is included in the hierarchy of constitution and regulations in Indonesia. In Indonesia, the hierarchy of constitutions and regulations is regulated in the provisions of Article 7 paragraph (1) of Constitution Number 12 of 2011 concerning the Establishment of Constitution and Regulations as amended by Constitution Number 15 of 2019 concerning Amendments to Constitution Number 12 of 2011 concerning the Establishment of Legislation. The hierarchy of Constitution and regulations in Indonesia consists of: 1) The 1945 Constitution of the Republic of Indonesia; 2) Decree of MPR; 3) Constitution or Government Regulations Replacement of Constitution; 4) Government Regulations; 5) Presidential Regulation; 6) Provincial Regulations; and 7) Regency or City Regional Regulations.

Its development from post-independence period to the present legally historically the arrangement of the hierarchy of constitution and regulations has undergone 5 (five) changes. Each of these changes has substantial similarities and differences (Aditya Z.F and Winata M.R, 2018). The arrangement was first regulated in Constitution Number 1 of 1950 concerning the Types and Forms of Regulations Issued by the Central Government, the composition of the types of central Constitution and regulations at that time only consisted of 3 (three) types, namely; a) Constitution and Government Regulations Replacement of Constitution, b) Government Regulations, and c) Ministerial Regulations. In the next setting regulated in the Provisional MPR Decree Number XX/MPRS/1966 concerning the Memorandum of the DPR of Mutual Cooperation Concerning the Source of Order and Legislation, placing the 1945 Constitution of the Republic of Indonesia as a statutory regulation that The highest level and the basis for all constitutions and regulations below it, and in this arrangement, the term Presidential Decree is only known which is included in the hierarchy of constitutions and regulations (Retno Saraswati, 2009). Furthermore, the regulation regarding the hierarchy of constitutions and regulations as regulated in the Decree of the People's Consultative Assembly Number III/MPR/2000 concerning Sources of constitution and Order of Legislation, underwent a change in the separation of the location of constitution and Government Regulations in Lieu of constitution that were drawn up. Separately, after the previous two arrangements were arranged in parallel, and in that arrangement for the first time a Regional Regulation was recognized and included in the hierarchy of constitution and regulations. Then, changes to subsequent arrangements in constitution Number 10 of 2004 concerning the Establishment of Legislations, issued Decrees of the People's Consultative Assembly from the hierarchy of constitution and regulations, and changed the nomenclature of Presidential Decrees to Presidential Regulations. In the next regulation in constitution Number 12 of 2011 concerning the Establishment of Legislations as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislations, the amendment is to restore the Decree of the Assembly People's Deliberations into the hierarchy of constitution and regulations, and reinforce the position of Regional Regulations by dividing them into Provincial Regulations and Regency/City Regional Regulations.

The dynamics of changing the hierarchy of constitutions and regulations have their respective problems in their preparation, although they also have the same initial goal, namely to bring order and correct confusion from previous regulations in order to realize legal certainty (Wicaksono D.A, 2013). These changes also affect the legal system in Indonesia. In the old order era, before the emergence of Presidential Decrees/Presidential Regulations in the hierarchy of constitution and regulations, the state was carried out in the form of regulations and decisions such as Presidential Decrees, and Presidential Decrees (Rosyid Al Atok, 2015). Meanwhile, during the New Order era, leaders at that time more often chose to use the Presidential Decree instrument in carrying out all state activities, both in regulating and deciding a policy (Ahmad Husen, 2019). Then, in the reform era, it seems that the government is still inclined to use the legal products inherited from the new order in carrying out state power.

Dr. Anang Puji Utama, SH, M.Sc. Considers that the Presidential Regulation has a special privilege when compared to other legal products. The authority to form a Presidential Regulation is an embodiment of the governing power possessed by the president, which is a form of inherent power as a consequence of the authority of Article 4 paragraph (1) of the 1945 Constitution of the Republic of

Indonesia. The power to form a Presidential Regulation is attached to office president as a form of attribution authority. Attribution Presidential Regulations is often known as independent Presidential Regulations. The position of the Presidential Regulation has a special place in the statutory system within the scope of its establishment authority. In addition, the Presidential Regulation also has a broad regulatory scope to run the wheels of government. However, this privilege needs to be balanced with clear arrangements so that the Presidential Regulation does not become a new problem point in the legal system (Utama AP, 2019). When viewed from the content material, the content of the Presidential Regulation can be attribution or in the form of content ordered by constitution or *delegated legislation* (Indrati MF, 2020).

The existence of a Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia is also used as a tools by the authorities in formulating a policy which is the fulfillment of legal needs in society, which regulates the lives of many people and is the rights of citizens. This is reflected in the delegation of constitution Number 40 of 2004 concerning the National Social Security System, which mandates further regulation of health insurance in the form of a Presidential Regulation. Thus, Presidential Regulation Number 82 of 2018 concerning Health Insurance juncto the Presidential Regulation Number 75 of 2019 concerning Amendments to Presidential Regulation Number 82 of 2018 concerning Health Insurance. One of the substances in the Presidential Regulation is the determination of the contribution rate for participants who receive health insurance benefits. This substance has a direct impact on the wider community, so it should be determined through the approval of the people through their representatives in parliament. These provisions are considered to be very burdensome for the community, so the Presidential Regulation is submitted for judicial review. Through Supreme Court Decision Number 7 P/HUM/2020, the provisions contained in Article 34 paragraph (1) and paragraph (2) are declared contrary to Article 2 of constitution Number 40 of 2004 concerning the National Social Security System, and have no legal force. Tie. This shows that the substance regulated in the Presidential Regulation exceeds the content material limit that can be regulated by a legal product in the form of a Presidential Regulation. Even after the decision has been issued Presidential Regulation Number 64 of 2020 concerning the Second Amendment to Presidential Regulation Number 82 of 2018 concerning Health Insurance. However, the changes made are still deemed not to fulfill the principles of humanity, the principle of benefit, and the principle of social justice for all Indonesian people.

The existence of a Presidential Regulation still leaves several problems in the field of legislation due to the dualism that occurs between Presidential Regulations and Government Regulations. This creates confusion in terms of determining the content of the material and its delegation. The process of forming a Presidential Regulation is also relatively easier and shorter compared to other types of legislation in the hierarchy of constitution and regulations. Thus, the issuance of Presidential Regulations has become so numerous and burdens the number of positive constitution in Indonesia, which is already experiencing hyper-regulation.

This causes disorder in the statutory system, so it is necessary to study it to discuss these matters. Many studies and published articles have discussed the existence of this Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia, however, according to the author, there has been no satisfactory answer and understanding regarding the position of this Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia. This paper is focused on discussing two things, namely: 1) why does the position of the Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia need to be reconstructed? 2) What should be the position of the Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia? This study is needed in order to make improvements to the system of constitution and regulations, especially those relating to Presidential Regulations. Thus, in the future the Presidential Regulation can be used effectively and efficiently and provides benefits for the administration of government.

B. Research Methods

The type of research used in this research is legal research or more commonly known as doctrinal research (Marzuki, 2019). The object of study in this legal research will be focused on problems in regulating legal norms in statutory regulations. The approach used in this research is the statutory approach, the historical approach, and the conceptual approach. This study uses primary and secondary legal materials to answer the formulation of the problem that has been prepared in order to solve the legal issues being faced, as well as provide prescriptions on what should be needed as research sources. The technique of collecting legal materials uses library research. Analysis of legal materials using the syllogism method. The major premise is the theory of executive unitarism and the theory of constitutionalism, while the minor premise is the legal reality of the position of the Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia. From these two premises, a conclusion is drawn in the form of a reconstruction of the hierarchy of constitutions and regulations in Indonesia as an effort to reform regulations.

C. Results and Discussion

1. Reconstruction of the Position of Presidential Regulations in the Hierarchy of Legislation in Indonesia.

Presidential Regulations and Government Regulations have a similar character, both of which can be the implementing regulations of a constitution. The two types of regulations are also constitutions and regulations that are formed and stipulated by the same official, namely the president. Hierarchically, they are also statutory regulations at the central level whose position is under the constitution. Therefore, there has been a dualism between the two which can lead to confusion in the science of legislation, one of which is the dualism of the charge material between the two.

Before discussing further the dualism of content material between Presidential Regulations and Government Regulations, it is necessary to first have an agreement as a basis for reference on what is meant by content material. Referring to the provisions contained in Article 1 number 13 of constitution Number 12 of 2011 as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislation, it is stated that "*content material statutory regulations are materials contained in statutory regulations according to the type, function, and hierarchy of statutory regulations*". Therefore, each statutory regulation has its own content material which has been determined by constitution. This is done so that there are no overlapping arrangements between the types of existing constitution and regulations, as well as to be precise in determining the type of legislation to be issued in accordance with the content material to be regulated in it (Anggono B.D, 2020).

Based on the provisions contained in Article 13 of the same constitution, it states that "*the material for the content of the Presidential Regulation contains material ordered by constitution, material for implementing Government Regulations, or material for carrying out the administration of government power*". This means that there are 2 (two) forms of content material owned by the Presidential Regulation, namely the first is delegated, in this case the formation of a Presidential Regulation to carry out further arrangements ordered by higher constitution and regulations. Then, the second is attribution or can be said to be an independent regulation whose authority is attached to the president to carry out the administration of government power (Prisca Listiningrum, 2019). However, if one observes the explanation of Article 13 of the constitution, there have been efforts to expand the material contained in the Presidential Regulation. The explanation of the article states that the delegation given by the constitution or government regulation is either explicitly stated or not explicitly ordered to be formed. This means that the scope of the content of the material contained in the Presidential Regulation may be wider than the

scope of further regulations or provisions provided by constitution or government regulation to the Presidential Regulation, because the order for its formation does not have to be stated explicitly. Not to mention the existence of the phrase "material for carrying out the administration of government power" which makes the material for the contents of the Presidential Regulation even more limitless.

Based on some of the provisions as mentioned above, it can be concluded that delegatively the contents of the Presidential Regulation can be based on orders from higher constitutions and regulations which are stated explicitly or not explicitly for their formation, either by delegation or sub-delegation, especially as an effort to support the implementation of the constitution (*executive act*). Meanwhile, attributively, the material contained in the Presidential Regulation contains material for carrying out the administration of government power. However, in this case the researcher is of the opinion that the content should only be limited to administrative matters in the internal government and does not regulate the fulfillment of legal needs in society regarding the rights and obligations of citizens which have a broad impact.

Meanwhile, comparing with the content of Government Regulations as contained in Article 12 of constitution Number 12 of 2011 as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislations, states that "*The content of the Government Regulation contains material for carrying out the constitution as it should*". If observed, the contents of the article are given in full from Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Based on the provisions contained in these articles, both those contained in the constitution and the constitution are often interpreted by some jurists wrongly. The phrase "to carry out the constitution as it should" in the article is interpreted as if a Government Regulation can only be enacted based on an order from the constitution alone or is the only delegation.

In fact, the article emphasizes that the president as head of government has the duty and authority to carry out the constitution. Based on this, he is attached to an attributive authority that is free and broad to stipulate Government Regulations to carry out the government process he leads in the broadest sense, unless stipulated otherwise by constitution (Jimly Asshiddiqie, 2020). This is also strengthened by the provisions contained in Article 74 paragraph (2) of constitution Number 12 of 2011 as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislation. which states, "*The stipulation of Government Regulations and other regulations required in the administration of government is not based on the order of a constitution, except for the provisions as referred to in paragraph (1)*". This means that the stipulation of Government Regulations does not always have to be on direct orders from the constitution (delegation), so Government Regulations can also be attributive.

Apart, from being attributive, of course, Government Regulations can also be delegating. For example, in a constitution it is stated explicitly that further regulation of a norm in the constitution is given to a Government Regulation by using the phrase "*further provisions are regulated by a Government Regulation*". Of course, this has become an agreement and understanding with the jurist so far.

If so, there has been a dualism in the content material between the Presidential Regulation and the Government Regulation. These dualisms are related to each other and in practice can cause problems related to confusion in delegating implementing regulations of a constitution. Such confusion can occur when a constitution will delegate its implementing regulations in the form of legislation below it which is prepared by the president. In this case, the president is faced with two choices of authority that he has to choose to stipulate a Presidential Regulation or a Government Regulation in implementing the constitution as it should. This situation causes the statutory system to be unorganized and often causes problems in determining which type of legislation is more appropriate in accordance with the content material to be regulated in it.

This is because there is no clear and clear regulation that shows the difference between the contents of the Presidential Regulation and the Government Regulation. The difference referred to in this case is the limitation of the scope that can be regulated between the two which can distinguish the range of categories of material content of Presidential Regulations with Government Regulations, considering that in this case the two types of constitutions and regulations are formed and compiled by the same official, namely the president. Boundaries regarding clear and firm content between the two become very important, because if there is no demarcation between the two, the determination of which type of legislation will be used as the implementing regulation of a constitution is only based on the will or taste of the individual. Legislators. This can be used as a justification by legislators in determining what legal products will be used as further arrangements or derivative arrangements of a constitution. As a result, legislators who are representatives of the government will be more inclined to choose a Presidential Regulation because it is considered an easier and faster process of enactment.

So, the researcher is of the opinion that there must be a demarcation between the contents of the Presidential Regulation and the Government Regulation in order to realize the rule of constitution and legislation, and to avoid abuse of power. This step is taken to end the unorganized delegation of constitution, the delegation of constitution should ideally only be given to Government Regulations. In addition to avoiding confusion in the delegation due to dualism, it is also to comply with the provisions in the basic constitution which only explicitly states that a Government Regulation which is constitutionally authorized to become a legal product in carrying out the constitution as it should be.

2. The Ideal Idea of the Position of Presidential Regulations in the Hierarchy of Legislation.

In 2021, it has been 10 (ten) years since the constitution Number 12 of 2011 concerning the Formation of Legislation has become a positive constitution in this republic. In the 10 (ten) years of its journey as the legal basis for the formation of legislation, there are various legal problems that have arisen along with the development of science in the field of legislation. Then, at the end of 2019, with the mutual consent of the People's Consultative Council and the President agreed to amend constitution Number 12 of 2011 concerning the Establishment of Legislation by issuing constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislation. The first amendment to this constitution inserts a new substance regarding the regulation of the mechanism for discussing draft constitution that have been discussed in a period to be discussed again in the next period, as an effort to ensure continuity in the formation of constitution, as well as arrangements regarding monitoring and reviewing legislation as an inseparable unit in the process of forming constitution and regulations. In addition to such substantial changes, the government also intends to create a special institution that carries out government affairs in the field of establishing constitution and regulations, with the aim of being able to focus on solving problems in the increasingly complex field of legislation. Unfortunately, the amendment to the constitution does not touch the provisions regarding the hierarchy of constitution and regulations. In fact, one of special discussion of the jurist is the provision regarding the hierarchical arrangement of constitution and regulations. The hierarchy of statutory regulations is the main idea that is like the heart of the constitution.

In the momentum of a decade, constitution Number 12 of 2011 concerning the Formation of Legislations must be used to restructure the system and structure of constitutions and regulations to find the ideal legal system in order to bequeath a stable, effective, and just legal system for future generations. In particular the provisions regarding the hierarchical arrangement of constitution and regulations, the seven layers of the hierarchy of constitutions and regulations that currently exist there are still legal problems caused by them. Even though something is wrong, it must still be enforced with binding power and coercion by state power. In fact the regulations regarding the hierarchy of constitution and regulations, as regulated in Article 7 paragraph (1) of constitution Number 12 of 2011 concerning the Establishment of Legislations as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 2011 concerning the Establishment of the Legislation, is still valid and

becomes a positive constitution in this republic, and is assumed to be correct and has fulfilled a sense of justice until it is decided otherwise by the competent authority it is no longer valid. We must accept the principle of *praesumptio iustae causae* for what it is regarding the implementation of provisions regarding the hierarchical arrangement of constitutions and regulations in the national legal system.

However, for the sake of scientific and practice improvement, the researchers have studied it critically and constructively. Based on the results of the research as described previously, the researcher believes that concrete steps need to be taken to present an ideal idea regarding the position of the Presidential Regulation in the hierarchy of constitutions and regulations in Indonesia. If a Government Regulation is used as a forum to implement constitution properly in the context of administering government, then a Presidential Regulation should only be used to regulate government administration which is more of a government element, both regarding institutions and the appointment and dismissal of state officials. However, in practice there are still the stipulation of a Presidential Regulation that regulates outside the substance, namely regulating the fulfillment of legal needs in society regarding matters that have a direct impact on the lives of many people and are the rights of citizens as the researchers described in the section. Introduction.

Considering that the power that has been given to the president is so great, there must be a limit on that power that the president cannot exceed or violate. If there is no limit to that power, then the president can exercise his power absolutely and act in an unlimited manner. One that can be used to limit this authority is to utilize the theory of constitutionalism. Constitutionalism assumes the limited state so that the administration of the state and government does not apply arbitrarily. Therefore, constitutionalism becomes a system of effective and orderly restraint that is instituted against the actions of the president. Constitutionalism comes with the idea that a government run by and on behalf of the people must be subject to some restrictions to ensure that the power held is not misused (Jimly Asshiddiqie, 2018).

Therefore, the Presidential Regulation should be placed in other types of constitutions and regulations other than those contained in the hierarchy of constitutions and regulations as stipulated in Article 8 of constitution Number 12 of 2011 concerning the Establishment of Legislations as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislation. Of course, the existence of the Presidential Regulation is still recognized and has binding legal force as long as it is ordered by a higher statutory regulation or is formed based on authority. It is intended that in the future the process of forming the draft constitution will only prioritize the delegation of further regulations to Government Regulations, because in this case the formation of Government Regulations is considered more procedural based on the constitution, because it is formed *mutatis mutandis* with the process of forming constitution.

Based on this, the researcher is of the opinion that Presidential Regulations should not be placed in the hierarchy of constitution and regulations. However, the Presidential Regulation remains one of the recognized types of legislation in the national legal system. Therefore, the researcher has the idea that for the composition of the types and hierarchies of the legislation in the future, it will only consist of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Decree of MPR;
- c. Constitution or Government Regulations Replacement of Constitution;
- d. Government regulations;
- e. Provincial Regulations; and
- f. Regency or City Regional Regulations.

In addition to the types of constitutions and regulations as set out in the hierarchy, other types of constitutions and regulations that are recognized for their existence and have binding legal force as long

as they are ordered by higher constitutions and regulations or are formed based on the authority, one of which is Regulations President.

It is intended that in the future the process of forming the draft constitution will only prioritize the delegation of further regulations to Government Regulations, because in this case the formation of Government Regulations is considered more procedural based on the constitution, because it is formed *mutatis mutandis* with the process of forming constitution. It is far different from the formation of a Presidential Regulation which can go through a brief mechanism without going through the process of harmonizing, concluding, and stabilizing the conception which is carried out through inter-ministerial and/or inter-non-ministerial meetings. However, legally it cannot also be said that the formation of the Presidential Regulation is formally fconstituted, because the brief formation process has been given a 'legal umbrella' by the constitutions and regulations to legalize the process, namely with the provisions of Article 66 of Presidential Regulation Number 87 of 2014 concerning the Implementing Regulations of constitution Number 12 of 2011 concerning the Establishment of Legislation.

However, when viewed from the main regulation, namely constitution Number 12 of 2011 concerning the Establishment of Legislations, the fact is that this privilege is not granted by constitution. This is one concrete example that there is an expansion of the scope of norms carried out by implementing regulations of a constitution. The constitution has regulated the process of planning, drafting, and discussing the formation of the Draft Presidential Regulation which is carried out in accordance with the technique of drafting constitution and regulations. However, the follow-up regulation as a delegate of the constitution which happens to be in this case in the form of a Presidential Regulation actually provides an expansion of norms by providing the possibility for the formation of a Draft Presidential Regulation other than those stipulated by the constitution as the parent regulation. This is what is considered to violate the norms in the constitution, how is it possible that an implementing regulation can conflict with the regulations that ordered its formation.

The absence of a Presidential Regulation in the hierarchy of constitutions and regulations certainly cannot be interpreted narrowly as that a Presidential Regulation becomes invalid and discredits the authority of the presidential institution. Whether or not a Presidential Regulation is included in the hierarchy of constitutions and regulations is a choice of policy (legal policy) for legislators by considering the implications of the existence of a Presidential Regulation in the hierarchy of constitution and regulations.

Conclusion

The position of the Presidential Regulation in the hierarchy of constitution and regulations in Indonesia needs to be reconstructed, because there have been indications of abuse of power which is indicated by the dualism between the contents of the Presidential Regulation and the Government Regulation. This is reflected in the similarity in the scope of content material that can be regulated by Presidential Regulations and Government Regulations. Both are given a range of attributive and delegation content. Therefore, a clear and firm boundary is needed between the two so that there is no confusion in the delegation and ineffectiveness in the process of forming constitution and regulations.

Placing the Presidential Regulation not in the hierarchy of constitution and regulations is a step to improve the legal system that needs to be taken, so that there is no longer a unilateral formation of constitutions and regulations without involving various parties. It is appropriate that Presidential Regulations is placed in other types of constitution and regulations other than those contained in the hierarchy of constitution and regulations as set forth in Article 8 of constitution Number 12 of 2011 concerning the Establishment of Legislations as amended by constitution Number 15 of 2019 concerning Amendments to constitution Number 12 of 2011 concerning the Establishment of Legislation. Of course,

the existence of the Presidential Regulation is still recognized and has binding legal force as long as it is ordered by a higher statutory regulation or is formed based on authority.

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