
ANALYSIS OF THE FORMATION OF GOVERNMENT REGULATIONS AS SEPARATION OF POWERS IN INDONESIA

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ABSTRACT

Keywords: Government Regulations; Legal Norms; Separation Of Powers.

Indonesia is a constitutional state where government administration is based on statutory regulations hierarchically proposed by the law as mandated by the 1945 Constitution. The authority to implement laws is translated into government and other laws and regulations. The order of laws and regulations is used as a "rule" when a government activity is to be carried out. However, in practice, there are still mechanisms for forming PPs that are inconsistent with the orders of the law. This study aims to determine the basis and mechanism for forming PP as an executive authority and the legal implications of not issuing PP by the executive. The type of research is normative juridical with a literature study approach. The analysis shows that the process of forming laws can be studied from two perspectives, namely normative juridical and sociological perspectives. The material content of laws in Indonesia is complex to determine from the power-sharing system. However, it can be determined by looking at the system for forming statutory regulations, where it has been stated that the formation of statutory regulations must be based on hierarchical law. Suppose the executive does not issue a PP as mandated by the law. In that case, it will result in not achieving the ideals of the general norms contained in the law, and harmonisation of law implementation will not be realised. Even though it is a country based on law, no government administration in Indonesia is not based on statutory regulations as its legal basis.



Introduction

The 1945 Constitution has been amended four times and has made fundamental changes related to the administration of the Indonesian state (Zulfan, 2018). This also further strengthens the position of the Constitution as a guide for governance, such as amendments to the nomenclature of Article 1 Paragraph 2 of the Constitution, which states that the community holds full sovereignty, which the Basic Law must exercise (Barus, 2017). According to Plato in the books "The Statesman" and "The Law," the form of the state of the law is the second best. Therefore, government administration should be based on hierarchically proposed regulations mandated by the 1945 Constitution (Safudin, 2020).

Article 4, paragraph (1) states that the holder of government power is the President. Meanwhile, the government uses the Law to detail the norms of state administration required by the Constitution as a form of people's sovereignty, as mentioned in Article 1 number 3 of the 1945 Constitution's third amendment (Yani, 2018a). It is said that the Indonesian state is a state of law, so all forms of governance are based on laws and

regulations. This means that government power granted by the Constitution cannot be exercised without the basis of authority regulated by law (Basuki, 2011).

Law is defined as legislation formed by the House of Representatives (DPR) with the mutual consent of the President (Hantoro, 2016). The president holds the authority to carry out the law. The authority to implement the law is translated into Government Regulations and other laws and regulations. The order of laws and regulations is used as a "rule" when a government activity will be carried out. This means that the law still requires a form of implementing regulations to implement it. In exercising his authority, the president is assisted by state officials as implementers of laws (executive). The executive must carry out laws and regulations as an authority the executive possesses (Yani, 2018b).

One characteristic of the contemporary legal state (state of law or *rechtsstaat*) is that the power used to exercise state power is limited by law. This idea later became the basis of contemporary constitutionalism. In the context of the theory of separation of powers, the executive possesses delegated authority, and legislative power, which is one of its functions as a legislator, is then translated by the executive through the authority it has. Montesquieu is known as a figure in the theory of separation of powers. In his book, *L'Esprit de Louis* separates the state into three powers based on their functions, namely: 1) The legislature is in charge of drafting laws; 2) The judiciary resolves legal cases and decides civil disputes; and 3) The Executive powers to implement laws to prevent war, promote peace with other states, ensure security, and prevent hostilities. In principle, the teachings of *Trias Politica* emphasise the existence of 3 types of power in each government: legislative, executive, and judicial.

Sir Ivor Jennings, in his work entitled *The Law and the Constitutions*, distinguishes the theory of separation of powers into separation of powers in the material sense and separation of powers in the formal sense: If there is no express separation of powers in the duties or functions of statehood, it is called separation of powers. However, in a formal sense, separation of powers applies only when there is a clear separation. In the material sense, Indonesia does not apply power-sharing (Haryadi, 2015). However, it tends to separate power in the sense of sharing or power-sharing by not looking at the separation of powers. This can be seen from the strategy of forming laws where in addition to the president having the authority to implement laws by forming implementing regulations and other laws and regulations, Article 5 of the 1945 Constitution amendment allows the President as the executor of the law also to have the power to submit draft laws including passing laws after being approved jointly with the DPR as mentioned in Article 20 number 4 of the Constitution '45 fourth amendment. According to Heinrich Triepel, Authorization in the legal context refers to the legal act of holding a public authority so that the state or municipality surrenders all or part of its authority to another party.

The involvement of the executive in the possession of the power to form laws occurred after the reading of the text of the proclamation of August 17, 1945, as well as the transitional provisions of Article VI in the 1945 Constitution at that time, which stated that as long as state bodies have not been established under the 1945 Constitution, the

president exercises all authority Let me know if there is anything else I can help you with. Government. Therefore, the author distinguishes between the power of the President in government and the authority of the president to make laws. In government, the president holds power because it is clearly stated in Article 4 (1) of the 1945 Constitution, while in the formation of the Law, power remains in the hands of the DPR even though the president also has the right to be involved in submitting bills. Meanwhile, to form laws and regulations under the Law, the author includes it in the authority category (Mansbach, Rafferty, Asnawi, & Sufyanto, 2021).

In carrying out state administration, the formation of a PP is handed over to the President as the chief executive, and the president exercises his authority over his cabinet. However, not all PPs required by law can be formed immediately. This becomes a question when state administration is based on law (Huda, 2001). Thank you for reaching out. Law as an interpretation of basic norms (UUD) and the executive forms PP to implement the law, how state administration can be carried out based on the orders of the Law as well as the mandate of the Constitution if PP as a regulation that implements the orders of the Law is not made and made but not as a whole (Abdullah, 2016).

In consideration, "Weighing" mentions at least 3 (three) bases that must be met by law when the legislation is a form of delegation of the above laws and regulations, namely philosophical, sociological, and juridical foundations, where each of these three things represents the interest of achieving the objectives of the existence of the legislation in the context of public order, partiality to the community and law enforcement for imminent violations. This means that PP as a law whose content is to implement the Law is closely related to the embodiment of the philosophical, sociological, and juridical bases contained in a PP. However, when the PP is not formed while the Law mandates the presence of a PP, the values that must be carried out based on philosophical, sociological, and juridical bases become unimplemented, affecting the course of state administration.

The absence of part and all of the PP in law is an obstacle to implementing the law as the basis for state administration. Meanwhile, the mechanism for forming PP that is inconsistent with the orders of the Law is also a subject matter in itself. This study aims to determine the basis and mechanism of the formation of PP as an executive authority and the legal implications of the non-issuance of PP by the executive mandated by law.

Research Methods

The type of research is normative juridical by studying various applicable literature and legislation regarding executive authority in the formation of PP from the perspective of laws and regulations. The approach of this research is a) Conceptual Approach, which is an approach based on the rule of law related to executive authority in the formation of PP in the perspective of laws and regulations; b) Statutory approach (Statute Approach) because the focus of this research itself is the rule of law itself; c) Historical Approach, carried out to trace the history of the formation of laws and regulations, especially PP as the focus of research.

Data are obtained from literature and related documents. The primary legal material consists of legislation related to the issues discussed; secondary legal documents include books or related documents; and third-level legal documents, which are documents in the form of guidelines and explanations of first- and second-level legal documents. Data analysis begins with collecting primary, secondary, and tertiary legal materials to be analysed normatively, namely inventory according to type and hierarchy, then analysed to gain understanding, and then interpreted to obtain the meaning of the rule of law.

Results and Discussion

The basis for the establishment of PP as an executive authority

Referring to the theory of separation of powers by Montesquieu and Sir Ivor Jennings, Indonesian statehood also affects the authority possessed by each state institution, including in the formation of laws and regulations. Before the amendment of Article 5, paragraph (1), the Constitution states that "the President holds the power to form laws with the approval of the House of Representatives". Article 22, paragraph (1) states, "In the event of a compelling emergency, the President has the right to enact government regulations instead of laws." After the amendment of the Constitution, the articles were amended to Article 5, paragraph (1): "The President has the right to submit draft laws to the House of Representatives," and Article 22 has not been amended. However, this change has also not had much effect because Article 20 paragraph (5) of the 1945 Constitution changes and Article 73 paragraph (2) of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations states that the President can disagree with laws that the DPR has passed by not signing the law. This disapproval shows that the president also plays a role in the legislative process (Hasianna, 2022).

Thus, the President or executive has a large intervention room for forming laws, especially laws whose jurisdiction is the legislative area. A. Hamid Attamimi stated this in his dissertation, "The Role of Presidential Decrees of the Republic of Indonesia in the Administration of State Government." A. Hamid Attamimi said that the power of law-making rests with the president, not with the DPR, and the president's executive power contains regulatory power". Meanwhile, enacting government regulations instead of laws has opened up more excellent space for the executive to exercise legislative power because neither Article 22 (1) of the Constitution nor Law No. 12/2011 clearly states what force majeure means. Only in Article 12 of the 1945 Constitution does the amendment state that in declaring danger, the head of state must be based on the provisions and consequences of the danger condition; however, its determination is by law, not Perppu, and until now, there is no specific law that regulates the forms of the state in such a state of danger. In addition, the question arises whether the phrase "on matters of compelling urgency" is equivalent to the sentence "The president declared a state of danger" contained in the provisions of Article 12 of the 1945 Constitution amended.

This resulted in much controversy. Since Indonesia's independence until now, Daniel Yusmic, a lecturer at the Faculty of Law, Atma Jaya University Jakarta, has counted 207 Perppu. During the administration of President Susilo Bambang Yudhoyono,

16 Perppu have been issued. There are 3 Perppu debated, namely on the Financial System Safety Network (Perppu No. 4/2008), Bank Indonesia (Perppu No. 2/2008), and the Deposit Insurance Corporation (Perppu No.3/2008). Therefore, the regulatory authority by the executive that "should" be meant is the regulatory authority to carry out laws excluding the Law because the regulation of the Law is included in the space of legislative power while the space of executive power is to run the government as stated in Article 4 paragraph (1) of the amended 1945 Constitution.

Hamid Attamimi asserted that there was no detailed explanation of the word "together" until fourteen years after returning to the 1945 Constitution. In the General Session of the People's Consultative Assembly in 1973, MPR Decree Number VI / MPR / 1973 concerning the Position and Relationship of Work Procedures of the highest state institutions with / or between high state institutions was established. Hamid Attamimi also questioned Article 8 paragraph (3) regarding the words "together" in the sentence "The DPR and the President jointly form laws including enacting the State Budget Law." However, the MPR TAP itself did not explain it. Some expert opinions also do not explain what the words "together" mean, including Ismail Suny and J.C.T Simorangkir.

According to Jimly Asshidiqie, in forming PERPU, there are certain limitations related to material requirements, including reasonable necessity or urgent need to act within a limited time and the absence of other options according to reasonable reasoning (beyond reasonable doubt. The same thing was also expressed by Prayitno, who said there are three main requirements related to making laws and regulations by the president: time limits (when), material (substance), and protection of people's constitutional rights.

The mechanism of the formation of the PP as a rule that carries out the UU

Discussing laws and regulations, we are talking about state law broadly, namely the formation of laws for holders of government power or state administrators and, at the same time, giving authority to administrators based on these laws to carry out state activities. H.J. Hamaker, a master teacher in Utrecht, in his book "Het recht en de maatschappij," says the law is the result of the life of human society, and our understanding of it is a collection of knowledge about how society conducts actions. Eugen Ehrlich said there are two kinds of laws: the first is *Entscheidungsnormen*, which is a provision made by law and becomes a reference for judges to make decisions, and the second is the *Gewohnheitsrecht* or *Tatsachen des Gewohnheitsrechts* or customary law facts.

The provisions produced by the Perpu contain rules about how we should act in society or the state and sanctions if we make them outside these rules. Hestu said that the nature of the science of legislation as a branch of legal science is an object; the object of the science of legislation is legislation, which is a product of written law made by individuals who have the authority to do so, starting from the premise of making the legislation until the legislation is produced or until it becomes a law promulgated.

According to Hestu, legislation can be referred to as an object of science and must meet the initial provisions (*causa*): a. Source of materials (from which the object of Science is obtained); b. The origin of form (what is the concrete form of the object of

science); and c. The origin of the process (how the study of science is processed from the materials to concrete form). There are three ways to examine the legislative process: normative, juridical, and sociological. This is because legislation is the subject of science.

First, from a juridical normative point of view, it includes formulating, analysing, and promulgating laws. The method or procedure of formulation, procedure, and procedure for discussion, as well as how the Law is promulgated, is a process that the material of the Law must pass to become the basis of the Law. It is very important to pay attention to institutional requirements during this process as this will shape the initial materials into concrete.

Secondly, from a sociological point of view, the process is abstraction, identifying juridical elements related to social phenomena and formulating them in written law. At this stage, it is necessary to prepare an academic manuscript as an academic accountability plan for the theoretical reasons behind the formation of the Perpu. This script, existing social phenomena are included and arranged into written academic manuscripts. In addition, this sociological perspective discusses how social phenomena are codified and transformed into legal documents.

According to the perspective of laws and regulations, codification means collecting social phenomena that already exist and freeze in society, then formulating written legal provisions accompanied by sanctions. With this process, the formation of laws and regulations only maintains the existing social symptoms. At the same time, modification is a process carried out by the drafter of laws and regulations that collect and change social symptoms that will exist. The modification essentially tries to carry out social engineering as written legal provisions outline.

When the Drafter of Laws and Regulations formulated written laws, the initial concept of thinking was more influenced by social phenomena that prevailed in people's social lives, while modifications to carry out social engineering were still relatively few. Such social symptoms of society colour many legal provisions compiled by the Drafter of Laws and Regulations. The drafter of legislation concentrates more of his ideas on codification. However, in line with the changing demands of society and the influence of the times, social symptoms that will arise in the future must also be anticipated. Therefore, the modification step is increasingly colouring the concept of thinking from the Drafter of Laws and Regulations. This modification is not excessive if the Drafter of Laws and Regulations must have futuristic insights. Foresight to direct social symptoms will be addressed.

Amid a changing society, this modification process occupies a critical position. However, the codification process must still be carried out because longstanding social symptoms still have wisdom values that should be considered to carry out drafting laws and regulations so that the written law formed does not lose its living law spirit. In this regard, Hamid S. Attamimi argues that it is appropriate to say that the framers of the current law no longer "walk behind" following and trailing the development of society; They are now "walking ahead" and leading the development and change of the nation's society. It is precisely the famous expression of Koopmans, who said the formation of the

Act initially did not lead to codification but modification (de whatever street niet meer primary naar codification maar naar modification). This certainly does not mean that codification has no benefits, but the arrangement of social life as a nation that makes law the basis of life is the main one. The stages of the formation of the Law are described as follows:

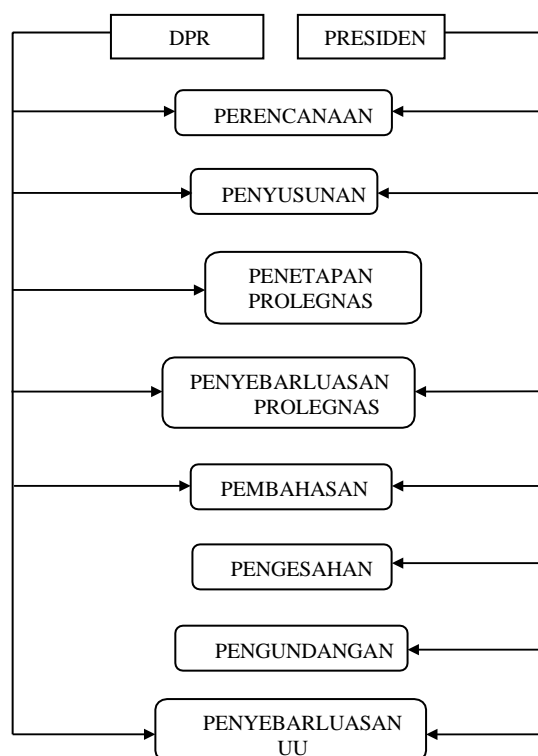


Figure 1. Stages of Law Formation

Between this juridical normative process and psychological processes run complementary and complementary. They run simultaneously and cannot be separated from one another. The nature of the formation of the Law includes three essential things: methods, systems, and universals—the method means using two approaches, namely normative, sociological, and juridical. The juridical approach focuses on forming laws based on the structured implementation of written law. However, the sociological approach focuses on forming laws and regulations based on the social symptoms of society. The existing legal theories are then strengthened by this approach and then abstracted (sought juridical elements) to be outlined in Legislation. In the process of forming legislation, both methods work together.

There are two paradigms in legal science: the Continental tradition, which focuses more on codified legal systems, and Anglo-Saxon customs, centred on common law. The systematic nature of law is influenced by these two traditions. Therefore, the statutory system is also worthy of being based on the above legal traditions. It is universal, namely questioning the nature of the need for laws and regulations from the perspective of legal

tradition. Facts show that legislation is significant in regulating human life so that there is justice, security, order, and welfare. Legislation must be universal, not limited to time, place, or tradition, as they have transcended the line between Continental and Anglo-Saxon traditions.

Legal implications of non-issuance of PP by the executive mandated by law.

The discussion of the Perppu determination is the same as the discussion of the Law. According to Hamit Attamimi Perppu, the Emergency Law contained in Article 139, paragraphs (1) and (2) of the RIS Constitution, and Article 96, paragraphs (1) and (2) of the 1950 Constitution. This arrangement was called Noodverordeningsrecht, but the term was alternated. If the 1945 Constitution is referred to as the Government Regulation instead of Law, the RIS and the 1950 Constitution call it the Emergency Law. According to Hamid Attamimi, these terms show that the 1945 Constitution feels that there is a 'condescending' attitude by not wanting to call it a law because it has not obtained the approval of the DPR, so it is referred to as a Government Regulation that replaces the Law. The term replacement contained in the type of Perppu essentially indicates that although it is referred to as a Government Regulation, it occupies a position equivalent to the Law. According to the Indonesian Dictionary, the word substitute comes from the root word pronoun, which means an exchange for something lost.

Some nomenclature of transitional provisions of the Law states that implementing regulations from laws before the new law can be declared valid as long as they do not conflict with the new law. Some laws and regulations considered "problematic" are often found in the material aspects of laws or regulations. This is because the substance discussed is considered controversial, biased, duplication, and inconsistent vertically and horizontally. Furthermore, the nomenclature of transitional provisions also often mentions the limit or period of executive time in forming PPs, but not all PPs have been formed until such time. For example, we see in Law Number 4 of 2009 concerning Mining, Minerals, and Coal, which limits the work of the executive in forming implementing regulations or PP for 1 (once) a year, while until now, of the 22 implementing regulations or PPs ordered by this Law until now no PP has been formed. Likewise, Law Number 18 of 2004 concerning Plantations provides a period for the executive to form implementing regulations for 3 (three) years; from 5 (five) PPs and 3 (three) Decrees mandated by this Law until now, only 2 (two) PPs and 2 (two) Decrees have been promulgated. Even what is still a debate is that there has been no PP on customary forests as ordered by Article 67 of Law No. 41/1999 on Forestry, Law Number 13/2010 on Horticulture until now there is no PP, Law Number 3 of 2011 concerning Fund Transfer, until now there has been no PP.

Regarding this government regulation, Hamid Attamimi said that in the explanation of Articles 4 and 5, paragraph (2) of the 1945 Constitution before the amendment, it was stated that the President of the Republic of Indonesia had the power to enact government regulations. By adding in parentheses the foreign words "pouvoir reglementaire" or to Donner's explanation quoted by Hamid Attamimi means the power to regulate what belongs to the head of state which is exercised freely, to exercise or regulate the working

(mise en oeuvre) of law and to carry it out properly. According to Hamid Attamimi, along with the development of the Republic of Indonesia, like most modern countries, they realised that principles should be determined and established in outline only (principes fondamentaux), with more detail given to lower laws.

Article 1 states that Government Regulations are laws and regulations the President stipulates to carry out laws properly. So, the provisions of the 1945 Constitution Article 5 paragraph (1) can be said to include delegation to government regulations required by law. Government regulations arise due to the law's orders. However, in another sentence, Hamid Attamimi says that the delegation referred to above can also occur even if the law does not explicitly state it; the need for additional arrangements "deemed necessary" by the law is sufficient to make government regulations.

The rule of law means that the life of all walks of life, nationality, and statehood, including government, must be based on law by the national legal order. The state of the law is adopted because the state of the law of Pancasila is a modern state, and laws and regulations function as more than just a store of values and habits of society. However, laws and regulations are among the best ways and tools to organise people's lives and steer them in the expected direction.

Establishing people is a matter of fulfilling state institutions' duties and, most importantly, ensuring harmonisation in relevant regulations. Perpu disharmony can lead to different interpretations in practice; the law creates uncertainty, ineffectiveness, and dysfunction. As a result, the law does not serve as a social control, dispute resolution, and organising tool for social change because one of the objectives of harmonising laws and regulations is to strive to improve the quality of laws and regulations.

The fathers of the nation wanted the rule of law with a democratic political system in which the people run the government for the benefit of the people, by the people. For the benefit of the people, it is necessary to regulate and practice the separation of powers. In addition to ensuring no authority overlap between executive, legislative, and judicial institutions, it is also to create checks and balances for both institutions. The non-issuance of PP by the executive branch violates the law and becomes an obstacle when facing critical problems when the legislature has not yet established regulations governing it. The term "free ermessen" refers to this action. In today's times, discretion or freedom of action is necessary to achieve the goals of the common good quickly. Discretion is also a means of determining if there is a vacuum or absence of rules, while a concrete event urges a decision to be taken immediately. Discourse can be used to challenge stagnation, promote programs, or achieve desired goals. However, it must also be used to prevent abuse of power, deviation of power, and arbitrary decision-making. The state administration has laws to regulate what is allowed and what is prohibited. So, all its authority is limited by law. The absence of PP in a problem topic is a condition that is concerning and causes concern. The concept of the direction of separation or division of powers becomes ineffective, and the primary purpose of the law as a reference in organising state life becomes not optimal.

Conclusion

The literature analysis above shows that the legislative process can be studied from two aspects, namely, the juridical normative aspect and the sociological aspect. The material content of the law in Indonesia is complex if the power-sharing system determines it. However, it can be determined by looking at the Perppu formation system, where it has been stated that the Indonesian state is a state of law. The formation of laws and regulations must also be hierarchically based on the law, as stated in Article 10 of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. Suppose the executive does not issue PP as mandated by the law. In that case, it will cause the ideal of the general norms in the law not to be adequately implemented by the executive as the executor of government administration. In fact, as a country based on law, no administration in Indonesia is based on laws and regulations as its legal basis.

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