Regulatory Reform in Indonesia
A Legal Perspective

Prof. Dr. Widodo Ekatjahjana
Kai Hauerstein
Dr. Daniel Heilmann (Eds.)

Hanns Seidel Foundation
Indonesia Office

PENGAYOMAN

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Prof. Dr. Widodo Ekatjahjana
Dr. Daniel Heilmann
Kai Hauerstein

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Foreword

This book aims to describe the regulatory reform process in Indonesia from a legal perspective. The concept of the "regulatory state" notes that different governance models exist regarding the degree of public involvement in governance structures. There are many attempts to influence the content of the regulations because they have a direct impact on individual interests and the general public. As a result of these competing interests, the current regulatory environment in Indonesia is diffuse. Thus, it is crucial to understand the horizontal and vertical interplay between different norms and to understand how to harmonize the respective norms in case of conflict properly.

Given the high complexity of the law hierarchy in Indonesia, this book takes stock of the ongoing reform efforts. However, discussions regarding regulation that focus on individual aspects often appear too parochial to shed much light on the bigger picture. With this book, the Hanns Seidel Foundation presents a framework for analyzing regulatory reform in Indonesia from a broad perspective. The book explains some of the core issues, and it also proposes a way forward to accelerate the process. It adds highly-informed voices to the, sometimes contentious, debate on regulatory reform, but it does not enter (or resolve) all controversies surrounding the debate.

The book originates from the longstanding co-operation between the Hanns Seidel Foundation and the Indonesian Ministry of Justice and Human Rights (Kemenkumham). The work of the Hanns Seidel Foundation in the justice sector since many years focuses on capacity-building and knowledge transfer. This book mainly stems from a series of alternative dispute resolution hearings and expert workshops at the Ministry of Law and Human Rights, that HSF supported in the years 2017 to 2019. Many of the legal experts that advise the Ministry on regulatory reform and alternative dispute resolution mechanisms are authors in this book.

As editors, we are grateful to the many people who made this book possible. We are especially grateful to all the contributors for their willingness to participate in this important project. The book is based on their valuable research, that they agreed to share with us. Thanks are also

due to many individuals for helpful comments and suggestions. Last, but not least, this compilation of expert knowledge on regulatory reform and harmonization of laws would not have been possible without the support of the Indonesian Ministry of Justice and Human Rights, and particularly Director General for Legislation, Professor Dr. Widodo Ekatjahjana. However, the views expressed in this book are the ones of the authors alone and should not be taken to reflect the views of the Hanns Seidel Foundation or the Indonesian government.

Jakarta, 15 May 2019,

Dr. Daniel Heilmann Prof. Dr. Widodo Ekatjahjana Kai Hauerstein

About This Book

Purpose: The purpose of this book is to provide a detailed legal analysis of regulatory reform measures starting as early as 2000. Almost 20 years of regulatory reform is not only reason to celebrate, but also to look back and evaluate. Thus, the book intends to take stake stock, evaluate past regulatory reform measures, but also look ahead and provide a road map for adjustments, primarily aiming to produce high-quality regulations.

Reader: Considering the before mentioned purpose, the book targets vital stakeholders in the regulatory reform process, such as government officials in those institutions responsible preparing and implementing regulatory reform policies and measures, but also for those institutions and development partners, which support these processes. The book could be also helpful for those in the executive preparing/reviewing legislative drafts. Other groups in the legislative/policy cycle can benefit from the information and techniques provided in this book. The reference material is often universal and is useful for other institutions that have authority to prepare draft laws such as members of the People's Representative Councils on the national and sub-national level. Students, legal practitioners, and civil society can also benefit. Thus, the scope of this book is rather broad, addressing different skill levels and different practices.

Context: Indonesia has overcome the challenges of the Asian crisis, the resulting political turmoil, and proved capable of managing the effects of its radical decentralization. In the last twenty years, Indonesia became more competitive looking at the impressive jump in rankings, for example, in the World Bank (WB) Ease of Doing Business Reports. This reflects a sound policy capable of addressing critical regulatory constraints, which 20 years ago seemed a doomed task.

Issue: But, why is Indonesia still considered to have imperfect laws? This is what statistics, well-known scholars, official reports, or newspaper articles suggest. The short answer is, quality matters! This book collects the view of renowned legal scholars on specific regulatory reform issues.

In **Part 1, Kai Hauerstein** provides the general framework for discussion. He outlines the background and the key concepts for regulatory reform

including criteria for measuring regulatory quality, such as alignment with the Rule of Law, effectiveness, efficiency, access to regulation, regulatory review, and enforcement. All these criteria are geared to produce good regulations effectively promoting a change of a potentially harming behavior. Kai Hauerstein questions whether reform measures improved the quality of regulations? He argues that regulatory reform focused more on quantity, such as reducing numbers of regulations, procedural steps, or administration costs, rather than on quality, i.e., how to achieve effectiveness and ultimately achieve compliance. A detailed gap analysis supports his thesis. In the gap analysis, Kai Hauerstein defines the desired state of regulatory reform and compares the five quality criteria (the rule of law, access to regulation, regulatory quality and quality, and enforcement) with the current state. The assessment between the desired state (Should) and the current state (Is) leads to the identification of key issues (gaps), which are then discussed in detail. He concludes and stresses the fact that quality matters and recommends steps on how to improve not only the quantity but also the quality of regulations.

Part 2 of this publication provides some selected analysis on essential topics regarding regulatory reform.

In "Efforts to Improve the Performance of the Indonesian House of Representatives," **Agus Riewanto** analyzes the leading causes for the low performance of the Indonesian Parliament drafting national legislation both in terms of quality and quantity. He then recommends how to improve the performance of the Indonesian House of Representative and how to formulate better laws. One reason for bad performance is the planning stage. Agus further reveals that the multiparty system in the DPR, meant a significant shift from "executive heavy" to "legislative heavy" when it comes to initiating laws. Agus suggests improving the productivity of legislation, for example by changing the orientation of the DPR, eliminating the factions in the DPR as well as balancing the role of the House of Representatives and the Regional Representative Council, and paving the way for the President's right to veto and s to strengthen public participation.

In "Structuring the Laws and Regulations in Indonesia, Issues, and Solutions," **Bayu Dwi Anggono** analyzes how regulations have been re-structured and reduced, to attract investment referring to a regulation issued by the Ministry of Law and Human Rights to improve the quality

of regulations. The article explains how, over time, different government agencies regulated regulations against the background of changing responsibilities and policies. He analyzes regulatory reform measures from before and after the amendments of the 1945 Constitution. He concludes that a comprehensive strategy must complement the commitment to structure and review regulations as well as to establish institutions with sufficient authority.

In "The Authority of the Ministerial Regulation and the Hierarchy of the Laws and Regulations," **Jimmy Usfunan** explains the philosophy of laws and regulations during the ancient Greece period and analyzes the concept of the hierarchy of laws adopted by Law No. 12 of 2011 on the Formulation of the Laws and Regulations. Jimmy identifies the problem of how placing ministerial regulations outside the pyramid compromise the overall dogmatic understanding, which leads to regulatory conflicts. Jimmy proposes to amendment Article 8 paragraph (2) of Law Number 12/ 2011 on the Formulation of the Laws and Regulations and includes a Ministerial Regulation into the Hierarchy of Laws placed after the Presidential Regulation and before the Regency/City Regulations.

In "Executive Review in the Efforts to Structure Regulations in Indonesia," **Oce Madril** introduces executive review as one regulatory reform strategy. A comparative analysis of other countries complements the outline on administrative reviews, such as South Korea. Oce explains that regulations in Indonesia are heading towards the point of obesity where the number of uncontrolled overregulation contribute to lack of synchronization and disharmony, potentially leading to many problems within the government administration. Oce concludes that executive review efforts could be a solution and that Government needs to strengthen institutional capacities responsible for legal and legislative affairs. He recommends that the Government establishes a special ad-hoc team assisting in the review process of the various laws and regulations. In addition, the Government should introduce sunset clauses to determine the time or expiry of existing regulation.

In "The Regulation Reform of the Settlement in Disharmony of Norms," **Agus Riewanto** discusses regulatory reform on harmonizing conflicting regulations through mediation. He focuses on a new regulation issued by the Ministry of Law and Human Rights. Regulation No. 32/2017 on Procedures for Settlement of Disputes through Non-litigation introduces a

new way of resolving regulatory conflicts, which were previously reviewed by the Constitutional Court and Supreme Court. The new regulation complements the judicial review by the Supreme Court. Agus also explains the benefits of the new regulation, which could reduce the significant backlogs in courts, enhance public involvement, and improve access to justice. He concludes that the new regulation strengthens the role of Permenkumham harmonizing conflicting regulations through alternative dispute resolution.

In "Regulatory Reform Efforts through Mediation," **Ninik Hariwanti** addresses the question, whether mediation as a regulatory reform measure is the right step to harmonize regulations? She explains the current conditions of Indonesian legislation, which led to regulatory "obesity" regulation causing overlaps and conflicts. According to Ninik, the right step to solve this problem is through alternative dispute mechanisms as introduced by the Ministry of Law and Human Rights. At the end of her analysis, Ninik suggests to revise the Regulation of the Minister of Law and Human Rights number 32 of 2017 concerning Procedures for Settling Disputes in Laws and Regulations through Non Litigation and optimize the authority of the Directorate General of Law and Human Rights to conduct a review and examination of conflicting laws and regulations.

In "Developments in the Formulation of Regional Regulations in Indonesia," **Feri Amsari** explains the developments of formulating local regulations (Perdas) in Indonesia. He provides a historical overview of the development of local regulations from the RIS Constitution, the 1945 Constitution, to the recent amendments. Feri explains the comparative arrangement of the hierarchy of law in Indonesia with a historical approach to juridical regulations that had once prevailed in Indonesia. He then analyses the political direction of regional regulations in Indonesia along with the problems of formulating current local regulations. He outlines the classification of functional assignments between the central government and the regional government. To answer the issues posed by local regulations, Feri explains the mechanism on how to review and repeal local regulations.

In "Preventive Oversight on the Development of Regional Regulations," **Charles Simabura** analyzes the preventive oversight on the development of local regulations. He concludes that local regulations should not only be based on the characteristics of each respective region but also

the national legal framework, accompanied by supervision from the central government. However, he considers the current oversight of local regulations by the central government to be repressive, hurting the autonomy of the region. So, he argues for the introduction of preventive measures, i.e., before local regulations are ratified. Chares further outlines the preparatory stage for drafting regulations, and how the regional regulatory formulation/planning program is implemented. At the end of his article, Charles recommends how to improve the role of the government and introduce consultations, supervision, also harmonization and synchronization before the planning phase.

In "Content Material for the Nagari Regulation," **Feri Amsari**, discusses the Law on Villages (*Nagari*), including the authorization to issue village regulations. Feri outlines different types and content of village regulations as well as issues regarding village administration in general and causes for problematic village regulations in specific. According to Feri, village regulations must comply with higher ranking law and supervised by regional governments. He recommends that regional governments should issue rules on making village regulations and on regulatory review. Consequently, village regulations need to be compiled and reviewed.

Part 1

Context and Analysis: Twenty Years of Regulatory Reform

Kai Hauerstein

Abstract

Indonesia has overcome the challenges of the Asian crisis, the resulting political turmoil, and proved capable of managing the effects of its radical decentralization. In the last twenty years, Indonesia became more competitive looking at the impressive jump in rankings, for example in the World Bank (WB) Ease of Doing Business Reports[1]. This reflects a sound policy capable of addressing key regulatory constraints, which 20 years ago seemed a doomed task.

But, why is Indonesia considered "to be bad in law making?" as the recent Article by the Economist, published in 2018[2], suggests. Other well-known scholars and authors of official reports have voiced similar concerns.

The short answer is, quality matters!
Part 1 of this book provides an overview of 20 years of regulatory reform in Indonesia outlining the key reform measures, identifying gaps, and proposing recommendations as a way forward.

Chapter 1 provides the historical context for regulatory reform in Indonesia, in particular the three main catalysts for reform, (i) the Asian crisis and the downfall of Suharto, (ii) rapid decentralization including the devolution of legislative and administrative powers to sub-national level, and (iii) globalization and the need respond to the pressure competing with other economies regionally and globally.

Chapter 2 explains the methodological approach, i.e., the gap analysis, which assesses the difference between the desired state (Chapter 3) and the current state (Chapter 4). The theoretical background establishes a common understanding with regards to key terms, processes, and principles in the legislative drafting process, defining regulations, outlining generic quality criteria for "good" laws, the hierarchy of regulations, and the legality principle.

1 or the IMD World Competitiveness Center, World Competitiveness Ranking 2018, PDF file downloadable at *https://www.imd.org/wcc/world-competitiveness-center-rankings/world-competitiveness-ranking-2018/*

2 Economist, *Why is Indonesia so bad at law making*, 2018, at *https://www.economist.com/asia/2018/06/21/why-indonesia-is-so-bad-at-lawmaking*.

Chapter 3 defines the desired/ideal state and explains the criteria assessing regulatory reform, i.e., (i) complying with fundamental Rule of Law principles, (ii) providing access to regulations, (iii) ensuring regulatory quality (iv) improving regulatory review, and (v) improving the implementation/enforcement of regulations.

Chapter 4 takes stock of the current state and explains the key legal and institutional reform measures, which the Government as well development partner initiated over the the last 20 years.

Chapter 5 assesses the gaps between the current state (IS) and the desired state (SHOULD) and analyses these gaps in more detail identifying key issues/constraints (= gap analysis).

Chapter 6 provides recommendations on how to bridge the gap between IS and SHOULD by addressing key issues/ constraints.

The summary of the **complete gap analysis** is presented in Table 1, on p. 18.

1. Catalysts for Regulatory Reform

1.1. Introduction

Around 20 years ago, Indonesia introduced significant regulatory reform measures responding to the aftermath of the Asian financial crisis, the constitutionalization process after the downfall of Suharto ("*Reformasi*"), and rapid decentralization. The primary purpose of these reform measures was to (i) establish the Rule of Law Principles outlined in the Constitution, (ii) address the aftershocks of decentralization harmonizing national and sub-national legislation, (iii) to deregulate/improve an inconducive business environment, as well as (iv) to improve overall regulatory quality considering the impact of regulations on affected stakeholders. Recently, the same reform ideas gained a new impetus under President Jokowi prioritizing regulatory reform[3] issues.

Against this background, the Hanns Seidel Foundation (HSF) supports the Ministry of Law and Human Rights (MLHR) to improve further, harmonize, and review existing and new regulations. Support included, for example, publications[4], expert meetings[5], and conferences[6] on regulatory reform.

Purpose: The purpose of Part 1 of this book is to take one step back and review the reform measures of the last 20 years, assess their impact and overall success and propose recommendations for improving regulatory policy as well as specific support measures for the Ministry of Law and Human Rights (*Menkumham*).

Scope: The study (i) provides the historical context, as well as reasons for introducing regulatory reforms, (ii), outlines the legal and institutional framework for reviewing regulations, (iii) identifies key reform measures and assess their progress and success, and, (iv) identifies key constraints and propose ways to address them.

Structure: The first chapter defines regulations including quality criteria, processes, and perspectives providing the methodological framework

3 National Strategy for Regulatory Reform (2015-2019). See also Table 2.
4 HSF/MLHR, *Handbook on Legislative Planning on Sub-National Level (Panduan Memahami; Perancangan Peraturan Daerah)*, 2015.
5 Hanns Seidel Foundation (HSF), *Expert Round on Regulatory Reform*, Tangerang, 2018.
6 HSF/MLHR, *Symposium on Regulatory Reform*, Bali, 2018.

for the assessment. The second chapter provides the historical context, why regulatory reform measures were introduced and why they are still relevant. The third chapter summarizes the legal and institutional framework for regulatory reform, which at the same time, is the starting point for the gap analysis. The fourth chapter includes the gap analysis assessing the ideal situation (outlined in the legal and institutional framework) with the current situation.

Regulatory reform measures were often the response to significant political and economic changes such as the (i) Asian financial crisis, (ii) the downfall of Suharto, (iii) decentralization, and (iv) economic pressures in a globalized and competitive world.

1.2. The Asian Financial Crisis and the Downfall of Suharto

The Asian financial crisis proved to be an economic and political catalyst. The social costs of the crisis contributed to the dissolution of the New Order government under Suharto. The crisis revealed profound structural deficiencies of the Indonesian economy and related policies, referred to as corruption, collusion, and nepotism (KKN). The economic crisis revealed that the growth of large enterprises was rarely sustainable. It had been based primarily on political protection, nepotism, and unhedged foreign exchange speculation. With the collapse of the banking sector and the economy, the "father of development" Suharto stepped down.

In the aftermath of the crisis and transfer of political power, Indonesia's rapid and large scale institutional and social transformation laid the foundation for a robust economic recovery. However, much of this recovery would not have happened if Indonesia had not reformed its banking sector, liberalized to (a certain extent) its markets and attracted Foreign Direct Investment, regulated anti-competitive conduct, and introduced its first policies for regulatory reform and deregulation packages. The growing importance of reform if Indonesia's regulatory framework is to a large extent the result of Indonesia's system transition from a centralized and authoritarian state, to liberal democracy.

1.3. Decentralization

The other catalyst for reform was the rapid decentralization process and the transfer of the majority of legislative and administrative powers to

sub-national level, starting in 1999. Significant law-making powers have been devolved to Indonesia's districts and provinces, which now include 1000 local legislating bodies and executive officials, such as mayors, regents, and governors, issuing local regulations and administrative decisions. The combined sound output of these lawmakers has added great bulk, complexity, and uncertainty to Indonesia's legal system. Many new local laws have been criticized for being misdirected or unclear, violating citizens' rights, imposing excessive taxes, even breaching Indonesia's international obligations[7]. As a result, the national government tried to regain much of its legislative powers, which granted them the authority to extensively review, sanction, and even trump local regulations, wich conflict with high ranking legislative instruments. It has done so with regards to local regulations related taxes and user charges. However, with the reform of radical decentralization initiated in 1999, the genie was out of the bottle.10 of thousands of sub-national legal instruments have been issued and only in parts have been reviewed. Until today, Central Government was not able to establish an effective review mechanism. Besides those Perdas, which have been submitted for review, there are still thousands, which are undetected, or which are still on the books, even though they have been invalidated. Besides, to the devolution of legislative powers, most of the administrative powers, i.e., the implementation of national law as well as the provision of public services, have been transferred to the sub-national level. This leads to other problems, as processing time and costs for issuing licenses largely vary throughout the archipelago, increasing administrative costs for business as well citizens.

1.4. Competitiveness

Investments are the key to economic growth. Investments create job opportunities and provide income for the society as well as for Government. In a global world, investment decisions become more and more competitive. International firms base their investment decisions on detailed assessments, taking into account various factors, such as markets, access to input materials, human resources, infrastructure, but also the conduciveness of the regulatory environment. For businesses, it is essential to know how long it takes until an investment can be realized and to have certainty about the risks and cost which are related to this

7 Butt, Simon; *Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia*, Sidney Law Review, Sidney, 2010, p.1.

investment. However, these issues are not only crucial for international investment but also local investments. What are the reasons why a firm invests into a new factory in Jakarta, in Central Java or East Java or maybe outside Java?

To help international companies in their decision on where to invest, countries are ranked concerning their competitiveness for investment. IMD, a Swiss-based research institutive does such international competitiveness ranking for many years. According to their latest ranking conducted in 2018[8], Indonesia ranks 43 out of 63 (10 years ago Indonesia's rank was 54 out of 55 countries). Another study, which helps to determine competitiveness, is the WB Doing Business report[9].

The high-cost economy" has become a common complaint from investors in Indonesia. Filling out forms, registering a business, asking for permits, licenses, and dealing with tax and other authorities is extraordinarily complex and cumbersome generating unnecessary regulatory burden. Indonesia's regulatory environment concerning the cost of doing business, corruption, economic freedom and legal certainty has improved but still is not attractive for investments desperately needed to maintain economic growth.

Local regulations (*Perdas*), are a significant part of the legal framework and are therefore of great concern to the business community. Since decentralization in the year 1999, local governments are authorized to generate own income and enacted a plethora of new licenses, taxes, and user charges which has resulted in a rapid increase in local taxes, user charges, and licenses as the following chart indicates.

Against this background, the new Government introduced a comprehensive competitiveness policy packages, which aims at reducing regulatory burden and improving the processing of licenses and permits. See also Table 2.

8 *Ibid*., WB Doing Business Report (2018). Overall ranking and country report.
9 *Ibid*., IMD Competitiveness Report (2018).

2. Regulations and Methodology for Gap Analysis

2.1. Regulations: Purpose and Types

Purpose: Laws and regulations provide rules for the relationship between one person and another person as well as for the relationship between a person and the state. Rules are essential for maintaining social peace primarily by addressing problems within the territory of a state. Against this background, we can identify different types of regulations reflecting the function of the state. These functions range from maintaining law and order to providing welfare.

Governments exist to manage the business of governing a state. They are appointed to ensure that their ideas and policies on how to address problems within a society are implemented addressing issues, which range from security to social development, from environmental protection to correcting market failures. Thus, laws and regulations reflect the process of solving problems identified by the Government. In the end, governments are accountable for effectively addressing social problems for their constituency. If they succeed then they will be re-elected; if not, another government is elected with a new mandate to address the critical issues perceived in society. Even without a functioning democracy, governments sooner or later will be held accountable. Even a long-lasting dictator, like Suharto, was overthrown, when he could no longer guarantee economic development and a minimum of welfare. Thus, regulations as a means to effectively solve and manage problems in society are essential for social peace as well as for governments.

Regulations reflect the function of the state: The requirement for rules largely depends on the understanding of the function of the state. In the beginning theorists, like Thomas Hobbes (1588–1679), considered the prime function of the state to protect life and property, i.e., protecting law and order. However, since then Hobbes state affairs became more complex. Modern states professionalized their bureaucracy and kept standing armies. This increased financial need and introduced the economic function of the state and rules were enacted to collect money through taxes. The next step was that the state actively addressed social problems and corrected market failures and became a welfare state. These developments created the need for a new perspective concerning the function of the state as well as new types of laws. So, the function of the state moved from minimal

functions such as law and order to more complex functions such as fiscal and welfare functions. These new functions also required different types of rules. Nowadays, citizens expect their Governments to ensure their safety and welfare. Businesses expect public authorities to ensure a level playing field and boost innovation and competitiveness. Regulation is the key to meeting these challenges. It serves many purposes – to protect health by ensuring food safety, to protect the environment by setting air and water quality standards, to set rules for companies competing in the market- place to create a level playing field.

Different functions of the state: According to the functions of the state, laws, and regulations can regulate, (i) social (welfare) issues, (ii) economic issues, (iii) environmental issues, (iv) Security/law and order issues, (v) fiscal (revenue) issues, (vi) administrative issues, and, (vii) Moral issues.

2.2. Regulations and Their Hierarchical Order

This Chapter outlines, why rules and the rule of law are essential to maintaining social peace, explains the development of rules from protecting the life of an individual to providing general welfare and tries to classify them.

Definition regulation: For this study, the understanding of regulation includes statuary laws enacted by the legislature as well as subordinate regulations issued by the executive.[10] The first is considered primary legislation the second is considered secondary legislation. See also Box 1. A subordinate/secondary regulation is considered to be public rule having an external effect (as opposed to an internal decision guiding the activities of officials or a group of officials within a particular government institution).

Primary and secondary legislation: Legislation can be classified as either primary or secondary. Primary legislation is usually made directly by the legislature (statuary law). The most common name for primary legislation is an Act of parliament. It is the most important type of legislation and takes priority over secondary legislation so that if there is a conflict between the primary and secondary legislation, the primary legislation prevails.

10 Art. 4 of the Law on Law-making (12/2011) reflects this understanding.

Primary legislation contains typically the most critical aspects of the law (the "What" as well as containing the main principles and definitions. Secondary legislation fills in the less important details or contains technical or detailed information (the "How"). For example, in a specific sector regulatory field, primary legislation may state that a license is required for a particular activity and that the license may be obtained from the relevant government agency.

Secondary legislation is made by the executive enabled by the primary legislation, i.e., the primary legislation states that secondary legislation on a particular point can be made.

Secondary legislation can only include provisions that have been authorized by the primary legislation, i.e., secondary legislation must be intra vires, or within the limits of its parent legislation (as opposed to ultra vires meaning outside of the scope of authority.

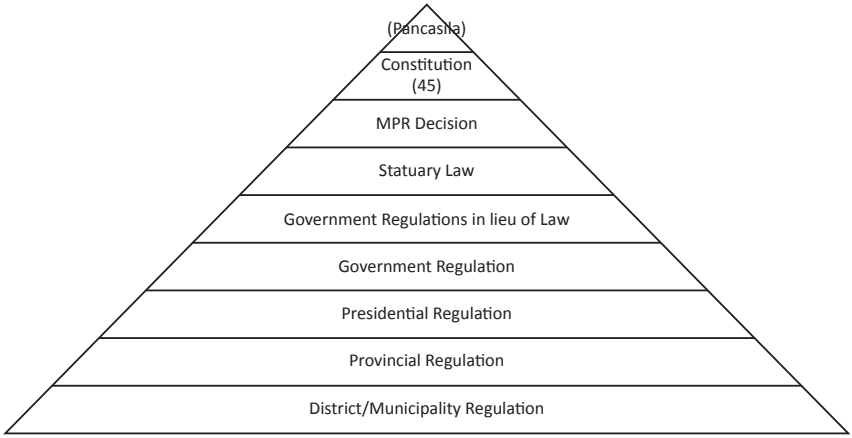
Secondary legislation should not include anything outside the scope of the authorizing primary legislation. The theory is that the primary legislation provides the framework for the topic, enabling secondary legislation to fill in some of the spaces provided by the framework. Most jurisdictions provide specific defining limits as well rules for assisting in the scrutiny of secondary legislation.

For their validity/legality, laws and subordinate regulations are considered to be in a hierarchical relationship with the Constitution at the apex, followed by primary legislation and then secondary regulations.

Hierarchy of regulations: Legislative instruments have to be viewed in a hierarchical order. General legal principles demand that lower-ranking laws always have to comply with higher-ranking laws (intra vires); thus, there must be an uninterrupted chain of legality from the lowest level regulation up to the highest level, the Constitution (or even the Pancasila) being the ultimate source for regulations. Art 7 of the Law 12/2011 on Making Regulations (Law on Law-Making reflects a strict hierarchy of legislative instruments. The following Figure illustrates the different types of legislative instruments for Indonesia and their hierarchal relationship.[11]

11 Art 2 and Art. 7 of the Law on Law-Making (12/2011).

Figure 1: Hierarchy of Regulations



It follows from Art 7 of the Law on Law Making that only regulations issued by the People's Consultative Assembly (MPR), the People's Representative Council (DPR), the President, and sub-national governments are in included in the hierarchy. Regulations issued by other administrative bodies authorized to issue regulations appear to be excluded from this hierarchy.

Regulations issued by other administrative bodies appear to be excluded from the hierarchy of regulations: Sector laws authorize line ministries and other administrative bodies to issue implementing regulations within their jurisdiction. Thus, administrative bodies issue the majority of regulations, which are necessary to operationalize vague framework laws. It is unclear how implementing regulations issued by line ministries and other administrative bodies fit in the hierarchy of regulations. This uncertainty has significant implications for the general understanding of the legal system, the rule of law, and underlying principles such as the legality principle and the separation of powers.

It is unclear, for example, how the legality of regulations issued by other administrative bodies is assessed with regards to a) their horizontal relationship, b) to their relationship to regulations included in the legal hierarchy, c) to their relationship to their authorizing regulations, or, c) their relationship to the Constitution including potential human rights

violations. Unfortunately, the Law on Law-Making (12/2011) does not provide answers to these fundamental questions. In fact, Art 8 of the Law on Law Making excludes these lower-level regulations form the legal hierarchy. Regulations, which are excluded are regulations issued by the (i) People's Consultative Agency, (ii) House of Representatives, (iii) Regional Representatives Council, (iv) Supreme Court, (iv) Constitutional Court, (v) State Audit Board, (vi) Judicial Commission, (vii) Bank of Indonesia, (vii) all Line Ministries, Agencies, Institutions, Commissions, (vii) the Provincial Regional House of Representatives, (vii) the Governor, Regency/Municipality Regional House of Representatives, and (viii) Regent/Municipal Government, and the Village Heads. These regulations live unfretted and unreviewed in the legal space causing uncertainty and disharmony.

Regardless of their hierarchical relationship to each other or to those regulations included in the hierarchy, they are legally binding for institutions and citizens alike as long as they are authorized or issued within their institutional authority.[12] The Law on Law Making does not define their position, role or function in or outside the legal pyramid. This makes the concept of a legal pyramid for assessing the validity and legality of a regulation inoperable and threatens the rule of law.

Legal application of the hierarchy is considered unclear, disputed, and highly problematic: Because of these inconsistencies, the precise operation of the hierarchy is considered unclear, disputed, and problematic. Most fundamentally, neither the Law on Law-Making (12/2011), nor any other Indonesian regulations, or judicial decisions, explain precisely how the hierarchy works, or more particularly, the purpose for which it can be used if any. [13]

The strict application of the hierarchy of laws and regulations in conjunction with the legality principle is essential for building a predictable, sound, and consistent legal framework. A solid dogmatic foundation is needed for the legal review and harmonization process.

Legality principle: The concept of the legal hierarchy has to be applied together with the legality principle. The legality principle, simply stated,

12 Art 8 (2) of the Law on Law-Making (12/2011).

13 *Ibid*., Butt, Simon, *Indonesian Law, Chapter 2, Indonesian Laws and Lawmaking, Hierarchy of Laws*.

means that no government action should be without law and that no government action should be against the law. The legality principle means, that every regulation should be authorized by regulation (ultimately the Constitution) and that no regulation should conflict with the authorizing regulation itself or higher-ranking regulations.

When applied to the hierarchy of laws, it follows that statutory laws may not conflict with the Constitution. Besides, subordinate regulations may not conflict with the Constitution (as the ultimate source for all regulations) as well as with the authorizing law.

Against background, important and commonly applied universal legal principles have been developed which include:

- Lex superior derogat legi inferior (the higher-ranking law trumps the lower ranking law)
- Lex specialis derogat legi generalis (the special law trumps the general law); and
- Lex posterior derogat legi priori (the later law trumps the earlier law).

Together with these principles, the hierarchy of laws should have the following implications:

- A new legal instrument must comply with existing higher-ranking regulations;
- A new legal instrument cannot modify/repeal higher-ranking regulations;
- A new legal instrument can modify/repeal a legislative instrument on either the same or on the lower level.

From the statement[14] mentioned above, it appears that these principles are not legally formalized or uniformly applied.

Regulations vs. administrative decisions: Both, regulations, as well as administrative decisions, have an external effect, i.e., they address citizens telling them, what to do (or not to do). Regulations can be primarily distinguished from administrative decisions because they regulate an abstract issue addressing a large number of persons, as opposed to an administrative decision, which regulates one specific issue for one person (or a specified number of persons). For example, the Law on Buildings is

14 *Ibid*., Butt, Indonesian Law, Table 2.2 provides a complete list of secondary legislation not included in the hierarchy.

a regulation, because it regulates general requirements for all landowners intending to build a house. A building permit is a decision because a government institution allows an applicant to build a specific building in a specific area. In how far, above mentioned legal instruments are considered regulations, administrative decisions, or internal instructions, is not entirely clear.

2.3. Regulatory Quality

One of the questions we have to ask ourselves is, whether regulatory quality has improved? Thus, the following chapters provide the context defining the regulatory quality criteria.

2.3.1. Development: From Red Tape to "Smart" Tape

Deregulation: Over-regulation or too much Red Tape triggered the first deregulations movements as early as 1970. In most Western countries, for example, a massive influx of laws was caused by the development of the welfare state. The more social market economy emerged, the more laws are necessary. To correct market failures, governments issued a host of economic laws and regulations. Also, and new areas had to be regulated such as the protection of the environment, the internet, as well as a host of international or supra-national regulations. In 1970, there was a consensus emerging from the United States that the flood of laws had to be stopped, which means that the state's tasks and thus the tasks of legislation have to be restricted by, amongst other things:

- Privatization of tasks of the state (e.g., gas, water, waste disposal, railroads, postal service, part of the school system and other businesses),
- De-bureaucratization,
- Deregulation,
- Lean administration, and
- Elimination of detail regulation.

From Red Tape to Smart Tape: There is no clear answer to the question of how many laws and legislative activity a country needs. The answer to that question depends mainly on the historical background and the political, economic and social situation of a state as well as on the view of how much the state should regulate. However, policies and plans in Indonesia, still address regulations from a quantitative rather than a qualitative

perspective. If we look at the European countries, the issue is not so much to have less or no regulations but to have better regulations. The development goes from Red Tape to Smart Tape, i.e., from overregulation to better regulation. For example, the EU "Better Regulation" policy states, "Laws and regulations are necessary to ensure a fair and competitive market place, the effective protection of public health, the environment and the welfare of European citizens. Better Regulation is about doing this in ways that maximize public policy benefits while minimizing the costs regulation may impose on our economy. There is abundant evidence that Better Regulation can boost productivity and employment significantly, thus contributing to Europe's growth and jobs agenda."[15]

2.3.2. Regulatory quality criteria

It is not enough to only produce laws and scrap laws, but more importantly, to produce good laws, i.e., which achieve the desired results. The quantity of regulations is not as important as quality. Poorly conceived laws can have a negative impact on economics, social development, and the natural environment and are likely to harm the credibility of Government institutions. Moreover, they may conflict with a country's existing laws. Once a law has been enacted, it becomes more difficult to revise or to revoke it. High-quality regulation avoids these pitfalls.

To ensure the quality of regulations, many sub-goals need to be achieved, including overall compliance, effectiveness, efficiency, clarity, and plain language.[16] However, it should be noted that there is not a universally agreed set of quality criteria. The criteria are fluid and depend on the country or the organization, which promotes them. However, the majority of regulatory quality criteria centre around, (i) necessity, (ii) effectiveness, (iii) efficiency, and (iv) clarity. These quality criteria are often complemented by measures of accessibility as well as legal and institutional framework conditions assuring regulatory quality.

Functionality of laws as paramount: The ultimate goal is functionality, i.e., to achieve the intended objective of a law by addressing the underlying key constraint. This is the case when all the following stages are achieved.[17]

15 EU, *Better Regulation; Why and How? https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en*

16 Xanthaki, Helen; *Drafting Legislation; Art and Technology of Rules and Regulations*, Oxford, 2014, p.5.

17 *Ibid*.

- **Compliance**: One can judge the quality of a law by its overall effect, i.e., looking at the level of compliance within society. Compliance is achieved when people within society follow rules that have been enacted to address a specific problem. Thus, a good law is when people change their behaviour, and the underlying harmful effect is mitigated. If laws are not implemented (administrative non-compliance) or ignored by society, the law it is not a good law, as it does not change the underlying a harmful behaviour.
- **Effectiveness**: One, quality criterion we find throughout the world is effectiveness. Effectiveness reflects the extent to which the legislation manages adequate mechanisms to achieve the desired objective and solve the underlying problem. A good law always addresses a clearly defined problem and its corresponding the objective and provides necessary and appropriate means and enforcement measures.
- **Efficiency**: Efficiency is one means of achieving effectiveness. Efficiency can be achieved by using minimum costs for the achievement of maximum benefit.
- **Clarity, precision, and unambiguity**: To be effective and efficient, a regulation must be clear enough to be understood. Clarity is defined as exactness of expression or detail. Unambiguity is certain or exact meaning. These quality criteria offer predictability to the law, which allows the users of the legislation, including enforcers, to comprehend the required content of the legislation. These two elements are essential pre-requisites for compliance.

2.3.3. Approaches towards better regulations

As mentioned above quality criteria regarding regulations are fluid. The type and approach chosen, very much depends on the country's/ institution's the policy agenda, e.g. to reduce Red Tape and increase competitiveness. A brief overview of different approaches is presented below:

- In the **United States** cutting Red Tape to promote business has been a priority for virtually every administration since the Nixon presidency and now includes, among others. specific tools such as Regulatory Impact Assessment and Plain English requirements.
- The **OECD** has been at the forefront promoting regulatory quality and reform, also with the aim to promote competitiveness and business development. The OECD provided the blue print for quality criteria for all member countries, the EU, as well as the World Bank, in particular

their "Doing Business Report". Over the last 15 years or so, there have been four "waves" of recommendations towards regulatory quality:

- Recommendation on **Improving the Quality of Government Regulation (1995)**[18]; and a first set out principles (see check list below), which was refined over the years;
- Recommendations for **Better Regulation** (1997)[19];
- Guiding Principles for **Regulatory Quality and Performance** (2005)[20];
- Recommendation on **Regulatory Policy and Governance** (2012)[21], key principles in areas of leadership, governance, process and capacities;
- Research, how principles are translated into practice include the **Regulatory Indicators Survey (2014)**; and the **Policy Outlook (2015)**[22]; cross country analysis and recommendations.

- The **European Union**, which is a regulator in its own right, started to develop quality criteria in 2002, and developed an integrated approach to better law making responding to the Mandelkern Report[23]. A first RIA template for policy proposals was developed as well as a set of quality criteria: Efficient, effective, coherent, simple.[24] In the aftermath, the EU adopted **two agendas** (leading to the 2020 Agenda: growth and competitiveness), (i) the **Better Regulation Agenda**[25] developing guidelines and tool, and (ii) the **SMART Regulation Agenda**[26] (2010): cutting red tape and simplification. **Specific initiatives** include, (i) SLIM: Simpler legislation for the internal market initiative (1996), (ii) SOLVIT: Post legislative scrutiny/fitness checks, (iii) an EU Pilot: clearer and accessible legislation.
- In the **United Kingdom**, the Office of Parliamentary Council, introduced a new innovate project, the Good Law Test, to primarily improve the

18 *http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD(95)95.*

19 *https://www.oecd.org/governance/regulatory-policy/49990817.pdf.*

20 *https://www.oecd.org/fr/reformereg/34976533.pdf.*

21 http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm.

22 *http://www.oecd.org/governance/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm.*

23 *http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf.*

24 Claudio M. Radaelli, *How context matters: regulatory quality in the European Union*, paper prepared for the special issue of Journal of European Public Policy on Policy Convergence, 2009, p. 4.

25 *http://europa.eu/rapid/press-release_IP-15-4988_en.htm.*

26 *http://europa.eu/rapid/press-release_MEMO-12-974_en.htm.*

accessibility and overall understanding of laws.[27]

- **Other countries** have set up processes to simplify national legislation and established departments dedicated entirely to better regulation and reform of the law.[28]

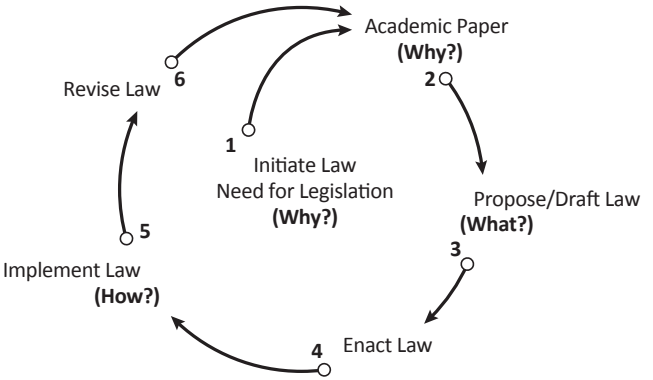
2.4. Regulatory Process: Entry Points for Regulatory Reform Measures

One of the questions we have to ask ourselves is, whether regulatory quality has improved? Thus, the following chapters provide the context defining the regulatory quality criteria.

To improve the quality of regulations as the overall goal for regulatory reform, one has to understand the legislative process as integral part of the policy process and identify the entry points for reform measures. This process is key for understanding, what social problems Government intends to address.

The legislative process as an integral part of the policy process: The policy cycle is a continuous process, including: (i) policy initiation identifying the need for legislation, (ii) formulation and justification of a policy, (iii) drafting a law, (iv) enacting a law, (v) implementing a law, and (vi) evaluating and revising a law. This generic cycle repeats itself on national as well as sub-national level.

Figure 2: Legislative Process as Part of The Policy Process



27 See the website of the Better Regulation Task Force at *http://www.brtf.gov.uk/*.

28 For a comparative view, see the OECD Policy Outlook (20150.

Within the legislative process outlined in Figure 2, actors need different legal drafting and review skills for the following steps:

- **Initiate Law**: The starting point for initiating a law is the need for a regulation, which is mostly a political decision to address a social, economic, cultural, or environmental problem or other requirements as set out in the Constitution. The approach on how to address a problem in the society is outlined in either party programs, policies declared by the Government, or legislative agendas. The Constitution authorizes the government as well as the legislature to address a perceived problem by initiating a law. As -at this stage- the need for a law is mostly a declaration of intent, a policy, or an electoral promise it lacks a more in-depth analysis concerning the problem itself or its potential impact.
- Therefore, experts in the executive or the legislature have to analyse the reasons for the law further, understand the underlying problem and assess the impact of the policy decision.
- **Prepare an Academic Study ("Why")**: The executive/legislative should justify their proposal and clearly state "Why" law is needed. In Indonesia, the results of this process should be included in a statement called Academic Paper[29]. Legal drafters need tools on how to analyze problems (the underlying reason for regulations), come up with options on how to address these problems, and assess the impact concerning costs/ benefits. The Law on Law-Making (11/2012) provides a format for an academic paper outlining the requirements "Why "regulation is needed.
- **Draft Law ("What")**: In the next stage the legal drafter should clearly state "Who" has to do (or not do) "What." Some stakeholders are involved in this process, and different skills are required. In the first step, a legal expert should translate the need for a law in a legally effective statement. A legally effective statement should take the findings of the Academic Paper into account and outline very clearly, "Who" has to do "What." This step requires strong technical skills, knowing the subject matter inside out; but it also requires writing skills to express the rights, obligations, and sanctions clearly. Additionally, legal skills are required to determine whether the proposed draft conflicts with laws on the same level or higher-ranking laws. S/he must also have

29 Law on Law-Making (11/2012). Presidential Regulation No. 68/2005 subsequently notes that the formulation of the academic paper is to be done by the initiator of the proposed bill together with Ministry of Law and Human Rights‟ Department General of Laws and Regulations. It allows for the preparation of an academic study to be done by universities or another specialized third party.

an understanding of how to comply with formal procedures. This requires an increased capacity from legal experts within the executive who prepare the legislative drafts as well as legal experts from other institutions that review the drafts, such as the MoLHR.

- **Enact Laws**: Lawmakers should have basic skills to understand proposed laws, which have been put on the floor for a vote. This requires a well written Academic Paper and includes a basic understanding of principles governing "good" laws a. Besides lawmakers and depending on the type of law, many other institutions are involved in the enactment process, such as the President.
- **Implement ("How")**: As soon as the law is enacted, the responsible ministry prepares implementing regulations. Implementing regulations describe the technical details, "How" the law is going to be applied. This includes the development of processes, procedures, formats, and guidelines. Besides technical skills, legal drafting skills are required for preparing decrees, directives, circulars.
- **Review/revise Laws ("How Well")**: Finally, monitoring and evaluating laws and regulations are essential to assess the quality regarding effectiveness and compliance (ex-post review). Laws can be either amended or repealed.

Ex-ante and ex-post review: The cycle also implies two review mechanisms, which help to improve regulatory quality: (i) ex-ante- review, i.e., the assessment of new laws and regulations and (ii) ex-post review, i.e., the review of existing regulations. Ex-ante assessment should be ideally conducted at the beginning of the legislative cycle, when initiating a regulation. See entry points 1 and 2 as outlined in the figure above. The ex-post review should be an integral part of the evaluation process, after the regulation has been implemented. See entry point 6 as outlined in the figure above (= revise law).

Comparing regulatory quality with the maintenance of a swimming pool: The flow and quality of regulations can be compared with a swimming pool. In this metaphor, the swimming pool is the existing legal framework or the regulatory stock, and the regulations in the pool represent the water. The objective is to keep a clean swimming pool with clear water, instead with murky, brown water.

The same is true for the regulatory environment: A friendly regulatory environment is more inviting for compliance and attractive for businesses

than a muddy regulatory environment. Again, who likes to swim in a dirty pool?

In the swimming pool, clean water is maintained by continuously filtering the incoming water as well as the existing water. To keep the swimming pool clean, the existing water, as well as the incoming water, needs to be cleaned. Both, the pool itself and the incoming water has to be clear. The same is true for the regulatory environment: an attractive regulatory pool requires the review of existing regulations (ex-post review of regulatory stock) as well as the review of new regulations (ex-ante review of regulatory flow).

While the water in the swimming pool is maintained with filters and chemicals, the tool for maintaining a clean regulatory pool are included in a toolbox, such as Regulatory Impact Assessment or expiry clauses such as sunset-clauses. Introducing expiring mechanism and Regulatory Impact Assessment (RIA), as well as building the capacity for applying these tools are essential to improve the regulatory environment.

Regulatory Impact Assessment: Regulatory Impact Assessment is a tool to improve the quality of new or existing regulations. As a methodology for improving regulatory quality, RIA provides a toolset for:

- Problem and Objective Analysis (Effectiveness): Laws usually react to legislative need and thus to an assumption of a problem. However, the problem identified is often only a symptom for underlying problems. RIA helps to identify the core problem/root cause to identify symptoms and thus make the law more effective.
- Option Development: There are often more options to address a problem than a law. Legislative drafters should not limit themselves and ask whether government action is needed or whether there are other options than drafting a law. RIA opens the view to identify alternative options for problem-solving.
- Cost and Benefit Analysis (Efficiency): Each option has trade-offs regarding cost and benefits of a regulatory solution compared to non-regulatory solutions. RIA helps to identify the option with the best cost-benefit ratio, thus increasing the efficiency of a regulation.
- Public Participation: Public consultation is included as a mandatory step in the RIA process. Public Consultation is vital to include know-how, experience, and expertise of all stakeholders. Through public participation, RIA improves the acceptability and the quality of regulation.

In the past, a few Indonesian national ministries and local governments have adopted RIA methods to analyze regulations with the support of donors and NGOs. However, RIA was never formally adopted in Indonesia. In parts, RIA is indirectly reflected in various handbooks on legal review and drafting as well as in the Law on Law-Making (12/2011) and the requirement to prepare an Academic Paper before enacting a regulation. For details, see Chapter 4.

2.5. Methodology Gap Analysis and Key Findings

Methodology gap analysis: The gap analysis includes the following steps,

(i) Identifying the desired state of regulatory reform,
(ii) Outlining the current state (= stocktaking of the legal and institutional framework and identifying key constraints), and
(iii) Providing Action/Plan/Recommendations how to bridge the gap between the current and the desired state, ultimately arriving at the desired state.

The desired state is further explained in the next section (Section 2.6), whereas Chapter 3 and Chapter 4 outline the current state identifying gaps in relation to the Desired (highlighting key issues, and Chapter 5 provides the recommendation.

Summary gap analysis: The findings of the gap analysis are listed in the following table and are explained in more detail in the following chapters.

Table 1: Summary Gap Analysis

Desired State	Current State/Key Issues	Recommendations
Compliance with the constitutional mandate (Rule of Law/*Negara Hukum*)	Uncertainty with regards to legality of regulations The authority of the executive to draft secondary legislation is insufficiently limited due to broad enabling laws and vague legal terms und thus prone to abuse. Low initiative/capacity of DPR drafting/reviewing laws.	Clarify the hierarchy of norms as the ultimate reference point for assessing legality Define what necessarily needs to be regulated by statuary law and regulate the limits of implementing regulations. Limit the use of vague legal terms Standardize quality criteria, drafting/review handbooks and improve legal drafting capacity

Desired State	Current State/Key Issues	Recommendations
Improved access to regulations	Limited access to regulations, i.e., there is no centralized, consolidated, updated legal data base, which people can access.	Systematically inventorize, compile and consolidate all regulations in one publication, which is periodically updated; Utilize new technologies for publishing and disseminating regulations.
Improved regulatory quality on the national level	Policy measures focus on quantity rather than quality; Limited understanding/ operationalization of quality criteria; Limited synchronization between quality criteria for laws and corresponding tools such as Regulatory Impact Assessment (RIA); Lack of tools assessing legality and human rights violations; Imperfect interaction with stakeholders;	Develop an explicit regulatory policy on regulatory quality; Operationalize quality criteria for good regulations; Formally adopt tools, such as Regulatory Impact Assessment, for ex-ante and ex-post review on the national and sub-national level; Adopt module on stakeholder participation
Improved regulatory quality on the n sub-national level	Institutional fragmentation/ unclear responsibilities thus lack of standardization and clear guidance; Problems remain with the quality and effectiveness of sub-national regulation; Limited effect and understanding of RIA on the sub-national level;	Include legality assessment in the ex-ante and ex-post review (legal impact assessment) Establish a Central Regulatory Body for national and sub-national regulations

Desired State	Current State/Key Issues	Recommendations
Improved regulatory review on the national level	Ineffectiveness of revised review mechanism managing the massive sub-national regulations; Less focus on regulatory quality; more on revenues; Unconstitutionality of review mechanism.	Introduce expiry mechanism in regulations; Clarify the role of the hierarchy of norms in the review process and develop legality principles Revise the review mechanism reflecting the decision of the Constitutional Court
Improved regulatory review on the sub-national level	Impressive jump in Ease of Doing Business ranking; Institutional fragmentation for regulatory review; No central oversight body; No expiry mechanism to effectively manage the regulatory stock.	Revise decentralization laws introducing ex-ante approval for all Perdas; Introduce a constitutional review mechanism for regulations once enacted; and Establish a Management Information System for regulatory review.
Improved implementation of regulations	One Stop Shop services improved the processing of business licenses on the national and sub-national level. However, their performance varies on a sub-nation level depending on the type, transferred authority, and willingness.	Prioritize streamlining regulations and underlying processes; Build on best practice OSS models, and Strengthen the role of Central Government in standard setting.

3. Criteria for Assessing Regulatory Reform (SHOULD)

The desired state for regulatory reform is defined as:

- Compliance with the Rule of Law (*Negara Hukum*);
- Improved access to regulations;
- Improved regulatory quality (on national and sub-national level);
- Improved harmonization/review of regulations, and
- Improved implementation of regulations.

The following sections briefly explain these five criteria as a starting point for assessing the regulatory reform initiatives of the last 20 years.

3.1. Complying with *Negara Hukum* (Rule of Law)

Art 1 (3) of the 1945 Constitution stipulates that the State of Indonesia is based on the rule of law. Against this background, the Indonesian government is considered to be (among others) bound by law and not to be above the law. Until 1999, the rule of law concept remained a vague promise buried in Art 1 (3) of the Constitution. In reality, the 1945 Constitution failed to endow the DPR and the judiciary, with the necessary powers to control and bind the government. Consequently, the 45 Constitution served as carte blanche for authoritarian rulers, such as for Sukarno (re-instating the 45 Constitution in 1954) or Suharto. The influential role of the president and the weak role of the DPR and judiciary provided the blueprint for two authoritarian/totalitarian regimes, which ruled "by law" without being bound by it. Only, in 1999, after the downfall of Suharto, the constitutionalization process introduced and strengthened those institutions designed to bind the government to the rule of law. Between 1999 and 2002 four amendments introduced: (i) separation of powers strengthening the role of the DPR as well as the judiciary, (ii) a Constitutional Court and administrative courts challenging government decisions, (iii) fundamental human rights, and (iv) a multiparty democracy. Operationalizing the amended Constitution and consequently establishing the legal and institutional framework has been the single most important achievement of the regulatory reform.[30]

3.2. Providing Access to Regulations

The first (sometimes overlooked) building block of the rule of law and thus regulatory reform is providing access to regulations. Citizens and business have to know the legal basis for their action or non-action. They have to know what is allowed and what is prohibited. The Constitution, as well as the Law on Law-Making (12/2011), require (in theory) that every regulation should be published and be accessible for the people.[31] A publication, of regulations, i.e., access to information, is part of the promulgation process and a fundamental right of a citizen. National regulations must be

30 For details see, Denny Indrayana, *Indonesian Constitutional Reform 1999-2002; An Evaluation of Constitution-Making in Transition*; Jakarta, 2008.

31 Art 45 of the Law on Law-making (10/2004) in conjunction with Art 101 of the Law on Law-making (12/2011), and Art. 22 A of the Constitution (1945).

published in the Statute Book of the Republic of Indonesia and the State Gazette of the Republic of Indonesia. Sub-national regulations must be published in the Regional Book and the Regional Gazette.[32]

3.3. Improving the Quality of Regulations on National and Sub-National Level

Improving the quality of regulations is the centrepiece of regulatory reform. The development and approaches improving regulatory quality have been outlined in Chapter 2. Regulatory reform is often complemented by new legal and institutional frameworks on (good) law-making, a centralized regulatory body responsible for checking the quality of regulations, tools such as sunset clauses, Regulatory Impact Assessment, public participation, and delegation of legislative authority to sub-national entities. Because the lack of expertise is often blamed for the poor quality of laws, capacity building measures are often introduced to improve regulatory quality further.

3.4. Improving the Review and Harmonization of Regulations

Every system, including a system creating regulations, needs checks and balances. Most countries introduced ex-ante and ex-post review systems to check regulatory quality similar to cleaning a swimming pool (see example above).

In an ex-ante review system, the executive, which is responsible for preparing legislative-drafts, usually submits a draft to an internal or external expert body or to the next higher administrative level for reviewing the quality of the draft to obtain bureaucratic approval for processing the draft.

Ex-post reviews are either performed by the executive or the judiciary (=Constitutional Court). Because, ex-ante review of regulations is mainly ineffective, there are numerous national and sub-national regulations, which conflict with higher ranking norms. As responsible institutions are unable to address this constraint, informal harmonization mechanisms have been introduced to regulate institutional disputes. Also, deregulation policies of the current government outline a road

32 *Ibid*., Art 45 of the Law on Law-making (10/2004).

map to review regulations hampering the business environment, such as business licenses.

3.5. Improving the Implementation of Regulations

Improving the implementation of regulations is another aspect of regulatory reform. These reforms often focus on business hampering regulations. In Indonesia, as well as other countries, the introduction of one-stop-shops (one-stop-services or one window services), which handle business/investment formalization and other bureaucratic processes under one roof, have been found to increase efficiency and transparency. A critical step has also been to promote a customer-oriented service culture towards business, in contrast to the more bureaucratic mindset typically prevalent in the civil service. Depending on the extent of their authorities and capacity, one-stop-shops can utilize their function as "gateways" (single points of access and information) by developing other facilitative functions, such as introductory services for foreign investors. The introduction of IT systems (including online services) and better performance measurement are essential for improving efficiency. The reorganization and modernization process are supported by efforts geared to collecting staff ideas on how to improve service quality and efficiency and the introduction of performance measurement systems using efficiency- and service-oriented indicators such as licenses issued per month and time taken to issue a license. OSS has been embedded in administrative modernization and decentralization and has been established on the national and sub-national level.

4. Stock-Taking of Regulatory Reform Measures (IS)

4.1. Regulatory and Policy Framework for Regulatory Reform

Regulatory reform is shaped by external (international) and internal factors. On the international pane, regulatory reform is promoted by APEC and ASEAN. The need to transform international obligations into national law drives national reform policies. Besides, regulatory reform is shaped by internal political factors, primarily to attract investment. Regulatory reform under President Jokowi gained momentum through the National Strategy for Regulatory Reform and respective policy packages aiming to improve

the ease of doing business through streamlining business licenses and the promotion of One Stop Shops. The current Medium-Term Action Plan also strives to improve regulatory quality. These policies are guided by internal and external government regulations as well as newly amended laws. The following Tables provide an overview of, (i) regional and international obligations for regulatory reform, (ii) national policies and plans for regulatory reform, and (iii) laws and regulations governing regulatory reform.

Table 2: Regional and international obligations for regulatory reform

Title	Time	Summary	Source/Comment
APEC/ Honolulu Declaration	2011	"Whole of government" approach to regulatory management and assess impact, and promote public consultation	*https://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm* Report on progress due 2013
ASEAN Blueprint on Single Market Integration	2006	Embed good regulatory practice[33] Harmonize regulations Ensure transparency and publication Make prudential regulations more cohesive Ensure that regulations are pro-competitive	*https://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf*
		Reduce the burden on business placed by regulations ASEAN One Stop Shop Model	
ASEAN Vision 2020	1997	The vision for regional integration: harmonization of rules and procedures	*https://asean.org/ ?static_post=asean-vision-2020*

33 *Ibid*., WB Doing Business Report (2018).

Table 3: National policies and plans for legal reform

Title	Time	Summary	Source/Comment
Presidential policy announcement	2018	Plan to establish a centralized regulatory body on national level	Expert round held on Dec. 03. 2018
National Strategy for Regulatory Reform	2015-2019	Framework promoted by President Jokowi; acceleration of doing business Target: Improve Ease of Doing Business[34] to rank 40	BKPM OECD, Good Regulatory Practices to Support Small and Medium Enterprises in Southeast Asia, Indonesia, p. 78
Policy Packages (16) 16th policy package	2015 2017	Operationalizes strategy: Attracting Investment, streamlining regulations Regulatory Reform; business licenses	BKPM[35] Presidential Regulation 91/2017
Master Plan for Economic Development (MP3EI)	2011-2025	Produce a transparent and comprehensive regulatory framework and streamline the policy-making process	Coordinating Ministry for Economic Affairs (2011)
National Medium- Term Action Plan and respective annual WPs and budget	 2015-2019 2010-2014 2005-2009	Regulatory reform targets such as, Regulatory quality Review sub-national stock legislation and reduce licensing burden Introduce and roll out OSS	Presidential Regulations 02/2015 05/2010 07/2005

34 *http://www.pma-japan.or.id/bundles/bsibkpm/download/BKPM%20Presentation%20-%20PR%2091-2017_3.pdf*

35 *http://www.pma-japan.or.id/bundles/bsibkpm/download/BKPM%20Presentation%20-%20PR%2091-2017_3.pdf*

Table 4: Selected laws and regulations governing regulatory reform

Title	#/Year	Summary	Source/Comment
Cabinet Secretary Regulation	01/2018	Implement RIA (ex-ante/ex post)	*http://sipuu.setkab.go.id/PUUdoc/17543*
Presidential Regulation	91/2017	Special task force streamlining business licenses and OSS	*http://www.pma-japan.or.id*[36]
Presidential Instruction	07/2017	Report new regulation, introduce mandatory RIA	*https://www.ekon.go.id*[37]
Presidential Decree	98/2014	Simplify business licenses The one-page business license for MSME	*http://www.gbgindonesia.com*
Law on Local Government	23/2014	2 tiers of regulatory quality a. District/Province b. Province/NL (MoHA)	Art. 242 and 249 of the Law on Local Government (2014); Art 80 and Art. 78 of the Law on Law-Making (11/2012); Art. 245 of the Law on Local Government (2014).
Law on Formulation of Laws and respective implementing regulations, such as Presidential Regulation No. 87 of 2014	12/2011 (10/2004)	Standardize lawmaking process, introduce regulatory quality criteria	Sustaining/amending Law 10/2004 Art 5 and Art 6 of Law 12/2011
Law on Sub-National Taxes and User Charges	28/2009	A closed list of taxes, ex-ante review of sub-national legislation	Art 2 of Law on Sub-National Taxes and User Charges (28/2009)
MoHA Regulation	24/2006	Nationalization OSS (MoH)	*http://www.worldbank.org*[38]

36 Based

37 *https://www.ekon.go.id/berita/view/workshop-implementasi.3771.html*

4.2. Institutional Framework for Regulatory Reform

There are numerous institutions, which draft, enact, implement, and review laws and regulations. See also Figure 1, Legislative cycle. The separation of powers outlined in the Constitution (45) assigns these responsibilities to the executive, the legislature, and the judiciary. The legal framework governing the legislative cycle as well as the decentralization of legislative function to the sub-national level introduced new responsibilities to line ministries. The fragmentation of institutions, as well as the lack of capacity and clear responsibilities, is the reason, why regulatory reform measures have had little impact. The following tables provide lists the leading institutions and functions in the legislative cycle on the national and sub-national level. Table 4 lists the leading institutions in the executive, legislature, and judiciary including their regulatory functions. Table 5 lists the leading institutions on sub-national level including their regulatory functions.

Table 5: National Level: Institutions Responsible for Preparing, Reviewing, Enacting, and Improving Regulations.

Executive/Administration: Prepares legal drafts, issues regulations implement policies/regulations, and reviews/harmonizes regulations,		
Institution	**Regulatory Function**	**Legal basis**
President	Proposes bills Signs/ratifies bills Issues Government Regulation in lieu of law Issues Government Regulation (Implementing Regulations)	Constitution (45) Law 17/2014 Law 12/2011 (10/2004) Respective implementing regulations

38 Based on Regulation No. 25/2007 on Investment, Ministry of Home Affairs Regulation No. 24/2006 manages arrangements for the implementation of PTSPs (OSS) at the local level and also authorizes PTSPs to act as institutions with the responsibility to issue many business licenses. Other than this, Presidential Decree No. 27/2009 authorizes BKPM to implement PTSPs. Based on a Ministry of Home Affairs survey conducted in 2011 more districts have implemented PTSPs, indicated by the increasing number of PTSPs, from 105 in 2009 to 196 in 2011 across 252 districts in Indonesia. However, more than half of the PTSPs claim that they have authority to issue fewer than 20 business licenses out of over 100 licenses in total (Asia Foundation, 2012). As a result, PTSPs are still often perceived by the private sector as being inefficient due to the still lengthy process of obtaining licenses and because the costs continue to exceed those stated in the regulations (KPPOD and Asia Foundation, 2011:33, 102).

Institution	Regulatory Function	Legal basis
	Issues Presidential Regulations Issues: Presidential Decree, Presidential Instruction Initiates (statuary) laws	
State Secretariat	Supports President preparing legal drafts Provides analysis and reviews government programs Prepares service standards	Presidential Regulation 24/2015
Cabinet Secretariat	Provides legal analysis and administrative and technical support; advises the President on all legislative proposal	Presidential Regulation 24/2015
Coordinating Ministries	Coordinates, synchronize, monitoring line ministries (in 4 areas): among others harmonization of laws Coordination Minister for Economic Affairs business and investment climate	N/A
Line/Sector Ministries	Review bills drafted by DPR Prepare draft laws/regulation Issue Ministerial Regulations, Ministerial Decree, Ministerial Instruction, Joint Ministerial Regulation,	Law 12/2011 Presidential Regulation 68/ 2005
Ministry of Law and Human Rights	Prepares policies related to the formulation of laws and regulations focusing on legal quality Coordinates lawmaking process Provides capacity building on legislative drafting Oversees the analysis of laws and regulations Harmonizes law on the national level (ADR mechanism)	Law 12/2011 (10/2004) Permenkumham 32/2017

Institution	Regulatory Function	Legal basis
Ministry of Law and Human Rights/ Agency for National Law Development (BPHN)	Promotes legal research, legal studies, and conduct training seminars and workshops. Developed a Handbook on the Evaluation and Analysis of Regulation (*Pedoman Analisis dan Evaluasi Hukum*). Evaluates and analysis regulations	Peraturan President 44/2015
Ministry of Home Affairs	Coordinates regulatory review on the national and sub-national level Reviews sub-national regulations (PERDA) a. taxes/user charges (together with MoF) b. other regulations Invalidates sub-national regulations	Law 12/2011 (10/2004)
Ministry of Finance	MoF and Bappenas review budget framework for all ministries; reviewing budget and performance of the previous year (including performance targets for regulatory reform Supports MoHA reviewing local taxes and user charges	Law 12/2011 (10/2004)
BAPPENAS	Regulatory Quality Management on National Level through defining national programs and budget planning Directorate for the Analysis of Laws and Regulation developed two handbooks to support the analysis of regulations, (i) the Regulation Framework Analysis Model for proposed bills and sub-national regulations, and (ii) the Law and Regulation Analysis Model for reviewing and simplifying existing laws and regulations.	GR 66/2015

Institution	Regulatory Function	Legal basis
Taskforce/ Working Groups	Taskforce to monitor 16 economic policy packages The 16th reform package is on business licensing Institutionalize national, regional task forces Streamline business licensing process through OSS	GR 24/2018
BKBN; National Single Window for Investment	Facilitates business license procedure through OSS Case studies and SOPs	GR 24/2018

Legislative: enacts/amends laws, oversees government, and approves the budget.		
People's Consultative Assembly (*MPR*) (1) House of Representatives (*DPR*) (2) Regional Representative Council (*DPD*)	*DPR* initiates laws *DPR* enacts laws *DPR* repeals revises and amends laws Commission I: Regional Autonomy, Decentralization Commission II: Law and legislation (a.o) *DPD* participates in debates regarding regional autonomy	Art 20 of the Constitution Law No. 17/2014
Judiciary: Resolves regulatory private/public law issues		
Constitutional Court	Rules of disputes relating to the constitution including the legality of laws; review the constitutionality of statutes, but cannot review lower-level laws Relative jurisdiction of state institutions Electoral disputes	Art 24 and 24A of the Constitution (45) Law on the Judicial Power (4/2004 and 48/2009); Law on the Constitutional Court (24/2003)

	The final court of appeal in criminal and civil law matters Judicial review of regulations (i.e., below statutory law); reviews compliance with national statutes, however, lacks the power to assess legality/constitutionality of lower ranking laws against higher-ranking laws Appeal against MoHA decision to repeal *Perda* Administers the judiciary (*"satu atap"* reform)	Art. 24C of Constitution (45) Law on the Judicial Power (4/2004 and 48/2009); Law on the Supreme Court (5/2004 and 3/2009)
Administrative Courts	Rules of disputes relating administrative bodies on a national and sub-national level	Law on the Judicial Power (4/2004); Law on the Administrative Courts (9/2004)
Informal Justice System		
Ombudsman	Investigates complaints regarding the provision of public services and unlawful administrative practices	Presidential Decree 2000
MLHR ADR Committees	(Non-Litigant) harmonization of national laws involving national agencies	Permenkumham 32/2017

Table 6: Legal and Institutional Framework for Preparing, Reviewing, and Reforming Regulations on **Sub-National Level**

Executive/Administration: prepare legal drafts, enacts implementing regulations and implements policies and regulations; reviews regulations,		
Institution	**Regulatory Function**	**Legal basis**
Governor (Province)	Review of *PERDAs* representing MoHA	Law on Law-Making (11/2012) and Law on Local Autonomy (2014)

Regent (*Bupati*), Mayor	Initiates and approves legislative draft; formalizes *PERDA* enacted by *DPRD*.	Art. 18 of the Constitution (45) Art.136 (1) of Law 32/2004 (Art. 236 of Law 23/ 2014); Law 12/2011
Sector *Dinas* *BAPPEDA*	Prepares sectoral plans Prepares draft laws/regulation Prepares implementing regulations Implements the sectoral legal framework	Planning laws Authorizing administrative laws Respective procedures on sub-national lawmaking
Biro Hukum	Reviews of new draft regulations (ex-ante) Reviews of existing regulations (ex-post)	Respective procedures on sub-national lawmaking
One Stop Shops	Facilitates and coordinates the business licensing process on a sub-national level	Respective local regulations (Perdas)
Legislative: enact sub-national laws, oversees government, and enact the budget.		
Regional House of Representative (*DPRD*)/ respective commissions	Enacts sub-national laws (*Perdas*); initiates *PERDAS*	Law on Law-Making (11/2012) and Law on Local Autonomy (2014) Respective procedures on sub-national lawmaking

4.3. Donor Support

Development partners activities in the past targeted national level as well as sub-national level institutions promoting international best practices for regulatory reform such as Regulatory Impact Assessment, public participation, and One Stop Shops. Policy recommendations, as well as capacity building measures, date back as far as 2002. The following table provides an overview of relevant projects and respective outputs, in particular, training manuals, guidelines, formats, approaches, and best practice models. As there are still no official guidelines on how to conduct ex-ante and ex-post reviews of laws and regulations, or how to conduct public consultations, these outputs form an accessible part of institutional memory. Rather than inventing the wheel twice, the table provides an entry point for research.

Table 7: Development partners supporting regulatory reform

Donor/Year	Project Title/Objective	Output/Resource	Partner/Level
ADB (2002)	TA Promoting Deregulation & Competition	Develop RIA Manual Revise 3 National Laws Institutionalize RIA task force	National Level Ministry of Industry and Trade
ADB (2002)	TA SME Development	Strategy Conducive Business Environment for SME Policy Papers on RIA and OSS Simplification of business licenses	National Level Ministry of Industry and Trade/
ADB (2003-2004)	TA Business Development Services	Revision RIA manual Introduction RIA in four districts and review ca 8 PERDAS Introduction RIA on national level review business licensing system and SME Law	National and Sub-National Level Ministry for MSME District Governments
GIZ/ Swisscontact (2004-2012)	Regional Economic Development	Implementation of RIA on the regional level (*JATENG* and province); improvement OSS	Sub-National Level *Bappenas* District Governments
Swisscontact (2008-2010)	WISATA	Implementation of RIA in Flores	Sub-National Leve District Government
USAID/Asia Foundation (2004-2006)	SENADA	Implementation RIA in 20 districts	Sub-National Level District Governments
USAID (200)7	Local Governance Support Program	Legal Drafting Handbook for Local Regulations (*Perda*)	Sub-national Level 60 District Governments in 9 Provinces

Donor/Year	Project Title/Objective	Output/Resource	Partner/Level
European Union (2010)	AGSI	Introducing RIA in four districts Improve legal drafting skills on provincial level	Sub-National Level Provincial Government Aceh
Centre for International Legal Cooperation (2016-2017)	Capacity Building in Legal Processes and Legislative Drafting	Improve legal drafting skills	National Level
A collaboration of many organizations (2018)	The Indonesian-Netherland Rule of Law and Security Update	Topics such as progress towards SDG#16 in ensuring equal access to Justice, or towards better regulation	National level Ministry of Law and Human Rights
Hanns Seidel Stiftung (2018)	Supporting Democracy and Rule of Law	ADR handbook for the harmonization of regulations Study "20 years regulatory reform."	National Level Ministry of Law and Human Rights
IDLO (2018) Indonesian Center for Law and Policy Studies	Indonesia-Netherlands Rule of Law Fund of the Embassy of the Kingdom of the Netherlands	Study with data and recommendations on how to develop a particular task unit to handle regulatory reform in Indonesia	National Level Ministry of Law and Human Rights Bappenas

5. Key Issues: Assessing the Difference Between IS and SHOULD

Regulatory reform measures sharply increased over the last 20 years introducing new laws and respective institutions. However, these measures remain fragmented and uncoordinated lacking clear responsibilities, standardization, and operationalization. This piecemeal approach lacks a comprehensive strategy (sometimes referred to as "whole of government approach"). Against this background, the gap analysis assesses the difference between the current state of reform (IS) and the desired state (SHOULD), which includes the the following

five criteria: (i) complying with the rule of law, (ii) providing access to all laws and regulations, (iii) improving regulatory quality, (iv) strengthening review/harmonization functions, and (v) improving the implementation of regulations.

5.1. Mandate "*Negara Hukum*"

Gaps with regards to the rule of law: Dominant role of the executive authorized by broad framework laws/vague legal terms; weak role of DPR in the legislative process.

Rule of Law: Rule of is a broad legal term, which evokes different legal concepts, understandings, definitions, and even emotions. Without going too much into the "Thin" and "Thick" understanding of the rule of law, one common denominator remains: everyone, including government, is bound by law, and no one should be above the law. How to further qualify this core principle epends very much on a more formalistic/procedural or a more substantive/material view. The following sections offers a broad framework for comparison and without going too much into detail highlights the fact that Indonesia has come a long way from an autocratic regime to a state, which respects human rights, the separation of powers, democratic accountability, and decentralization.

Principles governing the rule of law: Art. 1 of the Constitution (45) states that Indonesia is a State based on the rule of law. In "Constitutionalism in South East Asia: Some Comparative Perspectives"[39], Joerg Menzel proposes a framework as well as criteria for comparing constitutions, including the rule of law. Assessment criteria are constitutional core principles, such as the separation of powers, the rule of law, fundamental human rights, democracy. These criteria determine the level of Constitutionalism in a given country. Constitutionalism requires a certain level of depth and substance, as well as a common understanding, what these core elements mean, and how to assess them concerning achievement/performance. A comparative view, as well as common understanding, helps to establish a baseline for constitutionalism, comparing different countries.

Four amendments introducing fundamental rule of law principles: The four amendments of the 45 Constitution between 1999-2004

39 Joerg Menzel, *Constitutionalism in South East Asia*, Volume 3, Cross-Cutting Issues, Eds. Claus Peter Hill, Joerg Menzel, 2008, Konrad-Adenauer- Stiftung, Singapore.

transformed a blueprint for authoritarian rule into a promise for liberal democracy. In its current state, Indonesia champions, among others:

- Fundamental human rights;
- Separations of powers with a strengthened/independent legislature (*DPR*) and judiciary including a newly established constitutional court.
- Democratic accountability through a multi-party system and free/fair elections, and a
- Decentralized state.[40]

A new legal and institutional framework operationalizes the before mentioned key features transforming Indonesia into a country based on the rule of law. The gap analysis identifies some key issues in the following sections.

5.1.1. Dominating Role of The Executive: Wide-Ranging Legislative Powers Through Broad Framework Laws

The executive still holds significant "legislative" powers. First, the majority of laws are still initiated and drafted by the executive and then submitted to the *DPR* for enactment. Second, statuary laws in Indonesia are broad framework laws, which lack basic operational detail. By default, these broad framework laws are designed to authorize the executive to issue implementing regulations to operationalize the details and specify technical details. Third, the role and function of numerous administrative regulations listed in Art. 8 of Law on Law-Making (12/2011) are still unclear with regards to their relationship to regulations listed in Art. 7 of the Law on Law Making and with regards to judicial review and control.

The Law on Law-Making (12/2011) does not stipulate the limits of "administrative law making": Boundaries for the legislative authority vested in the executive are sometimes difficult to draw. According to the Constitution, the *DPR* has primarily legislative authority. However, the legislature can also authorize the administration to issue implementing regulations (delegated legislation). However, a law that delegates most of the legislative response to the administration could violate the "separation of power" principle stated Constitution, which provides that legislative and executive functions should be separated. It is difficult to

40 *Ibid*., Denny Indrayana, *Indonesian Constitutional Reform 1999-2002*.

define what belongs to legislative powers and what belongs to executive powers in the legislative process. Within limits, the delegation of "legislative powers" does not conflict the separation of powers principle, as the responsible line ministries often have more technical knowledge than the lawmakers. Nonetheless, the legislative power of the executive should not be disproportionate and therefore limited by the authorizing law to contain potential misuse. Germany, for example, developed a rule that parliament must regulate all "essential matters.[41] As a consequence, the more essential a matter is for a citizen and the public, the more detailed the Parliament-made law should be. This rule effectively limits the administration from issuing regulations in essential areas, for example, areas in which fundamental human rights are concerned. One key question for regulatory quality and - thus constitutionality- is, "Does the law delegate too much power to the executive?" The law delegates too much power to the executive, if significant aspects are not regulated, if the scope of authorization is unclear, or if individual liberties and fundamental rights would be regulated by executive order.

Lack of coherency: Unclear role and relationship of administrative regulations within the hierarchy of norms: An indicator for the unclear and thus unfretted role of the executive is the plethora of different types of regulations such as (i) Presidential Decrees, (ii) Presidential Instructions, (ii) Ministerial Regulations, (iii) Ministerial Decrees, (iv) Ministerial Instructions, (v) Joint Ministerial Letters, (vi) Director General Regulations, (vii) Director General Decrees.[42] Art. 7 of the Law on Law Making defines some regulations and includes them in a hierarchical relationship, whereas Art 8 of the same Law excludes regulations from this hierarchical relationship, but still declares them legally binding. See above. The unclear relationship of regulations to each other, the lack of definitions, and the inability of the Law on Law on Law Making to structure and order this legal chaos contribute to the conflicting interpretation/application of laws and the call for legal "harmonization." It is also one the reason, why the legality

41 "The theory was developed by the German Constitutional Court defining the limits of administrative, legislative powers. To limit the scope of the executive in the legislative cycle, Germany, for example, developed, the "Theory of Importance," or Wesentlichkeitstheorie The theory states that crucial decisions should be reserved to Parliament. The "Theory of Importance" has three aspects. Firstly, it requires a legislative act that authorizes the executive. Secondly, the law has to specifically define the scope of authorization. Thirdly, Parliament (and not the executive) should regulate if individual liberties and fundamental rights have impinged.

42 Art 8 (1) of the Law on Law-Making (12/2011).

of regulations cannot be fully reviewed. It appears that the Supreme Court only reviews the legality of regulations included in the hierarchy of norms, as their position can be clearly defined in relation to each other as being either below or above.[43]

5.1.2. Weak *DPR*: Unproductive, Inexperienced, and Corrupt

Under Sukarno and Suharto, the legislature was "guided," i.e., powerless. The limited role of the Peoples House of Representatives (*DPR*) was possible because the Constitution (45) granted only a few powers and little rights. The *DPR* "rubberstamped" the broad framework-laws floored by the executive. These framework laws, in turn, authorized the executive to rule by executive orders.

Under the amended Constitution, the *DPR* has become the most powerful institution constitutionally. However, it does not fully utilize its new constitutional role. The primary function of *DPR* is to initiate and enact legislation, approve the budget, and provide oversight of the President and the Cabinet.

Even with increased constitutional powers, the *DPR* has been considered to neglect its duties of legislation and be negatively affected by institutional and political challenges. This reflects, in part, greater attention to the budget and other oversight functions. Systemic problems range from unproductivity, in-experience, and graft.

- Unproductivity: In the 2015-2019 legislative plan (Prolegas), the DPR had a target of approving 52 bills, but approved only three statutes in 2015[44]. The OECD report on the Review of Regulatory Reform (2012) included a Table on page 26 indicating that the DPR enacted around 40% of the planned laws (between 2004 and 2011).
- Inexperience: Well over half the members of parliament after 2014 were new to the job, thus new to legislative processes, legal drafting, and review.
- Graft: Polls routinely find that the national parliament is considered the country's most corrupt institution. A graft-busting commission has

43 Art 31 of the Law on the Supreme Court (5/2004) stating "Pasal 31 that the "Mahkamah Agung mempunyai wewenang menguji peraturan perundang-undangan di bawah undang-undang terhadap undang-undang."

44 Abi Sarwanto, *"Setahun Bekerja DPR Hanya Hasilkan Tiga Undang-Undang"* CNN Indonesia (1 October 2015) Lindsey, Tim; Butt, Simon. Indonesian Law (Kindle Locations 5006-5007). OUP Oxford. Kindle Edition.

found grounds to arrest MPs from all ten of the parties represented the E-KTP scandal.[45]

5.2. Access to Legal Information

Gaps with regards to access to legal information: Limited access to regulations; no centralized, consolidated, updated legal database.

Accessibility to the law is a key aspect of the rule of law principle.[46] Access to legal information is essential for businesses and law-abiding citizens. They have to know what is allowed and what is prohibited. Access to legal information determines -at best- business and investment decisions, at worse whether a citizen is thrown into jail. Legal certainty and predictability depend on the access to a complete and updated compilation of all laws and regulation valid in a country. Due to the importance of accessing information, most countries included the obligation to publish laws and regulation in their Constitutions.

Constitutional and legal requirements: In theory, the Constitution, as well as the Law on Law-Making (11/2012), require that every regulation should be published and be accessible for the people.[47] The publication, of regulations, i.e., access to information, is part of the promulgation process and a fundamental right of a citizen. Laws, government regulations and presidential regulations must be published in the Gazette of the Republic of Indonesia (*Lembaran Negara Republik Indonesia*).[48] The explanatory note accompanying a law and regulation must be published as an annex to the Gazette of the Republic of Indonesia. President Regulation No. 1/2007 on the Approval, Promulgation, and Distribution of Laws and Regulations also requires that government regulations in lieu of law, government regulations and presidential regulations must be published in the Gazette of the Republic of Indonesia. Dissemination is intended to ensure that the general public understands and comprehends the contents of the laws and regulations to ensure

45 Asia Times, Many *More to fall in Indonesia E-KTP scam, http://www.atimes.com/article/many-more-to-fall-in-indonesias-e-ktp-scam/*.

46 There are different conceptions of the rule of law including its elements. Key writers, such as Lon Fuller, Joseph Raz, and Tom Bingham, refer to the accessibility of law as one key element.

47 Art 45 of the Law on Law-making (10/2004) in conjunction with Art 101 of the Law on Law-making (12/2011), and Art. 22 A of the Constitution (1945).

48 *Ibid*., Law on Law-making (12/2011).

successful implementation of the laws/regulations. The general public is defined in broad terms to include public institutions, ministries, and non-department organisations, sub-national government and other stakeholders, as well as non-government actors.

Publication of regulations: Law No. 12/2011 makes publication of the law and regulations in the Gazette of the Republic of Indonesia the responsibility of the Minister of Law and Human Rights. Previously, the publication was the responsibility of the respective minister. Dissemination of law is also a joint responsibility of the House of Representatives and President of the Republic. The Regional Representative Council may be involved for laws related to sub-national autonomy, relations between the national and sub-national governments, the formulation, expansion or incorporation of sub-national governments, the management of natural and other economic resources and inter-governmental fiscal relations. Dissemination is also achieved by the State Secretariat and Cabinet Secretariat distributing an authorised copy to the government institutions, ministries, non-department organisations, sub-national governments, and related actors. Ministers are also required to provide a copy of the law and regulation to the general public; other stakeholders may request a copy of the law/regulation.

Dissemination of regulations: Dissemination must happen through print and electronic media, among other methods.[49] The State Secretariat, Cabinet Secretariat, secretariats of public institutions and sub-national secretariats are required to maintain an internet-based law/regulation information system. Other methods for dissemination included in the law include workshops, seminars, expert meetings, media conferences, among others. A plethora of institutions publish laws and regulations, such as Ministry of Law and Human Rights, Directorate of Law and Regulation, the State Secretariat, House of Representatives (Secretariat General), National Audit Board (Legal Bureau), Ministry of Trade (Legal Bureau), Ministry of Finance (Legal Bureau), and the Constitutional Court. These databases[50] are either sector related, or only cover specific time frames or administrative levels.

In addition to the above-mentioned legal requirements to publish and disseminate regulation, Indonesia's Law on Freedom of Information

49 *Ibid*., OECD report (2012), p. 30.
50 *Ibid*., OECD, Table 7, p. 31.

(14/2008) guarantees access for citizens accessing information held by public bodies including regulations.

Limited access to regulations: No centralized, consolidated, updated legal database: Despite, two laws, a presidential regulation, and implementing regulations and the benefits of IT solutions, such as database software, scanners, and Optical Character Recognitions, there is still no centralized, consolidated, updated, legal database, repository, or printed collection which compiles all laws and regulations, which are valid in Indonesia. Finding prevailing laws and regulations in Indonesia is not an easy task because there is no single public service allowing access to a complete compilation of laws and regulations. Lawyers usually obtain legal texts on an as needed basis, which can be both very times consuming and expensive because it requires paying employees to consult the State Gazette or issuing department or agency until they find the right document. Consequently, law firms have established their legal databases for their purposes. A new online service, *hukum online*[51], provides access to some (not all) regulations, as well as legal briefs and updates.

International approaches: Most countries compiled all private and public laws publicly and had updated publications produced by the private publishing company. Dalloz, for example, is a private company in France, which compiles administrative laws and regulations. Such compilations also exist in Germany (for Federal Public Law the most established one is the Sartorius, produced by private publisher Beck; or the Schönfelder for Private Law). Beyond, compiling laws and regulations and publish them, governments can choose a more systematic approach consolidating and/or codifying existing law. Good law initiatives focus more and more on the target audience and seek solutions, (i) how law can appear to the online user, (ii) what can be done to improve navigation, and (iii) how to draft laws, which are machine readable/searchable, all geared to improve the accessibility of laws and regulations.

5.3. Regulatory Quality

Indonesia has a vast regulatory inventory, both national and local regulation from the colonial past until the present. There are many regulatory authorities, and different authorities regulate the same matter in a different, and sometimes, in a multiplicative and conflicting way. Many

51 *https://www.hukumonline.com*

regulations lack quality as they are often vague, unclear in objectives, or confer unbridled discretion on officials. They often provided a basis for opportunistic, discriminatory, or abusive enforcement. Therefore, achieving regulatory quality has been at the heart of regulatory reform over the last 20 years.

Regulations should state "Who" has to (or not) do), "What," "When" and outline the consequence of this legal action. This should be clearly stated, with no ambiguity and as little room for discretion and interpretation - all in total compliance with the existing national and international legal framework.

This Chapter identifies key issues relevant to regulatory reform. A starting point for the assessment is the understanding that regulations should be effectively addressing and solving problems within society. A way gaining an understanding with regards to the level of effectiveness is to ask, whether citizens and government alike comply with the rules in a given jurisdiction. Is Indonesia a law-abiding country or not? The answer gives you a general direction, whether regulations are effective or not.

There are some reasons, why regulations are ineffective. For example, regulations can be drafted in a way which is unclear, so that citizens cannot easily understand them. If they can't understand them, they can't follow them. Legislation can be imprecise so that it doesn't regulate the area which it is meant to regulate, or it can be ambiguous or conflict with itself. This also makes it difficult to follow or predict. Ambiguous terms provide the administration with too much discretion and opportunities for corruption. Alternatively, the means used to achieve the regulatory goal may be disproportionate, for example, the legislative solution may be prohibitively expensive.

5.3.1. National Level

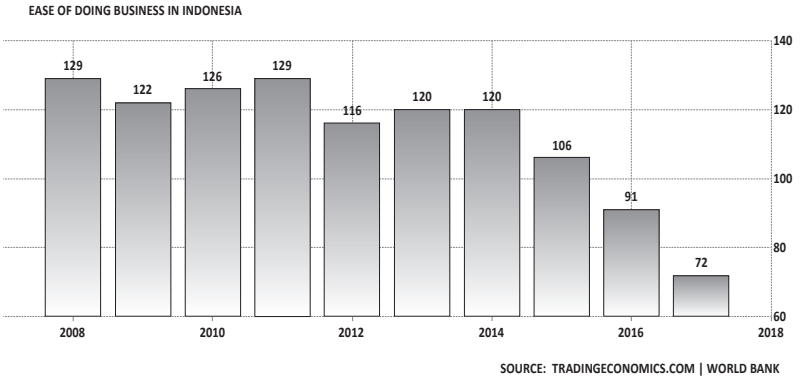
Gaps with regards to regulatory quality on national level: Focus on quantity rather than quality; limited understanding/operationalization of quality criteria; imperfect law-making: wide-ranging framework laws authorizing the executive as well vague and often conflicting legal terms; limited synchronization/ standardization between quality criteria in laws and corresponding tools such as RIA; lack of tools assessing legality and the violation of human rights; Imperfect interaction with

stakeholders; institutional fragmentation/unclear responsibilities thus lack of standardization and clear guidance.

On a national level, a host of regulatory reform measures aiming at improving regulatory quality have been introduced, such regulatory reform policies include, the Law on Law-Making (12/2011) complemented by implementing regulations, capacity building measures by various government agencies and development partners, the publication of various RIA handbooks training and deregulation packages, for details see Chapter 2, Overview Legal and Institutional Framework for Regulatory Reform. Regulatory reform on national level resulted in impressive gains in the WB ranking on the Ease of Doing Business.[52] However, the need to harmonize conflicting regulations as well as the notoriety of Indonesian laws lacking precision as well as their extensive use of vague terms indicates that regulatory quality is still low.

The impressive improvement was reforming the regulatory environment for the ease of doing business: Indonesia made impressive gains in the WB ranking on the Ease of Doing Business, moving up from rank 129 in 2008 to rank 72 in 2017. See Figure 3.

Figure 3: Indonesia's Ease of Doing Business ranking



Focus on quantity rather than quality: Indices, policies, such as Master Plans, Medium Terms Development Plans, Investment Packages, primarily focus on reducing the number of laws, regulations, and procedures.

52 *Ibid*., WB Doing Business Report (2018).

The 2010-2025 Master Plan, for example, emphasizes ac (i) accelerating the completion of implementation regulations, (ii) eliminating overlap between existing regulations between national and sub-national levels as well as between sectors and institutions, (iii) amending and establishing new regulations to support implementation of the Master Plan; and (iii) accelerating and simplifying the process of issuing licenses and permits.

Attention to regulatory reform national medium-term development plans (see Table 2) has been linked to improving the investment and business climate. Under the most recent plan this has included licensing simplification through the use of electronic information and licensing investment services in one-stop-shops on the national and sub-national level, and the reduction of costs to start a business, such as company registration and trading licenses.

Not less, but "smart" regulations: Besides the inherent weakness of plans in general, they focus almost entirely on quantitative rather than qualitative dimensions, emphasizing the achievement of output targets rather than outcomes and the effects on society. A reduced number of procedures, laws, and regulations as such is not a quality criterion in itself. At best, it is a mean to an end, for example, to reduce the burden for business, to increase FDI, to change human behavior; at worst it is cosmetics. To achieve the regulatory environment that enables economic growth and competitiveness or ultimately changing harmful human behavior, the issue is not to have less or no regulations but better regulations. The Smart Regulation Movement[53] aims at producing better regulatory results at lower costs by, for instance, not implementing those regulations that impose unreasonable burdens on businesses.

Key characteristics of a "smart" regulation are for example.:

- Smart regulations effectively protect and enable their constituencies;
- Smart regulation reduces procedures and cost to the highest extent possible;
- Smart regulation keeps up with development in science, technology, and global markets;
- Smart regulation is governed jointly with the private sector for the interest of the public;

53 Smart Regulations are promoted by among others the EU Commission and OECD. For an overview of different approaches, see p. 15.

So far, no indicators for assessing smart regulations were developed.

Quality criteria outlined in the Law on Law Making are not standardized and fully operationalized: Article 5 of the Law on Law-Making (12/2011) states that making of regulations should be done based on the principles of good lawmaking, including:

- Clear purpose;
- Made by proper agency or official;
- Match between the types, hierarchy, and the contents;
- Can be implemented;
- Versatility and result;
- Clear formulation; and
- Openness.

These terms are not yet standardized and fully operational. Besides, criteria listed in the Law on Law Making does not match the criteria required, for example, in the Academic Study (see below), or the handbooks developed by other government agencies (see below). This limits the potential to draw from international experience as quality criteria for regulations, such as efficacy, legality, effectiveness and efficiency, clarity, and public participation are already well developed and operationalized.

Limited synchronization with other instruments such as the academic paper or implicit use of RIA: The Academic Study, which is required for statures, government regulations, and Perdas, is similar to a Regulatory Impact Assessment Statement, and should summarize the process and the analysis justifying why a regulation is needed The Law on Law-Making (12/2011) provides a template and includes the following requirements:[54]

- Outlining the **reasons** why an in-depth and comprehensive theoretical study needs to be prepared as a reference document to the formulation of proposed bill/draft sub-national regulation;
- **Identifying the challenge**(s) faced by the state and society; the reason(s) why the government has a role in resolving the challenge(s); why the challenge(s) should be resolved by law/sub-national regulation;
- **Defining the philosophical, sociological and juridical basis** to formulate the proposed bill/draft sub-national regulation; and the **proposed goal(s), scope** and direction of the proposed bill/draft sub-

54 Annex I of Law No. 12/2011 on the Formulation of Laws and Regulations outlines a standardized structure for the academic study.

national regulation; and

- Describing the **methodology** for the formulation of academic study, i.e., **normative** (examination data, interviews, discussions, **public hearings**) and **empirical** surveys.
- Examining the theoretical and principles, practical **implementation**, as well as social, political and economic implications, including **the impact** on public finances, of the proposed bill and sub-national regulation.
- **Reviewing existing laws and regulations**, possible linkages between the proposed law or sub-national government regulation with existing laws and regulations, including those revoked/or amended, as a basis for discussing vertical and horizontal harmonization of any new regulations.
- The **philosophical basis** is to give consideration of and reasons illustrating that the proposed bill/draft regulation considers livelihood, consciousness and legal ideals, including the Indonesian nation philosophy of *Pancasila* and the Preamble to the 1945 Constitution;
- The **sociological basis** is to give consideration of and reasons illustrating that the proposed bill/draft regulation meets the needs of the general public, based on empirical evidence concerning real challenges and needs of the general public and state;
- The **juridical basis** is to give consideration of and reasons illustrating that the proposed bill/draft regulation to address the challenge or fill a legal void, gives legal certainty and provide social justice. It also relates to the need is to use new laws/regulations where existing laws/regulations are outdated, inconsistent or overlapping.
- **Defining related terminology** and concepts, materials that should be regulated, possible sanctions to be included within the proposed law or sub-national regulation; and transition clause based on the results of the previous chapters.
- Including **recommendations** related to a need to include the subject of the academic study in law or sub-national regulation, or secondary legislation; the priority of the proposed law or sub-national regulation in the *Prolegnas/Prolegda*; and other remarks to support the improvement of future academic studies.

The process and content as outlined in the Academic Study are more precise than the quality criteria set out in Art. 5 of the Law on Law-Making. However, even the requirements included in the Academic Paper are insufficient to provide clear guidance for legislators, how to perform the required analytical process. If drafted properly, the Academic Study

would be an excellent document to assess and to ensure regulatory quality.

In practice, academic studies are rarely developed in detail as required by law. The format is less used for analytical guidance, but more as requirements being "ticked off" without giving them much thought.[55]

Academic studies are not systematically made publicly available and thus cannot be scrutinized from independent sources. They are not well integrated into the legislative cycle. Finally, no standardized handbooks are explaining the process of how to draft an academic a paper. This is parts because there is no centralized agency responsible for regulatory quality and that capacity building measures are institutionally fragmented. See also the next paragraph.

Tools for creating "smart" regulations not yet standardized and institutionally fragmented: The responsibilities of different ministries overlap, as well as their methodologies reviewing the quality of regulation. The Law on Law-Making (12/2011) authorizes the Ministry for Law and Human Rights (*Kemenkumham*) to play a critical role in the planning, coordinating, harmonizing, drafting, and reviewing regulation. The *Kemenkumham*/Directorate General on Legislation is responsible for developing policies, providing technical guidance and evaluating the formulation of laws and regulations on the national level.

Agency for National Law Development (BPHN) was established under the Ministry for Law and Human Rights, to promote legal research, legal studies, and support. The Agency, for example, developed a Handbook on the Evaluation and Analysis of Regulation (*Pedoman Analisis dan Evaluasi Hukum*) and conducted training seminars and workshops.

BAPPENAS/Directorate for the Analysis of Laws and Regulation developed two handbooks to support the analysis of regulations, (i) the Regulation Framework Analysis Model for proposed bills and sub-national regulations, and (ii) the Law and Regulation Analysis Model for reviewing and simplifying existing laws and regulations.

All these institutions have overlapping responsibilities, different approaches, and handbooks on improving regulatory quality.

55 legal expert meeting on December 3, 2018.

Regulatory Impact Assessment as a method for regulatory quality is reflected in the Law on Law Making and handbooks for analysing regulations: Even though a recent study[56] reported that RIA is in recline, the RIA concept is inherently reflected in the requirement to prepare an Academic Study before the drafting of regulation (see also Art 5 of the Law on Law-Making) as well as in the handbooks published by Bappenas and BPHN. However, human resources and capacity are limited to apply these tools throughout the legal drafting cycle as well as tackling the thousands of regulations being issued every year as well as those who are still in the review pipeline.

Imperfect interaction with stakeholders: Even though stakeholder participation is an integral part of RIA as well as the Law on Law Making, the interaction with stakeholders is considered to be imperfect.[57] As with many things, stakeholder participation is easy to claim. However, it's difficult actually to obtain meaningful input from stakeholder consultations. One overlooked requirement is that legislators have to know more than stakeholders with regards the relevant issues related to the problems being addressed by the regulations, the statistical facts, the costs and benefits, the legality. They have to structure and prepare the meetings including meaningful questions guiding the consultations. However, considering the overall low capacity of legislative drafters, this task is difficult to perform. As a result, stakeholder participation becomes a tick-box formality, where uninformed citizens meet uninformed legislative drafters. As with many tools and methodologies, there are numerous handbooks[58] in Indonesia, which provide toolboxes on how to conduct stakeholder meetings. However, the problem is not so much related to the process, but with o regards to the capacity to understand and structure the content.

Vague legal terms as signs of imperfect law-making: Even though the quality criteria for good regulation may vary, there are immediate signs of imperfect law-making. To know for citizens what to do (or not to do), the law must make sense; it must be clear, and predictable. Vague legal terms defy all of the above. A key factor in determining rights and obligations

56 Teguh Kurniawanamuh, *Regulatory impact assessment and its challenges: An empirical analysis from Indonesia* (2017) at *https://www.sciencedirect.com/science/article/pii/S2452315117306197*

57 *Ibid*., OECD (2012) p.28.

58 *Ibid*., See Table 5.

should be what the law says, not the view of an official. If officials could decide according to their personal preference, then this is not a proper rule of law system. Vague legal terms do this. They are open to interpretation and administrative discretion. Terms like "morals," "national security," are entry points for unfretted administrative discretion. Their terms and (more importantly limits) need to be clearly defined. Vague legal terms are found in laws on defamation, anti-pornography, blasphemy. The Anti-Pornography Law allows officials to prosecute people who perform "actions deemed indecent." The responsible minister is then authorized, to regulate "what is deemed necessary." However, legislation shouldn't authorize a minister to do whatever they think fit. It should authorize a minister to make a particular thing set out in a closed, clearly defined list of authorized things, to achieve a particular purpose. As mentioned above, the scope of authorization and essential regulatory details should be set out by the legislature, especially when fundamental human rights are concerned.

5.3.2. Sub-National Level

Gaps with regards to regulatory quality of sub-national level: Early regulatory excesses raising local taxes and user charges have been curbed; Problems remain with the quality and effectiveness of sub-national regulation; Limited effect and understanding of RIA on the sub-national level; one size fits all approach.

Indonesian governmental decentralization exposes the size and scope of the regulatory problem. In granting greater autonomy to local governments, and transferring former central government functions, including legislative functions to them, decentralization has increased the authority of local governments to enact regulations.

Radical decentralization and transfer of legislative powers to sub-national level: To avoid the "balkanization" of Indonesia after the downfall of Suharto, his successor, President Habibie, introduced far-reaching decentralization measures transferring not only administrative but also legislative authorities to ca 300 districts/municipalities at that time, so they could effectively manage their affairs (often dubbed as "big bang" decentralization). Law No. 22/1999 on Sub-national Government – which became effective in 2001 – gave districts and municipalities broad, but undefined regulatory authorities. One area, which authorized sub-national

legislatures was to issue licenses corresponding user charges for issuing licenses and local taxes primarily to raise their revenues. This resulted in a rapid increase in local business regulations. Within 5 years some districts increased the number of Perdas charging taxes and user charges by 1000 percent.[59] By 2006, the sub-national government sent ca. 12.000 to the national level for legal review deeming them unlawful.[60]

The proliferation of poorly drafted sub-national regulations hampering the business environment: At that time, Indonesia's regulatory environment regarding the cost of doing business, corruption, economic freedom, and legal certainty, contributed to what was considered to be the worst business environments in the world. Consequently, Indonesia faced a constant net outflow of Foreign Direct Investment (*FDI*); capital desperately needed to rebuild the economy. Local regulations (*Perdas*) were a significant part of this unconducive business environment and therefore of great concern to the business community and international financial institutions. In addition to creating an unconducive business environment, many new local laws have been criticized for being unconstitutional, misdirected or unclear, violating citizens' rights. When assessing the success of administrative review of regulations, we primarily look at the proliferation of sub-national regulations (*Perdas*) in the aftermath of a major decentralization campaign in the year 1999 and their negative impact on the business environment and central government's revenues.

Early regulatory excesses raising local taxes and user charges have been curbed: Since the beginning of decentralization, regulatory activity of regional parliaments and local administrations has become a focus of business concern. Because Central Government did not fully fund local governments, many of the new local regulations have imposed taxes and fees of various kinds to raise own revenues. A revised legal and institutional framework, quality assessment, and ex-ante assessment curbed the early excesses to regulate local taxes and user charges. Important legislation included the Law on Local Government (23/2014), the Law on Formulation of Laws and respective implementing regulations such as Presidential Regulation No. 87 of 2014, and the Law on Sub-National Taxes and User Charges (28/2009), the Law on Local Government (23/2014), the Law on Formulation of Laws, and respective implementing regulations such as

59 GTZ, RED, Business Climate Survey Surakarta, Boyolali, Sukoharjo, Klaten, 2004.

60 Butt, Simon; *Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia*, Sidney Law Review, Sidney, 2010, p. 1.

Presidential Regulation No. 87 of 2014, and Law on Sub-National Taxes and User Charges (28/2009). The Law 28/2009 on Regional Taxes and User Charges needs to be better enforced so that local governments are prevented from levying user charges that substantially increase the transaction costs of doing business in the regions, both regarding time and money. Lewis shows that such user fees and charges constitute a substantial impediment to positive regional development outcomes.[61]

Problems remain with the quality and effectiveness of sub-national regulations: Despite the formal improvement of reviewing *Perdas*, problems remain with the quality and effectiveness of sub-national regulation. Due to the lack of legal drafting skills, laws are unclear as to be unworkable; others highlight the propensity of local governments to pass laws about matters that do not require regulation at all and might be better addressed with non-regulatory measures. Many sub-national regulations exceed the law-making powers of those who create them or contradict other local or national laws. In Indonesia decentralization has happened so quickly that, even after a decade and a half, in addition to the imprecise division of responsibilities across levels of government, there remain many jurisdictional regulatory overlaps.[62]

Thousands of *Perdas* have been annulled, and thousands of *Perdas* are considered too problematic: As per 2018, *Bappenas* assumes that 3000 Perdas are considered problematic and that 50% need to be repealed.[63] In mid-2016 the government announced that since it had taken office in 2014, it had overturned 3143 *Perdas* that were inconsistent with higher laws and national priorities.[64]

"A 2011 survey of approximately 1500 sub-national regulations – most related with user charges, including building permits (*IMB*), trading licenses (*SIUP*), company registration (*TDP*) and SITU/HO from nearly 240 regencies/

61 Lewis, Blane, *Twelve Years of Fiscal Decentralization: a Balance Sheet in H. Hill* (ed.), Regional dynamics in Decentralized Indonesia, Institute for South East Asian Studies, Singapore, p. 133-135.

62 Pisani, Elizabeth, *Indonesia in Pieces: The Downside of Decentralization*; Foreign Affairs, July/ August 2015.

63 Putra Dhahna, Putra, *PPP Reformasi Regulasi dan Politik Hukum dalam Pembentukan Peraturan Perundang-Undangan di Indonesia, slide 5 (according to the estimation of Bappenas)*, 2018.

64 Jakarta Post, 2016/06/13, Government annuls 3.143 bylaws (= Perda); OECD, Economic Survey of Indonesia, 2016, p. 87.

cities found many legal, substantive and principles issues. Approximately 80% of the surveyed regulations had more than one problem of legality: either not referring to an up-to-date law or higher-order regulation (over 70% of reviewed regulations), lacking complete reference to law or higher-order regulation (35%) and referring to a relevant law or higher-order regulation (almost 10%). Approximately 40% of the surveyed regulations had a problem with its substance, including lack of clarity of the procedures, processing time and cost (21%), lack of clarity of right and obligation to make payment (12%), lack of clarity of object (9%) and lack of clarity of the subject (8%). Approximately 23% of the surveyed regulations had a problem of principle, including a negative economic impact (17%) or lack of authority of sub-national government (5%)".[65]

A SENADA Indonesia regulatory study confirmed the findings of the previous and other studies that Indonesia's licensing and permitting procedures were complex, overlapping, redundant, and imposed high compliance costs.[66]

The curse of unlawful *Perdas*: The overall ineffectiveness of policy measures aimed at reducing unlawful regulations has many explanations; First, sub-national governments are often not aware of changes to higher-order regulations. For limited access to regulations, see above. Second, the national government is unable to review all sub-national regulations received merely because of the overwhelming number of sub-national regulations it receives. Third, not all sub-national regulations are sent to the national government for review, mainly as, before 2009, no sanctions existed for sub-national governments. In the first few years of decentralization, it was estimated that only 30–40% of sub-national regulations were sent to the national government.[67] Fourth, sub-national governments do not always take regulations of the book that are invalidated by the national government.[68]

Limited effect of RIA on sub-national level: Regulatory Impact Assessment has been mostly tested and introduced on the sub-national level. With the help of development partners, the methodology was adapted to

65 KPPOD/The Asia Foundation/AusAid, A Survey of Business Operators in 245 Districts and Municipalities, 2011.

66 USAID/SENADA, Project Report Business Enabling Environment, Measure Plus, Indonesia, 2011.

67 *Ibid*., Lewis (2003).

68 *Ibid*., Butt (2010).

the Indonesian context. Many districts and provinces introduced and implemented RIA (with limited success). *Bappenas* assumed responsibility for developing ex-ante and ex post regulatory impact assessment tools[69] for sub-national governments as part of its strategic role for the monitoring and evaluation of the implementation of national programs and policies by ministries and government agencies. *Bappenas* launched the 'regulatory simplification' program in 2015, to improve the quality, efficiency, and effectiveness of the regulations in the country. The role of *Bappenas* and the impact on the regulatory reform process is not entirely clear.[70] It seems that this attempt just adds to the already fragmented institutional framework trying to ensure regulatory quality.

The introduction of RIA on the sub-national level was largely donor-driven, for example by the ADB, the Asia Foundation, GIZ, Swisscontact, SENADA, and EU among others. They took on the cause of regulatory review in Indonesia and had conducted numerous training in regulatory impact analysis for local governments. For example, Pare Pare, Solak, Gorontalo, and Blitar are among the localities that introduced regulatory review. Yogyakarta also engages in some regulatory review, and it has been reported that the Yogyakarta provincial government, as an intermediary between the national government and local governments, may use RIAs to assess local Perdas. While institutionalization efforts have so far been less successful in other localities, there are encouraging signs that other local governments have noticed what their — competitor governments have done with RIA and are seeking assistance to develop their regulatory assessment systems.

The GIZ/RED project in Central Java has also conducted many regulatory impact analyses in Solo and six local districts. In each area, there was a local RIA committee that worked on reviewing regulations, and there was a plan to develop a regional RIA committee. Swisscontact, in conjunction with its Indonesian SME project and RED, has also introduced RIA in central Java, particularly in Sragen and Yogyakarta, and has reported positive impacts: RIA institutionalization through inclusion in local government budgets;

69 The Bappenas/Directorate for the Analysis of Laws and Regulation has developed with the support of GIZ, the Regulation Framework Analysis Model (*Model Analisa Kerangka Regulasi or Makara*) for proposed bills and sub-national regulations and the Law and Regulation Analysis Model (*Model Analisa Peraturan Perundang-undangan* or Mapp) for reviewing and simplifying existing laws and regulations.

70 *Ibid*., Teguh Kurniawanamuh (2017).

more significant interaction between governments and stakeholders; increased public-private dialogue; the provision of technical RIA assistance by RIA-enabled governments to other local governments; and a request by other local governments that Swisscontact provided them with similar assistance.

Even these interventions appeared to be successful pilot projects; there was no corresponding initiative to promote a national strategy rolling out RIA to other provinces/districts. The above-mentioned empirical analysis on RIA in Indonesia[71] concluded that RIA is in decline facing common problems with regards to lack of commitment, socialization, and allocated budget and limited capacity of local authorities.

Understanding factors relevant for the poor performance of RIA: There are many reasons why RIA was performing not so well. Parker, and Kirkpatrick named lacking institutional endowment, level of expertise, availability of information, elite capture as primary reasons and propose to develop appropriate cost and benefit analysis, extend consultation procedures.[72]

Indonesia has not formally adopted or institutionalized RIA and therefore has not integrated the RIA framework in its lawmaking and review processes. Donor support was mostly supplied and not demand driven, which proved to be unsustainable. The principal constraint was a lack of resources, i.e., an ample supply of personnel capable of conducting regulatory impact assessments. As the methodology was new to Indonesia, there are relatively few people that understood RIA and even fewer that can carry it through.

RIA is not an easy a methodology and needs to be adapted to context and need. Kirkpatrick already warned in 2007 that the generic framework, which is common to most RIA procedures, should not be interpreted as advocating a 'one-size-fits-all" approach to regulatory impact assessment and stresses the fact that the RIA framework needs to be adapted to country-specific requirements.[73]

71 Teguh Kurniawanamuh, *Regulatory impact assessment, and its challenges: An empirical analysis from Indonesia* at *https://www.sciencedirect.com/science/article/pii/S2452315117306197*.

72 Parker and Kirkpatrick, *Regulatory impact assessment in developing and transition economies: A survey of current practice and recommendations for further development provides a good overview and reference*, 2007.

73 Ibid., Parler and Kirkpatrick (2007).

In Indonesia, RIA was introduced to review existing regulations. However, the methodology - originally designed to assess the impact of new regulations- was not sufficiently adapted to evaluate and identify problems of existing regulations, such as appropriateness, effectiveness, proportionality, and legality.

30 Regulatory Impact Assessment Statements, which were reviewed, lacked the understanding of defining the problem correctly because the RIA methodology was not adapted to the review of existing regulations analyzing the underlying problems at the beginning of the legislative cycle rather than at the end.[74] The statements lacked the element of legality assessment. As part of the problem analysis, this was crucial as Perdas had to comply with higher ranking laws. There was no understanding of how to assess the problem of the legality of a Perda vis-à-vis the authorizing norm or higher-ranking norms; including the limitation of lawmaking through basic administrative principles such as proportionality or fundamental human rights.

Between 2000-2010, RIA was considered new and attractive promising a quick fix through Cost/Benefit analysis. When administrators found out that RIA was not a quick fix, they quickly lost interest.

5.4. Regulatory Evaluation: Review and Harmonization

Regulatory review, i.e., assessing the validity or quality of a regulation, is another essential aspect of regulatory reform. Mechanisms in the formal and informal justice system have been developed to review and harmonize regulations.

Regulatory review in the formal justice system can be further sub-divided in administrative review and judicial review:

- Administrative review includes institutions in the executive, which are responsible for reviewing sub-national regulations against national legislation and/or deregulation packages.
- Judicial review includes institutions, such as the Constitutional Court and the Administrative Court, which are responsible for reviewing statuary legislation and/or reviewing subsidiary legislation, such as sub-national legislation (*Perdas*).

74 GTZ/RED internal study on reviewing and assessing Regulatory Impact Assessment Statements prepared by RIA working groups, 2009.

Alternatively, the informal justice system provides review and ultimately harmonization mechanisms, when conflicting laws impede either the work between government agencies or the rights of citizens. These conflicts are often solved through alternative dispute resolutions (ADR) or an Ombudsman.

5.4.1. Administrative Review of Regulational

Administrative review of regulations as part of regulatory reform became relevant after the massive increase of sub-national legislation in the aftermath of decentralization starting in 1999. Besides, national policies and deregulation packages focused on improving the ease of doing business (measured by the World Banks "Doing Business" reports) by reviewing and streamlining national legislation related to the WB indicators such as starting a business, and registering property.

5.4.1.1. Review Sub-National Level Regulations (*Perdas*)

Gaps with regards to the review of sub-national level regulations: Ineffectiveness of revised review mechanism managing the massive sub-national regulations; less focus on regulatory quality than on revenues; unconstitutionality of review mechanism.

Indonesia introduced far-reaching reforms of its decentralization and law-making framework responding to the explosion of unlawful *Perdas*: Responding the lack of clear administrative rulemaking on the sub-national level, national government tried to regain legislative authority and increased additional review/approval mechanisms. New laws and procedures were introduced to strengthen bureaucratic mechanisms by which the national government can exercise control over local law-making, allowing it to review and ultimately declare local laws invalid contravening national law or the 'public interest.'

For most types of *Perdas*, Central Government represented by MoHA reviews *Perdas* after the local lawmaker has enacted the *Perda* (ex-post review).[75] *Perdas* related to local taxes, and user charges need to be approved before enactment involving the Ministry of Finance as well as MoHA (ex-ante review).[76]

75 Art. 242 and 249 of the Law on Local Government (2014); Art 80 and Art. 78 of the Law on Law-making (11/2012)

76 Art. 245 of the Law on Local Government (2014).

The Law on Regional Autonomy 32/2004 sustained and amended by Law 23/2014 on Regional Government replaced the 1999 decentralization package in an attempt of the central government to clarify the roles and responsibilities between national and sub-national level and regain more control over sub-national powers, including law-making powers. The Laws on Regional Autonomy (32/2004 and 23/2014) achieved this by making provincial governors central government representatives responsible to the President charged, among othersm with reviewing *Perdas*. Details of the administrative review mechanism are now regulated in Art 151 of the Law on Regional Government (23/2014) and respective implementing regulations, introducing administrative sanctions in Art. 252.

The Law on Law-Making (10/2004) sustained/amended by the Law on Law-Making (12/2011) introduced quality criteria as well as a revised hierarchy of norms, which ultimately provided a normative framework reviewing *Perdas* as well as striking down *Perdas* if they conflict with higher ranking (national) norms.

Additional measures were taken to strengthen ex-ante review of *Perdas* related to local taxes and user charges: The Law on Sub-national Taxes and Charges (Law No. 28/2009) was enacted to clarify further and limit the discretion of sub-national governments to introduce new taxes and charges. This law amended by Law 19/1997 on the same subject addressing the critical concerns of (i) having a negative impact on the local investment climate, (ii) overlapping with national government taxes and charges, (iii) hindering internal trade of goods and services between sub-national governments, and (iv) ineffective monitoring of sub-national regulations. Furthermore, the law introduced a new "closed list system" for those sub-national regulations that do not meet the criteria contained in the new law or that fall outside the jurisdiction of provincial and regency/city governments and which become unlawful after a two-year transition period. The Law on Sub-national Taxes and Charges (28/2009) in conjunction with the Laws on Regional Autonomy (32/2004 and 23/2014) introduces an approval process for local taxes and user charges before their enactment (ex-ante review), which is co-administered by the MoF and the MoHA.

Ineffectiveness of revised review mechanism managing the massive influx *Perdas*: Regional lawmakers must send their Perdas to Central

Government (represented by the respective provincial Governor) within 7 days of enactment.[77] Previously, the central government's right of review expired after 60 days if it did not invalidate the *Perda* within this time, then the *Perda* continued to be in force by default.[78] The revised Law on Local Government (2014) did not include the provision of automatic validity after 60 days. This was considered to be a good move, keeping unlawful Perdas of the book before their assessment.

On the other hand, significant back-logs within the review process on the national and provincial level, are likely to hold back the law-making process on the sub-national level.

The governor's review team determines whether the *Perda* contradicts with the public interest or conflicts with higher ranking norms.[79] Based on the findings of the review team, the governor proposes invalidation to the Ministry of Home Affairs. If the MoHA considers that the *Perda* breaches either of these criteria, the law permits invalidation by ministerial regulation (for provincial *Perdas*), respectively gubernatorial decision (for district/city *Perdas*).[80]

Local lawmakers can appeal the invalidation decision lodging an application for review with the next higher administrative level.[81]

The revised review mechanism cannot manage the massive influx of *Perdas*. In 1998 Indonesia had approximately 292 local governments outside Jakarta. In 2017, there are 34 provinces, 416 districts, 98 municipalities. Their respective governments and legislative bodies all have law-making powers ranging from issuing Perdas to administrative decisions. It is estimated that there are thousands of institutions and government officials flooding the country with regulations.[82] It is impossible to estimate how many local laws have been produced because there is no updated central legal database neither on national nor on the sub-national level, which monitors the inflow.

77 Art. 242 and 249 of the Law on Local Government (2014).
78 Art. 145 (3) and Art, 145 (7) of the Law on Local Government (2008). It is now revised by Law 2014.
79 Art. 250 of the Law on Local Government (2014).
80 *Ibid*., Art. 250.
81 *Ibid*., Art. 251.
82 *Ibid*., Butt, Simon, Regional Autonomy and Legal Disorder, The Proliferation of Local Laws in Indonesia, p.1.

As discussed above, local lawmakers are required to publish all enacted *Perdas* and send them to the central government either for ex-ante review/ approval or ex-post review. By 2006, at least 12 000 had been sent.[83] By now, this number must have increased substantially. By how much, is unclear as statistics are limited, and standardized monitoring mechanisms are not publicly available.[84] MoHA, which has the overall responsibility for regulatory review of *Perdas*, is not publishing information with regards to (i) total number of *Perdas* received, (ii) total number reviewed, (iii) total number approved, (iv) total number repealed, (v) total number being processed/carried forward.

Even though the new Government announced that it had repealed more than 3000 *Perdas* in just two years (see above), the effectiveness, as well as the diligence of the review process, remains questionable. Considering the massive influx of *Perdas* and the relatively small MoHA and governor teams, which meet once a week, are unlikely to review submitted *Perdas* in depths. It is assumed many non-revenue *Perdas* are just being approved even though they may contradict central government laws, general quality criteria, or breach fundamental human rights. As mentioned above, the focus seems to be less on regulatory quality than on protecting revenues.

Unconstitutionality of the invalidation process: Until recently, the Ministry of Home Affairs had the power to invalidate *Perdas*. Article 251 of the new Law on Local Autonomy (23/2014), re-affirmed the role of MoHA, respectively the Governor, to invalidate *Perdas*. However, the authorization to cancel *Perdas* through an administrative decision had a number of legal defects. First, and the most important, it conflicts with Art. 24 A of the Constitution. Art. 24 A of the Constitution authorizes only the Supreme Court to invalidate government regulations, including *Perdas*. Second, the decision of the MoHA/Governor cancelling a *Perda* is not included in the hierarchy of laws. As only government regulations are included in the hierarchy, it is unclear whether an administrative decision can trump a regulation issued by the sub-national legislative body. Third, the new Law on Sub-National Government (23/2014) also repealed the role of the Supreme Court to appeal MoHAs decision cancelling a *Perda*. This judicial

83 *Ibid*., Butt (2010).

84 The OECD (2012) included a monitoring list, which was published by the Ministry of Finance in 2009 focusing on local taxes and user charges. It appears that this list has not been updated.

review mechanism has been replaced by an internal administrative appeal mechanism.

Against this background, two recent Constitutional Court decisions declared the review/invalidation mechanism unconstitutional, effectively stopping the central government from cancelling unlawful *Perdas*.

In two decisions (*Putusan MK Nomor 137/PUU-XIII/2015* and *Putusan MK Nomor 56/PUU-XIV/2016*), the Constitutional Court declared the authority of the MoH reviewing and invalidating *Perdas* as outlined in Art 251 of the Law on Regional Government (23/2014) as unconstitutional.[85]

The Constitutional Court argued that the function of governors and the minister was the same as 'judicial review,' which, under the Constitution, could only be performed by the Supreme Court. Therefore, Art. 251 of the before said law, would conflict with Art. 24 A of the Constitution (45), which authorizes the Supreme Court to invalidate government regulations, including *Perdas*. The Constitutional Court added that gubernatorial decisions lacked sufficient authority to invalidate Provincial *Perdas*.

As MoHA's supervisory/review function was declared unconstitutional, *Perdas* can only be trumped by (higher ranking) legal instruments, issued by national government agencies. This mechanism appears to be not very practical and will add to amount of already conflicting regulations.

5.4.1.2. Review of National Legislation

Gaps with regards to regulatory review: Impressive jump in Ease of Doing Business ranking; institutional fragmentation for regulatory review; no central oversight body; no expiry mechanism to effectively manage the regulatory stock.

Impressive jump in Ease of Doing Business ranking: The 2016 "Economic Policy Package XII on the Ease of Doing business aimed at reducing the number to start a business. These policies resulted in significant improvement in the overall Ease of Doing Business and Competitiveness rankings (see above). Relevant laws and procedures were reviewed and streamlined reducing administrative costs for business. in terms. It remains to be seen what impact the 18th reform policy measure on regulatory

85 Kompas, Kewenangan Kemendagri Batalkan *Perda* Digugat ke MK, 06/09/2016.

reform/business licenses will have on the overall regulatory environment including the ease of doing business. The jump in ranking is an outcome of the strong commitment from President's Jokowi administration when taking office in 2014 promising to improve Indonesia's investment climate. More recently, the government announced that it would remove expiration dates of general business license (*SIUP*) and business registration (*TDP*) as previously they had to be renewed every five years.

The institutional framework for regulatory review/harmonization on the national level is fragmented. Law 12/2011 on the Formulation on Laws and Regulations establishes the obligation for the harmonization of regulations. Within the executive, harmonization is supported by an inter-ministerial committee composed of relevant ministers or heads of non-ministerial bodies and co-ordinated and overseen by the Directorate of Legal Harmonisation under the Ministry of Law and Human Rights. The State and Cabinet Secretariats, also, support the formulation of laws and national regulations and have authority to return regulatory proposals if deemed unsatisfactory. One of the reasons, overall regulatory quality remains low, is the institutional fragmentation and overlapping responsibilities of institutions involved in the drafting and review process. This may have been one of the reasons, why President Jokowi, announced in December 2018, to establish a Central Regulatory Review Body.[86] Indeed, a Central Regulatory Review Body would be helpful to address institutional fragmentation and centralize regulatory review.

Lack of a Management Information System (MIS): None of the institutions charged with legal review has a proper management information system in place or use ICT for exchange, coordination, and review. Thus, no statistical data is available, for example, on how many regulations have been submitted for review, how many are being reviewed, and how many have been reviewed, and how many have been repealed. Still, policies and medium-term action plans require to reduce the regulatory burden without having sufficient statistical data.

No institution was formally responsible for coordination and oversight to ensure regulatory quality. There is no formal policy to periodically review the stock of existing laws and national government regulations. In contrast to most OECD countries, which established regulatory oversight bodies and

86 This information was shared during a Legal Expert Meeting funded by HSS in the Hotel Luwansa in Jakarta on December 4, 2018.

introduced processes assessing the impact of new or existing laws, such as the Better Regulation Executive in the UK, the Administrative Evaluation Bureau in Japan, the Nationale Normenkontrollrat in Germany, the Office of Regulatory Review and the Office of Best Practice Regulation (OBPR) within the Department of the Prime Minister and Cabinet in Australia, the Treasury Board of Canada Secretariat in Canada, or Office of Information and Regulatory Affairs (OIRA) in the United States. A crucial role of oversight bodies is to coordinate and supervise, making sure that regulatory reform meets quality standards, complies with a general economic strategy and that Regulatory Impact Analysis (RIA) is undertaken appropriately. In that sense, channels of communication between regulators and bodies must be properly settled. Furthermore, the level of government from which the body coordinates is essential, as well as the used tools, such as handbooks, formats, and guidelines.

Indonesian laws and regulation have no expiry mechanism, such as sunset-clauses, one-in-one-out rules, repeal, or review clauses. Thus, the options to effectively manage the regulatory stock is limited.

5.4.2. Judicial Review

Gaps with regards to judicial review: legality assessment higher ranking norms and limited protection of fundamental human rights.

Judicial system reviewing legality within the hierarchy of norms: The Indonesian judiciary can review both legislative and executive actions assigning the Constitutional Court and the Supreme Court reviewing regulations, and the administrative courts reviewing administrative decisions. Thus, the judicial system can (in theory) review the legality of each action of the state (regulatory and administrative) including the assessment whether government actions violate fundamental human rights.

Unclear rules for legality assessment of authorizing/higher ranking law: As a rule, government action must comply with the law itself as well as with the authorizing legal framework. As a consequence of the legality principle, there must be an uninterrupted chain of legality from the lowest level of regulation to the highest-level regulation, i.e., the Constitution. Kelsen, in his principal work, “Reine Rechtslehre,” introduces the legal order as an aggregate of norms and considers the question of the basis of the validity of a norm. “The higher norm is the norm that regulates

the creation of another norm, the lower norm, and is thus the basis of the validity of this lower norm. The higher norm can also regulate in varying degrees the content of the lower norm. In so doing, the norms of the constitution regulate not only the enactment but also the content of prospective statutes. Similarly, the general norms of statutes regulate not only the creation but also to a greater or lesser extent the content of the particular norms issued through courts and administrative agencies, whose acts represent applications of the law".[87] It follows that any statute is invalid, which conflicts with the Constitution, including every subsequent regulation based on this statute. Thus, any regulation, which conflicts with its authorizing norm, will conflict with the authorizing norm and ultimately with the Constitution, as the supreme body of law. As the rules and principles assessing the validity of norms within this hierarchy remain unclear, the legality principle and thus the rules for assessing the validity of regulations, cannot be applied to its full extend. See above.

Abstract legal review by the Constitutional Court regarding statutes (primary law): The Constitutional Court has the power to review the constitutionality of statutes. Under Article 24C(1) of the Constitution (45), the Constitutional Court can only assess whether laws enacted by the DPR conflict with the Constitution. Thus, the Constitutional Court has the monopoly to invalidate law enacted by the legislature. The Constitutional Court cannot review other types of legislative instruments or government actions authorized by sub-ordinate regulations (secondary legislation).

Abstract legal review by the Supreme Court regarding subordinate legislation (secondary law): Only, the Supreme Court can review laws below the level of statues to ensure that they comply formally and materially with statutes.[88] Even though the Supreme Court can declare lower level law invalid, the judicial review of the Supreme Court is limited as it lacks the power to assess the constitutionality of the authorizing primary law. This is the monopoly of the Constitutional Court. It appears that there is no procedure, which allows the Supreme Court to suspend the review process of secondary legislation and transfer the question with regards to the constitutionality of the primary authorizing legislation to

87 Hans Kelsen, *The Concept of the Legal Orderm Logique et Analyse*, vol. 1 (1958), and was reprinted in Die Wiener Rechtstheoretische Schule, H. Klecatsky, R. Marcic, and H. Schambeck, eds. (Vienna: Europa Verlag, 1968), vol. 2, at pp. 1395-1416.

88 Butt, Simon and Tim Lindsey; *Indonesian Law*, Oxford, (2018). R Refer to Chapter 1, Section on the Operation of the hierarchy for details.

the Constitutional Court. It is also not clear whether the Supreme Court is authorized to review those lower level administrative regulations, which have been excluded by Art 7 of the Law on Law-Making. See above.

Concrete review by the Administrative Courts regarding administrative decisions: The Administrative Court (and the Supreme Court as a the final court of appeal) is authorised to examine, adjudicate and decide on administrative disputes between an individual or private legal entity and a government administrative official or institution as a consequence of the issue of a state administrative decision.[89] If a private citizen wishes to challenge, for example, a local license or a tax has two options. Sh/e can either challenge the decision of the government agency through the administrative courts or Sh/e can directly challenge the authorizing norm with the Supreme Court.

Legality gap with regards to the judicial review of *PERDAs*: It appears that Perdas cannot be reviewed against the Constitution.[90] The Supreme Court cannot assess the constitutionality of *Perdas*, and the Constitutional Court cannot assess *Perdas* (as only the Supreme Court can review *Perdas*).[91] This "Catch 22" situation causes severe disruption in the theoretical legal understanding of the hierarchy of norms, which requires an uninterrupted chain of legality from the lowest to the highest level of norms. Other countries have overcome this gap, by introducing procedures regarding the particular/detailed review of statutes with regards to their constitutionality. If a regular court considers the validity of the law, which is material to its decision, to be unconstitutional, it suspends the proceedings and refers the matter to the Constitutional Court for decision. In the before mentioned matter, the administrative Court or Supreme Court would suspend its proceeding reviewing the constitutionality of a Perda and refer the matter to the Constitutional Court for decision. It appears that this type of proceedings referring the matter from the Supreme Court to the Constitutional Court is either not yet developed or not being applied. For example, an administrative court deems a local tax to be unconstitutional and refers to the legal action of a citizen, brought against the notifications paying the tax, to the Constitutional Court. The Constitutional Court then would decide

89 A state administrative decision is a written decision issued by a state administrative official or institution, which contains administrative, legal action based on the applicable laws and regulation with concrete, individual and final characteristics and has legal consequences for an individual or a private legal entity

90 Ibid., Butt, Indonesian Law, on judicial review.

91 Arts 24 A and 24 C of the Constitution (45).

on the constitutionality of the submitted provisions regarding the local tax. Afterward, the administrative court completes the proceedings, taking into account the Constitutional Court's decision, if the authorizing law conflicts with the Constitution, i.e., infringing fundamental human rights, then the Administrative Court has to annul the notification to pay a local tax.

Other procedural problems: The review of a *Perda* against the authoring law is final, and no appeal may be brought against the decision. There are no regulations, for suspending the enforcement of decision, while being reviewed. Moreover, even if the *Perda* were to be declared unlawful, i.e., to conflict with higher ranking norms, then it would be declared unlawful from the day of the Supreme Court's decision and not from the day of enactment. Consequently, enforced action could not be revoked and state liability not be claimed as the legal basis at the time of enforcement would have been lawful.

Human rights issues: As mentioned above *Perdas* are primarily invalidated if they interfere with the authority of the central government to generate revenues. However, *Perdas* violating human rights have not yet been revoked. In the past, the Supreme Court has ignored these claims.[92] Even though the Supreme Court should consider, for example, the Law on Human Rights (39/1999) as the higher-ranking legal statue, which could conflict with local regulation, it has not done so. So far Islamic *Perdas* restricting religious, economic, and other civil rights have reviewed against neither against the Law on Human Rights (39/1999) nor the Constitution. With regards to the latter see above.

Quality issues: The majority of *Perdas* are poorly drafted. Their quality with regards to necessity, proportionality, effectiveness, efficiency, and legality could be reviewed against the quality criteria outlined in the Law on Law-Making (12/2011). However, for the Supreme Court regulatory quality as well as compliance the Law on Law Making has not been a legal concern.

5.4.3. Informal Justice System Harmonizing Conflicting Regulations Other Disputes

Harmonization of regulations: The need to harmonize regulations is an indicator that a regulation is unlawful, i.e., that it conflicts with either a

92 Butt Simon and Tim Lindsey, The Constitution of Indonesia; A Contextual Analysis, Oxford, 2012.

norm on the same or higher level. One of the reasons is that there is no mechanism to review and eventually strike down conflicting ministerial regulations as they are not included in the hierarchy of norms (see above). With regards to those regulations, which are included in the hierarchy of norms, legal harmonization is required to deal with the massive influx of regulations from national and sub-national level. The influx of regulations is caused by wide-ranging framework laws authorizing the executive to issue implanting regulations, the devolution of legislative powers to subnational level, the weak and ineffective judicial review mechanism, and a general reluctance to strike down unlawful regulations. As the review mechanism through the formal justice system, i.e., through Administrative Courts, the Supreme Court, or the Constitutional Court, is neither effective nor efficient, informal harmonization regulatory mechanism have been developed to deal with conflicting norms.

Informal justice system: Non-formal mechanisms were introduced to resolve disputes between government and citizens as well as disputes arising from conflicting regulations. Non-judicial mechanism included ADR mechanism, the Office of the Ombudsman, the Corruption Eradication Commission, and the Central Information Commission. The focus is on how these mechanisms contributed to reforming/harmonizing regulations. Thus, the focus will be on the office of the ombudsman and ADR mechanisms harmonizing conflicting regulations.

The office of the Ombudsman: One institution for reviewing government action is the national ombudsman governed by the Law on the Ombudsman (27/2008). The Ombudsman is the (informal) pendant to an administrative court, where citizens can complain against government action contravening laws and regulations. Citizens or citizen groups have used the Ombudsman to lodge complaints against local government's rejection the application for a permit. However, the effectiveness of an Ombudsman depends on the responsiveness of the government to its recommendation.

ADR mechanism harmonizing conflicting regulations: Disputes concern either complaints against local and regional governments by private parties, or inter-institutional disputes concerning government regulations, which are deemed to be conflicting An alternative dispute resolution approach, which was developed by the Ministry of Law and Human Rights/ General Department of Legislation was developed to resolve these types of Hanns Seidel Foundation, for example, is supporting an expert group, which

supports the Ministry developing Standard Operating Procedures for the ADR mechanism with regards to the harmonization regulations.[93] The goal is to standardize the procedure for all cases. As the ADR mechanism is new and only a handful of cases have been arbitrated so far, additional experience and input are needed to finalize the standard operating procedures.

5.5. Implementation of Regulations

Gaps with regards to the implementation of regulations: OSS services improved the processing of business licenses on the national and sub-national level; performance varies on sub-nation level depending on the type, transferred authority, and willingness.

Unless regulations are enforced in a fair, efficient, and transparent manner even the best-drafted laws in the world are useless. Government can improve the regulatory environment in two ways. Either, by ensuring regulatory quality and if necessary, deregulating/streamlining the regulatory stock as much as possible without comprising public objectives. Alternatively, by ensuring that implementation and enforcement of regulation are efficient and transparent. Ideally, regulatory quality should be approached from two sides.

Improving the implementation of regulations is in parts related to regulatory reform and in parts to administrative reform. It is critical that the establishment of one-stop-shops is embedded within the general framework of administrative modernization. This process is complex and includes actions on various levels. Regarding one-stop-shops, the most critical level is the city and district, where most administrative functions with direct contact with citizens are concentrated.

The introduction of one window service focuses on the national and sub-national level has been a significant effort backed by the investment policy packages listed in Table 2.

5.5.1. National Level

The 2016 "Economic Policy Package XII on the Ease of Doing Dusiness" aimed at not only at reducing the number of procedures to start a business, but also to improve the processing time and costs. This included

93 Workshops on developing a handbook on ADR were held in October and December 2018.

reducing the days starting a business from 48 to 10 and the cost linked to setting up a business from IDR 7,8 million to IDR 2,7 million.[94] These efficiency gains can be attributed to improving the implementation of business formalization requirements. Additional reforms have included the reduction on the time to register property and acquire construction permits. As a consequence, Indonesia could gain 48 ranks between 2015 and 2018 in the WB Doing Business Report. See above.

Online Single Submission (OSS) on National Level: In 2018, the Indonesian government introduced an online single submission system to allow the centralization of formalization procedures from all levels of government into one single website. Under Government Regulation Number 24 of 2018 on Integrated Business Licensing Services through Electronic Systems ("GR 24/2018"), the Indonesian government launched an "Online Single Submission (OSS)" web portal under *www.oss.go.id* on 9 July 2018. The implementation of OSS rises the hope for business licenses to be obtained faster and easier than before likely to improve the overall ranking of Indonesia in the WB Doing Business report, as envisaged by President Jokowi.

5.5.2. Sub-National Level

Two WB surveys on the issuance of construction permits on sub-national level indicate that reforms need include the sub-national level interventions to be effective.

In 2010 and 2012 the World Bank conducted a sub-national analysis of their index in 14 Indonesian cities (World Bank, 2010 and 2012)[95] and found that there is considerable variance in business regulation across the cities surveyed. For instance, the cost of a construction permit ranges from USD 850 in Jambi (Central Sumatra) and Pontianak (West Kalimantan), to around 4 times as much (approximately USD 3450) in Batam and Makassar (South Sulawesi). Likewise, a construction permit in the city of Bandung takes on average 44 days, while in Jakarta, less than 150 km away, it takes on average 158 days. The significant variance in most metrics was attributed in part to the fact that the stringency of enforcement of national regulations varies across cities as well as to the effectiveness and

94 *Ibid*., WB Doing Business Report (2018).

95 WB, Doing Business in Indonesia, Sub-National Series, 2010 http://www.doingbusiness.org/content/dam/doingBusiness/media/Subnational-Reports/DB10-Sub-Indonesia.pdf; WB, Doing Business in Indonesia, Sub-National Series, 2012 http://www.doingbusiness.org/content/dam/doingBusiness/media/Subnational-Reports/DB12-Indonesia.pdf

efficiency of One Stop Shops, which have been introduced to a varying degree since 1997. These variations indicate that improvements in the regulatory environment cannot be achieved independently from sub-national reforms level.

The introduction and effectiveness of OSS: Indonesia has already taken many steps to reform business formalization mechanisms dating back to 1993. The Ministerial Decree (1993/20) lists three different models for the provision of administrative services, (i) One roof service unit' (*Satu Atap*): the service unit only provides the 'roof' or space for many regulating institutions; administration and provision of service remains with the regulating institutions; (ii) 'Centralized service unit' (*Terpusat*): the service unit provides administrative coordination, infrastructure, and information; direct service delivery remains with the regulating institutions; (iii) 'One door service unit' (*Satu Pintu*): the provision of certain services is delegated to the unit by the regulating institutions; regulating institutions control and evaluate the service provision.

Assessment: Following decentralization in 1999, the national government issued a directive authorizing all local governments to create OSS according to one of the three models (or to issue licenses through the existing administrative set up). While the Ministry of Home Affairs in 2006 issued regulations regarding the structure and processes of OSS offices, the regulations were considered as legally non-binding, and local governments were considered free to define their structures. By 2013, according to the MoHA, more than 90 percent of 497 districts in Indonesia had established the OSS model. While this marked a quantitative improvement, qualitative improvement with regards to overall effectiveness, i.e., reducing time and costs of the formalization process largely varied on the type of OSS model and the willingness of the sub-national government to improve the local investment climate. Effective replication of the OSS approach is dependent on ensuring that OSS is vested with sufficient autonomy and authority to be operationally effective as well as on the number of licenses processed. A TAF study indicated that the majority of these OSS had limited authority to process numerous types of licenses required by the local governments impeding overall effectiveness.[96]

To date, there is no generally applied model emerging from present

96 Asia Foundation; Licensing Reform in Indonesia; What is next after the One Stop Shop, Indonesia, 2017.

practice, although it is clear that real "one door services units" with the highest degree of autonomy is still the exception and not the rule. However, research finds relatively little evidence that the program has increased the rate of (formal) business registration across the regions.[97]

6. Way Forward: Recommendations for Addressing Identified Gaps

Indonesia has overcome the challenges of the Asian crisis and proved capable of managing the effects of its radical decentralization. Indonesia became more competitive if we look at the impressive jump in Ease of Doing Business as well as the IMB competitiveness ranking. These success stories reflect a sound policy capable of addressing key constraints, which 20 years ago seemed a doomed task. But, why is Indonesia considered bad in law-making? Recent reports, articles, and well-known scholars come to the same conclusion. The short answer is, quality matters!

When we talk about regulatory reform, we need to consider more than indicators measuring the quantity or superficial rankings. Ultimately, regulatory reforms need to improve the effectiveness of regulation and thrive to achieve compliance as the overall goal for regulatory quality.

What is regulatory quality? The ultimate test for quality, is legality, followed by tests, which are more fluid either highlighting specific criteria, such as, effectiveness, accessibility to regulations, or specific tools, or legal and institutional framework conditions.

- Legality test: The ultimate test for quality, is legality. Compliance with the existing legal framework, is not debatable, but simply a prerequisite for any country based on the principles of the rule of law. The violation of constitutional principles such as the rule of of law and human rights, makes a law not only "bad", but invalid. Thus, regulatory reforms need to ensure that regulations comply with the existing legal framework before they are enacted. In Indonesia, it is assumed that there are thousands of regulations on sub-national level, which are deemed to be legally invalid, because they conflict with higher ranking norms. See above. For a country, which is based on the rule of law, this lack of legal coherence is a serious concern. Legality principles, capacities, and institutions need

97 Ibid., OECD, Economic Surveys: Indonesia 2016.

be established to ensure a harmonized, coherent legal system.

- Other quality tests: As outlined above, other criteria for legislative quality are fluid, and depend on either the country or the organization promoting specific regulatory policies. However, a number of core-criteria have been developed as well as framework conditions, which promote good laws, i.e., laws, which do not constraint economic development, or obstruct the access for people. Normative quality criteria, which have been developed include,
- Necessity,
- Effectiveness, and
- Efficiency.

Then, there is a set of criteria, which promote, accessibility and understanding of regulation, such as,

- Clarity,
- Non-ambiguity, and
- Access.
- Other quality criteria relate more to framework conditions as well as tools promoting good laws, such as,
- Comprehensive regulatory policies as part of whole of government approach,
- Institutions, and
- Tools for ex-post and ex-ante assessments as well as stakeholder participation.

The OECD, in particular, has been promoting these enabling framework conditions for years, and it is therefore, useful to take these recommendations and findings into consideration. The general recommendations are included in the report on Regulatory Policy and Governance (2012) outlining key principles in areas of leadership, governance, process, and capacities. The recent OECD Policy Outlook (2015) provides a comparative analysis for most of the OECD Countries featuring the situation of the country against the composite indicators for stakeholder engagement, Regulatory Impact Assessment and ex post evaluation. Against this background, Indonesia, could learn not only about general best practices, but also from the OECD report, "Reviews of Regulatory Reform, Indonesia, Government Capacity to Ensure High-Quality Regulations, Indonesia, 2012". One recommendation, which reflects the findings of the report regarding the fragmentation of measures and institutions, is the lack of a comprehensive (whole of government) approach.

Comprehensive (whole of government) approach: One way forward would be to formulate a comprehensive policy, which addresses the gaps identified in this book by (i) reforming the legal and institutional framework, (i) complying with the fundamental rule of law principles, (ii) improving access to regulation, (iii) improving the regulatory quality of regulations, (iv) improving regulatory review, and (v) improving regulatory implementation.

6.1. Towards Complying with "*Negara Hukum*"

Without going too much into the "thick and thin" of Rule of Law concepts, the basic principle remains that everyone, including the government, is subject to the law. Thus, law making and defining its limits are at the core of every Rule of Law concept. The making of laws should be guided by open, stable, clear and general rules. It follows from there that the Law on Law-Making (11/2012) should clearly outline, (i) the hierarchy of norms, (ii) the limits of authorization, and (iii) the limits of discretion by limiting the use of vague legal terms and broad framework laws.

Clarify the hierarchy of norms as the ultimate reference point for assessing legality: In legal theory, the understanding and application of the hierarchy of norms dates back to Hans Kelsen (see above). The basic understanding of validating any norm back to its origin is fundamental to review the legality of regulations to each other. Determining the legality of a legal norm is therefore a fundamental aspect of the Rule of Law principle.

In Indonesia, the methodology determining the legality of a norm remains unclear and appears to be less dogmatic. The Law on Law-Making (12/2011) only reaffirms the hierarchy of norms without clarifying the role and function of specific types of regulations, such as ministerial regulations, decrees, and instructions. These are secondary norms enabled by primary legislation (as opposed to administrative acts or internal instructions). Excluding specific types of regulations from the legal "pyramid" has numerous implications, for example, that their legality and the legality of conflicting regulations cannot be assessed. As a result, thousands of regulations on the sub-national and national level, are deemed to conflict with each other and therefore, and need be "harmonized". The exact number of regulations in need for harmonization is unknown, a fact that creates a constant background noise of legal uncertainty. It is, therefore, recommended to develop a comprehensive set of legal principles and rules

for assessing the legality of all (!) regulations within the legal hierarchy. Ideally, the Law on Law Making would be revised and include the hierarchy of all laws and regulation, including principles reviewing their relationship with each other.

Limit the use of discretion and vague legal terms: Vague legal terms are entry points for the administration on how to apply a law in practice. Discretion, strictly speaking, is not a rule by law, but a rule by the administration. It is understood, that a law cannot regulate every detail, and that the administration needs some flexibility, how to apply the law. But, administrative discretion has its limits. If there is an amount of discretion on how laws are enforced in practice, that discretion is itself should be controlled by limits set out by law. The critical factor in determining rights and obligations should be outlined and specified in the law itself, which creates legal certainty for the user. Rights and obligations should not be a random view of a government official. If officials could decide according to their personal preference, then this is not a proper rule of law system. Legislation which gives discretionary powers ought to have boundaries to the exercise of those discretionary powers. These boundaries need to be checked by courts.

Define what necessarily needs to be regulated by statuary law and regulate the limits of authorizing regulations: For example, legislation should not authorize ministers to do whatever they think fit. Thus, general authorizations, such as the minister can issue regulations, which implement statuary law, usually, are at odds with the rule of law principle. The authorizing law or the Law on Law-Making should authorize a minister to do a particular thing set out in a specified list of authorized things, to achieve a particular purpose. The theory is that the primary legislation covers the topic in its entirety, leaving secondary legislation to fill in some of the gaps left by the primary provisions. In other words, the authorizing legislation should regulate the essentials. Rules defining what should be essentially regulated in a statuary law as well as rules, which regulate the limits of an implementing regulation should be considered in Indonesia.

6.2. Towards Improving Access to Regulations

Access to regulations is a fundamental rule of law principle. If you are supposed to be ruled by law, then you have to know what the law is.

Systematic inventorization is compiling and consolidating all regulations in one publication, which is periodically updated: Consider the complete consolidation and compilation of all existing laws and regulations and periodically update this compilation every year. Systemize the inventory and develop categories, such as private law and public law, as well as sub-categories Systematization and the compilation of laws and regulations is a public task. However, publication and dissemination could be delegated to a private company as examples from Germany and France have shown. An updated repository of all laws and regulations is the starting point for any legality assessment, i.e., whether one regulation conflicts with another regulation. It could also support efforts by the government of Indonesia to cap the proliferation of sub-national laws and regulations and to ensure their coherence with higher order regulation.

Utilize new technologies for publishing and disseminating regulations: It is becoming increasingly apparent in the modern world that proper publication of legislation includes making it freely available online. New technologies such as optical character recognition (OCR) and high-speed scanner support more effective dissemination and compliance with laws and regulations. A policy should set out what accessibility of legislation means in the electronic age. New technologies offer the possibility of integrating existing law and regulation databases into a comprehensive and user-friendly portal and even make them searchable. Such a portal could support the systematic inventorization of laws and regulations. This policy should be complemented, ideally by Law on Publication, which besides should state. That every regulation, which is not published and disseminated, is either void or suspended.

6.3. Towards Improving Regulatory Quality

Improving regulatory quality is at the heart of any regulatory reform. The details of what is a "good" varies (see above). Good regulations do not necessarily mean less regulation. It helps to refer to the core principles, such as, (i) effectiveness, (ii) efficiency, and (iii) clarity, and introduce the tools, which help to achieve these criteria, for example stakeholder participation, and Regulatory Impact Assessment.

- Good regulations effectively protect and enable their constituencies;
- Good regulations efficiently reduce procedures and cost to the greatest extent possible;
- Good regulations comply with the legal framework;

- Good regulations are as clear possible;
- Good regulations are governed jointly with the private sector for the interest of the public.

Develop an explicit regulatory quality strategy: This strategy would specifically aim to define quality criteria and develop an approach on how to achieve these criteria. A strategy would consider aspects concerning,

- Institutionalizing regulatory quality with a centralized regulatory body,
- Operationalization of quality criteria,
- Development of tools, skills, knowledge development; and
- Implementation of reform processes.

See also above, what the OECD calls a "whole of government approach".

Operationalize quality criteria for good regulations: Quality criteria with regards to good regulations need be further defined and operationalized by methodologies and strengthened by institutional processes. It helps to establish links to international quality standards such as (i) effectiveness, (ii) efficiency, (iii) clarity, (iv) legality and (iv) stakeholder participation and draw upon the work conducted by other countries or institutions. Operationalization could start with the Law on Law-Making (12/2011), which provides a framework for the formulation of laws and regulations as well and includes criteria for good regulations. The quality criteria mentioned in the Law on Law Making share the following similarities with international terms. The following table lists some of the national as well as well as corresponding international quality criteria and could be taking as a starting point for a copy-paste approach.

Table 8: National and corresponding international quality criteria

Art. 5 of the Law on the Law Making (12/2011)	Corresponding (International) Quality Criteria
Clear purpose	Functionality
Made by a proper agency or official	Legality with regards to formality (involves a responsible institution
Match between the types, hierarchy, and contents	Legality with regards to a substance (complies with the hierarchy of norms)
Versatility and result	Effectiveness and efficiency
Clear formulation	Clarity
Openness	Public participation

View the legislative cycle as an integral part of the policy cycle: The policy cycle can be understood as a structured and logical process of problem solving led by government. Legislation is one of many tools, which can solve a problem identified by a policy, for example addressing a social, economic, or environment problem. Against this background, it helps to view legislation, and thus the legislative cycle, as an integral part of the policy cycle. See above, Figure 2.

In its generic form the policy cycle includes the following stages: (i) initiation, (ii) formulation, (iii) implementation, (iv) evaluation, and (v) revision. If we view the legislation as tool within the policy cycle, the legislative cycle starts, when the legal drafter is instructed to prepare a draft law and receives the drafting instructions and other supporting documents, such as the white paper, regulatory impact assessment statements, and other academic papers. The legal drafter, then, prepares a first draft, which is presented to parliament for enactment. After enactment and publication, the law enters again the policy cycle, where it is implemented, evaluated, and if necessary revised. Viewing regulations as part of a policy cycle, provides the big picture for a "whole of government approach" and helps to identify entry points for regulatory reform measures as well as to assess the effectiveness of a regulation (which is ultimately, to solve the underlying problem identified by the policy). This view, however, requires that Indonesia has a clearly defined policy process and the institutional set up with defines roles and responsibilities, who is doing what in the policy process. At this stage it is unclear whether Indonesia follows a policy cycle in the above-mentioned sense. Traditionally, Indonesia, focuses more on the planning cycle than on the policy cycle. A more recent study even concludes, that the above-mentioned stages of a policy cycle, do not really exist in Indonesia.[98] It is not the purpose of this chapter to determine, whether this statement is true or not. What is merely suggested that viewing the legislative cycle as part of the policy cycle could provide a map for comprehensive regulatory reform measures.

Formally adopt Regulatory Impact Assessment as one tool achieve quality criteria for ex-ante assessment on national and sub-national level: To further operationalize the quality criteria, which are included in the Law on Law Making, it is recommended to consolidate existing

98 The Policy Lab (The University of Melbourne) and the Indonesian Centre for Law and Policy Studies (PSHK), for Knowledge Sector Initiative, "Understanding Policymaking in Indonesia: in Search of A Policy Cycle", 2017, p.2.

handbooks and formally adopt Regulatory Impact Assessment as the tool for the ex-ante and ex-post assessment of regulations. Here, it helps to view regulations as a policy tool (see above). The entry point for ex-ante assessment, and thus RIA for ex-ante assessment, could be the policy formulation stage. The entry point for ex-post assessment, and thus RIA for ex-post assessment, could be the policy evaluation stage.

RIA has been introduced almost 20 ago on the national and sub-national level but was never formally adopted as a tool for regulatory review (ex-post assessment) or the assessment of new regulation (ex-ante assessment).

Thus, it is suggested to institutionalize a comprehensive RIA policy at national and sub-national level to build on tool box, which is likely to achieve sustainable results. At a minimum, such a policy could,

- Adopt RIA methodology and define the entry points, where RIA should be applied in the legislative cycle;
- Specify types and level (order) of regulations subject for review as well as the relationship between the national and sub-national level;
- Specify mechanisms for consultation with stakeholders as well as mechanisms on how to ensure transparency within the stakeholder consultation process;
- Specify enforcement mechanisms (including, reward and sanction);
- Institute commitment from high-level officials, for example by making an RIA report an official document to be signed by Ministers, Heads of Department, Governors, Regents, and Mayors.

Establish a Central Regulatory Body: Considering the overlapping responsibilities of the existing institutional landscape involved in the regulatory review process (see Table 5 and 6), it is suggested to merge them into one national institution, for example a central regulatory body. Trends in institutional setting to promote regulatory policies suggest that one institution should be responsible for (i) promoting a regulatory policy, (ii) regulatory ex-ante review, (iii) regulatory ex-post review, and (iv) monitoring other ministries. Thus, a central regulatory body must ensure that regulatory review and evaluation takes place on a continuous basis, assessing the effectiveness and the impact of regulation, just like continuously cleaning a swimming pool. Ideally, such a function needs to be able to operate with coordination and directive authority above the line ministries. The function should include, but are not limited to,

(i) formulating regulatory policy goals; (ii) examining the potential for regulation to be more effective including promoting the consideration of regulatory measures in areas of policy where regulation is likely to be necessary; (iii) coordinating ex post/ex-ante evaluation, (iv) ensuring regulatory quality, (v) define and supervise RIA quality standards (v) providing training and guidance on impact assessment and strategies for improving regulatory performance, (v) monitoring and periodic reporting on regulatory management system performance and compliance. Besides, RIA units on national, provincial, and district level need to be established according to the role in the legislative cycle as well as decentralization laws.

6.4. Towards Improving Regulatory Review

Regulatory review of national level and (and even more so) sub-national level regulations has become unmanageable. It is clear that more laws and regulations are being produced than being reviewed. Many of them are considered unlawful as they conflict with each other. The following recommendations could improve the overstrained, and mostly ineffective regulatory review mechanism.

Establish a regulatory review body on the national level and sub-national level. See above.

Clarify the role of the hierarchy of norms in the review process and develop review principles: See above.

Introduce standardized ex-ante review mechanism: Ex-ante assessments can include (i) pre-legislative policy assessment and (ii) pre-legislative (parliamentary) scrutiny.

- **Pre-legislative policy assessment**: The analysis may include a detailed assessment of the underlying problem as well as an assessment of regulatory options from non-legislative tools to legislative tools. In larger jurisdiction in depth analysis of the subject matter as well as more detailed cost and benefit assessments are conducted in the relevant ministries or by external bodies. In Germany, for example, the Research Services of the German Bundestag publishes Research Papers on the various policy areas in which the government intends to legislate. In Indonesia, results from the policy assessment are included in the Academic Paper, which is required by the Law on Law Making.

In addition, Regulatory Impact Assessments are conducted, often to assess the costs and benefits of different regulatory and non-regulatory options. In most OECD countries RIA has become mandatory.[99] The findings of the pre-legislative policy assessment are summarized in drafting instructions, which are then handed over to the legislative drafter.

- **Pre-legislative scrutiny**: Pre-legislative scrutiny is part of the legislative process. In most liberal democracies a draft law does not appear out of the blue. Instead, there is usually a consultation period during which the government proposes various alternatives, inviting the public to discuss them. In fact, legislative scrutiny has grown in importance to the point that more and more legislatures around the world are seeking to integrate pre-legislative scrutiny into their legislative process. In Indonesia, this type of scrutiny can be found in the planning process of national legislation as reflected in the National Legislative Program (PROLEGNAS).

Introduce ex-post review mechanism: If one views regulations as an integral part of the policy cycle, they should be evaluated like any other policy measure. Thus, a regulation should be evaluated, whether it has achieved its purpose, as well as whether it created unintended side effects, which need to be remedied, or whether a regulation can be implemented more efficiently (faster/cheaper). Tools for ex-post evaluation are not as well developed, as for example Regulatory Impact Assessment.[100] Attempts have been made to have a more complete Impact Assessment approach, which includes, the monitoring of implementation and feedback of regulations. Essentially these were attempts to merge pre-legislative scrutiny and continuous evaluation.

However, too often, governments (including Indonesia) have started experimenting impact assessment systems by adopting RIA as a one-size-fits-all tool. As a result, many countries have failed in their regulatory reform not because of the bad design of RIA, but due to a lack of co-ordination between the various phases of the policy cycle (see above). Even the best RIA system, taken in isolation, cannot succeed in making reform happen. Current practices appear to strictly assign RIA for ex-ante assessments and other evaluation instruments for ex-post assessments.

99 *Ibid*., OECD. Policy Outlook (2015), p. 99.
100 *Ibid*., OECD. Policy Outlook (2015), p. 119.

Ex-post evaluations are less formalized and evaluation criteria often include instruments assessing (i) political costs (ii) economic costs, and (iii) functionality. The concept of retrospective evaluation of legislation and 'if necessary or appropriate, the adaptation of legislation on the basis of the retrospective evaluation' is not new.

The concept of retrospective evaluation of legislation and 'if necessary or appropriate, the adaptation of legislation on the basis of the retrospective evaluation' is not new. As we have already seen, the evaluation stage of the policy process is a strong post-legislative scrutiny method and has been employed by governments for decades.

What is relatively new is the formal involvement in post-legislative scrutiny. Looking around the world it is interesting to note that many jurisdictions started such initiatives around the same time, e.g. 1999 in New Zealand, 2003 in Australia, 2001 in Germany (Nationale Normenkontrollrat) 2005). However, although provisions for post-legislative scrutiny are present in some common law and civil law jurisdictions, they are absent in Indonesia. Reasons for post-legislative scrutiny are, (i) to see whether legislation is working out in practice as intended; (ii) to contribute to better regulation; (iii) to improve the focus on implementation and delivery of policy aims; (iv) to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work. For example, in 2008 the UK government established a new system for promoting post-legislative scrutiny. makes a new commitment that the relevant ministry, within a period of three to five years from the Royal Assent of an Act, will submit a Memorandum that will report on the Act's implementation

In addition to parliament, other institutions conduct post-legislative scrutiny, such as independent bodies such audit authorities or courts. In addition, sun-set clauses, may require conducting ex-post assessments.

Revise decentralization laws introducing ex-ante approval for all *Perdas*: Considering the overall ineffectiveness of the review mechanism and the constitutional constraint that *Perdas* once enacted can only be invalidated by the Supreme Court. Central Government should consider introducing ex-ante approvals not only for *Perdas* concerning local taxes and retributions, but for all *Perdas*. Ideally, the centralized regulatory overview body, which has been proposed in the previous section, should review and

approve *Perdas* before their enactment. Every un-approved *Perda* should be declared invalid by law. Any time limitations and burden of proof at the expense of central government should be removed. Local autonomy should not lead to legal anarchy.

Introduce a constitutional review mechanism for regulations once enacted: It appears that the Constitutional Court can only review statuary law against the Constitution (and not *Perdas* authorized by statuary law). Other countries have overcome this gap, by introducing procedures regarding the particular/detailed review of laws with regards to their constitutionality. If a regular court, the Supreme Court of Administrative Court for example, considers the validity of a law, which is material to its decision, to be unconstitutional, it should be able to suspend the proceedings and refers the matter to the Constitutional Court for assessing the constitutionality of the (authorizing) statuary law. This procedure is the logical reflection of the legality principle and Klesen's norm-hierarchy.

Introduce expiry mechanism in regulations: A permanent regulatory impact assessment function needs to be complemented by expiry mechanisms, which forces government institutions to review existing regulations. Strictly speaking, legislation continues to be infinitely valid unless some intervention brings it to an end. In Indonesia, there are numerous regulations, which are outdated, conflicting, or even declared unlawful, but they are still on the books, i.e., formally valid. As with commencement, there are several mechanisms to determine the date when a statute comes to an end, or at least to determine when it should be reviewed.

- A sunset clause, for example, could state when a regulation expires (subject to review).
- A review clause is a provision in a statute which requires a particular person to consider the impact that a statute has had over a specified period and deliver a report on that impact to the legislative assembly (or body which made the statute).
- Disuse clause: If a regulation hasn't been enforced in a long time, then the principle of desuetude means that it is no longer valid.
- 'One in, two out' approach: each government department that suggests a new law must first remove two existing laws within its competence from the statute book.

Establish a Management Information System (MIS) for regulatory review: Develop and introduce a cross-institutional MIS involving key institutions on national, provincial, and district/city level. In a first step, a system should collect and analyze essential information with regards to (i) submitted regulations, (ii) processed regulation, (iii) regulation being processed (pending), (iv) repealed regulations, (v) average time for reviewing regulations, (vi) number of many approvals/repeals in a year.

6.5. Towards Improving Regulatory Implementation

Whereas the review of regulations focuses on regulatory quality regarding effectiveness, OSS address the efficiency processing the implementation of regulations.

Improvements with regards to efficiency on national and sub-national level largely depend on the type of OSS and the willingness of local government to change the regulatory environment within their jurisdiction. The national OSS level appears to be more professionalized, but also has a narrower focus on facilitating foreign investment.

By nature, improving the implementation of regulation becomes is more problematic when dealing with the standardization of 400 + different OSS types on the sub-national level.

Regulations and underlying processes need to be streamlined first: On the sub-national level, it is highly recommended to combine regulatory review/ streamlining with the introduction of OSS to assure an integrated approach towards regulatory improvements. Unnecessary and burdensome licenses do not become better by the fact that the regulations are implemented through OSS. As a first step, it is always recommended to streamline those regulations and underlying processes handled by an OSS. This integrated approach needs to be coordinated with the national government as some regulations, such as the general business license (SIUP) all under the legislative authority of the national government. Other local licenses typically associated with user charges fall under the legislative authority of sub-national government, such as the disturbance license.

Build on best practice models, which have been proven to be effective: Previous projects supported by development partners and evaluations of existing OSS initiatives in Indonesia indicate that several fundamental

changes are required to ensure effective OSS. These include delegation of sufficient levels of autonomy and authority to OSS; reorganization of local administration to permit this delegation of authority; and, provision of central government support and monitoring to the regions for OSS development. Against this background, the establishment of one-stop-services on the "one-door" model achieve the highest degree of administrative efficiency. Experience suggests that entire delegation of authority to OSS, along with the lines of the 'one-door' model, bring the highest accessibility and efficiency gains because it allows OSS to deal with SMEs on the spot, rather than referring them to a multitude of other agencies. This requires, however, a complete delegation of institutional authority and discretionary powers to OSS as roles and responsibilities at a sub-national level often vested in a range of different agencies. This has proven to l be a complicated, time- consuming process, requiring political leadership and determination.

The national level has to play a decisive role: Central government should develop a mandatory framework for establishing OSS, including the type of OSS, key processes, and performance standards. Guidelines should be offered as part of the development service to local government and include actions geared at improving administrative performance, such as the reorganization of tasks, standardization of reporting forms, reduced reporting requirements and more effective use of IT for both administration and online service delivery. Monitoring and evaluation of OSS efficiency, effectiveness and nationwide consistency is a function that should be conducted by central government; standardized performance measures such as licenses issued per month or average time are taken to process a license should be put in place, both for evaluation purposes and internal management.

In the past, sub-national governments ignored standardization attempts launched by the national government. MoHA's decision on the implementation of OSS included many of the before mentioned recommendations, but it was argued that a ministerial decision is not legally binding as it is not included in the hierarchy of norms. If this is the case, national government should issue a regulation, which is included in the hierarchy of norms and trumps sub-national legislation. As with regulatory review, the central government should play a more decisive role. The revised decentralization laws now provide more opportunities than 10 years ago.

Legal Terminology and Citation

The book interchangeably uses the following legal terms:

- Sub-national level = provinces (with and without special status), districts (regencies), and cities (municipalities)
- Regulation in the broader sense = Rules and Norms
- Law = Statuary Law, Primary Legislation/ Law, a law made by the legislature, Acts, Ordinances.
- Bill = draft law
- Regulation (in narrow sense) = Administrative Regulations, Secondary Law, Implementing Regulations. Secondary legislation can be called Rules, Regulations, Orders, Directives, Decrees or Statutory Instruments.
- One-Stop-Shops = One-stop-services or one window services

This study does not follow a particular or official citation guideline.

Sources are cited: Institution or Author; (Surname, Name); Source; Where; When; Page; or respective links to the internet source (URL).

The formal citation of statuary laws and regulations was shortened to Art. (x) of the law or regulation (number/year).

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List of Acronyms and Abbreviations

ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
BKPN	Investment Board
Dinas	Technical line agency on sub-national level
DPR	Nation Legislature (House of Representatives)
DPRD	Sub-national legislature
EC	European Commission
EU	European Union
GIZ (GTZ)	Gesellschaft für Internationale Zusammenarbeit
GR	Government regulation
HSF	Hanns Seidel Foundation
IDR	Indonesian Rupiah
Menkumkam	Ministry of Law and Human Rights
MoHA	Ministry of Home Affairs
OECD	Organization of Economic Cooperation and Development
OSS	One Stop Shop
Perda	District/City regulation (*peraturan daerah*)
RIA	Regulatory Impact Assessment
TAF	The Asia Foundation
UU	Statuary law (*Undang Undang*)
UUD	Constitution (*Undang Undang Dasar*)
USAID	United States Agency for International Development
WB	World Bank

Part 2

Selected Analysis of Key Issues on Regulatory Reform

I

Efforts to Improve the Performance of the Indonesian House of Representatives in the Formulation of Quality Laws

Agus Riewanto

1. Introduction

After the fall of the New Order and the rise of the Reform Order, this nation continues to be battered by a seemingly unending series of issues, including social, economic, political and legal issues. As a nation that is grounded on the constitution (rechstraat), this nation believes that the law is the central pillar for the "common home" known as Indonesia. The main component necessary in enforcing the law is the presence of appropriate laws and regulations, not only in terms of its democratic technical formulation procedures (legal drafting)[1], but also in the quality of its content materials, which could be used as reference and guidelines by the nation without contradicting the hopes and wishes of the public.

After the amendment of the 1945 Constitution, the pendulum of power in the production of the laws have shifted, where the position of the House of Representatives is stronger than that of the President. This condition is apparent in Article 20 Paragraph (1) that mandates the House of Representatives with the power to formulate legislation. The amended Article 5 Paragraph (1) stipulates that the President only has the right to propose a Bill (draft legislation) to the House of Representatives. The position of the House of Representatives was further strengthened through Article 20 Paragraph (5), in such case as the President does not pass the Bill that has been jointly approved within 30 days since its approval, the Bill shall be passed as a Law and must be promulgated. The provisions stipulated in Article 20 Paragraph (5) implicitly forces the President to promulgate every Bill that has been approved by the House of Representatives, even if during the deliberation process certain materials are not considered to be acceptable by the government.

1 Several scientific works provide explanations on the technical procedures for drafting the law that could be used as a reference; Rusminah, "*Pembentukan Peraturan Perundang-Undangan*" (Formulation of Legislations) in Padmo Wahyono, *Masalah Ketatanegaraan Dewasa Ini* (Current Issues on Constitutional Governance) Jakarta: Ghalia Indonesia,1985. p. 143-154. Maria Farida Indrati S., *Ilmu Perundang-Undangan: Jenis, Fungsi dan Materi Muatan, Jilid I* (The Science of Legislation: Type, Function, and Content Material, Volume 1), Yogyakarta: Kanisius, 2007. Budiman M.P.D. Sinaga, *Ilmu Perundang-Undangan* (The Science of Law), Yogyakarta: UII Press, 2004. A, Hamid S. Attamimi, *Peran Keputusan Presiden dalam Penyelenggaraan Pemerintahan Negara* (The President's Role in State Administration), Dissertation, UI, Jakarta, 1990. Bagir Manan, *Hukum Tentang Perundang-Undangan di Indonesia* (The Law on Legislation in Indonesia), Bandung: Ind Hill Co.,1992. Soehino, *Teknik Perundang-Undangan* (Law Formulation Techniques), Yogyakarta: Liberty, 2003.

At this point, there seems to be a shift in the functions and authorities in the production of the Laws, as before being amended, Article 5 Paragraph (1) stipulates that the President has the authority to formulate the laws with the approval of the House of Representatives. Article 20 Paragraph (1) stipulates that every Law requires the approval of the House of Representatives. The facts show that before the amendment of the 1945 Constitution the position of the President was stronger than the House of Representatives (executive heavy), however, after the amendment of the 1945 Constitution, the power shifted to the House of Representatives (legislative heavy).

This phenomenon within the constitution shows that the House of Representatives holds a strategic function in determining the form and format of the Law. The House of Representatives is also responsible for the quality of the legislation products. Because within the context of institutionalizing the democracy through the legislation products, the House of Representatives plays an influential role in determining the direction of the consolidated democracy. The functional urgency could be determined by measuring the level of quality of the Legislation products. This is key in a thriving consolidated democracy.[2]

In this paper, the term politics refer to the legal policy that would be or had been applied at the national level by the government. The legal policy encompasses: First, the developments of the law with a core focus on the formulation and reform to ensure that they conform to the needs. Second, the implementation of the existing provisions on the laws, including in affirming the functions of the agencies and the training of the law enforcers. Hence, based on this understanding, the politics of law encompasses the formulation process and implementation of the laws, which could determine the nature and the direction of the law that would be developed and enforced.[3]

In the future, therefore, it is necessary to have a political-legal strategy to improve the quantity and quality of the legislation that is not only

2 Alan R. Ball and Guy Peters, Modern Politics and Government. Macmillan: Palgrave Macmillan, 2005, p. 59.

3 Mahfud MD., "*Mengawal Arah Politik Hukum: Dari Prolegnas Sampai Judicial Review*" (Safeguarding the Politics of Legislation: From the National Legislation Program to Judicial Review), Paper delivered at a National Seminar themed "*Arah Politik-Hukum Legislasi Nasional*" (The Direction of Politics-Legislation of the National Legislation) held by the Doctorate Program in the Law of Science, Faculty of Law, *Sebelas Maret University* (UNS) Surakarta at Hotel Sahid Raya Solo on February 20, 2010, p. 3.

democratic in terms of their contents and form but also follows the clean and good lawmaking process. In particular, the legislation must be free of corruption, collusion, and nepotism, and could achieve the targeted number of legislation as stipulated in the National Legislation Program (*Prolegnas*). This is to ensure that the national legislation products are able to guide and protect the state and community systems effectively. In other words, future national legislation products should be a manifestation of the people's aspirations within the framework of the state, and not the political request of certain groups (political parties, religious, ethnic and majority groups) and even more so, on the orders of the global economic and financial capitalists (global capitalism).

This article aims to uncover the main reasons behind the low performance of the Indonesian House of Representatives in producing national legislation, in terms of their quality as well as quantity, and efforts to improve the performance and productivity of the Indonesian House of Representatives in formulating the legislation.

2. Arrangement of the National Legislation Program

Within the context of the political-legal legislation policies, the National Legislation Program, often abbreviated into Prolegnas, aims to develop program plans in the formulation of legislation that is considered to be of national priority to overcome the various legal problems within the society. The Prolegnas is implemented over the five-year period of the Members of Parliaments and President's term of office, as they are the two institutions that hold power to propose the laws and legislation, as stipulated in the provisions of Article 20 of the post-amended 1945 Constitution.

Arrangements for the Prolegnas is regulated in Article 16 of Law Number 12 Year 2011 on the Formulation of the Laws and Legislations that stipulates, the planning for the formulation of the Laws are carried out through the Prolegnas. The Prolegnas is also equipped with various instruments to determine the scale of priorities in the drafting of the Laws. The mechanism for the Prolegnas is regulated in Presidential Regulation Number 87 Year 2014 on the Implementing Regulations for

Law Number 12 Year 2011 on the Formulation of Laws and Regulations, which is a legally binding regulation for all ministries and non-ministerial government institutions in drafting and proposing a Bill. Then there is the Indonesian House of Representatives Regulation Number 1 Year 2012 on the Guidelines for the Preparation of the National Legislation Program and the Indonesian House of Representatives Regulation Number 1 Year 2012 in conjunction with the Indonesian House of Representatives Regulation Number 1 Year 2014 on the Code of Conduct of the Indonesian House of Representatives that legally binds the Members of Parliament who are members of the Commissions, Legislation Body, as well as Factions within the Indonesian House of Representatives proposing a Bill.

The preparation and proposal mechanisms for a Bill in the Presidential Regulation and the Indonesian House of Representatives Regulation legally binds each institution (the President and the House of Representatives) to enact the Prolegnas during the Plenary Session of the Indonesian House of Representatives in the form of the annual Indonesian House of Representative Decree on *Prolegnas* and the annual priority *Prolegnas*. For example, based on the mechanisms that are regulated in Presidential Regulation Number 87/2014 and the Indonesian House of Representatives Regulation Number 1/2014, the Plenary Session of the House of Representatives have decided, through the Indonesian House of Representatives Decree Number 06A/DPR RI/II/2014-2015 on the National Legislation Program for 2014-2015 and the National Legislation Program for the Priority Bills for 2015 to approve 160 Bills in the 2015-2019 *Prolegnas* as the target for the House of Representatives and the government to complete throughout 2015-2019, or within one period of the Members of Parliament's term of office. The priority *Prolegnas* for 2015 is 37 Bills and 2016 as many as 40 Bills.

3. The Low Number of National Legislation Products

After the amendments of the 1945 Constitution, we began to see a shift in the pendulum of power for legislation production, where the House of Representatives holds higher power over the President. This is apparent in Article 20 Paragraph (1) that mandates the House of Representatives with the power to produce legislation. The amended Article 5 Paragraph (1) stipulates that the President only holds the right

to propose a Bill to the House of Representatives. The position of the House of Representatives is further strengthened through Article 20 Paragraph (5) that stipulates, in the event that the Bill that had been jointly approved are not passed by the President within 30 days as of the day the Bill was approved, the Bill shall be passed in to a Law and must be promulgated. The provision stipulated in Article 20 Paragraph (5) implicitly forces the President to promulgate every Bill that has been approved by the House of Representatives, even when certain materials are deemed unacceptable by the government during the deliberation process.

At this point, there is a shift in the function and authority of producing the Bill, which before the amendment was stipulated in Article 5 Paragraph (1) as the President holds power to formulate legislation with the approval of the House of Representatives. Article 20 Paragraph (1), stipulates that every legislation shall require the approval of the House of Representatives. These facts on the pre-amended 1945 Constitution showed that the President held a stronger position than the House of Representatives (executive heavy), however, after the amendment of the 1945 Constitution the position shifted, where the position of the House of Representatives is stronger than that of the President (legislative heavy). This condition resembles the parliamentary system, and as we move towards the purification of the presidential system, some of these parliamentary systems have been incorporated into the provisions.[4]

This model is a primary impediment that resulted in the imperfect legislation process at the House of Representatives. This situation is further exacerbated by the extreme multi-party system at the House of Representatives, where there are currently 10 political parties that are grouped into 10 Factions, thus resulting in numerous conflicts of interests among the factions to secure the most substantial influence in their oversight function towards the President to ensure that the President is willing to give some of the cabinet minister's positions to the parties.

4 Moh. Fajrul Falaah, "*Presidensial dan Proses Legislasi Pasca Revisi Konstitusi: Parlementarianisme Lewat Pintu Belakang*" (The Presidential and the Legislation Process Post Constitutional Revision: The Unseen Parliamentary System), Paper presented at the National Seminar titled: "*Meluruskan Jalan Reformasi*" (Setting straight the Path of Reform), held at the Gajah Mada University, 25-27 September, Yogyakarta, p. 10.

The multi-party system has made it difficult for the House of Representatives to make any decisions during the legislation process. Therefore, the claims made by Giovani Sartori's have now become a reality. Sartori said in the extreme multi-party based Presidential system the problems in the planning and determination of a legislation and non-legislation product is not in the executive arena (the President) but the legislative arena (the House of Representatives).[5]

The dominant position of the House of Representatives (legislative heavy) in producing legislation is not supported by the strong commitment and the discipline of the legislators' to improve their performance and in the quantity and quality of the Laws that are produced. In reality, in the 2015 plenary period, the House of Representatives were only able to deliver 2 (two) Laws out of the 36 Bills targeted in the *Prolegnas*, which are the Law on Regional Government and Law on the Regional Heads Election.

The House of Representatives generally uses the time that they have to conduct several visits and to oversee the performance of the President, disregarding their legislation functions altogether.[6]

In fact, in the 2009-2014 period of the House of Representatives, the public rejected many of the legislation that was produced for various reasons. What was most remarkable was that within the entire month of December 2008, the public rejected three Bills, which were, the Law on the Supreme Court, Law on Minerals and Coal, and Law on the Legal Entity for Education. Added to that list were the Law on Politics (such as the Law on Political Parties, Law on the Election of the Members of the House of Representatives, House of Regional Representatives, Regional House of Representatives, as well as the Law on the Presidential/Vice Presidential Election) that were passed to serve as the legal platform for the organization of the 2009 election. The election was the most controversial election in history because of the faulty legislation product.

The following table illustrates the legislation products that the House of Representative had failed to complete:

5 Giovani Sartori, *Comparative Constitutional Engineering*, London: Macmillan Press Ltd., 1997, p. 83.

6 APA, "*Kinerja DPR, Memperbaiki Produktivitas Legislasi" (The House of Representatives Performance, Improving the Legislation Productivity)*, Kompas, 12 August 2016, p. 5.

Table 1

No	Year	Target	Completed
1	2005	55	14
2	2006	76	39
3	2007	78	40
4	2008	81	61
5	2009	76	39
6	2010	70	16
7	2011	93	24
8	2012	69	30
9	2013	70	22
10	2014	69	31
11	2015	39	2
12	2016	50	9
13	2017	89	3
14	2018	43	3
15	2019	55	Ongoing

Source: Taken from varoius sources

Furthermore, there were other reasons for the low number of legislation produced by the House of Representatives and they include: First, the legislation function requires a high mastery on the content materials and the technical skills as the deliberation process would encompass the detailed technical arrangements, the members of the House of Representatives, however, lack the adequate capability in this matter. Second, the numerous deals made during the deliberations of the legislation at the House of Representatives that were accommodated in every existing article, consequently, deliberations on the Bills tend to be insignificant when compared to the Members of Parliament's attitude when exposing their performance on the oversight and budgeting functions, which tended to be more aggressive and uncompromising. This situation is also apparent in the low attendance level of the Members of Parliament in Bill related deliberations, whereas the level of presence was relatively higher in meetings on the oversight and budgeting functions.

The statements made by several people who rejected the legislation products included, unable to reflect a sense of justice, too many overlaps, increases empathy and benefits towards certain parties but were discriminating towards others. There is some form of "resistance," which in the words of Larry Cata Backer,[7] was a result of a mismatch between the law and society.[8]

This shows that the House of Representatives is nothing more than a legislation making factory, where the process in the formulation of a legislation is unreflective of the public's hopes, is more geared towards the interest of certain groups, without in-depth reviews, lacking the strong commitment to achieving the productivity target in both quality as well as quantity, and is far-removed from the aspirations of the public.

According to Mahfud M.D., the politics of law that is targeted in the national law development must be based on four principles.[9]

One, the Indonesian law must serve the purpose of and guarantee national integration, both territorially and ideologically. Two, the laws must work in synergy to develop democracy and monocracy, which means, the law must be able to tap into the aspirations of the society through a fair, transparent, and accountable mechanism.

Three, the law must be capable of developing social justice. There is no justification for the emergence of a law that encourages, or allows, social-economic disparities from taking place due to exploitations of power by the strong towards the weak without the protection of the state.

Four, the law must build religious tolerance and civility. The law must not provide the privilege to, or discriminate against, certain groups based on how large or small the number of their religious followers may be. Indonesia is not a nation based on religion (whose constitution is based on

7 Larry Cata Backer, *Harmonization Law in an Era of Globalization*, Convergence, Divergence, and Resistance, (Durham, North Carolina: Caroline Academic Press, 2007, p. 137.

8 For more in-depth information on the legal problems and the society within the Indonesian legal reform read, Hari Purwadi, *"Reformasi Hukum Nasional: Problem dan Prospeknya" (National Legal Reform: Problems and Prospects)*, in Satya Arinanto and Ninuk Triyanti (ed.), *Memahami Hukum dari Konstruksi sampai Implementasi (Understanding the Law, from Construction to Implementation)*, Jakarta: Rajawali Press, 2010, p. 61-67.

9 Mahfud MD, Ibid., p. 5-6.

one particular religion), nor is it a secular nation (that pays little attention to or are devoid of any religious beliefs). The state constitution could not make the enactment of the religious law compulsory. Nevertheless, the state must facilitate, protect, and guarantee the safety of their citizens in performing their religious rituals and teachings based on their own beliefs and conscience.

4. Efforts to Improve Legislation Productivity

There needs to be an effort to improve productivity in the formulation of the national legislation, quantitatively as well as qualitatively. The objective is to resolve the poor performance of the House of Representatives in assuming the legislative mandate to achieve excellent and clean politics of law on national legislation that is free of corruption and is democratic in producing the laws and legislation of the future (clean and good lawmaking process).

4.1. Changing the Orientation of the People's Representative

In terms of improving the legislation productivity, the issue lies in the role of the Members of Parliament, whether they are an agent or a trustee.[10] It is essential that a clear definition be made on the duality of the roles held by the Members of Parliament, as lack of clarity on the actual role of the

10 Many theories touch on how the political representation of a legislative member can be influential towards the quality of their partiality towards the people. Malcolm E. Jewell places them under two categories, as trustee and as a delegate, Malcolm E. Jewell, *"Legislator-Constituency Relations and the Representative Process,"* in the Legislative Studies Quarterly Journal, Vol 8 Number 3 (Aug. 1983), p. 310-311. Others divide them into an imperative mandate and free mandate. See Bintan R. Saragih, "*Sistem Pemerintahan dan Lembaga Perwakilan di Indonesia" (The Government System and Representative Body in Indonesia)* Jakarta: Perintis Press, 1985, p. 101. Moreover, there are those who categorize them as being politico, a form of a mixed model where they sometimes act as a delegate and sometimes trustee. There are also those that divide them into two categories, the unity model and the diversification model. In the first model, the Members of Parliament is viewed as representative of the entire population, whereas in the second model, they are viewed as a representation of certain territorial, social, or political groups. See Bilal Dewansyah, "*Implikasi Pergeseran Tipe Wakil Rakyat dari Partisan ke Politico" (The Implications in the Shift of the Type of People's Representatives from Partisan to Politico)*, Paper delivered at the 10th International Seminar organized by the Yayasan Percik (The International Foundation for Social Research, Democracy and Social Justice) in cooperation with the Ford Foundation in Salatiga on July 28-30. 2019.

House of Representatives is seen as one of the determining factors in their low productivity level.

This lack of clarity is evident throughout, for example, there are times when the House of Representatives positions itself as an agent that takes on the role of mediator for certain constituent groups or other groups with specific interests. In this context, the struggle to produce the legislation is based on what is deemed advantageous or disadvantageous for a particular group, or based on a political "order." The greater the advantages that could be obtained through this political order, the greater the struggle would be to approve the Bill and to promulgate it as a Law, and vice versa.

At other times, the House of Representatives positions itself as a trustee, where the presence of the Member of Parliament at the House of Representatives is seen as a representation of the collective will of the people. The efforts in formulating a Law is no longer bound by the interest of certain constituent groups, but solely for the interest of the people.

Primarily, two factors differentiate the two types of roles played by the House of Representatives. The Agent model, where formulation of the Legislation is based on the interests of individual constituents groups and not the public in general, and the Trustee model, where formulation of the Legislation is based on national interests, and not the interests of certain groups.

Determining whose interest must come first is not an easy feat, because there may be possibilities where the Members of Parliament interchangeably, or perhaps even unanimously, take on one role and then the other.[11]

Empirical evidence showed that in practice, almost every developing nation finds it difficult to position the Members of Parliament as trustees. C. Wright Mills illustrate the situation by saying that the main actors in the political process of the parliament are usually those working outside of the parliament, such as the bureaucrats, military, influential entrepreneurs, and bogus intellectuals. Therefore, it can only be expected that the process

11 Sony Maulana S. "*Power Versus Pragmatism: Menggagas Pembahasan RUU dengan Argumentasi Berdasarkan Fakta dan Logika" (Power versus Pragmatism: Initiating Deliberations on a Bill through Argumentation Based on Facts and Logic)* in the Jurnal Hukum Jentera, 10th Edition Year III, October 2005, p. 25.

for developing public policies, which is translated into legislation products, would be elitist and are inaccessible to the public.[12]

This is where the allegations of the transactional or corruption practices that take place between the House of Representatives and other interest groups on the legislation products came to the surface. The most recent is the scandal on the disappearance of Article 113 Paragraph (2) or "Paragraph on Tobacco" in the Bill on Health. A similar situation also occurred in the formulation process of the 2009 Legislative Election Law (Law Number 10/2008). Based on its research, Cetro noted that after the Plenary Session, the number of articles increased from 316 to 320. This was the latest political scandal in the legislation process. Therefore, it would be a fallacy, and irresponsible, to say that the incident was merely a technical error when in actuality, it could be considered as an editorial coup.[13]

However, as difficult as the situation may be, the Members of Parliament need to position themselves as independent individuals who are not dependent upon their political parties in developing good legislation products. They should base the process on their logic and comprehension of the facts surrounding every particular circumstance.[14]

4.2. Eliminating the Factions at the House of Representatives of the Republic of Indonesia

Another issue of interest in the efforts to create the independent attitudes of the Members of Parliament in the legislation process is the need to eliminate the functions of the factions as the primary mechanism of work in the House of Representatives. The presence of the factions results in three things: First, it accentuates the partisan political system of the Members of Parliament, which is evident in the blind discipline and loyalty towards the political agenda of the political parties. Second, it serves as an impediment to the development of the Members of Parliament role as the representative of the people (delegate) and as Members of Parliament who are autonomous (trustee). Third, it forfeits the Members of Parliament's autonomy as individuals.[15]

12 C. Wright Misll, *"The Power Elite"* in Susan J. Fergusson, *Mapping the Social Landscape*, 2nd Edition, California: Mayfield Publishing Company, 1999.

13 Saldi Isra, *"Kudeta Redaksional" (Editorial Coup)*, in Kompas, October 19, 1999, p. 5.

14 Sonny Maulana S., Ibid., p. 25.

15 Gadjah Mada University Team, "*Demokratisasi Politik, Sumbangan Pikiran Universitas Gadjah Mada" (Political Democratization, Contributing Opinions from the Gadjah Mada University)*, Yogyakarta: UGM-Kadin, 1998, p. 7.

The fact is that in the existing provisions, factions are not listed as an organ of the House of Representatives. Factions are seen as a vehicle for grouping the political elements in the House of Representatives. Although the Factions are not an organ of parliament, there are far stronger than any other organs within the House of Representatives, to the extreme that there were cases where the power held by the Factions were able to make the House of Representatives come to a standstill. One such incident was the feud between the National Coalition and the People Coalition, which showed the domination of the factions in determining the political dynamics of the House of Representatives. Frankly speaking, even from its earliest beginning, the presence of the factions have dampened the constitutional rights of the Members of Parliament, particularly in expressing their ideas and opinions, both verbally or in writing.[16]

The presence of the factions in the implementation of the legislation function appear to be dominant, most specifically during the discussions on the general perspective and in determining the final formulation of a Bill. It is worth mentioning that the debates that took place during the entire legislative process were based on the argumentations made by the factions. Very rarely do we hear opposing opinions being put forward by the Members of Parliament that go against the opinions of the factions. As such, almost all of the legislation products are biased and are partial towards the elite, who are the kingmakers of a political party.[17]

4.3. Finding Balance in the Role of the House of Representatives and the House of Regional Representatives of the Republic of Indonesia

The low quality of the various legislation products by the House of Representatives is probably due to the unavailability of a control center that can balance the domination of the House of Representatives in the legislation process. One of the main reasons behind this condition is the diminution of the representative system in the House of Representatives and the minimum role that other institutions play in the legislation process. The purpose of the two-chamber system (bicameralism) that is implemented in Indonesia is to increase the participation and function of the political institution. Unfortunately, in reality, the legislation process

16 Saldi Isra, *"Reformasi Fungsi Legislasi" (Reforming the Function of Legislation) at http://www.infoanda.com/linksfollow.php?lh=VwEICwVeBlZV*, accessed on July 10, 2016.

17 *Ibid*., p. 667.

is not bicameral but tends to be unicameral, which is the House of Representatives. As a result, the term "representative" that should have carried a larger meaning is reduced in the legislation process.

In the House of Representatives, only representatives of the political party play a significant role, whereas the role of the regional representatives is of little significance. This is something of an oddity. The parliamentary system is bicameral, but the legislative process tends to be unicameral. Realistically, the quality of the legislation could have been improved through checks and balances by the second chamber, as the saying goes, "two heads are better than one." Through the intra-parliamentary checks and balances mechanism, it is expected that there is substantial control towards the authoritative right of the House of Representatives and the House of Regional Representatives.[18]

It is an undeniable fact that in the legislation process, the quality of the legislation product is tightly linked to the equal relations between the House of Representatives and the House of Regional Representatives. Through this mechanism, it is possible to obtain more comprehensive inputs on the materials of the legislation because of the involvement of other political actors who are not politicians (the House of Regional Representatives).[19]

4.4. Paving the Way for the President's Right to Veto

One way to reduce the domination of the House of Representatives in the legislation process, which are often abused, is to give an equal role to the President to reject the various Bills formulated by the House of Representatives if the Bills are in contradiction with the interest and will of the public; alternatively, providing the President with the right to veto.

18 Zaenal Arifin Mochtar, *"Legislasi Zonder Partisipasi" (Legislation Without Participation)* at http*://library.wri.or.id/index.php?p=show_detail&id=2146*, accessed on July 3, 2016.

19 Read the paper on this issue in Saldi Isra, *"Prospek Fungsi Legislasi" (The Prospect of the Legislation Function)* in the Tempo daily, October 23, 2004. In terms of the balance of the roles and function of the House of Representatives and the House of Regional Representatives or other mentions on the legislation process, South Africa has one of the most democratic practices. See Karen Syma Czapanskiy and Rashida Manjoo, *"The Right of Public Participation in the Law-Making Process, and The Role of the Legislature in the Promotion of This Right,"* at *http://www.law.duke.edu/shell/cite.pl?19+Duke+J.+Comp.+&+Int%27l+L.+1*, accessed on July 23, 2016.

The term "veto" is a Latin word meaning "I forbid" or "I reject." The right to veto is a right that can be found in the political and governmental lives for checks and balances that is grounded on the United States Constitution. International Encyclopedia of Governments and Politics: Routledge; annotated edition (January 1997).[20]

Unlike the United States governance system, Indonesia's legislation process does not allow the President to use the right to veto. In fact, Article 20 Paragraph (5) of the 1945 Constitution makes it mandatory for the President to accept the Bill from the House of Representatives, even if sociologically and philosophically the legislation product does not have any significance towards the interest and welfare of the people.

We cannot refute the fact that constitutionally the House of Representatives IS the institution that has been afforded the authority to formulate and develop the legislation. However, for equality, the President, as the executive, must be given the rights to conduct checks and balances, because there is a possibility that if the Bill is enacted, it may result in disorderliness, lack of security, unrest, and impoverishment. The President and the executive body are responsible for dealing with the social-political chaos. Also, because of the responsibilities that had been bestowed to the President as the executor of the law, including the burden that follows, it is only right that the President is given an in persona rights in the legislation making process.[21]

If we study the constitutional mandate stipulated in Article 20 Paragraph (2) of the 1945 Constitution using the interpretative grammar theory, we can infer that in the deliberation of a Bill, the President is given the constitutional right to approve a Bill. Similarly, if we use the a contrario interpretation theory, the President is also given the right to reject or disapprove.

In the post-amended 1945 Constitution, the President has been given the right to use "a form of right to veto" to express rejection towards a Bill that has been jointly deliberated in a plenary meeting of the House of Representatives. The President's "right to veto" has to be based on the President's personal philosophical, jurisdictional, and sociological considerations, as the President is the person who holds the responsibility in implementing the legislation.[22]

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20 Alex Bambang Riatmodjo, *"Hak Veto Presiden dalam Proses Pembuatan UU" (The President's Right to veto in the Legislation Process)* in Kompas, July 17, 2003.

21 *Ibid*.

22 *Ibid*.

Many state law experts have recommended the need for a President's right to veto in the legislation-making process. However, the authority of the President in the legislation-making process must first be removed. Nevertheless, to maintain continuity, it is imperative that the President holds the right to veto towards a Bill, which can the re-vetoed by the House of Regional Representatives or the House of Representatives through a majority vote.[23] This model is considered a long-term process as it is considered too complicated and would require the need to carry out amendments to the 1945 Constitution.[24]

4.5. Strengthening Public Participation

To prevent politically corrupt practices[25] in the form of abuse of authority in the legislation-making process at the House of Representatives, the capacity of the public participation in the legislation-making process needs to be strengthened. In the Indonesian constitution, theoretically and in practice, it would be difficult to renounce the function of participation in the legislation-making process.

There is a strong connection, and an inseparable connection, between public participation, who is being represented and would be regulated, and the elites who represent the public and initiate the regulation. In this sense, participation is imperative. The legislation-making processes that do not accommodate participation have harmed the principles of the mandate by the people that is guaranteed through the constitution.

23 Read one of the points in the *"Hasil Kesepakatan Pertemuan Ahli Tata Negara" (The Results of the Agreement in the Meeting of State Law Experts)* held at the Andalas University, Padang on May 17, 2007, in *http://reformasihukum.org/konten.php?nama=SiaranPers&op=detail_siaran_pers&id_siaran_pers=26* accessed on July 7, 2016.

24 Pessimism towards the bestowal of the right to veto to the President was implied in Saldi Isra's paper, *"Legislasi yang Mati Rasa" (Insensitive Legislation)*, Kompas daily, Tuesday, December 30, 2008, *http://antikorupsi.org/indo/content/view/13938/6*, accessed on June 8, 2016.

25 Artidjo Alkostar was repulsed by the political corruption in the parliament, which according to him was a crime that is far more dangerous than the corrupt practices carried out by people without political power. The social-political and economic impact would be widespread because of the political authority and power held by the actor. The political corruption that takes place in the parliament is a betrayal towards the mandate given by the people, particularly the constituents. Political corruption in parliament is carried out utilizing electoral transactions for personal gains. See, Artidjo Alkostar, *"Korupsi Politik di Parlement" (Political Corruption in the Parliament)* in Kompas daily, Agusust 27, 2008, p. 5.

Violations against the constitution could be used as a strong defense to invalidate the legislations that are in contradiction with the hopes of the people through the Constitutional Court as the court of law.[26]

Law Number 12 Year 2011 on the Formulation of the Laws and Regulations stipulates the need to include public participation in the legislation-making process. In Article 139-141 of the Code of Conduct of the House of Representatives, it is stated that the public could provide feedback, both verbally or in writing, to the House of Representatives in the preparation and deliberation of a Bill. In fact, should there be any verbal feedbacks, the head of the parliamentary organ shall make available time for a special meeting with the giver of the feedback. Compared to the previous period, the opportunity for the public to participate in the legislation-making process is positive progress.[27]

On a broader scale, the opportunity to participate would encourage the people to be more critical in observing the process and substantiality of the Bill being deliberated in the House of Representatives. The logic behind this idea is that by opening the opportunity for public participation, the people has a greater understanding of the substantial impact a Bill would have in their lives. In addition to that, the opportunity for public participation could also be used to prevent the possibilities of unlawful practices from occurring in the legislation-making process.[28]

The question then is, to what extent could public participation influence the content materials of the Bill. This is a logical question and needs to be urgently put forward for the following reason; it is not that there has never been any public participation, but the feedbacks that were put forward had been unsuccessful in changing the political calculations of the majority of the politicians at the House of Representatives. In fact, in many cases, public participation was merely used as legitimation in the legislation-making process.[29]

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26 Zaenal Arifin Mochtar, Ibid.

27 Saldi Isra, *"Reformasi Fungsi Legislasi" (Reform in the Function of Legislation)*, Ibid.

28 *Ibid*., with regards to the function of public participation, also read Saldi Isra, *"Menggugat Arah Fungsi Legislasi" (Making a Case against the Direction of the Function of Legislation)*, in *http://www.kompas.com/kompas-cetak/0309/24/opini/575930.htm*, accessed on June 8, 2016.

29 *Ibid*.

In the deliberation on Bill Number 11/2012, there were recommendations to add one clause, "if the deliberation renounced the participation of the public, the legislation shall be determined as null and void." This recommendation was put forward based on the reasoning that if participation is stipulated as the rights of the people, then consequently, the House of Representatives must follow it up. Unfortunately, the recommendation went through deaf ears. Meanwhile, the rights to participate has the potential to become an influencing factor in maintaining the political relations between the public and the political powers within the House of Representatives.[30]

In many of the theories on how to produce good legislation, public participation is always positioned within the main nomenclature. Ann and Robert Siedman establishes the rules that must be followed in the legislation-making process, they are: (1) a bill's origin, (2) the concept paper, (3) prioritization, (4) drafting the bill, (5) research, and (6) who has access and supplies input into the drafting process.[31]

The academic community (universities and intellectuals) can play a pivotal role by preparing an academic paper (the concept paper) as it could be used as an initial reference on why the Bill needs to be passed and as a vehicle of communications between the House of Representatives and the public.

At the very least, the academic paper must be reflective of the following five points: (1) must be able to show the importance of the Bill in improving the quality of life of the people, both in theories and in practice, (2) the social and economic benefits of the Bill must be more significant than the cost required to produce the Bill, (3) must include provisions that regulate continuous monitoring and evaluation, (4) the Bill must be designed in such a way as to ensure an effective implementation, and (5) the Bill must encourage and promote good governance.[32]

It is for this reason that universities should have a center for law studies with a focus on legislation at the faculty of law. The center should

30 *Ibid*., Read Saldi Isra's paper on *"Potret Fungsi Legislasi DPR" (A Glimpse into the Legislation Function of the House of Representatives)* in *http://www.kompas.com/kompas-cetak/0307/17/opini/435868.htm*, accessed on June 8, 2016.

31 Ann Seidman and Robert Seidman, *Legislative Drafting for Democratic Social Change, a Manual for Drafters*, London: Kluwer Law International, 2001, p. 125.

32 Sony Maulana S., Power vs. Pragmatism, Ibid., p. 32.

provide, at the very least, three activities: (1) Legislation Monitoring: Providing information on the legislation-making process, the material and the content materials, that serves as an argumentative tool with the House of Representatives; (2) Training Center for Legislation Development; and (3) Legislation Service Center. The purpose of the center is as follows:

- Generate awareness that the initiatives for regulation and policy development could come from the Government, the House of Representatives, as well as the public;
- In developing legislative policies/regulations, the government and the House of Representatives must involve the participation of the public in its broadest sense;
- The decision making the process by the Government and the House of Representatives must be conducted openly and with public participation.
- Providing accessibility to the process through various public consultations, encouraging public initiatives and many more;
- Partial towards community groups who would be most vulnerable from the issuance of a (public) policy or regulations (legislation);
- Acknowledgment from the state of the rights of every citizen to participate in the policy/legislation making process, and guarantee that this right is exercised.
- Availability of access to justice, such as the right to appeal, should there be violations/deviations in the regulation/legislation making process. Included in this are the rights of the people to perform judicial reviews if the substance/material of the legislation are not consistent with the interest of the people;
- Ensure the accountability of the policy-makers (executive) and the legislation-makers (legislative) in the formulation process.[33]

4.6. Cost-Effectiveness in the Formulation of the Laws

Law Number 12 Year 2011 on the Formulation of the Laws and Regulations does not stipulate the cost for the legislation-making process. Furthermore, the core-provisions do not make any mentions of the cost effectiveness in the legislation-making process.

33 Center for Law and Public Policy Studies, *"Program Legislasi PSHK, Mengapa Legislasi" (The Center for Law and Public Policy Studies Legislation Program, Why Legislation?"* in dalam *http://www.parlemen.net/ind/program_pshk.php*, accessed on May 3, 2016.

Therefore, it is only logical that M. Yasin discloses the results of his research, stating that one of the forums most prone to money politics is in the deliberations on the Laws; another forum is the Hearings on the selection of public officials.[34]

The legal vacuum in determining the cost needed in the formulation of the Laws has resulted in the probabilities of the "financially beneficial legislation" and "financially unbeneficial legislation" to transpire among the Members of the House of Representatives. Without an explicit provision on the cost in the legislation making process, it would be difficult to measure the cost-effectiveness and usefulness of specific Laws.

At this point what is required is a detailed description of the cost units in the legislation-making process, which encompasses the analytical research of the needs and benefits of the policy, how much aspiration has been absorbed from the public and through public consultations, formulating the materials and content of the Laws, and the drafting of the Bill. In essence, there needs to be a detailed and accurate description of the cost, for example, cost for consultations, how many people would be participating, transportation costs for consultation purposes, comparative studies to other countries, and perhaps even how much is the rate for accommodations at starred hotels, all of which could be adequately monitored.[35]

On the other hand, in the proposal for a Bill by the government, and when viewed from the Draft State Budget, there is always a nomenclature that details the costs for proposing the development of a Bill. Unfortunately, it does not provide a detailed description of the standard cost of the necessary units for the Bills proposed and developed by the government. The nomenclature also does not regulate which ministries have the right to propose a Bill. For clarity reasons, this situation needs to be further explained to understand the course of the legislation and prevent overlaps among ministries in proposing a Bill, and most importantly the level of benefits it would bring to the public.

34 Muhammad Yasin, *"Suap dalam Proses Legislasi, Penelusuran Awal" (Bribery in the Legislation-making Process, An Initial Study)*, in the Hukum Jentera Journal, 10th Edition-Year III- October 2005, p. 53.

35 Luky Djani, *"Efektifitas Biaya dalam Pembuatan Legislasi" (Cost-Effectiveness in Legislation Development)*, in the Hukum Jentera Journal, Edition 10-Year III-October 2005, p. 42.

This method also brings clarity over the priorities of the Bill that would be deliberated at the House of Representatives through the National Legislation Program (*Prolegnas*). Therefore, the House of Representatives and the government must announce the level of priorities of the Bill to be deliberated at the beginning of each year, so the public is able to control and participate in the process actively.

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II

Structuring the Laws and Regulations in Indonesia: Issues, and Solutions

Bayu Dwi Anggono

1. Introduction

Since being sworn into office in 2014, the President of the Republic of Indonesia, JokoWidodo, has placed great interest in the efforts to structure the existing regulations in Indonesia. This is grounded on the considerations that regulations play an essential role within a state of law, as regulations are the platform from which the government is able to administer the state in order to regulate social orderliness within the community and in supporting the national development, as well as in improving the social welfare of the people.[1]

In the Government Working Meeting in March 2018, which was attended by the Regents and Mayors from across Indonesia, President JokoWidodo reiterated the importance of regulatory reform or in structuring the legislations.[2] The President stated that there were still 42,000 regulations that impede on the ease of investing in Indonesia. A majority of the regulations were at the regional level. The President had ordered its Ministers to purge 100 regulations that inhibit investment every month and requested that the regional governments conduct similar procedures.[3]

This is not the first time President JokoWidodo's expressed his intention to structure the regulations. In early 2017, the President had launched the Judicial Reform Package Part II that included regulatory structuring.[4] The purpose of structuring the regulations is to resolve the many regulations that overlap, that have no apparent benefits or even conflicting. It is expected that through regulatory structuring, regulations that have no apparent benefits could be eliminated, thus making it possible to

1 Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

2 Kompas.com, *"Jokowi Targetkan Setiap Menteri Pangkas 100 Aturan Penghambat Investasi Per Bulan" (Jokowi Expects Every Minister to Purge 100 Regulations the Inhibits Investment per Month), https://nasional.kompas.com/read/2018/03/28/15365951/jokowi-targetkan-setiap-menteri-pangkas-100-aturan-penghambat-investasi-per*, accessed on November 10, 2018.

3 *Ibid*.

4 Another point included in the Judicial Reform Package Phase II is Enlarging the scope of legal assistance to the community and building a sense of security within the community environment. Kompas.com, *"Reformasi Hukum Jilid II, dari Penataan Aturan Hingga Bantuan Hukum" (Judicial Reform Phase II, from Structuring the Regulation to Legal Assistance), https://nasional.kompas.com/read/2017/01/17/19334601/reformasi.hukum.jilid.ii.dari.penataan.aturan.hingga.bantuan.hukum*, accessed on November 10, 2018.

understand which regulations are correct and which are no longer appropriate today.[5]

The strong political will shown by President Joko Widodo has been followed up by several related ministries, one of which is the Ministry of Law and Human Rights, which in accordance to the prevailing Laws has the duty and function of organizing government affairs in the field of law. The Ministry of Law and Human Rights had put in place a number of policies to ensure the success in structuring the regulations, from limiting the proposals for new regulations, harmonizing the drafts of the regulations, including Ministerial/Institutional Regulations, reviewing the draft of the regulations before they are enacted, performing evaluations over the validity of the regulations and taking on mediation efforts should there be any disputes or conflicts among the regulations.

It is possible to say that many policies to structure the regulations had been put in place by previous Presidents, and numerous strategies had been put into action by the previous administration as part of their commitment. The policies relating to the structuring of the regulation that had been issued by past Presidents were, among others, the Decree of the Provisional People's Consultative Assembly (MPRS) Number XIX/MPRS/1966 on the Review of the State Legislative Products, with the exception of the MPRS Products, that were not in accordance to the 1945 Constitution, Presidential Instruction Number 3 Year 2006 on the Policy Package on Improving the Investment Climate, Presidential Instruction Number 6 Year 2007 on the Policy to Accelerate the Development of the Real Sector and the Empowerment of the MSMEs, the Master Plan for the Acceleration and Expansion of the Indonesian Economic Development for 2011-2025.

The many strategies that had been put into action in structuring the regulations over many government administration periods is a fascinating subject for discussion, most specifically on how the strategies for the structuring were carried out and which institution had been given the authority and responsibility to structure the regulations. Through this in-depth discussion and study, it would be possible to find the best strategy for structuring the Indonesian regulations in the future.

5 Hukumonline.com, *"Ini 3 Agenda Paket Reformasi Hukum Tahap II" (The 3 Agenda in the Phase II Judicial Reform Package)*.

2. Discussion

2.1. Regulatory Structuring Before the Amendment of the 1945 Constitution

2.1.1. The Regulatory Condition

The types of legislation that were used during the enactment of the 1945 Constitution are evident in many of the laws and regulations that were issued at the time, this included the Government Regulation Number 1 Year 1945 on the Announcement and the Commencement of the Enactment of the Laws and Government Regulations, Law Number 1 Year 1950 on the Regulations concerning the Types and Forms of the Regulations issued by the Central Government, and the Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia Number XX/MPRS/1966 Year 1966 on the Memorandum of the DPR-GR(The People's Representative Council of Mutual Assistance) on the Sources for Legal Order of the Republic of Indonesia and the Sequencing Order of the Laws and Regulations of the Republic of Indonesia.

During the period when Government Regulation 1/1945 was enacted, the type of Laws and Regulations that were recognized were the Laws and the Presidential Regulation (Government Regulation). However, if we refer to Law Number 1 Year 1945 on the Position of the National Committee on the Regions, Article 2 stipulates the presence of regulations at the regional levels, "The National Committee on the Regions is transformed into the Regional Representative Body, who along with and lead by the Regional Head, shall regulate the administration of their regions, so long as they are not in conflict with the Central Government and Regional Governments Regulations that are of a wider scope".

Moreover, during the period of the enactment of Law 1/1950 that revoked Government Regulation 1/1945, the types of laws and regulations that were recognized at the central level were the Laws and Government Regulations in Lieu of the Law, Government Regulations, and Ministerial Regulations. The Ministerial Regulation was officially recognized with the enactment of Law 1/1950, as previously they were not mentioned in the Government Regulation 1/1945.

When the People's Consultative Assembly Decree Number XX/MPRS/1966 was enacted, the type of laws and regulations that were enforced were the 1945 Constitution, the People's Consultative Assembly Decree, the Laws, government regulations in Lieu of the Law, Government Regulations, Presidential Decree, and other Implementing Regulations, such as the Ministerial Regulation, the Ministerial Instruction, and others. The People's Consultative Assembly Decree XX/MPS/1966 also mentioned the types of content materials that could be included in each type of laws and regulations.

The Laws were developed to implement the Constitution or the Decrees of the People's Consultative Assembly. The Government Regulations were to include the general rules for implementing the Constitution. The Presidential Decrees were to comprise of individual decisions (einmalig) to implement the provisions stipulated in the relevant Constitution, the Decrees of the People's Consultative Assembly at the executive level or the Government Regulations. Other implementing regulations, such as the Ministerial Regulations, the Ministerial Instructions, and others, shall be strictly based on and subject to the higher legislations.

According to the Decree of the People's Consultative Assembly XX/MPRS/1966, these types of laws and regulations were to remain in effect until the year 2000, when it was replaced by the Decree of the People's Consultative Assembly of the Republic of Indonesia Number III/MPR/2000 on the Sources of the Laws and the Sequencing Order of the Laws and Regulations. Article 7 of the Decree of the People's Consultative Assembly III/2000 stipulates that with the enactment of the Decree of the People's Consultative Assembly on the Sources of the Law and the Sequencing Order of the Laws and Regulations, therefore, the Decree of the Provisional People's Consultative Assembly Number XX/MPRS/1966 on the Memorandum of the People's Representative Council of Mutual Assistance on the Sources of the Law and Order of the Republic of Indonesia and the Sequencing Order of the Laws and Regulations of the Republic of Indonesia is revoked and determined as null and void.

There were several indications on the conditions of the laws and regulation in the period before the amendments of the 1945 Constitution, which were: First, the rights of the initiative to propose a Bill by the House of Representatives were rarely used. Although the House of Representatives has the right to propose a Bill (proposed Bill based on initiative), in

practice, however, it was not effectively used. According to Mahfud MD, during the Old Order era, which lasted for six years, and the New Order era that lasted for 32 years, not one single law was produced based on the House of Representative's rights of the initiative.[6]

In that period, the members of the House of Representatives believed that the duty of the House of Representatives was merely to approve every Bill proposed by the President. Although in practice, the members of the House of Representatives did make specific changes to the Bill proposed by the President, it could only take place so long as the changes were not in contradiction to what was expected by the President. During President Suharto's administration, there was one instance where the Bill on Broadcasting, which had been approved by the House of Representatives and the minister that acted on behalf of the Government, was returned by the President and amendments were made to suit the wishes of the President.[7]

Another reason behind this condition was the fact that prior to the Amendment of the 1945 Constitution, especially in the second phase of the New Order that began after the 1971 General Election, the people's representative council were unable to showcase their true identity as the representative of the people due to the immense authority held by the government, hence the council was referred to as the "rubber stamp" of the government. The dominant role of the executive over the House of Representatives after the 1971 General Election continued to 1977, 1982, 1992, and 1997 General Elections. The dominance of the Government in the state administration had made the role of the House of Representatives during the New Order era to become less optimal and, as such the legislative body was considered uncritical over the policies of the Government.[8]

Second, there was a tendency for the laws and regulations to be conservative and orthodox. The laws and regulations that were produced

6 Moh.Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi. (The Debate on the Constitutional Law After the Amendment of the Constitution)*, Jakarta: Rajawali Pers, 2010, p. xiv.

7 Bagir Manan, *DPR, DPD dan MPR dalam UUD 1945 Baru. (The DPR, DPD, and MPR within the New 1945 Constitution)*. Yogyakarta: FH UII Press , 2005, p. 23.

8 Secretary-General of the House of Representatives of the Republic of Indonesia, *Laporan Lima Tahun DPR RI 2004-2009, Mengemban Amanat dan Aspirasi Rakyat. (Five Year Report of the DPR RI 2004-2009, Fulfilling the Mandate and Aspirations of the People)*, Jakarta: Sekjend DPR, RI, 2009, p. 5-6.

under the helpless conditions of the House of Representatives and the stable government, as a consequence of the democratic system built by the New Order, had generated conservative and orthodox legal products.

Several examples of the Laws produced during the New Order and could be categorized as legal products with orthodox/elitist/conservative characteristics were Law Number 15 Year 1969 on the General Elections and Law Number 6 Year 1969 on the Regional Governments, which were then replaced by Law Number 5 Year 1974.[9]

The materials in Law 5/1974 showed a conservative mannerism that were characterized by the use of the principles of real autonomy and responsibility as a substitute to the principles of autonomy in the broadest sense, the authority of the Central Government to appoint a Regional Head without being bound by the standings in the results of the elections at the Regional House of Representatives, and the appointment of a Regional Head concurrently as the head of region with the capacity to act as the "sole ruler" and as an operative arm of the central government in the regions, including in the use of the preventive, repressive, and public oversight mechanisms.[10]

Third, the rise in the tendency to run the Government based on Presidential Decrees, where a majority of the process of governance was executed based on the decisions that were regulated in the form of a Presidential Decree. The Presidential Decrees were enacted to regulate the norms of the Laws that were general or abstract and had not been regulated in the Constitution and the Laws, and to enact the administrative decisions relating to the individual-concrete norms of the laws.[11]

During this period, there was a strong tendency for the President to use a Presidential Decree to regulate the materials that should have been stipulated in the Laws. One example is Presidential Decree Number 90 Year 1995 on the Utilization of the Income Tax for the Assistance Provided for the Development of the Less Prosperous Families and Level I Prosperous Families. The materials in the Presidential Decree regulated the issues on

9 Moh. Mahfud MD, *Politik Hukum di Indonesia. (The Political Law of Indonesia)*, Jakarta: LP3ES, 1998, p. 15.

10 *Ibid*.

11 Jimly Asshiddiqie, *Perihal Undang-Undang, (About the Laws)*, Jakarta: Konstitusi Press, 2006, p. 116.

how to fulfill the social and psychological needs of the less prosperous families and the level I prosperous families, however, the funds that were to be used for implementing these objectives were obtained through withdrawals from the fund-related taxes. Presidential Decree Number 90 Year 1995 was later amended through Presidential Decree Number 92 Year 1996. The amendment was made to Article 2, where the content was revised to read: Corporate or Individual Tax Payers must provide assistance for the development of the Less Prosperous Families and Level I Prosperous Families in the amount of 2% (two percent) of the profit or earnings after Income Tax within 1 (one) fiscal year.[12]

The fundamental nature of Presidential Decree Number 90 Year 1995 that was later revised through Presidential Decree Number 92 Year 1996 constituted a regulation that was legally binding for the public and placed significant burdens on, or limiting the rights and obligations of the citizens, which in this case were in relations to taxation. Therefore, the regulation should have been specified through a Law, as regulated in Article 23 Paragraph (2) of the (pre-amended) 1945 Constitution that stipulated all forms of taxation for the interest of the state shall be based on the Laws.[13]

2.1.2. Strategies in Structuring the Regulations

The policies that were taken in structuring the laws and regulations prior to the amendment of the 1945 Constitution, were: First, the Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia Number XIX/MPRS/1966 on Reviews on the State Legislation Products Outside of the Products of the Provisional People's Consultative Assembly that were Not In Accordance to the 1945 Constitution. The Decree of the Provisional People's Consultative Assembly was initiated because of the rise in the eagerness to purify the implementation of the 1945 Constitution, which required that a review be done on such legislative products as the Presidential Decrees, Presidential Instructions, as well as the Laws and the Regulations in Lieu of the Law.

12 Maria Farida Indrati S, *"Kedudukan dan Materi Muatan Peraturan Pemerintah Pengganti Undang-Undang, Peraturan Pemerintah, dan Keputusan Presiden Dalam Penyelenggaraan Pemerintahan Negara di Republik Indonesia" (Position and Content of Government Regulation in Lieu of the Law, Government Regulations, and Presidential Decrees in the State of Administration of the Republic of Indonesia)*, Post Graduate Studies Dissertation, Faculty of Law, University of Indonesia, 2002, p. 316

13 *Ibid*., p. 320.

The types of legislation that needed to be reviewed were the Presidential Decrees and Presidential Instructions, including those that took the form of a Law and Government Regulation in Lieu of the Law. The institutions responsible for the structuring process were the Government in cooperation with the People's Representative Council of Mutual Cooperation. Their tasks were to carry out reviews through the provisions stipulated in the Presidential Decree and Presidential Regulations whose content and objectives were in line with to the voice of the People as part of the effort to secure the Revolution, which was stipulated into the Laws. Presidential Decrees and Presidential Regulations that did not comply with the provisions were pronounced no longer valid. Thus it shall be further regulated through the legislation. The Laws and Government Regulations in Lieu of the Law that whose materials conflicted with the 1945 Constitution shall be further reviewed.

As stipulated in the Decree of the People's Consultative Assembly Number XIX/MPRS/1966, the time frame to complete the structuring of the laws and regulations was two years. Another provision that must be complied with during the structuring process was until the review is completed the Presidential Decree, Presidential Regulations, the Laws and the Government Regulations in Lieu of the Law shall remain in effect. Furthermore, there was one other provision that stated, as of the enactment of the Decree of the People's Consultative Assembly Number XIX/MPRS/1966, the issuance of Presidential Decrees and Presidential Instructions shall no longer be justified.

The structuring of the laws and regulations through proper preparatory management in the formulation of the laws and regulations prior to the amendment of the 1945 Constitution had been conducted through various means, among them are through the enactment of the Presidential Instruction Number 15 Year 1970 on the Procedures in the Drafting of the Bills and the Drafting of the Government Regulations, and Presidential Decree Number 188 Year 1998 on the Procedures in Drafting a Bill. Presidential Instruction Number 15/1970 regulates that before submitting the Draft of the Bills and the Draft of the Government Regulations to the President, it must be delivered/circulated to: (i) the Ministers/Heads of State Intuitions that are closely linked to the materials that shall be regulated in the draft for perusal and to obtain their opinions and considerations, (ii) the Minister of Justice to obtain the necessary

legal opinions, (iii) the Cabinet Secretary for further preparations the completion of the Bill.

Presidential Decree 188/1998 regulates that in order to harmonize, round up, and consolidate the concepts that were to be stipulated into the Bill, the Ministers or Heads of State Institutions, who initiated the drafting of the Bill, must first consult the Minister of Justice and other related Ministers, as well as Heads of other Institutions regarding its concept. Moreover, in order to ensure efficiency in the harmonization, round up, and consolidation of the concept, it was also regulated that the Minister of Justice coordinates the consultation process among officials with the technical knowledge on the issue that shall be regulated, law experts from the Departments, or the Institution who initiated the Bill, the State Secretariat and other related Departments as well as Institutions. The efforts to harmonize, round up, and consolidate the concept of the Bill was directed towards aligning the concepts with the state ideology, national objectives and the scope of the aspirations, the 1945 Constitution, the State Policy Guidelines (*Garis Besar Haluan Negara*), other existing Laws and all the implementing regulations, and other policies related to the affairs that shall be regulated in the Bill.

The strategy to structure the regulations before the amendment of the 1945 Constitution was mainly characterized by: One; the structuring only focused on the drafting of the regulations. Two, the structuring of the regulations were only focused on two types of legislation, which were the Laws and the Government Regulations, while no attention was given to other laws and regulations that do not fall into the two categories. Three, efforts to structure a regulation over another prevailing regulation had previously been done. However, it was incidental and tended to be based on political considerations and not so much on the needs to evaluate the effectiveness of the existing regulations. Four, there were no institutions/ agencies established to undertake the regulation structuring process; the structuring task was given to an already existing institution. Five, the mechanism for public participation in the regulation structuring process had not been regulated, and as such, the formulator played a more dominant role.

3. Structuring of the Regulations After the Amendment of the 1945 Constitution

3.1. The Condition of the Legislations

After the amendment to the 1945 Constitution, the types of laws and regulations that were recognized included: the 1945 Constitution of the Republic of Indonesia, the Decrees of the People's Consultative Assembly, the Laws and the Government Regulations in Lieu of the Law, the Government Regulations, the Presidential Regulations, the Provincial Government Regulations; and the Regency/Municipality Government Regulations.[14] There were also other types of legislation as stipulated in Article 8 Paragraph (1) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations, which were regulations enacted by the People's Consultative Assembly, the House of Representatives, The House of Regional Representatives, the Supreme Court, the Constitutional Court, the State Audit Agency, the Judicial Commission, Bank Indonesia, the Ministers, agencies, institutions, or commissions of the same level that were established based on the Law or the Government on the order of the Law, the Regional House of Representatives at the Provincial Level, the Governor, Regional House of Representatives at the Regency/Municipality Level, the Regent/Mayor, Village Head or officials of the same level.

Fundamentally, the President does not have the authority to formulate any types of laws and regulations. The laws and regulations that fall under the authority of the President are the Law/Government Regulation in Lieu of the Law, Government Regulations, and Presidential Regulations. The authority of the President to formulate a Law is grounded on Article 5 Paragraph (1) of the 1945 Constitution, which stipulates, "The President has the right to propose a Bill to the House of Representatives", and Article 20 Paragraph (2) of the 1945 Constitution that stipulates, "Every Bill shall be deliberated by the House of Representatives and the President for a joint approval".

The authority of the President to formulate a Government Regulation in Lieu of the Law is grounded on Article 22 Paragraph (1) of the 1945 Constitution, which states, "In the event of an emergency or coercive conditions, the President holds the right to enact a Government

14 Article 7 Paragraph (1) of Law Number 12 Year 2011 on the Drafting of Legislations.

Regulation in Lieu of the Law." The authority of the President to formulate a Government Regulation is stipulated in Article 5 Paragraph (2) of the 1945 Constitution, which states, "the President shall enact a Government Regulation to execute the Laws accordingly". Lastly, according to A. Hamid S. Attamimi, the authority of the President to develop a Presidential Regulation is derived from a regulation of a higher level that delegates the President to develop Government Regulations, and it could also be derived from the attributive authority as stipulated in Article 4 Paragraph (1) of the 1945 Constitution.[15]

The authority given to the President to formulate the Presidential Regulation is based on the notion of reinforcing the presidential system as applied in the Indonesian governance system. The presidential system provides the authority to the President to perform the state administration. Hence the President, who holds the power of governance, must be supported by the authority to formulate a Presidential Regulation in order to optimize his/her duties in running the state.[16]

The main characteristic of a Presidential System is that the President directly leads the government administration that he/she had formed. Government administration, in this case, is not the Administration in its broadest sense, where all affairs of the state are executed to ensure the welfare of its citizens and the interest of the state, and which includes the executive, legislative and judicative bodies.[17] Here, the government administration lead by the President refers to the administration in its narrowest sense, where the holder of the official position is the executive

15 Article 4 Paragraph (1) of the 1945 Constitution stipulates that "The President of the Republic of Indonesia holds the administrative power as stipulated in the Constitution." A. Hamid S. Attamimi, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara, Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan Dalam Kurun Waktu Pelita I – Pelita V. (The Role of the Decree of the President of the Republic of Indonesia in Administering the State Governance, an Analytical Case Study on the Presidential Decrees that Functions as a Regulation within the Period of the Five Year Development Plan I – Five Year Development Plan V)*, Dissertation for a Doctorate Degree in Law at the University of Indonesia, December 12, 1990, p. 236-237.

16 Anang Puji Utama, *Eksistensi Peraturan Presiden Dalam Sistem Peraturan Perundang-Undangan di Indonesia (The Presence of a Presidential Regulation Within the Indonesian Legislation System)*, Dissertation Summary, Post Graduate Program for Doctoral Program in Law, Malang: Brawijaya University, 2018, p. 63.

17 Moh. Kusnardi and Hermaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia (Introduction into the Indonesian State Law)*, Jakarta: Pusat Studi Hukum Tata Negara, 1983, p. 171.

(executor of the law), or, more importantly, the government as the executor of the state administration.[18]

When viewed from the positive Indonesian law, the government agencies/officials under the President that falls under the scope of the executive body are the Ministers/Non-Ministerial Government Institutions, State Entities, and Regional Governments. As part of the executive power, the Minister is mentioned in Article 17 Paragraph (1) of the 1945 Constitution, which stipulates that the President is assisted by the state ministers. The non-ministerial state institutions were mentioned in Article 25 Paragraph (1) of Law Number 39 Year 2008 on State Ministries that stipulated, The functional relations among the ministries and non-ministerial state institutions shall be performed in synergy as one government system within the Unitary State of the Republic of Indonesia as regulated by the legislation.

The term State Entity was initially introduced during the Reform era. State Entities are state institutions or government institutions formed by the Law and whose functions are to execute all affairs relating to their duties and authorities.[19] One example of a State Entity is the Social Insurance Administration Body (*Badan Penyelenggara Jaminan Sosial – BPJS*). Article 7 Paragraph (1) of Law Number 24 Year 2011 on the Social Insurance Administration Body states that the Social Insurance Administration Body is a public legal entity that is grounded on the Constitution. Also, Paragraph (2) states that it is responsible to the President. The Regional Government, as part of the executive body, is mentioned in Article 1, Number 2 of Law Number 23 Year 2014 on Regional Government, which stipulates,Regional Governments are the executors of government affairs by the Regional Government and the Regional House of Representatives that are grounded on the principles of autonomy and in co-administration based on the principles of autonomy in its broadest sense within the system and principles of the Unitary State of the Republic of Indonesia as stipulated in the 1945 Constitution of the Republic of Indonesia.

All government agencies/officials that fall under the criteria of executive power under the President are given the right to formulate the laws and

18 Bagir Manan, *Menyongsong Fajar Otonomi Daerah (Welcoming the Regional Autonomy)*, Yogyakarta: Center for Legal Studies, Faculty of Law, UII, 2001, p. 101.

19 Maria Farida Indrati, *Ilmu Perundang-Undangan: Jenis, Fungsi dan Materi Muatan (The Science of Legislations: Types, Functions and Content Materials)*, Yogyakarta: Kanisius, 2007, p. 178.

regulations. The authority to formulate the laws and regulations is grounded on 2 (two) authorities, the attributive authority or the delegation of authority. The attributive authority is the authority given by the Grondwet (Constitution) or wet (Laws) to a state institution/government to formulate the laws and regulations.[20] The delegation of authority is the delegation of authority to formulate the laws and regulations as stipulated by the higher laws and regulations towards the lower laws and regulations.[21]

The regulatory conditions after the amendment of the 1945 Constitution showed a tendency for the formulation of an uncontrollable number of regulations (regulatory obesity). Within 2000-2015 alone, there were already 12,400 regulations formulated at the central level encompassing the Laws, Government Regulations in Lieu of the Law, Government Regulations, Presidential Regulations up to the Ministerial Regulations. Up to the present, the total number of regulations is estimated to be around 62,000, spreading across the many institutions at the central as well as regional levels. The regulatory obesity had significantly impacted and hindered the acceleration of development and improvements of public services due to the extensive bureaucracy, generated disharmony among the regulations, as well as unsynchronized and overlapping regulations.

On the subject of the tendency to formulate the large number of laws and regulations (hyper regulations), particularly the Laws, is described by Ann Seidmanas a situation that often happens in most developing nations,which are nations that are in the transition phase and faced by many issues, such as failure to achieve the social and economic objectives, or in establishing a clean government.[22] In order to achieve the objectives, the Government would generally try to translate the proposed policies into laws and regulations.

3.2. Strategies in Structuring the Regulations

After the amendment of the 1945 Constitution, several policies on structuring the regulations were put forward in Law Number 21 Year 2001 on the Special Autonomy for the Province of Papua, the Decree of the People's Consultative Assembly Number I/MPR/2003 on the

20 *Ibid*., p. 55.

21 *Ibid*., p. 56.

22 Ann Seidman, Robert B. Seidman, and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafter*, London: Kluwer Law International, 2001, p. 15.

Review towards the Materials and Legal Status of the Decree on the Provisional People's Consultative Assembly, and the Decree of the People's Consultative Assembly Year 1960 to 2002. Also enacted were Presidential Instruction Number 3 Year 2006 on the Policy Package for the Improvement of the Investment Climate, Presidential Instruction Number 6 Year 2007 on the Policy to Accelerate the Development of the Real Sector and the Empowerment of the Micro, Small and Medium Enterprises, Presidential Regulation Number 48 Year 2014 on the Master plan for the Acceleration and Expansion of the Indonesian Economic Development 2011-2025, The Law Reform Package I Year 2016, Law Reform Package II Year 2017, The Minister of Law and Human Rights Regulation Number 23 Year 2018 on the Harmonization of the Draft Ministerial Regulation, the Draft of the Non-Ministerial Regulations, or the Draft of Regulations by the Non-Structural Institutions by the Formulator of the Laws and Regulation, and the Minister of Law and Human Rights Regulation Number 22 Year 2018 on the Harmonization of the draft laws and Regulations in the Regions by the Formulator of Laws and Regulations, and the Minister of law and Human Rights Regulation Number 29 Year 2015 on the Organization and Procedures of the Minister of Law and Human Rights.

Fundamentally, the various policies regulate the following, One: The mandatory harmonization for every legislation at the central level, including the Draft of the Ministerial Regulations, Draft of the Non-Ministerial Government Institutions, or Draft of the Non-Structural Institution Regulations by the Minister of Law and Human Rights. If what has been previously stipulated in Law 12/2011 only applies to the Draft of the Legislations, Draft of the government regulation, and Draft of the Presidential Regulations that must be harmonized, then, based on Article 3 of the Minister of Law and Human Rights 23/2018, the Draft of the Ministerial Regulations, Draft of the Non-Ministerial Government Institutions, or Draft of the Non-Structural Institutions Regulations must be submitted in writing to the Director General of Laws and Regulations as the Head Formulator in the harmonization process.

Two, on the subject of Regional Regulations, on April 4, 2017 and June 14, 2017, the Constitutional Court stated that as regulated in Law Number 23/2014 on Regional Governments the authority to annul the Regency/ Municipal Regulations are given to the Governor and the Regional Regulations at the Provincial Level to the Minister of Home Affairs, and that this Law is in conflict with the 1945 Constitution and as such is not

legally binding. Therefore, the Government has stepped up the efforts to prevent the presence of any problematic Regional Regulations. The policies that were taken were in accordance with Article 4 of the Minister of Law and Human Rights Regulation 22/2018, therefore, the Drafting of the laws and regulations at the regional level should be submitted in writing to the Director-General as the Chief Formulator in the Drafting Process through the Head of the Regional Office for harmonization purposes.

Three, evaluations have been conducted on regulations that are already enacted, including Law 21/2001, Presidential Instruction Number 3 Year 2006, Presidential Instruction Number 6 Year 2007, Presidential Regulation Number 48 Year 2014, the Law Reform Package I Year 2016, and Law Reform Package II Year 2017 — included in the evaluation of the establishment of the Center for the National Law Analysis and Evaluation at the National Law Development Agency (*Badan Pembinaan Hukum Nasional – BPHN*) through the Minister of Law and Human Rights Regulation 29/2015.

Numerous challenges still face the Indonesian government in implementing the policies to structure the regulations, such as: (i) the regulations are fragmented and incomprehensive; (ii) the plans focus more on the sectoral regulations than the entire regulations; (iii) the unavailability of a comprehensive and integrated electronic data base on the government regulations that could be accessed through a user friendly portal; (iv) evaluations on the impact of a draft regulation have not been well institutionalized as Law 12/2011 does not stipulate the obligation to harmonize all regulations; (v) the unavailability of a systematic criteria that serves as a guideline in evaluating the impact of a draft regulation and in evaluating the prevailing regulations; (vi) the unavailability of formal guideline on the consultation mechanism for all parties impacted by the regulation's decision making process; (vii) Law 12/2011 makes it mandatory to prepare an academic paper, but it does not make it mandatory to conduct a quantitative assessment on the economic impact of the draft regulation; (viii) an independent and objective evaluation policy from the economic stand point have not been institutionalized on a regular basis (only on a temporary or partial basis).

One of the challenges in managing the formulation of the laws and regulations in Indonesia is the fact that evaluation activities have not been institutionalized by the formulators the laws and regulations that they had developed (executive review). Meanwhile, there are benefits to executive

reviews, such as: (i) Achieving better management in the formulation of the laws and regulations; (ii) The result of the evaluation could provide information on whether the objective for the formulation of the laws and regulations could be achieved, and at the same time gain some insights into the benefits and impact of the laws and regulations when they are enacted. The information obtained from the evaluation could be paramount in future planning processes; and (iii) The consequences that may arise from the relations between the law and social changes, therefore, in order to maintain the existing coherent system even the previous regulations need to be adjusted to the new regulations.

Internationally, self-evaluations on the laws and regulations by the formulator had been put into practice for many years through various forms, models, methods, and approaches in accordance to the conditions of the laws and regulations of each country. In Indonesia, on the other hand, evaluations on the laws and regulations have so far been done towards specific issues that may arise within the laws and regulations, and are not routinely performed on the entire laws and regulations.

In addition to not being institutionalized, evaluation on the laws and regulations in Indonesia is also faced by yet another challenge, the unavailability of a standard model (mechanisms and methods) that are systematically designed for evaluating the laws and regulations. The evaluation of the laws and regulations have so far been limited to the trial and error approach, and in finding the most appropriate and accurate method as needed. Because of the unavailability of the tools to systematically evaluate the laws and regulations, the results of the evaluation on the laws and regulations have little significance in assessing whether or not the laws and regulations could be accepted by the society, is implementable and effective that it needs to be maintained, or whether or not the legislation needs to be improved or replaced with a new policy.

As for the challenges faced by the Indonesian government regarding the institutions that perform the structuring of the regulations, include, among others: (i) the lack of authority given to the responsible government institutions to ensure that the draft laws and regulations could support all the government policies; (ii) lack of a strong authority given to the government body that has been given the task of evaluating the proposed draft regulation based on adequate proof (quantitative and qualitative), including in rejecting the new draft regulation; (iii) the absence of an

institution to independently and objectively perform the evaluations on legislation that have been enacted on a regular basis (based on a pre-determined time frame); (iv) redundant institutions that monitors the development of a draft regulations in the regions; (v) the ministries have more power over the policies within their respective sectors and the tendency for the sectoral interest to have more significant political interests.

Given the above conditions, therefore the Policy to structure the laws and regulations in Indonesia could be performed through the following actions: First, a comprehensive policy framework on the structuring of the regulations (a comprehensive document on structuring the regulations) that is developed and enacted by the holder of the highest power in government. Second, reinforcing the (government) institutions responsible for the policies on regulations, which encompasses: assessment of the benefit and costs relating to new regulations, rejecting the draft of the new regulations, as well as monitoring and evaluating the execution of regulations that have been enacted. Third, the formulating institution must regularly conduct evaluations on the regulations they have enacted. Fourth, adopting the principles of transparency and conduct public consultations in the regulation related decision-making process through the development of consultation guidelines. Fifth, the development of clear criteria that serves as guidelines in the assessment of the drafting process of regulation and in evaluating the regulations. Sixth, the development of a single portal that provides information on the regulations and provides a section within the portal for people to comment on the draft regulation.

4. Conclusion

For many years, the policy of the President of the Republic of Indonesia has been to structure the laws and regulations (regulation) in order to simplify the regulations, provide legal certainties and improve the business climate. Numerous strategies have been put in place and executed by each administration during their respective administrative period, each with their characteristics. When compiled, these characteristics could become an interesting lesson on how to ensure that regulations achieve the desired result.

The structuring of the regulations,which has taken place over several periods shows that although the Presidents, as the highest executive power, have always been committed to executing the program to structure the regulations, they have not been supported by a comprehensive national document that regulates the necessary strategies to execute the program to structure the regulations. Furthermore, the institutions that have been given the authority and responsibility to structure the regulations have not been given the authority to coordinate the process to structure regulations. Therefore, the commitment to structure the regulations in the future must be complemented by the development of a document that contains comprehensive strategies and the reinforcement of the institution with authority to implement them.

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III

The Authority of the Ministerial Regulation and the Hierarchy of the Laws and Regulations

Jimmy Z. Usfunan

1. Introduction

After its amendment, and as stipulated in Article 28 paragraph (5) of the 1945 Constitution of the Republic of Indonesia, Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia interpreted as being associated to the principle of a democratic law-based state. The remaining provisions in Article 28 paragraph (5) of the 1945 Constitution of the Republic of Indonesia states:

> *To uphold and protect human rights following the principles of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated, and outlined in the laws and regulations.*

The principle of a democratic law-based state places greater emphasis on the activities of a state administration and outlines the relations between the law, democracy, and human rights. Therefore, a state administration that is based on the principle above could only be realized through the laws and regulations.

In other words, the notion of a law-based state that is grounded on the Constitution is acknowledged as a state that incorporates the legal supremacy and that guarantees human rights within the laws and regulations. The principle of a law-based state that is stipulated in the 1945 Constitution of the Republic of Indonesia is seen as an effort to realize the objective of the state, which is stipulated in the Preamble of the Constitution.

The founding fathers of this nation have determined the objectives of the state and stipulated them in the Preamble of the 1945 Constitution. The objectives that are stipulated in the Preamble could be observed through the phrases that are used, among them are: to protect all the people of Indonesia and all the land that has been struggled for, to improve public welfare, to educate the life of the people, and to participate towards the establishment of a world order. Some of these objectives are measures that the government continuously strives to achieve. Therefore, in Article 28 I paragraph (4) of the 1945 Constitution, it is determined that: The protection, advancement, upholding and fulfillment of human rights are the responsibility of the state, especially the government. Because of the importance of the laws and regulations in this nation, priority should, therefore, be given to achieving a comprehensive understanding, and the formulation of, the laws and regulations.

2. The Philosophy of the Laws and Regulations

In the perspective of philosophy, the laws and regulations are known to have existed during the ancient Greece period, and in the ideas of such philosophers like Plato or Aristotle. In his book, “Laws," Plato transformed his original concept that was written in his book “*Politea*." Plato initially believed that it was sufficient to provide the freedom/independence to a philosopher who was crowned as the king and leader of a nation because a king was considered to have the complete understanding of the objectives of the state.[1] However, this idea shifted to one where kings with a background in philosophy would find it difficult to administer the state, as it would be impossible to implement all of the authorities without any written regulations. This belief created the notion that justice could not be obtained through ideas alone, but must be put into writing. The purpose of this principle is to restrict the authority held by the ruler, to prevent any arbitrary actions and to ensure that the people understand their rights.[2]

Plato stated that laws are reasoned thoughts (*logismos*) embodied in the decrees of the state. He rejected the idea that the authority of the law depends solely on the desires of the governing power.[3] Plato’s train of thought illustrates that the law must not only be based on the desires of the ruler. Wayne Marissonreveals Plato’s idea that describes some of the basic principles, which are:

- there must be absolute moral standards;
- the absolute moral standards must be embodied in the codification of the law, however imperfect the codifications may be;
- That because of the people’s lack of understanding on the philosophy, the majority of the population within the state are prohibited from acting on their initiative to change the moral ideas, as well as the codifications of the law that reflects the moral ideas; the people are totally and unconditionally subjected to the laws that are applied to them by the legislators.[4]

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1 Soetiksno, *Filsafat Hukum (The Philosophy of Law)*, 7th Print, Jakarta: PT Pradnya Paramitha, 1991, p. 13.

2 *Ibid*.

3 H. Lili Rasjidi and Ira Thania Rasjidi, *Dasar-dasar Filsafat dan Teori Hukum (The Basis of Philosophy and Theories on the Law)*, Bandung: Citra Aditya Bakti, 2007, p. 18.

4 Wayne Marisson in I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara (Legal Efforts towards Violations on the Constitutional Rights of the People)*, Jakarta: Sinar Grafika, 2013, p. 47-48.

The urgency for a written law is absolute, and it was one of the ideas echoed by Plato at the time. This idea was based on his experience on constructing the desired aristocratic state (a state lead by philosophers/ aristocrats) up until the collapse of this idealistic thought because of the behavior/attitude of the people that needed to be restrained.

Aristotle (in ancient Greece) introduced 2 (two) principles of justice, the commutative (commutatief) justice (only equals be treated equally)and the distributive (distributief) justice (two persons of unequal rank cannot be treated alike).[5] Aristotle's idea on the law is an integral part of justice is similar to that of Plato. However, Aristotle's emphasis was on the division of justice within the two perspectives. Therefore, the formulation of the laws must accommodate the principle of justice.

The Ancient Greek period came to an end and was replaced by the Roman Empire. The idea of a written law also influenced the imperial administration of the time. However, the interest of the ruler (Emperor) greatly influenced the formulation of the policies in the laws that prevailed at the time. This was evident in the laws of the Roman Empire, which were known as LexRegia and Corpus Iuris Civilis.[6] Gede Palguna noted that several ideas were generated during the Roman period, they were: one, the law is not merely a written regulation but is a rule of reason, and as such, is integral to human experiences, two, the ruler is subject to the law, three, the creation of the early codification of the law.[7]

It was evident that over the different periods, the development of the law progressively developed after the Roman period, which was then followed by the Medieval period, the Renaissance (enlightenment) era, and finally the modern era. History shows that in its development, the law was quickly intervened by the desires of the ruler. Philosophically this hypothesis is deemed correct when complemented by the adage:

Homo Homini Lupus (A man is a wolf to another man)

Lord Acton: Power tends to corrupt, and absolute power corrupts absolutely

5 L.J. Van Apeldoorn, Year unknown, *Pengantar Ilmu Hukum (Introduction into the Law)*, Pradnya Paramitha, p. 11 and Theo Huijbers, *Filsafat Hukum (The Philosophy of the Law)*, Yogyakarta: Kanisius, 1995, p. 23.

6 See Brian Z Tamanaha, *On The Rule of Law (History, Politics, Theory)*, New York: Cambridge University Press, 2004, p. 11-12.

7 I Dewa Gede Palguna, Op. Cit, p. 55.

Based on the elaboration of the ideal above, it can be said that over the ages, the desired ideal had always been on the guarantee towards just legal certainty.

3. The Hierarchy of the Laws and Regulations

The development in the theory on Laws and Regulations opens the space to the implementation of Hans Nawiasky's initiative of differentiating the norms of the laws within a state into 4 (four) main categories, which are *Staatsfundamentalnorms* (the Fundamental norms of the state), *Staatsgrundgesetz* (the basic principles of the state), *Formell Gesetz* (the formal/official laws), and *Verordnung & AutonoeSatzung* (the implementing regulations and autonomous regulations).[8] In his book titled "General Theory of Law and the State," Hans Kelsen expressed that the higher norms and the hierarchy in the various levels of the norms creates the norms.[9]

Actualizing the ideas on the theory of the hierarchy of the norms leads to the provision in Article 7 paragraph (1) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations (hereinafter shall be abbreviated into UU No. 12/2011).

Article 7 paragraph (1) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations (hereinafter shall be abbreviated into UU No. 12/2011) determines the types and hierarchy of the laws, which are:

- The 1945 Constitution of the Republic of Indonesia;
- The Decree of the People's Consultative Assembly;
- The Laws/Government Regulations in Lieu of the Law;
- Government Regulations;
- Presidential Regulations;
- Provincial Regional Regulations; and
- Regency/Municipality Regional Regulations

8 Hamid Attamimi, *Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara (Suatu Studi Analis: Keputusan Presiden Yang Berfungsi Peraturan Dalam Kurun Waktu Pelita I – Pelita V (The Role of the Decree of the President of the Republic of Indonesia in State Administration, Case Study Analysis: Decree of the President that Serve as Regulations During the Five Year Development Plan I - V)*, Dissertation PPS Universitas Indonesia, 1990, p. 287.

9 Hans Kelsen, *General Theory of Law and State*, Harvard University Press, 1949, p. XIV.

In addition to that, other laws and regulations are regulated in Article 8 of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations, among them are:

(1) The type of Laws and Regulations, other than as specified in Article 7 paragraph (1), covers regulations that have been stipulated by the People's Consultative Assembly, the House of Representatives, the Regional House of Representatives, the Supreme Court, the Constitutional Court, the State Audit Agency, the Judicial Commission, Bank Indonesia, the Ministers, the agencies, the institutions or the equivalent commissions that were established through the Law or the Government on the instruction of the Law, the Provincial Regional House of Representatives, the Governor, the Regency/Municipality Regional House of Representatives, the Regent/Mayor, Village Chief or its equivalent.

(2) The Laws and Regulations as specified in paragraph (1) is recognized and legally binding so long as it is instructed by the higher Laws and Regulations or is formulated based on authority.

Based on the analysis of the theory it is evident that there are concrete influences from the ideas of Hans Kelsen on "*stufenbautheorie*" and Hans Nawiasky in the determination of the types of regulations within the hierarchy.

Furthermore, the Provisions in Article 8 paragraph (1) of Law Number 12 Year 2011 justifies the jurisdiction of their existence towards:

- The People's Consultative AssemblyRegulation,
- The House of RepresentativesRegulation,
- The Regional House of RepresentativesRegulation,
- The Supreme CourtRegulation,
- The Constitutional CourtRegulation,
- The State Audit AgencyRegulation,
- The Judicial CommissionRegulation,
- The Bank IndonesiaRegulation,
- The Ministerial Regulations,
- The Regulations of the agency, institution, or equivalent commissions that were established based on the Law or the Government on the instructions of the Law,
- The Provincial Regional House of Representatives Regulation,

- The Gubernatorial Regulation,
- The Regulation of the Regency/Municipality Regional House of Representatives, the Regent/Mayor,
- The Regulation of the Village Chief or the equivalent.

However, Law Number 12 Year 2011 does not regulate the space for the position of the regulation within the hierarchy specified in Article 7. Instead, it provides the possibility to confirm the "validity" of the regulations as regulated in Article 8 paragraph (2) of Law Number 12 Year 2011 in such situations as:

- instructed by the higher laws and regulations
- established based on the authority

The two propositions further blur the position of the regulations within the hierarchy. By being regulated as "instructed by the higher laws and regulations" it is evident that based on practical experiences, the intention of the formulators of Law Number 12 Year 2011 was to provide greater room for the determination of the hierarchy. For example, the comprehension will become blurred when the Ministerial Regulation is implemented on the instruction of the higher laws and regulations but at various levels. This is evident in the examples provided below:

- The Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 80 Year 2015 on the Formulation of the Law Products in the Regions that stipulates in order to implement the provisions in Article 243 paragraph (3) of Law Number 23 Year 2014 on Regional Governments that regulate the procedures in providing the registration numbers of regional regulations, which is an element in the formulation of the regional law products and the dynamics in the progress of the laws and regulations on the regional law products.
- The Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 30 Year 2006 on the Procedures for Delegating the Government Affairs of the Regency/Municipality to the Village in order to implement the provisions in Article 9 paragraph (1) of the Government Regulation Number 72 Year 2005 on Villages.
- The Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 138 Year 2017 on the Implementation of the Regional Integrated One Stop Service in order to implement the provisions of Article 25 paragraph (1) of the Regulation of the President of the Republic of Indonesia Number 97 Year 2014 on the Implementation of the Integrated One Stop Service.

- The Regulation of the Minister of Research, Technology and Higher Education of the Republic of Indonesia Number 3 Year 2018 on the Merging and Unification of Private Universities in order to implement the provisions in Article 16 paragraph (6) of the Regulation of the Minister of Research, Technology, and Higher Education Number 100 Year 2016 on the Establishment, Conversions and Dissolutions of State Universities and the Establishment, Conversions, and Revocation of the License of Private Universities, which would require the enactment of the Regulation of the Minister of Research, Technology, and Higher Education on the Merging and Unification of Private Universities.

Hence, in practice, by strictly regulating the position of the Ministerial Regulation within the hierarchy, there is the potential that it could give rise to the notion that theMinisterial Regulation is found at different levels of the hierarchy. By delegating the authority to regulate the norms from the Law to the Minister, the position of the Minister is no longer viewed as an assistant but has conceptually transformed into being the Vice President of the President. After all, the Constitution defines the concept of a Minister as the Assistant of the President.

Based on the theory of the Separation of Power, the Executive is the executor of the Law even if constitutionally it is the President and House of Representatives who deliberate over the Bill. However, Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia negates the fact that the power to formulate the Law lies in the hands of the House of Representatives. In terms of the executive power, Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that constitutionally, the President of the Republic of Indonesia holds the power of authority over the government. Because the President holds the power of authority over the government, by Law the delegation of authority should be given to the instruments established by the President, be it in the form of a Government Regulation or a Presidential Regulation.

It must be understood that realistically the hierarchy of the norms would also lead to consequences over the delegation in regulating the norms. In his book “The General Theory of Law and the State,” Hans Kelsen pointed out that the creation of the norm is determined by the higher norms. Hence, in this context, it is essential to note that special attention needs

to be given to the level of the norms for in the delegation of authority it is imperative to heed the "steps" of the lower norms. H.D. Van Wijk and Willem Konijnenbelt[10] said that there are 3 (three) methods to obtaining the government authority, they are:

- *Atributie: toekenning van eenbestuursbevevoegheid door eenwetgeveraaneenbestuursorgan* (Attribution is the delegation of the government's authority from the formulator of the law to the organs of the government).
- *Delegatie: Overdracht van eenbevoegheid van het eenbestuursorganaaneenander* (Delegation is the transfer of the government authority from one organ of the government to another organ of the government).
- *Mandat: eenbestuursorgaanlaatzijnbevoegdheid names hues uitoefenen door eenander* (A mandate takes place when the organ of the government permits another organ of government to use its authority on its behalf).

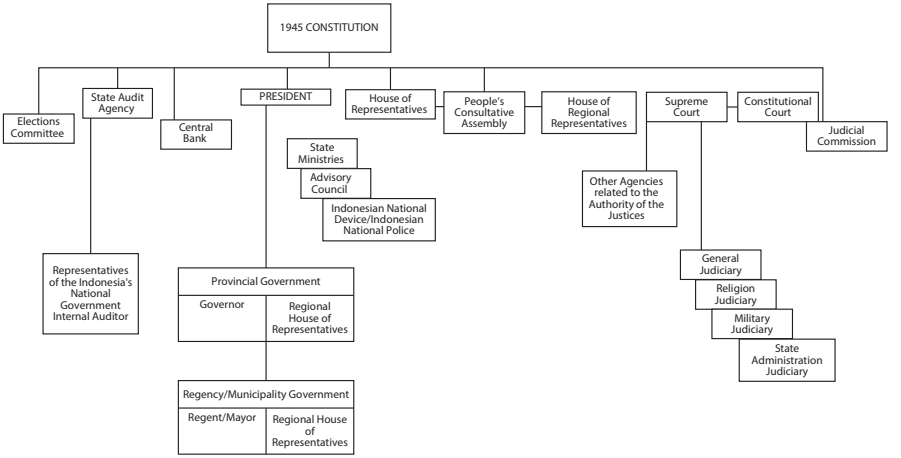
Article 1 number 22 and number 23 of Law Number 30 Year 2014 on Government Administration regulates:

- Attribution is the delegation of authority to a Government Agency and/or Government Official by the Constitution of the Republic of Indonesia or the Law.
- Delegation is the transfer of authority from a higher Government Agency and/or Government Official to a lower Government Agency and/or Government Official whereby the responsibility and accountability shall be fully transferred to the recipient of the delegation.

As such, in order to understand the "hierarchical ladder," it is important to understand the distribution of authority within the level of attribution as well as the delegation. When observing the construct of the Indonesian governance structure, it is essential to look at the state institutions that has been given the authority by the 1945 Constitution of the Republic of Indonesia, which are: the President, the State Audit Agency, the People's Consultative Assembly, the House of Representatives, the House of Regional Representatives, the Supreme Court, the Constitutional Court, and the Judicial Commission.

10 Van Wijk & Konijnenbelt, in Ridwan H.R, *Hukum Administrasi Negara (State Administration Law)*, PT. Raja Grafindo, 2006, p.102.

Scheme 1

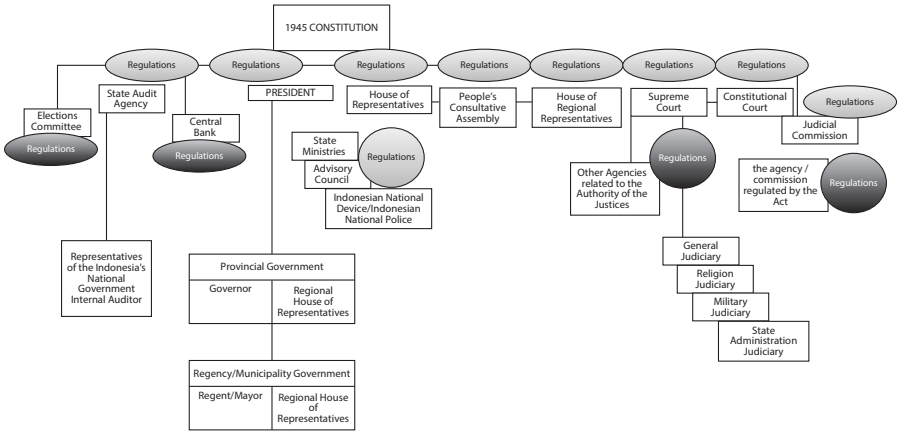


As the holder of the power of authority over the state governance, the President directly oversees the Provincial, regional governments, and then the Provincial Regional Government oversees the Regency and Municipality Regional Governments. This construct could be found in Article 18 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Hence, this structure shows that the Laws formulated by the President and the House of Representatives could provide a delegation of authority to the President and the Regional Government. This is because the Constitution provides the attributive authority to the President and the Regional Government to formulate the Regional Regulations.

Therefore, it is justifiable that the Law provides the authority to the Regional Government to execute the law, as the authority of the Regional Government is not a delegation of authority from the President but an attribution from the Constitution, even though there is the co-administration duty. A similar situation exists with the Regulation on State Institutions where the authority is regulated by the Constitution. Hence it is also justifiable that it be given the delegation of authority by Law to directly conduct administration activities because the state institutions also receive the attributive authority from the Constitution.

The Ministerial Regulations, on the other hand, only receives the delegation of authority from the President, so it is inaccurate if the law by-passes the "ladder' and gives the authority directly to the Minister. Hence, differentiation needs to be made on the levels of the regulations that are passed by the state institutions whose authority is regulated by the Constitution and regulations that are passed by the Minister/ Institution/Commission whose authority is regulated in the Law. The scheme below provides a better understanding of the situation.

Scheme 2



Although the Regulation of the Minister is included in the hierarchy of the laws and regulations, the phrase used in the provision of Article 8 paragraph (2) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulation should read "so long as it is instructed by the higher laws and regulations" without the addition of the phrase "formulated based on the authority".

Theoretically, Hans Nawiasky's idea could be used as an approach to analyzing the strength of the Ministerial Regulation by determining the qualifications of the laws and regulations with attributive characteristics, or through the delegation of authority. The levels based on the initiative of Hans Nawiasky are:

- *Staatsfundamentalnorm* (The Fundamental Norms of the State)
- *Staatsgrundgesetz* (The Basic Principles of the State)
- *Formell Gezets* (The Official/Formal Laws)

- *Verordnung & AutonomeSatzung* (The Implementing Regulations and Autonomous Regulations)

There are two types of regulations under the Law, which results from the delegation authority to regulate the laws, they are the implementing regulation (*Verordnung*) **Delegation of Authority** and the autonomous regulation (*Autonome Satzung*) **Attributive Authority**.

The character of the *Verordnung* could be found within the Government Regulations and the Ministerial Regulations. This is because the Minister receives the delegation to administer the government affairs from the President, as specified in Article 17 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution that stipulates:
(1) The President is assisted by the State Ministers.
(2) The Ministers are appointed and dismissed by the President.
(3) Every minister is responsible for specific affairs within the government.

Therefore, Article 8 paragraph (2) of Law Number 12 Year 2011 specifically regulates the Ministerial Regulations as "The Laws and Regulations as specified in paragraph (1) is recognized and is legally binding so long as it is instructed by higher Laws and Regulations (Verordnung), and to prevent any room for the Ministers to formulate regulations based on their authority because the Ministerial Regulations is AutonomeSatzung in nature."

The deletion of the phrase "formulated based on authority" in Article 8 paragraph (2) of Law Number 12/2011 provides the Ministers with the discretion to formulate regulation that they may interpret as being under their authorities. Therefore, the deletion of the phrase "formulated based on authority" in Article 8 paragraph (2) of Law Number 12/2011 would prevent the ongoing issues from continually arising within the government administration. These issues include, among others:
- The presence of a sectoral-ego, where the regulations of the ministers clash with one another.
- The issuance or amendment of a Regulation by the Minister within a short period, thus causing confusions within the region in attempting to make the necessary adjustments.
- The interest of the minister approach, as sometimes within 1 period of Presidency the position of the Minister may be replaced multiple times, thus resulting in different policies.

- The Regulation of the Minister that is issued is no longer in contradiction to the higher laws and regulations. For example: The Regulation of the Minister of Home Affairs Number 57 Year 2009 that regulates the cost or budget for the Regional Head Election. There were three conflicting laws: 1) Law Number 17 Year 2003 on the State Finances, 2) Law Number 1 Year 2004 on the State Treasury, and 3) Law Number 30 Year 2004 on Regional Governments. In essence, the three laws stipulate that the budget for the Regional Head Election is taken from the Regional Budget and that the formulation of the Regional Budget must be approved by the Regional House of Representatives and the Government before it could be executed through the Regional HeadRegulation. However, in the Regulation of the Minister of Home Affairs Number 57/2009 it is stated that even before the Regional Budget is passed, the Regional Government is permitted to use the budget. The Minister of Home Affairs stated that it was an urgent situation because of the many complaints lodged by the regions regarding the negligence in the budget proposal process, which resulted in the delays in organizing of the Regional Head Election, or worse, failed to be held at all because of the issues surrounding the formulation of the Regional Budget.

Furthermore, in practice, an incident was found where the Minister issued a Regulation and the regulation, which was on the mechanism of services, differed from the Regulations that had been administered by a specific region under the prevailing Regional Regulation and the Regional Head Regulation. Hence, in order to prevent a vacuum in the public services, the Regional Government temporarily disregarded the prevailing Regulation of the Minister and decided to refer to the prevailing Regional Regulation and the Regional Head Regulation as the basis in the government administration. At this level, the Ministerial Regulation is, in practice, downgraded.

Also, particular amendments need to be made towards Law Number 12 Year 2011 on the Formulation of the Laws and Regulations regarding the hierarchy of the Laws and Regulations stipulated in Article 7 paragraph (1) by inserting the Regulation of the Minister within the hierarchy.

In the formulation of Article 7 paragraph (1) on the types and hierarchy of the laws and regulation, the Bill for the Amendment of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations determined that the type and hierarchy of the Laws and Regulations should comprise of:

- The 1945 Constitution of the Republic of Indonesia;
- The Decree of the People's Consultative Assembly;
- The Laws/Regulations in Lieu of the Law;
- The Regulation of the Government;
- The Regulation of the President;
- The Regulation of the State Institution/Minister/Commission/ Agencies/ Institutions that are formed by the Law;
- The Provincial Regional Regulation;
- The Regency/Municipality Regional Regulation.

4. Closing

4.1. Conclusion:

The Minister is given the freedom to formulate the Ministerial Regulation based on authority following Article 8 paragraph (2) of Law Number 12/2011 on the Formulation of the Laws and Regulations. This is in contrast to the Theory on the Separation of Power, the Theory on Authority, and the Theory on the Hierarchy of the Norms. All of these theories are accommodated in the 1945 Constitution of the Republic of Indonesia.

4.2. Recommendations

The amendment of Article 8 paragraph (2) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations should include the following provision: The Laws and Regulations as specified in paragraph (1) is recognized and is legally binding so long as it is instructed by the higher Laws and Regulations (Verordnung). Also, there needs to be the addition of the Ministerial Regulation in Article 7 paragraph (1) of Law Number 12 Year 2011 that shall be elaborated as follows:

- The 1945 Constitution of the Republic of Indonesia;
- The Decree of the People's Consultative Assembly;
- The Laws/Regulations in Lieu of the Law;
- The Regulation of the Government;
- The Regulation of the President;
- The Regulation of State Institution/Minister/Commission/Agency/ Institution that is established by Law;
- The Regulation of the Provincial Regional Government;
- The Regulation of the Regency/Municipality Government.

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IV

Executive Review in the Efforts to Structure Regulations in Indonesia

Oce Madril

1. Introduction

Regulation obesity issues could bring about negative impacts on the many aspects of government administration. The actual number of regulations that are currently enacted in Indonesia is still unclear. Several media cited government sources and reported that the total number of regulations that are currently in effect in Indonesia is approximately 62,000 (sixty-two thousand). Other times, however, the media quoted the number to be around 42,000 (forty-two thousand). Regardless of the actual number of regulations that are currently in effect, as it is impossible to obtain the actual number, Indonesia is currently experiencing regulation obesity.

The National Development Planning Board stated that the large number of regulations could bring about negative impacts, such as, the less than optimum performance of the state administration, a feeling of insecurity at work, people having to pay more than they should (illegal levy), budget inefficiency that encompasses investment costs, implementation, and law enforcement, a decline in the investment, particularly the foreign direct investment, the loss of employment opportunities, and loss of prospects to perform other development programs.[1] These negative impacts would put Indonesia at a disadvantage.

The issue of regulation obesity also occurs in many countries and has become the main topic of discussion in the international arena. Efforts to resolve the issue would require the implementation of regulatory reform. Regulatory reform, in this case, is to reduce or cut down the number of existing regulations and to create regulations that are both effective and efficient. This study would specifically discuss the executive review as one of the strategies in performing regulatory reform. This study is complemented by a comparative analysis of other countries, particularly South Korea, that had carried out the regulatory reform. South Korea could serve as a reference for the Indonesian government in developing the policies to structure the regulations.

1 *Pedoman Penerapan Reformasi Regulasi (Guidelines on the Implementation of Regulatory reform)*, Deputy of Politics, Law, Defence and Security, Directorate of Laws and Regulations Analysis, p. 6-8.

2. Topic of Discussion

2.1. Executive Review

The executive review is a review concept on the laws and regulations by a government authority or the executive. It could be said that this concept is comparable to the other concepts on the laws and regulations, such as the judicial review by the judiciary body/judicative and the legislative review by the representative body/legislative. It is well understood that the concept of reviewing the laws and regulations through the review mechanism is performed when the laws and regulations have already been enacted or legislated. It is essential to recognize this concept to be able to differentiate the review mechanism from the preview mechanism, which is done before the laws and regulations are enacted or legislated.

In the United States of America, the executive review is defined as the authority of the President to evaluate the constitutionality of a law and regulation, as stated by Norman. R. Williams:

> *"The past decade has witnessed a remarkable resurgence in interest in executive review—the notion that the President, no less than the judiciary, has the power to interpret and enforce the U.S. Constitution… While virtually everyone agrees that the President may veto legislation or pardon individuals convicted under a statute he/she considers unconstitutional, there has been considerable debate over whether the power of executive review includes the authority to refuse to enforce federal statutes that the President believes to be unconstitutional."* [2]

In contrast to the concept that was cited above, the executive review concept defined in this paper is a model for examining, assessing, or evaluating the laws and regulations whose levels are below the laws and are products of the executive power through the executive body. The central government performs the examination, assessment, and evaluation of the laws and regulations issued by the central government as well as the regional government.

2 Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, University of Pennsylvania Law Review [Vol. 154: 565 2006], p. 1.

The executive review on the legislation products of the executive at the central level encompasses the Government Regulations, Presidential Regulations, Ministerial Regulations, and other Regulations issued by the Government Institutions at the central level. On the regional level, the executive review is performed on Regional Regulations and Regional Head Regulations at the provincial and regency/municipality levels. The main objective is to identify and create the basis for the government to revoke or amend the laws and regulations.

The executive review is also performed as a means to execute the legal principle of ius a contrarius actus. In essence, this principle states that the official/agency that formulates/issues a regulation/decree is automatically the party that could annul/revoke the regulation/decree. Just as other conventions, in the decrees made by the state administration, there is a safety clause stating, "should in the future it is found that there are errors or oversights, the decree shall, therefore, be reviewed." Even without the standard safety clause, the formulators of the laws and regulations still have the authority to annul the regulation/decree.

The ius a contrarius actus principle demands that every agency/official actively take the appropriate actions if it is known that regulation or decree that is issued is problematic. An annulment or amendment could be immediately executed without having to wait for other parties to submit an objection. This principle is the basis from which the government may actively take actions to conduct a review on every type of legislation products that have been issued, most specifically on regulations that may significantly impact the society.

The ministry with authority to handle the legal and legislative affairs, such as the Ministry of Law and Human Rights, and the Ministry of Home Affairs for regional regulations, could perform executive reviews, however they must take into account the Decree of the Constitutional Court Number 56/PUU-XIV/2016 that states, the government no longer has the authority to annul the Regional Regulations.

Another institutional mechanism that could be used as an option to resolve the issue of regulation obesity is to establish a specialized individual ad hoc body. The proposal to establish a specialized ad hoc body or team could be taken into consideration. The team could serve as a short-term solution to assist the government in performing the executive review.

Because the review will focus more on the laws and regulations that have been issued by the government, the ad hoc body or team should be positioned under the President. Hence, there needs to be a direct mandate from the President, as the regulations that would be reviewed are cross-institutional, cross-ministerial, and cross-sectoral. Under the mandate of the President, the team can work more effectively and would not be faced with the sectoral ego.

In the OECD (Organization on Economic Cooperation and Development) report it is stated that several countries have also chosen the option to establish a specialized body or team to reform the regulations and to overcome the over-regulation issue. Pedro Andres Amo and Delia Rodrigo stated that the body with the authority to reform the regulations has several characteristic role, which are:[3]

- Coordination and supervision, these are the characteristics of the regulatory reform body in such countries as South Korea, Denmark, and Mexico. The coordination and supervision function could be explained as follows, "A key role of oversight bodies is to coordinate and supervise, making sure that regulatory reform meets quality standards, complies with a general economic strategy and that Regulatory Impact Analysis (RIA) is undertaken appropriately. In that sense, channels of communication between regulators and bodies must be properly settled."
- The challenge function, which is a form of regulatory reform body that could be found in Denmark, the United Kingdom, and Australia. This function could be defined as follows, "The challenge function empowers the oversight institution with the competence of questioning regulation and its reforms by assessing the quality of regulatory policy through RIA and the gatekeeper function. This means the capacity to veto a regulation which does not fulfill the requirements of quality, giving the oversight body an important amount of power."
- Advice and support, which is a type of regulatory reform body that is implemented in Japan and the United Kingdom. Its function is as follows, "Provide advice and support, helps to create and maintain a cultural change in regulators. This generally under-prioritized task could be achieved through broad guidelines, continuous training

3 Pedro Andres Amo & Delia Rodrigo, *Oversight Bodies for Regulatory Reform*, Background Document Presented on Regional Capacity-Building Seminar on Regulatory Tools and Policies and Third Regional Meeting of The Working Group IV on Public Service Delivery, Public-Private Partnerships and Regulatory Reform, Tunisia, 2007.

and providing specific expertise even with external consultants if necessary".

2.2. Implementation of the Sunset Clauses in the Laws and Regulation

One of the definitions that need to be cited on the concept of the sunset clause is one provided by Jonathan Waller, who introduced the term "sunset laws." Jonathan Waller said that the idea and concept of the sunset laws could be traced back to Thomas Jefferson, who stated, "every law naturally expires every 19 years". Waller also said that besides Thomas Jefferson, the idea on the sunset laws could also be traced back to when John Adams said that the Sedition Acts of 1798 would expire when he completes his term of office as President of the United States of America. [4]

Brian Baugus and Feler Bose believe that sunset clauses could be defined as:

> *"Sunset provisions are clauses embedded in legislation that allow a piece of legislation or a regulatory board to expire on a certain date unless the legislature takes action to renew the legislation or board… The reviewers will recommend allowing the law or board to sunset, allowing it to continue but with changes, or leave it unchanged. Sunset provisions also frequently allow or even require a preliminary review before the final review."* [5]

Another definition is provided by Sofia Ranchordas, who defined sunset clauses as:

> *"Sunset has been defined as a statutory method of forcing legislators to make a periodic determination of whether to allow a particular program or agency to continue." The term sunset clauses have been used in the literature to describe a broad range of statutory or regulatory mechanisms that entail the termination of a statute after a beforehand determined period. Sunset clauses or provisions can be applied to entire statutes or determined provisions.*[6]

4 Jonathan Waller, *The Expenditure Effects of Sunset Laws in State Governments*, Dissertation: Clemson University, 2009, p. 4.

5 Brian Baugus and Feler Bose, *Sunset Legislation in the States: Balancing the Legislature and the Executive*, Mercatus Research, Mercatus Center at George Mason University, Arlington, 2015, p. 3.

6 Sofia Ranchordas, *Sunset Clauses and Experimental Legislation: Blessing or Curse for Innovation*, Disertasi: Tilburg University, Belanda, 2014, p. 70.

In her dissertation, Sofia Ranchordas compares the sunset clauses with the experimental legislation. Ranchordas quoted the ideas of Wolfgang Beck and Claudia Schurmeier and said that the two concepts could be seen as being similar. The innovative legislation concept is recognized in German law literature, whereas the sunset clauses could found in the United States of America's law literature.[7] Ranchordas also states that the sunset clauses comprise of three elements; one, the formulators of the regulation must have a specific reason to include the sunset clauses in the regulation. Two, the provisions on the sunset clauses must be implemented in temporary regulations, not those that require continuity, and three, adequate time to evaluate the regulations that incorporate the sunset clauses within its content.[8] Ranchordas provides the following explanations:

- a specific reason to submit a law to a time limit since sunset clauses are usually not the first choice of legislators–although it is essential to inquire if they should not be so under certain circumstances;
- temporary character: a sunset clause does not aim at continuity; instead it determines the expiration of a law on a specific date unless there are substantial reasons to believe that the former should be extended for a determined period;
- Evaluation moment, meaning that the effects of the sunset disposition should be assessed in order to verify whether the objective for which it was enacted has been achieved. Depending on the evaluation report, it should be decided whether to let the provision sunset or renew it on the grounds of the arguments provided.[9]

Another definition is provided by Antonios Kouroutakis who defined sunset clause as:

> *"Sunset clauses (or provisions) are dispositions that determine the expiry of a law or regulation within a beforehand determined period. These provisions are conceived to automatically 'erase' legislation, which is no longer necessary either because it has fulfilled its function or because it is no longer effective. Before the law sunsets, it is generally subject to final evaluation."* [10]

7 *Ibid*., p.72.
8 *Ibid*., p.70.
9 *Ibid*.
10 Antonios Kouroutakis dan Sofia Ranchordas, *Temporary De-Juridification: Sunset Clauses at A Time of Crisis*, Preliminary Draft Minnesota Journal of International Law, Volume 25, Special Issue, Forthcoming, 2016, p. 22.

Furthermore, there needs to be a differentiation between sunset clauses and sunrise clauses. Sunset clauses determine the time or expiry of a prevailing regulation, while the second terminology, sunrise clauses is the opposite, it a clause that states a regulation shall be in effect within a pre-determined time frame.[11]

According to Baugus and Bose, a sunset clause could be divided into four different types and could be implemented in its entirety or only for specific selected regulations. The four types are known as the comprehensive, regulatory, selective, and discretionary models.[12] Kamal further elaborated.[13]

- **The Comprehensive Review Model**, wherein the implementation of the sunset clauses, every government agency must review the laws and regulations according to the predetermined schedule. It could, therefore, be understood that this model provides the authority to all parties to conduct a review on the legislation product that has been made. Every agency that issues a regulation must review according to the predetermined schedule;
- **The Regulatory Review Model**, wherein the implementation of the sunset clause, the rights to review the laws and regulations are only given to the agencies with authority to do so and the legislative body. In this model, not every agency could review the legislation product that has been made. The state would only permit certain agencies and the legislative to conduct a review on the entire laws and regulations;
- **The Selective Review Model**, where in the implementation of the sunset clause, the state selects certain agencies and the legislative to review the prevailing laws and regulations. Similar to the previous model, not every agency has the authority to review the legislation products that have been made;
- **The Discretionary Model**, where in the implementation of the sunset clause freedom is given to the legislative body to select the agency, and the laws and regulation that would be reviewed. This method

11 *Ibid*.

12 Brian Baugus dan Feler Bose, *Sunset Legislation in the States: Balancing the Legislature and the Executive*, Mercatus Research, Mercatus Center at George Mason University, Arlington, 2015, p. 4.

13 this idea as Kamal Fahmi Kurnia, *Gagasan Metode "Sunset Clauses" dalam Sistem Perundang-undangan di Indonesia (The Idea for the "Sunset Clauses" within the Indonesian Legislation System),* 2017, p. 6, accessed from *https://osf.io/preprints/inarxiv/gsz54/download?format=pdf*, on 11 November 2017.

provides the room for the legislative body to perform reviews on the prevailing regulations or to delegate the review process to each respective agency that formulated the regulations.

Baugus and Bose also stated that the sunset review mechanism could establish the regulation as the object. The sunset review mechanism could result in four possible outputs. The first possibility is a reform without any changes (renewal-unchanged), which means that if during the review process on a regulation that contains the sunset clauses it were found that the regulation is still effective, the regulation would then be continued. Second, reform with changes (renewal-changed), which is when the agency that performed the review found that the regulation's period of enactment needs to be extended, and amendments also need to be made on the regulation. Third, consolidation, which means the entity that performs the review found that the function of a particular agency remains important and hence, consolidation needs to be made between the agencies and their relevant functions, while at the same time eliminating the functions that are deemed unnecessary. Fourth, termination, which means during a review it was found that the regulation or agency being reviewed is no longer capable of achieving the desired objective and have deviated from their primary functions, therefore, the regulation or agency could be terminated.[14]

3. Regulatory Reform, The South Korea Experience

South Korea is a country that was able to quickly rebound and improve its economy after the 1997 economic crisis. One of the real efforts taken by South Korea to free itself from the economic crisis was regulatory reform. In 1998, under President Kim Dae Jung, South Korea launched a reform program that encompassed four sectors, finance, corporation, public, and labor. One of the aspects of the reform program was the regulatory reform to regulate the four designated sectors. The objective of South Korea's regulation reform was to transform South Korea from a state policy centered economic growth to one that is open market-oriented based on the principles of market competitiveness, autonomy, creativity, democracy, and consumer priority.[15]

14 Brian Baugus dan Feler Bose, Op.Cit., p. 6.

15 Daeyong Choi, *How effective is the Korean model of regulatory reform to cut down existing regulations?* p. 1.

In 1997, the Basic Act on Administrative Regulations (BAAR) was legislated as a legal umbrella in executing the regulatory reform. The BAAR regulate South Korea's regulatory reform, by among others, using the Regulatory Impact Assessment (RIA) in formulating new regulations, incorporating the sunset clauses within then new regulation, and establishing an agency aptly named the Regulatory Reform Committee (RRC). The successful implementation of the BAAR could not be separated from the role of the RRC, an agency whose main task was to reform the regulations. The BAAR also regulated the inclusion of the sunset clause, where every regulation that was formulated would be in effect for 5 (five) years. Although there was a designated time frame, the regulation could still be renewed.[16]

The development on the use of the sunset clause in the formulation of the regulations in South Korea had gained full attention during the administration of President Lee Myung Bak, who was elected in 2008. During this period, the sunset clauses could be incorporated into the prevailing regulations, which differed from the sunset clauses concept that had been in use since 1997, which were only implemented in regulations that would be formulated.[17] The sunset clauses that could be implemented into the prevailing regulations were then called the Sunset for Review.[18] Under President Lee Myung Bak administration, a new commission was established and named the Presidential Commission on National Competitiveness (PCNC) that was responsible for performing the regulatory reform with authority to conduct follow-ups on reports relating to regulations on businesses.[19]

During President Lee Myung Bak's administration, the PCNC was an ad hoc or temporary agency. The authority of the PCNC in conducting a sunset review and its relations to the RRC could be explained as follows:

> *"The PCNC adopted a plan early this year to subject more than 1000 existing regulations to sunset review. However, the RRC has found this measure needed further action in the short term, as the sunset review*

16 *Ibid*.

17 Kim Song June dan Choi Dae Yong, *Regulatory Coherence: The Case of the Republic of Korea, ERIA (Economic Research Institute for ASEAN and East Asia)* Discussion Paper Series, 2016, p. 14.

18 OECD Research, *Latest Developments on Korea's Regulatory Policy*, p. 2, downloaded from *http://www.oecd.org/gov/regulatory-policy/45347364.pdf*, accessed on 15 November 2017.

19 OECD Review of Regulatory reform, *Regulatory Reform for Recovery: Lessons from Implementation During Crises*, OECD, 2008, p. 120.

could bear fruit only after the deadline reaches, which generally means 3 to 5 years from the time of imposition. Against this background, The RRC and the Office of Regulatory Reform under Prime Minister, a standing unit for the RRC, embarked upon a search for a breakthrough, and reached to a conclusion that more urgent measures were needed to adopt a more flexible approach to the application or enforcement of regulations and to turn the regular sunset review into a new mechanism more suitable to the current economic situation." [20]

Mostly it was difficult to differentiate the duties and functions of the specialized agencies. PCNC and RRC both focused on performing regulatory reform and review of the prevailing laws and regulations. The two similar roles had made it possible for PCNC and RRC to work together in performing the reforms, as explained by Song June Kim and Dae Yong Choi:

"The Presidential Council on National Competitiveness (PCNC) was established under the Lee Myung-Bak Administration as a new presidential regulatory reform organization. While the RRC focused on examining new and reinforced regulations, managing regulatory information and the regulatory reform of each ministry, and the rearrangement and management of regulatory reform-related policies, the PCNC's emphasis was on strengthening national competitiveness by controlling key policies that have a greater impact on state affairs and bundles of regulations that involve multiple ministries. However, no clear boundaries of working scope were drawn between the RRC and the PCNC in dealing with the reform of existing regulation, allowing them to engage in cooperation and competition for regulatory projects." [21]

It could be said that South Korea's regulatory reform efforts had become the primary attention of every President in office. Imagine, under four presidencies, regulatory reform had become a part of the South Korean government's dynamics. It all began with Kim Dae Jung's administration in 1997 when regulatory reform was used as part of the effort to overcome the economic crisis. It was during this period that the RRC was established. Regulatory reform continued during the Roh Moo Hyun administration, where regulatory reform was not seen as an effort to reduce the number of regulations, but as an effort to improve the quality of the regulations. Lee Myung Bak, who replaced Roh Moo Hyun, used the regulatory reform agenda as the primary agenda of his policies. The PCNC was established

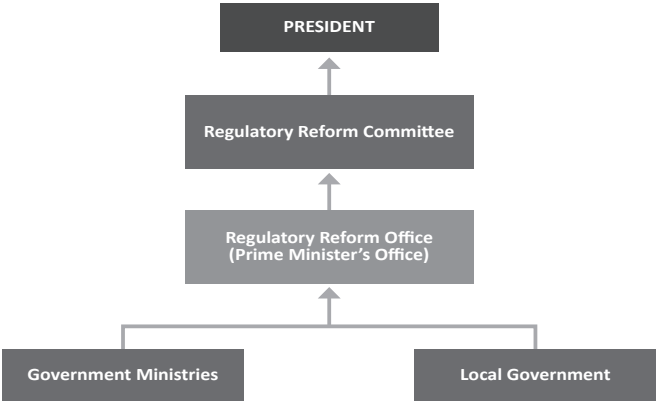
20 *Ibid*.

21 Song June Kim dan Dae Yong Choi, op. cit., p. 11.

during this period as an ad hoc agency with similar tasks to the RRC but was more focused on regulations that relate to businesses. Finally, there was President Park GeunHye, who used regulatory reform to focus on the economic sector primarily. This effort had helped South Korea recover from the economic crisis and become one of the countries with the strongest economy in Asia, and even the world.[22]

As had been previously explained, the executive review to reform the regulations in South Korea is carried out by the Regulatory Reform Committee (RRC). The RRC was established based on the Basic Act on Regulatory Reform in 1997. The agency is made up of 22 members and co-chaired by the Prime Minister and a representative from a non-government agency. There are 20 members, and 14 of them are from non-government agencies, and the other six from within the government. In the committee, the government is represented by the Ministry of Finance and Economy, Ministry of Commerce, Industry and Energy, Ministry of Government Administration and Home Affairs, Ministry of Legislation, Office of Government Policy Coordination (Prime Minister's Office) and the Fair-Trade Commission.[23]

The position of this select committee within the government system could be illustrated in the following diagram:

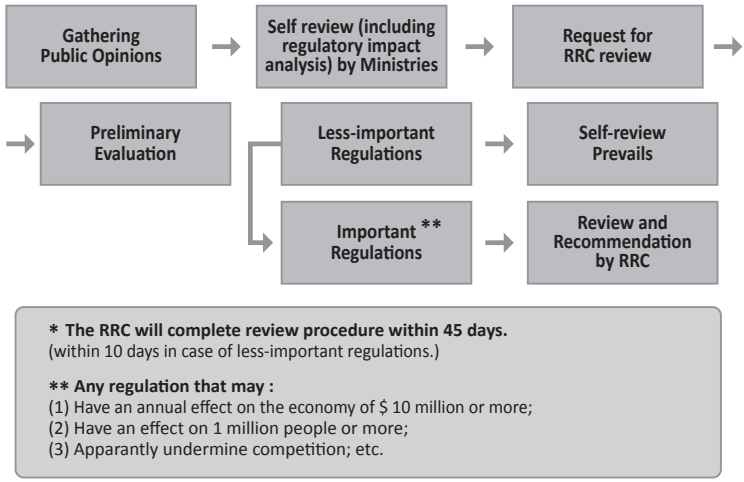


Source: Website of South Korea Regulatory Reform Committee, 2017

22 *Ibid*., p. 2.

23 Daeyong Choi, *How effective is the Korean model of regulatory reform to cut down existing regulations?*

The select committee is positioned directly under the President and in executing its duties and authorities reports directly to the President. The diagram shows that the committee has a strategic and vital position. It also has a strong authority as it was based on the President's mandate. Its work process (review procedure) could be explained in the following scheme:



Source: Website of South Korea Regulatory Reform Committee, 2017

The above scheme shows that in South Korea, the executive review procedure performed by the RRC begins with a self-review, which are performed by each respective agency or ministries that issued the regulation. The above mechanism also shows that before conducting the self-review, the ministry must collect the public's opinion as feedback.

South Korea's reform agenda was able to reduce the number of regulations that were deemed to conflict, no longer necessary or no longer in keeping with the development. After the regulatory reform initiative was launched at the end of 1998, South Korea was able to cut down its regulations by 50%, from 11,125 regulations to 5,430 regulations and revised 2,411 regulations by the end of 1998. The specialized committee for regulatory reform continued the review process from 1998 to 2002, as shown in the following table:

	Regulations Reviewed	Recommend for Revision	Recommend to be Revoked	Passed the Review
Economic Committee I	1724	512	122	1000
Administration and Social Committee	1347	300	200	847
Economic Committee II	1447	345	65	1037
Total	**4518**	**1157**	**387**	**2974**

The above data shows that there were 4,518 regulations reviewed by the RRC through several subcommittees, which were grouped into 3 (three) main regulatory themes. Of that number, 1,157 regulations were recommended to be revised and 387 to be revoked or annulled. There were 2,974 regulations that were deemed still relevant and were still in effect. In addition to the review efforts performed by the RRC, the agencies or ministries also conducted self-reviews on each of their regulations. A majority of the regulations that were reviewed were those relating to issues on the social welfare of the people. This was then followed by regulations on such affairs as construction and transportation, maritime affairs, agriculture, trade and energy, finance and environment.[24]

Another aspect of South Korea's successful implementation of the regulatory reform is the political will of the government. South Korea's success was not only because of the specialized agencies that were established, such as the RRC, but also the political will of the government, in this case, the President. Daeyong Choi said:

> *"The President has fully supported the activities of RRC. Decisions made by RRC have been decisive because the President has endorsed them. The Prime Minister and ministers have directly participated in the decision-making process and undertook responsibility for implementation. Once decisions were made at RRC, the Prime Minister undertakes responsibility for implementation in public administration."* [25]

24 Jong Seok Kim, Tae Yun Kim, Junsok Yang, dan Scott Jacobs, *Regulatory Transformation in The Republic of Korea: Case Studies on Reform Implementation Experience*, The World Bank, Washington, 2008, p. 19.

25 Daeyong Choi, 2001, *A Radical Approach to Regulatory Reform in Korea*, paper presented in the Annual 2001 Conference of the American Society for Public Administration at Rutgers University, New Jersey, USA.

Peter Nijkam and Andre Oosterman, Political said that political support is necessary because regulatory reform efforts is a political process that is related to the social-political factors and cuts across the political agencies within the government. However, political will alone is not enough because to be successful regulatory reform must also gain the support of the public (public participation). The government must ensure that the regulatory reform process is transparent and is accessible to the public. The stakeholders must also be able to obtain information on the development of the regulatory structuring. In implementing regulatory reform, the government could also take into consideration the views of the public.[26]

4. Closing

A poorly structured regulation could be influential towards the government administration and in fulfilling the rights of the society. A large number of unsynchronized and disharmonious regulations could potentially lead to the many problems within the government administration. Poorly formulated regulations would impedeon the effectiveness of the government. Therefore it is compulsory for the government to conduct regulatory structuring.

One of the efforts that could be used by the government in structuring the regulation is the executive review. The government could self-undertake the executive review by strengthening the authorities of the ministry responsible for legal and legislative affairs. The government could also establish a special ad hoc team that could assist in the review process of the various laws and regulations.

The Indonesian government could learn from South Korea's success in performing regulatory reform. South Korea implemented two main models. First, by strengthening the executive review mechanism through the establishment of a specialized agency, which is the Regulatory Reform Committee. Second, by strengthening of the sunset clauses and the sunset review system, so that the laws and regulations could be reviewed, regularly.

26 Peter Nijkamp dan Andre Oosterman, *Regulatory Reform Lessons from Western Europe for Eastern Europe*, Department of Economics Free University Amsterdam The Netherlands, p. 17-18.

Regulation structuring efforts would require a strong political commitment from the President. The political will of the President is necessary in order to ensure an effective executive review through regulatory reform. Finally, also important is public participation, as the public needs to be included in the regulatory reform agenda.

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V

The Regulation Reform of Harmonizing Conflicting Regulations through Mediation

Agus Riewanto

1. Introduction

The main component in upholding the law is the presence of adequate laws and regulations, not only in terms of its democratic formulation procedures but also in the quality of its material substance that could be used as reference and guidance for the nation without it conflicting with the wishes of the public.

According to Jeremy Benthem (1956), the product of the Law is a manifestation of the state's ability to create healthy and effective regulations that are in favor of the public interest, and which could benefit the majority and not just a few (Principle of Utility).[1]

Therefore, laws and regulations should be formulated to support a well-run state. The fact is that the laws and regulations are a regulatory instrument to ensure orderliness within the community and prevent any deviations in the rights and obligations of the people within the community. Penalties for any violations are also stipulated within the laws and regulations and are fully enforced by the law enforcers in order to ensure that the rules and regulations are observed and complied with by every element of the society.

The laws and regulations have several functions: First, the internal function that functions as the subsystem of the law (constitutional law) towards the principles of the legal systems in general, which are its functions to create the laws (rechts chepping), to undertake legal reforms, integration, and legal certainties. Second, the external functions that serve as provisions to the laws and regulations in the environment in which it prevails. This function could be referred to as the social-legal function, and as such, could be applied towards the customary laws, including its jurisprudence. Therefore, the external function could be formulated into the reform function, stabilization function, and efficiency function.[2]

A. Hamid S. Attamimi stated that in the modern constitutional state, the functions of the laws and regulations are: One, it gives forms to the

1 Bentham, J. *Introduction to the Principles of Morals and Legislation*, Oxford: Basil Blackwell, 1960.

2 Hamzah Halim dan Kemal Redindo Syahrul Putera, *Cara Praktis Menyusun & Merancang Peraturan Daerah; Suatu Kajian Teoretis & Praktis Disertai Manual (Practical Methods in Developing and Formulating Regional Regulations; A Theoretical & Practical Study Complemented by a Manual)*, Jakarta: Kencana, 2013, p. 61-64.

inherent values and the prevailing norms that are in place and that exists within the society. Two, the state functions in the form of regulatory products; and Three, it is an effective method and instrument in regulating and directing the society in achieving the desired aspirations.[3]

The fact is that, since 2014 to October of 2018 there were 62.000 (sixty-two thousand) regulations that had been formulated, these regulations include, Laws, Government Regulations, Presidential Regulations, Presidential Decrees, Ministerial Regulations, and Regional Head Regulations. The total number of regulations could be broken down into: Laws (107), Government Regulations (452), Presidential Regulations (765), and Ministerial Regulations (7621). Almost all of these regulations overlap, thus resulting in hyper-regulations that inhibit the strategic decision-making processes and implementation of state policies and resulting in the delays in development.[4]

Data provided by the Ministry of Law and Human Rights showed that within the last three years (2016, 2017 and 2018) alone, there were already 7,898 new laws and regulations. Of that number, the majority of the regulations were Ministerial/Agency/Institution/Non-ministerial State Institution Regulations, numbering 6.258 in total. The data shows the sheer obesity in the number of laws and regulations in Indonesia, thus requiring progressive approaches in resolving the conflicts that arise among the norms of these laws and regulations.

In general, the main issue in the Indonesian laws and regulations is the disharmony in the planning and the course of development, disharmony in the content materials, the ineffectiveness in the implementation, the sheer number of the regulations (hyper-regulations), and the overlaps in its institutional authorities.[5]

It is, therefore, only natural that there are disharmonies between the norms contained in one rules and regulations with other existing rules and

3 Maria Farida Indrati, *Ilmu Perundang-undangan; Jenis, Fungsi dan Materi Muatan (The Science of Laws and Regulations, Types, Functions and Content Materials)*, Yogyakarta: Kanisius, 2008, p. 215.

4 M. Nur Sholikin, 2018, *Prioritas Reformasi Regulasi (Priorities in Regulation Reform)*, Paper, at the National Seminar on the Regulation Reform Agenda: Structuring the Function Institutionalization of the Indonesian Legislations System, Jakarta, Februari 13, 2019, p.

5 *Ibid*., p. 7.

regulations, in one form or another, for both rules and regulations that are of the same level as well as other levels, hence resulting in the delays in the state policies making processes, and to a certain extent disrupting the economic and financial investment systems.

Therefore, the Ministry of Law and Human Rights of the Republic of Indonesia issued the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for Settlements of Disputes in the Laws and Regulations through Non-litigation Channels.

This paper aims to study, in depth, the urgency in the issuance of the Ministry of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes in the Laws and Regulation through Non-Litigation Channels in the effort to settle the disharmony among the norms within the laws and regulations through the mediation mechanism as a new approach in settling the ongoing conflicts that exists in the Indonesian laws and regulations. In Indonesia, settlement of conflicts on the norms in the laws and regulations have always followed the conventional model, which is through a judicial review at the Supreme Court, for conflicts relating to disputes on the norms between the laws and regulations and the laws, whereas conflicts on the norms between the Laws and the 1945 Constitution is carried out through a judicial review at the Constitutional Court.

The implementation of a legal policy for a judicial review were only able to be set in motion within the construct of the Post-amended 1945 Constitution and the introduction of Article 23 A Paragraph (1) and 24C Paragraph (1) of the 1945 Constitution that regulates the judiciary powers and their functions, which in this case are the Supreme Court and the Constitutional Court as the authoritative branch of the judiciary. The difference in the authorities of the Supreme Court and the Constitutional Court lies in their authorities in performing the judicial review. The Supreme Court is designed to review the validity of the laws and regulations under the Law, whereas the Constitutional Court reviews the validity of the Laws in relations to the 1945 Constitution. Therefore, in selecting the legal policy, the design of the Indonesian governance tends to be influenced by the European style, not only does it differentiate the judicial review for the materials on the laws and regulations at two different judicial bodies, the Supreme Court and the Constitutional Court, but that the two judicial bodies also have different authorities,

the Supreme Court as the court of justice, while the Constitution Court as the Court of Law.[6]

Therefore, it can be said that the Indonesia judiciary follows the bifurcation system with two different and separate judicatures, where the Supreme Court has the judicial power in the handling of general cases within an ordinary court, and the Constitutional Court has the judicial power over cases relating to the state constitution.

Moreover, the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels had been formulated to develop a new model in the settlement of disputes through mediations on the norms of the laws and regulations in Indonesia that may potentially result in injustice, generate conflict of authorities between state institutions and hamper economic growth and investment climate.

Mediation is an effective legal solution because in settlement of the dispute this model places greater emphasis on the consensus approach and seeks to bring together the interests of the disputing parties in order to achieve justice and a win-win solution. The settlement of disputes through litigation channels in court could result in a confrontation among the parties and lead to a model known as the adversary system, which is:

> *"Adversary system is Jurisprudential network of laws, rule, and procedure characterized by opposing parties who contended against each other for a result favorable to themselves. In such system, the judge acts as an independent magistrate rather than prosecutor, distinguished from the inquisitorial system"* [7]

The conflict mechanism always uses coercion and would result in two opposing parties, which are the winning party and the losing party. This condition would lead to a sense of dissatisfaction between the parties in settling the conflicts that exist between them.

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6 Jimly Assidiqie, *Hukum Acara Pengujian Undang-Undang (Legal Procedures for Reviewing the Laws)*, Jakarta: Sekjen dan Kepaniteraan MKRI, 2005, p. 206.

7 H. C Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence Ancient and Modern*, Sixth Edition, St. Paul, Minn: West Publishing, Co. 1990.

2. The Panacea that is the Ministry of Law and Human Rights Regulation

Realistically, the enactment of the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels is a continuous effort to seek alternative solutions in the event of a conflict in the norms of the Indonesian laws and regulations. In essence, this Ministerial Regulation regulates that in the event of a conflict in the Laws and Regulations, both vertically as well as horizontally, which results in conflicts on the legal norms, conflicts of authority among ministries/state institutions and the regional government, generates injustices towards the communities and entrepreneurs, hinders the investment and businesses climates, as well as national and regional economic activities, a petition for a settlement of conflict through non-litigation channels could be submitted to the Ministry of Law and Human Rights.

It is because of this reason that the issuance of the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels is not in conflict with the conventional judicial review mechanism at the Supreme Court and the Constitutional Court. The Regulation provides the public with an alternative mechanism of mediation and dialog that are both progressive and unconventional. Moreover, the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Rules and Regulations through Non-Litigation Channels aims to position the Minister of Law and Human Rights as the exclusive institution with the power to synchronize, generate coherence and harmony among the various laws and regulations prior to, and after they had been promulgated in the state gazette or the state report.[8]

8 Agus Riewanto, *Progres Penyelesaian Konflik Perundangan (Progress in Settlement of Conflicts on the Laws and Regulation)*, at *http://mediaindonesia.com/read/detail/210778-progresivitas-penyelesaian-konflik-perundangan*. Accessed on, February 22, 2019.

3. Legal Foundation for the Authorization of the Regulation of the Minister of Law and Human Rights

The legal foundations that serves as the foundation for the formulation of the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels could be traced back to the many regulations that were enacted in Indonesia.

First, based on Article 17, paragraphs (1), (2), and (3) of the 1945 Constitution that stipulates:
(1) The state ministers assist the President.
(2) The Ministers are appointed and dismissed by the President.
(3) Each minister is responsible for specific affairs of governance.

Based on the above provisions, it is clear that within the presidential governance system, the ministers assist the President in performing the state administrations, and that each minister implements the policies of the president for specific affairs. One of the ministries that assist the President in matters relating to the laws and regulations is the Ministry of Law and Human Rights.

Second, based on the provisions in Article 4 and Article 5 of Law Number 39 Year 2008 on State Ministries that stipulates:

- Article 4 (1) Every Minister is responsible for specific affairs within the government. (2) Specific affairs within the government as stipulated in paragraph (1) are comprised of: a. Governance affairs whose nomenclature is stipulated in the 1945 Constitution of the Republic of Indonesia; b. Governance affairs, the scope of which are stipulated in the 1945 Constitution of the Republic of Indonesia; and c. Governance affairs for refining, coordinating, and synchronizing the government programs.
- Article 5 (1) Governance affairs as stipulated in Article 4 paragraph (2) letter a. are made up of foreign, domestic, and defense affairs. (2) Governance affairs as stipulated in Article 4, paragraph (2) letter b. Encompasses religion, law, finance, security, human rights, education, health, social, manpower, industry, trade, mining, energy, public works, transmigration, transportation, information, communications,

agriculture, plantation, forestry, animal husbandry, maritime and fishery affairs. (3) Governance affairs as stipulated in Article 4, paragraph (2) letter c. Encompasses such affairs as national development planning, state apparatus, state secretariat, state-owned enterprises, land, civil registry, environment, science, technology, investment, cooperatives, small and medium enterprises, tourism, women empowerment, youth, sports, housing, and regional development or underprivileged regions.

The above provisions clearly show that the Ministry responsible for assisting the President in affairs on the laws and regulations is the Ministry of Law and Human Rights.

Third, based on Law Number 12 Year 2011 on the Formulation of the Laws and Regulations:

- Article 47 paragraph (3) stipulates, "Coordination for harmonizing, integrating, and strengthening the concept of the draft Bills that are initiated by the President shall fall under the of the minister responsible for governance affairs relating to the laws.
- Article 49 paragraph (3) stipulates, "The Minister, as stipulated in paragraph (2), coordinates the preparation for the discussions with the minister in charge of governance affairs relating to the laws."
- Article 54 paragraph (2), Article 55 paragraph (2), Article 58 paragraph (2), Article 63, in essence, stipulates that the harmonization, integration, and strengthening of the concepts in the drafting of the Government Regulations, Presidential Regulations, Regional Government Regulations (Provincial/Regency/Municipality) falls under the coordination of the Minister in charge of governance affairs relating to the laws.

Referring to several of the provisions stipulated in the articles of Law Number 12 Year 2011, it is clear that the Ministry/State Institution responsible for the formulation/development of laws/regulations is the Ministry of Law and Human Rights.[9]

Fourth, based on the provisions in Article 2 and Article 3 of Presidential Regulation Number 44 Year 2015 on the Organizational Structure of the

9 Jhony Ginting, *Hubungan Antar kelembagaan Dalam Pembentukan Peraturan Perundang-Undangan (Inter-institutional Relations in the Formulation of the Laws and Regulations)*, Paper, presented at the National Seminar on the Inter-institutional Relations in the Formulation of the Laws and Regulations, Jakarta, November 28, 2018, p. 68.

Ministry of Law and Human Rights, it is clearly stated that the function of the Ministry of Law and Human Rights is to formulate, determine, and implement policies pertaining to the laws and regulations.

4. The Judicial Review Model at the Supreme Court Corrected Through the Ministry of Law and Human Rights Regulation

At this point the enactment of the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels is deemed as a panacea and an oasis amidst the political-legal situation relating to the settlement of conflicts on the norms of the laws and regulations under the law at the Supreme Court, as the public considered the process to be non-progressive, and their reasons were:

First, for its high cost, because it costs IDR 5,000,000 (five million Indonesian Rupiah) to submit a request for a judicial review to the Supreme Court.

Second, the judicial review is a closed proceeding, and because of that, the public is unable to participate in the judicial process. The legal procedures on judicial reviews at the Supreme Court is closed to the public; hence, it encourages the non-participation of the public in the judicial review process at the Supreme Court. This is evident in the various products on the guidelines for the rights to judicial reviews, which are: Supreme Court Regulation No. 1 Year 1992, Supreme Court Regulation No. 1 Year 1999, Supreme Court Regulation No. 2 Year 2002, Supreme Court Regulation No. 1 Year 2004, which was later amended to become the Supreme Court Regulation No.1 Year 2011. As the judicial review at the Supreme Court is regulated through the Judex Jurist court nomenclature, it is therefore conducted without the control of other institutions, which means that the Supreme Court rarely invites the presence of the parties involved in the judicial review, particularly the institution in charge for the formulation of the regulation, to obtain their statements on the purpose and intention of the regulation that resulted in damages to several parties, thus requiring the judicial review at the Supreme Court. Because the judicial

review proceedings at the Supreme Court are closed proceeding, they are deemed non-transparent and unaccountable.[10]

Often the Supreme Court rulings on the judicial review are not based on the constitutional principles, nor do they refer to the Constitution, because in the Supreme Court's opinion the review points for a judicial review is based on the Laws and not the 1945 Constitution. As a result, the rulings that were produced for the judicial review at the Supreme Court are incoherent with the 1945 Constitution. Hence, the rulings for the judicial review at the Supreme Court are only based on the principles of legality and not the constitutional principles.

In actuality, it is imperative that the Supreme Court applies the constitutional interpretation in a judicial review proceeding. The primary justification for the Supreme Justice to interpret the constitution in the Judicial Review Cases is to guarantee the hierarchical consistency of the laws and regulations. This is in line with the opinion put forward by Bagir Manan, who said that the authority and duty of the Supreme Court in the affairs of the law is to guarantee unity in the application of the law, guarantee unity in the interpretation of the law, guarantee the unity in the orderliness of the law, guarantee the harmonization in the application of the law, and guarantee that there are no mistakes in the application of the law.[11]

Third, judicial review is a lengthy process. It takes 14 days to determine a judicial review ruling for at the Supreme Court. Fourth, the Supreme Court ruling would require 90 days to execute, thus resulting in legal uncertainties. Fifth, the Supreme Court is, by nature, passive, in that it only receives the petition for a judicial review and does not actively perform any reviews on the conflicting legal norms that need to be annulled.

This is in contrast to the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on

10 Agus Riewanto, *Integrasi Pengujian Peraturan Perundang-Undangan di Mahkamah Konstitusi RI: Menuju Purifikasi Sistem Peradilan Bifurkasi (The Integrated Assessment of the Laws and Regulations at the Constitutional Court of the Republic of Indonesia: Towards Purifying the Bifurcation Judicial System)*, Paper, Presented at the 4th Conference on Constitutional Law/State Administration Law at the Faculty of Law, Jember University on November 10-13, 2017, p. 938.

11 Inna Junaenah, *Tafsir Konstitusional Pengujian Peraturan di Bawah Undang-Undang (Constitutional Interpretation in Reviewing the Regulations Under the Law)*, Jurnal Konstitusi, Volume 13, Number 3, September 2016, p. 514.

the Laws and Regulations through Non-Litigation Channels, where the dispute settlement model on the norms do not have to go through the normative legal channels, but through mediations and dialogs, similar to an arbitration on the laws. This model is deemed more progressive for several reasons:

One, it is simultaneously active and passive in nature, meaning, in settling conflicts pertaining to the norms of the law, the Ministry of Law and Human Rights must at times wait for the submission of a petition from the parties, while at the same time actively reviewing the various conflicting norms of the law in order to recommend an annulment through the President.

Two, it is free of charge. There are no fees for the submission of a petition for settlement at the Ministry of Law and Human Rights, thus making it effective and affordable. Three, the examination process is also conducted openly, where all parties are invited to deliver their legal argumentations directly before the examination council assembly that are made up of five individuals, three are designated internally from the Ministry of Law and Human Rights, and 2 are experts from the universities.

Four, expedient settlement of the dispute, and if the disputing parties agree, it could be executed immediately. If an agreement is not reached, then recommendations would be made for the President, as the head of state, to retract or improve the laws and regulations that are found to contain the conflicting norms.

5. The Minister of Law and Human Rights Regulation as a Form of Legal Reform

If viewed from the regulatory reform perspective, the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels is a strategic step in reforming the management of the settlement of conflict by using the mediation model for disputes on the norms of the laws and regulations in Indonesia.

It is a well-known fact that the model for the settlement of the dispute through the mediation mechanism is a means to achieve judicial fairness by seeking other alternatives. Mac Galanter said that true justice lies in many rooms, not only in the courtrooms but in every element of life, even those that are outside of the regular channels, no matter how long it may take, the parties are able to achieve true justice and humanity, as that is the essence of true justice.[12]

In fact, the mediation mechanism in the settlement of the disharmony among the norms of the laws could provide significant benefits:[13]

- To reduce backlogs of cases and court congestions. The numerous cases filed to the courts have resulted in lengthy proceedings and high costs, and often with poor outcomes.
- To enhance public involvement (decentralization of the law), or to empower the disputing parties in the settlement of dispute process.
- To provide the public with easy access to justice.
- To provide the opportunity to achieve rulings that are widely accepted by all parties involved in the settlement of disputes, and prevent the parties from attempting an appeal and cassation.
- Faster and more affordable settlements of cases.
- Higher probabilities of achieving an agreement, hence the relations of the disputing parties could remain amicable in the future.
- Reduce the spread of "unlawful practices" in the courts.

Many countries have implemented the settlements of disputes on the law through mediations, such as the United States, Japan, Korea, Austria, Great Britain, Hong Kong, Singapore, Sri Lanka, the Philippines, and the Arab countries. These countries have utilized the win-win solution dispute settlement mechanism to settle any arising disputes. The presence of an effective and efficient dispute settlement mechanism has become one of the main attractions that are used to promote foreign investors to invest in their countries.[14]

12 Mac Galanter, *"Justice in Many Rooms,"* in Mauro Cappellti, Acces to Justice and the Welfare State, Italy, European University Institute, 1981.

13 Adi Sulistiyono, 2005, *Merasionalkan Budaya Musyawarah Untuk Mengembangkan Penggunaan Penyelesaian Sengketa Win-Win Solution (Rationalizing the Culture on Deliberation to Develop the Use of the Settlement of Conflict for a Win-Win Solution)*, Scientific Lecture delivered at the Open Senate Session at the Sebelas Maret University on March 12, 2005, Surakarta, p. 9-10.

14 *Ibid*., p. 11.

Because of the advantages that it offers, and since the enactment of the Minister of Law and Human Rights Regulation No. 32 Year 2017 on the Guidelines for the Settlement of Disputes on the Laws and Regulations through Non-Litigation Channels, 25 individuals/state institutions/public/private bodies have submitted their petition for the settlement of disputes to the Ministry of Law and Human Rights.[15]

To date, the Ministry of Law and Human Rights have settled 5 cases on conflicts on the norms of the laws and regulations. The cases that have been settled are cases in which the benefits could be readily felt, among them are, the case involving the compensation provided to the street singer that was wrongfully arrested and was submitted by the Jakarta Indonesian Legal Aid Institute (*YLBHI Jakarta*).[16]

There was also a case relating to a dispute in the norms of the law for the Regional Government Regulation in South Sumatera on the restrictions to use the inter-provincial public highways to transport coals, which resulted in significant losses on the side of the coal mining companies. The allegations were the regulation conflicted with the norms of the law in the regulation that was issued by the related ministry; however, the case was settled amicably, and both parties were able to reach an agreement.[17]

Another case is on the Mining Business License Area (*Wilayah Ijin Usaha Pertambangan-WIUP*) for the Silo Block in the Jember Regency of East Java. For years the people in Silo refused to let their lands be used as a location for mining activities, but their rejection went unheeded because under the recommendations of the Governor and without prior coordination with the Regent of Jember, the Ministry of Energy and Mineral Resources established the area as a mining location. The Ministry of Law and Human

15 Andy Saputra, 2018, *"3 Bulan Terima 25 Perkara, Mediasi di Kemenkum Harus Diperkuat" (25 Cases Received in 3 Months, Mediations at the Ministry of Law and Human Rights Must be Reinforced) https://news.detik.com/berita/d-4223216/3-bulan-terima-25-perkara-mediasi-di-kemenkum-harus-diperkuat*. accessed on February 22, 2019

16 Andi Saputra, 2018, *Ganti Rugi Korban Salah Tangkap Secera Cair, Mediasi Kumham Efektif (Compensation for Victim of Wrongful Arrest Soon to be Dispensed, the Ministry of Law and Human Rights Mediation Effective), https://news.detik.com/berita/d-4222613/ganti-rugi-korban-salah-tangkap-segera-cair-mediasi-kumham-efektif*. Accessed on February 22, 2019.

17 Andy Saputra, 2018, *Kisruh Jalur Truk Batu Bara Sumsel Berakhir Damai di Kumham (Arguments in the Coal Truck Routes Ends Amicably at the Ministry of Law and Human Rights), https://news.detik.com/berita/d-4343579/kisruh-jalur-truk-batu-bara-sumsel-berakhir-damai-di-kumham*. Accessed on February 22, 2019

Rights were able to settle the dispute between the disputing parties through mediations and annulled the Mining Business License Area due to formal discrepancies.[18]

6. Promoting the Ministry of Law and Human Rights Regulations into a Presidential Regulation

Besides its advantages, the Ministry of law and Human Rights Regulations also has some weaknesses, among them, are:

First, the Ministry of Law and Human Rights Regulations is deemed to be lacking in power and not legally binding as it is merely based on a Ministerial Regulation; therefore it should be elevated into a Presidential Regulation. Besides, and if possible, the mediators should not be ad hoc, but permanent, and to strengthen their positions, it should be mandated in the Presidential Regulation.[19]

Second, as a new model that reforms the settlement of dispute on the norms of the laws and regulations through mediation, the Ministry of Law and Human Rights Regulations should be better understood and must attract the interest of the public to submit a petition for the settlement of disputes to the Ministry of Law and Human Rights. Achieving this objective would require the disbursements of information on a grand scale to all central and regional government institutions, including the higher education institutions and universities. The purpose of promoting the Ministry of Law and Human Rights Regulation is to generate awareness of it being an alternative mechanism in the settlement of conflicts on the laws and regulations that create injustices, human rights violations, conflicts of authorities among state institutions and inhibits the investment climate and national development.

18 Andi Saputra, 2018, *Mediasi Kemenkum Akhirnya Akhiri Sengketa Tambang Emas Blok Silo (Mediations by the Ministry of Law and Human Rights Ends Silo Block Gold Mine Dispute), https://news.detik.com/berita/d-4377108/mediasi-kemenkum-akhirnya-akhiri-sengketa-tambang-emas-blok-silo*. Accessed on February 22, 2019.

19 Andi Saputra, 2018, *Pangkas Obesitas Hukum, Mediasi Ala Kemenkum Perlu Diperkuat (Reduce Obesity of the Laws, Mediation by the Ministry of Law and Human Rights Need to be Strengthened), https://news.detik.com/berita/d-4235483/pangkas-obesitas-hukum-mediasi-ala-kemenkum-perlu-diperkuat*. Accessed on February 22, 2019.

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VI

Regulatory Reform Efforts Through Mediation

Ninik Hariwanti

1. Background

Based on the data collected by the Ministry of Law and Human Rights within the last three years (2016-2018), the number of new laws and regulations that have been promulgated in the State Gazette/State Report has reached 7,898. Of that number, 6,258 are regulations that were issued by the Minister/Agency/Institution/Non-Ministerial State Institution.[1]

The sheer number of laws and regulations shows that we are headed towards acute laws and regulation of obesity. The recent rise in the number of regulatory issues is due to a large number of laws and regulations that have been imposed on the society (obese), both in terms of its quantity as well as type. The issue of regulatory obesity has resulted in the many overlaps and conflicting laws and regulations, thus creating disharmony in the norms of the rules, both horizontally as well as vertically. Regulatory obesity impedes development, particularly in terms of investment, as it often leads to conflicts of authority between Ministries/Central and Regional Government Institutions, thus resulting in injustices within the society and entrepreneurs. It also inhibits the business investment climate and the national, as well as regional, economic activities in Indonesia.

As the assistant to the President in executing the government affairs on the law, most specifically the laws and regulations, the Ministry of Law and Human Rights of the Republic of Indonesia is responsible for resolving the various issues on the regulations. In principle, the problems could be resolved through mediation forums by making effective use of and optimizing, the coordination functions among Agencies, or Institutions, or Ministries, or Non-Ministerial Institutions. The non-litigation/mediation method in resolving the disharmony in the laws and regulations provides the community or parties, who felt that they had been harmed by the enactment of specific legislation, with the opportunity to submit a petition for the settlement of conflicts/disharmony on the laws and regulation without having to go through the litigation process in court. The forum also provides the opportunity and room for the government/agencies with authority to implement the regulations to immediately understand the issues in the implementation of the norms in the society without having to wait for a court ruling. The recommendations set forth by the mediation forum must be followed-up through an "executive review" of the conflicting

1 *www.ditjenpp.kemenkumham.go.id*

regulation in the form of an annulment, amendment or formulation of a new regulation in order to reduce the issues on the conflict of norms and overlaps in the existing regulations, be it in the central as well as regional levels. It could also be seen as a means to resolve the regulatory obesity issue by reducing and simplifying the number of regulations, or even by erasing the conflicting or disharmonious regulations, and are problematic, both vertically as well as horizontally, to minimize or also eliminate any issues that may potentially arise.

2. Settlement of Conflict/Disharmony In The Laws and Regulations Through Non-Litigation Channels/Mediation

The non-litigation model for the solution of conflicts was born out of the dissatisfaction over the settlement of disputes through litigation methods. Thomas J. Harron stated that the societies were dissatisfied with the conflict settlement through litigation methods because the system is deemed to be too formal, the process tends to be lengthy and costly, often focuses on the past rather than future, creates animosities, and incapacitate the parties (Thomas J. Harron, 2012).

The various formal and informal models of conflicts settlements (on the norms of the laws and regulations) that are recognized to the present are:

2.1. The Adjudicative Processes

Conflicts settlement on the laws and regulations in the Constitutional Court and Supreme Court through the litigation process is characterized by the presence of a Panel of Justices with the power to impose and provide solutions to the disputing parties. The terminologies used to define the parties are the Applicant and the Respondent (the formulator of the laws and regulations), and although the parties have their opposing interests and legal reasons, they are not viewed as being on two opposite ends because of the nature of the judicial review on the Constitution in the Constitutional Court and the higher laws and regulations at the Supreme Court are in relations to the interest of the public, which is the legal subject of the legislation requested for judicial review. The Panel of Justices may request information from the Government and the House

of Representatives, as the formulator of the legislation, on the regulatory background of the legislation with regards to its historical, sociological and judicial elements, including the debates in the deliberation that was noted in the "memorie van toelichting" as consideration in evaluating the constitutionality of a norm or any conflicts in the norm with the 1945 Constitution as well as it higher laws and regulations.

2.2. The Consensual Processes

This process is performed by the Ombudsman, which was established based on Law Number 37 Year 2008, and who has the authority to supervise the implementation of the public services. The method used include, among others, investigation, publication, and the provision of the Ombudsman Recommendation as the independent party responsible for facilitating conflicts between parties, and where the nature of the result and the research are delivered in the form of recommendations on the decision of the ruling.

2.3. Quasi Adjudication

This process is a combination of the various methods that had been designed to encourage the disputing parties to settle the conflicts through alternative dispute resolutions and not through the litigation process (out of court settlement), and is expected to be able to resolve the disputes through the mediation forum so that it could be settled quickly, effectively and efficiently, and more suited to the aspirations of the parties. One alternative for out of court settlement in settlement of conflicts is through arbitration.

Settlement of conflicts on the norms/disharmony of the laws and regulations through non-litigation/mediation channels is more suitable for the consensual process and/or the quasi adjudication process, where the Ministry of Law and Human Rights is not positioned as the "provider of justice" that rules over a case, but as a "mediator/facilitator" that conducts mediations to the agencies that issue the problematic regulation so that they may make revisions without having to go through the judiciary process, and without having to wait for a court ruling, as the process may be too long due to the many cases that are handled by the court,. In essence, the task of the Ministry of Law and Human Rights is to examine the petition for the settlement of conflicts on the norms, as well as the

conflicts on the authority, from the formulation of the laws and regulations aspects and perform mediations between the Ministry/Institution and seek agreements to correct the conflicting norms so that it may no longer be deemed conflicting. Should the parties fail to reach an agreement, then the Ministry of Law and Human rights may provide Recommendations to the President to resolve the conflicting norms based on the result of the examination. Besides, the Ministry of Law and Human Rights may actively review any allegations of conflicting norms or authorities without having to wait for a petition to be made.

This mechanism is similar to the adjudication that is performed by the Ombudsman, where the output takes the form of a recommendation and not a ruling like other cases on the settlement of conflicts that are handled by the Supreme Court or the Constitutional Court (in performing judicial review).

Law Number, 12 Year 2011 on the Formulation of the Laws and Regulations, regulates that the Ministry of Law and Human Rights is given the authority to undertake the planning, deliberation, and promulgation of the laws and regulations. Article 2 and Article 3 of Presidential Decree Number 44 Year 2015 on the Organization of the Ministry of Law and Human Rights regulates that the Ministry of Law and Human Rights is responsible for executing government affairs on law and human rights to assist the President in performing the state administration. The Ministry of Law and Human Rights also hold the function of formulating, determining, and executing the policies on the laws and regulations. The Minister of Law and Human Rights implements its authority on the laws and regulations through, among others, The Minister of Law and Human Rights Regulation Number 32 Year 2017 on the Procedures for the Settlement of Conflicts through Non-Litigation Channels (Permenkumham 32/2017).

Under Permenkumham 32/2017, the Minister of Law and Human Rights can settle conflicts on the laws and regulations through non-litigation channels and examines the conflicting legislation, both vertically as well as horizontally. Conflicts may arise due to disputes in the material content, conflicts of authority between the ministries/institutions, and the regional governments. Furthermore, conflicts on the norm could also arise due to damages and injustices experienced by the people and entrepreneurs, as well as matters that inhibit the investment, business, and national and regional economic climates.

The basic idea for "non-litigation/mediation" is to settle norm related conflicts outside of court but is still under the jurisdiction of the Ministry of Law and Human Rights. This method is expected to resolve issues on regulatory conflicts through the mediation forum and at the same time, improve the coordination among Ministries/Institutions. Empirically speaking, the enactment of Permenkumham 32/2017 was based on the numerous conflicting legislation that was found. The vertical and horizontal conflicts have resulted in conflicts relating to the legal norms, conflicts of authorities among ministries/institutions, and regional governments. The conflicts also lead to injustices towards the people and entrepreneurs and inhibit the investment and business climates, including the national and regional economic activities in Indonesia, which would ultimately create difficulties in running the state and to carry out developments.

There were several important reasons for the enactment of Permenkumham 32/2017, which are:

First, as a legal instrument that provides solutions in the event of a vacuum on the laws, as it does not require the settlement of conflicts for legislation of the same degree/level (horizontal). This is because Article 8 paragraph (1) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations regulates the Type of Laws and Legislations to include:

- regulations enacted by the People's Consultative Assembly, House of Representatives, Regional House of Representatives, Supreme Court, Constitutional Court, State Audit Agency, and Judicial Commission,
- regulations enacted by Bank Indonesia, the Ministers, agencies, institution or commissions of the same level that was established based on the Constitution or Government under the order of the Constitution,
- regulations enacted by the Regional House of Representatives at the Provincial Level, the Governor, the Regional House of Representatives at the Regency/Municipality Levels, and the Regent/Mayor,
- regulations enacted by the Village Chief or other officials of the same level.

And, Article 8 paragraph (2) stipulates that the Laws and Regulations are acknowledged and are legally binding as long as they are instructed by a higher level Legislation or is developed based on authority.

Law Number 12 Year 2011 does not regulate the position of the Laws and Regulations within the hierarchy as regulated in Article 8 paragraph (1) that is based on the existing hierarchy defined in Article 7 of the Law. The a quo article only provides the room to reinforce the "validity" of the regulation as regulated in Article 8 paragraph (2) of Law Number 12 Year 2011, under the following conditions:

- it is instructed by the higher legislation
- developed based on the authority

As such, the Ministries/Institutions are under the impression that the development of a product of the law could be done not only under the instruction of a higher regulation but also based on the authority that is given to each respective ministry. Hence, this condition has resulted in every ministry/institution to issue products of the laws within their environs and based on their interpretations of the authorities that they hold. The result is that the products of the law often intersect with other products of the law issued by different Ministries/Institutions, and at times, impede on the implementation of the government policies.

The attributive authority given to the Ministries/Institutions is believed to be the reason behind the thousands of regulations that had been issued, thus resulting in over-regulation that could potentially lead to, or have lead to, overlaps and conflicts on the norms, including conflicts of authority between the Ministries/Institutions who issued the regulations.

Second, it provides the opportunity for the public who feels disadvantaged by the issuance of a specific regulation to submit a complaint and settle the issue out court through mediation. On the other hand, the institution that issued the legislation could immediately recognize the problem at the implementation level of the regulation that they had formulated, as the regulation would impact the use of the authority in the state administration and its effort in fulfilling the constitutional needs of the citizens.

Third, is the manifestation of the implementation of the President's authority, as the holder of the executive power in government through coordination among the working units within the executive level through deliberations to reach a consensus. In terms of attributes, the President is responsible for executing the highest government administration, and one of the issues that hinder the government administration is the conflict on norms, which could consequently lead to an overlap of authorities

between the Ministries, Institutions, Commissions, Agencies, as well as Regional Governments.

As the head of the State, the President is responsible for harmonizing the laws and regulations that are regulated under the Laws, and which resulted in the conflict of authority and is impeding on the state administration. Therefore, the conflicting laws and regulations, which resulted from the emergence of a conflict on the norms of the laws and regulations, conflict of authority among Ministries/Institutions that lead to a disharmony in the laws and regulations, could be submitted in the form of a petition for the settlement of conflicts through non-litigation channels or through the mediation forum. The purpose is to present an excellent product of the law to the public and to harmonize the policies to improve the investment and business climates, including the national economy to increase the prosperity of people.

Fourth, the mechanism for the settlement of conflicts through non-litigation channels/mediation forum using the deliberation approach to reach a consensus is believed to be better accepted by every party because they do not create intense frictions and resistance among the disputing parties, as mediation is placed at the forefront.

3. Evaluation Towards the Implementation of the Minister of Law and Human Rights Regulation Number 32/3027 (*Permenkumham* 32/2017)

3.1. The Essence of Conflicts Settlement/Disharmony of the Legislation Norms in Systematizing the Regulation

Fundamentally, the Indonesian Constitutional System has adopted the settlement of conflicts on the norms of the laws and regulations. Theoretically and on a practical level, there is what is known as the reviews. The first one is the executive review, which is carried out by the government for laws and regulations that were formulated by the government. The second one is the legislative review, which is performed by the House of Representatives with the Approval of the President, or on the opposite end, through the formulation of the laws. The third is judicial review in court, which in this case are the Supreme Court that has

the authority to review the laws and regulations under the law against the higher laws and regulations, and the Constitutional Court that reviews the law against the 1945 Constitution. As institutions with judiciary power, the two institutions are given the authority to carry out judicial reviews on the laws and regulations that contain conflicting norms with the higher regulation through the litigation mechanism. Meanwhile, settlements of conflicts on norms that are of the same level is carried out using the ius contrarius actus principle, which is to return it to the formulator of the laws and regulations or the official with a higher position than the formulator of the laws and regulations, for example, in cases where the Regency/Municipality Regional Regulation is in conflict, then it should be revised by the Regent/Mayor and the Regional House of Representatives. It is a well-known fact that the Model used in Law Number 22 of 2014 on Regional Government that gives the authority to the Governor and Minister of Home Affairs to revoke problematic Regional Regulations has been annulled through the decision of the Constitutional Court, therefore, the only way the conflicting Regional Regulation of the same level could be settled is to have the formulator revise them.

The issue would become even more complicated when the conflicting product of the law that comes from the Ministries/Agencies/Institutions are of the same level and the content materials intersect one another, for it would be difficult to use the ius contrarius actus principle to demand the formulator to carry out the revisions, as each respective ministries would remain steadfast and maintain their confidence in the policy that they had issued. Therefore, the only possible thing to do is to use the ius contrarius actus principle on the superior officer of the Minister, which in this case is the President. In the event that a conflict on the norms and/or conflict of authority arises among the Ministries/Institutions with regards to a specific aspect of the laws and regulations, then it would be settled using the Ministry of Law and Human Rights Regulation Number 32 of 2017 (*Permenkumham* 32/2017) mechanism, the decision, however, is not final but needs to be returned to the President, as the highest administrator of the state, to decide on a policy on the problematic laws and regulations.

The aim of the settlement of conflicts on the laws and regulations through the non-litigation/mediation channel is to overcome the issue on laws and regulations obesity that are already occurring, and are overlapping with the a higher norms or norms of the same level, or for regulations that may potentially impede on the investment activities and the Indonesian

economic growth. The Ministry of Law and Human Rights, as the institution responsible for executing government affairs pertaining to the law, have taken the initiative to issue *Permenkumham* 32/2017 on the procedures for the Settlement of Conflicts on the Laws and Regulations through Non-Litigation Channels that has been promulgated in the State Gazette of the Republic of Indonesia Number 1754,2017 dated December 8, 2017. The issuance of this *Permenkumham* is expected to resolve the ongoing issues on laws and regulations obesity and overlaps.

According to the data from the Ministry of Law and Human Rights, within the last three years (2016, 2017, and 2018), there is currently 7,898 legislation in place. Of that number, regulations from the ministry/agency/institution/non-ministerial institution had been the major contributors in generating the highest number of regulations; at last count, the number reached 6,258 regulations, and these regulations had been the most problematic in their implementation. The data shows that the sheer number of regulations in Indonesia has reached the acute obesity level and would require progressive means to reduce these problematic regulations. The mechanism that is used is the settlement of conflicts on the laws and regulations through non-litigation channels (*Permenkumham* 32/2017), where the settlement of conflicts among the norms that lead to disharmony is still within the scope of the Ministry of Law and Human Rights, is by improving the coordinating functions between the Ministries/Institutions through a mediation forum, as this is one of the methods to settle the conflicts of authority between ministries/institutions through the non-litigation channels (outside of court).

The settlement of conflicts mechanism that is based on the *Permenkumham* 32/2017 is both active and passive. This means that the Ministry of Law and Human Rights can settle the conflict on the norms based on the submission of a petition, and at the same time conduct a review on the allegations of a conflict on the norms of the laws and regulations and submit the recommendation for an annulment to the President. The submission of a petition for the settlement of the conflict on the laws and regulations at the Ministry of Law and Human Rights is free of charge, making it effective and affordable. Besides, the examination process is conducted openly and involves the participation of the parties to directly deliver their legal argumentations before the Review Council that comprises of 5 people (3 people from the Ministry of Law and Human Rights and two academicians). The process is also

efficient as each submission is limited to, at the very least, 3 (three) trial sessions. If the parties agree to settle the issue, the process could be executed immediately. In the event that the parties failed to reach an agreement, a Recommendation would be formulated and delivered to the parties, and in the event that the recommendations were not executed, then it would be submitted to the President, who would then issue an instruction to revoke or revise the laws and regulations that were proven to contain conflicting norms.

The settlement of conflicts/disharmony on the laws and regulation's through the *Permenkumham* 32/2017 is already very progressive, as such mechanisms were not known to have existed, nor have it ever been used in the settlement of conflicts on the norms of the laws and regulations under the Law at the Supreme Court, which many people felt were unprogressive. This condition exists because of number of reasons, one, it is costly, IDR 5,000,000 for each submission, two, the judicial review on the materials is a closed session and does not involve the public participation in the litigation process, three, is time-consuming due to the backlog of cases at the Supreme Court that needs to be finalized and, the Supreme Court ruling would require 90 (ninety) working days to be executed, and four, the passive nature of the Supreme Court in completing the judicial review, as it only receives the petition and do not actively review the conflicting norms on the laws and regulations for an annulment.[2]

The superiority of the *Permenkumham* mechanism has given rise to the profusion of requests submitted to the Ministry of Law and Human Rights. Today, the public has come to realize the benefits of the settlement of conflicts through non-litigation channels that are performed by the Ministry of Law and Human Rights. The deliberation to achieve a consensus mechanism, which is based on the local culture, is more widely accepted among the parties and during the examination process could uncover all the current issues of a specific regulation. The settlement of conflicts through the non-litigation channel is believed to prevent the emergence of friction among the disputing parties as it puts mediation in the forefront. An estimated 36 requests have been registered since December 2017 to the present (February 2019). There are also several conflict cases being

2 See Agus Riewanto, *Progresivitas Penyelesaian Konflik Perundangan (Progressiveness in the Settlement of Legislation Conflicts) https://www.google.com/amp/m.mediaindonesia.com/amp/am_detail/210778-progresivitaspenyelesaian-konflik-perundangan*

examined by the Review Council. Almost all of the issues relating to regulations are settled with an agreement, whereby both parties agree to revise their regulations.

The conflicts settlement model of the Ministry of Law and Human Rights that places deliberations to reach a consensus in the forefront is acknowledged by the people and is considered to be extremely effective in resolving issues relating to regulatory conflicts through a mediation forum outside of court (non-litigation), as it provides the opportunity for the people, or parties, that felt disadvantaged by the enactment of specific laws and regulation to submit a request for the settlement of conflicts outside of court.

This situation is evident in 2 (two) cases that had attracted the public's attention involving 2 (two) street singers, Andro Supriyanto and Nurdin Priyanto, who were wrongly arrested. The case was settled quickly and effectively in the form of compensation payments from the Ministry of Finance. As stipulated in Government Regulation Number 92 of 2015 (PP 92/2015), the Minister of Finance, as the State Treasurer, must make compensation payment within 14 (fourteen) days as of the date of the court ruling, as the victims have been robbed of their freedom by the law enforcers in an erroneous litigation proceeding, therefore the victims have the right to be compensated. However, the Ministry of Finance failed to release the fund because the implementing regulation for PP 92/2015 has not been made, even though the Government Regulation (PP) instructs that the implementing regulation be made within 6 (six) months as of the date of the regulation was enacted. Therefore, the Ministry of Law and Human Rights was deemed negligent in executing the instructions stipulated in the Government Regulation, and at the same time in executing the Court Ruling. As of the Court Ruling on August 9, 2016, numerous efforts were carried out by the Jakarta Legal Aid Institute (LBH Jakarta) to obtain the compensation payment by setting up meetings with the Ministry of Finance and requesting the South Jakarta District Court to execute the compensation payment, but according to the South Jakarta District Court, the execution process falls under the authority of the Public Prosecutor. The LBH Jakarta then sent a letter to the Ombudsman to review the case, followed by a letter to the Attorney General Office requesting execution of the ruling for compensation. In addition to that, the LBH Jakarta also sent a letter and met with the Commission III of the House of Representatives, the National Commission on Human Rights, the Presidential Advisory Council,

and the Ministry of the State Secretariat, however, all of these efforts were in vain. Finally, the LBH Jakarta submitted a request for the settlement of conflicts on the laws and regulations through the non-litigation channels to the Ministry of Law and Human Rights. So, on September 21, 2018, an Examination Session was held, and after mediations by the Review Council, an agreement was reached, whereby the Ministry of Finance would release the compensation payment at the latest by December 30, 2018. The Ministry of Finance, however, immediately released the compensation payment without haste, or without having to wait until the final deadline.

The second case involved the annulment of the Silo Block as a Gold Mining Area. The mediation held by the Ministry of Law and Human Rights was able to end the conflicts relating to the Silo Block Mining Area in Jember, East Java. The Regency Government, alongside the people of the Silo Sub-district, had, for quite some time, expressed their strong objection on the presence of mine in their region. The Review Council ruled that the issuance of the Mining Business License Area (Wilayah Izin Usaha Pertambangan – WIUP) for the Silo Block by the Minister of Energy and Mineral Resources under the proposal of the Governor of East Java, had not been previously coordinated with the Regent of Jember. And as such, the establishment of the Silo Block as a Mining Business License Area is formally ruled as being defective. The Ministry of Energy and Mineral Resources then issued Decree Number 23K/MEM/2019 was signed by Minister Ignasius Jonan on February 6, 2019, that annulled the Silo Block as a Gold Mining Area. The document contained amendments to the Minister of Energy of Mineral Resources Decree Number 1802K/30/MEM/2018 on the Mining Business License Area and the Special Mining Business License Area (Wilayah Usaha Pertambangan Khusus – WIUPK) for the 2018 period that included the Silo Block as a mining area.[3]

The Regent of Jember, dr. Faida MMR and the Village Chief of Pace, Mohamad Farohan, stated that the Regional Government of the Jember Regency and the people of Jember welcomed the decision and were grateful for the annulment of the mining business license at Silo, as the people had rejected the presence of any mining activities in their area, even from its initial establishment. The document also reiterated that the annulment of the Minister of Energy and Mineral Resources Decree Number 1802K/30/MEM/2018 was an implementation of the result of

3 Kompas Daily, February 11, 2019.

the settlement of conflicts on the laws and regulations through the non-litigation channels that was mediated by the Ministry of Law and Human Rights. These cases show the effectiveness of settlements using the non-litigation model of the Ministry of Law and Human Rights, as without having to wait for the 60 (sixty) day period since the decision was made on January 9, 2019, the Ministry of Energy and Mineral Resources immediately annulled the license without waiting for the Ministry of Law and Human Rights to recommend the annulment to the President. The people who were present at the trials were also jubilant, as they were able to expose the issue directly and were appreciative for being able to participate in the process. The people also felt that the process had fulfilled their quest for justice, as shown by everyone unanimously kneeling in prayer at the courtroom immediately after the court was adjourned marked their jubilance. The settlement through non-litigation channels is also the realization of the Central Government's responsiveness to fulfilling the hopes of the people who do not wish to have a gold mining site in the Silo area.

The settlement of conflicts on the laws and regulations through non-litigation channels or the mediation forum not only benefits the people but it also provides the room and opportunity for the government/agencies with authority to execute the regulation to understand the problems immediately and implement the norms in the community without having to wait for a court ruling. The recommendations resulting from the settlement of conflicts through non-litigation channels can take the form of an annulment, amendment or development of a new regulation to reduce the overlaps in the legislation at the central as well as regional levels. The mechanism is one of the strategies to resolve the obese regulation issue by reducing the number of problematic regulations to cut down on a large number of regulations that are already in place as part of the Government's effort to better manage the regulations.

The efforts would be even more effective and meaningful if the Ministry of Law and Human Rights were to use their authority actively without having to wait for a submission of petition from the people to immediately perform an examination using the non-litigation mechanism on the conflicting legislation, both vertically and horizontally, that had resulted in a conflict on the legal norms, conflict of authority among ministries/institutions and regional governments, creates injustices towards the people, entrepreneurs, and inhibits the investment and business climates,

including the national and regional economies. Thus, the Ministry of Law and Human Rights are able to enhance its function as the sole institution to carry out the synchronization, coherence, and harmonization activities on the many laws and regulations that have not been promulgated in the State Gazette or the State Report, the Ministry could also resolve issues relating to the disharmony of the laws and regulations that have been passed by performing mediations among the state institutions with the conflicting laws and regulations, be it in the Central as well as Regional levels. The purpose of the mediation is to achieve an agreement among the state institutions at the central and regional levels to revise the problematic norms to prevent any conflicts from arising. The settlement mechanism is a commitment made by the President to reduce the number of problematic regulations that inhibits development by systemizing the regulations.

3.2. The Reason for the Need to Strengthen and Revise *Permenkumham* 32/2017 on the Procedures for the Settlement of Conflicts on Laws and Regulations Through Non-Litigation Channels

After conducting an evaluation on the Minister of Law and Human Rights settlement of conflicts on the laws and regulations through non-litigation channels that are grounded on *Permenkumham* 32/2017 for one year since its enactment on December 8, 2017, to February 2019, there were several weaknesses found, one of which is the effectiveness of the Recommendations. Unlike court rulings with its power to enforce compliance, the recommendations are not binding, as the non-litigation/mediation forum had been designed to settle the conflicts among the parties involved outside of court. Also, the legal standing of the Permenkumham, as the legal basis for non-litigation settlement, lacks the legal power. This situation is evident in the non-presence of the representatives from the Ministries/Institutions at the trial sessions and their failure to execute the agreement as they felt that the regulation issued by the Ministry of Law and Human Rights has the same legal standing as the other ministries. Recently, the public was also astounded by a number of parties who submitted a petition for a judicial review to the Supreme Court on Permenkumham 32/2017 on the Procedures for the Settlement of Conflicts on the Laws and Regulations through Non-Litigation Channels, with allegations that the Permekumham contradicts

the conventional mechanisms for judicial reviews on the laws and regulations.

There were 2 (two) cases that had been decided based on the agreement of the parties but were not executed, these were the Case of the Indonesian Association of White Cigarette Producers (*Gabungan Produsen Rokok Putih Indonesia – GAPRINDO*) / the Indonesian Retail Merchants Association (*Asosiasi Pengusaha Ritel Indonesia – APRINDO*) versus the Municipality of Bogor, and the Case of Riau Islands Provincial Office of Transportation versus the Ministry of Transportation. The first case between the Indonesian Association of White Cigarette Producers (*Gabungan Produsen Rokok Putih Indonesia – GAPRINDO*)/ the Indonesian Retail Merchants Association (*Asosiasi Pengusaha Ritel Indonesia – APRINDO*) versus the Municipality of Bogor ended with an agreement, which was marked by the signing of the Official Record of Agreement by both parties. In reality, however, the Municipality of Bogor disregarded the agreement that was made with the stakeholders of the Tobacco Products Industry during the trial on the settlement of conflicts on the laws and regulations through non-litigation channels that were mediated by the Ministry of Law and Human Rights. The reason was that in the Regional Regulation Plan for the revision of Regional Government Regulation 12/2009 on the Smoke Free Zone (*Kawasan Tanpa Rokok – KTR*) the prohibition to display cigarette products at retail stores were still imposed and was legislated during the General Assembly of the Regional House of Representatives without the involvement of the stakeholders in its formulation. Meanwhile, in the Official Record of Agreement the Municipality of Bogor have agreed that the Regional Government Regulation on Smoke Free Zones that contain the prohibition to display tobacco products is in conflict with Government Regulation Number 109/2012 on the Control of Materials that Contain Addictive Substances in Tobacco Products in The Interests of Health, therefore, the Regional Government Regulation of the Bogor Municipality Number 12/2009 that contains the prohibition for displaying cigarettes must be adjusted to the higher regulation, which is Government Regulation 109/2012. In the event that the Municipality of Bogor do not comply with the agreement that has been made, the Minister of Law and Human Rights could only issue a Recommendation to the Speaker of the Regional House of Representatives and the Minister of Home Affairs (as the Governing Agency of the Regional Governments) to comply with the agreement to revise the Regional Government Regulation of the Bogor Municipality

Number 12/2009 that is in conflict with Government Regulation 109/2012, and to revoke the Mayor of Bogor Regulation Number 3/2014. Should the Recommendation failed to be followed, it would then be reported to the President as the Head of State.

The second case was the Riau Islands Provincial Office of Transportation versus the Ministry of Transportation, were up to the present, the Related Party (the Ministry of Transportation) refused to execute the Agreement that was reached in the decision of the non-litigation examination trial signed on October 31, 2018. Consequently, The Petitioner (the Riau Islands Provincial Office of Transportation) was unable to impose retribution fees for the Utilization of the Maritime Waters Services and Docking Services that falls under its authority based on Law Number 23 of 2014 on Regional Governments and Law Number 28 of 2009 on Regional Taxes and Retributions that stipulate the authority of the Provincial Government on the utilization of up to 12 miles of the maritime waters in the Riau Islands. However, based on Law Number 15/2016 the retribution fees are collected by the Ministry of Transportation, and that the Law has not been adjusted to the new Law on Regional Governments that regulates the authority of the regional government to manage its maritime waters of up to 12 miles from the coastline. According to the Petitioner, from the date of the decision on the non-litigation trial was made, the Petitioner had sent 5 (five) letters to the Director General of Sea Transportation of the Ministry of Transportation to request a Meeting and dialog as a follow up to the decision of the trial on the conflicts of authority relating to the 12 miles regulation in the Riau Island Province. The Governor of the Riau Island Province had also sent 2 (two) letters to the Minister of Transportation regarding the notification and directives on the implementation of the collection of the Regional Retribution for Docking Services and Utilization of the Maritime Waters, but up to the present there has been no response or follow-ups from the Ministry of Transportation.

Due to the many requests that had been submitted, and the lack of response from the Ministry of Transportation, the Petitioner (Head of the Office of Transportation of the Riau Islands Province) sent a letter, numbered 552.3/178/HUB/2019 dated February 6, 2018, to the Director-General for Laws and Regulations of the Ministry of Law and Human Rights regarding a Request for a Follow Up on the Result of the Non-Litigation Trial. The Minister of Home Affairs, through letter Number

550/10589/59 dated November 30, 2018, have asked the Minister of Transportation to follow up on the need to immediately formulate the Norms, Standards, Procedures, and Criteria (NSPC) on the sub-affairs, as shown in the enclosed Law Number 23 of 2014 on Regional Governments, that is still non-existent/or is not in line with the aforementioned Law, which encompasses the organization of the regional feeder ports that is under the authority of the Provincial Government, the Organization of the Docking Services and the Maritime Lease Services under the authority of the Provincial Government, including the mechanism and procedures on the authoritative functions. The enactment of the NSPC by the Ministry of Transportation is also one of the points stipulated in the agreement that has not been executed by the Ministry of Transportation. In lieu of this issue, the Ministry of Law and Human Rights shall deliver a Recommendation to the President to revise the existing regulations that contain the conflicting norms.

Furthermore, the legal umbrella that is currently regulated by a Ministerial Regulation must be reinforced into a Presidential Regulation, not only to increase the dignity of the mechanism for the settlement of conflicts on the laws and regulations through non-litigation channels and increase the compliance of the disputing parties, but also to convince the public that the President is committed to the mechanism for the settlement of conflicts as part of the effort to cut down the number of problematic regulations and the profusion of regulations, and to organize the existing regulations.

It is also important to note the urgency to revise the Minister of Law and Human Rights Regulation Number 32 of 2007 on the Procedures for the Settlement of Conflicts on the Laws and Regulations through Non-Litigation Channels for the following reasons:

First, the use of the term "conflict" in the title of the Permenkumham 32/2017. Etymologically, the use of the term "conflict" as defined in the Minister of Law and Human Rights Regulation No. 32 of 2017 is conflicts/oppositions among the legal norms or conflict of authority resulting from the enactment of the laws and regulations. Therefore, the use of the term "conflicts" is not about "conflicts among parties." The term "conflicts" is used because the formulators have not been able to find a more appropriate term to define "conflicting norms." The term "conflicting" could only be translated as is or as "dispute," both of which

carry the same meaning. In actuality, however, there are no conflicting parties, only conflicting legal norms.[4]

Some people, including some legal experts, are of the opinion that the settlement of conflict on the norms of the laws and regulations falls under the judicial authority through the litigation mechanism (in court), however, today it is performed by the executive authority in the form of the non-litigation mechanism (outside of court), hence it gives the impression that it is a "judicial review" trial conducted by the Ministry of Law and Human Rights through the non-litigation mechanism.[5]

The fact is that settlement of conflicts through the non-litigation channels falls under the authority of the Ministry of Law and Human Rights. However, the Ministry of Law and Human Rights does not position itself as the "judge", meaning the Ministry of Law and Human Rights does not make a "ruling", but instead carry out mediation activities or serves as a coordination forum or discussion forum among institutions within the government by reviewing the laws and regulations that impede on the implementation of government policies. Hence, in reviewing the conflicting laws and regulations, the Ministry of Law and Human Rights tries to carry out mediation efforts between the central and regional government institutions to revise the problematic norms so that the laws and regulations do not conflict with one another.

The mediation mechanism illustrates the deliberation to reach a consensus model that is facilitated by the Ministry of Law and Human Rights in settling the conflicting norms. If an agreement between parties could not be reached, then the Minister of Law and Human rights would submit a recommendation that is based on the result of the review to the President to settle the conflicting norms. The *Permenkumham* 32/2017 serves as the foundation for the requests on the settlement of the conflicting laws and regulations that had been made. ***Permenkumham* 32/2017 is an alternative mechanism for the settlement of conflicts on the laws and regulations using the deliberation approach within the government**. The Settlement of Conflicts on the laws and regulations through Non-litigation Channels is merely a "coordination forum" at the executive level and not

4 See Bivitri Susanti *http://m.hukumonline.com/berita/baca/lt5bbe54cf1a3be/kenali-mekanisme-penyelesaian-nonlitigasi-sengketa-norma-perundang-undangan*

5 Settlement of Conflicts on the Norms, Adriyan, S.H., M.H., Lecturer at the Faculty of Law, Muhamadiyah University, North Sumatra.

a review mechanism like in the "judicial review." This Ministry of Law and Human Rights initiative is part of its duty to assist the President in systemizing the regulations.

The issue probably arises due to the title of the Ministerial Regulation, therefore, it may be wise to revise the title of the regulation into "Settling the Disharmony in the Laws and Regulations through Mediation" as it would better reflect the purpose of the regulation, which is to settle the disharmony in the laws and regulations. Disharmony here refers to the conflicts/disputes among the norms of the law or the conflicts of authority resulting from the enactment of the laws and regulations, and the disharmony is resolved through the mediation forum as an out-of-court settlement efforts by the Directorate General of Laws and Regulations, and as part of the Ministry of Law and Human Rights duty to administer the law related government affairs and assist the President in systemizing the regulations.

Second, is the type of disharmony on the laws and regulations that could be settled. Due to a large number of laws and regulations that have been formulated and recognized based on Law Number 12 of 2011 on the Formulation of the Laws and Regulations, therefore, a limit must be set on the object stated in the petition for settlement of the conflict on the laws and regulations must. A determination of a limit is crucial to prevent any conflicts of authority from arising within the inter-institutional relations, both vertically and horizontally. As such, the settlement of conflicts on the laws and regulations through the non-litigation channels could not be used on the 1945 Constitution, the Decree of the People's Consultative Assembly, and the Laws and Government Regulation in Lieu of the Law, as well as laws and regulations formulated by a state institution or state commissions. The type of laws and regulations where a petition for the settlement of conflicts could be made are limited to legislation that is formed by institutions under the jurisdiction of the President/executive level of government.

The *Permenkumham* 32/2017 does not regulate the scope or limitations on the type of conflicts on the norm or authority related to the laws and regulations that could be settled through non-litigation channels. Therefore, it is imperative that the *Permenkumham* 32/2017 be revised by limiting the object in the petition for the settlement of conflicts on the laws and regulations by regulating the scope and type of laws and regulations that would be reviewed through mediation, such as:

- Ministerial Regulations;
- Non-Ministerial State Institutions Regulations;
- Regulations issued by the Non-structural Institutions; and
- Regional Laws and Regulations.

Third, the relevant party entitled to submit a petition for the settlement of the conflict through non-litigation channels is known as the Petitioner. A petitioner is a legal subject recognized by law and the legislation. There are at least two types of legal subjects, which are, a person (persoon) and a legal entity (rectpersoon). A person is an individual, whereas a legal entity could be divided into a private entity or a public entity (e.g., companies, organizations, institutions).

Article 2 paragraph (2) c of the *Permenkumham* 32//2017 states that a Petitioner for a settlement of the conflict through non-litigation channels is private individuals or public/private entities. Therefore, the Petitioner is a private or public entity, is a listed or non-listed entity. In addition to the aforementioned Petitioner, and as regulated through the legislation, a legal entity, be it private or public, could also be an individual; therefore, the article on Petitioner, as regulated in Article 2 paragraph (2) needs to be revised to be as follows:

- a person or a group of persons;
- agency/institution/ministry/non-ministerial state institution/regional government; and/or
- a public/private legal entity.

Fourth, the *Permenkumham* 32/2017 does not regulate the Related Parties. In the petition for settlement of conflicts on legislation through the non-litigation channels, the term used for the party who submitted the petition is "the Petitioner." As for the party who formulated the legislation, the term that should be used is "The Related Party." The use of the term "Related party" is an alternative terminology of the term "the Respondent." The term "Respondent" is purposefully avoided to prevent any perception of the trial as being a litigation process. Although the term "Related Party" does not eliminate the image of it being a litigation process, it does, however, strengthen the notion of the trial as non-litigation through mediation.

The Related Party in the conflict is the institution that formulated/issued the legislation as instructed by the higher legislation based on the

institution's authority. Furthermore, the Related party could also be from the parties that were impacted or had a direct/indirect interest towards the petition as well as the legislation under conflict. This means that the other related parties ould also include institutions in the public and private sector that falls under the subjectum litis as well as objectum litis in the legislation under conflict.

Therefore, it is necessary for the *Permenkumham* 32/2017 to be revised by including an additional regulation on the Related Party, which is the party that is directly related to the petition, or the party whose rights and/or authorities had been impacted by the points specified in the petition.

Fifth, the Procedure for the Submission of the Petition is not regulated and defined in details, thus making it difficult for the Petitioner to submit the petition. Hence, in the revised *Permenkumham* 32/3017 the procedures need to be regulated further and complemented by a Guideline on the Settlement of Legislation Disharmony through Mediation and a Standard Operations Procedure (SOP) relating to, among others:

- The Petition must be submitted to the Minister of Law and Human Rights of the Republic of Indonesia and copied to the Director-General for Legislations.
- A Letter of Assignment from the Minister to the Director-General to examine the petition submitted by the Petitioner.
- A Letter of Assignment from the Director-General to the Initial Examination Team to check the completeness of the submitted petition file (the Initial Examination Team comprises of the administration officials at the Directorate of Legislation Litigation at the Directorate General of Legislation). The function of the Initial Examination Team is crucial. The team determines whether the petition has fulfilled all the prerequisite to be brought to a case examination trial.
- Registration of petition. Of the 32 (thirty-two) Petitioners evaluated petition that had been submitted in 2018, only 10 (ten) petitions had completed all the requirements, as such those cases that had completed the requirements were registered (unfortunately, at the time, a mistake was made where all of the cases registered).
- The incomplete petition files that did not fulfill the requirements were returned for revision.
- Registration of the petition files that had completed the requirements.
- The time frame for the delivery of the Copy of the Petition to the Related Party.

- Regulations should the Petition decides to retract the petition from the register.
- Summoning the parties to be present at the examination trial.
- A letter of Assignment from the Director-General to the Trial Support Team whose tasks include reading the trial code of conduct, by the rapporteur in noting the minutes, recording and covering the trial process and ensure that the trial runs smoothly and in an orderly manner.

Sixth, the importance of further regulation in relations to the assignment of the Review Council and the Panel of Experts, which encompasses the following:

A. Review Council

1. Composition and Formation

As had been previously explained, individuals, groups, public entity or private entity could submit a petition to the Minister of Law and Human Rights regarding legislation issues under the constitution that are deemed to contain conflicting norms or conflicting authorizes with the higher legislation or legislation of the same level.

The Minister of Law and Human Rights then delegates the authority to the Director General of Legislation to review the petition submitted by the Petitioner. The Director-General of Legislations then appoints and determines a Review Council deemed to be able to provide solutions to the parties involved in the issue to perform a review. The review should not take more than 3 (three) trial periods to prevent lengthy reviews and to main the effectiveness and efficiency in the holding of the trial. Upon appointment, the Head of the Review Council would determine the trial date at the latest within 7 (seven) working days, the determination of the trial date could also be extended after the petition has been registered.

The Review Council works under the independent, non-discriminatory, and non-partiality principles, under the convention of formulating good legislation and free of charge. The Review Council must also listen to, and take into considerations of, the opinions of the parties and facilitate the Petitioner in delivering the statements.

The Review Council is similar to the Arbitration Council in Civil Law Cases. As an illustration, Article 1 number 1 of Law Number 30 of 1999 on Arbitration and Alternative Settlement of Disputes, it is stipulated that arbitration is a means to settle a civil case outside of court based on the written arbitration agreement by the disputing parties. Hence, when viewed from the above definition on arbitration, the Review Council is the council appointed and assigned by the Director-General to perform Mediations in the Legislation Disharmony by means of settling the conflict/dispute on the legal norms or conflict of authorities that arises due to the enacted of the legislation through mediation. The mediation is expected to result in an agreement between the disputing parties or provide recommendations to the government authority to take administrative actions to resolve the issues on the conflict of norms and conflict of authority.

Based on the considerations and mediation process, the Director General of Legislation will appoint 5 (five) people to sit in the Review Council, including as Chair. The five officers would be comprised of 3 (three) officials from the Directorate General of Legislations, and 2 (two) academicians or representatives of the community. The three officers from the Directorate General of Legislations that are appointed are Echelon II officials who have in-depth knowledge on legislation. Generally, the officials are the superiors of the formulators of the legislation at the Directorate General of Legislation of the Ministry of Law and Human Rights of the Republic of Indonesia. By appointing highly capable staff, it is expected that the non-litigation forum can provide alternative advice or recommendations that would be well accepted by all parties.

As well as the officials from the Directorate General of Legislations that can provide a general overview to the team, also appointed are 2 (two) highly competent academicians or representatives of the community with knowledge on the issue. The Directorate General of Legislations also appoints individual members of the community with knowledge relating to the object of the legislative issue, in addition to the academicians who work in the field of law and legislation, to seek a standard solution.

One example is if there are issues in the implementation of the legislation under the law relating to mining, then the Director-General for Legislation could appoint a mining expert as a member of the Review Council with the hope that the team could provide their views and opinions to the parties. The expected outcome is that the parties can

settle their disputes and cease all intentions to bring the issue to the court/litigation forum. The team is also expected to assist in reducing the judicial burdens of the courts due to a large number of cases being filed by the disputing parties.

2. The Authority of the Review Council

The Review Council has the authority to review the petitions for settlement of conflicts on the legislation through non-litigation/mediation channels. In performing their duties, the Review Council may:

- hear the statements of the Petitioner and the Related Party;
- hear the opinions from the legal Experts;
- seek clarifications from the Parties; and
- make conclusions and read out the result of the Mediation.

In settling the conflicts on legislation through non-litigation/mediation channels, the Review Council cannot impose an involuntary summons to the parties. The reason behind this is that even from its earliest establishment, the forum aims to settle the dispute that arises between the parties outside of court.

If the related parties failed to be present at the forum without any apparent reasons, even though they had been formally invited, the review and mediation processes would continue to be held without hearing the statements from the related parties who are not in attendance. The absence of the related party would not prevent the Review Council from providing recommendations on the settlement of conflicts on legislation without requiring the agreement of the parties.

3. Domicile of the Review Council

Office of the Directorate General for Legislation, Ministry of Law and Human Rights, Jl. H.R. Rasuna Said Kav. X-6 No. 8 RT16/RW04, Kuningan, Setiabudi Sub-district, South Jakarta 12940.

B. Panel of Experts

The Panel of Experts is established by the Directorate General of Legislation to hear the statements of the experts whose expertise lies in the field of legislation and the issue at hand. The Panel of Experts is determined by the Directorate General of Legislations to assist the disputing parties

in understanding the issues, and the expectations of settling the issue through the solutions offered by the experts and the Review Council.

Moreover, in addition to the experts in specific fields, the Panel of Experts may also include the appointment of people with the ability to mediate and understand the issues so they may provide alternative solutions that could be acceptable by the parties. The expertise of the experts may not be directly related to the core issue, as the Review Council also include those who are appointed based on their capacity to understand the core issue.

The Panel of Experts is made up of academicians, related officials and/or people from the community that the Directorate General of Legislation consider having the expertise in a specific field that is related the disputed issue. The experts could be from the universities or institutions; they may also be practitioners and certain people from the community that is considered to be capable and have a full understanding of the issue under review. In practice, the Directorate General of Legislation appoints the experts based on the opinion that the experts could provide alternative views to the disputing parties. The purpose of a detailed definition of what an expert refers to is to ensure that the Review Council can get a whole and complete understanding of the issue.

In practice, however, only 2 (two) people are appointed to be in the Panel of Experts. The two experts are deemed capable of providing sound considerations to the Review Council and the parties in settling the conflict on legislation that is under review. But, that does not mean that the Review Council, based on specific considerations, could not add more experts into the panel.

Seventh, the need for regulations relating to the Mediation process.

The non-litigation approach adopts the settlement of the conflict through mediation model. Mediation is defined as a mechanism for the settlement of conflicts with the assistance of a neutral/impartial third party (mediator). The role of the mediator is to serve as the middleman (passive) that assists in the form of alternative settlements of conflicts for determination by the disputing parties. In this mechanism, the role of the mediator is played by the Review Council established by the Directorate General of Legislation of the Ministry of Law and Human Rights, and its role dramatically differs from that of the Panel of Judges in court.

Eighth, further regulations are required on the Results of the Mediation that stipulated into the Examination Report in the form of:

1. Agreement by the Parties

If the Mediation efforts are declared successful, the Review Council will record the Agreement by the Parties in the Agreement Report signed by the Parties over sufficient duty stamps as part of the integral element of the Review Report, which is legally binding and applies to the Parties. The Agreement Report and the Review Report would then be handed over to the Parties as written proofs.

The Parties must execute the agreement at the latest within 30 (thirty) calendar days or as agreed upon by the Parties. Based on the Agreement Report and the Review Report, the Director-General would then write a report on the result of the Mediation to the Minister. If the Petitioner and/or the Related Parties failed to execute the agreement within the determined time frame, the Review Council should deliver consideration to the Minister for recommendations to the President.

2. Recommendations

If an agreement failed to be reached, the Review Council shall formulate Recommendations based on the report of the review trial and submit it to the Minister of Law and Human Rights and the Parties for execution.

The *Permenkumham* 32/2017 does not regulate the time frame for the execution of the Recommendations. Ideally, the Parties are provided with the opportunity to execute the Recommendations, and not directly be reported to the President. The Parties needs to be provided with an extension period and opportunity if the Parties are willing to execute the Recommendations voluntarily. The related Agencies, or Institutions, or the Ministries, or the Non-Ministerial State Institutions, or the Regional Governments that have received the recommendations prior to it is submitted to the President, should express in writing their willingness to perform a follow up on the recommendations, including a statement on the time frame for the execution, that is addressed to the Minister of Law and Human Rights.

The revised *Permenkumham* 32/2017 should also regulate the time frame for the execution of the recommendation to not exceed 60 (sixty) calendar

days upon the receipt of the Recommendations. If the Recommendations were not executed, then, and only then, would the Recommendations be submitted to the President. Submission to the Pres should be within at least 30 (thirty) calendar days upon the expiration of the time frame for execution of the Recommendations.

Recommendations can take the form of a retraction and revision of the legislation, and the formulation of new legislation based on the executive review. The Recommendations could be used as considerations in such Programs as the Formulation of a Ministerial Regulations, Non-Ministerial Institution Regulations, Non-Structural Institution Regulations, and Regional Legislations.

Ninth, *Permenkumham* 32/2017 does not regulate the Monitoring of the Agreement, nor the Recommendations, by the Parties.

The execution of the Agreement by the Parties and the Recommendations that arise from the settlement of conflicts/disharmonies in the legislation through non-litigation/mediation channels would require the participation of the public, most importantly the Petitioner. Therefore, if the Agreement of the Parties, including the Recommendations, are not executed by the Related Parties, the Petitioner and the public may submit a complaint or report to the Ministry of Law and Human Rights through the Director General of Legislation. The Report or Complaint should be submitted in writing or through electronic media.

Based on the Evaluation of the cases reviewed in 2018, there are 2 (two) that were successfully resolved through an agreement by both parties; they are the *GAPRINDO/AFRINDO* versus the Municipality Government of Bogor and the case involving the Office of Transportation of the Riau Islands Province versus the Ministry of Transportation. However, the Related Party, which in this case are the Municipality of Bogor and the Ministry of Transportation, ignored the result of the agreement and refused to execute the agreement that had been signed by both parties on top of a duty stamp and was recorded in the Agreement Report. The Petitioner of the first case did not report the situation to the Ministry of Law and Human Rights, but the situation was made known through social media through the following address *https;//id.beritasatu.com/home/pemkot-kota-bogor-abiakan-kemendagri-kemenkumham*. Whereas in the second case the Office of Transportation of the Riau Island Province

sent a letter to the Director General of Legislations Number 552.3/178/HUB/2019 dated February 6, 2019, on the request for directives to follow up on the result of the non-litigation trial dated October 31, 2018. With regards to this case, the Minister of Law and Human Rights, in this case, the Director General of Legislation, prepares the Recommendations that would be submitted to the President. The recommendation would be formulated after coordination had been carried out with the Municipal Government of Bogor and the Ministry of Transportation as the parties who failed to execute the decision of the non-litigation trial.

The amended *Permenkumham* 32/2017 must regulate the Supervision of the Agreements of the Parties and the Recommendations.

Tenth, the *Permenkumham* 32/2017 does not regulate the nebis in idem requests. Therefore, in the amended *Permenkumham* 32//2017, it is essential to include regulations stipulating that in such case as the core issues and the matters set forth in the petition are similar to the request that had been settled through an agreement by the Parties, no future petitions on the settlement on the disharmony of legislation through mediations could be made, unless the Parties agree to amend the agreement.

Eleventh, it is vital to regulate the assignment of the appropriate officials for cases relating to legislation that are in disharmony. In settlement of legislation disharmony, the Minister of Law and Human Rights may assign the Director-General to conduct Mediations in reviewing the legislation that is vertically as well as horizontally conflicting, thus resulting in the disharmony of the legal norms, conflicts of authorities among ministries/institutions, creates an injustice among the people and entrepreneurs, and inhibits the investment and business climate, including the national and regional economic activities. The result of the mediation and the Recommendations shall be submitted to the President.

4. Conclusion and Recommendations

4.1. Conclusions

- Today, conflicts relating to the legal norms or conflicts of authorities in the legislation making process that results in legislation disharmony could be resolved by settling the conflicts out of court, through the

mediation, or non-litigation, mechanisms. The Ministry of Law and Human Rights put forward this initiative as part of its duty to assist the president in executing Regulation Reform by systematizing problematic legislation.

- The issuance of *Permenkumham* 32/2017 on the Procedures for Settlement of Conflicts on Legislation through Non-Litigation Channels that regulate the methods in settlement of legislation disharmony through a mediation forum is seen as an alternative legal effort and a new as well as a progressive breakthrough in Indonesia's Regulatory Reform. The purpose of the Permenkumham 32/2017 is to systemize the already abundant regulations, both in terms of number and type, which resulted in overlaps and the vertical as well as horizontal conflicts of legislation.
- The overlaps and conflicts due to the implementation of legislation have resulted in conflicts between the legal norms and/or conflicts of authorities among agencies, or Institutions, or Ministries, or Non-Ministerial Institutions and the Regional Government, thus creating injustice to the public in general, and entrepreneurs. The legislation also inhibits the Indonesian investment and business climates, as well as the national and regional economy.
- Regarding the issues stipulated in point 3, it is now possible to submit a petition for the settlement of conflicts out the site of court through a mediation forum or through non-litigation channels, which are both more efficient and effective, as part of its public service to resolve legislation issues. This is most appropriate for cases where damages were incurred due to the implementation of a vertically and horizontally conflicting policy that had been stipulated into the legislation had resulted in conflicts of norms and/or conflicts of authorities. On the other hand, the forum also provides room for the formulators of the legislation to understand and be aware of the fact that the policies they had implemented were problematic; thus they can correct and revise the problematic regulation without having to go through a litigation process that is both complex and time-consuming. The output from this type of conflict settlement may be followed up into an "executive review" on the legislation that is in disharmony, through a retraction, revision or formulation of new legislation. Hence, reducing the current issues that relate to the conflicting norms and overlaps of legislation, at the central as well as the regional levels. It is expected that the legal product issued could be more appropriate in fulfilling the sound legal principles of benefit, justice, and legal certainty.

- The mechanism used in settlement of conflicts that resulted in legislation disharmony is still within the authority of the Ministry of Law and Human Rights, as the assistant to the President, in performing its duties in the field of law, and to assist the President in regulations reform and in improving the management of the regulations. This is particularly relevant for regulations that inhibit the investment and business climates, and the national and regional economic activities in Indonesia. The settlements of conflicts/disharmonies in the legislation through the mediation/non-litigation channels is merely a "coordination forum" within the executive power and not a review mechanism that is performed by the judicative power, such as a judicial review.

4.2. Recommendations

- Based on the analysis and observations of the *Permenkumham* 32/2017, from its initial execution on December 8, 2017 up to the present (February 2019), there many issues and weakness found in the management of the settlement of conflicts relating to legislation, most specifically in its position and the legal umbrella, including in its regulatory substance. Therefore, it is essential that the government immediately make the necessary amendments to *Permenkumham* 32/2017.
- There are 11 (eleven) specific reasons as to why it is necessary to strengthen and make amendments to Permenkumham 32/2017 on the Settlement of Conflicts of Legislation through Non-Litigation Channels. One of the reasons is that the mechanism for the settlement of conflicts/disharmonies on legislation through the non-litigation/ mediation channels that are performed by the Ministry of Law and Human Rights has gained higher interests and is trusted by the people as an efficient, effective and expedient alternative in settlement of conflicts. Therefore, in the implementation of the settlement of conflicts on legislation through non-litigation/mediation channels, it is imperative that there are a strong legal foundation and human resources.
- It is expected that the Minister of Law and Human Rights are able to optimize its authority by assigning the Director General of Legislations to carry out reviews/investigations towards the vertically, as well as horizontally, conflicting legislation that had generated disharmony in the legal norms, conflicts of authorities among the ministries/institutions,

created injustice towards the people and the entrepreneurs, as well as those that inhibits the investment and business climates, and the national and regional economic activities. The result of the review, which is complemented by the Recommendations, must be delivered to the President for an "executive review." Such efforts are deemed to be more effective in settling the conflicting norms and in reducing the number of problematic legislation when compared to having to wait for a petition, because the Ministry of Law and Human Rights are able to actively conduct a review towards allegations of a conflicting norm in the legislation and recommend its annulment through the President. The mechanism could expedite the Regulations Reform efforts by systemizing the regulation to establish proper regulation management through synchronizing and harmonizing the formulation of regulations, and at the same time, settling the legislation disharmony through the mediation channels.

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VII

Developments in the Formulation of Regional Regulations in Indonesia

Feri Amsari and
M. Nurul Fajri

1. Introduction

Part of the idea for constitutional reform after the fall of the New Order Regime is autonomy at its broadest sense. This concept was expected to build new relations between the central and regional governments that were seen as being too centralistic during the New Order era. The centralistic relationships received extensive criticism because it only centered on improving welfare at the central level. During that era, the prosperity of the regions was far from being successful, although the abundant natural resources of the regions were substantially exploited in the interest of the central government.

The central-regional imbalance could also be seen in the formulation of the laws and regulations. The Regional Regulations that were expected to serve as the norms to organize the management of the regions became more of an instrument to "approve" the wishes and interests of the central government.

The aim for the enactment of the new constitution was to restructure this central-regional imbalance and make it more oriented towards the regions. Article 18 Paragraph (5) of the 1945 Constitution stipulates: "A regional administration shall exercise the broadest possible autonomy, except for matters of governance that are determined by law as the prerogative of the Central Government." Through this provision, the regional governments are given the authority to develop their own regional regulations to regulate and manage their own domestic affairs. Therefore, constitutionally, the regional governments are given the independence to improve the welfare of their respective regions.

As such, in administering the regional government affairs through the regional regulations, the authority of the regional government is limited by the principles of the transfer of authority from the central government to the regional governments, namely: the principles of decentralization, de-concentration, and co-administration. In administering the regional government affairs, the regional governments have the right to enact their own regional regulations and other regulations to implement the autonomy and co-administration duties as stipulated in Article 18 Paragraph (6) of the 1945 Constitution.

Regional regulations were indeed unknown in the pre-amended 1945 Constitution; hence, the term regional regulations were not found in the hierarchy and types of laws and rules that were previously enacted in Indonesia. After the amendment of the 1945 Constitution, however, the term Regional Regulation explicitly mentioned in the constitution. This was stipulated in Article 18 Paragraph (6), which states: A regional administration shall have the right to adopt regional regulations as well as other rules to implement autonomy and the co-administration duties.

As one of the platforms for the implementation of regional government administration, the regional regulations, therefore, are established as part of the delegation of authority from the central government to the regional government. The provisions in the laws and regulations outline that in administering the regional government, the regional regulations need to be by the potential and diversity of the regions. In terms of regional government administration, Law Number 23 Year 2014 provides the regional governments with the freedom to develop regional regulations that are based on the authorities and potentials of their own respective regions, and as mandated by the higher laws and regulations.

As previously mentioned, the content materials of the regional regulation must be in accordance to the implementation of the regional autonomy and co-administration duties, including in fulfilling the special conditions of the region and/or as further elaborations of the higher laws and regulations. However, in the formulation of regional regulations, special attention must be given to the principles of 'conformity in the type, hierarchy, and content materials,' in other words the laws and regulations must pay attention to the appropriateness of the content materials as based on its type and hierarchy. On a theoretical level, there is what is known as the principle of lex superiori derogat legi inferiori, which means, the higher-level regulations shall override the regulations of the lower level. The lower-level regulations must not be in contradiction to the higher-level regulations.

However, it is impossible to negate the fact that there are still many regional regulations that have, in fact, created new problems, particularly those relating to harmonization and synchronization, thus resulting in implications on the effectiveness of the government administration, legal certainty, justice, and expediency. As detailed above, the topic of discussion would focus on the position of the regional regulations in the

history of the constitution, and the hierarchy of the laws and regulations in Indonesia. Also to be discussed are issues on the politics of law and the problems of formulating the current regional regulations.

2. The History and Legal Basis of the Regional Regulations

Since gaining its independence, Indonesia has divided its government system into the central and regional government. At the time there were only eight provinces, they were: [i] Sumatera, [ii] Kalimantan, [iii] Sulawesi, [iv] West Java, [v] Central Java, [vi] East Java, [vii] Maluku, and [viii] Nusa Tenggara. In addition to the provinces, there were also several smaller regions, such as residencies, autonomous municipalities/regencies, and villages. As a vast archipelago and the lack of access and technology at the time, it is clear that the type of government administration in Indonesia at the time was, by nature, de-centralistic by providing certain authorities to the regions to administer their own governance.[1]

With authority to administer their own governance, the regional government requires legal instruments that are following the conditions of the regions. The legal instrument is what is known as the regional government. The development of the authority to formulate regional regulations is in line with the events in the implementation of the regional autonomy in Indonesia. Article 1 number 6 of Law Number 23 Year 2014 on Regional Government stipulates that regional autonomy is defined as the right, authority, and obligation of the autonomous region to independently regulate and manage the local Government Affairs and the interest of the public under the Unitary State of the Republic of Indonesia.

Consequently, the central-regional relations, most specifically on how far the central government can delegate the government affairs to the regions, has become an essential aspect in illustrating the developments in the formulation of the regional regulations. History shows that the implementation of the regional government itself had not always been smooth.

1 Reny Raswita, et.al. *Menilai Tanggungjawab Sosial Peraturan Daerah (Assessing the Social Responsibilities of Regional Regulations)*, Jakarta: PSHK, 2009, p. 22.

Indonesia had gone through several constitutional changes and amendments, which, of course, had been highly influential towards the concept of regional government and the authority of the region to formulate regional regulations. One of the tools to assess the position of regional regulations in the different constitutions is the provision of the regional government itself. of the many constitutions that had been enacted, the only constitution that did not determine the authority of the region to formulate regional regulations is the pre-amended 1945 Constitution.

Theoretically, the authority to formulate regional regulations is a form of the region's independence to regulate their own domestic affairs A regional regulation is a strategic instrument to achieve the decentralization objective. Reny Raswita states that in principle, regional regulations play an important part in encouraging maximum decentralization.[2] Hence, it is important that the constitution mentions about authority in the formulation of regional regulations. It would, at the very least, reinforce the constitutional foundation on the existence of regional regulations in the state administration.

Therefore, viewed from the various constitutions that had been enacted, it is safe to say only the Constitution of the Republic of the United States of Indonesia (*Republik Indonesia Serikat – RIS*) that strictly regulates the authority to formulate regional regulations and the stringent boundaries between the affairs of the federal government and the state governments. In the Constitution of the Republic of the United States of Indonesia, regional regulations are mentioned as Regional Laws, because of the federal system that was implemented in the Constitution of the Republic of the United States of Indonesia. Although it has been regulated in the constitution, particularly the Constitution of the Republic of the United States of Indonesia and the Provisional Constitution of 1950, however, in terms of the type and hierarchy, the laws and regulations failed to accommodate the presence regional regulations. This situation occurs because based on the federal system, every region needs to formulate its own constitution. The different terminologies, regulation, and hierarchy on regional regulations could be seen in the two tables below:

2 *Ibid*., p. 60.

Table 1

No.	Constitution	Type of Regulation
1	The 1945 Constitution	**Article 18** The Division of the Region shall be based on how large and small the region is, and the structure of the administration is stipulated in the Laws by taking into account and concerning the deliberations in the State Administration sessions and the rights of origin within regions that are considered to be Special.
2	The Constitution Republic of the United States of Indonesia (RIS)	The Republic of the United States of Indonesia encompasses every region of Indonesia, which are the common region: a. The State of the Republic of Indonesia with regions that are following the status quo as stipulated in the Renville Agreement signed on January 17 in the year 1948: The State of Eastern Indonesia; The State of Pasundan, including the Federal District of Jakarta; The State of East Java; The State of Madura; The State of East Sumatera, with the understanding that the status quo on South Asahan and Labuhan Batu and the relations to the State of East Sumatera remains in effect; The State of South Sumatera. b. Independent states; Central Java; Bangka; Belitung; Riau; West Kalimantan (Special Territory) Major Dayak; Banjar Region; Southeast Kalimantan; and East Kalimantan a and b are territorial regions with the independence to self-determination that are united under the bond of the Federation of the Republic of the United States of Indonesia, based on this and other constitutions c. Other Indonesian regions that are not part of the regional states.

		Article 32 (2) If required, the federal law shall determine the guidelines on the matter of the laws in the regional states **Article 43** In finalizing the structure of the federation of the Republic of the United States of Indonesia the principle-guideline is applied, whereby the will of the people in the regions that are declared independent according to the path of democracy, shall decide the status that shall afterward be occupied by these regions within the federation. **Article 45** The structure and procedures for administering the governance in the regional states must be consistent with the practices of democracy, following the principles set out in this Constitution. **Article 47** The constitutional regulations of the states must guarantee the right to self-determine the lives of the people towards the various community confederations within their regions, and it must also create the potentials to realize them on a state level through regulations on the formulation of the confederation in an orderly manner within the autonomous regions. **Article 51** 1) The government administration on the points listed in the annex of this Constitution shall be charged solely to the Republic of the United States of Indonesia. 2) The of annexes on government administration as stated in paragraph 1 is amended, either at the request of the joint regional states or on the initiative of the federal government after it is unanimously agreed upon by the regional states according to the proceedings that are stipulated in the federal laws. 3) The federal constitution shall subsequently take all necessary actions to properly regulate the government administration that is charged to the federation. 4) All government administrations that are not included in the stipulated paragraphs above are merely the authorities of the regionals states.

3	The 1950 Provisional Constitution	**Article 131** 1) The division of the Indonesia regions are based on how large or small the regions are with the right to autonomously manage their own domestic affairs (autonoom), whereby the structure of the government shall be stipulated by law, by taking into account and in consideration of the basis of consultations and representation within the state government system. 2) The regions are given autonomy in the broadest sense to manage their own domestic affairs. 3) By law, it is possible to delegate the administration of the duties to regions that are not included in the domestic affairs. **Article 132** 1) The position of the self-governing regions is regulated by the law with the provision that the structure of the government must take into account the rule in Article 131, the basis of the regions' consultations and the representation system within the state government system. 2) The existing self-governing regions shall not be erased or reduced against their own will, except being in the public interest and after the law states that the public interest demands its erasure or reduction, by providing the authority to do so to the Government. 3) Legal disputes on the regulations specified in Paragraph (1) and on the matter of its procedures shall be tried at the court whose jurisdiction is stated in Article 108.
4	The Post-amended 1945 Constitution	**Article 18** 1) The Unitary State of the Republic of Indonesia shall be divided into provinces, and those provinces shall be divided into regencies and municipalities, each of which shall have regional governance as regulated by the law. 2) The regional government of the provinces, regencies, and municipalities shall administer and manage their own affairs according to the principles of regional autonomy and co-administration duties. 3) The regional government of the provinces, regencies, and municipalities also has a Regional House of Representatives (DPRD) whose members shall be elected through general elections. 4) Governors, Regents, and Mayors, respectively as head of the regional government of the provinces, regencies, and municipalities, are democratically elected.

		5) The regional government shall implement the autonomy in its broadest sense, except in matters specified by law to be the affairs of the Central Government. 6) The regional government has the right to enact regional regulations and other regulations to implement the autonomy and co-administration duties. 7) The structure and procedures for regional government administration shall be regulated by the law.

Table 2

No.	Regulation	Type and Hierarchy
1	Decree of the Provisional People's Consultative Assembly Number XX/MPRS/1966 on the Memorandum of the People's Representative Council of Mutual Assistance on the Source of the Indonesia Legal Order and the Procedural Order of the Laws and Regulations of the Republic of Indonesia	1) The 1945 Constitution of the Republic of Indonesia 2) The Decree of the People's Consultative Assembly 3) The Law/Government Regulation in Lieu of the Law 4) The Government Regulation 5) The Decree of the President 6) Other implementing regulations, such as: • Ministerial Regulation • Ministerial Instructions • and others
2	Decree of the People's Consultative Assembly Number III/MPR/2000 on the Source of the Legal Order and the Procedural Order of the Laws and Regulations	**Article 2** The procedural order of the laws and regulations is a guideline in the formulation of the laws and regulations under them. The order of the laws and regulations in the Republic of Indonesia are: 1. The 1945 Constitution; 2. The Decree of the People's Consultative Assembly of the Republic of Indonesia; 3. The Laws; 4. The Government Regulations in Lieu of the Law; 5. The Government Regulations; 6. The Decree of the President; 7. The Regional Regulation.

3	Law Number 10 Year 2004 on the Formulation of the Laws and Regulations	**Article 7** (1) The type and hierarchy of the Laws and Regulations are as follows: a. The 1945 Constitution of the Republic of Indonesia; b. The Laws/Government Regulations in Lieu of the Law; c. The Government Regulation; d. The Presidential Regulation; e. The Regional Regulation (2) The Regional Regulation, as specified in paragraph (1) letter e encompasses: a. The provincial Regional Regulation developed by the provincial Regional House of Representatives and the Governor; b. The Regency/municipality Regional Regulation developed by the regency/ municipality Regional House of Representatives and the Regent/Mayor; c. The Village Regulation/regulations of the same level, developed by the Village Representative Council or another form of names with the head of the village or another form of titles. (3) Further provisions on the procedures for the formulation of the Village Regulation/regulations of the same level shall be regulated through the relevant regency/municipality Regional Regulations.
4	Law Number 12 Year 2011 on the Formulation of the Laws and Regulations	**Article 7** (1) The types and hierarchy of the Laws and Regulations are comprised of: a. The 1945 Constitution of the Republic of Indonesia; b. The Decree of the People's Consultative Assembly; c. The Laws/Government Regulations in Lieu of the Law; d. The Government Regulation; e. The Presidential Regulation; f. The Provincial Regional Regulation; and g. The Regency/Municipality Regional Regulation.

3. Issues in the Formulation of the Regional Regulations

Jimly Asshidiqqie said that one of the elements of the law is the principle of the rules.[3] The principle of the rules would, of course, be the prevailing laws and regulations. Laws and regulations shall, of course, be well validated if it were stipulated in the constitution.[4] Hence, there are rules on the lower laws and regulation within the higher laws and regulations.

The relations among the laws and regulations are called the super relations (higher) and subordinate (derivative) within the spatial context (placement). The laws and regulations that determine the formulation of other laws and regulations are the superior regulations, whereas the laws and regulations that had been formulated based on superior regulation is the inferior regulation.[5] The relations between the regulations that create a hierarchy, based on the different levels of the laws and regulations, are called the legal order. The situation where the lower laws and regulations are determined by the other higher laws and regulations is something that is well understood and has been implemented in many countries.[6] The purpose is to generate an order in the legal system.

Legal order through the structuring or hierarchy of the laws and regulations is also essential in the formulation of the regional regulations and their relations to the authority of the region to self-administer the government. The central government, as the center of power, is responsible for the formulation of the regulations that shall determine the relations between the regional regulations and the higher regulations.

Many regulations had been developed to regulate the Regional Government, and one of the objectives is, of course, to regulate the hierarchy of the laws and regulations. The laws on regional governments are: (1) Decentralisatie Wet Year 1903; Bestuurshervorming Year 1922; (3) Law Number 1 Year 1945 on Regional Governments; Law Number 22 Year 1948 on Governance in the Regions; (5) Law Number 44 Year 1950

3 Asshidiqqie, *Konstitusi Bernegara (Constitution of the State)*, Malang: Setara Press, 2015, p. 105.
4 *Ibid*., p. 107.
5 *Ibid*.
6 See Hans Kelsen, *General Theory of Laws and State*, New York: Russell & Russell, 1961, p. 115-124.

on the Regional Government, Eastern Indonesia Region; (6) Law Number 1 Year 1957 on the Principles of Regional Government; (7) Decree of the President Number 6 Year 1959 on Regional Government; (8) Decree of the President Number 5 Year 1960 on Regional Government; (9) Law Number 18 Year 1965 on the Principles of Regional Government; (10) Law Number 5 Year 1974 on the Principles of Regional Government; (11) Law Number 5 Year 1979 on Village Administration; (12) Law Number 22 Year 1999 on Regional Government, and the various implementing regulations that were enacted in 1999 and 2000; (13) Law Number 32 Year 2004 on the Second Amendment of Law Number 32 Year 2004 on Regional Government; up to the most recent regulations on regional governments (15) Law Number 23 Year 2014 on Regional Government.

As a legal umbrella, it is evident that the constitution regulates the matters on regional governments. The Constitution of the State of the Republic of Indonesia Year 1945 regulates this matter in CHAPTER IV titled, "Regional Government." In the Provisional Constitution of the Republic of Indonesia Year 1949, the provision on the subject is stipulated in Article 42 to Article 67. In the 1950 Provisional Constitution, regulations on regional government are specified in Articles 131 and 132. Jimly states that even before Indonesia gained its independence, many regulations had been made to regulate governance issues in the region and matters that pertain to decentralization.[7] As a product of decentralization, which provides the regional government with authority to regulate every matter relating to the implementation of the regional autonomy, the regulations are then developed into regional regulations.

The purpose for the amendments that were made on the subject matter of Law Number 23 Year 2014, as the latest legal product on the implementation of the regional government, was to restructure the implementation of the regional autonomy. Also evaluated were the implementation of Law Number 32 Year 2004, which substantially separated the regulation on the implementation of the village governance through Law Number 6 Year 2014 on Villages and the implementation of the regional heads and vice regional heads elections through Law Number 1 Year 2015 in conjunction with Law Number 8 Year 2015 in

7 Jimly Ashiddiqie, *Pokok - Pokok Hukum Tata Negara Indonesia Pasca Reformasi (The Principles of Constitutional Laws in Post Reform Indonesia)*, Jakarta: Buana Ilmu Populer, 2009, p. 395.

conjunction with Law Number 10 Year 2016 on the Elections of the Governors, Regents and Mayors.

Regional regulations are political products that were created and designed by two governmental bodies, which are the Head of the Region and the Regional House of Representatives. The regulation could only become a part of the legal system after it has been passed and published in the regional gazette. This concept or principle in the formulation of the regional regulations follows the distribution of work between the central government and the regional government. All affairs that are mandatory to the central government could not be regulated through the regional regulations. The regional regulations only cover matters that are outside of the absolute affairs of the regional government, both those that are mandatory or optional in nature.

As one of the instrument that defines the implementation of regional autonomy in its broadest sense, the formulation of a regional regulation must be founded on the range of issues within a region that could be developed into regional regulations that shall serve as a politics of law of the regional policies. The politics of law is a legal policy or official policies on the laws that shall be well implemented through the formulation of new laws, as well as through the replacement of the older laws, to achieve the objective of the state. Therefore, the politics of law is an option on the laws that would be enacted, and at the same time, as an option on the laws that would be retracted or to not be enacted to achieve the objective of the state as stipulated in the Preamble of the 1945 Constitution.[8]

In accordance to the above purpose, and as regulated in Article 14 of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations, it is stated that the content materials for the provincial, regional regulations and regency/municipality regional regulations are content materials on the implementation of the regional autonomy and the co-administration duties as well as the special condition of the region and/or an elaboration of the higher laws and regulations. Chapter IV of Law Number 23 Year 2014 on Regional Governments strictly divides the matters that fall under the administration of the regional government:

8 Moh. Mahfud. MD, *Politik Hukum di Indonesia (Politics of Laws in Indonesia)*, Jakarta: Rajawali Pers, 2010, p. 1.

Part One
Classification of Government Affairs
Article 9

(1) Government Affairs consists of absolute government affairs, concurrent government affairs, and general government affairs.
(2) Absolute Government Affairs, as specified in paragraph (1) are the entire Government Affairs that are under the authority of the Central Government.
(3) Concurrent Government Affairs as specified in paragraph (1) are Government Affairs that are shared between the Central Government and the Provincial Regions and the Regency/Municipality Regions.
(4) Concurrent Government Affairs that are delegated to the Regions becomes the basis for the implementation of the Regional Autonomy.
(5) The general government affairs, as specified in paragraph (1) are Government Affairs that are under the authority of the President as head of the government.

Part Two
Absolute Government Affairs
Article 10

(1) Absolute Government Affairs, as specified in Article 9 Paragraph (2) encompasses:
    a. Foreign Politics;
    b. Defense;
    c. Security;
    d. Justice;
    e. National Monetary and fiscal affairs; and
    f. Religion
(2) In implementing the absolute government affairs as specified in Paragraph (1), the Central Government shall:
    a. Undertake self-implementation; or
    b. Delegate the authority to the existing Vertical Institution in the Region or the Governor as the representative of the Central Government as based on the principles of De-concentration.

Part Three
Concurrent Government Affairs
Article 11

(1) Concurrent Government Affairs as stipulated in Article 9 Paragraph (3) that falls under the authority of Regions consists

of the Mandatory Government Affairs and Optional Government Affairs.

(2) Mandatory Government Affairs as specified in Paragraph (1) comprises of Government Affairs that relate to the Basic Services and Government Affairs that are unrelated to the Basic Services.

(3) Mandatory Government Affairs that relate to Basic Services, as specified in Paragraph (2), are Mandatory Government Affairs in which some of the subject matters are about Basic Services.

Article 12

(1) Mandatory Government Affairs that relate to Basic Services as specified in Article 11 Paragraph (2) encompasses:

(2) Mandatory Government Affairs that are unrelated to the Basic Services as specified in Article 11 Paragraph (2) comprises of:
   a. Manpower;
   b. Women Empowerment and Child Protection;
   c. Food;
   d. Land Affairs;
   e. Environment;
   f. Demographic Administration and Civil Registry;
   g. Community and Village Empowerment;
   h. Population Control and Family Planning;
   i. Transportation;
   j. Communications and Informatics;
   k. Cooperatives, Small and Medium Enterprises;
   l. Investment;
   m. Youth and Sports;
   n. Statistics;
   o. Cryptology/Coding;
   p. Culture;
   q. Libraries; and
   r. Archives.

(3) Optional Government Affairs, as specified in Article 11, Paragraph (1) encompasses:
   a. Maritime and Fisheries Affairs;
   b. Tourism;
   c. Agriculture;
   d. Forestry;
   e. Energy and Mineral Resources;
   f. Trade;

g. Industry; and
h. Transmigration.

Article 13

(1) The distribution of the concurrent government affairs between the Central Government and the Provincial Regional Government, as well as the Regency/Municipality Regional Government as stipulated in Article 9 Paragraph (3), is grounded on the principles of accountability, efficiency, and externality, including the strategic national interests.
(2) Based on the principles as specified in Paragraph (1), the criteria for Government Affairs that is under the authority of the Central Government are:
    a. Government Affairs in which the location cuts across the provincial Regions or cuts across the state borders;
    b. Government Affairs whose users span across the provincial Regions or spans across the state borders;
    c. Government Affairs in which the benefits or negative impacts span across the provincial Regions or spans across the state borders;
    d. Government Affairs where the use of the natural resources could be more efficient if it were administered by the Central Government; and/or
    e. Government Affairs with a strategic role in safeguarding the national interest.
(3) Based on the principles specified in Paragraph (1), the criteria of Government Affairs that are under the authority of the Provincial Regions are:
    a. Government Affairs where the location cuts across the regency/ municipality Regions;
    b. Government Affairs whose users span across the regencies/ municipalities Regions;
    c. Government Affairs in which the benefits or negative impacts span across the regencies/municipalities Regions; and/or
    d. Government Affairs where the use of natural resources could be more efficient if administered by the Provincial Region.
(4) Based on the principles as specified in Paragraph (1), the criteria for Government Affairs that are under the authority of the Regency/ Municipality Regions are:
    a. Government Affairs where the locations are within the regency/ municipality Regions;
    b. Government Affairs whose users are within the regencies/

municipalities Regions;

c. Government Affairs in which the benefits or negative impacts are within the regencies/municipalities Regions; and/or
d. Government Affairs where the use of natural resources could be more efficient if administered by the regency/municipality Regions.

Article 14

(1) The implementation of Government Affairs in matters of forestry, marine affairs, as well as energy and natural resources, are divided between the Central Government and the Regional Government at the Provincial levels.
(2) Government Affairs for matters of forestry as specified in Paragraph (1) that relate to the management of the forest park conservation area at the regencies/municipalities is under the authority of the regency/ municipality regions.
(3) Government Affairs in matters of energy and mineral resources as specified in paragraph (1) that relate to the management of oil and natural gas is under the authority of the Central Government.
(4) Government Affairs on matters of energy and mineral resources as specified in Paragraph (1) that relate to the direct exploitation of geothermal energy in the regency/municipality Regions is under the authority of the regency/municipality Region.
(5) Regency/municipality Regions that are producers or non-producers shall receive a share of the profit from the implementation of the Government Affairs as specified in Paragraph (1).
(6) The determination of the producing regency/municipality Regions to calculate the profit sharing from maritime affairs is based on the marine products obtained within the boundary of 4 (four) miles as measured from the coastline towards the open sea and/or towards the island waters.
(7) If the boundaries of the regency/municipality as specified in Paragraph (6) is less than 4 (four) miles, the limits shall be divided equally by distance or measured in accordance to the principles of the diameters from the bordering Regions.

Article 15

(1) The distribution of concurrent government affairs between the Central Government and the Regional Governments at the Provincial level, as well as the regency/municipality level, is stated in the Annex, which is an integral part of this Law.

(2) The concurrent government affairs that are not stated in the Annex to this Law are under the authority of every level or structure of the government that are determined through the principles and criteria on the distribution of the concurrent government affairs as specified in Article 13.
(3) Concurrent government affairs as specified in Paragraph (2) is enacted through a Presidential Regulation.
(4) Amendments to the distribution of the concurrent government affairs between the Central Government and the Regional Government at the Provincial level as well as the regency/municipality levels as specified in paragraph (1) that do not result in the transfer of concurrent affairs of other government levels or structures is enacted through government regulation.
(5) Amendments, as specified in Paragraph (4), is permissible so long as it is not contradictory to the principles and criteria of the distribution of concurrent government affairs as stipulated in Article 13.

Article 16

(1) In administering the concurrent government affairs as specified in Article 9 Paragraph (3), the Central Government has the authority to:
    a. determine the norms, standards, procedures, and criteria in the implementation of the Government Affairs; and
    b. carry out development and oversight activities towards the implementation of the Government Affairs that are under the authorities of the Regional Government.
(2) The norms, standards, procedures, and criteria as specified in Paragraph (1) letter a, are provisions of the laws and regulations enacted by the Central Government as guidelines in the implementation of the concurrent government affairs under the authorities of the Central Government and under the authorities of the Regional Government.
(3) The authorities of the Central Government as specified in Paragraph (1) shall be carried out by the ministries and the non-ministerial government institutions.
(4) Implementation of the authorities by the non-ministerial government institutions as specified in Paragraph (3) must be coordinated with the related ministries.
(5) The enactment of the norms, standards, procedures, and criteria as specified in paragraph (1) letter a, must be implemented at the latest 2 (two) years from the date the government regulations on the application of the concurrent government affairs are legislated.

Article 17

(1) The regions have the right to enact Regional policies to implement the Government Affairs that are under the authority of the Region.
(2) In enacting the Regional Policy as stipulated in Paragraph (1), the Region must be guided by the norms, standards, procedures, and criteria set forth by the Central Government.
(3) In the event the Regional Policy that was formulated for the purpose of implementing the Government Affairs under the authority of the Region failed to follow the guidelines on the norms, standards, procedures, and criteria as specified in Paragraph (2), the Central Government may annul the Regional Policy as stated in Paragraph (1).
(4) If within 2 (two) years, as stipulated in Article 16 Paragraph (5), the Central Government has not determined the norms, standards, procedures, and criteria, the Regional Government administrators shall implement the Government Affairs that are under the authority of the Region.

The Articles illustrate how government affairs are distributed across several sectors. These concrete arrangements clearly show that the direction of the politics of law on regional regulations in Indonesia are integral to Articles 9-16 of Law Number 32 Year 2004 on Regional Governments.

Meanwhile, the annulment of a regional regulation could only be done through the regular channels, which is through the regional government itself by formulating new regional regulations to replace the previous regional government, and through a judicial review at the Supreme Court. This was confirmed by the Constitutional Court through two decisions of the Constitutional Court, Decision Number 137/PUU-XIII/2015 and Decision Number 56/PUU-XIV/2016 that terminated the authority of the executive body (executive review) in case governor or minister to annul a regional regulation. The two decisions state that the annulment of a regional regulation must go through the judicial review mechanism.

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VIII

Preventive Oversight on the Development of Regional Regulations

Charles Simabura

1. Introduction

The emergence of the oversight function on the regional regulations by the central government is a consequence of the model of the hierarchical relation between the governance structures within the regional autonomy framework. Clarke and Stewart state that oversight within the framework of regional autonomy could be differentiated into three categories, they are:[1]

First, the relative autonomy model. This model provides considerable freedom to the regional governments while still acknowledging the presence of the central government. The emphasis is on providing the regional governments with the freedom to act within the framework of their power/duties and responsibilities as defined in the laws and regulations. *Second, the agency model*. In this model, the regional governments have limited power, so their presence is viewed as an agent of the central government whose primary duties are to implement the policies of the central government. That is why in the laws and regulations, greater emphasis is given to the detailed instructions and acts as a mechanism of control. In this model, the Region Own Source Revenue (*Pendapatan Asli Daerah* – PAD) is not considered an essential instrument because the region is highly dependent on the assistance provided by the central government. Third, the interaction model. In this model, the presence and role of the regional government are determined by the interactions between the central government and the regional government.

In the regional autonomy regime, the three models could be used as a parameter in assessing the authorities of the central government in overseeing the regional regulations. The regional autonomy that is currently in place is not autonomous, nor is it free of control. The policy on regional autonomy was developed as a strategic effort to guarantee the unity of the nation and the state and to encourage the democratization process between the central and regional governments under the umbrella of a unitary state.[2]

1 Nimatul Huda, Penga*wasan Pusat Terhadap Daerah Dalam Penyelenggaraan Pemerintah Daerah (The Central Government Oversight towards the Regions on the Regional Governments Operations)*, Yogyakarta: FHUII Pers, 2007, p. 2.

2 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia (The Indonesian Constitution and Constitutionalism)*, Jakarta: Konpress, 2006, p. 137.

Under the umbrella of a unitary state, regional autonomy makes it possible to implement specific mechanisms that could nurture the diversity of all the regions across the nation.[3] Diversity could take many forms, one of which is the diversity in the regional regulations, including in the content materials of the regional regulations that are grounded on the characteristics of each respective region. These characteristics are the reason behind the distinct regulations that are found in different regions, both in the provincial as well as regency/municipal levels. Even within one province, it is possible to create different regulations over specific legal issues.[4]

Although every region has the authority to develop its laws in the form of a Regional Regulation, the regulations, however, must not be disaffiliated from the framework of the national laws. Therefore, central government oversight is imperative in order to maintain the unanimity of the laws. However, the oversight must not be grounded on the central government's dominance over the affairs of the regional governments. If this were to happen, the relations between the central government and the regional governments under the umbrella of a unitary state would become disharmonious.[5]

Oversight, within the context of controlling, evaluating, appraising, and correcting, must be applied as an instrument to bind the unity. The pendulum of autonomous freedom must not swing too far that it reduces, and even threatens, the principles of a unitary state.[6] Hence, there needs to be an explicit parameter to assess the significance of decentralization within the government system. One parameter that could be used is the oversight and development mechanism in the formulation of regional

3 *Ibid*., p. 63.

4 One example is the new Regional Regulation on the no smoking zones. The Province of DKI Jakarta was the first region to implement this regional regulation based on the Regional Regulation of the Province of DKI Jakarta Number 75 Year 2005 on the No Smoking Zone. Although the objective of the regulation was one that was positive, not every region formulated similar Regional Regulations. Other regions began to follow DKI Jakarta after the enactment of Law Number 36 Year 2009 on Health that makes it compulsory for every region to establish no-smoking zones through a Regional Regulation. Up to 2011, there were at least 11 regencies/municipalities that have similar Regional Regulations; they are Palembang, Bogor, Tangerang, Bandung, Sragen, Padang Panjang, Payakumbuh, and Cirebon.

5 *Op. Cit*., p. 3.

6 *Ibid*., p. 33.

regulations by the central government towards the regional government.[7]

The current oversight on the Regional Regulations (Perda) places greater emphasis on the repressive efforts using a mechanism for the annulment of regional regulations by the President through the Minister of Home Affairs. Data from the Ministry of Home Affairs shows that since the initiation of the regional autonomy in 1999, there are at least 1,878 Regional Regulations that have been annulled within the 2002-2009 period alone. In 2010, the Ministry of Home Affairs had clarified 3,000 Regional Regulations and found that 407 of the Regulations had many issues. In 2011, the Ministry of Home Affairs clarified 9,000 Regional Governments and found issues in 351 of them.[8] In 2016, the Minister of Home Affairs annulled 3,143 Regional Regulations that were deemed problematic.[9]

The sheer number of regional regulations that had been annulled would place the region at a disadvantage even if the reason behind the annulment were grounded on the law. Therefore, the oversight mechanism for regional regulations should not only be carried out through the annulment of the regional regulations and the decree of the head of the region. Hence, the time has come for the government to place greater importance on the preventive efforts. Such efforts could be carried out using the oversight mechanism starting from the planning phase in the formulation of a Regional Regulation, and which could then be specified in the Regional Legislation Program.

Article 1 Number 10 of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations (hereinafter shall be called UU PPP), states: *The Regional Legislation Program, hereinafter shall be called Prolegda, is an instrument in the planning of the program on the formulation of the Provincial Regional Regulations or the Regency/Municipality Regional Regulations that are structured in a planned, integrated and systematic*

7 Soewoto Mulyosudarmo, *Pembaharuan Ketatanegaraan Melalui Perubahan Konstitusi (Constitutional Reform Through Amendments of the Constitution)*, In Trans, 2004, p. 141.

8 Muhamad, R. Gani, *Perda Bermasalah, Proses & Mekanisme Penetapan, Makalah pada Sosialisasi Perda Bermasalah di BPK Perwakilan Sumatera Barat (Problematic Regional Regulations, Process & Mechanism for the Enactment, Paper at the Public Campaign on Problematic Regional Regulations at the West Sumatra Office of the State Audit Agency)*, June 7, 2012. Source: *http//www.kemendagri.go.id*

9 Source:*https://nasional.kompas.com/read/2016/06/16/16372801/kemendagri.tegaskan.pembatalan.3.143.perda.sesuai.aturan*.

manner.[10] Based on the given definition, it is possible to conclude that the development of the Regional Legislative Program (*Prolegda*) is carried out at the Provincial as well as the Regency/Municipal levels.

The use of the term *Prolegda* was based on Article 239 Paragraph (1) and Article 403 of Law Number 23 Year 2014 on Regional Governments, but the term was later changed to the Program for the Formulation of Regional Regulations (*The term Prolegda shall now be read as Propemperda – Program Pembentukan Peraturan Daerah*).[11] Law Number 12/2011 (UU PPP) that replaced Law Number 10/2004 provides further clarifications on the rules that govern the Regional Legislation Program (*Prolegda*). Law Number 12/2011 (UU PPP) regulates the National Legislation Program (*Prolegnas*) and the Regional Legislation Program (*Prolegda*) as a series of activities in the formulation of the laws and regulations. The principles of integration between the laws and regulations at the central and regional levels could be illustrated in the formulation of the National Legislation Program (*Prolegnas*) as well as the Regional Legislation Program (*Prolegda*).

The emphasis on the development of the Regional Legislation Program (*Prolegda*), in particular, is on the efforts to ensure that the laws and regulations produced in the regions remain integrated into the framework of the national law system.[12] The reinforcement of the principles of integration is found in the explanations provided in Article 32 of the Law on the Formulation of the Laws and Regulations (UU PPP): This provision is to ensure that the Regional Regulation products remain integrated into the framework of the national law systems.

Based on the provisions stipulated in the laws and regulations, there at least 3 (three) mechanisms that could be used to maintain the consistency

10 Similar explanations were also stipulated in Article 1 number 1 of the Minister of Home Affairs Regulation Number 169 Year 2000 on the Guidelines for the Development of the Regional Legislation Program, which states: "The Instrument for the Planning of the Program on the Formation of Regional Regulations that are prepared in a planned, integrated and systematic manner."

11 In some parts of this paper, the Writer continues to use the term the Regional Legislative Program (Prolegda) as the terminology is still used in the Law on the Formulation of the Laws and Regulations (UU PPP) and has not been amended. It is also to make it easier to comprehend, as it is hierarchical to the term used at the national level, which is the National Legislation Program (Prolegnas).

12 Jimly Asshidiqie, *Perihal Undang-Undang (On the Matters of Law)*, Jakarta: Konpres, 2006, p. 260.

of the Regional Regulations (*Perda*) with the products of the national law. *First,* through repressive measures or the annulment of the Regional Regulations *(Perda)*. Before the enactment of Law 23/2014 on Regional Governments, the annulment of the Regional Regulations were regulated through Article 145 of Law 32/2014, which stipulates that the Central Government may annul a Regional Regulation that is deemed to conflict with the hierarchy of the guiding principles as stipulated in the higher laws and regulations. This provision was later readopted into Article 251 of Law 23/2014. *Second*, through a judicial review at the Supreme Court on the Regional Regulations that are alleged to be problematic so that it may be ruled as null/void or for an annulment. *Third*, through supervision in the preparation of the Regional Legislation Program/ Program for the Formulation of Regional Regulations (*Prolegda/Propemperda*) that could, from the outset, detect the regional government's plan to formulate a Regional Regulation (preview mechanism).

The repressive mechanism was initially maintained in Law 23/2014 by providing the Ministry of Home Affairs and the Governor with the hierarchical authorities to annul a Regional Regulation should it be considered to conflict with the higher regulation or the interests of the public. However, today, the authority for an annulment (executive review) has been removed. The Decision of the Constitutional Court Number 56/PUU-XIV/2016 states that the annulment of a Provincial Regional Regulation by the minister conflicts with the constitution. The Articles that were annulled were: Article 251 Paragraph 1, 2, 7, and 8 of Law 23/2014. Before that, the Decision of the Constitutional Court Number 137/PUU-XIII/2015 on the Annulment of a Regency/Municipality Regional Regulation stipulated that Article 251 Paragraph 2, 3, and 4 of Law 23/2014, were also in conflict with the constitution.

Hence, the only remaining mechanism that is still in use by the Central Government on the oversight in the formulation of Regional Regulations today is the executive preview. It is, therefore, highly relevant to develop oversight or supervisory mechanism for the Program for the Formulation of Regional Regulations (*Propemperda*) even from the preparatory phase. By performing oversight on a Regional Regulation (*Perda*) from its planning phase, the government would be able to identify any potential for disharmonies in the Regional Regulations at a very early stage. Another advantage would be to prevent higher losses on the part of the regions due to the high costs in formulating a Regional Regulation, as

such, by supervising the preparation of the Program for the Formulation of Regional Regulations (*Propemperda*), the potentiality of producing problematic Regional Regulations could be minimized.

2. Topic of Discussion

Government oversight towards the regional policies, be it in the form of a Regional Regulation, Decree of the Regional Head as well as the Decree of the Regional House of Representatives and the Decree of the Speaker of the House of Representatives, is a consequential result of the relations between the central government and the regions within the framework of a unitary state. In practice, government oversight could be delegated to the Minister of Home Affairs, and it could also be delegated to the Governor as the representative of the Central Government in the region. Therefore, as the representative of the Central Government, the Governor has the functional relations with the regional government at the regency and municipality levels as delegated by the Central Government. Also, some of the authorities held by the Governor are not affiliated to the authorities of the regency/municipal governments.

Government Regulation Number 12 Year 2017 on the Development of Oversight over the Operational Activities of the Regional Government further clarifies the relations between the Central Government and the Governor as the representative of the Central Government in the region with the regional heads at the regency and municipality levels.[13] The relations were limited to affairs that are still under the authority of the Central Government and are delegated to the Governor as the representative of the Central Government in the region. The delegation of authority mechanism given to the Governor has opened the opportunities for Governors to retract/annul Regional Regulations at the regency/municipality levels.

13 Before being regulated in the Government Regulation Number 20/2001, the provisions were reinforced through Government Regulation Number 23/2011 on the Amendments of Government Regulation Number 19/2010 on the Procedures for Implementing the Duties and Authorities and the Financial Standing of the Governor as the Representative of the Government in the Provincial Region. Government Regulation Number 19/2010 and Government Regulation Number 23/2011 were retracted and replaced with Government Regulation Number 33/3018 on the Implementation of the Duties and Authorities of the Governor as the Representative of the Central Government.

In relations to the hierarchy in the norms of the laws, Hans Kelsen was of the opinion that the norms of the laws are tiered hierarchically, meaning that a lower norm is effective, sourced from, and based on the higher norms, and so forth, until it reaches a norm that could no longer be traced and is hypothetical and fictitious, which is the basic norm.[14] According to Bagir Manan, the philosophies on the sequencing/hierarchy of the laws and regulations are made up of several principles:[15]

- The laws and regulations of a higher position could be used as a platform or legal basis for the lower laws and regulation, or the laws and regulations that are positioned below them.
- The lower positioned laws and regulations must be based on, or have a legal basis from, the laws and regulations that are of a higher position.
- The content of the lower laws and regulations must not deviate from, or conflict with, the higher laws and regulations.
- The laws and regulations could only be retracted, or replaced, or amended by the higher laws and regulation, or at the very least, the laws and regulations that are of the same level.
- If similar laws and regulations regulate the same materials, then the new regulation must be enacted, even without clearly stating that the former regulation has been retracted. Furthermore, regulations that regulate specific materials must be given priorities over the laws and regulations that are more general.

In terms of an annulment of the Regional Regulation (*Perda*), the annulment must be based on the assessment that the Regional Regulation (*Perda*) conflicts with the higher laws and/or the interest of the public. This is where the role of oversight on the Regional Regulations is translated into a form of development by the Government towards the regions. Therefore, the development efforts through oversight of the Regional Regulations (executive review) that resulted in the annulment of the Regional Regulation would not leave a negative impact on the region.[16] Although constitutionally the mechanism for the annulment of a Regional Regulation could only be carried out through a Judicial Review at the Supreme Court, however, in practice, and prior to the enactment of the Decree of the Constitutional Court Number 56 and 137, the

14 Maria Farida Indrati S., *Ilmu Perundang-undangan (Jenis, Fungsi, Materi Muatan) (The Science of the Laws and Regulations (Types, Functions and Content Materials)*, Yogyakarta: Kanisius, 2007. p.38.

15 Bagir Manan, *Teori Politik Konstitusi (Theories on the Constitutional Politics)*, Jogjakarta: FHUII Pers, 2003, p. 133.

16 *Op. Cit*., Nimatul Huda, p.169.

Government through the Ministry of Home Affairs conduct most of the annulments.

Stages for Preparing the Program for the Formulation of Regional Regulations (*Propemperda*)

Based on the Law on the Formulation of the Laws and Regulations (*UU PPP*), the stages for the planning of a Provincial and Regency/Municipality Regional Regulations shall be performed through the Provincial and Regency/Municipality Prolegda (after this shall be referred to as *Propemperda*).[17] The Program for the Formulation of Regional Regulations (*Propemperda*) encompasses the programs for the Drafting of Regional Regulations under the name of Ranperda, the regulated materials, and its correlations to other laws and regulations. The materials mentioned above are in the form of explanations on the concept of the Provincial Drafts of the Regional Regulations (*Ranperda*) that covers: *a. the background and objective of the formulation; b. targets to be achieved; c. main ideas, scope, or object to be regulated; and d. extent and aims of the regulation*.[18] The materials need to go through a series of reviews and harmonization activities and presented in an academic paper.[19]

The Provincial Regional House of Representatives and the Provincial Government (*after this shall be referred to as DPRD and Pemda*) undertakes the preparations for the Program for the Formulation of Regional Regulations (*Propemperda*). The Program for the Formulation of Regional Regulations (*Propemperda*) is legislated for 1 (one) year based on the scale of priorities in the development of the Drafts of the Regional Regulations (*Ranperda*).[20] In preparing the Program for the Formulation of Regional Regulations (*Propemperda*), the list of the Drafts of the Regional Regulations (*Ranperda*) must be prepared based on the following:[21]

- as instructed by the higher Laws and Regulations;
- the regional development plan;
- the implementation of the regional autonomy and duties to assist; and
- the aspiration of the communities in the region.

17 Article 40 of the Law on the Formulation of the Laws and Regulations (*UU PPP*), stipulates that the planning of a Regency/Municipality Regional Regulation is an effective mutatis mutandis of the provisions on the planning for the formulation of the Provincial Regional Government.

18 Article 32 of Law Number 12/2011.

19 *Ibid*., Article 33.

20 *Ibid*., Article 34.

21 *Ibid*., Article 35.

The preparation of the Program for the Formulation of Regional Regulations (*Propemperda*) between the Regional House of Representatives (*DPRD*) and the Regional Government (*Pemda*) is coordinated by the Regional House of Representatives (*DPRD*) through the organs of the Program for the Formulation of Regional Regulations (*DPRD*) that handles explicitly the legislation affairs, which is the Regional Regulations Development Body (*Bapemperda*).[22]

As stipulated in Article 52 of Government Regulation Number 12/2018 on the Guidelines for the Preparation of the Code of Conduct of the Regional House of Representatives at the Provincial, Regency and Municipality Levels, several authorities are held by the Regional Regulations Development Body (*Bapemperda*) in preparing the Program for the Formulation of Regional Regulations (*Propemperda*), among them are:

- preparing the draft of the program for the formulation of Regional Regulations (*Perda*) that lists the drafts of all the Regional Regulations (*Perda*) based on their scale of priorities in the development of the Regional Regulations, as well as their reasons, for every fiscal year of the Regional House of Representatives (*DPRD*);
- coordinate the preparation of the Program for the Formulation of Regional Regulations between the Regional House of Representatives (*DPRD*) and the Regional Government;
- organize the Drafts of the Regional Regulations (*Ranperda*) from the Regional House of Representatives (*DPRD*) that were proposed by the Regional Regulations Development Body (*Bapemperda*) based on the designated priority programs;
- provide considerations towards the proposal to prepare the Drafts of the Regional Regulations (*Ranperda*) that were put forward by the Regional House of Representatives (*DPRD*) and the Regional Government that is separate from the program for the development of the Regional Regulations.

The Drafts of the Regional Regulations (*Ranperda*) that would be included in the proposal for the Program for the Formulation of Regional Regulations (*Propemperda*) could originate from the Regional House of Representatives (*DPRD*) or the Head of the Region. The Drafts of the Regional Regulations (*Ranperda*) that originated from the Regional House of Representatives

22 This Government Regulation replaces Government Regulation Number 16 Year 2010 on the Guidelines for the Preparation of the Regional House of Representatives Regulations on the Code of Conduct of the Regional House of Representatives, and the body is named the Regional Legislation Body.

(*DPRD*) or the Head of the Region shall include an explanation, or information, and/or an academic paper. In certain circumstances, the Regional House of Representatives (*DPRD*) or the Head of the Region could propose a Regional draft Regulation that is separate from the Program for the Formulation of Regional Regulations (*Propemperda*) that has been legislated.[23]

Within the Regional Government (*Pemda*), the formulation of the Program for the Formulation of Regional Regulations (*Propemperda*) is coordinated by the Legal Bureau and could include the participation of the related vertical agency, which in this case is the Regional Office of the Ministry of Law and Human Rights. The Regional House of Representatives (*DPRD*) and the Regional Government (*Pemda*) then regulates the guidelines for the formulation of the Program for the Formulation of Regional Regulations (*Propemperda*) at each respective agency through the Regulation of the Regional House of Representatives and the Regulation of the Head of the Region.[24] The agreement between the Regional House of Representatives (*DPRD*) and the Regional Government (*Pemda*) on the formulation of a Program for the Formulation of Regional Regulations (*Propemperda*) was decided on, and legislated, during a Plenary Meeting of the Regional House of Representatives (*DPRD*) and was regulated through a Decree of the Regional House of Representatives.[25] The Program for the Formulation of Regional Regulations (*Propemperda*) may include an extensive cumulative list that comprises of: *a. the effect of the Supreme Court's ruling; and b. the Regional Budget at the Provincial level*.[26] In certain circumstances, the Provincial Regional House of Representatives (*DPRD*) or the Head of the Region are able to submit the Draft of the Provincial Regional Regulation that are outside of the Program for the Formulation of Regional Regulations (*Propemperda*) in order to handle the following situations:[27]

- in resolving extraordinary circumstances, incidences of conflict, or natural disasters;
- the impact of cooperation with other parties; and
- other circumstances that require an urgent Drafting of a Regional Regulation that could be agreed upon by the organs of the Regional House of Representatives (*DPRD*) that handles the legislation and law affairs explicitly.

23 Article 81 of Government Regulation Number 16/2010.
24 Article 36 Paragraph (4) and (5) of Law Number 12/2011.
25 *Ibid*., Article 37 (1) and (2).
26 *Ibid*., Article 38 (1).
27 *Ibid*., Article 38 (2).

In order to guarantee accountability, transparency and public participation, the Regional House of Representatives (*DPRD*) and the Regional Government (*Pemda*) must disseminate the information on the Program for the Formulation of Regional Regulations (*Propemperda*). The dissemination of information is performed from the formulation stage of the Program for the Formulation of Regional Regulations (*Propemperda*), formulation of the Draft Regional Regulation, deliberations on the Draft Regional Regulations until the Regional Regulation is legislated.[28] The purpose of the dissemination of information is to provide information and/or obtain inputs from the communities and the stakeholders. The information is disseminated jointly by the Regional House of Representatives (*DPRD*) and the Regional Government (*Pemda*) at the Provincial or Regency/Municipality levels, under the coordination of the organs of the Regional House of Representatives (*DPRD*) that handles the legislation affairs.[29]

Supervision on the Preparation of the Program for the Formulation of Regional Regulations (*Propemperda*)

The Program for the Formulation of Regional Regulations (*Propemperda*) plays an essential role in assessing the development of the laws in the regions. The Program for the Formulation of Regional Regulations (*Propemperda*) is made up of the planned Regional Regulation (*Perda*) that would be developed within one government administration period, and that could be broken up into yearly programs.[30] Article 1 Number 13 of the Minister of Home Affairs Regulation Number 80 Year 2015 on the Formation of a Regional Law Product, stipulates that: *The Program for the formulation of a Regional Regulation (Perda), which hereinafter shall be called Program for the Formulation of Regional Regulations*

28 In the definition provided in Article 922 Paragraph (1): "dissemination" is defined as an activity in delivering information to the communities on the Regional Legislation Program, the Draft Regional Regulation at the Provincial Level, or the Draft Regional Regulation at the Regency/Municipality levels that has been prepared, deliberated, and legislated so that the community may provide their inputs or opinions on the Regional Regulation, or so that they may understand the Regional Regulation at the Provincial level or the Regional Regulation at the Regency/Municipality levels that have been legislated. The dissemination of information on the Regional Regulation is performed by such means as the electronic and/or print media.

29 *Ibid*., Article 93 (1).

30 Moh Mahfud. MD, *"Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi" (The Debate on the Constitutional Laws After the Amendment of the Constitution)*, Jakarta, LP3ES, 2007

(Propemperda), is a program planning instrument for the formulation of a Regional Regulation (Perda) at the Provincial level and the Regional Regulation (Perda) at the Regency/Municipality levels that are prepared in a planned, integrated and systematic manner.

The formulation of the Regional Regulations (*Perda*) comprises of 3 (three) main processes, which are made up of: *a. the Regional Regulation (Perda) planning process, b. the deliberation and joint approval process, c. the verification and dissemination of the Regional Regulation (Perda)*,[31] The (*Propemperda*), therefore, is still in the first phase. Hence, the Program for the Formulation of Regional Regulations (*Propemperda*) is not merely a document containing a list of Regional Regulations (*Perda*), but on an operational level, the Program for the Formulation of Regional Regulations (*Propemperda*) is a document that contains a list of Regional Regulations (*Perda*) that are to be drafted by the Regional Government and/or Regional House of Representatives (*DPRD*).[32] Given the fact that the Program for the Formulation of Regional Regulations (*Propemperda*) plays an essential role in the formulation of a Regional Regulation (*Perda*), therefore, it has several objectives and functions, such as:[33]

- Provide an objective overview of the general condition of the issues in the formulation of Regional Regulations;
- Determine the scale of priorities in the preparation of the long, mid and short term draft Regional Regulations to be used as a standard guideline in the formulation of a Regional Regulation;
- Establish synergy among institutions with authority to formulate a Regional Regulation (*Perda*);
- Accelerate the process of formulating a Regional Regulation by focusing on the preparation of the Regional draft Regulation according to the designated scale of priorities;
- Serve as a control tool in the formulation of the Regional Regulation.

Similar to the National Legislation Program (*Prolegnas*), the Program for the Formulation of Regional Regulations (*Propemperda*) also contains

31 Yuliandri, *Asas Pembentukan Peraturan Perundang-Undangan Yang Baik (The Principles of Good Formulation of the Laws and Regulations)*, Jakarta: Rajawali Pers, 2009.

32 Bambang Iriana Djajaatmadja, *"Penyusunan dan Pengelolaan Prolegda" (The Preparation and Management of the Regional Legislative Program)*. Modul Bintek Prolegda, BPHN, 2007.

33 A.A. Oka Mahendra, *"Reformasi Pembangunan Hukum dalam Prespektif Peraturan Perundang-undangan" (Law Development Reform within the Perspective of the Laws and Regulations)*. Jakarta: Depkumham RI, 2006.

the program to formulate the regional Laws and Regulations. In the formulation process, the core materials that shall be regulated are determined along with their relations to the other laws and regulations.[34] In terms of budgeting, the Program for the Formulation of Regional Regulations (*Propemperda*) is useful in that it provides an overview of the priority finances for the formulation of the Regional Regulation (*Perda*).

The Regional Regulation (*Perda*) that are of high priorities would, of course, be given priority in terms of its funding. Hence, Article 34 Paragraph (3) of the Law on the Formulation of the Laws and Regulations (*UU PPP*) stipulates that the Formulation and Verification of the Regional Legislative Program (*Prolegda*) (read: *Propemperda*) is carried out one year prior to the verification of the Draft Regional Regulation in the Regional Budget. Therefore, the financing for the formulation of a Regional Regulation (*Perda*) could be entered as a priority in the development of the laws in the region.

For the communities, the Program for the Formulation of Regional Regulations (*Propemperda*) could be used as a medium to encourage public participation in the planning of a Regional Regulation (*Perda*). The Program for the Formulation of Regional Regulations (*Propemperda*) could also serve as an instrument to receive the various inputs, in the form of suggestions, criticisms, countering concepts or the support by the people. As for the legislative and executives, the Program for the Formulation of Regional Regulations (*Propemperda*) could also be used to prevent the formulation of a Regional Regulation (*Perda*) that are, by nature, reactionary towards certain conditions.

Therefore, the Central Government, in this case, the Minister of Home Affairs, are able to conduct supervision on the Program for the Formulation of Regional Regulations (*Propemperda*) at the Provincial level from its earliest phase, and the Governor, as the representative of the Central Government in the region is also able to supervise the Program for the Formulation of Regional Regulations (*Propemperda*) of the Regional Regulation (*Perda*) at the Regency/Municipality levels. The authority of the Governor is regulated through Article 1 Paragraph (2) letter b of Government Regulation Number 33/2018 on the Implementation of the Duties and Authorities of the Governor as the Representative of the Central Government: *In performing its development and supervisory duties, the*

34 *Op. Cit*. Jimly Asshidiqie, Perihal, p. 260.

Governor, as the representative of the Central Government is responsible for: performing monitoring activities, evaluating and supervising the administration of the regional government at the regency/municipality levels within his/her region. By referring to this provision, it is possible to infer that the special duty of the Governor is to guide facilitation and consultation activities, including in the formulation of the Program for the Formulation of Regional Regulations (*Propemperda*) and the Regional Regulation (*Perda*).

Through this role, it is expected that the problematic content materials in the Regional Regulations (*Perda*) could be identified at the earliest phase. Hence, the development and supervisory duties in the preparation of the Program for the Formulation of Regional Regulations (*Propemperda*) could be performed through the following:

- Creating an inventory of the content materials in the Regional Regulations that originated from Regional Government (related Offices/Local Government Agencies), as well as the Regional House of Representatives (*DPRD*) with authority to propose an initiative on a Regional Regulation;
- Analyzing and evaluating the scale of priorities and the content for the regional legislation program;
- Deliberating on the issues on the regional legislation program;
- Monitoring to ensure that the Program for the Formulation of Regional Regulations (*Propemperda*) is not in conflict with the higher provisions;
- Identifying the Regional Regulations (*Perda*) that may have been prepared separately outside of the Program for the Formulation of Regional Regulations (*Propemperda*);
- Providing suggestions on the priority Drafts of the Regional Regulations (*Ranperda*), particularly on the Regional Regulations (*Perda*) that are developed based on the instructions of the higher laws and regulations.

These efforts ultimately serve as the basis for the Ministry of Home Affairs or the Governor, in accordance to their authorities, to carry out development and supervision activities on the formulation of the Regional Regulations (*Perda*). The development and supervision activities include, among others:

First, Developing an Inventory of the Regional Law Products. The purpose of developing an inventory of the products of the laws and regulations is to obtain a preliminary overview of the direction to be taken in the

formulation of the laws and regulations in the regions. The creation of a preliminary inventory is expected to generate an overview of the Drafts of the Regional Regulations that are required by the communities in the regions, in order to improve their prosperity and welfare. Furthermore, an inventory is required as a preliminary material in the formulation of the draft Program for the Formulation of Regional Regulations (*Propemperda*) in the following year. The purpose is to ensure that there is continuity between the draft law product and the law products that have been previously formulated.

Second, Developing an Inventory for the Drafts of the Regional Regulations (Ranperda) from the offices/local government agencies. The development of an inventory by the Regional Government's legislation team has not been optimum. This situation occurs because each office within the Regional Government have not performed regular and planned preparations of the Drafts of the Regional Regulations (*Ranperda*). The preparation for the Drafting of the Regional Regulations (*Ranperda*) tends to be random and incidental. Hence, it has not been included in the programs or schedules for the formulation of the existing Drafts of the Regional Regulations (*Ranperda*).

Third, analysis, consultations, and evaluations on the scale of priorities for the Program for the Formulation of Regional Regulations (Propemperda). The less than optimum inventory activities by the Program for the Formulation of Regional Regulations (*Propemperda*) team had been influential towards the formulation of the Program for the Formulation of Regional Regulations (*Propemperda*). The Head of the Region and the Regional House of Representatives (*DPRD*) will legislate the Program for the Formulation of Regional Regulations (*Propemperda*) that is jointly formulated through the participation of the Legal Bureau, and the Regional Regulation Formulation Agency (*Bapemperda*) of the Regional House of Representatives (*DPRD*). The Regional Government and the Regional House of Representatives (*DPRD*) must determine the scale of priorities in the preparation and formulation of the Drafts of the Regional Regulations (*Ranperda*) shown in the matrix for the Program for the Formulation of Regional Regulations (*Propemperda*) and must firmly implement them when developing the Drafts of the Regional Regulations (*Ranperda*). The development of the Drafts of the Regional Regulations (*Ranperda*) would regulate the implementation process, which regulation it originated from, or whether the Drafts for the Regional Regulations

(*Ranperda*) would be stipulated as a Program for the Formulation of Regional Regulations (*Propemperda*) or as a non-Propemperda.

The Ministry of Home Affairs/Governor has the authority to remind the executive and the legislative in the regions to implement the scale of priorities in the development of a Regional Regulation so that the presence of Drafts of the Regional Regulations (*Ranperda*) that is outside of the Program for the Formulation of Regional Regulations (*Propemperda*) could be minimized. The Ministry of Home Affairs/Governor must provide rooms for consultations in preparing the Program for the Formulation of Regional Regulations (*Propemperda*) in the regions. The commitment and willingness of all parties are necessary to ensure that the preparation and formulation of the Drafts of the Regional Regulations (Ranperda) that is in line with the Program for the Formulation of Regional Regulations (*Propemperda*).

Fourth, Promotion and Dissemination of Information on the Program for the Formulation of Regional Regulations (Propemperda) to the Related Parties (Stakeholders). In practice, many parties are still clueless about the Program for the Formulation of Regional Regulations (*Propemperda*). The Regional Government employees think that the Program for the Formulation of Regional Regulations (*Propemperda*) is an activity to analyze the existing Regional Regulations. In fact, many of them think that the Program for the Formulation of Regional Regulations (*Propemperda*) is a list of all the Regional Regulations that have been enacted. This lack of knowledge would, of course, result in the lack of interest on the side of the Regional Government to prepare a Program for the Formulation of Regional Regulations (*Propemperda*).

The Law on the Formulation of the Laws and Regulations (*UU PPP*), as explained above, stipulates that the Regional Government must prepare a Program for the Formulation of Regional Regulations (*Propemperda*). The participation of the related parties (stakeholders) becomes imperative. The aforementioned stakeholders include representatives from the regional government institutions, the vertical institutions, the private sector, as well as the non-government organizations. This is no easy feat, as often, it is difficult to determine the most appropriate stakeholder because of the diversity of the communities in the region.[35] However, this should not be

35 *Op.Cit*., Yuliandri.

used as a reason to shun away from performing the activity mentioned above.

Fifth, Coordination and the Executive and Legislative Elements in the Region. The executive and legislative elements must enhance their coordination in preparing the Program for the Formulation of Regional Regulations (*Propemperda*). Currently, a sectoral-ego seems to exist, thus resulting in the parties declining to bear the responsibilities, most notably the responsibilities relating to the (*Propemperda*). The decision to determine which parties from each institution that would be responsible for the activity is stipulated in the Law on the Formulation of the Laws and Regulations (*UU PPP*). Oversight from the preparation phase of the Program for the Formulation of Regional Regulations (*Propemperda*) is needed in order to formulate sustainable Regional Regulations. Should the Drafts of the Regional Regulations (*Ranperda*) that is proposed through the Program for the Formulation of Regional Regulations (*Propemperda*) is considered to be lacking in relevance or is inaccurate, it must be immediately returned for revisions. Hence, the possibilities of any errors in the formulation of the Regional Regulation (*Perda*) could be minimized from the earliest stage.[36] Given the fact that the duties of the Regional Government within the framework of the regional autonomy has become increasingly complex, serious attention must be given to the formulation of a Regional Regulation, including Regulations of the Head of the Region and the Decrees of the Head of the Region. The consultation, harmonization, rounding, and strengthening processes of the draft on the Regional Regulation (*Perda*) is, therefore, a necessity.[37]

Synchronization and harmonization in the formulation of the laws and regulation could be defined as an effort or activity to synchronize (make it to be in sync) and to harmonize (to create harmony) between one law and regulation with other laws and regulations that are of the same level (horizontal) or hierarchical (vertical) in nature.[38]

36 *Op.Cit*. Nimatul Huda, Pengawasan...p.106.

37 *Ibid*., p.107.

38 Maria Farida Indrati.S, *Meningkatkan Kualitas Peraturan perundang-undangan di Indonesia (Improving the Quality of the Laws and Regulations in Indonesia)*, Jurnal Legislasi Indonesia Vol 4 No.2-June 2007, Jakarta: Directorate General of Laws and Regulations, Ministry of Law and Human Rights of the Republic of Indonesia, 2007, p.25.

Sixth, Improving the Quality of the Drafts of the Regional Regulation (Ranperda) that has been Stipulated in the Program to Formulate the Regional Regulations (Propemperda). The Regional Governments have not given serious attention towards the Program to Formulate the Regional Regulation (*Propemperda*). The region has become accustomed to developing a Regional Regulation (*Perda*) based on a one-sided assumption, either from the legislative as well as the executive. It is, therefore, even more, essential to develop a Program to Formulate the Regional Regulation (*Propemperda*), as it would provide a list of the priority legislation that has been developed in the region. Furthermore, a majority of the Drafts of the Regional Regulation (*Ranperda*) that have been stipulated in the scale of priorities in the Program to Formulate Regional Regulation (*Propemperda*) are still incomplete and not integral. The Drafts of the Regional Regulation (*Ranperda*) that are listed in the Program to Formulate the Regional Regulation (*Propemperda*) should be a Draft of the Regional Regulation (*Ranperda*) that is complemented by an academic paper and the complete draft.

If this were to be successfully implemented, then the Program to Formulate the Regional Regulation (*Propemperda*) could become an alternative and preventive means in developing Regional Regulations (*Perda*), thus making the repressive action of an annulment through judicial review as the final mechanism in the Regional Regulation oversight.

3. Conclusion

Based on the above narrative, it can be concluded that:

One, based on the Law on the Formulation of the Laws and Regulations, the Regional Government (*Pemda*) and the Regional House of Representatives (*DPRD*) must enact the Program to Formulate the Regional Regulation (*Propemperda*) on a five-year or a yearly basis. The Program to Formulate the Regional Regulation (*Propemperda*) must contain the priorities for the yearly formulation of a Regional Regulation (*Perda*) along with the required budget that must be stipulated in the Regional Budget.

The Central Government could no longer perform two, Oversight that is more focused on the repressive effort that leads to an annulment of a

Regional Regulation (*Perda*). Hence, through the Program to Formulate the Regional Regulation (*Propemperda*), the Government can carry out oversight activities on the Regional Regulations (*Perda*) from the planning stage as a form of a preventive supervision action.

Three, preventive supervision is seen as being more effective in preventing the annulment of a Regional Regulation (*Perda*). Through the development function of the Ministry of Home Affairs and the Governor, as the representative of the central government in the region, it is expected that the planning and formulation of a Regional Regulation (*Perda*) be in accordance to the provisions stipulated in the Laws and Regulations. To optimize the role of the Government in providing consultations, preparation for the Program to Formulate the Regional Regulation (*Propemperda*) through harmonization and synchronization should be done from the planning phase.

Four, identification of any possibilities of deviations or violations in the Laws and Regulations could become an essential input for the region in developing the Regional Regulations (*Perda*). Good planning qualities could prevent the emergence of conflicts on the norms and higher losses, both materially as well as immaterially.

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Minister of Home Affairs Regulation Number 80 Year 2015 Daerah on the Development of Law Products

IX

Content Material for the Nagari Regulation Based on the Rights of Origin According to Law 6 of 2014

Feri Amsari, Charles Simabura and Beni Kurnia Illahi

1. Introduction

The issuance of Law Number 6 Year 2014 on Villages has resulted in significant legitimacy towards the administration of the village government. This legitimacy is realized by regulating the authority of the village through the laws and regulations.

Article 19 of the Laws on Villages states that there are 4 (four) authorities held by a village:

- authority based on the rights of origin;
- village-scale local authority;
- the authority delegated by the Government, Provincial Government, or the Regency/Municipality Regional Government;
- other authorities delegated by the Government, Provincial Government, or the Regency/Municipality Regional as stipulated in the provisions of the laws and regulations.

Of the four village authorities, two are deemed interesting because they are not authorities that are obtained through the delegation of authority by the Central and Regional Governments but are based on the elaborations from the provisions in the 1945 Constitution. As regulated in Article 18B Paragraph (2) of the 1945 Constitution that stipulates the State shall acknowledge the homogeneity of societies with customary laws along with their traditional rights; hence, the two authorities of a village that are based on the rights of origin and the village-scale local authority are authorities that are beyond the authorities of the Central and Regional Governments.

According to Enrico Simanjuntak, this provision is the state's acknowledgment and respect towards the village as an integrated customary law community.[1] Of the two village authorities, the village authority that is based on the rights of origin is one that relates to the state's respect towards the constitutional rights of the customary law communities.

1 Enrico Simanjuntak, *Pengujian Peraturan Daerah dan Peraturan Desa Pasca Perubahan UU Pemerintahan Daerah dan UU Desa (Assessing the Regional Regulations and Village Regulations After the Amendment of the Law on Regional Government and the Law on Villages)*, Jurnal Konstitusi Vol. 13, Number 3, Constitutional Court of the Republic of Indonesia, Jakarta, 2016, p. 645.

Article 20 of the Law on Villages stipulates that the implementation of the village authority based on the rights of origin shall be set and maintained by the village itself. In practice, the implementation of the village authority based on the rights of origin is carried out through the formulation of a village regulation in which the legal basis is regulated by the Regulation of the Regent/Mayor that comprises of a list of authorities that fall under the authority of the village to set and maintain.

Similar to other laws and regulations, Article 14 of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations also stipulates the content material of a Regional Regulation for implementing the regional autonomy, co-administration duties, and to take into consideration the special conditions of the region. Just as other Regional Regulations, the content materials for the Village Regulations in West Sumatera should also be regulated, mainly because the regulation that shall be regulated is on the authority of the village based on the rights of origin. Every regulation that shall be implemented would have an impact on the lives and livelihood of the customary law communities.

The content materials that could be regulated in the village regulations based on the rights of origin have been determined. Article 2 of the Regulation of the Minister of Villages, Development of Disadvantaged Regions and Transmigration Number 1 Year 2015 on the Guidelines of Authority Based on the Rights of Origin and the Village-scale Local Authority, stipulates the scope of authority based on the rights of origin of a village encompasses:

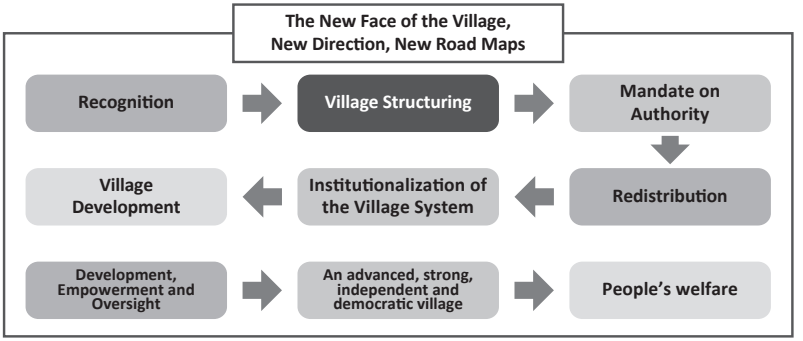
- organization system of the Village instruments;
- organization system of the customary communities;
- fostering of the community institutions;
- fostering of the customary institution and laws;
- management of the Village lands or lands belonging to the Village under the local terminology;
- management of the bengkok customary lands (village lands that are cultivated to pay the salaries of the village officers);
- management of the pecatu customary lands (village land given by the indigenous people to the public official for as long as the official is in office);
- management of the titisara customary lands (village lands where the products are used to fund the village activities);
- development of the role of the village communities.

The provision strengthens the position of the customary law communities in managing their villages. Article 4 of the Regulation of the Minister of Villages, Development of Disadvantaged Regions and Transmigration Number 1 Year 2015 stipulates that the Government, Provincial Government, and Regency/Municipality Government must acknowledge, respect and protect the authority based on the rights of origin of the village government.

With the presence of the authority to regulate based on the right of the origin, the position of the village government has been transformed into a hybrid government, which is a combination of the self-governing community and the local self-government. According to M. Silahuddin, the village government could no longer be described as a government organization that is located within the regency/municipality government system (local state government).[2] Salahuddin believes that the situation occurs because the Villages now have stronger sovereignty over their positions and roles in regulating and managing the villages. The development model that once followed the government-driven development system or community-driven development system has now shifted towards the village driven development system.[3]

This could be observed through Scheme 1 below:

Scheme 1[4]



2 M. Silahuddin, *Desa Membangun Indonesia, Buku 1 Kewenangan Desa dan Regulasi Desa (Development of Indonesia by the Villages, Book 1 The Authority of the Villages and the Village Regulations)*, The Ministry of Villages, Development of Disadvantaged Regions, and Transmigration of the Republic of Indonesia, Jakarta, 2015, p. 9.

3 *Ibid*.

4 *Ibid*., p. 10.

The above scheme explains that the Law on Villages has a somewhat revolutionary enthusiasm in structuring the village government through two principles of village government the principles of recognition and subsidiarity. The two principles differ from the principles of decentralization and residuality that were previously applied in the administration of the village government. Silahuddin states that the principles of decentralization and residuality were applied when villages were still considered to be "a part of the regional government," thus their authority ends at the regency/municipality levels.[5] In other words, the village only received the residue (remains) of the region, such as residual authority as well as residual financing in the form of the Village Allocation Funds.[6] However, through the Law on Villages, the villages can self-regulate their authority through the village regulations.

The village regulations must be effectively and professionally developed based on the rights of origin. Therefore, as had been mentioned at the beginning of this paper, just as in the formulation of the laws and regulations, the concept of the content materials is also required in the formulation of the village regulations. In West Sumatera, the village government is known by the term "the *nagari* government administration" that is grounded on the Minangkabau cultures and customs, which are distinct from any other customary law communities. Kurnia Warman noted that the *nagari* government administration is a customary government administration that stems from the tribal governance system.[7] The tribal governance systems assimilated and formed the *nagari* government administration. Therefore, it can be said that the *nagari* government administration originated from several smaller groups that merged into one larger group.

2. Topic of Discussion

2.1. Types and Content Materials of the *Nagari* Regulations

Before the Dutch colonization, the *nagari* was administered using the traditional government system that was based on the territorial units

5 *Ibid*. p. 11.

6 *Ibid*.

7 Kurnia Warman, *Hukum Agraria Dalam Masyarakat Majemuk (The Agrarian Law in a Plural Society)*, Cooperation between HuMa, KITLV- Jakarta, and the Van Volenhoven Institute, Jakarta, 2012, p. 15.

and according to the ancestral lineage. Zenwen Pador said that mostly the *nagari* was ruled by a group of tribal leaders of same authorities who are unified into one council.[8] Furthermore, Renske Biezeveld said that the *nagari* is a "mini republic" that is community based (self-governing community) and with its government administration (autonomous).[9] As a mini republic, the *nagari* has its democratic government instruments that are made up of the executive, legislative and judicative elements and the various phases of formation that could determine it to be a *nagari*.

According to Chairil Anwar, the phases in the formation of a nagari is implied in the saying *nagari nan ampek* (the nagari that is four), and *koto nan ampek* (the *koto* that is four) that is often shortened into *koto ampek* (the Four *Koto*).[10] This illustrates the four phases in the formation of a nagari, beginning with the formation of the *taratak, dusun, koto,* and finally the *nagari*. The *Taratak* is a freshly cleared area where the people of the nagari tend their paddy fields and fields together. The *taratak* is usually located on certain strategic lands, which are generally flatlands, near a water source, fertile, and safe from the threats of wild animals.

M. Rasjid Manggis Datuak Radjo Panghoeloe said that in its development, the kinship system of the *taratak* became more complicated because of the growth in population and a large number of new settlers. The economic and territorial zones began to expand and developed into independent hamlets. Datuak Radjo Panghoeloe went on to say that when the population density of the hamlets escalated, the only option would be to form new *tarataks*. After the new tarataks were established, the *tarataks* began to grow, and by using the same process, newer hamlets were then formed. The network among the autonomous hamlets formed a community known as the *koto*.[11]

The *koto*(s) already had their genealogical groups or independent tribes with their leaders, but their numbers were not sufficient to fulfill the

8 Zenwen Pador, *Kembali Ke Nagari: Batuka Baruak Jo Cigak? (Returning to the Nagari: Batuka Baruak Jo Cigak?)*, Padang: The Legal Aid Institute of Padang, 2002, p. 2.

9 Didik Sukriono, Op.Cit., p. 97.

10 Chairil Anwar, *Hukum Adat Indonesia: Meninjau Hukum Adat Minangkabau (The Indonesian Customary Laws: Reviewing the Customary Law of the Minangkabau)*, Jakarta: Penerbit Rineka Cipta, 1997, p. 23.

11 M. Rasjid Manggis Dt. Radjo Panghoeloe, *Sejarah Ringkas Minangkabau dan Adatnya (A Brief History into Minangkabau and its Customs)*, Jakarta: Mutiara Sumber Widya, Penabur Benih Kecerdasan, 1987, p. 81.

requirements for the formation of a *nagari*.[12] The *Koto*(s) are no longer bound by its *nagari* of origin in performing most of its activities. The next phase is the formation of a *nagari*, which is an expansion of a *koto*, by improving the community structure within the *koto*. The number of genealogical groups that are equivalent to a tribe had exceeded three groups; hence, there was a need to construct a customary hall where the customary council could assemble.[13]

Anthropologically, the *nagari* is a holistic integration of the various social and cultural orders. Hence, the *nagari* is an integrated customary law community with its original structure that is based on the special rights of origin.[14] This means that the *nagari* is a form of government administration that is based on the Minangkabau customs with a structure and arrangement that is specific to Minangkabau, while simultaneously implementing the general government administration within the framework of the Unitary State of the Republic of Indonesia.

In terms of jurisdiction, the Law on Villages already dedicates one special Chapter on the Village Regulations. Article 69 paragraph (1) of the Law on Villages, stipulates that the types of village regulations shall consist of the Village Regulations, joint regulations with the Village Chief, and the Regulations of the Village Chief. In Minangkabau, the Nagari Government Administration then enacts the regulations after it has been jointly deliberated with and approved by the *Nagari* Consultative Council. This concept serves as the framework and policy in the government administration and development of the *Nagari*.

The formulation of regulations that are grounded on the aspiration and participation of the community is a joint commitment of the Nagari Government administration, the *Nagari* Consultative Body and the customary law communities of the *nagari*. This joint commitment is expected to develop into a good democratization process for the people,

12 Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam Dalam Lingkungan Adat Minangkabau (The Implementation of the Inheritance System in Islam within the Minangkabau Customary System)*, Jakarta: Gunung Agung, 1984, p. 159.

13 *Ibid*. p. 159.

14 Saldi Isra dkk, *Otonomi Nagari Dalam Penguasaan Sumber Daya Alam di Nagari (The Autonomous Nagari in the Authority of the Nagari Natural Resources)*, Laporan Penelitian, Research Report, Padang: Cooperation between The Center for Constitutional Studies (PUSaKO) and the House of Representatives of the Republic of Indonesia, 2011, p. 1.

primarily because Article 69 paragraphs (9) and (10) has provided the customary law communities with the right to provide feedbacks and consultations in the Drafting of the *Nagari* Regulations.

When the *Nagari* Regulations are enacted, the people and the *Nagari* Consultative Council shall monitor the implementation of the *Nagari* Regulations that regulate the authority of the village based on the rights of origins. The purpose is to ensure that the local customary law communities could simultaneously monitor the implementation of the *Nagari* Regulations, as the *Nagari* Regulations were enacted to serve the interest of the communities within the *Nagari*.

As such, should there be violations in the implementation of the Nagari Regulations that has been enacted, the *Nagari* Consultative Council must deliver a warning and conduct a follow up on the violation as based on its authority. That is one of the oversight functions held by the *Nagari* Consultative Body. In addition to the *Nagari* Consultative Council, the people of the *nagari* also has the right to perform a participatory oversight and evaluation activities on the implementation of the *Nagari* Regulations as mandated in Article 68 paragraph (1) of the Law on the Villages.

Through such a design, the hopes and aspirations of the customary law communities, which is an autonomous *nagari*, could be realized. This is because as long as the formulation of the regulation is still under the authority of the *nagari*, the *Nagari* Regulations are formulated by the organs of the *nagari* for the sole purpose of improving the welfare of the people within the *nagari*. As in the perspective of the constitutional law, it is clearly stated that the enactment of the *Nagari* Regulations is an elaboration of the various authorities held by the *nagari*.

The norms within the Law on Villages, which is no less important when viewed from the aspects of the position and authority of the *Nagari* Government administration in formulating the *Nagari* Regulation, is that the *Nagari* Regulations must refer to the provisions specified in the higher laws and regulations and must not harm the public interests, which encompasses:[15]

- disruptions to the harmonious relations among the communities;
- disruptions to access to public services;
- disruptions to public peace and security;

15 See the General Explanation of Law Number 6 Year 2014 on Villages.

- disruptions to the economic activities in order to improve the welfare of the people in the *nagari*;
- discrimination against ethnicity, religion, belief, race, and groups, including gender.

Although Article 7 paragraph (1) of Law Number 12 Year 2011 on the Formulation of the Laws and Regulations does not list the Village Regulation in the hierarchy of the laws and regulations, however, Article 8 paragraph (2) of Law Number 12 Year 2011, in fact, confirms that the Laws and Regulations as specified in paragraph (1) is recognized and is legally binding as long as it is instructed by the higher Laws and Regulations, or formulated based on authority.

Furthermore, Article 8 paragraph (2) confirms that the phrase "based on authority" means the implementation of specific government affairs that are following the Laws and Regulations. Based on the aforementioned provisions, the Law on Villages determines that the village government could formulate Village Regulations.

Just as other laws and regulations, village regulations must also have the content materials that would be regulated. Ni'matul Huda believes that the content materials within the Village Regulations (whatever their terminologies would be in every region, for example, *nagari* in Minangkabau, gampong in Aceh, etc.) must incorporate:[16]

- the existing authority based on the village rights of origin;
- the authority obtained through the higher laws and regulations on the village affairs;
- further elaborations from the laws and regulations and co-administration duties;
- other government affairs obtained through the laws and regulations that are delegated to the villages.

If viewed from the definitions in Article 69 and Article 70 of the Law on Villages, it is apparent there is not one single norm that regulates the content materials explicitly to be incorporated into the Village Regulations. Although it is not regulated as part of the laws and regulations, Law Number 12 Year 2011 stipulates that the content materials of every laws and regulation must be formulated based on the principles of appropriateness concerning the type, hierarchy, and content

16 *Ibid*., p. 253.

materials. The principle, therefore, implies that in formulating the laws and regulations, special attention must be given to the appropriateness of the content materials towards the type and hierarchical structure of the laws and regulations.

The content materials that are regulated through Article 88 paragraph (2) of the Law on Villages are those relating to the Regionally Owned Enterprises. Additionally, Article 73 paragraph (3) of the Law on Villages also expects the Regional Budget to be regulated through the village regulations.

In addition to the village regulations, as had been elaborated above, there are also the Village Chief Regulation and the Joint Regulation of the Village Chiefs. The Village Chief Regulation is an implementing regulation on the Village Regulation. Whereas, the Joint Regulation of the Village Chiefs is a regulation of the Village Chiefs in establishing cooperation with other villages.

The content materials of the village regulations are regulated through the Regulation of the Ministry of Home Affairs Number 111 Year 2014 on the Technical Guidelines for Village Regulations that was legislated on December 31, 2014. Table 1 explains the differences in the content materials for each regulation.

Table 1

No.	Type of Regulation	Content Materials
1	Village Regulations	Implementation of the authorities of the village and further elaborations from the higher laws and regulations
2	Joint Regulation of the Village Chiefs	Materials on cooperation between villages
3	Village Chief Regulation	Materials on the implementation of the village regulations, the joint regulation of the Village Chiefs, and the follow up from the higher laws and regulations

In a paper titled “Village Parliament, Democratization, and Several Legal Issues,” Moh. Mahfud MD states that several matters also need to be taken into consideration when formulating the content materials for the

village regulations, both in terms of the perspective of the village authority based on the rights of origins, as well as the village-scale local authority, as specified below:[17]

- The Village Regulation must not include materials on the criminal laws, both in the general, as well as, specific context. As in actuality, issues on the criminal laws must be positioned within the unification of the politics of laws. Furthermore, Village Regulations may only include the village administration laws that bind the village administrators with the people in the related village;
- The presence of the national politics of law that regulate the boundaries for the legal materials that need to be unified, and materials that may be left as dualistic, and even pluralistic, in line with each respective customary law communities and each respective village's awareness of the law.

In terms of content materials, further research on the Village Regulations or whatever name it may come by would lead to issues relating to the provisions on criminal punishments. This is because the norms that are specified in the Village Regulations correlate to the local wisdom and the aspects of life in the village, or encompasses the provisions on the customary laws that are accommodated through the village government administration.

Hence, penalties that are based on the customary law should also be regulated in the nagari regulations that are not part of the provisions on criminal punishments. For example, in Minangkabau, there is a customary punishment where a person is exiled from the social life of the community. This type of punishment could not, of course, be categorized as a criminal punishment.

2.2. Regulatory Issues on the *Nagari* Government Administration

The *nagari* government administration comprises of the village leaders who are assisted by the *manti* (trusted intellectuals), *malin* (religious figures), and *dubalang* or *hulubalang* (security). Based on the positive law, the *nagari* government administration is regulated in Article 1 paragraph

17 Moh. Mahfud MD, *Parlemen Desa, Demokratisasi, dan Beberapa Persoalan Hukum (Village Parliament, Democratization and Sevaral Legal Issues)*, Paper, in Ni'matul Huda, Op.Cit., p. 263.

(8) of the Regulation of the Province of West Sumatera Number 2 Year 2007 on the Principles of the *Nagari* Government Administration, which stipulates:

> *"The Nagari Government Administration is the execution of the Government Affairs by the Nagari Government Administration and the Nagari Consultative Council based on the origins of the Nagari within the boundaries of the Province of West Sumatera under the Unitary State of the Republic of Indonesia."*

Article 6 of the *Nagari* Regional Regulation states that the *Nagari* Government Administration is made up of the Wali *Nagari* (Guardians of the *Nagari*) and the Perangkat *Nagari* (Organs of the *Nagari*). The Organs of the *Nagari* comprises of the Secretary of the *Nagari* and other organs. The Secretary of the *Nagari* is a Civil Servant that fits all the requirements. On a broader sense, the *nagari* government administration is the entire administrative bodies and all of the organizations, the units and all the officials of the *nagari*. On a narrower sense, the *nagari* government administration is a leadership body that is made up of one or several persons, such as the wali *nagari*, the instruments of the *nagari*, the head of government affairs and the chief of the *jorong* (village), whose roles are to lead and determine the implementation of the duties of the *nagari*.[18] The structure of the *nagari* government administration is somewhat different from the structure of the *nagari* government administration within the previously elaborated traditional concept.

Article 26 paragraph 3 letter (b) of the Law on Villages and Article 55 letter (a) stipulates that one of the duties of the *nagari* government administration is to legislate the village regulations and deliberate as well as approve the draft village regulations through the Village Government Administration and the Village Consultative Council. The same situation also exists in the *nagari* in Minangkabau, as the administrator of the government the *nagari* must formulate a *nagari* regulation as long as the regulation is not in conflict with the interests of the public, and/or the provisions in the higher Laws and Regulations.

18 In regional autonomy, the elements that lead the nagari government administrations are the *niniak mamak* (elders), *alim ulama* (religious figures), *cadiak pandai* (intellectuals) and *bundo kanduang* (matrilineal elders/queen). These elements are associated into the existing institutions of the *nagari*, such as the Nagari People's Representative Body (BPAN), and the Customary and Sharia Consultative Body (BMAS) as the bodies that provide suggestions and recommendations to the wali *nagari*.

Therefore, the content materials are considered to be an essential aspect in the formulation of the nagari regulations by the organs of the *nagari*, mainly because the *nagari* regulations regulate the authorities of the *nagari* based on the rights of origin. The customary law community and its rights of origin could be said to conform with the development of the communities when it is acknowledged by the prevailing laws as a reflection of the ideal values within the community, be it the general or sectoral laws.

In its implementation at the Agam Regency and the Tanah Datar Regency, the content materials of the nagari regulations are not regulated through the regional regulations or other higher norms. This is because it is not easy to identify and formulate the authorities of a nagari, most specifically the authority of the *nagari* that is based on the rights of origins, both from the government administration, as well as, the cultural and customary issues points of view.

The Tanah Datar Regency is known as the "*luhak nan tuo*" (the place of origin) in Minangkabau that has a strong cultural characteristic, from the customary judiciary lead by the *Nagari* Customary Council to the customary law communities. Although the region already has a comprehensive customary organ, in terms of determining the content materials for the *nagari* regulation, many issues could still be found. There are proofs that the *nagari* government administration is still not appropriately administered. *First*, the Regional Government of the Tanah Datar Regency has not developed a list of authorities of the *nagari* that are based on the rights of origin. However, in 2016, the Regional Government of the Tanah Datar Regency formulated the authorities of the *nagari* by taking the norms stipulated in the Regulation of the Minister for Villages, Development of the Disadvantaged Regions and Transmigration of the Republic of Indonesia Number 1 Year 2015 on the Guidelines on the Authorities Based on the Rights of Origin and the Village-scale Local Authorities, unfortunately up to now this legal instrument has not been legislated through a Decree of the Regent.

Secondly, many of the legal instruments in the *Nagari* Regulations at the Tanah Datar Regency have not yet coordinated and evaluated the *Nagari* Regulations with the Regional Government. Only a few of the *Nagari* Regulations formulated by the *Nagari* Government Administration at the Tanah Datar Regency have been coordinated and evaluated by

the Regional Government, in this case, the Legal Unit of the Regional Secretariat of the Tanah Datar Regency. The issue is that on the one hand the Regional Government still does not have a normative standard on the list of authorities of the *nagari* based on the rights of origin, and on the other hand the *Nagari* Instruments, in this case, the Wali *Nagari* and the *Nagari* Consultative Council do not want any problems to arise in relations to the *Nagari* Regulations.

Thirdly, the difficulties faced by the regional government of the Tanah Datar Regency in classifying and identifying which are the authorities of the *nagari* based on the rights of origin and the local authorities on a *nagari* scale. The lack of clarity covers the boundaries or types of activities and actions that fall under the authority of the *nagari* based on the rights of origin. If this boundary on the authority could be resolved, then it would be easier to determine the content materials for the *nagari* regulations.

Fourth, according to Andi Rahman (Head of the Documentation and Laws and Regulations Sub Unit, Legal Division of the Regional Secretary of the Tanah Datar Regency), the *Nagari* Regulations are often in conflict with the higher laws and regulations, such as the Regional Regulations, the Government Regulations, as well as the laws. Several of the *nagari* regulations incorrectly regulate the provision on penalties, particularly in the inclusion of a provision on criminal punishments that are not permitted to be included in the content materials of a *nagari* regulation. Another interesting situation was found in a *nagari* in the Lintau region of the Tanah Datar Regency, where the *Nagari* Customary Council formulated regulations relating to the customary court that could impose sentencing of imprisonment at the nagari prison on a criminal case. Such content materials are not permissible to be regulated within the *nagari* regulation. This could only happen because the officials within the *nagari* government administration still lack the understanding of the laws and regulations.

Fifth, many materials are not regulated through the *nagari* Regulations. Some of the matters have been regulated beforehand through the Decree of the Nagari Customary Council, as the body that resolves customary cases within the nagari. Furthermore, the reason for the limited number of nagari regulations is because the organs of the nagari believe that issues which are considered to be customary do not need to be regulated into the nagari regulations.

Just like in the Tanah Datar Regency, the Agam Regency also find it challenging to determine the rights of origin that could be regulated into the *nagari* regulations. The similar situation occurs because the determination on the rights of origin is based on the classifications that are made by the Regional Government of the Agam Regency. The provision tends to create conflicts between the regional government and the nagari government administration. However, if the regional government fails to create a classification on the content materials for the *nagari* regulations that are based on the rights of origins, then there is a relatively high potential for the *nagari* regulations to conflict with the higher laws and regulations. According to Andi Rahman, the wishes of the Regional Government of the Agam Regency is that the customary provisions are not formalized into the laws and regulations, because customs is, by nature, "alive" (progressing) in line with the conditions of the community, just as the belief that exists in Minangkabau, "*adaik salingka nagari; pusako salingka kaum*" (customs is applied throughout the *nagari*; heritage is applied among the people). If the customary laws were to be formalized, then when it is faced with the national law regime, it would always be on the weak end and would tend to overlap with the higher laws and regulations.

In practice, the organs of the nagari government administrations are not accustomed to the positive provision, and this could also be felt in the formulation of the nagari regulations. According to the Regional Government of the Agam Regency, several of the *nagari* regulations on the *Nagari* budget, retribution, spatial planning and the government organization of the *nagari* has to be approved by the *wali nagari* (village chief) and agreed upon by the *nagari* Cosultative Council and then submitted to the Regent/Mayor through the Head of the Sub-district at the latest within 3 (three) days since its approval in order for it to be evaluated [Article 14 paragraph (1) of the Regulation of the Minister of Home Affairs Number 111/2014]. In practice, evaluations could only take place after the nagari regulation is legislated, which means that the evaluation itself is of little, or no, benefit. The issues that arise at the Tanah Datar Regency also occurred at the Agam Regency. The *nagari* regulations often include inappropriate punishments, may generate different interpretation, and challenging to implement. This condition had made the implementation of the *nagari* regulation difficult. Furthermore, the relations between the regional government and the nagari government administration are not always smooth, because the determination of the *nagari* regulation that is based on the rights of origin is often interpreted differently by the *nagari*

government administrations, who sees it as an intervention towards the customary affairs. The Regional Government's intervention is, in actuality, mandated by law to prevent contradictions between the *nagari* regulations and the positive law. Another issue is the human resources' lack of understanding of the laws and regulations and the diminishing understanding among the communities on the customary laws due to the development of the times. There are several nagari regulations at the Agam Regency worth noting, such as the nagari regulations on the performances of solo keyboard players, the market, establishment of the *Nagari* Consultative Council, land purchases, public orderliness, and retributions.

2.3. The Causes for the Problematic Content Materials of the *Nagari* Regulations

One of the issues on why the *nagari* regulations have not been well executed is in the determination of the nagari regulations that are based on the rights of origin. Even though the Law on Villages do not regulate the content material for the *nagari* regulations, but in terms of the types of the *nagari* regulations, it may be worth the effort to determine what content materials are appropriate and do not conflict with the higher laws and regulations. If the regional government can identify the rights of origins, the issue on the content materials could be resolved.

According to the Law on Villages, at the very least, the *nagari* regulations could regulate the following matters:

- The execution of the local customary laws;
- The preservation of the local social-cultural values;
- The management and preservation of the natural resources that are controlled by the customary laws; and
- The settlement of customary disputes based on the local customary laws on the region and that is following the principles of human rights.

Meanwhile, based on Article 19 and Article 103 of the Law on Villages, it is regulated that the Village and the Customary Village have four authorities, which are:

- the authority based on the rights of origin. This is different from the previous regulations that state, the current government affairs are based on the rights of origin of the village.
- The Village-scale local authority, where the village has the full authority

to regulate and manage its village. This is different from the previous regulations that state, government affairs that are the authority of the regency/municipality whose administration has been delegated to the village.
- The authority assigned by the government, provincial, regional government, or the regency/municipality regional government.
- Other authorities assigned by the Government, the Provincial Regional Government, or the Regency/Municipality Regional Government under the provisions in the laws and regulations.

The authority on origins and the village-scale local authority are not residual authorities delegated by the Regency/Municipality Government as once regulated in Law Number 32 Year 2004 on Regional Governments, and Government Regulation Number 72 Year 2005 on Village Governments. Therefore, the content materials for the *nagari* regulations that are based on the two authorities could be directly determined by the *nagari* government administration after the regional government determines which content materials could be regulated by the *nagari* government, and which could not.

Article 103 of the Law on Villages regulates the content materials that fall under the authority of the customary village. The regulations and their implementation by the government must be based on the original structure:
- regulation and management of the communal or customary regions;
- preservation of the social-cultural values of the Customary Village;
- settlement of customary disputes based on the prevailing customary laws of the Customary Village within a region that is in harmony with the principles of human rights by placing resolution through deliberation first;
- holding of a trial for peace by the Customary Village judiciary under the laws and regulations;
- maintaining the peace and orderliness of the communities within the Customary Village based on the prevailing customary laws of the Customary Village; and
- development of the existing customary laws in accordance to the social-cultural conditions of the community of the Customary Village.

The above regulation is further regulated in Article 2 of the Minister of Villages, Development of Disadvantaged Regions, and Transmigration

Number 1 Year 2015, which explains that the content materials for the village or *nagari* regulations may comprise of:

- Management of the village land treasury;
- Management of the village lands or lands belonging to the village in the local name/terminology;
- Management of the *bengkok* customary lands (village lands that are cultivated to pay the salaries of the village officers);
- Management of the *pecatu* customary lands (village land given by the indigenous people to the public official for as long as the official is in public);
- Management of the *titisara* customary lands (village lands where the products are used to fund the village activities);
- The roles of the village communities.

Referring to the aforementioned ministerial regulation, it is evident that the content materials for the nagari regulations are straightforward. The six points provide the nagari with the opportunity to regulate their wealth, most specifically the lands. If the norms that are contained in the laws and government regulations are seen as an implementing regulation, then the authority that would become the content material in the *nagari* regulation could provide more excellent prospects for the *nagari* to regulate various other affairs. The unsynchronized laws and regulations have generated more significant issues and debates in the final phase of the deliberations on the content materials of the *nagari*.

If the laws and regulations were to be complied with, the content materials in the nagari regulations need to be reinforced, expanded, and made manifest. The regional government, who has the authority to determine the content material of the *nagari* regulation that is based on the rights of origins, should immediately determine the affairs that could be regulated by the nagari. Hence, the nagari regulations would no longer rely on the delegation of authority as instructed by the higher regulations, and it would provide recognition towards the rights of origins of the *nagari* communities as well.

Allowing the *nagari* government to self-regulate based on the principles of the *nagari* communities is an essential element in strengthening the government at the lowest levels. Should any conflicts arise between the *nagari* regulations and the higher laws and regulations, the higher governments could use corrective mechanism (executive review) through

the harmonization forum on the laws and regulations. The *nagari* regulations should have been provided with the possibilities to petition for a judicial review at the Supreme Court. A judicial review at the Supreme Court would, of course, be open for debate because the *nagari* regulation is not included in the hierarchy of the laws and regulation. Even if it were possible, then the legal basis for it would be Article 8 of Law Number12 Year 2011 on the Formulation of the Laws and Regulations.

3. Closing

The content materials of the *nagari* regulations is an essential aspect in the formulation of the *nagari* regulation by the instruments of the *nagari*, mainly since the *nagari* regulations regulate the authorities of the *nagari* that are based on the rights of origin. The point of the matter is that the unity of the customary law communities and its rights of origins could be considered appropriate to the developments of the communities if its presence is recognized by the prevailing laws as a reflection of the values that are considered ideal within the communities. In this case, the laws would include the general laws as well as the sectoral laws, and even the regional regulations along with the traditional rights, which are acknowledged and respected by the relevant legal communities as well as the public in general, and that it is not in contradiction with principles of human rights.

The fact is, the new village laws do not provide a detailed elaboration on the types of authorities executed by the Villages. The authorities of the Village are only outlined and are still too general. Some examples are, in the management of the Village resources, government affairs, village chief election, determining the Village Consultative Council and other village organs, formulation of the village regulations, developing the organizational structure of the village instruments, self-regulating and self-managing the government affairs, and management of the village institutions.

The village also has authority over matters relating to planning and development. Through this authority villages can plan, execute, oversee and expand the development activities in their regions; manage and exploit the wealth of the village for the welfare of the people; and obtain sources

of income for the village. As for the Customary Village, the authorities are those that relate to government affairs and the communities based on the customary laws that are in harmony with the laws and regulations. It is, therefore, recommended that authorities of the village encompass the following:

- Regulating and implementing the government systems based on the local customary laws;
- Regulating and managing the natural resources that are controlled under the customary laws, such as the village land treasury, communal lands, customary forests, and other natural resources;
- Administering the local customary laws;
- Preserving the local social-cultural values;
- Managing and conserving the natural resources controlled by the customary laws; and
- Settling customary disputes based on the local customary laws of the region that is in harmony with the principles of human rights.

In relation to the authorities of the *nagari* that are based on the rights of origin, the writer suggests the regional government conduct a review on the rights of origins that could be regulated by the *nagari* by developing a guideline and list of authorities for the *nagari* that are based on the rights of origin through the Regulation of the Regent/Mayor, and by identifying all the requirements for the "*adat salingka nagari*" (customs that are only used in a specific region).

Capacity building for communities of the *nagari* is required in the formulation of the *nagari* regulation, also required is legal advocacy for the communities. It is necessary to have stringent regulations and boundaries on the issue of the *nagari* asset management by the *nagari* government administrations so as to make it easier to determine which are the contextual assets and the cross-sectional assets of the *nagari* government administration in order to quickly identify the nagari regulations that are based on the rights of origin.

The rights of origin need to be regulated in order to improve the role of the communities and build the legal culture among the people. However, when viewed from the context of government administration, the problem that may arise is that if the rights of origin were to be given priorities, the writer predicts there will be potentials for disharmonies in the government administration.

The Regional Government is expected to formulate the provisions or legal instruments in the form of Regional Regulations in order to clarify and evaluate the content materials of the *nagari* regulations in the region. The purpose is to prevent any conflicts from arising between the nagari relations that have been formulated by the *Nagari* Government administration and the higher laws and regulation, including to ensure that they do not disrupt the interests of the public. This means that before the *Nagari* Government could enact the Regulation, it must go through the legislation process and receive an approval from the Regional Government, in this case, the Regent/Mayor c.q. the Head of the Legal Division of the local Regional Secretariat.

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Authors

Kai Hauerstein is a lawyer from Germany and expert for legislative drafting and review with more than 18 years of experience managing, implementing, evaluating regulatory reform projects. In 2001, he first came to Indonesia and was part of a project team funded by the Asian Development Bank introducing Regulatory Impact Assessment and One Stop Shops on the national and sub-national level. He continued to work in Indonesia for other development partners and supported local governments drafting and reviewing sub-national regulations (PERDAS). Other long and short-term assignments in South East Asia were related to legislative drafting and review, Good Governance, legal, judicial, and administrative reform, private sector development, and regulatory/business environment. As a licensed lawyer, Kai Hauerstein is specialized in public and administrative law; German, Indonesian, and Cambodian law; human rights and refugee law, and conflict resolution. He is the author of various law books, articles, and legislative training manuals.

Bayu Dwi Anggono is the Director of The Center of the Pancasila and Constitution Study (PUSKAPSI) Faculty of Law, Jember University. He completed his doctorate in Law Science in 2014 at the Faculty of Law, University of Indonesia. He participated in the Leiden University Doctoral Sandwich Program (2012) in the Netherlands and CPG Spring School Scholarship (2015) in Germany. He lectures at the Faculty of Law, University of Jember and is a well-known speaker on various legal. Topics. As an author, he published several books, including, "Development Establishment of Laws in Indonesia "(Constitution Press, 2014) and published scientific articles and opinions in the mass media.

Feri Amsari is the Director of the Center for Constitutional Studies (PUSaKO) Faculty of Law, Andalas University. He is an Indonesian law and academic activist, lecturer in Constitutional Law. He actively writes in various local and national media. He also participates in multiple studies and leading journals accredited and indexed by Scopus. Besides, he is an active speaker on numerous media television with highly regarded expertise in the field of Constitutional Law. He started his legal education in the Faculty of Law of Andalas University and succeeded in obtaining a bachelor's degree in 2008. His master's degree was taken at the same university as the cumlaude

GPA. He continued with a master on comparative American and Asian law at William and Mary Law School, Virginia. He published several books including "Amendments to the 1945 Constitution through interpretation of Judges" (Rajawali Press); “Procedural Law of the Constitutional Court” (Secretary General and Registrar of the Indonesian Constitutional Court, 2009); “Building Indonesia from Regional Public Participation and Politics of Regional Budgets” (Jica-CSIS, 2007) as contributor; “Concurrent Elections” (2014) and “Judge Selection Process” (2015).

Oce Madril is a Lecturer of the Faculty of Law Gadjah Mada University and Head of the Center for Anti-Corruption Studies (PUKAT) Gadjah Mada University, as well as a Deputy Secretary General of the Indonesian Network for Clinical Legal Education (INCLE). He has been active in the Legal Aid and Consultation Center (PKBH) of the Faculty of Law, Gajah Mada University (UGM) and completed his Bachelor degree at Faculty of Law Gadjah Mada University (2007) as well as a Master and Governance program, Nagoya University Japan (2011) ,and Doctoral Program at the Faculty of Law, University of Gadjah Mada Yogyakarta (2018). His study interests include constitutional law, state administration, and anti-corruption.

Jimmy Z. Usfunan is a Lecturer in the Faculty of Law, Udayana University, by completing doctoral studies in the Doctoral Program of Law at Udayana University in 2015. In 2018, he attended the CPG's Summer School Scholarship, held at Goethe University, Frankfurt, Germany. He is active as a member of an Expert Team of several regency/city Regional Governments in Bali and the Selection Team of the Election Supervisory Board of the Province of Bali in 2018. He published in the Sustainable Partner Journal of Legislation (Ministry of Law and Human Rights) and the Rechtvinding Journal and National Law Magazine (BPHN). He is a resource person for several ministries/institutions/agencies/commissions and regional governments.

Charles Simabura is a lecturer for Constitutional Law at the Faculty of Law, Andalas University, and Researcher of the Center for Constitutional Studies (PUSaKO) at the same faculty. He graduated from the Faculty of Law at Andalas University in 2004 and obtained a Master of Law in 2009. He started his doctoral studies at the Faculty of Law, University of Indonesia. He is a facilitator for the Regional Regulation Program in collaboration with the Regional Government Innovation Foundation and Justice For the Poor Program funded by the World Bank. He was the program manager for

the West Sumatra Anti-Corruption Agency (BAKo) from 2006 to 2008 and worked as an intern for the Indonesian Corruption Watch (2004). Charles is active in various researches focusing on Constitutional Law, legislation, and state institutions. He has published a book entitled "Indonesian Parliament, Historical Trajectory and System" in 2011.

Agus Riewanto is a Lecturer for Constitutional Law at the Faculty of Law and the Postgraduate Program in Law at the Sebelas Maret University, Surakarta. He completed his doctoral degree cum laude at the Faculty of Law, Surakarta State University in 2012. He received an Islamic Law Postgraduate degree from UIN Yogyakarta (2003), a Bachelor Degree from the Sharia Faculty and Law Department Comparative Madrasah and Law from UIN Yogyakarta (2000) and a Bachelor degree from the Law Faculty UMY (2001) He served as Chair as well as a member of the General Election Commission (KPU) of Sragen Regency in Central Java Province (2003-2013) as well as public defender for YLBHI-LBH in Yogyakarta (1997-2000). He received the Intellectual Award Youth Nominator reward from the HIPMI DPD and KNPI DPD Central Java Province (2005). He is a well-known speaker at various international and national seminars. He wrote several books, journals, and more than 1,000 (one thousand) newspaper articles since 1998 in Kompas, Republika, Media Indonesia, Seputar Indonesia, Bisnis Indonesia, Suara Pembaruan, Sinar Harapan, Suara Karya, Kontan, The Jakarta Post, Koran Jakarta, Investor Daily, Joglosemar, Bernas, Solopos, Suara Merdeka, Wawasan, dan Kedaulatan Rakyat.

Ninik Hariwanti was the Director of the Litigation of Laws and Regulations of the Ministry of Law and Human Rights (2016-2018). She graduated from the law school at the University of Padjadjaran in 1983 and majored in Media and Communication Law at the Law School University of Melbourne in 2003. Now she is a lecturer on High School Litigation Law.

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Hanns Seidel Foundation
Wisma AMEX, 3rd Floor
Jl. Melawai Raya No. 7, Kebayoran Baru
Jakarta Selatan 12160, Indonesia
Tel: +62 21 2793 3103
e-mail: indonesia@hss.de
Online: southeastasia.hss.de/Indonesia
Facebook: Hanns Seidel Foundation Indonesia