

**JUDICIAL REVIEW PRESIDENTIAL REGULATION ON THE
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ABSTRACT

With the existence of Article 9 paragraph of Law no. 13 of 2022 which only provides restrictions that only the Law can carry out a Judicial Review of the 1945 Constitution of the Republic of Indonesia, and Judicial Review of Government Regulations and Presidential Regulations can only be carried out on Laws, will close the way for a possible Judicial Review of the Independent Presidential Decree to be carried out on the contrary to the 1945 Constitution of the Republic of Indonesia. This research uses a normative method with a qualitative approach. The approach used in this research is a statutory approach and a conceptual approach. In exercising attribution authority, it is possible that there may be a Presidential Regulation that exceeds the authority of a President, or could potentially become a tool for abuse of authority by the President. There is a need for a correction mechanism in the form of a Judicial Review of the Independent Presidential Decree on the 1945 Constitution of the Republic of Indonesia as a mechanism for public control.

Keywords: Judicial Review, Independent Presidential Decree.

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INTRODUCTION

President Republic of Indonesia in system government Presidential domiciled as Head Head A government that has duties and authorities regulated in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). This is stated clearly based on Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads "The President of the Republic of Indonesia holds governmental powers according to the Basic Law ". One of authority President in indeed power government the is form something Regulation President

Regulation President new known in 2004 with promulgation Law no. 10 of 2004 concerning Formation Regulation Legislation . Previously President only can form a Presidential Decree . However in Article 7 paragraph (1) letter d.UU no. 10 of 2004 has give One form new type regulation legislation that is regulation the president who hierarchy is at under Regulation President . That matter Then emphasized in Article 56 which states that " All Presidential Decrees , Ministerial Decrees, Governor Decrees , Regent / Mayor Decrees , or decision official other as intended in Article 54 which is in nature set , which is already There is before Invite Invite This applies , must be read regulations , throughout No contradictory with Invite Invite This ." Based on Article 56 Law no. 10 of 2004 here We Can categorize there is a presidential decree in the form of regulation emerging legislation before the year 2004 .

In Law 12 of 2011 concerning Formation Regulation Legislation , explained in Article 56 that The contents of the Presidential Regulation contain material which: ordered by law, material for implement Government Regulations, or materials for carry out the administration of government power. If we connect with authority President in formation regulation legislation , then Regulation President has 2 (two) bases formation , ie delegation and attribution (Perpres independent). However based on provision regulation legislation about formation regulation legislation determine that regulation president only can done testing (*Judicial Review*) of Constitution only done in the Supreme Court .

METHOD

Study This use method normative with approach in a way qualitative . According to Peter Mahmud Marzuki , research law normative is a process for find something rule laws , principles law , nor doctrines law To use answer issue facing the law .¹ On research law type this , often law conceptualized as what is written in regulation legislation or law conceptualized as rule or the norm which is benchmark behave considered human proper .²

Approach used in study This is approach legislation (statute approach) and approach conceptual (conceptual approach). Approach legislation done with examine regulation related legislation with issue the law under study . Approach conceptual done with learn views internal doctrines knowledge law , researcher will find ideas that give birth understandings law , concepts laws and principles relevant laws with issues faced .³

¹ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada, 2010), p. 35.

² Amiruddin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta:PT. Raja Grafindo Persada, 2006), p. 118.

³ *Op.Cit.* , p . 135.

DISCUSSION

Indonesia is a legal state, as is contained in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia common law state own characteristic that is every action well done by the government nor people based on law. That matter For prevent there is arbitrary action from government and people's actions according to will Alone.⁴

As a rule of law, everything aspect life in nation and state must be in accordance with system law national. One of element in system law national which is the inner pillar maintenance government is system regulation legislation. Legislation in English is legislation or in Dutch *wetgeving* or *gesetzgebung* in German, have understanding as following:

1. legislation as a formation process or forming process state regulations, both at the level center as well as at level area; And
2. legislation as all state regulations which constitute results formation regulations, both at level center as well as at level area.⁵

Function legislation No only give form to opinion current values and norms life in society, and neither only simply product state functions in the field arrangement. Authority President related with formation Regulation Legislation, is provision Article 5 paragraph (1) of the 1945 NRI Constitution which states that President set regulation government For carry out Constitution as it should be.

Regulation legislation in Indonesia has arranged in Constitution Number 12 of 2011 concerning Formation Regulation Legislation as has changed the last few times with Constitution Number 13 of 2022 concerning Change Second on Constitution Number 12 of 2011 concerning Formation Regulation Legislation.

Regulation Legislation is Formation Regulation Legislation is Regulation written that contains norm binding law in a way general and established or determined by state institutions or authorized official through established procedures in Regulation Legislation.⁶ A number of expert own different meanings about understanding from regulation legislation. Bagir Manan argued that that regulation legislation are:

- a. every decision written statement issued official or environment positions of authority containing rule Act characteristic behavior or tie general.
- b. is rules Act meaningful behavior provisions about rights, obligations, functions, and status or something order.

⁴ Bintan R. Saragih, "Peranan DPR GR Periode 1965-1971 dalam menegakkan Ketatanegaraan yang Konstitusional Berdasarkan UUD 1945" Disertasi (Bandung, Universitas Padjajaran, 1991). p 11.

⁵ Maria Farida Indrati, Ilmu Perundang-Undangan: Jenis, Fungsi dan Materi Muatan, (Yogyakarta; Kanisius, 2007), p 10.

⁶ Article 1 number 2 Law no. 12 of 2011 concerning Formation Regulation Legislation

- c. is existing regulations characteristic features general-abstract or abstract-general , meaning No arrange or No aimed at objects , events or symptom concrete certain .
- d. with take understanding in Dutch literature , regulations legislation common called with *wet in materiele zin* or also often mentioned with *algemeen verbindende voorschrift* .⁷

Attamimi say that is State regulations , at the central level and at the regional level , are formed based on authority legislation , OK nature attribution nor nature delegation .⁸

Authority delegation started from the constitution provides delegation arrangement to regulation below it that is Constitution . Constitution must created and determined by the institution representative the people (parliament) with agreement together executive . Furthermore institution representative people give delegation authority to institution executive (*legislative delegation of rule-making power*) For make arrangement more carry on from Constitution (*second legislation*) . Executive institutions / institutions executor based on the second legislation it is possible Again provide sub delegation to tertiary regulation. With authority such an arrangement so government with itself considered own freedom For Act or move in frame maintenance administration government For interest general . In matter this , without delegation too government considered authorized set rules below Constitution in a way independent , though No governed by law .⁹

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⁷Maria Farida Indrati Soeprapto, Ilmu Perundang-undangan: Jenis, Fungsi dan Materi Muatan, Jakarta: Kanisius, 2000. p. 10-11.

⁸Rosjidi Ranggawidjaja, Pengantar Ilmu Perundang-Undangan Indonesia, (Bandung;Mandar Maju,1998). p.19.

⁹Jimly Asshidiqie, Pengantar Hukum Tata Negara Jilid 2, (Jakarta:Sekjend dan Kepaniteraan MKRI, 2006) p.33.

which: ordered by law, material for implement Government Regulations, or materials for carry out the administration of government power. If we connect with authority President in formation regulation legislation , then Regulation President has 2 (two) bases formation , ie delegation and attribution (Perpres independent).

If Regulations President is delegation direct nor in frame operate Chapter from Laws and Regulations Government so If There is the party who feels There is something Regulation Contradictory President so use Article 9 paragraph (2) Law no. 13 of 2022 concerning Change Second on Law no. 12 of 2011 concerning Formation Regulation Determining legislation that “ Deep matter something Regulation Legislation below Constitution allegedly contradictory with Law , the test carried out by the Supreme Court” already appropriate .

On the other hand there are Regulation President created based on attribution President (Perpres independent) as head government in carry out maintenance power government . Authority attribution This is authority granted based on Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. With exists attribution the then it is very possible exists Presidential Decree conflicting independence with the 1945 NRI Constitution. However with exists Article 9 paragraph of Law no. 13 of 2022 which is only give limitation that can be done *Judicial Review* against the 1945 Constitution of the Republic of Indonesia only Laws , and *Judicial Review* Regulation Government as well as Regulation President only can done against the law, will close road For done *Judicial Review* to Presidential Decree As independent as possible just contradictory with the 1945 Constitution of the Republic of Indonesia.

No exists chance in do *Judicial Review* to Presidential Decree independent Of course just No fulfil principle Legal certainty . But Not yet Of course considered as emptiness law (*Rechtsvacuum*). About certainty law , Lord Lloyd stated that :

(Lord Lloyd in Mirza Satria Buana , Loc.Cit .) “...law seems to require a certain minimum degree of regularity and certainty of or without that it would be impossible to assert that what was operating in a given territory amounted to a legal system .”

Out of sight This can understandable that with No exists certainty law then people don't know What should he did and in the end arise final uncertainty give rise to violence (*chaos*) as consequence from indecisiveness system law . With thereby certainty law pointing to enforcement clear , fixed and consistent laws Where its implementation No can influenced by circumstances of its nature subjective .¹⁰ With thereby then that becomes a barometer certainty law is guarantee on obligation as well as right public .

¹⁰R. Tony Prayogo, Jurnal Legislasi Indonesia, Volume 13, Nomor 2, 2016, p.194

If we use terminology emptiness the law (*rechtsvacuum*) is can interpreted as “ emptiness norm law positive (*wet vacuum*) ”, terminology This intended For emphasize view that law No Once empty , because in law No only what is written in the law (*the written law*) , but also what is real applies in life public .¹¹

Emptiness norm law positive happens by existence imbalance between need practice with availability law positive . Emptiness law is something circumstances or incident Because There is things that haven't arranged Constitution so that Constitution No can executed in situations and circumstances certain .¹²

No There is understanding or standard definition about emptiness law (*rechtsvacuum*), however in a way literally can interpreted as following : Law or *recht* (Bld) According to Law Dictionary , *recht* (Bld) in fact objective means Constitution or law . Deep Grotius his book “*De Jure Belli ac Pacis* (1625)” states that “ law is regulation about guaranteed moral actions justice ”. Meanwhile, Van Vollenhoven in “*HetAdatrecht van Ned. Indie* ” revealed that “ law is something symptom in association turbulent life Keep going continuously in circumstances banging and banging without ceaselessly with symptoms other ”.¹³

From the explanation on so in a way narrow “ emptiness law ” can interpreted as “ an circumstances blank or absence regulation legislation (law) that regulates (certain) rules and regulations in society ”, so emptiness law in Positive Law more appropriate said as “ emptiness laws / regulations legislation ”. In preparation regulation legislation either by the Legislature nor Executive in fact need a long time , so at the moment regulation legislation That stated applies so things or desired situation regulated by regulations the Already changed . Besides That emptiness law can happen Because things or the circumstances that occurred Not yet arranged in something regulation legislation , or though has arranged in something regulation legislation However No clear or even No complete .¹⁴ However often considered emptiness law when exists need will action law However Not yet there is a legal instrument that regulates it , so results studies in the form of a possibility that hasn't happen No can interpreted as emptiness law .

In the world of science law naturally we are very familiar and understand adigium law *Hit recht hint achter de feiten aan* which mean law always limping chase changing times. No reproach , actually adage This show deficiency , weakness law . One reason or another , legal arranged based on past events , human tacit knowledge . Even in law criminal , a deed No can convicted If Not yet There

¹¹Daniel Mulia Djati, Dwi Jatmiko Cahyono, H Dedi Candra Wijaya, Orpa Lintin, Penafsiran Asas Kepastian Hukum Dan Kekosongan Hukum Dalam Keputusan Mahkamah Konstitusi Terhadap Undang- Undang Nomor 11 Tentang Cipta Kerja (Kajian Keputusan Nomor 91/PUU-XVIII/2020), Fakultas Hukum Universitas Pamulang, p. 591

¹² Ibid

¹³ Ibid

¹⁴ Ibid

is rule the law . This known with the term " *nullum delictum noella* . " penna sin previa lege poenalli ". Principle legality in law criminal . By common , very rare happen rule law applied based on foresight .¹⁵ However very artful unfortunate if adigium the made as A backrest in the formation process regulation legislation .

There is a number of adigium of course support in preparation something applicable legislation become road go out based on possible possibilities just happen . Adigium " *Inde datae leges be fortior omnia posset* " which means that law created , if not a strong person will have power No limited , as well *Lex p rospicit , non respicit* - law see to front , no to behind . Of course just law created and valid to everyone , right to groups certain . So that No only society in general but it also applies for shaper law That Alone . Have an idea for do repair to lack on regulation legislation based on the possibilities obtained from results study Can held . Of course We understanding that regulation legislation become sign for government or ruler in operate power his government so that avoid " power No limited " . From the side government as shaper law , in operate government must see to front and run What should done (*Gouverner c'est prevoi*) .

With based on the description above , then can concluded exists need For give possibility testing regulation president against the 1945 NRI Constitution. Possible the only can done with change norm Article 9 paragraph (2) Law no. 13 of 2022 concerning Change Second on Law no. 12 of 2011 concerning Formation Regulation Legislation . So that open chance for party of course has "Legal Standing" for submit lawsuit *Judicial Review* to Presidential Decree self - assessed contain norm arrangement outside authority a President , beyond authority a President , or allegedly can become tool abuse authority by the President .

CONCLUSION

Presidential Decree independent is Regulation President created based on attribution authority President as head government For carry out the administration of government power based on Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. However in operate authority the possible exists Regulation President who goes above and beyond authority a President , or allegedly can become tool abuse authority by the President . Needed exists mechanism correct form *Judicial Review* Presidential Decree Independent against the 1945 Constitution of the Republic of Indonesia as mechanism control public .

¹⁵ <https://www.kompas.id/baca/opini/2022/06/23/tinjauan-masa-depan-dalam-hukumb> diakses tanggal 25 November 2023.

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