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## Reposition of the Promulgation for Indonesian Legislation

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### Abstract

Promulgation of legislation is one of the central processes of legislation making but is often forgotten by the legislators. Arrangements for the promulgation of a legislation have changed in line with the development of regulations governing the legislation making. Legislation that should not have been promulgated became promulgated and had an impact on increasing the number of legislation in Indonesia. This paper aims to place promulgation back to its proper position (reposition). The research method of this article is in the form of normative juridical research which fully uses secondary data or in the form of written legal norms. The results of the study found that legislation outside the hierarchy regulation as stipulated in Article 7 paragraph (1) of Law no. 12 of 2011 does not need to be promulgated because it is not a general binding legislation. Repositioning promulgation also requires repositioning of the understanding that the regulation outside the hierarchy of legislation cannot apply externally, namely they only apply to the Ministries/Government Institutions because the essence of promulgation is to enforce statutory regulations on the public.

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## A. Introduction

According to Article 1 No. 1 of Law Number 12 in The Year 2011, the Legislation Making is the forming of legislation which include the stages of planning, drafting, discussing, ratifying or establishing, and promulgation.<sup>1</sup> The stages or process of forming laws affects the quality of a law. A fine law can be produced if the content material that is conceptually regulated meets philosophical, juridical, and sociological values, and is processed in accordance with the procedures specified in the legislation. Maria Farida Indrati Soeprapto stated:

"... To make a fine law and regulation, it is necessary to have careful and in-depth preparation, including knowledge of the content material to be regulated in the legislation, and knowledge of how to put the content material in a law briefly but clearly, with a fine language and easy to understand, arranged systematically, without leaving procedures in accordance with the rules of Indonesian language in the phrasing of the sentence."<sup>2</sup>

But nowadays, the promulgation process may be underestimated. Law No. 12 of 2011 on the Legislation Making regulates the Promulgation in the State Gazette of the Republic of Indonesia, Supplement to the State Gazette of the Republic of Indonesia, State Gazette of the Republic of Indonesia, and Supplement to the State Gazette of the Republic of Indonesia.

Promulgation of legislation in the State Gazette of the Republic of Indonesia, Supplement to the State Gazette of the Republic of Indonesia, or State Gazette of the Republic of Indonesia and Supplement to the State Gazette of the Republic of Indonesia is carried out by the Minister of Law and Human Rights.<sup>3</sup> The Minister of Law and Human Rights or an appointed official signs the promulgation of legislation stipulated by the People's Consultative Assembly, DPR, Regional Representative Council, Supreme Court, Constitutional Court, Judicial Commission, ministers, agencies, institutions or commissions at the same level established by Law or

Government by order of the Law, or based on authority by affixing signatures to the text of the Legislation.<sup>4</sup> The issuance of the State Gazette of the Republic of Indonesia, Supplement to the State Gazette of the Republic of Indonesia, State Gazette of the Republic of Indonesia, and Supplement to the State Gazette of the Republic of Indonesia in the form of loose sheets shall be carried out within a maximum period of 14 (fourteen) days from the date of promulgation of the Legislation.<sup>5</sup>

In its amendment to Law No. 13 of 2022 on the Second Amendment, part of Law No. 12 of 2011 that was amended and received fair attention was only on the ministry institution that implemented the promulgation. In fact, by understanding the essence of promulgation, it can address the problems of existing legislation. The changes referred to can be found in the provisions of Art. 85 of Law No. 13 of 2022 regarding the authority of State Institutions to carry out Invitations. The changes referred to in Article *a quo* can be seen directly and tangibly with the promulgation of Law No. 13 of 2022 still being implemented by the Minister of Law and Human Rights (Menkumham), Yasonna H. Laoly, while the next Law, which is Law No. 14 of 2022 on the Establishment of South Papua Province (LN of 2022 No. 157, TLN No. 6803) has been promulgated by the Minister of State Secretary (Mensetneg), Pratikno.

The discussion of Promulgation has received renewed attention at this point with the second amendment of Article *a quo* as already mentioned. Referring to the provisions of Art. 85 of Law No. 12 of 2011, the authority of promulgation lies with only 1 state institution, namely the Minister of Law and Human Rights. Furthermore, the authority has been with the Minister of Law and Human Rights since the enactment of Law No. 10 of 2004 on the Legislation Making, precisely at Art. 48. The provisions of Art. 85 of Law No. 12 of 2011 itself have undergone changes in Law No. 15 of 2019 with changes from "*ministers who carry out government affairs in the field of law*" to "*ministers or heads of institutions that carry out government affairs*"

1 Article 1 Law No. 12 of 2011 on Legislation Making.

2 Maria Farida Indrati Soeprapto, *Science Legislation*, Yogyakarta: Canisius, 1998, p. 134.

3 *Loc Cit*, Article 147.

4 *Ibid* Article 153.

5 *Ibid* Article 154.

in the field of Formation of Legislation,” but actually still lies within the Minister of Law and Human Rights.<sup>6</sup>

In the provisions of Art. 85 of Law No. 13 of 2022, the authority of the promulgation lies within 2 state institutions, namely the Minister of State and the Minister of Law and Human Rights. This division of authority raises discussions and debates about the dualism of promulgation authority. More specifically, regarding the competence of the institutional functions of the two ministries and their rationalization.

The provisions of Art. 85 of Law No. 13 of 2022 are as follows:

“(1) *The promulgation of legislation in the State Gazette of the Republic of Indonesia as referred to in Article 82 letter a to letter c shall be carried out by the minister who organizes government affairs in the field of state secretariat.*

(2) *The promulgation of legislation in the State Gazette of the Republic of Indonesia as referred to in Article 82 point d and the State Gazette of the Republic of Indonesia as referred to in Article 83 shall be carried out by the minister or head of the institution that organizes government affairs in the field of Legislation Making.”*

vis-à-vis Art. 82 and Art. 83 of Law No. 12 of 2011:

Article 82

*“The legislation promulgated in the State Gazette of the Republic of Indonesia, include: Government Regulations in Lieu of Law; Government Regulations;*

*Presidential Regulation; and Other legislation according to the prevailing legislation must be promulgated in the State Gazette of the Republic of Indonesia.”*

Article 83

*“The legislation promulgated in the State Gazette of the Republic of Indonesia include legislation which according to the applicable legislation must be promulgated in the*

*State Gazette of the Republic of Indonesia.”*

By connecting the provisions regarding the above promulgation, it can be seen that based on the amendment of Art. 85 in Law No. 13 of 2022, the Minister of State is authorized to promulgate the Law, Government Regulation, and Presidential Regulation. Meanwhile, the authority of the Minister of Law and Human Rights to promulgate is over other legislation that must be promulgated in the State Gazette (LN) and State Gazette (BN), or in other words all types of legislation other than the Law, Government Regulation, and Presidential Regulation.

Today, several studies show several problems of legislation in Indonesia. Ida Bagus Rahmadi in his book *“Grand Design of Indonesian Regulatory Reform”* states some descriptions of regulatory conditions in Indonesia are as follows:<sup>7</sup>

*Hyper-regulation* (too much regulation). The legislative information system at the Cabinet Secretariat of the Republic of Indonesia shows that as many as 1,618 laws have been issued from 1945 to 2017, not including approximately 60,000 legislation products at the central, provincial, district, and city levels not to mention other types of legislation.<sup>8</sup>

*Contradict each other*. Many legislation have conflicting content materials both vertical and horizontal in nature, causing confusion and uncertainty in their implementation.

*Overlap*. Many overlapping legislation in the sense that the same issue is governed by one or more (leading to many) legislation.

*Multiinterpretation*. Many regulations contain content material that is multiinterpretative. The result of multi-interpretation regulations is the emergence of uncertainty and differences in their implementation so that they are vulnerable to the possibility of being misused for certain interests.

*Disobey the principle*. There are still many regulations in Indonesia that are not in accordance with the principles or theories

6 Minister in field of Formation Regulation Legislation is originally intended to be a new Government body, however since it has not been formed, hence the aforementioned assignment is carried out by the Minister of Law and Human Rights. *Legislation Making*, Law No. 12 of 2011, State Gazette of 2011 No. 82, Addition State Gazette No. 5234, Art. 99A.

7 Ida Good Rahmadi Supancana, *An Idea About Grand Design of Indonesian Reformation Regulation* (Jakarta: Penerbit Universitas Katolik Atmajatya, 2017), page. 2-4.

8 Secretariat Cabinet Republic Indonesia, “System Information Legislation”, <http://sipuu.setkab.go.id/>, accessed 4 March 2023.

of forming good laws. It was also found that regulation is inconsistent with the underlying policy whereas as understood that regulation is a policy instrument. Disobedience of principles is also evident in the various terminology used, including its understanding, which can cause confusion among those who base their actions on these regulations.

Ineffective. Research shows that there is ineffective implementation of legislation. The reason is first, inadequate preparation in the implementation of a law both from the aspect of socialization and the aspect of preparing the organizational structure of human resources in terms of competence and funding support, second, because of weaknesses in the public consultation process. Parties who should be asked for their views and aspirations, for example, affected parties and other stakeholders including interested parties do not know or cannot accept the provisions as a result of which parties arise who oppose its implementation which results in low compliance and ultimately makes legislation ineffective.

The Center for Law and Policy Studies (PSHK) in research on regulations shows that in 2019 alone, PSHK identified 8,311 ministerial/institutional-level regulations. This figure does not count the hundreds of new regulations issued until 2022.<sup>9</sup> This means that there are excessive regulations present in the types of regulations regulated in Article 8 paragraph (1) of Law 12 of 2011, namely *"regulations stipulated by the People's Consultative Assembly, House of Representatives, Regional Representative Council, Supreme Court, Constitutional Court, Audit Board, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions at the same level established by Law or the Government by order of the Law, Provincial People's Representative Council, Governor, Regency / City People's Representative Council, Regent / Mayor, Village Head or equivalent"*.<sup>10</sup> Director of the Center for Anti-Corruption Studies

at Gadjah Mada University, Zainal A Mochtar also argued that *"the problem of regulation in Indonesia lies in the No. of Ministerial Regulations made and enforced. The term that is trying to be popularized about the reality of most of these regulations is "obesity regulation" This ministerial regulation is the fattest and most problematic, should the regulation stop at the President so as to dampen the sectoral egos of the ministry"*.<sup>11</sup>

In this paper, we echo about the repositioning of promulgation for the types of legislation regulated in Article 8 paragraph (1) of Law 12 of 2011 to no longer be promulgated since actually the regulations in Article 8 paragraph (1) of Law 12 of 2011 are not legislation that apply outward.

Therefore, this study has two formulations of problems, *first* how to reposition the meaning of legislation for regulations in Article 8 paragraph (1) of Law 12 of 2011 and *second* how to reposition legislation for regulations in Article 8 paragraph (1) of Law 12 of 2011.

### Repositioning the Meaning of Legislation

The term 'legislation' was used by A. Hamid S. Attamimi, Sri Soemantri, and Bagir Manan. According to Hamid Attamimi, the term comes from the term *wettelijke regels* or *wettelijke regeling*, but the term is not absolutely used consistently. There are times when the term 'legislation' is used. The use of the term 'legislation' is more relevant in talking about the type or form of regulation (law), but in other contexts it is more appropriate to use the term legislation, for example in referring to the theory of legislation, the basics of legislation, and so on. Bagir Manan gave an overview of the meaning of legislation as follows:<sup>12</sup> Legislation are written decisions issued by authorized officials or office environments, containing rules of conduct that are generally binding; Rules of conduct that contain provisions regarding rights, obligations,

<sup>9</sup> Navel Study Law and Policy, *Reform Studies Regulation in Indonesia*, [https://pshk.or.id/wp-content/uploads/2019/11/PSHK\\_KAJIAN-REFORMASI-REGULASI-DI-INDONESIA.pdf](https://pshk.or.id/wp-content/uploads/2019/11/PSHK_KAJIAN-REFORMASI-REGULASI-DI-INDONESIA.pdf), accessed on 5 March 2023

<sup>10</sup> Loc. Cit, Article 8 (1) Law No. 12 of 2011.

<sup>11</sup> Zainal Arifin Mochtar, Paper Delivered in Forum Conference National Constitutional Law, in Jember, Javanese East date 16-17 September 2016.

<sup>12</sup> H. Rosjidi Ranggawidjaja, *Introduction Science Legislation Indonesia*, Bandung: PT. Mandar Forward, 1998, p. 17.

functions, status, or an order; Rules that have general-abstract or abstract-general characteristics, meaning that it does not regulate or is not aimed at certain concrete objects, events or symptoms.<sup>13</sup>

In relation to this definition, Bagir Manan also stated that legislation have a greater role day by day, especially in Indonesia. This is due to the following:<sup>14</sup> 1. Legislation are legal rules that are easy to be recognized (identified), easy to find, and easy to trace. As a written rule of law, its form, type and place are clear. So does the lawmaker; 2. Legislation provide more real legal certainty because the rules are easy to identify and easy to re-discover; 3. The structure and systematics of legislation are clearer so that it is possible to be re-examined and tested both in formal aspects and material content; 4. The establishment and development of legislation can be planned. This factor is very essential for developing countries including building new legal systems that suit the needs and development of society.

Next, P. J. P. Tak in his book *Rechtsvorming in Nederland*<sup>15</sup> interprets legislation (law in the material sense) is any written decision issued by an authorized official containing rules of conduct that are generally binding. Legislation is the embodiment of the will of the holder of the highest sovereign power, so legislation is the highest law and is the only source of law.<sup>16</sup> From this understanding, it can be interpreted that outside of legislation there are no other sources of law. This definition is referred to by Bagir Manan in providing an explanation of the legislation as explained above.

A Hamid S. Attamimi also limits the definition of legislation as all legal rules formed by all levels of institutions in a certain form, with certain procedures, usually accompa-

nied by sanctions and generally accepted and binding on the people.<sup>17</sup> T.J. Buys defines legislation as binding regulations in general (*algemeen bindende voorschriften*). Later, J.H.A. Logemann added the definition to the term *naar buiten werkende voorschriften*, so that the definition became generally binding and applicable regulations.<sup>18</sup> Being able to be implemented to the public means that the regulation is addressed to the community (general) not addressed to its formation (inward).

From some of the definitions above, the characteristics and limitations of legislation can be identified as follows: Legislation are in the form of written decisions, so they have a certain form or format; Established, determined, and issued by authorized officials, both at the central and regional levels. What is meant by authorized officials is officials who are determined based on applicable regulations, either based on attribution or delegation. A lawmaker is obliged to know correctly the type of rule and how logical it is to do so. Adequate knowledge of this can avoid errors in the selection of regulatory forms that are not in accordance with applicable legal provisions. In the context of law, the authority granted by the state both stipulated in the constitution and regulations under it must always be accountable by implementing institutions/organs. Therefore, there are organs that directly obtain authority from the constitution or other legislation, but there are also authorities delegated by one state organ to another; The legislation contains rules of behavior patterns. So, legislation is regulating (*regulerend*), not one-time (*einmalig*); Legislation are binding in general because they are intended for the public, meaning they are not addressed to a specific person or individual (not individual).

Ridwan HR stated that legal norms can be general-abstract, concrete-individual, general-concrete, and individual-abstract. The Law is interpreted as an abstract general legal norm. The general meaning of abstract is

13 Bagir Manan, "Terms about Formation Regulation Legislation in Development of National Law" (Paper Delivered at Meeting Scientific about Position Bureaus Law/Unit Work Department/ LPND in Legal Development, Jakarta, 19-20 October 1994), p. 13.

14 Bagir Manan, *Basics Legislation Indonesian* Jakarta: Ind. Hill, co. 1992, p. 8.

15 Bagir Manan, *Op. Cit.*, p. 3.

16 Bagir Manan and Kuntana Magnar, *Some Issues of Indonesian Constitutional Law*, Bandung: PT. Alumi, 1997, Pp. 248.

17 A. Hamid S. Attamimi, *The Role of the Decree of the President of the Republic of Indonesia in the Administration of the State*, Dissertation, Faculty of Law, University of Indonesia, 1990, p. 61.

18 Amiroeddin Sharif, *Op. Cit.*, p. 32-33.

characterized by the following elements:<sup>1920</sup> Time that do not only valid at a certain moment; Places that do not apply to a particular place; People who do not apply to certain people; Legal facts that are not only aimed at certain legal facts.

Therefore, as a form of repositioning the understanding of legislation, it is necessary to firmly re-establish that what is included in legislation is that they can be limited to legislation that apply outward in line with the meaning of legislation by D.W. Ruiters which states that legislation consist of several elements, namely legal norms (*rechtsnorm*); apply outward (*naar buiten werken*); and is general in the broadest sense (*algemeenheid in ruime zin*). Legal norm means a norm that contains orders (*gebod*); prohibition (*verbod*); *toestemming*; and liberation (*vrijstelling*). While it applies outward (*naar buiten werken*), namely in legislation, there is a tradition that wants to limit the application of norms only to those who are not included in government organizations, and is general in a broad sense (*algemeenheid in ruime zin*), namely the distinction between general - individual; abstract – concrete; Unspecified events – Certain events.

## Repositioning the Promulgation for Legislation in Article 8 Paragraph (1) of Law 12 of 2011.

### Definition of Promulgation

The proponent is the last part in the process of forming legislation before they have binding force and apply in the community. The use of the term “Promulgation” is a transition from the term “Announcement” which was last used during the transition period of the United States of Indonesia (RIS) to the Unitary State of the Republic of Indonesia (NKRI) and was officially abandoned with the enactment of Law No. 10 of 2004. The definition of promulgation is regulated at the latest in Art. 1 No. 12 of Law No. 15 of 2019, namely, “placement of legislation in the State Gazette of the Republic of Indonesia, Supplement to the State Gazette of the Republic of

Indonesia, State Gazette of the Republic of Indonesia, Supplement to the State Gazette of <sup>2122</sup>*the Republic of Indonesia, Regional Gazette, Supplement to Regional Gazette, or Regional News,”* and its provisions are regulated in Part IX of Law No. 12 of 2011 and its amendments.

The term Promulgation can be traced to the Dutch term, *Afkondiging*, which means “Notice” to the public.<sup>23</sup> In English, the term used is *Promulgation*, which means, “*The official publication of a new law or regulation, by which it is put into effect.*” Doctrinally, Prof. Maria Farida Indrati S. distinguishes Promulgation as formal notification with placement in special issues and Announcement as material notification to the general public.<sup>2425</sup>

The place where a law is promulgated is an official State issue, the types of which are regulated in Art. 81 Law No. 12 of 2011 as follows: State Gazette of the Republic of Indonesia; Supplement to the State Gazette of the Republic of Indonesia; State Gazette of the Republic of Indonesia; Additional State Gazette of the Republic of Indonesia; Regional Gazette; Additional Regional Gazette; or Regional News.

With reference back to Art. 82 and 83 of Law No. 12 of 2011, LN becomes the place of promulgation of laws, General Regulation, Presidential Decrees and other legislation regulated as such, along with BN which is the place of promulgation of such regulated legislation. Regarding the Supplement to the State Gazette (TLN) and the Supplement to the State Gazette (TBN), both contain an Explanation of the Legislation promulgated in LN and BN respectively. No less, official Regional Publications in the form of Regional Gazettees (LD) are intended for Provincial

21 Maria Farida Indrati S., *Legislation Volume II: Drafting Process and Techniques*, ed. Rev., cet. 1 (Yogyakarta: Kanisius, 2020), p. 185.

22 *Ibid.*, Pp. 188-189.

23 *Ibid.*, Pp. 185-186.

24 “Promulgation,” in *Black’s Law Dictionary*, ed. 11 (2019), available on: [https://www.westlaw.com/Document/I02fc1d23808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I02fc1d23808511e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0), accessed at 16 December 2022.

25 Indrati S., *Knowledge of Legislation Volume II...*, Pp. 186-187.

19 HR *State Administration Law*, p. 128.

20 *Ibid.*, p. 132.

Regional Regulations (Perda) and Regency/City Regional Regulations, Additional Regional Gazette (TLD) is intended for Explanation of Provincial and Regency / City Regional Regulations, and Regional News (BD) is intended for Governor Regulations and Regent or Mayor Regulations.<sup>26,27</sup>

Within the framework of legislation, the provisions of the Promulgation can be found in the Closing Provisions section, first in the last article of a law which states that the regulation takes effect on the date of promulgation or if otherwise specified in the relevant regulation so that it has binding legal force. Second, on the phrase, *“<sup>28</sup>In order that everyone may know it, order the promulgation (of this type of regulation) by its placement in (the place of promulgation),”* after the last article and before the signature of the Head of Government who ratifies or establishes the regulation and the Head of the State Institution authorized to promulgate. Through this phrase, it is implied that the fulfillment of the *formal legal fictie* that is the purpose of the promulgation, which is, everyone is considered to aware of the regulations that have been in force hence no one can reason not to aware of the applicable law and manipulate it as a forgiving reason for the actions taken.<sup>29</sup>

### Institutional Issues

In the explanation of the definition of Promulgation, it has been explained that the purpose of Promulgation is to fulfill the *formal fictie* of the law that gives legitimacy to the enforceability of a law and regulation. This is by remembering that the Promulgation is a formal and not substantial part in the process of Forming Legislation. Thus, the nature of the Promulgation is limited to administrative, but with legal consequences for the invalidity of a law if it is not fulfilled.

With the understanding that promul-

gation is formal-administrative, the discussion of what state institutions are authorized to promulgate seems to be a debate over unimportant legal issues. The author in this case emphasizes that the Institutional Issue in the Promulgation itself does not have a material effect, so that any state institution that does so as long as it is in accordance with applicable provisions remains valid. However, the discourse on Institutional Issues in Promulgation gains its weight when reviewed historically and institutionally.

The historical review provides background to the legal traditions that shaped the meaning of the Advocate as it applies today. Furthermore, a review of the institutional function provides a rationalization for why the Promulgation is in the state institution concerned in relation to the meaning of the Promulgation. Exposure to institutional functions will be useful as a reference when related to the role of state institutions in the process of forming legislation.

### Historical Aspects of Promulgation Period of Colonialism and Colonialism

The history of promulgation can be traced back to the Dutch colonial period, where at that time the promulgation was carried out by including the Regulations to be promulgated in a *Staatsblad van Nederlandsch-Indie* or *Bijblad* for the colonial territory of the Dutch East Indies.<sup>30</sup> The meaning of the *Staatsblad* itself is the Official Gazette, the same term used today. The same is true for <sup>31</sup>*Bijblad* which means Supplement to the Official Gazette. The <sup>32</sup>*Staatsblad* and *Bijblad* were explicitly stated by *van Nederlandsch-Indie* to state that these publications applied to Dutch colonial territories in the Dutch East Indies.

During the period of colonialism, the integral territory of the Kingdom of the Netherlands consisted of the Netherlands, the Dutch East Indies, Suriname, and Kurasao. Such a division of territories also influenced

26 Law No. 12 of 2011, Art. 84 verse (1) and verse (2).

27 Law No. 12 of 2011, Art. 86 verse (1) and verse (2).

28 Law No. 12 of 2011, Art. 87.

29 Refer to *Indonesian Constitution 1945 Amendment IV*, Art. 3, a self statement self Indonesian is a State of Law gives constitutional foundation to the above *law fictie*. See also: Indrati S., *Knowledge of Legislation Volume II...*, Pp. 187. See also: Soehino, *Governance Law: Technique Legislation Cet. 2* (Yogyakarta, Liberty, 1984), Pp. 92-93.

30 Mas Soebagio. *State Gazette Republic Indonesian As Place Promulgation Deep Fact*, (Bandung: Alumni, 1983), Pp. 3-4.

31 “Staatsblad” in Marjanne Thermorshuizen, *Dutch-Indonesian Legal Dictionary*, (Jakarta: Djambatan, 2002), Pp. 390.

32 “Bijblad” in *Ibid.*, Pp. 64.

Dutch colonial-era legislation, with Dutch lawmakers as the framers of laws with the highest position among the four regions of the Kingdom of the Netherlands. In the Dutch East Indies itself, lawmakers were authorized to make legislation to regulate the internal affairs of the Dutch East Indies with the highest type of "Regulation" or <sup>33</sup>*Ordonantie* passed by the Governor-General with the approval of the *Volksraad*.<sup>34</sup>

Regarding Promulgation or Announcement, it refers to the provisions of Art. 1 *Algemene Bepalingen van wetgeving voor Indonesië* (abbreviated AB) that the provisions of the King and Governor-General apply as laws (regulations) in the Dutch East Indies after being "promulgated" in the regulated manner. More detailed rules will be prepared in the <sup>35</sup>*Indische Staatsregeling* (abbreviated ISR) in the provisions of Art. 95 paragraph (1) and the framework of legislation regulated in Art. 96 (1):

Article 95 paragraph (1) ISR:<sup>36</sup>

"De algemeene maatregelen verordeningen (regeeringsverordeningen, *ordonanties*, *algemeene maatregelen van bestuur en wetten*) worden door den Gouverneur-Generaal afgekondigd en door den algemeenen secretaris of een der gouvernements-secretarissen *gewaarmerkt*."

Free translation:

"The general act regulations (Government Regulations, Acts, General Administration Acts and Legislation) are ratified by the Governor-General and promulgated by the secretary-general or one of the government secretaries."

33 J. Stroomberg, *Indian Netherlands 1930*, (Yogyakarta, IRCiSoD, 2018), Pp. 97.

34 *Ibid.*, Pp. 97, 99.

35 *Regulation Common about Legislation in Indonesia* [*Algemene Bepalingen Van wetgeving Voor Indonesia*], *Staatsblad* of 1847 No. 23, in *Set Regulation Legislation Republic Indonesian: Compiled According to Engelbrecht System*, (Jakarta: Ichtiar Baru-Van Hoeve and Intermedia, 1989), Art. 1.

36 *Constitutional Regulations in Indonesia During Dutch Rule* [*Indische Staatsregeling*], *Staatsblad* In 1855 No. 2 jo. *Staatsblad* 1925 No. 447, in W.A. Engelbrecht, E.M.L. Engelbrecht, Ed., *Book2 Law2, Law2, and Regulations2 and Constitution of 1945 of the Republic of Indonesia* [*De Wetboeken Wetten en Verordeningen Benevens de Grondwet van 1945 van de Republiek Indonesie*], (Jakarta: Soeroengan, 1960), p. 203, Art. 95 paragraph (1).

Promulgation Provisions in Article 96 paragraph (1), paragraph (2), and paragraph (3):<sup>37</sup> "(1) *Het formulier van afkondiging der regeeringverordeningen is als volgt*"; "(2) *Het formulier van afkondiging der ordonnanties is als volgt*"; "(3) *Het formulier van afkondiging der algemeene maatregelen van bestuur en wetten is als volgt*"

"(Handteekening van den Gouverneur-Generaal en van den algemeen secretaris of van een der gouvernements-secretarissen)."

Free translation (merged):

"The formulation of the Announcement of the above (Government Regulations/ Laws/ General Administration Actions and Legislation) is as follows"

"(Signing by the Governor-General and by the secretary-general or one of the government secretaries)."

Thus, information can be obtained that the promulgation during the Dutch East Indies period was carried out in the form of *Staatsblad* and / or *Bijdsblad* which was carried out by a Secretary General. Regarding the promulgation mechanism, the *Staatsblad* lists the year of issue code and the sequence number code, while the *Bijdsblad* only lists the sequence number code.<sup>38</sup>

The inviting mechanism still exists and applies in real force during the Japanese colonial period which regulates it in Law No. 40 *Osamu Seirei* No. 9 on the *Gun Seirei* dated 5, month 10, of Syowa 17 (2602). Based on the provisions of Art. 9 The Japanese Colonial Regulations, stipulated that "*Osamu Seirei* <sup>39</sup> and *Osamu Kanrei* were promulgated by attaching the original laws written in Nippon language to the notice board in *Gunseikan*. Likewise, *Syuurei*, *Koorei*, *Kooti*, *Zimukyokurei*, and *Tokubetuserei* were announced by pasting the original rules written in Nippon on the notice boards in their respective offices." In practice, in addition to using the method of pasting on the notice board, promulgation or in this case the announcement of regulations can also be done through *KAN PO* magazine or *Government News* as well

37 *Indische Staatsregeling*, in *De Wetboeken Wetten En Verordeningen...*, Pp. 203-204, Art. 96 verse (1), verse (2), and verse (3).

38 Soehino, *Constitutional Law...*, p. 94.

39 Soebagio, *Government Gazette...*, p. 30.



as containing the Japanese Colonial Regulations above in the Kan Po year I no. 4 months 10-2602.<sup>40</sup>

### Indonesia's Post-Independence Period

When Indonesia became independent, the promulgation still implemented pre-independence practices considering the unstable state situation as the background of the Transitional Rule II in the 1945 Pre-Amendment Constitution. Arrangements regarding the promulgation or promulgation of legislation are regulated in Government Regulation No. 1 of 1945 concerning "*About and Entry into Force of Government Legislation*" [Title not changed], as the first General Regulation of an independent government.<sup>41</sup> If observed in Art. 1 General Regulation No. 1 of 1945, the authority to 'proclaim' the Law and General Regulation rests with the President and is signed by the Secretary of State. Furthermore, in Art. 2, the practice of promulgation by physically attaching the Law and General Regulation to the notice board was still applied although only temporarily at that time. The provisions of Art. 3 are a follow-up to the announcement on Art. 2, by further disseminating the promulgators of the Law and General Regulation through the media available at that time. Finally, Art. 4 shows the legal implications of a promulgation, namely the enactment of the Law and General Regulation as binding regulations. The enforceability of the provisions of Government Regulation No. 1 of 1945 can be seen in the inclusion of signatures by the Secretary of State, A.G. Pringgodigo, in General Regulation No. 1 of 1945 dated October 10, 1945 and in Law No. 1 of 1945 dated November 23, 1945.

The media promulgation through notice boards gradually abandoned and developed with the publication of an official periodical by the Government, namely the State Gazette as mentioned earlier. In addition to LN, there are also TLN, Regional Gazette, and Additional Regional Gazette, which is an in-depth discussion in itself. The presence of LN was marked by the presence of Emergency Law No. 2 of 1950 during the Republic

of the United States of Indonesia (hereinafter abbreviated as RIS) which was invited in LN No. 1 dated January 17, 1950. Based on the provisions of Art. 1 of Emergency Law No. 2 of 1950, "<sup>42</sup>*The Government publishes a State Gazette of the United States of Indonesia and a State Gazette of the United States of Indonesia,*" and the practice of its implementation is regulated in Art. 4 as the authority of the Minister of Justice and in Art. 5 the authority is exercised by order of the President. The mechanism for the inclusion of regulations in LN itself is different from the inclusion in Kan Po, namely simply the inclusion of the No. and year of the relevant regulation as stipulated in Art. 3. No less, the presence of LN at that time did not cause the *Staatsblad* of the Dutch East Indies period to be invalid, but changed its name like LN as stipulated in Art. 8.

The return of the promulgation authority to the Secretary of State only occurred when Indonesia re-enacted the Pre-Amendment 1945 Constitution after a Presidential Decree dated July 5, 1959. The return is regulated in Presidential Decree No. 234 of 1960 (State Gazette of 1960 No. 87) on the Return of the Promulgation Section / State Gazette from the Ministry of Justice to the State Secretariat. The implementation of this transfer of authority was marked by the promulgation of Presidential Regulation No. 20 of 1960 concerning Awards/Allowances to Pioneers of the National/Independence Movement by the Secretary of State, Tamzil, in Foreign Affairs of 1960 No. 101, TLN No. 2041 dated September 17, 1960.<sup>43</sup>

### Validity Period of Law on the Legislation Making

After many years of promulgation authority rested with the Secretary of State or now known as Mensetneg, the change in state institutions authorized to conduct promulgators shifted to "Ministers whose duties and responsibilities are in the field of legislation," which is the Minister of Law and Human Rights or arguably "returned" to the Ministry of Justice which is now known as the Ministry

40 *Ibid.*

41 *Ibid.*, Pp. 42-43.

42 *Ibid.*, Pp. 93.

43 *Ibid.*, Pp. 138-139.

of Law and Human Rights (Kemenkumham). This change is regulated in the provisions of Art. 48 of Law No. 10 of 2004 as mentioned at the beginning of the article, which reads:<sup>44</sup>

“The promulgation of legislation in the State Gazette of the Republic of Indonesia or the State Gazette of the Republic of Indonesia as referred to in Article 46 is carried out by the minister whose duties and responsibilities are in the field of legislation.”

The transfer of the function of the Promulgation is essentially an administrative technicality, in accordance with the formal-administrative nature of the Promulgation itself. Because of this nature, according to Prof. Jimly Asshiddiqie, the problem that arises when the change in the authority of the promulgation shifts from the Minister of State to the Minister of Law and Human Rights is in the correspondence and administration of legislation. This will relate specifically to the attribution of the authority of lawmaking by the President in the Constitution.<sup>45</sup>

In the context of the regulation of the type of Law (Law), the process of making it is carried out with the mutual agreement of the House of Representatives and the President. When the draft law has been completed and is about to be ratified, the DPR will send a letter in the form of a copy of the law to be signed by the President on the basis of Art. 20 paragraph (4) of the NRI Constitution of 1945. Automatically, the receipt of the letter will be in the president’s office, namely the Secretariat of State.<sup>46</sup>

The process of ratification and administration of the promulgation if all held by the Minister of State, will end in the same office. However, with the transfer of the authority of the Promulgation to the Minister of Law and Human Rights, after the letter is processed at the State Secretariat, another letter must be sent for Promulgation by the Ministry of Law and Human Rights. Even in more recent provisions, after being promulgated by the Ministry of Law and Human Rights in the form of the signature of the Minister of Law and Human Rights, the Ministry of Law and

Human Rights still has to send a letter back to the State Secretariat to obtain numbering and as a fulfillment of the requirements for submitting news to the State Secretariat. This creates excessive bureaucracy because the human resources to handle administration are in two institutions in order to maintain a clear separation of duties, for ratification at the State Secretariat and for promulgation at the Ministry of Law and Human Rights.<sup>47,48</sup>

Inconsistencies arise again when paying attention to officials who are authorized to carry out promulgation at the regional level when compared to the central level. Both in Art. 49 paragraph (3) of Law No. 10 of 2004 and Art. 86 paragraph (3) of Law No. 12 of 2011, the authority to promulgate Regional Level Legislation in LD and BD lies with the Regional Secretary. This is in line with the stipulation of Regional level legislation stipulated by the Head of Government, both the Governor and the Regent/ Mayor based on Art. 42 paragraph (1) of Law No. 10 of 2004 and Art. 78 paragraph (1) jo. Art. 80 Law No. 12 of 2011. If at the regional level it can be carried out by state institutions or officials who handle government administration, then it should also be unified at the central level in similar institutions.

As feared by Prof. Jimly Asshiddiqie that there is a risk of a tug-of-war of authority, as happened in the second amendment of Art. 85 in Law No. 13 of 2022. Now the authority resides in two ministerial institutions, one in the field of state secretariat and one in the field of Formation of Legislation.<sup>49</sup>

### **Institutional Functions and Roles in the Formation of Legislation**

As with the *current status quo*, the authority of the promulgation lies with the Minister of State and the Minister of Law and Human Rights. Both handle legislation at the central level, with the regional level still promulgated by the regional secretary. It is questionable if the promulgation of the Law, General Regulation, Presidential Regulation is with the Minister of State and Regional

44 Jimly Asshiddiqie, *Subject Law Cet. 4* (Depok: Rajawali Press, 2017), Pp. 216.

45 *Ibid.*

46 *Ibid.*, Pp. 216-217.

47 *Presidential Regulation No. 87 of 2014*, Art. 151 and Art. 152.

48 *Ibid.*

49 *Ibid.*

Regulations are with the Regional Secretary, what exactly are the legislation that are the authority of the Minister of Law and Human Rights to be promulgated? This question will be important when institutional functions are linked to the Role in the Formation of Legislation itself.

The first institutional function to be discussed is over the Ministry of State Secretariat. Based on the provisions of Art. 2 of Presidential Decree No. 31 of 2020 on the Ministry of State Secretariat, the main task of the Ministry of State is, "to carry out technical and administrative support and analysis of government affairs in the field of state secretariat to assist the President and Vice President in organizing state government." Furthermore, in carrying out these tasks, the Ministry of State has 13 functions as stipulated in Art. 3, with the two most relevant functions in terms of Promulgation are:

Provision of technical, administrative, and analytical support in the preparation of initiative permits and the completion of draft legislation, settlement and handling related to litigation, legal issues, completion of the Presidential Decree Draft regarding clemency, amnesty, abolition, rehabilitation, remission of changes from life imprisonment to temporary punishment, citizenship of the Republic of Indonesia, extradition, and Indonesian membership in international organizations;

Providing technical, administrative, and analytical support in the implementation of relations with state institutions, nonstructural institutions, regional institutions, community organizations, political organizations, and handling public complaints to the President, Vice President and/or Ministers, as well as preparing and analyzing Ministerial policy materials;

Given that the nature of the Promulgation is formal-administrative and its implementation is very technical, it is very appropriate that the state institution that handles the Promulgation is the institution that is tasked with and carries out its functions in terms of providing technical and administrative support to the Government. In addition, Promulgation which is the last stage of the process of Forming Legislation means that the Ministry of

State is the last state institution that will receive a letter for promulgation. In this case, the technical and administrative support functions for the implementation of relations with state institutions have been in accordance with the mechanism of flow between state institutions for promulgation.

When referring to the past role and based on Presidential Regulation No. 87 of 2014, the role of the Minister of State in the process of Forming Legislation is actually quite limited, with only a role to promulgate or more narrowly only to receive promulgation reports and issue promulgation No.s. However, the second amendment in Law No. 13 of 2022 brings a controversial new role and is held by the Minister of State. The amendment of Art. 73 paragraph (1) in Law No. 13 of 2022 stipulates that if a draft law is considered to have a technical writing error that occurs for the second time, the Minister of State has the authority to make improvements.

The presence of this role accompanied by the *domino effect* of the presence of Law No. 11 of 2020 shows that there has been a trend of strengthening the role of the President to form legislation. It was the President who proposed Law No. 11 of 2020 using the *Omnibus* method, but the law was declared conditionally unconstitutional. This requirement has succeeded in being an impetus for changes to Law No. 13 of 2022 to be present which diverts accommodating the *Omnibus* method, changes the authority of promulgation to the Minister of State, and gives authority that has enormous implications, namely the improvement of the approved bill. Although the nomenclature used is "technical writing error," the author criticizes the involvement of the Minister of State to make improvements to writing which remains part of the substance of legislation regulated with the risk of conflicts of interest by the Government.

Furthermore, for the second, the institutional functions of the Ministry of Law and Human Rights will be discussed. The provisions of Art. 2 of Presidential Decree No. 44 of 2015 regulate the duty of the Ministry of Law and Human Rights to, "carry out go-

vernment affairs in the field of law and human rights to assist the President in organizing the government of the country." In addition, the Ministry of Law and Human Rights has 11 functions in the provisions of Art. 3 of Presidential Regulation No. 44 of 2015, with the main and most relevant are:

"A. formulation, determination, and implementation of policies in the fields of legislation, general law administration, corrections, immigration, intellectual property, and human rights;"

As for the Legislation Making, the Ministry of Law and Human Rights also has a role in addition to the promulgation of legislation outside the Law, General Regulation, Presidential Decree, and Regional Regulations. Based on the provisions of Art. 47 paragraph (3), Art. 54 paragraph (2), and Art. 55 paragraph (2), the Ministry of Law and Human Rights is involved in the process of harmonizing, rounding, and solidifying the conception of the draft Law, General Regulation, and Presidential Regulation. With the amendment of Art. 58 paragraph (2) and the addition of Art. 97D in Law No. 13 of 2022, the role of the Ministry of Law and Human Rights also includes involvement in the process of harmonizing, rounding, and solidifying the conception of Provincial and Regency/ City Regional Regulation Drafts.

If the duties and functions of the Ministry of Law and Human Rights are related to the role of the Ministry of Law and Human Rights to be involved in the process of harmonizing, rounding, and solidifying the conception of the draft laws, General Regulation, Presidential Decrees, and Provincial and Regency/ City Regional Regulations seen from the point of view of the material-substantive Formation of Legislation, then the role of the Ministry of Law and Human Rights in this case is based and has good rationalization. However, in this case, it must be emphasized that the role of the Ministry of Law and Human Rights is material-substantive, namely the *Legislative Drafting* process itself. The wrong argument according to the author if the promulgation authority is more accurately held by the Ministry of Law and Human Rights with the argument of the Mi-

nistry of Law and Human Rights which takes care of the *Legislative Drafting* process from beginning to end. The role of the Ministry of Law and Human Rights in this case is not in accordance with the duties and institutional functions of the Ministry of Law and Human Rights mentioned earlier, especially when related to the duties and functions of the Ministry of Law and Human Rights that are more appropriate.

As for the end of this section, question will first be addressed at the beginning of this section regarding what legislation can actually be promulgated by the Ministry of Law and Human Rights. Referring to Art. 149 of Presidential Regulation No. 87 of 2014, the Legislation stipulated by MPR, DPR, DPD, MA, MK, BPK (*sic.*), KY, agencies, institutions, or commissions at the same level formed by Law or the Government on the basis of the Law or based on their authority are the types of legislation promulgated in BN with their explanation to TLN. If the types of regulations as stipulated in Art. 147 of Presidential Regulation No. 87 of 2015 are considered and associated with the substantive and administrative roles of the Ministry of Law and Human Rights, various obstacles and inconsistencies will be found that do not allow the promulgation to still exist in the second state institution.

First, because the duties and functions of the Ministry of Law and Human Rights are not the implementation of relations between state institutions, the coordination flow of promulgation from these institutions to the Ministry of Law and Human Rights to be promulgated does not have a strong linkage. Furthermore, the proposition that the duties and functions of the Ministry of Law and Human Rights can materially justify such a flow of promulgation is also still not perfect. This is by considering the doctrine of Legislation which views the nature of the regulations in the legislation of these institutions which are internal and binding only on these institutions. Thus, materially the relevance of the role of the Ministry of Law and Human Rights is not appropriate, so consequently in terms of its promulgation it is also not well legiti-

zed.<sup>50</sup>

#### D. Conclusion

The promulgation of legislation is part of the last process but has important implications in the enforceability of legislation in the community. The problem of the massive issuance of legislation, especially for legislation in Article 8 paragraph (1) of Law No. 12 of 2011 can be overcome by repositioning the understanding that legislation outside the hierarchy of legislation cannot apply outward, but only apply to the Ministry/ Government Institution because the essence of the promulgation is to enforce legislation to the wider community.

The repositioning of provisions regarding promulgation as stipulated by amendments to Art. 85 in Law No. 13 of 2022 creates legal uncertainty and bureaucratic problems that are not in accordance with administrative and technical functions. Based on the discussion that has been described in this paper, the authority to promulgate has historically been in state institutions or positions in the secretarial field. Since being played by the Secretary General during the Dutch East Indies era, until Indonesian Independence by the Secretary of State, the secretarial field has historically carried out the role of Legislation. More importantly, the duties and functions of the Ministry of State Secretariat in the technical and administrative fields are in accordance with the formal-administrative nature of the promulgation in the series of processes for the Legislation Making.

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