



Delegated Legislation Making Models in Indonesia within 1999-2012

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Abstract

Based on the UUD 1945, delegated legislation in Indonesia is Government Regulations made by the President. The making of delegated legislation from 1999 to 2012 has shown some development in how delegated legislation is made. Therefore, this article shows three traditional models of delegated legislation in Indonesia between 1999 to 2012 that are different from the stipulations provided within the UUD 1945. Practice shows that there are 3 traditions of delegation legislation making models in Indonesia. Such tradition is not in accordance with the provisions in the Indonesian constitution. Therefore, it is necessary to control the delegation of Laws in Indonesia by selecting government regulations as delegated legislation.



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A. Introduction

Delegated legislations are legislations ordered by law to be made for the sake of supporting the Law's own implementation. Delegated legislation is not a type of legislation, but is a delegated legislation system.¹ Delegated legislation within the Rule of Law is a usual find, considering that the government's duties and functions are impossible to perform with laws that are general in character and only provides the principles.² The current context of governmental matters is growing increasingly complex, so much so that governmental practices requires administrative provisions, found such in delegated legislations.³

Delegated legislations are required within the government's administration as an elucidation of laws. In Indonesia, the delegated legislation making system is stipulated under Article 5 paragraph (2) of Indonesian Constitution of 1945.⁴ The President is given the authority to form Government Regulations to implement Laws, whilst, in practice, differences are found from what is stipulated in the Constitution. Seeing this fact, it can be asked again whether it is only Government Regulations that are meant by delegation regulations from the Law? In addition, it is also questioned about the authority of sub-delegations, whether it is possible to delegate the authority of laws to statutory regulations other than government regulations.

In addition to the issue of what type of regulation is appropriate as a delegation regulation that gets authority from the *pouvoir réglementaire*, it is also questioned who has the authority to have that authority. The Indonesian state government system which chooses a presidential system, makes the largest center of power in government held by

the President.

This article will raise the issue of (1) how is delegated legislation implemented? (2) how are the traditions and models known in the implementation of delegated legislation?

The choice of the period from 1999-2012 has the reason that 1999 is known as the beginning of reform, in which various legal reforms were colored by legal politics which demanded a more democratic Indonesian rule of law. Various laws and regulations were formed to support legal politics. One of them is Presidential Decree Number 44 of 1999 concerning Techniques for Drafting Legislation. The formation of this regulation can be considered as a momentum for the government to try to form better laws and regulations, so the beginning of 1999 was used as the starting year for this research. The period 1999-2012 was then chosen as the research period to look at the practice of forming delegated regulations from laws. With a period of 14 years, it is hoped that there will be developments and differences in the formation of delegation regulations from the Law based on 3 statutory regulations concerning the system of forming regulations. Namely Presidential Decree Number 44 of 1999 concerning Techniques for Drafting Legislation, Law Number 10 of 2004 concerning the Formation of Legislation and Law Number 12 of 2011 concerning Formation of Legislation. The practice regarding the formation of delegation regulations from the Law for 14 years will show whether the existing practice has been carried out in accordance with the legal theory related to the construction of the Republic of Indonesia in accordance with the constitution and applicable legislation.

B. Methods

This article uses the normative-juridical method. There are several approaches used. The first approach is the statutory approach. This research uses various statutory regulations which can be seen from three interests, namely (i) statutory regulations as positive law which bases the formation of delegation regulations from laws, (ii) statutory regulations regarding the system for forming

1 M. Fadli, "Perkembangan Peraturan Delegasi di Indonesia" (Ringkasan Disertasi Program Doktor, Universitas Padjajaran 2012), 1.

2 IC. Van der Vlies, Linus Doludjawa, *Buku Pegangan Perancang Peraturan* (Jakarta: Direktorat Jendral Peraturan Perundang-Undangan Departemen Hukum dan HAM, 2005) 30.

3 Uwe. Kischet, "Delegation of Legislative Power To Agencies: A Comparative Analysis of United States and German Law," *Administrative Law Review* Vol. 46, No. 2 (1994): 213, 216.

4 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD 1945) is Indonesia's Constitution.

statutory regulations and (iii) Acts from 1999 to 2012 totaling 473 Acts. The second approach is the concept approach. In this case the author tries to explore the Indonesian state government system based on the 1945 Constitution and the changes currently in effect and tries to develop a more appropriate system for forming delegation regulations from the Acts. This research is normative legal research which will use secondary data including primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include: the Constitution or UUD, legislation which include MPR decrees, acts, government regulations in lieu of law, government regulations, presidential regulations, and ministerial regulations. Secondary legal materials provide explanations regarding primary legal materials, namely research results, results of analysis of laws and regulations, books, scientific publications, and other literature related to the problem under study. Tertiary legal materials, such as dictionaries, encyclopedias. This study used data collection tools in the form of literature studies and interviews with informants. The data found in this study will then be analyzed using qualitative methods.

C. Results and Discussion

Delegated Legislation Making System in Indonesia State Based on the Rule of Law and the Necessity for Delegated Legislation

Delegated legislation making is currently a necessity in the rule of law.⁵ The development of the State based on the rule of law demands that the government establish legislations to implement the law. In general, laws are established to only provide general provisions and principles so they will require further elucidation.⁶ The conferment of authority to the executive has become a leading topic discussed in the academic and political world. This is a response to various 20th cen-

tury crises in western countries. According to Bogdan, such crisis has driven the need for governments to create several types of legislation instead of just laws.⁷

Every state based on the rule of law within this modern era requires delegated legislation. Several practical reasons were brought forward although debates on the presence of delegated legislation still exist. Based on current state practice, many scholars has put forward that every state ultimately needs delegated legislations. Matthew is one scholar who states as such. Matthew states, “*delegation is a central concept in the study of modern governance. The modern state could not function without delegation.*”⁸ As a main concept in the study of modern governments, it can almost be confirmed that every state performs its governmental function by forming delegated legislations. Laws formed by parliaments are general stipulations. Aside from the custom that Laws are general; technical limitations, legislators’ knowledge or insight on matters to stipulate has also driven the need for delegated legislations.⁹

In practice, states that use the principle of separation of power, find themselves in dilemma of to using delegated legislation, because the law made by the executive branch instead of the legislative.¹⁰ Further practice shows that even states that are in opposition to the existence of delegated legislation are gradually weakening their opposition as a result of the insistence of practical needs.¹¹ In the beginning, only parliament had the necessity for legislation, but now the executive and its administration also have the authority in legislation making and not just to “implement Laws.” The Rule of Law’s requisite for delegated legislation is related to (1) the welfare state based on the Rule of Law that has to reach its welfare objective through legisla-

5 Hermann Punder, “Democratic legitimation of Delegated Legislation, Comparative view on the American, British, And German Law” *International and Comparative Law Quarterly*, Vol. 58, No.2 (2009): 353-378

6 Van der Vlies (n 2) 30.

7 Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitution* (Heidelberg: Springer, 2012), 7.

8 Matthew Flinders, *Delegated Governance and the British State: Walking without Order* (Oxford University Press, 2008), 3.

9 *Ibid.*

10 Punder (n 5) 1.

11 Robert C. Sarvis “Legislative Delegation and two Conceptions of The Legislative Power,” *Pierce Law Review* Vol 4 No.2 (2006): 317.

tions; and (2) the Rule of Law that requires government institutions to implement Laws and also to make various legislations to provide guidance for the government in implementing its authority so it may be kept from authoritarian rule.¹²

Practices in Indonesia also requires as such. As a state based on the rule of law, Indonesia has an objective to provide welfare for its people. The Government is charged for implementing laws to reach that welfare objective. The Government is considered as the correct institution to elucidate laws. We must look at each country's use of separation of powers and system of government to determine whichever government institution is authorized to make legislations. Indonesia has a system of government that recognizes the separation of powers, that is, the execution of power that is not impermeable among the state's power institutions. Such a system still allows collaboration among power-holding agencies in Indonesia, especially for legislation and regulation making.

Indonesia's 'Unique' Governmental System

Indonesia's governmental system based on the UUD 1945 could be interpreted in two meanings, that is, 'before the original' UUD 1945 and after it was amended.¹³ The UUD 1945 makers had tried to establish their own unique democratic system and did not use the weaknesses of the system used by the United States of America and the United Kingdom.¹⁴ Such uniqueness was further elaborated in the UUD 1945's main text in order to formulate the most appropriate governmental system for the Indonesian people. Soepomo, as reiterated by Maria Farida Indrati, in talking about the

state's governmental system, did not fail to discuss the authorities within a Parliamentary Government and Presidential Government, within a state.¹⁵ The authority that is within Indonesia's unique system is that it does not use Montesquieu's *Trias Politica*,¹⁶ resulting there is no strict separation of powers among Indonesia's state institution.

According to Indrati, the meaning of governmental in the original phrase of system of government can be interpreted from the Dutch term '*regering*'. Indrati reiterated van Vollenhoven's opinion that *regering* or governmental can be construed in a wider meaning, that is, as an institution (*overheid*) and as activity or its function (*functie*). *Regering* as an institution can be construed as government and *regering* as a function can be interpreted as governmental. The meanings of government and governmental therefore are in fact different.¹⁷

In the early stages of UUD 1945 making, the *Founding Fathers* stated that Indonesia's governmental system is Presidential with 'its governmental system'.¹⁸ The governmental system as intended above was a system that discussed on the existing authority within a state.¹⁹ The use of "its governmental system" was because, at that time, the term mixed or hybrid system has yet to be known.²⁰ The intended 'presidential system' is different from the presidential system of the United States of America, the Philippines or South America.²¹ The proposed pre-

15 Indrati (n 13) 31.

16 M. Yamin, *Naskah Persiapan Undang-Undang Dasar 1945 Jilid I*, (Jakarta: Siguntang, 1971) 34.

17 Indrati (n 13) 31.

18 Looking at the founding fathers' discussions in making the UUD 1945 before independence, the discussion [focused] on choosing a governmental system, whether parliamentary or presidential. Yamin firmly rejected the parliamentary system. Finally Soepomo proposed the use of the presidential system where Indonesia's system is a unique system, unlike in America or France. See Kusuma (n 14) 388.

19 Indrati (n 13) 31.

20 R.M.A.B. Kusuma explained that Indonesia's founding fathers may have thought of a mixed or hybrid governmental system, where even in other parts of the world the term or concept of 'mixed or hybrid governmental system' was only known in France during the fifth amendment of its Constitution in 1958.

21 Kusuma (n 14) 13.

12 H.R. Ridwan, *Hukum Administrasi Negara* (Jakarta: Raja Grafindo Persada, 2006). Hlm 13.

13 Maria Farida explained that what is meant by a governmental system is a system that consists of parts of a state's government, which has their respective duties and functions but on the whole is an integrated unit that works rationally in Maria Farida Indrati, *Ilmu Perundang-undangan 1*, (Yogyakarta: Kanisius, 2020) 30.

14 R.M.A.B. Kusuma, *Sistem Pemerintahan Pendiri Negara versus Sistem Presidensial Orde Baru* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia 2011) 179.

sidential system differed from the one used in the United States of America, which used the separation of powers system, resulting in a 'rigid' separation between the legislative and executive powers. The President is not an institution beholding legislative powers or lawmakers, but as a veto rights holder.²²

Kusuma explained that Indonesia's governmental system follows Bodin – Hobbes - Locke's theory, where the sovereignty cannot be divided and must be in one place. Furthermore, a presidential system should follow Madison's idea that it should be divided into three powers: executive, legislative, and judicial.²³ At that time, Indonesia stated that its presidential system is unique compared to the usual trademark presidential system. There is an institution chosen by the people, where there are usually two institutions within a presidential system, congress and the president.

The UUD 1945 makers consciously used a Constitution without *Trias Politica*. The principle used was partial separation, not pure separation of powers, and not the fusion of power principle. Indonesia's special uniqueness is the legislation made jointly by the President and the DPR and differing from the American system that does not place the President as a power holder of legislation making.²⁴ In the 'original' UUD 1945, the MPR was placed as the sovereign body and had the authority to amend the Constitution's highest legal norm. Aside from that, the MPR is given the authority to establish another legal norm under the Constitution, namely the State General Guidelines (Garis-Garis Besar Haluan Negara/GBHN).²⁵

The governmental system in the UUD 1945 can be found in its elucidation within its original manuscript. There are nine key principals: Indonesia is a state based on the rule of law (*Rechtsstaat*); Constitutional System; The highest state power is held by the MPR; The President is the state's government executing power under the MPR; The Presi-

dent is not accountable to the DPR; The state ministers are the President's subordinates; the ministers are not accountable to the DPR; The state's power is not unlimited; The DPR position is strong; State ministers are not ordinary high officials.²⁶

Out of those nine principals, the essence for understanding Indonesia's used government system is in the key principal VIII, which states, "The DPR cannot be dissolved by the President, differing from the parliamentary system" and the key principal V, where "the President is not accountable to the DPR as they are in a legislative and executive relationship within the presidential system".²⁷

The UUD 1945 has been amended four times, and there were several changes in the governmental system. According to Kusuma, the governmental system after the amendment is a product of inconsistency of thought of the members of the MPR.²⁸ Kusuma stated that in amending the Constitution, the members swore an oath to uphold the UUD 1945. In reality, their ideas of the amendment were heavily influenced by the United States of America's system.²⁹ The amendment of UUD 1945 changed the existing constitutional structure and governmental system.³⁰ Kusuma then elaborated the founding fathers' opinions on Indonesia's unique presidential system to further obtain a final in-depth understanding and show the differences before and after the amendment,

26 The governmental system explained in the UUD 1945's Elucidation was born from Indonesia's nation-state theory. According to Soepomo and reiterated by Attamimi, Indonesia's nation-state theory, was taken from the Republic of Indonesia's state ideal termed as integralist state ideal or unified nation-state ideal. See ^{A.} Hamid S. Attamimi, Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara (Disertasi Program Doktor, Universitas Indonesia 1990) 2.

27 Ibid.

28 Kusuma (n 14) 179.

29 Ibid.

30 The amendment of UUD 1945 resulted in abolishing The Supreme Council of Representative (Dewan Pertimbangan Agung). The MPR no longer serves as an institution that embodies the people with the highest sovereignty and bestows its mandate to the President. The MPR is even no longer the most elevated state institution but only an institution equal to other state institutions

22 R.M.A.B Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2004), 388.

23 Kusuma (n 14) 26.

24 Ibid.

25 UUD 1945, art. 2.

such as:³¹

In this system, there is one institution [whose members] are directly elected by the people, that is, the DPR, while in Indonesia's version of a presidential system, there are two institutions [whose members] are directly elected [by the people], and they are the DPR (DPR and the Council of Regional Representatives or Dewan Perwakilan Daerah/DPD) and the Presidency.

Indonesia's system, as formed by the founding fathers, has the MPR as the highest state institution. However, the MPR here is not the same as the UK's parliament that holds supreme sovereignty as a lawmaker in England. The MPR is not Indonesia's lawmaker.³²

In drafting the UUD 1945's amendment, the MPR insisted that Indonesia uses the presidential system.³³ This contrasts with the founding fathers' opinion, which stated that Indonesia has a unique and not a purely presidential system. After the UUD 1945 was amended four times, Indonesia's current governmental system cannot be said as the same as it was in the original 1945 Constitution, so Indrati elaborated that based on the state's ideal, the governmental system theory and provision in the amended Constitution are as follows: Indonesia is a state based on the rule of law; therefore, its governing principles will surely be based on the state fundamental law or Constitution; The highest state power is held by the people which states that sovereignty is within the people and executed in accordance with the Constitution; The MPR consists of the DPR and members of the DPD elected through a general election and has the authority to: Amend and enact the Constitution; Inaugurate the President and/or the Vice President and Terminate the President and/or the Vice President during their term in accordance to the Constitution; Appoint the Vice President in the case of a vacuum; Appoint the President and Vice President in the case of vacuum in accordance to the constitution; The President is the highest governmental authority in the Republic of Indonesia; The President is not accountable to the

31 Kusuma (n 14) 28.

32 Ibid 18.

33 Ibid.

DPR; The state ministers are the President's subordinates. The state ministers are not accountable to the DPR; The Head of State's power is not unlimited. Although the Head of State is not accountable to the DPR, he/she is not a dictator with unlimited power.³⁴

From the elaborations of the provisional articles in the Amended UUD 1945, Indrati shows that the authority to make laws is implemented by DPR with the President's approval. Therefore, the President is the executive power in administering the government, yet a legislative power with the DPR.³⁵ As stipulated in the original manuscript of UUD 1945, the *Trias Politica* resulting in the separation of powers still cannot be found in such amendments.³⁶ In simplicity, it can be finally explained that the change of state institution powers in Indonesia's governmental system consists of (1) The President holds executive power. (2) The DPR holds legislative power with the President.³⁷ The MA and the MK, as well as other judicial institutions, hold the judicial powers.

Therefore, based on the Constitution's theory and provisions, the President's power is very strong within Indonesia's governmental system.³⁸ The President's strong power within this governmental system is completed with authority to make legislation, especially delegated legislation that is the topic of this article.

The President as a Delegated Legislation Making Institution in Indonesia

The modern state based on the rule of law requires all powers held by a state institution to be executed based on the law. The Republic of Indonesia, as a modern state based on the rule of law, also provides a legal basis to execute such state institution powers.³⁹ Indonesia's state powers are divided into several powers, among the legislative, executive, and judicative. Such powers are divided within a system that utilizes its division system

34 Indrati (n 13) 126-127.

35 Ibid 129.

36 Ibid.

37

38 Indrati (n 13) 79.

39 Nicholas W. Barber "The Rechtsstaat and Rule of Law" *The University of Toronto Law Journal*, Vol. 53, No. 4, Autumn (2003): 443, 446.

without a strict separation of powers and is known as the division of power.⁴⁰ This system then becomes the basis of how state power agencies work within a state. The discussion on legislation making in a state based on the rule of law is the interconnection between the legislative and the executive in exercising their authority, whether jointly or separately. Considering that Indonesia's system of division of power is 'uniquely Indonesian,' it does not recognize a strict separation [of power]. In legislative power, the legislative body does not solely hold such power resulting in the legislative making is jointly executed by several state institutions: the President, the DPR, and the DPD. As the executive, the President also holds legislative authority that is implemented together with the DPR and DPD.

The President of Indonesia's authority is implemented based on Article 4 paragraph (1) of UUD 1945, which states that the President holds the governmental power according to the Constitution.⁴¹ Aside from holding the executive power in implementing laws, the President has the authority to create other legislations, including delegated legislation to support its administrative duties. In line with the concept of a welfare state based on the rule of law adopted by the Indonesian Government, the President, as the Head of Government, must ensure public welfare by forming various legislations to implement social services and fulfill such public welfare.⁴² Furthermore, the President has a wider authority in making legislation than the DPR or the DPD.

Laws are enacted to be effective for many people and stipulate only general matters. Therefore, laws are established only to include general principles.⁴³ The laws stipulate general and wider public interest and do not connect to a particular event or are aiming at a specific person. Therefore, its stipulations need to be general and encompassing only general principles.⁴⁴ The consequence of such general stipulations is that existing laws cannot be directly executed, thus arising

the need for delegated legislation. Almost every country currently denotes the need for further regulating of laws.⁴⁵ This further strengthened the Government's position of having the authority to make delegated legislation that aims to implement the Laws itself. Such facts also occur in Indonesia; the need for delegated legislation becomes high when laws enacted are only general in principles and character. The Government is appointed as the authorized institution to make such legislations. The Government is considered more knowledgeable in the context of administrative practice and technical matters. The Government is regarded as the right institution to hold the authority of legislation making, where the President has the executive power based on Article 4 paragraph (1) of the Amended UUD 1945.

The President's regulating authority has produced several types of legislation. Based on the theory that as a governmental institution executing governmental matters, the President has governmental powers. Such governmental powers have a formal and material meaning of power. Attamimi explained such power by laying on Jellineck's opinion on government and viewing it from two perspectives, that is in its formal meaning, encompassing the authority to regulate and manage, while a government in its material meaning consists of two elements, that is to govern and execute.⁴⁶ Formal power means the authority to regulate, making the President has the regulating power to execute governing powers. In line with the opinion above, Manan also states that attached to the President's position as an executive is the regulating function (*regelen*) alongside the governmental function (*besturen*), thus further strengthening the President's [authority in] legislation making.⁴⁷ Such authorities also show that the President's authority to make various legislations is much more than the legislative's, which is only to make laws.

The provisions on the President's authority to create legislation, according to Atta-

40 Yamin, (n 18) 341.

41 Attamimi (n 30) 11.

42 Ridwan (n 12) 140.

43 van der Vlies (n 2) 29.

44 Ibid.

45 Punder (n 5) 355.

46 Ibid 180.

47 Bagir Manan, *Teori dan Politik Konstitusi* (Jakarta: Direktorat Jenderal Pendidikan Tinggi Kementerian Pendidikan, 2009) 147.

mimi, lies in the articles within UUD 1945's body and elucidation, where the President has three powers, namely legislative, regulatory and executive the President implements legislative power together with the DPR, and currently with the DPD in law making. The President implements regulating power by enacting Government Regulations, and the executive power by enacting Presidential Regulation.⁴⁸ Legislations created from those three powers, in turn, produce differing types, function, content, and placement within the normative hierarchy. Put simply, the Government's power that creates the authority to enact legislations is as follows:

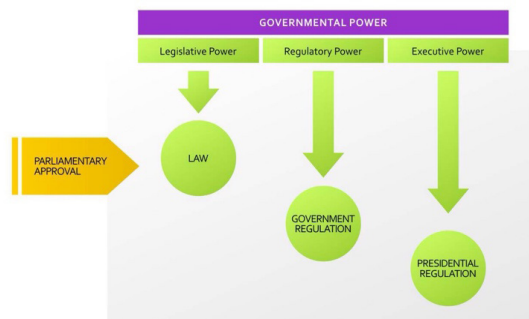


Figure 1. Governmental Power and the Authority to Make Legislations
Source: Attamimi (n 30) 188.

Out of those three powers from the figure 1 above, the President has the authority to create legislations. Concerning this article on delegated legislation; thus, regulating power is the basis of delegated legislation's existence. Discussions on the regulating power concerning other powers are relevant if they relate to the content of regulations produced by respective powers.

The state's governmental power held by the President provides centralized and concentrated authority to create legislations.⁴⁹ The power to make such legislation is partially implemented together with the DPR and the DPD, and the President holds the rest.⁵⁰ All government matters are substances [of legislation] that the President must regulate, except those that require the DPR's

48 Ibid.

49 Attamimi (n 30) 36.

50 In the current context, legislative power is jointly exercised with the DPR and the DPD, although joint approval is only required from the DPR.

approval. Attamimi stated that the laws' substantial content is a unique one compared to other legislation's substantial content because laws go through an enactment procedure by obtaining the DPR's approval.⁵¹

The Laws' unique substance can be explored from three breadths: the UUD 1945, the legal principle based on the rule of law, and the governmental principle based on the constitutional system.⁵² These three measurements create the nine unique substance of Laws. Presidential power to regulate is beyond such a unique substantial scope known as Presidential Decrees' substance as a residue of the Laws' substance. The Laws' unique substantial content and made through a different procedure, as it requires the DPR's approval, reflects how the accountability of people's sovereignty must be preserved. The President's authority in forming legislations and the substance of the type of legislation made was described by Attamimi as follows:⁵³

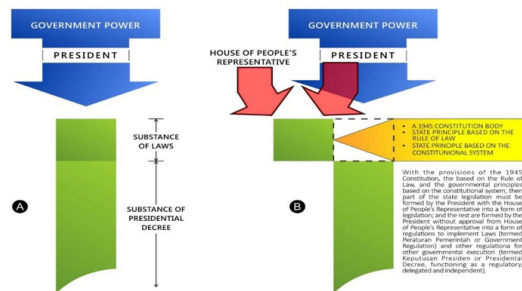


Figure 2. Presidential Authority in Making Legislations
Source: Attamimi (n 30) 264.

The Laws' unique substantial content is then delegated onto the substantial content of Government Regulations. The consideration to preserve the Laws' unique substantial content when they are delegated to Government Regulations is an important object for this article. The authority to make delegated legislations from enacted laws, which is also made from Presidential authority must also be carefully preserved as such legislation is a delegation of the laws' special substantial content.

51 Attamimi (n 30) 203.

52 Ibid.

53 Ibid 220.

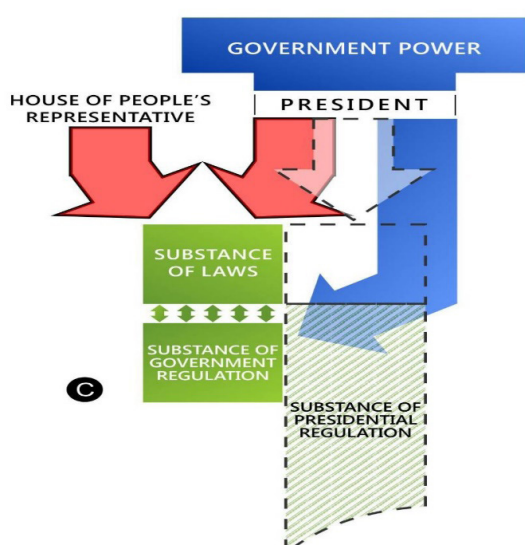


Figure 3. Presidential authority in Making Legislations

Source: Attamimi (n 30) 264.

The substance of Government Regulation as a provisional substance of delegated legislation is made from the President's authority based on Article 5 paragraph (2) of the Amended UUD 1945. Such authority is attached to the President as the highest governmental institution based on Article 4 paragraph (1) of the Amended UUD 1945. The connection between Article 4 paragraph (1) and Article 5 paragraph (2) of the Amended UUD 1945 can be seen in the articles' elucidation, where both are explained as follows, "The President is the Head of Executive Power of the state. In executing the Laws, he has the power to enact Governmental Regulations (*"pouvoir reglement"*)."

The elucidation of those articles explains that the President is the highest institution in the government, and the President has the authority to execute Laws by making Governmental Regulations.

Constitutional practice shows the necessity for delegated legislation is very high, and provisions in those articles support such practical needs. It affirms that laws alone are not enough to regulate and manage the governing, yet delegated legislations are required. In general, the authority to make delegated legislations resides at government institutions, which are knowledgeable in the

ins and outs of governmental matters. In determining which governmental institution is authorized to make delegated legislations we should refer to the adopted governmental system. While Indonesia does not declare to have a pure presidential system, its President's power shows its eminence.

The power to create Government Regulations is a follow-through making power after laws are enacted as the "primary" legislation. No Government Regulation is made before laws are made. This is a unique character of a Government Regulation. Due to this unique character, the substance of Government Regulations must preserve its given, or delegated, accountability by the laws. As a regulation that implements the unique substance of Laws, Government Regulations must only limit itself to include what is delegated and no more than required from the 'special substance' of laws.

Based on the idea above, the President, who has been given the authority to make Government Regulations, may not immediately and freely make Government Regulations without corridors. The authority is owned, but there is a principal limit in that it must be following the delegated authority provided and must not overstep the Laws' provisions. The green boxes in the picture above show equal sizes, meaning that it is forbidden to go beyond or less than the laws itself permits.

It is essential to supervise the President's authority in making Government Regulations, considering that this authority forms the substance of Government Regulations whose scope is limited by the substance of laws. In making Government Regulations, the President must pay notice to what extent the Laws has delegated. Considering that laws are made with a specific procedure, create special substances, and reflect people's sovereignty, the substance delegated to Government Regulations must be accountable to the people's sovereignty previously given to the laws. Therefore, the President is required to note those principles when making Government Regulations.

Models of Delegated Legislation Created Based on The Traditions Practices in Delegated Legislation Making from 1999 – 2012

Based on the Ministry of State Secretariat, there is a total of 473 Laws made within the year 1999 to 2012. Most of them stated the necessity of delegated legislation making. This reflects the modern state's implementation based on the rule of law in general that Laws do require delegated regulations to stipulate the implementation of Laws further. The study on the instructions for delegated decision making from 1999 to 2012 shows that it has been recorded that there were 261 Laws, which provides orders, and the rest of the 212 Laws did not have orders to make regulations. The 14 years of practice have produced 3.254 orders to make delegated legislation, although some resulted in decrees that are essentially injunctions. Study results on delegated legislation making from 1999-2012 show several regulations were ordered to be made in the year of 1999 – 2012, among them are the Laws, *Qanun*,⁵⁴ Special Regional Regulation, Presidential Regulation, Ministerial Regulation, Regional Regulation (Province and Regency/Municipality), Head of Region Regulation, and State Institution/Head of/Institutional Regulation. The type of regulation that were found to have been delegated are grouped into six as follows: Government Regulation; Presidential Regulation; Ministerial Regulation; Regional Regulation; (State) Agencies Regulation; others

The six groups of delegated legislation mentioned above will be explained as follows. Firstly, the Government Regulation. The study on those 473 Laws shows that there were 3.254 orders for regulation-making, out of which 39% were ordered for Government Regulation making. In general, Government Regulation can be identified as the principal delegated legislation preferred for Laws. This prominence can be seen from its order's total amount, 39% or 1.198 orders.⁵⁵ The cho-

ice on Government Regulation is in line with the mandate of Article 5 paragraph (2) UUD 1945 and its amendments that the regulation to implement Laws is the Government Regulation. The total of 3.254 orders has the type of regulations in percentage shown in the figure below:

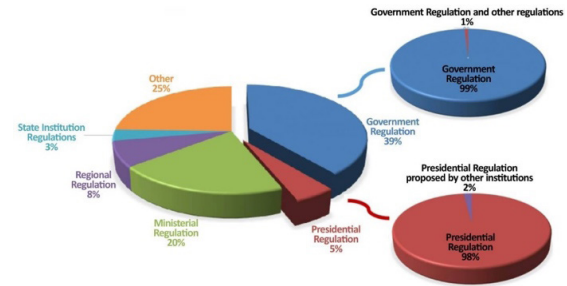


Figure 4. Percentages in the Total Amount of Delegated Regulations

Source: Study results on delegated legislation making orders within 1999 – 2012

Government Regulations are the primary choice for delegated legislation in Indonesia. Government Regulations' prominence does not eradicate practices of making other variants of regulations as delegated legislations. In detail, the total amount of ordered delegated legislation within this timeframe and each amount of the types of regulation shown below:

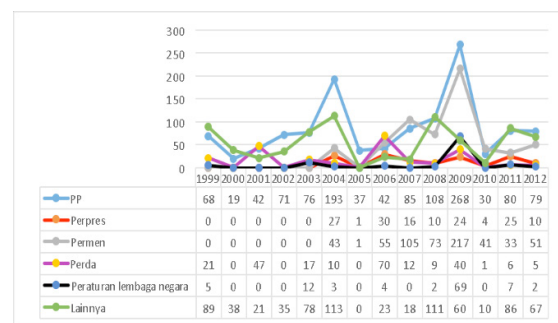


Figure 5. Types of Delegated Legislation Ordered Within 1999 – 2012

Source: Study results on delegated legislation making orders within 1999 – 2012

Government Regulation making is mandate to make Government Regulations. Among those numbers, the mandate to make Government Regulation was given simultaneously with other regulations with a total of seven regulations. For example, the mandate shown in the sentence, "... shall be further stipulated with a Government Regulation and/or Regional Regulation."

54 *Qanun* is a Regional Regulation based on Islamic Law implemented in Aceh Province and its regencies and municipalities.

55 The order to delegate authority was given to 1.198 Government Regulation. However, some orders were given to several types of regulation and the

mandated each year. It becomes an indicator showing that the Government Regulations are prominent, aside from the fact that there is an extensive government regulation.

Secondly, besides Government Regulations, the President also has the authority to make other regulations called Presidential Regulations, which are also seen as a delegated legislation. In 1999 – 2004 there were 108 mandates to create Presidential Regulation, 144 orders in 2004 – 2012, while during 1999 – 2004, not all of the Presidential Regulations considered legislation.

Thirdly, aside from the Government and Presidential Regulation, as the subordinates of the President, Ministers are also mandated to make Ministerial Regulations to implement the law. There were 619 mandates for making Ministerial Regulations within 2004 – 2012. It certainly more compares to the Presidential Regulation with a total amount of 144.⁵⁶ The practice of delegated legislation making has Government Regulation as the first choice and Ministerial Regulation and Presidential Regulation as the second and third choice.

The development of delegated legislation in Indonesia shows that delegated legislation making is given to state agencies such as the MPR, DPR, DPD, the Audit Board of the Republic of Indonesia (Badan Pemeriksa Keuangan), MK, and MA. All of these institutions are not executive bodies, which are usually mandated to make delegated legislation. The total amount of mandates given to these state agencies were 104 and categorized as the (state) Agencies' Regulation mentioned in the fourth group above.

Indonesia marked a higher demand for democratization in 1999, and the various state auxiliary bodies were created to support governmental work. Among these bodies were the General Election Commission (Komisi Pemilihan Umum), the General Election Supervisory Body (Badan Pengawas Pemilu), and the Indonesian Financial Transaction Reports and Analysis Center (Pusat Pelaporan dan Analisis Transaksi Keuangan). These bo-

⁵⁶ The timeframe is from 2004-2012 since the term 'Presidential Regulation' and 'Ministerial Regulation' introduced in 2004 by Law No. 10 of 2004 on Legislation Making.

odies are governed by Laws, where it is stated that they are to implement the Laws further. Aside from these bodies, several internal organizations such as professional associations, for example, the Advocate/Bar Association, are also ordered to make regulations as delegated legislations. The total amount of orders given to the regulation these agencies produced is quite many, 749 regulations.

Lastly, Indonesia's reform has also influenced the local government system to find an ideal form of relationship between the central and the local government. Within this timeframe, Law No. 22 of 1999 and Law No. 32 of 2004 on Local Government was enacted. Aside from the Law on the Local Government, there were several special regional autonomy governments formed, such as the Special Autonomy Government of Aceh and Papua. The local government was viewed as an institution with strong autonomous authority and influenced how delegated legislation is made. Hence, many Laws made from 1999 to 2012 are directly ordered the Regional Regulations to implement related Laws, causing it to become delegated legislations. There was a record of 225 orders given to Regional Regulations as delegated legislations.

Traditions in Delegated Legislation Making

The study elaborated and analyzed above concluded that there were four traditions in delegated legislation making as described below: Tradition in delegated legislation in Similar "Affairs" or Ministry. Similar ministries tend to make similar delegated legislations. For example, in the governmental affairs/finance ministry, delegated legislation is given to Government Regulations, Ministry of Finance Regulation, Presidential Regulation, and Regional Regulation. From five samples of Laws taken,⁵⁷ Government

⁵⁷ See (1) Law No. 2 of 2010 on Amendment to Law No. 47 of 2009 on the 2010 State Revenue and Expense Budget and Law No. 47 of 2009 on the 2010 State Revenue and Expense Budget; (2) Law No. 17 of 2003 on State Finance; (3) Law Number No. 17 of 2000 on Third Amendment to Law No. 7 of 1983 on Revenue Taxes; (4) Law No. 1 of 2004 on State Treasury; and (5) Law No. 28 of 2007 on Third Amendment to Law No. 6 of 1983 on General Provisions and Procedure on Taxes.

Regulations are most often used only for Law No. 1 of 2004 on State Treasury. Other Laws more often use Ministry of Finance Regulations. The choice to use Presidential Regulation is also rare but can still be found. A uniqueness found in the Law on financial affairs is the special term of Ministry of Finance Regulation, unlike other Laws that only mention Ministerial Regulation.

Another similarity is found in the Law on State Revenue and Expense Budget (Anggaran Pendapatan Belanja Negara) or its Amendment. Mostly, Laws concerning APBN do not have delegation orders. However, several APBN Laws that have ordered delegated legislation decided to give it to the Ministry of Finance Regulations. The first choice of the type of delegated legislation in financial affairs is to order the Ministry of Finance Regulations as a delegated legislation.

In general, the Laws concerning education affairs order a Government Regulation as the delegated legislation in education affairs. There are some variations by choosing other regulation types, such as Ministerial Regulations and several Presidential Regulations. Some ordered university statutes. In the end, the Laws in this area have a choice of either using Government Regulation or Ministerial Regulation as delegated legislation, compared to choosing Presidential Regulation.

Laws in health sector orders more to Governmental Regulations or Ministerial Regulations.⁵⁸ Unlike in the financial affairs, the health sector laws mention Ministerial Regulations generally, without citing the Ministry. Another custom is that Laws concerning the health sector give several authorities to other institutions to make delegated regulations, compared to Presidential Regulation. Among those that receive orders to do so are the Food and Medicine Supervisory Bureau (Badan Pengawas Obat dan Makanan), the National Narcotics Bureau (Badan Narkotika Nasional) or the Indonesian Medical Council (Konsil Kedokteran Indonesia).

The agriculture sector laws chose Government Regulation, Ministerial Regulation, Regional Regulation, and Governor Regu-

⁵⁸ See (1) Law No. 29 of 2004 on Doctor Practice, (2) Law No. 36 of 2009 on Health, (3) Law No. 44 of 2009 on Hospital.

lation as delegated legislations.⁵⁹ From the sample taken to look at the style of order in the agriculture sector, none of it mentioned Presidential Regulation as delegated regulation. Generally, the Laws in this sector most likely chose the Government Regulation (and sometimes varying on) Ministerial Regulation as delegated legislation. For several matters relating to local government affairs, the Laws are delegated to Regional Regulations and Head of Region Regulations.

Customary Traditions of Delegated Legislations with Parallel or Almost Parallel Making Period. Study on the delegated legislation making from 1999 to 2012 shows several similarities within particular year as follows: In 1999, there were eight Laws related to the establishment of regencies/cities, where one of their articles stated almost the same provision, that is, 'the execution of the addition and reduction of matters as referred to in paragraph (1) shall be stipulated with a Government Regulation.' Overall, these eight Laws have ordered Government Regulations with a similar wording style. Several of them have even ordered a delegated legislation making in Article 11.⁶⁰

In 2001, some Laws were considered coming in one package, namely Law No. 14 of 2001 on Brands and Law No. 15 of 2001 on Patents. Both were made and signed by the President on August 1st, 2001, drafted in parallel, and produced the same drafting style. The same signing time shows that the drafting team was also the same, as well as the same order style and delegated to Government Regulation and Presidential Decree.⁶¹

⁵⁹ See (1) Law No. 18 of 2004 on Plantations, (2) Law No. 16 of 2006 on Socialization System of Agriculture, Fishery, and Forestry, and (3) Law No. 18 of 2012 on Food.

⁶⁰ There were six out of eight Laws that worded the delegation order into Article 11, such as Law No. 9 of 1999 on The Establishment of Regional City Level II of Banjar Baru, Law No. 10 of 1999 on The Establishment of Regional Regency Level II of Bengkayang, Law No. 11 of 1999 on The Establishment of Regional City Level II of Ternate, Law No. 13 of 1999 on The Establishment of Regional Level II of Luwu Utara, Law No. 14 of 1999 on The Establishment of Regional Regency Level II of Aceh Singkil, and Law No. 16 of 1999 on The Establishment of Regional City Level II of Dumai.

⁶¹ Presidential Decree in this matter is a decree encompassing provisions before Law No. 10 of 2004.

In 2007, there were sixteen Laws on establishing regencies/cities with similarities in wording the delegation order. The President also enacted these Laws on the same day, January 2nd, 2007.⁶² In the same year, Law No. 19 of 2007 on The Establishment of Memberamo Raya Regency in the Province of Papua enacted on March 16th, 2007, and has a similar style with the other sixteen established earlier.⁶³ It would be most likely that 'the latter' Law was made in parallel with the other sixteen, while the signing came last. In conclusion, all seventeen Laws were made in parallel or almost in parallel, and chose the Minister of Domestic Affairs Regulation as the delegated legislation.

Tradition in Delegated Legislation in relation to Local Governments. The third tradition is concerning delegated legislation making on local governments. This area of government is divided into (1) Law on the provision

of the local government system and the execution of the local government system.⁶² See Law No. 1 of 2007 on The Establishment of Four Lawang Regencies in South Sumatera Province; Law No. 2 of 2007 on The Establishment of Nagekeo Regency in East Nusa Tenggara Province; Law No. 3 of 2007 on The Establishment of Sumba Regency East Nusa Tenggara Province; Law No. 4 of 2007 on The Establishment of Kotamobagu City in North Sulawesi Province; Law No. 5 of 2007 on The Establishment of Batu Bara Regency in North Sumatera Province; Law No. 6 of 2007 on The Establishment of North Kayong Regency in West Kalimantan Province; Law No. 7 of 2007 on The Establishment of Pidie Jaya Regency in Nanggroe Aceh Darussalam Province; Law No. 8 of 2007 on The Establishment of Sabulussalam City in Nanggroe Aceh Darussalam Province; Law No. 9 of 2007 on The Establishment of Minahasa Tenggara Regency in North Sulawesi Province; Law No. 10 of 2007 on The Establishment of Bolaang Mongondow Regency in North Sulawesi Province; Law No. 11 Year 2007 on The Establishment of North Gorontalo Regency in Gorontalo Province; Law No. 12 of 2007 on The Establishment of West Bandung Regency Bandung Barat West Java Province; Law No. 13 of 2007 on The Establishment of North Konawe Regency in Southeast Sulawesi Province; Law No. 14 of 2007 on The Establishment of North Buton Regency in Southeast Sulawesi Province; Law No. 15 of 2007 on The Establishment of the Islands of Siau Tagulandang Regency in North Sulawesi Province; Law No. 16 of 2007 on The Establishment of Southwest Sumba Regency in East Nusa Tenggara.

⁶² The seventeen Laws describes similarities in the delegated legislation making order. Even the Article 5 paragraph (6) in each law has the same wording that states, "further provisions on the definite marking of territory on ground borders as referred to in paragraph (3) shall be stipulated with a Ministry of Domestic Affairs Regulation."

cution of local government affairs; (2) Law on the establishment of provinces, regencies and cities/municipalities; and (3) Laws on government technical affairs, which consists several matters relating to the local government. The paragraph below shall discuss the traditions in delegated legislation making based on those three categories above.

The first category places the local government system as the basis for local administration's execution. It consists of two sub-groups; where the first sub-group related to the Law on local government in general, such as Law No. 22 of 1999 on Local Government, Law No. 25 of 1999 on Financial Balancing between the Central and Local Government, and Law No. 32 of 2004 on Local Government. The second sub-group related to the Laws on 'special' governmental systems, such as Law No. 11 of 2006 on Aceh Special Regional Government, Law No. 13 of 2012 on Yogyakarta Special Region, Law No. 21 of 2001 on Special Autonomy for Papua Province, and Law No. 34 of 1999 on Provincial Government of Special Regions in the Republic of Indonesia. In this group, delegated legislation has produced delegating orders to Government Regulations, Presidential Regulations, and Ministerial Regulations. There are special mentions relating to the delegation order for Ministry of Domestic Affairs Regulations and Ministry of Finance Regulations. There were also delegations on regional level regulations, such as *Qanun*, *Perdasi*,⁶⁴ *Perdasus*,⁶⁵ Special Regional Regulations, as well as the mention of Village Regulation making.

The second category is the Laws determining regional boundaries within a region, whether provincial, regency or cities/municipalities in the Republic of Indonesia. This boundary setting and the establishment of provinces/regencies/cities Laws are more formal or known as Laws with injunction characters. On average, the Laws that fit into this group do not give orders for delegated

⁶⁴ Peraturan Daerah Provinsi Papua (Perdasi) is Regional Regulation of Papua Province enacted to exercise the authorities given by the Laws.

⁶⁵ Peraturan Daerah Khusus (Perdasus) is Regional Regulation of Papua Province enacted to implement particular articles stated in the Law on Special Autonomy for Papua Province.

regulations. Between 1999 and 2012, 135 laws were included in this group, yet only 35 Laws demand delegated regulations. From a normative perspective, Laws with injunction characters should not give an order for delegated legislation making. However, in practice, delegated legislation making orders are still found within this group of Laws. Delegated legislation making in this group is given to: Government Regulation. The substances delegated to Government Regulations are related to the addition or reduction of government affairs.⁶⁶ Laws within this group govern several governmental affairs subject to the authorities of the new local government. To provide the possibility of adding or reducing the given affairs, one of the articles in these Laws orders the delegated regulation-making. The authority given in Government Regulation is understandable since the Central Government owns overall authority to add or reduce such affairs.

Presidential Decree. In 2000, the delegation for Presidential Decree making was given by the Laws relating to the establishment of provinces/regencies or cities/municipalities.⁶⁷ These decrees contain substances on the total amount and procedure to fulfill membership of the Council of Regional Representative (Dewan Perwakilan Rakyat Daerah).⁶⁸

The Minister of Domestic Affairs Regulation. The Laws in this group ordered the stipulation of the territory borders ground marking by the Minister of Domestic Affairs Regulation.⁶⁹ As the affair of territory bor-

ders, the related region cannot stipulate the ground marking, so the Ministry of Domestic Affairs Regulation should be appointed. Such delegation is currently considered as the most accurate one as the latter is considered to be executed by the Minister.

The third category is the other technical Laws related to local government affairs and directly linked to the stipulations of the citizens, such as the Laws on state finance, energy, disaster prevention, spatial planning system, waste management, coastal and small islands management, state treasury, finance balancing between the central and local government population development and family building, sustainable protection of food farming land, mineral and coal mining, as well as the composition and status of MPR, DPR, DPD, and DPRD.⁷⁰

The titles in the third category do not actually show local government regulation, but as technical affairs directly bind the local citizens, there are many stipulations that are directly delegated to the Regional Regulations. Several examples of substance from this group of Laws that are made into Regional Regulation are the blueprints for the development of regency/city tourism and the determination of slum area and residential area by local governments.⁷¹ The substance of those mentioned above is subject to the Local Government, so functionally it is easier if they are made into delegated legislation that comes from the local government's authority, that is, the Regional Regulation.

Traditions in Laws Without an Order to make Delegated Legislation. Within the timeframe of Lawmaking in this study, 210 Laws from the total amount of Laws made in those fourteen years that did not delegate to subordinate delegated legislation reached almost 44 percent of a total of 478 Laws. This phenomenon reached its highest in 2008,

66 There were several Laws on the Establishment of provincial, regency, or city/municipality government. As an example, Article 12 paragraph (1) of Law No. 15 of 1999 on The Establishment of Regional City Level II of Depok and Cilegon explains that part of government affairs are given to the Local Government of Depok, and Article 12 paragraph (3) provides the possibility to add or reduce through provisions in a Government Regulation.

67 At this current time, Presidential Decrees that are provisional are included as legislations based on Presidential Decree no.44 of 1999 on Techniques in Legislative Drafting.

68 See Law No.12 of 2000 on Amendment to Law No. 52 of 1999 on the Establishment of Lembata Regency, Law No. 10 of 2000 on Amendment to Law No. 50 of 1999 on the Establishment of Boalemo Regency.

69 Laws are stating the requirement of Ministerial Regulation, such as Law No. 3 of 2007 on The

Establishment of Suma Regency in West Nusa Tenggara Province and Law No. 2 of 2007 on The Establishment of Nagekeo Regency in East Nusa Tenggara Province.

70 In the table of Laws from 1999 to 2012, it is found that Laws on such issues delegated legislation making to Regional Regulations. Not too many, on average each law has 1 delegated legislation making to Regional Regulations.

71 Law No. 1 of 2011 on Housing and Settlement.

with a total of 35 Laws. Most of these were Laws on the establishment of local government. Existing data shows that there were several Laws with substances that did not delegate to subordinate delegated legislation, such as: Law on the establishment of regional area and local government; Law on the establishment of courts; Law on the ratification of treaties; Law on the revocation of other Laws; Law on APBN or its amendment; Law on the enactment of Government Regulation in Lieu of Law as Law; and Laws that do not require subordinate legislation with some 'unique' character.

From those categories, most of all of the Laws have a unique character as Laws that only sets conditions or Laws that set others into Laws, with a small portion of those are stipulations. Several Laws did not require subordinate delegated legislation since their substance is actually 'simple' and only consists of a few articles. Another reason added is that they are only internal organizational provisions. The absence of delegation is a consequence of the lack of the need to have an implementing or delegated legislation, particularly for the provisional Laws. This differs from Laws that are injunctions in character and do not require implementing regulation.

Designs Created from the Traditions in Delegated Legislation

A total of 473 Laws were made from 1999 to 2012, of which 261 of them did delegate to subordinate delegated legislation. Based on the 261 laws above, it is concluded that Indonesia has three traditional models of delegated legislation as follows: Functional Model. Laws utilizing this function model emphasize function over a constitutional stipulation that mandates for Government Regulation as delegated legislation. Such Laws directly delegate legislation to a reachable institution for more straightforward implementation of its function. Practice shows several examples of this model, such as the Laws regarding certain governmental areas prefer Ministerial Regulation making since it is much simpler than Presidential Regulation making. Unlike the Government Regulation, Ministerial Regulations are made only within

the related ministry milieu and not through inter-ministry committees.

This model is also found in several Laws technically related to local governments. There is a tendency for laws relating to technical matters and directly linked to local governments delegating to Regional Regulations. This choice lies on the 'technical implementing function' of local governments, so such delegations would have more role if given to local governments.

Tempus Model. The tempus model is also found in this study. Practice shows that the parallel timing of drafting bills and its enactment into Laws, marked by the President's signing, will have the same delegated legislation and the similar wording.

Sectoral/Affairs Model. The same ministry usually drafts laws made for the same affairs. For example, the Law on Bank Indonesia and Law on Guarantor Institutions for Savings and Loans came from the same government unit resulting in the same delegated legislation making. Study results show that Laws coming from the same government sectors/affairs tend to have similarities in delegated legislation.

D. Conclusion

As the Rule of Law, Indonesia has a unique governmental system, where there is no rigid separation of powers causing the division of power. In this regard, the President as the holder of executive power, also has legislative power in making laws with the DPR and DPD. Based on Article 5 paragraph (2) of the UUD 1945, the President is given the authority to form a Government Regulation to implement the Law, that is, the delegated legislation. Three models were created from 1999 to 2012 from the tradition of developing delegated legislations, namely the functional model, tempus model, and sectoral/affairs model. Such model is not in accordance with the provisions in the Indonesian constitution. Besides, there are several incompatibilities in the implementation of delegated legislation as mandated by the UUD 1945 with practice, including due to policymakers' lack of understanding on which type of legislation is the most accurate to implement Laws,

misunderstanding between the delegated legislation and the implementing regulations of Laws, broadening interpretation on the concept of delegated legislation, the lawmakers' preference on the 'simpler' regulations, types of delegated legislation of a particular sector has become a hereditary tradition and the distrust in Governmental Regulations as delegated regulations. Therefore, it is necessary to control the delegation of Laws in Indonesia by selecting government regulations as delegated legislation.

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