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Rethinking Delegated Legislation in the Indonesian Legal System

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Abstract

Introduction to The Problem: Delegated legislation in Indonesia is a new type of legislation that should be interpreted and ruled carefully. However, nowadays, the Indonesian legal system has no fixed term for delegated legislation and no hierarchy on it. Furthermore, as many as 57.677 regulations at the level of Ministries, Agencies and State Institutions have the potential to overlap regulations and become subject to judicial review in the Supreme Court

Purpose/Objective Study: This article aims to analyze the best term and hierarchy of delegated legislation in the legal system in Indonesia.

Design/Methodology/Approach: This legal research conducted normative studies, by examining previous studies on delegated legislation and Electronic and Information Transaction (EIT) law to imagine the delegated legislation type and hierarchy. The data was analyzed by a prescriptive method to give a new idea regarding delegated legislation in Indonesia's legal system.

Findings: This paper finds no fixed term for delegated legislation in the Indonesian legal system. There is a loophole in the Indonesian legal system related to delegated legislation. However, some scholars argue that delegated legislation in Indonesia can be found in Government Regulation, Presidential Regulation, Local Regulation and *beleidsregel* in Article 8 Paragraph (1) Law Number 12 of 2011 concerning Establishing Statutory Regulation and its amendment. As a suggestion, the amendment of the Law on Establishing Statutory Regulation is a must in carrying delegated legislation definition, purpose and hierarchy.

Paper Type: Research Article



Keywords: Delegated Legislation; Legal System; Electronic; Indonesia

Introduction

Legislation is a grouping of words that has the form of legislation (Erdos, 2023). It is defined as any text approved by all houses of a legislative assembly and signed by the head of state, the governor, the head of local government or their representative. A series of legislative procedures are used to create legislation, and the reproduction of the official language of legislation in the proper form indicates that the words have been adopted as a result. This legislation is "intended as an act of norm creation on the part of the legislator" (Daly, 2021).

Legislation, however, also has substantive qualities. Ordinarily, legislation consists of a broad, impersonal set of standards that are forward-looking yet fixed in time, intended to alter the current legal situation, and only subject to modification through a specified procedure. These important qualities will occasionally be present (Daly, 2023). As a product of legislation, the legislation contains regulations and/or rules that executives should implement and monitor by judicatives, as Trias Politica's doctrine mentioned (Handmaker & Taekema, 2023).

However, different practices are found in the common law system. Common law jurisdictions frequently use delegated legislation, also known as subsidiary legislation. Delegated legislation includes, among other things, rules, bylaws, and regulations. Despite the wide range of terminology, they all have something in common. Contrary to popular belief, the legislative branch does not actually enact delegated laws. assigned legislation is actually enacted by executive authorities pursuant to legislative powers assigned to them by the legislature, in contrast to primary legislation, which does originate from the legislature (Chng, 2023).

The executive branch usually produces delegated legislation in response to legislative weakness to implement the law they made. The phenomenon was captured by Lord Hewart, former Lord Chief Justice of England and Wales and the author of *New Despotism* (Hewart, 1929; Kosti, 2023), who shared the idea of delegated legislation and then the delegated legislation popular in the British and most common law jurisdiction. Furthermore, the situation of delegated legislation turns unfavorable, as observed in Australia. An example is the National Construction Code, which, through its delegated legislation, significantly falters in addressing the combustible cladding crisis, incurring an estimated cost of around \$6 billion for remediation (Pump & Scheepbouwer, 2023). Additionally, issues concerning legislative capacity and bureaucratic reputation pose significant challenges for delegated legislation (Zhang et al., 2023).

Although delegated legislation is popular in common law jurisdiction, it is probably a new idea in civil law jurisdiction, such as in Indonesia. The first author who wrote and discussed delegated legislation in Indonesia is Moh. Fadli, a professor from Universitas Brawijaya, earning his doctoral degree at Universitas Padjadajaran



Bandung. With the same topic, Moh. Fadli wrote a book published by Universitas Brawijaya Press (UB Press), *Peraturan Delegasi di Indonesia*, in 2011 (Fadli, 2011). Then, in the next four years, Fitriani Ahlan Sjarif, a Lecturer from Universitas Indonesia, wrote her Dissertation, *Pembentukan Peraturan Delegasi dari Undang-Undang pada Kurun Waktu 1999 - 2012*, in 2015 (Sjarif, 2015).

Since then, the study of delegated legislation in Indonesia has risen. Some authors write on delegated legislation, such as Fathorrahman, who wrote in *Jurnal Rechtsens* about the delegated legislation in Indonesian legislation (Fathorrahman, 2018). Fitriani Ahlan Sharif also wrote in *Pakuan Law Review* in 2017 about the language style of order sentences of delegated legislation (Sjarif, 2017). On the other hand, Prisca Listiningrum wrote about Presidential Regulation, defined in Indonesia as a type of delegated legislation. Prisca wrote on *Jurnal Arena Hukum* in 2019 (Listiningrum, 2019).

The previous research on delegated legislation in Indonesia needs to analyze the definition of delegated legislation precisely. Moh. Fadli wrote about how to control and monitor the enormous number of delegated legislations (when this article was written, more than 57-thousand delegated legislations existed in Indonesia, which had the potential to give rise to overlapping regulations and become the object of a dispute over the right to judicial review at the Supreme Court) by strengthening the legislative body. At the same time, Fitriani Ahlan Sjarif focuses on Governmental Regulation as the best type of delegated legislation. However, the kind of delegated legislation in Indonesia is more varied, such as Government Regulation, Presidential Regulation, and Local Regulations (Fadli, 2011). So, this research, which has questioned how delegated legislation and its hierarchy in Indonesia's legal system should be, is new in Indonesia.

In the end, from the background above, this paper will gain high-contribution research, especially in legislation. The findings will accurately help scholars and experts understand how delegated legislation in Indonesia is, which is the best hierarchy for delegated legislation in Indonesia's legal system, and what the purpose of delegated legislation is.

Methodology

Analyzing regulation is a type of legal research (Irwansyah, 2020). As legal research, this paper collected any acts or bills related to the topic, and delegated legislation (such as 57.677 regulations at the level of Ministries, Agencies and State Institutions and so on). Then, those regulations are analyzed with prescriptive methods (Peter Mahmud Marzuki, 2022), such as a doctor who gives a medical prescription to a patient. The authors use the prescriptive method to give a new idea regarding delegated legislation in Indonesia's legal system. Primary law resource is used in this paper, with the conceptual, historical, and statutory approaches (Al-Fatih & Siboy, 2021) to describe how the problem should be fixed.



Results and Discussion

Understanding Delegated Legislation in Various Legal Systems

The legal system is defined as a legal way (Fadli & Hadi, 2023). Every single culture of law has a different legal system (Said et al., 2023). Furthermore, every country has its legal system. Although, famously, the legal system is divided into common law and civil law. However, scholars have recently rejected those doctrines due to the dynamics of law, and the phenomenon showing that every country has different legal cultures, values and beliefs.

Mathias M. Siems stated that there are at least 156 (one hundred and fifty-six) countries that have legal systems. Of the 156 countries, Mathias M. Siem divided into 4 (four) clusters of legal systems as the origin of the legal system (Siems, 2016). The original legal system is a legal system that affects and develops in these 156 countries. The four clusters are as follows: First, nations with any legal tradition in Europe, including Common Law, Germanic, French, and Nordic civil law, make up the majority of the "European Legal Culture" cluster. It also includes a few non-European nations that score highly on institutional metrics and have been greatly impacted by European legal systems. In the European legal systems, delegated legislation is also well known as secondary legislation and implemented also in European Union jurisdiction (Nguyen & Dinh, 2020).

Second, since the nations in the second cluster combine elements of civil law, religious legal traditions, and/or common law systems, they are referred to as having "Mixed Legal Systems." The literature frequently categorizes the following countries as having mixed legal systems: South Africa, Sri Lanka, Israel, Botswana, Guyana, Lesotho, Namibia, Zimbabwe, and the Philippines. Some of the nations in this cluster, like India and Kenya, have a common law system in line with their history as former English colonies; others, like the Philippines and Taiwan, may have benefited more recently from US law. The practice of delegated legislation in this cluster is similar to the previous cluster due to colony law.

Third, the 'Rule by Law' cluster includes a few non-democratic nations, many of which have socialist origins, along with a few nations that follow Islamic law. Still, it is evident that the central Asian countries are on the right side of the cluster, nearer the 'transition' cluster, and the Muslim countries of the Middle East are often on the left side: At the bottom of this cluster is China. This cluster is slightly different from the first and second clusters, while Islamic law in the Middle East plays a large part in creating the pattern of delegated legislation. Islamic law takes the Holy Qur'an and Al-Hadith as the primary source of law, while the delegated legislation is implemented in *Ijma'* or *Ijtihad* from Ulama. In Indonesia, *Majelis Ulama Indonesia (MUI)*, *Majlis Tarjih Muhammadiyah*, and *Majlis Bahtsul Masa'il Nahdlatul Ulama* are some of the most popular Islamic organizations that release fatwa (a binding decision of *Ijma'* and *Ijtihad* from Ulama) (Al-Fatih et al., 2021).



Fourth, the hardest cluster to identify has been the fourth one, "Weak Law in Transition." It comprises a wide range of nations from South-East Europe, Asia, Africa, and Latin America. It is possible to consider many of the nations in this cluster to be transitional nations. Overall, as the discussion in the next section will make clear, these nations likewise share the trait of having respectable but imperfect legal systems. The last cluster is probably difficult to identify in terms of whether the delegated legislation is implemented or not.

On the other hand, M. Fadli, the legal systems developing at this time can also be divided into 4 (four) parts, namely 1) the Continental European legal system or Civil Law that develops in Mainland Europe, such as Germany, France, the Netherlands, and other countries; 2) the Common Law/Anglo Saxon legal system that develops in England, the United States, and other countries; 3) Islamic legal systems developing in the Middle East; and 4) Hybrid legal systems (Fadli & Hadi, 2023).

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First, the Continental European legal system/Civil Law. Referred to as the Civil Law system because this legal system originated from the codification of *Corpus Ius Civilis* carried out by the emperor Justinian around the 6th century BC. It is referred to as the Continental European system because this legal system spreads in Mainland European countries such as Germany, France, the Netherlands, and other Mainland European countries. This legal system may implement the delegated legislation, only while the legislative gives the authority to the executive. The main features of the Civil Law legal system are as follows:

- a. Legislation or written law is the main source of law, so that parliament has a very large role in creating laws. Rules are said to be laws if they have been positively maximized by parliament. Therefore, the Civil Law legal system sovereignty is held by parliament (parliament supremacy). As a result, the law as a product of parliament cannot be contested in the court. The Civil Law country that still upholds the principle of parliamentary supremacy is the Netherlands. Other countries such as Germany, France, and other civil law countries have abandoned the principle of parliamentary supremacy, along with the adoption of judicial review mechanisms.
- b. The role of judges is only as a speaker of the law so the creation of laws by judges is very limited. In the civil law legal system, the creation and formation of laws are more done in the legislative process. Judges are only executors of laws made by parliament. The judge only has the role of solving the case submitted to him. Judges are only limited to being negative legislators, not judge-made laws. Although judges are given the authority to interpret laws, it is very limited.
- c. It does not recognize the principle of precedent or *stare decisis*, only about the principle of jurisprudence constant. As a result of the implementation of the law in parliament, judges are only bound by laws made by parliament (bound by law). The judge is not bound by precedent. However, in the legal system of Civil Law, it is known as the principle of 'fixed jurisprudence'. Fixed jurisprudence is the decision of the previous judge that is recognized as true and followed by the judges



after it because the decision contains excellent legal rules. However, it is not binding for judges in making decisions.

- d. Public law and private law are strictly separated.
- e. Other characteristics such as not using juries in the criminal justice system.

⁴ Second, the Common Law/Anglo-Saxon legal system is referred to as the Common Law legal system because this legal system originates from the customs (common) of English society. It is referred to as the Anglo-Saxon legal system because this legal system originally grew and developed in the Anglo-Bangs (Angles) and Saxon-Bangs tribes living in Great Britain. This legal system may also be the most implementation of delegated legislation, as much as the civil law system. The main features of the Common Law legal system are as follows:

- a. The main source of law is the common manifestation in the judge's decision. The Common Law legal system is derived from people's habits in the form of legal principles. Then, these legal principles are used by judges to solve concrete cases submitted by the community. The judge's decision is not only binding on the parties to the dispute, but the legal rules built by the judge in his decision become law that applies to everyone.
- b. Judges have a very big role in creating law (judge-made law). The courts are the main legal development centers in the Common Law legal system. For this reason, judges are the creators of laws (positive legislators), in addition to acting as a dispute resolution institution submitted by the community. Judges are given independence and freedom to explore legal principles that live in the community to create certain legal rules. Therefore, judges can create binding and generally accepted legal rules for parliamentary institutions.
- c. It is known as the principle of precedent or *stare decisis*. Because the main legal development is in court decisions, the Common Law legal system applies the principle of *stare decisis*. Based on this principle, the judge after him is bound and must follow the decision of the previous judge in the same case (bound by precedent). The judge thereafter is prohibited from giving a different ruling in the same case from the previous judge's decision unless there are certain reasons that cause the previous decision to be replaced.
- d. Public law and private law are not strictly separated.
- e. Another feature is the use of juries in its criminal justice system.

Third, the Islamic legal system is referred to as the Islamic Legal System because this legal system originated from Islamic thought brought by the Prophet Muhammad SAW, Peace Be Upon Him (Zada et al., 2022). For this reason, this legal system is also known as the Muhammadian Legal System and spreads across the Middle East, some African countries, and Southeast Asia. As previously described, the delegated legislation is implemented in Ijtihad (because Ijtihad, Ijma', among others, are the form of delegated legislation from the authority of Al-Qur'an and Hadith). The main features of the Islamic Legal System involve the following:



- a. The main sources of law are the Holy Qur'an and the Al-Hadith (Wibowo et al., 2023). The Qur'an is a revelation of Allah SWT revealed to the Prophet Muhammad SAW which contains the Sharia. For this reason, the Qur'an is the main source of law in the Islamic Legal system. Then, the sharia contained in the Qur'an is explained and detailed in the Hadith of the Prophet Muhammad SAW, both in the form of words, deeds, and determinations.
- b. The government or judges or scholars are allowed to make laws through Ijtihad provided that it is done in cases that are not explained in qath' the law in the Holy Qur'an and Al-hadith and do not contradict the Qur'an and Al-Hadith (Zulfikar, 2020).
- c. The purpose of law in the Islamic Legal System is to protect 5 (five) things, namely religion, soul, reason, property, and offspring. These five things are referred to as *Maqashid Sharia* (Purnomo et al., 2023). Some Muslim jurists in the 20th century added that it protects the environment as part of the purpose of Islamic Law.
- d. Islamic law regulates the relationship between man and Allah SWT (*ubudiyah*), the relationship between man and man (*muamalah*), and the relationship between man and the environment.

Fourth, a hybrid legal system. It is referred to as a mixed legal system because this legal system is a mixture of Civil Law and Common Law legal systems, even with other major legal systems. This mixed legal system was born, one of which was caused by globalization. Globalization causes no legal system to be independent or completely independent from the influence of other legal systems. By this legal system, delegated legislations are implemented in various forms, like in Bali. While civil law is mixed with *adat*/customary law, *awig-awig* as a local regulation consists of national or local regulations with Hinduism values. The main features of a mixed legal system are as follows:

- a. The source of law is not only in the form of laws and regulations but also in the form of common which is concretized in the judge's decision
- b. Judges have a more important role in creating laws with certain limits (judicial restraint), and today, the legal system has undergone modifications here and there tailored to the needs of each country. That is, the state has imaged its legal system in accordance with the legal needs and character of its people. The United States and Indonesia are 2 (two) countries that can be proposed as examples. Although basically the United States uses the Common Law/Anglo-Saxon legal system, it has a legal variant that is modified and developed to produce a variant of the legal system Anglo-American. The Indonesian legal system is influenced a lot by the civil law legal system, but Indonesia is not a country with a pure Civil Law legal system. Because, in practice, Indonesia also uses Islamic law and customary law in law. For this reason, Indonesia introduced its legal system called the Pancasila legal system which is prismatic.

Thus, this research leads to the main idea that there are 4 (four) main categories of legal systems. Delegated legislation is among the four types of legal systems that have



emerged; they are established and employed extensively in civil law, common law, and Islamic legal systems. In civil and common law systems, delegated legislation also known as secondary legislation implements primary legislation, while in the Islamic legal system, they are referred to as *Ijtihad* or *Ijma'*.

Delegated Legislation in Indonesia: How Should It Be?

Various legal system above has different types of delegated legislation. In Indonesia, there are no fixed terms for delegated legislation. Delegated legislation belongs to the Government Regulation, Presidential Regulations, and Local Regulations (Fadli, 2011). However, Article 8 Paragraph 1 Law Number 12 of 2011 concerning the Formation of Statutory Regulations stated that Ministry Regulation, Bank Indonesia Regulations, House of Representatives Regulations, and many others, are subject to delegated legislation.

Based on the database of the Directorate General of Legislation, Ministry of Law and Human Rights of Indonesia, the number of laws and regulations from 1945 to December 2019, the government has issued many regulations. Of this number, the most numerous regulations are ministerial-level regulations, namely 14,334 Ministerial Regulations. This number continues to increase in 2021, where, based on data from the Ministry of Law and Human Rights, there are 3,835 Central Regulations (including Government Regulations and Presidential Decree), 16,619 Ministerial Regulations, 4,478 *Lembaga Pemerintah Non-Kementerian/LPNK* Regulations (Non-Governmental Institution) and 15,982 Local Regulations.

The data is updated daily on the webpage www.peraturan.go.id, and during the time this paper was written, the number of regulations reached 57.677 on 3rd November 2023. Those regulations include 55.317 active rules, 2.771 non-active regulations, and 9.637 regulations related to the law (www.peraturan.go.id, 2023). The massive number of delegated legislations in Indonesia, according to the type of Government Regulations, Presidential Regulations, Local Regulations, and the types of regulation in Article 8 Paragraph 1 Law Number 12 of 2011 concerning the Formation of Statutory Regulations, probably takes severe discussion for scholars.

Current regulation in Indonesia's legal system does not regulate the delegated legislation as well. There are no fixed terms for delegated legislation. Then, how should it be? The condition is a loophole in the Indonesian legal system. Moreover, there are only a few papers or research regarding those issues. In this research paper, the author(s) may recommend a way to solve the problem. First, the Government should amend Law Number 12 of 2011 concerning the Formation of Statutory Regulations and add fixed terms and purposes for delegated legislation. The terms and purpose of delegated legislation can refer to the theory of sources of authority in the state administrative law (Sibarani et al., 2023). In the source of authority theory, it is explained that there are attribution, delegation, and mandate sources of authority (Al-Fatih & Muluk, 2023). Theoretically, the source of delegation authority means that



delegation can only be given if there is authority to order it. This is in line with the principle of *delegatus non potes delegare* (Carr, 2016).

Second, the delegated legislation must be clear that it is made from the primary legislation such as *Undang-Undang/Law* and *Peraturan Pemerintah Pengganti Undang-Undang/Government Regulation in Lieu of Law*. Delegated legislations not made by those primary legislations may be canceled by the judiciary and/or legislative procedures (Fadli, 2011). Third, according to Article 8 Paragraph 1 Law Number 12 of 2011 concerning the Formation of Statutory Regulations, there is no hierarchy. So, the Government should add a hierarchy to it. The author(s) recommend that the hierarchy be made vertically, from the primary legislation to the secondary legislation. For example, the author simulated Law Number 19 of 2016 concerning Electronic and Information Transaction and all the amendments (hereinafter referred to as EIT Law) that have delegated legislation model. EIT Law and delegated legislation model can be found on Article 10 Paragraph 2, Article 11 Paragraph 2, Article 13 Paragraph 6, Article 16 Paragraph 2, Article 17 Paragraph 3, Article 22 Paragraph 2, Article 24 Paragraph 4, Article 26 Paragraph 5, Article 31 Paragraph 4, and Article 40 Paragraph 6. These 10 (ten) delegated legislations are hierarchically straight under the EIT Law. Even if the EIT Law has new amendments, and the delegated legislation type is not Government Regulations, such as Ministerial Regulation, the hierarchy is still the same. The hierarchy of delegated legislation is based on the primary legislation. Without delegated orders from the primary legislation, the delegated legislation cannot be made.

Fourth, as the various legal systems mentioned by Mathias M. Siems and M. Fadli, there is an Islamic legal system that produces *Ijma'* or *Ijtihad* from the Ulama. In Indonesia, there were famous Islamic organizations, such as Majelis Ulama Indonesia (MUI), Muhammadiyah, Nahdlatul Ulama (NU), PERSIS, Hidayatullah, Nahdlatul Wathan (NW), and so on (Aditya & Al-Fatih, 2019). They also produce fatwa as a type of *Ijma'* and *Ijtihad* so that it could be formulated as a new type of delegated legislation. So, besides Government Regulations, Presidential Regulations, Local Regulations, and Regulations in Article 8 Paragraph 1 Law Number 12 of 2011 concerning the Formation of Statutory Regulations, the Government should add MUI Fatwa as a part of delegated legislation and be a positive law. All in all, in Indonesia, delegated legislations should be figured out as an implementing/technical regulation that get delegation authority in the sphere of legislation from the Law/Perppu (primary legislations) above, and whose position is immediately under the Law/Perppu that commands them.

Conclusion

This paper concludes that there are no fixed terms for delegated legislation in the Indonesian legal system. There is a loophole in the Indonesian legal system related to delegated legislation. However, some scholars argue that delegated legislation in Indonesia can be found in Government Regulation, Presidential Regulation, Local



Regulation, and Ministerial Regulation in Article 8 Paragraph (1) Law Number 12 of 2011 concerning Establishing Statutory Regulation and its amendment. As a suggestion, the amendment of the Law on Establishing Statutory Regulation is a must in carrying delegated legislation definition, purpose, and hierarchy. Thus, the delegated legislation in Indonesia should be defined as implementing/technical regulations, which obtain delegation authority in the field of legislation from the Law/Perppu (primary legislations) above, and whose position is directly under the Law/Perppu that orders them.

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Declarations

Author contribution : Author 1: initiated the research ideas, instrument construction, data collection, analysis, and draft writing; Author 2: revised the research ideas, literature review, data presentation, and analysis; Author 3: revised the research ideas about the hierarchy of delegated legislation, analysis, and the final draft; Author 4: revised the research ideas about the delegated order from primary legislation and analysis, and the final draft.

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Rethinking Delegated Legislation in the Indonesian Legal System

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Abstract

Introduction to The Problem: Delegated legislation in Indonesia is a new type of legislation that should be interpreted and ruled carefully. However, nowadays, the Indonesian legal system has no fixed term for delegated legislation and no hierarchy on it. Furthermore, as many as 57.677 regulations at the level of Ministries, Agencies and State Institutions have the potential to overlap regulations and become subject to judicial review in the Supreme Court.

Purpose/Objective Study: This article aims to analyze the best term and hierarchy of delegated legislation in the legal system in Indonesia.

Design/Methodology/Approach: This legal research conducted normative studies, by examining previous studies on delegated legislation and Electronic and Information Transaction (EIT) law to imagine the delegated legislation type and hierarchy. The data was analyzed by a prescriptive method to give a new idea regarding delegated legislation in Indonesia's legal system.

Findings: This paper finds no fixed term for delegated legislation in the Indonesian legal system. There is a loophole in the Indonesian legal system related to delegated legislation. However, some scholars argue that delegated legislation in Indonesia can be found in Government Regulation, Presidential Regulation, Local Regulation and *Indisregel* in Article 9 Paragraph (1) Law Number 12 of 2011 concerning Establishing Statutory Regulation and its amendment. As a suggestion, the amendment of the Law on Establishing Statutory Regulation is a must in carrying delegated legislation definition, purpose and hierarchy.

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