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JURIDICAL REVIEW OF THE ISSUANCE OF MINISTERIAL REGULATIONS WITHOUT ANY DELEGATION FROM THE LAW

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Abstract

Ahead of the syncronous Regional Elections (Pilkada) that to be run in November 2024, there is still a polemic related to the legal guidelines for the acting of regional heads's levitation whose term of office ends ahead of the 2024 simultaneous elections. The legal basis for the Minister of Home Affairs Regulation Number 4 of 2023 concerning Acting Regional Heads issued by the Minister of Home Affairs is considered to have many irregularities. This paper reveal the absence of statutory delegation in the issuance of the Permendagri and the use of legal considerations of the Constitutional Court judges in the Constitutional Court Decision Number 15/PUU-XX/2022 as a consideration in the Permendagri. The research method used in this paper is normative juridical through a statutory approach as a source of existing law. The results of this study conclude that the issuance of Permendagri No. 4 of 2023 is unfounded if only viewed through the presence or absence of delegation of the formation of implementing regulations. If viewed more broadly through the theory of discretion, then this is considered valid, in order to fill the legal vacuum. The legal deliberations of the Constitutional Court judges in MK's Decision Number 15/PUU-XX/2022 also strengthen the legitimacy of the issuance of Permendagri No. 4 of 2023, this is because the content of the legal considerations is considered to be commensurate with the ruling, even though the ruling was rejected. Unfortunately, the implementing regulation chosen by the government to regulate the inauguration of acting regional heads is in the form of a Minister of Home Affairs Regulation, not a Government Regulation.

Keywords: Ministerial Regulations, Statutory Delegations, Legal Considerations

Introduction

The election of regional leaders, which we commonly know as regional elections, is a procedure carried out to submit the sovereignty of the people through the process of electing government leaders in the regions democratically (Johannes, 2020). Pilkada is a political reality that plays a major role in the process of democratic development at the local level. Pilkada is a way for local communities to take part in forming a transparent local government that is directly legitimized by the people.

In Article 101 of Law Number 10/2016 on Pilkada that the 2024 regional election voting will be held in November 2024 (Guspardi, 2024). In line with this, the Government and the House of Representatives agreed to eliminate the elections in 2021 to 2023. In order to avoid filling vacant positions due to the postponement of the elections, an acting regional head will be appointed by the Minister of Home Affairs (Huda, 2021). This is stipulated in Article 201 paragraphs (9), (10) and (11) of Law No. 10/2016 on Pilkada. As of 2021, Minister of Home Affairs Tito Karnavian has appointed 20 Acting Governors in 20 provinces and 182 Acting Regents/Mayors in 182 regencies/cities (Vote., 2024).

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Initially, the mandate of acting regional heads generated a lot of polemics in the community due to the absence of implementing regulations regarding the mechanisms and requirements that became the benchmark for the government in acting regional heads designation. This led to public suspicion concerning the transparency of the selection of acting regional heads, so there was potential for the acting heads to be selected without experience, integrity, and good credibility. The absence of community involvement in the process of selecting acting heads also makes the aspirations of the people in the regions not well channeled, especially in terms of the figure of regional leaders needed by local community (Anugrah, 2023).

After Constitutional Court (MK) decision Number 15/PUU-XX/2022 the Minister of Home Affairs, Tito Karnavian ratified the Permendagri Number 4 of 2023 concerning Acting Governors, Acting Regents, and Acting Mayors in response to public criticism and follow-up regarding the MK's decision Number 15/PUU-XX/2022 on April 5, 2023.

Article 8 paragraph (1) of Law No. 12/2011 on the Formation of Legislation regulates Ministerial Regulations. This article explains that Ministerial Regulations are included in other regulations other than those mentioned in Article 7 paragraph (1) of Law No. 12/2011. In addition, Article 8 paragraph (2) of Law No. 12/2011 states that Ministerial Regulations are binding if they are stipulated by higher laws and regulations or made through the primary of the relevant Ministerial authority. Ministerial Regulations are basically needed in order to implement the provisions of higher laws and regulations, which explicitly request or order the making of further regulations in the form of Ministerial Regulations (Zaman et al., 2020).

In making Ministerial Regulations, several things need to be considered, namely contained in the Stufenbau theory (ladder theory) proposed by Hans Kelsen, that, regulations (norms) their binding force comes from a higher regulation (norm) (Rumokoy. D. A., 2018). The origin of the delegation of Ministerial Regulations can start from Government Regulations, Laws and Presidential Regulations that do not cover all matters, let alone certain ministerial fields. In addition, delegation can also come from Government Regulations, Laws and Presidential Regulations that are not detailed and require Ministerial Regulations, so that the content discussed in the regulation is well defined (Wardoyo et al., 2024).

There are several conditions for delegation of authority to form Ministerial regulations according to Jimly Asshidiqie, such as (Asshiddiqie, 2004):

1) There is clear direction on the subject matter of the implementing agency that is granted the delegation of authority, as well as the format of the implementing regulation that explains the content of the delegation of authority;
2) There is clear direction on the type of implementing regulations that should be used to include the given regulatory material;
3) The law or lawmaking body gives a clear mandate to the delegated body, without specifying the type of regulation being mandated.

The nature of the three provisions above is alternative, there is at least one of the three to be the reason for the delegation of regulatory authority (rule making power). After the law as "primary legislation" has instructed or handed over the authority to establish a regulation, only then can the law implementing agency hold the authority to issue regulations that are binding in general, because the most important provision for delegating the authority to form regulations is that there must be an order or delegation that is expressly contained in the law (Asshiddiqie, 2006).

Often, delegation is only mentioned as the subject of the grant, not the form. The President, in his position as the leader of the government, has the power to issue legal products such as Government Regulations, Presidential Regulations, or order his ministers to make and stipulate Ministerial Regulations if higher regulations mention that certain matters that intersect with these regulations will be further regulated in implementing regulations made by the government (Huda, 2021).

As the leader of the government, the Minister can issue Ministerial Regulations in their respective fields because there is an explicit order regarding the delegation of authority to make implementing regulations. However, if the type of implementing regulation that is intended to express the delegated regulatory material is not clearly and explicitly defined, then the institution receiving the delegation must determine the form of the implementing regulation itself.

This issue relates to Permendagri Number 4 of 2023 concerning acting regional heads. This regulation was made based on the MK's decision Number 15/PUU-XX/2022, which recommended the government to issue implementing regulations relating to acting regional heads. This Minister of Home Affairs Regulation was made without a higher law.

Based on this background, the problems that can be identified in this article are: First, related to the absence of direct delegation from the law that is used as a consideration. Second, the legal considerations in the Constitutional Court Decision used as the basis for the formation of the Minister of Home Affairs Regulation; Third, the ideal form of implementing regulations as the implementation of the Constitutional Court decision.

Research Methods

This research uses normative juridical research methods, which are based on activities that study elements to solve problems related to positive law carried out through a review of concepts, theories, legal principles and laws and regulations relevant to this research. The nature of this research is normative legal research with library research through a statutory approach *(Statue Approach)* as an existing legal source. Primary legal material comes from legislation related to this paper, while secondary legal material comes from scientific papers, books, articles, legal expert opinions, and other legal sources.

Results and Discussion

No Direct Delegation from the Law

Ministerial regulations are one type of legislation that has binding legal force as long as it is ordered by regulations above it or made based on authority, this is in accordance with Article 8 paragraph (2) of Law Number 12/2011 concerning the Formation of Legislation.

Based on the theory of delegation, the phrase *"ordered by higher regulations"* falls under the category of delegation of authority. Supplementary regulations, also known as delegated regulations, are implementing regulations of the law. In this case, an executive agency that is outside the parliament makes the implementing regulation. The delegated authority is the beginning of the order to establish implementing regulations. This indicates that the higher legislation must give clear orders to establish implementing regulations. In this case, the implementing regulation is a regulation made by an agency

external to parliament, such as a minister, who is tasked with implementing the law as a product of the legislature.

Appendix II of Law Number 12/2011 on the Formation of Legislation, numbers 198-216, provides further explanation on delegation of authority. Which in essence in the explanation of number 198 states "Lower laws and regulations can be given the authority to regulate further if ordered by higher laws and regulations." In the explanation of number 211, it is explained that the form of Ministerial regulations as the implementation of delegated regulations is only limited to technical administrative arrangements. This is to prove that the authority to regulate owned by the Minister to issue Ministerial regulations comes from the delegation of laws (Hayati & Hezron, 2024).

Currently, normatively, Ministerial regulations and Ministerial instructions are explicitly stated that they can only be issued based on and sourced from higher laws and regulations. Therefore, currently the formation of Ministerial Regulations cannot be formed through authority and is limited only if it gets delegation from higher regulations. According to a statement from Maria Farida, Ministerial Regulations fall into the group of policy regulations with an inward regulating character. A strong legal basis accompanied by the hierarchy of legislation in force in Indonesia is the basis for the formation of Ministerial Regulations. Philipus M. Hadjon in his statement stated that the material of the Ministerial Regulation contains provisions that are the jurisdiction of the Ministry's field (Handjon et al., 2005).

The rules regarding delegation to laws and regulations under the law are contained in Law No. 12/2011 including Ministerial regulations in terms of submitting delegations and receiving delegations. Redactionally, the rules for formulating the form of delegation are defined as follows (Wardoyo et al., 2024):

1) Delegated rules must be used to govern partially delegated matters. The sentence used should not be sub-delegated to the rules below. Sentence used: *...further provisions concerning ... shall be regulated by...*
2) The use of the sentence *...further provisions concerning ...* shall be regulated by or based on ... is used in cases where the regulatory material can be further delegated, also known as subdelegation. Based on this provision, it can be concluded that Law No. 12/2011 explains about subdelegation.
3) The use of the sentence *...provisions concerning ...regulated by ...* is used in situations where the subject matter has not been regulated in the delegated laws and regulations, and the content material may not be sub-delegated to lower rules.
4) The use of the phrase *...provisions concerning ...provided for by or under ...* is used in cases where the content is permitted to be further delegated than such arrangements.
5) The use of the phrase *...provisions concerning ...are regulated in ...* is used in situations where the Laws and Regulations stipulate some given material, even if it is only mentioned in a few articles or paragraphs.
6) The use of the phrase *...(type of Laws and Regulations)... concerning implementing regulations ...* is used in cases where several delegated materials are combined into one implementing regulation of the delegated Laws and Regulations..
7) Technical administrative regulations are limited to the authority granted by law to ministers, heads of government agencies outside of ministries, or officials with ministerial equivalent positions.

Regulation of the Permendagri 4/2023 on Acting Governor, Acting Regent, and Acting Mayor was issued using Article 201 paragraph (9), paragraph (10), and paragraph

11 of Law Number 10 of 2016 as one of its considerations. If examined further regarding the articles used as a consideration in the regulation, there is not a single sentence that states or orders the issuance of implementing regulations in accordance with the seven editorial rules for formulating the form of delegation which have been described previously (Hukum Online.com, n.d.).

Legal Considerations in the Constitutional Court Decision as the Basis for Establishing Implementing Regulations

The Constitutional Court is one of the two branches of judicial power other than the Supreme Court. As a judicial institution included in the judicial branch, the Constitutional Court is responsible for hearing cases of judicial review of laws against the 1945 Constitution, disputes over the authority of state institutions, and disputes over the results of general elections. This explanation is based on the first paragraph of Article 24C of the 1945 Constitution (Prang, 2011).

Article 10 paragraph (1) of Law Number 8/2011 on the Constitutional Court states that the decision of the Constitutional Court is final and binding. The decision of the Constitutional Court, in addition to being final and binding, has legal force from the time it is pronounced and cannot be canceled by legal remedies. In addition, Article 24 C paragraph (1) of the 1945 Constitution stipulates the final nature of the Constitutional Court's decision, which also includes final and binding legal force (Soeroso, 2014).

A judge's decision can be interpreted as a statement made by a judge at trial in his position as a representative of the government who has authority over it, and has the aim of resolving the case. One of the most important aspects in the birth of a judge's decision in realizing a judge's decision that has justice and legal certainty is the judge's consideration. This judge's consideration must be considered carefully, well, and carefully (Prasetya & Simangunsong, 2023).

Judges' reasoning on the case being handled is needed to build legal considerations on the empirical reality that occurs. This process is often called legal reasoning. Legal reasoning itself means the process of thinking, using, developing, and controlling a problem in the field of law by involving reason. The involvement of reason itself has the aim that a judge can find legal reasons to decide a legal case. The results of the legal reasoning will be stated in the decision in the legal reasoning section or ratio decidendi, namely the judge's legal reasoning in deciding a case (Sensu et al., 2023).

In the judge's legal consideration number (3.13.3) in the Constitutional Court (MK) Decision Number 15/PUU-XX/2022 it is written that *"... it needs to be a consideration and concern for the government to issue implementing regulations as a follow-up to Article 201 of Law 10/2016, ..."*. The verdict of the MK's Decision Number 15/PUU-XX/2022 itself was rejected in its entirety.

Often the Constitutional Court's decision, which is expected to solve the problem, actually creates new problems caused by the unclear ruling. Inconsistent legal considerations and verdicts are often a problem that causes contradictions. Based on Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, the applicable law in Indonesia must be understood not only as it is but also must fulfill the justice felt by the community (Indrayana & Mochtar, 2007). the use of progressive objective glasses must be used to read these rules, thus freeing the enforceability of positive law from its flawed character so that it then fulfills a sense of justice in society (Sarmadi, 2012).

According to Article 48(2) of the Constitutional Court Law, as well as Article 33 of Constitutional Court Regulation No. 06/PMK/2005 on Procedural Guidelines in Law

Review Cases, the judges' deliberations in the Constitutional Court's decision basically have the same legal force as the ruling. This is because the judge's consideration is an integral part of the Constitutional Court's decision, as explained in the article on the seven elements of the Constitutional Court's decision that apply cumulatively, one of which is the judge's consideration, which can result in the conclusion of a separately written verdit (Asshiddiqie, 2006). According to Prof. Dr. Yuliandri, S.H., M.H., the opinions and legal considerations that make up the verdict are legally binding and can be used as a legal basis. Based on the 1945 Constitution, these legal opinions and considerations can be interpreted as the judge's interpretation and interpretation of a case (Hukum Online.com, n.d.).

The substance of legal considerations themselves consist of two main categories of essence. *First, Ratio Decidendi*, also known as the judge's reasoning, is the reasoning used by the judge as the basis for making a decision on a case (Sidik, 2021). The judge's thoughts on Ratio Decidendi include the basic reasons that will be used to make a decision. This section is an integral part of the verdict, so it has legally binding force (Siahaan, 2008).

Second, Obiter Dictum. According to John Chipman Gray, this section is the opinion of the judge which is not necessary for the decision of the court. Such statements do not have the force of precedent, but may be meaningful. Obiter dictum itself often takes the form of overly broad statements (Britannica, 2020). *Obiter dictum* does not necessarily have a direct attachment to legal issues, hence its position is different from the verdict. In addition, Obiter Dictum does not have binding legal force (Siahaan, 2008). Obiter Dictum itself is made to explain the principles and legal provisions that will be considered by the judge (M. Natsir Asnawi., 2011).

In the consideration section [3.13.3] in decision 15/PUU-XX/2022, which is also one of the considerations in the Permendagri 4/2023 concerning Acting Regional Heads, the judge's consideration of Ratio Decidendi is seen from the previous two theories. This was based on the belief that this rule was made by the court as an interpretation of the article under review (Martitah, 2013).

The Court states in consideration [3.13] that this is one component of the consideration undertaken by the court when examining the Applicants' evidence. Essentially, the petitioners oppose the inauguration of acting regional heads in accordance with Article 201 paragraphs (10) and (11) of Law No. 10/2016, which they consider to be contradictory to democracy, popular sovereignty, and justice guaranteed by the Constitution. Although there is no word "order", the legal considerations used to make the decision have the same legal force as the Constitutional Court's decision. The non-acceptance of all requests in a decision cannot be interpreted that the article under review does not require implementing regulations. Due to the commensurate legal force between the legal considerations and the ruling, the government can establish implementing regulations for the election of acting regional heads. Although it cannot be used as positive law, the considerations contained in the MK’s Decision Number 15/PUU-XX/2022 can be used as a legal basis for making laws (Kejaksaan.go.id., 2022).

The next thing to be highlighted is that in consideration [3.13.3] in the MK’s decision 15/PUU-XX/2022, it is not clearly and explicitly stated who is then ordered to make implementing regulations. In the consideration of the decision, it is only mentioned broadly with the phrase "government". In this case, the author refers to Ni'matul Huda's opinion, which states that as head of government, the President has the authority to issue Government Regulations, Presidential Regulations, or instruct his ministers to draft

Ministerial Regulations (Huda, 2021). If there is no clear provision on the type of implementing regulation to be used to fill the given regulatory material, the authorized institution must determine for itself the type of regulation to be used (Asshiddiqie, 2006).

Although given the freedom to choose the type of implementing regulations, Jimly Asshiddiqie suggested avoiding the form of Ministerial regulations as implementing rules. Implementing regulations are better in the form of government regulations or presidential regulations (Asshiddiqie, 2006).

This is in line with the opinion of Robert Na Endi Jaweng, a member of the Indonesian Ombudsman, who emphasized that a Government Regulation (PP) should be used rather than a Minister of Home Affairs Regulation (Permendagri). There are four reasons why the implementing rules for acting regional heads must be made in the form of a Government Regulation (Tempo.co, 2022).

Based on the direction of Article 86 Paragraph (6) of Law Number 23 Year 2014 on Regional Government, which stipulates that government regulations regulate the requirements and term of office of acting governors, regents, and mayors.

1) The jurisdiction to appoint acting regional heads is not only owned by the Minister of Home Affairs, but also by the President. Therefore, it is impossible for the President to appoint an acting regional head, especially an acting governor by using Permendagri as a reference.
2) The issuance of implementing regulations on the Acting Regional Head through PP is considered to revise the material of a number of PPs that intersect.
3) The material of the implementing regulations of the Acting Regional Head must contain the appointment and limitations of his authority. Therefore, the legal umbrella must be strong, it should even be compiled in the form of a law, but the lengthy process of drafting a law will take a long time, government regulations can be an alternative for this.

With its legal force, the judge's reasoning can create a new law that is final and mandatory, forming the executorial power in this discussion. Although the legal judgment has been integrated, the competent authority still has to apply it in a particular case. The government is the competent authority here. The necessary regulations, made by the government to follow up on Article 201 of Law No. 10/2016 on Pilkada, are intended to provide strict and detailed processes and provisions for the filling of positions while taking into account the principles of democracy and to ensure that the process of filling positions is carried out in a clean, open and accountable manner in order to produce leaders with expertise, integrity and in accordance with the law (Hakim et al., 2023).

Conclusion

Minister of Home Affairs Regulation Number 4 Year 2023 on Acting Governor, Acting Regent, and Acting Mayor uses Article 201 paragraph (9), paragraph (10), and paragraph (11) of Law Number 10 Year 2016 on Pilkada as one of its considerations. However, if examined further, the article mentioned does not order to make implementing regulations. This means that it violates the rules of the hierarchy of legislation because it does not fulfill the main requirement for making implementing regulations, namely direct delegation from higher laws.

Although there is no delegation from higher laws, the legal considerations of the judges in Constitutional Court Decision Number 15/PUU-XX/2022 can be used as legitimization for the issuance of this Permendagri. Although the verdict was rejected in its entirety, the legal considerations of the judges in the verdict who advised the

government to make implementing regulations related to Article 201 of Law No. 10/2016 are considered as interpretations and interpretations of judges that have legal force commensurate with the verdict. Even so, the implementing regulation should not be in the form of a Minister of Home Affairs Regulation (permendagri), but a Government Regulation (PP).

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