

MINISTERIAL AUTHORITY IN FORMULATING REGULATIONS RELATED TO PRESIDENTIAL LAWMAKING DOCTRINE

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Abstract

As ministerial regulations increasingly play a larger role in government administration, they have become one of the main forms of legislation. This has resulted in a significant increase in the quantity of ministerial regulations, including those formed under the mandate of higher regulations, and those formed under the authority of ministers. According to the doctrine of making presidential laws, the president has a constitutional mandate to form implementing regulations for laws (delegated legislation). This normative research examines the basis for the formation of ministerial regulations in a presidential system. It analyzes quantitative data by using samples from ministerial regulations

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issued between 2005 and 2020 by 12 ministries. The analysis reveals that 65% of ministerial regulations come from ministerial authority (attribution), while 35% stem from higher regulatory directives. This has resulted in a proliferation of ministerial regulations in Indonesia. In the presidential system, the president holds the authority to formulate implementing regulations, with ministers acting as presidential aides and not lawmaking agents. Nevertheless, the unchecked formation of ministerial regulations on the basis of authority has contributed to a power imbalance, wherein ministerial regulations have gained ascendancy at the expense of presidential legislation products. This divergence from the Indonesian Constitution's Article 4, Paragraph (1), and Article 5, Paragraph (2) dilutes the role of presidential legislation products as implementing regulations. It deviates from the established tenets of the presidential system in Indonesia, wherein the president is designated as the law executor rather than the minister.

Keywords: Ministerial Authority; Ministerial Regulation; Presidential Lawmaking Doctrine

I. INTRODUCTION

1.1. Background

Inadequate alignment between the institutions responsible for creating laws and regulations can result in contradictory legislation. Similarly, an excessive authority to these institutions has led to an overwhelming profusion of laws and regulations.¹ The emergence of ministerial authority to create ministerial regulations has contributed to the surge of regulations in Indonesia. President Joko Widodo has often spoken publicly about this deluge of regulations.² According to the website of the Ministry of Law and Human Rights', <https://peraturan.go.id>, there are 3,865 regulations at the central level; 16,995 ministerial regulations; 4,565 non-ministerial governmental institution regulations; and 15,982 regional regulations/ordinances.³ At the central level, in particular, there are a total of 25,425 regulations, most of which are ministerial regulations.

¹ Indonesian Cabinet Secretariat, "*Reformasi Hukum: Menuju Peraturan Perundang-undangan yang Efektif dan Efisien* [Legal Reform: Towards Effective and Efficient Legislations]," (Paper (unpublished) presented on National Seminar in Jakarta, 2018), 11.

² Andi Saputra, "*Jokowi Keluhkan Banyaknya Regulasi, Kini Ada 43.005 Peraturan di Indonesia* [Jokowi Complains about the Number of Regulations, Now There are 43,005 Regulations in Indonesia]," *Detik News*, November 14, 2019, <https://news.detik.com/berita/d-4784463/jokowi-keluhkan-banyaknya-regulasi-kini-ada-43005-peraturan-di-indonesia>.

³ Ministry of Law and Human Rights of the Republic of Indonesia, "List of Laws and Regulations," last modified March 30 2022, <https://peraturan.go.id>.

In principle, there are two sources of authority that serve as the basis for the creation of ministerial regulations, i.e., higher legislations orders (delegation) or on the basis of the authority possessed (attribution/discretion).⁴ The authority has potential implications for the overlapping of ministerial regulations with presidential regulations, government regulations and even laws. This is a result of the difficulty in avoiding an overlap of authority amongst ministries.⁵ Another influencing factor is the sectoral approach in which ministerial regulations are drafted which is more popular than a systematic approach.⁶ A lack of coordination in the formation of ministerial regulations has created friction and contradictory legislation because it does not involve various relevant agencies and certain particular legal disciplines.⁷

The ministerial discretion in the formation of regulations is also strengthened by the direct delegation/mandate provided by Laws to form ministerial regulations.⁸ Substantially, the contents of ministerial regulations are most often formulated without the approval of the President.⁹ This structure poses the potential to diminish the President's power as head of government in forming regulations. As ministers are appointed, dismissed and held responsible to the President,¹⁰ on the one hand, all executive regulations issued should be sourced from the President. On the other hand, ministries have gradually become autonomous institutions relying on their own authority in forming ministerial regulations. Conceptually, this practice is clearly contrary to the presidential system which places ministers as assistants to the President.¹¹ The existence of a delegation

⁴ H.A.S. Natabaya, *Sistem Peraturan Perundang-undangan Indonesia* [System of Legislations in Indonesia] (Jakarta: Secretariat General of the Indonesian Constitutional Court, 2006), 53.

⁵ Simon Butt and Tim Lindsey, *Indonesian Law* (London: Oxford University Press, 2018), 53.

⁶ Butt and Lindsey, *Indonesian Law*, 53.

⁷ Indonesian Cabinet Secretariat, "Reformasi Hukum," 34.

⁸ Jimly Asshidiqie, *Perihal Undang-undang* [On the Subject of Laws] (Jakarta: Konstitusi Press, 2006), 215.

⁹ In the formation of Ministerial Decree, there is a mechanism referred to as 'harmonization' by the Ministry of Law and Human Rights through the Directorate General of Legislations, based on the Regulation of the Minister of Law and Human Rights No. 23 of 2018.

¹⁰ Hanta Yuda, *Presidensialisme Setengah Hati, dari Dilema ke Kompromi* [Half-hearted Presidentialism, from Dilemma to Compromise] (Jakarta: Gramedia, 2010), 130.

¹¹ Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* [The Shift of Legislation Functions: The Strengthening of Parliamentary Legislation Model in Indonesian Presidential System] (Jakarta: Rajagrafindo, 2010), 40.

obtained by the minister by law has placed the minister as recipient of a direct delegation from the DPR (*Dewan Perwakilan Rakyat*; House of Representatives), the legislature. This is because conceptually the recipient of the delegation is held responsible to the provider of the delegation (in this case the DPR).

The theories of Hans Kelsen¹² and Hans Nawiasky,¹³ suggest that law is a hierarchical system, where the legal order is not a system of coordinated norms of equal status, but a hierarchy of legal norms within various levels. Hence, within the hierarchical framework, the position and content of each statutory regulation that is formed within the realm of the Presidential Power does not stand alone because its formation is based on the authority possessed as regulated in Article 8 paragraph (2) of Law 12/2011.¹⁴ The laws and regulations referred to include government regulations, presidential regulations, and ministerial regulations. The hierarchical nature of the norm, if associated with Bronwen Morgan's opinion, starts from the assumption of the nature of the state and government that works in a hierarchical manner.¹⁵

Since the amendment of the 1945 Indonesian Constitution, the existence of ministerial regulations has been questioned, especially by local governments. However, Baharuddin Lopa, as the Minister of Justice in 2001, issued Circular Letter No. M.UM.01.06-27 dated February 23, 2001 declaring that ministerial decrees that were regulatory in nature serve as a type of legislation and are hierarchically positioned between Presidential Decrees and Regional Regulations.¹⁶ According to Satya Arinanto, this is the basis for the enactment of the Regional Regulation and its position as one of the statutory regulations. In its further

¹² Hans Kelsen, *General Theories of Law* (New Jersey: Transaction Publisher, 2006), 123.

¹³ Maria Farida Indrati S, *Ilmu Perundang-undangan: Jenis, Fungsi, dan Materi Muatan-Edisi Pertama* [Legislation Theories: Types, Functions, and Contents-First Edition] (Yogyakarta: Penerbit Kanisius, 2007), 10.

¹⁴ Constitution of the Republic of Indonesia, Article 8, Law No 12 of 2011 on Revision of Law No 15 of 2019.

¹⁵ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation Text and Materials (Law in Context)* (Cambridge: Cambridge University Press, 2007), 4 and 112.

¹⁶ Satya Arinanto, *Kedudukan Keputusan menteri dalam Ketetapan MPR Nomor III/MPR/2000: Problema Yuridis yang Dihadapi Pemerintah Pusat dan Pemerintah Daerah* [The Status of Ministerial Decrees within the MPR Stipulation No. III/MPR/2000: Judicial Issues Faced by Central and Regional Governments] cited in Budiman Ginting et al. (ed) *Refleksi Hukum dan Konstitusi di Era Reformasi* [A Reflection of Law and Constitution in the Reform Era] (Medan: Pustaka Bangsa Press, 2002), 246. Also see in Farida Indrati, *Legislation Theories*, 94.

development, the formation of ministerial regulations has increased significantly, especially since the promulgation of Law 10/2004.¹⁷

One of the main contributing factors to this is that the existence of a ministerial regulation is recognized and legally binding whenever the formation is ordered by a higher legislation or on the basis of authority.¹⁸ Consequently, ministerial regulations that are originally delegated regulations can then be formed independently on the basis of the authority held by each ministry. According to Saldi Isra, the number of ministerial regulations that have been formed may also be due to the lack of detailed regulations that limit the content of ministerial regulations. Thus, it is crucial to re-examine the extent to which the formation and contents of the ministerial regulation shall not pose a conflict of norms or are indeed aimed at matters of a technical-administrative nature.¹⁹

With the position as an official assisting the Presidential power in certain specific government affairs,²⁰ the entire implementation of the authority to form laws by the minister must be integrated under the authority of the President. Integration is a form of consistency and a consequence of the presidential system adopted by Indonesia. Thus, amid the strengthening of the minister's authority to form ministerial regulations as implementing regulations of the law (delegated legislation), it is vital to redesign such authority.²¹ The legislative power of the President that has been "stolen" by the minister needs to be reconstructed so that it is in line with the presidential system according to the Indonesian Constitution.

1.2. Research Question(s)

Critical questions that can be raised are: First, the extent to which ministerial regulations are needed in the context of implementing the laws and regulations

¹⁷ According to Pramono Anung (Cabinet Secretary), Indonesia has experienced an "obesity of regulations" since 2000 through 2017. There has been 20,283 regulations issued with an average of 1,193 regulations per annum. See also in: Christie Stefanie, "Istana Siapkan Badan Tunggal Perumus Regulasi Pemerintahan [The Palace Prepares Sole Agency for Formulating Government Regulations]," *CNN Indonesia*, November 28, 2018, <https://www.cnnindonesia.com/nasional/20181128154327-32-349959/istana-siapkan-badan-tunggal-perumus-regulasi-pemerintahan>.

¹⁸ Law of Indonesia, Law No 10 of 2004, State Gazette No 53 of 2004, and Article 7 Sentence (4), Supplementary State Gazette No 4389. See also Article 17 of the Indonesian Constitution.

¹⁹ Saldi Isra, "Merampingkan Regulasi [Downsizing Regulations]," *Kompas*, March 13, 2017, 6.

²⁰ Indonesian People's Consultative Assembly, Article 4 Sentence (1) and Article 17 Sentence (1).

²¹ Horst P. Ehmke, "Delegata Potestas Non Potest Delegari a Maxim of American Constitutional Law," *Cornell Law Review* 47, no. 1 (1961): 51.

above. In fact, implementing regulations are formed with the potential to repeat and even deviate from the content of regulations with higher authority. Second, the extent to which ministerial regulations of a sectoral nature do not conflict/contradict ministerial regulations in other sectors. Third, the extent to which the ministry as an institution under the authority of the President has the power to form regulations that are self-regulating as has been the case thus far.

1.3. Method

The research that was used in writing this study was normative legal research, namely research that aims to examine legal principles, legal systematics, legal synchronization, legal history and legal comparisons.²² This research is prescriptive, namely: “research that aims to provide an overview or formulate a problem in accordance with existing conditions or facts with existing standards/norms.” According to Prasetyo Hadi Purwandaka, “Prescriptive research is research aiming to get suggestions in overcoming certain problems.”²³ The prescriptive nature of the legal discipline requires recommendations regarding the rule of law, including to the legislature, courts or state administration administrators.²⁴ In this study, the approaches used include the general framework approach to institutional design²⁵ and statute approach, black letter approach, and comparative approach.²⁶

To select research samples, the study randomly chose 12 ministries and identified five ministerial regulations per year for each ministry. This resulted in a total of 747 ministerial regulations as research samples. Although the *peraturan.go.id* website does not have complete data, the author was able to obtain data from ministry websites. However, only ministerial regulations established from 2005 to 2020 were used due to time limitations for this research.

²² Soerjono Soekanto, *Pengantar Penelitian Hukum* [Introduction to Legal Research] (Jakarta: UI Press, 2007), 51.

²³ Suteki and Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik* [Legal Research Methodologies (Philosophy, Theories, and Practices)] (Jakarta: Rajawali Pers, 2018), 137.

²⁴ Jan M. Smits, *The Mind and Method of the Legal Academic*, (Cheltenham: Edward Elgar Publishing, 2012), 44. See also: Mike McConville and Wing Hong Chui (ed), *Research Methods For Law* (Edinburgh: Edinburgh University Press, 2007), 137.

²⁵ Tom R. Tyler, “Methodology in Legal Research,” *Utrecht Law Review* 13, (2017): 14.

²⁶ Michael Salter and Julie Mason, *Writing Law Dissertations an Introduction and Guide to the Conduct of Legal Research* (Preston: Lancashire Law School University of Central Lancashire, 2007), 44.

II. RESULTS AND DISCUSSION

2.1. The Influence of the Parliamentary Model in Presidential Lawmaking Power in Indonesia

The formation of laws is a common feature of most democratic societies, although the specific processes involved can vary greatly between countries. Presidential power in the field of legislation is in reality not exercised by the president himself, as adopted in the presidential system of government in general.²⁷ In the presidential system of government in Indonesia, the power to form laws and regulations is also held by ministers as assistants to the President, both based on the authority of delegation and attribution. This authority is obtained both from the law that delegates and from the authority of the minister in carrying out government affairs. In the separation of power doctrine in the United States, after Congress enacts legislative products, the President is fully responsible for implementing them.

In the parliamentary system, such as in the United Kingdom, the existence of the formation of laws and the delegation of regulations from laws are the main characteristics. This system fosters cooperation between the holders of executive and legislative powers, as the prime minister and parliament work together to form laws. Since the two branches are inseparable in a unitary system of government,²⁸ party politicians in parliament have an obligation to be responsible for the formation of laws that are presented to the public. Therefore, demands for accountability must be a concern when these laws are delegated to delegation regulations.²⁹

In the presidential system, if the broad authority held by ministers as assistants to the president is taken into account, then the hierarchical existence of ministerial regulations as one type of legislative regulation must be reconstructed in the

²⁷ M. Patrick Moore and Kate R. Cook, "Executive Orderstrike of A Pen, Law Of the Land?" *Boston Bar Journal Summer* 61 (2017): 14.

²⁸ Fitriani A. Sjarif, "Pembentukan Peraturan Delegasi Dari Undang-Undang Pada Kurun Waktu 1999-2012 [The Formation of Delegated Statutories from Laws in the Period of 1999-2012]" (Thesis, University of Indonesia, 2015), 37.

²⁹ Uwe Kischel, "Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law," *Administrative Law Review* 46, no. 2 (1994): 215.

Indonesian legal system. Within the framework of the rule of law, the flexibility of this system has resulted in a flood of regulations that do not necessarily serve a beneficial purpose. However, it is important to understand that the flood of regulations cannot be completely shut off, but at least it can be controlled and corrected.³⁰ Consequently, it is necessary to correct various laws and regulations, especially ministerial regulations, with laws and regulations at a higher level to achieve effective and coherent legislation.

The existence of ministerial regulations in Indonesia can be traced back to parliamentary practices that were implemented from 1945 to 1959. This legacy is reflected in the recognition of ministerial regulations as implementing regulations in the order of laws and regulations. This acknowledgment is based on MPRS Decree Number XX/MPRS/1966 on the DPR-GR Memorandum on the Source of the Order of Law of Indonesia and the Order of Legislation of Indonesia. Based on Annex II of the Stipulation of MPRS No. XX /MPRS/1966, the types of legislation in Indonesia, as specified in the 1945 Constitution, are as follows:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Stipulations of the MPR;
- c. Law or Government Regulation in lieu of Law;
- d. Government Regulation;
- e. Presidential Decree;
- f. Other implementing Regulations, such as:
 1. Ministerial Regulation;
 2. Ministerial Instruction;
 3. And so forth.

This stipulation recognizes the existence of ministerial regulations because they had previously existed and were recognized as a legitimate form of state regulation.

³⁰ A. Hamid S. Attamimi, "Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu PELITA I – PELITA IV [The Roles of Indonesian Presidential Decrees in the State Governance Administrations: A Study on the Analysis on Regulatory Presidential Decrees during the Five Year Developments I – IV]" (PhD diss., University of Indonesia, Jakarta, 1990), 11.

Norman Singer explained that in a presidential system, non-legislative government departments carry out lawmaking functions based on specific constitutional arrangements or by historical precedent. Thus, in the US, the President only exercises legislative power under the constitution by cooperating with the Senate in the formation of treaties and may contravene in the legislative process by exercising veto power. Therefore, the function of the executive is to “execute” or implement laws formulated by the legislative. The executive does not have the authority to create new laws. On the other hand, executive departments can form regulations based on the delegation of lawmaking power to carry out certain tasks while still being given strict limitations on these powers. Doak J. Wolfe said, The General Assembly may limit and define the functions of the agencies it creates but may properly exercise non-legislative functions “only to the extent that their performance is reasonably incidental to the full and effective exercise of the legislative powers.” The legislature must ensure that its delegation of authority does not infringe on the executive department’s constitutional duties.³¹

In Indonesia, in addition to the existence of ministerial regulations, the mechanism for joint discussion in the formation of laws is also the adoption of a parliamentary legislation process which is also practiced in the Netherlands and other parliamentary countries.³² The influence of the Dutch on the Indonesian legal system, and in the existence of ministerial regulations, can be classified as indirect because Indonesia’s constitutional structure is quite different from that of the Netherlands. The lasting effects are felt in the existence of government regulations. Government regulations in the realm of Dutch East Indies legislation were known as *Regeringsverordening* and they were issued by the Governor-General in order to run the government or to act as the head of government in the former colony.³³

The use of government regulations was adopted as the main delegated legislation formed by the president as the head of government based on Article

³¹ Doak J. Wolfe, “Esq: Constitutional Law, Executive-Legislative Conflicts,” *South Carolina Jurisprudence* 19 (2018): 30.

³² Ismail Suny, *Pergeseran Kekuasaan Eksekutif* [The Shift in Executive Powers] (Jakarta: Aksara Baru, 1977), 17.

³³ Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi* [Constitutional Law and Pillars of Democracy] (Jakarta: Konpress, 2005), 170.

5 paragraph (2) of the Indonesian Constitution. In fact, when referring to the presidential system, what should be made note of is the executive order model or presidential decree which in Indonesian law,³⁴ is recognized as the attributive authority of the president based on Article 4 paragraph (1) of the Indonesian Constitution. Thus, if it is associated with the presidential legislative power, the existence of ministerial regulations as implementing regulations in the Indonesian presidential system has constitutional and conceptual contradictions. Usually, ministerial regulations are formed in a parliamentary government system because the minister is responsible to parliament so the minister is appointed a delegation from parliament to regulate further in addition to the government regulations in general.³⁵ The situation is different from several other countries where the form of law that regulates subordinate legislation is usually known as “rules” in the United States, “statutory instruments” in the UK and “*Rechtsverordnungen*” in Germany.³⁶ The government in a parliamentary system is collegial (collegial national executive) while the presidential system adheres to a hierarchical model of government (hierarchical national executives).³⁷ Although the pattern of this relationship cannot be proven unequivocally, the collegial character is often based on the assumption that all cabinet members must be active, whereas in a hierarchical system their activity is not taken into account.³⁸

2.2. The Formation of Ministerial Regulations within the Indonesian Legislation System

Along with the agenda of constitutional amendment in 1999-2002, Indonesia faced a new era of purifying the presidential system.³⁹ This change in order was

³⁴ Brian H. Mix, “Kelsen, Hart, and Legal Normativity,” *Revus Journal for Constitutional Theory and Philosophy of Law* 34 (2018): 3.

³⁵ Hermann Punder, “Democratic Legitimation Of Delegated Legislation, A Comparative View On The American, British And German Law,” *International and Comparative Law Quarterly (ICLQ)* 58 (April 2009): 354. *Rechtsverordnungen* is a piece of legislation that is not passed by Bundestag through a formal legislative proceedings, but issued by the federal government, federal minister, or a state’s government. The authority to issue a legislation must be determined in the law.

³⁶ People’s Consultative Assembly, Article 2, MPR’s decision No III/MPR/2000.

³⁷ Herbert Barry, “The King Can Do No Wrong,” *Virginia Law Review* 11, no. 5 (1925): 353.

³⁸ Jean Blondel and Nick Manning, “Do Ministers Do What They Say? Ministerial Unreliability, Collegial and Hierarchical Governments,” *Political Studies* 50 (2002): 457.

³⁹ Saldi Isra and Hilaire Tegan, *Vers une démocratie présidentielle en Indonésie* [Towards Presidential Democracy in Indonesia], *Pouvoirs: Revue Française d’études Constitutionnelles et Politiques*, no. 179 (2021): 131-133. See also Saldi Isra, Fahmi Idris and Hilaire Tegan, “Designing a Constitutional Presidential Democracy in Indonesia,” *Journal of Politics and Law* 13, no. 2 (2020): 26.

also followed by the strengthening of the presidential system, which maintained the concept that the President would be the center of executive decision-making power. The constitutionally recognized executive prerogative has allowed the President to act unilaterally against (*vis-a-vis*) the legislative branch.⁴⁰ It also brings differences in the perspective of the distribution of power within the cabinet concerning the bargaining power of the ministers against the chief executive (the power of the ministers *vis-a-vis* the executive chief).⁴¹ The amendment of the constitution, especially in the second amendment made by the MPR, revoked the 1966 MPRS Decree, formulated during the New Order period, and then replaced it with MPR Decree Number III/MPR/2000 concerning Legal Sources and the Hierarchy of Legislative Regulations which in essence reorganized the new structure of laws and regulations in Indonesia.

The previous ministerial regulation was included in the category “other implementing regulations” but based on TAP III/MPR/2000, the existence of ministerial regulation was recognized based on Article 4 Sentence (1): *In accordance with this hierarchy of legislations, each lower law shall not contradict higher law.* Paragraph (2) declares: *Regulations or decisions of the Supreme Court, the Supreme Audit Agency, ministers, Bank Indonesia, agencies, institutions, or commissions of the same level established by the Government may not conflict with the provisions contained in the order of laws and regulations.* Thus, the existence of a ministerial regulation is recognized and only stated that it can be formed as long as it does not conflict with higher laws and regulations.

The difference between the two TAPs is that TAP MPRS Number XX/MPRS/1966 incorporates ministerial regulations and ministerial instructions into the order of legislation, while TAP MPR Number III/MPR/2000 does not place ministerial regulations in the hierarchy of laws and regulations. In subsequent developments, the existence of ministerial regulations and other institutional regulations was later recognized based on Article 7 paragraph (4) of Law 10/2004, “*Types of Legislation other than those referred to in paragraph (1), their existence*

⁴⁰ Octavio Amorim Neto, “The Presidential Calculus Executive Policy Making and Cabinet Formation in The Americas,” *Comparative Political Studies* 39, no. 4 (2006): 416.

⁴¹ Juan José Linz, “The Perils of Presidentialism,” *Journal of Democracy* 1, no. 1 (1990): 61.

is recognized and has binding legal force as long as it is ordered by the Legislative Regulations". Higher laws have legal force in accordance with their hierarchy".⁴² The laws and regulations referred to are in accordance with the hierarchy of laws and regulations as previously explained.⁴³

Unlike Law 12 of 2011 concerning the Formation of Legislations,⁴⁴ Law 10/2014 does not recognize clauses "on the basis of authority" or "attribution" as the basis for the formation of other regulations. This means that Law 10/2004 only recognizes other statutory regulations and is only formed at the behest of higher statutory regulations or delegations.⁴⁵ Article 8 Sentence (2) of Law 12/2011 adds a clause "on the basis of authority" in addition to orders from higher laws and regulations as the basis for the formation of other regulations.⁴⁶ This provision seems to give legality to the attribution/discretion practice that was carried out at the time Law 10/2004 came into effect, which incidentally does not recognize such a provision.

If it is related to the duties and functions of ministers according to Article 17 of the Indonesian Constitution, the functions of ministerial regulations that have been practiced so far include:

1. Organization of general arrangements in the context of administering governmental power in their respective fields. The implementation of this function is based on Article 17 of the Indonesian Constitution after amendments and conventions.
2. Implementation of further provisions in presidential regulations. Because the ministerial regulation in this case is a delegation of the presidential regulation, the ministerial regulation is a further regulation pertaining to matters regulated in the presidential regulation which is the policy of the President.

⁴² The Republic of Indonesia, Elucidation of Article 7 Sentence (4), Law No 10 of 2004.

⁴³ Law 12/2011 is a betterment and revokes the enforcement of Law 10/2004 due to:

- a. Contents of Law 10/2004 created ambiguity and led to confusion, hence, failed to provide legal certainty;
- b. Many inconsistencies in the formulation writing techniques;
- c. New development brought new things that needed regulation in line with legal development or necessities in terms of legislation; and
- d. Elucidation of contents are in line with the chapters contained in the writing system.

⁴⁴ Law of Indonesia, Article 7 Sentence (4), Law No 10 of 2004.

⁴⁵ Law of Indonesia, Article 8 Sentence (2), Law No 12 of 2011.

⁴⁶ Farida Indrati, "Legislation," 225-227.

3. Implementation of further rulings of provisions in a law that explicitly mentions it.
4. Implementation of further rulings in the provisions in government regulations which expressly mention it.⁴⁷

According to Bagir Manan and Kuntana Magnar, the material restrictions on the content of ministerial regulations that can be contained are:

- a) The regulatory authority is limited to the confines to state administration, both in instrumental and contractual (protection) functions.
- b) The regulatory authority is limited to the fields that are the duties and authorities and responsibilities of the minister concerned.
- c) It must not conflict with the above laws and regulations and general principles of proper governance (*Algemene beginselen van behoorlijk bestuur*).⁴⁸

According to Maria Farida Indrati, delegating laws to ministerial regulations is inappropriate and should be avoided because the system adopted is presidential, whose ministers are responsible to the President.⁴⁹ Although often questioned in terms of content and the basis for their preparation, ministerial regulations are often used as implementing laws. As evidenced in the research data, there is a tendency to strengthen the role of ministerial regulations as implementing regulations for the law.

2.3. Ministerial Regulations Compared to Legislative Delegation Regulations from 2004 to 2019

Based on research of the performance of presidential legislation, from 2005 to 2020,⁵⁰ a total of 414 laws, 1,412 PPs, 1,960 presidential regulations, and 15,996

⁴⁷ Bagir Manan and Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara* [Various Issues of Constitutional Law] (Bandung: Alumni, 1997), 155; See also in Bagir Manan, "Fungsi dan Materi Peraturan Perundang-Undangan [Functions and Contents of Legislations]" (Paper (unpublished) presented in the Training of Lecturers and Training for Legal Skills for BKS-PTN in Law for Western Indonesia at the Faculty of Law of Lampung University, in Bandar Lampung, 1994), 32, as cited in Moh. Fadli, *Peraturan Delegasi di Indonesia Edisi Pertama* [Delegated Regulations in Indonesia First Edition] (Malang: UB Press, 2011), 39; Interview with Prof Bagir Manan on December 27 2021.

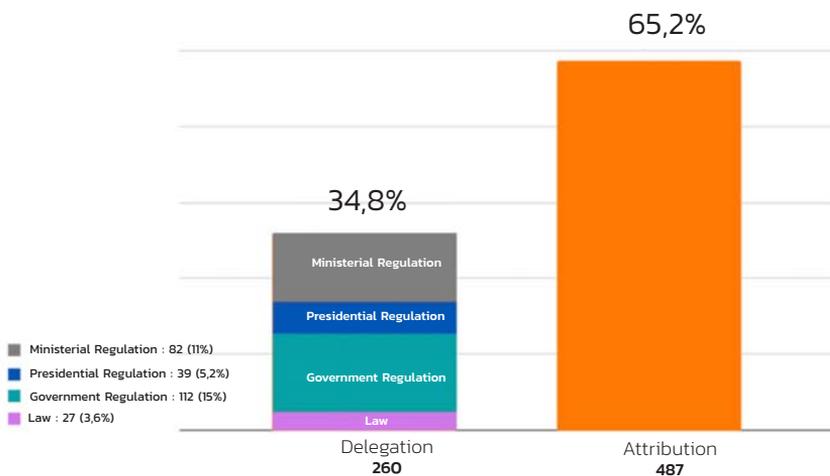
⁴⁸ Indrati S, *Legislation*, 228.

⁴⁹ Ministry of Law and Human Rights of the Republic of Indonesia, "List of Laws and Regulations," Last modified March 30 2022, <https://peraturan.go.id>.

⁵⁰ Asshiddiqie, *On the Subject*, 375.

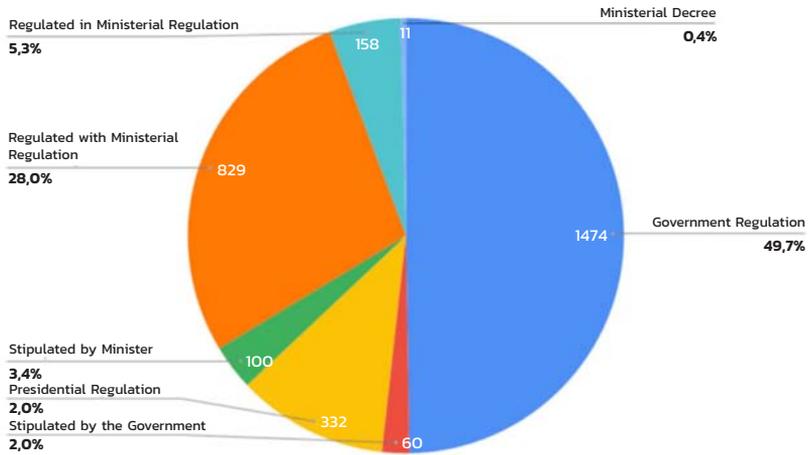
ministerial regulations were passed and issued. Referring to the data, several forms of delegation can be found in the delegation of regulations by law to implementing regulations for the years 2004 to 2019. The form of delegation from laws to lower laws and regulations includes: a. ... regulated in or ... regulated by a government regulation; b. determined by the Government; c. ... regulated in or regulated by presidential regulation; d. determined by the Minister; e. ...is stipulated in a Ministerial Regulation; f. ... is regulated by a Ministerial Regulation; g. ...is regulated in a Ministerial Regulation; h. Ministerial decree. In total, laws have delegated as many as 2,964 delegations from 414 laws in the period between 2004 to 2019 which can be seen in **Diagram 1**.

Diagram 1.



The diagram also confirmed that ministers were given more delegations, with 1,098 delegations (37.1%) compared to presidential regulations which only amounted to 332 delegations (11.2%). However, the number was still lower than afforded to Laws which amounted to 1,474 delegations (49.7%). If we compare the total number of statutory regulations under the law with the number of delegations given, it is clearly very different. An explanation for this is that apart from those formed by delegation, the rest are most likely formed on the basis of attribution.

Diagram 2



To find the basis for the formation of ministerial regulations, from 747 ministerial regulations that were used as research samples, data showed that 65.2% or as many as 487 ministerial regulations were formed on the basis of attribution. Delegations amounted to 260 ministerial regulation (34.8%) the largest of which was given by PP with 112 ministerial regulations (15%). The second highest number of delegations came from ministerial regulations, which amounted to 82 ministerial regulations (11%). Perpres delegations in that period only amounted to 39 ministerial regulations (5.2%) and the rest from Law delegations were 27 ministerial regulations (3.6%) **Diagram 2.**

2.4. Formation of a Ministerial Regulation Based on a Higher Legislation Delegation

The granting of authority by legislators to law enforcers to regulate certain matters further in the form of lower implementing regulations is referred to as the delegation of legislative authority (legislative legislation of rule making power).⁵¹ These implementing regulations are also commonly referred to as regulations.⁵² Delegation of authority to regulate the new can be exercised under three prerequisites:

⁵¹ Ibid., 376.

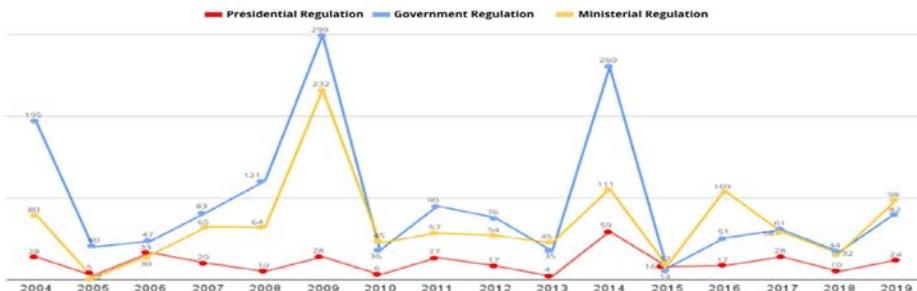
⁵² Ibid., 381.

- i. there is a firm order regarding the subject of the implementing agency that is given the delegation of authority and the form of implementing regulations to set out the delegated regulatory materials; or
- ii. there is a firm order regarding the form of forced regulations to disseminate the delegated regulatory materials; or
- iii. there is a firm order regarding the delegation of authority from the law or law-making institution to the institution receiving the delegation of authority, without mentioning the form of arrangement that will receive the delegation.⁵³

Thus it can be concluded that the delegation can be in the form of mentioning the name of the legislation, mentioning the delegation to certain institutions and mentioning the institution by mentioning the type of legislation.

The following is a graph that proves the increase in delegations from laws to ministerial regulations from 2004 to 2019 **Graph 1**.

Graph 1



In the last 5 years studied, the number of delegations to ministerial regulations has increased and the number even exceeds the number of delegations to presidential regulations and governmental regulations (2010, 2013, 2015, 2016 and

⁵³ Out of the 260 ministerial regulations, 2 vaguely mention the sources of delegations, i.e.: (1) Minister of Transportation Regulation No. 59 of 2007 and (2) Minister of Energy and Mineral Resources Regulation No. 29 of 2009. There are 10 ministerial regulations sourced from more than 1 delegations i.e.: (1) Minister of Transportation Regulation No. 93 of 2011; (2) Minister of Internal Affairs Regulation No. 37 of 2009 (3) Minister of Internal Affairs Regulation No. 20 of 2009; (4) Minister of Internal Affairs Regulation No. 18 of 2008; (5) Coordinating Minister of Economics Regulation No. 13 of 2017; (6) Finance Minister Regulation No. 117/PMK.02/2016; (7) Minister of Trade Regulation No. 44/M-DAG/Per/6/2016; (8) Minister of Trade Regulation No. 49 of 2018; (9) Minister of Trade Regulation No. 50 of 2018; 10. Minister of Trade Regulation No. 58 of 2019. In total, there are 268 sources listed as the sources of delegation for the formation of ministerial regulations illustrated in **Graph 3.32**.

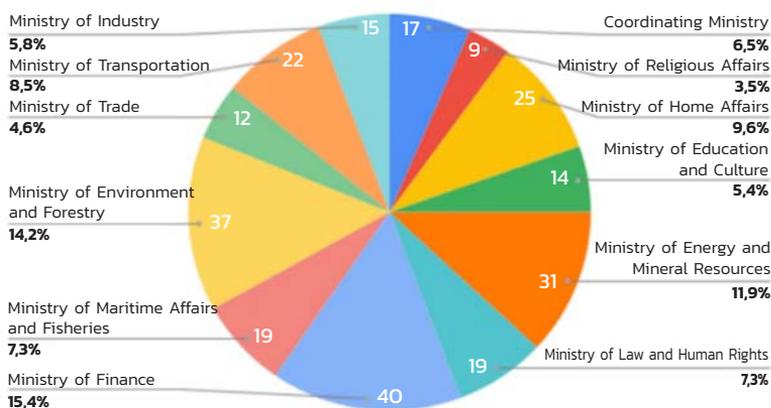
2019). In previous years, the numbers remained relatively the same. The graph shows the significant role of ministerial regulations as delegation regulations, even as a whole it has become the second alternative after government regulations. Even though the president also has other delegative powers, namely to form presidential regulations, the amount is incomparable to ministerial regulations.

Based on the results of the research, the distribution of ministerial regulation delegation can be seen in the following diagram. From 747 samples of ministerial regulations examined in 12 ministries, it was found that the Ministry of Finance and the Ministry of Environment and Forestry formed the largest contingent of ministerial regulations based on delegations with a percentage of 15.4% and 14.2%, respectively. Of the total ministerial regulations formed by the Ministry of Finance in the 2005-2020 there were 2,925 ministerial regulations as delegation regulations **Diagram 3**.

Furthermore, from the research, of the 747 ministerial regulations depicted in Diagram 2, 260 of them are delegations or sub-delegations of higher or equivalent legislation.⁵⁴ The pattern of delegations found are as follows:

Diagram 3

Delegation

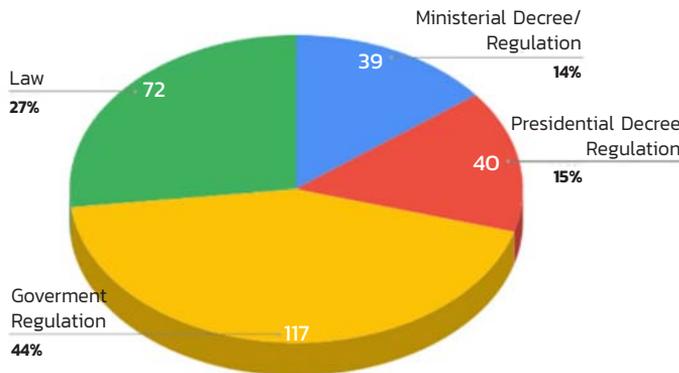


The delegate patterns found are: a) delegation of laws to ministerial regulations (as many as 72 ministerial regulations); b) sub-delegation of government

⁵⁴ A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, (New Jersey: Pearson Education, 2007), 78.

regulations to ministerial regulations (117 ministerial regulations); c) delegation and sub-delegation from presidential regulations to ministerial regulations (40 ministerial regulations); d) sub-delegation of ministerial regulations to ministerial regulations (39 ministerial regulations). The comparison and percentage of each can be seen in **Diagram 4**.

Diagram 4



Furthermore, of the 747 ministerial regulations studied as described in **Diagram 2**, 260 ministerial regulations are delegations or sub-delegations from higher or equivalent laws and regulations.⁴³ The delegate patterns found are: a) delegation of laws to ministerial regulations (as many as 72 ministerial regulations); b) sub-delegation of government regulations to ministerial regulations (117 ministerial regulations); c) delegation and sub-delegation from presidential regulations to ministerial regulations (40 ministerial regulations); d) sub-delegation of ministerial regulations to ministerial regulations (39 ministerial regulations). The comparison and percentage of each can be seen in **Diagram 4**.

1) Act

In a presidential system, the delegation of laws to the President is a consequence of the doctrine of presidential lawmaking as an adjustment to the non-delegation doctrine as described in the previous chapter. There are several different theories of delegation of authority which are a product of legislation.

These differences are the result of the theory of delegation of authority over delegation regulations, which is tied to several factors such as the theory of the rule of law adopted by a country, the theory of separation of powers and the theory of law-making institutions (legislative products) including the government system used such as presidential or parliamentary.⁵⁵

Based on **Diagram 4** there are at least 27 ministerial regulations (3.6%) that were formed based on delegation from law. Although the number is small, it at least confirms that there is a direct delegation of legislation to ministerial regulation and when compared to the Law delegations from **Diagram 1** to ministerial regulations, they are given in various forms, including: ...as determined by the Minister..., ...regulated by ministerial regulations... and ...regulated in the ministerial regulations... the total number is 1,098 delegations or equivalent to 37% of all delegations granted by the Act to the lower authority.

2) Government Regulations

Government regulations based on Article 5 of the Indonesian Constitution can be categorized as implementing regulations (delegated legislation/*pouvoir réglementaire*) and are included as objects of state administrative law studies. In terms of constitutional law, government regulations can be seen in the history of their constitutionalism which is contained in Article 5 Paragraph (2).⁵⁶ Based on the Indonesian legal system and several principles of delegation regulations, A. Hamid S. Attamimi formulated several characteristics of government regulations, i.e.:

- a. Looking at the history of legislation during the Dutch East Indies era, regulations of the *Regeringsverordening* type can be equated with the current government regulations, which are empowered with the authority to impose criminal sanctions.
- b. Government regulations may be established even though the relevant laws do not explicitly require them; or should the Law not state in its provisions

⁵⁵ Attamimi, *Law*, 14.

⁵⁶ Attamimi, *The Roles of*, 178-179.

a government regulation is needed. Because Article 5 Paragraph (2) has given authority to the President as a form of regulatory power.

- c. Government Regulations are regulations used to implement higher regulations, i.e. Laws, so that government regulations may not amend nor reduce the content of the Law, and they do not modify the provisions therein so as to change the meaning of the parent Law.
- d. Government Regulations only contain the nature of regulatory norms or a combination of regulations and stipulations. However, a government regulation cannot merely be stipulating.
- e. Judging from its function, government regulations were created for implementing statutes. So, if it is not necessary, it is better not to delegate powers to lower Regulations.⁵⁷

Based on the research data in the Diagram. 4 at least it was found that there were 117 ministerial regulations which were delegations from PP or 15% of the total ministerial regulation studied. This number is the highest in giving delegations to ministerial regulations.

3) Presidential Regulation

The contents of the presidential regulation (commonly referred to as 'Perpres) according to Law 12/2011 in Article 13 contain material prescribed by a Law, material for implementing government regulations, or material for executing the administration of governmental power, expressly or indirectly ordered to be formed.⁵⁸ Such a formulation is not much different from the understanding provided by Law 10/2004, Article: "The material on the content of a Presidential Regulation contains material ordered by law or material to implement a government regulation." In the elucidation of the article it is stated: "In accordance with the position of the President according to the Indonesian Constitution, a Presidential Regulation is a regulation made by the President in administering the state government as an attribution of Article 4 paragraph

⁵⁷ Law of Indonesia, Elucidation of Article 13, Law No 12 of 2011.

⁵⁸ Asshiddiqie, *On the Subject*, 385.

(1) of the Indonesian Constitution.” The existence of this affirmation places the *Perpres* that can be used freely by The President as a form of exercise of state power based on Article 4 of the 1945 Constitution of the Republic of Indonesia.⁵⁹

There are three possibilities that can be developed regarding the meaning of “unequivocal mandate”, i.e.:

- (1) the regulatory mandate does exist but does not explicitly specify what form of regulation is chosen as the place for containing the material for the provisions delegated to the regulation;
- (2) the regulatory mandate does exist, but it is not clearly defined which institution has delegated the authority or the form of regulation that must be determined for containing the delegated provisions;
- (3) such regulatory mandates are not mentioned or specified in the relevant law at all, but the need for such arrangements is real and unavoidable in the context of implementing the provisions of the law itself.⁶⁰

Thus, the Presidential Decree that was issued on the basis of “*Freies Ermessen*” or the principle of “*beleidsvrijheid*” is only needed in the context of executing the duties and authorities as the highest government administrator.⁶¹ It is limited to: i) that the further regulatory material as outlined in the presidential regulation is only internal in the context of the needs of government administration; and ii) that the material in the provisions concerned is only of an administrative procedural nature to assist law- implementing agencies in carrying out the provisions of the law in question. Its contents do not include the adding norms or changing norms that are reducing the provisions of the law.⁶²

⁵⁹ Matthew J. Steilen, “How to Think Constitutionally about Prerogative a Study of Early,” *Buffalo Law Review* 66, no. 3 (2018): 564.

⁶⁰ Asshiddiqie, *On the Subject*, 385.

⁶¹ In the legislative process and policy formation in general, referring to the Latin American presidential model, Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg stated that the Latin American presidential power model has a vital and broad role for the president in forming regulations (decree power/decree-law) and regulations. Emergency (emergency power). Jose Antonio Cheibub, Zachary Elkins, Tom Ginsburg, “Latin American Presidentialism in Comparative and Historical Perspective,” *Texas Law Review* 89 (2011): 2.

⁶² Rod Hague and Martin Harrop, *Comparative Government and Politics*, Sixth Edition (London: Palgrave Macmillan, 2004): 268.

The position of the presidential regulation, apart from being an implementing regulation (delegation), is also a regulation that forms the basis for the formation of a ministerial regulation. Based on the study, it can be identified that at least 39 ministerial regulations (5.2%) studied are ministerial regulations formed by Presidential Decree delegation. This means that Perpres are not overrepresented when issuing delegation compared to PP. If it is related to the tiered delegation and the material contained within the presidential regulation, it can be said that the dominance of the presidential regulation as a statutory regulation originating from the President is quite high. From the recapitulation of laws and regulations for the 2005-2020 period, the presidential regulations formed during that period amounted to 1960 presidential regulations. Most of these Perpres are formed on the basis of articulation because they are based on **Diagram 1**. There are only 332 Perpres that are given by law. It is possible that this amount was obtained from PP delegations outside those formed attributively

4) Ministerial Regulation

The vital role played by a minister in making policy, in this case, ministerial regulations in the Indonesian presidential system, is the influence of the parliamentary system on the presidential system. Ministers are an important part of “the political executive” which is defined as: “The political executive is the core of government, consisting of political leaders who form the top slice of the administration: presidents and ministers, prime ministers and cabinets. The executive is the regime’s energizing force, setting priorities, making decisions and supervising their implementation. Governing without an assembly or judiciary is perfectly feasible but ruling without an executive is impossible”.⁶³ There is a significant difference regarding the source of delegation for the formation of regulations by a minister where in a parliamentary system it can be given directly by law⁶⁴ while in a presidential system, this is not the case. This, according to C.F.

⁶³ Timothy Endicott, *Administrative Law* (Oxford: Oxford University Press, 2011), 125 and 580.

⁶⁴ C. F. Strong, *Modern Political Constitution: An Introduction to the Study of Their History and Existing Forms* (London: Sidgwick & Johnson, 1973), 212.

Strong, is a consequence of there being no separation between the executive and the legislative where the executive cabinet is very dependent on the legislature.⁶⁵

In a presidential system, the executive cabinet is independent of the legislative under the power of the president.⁶⁶ The authority of a minister to make policies is included in the administrative realm, either in the form of decisions or actions meant to carry out government affairs or executive power (executive power).⁶⁷ In Indonesia, because it is influenced by the parliamentary system, the formation of ministerial regulations has penetrated the realm of regulations (regeling). Even though they are normatively limited to technical and administrative matters, this is in fact not the case, ministerial regulations have become one type of legislation in the executive toolbox in addition to PP and Perpres. According to Nicoleta Yordanova and Asya Zhelyazkova, this is the cause of the parliament's ineffective control of delegation regulations.⁶⁸

If we refer to the parliamentary system model, there is a ministerial act or ministerial rule:

“Ministerial Act: A ministerial act is an act performed in a prescribed manner and in obedience to a legal authority, without regard to one’s own judgment or discretion. The distinction between ministerial acts and acts that are discretionary is often important to determine whether a public official is shielded by qualified immunity. Generally, ministerial acts are unshielded by

⁶⁵ Administrative includes the implementation of public policies or regulations on particular cases including the actions of ministers that are commonly described as “administrative”. Unlike *the Report of the Committee on Ministers’ Powers (1932)*, framers of administrative decisions:

- a. *may need to consider and weigh submissions and arguments and collate evidence (in addition to acting on the basis of evidence); and*
- b. *does not have an unfettered discretion as to the grounds upon which to act nor the means which the decision maker takes to inform itself before acting.*

A great number of what is called administrative decrees that might involve larger or smaller scopes, including certain attributes of what is called “judicial or quasi-judicial decrees”. The phrase is “the mandate to act juridically.” The context of administrative decision making refers to the mandate to act “fairly” in a sense that the procedural fairness in the in the making of administrative decisions that affect one’s rights, interests on legitimate expectation. Compare with C.F. Strong, *Modern*, xxiv.

⁶⁶ Bruce Ackerman, “The New Separation of Powers,” *Harvard Law Review* 113, no. 3 (2000): 694.

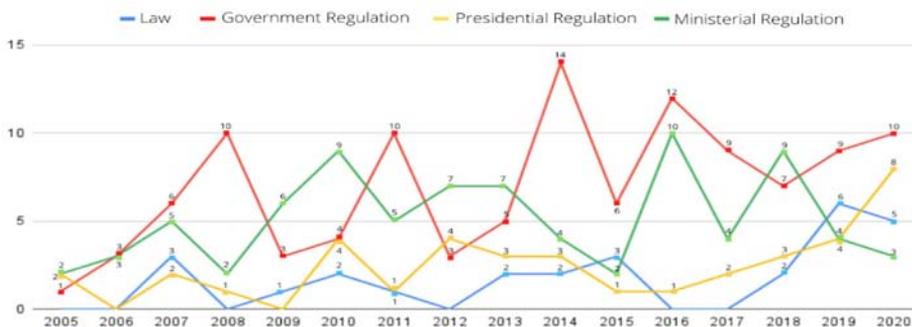
⁶⁷ Cornell Law School, “Ministerial Act,” last accessed on May 2 2021, https://www.law.cornell.edu/wex/ministerial_act. Several instances of ministerial regulations are, among others: the preparation of ballots, the registration of voters, the recording of documents and filing of papers, the care for prisoners, the driving of vehicles, the repair of highways, the collection of taxes.

⁶⁸ Nicoleta Yordanova and Asya Zhelyazkova, “Legislative Control over Executive Law, making/Delegation of Quasi-legislative Powers to the European Commission,” *Journal of Common Market Studies* (2019): 16.

qualified immunity, which protects only actions taken pursuant to discretionary functions. In other words, noncompliance with ministerial duty bars qualified immunity.”⁶⁹

This definition may be viewed as a clear-cut distinction between actions, but it remains to be seen as distinctive between the presidential and parliamentary systems. Based on the study, at least one point of interest worth nothing was that there were 82 ministerial regulations, or 11% of ministerial regulations, formed on the basis of the Ministerial Delegation. This number occupies is the second most popular source of Ministerial Delegation after the PP. Based on the research results, the overall development of delegation regulations in the 12 sample Ministries studied in **Diagram 3** each year can be seen in **Graph 2**.

Graph. 2



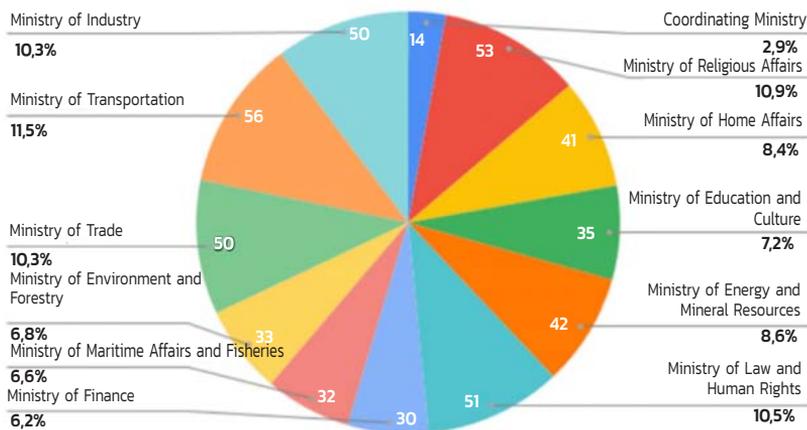
2.5. Formation of Ministerial Regulations Based on Attributions in the Administration of Certain Governmental Affairs

Based on the provisions of Law 12/2011, Ministerial Regulations can be categorized as statutory regulations. The inclusion of ministerial regulations is due to the notion of statutory regulations which are interpreted to include all statutory regulations relating to laws and sourced from legislative power. The types of legislation are laws and other regulations that are formed based on the attribution authority or the delegation of authority from the law.

⁶⁹ Attamimi, *Law*, 8.

Diagram 5

Attribution



Therefore, certain laws and regulations are limited in type considering that the attribution authority is certain and limited, while the delegation’s authority cannot be delegated further without the “approval” of the delegate (*delegatus non potest delegare*).⁷⁰ The content of other laws and regulations is the “leftover” content that has been regulated in the law.⁷¹ This proves the importance of regulation at the legal level even though it is difficult, complicated, time-consuming and expensive.⁷²

Quantitatively, it can be seen that the Ministerial Regulation must be the most widely formed regulation. However, what must be criticized is the basis for the formation of the ministerial regulation. Referring to the results of data processing, the inter-ministerial attribution performance studied can be seen in Diagram. 5 below.

The Ministry of Transportation has the highest percentage of all attribution ministerial regulation studied at 11.5%, while the Ministry of Finance occupies the

⁷⁰ *Ibid.*, Law, 9.

⁷¹ *Ibid.*, Law, 10.

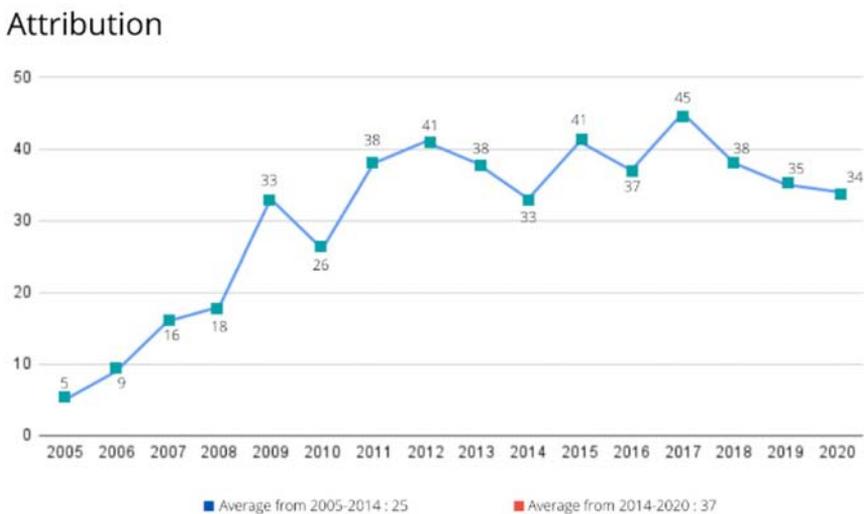
⁷² Ministry of Law and Human Rights of the Republic of Indonesia, “List of Laws and Regulations,” Last modified March 30 2022, <https://peraturan.go.id>.

The data on ministerial regulation of the Ministry of Education and Culture is the accumulation of ministerial regulations issued by the Ministry of National Education, the Ministry of Education and Culture, and the Ministry of Research, Technology, and Higher Education. The data on Minister of Environment and Forestry Regulations is the accumulation of ministerial regulations issued by the Ministry of Environment and the Ministry of Forestry.

lowest position. The Coordinating Ministry for the Economy was not counted because the data studied was too insignificant.

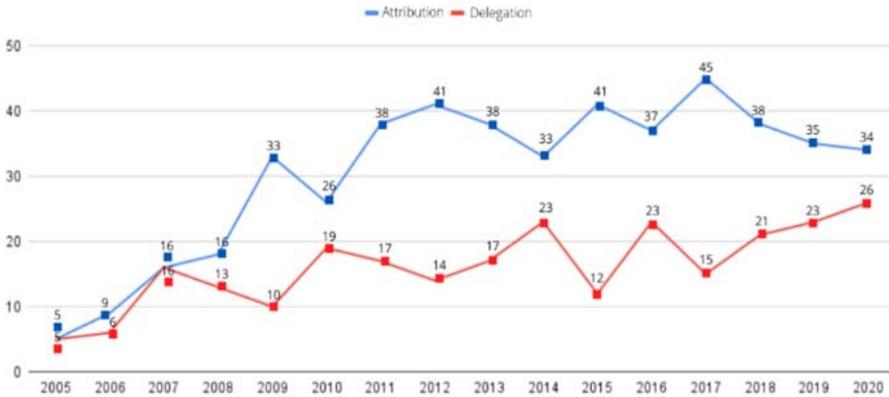
The development of the number of formations of attribution ministerial regulations in general can be seen in Graph 3. In terms of numbers, if taken on average, at least 37 Attribution Regulations are formed per year. This number clearly exceeds the highest number of delegations, which was only 14 ministerial regulations in 2014.

Graph 3.1.



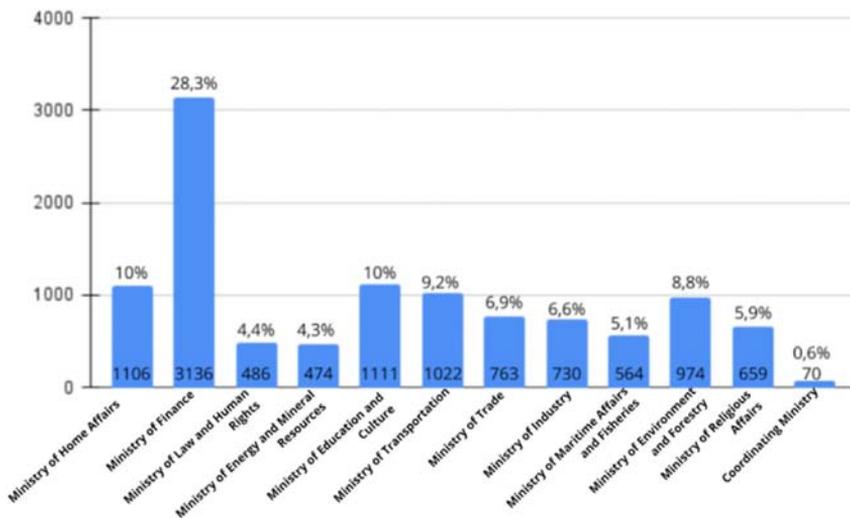
If we compare the performance of attribution and delegation in the formation of ministerial regulation, it can be seen in the graph., that attribution becomes the most dominant basis in the formation of ministerial regulation every year. The average attribution per year is 31 ministerial regulations while the delegations are only around 15 ministerial regulations per year. This means that twice as many attributions are formed as compared to delegations. The factual productivity of the formation of ministerial regulation, both derived from the delegation and the respective attributions of the 12 Ministries studied in the period from 2005 to 2020, can be compared in Graph 4.

Graph 4



The Ministry of Finance is the Ministry that issues the most ministerial regulations, but factually based on research data, the Ministry of Finance forms ministerial regulations mostly based on orders from delegations, both UU, PP and the Minister of Finance itself (sub-delegation). The ministerial regulation that comes with attribution places the Ministry of Finance as the ministry that issues the least amount of ministerial regulation **Diagram 6**.

Diagram 6



The research data shows the fact that ministerial regulations are increasingly becoming an option in containing legislative delegation regulations. Based on research data from 2004 to 2019 it was found that only 35% of the formation of ministerial regulations was based on the authority of the delegation, far below the attribution authority which reached 65%. This shows that the ministers were very expansive in forming ministerial regulations based on authority. On the other hand, ministerial regulations that are formed on the basis of delegation authority receive delegations from: laws, government regulations, presidential regulations and even ministerial regulations (sub-delegations).

There is an absence of limitations and criteria for delegation in the law, not only for government regulations but also ministerial regulations. Even the delegation of ministerial regulations became the second choice after government regulations.⁷³ In the presidential system, the delegation of laws should be given to the president as the holder of power in the field of legislation other than the DPR, known as the “presidential lawmaking” doctrine. In fact, the president has a reduced role. Although the number is still dominated by government regulations, the increase in the delegation of laws to ministerial regulations must be evaluated immediately. It is time for the formation of delegation regulations to be returned to the concept of the Indonesian Constitution.

The expansion of ministerial authority in forming laws and regulations in the Indonesian presidential system represents a departure from the Constitution’s provisions of Article 5 paragraph (2) and Article 4, as the power to delegate and make laws that rightfully belongs to the President has been shifted to ministers in the role of presidential assistants. This shift has resulted in an over-reliance on ministerial regulations, which is largely due to the absence of restrictions on the authority of ministers to create regulations. However, based on Article 17 (3) of the Indonesian Constitution each minister is responsible for a particular area of government affairs, and this responsibility should not replace the authority of the president as chief executive to make regulations.

⁷³ Charles Simabura, “Non-Delegation Doctrine of Presidential Legislative Power in The Presidential Government System: A Comparative Study Between Indonesia and In The United States Of America,” *Journal of Legal, Ethical and Regulatory Issues* 24, no. 6 (2021): 4.

III. CONCLUSION

The research indicated that the delegation of the rulings of laws into executive legislations both in the forms of government regulations and presidential regulation is a necessity under the doctrine of presidential lawmaking. Even though the theory of separation of power recognizes nondelegation doctrine, such doctrine has experienced a weakening. However, the principle that the legislative power should be possessed by the legislature should remain the primary bases for the creation of delegated regulations for serving the purpose of both meeting the needs of constitutional law and implementing the president's constitutional authorities. Any forms of delegation should be based on the directives of the constitution and delegations from the DPR as the primary legislative power within the presidential system.

Conceptually and constitutionally, governmental and presidential regulations are the primary forms of delegated legislation based on the Indonesian Constitution. A form of delegation to the ministers to create ministerial decrees is obviously in contrast to the presidential system theory wherein the power to create delegated regulations is the authority of the president. The president shall lose legislative power if the delegation is directly given by law to the ministers. Ministers, in their positions as assistants to the president in executive affairs, should have acquired their delegated authority from the president, not the legislature.

When ministers acquire delegations from the laws, they should be responsible to the framers of laws and not only to the president. This will shift the mechanism of responsibility of ministers from the presidential model to the parliamentary. In the delegated concept, the recipients of delegations (ministers) would be responsible to the party that provides them with delegations (legislators) and not to the president as commonly found in the presidential system. The parliamentary model of legislation that recognizes the common discussion between the DPR and the President has led to the weakening of presidential lawmaking power as the power is in fact passed to the ministers. The passing includes the status as

representatives of the president in the discussions during the legislative process and the creation of ministerial regulations as the implementing statutory of laws.

The non-delegation doctrine in the separation of powers concept allows the president to create delegation regulations in the presidential system. To uphold the doctrine of presidential lawmaking and restore legislative power, the Indonesian Constitution mandates that laws be delegated to government regulations, not ministerial regulations. Presidential legislation should be subject to public, DPR, and judicial control, while ministerial regulations should be classified as policy regulations and comply with the Government Administration Law.

To structure the president's legislative powers under the Indonesian Presidential Government System, government regulations and presidential regulations should be strengthened as implementing regulations. The authority of ministers in forming laws and regulations should be clarified, and ministerial regulations should be categorized as either legislation or policy regulations. The formation of ministerial regulations should be subject to the president's delegation and supervision, while government and presidential regulations can be categorized as one type of statutory regulation.

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