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Regulatory Reform in Indonesia: Policies and Alternative Proposal

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Abstract
After the reformation in Indonesia, the number of laws and regulations has continued to increase. In the period 2000-2017, there were 35,901 regulations. The highest number is Regional Regulations, which are as many as 14,225 Regional Regulations, followed by a Ministerial Regulation at 11,873. And in the third place, there were 3,163 regulations from non-ministerial institutions. This study has the main objectives of finding policy choices in an effort to simplify and identify regulations as an agenda for legal reform. This research is a normative juridical research. The data used are secondary data, which includes primary and secondary legal materials, in the form of relevant legislation, as examples of regulations that are out of sync, incoherent, and potentially overlapping. This study concluded that the regulatory reform agenda can be carried out by three steps, (1) Regulatory simplification (2) Reconceptualization of understanding regulatory needs and (3) synergies between regulators.

Keywords: Simplification regulations, harmonization, legislation

1. Introduction
Indonesia has a high number of overlapping or contradictory laws and regulations. This condition is well known as hyper-regulation crisis.[1] After a political transition from the authoritarianism regime to the democratic era in 1998, number of laws and regulations has continued to increase. From 2000 up until in the late 2017, there were 35.901 regulations, the highest number was Regional Regulations, which was 14.225 regulations, followed by Ministerial Regulations with 11.873 regulations, and in third place was Non-Ministerial Regulations with 3.163 regulations.[2] There are still 36 Dutch colonial legacy regulations.[3] This quantity does not accord with the quality of regulation. Until March 2017, there were 802 Constitutional Court decisions, 203 Supreme Court decisions, and 168 Legal conventions through interpreting the law and regulation from commercial court decisions.[4] Although it has not been carried out systematically, regulatory reform has already been carried out since 1983. In 1983, for example, when there was an over-regulation of the banking sector which resulted in stagnant conditions and the loss of banking initiatives, Bank Indonesia (BI) carried out banking modernization adjusting with the demands of the public, business world, and economic life during this period. Deregulation began with the elimination of the credit ceiling; banks are free to set interest rates on loans, savings and deposits; and stop granting Liquidity Credit of Bank Indonesia (KLBI) to all banks, except for certain types of credit relating to the development of cooperatives and exports. The initial stage of the deregulation succeeded in fostering a climate of interbank competition. [5] In 1988, in the context of opening a new bank operating license that had been stopped since 1971, the government carried out banking deregulation by issuing the October 27th , 1988 Policy Package (Pakto 88). Only with a capital of Rp. 10 billion an entrepreneur can open a new bank. Old and new foreign banks were allowed to open branches in six cities. In fact, the form of joint ventures between foreign banks and national private banks was permitted. Reserve

[1] Susskind said that "*By that I meant we are all governed today by a body of rules and laws that are so complex and so large in extent that no one can pretend to have mastery of them all. I argued then that hyper-regulation means not that there is too much law, by some objective standard, but that there is too much law given our current methods of managing it*." Richard Susskind, "Legal Informatics: a Personal Appraisal of Context And Progress", *European Journal of Law and Technology*, Vol. 1, No 1, 2010, p. 90-92

[2] Chandranegara, I.S. (2017). *Menemukan Formulasi Diet Regulasi*, paper presented in 4th National Conference of Constitutional and Administrative Law Academician, Jember, Indonesia, p. 208-211.

[3] Hartono, S. (2014). *Analisis dan Evaluasi Peraturan Kolonial (Masa Hindia Belanda dan Kependudukan Jepang)*, Jakarta: Badan Pembinaan Hukum Nasional, 2017, p 22-23

[4] Chandranegara, I.S. (2019). *Kemerdekaan Kekuasaan Kehakiman Pasca Transisi Politik*, Jakarta: Radjawali Press, p. 112

[5] Badan Pembinaan Hukum Nasional, *Perencanaan Pembangunan Hukum Nasional 2015-2019*, Ministry of Law and Human Rights, Jakarta, 2014, p 14-13

requirements of local banks from 15 percent to 2 percent. The Pact's policy led to an increase in money circulating in the market. In other words, the Pakto 88 policy is an aggressive policy for expansion. With various facilities through Pakto 88, the number of commercial banks rose 50 percent from 111 banks in March 1989 to 176 banks in March 1991. Then, in 1993, to attract investors to invest in Indonesia, the government issued a deregulation package known as the October 1993 Package (Pact 1993). This package is intended to facilitate foreign investors to invest their capital in Indonesia. The 1993 Pact regulates five business sectors, namely: (1) Export, (2) Foreign Investment, (3) Licensing for Investment, (4) Health, and (5) Simplification of Environmental Impact Analysis Procedures (Analisis Mengenai Dampak Lingkungan or AMDAL).[6]

This fact shows that the regulation in Indonesia still not well planned. If this problem not immediately resolved, this will counterproductive with government policy to increase investment and economic growth.[7] Moreover, it will be resulting in ineffective administration, lengthy processes, and obstacles for economic development.[8] While the Government has taken several measures to enhance regulatory reform, regulatory functions are currently scattered across several governmental institutions, making a web of uncoordinated mandates.

This study has the objective to find policy options to simplify and restructure the regulatory system as the main agenda for regulatory reform in Indonesia.

2. Method

This research is a normative juridical research. The data used are secondary data that includes primary and secondary legal materials in the form of relevant laws and regulations used as samples of regulations that are out of sync, incoherent, and potentially overlapping especially on economic sector. Secondary data obtained through literature study. The method used is the conceptual approach and the statue approach. Data analysis is done by systematizing data so that the data is then used to translate the right concepts in an effort to simplify and harmonize regulations.

3. Simplification

Simplification is the first policy on regulatory reform that could be used in Indonesia to decrease the quantity of regulations. Simplification method will be conducted by inventorying existing regulations, identifying problems and stakeholders, evaluating problematic regulations, and removing unnecessary regulations.[9] The efforts of the Ministry of Law and Human Rights to provide a directory of regulations is the initial capital in mapping regulatory formation subsequently enters the stage of simplification of regulations in certain aspects to ensure legal certainty. Furthermore, the stages of regulation implementation begin in the sequence of the process, starting with an inventory, then identification, analysis, and then recommendations. From this process, it will be seen whether a regulation can be maintained or harmonized or it must be revoked immediately. Recommendations can also include proposals for making new regulations if needed.[10] Because of the large number of regulations, the simplification of regulations must be mass and fast, so that it is necessary to formulate simple criteria in carrying out these simplification stages. In general, the problems faced will be generalized to specific criteria.

The first criteria would be conflicted regulation question, which is a condition where there are articles or provisions that clearly contradict other regulations. For example, Art 29 (2) and (3) Agrarian Act of 1960 regulating that the right to cultivate can be granted for a maximum period of

[6] Chandranegara, I.S. (2016), *Purifikasi Konstitusional Sumber Daya Air Indonesia*, Rechtsvinding, 5(3). p 359-379.

[7] Hartono, D and Hardiwinoto, S. (2018). *Legal Perspective on Asean Economic Community*, Diponegoro Law Rev. 3 (2). p 199-222.

[8] Malau, M. T. (2014). *Legal Aspects of Government Regulations and Policies Facing Regional Economic Liberalization: ASEAN Economic Community 2015*, Rechtsvinding, 3 (2). p 163-182.

[9] Sadiawati, D. (2015), *Strategi Nasional Reformasi Regulasi: Mewujudkan Regulasi yang Tertib dan Sederhana*, Jakarta: Kementerian Perencanaan dan Pembangunan Nasional/ Bappenas, p. 34

[10] Anggono, B.D. (2014), *Perkembangan Pembentukan Undang-Undang di Indonesia*, Jakarta: Konstitusi Press, Jakarta, p 88

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60 years contrary regulate based on Art 22 (1) Investment Act of 2007 which regulating that the rights to cultivate can be granted for a maximum period of 95 years, and Art 35 (1) and (2) Agrarian Act of 1960 which regulating that the rights to build can be granted for a maximum period of 50 years with Art 22 (1) point b of the Investment Act of 2007 which stipulates that the rights to build can be granted for a maximum period of 80 years.

The second criteria will be inconsistent regulations. This means that there is no consistency concerning a specific or certain issue in the stage of legislation and its implementation into regulation. For example, the definition of investment in Art 1 (1) of Investment Act of 2007 explains that Investment is all forms of Investment activities, both by domestic investors and foreign investors to do business in the territory of the Republic of Indonesia with the definition of investment in Art 1 (1) Government Regulation No 1 of 2007 jo. Government Regulation No. 62 of 2008 concerning Income Tax Facilities for Investments in Certain Business Fields and/or in Certain Regions which stipulated that Investments are investments in the form of tangible fixed assets including land property used for main business activities, both for new investments and expansion of existing businesses.

The third criteria is the regulation that creating multiple interpretations**.** This type of criteria is lack of clarity on the object and the subject on the regulation and causing fuzziness (hard to understand). For example, Art 14 Investment Act of 2007 states: "Every investor is entitled to: a. certainty of rights, law and protection; b. etc..." The elucidation states that "What is meant by 'certainty of rights' is the Government guarantee for investors to obtain rights as long as the investor has carried out the specified obligations." The norm and its explanation do not answer what rights that guaranteed, so this kind of norm has a lack of clarity. The fourth criteria will not be operational or hard to implement. Certain regulation is declared not operational if the regulation is not applicable, but the regulation is still valid, or the regulation does not have implementing regulation yet. By analyzing through these four criteria, there are some condition that certain regulation can still be maintained if (1) the regulation does not have the potential to conflict with other regulations, especially to the legislation, (2) the regulation is needed by the public or by state administrators, and (3) the regulation is business-friendly. Regulations will be revised if "not friendly" for doing business, but also needed by the community as well as by state administrators.

4. Reconceptualization of Rule Making Power

On many occasions, President Joko Widodo often complained about the number of laws. He thinks if good-quality law is made simply, three or five laws are enough in one year.[11] Despite hyper-regulation scattered in the Indonesian legal system, Saldi Isra explained the current quantity of laws couldn't be qualified as bad or worse. Because there are still many laws based on the mandate of the 1945 Constitution that has not yet been implemented, and in other conditions there are many sectoral problems that in fact require regulatory updates.[12] For example, revision of Regional Government Act of 2004 into Regional Government Act of 2014, the new law that is related to many other (sectoral) laws will cause an adjustment to those laws especially that related to the new regional governance.[13] Maria Farida Indrati argued the opposite, she argues that a lot of content that should have been sufficiently regulated through statutory regulations was actually forced to be regulated by law. If it is regulated by laws and regulations, the implementation will be simpler and the budget needed is relatively small.[14]

According to some analysis above, the main focus for resolving the hyper-regulation problem lies in reconceptualization rule-making power on statutory regulations. The logic is the limited number of regulations in the form of statutory

[11] Isra. S, (2017), *Merampingkan Regulasi,* Kompas, March 13th 2017,

[12] *Ibid*

[13] Djamil. N, (2015), *Setengah Hati Reformasi Regulasi*, *Seputar Indonesia,* November 12th, 2015.

[14] Indrati, M. F. (2008). *Kompendium Ilmu Perundang-undangan*, Jakarta: Kementeriaan Hukum dan HAM, p.44

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regulation if we refer to Art 7 (1) Law and Regulation Procedure Act of 2011 the main problem comes from government regulations and presidential regulations. Art 12 and 13 Law and Regulation Procedure Act of 2011 confirm that the content of Government Regulations is for the implementation of the Law. On the other hand, Presidential Regulation must be ordered by law, and implementing government regulations or to run the government power according to Art 4 The 1945 Constitution. This situation brings the conclusion that the administration of government will rely on government regulations and Presidential regulation. This construction puts Government Regulations or Presidential Regulation more positioned as the actual regulation intention, when the law does not (fully) explain the legal intent. Additionally, the formulation of Government Regulations and Presidential Regulation must be planned and not reactive. For example, Presidential Regulation No. 36 of 2005 concerning Land Procurement for Development is known as a follow up to the 2005 Infrastructure Summit. In its journey the Presidential Regulation was rejected by most of people with a wave of massive demonstration. The Presidential Regulation was later changed into Presidential Regulation No. 65 of 2006, which in fact is not much different in substance from the previous. Another example is the issuance of the Minister of Maritime Affairs and Fisheries Regulation No. 2 of 2015 concerning the prohibition of fishing using cantrang fishing gear. These tools are not considered environmentally friendly. However, Luhut Binsar Panjaitan, as the Coordinating Minister for Maritime Affairs, carried another view and wanted to maximize the fishing capability of the fishermen. Therefore, the Ministerial Regulation was requested to be revoked. This situation shows a weakness in the effort to integrate the region and policies in the framework of state and development into a National Regulatory System, which is an aggregation of all existing regulations.

Based on situation above, there were two solutions for limiting the will for making regulation. First, limiting authority rule-making power, especially ministerial regulations by eliminating the phrase "form based on the power" as stipulated in Art 8 (2) Law and Regulation Procedure Act of 2011. Second, even though the rule-making power presented by the delegation concept, the authority must be supported by an obligation that every Ministerial Regulation draft must follow the harmonization process in the Ministry of Law and Human Rights.

5. Strengthening Synergies Between Policy and Regulation

Another crucial problem that needs to be handled is the disharmony between policy-making and regulatory-making to implement policies and ensure the harmony of development between the central and regional government as well as business and civil society interest. For example, the case between Investment Act of 2007 with Government Regulation No 1 of 2007 concerning Income Tax Facilities for Investment in Certain Business and/or in Certain Regions. Art 1 (1) Investment Act of 2007 states that: "Investment is all forms of investment activities, both by foreign investors to do business in the territory of the Republic of Indonesia." Whereas Government Regulation No 1 of 2007, which implementing Investment Act of 2007 states that: "Investment is in the form of tangible fixed assets that are used for main business activities, both for new investment and expansion of existing businesses." In this case, investment in the two regulations has a very different meaning, where Investment Act of 2007 defines Investment as an activity and the Government Regulation No 1 of 2007 defines Investment as in the form of tangible fixed assets. This inconsistency will cause difficulties during the implementation sector.

Another case occurred between Art 22 (1) Investment Act of 2007 with Art 29 the Principles of Agrarian Provisions Act of 1960. In Art 22 (1) Investment Act of 2007 stated that: "Land Use Rights can be granted in the amount of 95 (ninety five) years by being granted and extended in advance at the same time for 60 (sixty) years and can be renewed for 35 (thirty five) years." Whereas Art 29 the Principles of Agrarian Provisions Act of 1960 stipulates that: "(1) The right to operate is granted for a maximum period of 25 (twenty five) years; (2) For companies that require a longer period of time, a right to use can

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be granted for a maximum period of 35 (thirty five) years; (3) At the request of the right holder and bearing in mind the condition of his company, the period referred to in paragraphs (1) and (2) of this article can be extended for a maximum period of 25 (twenty five) years. The longer-term arrangement of the granting of land use rights (95 years at the most at Art 22 (1) Investment Act of 2007) than the regulation in the Principles of Agrarian Provisions Act of 1960 (no longer than 60 years) is intended to increase Indonesia's competitiveness in the investment sector. However, the policy is outlined in the form of regulations that are not appropriate, because they are regulated in equal law (fellow laws) but not revoking the provisions in the previous law which governing the same thing (the Principles of Agrarian Provisions Act of 1960). This is what then raises the disharmony of regulation and surely will induce problems in its implementation.

The above description shows there are indications of a lack of understanding of government administrators of the differences and relationships between policies and regulations. Structuring the understanding of this synergy is the main problem that must be resolved considering policy is always the substance of regulation. The capacity of legal drafter in understanding policies, which will be the core substance of regulation, will considerably determine the quality of the resulting regulations. In the current situation, legal drafters are lack of capacity to understand the policies. Therefore, when analyzing the draft, they only focus on the technical problem, not the policy or its philosophy.[15] This, of course, potentially leads to problematic regulations and causes new problems in the implementation.[16] Thomas R. Dye describes policy as everything that is chosen by the government to do something or not do something.[17] Whereas based on Art 1 (2) of Legislation and Regulationg Making Act of 2011 determines that statutory regulations are written regulations that contain generally binding legal norms and are formed or established by state institutions or authorized officials through the procedures stipulated in statutory regulations. In other words, regulation is a formal form of government policy so that it can be implemented in the community. However, government policies do not have to always be converted into regulations. The difference between policies and regulations is as follows:

[15] Bădescu, M. (2018). *Legislative Inflation: an Important Cause of The Dysfunctions Existing in Contemporary Public Administration, Juridical Tribune*. 8 (2). p 357-369.

[16] Šulmane, D. (2011). *Legislative Inflation: an Analysis of The Phenomenon in Contemporary Legal Discourse*, Baltic Journal of Law & Politics, 4 (2). 78-101.

[17] Dye, T. R. (2016). *Understanding Public Policy*. London, Pearson, p 411.

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Table.1. Comparation Between Policy and Regulation

Policy	Regulation
Choice of action among a number of alternative actions.	Operational instruments for selected actions.
Selected policies do not have to/ always become a regulatory norm.	Regulation contai policy as substance.
Free Norm.	Bound to the norms of the National Regulatory System, e.g. structure of regulation (there must be no norm conflicts), must be consistent and harmonious with other norms, etc. Need to control from aspects of policy planning, coordination, monitoring, and evaluation.

Therefore, strengthening the capacity of policymakers and regulatory designers is a necessity that must get an extensive focus, considering that policy formulators and regulatory designers need to have the ability to analyze and harmonize these policies, of course, in-depth knowledge of the policies outlined and will be operationalized with these regulations is needed.[18] Strengthening the capacity of policymakers and drafting regulations can be done by arranging the stages of policy harmonization as well as an efficient and effective procedure on making regulation, which will be carried out by the Ministry of Law and Human Rights. In addition, increasing appreciation of the process is also a form of strengthening the capacity of policymakers and legal drafter. This can be done by organizing coordinating meetings between ministries/agencies. Capacity building can also be increased by empowering the implementation of public consultations, or what Law and Regulation Procedure Act of 2011 calls community participation. Lothar Gundling stated several reasons concerning the need for community participation in policy making, including, first, providing information on legal needs sociologically to the government, second, increasing people's willingness to obey state policies, third, providing guaranteed legal protection, fourth, democratic decision making.[19] But until now, public consultations often disobey by legal drafter and just to fulfill provisions of Art 96 Law and Regulation Procedure Act of 2011 only.

6. Other Optional Policies

There are many policies to adopt for the regulatory reform agenda in Indonesia, including omnibus law. At the most basic level, omnibus law, known as omnibus bill under common law system, is solely packages of budget measures and policy changes. Started as a structural and organizational tool, it was originally a way for lawmakers to bundle similar proposals at once.[20] Just like a regular law, omnibus law is formal proposals to change laws that are voted by rank and file lawmakers. The difference with omnibus bills is it contains numerous smaller bills, ostensibly on the same broad topic. Take the omnibus tax bill as an example: It may include changes on everything from income, corporate, and sales taxes, but all of those issues can fit under the large umbrella of taxes. But many legislative observers feel the implementation has gotten out of control, with omnibus law now encompassing so many issues that a single omnibus bill can span hundreds or even thousands of pages, often drafted in mere hours on short

[18] Sadiawati, D. (2015), *Strategi Nasional Reformasi Regulasi…Op. Cit*, p. 37

[19] Gundling, L. (1980) *Public Participannt in Environmental Decision Making, dalam Trends in Environmental Policy and Law*. IUCN Gland. Switzerland, p 11.

[20] Massicotte, L. (2013), *Omnibus Bills in Theory and Practice*, Parliamentary Rev, 13 (1). 14–15

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deadlines. Second optional policy is using "one-in, two-out" rule which has success in UK. (The rule is or every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. UK has had a policy like this since 2005, first adopting a "'one-in, one-out" rule, then a "one-in, two-out" rule and now a "one-in, three-out" variant.[21] The Third optional policy is by including specific clause so that the regulation can correct itself in case there is a problem. Those clauses are, a review clause which provide review process after specified period since its enactment, a sunset clause which provide periodic review of the regulation, and, finally but not least, the temporary legislation clause which set the active period of the regulation in advance.[22]

7. Conclusion

This article is intended to outline the right policies in terms of regulatory reform, especially in this case in Indonesia. These policies, among other simplification of regulations, reconseptualization of rule making power, and strengthening synergies between policy and regulation. Lawmaker institution shall create database of legislation and regulation which integrated and systematic. This technology would facilitate information especialy to find regulation that (1) conflict, (2) inconsistency, (3) multiple interpretations, (4) not operational. reconseptualization of rule making power is carried out by conceptualizing the understanding of the formers of regulations so that they do not favor the response or reaction of understanding is not merely for the making of new regulations. strengthening synergies between policy and regulation is carried out by synchronization between policy and regulation drafting. In addition to the policies referred to, other legal policy options such as the omnibus law will carry out massive deregulation by using one law only. Other policy options such as one in, one out rule that are successfully implemented in the UK, or even apply specific clauses such as the review clause, the sunset clause or temporary legislation. In the end, we expect that there must be some reformation between actual practice and long-held frameworks on regulation making process and regulation itself. That is because effective regulation is not just predicated on technical information-capturing capabilities (and the experience) of the regulator. It is also dependent on the involvement of civil society in the regulatory process. Increasingly in, all aspects of regulation, the sustainability of the regulatory regime depends on the degree of inclusiveness so as to provide credibility and there by reduce uncertainty of regulatory decisions. By ensuring broad participation, regulatory mechanism should not be able to deliver technically efficient and economically sound decisions, but to effectively resolve legitimate social conflicts, consistent with the public interest.

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