NON-DELEGATION DOCTRINE OF PRESIDENTIAL LEGISLATIVE POWER IN THE PRESIDENTIAL GOVERNMENT SYSTEM: A COMPARATIVE STUDY BETWEEN INDONESIA AND IN THE UNITED STATES OF AMERICA

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ABSTRACT

This study aims to discuss the doctrine of non-delegation with regard to the president's law-making power within a presidential government system. This normative study drawing on a comparative approach between both the Indonesian and the American systems of government, especially the law-making power of the president. Based on the 1945 Constitution, the Indonesian House of Representatives has the power to make laws. Every bill is deliberated by the House, together with the President, for joint approval. The bills may come from the House, the President, or the Regional Representative Council. In so setting, this constitutional provision places the law-making process in the hands of both the Legislative and the Executive. This study relies on the tex-based method to gather data consisting of constitutional provisions, laws, and regulations. The study shows that even though both Indonesia and America claim to practice the presidential system of government and the separation of powers, both countries have a different understanding of the source of legislation. In the latter, the law-making power is solely vested in the legislative with only veto power granted to the executive whereas, in the former, both the law-making power is shared by the legislative and the executive. The study also reveals that the power vested in the president to issue several types of laws and regulations When referring to the non-delegation doctrine, it is clear that the existence of the three forms of legislation is not in accordance with this doctrine and may cause several problems such as unclear limitations of the content of Government Regulations and Presidential Regulations.

Keywords: Non-Delegation, Law-Making Power, Presidential Government System, The 1945 Constitution, Presidential Legislative Power.

INTRODUCTION

The idea of separation of powers from the branches of state power is the antithesis of the centralization of power. Quoting Baron de Montesquieu through his Trias Politica theory, Cooper argues that when the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner (Samuel, 1994). This affirmation is important to prevent the recurrence of uncontrolled concentration of power which results in the emergence of tyranny or dictator. The separation of powers shows the difference between the legislative, executive, and judicial functions of

government. The functional division will later manifest in the government system of a country. The government system is defined as a system that regulates the relationship and work procedures between state institutions (Mahfud, 2001). The choice of a particular system of government will give birth to different patterns of relationships between the legislature and the executive. In the end, it will influence the implementation of each authority and function.

According to Soemantri, the system of government consists of a parliamentary government system, a presidential system of government, a system of government that contains parliamentary and presidential aspects, and a system of dictatorship (Soemantri, 1981). A government system that is considered to contain a parliamentary or presidential system can be said to be a semi-presidential system of government (José, 2009). For Mahfud, in the study of state science and political science, the government system consists of a presidential system, a parliamentary system, and a referendum system (Mahfud, 2001).

Meanwhile, according to Asshiddiqie, the system of government known in the world can be broadly divided into three types, namely: presidential, parliamentary, and mixed systems (Asshidiqie, 2007). The systems most widely used by countries in the world according to Hague are Presidential and Parliamentary systems. According to Hague, the main differences between the two are "*the assembly in parliamentary systems plays an important role in making, and breaking governments. In a parliamentary system, the executive governs only so long as it retains the confidence of the assembly. Parliament remains the sovereign body. This is in contrast to presidential systems, where the chief executive is directly elected by the people and cannot normally be removed from office by the assembly.*" (Hague et al., 1992) The presidential government system emphasizes the balance of the three functions. The power of the president or the presidential body is the main point in the administration of government. According to Strong, the Presidential Power can be divided into five forms, namely:

1. Diplomatic power-relating to the conduct of foreign affairs;
2. Administrative power-relating to the execution of the laws and the administration of the government;
3. Military power-relating to the organization of the armed forces and the conduct of war;
4. Judicial power-relating to the granting of pardons to those convicted of a crime;
5. Legislative power-relating to the drafting of bills and directing their passage into law.

The five presidential powers apply in general to almost all Presidential government systems, including in Indonesia. The same thing was also stated by Suny and Manan who saw that the president as the holder of executive power in the concept of trias politica has power that includes:

1. Administrative power or government administration, namely the implementation of laws and administrative politics;
2. Legislative power or power in the field of legislation, namely to advance draft laws and pass laws and form statutory regulations under laws;
3. Judicial power or power in the judicial field, namely the power to grant clemency and amnesty;
4. Military power, namely power regarding the army and defense affairs;
5. Diplomatic power, namely power regarding foreign relations. Bagir Manan places the power to appoint/receive ambassadors and consuls as the fifth power.

Of the five powers of the President, one that is interesting for further review is the authority of the President in the field of legislation. In the literature, the President's legislative

authority experiences quite a long debate, especially regarding the limits and forms of his legal products. One of the approaches used in the debate is the non-delegation doctrine. This doctrine then creates a tug of war between the two poles of power, namely the executive and the legislature. A large academic literature discusses the nondelegation doctrine, which is said to bar Congress from enacting excessively broad or excessively discretionary grants of statutory authority to the executive branch or other agents. The bulk of this literature accepts the existence of the doctrine and argues only about the terms of its application or the competence of the courts to enforce it. In this study, we argue that there is no such thing as a non-delegation doctrine which implies a statutory grant of authority to the executive branch. Our argument is based on an analysis of the text and history of the Constitution, the case law, and a critique of functional defenses of the nondelegation doctrine that have been proposed by academics (Eric & Adrian, 2002).

It can be interpreted that this doctrine prohibits delegations from the legislative body to other institutions (executives) to make laws. According to Thomas W. Merrill, there are two main arguments raised in the debate on the non-delegation doctrine. The first is the nondelegation doctrine, which says that Congress may not delegate. The second is the exclusive delegation doctrine, which says that only Congress may delegate its powers to other institutions (the executive). Referring to the non-delegation doctrine, the subject matter of this article will begin with a discussion of the president's power in the formation of laws (legislative powers) in Indonesia. Second, the discussion focuses on the non-delegation doctrine applied in the Presidential government system in the United States. In the final section, we will describe the analysis of the President's power in the field of Legislation with a non-delegation doctrine approach to draw conclusions and recommendations on the President's authority in forming regulations.

Presidential Legislative Power in Indonesia

In Indonesia, the law and statutory regulations making power of the President is regulated by several articles of the 1945 Constitution of the Republic of Indonesia including:

1. Article 4 (1): The President of the Republic of Indonesia holds governmental powers according to the Basic Law;
2. Article 5 (1): The President has the right to submit a bill to the House of Representatives;
3. Article 5 (2): The President determines government regulations to implement laws properly;
4. Article 22 (1): In compelling circumstances, the President has the right to enact Government Regulations in lieu of laws.

The presidential law-making power is further regulated in Law No. 12/2011 on Legislation (hereinafter referred to as the PPP Law). Based on the Constitution and the PPP Law, there are several types of laws and regulations that can be issued by the President independently. These statutory regulations include Government Regulations in Lieu of Laws, Government Regulations and Presidential Regulations. Not only have those, the Minister and other executive agencies also had the authority to form laws and regulations. The Minister as a constitutional organ in the presidential system that helps the President carry out governmental duties is given the authority to form a Ministerial Regulation as the delegative authority of the President. The ability of the president to issue several types of laws and regulations may cause several

problems. One example concerns the unclear limitations of the content of Government Regulations and Presidential Regulations. The PPP Law says that Presidential Decrees may serve as laws. On the other hand, the Presidential Regulation contains material ordered by law, material for implementing Government Regulations, or material for carrying out the exercise of government power. This means that both the Presidential Decree and the Presidential decree in lieu of law are issued to carry out the orders of the law. This is where the problem lies because both the Presidential decree in lieu of law and the Presidential Decree can contain a statutory order without any distinction between the scopes of the respective laws.

Another reason is that an institution has the authority to deal with the affairs of other institutions, which leads to interference between them. Weakness in coordination in the process of forming laws and regulations that do not involve various institutions has also triggered disharmony in statutory regulations.

The next issue concerns the content limitations that can be regulated between Government Regulations, Presidential Regulations, and Ministerial Regulations. The formation of the three laws and regulations can be based on a high order (delegative) or the basic authority (attributive). Thus, each organ can independently form laws and regulations based on orders from a higher level of regulation or the authorities they have. In the context of the power of the presidential institution, the existence of Government Regulations and Presidential Regulations can cause two problems. First, because the formation of Government Regulations and Perpres can be directly delegated by law, it is difficult to distinguish between the material limitations of the content of the two. Second. Especially for a Presidential Decree which is formed based on discretion, it is difficult to determine the reasonable limits that the President has for issuing a Presidential Regulation so that it is not carried out arbitrarily (Asshidiqie, 2007).

It is noteworthy that the legal order is not a coordinated norm system that has the same position, but a hierarchy of legal norms with various levels (Maria & Indrati, 2007). So that in this hierarchical framework, the position and content of each statutory regulation formed in the realm of the President's power do not stand alone because their formation is based on the authority they have. The same condition also occurs in the formation of Ministerial Regulations where often the content of the Ministerial Regulation actually exceeds the authority of a minister and even regulates things that should be regulated in a higher regulation. The Ministerial Regulation should contain implementing regulations that are technical and administrative. Quantitatively, based on data from the Ministry of Law and Human Rights for the period 1945-2018, there are at least 4837 Government Regulations, 1884 Presidential Regulations, and 12,829 Ministerial Regulations. Overall, from the data released by the Center for Law and Policy Studies as of 2017, there are at least 1899 laws, 4783 Government Regulations, 5242 Presidential Decrees, and 186 Government Regulation In Lieu of Law.

In terms of the number of these regulations, Ministerial Regulations can be considered the most significant which have increased. From the official data on the website of the Ministry of Law and Human Rights, between 2000 and the end of 2015, the government has issued 12,471 regulations. Of these, the highest number of regulations was ministerial level with 8,311 regulations, followed by government regulations with a total of 2,446 regulations. This shows that it was the Ministry that was very expansive in forming regulations after the promulgation of Law No. 10/2004 on the Formation of Laws and Regulations, which was repealed and replaced with the Legislation Law. It is reasonable to suspect that the increase in the number of statutory regulations under the Law (especially ministerial regulations) is only a repetition of the material

content of higher regulations. Conditions due to sectoral egos of each ministry in making laws and regulations. Whereas the Ministry as an institution under the power of the President must assist the implementation of the President's authority in certain matters. This means that all exercises of authority to form laws and regulations must be integrated under the power of the President as a consequence of the Presidential system. So, it is necessary to redesign the legislative authority of the President to form Government Regulations, Presidential Regulations, and Ministerial Regulations in the Presidential system according to the Constitution.

Non-Delegation Doctrine in Presidential Government System

As discussed earlier, the doctrine of non-delusion was born under the influence of the theory of separation of powers, which was championed by Baron de Montesquieu when he argues that in England, the orders of the old regime, commons, lords, and king, each take up a function in the new division of rule into legislative and executive functions, with the judicial function set aside. The functions of government are not entirely separated, as each branch participates to some extent in the task of the others, making the balance a result of an interaction between the branches. However, the question remains of the separation of the three orders. That is, does the king properly have some part in the choice of members of Parliament? Is the king, or his minister in Parliament, the executive, and what is the meaning of that term? Is it proper to dilute the old nobility by creating new nobles? (Montesquieu, 1989).

From what precedes, it can be seen that the term separation of powers comes from the separation of the three functions of executive, legislative, and judicial powers which were originally held by the King. Even though there was a separation of powers, it was not done purely. For example, there are still those who question the role of the king in filling the positions of members of parliament. Montesquieu's idea of the separation of powers is also known as the trias politica theory, which described the organs of government in three separate forms of power functions, namely the Executive, Legislative, and Judiciary (Asshiddiqie, 2007). Montesquieu argues that the functions of government are not entirely separated, as each branch participates to some extent in the task of the others, making the balance a result of an interaction between the branches. However, the question remains of the separation of the three orders. The three powers were distributed there so that the people had the legislative power, and the king, the executive power, and the power of judging; whereas, in the monarchies we know, the prince has the executive and the legislative power, or at least a part of the legislative power, but he does not judge.

In practice, when carrying out their duties and authorities while supervising each other (checks and balances) (Huda, 2009). From this, it can be seen that the power of legislation or forming laws and regulations is the right of the people which is manifested in the legislative body, while the executive power holders or the government only carry it out. Strong argues that government, in a broader sense, is charged to maintain the peace and security of the state. It must, therefore, have first military power or control the armed forces, secondly, legislative power or the mean's making laws, thirdly financial power or ability to extract sufficient money from the community to defray the cost of defending of state and of enforcing the law it makes on the state's behalf (Syafiie, 2011). Thus, the power of government, if interpreted broadly, includes all affairs that fall under the authority of the State. In particular, the authority to form laws and regulations only belongs to the legislative body.

However, according to Doak Wolfe, executives in the Presidential government system, it is possible for the Executive to formulate legislation with the following prerequisites: Often where the law-making function is exercised by nonlegislative departments of government these exercises are sanctioned either by specific constitutional directives or by historical precedent (Norman & Shambie, 2018). This means that the power of the president to form laws and regulations is not automatically given but must be clearly stated in the provisions of statutory regulations, for example, regulated in the constitution. Article 1, section 1 of the US Constitution says that all legislative powers shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives. This means that the legislative authority is in the hands of Congress. Meanwhile, according to Article II Section.1 Clause 1, the President is: the executive power shall be vested in a President of the United States of America. The article goes on to say that the president shall hold his office during the term of four years and, together with the Vice President, chosen for the same term, be elected, as follow. It can be understood that there is a clear separation between executive and legislative powers. Historically, it is this provision that gave birth to the doctrine of non-delegation in the United States.

Furthermore, Doak J. Wolfe believes that the President exercises legislative power under a constitutional grant in cooperation with the Senate in the formation of treaties, and negatively participates in the legislative process through the veto power. The executive function is to "*execute*" or implement laws made by the legislature, and the executive has no power to enact new laws (Norman & Shambie, 2018). The legislature has the power to delegate authority to the executive department by creating executive agencies or vesting existing agencies with specified duties. (Doak, 2018). The executive can be involved in the legislative process as long as it gets a mandate or order from the constitution in cooperation with the Senate. Executive participation or intervention in the legislative process is only possible in the form of a veto. The function of the executive is only to "*execute*" or apply the laws made by the legislature. The executive does not have the power to enact new laws. Included in this provision is the prohibition of forming certain executive departments without the approval of legislative powers.

Abner claims that although the two postulates rest on different definitions of and different conceptions about how far that power can be shared, they do not generate inconsistent doctrinal requirements. The nondelegation postulate generates the (unenforced) requirement that Congress must constrain the discretion of an agency when it is given authority to make legislative rules. The exclusive delegation postulate generates the (often ignored) requirement that Congress must authorize an agency to make legislative rules. These propositions that discretion must be confined and that authority must be granted-obviously can, and do, coexist. For practically-minded lawyers and judges, therefore, there has been no urgency about developing a coherent understanding of Article I, Section 1, because whatever inconsistencies may exist in theory do not translate into contradictory commands in terms of everyday practice.

Although the two propositions rest on different definitions and conceptions of how far legislative power can be divided, the Expert does not produce consistent doctrinal requirements. The non-delegate postulate resulted in a requirement that Congress limit the discretion of a body when it was given the power to make legislative rules. In contrast, the postulate of exclusive delegation results in the requirement that Congress regulate an institution that is empowered to make legislative rules. At the lower level of institutions under the power of the President, the delegation was increasingly tighter. This is to keep these institutions out of the corridors of executive power.

However, outside the context of legislation, the President has other legal instruments to make policies. This Presidential policy in the Presidential system is known as an executive order or Presidential Decree. The existence of an executive order is more about an effort to overcome the tension between the executive and the legislature in interpreting the doctrine of non-delegation. An executive order is an effort to protect executive interests when acting in government administration. Samuel argues that this tension between restricting the power of each branch to act and, at the same time, giving the branches the ability to protect themselves can perhaps best be seen in the Founders' attitudes toward legislative and executive aggrandizement.

The Doctrine of Non-Delegation in the Presidential Government System in Indonesia

Regulatory regimes requiring some form of enforcement mechanism to achieve their goals rely upon the use of rules to guide the conduct of members of the regulated community (Bronwen & Karen, 2007). In line with that, Manan stated that statutory regulations are any written decisions issued by an official or an authorized official which contains rules of conduct that are generally binding. Concerning the non-delegation doctrine, the formation of laws and regulations by the President as granted by the constitution, is not carried out freely and broadly. The rejection of the limitation of legislative power occurs on the basis that the government can operate freely, however, the restrictions cannot be avoided. Robert J. Reinstein argues that in a presidential system, government principles follow from the historical limits of prerogative power, the decision to make express presidential powers is subject to legislative constraint, and the fundamental theorem that Article II powers cannot be greater than the prerogatives legally exercised by the King (Robert, 2009). Thus the policy power of rule formation is something that must be limited from executive power. The President must submit to legislative powers to prevent past practices dominated by the prerogative of the King.

Furthermore, at a lower level under the power of the President, the doctrine of non-delegation also applies as stated by Doak J. Wolfe who argues that the President exercises legislative power under a constitutional grant in cooperation with the Senate in the formation of treaties, and negatively participates in the legislative process through the veto power. The executive function is to "*execute*" or implement laws made by the legislature, and the executive has no power to enact new laws. The legislature has the power to delegate authority to the executive department by creating executive agencies or vesting existing agencies with specified duties. The President exercises legislative powers under the constitutional order in collaboration with the Senate in the formation of agreements and participates negatively in the legislative process through veto power. The function of the executive is to "execute" or implement laws made by the legislature, and the executive does not have the power to make new laws. The legislature has the power to delegate authority to the executive department by creating an executive body or providing existing agencies with assigned tasks.

The legislature can define and define the functions of the institutions it forms, but can appropriately carry out non-legislative functions only to the extent that their performance is reasonably related to the full and effective implementation of the orders of legislative powers. The legislature must ensure that its delegation of powers does not constitute a violation of the constitutional duties of the executive department. Thus, the non-delegation doctrine in the practice of the relationship between the executive and legislature in the United States can be broadly concluded that the legislative power of the state is vested in the Senate and Assembly,

and cannot be passed on to other bodies. Neither the legislature nor any other body in which the constitution vests legislative power may abdicate its legislative function by delegating power to another body to make the law. An unconstitutional delegation of legislative powers may violate not only the doctrine of separation of powers but also the due process clause, and this is the ground of attack on such provisions of state laws in the federal courts. Although the legislature is constitutionally prohibited from delegating its lawmaking power to other bodies, it is not prohibited from delegating the discretionary power to execute and administer the laws where such delegation is accompanied by reasonable safeguards and standards. There is no unconstitutional delegation of legislative power, moreover, where the legislature authorizes an administrative agency to adopt present or prospective regulations of a federal agency if such federal regulations would otherwise be operative within the state (Romualdo, 2018).

From the practice in the United States, when compared to Indonesia, it is very different. As explained earlier, the President has several legislative instruments that can be formed to carry out the orders of the Law. The provisions governing the formation of the statutory regulations on the delegation are regulated in the PPP Law. This law is a further regulation based on a constitutional order which states:

> *"Further provisions regarding the procedure for the formation of laws are regulated by law."*

Through this Law, statutory regulations are formed and arranged based on levels or hierarchies. The PP Law also regulates the hierarchical level or order of the laws and regulations in Indonesia. Based on the theory of Kelsen (stufenbowtheorie) originally put forward by Adolf Merkel (1836–1896). According to Kelsen, the legal system, especially as the personification of the state, is not a system of norms coordinated with one another, but a hierarchy of norms that have different levels. The unity of this norm is constituted by the fact that the creation of a lower norm is determined by another, the higher norm. The making which is determined by higher norms is the main reason for the validity of the whole legal system that forms the unity. According to Nawiasky, the highest state norms which Kelsen called basic norms (grundnorm) should not be referred to as staatsgrundnorm but staatsfundamentalnorm or fundamental state norms. Furthermore, according to Nawiasky, norms can be composed of: (1) fundamental state norms (staatsfundamentalnorm), (2) basic state rules (staatsgrundgesetz), (3) formal laws (formell gesetz), and (4) implementing regulations and autonomous regulations (verordnung en autonome satzung). The hierarchy of laws and regulations in Indonesia consists of the 1945 Constitution of the Republic of Indonesia, the Decree of the People's Consultative Assembly, Law/Presidential Decree in lieu of law, Government regulations, Presidential Regulations, and Regional Regulations.

From these provisions, it is clear that there are differences in the application of the non-delegation doctrine between Indonesia and the United States. If the United States adheres to the non-delegation doctrine principle, Indonesia provides the opposite. In Indonesia, the President is very dominant in shaping laws and regulations. In addition to participating in discussing and approving laws with the DPR. While in the United States, the law-making process is fully under the authority of Congress. In Indonesia, the President can establish a Presidential decree in lieu of law during emergencies. Additionally, the President can also form several legal products for delegations in the form of Government Regulations, Presidential Regulations. Based on the PPP

Law, "The content of the Government Regulation contains material to carry out the law properly". This is not much different from other provisions which state that:

> *"The content of the Presidential Regulation contains material ordered by law, material for implementing Government Regulations, or material for implementing the exercise of government power."*

This means that to implement laws the President can form a Government Regulation or Presidential Regulation without a clear limit to the scope of each of these regulations, even though both are formed by the President.

At a lower level, the Minister as assistant to the President is given the authority to form Ministerial Regulations in the context of carrying out his duties and powers. Even the formation of a Ministerial Regulation is not only on the delegation of a higher regulation but can also be formed independently based on the authority of the Minister concerned. When referring to the non-delegation doctrine, it is clear that the existence of the three forms of legislation is not in accordance with this doctrine. On the delegation, the President and Ministers have the discretion to issue policies. The aforementioned policies sometimes collide with each other, both vertically with the law and horizontally with those which are at a more equal level. In practice, often legislators consciously give delegates to the executive to further regulate to avoid more detailed regulation at the level of the law. In fact, according to Harold J. Krent, referring to the arrangement by the Congress in the United States, in general, can limit the power of the President in terms of implementing laws, pardon/clemency, and foreign affairs. The Congress according to Krent can at least provide limits by category (Saikrishna, 2015): (1) enumerated powers, which are not regulable; and (2) unenumerated powers, which are regulable. At other times, Krent seems to accept some congressional regulation of law execution, foreign affairs, the protective power, and privileges and immunities but rejects any regulation of the pardon power. And sometimes, Krent can be read as advancing the theory that Congress may reasonably regulate all.

This means that congress is strict in imposing limits on the executive to enforce laws. This is very different from the power of the President in Indonesia, who is very flexible in issuing and implementing regulations based on delegation.

CONCLUSION

It is important to note that the choice of a particular system of government will give birth to different patterns of relationships between the legislature and the executive. The power of the President in Indonesia in issuing statutory regulations is regulated based on the 1945 Constitution of the Republic of Indonesia. Based on the Constitution and the PPP Law, the president has the power to issue several laws and regulations including Government Regulations in Lieu of Laws, Government Regulations and Presidential Regulations. Not only have those, the Minister and other executive agencies also had the authority to form laws and regulations. However, the power vested in the president to issue several types of laws and regulations may cause several problems. One example concerns the unclear limitations of the content of Government Regulations and Presidential Regulations. In America, Article 1, section 1 of the US Constitution says that all legislative powers shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives. This means that the legislative

authority is in the hands of Congress. Meanwhile, according to Article II Section.1 Clause 1, the President is: the executive power shall be vested in a President of the United States of America. The article says that the president shall hold his office during the term of four years and, together with the Vice President, chosen for the same term, be elected, as follow. It can be understood that there is a clear separation between executive and legislative powers. It is this provision that gave birth to the doctrine of non-delegation in the United States. The executive can be involved in the legislative process as long as it gets a mandate or order from the constitution in cooperation with the Senate. The president's intervention in the legislative process is only possible in the form of a veto. His/her role is only to "*execute*" or apply the laws enacted by the legislature. He/she does not have the power to enact new laws. Interestingly, when the American people came to establish their governments, they acted on the principle that the law-making power should be kept distinct from the law-executing, and the law interpreting powers.

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