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THE ROLE OF MINISTERIAL REGULATIONS IN THE REVIEW OF THE HIERARCHY OF LEGISLATION IN INDONESIA

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Abstract: *Ministerial regulations play an important role in the Indonesian legal system as an instrument for implementing legislation and supporting governance. However, its legal status is still controversial because it is recognized under Article 8 of Law Number 12 of 2011, as amended by Law Number 15 of 2019, but it is not expressly included in the hierarchy of laws and regulations stipulated in Article 7. This condition creates legal uncertainty regarding the position, binding force, and relationship with other legislative instruments. This study aims to assess the legal status of ministerial regulations based on Law Number 12 of 2011 and Law Number 15 of 2019, as well as analyze its role in the hierarchy of Indonesian legislation. This study uses normative legal methods with statutory, conceptual, and literature approaches. The Data consists of primary, secondary, and tertiary legal materials collected through library research and analyzed descriptively. The findings indicate that ministerial regulations have binding legal force provided that they are enforced in accordance with the delegation of a higher statutory regulation or based on the statutory authority of the minister. Although not formally placed in the legislative hierarchy, ministerial regulations serve as essential implementing regulations (verordnung) and, in certain circumstances, as policy regulations (beleidsregel) derived from administrative discretion. Nevertheless, the absence of a clear hierarchical position has contributed to regulatory overlap, disharmony and legal uncertainty. Therefore, strengthening the harmonization mechanism, compliance with the principles of drafting legislation, and ensuring compliance with higher legislation is needed to improve legal certainty and effectiveness of governance in Indonesia.*

Keywords: *Ministerial Regulation, hierarchy of legislation, legal authority, drafting legislation, legal certainty.*

I. INTRODUCTION

Ministerial regulation is one type of legislation in indonesia that has an important role in the implementation of policies and implementation of programs at the ministry level. In the hierarchy of legislation in indonesia, the position of Minister regulation is subordinate to government laws and regulations, but has significant legal force within the scope of the ministry concerned. The definition of legislation according to the experts themselves is very diverse. Such as the opinion of Bagir

Manan, that legislation is a written decision of the state or government that contains instructions or patterns of behavior that are binding and generally. 'Legislation' is defined by everything related to the law, the ins and outs of the law. Nomenclature 'legislation' can be preceded by other words.'regulation' for example,thus becoming 'legislation', which consists of the word 'regulation'and the word "legislation". According to s.j. Fockema ansdreae, the term legislation (legislation, wetgeving or gesetzgebung) has two meanings, namely: First, legislation is the process of formation/process of forming state regulations both at the central level and at the regional level; second, legislation is all state regulations that are the result of the formation of regulations both at the central level and at the regional level.According to Law No. 12 of 2011 on the establishment of legislation as amended by Law No. 15 of 2019, the hierarchy of legislation in indonesia is as follows:

1. Constitution of the Republic of indonesia year 1945 (UUD 1945)
2. Resolution of the people's Consultative Assembly (MPR)
3. Law (UU) / government regulation in lieu of law (PERPU)
4. Government regulation (PP)
5. Presidential regulation (PERPRES)
6. Provincial regulations
7. District/city regulations

The order of law is often associated with hans kelsen's teaching on the stuffenbau des recht or the hierarchy of law. Hans kelsen argued that the norms of law are tiered and layered in a hierarchy of order, where a lower norm is valid, sourced, and based on a higher norm, a higher norm is valid,sourced and based on an even higher norm, and so on until a norm that cannot be traced further and is hypothetical and fictional, namely the basic norm (grundnorm).[1] Legislation is a written regulation that contains generally binding legal norms and is established or stipulated by state institutions or authorized officials through procedures set forth in the legislation the formation of regulations in indonesia is not yet optimal. One of the fundamental problems with national regulation is that there are too many regulations.published legislation or hyper-regulation. 8,945 regulations have been issued in various forms over a period of time based on data compiled by the Center for law and Policy Studies. According to the figures, the ministerial regulation was ranked first as the most formed regulation with a number of 7,621. When taken on average, makapemangku policy in indonesia issued 6 regulations every day.[2]

According to Jimly Asshiddiqie related to the importance of the role of the minister can be described as follows: 'the actual chief executive is the minister responsible to

[1] Fitriani Amlia Ady Supriyadi, "Kedudukan Peraturan Menteri Ditinjau Dari Hierarki Peraturan Perundang Undangan Di Indonesia.," *Unizar Law Review* 4 (2) (2021): p. 147., https://doi.org/http://dx.doi.org/10.53726/ulr.v4i2.471.

[2] Fakhry Amin, *Ilmu Perundang-Undangan* (Banten: PT Sada Kurnia Pustaka, 2023), p. 2.

the President. Therefore, in the explanation of the 1945 Constitution before the change, it was stated that the minister was not an ordinary official. He is highly respected as a day-to-day leader. That is, the ministers are basically the leaders of the ministries in the true sense in their respective fields of work'. The importance of the position of ministers in government power can refer to the opinion of Maria Farida Indrati s about the position of ministers based on the formulation in Article 17 of the 1945 constitution changes which can be concluded as follows: "that the Ministers of State are not ordinary high-ranking officials, although the position of the minister depends on the President. In addition, based on Article 17 paragraph (3) of the 1945 Constitution Amendment, it is actually the ministers who primarily exercise government power (pouveir executive) in their fields.[3] Regulations are issued by a minister. In the presidential system of government, ministerial regulations are included in the hierarchy because at that time the parliamentary system of government was applied.[4]

In terms of the content of the ministerial regulation, the mechanism for its formation must be seen first, which is based on two main things, namely the orders of higher laws and regulations or the authority of certain government affairs. This means that the content of the ministerial regulation must be in accordance with the matters ordered by higher laws and regulations or the basis of authority attached to the relevant minister. This is in accordance with the theory of Norm level hans nawiasky and in line with the opinion of Bagir Manan as previously explained that the norms below apply, sourced and based on higher norms, higher norms apply, sourced and based on higher norms, up to a highest norm called the basic norm. Then the lowerlevel legislation should not conflict with the higher legislation this is known as the principle of lex superior derogat Legi inferiori, if there is a conflict or conflict between the high legislation with the low then the high should take precedence.[5]

According to peter noll, the science of legislation *(which he called gesetzgebungslehre)* as a science that provides guidance, the science that outlines the normative provisions, a lehre. Therefore he named it not gesetzgebungswissenschaft but gesetzgebungslehre. Noll argues, the development and consolidation of the method of legislation is part of the science of law. And although it does not explicitly mention as part of interdisciplinary legal Science, gesetzgebungslehre is a legal discipline (juristische disziplin) in the sense of the

[3] *Ibid*. p. 148.

[4] Juwita Putri Pratama, Lita Tyesta Alw, and Sekar Anggun Gading Pinilih, "Eksistensi Kedudukan Peraturan Menteri terhadap Peraturan Daerah dalam Hierarki Peraturan Perundang-Undangan," *Jurnal Konstitusi* 19, no. 4 (December 2022): p. 879., https://doi.org/10.31078/jk1947.

[5] Erdin Tahir, "Analisis Keberlakuan Peraturan Menteri Hukum dan Hak Asasi Manusia dalam Sistem Peraturan Perundang-Undangan di Indonesia," *Halu Oleo Law Review* 3, no. 2 (September 2019): p.16., https://doi.org/10.33561/holrev.v3i2.8169.

science pursued and the activities undertaken by legal experts.[6] Based on the description, This study focused on the assessment of the position of ministerial regulations in the Indonesian legislation system. Although not included in the hierarchy of laws and regulations as stipulated in Article 7 Paragraph (1) of Law No. 12 of 2011 as amended by Law No. 15 of 2019, ministerial regulations are still recognized by Article 8 as long as they are established based on higher regulatory orders or authorities. Therefore, this study aims to analyze how the position of ministerial regulations based on Law Number 12 of 2011 as amended by Law Number 15 of 2019 and how its role is viewed from the hierarchy of legislation in Indonesia.

II. RESEARCH METHODS

This study is a type of normative legal research conducted through the study of library materials and secondary data, in libraries and other law journals, and is conceptualized as rules and norms that are considered standards of human behavior.Secondary Data is data obtained but not directly from the source.The legal materials used in this secondary data include primary legal materials, secondary legal materials, and tertiary legal materials. These data and legal materials are obtained through library studies or library research. Literature study is a study to obtain information related to this research by reading, studying, and even quoting books, journals or relevant legislation.[7]

III. ANALYSIS AND DISCUSSION

A. Position of ministerial regulations (based on Law No. 12 of 2011 and Law No. 15 of 2019)

Regulation on the position of ministerial regulations in legislation in Indonesia has experienced dynamic development since the regulation of the system of legislation in Law No. 1 of 1950 on Central government regulations until Law No. 12 of 2011 as amended into law no. 15 of 2019 on the establishment of legislation. When looking at the position and legal status of the current ministerial regulation stipulated in Article 8 paragraph (2) of Law No. 12 of 2011, it raises many questions that cause the position of the Ministerial Regulation with other laws and regulations, because on the other hand its existence is recognized as a regulation, but on the other hand it is not listed in the hierarchy of laws and regulations. The ambiguity is characterized by, for example, whether the Ministerial Regulation is under the presidential regulation as the implementing rule of the Presidential Regulation and is above the regional regulation and whether in the formation of the regional regulation must consider the Ministerial Regulation.

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[6] Erdin Tahir Dkk, *Teori & Pengujian Peraturan Perundang-Undangan* (Bandung: Nusa Media, 2020), p.5.

[7] Zainuddin Ali, *Metode Penelitian Hukum* (Sinar Grafika, 2021), p. 1-5.

According to Retno Saraswati, the vagueness of the position of ministerial regulations in practice causes many regions in forming local regulations not to refer to ministerial regulations and even tend to be ignored on the grounds of not including the type of ministerial regulations in the type and hierarchy of legislation in Indonesia.This can lead to inharmonious policy inequality between the central government and local governments. If a common thread is drawn from the issue of the position of the Ministerial Regulation described above, it is clear that the core of the problem lies in the confusion or vagueness of the position of the Ministerial Regulation with other regulations, so that there is a need for renewal and reassessment of the position of the Ministerial Regulation d so that there.[8]

1. Position of Ministerial Regulation in Law No. 12 of 2011 on the enactment of laws and regulations

The urgency of the minister's position in exercising government power gives the minister the authority to form laws and regulations. Based on Article 8 paragraph (2) of Law No. 12 of 2011, a regulation has binding force if ordered by higher laws and regulations or established based on authority. Thus, ministerial regulations can be established on the basis of delegation from laws, government regulations, or presidential regulations, as well as based on the authority attached to the minister. In legal doctrine, the authority for the formation of legislation comes only from attribution and delegation. According To A. Hamid S. Attamimi, attribution is the granting of new authority by the Constitution or formulating laws to a state organ, while delegation is the delegation of authority to form regulations from authorized officials to other officials with the responsibility for their implementation is on the recipient of the delegation. Article 8 paragraph (2) of Law No. 12 of 2011 not only recognizes ministerial regulations that are formed based on delegation, but also those that are formed based on authority. The authority comes from the duties of the minister in conducting government affairs in his field as the executor of presidential powers. Therefore, ministerial regulations that are established without direct orders from higher regulations are still recognized as laws and regulations as long as they are based on legitimate authority.[9]

A ministerial regulation is a type of regulation issued by a minister or government official who has authority in a particular field. Ministerial regulations have legal standing under the law and above lower statutory regulations such as institutional regulations or local regulations. Act No. 15 Of 2019 On the Establishment of Legislation. In the provision is also not expressly regulated in relation to the position of ministerial regulations in the hierarchical system of legislation. The legal system

[8] Muhamad Nafi Uz Zaman, Retno Saraswati, And Ratna Herawati, "Analisis Dan Evaluasi Kedudukan Peraturan Menteri Terhadap Peraturan Daerah Dalam Sistem Ketatanegaraan Indonesia," *Diponegoro Law Journal* 9 (2020): p.385, Https://Ejournal3.Undip.Ac.Id/Index.Php/Dlr/.

[9] *Ibid*., p.395.

in indonesia itself is recognized to still contain a number of problems, including not all types of legislation clearly located in the hierarchy of legislation, and too broad content material and similarity of content material between legislation. Explanation of the system of state government as emphasized in the 1945 Constitution (before the amendment) Roman numeral VI emphasized that the minister of State is the assistant to the president; the minister of State is not responsible to the DPR. The president appoints and dismisses ministers of State. The minister is not responsible to the DPR. His position does not depend on the council, but on the president. Ministers are assistants to the president.Attamimi, argued that legislation is a state regulation, at the central level and at the regional level, which is formed based on the authority of legislation, both attribution and delegation. Then in his dissertation, Attamimi provides limitations on legislation are all the rules of law established by all levels of institutions in a certain form, with certain procedures, usually accompanied by sanctions and generally accepted and binding on the people.[10]

According to Article 1 Number 2 of Law No. 12 of 2011, legislation is a written regulation that contains generally binding legal norms and is established or established by state institutions or authorized officials through procedures set forth in legislation. In Jimly Asshiddiqie's view, the definition of legislation is the existence of ministerial regulations in the context of the legal system in Indonesia regulated in Article 8 of law no. 12 of 2011 and Law No. 15 of 2019 on the establishment of legislation. In this provision, it is also not expressly regulated in relation to the position of ministerial regulations in the hierarchical system of laws and regulations. The legal system in Indonesia itself is recognized to still contain a number of problems, including not all types of legislation clearly located in the hierarchy of legislation, and too broad content material and similarity of content material between legislation. Ministerial regulations on the one hand can actually play an important role for the effectiveness of government administration, because not all things whose substance is regulated in the provisions of higher laws and regulations can already be implemented to organize government. This Ministerial Regulation is normatively also recognized its existence and has binding legal force as long as it is ordered by higher laws and regulations or established based on authority. Ministerial regulations therefore have functions and positions that are actually important to implement state government policies.[11]

The formation of ministerial regulations is motivated by government policies that need to be outlined in the form of regulations that are the implementation of higher regulations, therefore ministers or ministerial-level officials can be given the

[10] Ni'matul Huda, "Kedudukan Dan Materi Muatan Peraturan Menteri Dalam Perspektif Sistem Presidensial," *Jurnal Hukum Ius Quia Iustum* 28, no. 3 (September 2021): p.559., https://doi.org/10.20885/iustum.vol28.iss3.art5.

[11] *Ibid*., p.559.

authority to make regulations that are the implementation. If it is noted, the implementation of ministerial regulation is sourced from the delegation, namely to run higher legislation, however, the obesity of the formation of ministerial regulations on the other hand is also a separate problem for the effectiveness of government administration. Saldi Isra had suggested efforts to overcome the massive issuance of this Ministerial Regulation, among others: first, narrowing the space to form a Ministerial Regulation. The simplest way is to eliminate the phrase "established by authority" as stipulated in Article 8 paragraph (2) of law no. 12 of 2011. Second, even if a room is opened based on the delegation of laws, government regulations and presidential regulations, but in forming ministerial regulations, the space must be followed by the obligation that every draft ministerial regulation must follow the harmonization process at the Ministry of Law and Human Rights.[12]

According to Jimly Asshiddiqie, legal products set by certain officials or institutions do not always follow the hierarchy of their forming positions. Regulations issued by specialized and independent institutions are more properly categorized as special regulations (lex specialis) which are subject to the principle of lex specialis derogat legi generali. Institutions such as the Supreme Court, Constitutional Court, Bank Indonesia, Election Commission, and other independent institutions may establish regulations to the extent that such authority is granted by law. Article 12 of Law Number 12 of 2011 determines that government regulations serve to implement laws, while Article 13 regulates that presidential regulations are established to implement laws, government regulations, or the administration of government powers. Thus, PP and Perpres are instruments for implementing laws based on firm delegation. The minister is also authorized to form ministerial regulations in accordance with his / her field of work, but this authority is only given to ministers who lead ministries with certain portfolios. Ministerial regulations contain norms that regulate, while ministerial decisions can be in the form of regulations (regeling) or stipulations (beschikking). The content of ministerial regulations and ministerial decrees that regulate can be sourced from the authority of attribution and delegation.[13]

2. The position of the Minister Regulation in law No. 15 of 2019 on the establishment of legislation

As amended by Law Number 15 of 2019 concerning amendments to Law Number 12 of 2011 concerning the establishment of legislation (hereinafter referred to as the PPP law) is not included in the type and hierarchy of legislation in Indonesia. However, ministerial regulations are recognized in existence and have binding legal force through Article 8 of the PPP law, either based on a higher regulatory order or established upon the authority given. In addition, if viewed from the historical side,

[12] *Ibid*., p.565.
[13] *Ibid*., p.567.

this Ministerial Regulation has been recognized since the existence of TAP MPRS number XX/MPRS/1996 on sources of Law of the Republic of Indonesia. Based on data from the Ministry of Law and Human Rights, quantitatively in the period 1945 to 2021 there were 4,747 government regulations and 2,217 presidential regulations. Meanwhile, in the period 2005 to 2021 there were 16,818 ministerial regulations.[14]

According to Saldi Isra, referring to Article 7 Paragraph (1) of the PPP law, the number of implementing regulations that are born is likely to come from legal orders that lack detail in regulating related content materials.Of the three types of legislation, the number of ministerial regulations is more than the other two regulations, namely government regulations and presidential regulations. At this point, it is very relevant if the question arises as to the extent of the formation and content of ministerial regulations so as not to cause a conflict of norms with other laws and regulations. In the current development, ministerial regulations are no longer the authority that is fully in the minister, there must be presidential approval as stipulated in Presidential Regulation number 68 of 2021 concerning the granting of presidential approval to draft ministerial regulations and heads of institutions. The birth of this regulation is a breath of fresh air to produce quality, harmonious, non-sectoral regulations. Even the Cabinet Secretary, Pramono Anung revealed that often the president's directives are translated differently by several ministries.[15]

The conception of state institutions in Dutch is commonly called staat sorgaan. In English, the term political institution is used. In Indonesian, it is synonymous with a state institution, state agency, or state organ. In the 1945 Constitution of the Republic of Indonesia (UUD NRI tahun 1945) before the amendment, the term "institution" did not exist. There is the term"body". For example, in Article 23 paragraph (5) for the audit board. Similarly, the word " Agency "is found in Article 24 of the 1945 Constitution with the formulation of the word"judiciary". The word " Agency "reappears in Article II of the transitional rules, in the explanation of the 1945 constitution part of the state government system, the MPR is called the word" Agency " as the embodiment of the entire Indonesian people. Similarly, in the explanation of Article 2 of the 1945 Constitution which regulates the composition of the membership of the people's Consultative Assembly, the term "bodies" is used for Cooperatives and so on. the mention of the word "Agency" is also consistently made for the explanation of Article 2 Paragraph (2) for the MPR. In the elucidation of Article 18, the term "body" for DPRD is also mentioned. Also in elucidation of Article

[14] Moh Amar Khoerul Umam And Fitriani A. Sjarif, "Pengaturan Pemberian Persetujuan Presiden Terhadap Rancangan Peraturan Menteri Berdasarkan Teori Peraturan Perundang-Undangan," *Palar | Pakuan Law Review* 7, No. 2 (December 2021): p.527., Https://Doi.Org/10.33751/Palar.V7i2.4371.

[15] *Ibid*., p. 527.

23 paragraph (5) for BPK, the term "agency" is used. Even in Article II of the transitional rules, the word “Agency” is supplemented by the word “state” so that it becomes the term "state agency.[16]

A ministerial regulation is a type of regulation issued by a minister or government official who has authority in a particular field. Ministerial regulations have a legal standing under the law and above lower statutory regulations such as institutional regulations or local regulations. Act No. 15 Of 2019 On the Establishment of Legislation. In this provision, it is also not expressly regulated in relation to the position of ministerial regulations in the hierarchical system of laws and regulations. The legal system in indonesia itself is recognized to still contain a number of problems, including not all types of legislation clearly located in the hierarchy of legislation, and too broad content material and similarity of content material between legislation. Explanation of the system of state government as emphasized in the 1945 Constitution (before the amendment) Roman numeral VI emphasized that the minister of State is the assistant to the president; the minister of State is not responsible to the DPR. The president appoints and dismisses ministers of State. The minister is not responsible to the DPR. His position does not depend on the council, but on the president. Ministers are assistants to the president.[17] According to Heri, the omnibus law concept in its creation mechanism must follow the procedures stipulated in law Number 15 of 2019 concerning the establishment of laws and regulations, starting from planning, preparation, discussion, to ratification. He considered that the omnibus law scheme was too sectoral and narrow. However, in other sis it is good to stimulate investment and export. Indeed, if the omnibus law is applied, it must have a significant impact on better economic growth.[18]

B. The Role of Ministerial Regulations in The Review Of The Hierarchy of Legislation In Indonesia

The state of Indonesia is a legal state which does not show views between the ruler and the community or vice versa. The law is often the perspective that the law is blunt upward and sharp downward. That perspective has been a problem until now. Even in the New Order era up to the reform order this perspective continued to be

[16] Patrialis Akbar, *Lembaga-Lembaga Negara Menurut UUD NRI 1945* (Jakarta: Sinar Grafika, 2022), p. 2.

[17] Sofyan Apendi, “Ketiadaan Peraturan Menteri Dalam Hierarki Peraturan Perundang-Undangan Nasional Dan Implikasinya Terhadap Penataan Regulasi Dalam Sistem Hukum Nasional,” *Palar (Pakuan Law Review)* Vol 07, No 01 (2021): p. 122., Https://Journal.Unpak.Ac.Id/Index.Php/Palar.

[18] Agnes Fitryantica, “Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law,” *Gema Keadilan* 6, No. 3 (December 2019): Hal 312., Https://Doi.Org/10.14710/Gk.2019.6751.

the subject of discussion by the community. The problem certainly requires problem solving that touches all stakeholders.[19]

Ministerial regulation in the system of legislation in Indonesia. Where both regulations are equally recognized as a form of generally binding legislation. Regulations that are formed at the behest of higher legislation can be categorized as implementation regulations (verordnung), while ministerial regulations that are born based on authority can be categorized as policy regulations (beleidsregel). These two types of regulations are two different things. The phrase" by authority " is explained as the conduct of certain affairs of government in accordance with the provisions of legislation.So, in simple terms, the provision is based on the authority of the formation of the ministerial regulation on the authority of the minister to carry out an action in the framework of government administration in order to achieve a certain goal. However, the provisions do not explain how these actions should be carried out (technically). Here, the minister has the "authority "to take action, the" authority " comes from the office because he is a minister (inherent aan het bestuur). On the basis of this authority, the minister can take action (including making regulations) without having to be bound by strict regulations that regulate how these actions must be carried out. This authority in administrative law is known as freies ermessen (authority to act freely).[20]

Ridwan HR explained that this authority is a logical consequence of the conception of welfare state. Where this concept appears to fill the shortcomings and weaknesses of the application of the principle of legality *(wetmatigheid van bestuur)*. It deals with the function of government to administer the general welfare. Because in the welfare state, in fulfilling the welfare and interests of society, the principle of legality alone is considered insufficient. Where one of the characteristics of the limitations of written law is characterized by the existence of vague norms (vage norm) and the provisions of open norms (open texture). So that the government is given the authority to take free actions that are not bound by laws and regulations (freies ermessen) or commonly called discretionary (discretionary power). This is in line with the view of SF Marbun who also explained that in order for public services to achieve maximum results, the state administration is given a certain independence to act on its own initiative in the face of a problem that requires quick handling. Kenneth Culp Davis explains,"a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses

[19] Muhammad Dimas Rizqi Et Al., "Pendampingan Rancangan Penyusunan Peraturan Desa Di Desa Air Satan Kecamatan Muara Beliti Kabupaten Musi Rawas," *Jurnal Masda* 1, No. 2 (November 2022): p. 89., Https://Doi.Org/10.58328/Jm.V1i2.83.

[20] Irfan Ardyan Nusanto, "Analisis terhadap Dualitas Peraturan Menteri dalam Sistem Peraturan Perundang-Undangan di Indonesia," *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 4, no. 1 (June 2021): p. 60., https://doi.org/10.24090/volksgeist.v4i1.4245.

of action or inaction". Thus, discretion here is interpreted as optional. So that the choice here is more directed at government decisions/actions that prioritize the achievement of goals or objectives (doelmatigheid), rather than compliance with the law (rechtmatigheid).[21]

Act No. 30 of 2014 on Government Administration (AP law) states that discretion is a decision and/or action that is determined and/or carried out by government officials to overcome concrete problems faced in government administration in terms of laws and regulations that allow choices, do not regulate, are incomplete or unclear and/ or government stagnation. The purpose of governance; fill the legal vacuum; provide legal certainty; and overcome the stagnation of government in certain circumstances for the benefit and public interest.38 however, discretion can only be exercised by authorized government officials,since the source of discretion lies in the authority of the official himself (inherent aan het bestuur). This includes freedom of discretion (beleidsvrijheid) and freedom of judgment (boerdelingsvrijheid). And when the discretion (freies ermessen) is realized into a written juridical instrument, it becomes a policy regulation (beleidsregel). So, when a ministerial regulation is born based on the authority attached to him (position), then it should be interpreted as a policy regulation (beleidsregel) that was born because of the freies ermessen.[22]

On the other hand, ministerial regulations in the form of verordnung (implementing regulations) are actually bound by higher legislation, because their existence is based on the orders of higher legislation to be further regulated, so that their existence is always preceded by legislation (formellgezets) which is the parent of the substance delegated to the verordnung to be implemented. However, in practice it is very difficult to distinguish between the two types of ministerial regulations. According to Wicipto Setiadi, in practice it is very difficult to distinguish between ministerial regulations in the form of policy regulations (beleidsregel) with ministerial regulations in the form of implementation regulations (verordnung). The minister may make general binding implementing regulations as it orders delegation of higher legislation, and may also make beleidsregel. because it is based on discretion, so to distinguish between the two, you have to look at the source of the delegation order. But in fact, not infrequently beleidsregel also given clothes like legislation in general, so it is very difficult to distinguish.[23] While in Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the establishment of legislation, there are 15 points of change that are the author's concern, namely Article 5 letter g and Article 96 paragraphs 1 to 9, where in Article 5 letter g, as explained in the explanatory chapter, what is meant by the "principle of openness"

[21] *Ibid*., p. 60.
[22] *Ibid*., p. 61.
[23] *Ibid*., p.61.

is that the formation of legislation starts from planning, drafting, discussion, ratification or determination, and promulgation, including monitoring and reviewing provide access to the public who have an interest and directly affected to obtain information and/ or provide input at every stage in the formation of legislation conducted orally and/or in writing by way of online (in the network) and/or offline (outside the network).[24]

The principle of law has an important role in the formation of legislation. According to Paul Scholten as quoted by A. Hamid S. Attamimi, the principle of law serves to find the common thread of a positive legal system and become a guideline so that the formers of regulations do not deviate from the ideals of law (rechtsidee). Although the principle of law is not a legal norm that can be applied directly to a concrete event, its existence is still necessary as a basis for understanding and forming law. In the formation of legislation, the principles of law serve as guidelines for the preparation and testing of norms, facilitate understanding of the law, and reflect the values and civilization of society. Therefore, the formulator of regulations must be guided by legal principles to prevent the birth of regulations that favor certain interests, are repressive or threaten the freedom of citizens, while ensuring the effectiveness of the entry into force of the regulations. In line with this, Abeer Bashier and Eid Ahmad Al-Husban affirm that the formers of laws must comply with a set of principles and criteria that guarantee the quality of the regulations, both in terms of universality and rationality, as well as ensure their compliance with higher regulations based on the principles of the hierarchy of legislation and the rule of law.[25]

IV. CONCLUSION

The position of the Ministerial Regulation based on Law Number 12 of 2011 as amended by Law Number 15 of 2019 is not included in the hierarchy of laws and regulations as stipulated in Article 7 Paragraph (1). Nevertheless, its existence is still recognized and has binding legal force as stipulated in Article 8 paragraph (2), as long as it is established based on a higher order of legislation or based on the authority of the minister. This condition shows that the Ministerial Regulation has juridical legitimacy as a legal instrument, but has not gained a firm position in the hierarchical structure of legislation, thus potentially causing legal uncertainty, overlapping arrangements, and disharmony between regulations.

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[24] Fiqih Rizki Artioko, "Pengadopsian Partisipasi Masyarakat Yang Bermakna (Meaningful Participation) Dalam Undang-Undang Nomor 13 Tahun 2022 tentang Perubahan Kedua Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan," *Al-Qisth Law Review* 6, No. 1 (October 2022): p. 64, Https://Doi.Org/10.24853/Al-Qisth.6.1.52-83.

[25] Rokilah Rokilah and Sulasno Sulasno, "Penerapan Asas Hukum Dalam Pembentukan Peraturan Perundang-Undangan," *Ajudikasi : Jurnal Ilmu Hukum* 5, no. 2 (December 2021): p. 184, https://doi.org/10.30656/ajudikasi.v5i2.3942.

Ministerial regulations have a strategic role in the Indonesian legislation system as an instrument of implementing norms derived from laws, government regulations, and presidential regulations, as well as a means of implementing the administrative authority of the ministry in government administration. In practice, a ministerial regulation can function as an implementing regulation (verordnung) when formed by delegation from a higher regulation, or as a policy regulation (beleidsregel) when formed under the authority or discretion of the minister. Therefore, the formation of ministerial regulations must be guided by the principles of the formation of legislation, the principle of hierarchy of norms, the principle of lex superior derogat Legi inferiori, and harmonization mechanisms so as not to conflict with higher regulations, avoid hyperregulation, and be able to realize legal certainty, effectiveness of governance, and protection of public interests.

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