

URGENCY OF RENEWAL OF THE JOINT MINISTERIAL REGULATION ON THE ESTABLISHMENT OF HOUSES OF WORSHIP: A LEGAL ANALYSIS OF THE STATUS AND POSITION

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Abstract:

This study discusses the urgency of renewing the Joint Regulation of the Minister of Religion Number 9 of 2006 and the Minister of Home Affairs Number 8 of 2006 related to the establishment of houses of worship. Researchers in studying the problem use normative legal research methods with a statute approach related to the legal issues being handled, namely examining PBM Numbers 9 and 8 of 2006. The author intends to legally analyze the status and position of the Joint Regulations of the Minister of Religion and the Minister Domestic Affairs is from the urgency aspect of its renewal. The author also uses a conceptual approach, which is intended to analyze existing legal material so that the meaning contained in legal terms can be known. The results of the study show that the importance of renewing the Joint Regulation of the Minister of Religion No. 9 of 2006 and Minister of Home Affairs No. 8 of 2006 to create legal certainty for regulatory products; there is an excess of authority in PBM and there are multiple interpretations in the regulation of religious matters. The existence of PBM gave way to the fulfillment and implementation of worship being taken over by the regions, even though Article 10 of the Law on Regional Government states that religious affairs are an absolute authority that may not be handed over to the regions.

Keywords: Establishment; Houses of Worship; Renewal; Regulation.

1. Introduction

The phenomenon of the birth of various written legal products and laws and regulations sometimes raises important questions to know the answers, such as regarding binding provisions as regulatory products and their relationship with other legal provisions. In essence, political changes in Indonesia have caused legal changes, not only at the level of the Law but also higher regulations and even rules below it. This is closely related to the structure or hierarchy of laws and regulations, each of which contains consequences, including resulting in an assessment of whether the regulation can be implemented or not.

Basically, there are 2 types of government that can be organized, namely formed through legal means and not through legal means. Friedrich Julius Stahl in his work *Staat and Rechtslehre II*, explained that the existence of legal products is due to the concept of a legal state that determines the path and limits of its activities, and how to realize them. Similarly, Von Munch argues that the elements of the rule of law are the existence of basic rules regarding proportionality, the attachment of all state organs to the law and the judiciary and the division of power. Another statement

was made by Munir Fuady, that it is necessary to limit the authority and power of the state in order to avoid the emergence of arbitrariness.

Another interesting statement was made by Munir that there are elements that make the law good, including the law must be made legally by those who have the authority, fulfill juridical, sociological, morality, philosophical and rational requirements. Not only that, the law made must be applicable so that the goals of goodness, order, prosperity and justice can be achieved.

Meanwhile, one of the obligations of the state is to facilitate the people in its territory so that they can live in harmony and side by side. Pancasila, which is the basis and guideline of the state, strives to always realize harmony for its citizens, especially in terms of religion. Another task of the state foundation that contains the value of life is agreed to protect religious pluralism for people in Indonesia, whose precepts are detailed in the 1945 Constitution of the Republic of Indonesia in the body.

As Article 29 paragraph (2) reads: "The state guarantees the freedom of each citizen to embrace their respective religions and to worship according to their religions and beliefs." Indonesia guarantees the freedom of all its citizens to practice their beliefs, which in reality cannot be denied, that this region is a country of plurality and has a level of plurality that is multidimensional in nature. This plurality is in the form of differences in ethnicity, group, race and religion, making Indonesia unique and specific.

Indonesia itself has ratified the International Covenant on Civil and Political Rights through Law Number 12 of 2005, relating to the rights and freedoms of thought, religion and belief, especially in Article 18 of this provision. Freedom of religion and belief is more fully contained in the constitution Article 28E paragraph (1 and 2) Article 28I paragraph (1) and Article 29 paragraph (2), and there is also a guarantee of freedom of worship in Law No. 39 of 1999 concerning Human Rights in Article 22 paragraph (1 and 2).

Therefore, places of worship and the implementation of their activities for religious communities are the main and basic things for all people, which in fact have been guaranteed by the state and laws and regulations. Realizing this, the government issued a Joint Regulation of the Minister of Religion and the Minister of Home Affairs Number 9 and 8 of 2006 concerning Guidelines for Implementing the Tasks of Regional Heads / Deputy Regional Heads in Maintaining Religious Harmony, Empowering Religious Harmony Forums, and Establishing Houses of Worship.

This regulation arises when there is a phenomenon and tendency for religious people to tear the bonds and unity of state life. Therefore, it is necessary to behave and have a perspective and religious practice that strengthens unity above all else, which is called religious moderation. Religious moderation is a process of how we address differences, especially in religious life, by building an attitude that has implications for a peaceful and harmonious life in the midst of religious diversity.

The maintenance of inter-religious harmony is the responsibility of all elements, both central and local governments, including society in general. The joint regulation above emphasizes that governors, regents/mayors and sub-district heads including village heads have an obligation to organize and maintain religious life. It means that this element is obliged to maintain public peace and order and the

realization of religious harmony in its region, by emphasizing the aspects of harmonization, respect and tolerance between people.

Belief in religion and participation from the social side are indicators of building community religiosity, and produce a view that there is a relationship between religious understanding and participation in religious life.¹

Towards the development of religious harmony, the presence of the Religious Harmony Forum (FKUB) is one of the provisions regulated through PBM Number 9 and 8 of 2006 and has a strategic role. Considering, FKUB has a membership consisting of religious leaders with a minimum representation of 1 person of each religion in a region. FKUBs both at the provincial and regency/city levels are tasked with, among others, holding dialogues with religious leaders and community leaders, collecting the aspirations of religious community organizations including the aspirations of citizens, as a channel for aspirations and recommendations that become policy material for regional heads, and there is even an additional task of providing written recommendations on applications for the establishment of houses of worship.

The Minister of Religious Affairs and Minister of Home Affairs regulations on the establishment of houses of worship are based on real needs by considering the composition of the population and fulfilling administrative and technical requirements for building construction. In addition, the construction of houses of worship should not disturb public peace and order, as stated in Chapter IV regarding the Establishment of Houses of Worship, especially in article 13 of the regulation.

The phenomenon that occurs, the existence of PBM is actually considered to bring opportunities to hamper the right to worship, so it is considered to be a latent danger by some parties, especially in establishing houses of worship in a number of regions. Several cases related to the construction of houses of worship in a number of regions have been recorded, as described by the Indonesian Church Fellowship (PGI) which noted that from 2015 to 2018, there were 51 churches that did not have establishment permits because they stumbled over recommendations from FKUB.² Destruction of mosques in North Minahasa in 2019 and obstruction of church construction in Bogor and Semarang.³

In addition, throughout 2020 Amnesty International noted that there were 40 problems of violations of rights such as freedom of thought and belief, and 18 of them were related to the closure and rejection of the construction of places of worship which were suspected of being acts of intimidation by religious adherents of other religions. In the Riau Islands where the renovation of a church was stopped in January, because the IMB permit or building establishment permit was challenged by a group of residents, including the case of sealing the grave of an elder or Indigenous figure in West Java, after the rejection of a joint organization under the guise of a religious group.

¹ Choirul Kurniawan et al., "Studi Terhadap Pergaulan Lintas Agama Dalam Meningkatkan Kearifan Sosial Mahasiswa Di IKIP Budi Utomo Malang," *Publisia: Jurnal Ilmu Administrasi Publik* 3, no. 2 (October 2018): 95–100.

² "Kementerian Agama Buka Peluang 'revisi' SKB Dua Menteri Soal Pendirian Rumah Ibadah Yang Disebut Pegiat HAM 'Kerap Menjegal Kelompok Minoritas Memperoleh Hak Beribadah' - BBC News Indonesia," n.d.

³ "Kemenag Bahas SKB 2 Menteri Soal Rumah Ibadah Jadi Perpres," n.d.

The urge to revise the PBM is because it is considered that the composition of FKUBs in each region does not reflect equality so that it has an impact on decisions that are considered one-sided, namely on groups that refuse. In addition, the authority of FKUB is too great in giving recommendations or permits for the establishment of houses of worship so that disputes often occur between religious communities.

Exploring the problems that occur, especially in the PBM of the Minister of Religion and the Minister of Home Affairs Number 9 and 8 of 2006, the researcher describes several problems in the regulation that need to be studied comprehensively, namely this regulation is much highlighted because it causes cases of prohibition in the establishment of houses of worship in several regions. Meanwhile, issues related to community harmony are not something that can be taken lightly, considering that religious guarantees in the constitution are individual rights and are comprehensive.

In addition, FKUB's authority is considered to exceed the government in regulating and determining the construction of places of worship of other religions. The existence of FKUB should be focused on being a forum for dialog and mediation in the event of a problem or rejection by certain groups, and not as a recommender. As stated in Article 14 Paragraph (2) Point d, it contains that the requirement for the establishment of a house of worship is a written recommendation from the district / city FKUB. This certainly opens up opportunities and polemics that religious affairs can be regulated by civil society groups, while in the division of central and regional government authority affairs, this is the responsibility of the government which cannot be delegated to community organizations, given the pluralism in this country.

Not only that, the provision that the establishment must meet administrative and technical requirements in article 14 points a and b is also a matter of concern in almost all parts of Indonesia. This provision reads "in addition to fulfilling the requirements as referred to in paragraph (1), the establishment of a house of worship must meet special requirements including a list of names and Identity Cards of users of the house of worship of at least 90 (ninety) people authorized by local officials in accordance with the level of territorial boundaries as referred to in Article 13 paragraph (3), and local community support of at least 60 (sixty) people authorized by the village head. This provision is controversial because it could hamper the establishment and development in a number of regions, and is considered intolerant and does not prioritize the interests of religious communities.

Law No. 23 Year 2014 on Regional Government, especially Article 10 Paragraph (1) emphasizes that absolute government affairs include foreign policy, defense, security, judiciary, national monetary and fiscal, and religion. Referring to this provision, in order to create a uniform arrangement in all regions, it is advisable that religion and worship be regulated through a decision that has binding legal force and is not multi-interpretive. Meanwhile, the essence and purpose of PBM regulation is to regulate the implementation and duty of government apparatus to ensure the order and smoothness of worship of each religion with its adherents, as the implementation of regional autonomy. However, the existence of PBM actually regulates the opposite where the problem of fulfillment and implementation of worship is actually taken over by non-government institutions.

The content of Article 10 which contains the provision of "the number of members of the provincial FKUB is at most 21 people and the number of members of the district FKUB or at most 17 people, with the composition of the provincial and district / city FKUB membership as referred to in paragraph (2) determined based on the ratio of the number of local religious adherents with a minimum representation of 1 (one) person from each religion in the province and district / city" seems multi-interpretive and less equitable.

Article 7 Paragraph (1) of Law No. 12/2011 stipulates that the hierarchy of laws and regulations includes the following;

- 1) Constitution Of The Republic Of Indonesia
- 2) Decree Of The People's Consultative Assembly Of The Republic Of Indonesia
- 3) Law/Regulation In Lieu Of Law
- 4) Government Regulation
- 5) Presidential Regulation
- 6) Provincial Regional Regulations
- 7) Regency/City Regional Regulations.

Furthermore, article 8 of Law No. 12/2011 states that:

- 1) "Types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, Agencies, Institutions or commissions of the same level established by law or government by order of law, Provincial DPRD, Governors, Regency / City DPRD, Regents / Mayors, Village heads or equivalent."
- 2) "The laws and regulations as referred to in paragraph (1) are recognized and have binding legal force insofar as they are governed by higher laws and regulations or are formed based on authority."

Looking at these provisions as regulated in article 7 (1) and article 8 of Law No. 12/2011 on the Formation of Legislation, there is no type of legal product of Joint Ministerial Regulation. The term 'minister' listed in article 8 only signals the formation of laws and regulations singly for the ministry itself, such as Ministerial Decrees, Ministerial Regulations and Ministerial Circular Letters, and does not contain Joint Ministerial Regulations in it as a legislative product.

In addition to the above, in the hierarchy of laws and regulations, every legal product is recognized as long as it is ordered by higher laws and regulations and is formed based on the authority of the minister.⁴ Therefore, every state institution and regulation maker in principle must also pay attention to the purpose and purpose of its formation. The authority in question is the power of a group or group to control other parties based on their authority or power.⁵ The authority in this section focuses on the existence of the government to perform legal acts including

⁴ Rati Riana, "Konstitusionalisasi Pembentukan Peraturan Perundang-Undangan Melalui Penggunaan Bahasa Indonesia Baku," *Jurnal Legislasi Indonesia* 15, no. 4 (2018), <https://www.academia.edu/download/61183399/261-1215-1-PB20191111-120726-19rvxbo.pdf>.

⁵ Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1989). 468

in drafting laws and regulations, which comes from the authority of attribution and delegation as well as the mandate it receives.⁶

Meanwhile, there are those who suggest that Ministerial Regulations be reviewed or eliminated in the per-uu regulatory system in Indonesia. As stated by Sofyan A. who gave a recommendation to eliminate Permen because he considered that regulations at the central government level were sufficient in Presidential Regulations.⁷ Permen is not included in the laws and regulations in the era of Law No. 12/2011, because the minister is an assistant to the president, therefore it is considered appropriate if the organ forming this regulation is not the minister but the President through the existence of PP or Perpres (Presidential Regulation).⁸

The position of the Minister in the presidential system is to assist the president,⁹ so that it cannot be given attribution through law in drafting Permen. Ministerial Regulations are needed in the implementation of government affairs, only as implementing regulations for PP and Perpres to regulate and manage the operations of certain fields in each ministry.¹⁰

PBM issues are certainly related to the functions and roles of the government and society, especially with regard to religious harmony issues. While Pipin Syarifin and Dedah Jubaedah explained that authority is the implementation of the functions of a person or group. A.S.S Tambunan himself said that the function of a body or government describes its role or usefulness in the life of the state. In this section, authority is not only defined as the right to practice power but also as the application of the rule of law, obedience, orders, decisions, supervision, and power.

Therefore, it is necessary to confirm the position of the Joint Ministerial Regulation in the hierarchy of Per-uu Regulations, so as not to cause doubts about the principle of legal certainty of the PBM in question. However, if the PBM is still enforced, it deserves a direct affirmation, whether in the form of attribution or delegation from a higher-level Per-uu regulation.¹¹ This harmonization is important in order to achieve certainty and legal guarantees for everyone with an interest in it. Without harmonization of the rules made, there is no order, uncertainty and a sense of no protection for the community.¹²

⁶ Salim HS, *Hukum Divestasi Di Indonesia* (Jakarta: Gelora Aksara Pratama, 2010). 61

⁷ Sofyan Apendi, "Ketiadaan Peraturan Menteri Dalam Hierarki Peraturan Perundang-Undangan Nasional Dan Implikasinya Terhadap Penataan Regulasi Dalam Sistem Hukum Nasional (Studi Pengaturan Peraturan Menteri Dalam Hierarki Peraturan Perundang-Undangan)," *PALAR (Pakuan Law Review)* 7, no. 1 (March 31, 2021): 111-26, <https://doi.org/10.33751/PALAR.V7I1.3076>.

⁸ Ni'matul Huda, "Kedudukan Dan Materi Muatan Peraturan Menteri Dalam Perspektif Sistem Presidensial," *Jurnal Hukum Ius Quia Iustum* 28, no. 3 (2021): 550-71, <https://doi.org/10.20885/iustum.vol28.iss3.art5>.

⁹ Tria Noviantika M. Shofwan Taufiq, "Eksistensi Kementerian Negara Dalam Sistem Presidensial Berdasarkan Undang-Undang Nomor 39 Tahun 2008 Tentang Kementerian Negara," *Muhammadiyah Law Review* 5, no. 1 (2021): 1, <https://doi.org/10.24127/lr.v5i1.1496>.

¹⁰ Ridwan Ridwan, "Eksistensi Dan Urgensi Peraturan Menteri Dalam Penyelenggaraan Pemerintahan Sistem Presidensial," *Jurnal Konstitusi* 18, no. 4 (2022): 828, <https://doi.org/10.31078/jk1845>.

¹¹ Junaidi, "Analisis Yuridis Keberadaan Peraturan Bersama Menteri Dalam Sistem Peraturan Perundang-Undangan Di Indonesia," *NESTOR: Tanjungpura Journal Of Law* 9, no. 3 (2013): 1-15.

¹² Firdaus Firdaus and Donny Michael, "Implementasi Peraturan Menteri Hukum Dan HAM Nomor 23 Tahun 2018 Tentang Pengharmonisasian Rancangan Peraturan Menteri, Rancangan Peraturan Lembaga Pemerintah Nonkementerian Atau Rancangan Peraturan Dari Lembaga Nonstruktural Oleh

2. Method

This research method is a type of normative research or doctrinal legal research using data sources, and is often conceptualized in what is written in laws and regulations (law in books), as well as rules or norms that are a reference for human behavior.¹³ The author in examining the problem uses a statutory approach related to the legal issues addressed, namely examining PBM Number 9 and 8 of 2006. The researcher intends to legally analyze the status and position of the Joint Regulation of the Minister of Religion and the Minister of Home Affairs from the aspect of urgency towards its renewal. In addition to the statute approach, the author also uses a conceptual approach, which is intended to analyze existing legal materials so that the meaning contained in legal terms can be known.

3. Discussion

3.1. The Urgency of Renewing the Joint Ministerial Regulation (PBM) of Religion No. 9/2006 and Minister of Home Affairs No. 8/2006

The pressure related to the revision of PBM based on the researcher's search has occurred after this regulation was implemented, with reasons ranging from the existence of FKUB to the problem of administrative requirements in the permit for the establishment of houses of worship. It is known that before the birth of PBM No. 9 of 2006 and No. 8 of 2006, there had previously been a Joint Decree (SKB), namely the Joint Decree of the Minister of Religion and the Minister of Home Affairs Number 01/BER/MDN-MAG/1969 concerning the Implementation of the Duties of Government Apparatus in Ensuring Order and Smoothness in the Implementation of Religious Development and Worship by its Adherents, which was later revoked and declared invalid.

Based on the development of modern state law, the executive position contains regulatory or *regeling* functions, as well as services or *besturing*. In the context of state administrative law, government power is active power and intrinsically the main element. This indicates the breadth of tasks that must be carried out by the government, which is then called government affairs. Institutionally, the government is in charge of running government affairs, as well as a collection of government organs. While in the Indonesian government system, these organs are structured both horizontally and vertically, hierarchically starting from the lowest level, namely the village government, to the highest level, namely the President and his apparatus. There are also those that are arranged horizontally, such as Ministries and Non-Ministerial Government Institutions (LPNK) and their respective apparatus, and there are Non-Structural Institutions (LNS) as elements supporting the implementation of government and state functions.

In the implementation of government affairs, the organs mentioned above must have legality and originate from the constitution and laws. On the basis of legality, government organs perform legal actions and deeds, which are different

Perancang Peraturan Perundang-Undangan," *Jurnal Penelitian Hukum De Jure* 19, no. 3 (September 2019): 323–38, <https://doi.org/10.30641/DEJURE.2019.V19.323-338>.

¹³ Said Sampara-Laode Husen, *Metode Penelitian Hukum* (Makassar: KRETAKUPA Print, 2013). 44

from the actions of private law subjects. The actions of government organs are in the form of arrangements, policies (beleid), stipulations or *beschikking*, planning and factual actions. Legal action in the form of regulation, in the form of legislation that is delegated.

The term delegation regulation according to the opinion of an expert, namely Hamid Attamimi, has the same meaning as the transfer or transfer of authority in forming regulations from the original authority holder, who then gives delegation or is called delegans to the recipient of the delegation. Meanwhile, Aan Efendi mentions 2 characteristics of delegation regulations, namely:¹⁴

- a) The maker is not a legislative body;
- b) Delegated regulations are made by the government only when ordered by law, especially to translate in detail legislative products so that they can be implemented, as well as to regulate certain further matters in the form of lower implementing regulations, especially for the purpose of interpreting legislative products with the aim of implementing them.¹⁵

In the presidential system, the position of a minister is an assistant to the president, therefore he does not get attribution from the law to make Permen. Ministerial Regulations are needed in the implementation of a government interest, especially as an implementing regulation of a PP or Perpres to regulate and manage operations in certain fields in each ministry. The field of government in question is specific, not proportional to the Perpres or PP, because this government regulation has a special meaning as an implementing regulation of a law. Reza stated that the obesity of rules is not only the cause of overlapping regulations, but also inhibits reform. The emergence of various regulations is directly proportional to the expansion of the structure and authority of the bureaucracy.

There are many parties who propose Permen to be reviewed and even eliminated in the per-uu regulatory system in Indonesia, as stated by Sofyan A. who recommends eliminating Permen because he considers the regulations at the central level to be sufficient Perpres. In addition, Zainal Muchtar also has the same opinion to eliminate Permen, which according to him does not have attributive authority, but only a delegation or mandate from a President. Even Ibnu Sina also said that Permen brings fattening to regulations, where constitutionally at the executive level, the minister is only a presidential assistant who accommodates certain affairs, without interfering with the affairs and authority of other ministers. Likewise, Saldi Isra stated that Permen was the cause of over regulation.¹⁶

According to him, through the power to form open rules, the content material of the Permen will be "wild" because it ignores the principles of the formation of laws and regulations, which ultimately causes legal certainty during governance to be difficult to obtain. The cause of uncertainty arises because the formation of

¹⁴ Aditya Rahmadhony et al., "Problematika 'Delegated Legislation' Pada Undang-Undang Nomor 52 Tahun 2009 Tentang Perkembangan Kependudukan Dan Pembangunan Keluarga," *Jurnal Legislasi Indonesia* 17, no. 4 (December 30, 2020): 407–22, <https://e-jurnal.peraturan.go.id/index.php/jli/article/view/681>.

¹⁵ Sukardi and E. Prajwalita Widiati, "Pendelegasian Pengaturan Oleh Undang-Undang Kepada Peraturan Yang Lebih Rendah Dan Akibat Hukumnya," *Yuridika* 2, no. 2 (2012).

¹⁶ Rilo Pambudi. S, Oksep Adhayanto, and Pery Rehendra Sucipta, "Lembaga Tunggal Pengelola Regulasi: Dasar Pemikiran Dan Tawaran Implementasinya Dalam Ketatanegaran Indonesia," *Veritas et Justitia* 7, no. 2 (2021): 431–58, <https://doi.org/10.25123/vej.v7i2.4237>.

Permen does not go through a harmonization process like the formation of PP or Perpres.¹⁷ Therefore, substantively candy allows for disharmonious and unsynchronized rules against the type and hierarchy of laws and regulations, even contradicting the law. This harmonization is considered important to create certainty.¹⁸ as well as legal guarantees for individuals and all concerned. Without harmonization, regulations that are drafted create uncertainty, lack of order and lack of protection for the community.

Meanwhile, the granting of an authority to the government to make laws and regulations is unavoidable in a modern legal state, which positions the government as a party that is directly related to the interests of many citizens. At the same time, the granting of authority to make and determine legal norms in government is also given the authority to enforce, supervise and apply sanctions.

As explained earlier in Article 29 paragraph (2) where the state provides guarantees to all citizens in embracing the religion they believe in,¹⁹ then of course the place of worship and the implementation of activities for all people become important and basic things, which in essence have been guaranteed by the state and regulations. This is the basis for the government to issue the Joint Regulation of the Minister of Religious Affairs and the Minister of Home Affairs Number 9 and 8 of 2006 concerning Guidelines for the Implementation of the Duties of Regional Heads / Deputy Regional Heads in Maintaining Religious Harmony, Empowering Religious Harmony Forums, and Establishing Houses of Worship. In principle, the PBM emphasizes that the governor, regent/mayor and sub-district head, including the village head, have the obligation to organize and maintain religious life. That is, this element is obliged to maintain public peace and order, and realize religious harmony in its region.

The existence of PBM since its birth in 2006 even brings another opportunity in terms of suppressing the right to worship, and is considered to be an obstacle by some circles, especially for the establishment of houses of worship, such as a series of cases that have been described previously. Therefore, various urges to revise PBM Number 9 and 8 Year 2006, according to the researcher, it is necessary to do both in the revitalization of nomenclature and position as well as the material or substance of the regulation, whose reasons will be described and elaborated hereinafter.

The following are the reasons why it is important for researchers to make changes to the PBM in question, namely:

1. Realizing Legal Certainty for Regulatory Products

Law No. 12/2011 on the Formation of Legislation, especially Article 7 Paragraph (1) regulates that the hierarchy of laws and regulations includes:

- 1) Constitution Of The Republic Of Indonesia

¹⁷ Ibnu Sina Chandranegara, "Bentuk-Bentuk Perampangan Dan Harmonisasi Regulasi," *Jurnal Hukum Ius Quia Iustum* 26, no. 3 (2019): 435-57, <https://doi.org/10.20885/iustum.vol26.iss3.art1>.

¹⁸ Nyoman Nidia, Sari Hayati, and Sri Warjiyati, "Analisis Yuridis Konsep Omnibus Law Dalam Harmonisasi Peraturan Perundang-Undangan Di Indonesia," *Jurnal Hukum Samudra Keadilan* 16, no. 1 (2021): 1-18.

¹⁹ Andi Lala, "Analisis Tindak Pidana Penistaan Agama Dan Sanksi Bagi Pelaku Perspektif Hukum Positif Di Indonesia," *Jurnal Ilmiah Indonesia* 2, no. 3 (2017): 6-18, <https://www.jurnal.syntaxliterate.co.id/index.php/syntax-literate/article/view/76/128>.

- 2) Decree Of The People's Consultative Assembly Of The Republic Of Indonesia
- 3) Law/Regulation In Lieu Of Law
- 4) Government Regulation
- 5) Presidential Regulation
- 6) Provincial Regional Regulations
- 7) Regency/City Regional Regulations.

Furthermore, it is explained in article 8 that the types of laws and regulations other than those referred to in article 7 paragraph (1) include regulations stipulated by the MPR, DPR, DPD, MA, MK, BPK, KY, Bank Indonesia, Ministers, Agencies, Institutions or commissions at the same level and formed by law or government by order of law, Provincial DPRD, Governor, Regency / City DPRD, Regent / Mayor, Village head or equivalent. It is also emphasized that the laws and regulations as referred to in paragraph (1) are recognized and have binding legal force as long as they are ordered by higher laws and regulations or formed based on authority.

If you look at the provisions above, both Article 7 (1) and Article 8 of Law No. 12/2011, there is no type of legal product of Joint Ministerial Regulation. The term 'Minister' listed in article 8 only gives a signal for the formation of a single legislative regulation of the ministry itself such as Ministerial Decree, Ministerial Regulation or Ministerial Circular Letter, and does not contain Joint Ministerial Regulation (PBM) in it as a legislative product.

Basically, there are 2 (two) ministerial authorities in the formation of laws and regulations that can be stipulated, namely ministerial regulations and ministerial decisions as presidential assistants. Therefore, ministers exercise government authority according to their own fields and based on delegation or derivative authority from the President. Although a distinction is made between ministerial regulations and ministerial decrees, in reality it is not clear what material should be regulated by ministerial regulations, but it is certain that both are implementing regulations of higher regulations. As revealed in Natabaya's research²⁰ to determine the content material of the Permen, it is necessary to see the following in the form of;

- a) The minister issues candy that is derivative (derivative) of the president's authority;
- b) The law should not stipulate that its provisions will be further regulated by regulations, unless it is not possible or reasonable to regulate it by PP or Perpres.
- c) The PP will not delegate further regulation of its provisions to ministerial regulations, unless it is impossible or unreasonable to further regulate it by Perpres.

Therefore, Permen should only be an internal regulation unless it is assigned to detail the provisions of the Perpres, which are more technical or operational in nature. Basically, as a state official, the minister has 3 (three) authorities, namely:

- a) make decisions that are *beschikking* or stipulation in nature, such as determining an appointment of officials within their work environment so that it is more inward;

²⁰ Natabaya, *Sistem Peraturan Perundang-Undangan Indonesia* (Jakarta: Sekjend Mahkamah Konstitusi RI, 2006). 177

- b) the authority to make rules in the form of policies that are not based on a per-uu regulation but rather on *freis ermessen* in the form of authority, which is discretionary in nature and cannot conflict with per-uu regulations and general principles of good governance, and must not arbitrarily use power;
- c) The authority to make regulations (*regeling*), the condition of which is that the authority to make this regulation (*Permen*) is derivative / delegative from the president, considering that the minister is an assistant to a president. From this provision, the minister may issue regulations based on PP and *Perpres* orders, as long as the delegated substance is not suitable to be regulated by PP and *Perpres* and is technical and operational in nature.

Meanwhile, neither the 1945 Constitution of the Republic of Indonesia nor Law No. 39 of 2008 concerning the Ministry of State clearly states the authority of the minister in forming a legislative product, but there is only a provision in Article 8 of Law No. 12 of 2011 which states that *Permen* is only formed by 1 (one) ministry, which then at this time in practice the term PBM (*Joint Ministerial Regulation*) appeared.

Initially, PBM was not known in the practice of government administration, but the term for joint regulations issued by ministries was *Joint Ministerial Decree (KBM)*. Therefore, in order to classify PBM as a per-uu regulation, there are things that can become a touchstone, namely from the characteristics of per-uu regulations revealed by experts as stipulated in Law No. 12 of 2011, the elements of which are:

- 1) written decisions and rules have a specific form and format;
- 2) the establishment of authorized institutions and officials from the central and regional levels, either by attribution or delegation;
- 3) contains rules regarding behavior, granting authority, determining a matter, and is regulatory in nature;
- 4) generally binding, outgoing enforcement where it is not aimed at an individual, but for anyone.

If you look at the basis of the above test, then normatively, PBM is indeed a written rule, which is regulating and generally applicable. However, in terms of authority, the minister is not right to issue PBM because there is no attribution or delegation through laws and regulations. In other words, in the regulatory hierarchy where every legal product will be recognized as long as it is ordered by higher rules and formed on the basis of authority. In addition, all state institutions or regulation makers, in essence, must have the purpose of forming these rules. This authority focuses on the existence of the government to carry out a legal action, including to formulate rules derived from the authority of attribution, delegation and mandate it has.

On the other hand, the existence of PBM needs to be reviewed, especially in content material that is generally applicable and binds anyone, because regulations at the central government level according to researchers are sufficient through *Presidential Regulations (Perpres)*. The reason that reinforces that;

- a) *Permen* is not included in per-uu regulations, especially in the Law on the formation of laws and regulations, because the minister himself is an assistant to the president. Moreover, in the PBM nomenclature, this is a regulation from 2 ministries with different fields of affairs, so it would be

more appropriate if the one who formed it was the President through a PP or Perpres.

- b) The position of a minister in a presidential system of government such as in Indonesia is as an assistant to the head of state, who therefore cannot be given attribution through law in the preparation of Permen. However, ministerial regulations are needed in the implementation of government affairs, as implementing regulations for PP and Perpres to regulate and manage operations in certain fields in each ministry.

The problem of PBM, especially in terms of the establishment of houses of worship, is certainly related to the function or role of the government with regard to religious harmony. While the authority itself is the implementation of the functions it has, which describes its role or usefulness in the life of the state. Authority here does not mean the right to practice power but as a function of implementing rules, supervision and power to give orders and decisions.

It is clear that Indonesia, which adheres to the presidential system, then places the minister as an assistant to the president, which is *expressis verbis* stipulated in Article 17 Paragraph (1) of the 1945 Constitution, where if based on these provisions the minister is only a mandatary or official who carries out tasks, and the authority and responsibility remain with the President as the mandans or mandate giver. In current practice, where the fact there is an oddity and can even be said to be a deviation that the minister gets attribution in drafting regulations in our presidential system.

This situation can certainly lead to disharmony and incompatibility of norms and rules given the absence of Permen in the hierarchy of national legislation and have an impact on regulatory structuring in the Indonesian legal system. Especially in the presidential system, the organ that forms and stipulates *per-uu* regulations should not be the minister but the President, especially with regard to regulating issues that are comprehensive in nature and can threaten the integrity of the state. Therefore, it is important to first confirm the existence and position of PBM in the *Per-uu* hierarchy so as not to result in doubts about the principle of legal certainty regarding the existence of the PBM in question. If PBM is still held, it deserves direct affirmation in the form of attribution or delegation from higher-level regulations. Harmonization of this regulation is very important in order to achieve legal certainty and guarantee for everyone. This is because, without harmonization, there will be disorganization, uncertainty and no protection for the community and lower rules can regulate thoroughly and can be applied.

2. Terdapat Pelampauan Kewenangan Dalam Peraturan Bersama Menteri

The existence of PBM, one of which contains the granting of authority in terms of recommendations as a requirement for the establishment of houses of worship to organizations or civil society and not the government called FKUB (Forum Kerukunan Umat Beragama), which then becomes the cause of egocentric towards minorities. As is known in Article 14 Paragraph (2) Point d, contains that the requirement for the establishment of a house of worship is a written recommendation from the district / city FKUB. This certainly opens up opportunities and polemics that religious affairs can be regulated by civil society

groups, while in the division of central and regional government authority affairs, this is the responsibility of the government which cannot be delegated to community organizations, given the pluralism in this country.

In addition, relating to the issue of religious harmony is certainly not something that can be taken lightly, considering that religious guarantees in the constitution are individual rights and are comprehensive to all citizens. Another statement is contained in Article 10, which stipulates that "the number of FKUB members in the Province is at most 21 people and the number of FKUB members in the Regency is at most 17 people, with the composition of the membership of the Provincial and Regency / City FKUBs determined based on the ratio of the number of adherents of local religions, with a minimum representation of 1 (one) person from each religion in the Province and Regency / City. If interpreted, the meaning in the statement above seems less equitable because it uses a comparison according to the number of religious adherents.

The presence of FKUB towards the development of religious harmony which is one of the provisions in PBM Number 9 and 8 of 2006 has a strategic role, which is also decisive in the establishment and implementation of the construction of houses of worship. Although this organization has a membership consisting of religious leaders and has a minimum representation of 1 person from each religion in each region, the purpose and function should be limited to the implementation of dialogue with the community to collect the aspirations of religious communities. As a channel for aspirations, FKUB is more about giving oral recommendations related to what will become the policy material of the regional head, but not for written recommendations on the application for the establishment of houses of worship.

Another provision about the establishment must meet the administrative and technical requirements in article 14 points a and b is also a matter of concern in almost all regions of Indonesia. This provision reads "in addition to fulfilling the requirements as referred to in paragraph (1), the establishment of a house of worship must meet special requirements including a list of names and identity cards of users of the house of worship of at least 90 (ninety) people authorized by local officials in accordance with the level of territorial boundaries as referred to in Article 13 paragraph (3), and local community support of at least 60 (sixty) people authorized by the village head. This provision is controversial because it could hamper the establishment and development in a number of regions, and is considered intolerant and does not prioritize the interests of religious communities.

Not only that, the nomenclature states that this PBM is related to the Guidelines for the Implementation of the Duties of Regional Heads / Deputy Regional Heads in the Maintenance of Religious Harmony, Empowerment of Religious Harmony Forums, and the Establishment of Houses of Worship, so that this term "empowerment" should not be interpreted as a handover of authority by giving the organization (FKUB) the opportunity to participate and decide, but its existence is focused on being a forum for discussion and mediation in the event of a problem or rejection by certain groups, and not as a recommender.

Another weakness in the PBM, according to researchers, is found in Article 15, which states that the FKUB's recommendation as the result of deliberation and consensus is in writing, but does not explain who signs it. This should be clearly stated to avoid problems if one of the 21 FKUB members at the provincial level and

17 FKUB members at the district level disagree with the recommendation. Therefore, in addition to the excess of authority over the position of FKUB, there is also the substance of PBM that has multiple interpretations and needs to be reaffirmed so that PBM does not violate the right to religion, and gives an opportunity to community organizations to participate in regulating in terms of giving a determination on the establishment of places of worship for other religions.

3. There is Multinterpretation in the Regulation of Religious Issues

In this section, the researcher would like to first express the contents of Law No. 23 of 2014 concerning Regional Government, especially Article 9 which states that Government affairs consist of Absolute government affairs, Concurrent government affairs, and General Government affairs consisting of;

- 1) Absolute government affairs are government affairs that are fully under the authority of the Central Government;
- 2) Concurrent government affairs are government affairs that are shared between the Central Government and Provincial and Regency / City Regions. Concurrent government affairs that are handed over to the Regions become the basis for the implementation of Regional Autonomy.

Meanwhile, Article 10 states that absolute government affairs as referred to in Article 9 Paragraph (2) include;

- a) Foreign Policy
- b) Defenses
- c) Security
- d) Justice
- e) National Monetary and Fiscal, and
- f) Religion

Religious moderation is very important to be presented in the form of guidelines such as regulations, as long as all parties are open to facing differences. However, the existence of PBM Number 9 and 8 of 2006 is considered urgent to make changes including increasing its status so as not to cause polemics at the lower levels of government including among the community.

Law No. 23/2014 as mentioned above, especially Article 10 Paragraph (1) emphasizes that absolute government affairs are in the form of foreign policy, defense, security, justice, national monetary and fiscal affairs, and religion. Referring to this provision, in order to produce a uniform arrangement in all regions, it should be regarding religion and worship regulated through a decision that has binding legal force and is not multi-interpretive. The minister is indeed an assistant to the president who can then be handed over to take care of government affairs, but that does not mean that he can take over an activity that is thoroughly regulating and out of authority.

The nature and purpose of regulation formation, especially PBM, actually intends to regulate the implementation and task of government apparatus in ensuring order and smoothness of worship for each religion and its adherents, as the implementation of regional autonomy. However, the existence of PBM actually regulates the opposite, which gives way to the fulfillment and implementation of worship to be taken over by non-governmental institutions through PBM legitimacy of an organizational group that can participate in making policies. In addition,

according to the researcher, the material or substance of PBM is considered less decisive or become the determinant if there is a dispute, which in the end is handed back to the government.

4. Conclusion

Based on the above discussion, the urgency of renewing the Joint Ministerial Regulation (PBM) of Religion No. 9 of 2006 and the Minister of Home Affairs No. 8 of 2006, namely: First, to realize the legal certainty of regulatory products, where Permen is not included in per-uu regulations, because the minister himself is a presidential assistant who cannot be given attribution through the Law in the preparation of regelling provisions. Secondly, there is an excess of authority in the PBM, namely Article 14 Paragraph (2) Point d, which contains that the requirement for the establishment of a house of worship is a written recommendation from the district / city FKUB. This opens up opportunities and polemics that religious affairs can be regulated by civil society groups, while in the division of central and regional government authority affairs, this is the responsibility of the government which cannot be delegated to community organizations given the pluralism in this country. Third, there is a mulitinterpretation in the regulation of religious issues, where the nature and purpose of the formation of regulations, especially PBM, is actually related to the implementation and duties of government officials in ensuring order and smoothness of worship for each religion and its adherents as the implementation of regional autonomy. However, the existence of PBM actually regulates the opposite, which gives way to the fulfillment and implementation of worship taken over by the region, whereas Article 10 of the Regional Government Law states that religious affairs are an absolute authority that cannot be submitted to the region.

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