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MINISTERIAL REGULATIONS – TRYING TO OVERCOME THE FLIP FLOP PROBLEM[1][2][3][4][5]

INTRODUCTION

Presidential approval is now required for at least some proposed ministerial regulations before they are finalized and issued.

The apparent objective of the new presidential approval requirement is to try to overcome Indonesia's endemic problem of poorly thought through ministerial regulations being issued, by ministers responsible for particular industries, even though the ministerial regulations are inconsistent with or even contradict government policy and are only likely to impede the realization of the Government's macro-objectives. These inconsistent/contradictory ministerial regulations are mostly amended or revoked in due course but often not before they create serious difficulty and uncertainty for companies operating in the particular industry sectors targeted by the ministerial regulations.

Often referred to, in colloquial terms, as the "flip flop problem", inconsistent and contradictory ministerial regulations have proved to be a particularly serious issue in the Indonesian energy, infrastructure and mining industries over many years.

The recent initiative to address the "flip flop problem" will surely be welcomed by both domestic and foreign investors in the Indonesian energy, infrastructure and mining industries as well as in numerous other industries plagued by deficient ministerial regulations. It must be questioned, though, just how effective the new presidential approval requirement is likely to be. There is also the bigger question of whether overtly strengthening presidential authority, at the expense of ministerial authority, is a positive development for Indonesian democratic institutions.

In this article, the writer will review the new presidential approval requirement before turning to the substantive issues of whether or not it will really overcome the "flip flop problem" and the desirability or otherwise of a stronger Indonesian presidency.

BACKGROUND

Indonesia is a state based on the rule of law, at least in theory if often not so in practice it would seem.

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[5] An earlier version of this article appeared in the September – October 2021 edition of Coal Asia Magazine.

Executive power is vested in the President, subject to the 1945 Constitution ("**Constitution**"). The President is assisted by Ministers of State, each responsible for a particular area of Central Government activity.

The Constitution provides for a number of constitutional bodies - the most important of which are the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, or "**MPR**") and the People's House of Representatives (*Dewan Perwakilan Rakyat or* "**DPR**").

The MPR is the only institution that holds the power to amend the Constitution.

Legislative power is vested jointly in the DPR and the President, with each having the right to propose Bills which, when jointly approved, become Laws.

The President may issue (Central) Government Regulations as required to implement Laws. In urgent circumstances, the President may also issue (Central) Government Regulations in lieu of a Law which must be ratified by the DPR at its next sitting. Upon ratification, (Central) Government Regulations become Laws and, if not ratified, they are revoked.

The procedures to enact a new Law and the hierarchy of Laws and Regulations, in Indonesia, are governed by Law 12 of 2011 re the Enactment of Laws and Regulations as amended by Law No. 15 of 2019 ("**Law 12/2011**"). According to Law 12/2011, the hierarchy of Laws and Regulations (in descending order) is as follows:

(a) the Constitution;

(b) Resolutions of the MPR;

(c) Laws/(Central) Government Regulations in lieu of Laws;

(d) (Central) Government Regulations;

(e) Presidential Regulations;

(f) Provincial Government Regulations; and

(g) Regional Government Regulations.

The above list is not exhaustive as there are other types of regulations not specifically mentioned in Law 12/2011. Of particular importance, for this article, are Ministerial Regulations.

Laws and (Central) Government Regulations are, usually, very broadly worded and only serve to set out the basic principles which will apply in the areas regulated by the Laws and (Central) Government Regulations. The basic principles set out in a Law or (Central) Government Regulation will then be expanded upon and the details of how those principles are to be administered and applied will be subsequently provided for in one or more implementing regulations issued by the Minister of State with primary responsibility for overseeing the carrying out of the Law or (Central) Government Regulation in question ("**Ministerial Regulations**"). The Ministerial Regulations in respect of a particular Law may, in turn, be subsequently augmented and expanded upon by decrees, circular letters and

instructions of the overseeing Ministry with the intention of addressing specific administrative issues encountered in applying earlier Ministerial Regulations.

For the purpose of this article, Ministerial Regulations may be understood as ranking below Presidential Regulations but above Provincial Government Regulations and Regional Government Regulations.

In addition to Ministerial Regulations, a particular Ministry (responsible for supervising the implementation of a particular Law or (Central) Government Regulation) will have internal guidelines and policies which reflect that Ministry's bureaucratic position on how its staff should deal with certain matters and otherwise exercise their administrative discretion when faced with a particular issue such as how to determine whether or not particular conduct does or does not comply with the relevant Law or Ministerial Regulation ("**Ministerial Guidelines & Policies**"). Ministerial Guidelines & Policies are subject to change from time to time and very much reflect the attitudes and views of the particular bureaucrats responsible for overseeing the administration of a particular Law or Ministerial Regulation at a particular time.

Under Indonesia's hierarchy of Laws and Regulations (i) a lower-level instrument may not contradict or be inconsistent with a higher-level instrument and (ii) the purpose of a lower-level instrument is merely to provide supplementary detail and explanation for a higher-level instrument ("**Hierarchy of Laws Principle**"). More particularly, a Ministerial Regulation (far less a Ministerial Guideline & Policy) should never contradict or be inconsistent with a Law or (Central) Government Regulation.

Notwithstanding the Hierarchy of Laws Principle, Ministerial Regulations (and even Ministerial Guidelines & Policies) in Indonesia often seem to contradict or, at least, go well beyond the actual wording of the Laws and (Central) Government Regulations they are meant to be administering and implementing. There are various possible explanations for this phenomenon. First and most benignly, there may be an innocent failure on the part of the relevant Minister and/or his staff to properly understand the intention and objectives of the DPR or the Government in passing a particular Law or issuing a particular (Central) Government Regulation. Second and more machiavellian, is a deliberate attempt on the part of the relevant Minister and/or his staff to circumvent the intention and objective of the DPR or the Government in passing a particular Law or issuing a particular (Central) Government Regulation because of disagreement with that intention or objective, whether motivated by philosophical considerations or more mercantilist reasons. Third and somewhere in between the first and second possible explanations, is the reality that Laws and (Central) Government Regulations are sometimes so broadly worded that the relevant Minister and his staff have little choice but to exercise considerable discretion as to how a particular Law or (Central) Government Regulation should be administered and implemented in practice.

In the case of the third possible explanation outlined in the previous paragraph, observers may legitimately differ as to whether it is a good thing or a bad thing to invest considerable discretion in the relevant Minister and his staff as to how a particular Law or (Central) Government Regulation is to be administered and implemented. Given Laws, in particular, are meant to be in place for a long period of time, it is not necessarily a bad thing that the relevant Minister and his staff have at least some discretion, when it comes to the administration and implementation of a particular Law, as this enables the resulting Ministerial Regulations and Ministerial Guidelines & Policies to be amended/revised over

time in order to reflect changing economic and industry conditions. This, of course, assumes that the relevant Minister and his staff are genuinely committed to ensuring the resulting Ministerial Regulations and Ministerial Guidelines & Policies are amended/revised over time in order to reflect changing economic and industry conditions rather than being motivated by self-interest in the nature of "empire building" or "rent seeking".

Commission VII of the DPR, which is responsible for DPR initiatives in the energy and mining sectors, has often indicated its frustration with Ministerial Regulations issued by the Minister of Energy & Mineral Resources ("**MoEMR**") that Commission VII views as openly disregarding the provisions of the 2009 Mining Law, particularly with regard to domestic processing and refining of metal minerals, smelter construction and the export ban on unprocessed metal ore. One of the objectives of the 2020 amendments to the 2009 Mining Law was, supposedly, to "tighten up" various provisions of the 2009 Mining Law so as to reduce MoEMR's discretion as to how certain provisions of the 2009 Mining Law were to be administered and implemented. Likewise, the President himself has been reported in the popular and business press as, on several occasions, having expressed his anger, during cabinet meetings, about the contradictions and inconsistencies in certain Ministerial Regulations having regard to the apparently clear wording of the relevant Laws and (Central) Government Regulations.

In addition to the prevalence of Ministerial Regulations that, arguably, violate the Hierarchy of Laws Principle, another recurring problem has been inconsistent Ministerial Regulations issued by different Ministers with overlapping responsibilities. Again, the local energy, infrastructure and mining industries have provided numerous "textbook examples" of this inter-Ministry inconsistency when it comes to the regulation of energy, infrastructure and mining activities that take place in forest areas and/or require environmental approvals or permits. Industry observers could be forgiven for sometimes thinking that there is a complete lack of co-ordination between the Ministry of Energy & Mineral Resources, the Ministry of Public Works & Housing, the Ministry of Forestry and the Ministry of the Environment when it comes to the issuance of Ministerial Regulations impacting energy, infrastructure and mining business activities.

Given the foregoing, it is perhaps not surprising that the President has recently issued Presidential Regulation No. 68 of 2021, dated 2 August 2021, re Granting Approval of Draft Ministerial and Head of Institution Regulations ("**PR 68/2021**").

ANALYSIS AND DISCUSSION

1. Overview of PR 68/2021

As stated in the preamble, PR 68/2021 is based on the premise that it is important, for the purpose of maintaining the momentum of national development policy, that Ministerial/Head of Institution Regulations be:

> "*of a certain quality, harmonious, not sectoral and not impede public and business activities*".

PR 68/2021 seeks to ensure the requisite quality, harmony and non-sectoral nature of Ministerial/Head of Institution Regulations, as well as avoid the impeding of public and

business activities, by putting in place a mechanism for presidential review and approval of certain draft Ministerial/Head of Institution Regulations before they are finalized and issued. The need for such a mechanism is said, in the preamble to PR 68/2021, to be consistent with the imperative of the President knowing of and approving in advance every "policy" contemplated by Ministers and Heads of Institutions.

The reference, in PR 68/2021, to "*Head of Institution*" Regulations, in addition to Ministerial Regulations, is to be properly understood as a reference to persons such the Head of the Investment Co-ordinating Board ("**BKPM**") and the Governor of Bank Indonesia who also have the right to issue regulations and similar instruments in connection with those activities that they oversee.

2. PR 68/2021 in Detail

2.1 **Statement of Limitations on Regulation Making Authority**: PR 68/2021 goes out of its way to make clear the limitations on the right of Ministers/Heads of Institutions to prepare draft Regulations by providing that Ministers/Heads of Institutions must only prepare draft Regulations that are:

(a) within the scope of authority of the relevant Minister/Head of Institution and;

(b) based on (i) the requirements of a particular Law or (Central) Government Regulation, (ii) a direction by the President or (iii) the implementation of certain matters within Government.

At the same time, PR 68/2021 seeks to encourage co-operation across Ministries/Institutions in drafting Regulations by expressly acknowledging that, in preparing draft Regulations, a particular Minister/Head of Institution may involve other Ministries/Institutions (Article 2 of PR 68/2021).

2.2 **Draft Regulations that Must be Submitted to President for Approval**: Although not entirely free from doubt, the better view is probably that PR 68/2021 does **not** require **all** draft Ministerial/Head of Institution Regulations to be submitted for presidential approval but, rather, only draft Ministerial/Head of Institution Regulations that:

(a) have a "*major impact on people's lives*";

(b) are "*strategic*", in the sense of being materially relevant to (i) the President's priority programs, (ii) matters targeted by the Government in the National Medium Term Development Plan and the Government's Work Plan, (iii) defence and security and (iv) state finance; and/or

(c) are cross-sectoral or involve multiple Ministries/Institutions (Article 3 of PR 68/2021).

2.3 **Requirements for Draft Regulations to be Submitted to President**: PR 68/2021emphasises the responsibilities of Ministers/Heads of Institutions in preparing draft Regulations to ensure that draft Regulations are carefully thought through and

otherwise conceptually robust by providing that draft Ministerial/Head of Institution Regulations, requiring presidential approval, may only be submitted for consideration **after** the relevant draft Regulation has gone through the process of*:*

"*harmonization, rounding and perfection of concepts*".

This may be understood as the "no sloppy drafting allowed" admonition (Articles 4 and 5 of PR 68/2021).

2.4 **Application Process for Presidential Approval**: Applications for presidential approval of relevant draft Ministerial/Head of Institution Regulations must be:

(a) in writing;

(b) accompanied by an explanation of the need for/urgency of the relevant draft Regulation and the main points of the relevant draft Regulation; and

(c) submitted to the Cabinet Secretary together with a statement confirming completion of the process of *"harmonization, rounding and perfection of concepts*" in respect of the relevant draft Regulation ("**PA Applications**") (Article 6 of PR 68/2021).

2.5 **Need for Cabinet Secretary Recommendation**: By implication, PR 68/2021 requires the Cabinet Secretary to carry out a preliminary review and assessment of every PA Application. Based on the outcome of this preliminary review and assessment, the Cabinet Secretary is then to submit a recommendation to the President as to whether or not the relevant draft Ministerial/Head of Institution Regulation should be approved (Article 7 of PR 68/2021).

2.6 **Form of Presidential Decision**: PR 68/2021 makes clear that the process of obtaining presidential approval is not intended to be a mere "rubber stamp" exercise. In this regard, the President's decision on a particular PA Application may take any of the following forms:

(a) approval of the relevant draft Ministerial/Head of Institution Regulation;

(b) rejection of the relevant draft Ministerial/Head of Institution Regulation; or

(c) "*issuance of other policy directives*".

It is not clear as to just what the alternative decision form of "*issuance of other policy directives*" refers to in the context of a decision on a particular PA Application. It may be, however, that this alternative decision form is intended to highlight that the President has the discretion to change a policy that is otherwise contradicted by or inconsistent with the draft Ministerial/Head of Institution Regulation which is the subject of a particular PA Application if, upon further reflection, the President agrees with the approach taken by the relevant draft Ministerial/Head of Institution Regulation.

The President's decision on a particular PA Application is to be conveyed, in writing, by the Cabinet Secretary to the relevant Minister/Head of Institution who submitted a particular PA Application (otherwise referred to as the "*Initiator*") (Article 8 of PR 68/2021).

2.7 **Consequence of Presidential Approval**: If and when presidential approval of a draft Ministerial/Head of Institution Regulation is obtained, the relevant Regulation is to be (i) finalized by the relevant Minister/Head of Institution and (ii) promulgated in the State Gazette.

Following promulgation in the State Gazette, the relevant Ministerial/Head of Institution Regulation is to be disseminated to ministries/institutions, Provincial and Regional Governments and the Public (Articles 9 and 10 of PR 68/2021).

3. Assessment of PR 68/2021

3.1 **Drafting Deficiencies**: There are some quite obvious drafting deficiencies with PR 68/2021, which drafting deficiencies may well prevent PR 68/2021 from achieving its intended purpose any time soon.

First, the criteria for what qualifies as a Ministerial/Head of Institution Regulation requiring prior presidential approval are hopelessly vague and, as a consequence, almost certain to give rise to different views as to whether or not any particular Ministerial/Head of Institution Regulation requires prior presidential approval. More particularly, observers may genuinely differ in their assessment of whether or not a particular draft Ministerial/Head of Institution Regulation will, if it is finalized and issued in its current form, (i) have a "*major impact on people's lives*" or (ii) be "*strategic*".

Second, it is **not** clear who is responsible for determining whether or not a particular draft Ministerial/Head of Institution Regulation meets any of the criteria for a draft Ministerial/Head of Institution Regulation requiring prior presidential approval. If this is a matter for the Initiator (**i.e.**, the Minister/Head of Institution who has drafted/overseen the drafting of a particular Ministerial/Head of Institution Regulation) to determine, then it should be obvious that the Initiator has every incentive to conclude that none of the criteria are satisfied as this will enable him to immediately proceed with the finalization and issuance of the relevant Regulation.

Third, PR 68/2021 does **not** address the issue of what is the legal status of a draft Ministerial/Head of Institution Regulation that requires prior presidential approval but is finalized and issued by the relevant Minister/Head of Institution without, first, obtaining the required presidential approval. More particularly, is such a Ministerial/Head of Institution Regulation automatically void and otherwise of no force and effect as of the date it is issued or is it merely voidable such that it is capable of being declared void if and when it is challenged in the courts? This failure to make clear the consequences of non-compliance with PR 68/202 is likely to create confusion and be a source of endless disputes, as well as opportunistic and protracted court challenges, in the case of any Ministerial/Head of Institution Regulation that did not obtain prior presidential approval when it was still in draft form and where

the affected parties want to avoid having to comply with the relevant Ministerial/Head of Institution Regulation now that it has been finalized and issued.

Fourth, there is **no** fixed timetable for either (i) the Cabinet Secretary to carry out his preliminary review and assessment of a particular PA Application and issue his recommendation in respect of the same or (ii) the President to make his decision on whether to approve or reject a particular PA Application. This may well result in long delays in finalizing and issuing important draft Ministerial/Head of Institution Regulations. At the very least, PR 68/2021 should have included a fixed timetable for reviewing and making a decision on every PA Application and a provision to the effect that, if the fixed timetable is not met, the relevant draft Ministerial/Head of Institution Regulation is deemed to have been approved by the President.

3.2 **Practical Concerns**: It is **not** at all obvious to the writer that the Cabinet Secretary, the President's staff or the President himself are likely to have, whether individually or collectively, the in-depth industry and technical knowledge required to make an informed assessment of whether or not a particular draft Ministerial/Head of Institution Regulation is consistent with and does not otherwise contradict national development policy or needlessly impede business activity. In this regard, it is important to remember that Ministerial/Head of Institution Regulations are often very technical in nature and require a high level of industry and technical knowledge to properly evaluate. Further, the fact that a particular draft Ministerial/Head of Institution regulation is very technical in nature does not necessarily prevent it from having a "*major impact on people's lives*" or being "*strategic*". The energy, infrastructure and mining industries are the subject of numerous Ministerial Regulations which require a high level of industry and technical knowledge to properly evaluate while, at the same time, being "*strategic*" in the sense of having the potential to materially impact the national development plan and/or state finances. It would certainly be an interesting exercise, as well as very likely an entertaining one, to observe the Cabinet Secretary, the President's staff and/or the President himself trying to make sense of ministerial regulations dealing with the "nuts and bolts" of domestic processing & refining of metal minerals, coal down-streaming, electricity pricing or the promotion of renewable energy resources.

The prevalence of contradictory and inconsistent Ministerial/Head of Institution Regulations in Indonesia, as well as the consequent unnecessary impediments created for legitimate business activity, are a function of many factors which it is **not** possible to overcome without far more sweeping reforms than those contained in PR 68/2021. More particularly, (i) the lack of adequate industry knowledge within various Ministries including, most certainly, within the Ministry of Energy & Mineral Resources and (ii) insufficient communication between Ministries and relevant industry associations, re draft regulations before they are finalized and issued, have definitely contributed, in large measure, to the prevalence of contradictory and inconsistent Ministerial/Head of Institution Regulations that have to be subsequently amended or revoked in order to prevent widespread disruption of legitimate business activity. PR 68/2021 makes no attempt whatsoever to address these other causes of/contributors to the "flip flop problem".

3.3 **Governance/Political Considerations**: While unquestionably seeking to address a very real problem, PR 68/2021 increases the authority of the President and, thereby,

creates a more powerful Presidency at the expense of other elements of the Executive branch of government in Indonesia; namely, the Ministers of State and Heads of Institutions. Whether or not this is a good thing is very much a matter of personal opinion and about which people may genuinely differ.

Some people, of course, look back with great nostalgia at the "glory days" of President Suharto and his New Order. They see this period as the "golden age" of modern Indonesian history when an all-powerful President was able to, almost singlehandedly, make the key decisions required to move Indonesia forward economically in an efficient manner and without the distractions of having to deal with poorly performing democratic institutions, such as the DPR, except on a token and carefully stage-manged basis. During this supposedly "golden age", Ministers of State and Heads of Institutions, such as BKPM and Bank Indonesia, were often little more than well-paid "flunkies" carrying out the President's decisions without debate or discussion, far less challenge or opposition. To these readers, PR 68/2021 will, no doubt, be seen as a very positive development and one that has the potential to help start moving the Indonesian system of government in the right direction once again.

Other people, however, will recall that, in the aftermath of the 1998 fall of President Suharto and his New Order, it was generally accepted that an all-powerful President was not consistent with the development of genuine democratic institutions in Indonesia. Supporters of a democratic Indonesia sought and managed to bring about a more balanced system of government whereby the President was obliged to work closely with other elements of the Executive while the DPR and the Constitutional Court had some genuine oversight of what the President did and did not do. Although there has been an undeniable degree of government inefficiency and even some chaos as a result of Indonesia having a less powerful President in the post 1998 period, supporters of a more democratic Indonesia may well see PR 68/2021 as a worrying attempt to "turn back the clock" in Indonesia to much less democratic times.

SUMMARY & CONCLUSIONS

A concerted Government effort to ensure greater consistency in the quality of Ministerial/Head of Institution Regulations and otherwise avoid policy contradictions, as well as unnecessary impediments to business activities, is long overdue.

PR 68/2021 may be accepted, at face value, as a genuine attempt to at least start the process of improving the quality of Ministerial/Head of Institution Regulations.

The reasons for the endemic "flip flop problem" in Indonesia are, however, complex and a comprehensive solution to the same goes far beyond the scope of PR 68/2021.

PR 68/2021 also raises fundamental questions about the proper role of the President in modern day, democratic Indonesia. These questions may make some observers very uncomfortable with the possible, partial solution to the "flip flop problem" offered by PR 68/2021.

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