Proceedings International Conference of Bunga Bangsa (ICOBBA)
Volume 2 Number 1 February 2024
ISSN : 3032-5641
DOI: 10.47453
Web Journal: https://journal.epublish.id/index.php/icobba/

LEGAL PROBLEMS OF COMPILATION OF ISLAMIC LAW IN THE INDONESIAN LEGAL SYSTEM

Soimin

Universitas Islam Bunga Bangsa Cirebon

Email : soimin@bungabangsacirebon.ac.id

Received: 2023-12-05 ; Accepted: 2024-01-11 ; Published: 2024-02-29

Abstract
What is written in this legal study, to contribute to the legal complexity in Indonesia. What is debated in this subject matter, actually raises the legal existence of the validity of the Compilation of Islamic Law (KHI), to be a legal consideration in every case involving Muslims regarding Islamic legal issues is expected to refer to the provisions in the KHI, which applies under the provisions of Presidential Instruction No. 1 of 1991 concerning the Socialization of KHI in the Religious Courts. This issue becomes important to find a solution by taking a policy that can be taken by the government through re-establishing KHI as a positive legal document, which can have permanent legal force and become a source of Islamic law in cases brought by Muslims in the Religious Courts. That way, the existence and position of KHI really has legal certainty over its applicability in Indonesia. When all legal cases that occur and pertain to Muslims are always based on the provisions in KHI. It is appropriate to end the debate that has been going on about KHI by re-establishing it according to the correct legal provisions, in accordance with the provisions in Law No. 12 of 2011 concerning the Formation of Legislation. Thus, this writing has the following objectives: (a) To provide a legal analysis of the validity of KHI as an Islamic legal document in Indonesia, which is valid because of Presidential Instruction No. 1 of 1991 concerning the Socialization of KHI in the PA Environment in order to provide recommendations to the government; and (b) To provide legal arguments and solutions regarding the legal view of KHI as an Islamic legal document, if changes are made through an increase in the status of its legal position, namely by law or other forms of regulation other than law as a legal consideration for the government. The method of writing is normative juridical.

Keywords: Legal Problems, Compilation of Islamic Law, Indonesian Legal System.

INTRODUCTION

This is how long the existence and application of the Compilation of Islamic Law in Indonesia, hereinafter abbreviated to KHI, has been in effect until now. In fact, its validity has become a reference in the application and practice of Islamic law in Indonesia. It cannot be denied that the implementation of Islamic law in Indonesia often gives rise to different understandings among Muslims. So, to avoid this, the presence of KHI is very necessary for Muslims to become a bridge as well as norms (law) that can be used as a benchmark in determining the boundaries of state law which are based on Islamic rules and/or teachings, based on the Koran and Al -Hadith (Mukti, 2001). Although it can be understood, the existing boundaries of Islamic law still refer to the views spread in various fiqh literature written by the Fuqoha.

As a result, laws decided on an event that are based on Fuqoha's views often generate debate among Muslims. Therefore, to fulfill the demand for state legal certainty among Muslims, who are seeking justice in judicial institutions, efforts are needed to achieve uniformity/unity of understanding which becomes a single reference as an explanation of Islamic law regarding all events that occur among Muslims (Mukti, 2001). This desire was the basis for the birth of KHI, which would later become a guide for Judges in the Religious Courts (PA), which was then abbreviated as PA, which was formed to handle legal incidents, based on Islamic legal rules in making legal decisions.

Recognized since its birth, KHI is indeed a collection of Islamic law (fiqh) which was prepared based on the conditions and needs of Indonesian Muslims, which has received approval from Muslims (especially Indonesian Ulama) to become a guideline and reference for law enforcers in the PA environment. in every case submitted, the case will be decided based on the provisions of Islamic law. Apart from that, KHI also functions as a complement to existing laws and regulations that apply throughout Indonesia. Although we admit that the implementation of KHI in Indonesia actually only refers to the provisions of Presidential Instruction (Inpres) Number 1 of 1991 concerning the Socialization of KHI in the PA Environment, which at that time was still under the Ministry of Religion.

This is where the legal problem just emerged, when the application of KHI law in Indonesia still refers to Presidential Instruction no. 1 of 1991 throughout its validity to date. And there is no sign of government efforts c.q. Ministry of Religion to make changes to the validity of, as well as improve the legal position of KHI in the Indonesian legal system, especially in the legal hierarchy at the time of MPRS Decree No. XX/MPRS/1966 is no longer valid. In this context, it is important to study critically the existence of KHI and legal review of the validity

of the KHI, on the one hand, whether the existence of the KHI still really needs to be implemented, and on the other hand, whether the validity of the KHI is still relevant, which is still based on Presidential Instruction No. 1 of 1991? when viewed from the legislative sequence.

From these two points of view, it would be appropriate to carry out in-depth research in order to find legal justification, either from the legal perspective of KHI still referring to the documents currently in force based on Impres Number 1 of 1991, or following the legal view of KHI so that changes can be made immediately. through improving its legal status – is it determined by law or by other forms of regulations other than law? Bearing in mind that the legal position of the Presidential Instruction (Impres) which was adopted as the basis and legal umbrella for the implementation of KHI in Indonesia is no longer relevant to current legal developments, namely based on the provisions of applicable laws and regulations, especially regarding the legal sequence.

Departing from these two hypotheses, these two things can be said to be problems with KHI law regarding its implementation in Indonesia to date, so it is necessary to immediately solve these problems, comprehensively. For this reason, researchers consider it necessary to review the legal position of KHI in Indonesia, while still referring to current legal developments. And it is very interesting to emphasize here, that the existence of KHI was actually questioned by the Minister of Law and Human Rights at that time. The Minister of Law and Human Rights in question is Prof. Dr. Yusril Ihza Mahandra, SH stated that KHI's position needed to be improved (Mahutama, 2021).

Referring to the problem formulation above, this research has the following objectives; to provide a legal analysis of the applicability of the KHI as an Islamic legal document in Indonesia, which is valid due to Presidential Instruction Number 1 of 1991 concerning the Socialization of the KHI in the PA Environment in order to provide recommendations to the government. Then, to provide legal arguments and solutions regarding the legal view of the KHI as an Islamic legal document, if changes are made through increasing the legal status of its validity, namely with a law or other form of regulation besides the law as a legal consideration for the government.

METHOD

From the problem formulation that has been raised above, the author in conducting legal studies uses normative legal study methods, which are based on applicable legal rules. Then in this study, the author also describes it analytically. What is meant by analytical descriptive is to provide an explanation of the legal rules that form the basis of the law in terms of their validity (Soekanto

et.al, 2001), then how the law provides a basis or umbrella for the implementation of positive law as a whole, especially in terms of sequence legislation.

The method used in collecting data in this study, the author used search techniques and collected the necessary materials from the literature (Soekanto et.al, 2001). The data collected and required in literature or normative studies are taken from secondary legal materials, namely materials that are closely related to primary legal materials, namely statutory regulations and secondary legal materials, namely from scientific books, papers and results. relevant research results.

Meanwhile, to analyze data from all the materials mentioned above, then process and analyze the data, intended to discover legal concepts in abstracto expressed by legal scientists. According to Soetandyo Wignjosoebroto, speaking of theory, a person will be faced with two kinds of reality, the first is reality in abstracto which exists in the realm of imaginative ideas, and the second is its equivalent in the form of reality in concreto which is in sensory experience (Wignjosoebroto, 2002), especially from the perspective of legislative order. Next, descriptive analytical analysis will be carried out, namely looking for and determining the relationship between data obtained from normative legal studies and legal science studies, and used for analysis so as to provide constructive pictures of the problems studied (Soekanto et.al, 2001). Apart from that, the author also uses qualitative analysis methods, with the aim of understanding and comprehending the problem points that are being researched or explored by the author.

RESULTS AND DISCUSSION

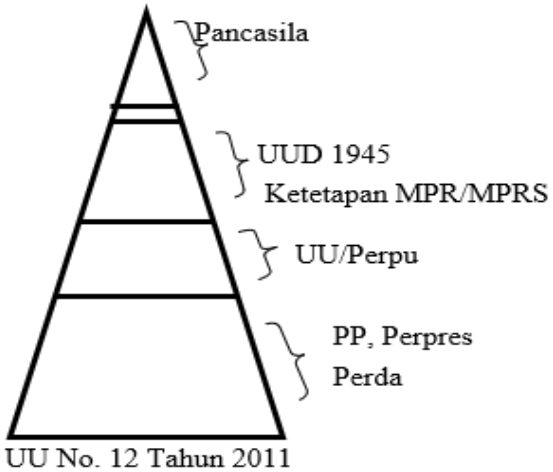
Getting to Know the Legal Position in the Sequence of Indonesian Legislation

First of all, what needs to be understood regarding the existence and/or position of law, cannot be separated from the views of legal experts, especially pure legal thought which concerns the hierarchical order of state legislation in the formation of legal norms as stated by Hans Kelsen (Soimin, 2010), then Hans Kelsen's views were refined by his student, Hans Nawiasky, regarding the theory of multi-layered levels in statutory legal norms (Sumali, 2002). Hans Kelsen put forward his theory regarding levels of legal norms (stufentheorie), in which he argued that legal norms are tiered and layered in a hierarchical order, where a lower norm applies, originates and is based on the norm. higher, higher norms apply, are sourced and based on even higher norms; and so on until we arrive at a norm that cannot be explored further and is hypothetical and fictitious, namely the basic norm (grundnorm).

Based on this theory, what are the legal norm provisions that have been developed in Indonesia regarding the legal sequence? Even though almost all countries in the world do not include the legal order in their respective constitutions; However, Hans Kelsen and Hans Nawiasky's theory greatly influences the existence of each country's laws in regulating the legal sequence.

And the 1945 Constitution of the Republic of Indonesia, later abbreviated to the 1945 Constitution, also contains rules governing the formation of legal norms, especially the formation of statutory regulations in their legal status. Where the legal norms of a constitution are not the same as the legal norms of a statutory regulation. Even though the institutions that form the constitution and those that form legislation are the same or not the same institutions. If this is the case, then the legal norms contained in the constitution and those contained in the legislation are certainly not the same in nature. Which in the constitution forms the broader bases for the legal system of a country, including the basis for the formation of statutory regulations. That's why it's called "staatsgrundgesetze"; and what is regulated in legislation are legal norms which, apart from being binding, can also be coercive and contain criminal sanctions, which is why it is also called "formelle gesetze" (Attamimi, 1984).

Based on the description above, by using Hans Nawiasky's division of legal norms, as outlined in Law Number 12 of 2011 as amended by Law Number 15 of 2019 concerning the Formation of Legislative Regulations, the structure of the legal norms developed is in sequence: basic norms (grundnorm), namely Pancasila in the Preamble to the 1945 Constitution; basic rules (grundgesetze), namely the Body of the 1945 Constitution; and only then below are the formal rules (formelle gesetze), namely statutory regulations. This can be illustrated in the following image:



UU No. 12 Tahun 2011

From the description of the image above, it can be seen that the structure of legal norms in Indonesian legislation is that Pancasila occupies the category of

basic state norms or is often known as "staatsfundamentalnorm", because Pancasila is the basic norm of the state, it usually contains the ideals of the state (staatsidee) (Mahendra, 1996), which is to be aspired to as stated in the Preamble to the 1945 Constitution. In explaining the meaning of the ideals of the state, Indonesian legal experts generally refer to the thoughts of a Dutch scholar, Bierens de Haan, who is considered the most important in making an academic contribution to this issue. Bierens de Haan put forward the term "staatsidee" which Soepomo translated as the basic term of understanding the state or state school of thought. A. Hamid S Attamimi then popularized the term "state ideals" as a staatsidee translation to replace Soepomo's translation which he considered inaccurate. Bierens de Haan stated that the existence of the state does not occur naturally, but because of a will that is realized by certain minds. These desires and thoughts are realized into a goal (een idee) that can bridge the common interests of societal units. The ideals that exist in every society will turn into the ideals of the state or state side. The ideals of the state as stated in the Preamble to the 1945 Constitution are then realized in the norms of the basic rules of the state, which usually contain the main rules of the state in achieving the "ideals of the state" as stated in the Body of the 1945 Constitution. Because the Constitution regulates the main matters Of course, further regulations are needed which are contained in implementing regulations, which are usually stated in Laws (UU) or other autonomous regulations such as Government Regulations (PP), Presidential Regulations (Perpres), and Regional Regulations (Pemda).

Within this framework, legal contextualization in the formation of implementing regulations for the 1945 Constitution as the basis of the Republic of Indonesia must be placed in a legal position under the constitution (1945 Constitution). In this case, the existence of all implementing regulations is in order to implement all the rules of the constitutional mandate. The realization of the constitutional mandate is spread into the form of legal products, all of which will lead to legal forms in the form of:

1. MPR Decree
2. Law (UU),
3. Government Regulation (PP),
4. Presidential Regulation (Perpres), and
5. Provincial and Regency/City Regional Regulations (Perda).

Each form of legal product as mentioned above, is a further embodiment of the contents of the mandate of the 1945 Constitution. The provisions regarding the material regulated in the legal product, are the levels of legal norms in the legislative order which are adjusted based on the regulatory material. Setting

legal norms in laws is a form of legislation that has the broadest range of content. It can be said that there is no field of life and activities of the state, government, society and individuals that cannot be within the scope of objects to be regulated by law. Fields that cannot be regulated by law are only things that have been regulated by the Constitution, or things that the law itself has delegated to the form of statutory regulations below it. However, this does not mean that the content material regulated by the Constitution cannot become the content material of the Law (Manan, et.al, 1997).

Meanwhile, legal products under the Law are in the form of Government Regulations (PP). PP is a form of statutory regulation stipulated by the President to implement the law as it should. So, in contrario, it means that government regulations "cannot" be made to implement the Constitution. Considering that the PP is the implementer of the law, basically the content of the PP is the content of the law (Attamimi, 1990). The formation of a PP does not have to be based on strict provisions in a law. Even though the relevant law does not explicitly require a PP to be made. To get a clearer description of PP, the characteristics inherent in PP are mentioned as stated by A. Hamid S. Attamimi and Maria Farida Indrati Soeprapto, there are at least five special characters, namely:

1. PP cannot be formed without first having a law that becomes its parent;
2. The PP cannot include criminal sanctions if the relevant law does not include criminal sanctions;
3. PP provisions cannot add to or reduce the provisions of the relevant law;
4. To implement, explain or detail the provisions of the Law, a PP can be formed even though the provisions of the Law do not explicitly require it;
5. PP provisions contain regulations or a combination of regulations and stipulations: government regulations do not contain stipulations alone. (Attamimi, 1990)

Furthermore, the form of legal product after the PP is a Presidential Regulation (Perpres). A Presidential Decree is a form of law stipulated or issued by the President as Head of State or Head of Government. The President has the authority to issue a Presidential Decree. This is in accordance with the general principle, that one of the characteristics that is always attached to an official or position is the authority to make decisions. By still paying attention to the content and content of a decision issued by the President, whether the decision is a regulatory decision (regeling) or a decision that is an administrative decision (beschikking). If the decision is of a regulatory or regeling nature then it is called a Perpes, while if the decision is an administrative decree or beschikking then it

is called a Presidential Decree (Penpres), it could also be in the form of a Presidential Instruction (Inpres).

Under the Presidential Decree, the next legal product is called a Regional Regulation (Perda) – whether a Regional Regulation is issued by the Provincial government or the Regency/City government. Regional regulations are a form of statutory regulations formed by the Regional People's Representative Council (DPRD) with the joint approval of the Regional Head. The content of the Regional Regulations in the field of assistance tasks is determined according to the type of assistance tasks which are the household affairs of the assistance tasks (medebewind). Meanwhile, the Regional Regulation to carry out autonomy tasks as stated in Article 18 of the 1945 Constitution covers all autonomous household affairs. So that regional governments that carry out regional autonomy based on the principle of decentralization or deconcentration, autonomous household affairs can be sourced from:

1. Government affairs are handed over by the Government to lower regional governments.
2. Government affairs arising from regional initiative are allowed or recognized as autonomous household affairs, as long as they do not conflict with the laws and regulations above.

Placement of the Legal Form of Presidential Instructions in the Legislative Order Hierarchy before and after the Revocation of MPRS Decree No. XX/MPRS/1966 concerning Legal Sources and Legislative Sequence Hierarchy

Throughout the implementation of MPRS Decree No. XX/MPRS/1966 concerning Sources of Legal Order and Sequence of Legislative Regulations of the Republic of Indonesia, both during the Old Order government under President Soekarno and the New Order government under President Soeharto, in practice the form and type of legislative regulations were still unclear and be firm in regulating the material content of state government political and legal policy products in the form of statutory regulations. In the end, the legal product MPRS Decree no. XX/MPRS/1966 was amended in line with the direction of the reform winds that blew in 1998 as one of the growing aspirations demands in the current era of reform is legal reform. In the context of updating our current system of legislative regulations, in the current era of reform the 2000 MPR Annual Session has established MPR Decree No. III/MPR/2000 concerning Amendments to TAP MPRS No. XX/MPRS/1966 concerning Legal Sources and Legislative Order.

The MPR Decree is intended to replace MPRS Decree no. XX/MPRS/1966 which is considered no longer in accordance with current legal developments

and needs. However, the birth of MPR Decree no. III/MPR/2000, which was originally expected to bring order and unravel a number of problems surrounding statutory regulations, actually gave rise to new problems regarding the sequence of statutory regulations. Some of the problems that can be identified from this decree include (Soimin, 2009): First, the mention of Government Regulation in Lieu of Law is placed in the serial number below the Law. In fact, the legal status of both is equal as stated in Article 22 of the 1945 Constitution.

Second, the use of the Presidential Decree nomenclature that has so far been used contains weaknesses because it does not clearly distinguish between decisions that are regulatory in nature (regeling) and decisions that are merely administrative in nature (beschikking). In order to reorganize laws and regulations that use terminology that is considered not good and correct, especially those involving decisions that contain rules and regulations, the legal documents should be called regulations, not decisions. Third, just because of the consideration that the MPR sufficiently regulates the sequence of statutory regulations up to the level of regulations stipulated by the President, the form of Ministerial Regulation is not mentioned in that sequence. In fact, below it are still called Regional Regulations which are also below the level of regulations stipulated by the President.

Of some of the weaknesses mentioned above contained in the use of material content of statutory regulations based on MPR Decree No. III/MPR/2000, can be corrected by immediately enacting the Law ordered in Article 6 of the MPR Implementation. In Article 6 of the TAP MPR provisions, it is stated that the procedures for making Laws, Government Regulations, Regional Regulations and the review of statutory regulations by the Supreme Court as well as regulating the scope of Presidential Decrees are further regulated by Law. Based on the provisions of Article 6 of MPR Decree No. III/MPR/2000 as a mandate for the formation of the Law concerning Procedures for Forming Legislative Regulations. With this mandate, Law no. 10 of 2004 which regulates the Formation of Legislative Regulations, as a juridical basis for forming statutory regulations at both the central and regional levels, as well as regulating in a complete and integrated manner regarding systems, principles, types and content of statutory regulations.

We can describe the development of the legislative order after MPRS Decree No. XX/MPRS/1966 which has been amended by MPR Decree No. III/MPR/2000. Where on May 24 2004 the DPR and the Government approved the Draft Law (RUU) concerning the Formation of Legislative Regulations into Law, namely Law no. 10 of 2004, which provisions are the basis and source of norms for the formation of law in Indonesia. Provisions regarding the legal

sequence are regulated in Law no. 10 of 2004 then changes were made to Law no. 12 of 2011 concerning the Formation of Legislative Regulations, which restores the position of TAP MPR as a valid source of law after the 1945 Constitution and removes the mention of Village Regulations after Regional Regulations (Provincial and Regency/City). This can be illustrated in table 1 below.

Table 1. Sequence of Legislative Regulations Since 1966 – 2011

TAP MPRS No. XX/MPRS/1966	Tap MPR No. III/MPR/2000	UU No. 10 Years 2004	UU No. 12 Years 2011
- 1945 Constitution - TAP MPR - USA/Perpu - PP - Keppres - Other Implementing Regulations: a.Permen b.Presidential Instructions	- 1945 Constitution - TAP MPR - U S - Perpu - PP - Keppres - Loss	- 1945 Constitution - USA/Perpu - PP - Perpres - Loss: a. Provincial Bylaws b. Kab./Kota Loss c. Lose	- 1945 Constitution - TAP MPR - USA/Perpu - PP - Perpres - Loss: a. Provincial Bylaws b. Kab./Kota Loss

Thus, conclusions can be drawn as depicted in table 1 above. That the existence of the Presidential Instruction (Inpres) after it was revoked by MPR Decree. No. III/MPR/2000, the position of the Presidential Instruction in the hierarchy of legislative order is not recognized as a source of positive law, the nature of its validity is regeling. However, this does not mean that the Presidential Instruction is not recognized in administrative legal regulations (beschikking) and/or concerns certain and special issues. Likewise in the provisions of Law no. 10 of 2004 as amended by Law no. 12 of 2011 concerning the Formation of Legislative Regulations which states explicitly, the tiered and multi-layered legal sequence does not at all mention the position of the Presidential Instruction as stated in the provisions of TAP MPRS No. XX/MPRS/1966.

Legal Views on the Applicability of the Compilation of Islamic Law as a Document of Islamic Law in Indonesia as a Source of National Law in Islamic Religious Cases

Many IHL studies have actually studied and reviewed, not only in terms of the substance of the existing regulations in the KHI Book which is divided into three books, namely Book I on Marriage Law, Book II on Inheritance, and Book III on Wakafan. Likewise, in terms of the position of IHL, such as the study delivered by Barmawi Mukri which states that the existence of IHL is based on Presidential Instruction No. 1 of 1991 (Mukri, 2001). Meanwhile, the position of Presidential Instruction No. 1 of 1991 in the National Legal System in the order of legislation in Indonesia is below or lower than the Law and PP. It's just that the KHI material contained in Book I on Marriage Law, Book II on Inheritance, and Book III on Wakafan is an Islamic law that has long been alive and practiced by Indonesian people who are Muslims.

Thus, the reviews and studies conducted by Barnawi Mukri are still not comprehensive, and this is illustrated in the results of his study, which conveys that, quoting the opinion of Tahir Azhari who argues that the issuance of Presidential Instruction No. 1 of 1991 concerning the Socialization of the Compilation of Islamic Law is the right action because the Presidential Instruction contains a presidential order to his aides, in this case the Minister of Religious Affairs, in order to disseminate the IHL to the Higher Education of Religion and the Religious Court with the intention that the IHL can be used as a guide in deciding cases of citizens who are Muslims related to matters or problems of marriage, inheritance, and wakafan (Azhari, 1991). Almost in line with the above opinion is Abdullah Kalib's; who said that there is no prohibition for the President to issue instructions to his ministers as aides to the President, provided that as long as the vision and purpose of the instructions do not contradict Pancasiia, the 1945 Constitution, the MPR TAP and the Law that is still in force.

Furthermore, he stated that the enactment of the KHI with Presidential Instruction No. 1 of 1991 was quite strong in its position in the context of creating order and fostering justice and establishing legal certainty. Therefore, it does not matter if the KHI which has a strong position becomes a material law for the Religious Court, and has the validity of authority and can even be imposed on Muslims through the authority of the Religious Court (Daud, et.al, 1994). Meanwhile, Fajrul Falakh argued that the IHL did not have the authority to be used as material law for cases submitted to the Religious Court. The position of the KHI is similar to the position of various fiqh books that are used as references by religious judges in deciding cases in religious education. There is no

prohibition for Religious Judges to make KHI as one of the references or guidelines in deciding cases in Religious Courts.

From the above can be stated. that the main qibla that can be used as the basis for the decision of the Religious Judge in Religious Education is Law No. 1 of 1974 concerning Marriage; Government Regulation No. 9 of 1975 and Government Regulation No. 28 of 1978 concerning Wakafan. If the Religious Judge does not find his material basis in the legislation, then he can put the IHL as a material legal basis in his decision, even more than that he can still use the opinion of the ulama contained in one of the fiqh books quoted by the KHI of which there are 13 as the basis for his decision; 1. Al-Bajuri; 2. Fathul Mu'in; 3. Sharqowi Alat-Tahrir; 4. Qalyubi/Mahalli; 5. Fathul Wahhab with his Syarah; 6. Tuhsah; 7. Tarshibul-Mustaq; 8. Qawanin Shar'iyyah lis Sayyid bin Yahya; 9. Qawanin Shar'iyyah lis Sayyid Sadaqah Dahian; 10. Shamsuri fi al-Fara'idh; 11. BuqyatuI Murtarsyidini; 12. Ai-Fiqhu 'aia Mazahibi-arba'ah; 13. Mughnil Muhtaj. Considering that the KHI is only established by Inpres only and in practice in Religious Education. While the judge of the Religious Court uses the opinion of the cleric as the basis for his decision. This is still happening because the KHI has not yet become a law, which hierarchically the position of the Law is higher than the Presidential Instruction.

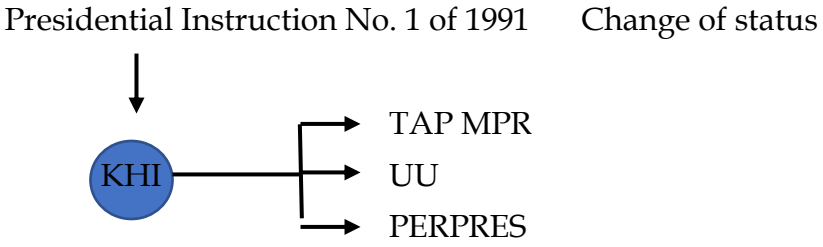
Therefore, Religious Judges are not bound by the KHI in a formal juridical manner. De facto religious judges can still refer to the provisions of the IHL because the material provisions of the written law are insufficient. This is done solely so that there is unity and legal certainty in handling the same case, even though it is decided by different judges. In that context, to end the cross-opinion about the position and enforceability of IHL in Indonesia, it is necessary to conduct a further study of the legal settlement of the validity of IHL as a document of Islamic law in Indonesia can be resolved, with the choice of legal arguments as hypotheses that are allowed by the government to take policy; namely through changes in the law of the enforceability of IHL by stipulated through the Law or by other forms of regulations other than the Law such as TAP MPR or Presidential Regulation after TAP MPRS No. XX / MPRS / 1966 is no longer valid. So that this can end the conflict of IHL law and increase the degree of the legal position of IHL in the Indonesian legal system.

This issue is important so that there is legal certainty over the validity and position of the IHL in Indonesia, when all legal cases involving Muslims are always based on the provisions of the IHL. It would be appropriate to end the debate that has been going on regarding IHL, as stated by Prof. Yusril Ihza Mahendra when he was a resource person for the Webiner event, organized by Mahutama on August 15, 2021.

Improving the status of the compilation of Islamic law as a legal document through law or by other forms of regulation

As mentioned above, to solve the legal problems of the position of the IHL, it would be appropriate for the government to immediately make improvements to the legal basis, which becomes the basis or legal basis for the enforceability of the IHL. Departing from that thought, the effort to resolve the IHL crisis is one of them by formulating several problems regarding the legal view of the enactment of the IHL as a document of Islamic law in Indonesia, when its enactment was still sourced from Presidential Instruction No. 1 of 1991, which we have discussed in the sub above. Furthermore, regarding changes in the status of the position of IHL through improvements in the determination of IHL with several choices of other forms of laws and regulations, known in the provisions of Law No. 12 of 2011 concerning the Establishment of Laws and Regulations such as TAP MPR or Presidential Regulation (Perpres).

Regarding the choice in increasing legal status as a source of footing, it is not based on the Presidential Instruction (Inpres), whose current existence has been revoked after the provisions of TAP MPRS No. XX / MPRS / 1966 through TAP MPR No. III / MPR / 2000. With regard to the choice of concepts for the solution of IHL, it is appropriate to choose a legal source that is likely to be done. The option for this solution, can be in the form of TAP MPR, it can also be by law, even the most likely and does not require energy-draining debate is to use a Presidential Regulation (Perpres). Regarding legal options that can be used in improving legal status, especially in the position of enforceability, we can describe as follows:



Ad. 1. MPR TAP Options

Quoting the views expressed by Prof. Jimly Asshiddiqie revealed that, when viewed in terms of its form and the institution authorized to determine it, it is clear that the MPR/S Decree is not a law at all. The eight provisions of the MPR/S can be rated higher than the law and are therefore equivalent to the Constitution, for several reasons. First, historically until the implementation of the MPR Session in 2003, its position has indeed been higher than the position of the law as determined by MPR Decree No. III / MPR / 2000. Second, in terms of

form, the eight MPR/S Decrees are clearly not in the form of laws, so they cannot be equated with laws. Third, in terms of the forming institution or state institution that establishes it, it is also clear that the MPR/S Decree is not determined by the framer of the law, namely the DPR together with the President, but by the MPR and MPRS (Asshidiqie, 2006).

Further said, by having been invited to Act No. 10 of 2004 on the Formation of Legal Regulations and thus the Ruling of MPR No. III/MPR/2000 is stated to be no longer binding to the public, so based on the post-enactment UUD 1945, Indonesia's legal and strict system today no longer recognizes the product of the governing law (regeling) whose position falls under the UUD (grounwet, gerundgesetze, constitution), but has legal status above the law (wet, statute, legislative act). As mentioned above, with regard to the order of the rules of law, it is necessary to distinguish that each decision in the form of legal regulation (regeling) and decisions that are not legal regulations (beschikking).

When viewed from the provisions of the order of laws and regulations, especially those relating to Presidential Regulation c.q. Presidential Instruction No. 1 of 1991, then we must be able to distinguish between regulations that are "regeling" and those that are "beschikking". So it is necessary to distinguish between the branches of government and state administration. Because these differences also affect various kinds of decisions, there are government decisions and state administration. Both government and state administration basically make two kinds of decisions. Decisions in the form of laws and regulations (algemene verbindende voorschriften) and decisions that are not laws and regulations.

As an affirmation, it is better for us to quote the views expressed by Abdul Hamid S. Attamimi regarding the MPR TAP stating that the MPR TAP is an assembly regulation that has the legal force to bind outside and into the assembly. He said, does it mean to have the force of law? And is it binding outward and inward? To answer the problem, Abdul Hamid S. Attamimi said that it has been said that the MPR TAP (the normstellend) contains legal norms, and a legal norm always has binding legal force. Just because its position is at the level of basic rules, the binding force of the legal norms of the MPR TAP is not the same as the legal norms of the Law which are at the level of laws and regulations (wet in materiele zin).

While what is meant by binding outward and inward, in the constitutional law literature the problem that arises regarding the general regulatory system (algemeene regeling) is whether to bind outward or not, not binding outward or inward. Because rules that are only binding into lose their general binding basis, and are therefore not rules in "materiele wetgevering". In other words, the rules

of a state institution can only be outwardly binding; This means binding on society in general, including members of state institutions, as members of society or not.

ad. 2. Legal Options

Because the law covers such a wide range of content material, the determination of statutory content material is only approached from general benchmarks. The content of the law is determined based on the following benchmarks:

1. stipulated in the Constitution;
2. prescribed in the previous Law;
3. stipulated in order to repeal, add or replace the old Law;
4. The content material concerns the interests or obligations of the people.

The benchmark, in certain cases, is not absolute. This means that not all of the content material must be formally regulated in law, but it can also be that the law concerned delegates its regulations to lower level legislation (delegated legislation). Thus, it can be said that there is no field of life and activities of state, government, society and individuals that cannot be reached to be regulated by law. Areas that cannot be regulated by law are only matters that have been regulated by the 1945 Constitution or the MPR TAP, or something that by the Law itself has been delegated to other forms of legislation.

To emphasize the views and understandings mentioned above, it would be appropriate to quote the views expressed by Prof. Abdul Hamid S. Attamimi who stated that there is a close relationship between legal norms contained in the 1945 Constitution, TAP MPR and Law. Categorically it can be seen that in the first line there is a direct link between the 1945 Constitution and the Law. The relationship between the 1945 Constitution and this Law does not have to go through the MPR TAP level. In other words, every provision in the Body of the 1945 Constitution can be spelled out directly in the Law. Conversely, the Law can even accept elaboration from sources other than the Body Body of the 1945 Constitution, such as from the MPR TAP or other basic rules such as the unwritten basic law.

The relationship with the second line is between the legal norms contained in the 1945 Constitution and the Law that describes and implements, between the 1945 Constitution and the MPR TAP the relationship is complementary. This is understandable because the legal norms of the 1945 Constitution and the legal norms of the MPR TAP although one is higher than the other, they are both at one level, namely the basic rules; while the legal norms

of a law are at the level of laws and regulations. Finally, the link we find between the legal norms of the MPR TAP and the Law is a link in the third line, which is essentially the same as the first line between the legal norms of the 1945 Constitution and the Law, only at a lower priority level.

Although the existence of the MPR TAP as a basic rule, it is a place to further detail the basic rules contained in the Body Body of the 1945 Constitution. In addition, the MPR TAP is also a place for the embodiment of legal norms derived from the unwritten basic law into the basic rules of written law and is a complement to the basic rules contained in the Body Body of the 1945 Constitution and other existing MPR TAP. Thus, the Law is the place of embodiment of the basic rules contained in the Body Body of the 1945 Constitution and the MPR TAP into legal norms that have coercive power, both in the form of forced implementation (vollstreckungswang) and in the form of punishment (strafe). Therefore, to be recognized by the public, a fixed and definite form of birth of a law is a must.

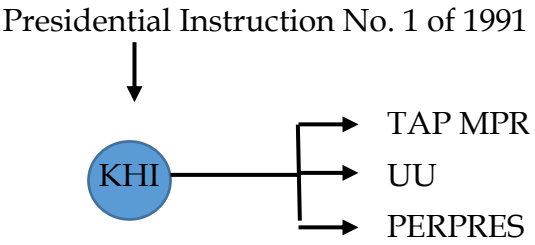
ad. 3. Presidential Rules Options

As explained earlier, that presidential regulations are determined by the President as head of state or head of government, the President is authorized to determine presidential regulations. This is in accordance with the general principle, that one of the characteristics that is always inherent in officials or positions is the authority to make decisions. By taking into account the content and material content of a decision issued by the President, whether the decision is regulatory (regeling) or a decision that is administrative decree (beschikking). As mentioned in Article 1 paragraph (6) of Law No. 10 of 2004, it is stated that, presidential regulations are laws and regulations made by the President.

Therefore, in terms of material content, presidential regulations can be divided into presidential regulations that are regulatory (regeling) and presidential regulations that are stipulative or stipulated (beschikking). Presidential regulations that regulate are laws and regulations, but presidential regulations that stipulate are not laws and regulations, but their existence is needed in law, especially administrative law. Thus, regarding the material content of presidential regulations can serve as delegated arrangements of Government Regulations (where the scope is limited, since it requires the approval of the House of Representatives); and material content of presidential regulations that are independent in nature (Sumali, 2002).

This independent presidential regulation is so broad in its authority, that there is an assumption that only the President himself may limit his authority. This independent presidential regulation is still distinguished again: certain

scope (Law, Perpu and PP which functions as delegation arrangement), and not certain scope (independent Presidential Regulation, namely the remaining material of the Law, Perpu, PP). Therefore, according to Bagir Manan and Kuntana Magnar, the material content of presidential regulations (formerly Keppres) in the form of laws and regulations as a manifestation of the original power of the President, mainly includes all the powers of the President to run the government (state administration), both "instrumental" and "guarantee-granting"" against the people. Meanwhile, the presidential regulation (formerly the Presidential Decree) in the form of laws and regulations sourced from the delegation will consist of the delegated content material.



CONCLUSION

Arrive at a conclusion that can be drawn from the legal issues raised, so it is hoped that what we write in this paper can contribute to the legal ruweness in Indonesia. What is debated in this subject, actually raises the existence of law on the validity of the Compilation of Islamic Law (KHI) that is valid, to be the subject of legal consideration in every case involving Muslims regarding matters of Islamic law is expected to refer to the provisions of the KHI, which applies based on the provisions of Presidential Instruction No. 1 of 1991 concerning the Socialization of IHL in the Religious Court Environment.

This problem is important to find a solution by taking policies that can be taken by the government through re-establishing the IHL as a positive legal document, which can have permanent legal force and become a source of Islamic law in cases brought by Muslims in Religious Courts. That way, the existence and position of KHI really has legal certainty for its validity in Indonesia. When all legal cases occur and pertain to Muslims always base on the provisions that exist in the KHI. It would be appropriate to end the debate that has been going on regarding IHL by re-establishing it in accordance with the correct legal provisions, in accordance with the provisions in Law No. 12 of 2011 concerning the Establishment of Laws and Regulations.

Regarding the choice of law in increasing the status of the validity of the KHI as a source of law, it is no longer based on the Presidential Instruction (Inpres) whose current existence has been revoked after the provisions of TAP MPRS No. XX / MPRS / 1966 were declared invalid through TAP MPR No. III /

MPR / 2000. In this regard, the choice of concept for the solution of IHL would be appropriate to choose legal sources that are likely to be done, namely being able to use by: (i) TAP MPR, (ii) Law, and (iii) Presidential Regulation (Perpres).

REFERENCES

A. Hamid S. Attamimi, (1990). Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara : Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I – Pelita IV, Jakarta: Disertasi FH UI.

Barmawi Mukri, (2001). Kedudukan dan Peranan Kompilasi Hukum Islam dalam Sistem Hukum Nasional, Jurnal Hukum. No. 17 Vol. 8.

Hans Kelsen, (1979). Allgemene Theorie der Normen, Wien: Manzsche Verlag & Universitatsbuchhandlung.

Hans Nawiasky, (1948) Allgemeine Rechtslehre als system der rechtlichen Grundbegriff.

Jimly Asshiddiqie, (2006) Perihal Undang Undang, Jakarta: Konstitusi Press.

M. Daud All. (1004). Pengembangan Hukum Material Pengadilan Agama. dalam Mimbar Hukum. No. 7 Tahun A.

Maria Farida, Indrati, (2002). Ilmu Perundang-undangan: Dasar-dasar dan Pembentukannya, Kanisius, Yogyakarta, 2002.

Padmo Wahjono, (1984). Masalah Ketatanegaraan Indonesia Dewasa Ini, Jakarta: Ghalia Indonesia.