

Critical Study of the Characteristics of the Judicial Decision on the Judicial Review of Supreme Court Decision Number 72 P/HUM/2022 on the Minimum Wage

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Received: May 16, 2023	<p>Purpose of study: This study aims to analyze the conflict of norms in the Regulation of the Minister of Manpower Number 18/2022 and Government Regulation Number 36/2022 on the Minimum Wage Determination Method. As a result of the conflict, losses will be borne by business actors on the increasing minimum wage based on Government Regulation Number 36/2021 and the Regulation of Minister of Manpower Number 18/2022. This creates legal uncertainty for business actors and laborers.</p> <p>Methodology: This study was conducted using the normative (doctrinal) research method with the approach of legislation and legal reasoning. Data sources were taken from primary legal materials, secondary legal materials, and tertiary legal materials using descriptive analysis and analytical critical thinking.</p> <p>Results: The Regulation of the Minister of Manpower contradicts the Law on Manpower in conjunction with Law on Job Creation. The conflict rose because the Manpower Law in conjunction with the Job Creation Law, has limited some of the additional advances of the Wage Determination Law to only the Government</p>
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Regulation level. Special subjects are: 1) the procedure of the minimum wage regulation; and 2) the formula of the minimum wage calculation. On the judicial review, the judges declared the objection to the judicial review of the petitioner unacceptable. The lawsuit was deemed premature because the Regulation in lieu of Job Creation Law has not reached *inkracht* (permanent legal force).

Applications of this study: This will be useful and beneficial for the development of legal science, especially aspects of legal reasoning involving court decisions. The results are also practical for businesses and laborers when using the methods of determining the legal and fair minimum wage.

Novelty/Originality of this study: Judge's Legal reasoning in decision number 72 P/HUM/2022 on Minimum wage was not one of the objection points of the petitioners or the answer to them. A judicial decision outside of a lawsuit, or so-called *ex parte* decision, is a decision taken by the court without involving the parties to the trial.

Keywords: *Characteristics of Judge's Decision, Judicial Review, Minimum Wage Method*

ABSTRAK

Tujuan: Untuk menganalisis pertentangan norma pada Permenaker Nomor 18/2022 dengan PP Nomor 36/2021, materi pokoknya terkait metode penetapan upah minimum. Akibat pertentangan tersebut, maka kerugian bagi pelaku usaha terhadap perbandingan kenaikan upah minimum berdasarkan PP 36/2021 dengan Permenaker 18/2022. Hal tersebut berdampak kepada ketidakpastian hukum bagi pelaku usaha dan pekerja.

Metodologi:

Metode penelitian normative doctrinal, dengan pendekatan Perundang-undangan, dan pendekatan penalaran hukum. Sumber data berasal dari bahan hukum primer, bahan hukum sekunder dan bahan hukum tersier. Menggunakan analisis deskriptif analitis dan critical thinking.

Temuan: Ketentuan Permenaker bertentangan dengan UU Ketenagakerjaan juncto UU Cipta Kerja. Pertentangan tersebut, karena UU Ketenagakerjaan juncto UU Cipta Kerja telah membatasi beberapa pengaturan lanjutan dibawah UU terkait pengupahan hanya pada tingkat PP. Berlaku materi muatan yaitu: 1) tata cara penetapan upah minimum; dan 2) formula perhitungan upah minimum. Pada uji materiil, putusan Hakim, Menyatakan permohonan keberatan hak uji materiil dari Para Pemohon tersebut tidak dapat diterima. Gugatan dianggap masih premature, karena Perpu Cipta Kerja belum *incrah*.

Kegunaan: Berguna dan bermanfaat bagi pengembangan ilmu hukum, khususnya aspek penalaran hukum dengan objek kajian putusan pengadilan. Berguna bagi pelaku usaha dan pekerja dalam pemilihan metode penetapan upah minimum, yang berkepastian hukum dan berkeadilan

Kebaruan/Orisinalitas: Legal reasoning hakim pada putusan nomor 72 P/HUM/2022 tentang Upah Minimum, bukan merupakan salah satu poin keberatan para pemohon maupun poin jawaban dari termohon. Putusan Hakim, diluar gugatan atau disebut *ex parte decision*, yaitu keputusan yang diambil oleh pengadilan tanpa melibatkan para pihak dalam persidangan.

Kata Kunci: Karakteristik Putusan Hakim, Uji Materiil, Metode Upah Minimum

INTRODUCTION

The issuance of Regulation of the Minister of Manpower (hereinafter abbreviated as Permenaker) Number 18 of 2022 on the Minimum Wage Determination (Kemenaker 2022) in distress for the business and investment climate of Indonesia and the world was an arduous challenge due to the COVID-19 pandemic (Nicola et al. 2020). Russian War Ukraine, as well as the threat of recession, occurred before our very eyes (Liñán and Jaén 2022). With increasingly severe conditions and uncertain situations, Permenaker 18/2022 was also created in status quo. Permenaker Number 18/2022 was immediately issued on November 16, 2022, shortly before the deadline for Minimum Wage Determination in 2023, resulting in uncertainty and suspense in Indonesia's investment climate.

The current development of manpower in Indonesia related to labor, wage standards, working conditions, and working hours is rather complex (Septyanun 2013). The formula for increasing the minimum wage determined by Permenaker Number 18/2022 aggravates the complexity of the business actor situation due to a higher percentage increase in the minimum wage. The conception's norm contradicts Government Regulation Number 36 of 2021 on Wages (Government Regulation Number 36/2021)(Presiden Republik Indonesia 2021). Government Regulation Number 36/2021 is derived from Law Number 11 of 2020 on Job Creation (Indonesia 2020). Apparently, the wage increases provide justice, both for laborers and business actors, to be able to maintain their business continuity and job security for laborers (Buchanan and Houser 2022). Employers are heavily burdened by a significant wage increase, which will result in layoffs.

Layoffs will harm the laborers themselves as well as the national economy (Pagano and Picariello 2023). The community as a whole and the capital owners (capitalists) jointly controlled the management of private industry (Septyanun and Yuliani 2020).

Business actors will naturally experience losses due to the enactment of Permenaker Number 18/2022. It is because the formulation used results in a much higher minimum wage value. Below is a table of examples of losses for business actors by comparing the increase in the minimum wage based on Government Regulation Number 36/2021 and Permenaker Number 18/2022 in Table 1.

Table 1. Losses for business actors by comparing the increase in the minimum wage according to Government Regulation Number 36/2021 and Permenaker Number 18/2022

Average Provincial Minimum Wage Increase Simulation Comparison 2023 in 34 provinces		
Formula of Government Regulation Number 36/2021	Formula of Permenaker Number 18/2022	
	Alpha 0,1	Alpha 0,3
4,29%	7,12%	8,15%

Source: Simulation of Formulation of Government Regulation Number 36/2021 and Permenaker Number 18/2022

In Table 1, it is evident that in the formulation of Government Regulation Number 36/2021, business actors can simply allocate an increase in wages of 4.29% from the previous Minimum wage. Meanwhile, in the Permenaker Number 18/2022 formulation, the minimum wage percentage increases by 7.12% to 8.15%, which is an increase from 65% to 90%. It suggests a very high percentage of burden on business actors ends. Business actors as legal entities or known "*recht persoon*" are similar to "*natuurlijk person*" in that an individual is a subject of law (Disemadi, Yusro, and Shaleh 2020). In fact, business actors have not fully recovered economically post-COVID-19 pandemic (Shammi et al. 2020) and re-prepare for recession 2023 (Sabes and Sahuc 2023). In fact, the increase in the minimum wage still refers to Government Regulation Number 36/2021 of 4.29%, which is rather taxing for business actors. Moreover, they are forced to use the Permenaker Number 18/2022 formulation with an increase of 7.12% to 8.15%.

The calculations in Table 1 have fairly high accuracy. For instance, in Riau Province, the results of the author's calculation are identical to those set by the Government of Riau Province. Based on calculations, the increase in the minimum wage in Riau province according to Government Regulation Number 36/2021 is 5.69%, while Permenaker Number 18/2022 increases

by 8.61% (alpha 0.3). Likewise, the calculation findings by the Riau provincial government based on Minutes Number 02/BA-DEPEPROV/XI/2022 of November 15, 2022, on the Recommendations of the Riau Provincial Wage Council on the Minimum Wage of Riau in 2023, the minimum wage in Riau province will rise to 5.69% if the formulation of Government Regulation Number 36/2021 is implemented. On the contrary, according to Minutes No. 3/BA-DEPEPROV/XI/2022 on the Recommendation of the Riau Provincial Wage Council on the Provincial Minimum Wage of Riau in 2023, incorporated with the formulation of Pemenaker Number 18/2022, the minimum wage percentage of Riau Province rises to 8.61% (alpha 0.3).

The following table provides an estimated comparison of the average minimum wage increase in Rupiah units (Rp) to further clarify the comparison of minimum wage increases. The calculation uses the formulation of Government Regulation Number 36/2021, as well as those using the formulation of Permenaker Number 18/2022, in Table 2.

Table 2. Estimated comparison of the average rise in the Rupiah (Rp) minimum wage

Average Minimum Wage 2022	Estimation of Average Minimum Wage 2023 according to Government Regulation Number 36/2021	Estimation of Average Minimum Wage 2023 following Permenaker Number 18/2022	
		Economic Growth 0.1	Economic Growth 0.3
Rp. 2.727.995,31	Rp. 2.839.656,91	Rp. 2.920.902,13	Rp. 2.949.297,36

Source: Simulation of Formulation of Government Regulation Number 36/2021 and Permenaker Number 18/2022 in rupiah.

The inflated minimum wage, according to Permenaker Number 18/2022, is somehow formidable for businesses to pay their employees' wages, thus triggering many layoffs (Lu and Niu 2022). This occurs because business actors cannot accomplish the business projections that have been previously made referring to Government Regulation Number 36/2021. Therefore, the production estimates for 2023 and later years may be lower. It starts with a decrease in sales and profits and cutting working hours, followed by dismissing laborers, and finally layoffs (Albanese, Picchio, and Ghirelli 2020). A threat to laborers' ability to maintain their employment is the logical outcome of the aforementioned circumstances.

Due to the additional burden of labor costs in the last trimester of 2022 and the global recession, widespread layoffs have occurred in Indonesia (Paramita et al. 2022). The industrial era

ensues in an industrial society characterized by high levels of consumption in the community by both business actors and laborers (Idayanti, Hartati, and Haryadi 2019). This state could have been avoided from the beginning. For example, based on the report, the garment, footwear, and textile industries have let go of 87,236 employees from 163 companies. The chairman of the Association of Textile Entrepreneurs of West Java Province stated that the layoffs occurred in 14 districts of the city. 124 companies reported 64,000 laborers who were laid off (Rahmah 2022). According to the statement of the president of the Confederation of National Welfare Union (Konfederasi Serikat Pekerja Nusantara/KSPN), Ristadi, layoff data received by the Ministry of Manpower does not correspond to real data in the field, which is far more ghastly. The data from KSPN reveal that its members have been laid off by as many as 8,000 people from the textile industry in Central Java province (ROCHMANNUDIN 2022).

The presence of multiple forms of enterprise by the business partner will affect the pattern of the legal relationship (Chairi, Afrita, and Yudhistira 2019). Various normative and empirical problems that occur underlie the lawsuit of judicial review by 10 (ten) plaintiffs jointly to the Ministry of Manpower of the Republic of Indonesia against the object of the lawsuit, namely Permenaker Number 18/2022 concerning the Minimum Wage Determination in 2023. The petitioners consist of approximately 275,658 companies in Indonesia, employing approximately 23,602,049 laborers. More comprehensive data are shown in Table 3.

Table 3. Data on the petitioners of the judicial review lawsuit Permenaker Number 18/2022 on the Minimum Wage Determination 2023

No.	Name	Number of Members	Number of Laborers
1	APINDO	13.188	6.500.000
2	ABADI	124	500.000
3	API	694	2.300.000
4	APRISINDO	251	2.000.000
5	GAPMMI	475	4.462.228
6	HIPPINDO	286	2.000.000
7	PHRI	260.214	6.850.000
8	APRINDO	353	5.000.000
9	APSYFI	22	33.122
10	GAPKI	722	1.050.000
TOTAL		275.658	23.602.049

Source: Decision Number 72 P/HUM/2022

The importance of this study, given the subject matter of the submitted lawsuit, is the conflict between the object of the lawsuit, Permenaker Number 18/2022, and the higher law, namely Government Regulation Number 36/2021. The judicial review of Permenaker Number 18/2022 against PP Number 36/2021 was submitted by the applicants on November 28, 2022, and registered under number 72 P/HUM/2022. The review was decided by the Supreme Court of the Republic of Indonesia on February 20, 2023. To control the study, the direction and focus of the discussion cover two points: how the regulation of the minimum wage determination method in Indonesia is and what characteristics of the judge's paradigm towards judicial review in Supreme Court decision number 72 P/HUM/2022 on the Minimum wage are?

RESEARCH METHOD

This research is normative (doctrinal) legal research. This study applied several approaches, including the approach of legislation (the statute of approach) and legal reasoning skills. The statutory approach, also known as the legal approach, is a method the legal system employs to regulate and manage behavior in people. This approach is based on the principle that the law is a means to achieve social goals such as justice, security, and order (Irwansyah 2021). Approach to legal reasoning proficiency through methods and analysis of legal sources, such as a) proficiency in academic reading and writing; b) proficiency in summarizing cases; and c) proficiency in critical thinking about the future of the company, is an attempt to always question (hence the use of the word “critical”) facts and information to be able to get all points of view to understand something (Jacqueline Vel, Rikardo Simarmata, Laurens van Veldhuizen 2022). Sources of legal materials comprise primary legal materials, including laws, government regulations, ministerial regulations, and judges' decisions. While secondary legal materials are, expert legal opinions published in scientific journals, books, and others. Tertiary legal materials incorporate legal dictionaries, news portals, dictionaries, and others. Various data sources were collected through research library and analyzed using the descriptive analytical method. Descriptive analytical law is a method or approach in legal research that aims to provide an accurate picture of the laws that exist and apply to a region or country (Salim and Septiana Nurbani 2016). Data collection was carried out systematically. Data analysis and data interpretation are meant to produce conclusions useful in developing an understanding of the law.

RESULTS & DISCUSSION

Analysis of norm conflicts in Regulation of Minister of Manpower Number 18/2022, Government Regulation Number 36/2021, and Manpower Law in conjunction with Job Creation Law

The conflict between Regulation of Minister of Manpower Number 18/2022 and Government Regulation Number 36/2021 can be broadly elaborated on in Article 4 Section (1) of PP 36/2021, which regulates and restricts the policies related to wage determination. Its purpose is to realize the rights of workers/laborers to a decent life for humanity through the Central Government. Based on Article 1 Number 11 of PP 36/2021 in conjunction with the Constitution of the Republic of Indonesia of 1945, the Central Government is referred to as "The president of the Republic of Indonesia who holds the power of the Government of the Republic of Indonesia, assisted by the Vice President and ministers". The article distinctly regulates and limits that only the president is authorized to establish wage policies through legal products within his/her authority, namely in the form of Presidential Regulations or Government Regulations, except Ministerial Regulations.

Definition of the central government according to the provisions of Article 1 point 1 of Law Number 23 of 2014 on Local Government in conjunction with Law Number 9 of 2015 on the Second Amendment to Law Number 23 of 2014 on Local Government. Article 1 point 2 of Law Number 1 of 2022 on Financial Relationships between the Central Government and the Local Government (referred to as HKPD law). The two guidelines are in line with what the Central Government, which is represented by the President of the Republic of Indonesia, defines and how it operates. Meanwhile, the authority of the ministers can only be exercised if there is a clear delegation in a certain regulation.

Government Regulation Number 36/2021 provides for policy limits related to wages deputed to the Ministry of Manpower. The limitations of the policy are presented in Table 4.

Table 4. Analysis of Wage Policy Limitations

Authority for the Formation of the Ministerial Regulations based on Government Regulation Number 36/2021	Conclusion
a) Article 9 Section 3: Terms of holiday allowance and Procedures	- Government Regulation Number 36/2021 does not authorize the Minister of Manpower to make regulations
b) Article 13 Section (3) on <i>service</i> fee in a particular effort;	

- | | |
|---|---|
| c) Article 22 Section 6 on the wage structure and scale; | related to minimum wage materials. |
| d) Article 74 Section 4 on the procedure for appointment and dismissal of the Wage Board; | - The Minister of Manpower is only assigned to regulate, as in points a) to f). |
| e) Article 75 Section 7 on the procedure for Member Replacement of the Wage Board; | |
| f) Article 76 Section 4 on the Working Procedures of the Wage Board | |

Data source: processed from Government Regulation Number 36/2021

The conflict of norms between Permenaker Number 18/2022 and Government Regulation Number 36/2021 is due to the Permenaker's status quo setting standards outside of their control. There are additions, amendments, and conflicts with Government Regulation Number 36/2021. The subject of wage regulation does not count in the substance of the rules delegated to the Minister of Manpower. The substances appended that were changed and contradicted are: 1) Amendment to and appending of new variables in the calculation of Minimum Wage increases so that the results are unlike what has been stipulated in Government Regulation Number 36/2021; 2) Amendment to the maximum deadline for determination of Minimum Provincial Minimum Wage and Regency/Municipal Minimum Wage from those stipulated in Government Regulation Number 36/2021; and 3) Amendment to norms regarding the implementation of Minimum Wages for laborers with a tenure of less than one year.

The contradiction in these three elements is that Government Regulation Number 36/2021 has regulated the variables for calculation of the minimum wage increase as stated in Article 26 Section (7). The variable is the implementation of Article 88D Section (2) on Manpower Law, which is partially amended by the Job Creation Law. The regulations outlined in the Manpower Law in conjunction with Job Creation Law in conjunction with Government Regulation Number 36/2021 are unlawfully distorted by the issuance of Permenaker Number 18/2022. The divergence lies in the addition of calculation variables from variables of economic growth or inflation to variables of economic growth, inflation, and certain price indices. The formula for Minimum Wage calculation can be seen in Figure 1:

Figure 1. *Minimum Wage Calculation Formula*

$$UM_{(t+1)} = UM_{(t)} + (\text{Penyesuaian Nilai UM} \times UM_{(t)})$$

Description :

$UM_{(t+1)}$: Minimum wage to stipulate
$UM_{(t)}$: Minimum wage of the current year
Minimum Wage Adjustment	: Minimum Wage adjustment is Sum of inflation and multiplication of Economic growth and α

Source: Permenaker Number 18/2022

Deviations in Permenaker Number 18/2022 let entrepreneurs experience increasingly complex and uncertain legal conditions. If Government Regulation Number 36/2021 in conjunction with the Manpower Law in conjunction with the Job Creation Law is consistently used, then the average increase in the Minimum Wage paid is 4.29%. Meanwhile, due to the enactment of Permenaker Number 18/2022, employers should embrace an increase of 7.12%–8.15%. There is a difference of 65%–90%, which is completely onerous for entrepreneurs.

Government Regulation Number 36/2021 has determined a deadline for the increase in the Provincial Minimum Wage and the Regency/Municipal Minimum Wage governed by the Local Government. This is as stipulated in Article 29 Section (1) Government Regulation Number 36/2021, namely "The provincial minimum Wage is determined by a Governor Decision and announced not later than 21 November of the current year." Meanwhile, Article 35 Section (2) Government Regulation Number 36/2021 reads: "The regency/municipal minimum Wage is determined by a Governor Decision and announced no later than 30 November of the current year." Where the provision is unlawfully amended by the Minister of Manpower in Article 13 Section (2) Permenaker 18/2022 that: "The provincial minimum wage 2023 is determined and announced not later than 28 November 2022."

Further, Article 15 Section (2): *"The regency/municipal minimum Wage in 2023 is determined and announced not later than 7 December 2022."* These changes will be very detrimental to entrepreneurs as they damage the budgeting system planning in the company. Formerly, wage and budgeting systems have been established by the company using Government Regulation Number 36/2021. This is based on the Circular Letter of the Minister of Manpower of the Republic of Indonesia Number B-M/360/HI.01.00/XI/2022 on November 11, 2022, on the Submission of Data on Economic Conditions and Laborers for the Minimum Wage Determination in 2023. In practice, 5 (five) days following the Circular Letter issuance, on November 16, 2022, the Ministry of Manpower modified it. This also disrupted the legal certainty and business certainty

aspect, which have been well maintained by the President of the Republic of Indonesia, Ir. Joko Widodo.

Government Regulation Number 36/2021 has affirmed that the Minimum Wage applies to laborers with a tenure of less than a year. Those regulations were re-altered in Permenaker Number 18/2022, in which laborers with a tenure of less than one year may receive wages under the wage scale scheme if they meet certain criteria. Forms of wage policies that are relevant and protect workers and laborers as set out in Article 88, Section 3 of Law 13 of 2003 on Manpower comprise 1) Minimum wage; 2) Overtime pay; 3) Wages for not being able to work; 4) Wages for non-work-related field activities; 5) Wages for rest breaks; 6) Forms and methods of wage payment; 7) Points that can be taken into account with wages; 8) Structure and scale of proportional wages; 9) Wages for severance payment; 10) Wages for income tax protection (Mawardi Khairi, Lelisari, Nurjannah S, Novita Listyaningrum n.d.).

In addition to Permenaker Number 18/2022 contradicting PP36/2021, it is also contrary to the Manpower Law. The law has also limited the regulation of the provision of wages above the minimum wage which can only be completed through agreement. It is regulated in the provisions of Article 90A on Manpower Law in conjunction with the Job Creation Law "Wages above the minimum wage are determined based on an agreement between employers and employees/laborers within the company". Amendment by the Ministry of Manpower against the law is rigorous and certainly detrimental to employers. Where the probability of *norma a quo* raises demands from laborers with less than one year of tenure in order to earn wages above the Minimum Wage. On the other hand, if it is agreed upon, it will cause social injustice for other groups of laborers who have worked for more than one year. This juxtaposes entrepreneurs in an increasingly intricate position. A similar problem surfaces when the discourse on the minimum wage determination, which in Adrian Sutedi's view ensues as a result of the non-realization of a uniform wage, either regional or provincial, regency /municipal, sectoral or national, ensues. This inequality has unexpectedly become the basis for consideration for the survival of the company and its laborers (Kahpi 2018).

The legal consequence of hierarchical opposition is the invalidation of the enforceability of the lower regulation. Hans Kelsen's theory states that a norm of state law is always layered and tiered, that is, the norm below is applied, has a basis, is derived from a higher norm, and so on until the highest norm is termed the basic norm (Berry 2018). The addition of variables or

expansion of norms in implementing regulations, such as ministerial regulations whose references are not governed by higher regulations, is a conflict of hierarchical principles. Based on the theory of hierarchy norms, lower ministerial regulations should not change higher government regulations. Moreover, the change concerns the wage formula, which is indeed outside the authority of ministerial regulation to amend.

The conflict between Permenaker Number 18/2022 and Government Regulation Number 36/2021 was acknowledged by the Minister of Manpower through his statement via video conference, as covered by hukumonline.com. The co-respondent stated: “The determination of the minimum wage through the formula of Government Regulation Number 36 of 2021 has not been able to accommodate the impact on socio-economic society. As a result, the increase in the minimum wage in 2022 was not followed by the increase in the price of goods; thus, the demand for workers/laborers fell.” (DA 2022) The accommodation is the basis for the determination of Permenaker Number 18/2022, which manages different norms from Government Regulation Number 36/2021 in calculating the Minimum Wage increase in 2023. However, lower rules could not change higher rules. A rule can only be changed by a change in an equal rule or a change in a higher rule, not by a lower rule. Based on the arguments above, it is obvious that the addition of norms in Permenaker Number 18/2022 has changed the wage law norms regulated in Government Regulation Number 36/2021 and is a conflict of norms between lower regulations and higher regulations.

According to Stufenbau's theory, ministerial regulations must be based on source and reference and not conflict with the higher ones, i.e., laws, government regulations in lieu of laws, and government regulations (Amancik 2023). The Permenaker provisions oppose the Manpower Law in conjunction with the Job Creation Law. Such opposition is because the Manpower Law in conjunction with the Job Creation Law, has limited some of the advanced arrangements of the wage-related law only to the level of government regulations. It is further classified in Table 5.

Table 5. The procedure for Minimum Wage Determination and Formula for Minimum Wage Calculation

Manpower law	Conclusion
Article 88C Section (7): g) “Further provisions regarding the procedure for the minimum wage determination as referred to in Section (3) and certain conditions as referred to in Section (4) are regulated in Government Regulations.”	- The determination of the minimum wage, following the calculation formula, is only established in the rules made by the central government, in this case, the president of the Republic

	of Indonesia, in the form of Government Regulations.
Article 88D Section (3): “Further provisions on the formula for minimum wage calculation are provided for in Government Regulations.”	Thus, the minister does not have the authority to regulate the determination of the minimum wage at the Ministerial Regulation level. It is not justified to use the authority of the president to regulate the determination of the minimum wage, as is only exercised by Permenaker Number 18/2022

Source: processed from Manpower Law and Permenaker Number 18/2022

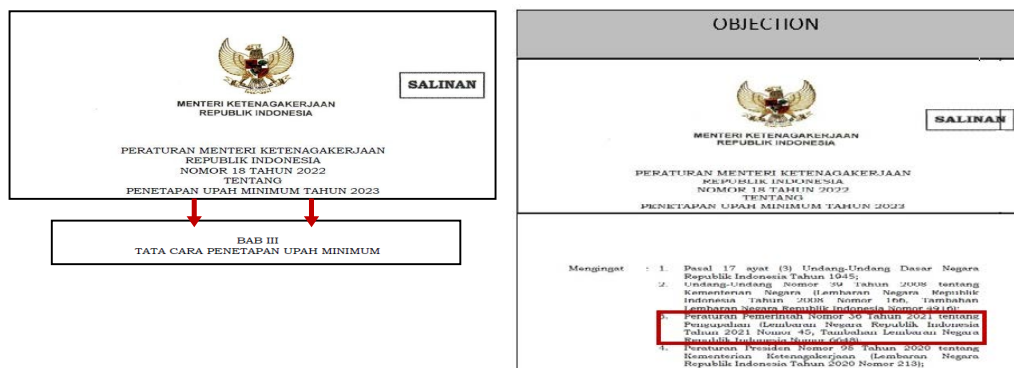
Based on the explanation in Table 5, it is very clear that the regulation of the minimum wage is only under the authority of the Central Government, namely the president of the Republic of Indonesia, through Government Regulation Number 36/2021 and outside the authority of the Minister. In fact, the issuance of Permenaker Number 18/2022 by the Ministry of Manpower illustrates that the Ministry of Manpower has taken actions beyond its authority and taken over the authority of its own superior (the president of the Republic of Indonesia) unlawfully because it issued rules related to setting the minimum wage.

The integral part between the law of administrative and responsibility concept, according to Tatiek Sri Djamiati, is prompted by administrative law or constitutional law (*administratiefrecht* or *bestuursrecht*), which contains the norms of government law. Governmental bodies use the norms of the state as guidelines when exercising their power. The parameters used in the use of authority are legal compliance or non-compliance with the law, so that in the event that the use of authority is carried out improperly or illegally, the authorized government agency shall be responsible (Simanjuntak 2018).

There are two criteria for delegation of authority for the establishment of laws and regulations set out in Number 200, Chapter II on Special Matters Letter A on delegation of authority, which is described in Annex II of Laws and Regulation Law as follows: “The delegation of authority must explicitly mention: a) criteria 1: the scope of the regulated content material, the procedure for the determination of the minimum wage; or b) criteria 2: the type of legislation stipulated in government regulations. Therefore, article a quo clearly implies that the procedure for minimum wage determination and the formula for the minimum wage calculation are only

delegated to their arrangement in the Government Regulation and not other laws and regulations, moreover at the level of ministerial regulations such as Permenaker Number 18/2022, which are hierarchically under government regulations”. This can be seen in Figure 2.

Figure 2.
The Minimum wage can only be determined by Government Regulation



Source: Permenaker Number 18/2022

Permenaker Number 18/2022 also includes the formula for minimum wage calculation in Article 6 Section (2), Section (3), Section (4), Article 7 Section (1) and Section (2), and Article 10 Section (1), whose regulatory substance is contrary to what has been stated in Government Regulation Number 36/2021. In reality, these arrangements should only be contained within government regulations. It is an indisputable legal fact that the issuance of Permenaker Number 18/2022 is without authority and further contradicts higher legislation in the field of labor (Manpower Law in conjunction with Job Creation Law and Government Regulation Number 36/2021). Based on the arguments, there is a fundamental lack of authority for the issuance of Permenaker Number 18/2022.

Characteristics of Paradigm of the Judicial Decision on the Judicial Review Number 72 P/HUM/2022

Supreme Court Decision Number 72 P/HUM/2022 "Hereby declare that the judicial review lawsuit by petitioners are rejected.". The legal reasoning used by the judges is "That the quo object test of minimum wage is closely related to the decision of the Constitutional Court regarding PERPU Number 2 of 2022, so in order to maintain harmonization regarding the hum a quo test, the Supreme Court believes that it shall wait for the Constitutional Court's decision, and it was submitted prematurely, so the application for Hum objection cannot be accepted". Legal reasoning is neither one of the points of objection of the petitioners nor one of the points of answer of the respondent.

This is a decision outside the lawsuit, often called an *ex parte decision*, that is, a decision taken by the court without involving the alleged party or respondent in the proceedings. This decision is usually taken in an emergency and/or if the court believes that involving the other party would be harmful or impractical. In some jurisdictions, an out-of-court judgment may be rendered in cases such as the filing of a temporary restraining order, a temporary suspension or prohibition from performing a particular act, or a request for emergency protection. A decision of this kind can be rendered at the request of one of the parties involved in the case or on an initiative basis by the court. However, it is important to note that the out-of-court ruling is usually provisional and will be examined further in a more complete trial in the future. The alleged party or respondent usually has the right to object to or appeal against the judgment.

This is in accordance with the provisions of Article 13, Section 1, of Law Number 48 of 2009 concerning Judicial Power, which states that all court hearings are open to the public unless the law says otherwise. Therefore, judicial review of a trial must be conducted publicly. When the process of the judicial review is conducted in the courtroom, then it can be deemed a legal defect because it is contrary to Article 13 Section (3) of the law. The Supreme Court does not rule that the trial judicial review should be inside the courtroom because in judicial review there needs to be a principle, or *audi alteram et partem*, or the parties to the litigation should be given the opportunity to provide information and express their opinions, including the respondent as a legislator under the law, so that it will be affected by the decision and needs to be involved (Hidayat 2019).

From the description above, the requirement of an *ex parte decision* has already been fulfilled in the event that a decision is taken under emergency conditions, where the *quo* object of minimum wage is a derivative rule of the Job Creation Law in conjunction with the regulation in lieu of the job creation, which is currently in the process of Judicial Review in the Constitutional Court. Therefore, if it continues, it will involve other parties. This is what it means by “so in order to maintain harmonization related to testing quo of minimum wage , which is to maintain harmony between the Supreme Court and the Constitutional Court. But according to the above description, the *ex parte decision* is temporary, and according to the decision "The Supreme Court considers it necessary to wait for the decision of the Constitutional Court,” the authors interpret that there is still a material test that can be performed if the decision related to Job Creation Law by the Constitutional Court has been *inkracht* (permanent legal force).

The process of this judicial test is indeed very vulnerable to the real conditions that occurred at that time, where changes took place instantly related to the Job Creation Law. As a result, it is very possible that there will be dissenting opinions in observing the decision. Specifically in this case, in which one of the points of the petitioner's objection is “Permenaker Number 18/2022 also violates Decision Number 7 of the Job Creation that "Hereby suspend all actions/policies that are strategic and have a wide impact, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 on Job Creation. The deadline for the suspension of the issuance of government regulations or policies of a strategic nature and broad impact is 2 (two) years”. Permenaker Number 18/2022 was issued during the suspension of the issuance of the Implementing Regulation on Manpower Law.

There are three bases that show Permenaker Number 18/2022 has fulfilled the Constitutional Court decision above, namely:

- 1) It is the Implementing Regulation of the Job Creation Law because its publication is based on Government Regulation Number 46/2021, which is the executor of the Job Creation Law. This can be seen in Figure 3.

Figure 3.
Permenaker is the Implementing Regulations of the Job Creation Law



Source: Permenaker Number 18/2022 and Government Regulation Number 36/2021

Government Regulation Number 46/2021 was promulgated on February 2, 2021, so that the decision of the Job Creation Court, which is bound by the non-retroactive principle, does not have an impact on the Government Regulation because its status quo published earlier than the decision of the Constitutional Court;

- 2) Permenaker Number 18/2022 is a strategic implementing regulation because *beleiduses* Government Regulation Number 46/2021 as its constituent legal basis. The legal basis stipulates that the wage policy is a national strategic program.
- 3) Permenaker Number 18/2022 is an implementing regulation that has a wide impact. Permenaker Number 18/2022 is a central government policy that applies at the national level. This implies that local governments, as executors of regional autonomy in the labor sector spread across 38 provinces, 98 cities, and 416 regencies, will be affected by the implementation of Permenaker 18/2022.

CONCLUSION

The conflict of norms in the regulation of the Minister of Manpower number 18/2022 with Government Regulation Number 36/2021 assumes that Permenaker Number 18/2022 without authority included a special chapter in the body that regulates the procedure for minimum wage determination which writes Article 13 to Article 17, the substance of the regulation appends, changes, and ultimately contradicts the legal norms regulated in Government Regulation Number 36/2022. In reality, these arrangements should only be contained within government regulations. If the use of authority is exercised in improper illegal as such, the legal consequence is that authorized government bodies must be held accountable. The parameter is in the use of authority that is legal compliance or non-compliance with the law.

The aspect of legal reasoning of judges in Decision Number 72 P/HUM/2022 on the Minimum wage, was not one of the points of the objection of the applicants nor was it one of the points of the respondent's answer. This is a decision outside the lawsuit, often called an *ex parte* decision, that is, a decision taken by the court without involving the alleged party or respondent in the proceedings. This decision is usually taken in an emergency and/or if the court believes that involving the other party would be harmful or impractical. The *ex parte decision* is temporary and is also delivered through the point that "The Supreme Court opines that it should wait for the decision of the Constitutional Court", meaning that there is still a judicial review that can be resubmitted until the decision related to the Job Creation Law by the Constitutional Court is *inkracht*.

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