



Legal Uncertainty in Testing of Legislation Due to Weak Implementation of the Principle of Lex Superior Derogat Legi InferIORI

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Abstract

The principle of *lex superior derogat legi inferiori* is a fundamental principle in the hierarchical system of Indonesian laws and regulations, which emphasizes that lower norms must not contradict higher norms. However, in practice, this principle is often ignored in the process of drafting, harmonizing, and testing regulations, both by the legislative and judicial institutions. This study aims to analyze the forms of weak implementation of the principle of *lex superior derogat legi inferiori*, identify the causal factors, and assess its implications for legal certainty. The study uses a normative juridical method with a statutory, conceptual, and case approach through an analysis of decisions of the Constitutional Court and the Supreme Court. The results show that the weak implementation of this principle is caused by regulatory disharmony, low legislative quality, overlapping authority, passive norm oversight mechanisms, and low compliance by administrative officials with the regulatory hierarchy. The resulting implications include norm conflicts, legal uncertainty in policy implementation, decreased regulatory legitimacy, increased burden of judicial review, and hampered business certainty. This research emphasizes the importance of strengthening regulatory harmonization mechanisms and improving the quality of legislation to ensure legal certainty and a more orderly regulatory system.

INTRODUCTION

Legal certainty constitutes a fundamental pillar of the rule of law and functions as a prerequisite for orderly governance, the protection of fundamental rights, and the predictability of state actions. In modern constitutional systems, legal certainty is closely linked to the clarity, coherence, and consistency of the legal norms that regulate public life. A legal system that fails to provide certainty risks generating normative confusion, arbitrary governance, and declining public trust in law as an

instrument of social order (Nadzirin et al., 2025; Fitria et al., 2025). Consequently, the establishment of a structured hierarchy of norms and effective mechanisms to ensure consistency among regulations is essential to maintaining the integrity of the legal system. Within this framework, the principle of *lex superior derogat legi inferiori* plays a central role in safeguarding the coherence of legal norms by ensuring that lower-level regulations do not contradict higher-level legal instruments (Karjoko et al., 2025; Fatahillah et al., 2025; Belof & Kryczka, 2025).

In the Indonesian legal system, legal certainty is constitutionally grounded and operationalized through a hierarchical structure of legislation as well as judicial review mechanisms exercised by the Constitutional Court and the Supreme Court (Cammack, 2023; Siddiq & Salam, 2025; Phiau et al., 2025). The hierarchy of laws, as regulated under Law Number 12 of 2011 as amended by Law Number 13 of 2022, reflects the normative ordering envisioned by legal positivist theory, particularly the *Stufenbau* theory articulated by Hans Kelsen. According to this model, the validity of lower norms is derived from higher norms, culminating in the constitution as the supreme legal authority. The principle of *lex superior derogat legi inferiori* thus serves not merely as a technical doctrine but as a foundational mechanism to ensure that the legal order functions as a coherent and unified system. In theory, this principle should operate preventively and repressively to maintain normative harmony across all levels of regulation.

Despite its formal recognition, the practical implementation of the principle of *lex superior derogat legi inferiori* in Indonesia remains problematic. Numerous regulations below the level of statutes, including ministerial regulations, institutional regulations, and regional bylaws, continue to exhibit substantive inconsistencies with higher-level norms. These conflicting regulations often remain in force for extended periods before being challenged through judicial review, thereby creating legal uncertainty for citizens, administrative officials, and economic actors. This phenomenon indicates structural weaknesses in regulatory harmonization processes and reveals the limitations of relying solely on judicial mechanisms to correct normative inconsistencies after they have already generated legal consequences.

The persistence of such regulatory conflicts raises fundamental questions regarding the effectiveness of existing mechanisms designed to enforce the hierarchy of norms. While judicial review by the Constitutional Court and the Supreme Court is constitutionally mandated, the predominantly passive nature of norm control means that unconstitutional or *ultra vires* regulations often continue to operate until a formal challenge is submitted and adjudicated. Furthermore, the dual authority of judicial review between these two courts introduces additional complexity, particularly in determining jurisdiction over certain types of regulations. These institutional arrangements, while intended to strengthen constitutional control, may paradoxically contribute to uncertainty when coordination and clarity are lacking.

Previous scholarly studies have extensively discussed the principle of *lex superior derogat legi inferiori* as a normative doctrine within the theory of legislation and constitutional law. Scholars such as Asshiddiqie and Indrati have emphasized its importance in maintaining the hierarchical integrity of legal norms, while administrative law theorists have linked the principle to the legality principle (*wetmatigheid van bestuur*) in public administration (Suparto et al., 2024; Coerts, 2025). However, much of the existing literature remains doctrinal and abstract, focusing primarily on the conceptual justification of the principle rather than its empirical application within judicial review practices. As a result, there is limited scholarly attention to how weaknesses in the implementation of this principle concretely affect legal certainty in the daily operation of the Indonesian legal system.

Several studies have also identified systemic issues in the legislative process that contribute to regulatory disharmony. These include inadequate inter-institutional coordination, insufficient regulatory impact assessment, limited public participation, and the frequent use of vague or multi-interpretative norms. In addition, political interests and sectoral ego often influence the drafting of regulations, leading to overlapping authority and normative inconsistency. Administrative officials, in practice, tend to continue applying problematic regulations until they are formally annulled by a court, further exacerbating uncertainty. The absence of effective sanctions for regulatory drafters who violate hierarchical principles reinforces a culture of low compliance with the normative order.

Although these studies provide valuable insights, there remains a critical gap in the literature regarding the systematic analysis of how weak implementation of *lex superior derogat legi inferiori* manifests in judicial review decisions and how it undermines legal certainty as a constitutional value. In particular, limited attention has been given to examining the cumulative implications of regulatory disharmony, overlapping judicial authority, and passive norm control mechanisms. This gap is significant, as legal certainty is not merely a theoretical ideal but a practical requirement for effective governance, the protection of rights, and a stable investment climate.

This study seeks to address that gap by examining the weak implementation of the principle of *lex superior derogat legi inferiori* in the testing of legislation within the Indonesian legal system. The objectives of this research are threefold. First, it aims to identify and analyze the forms in which the principle is inadequately implemented in the drafting, harmonization, and judicial review of regulations. Second, it seeks to examine the structural, institutional, and procedural factors that contribute to this weakness. Third, it assesses the implications of such weaknesses for legal certainty, particularly in relation to norm conflicts, administrative governance, and the burden on judicial review institutions. By employing a normative juridical approach with statutory, conceptual, and case-based analyses, this study offers a novel contribution by linking doctrinal principles with judicial practice and regulatory realities, thereby reinforcing the importance of strengthening regulatory harmonization and normative consistency to uphold legal certainty within the Indonesian rule of law framework.

METHODS

This study employs a normative juridical research design to examine the weak implementation of the principle of *lex superior derogat legi inferiori* and its implications for legal certainty within the Indonesian legal system. Normative legal research is appropriate because the focus of the study lies on legal norms, principles, and judicial reasoning rather than empirical social behavior. The research treats law as a prescriptive system and evaluates the internal coherence, validity, and hierarchical consistency of regulations, in line with established legal research methodologies that emphasize doctrinal and analytical approaches to legal problems.

The primary approach used in this research is the statutory approach, which analyzes the hierarchy, structure, and substance of laws and regulations governing the formation and testing of legislation in Indonesia. Particular attention is given to the 1945 Constitution, Law Number 12 of 2011 on the Formation of Laws and Regulations as amended by Law Number 13 of 2022, and other relevant statutory instruments. Through this approach, the study assesses the extent to which lower-level regulations conform to higher-level norms and evaluates the effectiveness of the regulatory framework in enforcing the principle of *lex superior derogat legi inferiori* as a safeguard of legal certainty.

In addition, a conceptual approach is applied to clarify the theoretical foundations of the research. This approach draws on legal theories concerning hierarchical norms, legal certainty, and judicial review, particularly the ideas of Hans Kelsen regarding normative hierarchy and Gustav Radbruch concerning legal certainty as a fundamental value of law. By engaging with these concepts, the study situates the Indonesian regulatory system within broader jurisprudential discourse and examines whether the practical application of the principle aligns with its normative and theoretical justification.

A case approach is further utilized to analyze judicial decisions of the Constitutional Court and the Supreme Court related to the review of legislation and subordinate regulations. These decisions are examined to identify patterns in judicial reasoning, inconsistencies in the application of hierarchical principles, and institutional constraints affecting norm control. The case analysis enables the study to observe how the principle of *lex superior derogat legi inferiori* operates in practice and to evaluate the extent to which judicial review mechanisms effectively address regulatory conflicts and contribute to legal certainty.

The legal materials used in this research consist of primary, secondary, and tertiary sources. Primary legal materials include constitutional provisions, statutory laws, and court decisions, while secondary materials comprise scholarly books, peer-reviewed journal articles, and academic commentaries relevant to legislative hierarchy and judicial review. Tertiary materials, such as legal dictionaries, are used to ensure conceptual precision. Data analysis is conducted qualitatively through systematic interpretation and legal reasoning, allowing the study to draw normative conclusions regarding the causes and consequences of weak implementation of *lex superior derogat legi inferiori* within the Indonesian legal order.

RESULTS AND DISCUSSION

Weak Implementation of the Principle of *Lex Superior Derogat Legi Inferiori* in the Indonesian Regulatory System

The results of this study demonstrate that the principle of *lex superior derogat legi inferiori* has not been effectively operationalized within the Indonesian regulatory system, despite its explicit recognition in constitutional and statutory frameworks. Normative analysis of legislation and judicial decisions reveals a persistent pattern in which lower-level regulations deviate from, reinterpret, or directly contradict higher-level legal norms, particularly statutes and constitutional provisions. This finding indicates that the hierarchical structure of legislation functions more as a formal-symbolic arrangement than as a substantively enforced system of legal control. As noted by Asshiddiqie (2010) and Indrati (2007), the hierarchy of norms in Indonesia is often treated as a procedural requirement rather than a binding normative discipline, allowing inconsistencies to proliferate across regulatory levels.

A closer examination of judicial review cases confirms that ministerial regulations, institutional rules, and regional bylaws frequently introduce substantive norms that alter the scope, intent, or legal consequences of statutory mandates. These regulations often impose new obligations, restrictions, or discretionary powers not envisaged by the legislature, thereby exceeding the limits of delegated authority. Such practices fundamentally undermine the hierarchical logic of legal validity, which requires that lower norms derive both their authority and content from higher norms. From a jurisprudential perspective, this condition directly contradicts Kelsen's *Stufenbau* theory, which conceptualizes the legal system as a coherent structure in which the validity of each norm depends on its conformity with superior norms (Kelsen, 1961; Kammerhofer, 2023).

The persistence of hierarchically defective regulations is further exacerbated by the temporal dimension of judicial control. The analysis shows that problematic regulations frequently remain in force for extended periods before being challenged and annulled by judicial institutions. During this interval, these regulations continue to produce binding legal effects, shaping administrative decisions and individual conduct despite their questionable normative validity. This phenomenon exposes a critical weakness in Indonesia's system of norm control, as legal certainty is compromised not only by the existence of conflicting norms but also by the prolonged tolerance of such norms within the legal order.

This condition reflects the fundamentally reactive nature of norm control in Indonesia, where the enforcement of *lex superior derogat legi inferiori* depends largely on ex post judicial review rather than effective preventive mechanisms. As Hadjon (2017) argues, judicial review, while essential, cannot substitute for robust harmonization and supervision at the legislative and administrative stages. When preventive controls fail, courts are compelled to correct systemic regulatory defects after they have already generated legal consequences, thereby transforming hierarchical supremacy into a remedial doctrine rather than a guiding principle of lawmaking (Doerfler & Moyn, 2024; Harefa, 2025; Ahamed, 2025).

Taken together, these findings reveal a structural gap between normative ideals and institutional practice in the Indonesian legal system. Although the legal framework formally affirms the supremacy of higher norms, its practical enforcement remains fragmented, delayed, and heavily dependent on judicial intervention. This weakens the capacity of *lex superior derogat legi inferiori* to function as an effective guarantor of legal certainty and normative coherence. Consequently, the principle risks being reduced to a rhetorical affirmation rather than an operational standard, undermining the integrity of the regulatory hierarchy and the rule of law itself.

Regulatory Disharmony and Weak Preventive Harmonization Mechanisms

The findings further demonstrate that regulatory disharmony within the Indonesian legal system is a direct and systemic consequence of weak preventive harmonization mechanisms in the legislative drafting process. Although Indonesian law formally mandates harmonization and synchronization of draft regulations, these requirements are frequently treated as administrative formalities rather than substantive processes aimed at ensuring normative consistency (Pontoh, 2023; Arafiq et al., 2024; Malik et al., 2024). As a result, the drafting stage fails to function as an effective gatekeeping mechanism for hierarchical compliance. This condition reinforces scholarly critiques that characterize Indonesian legislative harmonization as procedural and symbolic, rather than analytical and corrective in nature (Indrati, 2007; Asshiddiqie, 2010).

Normative analysis of statutory frameworks reveals that institutions tasked with regulatory harmonization often lack binding authority to compel compliance with hierarchical principles. Their role is typically advisory, enabling regulatory drafters to disregard harmonization findings without meaningful legal consequences. In practice, harmonization outcomes are frequently subordinated to sectoral interests, bureaucratic priorities, or short-term political considerations. This institutional design flaw allows regulations that are clearly inconsistent with higher-level norms to proceed through the legislative process and acquire formal validity despite substantive defects.

The weakness of preventive harmonization is further reflected in the content of judicial review decisions analyzed in this study. Courts repeatedly identify deficiencies that should have been detected and corrected during the drafting stage, including vague delegations of legislative authority, ambiguous normative formulations, and excessive regulatory discretion. Such deficiencies indicate not

merely technical drafting errors but a broader failure to internalize hierarchical discipline within the legislative process. The recurrence of similar defects across multiple cases and regulatory sectors strongly suggests that regulatory disharmony is systemic rather than incidental (Robb et al., 2023; Morelli, 2023).

These findings support broader critiques of legislative governance that emphasize the absence of rigorous legal reasoning and comprehensive regulatory impact assessment in regulatory formation. As Hadjon (2017) argues, the lack of substantive evaluation during lawmaking leads to norms that are formally valid yet materially inconsistent with the legal order. Without systematic analysis of hierarchical positioning and legal consequences, regulations are drafted in isolation, increasing the likelihood of conflict with superior norms and undermining the coherence of the legal system (Sytch & Kallapur, 2025; Khan, 2022; Araszkievicz & Florczak-Wątor, 2025).

Consequently, the failure of preventive harmonization mechanisms shifts the burden of norm correction to judicial institutions. Courts are compelled to resolve conflicts that should have been addressed *ex ante*, reinforcing the reactive character of *lex superior derogat legi inferiori*. This reactive enforcement diminishes the preventive function of the principle and weakens its role as a structural safeguard of legal certainty and normative coherence. Instead of guiding regulatory behavior from the outset, hierarchical supremacy is applied retrospectively, after legal uncertainty has already materialized.

Institutional Fragmentation and Overlapping Judicial Authority

Another significant result of this study concerns the impact of institutional fragmentation on the enforcement of hierarchical principles within the Indonesian legal system. The division of judicial review authority between the Constitutional Court and the Supreme Court, while constitutionally justified, generates substantial practical challenges in ensuring the consistent application of *lex superior derogat legi inferiori*. Although this dual system was designed to distribute constitutional and administrative review functions, in practice it has produced overlapping jurisdictions and interpretative uncertainty. Indonesian constitutional scholars have long identified this institutional dualism as a structural source of legal uncertainty rather than a complementary system of norm control (Asshiddiqie, 2010; Suratno, 2025; Mutiasi & Kristanto, 2025).

Case analysis conducted in this study demonstrates that uncertainty frequently arises regarding the appropriate judicial forum for reviewing certain types of regulations, particularly those that do not fall clearly within traditional classifications of legislation. Hybrid regulatory instruments, delegated regulations, and quasi-legislative norms often occupy ambiguous positions within the hierarchy, complicating jurisdictional determinations. This ambiguity can delay judicial intervention or deter potential applicants from initiating review proceedings, allowing hierarchically defective regulations to remain operative and continue producing legal effects (Sytch & Kallapur, 2025).

The prolonged operation of such regulations undermines the effectiveness of judicial review as a mechanism for maintaining normative hierarchy. When legal actors are uncertain about where and how to challenge defective norms, judicial review loses its accessibility and predictability. This condition weakens legal certainty by permitting inferior norms to govern administrative practice despite their questionable conformity with superior laws. As a result, the hierarchical principle functions unevenly, depending more on procedural contingencies than on substantive legality.

Furthermore, the findings reveal that differences in interpretative approaches between the Constitutional Court and the Supreme Court contribute to inconsistent

reasoning regarding hierarchical conformity. Although both institutions formally affirm the supremacy of higher norms, variations in doctrinal emphasis, interpretative methodology, and institutional mandate may lead to divergent outcomes in similar cases. From a theoretical standpoint, such inconsistency conflicts with Kelsen's conception of a coherent normative system, in which hierarchical validity requires uniform interpretative standards to ensure systemic unity (Kelsen, 1961).

Ultimately, institutional fragmentation reduces the capacity of judicial review to function as a coherent and reliable guarantor of normative hierarchy. Without effective coordination mechanisms, clear jurisdictional boundaries, and harmonized interpretative standards, the enforcement of *lex superior derogat legi inferiori* remains uneven and unpredictable. This condition contributes to sustained legal uncertainty and weakens the rule of law by undermining confidence in judicial institutions as consistent arbiters of normative supremacy.

Low Legislative Quality and Administrative Compliance

The findings also indicate that low legislative quality is a significant structural factor contributing to the weak application of *lex superior derogat legi inferiori* within the Indonesian legal system. Normative analysis reveals that many conflicting regulations originate from inadequate drafting techniques, ambiguous normative formulations, and insufficient engagement with existing legal frameworks. These deficiencies suggest that regulatory drafters often fail to internalize hierarchical discipline as a substantive requirement of lawmaking. As noted in Indonesian legislative studies, weaknesses in legislative technique undermine the coherence of the regulatory system and facilitate the production of norms that are formally valid yet substantively inconsistent with superior laws (Indrati, 2007).

A critical source of low legislative quality is the limited use of comprehensive regulatory impact assessments during the drafting process. Regulations are frequently enacted without systematic evaluation of their hierarchical position, legal implications, or interaction with existing norms. This omission reflects a procedural approach to legislation that prioritizes speed and sectoral objectives over normative coherence. Such practices contradict the rational-legislative ideal, which holds that lawmaking should be grounded in careful analysis, structured reasoning, and anticipation of legal consequences in order to ensure legal certainty and justice (Radbruch, 2006).

The absence of rigorous analytical foundations in legislative drafting also leads to excessive delegation of authority and overly broad regulatory discretion. Norms are often framed in vague or open-ended language, enabling administrative bodies to interpret and implement regulations in ways that exceed statutory mandates. This condition not only weakens hierarchical control but also increases the risk of arbitrary governance, as administrative action becomes detached from clearly defined legislative intent. From a hierarchical perspective, such ambiguity erodes the vertical coherence of the legal system.

Administrative practice further intensifies these structural weaknesses. The analysis demonstrates that administrative officials frequently continue to apply hierarchically flawed regulations until they are formally annulled by judicial decisions. This practice reflects a formalistic compliance culture that equates legal validity with procedural enactment rather than substantive conformity with superior norms. As a result, administrative action is guided by inferior regulations even when their hierarchical legitimacy is doubtful, contradicting the principle of *wetmatigheid van bestuur*, which requires that all administrative action be grounded in lawful and hierarchically valid norms (Hadjon, 2017).

Consequently, *lex superior derogat legi inferiori* loses much of its normative force at the administrative level and operates primarily as a retrospective standard invoked after judicial intervention. Instead of guiding legislative drafting and administrative conduct proactively, the principle is applied only once legal disputes have arisen and uncertainty has already materialized. This diminishes its effectiveness as an instrument for ensuring legal certainty and regulatory discipline, reinforcing the systemic weaknesses that undermine hierarchical coherence in the Indonesian legal system.

Implications for Legal Certainty and Normative Consistency

The cumulative effects of weak enforcement of hierarchical principles have profound and far-reaching implications for legal certainty within the Indonesian legal system. The findings demonstrate that persistent normative conflicts generate confusion among law enforcement agencies, administrative bodies, and the public regarding which legal norms should be applied in concrete situations. When inferior regulations contradict superior norms yet continue to operate, legal actors are placed in a position of normative ambiguity, undermining the law's capacity to function as a reliable guide for conduct. This condition directly compromises the predictability of law, which Radbruch identifies as a core component of legal certainty and an essential precondition for justice in a constitutional state (Radbruch, 2006).

Judicial decisions analyzed in this study further illustrate that inconsistent application of hierarchical norms weakens the legitimacy of regulations. Frequent annulments of regulations through judicial review signal systemic deficiencies in legislative governance, suggesting that flawed norms are routinely enacted without adequate scrutiny. Such patterns erode public trust in legal institutions and the lawmaking process, as citizens and regulated entities may perceive the legal system as unstable or unreliable. As Asshiddiqie (2010) argues, the authority of law in a constitutional state depends not only on formal legality but also on the perceived rationality and consistency of normative production.

The legitimacy crisis is compounded by the institutional consequences of weak preventive control. The increasing volume of judicial review cases reflects the inability of legislative and administrative mechanisms to ensure normative consistency at the pre-enactment stage. Courts are compelled to resolve conflicts that should have been prevented through effective harmonization and drafting discipline. This overreliance on judicial review transforms courts into primary regulators of normative coherence, a role that exceeds their corrective function and strains institutional capacity.

Judicial overload resulting from excessive norm review has tangible effects on institutional efficiency and the timely delivery of justice. Delays in judicial resolution prolong periods during which hierarchically defective regulations remain in force, perpetuating legal uncertainty for individuals, administrative bodies, and economic actors. This dynamic undermines the responsiveness of the legal system and weakens confidence in its ability to provide timely and effective legal protection. The prolonged coexistence of conflicting norms also increases the risk of inconsistent administrative practice and selective enforcement.

Taken together, these findings confirm that legal certainty depends not merely on the formal existence of hierarchical principles such as *lex superior derogat legi inferiori*, but on their effective and consistent implementation across legislative, judicial, and administrative domains. The weak application of this principle constitutes a systemic threat to normative consistency, legal predictability, and institutional credibility within the Indonesian legal system. Without meaningful reforms aimed at strengthening preventive harmonization, legislative quality, and institutional coordination, the hierarchy of norms risks remaining an abstract ideal rather than an operational foundation of the rule of law.

CONCLUSION

This study concludes that the principle of *lex superior derogat legi inferiori*, despite its formal entrenchment in Indonesia's constitutional and statutory framework, has not been effectively implemented in regulatory practice, resulting in persistent normative conflicts and weakened legal certainty. The findings reveal that ineffective preventive harmonization, fragmented judicial review authority, low legislative quality, and formalistic administrative compliance collectively undermine the hierarchical integrity of the legal system, causing the principle to function primarily as a reactive judicial mechanism rather than a preventive normative safeguard. Consequently, legal certainty is compromised through regulatory inconsistency, reduced legitimacy of legislation, increased reliance on judicial review, and uncertainty in governance and economic activity. Strengthening proactive regulatory harmonization, improving legislative drafting standards, and enhancing institutional coordination are therefore essential to restoring the normative function of *lex superior derogat legi inferiori* and ensuring a coherent, predictable, and credible legal order in Indonesia.

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