

THE HARMONIZATION OF MINISTERIAL REGULATIONS AND NON-MINISTRY GOVERNMENT INSTITUTION REGULATIONS IN PERSPECTIVE NATIONAL LEGAL SYSTEM

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Abstract

The Harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions is not regulated in detail in Law Number 12 of 2011 concerning the Establishment of Legislations as amended by Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning Formation of Legislation. Harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions is still needed to avoid overlapping and conflicting norms. One way to fill the legal vacuum from the absence of detailed regulations is by issuing the Minister of Law and Human Rights Regulation Number 23 of 2018 concerning the Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Designers of Legislative Regulations. Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-Structural Institutions by Designers of Legislation. However, it is not only the harmonization process that needs attention but the process of forming good laws and regulations starting from planning, drafting, stipulating and enacting regulations must also be applied to Ministerial Regulations and Regulations of Non-Ministerial Government Institutions, so that the position of Ministerial Regulations and Government Institution Regulations Non-Ministry in the National Legal System is really comprehensive and thorough.

Keywords: Harmonization, Ministerial Regulations, Institutional Regulations, National Laws

CHAPTER I. INTRODUCTION

A. Background

Ministerial Regulations and Regulations of Non-Ministerial Government Institutions have an important and strategic position in the national legal system, because Ministerial Regulations and Regulations of Non-Ministerial Government Institutions are regulated in Article 8 Paragraph (1) of Law 12 of 2011 concerning the Establishment of Legislations that reads:

“Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, the Minister, agency, institution, or commission of the same level established by law or by the Government on the orders of the Act, the Provincial People's Representative Council, the Governor, the Regency/City Regional People's Representative Council, the Regent/Mayor, the Village Head or the equivalent.”

Therefore, the position of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions is recognized as one of the elements of the national legal system that is generally accepted and binding.

It is further stated in Article 8 paragraph (2) of Law 12 of 2011 concerning the Establishment of Legislation that ministerial regulations and regulations of non-ministerial government institutions are formed based on delegations from higher laws and regulations or because of the attribution or authority attached to them. ministers as assistants to the president and also heads of non-ministerial government agencies or institutions. Due to the nature of delegation, all content contained in ministerial regulations and non-ministerial government agency regulations is a further elaboration of higher legislation.

As part of the national legal system, hierarchically the laws and regulations exist, the existence of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions has a central position in the perspective of national law and plays an important role in organizing and realizing the development of a national law that is equitable, just and prosperous. In

addition, Ministerial Regulations and Non-Ministerial/Substantive Government Institution Regulations are expected to be able to provide direction for ministers and heads of non-ministerial Government agencies in exercising their powers in accordance with the ideals and goals of the State based on Pancasila and the Constitution of the Republic of Indonesia in 1999. 1945.

Legal politics as the direction of national legal development, plays a major function in the formation of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions. In the context of legal politics, law is a tool in the legal system to achieve the State's goals as stated in the National Long-Term Development Plan and National Legislation Program.

Ministerial Regulations and Regulations of Non-Ministerial Government Institutions as a form of delegation regulation or orders from higher regulations, are expected to be the backbone of the implementation of national law development. However, in its development, the number of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions has reached almost twenty thousand.

Based on regulatory data in the database of the Directorate General of Legislation, Ministry of Law and Human Rights, the number of Ministerial Regulations is 15,652 and Regulations of Non-Ministry Government Institutions are 4,127. From the data on these laws and regulations, when added together, there are as many as 19779 Ministerial Regulations and Regulations of Non-Ministerial Government Institutions.¹

Based on the large number of Ministerial Regulations and Non-Ministerial Government Institution Regulations, it is considered that they are no longer proportional or even too many so that they tend to be over-regulated. In addition to being over-regulated, there is also the possibility that Ministerial Regulations and Non-Ministerial Government Institution Regulations overlap with each other (overlapping) and cause conflicting norms.

Based on Law Number 12 of 2011 concerning the Formation of Legislations, it is stated that the process of forming laws and regulations basically starts from planning, drafting, discussing, ratifying/stipulating, and enacting legislation. Among the series of processes above, there is a process that is not explicitly stated but has a very important role, namely the harmonization process. The harmonization process is a process that is in the preparation process. The harmonization is intended to prevent or reduce the overlapping of laws and regulations. Thus,

¹ Taken From *database* peraturan perundang-undangan pada situs yang dikelola Direktorat Jenderal Peraturan Perundang-Undangan. Lihat: Direktorat Jenderal Peraturan Perundang-Undangan, <https://www.peraturan.go.id> (accessed 29 April 2021)

the products of laws and regulations produced are efficient and successful for the realization of the value of legal certainty in society, nation and state.

The harmonization process at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions carried out by the Designer of Legislation requires a juridical basis because Law Number 12 of 2011 concerning the Establishment of Legislations does not regulate harmonization at the level of Ministerial Regulations and Regulations Non-Ministry Government Agencies. At the level of implementing regulations, Law Number 12 of 2011 concerning the Establishment of Legislation, namely Government Regulation Number 59 of 2015 concerning the Participation of Legislative Designers in the Establishment of Legislation and Development and Presidential Regulation Number 87 of 2014 concerning Implementing Regulations. -Law Number 12 of 2011 concerning the Establishment of Legislation is also not regulated regarding harmonization² at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions.

Therefore, the Ministry of Law and Human Rights as the ministry that carries out government affairs in the field of law and human rights stipulates Regulation of the Minister of Law and Human Rights Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Designers of Legislation, to answer the needs related to the juridical basis in order to carry out harmonization at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions.

However, at the implementation level in the field, there have been rejections from several ministries and non-ministerial government agencies against the Regulation of the Minister of Law and Human Rights Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Designers. Legislation.

One of the ministries that refused, for example, was the Ministry of Home Affairs which sent a letter requesting the revocation of Regulation of the Minister of Law and Human Rights Number 22 of 2018 and Regulation of the Minister of Law and Human Rights Number 23 of 2018 directly to the Minister of Law and Human Rights Number 180/7182 /SJ on September 19 2018. In addition, the Drafter of Legislation from the Ministry of Home Affairs also submitted an objection request through the right of judicial review to the Regulation of the Minister of Law

² Soegiyono, tanpa tahun, *Pentingnya Harmonisasi Pembentukan Peraturan Perundang-undangan*, Makalah : Kajian Kebijakan dan Hukum Kedirgantaraan, Pusat Pengkajian dan Informasi Kedirgantaraan Lembaga Penerbangan dan Antariksa Nasional

and Human Rights of the Republic of Indonesia Number 23 of 2018 to the Supreme Court. They argue that the harmonization activities carried out by the Ministry of Law and Human Rights are considered to hamper the performance of state institutions, ministries, non-ministerial government agencies, and non-structural institutions in drafting laws and regulations in each sector. The applicants consider that the involvement of the drafters of laws and regulations of the Ministry of Law and Human Rights is ineffective because they only have general competence in drafting laws and regulations and are not equipped with technical competence in each field of government affairs as well as the drafters of laws and regulations in the scope of internal state agencies, ministries, non-ministerial government agencies, and non-structural institutions.³

The above opinion was then added by the applicant for judicial review that the mechanism for the formation of laws and regulations, the authority and role of each state institution and local government in the formation of laws and regulations has been regulated in Law Number 12 of 2011 in conjunction with Presidential Regulation Number 87 2014. The authority of the Minister of Law and Human Rights in carrying out harmonization of laws and regulations based on Law Number 12 of 2011 is limited to harmonization of Laws, Government Regulations, and Presidential Regulations. Thus, in the opinion of the applicant, the application of the Regulation of the Minister of Law and Human Rights Number 23 of 2018 can damage the national legal system that is planned, integrated, and sustainable which is framed in Law Number 12 of 2011 concerning the Establishment of Legislation which is a definite, standard, and standard methods and methods that bind all authorized institutions in forming laws and regulations.⁴

Article 3 of the Regulation of the Minister of Law and Human Rights Number 23 of 2018 reads as follows:

Article 3

"The Draft Ministerial Regulation, Draft Regulation of Non-ministerial Government Institutions, or Draft Regulations from Non-structural Institutions as referred to in Article 2 shall be submitted in writing to the Director General as the Design Supervisor for harmonization";

³ Putusan Mahkamah Agung Nomor 15P/HUM/2019, Perihal Hak Uji Materiil Terhadap Peraturan menteri dan peraturan lembaga non-kementerian dan peraturan lembaga non-kementerian Hukum Nomor 23 Tahun 2018, Date 4 April 2019.

⁴ Ibid.

The article above is considered contrary to Article 2 and Article 3 of Government Regulation Number 59 of 2015 concerning the Participation of Legislative Designers in the Formation of Legislation and Development which reads as follows:

Article 2

- (1) The designer is domiciled as the functional technical executor of the Designer in the work unit that has the task of establishing laws and regulations and compiling other legal instruments;
- (2) The work units as referred to in paragraph (1) are located within state institutions, ministries, non-ministerial government agencies, non-structural institutions, Provincial Governments, and Regency/Municipal Governments;

Article 3

- (1) The designer has the task of preparing, processing, and formulating Draft Laws and Regulations as well as other legal instruments;
- (2) In carrying out the tasks as referred to in paragraph (1), the designer must harmonize;

Because it changed the legal subject which was originally “...The designer must carry out harmonization” to “... submitted in writing to the Director General as the Designer Advisor to be harmonized”. Designers referred to in Article 3 of Government Regulation Number 59 of 2015 are Designers who are in the environment of state institutions, ministries, non-ministerial government agencies, non-structural institutions, Provincial Governments, and Regency/Municipal Governments so they are not addressed to Designers who are in the Ministry of Law and human rights; Government Regulation Number 59 of 2015 does not specifically delegate activities to harmonize laws and regulations to the Director General of Legislation, Government Regulation Number 59 of 2015 only regulates orders to state institutions, ministries, non-ministerial government institutions, non-structural institutions, local governments Province, and Regency/Municipal Government to involve the Drafters of Legislations in every stage of the formation of statutory regulations. The participation of the Legislative Designer is a formal requirement in each stage of the formation of laws and regulations.

Government Regulation Number 59 of 2015 also stipulates that if a state institution, ministry, non-ministerial government agency, non-structural institution, Provincial Government, and Regency/City Government does not yet have a Legislative Designer, it can include Designers from institutions, ministries, or other Regional Governments to fulfill the formal requirements. Thus, the implementation of the Regulation of the Minister of Law and Human

Rights of the Republic of Indonesia Number 23 of 2018 is considered to underestimate the role of drafters of legislation in the internal scope of each government agency.⁵

In writing this scientific paper, the author tries to raise the implementation of the harmonization process at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions carried out by the Ministry of Law and Human Rights in the perspective of the National Legal System.

B. Problem Formulation

How is the implementation of the process of harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions carried out by the Ministry of Law and Human Rights in the perspective of the National Legal System?

CHAPTER 2. EXPLANATION

Law Number 12 of 2011 was established with the aim that the process of the formation of laws and regulations is in accordance with the principles of the formation of good laws and regulations. These principles include clarity of purpose, proper institutional or official formation, compatibility between types, hierarchies, and content, can be implemented, usability and effectiveness, clarity of formulation, and openness. The formation of good laws and regulations is essentially to realize Indonesia as a state of law, the State is obliged to carry out the development of national law which is carried out in an integrated and sustainable manner in the national legal system which guarantees the protection of the rights and obligations of all Indonesian people based on the Constitution of the Republic of Indonesia in 1945 (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia). With so many Ministerial Regulations and Non-Ministerial Government Institution Regulations that tend to be over-regulated, these contradict each other and overlap with both parallel and higher regulations. The discrepancy between one regulation and another will clearly lead to contradictions that lead to legal uncertainty. If a statutory regulation that is formed fails to provide legal certainty for the community, it will be difficult to implement legal order in society. This is in accordance with the Principle of legality by Lon L. Fuller where good law must avoid contradictions and be constant.

To fulfill the community's need for good laws and regulations, it is necessary to make regulations regarding the formation of laws and regulations which are carried out in a definite, standard and standard way and method that binds all institutions authorized to form laws and

⁵ Ibid.

regulations.⁶ In relation to the legal norm formulation system in Indonesia, if a legal comparison is made according to Hans Kelsen, namely based on (stufentheorie) thought/theory of the level of norms, according to Hans Nawiasky based on (die theorie vom stufentordnung der rechnormen) the theory of legal norms level, the system of state legal norms The Republic of Indonesia adheres to both ideas/theories regarding the system of norms. In this case, Pancasila as the highest source of law in the hierarchy of formation of legal norms under it and the basic norms of state administration. Thus, in the formulation of a real/concrete legal rule/norm in the formulation of a real/concrete legal rule/norm in a statutory regulation, it is obligatory to refer to and follow a legal principle/principle. One of these legal principles/principles is the principles of establishing good laws and regulations. The legal principles/principles are intended as a reference and direction for pouring the contents of the regulations into the right form and arrangement, in accordance with the use of methods, and following a predetermined formation process.⁷

Along with the existence of many applicable laws and regulations that can lead to the emergence of overlapping and conflicting laws and regulations, over time it will pose a threat to legal certainty, in addition to legal certainty it will also reduce the time and energy to understand the applicable rules.⁸

In the process of their formation, Ministerial Regulations and Regulations of Non-Ministerial Government Institutions need to go through an initial procedure as a preventive measure from the ineffective or ineffective use of a legal product that is formed in the future. This effort is carried out by conducting a review of the draft Ministerial Regulations and Regulations of Non-Ministerial Government Institutions through a process known as harmonization of laws and regulations.⁹

From the theoretical aspect of harmonization of laws and regulations, the development of legal harmonization has actually existed in legal science and legal practice in the Netherlands after World War II and has been more developed since the 1970s. Even in Germany, the development of legal harmonization has been around since 1902. The harmonization of law that developed in legal science in the Netherlands is used to show that in the world of law, government policies

⁶ Maria. F Indrati, *Ilmu Perundang-undangan : Jenis Fungsi dan Materi Muatan*, Yogyakarta: Kanisius, 2014, p. 57

⁷ Sudikno Mertokusumo, *Penemuan Hukum (Sebuah Pengantar)*, Liberty, Yogyakarta, 2006, p.11

⁸ E. Prawalita Widiyanti dan N. Adi Utomo, *Menjejakkan legislasi Berbasis HAM*, Komisi Nasional Hak Asasi Manusia, Jakarta, 2016, p. 84

⁹ Look Article 58 ayat (1) Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan

and the relationship between the two there are differences that result in disharmony. Rudolf Stammler argues that the purpose or function of law is the harmonization of various purposes, goals and interests between individuals and individuals and individuals with society. On the other hand, the National Legal Development Agency of the Ministry of Law and Human Rights, provides an understanding of legal harmonization as a scientific activity towards the process of harmonization (alignment/conformity/balance) of written law that refers to philosophical, sociological, economic and juridical values.¹⁰

In Indonesia, the problem of legal harmonization has also been initiated by Soepomo, an expert on Indonesian customary law who had a major role in formulating the 1945 Constitution of the Republic of Indonesia. Soepomo suggested how to link the Indonesian legal system with legal ideas originating from the western legal system, as following:¹¹

“... the essence of the problem now is how to unite the ideals of the East with the ideals and modern needs originating from the West so that they become a harmony. The only effective answer seems to be: the assimilation of Western notions in a form that is compatible with the structure of Indonesian society itself.”

The idea above shows that the Indonesian legal system thinks about the problem of harmonization with modern law through the assimilation method of understanding the concept of western law which is in accordance with the structure of Indonesian society itself. The idea of legal harmony with the pattern of assimilation is implicit in the transitional provisions of the 1945 Constitution of the Republic of Indonesia, not only meaning that the law inherited from the Netherlands was only to fill the legal vacuum that occurred because of the independence of the Republic of Indonesia. This can also be interpreted to provide an opportunity for the Indonesian people to harmonize colonial law with the needs of the community in stages, according to the procedures and procedures for the formation of national law.

Harmonization is ideally carried out at the time of drafting laws and regulations. The harmonization of draft laws includes 2 (two) aspects as follows:¹²

a. Harmonizing the content of the draft law with:

- 1) Pancasila;
- 2) the 1945 Constitution of the Republic of Indonesia/ vertical harmonization;

¹⁰ Mohammad Zamroni, <http://www.djpp.kemenkumham.go.id/htn-dan-puu/1156-menakarkorelatifitasantara-harmonisasi-peraturan-daerah-dengan-hak-uji-materiil-mahkamah-agung.html>, Kementerian Hukum dan HAM RI, 14 November 2019

¹¹ Badan Pembinaan Hukum Nasional, 2008, Tiga dekade Prolegnas dan Peran BPHN., p.162.

¹² AA. Oka Mahendra, Harmonisasi Peraturan Perundang-undangan, <http://www.djpp.depukumham.go.id/htn-dan-puu/421-harmonisasi-peraturan-perundangundangan.html> accessed 7 Januari 2021

- 3) Laws/horizontal harmonization;
- 4) The principles of laws and regulations:
 - a) the principle of formation;
 - b) the principle of charge material;
 - c) other principles in accordance with the legal field of the relevant draft law.

b. Harmonization of draft laws with techniques for drafting laws and regulations which include:

- 1) the framework of laws and regulations;
- 2) special matters;
- 3) variety of languages;
- 4) form of draft legislation.

Harmonization is carried out in the following way:¹³

- a. ensure that the draft law includes the philosophical values of Pancasila and the articles in the draft law do not conflict with these values.
- b. ensure that the articles of the 1945 Constitution of the Republic of Indonesia ordering its formation have been correctly stated and ensure that the draft law is in line with the principles of state administration according to the Constitution.
- c. use legal terms or legal meanings consistently.
- d. examine carefully whether the content of the draft Law is in harmony with other related laws.
- e. Ensure that the principles of legislation, both the principle of formation, the principle of content material, and other principles related to the legal field regulated in the draft law, have been properly accommodated in the draft law.
- f. Ensure that technical guidelines for drafting laws and regulations have been consistently followed.
- g. Ensure that the language used in formulating norms in the draft law is in accordance with good and correct Indonesian language rules and uses the right, clear and definite choice of words.

Based on the above, in essence, the harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions in the Perspective of the National Legal System is the same as the concept in the harmonization process at the Law level. In Law Number 12 of 2011 concerning the Establishment of Legislation, there is no regulated regarding

¹³ Ibid.

harmonization at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions. Similarly, at the level of implementing regulations for Law Number 12 of 2011 concerning the Establishment of Legislation, namely Government Regulation Number 59 of 2015 concerning the Participation of Legislative Designers in the Establishment of Legislation and Development and Presidential Regulation Number 87 of 2014 concerning Regulations The implementation of Law Number 12 of 2011 concerning the Establishment of Legislation is also not regulated regarding harmonization at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions. Thus, legal instruments are needed so that harmonization can be carried out at the level of ministerial regulations and regulations of non-ministerial government institutions. To answer these legal needs, the Ministry of Law and Human Rights established the Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Designers of Legislation so that the process harmonization at the level of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions can be carried out.

CHAPTER III. CONCLUSION

Based on the problems formulated and the discussion, it can be concluded that the harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions is not regulated in detail in Law Number 12 of 2011 concerning the Establishment of Legislation as amended by Law Number 15 of 2019 concerning Amendment to Law Number 12 of 2011 concerning the Establishment of Legislation. Harmonization of Ministerial Regulations and Regulations of Non-Ministerial Government Institutions is still needed to avoid overlapping and conflicting norms. One way to fill the legal vacuum from the absence of detailed regulations is by issuing the Minister of Law and Human Rights Regulation Number 23 of 2018 concerning the Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-ministerial Government Institutions, or Draft Regulations from Non-structural Institutions by Designers of Legislative Regulations.

Minister of Law and Human Rights Regulation Number 23 of 2018 concerning Harmonization of Draft Ministerial Regulations, Draft Regulations of Non-Ministerial Government Institutions, or Draft Regulations from Non-Structural Institutions by Designers of Legislation However, it is not only the harmonization process that needs attention but the process of forming good laws and regulations starting from planning, drafting, stipulating and

enacting regulations must also be applied to Ministerial Regulations and Regulations of Non-Ministerial Government Institutions, so that the position of Ministerial Regulations and Government Institution Regulations Non-Ministry in the National Legal System is really comprehensive and thorough.

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