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The Norm Dispute Resolution Through Mediation

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***Abstract*— Indonesia has identified itself as the state of law (rechtsstaat). The principle of the rule of law undoubtedly underlies the life of the state and nation by embodying hierarchical legal norms culminating in constitution. However the inconsistency between the laws and regulations is inevitable in constitutional practice thus the Supreme Court and Constitutional Court are ruled to examine legal products from the legislative and executive institutions under the mandate of the Act of 1945. Nevertheless in the progress, Ministry of Law and Human Rights issued a policy that norm disputes under the Laws can be resolved through mediation by the Ministry. Therefore, this study aims to analyze the legality and fulfillment of the value of justice in the practice of norm dispute resolution through mediation. This study uses normative research method and is based on the theory of hierarchical relation of legal norms and the theory of concept of law. The result of the study is in spite of the effectiveness, mediation as an alternative resolution of norm disputes contradicts with the higher legislations that the regulation needs to be readjusted.**

Keywords*: *norm dispute resolution, mediation, ministry of law and human rights

I. INTRODUCTION

The supremacy of law is a logical consequence from the existence of Indonesia as a legal state remarked as various legal norms that are used as guidelines in the relation between citizens, between citizens and the state, and between state institutions. To begin with, the understanding that Republic of Indonesia was concepted after rule of law was implicitly contained in a series of provisions of the Constitution of the Republic of Indonesia of 1945 before amendments, or known as UUD 1945 by the local people [1]. The formulation of rule of law is implied in the Annotations of UUD 1945 regarding the Government System which reads "... As Indonesian State is based on law (*rechtstaat*), it is not founded on power alone (*macthstaat*) ...". After amended, the concept of rule of law is written explicitly and directly in Article 1 paragraph (3) of UUD1945 that the State of Indonesia is a state based on the rule of law.

The view of Indonesian rule of law is different from the concept of rule of law adopted by Anglo Saxon and Continental Legal System. Ideology of Pancasila built on Indonesian civil law concept. Pancasila as the state fundamental norm was born and developed from the perspective of life and historical background of the nation thus the role of the state is quite large for the welfare of its people, as written in paragraph IV of UUD 1945. Therefore, Indonesia is a welfare state based on rule of law. Friedrich Julius Stahl describes four elements of *rechtstaat* which include the existence of human rights protection, separation or division of power, government based on rules-regulations (*wetmatigheid van bestuur*), and a free trial. In its development, the state must carry out public interests accordingly this concept has formed as what is known as a welfare state (*verzorgingstaat*) [1]. In accordance with legality principle as the result of legal state, the value of Pancasila is further formulated in regulations which is now hierarchically formed in Article 7 of Law No.12 of 2011 concerning the Establishment of Legislation (Law 12/2011), including:

a. UUD NRI Tahun 1945;
b. Ketetapan Majelis Permusyawaratan Rakyat;
c. UU/Peraturan Pemerintah Pengganti Undang-Undang;
d. Peraturan Pemerintah (PP);
e. Peraturan Presiden (Perpres);
f. Peraturan Daerah (Perda) Provinsi;
g. Perda Kabupaten/Kota.

Based on the provisions of Article 8 paragraph (1) of Law 12/2011, in addition to the above laws and regulations, the regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the

Constitutional Court, the Financial Audit Board, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions or commissions established by the Act or Government at the behest of the Law, Provincial Regional Representatives, Governors, City / Municipality Regional Representatives, Chief of City / Municipality, Village Heads or the same level includes the types of legislation.

Legal studies on the hierarchy of legislation are closely related to the Theory of Structures (*Stufenbau Theorie*) developed by Hans Kelsen and Hans Nawiasky. In talking about law as a scientific discipline, Hans Kelsen revealed that the validity of a law lies in its conformity with other norms, especially the highest norms of grund norms [2]. Law as a unity is a series of hierarchical relationships between norms with one another that must not be contradictory. However, there are often inconsistencies between laws and regulations in practice, both similar and different levels. Therefore, there are restrictions that limit the interests and rights of all parties in order to avioid the arbitrariness of policy-making institutions. (**Hosein, 2019**). In case of a statutory regulation deemed contrary to a higher regulation, in order to ensure the validity of the regulation, the provisions involved will be reviewed by the judicial institution, which is called judicial review [3].

Post-reformation that resulted in the supremacy of the People's Consultative Assembly (MPR) shifted to constitutional supremacy, fundamental changes took place which impacted in an institutional and constitutional mechanism statutory regulations review. The Institute of Justice was established to address the possibility of disputes between policy-making state institutions which denoted the equality and and the implementation of checks and balances between each power. SInce legal products that are mostly used as footholds are produced by the executive and legislative institutions, the Supreme Court (MA) and the Constitutional Court (MK) are formed in a strategic position to carry out a normative control until all rules correspond vertically with UUD 1945 and the Act [4].

Indonesia as a legal state adheres to three models of judicial review, namely the judicial review against the Constitution by the Constitutional Court, reviewing of legislation under the law against the Act by the Supreme Court, and reviewing of decisions and/or actions of administrative bodies or officials state by the State Administrative Court [5].Meanwhile, Ministry of Law and Human Rights (Kemenkumham) ruled

Peraturan Menteri Hukum dan Hak Asasi Manusia Number 32 Year 2017 (Permenkumham 32/2017) concerning Procedures for Settling Disputes in Legislation through the Non-Litigation Way or translated as *Tata Cara Penyelesaian Sengketa Peraturan Perundang-undangan melalui Jalur Nonlitigasi* which has been amended by Permenkumham No. 2 of 2019 concerning the Settlement of Laws and Regulations Disharmonies through Mediation ("Permenkumham 2/2019") or known as *Permenkumham Penyelesaian Disharmoni Peraturan Perundang-undangan* which opens alternative paths for resolving conflict of laws regulations under the Act. Under Article 1 paragraph of the Supreme Court Regulation No. 1 of 2016 concerning Procedure for Mediation in Courts, mediation is a method of resolving disputes through the negotiation process to obtain an agreement of the Parties assisted by the Mediator. Specifically, the Ministry of Law and Human Rights regulates in Article 1 paragraph (3) Permenkumham 2/2019 that mediation is an attempt to resolve outside the court against disharmony in legislation carried out by the Director General of Legislation ("DG PP") Kemenkumham. A conflict is risen as the judicial review which has been the realm of judicial power through the mechanism of litigation, is now actually carried out by the holders of executive power in non- litigation, namely mediation. The Government's efforts in structuring this regulation break down the provisions of the Constitution and other related laws and regulations. Based on the description of this problem, the author is interested in writing this research with the title "NORM DISPUTE SETTLEMENTTHROUGHMEDIATION".

II. ANALYSIS

Reviewing legislation or often known as toetsing (tregulations review) is an authority to assess whether a statutory regulation is appropriate or contrary to a higher degree of regulation, and whether a certain authority has the right to issue a certain regulation [6]. The reviews carried out are normative, namely reviewing of general-abstract norms or prizes contained in the regulations, not testing certain material or physical actions or actions. Norm is a measure or benchmark or guideline for someone in acting or behaving in society [3]. General-abstract norms mean the norms aimed at the general public and things or actions that are regulated are not determined [7]. Theoretically, legislation review is distinguished by judicial review, legislative review, and executive review. Judicial review is externally carried out by institutions outside the regulatory body, both regulations made by the legislature and the executive through court proceedings. On the other hand, legislative review and executive review are internal tests carried out on regulations that are made by the institution that conducts the tests themselves. Legislative review is conducted by changes, reimbursement, revocation, or review of the relevant regulations by the legislative body while the

executive review is held following the objection attempts (*doleansi*) and administrative appeal (*administrative beoref*) [8].

In 2017, the Ministry of Law and Human Rights published a new breakthrough by promulgating Permenkumham 32/2017 which was amended by Permenkuham 2/2019 regarding the testing of legislation under the Law through mediation held by the Directorate General of PP Kemenkumham. The scope of dispute norms included in the object of the Permenkumham is the contradiction of laws and regulations both vertically and horizontally which cause conflicts of legal norms, conflicts of authority between ministries / institutions and local governments that cause injustice to the community and business actors and hamper the investment climate, business and national and regional economic activities can be submitted for dispute resolution applications through non-litigation channels, as stipulated in the provisions of Article 2 paragraph (1) Permenkumham 32/2017. In this case, the community, both individuals, groups, government agencies, and legal entities, can submit a request for inspection of legislation that is considered to cause disharmony or contradiction with other laws and regulations. [9] Provisions of Article 2 of Permenkumham No. 2/2019 then limits the types of legislation that can be requested for examination by the Ministry of Law and Human Rights including MinisterialRegulations, Non-ministerial Government Institution Regulations, Non-structural Institution Regulations, and Regional Regulations. Judging from the formulation of the regulation, the principle of transparency [10] and efficiency seems guaranteed through this pathway. After the filing of the application successfully registered, 7 (seven) days later [11] the mediation can be held in a meeting between the applicant and the related party at the maximum 3 (three) times for each request by the five Examining Council, namely three persons from the Ministry and two from the academic elements. As written in the provisions of Article 14 of Permenkumham No. 2/2019, the results of mediation can be in the form of an agreement between the parties and recommendations prepared by the Minister of Law and Human Rights based on the mediation report.

This policy has drawn criticism from state experts. The reason is that the material for the Permenkumham content is considered inconsistent with the authority of the Ministry of Law and Human Rights and goes beyond the Supreme Court's judicial review authority. In accordance with the concept of the State of Pancasila Law, all legal products produced, either because of the laws of the constitution, implementing the law, and in carrying out their duties and functions as stipulated in the law, the material must be vertically in accordance with the law basic laws and laws. The way to make it happen is through normative control, that is, through testing by the Constitutional Court and the Supreme Court [8]. As written in Article 24 A UUD 1945 jo. Article 20 paragraph (2) letter (b) of Law No. 48 of 2009 concerning Judicial Power (Judicial Power Law) jo. Article 9 paragraph (1) Law No. 12 of 2011 concerning Establishment of Legislation, the Supreme Court has the authority:

a. adjudicate at the level of appeal against the decision given at the last level by the court in all jurisdictions under the Supreme Court, unless the law stipulates otherwise;
b. examine the laws and regulations under the law against the law; and
c. other authorities granted by law.

In fact, the object of the related Permenkumham is the Supreme Court's authority of judicial review. Furthermore, based on Article 20 paragraph (3) of Law 4/2004, regarding the authority to examine statutory regulations under the law on the law, it is affirmed that the statement of inapplicable legislation as the results of the review can be ruled both in the examination of the appeal or based on a direct request to the MA. Article 31 paragraph (2) Law No. 5 of 2004 concerning Amendment to Law No. 14 of 1985 concerning the Supreme Court (MA Law) jo. Article 6 Supreme Court Regulation ("PERMA") No. 1 of 2011 concerning Maternal Review Rights states that after the examination, the Supreme Court has the authority to declare illegitimate legislation under the law for reasons contrary to the higher laws or the establishment does not meet the applicable provisions. In its decision, the Supreme Court can declare that the laws and regulations being filed for objection are not valid or not valid for the public, and order the relevant agencies and their revocation. [12] In the case of the Supreme Court arguing that the appeal was unwarranted, the Supreme Court rejected the request.[13]

Judging from the original intent of establishment of the Supreme Court to conduct material and formal tests of legal products under the Law in Constitution of the Republic of Indonesia of 1945, this authority is regulated concretely to foster checks and balances between various State High Institutions. The control system between high state institutions is realized effectively when the legislative and executive institutions rule regulations whereas judicial institutions are authorized to examine the relevant legal products that are considered by the public violate their rights, [14] by ratifying or canceling in accordance with the theory of balance of state institutions where institutions become monitors of the performance of other state institutions Lawrence Friedman [15]. In addition, the judiciary is a free and independent institution. [16] explained that more importantly, it is through its exercise of

judicial review that can protect the judicial system from undue external pressures. In line with Friedman's opinion, M a hf ud M D [17] revealed that the Law is a product of political hegemony or domination and political compromise among its forming actors so that the judicial institution has the authority to improve it through constitutional testing of its legality. On the contrary, mediating the disharmony of norms is under the authority of the Directorate General of PP Kemenkumham who is under and responsible for the President. [18]

Therefore, Kemenkumham is not an institution free from competing political wills. Moreover, the Ministry of Law and Human Rights which is domiciled under the President is not a high state institution like the MA so that these two institutions cannot be juxtaposed to develop similar authority. In addition, the object of mediation consists of regulations issued by the Minister, Non-Ministerial Government Institutions, Non-structural Institutions, and Regional Governments which are all executive institutions. Thus, the position of Kemenkumham which is equally in the executive domain is prone to cause conflicts of interest.

James Bradley revealed that if the legislature had ratified a bill that was unconstitutional and then had to decide the legal unconstitutionality, it was clearly dubious. The rationality of testing by the legislature here is questionable. In fact, it was not found that the dispute resolution under the Law was the duty, authority, or function of the Directorate General of PP along with the Ministry of Law and Human Rights in accordance with the provisions of Article 11 jo. Article 3 Presidential Regulation No. 44 of 2015 concerning the Ministry of Law and Human Rights (Perpres 44/2015). Even so, written in the consideration of Permenkumham No. 2/2019, the mediation arrangement by the Ministry of Law and Human Rights is stated in accordance with the duties and functions of the Directorate General of Kemenkumham, namely the formulation and implementation of policies in the fields of design, harmonization, enactment and publication, legislation litigation, facilitation of drafting legislation in the regions on request regions, and coaching legislative designers.[19] In practice, efforts to harmonize the laws and regulations have been implemented in each agency's law bureau or the Directorate of Harmonization of Laws and Regulations in the DG PP, as well as the settlement of norm disputes by the Litigation Directorate against non-harmonized legislation so that settlement mediation disharmony of regulations only creates an unnecessary burden. The absence of a legal standing for the implementation of norm dispute mediation by the Ministry of Law and Human Rights which has been included in the scope of the authority of Judicial Authority is the main problem.

On progress, the effectiveness of the Kemenkumham mediation results has been proven in several cases. One of them is the promulgation of ESDM Minister Decree No. 23 K / MEM / 2019 concerning Amendment to Decree of the Minister of Energy and Mineral Resources Number 1802 K / 30 / MEM / 2018 concerning Mining Business Permit Areas and Special Mining Business Permit Areas for the 2018 Period. cancel and declare invalid the fourth attachment in the ministerial decree which lists the Silo Block area as a gold mining area that is postulated to contradict Government Regulation No. 23 of 2010 concerning Business Activities so that they contain formal defects. As stated in the consideration of the Minister of Energy and Mineral Resources No. 23/2019, this revocation is a concretization of the results of the dispute resolution of legislation through a non-litigation path with the register number 31 / NL / 2018 within the Ministry of Law and Human Rights which is proposed by the Silo Regency Government. Even so, the agreement of the mediation parties was inseparable from being ignored. This is evidenced by an agreement between the Indonesian White Cigarette Manufacturers Association (Gaprindo) and the Bogor City Government on September 20, 2018 regarding the prohibition on displaying cigarette products in retail stores contained in Bogor City Regional Regulation Number 12/2009 concerning Non-Smoking Areas and Bogor Mayor Regulations (Perwali) Number 3/2014 as the derivative of the relevant Regional Regulation contradicts PP No. 109 of 2012 concerning Safeguarding of Materials Containing Addictive Substances in the Form of Tobacco Products for Health (PP No. 109/2012). In the minutes of the agreement on the non-litigation law case hearing, the parties agreed on a five-point agreement, including the relevant Regional Regulation to be adjusted to PP No. 109/2012 and Perwali will be revoked. Even though Regional Regulation No. 12/2009 is revoked, the Bogor City Regional Regulation Number 10/2018 concerning Non-Smoking Regions which is the replacement contains the same substance. Up until now, the effectiveness of mediation results has not been comprehensively studied, considering that research still needs to be carried out comprehensively on the results of mediation that has been issued by the Ministry of Law and Human Rights.

III. CONCLUSION AND SOLUTION

Alternative norm dispute resolution through mediation by the Directorate General of Laws and Regulations of the Ministry of Law and Human Rights regulated in Permenkumham No. 2 of 2019 concerning still raises inconsistencies with Article 24A of the 1945 Constitution of the Republic of Indonesia which mandates that judicial review of legislation under the Act be the authority of the Supreme Court. In addition, norm dispute

resolution goes beyond what is the duty, authority, or function of the DG PP along with the Ministry of Law and Human Rights as stipulated in the provisions of Article 11 jo. Article 3 Presidential Regulation No. 44 of 2015 concerning the Ministry of Law and Human Rights. Therefore, synchronization between the Permenkumham concerned with the regulations above is an urgency that needs to be realized. In addition, the Ministry of Law and Human Rights needs to formulate oversight institutions for the execution of the results of mediation so that the effectiveness of the mediation agreement and recommendations can be guaranteed.

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[10] Article 12 Permenkumham No. 2/2019.
[11] After the application has been registered, a copy of the application shall be submitted to the party relating to the dispute no later than 7 (seven) working days, in accordance with Article 8 of Permenkumham 2/2019. Along with this, the Director General sets out the Examining Board and the Chairperson of the Assembly to immediately determine the date of mediation no later than 7(seven) working days after the application is registered, as referred to in the provisions of Article 10 paragraph (1) Permenkumham 2/2019.
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