

COORDINATION AND HARMONISATION OF LEGISLATION

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A. INTRODUCTION

The development of legal substance or legislation in Indonesia is a never ending process reminding that the legislation is one of the main pillars for national law system. Nonetheless, the so-called "problematic" legislations still remain either as a result of the substance, the process, the procedure or the legal drafting. At least, there are three main problems in this subject, which are: (a) the overlapping and inconsistency of legislations; (b) the ambiguous formulation of legislation; and (c) the obstruction of laws implementation by their implementing regulation.

Those problems are caused by the process of legislation which disregards the importance of examination, coordination, synchronization and harmonization with other legislations. Therefore, one priority should be done to perform a national law development is to harmonize legislations. Such harmonization should be conducted systemically since the very beginning from preparing academic draft, formulating National Legislation Program, to drafting bills.

The planning is an important factor that is why the legislation formulation should be started from planning, arranged in a planned, organized, and systematic way, also supported by a certain way and method, and a standard which bind all competent law making institutions. Indonesian Law Number 10 Year 2004 concerning the Establishment of Legislation has stipulated that the planning of formulating legislations is conducted under a National Legislation Program called "Prolegnas".

Article 18 paragraph (2) of Law Number 10 Year 2004 stipulates that "harmonizing, enclosing, and consolidating the conception of the draft of law initiated by President, coordinated by a minister whose duty and responsibility in the field of legislation." This provision contains a consequence that the initiation of bills should pass a mechanism of harmonization which is usually conducted through a joint discussion of Interdepartmental Committee to avoid an arrangement overlapping in the draft of law (bill). For that reason, the *Prolegnas* has a very significant role so that the drafts of laws are not overlapped and contrary to one another.

The Minister for Law and Human Rights in conducting the duty of coordination in formulating *Prolegnas* delegates the National Law Development Agency (BPHN), while the duty of coordination in harmonizing the formulation of bills is delegated to Directorate General of Legislations (*Ditjen PP*).

This paper will explain the coordination and harmonization in establishing legislation in accordance with a topic suggested by the Committee.

B. DEFINITION AND HISTORY

Definition

By etymology, "**coordination**" means a way to administer an organization or activity so that a regulation and manner to be conducted are not in conflict or contradicted. (*Indonesian Dictionary*, Third Edition, 2005). While in terms of management, coordination is an activity to combine functions and resources in the system or organization, so that it can accomplish optimal result for the accomplishment of organization goals and objectives. In general, coordination interacts horizontally, though sometimes it interacts globally and vertically. In a vertical relation, the subject of coordination is the coordinator, while its object is those being coordinated. In relations with the 'legislations', the coordination is necessary to accomplish the synchronization in the process of formulation, establishment and implementation so that it can achieve optimal result.

"**Harmonization**" is originated from the word 'harmony', which means harmony, compatibility, synchronized.¹ In *Indonesian Dictionary* (2005) it is defined as an attempt to find harmony. In *Collins Cobuild Dictionary* (1991) it defines *harmonious* and *harmonize* as follow:

- A relationship, agreement etc. that is harmonious is friendly and peaceful.
- Things which are harmonious have parts which make up an attractive whole and which are in proper proportion to each other.
- When people harmonize, they agree about issues or subjects in a friendly, peaceful ways; suitable, reconcile.
- If you harmonize two or more things, they fit in with each other is part of a system, society etc.

The elements deducted from the definition of harmonization above, among others: (a) there are some oddity, conflicting things; (b) harmonizing conflicting things proportionally in order to establish a system; (c) a process or an attempt to realize a harmony, conformity, compatibility, and stability; (d) a cooperation between numerous factors in such a way those factors produce a unity of virtue.

The meaning of **harmonization of legislation** is the process or effort to realize harmony and suitability of principle and legal system that produce harmonious regulation (legal

system). BPHN defines the harmonization of law as follow:

Harmonization of law is a scientific activity towards a process of harmonization for written laws which refer either to values of philosophy, sociology, economy or juridical. In its implementation, the harmonization activity is a comprehensive study to a draft of legislation, with a purpose of identification whether the legislation draft, in all aspects, has reflected the harmony and suitability with other national legislations, with unwritten law existing in society, or with the international conventions and treaties, either bilaterally or multilaterally, which have been ratified by the Government of the Republic of Indonesia.²

The History of Harmonization

The development of law harmonization has emerged in the science of law and legal practice in the Netherlands after the World War II and more developed since the year of 1970s. Even in Germany, the development of law harmonization has emerged since 1902. The harmonization of law developed in the science of law in the Netherlands is used to indicate that in the field of law, the government policy and the relations between them, there is diversity that resulted in disharmony. **Rudolf Stammler** (1902) suggests that the purpose or function of the law is the harmonization of purpose, goals and interests between the individual and the individual and between individuals in the community.

In Indonesia, the issue of law harmonization has been initiated by **Soepomo**, an Indonesian customary law expert who has a major role in formulating the Constitution of 1945. Soepomo suggests how to link the Indonesian legal system with the idea of law from Western legal systems. He said: "...The core problem now is how to unite the ideals of the East with the ideals and the modern needs from the West so that becomes a harmony. The only effective answer it seems is: the assimilation of Western notions in the form of which is connected with the structure of Indonesian society itself."⁴

The above idea shows that the Indonesian legal system thinks about the harmonization problem using the modern law through a method of assimilating the western law conceptions and definitions suitable with the structure of Indonesian society itself.

The thinking about the harmony of law with such assimilation pattern is implicit under the transitional provisions of Constitution 1945 which is not only meant that the Dutch heritage law didn't just fill the vacuum of law because of the independence of the Republic of Indonesia, but it also can be meant to give a chance to Indonesia to harmonize the colonial law with the needs of society gradually according to the procedure and setting for the establishment of national law.

¹ M Dahlan al Barry, 1995, *Kamus Modern Bahasa Indonesia*, Yogyakarta: Arkola, p. 185.

² Moh. Hasan Wargakusumah, *Perumusan Harmonisasi Hukum tentang Metodologi Harmonisasi Hukum*, Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1996/1997, p. 37.

³ L.M. Gandhi, *Harmonisasi Hukum Menuju Hukum Yang Responsif*, Pidato Pengukuhan Guru Besar pada Fakultas Hukum UI, Jakarta, 14 Oktober 1995.

⁴ See, Herlien Boediono, *Het Evenwichtsbeginsel voor het Indonesisch Contractenrechten*, disertasi, 2001.

The arrangement on the harmonization of legislations post independence has been regulated under the Presidential Instruction (*Inpres*) Number 15 Year 1970 concerning the Preparing Bills and the Draft of the Indonesian Government Regulation, though not explicitly and detailed. This provision was then changed into the Presidential Decree Number 188 Year 1998 concerning the Procedures of Preparing Bills which requires the **harmonization of legislations**. Presidential Decree (*Keppres*) 188/1998 is published before the changes to Constitution 1945, so it needs improvement or changes. That is related to the fundamental changes in Constitution 1945 correlating with the law maker (institutions).

After the Amendment of Constitution 1945, 'harmonization' is regulated by Law Number 10 Year 2004 concerning the Establishment of Legislation. Under the Article 18 of Law Number 10 Year 2004 which is regulated further under the Presidential Regulation Number 61 Year 2005 concerning the Formulation and Administration of National Legislation Program and Presidential Regulation Number 68 Year 2005 concerning the Procedure of Preparing Bills, Draft of Government Regulation Substituting Laws, Draft of Government Regulation, and Draft of Presidential Regulation.

C. COORDINATION AND HARMONIZATION OF LEGISLATIONS

Coordination

Coordination is one of the consideration keywords for the enactment of Law Number 10 Year 2004. Under the consideration on letter b it is stated: "that to increase **coordination** and continuity of legislation establishment process, then the state of the Republic of Indonesia as a law state find it necessary to have a regulation on the establishment of legislation".

Referring to the provisions of articles under Law Number 10 Year 2004, Presidential Regulation Number 61 Year 2005 and Presidential Regulation Number 68 Year 2005, the word coordination is used more in verbs (passive and active), which are 'be coordinated' and 'to coordinate'. Those words used to state, among others:

- a. The Formulation of National Legal Program between the Parliament and the Government is **coordinated** by the Parliament through an instrument which specializes in handling legislation.
- b. The Formulation of National Legal Program in the Parliament is **coordinated** by an instrument which specializes in handling legislation.
- c. The Formulation of National Legal Program in the Government is **coordinated** by a minister whose duty and responsibility covering the area of legislation.
- d. The effort for harmonization, rounding and stabilization of Bill conception is implemented through a consultative

forum which is **coordinated** by a Minister.

- e. If the President considers the Bills still contain problems, President will delegate the Minister and the Initiator to re-**coordinate** for improving the Bills.
- f. For the continuity of harmonization, rounding, and stabilization the Bills conception as stated under Article 21 paragraph (2), the Minister **coordinates** the discussion of conception with the official who is competent to take decision, legal expert, and/or the legal drafter from the Initiating Institution and other related institutions.

Based on the above explanation, we can conclude that coordination is an activity which combines different kinds of functions in the *Prolegnas* formulation and Bills drafting stages implemented by the Parliament and the Government. The coordination activity is more technical.

Harmonization of Legislation

Harmonization is an effort to conform, adjust, stabilize, and complete a legislation draft conception with other legislation, either the higher, equal, or the lower, and other things than legislation, so that it is arranged systematically, not conflicting one to another or overlapping. This is a consequence of a legislation hierarchy as regulated under Article 7 of Law Number 10 Year 2004. By implementing a harmonization, it will clearly describe the consideration or understanding that legislation is an integral part of the whole legislation system.

Why is the Harmonization Necessary?

At least there are three reasons why it is necessary to harmonize the bills in order to satisfy the provisions under Article 18 of Law Number 10 Year 2004, which are:

- 1) Law as a type of legislations is a subsystem of national law system.

As a subsystem of a larger system, legislations should have interrelations and interdependency, and also a complete unanimity with other subsystem;

- 2) Law can be reviewed (*judicial review*) materially and formally. The Constitutional Court (MK), based on Article 24 C paragraph (1) of Indonesian Constitution 1945, is competent to review Law to Constitution. Concerning with that matter, the harmonization of legislation has a strategic function as an effort to prevent the application of legislation review to the competent judicial power.

The decision of MK can state that a substance of article, paragraph, and/or part of legislation does not have a legal binding or does not have a broad juridical, social, and political impact. See, Article 57 of Law No. 24 Year 2003 on Constitutional Court Therefore, the harmonization is necessary to be implemented carefully;

- 3) Ensure the legislation establishment process to be

implemented by principle compliance for the sake of legal certainty.

The Stages of Harmonization

Ideally, harmonization should be implemented since the Bill Academic Draft formulating stage, *Prolegnas* stage, and Bill drafting stage. But, in accordance with the existing regulation, the Bill harmonization is conducted at the time of formulating *Prolegnas* and formulating/drafting Bill.

1) Harmonization in the Academic Draft Formulating Stage

To accelerate the Bill discussion in Parliament, and to avoid the poorly prepared conception, a harmonization of legislation should be started since the formulating Academic Draft.

Academic Draft (NA) is a draft which can be accounted scientifically on the conception which contains a background, the purpose of formulation, the objective to be accomplish, scope, range, object, or the direction of Bill.⁵ According to the Presidential Regulation Number 68 Year 2005, the formulation of NA is optional, not required, also set in the Order of Parliament as stipulated in the Decision of Indonesian Parliament Number: 08/DPR RI/I/2005-2006 concerning the Order of Indonesian Parliament (27 September 2005). But, during the Coordination Meeting on Formulating *Prolegnas* on 6-8 October 2006 between the Legislative Body of Parliament and the Government (Minister of Law and Human Rights), it was agreed that the program of Bill to be proposed as a priority of discussion should have an academic draft formulated. So in practice, it becomes mandatory.

Harmonization in this stage is implemented through analysis and evaluation to all related legislations, either national legislations or international conventions or treaties, and harmonization to the principles and theories of law, also their conformity to State Basic and Constitution 1945. This stage is also formulating norms in form of academic formula as a basis for formulating a concrete article.

2) Harmonization in the *Prolegnas* Formulating Stage

The mechanism of harmonization, rounding and stabilization of Bill conception (hereinafter to be called 'harmonization') in order to formulate *Prolegnas* based on Presidential Regulation Number 61 Year 2006⁶ in general covers three aspects as follow:

(a) Institutional aspect:

- The harmonization coordinator is the Minister of

Law and Human Rights, colloquial the National Law Development Agency.

- The parties involved beside the Department of Law and Human Rights are the initiating agencies and other related Government agencies in accordance with the substances to be regulated.
- The harmonization is implemented through a consultative forum coordinated by National Law Development Agency.

In practice, the existing consultative forum which is the *Prolegnas* Yearly Discussion Meeting organized by BPHN. This forum has duty mainly to harmonize and synchronize the Bill program in order to formulate the yearly prioritized Bill to be proposed.

In the consultative forum, it involves the experts from universities and the social, political, professional, or societal organization as needed. For Bill accompanied with Academic Draft, then the academic draft is used as the discussion material.

For supporting the implementation of *Prolegnas* formulating process conducted by BPHN, the *Prolegnas* Interdepartmental Team is established which consists of the legal bureaus from Governmental Departments and Non-Department Institutions. This team also conducts harmonization and synchronization for Bill program proposed by Departments/Non-Department Institution.

Until currently, there is no standard format in *Prolegnas* for implementing the Bill harmonization function in the context of preparing *Prolegnas*.

(b) Substantial aspect

The harmonization direction is the conception conformity with the state philosophy, national goal including its surrounding aspiration, Indonesian Constitution 1945, other existing legislations including their implementing regulations and other policies related to the field regulated by those Bills.

(c) Procedural aspect

- The Bill initiator proposed the harmonization to the Minister of Law and Human Rights.
- The Bill conception already harmonized should request President's approval for *Prolegnas* Bill.

Subsequently, in relations with the Bill proposed by the Parliament through *Prolegnas*, the mechanism is as follow:

⁵ Article 1 point 7 of Presidential Regulation No. 68 Year 2005

⁶ See, Article 14 - 18 of Presidential Regulation No. 61 Year 2005

- 1) Minister of Law and Human Rights first consults each concept of Bills produced by the Parliament to other Minister or the Head of Non-Department Institution in accordance with the scope of their duty and responsibility and the problem will be regulated in the Bill, and the Head of other related government agencies. The consultation as mentioned above is implemented in the context of harmonizing, rounding, and stabilizing the Bill conception including its establishment readiness.
- 2) The result of *Prolegnas* formulated in the Parliament and the consultation in the context of harmonizing, rounding, and stabilizing the Bill conception will be conveyed to the President to request an approval before re-coordinating with the Parliament (Article 23).
- 3) The President's approval to the *Prolegnas* formulated in the Parliament is notified in written to Minister of Law and Human Rights and delegates the Minister to re-coordinate it with the Parliament.

3) Harmonization in the Bill Drafting Stage

Harmonization in this stage is conducted by the Directorate of Harmonization of the Directorate General of Legislation of the Department of Law and Human Rights. The harmonization is implemented in an Interdepartmental Meeting chaired by the Department of Law and Human Rights.

The aspects being harmonized

At least there are 2 aspects that should be harmonized at the time of formulating legislation, which is related to the aspect of substance conception and the aspect of legislation formulating technique.

- a. related to the legislation **substance conception** includes:
 - 1) The harmonization of legislation draft substance conception with *Pancasila*. *Pancasila* is a law ideal (*rechtsidee*). The law ideal does not only function as a regulative benchmark, which evaluates whether a positive law is fair or not, but also as a constitutive basis which defines that without a law ideal, the law will lose its meaning as law.
 - 2) The harmonization of legislation draft substance conception with Constitution.

The legislation substance should conform to the provisions under Constitution as a state basic law. The harmonization of legislation with Constitution beside related to certain articles made as basis for its establishment and the articles which are also related to principles of law state and democracy state in social, politic and economy.

The legislation contrary to the articles and spirit of

Constitution as set in preamble, its validity can be tested by the Constitutional Court because such legislation has lost its constitutional basis.

- 3) The harmonization of legislation draft with the legislation establishment and substance principles. Law Number 10 Year 2004 categorizes the principles of legislation into 3 (three) categories, which are: the principle of good legislation establishment; the principles of substance and other principle in accordance with the legal field of concerned legislation.
- 4) The harmonization of legislation draft substance horizontally to avoid overlapping and conflicting, because it will cause legal uncertainty and ambiguity in its implementation.
- 5) The harmonization of legislation draft substance with international convention/treaty. The international convention/treaty should also be observed so the national legislation is not conflicting with the international convention/treaty, especially the convention/treaty that has been ratified by Indonesia.
- 6) The harmonization of legislation draft with the decision of the Constitutional Court and the decision of the Supreme Court on the review of legislation.
- 7) Not less important is the harmonization of legislation draft with the theories of law, the expert opinions (dogma), jurisprudence, customary law, unwritten norms, legislation draft, and other related legislation to be formulated.

- b. The legislation **formulating technique** either on the legislation framework, specific things, variety of language and types of legislations. The legislation formulating technique is contained in appendix of Law Number 10 Year 2004. The ignorance of legislation formulating technique cannot be a reason for cancelling legislation or for performing *judicial review*. But, it will indicate the poor legislation formulating.

D. CONSTRAINTS

Problems encountered in the harmonization process among others are:

1. The mechanism of Bill conception harmonization, rounding, and stabilization in formulating *Prolegnas* based on Presidential Regulation Number 61 Year 2005 as described above has not been fully functioned because the Presidential Regulation is established after the formulation of *Prolegnas* Period 2005-2009 based on the Decision of Parliament Number 01/DPR-RI/III/2004-2005 on the Approval Determination of National Legislation Program Period 2005-2009.⁷ dated 1 February 2005.
2. The Bill discussion in Parliament, either through a Commission or a Special Committee (*Pansus*), often is

⁷ The *Prolegnas* legal determination form is not regulated under Law No. 10/2004 or Presidential Regulation 61/2005.

not coordinated or communicated with the other Commission or *Pansus*, that often one Bill to another is not synchronized and not in a unified system of legislation or national law system.

3. The existence of sectional egoism spirit from each related agency and the absence of common perception on the legislation draft as a system. This led to a material discussion is not comprehensive but fragmentary according to the interest of each agency.
4. The representatives from related agency are often alternated and do not have capacity to take decision so that their opinion is not consistent. In practice, this inhibits the discussion.
5. The legislation draft to be harmonized is not well-prepared and often distributed during the meeting, so that the opinion is spontaneous and does not necessarily represent the opinion their agency's opinion.
6. The functional Legislation Drafter is still limited and has no specialization in certain legal field.

7. The legal bureaus of departments/non-department institutions are usually not involved since the beginning. They often just involved at the time harmonization is coordinated by the Department of Law and Human Rights.

E. CONCLUSION

The Coordination and Harmonization of legislation is significant and strategic in establishing and delivering a good implemented legislation. Observing the current problems and practices in formulating legislation, the revitalization efforts is substantial and urgent to be implemented.

The revitalization of legislation harmonization at least includes a harmonization system and procedure which started from the Academic Draft. It needs a study on the harmonization stages after the Bill discussion in the Parliament for system synchronization in the frame of national law system and the competent institutions.

