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RESEARCH ARTICLE

DISHARMONY LEGISLATION IN THE AGRARIAN SECTOR

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ABSTRACT

Disharmony (inconsistency) of laws and regulations is due to the existence of sectoral egos between ministries / institutions in the process of planning and legal formation. In 2016 15 harmonized draft laws, 64 draft Government Regulations and 7 draft Presidential Regulations. Regulation of land rights still raises many problems with regard to sectoral, departmental and local (regional) activities. In its assessment, this occurred due to a discrepancy between what was regulated by Law Number 5 Year 1960 concerning Basic Agrarian Principles Regulations (hereinafter referred to as UUPA) with other laws. The main objective of this study is to determine the impact of the implementation of various laws and regulations related to land and provide options for synchronizing / harmonizing so that the legal framework for land management in Indonesia is compatible with what is mandated by the constitution. The method used in this study is normative legal research using for approaches namely historical approach, statue approach, conceptual approach, and philosophical approach. This study uses primary, secondary and tertiary legal materials. Meanwhile, analysis of the subject matter and legal material was carried out in a descriptive analytic manner. This study concludes that there is still overlapping substance in natural resource regulation because each sector adheres to sectoral laws with the same degree of law. This overlap occurs because there is no one ministry / department authorized to coordinate natural resource related policies and their implementation. Sectoral laws whose publishing process through the legislature does not guarantee free from overlap, because the discussion of sectoral laws is carried out through commissions that are different according to their respective fields. Harmonization tasks that are charged to the Ministry of Law and Human Rights cannot always be expected to have maximum results due to various obstacles.

INTRODUCTION

Natural resources have a very significant economic value and meaning, even a potential natural resource in each region often becomes the backbone in the process of realizing the existence and continuity of the life of the community, nation and state, as mandated by the provisions of Article 33 of the Unitary State Constitution The Republic of Indonesia in 1945 as a "grundnorm" of articles on national economy and social welfare. However, the provisions contained in this article still require operational elaboration in laws and regulations along with the implementation of the derivatives (Asshidiqie, 2005).
One of the main things in the regulation which is currently under the public's spotlight is about laws relating to land use, because basically, economic activities by using land as one of the capital in economic activity. Land issues contained in the LoGA that cover a wide scope of the earth, water and natural resources contained in it, even the air above the surface of the land, meanwhile in the strict sense is a matter of land.

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Regulating land rights still raises problems with regard to sectoral, departmental and local (regional) activities. In its assessment, this occurred as a result of the synchronization between the regulation of the LoGA and other laws such as forestry, mining, spatial planning and investment laws, as well as among these laws. overlapping in land regulation can be resolved if the land rights of an area are clear through the local Spatial Plan (RTRW), which then becomes the basis of rights in issuing various legal products, such as location permits and permits. other land use. While the existence of clarity about the area through the RTRW can be used as an excuse to issue various rights to land that are adjusted to its designation. Thus an accurate data base system and transparent and valid distribution of information are very important and strategic in carrying out data collection on land in Indonesia. In the field of forestry, it will be more effectively managed, both from the economic, environmental aspects, because forest area management planning must harmonize with the function of the forest as a biological source and spring. Therefore, the forest area will be calculated and calculated as state assets that have environmental economic meters so that the meaning of

sustainable development of forest (sustainable development in the field of forestry) can be used as a measure for determining the RTRW. In addition, the authority of the forestry minister in the determination of forest areas can be reviewed, if the pattern contained in the RTRW has been carried out in an integrated and effective manner taking into account the things mentioned above. In relation to this field, the determination of land rights can be done in the context of land use by the government, so that the clarity of the concession area boundaries can be accurately calculated in terms of its economic value, both for investors (entrepreneurs) and in terms of state income. Similarly from the mining sector, it must be seen as a part of activities that have a direct impact on soil conditions, therefore, the pattern of mining activities must be harmonized with the RTRW in the future. Thus, reclamation and post-mining activities can still be utilized in accordance with their designation. Post-mining land must be granted land rights to avoid the presence of abandoned land which can be a burden on the state (local government). Disharmony (inconsistency) of legislation also occurs due to the existence of sectoral egos of ministries / agencies in the process of planning and establishing laws, in harmonizing legislation carried out at the Central level. According to data from the Ministry of Law and Human Rights-RI in 2015 harmonization of 25 of the 27 draft laws has been harmonized, 92 of the 107 draft Government Regulations submitted, 7 out of 9 draft Presidential Regulations submitted. In 2016 15 harmonized draft laws, 64 draft Government Regulations and 7 draft Presidential Regulations.

L.M Gandhi as quoted from Sidharta (2006) identified 8 (eight) factors that cause the occurrence of disharmony in legal practice in Indonesia, namely:

- The difference between various laws or regulations. in addition, the increasing number of regulations causes difficulties to know or recognize all these regulations. Accordingly, the provision which states that everyone is considered to know all applicable laws is undoubtedly ineffective;
- The conflict between the law and the implementing regulations;
- The difference between legislation and the policies of government agencies. Like the operational guidelines (instructions and implementation) that are contrary to the laws and regulations to be implemented;
- Differences between statutory regulations and jurisprudence and Circular of the Supreme Court;
- Central agency policies that are conflicting;
- Differences between legal provisions and the formulation of certain definitions;
- Differences between the policies of the Central Government and Regional Governments;
- Conflict between the authority of government agencies because the distribution of authority is not systematic and clear.

In connection with this, the author is interested in discussing and analyzing the laws and regulations of any sector that collides, is not synchronous (disharmony) with the LoGA, which is a benchmark for disharmony assessment. This is what needs further investigation. Based on the description of the background above, the problems in this study are:

- What laws and regulations are conflicting (disharmony) with the LoGA?
- What is the benchmark for disharmony assessment?
- What is the impact of the implementation of various laws and regulations related to land and provide options for harmonization, so that the legal framework for land management in Indonesia is compatible with the mandate of the constitution of the Republic of Indonesia?

MATERIALS AND METHODS

The type of this research is normative legal research. Research approaches include statute approaches, historical approaches, philosophical approaches, and conceptual approaches (Sunggono, 2000). Study of primary, secondary, and tertiary legal materials. Primary legal materials consist of legislations, official records in drafting legislation, or court decisions. Secondary law materials are the legal materials for primary legal materials to assist in analyzing the problem. The tertiary legal material is a Large Dictionary of Indonesian and the Law Dictionary. Collection of legal materials is done by studying documents or library materials in several libraries. Research is also carried out by collecting articles in scientific journals relating to research, official documents issued by the government and internet searches (Ibrahim, 2006). To analyze legal material, firstly, fact qualifications and legal qualifications are carried out which will produce headings (problems or legal events) by looking at the index of problems examined separately (Hartono, 1994). Legal materials obtained in the next study are described in accordance with the subject matter under study. Descriptions are carried out on "the content and positive legal structure" relating to the relationship of authority between the central government and local governments in the use of natural resources, especially in the forestry sector (Hadjon, 1994). Legal materials that have been described are then determined by means of interpretation in an effort to provide an explanation of the word or term whose purpose is less clear in a legal material related to the subject matter that is fixed, so that other people can understand it (Ardhiwisastra, 2000).

RESULTS AND DISCUSSION

Disharmony of legislation means that there is legal uncertainty in its implementation. This certainly contradicts the principles adopted by the rule of law, both materially and formally. Materially related to the disorder of a society due to the existence of legislation that does not guarantee legal certainty. This has been regulated in the State Law of the Republic of Indonesia in 1945 (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) specifically Article 28 letter D paragraph (1) which reads: "Every person has the right to recognition, guarantee of protection, and fair legal certainty and treatment the same before the law". Regarding the regulation in the agrarian sector, the dynamic conditions that exist in land use are closely related to existing business activities. This means that there is a need for public participation, especially in the business world in the process of drafting a law (draft bill) or the design of other legal regulations. In the practice of agrarian principal regulation, which still relies on the LoGA, so many things that in sectoral arrangements tend to hit these basic provisions due to sectoral dynamics.

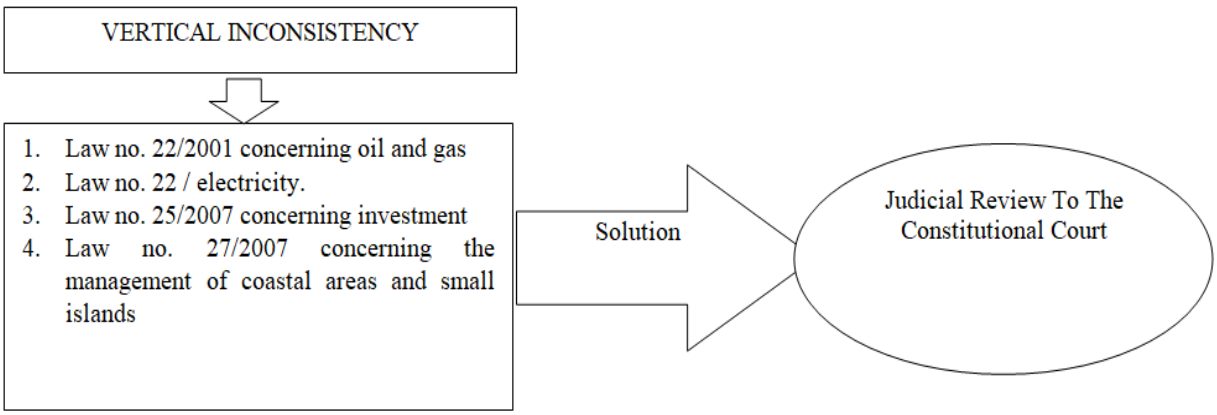

Figure 1. Vertical Inconsistency

Table 1. Benchmark Assessment of Disharmony

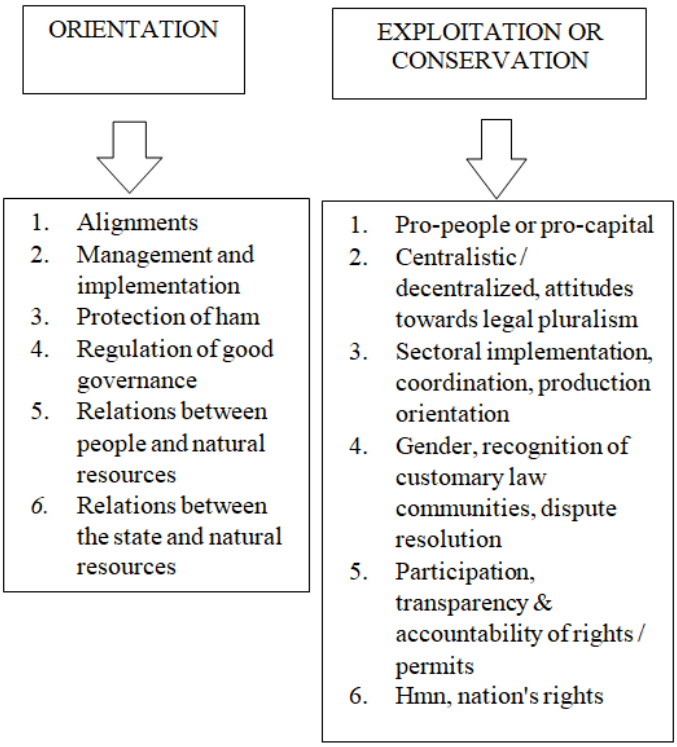

Table 2. Inconsistency between LoGA and Forestry Law

ASPECTS	The LoGA	Forestry Law
Orientation	Textual Conservation. Contextual Conservation	Textual in production & conservation, contextual balance between production & conservation of distributive justice
Utilize Access	Individual / Indonesian / Foreign Legal Entity. Cumulative Justice	BUMN & community members
Country Relations with the Object of Implementing State Authority	Mastering State (Government). Rights of the Nation & Human Rights. Government: Centralistic there is Medebewind. Country has the right to exercise control	National wealth & controlled by the State, Government & Regional Government as executors. Human rights are sub-ordained to the right of the nation centrally
Relationship of People with Objects of Human Rights	Recognized Gender and Ulayat Rights	Utilization Permits which are controlled by the state
Good Governance	Not explicitly mentioned, but can be found in several social provisions on monopoly prohibitions	MHA is recognized, (half-hearted) Customary Forests become State Forests

For example, Law Number 7 of 2004 concerning Water Resources, which regulates Water Utilization Rights, but it is not clear how related it is to the LoGA and does not include the LoGA as a basis for considering in its consideration. In theory, there are differences in principles for the meaning of permission (verguning) with agreements (verbintenis).

First, the position of the Government / State above, meaning that the granting of the permit is unilateral on the basis of state approval by looking at the conditions that the permit is fulfilled by the Second Party, while if the agreement, the position of both parties is the same / Second Party equivalent, each has equal rights and obligations and cannot be canceled by one party.

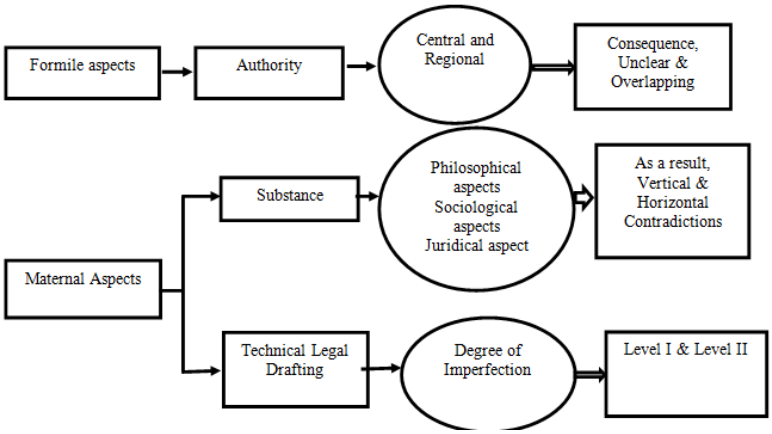

Figure 2. Chart of Benchmarks for Disharmony of Legislation

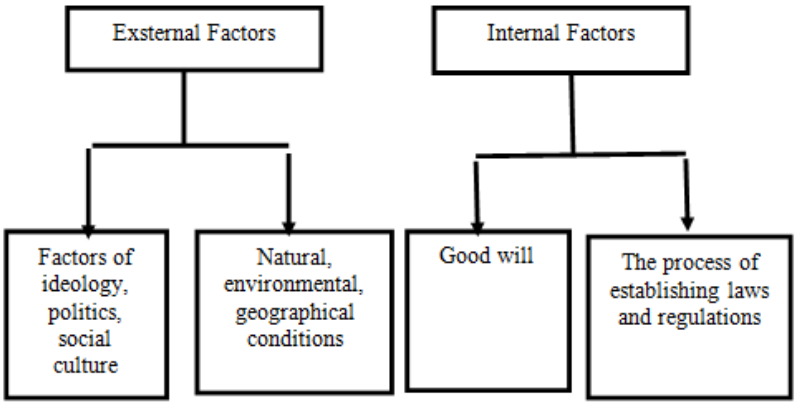

Figure 3. Causes of disharmony in legislation

In this position, the impact that occurs economically is clearly different, because managing permits by making an agreement has neither the same material nor immaterial values. For licensing, the budget that must be prepared may be greater due to the many "levies" as well as the legitimacy of permits that must continually be extended (Asshidiqie, 2005). The problem is, in the LoGA, the mechanism for obtaining rights through requests to the state, which is then issued rights for applicants who have fulfilled the requirements. This is more in the form of State Administration Products (beschikking), while the SDA Law, the acquisition of rights to water use rights (HGUA) mechanism is not clearly regulated, whether in the form of beschikking, such as licensing or decree or other forms, such as auction, because the HGUA contained in the SDA Law is unclear in its regulatory mechanism, then in its implementation there is a difference between HGUA for drinking water and HGUA for irrigation.

In Article 64 paragraph (1) to paragraph (8) Government Regulation Number 16 of 2005 concerning the Development of Drinking Water Supply Systems, states that, the management of drinking water systems is through an auction mechanism for private legal entities, cooperatives, or individuals. On the other hand, the regulation of water for irrigation uses a permit mechanism for private parties, both legal entities, cooperatives and individuals as stipulated in Article 15 of Government Regulation Number 77 of 2001 concerning Irrigation which still comes from Law Number 11 of 1974 concerning Irrigation (The Law a quo has been revoked with Law No. 7 of 2004 concerning Natural Resources).

With the dualism of the regulation, it needs to be questioned further, is there substantially a difference between the exploitation of drinking water and the exploitation of irrigation water, because both of these are both in the public interest. Meanwhile, if viewed hierarchically, the management of water resources must be based on the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which actually has been interpreted as constitutional value by the Constitutional Court of the Republic of Indonesia in Decision Case Number 058-059-060-063/PUU-II/2004 and case number 008 / PUU-III / 2005. Regarding the existence of Government Regulation Number 16 of 2005, according to Sidharta, the common thing is that there is a clash of norms which then interrogates one another. Norms that derogate are norms that invalidate the validity of other norms, this in the scope of the regulation of a hierarchy of legislation can still be done if the legislation is higher in the face of lower legislation. With the principle of Lex Superiori Derogate Legi Inferiori, higher provisions derogate lower regulations. Unlike the case if the conflict occurs between fellow laws, where the conflict of norms over an arrangement that is an obligation or prohibition are equally regulated on the same object in different sectoral laws. The principle of Lex Special Derogate Lex Generalis cannot be easily applied, because which sector must be favored.

Vertical inconsistency: Based on the investigation related to the Constitutional Court's decision on the judicial review of several SDA Laws it was stated that the SDA Law was contrary to the 1945 Constitution of the Republic of Indonesia,

specifically related to the provisions of Article 33 paragraph (2) and / or paragraph (3) and / or paragraph (4) besides various other articles which result in the absence of force binding certain articles in the law concerned. Some examples can be stated as follows: As a note, it can be stated that the vertical inconsistency of the SDA Law against the 1945 Constitution of the Republic of Indonesia, the impact may not have been felt or experienced directly in the implementation of the SDA Law in question. Even more concerning is the overlap between various sectors of the SDA Law, its implementation and impact. If there is a vertical inconsistency between the SDA Law and the 1945 Constitution of the Republic of Indonesia, the solution is clear, namely through Material Test to the Constitutional Court (MK), then solving horizontal inconsistencies between the SDA Law is not that simple.

Horizontal Iconsistencies: Horizontal inconsistencies occur between equal laws and regulations, in this case the review is the LoGA with other sectors such as the Forestry Law, Mining Law, Water Resources Law, Oil and Gas Law, and others. Maria SW Sumardjono (1998) makes parameters to make several parameters as follows:

Overlapping Natural Resource Settings: The study of 12 SDA Laws which was carried out by establishing seven benchmarks showed that various SDA Laws were out of sync with one another, even overlapping. Particularly related to the overlap between the LoGA and Law No. 41 of 1999 concerning Forestry (UUK) and Law No. 4 of 2009 concerning Minerba. Furthermore aspects of the authority of the institution, or regulation of land that contradicts the LoGA, which can be seen from various examples such as Law No. 25 of 2007 concerning Investment which was ratified on April 25, 2007 and the existence of the LoGA. The disharmony between the two laws was resolved by the Constitutional Court Decision for cases 21-22 / PUU-V / 2007 on March 25, 2008 which stated that Law No. 25 of 2007 contradicts the 1945 Constitution of the NRI Constitution in Article 22 paragraph (1) insofar as it relates to the words "in advance at the same time" and "in the form of: a.

Business Use Rights (HGU) can be granted in the amount of 95 (ninety five) years by means of being able to be extended and extended in advance at the same time for 60 (sixty) years and can be renewed for 35 (thirty five) years; b. Hak Guna Bangunan (HGB) can be granted in a period of 80 (eighty) years and can be extended in advance at the same time for 50 (fifty) years and can be renewed for 30 (thirty) years; c. Rights of Use (HP) can be granted for a period of 70 (seventy) years by way of being given and extended in advance at the same time for 45 (forty five) years and can be renewed for 25 (twenty five) years. In addition to this, Article 22 paragraph (2) of sepanajang concerning the words "in advance at the same time" is also stated to be contrary to the 1945 Constitution of the Republic of Indonesia. Likewise, disharmony occurs between the Law and the Regional Regulation (PERDA). For example, the Lapindo Brantas case. Perda No. 16 of 2003 concerning the RTRW of Sidoarjo Regency for 2003-2013 which was stipulated on June 13, 2003. The regulation indicates that the mining area is not explicitly stated in the RTRW of Sidorajo Regency. However, mining activities are possible based on Law No. 22 of 2001 concerning Oil and Gas which was ratified and promulgated on November 23, 2001. In summary, inconsistencies between the LoGA and the Forestry Law can be seen in the following matrix: In the relationship between the state and land according to the LoGA, there are three entities, namely, state land, land (hak) ulayat Masyarakat Adat (MHA) and land rights, namely land owned by land rights according to the LoGA by individuals legal entity. But in the legal relationship between the state and the forest, what appears is only two entities, namely state forests (forests that are on land that are not burdened with land rights) and rights forests. Whereas customary forests are state forests in the MHA area, or in other words, customary forests are included in the category of state forests. An understanding of the status of the forest has implications for two things: First, UUK does not recognize customary forests which are actually part of the customary rights of MHA. However, the UUK does not recognize the existence of these customary forests, recognizes and determines the requirements for the existence of MHA; this is a contradiction because the UUK does not recognize the object (customary forest) but recognizes the existence of the subject (MHA), if it meets the requirements. If there is a dispute over customary rights of MHA related to customary forests, then the resolution according to the LoGA and UUK will be different. Second, related to the status of forests, it is stated that state forests are "forests that are on land that is not burdened with land rights". In the context of the LoGA, land that is not burdened with rights to the land is state land. Thus, consequently, (a) lands in the state forest area are actually state land. However, in the practice of administration of state land in the forest area there are obstacles in the administration of state land in forest areas. Until now, administration of state land generally applies in non-forest areas, whereas in accordance with the understanding related to state forests in the context of the Law itself, administration of state land should be carried out throughout the Republic of Indonesia without differentiating forest or non-forest areas, in accordance with Article 19 the LoGA. It is clear in this regard, that the impact of these inconsistencies is the unclear coordination and management authority between the LoGA and UUK.

Factors of Disharmony

There are 6 factors that cause disharmony in legislation, as follows:

- Formation is carried out by different institutions and often in different periods of time;
- Officials who are authorized to form legislation alternately either because they are limited by tenure, assignment or replacement;
- The sectoral approach to establishing legislation is stronger than the system approach;
- weak coordination in the process of establishing legislation involving various agencies and legal disciplines;
- Community access to participate in the process of establishing legislation is still limited;
- There are still uncertain methods, methods and standards and standards that bind all authorized institutions in making laws and regulations.

The disharmony of legislation has resulted:

- The occurrence of differences in the interpretation of its implementation;
- The emergence of legal uncertainty;
- Legislation cannot be implemented effectively and efficiently;

- Legal dysfunction, meaning that the law cannot function in providing guidelines for behavior to the community, social control and dispute resolution.

The various problems mentioned above do not escape the existence of external and internal factors from the changes that occur. This is philosophically, sociologically and politically resulting in the formation of laws and regulations sometimes intervened by law politics forming laws in accordance with the interpretation of ongoing conditions, including in this case the interests in trying. Several factors causing disharmony in this case can be distinguished between formal aspects and material aspects, which can be described as follows:

The efforts mentioned above include the following:

- Termination (moratorium) of the preparation of sectoral sambal laws provides an opportunity for the DPR-RI to conduct legislative reviews on sectoral laws which are indicated to overlap;
- The proposal for a moratorium is easy to say but difficult to implement, because, (1) there is no legal basis that explicitly orders the moratorium, although implicitly it is formulated in the Decree of the People's Consultative Assembly (TAP MPR) No. IX / MPR / 2001 specifically the direction of policy letter a): and (2) will collide with the urgency of the formulation of sectoral legislation, whether in the form of a completely new law or an Act intended to perfect / supplement the previous Law.

If this is "forced" to be done then efforts are needed to minimize the possibility of synchronization both vertically and horizontally. To support horizontal synchronization, the preparation of academic texts must be truly high quality, by giving special time and attention to understand all the laws and regulations related to the proposed sectoral law. This effort can at least minimize the occurrence of overlapping with other sectoral laws. Ideal harmonization can only be achieved if there is a law that applies as Lex Generalis for all natural resource related arrangements. The law will be realized if there is a mutual willingness between sectors to sit together to form the principles / principles of management and utilization of natural resources in accordance with the principles outlined by the the Decree of the People's Consultative Assembly No. IX / MPR / 2001.

Another effort to harmonize the regulation of natural resources is through Legislative Review of overlapping sectoral laws. To do this, a commitment from the DPR-RI is needed to initiate it. Legislative Review is carried out because this is in accordance with the direction of the Agrarian Reform Policy as contained in the the Decree of the People's Consultative Assembly No. IX / MPR / 2001. Therefore, what is equally important is to lay the ground that law (in the natural resources sector) is a system, namely, with the scheduled establishment of laws related to the management and utilization of agrarian SDAs / SDs as Lex Generalis which will become the basis for legislation sectoral (lex specialis) to adjust after the issuance of the Law which is Lex Generalis). Likewise, it is necessary to consider the idea of the existence of a ministry that has the main tasks and functions of coordinating policies and regulations in the natural resources sector and their implementation.

Conclusion

The impact of inconsistencies in natural resources legislation includes: a) scarcity and deterioration in the quality and quantity of natural resources; b) inequality in the structure of ownership / ownership, designation, use and utilization of natural resources; c) the emergence of various conflicts and disputes in the control / ownership, use and utilization of natural resources (between sectors, between sectors with MHA, between investors and MHA and between investors regarding the rights / permits to use natural resources). Completion of the overlapping problem is indeed not easy, because each sector adheres to sectoral laws with the same degree of law. The LoGA, which was originally intended to be the basis for further regulation of legislation in the natural resources sector, has been degraded since the early 1970s along with the issuance of various sectoral laws. The LoGA is not included in the consideration of sectoral laws, all sectoral laws refer directly to the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The overlapping substance in the regulation of natural resources is in line with the absence of one ministry / department authorized to coordinate natural resource related policies and their implementation. Each sector is shaded by the ministry and since 1988, the land sector has been sheltered by the National Land Agency. Sectoral laws whose publishing process through the legislature does not guarantee free from overlap, because the discussion of sectoral laws is carried out through commissions that are different according to their respective fields. Harmonization tasks that are charged to the Ministry of Law and Human Rights cannot always be expected to have maximum results due to various obstacles.

Suggestions

There are 3 (three) ways to overcome various problems related to the disharmony of the laws and regulations, namely: Changing / revoking certain articles that experience disharmony or all articles of the relevant legislation, by the institution / agency authorized to form it. Submit a judicial review request to the judiciary as follows: 1) for testing the law against the Constitution to the Constitutional Court; 2) for testing the laws and regulations under the law against the law to the Supreme Court; 3) apply the principle of law / legal doctrine as follows: 1) Lex Superior derogat legi inferiori. Higher-order legislation overrides lower-level laws and regulations, except when the substance of legislation is higher in regulating matters which are stipulated by law to be the authority of lower-level legislation. 2) Lex Specialis derogat legi generalis, this Principle implies, that special legal rules will override general legal rules. There are several principles that must be considered in the principle of Lex Specialis derogat legi generalis: (a) the provisions obtained in the general legal rules remain valid, except those specifically regulated in the special legal rules. (b) the provisions of Lex Specialis must be equal to the provisions of Lex Generalis (law with law). (c) the provisions of Lex Specialis are in the same legal (regime) environment as Lex Generalis. The Code of Commerce and the Civil Code together include the civil law environment. 3) Principle of Lex Posterior Legi Priori derogate: Newer law rules override or negate old legal rules. The principle of Lex Posterior deregate Legi Priori requires to use a new law. This principle contains the following principles: (1) new legal rules must be equal or higher than the old legal rules; (2) new and old legal rules governing the same aspects.

This principle, among others, contains the intention of preventing the occurrence of dualism which can lead to legal uncertainty. With the existence of the Lex Posterior derogate Legi Principle the provisions governing the revocation of a statutory regulation are actually no longer so important. Legally, the old provisions similar to that will no longer apply when the new legal rules take effect.

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