

STUFEN THEORY AS A BASIC ANALYSIS OF THE LEGAL STANDING OF THE MINISTERIAL REGULATION AND ITS RELATION TO THE EXECUTION OF THE LOCAL REGULATION

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Abstract

Law is a set of regulations that contain a kind of unity that we understand through a system, as one form of this realization through Article 22A of the 1945 Constitution of the Republic of Indonesia. The legal force binds a regulation in accordance with the hierarchy as referred to in Article 7 of the Law Number 15 of 2019 on the Establishment of Laws and Regulations (hereinafter Law Number 15 of 2019), but in line with Law Number 15 of 2019, it does not recognize the legal standing of the Ministerial Regulation. This research focuses on analyzing and finding answers to questions about the legal standing and characteristics of Ministerial Regulations in the Hierarchy of Statutory Regulations in Indonesia. The research method with a normative juridical approach, prioritizes library research and its implementation in practice. Research specifications are descriptive. The research phase is carried out through library research, collecting secondary data in the form of primary, secondary, and field research materials to obtain primary data as a support. The theory put forward by Hans Kelsen through Stufen Theory and Adolf Merkl's theory through (Das Doppelte Rechtsantlitz) as a basic analysis to study the legal standing and characteristics of the Ministerial Regulation. In line with the Law 9 of 2015 on the Local Government that Ministerial Regulations are above Provincial, Regency / City Regional Regulations, thus Ministerial Regulations may not conflict with Presidential Regulations and Government Regulations and provide guidelines for Provincial, District / City Regulations in determining the local regulations

I. Introduction

The State of Indonesia is a state of law which means the state is based on law or *rechtsstaat* not based on mere authority or *machsstaat* as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution). "The discourse on the rule of law begin to develop when ideas emerged about the theory of natural law, which grew in Europe in the seventeenth to eighteenth centuries" (Wahyudi Djafar, 2020: 152). The rule of law can not be separated from the pillars of the rule of law, besides the founders of the State in forming the government of the Republic of Indonesia which has determined another pillar, namely the sovereignty of the people. In addition, Article 1 paragraph (3) of the 1945 Constitution provides legal protection for the people, as stated by Philipus M. Hadjon that "legal protections for the

people against governmental acts is based on two principles, namely the principle of human rights and the principle of the rule of law. Recognition and protection of human rights take place and can be said to be the goal of the rule of law “ (Philipus M. Hadjon, 2005: 2).

By having the reformation, the Republic of Indonesia holds a commitment to strengthen the presidential system, there are nine characteristics of presidential government as follows (Jimly Asshiddiqie, 2007: 316):

1. There is a clear separation of powers between the executive and legislative branches of power;
2. The president is the sole executive, the executive power of the president is not divided and there are only the president and vice president;
3. The head of government is at the same time the head of state or *vice versa*, the head of state is also the head of government;
4. The president appoints ministers as servants or as subordinates responsible to him;
5. People’s Representatives Assembly may not hold executive positions;
6. The president can not dissolve or force parliament;
7. The principle of constitutional supremacy applies, therefore the executive government is responsible to the constitution;
8. The executive is directly responsible to the people who are sovereign;
9. Power is not spread out centrally;

“The United States is an ideal example of a presidential government system. This system of government was born as an attempt by the United States to oppose from British colonialism, by forming a different system of government, namely the separation of powers between the legislature and the executive as Montesquieu’s Trias Politica concept “(Saldi Isra, 2010: 31-32). The State of Indonesia is led by a President and assisted by a Vice-President in holding the power of the government which is carried out in accordance with the 1945 Constitution of the Republic of Indonesia. The 1945 Constitution of the Republic of Indonesia” that: 1. The President is assisted by state ministers; 2. The ministers are appointed and dismissed by the President; 3. Each minister in charge of certain affairs in government; 4. The formation, amendment and dissolution of state ministries shall be regulated by law. The President exercising his governmental powers is assisted by the minister who reports directly to the President as referred to in Article 3 of Law Number 38 of 2009 on the State Ministries.

Based on Article 7 of Law Number 12 of 2011 on the Establishment of Regulations and Laws as amended by Law Number 15 of 2019 on Amendment to Law Number 12 of 2011 on the establishment of Laws and Regulations (hereinafter referred to as Law Number 15 of 2019) “That the type and hierarchy of the legislation consists of: a. 1945 Constitution; Statue of People’s Representative Assembly; Law / Governmental Regulation in lieu of Law; Governmental Regulations; Presidential Regulation; Provincial Regulations; and Regency / City Regulations “, the legal standing of the Ministerial Regulation is not included in the hierarchy of the Statutory Regulations so it is necessary to study the position of the Ministerial Regulation so that it does not conflict with other Regulations

vertically and horizontally. The minister in charge of certain matters in government has the authority to determine Ministerial Regulation based on Article 8 paragraph (1) of the Law Number 15 of 2019.

The existence of the Ministerial Regulation is recognized and has binding legal force as it is ordered by higher Regulations or formed based on authority as referred to in Article 8 paragraph (2) of the Law Number 15 of 2019, the explanation of what is meant by based on authority is the implementation of certain government affairs in accordance with the provisions of the legislation. This shows that there are 2 (two) different characteristics of the Regulation made by a Minister. Article 8 paragraph (2) of Law Number 15 of 2019 causes Minister to stipulate Regulations in accordance with his authority. The Local Governments have the authority to stipulate Local Regulations and other Regulations to carry out regional autonomy and co-administration tasks, with many implementations in the form of Ministerial Regulations as examples of the implementation of government policies through business acceleration through Presidential Regulation 91 of 2017 on the Acceleration of Business Conduct and Government Regulation Number 24 of 2018 on the Electronic Integrated Business Licensing Services gave to issue many Ministerial Regulations including the Minister of Trade Regulation Number 77 of 2018 on the Electronic Integrated Business Licensing Services in the field of Trade and Minister of Tourism Regulation Number 10 of 2018 on the Electronic Integrated Business Licensing Services of the Tourism Sector.

This shows the importance of clarifying the legal standing and characteristics of Ministerial Regulations in the hierarchy of statutory regulations in Indonesia. This study focuses on analyzing and finding answers to questions about the characteristics of the Ministerial Regulations in the Hierarchy of Statutory Regulations in Indonesia. Thus, this study is analyzed by the Theory of Rule of Law, Theory of Authority, and Theory of Law, bearing in mind that currently more and more Ministerial Regulations are of course providing a lot of guidance for Local Governments in carrying out their Government.

II. Research Methods

The research method with a normative juridical approach, prioritizes library research and its implementation in practice. Research specifications are descriptive. The research phase is carried out through library research, collecting secondary data in the form of primary, secondary, and field research materials to obtain primary data as a support.

III. Research Result and Discussion

A. Principle of The Law Making Process

Law has a variety of meanings, so there is no standard definition of the law itself. Most legal experts consider that it is not possible to make a standard definition of the law. Law has a very broad scope and different aspects from other sciences. Law is also part of a norm that lives and develops in society. Legal Norm or Legal Studies is a system of rules or customs that are officially considered binding and confirmed by the authorities, governments or authorities through the authorized institutions or institutions. Indonesia recognizes the order of the law or referred to

as a hierarchy that is a set of regulations made by the authorities. The establishment of laws and regulations is a condition in the context of the formation of national law which can only be realized if by means of a standardized, certain and binding method for all institutions authorized to make laws and regulations.

Indonesia is a state of the law as referred to in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, following the Continental European legal tradition, makes the Statutory Regulations a positive law and one of the main joints in the national legal system. National development is always accompanied by the development of a sustainable and integrated legal system, this is in accordance with the need for the development of the legal structure with a legal culture. Legislation as an important component in the unity of the national legal system must be developed and formed in an integrated manner to ensure that the development of the national legal system can run regularly, there are legal certainty and benefit for the fulfillment of the need for a sense of justice and prosperity of the people in accordance with the mandate of the opening of the 1945 Constitution Article 22A of the 1945 Constitution of the Republic of Indonesia states that "further provisions concerning the procedures for the formation of laws are regulated by-laws", this gives an order to regulate in the Law.

The basis in the establishment of legislation include the following:

1. Philosophical foundation which is a view, idea, or idea which is the basis by considering the outlook on life, awareness, and the ideals of the law by covering the atmosphere of mysticism and philosophy of the Indonesian nation which originates from the Pancasila and the Opening of the 1945 Constitution of the Republic of Indonesia. So that the legal principles which in the form must reflect the philosophy of life of the Indonesian people, at least not in conflict with the moral values of the Indonesian nation.
2. The sociological foundation is a consideration or reason that illustrates that regulations are formed to see the needs of the community in various aspects. This foundation actually involves empirical facts about the development of problems and the needs of society and the state. The laws and regulations must be comprehended by the community and in accordance with the realities of life, so the provisions must be in accordance with the general beliefs of the community, community legal awareness, values and laws that live in society, values and laws that live in society as legal norms what is stated in the Law can be implemented well in the community.
3. Juridical foundation, which is a legal provision that forms the legal basis for making a statutory regulation as a consideration or reason that illustrates that the regulations established to overcome legal problems or fill the legal vacuum by considering the existing rules, which will be changed, or which will be revoked to ensure legal certainty and a sense of community justice. This foundation is related to legal issues related to the substance or material that is regulated so that it is necessary to form legislation including legal issues faced, among others, regulations that are outdated, regulations that are not overlapping, types of regulations that are lower than the Act.

4. The political reason is the political policy in line which forms the basis for the policies and direction of the governance of other State governments. so this reason is a national policy as the direction of government policy that will be taken during the future administration

According to Article 1 number 1, the Law Number 15 of 2019 explains that “Establishment of legislation is the making of legislation which includes the stages of planning, preparation, discussion, approval or enactment, and enactment.” The procedure for the existence of 5 (five) stages must be passed in in the process of the legislation. The Stages of Planning, Compilation, Discussion, Ratification or Stipulation, and Enactment are steps that basically must be taken in the Establishment of Regulation of Legislation. These stages are of course carried out in accordance with the needs or conditions as well as the type and hierarchy of certain laws and regulations whose formation is not regulated by law number 15 of 2019.

In line with Article 1 number 2 of the Law Number 15 of 2019 explains that “Statutory Regulations are written regulations that contain generally binding legal norms and are formed or established by state institutions or authorized officials through the procedures set out in Statutory Regulations”. The procedure established in accordance with it, covering the stages of planning, drafting, discussing, ratification or stipulation, and enactment. The type and hierarchy of statutory regulations as referred to in Article 7 paragraph (1) of the Law Number 15 of 2019 “consist of: a. 1945 Constitution; b. Statue of People’s Consultative Assembly; c. Law / Governmental Regulation in lieu law; d. Governmental Regulations; e. Presidential Regulation; f. Provincial Regulations; and g. District / City Regulations “. The force of law binding legislation in accordance with the hierarchy referred to in Article 7 paragraph (2) of Law Number 15 of 2019.

In addition to the legislation in the hierarchy of Article 7 paragraph (1) of the Law Number 15 of 2019, the other state institutions such as the People’s Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Indonesian Bank, Ministers, bodies, institutions, or commissions of the same level formed by Law or Government by order of Law, Provincial Regional Representative Council, Governor, Regency / City Regional Representative Council, Regent / Mayor, Village Head or the same level of authority to set rules. The Minister is one of the state officials who is given the authority to stipulate regulations based on Article 8 paragraph (1) of the Law Number 15 of 2019 and is recognized as having the binding legal force as it is formed by the higher statutory regulations or formed based on the authority referred to in Article 8 paragraph (2) Law Number 15 of 2019.

The establishment of Regulations must be suitable with the formal requirements and material requirements. Basic authority for the establishment of legislation as explained in item 28 of attachment II of the Law Number 15 of 2019 that there are 2 (two) basic authorities for the formation of legislation namely the basis for authority by a delegation of authority or attribution of authority.

The attribution of authority is the granting of authority on the orders of the legislation which means that the authority has never before existing, while the

delegation of authority is the delegation of authority from a statutory provision that governs to be regulated further by a statutory regulation of the same status in the hierarchy of statutory regulations or lower in the hierarchy of statutory regulations. This is binding on the types of statutory regulations that are clearly stated in Article 7 paragraph (1) of the Law Number 15 of 2019, in contrast to the Regulations established by state institutions, one of which is the Ministerial Regulation mentioned in Article 8 paragraph (1) Law Number 15 of 2019. The Ministerial Regulation is not only based on attribution or delegation authority but also established on authority as explained in the explanation referred to as “based on authority” is the implementation of certain government affairs in accordance with the provisions of the Laws and Regulations. This particular matter is then regulated through Law Number 38 of 2009 on State Ministries and their implementing regulations.

Each statutory regulation contains legal norms arranged in stages in accordance with the legal standing of the hierarchy. Hans Kelsen in *Stufen Theory* or the theory of tiered norms argues that “norms are tiered and layered in hierarchical order, norms below apply, are sourced and are based on higher norms, higher norms apply, are sourced and based to higher norms and so on until finally the ‘regresus’ stops at a supreme norm called the basic norm (*Grundnorm*) which cannot be traced back to who formed it or where it came from” (Hanks Kelsen, 1945: 112-113).

The tiered norm theory from Hans Kelsen was inspired by one of his students named Adolf Merkl who argued that a legal norm always has two faces (*Das Doppelte Rechtsantlitz*), which means that “legal norms are above sourced and based on the norms that exist in the norms above it, but downward also becomes the source and becomes the basis for the legal norms below, so that the legal norm has a relative validity period (*rechskraft*) because the period of validity of a legal norm depends on the legal norms above it. If the legal norms that are above are revoked or removed, basically the legal norms that are below them will be revoked or removed too” (Maria Farida, 2007: 41-42). Forming legal norms should be able to make people happy as “legal norms that are crystallized into statutory regulations ultimately have legal objectives that make their people happy, so that they are able to present legal products that contain the value of social justice/substantial justice (Wahyu Nugroho, 2013: 210). Establishing legislation must be based on the principle of the establishment of good legislation as referred to in Article 5 of the Law Number 15 of 2019, which includes:

1. Clarity of Purpose

What is meant by “the principle of clarity of purpose” is that each establishment of Legislation must have a clear purpose to be achieved.

2. Institutional Or Appropriate Forming Officer

What is meant by “the right institutional principle or forming official” is that each type of statutory regulation must be made by a state institution or an official legislator. These laws and regulations can be postponed or null and void if they are made by unauthorized state institutions or officials.

3. Conformity Between Type, Hierarchy, and Material Content

What is meant by “the principle of conformity between types, hierarchy, and material content” is that in the establishment of Legislation Regulations must really pay attention to the appropriate content material in accordance with the type and hierarchy of the Regulations.

4. Implemented

What is meant by “principle can be implemented” is that the establishment of Regulations and Regulations must take into account the effectiveness of these Regulations in the Society, both philosophically, sociologically, and juridically.

5. Usability and Efficacy

What is meant by “the principle of usefulness and usefulness” is that each of the Laws and Regulations is made because it is really necessary and useful in regulating the life of society, nation and state.

6. Clarity of Formulation

What is meant by “the principle of clarity of formulation” is that each statutory regulation must see the technical requirements for the drafting of statutory regulations, systematic, choice of words or terms, and legal language that is clear and easy to understand.

7. Openness.

What is meant by “the principle of openness” is that in the Formation of Legislation starting from planning, drafting, discussion, ratification or stipulation, and legislation is transparent and open. Thus, all levels of society have the broadest opportunity to provide input in the formation of legislation.

Based on Article 6 paragraph (1) of the Law Number 15 of 2019, each statutory regulation contains material content that must reflect the principles of:

1. Guarding

What is meant by “the principle of protection” is that each Material of Regulatory Content must function to provide protection to create peace of society.

2. Humanity

What is meant by “the principle of humanity” is that each Material of Regulatory Content must reflect the protection and respect for human rights and the dignity and dignity of each Indonesian citizen and population in proportion.

3. Nationality

What is meant by “nationality principle” is that each Material of Regulations Content must reflect the diverse nature and character of the Indonesian people while maintaining the principles of the Unitary State of the Republic of Indonesia.

4. Kinship

What is meant by “the principle of kinship” is that every Material of Regulatory Content must reflect deliberation to reach consensus in every decision making.

5. Archipelago

“Literacy principle” means that each Material of Regulatory Content is always concerned with the interests of the entire territory of Indonesia and the Material of Regulatory Content made in the regions is part of the national legal system based on the Pancasila and the 1945 Constitution of the Republic of Indonesia .

6. Unity in Diversity

What is meant by “the principle of unity in diversity” is that the Material of Regulatory Content must pay attention to the diversity of the population, religion, ethnicity and class, special conditions of the region and culture in the life of society, nation and state.

7. Justice

What is meant by the “principle of justice” is that every Material of Regulatory Content must reflect proportionally justice for every citizen.

8. Equality in law and government

What is meant by “the principle of equality in law and government” is that each Material of Regulatory Content may not contain things that are differentiating based on background, among others, religion, ethnicity, race, class, gender, or social status.

9. Order and legal certainty

What is meant by “the principle of order and legal certainty” is that every Material of Regulatory Content must be able to realize order in society through guaranteed legal certainty.

10. Balance, harmony, and harmony.

What is meant by “the principle of balance, harmony and harmony” is that every Material of Regulatory Content must reflect the balance, harmony and harmony between individual, community and national and state interests.

B. Legal Standing of The Ministerial Regulation in The Hierarchy of Statutory Regulations

The state is an organization of authority or authority that must meet the requirements of certain elements, there must be a sovereign government, a certain region, and people who live in an orderly fashion so that it is a nation (G. Pronggodigdo, 2008: 2). The state is an agency or authority that regulates and controls common issues on behalf of the people. This control is based on the law and regulations established by the government and its institutions. The state administration system of each country is regulated in the constitution of each country, the constitution is considered to precede and overcome the government and all forms of decisions of other state institutions. As a state, the constitution of the Indonesian State has been promulgated in the 1945 Constitution of the Republic of Indonesia. The Indonesian state adheres to a Presidential system that makes the President as head of state and at the same time as head of government.

The President as the holder of state and governmental power in carrying out his duties is assisted by state ministers as referred to in Article 17 of the 1945 Constitution of the Republic of Indonesia. The ministers are appointed and dismissed by the President to carry out certain functions within the government in order to achieve the country's objectives as mandated by the 1945 Constitution. According to Jimly Asshiddiqie's reasons for the compilation of provisions on State Ministries in Chapter V that are separate from Chapter II on governmental power, are mainly due to the position of state ministers considered to be necessary for the constitutional system according to the 1945 Constitution (Jimly Asshiddiqie, 2006: 174). According to Jimly Asshiddiqie, the importance of the minister's role can be described as follows:

The actual chief executive is the minister responsible to the President. Therefore in the explanation of the 1945 Constitution, before the amendment, it was stated that the minister was not an ordinary official. His position is high as a daily executive leader. This means that the ministers are essentially the leaders of the ministries in the real sense in their respective fields of duty.

According to Article 3 of Law Number 38 of 2009 on the State Ministry, it states that "The Ministry is under and is responsible for the President", the President as the holder of power over the government is assisted by state ministers in organizing his government. State ministers in Indonesia have the authority to determine regulations based on Article 8 paragraph (1) of the Law Number 15 of 2019. The authority of the state ministers to stipulate the regulation is not contained in Article 7 (1) of the Law Number 15 of 2019 related to the hierarchy of legislation while in Article 7 paragraph (2) of the Law Number 15 of 2019 explains that the legal force binds it according to the hierarchy so it must be known firstly the legal standing of the Ministerial Regulation is based on it.

Article 7 paragraph (1) of the Law Number 15 of 2019 states "that the type and hierarchy of the Regulations consists of: a. 1945 Constitution; b. Statue of the People's Consultative Assembly; c. Law / Governmental Regulation in lieu the law; d. Governmental Regulation; e. Presidential Regulation; f. Provincial Regulations; and g. Regency / City Regulations "and Based on Article 8 paragraph (1) of the Law Number 15 of 2019 states that" types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, People's Representantive Council, Lecal Representative Council, Supreme Court, Constitutional Court, Audit Board of The Republic of Indonesia, Juducial Commision, Bank Indonesia, Ministers, Institution Bodies, or Commissions of the same level formed by Law or Government on the Orders of the Law, , Governor, Village Head or equivalent ".

Adolf Merkl has suggested that a legal norm always has "two faces" (*Das Doppelte Rechtsantlitz*) meaning that the legal norms are up, sourced and based on the norms above, but down also become a source and become the basis for legal norms below, so that legal norms have a relative validity period (*rechskraft*), because the period of validity of a legal norm depends on the legal norms above it. If the legal norms that are above are revoked or removed, basically the legal norms that are below it

will be revoked or removed as well. The state ministers have the duty to assist and report directly to the President, the material contained in the norms stipulated in the Ministerial Regulation must be sourced and based on the norms given by the President through Presidential Regulations or Government Regulations as described in Article 17 of the 1945 Constitution of the Republic of Indonesia.

Based on Article 5 of Law Number 23 of 2014 on the Regional Government reads that "(1) The President of the Republic of Indonesia holds the power of government in accordance with the 1945 Constitution of the Republic of Indonesia, (2) Government Authority as referred to in paragraph (1) is described in various Government Affairs, (3) in carrying out Government Affairs as referred to in paragraph (2), the President shall be assisted by a minister who carries out certain Government Affairs; (4) the implementation of Government Affairs as referred to in paragraph (2) in the Regions shall be carried out based on the principles of Decentralization, Deconcentration, and Assistance Tasks. Based on Article 18 paragraph (6) of the 1945 Constitution of the Republic of Indonesia which states that "Local Governments have the right to stipulate regional regulations and other regulations to carry out autonomy and co-administration tasks", of course, Regional Governments in carrying out regional government affairs in establishing the regional regulations and other regulations at the regional level must be guided by state ministers as presidential aides who carry out certain affairs.

For this reason, the governmentally accelerated effort through Presidential Regulation 91 of 2017 on the Acceleration of Business Implementation and Government Regulation Number 24 of 2018 on the Electronic Integrated Business Licensing Services issues to many Ministerial Regulations including Minister of Trade Regulation Number 77 of 2018 on the Electronic Integrated Business Licensing Services in the field of Trade and Regulation of the Minister of Tourism Number 10 of 2018 on the Electronic Business Licensing Services for the Tourism Sector. The Ministerial Regulation provides guidelines for the Regional Government in accelerating efforts to support the President's policy to facilitate the public or business actors in obtaining permits.

"The Indonesian state has the concept of *trias politica*, namely the separation of state power into three organs, namely: Legislative Power (making laws), Executive Power (implementing laws / organizing government), and Judicial Power (adjudicating when violations occurred)" (Moh. Mahfud MD, 2001: 73). In Indonesia, executive power is vested in the President as referred to in Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that "The President of the Republic of Indonesia holds governmental authority according to the Constitution." As a Head of Government, the President has full authority to run the wheels of government in Indonesia (Kukuh Tejomurti, 2017: 47). One of the authorities held by the President as the head of government is the power to appoint and dismiss ministers in helping to carry out certain affairs in the Government. Article 17 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that "the minister is an assistant to the president in running the government." Therefore, the President has the prerogative to appoint and dismiss his Ministers. Appointment of ministers and

in the preparation of the cabinet is a prerogative of a president, but as a state based on the law (*rechstaat*), there are limits to the president in exercising that authority so that there is no abuse of authority (*detournement de pouvoir*) by the president. For this reason, Law Number 39 of 2008 on the State Ministry was established as an attribute of the provisions of Article 17 of the 1945 Constitution of the Republic of Indonesia.

As the holder of executive power, the President in carrying out his functions and duties as mandated by the 1945 Constitution is assisted by the Minister. Affirmed in the 1945 Constitution of the Republic of Indonesia in Chapter V concerning the State Ministry Article 17 states that:

1. The President is assisted by State Ministers.
2. The ministers are appointed and dismissed by the President.
3. Each minister in charge of certain affairs in government.
4. The formation, amendment and dissolution of state ministries is stipulated in the Act.

In a presidential system, the executive (government) is non-collegial. The president is responsible for carrying out the duties of his ministers. All officials under the president are helping him. Thus, the leadership is hierarchical, and the full responsibility lies with the president. In other words, the president is the sole executive power holder. The responsibility of the president is not the parliament. However, as in the United States that the president can be dismissed from office through the mechanism of impeachment if committing treason, accepting bribes, and committing serious crimes (treason, bribery, or other high crime, and misdemeanors) as referred to in Article 7A of the 1945 Constitution states that “the President and / or Vice-President may be dismissed in his term of office by the People’s Consultative Assembly at the suggestion of the House of Representatives “.

As a state of law, the formation of ministers in a cabinet besides being a prerogative of the president, is also an order of the law. The theory of the state based on the law essentially means that the law is “Supreme” and the obligation for every state or government administration to obey the law (subject to the law). There is no power above the law (above the law) everything is under the law (under the rule of law). By this position there can be no arbitrary power (Sumali, 2003: 11). As a form of the governmental control, there is the Minister of Law and Human Rights Regulation Number 23 of 2018 has been enacted regarding the Harmonization of the Ministerial Draft Regulation, the Draft Regulation of Non-Ministerial Government Institutions, or the Draft Regulation of Non-Structural Institutional Arrangements by the Draft Regulators in Government Efforts to harmonize so that it is in harmony with Pancasila, the 1945 Constitution of the Republic of Indonesia, the higher or equivalent legislation, and court decisions and techniques for the preparation of legislation.

Article 7 paragraph (1) of the Law Number 15 of 2009 states “that the type and hierarchy of the Regulations consists of a. 1945 Constitution of the Republic of Indonesia; b. Statue of the People’s Consultative Assembly; c. Law/ Governmental Regulation in lieu of the law; d. Governmental Regulation; e. Presidential Regulation;

f. Provincial Regulations; and g. Regency / City Regulations “and Based on Article 8 paragraph (1) of the Law Number 15 of 2009 states that” types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People’s Consultative Assembly, People’s Representatives Council, Local People’s Representative Council, Supreme Court, Constitutional Court, Audit Board of the Republic of Indonesia, Judicial Commission, Bank Indonesia, Ministers, Institution Bodies, or Commissions of the same level formed by Law or Government on the Orders of the Law “. The legally binding force of a Ministerial Regulation based on Article 8 paragraph (2) of Law Number 15 of 2019 is that as long as it is formed by order of higher statutory regulations or is formed based on authority. This means that the Ministerial Regulation, in this case, has 2 (two) characteristics.

First, it was formed by order of the higher laws and regulations as Hans Kelsen in *Stufen Theory* or the theory of tiered norms argues that the norms are tiered and multi-layered in a hierarchical structure, the norms below are valid, based on norms higher, and so on until the ‘*regresus*’ steps at the highest norm called the basic norm (*Grundnorm*) which cannot be traced back to who formed it or from where does it come from. So that the characteristics of Ministerial Regulations formed by order of higher laws and regulations have the characteristics of *regeling* / regulating or what is referred to as statutory regulations as referred to in the Law Number 15 of 2019.

Second, it is formed according to the authority. Elucidation of Article 8 paragraph (2) of the Law Number 15 of 2019 explains that what is meant by “based on authority” is the administration of the certain government affairs in accordance with the provisions of the Laws and Regulations. The term particular functions in the administration of government in charge of certain functions in accordance with Law 39 of 2008 on the State Ministries which are classified in a policy in carrying out certain functions. Thus, the Ministerial Regulation which is formed based on this authority is not based on the order of higher laws but rather the policy of the state ministers in carrying out their authority in carrying out their governmental affairs. Ministerial regulations established under this authority can be classified as *beleidsregel* / Policy Regulations. *Beleidsregel* or policy regulations are a type of state administrative action. Laica Marzuki argues that the regulation / policy regulation itself consists of the following elements (Safri Nugraha, 2005: 93):

1. Issued by a state administration agency or official as an embodiment of discretionary *freies* (discretionary power) in written form, which after being announced is released to be applied to citizens;
2. The contents of the aforementioned policy regulations are, in fact, separate *generale* rules, so they are not merely operational guidelines as the original purpose of the policy regulations or the regulation itself. State administrative bodies or officials that issue policy regulations have absolutely no authority to make general rules (*generale* rules) but they are still seen as legitimated given that *beleidsrege* is an embodiment of *freermind ermessen* which is given a written form.

In addition, Bagir Manan adds that:

This regulation is a type of regulation that is not included in the Statutory Regulations. As a result, it cannot be applied to policy regulations because it is not a type of regulation. A policy regulation cannot be legally tested (*wetmatigheid*) because there is indeed no legal basis for the decision to make a policy regulation. Policy regulations are made based on German *freievers* and the lack of the administrative authority of the State concerned to make laws and regulations. Furthermore it is said that testing of policy regulations is more directed at *doelmatigheid* and therefore the touchstone is the general principles of proper governance (Bagir Manan, 2008: 15).

This freedom in acting through *freessen ermessen* is one of the backgrounds of the formation of Ministerial Regulations which are formed based on the authority that is characterized by the *Beleidsregel* / Policy Regulations and is not a statutory regulation.

One of the government policies that issue many Ministerial Regulations, one of which is a government policy through business acceleration through Presidential Regulation 91 of 2017 on the Acceleration of Business Implementation and Government Regulation Number 24 of 2018 on the Electronic Business Licensing Licensing Services. Ministerial Regulations including Minister of Trade Regulation Number 77 of 2018 on the Electronic Integrated Business Licensing Services in the field of Trade through considerations consider that to implement the provisions of Article 88 and Article 89 Government Regulation Number 24 Year 2018 on the Electronic Integrated Business Licensing Service Services, this is as meant in Article 8 paragraph (2) of the Law Number 15 of 2019 that the Ministerial Regulation is formed by order of higher laws or in other words obtaining an order based on delegation of authority, it shows the characteristics of the Ministerial Regulation *regeling* / regulating. In addition, Regulation of the Minister of Tourism Number 10 of 2018 on the Electronically Integrated Business Licensing Services in the Tourism Sector is different from Regulation of the Minister of Trade Number 77 of 2018 on the Electronically Integrated Business Licensing Services in the Field of Trade. Considerations considering the Minister of Tourism Regulation Number 10 of 2018 on the Electronic Integrated Business Licensing Services in the Tourism Sector does not show to carry out higher laws and regulations so that its formation is carried out on the basis of the authority possessed by the Minister of Tourism, so it has the characteristics of *Beleidsregel*.

IV. Conclusion

The Minister is a presidential aide and is directly responsible to the President according to the 1945 Constitution of the Republic of Indonesia, thus the Ministerial Regulation is under the Presidential Regulation and based on Law 9 of 2015 on the Local Government that the Ministerial Regulation is above the Provincial (Regional) Regulations. Therefore Ministerial Regulation may not conflict with Presidential Regulation and Government Regulation and provide guidelines for Provincial, Regency / City Regional Regulations which means Provincial, Regency / City Regional Regulations may not conflict with Ministerial Regulations. The Minister in conducting certain government affairs has the authority to determine 2 (two) regulatory characteristics based on Article 8 of the

Law Number 15 of 2019, which is characterized by regulation and *beleidsregel* / policy regulations. Ministerial Regulations determined by order of higher statutory regulations are *regeling* / regulated and are referred to as statutory regulations, whereas Ministerial Regulations are stipulated based on authority characterized by *beleidsregel* and not as statutory regulations.

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