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LEGAL CERTAINTY OF THE PROBATIONARY PERIOD REGULATION FOR EMPLOYEES OF REGIONAL WATER COMPANY

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Abstract: The legal conflict regarding the probationary period between the Employment Law and the Ministry of Home Affairs Regulation concerns the regulation of the probationary period, where the Employment Law stipulates that the probationary period should not exceed 3 (three) months. However, the Ministry of Home Affairs Regulation states a minimum of 3 months and a maximum of 6 months for the probationary period. Based on this, the research question of this paper is formulated as follows: What are the provisions of the Probationary Period in Article 33 Paragraph (2) of the Minister of Home Affairs Regulation on the Organization and Personnel of Regional Drinking Water Companies in terms of the Principle of Legal Certainty? The writing of this paper uses a normative juridical method with the Statute Approach and Analytical Approach. In analysing this research, several theories are employed, including the theory of legal certainty, the theory of norm hierarchy, and the theory of norm conflict. The researcher obtains answers to the existing problems by analysing the legal certainty of the probationary period regulation. In terms of the theory of legal certainty by Jan Michiel Otto, it aligns with Lord Lyod's opinion on the meaning of legal certainty, which is consistent, stable, and clear. The regulation in Article 33 Paragraph (2) of the Ministry of Home Affairs Regulation does not meet the principle of legal certainty. While the regulation in the Ministry of Home Affairs Regulation in Article 33 Paragraph (2) is consistent and clear, it lacks consistency. This is because the regulation should comply with labour laws where the maximum probationary period is 3 months, while in the Ministry of Home Affairs Regulation, the probationary period is a minimum of 3 months and a maximum of 6 months.

Keywords: Probationary Period, Company Employment Contract

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INTRODUCTION

Issues in the industrial sector, particularly in the field of labour, still frequently occur, and legal certainty is crucial given the rapid development in Indonesia. This has resulted in an imbalance between the supply and demand for labour, especially in the category of a large workforce in Indonesia, where employers (companies) prefer skilled labour according to the company's needs. Juridically, the definition of labour based on Article 1 of the Labor Law is "everything related to labour before, during, and after working hours." It can be interpreted that Labor Law based on this law is a "collection of regulations regarding everything related to labour before, during, and after working hours."¹

The definition of labour according to Law No. 13 of 2003 concerning Manpower, in Article 1 paragraph 2, states that: "Labor is every person capable of performing work to produce goods and/or services, either for their own needs or for the community." Meanwhile, according to DR Payaman, labour refers to the population that is already or currently working, actively seeking employment, and engaged in other activities such as attending school and managing household affairs. In practice, he emphasizes that the distinction between labour and non-labour is only based on age limits.² Therefore, labour is defined as individuals who are actively seeking or have already found employment, producing goods or services that meet the legal age requirements, with the aim of achieving results or fulfilling daily living needs.

The creation of job opportunities, the goods and services produced by companies, and the taxes generating income for the government are considered highly beneficial contributions. According to Law No. 13 of 2003 concerning Manpower, a Employment Contract/Work Agreement is an agreement between workers/laborers and employers that includes the terms of employment, rights, and obligations of the parties involved. Companies, in employing workers, base their decisions on agreements made in contracts. The form of employment contracts is generally free and

¹ S, R. J. Bambang, *Hukum Ketenagakerjaan*. (Bandung: Pustaka Setia, 2013)

² Sendjun H Manululang, *Pokok-Pokok Hukum Ketenagakerjaan Di Indonesia* (Jakarta: PT Rineka Citra, 1998).



can be made verbally or in writing³. Basically, there are two types of employment contracts: fixed-term employment contracts (PKWT) and indefinite-term employment contracts (PKWTT). In practice, companies often hire workers before creating or signing a contract because workers actually need employment to meet their family's needs. It could also be that workers themselves arrange for the work they do, accept it, or are willing to work there with the expectation that the employer will fulfil their obligations to the workers fairly.

PKWT (Fixed-Term Employment Contract) is an employment agreement between workers or laborers and employers to establish an employment relationship for a specific period or specific job, while PKWTT (Indefinite-Term Employment Contract) is an employment agreement between workers or laborers and employers to establish a permanent employment relationship. The time frame for a Fixed-Term Employment Contract (PKWT) according to Article 3 paragraph (2) of Ministerial Regulation No. 100/Men/VI/2004 regarding the Implementation of Fixed-Term Employment Contracts is specified to be a maximum of 3 (three) years, with an initial period of two years, followed by an extension of one year. PKWT legally terminates upon the expiration of the agreed-upon time in the contract or upon the completion of the agreed-upon work. It can also end in the event of death. PKWT may not require a probationary period, as probationary periods are relatively short. If a probationary period is stipulated in the employment contract, it is legally null and void.⁴

Therefore, the Probationary Period is only present in an Indefinite-Term Employment Contract (PKWTT). The definition of the probationary period is not regulated in the law; however, it is a specific work period before the company officially hires an employee permanently. During the probationary period, the company assesses the performance and attitude of the employee to determine whether the individual is suitable to be retained as a permanent employee. In the Labor Law, the duration of the probationary period is regulated, where Article 60 paragraph (1) states that

³ Abdul Khakim, *Pengantar Hukum Ketenagakerjaan Indonesia, Berdasarkan Undang-undang Nomor 13 Tahun 2003* (Bandung: PT Citra Aditya Bakti, 2003).

⁴ F. Andi, *Aspek Legal Sumber Daya Manusia Menurut Hukum Ketenagakerjaan*. Jakarta: Penerbit Mitra Wacana Media, 2012)



"an indefinite-term employment contract may stipulate a probationary period of up to 3 (three) months." It is clear that the probationary period is limited to a maximum of 3 months and cannot be extended. After this 3-month period, the company must determine whether the employee becomes a permanent employee or not.

In reality, it turns out that there are several regulations governing the probationary period, such as in the Ministry of Home Affairs Regulation No. 2 of 2007 regarding the Organization and Personnel of Regional Drinking Water Companies. In this regulation, Article 33 Paragraph (2) states that "the appointment of employees is carried out after undergoing a probationary period of at least 3 (three) months and at most 6 (six) months, with the provision of fulfilling a work assessment list where each element is at least valued as good." In this article, there is an apparent inconsistency between the Ministry of Home Affairs Regulation and the Labor Law regarding the duration of the probationary period.

The Ministry of Home Affairs Regulation should adhere to legal norms, where legal norms of lower hierarchy derive from or are based on higher legal norms, and these higher legal norms, in turn, are based on even higher norms, continuing until the fundamental norm (ground norm) is reached, which is considered an axiom or a final presupposition (transcendental-logical presupposition)⁵. There is a legal conflict between the Ministry of Home Affairs Regulation (Permendagri) and the Labor Law (Undang-Undang Ketenagakerjaan) regarding the regulation of the probationary period. While the probationary period should ideally be a maximum of 3 (three) months according to the Labor Law, the Ministry of Home Affairs Regulation allows it to exceed 3 (three) months. This provision contradicts the regulations stipulated in the Labor Law.

Moreover, when viewed from the theory of legal certainty by Jan Michiel Otto, it aligns with Lord Lyod's opinion on the meaning of legal certainty, which is consistency, stability, and clarity. In this context, the regulation in Article 33 paragraph (2) of the Ministry of Home Affairs Regulation, while its provisions are clear and stable, lacks consistency. Based on the background outlined above, the legal issue in this research is

⁵ Jimly Asshiddiqie & M. Alli Safa"at, *Teori Hans Kelsen Tentang Hukum* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006).



the existence of a legal conflict regarding the probationary period between the Employment Law and the Ministry of Home Affairs Regulation. This research will analyse the "Legal Certainty of the Probationary Period Regulation for Employees of Regional Drinking Water Companies." The research question is formulated as follows: How is the regulation of the probationary period in Article 33 Paragraph (2) of the Ministry of Home Affairs Regulation on the Organization and Personnel of Regional Drinking Water Companies viewed from the principle of legal certainty?

THEORETICAL BASIS

Theory of Legal Certainty

The Theory of Norm Hierarchy in this study will be used as an analytical tool to examine the Probationary Period in the Minister of Home Affairs Regulation in relation to Law Number 13 of 2003 Regarding Manpower. The theory of the doctrine of the hierarchy of legal norms suggests that legal norms are hierarchical. Lower legal norms are derived from or based on higher legal norms, and these higher legal norms, in turn, derive from even higher norms, continuing until reaching the basic norm (ground norm) considered as an axiom or final presupposition (transcendental-logical presupposition). Therefore, in this study, the Minister of Home Affairs Regulation, as a lower legal regulation, should derive from or be based on a higher legal regulation, namely the Law. Essentially, the idea of the hierarchy of legal norms is an integral part of pure legal theory. Therefore, in the following section, the author will briefly explain the pure legal theory. Hans Kelsen explained that:

The theory of pure law is a theory of positive law. It is a theory about general positive law, not about the legal order of a particular system. It is a general legal theory, not about the interpretation of specific national or international legal norms. However, it presents a theory of interpretation. As a theory, it is primarily intended to understand and explain its subject. This theory attempts to answer the questions of what law is and how it exists, not how it should exist. It is a legal science rather than legal politics. It is called "pure" legal theory because it only explains the law and attempts to cleanse its explanatory object from everything unrelated to the law. Its



goal is to purify legal science from foreign elements. This is the methodological foundation of the theory.⁶

One crucial point in the discussion of the theory of pure law is that the law regulates its own creation. According to Hans Kelsen, the creation of legal norms can be done through procedures established by other legal norms, and it can also be accomplished by norms specifying within certain limits the content of the norm to be created. In other words, the norm that serves as the basis for creating a new norm holds a higher position, while the newly created norm occupies a lower position.⁷ Based on the above premises, Hans Kelsen concluded that the legal order is not a system of coordinated norms with equal status, but rather a hierarchy of legal norms with various levels. Each legal norm is interconnected with the others, where higher-level norms serve as the basis for lower-level norms. Conversely, lower-level norms are subject to higher-level legal norms, and these higher-level norms are also subject to even higher-level legal norms, continuing until reaching the most fundamental norm.⁸

According to Hans Kelsen, the Constitution is the highest level of positive law, while the levels below it consists of general norms created through legislation or tradition, such as laws and regulations, as well as court decisions. In addition to Hans Kelsen, several authors state that this theory of norm hierarchy was influenced by Adolf Merk's theory, or at least Merk had written the theory first, referred to as the "Stairwell Structure of Legal Order" by Jelic. Adolf Merkl's theory revolves around the stages of law ("*Die Lehre vom Stufenbau der Rechtsordnung*"), proposing that law is a system of hierarchical rules, a system of norms that condition and are conditioned by legal actions. The conditioning norms contain conditions for the creation of other norms or actions. This hierarchical creation is manifested in the regression from higher legal systems to lower legal systems. This process is always a process of concretization and individualization. Regardless of the correctness of these experts' opinions,

⁶ Hans Kelsen, *Teori Hukum Murni: Dasar-Dasar Ilmu Hukum Normatif* (Bandung: Nusa Media, 2008).

⁷ Hans Kelsen.

⁸ Jimly Asshiddiqie & M. Alli Safa"at, *Teori Hans Kelsen Tentang Hukum*.



in essence, both Hans Kelsen and Adolf Merkl have theories about norm hierarchy.

Theory of Norms Conflict

The Theory of Norm Conflict is used to analyse the probationary period between the Ministry of Home Affairs Regulation and Legislation, where a conflict occurs between these two regulations. Talking about norm conflicts, it is necessary to compare several articles between the two Regulations. In reality, there are several regulations that regulate the probationary period, namely in the Ministry of Home Affairs Regulation, where this regulation states that the length of the probationary period does not align with the Manpower Law.

The absence of harmonization between legal products, both vertically and horizontally, can undoubtedly lead to chaos, no longer aligning with the intended goals of the applied regulations. This chaos arises not only due to inconsistencies in the application of principles for forming good legislation but goes further, becoming a trigger for various tensions and conflicts in practical terms.

RESEARCH METHODS

This research employs a normative juridical research method. This method is a library-based legal research conducted by examining literature or secondary data⁹ this study, the researcher focuses on the duration of the Probationary Period in the Ministry of Home Affairs Regulation compared to the Employment Law.

In the research, there are several approaches. Through these approaches, the researcher will obtain information from various aspects related to the issue being addressed. The methodological approach used in this research is the Statute Approach. The Statute Approach is a method used by the researcher to examine all laws and regulations related to the legal issue under investigation¹⁰.

Analytical Approach. The analytical approach is a method of analysing existing legal materials with the aim of understanding the

⁹ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2016).

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenadamedia Group, 2001).
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meanings contained in laws and regulations¹¹. The researcher conducts an analysis of the Probationary Period in the Ministry of Home Affairs Regulation compared to the Employment Law.

RESULTS AND DISCUSSION

The Role of Prosecutors in Designating Justice Collaborators

The government, as the regulator, supervisor, and enforcer of the law, implements legal regulations carefully, considering the positions of both employers and workers as potential assets for the country. They are also subjects of national development with equal standing before the law. Legal regulations, serving as guidelines for behaviour, must be adhered to by all parties with a strong sense of responsibility. Compliance is not a coercion but rather a culture of adherence to legal provisions.

Essentially, labour law has the nature of protecting and creating a sense of safety, tranquillity, and prosperity by realizing social justice for the entire population. Labor law, in providing protection, must be based on two aspects. First, the law, from an ideal perspective, is embodied in legislation (*heterotomic*) and autonomous law. This legal domain should reflect legal products that align with the ideals of justice and truth, certainty, and have benefits for the parties involved in the production process. Labor law not only prioritizes business actors but also considers and provides protection to workers who, socially, have a very weak position compared to financially stable employers. The law is beneficial to the principle of social differentiation and the economic level for less fortunate workers, including aspects such as welfare, wage standards, and employment conditions, as regulated by legislation and in harmony with the meaning of justice according to Article 27 paragraph 2 of the 1945 Constitution, which states: "Every citizen has the right to work and a decent life for humanity." Similarly, Article 28 D paragraph (2) of the 1945 Constitution states: "Everyone has the right to work and to fair and decent treatment in employment relationships." Second, normative law at the implementation level contributes through supervision by law enforcement officials and takes action against parties that do not comply with legal provisions.

¹¹ Jhonny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2006).



The definition of labour according to Law No. 13 of 2003 concerning Manpower, in Article 1 paragraph 2, states that: "Labor is every person capable of performing work to produce goods and/or services, either for their own needs or for the community." According to Article 1 of Law No. 13 of 2003 concerning Manpower (Manpower Law), an employment agreement is an agreement between an employee and an employer that includes the terms of employment, rights, and obligations of the parties. By agreeing to the employment agreement, an employee establishes a legal bond and obligations that must be fulfilled at the company where they work. Conversely, the company also has the obligation to fulfill the rights of employees, such as providing wages, registering employees in health and employment insurance programs, and granting leave entitlements to employees.

The government has established rules for employment agreements aimed at benefiting both parties. Consequently, economic growth can be maintained, and the welfare of society can be achieved. Based on Article 56 of the Manpower Law (UU Ketenagakerjaan), there are two types of employment agreements: Fixed-Term Employment Agreement (PKWT) and Indefinite-Term Employment Agreement (PKWTT). The main difference between PKWT and PKWTT is based on the duration or completion of a specific job.

Fixed-Term Employment Agreement (PKWT) is a contract made between an employee and a company to establish a work relationship for a predetermined period. In a PKWT, there are still general provisions that regulate the employment relationship between the company and the employee, such as the rights and obligations of each party, as well as positions, wages, and other stipulations. On the other hand, an Indefinite-Term Employment Agreement (PKWTT) is a work contract or agreement made for an undetermined period, resulting in permanent employment or what is also known as a permanent employee. Unlike PKWT, which must be made in writing and recorded with the labor office, PKWTT can be made in written or oral form and is not obligatory to be recorded with the labor office.

Fixed-Term Employment Agreements (PKWT) must not stipulate a probationary period because the probationary period is relatively short. If



a probationary period is included in the employment agreement, it is considered legally null and void. Therefore, the probationary period is only applicable in an Indefinite-Term Employment Agreement (PKWTT). The probationary period is a timeframe during which an employee is not yet bound by a work contract, used by the company to assess the employee's performance. Regional Drinking Water Company (PDAM) is a Regional-Owned Enterprise (BUMD) engaged in providing drinking water services established by the regional government. PDAM is a regional company aimed at being a provider of clean water, supervised and monitored by local authorities and the legislative branch. Therefore, the government mandates all regions to support the provision of clean water in urban and rural areas.

In the Manpower Law, the duration of the probationary period is regulated in Article 60 paragraph (1), which states that "an employment agreement for an indefinite period may specify a probationary period of up to 3 (three) months." It is clear that the probationary period is limited to a maximum of 3 months and cannot be extended. After this 3-month period, the company must determine whether the employee will become a permanent employee or not.

In reality, there are indeed several regulations governing the probationary period, such as in the Ministry of Home Affairs Regulation No. 2 of 2007 concerning the Organization and Personnel of Regional Drinking Water Companies. In this regulation, Article 33 paragraph (2) states that "the appointment of employees is carried out after a probationary period of at least 3 (three) months and at most 6 (six) months with the condition of fulfilling a work assessment list for each element, at least valued as good." In this article, there is an apparent lack of synchronization between the Ministry of Home Affairs Regulation and the Manpower Law regarding the duration of the probationary period.

Gustav Radbruch, in the concept of the "Doctrine of Basic Values," posits three fundamental ideas of law or three legal objectives: justice, utility, and legal certainty. Justice is the primary among these three, but it does not imply that the other two elements can be simply disregarded. Good law is one that can synergize these three elements for the well-being and prosperity of society. According to Radbruch, "legal certainty is



understood as the condition in which the law can function as rules that must be obeyed."¹²

The law has the duty to create legal certainty as it aims to establish order in society. Legal certainty is an inherent characteristic of the law, especially for written legal norms. According to Fence M. Wantu, "law without the value of legal certainty will lose its meaning because it can no longer serve as a guide for the behaviour of everyone"¹³

Legal certainty is defined as the clarity of norms so that they can serve as a guide for the community subject to these regulations. The understanding of certainty can be interpreted as having clarity and firmness regarding the applicability of the law within society, preventing many misinterpretations. According to Van Apeldoorn, "legal certainty can also mean something that can be determined by the law in concrete matters."¹⁴ Legal certainty is the assurance that the law is enforced, that those entitled under the law can obtain their rights, and that decisions can be executed. Legal certainty is the justifiable protection against arbitrary actions, meaning that an individual will be able to obtain something expected in certain circumstances.

Grammatically, "*kepastian*" comes from the word "*pasti*," which means certain, definite, and sure. In the Indonesian Dictionary, the definition of "*kepastian*" is related to something definite, certain, or fixed. On the other hand, the definition of "*hukum*" is the legal system of a country capable of guaranteeing the rights and obligations of every citizen. Therefore, "*kepastian hukum*" refers to provisions or determinations made by the legal system of a country that can provide guarantees for the rights and obligations of every citizen. Legal certainty points to the implementation of laws that are clear, fixed, and consistent, where their enforcement cannot be influenced by subjective circumstances.¹⁵

A regulation is created and promulgated precisely because it regulates clearly and logically. Clarity implies that it does not create ambiguity

¹² Theo Huijbers, *Filsafat Hukum Dalam Lintasan Sejarah* (Jakarta: Kanisius, 1982).

¹³ Van Apeldoorn, *Pengantar Ilmu Hukum*, Cetakan Ke (Jakarta: Pradnya Paramita, 1990).

¹⁴ Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1997).

¹⁵ Raimond Flora Lamandasa, "Penegakan Hukum" (Universitas Indonesia, 2011).



(*multitafsir*) and is logical, making it a system of norms that do not conflict or cause normative conflicts with other norms. Normative conflicts resulting from the uncertainty of rules can take the form of normative contention, norm reduction, or norm distortion. True legal certainty is achieved when legislation can be implemented in accordance with legal principles and norms.

Jan Michiel Otto, in line with Lord Lyod's opinion on the meaning of legal certainty, emphasizes consistency, stability, and clarity. In his theory, Jan Michiel Otto argues that legal certainty is needed in the following aspects:¹⁶

- (1) Clear, consistent, and easily accessible and obtainable legislation.
- (2) Legislation must be issued and recognized by those with authority in this matter (the state) consistently and adhered to.
- (3) The rule of law can be upheld and consistently applied by various authorities or government bodies.
- (4) Citizens have the principle that they agree with the content of the legislation. Therefore, citizens adjust their behaviour in accordance with the legislation that has been established.
- (5) Judges are independent, meaning judges do not comment on the consistent application of the rule of law when a judge can observe the law. Court decisions can be implemented concretely.

According to Sudikno Mertokusumo, legal certainty is an assurance that the law must be executed in a proper manner. Legal certainty requires legal regulation efforts in legislation made by authorized and authoritative parties, so that these rules have juridical aspects that can ensure the certainty that the law functions as a regulation that must be obeyed¹⁷.

In terms of the theory of legal certainty by Jan Michiel Otto, aligned with Lord Lyod's opinion on the meaning of legal certainty, which involves consistency, stability, and clarity. The regulation in Article 33 paragraph (2)

¹⁶ Sulistyowati Irianto Jan Micheil Otto, *Kepastian Hukum Yang Nyata Di Negara Berkembang [Real Legal Certainty in Developing Countries]* (Bali: Pustaka Larasan, 2012).

¹⁷ A. & Z. Asikin, *Pengantar Metode Penelitian Hukum*. (Jakarta: Raja Grafindo Persada, 2012)



of Permendagri does not meet the principle of legal certainty, where in the regulation of Permendagri in Article 33 paragraph (2), although it is clear and stable, it lacks consistency. This is because the regulation should be in accordance with labour laws, where the maximum probationary period in labour laws is 3 months, while in Permendagri, the minimum probationary period is 3 months and the maximum is 6 months.

This results in the inconsistency of the regulation in Article 33 paragraph (2) of Permendagri. The regulation regarding the duration of the probationary period stipulated in Article 33 paragraph (2) of Permendagri No. 2 of 2007 concerning the organization and personnel of regional water utility companies, which is one part of the Regional-Owned Enterprises (BUMD), in Government Regulation No. 54 of 2007 regarding BUMD, in Article 74 states that "Employees of BUMD are BUMD workers whose appointment, termination, position, rights, and obligations are determined based on employment agreements in accordance with the provisions of laws and regulations governing labour relations." In this Government Regulation, it emphasizes that all regulations are established in accordance with the provisions of labour laws, where Permendagri should adhere to legal norms. Legal norms derive from or are based on higher legal norms, and those higher legal norms, in turn, derive from even higher norms, and so on until reaching the basic norm (ground norm), which is considered an axiom or a final presupposition (transcendental-logical presupposition). The regulation on the probationary period in Permendagri should be in line with labour laws, providing legal certainty for workers and serving as a guideline for subordinate regulations.

CONCLUSION

The regulation in Article 33, paragraph (2) of Permendagri does not meet the principle of legal certainty. Despite being clear and definite, it lacks consistency. This is because the regulation should align with labor laws, where the maximum probationary period is 3 months. In Permendagri, however, the minimum probationary period is 3 months, and the maximum is 6 months.



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