Application of theory and regulation of hierarchy legal regulations in the problem of forest area status

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Abstract. The application of hierarchical theory and regulation of laws and regulations in Indonesia is still not fully implemented properly, especially in many cases there are still many laws and regulations under the law that are contrary to the law but not immediately revoked or revised. In its application in forestry regulations from the Decree of the Minister of Forestry number 454/KPTS-II/1999 concerning the appointment of forest areas in Southeast Sulawesi issued on June 17, 1999 and the Forestry Minister's decree number 465/Menhut-II/2011 concerning declining status the forest area in Southeast Sulawesi issued on August 9, 2011 also contradicts the theory and regulations contained in article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of legislation in which the problems in the status of forest areas in the decree the minister of forestry mentioned above contradicts article 1 point 3 of Act number 19 of 2004. Law number 41 of 1999 concerning forestry has been amended by the decision of the Constitutional Court number 45/PUU-IX/2011 which was established on February 21, 2012 where the determination of forest areas is not only biased by the government as it is which occurred in the Decree of the Minister of Forestry number 454/KPTS-II/1999 concerning the appointment of forest areas in Southeast Sulawesi and the Forestry Minister's decree number 465/Menhut-II/2011 concerning the decline in the status of forest areas in Southeast Sulawesi but must have been established regulated in forestry minister number 44 of 2004 concerning forestry planning which starts from the process of designating forest areas, structuring forest boundaries, mapping boundary areas and setting boundaries of forest areas so that the problem of forest area status can be minimized by applying appropriate theories and regulations in the hierarchy legislative regulations in the field of forestry in Indonesia.

1. Introduction

One of the ideals inherited by the founders of the Indonesian nation to our present generation, namely Pancasila and the 1945 Constitution. In the 1945 Constitution it has included the fundamental things for the formation of the Indonesian State, one of which is that the State of Indonesia is a rule of law. After the amendments to the 1945 Constitution, it was further emphasized in article 1 paragraph (3) of the 1945 Constitution that the State of Indonesia is a rule of law. Substantially the concept of the rule of law in Indonesia has combined two concepts, namely the concept of a legal state resistant in the
civil law legal system and the concept of the rule of law in the common law legal system [1,2]. But in practice, Indonesia does not purely adopt the two concepts of the rule of law but is adjusted to the fundamental norms that exist in Indonesia. The consequence of the State based on the law, then the State of Indonesia in carrying out the life of the nation and state is inseparable from the legal norms that were formed which of course originated in the abstract, general, binding and universally applicable Pancasila and UUD within the frame of the Unitary State of the Republic Indonesia, so that it also implies that in the implementation of the State of law it must be used as a barometer in the management of the State in which there are many regulations or norms [3].

In theory, according to Hans Kelsen the legal norms are tiered and layered in a hierarchical arrangement. This implies that the legal norms below are valid and sourced and based on higher norms, and higher norms also originate and are based on higher norms and so on until they stop at the highest norm called the Grundnorm. Stufenbau Han Kelsen as the Base of Indonesian Legal Governance Theory or also known as the Pyramid theory (Stufentheory) is a theory of the legal system pioneered by Hans Kelsen. The theory states that "The legal system is a system of stairs with tiered rules where the lowest legal norms must hold to higher legal norms, and the highest legal norms (such as the constitution) must hold to the most basic legal norms (grundnorm)". From Hans's theory, the kelsen that gets the most attention is the hierarchy of legal norms and the chain of validity that make up the legal pyramid. Then the development of the theory was Hans Kelsen's own student Hans Nawiasky [3–5]. This Nawiasky theory is also called theorie von stufentheory der rechtssubstanz. In nawiasky Hans theory is known as the norm grouping. The arrangement of norms according to the theory is: 1) Fundamental norms of the country (Staatsfundamentalnorm) 2) Basic state rules (staatsgrundgesetz) 3) Formal law (formell gesetz); and 4) Autonomous rules and regulations (verordnung en autonome satzung).

Furthermore, according to Adolf Merkl, it was stated that a legal norm was always had two faces. A legal norm is upward and it is based on the norms above, but downward it also becomes a source and becomes the basis for legal norms below it, so that a legal norm has a relative validity period. because the validity period of a legal norm depends on the legal norms above [3,6,4].

The application of the theory of Hans Kelsen, Hans Nawiasky and the theory of Adolf Merkl in Indonesia can be seen from Law No. 12 of 2011 concerning the formation of legislation. In Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation Regulations governs the hierarchy of laws and regulations. The types and hierarchies of legislation consist of:

1) 1945 Constitution of the Republic of Indonesia;
2) Decree of the People's Consultative Assembly;
3) Substitute Government Laws / Regulations;
4) Government Regulations;
5) Presidential Regulation;
6) Provincial Regulation; and
7) District / City Regulations.

In the rules or legal norms that apply in Indonesia which hierarchically form a pyramid also regulates regulations in the field of forestry which are no exception must be guided by article 7 paragraph (1) and Article 8 paragraph (1) Law number 12 of 2011 concerning the establishment legislation. Today's regulations in the forestry sector are regulated in Law Number 19 of 2004 concerning the stipulation of government regulations in lieu of Law number 1 of 2004 concerning changes to Law No. 41 of 1999 concerning Forestry [7–8]. Under regulations in the forestry sector, it also regulates forest areas regulated in-laws and regulations under the law. Regarding the regulation in the forestry sector under the regulations under the law, with the issuance of a minister of forestry decree in the designation of forest areas, there is a problem that has been studied by the author in this article, which is related to the phrase "designated" in Article 1 number 3 of Law Number 41 the Year 1999 concerning forestry which has been canceled by the Constitutional Court in its decision Number 45 / PUU-IX / 2011 stipulated on February 21, 2012 (hereinafter referred to as MK45) and replaced with the specified phrase. Problems that later arose, especially in Southeast Sulawesi related to the
existence of legal norms under the Law, namely the Decree of the Minister of Forestry Number 454 / KPTS-II / 1999 concerning the appointment of forest areas in Southeast Sulawesi issued on June 17, 1999 and the Forestry Minister's decree number 465 / Menhut-II / 2011 concerning the decline in the status of forest areas in Southeast Sulawesi issued on August 9, 2011. In the opinion of the author, there is a fundamental conflict over the birth of the decree of the Minister of Forestry mentioned above in Article I number 3 of Law Number 19 of 2004 Jo. Law number 41 of 1999 concerning forestry concerning the appointment of forest areas has been canceled and amended by the constitutional court in the decision of the Constitutional Court number 45 / PUU-IX / 2011 so that the forest area is not only appointed by the government but must go through the stages of determining the area Forest [5,7,8].

2. Methods
The type of research used is normative research with an approach focusing on the theoretical approach, the legislative approach, the case approach and described in the form of qualitative descriptive. The normative juridical approach is carried out by studying, seeing, and examining some theoretical matters concerning legal principles relating to research problems. This study is normative legal research that is used in an effort to analyze legal material by referring to legal norms as outlined in the legislation. Procedure for identification and inventory of legal materials covering primary legal materials, namely legislation, secondary legal materials, namely literature and legal scientific works, tertiary legal materials, consisting of; legal dictionary. Legal materials obtained, inventoried and identified are then analyzed qualitatively. To obtain the correct and accurate data in this study, namely by conducting a library study by collecting data by reading, quoting, recording and understanding various literature related to the problems under study.

3. Results and discussion
In article 1 number 3 of Law 19 of 2004 Jo. Law number 41 of 1999 concerning forestry which states that "forest area is a certain area designated and or determined by the government to maintain its existence as a permanent forest" has been canceled by the Constitutional Court in its decision Number 45 / PUU-IX / 2011 stipulated on February 21, 2012 (hereinafter referred to as MK45) which materially examines the constitutional validity of Article 1 point 3 of Law Number 41 of 1999 concerning Forestry, establishes the legal existence and legal standing of forest and customary forest areas in the system and structure of national law. The Constitutional Court (MK) argued in the MK45 ruling that state administration officials should not do as they wish and must act in accordance with laws and regulations and actions based on freies Armesen (discretionary powers) and the process of stipulating a forest area must be in line with the rule of law which among other things is that the government or state administration officials obey the applicable laws and regulations [9,10].

Based on legal considerations and the ruling of the Constitutional Court number 45 / PUU-IX / 2011. The substance of the MK45 decision can be divided into four topics, namely: First, the mere appointment of a forest area to be made into a forest area without going through processes or stages involving various stakeholders in the forest area in accordance with laws and regulations, is authoritarianism and therefore it contradicts the principles of the rule of law regulated in the 1945 Constitution. Second, the affirmation of forest areas must pay attention to regional spatial plans, individual rights, and pertuana (ulayat) rights. If there are individual rights and customary rights, then in the mapping of forest area boundaries, the government must issue these rights from the forest area. Third, the Constitutional Court stated that there was a synchronization between the contents of Article 1 paragraph (3) and Article 15 of the Forestry Law so that this synchrony is contrary to the principle of legal certainty as referred to in Article 28D paragraph (1) of the 1945 Fourth. forests that are issued before the enactment of the Forestry Law are considered to remain valid and binding as stipulated in Article 81 of the Forestry Law [11].

The appointment of forest areas in Southeast Sulawesi as contained in the forestry minister's decree number 454 / KPTS-II / 1999 concerning the appointment of forest areas and ministerial decree
number 465 / Menhut-II / 2011 concerning the decline in the status of forest areas in Southeast Sulawesi has contradicted the Court's ruling The Constitution number 45 / PUU-IX / 2011 which cancels article 1 number 3 phrases is designated to be stipulated in the determination of forest areas so that it needs to be revoked and declared invalid and the forestry minister's decree null and void and must be amended immediately. This, of course, refers to the theory developed by Hans Kelsen, Hans Nawiasky and Adolf Merkl which basically emphasizes that lower laws and regulations should not conflict with higher regulations and higher regulations become the source or basis for the regulations below them [1,7] or lower. In the Decision of the Constitutional Court 45 / PUU-IX / 2011 it is final and binding so that there is no legal remedy against the decision of the constitutional court and has binding strength, evidentiary power and executive power when reading out in a trial that is open to the public as stipulated in the Law. Law number 24 of 2003 concerning the Constitutional Court and included in the State Gazette of the Republic of Indonesia so that the parties related directly or indirectly to this decision must be able to obey it and revise all laws and regulations that contradict this decision and apply as legal norms in accordance with article Article 10 paragraph (1) letter d of Law Number 12 of 2011 concerning the establishment of laws and regulations that follow-up the decision of the constitutional court becomes material that must be regulated by law [1,10].

In the Decree of the Minister of Forestry number 454 / KPTS-II / 1999 concerning the appointment of forest areas and ministerial decree number 465 / Menhut-II / 2011 concerning the decline in the status of forest areas in Southeast Sulawesi, there were no steps in establishing forest areas but there was a direct appointment with forest areas so that there are serious problems related to the status of forest areas in Southeast Sulawesi when viewed from the perspective and application of the theories of Hans Kelsen, Hans Nawiasky and Adolf Merkl about the hierarchy of laws and regulations contained in article 7 paragraph (1) Law 12 2011 concerning the hierarchy of laws and regulations in Indonesia, it can be concluded that in the Decree of the Minister of Forestry number 454 / KPTS-II / 1999 concerning the appointment of forest areas and ministerial decree number 465 / Menhut-II / 2011 concerning the decline in forest area status in Southeast Sulawesi has contradicted article 1 point 3 of Law number 19 t in 2004 [12–14].

Law number 41 of 1999 concerning Forestry which has been amended in the decision of the Constitutional Court number 45/PUU-IX/2011 so that the phrase designation of forest areas cannot only be appointed by the government but must be determined by a process stipulated in forestry ministerial regulation number 44 2004 concerning forestry planning began with the appointment of forest areas, structuring of forest area boundaries, mapping of regional boundaries and setting boundaries of forest areas. From the above, of course, the Minister of Forestry Decree 454 / KPTS-II / 1999 concerning the appointment of forest areas and ministerial decree number 465 / Menhut-II / 2011 concerning the decline in the status of forest areas in Southeast Sulawesi has not been in accordance with the theory developed by Hans Kelsen, Hans Nawiasky, and Adolf Merkl and has contradicted article 7 paragraph 1 of Law Number 12 of 2011 concerning the establishment of legislation so that it must be revised immediately and all forms of norms and legal actions originating from the forestry minister's decree are mainly in issuing licenses for logging in a forest area determined by the Governor must be revoked and declared null and void [12,14,15].

In other aspects the designation of forest areas that contradicts the ruling of the constitutional court 45 / PUU-IX / 2011 must be declared null and void through the Supreme Court verdict because in Article 9 of Law Number 12 of 2011 concerning the establishment of legislation stated that all the form of legislation under the law that is contrary to the law can be tested to the Supreme Court. So it needs to be observed that in addition to executive review, in this case, the Minister of Forestry must revoke and revise the forestry minister's decree, also on the other hand there must be a judicial review of parties who feel disadvantaged either directly or indirectly from the forestry minister's decree. Seeing conditions such as those in other areas, namely in North Sumatra, related to the appointment of forest areas in the forestry minister's decree number 44 / Menhut-II / 2005 which was posted by Mangindar Simbolon, Samosir Regent, Touring Lumban Tobing, at that time North Tapanuli and Sintong Regents Maruap Tampubolon (Chairperson of the Bona Pasogit caring forum) in his
termination ceremony the Supreme Court said that the Minister of Forestry's Decree was in contradiction with the higher laws and regulations, which were considered to violate Law No. 19 of 2004, Jo. Law number 41 of 1999 concerning Forestry and also violated Government Regulation number 44 of 2004 concerning forestry planning. Judging from the above and based on the problem of the status of the forest area in Southeast Sulawesi, according to the author of the Decree of the Minister of Forestry Number 454 / KPTS-II / 1999 concerning the designation of forest areas and Decree of the Minister of Forestry Number 465 / Menhut-II / 2011 about decreasing forest area status in contradiction higher legislation [12,14,15].

4. Conclusion
The application of the theory of Hans Kelsen, Hans Nawiasky and Adolf Merkl and in article 7 paragraph (1) of Law 12 2011 concerning the hierarchy of legislation in Indonesia and its relation to the Minister of Forestry's decree number 454 of 1999 concerning the appointment of forest areas and ministerial decree number 465 In 2011, the decline in the status of forest areas in Southeast Sulawesi had contradicted article 1 point 3 of Law Number 19 of 2004, Jo. Law number 41 of 1999 concerning Forestry which has been amended in the decision of the Constitutional Court number 45 / PUU-IX / 2011 so that the phrase determining forest areas is not only biased by being appointed by the government but must be determined by a process stipulated in forestry ministerial regulation number 44 in 2004 regarding forestry planning so that the minister of forestry's decree was incompatible and contradicted the theory developed in Hans Kelsen's theory, Hans Nawiasky, and Adolf Merkl and also contradicted article 7 paragraph 1 of Law Number 12 of 2011 concerning the establishment of legislation and must be revised immediately and revoked and all forms of norms and legal actions originating from the decree of the forestry minister are mainly in issuing licenses for logging number 198 / SK / 2016 in forest areas issued by the Governor to be revoked and canceled or invalid.

References
[1] Gutmann J and Voigt S 2018 The rule of law: Measurement and deep roots Eur. J. Polit. Econ. 54 68–82
[2] Ben-Menahem H and Ben-Menahem Y 2019 The rule of law:Natural, human, and divine Stud. Hist. Philos. Sci. Part A
[3] Editors S, Sellers M, Martyn G and Sellers M Studies in the History of Law and Justice 12 Reconsidering Constitutional Formation II Decisive Constitutional Normativity From Old Liberties to New Precedence Series editors
[4] Baume S 2009 On political theology: A controversy between Hans Kelsen and Carl Schmitt Hist. Eur. Ideas 35 369–81
[5] Bončina A, Simončič T and Rosset C 2019 Assessment of the concept of forest functions in Central European forestry Environ. Sci. Policy 99 123–35
[6] Ashiddiqie J and Syafa’at M A 2012 Teori Hans Kelsen Tentang Hukum, Konstitusi
[7] Sears R R, Cronkleton P, Polo Villanueva F, Miranda Ruiz M and Pérez-Ojeda del Arco M 2018 Farm-forestry in the Peruvian Amazon and the feasibility of its regulation through forest policy reform For. Policy Econ. 87 49–58
[8] Nhém S and Lee Y J 2019 Using Q methodology to investigate the views of local experts on the sustainability of community-based forestry in Oddar Meanchey province, Cambodia For. Policy Econ. 106 101961
[9] Hartwell C A 2018 The “Hierarchy of Institutions” reconsidered: Monetary policy and its effect on the rule of law in interwar Poland Explor. Econ. Hist. 68 37–70
[10] Ebenstein W 2006 The Pure Theory of Law: Demythologizing Legal Thought Calif. Law Rev. 59 617
[11] Indonesia. Mahkamah Konstitusi. Y 2011 Perkembangan Konstitusionalitas Penguasaan Negara Atas Sumber Daya Alam Dalam Putusan Mahkamah Konstitusi J. Konstitusi 8 257–314
[12] Ambo-Rappe R and Moore A M 2018 Sulawesi Seas, Indonesia (Elsevier Ltd.)
[13] Kelley L C 2018 The politics of uneven smallholder cacao expansion: A critical physical geography of agricultural transformation in Southeast Sulawesi, Indonesia Geoforum 97 22–34

[14] Tacconi L and Muttaqin M Z 2019 Policy forum: Institutional architecture and activities to reduce emissions from forests in Indonesia For. Policy Econ. 101980

[15] Erbaugh J T and Nurrochmat D R 2019 Paradigm shift and business as usual through policy layering: Forest-related policy change in Indonesia (1999-2016) Land use policy 86 136–46