



The existence of policy regulations and the court's authority to review policy regulations (beleidsregel)

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ABSTRACT

Policy regulation (beleidsregel) is a legal product that is based on the expertise/discretion of the government in making policies because of the law. Policy regulations are outlined in various forms, including in the form of circulars, guidelines, announcements, decrees that are general and abstract in nature and even in the form of regulations which are referred to as pseudo regulations (pseudo legislation). Legal developments then gave birth to policy regulations that were formed based on the mandate of statutory regulations. In a rule-of-law state, every policy that binds society must be subject to review in court, including policy regulations, which then creates differences of opinion about who has the authority to implement policy regulations, bearing in mind that until now there are no laws and regulations that regulate rigidly regarding the formation policy regulations and their testing mechanisms.

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1. INTRODUCTION

One of the state's objectives in the preamble of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) in the fourth paragraph mentions promoting general welfare. The role of the state in promoting general welfare is carried out by forming various regulations in the social, economic, cultural, environmental, defense, security and other fields related to the welfare and interests of the community (Deacon, 2007). The role of the state is getting bigger and wider covering all aspects of people's lives which demands that all problems can be resolved quickly so that the government needs discretion. (*freies ermesen*) (Tandungan & Parinussa, 2021).

Freies ermesen is the government's authority to take action to solve an important problem that is urgent, comes suddenly, and does not yet have a regulation or legal basis governing it (Sadat, 2020). For this reason, the policy is taken without being based on general regulations that authorize the government to make policies (Nelson, 2006). Wisdom in practice is expressed in various forms, including circulars, guidelines, announcements, general and abstract decrees and even in the form of regulations called pseudo-wetgeving (pseudo legislation) (Firmansyah & Evendia, 2022).

Fries ermesen has become one of the sources that causes many disputes between state administrative officials and citizens, especially in the issuance of a decision (*beschikking*) (Hani, 2021). *Fries Ermessen* that is implemented and outlined in the form of a decision (Widijowati, 2016), if it causes harm to a person or civil legal entity, can be considered as a decision that is contrary to the applicable legislation, both formally/procedurally and materially/substantially or

considered as an act (decision) issued on an arbitrary basis. (*willkeur* atau *abus de droit*) atau abuse of authority (*de'tournement de pouvoir*) (Cucić, 2011).

In the practice of forming regulations, not all written regulations are qualified as laws and regulations even though they are generally binding, the development of state administrative law then recognizes the term policy regulations. (*beleidsregel*). In practice, policy regulations are intended to facilitate policy making without the need to form laws and regulations which tend to take a long time. However, in the course of this, it often causes legal problems, apart from the fact that normative legislation does not recognize the term policy regulations, in general form and content material, the public often experiences confusion in testing policy regulations whether it should be carried out by the Supreme Court through judicial review or through the State Administrative Court.

2. RESEARCH METHOD

This research is in the form of normative juridical which focuses on studies related to the application of rules or norms contained in positive law (Budianto, 2020). This paper will examine the existence of policy regulations and the authority of the court to review policy regulations. The data used in this research is secondary data obtained by searching the literature or documentation used based on primary, secondary and tertiary legal sources (Häyrynen et al., 2008). Primary legal sources used in this paper include the Supreme Court Decision Number 12 P/HUM/2019 dated May 16, 2019, Decree of the Minister of Public Works and Public Housing (PUPR) No. 710/KPTS/M/2018 concerning Amendments to the Decree of the Minister of PUPR No. 382/KPTS/M/2018 concerning Determination of Motor Vehicle Type Classes, Tariffs, and Toll Collection Systems in Integration on JORR Toll Roads, as well as laws and regulations or other legal products related to policy regulations.

3. RESULTS AND DISCUSSIONS

The Existence of Policy Regulations in the Indonesian Legal System

Legislation contains two meanings, namely regulations and laws (Yuliantini, 2021). The definition of regulation or *regeling* is the overall legal rules included in the law in the material sense (Putra et al., 2020). Regulations in the material sense are laws that are generally binding (generally applicable) (Volokh, 2004) and their task is to regulate general matters (Wright & Beaver, 2005). In addition to the term "laws and regulations" (*wettelijke regels*) there is also the term "policy regulations" (*beleidsregel*) which was formerly known as "administrative regulations" (*administratieve regels*). The term "laws and regulations" is always associated with "laws" which are part of the power of state government (*staatsregering*) A policy regulation, although different from statutory regulations, is in fact also "binding" in general (*algemeenbindend*) because the people affected by the regulation cannot do otherwise but follow it (Saija & Simatauw, 2020).

Maria Farida Indarti explains that a written regulation from a state institution or authorized official is not necessarily a statutory regulation which means that written regulations can be general, abstract, and apply continuously as a statutory regulation or policy regulation in the field of government, and can also be a regulation that applies internally (*interne regelingen*). According to Philip M. Hadjon, policy regulations, *beleidsregel*, or policy rules are created by state administrative officials to carry out government tasks. The existence of these policy regulations is a consequence of the welfare law state which imposes a very broad task, namely organizing the welfare of the people (welfare state) (Offe, 1987). Government tasks can be carried out if the government is given the freedom to make policies in accordance with factual situations and conditions, the policies of state administrative officials are then outlined in the form of policy regulations (Barzelay, 1992). Although it is based on the freedom of government bodies / positions, in its formation policy regulations must still be given limits, limits or benchmarks so that there is no abuse of authority (Blades, 2013). This is in accordance with the general principles of good governance as stipulated in Law Number 30 of 2014 concerning Government Administration (Law No. 30 of 2014) which at least includes the principles of legal certainty, expediency, impartiality, accuracy, not abuse of authority, openness, public interest, and good service.

Policy regulations are free policy products set by state administrative officials in the context of carrying out government tasks (Kerwin & Furlong, 2018). The official's policy is then outlined in a certain format so that it can be applied generally (Taylor, 1993). Often the formal form of policy regulations is no different or resembles the form of laws and regulations (Rubin, 1989). Legislation and policy regulations can be categorized as concrete general, general-abstract and abstract individual norms (Rizzo, 2022).

According to van Kreveld, policy regulations can be recognized by stating the following characteristics: a) The regulation is directly or indirectly not based on the formal provisions of the Wet or Grondwet which grant regulatory authority; in other words, it does not have an explicit legal basis in the Wet; b) The regulation can be: 1) unwritten and arises from a series of decisions of government agencies in the context of the exercise of independent governmental authority (vrij) over individuals; or is stipulated in writing by the government agency; b) The regulation provides general instructions on how the government agency will exercise the independent governmental authority over individuals formulated in the regulation.

Similarities between statutory regulations and policy regulations: a) Rules that apply generally: both statutory regulations and policy regulations have the same address or subject norms and behavioral arrangements or objects of norms, which are general and abstract (algemene regeling or algemene regel); b) Rules that apply outward: Statutory regulations apply 'outwards' and are addressed to the general public (naar buiten werkend, tot een ieder gericht); likewise policy regulations apply 'outwards' and are addressed to the general public concerned (jegens de burger). c) Regulatory authority of a general/public nature: Statutory regulations and policy regulations are stipulated by institutions/officials that have general/public authority to do so.

Initially, policy regulations were born in the form of discretion, which means that policy regulations were formed to fill a legal vacuum due to the absence of laws and regulations governing a certain matter (Frank, 1931). Discretion is specifically regulated in Chapter VI of Law No. 30 of 2014, where the provisions of Article 1 define discretion as Decisions and / or Actions determined and / or carried out by Government Officials to overcome concrete problems encountered in the administration of government in laws and regulations that provide options, do not regulate, are incomplete or unclear, and / or the existence of government stagnation.

Current legal developments show that policy regulations are not only formed based on discretion, policy regulations can also be born due to "delegation" or formed due to statutory orders (Richman, 1998). This can be seen in, among others, the determination of toll tariffs and the determination of minimum wages, both of which are policy regulations formed due to statutory orders.

Law No. 38 Year 2004 on Roads (Law No. 38 Year 2004) in Article 48 paragraph (4) determines that the initial toll tariff and toll tariff adjustment are determined by the Minister. This provision is then implemented by the Minister of Public Works and Public Housing of the Republic of Indonesia in the form of a legal product in the form of a Ministerial Decree. Although it is stipulated in the form of a legal product in the form of a 'decision', but considering that the address of the toll tariff is not indicated for certain individuals or parties (Rinaldi et al., 2001), the ministerial decision regarding toll tariffs is generally applicable and binding on all people who use toll roads (Ng & Loosemore, 2007).

Another example of a policy regulation legal product formed based on a statutory order is the determination of minimum wages for laborers/workers. Based on Article 27 paragraph (1) of Government Regulation Number 36 of 2021 concerning Wages, which states that the Governor is obliged to determine the minimum wage. This provision has also been previously regulated in Government Regulation Number 78 of 2015 concerning Wages. Similar to the determination of toll tariffs, the legal product of determining the minimum wage set by the Governor is made in the form of a 'decision' which is not intended for certain individuals but all workers in a certain area (Hamid, 2020).

Court's Authority to Examine Policy Regulations

Similar to laws and regulations, policy regulations as a legal product are often considered detrimental and are rejected by the community. As a state of law, it is fitting that if there is a legal

product that is deemed detrimental to the rights of the community, then the community has the right to test it (Kass, 2001).

There are different views regarding the testing of policy regulations, one of which is expressed by Enrico Simanjuntak (Judge at the Jakarta State Administrative Court) who in his opinion states that policy regulations are grouped as norms that are concrete-general, general-abstract and abstract individual, so that policy regulations cannot be tested in the State Administrative Court. The Supreme Court through Circular Letter No. 4 of 2014 concerning the Implementation of the Formulation of the Results of the 2013 Plenary Meeting of the Supreme Court Chamber as Guidelines for the Implementation of Tasks for the Courts ("SEMA No. 4 of 2014"), determines that policy regulations (beleidsregel) cannot be tested by judges. Legal developments in judicial practice have then repeatedly tested policy regulations, which can be seen in the testing of the Decree of the Minister of Public Works and Public Housing of the Republic of Indonesia regarding the determination of toll tariffs as the Supreme Court Decision Number 12 P / HUM / 2019 dated May 16, 2019 and testing the Governor's Decree regarding the determination of minimum wages as the Bandung State Administrative Court Decision Number: 145 / G / 2019 / PTUN-BDG dated July 28, 2020.

Examination of the Governor's Decision Regarding the Determination of Minimum Wage

Another example of a policy regulation that was born because of the mandate of the law is the Governor's Decree regarding the determination of the minimum wage. This is based on Article 27 paragraph (1) of Government Regulation Number 36 of 2021 concerning Wages, which states that the Governor is obliged to determine the minimum wage. This provision has also been previously regulated in Government Regulation Number 78 of 2015 concerning Wages. Similar to the determination of toll tariffs, the legal product of determining the minimum wage set by the Governor is made in the form of a 'decision' which is not intended for certain individuals but all workers in a certain area. One example of testing a policy regulation regarding minimum wages can be seen in the Bandung State Administrative Court Decision Number: 145/G/2019/PTUN-BDG dated July 28, 2020 which tested the Decree of the Governor of West Java Number 561/ Kep.983-Yanbangsos/2019 dated December 01, 2019 concerning Regency / City Minimum Wages in the Province of West Java in 2020.

Unlike the case with the review of the Decree of the Minister of PUPR regarding the determination of toll tariffs, the authority to review the Governor's Decree regarding the determination of minimum wages has been confirmed in Supreme Court Circular Letter No. 1 of 2017 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2017 as Guidelines for the Implementation of Duties for the Courts (SEMA No. 1 of 2017) which explicitly states that the governor's decision regarding minimum wages in the form of *beschikking* / decision of government officials or policy regulations (*beleidsregel* / *pseudo wetgeving*) is the absolute authority of the State Administrative Court. In addition, SEMA No. 1/2017 also emphasized that the governor's decision regarding the minimum wage is only valid for one year and is *einmalig* (applies once completed).

In line with this, the Bandung State Administrative Court Decision Number: 145/G/2019/PTUN-BDG dated July 28, 2020, which examined the Decree of the Governor of West Java regarding the minimum wage in the West Java region in 2020, also emphasized that testing the determination of minimum wages is the authority of the State Administrative Court. One of the interesting considerations of the Decision is that the expansion of the definition of 'individual' in a State Administrative Decision is not limited to the inclusion of the name of a person or legal entity in a State Administrative Decision. When referring to Law No. 5 of 1986, the individual nature means that the state administrative decision is addressed to a specific and definitive party, has a specific or special legal address. The party or legal entity addressed by the individual decision can be a specific individual (person) or legal entity (*rechtsperson*) or in other words, its identity is clear. For example, a decision of the Minister of Law and Human Rights appointing a Notary, the decision must clearly state the Notary's name, home address, nationality and other identities that clarify the legal subject addressed by the decision.

The Panel of Judges in its consideration expanded the definition of the word 'Individual' in Article 1 number 9 of Law Number 51 of 2009 concerning the Second Amendment to Law Number

5 of 1986 concerning State Administrative Courts to mean: "special" or "specific" to a particular subject, not a KTUN that is addressed to a "general" subject. *The formulation of Administrative Decree according to Article 1 point 9 which can be an object in the State Administrative Court means that the Administrative Decree is addressed to specific and particular legal subjects. Second, that in the explanation of Article 2 letter b of Law No. 9 of 2004 on the Amendment to Law No. 5 of 1986 on State Administrative Courts, the following explanation is provided: What is meant by "general regulation" is a regulation that contains legal norms that are set out in the form of regulations whose validity is binding on everyone.*

The Governor's Decree regarding the policy on District Minimum Wages in West Java Province is a Decree that is only specifically addressed to all Employers domiciled or operating in West Java. The Decree is not addressed to every person domiciled in West Java. The Decree is also not addressed to all levels or all groups of society or professions in West Java, so according to the Panel of Judges the element of "individual" in the Governor's Decree regarding the minimum wage has been fulfilled.

Based on the whole description above, although the laws and regulations have not specifically regulated the authority of the court to review policy regulations (beleidsregel), judicial practice and guidelines made by the Supreme Court through SEMA have emphasized that the authority to review policy regulations (beleidsregel) is absolutely the authority of the State Administrative Court.

Aspects of Policy Regulation Testing

Based on the description above, because policy regulations (beleidsregel) are qualified as State Administrative Decisions whose absolute testing authority is the authority of the State Administrative Court, there are several things that need to be considered in testing policy regulations (beleidsregel), namely as follows: a) Based on Law No. 5 of 1986 and Law No. 30 of 2014, testing of policies (beleidsregel) must be based on the existence of conflicts with applicable laws and regulations and/or contrary to general principles of good governance; b) There is a grace period for filing a lawsuit within 90 (ninety) days; Before filing a lawsuit, the public first takes administrative efforts which are requirements as stipulated in Article 2 paragraph (1) of Supreme Court Regulation No. 6 of 2018 concerning Guidelines for Settling Government Administration Disputes After Taking Administrative Efforts.

4. CONCLUSION

Based on the material and analysis explained above, it can be concluded that policy regulations (beleidsregel) are legal products that are formed based on discretion/wisdom to fill legal gaps. In its development, there are policy regulations (beleidsregel) which are formed based on statutory regulations. Until now there are no statutory regulations that regulate the rules for forming policy regulations that can be used as a guide in determining a legal product as a policy regulation or statutory regulation. Based on Supreme Court Circular Letter Number 1 of 2017 and judicial practice, the authority to review policy regulations (beleidsregel) is the absolute authority of the State Administrative Court.

Law makers need to make regulations and guidelines to determine the criteria for a legal product as a policy regulation (beleidsregel) so that there are no differences in interpretation regarding a legal product. The Supreme Court can fill legal gaps by making Supreme Court regulations or Supreme Court Circulars and creating precedents that can be used as guidelines in testing policy regulations.

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