The Existence of Policy Regulations (Beleidsregel) in the Indonesian Legislative System

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ABSTRACT

The phenomenon of many types of statutory regulations being formed, there is the formation of a number of policy regulations. The main issue related to policy regulations is the issue of accountability and supervision. Because its formation is based on "free" authority, this policy regulation is vulnerable to abuse even though the accountability mechanism is not clear. The problems are: (1) What is the existence of policy regulations related to legal force and the implications that arise from their implementation? (2) How is policy regulation carried out to ensure that there is no abuse of power? This research uses normative legal research methods. Research results: The existence of policy regulations (beleidsregel) was formed not based on attribution or delegation authority from the Constitution and Laws, but was formed on one's own initiative (discretion) in order to resolve the government administration problems faced. Policy regulations are not statutory regulations and are not directly legally binding. The unclear status of policy regulations has the implication that the supervision carried out over them is still not optimal because there are no explicit regulations regarding the supervision mechanisms that can be carried out. To clarify the scope of supervision of policy regulations, there needs to be a revision of Law no. 30 of 2014 concerning Government Administration so that supervision of the use of discretion is not only aimed at decisions and/or actions of Government Officials but also includes supervision of the use of discretion which results in policy regulations. Apart from that, a monitoring mechanism through the judiciary must be sought where the Supreme Court must have consistency in its decisions and provide criteria related to policy regulations that can be tested to control them so that they are not misused.

Keywords: Discretion; Policy Regulations; Supervision.

Introduction

Indonesia as a country that has roots in the continental European legal tradition in its legal development focuses more on the formation of laws and regulations. It can be said that all areas of state life are regulated by laws and regulations so that Indonesia experiences hyper regulation because so many laws and regulations are formed.[1]

[1]The term hyper-regulation was introduced by Richard Susskind: "By that I meant we are all governed today by a body of rules and laws that are so complex and so large in extent that no one can pretend to have mastery of them all. I argued then that hyper-regulation means not that there is too much law, by some objective standard, but that there is too much law given our current methods of managing it." See Richard Susskind, 2010,

There are many types of laws and regulations in Indonesia ranging from central level regulations such as the 1945 Constitution, Laws (UU) to regional level regulations such as Provincial Regulations (Perda) and Regency / City Regulations. Based on Article 7 of Law No. 12/2011 on the Formation of Legislation, a number of these regulations are arranged hierarchically, each of which has legal force in accordance with its position in the hierarchy, namely:

a. The 1945 Constitution of the Republic of Indonesia;

b. Decree of the People's Consultative Assembly;

c. Law / Government Regulation in lieu of Law;

d. Government Regulation;

e. Presidential Regulation;

f. Provincial Regional Regulations; and

g. Regency/City Regional Regulations.

In addition to the phenomenon of so many different types of laws and regulations being formed, there is the formation of a number of policy regulations (beleidsregel/policy rules) or commonly referred to as quasi regulations. These policy regulations are not categorized as laws and regulations, but in substance or content they are regulating (regeling).

This policy regulation cannot be formally called a statutory regulation, such as a circular letter from a Minister or Director General addressed to all levels of civil servants within the scope of their responsibility. It is usually written in the form of an ordinary letter, not in the form of an official regulation, such as a Ministerial Regulation. However, this circular is regeling in nature and provides guidance in the context of implementing civil service tasks. The source of authority to establish this policy regulation arises from the inherent authority possessed by state administrative officials in the form of discretionary power, freies ermessen. This discretionary authority is the authority to establish policies outside the applicable provisions where there is room for maneuver for state administrative officials to act on their own initiative freely and in a timely manner without fear of violating strict and rigid legal rules.[2]

The main issue related to the existence of this policy regulation is the problem of accountability and supervision. Because its formation is based on "free" authority, this policy

Legal Informatics - a Personal Appraisal of Context and Progress, European Journal of Law and Technology, Vol. 1, Issue. 1, 2010.

[2] Jimly Asshiddiqie, 2007, Pokok-Pokok Hukum Tata Negara Indonesia, Jakarta: PT Bhuana Ilmu Popular, pp. 264-265.

is susceptible to misuse, despite the lack of clarity surrounding the accountability mechanism. Because there is no institution that has the authority to review policy regulations that have been determined except by the institution itself. There is no mechanism for judicial review of policy regulations such as legislation where the Constitutional Court (MK) has the authority to review the Law against the 1945 Constitution while the Supreme Court (MA) has the authority to review legislation under the Law against the Law. Likewise, for decisions / decrees (beschikking) issued by state administrative officials, there is a mechanism to file a lawsuit if the decision causes harm to the community and is contrary to higher laws and regulations.

The problem now is what mechanism can be used to supervise policy regulations if they cause harm to the community and conflict with other laws and regulations. Even though this policy regulation when enacted is only intended for internal ranks as instructions or guidelines, it still has implications for the community. Especially, in response to the health emergency situation precipitated by the global pandemic of the novel coronavirus, the government issued a series of policy regulations in the form of circular letters. However, until now the presence of Circular Letters related to COVID-19 is considered to have no binding power, under the pretext that Circular Letters are not products of rules listed in the hierarchy of laws and regulations. The implication is that the legitimacy of the COVID-19 Circular Letter is often considered 'trivial' because it has no legal consequences.[3]

Due to the problems related to policy regulations as described above, this paper aims first to examine how the existence of policy regulations (beleidsregel) is related to their legal force and the implications arising from their implementation. Secondly, it will analyze how supervision is carried out on policy regulations so that abuse of power does not occur.

Methods

This research was conducted using the normative juridical method, which is research conducted by examining library materials.[4] In this research, the author uses several approaches, namely: First, conceptual approach, this approach is used in examining the theories and concepts of legislation in reviewing the existence of policy regulations (beleidsregel) and the supervision mechanism. Second, statute approach, this approach is used to analyze and review the juridical aspects of the existence of policy regulations (beleidsregel) as well as several Supreme Court Decisions related to the review of policy regulations, such as Supreme Court

[3] Fradhana Putra Disantara, 2020, Legitimasi Surat Edaran dalam Penanganan Pandemi COVID-19, Rechtsidee, Vol 6 No 2 (2020): June, pp. 7.

[4] Soerjono Soekanto and Sri Mamudji, 2003, Normative Legal Research: A Brief Overview, Jakarta, RajaGrafindo Persada, pp. 13-14.

Decisions No. 23P/HUM/2009 and No. 27 P/HUM/2015. Because this research is a descriptive-prescriptive normative legal research, the data is analyzed qualitatively. The approach taken is abstraction, meaning that the data collected is compiled and selected to find data specifically related to the object of research.

Results and Analysis

A. The Existence of Policy Regulations (beleidsregel) Regarding its Legal Power and the Implications Arising from its Enforcement.

Policy regulations (beleidsregel) are formed not based on the authority of attribution or delegation from the Constitution and Law, but their formation has justification. The source of authority for the formation of beleidsregels lies in the "beoordelingsruimte" (space for consideration) given by the legislator to officials or government bodies to take public legal actions on their own initiative in the nature of regulation, stipulation or positive real action to solve the problems of governance faced. The space for consideration (beoordelingsruimte) can be divided into 2, namely "objectieve beoordelingsruimte" (objective consideration space) and "subjectieve beoordelingsruimte" (subjective consideration space), namely:[5]

First, objective discretion (objectieve beoordelingsruimte): this discretion implies that there is room for interpretation (discretion) given by the law to state administrative officials or bodies to carry out public legal actions according to objective situations and objects. To beleidsregels issued based on this "objectieve beoordelingsruimte" (bound discretion), judges can be bound (justify) in deciding a case submitted to the court. The room for consideration given by the legislator in the "objectieve beoordelingsruimte" is generally only with vague criteria. For example, the provisions of Article 5 of the Dutch Auction Act of 1956 which determines that: "goods that have not been auctioned" can be used by the owner by submitting an application to the Chamber of Commerce and Industry. The Chamber of Commerce and Industry can accept or reject the owner's application submitted to it under conditions and requirements determined by the Chamber of Commerce and Industry.

Second, the subjective consideration space (subjectieve beoordelingsruimte): this consideration space is general and free (free discretion), based solely on the subjective

[5]Josep Leonardy, 2023, Eksistensi Peraturan Kebijakan (Beleidsregels) Dalam Konteks Indonesia Sebagai Negara Hukum Kesejahteraan Menurut Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan, Jurnal Pendidikan dan Konseling, Volume 5 Number 2 of 2023, Kl. 5294-5295.

consideration (initiative) of state officials or administrative bodies. Against beleidsregels issued on this subjective consideration, judges have the freedom to test their validity. Other terms for this space of consideration are "beoordelingsvrijheid", "discretionaire bevoeghdheid", "freies ermessen", and "beleidsvrijheid".

The establishment of policy regulations (beleidsregel) based on the existence of beoordelingsruimte (space for consideration) as described above is intended to describe how the interpretation is carried out by officials or government bodies on their own initiative to take real positive actions to solve problems of governance faced at a certain time that require regulation.[6]

In the Indonesian context, the use of policy regulations is one of the instruments of government based on discretion (freies ermessen)[7]. The formation of policy regulations shows how the government exercises its power over the general public. Policy regulations can be made by the central or sectoral government as well as local governments. For example, ministerial instructions to tax inspectors and regulations developed in relation to the granting of licenses. Policy regulations provide guidance to the government especially where the government has broad discretionary powers. As such, policy regulations help to prevent arbitrary actions. Initially, policy regulations were only intended to have internal effects. However, policy regulations tend to be made public through official or unofficial announcements, while their content is sometimes derived from government practice. Policy regulations are different from laws or regulations that are binding on the public. Policy regulations are not made pursuant to lawmaking powers but are accepted and followed by government bodies or officials authorized to exercise their discretionary powers[8].

One of the most frequently used forms of policy regulations in Indonesia is in the form of Circular Letters, whether issued by Ministers or Regional Heads or various other government institutions. This Circular Letter is classified as an official manuscript product as stated in the Regulation of the Minister of Administrative Reform and Bureaucratic

[6]Ni Luh Gede Astariyani and Bagus Hermanto, 2019, Paradigma Keilmuan Dalam Menyoal Eksistensi Peraturan Kebijakan dan Peraturan Perundang-Undangan: Tafsir Putusan Mahkamah Agung, Indonesian Legislation Journal, Vol. 16 No. 4 - December 2019, pp. 436.

[7] According to HR Ridwan, government instruments can be divided into six, namely: (1) Legislation; (2). State Administrative Decisions; (3) Policy Regulations; (4) Plans; (5) Licenses; (6) Civil law instruments. See Fitriani Ahlan Sjarif and Efraim Jordi Kastanya, 2021, Circular Letter as an Instrument of State Administration during the Covid-19 Pandemic, Jurnal Hukum & Pembangunan, 51st Year No. 3 July-September 2021, pp. 790-793. 790-793.

[8] Eric, Wening Anggraita, 2021, Perlindungan Hukum Atas Dikeluarkannya Peraturan Kebijakan (Beleidsregel), Jurnal Komunikasi Hukum, Volume 7 Nomber 1, Februari 2021, pp. 475.

Reform No. 80 of 2012 concerning Guidelines for Government Agency Service Manuscripts where the definition of a Circular Letter is an official manuscript that contains a notification of certain matters that are considered important and urgent. The existence of a Circular Letter in terms of its position is as follows[9]:

1. The Circular Letter in this case made by the Minister is not a statutory regulation, because the Ministerial Circular Letter does not contain norms of behavior (prohibitions, orders, permits and exemptions), authority, and stipulations.
2. Circular Letter is an official script that contains notification, explanation and/or instructions on how to implement certain matters that are considered important and urgent.
3. A Circular Letter cannot be used as a legal basis to annul a Ministerial Regulation, Presidential Regulation, or Government Regulation, but merely to clarify the meaning of the regulation to be notified.
4. Circular Letters have a higher degree than ordinary letters, because Circular Letters contain instructions or explanations of things that must be done based on regulations. A Circular Letter is a notification, it does not regulate sanctions because it is not a norm.
5. A Circular Letter is an order from a certain official to subordinates or people under his guidance.
6. Circular Letters do not have binding force outside the agency and are only binding in the agency of the official who made it.
7. The issuing official does not need a legal basis because a Circular Letter is a policy regulation issued solely based on discretionary authority. it is worth noting the factors for issuing a Circular Letter: (i) It is only issued due to urgency; (ii) There are unclear related regulations that need to be interpreted; (iii) The substance does not conflict with laws and regulations; (iv) It can be morally accountable with the principles of good governance.
8. A Circular Letter is an order or explanation that does not have the force of law, meaning there are no legal sanctions for those who do not comply.

When policy regulations (beleidsregel), such as Circular Letters, are formed not based on the authority of attribution or delegation from the Constitution and Laws, the problem to

[9]https://www.hukumonline.com/klinik/a/pelanggar-surat-edaran--bisakah-diproses-hukum-oleh-polisi-lt62146dc9da7c2/https://www.hukumonline.com/klinik/a/pelanggar-surat-edaran--bisakah-diproses-hukum-oleh-polisi-lt62146dc9da7c2/ , accessed on July 15, 2023.

explain the existence of its position as a "rule" and the binding force of its enforcement. This is always an interesting study related to the existence and legal force of policy regulations because of course it will have implications for its enforcement.

As a manifestation of fries ermessen (discretionary power), policy regulations (beleidsregel) are formed with material that often contains general rules (algemene regel) whose scope of rules is like laws and regulations that have implications both directly and indirectly binding on citizens as well as the rules of "juridische regels", although policy regulations are not laws and regulations[10].

The unclear status of policy regulations raises questions about their binding force, although some assume, such as Bagir Manan and Indroharto, that policy regulations are not directly legally binding for the community, but have legal relevance. Meanwhile, according to Hamid Attamimi, policy regulations are binding in general, because the people affected by the policy regulations cannot do anything else but follow them. Actually, the administration of government affairs in a state of law is based on laws and regulations in accordance with the principles adopted in a state of law, namely the principle of legality. However, because statutory regulations as written law contain shortcomings and weaknesses, the existence of policy regulations occupies an important position, especially in a modern legal state.[11]

This is where the relevance of the existence of policy regulations as a government instrument to explain or provide guidelines for the implementation of provisions in laws and regulations for government officials, which consequently, even though it is intended as an internal direction, it can have an impact on society, either positive or causing harm. Because actually there is no government action that does not have a public dimension even though the policy regulations are made for the internal scope. Therefore, it becomes very important to supervise the existence of policy regulations so that they do not become instruments of abuse of power.

B. Supervision of Policy Regulations (beleidsregel) to Avoid Abuse.

Government administration does not always run as prescribed by existing rules. In fact, it often happens that the administration of this government causes harm to the people either due to abuse of authority (detournement de pouvoir) or arbitrary actions (willekeur).

[10] Ni Luh Gede Astariyani and Bagus Hermanto, 2019, Paradigm...Op.Cit, p. 441.

[11] Pusdiklat Pajak, 2014, The Position of Policy Rules (Circulars, Instructions, Technical Guidelines) in Indonesian Positive Law, https://bppk.kemenkeu.go.id/pusdiklat-pajak/berita/kedudukan-aturan-kebijakan-surat-edaran-instruksi-petunjuk-teknis-dalam-hukum-positif-di-indonesia-140942 , accessed on June 8, 2023.

Arbitrary government action occurs when the elements are fulfilled; first, the ruler who acts juridically has the authority to act (there are basic regulations); second, in considering the relevant decisions made by the government, the element of public interest is not considered; third, the action causes concrete harm to certain parties.[12]

The organization of government that has abuse of authority (detournement de pouvoir) or arbitrary action (willekeur) has the impact of not implementing development properly and not implementing services to the community as it should. Efforts that can be made to improve governance include a comprehensive understanding of the law of governance, streamlining supervision both through judicial supervision, supervision from the public, and supervision through the Ombusdman institution.[13]

In theoretical construction, Paulus Effendie Lotulung states that supervision is an effort to avoid mistakes, both intentional and unintentional, as a preventive effort or also to correct it if the mistake has occurred as a repressive effort. A system of checks and balances is indispensable in the context of limiting the government's freedom of action. If it is not limited through effective control, then the freedom of action will instead slip into an abuse of authority (a bus de droit); exceeding authority (ultra vires), unlawful acts (onrechtmatige overheidsdaad) which will lead to human rights violations.[14]

Furthermore, Paulus Effendie Lotulung said that supervision can be divided into two types, namely internal supervision which can be classified as a type of technical-administrative control or commonly known as a form of "built in control" and external supervision which is not only in the sense of judicial control (control carried out by the judiciary) but also by organs or institutions that are structurally outside the government in the sense of the executive. This is in line with Jowell's opinion in the context of control, there are two means of control that can be carried out, namely through internal and external administrative supervision mechanisms in the form of judicial channels.[15]

In the context of monitoring the existence of policy regulations as one of the government instruments formed based on discretionary authority, it received a more serious spotlight during the COVID-19 pandemic, where at that time there were a number of policy

[12] Murtir Jeddawi, 2020, The Urgency of Governance Law Enforcement, PALLANGGA PRAJA Volume 2, No. 1 April 2020, pp. 12.

[13] Ibid, p. 13.

[14] Surya Mukti Pratama, Hario Danang Pambudhi, 2021, Position, Function, and Supervision of Regional Head Policy Regulations within the Framework of the Regional Autonomy System, Journal of Legal Analysis (JAH), Vol. 4 No. 1, April 2021, p. 126. 126.

[15] Ibid.

regulations, especially in the form of Circular Letters used to provide direction, guidance and arrangements related to handling the Covid-19 situation at that time. The question arises how to supervise the many policy regulations issued at that time to avoid abuse of authority (detournement de pouvoir) or arbitrary actions (willekeur)?

Based on Law No. 30 of 2014 concerning Government Administration, there are limitative arrangements in the use of discretionary authority in Article 25 to Article 28.[16] These arrangements show restrictions on the use of discretionary authority and can be said to be a form of supervision through internal government mechanisms. However, there are restrictions on the purpose of discretion that have implications for the existence of policy regulations when looking at Law No. 30 of 2014 concerning Government Administration, such as in Article 1 number 9 where the form of discretion is limited to decisions and / or actions determined and / or carried out by government officials to overcome concrete problems encountered in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete or unclear, and / or there is government stagnation. Meanwhile, Article 1 point 7 of the same Law defines a decision as a written

[16] Article 25:
(1) The use of discretion that has the potential to change the budget allocation must obtain approval from the superior officer in accordance with the provisions of laws and regulations.
(2) The approval as referred to in paragraph (1) is carried out if the use of Discretion has the potential to burden state finances.
(3) In the event that the use of Discretion causes public unrest, emergencies, urgency and/or natural disasters, Government Officials are required to notify the Supervisor of Officials before the use of Discretion and report to the Supervisor of Officials after the use of Discretion.
(4) Notification prior to the use of Discretion as referred to in paragraph (3) shall be made if the use of Discretion due to government stagnation in the broader interest has the potential to cause public unrest.
(5) Reporting after the use of Discretion as referred to in paragraph (3) is carried out if the use of Discretion is based on the existence of government stagnation for the wider interest in an emergency, urgent situation, and/or natural disaster.

Article 26
(1) Officials who use discretion must outline the purpose, objectives, substance, and administrative and financial impacts.
(2) Officials who use Discretion as referred to in paragraph (1) shall submit a written request for approval to the Supervisor of the Official.

Article 27
(1) Officials who use Discretion as referred to in Article 25 paragraph (3) and paragraph (4) must describe the intent, purpose, substance, and administrative impact that has the potential to change the burden on state finances.
(2) Officials who use Discretion as referred to in paragraph (1) shall submit oral or written notification to the Official's superior.

Article 28
(1) Officials who use Discretion as referred to in Article 25 paragraph (3) and paragraph (5) shall describe the purpose, objective, substance, and impact caused.
(2) Officials who use Discretion as referred to in paragraph (1) shall submit a written report to the superior of the Official after the use of Discretion.

decree issued by a Government Agency and/or Official in the administration of government. Meanwhile, referring to Article 1 point 8, what is meant by action is the action of Government Officials or other state administrators to perform and/or not perform concrete actions in the context of governance.[17]

Based on the provisions of Article 1 numbers 7, 8, and 9 of Law No. 30 of 2014 concerning Government Administration, it can be seen that there is a limitation of the scope of discretion only on decisions and / or actions determined and / or carried out by Government Officials, which has an impact on the absence of regulations (legal vacuum) governing the formation of policy regulations. In fact, at the conceptual and implementative levels, discretion in its form as a policy regulation is not only in the form of a decision / decree but can also take the form of: 1) circular letters, 2) orders or instructions; 3) work guidelines or manuals, 4) implementation instructions (juklak), 5) operational / technical instructions (juknis), 6) instructions, 7) announcements, 8) guidebooks or "guides" (guidance), 9) terms of reference or Term of Reference (TOR), and 10) work design or project design (project design) whose material is regulating.[18]

The lack of explicit regulation of policy regulations as part of discretionary products in Law No. 30 of 2014 makes it difficult to determine what kind of product they are, because in substance, policy regulations are often found to be regeling in nature, which is similar to laws and regulations so that they become the object of judicial review requests to the Supreme Court. This is where the idea arises to make the judiciary, namely the Supreme Court as an external supervisor of policy regulations by conducting tests, namely:[19]

First, the Supreme Court is authorized to examine policy regulations while still referring to Law No. 12/2011 on the Establishment of Laws and Regulations which provides limitations on laws and regulations. In this case, the Supreme Court does not need to be explicitly authorized to review policy regulations. If the first option is used, the material test of policy regulations by the Supreme Court can only be carried out on policy regulations in the form of laws and regulations, namely laws and regulations formed on the basis of discretion. Because these regulations are born from discretion, the basis for testing cannot

[17] Bayu Dwi Anggono, Nando Yussele Mardika, 2021, Consistency of Form and Content Material as Legal Products in Handling Covid-19, Legal Issues, Volume 50 No. 4, October 2021, pp. 357-358.

[18] Ibid, p. 358.

[19] Victor Imanuel W. Nalle, 2013, Judicial Authority in Policy Regulation Testing: Review of Supreme Court Decision Number 23 P/HUM/2009, Judicial Journal Vol. 6 No. 1 April 2013, pp. 44-45.

be limited to the laws and regulations above them. Testing also needs to be based on principles or principles in governance or regulation formation.

Second, the Supreme Court is given the authority to examine policy regulations so that the Supreme Court can not only examine regulations in the form of laws and regulations as limited in Law No. 12/2011 but also examine regulations in the form of circulars or instructions. If the second option is taken, it will blur the distinction between policy regulations and laws and regulations. Both will be considered equal and have the same position.

In the development of current practice, the Supreme Court has repeatedly conducted judicial review of policy regulations (beleidregel). The following are material tests of policy regulations that have been decided by the Supreme Court:

1. Material Test of Circular Letter of Director General of Coal and Geothermal Minerals No. 03.E/31/DJB/2009.[20]

   This judicial review case began on January 30, 2009 when a letter was issued. Circular of the Director General of Coal and Geothermal Minerals, Ministry of Energy and Mineral Resources. Mineral Resources Number: 03.E/31/DJB/2009 dated January 30, 2009 concerning Mineral and Coal Mining Licensing Prior to the Issuance of Government Regulation as the Implementation of Law No. 4/2009 (SE PPMB).

   As a result of the issuance of the Circular Letter, the Regent of East Kutai, who at that time was Ir. H. Isran Noor, M.Si., objected and then filed a petition for judicial review to the Supreme Court dated July 22, 2009, which was received at the Supreme Court registrar's office on July 22, 2009. dated July 27, 2009 and registered with Number: 23 P/HUM/2009.

   The Regent of East Kutai in his petition objected to the SE PPMB material a quo which reads as follows:

   > "As long as before the issuance of government regulations as the implementation of the 2009 PMB Law with provisions:
   > a) Governors and Regents/Mayors throughout Indonesia should pay attention to the following matters:
   > 3. ..... etc;
   > 4. Temporarily suspend the issuance of new Mining Business License (IUP) until the issuance of Government Regulation as the implementation of the 2009 PMB Law."

[20] Muhammad Thabrani Mutalib, 2017, The Authority of the Court to Examine the Norms of Policy Regulations (beleidsregel) in Indonesia, Master of Law Program, Postgraduate Program, Faculty of Law, Islamic University of Indonesia, p. 176. 176-180.

The above SE PPMB material is considered contrary to Law No. 4 of 2009 concerning Mineral and Coal Mining (PMB Law), namely:

> "As far as the Regent's authority granted by the Law is concerned, Article 8 paragraph (1) letter b of the 2009 PMB Law explicitly states:
> The authority of the Regency / City Government in the management of Mineral and Coal Mining, among others, is :
> c. ..... etc;
> d. Provision of IUP and IPR, guidance, community conflict resolution and supervision of mining businesses in the Regency / City area and / or sea area up to 4 (four) miles;"

> "As far as government regulations are concerned as the implementation of the 2009 PMB Law, the provisions of Article 173 paragraph (2) of the 2009 PMB Law explicitly state: When this law comes into force, all laws and regulations that are the implementing regulations of Law Number 11 of 1967 concerning Basic Mining Provisions are declared to still apply as long as they do not conflict with the provisions in this Law.

The Supreme Court then handed down a decision on case number: 23 P/HUM/2009 with dictum, among others:

> "granting the petition for judicial review from the Regent of East Kutai as the petitioner, stating that the SE PPMB a quo is contrary to the applicable and higher provisions, namely Law Number 4 of 2009, and is therefore invalid and not generally applicable and ordering the Minister of Energy and Mineral Resources to cancel and revoke the SE PPMB".

Referring to the ratio decidendi of the Supreme Court, it is clear that the Supreme Court classified the Circular Letter of the Director General of Coal and Geothermal Minerals, Ministry of Energy and Mineral Resources Number: 03.E/31/DJB/2009 dated January 30, 2009 on Mineral and Coal Mining Licensing as a statutory regulation and thus subject to the principle of lex superior derogat legi inferiori.

2. Material Test of Supreme Court Circular Letter No. 7 of 2014 concerning Application for Reconsideration of Criminal Cases[21]

The examination of Supreme Court Circular Letter No. 7/2014 on the Application for Reconsideration of Criminal Cases (SE PPPK) began with a petition for judicial review filed by the Institute for Criminal Justice Reform (ICJR) and friends. The petition

[21] Ibid, pp. 189-192.

was received by the Supreme Court registrar on April 20, 2015 and registered with No. 27 P/HUM/2015. ICJR and friends as petitioners submitted the following reasons:

> "The existence of SEMA No. 7/2014 has severely disrupted and hampered the activities of the Objection Petitioner. The enactment of the regulation has harmed the rights of the Objection Petitioner to play an institutional role in ensuring the upholding of a just law and the struggle for the upholding of respect for human rights which is the mandate of the 1945 Constitution. Thus, the enactment of SEMA No. 7/2014 both concretely and factually and potentially harms the rights of the Objector Applicant. The existence of the regulation a quo, either directly or indirectly, has harmed various kinds of efforts that have been carried out continuously in order to carry out the duties and roles of the Objection Petitioner;"

The applicant considers the SE PPPK material to be contrary to Article 6 paragraph (1) letter (i) of Law No. 12/2011 on the Formation of Legislation regarding the principle of legal certainty. In addition, the SE PPPK is considered contrary to the principle of clarity of purpose, the principle of clarity of formulation and the principle of justice mandated through Article 5 letters (a), (f) and Article 6 paragraph (1) letter (g) of Law No. 12/2011 concerning the formation of laws and regulations. Then the SE PPPK is also considered contrary to Article 8 paragraphs (1) and (2) and Article 10 paragraph (1) letters (a), (d) of Law No. 12/2011 on the formation of laws and regulations. On that basis, although the right of access to justice guaranteed by the 1945 Constitution can be restricted, based on Constitutional Court Decision No. 5/PUU-VIII/2010, such restrictions must meet two criteria, namely: (i) the restriction can only be done in the context of law enforcement, and (ii) the restriction is regulated by law.

Based on this request, the Panel of Judges of the Supreme Court stated in its legal reasoning (ratio decidendi) as follows:

> "...that the Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA) Number 7 of 2014 dated December 31, 2014 concerning the Submission of Petitions for Judicial Review in Criminal Cases (the object of judicial review) addressed to the chairman of the court of appeal and the chairman of the court of first instance is a form of circular from the leadership of the Supreme Court as referred to by H.P. Panggabean as regulated and not a form of regulation as a regulation of the Supreme Court, so that SEMA Number 7 of 2014 is not included as a regulation as referred to in Article 7 and Article 8 of Law Number 12 of 2011, so that SEMA Number 7 of 2014 is not included as an object of judicial review."

Then on that basis, the Supreme Court emphasized that the SE PPPK is not an object of judicial review because it does not include laws and regulations, among others:

> "That there is no delegation regarding further regulation of Judicial Review (PK) specified in higher legislation or in the decision of the Constitutional Court Number 34/PUU-XI/2013 regarding the submission of Judicial Review, so that the object of judicial review in the form of the Supreme Court Circular Letter is not included as legislation that can be tested by the Supreme Court or become an object of judicial review objection at the Supreme Court of the Republic of Indonesia...because SEMA Number 7 of 2014 concerning the Submission of Petitions for Judicial Review in Criminal Cases (the object of judicial review) is not included in the laws and regulations that can be tested by the Supreme Court, the petition for judicial review must be declared inadmissible (niet onvankelijke verklaard)."

On the basis of these considerations, the Supreme Court then in the dictum of its decision did not accept the petition for judicial review filed by ICJR and friends. The legal consideration (ratio decidendi) of the Supreme Court is contradictory to the previous Supreme Court Decision in the case of Supreme Court Decision No. 23 P/HUM/2009. This shows that the Supreme Court's ratio decidendi is illogical and inconsistent. The legal reasoning (ratio decidendi) in Supreme Court Decision No. 23 P/HUM/2009 states that although Circular Letters are not included in the order of laws and regulations as referred to in Article 7 of Law No. 10/2004 on the Establishment of Laws and Regulations, however, based on the explanation of Article 7, they can be classified as a valid form of legislation, so they are subject to the provisions of the order in which lower regulations must not contradict higher regulations (lex superior derogat legi inferiori), on that basis the Supreme Court then classified Circular Letters as laws and regulations. In fact, as is known in theory, Circular Letters are a form of policy regulation (beleidregel). However, the ratio decidendi in the case of Supreme Court Decision No. 27 P/HUM/2015, the Supreme Court acted otherwise by stating that the Circular Letter is not a statutory regulation so it is not an object of judicial review that can be tested by the Supreme Court. The Supreme Court's interpretation shows the inconsistency of the Supreme Court's ratio decidendi in a decision with a similar object.[22]

Seeing the inconsistency of the Supreme Court in its decisions regarding the existence of policy regulations, in this case Circular Letters, shows that there are still differences in understanding and views in assessing whether policy regulations are laws or not. Supreme Court Decision No. 23 P/HUM/2009, which was expected to be a precedent that was an "entry point" in clarifying the position of policy regulations as laws

[22] Ibid, pp. 193-195.

and regulations, was overturned by Supreme Court Decision No. 27 P/HUM/2015. In this case, it becomes difficult to expect control or supervision of policy regulations through mechanisms in the judiciary when there are contradictions in Supreme Court Decisions for the same case object.

The Supreme Court should have consistency through its decisions and provide criteria related to policy regulations, such as Circular Letters that can be tested to control them from being misused with the following conditions: 1) when the content of the Circular Letter is contrary to human rights; 2) the content material should be set out in laws and regulations; 3) there is material from the Circular Letter that conflicts with higher laws and regulations. If all three elements are met, then judicial review can be conducted to the Supreme Court.[23]

When external supervision of policy regulations is still problematic, internal supervision must be optimized in the use of discretionary authority. This is where the role of supervision is very important, including in the context of the relationship between the Central Government and the Regional Government in relation to the implementation of regional autonomy. Because at the Regional Government level, both Governors, Regents and Mayors in the implementation of regional governance, of course, also often take discretionary actions so that they issue policy regulations for their ranks which either directly or indirectly have implications for the community. The enactment of these policy regulations certainly should not cause harm to the community so that supervision of them becomes important.

Based on Law No. 23 of 2014 concerning Regional Government, internal supervision is carried out in an effort to implement guidance and supervision by the Central Government - including representatives of the Central Government - to Regional Governments, both Provincial and Regency / City, preventively and repressively. Further provisions regarding guidance and supervision of Local Governments are regulated in Government Regulation No. 12/2017 on the Guidance and Supervision of Local Government Implementation. Guidance and supervision efforts are carried out by the Central Government to the Provincial Government through Ministers, technical Ministers, and Heads of Non-Ministerial Government Institutions. This also applies to Regency / City Regional Governments which are carried out by the Governor as a

[23] Bayu Dwi Anggono, Nando Yussele Mardika, 2021, Consistency...Op.Cit, p. 361.

representative of the Central Government and its duties. The authority to conduct guidance and supervision includes matters of a general nature, namely the division of government affairs, regional institutions, staffing in regional apparatus, regional finance, regional development, public services in the regions, regional cooperation, regional policies, regional heads and DPRDs, as well as other forms of guidance in accordance with statutory provisions. Meanwhile, technical guidance and supervision is handed over to the technical Minister or Head of the Non-Ministry Government Institution for the Provincial scope and the Governor for the Regency / City scope. The activities carried out to be able to make coaching efforts can be carried out through various activities such as facilitation, consultation, education and training, and research and development. Meanwhile, supervisory efforts can be carried out through various activities such as review, monitoring, evaluation, inspection, and other forms of supervision.[24]

The forms of guidance and supervision activities can be interpreted as part of the concept of supervision or internal control that can correct errors in the formation of policy regulations from the Regional Head either by the Central Government and / or its representatives in accordance with the authority in PP Number 12 of 2017. Referring to the opinion of Paulus Effendie Lotulung, which states that internal administrative technical control within the government itself (built in control) is in addition to assessing legality (rechtmatigheidtoetsing) and even focuses more on the aspect of assessing the usefulness (doelmatigheidtoetsing) of the actions concerned.[25]

The means of internal supervision by the executive itself will be a definite answer in the discourse of control over policy regulations. This is based on the condition that the testing of policy regulations is still in a gray area if it goes through the authority of the judicial body. Because it still leaves a debate that a policy regulation cannot be legally tested (wetmatigheid) because policy regulations are not based on statutory regulations and policy regulations themselves are not statutory regulations.[26]

Conclusion

The existence of policy regulations (beleidsregel) is formed not based on the authority of attribution or delegation from the Constitution and Law, but its formation has justification. The source of authority for the formation of beleidsregels lies in the "beoordelingsruimte" (space

[24] Surya Mukti Pratama, Hario Danang Pambudhi, 2021, Position, ...Op.Cit, p. 127.
[25] Ibid
[26] Ibid, pp. 127-128.

for consideration) given by the legislator to Officials or Government Bodies to take public legal actions on their own initiative (discretion) in the nature of regulation, stipulation or real positive action to solve the problems of governance faced. Policy regulations are not laws and regulations and are not directly legally binding.

The unclear status of policy regulations has implications for the supervision carried out on them is still not optimal because there are no explicit arrangements related to the supervision mechanism that can be carried out. To clarify the scope of supervision of policy regulations, it is necessary to revise Law No. 30 of 2014 concerning Government Administration so that the supervision of the use of discretion is not only aimed at decisions and / or actions determined and / or carried out by Government Officials but also includes supervision of the use of discretion that produces policy regulations, in the form of Circulars, Orders, Instructions and others. In addition, the external supervision mechanism through the judiciary against policy regulations must still be pursued where the Supreme Court must have consistency through its decisions and provide criteria related to policy regulations that can be tested to control them from being misused.

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