

LEGAL SOLUTION TESTING POLICY REGULATIONS IN INDONESIA

^a Rasji Sidin

ABSTRACT

Objective: The objective of this study was to determine the legal solution for testing policy regulations in Indonesia, in order to protect the legal rights of the people and create legal certainty.

Method: The study employed empirical legal research methods. Primary data regarding policy regulations and the testing of policy regulations were collected through interviews with Constitutional Law experts and Supreme Court judges. A qualitative approach was used to analyze the research data.

Results: The study found that policy regulations often conflict with laws and regulations, leading to harm to the legal rights of the community. The Supreme Court's decisions regarding the review of policy regulations have been ambiguous, creating legal uncertainty. The study proposed a two-stage approach for testing policy regulations. The first stage involves an executive review conducted by government officials, including objection and administrative appeal processes. The second stage involves a judicial review conducted by the Supreme Court, which assesses the conformity of policy regulations with applicable laws and regulations. The study concluded that the legal solution for testing policy regulations lies in these two stages of review.

Keywords: policy regulations, testing, legal solutions.

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SOLUÇÃO JURÍDICA REGULAMENTAÇÃO DA POLÍTICA DE ENSAIOS
NA INDONÉSIA

RESUMO

Objetivo: O objetivo deste estudo foi determinar a solução jurídica para testar os regulamentos de política na Indonésia, a fim de proteger os direitos legais das pessoas e criar segurança jurídica.

Método: O estudo utilizou métodos de investigação jurídica empírica. Foram recolhidos dados primários relativos a regulamentos de políticas e ao ensaio de regulamentos de políticas através de entrevistas com peritos em Direito Constitucional e juizes do Supremo Tribunal. Foi utilizada uma abordagem qualitativa para analisar os dados da investigação.

^a Lecturer, Faculty of Law, Tarumanagara University, Jakarta, Indonesia, E-mail: rasji@fh.untar.ac.id



Resultados: O estudo concluiu que os regulamentos sobre políticas entram frequentemente em conflito com as leis e os regulamentos, prejudicando os direitos legais da comunidade. As decisões do Supremo Tribunal relativas à revisão dos regulamentos sobre políticas têm sido ambíguas, criando incerteza jurídica. O estudo propôs uma abordagem em duas fases para testar os regulamentos sobre políticas. A primeira fase envolve uma revisão executiva conduzida por funcionários do governo, incluindo objeções e processos de recurso administrativo. A segunda fase envolve uma revisão judicial conduzida pelo Supremo Tribunal, que avalia a conformidade dos regulamentos políticos com as leis e regulamentos aplicáveis. O estudo concluiu que a solução jurídica para testar os regulamentos políticos reside nestas duas fases de revisão.

Palavras-chave: regulamentação política, ensaios, soluções jurídicas.

1 INTRODUCTION

Indonesia is a country based on law. The consequence is that the implementation of governmental tasks must be based on law (Azahary, 1995). Law is the basis for determining government authority in carrying out its daily duties. Law is also the basis for government accountability for the tasks it has carried out (Sibuea, 2010). The government's duty is legitimate if there is a law that regulates it. On the other hand, the government's duty is illegitimate if there is no law that regulates it.

Indonesia has formed laws called statutory regulations, starting from the 1945 Constitution (UUD 1945) to Village Head Regulations (Soeprapto, 2007). These regulations become the foundation of national life, both for the government and for society. It is expected that all laws and regulations formed by the state are able to meet the legal needs of the government in carrying out its duties.

The government is an institution that deals directly with citizens and resolves various concrete events in society. In practice, the government often experiences difficulties in carrying out its duties because laws and regulations do not adequately regulate all government affairs. To address this legal need, the government has established regulations called policy rules (policy rules or *beleidregel*) (Nugraha, 2008). Policy regulations are regulations formed by government officials or agencies based on discretionary administrative authority, namely the government's free authority to technically regulate government affairs, in order to achieve the success of its duties in accordance with the laws and regulations that regulate it (Ridwan, 2014).

Examples of the types of policy regulations that are widely formed and used by the government are government circulars. Government circulars are letters made by government officials or agencies, which contain regulations regarding government affairs, which are circulated openly (Badudu & Zain, 2001). Government Circulars contain legal norms such as laws



and regulations, which have the nature of regulation and become the legal basis for the government in achieving the success of its duties.

In fact, there are many policy regulations that cause legal problems for the community, because their contents conflict with laws and regulations (Rasji, 2019). Many people lose their legal rights, because these policy regulations eliminate or reduce the legal rights of the people granted by laws and regulations. However, the community experiences difficulties in defending their legal rights, because there are no regulations governing policy regulations, there is no institution that is authorized to resolve the loss of these rights, and there are no legal procedures to restore the community's legal rights.

In practice, some people have sought legal solutions by submitting requests for review of policy regulations to the Supreme Court (Hutabarat et al., 2022). The Supreme Court as a bastion of justice is considered capable of restoring people's legal rights. In practice, the Supreme Court is ambivalent in deciding requests for review of policy regulations. On the one hand, the Supreme Court stated that it had the authority to review policy regulations, but on the other hand, the Supreme Court stated that it had no authority to review policy regulations (Rasji, 2019). This condition has created legal certainty for the people in defending their rights.

The conditions above show that there is a legal vacuum in reviewing policy regulations in Indonesia. This condition cannot be tolerated because it has harmed the legal rights of the community, and it is very urgent to find a solution. The problem is what is the legal solution for testing policy regulations in Indonesia, so that policy regulations do not harm the legal rights of the people? This problem is a big problem in the Indonesian legal system, because one legal aspect, namely the review of policy regulations, has no legal regulation. The aim is to overcome the legal vacuum in order to create legal certainty regarding the review of policy regulations in Indonesia.

2 METHOD

The problems above have been investigated using empirical legal research methods. The data studied are primary data regarding policy regulations and testing of policy regulations. Data collection was carried out using interview techniques with Constitutional Law experts and Supreme Court judges. This interview is related to library data in the form of 368 policy regulations of the type of Government Circular Letters and 10 Supreme Court Decisions that examine policy regulations. Research data were



analyzed using a qualitative approach, the results of which are presented in the form of a research report.

3 RESULTS AND DISCUSSION

3.1 LEGAL PROBLEMS OF REVIEWING POLICY REGULATIONS

Policy regulations are regulations that appear in the practice of implementing government tasks. The government is the executor of laws and regulations, whose job is to apply statutory regulations to concrete events in society. The concrete events referred to are the needs of the people served by the government. The government provides services to the public in accordance with statutory provisions which form the legal basis. Therefore, the task of the government must not deviate from the applicable laws and regulations. The government is obliged to comply with laws and regulations, but the government is also obliged to meet the various needs of the community. This task must be carried out by the government to create people's welfare.

For this reason, the government has the authority to regulate government affairs based on statutory authority and administrative authority. Legislative authority is the authority to make statutory regulations, namely to make legal norms that apply to the general public and the things they regulate apply continuously. Administrative authority is the authority to carry out (execute) statutory regulations into government tasks.

The government's authority to make statutory regulations is obtained from the granting (attribution) or delegation of statutory authority. For example, the regional government makes regional regulations based on the authority granted by Law Number 23 of 2014 concerning Regional Government and the village government makes village regulations based on the authority granted by Law Number 6 of 2014 concerning Villages. The Governor forms a Governor Regulation based on the delegation of authority from provincial regional regulations, the Regent makes a Regent Regulation based on the delegation of authority from the regency regional regulation, and the Village Head makes a Village Head Regulation based on the delegated authority from village regulations.

The government also forms policy regulations (*beleidregel*, policy rules) (Razak, 2015) or *pseudowetgeving*, *speigelrecht* (Salim, 2015) based on their administrative authority. This authority is used to apply the norms of legislation to concrete events faced by the government in society (Hamid & Attamimi, 1990). The government often experiences deadlocks or gaps in their duties because there are no laws and regulations



governing these concrete events. For this reason, the government uses its administrative authority in the form of free authority (discretion) or "*freies ermessen*" to make regulations called policy regulations, which directly regulate these concrete events (Rasji, 2019). Every government official has the authority to act freely (*beleidsvrijheid* or *beoordelingsvrijheid*) (Hadjon, 1997) to issue policy regulations, which are not based on legislation (Hadjon, 1997), but are still considered legitimate as regulations (Lazuardi, 2012). Policy regulations function to provide instructions or become guidelines for government officials/institutions in the context of implementing laws and regulations (Atmosudirjo, 1994).

Policy regulations are not statutory regulations but administrative regulations created by government officials/institutions to carry out their governmental tasks (Salim, 2015). This regulation does not have a positive legal basis (statutory regulations), because there are no statutory regulations that regulate it (Ridwan, 2014). The basis for its validity is a theoretical basis, so its establishment is only based on theoretical authority. In theory, the existence of this regulation is a consequence of the adherence to the concept of a welfare state by Indonesia, which places a very broad burden on the government, namely the burden of administering people's welfare (welfare state). The Indonesian government is obliged to create the welfare of its people, so that the government's duties cannot be stopped or delayed because there are no regulations. For this reason, the government is given the freedom to take policies according to the factual situations and conditions it faces (Asshiddiqie, 2006). Furthermore, policy regulations are used as a legal basis by the government in serving or solving concrete events in society. An example of the type of policy regulation formed based on administrative authority is a Government Circular Letter.

Policy regulations have become a government tool to regulate government affairs. This arrangement is a solution to the legal vacuum governing government affairs. Even so, the existence of policy regulations is often a problem for the people because their provisions contradict statutory regulations and harm the legal rights of the community. From the results of research on 368 policy regulations in the form of Government Circular Letters, there are 17 Circular Letters whose norms are contrary to the norms of laws and regulations. Communities have difficulty defending rights that are harmed by policy regulations, because there are no legal rules that regulate them.

In the theory of Constitutional Law, settlement of regulatory norms that conflict



with higher regulatory norms is carried out by examining regulations (Soemantri, 1997). However, this is a problem for the review of policy regulations, because there is no legal regulation that regulates it, there is no institution that is authorized to examine it, and there is no procedure for testing it. In practice, of the 17 Circular Letters that conflict with laws and regulations, only 10 of them have been submitted for review by the public to the Supreme Court. It turned out that the examination by the Supreme Court also created new problems, because the Supreme Court's decision was ambiguous. On the one hand, the Supreme Court has accepted and tested 6 (six) policy regulations, but on the other hand, the Supreme Court has stated that it does not accept and has no authority to review 4 (four) policy regulations (Rasji, 2019). This condition creates new problems for the Indonesian legal system, namely the absence of legal certainty in reviewing policy regulations and the absence of protection of the legal rights of people who are disadvantaged by policy regulations.

This legal uncertainty is still a legal problem to date. The state and government have not provided a legal solution to overcome this. The impact is that the review of policy regulations is highly dependent on the attitude of the Supreme Court, whether the Supreme Court will conduct a review or not. Such an attitude of the Supreme Court is not wrong, because there is no law that obliges the Supreme Court to review policy regulations. During this legal condition, the community continues to be the party whose rights are impaired by policy regulations, and the community does not receive legal protection for their legal rights.

3.2 LEGAL SOLUTIONS POLICY RULES TEST

Policy regulations have the same characteristics as laws and regulations even though the basis for their formation is different. Policy regulations must be in harmony with laws and regulations and have value for the benefit of the general public. Policy regulations that conflict with laws and regulations, even harm people's legal rights have no value for society, so that the applicability of policy regulations based on discretion must be accounted for (Handoyo, 2009) and tested. Bagir Manan & Magnar (1996) stated that testing of policy regulations can be carried out based on statutory regulations and the general principles of good governance (AUPB) (Ridwan, 2014). This is supported by the Supreme Court Judgment Jurisprudence which has carried out legal review of policy regulations based on statutory regulations and AUPB.



Theoretically, there are three regulatory review mechanisms, namely judicial review, legislative review, and executive review (Wiratraman & Perdana, 2014). Judicial review is a mechanism for reviewing regulations by the judiciary. Legal review is a mechanism for reviewing regulations by the legislature. Executive review is a mechanism for testing regulations carried out by the executive or the Government (Arifin, 2009). Policy regulations are not laws, so it is not possible to be reviewed by the legislature. Policy regulations are made by the executive to implement laws and regulations and AUPB, so that the review of policy regulations can be carried out by the executive branch.

Considering that policy regulations are in the realm of the executive, policy regulations are regulations that apply statutory regulations, and based on the results of research on 368 policy regulations, the testing of policy regulations is in the executive and judicial domains. Testing in the executive domain is testing within the scope of executive authority, which is carried out through an executive review mechanism (executive review), while testing in the judicial realm is testing within the scope of judicial authority, which is carried out through a judicial review mechanism (Rasji, 1995). Executive testing is testing conducted to assess whether policy regulations are appropriate or not in accordance with the scope of duties and authority of the executive policy maker. Judicial testing is testing carried out to assess whether policy regulations are in accordance or not in accordance with legislation. Executive testing is carried out by officials or executive/government agencies. Judicial test is a test to assess whether policy regulations are in accordance or not in accordance with statutory regulations. Judicial examination is carried out by the judiciary. The executive review mechanism is the first stage testing mechanism, while the judicial review is the second stage testing mechanism. Executive review is a requirement to be able to take a judicial review.

Executive review is also called administrative effort, namely the mechanism for testing the norms of policy regulations administratively based on the administrative authority granted by laws and regulations or AUPB. Norms of policy regulations are measured and assessed for conformity with the administrative authority possessed by the policy regulation makers, whether they are in accordance with the policy regulations or AUPB. This assessment effort can be done through two levels of administrative effort. The first level is an objection effort (*doleance*) that can be submitted by the community to the officials forming the policy regulations. In this case the community submits objections to the policy regulators regarding the policies they make because they are



contrary to laws and regulations and/or AUPB and harm their legal rights. Furthermore, the official who makes policy regulations examines the community's objection and decides on it. In the event that policy regulators assess that the policy regulations they make are in accordance with their authority based on statutory regulations, then the regulatory official has the authority to issue a decision rejecting a request for public objection. On the other hand, if the official who makes policy regulations considers that the policy regulations he makes are not in accordance with his authority based on statutory regulations and/or AUPB, then the official who makes policy regulations has the authority to issue a decision that rejects the public's request.

If the official who makes the policy regulations rejects the public's objection, the community can submit a second level of effort, namely an administrative appeal (administrative *beroef*) to the superior official of the policy regulation maker. The superior official who receives an application for an administrative appeal checks the policy regulations made by his subordinate officials, whether they are in accordance with the authority they have based on statutory regulations and/or AUPB. If the policy regulations are considered in accordance with the authority possessed by their subordinates, the superior official has the authority to issue a decision rejecting the application for an administrative appeal. Conversely, if the policy regulations are deemed not in accordance with the authority of their subordinate officials, then the superior official has the authority to issue a decision granting an administrative appeal.

In the event that the community does not accept the administrative effort decision, then the community can apply for a judicial review mechanism in writing to the Supreme Court. The application for material review rights requested by the public is for the policy regulations to be declared in conflict with laws and/or AUPB regulations and the said policy regulations are declared to have no legally binding force. On the basis of this request, the Supreme Court conducted a judicial review by assessing the conformity of the policy regulations with the applicable laws and regulations. The Supreme Court can grant the request for judicial review, which means that the policy regulation is contrary to laws and regulations and states that the policy regulation does not have legally binding force. However, if the policy regulations are deemed in accordance with statutory regulations and/or AUPB, the Supreme Court may issue a decision rejecting the application for judicial review. Judicial review decisions are decisions that are final and binding. This decision cannot be filed for any legal remedies, and must be implemented



by all parties.

4 CONCLUSION

Policy regulations are regulatory legal norms, which have the same characteristics as statutory norms. Policy regulations are formed based on administrative authority for the success of government tasks. Policy regulations that conflict with laws and/or AUPB can be subject to legal review. The basis for testing is statutory regulations and/or AUPB. The examiners are government officials through an executive review mechanism, and to court judges through a judicial review mechanism. Executive review is the first stage of testing which includes objection efforts and administrative appeal efforts. Efforts to object are attempts to test submitted to officials forming policy regulations, while administrative appeals are attempts to test submitted to superiors from officials who make policy regulations. Administrative appeals can be made if the public does not accept the objection decision. In the case of not accepting the administrative appeal decision, the public can submit a written judicial review to the Supreme Court. If a policy regulation is deemed to be contrary to statutory regulations and/or AUPB, the Supreme Court has the authority to decide by declaring the policy regulation to be contrary to statutory regulations and/or AUPB and does not have legally binding force. It is better if the policy regulations are deemed in accordance with statutory regulations and/or AUPB, the Supreme Court has the authority to decide by declaring that the policy regulations do not conflict with statutory regulations and/or AUPB.

To support the above conclusions, it is suggested to the People's Consultative Assembly to amend Article 24A of the 1945 Constitution by adding the authority of the Supreme Court to examine policy regulations. Furthermore, the legislature amended the Law on Judicial Powers and the Supreme Court Act by adding the authority of the Supreme Court to review policy regulations, as well as amending Law Number 30 of 2014 concerning Government Administration by increasing the government's discretionary authority to make policy regulations and review policy regulations independently. executive review and judicial review by the Supreme Court.



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