Conceptualization of Policy Regulatory Review in the Principle of the State of Democratic Law

Andryan Andryan(✉), Zainuddin Zainuddin, and Benito Ashie Kodiyat

Muhammadiyah Sumatera Utara, Medan, Indonesia
Andran@umsu.ac.id

Abstract. The state of Indonesia is a country of laws. Consequently, all acts of state power must always adhere to the law, in realizing a democracy based on a law or a democratic state of law. State administrative officials have the authority to make policy regulations based on the authority of freedom of action (freies ermessen). Unlike the case with laws and regulations, policy regulations are not given the authority to be reviewed. Judicial review includes testing the legal actions of the ruler either actions outside his authority or because public officials did not perform the actions they should have taken. Judicial review about the control of judicial power over government legal action. The formulation of the problem in this paper, namely, what is the position of policy regulations in Indonesian laws and regulations? and how is the conceptualization of the testing of policy regulations in the perspective of a democratic legal state? The method of analysis in this paper is normative juridical using a statutory approach and conceptual approach. The conceptualization of the testing of policy regulations needs to be carried out again so that there is legal protection provided to parties who are harmed by the existence of policy regulations as adopted in democratic legal countries. In order to avoid policy regulations that go beyond the limits of freedom of action and undermine the prevailing legal order as embraced in the concept of a democratic legal state, the judge can at least contain the option of testing policy regulations by using interpretation by the method of interpretation, which is the autonomy or independence of judges in legal discovery.

Keywords: Testing · Policy Regulation · State of Law

1 Introduction

The State of Indonesia is a country based on law, this is as affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (Uud 1945), "The State of Indonesia is a state of law". The logical consequence of a state based on the law of them is that all rules must be based on and refer to the law. In terms of the formation of legislation, of course, it is based on authority. According to Bayu Dwi Anggono, there are 2 sources of authority, namely attribution of authority and delegation of authority. Attribution of authority is the granting of authority to form laws and regulations given by the ground wet (Basic Law) or wet (Law) to a state/government institution.

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Meanwhile, the delegation of authority is the delegation of authority to form laws and regulations carried out by higher laws and regulations to lower laws and regulations [1].

Like the administration of the State, the government issued many policies that were implemented in various forms [2]. Such regulations can be referred to as policy regulations. According to Hamid Attamimi, policy regulations have received a lot of attention, especially regarding their legal position. According to Can Kreveld, policy regulations can be recognized by stating the characteristics of the Regulation or not being written and arise by a series of decisions of government agencies in the context of the implementation of free government authority against individuals [3].

Philipus M. Hadjon, said the policy regulation is essentially a product of state administrative acts aimed at "naar buiten gebracht scrichftelijk beleid", that is, it reveals the issuance of a written policy [4]. Bagir Manan said that one of the characteristics of policy regulations is that the policy plan cannot be reviewed [5].

Supreme court, made a breakthrough in testing policy regulations in the form of circulars, namely against the Circular Letter of the Director General of Coal and Geothermal Minerals Number 03/31/DJB/2009 (SE No.03/31/DJB/2009). Based on the Decision of the Supreme Court of the Republic of Indonesia Case No.23 P/HUM/2009, the Supreme Court declared SE No. 03/31/DJB/2009 contrary to Law Number 4 of 2009 concerning Mineral and Coal Mining. Upon the ruling, the policy rule was declared invalid and did not apply to the public. The Supreme Court's ruling shows an interpretation that expands the scope of the types of legislation.

2 Research Method

In accordance with the problem, this paper uses a normative juridical methodology, finding a rule of law, legal principles, and legal doctrines to solve the problems of legal issues faced. Starting from this understanding, this paper is to find answers to the problem of the conceptualization of the testing of policy regulations from per perspective of the democratic legal state [6].

The approach used in this paper, namely the statutory approach, is used to look at the problem of the right to test policy regulations. The conceptual approach used will be to look at the conceptualization of the testing of policy regulations in the concept of a democratic legal state.

3 Findings and Discussion

1. Policy Regulations

   M. Solly Lubis, said that what is meant by state regulations (staatsregelings) are written regulations issued by official agencies, both in the sense of institutions and in the sense of certain officials. The regulations in question include Laws, Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, Ministerial Regulations, Regional Regulations, Instructions, Circulars, Announcements, Decrees, and others. According to I Gde Pantja Astawa, which is called state regulation (staatsregelings) or decision in a broad sense (besluiten). Decisions in a broad sense (besluiten) can be divided into 3 (three) groups, namely:

a. Wettelijk regeling (laws and regulations), such as the Constitution, laws, government regulations in lieu of laws, government regulations, presidential regulations, ministerial regulations, regional regulations, and others;
b. Beleidsregels (policy regulations), such as instructions, circulars, announcements, and others;
c. Beschikking (determination), such as decrees and others

The definition of policy regulation (beleidsregels) in the Netherlands, according to Bruinsma, cannot be separated from the concept of 'beleid' which is difficult to translate into other languages because the concept is an integral part of Dutch society. The terminology 'policy' includes only part of the meaning of 'beleid'. Regulation can mean managing and governing based on principles and policies. This aspect has to do with top-down planning. Beleid can also mean considering all related aspects and providing solutions to a problem. These two notions of meaning can be contradictory. In the first sense, a decision taken may go against the wishes of one of the parties. In the second sense, the decision taken is a win-win for the two parties concerned. In theory and practice, the concept of 'beleid' is a mixture of the two meanings [7].

Jimly Asshiddiqie, asserts that "policy rules" or "beleidsregels", which are forms of policy regulations that cannot be categorized as ordinary forms of legislation. It is called "policy" or "beleids" or policy because it cannot be formally called or is not in the form of official regulation [8]. For example, a circular from a Minister or a Director-General addressed to all ranks of civil servants who are within the scope of his responsibilities, may be outlined in an ordinary letter, not in the form of official regulation, such as a Ministerial Regulation. However, the content is regulating (regeling) and providing instructions in the context of carrying out staffing tasks. This kind of circular is commonly called the "policy rule" or "beleidsregel".

Jimly Asshiddiqie, as quoted by Michael Allen and Brian Thompson, said that policy rules can also be referred to as "quasi-legislation". Policy rules can be made in various forms of written documents that guide, guide, give policy direction, and regulate the implementation of work [9].

Van der Vlies, one of the experts on Dutch legislation, identified policy regulations in the Netherlands that were more made by minister not based on the Act. According to Victor Imanuel W. Nalle, the United States also regulates policy regulations in the Administrative Procedure Act (APA). Rule, according to Sect. 551(4), means:

> *... the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.*

Policy regulation is based on the doelmatigheid aspect as the implementation of the principle of beordelingsvrijheid/freis ermessen/discretion, that is, the principle of freedom of action of state administrative bodies/officials to carry out the duties and functions

of government. Law Number 30 of 2014 concerning Government Administration, in Article 1 number 9, specifies that:

> *"Discretion is a Decision and/or Action determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and. or the existence of government stagnation."*

2. Review of Legal Norms

   The term test of legal norms (legislation) can be divided based on the subject and object of the regulation [11]. Thetest is then divided into formal test rights (formele toetsubfsrecht) and judicial reviewing rights (materiele toetsingsrecht) [12]. Judicial Review is the authority to assess whether a legislative product is formed through proper procedures according to law [13].

Although judicial review and toetsingsrecht have different developmental histories, the essence of these two terms is almost the same, namely testing legal products. The development of law and constitutionality in the issue of testing legal products by judicial institutions is what cannot be separated from influencing the formation of Mahkamah Konstitution in the world and especially in Indonesia [14].

A special judicial review institution called the "verfassungsgerichtshof" or Constituency Court [15]. In fact, for state courts there has been the authority to decide constitutional objections that citizens raise to state actions [16]. According to the provisions of Article 24A paragraph (1) it is affirmed, "The Supreme Court has the authority to adjudicate at the level of cassation, to test laws under the law against the law, and to have other powers granted by law."

Both common law countries and civil law countries give the right to test (toetsingsrecht) to the judicial power, namely the right to test laws and regulations and decisions of state administrative officials with different models. Overall Hans Kelsen's thinking is not accepted by all countries due to differences in philosophical and legal traditions in each country but in the context of testing its own legal norms have been applied in almost all countries with different models and reasons. These tests are carried out by lawmakers or through specialized organs such as judicial review models. The implementation of the testing of laws and regulations and the decisions of administrative officials themselves are strongly influenced by the philosophy of each country [17].

3. Concept of a Democratic Legal State

The 1945 Constitution, as the constitution of the state of Indonesia, is the supreme law of the land [18]. According to Carl Schmit, the constitution is considered the highest political decision. Therefore, the constitution has the highest position in the orderly laws of a country [19]. According to Willem Koninjnenbelt, there are four important elements of the idea of a state of law, namely that government actions must be controlled by a judicial body that freely assesses the validity of these acts (rechterlijke controle) [20].

According to Bagir Manan, the modern legal state concept is a combination of the concept of a legal state and a welfare state [21]. According to Frans Magnis Suseno,

a democratic legal state includes a free and impartial judicial body, State functions are carried out by institutions by the provisions of a Basic Law [22]. The concept of the Indonesian State is idealized to realize a democratic legal state [8].

The State of Law or the Rule of Law itself is a concept of an ideal state-led and guided by the rule of law, which in German is called Rechtsstaat. In English, the writing of the Rule of Law (with uppercase) should be distinguished from the sense of the usual noun, that is, the rule of law (with lowercase letters) which contains only the meaning of "rule of law". His initial idea, originally related to the term nomokratie started by Aristotle, was later passed on by Plato in his book, "Nomoi", which means norm or method.

After continuing to develop in philanthropic thought, the concept of the legal state grew in practical lands throughout history, including the practice of the life of the city-state of Medina in the time of the prophet Muhammad and the era of the four successors of the prophet as head of state commonly referred to as khulafaurrasyidin, namely Abu Bakr Siddik, Umar bin Khattab, Usman bin' and Ali bin Abi Thalib.

The formation of the state of Medina was based on a mutual agreement of representatives of the population jointly signed in 622 AD which from a modern perspective can be viewed as the first written constitution in history. After that, this idea of a legal state continued to grow and develop until the pre-modern era when Sir John Fortescue (1471) is also often considered the first theorist to develop this idea in the 15th century. In the world of practice, Sir Edward Coke, while serving as Chief Justice of the Supreme Court of England during the time of King James I, also once stated that the King should be subject to the law by using the term "the Rule of Law" as well [8].

Discussions about the concept of the "State of Law", in the sense of the Rule of Law, continued to expand in the works of John Locke (1689), James Harrington (1656), Machiavelli (1517), Montesquieu (1748), to the work of Albert Venn Dicey (1885) entitled "Introduction to the Study of the Law of the Constitution" (1885) which has inspired many legal and political thoughts in modern times, such as Friedrich A. Hayek (1944, 1960, and 1973), Michael Oakeshott (1983), Joseph Raz (1977), and John Finnis (1980), and in the United States in the writings of Lon L. Fuller (1964), Ronald Dworkin (1985), John Rawls (1971), and others. According to Albert Venn Dicey, the Rule of Law must meet 3 main principles, namely: (i) the Supremacy of Law; (ii) Equality before the law; and (iii) The spirit or spirit of the law which is predominant (Predominance of legal spirit) which is nothing but the basic values and norms of the constitution that live in history [23].

In the tradition of the United States, the state of the law is nothing but a constitutional state or the Rule of Law as a principle of state by which all persons, institutions, and legal entities (entities) are accountable to laws, namely: (i) publicly promulgated, (ii) enforced fairly and equally enforced), (iii) all legal issues are resolved and decided through independent judicial proceedings (independently adjudicated), and (iv) based on the highest principles of constitutional reference in the state Constitution [24].

In the implementation of the principles of the state of law, it is recognized that in it there must be a mechanism of control by the judiciary by carrying out the function of testing the validity of legal norms (judicial review) both regarding the products of legislation and regulations as well as products of government administrative decisions.

Therefore, judicial review is seen as a means of protecting legal rights and enforcing good governance. The mechanism of testing the products of legislation and regulation and the products of administrative decisions by the judiciary is a central element of the modern legal state or Rule of Law today.

The democratic rule of law and democracies based on law or constitutional democracy today continue to grow and develop their standardized practices by simultaneously making them a triggering and spurring tool to prevent the decline of laws that are only used as a tool to satisfy personal, group, and personal passions, groups, or even individual countries or groups of countries. The law must be saved lest it becomes merely a tool of justification, a means of giving legitimacy during increasingly dynamic and open competition, hatred, and even hostility in today's era of economic, political, and cultural free markets. Therefore, the term Rule by Law which must be kept away from the meaning of Rule of Law is a necessity.

One of the basic principles that received affirmation in the amendment of the 1945 Constitution was the principle of the state of law, as stated in Article 1 Ayat (3) of the 1945 NRI Constitution [25] which states that 'The State of Indonesia is a state of law. "The Rule of Law" pioneered by A.V. Dicey. The concept of the state of the law is related to the term nomocracracy (nomocratie) which means that the determinant in the exercise of state power is the law [26].

4. Policy Regulatory Testing

   The testing of a legal norm is enforcement of the constitutional rule. M. Yahya Harahap, [27] stated that judicial power is given the right and authority to supervise the limits of the government's authority in issuing statutory authority by the boundaries of its jurisdiction or area of power. Anything that is not delegated by law to the ruler, or makes legislation much broader than what has been delegated, must be declared an unlawful act because it is considered an illegal act. The judiciary is given the right, function, and authority to supervise the central and regional, and local rulers not to abuse power beyond the boundaries of their jurisdiction.

In practice, Jimly Asshiddiqie said that there are three kinds of legal norms that can be a review or commonly referred to as norm control mechanisms. All three are both forms of legal norms as a result of the proses of legal decision-making [28]. Bagir Manan took the view "… until now nobody has been authorized to resolve disputes stemming from a Policy Rule. In practice, objections to policy regulations that cause harm are sued for unlawful acts." [29] Sine ira et studio (understandable).

H. Abdul Latief said that the need for testing policy regulations is based on two reasons, namely Theoretical reasons: driven by the development of administrative law, namely, in particular, the concept of besluit (decision) gets a new understanding that is quite broad and is the main instrument in the administration of the government of a legal state. Therefore the judicial reviewing of the regulation of absolute discretion to be carried out by the judiciary, Practical reasons: driven by the needs both the needs of the government and society. The public expects a guarantee of legal protection from the attitude of government agencies or officials. Conversely, for government agencies or officials, it is a limitation or basis not to act freely to form discretionary regulations that may conflict with laws and regulations and unwritten laws [30].

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, concerning Mineral and Coal Mining Licensing Before the Issuance of Government Regulations as an Implementation of Law Number 4 of 2009 (SE PPMB). The Supreme Court in its legal considerations stated: "… That the object of objection to the Right to Judicial review is in the form of a Circular Letter of the Director General of Minerals, Coal, and Geothermal, Ministry of Energy and Mineral Resources of the Republic of Indonesia Number: 03.E/31/DJB/2009 although it does not include the order of laws and regulations as referred to in Article 7 of Law Number 10 of 2004 concerning the Establishment of Laws and Regulations, based on the explanation of Article 7 it can be classified as a form of legal legislation, so that it is subject to the provisions of the order by which the lower regulations shall not conflict with the higher regulations (the principle of lex superior derogat legi inferiori).

The Supreme Court then handed down a decision with dictums, among others: granting an application for objection to the Right to Judicial review from the Regent of East Kutai as the applicant, stating that SE PPMB a quo is contrary to the applicable provisions and higher, namely Law Number 4 of 2009. Types of laws and regulations other than this provision include, among others, regulations issued by the Assembly of the House of Representatives, the Constitution, the Financial Audit Board, Bank Indonesia, Ministers, Heads of Agencies, institutions, or commissions of the same level established by law or government over the Province, Governor, Regional People's Representative Council of Regencies/Cities, Regents/Mayors, Village Heads or the same level."

This Ma jurisprudence shows the inconsistency of the Supreme Court in testing policy regulations under the Law governing legislation and judicial reviews [31]. If the substance is as regulatory as the legislation, then the Supreme Court has the right to test it. The authority of the Supreme Court's judicial review of laws and regulations under the law refers not only to the substance but also to the form of the regulation. The main reference to a regulation called a regulation is to look at its form or identifying elements as statutory regulation [32].

4 Conclusion

The regulation in Law Number 12 of 2011 Jo. Law Number 15 of 2019 concerning the Establishment of Laws and Regulations, has placed policy regulations as policy regulations that cannot be review materially by the Supreme Court. The conceptualization of the testing of policy regulations needs to be carried out again so that there is legal protection provided to parties who are harmed by the existence of policy regulations as adopted in democratic legal countries. Law is a reflection of human rights, so that the law contains justice or not. Human rights that are conceived and regulated or guaranteed by law are no longer seen as mere reflections of power, but must also radiate protection of the rights of citizens. Laws based on human values reflect norms that respect human dignity and recognize human rights themselves. Norms that contain noble values that uphold human dignity and guarantee human rights. A policy regulation cannot be review in a wetmatigheid manner, because there will indeed be no regulatory basis for the decision to make a policy regulation. Since policymaking was made based on

Freies Ermessen and the absence of administrative authority of the state concerned made laws and regulations (both in general not authorized nor for the object concerned was not authorized to regulate). The testing of policy regulation is more directed at doelmatigheid and its touchstones are the general principles of proper governance. Although the authority is not contained in the provisions of the legislation, the judge can at least contain the option of testing the policy regulations using interpretation by the method of interpretation, which is the autonomy or independence of the judge in legal discovery. The independence of judges in determining the method of interpretation to be used is affirmed in Article 5 paragraph (1) of Law number 48 of 2009 concerning Judicial Power, which states: "Judges and constitutional judges are obliged to explore, follow and understand the values of law and the sense of justice that lives in society" Mahfud MD, said that the judge in conducting the examination of the trial and taking the verdict, does not only rely on intelligence and ingenuity of the ratio, but the judge must also be supported by the sensitivity of his conscience, so that his verdict can be fair, useful and have legal certainty. Therefore, in order to avoid policy regulations that go beyond the limits of freedom of action and undermine the prevailing legal order as adopted in the concept of a democratic legal state, it must adjust the principles that can be the control of policy regulation. These principles include state principles based on law, principles of protection of society and general principles of proper state administration, as affirmed in the provisions of Law Number 28 of 2009 concerning the Implementation of a Clean and Free State from Corruption, Collusion and Nepotism and Law Number 30 of 2014 concerning Government Administration.

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