



JUXTAPOSITION OF *BELEIDSREGEL* BASED ON POPULISTIC REGULATIONS

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Abstract

This paper aims to criticize the lack of good legal order, forms, and formation methods, to understand the tendency of the conservative nature of policy regulations, the position of policy regulations in good legal order, and the concept of policy regulations in legislation based on populist regulations. The issue in this research is that the government uses policy regulations to deal with government affairs quickly and easily. On the other hand, the government has not guaranteed the realization of democracy and human rights and is against other laws in establishing legal order. The impact is overlapping, weighty, and seems authoritarian. The issue in this research is a national strategic issue because the country's vision and mission depend on the capabilities of the instruments or regulations. This research can be used as a guideline for the authorities to formulate, lay down and establish regulations without humiliating the dignity of human rights and democracy.

Keywords:

Populistic, Regulations,
Beleidsregel

Abstrak

Makalah ini bertujuan mengkritisi keberadaan tertib hukum yang belum baik, bentuk dan metode pembentukan, memahami kecenderungan sifat konservatif peraturan kebijakan, kedudukan peraturan kebijakan dalam tertib hukum yang baik, serta konsep kedudukan peraturan kebijakan dalam perundang-undangan yang berbasis regulasi populistik. Isu dalam penelitian ini adalah pemerintah menggunakan peraturan kebijakan untuk mengatasi suatu urusan pemerintah dengan cepat dan mudah. Di sisi lain, pemerintah belum memberikan jaminan perwujudan demokrasi dan hak asasi manusia serta bertentangan dengan perundang-undangan lainnya dalam menetapkan tertib hukum. Dampaknya terjadi tumpak tindih, obesitas, dan terkesan otoriter. Isu dalam penelitian ini merupakan isu strategis nasional karena visi misi negara tergantung pada kapabilitas instrumen atau regulasi. Penelitian ini dapat dijadikan pedoman bagi otoritas untuk merumuskan, meletakkan, dan menetapkan regulasi tanpa mengurangi muruah hak asasi manusia dan demokrasi

INTRODUCTION

The organization of a legal norm should refer to philosophical values (Kaelan, 2007, p. 41), which are the foundations and fundamental norms of a country (staatsfundamentalnorm). The philosophical values of Indonesia as outlined in Law Number 12 of 2011 about the making of the rules of legislation as the main source of law known as Pancasila. Philosophical values can influence and have both constitutive and regulative functions. The constitutive function determines the fundamentals of the legal order and the meaning of the law itself. The regulative function is a guideline in the formulation of statutory regulations, both in the form of policy or discretionary regulations, and all state administrative actions (Mahfud M.D, 1999, 59). Government regulations or policies should reflect the will of the people to ensure the role of citizens in the state decision-making process, namely as a form of democracy (Pataniari Siahaan, 2012, 428). The ideal law is not made to guarantee groups' interests or powerful individuals, but to guarantee the interests of citizens (Bobi Aswandi and Kholis Roisah, 2019, 128-145). Thus, regulation should be the result of an agreement from state elements, known as the rules of legislation (Yahya Ahmad Zein, 2020). The rules of legislation and their derivatives are important instruments for the prolongation of state administration. The elements of a rule of law include a guarantee of human rights, separation of state powers, action based on predetermined laws, and the existence of a state administrative court (A.V Dicey 1885 in Ni'matul Huda, 2007, 74-75).

The existence of a legal order turns out problematic that need serious attention (Bayu Dwi Anggono, 2017, 897-910), namely that the authorities do not have good consideration in choosing legal norms for the public interests (Yahya Ahmad Zein, 2020, 238-248). The authorities stipulate a policy regulation referring to Law of the Republic of Indonesia Number 12 of 2011 concerning the making of the rules of legislation originating from the authority.

The policy regulations include Ministerial Regulations, Regional Head Regulations, and regulations of other institutions (Ibnu Sina Chandranegara, 2017, 206-236). Policy regulations should be established for specific and technical governance (Jimly Assididdiqie, 2000). It should be noted that policy regulations were only initiated by administrative officials (Ni'matul Huda, 2007,75) tended to be inclined towards political interrelation (Ibnu Sina Chandranegara, 2017, 206-236). Characteristics and compensations of policy regulation are dominated by authority, direct coordination and subordination of the official legal institutions to the ruling elites (*raison d'etat*), susceptible, verifiable, escorting power, securing privileges, and winning the obedience. (Pataniari Siahaan, 2012, 429).

Not all types of policy regulations that are administrative in nature have equal position. Policy regulations established by certain state institutions have internal regulatory power (*interne regelingen*) (Bayu Dwi Anggono, 2017, 21). The legal order in the civil law system has different characteristics from the common law system, namely the written law order is not flexible and incomplete (Sirajuddin, 2015, 19). This can be seen in the limitation of the

number and process of forming legal norms in Indonesia from its formal sources (*regeling*). In Articles 7 and 8 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations, laws and regulations and policies that do not yet have a clear and defined role, purpose, scope, and function of the legal order, namely: (a) the People's Consultative Assembly, (b) House of Representatives, (c) Regional Representative Board, (d) Supreme Court, (e) Constitutional Court, (f) The Supreme Audit Board, (g) Judicial Commission, Bank Indonesia, (h) Minister, (i) Agencies, (j) Institutions, (k) Commissions that are at the same level and which are formed by law or the government by a Law Order, (l) Provincial Regional House of Representatives, (m) Governor, (n) District Regional House of Representatives, (o) Mayor/Regent, and (p) Village Head or equivalent. This is the characteristic of common law system.

It is obvious that the applications of *beleidsregel* and *regeling* are mixed up in Indonesia legal order. The impact is there is no clarity, tends to be conservative, there is no purpose and objective systemically at the content and degree, both in terms of social validity, juridical enforcement, and moral enforcement (Philippe Nonet and Philip Selznick, 2017, p. 18). In addition, it will also result in obstructed public services, disharmony, overlapping, and prevent the state from realizing the democracy. This is a small form of human rights' protection and equality in law (Bayu Dwi Anggono, 2020, 21).

It is necessary to conduct a study to the lack of lucidity of law in Indonesia in order to clarify its function, in the hope of avoiding abuse of authority, upholding the rule of law, human rights, and democracy. This refers to a concept based on responsiveness to a rule, with the content of emphasizing the position of policy regulations and legislation in order to achieve a responsive regulation that reflects a sense of justice and democracy.

RESEARCH METHODS

Based on the stated problem, this normative legal research was conducted to criticize written law from the scope of the materials and various theories (Salim HS and Erlies Septiana Nurbani 2013, 11). The characteristics of the documents were primary and secondary legal materials. The primary legal materials covered regulations and policies, while the secondary legal materials consisted of research documents, journals, proceedings, articles, news gathered from both scientific and official websites, and other books related to the topic. Library research, comparison and concept were parts of this formulated research. In addition, this research used both constitutional and historical approaches. Constitutional approach is carried. 44). Historical approach investigates and reviews legal objects, which are either valid or invalid (historical documents) to comprehend the situation philosophically or politically (Kamus Bahasa Indonesia, 1997, 34).

This research is descriptive in nature which describes a situation in a certain setting or an existing phenomenon thoroughly (Abdul kadir Muhammad, 2004, 50), or a certain event occurring in society based on the research context (Soerjono Soekanto, 1986, 10). The qualitative analysis model was employed to analyze regulations and policies which were considered to be conservative and had an impact on the image of law, human right and democracy.

RESULTS AND DISCUSSION

This research revealed several findings. Firstly, regulations in Indonesia have not clearly defined the provisions of legislation and policy which impact on the tendency for being conservative. Secondly, the position of policy regulation should not be equal or lower than legal norms which are regulatory (*regeling*) since policy regulation is only served as executive/administrative and does not meet the standard of populist regulation. Thirdly, policy regulation should refer to an sich rules concerning public administration rules along with the testing through administrative justice. Fourthly, policy regulation is believed to provide recent comprehension and therefore included in the category of regulation which is made for the public; it corresponds with a high degree regulation or is delegate-based drafted and recognized de jure; a lower degree regulation is not supposed to oppose a higher or same degree regulation (Kompas, 2020) for not all government bodies are wholly supported to make legally binding regulations. The following is de facto the example of implementation and impact of policy regulation.

Table 1. *Implementation and Impact of Policy Regulation in Indonesia*

| Policy Regulation | Implementation and Impact |
|----------------------------|---|
| Rules of the Supreme Court | <ul style="list-style-type: none">• The rules of the Supreme Court prescribe that the Supreme Court shares no possibility to adjudicate the request for material testing towards the rules of the Supreme Court arranged by the Court itself (Yahya Ahmad Zein, 2020, 238-248)• If citizens request for material testing concerning those legal products, the Supreme Court has authority to execute an action. The testing of the regulations under the Laws is the Supreme Court's authority in order to rate lower democratic or populist values. |
| Ministerial Regulation | There is a clash of regulation between the Minister of Home Affairs Regulation Number 52 Year 2014 concerning guidance for the Recognition and Protection of Traditional Communities and the Regional Regulation of Sumbawa District Number 23 Year 2007 concerning Customary Institutions. Regional Regulation regulates Sultan Sumbawa's order and Sumbawa Regent's official statement resulting in the clash between customary law community of Cek Bocek Selesek Reen Suri and PT.NNT. The Minister of Forestry Regulation P.62/Menhut-II/2013 as the regulatory guide for PT.NNT and the Minister of Home Affairs Regulation Number 52 Year 2014 concerning guidance for the Recognition and Protection of |

| | |
|------------------------|--|
| | Traditional Communities are found to be actually contradicted which cause ambiguity and legal dualism of problems with similar provisions. These issues lead to <i>lex specialis derogat legi generali</i> practice which validates the Minister of Home Affairs Regulation and discards the Minister of Forestry Regulation (Jasardi Gunawan, 2018, 158-174) |
| Ministerial Regulation | In respect of Large Scale-Social Restriction process, the Minister of Transportation Regulation Number 18 Year 2020 is not in line with the Minister of Health Regulation Number 9 Year 2020 which stipulates Large Scale-Social Restriction (Kompas, 2020) . |
| Mayor Regulation | <ul style="list-style-type: none">• The Mayor Regulation of Samarinda, East Kalimantan Province Number 43 Year 2020 provides sanctions regarding violation of the implementation and handling of <i>corona virus disease 2019 (COVID-19)</i> outbreak such as wearing a mask, avoiding crowds, implementing limitation of activities and providing sanctions for those violating the rules (Kaltim Tribunnews, 2020).• During COVID-19 pandemic, Indonesian Government has taken collective efforts to prevent the massive transmission of COVID-19 (Nelvitia Purba et.al, 2020, p. 261-269). |
| Circular Letter | Circular Letter Number 41 Year 2020 provides revision to Circular Letter Number 36 Year 2020 concerning preventive actions of COVID-19 transmission such as controlling outbond travel or homecoming travel and leave of absence for state apparatus. This legal product at glance has no binding power, provision or even sanction for it is only served as a circular. Its role is typically viewed as legal product in terms of laws (Republika, 2020). |

Policy regulation with the tendency for being conservative is a well characterized regulation of an institution is formed by regulators following applicable standards. Besides, it is also crystallization under the agreement between the authority and the people. Any of the execution of the regulation should fulfill virtuous desire of the society and can be accounted for. Legal order is divided into two parts namely responsive (populistic) and repressive (conservative). Repressive or conservative regulation is a regulation which more essentially reflects the perception of political stakeholders, the desire of authorities, and has positivist-instrumentalist quality. Contrary to repressive or conservative regulation, responsive or populistic law emphasizes the fulfillment of society demand and tends to be objective (Philippe Nonet & Philip Selznick, 2017, 18) and it is moderately authoritative to control the regulation-making process that is relevant to the nation and society's demand. Dealing with conservative law, the activity of exploring the values within society to achieve the target is impactful and high-risk for state legal institutions. From the perspective of conservative law, half of the state legal institutions prefer experiencing the low-risk effect upon protecting their identities and maintaining the legitimacy to drafting the regulations more transparent in their area (Moh. Mahfud MD,2001, 25).

Indonesia is in possession of legal order contained in the Article 7 and Article 8 Law Number 12 Year 2011 concerning Making Rules which state that the existing legal basis for policy regulation is admitted, legally binds, instructed by a higher degree regulation and arranged by “the authority”. The term “authority” means that the officials with freedom of act (*discretion*) are competent at drafting regulations depending on their own demand. This is obviously a fact that the contradictory policy regulations exist and bring the tendency for technically directing administrative officials.

Although it is considerably simple that the authority has formulated a policy regulation, regulations concerning laws and administration have not been properly arranged by the government of the Republic of Indonesia (Ni'matul Huda & R. Nazriyah, 2001, 89). This potentially affects the implementation of policy regulation in the form of arbitrariness and conservative act. The conservative act happens due to the manipulation of policy regulation by the authority and his/her constituents which causes excessive regulation (Richard Susskind, 2010), disharmony and overlapping regulation (Philippe Nonet & Philip Selznick, 2017, 33- 40).

The advantage of policy regulation is to overcome government affairs more simply (Lawrence M. Friedman, 2001, p. 122) in a short period of time and precisely make use of a variety of forms (Bagir Manan, 1992, p. 39), norm label, and constructed by public and administrative officials originating from members of the cabinet, institution, organization, or power of attorney (Khairul Fahmi, 2017, 667) .

The Position of Policy Regulation under Legislation

The written formal law has the highest position in the Republic of Indonesia since it shows a characteristic of *civil law*. The regulation products should have systematically binding power and are codified (Abdul Latief, 2005, p. 20). The contents list the rights of people and authority, the separation between tasks and functions among administrators, regulators and regulation examiners (Sudargo Gautama, 1983), do not oppose the role as *rule by law* (Rahmat Trijono, 2014, 27). The following constitutes legal order with good law characteristics.

Table 1. Comparison between good legislations and the legislations that exist in Indonesia

| Good Legislations | Legislations in Indonesia (Rahmat Trijono, 2014 p. 34-78) |
|--|---|
| a. The rules of legislation reflected in the Constitution and Law are the result of consensus, meaning that the people are involved in the making process. b. The naming of a regulation, like the Constitution and Law, is easily recognized and commonly known as | a. Article 7 section (1) Law Number 12 of 2011 the making of the legal order is clear, based on consensus, and applies nationally. b. Based on philosophical, juridical, and sociological grounds (Bagir Manan, 1992). c. Article 8 Law Number 12 of 2011 does not possess populist characteristic. |

regeling.

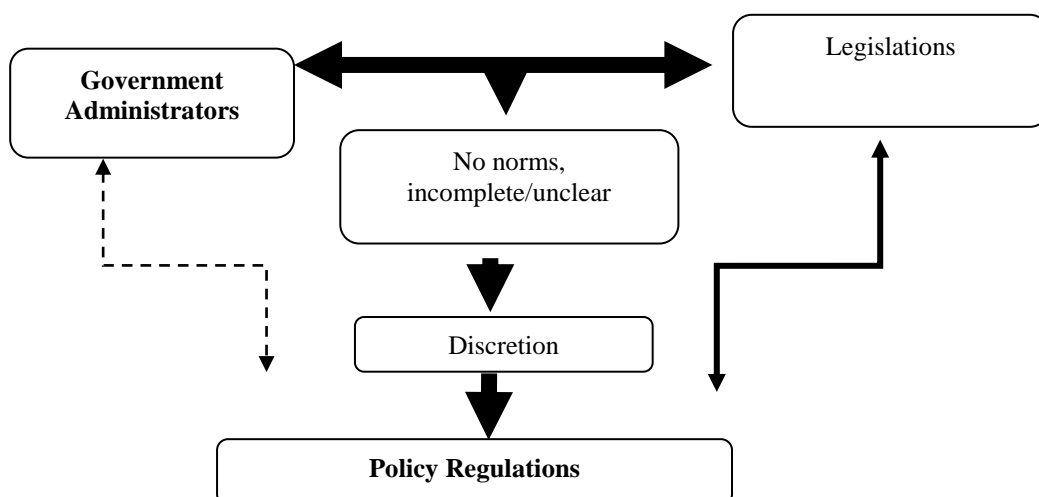
- c. The enforceability is general or national in nature.

The placements and principles of the laws and policy regulations should be separated. As a comparison, we can inspect the existence and setting of policy regulations from the Netherlands and the United States of America regarding government administration.

The policy regulations of the Netherlands, widely known as *beleidsregels*, are parts of forms of actions of administrative officials. Referring to Government Administration Law or *Algemene Wet Bestuursrecht* (AWB), it acts as a legal product to interpret the regulations above it when they are deemed incomplete, non-existent, or unclear. Policy regulations are solutions in resolving government problems drafted by competent administrative bodies (Albertjan Tollenaar, 2012 in Viktor Imanuel W, 2016, 9-11). The United States of America has statutory regulations and presented in Administrative Procedure Act (APA). The administrative policy regulations are not comprehensive and do not explicitly mention the terminology “policy role” in the policy.

Substantially, the responsive legal paradigm is the continuation of the conservative and autonomous legal process. Populistic law struggles to solve the problems by showing the capacity of responsibility, by following selective and careful circumstances. A populistic institution is steady and closely related to contents as a form of credibility. Those things are implemented while observing the existence of power and dignity or values that reside in the environment (local wisdom). Thus, transparency and credibility can move in tandem, notwithstanding the conflict between the two (Philippe Nonet & Philip Selznick, 2017, 33-40).

Chart 1. *Flow of position and ideal placement of legislations and policy regulations*



The Concept of Policy Regulation’s Position within The Legislation Based on Populistic Regulation

Policy regulation (*beleidsregel*) needs to be regulated in a separate Law to avoid despotism. Responsive or populist law aim to reach the target, both within and outside the law (Rahmat Trijono, 2014, 39). In responsive law, legal order is the result of a consensus from various parties, both authorities and public, not superior through subordination (Philippe Nonet & Philip Selznick, 2017, 33-40). It has to fulfill 3 indicators that are used as a measure to determine a legal responsive populist product, i.e.: (a) participative making process, (b) the content is aspirational, (c) small probability for government to interpret Legislation, except for administrative regulations (Moh. Mahfud MD, 2014, 35).

The three indicators are interconnected, the contents are aspirational, and the content details are limited depending on whether they are participatory or not. Law Number 12 of 2011 on Legislation Making in Indonesia has a perspective which defines participatory is compulsory in every regulation. In other words, the drafting process should involve and include participation from citizens. Public or citizens have the right to submit Bills or Local Regulations, and the right to obtain information in the drafting of Legislations.

The Law should emphasize more on its real purpose, not only about procedural and pseudo justice (Kaelan, 2017, 171). Populistic law has more ability, justice, and fulfillment of public demands compared to autonomous or repressive law which are only parts of technical rules after a legislation is enforced. A policy regulation has populist nuance, if: (1) the regulation is maintained as long as there is no potential for conflict (sectoral ego), needed by the public and there is participation from the public, and affair-friendly regulation; (2) an easy to fix and testable regulation; and (3) a regulation that can be not enforced due to various considerations (Ibnu Sina Chandranegara, 2017). Thus, a policy regulation can be utilized on populist basis when the authority has a formulation which terms are contained in Table 3.

Table 3 Comparison of Conservative and Populistic Legal Patterns

| Conservative Pattern | Responsive Pattern |
|--|--|
| <ul style="list-style-type: none"> • Policy regulations are often formed by authority without a solid foundation. • Policy regulations are formed only based on the authority of the authorities. • The authority creates a policy based on its subjective assessment or unilateral. • Policy regulations are made based on the needs of government affairs, even though | <ul style="list-style-type: none"> • Policy regulations are made by administrative officers with responsive pattern. • Omitting “formed based on authority” phrase for policy regulations. • Policy regulations can be drafted according to the order or delegation directly from higher degree regulations. • Policy regulations can be drafted when there is a direct order from higher degree regulations. • The Authorities must have an understanding of the purpose and objective of state affairs to circumvent policy regulations that can create conservative or autonomous law, overlapping, and sectoral ego consequences. • The possibility to make policy regulations can |

| | |
|---|---|
| they are contrary to the rules at the level above. | only be implemented if there is a direct order from the law, government regulation, and presidential decree. |
| <ul style="list-style-type: none">• Policy regulations do not require control from certain institutions as they are merely formed by administrative officers. | <ul style="list-style-type: none">• When a policy regulation needs to be made in an emergency or discretion, then this is a part of authority/delegation. Hence, it is deemed necessary to make separate rules regarding the drafting of policy regulations which are generally included in the content of government administration regulations.• The law regulations and government administration regulations are ways of controlling and limiting by legal institutions which <i>an sich</i> serve to monitor the drafting of policy regulations (Ibnu Sina Chandranegara, 2017, 206-236). |

It is necessary to form legal orders *an sich* governing government administration to the extent where it can govern the overall aspects of government administration. It is implemented to reduce “void” or “blur” norms from legislations in running the government. However, if it is scrutinized, it still leaves voids in the administrative regulations. It is one of the instruments often used by state apparatus, i.e., policy and statutory regulations.

CONCLUSION

The existence of responsive or populist laws plays a role in realizing justice and public participation. While the existence of policy regulations as conservative legal orders is used as statutes, made by administrative officers, technical implementer, discretion, specific, concrete, and those norms become fast and effective instruments in resolving government affairs.

Policy regulations do not have standard formats, unclear drafting process, and narrow scope. When a policy regulation is established based on authority, the authority tends to be subjective in establishing regulations and causing obesity, overlapping, and sectoral ego consequences. Therefore, policy regulations do not fulfill the populist regulations criteria. Policy regulations contained in legal orders regarding regulations drafting in Indonesia are generally government administration acts (discretion). The position of policy regulations needs to be clarified, i.e., a level below Legislation.

Policy regulations should be positioned at regulations *an sich* with public administration regulations, including the form of testing through administrative courts. It is implemented to circumvent the credibility of legal norms in Indonesia becoming conservative regulations. Yet, in practice, policy regulations often have equal binding power to legislations and should be included in administration legal orders.

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