

Type: Research Article

Construction of the Form and Content of Policy Regulations (*Beleidsregel*) in the Amendment to the Law on Government Administration

Joice Soraya 

Politeknik Negeri Malang, Indonesia

E-mail: joice.soraya@polinema.ac.id

Eduard Awang Maha Putra 

Directorate General of Corrections, Ministry of Immigration and Corrections of the Republic of Indonesia, Indonesia

E-mail: eduardputra21@gmail.com

Lalu Aria Nata Kusuma 

University of Gadjah Mada, Indonesia

E-mail: laluarianatakusuma@mail.ugm.ac.id

ABSTRACT

The problem in this research is the existence of a legal vacuum related to the form and content of policy regulations in Indonesia, especially in Law Number 30 of 2014 concerning Government Administration, which often causes legal uncertainty in its application in government administration. So this research aims to analyze and provide a construction of the presence of policy regulations in the Amendment to the Government Administration Law. The research method used is normative legal research, using statutory, conceptual, and comparative approaches. The results showed that the construction of forms of policy regulations in the amendment to the Government Administration Law includes circulars, instructions, implementation instructions, technical instructions, announcements, and guidelines. The content material of policy regulations includes regulation or free policy-making if the laws and regulations provide options, do not regulate, or are incomplete or unclear; the existence of government stagnation; interpreting rules and regulations; and providing instructions or guidelines. Regarding sanctions, policy regulations can only contain administrative sanctions. The nature of policy regulations, namely, policy regulations generally bind the intended administrative body or official but will indirectly affect the general public, is abstract and applies continuously. As a result of not regulating policy regulations in the Government Administration Law, in practice, the use of policy regulations often creates legal uncertainty, where in its application there are policy regulations but in the form of laws and decisions and also policy regulations that seem to limit the rights of citizens guaranteed by the 1945 Constitution and contain criminal sanctions.

KEYWORDS

Policy
Regulation;
Discretion;
Form;
Content
Material





INTRODUCTION

Indonesia as a country that adheres to the concept of a welfare state so that the purpose of the state is to promote public welfare as stated in the preamble of the 1945 Constitution has consequences for government administration, namely the government must play an active role in interfering in the field of socio-economic life of the community. For this reason, the government is delegated to *bestuurszorg* or public service. For public service to be carried out and achieve maximum results, the State Administration Agency/Official is given a certain freedom by attribution by Law Number 30 of 2014 concerning Government Administration (Government Administration Law) to be able to act on its initiative to solve various complicated problems that require immediate handling, while there is no, or still no legal basis for solving the problem by the legislature which is then given free authority in the form of discretion or *freies ermessen* in state administrative law.¹

In the Science of State Administrative Law, this *freies ermessen* or discretion is given only to state administrative bodies or officials to carry out both ordinary actions and legal actions. When this *freies Ermessen* is concretely realized in a written juridical instrument, it becomes a Policy Regulation (*Beleidsregel*).² The government often uses policy regulations as a legal basis for implementing policies or administering the government.³ The problem then that occurs is that there is no regulation related to policy regulations in Indonesian legislation, even in the Government Administration Law, which is a legal umbrella for every administrative action/action of state administrative bodies/officials, only regulates discretion. In contrast, policy regulations, as a written form of discretion, are not regulated in the Government Administration Law.⁴

As a result of the absence of such arrangements in the practice of government administration, there is often confusion or legal uncertainty regarding the issuance of policy regulations. For example, policy regulations have been issued, but in the form of laws and regulations, namely the Regulation of the Minister of Home Affairs Number 4 of 1976 concerning Procedures for Implementing the Transfer of Affairs from Level I Regions to Level II Regions. According to Bagir Manan, this legislation is classified as a policy regulation because Law Number 5 of 1974 concerning the Principles of Government in the Regions does not explicitly regulate the handover of Household affairs of Level I Regions to Level II Regions.⁵ In addition, there have also been Policy Regulations issued by the Government, but these Policy Regulations have content material that is contrary to the Law (UU), and some even seem to limit the rights of citizens regulated in the Constitution (UUD). Policy Regulations that

¹ SF Marbun, *Dimensi-Dimensi Pemikiran Hukum Administrasi Negara* (Yogyakarta: UII Press, 2001).

² Sadhu Bagas Suratno, "Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan yang Baik" (2017) 4:3 *Lentera Huk* 164-174.

³ Eduard Awang Maha Putra, "Konsep Ideal Pengujian Peraturan Kebijakan (*Beleidsregel*) di Indonesia" (2024) 3:1 *Wijaya Putra Law Rev* 1-20.

⁴ Eduard Awang Maha Putra, Gatot Dwi Hendro Wibowo & Minollah Minollah, "Legal Vacuum in Indonesian Administrative Law: Urgency of Policy Regulation" (2024) 19:1 *Indones J Law Econ Rev* 1-13.

⁵ Bagir Manan & Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia* (Bandung: Alumni, 1997).



contradict the Law, for example, the Circular Letter (SE) of the Director General of Mineral Coal and Geothermal No. 03/31/DJB/2009 whose content material contradicts Law No. 4/2009 on Mineral and Coal Mining (Mineral and Coal Mining Law), even though the Circular Letter was issued in connection with the enactment of Law No.4/2009. Meanwhile, Policy Regulations that seem to limit the rights of citizens regulated in the Constitution are Policy Regulations related to the Enforcement of Restrictions on Community Activities (PPKM) as outlined in the Instruction of the Minister of Home Affairs (Inmendagri) Number 1 of 2021 concerning the Enforcement of Restrictions on Activities to Control the Spread of Covid-19. The substance contained in the Inmendagri includes restrictions related to the community's right to worship, work, and daily activities.⁶

Moving on from this, this article will comprehensively discuss the ideal construction of the form and content of policy regulations to be regulated in the amendment to the Government Administration Law. Through this article, examples of policy regulations that seem problematic in government administration will also be analyzed. These policy regulations will be analyzed using the ideas/concepts of policy regulations that have been constructed in the previous discussion.

To ensure novelty in this article, the author will outline several previous studies that are similar to and different from this article. First, an article written by Victor Imanuel Nalle entitled "The Position of Policy Regulations in the Government Administration Law". In the article, the focus of the problem and the main study is related to the legal vacuum related to policy regulations in the Government Administration Law and the position of policy regulations as discretionary written products in the Government Administration Law.⁷ As for the difference with this article, it can be seen that the focus of the researcher's study is related to the construction of the form and content of policy regulations to be regulated in the amendment to the Government Administration Law and also an analysis of examples of policy regulations that seem problematic in government administration. Second, an article written by Adam Muhshi and Fenny Tria Yunita entitled "Discourse on Testing Policy Regulations (Beleidsregel) by the State Administrative Court". In the article, the focus of the problem and the main study is more related to the touchstone of policy regulations and the testing of policy regulations by the State Administrative Court.⁸ The difference with this article is that the focus of the researcher's study is not related to testing policy regulations, but is more focused on the construction of the form and content of policy regulations in the amendment to the Government Administration Law.

METHOD

The writing of this article seeks to reveal the rules, doctrines, and legal principles to answer the legal issues at hand in this case relating to policy regulations in Indonesian administrative law, so the writing of this article uses normative legal

⁶ Putra, Wibowo & Minollah, *supra* note 4.

⁷ Victor Imanuel Nalle, "Kedudukan Peraturan Kebijakan dalam Undang-Undang Administrasi Pemerintahan" (2016) 10:1 Refleks Huk J Ilmu Huk 1–16.

⁸ Adam Muhshi & Fenny Tria Yunita, "Diskursus Pengujian Peraturan Kebijakan (Beleidsregel) oleh Peradilan Tata Usaha Negara" (2024) 7:2 Media Iuris 191–220.



research methods. The approaches used are statutory, conceptual, and comparative. The statutory approach is aimed at parsing juridical aspects related to discretion and instruments in state administrative law. Then, the conceptual approach is intended to analyze concepts, principles, and theoretical aspects related to policy regulations, government discretion, and other legal principles relevant to this research. The comparative approach is carried out by comparing the legal system, or laws of a country, with laws from one or more other countries regarding the same matter, including court decisions. In this article, a comparison is made between the laws in force in the Netherlands and the United States relating to policy regulations (*beleidsregel*). The object of this research is aspects of state administrative law related to policy regulations. The method or technique of collecting legal materials used in this research is a literature study by inventorying and studying library data in the form of laws and regulations, books, journals, articles, documents, and official websites. While the legal material analysis technique used in this research is descriptive analysis, and uses the evaluation method.

RESULT & DISCUSSION

I. Construction of the Form and Content of Policy Regulations (*Beleidsregel*) in the Amendment to the Government Act

1. Policy Rule Form Construction (*Beleidsregel*)

The form of policy regulations cannot be referred to in Indonesian legislation because there is no legislation governing the forms of policy regulations. So that, the forms of policy regulations in the practice of government administration so far used by state administrative officials are only based on the form of policy regulations according to the opinions of administrative law experts. Policy regulations have a distinctive form and are different from laws and regulations. Policy regulations can be made in various forms of written documents that guide, guide, provide policy direction, and regulate the implementation of tasks and work.

The forms of policy regulations, according to experts in the practice of governance in Indonesia, can be in the form of:⁹

- a. Circular letter (*se*), usually used by an official (minister or director general) to inform the ranks below about a policy that must be implemented relating to public services.
- b. Operational guidelines or technical guidelines that contain various administrative and operational technical methods regarding certain tasks.
- c. Instructions issued by the leader are like an order to carry out certain tasks.
- d. Announcements, which, among other things, contain information necessary for the interested public regarding a public service provided by a government agency.

Meanwhile, according to Jimly Asshidiqie's opinion, in practice in Indonesia, policy regulations can be made in forms such as: a). Circular Letter; b). Order or

⁹ Zaffirulah Salim, "Legislasi Semu (Pseudowetgeving)", (2023), online: *Ditjenpp Kemenkumham*.



Instruction Letter; c). Work guidelines or manuals; d). Implementation Guidelines (Juklak); e). Technical Guidelines (Juknis); f). Manual (guide); g). Terms of Reference; and h). Work Design.¹⁰ Policy regulations, according to Jimly Asshidiqie, when compared to Article 7 paragraph (1) and Article 8 paragraph (1) of the Law on the Formation of Legislation, are not included as a form of legislation, showing a formal difference between the two.

Outside the Indonesian legal system, policy regulations take various forms. Baldwin and Houghton (1986) categorize eight categories of policy regulations: Procedural rules, Interpretative guides, Instructions to officials, Prescriptive/evidential rules, Commendatory rules, Voluntary codes, Rules of practice, management, or operation, and Consultative devices and administrative pronouncements.¹¹ In the Dutch context, Van Wijk divides policy regulations into two main forms. First, policy regulations that are made and apply to the policymakers themselves. Second, policy regulations are made and apply to administrative bodies or officials who are subordinate to policymakers.¹² In government practice in the Netherlands, there are various forms of policy regulations. According to Van Kreveld, as quoted by Markus Lukman, as follows:¹³

“In the practice of governance (*bestuurpraktijk*) in the Netherlands, there are various designations including *beleids lijnen* (lines of policy), *het beleid* (policy), *voorschriften* (regulations), *richtlijnen* (guidelines), *regelingen* (instructions), *circulaires* (circulars), *resoluties* (resolutions), *aanschrijvingen* (instructions), *beleidsnota's* (policy notes), *reglemen* (ministerial regulations), *beschikkingen* (decisions), and *bekendmakingen* (announcements).”

In the United States, policy rules are governed by the Administrative Procedure Act (APA), including interpretative rules, general statements of policy, and agency rules of organization and procedure. The APA does not directly define interpretative rules and general statements of policy, but according to the Attorney General's Manual (1947), interpretative rules are statements from agencies to explain their views on the laws they administer, without adding new provisions.¹⁴ Jack M. Beerman adds that interpretative rules only convey the viewpoint of the administrative body without changing the existing rules. General statements of policy, on the other hand, explain the planned use of discretionary power to the public prospectively without replicating existing provisions.¹⁵

The definitions of interpretative rules and general statements of policy show the functional differences between them. Interpretative rules are designed by administrative bodies to clarify and further regulate laws and regulations that may be ambiguous, notwithstanding substantial changes in the applicable law. Meanwhile, general statements of policy are informative, explaining the administrative body's policy to the public based on its discretionary authority,

¹⁰ Jimly Asshidiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Pers, 2010).

¹¹ Michael Zender, *Law-Making Process* (Cambridge: Cambridge University Press, 2004).

¹² Manan & Magnar, *supra* note 5.

¹³ Markus Lukman, *Freies Ermessen dalam Proses Perencanaan dan Pelaksanaan Rencana Kota di Kotamadya Pontianak* (Bandung: Padjajaran University, 1989).

¹⁴ Jacob E Gersen, “Legislative Rules Revisited” (2007) 74 *Univ Chicago Law Rev* 1709.

¹⁵ Jack M Beerman, *Administrative Law* (New York: Aspen Publishers, 2010).



and cannot be used as a legal basis for administrative action. There are two motivations for issuing general statements of policy, namely to provide internal guidance for employees and to convey the government's intentions to the public.¹⁶ In addition, there are also rules of agency organization that govern the distribution of authority within the administrative agency and focus on internal concerns, while rules of agency procedure inform the public about the process of filing applications or claims, and can function as substantive rules if they affect substantial decisions on certain actions.¹⁷

Based on the opinions of experts as well as the context in the Netherlands and the United States, the forms of policy regulations that are most relevant to the concept of policy regulations in Indonesia for use by government agencies or officials in governance include: 1) Circular Letter, which is a policy product from higher officials to inform the ranks below about policies that must be implemented; 2) Instruction, which is a leadership order to carry out certain tasks; 3) Technical Guidelines (Juknis), which contain administrative and operational technical methods related to certain tasks; 4) Implementation Guidelines (Juklak), which explain how to carry out administrative tasks; 5) Announcements, which provide information to the public about public services; and 6) Guidelines, which are the basis or instructions in determining or doing something.

Regarding the time the Government Agency / Official uses the forms of the above policy regulations, which are adjusted to the needs of government agencies or officials to carry out or carry out certain tasks, this is also a form of freedom of action of government agencies or officials in the administration of government.

2. Construction of Policy Regulation Content

As a juridical instrument that was born based on discretion or as a written form of discretion (authority to act freely), the content material of policy regulations cannot be separated from the scope of discretion regulated in Article 23 of the Government Administration Law, which reads:

“Discretion of Government Officials includes:

- a. Decision and/or Action making based on the provisions of laws and regulations that provide a choice of Decision and/or Action;
- b. Decision and/or Action making because the laws and regulations do not regulate.
- c. The taking of Decisions and/or Actions because the laws and regulations are incomplete or unclear; and
- d. Making decisions and/or taking actions due to governmental stagnation for broader interests.”

In the context of freedom of action to form policy regulations, the Algemene Wet Bestuursrecht (AWB) in the Netherlands strictly regulates it, making beleidsregel a tool to interpret regulations that have vague norms, and requiring policy regulations to be in writing. On the other hand, the Administrative Procedure Act (APA) in the United States also focuses on interpreting vague

¹⁶ William Funk, “A Primer on Nonlegislative Rules” (2001) 53 Adm Law Rev 1332.

¹⁷ *Ibid.*



norms and excludes some regulations from the rulemaking procedure, such as interpretative rules and general statements of policy.¹⁸ Both indicate that the formation of policy regulations does not require delegation of authority from the law, although government officials need to provide interpretations of ambiguous laws to maintain a common view in governance. The absence of a consistent interpretation can hinder the governance process. For example, the Minister of Manpower's Circular Letter No. SE.04/MEN/1992 was issued to further regulate the provisions on Foreign Work Permits (IKTA), in response to gaps in the existing regulations, especially regarding the submission of plans for the use of foreign workers.¹⁹

Freedom of interpretation is the background for the emergence of policy regulations when the norms in the law are unclear, so policy regulations serve as an instrument to provide a consistent interpretation. According to Van Der Vlies, the vagueness of the law can result in employees within a ministerial institution interpreting the law differently, so the minister needs to issue circulars to explain the implementation of the law and ensure employee compliance based on hierarchical relationships.²⁰ An example of a policy regulation in this context is the Joint Instruction of the Minister of Home Affairs and Regional Autonomy with the Minister of Agrarian Affairs No. Sekra 9/1/2 issued on January 5, 1961, which explains the implementation of Law No. 56/Prp Year 1960 regarding the determination of the size of agricultural land.²¹ The instruction is addressed to governors, regents/mayors, and agrarian officials to provide a common understanding of the terms stipulated in the law, such as 'family', 'agricultural land', and 'property rights', thereby supporting the single interpretation required.

Policy regulations, apart from being a juridical instrument of the government that contains freedom of policy and freedom of interpretation, are also regulations that provide instructions to administrative officials to carry out their government authorities and duties. This is one of the characteristics of policy regulations put forward by J.H. Van Kreveld, namely:²²

“The regulation provides general instructions, in other words, without statements from individual citizens, on how government agencies should exercise their free government authority towards individual citizens who are in the situation specified in the regulation.”

Based on the explanation above, researchers can construct the content material of policy regulations in the form of circulars, instructions, technical instructions, implementing instructions, announcements, and guidelines, namely:

The content material in the policy regulation contains:

¹⁸ Victor Imanuel W Nalle, *Konsep Uji Materiil: Kajian Pembentukan Dan Uji Materiil Peraturan Kebijakan di Indonesia* (Malang: Setara Press, 2013).

¹⁹ *Ibid.*

²⁰ Linus Doludjawa, *Buku Pegangan Perancang Peraturan Perundang-undangan* (Jakarta: Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan Hak Asasi Manusia RI, 2005).

²¹ Nalle, *supra* note 18.

²² JH Van Kreveld, *Beleidsregel in het Recht* (Kluwer-Deventer, 1983).



- a. Regulation or free policy making based on the provisions of laws and regulations that provide a choice;
- b. Regulation or policy making is free because the laws and regulations do not regulate.
- c. Arrangement or free policy making because the laws and regulations are incomplete or unclear;
- d. Arrangement or free policy making due to government stagnation for broader interests;
- e. Arrangements to interpret or interpret laws and regulations due to the existence of vague norms;
- f. Arrangements to provide instructions or guidelines.

In the context of sanctions for violators of the provisions of policy regulations, the sanctions imposed are administrative, not criminal sanctions, which is one of the differences between policy regulations and laws and regulations, according to A. Hamid S. Atamimi. He explained that criminal sanctions can only be regulated in laws approved by the people or their representatives, and lower laws and regulations can only include criminal sanctions if they are expressly regulated by law.²³ In contrast, policy regulations can only establish administrative sanctions for violators of their provisions. Therefore, government officials subject to policy regulations are obliged to implement these provisions and may be subject to administrative sanctions if they violate them.

Then, about the binding force of the issuance of policy regulations, it is also necessary to study to find out policy regulations as instruments formed by state administrative officials based on government authority (executive authority) which are regulating in nature, do they have general or individual binding force, then whether they are abstract or concrete, and also whether they apply continuously like laws and regulations (*regeling*) or are once completed (final) like decisions (*beschikking*)?

Before discussing the general binding force of policy regulations, it is important to explain the scope of the binding force. Van der Vlies suggests four aspects of the generality of a regulation.²⁴ First, generality according to place, which means that regulations apply relatively depending on the jurisdiction in which they are enacted.²⁵ If an administrative body makes a regulation for employees outside of its territory, the act is considered an abuse of authority *onbevoegdheid ratione loci* (act of abuse of authority in terms of territory). Secondly, generality by time relates to the duration of validity of regulations, where most are intended to be valid forever or for as long as they are relevant, with no minimum time limit. Third, rules aimed at recurring conditions, emphasizing that rules should not only apply to one concrete act, to maintain their generality. Fourth, generality according to the legal subject, which states

²³ Abdul Hamid S Attamimi, *Hukum tentang Peraturan Perundang-undangan dan Peraturan Kebijakan* (Depok: Fakultas Hukum Universitas Indonesia, 1993).

²⁴ Doludjawa, *supra* note 20.

²⁵ *Ibid.*



that the regulation is intended for all targeted persons within the jurisdiction of the enactor of the regulation.²⁶

This does not mean that all regulations must be intended for all legal subjects without exception. It is the exclusion of targeted legal subjects that distinguishes policy regulations from statutory regulations. Most laws and regulations are intended for all legal subjects, although there are also some exceptions. An example of such an exception is Government Regulation No. 16/2010 on the Guidelines for the Preparation of Regional House of Representatives Regulations on the Rules of Procedure of the Regional House of Representatives, which is a statutory regulation aimed at DPRD members only. Policy regulations are formal regulations that do not have binding force for all legal subjects. Circulars, instructions, operational guidelines, technical guidelines, and other forms are intended only for administrative officials in carrying out their duties when there is a regulatory vacuum or vague norms. However, some legal experts argue that policy regulations also have general binding force, as stated by A. Hamid S. Atamimi, who states that laws and policy regulations have the same normative address, which is general and abstract (*algemene regeling*).²⁷

Meanwhile, according to Bagir Manan, he expressed his opinion, namely:²⁸

“As a regulation that is not a statutory regulation, policy regulations are not directly legally binding but contain legal relevance.”

Bagir Manan argued that the reason for this is that policymakers do not have statutory authority. About the indirect binding nature, Bagir Manan further argues:²⁹

“Policy regulations are addressed to state administrative bodies or officials. So, the first to implement the provisions contained in policy regulations are state administrative bodies or officials.”

However, these policy regulations will indirectly affect the general public because citizens must carry out the provisions of these policy regulations. Meanwhile, according to Van Kreveld, as cited by Ridwan H.R., states implicitly that policy regulations are intended for government agencies in exercising their authority. According to Van Kreveld:³⁰

“The regulation provides general instructions, in other words, without statements from individual citizens, on how government agencies should exercise their free government authority towards individual citizens who are in the situation specified in the regulation.”

Referring to Van Kreveld's opinion, one of the characteristics of policy regulations that distinguishes them from laws and regulations is the aspect of their binding force. Formally, it can be seen that policy regulations do not have the

²⁶ *Ibid.*

²⁷ Attamimi, *supra* note 23.

²⁸ Zaka Firma Aditya & Muhammad Reza Winata, “Rekonstruksi Hierarki Peraturan Perundang-Undangan di Indonesia (Reconstruction of the Hierarchy of Legislation in Indonesia)” (2018) 9:1 Negara Huk Membangun Huk untuk Keadilan dan Kesejaht.

²⁹ *Ibid.*

³⁰ Kreveld, *supra* note 22.



general binding force of laws and regulations by referring to two things. First, the nomenclature of policy regulations in Law No.12/2011 is not stated as one type of legislation. Second, because the nomenclature of policy regulations is not classified as statutory regulations, policy regulations cannot be included in the State Gazette or the Federal Gazette, so they do not have general binding force.

When compared to the Netherlands, in the Netherlands, policy regulations can bind state administrative bodies, but are excluded in special circumstances. The special circumstances in question are if the implementation of the policy regulation results in the interests of one or more parties being incompatible with the intended purpose of the policy regulation. This principle is regulated in Article 4:84 AWB:

“Het bestuursorgaan handelt overeenkomstig de beleidsregel, tenzij dat voor een of meer belanghebbenden gevolgen zou hebben die wegens bijzondere omstandigheden onevenredig zijn in verhouding tot de met de beleidsregel te dienen doelen.”

When examined closely, Article 4:84 AWB requires state enterprises in the Netherlands to comply with policy regulations, with deviations only allowed in special circumstances. According to Tollenaar, without such circumstances, the regulation must be implemented without considering the negative consequences.³¹ Meanwhile, non-legislative rules in the United States do not have binding force, although in practice, they are often applied as guidelines that are carried out routinely, so they appear to have binding force.

Based on the opinions of experts and comparisons with laws in the Netherlands and the United States, researchers can construct the nature of policy regulations consisting of binding force, validity time, and form of policy regulations, namely related to the binding force of policy regulations where policy regulations are generally binding on administrative bodies or officials to carry out government functions, but will indirectly affect the general public because citizens must carry out the provisions of these policy regulations. Regarding the form of policy regulations, namely abstract policy regulations, to regulate general matters related to certain issues or problems. Then, related to the time of validity of policy regulations, namely, policy regulations are valid continuously until revoked or changed by the Government Official who issued them, but this is excluded for policy regulations that have been determined to have a period of validity.

II. Analysis of Examples of Policy Regulations (*Beleidsregel*) that appear to be Problematic in their Application to Government Operations

1. Policy Regulations (*Beleidsregel*) but in the Form of Laws and Decrees

In the practice of government administration, the government often forms policy regulations, but they are not formed based on the formal forms of policy regulations, according to experts such as Circulars, Instructions, Juklak, and Juknis etc. Instead, administrative bodies or officials form laws and regulations (regeling), which are the content material contained in the laws and regulations.

³¹ Albertjan Tollenaar, “Soft Law, Policy Rules and the Quality of Administrative Decision-Making” in *Challenges Soft Law* (Beijing: The Commercial Press, 2011).



Policy regulations in the guise of laws and regulations usually use one of the types of laws and regulations contained in Article 8, paragraph (1) of the Law on the Formation of Laws and Regulations, namely Ministerial Regulations. An example is the Minister of Home Affairs Regulation Number 4 of 1976 concerning Procedures for Implementing the Transfer of Affairs from Level I Regions to Level II Regions. According to Bagir Manan, this legislation is classified as a policy regulation because Law No. 5 of 1974 on the Principles of Government in the Regions does not explicitly regulate the handover of Household affairs of Level I Regions to Level II Regions. The regulation can be classified as a regulation formed based on discretion and classified as a policy regulation because there is no delegation of authority to regulate this matter.³² There is also nomenclature that should be referred to as a decision (*beschikking*), but the substance is a policy regulation, for example, Presidential Decrees and Joint Ministerial Decrees.

Even in the old order era, when the system of laws and regulations had not been neatly arranged, the nomenclature of Presidential Determinations (Penpres) was often used to exercise free power. Meanwhile, the position of the Presidential Decree based on Presidential Letter Number 2262/HK/1959 dated August 20, 1959, is one type of legislation. Some concrete examples of Presidential Decrees that can be categorized as policy regulations include Presidential Decree No. 7 of 1959 concerning Party Requirements and Simplification (Presidential Decree No.7 of 1959), Presidential Decree No. 2 of 1962 concerning the Prohibition of Organizations that are Incompatible with Indonesian Personality, Obstruct the Completion of the Revolution or Contrary to the Ideals of Indonesian Socialism, and Presidential Decree No. 5 of 1963 concerning Political Activities.

Meanwhile, during the New Order period until before the issuance of Law Number 10/2004 on the Formation of Legislation (PPP Law), Presidential Decrees (Keppres) were often used to exercise free power. The Presidential Decree at that time was a form of legislation based on TAP MPRS Number XX/MPR/1966, which could be categorized as a policy regulation if it was formed without any delegation from higher laws and regulations. Thus, the President's power in forming laws and regulations seems to have no limits. This is what Jimly Asshiddiqie later termed as "Government by Keppres". The government process is carried out only by decisions that are outlined in the form of Presidential Decrees.³³

The Presidential Decree uses Article 4, Paragraph (1) of the 1945 Constitution before the amendment, which states that the President holds the power of government according to the Constitution. This article is interpreted to mean that to run the government, the President can issue a Presidential Decree without any delegation from higher laws and regulations. Based on Article 4, Paragraph (1) of the 1945 Constitution before the amendment, the Presidential Decree is positioned as an authority of attribution and is also positioned as an independent Presidential Decree. The function of the Presidential Decree as an independent regulation is what then places the formation of the Presidential Decree more characterized as a policy regulation based on freedom of action.

³² Manan & Magnar, *supra* note 5.

³³ Asshiddiqie, *supra* note 10.



Attamimi is one of the scholars who position the Presidential Decree as a policy regulation. According to Attamimi, the Presidential Decree can contain four kinds of legal norms, namely:³⁴ Regulatory norms based on delegated authority (*gedelegeerde wettelijkeregels*); legal norms that organize unbound or independent government policies (*beleidsregels*); legal norms in the form of general administrative decisions (*besluiten van algemene strekking*); legal norms in the form of administrative decisions addressed to specific legal subjects, called state administrative decisions (*besluiten gericht tot bepaalde person of beschikking*).

Some examples of Presidential Decrees in the New Order era until the enactment of the PPP Law, whose substance is a policy regulation and is independent, include: a. Presidential Decree No. 2 of 1987 concerning the amount of the 1987/1988 Hajj Pilgrimage Fee; b. Presidential Decree No. 34 of 1988 concerning the Collection of General Reserve Funds; c. Presidential Decree No. 20 of 1992 concerning the Commerce of Domestically Produced Cloves.

Presidential Decree (Keppres) as a policy regulation is often different from the definition in TAP MPRS No. XX/MPRS/1966, which states that a Keppres that is included in statutory regulations must be *einmahlig*, namely a “stipulation” whose norms are individual, concrete, and final. However, in practice, Presidential Decrees are often *dauerhaftig* (in perpetual effect).³⁵ Since the PPP Law came into effect, the Presidential Decree has been used more as an instrument that is similar to a State Administrative Decree (KTUN), namely individual, final, and concrete, as regulated in the State Administrative Court Law. In addition, there are also other forms of policy regulations, such as Joint Ministerial Regulations, which are not recognized in the PPP Law. Bayu Dwi Anggono mentions that the Joint Regulation of 4 Ministers, such as the regulation related to national economic growth issued by the Ministers of Labor and Transmigration, Home Affairs, Industry, and Trade, is an example of a policy regulation. Anggono argues that these regulations are made based on freedom of action, not statutory authority, and are aimed at the same administrative officials, to maintain economic growth and peace of mind in doing business and working.³⁶

The formation of policy regulations (*beleidsregel*), but in the form of laws and regulations (*regeling*) or decisions (*beschikking*) in the practice of government administration, is due to the absence of a rigid and clear regulation of policy regulations in the Government Administration Law. The presence of Policy Regulations, but in the form of laws and regulations or decisions/decrees, is certainly a legal problem that has an impact on the realization of legal certainty, this is because the previous discussion has explained that policy regulations have their characteristics that distinguish them from laws and regulations and decisions.

Problems that occur if the decision/decreed is formed with the content material of policy regulations, namely the decision formed is not by or contrary

³⁴ Attamimi, *supra* note 23.

³⁵ Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan Proses dan Teknik Pembentukannya* (Yogyakarta: Kanisius, 2007).

³⁶ Bayu Dwi Anggono, *Keputusan Bersama Menteri dalam Perundang-undangan Republik Indonesia* Universitas Indonesia, 2009) [unpublished].



to the character of the State Administrative Decree (KTUN) as stipulated in the PTUN Law, which has an individual, final, and concrete nature, while the policy regulation itself has the character of being generally binding only on the intended administrative body or official, abstract, and applies continuously. Likewise, if policy regulations are promulgated in the format of laws and regulations, these regulations can bind the wider community, according to the PPP Law, which states that regulations included in the State Gazette or the State Gazette have general binding force. This certainly violates Hans Kelsen's theory of hierarchy of laws and regulations, which states that legal norms must be arranged in tiers based on their validity, with lower norms dependent on higher norms.³⁷ Incompatibility occurs when regulations are formed based on discretion without orders from higher regulations, contrary to the normative system that should be.

2. Policy regulations that seem to limit the fundamental rights of citizens guaranteed by the 1945 Constitution and contain criminal sanctions

In early 2020, the world, including Indonesia, was shocked by the outbreak of the COVID-19 virus from the Coronaviridae family of viruses, which can cause respiratory infections and, in serious cases, can result in death.³⁸ On 11 March 2020, the World Health Organization (WHO) declared COVID-19 a global pandemic after infections exceeded 121,000 cases. In response to this, the President of the Republic of Indonesia, Joko Widodo, declared the spread of Covid-19 a national disaster through Presidential Decree Number 12 of 2020 on the Determination of Non-Natural Disasters, after previously declaring a health emergency through Presidential Decree Number 11 of 2020 on the Determination of Covid-19 Public Health Emergency.³⁹ The government then refers to Law No. 6 of 2018 concerning Health Quarantine (Health Quarantine Law) to take policies for handling the COVID-19 virus pandemic outbreak, such as Large-Scale Social Restrictions (PSBB). However, PSBB is considered ineffective as cases continue to surge, and as of January 31, 2021, there were 1,078,314 COVID-19 cases in Indonesia, with 973,221 people recovered and 29,998 died.⁴⁰

Therefore, the government then issued an emergency policy to replace PSBB in areas with a rapid spike in COVID-19 cases, through the policy of Imposing Restrictions on Community Activities (PPKM) to suppress virus transmission. This policy is based on the Instruction of the Minister of Home Affairs (Inmendagri) addressed to the heads of regions with spikes in cases, and is taken based on discretionary authority because the Health Quarantine Law does not regulate PPKM as a mitigation measure. Because the law only recognizes several mitigation measures, such as Home Quarantine, Regional Quarantine,

³⁷ Eduard Awang Maha Putra, *Peraturan Kebijakan (Beleidsregel) dalam Hukum Positif Indonesia* (Yogyakarta: Samudra Biru, 2024).

³⁸ Ray Faradillahisari Nursowfa et al, "Penanganan Pelayanan Kesehatan di Masa Pandemi Covid-19 Dalam Perspektif Hukum Kesehatan" (2020) 1:1 *Inicio Legis*.

³⁹ Supriyadi, "Kebijakan Penanganan Covid-19 dari Perspektif Hukum Profetik" (2020) 8:2 *Suloh J Fak Huk Univ Malikussaleh* 91.

⁴⁰ Ana Fauzia & Fathul Hamdani, "Sanksi Penundaan atau Penghentian Jaminan Sosial Pada Masa Pandemi COVID-19" (2021) 1:2 *J Kaji Pembaruan Huk* 133-174.



Hospital Quarantine, and PSBB, which are not enough to overcome the COVID-19 emergency, the government has experienced stagnation, which has resulted in the soaring number of COVID-19 cases in Indonesia.

One of the Minister of Home Affairs Instructions that regulates PPKM as an effort to tackle Covid-19 is Inmendagri Number 01 of 2021 concerning the Enforcement of Activity Restrictions to Control the Spread of Covid-19, which stipulates restrictions on office activities with 75% work from home (WFH) and 25% work in the office (WFO). This instruction also includes the implementation of online teaching and learning activities, limiting restaurant capacity to 25% and shopping center operating hours to 19:00 WIB. In addition, the capacity of places of worship is limited to 50%, and in Inmendagri No. 15 of 2021, places of worship in Java and Bali are even temporarily closed.

Based on the substance of the Inmendagri above, several questions arise, including whether policy regulations can regulate matters that seem to limit the fundamental rights of citizens guaranteed by the constitution. Can policy regulations regulate and bind the public in general, while policy regulations are not laws and regulations?

Regarding policy regulations that regulate matters that limit the fundamental rights of citizens guaranteed by the constitution, when referring to the PPKM policy issued by the Government to deal with the case of the spread of Covid-19, there are indeed several fundamental rights of citizens that seem to be limited in this case the right to work, the right to obtain education, and the right to worship.

When referring to the 1945 Constitution of the Republic of Indonesia, the basic rights of citizens are regulated in several important articles. Article 28 D paragraph (2) guarantees the right of every person to work and receive fair and decent remuneration and treatment. Article 28 C paragraph (1) regulates the right to obtain education and develop themselves through the fulfillment of basic needs, as well as benefit from science, technology, art, and culture. Meanwhile, Article 28 E paragraph (1) ensures freedom of religion, worship, as well as individual rights to choose education, work, citizenship, residence, and to leave or return to the territory of the country.

Based on Article 28 C paragraph (1), Article 28 D paragraph (2), and Article 28 E paragraph (1), which relate to the substance of Inmendagri regarding PPKM, researchers argue that no fundamental rights of citizens are restricted. The restrictions that exist are only related to the methods of exercising these rights, such as in the context of work where Inmendagri regulates work methods, such as work from home (WFH) and work from office (WFO). Thus, there is no violation of people's right to work, because individuals can still carry out their work under the existing arrangements.

Regarding the right to education, Inmendagri only regulates learning methods during the pandemic, with teaching and learning activities carried out online, so there is no violation of the community's right to education according to the constitution. Regarding the right to worship, although PPKM restricts activities in houses of worship, Inmendagri does not violate the fundamental right of citizens to embrace religion. The restrictions aim to prevent the transmission of COVID-19 and protect public safety. People can still worship



according to the teachings of their respective religions, for example, Muslims can pray in congregation at home, and likewise for adherents of other religions, so there is no violation of the fundamental right to worship.

Then, back to the question of whether policy regulations can regulate things that are contrary to the rights of citizens regulated and guaranteed by the constitution? According to the researchers, policy regulations may conflict with the constitution on the condition that the policy regulations formed are by the conditions for the issuance of discretion stipulated in Article 175 number 2 of Law Number 6 of 2023 concerning Stipulation of Government Regulations instead of Law Number 2 of 2022 concerning Job Creation and the policy regulations formed are indeed aimed at the safety of the entire community, this is based on the adage “*Sallus populi suprema lex esto*” which means that the safety of the people is the highest law, this is also supported by the opinion of Mahfud MD who expressed his opinion as follows:⁴¹

“There is a proposition that is higher than the constitution, namely *Sallus Populi Suprema Lex Esto*, which means that the safety of the people and the state is higher than the constitution, even if the constitution needs to be violated for the safety of the people and the state”.

In emergencies that require quick handling, if positive law and the constitution cannot guarantee the protection and safety of citizens, the government can violate the constitution and make policies based on discretionary authority (*freies ermessen*) in the form of policy regulations to protect citizens. This approach is in line with Satjipto Rahardjo's Progressive Law theory, which emphasizes that law should function for humans, not the other way around. Therefore, when there are legal problems, what needs to be evaluated and corrected is the law itself, not society.⁴² This shows the importance of the government's active role to be responsive in formulating policies that ensure safety and protection for the community to achieve prosperity.

The question of whether policy regulations can regulate and bind the general public, even though they are not statutory regulations, can be answered by considering their binding nature, which only applies to the intended administrative body or official, but can have a legal impact on the public indirectly. Maria Farida states that policy regulations must show the relationship between superiors and subordinates in the organizational structure, so they are not directly addressed to the general public. As in the context of PPKM, the instruction of the Minister of Home Affairs is addressed to regional heads in areas with high spikes in COVID-19 cases, but indirectly also binds the community.⁴³ The provision of these instructions is by the minister's position as a government official in the Indonesian constitutional system, which has the authority to form various legal products, including policy regulations and state administrative decisions (KTUN), to carry out administrative functions in government.

⁴¹ Achmad Nasrudin Yahya & Diamanty Meiliana, “Mahfud: Kalau Ingin Selamatkan Rakyat, Boleh Langgar Konstitusi”, (2021), online: *Kompas*.

⁴² Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006).

⁴³ Fradhana Putra Disantara, “Tanggung Jawab Negara dalam Masa Pandemi Covid-19” (2020) 6:1 JCH (Jurnal Cendekia Hukum) 48–60.



However, there are problems in Inmendagri No.15 of 2021 related to Emergency PPKM, in the tenth dictum letter c stipulates that violators of the Emergency PPKM policy who commit violations in the context of controlling infectious disease outbreaks may be subject to sanctions based on Law Number 4 of 1984 concerning Infectious Disease Outbreaks; Law Number 6 of 2018 concerning Health Quarantine; and regional regulations, regional head regulations; and provisions of other related laws and regulations. Based on the tenth dictum letter c, Inmendagri No.15 of 2021 does not regulate new norms that contain criminal sanctions but refers to laws and regulations as mentioned above, but still the same, according to researchers, this indirectly shows that violations of policies regulated through policy regulations can be subject to criminal sanctions, this of course contradicts the character of policy regulations as stated by A. Hamid S. Atamimi, namely criminal sanctions can only be contained in regulations whose formation must obtain the approval of the people or with the approval of their representatives so that policy regulations can only contain administrative sanctions for violators of their provisions.⁴⁴

Against this, Presidential Instruction Number 6 of 2020 concerning Improving Discipline and Law Enforcement of Health Protocols in the Prevention and Control of Covid-19 also regulates that there are no criminal sanctions for violations of health protocols, but only administrative sanctions. Meanwhile, in Inmendagri No.15 of 2021, people who violate PPKM can also be subject to criminal sanctions even though these sanctions are by the law or local regulations/regulations made by the local government, this also according to researchers is not correct because policy regulations made by administrative bodies or officials are not directly addressed to the public or in this case are not binding in general but only to the intended administrative body or official, so that the public is not legally bound to comply with them.

The imposition of sanctions referring to the Health Quarantine Law for PPKM policy violators who commit violations in the context of controlling infectious disease outbreaks is also according to researchers not appropriate, this is because by the description of the previous discussion that the term PPKM is not known and is not regulated in the Health Quarantine Law so that it does not include risk factor mitigation measures in the region in a Public Health Emergency. Therefore, violators of the PPKM policy cannot be sanctioned based on the Health Quarantine Law because PPKM itself is formed based on the discretionary authority of administrative bodies or officials, not based on statutory regulations.

CONCLUSION

The construction of forms of policy regulations that can be regulated in the amendment to the Government Administration Law are circulars (se), instructions, technical instructions, implementation instructions, announcements, and guidelines. As for the content material of policy regulations, namely containing arrangements or free policy making based on the provisions of laws and regulations that provide an option; do not regulate; incomplete or unclear; the existence of

⁴⁴ Attamimi, *supra* note 23.



government stagnation for broader interests; arrangements to interpret or interpret laws and regulations due to the vagueness of norms; and arrangements to provide instructions or guidelines. Regarding the content material, namely sanctions, policy regulations can only contain administrative sanctions. Then the nature of policy regulations, namely, policy regulations are generally binding on the intended administrative body or official, but will indirectly affect the general public (containing legal relevance), abstract in form, and apply continuously. As a result of not regulating policy regulations in the Government Administration Law, in practice, the use of policy regulations often creates legal uncertainty, where in its application there are policy regulations but in the form of laws and decisions and also policy regulations that seem to limit the rights of citizens guaranteed by the 1945 Constitution and contain criminal sanctions.

From these conclusions, the suggestion from the issue of this study is that the Government and DPR must revise or amend the Government Administration Law by adding regulations related to policy regulations, especially specifically related to the form and content of policy regulations. This needs to be done to realize the legal certainty of the use of policy regulations as a juridical instrument of the government based on discretionary authority in government administration.

DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None.

ACKNOWLEDGMENT

None.

REFERENCES

BOOK

- Anggono, Bayu Dwi, *Keputusan Bersama Menteri dalam Perundang-undangan Republik Indonesia* Universitas Indonesia, 2009) [unpublished].
- Asshidiqie, Jimly, *Perihal Undang-Undang* (Jakarta: Rajawali Pers, 2010).
- Attamimi, Abdul Hamid S, *Hukum tentang Peraturan Perundang-undangan dan Peraturan Kebijakan* (Depok: Fakultas Hukum Universitas Indonesia, 1993).
- Beerman, Jack M, *Administrative Law* (New York: Aspen Publishers, 2010).
- Doludjawa, Linus, *Buku Pegangan Perancang Peraturan Perundang-undangan* (Jakarta: Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan Hak Asasi Manusia RI, 2005).
- Kreveld, JH Van, *Beleidsregel in het Recht* (Kluwer-Deventer, 1983).
- Lukman, Markus, *Freies Ermessen dalam Proses Perencanaan dan Pelaksanaan Rencana Kota di Kotamadya Pontianak* (Bandung: Padjajaran University, 1989).
- Manan, Bagir & Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia*



- (Bandung: Alumni, 1997).
- Marbun, SF, *Dimensi-Dimensi Pemikiran Hukum Administrasi Negara* (Yogyakarta: UII Press, 2001).
- Nalle, Victor Imanuel W, *Konsep Uji Materiil: Kajian Pembentukan Dan Uji Materiil Peraturan Kebijakan di Indonesia* (Malang: Setara Press, 2013).
- Putra, Eduard Awang Maha, *Peraturan Kebijakan (Beleidsregel) dalam Hukum Positif Indonesia* (Yogyakarta: Samudra Biru, 2024).
- Rahardjo, Satjipto, *Hukum Dalam Jagat Ketertiban* (Jakarta: UKI Press, 2006).
- Soeprapto, Maria Farida Indrati, *Ilmu Perundang-undangan Proses dan Teknik Pembentukannya* (Yogyakarta: Kanisius, 2007).
- Zender, Michael, *Law-Making Process* (Cambridge: Cambridge University Press, 2004).

JOURNAL

- Aditya, Zaka Firma & Muhammad Reza Winata, "Rekonstruksi Hierarki Peraturan Perundang-Undangan di Indonesia (Reconstruction of the Hierarchy of Legislation in Indonesia)" (2018) 9:1 Negara Huk Membangun Huk untuk Keadilan dan Kesejaht.
- Disantara, Fradhana Putra, "Tanggung Jawab Negara dalam Masa Pandemi Covid-19" (2020) 6:1 JCH (Jurnal Cendekia Hukum) 48-60.
- Fauzia, Ana & Fathul Hamdani, "Sanksi Penundaan atau Penghentian Jaminan Sosial Pada Masa Pandemi COVID-19" (2021) 1:2 J Kaji Pembaruan Huk 133-174.
- Funk, William, "A Primer on Nonlegislative Rules" (2001) 53 Adm Law Rev 1332.
- Gersen, Jacob E, "Legislative Rules Revisited" (2007) 74 Univ Chicago Law Rev 1709.
- Muhshi, Adam & Fenny Tria Yunita, "Diskursus Pengujian Peraturan Kebijakan (Beleidsregel) oleh Peradilan Tata Usaha Negara" (2024) 7:2 Media Iuris 191-220.
- Nalle, Victor Imanuel, "Kedudukan Peraturan Kebijakan dalam Undang-Undang Administrasi Pemerintahan" (2016) 10:1 Refleks Huk J Ilmu Huk 1-16.
- Nursofwa, Ray Faradillahisari et al, "Penanganan Pelayanan Kesehatan di Masa Pandemi Covid-19 Dalam Perspektif Hukum Kesehatan" (2020) 1:1 Inicio Legis.
- Putra, Eduard Awang Maha, "Konsep Ideal Pengujian Peraturan Kebijakan (Beleidsregel) di Indonesia" (2024) 3:1 Wijaya Putra Law Rev 1-20.
- Putra, Eduard Awang Maha, Gatot Dwi Hendro Wibowo & Minollah Minollah, "Legal Vacuum in Indonesian Administrative Law: Urgency of Policy Regulation" (2024) 19:1 Indones J Law Econ Rev 1-13.
- Supriyadi, "Kebijakan Penanganan Covid-19 dari Perspektif Hukum Profetik" (2020) 8:2 Suloh J Fak Huk Univ Malikussaleh 91.
- Suratno, Sadhu Bagas, "Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan yang Baik" (2017) 4:3 Lentera Huk 164-174.
- Tollenaar, Albertjan, "Soft Law, Policy Rules and the Quality of Administrative Decision-Making" in *Challenges Soft Law* (Beijing: The Commercial Press, 2011).

WEBSITE

- Salim, Zaffirulah, "Legislasi Semu (Pseudowetgeving)", (2023), online: *Ditjenpp*



LEX JOURNAL
KAJIAN HUKUM DAN Keadilan JOURNAL

Kemenkumham.

Yahya, Achmad Nasrudin & Diamanty Meiliana, "Mahfud: Kalau Ingin Selamatkan Rakyat, Boleh Langgar Konstitusi", (2021), online: *Kompas*.