

Judicial Review of Policy Regulations: A Comparative Study of Judicial Review in Indonesia and Netherlands

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Abstract

*This research aims to describe and compare the concept of judicial review of policy regulations in Indonesia and the Netherlands. The research method used in this study is normative research with literature studies using books, articles, and relevant references. The results show that there is no explicit and detailed regulation or norm regarding the concept of testing policy regulations in government administrative law. This is in contrast to the Netherlands, which explicitly and in detail regulates the concept of testing policy regulations in *Algemene Wet Bestuursrecht* (Dutch Government Administration Law). The unregulated concept of policy regulation reviews in Indonesia has led to inconsistencies in the review of policy regulations. For example, the Supreme Court (MA) received six requests to review policy regulations, four of which were accepted and two of which were rejected. This can have implications for uncertainty in guaranteeing the rights of aggrieved parties in the implementation of policy regulations so that it is necessary to formalize policy regulations in the Government Administration Law in the future so that the scope of discretion in the Government Administration Law does not only include State Administrative Decisions and Government Administration Actions, but also includes the concept and procedures for testing policy regulations.*

Keywords: *Judicial Review, Policy Regulation, Legal Comparison, Government Administration Law*

INTRODUCTION

Public administration in Indonesia has been operating for decades without any comprehensive laws governing it. This condition is different from other countries, such as the United States and the Netherlands. The United States has the *Administrative Procedure Act* (APA) whereas the Netherlands has the *Algemene Wet Bestuursrecht* (AWB). Indonesia finally had a law on state administration when the government passed Law Number 30 of 2014 on Government Administration (Victor Imanuel W. Nalle, "The Scope of Discretion ..." 2018: 1).

The definition of *beleidsregels* or *policy rules* in Indonesia cannot be referred to in the provisions of Laws and Regulations because the definition is not found in Law Number 12 Year 2011 on the Formation of Laws and Regulations. Based on Article 1 point 9 of Law Number 30 of 2014 concerning Government Administration, it is stipulated that discretion is a decision and/or action determined and/or carried out by a Government Official to overcome concrete problems encountered in the administration of government in the event that the laws and regulations provide options, do not regulate, are incomplete or unclear, and/or there is government stagnation. This Government Administration Law does not include *beleidsregels* or *policy rules* as part of "government discretion" (Muhammad Thabrani Mutalib, "Existence, Function, and Norming Government Discretion ...", 2020: 158-159).

Government practice shows that various forms of policy regulations are used in governance. However, various forms of policy regulations are not regulated by policy regulations. According to Jimly Asshiddiqie, in practice in Indonesia, policy regulations can be classified in the form of (a) circular letters, for example: Bank Indonesia Circular Letter; (b) Order or instruction letter, for example: Presidential Instruction; (c) Work Guidelines or Manual; (d) Implementation Guidelines (Juklak); (e) Technical Guidelines (Juknis); (f) Guidebook or "guide" (*guidance*); (g) *Terms of Reference* (TOR); (h) Work Design or *Project Design* (Victor

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Imanuel W. Nalle, "The Position of Policy Regulations ...", 2016: 7).

The main purpose of the formation of policy regulations (*beleidsregels*) is to provide direction (instructions and guidelines) to subordinate government officials to smoothly carry out their functions and duties. This is due to the fact that in general, laws and regulations that are higher in level or hierarchy only regulate basic matters so that further technical and administrative elaboration is needed to implement them, so this is where policy regulations (*beleidsregels*) play a role or perform their function of providing direction so that this is done or implemented by subordinate officials. In addition, the existence of policy regulations (*beleidsregels*) can also fill the void of legal rules in urgent and emergency situations, or at least complete and perfect the provisions that are considered no longer in accordance with the demands of the need for good governance and in accordance with the interests and needs of citizens (Aminuddin Ilmar, 2018: 147).

The absence of policy regulations in Government Administration Law shows that there is a legal vacuum (*vaccum of norm*) of policy regulations. The result that can be caused by this legal vacuum is the occurrence of legal uncertainty (*rechtsonzekerheid*). It can be seen that so far related to the definition, officials authorized to make, form, content material, binding force, and test policy regulations in Indonesia are only based on expert opinion (*doctrine*). Even within the scope of state administrative law, there are often differences in views between legal experts and others in discussing policy regulations (Eduard Awang Maha Putera, 2024: 66-67).

Legal uncertainty related to this policy regulation can certainly create or cause legal chaos (*rechtsverwarring*) from the use of policy regulations by state administrative officials in the practice of governance if this is the case, it can be said that one of the objectives of law according to the theory put forward by Gustav Radbruch, namely legal certainty, cannot be achieved properly because based on the theory put forward by Gustav Radbruch, law is a positive thing that must regulate the interests of every human being in society and must always be obeyed even though the positive law is considered unfair (Ibid., 2024: 67).

To overcome and anticipate legal chaos that can occur due to the non-regulation of policy regulations in Government Administration Law, it is very important or urgent to hold norms related to policy regulations in Government Administration Law (S.F. Marbun, 2018: 272). This is an effort to realize legal objectives, namely legal certainty in governance and of course if legal certainty related to policy regulations has been realized, then this will certainly have implications, either directly or indirectly, for the achievement of public welfare (Ibid., 2018: 67-68).

In practice, the Supreme Court has received 6 (six) cases of requests to review "policy regulations (*beleidsregels*)" in the form of circular letters. The 6 (six) cases of petitions for review can be described as follows.

Table 1.1 Policy Regulations that have been submitted as an object of judicial review at the Supreme Court (MA)

Policy Regulations submitted for judicial review in the Supreme Court		
No.	Accepted	Rejected
1	Circular Letter of the Director General of Coal and Geothermal Minerals of the Ministry of Energy and Mineral Resources No. 03.E/31/DJB/2009 on Mineral and Coal Mining Licences.	Circular Letter of the Minister of State for Administrative Reform and Bureaucratic Reform No. 5/2010 on Data Collection of Honorary Workers in Government Agencies.
2	Circular Letter of the Directorate General of Islamic Education of the Ministry of Religious Affairs Number Dj. I/PP.00.9/973/2009 concerning Procedures for Submitting Proposals for Determination of Professor/Professor Positions at PTAL.	Nganjuk Regent Circular Letter No. 140/153/411.010/2015 on Temporary Suspension of Village Apparatus Filling.
3	Circular Letter of the General Election Commission Number 649/15/VII/2007 on Individual Nomination in the General Election of Regional Head and Deputy Regional Head after the Decision of the Constitutional Court of the Republic of Indonesia Number 05/PUU-V/2007.	
4	Circular Letter of Director General of Taxes No. SE-118/PJ/2009 on Value Added Tax on Delivery of Clean Water.	

Source: Eduard Awang Maha Putera, *Policy Regulations (Beleidsregel) in Indonesian Positive Law (Samudra Biru 2024)*. [133-134]

Based on the case of the Supreme Court's examination of policy regulation in the form of a circular letter, as described above, there is inconsistency in the examination of circular letters in the judicial sphere (Dian Sunardi, 2022: 161). This is due to the absence of a legal basis that regulates which institution is authorized to review policy regulations (*beleidsregels*). Article 31, paragraph (1) of Law Number 14 Year 1985 on the Supreme Court states that the Supreme Court has the competence (authority) to examine laws and regulations under law against the law. Theoretically, administrative law experts agree that laws, regulations, and policy regulations are two different legal instruments. Policy regulations are based on the free authority or *ermessen* owned by the government, while laws and regulations are based on the delegation of authority (attribution) from higher regulations.

According to Attamimi, the similarities and differences between laws, regulations, and policy regulations can be described as follows (Firdaus Arifin, 2021: 143-144).

- Equation:

It is generally binding '*algemeen binden*' because the affected community cannot do otherwise.

Regulatory authority stems from general and public authority.

From the form and format, it is often the same complete with an opening in the form of "weighing" and "remembering" legal basis, the body in the form of articles, sections, chapters, and closing.

The needs of modern rule of law: As long as there is state intervention in people's lives, regulations (laws and policy regulations) will continue to exist, continue to be formed, continue to be amended, refined, revoked and formed again.

- Differences:

The source of legislation from the legislative and executive functions of the state necessary for the implementation of government policy is "bound" (*gebonden beleid*) while policy regulations originate only in the executive function of the state in the field of implementing government policy which is not bound (*vrijbeleid*).

Although they are public, the source of authority for laws and regulations comes from the written rules above them (Law or Constitution), whereas policy regulations are based on discretionary authority.

The forms and formats of laws, regulations, and policy regulations often differ. Policy regulations sometimes appear in forms such as circulars, official notes, operational guidelines, technical guidelines, and so on. It also appears in oral instructions (to subordinates) which do not have a form or format.

METODOLOGY

The type of research used in this research is normative research using primary legal materials consisting of laws and regulations and judges' decisions as well as secondary legal materials consisting of textbooks, legal journals, and comments on court decisions.

RESULTS AND DISCUSSION

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a. Indonesia

- **Circular Letter of the Director General of Coal and Geothermal Minerals of the Ministry of Energy and Mineral Resources No. 03.E/31/DJB/2009 concerning Mineral and Coal Mining Licences Prior to the Issuance of Government Regulations as the Implementation of Law No. 4 of 2009 which is contrary to Article 8 paragraph (1) letter b and Article 173 paragraph (2) of Law No. 4 of 2009 concerning Mineral and Coal Mining.**

The Circular Letter (SE) of the Director General of Coal and Geothermal Minerals No. 03/31/DJB/2009 is policy regulation whose content material was declared by the Supreme Court to be contrary to Law No. 4/2009 on Mineral and Coal Mining, even though the Circular Letter was issued in connection with the enactment of Law No. 4/2009. Before discussing the contradiction between the Circular Letter of the Director General of Coal and Geothermal Minerals and Law No. 4/2009 on Mineral and Coal Mining, we first discuss how the Circular Letter (SE) of the Director General of Coal and Geothermal Minerals can be materially challenged in the Supreme Court.

Initially, this Circular was disputed and materially tested to the Supreme Court by the Regent of East Kutai, Isran Noor. In short, the Supreme Court accepted and granted the objection of the Regent of East Kutai, Ir. H. Isran Noor, M.Si to the Circular Letter of the Minister of Energy and Mineral Resources No. 03.E/31/DJB/2009 dated January 30, 2009, concerning Mineral and Coal Mining Licensing Prior to the Issuance of Government Regulations as the Implementation of Law Number 4 Year 2009 concerning Mineral and Coal Mining (SE PPMB). The Regent of East Kutai in his petition objected to the SE PPMB material, among others, as follows:

"As long as before the issuance of government regulations as the implementation of the 2009 PMB Law with provisions:

- A. Governors and Regents/Mayors throughout Indonesia should pay attention to the following matters:
 - 1. etc;
 - 2. Temporarily suspend the issuance of new mining business Licences (IUP) until the issuance of Government Regulations as the implementation of the 2009 PMB Law."

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

"As far as the Regent's authority granted by the Law is concerned, Article 8 paragraph (1) letter b of the 2009 PMB Law explicitly states: The authority of the Regency / City Government in the management of Mineral and Coal Mining, among others are:

- a. etc;

- b. Provision of IUP and IPR, guidance, community conflict resolution and supervision of mining businesses in the Regency/City area and/or sea area up to 4 (four) miles."

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

Based on the petition, the Panel of Judges of the Supreme Court granted the petition while stating that the SE PPMB was contrary to the applicable and higher provisions *in the case of* the PMB Law, especially Article 8 paragraph (1) letter b and Article 173 paragraph (2) which is related to the authority of the Regent in granting Mining Business Permits (IUP) and People's Mining Permits (IPR) so that the SE PPMB was invalid and not generally applicable and ordered the Official *a quo* (Minister of Energy and Mineral Resources) to cancel and revoke the SE PPMB. The Supreme Court in its legal judgement stated the following:

"That the object of objection to the Right to Material Test in the form of Circular Letter of the Director General of Mineral, Coal and Geothermal, Ministry of Energy and Mineral Resources of the Republic of Indonesia Number: 03.E/31/DJB/2009 although not included in the order of legislation as referred to in Article 7 of Law Number 10 of 2004 concerning the Formation of Legislation, but based on the explanation of Article 7 can be classified as a valid form of legislation so that it is subject to the provisions of the order in which lower regulations may not conflict with higher regulations (*lex superior derogat legi inferiori* principle)."

Furthermore, based on the above considerations, the Supreme Court then gave the following affirmation:

"Based on these considerations it is evident that the Circular Letter of the Director General of Mineral, Coal and Geothermal, Ministry of Energy and Mineral Resources of the Republic of Indonesia Number: 03.E/31/DJB/2009 dated January 30, 2009 concerning Mineral and Coal Mining Licensing Prior to the Issuance of Government Regulations as the Implementation of Law No. 4 of 2009, which is the object of objection to the Right to Material Test (vide Exhibit P.1), is contrary to higher regulations *in the case of* Law No. 4 of 2009 concerning Mineral and Coal Mining.

The action of the Supreme Court in accepting the petition to review the Circular Letter of the Director General of Coal and Geothermal Minerals of the Ministry of Energy and Mineral Resources No. 03.E/31/DJB/2009 on Mineral and Coal Mining Licensing Prior to the Issuance of Government Regulation as the Implementation of Law No. 4/2009 is not juridically correct, because the authority of the Supreme Court based on Article 24A of the 1945 Constitution and Article 31, paragraph (1) of Law No. 14 of 1985 on the Supreme Court states that the Supreme Court only has the authority to review laws and regulations under the law against the law.

Policy regulations (*beleidsregels*) have characteristics different from statutory regulations. Policy regulations (*beleidsregels*) are made on the basis of "free authority" (*vrij bevoegdheid*) owned by the government in the executive sense. Meanwhile, laws and regulations are enacted by the government in the legislative sense and authority in the process of formulating laws and regulations is delegated by higher laws and regulations.

Decision of the Supreme Court of the Republic of Indonesia at the first and final instance in the case of a petition for judicial review in Ir. H. Isran Noor M.Si. (Regent of East Kutai) v. Minister of Energy and Mineral Resources, No. 23P/HUM/2009 p. 2. 2. Decided in a deliberation meeting of the Supreme Court on Wednesday, 9 December 2009 by Prof. Dr. H. Ahmad Sukardja, S.H., Supreme Court Justice appointed by the Chief Justice of the Supreme Court as Chairman of the Panel, H. Imam Soebechi, S.H., M.H., and Marina Sidabutar, S.H., M.H., Supreme Court Justices as Members.

- **Circular Letter of the Directorate General of Islamic Education of the Ministry of Religious Affairs Number Dj. I/PP.00.9/973/2009 concerning Procedures for Submitting Proposals for Determination of Professor/Professor Positions at PTAs**

The applicants in this material test of the Director General's Circular are 10 (ten) lecturers from Sunan Kalijaga University Yogyakarta, namely Sudarnoto Abdul Hakim, Jaenal Arifin, Sangkot Sirait, Nurun Najwah, Syafa'atun Almirzanah, Sukanto, Syaifan Nur, Sekar Ayu Aryani, Alim Roswanto, and Abdul Mustaqim. The respondent was the Directorate General of Islamic Education of the Ministry of Religious Affairs. The petitioner argues that the above circular contradicts Article 6 paragraph (4) of the Decree of the Minister of National Education No. 36/D/O/2001 on Technical Guidelines for the Implementation of Credit Score Assessment for Lecturer Position.

The Supreme Court has received a petition, examined, tested the material of the Circular against Article 6 paragraph (4) of the Decree of the Minister of National Education Number 36/D/O/2001 and the Supreme Court in its decision stated that the Circular contradicts Article 6 paragraph (4) of the Decree of the Minister of National Education Number 36/D/O/2001 concerning Technical Guidelines for the Implementation of the Assessment of Lecturer Position Credit Score and is declared to have no legally binding force.

In its legal judgement, the Supreme Court considered that the above Circular contains provisions that regulate and apply generally to all those addressed in the letter. Therefore, the Circular fulfils the requirements of a regulation under law in accordance with Supreme Court Regulation No. 1/2005 and Law No. 10/2004 on the Formation of Legislation that can be materially tested by the Supreme Court.

Based on the data above, the Supreme Court places itself as a judicial institution that has absolute competence to test policy regulations, in this case SEs. The SE is considered an object of testing by the Supreme Court, and the Supreme Court is authorized to declare the SE contrary to higher regulations.

The results of the examination of this case are set out in the Decision of the Supreme Court of the Republic of Indonesia Number 03 P/HUM/2010.

- Circular Letter of the General Election Commission No. 649/15/VII/2007 on Individual Nomination in the General Election of Regional Head and Deputy Regional Head After the Decision of the Constitutional Court of the Republic of Indonesia No. 05/PUU-V/2007

On January 22, 2008, the Supreme Court, through its Registrar, the Supreme Court petitioned for a material review of the General Election Commission Circular Letter No. 649/15/VII/2007 on Individual Candidacy in the General Election of Regional Head and Deputy Regional Head after the Decision of the Constitutional Court of the Republic of Indonesia No. 05/PUU-V/2007. The application is registered under the register number 04P/HUM/2008.

The above petition was filed by Eddy Rianto, S.H. and Endang Hastuti, S.T. as the Petitioner and the Chairman of the General Election Commission as the Respondent. The Petitioner argues that the SE KPU is contrary to Article 57 paragraph (1) and Article 58 of Law Number 24 Year 2003 on the Constitutional Court. The Petitioner requests that the Supreme Court declare the above SE KPU invalid and contrary to Article 57 paragraph (1) and Article 58 of Law Number 24 Year 2003 of the Constitutional Court.

Regarding the above petition, in its legal judgement, the Supreme Court stated:

- 1) The applicants have *legal standing* as petitioners.
- 2) The object of the petition was the General Election Commission Circular No. 649/15/VII/2007 on Individual Candidacy in the General Election of Regional Head and Deputy Regional Head after the Decision of the Constitutional Court of the Republic of Indonesia No. 05/PUU-V/2007.
- 3) The submission of the applicant's petition is still within the 180-day time limit as stipulated in Article 2 paragraph (4) of Supreme Court Regulation No. 01/2004.
- 4) SE of the General Election Commission Number 649/15/VII/2007 on Individual Nomination in the General Election of Regional Head and Deputy Regional Head after the Decision of the Constitutional Court of the Republic of Indonesia Number 05/PUU-V/2007. Therefore, the SE of the KPU is correct.

- 5) The Applicant's request for a material challenge must be rejected.
- 6) Adjudicated and decided by Decision Number 04P/HUM/2008 with the following ruling: - rejection of the application for objection to the right to material test from the Applicant: (1) Eddy Rianto, S.H., (2) Endang Hastuti, S.T. - Punishing the Applicant for the objection to the right of material test to pay court costs in the amount of Rp. 1,000,000.

Based on the data above, the Supreme Court has placed itself as a judicial institution that has absolute competence to test SEs and SEs are considered the object of material testing by the Supreme Court. The Supreme Court received the petition, examined and materially tested the SE KPU against Article 57 paragraph (1) and Article 58 of Law No. 23 Year 2003, legally considered and decided the petition for the right to materially test the SE with a verdict rejecting the petition. The verdict is based on the legal consideration that the SE KPU is correct and does not conflict with Article 57 paragraph (1) and Article 58 of Law No. 24 Year 2003 of the Constitutional Court.

The results of the examination of this case are set out in the Decision of the Supreme Court of the Republic of Indonesia Number 04P/HUM/2008.

- Circular Letter of the Minister of State for Administrative Reform and Bureaucratic Reform No. 5/2010 on Data Collection of Honorary Workers in Government Agencies contradicts Government Regulation No. 48/2005 jo. Government Regulation Number 43 Year 2007

On January 11, 2016, the Supreme Court received a petition for judicial review of the Circular Letter of the Minister of State for Administrative Reform and Bureaucratic Reform No. 5/2010 on the Data Collection of Honorary Workers in Government Agencies. This petition was registered under case number 1P/HUM/2016. This petition was filed by Abu Tholeb as the Petitioner against the Minister of State for Administrative Reform and Bureaucratic Reform as the Respondent.

The Applicant argues that the Number 2 letter B point 3 of the Ministerial Circular is contrary to Article 3 number 2 letter B of Government Regulation Number 48 Year 2005 jo. Government Regulation Number 43, 2007.

Regarding the above petition, in its legal reasoning, the Supreme Court declared itself as a court that did not have absolute competence to materially test the Circular Letter. The Supreme Court considers that SEs are not laws or regulations, while the Supreme Court only has the authority to materially test laws and regulations that are below the law. Therefore, the Supreme Court does not have the authority to review the Circular Letter, and the petition for judicial review of the Circular Letter cannot be accepted.

The results of the examination of this case are set out in the Decision of the Supreme Court of the Republic of Indonesia Number 1P/HUM/2016.

- Nganjuk Regent Circular Letter Number 140/153/411.010/2015 on Temporary Suspension of Village Apparatus Filling

On November 17, 2016, the Supreme Court received a petition for judicial review of the Nganjuk Regent's Circular Letter No. 140/153/411.010/2015 on the Temporary Suspension of Village Officials. The petition was registered under case number 48P/HUM/2016. The applicant was Agus Prayitno, S.Pd. while the respondent was in the Regent of Nganjuk.

The applicant argued that Nganjuk Regent's Circular No. 140/153/411.010/2015 on the Temporary Suspension of the Filling of Village Apparatus contradicted Nganjuk Regency Regulation No. 9/2006 on the Procedures for the Nomination, Appointment, and Dismissal of Regional Apparatus and Law No. 6/2014 on Villages. The content of the two conflicting provisions are described above.

Regarding the above petition, in its legal reasoning, the Supreme Court declared itself as a court that did not have absolute competence to materially test the Circular Letter. The Supreme Court considers that SEs are not laws or regulations, while the Supreme Court only has the authority to materially test laws and

regulations that are below the law. Therefore, the Supreme Court does not have the authority to review the Circular Letter, so the petition for the material review of the Circular Letter cannot be accepted.

Based on this, it is necessary to formalize the concept and nomenclature of "policy regulations (*beleidsregels*)" in Law Number 30 of 2014 concerning Government Administration to ensure legal certainty in the community. This is in line with the value of the *supremacy of law* contained in the concept/theory of the Indonesian rule of law put forward by Prof. Jimly Asshiddiqie in a book written by Prof. Muhammad Tahir Azhary with the title "*Some Aspects of Constitutional Law, Criminal Law, and Islamic Law*" (p.30), where the law must be the highest guide in solving problems that exist in society.

Based on the criteria of external form (*kenvorm*) or the formulation of orders for promulgation and placement of laws and regulations in accordance with Article 81 of Law No. 12/2011 on the Formation of Laws and Regulations, the SE, which is the object of HUM (Hak Uji Bahanil) does not meet the criteria of laws and regulations.

As stated in Decision No. 48P/HUM/2016, a copy of which has been published by the Supreme Court, the panel considers that the SE object the HUM (Right to Material Test) is only included in the criteria of a general state administrative decision with a form or characteristic whose addresat is not addressed to everyone, but only addressed to sub-district heads in Nganjuk district so that it is not properly categorized as *regeling* in the sense of legislation so that it can be concluded that the Supreme Court does not have the authority to review it. Consequently, the petition for judicial review by the applicant must be declared inadmissible.

The results of the examination of this case are set out in the Decision of the Supreme Court of the Republic of Indonesia Number 48P/HUM/2016.

- Circular Letter of Director General of Taxes No. SE-118/PJ/2009 on Value Added Tax on Delivery of Clean Water

On May 31, 2012, the Supreme Court accepted a petition for material review against Director General of Taxes Circular No. SE-118/PJ/2009 on value added tax on delivery of clean water. The petitioner was the Indonesian Industrial Estate Association, which was represented by six of its attorneys. The respondent was the Director General of Taxes of the Ministry of Finance. The petitioner argued that the Director General's Circular contradicted Ministerial Regulation No. 31/2008. The materials of the two conflicting provisions are as stated by the author in the previous description.

An application for a material challenge to the SE above had already been filed by the Applicant against the Respondent in 2010 with case register number 37P/HUM/2010. The first request for a material challenge was made by the Supreme Court in Decision No. 37/P/HUM/2010, which stated that the applicant's request for a material challenge could not be accepted. The basis of the legal reasoning was that the submission of an application for objection to the right of material test against the Circular to the Supreme Court exceeded the time limit according to Supreme Court Regulation No. 01/2004 on the Right of Material Test, which is no later than 180 days after the Circular was issued. With the passing of the time limit, the Supreme Court no longer has the competence (authority) to materially test SE-P.

After the Supreme Court issued Supreme Court Regulation No. 01/2011 on the Right of Material Test which replaced Supreme Court Regulation No. 01/2004, the Applicant resubmitted an application for objection to the right of material test against the SE-P above to the Supreme Court. The Applicant's reasoning is that Supreme Court Regulation No. 01/2011 abolished the provision of Supreme Court Regulation No. 01/2004 regarding the time limit for filing an application for objection to the right of material review no later than 180 days after the Circular was issued. The Applicant also stated that the Supreme Court's reasoning in Decision No. 37P/HUM/2010, based on Court Regulation No. 01/2004 was wrong. Therefore, the Applicant considers that it has legal standing to file a petition for judicial review against the above Circular.

Regarding the Petitioner's request, in its legal reasoning, the Supreme Court stated in the Decision of the Supreme Court of the Republic of Indonesia Number 03 P/HUM/2010:

- 1) that SE Director General of Taxes No. SE-118/PJ/2009 concerning Value Added Tax on Delivery of Clean Water.
- 2) that Supreme Court Regulation Number 1 Year 2011 on the Right to Material Test as part of legislation is issued by regulating the principle of "non retro active," meaning that laws and regulations are not enforced letter or legislation in force since promulgation, therefore with the enactment of Supreme Court Regulation Number 1 Year 2011 on the Right to Material Test, the application for the right to material test does not recognize the provisions regarding the grace period for submission.
- 3) that the submission of judicial review rights with a free period of time applies to laws and regulations under the law that have never been submitted for judicial review, even though they were issued earlier than Supreme Court Regulation Number 1 Year 2011.
- 4) that the petition for judicial review has already been filed by the Applicant with the same object as case register Number 37P/HUM/2010.
- 5) that for laws and regulations that have already been submitted for judicial review under Supreme Court Regulation No. 1/2004 on Judicial Review Rights, the petition by the Applicant is subject to the principle of *ne bis in idem*, therefore, the petition from the Applicant is declared inadmissible.
- 6) that since the petition for judicial review is declared inadmissible, the applicant shall be ordered to pay court costs.

Based on the legal considerations above, in Decision Number 22P/Hum/2012, the Supreme Court decided that the petition for judicial review from the Petitioner HIMPUNAN KAWASAN INDUSTRI Indonesia could not be accepted; Punish the Petitioner for judicial review to pay court costs of Rp. 1,000,000.00 (one million rupiah).

The data above show that the Supreme Court has interpreted itself as a court with absolute competence in materially testing SEs. However, the Supreme Court Decision in the above case stated that the petition was inadmissible due to *ne bis in idem*, so the Supreme Court was not authorised to examine the same SE-P material test rights petition.

b. Netherlands

Netherlands adhere to a system of supervision or control over administrative actions with complex characteristics. Unlike the UK, which does not recognize the existence of an administrative court or system that applies in France or Germany, which recognizes the existence of an administrative court that stands alone and is separate from the general court. This is because disputes between citizens and the government (*administratie*) are examined and decided by various bodies/organs, each of which is only authorized in the field specified by law (Muhammad Thabrani Mutalib, *The Authority of the Court ...*, 2017: 226).

The various bodies that hear disputes between the people and the government can be categorized into three groups. *First*, the resolution of disputes by bodies/organisations that are internal to the government and are structurally included in the government hierarchy is commonly known as the '*administratief beroep*' (administrative appeal). *Secondly*, the resolution of disputes by administrative judicial bodies, but not administrative courts in the sense of having general jurisdiction (*algemene administratieve rechtspraak*) as applicable in France (*Tribunal Administratif* and *Conseil d'Etat*), but only a special administrative court (*bijzonder administratieve rechtspraak*) which is only authorized in certain areas of dispute. *Third*, the determination of disputes by general and civil courts. The three groupings are described as follows (*Ibid.*, 2017: 226-230).

a) *Administratief beroep* (administrative appeal)

As mentioned above, administrative appeals are conducted by internal government bodies and fall within the executive's own authority. Administrative appeal procedures or *administratief beroep* can be granted to any

government agency (jawatan). In government practice in the Netherlands, there are various bodies/organs that are given the task of examining an *administratief beroep*, among others:

- (1) *Kroon* (King or Queen): The *Kroon* or Crown is authorised to receive applications for *administratieve beroep* in matters concerning the issuance of *beschikking*s or refusal of a business licence.
 - (2) *Gedeputeerde Staten* (Provincial Council): This council is authorized to examine the appeals of *beschikking*s issued by the *Gemeenteraad* (Township Council) on the declaration of the unoccupancy of a dwelling house.
 - (3) *Commissaris des Konings* (Queen's Commissioners): This body can hear appeals against several *beschikking* issued by a mayor regarding permission to hold meetings.
 - (4) *Minister*: An appeal that can be filed with the Minister of Justice regarding a *beschikking* issued on the basis of the *Vreemdelingenwet* of January 13, 1965 (Act on Foreigners).
 - (5) *Gemeenteraad* (Township Council): An appeal against *beschikking* on a building permit that has been refused by the Public Works Department.
- b) Ombudsman (*de Nasionale Ombudsman*)

Specifically, the Ombudsman, states that any citizen can apply to the National Ombudsman to investigate the deviant behavior of a government organ. In this case, what the Ombudsman investigates is not the decision of the government organ but the behaviour (*gedrag*) or '*niet behoorlijk (hebben) gedragen jegens een natuurlijk persoon of eenn rechtspersoon; ook eigener beweging kan hij een onderzoek installen*' (improper behaviour towards a person or legal entity; on its own initiative the ombudsman can examine the alleged government organ). In other words, Ombudsman investigates *the behoorlijkheid* aspects of officials, employees, and police.

c) Special Administrative Court (*bijzonder administratieve rechtsspraak*)

Specialized administrative tribunals are established by various laws governing their competence and examination procedures, so that there are as many of them as there are laws establishing them, with different types of disputes. However, sometimes one body may examine more than one type of dispute. The characteristic of this body is that its authority is only to assess or test whether the appeals of administrative law actions are in accordance with the law. *The a quo* body can be mentioned:

- (1) *Centrale Raad van Beroep* (Central Board of Appeals): This specialised administrative court hears appeals against *beschikking* on various types of social security. It also hears appeals to the decisions of the Civil Service Tribunal (*Ambtenarengerecht*) and pension matters.
 - (2) *College van Beroep voor het Bedrijfsleven* (Board of Appeal against *beschikking* on public enterprises)
 - (3) *Afdeling rechtsspraak van de Raad van Staten* (Supreme Judicial Advisory Council). This body is authorized to entertain challenges to government *beschikking* that have not been regulated by a specific law on the subject of the *beroep*. In fact, it is a complementary body for the legal protection of people against government arbitrariness when a *beroep* does not exist or is not regulated separately by law. This special administrative court exercises its authority on the basis of the Wet AROB (*Administratieve Rechtspraak Overheidsbeschikking*).
 - (4) *Tariefcommissie* (price commission): examines disputes concerning *Duane's* rule on import duty rates.
 - (5) The General Court judges who act as administrative judges. For example, an objection to the tax bill imposed by a taxpayer (examined by the *gerechtshof* in the *Belastingkamer*) or an examination by the Cantonal Court (*Kantonrechter*) of an application to amend the electoral register (*kiezersregister*).
- d) General Courts Acting as Ordinary Civil Judges.

General courts can examine government actions that violate the law and harm individuals (Article 1401 Dutch Civil Code or Article 1365 Civil Code). However, civil judges do not act as administrative judges. The case is also an ordinary civil case that uses ordinary civil procedural law. Therefore, the person being sued is not an organ of government/administration, but a public legal entity (municipality, province or state). The difference in the court that hears the dispute depends on the plaintiff's claim. If the plaintiff wants the cancellation of a *beschikking*, then the lawsuit must be filed with a special administrative court according to the type/object of the *beschikking* concerned or if the cancellation effort has not been regulated by law, then the lawsuit is filed with the *Raad van State* judicial section. On the other hand, if the government wants compensation for unlawful acts, the lawsuit should be filed in the General Court (civil judge) on the basis of 'onrechtmatige overheidsdaad' (the government's unlawful act).

The benchmark for testing (*toetsingsgrond*) government actions or decisions (*beschikking*) in the Netherlands developed based on jurisprudence, both decided by administrative judicial bodies and by the *Hoge Raad* can be classified into two (2) groups, among others (*Ibid.*, 2017: 230-231):

- (1) *Strijd met de wet* (contrary to the law) which can mean without authority (*onbevoegdheid*) based on *ratione materie* (not authorised in terms of material), *ratione loci* (on territory), *ratione temporis* (in terms of time). Alternatively, it can also mean *vormgebreken* (defect in form or procedural error), in which the statutory requirements in formulating a government *beschikking* are not fulfilled.
- (2) *Inhoudsgebreken* (content that contains defects): This parameter is an assessment of government actions or *beschikkingen* that contain material defects, including, *firstly*, challenges to higher regulations; *secondly*, containing abuse of authority (*detournement de pouvoir*), which is expressly regulated in the *Ambtenarenwet* (Civil Service Act of 1929), *wet administratieve rechtspraak bedrijfsorganisatie* (Public Enterprises Act of 1954), *wet beroep administratieve beschikkingen* (Law on objections to *beschikking*), and also in *Wet AROB* in 1976. Material defects can be categorized as follows: (i) *Onredelijk*, a decision that is not based on reasonable or appropriate considerations in terms of the interests of the parties subject to the *beschikking* in question. The term '*willekeur*' is often used. (ii) *Strijd met de algemene beginselen van behoorlijk bestuur* (contrary to general principles of good governance). In Dutch jurisprudence, the principles often used as a basis for judgement are: *First*, the prohibition of *detournement de pouvoir*; *second*, the prohibition of *willekeur* or *onredelijk* (unreasonable); *third*, the principle of *zorgvuldigheidsbeginsel* (careful and thorough); *fourth*, the principle that the decision must contain the motive for issuing the decision; the principle of *gelijkheidsbeginsel* (equality); *fifth*, the principle of *rechtszekerheid* (legal certainty) and the principle of *vertrouwensbeginsel* (putting trust in the government), which emphasizes that a decision cannot be interpreted doubly so that the people know the attitude and intentions of the government. In addition, there is also the principle of *fair play et cetera*.

The special administrative courts in the Netherlands are not authorized to examine and annul decisions of a *reglementary* nature but only *beschikking* of a personal and individual nature. With regard to policy regulations (*beleidregel*) in Dutch law, it is still debatable whether they can be categorized as binding legal regulations. In this regard, Paulus Effendie Lotulung states as follows (*Ibid.*, 2017: 231-232):

"In many decisions on tax matters, the tax judge has stated that a regulation that only applies internally within a ministry cannot be the basis for assessing whether *beschikking* conflicts with the relevant circular. This opinion was followed by several specialised administrative courts and *Kroon*. However, several other administrative courts have held that if a circular itself contradicts laws and other regulations, and is continuously followed by government officials, the circular can be considered a binding regulation even if indirectly."

In several *Hoge Raad* arrests it has been confirmed that General Court Judges may incidentally assess the validity of *beschikking* (*toetsen*). However, in reality, general (civil) Court Judges exercise their control over *beschikking* with great care and emphasis on whether there is a motive in *beschikking*. The benchmarks used are '*detournement de pouvoir*' and '*onredelijk* or *willekeur*' (*Ibid.*, 2017: 232).

Based on the Dutch administrative law system, discretion is considered an *inherent* part of the position or organ of government (*inherent aan het bestuur*) in the form of three freedoms: *interpretatievrijheid*, *beoordelingsvrijheid*, and *beleidvrijheid*. The benchmark for testing discretion and the use of policy regulations (*beleidregel*) is the general principle of good governance. According to Belinfante, the benchmark for assessing discretion (discretion-ed) is whether the criteria are fulfilled that are arbitrary, *detournement de pouvoir* or in the application does not pay attention to fundamental legal regulations. In addition, the principle of rationality (*redelijkheid*) is used. Government discretion is considered deviant if *aperte onredelijkheid in de belangenafweging* (obviously, clearly unreasonable in considering various interests), with testing directed at external aspects of rationality (*in de richting van een geobjectiveerde redelijkheidstoetsing*) known as *marginale toetsing*. In this regard, van Wijk/Willem Konijnenbelt said the following (*Ibid.*, 2017: 232-233):

"In de sociale-verzekeringsrechtspraak komt een bijzondere vorm van redelijkheidstoetsing voor die het midden houdt tussen volle beleidstoetsing zoals die in administratief beroep voorkomt en de gewone, marginale beleidstoetsing (willekeurtoetsing). Sommige sociale-verzekeringswetten bepalen dat de rechter de uitoefening van bepaalde discretionaire bevoegdheden door uitvoeringsorganen (besturen van bedrijfsverenigingen) kan beoordelen op de vraag of die 'in overeenstemming is met de redelijkheid.'" (in social security adjudication It is a specialized form of due diligence to supervise policies such as those in administrative and ordinary supervision and marginal policy testing (arbitrary testing). Some social security laws provide that the judge uses his discretionary powers with the implementing organ (the board of the business association) to assess whether it is consistent with propriety).

Based on this description, it can be stated that in the Dutch legal system, various forms of bodies carry out the examination of government actions or decisions. Testing by internal government bodies such as *Administratief Beroep*. However, there are also external ones through the Ombudsman Institution which places more emphasis on the behaviour of the apparatus (*gedrag*), special administrative courts, and general courts that act as ordinary civil judges. The benchmark for testing can be contrary to laws and regulations (*strijd met algemeen verbindend*) and general principles of good governance (*algemene beginselen van behoorlijk bestuur*). Regarding the testing of discretion and/or policy regulations (*beleidregel*), the parameters used to test them are not written regulations (*geschreven*), but the principle of rationality (*redelijkheid*) through the mechanism of *marginale toetsing* (marginal testing) by special administrative judicial bodies (*Ibid.*, 2017: 233-234).

The term *beleidsregels* is known in the Dutch General Administration Code (*Algemene wet Bestuursrecht / AWB*) as an object of dispute in the Dutch administrative court which is equated with a decision (Article 8;1 AWB). These *beleidsregels* are formal forms of discretion. This is also referred to as *pseudo-wetgeving* (*quasi legislation*) because of its character, which is formed by state administrative officials as a manifestation of *freies ermessen* (*discretionary power*). However, state administrative officials who issue *beleidsregels* do not have the authority to form laws and regulations, but can indirectly bind citizens as is the case with the rules of "*juridische regels*" (Adam Mushi and Fenny Tria Yunita, 2024: 198).

In the Netherlands, policy regulations, popularly known as *beleidregels*, are discussed in *Algemene Wet Bestuursrecht* or the Government Administration Act which is also translated into English as the *General Administrative Law Act* (GALA). The regulations are discussed in Article 1:3(4) of the AWB, among others (Firdaus Arifin, 2021: 141).

Onder beleidsregels wordt verstaan: een bij besluit vastgestelde algemene regel, niet zijnde een algemeen verbindend voorschrift, omtrent de afweging van belangen, de vaststelling van feiten of de uitleg van wettelijke voorschriften bij het gebruik van een bevoegdheid van een bestuursorgaan. (GALA translation: 'Policy rule' means an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority.)"

An Order or *Besluit* (as mentioned in Article 1:3(4)) is defined in Article 1:3(1) as "a decision in written form by an administrative body which, if it makes a determination as to the conduct of public law." Article 1:3(1) further states: "*Onder besluit wordt verstaan: een schriftelijke beslissing van een bestuursorgaan, inhoudende een publiekrechtelijke rechthandeling ('Order' means a written decision of an administrative authority constituting a public law act)".*

Beleidsregel when referring to the Government Administration Law focuses on the role of policy in interpreting a regulations (*Ibid.*, 2021: 141).

In the literature review, the definition of *beleidsregels* (policy regulations) based on Dutch law, Bruinsma, stated:

"There is no escaping the concept of '*beleid*', which is difficult to translate into other languages because it is a component that is deeply embedded in Dutch society. The term '*policy*' only partially covers the meaning of '*beleid*'. '*Beleid*' can mean organizing or managing according to policies and principles. This relates to the plans drawn from top to bottom. '*Beleid*' can also mean to review all conflicting and related matters. However, these two definitions have contradictory meanings. In the first sense, a chosen decision can be against the will of the other side. The second meaning is against the will of one of the parties. In the second sense, the chosen decision is one that is mutual for both parties. In practice or theory, the conception of '*beleid*' combines these two meanings." (*Ibid.*, 2021: 141-142).

CONCLUSION

The Supreme Court is a judicial institution that receives requests to review policy regulations in the form of circular letters. In some conditions, the Supreme Court places itself as a judicial institution authorized to review policy regulations because they can be equated with laws and regulations that have expanded meaning based on the Explanation of Article 7 of Law Number 10 of 2004 concerning the Formation of Laws and Regulations. On the other hand, the institution interprets itself as an institution that does not have the competence to review policy regulations because of differences in the nature and characteristics of each of these legal instruments. This has led to inconsistencies due to the absence of norming "policy regulations" in Indonesian law so that in the future the legal instrument of "policy regulations" needs to be regulated in terms of substance, scope, validity period, and testing procedures when there is a violation of individual rights in an agency or institution. As for the Netherlands, there are strict and detailed arrangements regarding the concept of "policy regulations" (*beleidsregels*) in the Dutch Government Administration Law (*Algemene Wet Bestuursrecht*) so that individual rights in an agency / institution are more guaranteed than the absence of the concept of "policy regulations" in the Government Administration Law.

REFERENCES

- Book
- Aminuddin Ilmar. (2018). Law of Governance. Jakarta: Kencana.
- Eduard Awang Maha Putera. (2024). Policy Regulations (Beleidsregel) in Indonesian Positive Law. Yogyakarta: Samudra Biru.
- Muhammad Tahir Azhary, et.al. (2015). Some Aspects of Constitutional Law, Criminal Law, and Islamic Law: Celebrating 73 Years of Prof. Dr H. Muhammad Tahir Azhary, S.H. Academician, Practitioner, and Politician. Jakarta: Kencana.
- S.F. Marbun. (2018). Administrative Law I. Yogyakarta: UII Press.
- Journal
- Adam Muhshi and Fenny Tria Yunita. (2024). "Discourse of Policy Regulation Examination (Beleidsregel) by the State Administrative Court". *Media Iuris*, 7 (2).
- Dian Sunardi. "Contradictions in Judicial Review Decisions of the Constitutional Court and the Supreme Court in the Indonesian Constitutional System". *ADLIYA: Journal of Law and Humanity*, 16 (2).
- Firdaus Arifin. (2021). "Policy Regulation Testing in the Indonesian Justice System". *JURNAL LITIGASI*, 22 (1).
- Muhammad Thabrani Mutalib. 2020. "Existence, Function and Norming of Government Discretion and Policy Regulations (Beleidsregels) in the Implementation of Government in the Indonesian Rule of Law". *An-Nizam: Journal of Law and Society*, 14 (2).
- Victor Imanuel W. Nalle. (2016). "The Position of Policy Regulations in the Government Administration Law". *Legal Reflection, Journal of Legal Science*, 10 (1).
- Victor Imanuel W. Nalle. (2018). "The Scope of Discretion in Government Administration Law: Constitutional or Unconstitutional?". *Hasanuddin Law Review*, 4 (1).
- Thesis
- Muhammad Thabrani Mutalib. (2017). The Authority of the Court to Examine the Norms of Policy Regulations (Beleidsregel) in Indonesia. Faculty of Law: Universitas Islam Indonesia.
- Legal Document
- Law Number 14 of 1985 concerning the Supreme Court (Indonesian State Gazette Year 1985 Number 73, Additional of Indonesian State Gazette Number 3316).

Judicial Review of Policy Regulations: A Comparative Study of Judicial Review in Indonesia and Netherlands

Law Number 10 of 2004 on the Formation of Legislation (Indonesian State Gazette Year 2004 Number 53, Additional of Indonesian State Gazette Number 4389).

Law Number 12 Year 2011 on the Formation of Legislation (Indonesian State Gazette Year 2011 Number 82, Additional of Indonesian State Gazette Number 5234).

Supreme Court Decision Number 23P/HUM/2009.

Supreme Court Decision Number 03P/HUM/2010.

Supreme Court Decision Number 04P/HUM/2008.

Supreme Court Decision Number 01P/HUM/2016.

Supreme Court Decision Number 48P/HUM/2016.

Supreme Court Decision Number 37P/HUM/2010.

Website

<https://www.hukumonline.com/berita/a/putusan-ma--surat-edaran-bukan-objek-hak-uji-materiil-lt58f4255c93fc1/>, accessed on 15 June 2024