UNDERSTANDING BESCHIKKING, REGELING AND BELEIDSREGEL IN INDONESIAN LEGAL SYSTEM

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UNDERSTANDING BESCHIKKING, REGELING AND BELEIDSREGEL IN INDONESIAN LEGAL SYSTEM

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Abstract: This article examines *beschikking, regeling,* and *beleidseregel* in the Indonesian legal system. This article aims to understand *beschikking, regeling,* and *beleidseregel* in the context of its content's type, form, and material. Using a conceptual approach method, this article will likely provide an understanding for academics and practitioners in the field of legislation. The results of this study show that *beschikking* in Indonesia appears in the form of KTUN. In contrast, *regeling* appears in the form of laws and regulations, while *beleidseregel* manifests in circulars and instructions. Measuring the marketability, binding, and usability of a *beschikking, regeling,* and *beleidseregel* uses a typology approach to the division of power.

Keywords: *beschikking; regeling; beleidseregel;* law; Indonesia

INTRODUCTION

Legal products in each country (both *wet in formele zin* and *wet in materiele zin*) (Aziz, 2010) have the potential to be tested if, in Indonesia, the test can be done by the Constitutional Court (Mahkamah Konstitusi/MK) and the Supreme Court (Mahkamah Agung/MA). So much of legal products are being tested (*judicial review*), indicating that public trust in a legal product is low, causes conflict (antinomic norms), and is allegedly not meeting legal objectives (Mochtar, 2015). A growing phenomenon in Indonesia, a bill is ready to be tested after it is passed. This impasse gave rise to allegations that the bill could not accommodate the interests of the public and was forced to be passed by lawmakers.

Another factor contributing quite a lot to the number of legal products tested by the Constitutional Court or MA is the incomprehension of the makers of these legal products. For example, in the context of making *beleidsregel*, the maker of *beleidsregel*, although based on the principle of *freies ermessen*, must still be guided by the negotiating regulations and the general principles of good governance. Unfortunately, few ignore these rules, so *beleidsregel* is often in question. In making KTUN also, many state administrative officials, who in making KTUN pay less attention to the rules of formation of KTUN. In fact, in the formation of undnag0undang, these basic rules are often forgotten, either due to *human error* or *dolus/culpa* factors.

The snowball phenomenon of the *omnibus law* method (Al-Fatih, 2020), for example, which has not been initially accommodated in the technique of drafting laws and regulations, is "forced" to be included in the revision of the Law on the Establishment of Laws and Regulations. Such complex problems in Indonesia's legal and legislative system should be unravelled to make it easier for academics to deliver material in study rooms and for practitioners in the field. Thus, through

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this article, the author tries to parse the meaning and definition of *beschikking, regeling,* and *beleidseregel* in the legal system in Indonesia, accompanied by its characteristics and examples.

RESEARCH METHOD

Conceptual methods (Irwansyah, 2020) are used to provide understanding for the readers of this article. The purpose of writing this article, of course, is to be able to contribute to academics and practitioners in the field of legislation (Al-Fatih & Siboy, 2021).

RESULTS AND DISCUSSION

Problems in Understanding the Meaning of *Beschikking, Regeling* and *Beleidseregel* in Indonesia

Understanding the terms *beschikking, regeling* and *beleidseregel* is fundamental for academics and legal practitioners. A less comprehensive understanding of *beschikking, regeling* and *beleidseregel* has an impact on the existence of incorrect *judicial review*, inappropriate court competence also of course results in court decisions that are not in line with the rules of law. The author conducts an inventory of several cases that are pros and cons to the understanding of the meaning of *beschikking, regeling* and *beleidseregel*.

Table 1. Types of *Beschikking, Regeling* and *Beleidseregel* that Give Rise to Pros and Cons

No.	Type	Information
1.	Circular Letter	Supreme Court Decision No. 23 P/HUM/2009 on Circular Letter of the Director General of Minerals, Coal and Geothermal, Ministry of Energy and Mineral Resources of the Republic of Indonesia Number: 03.E/31/DJB/2009 concerning Mineral and Coal Mining Licensing
2.	KTUN	PTUN Decision Number 09/G/2015/PTUN-BNA, Case Number 01/G/2015/PTUN-BNA and PTUN Decision Number 07/G/2013/PTUN-BNA in Banda Aceh which was rejected by the Supreme Court
3.	Law	Constitutional Court Decision Number 91/PUU-XVIII/2020 with a decision to grant a letter application for formal examination of Law Number 11 of 2020 concerning Job Creation and declare it Conditionally Unconstitutional

Source: Author-processed, 2023 (Nalle, 2013)(Astariyani & Hermanto, 2019)(Muhibuddin, Syahbandir, & Rasyid, 2017)(Wicaksono, 2022).

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Based on the table above, it can be found that there is a disagreement and debate among academics regarding policy regulations (*beleidsregel*), where some argue that policy regulations fall into the categorization of regulations that can be tested in the Supreme Court, but on the other hand there are those who disagree and think that policy regulations should not be tested. Dissent also arises when responding to the publication of a KTUN (which is a *beschikking*), where on the one hand it is interpreted with a positive fictitious approach, while on the other hand it can be interpreted with negative fictitious (Rodding, 2017). In the context of *regeling*, the phenomenon of the birth of Law Number 11 of 2020 concerning Job Creation (hereinafter referred to as the Ciptaker Law) has given birth to a new history for the Constitutional Court (MK), that since the Constitutional Court was established only during the testing of the Ciptaker Law, the Constitutional Court in its ruling stated that it accepted part of the formal testing of the Ciptaker Law and was declared conditionally unconstitutional.

These various problems, should be avoided if from the beginning, the framers of laws or administrative governments, understand the context and meaning of a *beschikking, regeling* and *beleidseregel* that they make. When the makers of *beschikking, regeling* and *beleidseregel* understand the legal product they are making, then they will also easily convey it to the public and minimize further legal remedies. Thus, in the next section will be described about the definition, content material, form and function of *beschikking, regeling* and *beleidseregel* in the legal system in Indonesia.

Meaning and Definition of *Beschikking, Regeling* and *Beleidseregel*

State regulations (*staatsregelings*) or decisions in a broad sense (*besluiten*) can be divided into 3 (three) groups, namely *wettelijk regeling* (legislation), *beleidsregels* (discretionary regulations), and *beschikking* (determination) (Anggono, 2018). Understanding the meaning and definition of *beschikking, regeling, beleidseregel* and *bestuur* in the Indonesian legal system, becomes an academic discussion that has developed from time to time. Because, many doctrines put forward differences between one another. In fact, in fact, it is very important to be able to understand it, so that its manufacture and application can be in accordance with the rules. In this section will be discussed one by one, about the development and definition of each of them.

1. *Beschikking*

Beschikking is often interpreted as a decision (some others also call it a decree) (Haris, 2017) that serves as the basis for the unilateral action of the government to run the government outside the other branches of power (legislative or judicial) (Herman & Noor, 2107). *Beschikking* is widely used in the sphere of state administration (Asshiddiqie, 2011), giving birth to delegation authority (Fadli, 2011), which has a correlation with the principle of *delegatus non potes delegare*.(Carr, 2016) Government officials who obtain certain authority based on delegation, must carry out the mandate. The nature of the decision is individual and concrete. Its validity depends on the internal governing environment in which the decision is made. Thus, if any of the ward members feel that a decision should not be made, then a lawsuit can be filed with the PTUN and become the object of the dispute.

Based on the legal system in Indonesia, *beschikking* is regulated in Law Number 30 of 2014 concerning AdminisGovernment Trasi (hereinafter referred to as the AP Law). In Article 1 number 7 of the AP Law, it is stated "Government Administration Decisions which are also called State

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Administrative Decisions or State Administration decisions hereinafter referred to as Decrees are written provisions issued by Government Agencies and/or Officials in the administration of government".

The explanation in the AP Law contains legal consequences, that every decision made (*beschikking*), must be in accordance with the provisions of laws and regulations and the general principles of good governance (Repi, 2014). Thus, the decision was not easily sued to the PTUN because its validity was questioned. Related to its type, *beschikking* in Indonesia is divided into 3, namely (Agustina, 2018):

a. Unilateral - concrete - individual;
b. Unilateral - concrete - general; and
c. More than one government institution - concrete - common.

The 3 (three) types are distinguished based on the government administrative agency / institution that makes them, whether one or more of one institution and the scope or environment of a decision. Referring to some of these explanations, *beschikking* elements are obtained, which include; (a) statements of will that are unilateral (one-sided), (b) issued by government organs, (c) based on the norms of authority provided for in public law (laws and regulations), (d) can be used for matters of a special nature or concrete and individual events, (e) with a view to causing legal consequences in the administrative field (Haris, 2017).

The forms of such decisions vary. When viewed from the impact of decisions on people, the form of decisions can be detailed, as follows: (i) decisions in the framework of verbod (prohibition) and/ or gebod (order) provisions, for example: granting permits, dispensations or concessions, (ii) decisions that provide a certain amount of money, for example: the provision of subsidies, facilities, etc., (iii) decisions that impose a financial obligation, for example: encumbrance On taxes, (iv) decisions granting a position, for example: the appointment of a civil servant, the placement of certain buildings, (v) foreclosure decisions, for example: the revocation of property rights or the withdrawal of goods from citizens used in the public interest (Haris, 2017).

Against these decisions, as previously explained, a lawsuit can be filed with the PTUN as the object of dispute (KTUN) and can be decided legally void, void or revocable. The reason that is often the applicant's argument for the annulment of a decision is abuse of power, relating to inconsistency with legislation and general principles of good governance. This is natural because the decisions made are often based on the principle of discretion attached to government officials.

2. *Regeling*

Regeling is often interpreted as a form of legislation or a certain regulatory product that means regulation (Asshiddiqie, 2011). It is general and abstract in nature with the aim of organizing. It is very different from the *beschikking* or decision in the previous discussion, which is individual and concrete (PPN/BAPPENAS, 2012). There are 4 properties or characteristics of a law (*wettelijk regeling*) namely, first, in the form of a written decision, so it has a certain form or format. Second, it is established, established, and issued by authorized officials, both at the central and regional levels based on attribution and delegation. Third, it contains rules for behavior patterns, thus laws and regulations are regulating (*regularend*), not one-way (*einmahlig*). Fourth, binding in general (because it is addressed to the public), meaning that it is not addressed to a specific person or individual /not individual (Ranggawidjaya, 1998).

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According to the author, all forms and types of hierarchies of legislation in Indonesia in Article 7 of the P3 Law, fall into the category of *regeling*. Although, in the development of nyes, there are pros and cons, for example regarding the MPR TAP, which in phrase uses the word statute that is closer to the linguistic terminology of *beschikking*. However, the author sees that the TAP MPR is made to bind the whole community and not only applies internally to institutions within the MPR. Therefore, the author puts Article 7 of the P3 Law, ranging from the Constitution to the Regional Regulations, into the category of *regeling*.

A unique phenomenon related to the meaning and definition of *regeling* or regulation, is precisely contained in Article 8 of the P3 Law. Because, in Article 8 of the P3 Law, there are several types of regulations that are not made by the legislature, but also executive and judicial institutions. Related to this phenomenon, there is a difference in terms, namely the power to regulate by the legislature is called the legislative *pouvoir*, while the governing power possessed by the executive agency to carry out or regulate the work of laws is called *pouvoir reglementaire* (Latif, 2014).

Against this phenomenon, Bayu Dwi Anggono divides it into 3 types of regulations and their binding power. First, the regulations of institutions that have binding power are only internal, that is, they are only binding on the organization of the regulator because they are related to the rules of the institution's order, organizational structure and the like. Included in this category include MPR Regulations, DPR Regulations, DPD Regulations, Judicial Commission Regulations. Second, the regulation of the institution which in principle is binding internally, but in its implementation has a lot to do with other subjects outside the organization that will be related if you want to carry out certain legal actions related to the institution, including the MA Regulations and the Constitutional Court Regulations, especially for various regulations regarding the guidelines for the organization. Third, institutional regulations that fall into the category of laws and regulations because they have broader general binding force, for example Bank Indonesia Regulations (Anggono, 2018).

Meanwhile, based on the author's perspective, in fact the regulations/regeling that exist in the Indonesian legal system, need to be distinguished based on the source of authority. First, regulations that are autonomous in nature. Autonomous regulations are in Government Regulations in Lieu of Laws (Perppu) and Presidential Regulations, where the authority rests with the President. The coercive crunch clause on which the Perppu was made, became the subjectivity and authorization of the President. Likewise in the formation of Presidential Regulations (previously known as Presidential Decrees, Presidential Determinations and the like). Second, regulation whose authority is granted by the Act or commonly also referred to as the delegation regulation. This type of regulation is contained in Government Regulations (PP), Regional Regulations and Ministerial Regulations. In its development, the delegation of authority in the field of legislation in Indonesia, is manifested in different forms and types. All three types are widely dispensing but in legislation form. Third, regulations whose source of authority comes from judicial and executive powers. Article 8 contains many types of regulations that originate from authority beyond the legislative power.

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3. *Beleidsregel*

Beleidsregel has differences with *regeling*. Although it is formed from the same basic word regel, which means regulation, *beleidsregel* is closer to *beschikking* or decision. *Beleidsregel* is often interpreted as a policy regulation, arising from the principle of *freies ermessen*, or freedom of action of government officials. Meanwhile, in other terminology, some refer to it as a policy provision (Manan & Magnar, 1977) and a policy rule (Asshiddiqie, 2011), the purpose is the same, which is to distinguish it from *regeling* or regulation.

Policy regulations, by some academics, remain recognized as laws and regulations if they meet the following characteristics (PPN/BAPPENAS, 2012): a. In the form of written decisions or regulations that have a certain form and format; b. Established or established by state institutions *or* authorized officials both at the central and regional levels formed based on statutory authority, whether attribution or delegated; c. Contains binding legal norms in general, it means legal norms that are aimed at many people and are not aimed at specific individuals, but apply to anyone. d. Through the procedures stipulated in the laws and regulations, it means that the formation of these laws and regulations has been regulated in certain laws and regulations.

Meanwhile, other academics describe *beleidsregel* with the following characteristics (Eric & Anggraita, 2021): 1. Made by government agencies/officials; 2. The authority to make policy regulations is not based on authority based on laws and regulations but because of the discretion possessed by the government agency/official so that it is not an implementing regulation of laws and regulations; 3. Can take various forms, such as circulars, instructions, etc.; 4. May contain orders, execution instructions, notices, advisories, etc.; 5. Applies to the government agency/official that issues it and all agencies/officials within the scope of their authority and can sometimes apply outside.

The establishment of policy regulations (*beleidsregel*) is based on the existence of a *beoordelingsruimte* (consideration room) in order to take public legal actions of a regulatory nature that lawmakers give to officials or government bodies on their own initiative. This initiative is in the form of positive concrete actions to solve the problems of governance faced at a certain time that require regulation (Astariyani & Hermanto, 2019). In the statutory regulation system, *beleidsregel* along with policy *rule*, *spiegelsrecht* or *pseudowetgeving* are categorized as policy arrangements (Eric & Anggraita, 2021)(Attamimi, 1993). In Germany, it is called *verwaltungsvorschriften*. Meanwhile, quasi-legislation, pseudo-legislation, policy rules, policy, quasi-law, administrative quasi-legislation, administrative rules, *tertiary legislation, tertiary rules, quasi-delegated legislation, sub-delegated legislation,* or *soft law* are various designations in English legal literature (Efendi & Poernomo, 2017).

The content of the policy regulations contains separate general rules (*algemene regel*) that go beyond the scope of the rules (*materialsphere*) of laws and regulations that are made operationally regulated. Factors influencing policy include: the environment, perceptions of policymaking regarding the environment, government activities regarding policies and community activities regarding policies (Surbakti, 2013).

Thus, policy regulation is widely referred to as a regulation that has legal relevance, but is not a statutory regulation. Tan Berge said that the Policy Rules (*beleidsregel*) are only biased if the authority of the government is not absolutely bound. Policy Regulations in the practice of government, through policy rules, are given content on the norms to be established for the

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purpose of protection. Policy rules are given the content of norms to be established for the benefit of protection. Policy rules do not rely on a general authority drawn from the statute and therefore do not constitute legislation. An important consequence of this is that citizens (communities) cannot be bound by policy rules. But the implementing organ does bind itself (Astariyani & Hermanto, 2019).

According to the author, with such a paradigm and pattern, what is included in the categorization of *beleidsregel* in Indonesia includes circulars and instructions made by State Ministries/Institutions. When viewed from the content material, then the *beledisregel* or policy regulation cannot be tested by the Supreme Court because it does not include the categorization of the regulation of the negotiation of theg-invitation.

Based on the description of *beschikking, regeling* and *beleidseregel*, a common thread can also be drawn that in the field of legislation, the form and type are divided, according to the material of the charge, its function and maker. This division seems to be inseparable from the division and separation of powers, an idea of not concentrating one power on an institution alone because it has the potential to create authoritarianism and dictators. Aristotle to Arthur Mass, contributed to this idea of the division of power. The idea of the two was then simplified into a typology of power sharing, namely: *capital division of power, areal* division of power and *non-governmental division of power* (Muluk, 2009). In the typology of power sharing, governmental power is divided based on the process of administering government, functions or activities of government and constituencies, both exclusively and shared (Muluk, 2009).

Through this typological approach of power sharing, it can be decomposed the types, forms and matter of *beschikking, regeling* and *beleidseregel* charges more concentrated in the capital division of power and the area of division of power with the *division of* power based on processes and *functions* exclusively. For example, when the Minister makes a Circular, in this case the Minister divides the power of *the capital division of power* based on its functions exclusively. This happens because the Minister is carrying out his specific functions, according to his field, so that no other institution is divided, while the division can be limited to providing input on the Minister's Circular. Therefore, through a typological approach to power sharing, makers of *beschikking, regeling* and *beleidseregel* can explore the extent to which the products they make have marketability, binding power and usability (Wicaksono, 2022) for society.

CONCLUSION

The problem of understanding *beschikking, regeling* and *beleidseregel* resulted in many judicial review lawsuits to the Constitutional Court and the Supreme Court against products made by the legislature and government administration. Thus, it is necessary to understand the meaning, form, and type of *beschikking, regeling* and *beleidseregel* in the legal system in Indonesia. Briefly, *beschikking* is interpreted as a decision, for example KTUN, while *regeling* is interpreted as a regulation, for example laws and regulations, such as: the 1945 Constitution, TAP MPR, Law/Perppu, Presidential Regulation, Government Regulation, Regional Regulations or other forms and types of regulations such as Ministerial Regulations or the like and *beleidseregel* is interpreted as a policy regulation, for example Circulars and Instructions made by State Ministries/Institutions.

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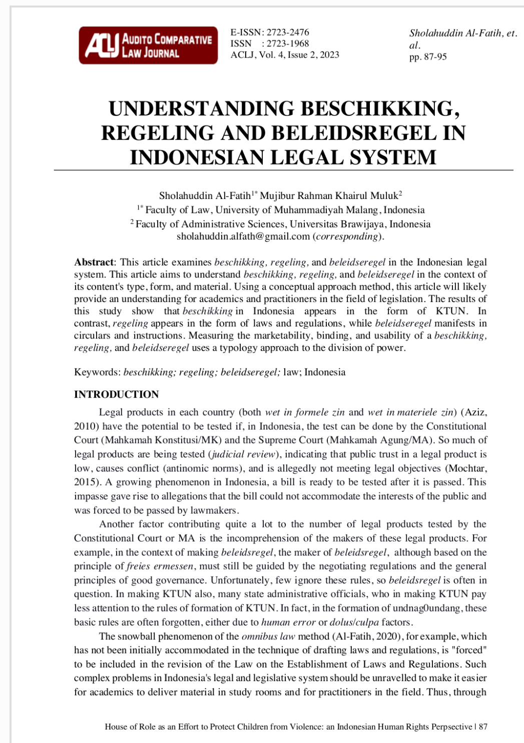

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UNDERSTANDING BESCHIKKING, REGELING AND BELEIDSREGEL IN INDONESIAN LEGAL SYSTEM

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Abstract: This article examines *beschikking, regeling,* and *beleidseregel* in the Indonesian legal system. This article aims to understand *beschikking, regeling,* and *beleidseregel* in the context of its content's type, form, and material. Using a conceptual approach method, this article will likely provide an understanding for academics and practitioners in the field of legislation. The results of this study show that *beschikking* in Indonesia appears in the form of KTUN. In contrast, *regeling* appears in the form of laws and regulations, while *beleidseregel* manifests in circulars and instructions. Measuring the marketability, binding, and usability of a *beschikking, regeling,* and *beleidseregel* uses a typology approach to the division of power.

Keywords: *beschikking; regeling; beleidseregel;* law; Indonesia

INTRODUCTION

Legal products in each country (both *wet in formele zin* and *wet in materiele zin*) (Aziz, 2010) have the potential to be tested if, in Indonesia, the test can be done by the Constitutional Court (Mahkamah Konstitusi/MK) and the Supreme Court (Mahkamah Agung/MA). So much of legal products are being tested (*judicial review*), indicating that public trust in a legal product is low, causes conflict (antinomic norms), and is allegedly not meeting legal objectives (Mochtar, 2015). A growing phenomenon in Indonesia, a bill is ready to be tested after it is passed. This impasse gave rise to allegations that the bill could not accommodate the interests of the public and was forced to be passed by lawmakers.

Another factor contributing quite a lot to the number of legal products tested by the Constitutional Court or MA is the incomprehension of the makers of these legal products. For example, in the context of making *beleidsregel*, the maker of *beleidsregel*, although based on the principle of *freies ermessen*, must still be guided by the negotiating regulations and the general principles of good governance. Unfortunately, few ignore these rules, so *beleidsregel* is often in question. In making KTUN also, many state administrative officials, who in making KTUN pay less attention to the rules of formation of KTUN. In fact, in the formation of undnag0undang, these basic rules are often forgotten, either due to *human error* or *dolus/culpa* factors.

The snowball phenomenon of the *omnibus law* method (Al-Fatih, 2020), for example, which has not been initially accommodated in the technique of drafting laws and regulations, is "forced" to be included in the revision of the Law on the Establishment of Laws and Regulations. Such complex problems in Indonesia's legal and legislative system should be unravelled to make it easier for academics to deliver material in study rooms and for practitioners in the field. Thus, through

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