

Discretion of Budget User Officials in Carrying Out Authority for the Purpose of Development: Limits, Legal Effects, and Responsibilities

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Abstract: *In the concept of a welfare state as adopted by Indonesia, government officials are given the authority to use discretion in the administration of government for the benefit of the people and development. The problem examined is the limits of the use of discretion, legal consequences, and accountability of officials. The methodology used is normative legal research. From the research it is known that the use of discretionary authority by Budget Users is ruled by Law No. 30 of 2014 concerning Government Administration which regulates the purpose, scope, requirements and procedures for the use of discretion. In principle, the use of discretion must pay attention to the General Principles of Good Governance (GPGG). While the legal consequences arising in the use of discretion there are 2 types, namely: invalid and can be cancelled according to the category of action taken. In connection with the responsibility for the use of discretion can be divided into 2 (two), namely: (1) as a position of responsibility, and (2) as a personal responsibility. Basically the use of discretion by Government Officials cannot be convicted, as long as the Government Official uses discretion in accordance with the objectives, scope, requirements and procedures in Law No. 30 of 2014 and not against the law that can harm the country's finances.*

Keywords: Discretion, Budget Users, Legal Effects, Accountability

1. Introduction

The main role of the Government is to realize the ideals of the Indonesian people as stipulated in the Preamble of the 1945 Constitution of the Republic of Indonesia. One of the goals of the state to be realized is prosperity. In other words, realizing prosperity for all citizens is a priority for the government. Indonesia as a welfare state, has several consequences for the administration of government, namely the government must play an active role in interfering in the socio-economic life of the community. For this reason public service is delegated to the government.¹

The implementation of public services by the state is a manifestation of the concept of the welfare state, because in the concept of the welfare state the government is given broad authority in the administration of public interests or in other words the government is given the authority to act / act actively interfering in the socio-economic affairs of its citizens. In this concept the government implements an obligation to realize the welfare of the people through education, the provision of health services, the provision and expansion of employment, and the implementation of other governmental tasks.²

Related to that, S.F Marbun stated that³ public services can be carried out and achieve maximum results, given to the State administration a certain independence to act on their own initiative to solve various complicated problems that require speedy handling, while those problems do not exist, or a legal basis for its resolution has not been established by the legislative body then in administrative law given free authority in the form of discretion.

The granting of authority to the state administration to act on its own initiative is customary according to S.A. de Smith is known as a discretionary power, a term which contains a broad range of obligations and powers. Obligations are actions that must be done, while the broad powers that imply the freedom of choice; do or not do an action. In practice between obligation and power are closely related.⁴ Nata Saputra defines the *freies ermesen* of freedom granted to administrative tools, namely freedom which in principle allows state administration tools to prioritize the effectiveness of an objective rather than to adhere to the legal provisions.⁵

Freies Ermessen or discretion is owned by every office holder or government official to take strategic policies in the form of decisions or actions in overcoming urgent concrete issues that require immediate treatment. Discretion by government officials often causes polemic in the

¹Lutfil Ansori, *Diskresi dan Pertanggungjawaban Pemerintah Dalam Penyelenggaraan Pemerintah*, Government Discretion and Responsibility in Government Administration Jurnal Yuridis Vol.2 No. 1 Juni 2015.

²Henny Juliani, *Pertanggungjawaban Pejabat Pemerintahan Dalam Penggunaan Diskresi Yang Membebani Keuangan Negara*, Accountability of Government Officials in the Use of Discretion that Imposes State Finance Administrative Law & Governance Journal Vol. 1 Edisi 3 Agustus 2018.

³ S.F.Marbun, *Pembentukan, Pemberlakuan, Dan Peranan Asas-asas Umum Pemerintahan yang Layak dalam Menjelmakan Pemerintahan Yang Baik dan Bersih di Indonesia*, The Establishment, Enforcement, and Role of General Principles of Government that Deserve to Embody Good and Clean Governance in Indonesia, (Disertasi, Universitas Padjajaran Bandung, 2001), hlm 73.

⁴Ridwan HR, *Hukum Administrasi Negara Edisi Revisi*, (Jakarta: Raja Grafindo Persada, 2013), halaman 15

⁵Ibid

community, it can even be considered as potentially detrimental to state finances.⁶

Normatively the term discretion can be found in Article 1 number 9 of Law Number 30 Year 2014 concerning Government Administration. The presence of this Act is intended to create an orderly administration of government, create legal certainty, prevent abuse of authority, ensure accountability of government agencies and / or officials, provide legal protection to citizens and government officials, implement the provisions of the legislation and apply the principles general principles of good governance, and provide the best service to citizens.

Government officials' policies implemented in the form of discretion should be protected by a legal umbrella, so that every government official who acts on behalf of his position and is used in the public interest will receive legal protection. State Administrative Law becomes an instrument of legal protection, as regulated in Act Number 30 of 2014 concerning Government Administration. The law guarantees government officials that the demand to reach a just and flexible decision / action in the administration of modern government is a necessity, so that discretion is seen to be able to make an important contribution to the public interest.⁷

As a state of law, all Government actions must be based on law, where there are restrictions on state power and protection of human rights, this is important so that the government does not act arbitrarily or there is no abuse of authority that can cause harm. Therefore, the principle of obeying the law has an important role in the administration of government.

One of the reasons behind the enactment of the Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration is in the framework of improving the quality of government administration, agencies and / or government officials in using authority must refer to the general principles of good governance and based on the provisions of the legislation -invitation.⁸ This law is the legal basis in the administration of government in an effort to improve good governance and as an effort to prevent the practice of corruption, collusion, and nepotism. Thus, this Law must be able to create a bureaucracy that is increasingly good, transparent, and efficient.⁹

In one of the considerations of Presidential Regulation No. 16 of 2018, it is said that the Government Procurement of Goods / Services has an important role in the implementation of national development to improve public services and the development of national and regional economies. In relation to the procurement of government goods / services, the Budget User (PA) as an official who holds the authority to use the budget of the State Ministry / Institution / Regional Apparatus becomes the dominant

authority in the governance of the implementation of the use of the state / regional budget.

Based on the background of the problems above, the problem formulations in this study are:

- 1) What are the limits of the authority of the Budget User Officer in the use of statutory discretion?
- 2) What are the legal consequences and legal liability for the Budget User Officer who uses the discretion?

Based on the above problem formulation, the objectives of this study are:

- 1) To analyse the limits of the discretionary authority of the Budget User Officer as stipulated in the Legislation.
- 2) To analyse the legal consequences and legal liability for the Budget User Officer who uses the discretion.

A. Usefulness

The purpose of this study is to examine the limits of the discretionary authority of the Budget User Officer regulated in the Legislation, the legal consequences and legal liability for the Budget User Officer who uses discretion. This paper is expected to make a theoretical and practical contribution to the development of legal science, especially those relating to discretion. The research method used in this study is a normative juridical method, which is a process to find the rule of law, legal principles and legal doctrine to answer the legal issues at hand. In this study, researchers used three approaches, namely: (1) the statutory approach; (2) a case approach; (3) and the comparative approach. The use of these three approaches is intended to complement one approach to another. According to Campbell, just one approach is not sufficient to analyse complex legal cases.¹⁰

1) Definition and Effect of Legal Discretion.

In the conception of a modern legal state, discretion is absolutely needed by the government and inherent to that authority (inherent aan het bestuur), in line with the increasing demand for public services that must be provided by the government on the increasingly complex socio-economic life of citizens.¹¹ According to Sjachran Basah, *ermessen freies* are the freedom to act on their own initiative, but in their implementation the administrative actions of the state must be in accordance with the law, as stipulated in the rule of law based on Pancasila. Whereas Diana Halim Koentjoro interpreted the *freies ermessen* as the independence of acting the state or government administration (executive) to solve problems arising in a state of urgency, where there are no settlement regulations for the problem.¹²

Some Articles which regulate discretion in Law 30 of 2014 concerning Government Administration, namely:

Article 22

- 1) Discretion can only be exercised by an authorized Government Official.

⁶Henny Juliani, Op.Cit.

⁷Ibid

⁸Lihat Undang-Undang Republik Indonesia Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan, KONSIDERAN Menimbang.

⁹Ibid.

¹⁰ Enid Campbell (*et.al.*), *Legal Research*, The Law Book Company Ltd., Sydney, 1996, hlm. 274.

¹¹ Ridwan, *Tiga Dimensi Hukum Administrasi dan Peradilan Administrasi*, Yogyakarta: FH UII Press, 2009, hlm. 80 – 81.

¹² Diana Halim Koentjoro, *Hukum Administrasi Negara*, Bogor: Ghalia Indonesia, 2004, hlm. 41

- 2) Every use of Government Official Discretion aims to:
 - a) Streamlining the administration of government;
 - b) Fill the legal vacuum;
 - c) Provide legal certainty; and
 - d) Overcome the stagnation of government in certain circumstances for the benefit and public interest.

Discretionary Scope

Article 23

Government Officials' discretions include:

- a) Decision making and / or action based on statutory provisions that provide a choice of decisions and / or actions
- b) Decision making and / or action because the statutory regulations do not regulate;
- c) Decision making and / or action due to incomplete or unclear laws and regulations; and
- d) Decision making and / or action due to government stagnation for broader interests.

Discretionary Requirements

Article 24

Government Officials who use Discretion must meet the following requirements:

- a) In accordance with the purpose of Discretion as referred to in Article 22 paragraph (2);
- b) Does not conflict with statutory provisions;
- c) In accordance with AUPB;
- d) Based on objective reasons;
- e) Does not cause a conflict of interest; and
- f) Done in good faith.

Article 25

- 1) The use of Discretion that has the potential to change the budget allocation must obtain approval from the Official Boss in accordance with statutory provisions.
- 2) Approval as referred to in paragraph (1) is carried out if the use of Discretion is based on the provisions of Article 23 letter a, letter b, and letter c and causes legal consequences that have the potential to burden state finances.
- 3) In the event that the use of Discretion raises public unrest, emergencies, urges and / or natural disasters occur, Government Officials must notify the Official Officer prior to the use of Discretion and report to the Official Boss after the use of Discretion.
- 4) Notification before the use of Discretion as referred to in paragraph (3) is made if the use of Discretion is based on the provisions in Article 23 letter d which has the potential to cause public unrest.
- 5) Reporting after the use of Discretion as referred to in paragraph (3) is carried out if the use of Discretion is based on the provisions in Article 23 letter d that occurs in an emergency, emergency situation, and / or natural disaster occurs.

Due to the Law of Discretion

Article 30

- 1) The use of discretion is categorized as exceeding authority if:

- a) acting beyond the validity period of the Authority granted by the provisions of the legislation;
- b) acting beyond the boundaries of the validity of the Authority granted by the provisions of the legislation; and / or
- c) not in accordance with the provisions of Article 26, Article 27, and Article 28.

- 2) The legal consequences of using Discretion as referred to in paragraph (1) become invalid.

2) Budget User Authority

Budget Users are officials holding the authority to use the budget of Ministries / Institutions / Work Units of Regional Apparatuses or Officials that are the same as the Institution of APBN / APBD Users. Budget users have a duty to use budget funds effectively. The effectiveness of the use of budget funds can be seen from how much the benefits of budget funds in supporting the performance of government agencies.

The responsibility of the Budget User in using the budget funds is carried out by determining the use of budget funds and packaging work. Errors in using the budget are Budget User errors. Errors in budget use occur when budget funds are used to procure goods / services that lack or do not benefit office performance. Because the provision of budget funds in each work unit is limited, the Budget User is required to use budget funds based on priority order of the interests of agencies in order to improve agency performance. Errors in determining priorities in meeting the needs of goods / services will also have a negative effect on improving agency performance.

3) Concepts of Liability Regarding the Use of Discretion.

Because the authority is inherent in the position, but in its implementation is carried out by humans as representatives or functionaries of the position, the responsibility can be divided into 2 (two), namely: (1) as office responsibilities, and (2) as personal responsibilities.¹³

If someone's legal actions for and on behalf of the position (ambtshalve), then the responsibility lies with the position. If there is compensation or penalty, then it is charged to the state budget or regional budget. Whereas someone's deeds in his capacity as a person, the consequences and responsibility lies with the person concerned, cannot be charged to the position, nor is it charged to the APBN or APBD when there is compensation or fines due to personal mistakes. Personal responsibility related to maladministration in the use of authority and public service. An official who carries out the duties and authorities of the office or makes policies will be burdened with personal responsibility if he carries out maladministration.¹⁴

The legal liability of the official who issues the discretion decision must be distinguished in terms of administration, civil and criminal. In terms of administration, discretionary decisions must be reported in writing to the direct supervisor of the official who issues the discretionary decision. If according to the assessment of the official officer who

¹³Ibid

¹⁴Ibid

issued the discretionary decision, the discretionary decision cannot be justified from a legal and policy perspective, then the supervisor of the official who issues the discretionary decision must order that the discretionary decision be revoked.

2. Resulta and Discussion

According to Bagir Manan, the government's authority to form laws and regulations for several reasons, First, understanding the distribution of power emphasizes the different functions rather than the separation of organs, therefore the function of the formation of regulations does not have to be separate from the functions of governance; Second, in a welfare state the government needs legal instruments to administer public welfare; Third, to support rapid changes in society, encourage state administration to play a greater role in the formation of laws and regulations.¹⁵ But arbitrary actions can occur because the government does not have enough rationality as its parameters. Therefore, any government discretion must be based on the principle of legality, the principle of democracy, the principle of purpose, and the general principles of good governance as a metanorm that underlies government action.¹⁶

The authority of government officials to use the discretion is regulated in the provisions of Article 22 paragraph (1) and (2) of Law no. 30 of 2014. In this Article it is expressly determined that discretion can only be carried out by authorized government officials with the aim of the following matters: (a) launching governance, (b) filling the legal vacuum, (c) providing legal certainty; and (d) overcoming government stagnation in certain circumstances for public benefit and benefit. This means that the use of discretion by government officials is limited and as long as it relates to the 4 goals.

The use of discretion by government officials is not easy, because besides having to have authority, limited objectives, and limited scope as described above, it must also fulfill 6 (six) requirements as regulated by Article 24 namely: (a) in accordance with the purpose of Discretion as referred to in Article 22 paragraph (2), (b) does not conflict with statutory provisions, (c) in accordance with the AUPB, (d) based on objective reasons, (e) does not cause a Conflict of Interest, and (f) done in good faith.

The following describes the procedure for using discretion as regulated in Article 26 below:

- 1) Officials who use Discretion as referred to in Article 25 paragraph (1) and paragraph (2) must describe the purpose, objectives, substance and administrative and financial impacts.
- 2) Officials who use Discretion as referred to in paragraph (1) must submit a written request for approval to the Official Superior.
- 3) Within 5 (five) working days after the application file is received, the Superior Officer determines approval, instruction for improvement, or rejection.

- 4) If the Official Superior as referred to in paragraph (3) rejects, the Official Superior must provide a reason for the rejection in writing.

Further procedures, in accordance with Article 27, are determined as follows:

- 1) Officials who use Discretion as referred to in Article 25 paragraph (3) and paragraph (4) must describe the purpose, objectives, substance and administrative impact that have the potential to change the burden on state finances.
- 2) Officials who use Discretion as referred to in paragraph (1) must submit verbal or written notification to the Official Superior.
- 3) Notification as referred to in paragraph (2) shall be submitted no later than 5 (five) working days before the use of Discretion.

Based on the description of the objectives, scope, requirements, and procedures for the use of discretion above, it can be stated that the Budget User (PA) is authorized to use discretion insofar as it relates to the use of the budget in the institution / institution where he / she is assigned with the obligation to fulfill the requirements and follow the procedures as regulated in Article 22 through Article 29 of Law No. 30 of 2020 concerning Government Administration.

Legal Consequences and Accountability of Budget Users for the Use of Discretion

The essence of discretion is the authority attached to certain positions. As something inherent in the position, the use of discretion is basically in the context of exercising the authority of the position. In other words, when a government official uses discretion, he acts for and on behalf of his position. Government officials who use discretion, as long as the action is carried out in accordance with the AP Law or carried out in order to carry out the authority of the position, then all consequences that arise will be the responsibility of the position.

Even discretion is often used as a tool to obtain certain goals, so this is quite vulnerable and intersects with the subjective interests of the discretion user. Not infrequently government officials use discretion because it is influenced by internal environmental factors and external environmental factors. This is what causes the abuse of authority by government officials, resulting in the neglect of the clean governance general principle (AUPB) and is against the laws and regulations.

It can be stated that the use of discretionary authority by the Government Administration Agency / Officer can only be done in certain cases where the applicable laws and regulations do not regulate them or because the existing regulations governing things are unclear and they are carried out under circumstances emergency / urgent for the public interest that has been established in a statutory regulation.¹⁷

¹⁵ Sudikno Mertokusumo, 2006, *Mengenal Hukum : Suatu Pengantar*, Yogyakarta, Liberty. Hlm 9

¹⁶Henny Juliani, Op.Cit.

¹⁷Ibid

While the definition of public interest according to the explanation of Article 49 of Law Number 5 of 1986 explained that what are meant by "public interest" are the interest of the nation and the State and / or the interests of the community together and / or development interests, in accordance with applicable laws and regulations. This means that it is still possible for sectoral laws and regulations to interpret the meaning of the public interest in a particular field as long as it is not only about the interests of certain people or groups / groups but is broadly applicable.¹⁸

In the field of administrative law, not all administrations or positions that carry out the authority of that government automatically assume legal responsibility, depending on how the position gets authority. Positions that exercise authority on the basis of attribution and delegation are those who assume legal responsibility. Whereas those who exercise authority are based on the mandate, not the party that bears legal responsibility and the responsibility is borne by the grantor of the mandate. Theoretically, in the attribution and delegation the transfer of authority occurs from the attributans and delegates to the attributees and delegates, while in the case of the mandate there is a transfer of authority from the mandator to the mandatary. This transfer of authority is the basis for the transfer of responsibility as stated above.¹⁹ Whereas in the concept of public law, legal liability is related to the use of authority that is not in accordance with legal norms, both in the form of conflicting with applicable laws, abuse of authority, obviously unreasonable, and there is an arbitrary element that results violation of citizens' rights.²⁰

Furthermore, discretionary decisions that result from criminal actions must be the responsibility of the Government Administration Agency or the relevant Agency and discretionary decisions that result in a civil loss for individuals, community groups, or organizations are the responsibility of Government Officials who determine discretionary decisions and discretionary decisions which is caused by negligence of the Government Administration Agency or Agency, or because of collusion, corruption and nepotism, which can be detrimental to the financial state / region and or contrary to state policy.

Government, and Regional Government or can benefit third parties, and other parties become personal responsibility Government Administration Officials that cannot be charged to the state, both civil and criminal.²¹

The first point of view stating that the examination of whether there is an element of abuse of authority carried out by government bodies and / or officials is a joint authority (concurrent authority) between the Administrative Court and the Corruption Court Basically asserting that there is no norm conflict between administrative law and criminal law because The Administrative Court and the Corruption Court actually have different competencies and do not need to be

debated because the context of abuse of authority that becomes the object of each is different. The second point of view stating that the examination of whether there is an element of abuse of authority carried out by government bodies and / or officials must be tested first by the Administrative Court basically wants to emphasize that the use of administrative law in such cases should take precedence over criminal law.

That authority is attached to the position. This form of responsibility can be divided into 2 (two) types, namely: (1) as a position of responsibility, and (2) as a personal responsibility.

If a person's legal actions are for and on behalf of the position, then the responsibility lies with the position. If there is compensation or penalty, then it is charged to the state budget or regional budget. Whereas someone's deeds in his capacity as a person, the consequences and responsibility lies with the person concerned, cannot be charged to the position, nor is it charged to the APBN or APBD when there is compensation or fines due to personal mistakes.

Personal responsibility related to maladministration in the use of authority and public service. An official who carries out the duties and authorities of the office or makes policies will be burdened with personal responsibility if he carries out maladministration. In other words, it can be said that every implementation of government affairs in which there is an element of maladministration and harms citizens, the responsibility and accountability is imposed on the person who commits the maladministration. Basically the use of discretion by Government Officials cannot be criminalized, as long as the Government Official uses discretion using discretion in accordance with the objectives, scope, requirements and procedures in Law No. 30 of 2014 and not against the law that can harm state finances. It is intended that Government Officials are not afraid to use discretion in making decisions and / or actions.

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