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***Discretion in Public Policy in Indonesia***

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**Abstract**

In the perspective of governance, any agency or government official in carrying out its responsibilities shall implement the general principles of good governance. Among these principles is the most basic prohibition of the abuse of authority and the prohibition of arbitrary action. While on the other hand, the regulations authorize the government to act and make decisions that deviate from the principle of legality. Discretion in public policy might be interesting, therefore, the authors are trying to develop the concept of discretion in this paper which discusses the case of discretion in public policy in Indonesia. The paper consists of three sections: first, the introduction which explains what discretion is ; second, the discussion on the case of Indonesia, and third, the conclusion. Hopefully what is presented in this paper can be bring into a better understanding of discretion in public policy in Indonesia.

Keywords: Discretion, Policy, Public

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## **Introduction**

### **Discretion**

In the perspective of governance, any agency or government official in carrying out its responsibilities shall implement the general principles of good governance and it is expected that any measure taken by public officials can be run in accordance with existing laws corridor. Among the general principles of good governance is the most basic prohibition of abuse of authority and the prohibition of arbitrary action. While on the other hand, the regulations also authorize the government to act and make decisions that deviate from the principle of legality. This is then qualified as discretionary (German: *Freies Ermessen*). According to the Law Dictionary, discretion means the freedom to make decisions in any situation encountered in his opinion alone.

Oxford English Dictionary's defines discretion as the "liberty of deciding as one thinks fit, absolutely or within limits". Such limits are typically designed to ensure that decisions are principled rather than arbitrary, and that they respect human and civil rights. Kenneth Culp Davis, "A Public officer has discretion whenever the effective limits on his power leave him (or her) free to make a choice among possible courses of action or inaction".

There are several legal experts who provide such definition of discretion, defines S. Prajudi Atmosudirjo discretion, discretion (UK), *discrétionnaire* (France), *Freies ermessen* (Germany) as the freedom of action or decision of the competent state administration officials and authorities according to their own opinion. Moreover, discretion is needed as a complement of the principle of legality, which is the legal principle which states that every action or deed of the state administration must be submitted to the provisions of the Act. But in practice it is impossible for the Law to regulate everything in everyday life. Therefore, the need for freedom or discretion of the administration consists of free and bound discretion.

Indroharto defines discretionary authority as facultative authority, which does not require administrative official agency or state to impose its authority, instead provides a choice under certain conditions specified in the regulations. Sjachran Basah said that *Freies ermessen* is the freedom to act on their own initiative, but the actions of the state administration must be in accordance with the law, based on Pancasila. Diana Halim Koentjoro interprets *Freies ermessen* as the freedom of the administration or government (the executive) to act to resolve the problems arising in crunch, where the rules cannot solve the problem.

Esmi Warassih says that within the framework of the implementation of public policy, the bureaucrats can determine in its sole discretion to adjust to a situation where they are, especially with regard to the availability of resources such as information, funds, expertise, skilled personnel and the knowledge. That means, discretion is a phenomenon that is very important and fundamental, especially in the implementation of public policy. With the existence of this discretion it is expected that under the existing conditions a maximal result or goal can be achieved.



According to Saut P. Panjaitan, discretion is a form of deviation from the principle of legality. Meanwhile, according to Benjamin, discretion is defined as the freedom of officials to make decisions in its sole discretion. Furthermore Gaius T. Lumbuun defines discretion as follows :

"The policy of state officials from central to local public officials that essentially allow conduct a policy that violates the law, the three conditions. Namely, in the public interest, is still within the limits of jurisdiction, and does not violate the general principles of good governance (AUPB). "

Regarding the definition, T. Lumbuun Gaius explains that people who use discretion might be violating the principle of legality, but in theory the use of discretion does not violate the public interest and represents an instant decision (without a plan) therefore is not a criminal act.

Based on the above definitions, it can be concluded that the essence of discretion is the freedom of administrative agencies or officials of government to act or to make decisions according to their own opinion as a complement of the principle of legality when the law is not able to resolve certain problems that arise in emergency or in some critical situations and where the rules do not exist or the existing regulations are unclear.

According to Muchsan, implementation of discretion by government officials (executive) is restricted to 4 (four) things, namely :

1. In the event of a legal vacuum;
2. The freedom of interpretation;
3. The existence of legislative delegation;
4. For the sake of compliance with legal interest;

Based on the above, it can be concluded that the use of discretionary powers by the Board / administration Officers can only be done in certain cases where the legislation does not exist or because the existing regulations are unclear, in a state emergency / urgent public interest specified in the legislation.

According to Bagir Manan, the government authority establishes regulations for several reasons : first, to understand and to emphasize the difference between the division of powers and the separation of organ function, because the function of the establishment of the rules should not be separated from the function of governance. Second, the government welfare state requires a legal instrument to organize the general welfare. Third, to support the rapid changes in society, encouraging the state administration to play a greater role in the formation of legislation. There are several benefits from the use of discretion by government officials : Government policy contingency related to people's lives can be decided or imposed by the government although it is still debated in juridical or even in a legal vacuum. The Board or government officials are not stuck in legal formalism, assuming that there is no legal vacuum for every public policy insofar as it relates to the public interest or the public at large; The nature and the wheels of government have become more flexible, so that the public service sector more vibrant and development for improving the welfare of the people be not static in the sense remains dynamic.

## **Discussion**

### **Discretion in Public Policy in Indonesia**

The Law No. 30, 2014 states that discretion is the Decision and / or action determined and / or carried out by Government officials to address concrete problems encountered in the implementation of government that gives option in case of incomplete or unclear legislation, and / or the stagnation of government.

Discretion can only be done by authorized government officials. Discretion aims to: launch governance, fill a legal vacuum, provide legal certainty and overcome the stagnation of government under certain circumstances in order to respond to the public interest. Discretion does not conflict with the provisions of the legislation as long as it is based on objective reasons, does not give rise to a conflict of interest and is conducted in good faith.

Officials who are using discretion must describe the purpose, objectives, substance, as well as administrative and financial impact which potentially alter the State's financial burden and results. Then shall submit an application for approval in writing to the official boss. Within 5 (five) working days after the application file is received, the official boss shall set approval, repair instructions, or rejection. If the boss Official's denial, the official supervisor must give reasons for refusal in writing.

In free discretion, the Act only establishes the boundaries and the state administration is free to make any decision that does not exceed / violate the boundaries. Whereas in bound discretion, Act establishes administrative decision alternatives and the state administration is free to choose one of the alternatives provided by the Act.

Concrete examples of bound discretion is the provision of severe disciplinary punishment for the Civil Servants in the form of dismissal according to the Article 8 paragraph b of Government Regulation No. 32 of 1979 on Dismissal of Civil Servants. In the case of dismissal because sentenced to prison by a court decision that has had legal still, as intentionally committed a criminal offense which is punishable by a maximum of four (4) years, or threatened with a more severe punishment. In the explanation that the dismissal as mentioned in this article can be performed with respect or not with respect, one way or another depending on the consideration of the competent authority on heavy or light acts committed and large or small consequences caused by the act. Although the maximum criminal penalty for a criminal offense has been established, but the sentence imposed / decided by the judge of the type of criminal offense that can vary with respect to the severity of the criminal offense committed and the size or the consequences thereof.

So in considering whether civil servant who has a felony that will be laid off or not or whether it will be honorably discharged or not with respect must consider the factors that encourage civil servant who commits a criminal act it, and should be considered severity of court decisions handed down.

In this case, the competent authorities impose severe disciplinary punishment can define severe disciplinary action will be dropped if not honorable discharge at his own request or dishonorable discharge depends on the assessment of severity of violations committed by the Civil Service so if Servants Civil concerned deserve sentenced

disciplinary dismissal with respect not his own request or dishonorable discharge is bound discretion.

Executive level is very close to the public service function. One positive example of discretion committed by government officials is described as follows: "At an intersection, in a traffic jam condition, flow of direction A is too dense while the reverse direction (flow B) is empty. The policeman then gives instructions to the drivers to keep going despite the traffic light is red ". Using the example above, discretion can be used for the purpose of public interest. This indicates that the government should actively interfere with public service which means that the state administration should not refuse to make a decision or act because of the absence of legislation. Freedom of movement is given to the government ; a free hand called discretion.

Discretion as a freedom of action would be susceptible to the complexity of the problem because it deviates the principle of legality in the sense of "exception". When the implementation of discretion takes wrong direction that will cause a huge loss to the community. Experience indicates that many government officials use discretion not in accordance with predetermined rules. Discretion is frequently used as a mean for personal profit or for the benefit of a particular party. Therefore, it is necessary to set limits of tolerance for the use of discretion.

Restriction is necessary because the user's discretion ordinary man who can do no wrong at any time or mistaken. For example, a traffic policeman who orders cyclists, rickshaws, motorcycles, cars and others to pass when the traffic lights is red, giving signs that they may pass is using discretion for the public interest, public safety, public service smoothness, and others in accordance with Law No. 2 of 2000 on the right of the Police have to apply discretion in their duties.

Another example can be seen at the hospital and clinic waiting room where it is written on the board : "We serve patients by emergency nature of the illness, not on the basis of first come". This is different from the public service average where those who come first are the first to be served.

Users of public services there may flout the contents of the board and claim the right to demand the respect of the principle of excellent customer service, which is applied in other places. They may protest to public officials there because that is considered to be outside the norm. But otherwise, the doctor or nurse with the capacity to act as a public official in charge there, has the right to assert the authority to exercise discretion, which is located behind the task, to reflect the implementation of crisis management, under the responsibility of the profession.

When discretion is run in the public interest there is no problem, whereas it becomes a problem when it is used as a mean for other purposes. For example, the issue of traffic control by police, a police officer asks the drivers to keep passing though the light is red, or closes some roads and diverts them to other roads just because of laziness to move. Discretion that has been committed by the police is not appropriate, because the problem occurs only mere removal, remove congestion from which should be the responsibility, moved to another place in the hope that the perpetrators of discretion free from congestion problems.

Discretion will be related to the subject matter that has the authority to make discretionary, the subject is authorized to make a discretionary state administration within the meaning of the narrow sense, ie the executive. Simple forms of administrative decisions outside of legislation that can be seen in the example of everyday life such as a memo issued by the officials, announcements, decrees (SK), determination letters, and others.

Kebumen Regent discretion done by stopping M. Budi Waluyo, SE, Sri Budiarti, Sugiarti and Siti Jaimah as PD employees. BPR Market Bank Kebumen for allegedly involved in the case of fictitious credits that occurs in PD. BPR Market Bank Kebumen.

The authority to dismiss employees PD. BPR Market Bank Kebumen actually Directors, the Board of Directors has the authority to appoint and dismiss employees of the Regional Rural Banks in accordance with the Regulation of the Minister of the Interior No. 22 of 2006 Section 37 subsection b, as well as Kebumen District Regulation No. 2 of 2002 which states that the Board of Directors are lifted and dismiss an employee with the approval of the Supervisory Board of Regents through by legislation in force.

But because of an urgent situation occurs where the credit fictitious suspected adverse PD. BPR Bank Kebumen market worth more than 1.5 billion rupiah led to all the Members of the Board of Directors have also been dismissed in advance by the Regent of Kebumen, the Board of Directors is authorized to dismiss employees attributive PD. BPR Market Bank Kebumen, can not carry out their duties because at the time Plaintiff dismissed, at that time there was Acting Managing Director.

In such circumstances, Kebumen Regent has taken a policy decision to publish the dismissal of the plaintiff by basing on the Central Java Governor Decree No. 64/2002 dated May 13, 2002 which stated Acting (Acting), Acting Officer (Acting), Officer Daily Executive (Acting) and Officer Running Tasks (YMT) is not authorized to set policy such as setting binding decrees and imposition of disciplinary punishment.

PTUN Semarang in Decision Number. 48 / G / 2008 / PTUN.SMG, 49 / G / 2008 / PTUN.SMG, 50 / G / 2008 / PTUN.SMG, and 51 / G / 2008 / PTUN.SMG each April 2, 2009 has confirmed the action The Kebumen regent although attributive authority to dismiss employees PD. BPR Bank Kebumen market is in the hands of directors by reason of urgency and in the public interest and not competent Acting (PJS) Managing Director to dismiss employees PD. BPR Market Bank Kebumen.

Subang regent Eep Hidayat, be convicted in a corruption case collection costs land and building tax (PBB) Subang, the Supreme Court (MA) decided EEP guilty and should be jailed for five years, fined Rp 200 million and the subsidiary three months in prison and obliged to return state funds amounting to Rp 2,548 billion. The Supreme Court canceled the verdict of acquittal previously issued Bandung Corruption Court. Simply put, the regents levy property taxes to repair damaged roads, but not budgeted and set on the year. It can be illegal even if for public services.



Minister of Health, Siti Fadilah Supari became a suspect on suspicion of abuse of authority administration of corruption related to the procurement of goods by direct appointment of bird flu vaccine, which caused the state a loss of about USD 6 billion. Siti Fadilah Supari approved the appointment of direct procurement of medical equipment and hospital supplies to cope with an outbreak of bird flu. Time constraints make Siti Fadilah Supari must perform discretionary, but as a result he was made a suspect because it does not comply with the rules.

### **Conclusion**

Discretion is decisions and/or actions to address concrete problems encountered in the implementation of government where laws and regulations that provide choice, not regulate, in complete or unclear, or the stagnation of government. Discretion could have a positive or negative impact, although the discretionary nature of the move on powers is one of their advantages, misuse of that discretion has the potential to seriously undermine the objectives of the legislation and to damage public confidence in policing. The exercise of any governmental power – be it legislative, executive, or judicial in nature – necessarily involves the exercise with appropriate restraint and judges recognize that they must be constantly vigilant in this regard. It is therefore important that the exercise of discretion be properly managed in terms of being reasonable, bonafide, principled and consistent. That management will only come about with adequate training, clear guidelines and cultural awareness.

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