

THE USE OF DISCRETION AUTHORITY IN THE ISSUANCE OF POLICY REGULATION FOR THE REALIZATION OF GOOD GOVERNANCE

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ABSTRACT

In the practice of administering government in Indonesia, the use of the discretion authority manifested in the publication of policy regulation is facing obstacle, that is, the existence of doubts to its use because it is still considered that there is theory struggle between discretion authority and principle of legality. These conditions should not be allowed because their use is a form of consequence for government to perform their tasks optimally, especially for the realization of good governance. Based on the results of the research with the scope of the policy regulation published by regent / mayor in the aspect of Building Permission (IMB) in the province of Central Java, that its use is not based on its own initiative but prompted by the publication of the policy regulation guidelines from the central government, as its beneficial will not only fill a void of law (rechtsvacuum) even it replaces the material of delegation rule, giving rise to irregularity in the use of policy regulation. The ideal legal construction for the use of the discretion authority in the form of publication of the policy regulation plays the policy regulation as responsive law. The law in this case is the policy regulation as a facilitator of a wide range of response to the social needs and aspirations. On the other hand it is portrayed as progressive law, that the policy regulation is the existence of the free authority to act on its own initiative, which does not always depend upon the legislation. Progressive attitudes need to be built for the officials of the state administration by providing the legal basis in the legislation.

Key words: Use of Discretion Authority, Policy Regulation, Good Governance

Introduction

Indonesia as a welfare state, provide functional consequences that the state is responsible for the people's welfare (Miriam Budiardjo, 1980: 74). In carrying out these functions, the government has large and extensive assignments and affairs. Not only to maintain the security and order of the citizens as well as its sovereignty, but rather also to run government affairs that is public service (AP Le Sueur and JW Herbeg, 1995: 53). To perform these tasks, the government cannot just rely on the existing statutory regulations, because at any time until the legislation will not be able to accommodate all needs of the government.

Meanwhile the government affairs with its activities are always dynamic and evolving according to the needs, demands and progress of time. In carrying out its activities and affairs, it should not be delayed by reason that there is no legal basis, so it has to wait for the establishment of the regulations. Of course this must not happen, especially in the urgent interests which will result in huge losses towards delayed service provided to the public. Therefore it needs special authority given to government officials to act freely, based on its own initiative, to take action for carrying out the affairs and activities of public services optimally. It occurs "gap" here between statutory regulations and the needs of setting. This issue is not easy and cannot be quickly resolved by forming the legislation, since many interests or factors affecting it. In such a position, it takes innovation and creativity of the state administration officials that have own initiative to make policy that can reduce the problem of incomplete legislation.

Overcoming such matters, especially in order to public service tasks can be executed well, administrative law provides legal tools in addition to legislations and decisions (beschikking), that is, the policy rules, which is also known as "beleidsregel" (Dutch), "policy rules" (English), "pouvoir discretioner" (French), "pseudowetgeving" (Dutch), "quasi / pseudo legislation" (Indonesian), which the forming is based on the use of discretion authority or "freiss ermessen", formulated in a variety of forms such as regulations, guidelines, announcements, circulars, technical instructions and others.

It turned out in practice, discretion authority owned by state administration officials are rarely implemented. Especially in issuing regulations it has faced obstacles. Though the discretion authority they possess is expected to become a way out in carrying out their duties optimally, so as to achieve a good governance. While its needs of a new arrangement in the form of regulatory policy is perceived if the state administration officials feel hampered in carrying out its government tasks since the basis regulations do not give space to work optimally and do not provide a delegation of setting. In the urgent interest, it takes courage of state administration officials to act on their own initiative to issue a policy rule.

But the opposite thing occurs, the state administration officials tend to be afraid to use it and avoid to utilize his own discretion authority. They keep staying safe with always trying to act in accordance with existing guidelines. This can happen due to reasons based on the recognition of the principle of the legality, which States that the government should not act outside the legislation. Discretion authority is considered to be contrary to the principle of legality. On this basis the state administration

officials do not dare to take risks, and feel afraid if actions deemed contrary to legislation or as an arbitrary action. Moreover, laws and regulations do not set any legal protection for state administration officials who use discretion authority.

These issues should not be allowed, because the impact makes the government organization not run as expected. The act of state administration officials who took no action with reasons it has not been set in legislation, is an act which is not justified because it makes public services delayed. Moreover the needed public service is urgent. So the state administration officials should not be fixated to the existing legislation, but in certain things they must have their own initiative to issue policy rule as the way out, so that good governance can be realized.

Nowadays in the development of administrative law, the embodiment of good governance has always been prominent in a variety of activities, including in the use of regulatory policy. It even has become a central issue in the discussion on governance, as evidenced by the emergence of various concepts of good governance, namely, the concept of the UN, UNDP, World Bank, Asian Development Bank, IMF and the experts. All of which gives discourse of the need for good governance always manifested by the countries.

The concept of good governance now has become a paradigm in organizing governance. Therefore, the embodiment of good governance should be the goal of the use of the discretion authority in the issuance of regulatory policy. Consequently the benchmarks of the use must be synergistic with the concept of good governance. This is the urgency of the functional relationship between policy rules and good governance. Policy rule in its role as a legal instrument, would be felt most when used in the realization of good governance.

THE MOTIVATION AND RESISTANCE

The use of discretion authority by the state administration officials by issuing a policy rule is logical consequence for state administration officials who want to run their duties optimally. Optimally here means that it is executed quickly without having to wait for the issue of the regulating legislation so that public can be served, but it is not contrary to regulations. So the discretion authority belongs to the state administration officials is required to be implemented when there is an issue that must be resolved, but it is not set in legislation.

Based on the research results, by harmonizing the focus of the research aimed at the implementation of the government tasks run by the state administration officials optimally, it can be understood that discretion authority belongs to the state administration officials which is in a written form manifested in policy rule (beleidsregel), practically used to meet incomplete regulatory or to fill the vacuum of legal (rules) in order to meet immediate needs to provide services to the public (Wijaya, 2013:201). Therefore the discretion authority in the practice has a role to complete the principle of legality as long as it can be accounted for the law, so it is hoped that there is no opportunity for public administration officials use their uncontrolled authority.

Discretion authority possessed by the state administration officials is also a consequence of the embracement by welfare state. The state administration officials are required to play role actively throughout the public life. Essentially the state administration officials attached to public service function (bestuuzorg). This heavy duty gives a logical consequence to the state administrative officials to be given freedom to move or act on their own initiative, although there is no governing legislation. It is important, especially in an urgent need, public need services. Do not let the case of public services be halted due to no legislations. Therefore, the state administration officials in performing their duties may not only be facilitated by legislation, but also the discretion authority.

Seeing the importance of the discretion authority, the legal products of the use of discretion authority in the form of policy rule should be acknowledged its existence since it has legal relevance, and not opposed to the principle of legality. The expediency of discretion authority for the state administration officials is to provide a wider space than required by legislation to act in carrying out their duties. So as the public service needs is available or adequate.

The use of discretion authority possessed by the state administration officials must not be confronted or opposed to the principle of legality, so there was no struggle between the theory the principle of legality with discretion authority. This is based on the theory of functions, it is stated that the power of government (verwaltung) formally contains power to regulate and to decide, and materially it contains two related elements, that is, the element to govern and element to organize (Jellinek, 1887: 613-618). Running the power to regulate, the state administration officials have the authority to conduct legal action by issuing regulations, both ruled and not by laws, such as policy rules (beleidsregel).

So the discretion authority and the principle of legality are not options for state administration officials, but both of them are the sources of legitimate authority in carrying out the functions of government. The two are not mutually negating but complement each other.

The policy rules are to regulate matters that have not been set in legislation, but that is not or does not include the type of delegated regulation. The policy rule is always published in the urgent interest, it means that it can no longer be delayed to wait for the new rules. If the state administration officials do not run the discretion authority, they can be regarded as an act of omission or do not have initiative to carry out their duties properly which has resulted to no service to the public. Their own initiative action, for the state administration officials, is the beginning to use discretion authority. The policy rules seen from their willingness come from their own initiative, neither from the public nor from their superior officials. Therefore policy rule as

a public policy, in the formulation, does not always follow the way of formulating a public policy, so that the substance is sometimes incompatible with the needs of the public.

In order to encourage the use of discretion authority to the state administration officials to realize a good governance, it takes a good understanding of the role of discretion authority to fulfill the need of setting that is not regulated in the legislation, in the ways as follows:

- a. Guidance to the state apparatus in stages aimed at changing bureaucracy attitudes from formal legalistic into being progressive or in other word they understand the progressive law which is not tied to the existence of the law;
- b. It needs a law that is able to provide confidence in legal certainty, as well as guarantees or legal protection for state administration officials in the use of discretion authority, so there is no longer any doubt in its use, so it needs to be set on the basis of law and its benchmark of its use; and
- c. Improving the ability of the state administration officials in the forming the policy rules, so that the legal product in the form of policy rules can be accepted by public as law.

It is time to call a policy rule as law due to the fact in its use not only the substance which is technically operational, but it is often found the substance which is legal norm, including prohibition norm, command norm, and sanction norm. This fact gives understanding that the policy rule, though it is not the legislation but it has legal relevance. The material content is adhered since the stakeholders need it, so it is enacted resembling legislation.

Although the beneficial will be perceived by the state administration officials as well as the public, apparently in the use of discretion authority in issuing the policy rules face obstacles (Wijaya, 2013:319), namely:

- a. **Constraint of Structure**
Thinking pattern of the state administration officials which is still formalistic legalistic inhibits the desire to act responsively to the needs of the law, so it tends to be a lot of waiting for orders or any provision of the guidelines given by their superior official.
- b. **Constraint of Substance**
Constraint for legislation, that is, there is no legislation governing the use of discretion authority, so it is often considered to be prohibited to use. It is supported by a narrow understanding of the principle of legality that as if all regulations issued must be based on the regulations in force, so that the rules rooted from the discretion authority is considered contrary to the law.
- c. **Constraint of Culture**
Legal needs of the public often cannot be formulated properly and completely due to the level of public participation which is still low against the legal establishment, so the space for public hearings with stakeholders is not utilized properly.

Facing constraints of structure in using discretion authority by the state administration officials which is in the form of weakness of the bureaucratic attitude of formal-legalistic giving rise to fear breaking the law (*ultra vires*), so it is necessary to change the attitude of the bureaucracy into being progressive or in other words they understand progressive law, which is not bound to the existence of legislation. However, the implementation of a progressive spirit can be realized if the state administration officials have creative ability, innovate, especially in the face of congestion law as a result of the inability of the law to accommodate the needs of the public. The use of the discretion authority can be interpreted as a legal exemption from its "status quo" (Satjipto Rahadjo, 2007:114) to be dynamic.

In the context of the duties of the state administration officials, legal exemption from static can be realized if the state administration officials have the ability to empower themselves in carrying out regulatory functions to make policy rules (*beleidsregel*). It means that incomplete legislation can be solved well when the state administration officials can utilize their own discretion authority.

Definition of the state administration officials holding the authority to obtain freedom of action is the executive board or the government, both at central and regional levels. At least there are some reasons that reinforce the notion, namely:

- a. Government agencies in carrying out their daily functions relate directly to the public, so they knows more the real needs compared to other agencies;
- b. Legislative Board, they have already established their authority in the making of certain laws, so if they are given the basis authority of "*freiss ermissen*", it can cause chaos authority;
- c. Judicial Board, their authority to resolve disputes only and cannot decide without any dispute;
- d. Executive Board, if there is violation in the implementation of "*freiss ermissen*", they are more easily held accountable than others.

Realization Of Good Governance

Policy rule as a legal product that emphasizes the interests of "*doelmatigheid*" than "*rechtmatigheid*" does not mean that it cannot be justified by the law because all deeds or actions of the government must be accountable. As stated by Philippe Nonet & Philip Selznik that discretion must be legally accountable.

Freedom of action which is owned by the state administration officials, does not mean freedom as free of the free, but freedom that can be justified by the law, then there is a limit to it. In the concept of state law there is no freedom without limits.

Unlimited freedom will only lead to disorder, regardless of its purpose. Basic testing is not based on legislations, but rather based on the principle of good governance, which has now developed into "good governance". On that basis it is necessary to develop a functional relationship between the discretion authority and the embodiment of good governance.

In terms of realizing good governance, the study of the use of discretion authority in the formation of policy rules must be able to accommodate the requirements or efforts that must be made to realize the "good governance". The word "good governance" is etymologically derived from the word "good government", but because of the growing need especially for a new government paradigm (reinventing government) that perform sorting the government tasks with the tasks handed to the market and civil society. The government is portrayed as a regulator, it means that the government in carrying out their duties do not only implement the law, but also perform the task of setting. In this setting one of which can use the discretion authority.

At first the concept of "good governance" is not known in administrative law, and began to be heard after the UN through the OECD (Organization of Economic Cooperation and Development), which is later followed by the World Bank, ADB (Asian Development Bank) and the IMF (International Monetary fund) who use them as a condition to developing countries that need loan. As a determinant or standard, then developing countries are determined to organize good governance, by applying a government which is transparent, responsive, participatory, obey the law, consensus-oriented, and accountable. In its development then the concept later expanded variedly.

The use of discretion authority in the form of the issuance of policy rule provides legal instruments for state administration officials in realizing good governance, namely:

- a. Provide the same guidelines used for state administration officials in making decisions, in this case is the embodiment of justice;
- b. The realization of public services;
- c. Provide space of responsibility for measuring the truth upon a decision of the state administration officials, thus it fulfills accountability.

In practice, the use of discretion authority in the form of policy rule has become an integral part of the regional administration, but in practice it has weakness because there is more guided or awaiting policy rule issued by their superior officers, thereby substantially it is not an own initiative (Wijaya, 2013:317). If this is maintained, then the discretion authority they possess will be losing its meaning which is not done in an urgent time.

In terms of legal certainty, the policy rules provide guarantee of legal certainty because of its role to fill the legal vacuum (*rechtsvacuum*). Even the policy rule made by the state administration officials has been the basic rules for local governments in the implementation of licensing services. In terms of fairness, the policy rule has been portrayed as a guideline for the state administration officials in formulating concrete policies, it is proven that the state administration officials have obtained the same consideration and measurable. In practice though it is not a binding legislation in general, in fact it has legal relevance, which is used as the rules followed and used as such as legislation. In practice it has never been questioned about the absence of the regulating laws because the policy rule has been deemed to have given a sense of justice.

In terms of usefulness, throughout policy rule it obtains benefits of empowerment functions of governance for public service optimally. Without the policy rules, the state administration officials, especially in region, which is in charge of providing public services will face obstacles. If viewed from the time of the enactment of the policy rules that are long enough and does not know the time limit for basic establishment of the legislation, then the value of the usefulness will be no need to doubt since it has been perceived by the public.

The use of discretion authority for the issuance of policy rules, in the perspective of responsive law, then the formulation must provide space for public involvement in the planning process through to the publication. In this case, the possibility of uncontrolled authority of the state administration officials to use their authority, such as: contrary to regulations, abuse of authority and arbitrary act is not going to occur. The chances are getting smaller, because the character of the responsive policy rules have quality to meet the principles of transparency, participation, and accountability, which became the essence of the embodiment of good governance.

Moreover, the state governance nowadays develops the concept of participatory democracy which is a refinement of previous democracy requiring the participation of public in decision-making related to public policy. For the realization of participatory democracy, it needs public confidence that grows starting from transparency. Therefore, it is not excessive if transparency, trust and participation become a bond in realizing participatory democracy.

An Ideal Construction Of Law

The research results showed that the use of discretion authority to issue policy rules not on the initiative of the state administration officials. As a result of legal vacuum (*rechtsvacuum*) left alone, so that state governance is not maximal. This attitude gives an overview that the state administration officials are not responsive to the needs of settings in fulfilling the needs of public service. Policy rules are not portrayed as a responsive legal, consequently the expected initiative cannot grow in the attitude of the state administration officials of, but rather tend to be silent or wait for the publication of the guidelines from their superiors. Whereas the emergence of a boost to the state administration officials to have their own initiative to act starts from the idea to organize governmental affairs maximally.

Theoretically, the use of discretion authority based on their own initiative is a must, as stated by Thomas J Aaron, that freedom to act is given to the state administration officials in order to overcome immediately urgent problems (Aaron Thomas J: 1964: 4). The speed of the act becomes an important factor of its use, so it is not necessary to have another procedure. Term of initiative itself is a translation of a very urgent need, so that in accordance with the purpose that requires immediate handling it.

Building an ideal construction should be directed so that the obstacles can be overcome, by basing on theories that can support the conception of ideal construction compiled. In order the policy rule issued is valid, then according to the responsive theory from Philippe Zelznik and Philippe Nonet, who stated that discretion not able to be justified is a foreign object in the jurisdiction (Philippe Nonet & Philip Selznik: 2007: 85), then the issuance of policy rules must also be held legally accountable. In view of the legality of the use of the authority it is granted on an unwritten law. Due to the difficulty of solving problems is still an assumption for going struggle between discretion authority with the principle of legality, then it needs recognition by the law upon discretion authority owned by the state administration officials.

Furthermore, in the view of the substance, then the policy rules must not be contrary to the regulations, must not abuse their authority (*detournement de pouvoir*), and not an arbitrary act (*willkeur*). These criteria can be used as a limit in the pouring material to be set on the policy rule. Upon this matter, the freedom to act in issuing regulations does not mean unlimited freedom, but it still has a limit so as to avoid a legal conflict, and it provides a resolution of the problem by issuing policy rule in order to fill the legal vacuum, which can realize good governance.

In relation to the realization of good governance, the policy rules having been published show support, then to build ideal construction, it must pay attention to the implementation of the principles of good governance. Therefore, in an ideal construction, policy rules issued must have a functional relationship with good governance, among others, the implementation can be structured as follows:

- a. The character of the policy rule must follow the legal politics as stated in the constitution that is a law product which has characters of democracy, populist-responsive, and participatory democracy;
- b. The idea to publish policy rules must be based on the urgent needs for the provision of services to the public. In this case there is a functional relationship between own initiative and service needs (responsiveness);
- c. The substance of the policy rules does not conflict with positive law. In this case there is a functional relationship with the certainty of law;
- d. Formulation of policy rule involves public. In this case there is a functional relationship with the public order in decision-making (participation);
- e. The policy rules fill the legal vacuum. In this case there is a functional relationship with the accountability to the public for a decision (accountability);
- f.

Of the overall functional relationship they provide, the role of policy rules as responsive-participatory law should be developed to cover the ideal construction in using the discretion authority in the issuance of the policy rules. The policy rule that is a responsive-participatory character seems to be more reflective of a sense of fairness and meet the public demand. In the participatory formulation it gives public the opportunity to participate. However, its formation does not eliminate the characteristic of the policy rule itself. In view of willingness it still comes from its own initiative, not from the public or superior officials. There is a legal vacuum (*rechtsvacuum*) and an urgent need to solve the problems immediately.

The existence of legal vacuum showing the setting needs to be a legal basis for the resolution of the urgent issues. Therefore the discretion authority to issue policy rule cannot be conducted at any time, but it requires precision for the state officials to see and understand the truth about the substance which is used as a basic rule, so that it is known the vacancy of the arrangement. Requirements for urgent considerations indicate that the solution may not have to wait for the presence of the legislation established the legislative board. If it is not held it is deemed not to have a policy because it is considered that there is a delay or omission of the public service. In relation to the concerns of the state administration officials to use discretion authority, then for its use they make policy rules and there is no risk as long as it does not conflict with the regulations, they do not abuse their authority (*detournement de pouvoir*) and not in the category of arbitrary acts (*willkeur*).

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