

Incentives and Disincentives of Discretion by Public Authorities

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ABSTRACT

The mindset of most people in Indonesia nowadays is that bureaucracy management is an intricate activity. Until now, the highest level of public complaints is still directed to the government agencies or bureaucracies. The highest complaint is due to the intricate administration within the government bureaucracy. Whereas in 2014, the government enacted a Law no. 30 about Government Administration, with the hopes of improving and facilitating public services, one of the musing the right of discretion by public authorities. However, the polemic happening now is that the discretion policy can be a legal trap, so public authorities are afraid to implement such policy. This research used a method of literature study (qualitative approach), by looking for some references of relevant data and information with the case or problem raised, in order to answer: empirical problem discretion.

Keywords: Government Administration, Bureaucracy, Policy, Discussion

1. INTRODUCTION

The enactment of Law Number 30 Year 2014 concerning on Government Administration since October 17, 2014, is the beginning of a new history for administrative reform in Indonesia. One of the interesting material is about discretion which is rigidly regulated in that law. But then, more than 5 (five) years after the Law of Government Administration is enacted, there is still uncertainty among the government apparatus for discretion.

Although discretion already regulated in detail in the Law of Government Administration, but it is deemed necessary to guarantee legal certainty for the government apparatus when conducting discretion. Ironically, an innovation of government officials is faced with a number of serious obstacles such as criminal prosecution of government officials who innovate policies and public services.

Some innovation in public service, sometimes it end in the criminal prosecution of government officials that involved in the innovation. The question are; is a policies innovation which provides benefits to many communities can be criminalized, and is there is no legal protection for government officials that are able to improve the public services?

Those question is expected to be answered by the publication of the Law of Government Administration. The expectation to this Law publication is not too much, as

in this Law besides discretion, government officials also have rights to get legal protection and protection guarantee in carrying out their duties.

Practically, discretion norm as regulated in the Law of Government Administration empirically not yet implemented. Even most of the government officials, do not want to use the Law of Government Administration as the basis for decision making. Whereas, most of the innovation needs discretionary umbrella as a safeguard for decision making.

This is caused by discretion norm in the Law of Government Administration still impressed like policy making under normal circumstances. Even though, because of it is carried out in under urgent conditions and limited power, discretion should be tolerated when it is thought to break through formal procedures. Different with the normal condition, the formal procedure should be followed. In another words, law guarantee of discretion itself is still being debated, because in various laws and regulations that are still not in line with the spirit of discretion as a choice of policy making in certain circumstances.

Discretion as regulated in Law of Government Administration that should be as policy making safeguard apparently it has not been synergized with regulations related to general criminal law (Article 421 of the Criminal Code), criminal acts of corruption (Law No. 31/1999) and state administration (Law No. 5/1986). Government apparatus do not dare to innovate, do not dare to do discretion for fear of being caught in TUN disputes, general crimes, or even may be suspected as corrupt acts (special crimes).

Until now in government apparatus itself and law enforcement officers circles are still polemic about discretion. Even, most of the government apparatuses afraid if conducted discretion in the future interpreted as administration deviations (maladministration) which became the pioneer of general crime and corruption. Theoretically and juridically-normative discretion is a valid action to be used, as long as it, from the aspect of law, accountability and rationality, can indeed be validated [1].

Polemic of the use of discretion become a “trap” if a public authorities acts outside the regulations, despite his intention to innovate or improve public services. Public authorities can be faced to the very serious obstacles such as “criminalization”. Some examples of discretion case that become popular in media and polemic are: First, The suspect of the former BUMN minister, Dahlan Iskan, for his policy of selling 23 BUMD assets, East Java [2]. Second, the Lubuklinggau Case about the shooting incident by police officers which resulted in two of eight people were killed, the National Police Chief explained after the case occurred, not all members of the National Police had the ability of discretion [3]. Third, the discretion policy of Basuki Tjahya Purnama (Ahok), related to the addition of a 15% levy for reclamation developers [4]. Fourth, the right of the discretion of Surabaya Mayor Tri Rismaharini, related to the free delegation of high school / vocational schooling authority which was rejected by the central government [5].

Based on the explanation above, in analyzing the act of discretion by public authorities there are some focus explained in this paper:

- a. The absence of a common understanding among government administrators

of the definition, scope and requirements of discretion in the Law of Government Administration, so that it still causes confusion in its implementation.

- b. The absence of format and report mechanism as the reference for government officers to report the discretion act. The discretion norm in the Law of Government Administration still impressed like policy making under normal circumstances. Although, because of its nature which is carried out in urgent conditions and limited power, discretion should be tolerated when it is thought to break through formal procedures.
- c. The absence of clarity of official level that have discretion policy. Although for street-level bureaucracy or administrator level apparatus that usually got urgent problem to improve the bureaucracy service.
- d. The absence of common understanding about discretion between the government apparatus and law enforcement officers. It is feared this can cause fear for government apparatus to take policy decision or discretion act.
- e. The government officers misunderstanding on whom to consult or coordinate when facing confusion to explain the policy or act taken concluded as the realm of discretion or not.

So in this paper would answer the problems in discretion act phenomenon:

- a. How is the formulation of the implementation of discretion definitions, aims and requirements in the Law of Government Administration that can be as an operational reference for government apparatus?
- b. What empirical problems happened in the act of discretion by public authorities?

2. RESEARCH METHOD

This paper is focused on certain objects which was appointed as a case to be studied in depth, so could solve the reality behind phenomenon. Started with reviewing some literature that could support the analysis approach, included review of: Discretion, Government Administration, etc. Literature study method which describes the scientific, incentive, and detailed phenomena regarding a program, event, and activity in the level of individual, a group of people, institution, or organization in order to gain in-depth knowledge of the event [6].

The review sources are formed as books, journals, related regulations, and other references. In the act of collecting the reading materials, the writer considers two aspects of the relevance of the reading material to the topic (case) raised and the latest. The conclusion is from the result of literature sources analysis described as the case study raised. This paper is trying to see the truth or justify the truth. The effort to pursue the truth is done by researchers through a model that is usually known as the paradigm because the paradigm is located as a base or foundation in conducting the research process [7].

For supporting data resulted from the fields, this paper conducted an approach that used in the research as qualitative approach, where a research process conducted as

normal and natural as the objective conditions in the field without manipulations [7]. The qualitative approach focused on process analysis from the process of thinking inductively related to the the dynamics of the relationship between observed phenomena, and always using scientific logic [8].

3. RESULTS AND DISCUSSION

3.1 The Nature and Aim of Discretion

Public authorities as the main stakeholders in the administration of public interests have broad authority in implementing the government bureaucratic system. Those authority is from the Law (written). But, in practically, the public authorities usually got problems, where to solve the problems there are no laws or procedures related (unwritten).

Discretion is still a widely discussed study because of its implications for justice. When the issue of concerns about unfairness increases and needs to be dealt with quickly, then discretion is the solution [9], [10], [11].

Discretion can also be interpreted as wisdom, innovation, and a means of space for public authorities without having to be fully bound to the law in order to solve pressing problems and regulations for its resolution do not yet exist. The act of discretion by government apparatus officials is a concept with the principle that still holds is accountability in taking that acts. The concept of discretion give an alternative in reaching the public services aims because there are urgent problems but the regulations is not exist yet. Procedurally it may be said that it is not in accordance with what has been determined, but if the motives and nuances are indeed in the interest of the community, then officials can use the right of discretion to facilitate service to the community. [12], [13].

The principle in the application of discretion theoretically is that violations or deviations from procedures are not really a problem, as long as the actions taken remain in the corridor of the organization's vision and mission and remain within the framework of achieving organizational goals [14]. Discretion also conducted in some countries such as:

- a. England; the rationale for discretion is the type of action that is only carried out by the king / queen without being held accountable. For public authorities have the same position as ordinary citizens who have responsibility for the court if there are actions taken by public authorities who are demanded by citizens. As explained that all officials stand on the same footing as ordinary citizens so far so the liability for their wrongful acts is concerned [15]. So, public authorities in England have discretion authority as long as the acts still in their area of authority/ power, even can be sued by citizens that judge if the authority/ act is an oppressive act in the implementation of public functions. Losses suffered by citizens from the actions of public

authorities are not borne by the State / government, but by the public authorities themselves. The example of public authorities discretion sued by citizens: related public authorities in England leave a hole open in the road, his discretion act is just close it with a tent and surround it with warning lights. A kid curious to observe it, he throw a lamp to the hole and cause an explosiun that injured himself [16].

- b. Netherlands; as a Country influenced by the royal system, firstly it must be stated that the legal position in the Netherlands is divided into 2 (two), namely the legal position as a representative of the legal entity and the legal position as the representative of the position. The act from legal entity when there is a mistake it concluded as civilization, but actions issued from office are burdened with responsibilities in the civil and public fields. In Netherlands, citizens can submit requests to the ombudsman to investigate the actions of public authorities deemed deviant by citizens.
- c. Germany; there is law regulated the public authorities in germany that formed as administrative decisions/ actions, can be written or not or known as discretion or eremessen. In Germany all of the action should be suitable with the rules set by the Law above. If the decision is oral, it must be emphasized with writing containing the signature of the discretion maker.
- d. Australia, there is a combination made by Australia’s ombudsman if public authorities conduct discretion. There are 10 steps that should be done by public authorities if they want to conduct discretion; (1) determine whether the decision maker has the authority to make discretionary decisions (2) follow the administrative procedure and the law (3) collect the relevant information to build facts (4) determine the evidentiary standard that applies (6) take an act with nature and fair without causing refraction (7) pay attention to the provisions regarding procedural fairness (8) consider the characteristics of the case (9) inform the progress of the discretionary act (10) create and maintain the discretionary record. The following table briefly describes the concept of discretion in several countries:

Tabel 1
The Concept of Discretion in some Countries

No	Country	Law Source	Character	Explanation
1	England	Constitution / Royal Sovereignty	Politics (Prerogative)	Known as discretionary powers is a kind of action that action that is only carried out by the king / queen without having to ask for approval from anywhere and without

				accountability. Because the authority of the king/ queen will become a constitution..
2	Netherlands	Legislation	Law (Authority)	Known as discretionary <i>bevoegdheden</i> that is a concept of public authority that the use related to the freedom to take policy from government organs. But still limited these actions to do not deviate from the applicable law.
3	Germany	Legislation	Law (Authority)	Known as <i>ermessen</i> that every state / public institutions have the right to discretion, the authority is regulated in a government law, which is almost the same as the concept in Indonesia. Germany regulates that an official may only do the discretion if there are clear rules regarding the implementation of the discretion. In essence, in Germany, applying the principle of proportionality is used as a measure of whether discretion can be accepted legally.
4	Australia	Australia's Ombudsman rules are the guide	Common Law	It is intended that discretion is a condition where the decision maker has the authority to choose between acting or not, agreeing or not with certain conditions. Discretion taken must pay attention to procedural fairness.

Source : Processed Data 2018

In Indonesia, it is almost the same as discretion in the Netherlands. Government officials have rights to use their authority in taking the decision of discretion. The rights meant is suitable with the aim. Even in another side government obliged to carry out government administration in accordance with statutory provisions. Discretion may be done (referring to Law No. 30 Year 2014) by authorized public authorities and aims to: (1) Facilitating governance. (2) Fill in the legal vacuum. (3) Providing legal certainty. (4) Overcoming the stagnation of government in certain circumstances for the benefit and public interest.

In those laws also regulated the requirement of discretion decision made by article 24 of:

- a) Suitable with the discretion aim as interpreted in article 22 verse (2)
- b) Does not conflict with statutory provisions in accordance with AUPB
- c) Based on objective reasons
- d) Does not cause conflicts
- e) Done with good intentions

Furthermore, discretion can be conducted when referred on statutory provisions giving an option for the institution or official. Regarding the scope of discretion in the Law explained in Article 23 that the discretion of government officials includes:

- a) Decision making and / or action based on statutory provisions that provide a choice of decisions and / or actions. The choice of decision and / or action characterized by the word can, may or may be given authority, right, should, be expected, and other similar words in the provisions of the legislation. While that is referred to decision making and / or action is a respond or attitude of government officials in carrying out or not carrying out government administration in accordance with statutory provisions.
- b) Decision making and / or actions because of the statutory provisions does not regulate or absence (emptiness) of the law governing administration.
- c) Decision making and / or actions because of the statutory provisions is not complete or not clear or in the sense that in the legislation still requires further explanation, overlapping (out of harmony) and out of sync) regulations, and regulations that require implementing regulations, but have not yet been made.
- d) Decision making and / or actions because of the government stagnation for further interest. In the sense that discretion taken is concerning the lives of many people.

However, the implementation encountered problems because of the discretion act regulated is no more like making policy in general, the main value of discretion as an action to deal with a stagnant problem quickly, is not reached. The study result in the location found that if officials not following the regulated procedural, the related officials will be summoned by legal action, to be asked about their background and motives. Legal officials will judge whether the discretion acts made have criminal or civil element.

3.2 Discretion Empirical Problem

The problem of discretion is very complex. As an example, discretion in the process of procurement and sale of goods/ services cause severe legal risk. Discretion on Government procurement and sale of goods/ services is the toughest challenge for public authorities. Although presidential decree norm of Government procurement and sale of goods/ services is administration norm. As an administration norm, public authorities have freedom to conduct administrative action as long as the aims and motives are for public benefit. Discretion in the government budget procurement and sale of goods and services if referred to

article 25 verse (1) and (2) Law Number 30 Year 2014 “maybe” after the written approval from the heads, will become “clean and clear”.

Law apparatus always assumed presidential decree norm violation of procurement and sale of goods / services and government budget as a criminal offense. Although in article 59 Law No 1 Year 2014 regulated it as administration violation. Discretion can be said as a crime when fulfilled this conditions:

- a) Misunderstanding to someone’s rights (for example: the goods/ services provider)
- b) Misunderstanding to statutory norms (for example, regarding procurement procedures and requirements)
- c) Misunderstanding to the self authority
- d) Misunderstanding to the main point of the norm of statutory makers

As a result of the potential for violations of the law in this discretion, there is a tendency for officials to avoid discretion. Public authorities are more looking for security in acting based on regulations that are applied, and interpreted rigidly.

Public authorities will not dare to take policy initiatives, especially when it comes to budgets or burdening state finances, even though there is a legal basis for discretion. Because of this fear, the concept of discretion to provide services that are not rigid cannot be implemented properly.

In the case of crime, discretion is considered as criminal act when fulfilled some conditions as: (1) misunderstanding to someone’s rights (2) misunderstanding to the statutory norms (3) misunderstanding to the self authority (4) misunderstanding the aim point of the norm statutory makers. When it fulfilled one of four of those conditions, so discretion is concluded as authority manipulation.

4. CONCLUSIONS

The emergence of the concept of discretion is inseparable from the shift in orientation of public administration, from government to governance. Discretion concept in Indonesia is based on bureaucracy system which suitable to be conducted but at the implementation level it is very complex. Problems that usually appeared because of discretion are: (a) The cause of public authorities do not want to do discretion in government administration is because fears and afraid of will become a suspect of a criminal offense. This often happens because there are differences in perspective between public authorities and law enforcement. (b) The high role of politics conditioned in discretion decision. (c) Every decision needs to determine the politics conditions at the time, so the discretion act get legislative support and not interpretation of meaning. (d) The type of discretion should be suitable with the authority type taken, so the discretion effectivity runs well

So that the recommendation offered from this paper explained as: (a) Discretion operationalization needs to regulated more in the regulation which is independent (for

now it is still in the Law on Government Administration). Inside this should be discuss and decide who can do the discretion and which institutions can provide advocacy regarding the fulfillment of the conditions of discretion. (b) The function of guard team, government security and central development (TP4D) should be optimized as a institutions that provide consultation and advocacy for government officials to take discretionary measures. Now, TP4D institutions is not optimal yet. (c) Must provide a common perception of the nature of discretion between law enforcers about discretion, so that public policy cannot be criminalized. Unlike the authority manipulation / maladministration.

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