

DISCRETION LIMITS IN GOVERNMENT GOVERNANCE POLICY

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Received : 20 January 2025
Revised : 31 January 2025
Accepted : 18 February 2025

Published : 23 March 2025
DOI : <https://doi.org/10.54443/ijerlas.v5i2.2629>
Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

Discretionary policy is an important aspect in government administration. In every government structure, the concept of discretion must be used. Discretion allows government authorities to make judgments that do not have to be strictly regulated by law. One example of discretionary policy is when an official at a licensing office has the ability to issue a building permit (IMB) after examining a development plan. This research is a normative research that investigates the purpose of law, values of justice, validity of legal rules, legal concepts, and legal norms. This research relies on primary, secondary, and tertiary legal sources as sources of information. The use of independent considerations by state administrative bodies/officials is only permitted if the applicable laws and regulations do not regulate it or the existing regulations do not clearly regulate it, which is carried out in an emergency/urgent situation for the public interest as determined by laws and regulations. The urgency in question is a problem that develops unexpectedly for the public interest and must be resolved quickly, but laws and regulations have not regulated it or only regulate it in general. While the definition of public interest is the interest of the nation and state or the interest of the community together or the interest of development, in accordance with applicable laws and regulations. In addition, the limitations or guidelines in the use of discretion are the General Principles of Good Governance (AUPB).

Keywords: *Governance, Discretion, Policy, AUPB*

INTRODUCTION

The state has goals, one of which is the goal of development and the welfare of its people. In realizing the goals of the state, its success depends on the implementation of government. Good governance is assessed from efficiency, effectiveness and justice in Indonesia. In certain situations, which are not regulated in detail by laws and regulations, discretion is the freedom to choose or determine the action that is considered most appropriate. Regulations that mandate officials to evaluate the situation and follow laws or government regulations.

Governance consists of various components, one of which is discretionary policy. Mardjono argues that discretion is a freedom or authority given to administrative officials to make decisions in certain situations that are not explicitly regulated by law. This Discretionary Policy provides space for public officials to make decisions based on considerations that are not clearly regulated by law. (Mardjono RS, 2019)

The principle of discretion is very fatal in the government administration system. This discretion provides space for the government to manage and/or make decisions that are not clearly regulated by law, but its use also has limitations so that there needs to be transparency in the use of discretionary policies. In the renewal of the bureaucratic system in Indonesia, public supervision holds an important key as supervision of the management of discretionary policies so that there is no misuse.

As one example of the use of discretionary policies is the Official in the Licensing Service who has the authority to issue a Building Permit (IMB) which is now called the Building Approval (PBG) after previously conducting an inspection of the entire development plan. In a problem where there are regulations that do not cover all aspects, officials can use their authority to consider the interests of the wider community and the surrounding environment, and there are still many other uses of discretionary policies that continue to be implemented to create good governance. (Santoso, B., 2020).

Initially, Law Number 30 of 2014 concerning Government Administration (UUAP) was the legal basis for discretion, including its entire scope and limits and matters that must be considered by government officials when using discretionary policies to influence decision-making and implement actions to solve specific problems in government management. However, the ideas and normative rules related to UUAP discretion have changed slightly

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with the enactment of Law Number 11 of 2020 concerning Job Creation (UUCK). This is especially true in terms of the use of discretion by government officials as a limitation. Ironically, by eliminating the limitation that such discretion must not be contrary to the law, this modification and change in concept is seen as an excessive expansion of the boundaries of freedom. (Dzikry Gaosul Ashfiya, 2023)

In addition, when exercising discretion, public bodies must still pay attention to the principles of justice and public interest. They must act fairly and without discrimination, and they must be accountable for their actions. In addition, public officials must be able to explain and justify that judgments made with discretion are based on rational and objective factors, and these decisions must be clearly disclosed to the public to maintain trust. (Agustinus F. Paskalino Dadi; et.all, 2024)

Discretion has the ability to increase flexibility and effectiveness in state administrative decision-making. Conversely, public bodies can abuse discretion for personal or organizational purposes. Therefore, an acceptable balance must be achieved between the exercise of discretion and the idea of legality in state administrative decision-making. (Tiantoro, 2023)

However, the freedom to act according to the wishes of government administrative bodies or persons is not without limits. The General Principles of Good Governance (AUPB) prohibit abuse of authority because such authority is limited. However, the choice of discretion can still be accounted for if there is a legal deviation that has an impact on society. This is in accordance with the understanding of "no authority without accountability." (Yudit Bertha Rumbawer, et.all, 2024)

RESEARCH METHODS

This research is a normative research that investigates the purpose of law, values of justice, validity of legal regulations, legal concepts, and legal norms. Normative legal research can also be defined as the act of identifying legal norms, principles, and legal doctrines to answer the legal problems faced. Legal research can also be defined as the development of arguments, theories, or concepts to function as recipes or answers to certain situations. (Peter M. Marzuki, 2023)

The sources of materials used in this study are primary legal materials, secondary legal materials and tertiary legal materials. Furthermore, the collected data were analyzed qualitatively. (Peter M. Marzuki, 2023)

DISCUSSION

According to the contemporary understanding of the rule of law, the government requires discretion (English), discretionaire (French), and freies ermesen (German), in order to meet the increasingly complex demands of public services from the government to the socio-economic life of its people. Discretion is defined as a means that allows officials or state administrative bodies to act without being fully bound by law, or actions taken to achieve goals (doelmatigheid) and not based on applicable law (rechtmatigheid).

The Legal Dictionary defines discretion as a person's ability to make judgments based on his or her own beliefs about the scenario at hand. However, the July 2008 Drac Government Administration Bill provides a more detailed explanation of discretion. Article 6 of the law defines discretion as the authority held by government agencies or officials, as well as other legal institutions, to make judgments about legal or factual activities related to government administration. (Wahyu, 2022).

This discretionary power, also known as freies ermesen, serves as an antithesis to the inadequacy and limitations of the idea of legality under the rule of law. (Agus Budi Susilo, 2015) In principle, this freedom allows the state administration apparatus to prioritize the effectiveness of achieving goals (doelmatigheid) rather than complying with legal provisions (rechtmatigheid), or is a legitimate authority to intervene in social activities (staatsbemoeyenis) to organize public welfare (bestuurszorg). (M. Nata Saputra, 1998)

While under bound discretion, the law sets out several possible options that the state administration can choose. In free discretion, the law only sets limits, and the state administration is free to make judgments as long as they do not exceed or violate these limits. (Ardiansyah et al., 2023). Article 8 letter b of Government Regulation Number 32 of 1979 concerning Dismissal of Civil Servants regulates dismissal as a severe disciplinary punishment for civil servants (PNS). This article states that PNS can be dismissed if sentenced to imprisonment based on a court decision that has permanent legal force, especially for crimes committed intentionally and threatened with imprisonment of four years or more. According to the explanation of this article, dismissal can be in the form of honorable or dishonorable dismissal, depending on the authority authorized in the dismissal, the severity of the violation committed, and the impact caused. (Moula, 2022).

Discretionary policy in government, particularly in the context of state administrative law, refers to the ability of public officials to make decisions or take actions based on their judgment and discretion, in accordance with

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existing laws and regulations. Discretion can be defined as the freedom or authority of administrative officials to choose which actions are appropriate in a particular scenario. State administrative law recognizes discretion as a component of a responsive and adaptable government structure. (Mardjono RS, 2019). An official from the licensing office can issue a Building Construction Permit (IMB) after examining the construction plan. In situations where regulations do not cover all technical issues, the official can exercise discretion to balance the interests of the community and the environment. (Santoso, B., 2020). Law enforcement agents, such as the police, have the authority to detain someone in certain cases, such as when the violator tries to resolve the problem in good faith. (Hidayat, R., 2023). In emergency situations, such as natural disasters, government authorities have the authority to direct resources to places that need help most, while there are no formal guidelines for dealing with such emergencies. (Rahmat, A., 2021).

The use of discretion in areas such as licensing and law enforcement requires a thorough awareness of the implications of the actions taken. Public officials must be educated to use discretion properly, based on legal and ethical issues. (Nita Sari, 2022). According to state administrative law, there are several principles that must be considered in the use of discretionary policies by the government, namely: (Budi Santoso, 2020)

1. Principle of Legality

Any judgment made based on discretion must comply with the applicable legal framework. Officials must not violate applicable laws or make judgments that are not in accordance with the rules.

2. Principle of Justice

Policies must be implemented fairly, regardless of the history of individuals or groups. Decisions must reflect principles of social justice.

3. Accountability

Officials who exercise discretion must be held accountable for their actions. Transparency in the decision-making process is essential so that the public can understand the underlying factors.

4. Transparency

The decision-making process must be transparent and open to the public. This is very important to maintain public trust in the government. (Andi Rahmat, 2021).

Although discretion allows freedom, some constraints must be overcome, and its implementation has drawbacks or limitations. Discretion can be abused for personal gain or to discriminate against certain individuals. Therefore, strict monitoring is needed to prevent this. Discretion that is exercised inconsistently can cause legal confusion and disrupt the stability of society. To illustrate the limits of discretion, consider the phrase in Article 24 of the Administrative Law. The main statement of the article limits discretion by stating that government officials who use discretion in decision-making must evaluate the purpose of the discretion, the laws and regulations on which the discretion is based, and the general principles of good governance.

Article 24 of the State Administration Law outlines the limits of the exercise of discretion. The main statement of the article limits discretion by stating that government officials who use discretion in decision-making must evaluate the purpose of the discretion, the laws and regulations that form the basis of the discretion, and the general principles of good governance. This formulation shows that the guidelines in the use of discretion and government policy-making based on State Administrative Law are the General Principles of Good Governance (AUPB), especially the principle of prohibiting abuse of authority (*detournement de pouvoir*) and the principle of prohibiting arbitrariness (*willekeur*). In addition, a policy is considered deviant if it is contrary to the public interest.

The concept of specialization (*specialiteitsbeginsel*), which decides that authority is entrusted to a government entity for a specific reason, is used to evaluate whether or not there is an element of abuse of authority. Abuse of authority occurs when the authority deviates from the purpose for which the authority was granted. The principle of rationality or appropriateness (*redelijk*) is used to evaluate the element of arbitrariness. A policy is said to contain an element of *willekeur* if it is clearly irrational or unreasonable (*kennelijk onredelijk*). Meanwhile, the implementation of discretion can be classified as mixing authority if it is not in accordance with the purpose of granting authority or violates the General Principles of Good Governance (AUPB). When an official who does not have permission exercises discretion, it is considered an arbitrary act. According to the Law on Government Administration, the purpose of government officials using discretion is to facilitate the implementation of government, fill legal vacuums, provide legal certainty, and overcome government stagnation in certain circumstances for the public interest.

Furthermore, the AP Law states that the use of discretion must be accountable to the superiors of officials and the public who are harmed by the discretionary decisions taken, and can be sued through administrative efforts or lawsuits to the State Administrative Court. This provision means that the AP Law not only limits the use of discretion by the State Administrative Agency/Official, but also regulates the accountability of the State Administrative

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Agency/Official for the use of such discretion, which is not only passive in the sense of waiting for a lawsuit from the public through the State Administrative Court but also active in the obligation to account for the use of discretion to their superiors, on the grounds that this is an obligation inherent in the authority that is the basis of the discretion itself, and accountability to superiors is carried out in writing by providing reasons for making discretionary decisions. Although the Law on State Administration does not regulate sanctions if the provision on the obligation to report to superiors is not implemented, at least by making the limitations on the use of discretion a binding norm, it is sufficient to avoid abuse of authority (*detournement de pouvoir*) and arbitrary actions (*willekeur*) by State Administration Agencies/Officials, because the main purpose of normativeization is to create and make applicable laws and regulations.

CONCLUSION

The use of discretionary authority by government administrative bodies/officials is only permitted in cases where applicable laws and regulations do not regulate it or existing regulations do not clearly regulate it, and is carried out in an emergency/urgent situation for the public interest, as determined by laws and regulations. The urgency in question is a problem that develops suddenly that concerns the public interest and must be resolved immediately, but laws and regulations have not regulated it or only regulate it in general. Meanwhile, public interest is interpreted as the interests of the nation and state, the interests of society as a whole, or development interests that are in line with applicable laws and regulations. Furthermore, the limitations or guidelines in the implementation of discretion are the General Principles of Good Governance (AUPB).

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