

Discretion and Accountability of Local Government in Administering Governance

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Abstract: *This study aims to investigate the limit of the discretion used in administering governance and the forms of responsibility when legal deviations occur. As a government adhering to the Welfare state, the principle of legality took a maximum role insufficiently in serving the interests of the citizens. The discretion appeared as an alternative to fill the gaps and weaknesses in the application of the principle of legality (wetmatigheid van bestuur). Results showed that the implementation of public service decentralization was motivated by the devolution of power from central to local government. This study applied a purposive sampling technique and was analyzed by descriptive qualitative which began with the process of collecting data, simplifying data, presenting data, and drawing conclusions. The results revealed that the use of discretionary power by Government Officials was only able to be applied in particular cases in which the prevailing laws and regulations did not regulate them, or the existing regulations governing them was not clear and it was in an emergency / urgent situation for the public interest. The guidelines for the use of discretion were the General Principles of Good Governance. Meanwhile, the responsibility for discretionary decisions was classified into two, (1) as a job responsibility, and (2) as personal responsibility. As the job responsibility, if acting for / and on behalf of the position (ambtshalve) which there was no element of maladministration. As personal responsibility, if the use of authority was found an element of maladministration.*

Keywords: *discretion, accountability, local government, government officials*

Introduction

As a welfare state, Indonesia's purpose is to advance public welfare as stated in the preamble to the 1945 Constitution of the Republic of Indonesia, has several consequences for governance, namely the government is required is to take a role actively interfering with the socio-economic life of society. For this reason, bestuurszorg or public service is

delegated to the government. (Basalamah, Andi, Palopo, Penyelenggaran, & Daerah, 2015) To achieve the maximum result and materialize the public, the state administration is given certain independence to act on their initiative to handle various complex issues requiring immediate handling, while there is no legal basis for this issue, or a legal basis for the resolution has not been

established by the legislative board, so that in administrative law, it is granted freely the authority like discretion. By granting discretion to the state administration, it is hoped that the welfare for citizens will be achieved.

Government administrative boards/officials are not allowed to refuse to provide services to the citizens because the law does not exist or the law exists but is unclear, as long as this is within their authority (Meutia, 2015). In the law of state administration, it's called "pouvoir discretionnaire" or "freies ermissen" or discretion, which contain large obligations and powers to determine what action to be taken and the freedom to do or not to do the action. The Freies Ermessen has it's own consequences on the legislative field (Yilmaz & Guner, 2013).

Early discretion raised concerns that the consequences of this discretion would cause harm to society. Therefore, to increase legal protection for citizens, the Panitia de Monchy in the Netherlands made a report about the general principles of good governance or an algemene beginselen van behoorlijk bestuur. Initially, the objections came from government officials and officials in the Netherlands because there was a concern that the Judge or Administrative Court would later use the term to assess the policies adopted by the government. Yet, this has now disappeared because it is relevant. However, the freedom to act relies on discretion exercised by government administrative boards/officials is not without limit. This freedom is limited by the General Principles of Good Governance, so that it is hoped that abuse of authority will not

occur in the realization a legal deviation from the discretionary decision is found and it is harmful to the citizens, the discretionary decision must still be accounted for. It relates to the principle of "geen bevoegdheid zonder verantwoordelijkheid", that there is no authority without accountability. According to the explanation above, this study investigated 1) how to use discretion in the administration of government in Baubau City, and 2) what is the form of local government accountability for discretionary decisions when legal irregularities occur causing public losses (Dawes & Gharawi, 2018).

Method

Research is an activity aiming to obtain the correctness of scientific knowledge through predetermined procedures. Research should be carried out carefully and thoroughly, so that the results obtained are accurate in research activities carried out carefully in determining the types of data, data sources, how to collect data, research objectives and data analysis techniques.

The variables were the object observations or are the factors playing a role in the events or symptoms being studied, in this case the Discretion and Accountability of Local Government to Government Administration in Baubau. Based on the theories discussed, so that in this study, the authors determined the dependent variable was Discretion and Accountability, while Government Administration in the city of Baubau was an independent variable.

Sources of data were as follows:

1. Primary data, is the data derived from respondents, like the

responses from respondents to questions posed by the author through interviews or questionnaires. Primary data in this study were the responses of officials at the Regional Secretariat Section in Baubau.

2. Secondary data, is the data from literature books, documents, journals to complement primary data. In this study, secondary data were obtained from books, documents or records relating to budget allocations and literature related to this research.

To obtain the intended data in this study the author used:

- a. Interview

Guidelines is a data collection technique by interviewing as well as a list of questions addressed to officials at the Regional Secretariat of Baubau

- b. Observation

It is a data collection technique carried out by observing directly the object of study so that the data obtained is valid.

Library Research is a data collection technique by reading literature books, images related to this research to obtain theories or materials related to this research. In this study, the data were analyzed by descriptive analysis. Descriptive research was intended to describe the research data according to the variables studied, without testing the relationship between variables through hypothesis testing, because in this study the authors did not make hypotheses. Apart from analyzing, the results were

interpreted and described qualitatively to obtain an overview of situations or events that occur in the field (Herdiansyah, 2010).

Results and Discussion

In the modern legal state conception, discretion (English), discretionair (France), freiesermessen (Germany) are needed by the government and to them, that authority is attached (inherentaanhetbestuur), in line with the higher demands of public services that must be provided by the government on the socio-economic life of the citizens which is increasingly complex. Discretion is defined as one of the means to provide mobile space for officials or state administrative agencies to take action without being fully bound by the law, or actions taken with priority achievement as the goals (doelmatigheid) rather than following applicable law (rechtmatigheid) (Daerah, Bone, & Selatan, 2020).

Public administration scholars and practitioners have a role to play in all stages of atrocity prevention, however, the most opportune space for public administrators to intervene in prevention efforts is long before crises escalate to mass atrocity. The level and type of representativeness of government agencies and the discretionary power and expertise of bureaucrats have implications for atrocity prevention. Collaboration can avoid the societal divisions that lead to atrocities and could allow what are now emerging national mechanisms to transform into fully integrated wholeof-society mechanisms, folding in subnational governments and nongovernmental actors as well (Appe, Rubaii, & Whigham, 2020).

The definition of discretion according to the Law Dictionary, discretion means the freedom to make decisions in every situation faced according to his own opinion. Meanwhile, according to Law Number 30 of 2014 concerning Administration, discretion is defined as a decision or action that is determined or carried out by Government Officials to overcome the concrete issues faced in the administration of government in terms of laws and regulations providing options, no regulating, being incomplete or unclear or the stagnation of government (Resiko, Analisis, & Diklat, 2020). Several legal experts defining discretion including S.Prajudi Atmosudirjo, he defined discretion that the freedom to act or take decisions from the competent state administrative officials according to their own opinion. Furthermore, he explained that discretion is required as a complement of the legality principle, it stated that every act or act of state administration is allowed by the provisions of the law.

According to Anna Erliyana, the use of *freies ermesen* by State administration agencies/officials is intended to handle urgent and sudden, cumulative issues. There may be important issues but it is not urgent to be handled immediately. The possibility of urgent issues might have arisen, but they are not important to handle. A new issue can qualify as an important issue if the issue concerns the public interest, while the criteria for the public interest are determined by laws and regulations (Muhsin, 2019). This theoretical examination leads to an exploration of where discretion is located in the policy

process. Discretion can be found in street-level implementation, but not only there. It appears to be granted as well as exercise at a multiplicity of points within an overall context, in which both vertical and horizontal power relationships may apply. Hence from an 'output' perspective, the study of discretion concerns the question of how laws or other norms 'work' within a multi-layered structure

Based on the explanation above, it is concluded that the use of discretionary authority by government administrative boards/officials may carry out in certain cases in which the prevailing laws and regulations governing were not clear and this was done in an emergency in the public interest stipulated in statutory regulation.

On the other hand, the intended important and urgent issues contain the following elements below:

- a. The arisen issues concerned the public interest, such as the interests of the nation and the state, the interests of the majority of citizens, the interests of the common people, and the interests of development.
- b. The issues emerged suddenly, outside the predetermined plan.
- c. To handle these issues, the laws and regulations had not regulated it or had only regulated in general, so that the State administration had the authority to handle based on their initiatives.
- d. The procedure was incomplete according to normal administration, or if it was completed according to normal administrative procedure, it was less efficient and effective.

- e. If the issue is not handled quickly, it will cause harm to the public interest.

In line with the doctrine, it is concluded that an urgent situation is a situation appearing suddenly concerning the public interest which is required to handle quickly. Occasionally, to handle the issue, the laws and regulations had not regulated it or only regulated it in general. In carrying out legal actions (*rechtshandelingen*) Government administrative officials/boards had government instruments. Government instruments mean tools or means used by the government or state administration in carrying out their duties. In carrying out these governmental duties, the government takes various legal actions by using various juridical instruments in carrying out activities, regulating and carrying out government and social affairs, such as laws and regulations, decrees, policy regulations, permits, and so on (Baru & Sripeni, 2019).

Legal products of them formed into documents containing concrete, individual and final determination material in administrative law are called decisions (*Beschikking*), while documents containing general regulatory material are called regulations (*regeling*). Licensing (*vergunning*) was a form of exemption from prohibitions contained in a regulation. Government instruments were set out formed into regulations regarding the permit for certain matters, while the basis for implementation /operations for the citizens or the boards/officials formed into government administration decisions regarding a permit for such matters. Meanwhile,

policy regulations (*beleid regels*) were legal products created by the independent authority which regulated the public interests based on the *freies ermessen* principle. It means that this *freies ermessen* or discretion was set in written form and became a policy regulation, so that the general regulations issued by government agencies regarding the implementation of government authority over citizens or other government agencies and the making of these regulations do not have a firm basis in the Constitution and formal laws either directly or indirectly (Yilmaz & Guner, 2013).

It was similarly that policy regulations relied on the statutory authority. Therefore, it was not classified as general binding laws and regulations but was attached to the governmental authority of a state administrative organ and is related to the exercise of their authority. In this case, the policy regulation (*beleidsregel*) is a state administrative law tool aiming to dynamize the validity of laws and regulations (Kumalaningdyah, 2019).

By granting the statutory authority (*beleid regels*) based on the principle of *Freies ermessen*, this is an implication of the welfare state (*welfarestate*). As the result, the government was demanded to take a role actively in interfering in the socio-economic life of society. For this reason, *bestuurszorg* or public service is delegated to the government. To implement the public services and to achieve maximum results, the state administration is given certain independence to act on their initiative to handle various complex issues that required immediate handling, while there

was no or still no legal basis for their resolution by the legislative board.

The existence of *freies ermesen* was interpreted that some of the power held by the legislature is transferred to the government/state administration authority, as an executive board. Hence, the supremacy of the legislature was replaced by the supremacy of the executive board. Since the state administration handled issues without having to wait for changing the laws from the legislature.

In principle government administrative boards / officials were not allowed to refuse the providing service to the citizens because the law does not exist or the law exists but is unclear, as long as this is within their authority. Frequently, these discretionary decisions were outlined in the form of Governor Decrees and Mayor Decrees. In this case the Governor Decree was classified into 2 (two), namely as a decision (*beschikking*) and policy regulation. Therefore, a legal product in the form of a Governor's Decree was classified into two things as mentioned above, the consequence is that to test a Governor's Decree it couldn't be interpreted from the nomenclature alone, but the content was required to interpret whether it was a decision (*beschikking*), or a policy regulation (*beleidsregel* /policy), because substantially the testing was different. Policy regulations were not statutory regulations so they were prohibited to be legally tested (*wetmatigheid*). The examination of policy regulations was more directed to *doelmatigheid* and, therefore the indicator was the general principles of good government administration (Wibowo & Harefa, 2015).

The Government Administration Officers or Agencies requiring the authority to make discretionary decisions are:

- a. Chairman of the Commission / Council and Equivalent Institutions;
- b. Governor;
- c. Regents and Mayors;
- d. The officials of Echelon I in the Government of Central and the Provinces;
- e. District / City Regional Secretary;
- f. Governing Board. As well as operational officials who have the authority to make discretionary decisions because their duties are directly related to citizens services such as;
- g. Head of the subregional police;
- h. Head of District;
- i. Head of Village;

Apart from the aforementioned positions, in principle every official having attributive and delegating authority needed the discretionary authority because it was a complement to the legality principle. For a government adhering to a welfarestate, the principle of legality itself was insufficiently taken part actively in serving the interests which are rapidly developing citizens in line with the development of science and technology.

Therefore, it appeared as an alternative to fill the shortcomings and weaknesses in the application of the legality principle (*wetmatigheid vanbestuur*). Every use of authority by officials was always accompanied by responsibility, referring to the principle of "geenbevoegdheidzonderverantwoordenl

ijkheid "ie there was no authority without accountability. The authority was inherent in the position, but the implementation was carried out by humans as representatives or functionaries of the position, the responsibilities were classified into 2 (two), namely: (1) as job responsibilities, and (2) as personal responsibilities (Holle, 2011).

If a person's legal actions were for and on behalf of the position (ambtshalve), then the responsibility lied on the position. If there is compensation or a fine, it would be born by the state or regional budget. Conversely, personal action in terms of capacity as a person, the consequences and responsibility lie on the person himself, it was able to be borne by the position, nor on the state or regional budget when there is compensation or fines due to personal mistakes. Personal responsibility related to maladministration in the use of authority or public service. An official carrying out the duties and authority of his position or creating policies was burdened with personal responsibility if he committed maladministration (Andhayani, 2020).

Maladministration comes from the Latin *malum* (evil, bad, ugly) and *administrare* (to manage, taking care, or serving), Maladministration means bad or bad service or management. Based on article (3) UUN No.37 of 2008 concerning the Ombudsman of the Republic of Indonesia, Maladministration is "Behavior or actions against the law, exceeding authority, using authority for other purposes than those for which the intended authority, including negligence or neglect of legal obligations in the

administration of public services carried out by state and government administrations that cause material and/or immaterial harm to the citizens and individual".

In the investigative procedure of the Ombudsman of the Republic of Indonesia, twenty types of maladministration were mentioned, such as delaying on service (protracted), not handling, neglecting obligations, conspiracy, collusion and nepotism, acting unfairly, clearly taking sides, forgery, violations of laws, acts against the law, beyond competence, incompetence, intervention, procedural irregularities, acting arbitrarily, abuse of authority, acting inappropriately, requesting compensation for money /corruption, unauthorized tenure, and embezzling of evidence (Andriani & Zulaika, 2019).

Briefly, it was interpreted that in every administration of government affairs containing an element of maladministration and detrimental to the citizen, the responsibility and accountability was borne by the individual who dealt with the maladministration act. In the field, not all administrations or positions carrying out government authority automatically handled the legal responsibility, depending on how the position obtained authority, the position exercising the authority based on attribution and delegation was the party that handled legal responsibility. Meanwhile, those carrying out the authority based on the mandate were not the parties handling the legal responsibility but the responsibility was handled by the mandate giver (Mandans). Theoretically,

in attributions and delegations there is a transfer of authority from attributans and delegates to attributaries and delegates. Meanwhile, in the case of the mandate, there is a transfer of authority from mandans to mandates. This transfer of authority becomes the basis for the transfer of responsibility as per the principle. (Muthahhari, 2020)

In the concept of public law, legal accountability was related to the authority use which was irrelevant with the norm, either in the form of contradicting authorization of the statutory regulations, abusing the unreasonable authority, or arbitrariness causing the violation of rights. citizen. The legal accountability of officials issuing the discretionary decisions was classified into an administrative, civil and criminal perspective. In point of administrative, discretionary decisions were demanded to reported in written form to the government official issuing the discretionary decision. If his perspective considered that the discretionary decision was not justified based on a legal and policy perspective, he would order to revoke (Napir, n.d.).

Furthermore, discretionary decisions causing the criminal acts became the responsibility of the Government Administration Officer or the Agency concerned and discretionary decisions causing civil losses for individuals, citizens groups or organizations become the responsibility of Government Officials who determine discretionary decisions and discretionary decisions. Causing the negligence of Government Administration Officials or Agencies, or collusion, corruption and nepotism, which harmed state/regional

finances and or conflict with the state, Government and Regional Government policies or benefited third parties, and other parties were the responsibility personal (foultdepersonale) Government Administration Officer who was not handled by the state, both civil and criminal (Naranjo, 2014).

To measure the actions violating the authority of discretion in the field of state administrative law are as follows:

- a. the authority abuse to perform actions contrary to the public interest or to benefit personally, group or group interests;
- b. the authority abuse such as general objective deviation
- c. the authority abuse to achieve certain goals through the use of other procedures, besides that it can also take the form of;
- d. Incorrect action, in case there are several options for action;
- e. Unwholesome actions.

Discretionary actions/decisions as mentioned above causing civil losses or result in criminal acts and violate the boundaries of discretion were declared as illegal acts committed by government administration officials (onrecht matige over heids daad) contained in the ruling of the State Administrative Court (Saputra, 2018).

As mentioned above, discretionary decisions were legally tested (wetmatigheid) through doelmatigheid and since the indicators were the General Principles of Good Government. The types are as follows:

1. The principle of legal certainty (principle of legal security);
2. The principle of proportionality;

3. The principle of equality in making decisions (principle of equality);
4. The principle of carefulness;
5. Principle of motivation for every decision;
6. The principle of non-misuse of competence;
7. The principle of fair play;
8. Principles of fairness and fairness (principle of reasonable tolerance of arbitrariness);
9. The principle of meeting raised expectations and responding to reasonable expectations;
10. The principle of undoing the consequences of an annulled decision;
11. The principle of protecting the personal way of life;
12. The principle of wisdom (sapientia);
13. The principle of public service.

On the other hand, based on Article 53 paragraph (2) section b UU No.9 Year 2004, it is stated that the TUN Decree contravened the general principles of good governance, which in the explanation states that what is meant by "general principles of good governance" includes:

- a. legal certainty;
- b. orderly state administration;
- c. openness;
- d. proportionality;
- e. professionalism;
- f. accountability.

If the people found interests harmed by the discretionary decision, they might file an objection to the intended official. Regarding public objections, the intended official was

required to respond to them. If people were unsatisfied with the official's response, then they might file an administrative appeal to the direct superior of the official and he was obliged to also respond to it. Administrative efforts taken by the citizens must be covered implicitly in discretionary decisions. If the direct superior of the official agreed with the public's objection, then the discretionary decision was ordered to be revoked, but if the direct supervisor disagrees with the people's objection, then they might file a lawsuit at the State Administrative Court (Tahir, 2019).

Furthermore, referring to the State Administration Law, the agency authorized to test the legality of discretionary actions/decisions was the direct supervisor of the official issuing the discretionary decision and the State Administrative Court. The direct supervisor was obliged to test the legality of the discretionary action/decision even though there were no administrative objections and appeals from members of the public because there was an obligation to report the discretionary decision issued.

Next, the new State Administrative Court had the authority to test the legality of discretionary actions/decisions if a lawsuit and all available administrative efforts had been taken, in principle as much as possible administrative disputes would be handled by the administration itself and after all administrative efforts were unsuccessful, the court was the last bastion of law enforcement to decide. (Xian, Gou Li, 2011) Although administrative efforts had been made, the object of the lawsuit was still a

discretionary decision and not an administrative superior's response, because if the object of the lawsuit was the response from the superior of the official, then if the lawsuit was granted and the Defendant was obliged to withdraw the decision on the object of the dispute, so that the revocation was from the superior of the official and not the discretionary decision itself, whereas what is being questioned by the public is the discretionary decision.

Conclusion

Regarding discussion, it is concluded that the use of discretionary powers by government administrative boards/officials can only be carried out in certain cases in which the prevailing laws and regulations do not regulate it or because the existing regulations governing was not clear and it was carried out in an emergency/urgent situation for the sake of public interest that had been stipulated in statutory regulation. An urgent situation means a situation suddenly appearing to the public interest concern which must be handled quickly, to handle the issue, the laws and regulations had not regulated it or had only regulated it in general. Meanwhile, public interest means the interests of the nation and the state or the interests of the common citizens or the interests of development, following the prevailing laws and regulations. Also, restrictions or signs in the use of discretion are the General Principles of Good Governance.

Implementation of local government accountability of Kebumen Regency, is based on Article 32 of Law Number 32 Year 2004 concerning

Regional Government, and Government Regulation Number 3 of 2007 concerning Implementation Reports Local Government To Government, Report Information Accountability of the Regional Head to the House of Local Representatives, and Information on Local Government Implementation Reports to Public.

Based on these provisions, there are 3 forms the accountability of the Regional Government of Kebumen Regency, namely :

- a. Regional Government Implementation Report to The Government
- b. Report on The Accountability Statement of The Regional Head to The Council Regional People's Representatives
- c. Regional Government Implementation Report Information Public

Accountability for discretionary decisions was classified into 2 (two), namely:

1. as a job responsibility
2. as personal responsibility.

As a position responsibility, if acting for and on behalf of the position (amtshalve) in which there was no element of maladministration. As a personal responsibility, if in the use of this authority there was an element of maladministration. Every administration of government affairs containing an element of maladministration and detrimental to citizens, the responsibility and accountability should be borne by the individual committing the maladministration act.

About Authors

Anwar Sadat is a lecturer in the Government Science Study Program at the Faculty of Social and Political Sciences, University Muhammadiyah Buton, concentrating on studies on the responsibility of local government administration and the use of discretionary control by government officials can only be performed in those cases where the relevant laws and regulations are in proximity to the public interest.

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