Discretion Government Officials in Implementing Government

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ABSTRACT--- ***Government officials in the exercise of discretion on laws and regulations, and in order to meet the demands of public service for the achievement of the people's welfare, then the proper government officials authorized discretion in the Organization of the Government. This research is useful for organizing Government accordingly with the nature, the purpose of the granting of discretion as well as the General principles of good governance. Type of normative legal research used in this research is normative law is also called doctrinal research. Doctrinal Research: Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explain areas of difficulty and perhaps, predicts future development. Normative legal research conducted to assess the legal concepts related to the discretion of government officials who do. The target in this research related to: a. The nature and purpose of the authority of the discretion government; and, b. criteria for the use of government discretion.***

Keywords--- authority, discretion, government

1. INTRODUCTION

The Government is required to meet the interests of the community, especially a variety of basic needs. This demands as part of the stewardship of State law in the country not only as a night watchman to keep order and harmony.

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State law with the aim of fulfilling the welfare of society is often known as the welfare state or welvaartsstaat. But the use of the term cannot be meant in the realm of the law, as expressed by Philipus M. Hadjon (2007), that: 'driven by the economic crisis after World War II, the birth of the concept of' welvaartsstaat 'which was then known as' verzorgingsstaat '. Welvaartsstaat and verzorgingsstaat are the concepts of sociology and politikology.

Ideally in better legal approaches used the term rechtsstaat sociale (social law State) or rechtsstaat, where democratic Government sociale has function to control people's lives by using the juridical instruments (including discretion) and on the other hand allows the community to participate in the control.

The Government has a rechtsstaat sociale 2 (two) more position leads to the main functions of Government. First, the Government serves as the ruler who is authorized to make rules that must be obeyed by the people so that the created order and harmony in society. Second, the Government serves as the public servant were required to perform public services. In such position, put forward more rechtsstaat sociale legal protection for the community because of the nature of the Government that the rechtsstaat sociale should pay attention to 'theright to receive'. This is where the position of the Government as servants and the community as a party to be served.

The existence of the Government no longer has the power to impose the desires of the community and for the community. In sociale rechtsstaat (State legal community), excellent service is the duty of the Government to realize social rights and not the power as well as the imposition of the will of the community. Social rights are the rights to receive, where society is entitled to receive from the Government and for the Government of the rights to receive a legal obligation to provide the best service.

During this time the Government often took refuge on the expression of the spirit of patriotism exhibited by John F. Kennedy for American citizens at the inauguration as President of the United States 35th in 1961: '…. and so, my fellow Americans: ask not what your country can do for you – ask what you can do for your country. This expression is incompatible with the concept of a public service which is currently the main task of the Government is based on the principle of good governance.

The concept of public service began to be developed in the United Kingdom in 1991 based on the citizen's charter as a crystallization of the process of transformation of the State in relation to the citizen in accordance with the

concept of the country's legal community for the achievement of common prosperity. Citizen's charter affirms the principles of Public Service, among other things: 1. The setting and improvement standards (the formulation and improvement of service standards); 2. The creation of greater openness and the provision of public information (establishment of spacious openness and regulation on public information); 3. The provision of choice by the public sector whenever practicable (choice of law rules that can be applied); 4. The Observance of the non discrimination principle (the principle of observance of the principle of no discrimination); 5. Accessibility of services (service access); 6. The charter requires public service providers to give a good explanation, or an apology when things go wrong ¸ ad to have a well publicised and readily available complaints procedure (the Charter requires to provide an explanation or an apology if there are errors, and provides a good publication and an easy complaint procedures) **(**Rodney Austin dalam Peter Leyland and Terry Woods, 1997:20-21).

Legally, the Government (Executive) or other State governmental structure no longer have any power in State law. The previous rule as popular sovereignty have been manifesting in the Constitution of the Republic of Indonesia in 1945 as stated in article 1, paragraph (2) and paragraph (3) which States that 'Sovereignty is in the hands of the people and is exercised according to the basic law' and the 'State of Indonesia is a country of laws'. Power in the State's legal authority is in fact primarily on the Constitution as the Supreme law that authorizes the Government (Executive) and the structure of Government in other countries to act in accordance with the authority given by law. The authority of Government is at once became the people's control of the Government functions in the Act.

Authority as a power law always must have a clear arrangement in legislation as a source of authority in itself. The setting is giving power or capabilities to State Administrative official to perform acts which give rise to legal consequences, in particular in the field of public law.

In implementing governmental functions, Government action should be based on the authority owned and not on power. Of course the use of discretion was not to be based on the authority that gives freedom of action for government agencies to use discretion and not the Government.

The Government in the implementation of the authority of government action in the form of either Regelling (the regulations) nor Beschikking (Assignment), as a form of public service to the community cannot be used as free-free authority without regard to the basic rules, but the Government often shifts the terms of the authority as free-free.

Based on the background of the above issue, the problem can be formulated as follows: Whether the Government can make use of the authority discretion with free-free Government in action?

2. RESEARCH METHODS

This research will use the type of normative legal research. According to Terry Hutchinson (2002), the normative legal research, also known as doctrinal research (Doctrinal Research). Doctrinal Research: Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explain areas of difficulty and perhaps, predicts future development.

This is also conform to that put forward by Peter Mahmud Marzuki (2007) that legal research is a process to find the rule of law, the principles of law, as well as legal doctrines in order to respond to the legal issue at hand.

Normative legal research conducted to examine legal concepts related to the Government's actions can be categorized as discretion.

1. Approach To The Problem

The approach used is the problem an approach militate in law (statute approach) and conceptual approach (conceptual approach) Philipus M. Hadjon (2007).

2. Types and Sources Of Law

Legal material in this study consists of primary legal materials (primary materials) and secondary legal materials (secondary materials). The primary legal materials consist of a variety of laws and regulations relevant to problem resolution efforts in this research.

Secondary legal material in the study of librarianship, views, doctrines, results of research, dissertation, thesis, scientific journals, news and popular scientific articles.

3. Procedures and the collection of Legal Materials.

The primary legal materials in the form of legislation is gathered with methods of inventory and categorization. Secondary legal material collected by card systems entry (card system), both with card overview (includes summary of writings matches the original outline and basic essay containing the opinion of the original author); card quote is used to load the basic problems of the notes), as well as card reviews (contains analysis and special notes writer).

4. Processing and analysis of Legal Materials.

The primary legal materials and legal materials secondary that has been collected (inventory), then grouped. It is then examined by a statutory approach to obtain an overview of all the synchronization level of the law. Legal materials that have been classified and systematization are studied, analyzed and compared with the theoretical and legal principles expressed by experts, to eventually be analyzed are normative.

3. RESULTS AND DISCUSSION

1. Nature And Purpose Of Government Discretion

Discretion in the Legal Dictionary is defined as the freedom of taking decisions in any situation encountered in his opinion alone. While in law number 30 by 2014 about government administration confirms in article 1 point 9, i.e. Discretion is a decision and/or action set and/or performed by government officials to resolve the question of concrete facing in implementing governance in terms of legislation that provide choice, not regulate, incomplete, or unclear, and/or any governmental stagnation. In Black's Law Dictionary, the term discretion means a public official's power or right to act in certain circumstances according to personal judgment and conscience (Henry Campbell Black, 1990:479). Emphasis on understanding discretion as power public officials to act according to his own conscience and decision. Discretion is authorized to act or not to act on the basis of his own judgment in the exercise of a legal obligation. It means, as the authority of Government discretion is a free authority that belongs to the Government apparatus at a time as opposed to authority bound (gebonden bevoegdheid). The nature and legal character of this Government action requires that Government power is not simply implement the law (principle wetmatigheid van bestuur), but it should be put forward 'doelstelling' (goal setting) and beleid (policy).

Government action that puts 'doelstelling' and 'beleid' is an active power. The nature of this active according to Philipus M. Hadjon (2004), in the concept of administrative law are intrinsically represents the main elements of 'Sturen' (besturen). In the concept of bestuur (besturen), the power of Government in the exercise of governmental authority is not solely as an authority is bound, as stated in the rule of law, but also a free authority or discretion.

As a comparison in some countries known as the 'discretionary power' (United Kingdom), 'ermessen' (Germany), and 'bevoegdheid vrij' (Netherlands). Discretion in the sense of the discretionary power in the common law system in the United Kingdom was 'the power of a judge, public official or a private party (under authority given by contract, trust or will to make decisions on various matters based on his/her opinion within general legal guidelines (www.LegalDictionary.com). Discretion in this approach means the authority of a judge, public officials or private parties (which act upon the authority given by a single agreement) to make decisions in a variety of it based on his own opinion with reference to the normative legal rules. The concept of discretion in the discretionary approach to power is the authority that is owned either by the judges, public officials and private parties. In this case, discretion is in the realm of public law as well as civil law.

The concept of discretionary power which applies in the United Kingdom is different from the concept of vrij bevogdheid in Netherlands is more directed to the realm of public law, since the term bevogdheid more brought in the realm of public law in connection with the vrijbestuur (freedom of Government) in carrying out the actions of Government. N.M. Spelt flour – J.B.J.M. ten Berge in his writings entitled 'Inleiding Vergunningenrecht' as quoted by Philipus M. Hadjon (2004), distinguishes two kinds of freedom of Government (vrij bestuur), namely beleidvrijheid (freedom of wisdom) and beoordelijngsvrijheid (freedom of judgement).

More about the freedom of wisdom (beleidvrijheid) outlined that: 'Er us beleidsvrijheid (ook wel discretionare bevoegdheid in enge zin) indien een regeling een wettelijke bestuursorgaan een bepaalde bevoegdheid verleent, terwijl het aan het orgaan vrij staat van het gebruik van bevoegdheid die af te zien, ook al zijn de voorwaarden voor rechtmatige uitoerening vervult daarvan' (freedom) of wisdom (discretion means narrow authority) when the legislation specific to the authorized organs of the Government while the organ free to (don't use it though the terms for its use is legally fulfilled) **(**Philipus M. Hadjon, 2004).

Regarding the freedom of judgement (beoordelingsvrijheid) it says that: 'Beoordelingsvrijheid (ook wel discretionare bevoegdheid in oneigenlijke zin) voorzover bestaat het bestuursorgaan heth in ann rechtens overgelaten om te beoordelen en zeltrstanding exclusier or de voorwaarden voor een rechtmatige uitoepening van een bevoegdheid rijn vervuld' (evaluation liberty (authorized diskresi in the sense that not real) is so far under the law submitted to the organs of Government to assess independently and exclusively whether the conditions for the implementation of an authority lawfully have been met) (Philipus M. Hadjon, 2004).

Discretion as vrij bevoegdheid can mean freedom of wisdom (beleidvrijheid) as a discretion in a narrow sense of authority to provide governance to disconnect the apparatus independently, whereas in the sense of freedom of judgement (beoordelingsvrijheid) as a discretion within the meaning of that fact, not authorize the interpretation of norms was disguised (vage normen or blanket norms).

As opposed to authority bound (gebonden bevoegdheid), discretion in free authority (vrij bevogdheid) is a great choice for government action with regard to the formulation of norms containing factual conditions or vage norm such as emergencies, disasters and others. Discretion can not be done without a conditio sine quo non of the underlying essence of discretion itself. Of course discretion as an action to perform the selection of aspects of the formulation of norms and

conditions of factual does not mean free-free, but the parameters are done based on laws and regulations and the General principles of Government is good.

In regard to the meaning of discretion in Germany not ‘ermessen’ in the sense of 'freies ermessen' as long as it is implemented in law in Indonesia. The existence of the ‘freies ermessen’ by legal experts before more are brought in the concept of vrij bevoegdheid in the Netherlands as the authority freely. But the essence is different with ermessen bevoegdheid vrij. ‘Ermessen’ concept defined as 'Ist Behőrde ermächtigt, die nach ihrem Ermessen zu handeln, hat sie ihr Ermessen entsprechend dem Zweck der Ermächtigung auszuüben und die Grenzen des gesetzlichen Ermessens einzuhalten' (if any State agencies/public have the authority for consideration, then the State agencies/public should use 'ermessen' it according to the usefulness of the authority and the legal limits that apply to the discretion) (Pipit Kartawidjaya, in Nirahua Salmon E. M, 2012:7).

In the concept of ‘ermessen’ (consideration), then the actions of the Government apparatus is not free but it must be based on the rule of law that apply to the authority owned. In that sense ‘ermessen’ above, then it can be said no ‘ermessen’ (consideration) are freies (free), but must be clearly defined in the legislation.

The use of the concept of discretion as a comparison made above a source of law in the application of discretion in Indonesia. During this time, discretion is often equated with policies that are as free as freedom means free-for the Government to act. During the old order and new order, discretion the policy was often likened to take refuge on the vague norms of restriction and its provisions. The norms include, among others, of public interest, public order, and others. The Government often took refuge on the conditions justify the validity of the abstract for the Government's actions were in fact not based on the interests of the community.

Discretion as an authorized non-free does not mean free. Every authority in the country of an unknown law of any authority as free-free. The Authority (including the authority to authorize free and bound) always have the restrictions ordered by the legislation. Discretion as free any authority can not be done without any authority granted by the legislation. In addition, the General principles of good governance to be the unwritten norms and norms of behavior for governmental actions in conducting the reform.

In law number 30 by 2014 about government administration, (an attempt at codification in the field of administrative law as well as the source of the normative acts of the Government). As quoted above discretion is defined as 'a decision and/or action set and/or performed by government officials to resolve the question of concrete facing in implementing governance in terms of legislation that provide choice, not regulate, incomplete, or not clear, and/or any stagnation of Government'. The existence of this legislation as well as clarify discretion and its use is an option and not as free as freedom-free.

In Act 30 2014 set about the purpose of the use of discretion, discretion scope, requirements, and procedures discretion the use of discretion, as provided for in article 22, paragraph (2) of article 23, article 24 and article 26. When government officials use discretion in taking decisions must consider the purpose of the regulations, discretion become discretion, and basic general principles of good administration (article 31).

Settings as described above, indicates that the purpose of discretion is in fact the objective of the authority itself. Forming law of course within the authorized government based on the expected goal of the authority in question. This is a principle of law that the specifics of the principle of legality (legaliteit beginsel). The principle of the legality of giving the rationale that any government authority should have a legal basis as provided for in the legislation. The principle of legality is used in administrative law that has the meaning of 'Dat het bestuur is onderworpen aan de wet' (that the Government is subject to the Act) (H. D. Stout, 1994: 28) or 'Het houdt in dat alle legaliteitsbeginsel (algemene) de burgers bindende wet op de bepalingen moeten berusten' (principle of legality to determine that all provisions that tie citizens must be based on legislation). (H. D. Stout, 1994: 28). The principle of legality of governing legitimacy of actions is the basis and guarantee for the protection of the rights of the community.

Specification of the principle of legality is a fundamental goal (specialiteit beginsel) that any authorizations it contains specific objectives. This principle became the basis for the authority of the Government to act with associated on a purpose. Each Government authority (bestuurs bevoegdheid) governed by the laws and regulations of a particular purpose. From this point of view is a series of rules of administrative law relating to a particular public interest (Mariette Kobussen in Nirahua Salmon E.M, 2012: 11).

2. Criteria For The Use Of Discretion Governance

Discretion as free authority (vrij bevoegdheid) have criteria with the parameters of the legislation and general principles of Government is good. Although in wetmatigheid, the regulations provide the authority for governmental apparatus free, but legal criteria (jurisdiche criteria) to assess in terms of rechtmatigheid the authority of the free. Legal criteria used are general principles of good governance, which is known in the Netherlands as 'algemene beginselen behoorlijk bestuur'.

United Kingdom legal system to put forward the principle of Ultra Vires in testing the discretionary power which is based on illegality, irrationality and procedural impropriety.

Illegality with regard to it decision makers that is not authorized or existing defects of authority (discretionary power or abuse of discretion).

Irrasionality occurs when a decision-maker has determined the factors which are not feasible or are not relevant in the reasoning, or disproportionate and contrary to Article 8 of the solar European Convention on Human Rights (respect of correspondences).

Procedural impropriety related to violating important statutory procedure, bias, lack of a fair hearing, failure to give reasons for decision.

General principles of good governance is the normative juridical arranged to in article 53, paragraph (2) letter b Act No. 9 of 2004 on amendment Of Act No. 5 of 1986 on The Judiciary of the country. General principles of good governance are juridische criteria by either the judges adjudicating in as well as by government apparatus as the Foundation in organizing governmental functions and reasons filed a lawsuit in The State Courts.

In the explanation of article 53, paragraph (2) letter b mentioned that: what is meant by 'general principles of good governance' is the Basic include:

- legal certainty;
- orderly organization of the State;
- disclosure;
- proportionality;
- professionalism;
- accountability,

as stipulated in Act No. 28 of 1999 regarding the organizers state that is clean and free from corruption, collusion, and Nepotism.

The settings in this explanation raises error of law by lawmakers with likened the General principles of good governance to the principles of organizing the State. General principles of good governance are the principles informing government actions performed by the apparatus of Government (particularly the Executive approach bestuur) and substantially different from principles of organizing the State apparatus is intended for organization of the State as a whole (whether legislative, Executive or judicial affairs).

General principles of good governance in the ius constitutum approach as set forth in section 10ayat (1) and explanations of Administrative legislation, namely:

a. the principle of legal certainty;
b. the principle of expediency;
c. the principle of independence;;
d. principle of accuracy;
e. the principle of not abusing the authority;
f. the principle of openness;
g. the principle of public interest, and
h. the principle of good service.

The principle of legal certainty is a fundamental law in the nation that prioritizes the cornerstone provision of legislation, the propriety and fairness in every policy organization of the Government.

The basic benefit is a benefit that must be considered in a balanced way between (1) the interests of the individual with other individuals, (2) the interests of the individual with the community, (3) the interests of citizens and foreign communities, (4) the interests of one community group and the interests of other community groups, (5) the interests of the Government with the citizens of the community, (6) the current generation's interests and the interests of future generations, (7) the interests of human beings and the ecosystem, (8) the interests of men and women.

The principle of impartiality is the principle which requires that agency or Government officials in taking decisions take into consideration the interests of the parties as a whole and is not discriminatory.

The basic principle of accuracy is containing the sense that a decision and/or action should be based on complete information and documents to support the legality of the determination and/or implementation of the award and/or an action so a decision and/or action in question prepared carefully before decisions and/or actions are specified and/or done.

The basic principle is that does not abuse requires that any agency or Government officials not to use those powers for personal gain or the benefit of another and not in keeping with the purpose of granting such authority, do not exceed, not abuse, and/or not to confuse authorities.

The principle of openness is the basis of serving the community to gain access and obtain the right information, honest, and not discriminatory in providing Government with fixed attention to the protection of personal rights, groups, and State secrets.

The principle of public interest is principle of giving priority to the welfare and benefit of the public by way of the aspirational, accommodating, selective, and are not discriminatory.

The principle of good service, is the basis of providing services that are timely, clear procedures and costs, in accordance with the standard of service, and rules and regulations.

The use of discretion by the apparatus of Government is related to the Government's actions raise the prices of fuel oil, as happens in 2012 is an analysis to find out whether such action constitutes an discretion Government officials or not.

Use of discretion is related to the increase in the price of fuel oil in the year 2012 as the basis of authority in the law on the State Budget revenue and Spending Changes to replace Act No. 22-year 2011 Budget of the State Expenditures and Revenues by 2012-is a political deal with the passage of the legislation Budget income and Expenditure the country Changes have caused the reaction of judicial review in the Constitutional Court against the formulation of norms of article 7, paragraph (6) letter a, which is the realm of the law Of the country.

However, the underlying thing is the formulation of legal norms in article 7, paragraph (6) letter a by the Government and its supporters often associated with Government as discretion Administrative jurisdictions. The formulation of legal norms of article 7, paragraph (6) letter a mentions that:

'In terms of the average price of oil Indonesia (Indonesia Crude Oil Price/ICP) within a increase or decrease an average of 15 (fifteen per cent) in 6 (six) months of the international oil price assumed in the budget income and Expenditure the country Changes the fiscal year 2012, then the Government has the authority to make adjustments to the price of subsidized fuel oil and its supporting policies'. The formulation of legal norms is considered the norm discretion Government to perform acts of Government.

The formulation of legal norms in question can be categorized as discretion the Government. Said so, because it is a free authority for the Government to make adjustments in fuel oil prices are subsidized with legal criteria of ICP in the period running within 6 (six) months of increase or decrease in the average of 15 (fifteen per cent). Although based on the legislation, lawmakers have authorized free (discretion) for the Government, but the nature of the discretion as an option against the formulation of legal norms and taking into account the factual circumstances, then the Government has the authority to do or not to do so.

Having the freedom to do or not do the authority it would need to be an rational thought by considering various aspects related to the increase in the price of fuel oil. Discretion as provided for in article 7, paragraph (6) letter a is not a freedom of action that is as free-free and is imposing the will of the Government. The main function of the Government in connection with community relations based on 'the right to receive' which must be accepted by the community. Factual circumstances should be a major consideration for the Government, because it certainly is a major task to pay attention to the principles of democracy and openness put forward and the role of the community.

The purpose of the granting of discretion for the Government by the legislation contains vague meaning of an discretion Government. Rationality and considerations having regard to the factual conditions is a requirement that must be implemented by the Government with constant attention to the principles of good governance in the conduct of Government.

Likewise with policy support will be undertaken by the Government with subsidized oil fuel restrictions for certain vehicles. These restrictions are in fact has no connection with advocates of policies, because it is not associated with a rise in the price of fuel oil. That means the Government is required to put forward 'the right to receive' and the destination is discretion.

Juridical consequences with the use of discretion which is not based on objectives, legislation and general principles of good governance will be discretion will be nuanced the occurrence of arbitrary actions and abuses of authority.

Arbitrary actions and abuses of authority as a normative set forth in Act No. 30 2014.

Article 18 paragraph (3) sets out that 'the Agency and/or Government officials acting arbitrarily categorized as referred to in article 17, paragraph (2) Letter c when decisions and/or actions taken:

a. Basic without authority; and/or

b. contrary to the ruling of the Court, consisting of the law anyway.

Article 17, paragraph (2) sets out that 'the prohibition of the abuse of the authority referred to in subsection (1) include the following:

a. ban transcends the authority;

b. Prohibition of mixing of authority; and/or

c. Prohibition Act arbitrarily.

Ratio of any of the above settings indicates that arbitrary action could occur because the Government does not have enough rationality as a parameter to the necessity of the price increase of the fuel oil and subsidized fuel restrictions. On the other hand, this action may result in abuses of power parameter based on the purpose of grant of authority misused.

4. CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions

From the above discussion, it can be concluded that any discretion the Government should be based on the principle of legality, the principle of democracy, the basic objectives, and general principles of good governance as a meta-norm informing government actions.

2. Recommendations

Government officials in carrying out discretion the Government is expected to achieve public services and welfare together.

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