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Juridical Analysis of Legal Protection On Charges Due To Discretionary Authority For Regional Officials

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ABSTRACT: This article reviews the roles and responsibilities of local officials in the use of discretionary powers and the legal repercussions that may arise from their decisions. Through a juridical approach, it investigates the legal protections available to local officials when they face indictments or lawsuits as a result of their discretionary actions. Taking into account the existing legal framework, this article analyzes various factors that may influence whether local officials will be held legally responsible for their discretionary decisions, including ethical, public policy and fairness considerations. In addition, it explores the legal safeguards that local officials can take, including enforceability of laws, liability insurance, and dispute resolution mechanisms. As such, this article aims to provide a better understanding of the complexities of legal protection for local officials in the context of the use of discretionary authority. The results showed that legal protection for regional officials related to the use of discretionary authority can be seen from various aspects, including the principle of legality, the principle of legal certainty and accountability. The juridical analysis of legal protection against charges due to discretionary authority for regional officials shows the importance of a deep understanding of the limits and responsibilities attached to the use of such authority. By paying attention to aspects of legality, legal certainty, and accountability, it is hoped that legal protection for regional officials can be guaranteed in the context of the use of discretionary authority.

Keywords: legal protection, discretionary authority, local officials

INTRODUCTION

One of the objectives of the State listed in the Preamble of the 1945 Constitution is to protect the entire Indonesian nation, which means that the state and government must protect citizens in all aspects of national life, namely both in terms of economics, for example regulated in article 33 and in terms of politics and regulated in article 27 paragraph 1, namely every citizen is equal before the law and government and must uphold the law and government with no exceptions. Thus, every citizen should get protection from the State and government when making a policy in government based on law, jurisdiction and discretion (Søreide & Vagle, 2020).

In running the government, the Government has been equipped with both attributive and delegative authorities. With the development of society, there are often certain urgent circumstances that make government officials / agencies unable to use their authority, especially the authority that is bound (gebonden bevoegheid) in carrying out legal actions and factual actions normally (Oomen et al., 2021).

The law on government administration is an important legal basis to ensure that government officials can take decisions and actions that are in accordance with the legal needs of the community. Government officials must make public policies that are in accordance with laws and regulations to meet the needs of society. However, if there is a situation where the law does not regulate an issue, government officials can use discretion to take relevant legal actions in policy making (Mugari & Obioha, 2022).

The implementation of the Indonesian government must act based on the law (rechtmatig) or what is called legality. In English literature, the term legality is also called legality, which means "lawfullnes" (Bryan A Garner, 2014).

In acting, the government must be based on the provisions that govern / the scope of legality "wetmatigheid van het bestuur". One of the rules of law is that the government must act based on authority. This authority is usually regulated by legislation (formal legality). But as the concept of material law develops, it requires the government to provide public services (bestuurszorg). It is not uncommon for the laws and regulations to be insufficient as the basis for the authority to act, because the laws and regulations have many shortcomings, such as unclear norms, vacant norms, and so on. It is in this situation that the government needs to take discretionary action.

According to Article 1 Point 9 of the General Provisions of the Government Administration Law Number 30 of 2014, the definition of discretion is the power determined and/or exercised by government officials to solve concrete problems in the administration of government is a decision and/or action that the provisions of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or stagnant by the government (Wissink, 2021).

The phenomenon in today's society is that in the use of discretionary authority, government officials are often misinterpreted as having abused their authority. Government officials are easily subject to criminal provisions, which threaten punishment for office holders who abuse their authority. Whereas in administrative law theory, officials only act in the capacity of representing the authority of the position. Government officials who use discretionary authority, as long as it is exercised within their formal authority or in the context of exercising official authority, all consequences that will arise are the responsibility of the office. According to Arifin P.Soeria Atmaja as quoted by Julista Mustamu that a discretionary policy cannot be submitted to the court let alone subject to criminal law because the legal basis of the policy that will be the legal basis for the prosecution does not exist (Mustamu, 2011).

Discretionary authority is a very broad authority, and it is not easy to interpret it. It requires a study to

determine whether it is included in discretion. And officials can freely determine when to use it. In exercising discretionary authority, officials can also be threatened with criminal sanctions or criminalization, so that if proper legal protection is not provided, the impact will occur, namely at least officials will be afraid to determine when there are no legal rules governing or the norm is vague.

Based on this phenomenon, it can be seen that the state has not protected both legally and politically. So that in government circles many officials are afraid to make policies for fear of being considered an abuse of power. This is due to the lack of clarity or at least the absence of arrangements regarding legal protection for government officials in using discretionary authority. Thus, the author wants to examine how the protection of charges or lawsuits against government officials due to the use of discretionary authority.

RESEARCH METHODOLOGY

This research is normative legal research with a qualitative approach. Normative law research, with a statutory approach. Normative legal research is legal research that examines the law conceptualized as norms or rules that apply in society, and become a reference for the behavior of everyone (Abdulkadir, 2004).

The normative legal research method is defined as a research method on the rules of legislation both in terms of the hierarchy of legislation (vertical), as well as the harmony of legislation (horizontal). The legal sources used are legislation related to legal protection, local government, and discretionary authority.

RESULT AND DISCUSSION

Legal Protection

Legal protection is a description of the function of law, namely the concept where the law can provide justice, order, certainty, benefit and peace. Satjito Rahardjo legal protection is an effort to protect a person's interests by allocating a Human Rights power to him to act in the context of his interests. Meanwhile, Setiono legal protection is an action or effort to protect the public from arbitrary actions by the authorities that are not in accordance with the rule of law, to create order and peace so as to enable humans to enjoy their dignity as human beings.

According to Phillipus M. Hadjon, legal protection for the people is a preventive and responsive government action. Preventive legal protection aims to prevent disputes, which directs government action to be careful in making decisions based on discretion and responsive protection aims to prevent disputes, including handling them in the judiciary (Rahardjo, 2013).

In the legal context, the definition of legal protection is all efforts made consciously by every person and government, private institutions aimed at securing, controlling and fulfilling the welfare of life in accordance with existing human rights as regulated in Law Number 39 of 1999 concerning Human Rights. Basically, legal protection does not distinguish between men and women.

Based on the description of the experts above, it provides an

understanding that legal protection is a description of the operation of legal functions to realize legal objectives, namely justice, benefit and legal certainty. Legal protection is a protection given to legal subjects in accordance with the rule of law, both preventive and repressive in nature, both written and unwritten in order to enforce the rule of law.

Concept of Discretionary Authority

In English, the principle of discretion is known as "discretion or discretion power" which means freedom of action or decisions taken on the basis of one's own judgment. According to the Legal Dictionary, Discretion is the freedom to make decisions in every situation faced according to his own opinion. Lumbun defines Discretion as "The policy of State officials from the center to the regions which essentially allows public officials to carry out a policy that violates the law, with three conditions, namely the public interest, still within the limits of their authority, and does not violate the general principles of good governance.

In Article 1. Number 9 in the general provisions of Law No. 30 of 2014 concerning government administration states that the definition of discretion is a decision and or action determined and or carried out by government officials to overcome concrete problems encountered in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete or unclear and or there is government stagnation.

Indroharto explains discretionary authority as facultative authority, which is the authority that does not require the State administrative body or official to apply its authority, but provides an option even if only in certain matters as specified in the basic regulations (Indroharto, 1993). Meanwhile, Atmosudirjo defines discretion as the freedom of action or decision making of authorized and authorized State administrative officials according to their own opinion (Atmosudirjo, 1994).

Discretion in the Legal System of Local Government in Indonesia

Law Number 23 of 2014 concerning Regional Government explains the regional government of the regional head as an element of regional government organizers who lead the implementation of government affairs which are the authority of autonomous regions. The regional government is the holder of power in the region, meaning that the administration of government in the region is the authority and power of the regional government.

In the regional government system in Indonesia, the regional head is elected together with the deputy regional head, namely the Governor and Deputy Governor who run the government in the provincial area, the Regent and Deputy Regent as the district government and the Mayor and Deputy Mayor as the government organizer in the city area. Regional heads are elected in a mechanism of general elections of regional heads. The authority to elect is given to the local community and not to the legislature.

The regional head is also an administrative official who has the authority to take an action or state administrative decision in order to carry out the administration of regional government. This also means that local governments are authorized to take actions or decisions that are directly written in laws and regulations or the

bound authority of the local government. The authority referred to is called discretionary authority.

Discretionary authority lies with government officials. In the previous explanation, it was explained that based on Law Number 30 of 2014 concerning Government Administration Article 1 Point 9, that discretion is a decision and / or action determined and / or carried out by a Government Official to overcome concrete problems encountered in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete or unclear, and / or there is government stagnation.

Government officials are authorized by law or have the right to take a discretion in the process of local government administration. Apart from having the right, government officials are also obliged to comply with the Government Administration Law in using discretion. Article 22 paragraph (1) of the Government Administration Law stipulates that discretionary authority can only be exercised by authorized government officials (Nalle, 2021).

Discretion can take 2 (two) forms.

1. State administrative decision.
2. Actual government actions or conceptualized by Utrecht as government actions based on facts or actions that are not legal actions or actions without consequences regulated by law.

Therefore, if referring to the definition of the Government Administration Law, discretion is also a factual action that does not have legal consequences (Wibisana, 2016).

Discretion can be in the form of a decision but can also be an action or a decision accompanied by action. Action in this context is interpreted in the Government Administration Law Article 1 point 8 as an act of Government Officials or other state administrators to perform and/or not perform concrete actions in the context of governance.

Legal Protection of Indictments Due to Discretionary Authority for Regional Officials

Legal protection does not only apply to citizens, but is also important for government officials in carrying out their duties and authorities. Like the public in general, officials are also legal subjects who have rights and responsibilities. Therefore, they are entitled to legal protection, especially when using the permits granted to them. Because as public officials, they face challenges in properly fulfilling their obligations (Darumurti, 2014).

The government that acts beyond its formal authority can be said to contain elements of maladministration, and the responsibility imposed is personal responsibility. A policy carried out by the government is considered deviant if there are elements of abuse of authority and arbitrary. In the Dutch wet AROB, a policy will be considered arbitrary if the authority is manifestly unreasonable). So what are the limits of government action that is still in its formal environment, of course this is a confusion. If this is allowed to continue, there will be a lack of courage for government officials to make policies, so that public services will be hampered.

Protection for local officials against indictments for actions can be

done by applying preventive legal protection. Preventive legal protection in the current law is very insufficient because not everything is contained in a regulation. Many government officials have not maximized the potential of discretionary authority because they do not get legal protection. Conversely, there are government officials who use discretionary authority with the purpose of granting such authority but are subject to criminal sanctions. One form of preventive legal protection stated in Article 67 paragraph (1) of Law of the Republic of Indonesia Number 5 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning State Administrative Justice (Law No. 5-2009), is the principle of legality.

Philipus M. Hadjon states that government actions should always be considered valid until they are overturned. He believes this principle creates a framework in which all government actions are considered valid. The presumption of just cause is a principle in administrative law that is now applied in the State Administrative Court (PTUN), providing certainty that every state administrative decision must be considered correct or valid according to the law (Tatawu, 2018). The point of this principle is that even if there is a challenge at the Administrative Court, it does not delay the implementation of the decision, and the decision continues as it was intended. emphasizes the importance of considering government actions as valid until proven otherwise, and stresses the importance of this principle in ensuring the legality of government decisions. This presumption forms the basis for considering all government actions as legitimate until challenged and overturned, thus contributing to the overall legitimacy of government activities.

In administrative law, the presumption of fairness plays an important role in the judicial process, especially in the context of the Administrative Court. By adhering to this principle, the Administrative Court ensures that every decision taken by a state authority is automatically presumed to be correct and lawful, unless proven otherwise, thus establishing a clear standard in assessing administrative actions.

The principle of legality is the basis for the validity of government actions, providing legal protection to the public and government officials. The presumption of validity of government actions is known as praesumptio iustae causa, which applies until it is overturned by the court or revoked itself. The purpose of this principle is to realize one of the main functions of law, namely legal certainty. If a decision issued by a government official can easily be said to be invalid, then the decision does not have strong credibility as a legal product issued by a government official body. For this reason, every KTUN issued by a government official must be interpreted as a legally valid decision if the court decision does not decide otherwise.

In addition, this principle is also a means of legal protection by government officials so that every decision they make is interpreted as valid and there are no elements of violating the law, this is so that government officials are easier and there is no fear of issuing any decisions that are considered important to carry out public service functions. If it is related to discretionary authority, every decision taken by government officials based on

discretionary authority is valid as according to the law. If you want to cancel a decision issued by an authorized government official, it must first be tested in court. The court that examines decisions made by government officials is the PTUN, whose absolute competence is to examine the KTU.

The second preventive legal protection is the principle that policies cannot be penalized. A policy (beleids) is a legal product that can be issued by authorized government officials. Muhadjir Darwin distinguishes between policy and wisdom, and defines that a policy is an immediate action, in view of the urgency or conditions faced by the government. While a policy is a series of planned and organized actions that have been carried out by government officials to achieve the desired goals, wisdom is more forward-looking. Policies issued by authorized government officials cannot be threatened with criminalization because a policy is an interpretation by the policy maker.

A policy is a product of administrative law and cannot easily move into the realm of criminal law, even if there are administrative irregularities in the policy. This principle must be stated in a regulation, because this principle relates to policies that are valid and used in carrying out a service. If this principle is not regulated, it will create an uncertainty about the existence of a policy, from one side the policy can be criminalized easily and from the other side there is a principle stating that policies cannot be subject to criminal sanctions which are really needed today to promote certainty (Subhan, 2019).

The above statement can be concluded that policies based on discretion cannot be punished, especially in policies taken by government officials that are solely used for the public interest. The initial idea of the emergence of a policy that cannot be punished arises because many policies issued by the government deviate from the law, so that their actions are considered as unlawful acts (wederrechtlijke), for that officials in using their policies are often subject to criminal sanctions, even though the concepts of administrative law and criminal law are very different.

The next principle that must be considered is the principle of legal certainty and accountability. Legal certainty over discretionary actions taken by government officials is stated in Article 67 paragraph (1) of Law of the Republic of Indonesia Number 5 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning State Administrative Courts (Law No. 5-2009).

The principle of accountability has been established as a principle that must be adhered to for every state administrator, in addition to the General Principles of Good Government (algemene beginselen van behoorlijk bestuur). In a legal context, the principle of accountability is one that asserts that public officials, including local officials, must be responsible for the actions and decisions they take in the course of their official duties. This is important to ensure transparency, integrity and fairness in public services as well as legal protection for all parties involved.

When a local official suffers charges as a result of a discretionary

action, it is important for them to ensure that the legal process is fair and transparent. Some steps that can be taken to protect themselves legally include:

1. Compliance with Legal Procedures: Local officials must ensure that any discretionary action they take is based on proper legal procedures and in accordance with their authority.
2. Collaborate with Legal Institutions : It is important for local officials to collaborate with legal institutions such as lawyers or advocates to obtain proper legal protection during litigation.
3. Transparency and Accountability: Local officials should be transparent in explaining the rationale behind each discretionary action they take and be ready to be accountable for such decisions.
4. Legal Education: Understanding the legal basics related to discretionary actions can help local officials avoid violating the law and better face charges.

CONCLUSION

The results showed that protection for local officials against charges for actions can be done by applying preventive legal protection. Preventive legal protection in the current law is very insufficient because not all of them are contained in a regulation. Legal protection for local officials related to the use of discretionary authority can be seen from various aspects, including the principle of legality, the principle of legal certainty and accountability. The juridical analysis of legal protection against charges due to discretionary authority for regional officials shows the importance of a deep understanding of the limits and responsibilities attached to the use of such authority. By paying attention to aspects of legality, legal certainty, and accountability, legal protection for regional officials can be guaranteed in the context of the use of discretionary authority.

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