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Removal of Discretion Requirements in Government Decision Making Based on Copyright Law

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Abstract

Elimination of conditions for the use of discretionary legislation must be followed by regulations. Article 24 point b of the Job Creation Law aims to provide more flexibility to government officials in making decisions for the purposes referred to in Article 22 paragraph (2) of the UUAP, bringing juridical implications for the use of the basis for decision making, the basis for lawsuits, and the basis for testing the validity of law *(toetsingrecht)* government decisions. In addition, the abolition of these conditions must also be followed by the threat of criminal sanctions for officials who commit criminal acts of corruption based on the provisions of Article 3 of the Anti-Corruption Law. This is done to avoid the escape of suspected perpetrators of corruption from the snares of the law. Because the criminal threat is based on Article 2 of the Anti-Corruption Law, if the suspect is not proven to have committed an unlawful act, then the suspect is based on the legality principle in criminal law, "no action can be punished unless it is regulated by law.

Keyword

Removal of Discretion Requirements; Government Decision; Copyright Law

Introduction

Indonesia is a state of law, this statement is formulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a consequence, every use of government authority must comply with the principle of *rechtmatigeheid van bestur,* that all actions of the authorities must be based on law. It also implies that, everything

in this country is always based on law[1]. Therefore, the existence of a law is very important as a basis for the legitimacy of the use of government authority. However, the law is not always able to meet the demands of the needs, in fact it always lags behind the needs of the practice of governance. Positive law is not able to predict government problems that continue to develop dynamically, so that there is a gap between the law and the need for governance practices.

To overcome the gap between norms and the need for government administration, in the tradition of administrative law, a legal instrument called "*discretionary power" is provided, discretionary power*, or "free power". Article 1 point 9 of Law Number 30 of 2014 concerning Government Administration (UUAP) and Article 1 point 9 of Law Number 11 of 2020 concerning Job Creation (UU-Cipta Kerja). In the Employment Creation Law, discretion is defined as "Decision and/or Action determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government, in terms of laws and regulations that provide choices, do not regulate, are incomplete. or unclear, and/or government stagnation".

At the time the UUAP comes into effect, the use of discretion must be in accordance with the laws and regulations. This requirement is regulated in Article 24 point b of the UUAP. However, the enactment of the Job Creation Law, the provisions of Article 24 point b of the UUAP are abolished and replaced with AUPB. The abolition of these conditions is regulated in Article 24 point b of the Job Creation Law. The abolition aims to provide more flexibility for government officials to use discretion to take real and fast steps to overcome problems in the administration of government, without having to be overshadowed by fears that the government's actions violate legal norms. So far, the use of discretion is often criminalized as an act that is not based on the law, and its officials are processed under the Corruption Law with accusations of abuse of authority.

Legal Issues

Implications for the abolition of conditions for the use of discretion do not have to be in accordance with the laws and regulations as referred to in Article 24 point b of the UUAP based on Article 24 point b of the Job Creation Law.

Research Methods

This research is normative legal research, namely legal research that focuses on positive legal studies, in this case the UUAP and the Work Creation Law, using a philosophical approach, a statutory approach, and a conceptual approach.

Result And Discussion

a. Discretionary Authority

The term authority is often used interchangeably with the term authority.

[1]Jazim Hamidi and Budiman NPD Sinaga, *Formation of Legislation in the Spotlight*, PT Tatanusa, Jakarta, Cet. I, 2005.

The term authority comes from the Dutch concept of administrative law *bevoegdheid*. The Dutch administrative law literature does not distinguish between authority and rights, both of which are grouped under the term *"bevoegdheid".* So *bevoegheid* does not have a legal character, because the term bevoegheid is used in the field of private law and public law. While the English language literature uses the term *competence,* which means authority and is distinguished from the term *authority* which means authority.

Authority is the power to take action in public law, while power is an action in the field of private law[2].

According to Bagir Manan, power has a different meaning from authority. Power is the right to do or not to do. Authority means both rights and obligations *(rechten and plichten).*[3] This means that in the authority at the same time there is an obligation, there is also a responsibility. Authority is divided into binding authority and free authority or discretionary authority.

The discretionary authority is further divided into judgmental authority and discretionary authority. The independent authority of judgment gives independent power to the owner of the authority to judge the vaguely formulated norms. Meanwhile, the discretionary authority gives the authority holder the power to choose to use or not to use his authority to make decisions.

The authority in Law Number 30 of 2014 concerning Government Administration, hereinafter referred to as UUAP, distinguishes between “authority and authority”. In Article 1 point 5, Authority is defined as the right owned by a Government Agency and/or Official or other state administrator to make decisions and/or actions in the administration of government. Whereas in Article 1 point 6, Authority is defined as the power of Government Agencies and/or Officials or other state administrators to act in the realm of public law.

Discretion according to Article 1 point 8 UUAP, is defined as a decision and/or action determined and/or carried out by a government official to address concrete problems faced in the administration of government in terms of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or government stagnation. Furthermore, the use of discretion is regulated in Article 24 of the UUAP, which is formulated: Government officials who use discretion must meet the following requirements: a). in accordance with the purpose of the Discretion as referred to in Article 22 paragraph (2); b). does not conflict with the provisions of laws and regulations; c). in accordance with AUPB; d). based on objective reasons; e). does not create a conflict of interest; and f). done in good faith.

The purpose of the use of discretion is regulated in Article 22 paragraph (2) of the UUAP, which is formulated: Every use of the discretion of government officials aims to: a). expedite the administration of government; b). fill legal voids; c). provide legal certainty; and D). overcome the stagnation of government in

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2 Prajudi Admosudirdjo, *State Administrative Law*, Cet IX, Ghalia, Indonesia, Jakarta 1998, p. 104.
3 Bagir Manan, in Philipus M.Hadjon, Concerning*Authority,* Juridika Numbers 5&6 Year XII, September-December., p. 7.

certain circumstances for the benefit and public interest.

Article 24 point b of the UUAP is abolished with the enactment of the Job Creation Law, based on the provisions of Article 24 point b, which is fully formulated: Government Officials who use discretion must meet the following requirements: a) in accordance with the objectives of the discretion as referred to in Article 22 paragraph (2); b). in accordance with AUPB; c). based on objective reasons; d) does not create a conflict of interest; e) done in good faith. So, Article 24 point b which in the UUAP contains the sentence "statutory regulations are replaced with AUPB".

b. Benefits of Discretion in Government Administration

Discretion gives freedom to the authority holder to: a) the freedom to use or not to use their authority; b) freedom to judge on vaguely formulated norms. The meaning of vague norms is clear, vague norms are formulated in concepts, propositions, verses, and articles in a law[4], the meaning depends on the interpreter.

The first type of discretion is marked with the word "can", and is called *bleeds vrijheids,* while the second type of called *discretion is "bordering Vryheid".* This type is characterized by phrases such as "decency, public interest, social welfare", and so on.

The type of phrase "can" in law is not imperative, but is an option. This means that the authority holder is given the freedom to use or not to use his authority, even though the conditions for that are met. For example, "The Regent has the authority to revoke the Building Permit, if it violates the conditions that have been determined". In practice, the Regent does not have to revoke the said permit, even though the conditions for that are met. In the sense that even though the use of the permit has been proven to violate the specified requirements, the Regent does not have to revoke the permit. Not using this authority is a problem, it is also not wrong to use it, but it must remain within the corridor of the rule of law.

The second type of discretion, with the phrase as in the example above, gives freedom to the authority holder to independently assess what is meant by vaguely formulated norms. What is the articulation of the meaning of the phrase decency, public interest, social welfare, and so on, is highly dependent on the authority holder who interprets it. The meaning of such vague norms is subjective, because there are no clear parameters or criteria to measure it.

If it is then interpreted according to its own interests, and it turns out that it is not in accordance with the principles of clean governance, in this case the importance of the presence of the General Principles of Good Governance (AUPB) as an instrument for limiting the use of discretionary authority.

c. AUPB as a Discretionary

Limiter AUPB is an extension of the General Principles of Good Governance,

[4] Yovita Arie Mangesti and Slamet Suhartono, Contemporary *Law*, Setara Press, Malang, 2020, p.70.

which is also called the General Principles of Proper Governance (AAUPL).[5] The definition and limits of AUPB are not regulated in detail in the law, because the scope is very broad, and it is difficult to determine the criteria and parameters. In addition, the detailed regulation of AUPB in the law would actually be contrary to the character of discretion. In addition, the general principles of governance itself continue to evolve according to the needs of practice.[6]

The AUPB is not regulated in detail in the law, in fact it can provide flexibility for judges who are adjudicating the use of discretion to explore, seek, and find the meaning of AUPB that develops in the administration of government. AUPB is elastic in nature and continues to follow the needs of governance practices.

The use of AUPB in the administration of government in Indonesia was first based on the Supreme Court's Implementation Guidelines (Juklak) No.052/Td.TUN/III/1992. In the Juklak, the use of AUPB is sufficient to be included in the judge's consideration, so that its use is not directly the basis for the judge's decision. In the dictum the judge's decision must still refer to the provisions of Article 5 paragraph (2) of Law Number 5 of 1986 concerning State Administrative Courts.

The enactment of Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning State Administrative Courts, the use of AUPB is stated in Article 53 paragraph (2) point b, which is formulated: -General principles of Good Governance. So that since then, AUPB can be used as a legal basis for filing a lawsuit, and at the same time as a test of the validity of state administrative actions by judges of the State Administrative Court.

At the time of the promulgation of Law Number 28 of 1999 concerning Clean, Corruption, Collusion and Nepotism Free State Administration, AUPB was included in Article 3, and was used as a parameter of legal validity for state administration. Furthermore, AUPB is further regulated in Law No. 9 of 2004 concerning Amendments to Law No. 1986 concerning State Administrative Courts. Its inclusion in this law is actually only an affirmation of what actually already exists in practice[7]. The enactment of the UUAP is stated in Article 24 letter c, before it was finally amended by Article 24 of the Job Creation Law. Currently, the use of AUPB as the basis for government decisions/actions, the basis for lawsuits, and the basis for testing the validity of government decisions/actions in a normative juridical manner must refer to Article 24 point b of the Job Creation Law.

d. Implications of Abolishing the Terms of Use of Discretion in the Employment Law The

The abolition of the requirements for the use of Discretion in Article 24 point

[5]Jazim Hamidi, Application of General Principles of Proper Governance in the State Administrative Court, Citra Aditya Bhakti, Bandung, 1999, p.21.
[6]Slamet Suhartono, *Principles of Limiting Free Authority*, Untag Press, Surabaya, 2011, p.37.
[7]R. Wiyono, *State Administrative Court Procedural Law*, Sinar Graphic, Jakarta, 2007, p.78.

b of the UUAP, indicates that the use of Discretion may override/statutory regulations, the important thing is that the use of Discretion is in accordance with the objectives as regulated in Article 22 paragraph (2) UUAP. In this regard, theoretically it has implications for the nomatic functions of administrative law, namely: the basis for government decision-making, the basis for public claims against government decisions, and the basis for testing the validity of government decisions by the Court. In addition, it also has juridical implications for the basis of criminal threats for government officials suspected of committing criminal acts of corruption.

First, the juridical implications for the legal basis of government decision-making are related to the principle of *rechtmatigheid van bestur,* which is adopted by Indonesia as a state of law. This principle requires that every use of government authority must be based on applicable law[8], basically ruling there is a law[9]. The principle of *rechtmatigheid van bestur* as the development of the principle of *wetmatigheid van bestur*, in the legal literature in Indonesia is called the principle of legal validity of government actions. Based on these principles, the existence of laws and regulations is very important as a legal basis for government actions, in this case government decision making. Contrarious, if the government's decision-making is not based on the applicable laws and regulations, then the decision is considered invalid, because it is contrary to the principle of *rechtmatigheid van bestur*.

The implementation of the principle of *rechtmatigheid van bestur* in the UUAP is stated in the provisions of Article 6 paragraph (2) point a, which is formulated: "Therights as referred to in paragraph (1) include: a. carry out the Authority possessed based on the provisions of the legislation and AUPB”; Article 7 paragraph (1), which is formulated: "Government Officials are obliged to carry out Government Administration in accordance with the provisions of laws and regulations, government policies, and AUPB"; and Article 8 paragraph (2), which is formulated: “Government bodies and/or officials in exercising their authority must be based on: a. laws and regulations; and b. AUPB".

The three provisions of the article in principle require that the Agency and/or Government Officials in exercising their authority must be based on: a). laws and regulations; and b). AUPB. However, the enactment of the Job Creation Law has removed the requirement of point a, which must be in accordance with the laws and regulations, meaning that the use of discretion can negate or ignore the laws and regulations, as long as it is in accordance with the purpose of the use of discretion as referred to in Article 22 paragraph (2) UUAP, and does not conflict with AUPB as referred to in Article 24 point b of the Job Creation Law.

If the provisions related to the abolition of the conditions for the use of discretion in Article 24 of the UUAP point b, it aims to provide more legal protection for government officials who use discretion. Because so far, when

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[8]HAMukti Fadjar, Types of Rule of Law, In-Trans, Malang, 2005, p.7
[9]Philipus M.Hadjon, *Government According to Law*, Unpublished Paper, Faculty of Law, Airlangga University, Surabaya, 1997.

government officials make decisions based on discretionary authority, they are often faced with legal problems, even to the point of going to court and being punished. The criminal imposition is based on the reason that the action or decision violates the applicable laws and regulations. Government officials are often accused of committing acts of abuse of authority, even though the decision/action is made to fulfill one or more purposes of using discretion as regulated in Article 22 paragraph (2) of the UUAP. In some cases, the suspect is indeed released from legal snares, and released from all charges, but not a few end up being sentenced to imprisonment and/or criminal fines.

Second, the implications for the basis of the community's lawsuit against the government's decision. The basis of the lawsuit is the second normative function of administrative law. Prior to the enactment of the Job Creation Law, the basis for a lawsuit against a government official, one of which must be based on the applicable laws and regulations. However, at this time, the lawsuit is quite based on the AUPB. If the lawsuit is based on the AUPB, then the first difficulty is that the plaintiff must be careful in choosing which principle to use as the basis for his lawsuit. Bearing in mind that in Article 10 of the UUAP, there are 8 types of AUPB, which include the following principles: a). legal certainty; b). benefit; c). impartiality; d). precision; e). not abuse authority; f). openness; g). public interest; and h). good service.

These principles are abstract and vague, still need to find the articulation of their meaning. As an example of the principle of "accuracy", this phrase certainly requires interpretation to find its meaning. Interpretation is subjective, which can give a very big influence in giving meaning in the use of norms vague[10]. Thus, in a lawsuit against the use of discretion, the plaintiff will at least be faced with the interpretation of the AUPB which is the basis of his lawsuit. Likewise, the judge who tested the lawsuit on the basis of the AUPB. The problem is whether the judge and government officials who are being sued have the same meaning as the plaintiff in giving the meaning of the principle of accuracy, so that the judge's decision, which is expected to win the plaintiff, actually wins the defendant, or vice versa.

It is different if the lawsuit is based on the norms of the legislation, which has a clear formulation, by mentioning the articles and paragraphs, as well as their elements in detail as the basis for the lawsuit, then the debate is only about proving whether or not the elements of the articles and paragraphs that were violated in the making decision. Meanwhile, a lawsuit based on AUPB will be faced with efforts to find and interpret which actions meet the AUPB criteria that are used as the basis for the lawsuit. Therefore, the use of AUPB as the basis for a lawsuit will be more difficult to prove than using laws and regulations, which have clearer parameters.

Third, the implications for the third normative function of administrative law, related to AUPB as a basis for testing *(toetsingrecht)* on government decisions by the Court, in the case of the State Administrative Court. In proving whether or not

[10]Slamet Suhartono, *Samar Norma and Its Use in Making Decisions Decision*, Untag Press, Surabaya, 2010, p.147.

the elements of AUPB which are used as the basis for the lawsuit are certainly not easy. Because there are no clear criteria regarding the AUPB which is used as the basis for the lawsuit. For example, the criteria and limitations violate the public interest in point d of Article 8 UUAP, which is used as the basis for a lawsuit to the Court. The meaning of "principle of public interest" is whose interests, whether the interests of the people, if it is related to the interests of the people, then the question is how many people are harmed by the government's decision, so that it can meet the criteria of public interest.

Assessing the articulation of the meaning of statutory norms will be easier when compared to assessing the AUPB which is used as the basis for a lawsuit against the government's decision. Because the principle is a meta norm, so it is not easy to determine the criteria and limitations. The judge when assessing the AUPB that is used as the basis for the lawsuit, may use his own understanding, but it should be based on sufficient scientific references, and pay attention to customary law that lives in the practice of government administration, so that the assessment of the AUPB is at least objective and close to the appropriate meaning. with a sense of community justice, especially the plaintiff.

Fourth, the implications related to the abolition based on the law as a condition for the use of discretion are threats to government officials suspected of committing a criminal act of corruption. During this time threatened criminal sanctions are the provisions of Article 2 Shrimp Act No. 30 of 1999 on Corruption Eradication (UU-Corruption), the offense under subsection (1), formulated: "Any person who acts unlawfully enrich oneself or another person or a corporation that can harm the state's finances or the state's economy, shall be punished with imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000. 000.00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)".

The formulation of the provisions of Article 2 paragraph (1) of the Anti-Corruption Law indirectly indicates that there is a condition that a person who can be suspected of committing a criminal act of corruption must first be proven to have committed an unlawful act. This means that in order for someone to be said to have committed a criminal act of corruption, evidence of a violation of the norms of the legislation is required first. Without any statutory regulations that are violated first, then relying on the principle of legality in the criminal law "*nullum delictum noela poena siene praevea lega poenali*", by law the official cannot be criminally prosecuted and must be released.

Taking into account the provisions of the article above, the abolition of the legal requirements as the basis for the use of discretion is in accordance with the legal basis for criminal threats, which so far have been based on the provisions of Article 3 of the Anti-Corruption Law. In Article 3 of the Anti-Corruption Law, the formulation of the offense is as follows: "Every person who with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunities or facilities available to him because of his position or position that

can harm state finances or the state economy, shall be sentenced to life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years and or a minimum fine of Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)".

The formulation of the offense in Article 3 of the Corruption Law does not include any unlawful acts, meaning that for acts that are categorized as criminal acts, it is not necessary to prove whether or not the statutory norms have been violated. In other words, the existence or absence of statutory norms that are violated is not important, but what is more prioritized is the existence of actions that aim to enrich oneself, others, and corporations. So the criminal offense in Article 3 of the Anti-Corruption Law focuses more on the consequences it causes than on the existence of violated legal norms.

Understanding the description of the offense in Article 3 of the Anti-Corruption Law, the use of the AUPB as the basis for criminal threats against Government officials suspected of committing a criminal act of corruption is felt to be more fulfilling the need for law enforcement of the Anti-Corruption Law, because criminal threats will be more flexible according to the AUPB. Therefore, the use of AUPB as the basis for prosecuting criminals will be more effective in preventing suspects from being released from legal snares. Because AUPB can be interpreted flexibly, so it is possible to avoid the use of the principle of legality in the criminal law "*nullum delictum noela poena siene praevea relieved poenali*" .

Reflections related to the use of AUPB as a basis for criminal threats against government officials suspected of committing a criminal act of corruption are an effort to reduce the chances of escape from criminal threats. Prosecutors in prosecuting perpetrators who are suspected of not committing a crime of corruption and Corruption Court Judges who examine and prosecute perpetrators of corruption do not need to prove a violation of the law, but it is sufficient to prove whether or not there is a violation of the AUPB.

AUPB is a principle that is in an abstract meta-norm, the use of which is discussed with interpretation. Interpretation is subjective, which is very likely to be influenced by the interests of the interpreter or other parties, so that it has an impact on not achieving legal certainty and or legal injustice, which ultimately harms the interested parties regarding the lawsuit against the government's decision. For this reason, the use of the AUPB should be as careful and objective as possible to prevent injustice and harmful legal uncertainty.

Conclusion

The use of discretion often results in the criminalization of government officials, on the grounds that they have violated the law, because the AUPB as the basis for the use of discretion does not have clear parameters and criteria. The abolition of the requirements for using the law as a condition for the use of discretion as referred to in Article 24 point b of the UUAP which is abolished based on Article 24 point b of the Employment Creation Law, is intended to minimize the occurrence

of criminalization of government officials. However, the abolition of these requirements also reduces the perpetrators of corruption crimes apart from the snares of the law. The abolition of these conditions also has an impact on changes in the normative functions of administrative law, namely changes in the basis of government actions, changes in the legal basis of lawsuits, and changes in the legal basis for assessing the validity of actions of government officials by the Court.

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