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Government's Responsibilities in the Use of Discretion for Natural Disaster Management

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Abstract--Indonesia as a state of law that aims to achieve public welfare, every activity must be oriented to the goals to be achieved as a rule of state activities, government, and society. The problems in this research are: (1) Why is there an urgency in the implementation of government accountability in the use of natural disaster discretion; (2) What is the responsibility in using discretion for natural disaster management; and (3) How is the construction of government responsibilities in the use of discretion for natural disaster management. This research method uses an empirical juridical approach. The juridical approach is based on a normative approach that provides various statutory regulations related to discretion. An empirical approach is used to analyze government responsibilities in the use of discretion for natural disaster management. The results of this study indicate that: (1) The implementation of government accountability in the use of discretion in natural disaster management must be in accordance with the objectives of goodness, not contrary to legal regulations, in accordance with good governance, and the basis of objective reasons must not be subjective; (2) Government responsibilities in the use of discretion for disaster management, namely position responsibilities occur when policy makers use discretion for and on behalf of positions, while personal responsibility is applied in the case of policy makers carrying out maladministration actions; and (3) The concept of government responsibility in the use of discretion for natural disaster management requires a minimum limit set by the National Disaster Management Agency, so that it can be known the responsibilities of the Regional Government or the Central Government in handling these natural disasters.

Keywords: ***government responsibility, discretion, natural disasters***

I. INTRODUCTION

Indonesia as a state of law that aims to achieve public welfare, every activity must be oriented to the objectives to be achieved based on the applicable law as a rule of state activities, government, and society. The state is required to play a further role and intervene in aspects of people's lives in order to realize prosperity. The function of government has a very broad scope, consisting of various kinds of government actions, decisions, general provisions, civil legal actions, and concrete actions.

The concept of the welfare state implies that the government is required to act to resolve all aspects and problems that concern the lives of its citizens, even though there are no grounds or rules that govern it. The government is given the freedom to be able to do or act on its own initiative in the public interest to solve all problems or problems. The government has an obligation to provide services to the public (public service). The government has the right to create concrete legal rules intended to realize the objectives of the legislation.[1]

The increasingly active involvement of law in issues relating to social change, in fact, raises issues that direct the use of law consciously and actively as a means to contribute to the new life order. Regulations by law, both from the aspect of its legitimacy, as well as aspects of the effectiveness of its application.[2]

The government in carrying out the task of administering public welfare, requires independence to be able to act on its own initiative and policy, especially in the resolution of critical issues that arise suddenly and whose rules do not yet exist or have not been made by state bodies entrusted with legislative functions.

The government is given a certain independence to act on its own initiative to solve various complicated problems that require speedy handling, while there is no legal basis for that problem, or a legal basis for its resolution has not been established by the legislature. In state administration law given free authority in the form of discretion.

Based on the provisions of Law Number 30 Year 2014 concerning Government Administration in Article 1 number 9, it explains that a discretion is a decision issued by a government official to deal with concrete problems encountered in the administration of government in terms of laws, regulations, incomplete or incomplete clear. In Law Number 30 Year 2014 concerning Government Administration this provides legal protection to the public. The law allows citizens to submit objections and appeals to decisions and actions of the Government Administration that are detrimental to the interests of the community.

Freedom of action on the basis of discretion carried out by the government is not without limits. This freedom is limited by the General Principles of Good Governance (AUPB), so that it is expected that there will be no abuse of authority.

If there is a legal deviation of the discretionary decision which results in a loss to the community, then the discretionary decision must still be accounted for. This is in accordance with the principle of "geen bevoegdheid

zonder verantwoordenlijkheid" ie there is no authority without accountability.[3]

So far, government officials in conducting discretion are still hesitant in issuing certain policies that have not been regulated in the legislation for fear of being seen as violating the law. Even though the legal administration of the policy can be considered true, as long as the policy is not for personal gain but for the public interest. Officials who carry out discretion, issuing such actions or policies must be protected because discretion has determined limits.

The use of discretion in overcoming natural disasters and humanitarian disasters are two potential conditions that threaten the security and safety of humanity. Natural disasters that occur because of human behavior and behavior that goes beyond the limits. The relationship between natural disasters and the responsibility of the state is reflected in Paragraph IV of the Preamble of the 1945 Constitution.

The provision shows that there is a state obligation to protect all citizens (State Legal Obligation), including those who are victims of disasters. Discretion in the management of natural disasters for efforts to prevent victims of disasters, then accountability can arise when there is negligence faced by the country.[4]

According to Paripurno in Liesnoor[5], disaster is a phenomenon that occurs because the triggering components, threats, and vulnerabilities work together systematically, causing risks to the community. According to Law Number 24 of 2007 that natural disasters are events or series of events that threaten and disrupt people's lives and livelihoods caused, both by natural factors and/or non-natural factors as well as human factors resulting in human casualties, environmental damage, property loss and psychological impact.

This study aims to find forms of government responsibility in the use of discretion in natural disaster management which are increasingly complex even though there is no explicit regulation. This raises problems that need to be carried out research entitled "Government Responsibilities in Using Discretion for Natural Disaster Management".

II. RESEARCH METHODS

This research uses an empirical juridical approach. Juridical approach to analyzing various laws and regulations related to the use of discretion for natural disaster management. While the empirical approach to analyzing the discretion and responsibility of public officials in carrying out tasks in an emergency situation as well as restrictions on acts that affect the administrative law and criminal law. The source of the data in this study in expressing the problems studied by adhering to normative provisions, supported by empirical data through interviews with authorized government officials, relevant institutions, and community leaders.

III. FINDINGS AND DISCUSSION

1. Use of Discretion For Natural Disaster Management

According to the Law Dictionary[6], discretion means freedom to make decisions in every situation faced in his own opinion. There are several legal experts who provide a definition of discretion including S. Prajudi Atmosudirjo[7] who defines discretion, discretion (English), discretionair (French), Freies ermessen (Germany) as freedom of action or take decisions from officials of the state administration who are authorized and obliged in their own opinion .

Muchsan's views[8] describe discretion as free authority granted to public officials because the statutory regulations which form the basis of authority provide a space for freedom of action. That is, public officials were given freedom to determine for yourself how to interpret (capture the intent and purpose) of the authority to administer the government that is charged with it.

In line with Indroharto's view[9] that discretion is actually freedom to determine wisdom or freedom to make a judgment which is good, which is not good, which is right, and which is not right. In its implementation, discretion has two patterns, namely:

1) Freedom to assess objectively, that is, if the norms in the law are vague but are actually intended as objective legal norms, because the explicit formulation is difficult to give, for example: the formula "acts as a good servant of the state".
2) Freedom to judge subjectively, meaning that there is freedom to make a policy of your own, because the law gives authority to public officials to determine for themselves what should be done when facing a concrete event.

A.M Doner's view[10], as quoted by Philipus M. Hadjon, policy regulations are essentially a product of state administrative actions aimed at "*naar buiten gebracht schricftelijk beleid"*, which shows a written policy. Policy rules only function as part of the operational implementation of government tasks, therefore they cannot change or distort laws and regulations.

Practically the discretionary authority of the state administration which later gave birth to policy regulations, contains two main aspects; First, freedom of interpretation regarding the scope of authority which is formulated in the basic regulations' authority. This first aspect is commonly known as objective freedom of judgment. Second, the freedom to determine for themselves by how and when the authority of the state administration is exercised. This second aspect is known as the freedom of valuation which is subjective.[11] It is this free authority to interpret independently from the government that gives birth to policy rules.

P.J.P's view Not explaining[12], the policy rules are as follows: Policy regulations are general rules issued by government agencies with regard to implementation

governmental 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 directly or indirectly.

This means that policy regulations are not based on the authority of making laws and therefore do not include legally binding regulations, but are based on the governmental authority of an organ of the state administration regarding the exercise of its authority.

Regarding the binding power of this policy regulation among legal experts there is no similarity of opinion. According to Bagir Manan[13], policy regulations as "regulations" that are not statutory regulations are not directly legally binding, but contain legal relevance. Own rules. So the first to implement the provisions contained in the policy regulations are state administrative bodies or officials. Nevertheless, this provision will indirectly be able to affect the general public.

As for Indroharto, the opinion of the policy regulations for the community creates indirect ties. According to A. Hamid Attamimi[14], the policy regulations are generally binding, because the people affected by the regulations cannot do anything but follow them.

According to Marcus Lukman, the strength of binding rules of wisdom depends on the type. Intra-legal and counter-legal policy regulations whose formation is based on freedom of consideration intra-legal, become an integral part of the hierarchical system of laws and regulations. The binding force also has a statutory status. Extra-legal and counter-legal policy regulations whose formation is based on freedom of consideration extralegal does not have binding power to the degree of legislation.[15]

Discretion as a form of choice of action that can be carried out by the government/state administration in the perspective of the welfare state system or dynamic legal state is the implementation of the form of responsibility in an effort to realize legal protection and efforts to realize general goals (people's welfare). Through this discretion the government is conceived of as the main respondent in the administration of the state, being demanded to always be present in any atmosphere faced by the people.

The enactment of Law Number 30 Year 2014 concerning Government Administration in the perspective of Government authority has provided legal certainty regarding the legal basis for the government's discretion. The enactment of Law Number 30 Year 2014 concerning Government Administration is also at the same time to guarantee that government actions caused by certain things as stipulated in Law Number 30 Year 2014 concerning Government Administration are legally justified/valid as long as it is become part of his authority.

Normatively, the reason for discretion by the government (government officials) has been determined in Article 22 of Law Number 30 Year 2014 concerning Government Administration as follows: Every use of Government Officials' Discretion is intended to:

a) Streamlining the administration of government;
b) Fill the legal vacuum;
c) Provide legal certainty; and
d) Overcome the stagnation of government in certain circumstances for the benefit and public interest.

Starting from the provisions of Article 22 of Law Number 30 Year 2014 concerning Government Administration, a discretion can only be taken as long as it is intended to fulfill the requirements as determined by the law. Therefore an act of discretion cannot be carried out arbitrarily or without reasons justified by law.

Discretion is a concept of action that can be carried out by the government in a very broad scope. To prevent arbitrary actions, discretion needs to be limited to the reasons for such actions. The extent of the scope of discretion as specified in Article 23 of Law Number 30 Year 2014 concerning Government Administration is as follows: Discretion of Government Officials includes:

a) Decision making and/or action based on statutory provisions that provide a choice of decree and/or action;
b) Decision making and/or action because the statutory regulations do not regulate;
c) Decision making and/or action due to incomplete or unclear laws and regulations; and
d) Decision making and/or action due to government stagnation for broader interests.

Based on these provisions, it is clear that the form of discretionary acts in government has certainly been limited in scope. Discretionary actions taken by the government exceed the scope specified by the law. Normatively it can be claimed as an act that exceeds authority so that it must be accounted for legally.

According to the Author State Administration Officials who issue decisions on the basis of discretion can only be done in certain cases where the applicable laws and regulations do not regulate them or because existing regulations governing things are unclear and they are carried out in an emergency/urgent situation in the interest of general stipulated in a statutory regulation.

The urgent situation in question is a situation that arises suddenly concerning public interests which must be resolved quickly, to resolve the issue, the laws and regulations have not yet regulated it or only regulates it in general. Whereas the intended public interest is the interest of the nation and state or the interests of the community together or the interests of development, in accordance with the applicable laws and regulations. In addition, the limitations or signs in the use of discretion are General Principles of Good Governance.

An event or event that can cause disaster, regulated in Law Number 24 Year 2007 states that there are 3 threats; threats that are natural, non-natural and humanitarian. New threats have the potential to cause death, cause casualties, suffering and others so that threats can occur and may not. Threats can arise even if the handling is good. The threat of casualties and deaths is caused by the earthquake, flood and tsunami.

In emergencies, such as the handling of the Merapi Eruption Disaster in Sleman (2010) after the eruption of Mount Merapi on October 21, 2010 and November 6 of 2010, government officials are obliged to resolve existing problems using discretion. The basic consideration is from the discretionary authority by applying the general principles of good governance, especially the principle of legal certainty, the principle of acting carefully and prudently, having reasons and grounds for facts, responding to reasonable expectations and principles of expediency.

2. Construction of Government Responsibilities in the Use of Discretion for Natural Disaster Management

The responsibility according to the Indonesian dictionary is the state of being obliged to bear everything. Responsible according to the Indonesian dictionary is obliged to bear, bear, bear everything and bear the consequences. Responsibility is man's awareness of his intentional or unintentional behavior or actions. Responsibility also means acting as an expression of awareness or obligation.

Responsibility is natural, meaning that it has become part of human life, that every human being is burdened with responsibilities, if assessed responsibility is an obligation that must be shouldered as a result of the actions of the party doing. Responsibility is a characteristic of civilized humans, humans feel responsible because he is aware of the good or bad consequences of his actions, and also realize that other parties need a trial or sacrifice.

According to Ridwan Halim, legal responsibility as a further result of the implementation of roles, both roles are rights and obligations or power. Generally legal responsibility is defined as an obligation to do something or behave in a certain way not to deviate from existing regulations.[16]

According to Purbacaraka[17], legal responsibility comes from the use of facilities in implementing the ability of each person to exercise their rights or/and carry out their obligations. Every implementation of obligations and every use of rights both inadequately or adequately carried out must basically be accompanied by accountability, as well as the exercise of power.

A decision/decision of the government that is contrary to the principle of proper governance means contrary to the rule of law. Kinds of General Principles of Decent Government (AAUPL). According to S. F Marbun, namely:

a) The principle of legal certainty;
b) The principle of balance;
c) The principle of equality in making decisions;
d) The principle of acting carefully or the principle of accuracy;
e) The principle of motivation for each decision;
f) The principle does not mix authority;
g) The principle of fair play, h) the principle of fairness and fairness;
h) The principle of reasonable trust and hope;
i) The principle of nullifying the consequences of a canceled decision;
j) The principle of protection of personal views or ways of life;
k) Principles of wisdom; and
l) Organization of public interests.

Power is often equated with authority, and power is often exchanged with the term authority, and vice versa. Authority is often likened to authority. Power usually takes the form of a relationship in the sense that "there is one party that rules and the other party is ruled" (*the rule and the ruled)*.[18]

Power that is not related to law by Henc van Maarseven is referred to as a *"blote match"*. Power related to law by Max Weber is referred to as rational or legal authority, that is, authority that is based on a legal system is understood as rules that have been recognized and obeyed by the people and even strengthened by the State.[19]

In public law, authority is related to power. Power has the same meaning as authority because the power held by the Executive, Legislative and Judiciary is formal power. Power is an essential element of a State in the process of governance in addition to other elements, namely:

a) Law;
b) Authority;
c) Justice;
d) Honesty; and
e) Policy.

Power is the core of the administration of the State so that the State is in a state of movement (de staat in beweging) so that the State can take part, work, have capacity, excel and perform to serve its citizens.

Power according to Miriam Budiardjo is the ability of a person or group of people to influence the behavior of a person or other group in such a way that the behavior is in accordance with the desires and goals of the person or country.[20]

Power can be exercised so the authorities or organs are needed so that the State is conceptualized as a set of positions *(een ambten complex)* where those positions are filled by a number of officials who support certain rights and obligations based on the subject matter construction.

Power has two aspects, namely political aspects and legal aspects, whereas authority is only a legal aspect which means; that power can be sourced from the constitution, can also be sourced from outside the constitution *(unconstitutional)*, for example through a coup or war, while the authority clearly comes from the constitution. Authority is often equated with the term authority. The term authority is used in the form of nouns and is often equated with the term *"bevoegheid*" in Dutch legal terms.

Indonesia's basic authority according to the principle of legality is a rule of law state, so that all its actions are determined in law. The principle of legality is a rule of law state which is often formulated by *Hetbeginsel van*

wetmatigheid van bestuur, namely the principle of the validity of government.

HD Stout's view[21] by quoting Verhey's opinion, suggests *Hetbeginsel van wetmatigheid van bestuur* contains 3 (three) aspects, namely:

1) Negative aspects *(het negatieve aspects),*
2) Formal-positive aspects *(het formeel-positive aspects),*
3) Positive material aspects *(het materieel-positieve aspect).*

First, the negative aspects of determining government action must not be contrary to law. Government actions are invalid if they conflict with higher legislation. Second, the positive formal aspects determine that the government only has certain authority as long as it is given or based on the law. Third, the positive material aspects of determining the law contain general rules that bind government actions. This means that the authority must have a legal basis and also that the content of the authority is determined by law.

Henc van Maarseveen uses two terms to explain the concept of authority, namely when analyzing the Constitution as a document van attribute, the term power is used while in analyzing "delegation" the term authority is used. There are two concepts of power, namely power that is not related to the law called blotemacht or in English neck power. On the other hand, power based on law is called authority.[22]

Theoretically, the authority that comes from legislation is obtained through 3 (three) ways, namely, Attribution *(Attributie),* Delegation *(Delegatie),* and Mandate *(Mandaat),* matters in Lukman Hakim, this is also in accordance with the opinion of HD van Wijk/Willem Konijnenbelt. According to H.D van Wijk/Willem Konijnenbelt defines as follows:[23]

a) Attribution is the granting of government authority by legislators to government organs;
b) Delegation is the delegation of governmental authority from one government organ to another government organ.

Mandates occur when governmental organs permit their authority to be carried out by other organs on their behalf. The authority as stated by Indroharto, that is authority in the sense of juridical, is an ability granted by the legislation in force to bring about legal consequences.

According to Indroharto that authority was obtained by attribution, delegation and mandate, each of which was explained as follows; authority obtained by attribution, namely the granting of new governmental authority by a provision in the legislation. Delegation occurs delegation of authority that already exists by the State Administration Agency or Office that has obtained an attributive authority to another State Administration Agency or Office.

The logical consequence of this discretion is that the government is given the droit function, which is the power to interpret laws and regulations, but that does not mean that the Government may act arbitrarily. The government is prohibited from carrying out acts that are *detournement de pouvoir* (doing something outside the purpose of the given authority) or *onrechtmatige overheidsdaad* (acts against the law by the authorities).[24]

Government officials who use discretion in making decisions must consider the purpose of discretion, the statutory regulations which form the basis of discretion and the general principles of good governance. The signs in the use of discretion and government policy making based on State Administrative Law are the General Principles of Good Governance (AUPB), especially the principle of prohibition of abuse of authority *(detournement de pouvoir*) and the principle of arbitrary prohibition *(willekeur).*

Discretion in administrative law is a necessity. If a government administration official must use discretion in making a government administration decision, the official concerned must pay attention to the purpose of giving discretion, applicable legal limits and the public interest. The use of discretion that is in the administration of the country so as not to be misused, it is necessary to have a benchmark against the use. The elements that must be fulfilled by a discretion are:[25]

a) There are because of the public service tasks performed by the state administration;
b) In carrying out this task, state administrators are given the discretion in determining policies; and
c) These policies can be accounted for both morally and legally.

The discretion of administrative officials has the power to act in the face of urgent problems because the rules do not yet exist, other than that the rules are unclear or provide choices, and a situation that results in a state of staknan, including when faced with conditions of natural disasters. Basically in these circumstances administrative officials determine "what is the law" for the problem and relate to the solution to the problem.

According to responsive law, discretion is broadened but the goal to be achieved remains on the goal. In doing this responsive law reinforces the ways in which openness and integrity can support each other despite the conflict between the two. Essential justice that puts forward the interests and needs/interests of individuals and society, through a participatory law-making process, the function of law as an instrument of implementing the will of the people. The aim of setting standards is to criticize established practices, and thus open the way for change. At the same time, if it is actually used, goals can control administrative discretion and thus reduce the risk of institutional release.[27]

The Government Administration Act states that the use of discretion must be accounted to by their superior officers and the public who have suffered losses due to the decision of discretion that has been taken and can be tested through administrative efforts or lawsuits in the State Administrative Court. These provisions mean that the Government Administration Act will not only provide limits on the use of discretion by Government

Administration Agencies/Officers, but also regulates the responsibilities of Government Administration Agencies/Officers for the use of discretion.[28]

IV. CONCLUSION

The responsibility of the Government Administration Agency/Officer for the use of discretion to their superior officials, bearing in mind that this is an obligation inherent in the authority on which the discretion is based. In his explanation it was stated that accountability to superiors was carried out in written form by giving reasons for making discretionary decisions.

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