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Legal Politics of Government Instruments in the Development of State Administrative Law

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Article

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Abstract

This research aims to identify and reconstruct the supervision and control of Government Instruments, especially in the State Administrative Law (HAN) Corridor. The results of the study were obtained by confirming that how do existing legal rules become the basis for state instruments in carrying out their duties and these legal rules regulate the relationship between citizens and the government. The results of this research are that HAN is an instrument used to carry out government tasks, and involves regulations that regulate interactions between the government and citizens. State Administrative Law plays an important role in regulating relations between the government and citizens and in controlling government tasks. This involves legal norms that regulate the duties and authority of state officials or institutions. The use of discretion or the principle of freies ermessen in HAN provides room for administrators to make contextual decisions. However, discretionary limits must be placed to ensure that the policies adopted do not violate social welfare principles.
Keywords: *Legal Politics, Government, State Administrative Law.*

Abstrak

Penelitian ini bertujuan untuk mengidentifikasi dan merekonstruksi ulang mengenai pengawasan serta pengendalian Instrumen Pemerintah khususnya dalam Koridor Hukum Administrasi Negara. Hasil kajian diperoleh dengan menegaskan bahwa Bagaimana aturan-aturan hukum yang ada menjadi dasar bagi alat-alat negara dalam menjalankan tugasnya dan aturan aturan hukum tersebut mengatur hubungan antara warga negara dengan pemerintah. Hasil dari penelitian ini adalah HAN adalah instrumen yang digunakan untuk menjalankan tugas-tugas pemerintahan, dan melibatkan regulasi yang mengatur interaksi antara pemerintah dan warga Negara Hukum Administrasi Negara berperan penting dalam mengatur hubungan antara pemerintah dan warga negara serta dalam mengendalikan tugas-tugas pemerintahan. Ini melibatkan norma-norma hukum yang mengatur tugas dan kewenangan pejabat atau lembaga negara. Penggunaan diskresi atau asas freies ermessen dalam HAN memberikan ruang gerak bagi administrator dalam mengambil keputusan yang kontekstual. Namun, batasan-batasan diskresi harus ditempatkan untuk memastikan bahwa kebijakan yang diambil tidak melanggar prinsip-prinsip kesejahteraan sosial.
Kata Kunci: *Politik Hukum, Pemerintahan, Hukum Administrasi Negara.*

Introduction

It is very difficult to create a clear understanding of state administrative law that can be accepted by everyone. However, it is important to remember that this knowledge can develop and influence a country's actions. All related regulations are regulated in the State Administrative Law, or (HAN). Ultimately, the best way to describe state administration is a system that uses its components and features to achieve a goal. Since its founding, Indonesia has been committed to becoming a rechtsstaat, according to Hamid S. Attamimi. In fact, Indonesian laws are laws that support general welfare, improve the life of the nation, and create social justice for all its citizens. Philipus M. Hadjon stated that the concept of rechtsstaat tends towards legal positivism, which means that law-forming bodies must actively make laws. In managing the state, government and society, law functions as the basis.[1]

This shows that state administration includes all methods, procedures and requirements that seek to change to achieve state goals. Administration also includes people who perform administrative tasks. How the current government uses HAN to achieve national goals is greatly influenced. On the contrary, state administrative law is very important for building an effective and strong government. In a limited sense, the government is a state institution responsible for implementing or enforcing the law.[2]

In responding to the dynamics of social life in line with the era of industrial revolution 4.0 to industrial revolution 5.0, the government must respond quickly to improve social welfare through planned policies. The theory that supports administrative law as a tool for achieving social welfare is called discretion. In the context of administrative law in Indonesia, this means the discretion or freedom of action of the state administration which is enabled by law to act on its own initiative to resolve important, urgent problems for which there are no regulations, and these actions must be accountable by the functioning of a good government instrument. in line with the principles of good governance.

Basically, government administration is a guide for government officials or institutions to implement policies, government administration is a tool used by the government to manage government to achieve national goals. In Indonesia, the General Principles of Good Government (AUPB) are used as guidelines in every discretionary decision issued by government officials, especially the principle of not abusing authority and the principle of public interest. As a country committed to the concept of a welfare state, the legal concept alone is not enough to increase its role in serving the interests of society. Common sense is another way to fill gaps and weaknesses in the application of legal concepts.[3]

However, the provision of discretion is limited through signs. In reality, AUPB still limits the space for state administration to implement its policies. It has been proven that in several cases, government officials are still afraid to use the budget because of the thin line between "mal administration" and "corruption". As a result, budget disbursement that should be allocated to meet people's needs can be hampered due to administrative obstacles in the administration of criminal law or legal entities.[4]

The idea of relational law initiated by Lukas van den Berge can be a balance to the principle of freies ermessen, on the other hand, administrative law is built on trust that does

[1] Hadjon, Philipus. *Pengantar Hukum Administrasi Indonesia.* (Yogyakarta : Gajah Mada University Press,1994), 16
[2] Anggara, *Hukum Adminstrasi Negara,* (Bandung : Cv Pustaka Setia,2018), 8
[3] Yulindasari,"Tindakan Pemerintah Dalam Implementasi Hukum Administrasi Negara", *Jurnal Nurani*, Vol. 18, No. 2, (Desember 2018), 16
[4] Ibid., 16

not prioritize prejudice and penal aspects, so that HAN becomes "realistic" and becomes a means of realizing a welfare state in Indonesia.[5] To regulate and supervise the implementation of state administration carried out by the government, both at the central and regional levels, such as provincial and district/city governments, administrative law is very necessary. The essence of state administrative laws is that they enable state administration to carry out its functions and protect it from committing unlawful acts. Therefore, state administrative law is very important for state life because it functions as a tool for implementing a welfare state to realize social welfare, as outlined in Pancasila and the 1945 Constitution.[6]

Research Method

This type of research is normative legal research. This method focuses on analyzing existing legal and regulatory texts, and seeks to identify the legal principles, norms and rules contained in these documents. Normative legal research is not only limited to descriptions of existing law, but also tries to interpret law and relate it to universal legal principles, legal doctrine, and legal concepts.[7] For the research approach used by researchers, first, the legal approach. is an approach that is studied in relation to Law No. 30 of 2014 concerning Government Administration. Second Concept Approach. namely the concept used in the concept of supervision and control of Government Instruments. Three Historical Approaches. is an approach taken in looking at the historical side of the development and relationship between government instruments and State Administrative Law.

For data sources or legal material sources, research will use primary and secondary materials. First, primary material is legal material that is directly obtained from the intended data source. The written regulations used by researchers as the basis for this research include Pancasila, the 1945 Constitution of the Republic of Indonesia, Law No. 30 of 2014 concerning Government Administration.[8] The type of research conducted also influences the way legal researchers analyze legal materials. Interpretation, harmonization, systematization, and legal discovery are prescriptive analysis methods used in normative legal research. Analysis of legal materials, according to Johnny Ibrahim, is the process of completing or simplifying data that is difficult to read and interpret.[9]

Results and Discussion

The Concept of Government Instruments in the Development of State Administrative Law

The life of a modern state which tends to try to meet the needs of the people, especially issues of public welfare services, requires instruments to carry out its duties. The instrument or tool used by the state to manage government in meeting the welfare needs of the community is state administration. This tool functions to organize all aspects of state life through bureaucracy, governance, preparation, implementation and supervision of all government actions so that the government system can run stably and measurably.

[5] L.Lismanto, "Membumikan Instrumen Hukum Administrasi Negara Sebagai Alat Mewujudkan Kesejahteraan Sosial Dalam Perspektif Negara Demokrasi" *Jurnal Pembangunan Hukum Indonesia,* Program Studi Magister Ilmu Hukum Volume 2, Nomor 3, (Tahun 2020), 8

[6] Ibid., 9-10

[7] Peter Mahmud Marzuki, *Penelitian Hukum* Cet.15,(Jakarta: Kencana, 2021), 18.

[8] Ibid., 19

[9] Johny Ibrahim, *Teori, Metode Dan Penelitian Hukum Normatif,* (Malang : Bayumedia Publishing, 2007), 30

Measurability and stability are needed so that the results aimed at by government activities can be achieved with measurable quality and quantity, as per the initial design in the government activity planning process.[10]

R. Abdul Jamali believes that the legal regulations governing public administration are known as administrative law. Furthermore, according to Logemann, government administrative law is a law that regulates interactions between one position and other positions, as well as a law that regulates the relationship between a government position and the demands of its people. According to the above point of view, there are two ways to understand state administration. The first is state administration as a unit. The second is state administration which focuses on achieving public or legally determined goals.[11] Administration in a broad sense can be viewed from three angles, namely:

a. Administration as a process in society
b. Administration as a type of human activity
c. Administration as a group of people who together are driving the above activities.

In other words, administration can be reviewed from:

1. Process angle (administration as a process)
2. Function angle (administration in the functional sense)
3. Institutional (institutional) angle, administration in civil service.

Next explained C.S.T. Kansil regarding the formulation of administration is as follows: Viewed from a process point of view, administration is a whole process, which starts with the thought process, the regulatory process, the process of achieving goals up to the process of achieving those goals. To achieve a goal, people must think first, then organize, and determine how to achieve that goal, then achieve their own goal. All of these activities are summarized into an administrative definition. Viewed from a function/task point of view, administration means the totality of activities that must be carried out consciously by a company (state) or group of people who act as administrators or leaders of a business.[12]

What is meant by "government instruments" are tools or equipment used by the government or national government bodies to carry out their duties among various legal acts in carrying out their duties. Apart from that, the government also uses various legal instruments, including legal regulations, decisions, policy regulations, permits, etc. In this context, further discussion is limited to legal documents which form the basis and are used by the government in carrying out its functions and authority.[13]

HAN observes countries in motion, focusing on how governments operate. HAN based on the opinion of Ridwan H.R. examines two aspects. He said, the first thing that HAN pays attention to is how the legal rules that exist in a country become the basis for carrying out their duties, and the second point is how these legal rules interact with society. However, the problem is how to regulate government relations with civil society.[14] Apart from that, in the nature of administrative law there are several levels of legal processes that we must deal with.

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[10] Fauzan Zakir, "Perkembangan Hukum Administrasi Negara Di Indonesia", *Jurnal Ensiklopedia Social Review* Vol. 2 No.1 Februari 2020, 21

[11] Hadjon, Philipus M., Martosoeignjo, Sri Soemantri., Basah, Sjachran., & Manan, Bagir, *Pengantar Hukum Administrasi Indonesia*. (Yogyakarta: Gajah Mada University Press,1994) 9

[12] Muhlizi, A. "Reformulasi Diskresi Dalampenataan Hukum Administrasi". *Jurnal Rechtsvinding,* Vol.1, 2012 (No.1), 34

[13] Ibid., 131

[14] Ibid., 132

This means that the legal system that should be used is not a simple legal system, but rather a combination of laws and relevant government decisions. Furthermore, according to Indroharto, he stated that :[15]

1. All laws that exist in society have a tiered structure, starting from general laws contained in the TapMPR, UU, etc., to the most individual rules and special provisions contained in written laws. (beschikking). Therefore, written law can also have the same meaning as law in general
2. Lawmakers (legislators) and judicial bodies are not the only parties responsible for establishing state administrative law standards. Government officials, especially state administrative agencies or positions, have the right to be responsible for setting these standards."

This qualification was initiated by Philip M. Hadjon using a scheme with four types of characteristics of legal norms emerging, including :[16]

a. General rules like laws
b. Concrete individual rules like KTUN
c. Concrete general rules like traffic signs installed in certain places (the signs apply to all road users, but only apply to that place)
d. Abstract individual rules for example interference permits.

Government actions are valid if they can be accepted as part of the legal order, and have legal force if they can influence legal relations. To this, A.M. Donner believes that state administrative decisions that have juridical deficiencies can still be valid as valid decisions until they are annulled. In addition, a state administrative decision that does not have any juridical deficiencies is only valid temporarily as long as it has not been cancelled/withdrawn, and can even be canceled (withdrawn), if the maker is not wise (viewed from a doelmatigheid perspective). This happens if the subject subject to the decision files an appeal. If an appeal is accepted, it will make the decision invalid, and if it is rejected, it will make the decision definitive (have formal legal force).[17]

According to R. Bintan Saragih, the role of State Administrative Law in bureaucratic reform is that all laws regulating bureaucracy and related to bureaucracy must be in sync or in harmony with Law Number 3 of 1999 concerning Human Resources Principles. Likewise, all statutory regulations implementing the Law must be consistent or must not conflict with the Law. This is the condition desired by good governance with the formulation: "applying laws to protect the public interest and not regulating too much". With the existence of a State Administration Law like this, bureaucratic reform can be predicted by the availability of regulations with clear implementation procedures.[18]

In this regard, Nata Saputra stated that the legal force of decisions can be divided into formal legal force (formele rechtskracht) and material legal force (materiele rechtskracht). A valid decision (rechtsgeldig) according to Utrecht will certainly have legal force (rechtskracht).

[15] Hadi, "Pertanggung Jawaban Pejabat Pemerintahan Dalam Tindakan Diskresi Pascaberlakunya Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan". *Jurnal Kertha Patrika*, Vol.39 No.1 (2017), 39

[16] Hadjon, Philipus, *Pengantar Hukum Administrasi Indonesia*, (Yogyakarta : Gajah Mada University Press, 1994), 32

[17] Herman, "Doktrin Tindakan Hukum Administrasi Negara Membuat Keputusan (Beschikking)", Jurnal Komunikasi Hukum, Volume 3, Nomor 1, Pebruari 2017, 83

[18] Ibid., 84

This legal decision is a government action that can be accepted as part of the general legal order (als een onderdeel van de algemene rechtsorde). [19]

This legality is not related to the content or deficiencies in the government's actions, but with the understanding that it has been accepted as something that is definitely valid. If actions are accepted as something that is certain (accepted as part of general legal order), then the government's actions will have the force of law, which of course will affect legal order. Therefore, before being declared legal, the government's actions do not yet have legal force, so they cannot yet influence the prevailing legal order (geldende rechtsorde).[20]

If Law Number 43 of 1999 Article 17 paragraph (2) has stipulated that the appointment of civil servants to a position is carried out based on the principle of professionalism in accordance with competency, work performance and rank level determined for the job and other purposes. requirements without regard to gender, ethnicity, religion, race or class from the State Administrative Law stipulated to refer to these provisions. If the State Administrative Law has been properly regulated, it must be implemented concretely in the selection of bureaucratic officials. This is what good governance calls "the realization of human rights" and preventing "too many bureaucratic arrangements that hinder the functioning of market mechanisms"[21].

According to Frank J. Goodnow, opinions expressed by the government have two different functions. This is in line with Ridwan H.R.'s thoughts. which states that government sometimes has two faces. One represents a viewpoint and the other represents a government entity. The variety of regulations and forms of state administration have a significant impact on the development of HAN. Jeremy Kessler and Charles Seibel argue that increasing reliance on regulations is a sign of the slow evolution of government administration during regulatory transitions.[22]

Mechanism for Monitoring and Controlling Government Instruments

Before understanding the definition of state administration, it is necessary to first understand that a dispute of opinion that has never been completely resolved is basically about providing limitations or definitions to an understanding. As long as science continues to develop, according to its nature, the debate regarding definitions will never end. Jacobs Israel de Haan's opinion in his book Rechtskundige Significa, illustrates that it is very strict and difficult to formulate a definition.[23]

Returning to state administration, the definition of state administration is the activities of the state in exercising its political power. In its narrow sense, it is the activities of the executive and judicial bodies, or specifically the activities of the executive body in carrying out government. Meanwhile, Prajudi Atmosudirdjo, defines state administration in 3 meanings, namely as state apparatus, government apparatus or as politics (statehood), as functions or

[19] Munaf, Y., & García Reyes, L. E. "Hukum Administrasi Negara Sektoral". *In Journal Of Chemical Information And Modeling* Vol. 53, 2013, 54

[20] Ibid 55

[21] Susanto, S. N. H, "Good Governance Dalam Konteks Hukum Administrasi". *Administrative Law And Governance Journal*,Vol. 2 No.1, 2019

[22] Ibid., 63-64

[23] Susanto, S. N. H, "Good Governance Dalam Konteks Hukum Administrasi". *Administrative Law And Governance Journal*,Vol. 2 No.1, 2019, 45

activities serving the government, namely as operational government activities, and as a technical process for implementing laws.[24]

Activities to carry out the role (function of uitoeefening, role playing) of state administration regarding activities to carry out overheids functions are included in the qualifications of state administration decisions. Historically, state administration decisions were first introduced by Otto Meyer, and he called them verwaltungsakt. In the Netherlands, it is known as beschikking, which was introduced by van Vollenhoven and C. W. van der Port as well as several other authors, such as AM. Donner, H.D. van Wijk/Willem Konijnenbelt, and other authors are considered "de vader van het moderne beschikkingsbegrip", (father of the modern beschikking concept). In the Indonesian context, the term beschikking in Indonesia was first introduced by WF. Prins.[25]

This change in the function of the state has penetrated into the private lives of civilians who were previously beyond the reach of the state in the context of the night watchman state. The state will then implement a management system to control all government activities aimed at creating people's welfare. State administrators' intervention in the private lives of their citizens aims to fulfill the function of bestorzorg. This requires action that can provide a legal basis for the state to carry out. This document is the basis for government activities that regulate these private affairs.[26]

Administration is an instrument or means used by the state to control government to meet the welfare needs of society. This instrument helps organize all aspects of national life through bureaucracy, government, as well as the preparation, implementation and supervision of all government activities so that the government system can function in a stable and measurable manner.[27]

The government is a combination of positions (complex van ambten) which are given the authority to carry out the will of the government. Therefore, government and positions are juridical constructions, the authority of which can only be exercised in real terms by the official who occupies that position (concretization). State administrative decisions refer to a specific legal event (concrete), and are addressed to a person or civil legal entity (individual). Meanwhile, for the word final, it means that it no longer requires approval and/or confirmation from other state administrative officials to take effect, so that it mutatis mutandis has given rise to legal consequences (rights and obligations) for those who are addressed to the decision. [28]

Furthermore, it is necessary to understand that dynamics is a necessity for government and society in state life, which continuously change and influence each other. State administrative decisions are positive provisions which are valid guidelines for the government in acting on the other hand, while on the other hand they are a form of legal protection for the community against government actions.

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[24] Muhlizi, A. "Reformulasi Diskresi Dalam Penataan Hukum Administrasi". *Jurnal Rechtsvinding,* Vol.1, 2012 (No.1),36

[25] Ibid., 37

[26] Lismanto, "Membumikan Instrumen Hukum Administrasi Negara Sebagai Alat Mewujudkan Kesejahteraan Sosial Dalam Perspektif Negara Demokrasi" *Jurnal Pembangunan Hukum Indonesia,* Program Studi Magister Ilmu Hukum Volume 2 Nomor 3, (Tahun 2020), 4,

[27] Ibid, 5

[28] Fauzan Zakir, "Perkembangan Hukum Administrasi Negara Di Indonesia", *Jurnal Ensiklopedia Social Review* Vol. 2 No.1 Februari 2020, 26

Conceptually, positive norms will always only be a moment in time, unable to fully answer all existing interests in society, while society is rapidly changing dynamically. Thus, doctrine should be a conceptual tool providing complete guidance for government actions in making state administration decisions, which is also a form of legal protection for society (rechtsbescherming).[29] This stability and measurability is necessary to ensure that the desired results of government activities can be achieved in the desired quantity and quality. This is the first step in the government movement planning process. State administrative law has special characteristics, namely:

1) There is a special relationship between the state and the people.
2) There are many rules that regulate the authority of state officials and government institutions.
3) The existence of state officials as implementers of special agreements.[30]

Administrative law has developed into a tool to improve the welfare of its people rather than being a tool of power or authority in modern countries that implement democracy in social life. This is due to the fact that state governments now function as representatives of the state in "popular sovereignty" rather than as power structures in which government officials act as supreme managers.[31] Because of these conditions, administrators must have time to adjust their actions quickly. The space needed by administrators includes discretion or also known as the freies ermessen principle. The aim of the Freies Ermessen principle, among others, is to assist administrators in achieving general welfare goals amidst the challenges of fast-paced and changing times. Discretion becomes a tool when there is a lack of rules or a vacuum in a particular mechanism when there is an important event that requires an immediate decision. Discretion can be great for overcoming stagnation, finding ways to speed up program performance, or getting around things to quickly achieve goals.[32]

Although in certain cases, the use of discretion can give rise to opportunities for abuse of power, exceeding authority (detournement de pouvoir), or arbitrary decisions (willekeur). However, without discretion, administrators will also be hampered. In Indonesia, discretion is limited by law with signs in the form of General Principles of Good Government (AUPB). However, the limits of authority granted by administrative law are often interpreted excessively, making them vulnerable to conflict with criminal law. In some situations, officials are still afraid to use the budget for fear of being caught in criminal violations. Conditions like this will prevent the country from implementing the concept of a welfare state, because the budget allocated to the people will be difficult to absorb.[33]

As mentioned previously, Berge offers the idea of relational law, which is a bridge connecting the three institutions of executive, legislative and judicial power. This allows them to communicate so that any policies or decisions made do not have a negative impact. This means that the intersection between administrative law and criminal law can be resolved through the concept of relational law. This is done to respond to the challenges of fast-paced and changing times and to meet the welfare of the people in a welfare state. Relational law

[29] Herman, "Doktrin Tindakan Hukum Administrasi Negara Membuat Keputusan (Beschikking)", *Jurnal Komunikasi Hukum*, Volume 3, Nomor 1, Pebruari 2017, 87

[30] Ibid., 88

[31] Safudin, E, "Politik Hukum Diskresi Di Indonesia: Analisis Terhadap Pembagian Kekuasaan Antara Pemerintah Dan Legislatif". *Jurnal Penelitian Islam*, Vol.14, No.1 (2020), 150

[32] Ibid., 151

[33] Ibid, 152-153

provides ideas about how the executive, legislative and judiciary relate to each other to communicate so that government policies for social welfare can be implemented well.[34]

If this concept is incorporated into administrative law, it will enable administrators to make relevant decisions in certain situations. The same thing applies if the principle of freies ermessen or discretion is incorporated into administrative law. However, the freies ermessen principle requires certain boundaries that are based on "social welfare" to avoid policies that prioritize power and authority. Therefore, administrative law must be "grounded" in trust by not prioritizing prejudice, suspicion and penal aspects, so that demands for the welfare of the people in all times can be achieved well.[35]

Conclusion

State Administrative Law (HAN) is an integral part of a country's legal system which regulates the government's duties and authority in carrying out state administration. HAN is an instrument used to carry out government tasks, and involves regulations that regulate interactions between the government and citizens. State Administrative Law plays an important role in regulating relations between the government and citizens as well as in controlling government tasks. This involves legal norms that regulate the duties and authority of state officials or institutions.

The use of discretion or the principle of freies ermessen in HAN provides room for administrators to make contextual decisions. However, discretionary limits must be placed to ensure that the policies adopted do not violate social welfare principles. The concept of relational law can also help connect various institutions of power (executive, legislative and judicial) to ensure that the policies taken achieve social welfare goals efficiently. In the Indonesian context, HAN implementation must pay attention to the General Principles of Good Governance (AUPB) as a guide in the use of discretion by administrators.

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[34] Berge, L, "The Relational Turn In Dutch Administrative Law". *Utrecht Law Review*, Vol. 13, Issue 1 (2017), 100

[35] Ibid, 101

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