

The Existence of General Principles of Good Governance Regarding Discretion in the Implementation of Regional Government

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Abstract

*The problem in this study focuses on AUPB based on Law No. 30 of 2014 concerning Government Administration and how the Existence of AUPB is related to Discretion in the Implementation of Regional Government. This study aims to determine the existence of AUPB, discretion in the implementation of regional government. The research method used is qualitative research with a normative legal research type. The research approach uses a descriptive analysis approach. The results of the study indicate that AUPB in Indonesia has been concretely regulated in Law No. 30 of 2014, where AUPB has a significant and urgent relationship with the authority of government officials in the use of discretion and the implementation of regional government. AUPB as a basis for reference in filing a lawsuit at the State Administrative Court. Discretion that is contrary to AUPB has an impact on the decision of the state administrative agency or official to become *detournement de pouvoir* or abuse of authority.*

I. Introduction

Indonesia is a unitary state with a decentralized system, meaning that there is a delegation of government affairs organized by the regional government. The implementation of regional government must be based on the principles of the Implementation of Government based on Law Number 23 of 2014 concerning Regional Government. Article 58 contains the Principles of the Implementation of Regional Government consisting of: the principle of legal certainty, orderly state administration, public interest, openness, proportionality, professionalism, Accountability, Efficiency, Effectiveness; and justice.

The Regional Government Organizer consists of the Regional Head together with the Regional People's Representative Council, assisted by the Regional Apparatus. The Regional Government Organizer in carrying out its main tasks and functions must be based on the Principles of Good Governance. The General Principles of Good Governance (AUPB) have been known in Indonesia for a long time, initially only as an unwritten principle in resolving problems of governance. Efforts to implement AUPB in Indonesia began with the formation of Law No. 5 of 1986 concerning State Administrative Courts.

Article 53 paragraph (2) of the 1986 PTUN Law does not explicitly mention AUPB as the basis for filing a lawsuit against a State Administrative Decision. At the time of the formation of the 1986 PTUN Law, the minutes of the law stated that the ABRI Faction had proposed the concept of AUPB, but the proposal was rejected by the Minister of Justice Ismail Saleh, on the grounds that state practice and in Indonesian State Administrative Law did not yet have the criteria of "algemene beginselen van behoorlijk bestuur" (general principles of good governance), as in the Netherlands and in Continental European countries (Cekli Setya Pratiwi, Shinta Ayu Purnamawati, Fauzi, 2016) .

AUPB was born from the practice of organizing the state and government so that it is not a formal product of a state institution such as a law. AUPB can be understood as general principles that are used as the basis and procedures for organizing proper governance, in which way the governance becomes good, polite, fair, and honorable, free from injustice, violations of regulations, acts of abuse of authority and arbitrary actions (Mandasari, 2023) .

Amendments to Law Number 5 of 1986 occurred, the government stipulated Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning State Administrative Courts, which was then amended Second with Law Number 51 of 2009 concerning Second Amendment to Law Number 5 of 1986 concerning State Administrative Courts.

In carrying out the task of testing the validity of a disputed State Administrative Decision (KTUN) in court, the judge will test it based on the applicable laws and regulations and the general principles of good governance, as regulated in Article 53 paragraph (2) letters a and b of Law Number 9 of 2004. As is known, Article 53 paragraph (2) letter b has placed the General Principles of Good Governance (AUPB) in a normative legal manner as the basis for a lawsuit at the PTUN and as the basis for testing the validity of a State Administrative Decision at the PTUN (Soehartono, 2012).

The development of the AUPB principle in Indonesia has become stronger after the enactment of Law Number 30 of 2014 concerning Government Administration. Based on the provisions of Article 10 paragraph (1) AUPB includes: a. Legal certainty, b. Benefit, c. Impartiality, d. Accuracy, e. Not abusing authority, f. Transparency, Public interest; and g. Good service.

The definition of AUPB is contained in Article 1 number 17 of Law No. 30 of 2014: General Principles of Good Governance, hereinafter abbreviated as AUPB, are Principles used as a reference for the use of Authority for Government Officials in issuing Decisions and/or Actions in the administration of government. All AUPB and other general principles can be applied as long as they are used as the basis for the judge's assessment as stated in the court decision that has permanent legal force. AUPB is not only the basis for the judge's assessment but also the basis for authorized government officials in the use of discretion as an effort to overcome concrete problems in the administration of government and regional government.

In terms of terms, discretion comes from the word discretion (English), discretionair (French), freies ermessen (German) which is absolutely needed by the government and is attached to an authority (inherent aan het bestuur) because it is in line with the increasing demands for public services that must be provided by the government to the increasingly complex social and economic lives of citizens (Septiani, 2020). Law Number 30 of 2014 provides an understanding of Discretion in Article 1 number 9: Discretion is a Decision and/or Action determined and/or carried out by Government Officials in the case of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation.

The regional head is a government official who is authorized to organize government in the region, can use discretion, so that the implementation of government in the region can be carried out to improve public services, in line with the objectives of good governance. The use of discretion when organizing government has positive and negative impacts on the regional head. Positive

impacts can be in the form of improving public services, the economy, and as a solution to solving existing problems. The negative impact of using discretion if it is contrary to the law and AUPB, then discretion as an act of abuse of authority for the regional head to be held accountable in accordance with the provisions of laws and regulations.

The existence of AUPB is very much needed in community life, in addition to protecting against deviant government decisions, AUPB can also be the basis for lawsuits for the community to obtain justice, reviewed based on the concept of the welfare state implemented in Indonesia, the government should be responsible for the welfare of its people, AUPB at least makes the community have an important role in the formation of regions not only the government, the community also plays an important role in the development of their domicile area (Andy Gunawan et al., 2019) .

2. Research Method

This study uses a qualitative research method, a type of normative legal research with a descriptive analysis approach. The data used in this study are secondary data in the form of laws and regulations, literature books, and scientific journals. The data collection technique uses the library research method (Library Research), namely by conducting research on various reading sources, namely literature books, opinions of scholars, laws and regulations, and scientific journals related to this study. Data analysis is carried out qualitatively which emphasizes understanding the existing problems. From the data obtained systematically and then analyzed to further obtain answers to the main problems discussed in this study to obtain definite answers as solutions in solving existing problems.

3. Results and Discussion

General Principles of Good Government (AUPB) in Indonesia based on Law no. 30 of 2014

The concept of AUPB in the history of its development in Indonesia was initially introduced by Van Poelje in the book General Introduction to Government Science in 1953, but this concept only became popular in 1978 through Crinice Le Roy when giving a lecture at the Faculty of Law, Airlangga University. Efforts to implement AUPB in Indonesia when Law No. 5 of 1986 concerning State Administrative Courts was formed, but did not receive approval from the legislators. After the 1986 PTUN Law was declared to have been effectively implemented throughout Indonesia since January 14, 1991, there was a State Administrative Court that issued a decision by declaring the nullity or invalidity of the state administrative decision on the grounds that it was contrary to the general principles of good governance. (Click here for full

title).

According to SF Marbun and Moh. Mahfud, in their book entitled Principles of State Administrative Law, there are 13 (thirteen) general principles of good governance (Principle of good public administration/Algamene behoorlijk van bestuur) consisting of (Arif, 2023) :

1. The principle of legal certainty (principle legal of security);
2. The principle of balance (principle of proportionality);
3. The principle of equality in making pangreh decisions (principle of equality);
4. The principle of careful action (principle of carefulness);
5. Motivational principles for every pangreh decision (principle of motivation);
6. The principle of non misuse of competence;
7. Principle of fair play (principle of fair play);
8. The principle of proper justice (principle of fair play);
9. The principle of responding to reasonable expectations (principle of meeting raised);
10. The principle of undoing the consequences of an annulled decision;
11. The principle of protecting the personal way of life;
12. The principle of wisdom (sapientia); And
13. The principle of public service.

Along with the development of time, these General Principles of Good Governance were finally included in Law Number 28 of 1999 concerning the Implementation of a Clean State Free from Corruption, Collusion, and Nepotism (KKN) (Ismail et al., 2024) . This law provides a legal basis to prevent public officials from committing acts of KKN, so that a clean, efficient and effective government is realized in line with the ideals of the Indonesian nation. The general principles of state administration are contained in Article 3 which include: the principles of legal certainty, orderly state administration, public interest, openness, proportionality, professionalism and accountability.

The enactment of this law has caused many government officials who have committed corruption, collusion and nepotism to be prosecuted with the threat of a minimum prison sentence of 2 years and a maximum of 12 years and a fine of at least 200 million and a maximum of 1 billion for perpetrators of collusion and nepotism, for perpetrators of corruption, the provisions of Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption are imposed. The actions of corruption by public officials have a negative impact on damaging morality and the order of community life, economic losses for social, economic and cultural development, and the emergence of massive poverty. Since the

enactment of Law No. 28 of 1999 and Law No. 31 of 1999, it was a period when the government began to seriously crack down on the practice of corruption in Indonesia.

Furthermore, Law Number 5 of 1986 does not explicitly regulate or contain AUPB, but in its implementation, judges use the AUPB principle as an additional consideration in deciding cases, this refers to Article 14 in conjunction with 27 of Law Number 14 of 1970 concerning the Principles of Judicial Power. Law Number 5 of 1986 has been amended, through Law Number 9 of 2004 concerning Amendments to Law Number 5 of 1986 concerning State Administrative Courts, in Article 53 paragraph (2) The reasons that can be used in a lawsuit as referred to in paragraph (1) are: a. The State Administrative Decision being challenged is contrary to applicable laws and regulations; b. The State Administrative Decision being challenged is contrary to the general principles of good governance. Based on the provisions of Article 53, it is expressly stated that the AUPB is enforced as the basis for testing lawsuits at the PTUN. Any decision of a state administrative body or official that conflicts with the AUPB can be challenged at the PTUN. The TUN decisions that are often challenged at the PTUN relate to the authority, procedures, and substance in issuing state administrative decisions, licensing policy issues, discretion, personnel/ASN and land. PTUN Decision No. 99/G/2020/PTUN-JKT, and PTUN No. 136/G/2021/PTUN.MDN are one of the violations of state administrative bodies or officials against the AUPB, namely the principle of accuracy and legal certainty.

AUPB is further contained in Law Number 30 of 2014 concerning Government Administration, in Article 10 AUPB includes the principles of: a. legal certainty, b. benefit; c. impartiality d. accuracy, e. not abusing authority, f. openness, g. public interest; and h. good service. Based on the explanation of the article perpal of Law No. 30 of 2014, what is meant by the principle :

- a. The principle of legal certainty is a principle in a state of law that prioritizes the basis of statutory provisions, propriety, consistency and justice in every government policy.
- b. The principle of utility is a benefit that must be considered in a balanced manner between: (1) the interests of one individual with the interests of another individual; (2) the interests of individuals with society; (3) the interests of citizens and foreign communities; (4) the interests of one community group and the interests of another community group; (5) the interests of the government with citizens; (6) the interests of the current generation and the interests of future generations; (7) the interests of humans and their ecosystem; (8) the interests of men and women.

- c. The principle of impartiality is a principle that requires Government Agencies and/or Officials to determine and/or carry out Decisions and/or Actions by considering the interests of the parties as a whole and not being discriminatory.
- d. The principle of accuracy is a principle which means that a Decision and/or Action must be based on complete information and documents to support the legality of the determination and/or implementation of the Decision and/or Action so that the Decision and/or Action in question is prepared carefully before the Decision and/or Action is determined and/or carried out.
- e. The principle of not abusing authority is a principle that requires every Agency and/or Government Official not to use their authority for personal or other interests and not in accordance with the purpose for which the authority was granted, not to exceed, not to misuse, and/or not to mix up authority.
- f. The principle of openness is a principle that serves the public to gain access and obtain correct, honest and non-discriminatory information in the implementation of government while still paying attention to the protection of personal, group and state secret human rights.
- g. The principle of public interest is a principle that prioritizes public welfare and benefits in an aspirational, accommodating, selective and non-discriminatory manner.
- h. The basis of good service is the principle of providing timely service, clear procedures and costs, in accordance with service standards and statutory regulations.

Violations of the AUPB, carried out by public officials who are authorized in the implementation of regional government, result in state administrative decisions being sued at the PTUN, lawsuits in the form of delays in implementation and/or cancellation of decisions of state administrative bodies or officials. Several Decisions of State Administrative Bodies/Officials that were canceled due to being contrary to the AUPB, such as: Decree of the Head of the Region (Bupati) of Deli Serdang Regency No. 00174/21212/TAP/03/21 dated May 25, 2021 concerning Honorable Dismissal not at his own request and the granting of a pension in the name of Dinawati Tarigan, based on PTUN Decision No. 59/G/2021/PTUN.MDN, the Regent's decision was canceled, and required the Regent to revoke his decision. Decree of the Regent of South Tapanuli Number: 188.45/14/KPTS/2023 concerning the Appointment of the Head of Simangambat Village, Saipar Dolok Hole District, South Tapanuli Regency on behalf of Johanner Tatar Simatupang which was determined in Sipirok on January 16, 2023, based on Decision Number 43/G/2023/PTUN.MDN canceled and revoked the regent's decree which violated the AUPB principles of professionalism, justice and accuracy. Decree of

the Governor of North Sumatra Number: 100.3.3.1/2344/V/2023 concerning the Release from Duties of the Head of the Public Works and Spatial Planning Service of North Sumatra Province dated May 17, 2023, is null and void based on Decision Number 96/G/2023/PTUN.MDN, the Governor of North Sumatra is obliged to cancel and revoke the decree, contrary to the general principles of good governance, namely the principle of reasonable expectations, and the principle of justice and accuracy of the AUPB Law No. 30 of 2014. From the three examples of the t-shirts, it can be said that the decision of the state administrative agency/official can be canceled and revoked if it is contrary to or does not comply with the AUPB.

The Existence of AUPB Regarding Discretion in the Implementation of Regional Government

The word existence according to the Big Indonesian Dictionary (KBBI), means existence or being. The existence of AUPB has a very urgent relationship with Discretion in the Implementation of the implementation. Discretion (*freies ermessen*) is the obligation of the government in a welfare state, where the main task of the government in a welfare state is to provide public services or strive for the welfare of citizens. The discretion in Indonesia arises along with the assignment of tasks for the government to implement and realize the goals of the Indonesian state (Githa Angela Sihotang et al., 2015) . The definition of discretion or in Article 1 number 9 of Law No. 30 of 2014, Discretion is a Decision and/or Action determined and/or carried out by government officials to overcome concrete problems faced in the implementation of central and regional government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation (Lutfil Ansori, 2015) .

Several legal experts who provide definitions of discretion include S. Prajudi Atmosudirjo who defines discretion as the freedom to act or make decisions by authorized state administrative officials according to their own opinions. Furthermore, it is explained that discretion is needed as a complement to the principle of legality, namely the legal principle that states that every action or deed of a state administrative body or official must be based on the provisions of the law. However, it is impossible for the law to regulate all legal issues that occur in society, therefore there needs to be freedom or discretion for government officials.

Discretion can only be exercised by authorized government officials, Article 22 paragraph (2) of Law No. 30 of 2014, the use of discretion aims to: 1. facilitate the implementation of government, 2. fill legal gaps, 3. provide legal certainty; and 4. overcome government stagnation in certain circumstances for the benefit and public interest :

The scope of government officials' discretion includes

1. Decision making and/or action based on provisions of laws and regulations that provide a choice of decisions and/or actions;

2. Because the legislation does not regulate;
3. Decision making and/or action due to incomplete or unclear legislation; and
4. Decision making and/or action due to government stagnation for the wider interest.

The requirements for government officials who use discretion must meet the requirements set out in Article 24 of Law No. 30 of 2014 as follows:

1. In accordance with the purpose of discretion;
2. Does not conflict with the provisions of statutory regulations;
3. In accordance with the Principles of Good Governance (AUPB);
4. Based on objective reasons;
5. Does not cause a conflict of interest; and
6. Done in good faith.

Legal analysis of Law No. 28 of 1999, Law No. 9 of 2004 Jo. Law No. 51 of 2009, Law No. 23 of 2014, with Law No. 30 of 2014 shows that AUPB has benefits and control functions for government officials in the implementation of regional government. The control function of AUPB here can minimize the occurrence of maladministration, from regional heads in the implementation of regional government. Regional heads in exercising discretion or *freies ermesen* cannot be arbitrary because they are limited by the provisions of the law and AUPB. Discretion issued by the regional head for the purpose of organizing government will be tested whether it is in accordance with the AUPB or not, if it is not in accordance then the discretion can be declared as an arbitrary act (*abuse of authority/detournement de pouvoir*) by a regional head, then the regional head can be sued at the PTUN, if there is an indication of state losses due to discretion and supported by concrete evidence then it enters the realm of criminal law (special criminal acts :

The functions and benefits of AUPB in the implementation of regional government include:

1. For the government that has the authority to organize regional government, state administrative bodies or officials, AUPB serves as a guideline in interpreting, carrying out their duties and functions without exceeding the limits of their authority.
2. For people seeking justice, AUPB is used as a basis for filing a lawsuit in accordance with the provisions of Law No. 9 of 2004 in conjunction with Law No. 51 of 2009.
3. For Judges, TUN is used as a basis for reviewing and canceling decisions of state administrative bodies or officials.
4. For regional legislative bodies, it is useful for designing regional regulations,

so that the resulting draft regional regulations provide benefits to the community.

5. AUPB as a control tool for the use of discretion by officials authorized to organize regional government .

4. Conclusion

The conclusion of this study are US follows:

- a. In Indonesia, the regulation of AUPB has been regulated concretely in Law Number 9 of 2004 Jo. Law No. 51 of 2009 and Law No. 30 of 2014 concerning Government Administration. Based on these laws, AUPB includes 7 (seven) principles: legal certainty; benefit; impartiality; accuracy; not abusing authority; openness; public interest; and good service. However, the General Principles of Good Governance are also regulated in several laws in force in Indonesia, Law No. 28 of 1999, Law No. 23 of 2014 and the general principles of good governance according to the doctrine (legal experts) that have developed in the administration of government. TUN does not pay attention to AUPB in making policies, so that the achievement of good governance has not been realized. In order for AUPB to be better understood by state administration officials, before being appointed to a position it is best to take part in training organized by regional civil service bodies to know and understand AUPB on a regular basis, so that every decision made by state administration officials immediately implements AUPB in their decisions.
- b. The existence of AUPB on discretion in the Implementation of Regional Government shows that AUPB has benefits and control functions for government officials. The use of discretion in the implementation of regional government must pay attention to the provisions of laws and regulations and AUPB. The legal bureau in the regional government must be able to test and provide input on the decisions and/or discretion of the regional head, so that the decisions and/or discretion do not conflict with AUPB.

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