Land policy: Discretion and government administration liability

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Abstract: Permitting has been regarded as the absolute authority of the government with its discretionary authority. Discretionary authority is freedom of government organs to act on their own initiative, as well as the freedom of government organs to judge independently and exclusively. The paper is a normative legal research, by using the statute approach and conceptual approach. The results of the research indicated that the urgency of licensing in the state wealth management is an instrument to ensure legal certainty, certainty over rights and control instruments. Hence, land rights management by the state exist because of permit to ensure suitable development in land policy in Indonesia. The first form of state control is state management (beheersdaad), secondly, as a policy-making (beleid) and management (bestuursdaad). State control in the third place is a regulatory (regelendaad) and supervisory function (toezichthouden-daad). In a democratic state, the licensing process should pay attention to the citizens’ rights in a democratic way, with the change in the basic principles from Freies Ermessen to Citizen Friendly. Likewise, in terms of licensing procedures, legal protection for permit applicants and the community must be prioritized, through community participation (inspraak).

1. Introduction
The bureaucracy of permit is a problem and an obstacle for the development of business in Indonesia. Currently, the conditions of permitting services are still faced with systems that have not been effective and efficient and have not been in accordance with the demands of the community. This can be seen from the number of complaints from the community, both directly and indirectly regarding the working of the officers, overlapping regulations, complicated procedures, uncertainty throughout the completion, as well as the high costs to be incurred, and so on. Thus, giving rise to an unfavorable image of the performance of the Government as the permit giver.

The essence of discretion or Ermessen is doelmatigheid freedom. Gradually, discretion or Ermessen is sometimes called Freies Ermessen, especially in relation to the Vrij Bestuur [1].
In terms of procedures, permitting in Indonesia is still diverse, complicated, and difficult to trace, so it is often an obstacle to business activities. The procedure of permit in various government agencies still prioritize the culture of official power, overlapping regulations, bureaucracy, non-transparency and frequent illegal levies. On the other hand, sometimes the people who are not applicants, but who are related to the object of permitting are obstacles and become a separate problem. Therefore, permitting has not been able to provide legal certainty for everyone who applies. Even with the birth of the Government Policy with the Economic Package, which accelerated permit services in the land sector [2] this permit was increasingly accelerated and ignored the rights of community participation. Even though in Act No. 39 of 1999 on Human Rights, guarantees the right to participation.

2. Discretion and government administration liability

Authority is a power to do something in a public law act [3]. A principle in the Constitutional state is *wetmatigheid van bestuur*, every legal action by the government, both in doing the functions of regulation and servants, must be based on the authority given by the applicable regulations. F.A.M. Stroink and J.G. Steenbeek said “Om positie recht ten k unnen vasstellen en handhaven is een bevoegheid noodzakelijk. Zonder bevoegheid kunnen geen juridisch concrete besluiten genomen worden” (to be able to implement and enforce the provisions of positive law, authority must be made, without the authority cannot make juridical decision concretely”) [4].

Authority in permit is very important. As known that with permit, the government allows people who request it to take certain actions which are actually prohibited to pay attention to public interests which require supervision. The action of government that allows must be based on the authority given by clear regulations. Permit in administering government can be applied as one of the authorities determined by the government whose implementation is reflected in the attitudes of the legal apparatus of government, both on the basis of legislation that is used as the basis, and based on the principles of decent government, as a form of public responsibility. Freedom of government organs to act on their own initiative, as well as the freedom of government organs to judge independently and exclusively is commonly referred to as a discretionary authority.

Marzuki [1], highlighted the use of discretion in the Government Administration Act which he said ignores the essence of freedom. In term of the use of discretion raises public unrest, emergencies, urgency and/or natural disasters, government officials must notify the superior of the official before the use of discretion and report to the superior officer after the use of discretion. The consent requirements of superiors are not commonly known, even in the context of *gebonden bestuur*. When discretion requires consent (by consent) of superiors, discretion experience bonding. This matter makes discretion lose the essence of its freedom. Discretion without the essence of freedom means discretion without discretion, “*a contradictio in adjekto*”.

Indeed, this is a picture of the intention to make a paradigm shift in the administration of government. The State power over citizens is not permitted arbitrarily; every decision and/or
action against the community must be in accordance with statutory provisions and AUPB. The government administration system based on UUAP (Government Administration Act) mandates a significant reform from the basic principle of Freies Ermessen to citizen friendly [5], or the Government becomes more suitable to the expectations and needs of the community. If observe the framework of the consideration of the law, it can be seen that the symbolic meaning of Citizen Friendly can be understood philosophically that the administration of government can only be carried out based on general principles of good governance and statutory provisions, so that the implementation is not based on freedom and freedom of the authority of power. This principle almost contradicts the philosophical implementation of government based on the principle of Freies Ermessen.

The symbolic conception of Citizen Friendly can also be understood from the general explanation of the law, which explains that:

a. The government administration system of Indonesia is based on the principle of people sovereignty and the principle of the constitutional State, so that the use of State power over Citizens must be in accordance with the provisions of regulations and general principles of good governance.

b. Administration of government is adjusted to the expectations and needs of the community (citizen friendly), to provide a foundation and guidance for the Agency and/or Government Officials.

c. Citizens are subjects who are actively involved in administering the Government, so every citizen is given the right to participate in determining State policies in the form of the right to file objections and appeals against decisions and/or actions, to the Agency and/or Government Officials or Superiors of the Official concerned and suing in the State Administrative Court.

In general, the government obtains the authority to issue permit are explicitly stipulated in the legislation as basis of the permit. However, in its implementation, according to Marcus Lukman, the authority of government in the field of permits is discretionary power or in the form of free authority, in the sense that the government is given the authority to consider on its own initiative matters relating to permits. The extent of the right of legal remedies held by the community must be followed by the accuracy of government officials in issuing or not issuing provisions and or factual actions, namely by basing their actions on the general principles of good governance and statutory provisions. On the contrary, a government action that is conducted by the law is something normal and cannot be interpreted as a mistake, but a correction and use of the legal rights of the community must be interpreted as referred to by the principle of Citizen Friendly. So that if the actions of government officials are corrected, as a result of legal efforts conducted by the community, then it is not proper to have a negative impact or punishment on the officials concerned, nor do they also generate rewards if there is an opposite action.

How to make the permit concept in accordance with the spirit of a democratic legal state is through permit reform and permit bureaucratic reform. Permitting bureaucracy is a problem and an obstacle to the development of business in Indonesia. The current conditions of permit services are still faced with systems that have not been effective and efficient and have not been in accordance with the demands of the community. This can be seen from the number of complaints from the community both directly and indirectly regarding the working of the officials and overlapping regulations, complicated procedures, uncertainty over the period of completion, high costs to be incurred, many requirements that must be fulfilled, the
attitude of officers who are less responsive, less facilities that support it and so on, thus
giving rise to an unfavorable image of the performance of the Government [6]. To overcome
these conditions, efforts need to be made to continually improve quality in order to create
excellent public services.

3. Community participation (inspraak) in land policy
The government uses permits as a juridical means to control the behavior of citizens. It is
consent from the government based on legislation to in certain circumstances deviate from
the provisions of the prohibition of legislation. By giving permit, the government allows
people who request it to do certain actions that are actually prohibited.

Processes and procedures of permitting are internal processes done by the government. In
general, the permit application must take certain procedures determined by the government,
as permit giver. In addition, the permit applicant must also fulfill the requirements
determined unilaterally by the government or the permit giver. In other words, it is not
permissible to determine conditions that exceed the objectives to be achieved by the legal
regulations that form the basis of the permit in question. The procedures and requirements
of permit vary depending on the type of permit, the purpose of permit, and the agency as permit
giver.

According to Soehino [7], the conditions in the permit are constitutive and conditional. It
is constitutive, because a certain action or behavior is determined which must be fulfilled
first, meaning that in the case of the permit is given a concrete act, and if it is not fulfilled
then it can be sanctioned. It is conditional, because the assessments exist and can be seen and
assessed after the actions or behavior required that occur.

As a country that upholds the legal supremacy, permit is an indicator of the governance
system that has a liability to submit and obey the positive laws that govern it. In simply, the
constitutional State is a State that places law as the highest reference in the administration of
the state or government (supremacy of law). Laws that can be used as the basis of State
power are laws that reflect justice. Thus, in the concept of the constitutional State, every
government activity must subject with and guarantee and protect the rights of its citizens,
both in the civil and political fields as well as in the social, economic and cultural fields.
Every government activity must be seen as a form of organizing interests for public services
that emanate from their rights that must be served and protected.

The issue of permitting will be interesting to see if it is related to the existing State order,
namely the democratic legal State. The implementation of a democratic legal state must be
understood by all government officials in exercising their authority. Permitting which has
been regarded as the absolute authority of the government must be placed in the dimension of
a democratic legal State. Therefore, permit cannot be understood as long as the government
apparatus wants to, but must pay attention to the rights of citizens in the life of democracy.
The existence of permit does not cause social conflict but should be able to create
harmonization of the life of the nation and State.

Legal protection for permit applicants and non-applicant related to permit applications
must be prioritized [8]. Legal protection in administrative law is divided into 2 (two) types,
namely preventive and repressive [9]. Preventive (preventieve rechtsbescherming) is a way to
prevent deviant acts or activities to anticipate steps to be taken by the government, including
in this case government actions based on freedom of action from the government which has a
major influence in taking a decision. The emergence of preventive legal protection in state
administrative law is inseparable from the right of citizens to submit objections or be asked for their opinions on planning decisions that will be issued or in the form of definitive.

There are 4 (four) forms of preventive legal protection, namely supervision, legalization or approval, the openness of government, and participation of citizens [8]. Supervision of administration is a process of monitoring, inspection, and evaluation conducted by an agency or institution authorized to take legal actions by the administration with a view to preventing violations of law and/or rights of citizens. Supervision of administration can be done by internal, external institution and community participation. Legalization or approval is part of preventive supervision conducted by higher government organs to lower-level government organs.

*Inspraak* as citizen rights in government is done by the following conditions: before the government established a plan, regulation, policy or decision, it is first announced publicly within a certain period of time to give an opportunity for citizens to objection. If at that time there is no objection, then it will be followed-up with a definitive determination and *vice versa* if there are objections at that time, the government will consider revising the plan, regulations, policies, or decisions if the objections filed can be rationally accounted for and in legal order.

At the constitutional level, in the 1945 Constitution, explicitly or implicitly guarantees constitutional rights to citizens or the public in their position in government and in development, that the community has the right to actively participate in various forms of rights and abilities in government. At the legislation level, arrangements regarding public participation in government are clearly stipulated in the Law No. 28 of 1999. Depart from the legal construction, it can be argued that in the State administrative, the community has a very important role, and based on Article 9 the community has rights, including the right to information, the right to fair service, the right to give advice or opinions and the right to obtain protection law.

Realize that the existence of the community in the supervision of permitting is an important aspect in democratic permit. The community can play an active role, both in the decision-making process and after decision making. On a practical level, community participation in permit supervision can be classified into the following forms: 1) Administrative procedures, for example in permit procedures and planning, making regulations. In making regulations, for example, communities have the right to participate in the preparation of administrative legislation; 2) providing information to the public. In the framework of information, the community has the right to obtain adequate information on a decision-making process, especially those who are candidates related to the impact of decision making, for example in granting permits.

However, as it turns out into practice, the involvement of community participation in land permit was finally ruled out [10]. This can be seen in the permit procedure of the Ministry of Agrarian and Spatial Planning which is based on the Minister of Agrarian and Spatial Planning No. 15 of 2014 on Technical Guidelines for One-Stop Integrated Services in the Agrarian and Land Sector in Investment Activities, both involving community participation in planning activities, as well as involvement of community participation in the implementation of activities there is nothing at all. This goal is to shorten the service process, and realize a service process that is fast, easy, cheap, transparent, sure, and affordable. Thus, the obligation of the State to respect, protect and fulfill it.
As discussed above, there is no reason for the government to deviate the rights of citizens for investment purposes. The existence of the community in the supervision of permit has 2 (two) forms of roles, namely: the community is not only the recipient of the decision, which acts as the passive (top-down) object of the policy recipient, but the community acts as the subject in a more active and dynamic form. Community activeness and dynamism is reflected not only from information sources, but also has a training position to democratize decision-making. Thus, all interests that refer to the rights of life should receive sufficient and fair space in all networks of interaction, including in decision-making. In addition, the concept of community participation was intended as part of a central effort to harmonize development interests.

The development of the concept of individual rights in permitting is that this conception can be done in the form of the right to take part in permit administrative legal procedures, such as participation (inspraak, public hearings) or the right of appeal (beroep) to the determination of administrative as in the Netherlands. Through inspraak in the Netherlands, the community actively participates in the decision-making process by thinking before the decision (meedenken vooraf) and not by raising objections after the decision is taken (bezwaren achteraf).

4. Conclusion
Permitting as based on discretion or Freies Ermessen places the State as the authority holder that comes from the power itself. On the principle of Freies Ermessen, the people as sovereignty holder are in a very weak position. With such discretion, making permitting appears as a forces instrument, whereas in modern democracy, permit must pay attention to the rights of citizens in the life of democracy. As in accordance with the government administration system which mandates a significant change from the basic principle of Freies Ermessen to citizen friendly or the government to be more in line with the expectations and needs of the public.

In terms of permit procedures, legal protection of permit applicants and non-applicant related to permit applications must be prioritized, through community participation (inspraak) as a right of citizens in the government. However, today the community participation (inspraak) in land permit has been ruled out. To realize permit in a democratic era, the quality of permit services through a series of policy regulations as a form of paradigm shift in governance and changes in mindset and cultural set of permit bureaucracy in serving the community. Thus, permit should implement the concept of participation rights in the forms of administrative procedures i.e inspraak, public hearing, and so on. It is intended to realize the principle of transparency and public participation.

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