

THE USE OF *FREIES ERMESSEN* (DISCRETION) IN THE ACTIVITY OF CENTRAL GOVERNMENT AND LOCAL GOVERNMENT

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Abstract

Nowadays Indonesia has a tendency to apply the legal system administratively, which dominates in every activities include public administration must be on rules written. If there are conditions in making of legislations that runs low, or their conditions had not been anticipated in certain condition. Beside that, there is the dynamic development of social life runs rapidly that requires immediate treatment by government or local government. In this circumstance, it requires the autonomy of the government to act in dealing with issues that happened. The use of *freies ermessen* can be shown to emerge certain innovation from the bureaucracy reformation for public interest. The form of this *freies ermessen* can be shown in some forms such as circular letter, guidance, and announcement, abstract and general letter of decision as well as in a form of regulation which is called *pseude-wet giving*.

Keyword: discretion, government, local government, regulation administration

1. INTRODUCTION

Government and local government in performing the task and its function constantly experiencing many things. So, it is often required to take immediate action for the public interest. Because, with the principle, countries must realize the *welfare state* (negara kesejahteraan) which gave rise to the obligation of governments and to be actively involved in the control of economic and social life of society.

By growing and expanding the duties and authority and responsibility of the government, it is often pose a dilemma and contradiction situation caused by the government action based on law (S.F. Marbun 1997). Meanwhile, sometimes the life of society and state which handle by the apparatus and government officer has been no regulation in written law. If any government action and local government based on law or waiting for the law which is made by the current situation, it is necessary to

have a freedom to act and tackle the problems that may occur. In the other hand, if there is no available facilities and space then of course there will be stagnation because public administration certainly hampered with this situation and waiting for the availability of the laws and regulation.

For guarantee and provide a legal basis to local government (*bestuur hendeling*) which was done as a lawful act (*legitimate and justified*), it is accountable and responsible, then any government action must be based on a fair legal, dignified and democratic (Winahyu, 2006)

For more in depth, this article discussed the problem about how the used of *freies ermessen* (discretion) by the authorized party in the local government activities. This article also done by using aspects of the legislation of Republic Indonesia No. 30 year 2014 about government administration.

2. FREIES ERMESSEN CONCEPT (DISCRETION)

According to S. Prajudi (1994) discretion is a freedom of action or taking decision according to the point of view of the officer itself. Ridwan (2011) express *freies ermessen* (discretion) is an inherent freedom for the government or state administration. According to Laica (1996) discretion is a freedom which is given by some entity or administration officer in the framework of governance in running *bestuur zorg*, because of the freedom that is owned by the state administration able to give optimal public services for the economic social life.

Whereas in the point of view of Islamic law, *ijtihad* is the same with discretion or *freies ermessen*, the article of the excavation process o law committed by the mujtahid in deciding the law is not only in the provisions of Al Quran or As Sunnah, but rather look for the situation and condition in creating justice and benefit for the people. Discretion

or *ijtihad* are equal because the decisions and legal law based on their own initiative (Aristoni, 2014)

3. THE USE AND THE LIMIT OF *FREIES ERMESSEN* (DISCRETION) IN THE GOVERNMENT ACTIVITIES AND LOCAL GOVERNMENT.

Organization of government activities and local government must be active to create people welfare. This effort makes government and local government interfere the field of socio-economic life of society (*public service*). So that, public administrator may not refuse in making decision or acting under the pretext of the absence of legislation (*rechtsvacuum*)

Fathudin (2015) suggests that in its development along with the dynamics of community life that is increasingly complex and fast which finally face deadlocked issues. The principle of legality that is rigid and tends to bind the government seems difficult especially in anticipation the new development that has not been regulating explicitly.

The action of the officer in using written discretion can be permission, dispensation, attribute, delegation and mandate. Other form of the discretion is an unwritten action. According to Muchamad Arif (2012) propose a free decision is not depend on written decision. This decision left to the circumstances and condition that may occur. In the current situation according to his job, an officer must be issued an urgent policy without having written. One of them can be direct orders or direct order through electronics for example by using calls.

Next, related to the responsibility of the discretion according to Julista (2011) any use of authority by government officer, there is a responsibility, this case is the same with *deen bevoegdheid zonder verantwoording* (no authority without accountability). If the are irregularities for each authority whether from civil organization or local

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government organization, they must bear the legal responsibility according to who will be the suspect. This responsibility can be job responsibilities or personal responsibilities.

Therefore, there needs to be clear and strict restrictions for every authority in order to prevent an abusement. Government officer in local government who takes an action must be think about the consideration of appropriate response based on the authority. Thus the use of authority is made for public interest and has clear benefits. For example, the central government and local government in this case asked residents of a volcano to leave a particular location temporarily with the consideration of the volcano could erupted because of the active volcano. We need quick action to avoid the community living around the volcano and trying to move the community to the save radius or kinds of relocation conducted by the central government and local government.

For the example, police officer has the rights to open and close the traffic in current situation. This action is used to reduce the traffic jam. Another example, Satuan Kerja Perangkat Daerah (SKPD/Local Government) which has a scope in the fields of transportation, installing the signs traffic 'prohibited parking' it is being done with a helpful consideration for public services especially for highway.

Another that, the government has rights to organize, collect taxes, enforce the law, impose sanction etc. with a purposeto achieve the statehood that must followed by the legal protection of the people of various government actions that may lead to a certain loss. This responsibility is able to give space for the emergence of community participation in the democratic life (Winahyu, 2006).

In line with the division of authority in the laws no 23 year 2014 local government which also contains an obligation for the head of the area under the provisions of the applicable law will require innovation in performing the duty to improve public

confidence and satisfaction. Then in this laws also shortly describe the licensing arrangement given by the provinsial government and the county or city government to promote growth and accelerated development for the welfare requires the creativity of local leaders in innovation.

Any form of innovation to be done in good faith using a procedure in accordance with the provisions of applicable law. So that each of these actions should be accountable. With the principle of accountability for all actions taken by officials or the government apparatus, it is an effort for a balance in government. The positions of central government and local government with citizens in achieving goals of social justice and execution of government function.

Although government officer and local government officer were given the freedom, but not allowed to be done with the aim of abuses. The holders of discretion authority must use judgement in making decisions to act not only based on their conscience, but also based on rational assesment and propotional so that these action can be measured his criteria. Therefore, the measures taken can be justified according to the laws.

With this existing principle of accountability for all acts committed by the officer, it is an effort to create balances of government position and local government with the society in reaching the purpose of social justice and the function of government.

Although the government officer and local government give the freedom, it is not justified to do with the purpose of abuse. The officers who hold discretion must use judgement in making decisions to act; it is also based on rational judgement and proportional. So the actions taken could be accounted in accordance with the provisions of applicable law.

Freies Ermessen which owned by the local government, can be refer to the article 18, paragraph 6 which shown the local government have the rights to set local regulations and other regulations to implement regional autonomy. The phrase of 'regulations' give a chance to make regulations under local regulations in order to interpret its own regarding the settlement of problems in running a government.

Next, in laws also explain about government administration, also described things that related to anyone who can use *freies ermessen* (discretion). In laws, discretion can only be done by authorized government. The use of discretion aims to: a. launched a government organization; b. to fulfill the emptiness of law; c. provides legal certainty; d. overcomes the stagnation of government for the benefit and the public interest. The discretion of government officer consists of: a. decision making based on laws; b. decision making because laws not regulate it; c. decision making if the law is incomplete or not clear; d. decision making of the government stagnation for the wider interest. The officer who used discretion must fulfill requirement: a. accordance with the purpose of discretion; b. do not against the law; c. accordance with AUPB; d. based on an objective reason; e. do not create conflict of interest; and f. carried out in good faith.

These laws regulate law arising from the use of discretion, for the example, if the discretion exceeds the limit or do not based on applicable provision, the use of discretion become invalid. The use of discretion can be confound the authority if it is inappropriate with the purpose or against with general principle of good governance (AUPB). Through this case, the use of discretion may be canceled. If the discretion issued by the officer who has not authorized, the use of discretion will be invalid.

Therefore, the central officer and local government officer include district head must understand and notice the general principle of good governance. It is intended to avoid the abuse of authority or irregularities that could harm the state.

Another that, administrative law action in using this discretion may also be filed as a law enforcement efforts if there are those who feel aggrieved with propose the decision which is made by Pengadilan Tata Usaha Negara (PTUN), in UU No. 5 year 1986 and UU No. 9 year 2004 about Peradilan Tata Usaha Negara.

This law states clearly the procedure and the limited along with the responsibility of the use *freies ermessen* (discretion). To avoid irregularities or misuse, discretion also describe about the process and responsibilities in doing innovation for development purposes. The significant growing development, one of them can be reach by the grown innovation of the central officer or local government officer.

4. CONCLUSION

With the authority in the form of *freies ermessen*, the apparatus in the context of administration have a wider capability to get an action based on law in order to serve the public interest. *Freies ermessen* (discretion) not allowed against with the general principle and the other ban as mention in UU Republic Indonesia No. 30 year 2014 about government administration and other rules. Any actions taken by the authority must be accountable morally based on applicable law.

REFERENCES

- [1] Aristoni. 2014. Tindakan Hukum Diskresi dalam Konsep Welfare State Perspektif Hukum Administrasi Negara dan Hukum Islam. Jurnal Penelitian, 8 (2), 221-246. unpublished
- [2] Fathudin. 2015. Tindak Pidana Korupsi (Dugaan Penyalahgunaan Wewenang) Pejabat Publik (Perspektif Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan). Jurnal Cita Hukum. Vol. II No. 1 Juni 2015; 115-132. journal.uinjkt.ac.id/index.php/citahukum/article/download/1844/1741. unpublished

- [3] Julista Mustamu. 2011. Diskresi Dan Tanggungjawab Administrasi Pemerintahan. Jurnal Sasi Vol. 17 No. 2 Bulan April-Juni 2011; 1-9. unpublished
- [4] Kuntjoro Purbopranoto. 1981. Perkembangan Hukum Administrasi Indonesia. Binacipta, Bandung.
- [5] Laica Marzuki. 1996. Peraturan Kebijaksanaan (*Beleidsregel*) Hakikat serta Julista Mustamu, Diskresi dan Tanggungjawab serta Fungsinya Selaku Sarana Hukum Pemerintahan, Makalah pada Penataran Nasional Hukum Acara dan Hukum Administrasi Negara, Fakultas Hukum Universitas Hasanudin, Ujung Pandang 26-31 Agustus 1996.
- [6] Muchamad Arif Agung Nugroho. 2012. Perintah Pejabat Tata Usaha Negara Melalui Telepon dan Akibat Hukumnya. Jurnal Ilmiah Ilmu Hukum QISTI. Vol. 6 No. 1 Januari 2012. unpublished
- [7] Ridwan HR. 2011. Hukum Administrasi Negara. Edisi Revisi. Jakarta : Rajawali Pers.
- [8] S. Prajudi Atmosudirjo. 1994. Hukum Administrasi Negara. Edisi Revisi. Ghalia Indonesia, Jakarta.
- [9] S.F. Marbun. 1997. Peradilan Administrasi Negara dan Upaya Administratif di Indonesia, Cetakan Pertama, Yogyakarta; Liberty.
- [10] Utrecht, E. 1988. Pengantar Hukum Administrasi Negara Indonesia, Pustaka Tinta Mas, Surabaya,
- [11] Winahyu Erwiningsih. 2006. Peranan Hukum Dalam Pertanggungjawaban Perbuatan Pemerintahan (*Bestuurshandeling*) (Suatu kajian dalam Kebijakan Pembangunan Hukum). Jurnal Ilmu Hukum, 9 (2), 183 - 200. <https://publikasiilmiah.ums.ac.id/bitstream/handle/11617/738/6.%20WINAHYU.pdf?sequence=1>. unpublished