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Meaning of Discretion Over Government Legal Actions in Public Policy

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ABSTRACT

The state has a goal of realizing prosperity for its people (welfare state), so the state needs to implement public policies in the context of the quality of public services which are influenced by internal factors, namely discretionary authority. The research method used is analytical descriptive with a normative juridical approach through library and field research stages with data collection techniques through library studies Based on the research results, show that discretion can be used by government officials to penetrate the legality of legal products which sometimes encounter deadlock, as long as it is in the interests of the people at large, so there is no reason for government officials to refuse to adopt a policy. If the law or other legal products do not regulate it formally, it does not mean that the situation will close the space to provide happiness for the people, the freedom to act is in the hands of government officials.

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1. Introduction

Indonesia is a country based on Pancasila and the 1945 Constitution of the Republic of Indonesia, so all aspects of life in the social, national, and state fields, including government, must always be based on law. (Indonesia 2002) This is an embodiment of the principle of legality in the field of state administrative law which according to HD Stout means "the government is subject to the law"(Ridwan 2006)or "the principle of legality determines that all provisions binding on citizens must be based on law". The principle of legality is the basis for the legitimacy of government actions and guarantees the protection of people's rights guaranteed in the 1945 Constitution because the application of the principle of legality will support the implementation of legal certainty and equality of treatment. (Rohyani 2010)

The government has the authority to establish laws and regulations under the law that are materially binding on the public; determination of individual, concrete, and final *beschikking*; implement real and active administrative actions; and implement administrative functions in the case of administrative appeals. (Number 5AD)Apart from that, the government has discretion (*freis ermessen*) as authority, namely the authority to make regulations on its initiative, especially in dealing with urgent problems for which there are no regulations, as well as the power to interpret various enumerative regulations themselves. This authority is given with the awareness that legislators are unable to detail or study every problem that arises in detail, so

the government must develop its own initiative and visionary attitude to be able to solve the problems it faces. The measure, that the act or action carried out by the regional government is not an abuse of authority, means that the act must be *wetmatig*, *rechtmatig*, and *doelmatig*.

In the practice of state administration, it is not uncommon for state administration legal acts or actions carried out by government officials that are intended to provide protection to the community or to overcome pressing emergencies, cause violations or deviations, and/or cause losses to state finances which are considered by judges, prosecutors, the police and the Corruption Eradication Commission are qualified as criminal acts of corruption, resulting in the imposition of criminal sanctions and administrative sanctions in the form of dismissal or dismissal of government officials from their positions as civil servants. This has very serious implications because it gives rise to the phenomenon of fear, reluctance, and hesitation among state officials to take administrative legal actions or actions, thereby affecting the performance of government officials and disrupting the administration of the government as a whole. (Ujang Charda 2012)

This creates two camps between those who are pro and those who are against. The pro camp says that a policy, especially a policy of a state administration official, should not or cannot be criminalized, because it falls under the state administrative law regime. (Setiadi 2010) Meanwhile, the opposing side says that a policy taken by a public official can be criminalized in the sense of being a criminal act if the policy taken has the potential to harm the state's finances or is deliberately used as a mode of committing a crime, in this case, for example, committing a criminal act. corruption by hiding behind the legality of policy decision-making. In other words, a policy can be criminalized if a criminal mind can be found in the policy. (Ujang Charda 2012)

2. Research Methods

This research uses a normative juridical approach. Specifications This research is descriptive analytical research which is research to describe the flow of scientific communication and analyze existing problems which will be presented descriptively. The type of data used is secondary data, including library materials related to research. Then, data collection was carried out through library research by reviewing library materials related to the problem under study.

3 Results and Discussion

3.1 Concept of Discretion in Government Legal Actions

The Indonesian state is a form of a modern welfare state which is reflected in the Preamble to the 1945 Constitution, the goal outlined in the constitution is that this country is a state that wants to provide prosperity for its people as clearly described in the state's goals. to be achieved, "…. to form an Indonesian State Government that protects the entire Indonesian nation and all of Indonesia's blood as the vision of the Indonesian state with its mission to advance the general welfare, educate the life of the nation, and participate in implementing world order based on independence, eternal peace, and social justice...".(Indonesia 2002)

This vision and mission is the basis for making public policies which must be based on law, because, in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it is determined that: "The Indonesian state is a state of law". According to Immanuel Kant, the rule of law is one of the goals of the state, meaning: (Wibowo, Tangkilisan, and Bahri 2004)

"The state must guarantee order for the individuals who are its subjects. Personal legal order is the main requirement for the goals of a state. The goal of the state is the establishment and maintenance of law as well as guaranteeing the freedoms and rights of its citizens. People must obey laws made with their consent. Apart from that, individuals are seen by Kant as being on the same level as the state itself. Both the state and individuals are legal subjects, who must view each other as fellow citizens, as parties holding rights and obligations. This means that the state cannot view individuals as objects that are lifeless and do not have any rights."

Thus, in administering government, the actions taken by both the government and its citizens must be based on law. The legal basis for the government in carrying out its actions can be seen from two sides, namely, on the one hand, it provides legitimacy for the actions taken by the government and at the same time provides legal protection in the event of a lawsuit by members of the public. To avoid irregularities in the administration of regional government, the law can be used as a means to achieve this goal because technically the law can do the following things: (Sunggono 1994) (a) Law is a means of ensuring certainty and providing predictability in people's lives. (b) Law is the government's means of implementing sanctions. (c) Laws are often used by Governments as a means to protect against criticism. (d) Law can be used as a means to distribute resources.

To achieve these state goals, the government is obliged to pay attention to and maximize social security efforts in the broadest sense, resulting in the government having to actively play a role in the socio-economic life of society (public service) which results in the state not being able to refuse to take decisions or act under the pretext of absence of statutory regulations (*rechtsvacuum*). Therefore, the existence of discretion which is often called *freies ermessen* (German) or *pouvoir discretionnaire* (French) or in Indonesia is known from the translation of discretion or discretion power (English) as "freedom to act" or "decisions taken based on one's judgment",(Santosa 2018) whereas in the Black Law Dictionary, the term discretion means a public official's power or act in certain circumstances according to person's judgment and conscience. (Garner 1999)

The term *freies ermessen* comes from the word freies, a derivative of the words frei and freie, which means free, independent, unbound, free, and free person, while the word *ermessen* contains the meaning of considering, assessing, conjecturing, judgment, consideration, and decision. (Panjaitan 1991) So etymologically, *freies ermessen* can be interpreted as a person who is free to consider, free to judge, free to suspect, and free to make decisions, while the term discretionair means according to wisdom, and as an adjective, means according to authority or power which is not or is not entirely tied to Constitution. (Andrea 1983)

In the literature on state administrative law, many experts have provided limitations regarding this term, such as Prajudi Atmosudirdjo who said:(Atmosudirdjo 1981) "... the principle of discretion (*disretie; freies ermessen*), meaning that ruling officials may not refuse to make decisions because there are no regulations, and therefore are given the freedom to make decisions according to their own opinion as long as they do not violate the jurisdictional and legality principles...".

In line with this opinion, Sjachran Basah said that the country's administration needed *freies ermessen*: (Basah 1992) "…it is possible by law to act on one's initiative,…especially in resolving important issues that arise suddenly. In such cases, the state administration is forced to act quickly, making solutions. However, the decisions taken to resolve these problems must be accountable."

In another part, Sjachran Basah said that *freies ermessen* is defined as freedom to act within certain limits or freedom in determining policies through the attitude of state administration actions that must be accountable. (Basah 1992) morally to God Almighty, upholding human honor and dignity, as well as the values of truth and justice, prioritizing unity and integrity for the common good. Meanwhile, Amrah Muslimin defines freies ermessen as a field of movement at one's discretion or freedom of wisdom. (Muslimin 1985)

Freies ermessen This is what government officials can use to penetrate the legality of legal products which sometimes encounter deadlock, as long as it is in the interests of the people at large, there is no reason for government officials to refuse to adopt a policy. (Santosa 2018) If the law or other legal products do not regulate it formally, it does not mean that the situation will close the space to provide happiness for the people, the freedom to act is in the hands of government officials, what remains now is how to utilize this freedom so that it functions

optimally and not just hurt society's sense of justice. The term *freies ermessen* in Law Number 30 of 2014 is known as discretion which is defined as follows:(Number 30AD)

"Discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is stagnation. government".

According to Article 6 paragraph (1) Jo. paragraph (2) letter fLaw Number 30 of 2014, states that the use of discretion following its objectives is one of the rights possessed by government officials in making decisions and/or actions which, among other things, include: (a) Carrying out the authority possessed based on the provisions of laws and regulations and general principles of good governance. (b) Carrying out government activities based on the authority they have. (c) Establish decisions in written or electronic form and/or determine actions. (d) Publish or not publish, change, replace, revoke, postpone, and/or cancel decisions and/or actions. Use discretion according to purpose., Delegate and provide mandates to other government officials in accordance with statutory provisions. Appoint daily executors or task executors to carry out tasks if the definitive official is unable to do so. Issuing permits, dispensations, and/or concessions by statutory provisions.

Furthermore, in Article 22 paragraph (1) of Law Number 30 of 2014, discretion can only be exercised by authorized government officials and every use of discretion by government officials aims to:(Number 30AD) (a) Facilitate government administration. (b) Filling legal gaps. (c) Provide legal certainty. (d) Overcoming government stagnation in certain circumstances for the benefit and public interest.

The scope of discretion of government officials according to Article 23 of Law Number 30 of 2014, includes: (a) Making decisions and/or actions based on the provisions of laws and regulations which provide a choice of decisions and/or actions. (b) Making decisions and/or actions because laws and regulations do not regulate them. (c) Decision-making and/or action due to incomplete or unclear statutory regulations. (d) Decision-making and/or action, due to government stagnation for broader interests.

Furthermore, in Article 24 of Law Number 30 of 2014, government officials who use discretion must meet the following requirements: (a) By discretionary purposes. (c) Does not conflict with statutory provisions. (d) By the general principles of good governance. (e) Based on objective reasons. (f) Does not create a conflict of interest. (g) Done in good faith.

The use of discretion does not mean completely ignoring the principle of legality, because the attitudes and behavior of state administration must be able to be tested based on other higher statutory regulations or based on unwritten legal provisions, such as general principles of good governance. If the principle of discretion is implemented, state administration will give the appearance of arbitrary action, but if it is not implemented, national development goals will be hampered. To avoid arbitrariness or abuse in using the principle of discretion, it is necessary to regulate restrictions on the use of the principle of discretion. The policy is permitted because in governance law there is a theory of discretion, but according to Muchsan, this principle of discretion creates a dilemma:(Muchsan 1981) (a) On the one hand, if discretion is always used, arbitrary government actions will occur. (b) But on the other hand, if the government is afraid to exercise discretion, then the noble, just, and prosperous goals of national development will be difficult to realize. (c) If it is carried out negatively by the government, it will result in arbitrariness or indiscretion, or abuse of authority. (d) If it is not done or used, it will not become something useful.

Furthermore, according to Muchsan, the exercise of discretion by government officials (executives) is limited by 4 (four) things, namely: (a) If there is a legal vacuum. (b) There is freedom of interpretation/interpretation. (c) There is a legislative delegation. (d) To fulfill the public interest.

The use of discretion that has the potential to change budget allocations must obtain approval from superior officials by the provisions of statutory regulations, as follows:(Number 30AD) (a) Approval is carried out if the use of discretion gives rise to legal consequences that have the potential to burden state finances. (b) If the use of discretion causes public unrest, is an emergency, is urgent and/or a natural disaster occurs, government officials are obliged to notify the official's superior before the use of the discretion and report to the official's superior after the use of the discretion. (c) Notification before the use of discretion is carried out if the use of discretion has the potential to cause public unrest. (d) Reporting after the use of discretion is carried out if the use of discretion occurs in an emergency, urgent situation, and/or a natural disaster occurs.

Officials who use discretion according to Article 26 of Law Number 30 of 2014: (a) Must describe the aims, objectives, substance, and administrative and financial impacts. (b) Must submit a written request for approval to a superior official. (c) Within 5 (five) working days after the application file is received, the superior official shall determine approval, instructions for improvement, or rejection. (d) If an official's superior refuses, the official's superior must provide reasons for the refusal in writing.

The use of discretion must be based on objectives, statutory regulations, and the principles of good governance, otherwise, the juridical consequences will encourage arbitrary actions and abuse of authority or in other categories exceeding authority. In Article 30 of Law Number 30 of 2014, the use of discretion is categorized as exceeding authority if: (a) Acting beyond the validity period of authority granted by statutory provisions. (b) Acting beyond the territorial limits of the authority granted by statutory provisions. (c) Not by the provisions of Article 26, Article 27 and Article 28. (Number 30AD) (d) The legal consequences of this use of discretion are invalid.

In addition to the category of exceeding authority, it is also known that the use of discretion is categorized as confusing authority if: (Number 30AD) (a) Using discretion is not for the authority given. (b) Not by the provisions of Article 26, Article 27 and Article 28. (c) Contrary to general principles of good governance. (d) The legal consequences of the use of this discretion can be canceled.

The use of discretion is categorized as an arbitrary act if it is issued by an unauthorized official so that the legal consequences of the use of discretion become invalid. (Number 30AD) Therefore, arbitrary actions can occur because the government does not have enough rationality as a parameter. Therefore, every government discretion must be based on the principle of legality, the principle of democracy, the principle of purpose, and the principles of good governance as the meta norms that underlie government actions. If all government administration in this country carries out government discretion based on these things, then collective prosperity can be achieved and the people will not be miserable by the government's actions.

3.2 Concept of Discretion in Government Legal Actions

In line with the current development of legal discourse and the modern constitutional system, it seems that discussions about law and public policy are becoming increasingly important. Day-to-day state administration is never free from issues covered by law and public policy. In the realm of practice, law and public policy are not only related to each other, but more than that, they must be able to help each other and complement each other so that the day-to-day administration of the state can run well. (Muchsin 2009) The development of the rule of law state to date has colored a concept of a welfare state law which has logical consequences for the state through its government to provide public policy.

The government's freedom to act on initiative and policy at the level of state administrative law and constitutional law is often known as *freies ermessen*/discretion. The definition of discretion is the power of public officials to act according to their own decisions

and conscience, so this discretion is the authority to act or not act based on their judgment in carrying out legal obligations. This is due to the increasingly advanced growth and development of society, the government in its state administration duties is always obliged to determine policies. The government, in determining government policies to carry out government duties aimed at improving the welfare of its people, issues policies (Ibrahim and Tjahja 2019) in public service.

For public service tasks to continue to achieve maximum results, administrative officials are given the freedom to act on their initiative in resolving concrete problems that must be handled appropriately, while the problems do not exist, or a legal basis for their resolution has not yet been established by the legislative body which is then in law. State administration is called free authority (discretion).

There can never be complete free authority, because, in the modern legal framework, this means that the authority possessed by administrative officials may not be used for purposes other than the purpose for which the authority was given to them. The free authority given contains an obligation, that state administrative officials must always determine the best decisions to deal with concrete situations. The nature of government authority, namely that it is bound, facultative, and independent, especially decisions (*besluiten*) and decrees (*beschikking*) by government organs so that it is known that some decisions or decrees are bound and free. (Indohartono 1995)

Freedom of policy regulations cannot be separated from the free authority of the government which is called *freies ermessen* and has relevance to policy regulations carried out based on government authority. So that the *freies ermessen* existing in the state administration are not misused, it is necessary to have benchmark restrictions on their use. This is where the importance of *freies ermessen* is related to the role of state administrative law, on the one hand, it is used to enable state administrative law to carry out its functions, but on the other hand, it is needed to protect citizens against the actions of state administration and to protect the state itself. (Basah 1989)

Government officials who use discretion, as long as it is done within the formal environment of their authority or carried out in the context of carrying out the authority of their position, all consequences that arise will be the responsibility of the position they hold. The parameters that limit the free movement of authority of state officials are *détournement de povouir* (abuse of authority) and *abus de droit* (arbitrary), whereas in the area of criminal law there are also criteria that limit the free movement of the authority of state officials, namely the elements of *wederrechtelijkheid* and abuse of authority. When a state apparatus commits an act that is considered to be an abuse of authority and is against the law, which court will process this matter. (Aji 2010)

Freies ermessen according to Nata Saputra, it is a freedom given to state administrative tools, namely freedom which allows state administrative tools to prioritize the effectiveness of achieving a goal rather than adhering to legal provisions or legal authority to intervene in social activities to carry out organizing tasks. public interest. (Ibrahim and Tjahja 2019) In Indonesia, the existence of *freies ermessen* is contained in the provisions of Article 4 paragraph (1) of the 1945 Constitution, which reads: "The President of the Republic of Indonesia holds governmental powers according to the Constitution". The meaning of the provisions of this article is that in his position as a state official, the President is given the freedom to carry out actions as head of the executive power to carry out statutory orders.

Although granting *freies ermessen* to the government or state administration is a logical consequence of the concept of welfare, within the framework of the legal state, *freies ermessen* can be used without limits, based on this view the elements of *freies ermessen* can be determined as follows: (a) As a consequence of the welfare state concept. (b) This is a form of intervention by the government or state administration officials. (c) Intended to resolve problems that arise

suddenly or are not yet contained in the provisions of the law. (d) Taken based on the government or state administration's initiative. (f) Aims to provide public services. (g) Does not conflict with the legal system of basic norms.

For a country that adheres to the welfare state ideology based on the principle of legality alone, it is not enough to participate optimally in serving the interests of society. *Freies ermessen* is something that cannot be avoided in the modern welfare state, especially towards the end of the XX century and entering the XXI century today so that *freies ermessen* is increasingly widely used by public administration officials. In practice, the administration of *Freies Ermessen* government is carried out by public administration in the following matters: (a) There are no statutory regulations governing in concreto resolution of a problem that requires immediate resolution, for example in the face of natural disasters and infectious diseases, government officials immediately take action that benefits the country and its people, action that arises solely on initiative. authorized government officials themselves. (b) The laws and regulations that are the basis for the actions or actions of government officials provide complete freedom, for example in granting permits, each granting permit is free to interpret the meaning of causing a dangerous situation according to the respective situation and conditions. (d) There is a delegation of statutory regulations, meaning that government officials are given the power to regulate themselves, which is the power of officials at a higher level, for example in exploring regional financial resources, regional governments are free to manage these sources legitimately.

Meanwhile, Ridwan HR. says that *freies ermessen* is used primarily, because: (Ridwan 2009) (a) Emergency conditions that make it impossible to implement written provisions. (b) There are no or no regulations governing it. (c) There are already regulations, but the editorial is the same or has multiple interpretations.

According to Muchsan, the restrictions on the use of Ermessen fries are as follows: (Muchsan 1981) (a) The use of *freies ermessen* must not conflict with the applicable legal system. (b) The use of Ermessen fries is only intended for the public interest.

JBJM Ten Berge said that this administrative freedom includes freedom of interpretation (*interpretatieverijheid*), freedom of consideration (*beoordelingsvrijheid*), and freedom of decision making (*beleidsvrijheid*). (Ridwan 2009) *Beoordelingsvrijheid* arises when the law presents two options (alternatives) of authority regarding certain requirements whose implementation can be chosen by government organs, meanwhile *beleidsvrijheid arises* when legislators give authority to government organs in carrying out their powers to carry out inventories and consider various interests.

Freedom of consideration for this administration is both subjective (subjectieve *beordelingsruimte*), namely the freedom to determine for themselves how and when the authority they have is exercised, and objective (objectieve *beordelingsruimte*), namely the freedom to interpret the scope of authority formulated in the basic regulations his authority. When this freedom of government or *freies ermessen* is expressed in written form, this will become a policy regulation. Thus, policy regulations are related to the use of authority of government organs, and the essence of policy regulations is naar *buiten gebracht schricftelijk beleid*, namely the appearance of a written policy.

In the science of state administrative law or state administration, *freies ermessen* is given only to the government or state administration, both to carry out ordinary actions and legal actions and when *freies ermessen* is realized in a written juridical instrument, it becomes a policy regulation. As something that is born from the *freies ermessen* and which is only given to state or public officials or administration, the authority to make policy regulations is inherent in the government. (Ibrahim and Tjahja 2019) When compared with Indonesia, *freies ermessen* emerged at the same time as the task given to the government to realize the state's goals, as stated in the Preamble to the 1945 Constitution. Pragmatically, it rests on the authority of the state

administration, which then gives birth to policy regulations containing 2 (two) aspects, namely: (a) Freedom to interpret the scope of authority formulated in the basic regulations of authority. This first aspect is commonly known as objective freedom of judgment. (b) Freedom to determine for themselves how and when the authority of the state administration is exercised. This second aspect is known as subjective freedom of judgment. This free authority to interpret independently gives rise to policy regulations. Policy regulations are general regulations issued by government agencies regarding the implementation of government authority toward citizens or other government agencies.

In carrying out their activities as policy implementers, bureaucrats still need to form further policies, or in other words, bureaucrats will determine their policies to be able to adapt to the situation in which they are and as a result of the limitations of available resources, both in the form of information. , funds, as well as experts, skilled workers, or the knowledge they have. (Sunggono 1994) Thus, bureaucrats in carrying out their activities have a certain policy freedom regarding the juridical aspect called *freies ermessen* (*pouvoir discretionnaire*) which can be described as follows: "Discretion refers to the ability of administrators to choose among alternatives to decide in effect how the policies of the government should be implemented in specific cases".

In the case of establishing the principle of legality in a broader and more flexible sense which is not only based on written statutory regulations but also based on unwritten legal provisions which are included in the words "accountable". In connection with this, Prajudi Atmosudirdjo stated the following: (Atmosudirdjo 1981)

"Discretion is needed as a complement to the principle of legality, namely the legal principle which states that every act or deed of state administration must be based on the provisions of the law."

It is hoped that with the existing conditions, maximum results/goals can be achieved with these discretionary/discretionary freies. This can be based on, as stated by Freidmann, the factor that gives rise to differences in legal life in society is the existence of cultural elements which are the driving force and which are the bridge that connects the applicable legal regulations with human behavior in society. This includes categories of values and attitudes that can influence the implementation process. (Sunggono 1994) In this case, of course, the principle of legality (in the sense of *wetmatigeheid van bestuur*) can no longer be maintained rigidly. Because in such circumstances, state administration is not only the trumpet of statutory regulations, but in carrying out its duties it is obliged to be active in order to carry out public service tasks, all of which cannot be accommodated by written law alone. Therefore, *fries ermessen* are needed. (Panjaitan 1991) If this is connected with Sjachran Basah's opinion, then the implementation of *freies ermessen/This discretion through the attitude of state administration can take the form of:(Basah 1992)*

Forming statutory regulations under the law that are materially binding on the public. (a) Issue concrete, final, and individual "*beschkking*". (b) Carry out real and active administrative actions. (c) Carrying out judicial functions, especially in matters of administrative objections and appeals.

Starting from the description above, the need for *freies ermessen*/Discretion in state administrative law can be used to fill gaps or gaps in the law (*rechtsvacuum*). Thus, it can be said *freies ermessen*/Discretion plays a role in filling, completing, and developing state administrative law

4 Conclusion

Discretion/*freies ermessenis* the freedom or freedom of action of the state administration which is enabled by law to act on its initiative to resolve important, urgent problems for which there are no regulations yet and these actions can be accounted for. The use of discretion is a means for government officials to make breakthroughs and solve problems that require quick

resolution and where there are no regulations governing something. Therefore, Discretion is the power of public officials to act according to their own decisions and conscience, so this discretion is the authority to act or not act based on their judgment in carrying out legal obligations. This is due to the increasingly advanced growth and development of society, the government in its state administration duties is always obliged to determine policies. The government, in determining government policies to carry out government duties aimed at improving the welfare of its people, issues policies in public services.

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