

DISCRETION (FREIES ERMESSEN): THE LEGAL DEVICE IN SUPPORTING DEVELOPMENT

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Abstract

The Implementation of development requires appropriate legal policies to avoid collusion, corruption, and nepotism. However, the government officers are being hesitate in conducting their duties due to a reason of corruption suspects. Thereby impacting in the implementation of development. Actually, discretion is a legal basis which is safely to be used, but due to lack of understanding of the state officers, they do not use it. This paper will explain the discretion as a "living law" which will be more understood deeply.

Keywords: Development, Discretion, living law

The disharmony between legal norms (das sollen) and its implementation (das sein) always happened. In some cases, the gap were caused by the legal politics of the sovereign,¹ as theorized by Marryman,² that a political determinant of the law. This kind of law is in authoritarian (non-democratic) state, the law functioned as policy which justified their own actions. Policies and laws were directing the public being obedient to the state.³ Contrary to the democratic state policies, Meuwissen says, the contents

and shapes of laws are changed depend on time, place and many social factors. The Legal functions in the Law on Public Services (UUPP) are: (1) The Realization of legal reference on public service ; (2) The realization of legal certainty of investment implementation in Indonesia; (3) The Establishment of good public service organization ; (4) The Implementation of effective and targeted resources managemnet of public service apparatur ; (5) The realization of Controlling system in public services implementation; And (6) The Realization of community participation in public administration.⁴

In the Article 3 of Law Number 25 of 2009 on Public Service, it is clearly stated that the function of law is to serve the community, but in reality there are doubttness in implementing the development programmes which based on a strong legal foundation .

¹ Politics Law in the narrow sense is often defined as legal policy (politics in the sense of policy direction). But it broadly embraces the 'political determination' of the law in these three meanings. Moh. Mahfud MD, Materials Post-Graduate Lecture, Political Law, FH UII, 2015. Page 1.

² .H. Marryman, *The Civil Law Tradition*, (California: Standford University Press, 1969), page.7.

³ Even other institutions within the state including the legislature are closer to politics than to the law. See, Abdul Hakim Garuda Nusantara, *Indonesian Political Law*, (Jakarta: LBHI, 1998), p.8

⁴ See, Article 3 Law No.25 Tahun 2009 about Public Services. D.H.M. Meuwissen, "Pengembangan Hukum", on *Journal PRO JUSTITIA*, Year XII No. 1 January 1994, page. 67.

In the middle of 2015, the government being criticized by the experts concerning about the State Budget (APBN) Changes, for the government's officer were being doubt in spending the development budget.⁵

The point of that criticism due to the Revised of State Budget 2015 set a budget of Rp 1.319, 5 trillion; About 60 percent or Rp 795.5 trillion is distributed to the ministries. The rest are transferred to the regions in balancing funds (revenue sharing, general allocation funds, and special allocation funds), an autonomy funds, village funds, privileges of the Special Territory of Yogyakarta, and other transfer funds. The budget is intended to development expenditure of this country in 2015. However, on August 2015 the expenditure used was about 20 percent of funds, means the absorption of the government budget is very low, which is influence the economic stagnation and national investment.⁶

The Low absorption Budget causes President Jokowi furious, thus, asked the Police and the Attorney not to criminalize the government administration discretion measures in the framework of policies and

breakthroughs which are based on good intentions.⁷ There are two reasons why President Jokowi asked not to criminalize the government's discretion. First, the President hasitate if the budget was not being properly absorbed it would be stunted the development programmes. Second, the president know well that whenever the officials were not criminilized by reason of "discretion" and then absorbing the budget without controlling, it could get stuck in corruption suspect. How the government's handling this problem, as for the government officials in charge and have responsibility in conducting people welfare?

B. Legal Issues

Based on the problems above, can be formulated two legal issues:

1. How should be The State Budget (APBN) absorbed optimally and not hampering the development implementation?
2. Whether the discretion policy could be used as a legal based in optimazing the development budget absorption?

C. Theoretical Review: Discretionary Power or Freies Ermessen

The President has instructed the law enforcers ie; Police and Attorney, they were not allowed to criminalize the discretion which conducted by government officials, especially local governments.⁸ This statement has been repeatedly stated, even he has an idea to formulate the anti-criminalization rules of government officials, it was a response of the regional heads and government officials complaint who were not dare enough in spending the

⁵ Hamid Awaluddin, Criminalization of Discretion, Kompas, June 24, 2016. Also Rudy Badrudin, in the article Low The Absorption of Regional Budget, People's Sovereignty, February 6, 2015.

⁶ Kompas, 6 August 2015. For example, from 17 districts and cities in South Sumatra, up to August 2015, 10 regions only absorb 10 percent. Budget absorption in the two new districts of North Musi Rawas (Muratara) and Penabab Abab Lematang Ilir even zero percent. East Ogan Komering Ulu Regency by 3 percent, Lubuk Linggau, Empat Lawang and Musi Rawas only 4 percent, and Musi Banyuasin only 5 percent.

⁷ Tajuk Rencana Kompas, 21 July 2016. See also Kompas, 22 Juli 2016, Riawan Tjandra, Pemidanaan Diskresi.

⁸ Kompas, 11 August 2016.

budget, as for they were worried about being criminalized. So far there were a lot of government officials who have been being prisoned because of this budget disbursement case.⁹ Then, what should be done to avoid the criminalization? The experts and President agree that the best solution to avoid the budget disbursement is by taking the advantage of legal based discretion. That is why discretion necessary?

Generally, the government officials of budget management were being accused and punished as defendants for gratification, baksheesh, kick back, markups; in article 2 on law violations, and article 3 on abuse of authority (abuse of power), corruption eradication law. These two chapters were terribly, indeed it stated that someone suspected of being able to the detriment of state finances. The word "being able" is something that has not happened yet, but the law apparatus used it strictly on the pretext of potentially harming the state finances. According to Hamid Awaluddin, these two articles are actually too loose.

Actually, The Officials should not be afraid and hesitate in policy-making, because they have authorized automatically, thus, the state officials have the right and authority to conduct discretion, that is called *freies ermessen* in Germany Legal System. In the UK it is known as **discretionary power**, which is also used in Law No.30 of 2014 on Government Administration

The *freies ermessen* is derived from the word *frei* means free, loose, unbound, and independent. While *ermessen* means to consider, judge, guess and estimate. *Freies Ermessen* means a person who has a freedom to judge, guess, and consider something. The term is typically used in the government sphere, so that *freies ermessen* (discretionary power) is defined as an opportunity or right for officials or state administrative bodies to take an action without having to be fully bound by the law.¹⁰ Another definition is given by Nana Saputra, which is a freedom granted to the administrative that is means in principle, the authorization of state administrative to prioritize an effectiveness of a goal (*doelmatigheid*) rather than adhering to the rule of law,¹¹ or legitimate authority to interfere in social activities to carry out the duties of administering the public interest.¹² Bachsan Mustafa mentions that, *freies ermessen* is given to the government which is functioned in governing or state administration that carry out the general welfare, it is different from the judiciary function in resolving disputes among the society. The government's decision more prioritize to the achievement of goals

⁹ Until 2017, there are 10 ministers, two governors of Bank Indonesia, 20 governors, a general four and three three-star, about 800 members / former DPR / D, DPD, and about 200 regents/mayors who have been tried and went to jail. Kompas, June 24, 2017.

¹⁰ Marcus Lukman, Existence of Policy Rules in the Planning and Implementation of Regional Development Plans and their Impacts on the Development of National Written Legal Material, Dissertation (Bandung: Padjadjaran University, 1996), pp. 205.

¹¹ Nana Saputra, Law of State Administration, (Jakarta: Rajawali, 1988), p. 15.

¹² Ridwan, Law of State Administration (Jakarta: Rajawali Pers, 2008), p.170.

(doelmatigheid) rather than in accordance with the applicable law (rechtmatigheid).¹³

Although the *freies ermesen* was granted to government or state administration is logically consequence of the welfare state's conception, but in the rule of law framework, the *freies ermesen* cannot be used indefinitely.¹⁴ Sjahran Basah expressed the elements of *freies ermesen* in a law state as follows:

- a. Aimed in performing public service (service) duties.
- b. An active action of state administration;
- c. The conducts are made possible by law;
- d. The conducts are taken on their own initiative;
- e. The conducts are intended to solve the problem (solution) of important problems that arise suddenly;
- f. The conducts can be accounted both morally to God Almighty and legally.¹⁵

Freies ermesen is emerging as an alternative to fill the shortcomings and weaknesses in the application of the principle of legality (*wetmatigheid van bestuur*). As for welfare state, the principle of legality has limited role in serving the public interest, which is growing rapidly in line with the development of science and technology. According to Laica Marzuki, *freies ermesen* is a freedom granted to the

state administration in the framework of governance, in accordance with the increasing of public services requirements that is more complex by the time. *Freies ermesen* is inevitable in the modern and democratic welfare state, especially in the late XXI century.

D. Discussion: Discretion in the State of Law

Based on the theoretical description above, the legal basis of discretion or *Freies Ermessen* is very strong. The discourse in terms of Lawrance Friedman becomes a living law, although unwritten.¹⁶ As stated in Law Number 30 The year 2014 which expressly states, the purpose of discretion is: to run the government, fill the legal void, provide legal certainty and overcome the stagnation of government in certain circumstances for public interest benefit. With such a strong legal basis, officials, regional heads should not be hesitate to take discretion, especially with the conditions of our nation today, which the development activities should be done expeditiously.

The philosophy of discretion is essentially the core of the rule of law itself. Discretion is a consequence of authority attribution is given to the administrative officials, for in the implementation of government functions there are limitations of the law which implicate to the occurrence of unclearly legal norms, legal void, or the

¹³ Bachsan Mustafa, *Principles of State Administration Law* (Bandung: Citra Aditya Bakti, 1990), p.55.

¹⁴ Murtir Jeddawi, *Law of State Administration*, (Yogyakarta: Creative Total Media, 2012), p.119.

¹⁵ Sjahran Basah, *Legal Protection for Conducts of State Administration* (Bandung: Alumni, 1992), p.68.

¹⁶ Even if referring to Lawrance Friedman's opinion, this legal policy is a living law. Lawrance Friedman, *The Legal System: Social Science Perspective*, (New York: Russell Dage Foundation, 1975).

gap between the rule of law norms and the need for government practice¹⁷

In this case, the principle of a modern legal state as the pillar of government in some European countries and European common law states were being tolerate legal discovery by government administration officials known as *freies ermesen* or discretion.

Discretion is intended to overcome the stagnation of government and to make the implementation of government responsibility in conducting public services more effective. In this context, President Jokowi appeal request should be placed in the correct proportion.¹⁸ The use of discretion by the government which give the limits scope of the crime by the courts, actually is a benchmark the quality of the separation / distribution of power principle as result the French Revolution then become a milestone in the commencement of constitutional democracy and the state of law that infiltrates absolutism.¹⁹

E. Discretion Discrepancies

Indeed, discretion is a freedoom can be used to overcome certain problems. However, it is often diverted, for example, in the cases of procurement of goods and services with a fictitious or regulated model (KKN / collusion, corruption, and nepotism). The application by government

administrative officials is inconsistent with the government need , so there were potentially arbitrary acts or deviation abuse of authority by government officials who has intention corruption , then discretionary corruption would be occurred.²⁰

Therefore, in order to prevent the motive of discretion or deviation behavior in carrying out the authority of government administration officials should be controlled through the general principles of good administration, an unwritten administration of governmental principles²¹

Logically, The president's statement on the need for precision of law enforcement officers, especially the Police and the prosecutor in assessing the discretion of government officials should become a momentum to actualize good governance principles as the spirit of the implementation of government functions. Government administrative officials do not need to be gripped and seized with fear if the discretion is done based on discretion philosophy and pay attention to general principles of the administration (general principle of good administration). These principles cannot be separated from the existence of state administration as a government (executive) with greater power

¹⁷ Riawan Tjandra, Criminalization of Discretion, *Kompas*, 22 July 2016.

¹⁸ Related to the discretion also, according to Miftah Thoha, Law No. 39 of 2008 on the State Ministry, in addition to not expressly mandated by the constitution, has reduced the president's discretion in holding the power to organize the government.

¹⁹ Juma'De Putra, *The Most Spectacular Revolutions in the World*, (Jogjakarta: IRCISoD, 2014), p. 41-42.

²⁰ Oce Madril, Discretion or Corruption, *Kompas*, August 11, 2016.

²¹ These principles were originally adopted from the administrative judicial model of the Netherlands. Gradually accepted as the norms of the unwritten law, which always have to be obeyed by the government. See, Philipus M. Hadjon, et.al. *Introduction to Indonesian Administrative Law*, (Yogyakarta: Gadjah Mada University Press, 2010, cet.ke-10), p. 270-271.

and has directly connected with the people.²²

F. Bureaucratic Reform

As for the corruption, colution and nepotism (KKN) of bureaucracy and misuse of discretion are happened frequently, the government must accelerate the process of bureaucratic reform. The philosophy of discretion and clean apparatus will have not be meaningful without good governance. Until nowadays The massive corruption caused by the bureaucratic system which is corrupt and the system not based on meritocracy system which recently strongly encouraged by the government.²³ However, the meritocracy model is contrary with the Legislator needs. Although the government has issued the policy of Law No. 5 of 2014 on the State Civil Apparatus (ASN), but the Legislators wants the State Civil Servant Committee to be dissolved, it will threatened bureaucratic meritocracy system. It must be acknowledged that the bureaucratic reform programm has not been running optimally and the implementation have not as expected yet

G. Conclusion

From the description above , it can be concluded that by the strenght legal basis the government officials should not be hesitate to do discretion as a policy solution. As for, this country is still need development, if the government officials passive and moreover afraid to take the initiative, especially related to the funding or budget , it will certainly be hinder the acceleration of development.

All activities undertaken by the government must be accountable to the public and God. The public understanding of its being the whole component of the people as the source of the establishment of democratic government. From the point of leadership, such style or model of leadership makes the government more close to the fate of the people. The most important point is the bureaucratic reform should begin to change the model of a normative hierarchy of procedural with a networking model. Leadership model is not as expected. Networking is a work model and service-based participation relying on the network of all the components that exist, as well as control of the performance of government (and its officials). For example, the eradication of corruption, normatively procedural should not only be the duties of the Corruption Eradication Committee(KPK) only and other law enforcement agencies, but networking also involves all actors; Including the people, political parties, non-governmental organizations (NGOs), nitizens, profit organizations and non-profit organizations. If so far there is corruption at the government level, by the networking model, corruption eradication will be results on satisfying all parties. It not only accentuates the tremendous power that has occurred so far. In the context of discretionary use, it would be very relevant to be connected to a networking leadership model.

²² Sirajudin, et.al., Public Service Law: Based on Participation and Information Disclosure, (Malang: Setara Press, 2012), p. 21-25.

²³ Kompas, February 7, 2017, Threat to Bureaucratic Meritocracy.

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