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FREEDOM ACT *(Discretionary Power)* AND ITS IMPLEMENTATION AS OBJECT CORRUPTION ANALYSIS OF THE DECISION NUMBER 2420.K / SPECIAL CRIMES / 2013 SPECIAL CRIMINAL CASSATION CASES

Julista Mustamu *, Syamsul Bahri **, Muh Yunus Wahid **, Aminuddin Ilmar **

* Graduate Student PhD, Study Program : Science Of Law. Hasanuddin University, Makassar, Indonesia
**Faculty Of Law. Hasanuddin University, Makassar, Indonesia

Abstract *: Freedom acting in the administration of government affairs known two kinds namely freedom of discretion and freedom of interpretation. freedom of discretion or freedom to decide independently occur in the case of a norm of giving freedom to the agency or official of the state administration to take an action according to the considerations to do or not do something that is stated in the basic rules. While freedom of interpretation is more focused on the formulation of norms which disguised (vage norm), in which case the entity or state administrative official has the freedom to interpret the intent (meaning) of the norm vage. Forms of discretion in the administration of government affairs, according* ***Kreveld*** *like; beleidslijnen (stripes wisdom), het beleid (*wisdom*), voorschriften (*regulations*), richtlijnen (*guidelines*), regelingen (*instructions*), circulaires (surat circulars), resoluties (resolutions), aanschrijvingen (instructions), beleidsnotas (memorandum of wisdom), reglemen (ministriele) (ministerial regulations),beschikkingen (decisions), en bekenmakingen (announcements). Based a nalisis freedom of action (discretionary power) and its implementation as an object of corruption to Decision Number 2420.K / Special Crimes / 2013 Case Special Criminal Appeal and* analysis of the reasons a weld Type of Cassation*, it was concluded that: 1) The act of law committed by the defendant is corruption, 2) Measure the abuse of authority in the in casu let by basing on the principles of specialties in budget management.*

Keywords: *Discretionary Power, Corruption,*

I. INTRODUCTION

In government *Freies Ermessen* give meaning as one of the means that provide space for administrative official bodies or countries are to commit an (Marcus Lukman, 1996) [1]. Space motion to perform the intended action is still unclear from these opinions, so it is important considering the views **Phlipus M. Hadjon** (Philip M. Hadjon, et al (2002) [2], Philip M. Hadjon and Tatiek Sri Djatmiati, 2005, [3] which states that, freedom of action in the implementation of government affairs known two kinds. It is declares, as follows : "Freedom of action which is commonly known from the principle of" *Freies Ermessen "(discretionary power).* There are two kinds of freedom, namely freedom of discretion and freedom of interpretation. Example : 1. the permit holder does not meet the provisions of Article II, permission *can be* revoked. 2. Governors authorized prohibit billboards in a foreign language for the sake of public order. In the two examples above, Example 1 allows a freedom of action in terms of policy freedom (freedom to decide independently). In a word *can be* implied the freedom to use the authority revoke licenses and the freedom to not use this authority. Freedom here does not mean *he pleases.* Liberty here to give an opportunity to consider carefully whether the permit is revoked or not. In the example of two in the words *"public order"* there is a vague formulation *(vage norm),* ie whether the interpreted with public order. Natural D example above, the governor is to interpret the meaning of the public order. "Thus, the freedom of discretion or freedom to decide independently occur in the case of a norm of giving freedom to the agency or official of the state administration to take an action according to the considerations to do or not do something that is stated in the basic rules. While freedom of interpretation is more focused on the formulation of norms which disguised *(vage norm),* in which case the entity or state administrative official has the freedom to interpret the intent (meaning) of the *norm vage.*

Relating granting freedom of action (free reign) set forth in the foregoing, **Philip M. Hadjon (Philip** M. Hadjon, et al (2002) [2] states: Against the free power *(vrij bestuur)* principle *"wetmatigheid"* not sufficient . The power of free is not intended as an unlimited power. The power of free is still a power that is subject to the law, at least the unwritten law in the form of legal principles. The principles of the law of the Dutch administrative law is defined as *"alegemene beginselen van behoorlijk bestuur* ". In literature Indonesian administrative law principles were originally popularly known as" general principles of good governance "that until today the word" *behoorlijk* "means" good ", although they were aware that" behoorlijk "means worthy or appropriate (in terms UK: *behoorlijk = proper; beginselen van Algemene behoorlijk bestuur - principles of proper administration or principles of due administration).*

Decision of the Supreme Court on Decision No. 2420.K / Pidsus / 2013 on special criminal appeal cases on behalf of Defendants Lodewyk Bremer, S. Sos, in essence, the public prosecutor in the indictment states that:
"The act of the defendant is a criminal offense and punishable as provided in Article 3 in conjunction with Article 18 of Law No. 31 of 1999 on Corruption Eradication, as amended and supplemented by Law No. 20 of 2001 on the Amendment of Law Number 31 Year 1999 on the Eradication of Corruption "
Furthermore, in the Corruption Court verdict on the Ambon District Court Number 27 / PID.TIPIKOR / 2012 / PN.AB, dated December 19, 2012, which amar Decision basically states that:
1. Declare the defendant Lodewyk Bremer, S.Sos not proven legally and convincingly guilty of committing a criminal offense as charged in the indictment Public Prosecutor primary;
2. Freeing the defendant from the primary charge *(vrijspraak)*
3. Removing the defendant Lodewyk Bremer, S.Sos therefore from any lawsuits over subsidiary charges *(onstlaag van alle rechtsvervolging)*

Given the deed of the appeal submitted by prosecutors *Public Prosecutor No. 10 / Akta.Pid.Tipikor.K / 2012 / PN.AB, the Supreme Court, in its Decision No. 2420.K / Special Crimes / 2013* on special criminal appeal cases on behalf of Defendants Lodewyk Bremer, S. Sos, in essence states that:
"To grant the appeal of Cassation Attorney / Public Prosecutor at the Ambon District Court. Cancel the decision of the Corruption Court in Ambon District Court Number 27 / PID.TIPIKOR / 2012 / PN /AB, December 19, 2012. The defendant menyatkan Lodewyk Bremer, S.Sos proven legally and convincingly guilty of corruption. "

Based on the description above, the analysis will be directed to examine the *ratio decedenci* against the decision on the case *a qua.* From this aspect, the analysis also rests on aspects of constitutional law relating to the **First,** constitutional juridical act in this case in his capacity as Cash holders / Treasurer Maluku Provincial Secretariat FY 2006, which was appointed by the Governor of Maluku Decree No. 135 of 2006 on the Ratification Documents Unit Budget Work (DASK) Maluku Regional Secretariat of Fiscal Year 2006. **Second,** the act detrimental to state finance, either against the law or because of abuse of authority (see Article 2 and Article 3 of Law No. 31 of 1999 on Corruption Eradication, as amended and coupled with Act No. 20 of 2001 on the Amendment of Law No. 31 Year 1999 on Eradication of Corruption)

II. ANALYSIS OF DECISION NUMBER 2420.K / SPECIAL CRIMES / 2013 SPECIAL CRIMINAL CASSATION CASES

The analysis focused on the consideration of the Supreme Court *in casu* the d apat described as follows : **Consideration of the Supreme Court** Considering that the reasons the Supreme Court opinion : That the Supreme Court as the body which has the task to foster da n keep all the laws and legislation in all regions of the country are applied properly and fairly, and with the Constitutional Court Decision number 114 / PPU-X / 2012 dated March 28, 2013 which states the phrase "except against the acquittal" in Article 244 of Law No. 8 of 1981 does not have binding legal force, the Supreme Court authority to examine the appeal against the acquittal "That goes the wheels of government and services to the public through **the provision of bias** by the defendant at **the** discretion **(discretion)** of the secretary of the areas where a single cent downpayment is not a legal obligation of the defendant, except admonition to regional work units. who made orally by it which is an advantage in a country where the provincial scale bias is not given, then the stagnation of the local government, directly or indirectly by will impact broadly to the central government, because if the local government services are not maximal, then the service to Central Government agencies in the area are also not optimal so that interfere with the performance of the central government;

Forms of discretion in the administration of government affairs, according to such **Kreveld** ; *Beleidslijnen* (stripes wisdom), *het beleid* (wisdom), *voorschriften* (regulations), *richtlijnen* (guidelines), *regelingen* (instructions), *circulaires* (email circulars), *resoluties* (resolutions), *aanschrijvingen* (instructions), *beleidsnotas* (memorandum of wisdom), *reglemen (ministriele)* (ministerial regulations), *beschikkingen* (decisions), *en bekenmakingen* (announcements) (JH van Kreveld, 1983) [4]. The same thing stated by other legal experts, among which was mentioned was **Bagir Manan** stating that in practice the various forms of policy decisions, instructions, circulars, announcements, etc. Another, even can be found in the form of *regulation (* Bagir Manan, 1994) [5]. That if *Judex facti* have made mistakes as we have described above, it should *Judex facti* declare acts of which the accused defendant was **proven legally and convincingly guilty of corruption** as in the subsidiary charges **and is not a mal-administration.** That for these reasons the Supreme Court argued:

That the reason for cassation Attorney / Public Prosecutor described in cassation posterior 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 **can be justified,** because *Judex facti* was wrong in applying the rule of law in *a* case verdict *quo* **wrong in applying the law of evidence.** That in accordance with the provisions of article 4 of Law No. 31 of 1999 on Corruption Eradication, as amended and supplemented by Law No. 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, the return loss of state or state economy does not Eliminate convicted perpetrators of corruption as referred to in Article 2 and Article 3 of Law No. 31 of 1999 on Corruption Eradication, as amended and supplemented by Law No. 20 of 2001 on the Amendment of Law No. 31 Year 1999 on Corruption Eradication, anyway sesui with the provisions of Article 57 of Decree No. 29 of 2002 **returns the bias recently completed restored in October 2011.**

That berdas a rkan above considerations Corruption Court verdict on the Ambon District Court **can not be maintained and must be canceled** by the Supreme Court
Consideration of the Supreme Court *in casu* in principle **accept** the applicant's appeal to **reason to cancel the Corruption Court verdict on the Ambon District Court Number 27 / PID.TIPIKOR / 2012, dated December 19, 2012.** On that basis, the analysis will be conducted on the reasons for the appeal (point 1 through item 11) which can be explained as follows:

III. ANALYSIS OF THE REASONS FOR APPLICATION CASSATION

The Supreme Court found the three (3) down-payment in 2007 of the Inspectorate / watchdog area not included in the indictment but was attached to the list of items of evidence because the data obtained after the indictment was made and transferred to the court. Referring to the reasons mentioned above, put forward legal question is "whether the difference in bias as stipulated in the indictment is a form of unlawful act or an act of mal administration". Against this, the administrative law distinguishes between **job responsibilities** and **personal responsibility.** The responsibility positions with regard to the legality of the (validity) *in* the form of legal acts *cause* in doing pa njar. Suppose there cac at juridical (eg log substance), remedies available at the time it was an effort cancellation Maluku Governor Decree No. 135 of 2006 on the Ratification of the Budget Unit (DASK) Secretariat Maluku 2006. Personal responsibility with regard to mal administration, especially **misuse of authority.** For example illustration his leadership elements with one or intimidation or the promise of a certain influence decision making, the act of intimidation or certain members i promise is mal administration and become a personal responsibility.

Under the provisions of Article 1 (1) of the Criminal Code would clearly that people can not be convicted based Decree of the Minister of the Interior. It is important to understand that the principle of **delictum crimen nulla poena sine praevia lege poenali** obvious that no crime without statutory provision as meaning ***lex*** legislation. In Dutch law known term ***wet*** which in Article 1 *Wethoek van Strafrecht* used ***wettelijk voorschriften*** formulation. Unfortunately, in many translations of the Criminal Code used formulas **provisions of legislation** or the **provisions of the legislation** giving rise to misinterpretation by reference to the meaning of the legislation of Law No. 11 of 2011. The misunderstanding occurred because the reference to the dictionary meaning of the word ***wettelijk*** . *Wet* or *wettelijk* have the same meaning, namely law (lex). The only difference in the type of words that is ***wet wettelijk*** **nouns** and **adjectives.** Translation ***wettelijk*** with legislation is erroneous translation (Note dictum weigh verdict of the Supreme Court in casu, yard 39). Ratio legis principle *delictum crimen nulla poena sine praevia lege poenali* relating to criminal nature. Essentially depriving criminal nature that *(life, liberty and property).* The essence is the natural right ***inalinable*** (can not be seized). In life built construction state law regarding deprivation of rights in the context of a criminal act. Construction is built on the argument of **natural rights can only be diram fitted with the approval of the people.**

Legal instrument which is made with the consent of the people is the **lex** *(wet, legislation)* on the basis of the spirit (soul) is formulated with the basic provisions of the criminal element **misuse of authority** (Article 3 of the Law on Corruption). Misuse of authority does not have the parameters of the law. It is clear from the examples of existing policy, not all can be qualified as regulatory policy *(beleidsregel).* Such *beschikkingen*, excluding regulatory policy. **Laica Marzuki** stated policy regulations *("beleidsregel")* is not a decision (decree) procedures ha usa state (HM Laica Marzuki (1997) [6]. The legal experts agreed that regulatory policy administration, is the product of state administration carried out without having statutory authority but is made on the basis of *Freies Ermessen (discretionary power),* the substance of which contains general rules and binding indirectly. **Philip M. Hadjon (Philip** M. Hadjon, et al (2002) [2], claim : "A regulatory policy is essentially a product of the actions of the state administration aimed at" *naar buiten gebracht schriftelijk beleid* (reveal out a written policy) "but without the rulemaking authority of the agency or a state administrative official who created the policy rules. Regulations wisdom meant in fact been a part of the administration *(bestuuren)* today. "

From this view it can be seen that a policy rule is a consequence of the government's power in running the affairs of government through the creation of regulations. It can views further, as follows : Marcus Lukman, 1996) [1] "Rules of wisdom instead of legislation. The agency issued regulations wisdom, is *in casu* not have rule-making authority *(wetgevende bevoegdheid).* Regulations wisdom is not binding law directly, but have a legal relevance. The regulations provide opportunities discretion how an entity or state administrative official run of governmental authority *(beschikkingbevoegdheid).* That in itself should be associated with the use of governmental authority on the basis of *discretionare* because if it were not so, there would be no place for the rules of wisdom. "

From the above opinion, it is clear that regulatory policy is the written form of the use of *discretionary power (Freies Ermessen),* and because of regulatory discretion is not made by the legislature, the written form of the regulation in question is in the context of the implementation of governmental power. The opinion gives the same meaning despite the different wording proposed by **Indroharto,** (Indroharto (2004) [7] and **Laica Marzuki** (HM Laica Marzuki (1997) [6], The difference **Laica Marzuki** detailing policy rules into subjektum components, materials, and authority. He said that:

1. **Components Subjektum :**
   Regulation wisdom *("beleidsregel")* made by the agency or official of the state administration as the embodiment of the use of *Freies Ermessen ("discretionary power")* in written form that was announced out and tied the residents.
2. **Component Materials :**
   Fill the policy regulations *("beleidsregel")* contains a general rule *("Algemene regal")* of its own.
3. **Component Authority *("bevoegdheid")* :**
   Entity or state administrative officials who make policy regulations *("beleidsregel")* does not have the statutory authority *("geen bevoegdheid wetgeving tot")* but is not directly binding on the citizens as well as the rules of *"juridistche regels"*

Through details like this make it easier to understand the concept of rules intended wisdom. One important thing is that the substance of the details norm regulatory policy is of a general nature. Before examining the similarities and differences in regulatory policy rather than as a legislative body with the legislation as a legislative product, needs to be seen **Kreveld** opinion about p eraturan wisdom that: (JH van Kreveld, 1983) [4]

a. ***De regal is noch direct and indirect, op green gebasserd completely turning away in de formale wet of grondwet die uitdrukelijk Regeling geeft tot een bevoegdheid, met andere worden, de regal heeft geen uitdrukelijke grondslag in de wet.***

(Regulation it direct or indirect, based on the provisions of the law or the Constitution that gives formal authority to regulate, in other words, that rule is not found essentially in the legislation).

b. ***De regal is, hetzij ongeschreven en and ontstaan door een reeks van individuele beslissingen Degen door de bestuursinstantie in de uitoefening van de vrije bestuurs bevoegdheid jegens individuele genomen burgers; hetzij uitdrukelijk vasgesteld door deze bestuursinstantie.***

(That rule, *unwritten* and emerge through a series of decisions of government agencies in implementing government authority y ang free to citizens or specified *in writing* by the government agencies).

c. ***De regal geeft in Algemene zin, zonder dat wil zeggen aanduiding van individuele, hoe de bestuursinstantie aan bij de uitoefening van de vrije bestuurbevoegdheid zal handelen jegens iedere individuele burger die zich bevint de situatie die in de regal in omschreven.***

(The regulations provide general guidance, in other words without the statement of the individual citizens on how public authorities carry out independent government authority to the individual citizens who are in a situation which is defined in the regulations).

One thing to receive a response from this opinion is about policy rules that are otherwise not found essentially in the legislation. This opinion was easily cause misunderstanding, that **as if the** policy rule that was born from the use of *Freies Ermessen* provides unlimited freedom law. As understood from the foregoing description, that the use of Freies Ermessen there is always an underlying rule because if not then what happens is arbitrary. Regulatory policy, according to **Hamid Attamimi (** A. Hamid S. Attamimi, 1993) [8] has much in common with laws and regulations, namely (1) Both have subjects and setting behavioral norms or norms of the same object, namely general and abstract *(Algemene Regeling* or *Algemene regal);* (2) Both are valid out (Though the enactment outside to regulatory discretion does not occur directly, author); and (3) Both are determined by the institution / public official who has the authority / public for it.

As per differences of both, is : (A. Hamid S. Attamimi, 1993) [8]

1. The formation of policy carried out by government regulations aimed at further regulate government administration, so that always can be done by any government agency that has the power of government. As for the formation of legislation done legislature or minimal with the approval of the institution.
2. The substance of policy rules associated with the authority's decision in the sense *beschikkingen* form, in the field of private law, make plans *(plannen)* government agencies. The legislation regulates the life of society more basic, such as command and prohibition to do or not do.
3. Regulatory policy can simply load administrative sanctions for violations of the norm. As for the legislation, may contain criminal sanctions and coercive that could restrict the human rights of citizens. Rule lower than law may only include criminal charge of violation if it is expressly attributed by law.

In consideration of the Supreme Court *in casu* relating to the "elements unlawfully" (vide case 36-38), that refers to the considerations mentioned above, then the element of unlawful fulfilled according to the law.

IV. CONCLUSION

Based on the description above, it can be concluded that:
1. The legal action undertaken by the defendant constitute corruption
2. Measure the abuse of authority in the *in casu* let by basing on the principles of specialties in budget management.

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AUTHORS

First author : Julista Mustamu, Graduate Student PhD, Study Program: Science Of Law. Hasanuddin University, Makassar. Indonesia : Email : julista.mustamu2014@gmail.com
The second author : Syamsul Bahri: Faculty Of Law. Hasanuddin University, Makassar. Indonesia
The third author : Muh Yunus Wahid: Faculty Of Law. Hasanuddin University, Makassar. Indonesia
The fourth author : Aminuddin Ilmar, : Faculty Of Law. Hasanuddin University, Makassar. Indonesia