DISCRETIONARY POLICY (FREIES ERMESSEN) OF STATE ADMINISTRATIVE BODIES OR OFFICIALS IN GOVERNMENT ADMINISTRATIVE LAW

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ABSTRACT

The aim is to examine and analyze how state government administrative agencies or officials carry out actions that are in accordance or not in accordance with the Ermessen freies legal conception itself which is known in scientific literature, especially state administrative law. In this case, the term "vrij inititiet" is used by Logeman in his book Eet Staaterecht van Indonesie, while Donner has the term "Vrijheid vanhet bestuur". The object of discussion in literature and practice is the application of discretionary policies or the use of Ermessen freies in order to achieve general welfare. The results of this research found that the meaning of freis Ermessen is the same or in accordance with practice through field research or cases that have occurred and to what extent the regulations that require Ermessen are in accordance with the facts implemented in practice.

Keywords: *Discretionary, beneficial policies. the rule of law welfare state*

INTRODUCTION

It is a fact today that every country that has an identity as a modern welfare state (modern welfare state), demands the appearance of the government (narrow sense) in all aspects of the lives of its people. The involvement of the government is in the context of organizing public welfare as a sign of the adoption of the modern welfare state type (Gilbert, 2002). However, in its involvement, the government in the case of state administrative officials or state administration often experiences obstacles because the laws and regulations relating to a problem have not yet regulated it in detail, so that an action or initiative is treated which is freedom or independence to organize or resolve precisely and quickly concrete events, where the Lawmaker is unable to regulate everything in detail. This is the reason why discretionary policy (fries Ermessen) cannot but must exist in a modern welfare state.

Discretionary policy (freies Ermessen) for state administrative officials or state administration is very urgent, because considering the task of state administration is increasingly broad in serving the needs of society and its diverse patterns (Nababan & Budianto, 2020). With the freedom given to the state administration, it is intended that the state administrative official body or state administration can take the initiative or assess concrete events that occur and quickly give its decision regarding these concrete events.

The term of the discretionary policy given to the state administrative body or state administration is called in German legal science "freis Ermessen, in France "Pouvoir Distratetionaier" or "Pouvoir D'appreciation", and in the Netherlands the German term was once translated as "heteroskedasitas vrijegoed vinden" to become a popular/general term but without success. A.M. Donner has the term "vrijheid vanhet bestuur" and J.H.A Logeman in his book "Eet Staaterecht van Indonesie" uses the term "Vrij Inititietief". in the Indonesian state "freis Ermessen" has become popular among jurists While in practice, especially among the government, the term "policy or Wisdom" is used. Utrect translates it as freedom of state administration there are also people who translate it as "wise actions" (IRFAN-IDRIS, n.d.)

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Based on the expression above, it shows that the essence of the notion of Freies ermessen is the existence of freedom or freedom for state administration in organizing public welfare. Thus, it can also be concluded that Freies ermessen is freedom or independence that is only intended for state government administration officials to take appropriate and useful actions or initiatives towards the resolution of a concrete event. Because it is impossible to be regulated in detail by the lawmaker so that state government administration officials regulate and resolve these concrete events. Furthermore, it is closely related to the use of Freies ermessen and or rules that guide the participation of state administration (government in the narrow sense), in all aspects of people's lives, giving rise to legal relations which are authority or power in the field of state administrative law.

Based on this relationship, Lamaire argues that: The meaning of state administrative law lies in the starting point that the relationship between individuals and administrative organs is a legal relationship (not merely a real relationship). If this is no longer the case, if the rules or rules of administration merely question administrative powers that can always be used freely, then it means that the principle of the rule of law has been abandoned (DI PERADILAN, n.d.).

Thus, it is in state administrative law that restrictions on state administrative action are contained or in the sense of looking for criteria for a country whether its identity is still a state of law or not, depending on the extent to which in legal relations the control takes arbitrary action or not. In practice it turns out that the ideal of state self-limitation has never broken through in its entirety in state administrative law, and the ability is not long. But in practice that "It is very difficult and it is impossible to determine the actions of the state administration step by step in detail because in the performance of its duties, freedom is always needed (Septa Candra, 2021).

However, in fact, it is still urgent to put forward the meaning of state administrative law in this discussion, because knowing the limits of the meaning of state administrative law will be able to provide clarity for further studies. According to De La Bassecaur Caan, state administrative law is a set of certain regulations that cause the state to function (react). The regulations regulate the relations of each citizen (state) with his Government (Stewart, 2021). This shows that there are two visible parts, namely first, even state administrative law is the basis for all state administrative actions. Second, that state administrative law includes public law because it regulates the relationship between citizens and the Government.

Legal Issues

It is recognized or must be recognized that in the type of modern welfare state the function of state administration is so broad, so that often the body of state administration officials is faced with a concrete event that requires quick, precise and beneficial resolution for the benefit of the people. In such a situation, the state administration body/official based on the authority possessed is free to regulate these concrete matters or take policy action. In contrast to state administrative actions based on subjectiv noodrecht which resolve concrete and urgent matters without waiting for regulations governing the concrete event. Thus, the actions of state government administrative bodies or officials based on freies Ermessen are always legal or in other words, the use of freies Ermessen by the state administration remains within the juridical framework (recht matigehaid).

With regard to the use of Freies ermessen by the state administration, the main problem formulations that can be identified are; First, how among legal experts in Indonesia menegnal or understand the nature of the understanding of Freies ermessen in reality, and whether the actions of state government administrative bodies/officials who use Freies ermessen are always legal or not. Second, how does the government in the narrow sense (bestuur), especially in Indonesia, know or understand Freies ermessen. Third, when can the government in a narrow sense of its actions be qualified as actions based on Freies Frmessen, or in other words how in the practice of exercising the authority of the state government administrative body / official, in Indonesia the action is included and based on Freies ermessen or not. The identification of the problems mentioned above are the things that the author will study in this book, although in the study later it is possible that matters related to Freies ermessen will also be discussed, for example, state government administration bodies/officials who act in relation to their positions, in order to realize the general welfare that will be expected by all Indonesian people.

METHOD

This research conducts two methods need to be combined. First is the deduction method, which in this case tests the theoretical understanding of Freies Ermessen through the library method (Library Research) and whether the understanding is the same or in accordance with practice through field research or cases that occur? The second is the sociological method, namely how far the regulations that contain Freies Ermessen are in accordance with the facts implemented in practice.

RESULTS AND DISCUSSION

A. Theory of Discretionary Policy (Freies Ermessen) in Government Administration Law

As is known in theory that after the emergence of modern welfare states replacing other types of states such as classical welfare states (liberal state type), has the consequence of changing ideals regarding the function of the state. If previously the type of liberal state was not allowed to interfere or participate in the socio-economic and cultural life of the people, then now in the type of modern welfare state it is the opposite, the state is obliged to participate in the socio-economic and cultural life of its people, to build and create a better, just and prosperous community life as referred to in paragraph IV of the Preamble to the 1945 Constitution of the Republic of Indonesia (UUDN-RI).

In carrying out the ideals of the state function, which is given authority or power to the government in a narrow sense or state administrative bodies / officials or state government administration, it is not only sufficient or the lawmaker itself is unable to stipulate in a detailed statutory regulation to regulate the behavior of state administrative bodies / officials or government administration charged with acting or seeking to achieve the ideals of the state's goals. In such a reality, state administration requires freedom or independence to act in order

to achieve the ideals of state functions known as Freies ermessen. According to Willy Voll, SH who stated that: "Freies ermessen" is an essential part of the modern "Welfare State" in the sense that the modern "Welfare State" cannot achieve its goals or cannot become a reality without "Freies ermessen". If Freies ermessen is eliminated or eliminated, the Modern Welfare State will in fact become a liberal state, because then it will not be able to realize the goals of the modern welfare state "(Nurdiyana et al., 2022).

Thus, from the above expression it is clear that the existence of freies Ermessen in the type of modern welfare state plays a very important role because without the freies Ermessen given to the state administrative body or state administration as a realizer, the achievement of state goals cannot be realized. Although freies Ermessen is inseparable and must exist in the modern welfare state type, it does not mean that because of the involvement of state administration in all aspects of people's lives it causes the legal state element to be absent or disappear. The modern welfare state is still a state of law, as stated by Mustamin Dg Matutu, SH, who stated that "This situation is different from the role of the state in a modern welfare state, which even though its intervention and role is very broad in matters of social life, the cultural economy of the people, it is still a State of Law" (Negara, n.d.) (Nasution, 2023).

Thus, although the state administration in carrying out its duties as a catalyst has been equipped with the granting of Freies Ermessen, as an alternative that must exist in every modern welfare state, it does not mean that the state administration can take Freies ermessen at will, because such use will have the logical consequence of no longer having elements of the rule of law.

In relation to the above description, we are of course faced with the question of what the theoretical understanding of Freies ermessen actually is.

a. Theoretical/Doctrinal views on the meaning of freies Ermessen.

As the term freies Ermessen has been stated in the previous description, it would not be wrong if the definition of freies Ermessen is stated again according to the opinion of legal experts including E. Utrect, SH. in giving the definition of freies Ermessen states that: "State administration requires independence, namely freedom to be able to act on its own initiative, especially in solving critical problems that arise suddenly and whose settlement regulations do not yet exist, that is, they have not been made by state bodies entrusted with legislative functions" (Matutu, 1972). Likewise, Dr. Lamaire in defining freies Ermessen states as follows: "freies Ermessen means that the state administration is given the freedom to take its own initiative to carry out actions to solve urgent problems and whose settlement regulations do not yet exist, namely not yet made by the state body entrusted with the task of making laws" (Asyikin, 2019).

Meanwhile, Willy Voll, SH, in this case giving the meaning of Freies ermessen in terms of its function states as follows: "The function of state administration is that state administration as an implementing apparatus can assess and determine what in concretnya or in fact should and should occur according to the dynamics of society in seeking the achievement or realization of the goals set by the government / legislator in the context of state functions" (Musbakar, SH. A. Muin Fahmal, n.d.).

From the above expressions, it appears that basically the interpretation of legal experts, in giving an understanding of Freies ermessen is an independence or freedom that is only permitted to state administrative bodies/state administrative officials, so that he as a realizer can be effective in achieving state goals set by the government in the sense of the highest word or determinant of the direction of state policy. In addition, from the definition of Freies emission mentioned above, it is also known that the location of the Fries ermessen field is the field or field of realizing state goals, which is none other than the implementing apparatus or

state administration. Furthermore, after the definition of Freies ermessen is stated, we are again faced with the question. When or how does the state administration carry out actions based on Freies ermessen. Regarding this matter, E. Utrecth, in his explanation in connection with the use of Freies ermessen states as follows: In contrast to the "idea" of the state in the narrow sense of the word (Kent, Fiechte), in the "idea" of the modern state of law the main emphasis is not on "law" (positive law), but on the goal of achieving social justice (sociale garechtigheid) for all citizens. If necessary, the state may also act outside the law to achieve social justice for all citizens (Muslimin, 1980).

Likewise, Bachsan Mustafa, SH, who agrees with E. Utrecth in responding to the use of Freies ermessen by stating that "So for the achievement of this welfare goal, the government must have the discretion and freedom to carry out various actions even if they are contrary to the law, because what is important for government actions is the benefit (doelmatigeheid) or whether or not it is in accordance with positive law (Rahman Syamsuddin, 2019).

On the basis of the two expressions above, it shows that the administration or state administrative officials can take actions based on Freies ermessen even though in reality these actions are unlawful or contrary to the law as long as they are for and in the public interest. In the author's opinion, the above expression is completely unjustified because when the state administration or administrative officials have the authority to realize state goals contrary to the law. Then the legal state is no longer in the atmosphere of a modern welfare state, but has switched back to the classic type of welfare state or the type of liberal state where the legal state element is not important.

Even though a modern welfare state involves its government (in the narrow sense) in all aspects of its people's lives, elements of the legal state cannot be eliminated (in accordance with what has been stated by Mustamin Daeng Matutu, as mentioned above. This means that the administration or state administration officials carry out actions that based on Freies ermessen, but bound by statutory regulations, as stated by A.M. Donner that "What is meant by independence is not independence from the law, because state administration or state administration officials remain subject to the law or the Act" (Ahmad Yamin, n.d.).

Furthermore, an understanding that is similar to the views of E. Utrecht and Bachsan Mustafa, is what was expressed in the upgrading of Constitutional Law teachers in State Law Faculties throughout Indonesia at the Airlangga Law Faculty, Surabaya, which was expressed as follows: According to the history of legislation in Indonesia, then In practice, the President has acted outside the limits of these provisions, including acts of Presidential Decree and others, all of which have no legal basis. However, the assessment that prioritizes the Pancasila democratic approach will have no objection to the implementation of what is called Freies ermessen, as long as the provisions below are met as conditions, namely:

1. Before implementation, the contents are discussed by the Head of State with his assistants (in a cabinet meeting or with one or several of the Ministers concerned).
2. The results of the deliberation are qualified as government policy, outlined in an official government decision.
3. As a product of action on one's own initiative, this policy contains confidence in the field of government accountability.
4. Operationally, this decision has objectives that are directed towards general/national interests in the political, social, cultural and economic fields.
5. The decision was made on the basis of good ethics and does not contain any juridical defects (faith, misdirection or fraud) (Siti, 2022).

What was formulated in the upgrading mentioned above, received scathing criticism from Willy Voll, SH, stating: If these conditions are made into "Freies ermessen" conditions and implemented then our country will clearly experience decadence and return to being a Classical

Welfare State or “Welfare State” Classic. Regarding the boundaries of "Freies ermessen" the problem is whether "Freies ermessen" justifies the state acting outside the law in the public interest. It turns out that the paper adheres to the understanding that as long as it is in the public interest, a legal basis is not needed” (Willy Voll, 1976). This is how legal experts question the actual Freies ermessen, whether or not the administration or state administrative officials in carrying out public welfare are justified in deviating from the law. Looking at the expressions stated above, it turns out that basically there are two opinions. The first opinion is that state administration or state administration officials can take actions outside the law as long as these actions are aimed at achieving benefit (doelmatigeheid). Meanwhile, in the second opinion, it requires that the state administration or state administration officials carry out actions, even if the aim is for benefit (doelmatigeheid) but is not based on law (rechmatigeheid), then the action is not at all justified because it can have the consequence of losing the state element. the law or state turns into a state of mere power. Despite this, the reality is that there is no uniformity in the opinions of legal experts expressed in scientific literature, but it is important to measure the standards or basic principles that will be used by our state administration or state administrative officials in using Freies ermessen.

b. Freis Ermessen's Benchmarks and Legal Principles of Action

The measures for state administration or state administration officials in carrying out Freies ermessen actions are:

1. Assess and determine whether authority is used/exercised or not.
2. If you have decided to use it, determine when to use it appropriately.
3. If you know the right time and date, then the question is again how you should and should act.
4. Finally, determine which measures will be used in the action (Adisapoetra & Prins, 2020).

Of course, the above measures in their implementation always adhere to legal principles, which in state administrative law are also known as the following legal principles:

1. The principle of legality, that every administrative action is based on law.
2. Principles must not abuse power or in other words, principles must not carry out Detournement de Pouvoir.
3. The principle of not usurping the authority of one state administrative body by another or what is called the principle of "ekes de pouvoir".
4. The principle of equal rights for every resident of the country or what is called the no-discrimination principle.
5. The principle of coercive measures or sanctions as a guarantee of compliance with state administrative law.

wSpecialty Principle (Specialiteitsbeginsel)

In the concept of administrative law, every grant of authority to an agency or to a state administrative official is always accompanied by the "goals and purposes" for which that authority is given, so that the application of that authority must be in accordance with the "goals and purposes" for which that authority is given. In the event that the use of authority is not in accordance with the "purpose and purpose" of granting that authority, then there has been an abuse of authority (degournement de pouvoir).

The parameters of the "goals and objectives" of granting authority in determining the occurrence of abuse of authority are known as the principle of specialization (specialialiteitsbeginsel). This principle was developed by Mariette Kobussen in her book entitled De Vrijheid Van De Overheid. This principle of specialization is a principle that is the basis for the government's authority to act by considering a goal. Every government authority (bestuurs bevoegdheid) is regulated by statutory regulations with a certain definite purpose. From the point of view of administrative law, specialization is stated as a series of regulations relating to certain public interests.

The Principle of Specialty Relation to the Principle of Legality

The principle of legality is the basis for the government to act to achieve certain goals. The granting of authority to the government is given by means of statutory regulations. The principle of legality does not take into account the specificity (purpose) of certain authorities in issuing decisions. The specifics of granting and the purpose of granting authority can be seen in each statutory regulation. It can happen that several laws and regulations conflict with one another, in such a situation the principle of legality loses its meaning. The principle of legality is no longer appropriate to use as a parameter to measure abuse of authority.

Discretionary authority can occur because legislative regulations do not regulate government authority at all or it can also happen that legislative regulations contain vague norms in granting authority. The first thing usually occurs in connection with an urgent situation and it is very necessary to immediately take a policy or decision, but there is no legal basis for action, even though in essence government should not stop for even a second, because the nature of government is continuity. Regarding the parameters for abuse of authority in discretionary authority (beleidsvrijheid, discretionary power, freies ermessen) the parameter used is the principle of specialization, which basically contains the purpose for which an authority is given. Abuse of authority occurs if the use of authority deviates from the aims and objectives set out in the basic rules.

Principle of Arbitrary Prohibition

Amendments to Article 53 paragraph (2) of Law Number 5 of 1986, the general principles of good governance have normatively become a reason to file a lawsuit regarding the validity of a state administrative decision, unfortunately the Elucidation of Article 53 paragraph (2) refers to the principles of principles contained in Law Number 28 of 1999 as General Principles of Good Government. The general principles of state administration in Article 3 Number 28 of 1999 include: the principle of legal certainty, the principle of orderly state administration, the principle of public interest, the principle of openness, and the principle of proportionality. "The State Administrative Decision that is being sued is contrary to the general principles of good governance" and in the explanation it is stated: "What is meant by general principles of good governance includes the principles of legal certainty, orderly state administration, openness, proportionality, professionalism and accountability. This must be measured whether the State Administrative Decree that is being sued is a legal act of government administration."

Thus, based on the description presented above, discretionary policy ("freies Ermessen") is a term in German law that can be translated as "freedom of action" or "discretionary policy." This term refers to the policy space given to authorities to make decisions based on their own considerations and judgments, without any clear legal provisions or strict limitations. In the context of German law, freedom of action or freies Ermessen gives authorities, such as government officials or courts, the freedom to use their own judgment and judgment in making decisions. This reflects the principle that not all situations can be strictly regulated by law, and that there is room for judicious judgment and action by competent authorities.

However, it is important to remember that freedom of action or freies Ermessen does not mean unlimited freedom. The authority granted must still be in accordance with legal principles and human rights. In addition, this principle must not be misused to act arbitrarily or violate the principles of justice. In the context of other legal systems, there may be similar terms referring to freedom of action or discretionary policy, but the names may vary. This concept reflects the general principle that there are situations in which discretion and judgment can be more effective than very rigid or strict rules.

B. Discretionary policy practices (Freies Ermessen) of State Administrative Officials in Government Administrative Law.

As in the previous description, state administration is entrusted with the task of Bestuurseorg (organizing public welfare), as stated by Lemaire. The effectiveness of state administration in carrying out public welfare will also be guaranteed by the implementation of legitimate authority and the basics of good office relationships. So, to achieve this, the role of state administration is very necessary in using Freies Ermessen as a basis for action to achieve general welfare goals. In this connection, it needs to be stated that the authority of state administration must be adequate to the objectives to be achieved and have freedom related to the exercise of state power in accordance with the law. This means that in terms of state administration carrying out its duties it must be in accordance with the objectives determined by the Government. in the highest sense. This does not mean that state administration only carries out what has been determined.

On the basis of the things described above, this is a consequence of the modern welfare state, where state administration in carrying out its function as implementer of government policy in the highest sense must be based on law. So, to achieve this, state administration is equipped with Freies Ermessen so that in carrying out their daily duties as state administrative officials as executors they always have the freedom to determine matters that are not yet concrete in the provisions of the law.

Based on the descriptions above, and by paying attention to the practices carried out by state administrations in realizing statutory provisions, it appears that there is an interesting thing, namely that state administrations have a tendency as to how this goal can be achieved, even though basically they intend to realize the will of statutory regulations or in other words departs from existing statutory provisions as a basis but appears to pay little attention to matters of a Rechmatigeheid (legal nature), which are absolute elements in a rule of law.

In practice, it appears that state administrators in carrying out their actions consider that "the freedom of state administration does not lie in regulations, simply because the regulations do not regulate something in detail in certain regulations so they are general in nature, this is where concrete action is needed and on this basis the state administration also acts to carry out a policy based on authority (Goodnow, 2017).

So, in the above practice, state administration in carrying out general welfare is bound by certain regulations that regulate things of a general nature. However, through regulations governing things and the events they face, state administration has freedom, namely freedom in terms of how to act and freedom to do things that are general in the sense of not being concrete in choosing alternatives that are possible by statute or more broadly by applicable law.

From the description of practice presented above, we can obtain clarity regarding what Lamaire stated with "neit door de wetgebonden taak" duties that are not bound by law", as well as what Donner said when he said: Het gaat bij de hier bedoelde vrijheid dus niet on een vrijheid van de wat, want aan de wettelijke vourshriften blijft men steeds ge bonden. Er id vrijheid van regel. "The freedom referred to her does not mean freedom from laws, because we are still bound to the rules of law. What exists is freedom to regulate" (Barnett, 2014).

The authority that can be exercised by state administration is based on the fact that it is not confirmed in the regulations that regulate it, so that better possibilities are chosen, by looking at capabilities (doelmatigehaid) which are based on the authority of the legislation and must be within the regulatory framework that regulates it. So, in general there is a basis or rule in terms of state administration acting to realize the policies that have been determined.

The above is a consequence of a Legislative Regulation which cannot determine in advance in detail what things will actually happen in a society that is complex and full of social dynamics, so that the Law Maker cannot determine the content. freedom (Freies Ermessen) owned by State Administrators. For further clarity, it would be good for the author to state the freedom as intended by Willy Volly, SH, as follows:

a. Whether or not a particular authority will be used for a particular event that will occur in a particular area at a particular time.
b. When will this authority be used concretely regarding this incident?
c. How will this authority be used in this concrete event?
d. Measures that will be used in the concrete event.

From the example that has been presented above, it seems that our description of the freedom (Freies Ermessen) possessed by state administrators is simply the freedom to regulate in order to realize state goals that have been determined in a government policy in the highest sense. Another example that can be put forward is the practice of using Emessen's discretionary policy.

In the context of Indonesian government, the concept of "freies Ermessen" or discretionary authority can be found in various aspects of policy implementation and government governance. The following are some examples of the use of Ermessen fries in Indonesia:

1. **Administrative Decision Making:** The Indonesian government has discretionary authority in making administrative decisions, such as granting business permits, assessing development projects, or responding to special cases. Authorized government agencies or officials have the freedom to adapt their decisions to specific circumstances on the ground.
2. **Public Fund Management:** The government uses Ermessen freies in managing public funds, including budget allocation for various programs and projects. Decisions regarding the use of funds and determination of priorities may depend on the discretion of the competent authorities.
3. Social and Welfare Policy: In formulating social and welfare policy, the government can adopt a discretionary approach to design programs that suit the characteristics and needs of local communities. This allows flexibility in adapting policies to changing social and economic dynamics.
4. **Law Enforcement:** Law enforcement officials in Indonesia, such as the police and prosecutors, can use discretionary authority in law enforcement. They can make decisions regarding case handling, law enforcement priorities, and resolution of specific cases.
5. **Regulations and Policy Making:** The process of making regulations and policies can also involve the use of Ermessen freies. Governments can adapt certain rules to ensure compliance with local conditions and take into account diverse interests.

While discretionary powers provide flexibility to governments in dealing with unique situations, it is critical to ensure that their use remains in line with the principles of the rule of law, transparency and accountability. Decisions taken should be based on objective considerations, good faith and justice. The government needs to ensure that discretionary policies are not misused or lead to arbitrary actions.

After the author has explained at length the freedom of action by state administration based on Freies Ermessen, in practice it is not generally known by our state administration which is in the field of government. This is due to the differences in educational background that each of them has, resulting in the understanding of freedom (Freies Ermessen) not being understood, especially the content of freedom itself which is a condition for determining whether state administrative actions are based on Freies Ermessen or not.

This discretionary policy (freies Ermessen) in the administrative practice of Akita State, especially in Ujung Pandang Municipality, is seen as freedom or independence to act to determine other goals than what has been determined in a statutory regulation based on expediency and urgent needs in the public interest. This is proven in practice as follows:

The task of state administrative officials is to carry out the objectives of the law. In carrying out this function, the state administrative apparatus produces decisions to resolve concrete problems that occur based on regulations that are abstract in nature. So based on the freedom (Freies Ermessen) that the state administration has in carrying out its functions, the laws and regulations are abstract basic regulations and are no longer appropriate to the situation and conditions being faced. So that the steps taken by the state administration as the implementing apparatus are no longer based on these statutory regulations, and may even conflict with the basic rules, because they are based on expediency (dolematigeheid) for the public interest in the context of achieving development.

Seeing the view above, state administration in practice, generally in realizing the state's goals in fulfilling development today, is no longer based on rules that regulate things in existing provisions but is based on benefits for the public interest. This kind of thing is not permitted in a modern international state and with this interpretation, it is a classic state which is not a legal state. Therefore, it is not surprising that in reality our state is similar to a classic welfare state which is not a legal state.

The meaning of Freies Ermessen in the practice described above according to Willy Voll, SH, is: Other freedom or independence of action, namely that which is based on what is called the subjective noodrecht of state administration. And the basis for state administration acting based on subjective noodrecht is the public interest and the legitimacy of the action (Wajdi & Andryan, 2020).

If we look at the view above, then the problem facing state administration is that there are no or no regulations, perhaps even the problem is a completely new problem that has never been known in society, however, according to its function as a realizer and builder of the public interest organizer, it must act. resolve concrete matters in society that are faced with him for the sake of public order. Furthermore, he also stated that: Such administrative actions which are based on subjective noodrecht are illegal, in contrast to state administrative actions which are based on Freies Ermessen which are always legal. Therefore, the absolute requirement is that the action must be legitimate. The condition for the legitimacy of state administrative actions is that they comply with the requirements, general principles of good administration (algemene Begincelen van Bchoorlijk Bestuur) or at least, do not violate these general principles (Setiawan & Istinah, 2023).

The principles of good government (administration) as mentioned above are a measure (indicator) in practice that can be used by state administrative officials in carrying out their functions to achieve state goals in the context of general welfare. So, the principle of good governance is that state administration must master both the preparation of the form and implementation as well as the content of state administration actions so that they can be carried out well without deviating from the principles of fairness, honesty and not conflicting with the law.

These principles can be further detailed as stated by Wiarda in:

1. The principle of honesty (fair play)

2. The principle of accuracy (zorgvoldigheid)
3. The principle of purity in goals (zuiverheid van oogmerk)
4. The principle of balance (even wichtigheid)
5. The principle of legal certainty (recht sekherheid).

You can even go into more detail regarding the use of Freies Ermessen. A.M. Donner stated that to use Freies Ermessen, state administration must fulfill the following requirements:

1. That a real assessment has actually been made of a concrete event with all its special characteristics.
2. That the decision taken is based on impartial common sense and that there are no biased motives or unreasonable arguments in it.
3. That the facts on which the assessment is built and becomes the basis are correct/correct.

The conditions mentioned above are a measure to determine whether the action is based on Freies Ermessen or subjectief noodrecht. As mentioned above, the legitimate actions of state administration must comply with the requirements of the general principles of good governance or at least not violate the general principles mentioned above. In this way, even though the action is illegal, it is legitimate, so it automatically becomes legal.

If we pay attention to the quote above which prioritizes benefits (doelmatigeheid) rather than factors that are rechtmatigeheid in nature, then according to Prof. Mr Kranenberg stated that: "If the establishment, expansion and implementation of power cannot be seen as the first goal of the state, then there must be another goal. That aim is to establish and maintain rights, so it is said. In that sense, the goal of the state lies in the existence of a legal state.

Thus, in practice the use of "freies Ermessen" is a term in German that can be translated as "discretion" in English. The use of Ermessen freies refers to the authority or right to make decisions based on personal considerations or discretion, without being bound by strict rules or strict legal requirements. In a legal or administrative context, the concept of freies Ermessen gives authority to competent authorities to make decisions based on their own judgment and discretion. It is often used when a law grants certain authorities the power to take certain decisions, but does not provide very detailed guidance on how those decisions should be taken.

From what has been stated above in practice. State administration carries out predetermined policies which provide authority to be implemented, especially regarding technical implementation matters. From this we can conclude that the state administration, in realizing what has been charged or assigned to it, always has the freedom to regulate, but is still bound by the provisions of statutory regulations. This means that the administrative authority in carrying out public welfare is limited to its authority in trying to realize the state's goals. So that everything can be avoided what is called abuse of authority and usurpation of power which is a deviation from the administrator. Here are some points that can help explain the theory and practice of freedom of action using Ermessen freies:

1. **Subjective Judgment:** This concept emphasizes that authorities have the freedom to make decisions based on their own subjective judgments and considerations. This recognizes the complexity of situations that may be difficult to strictly regulate by law.
2. **No Precise and Fixed Rules:** This freedom of action arises when there are no precise and fixed rules or legal provisions that can be applied to a situation. Therefore, authorities have room to use their judgment.
3. **Legal Flexibility:** This concept reflects the need for flexibility in the legal system, especially when facing unique or complex situations that are difficult to accommodate by established rules.

4. **Principles of Justice and Compliance with Law:** Despite freedom of action, the actions of authorities must comply with the principles of justice and remain in accordance with the broader legal framework. This freedom must not be abused for unethical or arbitrary purposes.
5. **Responsibility and Accountability:** Authorities exercising freedom of action must be responsible and accountable for their decisions. This helps prevent abuse of that freedom and ensures that decisions taken remain consistent with the objectives of the law.
6. **Context of Special Cases:** Freedom of action tends to be more relevant in dealing with special cases, where the use of rigid rules may not always result in fair or effective decisions.
7. **Fair Legal Process:** Despite freedom of action, it is important to ensure that any decision-making process is carried out fairly and transparently. This includes giving affected parties the opportunity to express their views or defend themselves.

Understanding the concept of freedom of action using Ermessen freies involves accepting that not all situations can be strictly regulated by law, and there is a need to leave room for judgment and discretion in order to achieve the most appropriate and fair results in a particular context. Here are some notes that need to be taken into account to explain the freedom of action using Ermessen freies, as follows:

1. **No Precise and Fixed Rules:** Freedom of action arises when there are no legal rules that provide precise guidance or specific provisions for a situation. This leaves room for authorities to determine the measures that best suit specific circumstances.
2. **Subjective Judgment:** Authorities may make decisions based on their own subjective judgment and judgment. This reflects a recognition that not all situations can be strictly regulated by law and that each case may be unique.
3. **Flexibility in Handling Cases:** This concept offers flexibility in handling special cases where rigid rules may not provide an adequate solution. Freies Ermessen provides the authority to adjust the assessment according to the needs of the situation.
4. **Limitation of Authority**: Even though there is freedom of action, decisions taken must remain within the broader legal framework and in accordance with the principles of justice. Authorities cannot exceed certain limits or act arbitrarily.
5. **Discretionary Involvement in the Decision-Making Process**: Freedom of action is often involved in administrative, judicial, or law enforcement decisions. Authorities using Ermessen freies must be able to provide rational reasons and be accountable for their decisions.
6. **Justice and Legal Compliance**: Although there is freedom of action, the principles of justice and legal compliance must be maintained. This freedom cannot be used as a justification for acting unjustly or violating individual rights.
7. **Accountability:** Those who have freedom of action must be responsible for their decisions. This includes the possibility of testing or checking the decisions taken to ensure that this freedom is not abused.

Freedom of action using Ermessen freies shows recognition of the complexity of cases that cannot be overcome by rigid legal rules. However, it is important to strike a balance between providing authority to exercise discretion and ensuring that decisions taken remain in accordance with legal norms and principles of justice.

CONCLUSION

Based on what has been described above as an answer to the problems in this research, the author can draw the following conclusions:

1. The definition of Freies Ermessen in state administrative law literature basically has two views, namely, that state administrative bodies/officials in state administrative law can carry out actions outside of the law, as long as these actions aim to achieve doelmatigheid. Meanwhile, the second view requires that the state administration in carrying out actions, even if the aim is for doelmatigheid, but is not based on rechmatigeheid, then this action is not at all justified, considering that the consequences of the modern welfare state are a state of law.
2. Freies Ermessen in our current state administration practice is generally misinterpreted by state administration officials. Generally they do not understand the content of the freedom of official bodies described above, and Freies Ermessen in practice is not generally known in our government sector today.
3. State administration in practice, in using the authority that has been given in a law, aims to increase efficiency according to its needs on the basis of doelmatigheid.
4. The use of Ermessen freies in state administrative law plays an important role in providing administrative authorities with the latitude to act in complex situations, while ensuring accountability and fairness in administrative decision-making.

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