

Determining Criminal Actions in Corruption: The Characteristics of Freies Ermessen Principles

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ARTICLE INFO	ABSTRACT
<p>Keywords : <i>Corruption Eradication Commission criminal act, freies ermessen</i></p> <hr/> <p>email: dijanwidijowati13@gmail.com</p> <p>The Southeast Asia Law Journal Volume 2 Nomor 1 Juli-Desember 2016 ISSN. 2502-5503 pp. 56-63 ©2016SALJ. All rights reserved</p>	<p><i>The government is required to solve the dynamics of the problem quickly and precisely by deciding a policy even though it has no legal framework (freies ermessen). The implementation of freies ermessen in practice is often used as the basis of alleged corruption by Corruption Eradication Commission (CEC/KPK). The method used in the assessment is the normative juridical approach with literature approach. The implementation of freies ermessen has the risk of success and failure that could harm the state, but Corruption Eradication Commission should be able to consider the failure of the policy is part of the business in freies ermessen.</i></p>

Introduction

Indonesia is a law state (*rechtsstaat*), the government as executive, legislative and judicial act in accordance with the applicable legal framework. Indonesia as a legal state views the legality principle as an important

characteristic, act through, and in accordance with applicable law (Aji, 1980). The executive institution (Government) implements every national development program in harmony with the social dynamics in community and the applicable

legal framework so that the Government is challenged to harmonize the three main elements: development programs, community needs and laws enacted by the legislature.

Philosophically, the Government acquires the authority and power to implement the development program in accordance with the applicable law, the Government has the authority to set policies outside the law with certain requirements or known as "freies ermesen".

Freies ermesen comes from the word "fres" which means "free," "loose," "unbound" and "independent," and "ermessen" means "consider," "judge", "guess" and "estimate". Freies ermesen is defined as a person who has a freedom to judge, guess and consider something. Freies ermesen is a freedom granted to the state administrative tools, which means the freedom that permits state administrative tools to prioritize the effectiveness of the objective rather than clinging to the rule of law (Suny, 1981).

Freies ermesen is a discretionary authority to act on its own initiative in solving problems that require rapid treatment, but has not yet been regulated by legislation enacted by a legislature (Averroes, 2012).

Freies ermesen has resulted in conflict practically. Some have the view that the implementation of freies ermesen as a form of authority abuse that needs to be supervised as a corruption. Some argue that freies ermesen is a strategic policy that must be conducted in the public interest, so the impact of freies ermesen should be seen as a form of goodwill of the Government, even though it has resulted in a loss to the state finances.

Based on the problems that have been described, the author intends to examine the authority of the Corruption Eradication Commission (KPK) in eradicating criminal action in corruption associated with the existence of the principle of freies ermesen in practice. The assessment was conducted on the KPK's duty to distinguish the good faith motives of the officials issuing the policy within the framework of freies ermesen, although in practice it has resulted in losses to the state finances. Therefore, the author intends to lift this paper entitled "Determining Criminal Actions in Corruption: The Characteristics of Freies Ermessen Principles". Based on the background of the problem that has been described, the problem identifications found as follows: a) How is the restriction of freies ermesen in criminal actions in corruption?; b) What are the characteristics and effectiveness of eradication of criminal actions in corruption in Indonesia?

The government as the state organizer has an obligation to realize the objective of Indonesia, which is to protect the entire and the blood of Indonesia, to promote the common prosperity, to educate the life of the nation, and to carry out the world order based on independence, eternal peace and social justice.

In implementing the mandate of Indonesia, the Government is often faced with various problems that occur in the community and has not been regulated legally in the legal framework. The government is required to issue a policy in deciding the problems that occur despite not having the right legal basis, as the concept of freies ermesen.

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The Government that issues policies within the framework of *freies ermessen* should always be based on good governance principles, so that the concept of *freies ermessen* is in line with the objectives of Indonesia. *Freies ermessen* based on good governance principles can prevent the practice of corruption, collusion and nepotism.

Based on the explanation of Article 53 of Law no. 9 of 2004 on Amendment of Law no. 5 of 1986 on Administrative Court Law Jo. UU no. 28 of 1999 about the Implementation of a Clean and Free State of Corruption, Collusion, and Nepotism defines that the general principles of good governance as legal certainty, openness, proportionality, professionalism, accountability, orderly State administration and public interest.

According to S.F. Marbun, the fair general principles of Indonesian government are: equality, balance, accordance, and harmony, respect and giving the right of everyone, indemnification by mistake, precision, legal certainty, honesty and openness, authority abuse prohibition, arbitrary prohibition, trust and expectation, motivation, fairness, responsibility, sensitivity, public interest administration, wisdom and goodwill (Marbun, 2011).

Descriptively, the principles of good governance based on law (*rechtmatig bestuur*), such as:

1. Act principle in accordance with legislation (*wetmatigheid*) which includes

the authority, procedure and substance of decision.

2. Principle does not abuse authority for other purposes.
3. Rational act principle.

Corruption is one of the special crimes in the economic field, as set forth in Law no. 31 Year 1999 Jo. UU no. 20 Year 2001 on the Eradication of Criminal Action in Corruption (Corruption Law). Corruption is an economic criminal action that has directly resulted in losses to state finances, hampering national development and violating the socio-economic rights of the people..

Under the United Nations Convention Against Corruption (UNCAC) 2003, corruption has become a threat to institutions, democracy, justice and law enforcement, in addition to threatening the stability and the national societies security, the international community and the sustainable development (Atmasasmita, 2006).

Based on the 8th UN Congress on Prevention of Crime and Treatment of Offenders which passed a resolution on the Corruption in Government in Havana in 1990, corruption has consequences, such as (Arief, 2007) :

1. Can destroy the potential effectiveness of alltypes of governmental programmes. Hinder development.
2. Victimize individuals and groups.
3. Inflicts leakage and irregularities to the state's finances and economy.
4. There is a relationship between corruption and other forms of organized economic crime, such as money laundering.

In terminology, corruption comes from the word "corruptio" or "corruptus" (Latin) translated into various languages, such as "corruption" or "corrupt" (English), and

"corruptie" (Dutch). Corruption is etymologically defined as evil, rottenness, or dishonesty (Amirudin, 2010).

Black's Law Dictionary defines corruption as "... *an act done with an intent to give some advantage inconsistent with official duty and the rights of other. The act an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others*" (Campbell, 1979).

Based on the Corruption Law, corruption is defined as an action conducted by any person who unlawfully conducts an action of enriching himself, another person or a corporation that may harm the state's finances. The criminal actions in corruption may also be interpreted as an action by any person to benefit himself, another person or a corporation, misusing the authority, opportunity or means available to him because of a position which could harm the state's finances.

According to Benveniste's view, corruption is defined in four (4) types (Djaja, 2012):

1. *Discretionary Corruption*, which means corruption conducted by the discretion freedom, albeit seemingly legitimate, is not a practice acceptable to the organization's members.
2. *Illegal Corruption*, which means an action intended to disrupt the specific language or legal intentions, rules and regulations.
3. *Mercenary Corruption*, which means a criminal action in corruption intended to gain personal gain, through abuse of authority and power.
4. *Ideological Corruption*, which means a kind of illegal or discretionary corruption intended to pursue group objectives.

Based on the Corruption Law, corruption has several elements, such as: An action

conducted by a person or legal entity; An unlawful action; An action conducted in the form of authority abuse; An action undertaken is intended to enrich themselves or others; An action conducted to harm the state, may be detrimental to the state's finances and economy; Giving or promising something to a civil servant or state organizer with a view to act or not do something in their position that is contrary to the legal obligation; Giving something to a civil servant or state organizer in contravention of an obligation to do or to not do something in his or her position; Giving or promising something to the judge with a view to influence the judgment of the tried case; Giving or promising something to a person who is under the terms of legislation is determined to be an advocate to attend a court hearing with a view to influence given opinions in relation to the case submitted to the court for trial; The existence of fraudulent behavior or intentionally letting the cheating happen; By deliberately embezzling money or securities held for office or allowing money or being taken or darkened by others or assisting in such actions; By deliberately defrauding, destroying, destroying or making unusable goods, deeds, letters or lists used to convince or prove to the competent authorities; Allowing others to remove, destroy, devastate, or make unauthorized use of such goods, deeds, letters or lists and assist others to remove, destroy, devastate or create unusable goods, deeds, letters or lists used to convince or prove in presence of the competent authority; A civil servant or state organizer accepting a gift or a pledge when it is known or reasonably suspected, that the prize or promise is given because of the authority relating to their position or to the their mind providing the relationship to their post.

Result and Discussion Restrictions on Freies Ermessen as the Basic Limitation of Criminal Actions in Corruption

The criminal action in corruption based on the Corruption Law is not only an action that is detrimental to the state's finances, but any actions that may result in the hearing of a state official in performing its functions. This can be seen from giving a gift to a public official who must be reported to Corruption Eradication Commission (CEC/KPK).

In fact, KPK is required to do the work objectively in distinguishing between corruption and ordinary deeds that are considered as criminal actions in corruption. This view is based on the fact that state officials are not only domiciled in the state of KPK, but a state official also has a position as an individual who must be respected as an independent and autonomous legal subject.

The eradication of criminal actions in corruption by KPK must be conducted with the legal dichotomy principle, such as : The law subject as a state official who must obtain supervision from KPK.

1. A person as a law subject who must be free from interference in all forms of KPK supervision.

The supervision conducted by KPK to the law subject as a state official should be differentiated based on the characteristics of criminal actions in corruption. KPK should be able to share the criminal actions in corruption conducted by a public official within the freies ermessen framework or in the illegal actions framework.

The criminal actions in corruption conducted within the framework of freies ermessen can not be equated with criminal actions in corruption in the framework of evil motives possessed by a state official. Criminal action within the framework of freies ermessen has a motive for the public interest and it's privately unfavorable except the public interest itself. The authority abuse in freies ermessen, whether resulting in a state loss or not detrimental to the state's finances should be viewed as the goodwill owned by a state official to resolve the problems occurring in community. This is because in every action and decision taken by state officials has a risk of failure, so KPK must be able to objectively assess that, the loss caused by a decision / determination as one form of any risk decision.

The existence of freies ermessen can be used philosophically as a basis for law enforcers (especially KPK) to examine every form of decisions and actions undertaken by a state official. Losses caused by freies ermessen should be regarded as a form of risk that is always present in each policy provided that the resulting losses is unfavorable in any form to some parties.

The Effectiveness of Eradication of Criminal Actions in Corruption in the Legal Framework Enforcement in Indonesia

In essence, criminal action in corruption that occurs in society is a transformation of the form of criminal action in theft and embezzlement. The characteristic equation between criminal action in corruption and theft/embezzlement is to take something that is not the rights of the perpetrator, while the difference between criminal action in corruption and theft/embezzlement is the

existence of the authority possessed by the perpetrator. The important characteristics which distinguish between criminal actions in theft, embezzlement and corruption are the different characteristics of the rights owned by the perpetrator, in addition to the characteristics of victims between individuals, legal entities, and the state.

To examine the characteristics between criminal actions in theft, embezzlement and corruption can further be explained as follows:

1. Criminal actions in theft:
 - a. Taking something that is not the rights of the perpetrator;
 - b. Taking goods partly or wholly owned by others;
 - c. It has the intention to own a good by unlawful means.
2. Criminal action in embezzlement :
 - a. Taking something that is not the rights of the perpetrator;
 - b. Taking goods partly or wholly owned by others;
 - c. It has the intention to have a good with the power of the perpetrator.
3. Criminal action in corruption :
 - a. Taking something that is not the rights of the perpetrator;
 - b. Taking advantage that is partially or wholly owned by the state;
 - c. It has favorable intention for certain actors or groups with the authority of the perpetrators granted by the state.

Law enforcement in eradicating criminal actions in corruption in Indonesia must be conducted by comparing a theory of law enforcement with the reality of criminal actions in corruption in community. The assessment of effectiveness of law

enforcement in eradicating criminal actions in corruption can be seen based on Friedman's view which explains, there are four (4) concepts of law effectiveness implementation which have been formed in practice (Friedman, 1977):

1. Legal Structure which is the body, framework, eternal form of a system.

Based on the legal structure, KPK has conducted eradication of criminal actions in corruption very well. This can be seen from the arrest of a number of corruptors, whether corruptors among state officials and corruptors among the private without being picky. The eradication of criminal actions in corruption has been conducted very well, but the dualism of the legal structure between KPK and Police in practice has caused problems. Problems between KPK and Police have been a dispute over authority. KPK and Police do not have a clear description of jurisdiction in conducting supervision and eradication of criminal actions in corruption. There should be a harmonization of the legal structure in conducting supervision and eradication of criminal actions in corruption, so that the eradication of criminal actions in corruption can be more effective without causing authority disputes between the legal structures.

2. Legal Substance which is the actual rules and norms used by the institutions, the reality, the principals behavioral form observed in the system.

Based on the legal substance, the eradication of criminal actions in corruption in Indonesia have been well regulated by the Corruption Law, because the Corruption Law has given wide jurisdiction to KPK to conduct monitoring and eradication of

criminal actions in corruption in Indonesia, although substantively still have some weaknesses as follows :

- a. The Corruption Law does not set restrictions and characteristics of *freies ermessen* that can be categorized as a criminal action in corruption.
 - b. The Corruption Law does not contribute positively between the jurisdiction of KPK and the jurisdiction of Police in eradicating criminal action in corruption.
 - c. The Corruption Law does not set descriptively about the form of accountability in restorative justice.
3. Legal Culture which is the ideas, attitudes, beliefs, expectations and every legal opinion.

Based on the legal culture, the eradication of criminal actions in corruption has become part of the legal awareness of the community. The public has a legal awareness to participate in the eradication of criminal actions in corruption, although on the other side there is a community culture that can be considered as a criminal actions in corruption, such as :

- a. A community culture that always gives thanks in all forms to someone who will or has given their help.
 - b. A community culture that considers in the achievements there is always a commission that must be given in every form of work.
 - c. A community culture of mutual giving is the characteristic of a civilized community, regardless of state officials and of community at large.
4. Legal Impact which is the impact of a legal decision imposed in community (Friedman, 1977).

The eradication of criminal actions in corruption that has been concretely conducted by KPK has had a positive impact and change on the bureaucratic system in Indonesia, although the eradication of criminal actions in corruption in fact can not dismiss criminal actions in corruption within the system of government itself, either government in executive, legislative and judicial institutions.

As for some criminal actions of corruption that still occur in practice, such as:

- a. The granting of ratification in executive, legislative and judicial institutions.
- b. The practice of collusion and nepotism that occurs in almost every government project.

The effectiveness of law enforcement against the eradication of criminal actions in corruption is determined from the purpose of law enforcement itself. Law enforcement against the eradication of criminal actions in corruption should be viewed from two (2) sides, namely: justice and legal certainty among perpetrators, communities and states. The existence of *freies ermessen* is one of the philosophical foundations of the perpetrators of criminal actions in corruption must also obtain justice and legal certainty in running the mandate of the people.

Conclusion

1. The limitation of *freies ermessen* in criminal action in corruption must be seen from the motive of the perpetrator in determining a policy. The state losses within the framework of *freies ermessen* are not the decisive factors to be the main basis in determining the existence of criminal action in corruption. State

losses can be viewed as a form of risk that is always present in every policy decision.

2. The characteristics of eradicating criminal actions in corruption have similarities with criminal actions in theft and in embezzlement. The fundamental difference between criminal actions in theft, embezzlement and corruption lies in the base of rights owned by the perpetrator. The effectiveness of the eradication of criminal action in corruption must meet the requirements of legal substance, legal structure, legal culture and legal impact. The eradication of criminal actions in corruption must fulfill justice and legal certainty for the perpetrator, the society and the state.

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