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Juridical Review of Implementation of Immigration Administrative Action in Indonesia

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ABSTRACT

It has been nearly a decade since Indonesia had the latest Immigration Act (Law Number 6 of 2011). However, since the new Immigration Act was issued, the implementation of regulations for The Immigration Administrative Action has not yet been established. The purpose of this study is to determine the validity of the implementing regulations of the legislation if the legal basis had been changed and to find out whether the discretion principle can be used as the basis for the procedure of Immigration Administrative Action. The research method used in this study is normative juridical. The conclusion drawn from the research is that the Director General of Immigration Instructions for Implementation Number: F-314.Il.02.10 of 1995 concerning procedures for Immigration Action is still valid but is no longer relevant to the current law, and the use of discretionary authority by the agency Government administration officials can only be done in certain cases where the applicable laws and regulations do not regulate them or

because existing regulations governing things are unclear and they are carried out in an emergency or urgent matter for the public interest.

Keywords: Instructions for Implementation, Discretion, Act

INTRODUCTION

The basis of Indonesian immigration positive law is currently referring to the Law of the Republic of Indonesia No. 6 of 2011 concerning Immigration stipulated in May 5, 2011 which was previously the Law No. 9 of 1992 concerning Immigration. The replacement of the law is based on violations arising from this time already different motives and objectives, so it is necessary to have a new law that can accommodate immigration. Based on this and other considerations the Government established Law No. 6 of 2011 concerning Immigration which contains new rules which are not regulated in Law No. 9 of 1999. One of them is the completion of the implementation of immigration action which now changes its terminological into Immigration Administrative Action.

The executive in carrying out its duties and functions has a legal basis that has been previously established and endorsed by the legislature, namely the law. In the law contains the basic provisions of the task of an institution or agency, but the law alone is not sufficient as the basis for the implementation of what the law mandates because in the article only contains provision in general, so that the rules of implementation are intended to be achieved uniformity, effectiveness and efficiency in the implementation.

Because the law of Law No. 9 of 1992 concerning Immigration has not been able to accommodate immigration matters that are increasingly complex, therefore issued Law No. 6 of 2011 concerning Immigration as a substitute in lieu of His. One of the things set forth in the two laws is the Immigration Act known in Law No. 9 of 1992 and subsequently renamed Immigration Administrative Action (TAK) in law number 6 of 2011 concerning Immigration.

In the implementation of immigration action as referred to in Law No. 9 of 1992 has the implementing regulations until the Directorate General of Immigration, namely Implementation Instruction of Director General Immigration Number: F-314. II. 02.10 of 1995 concerning Immigration

Action Procedures. But the legal basis for the implementing regulations is Law No. 9 of 1992 which has been revoked and replaced by Law No. 6 of 2011 concerning Immigration and until now there has been no implementing regulations under the governing Immigration Administrative Action. Although the legal basis for such instruction has been changed, the instruction will still be valid before there are instructions for implementing the new Immigration Administrative Action procedures. But in practice to fill the void of law, the Immigration Office undertook as a basis for implementing Immigration Administrative Action measures in the field.

Problem Statement

The Immigration Act has been replaced with a new Immigration Act. Thus, all implementing regulations based on the old law must also be changed, adjusted to the new law. There are several implementing regulations that have not been replaced in accordance with the new act, but the implementation of the tasks must still be carried out. There are several tasks that use the principle of discretion because there are no new implementing regulations found. There are two mains concern of this study, the first is what isthe validity of the regulations while the legal basis has been replaced? and the second is discretion can be used as the basis for the implementation of Immigration Administrative Action?.

Research Objectives

In the discussion of this journal aims to examine according to the perspective of the author, reviewed from several sides to find out:

i. To Identify the applicability of statutory implementing regulations if the legal basis has been replaced, and
ii. To identify whether principles of discretion can be used as the basis for the implementation of immigration administrative action.

Research Methods

This type of research is normative juridical. Normative legal research is a legal research conducted by researching a library material or secondary data (Soerjono and Soekanto, 2004). The method of approach used a qualitative approach because it examines the law that relates to this research. The implementing regulation is the Implementation Instruction of Director General Immigration No. F-314. Il. 02.10 of 1995 concerning Immigration

Action Procedures. Interpretation used is grammatically, is the simplest way of interpretation or explanation to know the meaning of the provisions of the law by parsing them according to their language, wording, or sound (Mertokusumo, 2007). Logical interpretation is to rule out various legal rules that exist through the legal reasoning to be applied to text that is blurred or less obvious (applying the obscure text the multiple resources of judicial reasoning) (Ibrahim, 2005). The type and source of legal material in this study came from a library research and interviews from the Directorate of Supervision and Enforcement of the Immigration. The legal material analysis technique uses grammatical interpretation used to resolve legal issues in this study.

Results and Discussions

Five themes emerged from the library search and expert interview data indicating lack of immigration administration action. These include: (1) immigration law enforcement, (2) immigration administrative action, (3) immigration crime investigation (4) applicability of the Implementing Legislation if the Legal Basis Has Been Replaced and (5) discretion principle as basis for implementing immigration administrative action.

Immigration law Enforcement

In implementing the enforcement of Immigration law, the Directorate General of Immigration has carried out various efforts. From monitoring, prevention, to enforcement. In the implementation of this, in particular the oppressing, immigration becomes the only institution in Indonesia that can do two types of oppressing against a person who has violated the law, by providing Immigration Administrative Action, and also the Immigration Criminal Investigation or which is also commonly referred to as *Pro Justitia* or judicial process.

The Immigration Administrative Action is an administrative sanction stipulated by an Immigration officer against the foreigner outside of the judicial process (Law No. 6 of 2011 concerning Immigration). This action is carried out by the Immigration Officer authorized in accordance with the provisions of the legislation, which is given to foreigners residing in the territory of Indonesia who engage in hazardous activities and should be suspected of harm to security and of public order or disrespecting or disobeyed statutory regulations (Law No. 6 of 2011 concerning Immigration, Chapter 75 No.1).

As also contained in the Law No. 6 of 2011 concerning Immigration, there are 6 forms of Immigration Administrative Action. These actions include:

i. Inclusion in the list of prevention or deterrence;
ii. Restriction, change, or cancellation of stay permit;
iii. Prohibition of staying at one or some specific places within the territory of Indonesia;
iv. Necessity of residing at a certain place in the territory of Indonesia;
v. Imposition of burden costs; and/or
vi. Deportation from the Indonesian territory (Law No. 6 of 2011 concerning Immigration, Chapter 75 No. 2).

First, inclusion in the list of prevention or deterrence, which is usually also called as block. This is done against immigration violators or perpetrators of criminal acts who have an intention to enter or exit the territory of Indonesia. Prevention, is an immigration administrative action in the form of preventing the subject to exit the Indonesian territory, which can be done by the immigration or there is a request from other agencies. For example, if the concerned is in the investigation process. Meanwhile, the deterrence is to reject the subject that intends to enter the territory of Indonesia, which is given to foreigners who once violated the regulations in Indonesia and then deportation and banned, or foreigners who are on the list of International search, such as from Interpol. The difference, only foreigners who can be denied to enter the territory of Indonesia, because based on Law No. 6 of 2011 concerning Immigration, Indonesian citizen is forbidden to be denied entry into Indonesian territory.

The restriction, change, or cancellation of the stay permit, provided to foreigners who commit the breach so that his or her residence permit may be restricted, amended or cancelled. With this, the permission of the foreigner to be in the territory of Indonesia will change and he must exit the territory of Indonesia not in accordance with the has been submitted.

The prohibition of staying at one or some specific places within the territory of Indonesia is one of the Immigration Administrative Action measures that the intensity of use is still rare. So far, its use is not even up to 5 times. One of the case is the prohibition of journalists to be in a region, and the prohibition of a company to be in a region.

The necessity of residing at a certain place in the territory of Indonesia is quite often done. This is done against foreigners violators of immigration

rules, by placing them in a space of Immigration Detention Room or at Immigration Detention House. The purpose of this implementation is to give confinement and limit their moving space, until there is a clear decision on what will be done next.

The imposition of burden costs is made against immigration offenders, especially for those residing in Indonesia territory exceeding the given permits, or which are often said to be overstay. If the violator has paid the required burden, he/she will be freed from other actions that can provide it. But if it is not paid, then the burden of punishment will be heavier over time.

Deportation (Law No. 6 of 2011 concerning Immigration, Chapter 1 No. (36)), Immigration Administrative Action given to foreigners as the last road. Deportation is an act of expulsion or forcibly return from the Indonesian territory for foreigners residing in the territory of Indonesia and committing immigration violations. Based on this, it can be concluded that the Immigration Administrative Action is administered administratively to foreigners who commit abuses particularly in the field of immigration. This is a form of problem solving against foreigners independently by the immigration authorities. Meanwhile, Law No. 6 of 2011 concerning Immigration, Chapter XI on Criminal Provisions, explains about various violations and immigration crimes that must be settled through the judicial process (investigation of criminal acts Immigration). The criminal provisions have included articles and penalties that should be dropped against foreigners or citizens who commit a criminal offence contained therein.

The investigation into immigration crime is conducted by the Immigration Officer PPNS (Civil Servant Investigator) (Law No. 6 of 2011 concerning Immigration, Chapter 1 No. (8)), which has been through special training and given the authority to conduct the investigation itself. This investigation is conducted by PPNS appointed in accordance with the UPT (Technical Implementation Unit) which is responsible for resolving the problem by coordinating with the Indonesian National Police investigator. The coordination was conducted since the issuance of the notification letter from the start of the investigation, implementation of the investigation, until the completion of the filing, and the submission of a copy of the case file to the Indonesian National Police investigator (Law No. 6 of 2011 concerning Immigration, Chapter 107 No. (1)). The reason why this coordination is done is to avoid overlapping investigations, given the function of PPNS and police investigators is similar. PPNS is responsible for implementing the

investigation to the point of P21 (the case file is declared complete by the Prosecutor) and the file is accepted by the Prosecutor, unless it is published by SP3 (termination warrant) due to insufficient evidence or other reasons.

Just like investigations in general, PPNS must prove that a crime has occurred, using evidence. Immigration Criminal Examination tool can be a proof tool contained in the Criminal program law, other evidence of information that is spoken, transmitted, and received or stored electronically or similar to it and written description of the immigration officer. Authorized. Meanwhile, during the judiciary until the judgment of the judges is given, immigration is not involved in the implementation. Immigration criminal investigation refers to chapter XI of Law No. 6 of 2011 concerning Immigration, so that the claims cannot exceed the limit stated in chapter XI.

Immigration Administrative Action

The Immigration Administrative Action is an administrative sanction stipulated by the Immigration Officer against a foreigner outside the judicial process. It is listed in Article 1 Number 31 Law No. 6 of 2011 concerning Immigration. Immigration Administrative Action carried out against foreigners in the territory of Indonesia because of hazardous activities and reasonably suspected to endanger public security or without respect or observe applicable laws and regulations in Indonesia. Conducting an administrative action against persons who do not obey regulations and conduct activities that are harmful to security and public order, consisting of:

1. Foreigners are block, rejection out and enter the territory of Indonesia, the cost of burden, deportation, quarantine restriction/cancellation/change of the permission of the existence, prohibition of being in one or several places, must reside in certain places;
2. Responsible for carrying equipment, such as cost of load, bring back the foreigners who are not given entry permit, foreigners who are not given admission permit to remain or isolated in the carrying equipment (Khamdan, 2015).

Then, in Article 75 Number 2 of the Immigration Law, there are forms of immigration administrative action, is a. Inclusion in the list of prevention or deterrence; b. Restriction, change or cancellation of stay permit; c. Prohibition of staying at one or some specific places in the territory of Indonesia; d. Necessity of residing at a certain place within the territory of Indonesia; e.

Imposition of burden costs; and/or f. Deportation from Indonesian territory. The Immigration Administrative Action is the authority of the Indonesian government. This authority is part of immigration law enforcement. Immigration law enforcement is carried out in order to safeguard the sovereignty of the unitary Republic of Indonesia.

Immigration Crime Investigation

The word investigation is not detached from criminal law and criminal proceedings. According to article 104 of the Immigration Law, immigration criminal investigation is conducted under criminal proceedings. In the Criminal Proceedings Act Article 1 Number 2 is mentioned that the investigation is a series of investigator actions in respect of and in the manner governed by this law to seek and collect evidence with evidence that makes about the crimes that occurred and to find the suspects. Next in the immigration Law, immigration authority is given to the immigration PPNS in coordination with the National Police of the Republic of Indonesia.

Criminal acts shall mean a deed by which the perpetration may be subject to criminal penalties. And the culprit can be said as the subject of criminal acts. While the type of criminal acts contained in the KUHP code is distinguished in 2 types, namely crimes (*Misdrijven*) and violations (*Overtredingen*) (Yusuf, 2011, Khamdan, 2015). Thus, the criminal offence field is defined as a series of prohibited acts by law, and is disgraceful in relation to immigration activities. Provisions on the criminal act in the field of immigration, amounted to 23 articles, and contained in Article 113, until Article 136 of Law No. 6 of 2011 concerning Immigration. As the basis for immigration crime, it can use 3 (three) elements, is an element of a criminal offence in the immigration law, consisting of individual actors, actors, groups of people, private bodies/ public bodies, and government agencies;

The element of the criminal proceedings in the immigration act is, create improperly or falsify a passport or successor letter, security card, street warrant or letter given, ordered to give such a letter on the false name, A false name, or by pointing to a false state, with the intention of wearing or telling others to use the letter as if it were true and not false or as if it were in accordance with the truth, using a letter that is not correct or In the first verse, as if true and not to be denied, or as if it were in accordance with the truth; and the criminal purpose element of the immigration law (Khamdan, 2015). For criminal acts specifically made by the law alone or in the event of its conduct is governed inside or outside the criminal KUHP but the procedure

of handling requires special ordinances or the law of special events that have a difference from the law of public events, It is called a special criminal offence. Therefore, the arrangement of immigration law in particular in its own law makes it also classified as a special criminal law, which is a special offense spread outside the KUHP (Khamdan, 2015).

Applicability of the Implementing Legislation if the Legal Basis Has Been Replaced

Indonesia's regulatory system adheres to the order (hierarchy). This becomes important because it affects the degree of strength of each regulation of the legislation. Article 4 Tap. MPR No. Ill/MPR/2000 mentions: "In accordance with the order of this legislation, then" any lower rule of law should not contradict the higher rule of law ". The above arrangement is based on the principle of legislation: *"Lex superiore derogat Lex infiriore"* (The higher law overcomes the law he rates below). It is intended to create legal certainty in the legislation system. The doctrine of the Order of Regulation (hierarchy) of legislation thus contains several principles (Law No 22 Of 1999 concerning Regional Government,. Chapter 69 and 72):

1. Lower-level legislation should be sourced or have a legal basis of a regulation of legislation more high.
2. The contents or the charge of the statutory regulations are not allowed to contend or contrary to the regulation of higher legislation level.

Essentially the authority to make laws, including the rules of implementation, is in the hands of legislative agencies. Executives have the power to implement them. However, a rule needs to be delegated due to the urging of the enforcement of a rule, the need for detailed arrangement, requiring special skills, and a setting that must match the character of each region. In addition, practically, the mechanism of determination of a long and complicated decision is not possible to be made by the DPR (People's Representative Council) (http://setkab.go.id). In practice in a form of law, the rules of inheritance are required to govern the technical provisions that are more specific to what laws mandated can be carried out.

This is what underlies the establishment of the Implementation Instruction of Director General Immigration No. F-314. Il. 02.10 of 1995 concerning Immigration Action Procedures. The instruction is intended to provide guidance on the implementation of the Decree of the Minister of Justice

Republic of Indonesia N. M. 02-PW. 09.02 dated March 14, 1995 concerning Procedures of Supervision, Filing of Foreigners ' Objection and Immigration Action. The instruction is intended to be achieved uniformity, effectiveness and efficiency in the implementation of immigration action.

But at this time the Law No. 9 of 1992 concerning Immigration has not been adequate to fulfil various developments needs of regulatory, service, and supervision in the field of immigration so it needs to be revoked and replaced with Law No. 6 of 2011 concerning Immigration. Then how is the applicability of Implementation Instruction of Director General Immigration number: F-314. Il. 02.10 of 1995 concerning Immigration Action Procedures if the basis of the law of formation was revoked and replaced? Because the rules of legislation must respect the principle "*Lex superior* derogat *Lex infiriore*" so that when we refer to the principle of the position of Implementation instructions under the Act then the Director General of Immigration Implementation Instructions F-314 automatic can no longer be valid.

In practice the applicability of the Implementation Instruction of Director General Immigration number: F-314. Il. 02.10 of 1995 cannot automatically be revoked because at Article 143 Law No. 6 of 2011 concerning Immigration mentioned that "the implementation rule of the Law No. 9 of 1992 concerning Immigration is still valid throughout the conflict or has not been replaced with a new one based on Law No. 6 year 2011 (Law No. 6 of 2011 concerning Immigration, Chapter 143)." So at this time the F-314 instruction is still the legal basis for the implementation of immigration measures. So it is reviewed in terms of the validity of the applicability of the applicability Implementation Instruction of Director General Immigration number: F-314. Il. 02.10 of 1995 may still apply during the no new implementation instructions governing the ordinance of Immigration action.

Discretion Principle as basis for Implementing Immigration Administrative Action

There has been no further arrangement as to the procedure for implementing Immigration Administrative Action found in Law No. 6 of 2011. In this law, the Immigration Administrative Action only contains the authority of the Immigration Officer in carrying out the administration, the types of administrative action, the implementation of objection to the minister, as well as the subject of Immigration Administrative Action based on the breach made as set out in articles 75 to 80 of this law.

There is no single article discussing the procedure of implementing the administrative action of immigration itself, even if we see article 142 of Law No. 6 of 2011 which reads "The implementing rules of this law must have been set at least 1 (one) year since the law is enacted "which until now does not regulate it, namely in government regulation No. 31 of 2013 on the regulation of law enforcement Law No. 6 of 2011.

The only setting of Immigration Administrative Action is governed only by the Director General's Instructions No F-314 of 1995. Although it is not considered relevant for some things but the instructions are still valid. If the procedure was to be addressed for implementing immigration action on this instruction, the procedure for the implementing the immigration measures consist of:

Checkpoint Place of Immigration

Refusal to enter Indonesia against foreigners classified in article 8 and article 17 Law No. 9 of 1992 concerning Immigration, refused to enter Indonesia.

Immigration Office.

Immigration officials check in the news of the interrogation event and create a resume. The head of the Immigration Office analyses:

i. The head of the immigration office after studying the resume and all evidence to provide a decision for immigration action for foreigners who are holders of a layover permit and permit visit. While immigration for the holder of the limited living permit is submitted to The Head of Regional Office of Department of Justice in this case Immigration Affairs Coordinator for approval, and the permanent residence permit is submitted to the Director General of immigration in this case the director of supervision and enforcement for the decision. The decision was reported to the head of the Department of Justice Regional office in this case the Immigration Affairs Coordinator/ Head of the Division of Immigration and report to the Director General of immigration in this case the Director of Supervision and Enforcement. The Decree of Immigration Administrative Action is submitted to foreigners who are subjected to Immigration Administrative Action at most 7 (seven) days as of the date of the decree stipulated.
ii. The execution of the Decree of Immigration Administrative Action shall be effective from the receipt of the decree by a foreigner or its power or sponsor.

iii. The head of the Immigration Office if knowing an immigration violations by a foreigner under the limited stay permit and visit permit is submitted to the Head of Regional Office of the Department of Justice in this case the Immigration Affairs Coordinator/Head of the Division of Immigration to obtain a decision with a copy of the Director general of immigration in this respect Director of immigration supervision and enforcement.

Regional Office of Justice Department;

i. The authorized Immigration Officer is required to conduct checks on reports received about any immigration violation by the foreigner from the community, the media of the time, or the government agencies set forth in the interrogation news and then create a Resume from the test result.
ii. Head of Regional Office of Department of Justice in this case the Immigration Affairs Coordinator/ Head of the Division of Immigration after studying resumes as well as any evidence to provide immigration action for foreigners who are holders of layover, permit visit, and limited residence permit. The decision was reported to the Director General of Immigration in this regard Director of Supervision and Enforcement. The Decree of Immigration Administrative Action is submitted to foreigners who are subjected to immigration action at most 7 (seven) days as of the date of the decree stipulated.
iii. Execution of the Decree of Immigration Administrative Action shall be effective from the receipt of the decree by a foreigner or its power or sponsor.
iv. Head of Regional Office of Department of Justice in this event the Immigration Affairs Coordinator/ Head of the Division of Immigration when knowing an immigration by a permanent stay permit holder shall be submitted to the Director General of immigration in this regard the Director Supervision and Enforcement for the decision.

Directorate General of Immigration

i. The Immigration officer authorized at the head Office of the Directorate General of Immigration is obliged to carry out a check on the report received about any violation in the field from the community, mass media and government agencies that And then create a Resume from the test results.

ii. Director Supervision and Enforcement after studying resumes and all evidence to provide immigration action for foreign persons with a stopover permit, visit permit, limited residence permit and permanent residence permit. The decision was reported to the head of the Department of Justice Regional office in this case the Immigration Affairs Coordinator/Head of the area where the foreigner is located. The Decree of Immigration Administrative Action is submitted to foreigners who are subjected to immigration action at most 7 (seven) days as of the date of the decree stipulated.
iii. The execution of The Decree of Immigration Administrative Action shall be effective from the receipt of the decree by a foreigner or its power or sponsor.

Immigration Administrative Action

i. Execution of the Decree of Immigration Administrative Action shall remain in effect, although the foreign person is objected in accordance with the prevailing provisions.
ii. Any foreigner subjected to Immigration Administrative Action in the form of expulsion is carried out by issuing a sign of expulsion to the travel letter.

Director Supervision and Enforcement shall compile the report of rejection periodically and be informed to the Director of the Consular affairs Department.

Any expulsion or deportation shall be kept under the supervision of the immigration Officer, and the implementation of the audit action is reported to the Director General Immigration.

Empirical facts in the field indicated that the implementation of Immigration Administrative Action can be directly processed at the office without having to delegate to the Regional Office or Directorate General of Immigration in case of alleged infringement of permit holders Limited stay, this is due to the absence of further arrangements for the implementation of the administrative action of immigration at Law No. 6 of 2011 concerning Immigration, while regulation Implementation Instruction of Director General Immigration No. F-314. Il. 02.10 of 1995 concerning Immigration Action Procedures. The action in the implementation was intended to be more efficient and the process was not belated.

However, this does not have a strong legal basis, because there is not a rule that underlies it. The only one underlying this is the policy assigned by the Immigration office concerned, the concept of this policy retrieval is generally known as the principle of discretion. The free Authority (discretionary) is an authority given to the agency/Administrative officer of the State whose basic regulations provide a space to the agency/State administration officials to interpret and determine the content of a decision to be issued. In relation to this free authority, Berge (Ridwan, 2014), divide it into three types, namely freedom of interpretation, freedom of consideration and freedom of taking policy.

According to Law No. 30 of 2014 concerning Government Administration precisely article 1 Number 9, discretion is the decision and/or action established and/or performed by government officials to address the concrete issues faced in the governance of the legislation that provides choice, not regulating, incomplete or unclear, and/or the presence of government stagnation.

Based on information obtained from the official site of the Cabinet secretariat of the Republic of Indonesia, the presence of law consisting of 89 articles is intended to create an orderly administration of governance, creating legal certainty, preventing misuse of authority, ensuring accountability of the body and/or government officials, providing legal protection to citizens and government apparatus, implementing regulatory provisions legislation and apply The General Principles of Good Governance, and provide the best service to the community.

What is meant by government officials here as contained in article 1 number 3 of law No. 30 of 2014 concerning the Government Administration is "agency and/or government officials are the elements that carry out government functions, both in government and other state organizers". Important matters regarding the disagreements set out in Law No. 30 of 2014 concerning Government Administration include:

i. The discretion can only be made by authorized government officials (article 22 paragraph (1))
ii. The discretion of government officials include (article 23):
    a. Decision making and/or action under the provisions of the legislation that provides an option of decision and/or action;
    b. Decision making and/or action because the legislation does not govern;

c. Decision making and/or action because the legislation is incomplete or unclear; and
d. Decision making and/or action due to stagnation of government for broader interests.

iii. Government officials who use the discretion must qualify [Article 24]:
a. In accordance with the purpose of the discretion as referred to in article 22 paragraph (2);
b. Not contrary to the provisions of statutory regulations;
c. In accordance with The General Principles Of Good Government;
d. Based on objective reasons;
e. Do not create conflicts of interest; and
f. Done in good faith

The use of discretionary, which has the potential to change budget allocation, must obtain approval from the Office Supervisor in accordance with statutory regulations. The approval is done when the use of the discretion raises the result of the laws that potentially burden the state finances (article 25 paragraph (1) and (2)). As explained above, government officials who do the discretion here are elements that carry out the functions of government, both in the government environment and other state organizers. The head of the immigration office in this case acts as the government that is running its function. In the conception of modern law, discretionary, discretion (English), Discretionair (France), Freies Ermessen (Germany) was absolutely needed by the Government and to him attached to that authority (*inherent aan het bestuur*), in line with the increasing demands public service that must be given by the Government to the socio-economic life of the increasingly complex citizens (Ridwaan, 2009).

The discretion itself is defined as one of the means that provides a moving space for officials or state administrative bodies to perform an action without having to be fully bound by the law, or the actions taken with Prioritizes achievement of objectives (*Doelmatigheid*) rather than in accordance with the prevailing laws (*Rechtmatigheid*) (Ridwan:2009). There are some legal experts who provide a discretionary definition of S. Prajudi Atmosudirjo which defines the discretion as freedom of action or to make decisions from the administrative officials of the authorized state in his own opinion (Atmosudirj, 1994). It is further explained that the disagreements are required as a complement to the legality principle, which the legal principle is stating that any action or State administration should be based on the

provisions of the law. However, it is not possible for the law to regulate all sorts of positions in the practice of everyday life. Therefore, there needs to be freedom or discretion of the State administration.

The *Ermessen freies* are used primarily because; First, an emergency condition that is not possible to enforce written provisions; Secondly, there is no or no regulation set up; Thirdly, there are already rules but the redaction is cryptic or multiple. Freedom of such discretionary is the administrative freedom which includes the freedom of Administration (*Interpretatieverijheid*), freedom of consideration (*Beoordelingsvrijheid*), and the freedom of policy-taking (*Beleidsvrijheid*). Freedom of interpretation implies freedom that government organs have to interpret a law. Freedom of consideration arises when the Act displays two options (alternate) authority against certain requirements that implementation can be chosen by the government organs. While the freedom to take the policy of birth when the lawmakers authorizes the government organs in carrying out its power to conduct an inventory and consider various interests (Ridwan, 2009).

The logical consequence of the authority of this *Ermessen freies*, the government is given the authority of the Droit function, which is the power to interpret the legislation, but does not mean that the government may arbitrarily. The Government is prohibited from carrying out the actions of *Detournement de Pouvoir* (doing something outside the purpose of the authority given) or the *Onrechtmatige Overheidsdaad* (Deed against Law by the ruler). Because any government deed that is detrimental to its citizens because *Detournement de Pouvoir* or *Onrechtmatige Overheidsdaad* can be prosecuted both through judicial administration of the State as well as through the general judiciary (Marbun and Mahfud, 2006)

Based on the doctrines of the law above, it can be concluded that the essence of the discretion is freedom of action or freedom of decision from the agency or official of government administration in his own opinion As a complement to the legality principle while the applicable law is incapable of resolving certain problems that arise suddenly, could be because the rules do not exist or because of the existing regulations governing the matter something does not Clear.
The administration of immigration administrative action can be directly processed at the office without having to delegate to the Regional Office or Directorate General of Immigration in the case of limited residence permit and permanent residence permit. To know the limits of use of the disagreements

can see the formulation in article 24 of the Government Administration Act. The principal formulation of the article gives a limitation on the discretion by mentioning that the government officials who use the discretion in making the decision must consider the purpose of the discretionary, statutory legislation which is the basis and general principles of good governance.

From the formulation it appears that the signs in the use of the disagreements and the making of government policies under the law of the State Administration are general principles of good governance , particularly the principle of prohibition of misuse of authority (*Detournement de pouvoir*) and the basic prohibition of arbritary (*willekeur*). In other words, government policy will be categorized as a distorted policy if there are arbitrary elements. In addition the policy is considered distorted if contrary to the public interest.

Furthermore, the Government Administration Act states that the use of the disagreements must be held accountable to the superiors and the communities that are harmed due to the discretion of the decision that has been taken and can be tested through administrative or lawsuit in the State administration judiciary. According to Anna Erliyana, the use of *Ermessen freies* by the agency/State administration officials is intended to resolve important and urgent issues as well as a sudden cumulative nature. It could arise important but not urgent issues to be resolved soon. There is also the possibility of urgent problems, but not too important to be resolved. A new issue can be qualified as an important issue when the issue concerns the public interest, while the criteria of general interest must be established by a statutory regulation (Erliyana, 2005).

Based on the above, it can be concluded that the use of discretionary authority by the Agency/Government Administration office can only be done in certain cases where the prevailing laws and regulations do not regulate or because the regulations that govern the things are unclear and it is done in an emergency/ urgent in the public interest that has been stipulated in a legislation.

The Government Administration Act affirm the boundaries of the scope of use by the government officials include:

i. Decision-making or action based on the provisions of legislation that provides an option of decision or action;
ii. Decision-making or action due to regulation of legislation does not govern;

iii. Decision making or action because the statutory regulations are incomplete or unclear; and
iv. Decision-making or action due to stagnation of government for broader interests.

Any use of authority by officials is always accompanied by responsibility, in accordance with the principle *"Geen bevoegdheid zonder Verantwoordenlijkheid"*, is the no authority without liability (Ridwan, 2009). Because the authority is attached to the office, but in its implementation is run by human as a representative or functionary of the department, then the accountability can be differentiated into 2 (two), namely: (1) as responsibility of the position, and (2) as Personal responsibilities.

If the legal action of a person for and on behalf of the Department (*Ambtshalve*), then the accountability is in position. If there is compensation or fines, it is charged to the State Budget or Regional Budget. While the deed of a person in the capacity as a person, then the consequences and accountability lies in the persons concerned, can not be charged to the position, not also charged to the State Budget or Regional Budget when there is damages or fines as a result of personal error. Personal responsibility relates to the maladministration in the use of authority and public service. An official carrying out the duties and authority of the department or making a policy will be liable for personal responsibility if he or she performs the maladministration action.

The legal liability of the officials who issued the discretionary decision should be distinguished in terms of administration, civil and criminal. In terms of administration, a disagreement must be reported in writing to the direct supervisor of the official who issued the discretionary decision. If according to the valuation of the employer who issued the disagreements, the disagreements decision is not justified in terms of the law and in terms of policy, then the employer who issued a discretionary decision should instruct the discretionary decision is revoked.

Against the action/decision of the disagreements as mentioned above, it may incur a civil loss or result in criminal acts and violate the limits of the discretionary. Furthermore, it must be declared as an act against the law by the government Administration officials (*Onrechtmatige Overheidsdaad*) which is contained in the decision of the State Administration court. As mentioned above, the decision of the dissent could not be legally tested (*Wetmatigheid*), the test is more directed to *Doelmatigheid* and therefore it is The General Principles of Good Government.

Furthermore, referring to the Law of the Government Administration, the authorized institution to test the legality of a discretionary action/decision is the direct supervisor of the official who publishes the discretionary decision and the State Administrative Court. The direct supervisor of the official who issued the discretionary decision is obliged to test the legality of a discretionary action/decision even though there is no objection and appeal of the community members because there is a duty to report a discretionary decision issued to superiors.

CONCLUSION

From the description in the above discussion, it can be concluded as that applicability and implementing regulation law if the legal basis has been changed is stated in the new law e.g. Article 142 Law No. 6 of 2011 which reads "The implementing rules of this law must have been set no later than 1 (one) year since the law was enacted" which until now does not regulate it, is the government regulation No. 31 Year 2013 Law enforcement regulation No. 6 of 2011, so the F-314 directive is still valid but is no longer relevant to the current law, and must be made a substitute with the legal basis of law No 6 of 2011.

The use of discretionary authority by the Agency/Government Administration office can only be done in certain cases where the prevailing laws and regulations do not govern them or because of the existing regulations governing the matter are unclear and it is in an emergency/urgent condition for the public interest that has been stipulated in a statutory regulation. The urgent circumstance in question is a situation that arises suddenly concerning the public interest that must be resolved quickly, in order to resolve the issue, the legislation has not set it or only govern in general. While the sense of public interest is the interests of the nation and country or the interests of society together or development interests, in accordance with the prevailing laws and regulations. In addition, the boundaries or signs in the use of discretionary are the General Principles of Good Governance. In the event that the liability for the discretionary decision is differentiated into 2 (two), namely: (1) as the responsibility of the position, and (2) as a personal responsibility. As the responsibility of the Department, if it is acting for and on behalf of the Department in which there is no element of maladministration. As a personal responsibility, if in the use of such authority there is an illegal behavior or transgressing authority element. Each implementation of governmental affairs in which there are elements of maladministration and adverse citizens, responsibilities

Based on the outcome of this study, it is recommended that the Directorate General of Immigration to renew the legal product, especially the regulation on immigration administrative action. This is to avoid and eliminate any contradiction between the legal articles and also to avoid legal obscurity in the field of practice. The use of discretionary should be considered in terms of how discretionary can be done, how the legal liability of the officials that issued the decision is discretionary, because the decision of the discretion can be tested as case material in the State Administrative court.

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REFERENCES

Anna Erliyana (2005). *Analisis Keputusaan Presiden RI Tahun 1981-1998*2005. Surabaya: Airlangga..

Atmosudirjo, S. Prajudi. (1994). *Hukum Administrasi Negara*. Jakarta: Ghalia Indonesia,.

Ibrahim, Johny. (2005). *Teori Dan Metodologi Penelitian Hukum Normatif*. Surabaya: Bayumedia Publishing,.

Khamdan, Muh. (2015). *Teori Dan Praktek Tindakan Administratif Keimigrasian, Modul Pendidikan Dasar Keimigrasian*. Jakarta: Poltekim Press..

MD, SF Marbun dan Moh Mahfud. (2006). *Pokok-Pokok Hukum Administrasi Negara, Cetakan Ke-6*. Yogyakrta: Liberty, Yogyakarta.

Muhammad Yusuf. (2011). *Pembahasan Rancangan Undang-Undang Tentang Pencegahan Dan Pemberantasan Tindak Pidana Pencucian Uang*Bandung: Alfabeta..

Ridwan. (2014). *Diskresi Dan Tanggung Jawab Pemerintah*. Yogyakarta: Penerbit FH UII,.

———. 2009. *Tiga Dimensi Hukum Administrasi Dan Peradilan Administrasi*. Yogyakarta: Penerbit FH UII.

"Mengapa Undang-Undang Perlu Peraturan Pelaksanaan." http://setkab.go.id.

Soekanto, Soerjono; Sri Mamudji. 2004. *Penelitian Hukum Normatif (Suatu Tujuan Singkat)*. PT. Raja Grafindo Persada,.

Sudikno Mertokusumo. 2007. *Mengenal Hukum (Suatu Pengantar)*. Liberty, Yogyakarta.

Law No. 22 of 1999 concerning Regional Government, 1999.
Law No. 30 of 2014 concerning Government Administrassion, 2014.
Law No. 6 of 2011 concerning Immigration, 2011. Accessed February 13, 2019. http://www.imigrasi.go.id/phocadownloadpap/Undang-Undang/uu-6-tahun-2011.pdf.