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Intended to Fail: The Problems of Regulating and Reviewing Discretion in Indonesia (An Empirical Study)

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ABSTRACT

In accordance with the principle of the rule of law (rechtstaat), all legal actions (rechtshandelingen) and/or factual actions (feitelijke handelingen) of government officials must be based on applicable laws and regulations. However, the increasing complexity of societal life means that not all public affairs are fully regulated. Existing regulations often contain vague or open norms that provide room for interpretation, thereby requiring the exercise of administrative discretion. While discretion is necessary to ensure effective governance, its use without clear requirements, objectives, and limitations may lead to arbitrary actions that harm the public, particularly when there is limited legal space to challenge or annul such decisions. To address this issue, Law Number 30 of 2014 on Government Administration establishes provisions regarding the requirements, procedures, objectives, and review mechanisms for government discretion. Nevertheless, the regulatory framework still contains several ambiguities, resulting in practical difficulties and uncertainty for government officials in exercising discretion as well as for judges of the Administrative Court (PTUN) in reviewing disputed discretionary decisions.
Keyword: *Discretion; Issues; Regulation; Judicial Review.*

Berdasarkan prinsip negara hukum (*rechtstaat*), setiap tindakan hukum (*rechtshandelingen*) dan/atau tindakan faktual (*feitelijke handelingen*) pejabat pemerintah harus didasarkan pada peraturan perundang-undangan yang berlaku. Namun, kompleksitas kehidupan masyarakat menyebabkan tidak semua urusan publik diatur secara lengkap. Ketentuan yang ada sering kali memuat norma yang bersifat umum atau terbuka sehingga memerlukan penggunaan kewenangan diskresi dalam penyelenggaraan pemerintahan. Meskipun diskresi diperlukan untuk menjamin efektivitas pelayanan publik, penggunaannya tanpa persyaratan, tujuan, dan batasan yang jelas berpotensi menimbulkan tindakan sewenang-wenang yang merugikan masyarakat, terutama apabila ruang hukum untuk menguji dan membatalkannya terbatas. Untuk mengatasi hal tersebut, Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan mengatur mengenai syarat, prosedur, tujuan, serta mekanisme peninjauan diskresi. Namun demikian, pengaturan tersebut masih menyisakan berbagai kelemahan yang menimbulkan ketidakpastian, baik bagi pejabat pemerintah dalam menggunakan diskresi maupun bagi hakim Pengadilan Tata Usaha Negara dalam menilai dan menguji keputusan diskresi yang disengketakan.
Kata Kunci: *Diskresi; Problematika; Pengaturan; Pengujian.*

A. INTRODUCTION

This article departs from the author's confusion in seeing the relevance of the arrangement of the state of law and discretion in Indonesia. On the basis of this confusion, the author conducted a simple normative research using secondary data and interviewing two judges of the State Administrative Court, but still leaves many problems. On that basis, this paper was made, so as a dislaider at the beginning, the researcher emphasized that this paper only comes to the aspect of showing the complexity of the problem of discretion in Indonesia, not the solution to the complexity of the problem.

Discussing the state of law and discretion, there are two situations that seem to be anomalous. *First,* for Indonesia, which since its inception has claimed at least in the explanation of the 1945 Constitution, Professor Soepomo as its main designer, wrote that Indonesia is a '*rechtsstaat*' not a '*machtsstaat*' (Bedner, 2010). What is the essence of the state of law? This simple question is not easy to answer. Over the last decade many scientists have tried to determine what the legal state means, what it should mean, or at least what its essential characteristics or proper characteristics are. These efforts greatly help our understanding of the term state of law (Peerenboom, 2003), but none of these efforts has provided a definition that is acceptable to all parties (Belton, 2005). The definition of the state of law seems to be entangled by time, place, context, and from author to author (Tamanaha, 2004). Although there is disagreement about the definitions of the state of law, almost all parties agree on the two functions provided by the state of law, from which we can identify the essence of the state of law (Sulistyowati, 2012): 1) the state of law limits the arbitrariness and improper use of state power; 2) the rule of law protects the property and safety of citizens from violations (Barber, 2003) and other citizen attacks (Janse et al., 2007). The point is that the two concepts boil down to the principle of legality (Utrecht, 1988), where everything done by the state/government must be based on the applicable laws and regulations (Ridwan, 2014). This situation is anomalous because discretion is basically born to bridge the government's opportunity to take policies that are not in line or, at least, not regulated in laws and regulations.

Second*,* the next anomaly is the inconsistency between state sovereignty and the rule of law. Theoretically, in the discourse of the modern state of law, there is a shift in the concept of state from state sovereignty to rule of law (Ridwan, 2014). That is, it is the law, and not power, that is the commander in chief in the life of the state, thus the government must be subject to the law not power. In the context of this discretion, what happens is the opposite, we want to put sovereignty back in the hands of the rulers, so that the rulers determine the direction of state management. Through these two anomalies, the researcher wants to show that talking about the state of law and discretion is actually not as simple as saying it. Discretion, although it is considered an important finding in the modern concept of the state, has since its birth contained "defects".

Shifting from the two anomalies above, the discretionary entrance that has been used so far is the rise of the *welfare state*. Initially, the state of law was a state system in which the law limited the actions of the state so that it would not be arbitrary against citizens. However, with the emergence of the welfare state concept, liberal, social-democratic, and conservative welfare regimes (Andersen, 1990) place an obligation on the state to take extensive actions to promote social welfare. So, on the one hand, the actions of the state are limited by law, but on the other hand, the state is actually given the obligation to take action (Marbun, 2001). Moreover, as a country that adopts state administrative law, which focuses its attention on the discussion of the state in a state of

movement (*staat in beweging*), it is because of the need for government flexibility as a logical consequence of trying to implement the idea of a welfare state that demands a more active presence of the state in an effort to improve the social welfare of its people, not just as a night watchman (Palguna, 2019).

The rapid development of the state of law into a modern state of law is partly due to the duties and authorities and responsibilities of the government are increasingly developing and expanding, both quantitatively and qualitatively (HR et al., 2018). The state administration as the organizer of public service tasks has entered various aspects of people's lives that are very complex and complicated. New tasks are adding up while old ones are growing (Marbun, 2001).

According to Sjahran Basah, in order to carry out the duties of public service actively, there is a special consequence for the state administration, namely the need for *Ermessen fries* which are allowed by law to be able to act on their own initiative. This is especially evident in the solution of problems that arise suddenly. In such a case, the state administration was forced to act quickly, making a settlement (Basah, 1998). In other words, for the smooth implementation of regulatory duties and services to the community, government organs are given freedom. Berge said that the freedom of government organs includes freedom of interpretation (*interpretatievrijheid*), freedom of consideration (*beoordelingsvrijheid*), and freedom to make policies (*beleidsvrijheid*). *Interpretatievrijheid* implies the freedom that the organs of government have to interpret a law. *Beoordelingsvrijheid* arises when the law presents two (alternative) options of authority to certain requirements whose implementation can be chosen by the governing body (Berge, 1996). *Beleidsvrijheid* was born when lawmakers give authority to government organs in exercising their power to conduct an inventory and consider various interests (HR, 2014).

Reflecting on the brief explanation above, the thesis that can be drawn from it is that even though it is born with various anomalies, its existence is a logical consequence of the development of the state of law (Heryansyah, 2015). Discretion is the way out of government stagnation, and discretion is a consequence of the adoption of *the welfare state* (Ridwan et al., 2020b). But on the other hand, due to the innate "defect" of the use of unlimited discretion, it will have an impact on the marginalization of the meaning of the state of law itself (Heriyansyah, 2017). Therefore, two things that are probably the big task of the modern legal state today, namely how to formulate the use of discretion that does not go out of the purpose of its existence (Huggins, 2021) and formulate a discretionary testing mechanism (Vermeule, 2015).

In this context, Law Number 30 of 2014 concerning Government Administration was born (Adpem Law) which also regulates quite completely the discretion. In the context of structuring, the Adpem Law regulates the provisions for the use of discretion, the scope of discretion, and the purpose of discretion (Simanjuntak, 2018). Meanwhile, in the testing aspect, the Adpem Law regulates the discretionary testing competence given to the State Administrative Court (PTUN) (Heryansyah, 2015).

From the perspective of researchers, the arrangement of discretion in the Adpem Law still leaves many problems, for example, the Adpem Law regulates the legal forum for discretion is a decision and/or action, whereas so far discretion has always been identified with policy regulations, so that the substance is different from decisions, let alone actions (Attamimi, 1993). In addition to being confusing from the terminological aspect, this will also have an impact on the difficulty of distinguishing discretion from ordinary decisions and/or actions. Not to mention, related to discretion that has an impact

on the use of the state budget which requires the permission of superiors that is inconsistent with the innate concept of discretion as freedom to act (Salim, 1996). Meanwhile, from the aspect of testing, the Adpem Law also does not provide an adequate procedural law for PTUN judges in testing the discretion of state officials. In fact, the existence of acts that exceed the authority in discretion, for example, is very easy to cross borders with the rules of criminal law (Heryansyah, 2018), because the act exceeds authority that contains abuse of authority (Amrani et al., 2023) and harm the state's finances can be a criminal act (Interview Luthfie Ardhian, 2024).

Departing from these problems, this paper tries to examine more deeply the problems of discretionary regulation regulated in the Government Administration Law and its derivative regulations, as well as the testing of Discretion in the State Administrative Court. The research was conducted in the Jakarta State Administrative Court and the Jogjakarta State Administrative Court, these two courts were chosen because they described two different administrative situations. Jakarta, as the Capital of the Country, crowded with administrative problems brought to the PTUN, on the other hand, the Special Region of Yogyakarta, as a region that is still in the form of a "kingdom", does not have complex administrative problems.

Thus, the legal issue in this article shows how the arrangement of discretion in Law Number 30 of 2014 concerning Government Administration then analyzes various problems that arise as a result of the arrangement, both from normative and empirical aspects. Furthermore, the author will also show how the implications of the regulation are for discretionary reviewing/testing in the PTUN. Many previous studies have been conducted, for example by Ridwan et al, but all of these studies have not covered the aspects of testing problems conducted by direct interviews with judges, as the author did in this study.

B. METHODS

This research is a type of non-doctrinal research (Wignjosoebroto, 2003), at least for two reasons: first, because the author does not only use a legal approach, but also uses conceptual glasses to show various problems of discretionary regulation in the Adpem Law. Second, because this study also conducted interviews with judges of the State Administrative Court (PTUN) as a reinforcement and enrichment of the analysis. In answering the formulation of the problem, three approaches are used, namely: The statute approach is used to systematically review the legal provisions that govern discretion in the Government Administration Law, Supreme Court regulations, and court decisions; The conceptual approach is used by examining relevant administrative law doctrines and theories to form the conceptual basis for discretionary arrangement; The comparative approach is used to compare discretionary arrangements in laws and regulations with theoretical ideas that develop in the administrative law literature. The data sources used in this study consist of primary data and secondary data. Primary data was obtained through in-depth interviews with seven judges, consisting of three judges of the Yogyakarta State Administrative Court (PTUN) and three judges of the Jakarta State Administrative Court. In addition, interviews were also conducted with experts in State Administrative Law. The secondary data consisted of: 1) Primary legal materials: Law No. 30 of 2014, Supreme Court regulations, and PTUN decisions; 2) Secondary legal materials: books, journals, scientific articles, treatises on amendments to the 1945 Constitution, as well as various other relevant legal publications. 3) Tertiary legal materials: legal dictionaries, legal encyclopedias, political dictionaries, and other

supporting comparative studies. All collected data was processed and analyzed in a separate manner. It was then narrated as a series of ideas, then analyzed, reviewed, and discussed to be presented in a qualitative descriptive manner to enrich and support the researcher's arguments and then draw conclusions.

C. RESULTS AND DISCUSSION

1. Discretionary Regulate in the Law Number 30 of 2014

Looking for the original intent, the reasons for forming the PTUN cannot be reduced solely as an effort to create a new, special, and independent institution. Establishing new courts is a political issue and although in the formation of the PTUN most reformists clearly adheres to the goal of restoring the independence of the judiciary from the influence of the government (Pompe, 2005), other actors pursue other interests, this indication has been widely researched and written about in scientific works (Bedner, 2001).

In the next section, the author will explain the definition, elements, and objectives of discretion as stipulated in Law Number 30 of 2014 concerning Government Administration or Adpem Law (Ridwan et al., 2020b). Apart from the various theories and concepts about discretion that have been written by many experts from within and outside the country, the Adpem Law has its own model of what is called discretion. Article 1 point 9 of the Adpem Law formulates the definition of discretion as follows:

> *Discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, are not regulating, incomplete or unclear, and/or there is government stagnation.*

From the formulation of this definition, it can be concluded that the elements of discretion are as follows (Marbun, 2012): Decisions and/or actions; Carried out by government officials; To overcome concrete problems faced in the administration of government; In the case of laws and regulations that provide choices, are not regulating, incomplete or unclear; and There is stagnation of the government. In order for the use of discretion to be directed and not abused, each use of discretion must be in accordance with its purpose, which is to: To facilitate the administration of government; Fill legal vacancies; Provide legal certainty; and Overcoming government stagnation under certain circumstances for the benefit and interest of the public

The scope of discretion of officials in exercising discretion includes decision-making and/or action because the provisions of laws and regulations provide choices that must be taken, because laws and regulations do not regulate them, because laws and regulations are incomplete or unclear, because there is stagnation of government so that discretion is needed to overcome further interests (Pasal 23 UU Adpem). This provision contains what situations allow officials or government organs to issue discretion.

Next is related to the conditions for the use of discretion must be fulfilled before or at the same time as the issuance of discretion, Article 24 of the Adpem Law stipulates as follows: *In accordance with the purpose of Discretion as referred to in Article 22 paragraph (2); Not contrary to the provisions of laws and regulations;*

AUPB compliant; Based on objective reasons; Does not give rise to a Conflict of Interest; and Done in good faith.

This requirement is important for two contexts, the first is to be a guide or guideline for state officials when they are about to issue discretion, so that it is not easily abused and can ultimately encourage the state of law to slip into a state of discretion. Meanwhile, on the other hand, this Article is also a guide for PTUN judges because it can be a legal basic for discretionary testing.

Another provision that is quite interesting in the Adpem Law is regarding discretion that has the potential to change budget allocations and burden the state's finances. If the use of discretionary authority has the potential to change the budget allocation and will cause legal consequences that have the potential to burden the state's finances, then the use of discretion must "obtain approval" from the official's superior (Article 22 of the Adpem Law). The application for officials who will use discretion must also be described in terms of purpose, purpose, substance and administrative and financial impacts that arise. Then within 5 (five) working days after the application is received by the superior, the superior determines the approval, correction instructions, or rejection. If the employer rejects the application, it must be accompanied by a reason for refusal (Article 26 of the Adpem Law).

Such a complicated discretionary arrangement can indeed be seen from two sides. On the one hand, it does guarantee that the use of discretion does not deviating of the purpose of discretion, so that the law remains the main reference for government officials in running their government. However, on the other hand, such discretionary arrangements will make it difficult for government officials to exercise discretion, so that discretion cannot be implemented. In fact, for example, there is a real urgency but government officials are reluctant to issue discretion. Thus, it is not easy for government officials to use this discretionary authority, especially if it is related to the procedure for its use (Marbun, 2012).

2. Problems of Regulating Discretion in the Adpem Law

In the following, the author will present some of the author's analyses of a few problems of Regulating Discretion in the Adpem Law. This structuring problem arises both in terms of the legal *substance* and the capacity of PTUN judges as law enforcers (*legal structure*), therefore since all authors have concluded that the discretionary provisions from the beginning were intended (either intentionally or not) to fail. Failure in two senses: it will be very rare for government officials to use discretion as a solution to government problems, and on the other hand fail to review discretion because they are not accompanied by complete instruments so that it is difficult for judges to interpret (Andriyani Masyittoh, Interview, 2025). Some of these problems are:

a. Terminology Issues

Article 1 number 9 of the Adpem Law determines that what is meant by discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, are incomplete or unclear, and/or there is government stagnation. There are two problems that arise from this understanding: *First*, so far discretion has been interpreted as a policy regulation, therefore it contains "regulations" issued by government officials, usually in the form of Circulars, Instructions or Decrees.

This point has been what distinguishes discretion from decisions. Meanwhile, the scheme offered by the Adpem Law stipulates that the form of discretion is also in the form of Decisions and/or Actions. This means that the actual discretion is the same as other ordinary decisions and actions. It will be very difficult to distinguish between discretion and ordinary decisions/actions. Therefore, in practice, it is rare for discretionary tests to be submitted to the PTUN, because even though it is discretionary, it is already in the form of a decision, so that it is accepted by the plaintiff and the judge as part of the ordinary decision (Interview, Luthfie Ardhian, 2025).

Second, the categorization of Actions as part of discretion is also confusing. Conceptually, for example, as stated in *the Algemene Bepalingen van Administratief Recht*, government action is the genus of all government policies. It is the actions of the government that give birth to public legal actions, then it is the public legal actions that give birth to decisions. Meanwhile, in the Adpem Law, actions are aligned with decisions (Interview Mohammad Herry Indrawan Patiradja, 2025).

b. Detailed Arrangements of Discretion

Discretion, in addition to being attached to office, is also a consequence of the welfare state and the fulfillment of citizens' human rights, meaning that its existence is indeed needed. However, the practices of discretionary actions without limits if allowed to continue to grow and develop, then in the end the Indonesian legal state will grow and develop into a state of wisdom or according to Nurhadiantomo's term is a state of officials or a state of power (Castles et al., 1986). Therefore, according to Marbun there are 3 (three) provisions or main elements of the exercise of discretion, namely (Marbun, 2003):

1) There is a freedom that the law allows for state administration to act on its own initiative.

   Wisdom is a complement to the principle of legality, meaning that it is not intended to override the law altogether. However, any administrative attitude must be tested by other higher laws and regulations and unwritten laws, such as the general principles of good state administration or unwritten government administration practices (Manan, 2009). Therefore, policies issued by the government must remain within the limits allowed by law and must not be outside the law, let alone contrary to the law, and not arbitrary acts or abuse of authority (Ridwan et al., 2020b).

2) There are important and urgent problem to be resolved immediately.

   The use of discretion by state administrative agencies/officials must pay attention to these two elements, namely that there are important and urgent problems that arise suddenly. The need for these two elements to be fulfilled is because sometimes an important problem arises but the problem is not so urgent to be solved immediately. On the other hand, there may also be times when an urgent problem arises, but it is not so important to be resolved immediately. An issue can be said to be an important issue when it concerns the public interest according to the applicable laws and regulations.

3) It must be morally and legally accountable.

   Responsibility in the administration of the state and government is inherent in the position, which is juridically attached to authority. The existence of this authority is what in the perspective of public law gives rise

to accountability, in line with the general principle that there is no authority without accountability (Marbun, 2003). Although state administrative officials are given the freedom to issue discretion, it should not be exercised without arbitrary limitations.

Unfortunately, in the implementation of the arrangement and regulation of discretion in the Adpem Law, it actually regulates discretion very rigidly and in detail. The Adpem Law specifies the conditions, objectives, scope, procedures, and even the obligation to report the discretion that has been taken by government officials. In fact, literally discretion itself means the freedom to act government officials, how can it be free if the regulation is very rigid (Ridwan et al., 2020a). The implication is that government officials will also be reluctant to use discretion as a solution to government stagnation. In fact, from the aspect of needs, the general public expects discretion to be issued.

c. Abuse of Authority in Discretion

A fairly complicated and problematic arrangement for the author is about discretion and abuse of authority both in the form of exceeding authority, confusing authority, and/or arbitrary actions as stipulated in Article 30. The purpose to be achieved of this clause is to limit the discretionary authority of state officials so that they do not exceed their authority, confuse authority, and/or act arbitrarily. So, discretion as a forum for fulfilling the interests of public services is still carried out (Michiels, 2004), by paying attention to the existing legal corridors (Ridwan et al., 2020b). Concerns have been raised about the use of discretion, including the existence of applicable norms, because it can give rise to flexibility for authority holders to interpret norms according to the tastes and interests of the interpreter (S. Suhartono, 2020). Free authority in the legal context is not in the sense of independence (*ondependheid*) that is independent of the legal framework, but freedom and independence (*vrijheid en zelfstandigheid*) to take or not take an action and/or decision based on the legal considerations that support it and in accordance with the demands of common sense (*redelijkheid*). In using this free authority, government organs must comply with written and unwritten legal norms.

However, discretionary regulation in the Adpem Law if it uses systematic interpretation, it seems out of sync and raises problems in its implementation. Article 18 stipulates that Decisions and/or Actions must not be contrary to laws and regulations and may not be issued without a basis of authority. The prohibition in Article 18, if associated with the existence of discretion, is quite confusing. As understood, the discretion issued is due to laws and regulations that provide choices, are not regulated, incomplete or unclear, and/or there is government stagnation. This means that it will be very possible if in a state of government stagnation, a government official issues a discretion that deviates from existing regulations, because it is very necessary. It will also be very possible, because there is no governing norm, which means that there is no basis for authority, but government officials still issue discretion because it is very needed. However, if the logic of prohibition in Article 18 is followed, such discretion can be canceled.

Another problem is related to the contact between state administrative law and criminal law, especially regarding corruption or between Law No. 30/2014 and Law No. 31/1999 on the Eradication of Corruption Crimes of the Corruption

Law. These two laws regulate acts of abuse of authority, but with different sanctions and different settlements. This is because in practice it will be very possible for government officials to issue discretion that has an impact on the abuse of authority that is detrimental to the state's finances. Article 3 of the Corruption Law states that abuse of authority that can lead to the loss of state money is including corruption, punishable by a maximum sentence of life imprisonment or a minimum of one (1) year. Meanwhile, the formulation in Article 17 of Law No. 30/2014 states that government bodies and/or officials are prohibited from abusing their authority. It is quite interesting because one legal case (abuse of authority) is regulated in two different norms of the Law: Law No. 31/1999 includes it as a criminal offense, while Law No. 30/2014 includes it as an administrative offense.

The problem arises when the same case is filed simultaneously in the two courts. The Supreme Court has indeed issued a Supreme Court Regulation (PERMA), which stipulates that criminal cases must be resolved first and exclude administrative cases, although theoretically the rule is a bit problematic because the legal principle regulates Lex specialis de rogad lex generalis. The next problem arises when a case has been examined and decided by the state administrative court (PTUN) which states that there is no abuse of authority. Then, when the case is submitted back to the corruption court, the question is, to what extent does the PTUN decision bind judges in the corruption court? Especially if in the case it is clear that there is a violation of the law that harms the state's finances?

Common sense of course directs that the case must be brought to trial by setting aside the PTUN decision. However, to this day there are no norms governing this and the judges have different opinions (Ridwan et al., 2020b). Some of the PTUN judges actually said that the case was not corruption because there was no abuse of authority so that the defendant should just return the loss of state money (Interview Adriyani Masyittah, 2020).

d. Superior Officer Approval

In Article 25 paragraph (1) it is stated that, *the use of discretion that has the potential to change the budget allocation must obtain approval from the Superior Officer in accordance with the provisions of laws and regulations*. Then in Article 25 paragraph (3) it is stated, *In the event that the use of Discretion causes public unrest, emergency, urgency and/or natural disaster, Government Officials are obliged to notify the Superior Officials before the use of Discretion and report to the Superior Officials after the use of Discretion*. The formulation of Article 25 poses many difficulties, because it requires the approval of the official's superiors before the issuance of discretion. In fact, what is called discretion is the freedom of government officials to take certain policies and under certain conditions. The need to obtain approval from this superior can take away the meaning of discretion (In this case, the Regent is a government that carries out an autonomous function that obtains the direct trust of the people, of course it would be illogical if to issue policies it must first get approval from the governor. The same is the case with the governor who must get approval from the president as his superior). Then another question, for example, what about the president, the Supreme Court, and the Constitutional Court? Who should he ask for approval? If the president, the chairman of the Supreme Court, and the

chairman of the Constitutional Court issue discretion are considered invalid because they do not meet this element? Another issue is, how is the accountability for the use of discretionary authority that has been notified or approved by the official's superiors, both from the perspective of administrative law and criminal law, especially if it causes losses to state finances? (Ridwan et al., 2020b).

In addition, if using the regional autonomy approach, such discretionary norm provisions are not appropriate. Article 18 paragraph (2) of the Constitution has expressly guaranteed that *the provincial, regency, and city governments regulate and manage their own government affairs according to the principle of autonomy and assistance duties*. Continued in paragraph (5) *The local* government *exercises the widest autonomy, except for government affairs which are determined by law to be the affairs of the Central Government*. Thus, the regions actually have the freedom and independence to manage and regulate the affairs of the government and the people of their respective regions. Without having to be shackled with permission from the superiors (Interview Mohammad Herry Indrawan Patiradja, 2025).

3. Discretionary Reviewing Problems

In this section, the author will show the problem of reviewing/testing discretion by Judges at the PTUN. The *first* and most crucial problem felt by judges is the absence of a procedural law for discretionary testing. The procedural law is actually a reference for judges in enforcing the norms of discretion in the Adpem Law that are not available. The procedural law will further regulate when a discretion can be tested, how the testing process is, what are the implications of the discretion canceled by the PTUN, and what are the components of the discretionary test legal basic. Due to the unavailability of discretionary procedural law, the judge uses the ordinary decision testing procedural law (Interview, Novy Dewi Cahyati, 2025). If there are things that are needed but there are no provisions for the event, it is enough to use the judge's discretion.

Second, the problem of the meaning of discretion. So far, discretion is part of policy regulations, in the form of a Circular or Decree (Interview, Mohammad Herry Indrawan Patiradja, 2025). However, in the Adpem Law, Discretion must be in the form of Decisions and/or Actions. The question is, then how to distinguish discretion from ordinary decisions or actions? PTUN judges differ in translating the form of discretion, some state that discretion is only in the form of decisions or actions after the Adpem Law. However, other judges are of the view that as long as Law Number 51 of 2009 has not been repealed, then another form of discretion as a Policy Regulation, is still valid and can be tested by the judge (Interview ALS, 2025). According to Novy, the judge of the Jakarta State Administrative Court, if the judge only limits the form of discretion to the Decision or Action, what if there is a community that tests the Circular Letter or Decree to the PTUN? Shouldn't the PTUN not reject the case submitted to it? (Interview Novy Dewi Cahyati, 2025) This is indeed quite complicated, the regulation in the Adpem Law, which narrows the meaning of discretion, leaves serious problems in its reviewing/testing.

Third, the Discretion legal basis for testing. If referring to the Adpem Law, then the use of discretion must meet the aspects of conditions, objectives, and procedures. These three components are also a legal basis of discretion, in addition to AUPB and human rights. However, the problem is that if the judge uses rigidly the fulfillment of the conditions, objectives, and procedures of discretion, then it can

be certain that it will be very difficult to have a discretion that meets all these provisions (Heryansyah, 2015). The author's interview shows that there is no common perception of judges in assessing discretionary legal basis, there are judges who view that the legal basis is authority, and there are even those who call the legal basis a law and regulation (Interview with Judges in Jakarta and Jogjakarta). In fact, theoretically and practically, the existence of discretion will almost always deviate from the provisions of laws and regulations, because existing regulations result in government stagnation. This shows that there is no common understanding between fellow PTUN judges in interpreting discretion (Interview DWG, 2025).

Fourth, a provision that is quite *debatable* in the discretion review is its intersection with the principle of *nemo judex in causa sua*. This principle, simply reads, *that the Judge may not adjudicate cases related to himself*. However, the question is what if the Chief Justice of the TUN Court, the Chief Justice of the TUN High Court, or the Supreme Court issues discretion, but the discretion is sued by interested parties. Won't the testing also return to the PTUN itself? If so, is it the same as testing themself? According to Novy, this provision is correct and does not contradict *nemo judex in causa sua,* because PTUN judges can behave objectively and professionally.

Fifth, the Human Rights as a legal basis of review. Article 5 of the Adpem Law states that government administration, both regulating and reviewing, must be based on laws and regulations, AUPB, and the protection of human rights. This means that human rights are one of the legal basis of Decisions and/or Actions, including discretion after the Adpem Law. Apart from these normative provisions, the protection of human rights is the main component of the state of law, both in the character *of rechstaat* and *the rule of law,* therefore all state policies must pay attention to the protection, fulfillment, and respect of human rights. However, in the author's interview with the PTUN judge, almost all judges think that human rights cannot be the main consideration, because the norms are still very abstract, while what is tested in the PTUN is a concrete-individual policy.

D. CONCLUSION

Based on the description above, this paper concludes that the existence of discretion is a double-edged sword. On the one hand, discretion is an important instrument for countries that adhere to the concept of welfare like Indonesia, so that the government can take various policies needed to realize social welfare. This paradigm has shifted one of the principles of the state of law (especially for Indonesia, which is very thick with the dogma of positivism), that all government actions must be based on the law. This principle is no longer relevant in the context of a *welfare state*. But on the other hand, the existence of discretion in practice is very vulnerable to abuse of authority that is detrimental to the people and various other corrupt practices. In this regard, the Indonesian government issued Law Number 30 of 2014 concerning Government Administration. This law provides provisions regarding the limits and scope of discretion as a reference for the government in issuing discretion, as well as providing guidelines for testing discretion at the State Administrative Court (PTUN). However, the discretionary regulation in the Adpem Law also leaves a number of problems, ranging from the problem of termination, the detailed regulation of discretion which actually eliminates the character of discretion as a free authority, the problem of prohibiting the abuse of authority in using discretion is also difficult to implement because discretion is

actually issued in the event of government stagnation, and finally the provision of permission for superiors to use discretion makes it difficult for officials or government organs to use discretion discretion. Meanwhile, the problems that arise from the aspect of discretion testing in the PTUN are related to the absence of procedural law, the diversity of interpretations of discretion, the touchstone of discretion, the intersection of discretionary testing with the principle of *nemo judex in causa sua,* and the position of human rights as a touchstone of discretion.

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