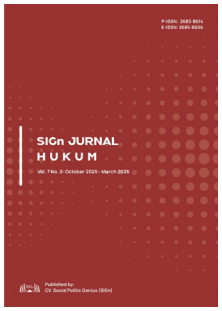


# SIGn Jurnal Hukum

E-ISSN: 2685 – 8606 || P-ISSN: 2685 – 8614
https://jurnal.penerbitsign.com/index.php/sjh/article/view/v7n2-17

Vol. 7 No. 2: October 2025 - March 2026 Published Online: December 11, 2025


Article Title

## Reformulating the Boundaries of Freies Ermessen: An Analysis of Conflict of Norms in the Government Administration Law Post-Enactment of the Job Creation Law

Author


**Triana Galuh Purnama Sari**
*Universitas Islam Negeri Sunan Ampel, Indonesia || trianagaluh057@gmail.com*



How to cite:

Sari, T. G. P. (2025). Reformulating the Boundaries of Freies Ermessen: An Analysis of Conflict of Norms in the Government Administration Law Post-Enactment of the Job Creation Law. *SIGn Jurnal Hukum, 7*(2), 901-916. https://doi.org/10.37276/sjh.v7i2.546

**ABSTRACT**

*The paradigm shift in Indonesian administrative law following the enactment of Government Regulation in Lieu of Law Number 2 of 2022 has created serious legal issues regarding the validity of discretion (Freies Ermessen). The elimination of the requirement that "not contrary to the provisions of laws and regulations" in Article 24 of Law Number 30 of 2014 creates an internal conflict with the Principle of Legal Certainty. Furthermore, this amendment blurs the demarcation boundary between administrative error (maladministration) and corruption offenses. This potentially leads to policy criminalization. This research aims to analyze the juridical implications of such norm change and to reconstruct the boundaries of public official liability using the parameters of mens rea and ultimum remedium. This study is normative legal research employing statutory, conceptual, and comparative approaches. The results indicate that the absence of formal legality parameters demands a shift in the focus of discretion validity testing toward a substantive aspect. Such focus encompasses compliance with the objectives of discretion and the general principles of good governance. The strict boundary between the administrative and criminal realms lies in proving the element of mens rea for unlawfully enriching oneself. Therefore, criminal law must be positioned as the ultimum remedium after administrative testing mechanisms through the Government Internal Supervisory Apparatus and the State Administrative Court have been exhausted. This research recommends adopting the reasonableness test in discretion testing to provide legal certainty and protection for officials when innovating.*

*Keywords:* *Conflict of Norms; Discretion; Freies Ermessen; Mens Rea; Ultimum Remedium.*

## INTRODUCTION

The concept of the welfare state mandates that the government not merely act passively as an executor of statutes. Instead, the government must act actively and responsively in public service provision (*bestuurszorg*). Within the complex dynamics of state administration, government officials often face concrete and urgent situations. In such instances, available statutory regulations are frequently unregulated, incomplete, or unclear. To bridge the rigidity of the legality principle (*wetmatigheid van bestuur*), which potentially hinders public service, state administrative law provides the instrument of discretion (*Freies Ermessen*). In Indonesia, the legal validity of this instrument is strictly regulated by Law Number 30 of 2014[1]. The objective is to provide legal certainty while protecting officials when making innovative decisions. As asserted by Purnamawati and Hijawati (2022), discretion is a logical consequence of the government's duty to realize welfare. However, its use must remain limited within legal channels to prevent it from devolving into arbitrary action.

Nevertheless, the administrative law landscape in Indonesia underwent a fundamental shift with the enactment of Government Regulation in Lieu of Law Number 2 of 2022, which was subsequently ratified as Law Number 6 of 2023. This regulation enacted a significant intervention on Article 24 of Law Number 30 of 2014 by altering the validity requirements for discretion. Purwanto et al. (2025) highlight that the most

[1]Law Number 30 of 2014, as amended by Article 175 of Government Regulation in Lieu of Law Number 2 of 2022.

crucial change is the elimination of the phrase "not contrary to the provisions of laws and regulations" as a condition for exercising discretion. This amendment creates a serious normative gap. On one hand, the goal is to provide bureaucratic flexibility and encourage official innovation without the fear of criminalization. On the other hand, this triggers an internal conflict of norms, as Article 5 and Article 10 of Law Number 30 of 2014 continue to mandate that government administration be based on the principle of legal certainty. A juridical problem arises regarding how the validity of discretion can be measured if its formal legality parameters are nullified. This potentially opens the door to an interpretation that is too broad for public officials.

The ambiguity of these boundaries underscores the urgency to distinguish between lawful discretion, administrative error (maladministration), and corruption offenses. In practice, a blurring of demarcation often occurs when administrative procedural errors that cause state losses are immediately drawn into the criminal realm. This shift to the criminal realm is frequently conducted without adequate proof of malicious intent (*mens rea*). Prior research, such as that conducted by Asyikin (2019) and Widhyasari (2020), has primarily focused on the procedural mechanism for testing discretion in the State Administrative Court or on the annulment of decisions through administrative efforts. These studies have not specifically reviewed the implications of removing the condition "not contrary to laws and regulations" following the enactment of Government Regulation in Lieu of Law Number 2 of 2022. Furthermore, existing scholarship has not discussed how this affects official liability parameters. Therefore, a gap in the literature exists regarding the analysis of this new legal construction of discretion in relation to legal protection for officials acting in good faith.

This condition of normative uncertainty is further complicated by the reality of law enforcement in Indonesia, which still frequently conflates the administrative law regime with criminal law. In judicial practice, the criminalization of public officials' policy discretion is often grounded solely in the emergence of state losses. This criminalization frequently occurs without adequate proof of the existence of *mens rea* to enrich oneself or others. Yet, doctrinally and normatively, errors in the use of discretion that are administrative in nature (maladministration) should be resolved through the internal supervision mechanism of the Government Internal Supervisory Apparatus or the State Administrative Court. Such errors should not be immediately drawn into the criminal realm. The absence of a clear line of demarcation between administrative procedural errors and corruption offenses creates a tangible chilling effect in the field. As observed in regional phenomena, public officials—ranging from Directors of Regional-Owned Enterprises to Village Heads—often hesitate to take strategic decisions. They are reluctant to make decisions regarding organizational restructuring or the use of emergency funds due to the shadow of policy criminalization. This hesitation ultimately leads to government stagnation.

To address this void, this research offers a novel approach by reconstructing the boundaries of discretion *Freies Ermessen* through an integrative framework combining administrative law and criminal law principles. Unlike previous partial studies, this research employs the perspective of Sutopo and Panjaitan (2025) regarding the importance of proving *mens rea* as an absolute distinguishing element between policy and corruption. This research will also draw upon the views of Sianturi (2025) regarding the application of the last resort (*ultimum remedium*) principle. The originality of this research lies in the effort to confront the norm changes in Article 24 of Law Number 30 of 2014 with the general principles of good governance as analyzed by Najicha (2021). The objective is to find an ideal testing formula that not only guarantees official flexibility, as in the case of Temporary Officials of Regional-Owned Enterprises reviewed by Muzakkir and Husen (2025), but also ensures public accountability.

Based on the outlined problems and gaps, this research aims to analyze the juridical implications of changes to the validity requirements for discretion under Law Number 30 of 2014, following the enactment of Government Regulation in Lieu of Law Number 2 of 2022. Additionally, this research aims to examine the strict demarcation boundaries between abuse of administrative authority and corruption offenses. This study seeks to answer the fundamental question of how legal certainty parameters can be maintained amidst the relaxation of formal discretion requirements. It will also address which testing mechanism is most appropriate for assessing the validity of such discretionary decisions.

Theoretically, this research is expected to provide a scientific contribution to the development of State Administrative Law. This contribution is specifically aimed at enriching the discourse regarding the paradigm shift from legality to flexibility in the modern concept of the rule of law. In practice, the results of this research are expected to serve as a guideline for the Government Internal Supervisory Apparatus and law enforcement officials in applying clear parameters before criminally processing public officials. Furthermore, this research is expected to provide legal certainty for government officials at both the central and regional levels in utilizing discretion for public service innovation without being overshadowed by the fear of policy criminalization.

## METHOD

This study employs normative legal research, focusing on the examination of rules or norms within positive law (Qamar & Rezah, 2020). The selection of this method is based on the characteristics of the issues raised, namely the existence of a conflict of norms and the presence of vague norms in the regulation of discretion following the amendment of Law Number 30 of 2014 by Government Regulation in Lieu of Law

Number 2 of 2022. This research does not intend to test the enforceability of law through empirical societal data; instead, it examines the internal coherence of the state administrative law system in responding to the dynamic need for bureaucratic flexibility without sacrificing the principle of legal certainty. Consequently, law is conceptualized as a set of norms, rules, and principles that serve as a reference for government officials in making discretionary decisions.

To comprehensively dissect the complexity of these issues, this study applies three main approaches simultaneously. *First*, the statute approach is utilized to examine the hierarchy and consistency among regulations. This approach is specifically used to confront the provisions of Article 24 of Law Number 30 of 2014, post-amendment, with the general principles enshrined in other articles. *Second*, the conceptual approach is applied to delve into legal doctrines related to discretion *Freies Ermessen*, criminal intent (*mens rea*), and principles of good governance. These doctrines serve as the theoretical foundation for distinguishing between administrative errors and corruption offenses. *Third*, the comparative approach is employed on a limited basis to observe the practice of testing discretion in other countries, such as the Netherlands. Practices in the Netherlands are used as comparative material to discover an ideal testing model for Indonesia.

The legal materials used in this research are sourced from secondary data classified into three categories (Sampara & Husen, 2016). Primary legal materials consist of binding statutory regulations, including Law Number 30 of 2014, Government Regulation in Lieu of Law Number 2 of 2022, and Law Number 31 of 1999. Secondary legal materials encompass relevant and up-to-date legal literature, including reputable national and international journal articles, state administrative law textbooks, and prior research findings directly related to the topics of discretion and abuse of authority. Tertiary legal materials, such as legal dictionaries and encyclopedias, are used to clarify technical juridical terms.

The legal material collection technique was conducted through library research, supported by online research of statutory databases and scientific journals. The collected legal materials were subsequently inventoried, classified, and selected for their relevance to the research problem. This process was carried out systematically to ensure the validity and reliability of the references used. This is particularly crucial in ensuring the use of regulations that remain in force and literature with a high state of the art value.

Furthermore, the processed legal materials were analyzed using a qualitative, deductive logic approach (Irwansyah, 2020). The analysis commences with a major premise consisting of positive legal rules and principles of state administrative law. This major premise is then connected to a minor premise consisting of legal facts regarding

the elimination of formal discretion requirements in Government Regulation in Lieu of Law Number 2 of 2022. The techniques employed include grammatical interpretation to understand the meaning of the statutory text and systematic interpretation to examine the relationship between articles. The culmination of this analysis is a legal prescription aiming to offer novelty. This novelty takes the form of a reconstruction of the boundaries of discretion *Freies Ermessen* that relies not only on formal legality but also on proof of *mens rea* and compliance with the general principles of good governance. The objective is to address the research goal of providing legal certainty for public officials.

## RESULTS AND DISCUSSION

### A. The Dynamics of Discretion Regulation Post-Amendment of Validity Requirements in the Government Administration Law

The concept of the welfare state places discretion (*Freies Ermessen*) not merely as a privilege for officials, but as an absolute necessity in the administration of modern government. As affirmed by research such as that of Purnamawati and Hijawati (2022), Fikri et al. (2023), and Lathifah and Frinaldi (2024), rapidly moving social dynamics frequently outpace static positive law. This condition creates a legal vacuum (*rechtsvacuum*) that must be immediately filled by public officials. In this context, discretion functions as a "safety valve" to prevent the paralysis of government operations when statutory regulations are unregulated, incomplete, or unclear. Without this instrument, the bureaucracy would be trapped in procedural rigidity, potentially detrimental to the public interest, particularly in situations that demand high responsiveness.

However, prior to the latest legislative amendments, the discretionary regulation regime in Indonesia, as enshrined in Law Number 30 of 2014 (pre-amendment), tended to constrain such flexibility. Article 24 of the Law established very strict cumulative requirements. One such requirement was that discretion must be "not contrary to the provisions of laws and regulations." This requirement, according to the analysis by Ridwan (2014), creates a juridical paradox. Officials were encouraged to innovate within legal voids, yet simultaneously threatened by rigid formal legality parameters. Consequently, many officials chose to adopt a passive attitude (wait and see) rather than risk being accused of violating the law. This passive attitude ultimately caused stagnation in public services and hindered investment.

In response to this condition, the government achieved a legal breakthrough by enacting Government Regulation in Lieu of Law Number 2 of 2022. Article 175 of this regulation radically overhauled the provisions of Article 24 of Law

Number 30 of 2014 by eliminating the phrase "not contrary to the provisions of laws and regulations" from the validity requirements of discretion. As analyzed by Purwanto et al. (2025), this elimination marks a paradigm shift in Indonesian administrative law. This shift moves from a stance that was originally highly legalistic-formal (*rechtmatigheid*) to one more oriented towards objectives and expediency (*doelmatigheid*). In terms of legal politics, this amendment signals that discretion is now strongly permitted to bypass written regulatory barriers in the name of accelerated development and bureaucratic efficiency, provided it remains grounded in the general principles of good governance.

The justification for this relaxation is most relevant in crises or emergencies, such as during the COVID-19 pandemic. Rakia (2021) emphasized in her study that in extraordinary conditions where the safety of the people is the supreme law (*salus populi suprema lex esto*), blind compliance with normal procedures can be fatal. The removal of the "in accordance with regulations" requirement provides juridical legitimacy for officials to take "out of the box" measures. These measures might conflict with standard regulations, but are essential to save lives and the national economy. Thus, this norm change essentially accommodates legal needs in unpredictable, urgent situations beyond legislators' control.

Nevertheless, the flexibility of this new norm leaves serious problems for officials with non-definitive status, such as Temporary Officials or Acting Officials, particularly within local government environments and Regional-Owned Enterprises. Empirical studies conducted by Fasyehhudin (2023) and Muzakkir and Husen (2025) highlight this issue. They state that although the law has relaxed discretion requirements, temporary officials are often still held hostage by psychological and juridical hesitation. This hesitation arises due to specific authority limitations in personnel regulations, such as prohibitions on conducting mutations or making strategic decisions. The asynchrony between the spirit of flexibility in Government Regulation in Lieu of Law Number 2 of 2022 and these technical personnel rules creates a new gray area. May a Temporary Director of a Regional-Owned Enterprise use this "free discretion" to restructure a loss-making company, or do they remain bound by the administrative limitations of their position?

This condition culminates in the conclusion that the amendment to Article 24 of Law Number 30 of 2014 has birthed a tangible internal conflict of norms. On the one hand, the elimination of formal legality requirements opens the floodgates for the widest possible freedom of action. On the other hand, Article 5 and Article 10 section (1) point a of Law Number 30 of 2014 (which remains unchanged) continue to mandate that every government administration, including discretion, be based on the principle of legal certainty. How can legal certainty be realized if

the objective parameter of "laws and regulations" is nullified? This contradiction has a high potential to open loopholes for arbitrariness (*willekeur*), hiding behind the pretext of discretion. If a testing parameter is not immediately found, this will blur the line between policy innovation and abuse of authority. Therefore, a reconstruction of a new demarcation line is required—one that relies no longer on written rules, but on the element of malicious intent (*mens rea*) and substantive compliance with the general principles of good governance, which will be discussed in the subsequent section.

## B. Reconstruction of Demarcation Boundaries: *Mens Rea* as the Distinguisher between Maladministration and Corruption Offenses

The elimination of the condition "not contrary to the provisions of laws and regulations" in Article 24 of Law Number 30 of 2014 (post-amendment) indeed opens the floodgates of flexibility. However, it widens the gray area that plagues public officials: policy criminalization. As sharply reviewed by Latif and Chariansyah (2024) and Sutopo and Panjaitan (2025), law enforcement practices in Indonesia often suffer from serious distortion. Law enforcement officials frequently equate "state financial loss" with "corruption offenses." Yet, in the context of discretion, state losses can arise from policy risks or pure administrative calculation errors without *mens rea* to enrich oneself. This phenomenon creates a paradox. Officials are encouraged to be bold in exercising discretion to accelerate development, but at the same time, they are threatened with criminal entrapment that could kill their careers and reputations if the discretion fails or incurs losses.

This fear is not groundless, as Article 2 and Article 3 of Law Number 31 of 1999 utilize very broad formal offense formulations. The elements of "unlawful" and "abusing authority" are often interpreted literally without regard to the administrative context. Pietersz (2024) criticizes the view that the concept of abuse of authority in administrative law should be interpreted as the misuse of power (*détournement de pouvoir*), rather than merely as technical procedural violations. When every procedural error in discretion is immediately drawn into the criminal realm, a violation of the fundamental criminal law principle occurs: no punishment without guilt (*geen straf zonder schuld*). Administrative error (maladministration) and criminal error are two distinct legal entities and must not be conflated solely because of the financial loss they cause.

Therefore, the reconstruction of the demarcation boundaries between the two becomes necessary, and the key lies in proving the element of *mens rea*. Sutopo and Panjaitan (2025) assert that *mens rea* must be a constitutive element proven materially, not merely assumed from the existence of state losses. In the context of discretion, *mens rea* manifests as intentionality (*opzet*) to abuse power

for personal or group gain through unlawful means. Suppose an official exercises discretion that violates procedure (for example, without superior approval pursuant to Article 25 of Law Number 30 of 2014) but is proven to lack malicious intent and to serve the public interest solely. In that case, the act remains purely within the administrative realm, not the criminal one.

Furthermore, this reconstruction must place administrative law as the primary remedy (*primum remedium*) and criminal law as the *ultimum remedium*. Sianturi (2025) argues that law enforcement against discretionary deviations must prioritize mechanisms for loss recovery and administrative sanctions first. If internal audits or examinations uncover procedural errors or negligence (*culpa*) causing state loss, the resolution is through the reimbursement of said loss (claims for compensation) and disciplinary sanctions. This is as stipulated in Article 20 and Article 80 of Law Number 30 of 2014. Criminal law may only enter if, and only if, the administrative mechanism stalls or strong evidence is found of bribery, gratuities, or clear, malicious intent involving corrupt kickbacks.

However, to ensure that *mens rea* and *ultimum remedium* do not become shields for impunity, a strong "filter" is required. This is where the vital role of the general principles of good governance lies. Najicha (2021) emphasizes that the general principles of good governance, particularly the principles of "non-misuse of authority" and "carefulness," must serve as objective parameters for assessing an official's inner state when making decisions. Discretion can be said to possess corrupt *mens rea* if it overtly violates the principle of impartiality (e.g., favoring cronies) or violates the principle of carefulness by recklessly ignoring valid data and facts. In other words, the general principles of good governance serve as a bridge to determine whether a procedural error is a mere administrative mistake or a criminal modus operandi.

Moral and ethical perspectives on governance also reinforce this reconstruction. Fitri et al. (2023) in their study of constitutional politics (*siyasah dusturiyah*) highlight that, in Islam, the abuse of authority is a betrayal of public trust. However, Islam also teaches justice (*adl*) in judging an individual. Punishing an official who exercises intellectual effort (*ijtihad*)—in the form of discretion—for the benefit of the people solely due to technical errors is a form of tyranny. Conversely, allowing corrupt officials to hide behind the pretext of discretion is also an evil. Therefore, integrating the ethical values of the general principles of good governance with strict criminal proof principles constitutes the middle path to achieving substantive justice.

In summary, a clear demarcation line can be drawn: The Administrative Realm is when discretion involves defects in procedure, authority, or substance,

but is exercised in good faith for the public interest and without personal gain. The sanction consists of the annulment of the decision and the imposition of administrative penalties. Conversely, the Criminal Corruption Realm is one in which such discretion is driven by *mens rea* to enrich oneself or a group. This is evidenced by fund flows (kickbacks), tangible conflicts of interest, or *fraud*. With this boundary line, government officials can innovate while state funds remain protected against corruption.

## C. Reformulating the Discretion Testing Mechanism: Towards Legal Certainty and Public Official Protection

The absence of the parameter "not contrary to the provisions of laws and regulations" in Article 24 of Law Number 30 of 2014 post-amendment demands a reformulation of a more substantive testing mechanism. Whereas the validity of discretion previously relied heavily on legal positivism (whether a rule was violated), the focus of testing must now shift to the quality of the policy itself. The greatest challenge lies in assessing a decision that may formally deviate from normal procedures but substantially brings tangible benefits to the public interest. Without a standardized testing mechanism, the assessment of discretion becomes highly subjective and susceptible to criminalization by law enforcement officials who tend to employ legalistic tunnel vision.

As an initial step in this reformulation, the mechanism of administrative appeal must be established as the primary remedy (*primum remedium*) in resolving discretionary disputes. Asyikin (2019) and Widhyasari (2020) agree that before a discretionary decision is brought to the judicial realm, it must first be tested internally within the government through the objection and administrative appeal mechanisms as stipulated in Article 75 of Law Number 30 of 2014. At this stage, testing touches not only on legality (*rechtmatigheid*) but also on expediency (*doelmatigheid*). The official's superior, or the Government Internal Supervisory Apparatus, has the capacity to assess whether a policy breakthrough, despite contravening technical rules, is truly effective in solving problems. Unfortunately, in practice, this mechanism is frequently bypassed by law enforcement officials, who immediately conduct criminal investigations the moment a sign of state loss is detected.

To strengthen the objectivity of testing at the judicial level, Indonesia should learn from administrative law practices in other countries with similar legal traditions. Suparto et al. (2024) highlight in their comparative study that the Administrative Court in the Netherlands applies the reasonableness test. Under this doctrine, judges do not usurp the executive's role in determining which policy is best; rather, they test whether the decision is reasonable and proportional.

Dutch judges afford broad deference to officials' creativity, provided the decision is not manifestly unreasonable. This approach is highly relevant to the State Administrative Court in Indonesia for filling the void in the parameters set forth by Government Regulation in Lieu of Law Number 2 of 2022.

The implementation of the reasonableness test in Indonesian law can be achieved by establishing the general principles of good governance as the primary testing ground (*toetsingsgronden*). Article 52 and Article 53 of Law Number 30 of 2014 grant judges the authority to annul decisions with substantive defects. By adopting Dutch standards, judges of the State Administrative Court can apply the principles of "carefulness" and "expediency" to assess the reasonableness of a discretionary act. Suppose an official exercises discretion in an urgent situation and chooses the most rational option to advance the public interest despite the risks. In that case, such action must be declared valid under administrative law. This will sever the chain of flawed reasoning in which every procedural deviation is automatically deemed to reflect corrupt, malicious intent.

The urgency of reformulating this test becomes increasingly apparent when observing the vulnerable position of non-definitive officials in Regional-Owned Enterprises. Muzakkir and Husen (2025) explicate the legal dilemma faced by Temporary Officials of Regional-Owned Enterprise Directors, such as in the Makassar City Water Supply Company (Perumda Air Minum). These interim officials are often confronted with critical corporate conditions (fiscal loss) yet hesitate to undertake strategic rescue actions (such as employee rationalization) due to their "precarious" authority status. If the discretion-testing mechanism is clear—that Temporary Officials possess full authority in emergencies and their actions will be assessed under the Business Judgment Rule—then such officials will have the legal confidence to make difficult decisions for corporate recovery without fear of future criminalization.

Similar vulnerability occurs at the lowest level of government, namely the village. Akhyar et al. (2023) found that decentralization of authority to villages is often unaccompanied by clear legal protections for budgetary discretion. Village Heads are frequently entangled in legal cases when diverting budget posts for urgent citizen needs that lack specific allocation. The reformulation of the testing mechanism must reach this level, in which the regional inspectorate serves as the first "judge" assessing the reasonableness of the Village Head's discretion. Suppose the inspectorate declares that the budget diversion is reasonable and that no funds were diverted into personal pockets. In that case, the case must be closed as an administrative matter, and law enforcement officials must be prohibited from intervening.

In summary, this research offers a tiered, integrated discretion-testing framework to ensure legal certainty. *First*, every allegation of discretionary deviation must be examined initially by the Government Internal Supervisory Apparatus to determine whether it constitutes an administrative error or actual abuse of authority. *Second*, suppose a dispute arises regarding the examination results. In that case, the official has the right to file a complaint for the abuse of authority with the State Administrative Court, as stipulated in Article 21 of Law Number 30 of 2014. *Third*, law enforcement officials may commence criminal investigations only after a final and binding (*inkracht*) decision of the State Administrative Court declares that an abuse of authority with malicious intent causing state financial loss has occurred. With this strict testing hierarchy, discretion, *Freies Ermessen* can be restored to its original essence as an instrument of welfare rather than a criminal trap.

## CONCLUSIONS AND SUGGESTIONS

The paradigm shift in Indonesian administrative law following the enactment of Government Regulation in Lieu of Law Number 2 of 2022 has profound juridical implications for the validity of discretion (*Freies Ermessen*). The removal of the condition "not contrary to the provisions of laws and regulations" in Article 24 of Law Number 30 of 2014 marks a transition from a rigid formal legality regime toward bureaucratic flexibility oriented toward expediency (*doelmatigheid*). However, this change simultaneously birthed an internal conflict over norms, as the Principle of Legal Certainty remains a pillar of government administration under Article 5 and Article 10 of Law Number 30 of 2014. The absence of such formal legal parameters opens an overly broad window for public officials to interpret (vague norms). If not managed carefully, this interpretative space holds significant potential to be misused into arbitrary action or, conversely, to trigger a fear of innovation due to the shadow of policy criminalization. Therefore, the validity of discretion can no longer be measured solely by its conformity to written regulatory texts. Such validity must rely on substantial parameters, namely, alignment with the objectives of discretion and compliance with the general principles of good governance, particularly the principles of carefulness and non-misuse of authority.

To prevent the criminalization of policy innovation, the demarcation line between administrative error (maladministration) and corruption offenses must be drawn by proving the element of *mens rea*. State financial losses arising from discretionary decisions cannot be immediately qualified as corruption unless accompanied by evidence of the intention to enrich oneself, others, or corporations unlawfully (*opzet*). In this regard, the application of the principle of *ultimum remedium* becomes

necessary. Criminal law must be positioned as a last resort after administrative remedies have proven ineffective or inadequate. Procedural or substantial errors in the use of discretion conducted in good faith for the public interest must be resolved through administrative law instruments. Such resolution takes the form of administrative sanctions and compensation claims, rather than criminal prosecution, which may stifle public officials' initiative. Thus, *mens rea* serves as the primary filter to distinguish between officials who err in policy-making and "budgetary predators" who hide behind the cloak of discretion.

To ensure legal certainty and protection for public officials, including non-definitive officials in Regional-Owned Enterprises and village governments, a tiered, integrated reformulation of the discretion-testing mechanism is required. The testing of discretion validity must commence in the internal realm through the Government Internal Supervisory Apparatus, which is authorized to assess aspects of reasonableness and policy expediency, not merely formality. Suppose a dispute arises regarding the assessment results. In that case, the mechanism for testing abuse of authority in the State Administrative Court must serve as the primary channel before law enforcement officials intervene. In examining discretionary disputes, judges of the State Administrative Court should adopt the reasonableness test as practiced in Dutch administrative law. The objective is to assess whether the official's decision is substantially acceptable to common sense and proportional in addressing concrete problems. Only with this objective and tiered testing mechanism can discretion, *Freies Ermessen* be restored to its function as an instrument of people's welfare, while simultaneously maintaining state organizer accountability within the framework of good governance.

Based on these conclusions, it is suggested that legislators immediately realign the conflicting norms in the Government Administration Law to close the legal uncertainty loophole. For Law Enforcement Officials (Police, Prosecution, Corruption Eradication Commission), it is suggested to prioritize coordination with the Government Internal Supervisory Apparatus in handling public reports regarding alleged discretionary deviations. Furthermore, it is recommended to use investigative audit results and State Administrative Court decisions as the basis for a preliminary investigation to establish the existence of *mens rea*. Finally, government officials are advised to always document every stage of discretionary decision-making in an orderly and transparent manner. Officials are also advised to conduct intensive consultations with superiors or the Government Internal Supervisory Apparatus before establishing high-risk strategic policies to mitigate potential legal issues in the future.

## REFERENCES

Akhyar, A., Usman, U., Saifuddin, S., Sadhana, K., & Musriandi, R. (2023). Freies Ermessen in the Delegation of Authority from District Government to Village Government. *Jurnal Ilmiah Peuradeun, 11*(2), 615-632. https://doi.org/10.26811/peuradeun.v11i2.851

Asyikin, N. (2019). Freies Ermessen Sebagai Tindakan atau Keputusan Pemerintah Ditinjau dari Pengujiannya. *Diversi: Jurnal Hukum, 5*(2), 184-209. https://doi.org/10.32503/diversi.v5i2.555

Fasyehhudin, M. (2023). Freies Ermessen dalam Tindakan Nyata di Pemerintah Daerah. *Jurnal Ius Constituendum, 8*(1), 69-86. https://doi.org/10.26623/jic.v8i1.6250

Fikri, F., Poesoko, H., Zainuri, Z., & Ali, M. K. (2023). Freies Ermessen Mewujudkan Good Governance Melalui Konsep Welfare State dalam Persepektif Hukum Administrasi Negara. *Prosiding Seminar Nasional Penelitian dan Pengabdian kepada Masyarakat: Sosial Humaniora, Pertanian, Kesehatan dan Teknologi, 2*(1), 397-403. https://doi.org/10.24929/snapp.v2i1.3162

Fitri, R. K., Pertiwi, D., Maghfira, S., & Alfiander, D. (2023). Penyalahgunaan Kewenangan oleh Pejabat Pemerintah dalam Pasal 10 Ayat (1) Huruf E Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan. *Jurnal Integrasi Ilmu Syariah (Jisrah), 4*(1), 65-74. https://doi.org/10.31958/jisrah.v4i1.9352

Government Regulation in Lieu of Law of the Republic of Indonesia Number 2 of 2022 on Job Creation (State Gazette of the Republic of Indonesia of 2022 Number 238, Supplement to the State Gazette of the Republic of Indonesia Number 6841). https://peraturan.go.id/id/perppu-no-2-tahun-2022

Irwansyah. (2020). *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*. Mirra Buana Media.

Lathifah, H., & Frinaldi, A. (2024). Analisis Mengenai Diskresi dengan Freies Ermessen. *Al-Dyas: Jurnal Inovasi dan Pengabdian kepada Masyarakat, 3*(2), 581-589. https://doi.org/10.58578/aldyas.v3i2.2852

Latif, A., & Chariansyah, H. (2024). Discretionary Policy (Freies Ermessen) of State Administrative Bodies or Officials in Government Administrative Law. *Journal of Social Research, 3*(2), 473-486. https://doi.org/10.55324/josr.v3i3.1945

Law of the Republic of Indonesia Number 31 of 1999 on the Eradication of Corruption Crimes (State Gazette of the Republic of Indonesia of 1999 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 3874). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/432

Law of the Republic of Indonesia Number 20 of 2001 on Amendment to Law Number 31 of 1999 on the Eradication of Corruption Crimes (State Gazette of the Republic of Indonesia of 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/351

Law of the Republic of Indonesia Number 30 of 2014 on Government Administration (State Gazette of the Republic of Indonesia of 2014 Number 292, Supplement to the State Gazette of the Republic of Indonesia Number 5601). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/1612

Law of the Republic of Indonesia Number 6 of 2023 on Enactment of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation Into Law (State Gazette of the Republic of Indonesia of 2023 Number 41, Supplement to the State Gazette of the Republic of Indonesia Number 6856). https://www.dpr.go.id/dokumen/jdih/undang-undang/detail/1825

Muzakkir, A. K., & Husen, L. O. (2025). The Legal Status and Authority of the Interim President Director of the Regional Public Corporation for Water Utility of Makassar City. *Al-Ishlah: Jurnal Ilmiah Hukum, 28*(1), 62-81. https://doi.org/10.56087/aijih.v28i1.1028

Najicha, F. U. (2021). Application of General Principles of Good Governance in Law No. 30 of 2014 as Guidelines in Implementing the Authority of Discretion by Government Officials in Indonesia. *Veteran Justice Journal, 3*(1), 36-43. https://doi.org/10.33005/vjj.v3i1.33

Pietersz, J. J. (2024). Rekonseptualisasi Penyalahgunaan Wewenang dalam Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan. *Prosiding Konferensi Nasional Asosiasi Pengajar Hukum Tata Negara dan Hukum Administrasi Negara, 2*(1), 411-430. https://doi.org/10.55292/maarpt29

Purnamawati, E., & Hijawati, H. (2022). Freies Ermessen dalam Pemerintahan Indonesia. *Solusi, 20*(1), 98-109. https://doi.org/10.36546/solusi.v20i1.529

Purwanto, D., Nasihuddin, A. A., & Kunarti, S. (2025). The Concept and Legal Politics of Discretion as Freedom of Action for Government Officials. *Jurnal Hukum Samudra Keadilan, 19*(2), 195-212. https://doi.org/10.33059/jhsk.v19i2.9360

Qamar, N., & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. CV. Social Politic Genius (SIGn). https://books.google.co.id/books?id=TAQHEAAAQBAJ

Rakia, A. S. R. S. (2021). Perkembangan dan Urgensi Instrumen Hukum Administrasi Pasca Penetapan Undang-Undang Nomor 2 Tahun 2020 pada Masa Pandemi Covid-19. *SIGn Jurnal Hukum, 2*(2), 157-173. https://doi.org/10.37276/sjh.v2i2.106

Ridwan. (2014). *Diskresi dan Tanggung Jawab Pemerintah*. UII Press.

Sampara, S., & Husen, L. O. (2016). *Metode Penelitian Hukum*. Kretakupa Print.

Sianturi, R. H. (2025). Legal Analysis of the Application of Ultimum Remedium towards State Officials' Discretion Causing State Financial Losses. *Priviet Social Sciences Journal, 5*(9), 27-33. https://doi.org/10.55942/pssj.v5i9.667

Suparto, S., Adinda, F. A., Esanov, A. E., & Normurotovna, Z. E. (2024). Administrative Discretion in Indonesia & Netherland Administrative Court: Authorities and Regulations. *Journal of Human Rights, Culture and Legal System, 4*(1), 75-100. https://doi.org/10.53955/jhcls.v4i1.189

Sutopo, R. B. P., & Panjaitan, H. (2025). A Juridical Demarcation: Reconstructing the Proof of Mens Rea to Differentiate Policy and Corruption by Public Officials. *SIGn Jurnal Hukum, 7*(2), 765-784. https://doi.org/10.37276/sjh.v7i2.525

Widhyasari, A. A. A. A. (2020). Pembatalan Peraturan Kebijaksanaan yang Dibuat Berdasarkan Asas Freies Ermessen. *Aktual Justice, 5*(2), 146-161. https://doi.org/10.47329/aktualjustice.v5i2.550