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Some Commentary Notes On Law Number 30 Of 2014 Concerning Government Administration

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Informasi Artikel	Abstrak
Histori Artikel: Diterima: 07-10-2024 Direvisi : 12-12-2024 Disetujui : 27-12-2024 Diterbitkan : 31-12-2024	<p>Kedudukan hukum administrasi di Indonesia tidak memiliki tempat khusus dibanding dengan ilmu hukum bidang lain. Hal ini menjadi masalah penting, bahwa hukum administrasi tidak memiliki kodifikasi baku hukum administrasi umum, layaknya hukum pidana yang memiliki KUHP dan hukum perdata yang memiliki KUHPerdata. Beberapa dekade terakhir sangat menarik mengenai kontras pada UU No. 30 Tahun 2014 tentang Administrasi Pemerintahan yang diyakini sebagai hukum materil pada Peradilan Tata Usaha Negara (PTUN). Perdebatan mengenai aturan ini terkait dengan adanya konflik norma antara pasal dengan pasal lain didalamnya, Menurut penulis bahwa aturan tersebut merupakan wujud konsep manajemen pemerintahan dan bukan pada aturan hukum umum administrasi. Sehingga penelitian ini perlu dikaji melalui metode penelitian hukum normatif dengan pendekatan undang-undang dan pendekatan konseptual. Dengan hasil penelitian menunjukkan yakni terdapat konflik norma dan konflik aturan. Oleh sebab itu sangat tidak layak aturan ini menjadi hukum materiil mengenai PTUN.</p>
Kata Kunci: Keputusan Tata Usaha Negara, Peradilan Tata Usaha Negara, Administrasi Pemerintahan	
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Article Info	Abstract
Article History: Received : 07-10-2024 Revised : 12-12-2024 Accepted : 27-12-2024 Published : 31-12-2024	<p><i>The position of administrative law in Indonesia does not have a special place compared to other fields of law. This is an important problem, that administrative law does not have a standard codification of general administrative law, like criminal law which has the Criminal Code and civil law which has the Civil Code. The last few decades have been very interesting regarding the contrast in Law Number 30 of 2014 concerning Government Administration which is believed to be material law in the State Administrative Court. The debate about this rule is related to the conflict of norms between articles and other articles in it, according to the author that the rule is a manifestation of the concept of government management and not the rules of general administrative law.</i></p>
Keywords: State Administrative Decisions; State Administrative Courts;	

Government
Administration.

So this research needs to be studied through normative legal research methods with a statutory approach and conceptual approach. The results show that there are conflicts of norms and conflicts of rules. Therefore, it is not feasible for this rule to become material law regarding the State Administrative Court.

INTRODUCTION

Administrative law can be defined as the legal control of government. Narrowly defined, administrative law consists of legal principles that define the powers and structure of administrative bodies, determine the procedures to be followed by those bodies that determine the validity of administrative decisions and determine the review role of courts and other government bodies in relation to administration.¹ Administrative action is one way of doing this - internal protection of the government for citizens as well as internal control of administrative agencies. What is meant by internal control is supervision carried out by positions in the government itself, not by officials outside the government.² According to Van Vollenhoven, in the broadest sense, government is the formation of regulations, the exercise of functions, the judiciary and the police.³

In the context of Law Number 30 of 2014 which is believed to be the material law of the State Administrative Court or hereinafter abbreviated as PTUN. So according to Philipus M. Hadjon that if the Netherlands has *Algemene wet Bestuursrecht* (AWB) which is the starting point for administrative law, while Law No. 30 of 2014 is government administration, so this rule is conceptually a confusing administrative law. On this basis, according to Philipus M. Hadjon, the general explanation of Law No. 30 of 2014 which states that this regulation is the material law of the PTUN system is a big question mark.⁴ The situation and facts above actually illustrate the existence of an antinomy of conflicting norms that continues in every norm created in the form of legislation, the content material of which does not escape from the antinomy of opposition.⁵

¹ Stephen G. Breyer, *Administrative Law and Regulatory Policy* (Massachusetts: Aspen Publishing, 2022). [1]

² Muhammad Adiguna Bimasakti, "Dispute Settlement in the Ombudsman and the Court of Law Regarding Compensation Public Service Dispute," *Jurnal Hukum Dan Peradilan*, Vol . 10, no. 2 (2021): [281].

³ Van Vollenhoven, *Staatsrecht Overzee* (Laiden: Stenfert Kroese, 1934). [104]

⁴ Philipus M. Hadjon, "Peradilan Tata Usaha Negara Dalam Konteks Undang-Undang No. 30 TH. 2014 Tentang Administasi Pemerintahan," *Jurnal Hukum Dan Peradilan*, Vol . 4, no. 1 (2015). [53].

⁵ Zainal Arifin Mochtar, "Antinomy in Indonesian Legislation," *Hasanuddin Law Review*, Vol . 1, no. 3 (2015): [318–319].

On the other hand, the antinomy in Law No. 30 of 2014 is conflictual between the government's freedom to carry out its functions and responsibility to protect the rights of citizens.⁶ So that Law No. 30 of 2014 is based on the concept of paradigma change through public services so that the government acts quickly as a public service task.⁷ So that the concept of administrative law approach has 3 (three), that is:

1. Approach to power;
2. Approach to human rights;
3. Approach to functionaries.

Where the approach cannot be separated in the concept of administrative law, the power approach which is the domain of the government, the human rights approach that how broad the protection and fulfillment of the government in this aspect and the functionary approach regarding the implementation of government functions as an administrative body.

Law No. 30 of 2014 is a regulation that contains the rights and obligations of government administrators, which can be said to be things that must be implemented, can be implemented, and prohibited to be implemented by government officials.⁸ So it can be concluded that this rule is an object of government management, not administrative law. Because in the perspective of Law No. 30 of 2014, it should be a form of application of 2 (two) theories, namely: green light theory, that an administrative regulation provides facilities for state administrative law. And red light theory, government power must have limits.

METHOD

Legal science is a *sui generis* science, which means that legal science is a separate science so that it has distinctive characteristics in its research object. This legal research is certainly normative research that examines existing legal norms, with the aim of finding the truth of coherence. This research uses methods:

⁶ Muhammad Aziz Zaelani and I Gusti Ketut Ayu Rachmi Handayani, "General Principles of Good Government Based on Pancasila as the Basis for the Use of Discretion," *Ius Quia Iustum Jurnal Hukum*, Vol . 3, no. 26 (2019): [459].

⁷ Rusnan, "Konsep Negara Hukum Dalam Hubungan Kekuasaan Freiss Ermerssen Dalam Welfare State," *Jurnal Ius*, Vol .2, no. 4 (2014): [3].

⁸ Francisca Romana Harjiyatni and Suswato, "Implikasi Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan Terhadap Fungsi Peradilan Tata Usaha Negara," *Jurnal Ius Quia Iustum*, Vol . 24, no. 4 (2017): [602].

1. statutory approach (statute approach) that this research establishes a *lex specialis* and *lex generalis* position.⁹
2. conceptual approach (conceptual approach) that this research does not rely on existing rules, it is also done because there is no or may not be legislation on the problem at hand.¹⁰

According to Dworkin, legal research is a study to investigate the relationship between a set of doctrines and other doctrines, to see the order made in the world of precedents (common law) with an isolated status.¹¹

DISCUSSION AND ANALYSIS

Authority Issues and Disputes

The definition of authority is based on Article 1 point 6 of Law No. 30 of 2014 which states that: *"Government Authority, hereinafter referred to as authority, is the power of Government Agencies and/or Officials or other state administrators to act in the realm of public law"*. When viewed in Article 8 of Law No. 30 of 2014, there is a mix-up between authority and authority. According to Philipus M. Hadjon, the term authority is used in the form of a noun, so it is often confused with the term authority. The terms authority and authority are often aligned in the Dutch legal term *"bevoegheid"*. Therefore, the authority has 3 (three) important components, that is:¹²

1. Influence;
2. Legal basis; and
3. Legal conformity.

Authority is the legality of the state administrative body that carries out administrative functions, so that the jurisdiction of an institution is the scope of its authority because the validity or invalidity of the decision depends on the authority of the administrative official.¹³ Because if the regulation is not correct, the results will also not be correct, therefore authority is a form of the

⁹ Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group, Jakarta, 2005). [140-141].

¹⁰ Marzuki. [170].

¹¹ Ronald Dworkin, 'Legal Research' (1973) 102 the MIT Press on behalf of American Academy of Art & Sciences [53].

¹² Philipus M. Hadjon, "Tentang Kewenangan," *Yuridika*, Vol . 7, no. 5-6 (1997).

¹³ James A. Grant, "Reason and Authority in Administrative Law," *Cambridge Law Journal*, Vol . 76, no. 3 (2017): [517].

principle of government responsibility both juridically and politically. Meanwhile, authority is power in a formal sense, and simply put, authority is a study of administrative law.¹⁴

Article 8 paragraph (2) of Law No. 30 of 2014 provides the basis for an authority, that is:

- a. Legislation; and
- b. General Principles of Good Governance (AUPB).

Confusion regarding AUPB which is a principle, but is normed. Because principles are not norms, and regulations should formulate norms not principles. Similarly, Article 10 contains AUPB, but becomes ambiguous in Article 10 paragraph (2) which states: *"Other general principles outside the AUPB as referred to in paragraph (1) can be applied as long as they are used as the basis for the judge's judgment contained in a court decision with permanent legal force"*.

AUPB is commonly applied in countries that claim to be a state of law and is usually found in the understanding of a welfare state.¹⁵ However, it is strange if the application of AUPB is based on a court decision. In the explanation of Article 10 paragraph (2), other general principles outside the AUPB are general principles of good governance derived from unappealed district court decisions, or unassailed high court decisions or Supreme Court decisions. Article 10 paragraph (2) certainly contradicts Article 1 point 2 of Law No. 13 of 2022 on the Establishment of Legislation, that: *"Legislation is a written regulation that **contains legal norms** that are binding in general and is formed or stipulated by state institutions or authorized officials through procedures stipulated in the Legislation"*. Based on the submission of experts, namely Wahyudi Kumorotomo that, in the Government Administration Bill which only contains general provisions in the administration of government and not substantial management of services, if it is only to implement AUPB, is it necessary to form this law?¹⁶

Regarding this authority, it is regulated regarding the source of authority obtained through attribution, delegation and mandate. Where usually attribution is very relevant to positions through orders from the 1945 Constitution and laws, as well as delegation which must be preceded by attribution authority, so the conclusion is that if there is no attribution then there is no delegation.¹⁷

¹⁴ F. A. M. Stroink, *Inleiding in Het Staats-En Administratief Recht* (Samson H.D Tjeenk Wilink: Alphen aan den Rijn, 1985). [26]

¹⁵ Marojahan JS Panjaitan, "Penyelesaian Penyalahgunaan Wewenang Yang Menimbulkan Kerugian Negara Menurut Hukum Administrasi Pemerintahan," *Jurnal Ius Quia Iustum*, Vol . 24, no. 3 (2017): [436].

¹⁶ DPR RI, "Cluster Pendapat Pakar Tentang RUU Administrasi Pemerintahan," 2014.

¹⁷ Sri Nur Hari Susanto, "Methods of Acquisition and Boundaries of Government Authority," *Administrative Law & Governance Journal*, Vol . 3, no. 3 (2020): [435].

Whereas in the mandate which is interpreted as being ordered, so that the juridical responsibility remains with the mandate giver,¹⁸ while the delegation is the transfer of responsibility and liability to the one receiving the delegation. There is a similarity between mandates and official assistance regulated in Article 1 point (10) of this regulation, which states: *"Official Assistance is cooperation between Government Agencies and/or Officials for the smooth running of Government Administration services in a government agency in need."* The big question is, what is the difference between a mandate and official assistance? Even though both have the same purpose in carrying out administrative functions. And regarding responsibility and accountability, it is still held by the Agency / Official who needs official assistance based on Article 37 of Law No. 30 of 2014.

Then on the concept of dispute resolution stipulated in Article 1 point (13) that: there is a claim of authority exercised by 2 (two) or more officials as a result of overlapping or unclear authority regarding the function of government affairs. If based on Article 16, there are several components of authority dispute resolution, that is:

- 1) Settlement of authority disputes through superior officials through coordination to produce an agreement;
- 2) Settlement of authority disputes that have resulted in an agreement is binding on the parties, as long as it does not affect state finances, assets, and the environment;
- 3) The settlement of authority disputes does not result in an agreement, then at the last level is decided by the President;
- 4) Settlement of conflict of authority involving state institutions, then resolved through the Constitutional Court (MK); and
- 5) If the authority dispute causes losses to state finances, state assets and also the environment, it is resolved based on statutory provisions.

This is ambiguous in the resolution of disputes over the authority of state institutions through the Constitutional Court in Article 16 paragraph (5), why? Because if reviewed based on Article 24C paragraph (1) of the 1945 Constitution which states that the Constitutional Court has the authority to hear at the first and last level whose decisions are final to test to decide disputes over the authority of state institutions whose authority is granted by the 1945 Constitution. Then

¹⁸ Josef M. Monteiro, "Tanggung Jawab Presiden Atas Kebijakan Menteri Yang Menimbulkan Korupsi Berdasarkan Sistem Presidensial Dan Teori Kewenangan," *Kertha Patrika*, Vol . 39, no. 2 (2017): [84].

specifically regulated through Article 1 number (5) jo Article 2 paragraph (1) and Constitutional Court Regulation Number 8 of 2006 concerning Guidelines for Procedures in Disputes over the Constitutional Authority of State Institutions explains that: state institutions are state institutions whose authority derives from the 1945 Constitution. The state institutions referred to include;

- a) DPR;
- b) DPD;
- c) President;
- d) BPK;
- e) Local Government; and

Other state institutions whose source of authority is based on the 1945 Constitution. In contrast to the view by Jimly Asshiddiqie who stated that, there are state institutions formed through the 1945 Constitution, and some are formed based on laws and even some are formed through presidential decrees such as the Ombudsman. Because on the basis of state institutions there are those that are specifically mentioned by the 1945 Constitution and there are also state institutions that have the same constitutional importance mentioned in the 1945 Constitution.¹⁹ Other state institutions are formed based on the mandate of the law or lower regulations, such as government regulations, presidential regulations, even presidential decrees, for example the Indonesian Child Protection Commission (KPAI) was formed based on Presidential Decree No. 77 of 2003, the Ombudsman Commission was formed based on Presidential Decree No. 44 of 2000,²⁰ and so on.

So what state institutions are meant by Article 16 paragraph (5) of Law No. 30 of 2014? Meanwhile, in the context of the Constitutional Court's authority to resolve disputes between institutions, there are 2 (two) concepts, that is: state institutions and constitutional authority.²¹ Because it is impossible for disputes over state institutions established by law or presidential decree to be resolved through the Constitutional Court. According to Saldi Isra, the Constitutional Court is the authority of constitutional authority.²² Meanwhile, Mahfud MD's view states that the

¹⁹ Jimly Asshiddiqie, "Focus Group Discussion (FGD) Pada 31 Oktober 2023 Mengenai Konsep, Batasan, Dan Kriteria Lembaga Negara Yang Bersifat Constitutional Importance," 2023.

²⁰ Jimly Asshiddiqie, *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Sinar Grafika, 2022). [216-217]

²¹ Anna Triningsih & Nuzul Qur'aini Mardiyah, "Interpretasi Lembaga Negara Dalam Penyelesaian Sengketa Kewenangan Lembaga Negara," *Jurnal Konstitusi*, Vol . 14, no. 4 (2017): [782].

²² Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi," *Jurnal Hukum Dan Peradilan*, Vol . 4, no. 1 (2015): [28].

Constitutional Court is an absolute authority granted directly by the constitution in constitutional law cases.²³ Therefore, Law No.30 of 2014 is a form of administration not state administration. So according to Kranenburg and Vagting that constitutional law discusses the general structure of the state,²⁴ and according to Van Wijk that administrative law is a juridical instrument regarding government activities.²⁵

Furthermore, regarding the application of Article 16 paragraph (6) of Law No. 30 of 2014 which explains; "regarding disputes over authority that cause losses to state finances and assets and the environment are resolved in accordance with statutory provisions". Regarding the application of this article, there are no further rules regarding this matter. So if it is not possible to apply, then blank delegation should be avoided in the formation of laws and regulations. Blank delegation itself is defined as the existence of further rules governing the matter. According to Annex II of Law Number 12/2011 on the Formation of Legislation which states: "In the delegation of regulatory authority, there shall be no blank delegation". For example: further regulated through government regulations. As well as the above provisions which are a form of blank delegation. The absence of application of these rules, of course, results in the constraints of justice which efforts to realize it based on positive law to the ideals of law, according to Maria Farida Indarti, states that legal ideals are a construction of the goals of law to the ideals desired by society.²⁶

Government Action and Discretion Issues

Based on Article 1 point 8 of Law No. 30 of 2014, it explains that: government administration actions are actions of state administrative officials or other state administrators to do/not do a concrete action in the context of government administration. There are 2 (two) problems regarding this rule, that is:

1. Concrete actions; and
2. Other state officials.

²³ Moh Mahfud MD, "Titik Singgung Wewenang MA Dan MK," *Jurnal Hukum Dan Peradilan*, Vol . 4, no. 1 (2015): [13].

²⁴ R. Krenenburg, *Inleiding in Het Nederlands Administratief Recht* (Haarlem: Tjeenk Willink, 1941). [10]

²⁵ H.D. Van Wijk, *Hoofdstukken van Administratief Recht* (Utrecht: Uitgeverij Lemma BV, 1995). [41]

²⁶ Maria Farida Indarti, "Eksistensi Penjelasan Undang-Undang Dasar 1945 Sesudah Perubahan," *Postdoctoral Speech at the Faculty of Law, University of Indonesia*, 2019. [12]

In theory, administrative actions are general regulations or decrees that apply to an individual or group (legal entity).²⁷ Then also that, all forms of government administrative decisions and / or actions must be based on constitutional democracy which is a reflection of Pancasila as a state ideology. Decisions and/or actions against citizens must be in accordance with the provisions of laws and regulations and general principles of good governance.²⁸ Regarding concrete actions, this is ambiguous in the definition, which is certainly contrary to Article 87 letter a of the regulation which states: written stipulations that include factual actions. Theoretically, there are 2 (two) types of government actions:²⁹

- a. Legal actions (*rechts handeingen*); and
- b. Factual actions (*feitelijke handelingen*).

Regarding this factual action, there are several opinions, according to **Philipus M. Hadjon** that factual actions are material actions of state administrative bodies known as *feitelijke handelingen* or factual actions;³⁰ according to **Ridwan HR** that, real actions (*feitelijke handelingen*) are actions that have no relevance to the law and do not cause legal consequences;³¹ according to **Kuntjoro Purbopranoto**, that government action is based on facts;³² **Riawan Tjandra**, factual / material actions are actions taken by the government in order to serve the factual / material needs of citizens and are not intended to cause legal consequences.³³

Although factual actions do not cause legal consequences, in practice it is not easy to say that they are part of legal actions. Indeed, in the administrative law literature it is not easy to parameterize between factual actions and administrative actions.³⁴ Therefore, if this concrete action is the same as factual action, why should the terminology be different between the articles? If reviewed based on the Draft Bill No. 30 of 2014, Article 1 point 8 states that *Government Administration Action, hereinafter referred to as Action, is the attitude of Government Officials or*

²⁷ H.B. Jacobini, *An Introduction to Comparative Administrative Law* (New York: Oceana Publications INC, 1991). [75]

²⁸ *Loc.Cit*, Marojahan JS Panjaitan, [431]

²⁹ Bambang Arwanto, "Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah," *Yuridika*, Vol. 31, no. 3 (2016): [361].

³⁰ Philipus M.Hadjon et al., *Pengantar Hukum Administrasi Indonesia*, cet. IX (Yogyakarta: Gadjah Mada University Press, 2015). [170]

³¹ Ridwan HR, *Hukum Administrasi Negara (16th Printing)* (Depok: Rajawali Pers, 2020). [109]

³² Kuntjoro Purbopranoto, *Beberapa Catatan Hukum Tata Pemerintahan Dan Peradilan Administrasi Negara* (Bandung: Alumni, 1981). [44]

³³ Riawan Tjandra, *Hukum Administrai Negara*, (Jakarta: Sinar Grafika, 2018). [145]

³⁴ Enrico Simanjuntak, "Restatement Tentang Yurisdiksi Peradilan Mengadili Perbuatan Melawan Hukum Pemerintah," *Jurnal Masalah-Masalah Hukum*, Vol. 48, no. 1 (2019): [44].

*other state administrators to perform and/or not perform **factual actions** in the context of government administration.*³⁵ However, in its enactment, it uses the term concrete action which has become a mess in administrative law. Based on the Academic Paper of this Law that real action (factual action not concrete action) is an instrument aimed at the factual result of an action that has no legal effect.³⁶

Then regarding the term **other state administrators**, does it mean State-Owned Enterprises? Or a private company whose deed of establishment is issued by the government? Of course this is ambiguous and contradicts Article 1 point 10 and Article 1 point 12 of Law Number 51 of 2009 concerning State Administrative Courts, which simply explains that the defendant is a state administrative agency or official as a result of the issuance of a legal decision. This means that there are no concrete actions or factual actions that can be the object of a lawsuit at the PTUN. Regarding these other organizers, it has reaped controversy from scholars at the time of the bill on Law No. 30 of 2014, therefore Article 1 number 9 and Article 1 number 10 of Law No. 50 of 2009 should be amended.³⁷ If we review the agenda for the delivery of expert opinions regarding Law No. 30 of 2014, that according to Frenadin Adegustara that government administration lawsuits carried out by BUMN and Private Sector are not within the jurisdiction of administrative procedure law and therefore cannot be filed through the PTUN.³⁸

There are several contradictions regarding the interpretation of judges related to other organizers. If it is related to BUMN, that in the Constitutional Court Decision No. 55/PUU-XV/2017 in which the applicant is a retired BUMN employee, where the Constitutional Court in its ruling **cannot be accepted by the Petitioner** regarding the testing of Article 1 number 7, number 8, and number 9 of Law No. 50 of 2009. Meanwhile, the Bandung State Administrative Court Decision No. 74/G/2014/PTUNBDG granted the Plaintiff's claim in which the Plaintiff is PT Bajatra and the Defendant is the Executive Vice President of Logistics of PT Kereta Api Indonesia (Persero). Then in the Surabaya State Administrative Court Decision No. 29/G/2020/PTUN.SBY which rejected the Plaintiff's claim and the Defendant was PT. DOK and Surabaya Shipbuilding (Persero), in its legal consideration that the Defendant was not a state administrative body. It should be noted that, from the three decisions, there are various

³⁵ Academic Legal Texts No. 30 Year 2014

³⁶ Academic Paper Law No. 30 Year 2014 on Government Administration

³⁷ *Ibid*

³⁸ DPR RI, "Cluster of Expert Opinions on the Government Administration Bill," 2014. [3]

interpretations that SOEs are the object of PTUN disputes, resulting in a conflict of rules and the need for revisions related to Law No.30 of 2014. According to Philipus M. Hadjon, Law No. 30 of 2014 concerning PTUN is not based on a clear conceptual approach, so Law No. 30 of 2014 related to PTUN is very difficult to apply and also judicial practice because the concept is unclear and contradicts the concepts of administrative law.³⁹

Then regarding discretion is regulated in Article 175 number 2 of Law No. 6 of 2023 concerning Job Creation, explaining that the conditions for the use of discretion are:

- 1) In accordance with the purpose of discretion in Article 22 paragraph (2) of Law No. 30 of 2014 includes, launching government administration, filling legal vacuum, providing legal certainty and overcoming government stagnation in certain circumstances with the aim of benefit and public interest;
- 2) In accordance with AUPB;
- 3) It must be based on objective reasons;
- 4) There is no conflict of interest; and
- 5) Carried out in good faith.

Theoretically, the concept of authority in administrative law is bound authority in the Dutch term *gebonden bevoegdheden*, and free authority or *vrije bevoegdheid*. According to Indroharto, the authority of public officials is divided into:⁴⁰

- a) Facultative authority, authority based on regulatory norms to determine when and under what circumstances the authority can be used;
- b) The authority is bound (*geboden*), the authority that has been regulated by provisions for any action taken;
- c) Discretionary authority, authority based on regulations that are not binding, so that officials are free to determine the content of their actions based on their interpretation.

This discretion is a free authority, so if it is drawn back to its terminology that *discretion* (English), *discre'tion* (French), *freies ermessen* (German). In the French term *discre'tion* which means that a

³⁹ *Loc.Cit*, Philipus M. Hadjon, "Peradilan Tata Usaha Negara Dalam Konteks Undang-Undang No. 30 TH. 2014 Tentang Administrasi Pemerintahan.", [63]

⁴⁰ Indroharto, *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara Buku I* (Jakarta: Pustaka Sinar Harapan, 2000). [99-100]

discretion, discretion, prudence or in the adjective is *discre'tionnaire* which is interpreted as a surrender of discretion on the basis of freedom to determine.⁴¹

Article 1 point 9 of Law No.30 of 2014 explains that discretion is a decision / action determined or carried out by an official with the aim of solving concrete problems encountered in carrying out government functions in the context of regulations that provide options, do not regulate, are incomplete or unclear, and also government stagnation. If based on the Constitutional Court Decision No. 25 / PUU-XIV / 2016 regarding the testing of Article 1 paragraph (2) and Article 3 of the Anti-Corruption Law, which if reviewed based on the ruling that the Constitutional Court concluded that every government official in acting uses discretion, of course there is no problem anymore. The legal effect in practice is that law enforcement officials must be able to prove the existence of alleged real state losses before acting to investigate corruption cases.⁴² Another example, regarding the use of discretion, is Bantul Regent Regulation No. 11B of 2006 and No. 7 of 2007 which contradicts Bantul Regency Regional Regulation No. 7 of 2002.⁴³

Discretion should be a free policy, but here there are conditions that must be met. According to Paulus Efendi Lotulung, discretion is based on 2 (two) things, that is:⁴⁴

1. Discretion involves abuse of power;
2. Discretion is arbitrary.

The application of discretion which is a policy or freedom of action, has two patterns, including: first, freedom of action to judge objectively, for example the norms in the legislation are vague, namely the formulation of behavior for good state servants; and second, freedom of action to judge subjectively, for example giving authority to officials to determine themselves in terms of solving the problems faced.⁴⁵ Indeed, in this article, discretion is no longer an inherent right in the government, because it is limited in its use to carry out the validity of superior officials. So that this hinders discretion as a rule of freedom of action.⁴⁶

⁴¹ Nehru Asyikin, "Tanggung Jawab Jabatan Dan Tanggung Jawab Pribadi Dalam Penggunaan Diskresi," *Jurnal Hukum & Pembangunan* 50, no. 3 (2020): [638].

⁴² Zaki Ulya, "Pertanggungjawaban Pejabat Pemerintahan Dalam Menetapkan Diskresi (Studi Terhadap Putusan Mahkamah Konstitusi Nomor 25/PUU-XIV/2016)," *Jurnal Ius Quia Iustum* 24, no. 3 (2017): 415.

⁴³ Ishviati Joenaini Koenti, "Diskresi Dalam Penanggulangan Bencana Di DIY Dengan Paradigma Kontinjensi," *Jurnal Ius Quia Iustum* 23, no. 3 (2016): [470].

⁴⁴ Academic Paper on Government Administration Bill, [54]

⁴⁵ *Loc. Cit*, Muhammad Aziz Zaelani and i Gusti Ketut Ayu Rachmi Handayani, [462]

⁴⁶ *Ibid*

The limits of discretion will be appropriate to use the concept explained by Sjahran Basah, that the form of responsibility that contains the limits of obedience to the principle or called obedience, namely the upper limit and lower limit.⁴⁷ The government's freedom to act based on discretion, "for the sake of" the public interest, then this brings a new paradigm of freedom that is significantly limited.⁴⁸ This limitation is certainly guided by the principle of not abusing authority and the principle of public interest. The public interest aspect in Law No. 30 of 2014 contains elements:

- a. Promote public welfare and benefit;
- b. By being aspirational, accommodating, selective, and non-discriminatory.

Then if reviewed in Article 58 of Law No. 23 of 2014 concerning Regional Government which states the principle of public interest, it has the same elements if studied.⁴⁹

The importance of discretion in the aspects of the life of the nation and state, especially in filling the void of rules, as well as flexing rules that are rigid and out of date and even adjusting to the current context that is better and more beneficial (*doelmatigheid*) for the public interest.⁵⁰ So that in the concept of administrative law, actions outside the provisions can be justified, namely the principle of legality at the operational stage can be carried out dynamically, effectively and efficiently.⁵¹ In the perspective of administrative law, the interpretation of discretion in the form of decisions and actions is an exception to the principle of legality, but is still guided by the predetermined authority. Even though the authority in question is multi-interpreted, or under certain conditions or urgent, the government is obliged to provide solutions to the problems faced. Meanwhile, the criteria for discretion are generally characterized by the birth of new laws or new circumstances, such as: forming or dissolving institutions or civil legal entities, in the form of orders, can be beneficial (positive) or detrimental (negative) to related parties, and the actions taken are the duties and obligations of their authority.⁵²

⁴⁷ Sjahran Basah, *Perlindungan Hukum Terhadap Sikap Tindakan Administrasi Negara* (Bandung: Alumni, 1992). [3]

⁴⁸ Rifqi Ridlo Phahlevy & Aidul Fitriaciada Azhari, "Pergeseran Paradigma Peradilan Tata Usaha Negara Di Indonesia Dan Belanda," *Jurnal Arena Hukum*, Vol. 12, no. 3 (2019): [580].

⁴⁹ I Gusti Ayu Apsari Hadi, "Pertanggungjawaban Pejabat Pemerintahan Dalam Tindakan Diskresi Pasca Berlakunya Undang-Undang No. 30 Tahun 2014 Tentang Administrasi Pemerintahan," *Jurnal Ilmiah Fakultas Hukum Universitas Udayana*, Vol. 39, no. 1 (2017): [39].

⁵⁰ Agus Budi Susilo, "Makna Dan Kriteria Diskresi Keputusan Dan/Atau Tindakan Pejabat Publik Dalam Mewujudkan Pemerintahan Yang Baik," *Jurnal Hukum Dan Peradilan*, Vol. 4, no. 1 (2015): [134].

⁵¹ *Ibid*

⁵² *Ibid*, [151]

Article 1 Point 9 which regulates discretion to be used when the substance of laws and regulations provides options, does not regulate, is incomplete or unclear, and/or government stagnation. This means that KTUN can be used to implement the provisions of laws and regulations, AUPB, the existence of options provided by law, or the existence of unclear substance in laws and regulations. One of the characteristics of choice in laws addressed to government officials is the use of the word "may" in the formulation of norms. These characteristics have been confirmed in the Annex to Law No. 12 of 2011 on the Formation of Laws Delegation of authority to government officials to form Administrative Decrees is characterized by the formulation of the norm of authority "determined by".⁵³

The Problem of State Administrative Decisions (KTUN) and the Principle of Positive Fiction

KTUN in its definition in Article 1 point 7 of Law No. 30 of 2014 explains that KTUN is a written decision issued by a state administrative agency/official in the administration of government. The concept of KTUN is expanded through Article 87 of this Law so as to expand the competence of PTUN and also creates a new construction of the elements contained in KTUN as an object of dispute at PTUN.⁵⁴ There are at least 2 (two) reasons for the object of state administrative disputes after this Law, that is:⁵⁵

1. KTUN issued by a TUN official or body; and
2. Performing or not performing factual actions by government officials or other state administrators.

However, this is contrary to Article 47 jo. Article 1 point 10 of Law No. 51/2009, which, if understood, states that one of the competencies of the Administrative Court is the effect of the issuance of a KTUN. If interpreted *an sich*, it is as if the government is actively acting (commission) to issue a KTUN, but it turns out that there are KTUN issued because the government does nothing or is passive (omission).⁵⁶ The elements of a KTUN in Article 1 number 9 of Law No. 50 of 2009 are:

⁵³ Victor Imanuel W. Nalle, "The Scope of Discretion in Government Administration Law, Constitutional or Unconstitutional?," *Hasanuddin Law Review*, Vol 4, no. 1 (2018): [5].

⁵⁴ Dola Riza, "Keputusan Tata Usaha Negara Menurut Undang-Undang Peradilan Tata Usaha Negara Dan Undang-Undang Administrasi Pemerintahan," *Jurnal Bina Mulia Hukum*, Vol. 3, no. 1 (2018): [88].

⁵⁵ *Ibid*

⁵⁶ Bagus Oktafian Abrianto, et-al, "Problematisasi Keputusan Tata Usaha Negara Yang Bersifat Fiktif Positif Setelah Undang-Undang Nomor 11 Tahun 2020," *Jurnal Arena Hukum*, Vol. 16, no. 3 (2023): [534].

- a. Written stipulation;
- b. By a state administrative agency/official;
- c. Administrative legal action;
- d. Concrete, individualized;
- e. Final;
- f. Legal consequences for citizens or civil legal entities.

The nomenclature that can be used in the use of policies is KTUN and factual government actions. When referring to the definition of KTUN in Law No. 30 of 2014 which expands the definition of KTUN in Law No. 51 of 2009, it can be concluded that the use of KTUN as an instrument of discretion is contrary to the nature of discretion. Article 87 of Law No. 30 of 2014 stipulates that the KTUN in Law 51 of 2009 must be interpreted:⁵⁷

- a. A written stipulation that also includes factual actions;
- b. Decisions of state administrative agencies/officials within the executive, legislative, judicial, and other state administrators;
- c. Based on statutory provisions and AUPB;
- d. Final in the broadest sense;
- e. Decisions that have the potential to cause legal consequences; and
- f. Decisions that apply to the citizens of the community.

The concept in **Article 87 letter a** which reaps contradictions regarding the concept of administrative law, according to Philipus M. Hadjon, so that Article 87 letter a of Law No. 30 of 2014 is not a *contradictio in termino* (it would not be the same if comparing a goat with a cat).⁵⁸ The question is whether the provisions in Article 87 letter a are the absolute competence of the PTUN based on Article 1 number 10 of Law No. 51/2009 expanded? If so, then what should be changed is the provisions of Article 1 number 10 of Law No. 51/2009. So is it appropriate to expand the absolute competence of the PTUN only with the transitional provisions of Law No. 30 of 2014 and not through the PTUN Law itself? And does the principle of *contarius actus* no longer apply?.⁵⁹ That the location of Article 87 lies in the transitional provisions that expand the meaning of KTUN in Law No. 50 of 2009. Therefore, State Administrative Court decisions that test the

⁵⁷ *Loc.Cit*, Victor Imanuel, [4]

⁵⁸ *Loc.Cit*, Philipus M. Hadjon, "Peradilan Tata Usaha Negara Dalam Konteks Undang-Undang No. 30 TH. 2014 Tentang Administasi Pemerintahan.", [54]

⁵⁹ *Ibid*

validity of a State Administrative Official's product in the form of a KTUN often have to be in the dialectic between justice and legal certainty.⁶⁰ The fallacy of Article 87 letter (a) of Law No. 30 of 2014, according to Enrico Simanjuntak, is that it equates administrative law actions with non-law actions of written determinations, including factual actions.⁶¹

In letter b, it gives space to the meaning of government broadly, but the question is what is said to be a legal action and factual action in the legislative and executive fields, then in **letter c** that, What is the purpose of this provision? AUPB is one of the parameters of legality. So the phrase applicable laws and regulations in Article 1 number 9 of Law No. 51/2009 is appropriate and redundant plus AUPB.⁶² **Letter d** raises the question of final in a broad sense, of course there is the intention of final in a narrow sense. In the explanation of Article 87 letter d, it is stated that final in a broad sense includes decisions that are taken over by the superior authorized official. And who is authorized to be responsible for decisions that are taken over? This is certainly difficult to understand. Then in **letter e** regarding decisions that have the potential to cause legal consequences, isn't it that decisions are consumptive and declarative. And theoretically both have legal consequences. Legal consequences are the emergence of legal relations, that's the existence of new rights and obligations and the elimination of rights and obligations. In **letter f**, to date there is no example of what is meant by a decision that is publicly applicable. Theoretically, the KTUN is addressed to a specified object.

According to Article 54 (1) of Law No. 30 of 2014, a KTUN is constitutive and declarative in nature. In the explanation of the article, what is meant by constitutive is an independent KTUN by a government official and declarative is a KTUN that is ratified after going through a discussion process at the level of the government official who made the constitutive decision. Of course this is wrong, theoretically a constitutive decree is one that creates a new legal situation. For example: issuance of a business license, or revocation of a business license. Meanwhile, a declarative KTUN confirms a pre-existing legal situation, for example: the issuance of a birth certificate. Then in Article 54 paragraph (2) of the AP Law, declarative decisions become the responsibility of Government Officials who make constitutive decisions. This is certainly problematic, because it

⁶⁰ Riawan Tjandra, "Dinamika Keadilan Dan Kepastian Hukum Dalam Peradilan Tata Usaha Negara," *Jurnal Mimbar Hukum* edisi khus (2011): 7.

⁶¹ *Loc. Cit*, Enrico Simanjuntak, [44]

⁶² *Loc. Cit*, Philipus M. Hadjon, "Peradilan Tata Usaha Negara Dalam Konteks Undang-Undang No. 30 TH. 2014 Tentang Administasi Pemerintahan.", [55]

is not in accordance with the principle of authority, namely geen verantwoordelijkheid zonder bevoegdheid (no responsibility without authority). This means that whoever is authorized to determine is responsible. Furthermore, Article 7 paragraph (2) letter f explains that state administrative officials are obliged to provide opportunities for citizens to have their opinions heard before making decisions/actions. And here, it raises the question that an obligation will have consequences if it does not carry out the obligation, therefore, is it void for a KTUN that does not involve the community?.

In the study of positive fictitious and negative fictitious KTUN, there is certainly a paradigm shift, if reviewed again that Article 3 of Law No. 51 of 2009 states that the legal effect of silence (omission) on the application for KTUN is that the application is considered rejected (negative fictitious).⁶³ Article 53 paragraph (3) of Law No. 30 of 2014 which states that if within the time limit as stipulated in paragraph (2), the Government Official does not determine and/or carry out a decision and/or action, then the request is considered granted. In this case, it can be interpreted that what used to be "silence means refusal" or also called negative fictitious, has changed to "silence means agreement" or also called positive fictitious.⁶⁴

The change from negative fictitious to positive fictitious is intended to optimize the basis of community service and government implementation based on AUPB. The *ratio legis* of the change from negative fictitious to positive fictitious is that the negligence of the government is the fault of the government itself, so it must not harm the community. Therefore, the government's silence actually brings legal consequences to the acceptance of the application submitted by the community.⁶⁵ Therefore, the amendment to Article 53 of the AP Law in Article 175 number 7 of the Job Creation Law removes the authority of the Administrative Court in the context of positive fictitious applications because it is assumed that the follow-up to positive fictitious decisions is regulated by presidential regulation. However, the fact is that until now there are many fictitious positive cases that are smuggled into factual action disputes at the State Administrative Court.

Based on the provisions of Article 97 paragraph (9) letter c of Law No. 5 of 1986, the type of case disputed is in the form of a lawsuit, even though the State Administrative Dispute arises as

⁶³ Azza Azka Norra, "Pertentangan Norma Fiktif Negatif Dan Fiktif Positif Serta Kontekstualisasinya Menurut Undang-Undang Administrasi Pemerintahan," *Jurnal Hukum Peratun*, Vol. 3, no. 2 (2020): [144].

⁶⁴ Ahmad, "Konsep Fiktif Positif: Penerapannya Di Pengadilan Tata Usaha Negara," *Jurnal Hukum Replik*, Vol. 5, no. 2 (2017): [148].

⁶⁵ *Loc. Cit*, Bagus Oktafian Abrianto, [541]

a result of silence on the request for issuance of a decision. So that the object of the lawsuit is the decision of the refusal of the State Administrative Body or Official on the request for the issuance of the KTUN. Because the form of the negative fictitious case is a lawsuit, the procedural law used is the same as the procedural law in ordinary lawsuits, including accommodating third parties to enter as parties in the trial. However, if the verdict of an ordinary lawsuit that is granted contains the dictum "revoked", in a negative fictitious lawsuit this is not the case, because the dictum of the lawsuit that is granted must be accompanied by an order to issue a decision that has been considered rejected by the state administrative agency or official.⁶⁶ Then regarding, Positive Fictitious is tried with a special event as stipulated in Supreme Court Regulation Number 8 of 2017 concerning Procedural Guidelines for Obtaining Decisions on the Receipt of Requests to Obtain Decisions and / or Actions of Government Agencies or Officials. Here are some differences in the examination in fictitious positive cases compared to ordinary lawsuits:⁶⁷

- a. Registration of the Petition with the Court is accompanied by preliminary evidence;
- b. The President of the Court determines the composition of the Tribunal without going through the dismissal process;
- c. The President of the Tribunal sets the day of the hearing and the court calendar from the time the file is received without prior preparatory hearings;
- d. The application shall be examined and decided within 21 (twenty-one) working days after the application is registered;
- e. The First Instance Decision is final and binding.

There is a comparative description of positive fictitious and negative fictitious, as follows:

Criteria	Positive Fictitious	Negative fictitious
Silence	Approval of application	Approval of application
Case Type	Application	Lawsuit
Subject	Petitioner and respondent (no intervention possible)	Plaintiff and Defendant (possible intervenor)
Object	Decision/action	Decision
Grace Period	Calculated 90 days from 20	Calculated 90 days from 4

⁶⁶ *Loc. Cit*, Azza Azka Norrra, [146]

⁶⁷ *Ibid*, [147]

	working days of receipt of the request if not regulated in the basic regulation	months of receipt of the application if not stipulated in the basic regulation
Inspection Deadline	Must be decided within 21 working days	Similar as ordinary lawsuit examination
Legal Remedies	First-tier final	Legal action may be taken

Table 1. Comparison of Positive and Negative Fictions.

Therefore, Article 53 of Law No. 30 of 2014 does not regulate in detail and clearly about the criteria for decisions and/or actions that can be requested to government agencies or officials, which if not responded to within the time specified by the invitation, then within 10 (ten) working days, the request is considered legally granted

CONCLUSIONS

From the description above, it can be concluded that: Law No. 30 of 2014 concerning Government Administration is inappropriate as material administrative law. Because the concept is only towards government management. The Law a quo has many weaknesses and discrepancies with the concept of administrative law that should be. This regulation focuses more on government management rather than general administrative law arrangements. There is a confusion of terminology between "authority" and "authority" and the unclear mechanism for resolving disputes over the authority of state institutions through the Constitutional Court. In addition, the law also contains ambiguities in the concepts of "concrete actions" and "other state officials", as well as overly strict restrictions on the use of discretion by government officials. The expansion of the definition of State Administrative Decree (KTUN) and the application of the positive fictitious principle are also seen as incompatible with established concepts of administrative law, causing various problems in the practice of state administrative justice. Overall, Law No. 30/2014 on Government Administration cannot be considered as a material administrative law that is in line with the principles of administrative law. Therefore, in the author's view, it is necessary to revise or replace the Law with a Law that is more in line with established administrative law concepts and principles.

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