



**JLPH:**  
**Journal of Law, Politic  
and Humanities**

E-ISSN: 2962-2816  
P-ISSN: 2747-1985

<https://dinastires.org/JLPH>    [dinasti.info@gmail.com](mailto:dinasti.info@gmail.com)    +62 811 7404 455

DOI: <https://doi.org/10.38035/jlph.v6i3>  
<https://creativecommons.org/licenses/by/4.0/>

## Legal Responsibility of Public Officials For The Use of Discretion In Government Implementation That Has The Potential to Lead to Corruption, As Seen From A Progressive Law Perspective

I Komang Angga Adi Setiawan<sup>1\*</sup>, Ni Ketut Sari Adnyani<sup>2</sup>

<sup>1</sup> Pendidikan Ganesha University, Bali, Indonesia, [angga.adi.setiawan@student.undiksha.ac.id](mailto:angga.adi.setiawan@student.undiksha.ac.id)

<sup>2</sup> Pendidikan Ganesha University, Bali, Indonesia, [sari.adnyani@undiksha.ac.id](mailto:sari.adnyani@undiksha.ac.id)

\*Corresponding Author: [angga.adi.setiawan@student.undiksha.ac.id](mailto:angga.adi.setiawan@student.undiksha.ac.id)

**Abstract:** This research is conducted with the objectives of (1) understanding and analyzing the The use of discretion by public officials in the administration of government often raises legal issues when such policies have the potential to cause state losses and are associated with criminal acts of corruption. This study aims to analyze the legal regulations and forms of accountability of public officials in the use of discretion that may result in state losses, as well as to examine the elements of state losses and the relevance of progressive law in assessing the use of such discretion. This research is normative legal research with statutory, conceptual, and case approaches. Research results indicate that discretion is a legitimate authority under the Government Administration Law; however, its use is limited by the general principles of good governance and statutory regulations. The accountability of public officials can entail both official responsibility and personal liability, particularly when discretion is exercised through abuse of power that results in actual state losses, as defined under corruption criminal law. In this context, progressive law provides an evaluative perspective by emphasizing the importance of considering good faith, the purpose of public interest, and social utility, so that the assessment of discretion is not solely based on formal consequences but also on the substance of justice and societal welfare.

**Keywords:** Discretion, State Losses, Legal Accountability, Progressive Law

### INTRODUCTION

Discretion exists as a government obligation in a welfare state like Indonesia, as its primary duty is to provide public services in an effort to improve public welfare. Therefore, discretion is said to arise when public officials carry out their official duties to realize the goals of the welfare state in Indonesia (Sihotang et al., 2017:6). Efforts to achieve a welfare state in society give rise to many social dynamics that must be addressed and handled effectively. Therefore, each social dynamic must be addressed adaptively and responsively by public officials, often using discretion to address dynamics not expressly regulated in regulations. Therefore, discretion serves as a motivating instrument for public officials to use actions in carrying out their functions as public servants to meet the needs of the community.

Discretion is a crucial instrument in the Indonesian state system. Through discretion, a public official is given the freedom to make decisions not explicitly regulated by law, as long as the decision is intended to serve the public interest and is made in good faith. Law No. Article 1, number 9, of Law No. 30/2014 concerning Government Administration states, "Discretion is a decision and/or action determined and/or carried out by government officials to address concrete problems faced in the administration of government, in the event that laws and regulations provide options, are non-regulatory, incomplete or unclear, and/or there is government stagnation." Therefore, discretion can be understood as the heart of flexible policy implementation by public officials, as it allows the wheels of government to continue running even in the absence of governing legal regulations. In this regard, discretion also embodies the responsibility of a public official in carrying out and exercising their authority.

However, in reality, the use of discretion does not always align with its objectives as stipulated in Article 22 of Law No. Law No. 30/2014 concerning Government Administration states that discretion aims to "smooth the administration of government, fill legal vacuums, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest." On the other hand, discretion can also become a tool for abuse of authority, resulting in state losses.

Discretion, which is closely linked to power, will always be close to corruption, as Lord Acton argued, "power tends to corrupt, and absolute power corrupts absolutely." (Djaja, 2010). The use of discretion is closely related to the potential for abuse of authority, which is one indicator of corruption, as regulated by Law No. 31/1999 concerning the Eradication of Corruption. Within the provisions of this law, the phrase "abuse of authority" contained in Article 3 is often used as a basis for assessing that the exercise of discretion can have implications for corruption. This is because discretion is essentially a form of freedom of action possessed by the state government officials in carrying out their duties, especially when laws and regulations do not provide clear provisions or there are still gaps in norms (Darojad, 2018).

The above conditions demonstrate that the line between legitimately used discretion and abuse of authority that results in corruption is often very thin. This line can become blurred when it is difficult to distinguish between public officials' discretionary policies and personal motives containing malicious intent to harm the public interest. The limits of discretion must meet the requirements set out in Article 24 of Law No. 30/2014 concerning Government Administration. This formulation contains the following requirements for exercising discretion: it must be in accordance with the purpose of the discretion, not conflict with laws and regulations, in accordance with the General Principles of Good Governance (AUPB), have objective reasons, not give rise to a conflict of interest, and be implemented in good faith.

Meanwhile, to be considered a criminal act of corruption, an action must meet the elements of a crime, namely the subjective and objective elements. The subjective element of corruption is malicious intent, or *mens rea*, as a deliberate act with the intent and purpose of enriching oneself, another person, or a corporation (Mallarangeng et al., 2023). Intent in corruption is crucial, as corruption is classified as an extraordinary crime. Furthermore, the objective element, or *actus reus*, in corruption includes: 1) enriching oneself, another person, or a corporation; 2) breaking the law; and 3) causing financial loss to the state. These two elements are crucial in the evidentiary process. In addition to considering evidence, it is also necessary to consider malicious intent, or *mens rea*, because a person can be considered to have violated the law and be subject to criminal sanctions if they meet two elements: *mens rea* and *actus reus*.

Despite these limitations, discretion does not always lead to success in its application. Discretionary actions by public officials often result in failure, especially when such failures result in state losses. In this case, it must be clearly and unequivocally proven whether the discretionary actions constitute a failure within the realm of state administration or a criminal

offense, specifically corruption. This situation has occurred in the case of former Minister of Trade Tom Lembong. According to Dr. Riza Alifianto Kurniawan, S.H., M.T.C.P., a criminal law expert from Airlangga University, this case touches on sensitive areas, such as the interpretation of administrative actions and criminal corruption. "This could be seen as a criminalization of public policy. Officials have certain discretion, especially when there is no evidence of malicious intent or personal gain" (Alfafa, 2025).

This situation raises questions of legal accountability: whether public officials exercising discretion, but resulting in failure and resulting in state losses, would likely subject them to criminal liability. This can lead to the criminalization of public officials, thereby weakening their ability to formulate policies in accordance with the needs of the situation due to concerns about criminalization resulting from discretion exercised in the public interest.

In a Pancasila state based on the rule of law, discretion should be used as a means to achieve social justice and public welfare. This is a fundamental consequence of Indonesia's role as not only a state based on the rule of law but also a welfare state. Satjipto Rahardjo proposed the idea that law is essentially created for humans, not humans created for the law. This idea reflects the fundamental view that law should function to serve and fulfill human needs, rather than become a tool that restricts or exploits humans for the benefit of the legal system itself (Situmorang et al., 2025). Satjipto Rahardjo's thinking is closely related to the welfare state, as both stem from the realization that policy should not be merely written but rather must be a means capable of achieving humanitarian goals, social justice, and public welfare.

The fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD NRI) defines the goals of Indonesia, one of which is to advance public welfare. Therefore, based on this formulation, public officials have a responsibility to actively participate in various aspects of public life, including the economic, social, cultural, defense and security, legal, and religious sectors. The broad scope of these obligations requires that the government not refuse to act or make decisions based on the absence of legislation or because existing provisions are deemed unclear. Such a passive attitude can result in the stagnation of the governance process. Therefore, the government needs to be given the freedom to take action, especially when faced with concrete situations that require immediate action, even if a specific legal basis is not yet available or existing regulations cannot be effectively implemented. This freedom is crucial to ensure that public services and government functions are not hampered by rigid legal norms that are inadequate or inadequate to meet the needs of the community (Asmara, 2022). Given the above description, discretion is crucial as a consequence of public officials' responsibility to provide welfare to the public. Therefore, it is crucial to examine in depth how the Indonesian legal system positions the legal responsibility of public officials in the use of discretion. This will help to find a balance between the use of discretion and the crime of corruption, which is a form of public officials' legal responsibility in providing welfare to the Indonesian people.

Based on the background above, this research aims to: (1) Determine the legal regulations and accountability of public officials in the use of discretion that has the potential to cause state losses. (2) Determine the elements of state losses assessed in discretion and how the relevance of progressive law is in the use of discretion by public officials.

## **METHOD**

This research is a normative legal research, namely research that focuses on applicable legal norms and the underlying value concepts. The approaches used include 3 (three) types, namely the statutory approach, the conceptual approach, and the case approach. The statutory approach is used to analyze the legal provisions that form the basis of discretion (Law No. 30/2014 concerning Government Administration), criminal acts of corruption (Law No.

31/1999 in conjunction with Law No. 20/2001 concerning Criminal Acts of Corruption) and the 1945 Constitution of the Republic of Indonesia which forms the basis of the welfare state in Indonesia. Then, the conceptual approach is used to examine the concept or theory of the relationship between progressive law, the welfare state and discretion. Finally, the case approach is used to examine the case of the former Minister of Trade, Tom Lembong, to see the blurring of the line between the failure of discretion that resulted in state losses and criminal acts of corruption. The legal materials used consist of primary legal materials and secondary legal materials. Primary legal materials include relevant laws and regulations, while secondary legal materials include various literature, journals, and scientific works that support the analysis of primary legal materials. Legal materials were collected through library research, and the research results were analyzed descriptively and qualitatively.

## RESULTS AND DISCUSSION

### Legal Regulations on the Use of Discretion by Public Officials in the Indonesian Legal System

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Indonesia is a state based on law." This provision affirms that all governance in Indonesia must be based on law, not power alone. Thus, Indonesia adheres to the principle of *rechtsstaat*, a state that places law as the controller and limiter of power, rather than *machtsstaat*, which prioritizes unlimited power. This formulation demonstrates that in the Indonesian constitutional system, law holds the highest position in regulating the relationship between the government and citizens. Therefore, both the public and government institutions are obliged to comply with applicable law, as law serves as the basis for legitimacy in every action and policy of state administration.

However, given the dynamic nature of social life, not all governance is based solely on written law. This limitation can create a normative vacuum or unclear norms. In this case, discretion plays a role as an instrument in granting public officials the freedom to act in policymaking without, or without, written regulations regarding the policies to be implemented by public officials in the public interest.

Discretion is a consequence of Indonesia's role as a state based on the rule of law and a welfare state. The primary objective of the Republic of Indonesia was to achieve prosperity for all citizens without exception. Therefore, Indonesia is being oriented towards the concept of a welfare state. National development undertaken by the government is not solely focused on increasing economic growth but also on efforts to meet the basic needs of society, both socially and economically. The ultimate goal is to achieve a decent standard of living for every citizen, reflecting the state's responsibility to ensure equitable social welfare (Elviandri et al., 2017). A welfare state positions the government as the primary implementer in efforts to meet societal needs. Therefore, one logical consequence of this concept is the existence of discretionary authority, which allows public officials to act even without a clear legal basis, as long as the action is for the public good.

The term discretion comes from the Dutch word *discretionair*, which literally means wisdom. It refers to the authority of an official to make decisions or take actions based on personal considerations, rather than solely on written legal provisions. In English, this term is known as discretion, which also implies freedom or latitude in determining a course of action. In a legal context, discretion is defined as the freedom for government officials to make decisions based on their own assessment of the situation at hand. Meanwhile, in state administrative law, this concept is often referred to as *freies ermessen*, which comes from the German word *frei*, meaning free or unbound, and *ermessen*, meaning to consider or assess something. Thus, *freies ermessen* reflects the freedom of officials to weigh and determine the actions deemed most appropriate for the public interest (Taufiqurrahman, 2024:767).

Legally, discretion is regulated in Law No. 30/2014 concerning State Administration. Article 1, number 9 of the law states, "Discretion is a decision and/or action determined and/or taken by a government official to address concrete problems faced in the administration of government, in cases where laws and regulations provide options, are non-regulatory, incomplete or unclear, and/or government stagnation exists." This formulation implies that discretion is a legitimate and necessary instrument in the practice of state administration, as it allows public officials to continue carrying out government functions even when regulations are not yet in place. This is done in the public interest.

In State Administrative Law, two forms of discretion are recognized as manifestations of the freedom of action of government officials: free discretion and bound discretion. Free discretion is freedom of action whose scope is not regulated in detail by law. Officials are given the freedom to make decisions as long as they do not exceed the established general limits. In this case, the law does not explicitly stipulate the criteria that must be used as a basis for decision-making, leaving officials with considerable room for interpretation. In contrast, bound discretion is a form of freedom limited by statutory provisions. Officials can only choose among alternatives determined by regulations and may not deviate from the guidelines established by lawmakers. Therefore, the scope of freedom under bound discretion is narrower than that under discretionary discretion (Pamungkas & Ispriyarso, 2020:116).

The use of discretion by public officials requires adequate oversight; decisions should be made with caution due to the broad scope of the administrative area. Policies made outside of legal regulations often result in arbitrariness, which can lead to injustice in society due to a lack of control over discretionary exercise. Therefore, in this regard, adequate oversight of the government's discretionary processes is necessary due to the close relationship between discretion and abuse of power, which can lead to harm in society due to its association with corruption (Thontowi, 2016:320).

Although discretion provides essential latitude for public officials, this authority is not unlimited. Its use must always be within the law and the principles of good governance. Limiting discretion is absolutely necessary to prevent abuse of authority and ensure that every decision taken is always in the public interest, not for personal or group gain. The AUPB is a key pillar that limits and directs the use of discretion by public officials. The AUPB serves as a guideline for the implementation of government administration. Law No. 30/2014 concerning Government Administration stipulates in Article 10 that the AUPB encompasses the principles of legal certainty, benefit, impartiality, accuracy, non-abuse of authority, transparency, the public interest, and good service. In the exercise of discretion, the AUPB is crucial because it serves as a moral and legal boundary for public officials in exercising their freedom of action. By adhering to the AUPB, every discretionary action can remain in line with the principles of justice, legal certainty, and the public interest.

Discretion serves as a means for government officials to take swift and innovative steps to resolve issues not yet clearly regulated by law. However, its implementation must be based on legitimate authority and directed entirely in the public interest. In Indonesian administrative law practice, discretion is crucial because it provides flexibility to public officials, but remains limited by the AUPB. By adhering to this principle, discretion can be exercised responsibly and in line with the state's goal of achieving public welfare (Asyhari, 2019:42-43).

Article 24 of Law No. 30/2014 concerning Government Administration establishes limitations and requirements for the use of discretion. Officials exercising discretion must meet these requirements: the discretion must be in accordance with its objectives, not contradict the law, align with the AUPB (Authorized Public Order) regulations, not create a conflict of interest, and be exercised in good faith. It is important to clearly define these limitations to eliminate loopholes for public officials to use discretion arbitrarily. These limitations are expected to be used in accordance with its objectives, as stated in Article 22 of Law No.

30/2014 concerning Government Administration. Every use of discretion aims to streamline government, fill legal gaps, provide legal certainty, and overcome governmental stagnation.

Although discretion is clearly regulated in the law on government administration, its implementation still presents various problems. One cause is the overlap between administrative norms and criminal norms. This occurs when a failure of discretion results in state losses. Policies that have the potential to lead to corruption occur when public officials entrusted with making decisions in the public interest produce policies that do not benefit the public and even cause state financial losses. This situation requires serious attention in governance based on the principles of good governance. Although ineffective policies are not always considered illegal, their impact can be detrimental to the state's economy. Therefore, public officials who have received the trust, salaries, and facilities from the state are obliged to use their authority responsibly to produce policies that positively impact the public's welfare (Aditya, 2017:411).

When public officials commit errors in their discretion, it can be considered maladministration (poor service). This can be narrowly defined as deviant behavior, but more broadly also means errors in the rational discretionary process due to the government official's incompetence in formulating policies or decisions, resulting in a failure to deliberate, enforce existing laws, test existing government procedures, and create policies that benefit the public. In this case, administrative sanctions are imposed on the maladministration (Asyikin & Setiawan, 2020). When an act occurs intentionally exploiting one's position to use discretionary authority illegally to benefit oneself, others, or corporations resulting in state losses, the elements of the crime of corruption can be fulfilled so that this action is no longer a maladministration treatment, but enters the realm of the elements of mens rea and actus reus in Law No. 31/1999 concerning the Eradication of Criminal Acts of Corruption because of committing acts of abuse of authority (abuse of power).

Maladministration and unlawful acts that lead to corruption are closely related, because if an unlawful act of an administrative nature leads to state financial and state treasury laws, it may not lead to a crime, so one of the important requirements for unlawful acts that lead to corruption is if there are parties who are enriched and cause state losses (Fajar, 2019:7). So it can be understood that in order to be said to be a criminal act of corruption, it must fulfill the elements contained in Law No. 31/1999, relating to the subjective element of the existence of evil intent or mens rea as a deliberate act with the intent and purpose of enriching oneself or another person or corporation (Mallarangeng et al., 2023). Evil intent can be in the form of the perpetrator having the intention to benefit himself, another person or corporation, the perpetrator knowing that the action taken will cause state losses, the perpetrator being careless and the perpetrator being negligent so that the crime of corruption occurs. Then the objective element or actus reus as a real action or behavior carried out by the violator of the law must also be considered. In criminal acts of corruption, the actus reus includes 1) Enriching oneself, another person, or a corporation, 2) violating the law, and 3) causing financial loss to the state. These two elements will be crucial in the evidentiary process for determining maladministration or corruption.

This situation illustrates the use of discretion that can lead to corruption, if the discretion results in failures that cause state losses and fulfill the elements of a criminal act of corruption. In this case, discretion, which authorizes public officials to act quickly and adaptively, can be criminalized if exercised carelessly. Therefore, a clear interpretation of the limits of public officials' legal liability is needed so that discretion exercised in the public interest does not automatically criminalize public officials for failures that cause state losses due to the discretion.

### **Legal Responsibility of Public Officials for Discretionary Use that Causes State Losses**

In the Indonesian legal system, every public official is responsible for exercising their authority in accordance with legal provisions and the principles of good governance. This basic principle aligns with the character of a state based on the rule of law, which places legal responsibility on every government action.

In the context of discretion, there are various views regarding the need for accountability for discretionary actions taken by state administrative officials. Bintan R. Saragih argues that discretion does not need to be strictly regulated because it inherently has its own accountability mechanisms, both moral and legal. He argues that specific regulations regarding discretion are common in parliamentary systems of government, while in presidential systems, discretionary practices are more based on established governance practices (Wuwungan, 2020). Furthermore, Topo Santoso emphasizes that criminal law should not ignore the administrative context when assessing the discretionary actions of public officials. If an action is deemed legal under state administrative law, then criminal law should also recognize it as lawful and even deserving of protection. He highlighted that many officials have been reluctant to make decisions without a written legal basis for fear of criminalization, even though as long as the action is carried out in the public interest and not for personal gain, it should be legally justifiable (Hadi, 2017:41).

The above view demonstrates that discretion does not need to be excessively restricted, but must still be placed within a framework of proportional legal responsibility. State administrative law serves as the primary safeguard for monitoring the use of discretion, while criminal law serves as a final corrective mechanism if discretion is exercised with malicious intent or for personal gain. This approach not only maintains a balance between authority and accountability but also encourages the creation of a bureaucratic culture that boldly makes decisions in the public interest without fear of criminalization.

Discretion, as a form of freedom of action for public officials, is fundamentally inseparable from the obligation to account for every decision made. In government practice, legal responsibility for the use of discretion is divided into two main categories: official responsibility, when actions are taken on behalf of the institution, and personal responsibility, when the actions involve elements of error or abuse of authority by individual officials.

Official liability applies when legal actions are taken for and on behalf of the position held by a public official. In this case, all legal consequences of exercising this authority, including potential compensation or fines, become a financial burden for the state, borne through the state budget (APBN) or regional budget (APBD). This liability is inherent in the official's position because the official acts as a representative of the state, not as an individual. However, in practice, if such actions are carried out through deviations from procedures, abuse of authority, or personal negligence, legal liability can shift to the official's personal responsibility (Ansori, 2015:144).

Conversely, personal liability arises when a government official commits maladministration in the use of authority or public services. The term maladministration is derived from the Latin words *malum*, meaning bad, and *administrare*, meaning to manage. Thus, maladministration can be defined as a form of government administration that does not conform to the principles of propriety and the public interest, such as poor public services, abuse of authority, or decisions that harm the public. In this case, officials who commit maladministrative acts can be held personally accountable because their actions are considered arbitrary (Hadi, 2017:42).

Regarding maladministrative acts, there are several administrative legal remedies available to the public. First, there is an administrative objection, which is a request submitted to a higher-level government official to review a decision deemed detrimental. Second, there is an administrative appeal, which is filed with a specialized administrative institution or pseudo-court, such as the Tax Court, Civil Service Court, or Labor Court. It is called a pseudo-

court because it does not fulfill all the elements of a pure court, such as procedural law, a third party authorized to adjudicate, and a binding decision. Third, there is an administrative lawsuit, which is filed through the State Administrative Court (PTUN), a form of pure court to test the legality of the actions or decisions of government officials. Thus, if there is an element of maladministration in the administration of government that is detrimental to citizens, legal responsibility is placed personally on the officials who committed the act (Hadi, 2017:42-43).

The form of legal responsibility for the use of discretion reflects an effort to balance the protection of public officials and the enforcement of the principle of accountability in governance. On the one hand, the concept of official responsibility provides legal guarantees for officials who exercise discretionary authority lawfully and in good faith. This guarantee is crucial to ensure officials do not hesitate to make strategic decisions in urgent situations, especially when the law does not explicitly regulate the situation. Without such protection, government functions can become rigid and slow to respond to public needs. On the other hand, distinguishing between official and personal responsibility also serves as a crucial mechanism to prevent the abuse of discretion as a justification for arbitrary action. When officials use discretion in violation of the general principles of good governance, the responsibility can no longer be borne by the state but must be borne personally. This emphasizes that public power must always be balanced with individual accountability for any violations that harm the public interest.

Furthermore, the legal accountability of officials for the use of discretion needs to be differentiated according to the nature of the legal consequences, namely administrative, civil, and criminal. From an administrative perspective, every discretionary decision must be reported in writing to their immediate superior. If a superior deems the decision inconsistent with law or government policy, the official issuing the discretion must revoke the decision. If the discretionary action results in criminal consequences, the official in question is solely responsible. However, if it results in civil losses for individuals, community groups, or organizations, the official issuing the decision is responsible for compensation. However, if the state loss arises due to the official's personal negligence, such responsibility is personal and cannot be imposed on the state either administratively, civilly, or criminally (Hadi, 2017).

Meanwhile, discretionary accountability that results in state losses can also be brought under criminal law, specifically within the scope of corruption, as stipulated in Law No. 31/1999 in conjunction with Law No. 20/2001 concerning the Eradication of Corruption. In this case, discretionary authority is misused to enrich oneself, another person, or a corporation, thereby causing state losses.

Articles 2 and 3 of the Corruption Law are frequently used to prosecute public officials for discretionary actions that lead to corruption. Article 2 states, "Any person who unlawfully commits an act to enrich themselves, another person, or a corporation, thereby harming state finances or the state economy, shall be punished...". Article 3 then states, "Any person who, with the intention of benefiting themselves, another person, or a corporation, abuses the authority, opportunity, or means available to them due to their position or position, thereby harming state finances or the state economy, shall be punished...". These articles imply that officials who abuse their discretionary authority can be charged with corruption, but only if the malicious intent to commit the crime has been proven.

According to Constitutional Court Decision No. 25/PUU-XIV/2016, the phrase "can harm state finances" requires actual proof (actual loss), not potential loss. In the case of abuse of authority, an act is classified as corruption if it involves state losses, the perpetrator benefits unlawfully, the public is not served, and the act is considered reprehensible. Therefore, corruption, as defined in Articles 2 and 3 of the Corruption Law, emphasizes the consequences, not just the act. Therefore, state losses are the implications of unlawful acts that benefit oneself, others, or corporations, and abuse of authority for the purpose of benefiting oneself, others, or

corporations.

The thin line between discretionary acts and acts of corruption has a fundamental difference between unlawful acts in criminal acts of corruption and abuse of authority maladministration, so that the inner/evil intention (*mens rea*) and the consequences or results of actions (*actus reus*) will be different, so it needs to be considered very carefully so that criminalization does not occur that in wrong discretion is the discretionary policy due to errors in the decision-making process, so there is no malicious intent to intentionally harm the state, meanwhile in criminal acts of corruption there is a deliberate malicious intent to abuse his authority/position to benefit/enrich himself, others or corporations so that there is a real loss to the state. So, in this case, proving the elements of the article is very important because between discretion and corruption have different legal umbrellas, namely between Law No. 30/2004 concerning Government Administration and Law 31/1999 in conjunction with Law 20/2001 concerning the Eradication of Criminal Acts of Corruption.

### **Elements of State Loss in the Use of Discretion that Potentially Lead to Corruption**

Law No. 15/2006 concerning the Supreme Audit Agency states in Article 1, number 15, that "state loss is a real and definite shortage of money, securities, and goods resulting from unlawful acts, whether intentional or negligent." Meanwhile, Law No. 17/2003 concerning State Finances defines state finances in Article 1, number 1, as "state finances are all rights and obligations of the state that can be valued in money, as well as everything, whether in cash or in kind, that can be owned by the state in connection with these rights and obligations." Therefore, state loss can be simply defined as an action that results in a loss to state finances or a reduction in state finances due to an unlawful act.

The occurrence of state loss is a crucial element in the crime of corruption. In order to prove the element of state financial loss in criminal acts of corruption, law enforcement officials will collaborate with agencies that have expertise in the field of financial audits, namely the Supreme Audit Agency (BPK) and the Financial and Development Supervisory Agency (BPKP). Both of these institutions have expertise in conducting investigative audits and financial calculations in the accounting discipline, so they do not lead to the process of searching for unlawful acts, as is the duty of law enforcement. (Yulia et al., 2016:136).

Law No. 15/2006 concerning the Supreme Audit Agency, specifically Article 10 paragraph (1), states the authority of the BPK, which reads: "The BPK assesses and/or determines the amount of state losses resulting from unlawful acts, whether intentional or negligent, committed by treasurers, managers of BUMN/BUMD, and other institutions or bodies that manage state finances." Furthermore, the legal basis for the BPKP's duties/authorities is regulated in Presidential Decree No. 192/2014, specifically Article 2 of which states that the BPKP is tasked with carrying out government affairs in the field of state/regional financial supervision and national development.

Discretion is closely linked to state losses. Discretion itself is the authority held by public officials to formulate or implement policies outside of statutory provisions for the benefit of the public. However, this good intention of discretion can also be detrimental when discretion is used through abuse of power, resulting in state losses. State losses resulting from discretion can be caused by several factors, including: 1). Errors in procedural implementation, where officials use their discretionary authority without following established procedures, despite good intentions, resulting in state losses as a result of their actions; 2). Negligence in the policy deliberation process, where officials fail to carefully consider or analyze the risks that arise when policies resulting from discretion are implemented, resulting in losses and failures as a result of their actions; and 3). Weak anticipatory capacity, where officials are unable to anticipate the negative impacts of policies produced through the discretionary process, resulting in state losses.

The consequences of state losses resulting from failed discretion are like a fine line between maladministration and criminal corruption. Maladministration is an error in the discretionary policy decision-making process made by officials due to their incompetence in making good policies for the public, resulting in state losses. However, when discretion is intentionally abused by using one's position to benefit oneself, others, or corporations, resulting in losses to the state, it provides an understanding that the action has exceeded administrative limits and leads to acts of corruption as the elements of corruption have been fulfilled. Therefore, the process of proving the elements in a criminal act is very important, both *mens rea* (evil intent) and *actus reus* (actual behavior) are very important in order to be able to measure whether state losses due to discretion lead to acts of corruption or are merely errors in maladministration so that the law can be enforced fairly and not unlawfully harm any party.

A concrete example demonstrating how the line between public policy and criminal acts is often blurred is the Central Jakarta Corruption Court Decision Number 34/Pid.Sus-TPK/2025/PN Jkt.Pst in favor of Thomas Trikasih Lembong (Tom Lembong). In this case, the prosecutor argued that the defendant's sugar import policy while serving as Minister of Trade resulted in state losses of Rp 578 billion. However, the panel of judges only recognized Rp 194 billion because some calculations were deemed to fall short of the element of actual loss.

In their deliberations, the panel of judges concluded that the sugar import policy was implemented to maintain price stability and national food availability, which essentially falls within the discretionary authority of public officials. However, due to irregularities in the implementation of procedures and reporting of state finances, the policy was deemed to have exceeded the legally justifiable limits of discretion. The judges also stated that while the defendant was not proven to have personally benefited from the proceeds, he was still found guilty because his actions caused measurable state losses. This ruling illustrates a dilemma that frequently arises in government practice: when administrative actions based on public policy intentions actually result in criminal liability. In this context, it is crucial to assess not only the consequences, but also the intent (*mens rea*) and good faith of public officials in exercising their authority. If the action is purely in the public interest and there is no evidence of malice, then the resolution should be pursued through administrative mechanisms, not criminal ones.

The Tom Lembong case serves as an example that law enforcement regarding public officials' discretion requires clear and proportional measures to avoid instilling fear in officials when making decisions. In practice, public policy always carries risks, and not all of these risks can be viewed as abuse of authority. Therefore, proving the elements of state loss and malice is crucial to maintaining a balance between legal certainty, justice, and expediency.

### **The Relevance of Progressive Law to the Use of Discretion by Public Officials**

The word "progressive" comes from the English word "progress," meaning progress. The concept of progressive law is rooted in the understanding that the law must be able to move forward with the development of society. This view was first emphasized by Satjipto Rahardjo, who saw that law should not be limited to formal texts but rather should be a means of solving real problems. He stated that law is made for humans, not humans who must adapt to rigid laws. His criticism of the minimal role of legal science in addressing the national crisis later gave rise to the idea of the need for rapid and fundamental changes in legal theory and practice, by opening up space for innovation so that the law remains relevant and beneficial to society (Siregar, 2024:5).

Based on this principle, Satjipto Rahardjo further emphasized that the quality of a legal system must be measured by its ability to deliver justice and improve human welfare. Progressive law thus demands the courage of legal practitioners to avoid being trapped by formalism, but rather to creatively interpret existing regulations when they are inadequate to meet public needs. Change does not always have to begin with a revision of the law; it can be

achieved through progressive, humanitarian-oriented interpretation. In this way, the law can still fulfill its social function even if it has not been normatively updated (Sufriadi, 2010:242).

The use of discretion is a consequence of the dynamics of social life within the Indonesian state system, which cannot always be anticipated by written legal regulations. Several situations, such as emergencies or legal vacuums, make discretion crucial for ensuring the general welfare of the Indonesian people. In these cases, the use of discretion will also prevent stagnation in the governance process.

Progressive law is based on the fundamental assumption that law is for humans, not humans for the law. This principle aligns with the nature of discretion, which authorizes public officials to act beyond the limits stipulated in legislation, when necessary for the public interest. In the context of a welfare state, the government not only performs administrative functions but must also be responsive to developments in public life. Therefore, the correct and accountable use of discretion reflects the principle of progressive law, which states that public officials' policies should not be constrained by rigid written regulations when the public urgently needs concrete action.

Progressive law can offer a more humanistic perspective in assessing the actions of public officials. In many cases, discretionary actions often face the risk of criminalization, especially when the policies taken result in negative impacts such as state losses. A positivist approach tends to judge such actions solely based on consequences or procedural errors, without considering the context of public needs and the intentions of the public official. Progressive law instead encourages law enforcement to examine the substance of the public official's social benefits and good faith before determining whether the action is criminalized. Thus, progressive law opens up the opportunity for comprehensive policy evaluation, not solely based on formalistic parameters of regulatory violations.

Furthermore, progressive law provides an ethical basis for the use of discretion to prevent it from spiraling into abuse of power. Satjipto Rahardjo emphasized the importance of official morality as a driver of legal behavior. Discretion exercised without integrity in implementing policies can easily turn into corruption. Conversely, officials who adhere to the values of humanity, justice, and public responsibility will utilize discretion as a means of solving problems, not as a loophole for personal gain. Thus, the relevance of progressive law is seen not only as support for the need for discretion in the governance process in Indonesia, but also in the moral pressure that must be attached to every use of discretionary authority by public officials.

The use of discretion from a progressive legal perspective lies in its ability to present a legal perspective that is adaptive, responsive, and oriented toward the protection of society (humans). This philosophy provides a normative and moral basis for public officials to exercise discretion appropriately, while also reminding law enforcers not to fall into formalism when assessing official actions. Ultimately, progressive law guides the use of discretion to align with the primary goal of the Indonesian rule of law, namely realizing justice, prosperity, and the benefit of the wider community.

## CONCLUSION

The use of discretion is an important instrument in governance to address urgent situations and regulatory gaps, but this authority must remain limited by statutory provisions and general principles of good governance. In practice, public officials' accountability for discretion can take the form of official or personal responsibility, depending on the presence or absence of deviations or maladministration. Discretion exercised without due care and not in accordance with procedures has the potential to cause state losses and can lead officials to criminal prosecution if the elements of real state losses and unlawful acts as stipulated in laws and regulations are met. The Tom Lembong case demonstrates the thin line between

administrative policy and criminal corruption when procedural errors result in state financial losses. In this context, progressive legal philosophy is crucially relevant by emphasizing that the assessment of discretion must take into account good faith, public interest objectives, and social benefits, so that the use of discretion remains within a legal framework that favors public welfare.

## REFERENCE

- Aditya, E. R. (2017). Penerapan Kebijakan Diskresi dalam Kaitannya dengan Tindak Pidana Korupsi. *Jurnal Magister Hukum Udayana*, 6(3), 404–416.
- Alfafa, S. (2025). *Pakar UNAIR Soroti Polemik Kasus Impor Gula Tom Lembong*. Unairnews. <https://unair.ac.id/pakar-unair-soroti-polemik-impor-gula-tom-lembong/>
- Ansori, L. (2015). Diskresi dan Pertanggungjawaban Pemerintah dalam Penyelenggaraan Pemerintahan. *Jurnal Yuridis*, 2(1), 135–150. <https://doi.org/https://doi.org/10.35586/v2i1.165>
- Asmara, G. (2022). Urgensi Kewenangan Diskresi Dalam Penyelenggaraan Pemerintah Untuk Memajukan Kesejahteraan Umum. *Jurnal Diskresi*, 1(1), 1–16. <https://doi.org/https://doi.org/10.29303/diskresi.v1i1.1307>
- Asyhari, F. (2019). Eksistensi Konsep Diskresi sebagai Sarana Pembaharuan Masyarakat dalam Penegakan Supremasi Hukum. *Journal of Humanities*, 33–51.
- Asyikin, N., & Setiawan, A. (2020). Tanggung Jawab Jabatan dan Tanggung Jawab Pribadi dalam Penggunaan Diskresi. *Kosmik Hukum*, 20(1), 1–13. <https://doi.org/https://doi.org/10.30595/kosmikhukum.v20i1.6324>
- Darojad, Z. (2018). Penggunaan Diskresi Oleh Pejabat Pemerintahan Dalam Kaitannya Dengan Kerugian Keuangan Negara Yang Mengakibatkan Tindak Pidana Korupsi. *Jurnal MP: Manajemen Pemerintahan*, 5(2), 125–139.
- Djaja, E. (2010). *Memberantas Korupsi Bersama KPK*. Sinar Grafika.
- Elviandri, Dimiyati, K., & Absori. (2017). Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia. *Mimbar Hukum*, 29(3), 252–266.
- Fajar, N. M. A. P. (2019). Mal Administrasi Dalam Pelaksanaan Administrasi Negara. *Jurnal Yustitia*, 13(2), 69–78.
- Hadi, I. G. A. A. (2017). Pertanggungjawaban Pejabat Pemerintahan dalam Tindakan Diskresi Paca Berlakunya Undang-Undang No. 30 Tahun 2014 tentang Administrasi Pemerintahan. *Kerta Patrika: Jurnal Ilmiah Fakultas Hukum Universitas Udayana*, 39(1), 33–46.
- Mallarangeng, A. B., Mustari, Firman, & Ali, I. (2023). Pembuktian Unsur Niat Dikaitkan Dengan Unsur Mens Rea Dalam Tindak Pidana Korupsi. *Legal: Journal of Law*, 2(2), 11–24.
- Pamungkas, M. R. A., & Ispriyarso, B. (2020). Kajian Paradigmatik Terhadap Konsep Diskresi Pejabat Pemerintahan di Indonesia. *Humani (Hukum dan Masyarakat Madani)*, 10(1), 112–127.
- Sihotang, G. A., Pujiyono, & Sa'adah, N. (2017). Diskresi dan Tanggung Jawab Pejabat Publik Pada Pelaksanaan Tugas Dalam Situasi Darurat. *Law Reform*, 13(1), 60–69. <https://doi.org/https://doi.org/10.14710/lr.v13i1.15951>
- Siregar, M. (2024). Teori Hukum Progresif dalam Konsep Negara Hukum Indonesia. *Muhammadiyah Law Review*, 8(2), 1–15. <https://doi.org/http://dx.doi.org/10.24127/mlr.v8i2.3567>

- Situmorang, A. F., Rizqullah, A. A., Bakti, F. M. D., & Hukum, B. A. R. (2025). Peran Hukum Progresif Dalam Mencari Keadilan Menurut Satjipto Rahardjo. *Nusantara: Jurnal Pendidikan, Seni, Sains dan Sosial Humaniora*, 3(1), 1–12.
- Sufriadi, Y. (2010). Penerapan Hukum Progresif dalam Penegakan Hukum di tengah Krisis Demokrasi. *Jurnal Hukum Ius Quia Iustum*, 17(2), 233–248. <https://doi.org/https://doi.org/10.20885/iustum.vol17.iss2.art4>
- Taufiqurrahman, M. (2024). Kebijakan Diskresi Pejabat Pemerintahan dalam Memutuskan Kebijakan Publik. *Iuris Studia: Jurnal Kajian Hukum*, 5(3), 766–771.
- Thontowi, J. (2016). Urgensi Undang-Undang Pelayanan Publik dan Pencegahan Fungsi Diskresi untuk Penyalahgunaan Kekuasaan. *Unisia*, 49, 316–330. <https://doi.org/https://doi.org/10.20885/unisia.vol26.iss49.art9>
- Wuwungan, S. (2020). Akibat Hukum Adanya Diskresi Dalam Penyelenggaraan Administrasi Pemerintahan. *Lex Administratum*, 8(3), 80–88.
- Yulia, R. P., Khunaefi, A., & Agoes, S. (2016). Peranan BKP dan BPKP Menghitung Kerugian Keuangan Negara Dalam Rangka Penanganan Perkara Tindak Pidana Korupsi. *Jurnal Bina Adhyaksa*, 6(2), 135–152.
- Undang-Undang Nomor 31 Tahun 1999 jo Undang-Undang Nomor 20 Tahun 2001 tentang Pemberantasan Tindak Pidana Korupsi
- Undang-Undang Nomor 17 Tahun 2003 tentang Keuangan Negara
- Undang-Undang Nomor 15 Tahun 2006 tentang Badan Pemeriksa Keuangan
- Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan
- Peraturan Presiden Nomor 192 Tahun 2014 tentang Badan Pengawasan Keuangan dan Pembangunan
- Putusan Pengadilan Tipikor Jakarta Pusat Nomor 34/Pid.Sus-TPK/2025/PN Jkt.Pst