International Journal of Multicultural and Multireligious Understanding

http://ijmmu.com
editor@ijmmu.com
ISSN 2364-5369
Volume 6, Issue 6
December, 2019
Pages: 874-885

Criminal Accountability of Government Officials Based on Discretion Authorities in the Perspective of the Indonesian Welfare Law State

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http://dx.doi.org/10.18415/ijmmu.v6i6.1365

Abstract

In the framework of a welfare law state, a government has two sources of authority, namely legality and discretion principle. In the implementation of state administration, the two authorities are complementary. Government officials' authority which only originates from legality principle of general welfare as a welfare state goal is impossible to achieve. The freedom of government officials to make decisions based on discretionary authority has a great potential to be abused which has consequences from the perspective of administrative and criminal law. In its implementation, the understanding of government official's discretionary authority accountability principles among law enforcers still varies. Government Administration actions taken based on the Discretion Principle, as a form of deviation from the inability of Legality Principle to reach public dynamic needs, are inappropriate and deserve to be convicted. The legislators are better to normalize the principle of hulprecht in every provision of law in the field of state administrative law as long as it is ultimum remidium.

Keywords: *Accountability; Criminal; Government Officials; Discretion*

Introduction

Indonesia is a welfare state based on the country's objectives as stated in the fourth line of the 1945 Constitutional Preamble (Wahyono, 1982, p. 49). Besides Indonesia, the Netherlands and France are the countries that adhere to the principles of the welfare law state (Azhary, 1995, pp. 49 – 59). People's welfare as the ultimate objective of the welfare law state covers a very broad scope. According to Utrecht (1962), government duties in the welfare state is called Lemaire "*bestuurszorg*." (p. 23).

In the frame of Indonesia's welfare law state, the regulation of discretion principle is stipulated in Article 6 paragraph (1) of Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration. One of the authorities referred to is the right to use discretionary authority as regulated in Article 6 paragraph (2) letter e of Law Number 30 of 2014 namely as follows "Rights as referred to in paragraph (1) include using discretion in accordance with their objectives." According to Article 6 paragraph (2) letter e of Law Number 30 of 2014, discretionary authority is limited by law. Article 1 number (9) of Law Number 30 of 2014 states "Discretion is a Decision and/or Action that are determined

and/or carried out by Government Officials to overcome concrete problems encountered in the administration of government in terms of laws and regulations that provide choices, do not regulate, incomplete or unclear, and/or government stagnation. " (Kemensetneg, 2014).

Restrictions on discretion include (1) in terms of public law subject (position) and (2) in terms of aims and objectives. Restrictions on legal subjects are regulated by Article 22 paragraph (1) of Law Number 30 of 2014 as follows "Discretion can only be carried out by authorized Government Officials." Public legal subjects that are allowed to use discretionary authority are authorized positions. Restrictions of discretionary authority is also regulated from the point of aims and objectives as stipulated in Article 22 paragraph (2) of Law Number 30 of 2014.

The discussion of liability for discretion can be done from the perspective of (1) state administrative law and (2) criminal law. Government actions based on legality principle mean that the actions are based on bounded authority (*gebonded bevoegheid)* because there are positive legal norms governing these actions. Relatively, the actions of the government apparatus based on the legality principle are easily tested for legal validity due to the existence of positive legal norms governing these actions. Ridwan (2014, pp. 7-8) says actions of government officials based on discretion mean that the actions are based on unbounded authority (free authority). Discretion is said to be an action based on free authority because the authority to carry out the action is not regulated in positive legal norms. Policies (*beleids*) of government officials based on discretion can also be held accountable from the perspective of criminal law. Discretion responsibility becomes very important to be discussed from the perspective of criminal law if associated with the principle of "no authority without accountability" (*geen bevoegdheid zonder verantwoordelijkheid*) that applies in the field of criminal law and state administrative law.

The study of the nature of a criminal act in corruption is important to determine and find the element of wrongdoing. Is the person who committed the crime convicted? A person who commits a criminal act has a mistake and that person will be convicted. However, when the subject has no element of wrongdoing even though they are committing a prohibited act, that person cannot be convicted.

In the study of criminal law, criminal responsibility of government officials' acts begins with actions that are against the law and misused authority. Prosecution of a government official can originate from actions done by government officials who issue policies based on laws and regulations and discretion of government officials without going through standard procedures. However, the act is thought to cause state financial losses that might occur as an element of criminal offense. Extensive provisions in the process of law enforcement for corruption are stated in Article 2 paragraph (1) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 and Article 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001. The existence of both articles has a direct impact on the government officials so that these officials were hesitant and frightened to set policies because they are worried it will be led to the alleged corruption act (Yudoyono, 2013). To determine whether an action is a criminal act that can be attached to the nature of unlawful act must be based on written regulations.

Research Methods

Normative legal research method is used in the research to obtain the data needed in connection with the problems. The data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. In addition, primary data is also used as supporting secondary data. Data analysis was performed using qualitative juridical analysis method.

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Analysis and Discussion

Principles of Government Officials' Discretion Responsibility in Terms of Criminal Law Within the Perspective of the Welfare Law State

According to the author, if the acts of government officials are based on the abused discretionary authority as stated above cause consequences from the perspective of criminal law, it is a logical and consistent matter. However, if the consequences from criminal law perspective occur only because the law enforcers misunderstand the concept of discretionary authority would be an illogical and very regrettable thing.

In the implementation of law enforcement and adjudicative process in Indonesia, the case that occur is not actually a government action based on misused discretionary authority which is subjected to criminal punishments. The cases occur because the lack of government officials' understanding towards discretionary authority so that actions done based on discretionary authority are seen as something that falls under the category of criminal acts and is forced to end in court and is subject to criminal punishments.

The abovementioned case occurs because law enforcers have difficulty to understand the concept of "discretionary authority or authority" so that it will also fail to understand "acts of government officials based on discretionary authority or power." In law enforcement and judicial process in Indonesia, the concept of government official's discretionary authority is a legal concept that is difficult to understand for some law enforcers. Therefore, the concept of government official's discretionary authority is often misunderstood. In many cases, the concept of "authority or discretionary authority" cannot be well distinguished by law enforcers from the concept of "abuse of authority" as a legal concept that is an element of criminal action. Mistakes and failures to understand the concept of power or discretionary authority have reached alarming levels. Surely, the failure to understand a legal concept is a mistake that will be fatal.

Making mistakes and misunderstand the concept of power or discretionary authority as stated above resulting in the failure to understand the nature and characteristics of "acts of government officials based on discretionary authority." Implementation of government official's discretionary authority in the form of government officials' actions based on discretionary authority often understood to be an act of authority abuse as an element of a criminal offense. In other words, the nature and characteristics of government officials' actions based on discretionary authority as a lawful act of state administration are misinterpreted as acts of authority abuse which results in criminal punishments. Government officials' actions based on discretionary authority are seen as abuse and forced to end or lead to criminal liability demands against the government officials. In fact, government officials who carry out these acts of discretion most likely do not violate criminal law norms and can result in the criminal prosecution of innocent government officials (error in *subjecto*). If there is a misinterpretation and misunderstanding that leads to a suspicion or charge of committing a criminal act, the person may receive a sentence of imprisonment, a fine, confiscation or revocation of political rights for a certain period. In fact, this possibility does not need to occur if the concepts of "discretionary authority" and "governmental actions based on discretionary authority" are correctly understood.

Failure to understand the characteristics of government officials' actions based on discretionary authority will have fatal consequences for their performance. It leads to the fear of taking an action based on discretionary authority since it will lead to criminal prosecution. In fact, the real situation and conditions may require government officials to act based on the discretionary authority to avoid impasse in the practice of governance.

Mistakes and misunderstandings as stated above prove that the characteristics of discretionary authority and government officials' actions based on discretionary authority are very necessary to be understood properly and correctly in order to avoid the negative impacts as stated above.

Indicators of government officials' actions based on discretionary authority from the standpoint of criminal law need to be established to avoid mistakes and errors as stated above. In the following explanation, the author will mention the parties who must involve in designing the indicators. First, for government officials as those who carry out governmental actions based on discretionary authority. If indicators of government officials' actions based on discretionary authority can be determined from the perspective of criminal law, the relevant government officials will have certain criteria when taking actions based on the discretionary authority, so that they will avoid the risk of alleged authority abuse as an element of criminal offense and avoid criminal sanctions.

Second, for a clean and healthy state management implementation. If the indicators of government officials' actions based on discretionary authority can be established from the perspective of criminal law, government officials who have discretionary authority will never hesitate to solve a problem immediately. The government officials will be very confident in taking a necessary action to solve a problem based on the discretionary authority because it is a measurable and accountable action before the law. Therefore, a clean and healthy government management will be implemented properly.

Third, for law enforcers such as the police and prosecutors who conduct their duties to enforce the law. If the indicators of government officials' actions based on discretionary authority can be established from the perspective of criminal law, law enforcers will be greatly helped in carrying out their duties to enforce the law. Law enforcers will easily be able to judge a government official's action based on discretionary authority which is legal before the law and does not have potential legal problems. The indicators are expected to help authorities to enforce a clean and healthy law and the enforcement itself will be easily upheld.

Fourth, for other law enforcers, judges, who are designated to adjudicate and decide cases or disputes. If indicators of government officials' actions based on discretionary authority can be determined from the perspective of criminal law, as law enforcers, judges will be greatly assisted in conducting their duties to examine and adjudicate cases submitted to them. Judges will easily assess a government official's actions based on discretionary authority that are not categorized as unlawful and authority abuse as an element of criminal acts. On the other hand, if indicators can be determined from the perspective of criminal law, the judge will also easily assess the government officials' actions based on discretionary authority that contain an "unlawful" element and " authority abuse" as an element of criminal activity that deserve criminal punishments. Therefore, a clean and healthy judicial process is expected to be implemented in the real life.

According to the context of arguments and ideas stated earlier, the right questions towards the efforts to understand government officials' actions based on discretionary authority from the perspective of criminal law are as follows. What doctrine or teaching of criminal law can be used as a basis to question the government officials' actions based on discretionary authority from the perspective of criminal law? According to the Doctrine, criminal law has 2 (two) criteria or parameters to assess and examine the government officials' actions based on discretionary authority. The two types of parameters referred to are (1) acts against the law and (2) acts of abusing authority (Patiro, 2012, p. 5). Both types of above-mentioned parameters are used by law enforcers as a benchmark to assess and/or examine government officials' actions based on discretionary authority from the perspective of criminal law.
Referring to both types of parameters or test equipment from the perspective of the criminal law stated above, the author can propose the following questions. Can the actions of government officials based on

discretionary authority be categorized as acts (1) against the law (*wederrehctelijk*) or (2) acts of abusing authority if viewed from the perspective of criminal law?

Liability Implementation of Government Officials' Discretionary Acts in the Concept of Unlawful Acts from a Criminal Law Perspective

The following is a main question that can be proposed – Can the actions of government officials based on discretionary authority be categorized as unlawful acts (*wederrehctelijk*)? The question above is a critical contact point between state administrative law and criminal law in the context of accountability for the actions of government officials based on discretionary authority from the perspective of criminal law which is often misinterpreted or considered as an act against the law.

The term against the law is used in the field of civil and criminal law (Projodikoro, 1993, p. 1). However, in the two different fields of law, the term against the law uses equivalent terms (words) of the Dutch language that are literally different and have different meanings. In civil law, the equivalent word (term) for against the law in Dutch is "*onrechtmatige*" and "the act of violating or against the law is called *oncrechtmatigedaad*." However, in criminal law, the equivalent term for against the law in Dutch is "*wederrehctelijk*." In this context, the term against the law discussed is *wederrehctelijk* which is the term used in criminal law.

What is meant by acts against the law (*wederrehctelijk*) from the perspective of criminal law? In the field of criminal law, the notion of "against the law" or "*wederrehctelijk*" has developed through times and created the meaning of "against the law" or *wederrehctelijk* in formal and material sense. Therefore, in criminal law, doctrine about against the law (*wederrehctelijk*) is divided into 2 (two) types, namely:

1. Doctrine against the law (*wederrehctelijk*) in formal sense.

2. Doctrine against the law (*wederrehctelijk*) in material sense (Hamzah, 2014, p. 140).

Various opinions are expressed by experts regarding the definition of "against the law" (*wederrehctelijk*) in formal sense. As Maramis (2016) said "according to the teachings against formal law, if an act is in accordance with the constitution formulation, then the act is clearly illegal. Further investigation is unnecessary to see whether the act is illegal or not." (p. 108). According to the quotation above, in formal sense the notion of "against the law (*wederrehctelijk*)" is an act that is against the constitution. The definition formulation of acts against the law formally as stated above includes a narrow scope of understanding. Formulating the scope of acts against the law (*wederrehctelijk*) from the perspective of criminal law as stated earlier has similarities with the understanding of against the law (*onrechtmatigedaad*) in civil law before 1919 (Fuadi, 2005, p. 30).

In line with the definition above, Hamzah (2014) said that the meaning of "against the law (*wederrehctelijk*)" is "interpreted contrary to the law. If an act has matched the formulation of offense, it is usually said to be against the law formally." (p. 141). According to Hamzah (2014), in formal sense the definition of against the law (*wederrehctelijk*) is an act that is "contrary to the law or violates the provisions of the law."

The formal definition of "act against the law (*wederrehctelijk*)" as mentioned earlier has the following consequences. An act against the law can only be avoided from criminal punishments if the person who committed the act can prove that it is done according to or allowed by the law. Excuses that can be stated to eliminate the unlawful nature of illegal acts must be based on provisions of law.

Therefore, excuses that are not based on provisions of the law cannot be stated to defend someone as not formally committing an act against the law (*wederrehctelijk*) whose elements have been fulfilled.

The formal definition of phrase "against the law (*wederrehctelijk*)" can be used as a starting point to build an understanding about acts that violate the law in the perspective of criminal law. In accordance with the main stance in the phrase "against the law (*wederrehctelijk*)" formally, the author can build an understanding of the nature and characteristics of formally acting against the law in the perspective of criminal law as follows. An action can be categorized as an act against the law (*wederrehctelijk*) formally if the action is contrary to the provisions of the law or the act matches the elements prohibited to be done as regulated in the law (in formal definition).

In accordance with the formal doctrine against the law (*wederrehctelijk*) above, the author can propose the following questions. Can the government officials' actions based on discretionary authority be categorized as "against the law (*wederrehctelijk*)" formally? Referring to the doctrine of "against the law (*wederrehctelijk*)" formally as stated earlier, the government officials' actions based on discretionary authority can be categorized as acts "formally against the law" if the act of discretion is contrary to the law. This means that the government official's act based on discretionary authority will not be seen as a formal "against the law" (*wederrehctelijk*) "if the action is not contrary to or does not violate the provisions of the law. Therefore, in the perspective of the doctrine "against the law (*wederrehctelijk*)" formally, government officials will not have legal risk from the perspective of criminal law if their actions are in accordance with or not contrary to the provisions of the law. Otherwise, if the actions based on discretionary authority violate the provisions of the law, it will be viewed as acts "against the law (*wederrehctelijk*)" formally from the perspective of criminal law. However, can a government official conduct an act based on discretionary authority that is contrary to the provisions of the law from the perspective of state administrative law?

Administrative law experts' views regarding the government officials' actions based on discretionary authority that are contrary to the law are divided into 2 (two) groups. The first group assumes government officials can take governmental action based on discretionary authority even though it is against the law. On the contrary, the second group believes government officials cannot take governmental action based on discretionary authority if it is against or violates the provisions of the law.
The consideration of government officials' actions based on discretionary authority tends to be oriented towards non-juridical and especially moral or propriety and appropriateness or common-sense consideration. This consideration is the main reason for the existence of government officials' discretionary actions in the field of state administrative law. In accordance with moral consideration (propriety) and rationality (appropriateness) which are non-juridical, discretionary actions must be conducted by government officials even though the actions are against or violate the law. Aron (1964) stated his attitude and stance on the nature and characteristics of discretionary authority as ". . . a power of authority conferred by law to act on the basis of judgment or conciliation and it uses more an idea of morals than laws." (p.84)

Although it is stated that the government officials' actions based on discretionary authority may against or violate the provisions of the law, it does not mean that the actions are absolutely free without restrictions. However, it still has certain limits as Muchsan (1981) stated, namely (1) the use of *freies ermessen* must not against the provisions in effect (law of the land) and (2) the use of *freies ermessen* is only intended in the public interest.

The reason for the use of discretionary authority by government officials which is not allowed to violate the law or the positive legal system in effect would make the discretionary authority lose its identity and characteristics as an authority based on free judgment. A good government will certainly act to overcome such critical situation even though it must violate the law or against the provisions of the

law, if it is morally and legally accountable. Basah (1992) expressed the following comment: "In this case, the state administration has the power to determine policies, however, the acts must be accounted for, both morally and legally (p. 3)." The author agrees that discretionary authority must be limited by law or provisions of law, but that does not mean that government officials should not violate the provisions of law if the situation and conditions require them to take such action.

In accordance with author's explanation regarding "against the law (*wederrechelijk*) formally, in the perspective of criminal law doctrine, the author can draw conclusions about indicators of government officials' actions based on discretionary authority. According to the author, indicators of government officials' actions that require attention are as follows:

1. From the prespective of criminal law, in accordance with the doctrine (teachings) "against the law (*wederrechelijk*) formally," government officials' actoins based on discretionary authority must not be against or violate the provisions of the law. If the act based on the discretionary authority is against the law or fulfils all elements or fits the formulation of provisions of the law, the action is categorized as an "act against the law (*wederrechelijk*)" formally, which subject to criminal punisments,
2. from the perspective of state administrative law: in accordance with the nature of discretionary authority, government officials' actions based on discretionary authority may violate or contravene the provisions of law. Even though government's act based on discretionary authority fulfils all elements or is in accordance with the provisions of law formulation, which is prohibited to be conducted, such action cannot be categorized as acts of authority abuse.

The second doctrine against the law in the field of criminal law is "against the law (*wederrehctelijk*)" materially. What is meant by "against the law (*wederrehctelijk*)" materially from the perspective of criminal law? Maramis (2016) stated "against the law (*wederrehctelijk*) materially" taught ". . . according to the teachings of against material laws, an act must not only fit the formulation of law but also must be against the law." (p. 108). According to the author, the statement above intends to say that the action "against the law (*wederrehctelijk*)" materially includes the actions that violate things that are outside the provisions of law in formal sense. The things that are outside the provisions of formal law are the norms of propriety and morality that exist and live in society.

The method of formulating the term "against the law (*wederrehctelijk*)" materially from the perspective of criminal law as stated earlier is a definition extension of against the law concept so that it covers a broad definition beyond the provisions of law. In the context of expanding the meaning of act against the law, Frans Maramis expressed further opinion: "In the view of doctrine against the law (*wederrechelijk*) as an unwritten element of every criminal act is the same as the act violating the law (*onrechmatigedaad*) in civil law (Article 1365 Civil Registry)."

The doctrine of "against the law in a material sense" as stated earlier then develops through times and according to society needs. Doctrine against material law has 2 (two) different kinds of variant with different characteristics. The two kinds of doctrine against the law (*wederrechelijk*) materially are (1) doctrine against the law (*wederrechelijk*) materially in a positive function and (2) doctrine against the law (*wederrechelijk*) materially in a negative function (Girsang, 2012).

According to the doctrine against material law (*wederrechelijk*) in a negative function, if an actual action is against the law formally, while in society the act is lawful or is not materially against the law instead, the act should not be criminally sentenced.

The above-mentioned doctrine shows a principle that in doctrine against material law in a negative function, the position of propriety or appropriateness values that live in society are more important than the rules of positive criminal law contained in the provisions of law. In the context of "against the law (*wederrechelijk*) materially in a negative function" doctrine, the principle of legality is placed second after the values of propriety, appropriateness, and other values that live in society as excuses to the crimes committed against the law formally.

What is meant by against material law (*wederrechelijk*) in a positive function? According to the doctrine against material law (*wederrechelijk*) in a positive function, an act can be categorized as materially unlawful if it violates propriety or morality values in society although it does not violate the constitution. In court decision Number 275K/Pid/1982 December 15, 1983 in Raden Sonson Natalegawa case.

Doctrine against the law (*wederrechelijk*) materially in a positive function as mentioned earlier is a definition extension of criminal action. An action can be considered a criminal act that violates the law even though it does not violate the provisions of law. In this case, the judge has "discretionary authority" "arbitrarily" to determine what kinds of action that are categorized as acts against the law. Judges can subjectively determine an action as an act that violates propriety, appropriateness and values that develop in society. According to the author, the doctrine against the law (*wederrechelijk*) materially in the positive function is a doctrine that contradicts or overrides the principle of legality as one of the welfare law state's pillars. The author believes doctrine against the law (*wederrechelijk*) in its positive function is contrary to the principle of the welfare law state, thus it is unworthy of "living" in the domain of Indonesian welfare law state.

In judicial process in Indonesia, the implementation of doctrine against the law that is dominant and now implemented is the doctrine against the law (*wederrechelijk*) materially in a positive function. From the outset, the Supreme Court adopted a stance based on the doctrine against material law in the negative function as stated earlier. However, in its development, the Supreme Court based on decision Number 003/PUU-IV/2006 on July 25, 2006 then adopted the doctrine "against the law in a formal sense." Based on the Constitutional Court Decision on July 25, 2006 the implementation of doctrine against the law in the material sense is eliminated. The Constitutional Court wants to implement doctrine against the law in a formal sense because it is in accordance with the principle of legality. However, the Supreme Court remains in its stance to implement the doctrine of against the law materially that allows for interpretation.

After discussing the notion of doctrine against the law (*wederrechelijk*) material (in a negative and a positive function) from the perspective of criminal law as explained earlier, the author would like to propose the following question. Can the government officials' actions based on discretionary authority be categorized as unlawful acts in the material sense of a positive function? The question will be discussed, and the author then draws conclusions about government officials' actions based on discretionary authority from the perspective of teachings against the law in criminal law. The discussion on this topic is expected to produce conclusions that can place the position of discretion act as a governmental act in the right place from the perspective of criminal law. The author believes if that objective is reached, the conclusion of this discussion will be able to provide a significant contribution to the efforts of reforming law enforcement and judicial practices in cases of corruption which are often be the subject of debate as stated at the beginning of this dissertation.

As stated earlier, the doctrine (teachings) against the law (*wederrechelijk*) materially consists of 2 (two) variants namely (1) against the law (*wederrechelijk*) materially in a negative function and (2) against the law (*wederrechelijk*) materially in positive function. In connection with these two teachings (doctrines), a question that can be asked is as follows. Can the government officials' actions based on

discretionary authority be categorized as "acts against the law (*wederrechelijk*) materially in negative and positive functions? There are 2 (two) possibilities that can be proposed as answers to the questions above with its different and opposite consequences. However, the discussion of the two questions will be available in a single unit because the nature of the authors' answers can already cover both questions.

Can the government officials' actions based on discretionary authority be categorized as "acts against the law (*wederrechelijk*) materially in the sense of violating propriety and morality values that exist in society?

As stated above, there are 2 (two) variants of material doctrine against the law. Both doctrines against the law materially are as follows:

1. the doctrine of the act "against the law materially in a negative function" teaches us that an act against the law formally (violating the constitution) is not convicted of criminal acts if in the society the act is not improper or not materially against the law,

2. doctrine "against the law materially in a positive function" teaches us that a lawful act still can be categorized as an act against the law if it violates propriety and morality values existed in the society.

In relation to the government officials' actions based on discretionary authority, the core of the two doctrines against the law materially as stated above can be summarized in the following question. Are the government officials' actions based on discretionary authority categorized as acts against the law materially only because it is considered improper and violates propriety and morality values existed in the society? The author believes the government officials' actions based on discretionary authority are not acts against the law in the material sense or acts that violate propriety and morality values existed in the society.

Government officials' actions based on discretionary authority are actions that must be conducted by government officials with a purpose relating to the national interests in the context of government administration process in order to overcome government deadlock. When a deadlock arises in the government administering process, government officials are given the obligation to overcome it so that the state or government administration process can run normally. However, if the deadlock or impasse that occurs in the state administration process has not been regulated in the law or there are no rules in the law, government officials cannot refuse to solve the deadlock. The reason that it is not or has not been regulated in law so that government officials do not have a legal basis to solve the problems occurred in the administration process is an unreasonable thing morally. In the perspective of the welfare law state, the government does not have a reason to refuse solving a deadlock in the state administration process on the grounds that there are no rules governing the problem. A good government must act to protect its people's interests like a father protects his children.

If the government takes an action based on discretionary authority to overcome a deadlock that occurs in the government administration process even though it must violate the provisions of law, such action can still be accepted and justified from the perspective of the values of benefit, propriety and morality existed in the society. In the case that the government officials' actions based on discretionary authority as stated earlier can be accepted and justified from the perspective of social values, public (community) acceptance implies that the government officials' actions are not against the law materially.

If the government official refuses to overcome the deadlock on the grounds that there is no law regulating it, the actions conducted by them will in fact be categorized as an improper act that is contrary

to the values of propriety, morality and rationality existed in a community and nation. Government officials who refuse to take an action based on discretionary authority on the grounds that it has not been regulated in the law are those who do not understand their duties as public servants in the framework of the welfare law state. In fact, government officials who refuse to take actions based on discretionary authority on the grounds that there is no regulated law can be categorized as government acts that "violate the law materially" because they violate values existed in the society.

Government officials' actions based on discretionary authority are actions that must be conducted by government officials based on good and right motivation such as public interests and not based on personal, family or group interests. As stated earlier, in the framework of welfare law state, government officials are given discretionary authority or the authority to act freely on their own initiative rather than their personal or family or group interests. The authority to act freely on their own initiative is given to government officials because they are public servants. The mission to provide public services can only be done well if government officials are given the authority to act on their own initiative. The services performed by government officials to the public are in accordance with or considered good when viewed from the perspective of propriety and decency (morality) and worthiness (rationality) values. Therefore, if a government official is forced to act against the provisions of law based on discretionary authority with a good motivation in order to provide public services, the act clearly does not violate the values of propriety and decency and worthiness.

If sudden problems are not immediately overcome, it is feared that greater losses will occur. In other words, the government officials' actions based on discretionary authority can be carried out in certain matters in accordance with government officials' evaluation on concrete facts or events that occur in the state administration process. The earlier argumentation implies that the government officials' actions based on discretionary authority can be conducted according to concrete facts and not based on unreasonable government officials' will.

According to the reasons and arguments stated earlier, the author can firmly state that the government officials' actions based on discretionary authority are not or do not belong to the category of "act against law materially" when viewed from the three indicators stated above. The indicators presented earlier are a standard or benchmark for assessing government officials' actions based on discretionary authority from the perspective of the doctrine "against the law materially." According to the indicators stated above, the government officials' actions based on discretionary authority can be examined or assessed in order to decide if their action categorized into acts against the law materially or not. The indicators stated above are available for government officials, law enforcement and judges when assessing government official's actions based on discretionary authority from the perspective of criminal law by using the concept of "against the law materially" as a benchmark.

Conclusion

In the perspective of welfare law state principle, the indicators of government officials' actions based on discretionary authority are made from the perspective of criminal law so that they are not categorized as unlawful acts. In line with this, it is necessary to amend the Law of the Republic of Indonesia Number 30 of 2014 by adding articles to regulate that the evaluation and assessment on government officials' discretion is guided by the provisions of the law as regulated in Law Number 30 of 2014. Such regulation is to prevent judges' broad interpretation in handling cases of authority abuse which has occurred in criminal justice process until now. Based on the principle of general preference, the Law Number 31 of 1999 is no longer appropriate to be applied absolutely with regard to Government Administrative Decisions and/or Actions taken based on the Discretion Principle, as a result of deviation

from the inability of the Legality Principle to reach community's dynamic needs, then Government Administrative Decisions and/or Actions are illegible to be charged. The legislators are better to normalize the principle of *hulprecht* in every provisions of law in the field of state administrative law as long as it is *ultimum remidium.*

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