PROBLEMATIZATIONS OF DISCRETION POLICY IN INDONESIA’S ADMINISTRATION LAW No. 30/2014

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Abstract
This paper aims to discuss problematizations of discretion issue in the Administration Law 2014. Discretion is one of some discussed issues in the Administration Law which provides a legal guidance for bureaucrats to conduct their jobs. Drawing on Bacchi’s WPR (What is problem represented to be?) approach to policy analysis, this paper interrogates what ‘problem(s)’ is(are) produced in the policy document, what presuppositions are used as arguments to support the ‘problems’, what left unproblematic issue is absence in the policy problematizations, and what effects are produced by the ‘problem’ representation. The paper finds out that rules and procedures are the key concepts which assumed as policy ‘problems’ regarding to discretion issue. Neglecting the certain rules and procedures will be considered as doing illegal action. Only public managers have the discretionary power, or managerial discretion, but in limited room because of upper manager’s intervention. However, this discretion policy remains an inefficient and rigid process in facing certain situation because, in exercising discretion, they have to obey certain rules and procedures. In addition, staffs do not have discretionary authority within their jobs although they might also face some certain situation which needs to make decisions.

Keywords: Problematizations, Discretion, Administration Law, Indonesia

1. Introduction
Discretion is a crucial issue in Indonesia’s public sector. Public managers and officials occasionally need to make some quick decision or action in a specific situation. This kind situation often drives them to create breakthrough or to make discretion. However, they have to obey some rules or procedures that are set as standard even in urgent times. Neglecting rules or procedures might become a trap for them as they will be alleged to commit a mal-procedure. Moreover, they might be accused to commit corruption if the decision or action spends public budget. Then the accusation might be making a financial loss upon public budget through their decisions or actions. Consequently, they will be sent to court. This phenomenon creates fear among bureaucrats to make discretion in the public sector.

Discretion exercise in Indonesia’s bureaucracy is mostly performed by public managers. There are some cases in which public managers sent to court because of their
decisions. For example, in 2004, former Chief of General Election Commission (*Komisi Pemilihan Umum*/KPU), Nazaruddin Sjamsudin, was sent to court as a consequence of his decision to expense public budget without auction process. As the commission chief he decided to protect the commission employees under an insurance program. Unfortunately, the program was not performed through an open auction process because of limited time. Although the general election was successfully done, but it did not help to release him from the court process. The judges sentenced him in guilty as making loss upon the public budget and sent him to jail for seven years (‘Nazaruddin Menolak,’ 2005).

Second example was a case of power plant project that involved former Director of National Electrical Company, Dahlan Iskan. Prosecutor suspected him to make a financial loss upon public budget because of power plant project failure. Fortunately, a judge at pre-trial session released him for being innocent. The judge argued that the prosecutor worked in wrong procedure (‘Dahlan Iskan’, 2015). One another example is former Minister of Health, Siti Fadilah Supari. She recommended a direct appointment in buying health facility to anticipate a bird flu epidemic in 2006. Her recommendation then made her become a corruption suspect because of wrong procedure (‘Siti Fadilah’, 2015). The first and the second cases have been over, while the last case is still going on today.

Those case examples show that making discretion is not an easy job in Indonesia’s bureaucracy. It is not only about the procedure but also the consequence. Public managers face dilemmatic situation between obeying procedures that will take a long time process, or doing quick action but risky to response the problem. Working in accordance with procedures will make public managers save from corruption accusation. On the other hand, it might neglect citizen demands that need quick respond. To response the such crucial nature, the discretion matter is then installed as part of some chapters in Administration Law 2014. Article 22 to article 32 in the chapter six of the law specifically discuss the discretion that is possible to conduct. The earlier law proposal was drafted by the government and then was discussed together with the parliament.

The Administration Law 2014, No. 30 is a regulatory policy type because it regulates activities (Hill, 2013, p. 142). In policy studies, there are two mainstream approaches in writing about policy, i.e. policy cycle and policy analysis (Colebatch, 2009, p. 5). This paper will critically discuss the problematizations of discretion issue in the Administration Law from a policy analysis perspective. Drawing on Bacchi’s WPR (What is the problem represented to be?) approach to policy analysis, this paper aims to find out how the discretion issue is constructed and the assumptions underlies it in the policy document. A question is
whether it is necessary to create a discretion regulation on a specific Law. Then a proposed thesis in this paper is that discretion should be embedded in all official jobs both managers and staffs in accordance with their job authorities.

This paper is organised into five sections. Section one discusses the concept of discretion from some literatures. Section two discusses theoretical framework of problematizations based on Bacchi’s WPR approach. Section three discusses the method that is used in this paper. Then section four presents discussion and result. Finally, section five is conclusion.

2. Discretion

There are various definitions of discretion. Hill (2013) compiles some definitions of discretion in his work of The Public Policy Process. A range of definitions from some scholars are presented from constraint to unconstraint definitions of discretion. Davis (in Hill, 2013, p. 237) argues that discretion is owned by a public officer within his power to make a choice to do or not to do an action among range of possible courses. Public officer has a freedom to decide the best choice in his thought. Then Jowell (in Hill, 2013, p.240) defines discretion as a room decisional manoeuvre or action that owned by decision makers, but they cannot make arbitrary decisions. Furthermore, Simon (in Hill, 2013, p. 241) argues that individuals have freedom to interpret their tasks within general framework from supervisor.

In these definitions, discretionary right is embedded at public officer authority in performing their tasks. They do not separate managers and staffs in making discretion. Otherwise, they use some terms, such as public officer, decision maker, and individual, as the actor who makes discretion. Those definitions also highlight the term ‘freedom’ as one of key words. On the other hand, discretion discourses inevitably often involve the discussion of rules. As Bull and Donnison (in Hill, 2013, p. 237) argue that discretion emerges when the rules allow functionaries the responsibility to make some decisions in particular situation as they think fit. Since discretion involves the rules, Jacques (in Hill, 2013, p. 238) argues that the discretion exercise is then determined by the rules.

Discretionary power is not only owned by managers, but it is also owned by lower officials. Lipsky (2010) uses the term ‘street-level bureaucrats’ to refer officials or staffs who directly interact with citizens in their daily tasks. The street-level bureaucrats, because of their interactive tasks, know what the citizens need and what the citizens complain regarding to public services. Lipsky (2010, p. 15) argues that it is reasonable for them to
have discretionary power based on some reasons. First, they often work in complicated situations to reduce the fixed formats. Second, they work in situations that often require responses to the human dimensions of situations. And third, it is not likely to be eliminated bears more on the function of lower-level workers who interact with citizens that with the nature of tasks.

Furthermore, Taylor and Kelly (2006) argue that there are three elements regarding to discretion at street-level bureaucracy. First, rule discretion is bounded by legal, fiscal or organizational constraints. The more rules will make less discretion at street level. By contrast, the less rules will make more discretion exercises at street-level bureaucracy. Second, value discretion may be determined by notions of fairness or justice, possibly involving professional codes of ethics or organizational codes of conduct, such as those affecting local authorities in the UK. And third, task discretion is the actual ability to carry out prescribed tasks such as working with clients or responding to requests for information. Of the three elements, task-based discretion has increased as professionals are required to consider the implications of their tasks for targets, managers, and ‘customers’.

3. Theoretical Framework of Problematizations

Policy analysis discourses mostly discuss issues outside of the policy, such as why a policy is less effective or even fails to achieve its goals. The WPR approach, according to Bacchi (2016), reversely discuss issues inside the policy content or policy proposal. Moreover, this approach recommends a critical interrogation of assumed ‘problems’ in the policy or policy proposal (Bacchi, 2009, p. 31). That is why in the WPR approach, the term ‘problem(s)’ is(are) placed between quotation marks. It is because the ‘problems’ in this context are not real problems that the policy should tackle. Otherwise, the term ‘problems’ are created as representation in the policy.

Then, the term ‘problematization’ in the WPR approach is used in two ways. First, it refers to the way(s) in which particular issues are conceived as ‘problems’. In other words, it is about how and why certain things (such as behaviour, phenomena, and process) become ‘problems’ in the policies. And second, is to interrogate or problematize the problematizations or how certain things are shaped as particular objects for thought in the policies (Bacchi, 2009, p. 30; 2012). These problematized phenomena are then called as problematizations (Bacchi, 2012).

The WPR approach adopts Foucault’s genealogy theory which starts from the present situation to the past. It is because the approach starts to find out the policy representation
problems’ from the actual policy document or policy proposal, then historically traces its underlies presumptions of the ‘problems’. The WPR approach involves three key propositions, such as:

“(1) We are governed through problematisations; (2) We need to study problematisations (through analysing the problem representation they contain), rather than ‘problems’; and (3) We need to problematize (interrogate) the problematizations on offer through scrutinising the premises and effects of the problem representation they contain” (Bacchi, 2009, p. 25).

To reveal the ‘problems’ representation in the policy document, this approach sets six interrelated questions to guide policy analysts or researchers in searching the ‘problems’ representation. The first question is ‘What is the problem represented to be in a specific policy?’ This question is one of key questions in the WPR approach, as Bacchi (2009, p. 4) argues that the goal this question is ‘to identify implied problem representations in specific policies or policy proposals’. Second, ‘What presuppositions or assumptions underlie this representation of the ‘problem’?’ This question is intended to identify and analyse the conceptual logics or arguments that underpin the ‘problem’ representation revealed before. Third, ‘How has this representation of ‘problem’ come about?’ This question discusses a genealogy of the problem representation in which it draws on Foucault’s genealogical theory. Fourth, ‘What is left unproblematic in this problem representation? Where are the silences? Can the ‘problem’ be thought about differently?’ This questions search what issues are left or silenced in the identified ‘problem’ representation. Fifth, ‘What effects are produced by this representation of the ‘problem’?’ And finally, ‘How/where has this representation of the ‘problem’ been produced, disseminated and defended? How could it be questioned, disrupted and replaced?’ (Bacchi, 2009, pp. 2-19).

However, self-analysis or reflexivity is needed to decide which questions will be applied. It is because we need to subject our own problem representations to the approach analysis (Bacchi, 2009, p. 19). Some authors apply several questions only to analyse policies in various fields, such as Alexander and Coveney (2013), Bastian and Coveney (2013), Payne (2014), Barsoum (2015), Bacchi (2015), Wahyudi (2016), and so on. Their works explore the contribution of WPR approach, which is considered as poststructural policy analysis, to the knowledge development in several policy analysis discourses.
4. Method

This paper uses a critical discourse analysis of the Administration Law document, focusing on discretion issue which is specifically discussed on chapter six. Moreover, academic paper of the policy draft document is also useful to support required information about discretion issue in the policy. The academic paper was issued by The Ministry of Administrative Reform which acted as leading institution during the policy making process. It is important to complete those two documents in order to gain a comprehensive meaning and background of the discretion issue formulation.

The analysis is then performed based on the WPR approach’s questions. However, this paper applies four of the six questions, they are question 1, 2, 4 and 5. The question 1 reveals the representation of discretion ‘problem’ in the document text. Then the question 2 searches the presuppositions or assumptions that underlie the representation of discretion ‘problem’. The question 4 searches the left unproblematic or silent in the representation. And finally, the question 5 searches the effects that are produced by the ‘problems’ representation. In addition, some literatures which discuss discretion issues are used to support and to enrich the discussion.

5. Discussion and Result

5.1. Discretion in the Administration Law

Although many literatures provide various meaning of discretion, but the Administration Law has its definition. The Administration Law (2014) defines discretion as a decision or action that is conducted by public managers to solve some real problem they face in performing governmental tasks. This definition is different from the definitions discussed above because the Administration Law limits its meaning for public managers only, while some literatures allow staffs to make discretions. The concept of discretion in this law is limited and narrower than the discretion in literatures generally.

The Administration Law states that discretionary decision or action is available in case existing regulations do not arrange the solution, incomplete, or unclear, and/or the discretion is done in order to solve some stagnation in the governmental activities. The discretion issue is completely presented on article 22 to 32 on chapter six. The articles discuss discretion issue in several aspects, such as actor, aim, scope, conditions, procedure, and consequences of discretion.

First, article 22 says that discretionary decision or action is only conducted by authorised public managers as the actors. Discretion is then intended to expedite the
governmental jobs, to fill the incomplete rules, to give the legal certainty, and to solve the stagnation in performing governmental jobs. Article 23 describes the scope of discretion and this article explains the previous one. It says that there are four situations in which public managers can make discretion. First, public managers are allowed to make decisions or actions based on rules which give them options to do it. Second, making decisions or doing actions is due to no rule that regulates some certain issue. Third, making decision or doing action is conducted because of unclear or incomplete rules. And finally, making decision or doing action is conducted due to broad interest to solve the stagnation in performing governmental jobs.

Second, article 24 sets some preconditions in which public managers must have before making discretion. The preconditions are including: (1) being fit for the objectives stated on article 22 above, (2) does not against other regulations, (3) being fit to good governance principles, (4) based on objective reasons, and (5) conducted in a good intention. Moreover, article 25 sets that in certain situations a public manager must get an approval from the upper manager before performing discretion. The certain situations are stated in this article such as potentially affecting budget allocation, potentially creating a problem among citizens, and in emergency or force majeure. Then public manager must give a report to upper manager after performing discretion, especially in the emergency or force majeure.

Third, article 26 to 29 discuss the procedure of implementing discretion. Public manager must explain the aim, objective, content and the possible administration and finance consequences. The explanation is written and proposed to the upper manager. In five days after the discretion is proposed, there will be three possible responses upon the proposed discretion, such as accepted, revised, or rejected.

Finally, article 30 to 32 discuss legal consequence of discretion. Discretion is considered as exceed the authority when public manager acts exceeding his authority period, territory, and does not meet the rules stated on article 26 to 28 of this Administration Law. Those three problems will make the discretion becomes illegal or cancelled.

5.2. Problem Representation

Discretion issue in the Administration Law (2014) emphasises on rules and procedures as important things and they must be followed by public managers. The salient indicators of the rules and procedures are clearly described on article 25 to 28. Article 25, which is concerning rules of discretion usage, clearly say that public managers must get approval before exercising discretion. Then, article 26-28 specifically discuss the procedure in
making and doing discretion. The discretion procedure says that public managers, as discretion maker, must explain the proposed discretion to their upper manager. Furthermore, the discretion proposal must be written and at least it consists of aim, objective, substance, and administrative and financial impacts.

A legal consequence might be applied if they neglect the certain rules and procedures in conducting discretion. Moreover, public managers must set their reasons as argument of why they exercise discretion. As explained on article 30 to 32 the discretion will potentially be cancelled or considered as illegal decision or action if the required rule and procedure do not meet the law or regulation. The upper supervisor or manager then assesses the discretion proposal and decides whether or not the proposed discretion being executed. Since rules and procedures dominate the discussion and they become the key issues on the articles, it is argued that the rules and procedures are represented as ‘problems’ in the policy document (Question 1 of the WPR approach). Therefore, discretion issue is set as rules and procedures ‘problems’ in the Administration Law in which all public managers must obey them.

This ‘problems’ representation confirms the characteristic of bureaucracy in Indonesia which is too many procedures, even exercising discretion is also arranged in a certain rigid procedure. Dwiyanto (2015, p. 58) argues that procedure problem is one of some bureaucratic pathologies in Indonesia. In fact, bureaucracy in public sector not only develops rigid and complex procedures, but also excessive demanding to obey the procedures. Neglecting the required procedures will consequently create difficulties to public managers or officials. Even the Administration Law maintains and strengthens this bureaucratic pathology by formalizing the discretion making in the policy document as one of ‘problems’ along with the discretion rules.

5.3. Presuppositions of Problem Representation

An Academic Paper on Draft of Administration Law (The Ministry of Administrative Reform, nd) states that discretion is one of public administration actions. This document also highlights that discretionary right is owned by public managers only. This kind of discretion in some literatures is called managerial discretion (Wülfeth, 2013, p. 25). Although discretion is intended to fill the lack of regulation or legal vacuum and to expedite the government activities, but it potentially creates negative impacts such as power abuse. Therefore, this academic paper suggests that a regulation of discretion is needed to allow the discretion practices create advantages in performing governmental activities. Moreover, the
regulation should be a guidance or sign for public managers in performing their discretionary rights (The Ministry of Administrative Reform, nd).

To interrogate how the meaning is created in the policy document, Bacchi (2009, p. 7) suggests some methods to dig it deeper, i.e. binaries, key concepts, and categories that operating within the policy problematizations. This ‘problem’ interrogation reveals that the binary and key concepts emerge in the problematizations of the Administration Law, while there is no category both implicitly or explicitly discussed in the articles.

First, the discretion policy implies legal and illegal actions. Public managers who neglect the discretion guidance or sign in the Administration Law then will be considered as doing illegal actions. By contrast, their discretions are considered as legal actions if they obey the provided guidance (Question 2 of the WPR approach). It is argued that high control from upper supervisor or manager toward discretion exercise is a form of intervention. This intervention is made to prevent possible negative impacts and legal consequences as stated in the academic paper.

Second, rules and procedures are the key concepts that operating within the discretion policy. Since the Administration Law emphasizes that certain rules and procedures must be followed by public managers in performing discretions, then the rules and procedures are the important things which they cannot neglect. Almost all articles in the Administration Law discuss about rules and procedures, both implicitly and explicitly, in which public managers must pay attention on them (Question 2 of the WPR approach).

5.4. Left Unproblematic Issue

The Administration Law limits the discretionary right belongs to public managers only. It is clearly stated on article 22 that discretion is performed by authorized public managers only. Public manager levels in Indonesia’s bureaucracy consist of several echelon levels, i.e. echelon I (higher), II, III, and IV (lower). Otherwise, the discretion issue in the Administration Law does not pay attention to staff level. In fact, discretionary actions often occur in all levels, even staffs at street-level bureaucracy. They should have discretionary right to solve certain problems in delivering services. As Lipsky (2010, p. 13) argues that street-level bureaucrats are policy makers. It is because they have higher intension in interacting with citizens than their managers, and their individual actions add up to agency behavior.

Discretion is about freedom to do or not to do possible actions in particular situation. This freedom should be owned by all officials both managers and staffs within their job
authorities. However, they have different job characteristics that lead to shape their results. Manager jobs are much more dominated by managerial tasks, while staff jobs mostly contain technical and administrative tasks. In conducting those kind of jobs, staffs (street-level bureaucrats are included) often face situations in which they need to make decisions, such as decisions in public service delivery. The absence of discretionary authority among staffs as a ‘problem’ representation in the Administration Law remains a question whether or not they have the discretionary right. This issue is the left unproblematic or silence one of the problematizations in the policy document (Question 4 of the WPR approach).

Lipsky (2010, pp. 18-19) describes the differences between street-level bureaucrats and managers and the conflict of interests among them. Street-level bureaucrats are interested in processing work consistent with their own preferences, while managers are interested in achieving results consistent with agency objectives. Then, street-level bureaucrats have desire to maintain and expand their autonomy, while managers try to restrict their staffs’ discretion in order to secure their certain results. Indeed, their job characteristics are different, as Lipsky describes the works of police officers, teachers, social workers, and nurses as some examples. They expect themselves to make discretionary decisions, but the absence of managers’ involvement in decision making will be regarded as illegitimate. Therefore, Lipsky argues that the maintenance and enhancement of discretion in so important and useful for street-level bureaucrats. Having discretionary power will allow them to decide necessary things during their interaction with citizens.

In addition, as Taylor and Kelly (2006) argue that there are three elements of discretion at street-level bureaucracy. Staffs at street-level bureaucracy therefore should have discretionary authority to face certain situation through one of three kinds of discretion, such as rule discretion, value discretion, and task discretion. The absence of discretionary authority for staffs remain some questions whether they can or not do something in certain situation they face. If they cannot make a discretion, the next question is who will be responsible to face a certain situation at street-level. The last question is whether public managers are also involved to make decision at street-level bureaucracy. Those question are not answered in the Administration Law policy.

5.5. The Problematizations Effects
‘Problems’ representation in the policy discourses creates some effects. In assessing the ‘problems’ representation effects, Bacchi (2009) suggests three kinds of effect that are possible to operate within the policy ‘problems’, i.e. discursive effects, subjectification
effects, and lived effects. ‘Discursive effects are effects which follow from the limits imposed on what can be thought and said. Then subjectification effects are the ways in which subjects and subjectivities are constituted in discourse. And finally, lived effects are the impact on life and death’ (Bacchi, 2009, p. 15).

First, the representation ‘problems’ of rules and procedures in the discretion policy creates effects upon public managers’ works. Wasting time and rigidity over bureaucrats’ works, are arguably two crucial effects that influence their decision making process. Some managers might obey the rules and procedures to secure their positions. However, the rules and procedures of discretion exercise need long process and consequently it is time consuming. For example, article 26 verse (3) says that upper manager has five days to respond the proposed discretion after he received the proposal. The proposed discretion in this article is the planned discretion which potentially spends budget. Then, the upper manager assesses and decides it whether to accept, ask for revision, or reject the proposed discretion. This kind of rule also applies on article 27 verse (3) concerning the proposed discretion which potentially creates social impacts. It is argued that the rules and procedures ‘problems’ in the policy neglect sense of urgency in making discretion.

Some other managers might leave the rules and procedures behind to make the decision is decided and executed quickly. However, they will be considered to break the rules and procedures or against the law. Even if the executed discretion spends public budget then the managers will be accused to commit corruption. The three examples in the introduction above tell the possible consequences of omitting the rules and procedures. Making discretion, for some public managers, is a risky work and therefore they tend to work as usual in order to secure themselves.

Second, the rules and procedures ‘problems’ puts public managers as central subjects. Public managers are the authorized individuals of discretionary power. They are the actors who propose discretion to their upper manager and they also the actors who will execute the discretion. Moreover, they also need to give report after finishing the discretion. In case the discretion fails, then they will take responsibility upon the consequences.

And finally, lived effects might be happened as indirect effects of the rules and procedures ‘problems’. The effects are specially related to discretion which is stated on article 25 verse (3). This verse says the discretion which is related with social, emergency and natural disaster. In such situations, quick and right decisions are needed to save people. Since discretion is freedom to decide the best possible courses in certain situation, managers need to decide it as soon as possible. Therefore, managers should do self-assessment and
decide it by themselves. Following rigid rules and procedures in making discretion will potentially affect people’s life.

6. Conclusion

In conclusion, the Administration Law 2014 produces rules and procedures as represented ‘problems’ that must be obeyed by public managers in Indonesia’s public sector. The rules and procedures are intended to prevent possible abuse of power in performing discretion. Since the Administration Law creates discretion issue as rules and procedures ‘problems’, consequently discretion exercise must obey the given rules and procedures. Moreover, public managers need to get approval from their upper manager if the discretion potentially spends budget or creates some social impact among the people. On the other hand, the rules and procedures cause public managers to take long and rigid process in making decision.

The practice of discretionary authority in Indonesia is a kind of limited managerial discretion. Only public managers have the discretionary authority according to the Administration Law, but they get an intervention from their upper manager through an approval mechanism. While, their staffs do not have discretionary power. The absence of discretionary authority among staffs consequently creates a longer decision making process at street-level bureaucracy because they have to consult almost everything to their managers and the managers will decide it. On the other hand, they need to make quick responds regarding to certain situation they face, such as in delivering services. Furthermore, staffs have much more interactions with citizens rather than their managers. Therefore, discretionary right should be owned and embedded at all level jobs, both managers and staffs in bureaucracy.

Finally, the rigid discretion rules and procedure will not make tasks being performed practically and easily. On the contrary, they will make the performing tasks being more difficult and time consuming. Discretion exercise should not need rigid rules and procedures. Otherwise, general norms are more appropriate to be guidance for bureaucrats in making discretion. It will provide them freedom or room to decide the best options in their thoughts in facing certain situations.

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