Author's name: Despan Heryansyah. Title: "Presenting a Human Rights Perspective in Administrative Law (Paradigm Offers Administrative Court Reviewing)." South-East Asian Journal of Advanced Law and Governance 2 no. 2 (2025).

SEAJ-ALGOV
Volume 2 Issue 2, 2025
E-ISSN: 3062-7907

Presenting a Human Rights Perspective in Administrative Law (Paradigm Offers and Administrative Court Reviewing)

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Received: July 23, 2025 | Revised: September 15, 2025 | Published: November 1, 2025

Abstract: Human Rights have not yet become the main norm and principle in the regulation and reviewing of state administrative law in the State Administrative Court. So far, state administrative law, both at the regulatory and reviewing levels, is still identified with procedures, authorities, and orders of laws and regulations. In fact, in many ways, the products of state administrative law are very intersecting with human rights, such as the eviction of agricultural land, the takeover of housing, and so on. This research shows the opposite paradigm that state administrative law is very close and closely related to human rights, so it must be the main foothold in its regulation and reviewing. This research is a type of non-doctrinal research, using secondary data as the main study. The approaches used are *the statute approach* and *conceptual approach*. The results of the study show that theoretically, departing from the contemporary meaning of the state of law, human rights and state administrative law (as an important instrument of the state of law), become a unit that is inseparable from the meaning of the state of law itself. Meanwhile, from the juridical aspect, the interpretation of Article 28I paragraph (4) and Article 5 of the Government Administration Law, has implicitly emphasized that human rights are an inseparable part of state administration. Both as the basis for government officials/organs in carrying out government functions, and as a touchstone for State Administrative Court (PTUN) judges in adjudicating administrative cases.

Keywords: Administrative Law; Human Rights; Awyu and Wadas

1. Introduction

This article departs from two phenomenal decisions that are quite public attention, namely Decision No.68/G/PU/2021/PTUN. SMG (related to the lawsuit of the Wadas community over the construction of a bener dam in Central Java) and Number 6/G/LH/2023/PTUN. JPR (related to the rejection of the Awyu tribe's lawsuit in Papua over customary forests). These two rulings both have a direct impact on human rights, which are owned by the Wadas community and the Awyu tribe in Papua.[1]

Wadas residents had to lose their land and livelihoods as a result of the construction of the Bener Dam, which is one of the Jokowi government's National Strategic Programs.[2] The lawsuit at the State Administrative Court (PTUN) as the only judicial avenue to restore the constitutional rights of Wadas residents ran aground after the Semarang State Administrative Court and Supreme Court Decision No.482 K/TUN/2021 essentially rejected the lawsuit of Wadas residents who requested that the Governor's Decree No.590/20 of 2021 be canceled or declared invalid. In some legal considerations, the panel of judges assessed that Article 21 paragraph (6) of Presidential Regulation No. 58 of 2017 concerning the Acceleration of the Implementation of National Strategic Projects which was used as the basis for the Governor of Central Java as a defendant in issuing the Governor's Decree No. 50/20 of 2021 is still legally valid. In addition, the panel also considered that the planning and implementation of dam construction was in accordance with the procedures as stipulated in laws and regulations and considered the Principles of Good Governance (AUPB).

Another similar reality is that the Awyu Tribe in Papua is certain to lose their land as customary forests,[3] where they live and fulfill their living needs. The Papua Provincial Government issued an environmental feasibility permit for PT Indo Asiana Lestari (IAL). PT IAL has an environmental permit covering an area of 36,094 hectares, which is in the customary forest of the Woro clan – part of the Awyu tribe.[4] The refusal of the permit was carried out by the Awyu Tribe by filing a lawsuit with the Jayapura State Administrative Court, unfortunately the lawsuit was rejected by the panel of judges. The Assembly, in part of its considerations, stated that there had been an assessment or testing of the EIA by the Environmental Feasibility Test Team or the Head of the Papua Provincial Environmental Forestry Service as the Chairman of the EIA Assessment Commission on November 1, 2021. In addition, the council also considered that the issuance of the Decree of the Head of the Papua Provincial PMPTSP Office on the feasibility permit for oil palm plantations by PT Indo Asiana Lestari "was procedurally appropriate and did not contradict the general principles of good governance".[5]

1. Compare with Sukirno, Muh. Afif Mahfud, dan Muhammad Fahad Malik, Reconstructing Village Druwe Land Administration to Protect the Communal Land in Bali, *Bestuur journal, Vol.12, No.2, December, 2024, pp. 104-123.* https://doi.org/10.20961/bestuur.v12i2.90365.
2. Eve Warburton, "Jokowi and the New Developmentalism," Bulletin of Indonesian Economic Studies 52, no. 3 (Februari, 2017): 306. https://doi.org/10.1080/00074918.2016.1249262.
3. Compare with Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," Journal of Genocide Research 8, no. 4 (Desember, 2006): 400, https://doi.org/10.1080/14623520601056240.
4. See Agung Wardana, "A Quest for Agency in the Anthropocene: Law and Environmental Movements in Southeast Asia," *Review of European, Comparative & International Environmental Law* 32, no. 1 (September, 2022): 57-66. https://doi.org/10.1111/reel.12467.
5. Compare Yance Arizona, "Adat Sebagai Strategi Perjuangan dan Mobilisasi Hukum," *The Indonesian*

If we pay attention, the two above decisions both come to the point of consideration that the government's decision "has been procedurally appropriate and does not contradict the general principles of good governance".[6] This is a commonly known "template" of PTUN decisions, meaning that almost all PTUN decisions have a sound that is not much different, especially if they contain a rejection of the object of the lawsuit. So far, the three mandatory components that are the main considerations of the PTUN judges are whether the Decision is in accordance with the authority, whether the making of the Decision is in accordance with the procedure, and whether the substance of the Decision is in accordance with the laws and regulations.

Judges of the Administrative Court rarely consider the dimension of human rights in their decisions, even though the object of the lawsuit is very strongly relevant to human rights.[7] The evictions that befell the residents of the Wadas, by the panel of judges, were seen as a purely formal procedural problem, not linked to the context of human rights. In fact, the human rights dimension in the case is very strong and dominant, for example, there are property rights, participation rights, rights to due process of law, rights to residence, right to work and so on. However, none of them were used by the panel as a basis for consideration, in fact, *amicus curae* and expert testimony that raised human rights issues, by the panel of judges were considered to be better placed in the Academic Manuscript of public policy. In line with the Semarang State Administrative Court's Decision, the Jayapura State Administrative Court in its decision above is also still dry from human rights considerations and arguments. In fact, in it the dimensions of indigenous peoples' rights, the right to decent housing, the right to work, the right to self-determination and so on.[8]

This reality reveals a fundamental question, namely whether the authority of the PTUN is only related to the formal aspects of authority and procedures for making a policy? Which means, it has nothing to do with the human rights dimension.[9] In a brief interview by the author with a PTUN judge, most of the PTUN judges think that the main task of PTUN judges is to ensure that the authority and procedures for making decisions and/or actions are appropriate, while human rights norms, because they are very normative in the constitution, make it difficult to relate them to concrete cases.[10]

Journal of Socio–Legal Studies 2, no. 2 (2023): 1-24. https://doi.org/10.54828/ijsls.2023v2n2.3. See also Nancy Fraser dan Axel Honneth (ed.), "Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation," in the *Redistribution or Recognition? A Political-Philosophical Exchange*, (London: Verso, 2003), 83.

6. See Muhammad Tanziel Aziezi, The Application of Human Rights Principles in the Jakarta State Administrative Court Decision, Regarding the Slowdown and Termination of Internet Access in Papua and West Papua, *Opinion of the Institute for the Study and Advocacy of Judicial Independence (LeIP)*, accessed on November 8, 2024, at 13.35 WIB. See https://leip.or.id/penerapan-prinsip-prinsip-hak-asasi-manusia-dalam-putusan-ptun-jakarta-terkait-pelambatan-dan-pemutusan-akses-internet-di-papua-dan-papua- barat/.

7. Compare I Wayan Gde Wiryawan et.al, Unprotected and Unparticipation Mental Health in Regulation Worker, *Bestuur Journal, Vol.12, No.2, December, 2024, pp. 124-150, Vol.12, No.2, December, 2024, pp. 124-150.*

8. Compare with Brian Z. Tamanaha, 'Tempering Arbitrary Power: A Moral Theory of the Rule of Law', *Washington University in St. Louis Legal Studies Research PaperLegal Studies Research Paper Series, 24.March (2024).*

9. Compare with Rafal Manko, "Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication," *Law and Critique* 33, no. 2 (2022): 180. http://dx.doi.org/10.1007/s10978-021-09288-w.

10. Wawancara dengan hakim PTUN Jogja dan PTUN Jakarta, pada bulan Mei 2025, di PTUN Jakarta dan

Departing from the above background, this paper will further examine the perspective of human rights in state administrative law. The state administrative law that the author refers to refers to two aspects, namely government organs and/ or officials in carrying out administrative functions and judges in examining the decisions and/or actions of government officials. Thus, this study will look further at the relevance of the state administrative function to human rights and the existence of PTUN in review these administrative products?

2. Methodology

In legal studies, this research is classified as a type of non-doctrinal research. This is because the author not only studies laws and regulations, but also relates them to criticism of judges' decisions, the conceptual framework of the relevance of State Administrative Law (HAN) and human rights, and the opinions of several experts. The data used in this study is secondary data, which is based on primary and secondary legal materials. This research begins with an examination of the PTUN decision that is relevant to human rights, to strengthen the argument that human rights have not been considered. Followed by the author's analysis of why HAN has been separated from human rights for a long time. Finally, the author uses a conceptual approach to show the urgency of using a human rights approach in testing decisions/actions. As for the results of the short interview, the author only placed it as a reinforcement of arguments, which was carried out online via the zoom application or whatsaaps to the speakers. The approach used is the *statute approach* or legislative approach, where the focus of this research study is on Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia, Law Number 30 of 2014 concerning Government Administration, and the Decision of the PTUN Judge in the case of the Bener Wadas dam and the Decision of the Awyu Tribe Case in Papua. *The comparative approach* is used by the author to compare the provisions in the constitution and laws with the practice of review decisions or actions in the State Administrative Court, while the *conceptual approach* is used to narrate the opinions or views of administrative and human rights law experts about the relevance of human rights to state administrative law and the State Administrative Court.

3. Contemporary Perspective: The Relevance of the Rule of Law and Human Rights

This sub-chapter attempts to revisit the basic concept of the rule of law, as well as answer the question of where human rights lie if they are relevant to it. In Indonesia, the concept of *rule of law* is still often understood as a concept that is different from *rechstaat*. Writers in Indonesia still state that the concept of the state of law used in Indonesia refers to the *rechstaat* and not the *rule of law*. This view is usually reinforced by referring to the views of Friedrich Julius Stahl and Albert Van Dicey. Two classical thinkers whose views were very helpful in their time.

PTUN Jogjakarta.

The authors argue that Stahl and Dicey's views on the state of law have undergone an innovative correction as well as an appreciation. The contemporary view no longer distinguishes between the *rule of law* and the *rechstaat*. The author uses this view by referring to the theoretical scheme developed by Adriaan Bedner and Biranz Tamanaha in this paper.[11] This paper uses the *rule of law*, *rechtstaat*, and the state of law simultaneously and in the same sense.

Bedner chose the concept of *rule of law* to represent several terms such as *the rule of law*, *rule of the law*, *rule by law*, *rechsstaat.*[12] Bedner states that whatever term is used, the most important element of this concept is the element of the principle. According to Bedner, *the rule of law* is built on three elements, namely procedural *elements*, substantive *elements*, and controlling *mechanism/guardian institution*.[13] The procedural elements consist of (a) *rule by law*, (b) state actions must be based on law, (c) formal legality which means that the law must be clear and definite, accessible and predictable, and generally applied, and (d) democracy. The substantive element is interpreted as (a) the subordination of all laws and their interpretation to the fundamental principles of justice, (b) the protection of individual rights and freedoms , (c) the advancement of social rights, (d) the protection of group rights. The latter is an element of the control mechanism consisting of (a) independent judicial power, and (b) the existence of institutions that secure the *element of rule of law.*[14]

Departing from the relatively close substance of the idea, Tamanaha developed two basic categories of rule of law , namely the formal version and the substantive version . Each of these basic categories consists of three differentiators through the following bodies:[15]

Table 1. Formal and Substantive Versions of the Rule of Law by Tamanaha

ALTERNATIVE RULE OF LAW			
	Thinner ---------->		to----------> Thicker
FORMAL VERSIONS:	**1. Rule-by-law** law as instruments of government action	**2. Formal Legality** general, prospective, clear, certain	**3. Democracy+Legality** consent determines content of law

11. The author has written something similar in the book Bunga Rampai Judicial Commission, see Eko Riyadi and Despan Heryansyah, T*hick And Thin Rule Of Law*; *Reading the Decision with the Dimension of Human Rights*, Jakarta: Judicial Commission of the Republic of Indonesia, 2024.
12. Andriaan Bedner, "An Elementary Approach to the Rule of Law," *Hague Journal on the Rule of Law*, 2 (2010), p. 48-87.
13. *Ibid.*
14. *Ibid.*
15. Brian Z. Tamanaha, *On The Rule Of Law, History, Politics Theory,* (Cambridge: Cambridge University Press, 2004), p. 91.

SUBSTANTIVE VERSIONS:	**4. Individual Rights** - property, contract, privacy, autonomy	**5. Rights of Dignity and/or Justice**	**6. Social Welfare** - substantive equality, welfare, preservation of community

Source: Author's Processed. 2025

The formal version of *the rule of law* pays attention to the authority of the party who ratified the rule, the clarity of the norm (to be used as a benchmark for one's actions), and the timing dimension of implementation (whether the norm applies prospectively, not retrogressively). Formal conceptions do not give adequate attention to whether the law is good or bad. While the substantive version of *the rule of law* works *beyond* formal concepts.[16] The formal aspect remained recognized and accepted, but this doctrine was further developed. Substantive rights are used as the basis of the rule of law. Rule of law is a concept that is used as the foundation for these rights, where good law is in accordance with these rights, while bad law is a law that is not in accordance with it.[17] The state must provide public rights such as freedom of thought, speech, belief, and organization.[18] A stark distinction is that formal theory focuses on adequate sources and forms of legality. Whereas substantive theory includes requirements regarding the content of the law (which is usually related to the principles of justice and morality).[19]

A country that only focuses on legal procedural formalities in order to protect individual rights, then it can be called a country with a *thin rule of law*. Meanwhile, a country that can develop substantive democracy and fulfill the prosperity of the people can be called a thick *rule of law*. What type of legal state is currently developing in Indonesia?

Simon Butt, referring to the practice of the Constitutional Court, stated that the Court uses the concept of *rule of law* in the sense that'*government by law*'.[20] Nadirsyah Hosen stated that the Constitutional Court has never comprehensively explained the version of the *rule of law* applied. There is a tendency for the concept of the 'state of law' in Indonesia to be equated with all versions of the *rule of law*, both thin and *thick*.[21] This concept of *the rule of law* encapsulates, on the one hand, the Western concept of the rule of law, including the components of democracy and human rights, and on the other hand *the rule by law* version without adequateguarantees

16. See also Brian Z. Tamanaha, 'Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences', Journal of Legal Pluralism and Unofficial Law, 53.2 (2021), 168–205. https://doi.org/10.1080/07329113.2021.1942606
17. Paul Craig, "Formal and Substantive Conceptions of the Rule of Law," *Public Law* (1997), p. 467-87 and republished in Richard Bellamy (ed.), *The Rule of Law and the Separation of Power,* (London dan New York: Routledge, 2005).
18. Stefano Civitarese Matteuci, "The Formal Meaning of the Ideal of the Rule of Law,", *Italian Journal Public Law*, Vol. 3, No. 1 (2011), p. 9; Corey Brettschneider, "A Substantive Conception of the Rule of Law: Nonarbitrary Treatment and the Limits of Procedure," *Nomos*, Vol. 50 (2011), p. 52-63; Robert S. Summers, "A Formal Theory of the Rule of Law," Ratio Jurist 123, 135 (1993).
19. Tamanaha, On *The Rule Of Law* ..., Op. Cit. p. 91-92.
20. Simon Butt, "Conditional Constitutionality, Pragmatism and the Rule of Law," *Legal Studies Research Paper* No. 09/28, (Sydney: Sydney Law School, The University of Sidney, Mei 2009).
21. Nadirsyah Hosen, *Human Rights, Politics and Corruption in Indonesia: A Critical Reflection on the Post-Soeharto Era,* (Doredrecht: Republic of Letters, 2010), p. 45-6.

of resistance to authoritarianism.[22]

For the sake of this article, the author would like to emphasize two important things: *First*, in the conception of the state of law, both the initial concept introduced by Dicey and Stahl, since all have placed human rights as part of the main elements of the state of law. Likewise, in the concept of the state of law that was later developed by Tamanaha and Bedner, it actually further strengthens and strengthens the aspects of protection and fulfillment of human rights. *Second*, state administrative law, as a concept that develops in a country with a civil law character, is the main aspect of supporting the state of law. This means that the law of state administration is the pillar for the establishment of the state of law. That way, it can also be interpreted that the existence of administrative law is also in the framework to realize the protection, fulfillment, and respect for human rights. At the practical level, this means that the implementation of administrative law by government organs is nothing but to ensure that human rights are not set aside, let alone overridden in decision-making and/or actions of government organs.[23]

4. Breaking the Boundaries of the Conservative Paradigm of State Administrative Law (HAN) and State Administrative Court (PTUN)

The discussion of state administrative law in practice cannot be separated from the discussion related to state power, both by John Locke and Montesquieu. Legislative power, executive power, and judicial/federative power,[24] Whether using the perspective of power sharing or separation of powers, it will lead to the conclusion that the three have different scopes of authority. The legislature is authorized in the scope of making laws and regulations, the executive is authorized in the scope of implementing laws and regulations, while the judiciary is authorized in the scope of supervising and adjudicating the implementation of laws and regulations. Theoretically, the three have separate authority, unable to interfere with each other. Interference by the executive branch in judicial affairs, interference by the judiciary in executive affairs, and/or legislative interference in the judiciary, is understood to be not only "haram" of the law, but will also lead to the birth of authoritarianism.[25]

The above paradigm, in the very long term, is believed to be the truth in the branches of constitutional law and state administrative law, especially in Indonesia. This condition, then gives birth to two factual conditions. *First*, state administrative law is considered an elaboration of executive duties and functions, which focuses on the issue of government administration which includes government actions, government decisions, and government instruments. The HAN's perspective as an

22. Herlambang P. Wiratraman dan Sébastien Lafrance, "Protecting Freedom of Expression in Multicultural Societies; Comparing Constitutionalism in Indonesia and Canada," *Yuridika*, Vol. 36 Bo. 1 (Januari 2021).
23. View and compare Adriaan W. Bedner, dkk (Ed.), *Kajian Sosio-Legal*, (Denpasar: Pustaka Larasan, 2102), p. 45-83.
24. John Locke, *Two Treatises of Government and A Letter Concerning Toleration, Edited and with An Introduction* by Ian Shapiro, (New Heaven and London: Yale University Press, 2003), p. 159-164. Quoted from Fitra Arsil, Diversifikasi Kekuasaan Legislasi: Fenomena Pelemahan Parlemen, Superioritas Presiden, dan Eskalasi Yudisialisasi Politik, *Pidato Pengukuhan Guru Besar*, Jakarta: UI Publishing, 2024.
25. Compare with P. A. Johnson dan R. *Williams. Judicial Influence on Parliamentary Affairs: An Analysis of Constitutional Court Decisions*, (Cambridge: Cambridge University Press, 2017).

elaboration of executive power sees the law as a ready-to-use product, or a finished product that has no room to criticize, let alone store it. *Second*, at the court level, the State Administrative Court (PTUN), which is focused on examining the intricacies of state administration or government, also has the view that the court as a judicial institution, cannot assess the substance of a policy, because policy-making is the domain of the executive. Crossing the executive boundary is a form of intervention against the executive domain that can obscure the basic theory of the separation of powers. So it can be understood that so far the PTUN's focus has only been on the level of review the formal procedural aspects of a policy. At the farthest, he will shift to adding aspects of the General Principles of Good Governance (AUPB) to assess the policy.

If we look far back, the birth of PTUNs in Indonesia cannot be separated from the political interests of authoritarian governments. The study of the relationship of authoritarian political power that influences the development of judicial power can be found in the results of Ginsburg and Moustafa's research.[26] They found that in Indonesia, the judiciary is often used as a tool to support the regime's power which in turn legitimizes human rights violations.[27] More specifically, Bedner revealed that the formation of the PTUN is also inseparable from the relationship of authoritarian political power of the new order. Ismail Saleh, the Minister of Justice who finally succeeded in establishing the PTUN, has stated from the beginning that the establishment of the PTUN will be a fairly effective tool to support the legitimacy of all government actions.[28]

The planning certainly results in the way the PTUN is formed. First, the competence of the court and the power to conduct judicial review must be limited. Court control over development programs deemed essential by the New Order government was reduced, as seen in some cases where district courts were unable to perform their functions to the fullest. Do not let there be any more cases like the Kedung Ombo case (a lawsuit against the government that is considered to have been negligent in providing proper compensation in the case of land eviction), which turns into bad publicity for the Suharto regime.[29]

Second, the establishment of a PTUN separate from the District Court is a better way to establish the legitimacy of the New Order. This confirms why the government ultimately chose to establish a separate state legislature rather than adding a special body to the state judiciary. In the end, with the formation of a special PTUN , the government can control the number of courts in question. In fact, for many citizens, the establishment of the PTUN is a significant setback in providing protection. Since the district court no longer has the competence to adjudicate state administrative decisions, the plaintiffs must take their cases to the first-level PTUN located thousands of kilometers from their place of domicile, because at the

26. Tom Ginsburg dan Tamir Moustafa (ed.), Rule by Law: The politics of Courts in Authoritarian Regimes, (New York: Cambridge Press, 2008).
27. Herlambang P. Wiratraman, "Political Cartels and The Judicialization of Authoritarian Politics in Indonesia", *Int'l J. Const. L. Blog*, 2021.
28. Adriaan Bedner, '*Shopping forums: Indonesia's administrative courts*', dalam A. Harding & P. Nicholson (eds.) New Courts in Asia, Oxford: Hart Publishing, 2012, p. 209.
29. See Sebastian Pompe, *Runstuhnya Institusi Mahkamah Agung*, Jakarta : Lembaga Studi Advokasi Independensi Peradilan Indonesia, 2014.

beginning of its formation there were only five or six PTUNs.[30] This means that since the beginning of its formation, the PTUN has indeed been designed to legitimize government actions, so the narrow scope of authority of the PTUN, coupled with the narrow scope of interpretation in resolving cases at the PTUN, is indeed as planned.

4.1 Breaking Through the Boundaries of Power Domains

The rigid separation of power domains has actually been abandoned for a long time. Recently, the phenomenon of power diversification has emerged and strengthened where the role of judicial institutions in the formation of public policy is increasing.[31] The judiciary is increasingly involved in processes that have traditionally been in the realm of politics and legislative and executive policies.[32] This phenomenon, known as political judicialization, is considered to affect the balance of power between state institutions and potentially create tension between political and judicial power.[33]

In the context of increasingly dynamic legal and political relations, political judicialization has become a trend that has caused side effects in the form of erosion of the boundaries between legislative, executive, and judicial functions. Rachel Zider, for example, captures the phenomenon of political judicialization in Latin America which shows that the courts are often in the midst of important political conflicts and seek to mediate and influence social change through judges' decisions.[34] This condition directly breaks through the boundaries of the domain of power that has long been maintained and firmly held in the branches of constitutional law (HTN) and administrative law (HAN) science.

The consequence is that judges transform political and/or public policy questions into legal questions and try to find the truth at the risk that the value of the truth is understood as absolute truth because it is decided by the court. In fact, as understood, public policy is often not always based on wrong and right, but is a reflection of the various political arguments of its makers in parliament. Political and/or public policy issues whose relativity is very high when tried and decided by the courts certainly change their acceptance into legal truth which is often considered absolute in nature. In terms of the decision-making process, there are concerns that if political issues that should be decided based on political considerations and public policy, when brought to court, they will be faced with legal interpretations that have too strict and more limited tools.[35] Meanwhile, in terms of accountability, the concern is that when political decisions that should be taken by political institutions are then transferred to the judicial realm, it is like reducing the accountability of these

30. Two courts were established in Sumatra (Medan and Palembang), two in Java (Jakarta and Surabaya) and one in Sulawesi (Ujung Pandang, now called Makassar). See Adriaan Bedner, Op.Cit., p. 214.
31. Fitra Arsil, *Op.Cit.*, p. 24.
32. See more in Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization,* (Oxford: Oxford University Press, 2002).
33. Compare with Ran Hirscl, "*The Role of the Judiciary in Politics: The Judicialization of Politics*," dalam *The Oxford Handbook of Comparative Politics*, (Oxford: Oxford University Press, 2008).
34. Rachel Sieder, "Revisiting the Judicialization of Politics in Latin America," *Latin American Research Review*, Vol. 55 (2020), p. 159-167.
35. Diana Kapiszewski, Gordon Silverstein, dan Robert A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective*, (Cambridge: Cambridge University Press, 2011). Quoted from Fitra Arsil, Op.cit.

political institutions which are the result of the people's democratic choice.

The increasing political judicialization in the world today can be explained, at least, by the following approaches: *First*, inherently, political judicialization is a generic effect of the practice of judicial review. The existence of the power to test laws by the courts is the beginning of the court's involvement in the formation of public policy which is now developing into a phenomenon of political judicialization. According to Dixon & Ginsburg's observations, the birth of judicial review authority in the Constitutional Court is a form of institutionalization of political judicialization.[36]

The main activity of judicial review is to interpret the legal text. The opening of the judicial review space has shifted the public's need for legislative institutions to make changes to the law in order to adapt to changing social realities. This is rooted in the recognition that the term in legislation—even if carefully drafted—often requires adaptation as social, technological, and normative contexts evolve. The judiciary, through interpretation mechanisms, can respond quickly and appropriately to contemporary challenges without waiting for legislation processes that often take a long time and the potential for politicization. By reinterpreting words, phrases, or sentences in a statute, the court not only clarifies the meaning but also, essentially, adapts the legal text to meet current conditions and situations.[37] *Judicial interpretation* is considered an effective and easy way to make legal changes rather than the legislative process in parliament. The process in court can avoid the need for legislative intervention in responding to any new developments or problems that arise in society.[38] Meanwhile, at the public policy level, the court's task has become more concrete, namely shifting the public's needs to the executive institution to make public policies that are more responsive to the needs and interests of the community. In fact, in a positive fictional context, the court has actually shifted the domain of policy-making to the judiciary.

Second, in many cases, laws made by the executive and legislature or policies made by the executive are more aimed at responding to pressing and factual issues in society. However, this overly pragmatic approach often poses complications in its implementation if it is not supported by an adequate understanding of human rights. Therefore, the existence of the judiciary calibrates between practical needs and constitutional principles, ensuring that the law can be implemented without sacrificing constitutional values.[39] The process of reviewing government decisions and/or actions carried out by the State Administrative Court actually aims to ensure that the policies issued by the government not only meet practical needs but are also in line with constitutional values such as human rights, democratic principles, and

36. See Rosalind Dixon dan Tom Ginsburg, *Comparative Constitutional Law*, (Cheltenham: Edward Elgar Publishing, 2015).
37. Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism*, (Cambridge: Cambridge University Press, 2011).
38. B. Smith. "Legal Texts and Judicial Interpretations: A Perspective on the Judicial Role in Constitutional Adaptation," *Journal of Law and Society*, Vol. 37 (2010), p. 621-645.
39. Mark Tushnet, *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law*, (Princeton: Princeton University Press, 2009).

recognized legal norms.[40]

Third, the State Administrative Court has played a broader role than simply assessing the formal procedural aspects of a government policy. In some cases, the PTUN has used human rights arguments in assessing the applicability of a policy,[41] which then provides substantive guidelines for the formation of future policies. This activity reflects the evolution of the court's role from a passive implementer to an active participant in the legislative process. Not only does it identify formal procedural aspects, but the judicial power interpretation function also offers policy guidance that explains how a policy meets established standards of substance. However, the court's proactive role in directing legislation and government policy may be seen as an increase in judicial power that could reduce legislative and executive prerogatives, an issue that has given rise to intense debate in the constitutional law literature.[42]

Fourth, in the context of contemporary democracy, the phenomenon of political judicialization reflects the expansion of the role of the court from its traditional function as a supervisor of the implementation of laws to a critical mediator in the broader public dialogue. This phenomenon can also be interpreted as an indication of public frustration with the policy-making process by the executive and legislature which is considered less participatory, thus encouraging the public to look for alternative paths through reviewing in court. The Court, in this capacity, not only performs the role of guardian of legality but also as an evaluator of the legitimacy of public policy, creating space for expression and advocacy that was previously unavailable or at least limited in the policymaking process. Benjamin emphasized the important role of public participation in the legal process through policy review, which can facilitate community involvement in governance and bridge the gap between policymakers and the public.[43]

This means that the State Administrative Court has actually made an active contribution in striving to fulfill, protect and respect human rights. However, this is done sporadically based on the capacity and responsiveness of the judge's legal thinking alone, not based on the official rules that are the grip of all PTUN judges in Indonesia. The majority of judges still have a conservative view, that the HAN is the domain of the executive, therefore the duties and functions of the PTUN as a judicial institution cannot cross the boundaries of judicial power, in the sense that it cannot assess the substance of government policies.

However, this does not mean that power restrictions and *checks and balances* are completely irrelevant in the modern legal state. The idea of separation of powers should be mentioned as still relevant to be maintained.

40. Michel Rosenfeld, "The rule of law and the legitimacy of constitutional democracy," South Carolina Law Review, Vol. 74 (2000), p. 1307.
41. For example, the policy of cutting off internet access carried out by the government in Papua in 2021 which was canceled by the Jakarta State Administrative Court.
42. See Jürgen Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy,* (Hoboken: John Wiley & Sons, 2015).
43. Stuart Minor Benjamin, "Evaluating e-rulemaking: Public participation and political institutions," *Duke Law Journal*, Vol. 55, (2005), p. 893.

Deviations from this idea must be proven within the framework of maintaining a mechanism of mutual control and mutual limitation so that the relationship remains critical. Therefore, the distinctive character of each institution must

be maintained and must not be confused. However important the role of the judiciary is to play a role in policy formation, it is necessary to understand that the process of public policy formation in the judiciary must be different from what happens in parliament (government and DPR).[44]

The process of forming public policy carried out by the legislature and executive is not solely for the benefit of all citizens, but for the benefit of their constituents and political campaigns. This is what causes the outside of the law to be nuanced in *one-sided interest*. This is different from the character of judicial power institutions that have the right to test executive products or political judiciary. In the B*angalore Principles of Judicial Conduct*, six principles are stated that must be possessed by the judiciary, namely *independence*, *impartiality*, *integrity*, *propriety*, *equality*, *competence* and *diligence*.[45] The six principles of judicial power above seem to differ even to a certain degree can be said to be contrary to the character of the legislative and executive institutions. *Independence*, *impartiality*, *equality*, *competence* and *diligence* are very different from parliaments. In the process of review government policies, judges have no obligation to satisfy constituents or proposing institutions. Judges should also not even get pressure and influence from both the press and the public (*trial by the press, trial by the mass*) in making decisions.[46]

4.2 Three Arguments for the Expansion of Human Rights in Administrative Law

In this section, the author tries to find a theoretical footing, why administrative law and PTUN must consider human rights in the dynamics of its development. Dan Moore offers three trends in the adoption of human rights in public policymaking that have emerged in recent times:[47] first, the increasing call for administrative decision-makers to engage strictly with the protection of human rights in the exercise of their discretion or in other words the Requirements for Administrative Decision-Making to Reasonably Engage the Rights and Values of Human Rights Acts; second, the potential role of international human rights sources in some decision-making contexts; and third, the emergence of a focus on the role of "safety valves" of administrative discretion where schemes have the potential to infringe on individual rights to life, liberty, and personal security.[48]

44. Stuart Minor Benjamin, "Evaluating e-rulemaking: Public participation and political institutions," *Duke Law Journal*, Vol. 55, (2005), p. 893.
45. United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principle of Judicial Conduct, (Vienna, 2007).*
46. Fitra Arsil, Teori Sistem…, Op.Cit.
47. Dan Moore, "Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture," *Ottawa Law Review*, Vol. 49, No. 1 (2017- 2018): p. 131-164.
48. See for example Evan Fox Decent, "The Charter and Administrative Law: Cross-Fertilization in Public Law" dalam Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, (Toronto: Emond Montgomery, 2oo8), p. 189.

In the first context, Dan Moore draws on the decisions of the Supreme Court of Canada that were actively involved in incorporating human rights considerations into administrative policy. The first relevant decision was Doré,

in which the Court unanimously ruled that courts should follow a more flexible approach to administrative law when conducting reviews of administrative decisions involving issues in Canadian Human Rights Act.[49] Effectively, the Court's decision affirms the general principle that "reasonable" decision-making by administrative actors requires engagement with the values in the Human Rights Law because those values are among the underlying values of the law that gives discretion to the state actor. Doré seeks to build on this principle, by establishing a framework for how such engagement can work in practice. There are three main steps: *the decision-maker must first* "*consider the statutory objectives*" *giving rise to the discretionary power; then assess how the decision may interfere with or otherwise implicate Charter values; and finally*, "*balance the severity of the interference of the Charter protection with the statutory objectives*," *with a view to deciding* "*how the Charter value at issue will best be protected in view of the statutory objectives*."

In the second context, Moore argues, balancing protection in human rights law is not the only human rights consideration that can influence administrative decision-making and increase its complexity. International human rights sources can also play a role in defining the values that underlie the granting of discretion. To provide some background on the relationship between international human rights law and Canadian domestic law, Moore offers the principle that the presumption of conformity is an established principle of statutory interpretation: courts will interpret the law as if the legislature intended to comply with Canada's binding international obligations, in the absence of any clear intent to the contrary.[50] Although international human rights sources are rarely relied upon in the formulation of discretionary authority, it is clear that they can play a role that increases the potential for administrative decision-making to require substantive engagement with human rights concepts. The approach suggested by Baker is open and flexible in several respects: in terms of referencable sources (binding or non-binding); norms that can be drawn from these sources ("values" and "principles"); and the role that international norms can play in the interpretation of discretionary authority (international sources "help to point out the values that are central").

In the third context, the increasingly central role of discretionary "safety valves " in ensuring that the legal regime can be applied to various individual rights while still respecting the rights in a country's human rights law. Current jurisprudence suggests that in the future, administrative decision-makers will increasingly be expected to make decisions that have direct implications for the rights in the Law, especially the "right to life, liberty, and security". While the first two trends are about how decision-makers should consider human rights, these third trends can affect what types of human rights are at stake

49. Doré, supra note 7 at paragraphs 23–37.

50. See for example See e.g. Ordon Estate v Grail, [1998] 3 SCR 437 at para 137, 166 DLR (4th) 193; Daniels v White and the Queen, [1968] SCR 517 at 541, 2 DLR (3d) 1; Boio v Canada (Citizenship and Immigration), 2015 SCC 58 at para 48, [2015] 3 SCR 704; R v Hape, 2007 SCC 26 at paras 53-54, [2oo7] 2 SCR 292.

in administrative decisions, and how important these decisions are to the overall integrity of the legislative scheme. This requires the executive as a decision-maker of state administration to consider human rights in context.

This means that in addition to having to consider the Human Rights Law and international instruments in making administrative policies, the implications of the policies taken must also have a positive impact on specific rights as the purpose protected by human rights law. The focus is no longer on the validity of norms, but on the impact of administrative decisions on the specific rights of individuals.[51]

5. Juridical Basis for the Mainstreaming of Human Rights in Government Administration

The juridical basis or national legal instrument of human rights in Indone- sia is actually very complete. Indonesia has ratified almost all international cove- nants and treaties on human rights. Meanwhile, at the domestic level, guarantees for human rights are quite fully contained in the 1945 Constitution of the Republic of Indonesia, especially Articles 28 and 28A-28J. In addition, there have also been national laws that are independently related to human rights, such as the Law on Persons with Disabilities, the TPKS Law, the Child Protection Law, and so on. At the institutional level, Indonesia also has a very complete supervisory institution for the fulfillment, protection, and respect of human rights, and even tends to overlap. Some of them are the Witness and Victim Protection Institute (LPSK), the National Human Rights Commission (KOMNASHAM), the National Commission for the Pro- tection of Women (Komnas Perempuan), and the Child Protection Commission, and the National Disability Commission (KDN). This means that at the regulatory and institutional level, Indonesia is actually one of the developing countries that has complete instruments. This section will outline the relevance of the regulation, both in the 1945 Constitution of the Republic of Indonesia and the law, with the coun- try's administrative law. In a sense, whether specifically, there are national norms that are directly related to the administrative obligation to respect human rights.

First, Article 28I paragraph (4), specifically states that the protection, promotion, enforcement, and fulfillment of human rights is the responsibility of the state, especially the government". This article places human rights obligations or responsibilities on the state, especially the government. This is one of the principles in human rights law, that the state bears the responsibility of fulfilling human rights. The phrase "mainly the government" as an affirmation, certainly not without a specific purpose. This phrase means that as the administrator of the state, which has the obligation to regulate and manage all government affairs, the government must: strive for the fulfillment of all human rights of citizens, both civil and political rights, as well as economic, social and cultural rights. For example, the government must earnestly strive for the enjoyment of the right to education, the right to health, the right to work, and so on. On the other hand, this phrase also requires that the government in conducting a business, is prohibited from ignoring or setting aside

51. Dan Moore, Op.Cit., p. 149.

human rights. That is, the government's policy in building toll roads to facilitate the mobility of citizens, for example, should not be done by arbitrarily taking ownership of other citizens' land. Thus, it can also be interpreted that in carrying out government administration, where administration is upstream of all state policies, the government must also be human rights as the main instrument for decision- making and/or actions. Moreover, the affirmation in the phrase "especially the government", does not mean negating the role of the legislature and the judiciary in the responsibility of protecting, promoting, enforceing, and fulfilling human rights. Article 28I paragraph (4) does affirm the duties of the government or executive, because indeed the responsibility of fulfillment is more inclined to the scope of executive duties. However, judges also have an equally important role, especially in terms of ensuring that all executive policies are aligned with human rights principles. For example, a PTUN judge must ensure that in the mining permit policy, indigenous peoples do not take over forests by force and arbitrarily. Even if the permit procedure is carried out correctly, the authority is translated correctly, and based on laws and regulations, if the permit harms the rights of indigenous peoples who have lived there before, then the judge must also consider the conflict of interest in a fair and humane manner.

Second, human rights have become one of the legal basis in review Government Decisions and/or Actions as stipulated in Law Number 30 of 2014 concerning Government Administration. If referring to Article 53 of Law Number 5 of 1986 concerning the State Administrative Court (PTUN), there are only two grounds to sue the State Administrative Decree (KTUN) or administrative decision, namely: (a) it is contrary to the applicable laws and regulations; and (b) it is contrary to the General Principles of Good Governance (AUPB). However, in its development, Article 5 of the Government Administration Law states that the implementation of government administration needs to be based on:

1. Legality principles;

2. The principle of protection of human rights (HAM);[52] and

3. General Principles of Good Governance (AUPB).

By reading the provisions of Article 5 normatively, it can be argued that there has been a change in the touchstone to review the validity and accuracy of Decisions and/or Actions of public bodies/officials in Indonesia by adding aspects of human rights protection as point (b) above. This means that human rights can be a touchstone to see how valid a decision and/or action of government officials/ organs is.

It is relevant to listen to the explanation of Article 5 of Law Number 30 of 2014 concerning Government Administration.[53] It is stated that what is meant by the principle of legality is the obligation of government administration to prioritize the legal basis when making a decision/action. Meanwhile, the intention of the AAUPB does not have any further explanation because it has been explained quite completely

52. The word or term that KBBI considers correct is protection, not protection as it has been used, including in Law Number 39 of 1999 concerning Human Rights.
53. Compare with Richo Andi Wibowo (eds.), *Hukum Administrasi Negara; Konsep, Fundamental, Perkembangan Kontemporer, dan Kasus*, Jakarta: Rajawali Pers, 2024.

in the body, namely Chapter IV on the Limits of Authority. Then what is meant by the principle of protection of human rights? The explanatory part of this norm states that the intention of point (b) is that government administration must not violate

the basic rights of the community as guaranteed by the constitution (Constitution of the Republic of Indonesia of 1945). Reading this provision, it contains at least two interrelated meanings. *First*, government administration, which in this case is an official/government organ, is obliged to pay attention to human rights as regulated quite completely in the 1945 Constitution of the Republic of Indonesia, especially Articles 28A-28J. *Second*, if there is a violation of various rights guaranteed in the 1945 Constitution of the Republic of Indonesia, it can be a basis for the PTUN to cancel a Decision and/or Action through review. This means that judges can test whether a policy is compatible with human rights instruments as recorded in the constitution of the Republic of Indonesia.

6. Conclusion

Based on the above description, the conclusion that can be drawn in this paper is that administrative law has a strong relevance to human rights, due to several things. First, based on the meaning of the state of law, contemporary conceptions place the protection, respect, and fulfillment of human rights as an inseparable part of the meaning of the state of law itself. So the state of law does not simply mean that all state actions must be based on the law, but the law itself must be compatible with human rights. In addition, based on the principle of "safety valves", it assumes that every citizen who brings his case to court, especially the PTUN for administrative courts, expects the court to be the safety valve for the rights of every citizen from the interests of the government. Second, juridically, Indonesia already has a national instrument that determines that every administrative action/decision is subject to human rights norms, the instruments are Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia and Article 5 of the Government Administration Law.

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