ABSTRACT

THE CONCEPT AND PRINCIPLE OF GOVERNMENT’S DISCRETIONARY POWER

The government’s discretion is a concept under the rule of law state. Practically, government’s discretion creates a tension between reliance upon legality principle and flexibility in exerting administration, which may violate or even supersede legal rules. The comprehensive study of government’s discretion, therefore, is significant to both philosophical discourse and practical matter.

From positivism perspective, discretionary action may be qualified as a violation of law or an abuse of power by the government official. Positivism gives no room for government’s discretion. In fact, government’s discretion is needed to ensure that under no circumstances is administrative action interrupted, including action that is done in an exceptional situation, by which it may deviate principle of legality. This dissertation, then, presents a broader conceptual spectrum to perceive government’s discretion more proportionately. In this dissertation, it is natural law theory that gives room to government’s discretion.

In this dissertation, it is argued that the use of discretion by the government should be based on justice and equity, either in case of the absence of legal rules or it might be against legal rules. In the Indonesian context, both principles, justice and equity are inherent in the Pancasila, which is the idea of law of the Republic of Indonesia.

As a result, this dissertation recommends that (1) the concept of government’s discretion be developed based on the natural law theory instead of utilitarian perspective suggested by the positivists; (2) government’s discretion be based on virtue; and in Indonesian context, the government officials internalize and adopt Pancasila values in order that their discretionary actions are justified and valid.

Key words: discretionary power of government; natural law; principles of law