



## Controlling Administrative Discretion: The Role of Law

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**Abstract:** The title of the paper has to be suitable, clear, concise and accurate. The **Abstract:** Discretion is a decision to explain policies that explicitly do not regulate certain activities. To interpret it is necessary for government administrators for protected by the formal legal administration so that they are not in the case of abuse of authority. This article was the view from the other side about the control discretion from logic formal. The formal logic we select for to clarify the general principles of reasoning about knowledge attribution for a claim and explain the implications and consequences of inferential control discretion and the role of law. The results of this research revealed that formal rules should control discretion so that the administrative irregularities in the government activity can avoid. This article also confirms the government administrators that discretion is not an activity that violates the law, but has controlled from the interpretation that is biased caused by lack of knowledge, relations of power, and the interests of a particular group.

**Keywords:** controlling; administrative discretion; the role of law

### 1. Introduction

Law enforcement is not binding may be extremely difficult to review. In some cases, the government administrator may seem to be above the law or beyond the limits of the law because they are unable to explain their actions. For example, the public

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administration has two great advantages in making the rules, adjudication, and policy implementation (Rosenbloom, O'Leary & Chanin, 2010). Later many administrative activities can be classified as "informal" (usually unwritten procedures-shaped), not through procedures prescribed by law, or the official rules. Informal action that is often associated with discretion (Mutereko & Chitakunye, 2015; Chiao, 2016), although discretion under normal circumstances it would be very useful in a wide range of government activity such as clarify rules that may not be regulated in the policy (Taylor, 1993; Parinandi, 2013), discretion for government organization change (Wangrow, Schepker & Barker III, 2015), and accountability (Yilmaz, Beris & Serrano-Berthet, 2010).

Legal issues into consideration seriously the decision maker to conduct discretion, even discretion will cause officials the considered a misuse of power and authority. Then, with the enactment of Act Republic of Indonesia No. 30 of 2014 about Government Administration provide legal certainty to government officials to do a discretion. However, often found the implementation of discretion with a binding precedent such as the violation norms of law, or the constitution is higher, in which case it is sometimes discretion may contain decision *ultra vires* (Friedman, 2012; Howe, 2014).

We have highlighted some of the discretion pre and post the legality law on discretion in the reign of Indonesia. Before laws on discretion passed the mode often unfold is discretion used as a tool for personal interests and groups such as the criminal procedure for corruption. Some of the published scientific literature also gives arguments that discretion will increase the motivation of people, groups to do corruption (Kwon, 2014). Discretion is the beginning of criminal procedure in government policy (Chiao, 2016).

After laws on the discretion were pass, then the practice has a slight shift in pattern towards that showing power relation with the official knowledge about the use of discretion and the restrictions that implementation. In such a case we see powers of judges on the court to decide a case related to state security and moral. A term often used in Indonesia to demonstrate the reality of the law "*hukum tajam kebawah dan tumpul keatas*" (the law will only function to the public and not to authorities and state officials). The policy creates a looseness to the expression of a preference of the judiciary, and discretion is often associated with power (Howe, 2014).

However, discretion will tend to be problematic on law problem when done and interpreted itself (Zahariadis, 2010; Knight, 2013; Keeler, 2013). On the other hand, there is a view that mentions that discretion is useful if done right and will benefit

the citizen and government organization (Zahariadis, 2010), the discretion can fill the void in government policy law (Wood, 2011; Mutereko & Chitakunye, 2015). Further discretion in the view of the laws of Anglo-American and Continental Europe has substantive differences. The Anglo-American tradition argues that all discretion is contrary to the rule of law, and therefore not desirable (Rosenbloom, O'Leary, & Chanin, 2010). While the Continental European tradition assumes discretion is about decision-making and associated with power, and discretion can be used to explain the legal vacuum in government activity (Allison, 2010).

One of the main goals of this research is to provide additional evidence a qualitative that a variety of official rules must control the use of discretion. Although various studies have much-discussed control over discretion previously, we are more focused to develop understanding through formal logic. Also, this study provides evidence that obtained from the analysis and synthesis of a variety of scientific literature. Therefore, we will review the formal logic; the goal is to articulate and clarify the general principles of about claim and knowledge attribution and explain the implications and consequences of inferential (Smith, 2003; Jago, 2007) from control discretion and the rule of law. Unlike most of the literature that addresses discretion in the scope of the judge's decision, judicial administration and court decisions, but this article will assess and take a broader insight to understand and develop knowledge about the discretion control and the rule of law in the Indonesia government activities. On the other hand, this article will discuss the major research question that is how discretion control and the rule of law can provide a formal description of the general principle in the administrative government activities? Further, this article will discuss the framework of theory, research objectives, research methods, research results obtained and analysis.

## **2. Formal Logic Discretion and Role of Law**

The formal principles play an important role in the construction of the discretion. Discretion is often contrary to the principles, and formal material has no substantial content (Klatt & Schmidt, 2012). Therefore, the formal principle could also construe as a procedural principle and also formal principles that relationship between discretion and control. Such as the relationship between the legislature and constitutional court, if the legislature has the power to make and ratify the policy to choose among all existing solutions so that that policy can cancel or revised again by a constitutional court.

In the case of discretion, practitioners and academics have built an extensive argument about discretion. They give the reasoning in normative and evaluative, even critical to provide attributes to discretion in various fields. For example, in the field of administrative government, discretions are the virtues and vices (Box, 2007). Through the discretion, government agencies or government officials can “flesh out” the policy implementation for a particular situation. On the other hand, the freedom to translate legislative mandates in administrative action can lead to a variety of interpretations with small modifications against the distortion of the goals and objectives (Box, 2007; Yilmaz, Beris & Serrano-Berthet, 2010; Howe, 2014; Chiao, 2016). For it when discretion considered as a crime then setting discretion should be made clear by a limit of the normative law, so that result interpretation over the logic of its own, interprets and specific objectives can avoid (Friedman, 2012; Knight, 2013).

For the Government of Indonesia before Act No. 30 of 2014 on the Government Administration set about discretion, generally, government officials hesitate in doing discretion due to the threat of criminal penalties. The other hand, discretion has a limitation that has determined, such as discretion can provide legal certainty in the conduct of the government. If the actions of government officials do discretion justified by the law of the state administration, criminal law should be paying attention to that action as an action that does not violate the law. Logically is in a discretion be considered deviant or unlawful deeds if discretion there are criminal deeds such as giving bribes or gratuities to certain parties.

### **3. Discretion**

History records the occurrence of discretion is the freedom of the act of government officials. As the democratic state, any action in government activities should base on formal legality (Tamanaha, 2012; Dye, 2013), but not the possible everything perfectly arranged deeds in government regulations (Tummers & Bekkers, 2013). Regardless of the legal material inequality, the emptiness of the law, including laws governing the authority source attribution, delegation, and a mandate for state officials, and discretion in practice requires the freedom to reflect all aspects of the policy, and the control of formal legal (Gennaioli & Shleifer, 2008; Allison, 2010; Wood, 2011). However, in some discretion condition will be faced with the problem of formal legal when performed and interpreted over the logic of its own for personal interests and groups (Goodin, Rein, & Moran, 2006; Rosenbloom, O’Leary, &

Chanin, 2010; Friedman, 2012; Knight, 2013), and discretion considered as an attempt to bribe and gratuity action (Knight, 2013; Mutereko & Chitakunye, 2015; Glasner, 2017).

Rosenbloom, O’Leary, and Chanin, (2010) confirm that discretion involves unconstrained or constrained official action or inaction. From a variety of literature, discretion has characteristics common to reaffirm the meaning, purpose and why discretion made, illustrated in Table 1:

**Table 1. General Characterization of Discretion**

Characteristic	Several Varieties	Advanced Literature
Positive characterization, “basic level” Public administration involves the execution of the law; An official can be said to have discretion if given the power of doing discretion, judges in certain circumstances to promote specific objectives; Some kinds of administration an official must make many decisions involving subtle and complex assessments of human characteristics.	Strong discretion Weak discretion Formal discretion Informal discretion Provisional discretion Ultimate discretion	Policy implementation; Policy making process; Political theory; Policy analysis; Administration and Law; Welfare state; and Public policy.
Negative characterization Discretion such as hollow as the area left open, opportunities that utilized the officials to take action, the absence of rules is not sufficient to qualify as "discretionary"; Can be highly subjective and may depend unconsciously on a judge's personal view of the subject matter.		

*Sources: Base on Goodin, Rein & Moran (2006); Rosenbloom, O’Leary & Chanin (2010); Mutereko & Chitakunye (2015)*

Common characteristics in Table 1, describe an idea that the discretion is not merely the independent authority, but discretion cannot do without grounded from various possibilities of substantive policies and law (Howe, 2014). The law was cast in as a set of principles or rules explicitly, stating how to do, and what is allowed or not allowed to do (Shleifer, 2005; Solan, 2012).

#### **4. Role of Law**

At the most basic level of discretion in the policy implementation involving law enforcement. The rule of law includes the normative political philosophy and philosophy of law, political science, and economics as well as empirical. It includes the proposition that it is (or used to be) the normative legitimacy to political criteria, and require government officials to follow the law (Solan, 2012; Grant, 2016). However, is often contrary to arbitrary power, as well as “rule by law”, and the instrumental use of legal institutions. Because the legislation can only govern through people, it is usually taken to mean that the rule of law is contrary to the arbitrary power (Grant, 2016). In the empirical literature that the rule of law as an idea very elusive giving rise to the differences argument (Fallon, 1997; Bingham, 2007; Rodriguez, McCubbins & Weingast, 2010; Tamanaha, 2012). Therefore, the role of law is a precious concept, but, on closer inspection, it is a complex mix of positive assumption of political and legal theory (Rodriguez, McCubbins, & Weingast, 2010). On the other hand, the concept of the role of law can also interpret as an act that is capable of allowing legal subjects and make the appropriate decision (Grant, 2016). However, others argued that in the role of law there are also issues such as the interpretation of the law enforcement knowledge, interests, problems, and issues of power which give influence on the running of the rule of law (Barnett, 1998). To put it simply the role of law is the principle of the law that States that no one is immune to the law.

For example, the increasing complexity of the tasks facing modern governance cannot deal with only through the elaboration of rules (Booth, 2007). So also with the discretion in the government activities, in practice we can show that discretion is generally done to fill in the blanks that are not such clear rules to regulate, what and where it can clarify the law. On the other hand, the continental European law tradition and Anglo-American have a line of discrepancies describing discretion, the good side they agree that the law is a rule that must position as a regulator, obeyed and guarding the signs when and how to apply the rules or in what way the rules themselves are framed (Goodin, Rein & Moran, 2006; Booth, 2007).

Although discretion can have legal consequences and the Administration, how then discretion it must be controlled. Does indeed correspond to the rule of law? The process of finding answers to this question has filled the minds of a legal expert and social scientists (Booth, 2007). At this point, they agreed that discretion is about making choices among the various actions (Fallon, 1997; Booth, 2007; Gennaioli & Shleifer, 2008; Grant, 2016). We give the assumption that different rules and

discretion, but discretion need to the arrangement so as not to be abused by officials for some reason. Those rules will control and give special attention to the actions of officials state to use discretion.

Another example for example in Indonesia, we identified the government rule of law about discretion as illustrated in table 2.

**Tabel 2. Scope, Rules, and Procedure of Discretion**

Scope of Discretion	Rules of Discretion	Procedure of Discretion
Decision making and actions based on conditions the regulations provide option decisions and actions;	for discretion; does not conflict with the provisions of the regulations law;	Officials using discretion are required to describe the purpose, substance, and impact of administration and state finances;
Decision making and action because the regulations law does not regulate;	by the general principle of good governance; based on objective reasons;	Officials use discretion must submit a written approval request to the supervisor official;
Decision making and action because the regulations law is incomplete or unclear;	does not pose a conflict of interest; do with goodwill.	Within 5 (five) working days after the application file is received, the supervisor official sets approval, repair instructions, or refusal;
Decision making and action due to stagnation government to the broader interests.		If the supervisor official makes a rejection, the supervisor official must provide the reasons for the denial in writing.

*Sources: Law of the Republic of Indonesia Number 30 of 2014 on Government Administration*

We consider the enactment of this law was too late when compared with the development of the complexity of government activity that demands good governance. However, at least the description of discretion in legislation that can clarify the scope, rules, and procedures of discretion. On the other hand, there is a clear need and sustainable to ensure that administrative activities by the constitutional democracy. The law is one of the tools for the retrofit of public administration to the constitution (Rosenbloom, O'Leary & Chanin, 2010; Yilmaz, Beris, & Serrano-Berthet, 2010; Wood, 2011).

## 5. Controlling Administrative Discretion and Role of Law

Misuse of discretion will be fatal in the government administration and harm the public interest. Therefore, setting, supervision by law is required to ensure that discretion can do with rational reasons. Described by Kenneth Culp Davis in his writing about *Discretionary Justice: A Preliminary Inquiry*, recommends that the discretion for government administrators limit the structure of discretion through the adoption plans. Statements policies, rules, precedents, and so on, even in the absence of delegated legislative powers, and that the courts should encourage them so to do (McHarg, 2017).

In fact, the administration controls the making of rules has long been considered one of the least satisfactory administrative law (McHarg, 2017). Hawkins (1994) argues that discretion is a phenomenon that is pervasive in the legal system, for social scientists, the wisdom of which is done by the principals of the law is a form of behavioral decision making. Where the rule of law is only one of force in the field of pressure and obstacles that push toward a certain for policy implementation. However, the use of discretion it is not easy to do, there are negative consequences that must accept as violating procedures, the legality of the law if the discretion translated in bias. More discretion used as a motivational tool to legalized abuse of authority and power that is closer to corruption, collusion, and nepotism. The use of relation of power is also a cause of discretion is considered something negative when it did. Positively, discretion can contribute to legalize a way deemed urgent for the public interest; it does not violate the existing rules (Booth, 2007; Howe, 2014).

The best method to control the discretion found in the setting of policies and procedures and the enforcement of a law that puts restrictions on the use of reasonable discretion (Shleifer, 2005; Booth, 2007; Solan, 2012). Therefore, there are several reasons why the rule of law should oversee discretion; First, the discretion must support with a deeper understanding of the complex including the application of the public service ethics and transparency in government activities requirements (Cox III, Hill & Pyakuryal, 2008; Keeler, 2013). Second, the use of discretion which set through a set of regulations will be easier to do, since discretion is not something illegal in government policies (Mutereko & Chitakunye, 2015). Third, the discretion is not contrary to the rules, whether the activity can influence the government, and norms of the propriety from public interest. Finally, the discretion should abolish interest relations of power and the criminalization of the procedure.



## 6. Conclusions

We have argued that the discretion in the activities of the government is the legal way, but the law must control discretion as a limitation to what can do. Therefore, the law became a tool to eliminate the practices of arbitrary power, bias interpretation by state officials because the irrational, and criminal procedure. It may just be discretion in different countries have different characteristics, but this research can complement a variety of studies about control of the discretion by the rules of the applicable law. We consider that in many cases discretion use, especially in government activities has raised concerns for government administrators. Hesitant actions result in losses in government caused by policies that do not explicitly explain.

On the other hand, actions that violate the law because discretion becomes the initial barriers of bad policy. It should acknowledge that discretion allowed in administrative measures should clarify in the context of formal law. We recognize that this research may well be there are the limitations of the information presented, but we expect that future research can improve the research or continue this study with more constructive. Finally, we can give recommendations to the government, and the officials who authorized that discretion can do, and regulated by the legal norms in force. Discretion will serve as a compliment to the implementation of the policy in the government activities.

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