

Administrative Discretion in Indonesia & Netherland Administrative Court: Authorities and Regulations



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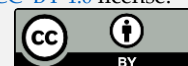
Regulation;

ABSTRACT

Discretion is used by state administrators (executives) to resolve complex government situations while still paying attention to the public interest. The practice of discretion still causes problems and debates. This research seeks to examine issues in discretionary authority and its testing. This research is normative juridical research using primary and secondary legal materials. The research approach was carried out using a statutory and conceptual approach. An analysis of the regulations and practices of discretionary testing at SAC was also added to complete the arguments that will be compared between Indonesia and the Netherlands. The findings of this research show that regulations in Indonesia contain provisions governing the limits and scope of discretion as a reference for the government in issuing discretion, as well as instructions for testing discretion at the State Administrative Court. The authority to use discretion, which has encountered problems that have arisen, includes aspects of the meaning of discretion, which also include factual actions, aspects of the regulation of discretion which are carried out in detail in the law, procedural aspects in the use of discretion which require prior permission, and aspects of the possibility of rejection of discretion by superior officials. Regarding the comparison of discretionary tests in the SAC, in Indonesia, the discretionary test is not substantially regarding discretion but instead is on the abuse of authority in exercising discretion concerning the terms and objectives of the discretion and conformity with the AUPB. Meanwhile, the SAC carries out a 'reasonableness test'—limited to whether administrative powers have been exercised fairly. Therefore, the conditions for restricting the use of discretion must be carried out strictly and need to be based on the AUPB so that discretion is issued that is not arbitrary in the public interest because discretionary authority cannot be tested in the SAC.



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1. Introduction

In the discourse on the modern rule of law, there is a tangled and complex connection between the rule of law and the welfare state in the discourse on the

modern rule of law.¹ Initially, the rule of law was a state system in which the law limited the state's acts so that they were not arbitrary in their treatment of citizens. However, the concept of a welfare state, whether liberal, social-democratic, or conservative,² imposes an obligation on the state to take "all" actions to ensure the well-being of society. Thus, on the one hand, state actions are restricted by law, but on the other hand, the state is required to act.³

Furthermore, as a country that has adopted state administrative law and focuses on discussing the state in motion (*staat in beweging*), this is due to the need for government discretion as a logical result of efforts to implement the idea of a welfare state, which requires a more active presence of the state in efforts to improve social welfare of its people, not just as a night watchman.⁴ One reason for the rapid development of the rule of law into a modern state of law is that the government's tasks, authorities, and obligations are rapidly evolving and expanding, both quantitatively and qualitatively.⁵ As the organizer of public service responsibilities, the state administration has penetrated several extremely complex and intricate societal elements. New tasks accumulate, while old tasks expand.⁶

According to Sjahran Basah, to actively perform public service tasks, particular repercussions for state administration exist, notably the requirement for *freies ermesen*, which are permitted by law so that they can act on their initiative. This is especially true when dealing with situations that develop unexpectedly. In such instances, the state administration is compelled to rush to find solutions.⁷ In other words, for the smooth implementation of regulatory duties and services to the community, government organs are given freedom. J. B. J. M. Ten Berge said that the freedom of these government organs includes freedom of interpretation (*interpretatievrijheid*), freedom of consideration (*beoordelingsvrijheid*),⁸ and freedom

¹ Khudzaiyah Dimiyati and others, 'Indonesia as a Legal Welfare State: A Prophetic-Transcendental Basis', *Heliyon*, 7.8 (2021), e07865 <https://doi.org/10.1016/j.heliyon.2021.e07865>

² Gosta Esping-Andersen and Guy Standing, 'Book Reviews: The Three Worlds of Welfare Capitalism', *Journal of European Social Policy*, 1.1 (1991), 71–75 <https://doi.org/10.1177/095892879100100108>

³ Sholahuddin Al-Fatih, 'Understanding Delegated Legislation in The Natural Resources Sector', *Bestuur*, 11.2 (2023), 290–311 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v11i2.78125>

⁴ Mulyadi Sumarto, 'Welfare Regime Change in Developing Countries: Evidence from Indonesia', *Social Policy & Administration*, 51.6 (2017), 940–59 <https://doi.org/10.1111/spol.12340>

⁵ Marius R. Busemeyer and Tobias Tober, 'Globalization and the Welfare State', in *Political Science* (Oxford: Oxford University Press, 2014) <https://doi.org/10.1093/obo/9780199756223-0094>

⁶ Ian Gough, 'Globalization and Regional Welfare Regimes: The East Asian Case', *Global Social Policy*, 1.2 (2001), 163–89 <https://doi.org/10.1177/146801810100100202>

⁷ Yapiter Marpi, 'The Dynamics of Judicial Administration in the Rule of Law Management System', *Eligible: Journal of Social Sciences*, 1.1 (2022), 44–49 <https://doi.org/10.53276/eligible.v1i1.12>

⁸ Reza Octavia Kusumaningtyas and others, 'Reduction of Digitalization Policy in Indonesian MSMEs and Implications for Sharia Economic Development', *Juris: Jurnal Ilmiah Syariah*, 21.2 (2022), 157–71 <https://doi.org/10.31958/juris.v21i2.6855>

to make policies (*beleidsvrijheid*). *Interpretatievrijheid* implies the freedom that government organs have to interpret a law. *Beoordelingsvrijheid* emerges when the law provides two options (alternatives) for authorities about particular obligations, the implementation of which can be chosen by government organs. *Beleidsvrijheid* arose when lawmakers delegated authority to government entities to carry out inventory and evaluate various interests.⁹

According to S.F. Marbun, providing the state administration freedom of action (*freies ermessen*) in carrying out its tasks to achieve the welfare state or *social rechtstaat* had raised concerns in the Netherlands that the implications of *freies ermessen* would hurt residents. As a result, in 1950, the *Panitia de Monchy* in the Netherlands issued a report on the general principles of good governance, or *algemene beginsselen van behoorlijk bestuur*. Initially, government officials and employees in the Netherlands objected because they were concerned that Judges or Administrative Courts would later use the term to evaluate the government's policies, but such objections have since faded as the term has lost relevance.¹⁰ As a result, the possibility of societal loss and abuse of authority by state authorities exercising unrestricted discretion is high.¹¹ For example, it is not uncommon to see the discretion of state officials lead to the dismissal of a civil servant or discretion that leads to the practice of corruption, collusion, and nepotism.¹²

As a result, discretion or *freies ermessen* is a two-edged sword in practice. On the one hand, the concept of a welfare state compels the state to take whatever acts necessary to achieve social welfare, but the scope for action in this context is discretionary. This indicates that discretion is critical to the country's success in obtaining prosperity. However, on the other hand, discretion also carries the potential for abuse of authority, leading to society losses and the spread of corruption, collusion, and nepotism practices.¹³

In line with a study of the Dutch administrative agency tasked with revitalizing the Indonesian Region in Zwolle, it was stated how public officials achieve

⁹ J.B.J.M. ten Berge, *Besturen Door de Overheid* (Deventer: W.E.J. Tjeenk Willink, 1996). Also see Ridwan Ridwan, 'Eksistensi Dan Urgensi Peraturan Menteri Dalam Penyelenggaraan Pemerintahan Sistem Presidensial', *Jurnal Konstitusi*, 18.4 (2022), 828 <https://doi.org/10.31078/jk1845>

¹⁰ Edi Pranoto, 'Effectiveness of Legal Construction: General Principles of Good Governance in Indonesia', in *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)* (Paris, France: Atlantis Press, 2019) <https://doi.org/10.2991/icglow-19.2019.87>

¹¹ Enrico Parulian Simanjuntak, 'The Rise and The Fall of The Jurisdiction of Indonesia's Administrative Courts: Impediments And Prospects', *Indonesia Law Review*, 10.2 (2020) <https://doi.org/10.15742/ilrev.v10n2.611>

¹² Mohammad Thoha and others, 'Can Indonesia ' s Decentralized Education Technology Governance Policy: Evidence from Muslim Countries', *Bestuur*, 11.2 (2023), 217–34 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v11i2.78320>

¹³ Husni Mubarrak and Faisal Yahya, 'Contestation on Religious Interpretation in Contemporary Aceh Shari'a: Public Caning in Prison as the Case of Study', *JURIS (Jurnal Ilmiah Syariah)*, 22.2 (2023), 213–22 <https://doi.org/http://dx.doi.org/10.31958/juris.v22i2.10258>

administrative justice, carried out by frontline officials making daily decisions while ignoring regulations. This is aimed at getting a more informal solution. However, there is a potential dark side to the exercise of discretion and judgment by officials. Discretion in service delivery is particularly objectionable because it creates the threat of personal domination and thus makes citizens vulnerable to being dependent on possible arbitrary judgments from others.¹⁴ Arbitrary judgment guides much of the discretion tested in the SAC.

In Law Number 30 of 2014 concerning Government Administration, the definition of discretion is formulated as a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation. From the formulation of this definition, it can be concluded that the elements of discretion are as follows: 1) decisions and/or actions; 2) done by government officials; 3. to overcome concrete problems faced in government administration; 4) in the case of laws and regulations that provide options, do not regulate, are incomplete or unclear; and 5) there is government stagnation.

By those rules, the possibility of government abuse of discretion is expected to be minimized.¹⁵ Law No. 30 of 2014 also regulates discretionary examinations issued by State Administration officials. The court given the competence to examine discretion is the State Administrative Court (SAC). The SAC faces a hurdle because discretionary decisions are difficult. Formally, the SAC requires new procedural law as a guideline for conducting trials. Meanwhile, SAC judges are supposed to have broader competence than only decisions/*beshicking*, particularly in the area of discretion. Even though discretion has two faces, it can be an opportunity to prevent government stagnation while also being a potential for abuse of authority.

Not to mention that the discretionary regulations in Law No. 30 of 2014 have significant procedural issues. Abuse of discretionary authority, for example, will be intimately tied to criminal law from a substantive standpoint. As stated by Bagir Manan, administrative law can easily cross borders with other legal regimes and thus requires caution. Acts of exceeding authority in administrative law can easily cross the line with criminal law rules because acts of exceeding authority

¹⁴ Paul Daly, *The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State*, 2 *Journal of Commonwealth Law* 99 (2020), in Sancho McCann, 'Discretion in the Automated Administrative State', *Canadian Journal of Law & Jurisprudence*, 36.1 (2023), 171-94 <https://doi.org/10.1017/cjlj.2022.25>

¹⁵ Enrico Parulian Simanjuntak, 'Penguujian Ada Tidaknya Penyalahgunaan Wewenang Menurut Undang-Undang Administrasi Pemerintahan / Examination To Determine The Presence Or Absence Of Abuse Of Authority According To Government', *Jurnal Hukum Dan Peradilan*, 7.2 (2018), 237 <https://doi.org/10.25216/jhp.7.2.2018.237-262>

that involve abuse of authority can become a criminal act.¹⁶ Similarly, in civil law, illegal conduct by authorities (*onrechtmatige overheidsdaad*) that results in losses will cross the boundary into civil conflicts. Another more complex example would be a normative conflict (*normatief geschil*) between administrative law, civil law, and criminal law in a corruption case.¹⁷

Therefore, discretion, the authority of the government (executive), is a separate note for government governance that prioritizes regulation or opens up accessible space for authority. Considering several discretionary limits in Indonesia, it is still a problem, especially at the practical level, which is worrying. The more prominent problem is that the concept of discretionary testing by the SAC is only carried out by arguing for abuse of the implementation of discretionary cases, not considering abuse of its discretionary authority. In particular, after Supreme Court Regulation No. 5 of 2014 was published. This limitation of authority, on the one hand, maintains the concept of dividing authority between the executive and judicial institutions. Still, on the other hand, it becomes a way for abuse of power to occur. Every country that implements the concept of discretion must experience the same concerns; this paper will try to find an overview of regulations and practices in the Netherlands with the hope of a similar legal system and almost the same understanding regarding the use of discretion.¹⁸

Studies regarding discretion have previously been researched by scholars who can support the argument. Several previous studies have intersections with this paper, but there are differences. For example, Jonathan Darling wrote a paper regarding discretion in asylum dispersal (2022). The paper discusses how discretion is understood as the capacity to make decisions and a form of influence that is often hidden. The research states that discretion functions in accommodation and support for asylum seekers. Discretion plays an essential role in shaping policy implementation and provides insight into changes in asylum governance at national and local levels.¹⁹ There are similar ideas regarding the authority of state officials to exercise discretion, but the paper only focuses on the issue of asylum seekers. Meanwhile, this paper compares the regulations and

¹⁶ Jeremy J. Kingsley, 'Indonesian Law by Tim Lindsey and Simon Butt', *Indonesia*, 109.1 (2020), 123–24 <https://doi.org/10.1353/ind.2020.0017>

¹⁷ Tommy Leonard, Elvira Fitriyani, and Rakotoarisoa Maminirina, 'The Influence of Green Tax Regulations on New Renewable', *Bestuur*, 11.2 (2023), 384–405 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v11i2.82506>

¹⁸ Bambang Tri Bawono, 'The Urgency of Restorative Justice Regulation on Hate Speech', *Bestuur*, 11.2 (2023), 364–83 <https://doi.org/https://dx.doi.org/10.20961/bestuur.v11i2.82508>

¹⁹ Jonathan Darling, 'The Politics of Discretion: Authority and Influence in Asylum Dispersal', *Political Geography*, 94 (2022), 102560 <https://doi.org/10.1016/j.polgeo.2021.102560>

authority in issuing discretion and its testing at the SAC in two countries, Indonesia and the Netherlands, along with testing practices.²⁰

In other research, as stated above, discretion can make arbitrary decisions rather than actions that benefit governance. S. Jeff Birchall and Sarah Kehler (2023) explain how actors' subjective perceptions influence adaptation governance. In the political, public, and professional spheres, individual actors often shape decision-making to reflect their informal social institutions. Climate change adaptation is often overlooked due to misperceptions of risks and responsibilities impacting governance and the role of resistance and discretion in this process.²¹ The paper shows that using discretion due to erroneous perceptions of public officials hinders governance. The research tends to discuss the negative impacts of denial and discretion.²²

In other research, it was assessed that discretion could be weakened due to the directive attitude of higher officials. Tanzania research states that the central government in Tanzania cuts the administrative freedom of regional councils in implementing approved regional plans and budgets. Therefore, the roles and responsibilities of policymakers should be explained in the national constitution to protect regional officials from a "directive culture."²³ This research discusses the importance of clarifying the role of government so that it can avoid central government directive orders to regions that limit discretion. This is different from what this paper tries to convey: examining the authority and regulation of administrative policies in the Indonesian and Dutch SACs.²⁴

Ultimately, based on the preceding description, this paper aims to examine the problems of regulation and discretionary testing authority at SAC. This research is essential to understand the issuance of discretion, which is closely related to authority, while the rule of law also requires legal certainty by promulgating

²⁰ Abdul Kadir Jaelani, Muhammad Jihadul Hayat, and others, 'Green Tourism Regulation on Sustainable Development: Droning from Indonesia And', *Journal of Indonesian Legal Studies*, 8.2 (2023), 663–706 <https://doi.org/https://doi.org/10.15294/jils.v8i2.72210>

²¹ S. Jeff Birchall and Sarah Kehler, 'Denial and Discretion as a Governance Process: How Actor Perceptions of Risk and Responsibility Hinder Adaptation to Climate Change', *Environmental Science & Policy*, 147 (2023), 1–10 <https://doi.org/10.1016/j.envsci.2023.05.017>

²² Soeleman Djaiz Baranyanan, Nilam Firmandayu, and Ravi Danendra, 'The Compliance of Regional Autonomy with State Administrative Court Decisions', *Journal of Sustainable Development and Regulatory Issues*, 2.1 (2024), 35–52 <https://doi.org/https://doi.org/10.53955/jsderi.v2i1.25>

²³ Ambrose Theobald Kessy, 'Decentralization and Administrative Discretion in Tanzania: An Analysis of Administrative Discretion on Human Resources, Finance and Service Delivery', *Social Sciences & Humanities Open*, 8.1 (2023), 100684 <https://doi.org/10.1016/j.ssaho.2023.100684>

²⁴ Abdul Kadir Jaelani, Resti Dian Luthviati, and Muhammad Jihadul Hayat, 'Halal Tourism Sector and Tax Allowance Policy: A Case Study Observed from Normative Problems to Effective Implementation', *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 23.2 (2023), 185–210 <https://doi.org/10.18326/ijtihad.v23i2.185-210>

formal rules.²⁵ However, the emergence of discretion to resolve complex problems issued by the executive cannot be hindered by fear of abuse of power. The authority of officials is regulated so as not to harm the community. This power has limits and must be accounted for so that every discretion made by government officials is subject to legal norms.²⁶ Therefore, in Indonesia, it is also possible to test discretion in SAC, even though its use and testing are still debated. An understanding of AUPB is added as a basis for examining the concept of discretionary authority by testing it in Indonesia and the Netherlands.

2. Research Method

This research is normative, examining the discretionary provisions in statutory regulations before comparing them with the theoretical framework of discretion by examining the legal problems that arise. The research approach used is statutory and contextual. This research mainly explains the basis for issuing discretionary authority and its testing at the SAC. The study of conceptions of authority and discretion is used as the theoretical basis for the discussion. A comparative method was also used to examine the similarities and differences in the regulation and practice of discretionary issuance in Indonesia and the Netherlands. A study of the regulations and practices of discretionary testing at SAC was also added to complete the comparative arguments between Indonesia and the Netherlands. Discretionary testing regulations and practices at SAC Indonesia will be devoted to finding weaknesses in SAC's discretionary testing authority. The analysis is carried out on primary and secondary legal materials to obtain adequate answer arguments for further conclusions to be drawn.

3. Results and Discussion

Discretion: Authorities and Regulations

Discretion problems do not only begin when a decision has been issued and implemented, but abuse of authority is encountered in exercising discretion. The discretionary debate must be interpreted from the concept of its emergence, which is permitted in a country's administrative law system.²⁷ The legality of the actions of government agencies or officials in the concept of a modern legal state is based on applicable laws and regulations. This is closely related to the principle of legality as the birth of authority in the concept of the rule of law. However, in practice, this administrative authority creates a disparity between the principle of

²⁵ Abdul Kadir Jaelani, 'Indonesia ' S Omnibus Law On Job Creation : Legal Strengthening Digitalization of Micro , Small and Medium Enterprises', *Revista Relações Internacionais Do Mundo Atual Unicuritiba*, 3.41 (2023), 209–27 <https://doi.org/http://dx.doi.org/10.21902/Revrima.v3i41.5833>

²⁶ Abdul Kadir Jaelani, Ahmad Dwi Nuryanto, and others, 'Legal Protection of Employee Wage Rights in Bankrupt Companies : Evidence from China', *Legality : Jurnal Ilmiah Hukum*, 31.2 (2023), 202–23 <https://doi.org/https://doi.org/10.22219/ljih.v31i2.25874>

²⁷ Susheng Wang, 'Rules vs. Discretion in Authority', *SSRN Electronic Journal*, 2019 <https://doi.org/10.2139/ssrn.3463789>

legality and real problems that must be resolved objectively. Administrative authority, which is free (discretionary), can be exercised to overcome gaps and complex issues, leading to government stagnation and potentially harming the public interest. Government stagnation is the inability to carry out government activities due to deadlock or dysfunction in government administration.

Definitively, S. Prajudi Atmosudirdjo defines discretion/*freies ermessen* as the freedom to act or make decisions from authorized and competent state administration officials according to their opinion. At the same point, Philipus M. Hadjon states discretion/*freies ermessen* is the freedom to apply regulations in concrete situations, the freedom to measure these concrete situations, and the freedom to act even though there are no or no explicit regulations (the active nature of the government). The nature and character of discretion require that government power not only implement statutory regulations (*wetmatigheid van bestuur*) but prioritize setting goals (*doelstelling*) and policies (*beleid*). Where both are active powers, namely free authority. Authority is taken to exercise freedom of action—discretion, which is then realized in a written juridical instrument, giving birth to policy regulations. These policy regulations can be submitted for testing at the SAC. The existence of an examination of the discretion in the SAC shows that not all discretion follows the limitations of its issuance.

The debate on compliance with regulations according to the principle of legality with efforts to break government stagnation through discretion will never end. The argument is that the state is based on law, not power, so it would be worrying if officials' use of authority were more dominant, so it was suspected that it would lead to arbitrary actions. However, once again, governance problems often face deadlocked challenges if we only focus on regulations. In his writings, Robert M. Cooper states that the exercise of discretion by administrative agencies may receive more criticism than other government administrative tasks. Even discretion is suspected of being suitable for reviving *laissez-faire* policies.²⁸ Such accusations still occur in this century in various fields.²⁹

Discretion is used to maintain the stability of government governance under certain conditions. Xin Zhang (2018) said that public administration must be carried out within the limits of rules and principles that limit discretionary power.³⁰ The benefits of bureaucratic discretion depend on how much the policy is used for the public interest and exploited for private interests. However, Francesco Decarolis et al. (2021) still warn that greater discretion will result in greater

²⁸ [https://doi.org/Robert M. Cooper, 'Administrative Justice and the Role of Discretion', *The Yale Law Journal*, 47.4 \(1938\), 577](https://doi.org/Robert%20M.%20Cooper,%20'Administrative%20Justice%20and%20the%20Role%20of%20Discretion',%20The%20Yale%20Law%20Journal,%2047.4%20(1938),%20577) <https://doi.org/10.2307/791857>

²⁹ Nick Gill and others, 'The Limits of Procedural Discretion', *Social & Legal Studies*, 27.1 (2018), 49–78 <https://doi.org/10.1177/0964663917703178>

³⁰ Xin Zhang, 'Towards the Rule of Law: Judicial Control of Administrative Discretion in a Comparative Context', *SSRN Electronic Journal*, 2018 <https://doi.org/10.2139/ssrn.3286207>

efficiency and more significant opportunities for theft, and central supervisors manage this trade-off by limiting discretion to procedures and locations where levels of corruption are high.³¹

In Indonesia, discretion is regulated in Law No. 30 of 2014. It is stated that discretion is a decision and/or action determined and/or carried out by a government official to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete, or unclear, and/ or there is government stagnation. Thus, the use of discretion is directed and not misused; every use of discretion must be by its purpose, namely to launch the administration of government, fill legal gaps, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest.

Article 175 number 2 Law No. 6 of 2023, which amends Article 24 of Law no. 30 of 2014 and its explanation, the conditions that government officials must fulfill in using discretion are: 1) by the purpose of the discretion; by the General Principles of Good Government (AUPB); 2) based on objective reasons, namely reasons taken based on factual, impartial and rational facts and conditions based on the AUPB; 3) does not create a conflict of interest; and 4) carried out in good faith, namely decisions and/or actions determined and/or carried out based on motives of honesty and based on the AUPB.

Legitimate discretion can only be exercised by authorized Government Officials, whether authority is about obtaining authority, namely attribution or delegation, or authority is related to territory, material, and time. The government officials in question carry out government functions in the executive, judiciary, legislative, and other government officials who carry out government functions as stated in the 1945 Constitution and/or laws. Discretion is only issued by the government (executive) at the central and regional levels and all its staff because, in the use of discretionary policies that violate or harm citizens' rights, the government (executive) can be held accountable through the courts.

In Article 25 paragraph (1), Law no. 30 of 2014 states that the use of discretion that has the potential to change budget allocations must obtain approval from superiors following statutory provisions. Then, in Article 25 paragraph (3), it is stated that if the use of discretion causes public unrest, an emergency, urgent situation, and/or a natural disaster occurs, Government Officials are obliged to notify the Official Superior before using the discretion and report to the Official Leader after the use of the discretion. However, the formulation of Article 25

³¹ Francesco Decarolis and others, 'Rules, Discretion, and Corruption in Procurement: Evidence from Italian Government Contracting', *SSRN Electronic Journal*, 2020 <https://doi.org/10.2139/ssrn.3744100>

causes many difficulties because it requires the approval of superior officials before the discretion is issued.

Because of Indonesia's vast geographical conditions, technology is still minimal. It is conceivable, for example, that a region far from the center faces a situation that requires immediate discretion, and government officials must obtain prior permission from the center to take policy. At the same time, there is an urgent need for immediate assistance. Not to mention, within a certain period, the official must make a report on the discretion he exercised. Requests and reports to superiors need to be submitted because they will be used as instruments of guidance, supervision, and evaluation, as well as accountability for the officials concerned.

In the context of the agreement, it is the superior officer who will be responsible for the use of discretionary authority. Another problem is using discretionary jurisdiction outside of the abovementioned matters. Can this discretion be justified, or is this discretion categorized as discretion that is outside the provisions of the law? Or is the use of discretionary authority that requires "approval" and/or "notification" only limited to these circumstances? In contrast, using discretionary authority outside this does not require approval and/or notification. Law No. 30 of 2014 does not provide answers to these questions.

The requirement that every use of discretionary authority must be notified or even seek approval and its use must also be reported to the official's superior can obscure an official's responsibilities according to the doctrine of authority in the form of delegation or mandate. Regulations regarding whether or not distinguished officials' notification or approval must be linked to the basis of authority, either in the form of delegation or mandate. Suppose the use of discretionary authority is based on the "approval" of the superior of the government official who uses it. In that case, it can be interpreted that the legal relationship between the official who gives discretionary approval and the official who will use that discretion is in the form of a trust. Hence, the person who must be responsible is the commander. On the other hand, if the use of discretionary authority is based on "notification," then the responsibility for the use of discretion lies with the person delegating. Article 25 only regulates the use of discretionary authority, which requires "approval" for discretion that can burden state finances, and discretion is sufficient with "notification" for discretion that causes public unrest if an emergency, urgent, and/or a natural disaster occurs.

Meanwhile, from the perspective of regional autonomy, such norm-discretionary provisions are inappropriate. Article 18, paragraph (2) of the 1945 Constitution expressly guarantees that provincial, district, and city governments regulate and manage government affairs according to autonomy and assistance duties. Continuation of paragraph (5) Regional governments exercise the broadest possible autonomy, except for government affairs, which are determined by law as

the affairs of the Central Government. In this way, regions have freedom and independence in managing and regulating the affairs of their respective regional governments and communities.³² Without having to be shackled with permission from superior officials. This case is like an intervention in the directive attitude of the Tanzanian central government to regional governments, which sometimes interferes with discretion at the regional level.

Worse, Article 26 paragraph (3) states that, within five working days after the application file is received, the superior official determines approval, instructions for improvement, or rejection. This article allows for the rejection of discretion to be issued by state administrative officials. It can eliminate the authority inherent in an official, namely the freedom to issue policies. This provision seems to make Indonesia not a state with people's sovereignty but rather state sovereignty. Meanwhile, on the other hand, in the welfare state (welfare state) concept, the government is obliged to strive for the welfare of its citizens. Added to this is the provision in Article 28 paragraph (2), which requires SAC officials to submit a written report to the official's superior after using discretion.

Meanwhile, in the Netherlands, the administration is regulated by the General Administrative Law Act (GALA). GALA holds the administrative decision-making process and the legal protection of that decision-making. In addition, it also governs the supervision of administrative authorities and law enforcement and, more specifically, administrative fines. Regarding discretion, GALA does not recognize this term. It just contains the meaning 'administrative authority,' meaning: a. an organ of a juristic person governed by public law, or b. any other person or body vested with public authority. However, there is a legal concept in the Netherlands known as a term closest to discretion/*freies ermessen*, namely *vrij bevoegdheid*, which is applied in the Netherlands as free authority. Although *freies ermessen* and *wreij bevoegdheid* have fundamentally different meanings.³³ Discretion should not be regulated in statutory regulations, let alone in detail and rigidly, as implemented in Indonesian law. Even though it must be normalized in the form of statutory regulations, it should only handle matters of a general nature, for example, only regarding limitations and tests.

In several articles, we also find the use of discretionary power, which is characteristic of and used in the Dutch criminal justice system. Criminal justice in the Netherlands has extensive judicial powers in determining punishment.³⁴ The

³² Bambang Suharnoko Sjahrir, Krisztina Kis-Katos, and Günther G. Schulze, 'Administrative Overspending in Indonesian Districts: The Role of Local Politics', *World Development*, 59.01 (2014), 166–83 <https://doi.org/10.1016/j.worlddev.2014.01.008>

³³ Iza Rumesten RS and others, 'Discretionary Policy Responses in India and Indonesia Amidst the COVID-19 Pandemic: Challenges, Strategies, and the Imperative for Legal Reform', *Journal of Indonesian Legal Studies*, 8.2 (2023) <https://doi.org/10.15294/jils.v8i2.70143>

³⁴ Peter J. P. Tak, 'Sentencing in the Netherlands: Discretion and Disparity', *Federal Sentencing Reporter*, 7.6 (1995), 300–304 <https://doi.org/10.2307/20639821>

"International Cooperation" report of the United Nations Convention against Corruption also mentions that discretionary powers allow public prosecutors to perform their functions. This term is also known in Dutch taxation, where the Dutch tax authority has discretionary authority, which can replace approved regulations. Likewise, it was stated that checks and balances are needed if prosecutors in the Netherlands have a broad scope of prosecutorial discretion. This is because discretion can be used arbitrarily, which is generally not seen as a good action.³⁵

In another study regarding employment, discretion is mentioned. Tesseltje de Lange et al.'s (2020) research illustrates discretion in this field by how applying discretion in labor migration law changes a concept. They are concerned with how discretion can be best limited. The issue is almost the same as Indonesia and various other countries regarding discretion, namely the emphasis on participation, transparency, impact, and accountability. Because in making a rule - not discretion, there are factors of transparency, accountability, and representation that can be accepted in the process of making policies and laws that protect the people from arbitrary attitudes towards.³⁶ In other publication, we find other terms that refer to wisdom. Digitized discretionary is used to show the use of discretion in technology-based public services. Public service workers exercise discretionary power due to information and communication technology's rapid and widespread spread. Discretion aims to make more efficient and fair decisions because society is increasingly vulnerable to existing technological reforms.³⁷

According to Western European doctrine, including the Netherlands, applying administrative discretion requires authorities to comply with procedural rules regulated in the normative act that determines it. But outside these legal criteria in the narrow sense, the scope of discretionary benefit does not arise. We must not forget the scale of effectiveness and economic feasibility. Therefore, the exercise of discretion will be considered correct (not wrong) if no legal error has been committed and provided that the public authority has acted resource-efficiently and as far as possible is reasonable and prudent.³⁸ Ultimately, the scope of an

³⁵ Willem Geelhoed, 'Prosecutorial Discretion in the Netherlands: An Advantage for Politicians?', in *Criminal Liability of Political Decision-Makers* (Cham: Springer International Publishing, 2017), pp. 369–81 https://doi.org/10.1007/978-3-319-52051-3_23

³⁶ Tesseltje de Lange and Pedro de Sena, 'Your Income Is Too High, Your Income Is Too Low: Discretion in Labour Migration Law and Policy in the Netherlands and Macau', *The Theory and Practice of Legislation*, 7.2 (2019), 135–51 <https://doi.org/10.1080/20508840.2020.1729559>

³⁷ Peter André Busch, Helle Zinner Henriksen, and Øystein Sæbø, 'Opportunities and Challenges of Digitized Discretionary Practices: A Public Service Worker Perspective', *Government Information Quarterly*, 35.4 (2018), 547–56 <https://doi.org/10.1016/j.giq.2018.09.003>

³⁸ European Commission for Democracy Through Law (Venice Commission) The Netherlands Opinion on The Legal Protection of Citizens Adopted by The Venice Commission at Its 128th Plenary, October 2021, See Anna Kashirkina, 'Review of the 128th Plenary Session of the European

official's discretion in using discretion includes decision-making and/or action because the provisions of laws and regulations provide choices that must be taken. Moreover, statutory regulations do not regulate it. Moreover, laws and regulations are incomplete or unclear due to stagnation. Therefore, government discretion is needed to handle further interests.³⁹

Ultimately, in contrast to the Netherlands, discretionary authority in Indonesia is regulated quite rigidly in law. Hence, officials' decisions to use discretion to resolve stagnant government problems have a clear legal basis. However, in the development of government governance, discretion has never been free from suspicion of practices of arbitrariness in public officials. This concern occurs in Indonesia and the Netherlands in various government sectors. Indonesia and the Netherlands provide signs of what circumstances and how discretion can be given by public officials. However, it can also be justified if arbitrary actions occur in the exercise of discretion. To deny that the concept of discretion that originates from the authority of public officials is a concept that is absolutely free from interference is a mistake, and that is precisely what constitutes arbitrary action. The possibility of abuse of authority in exercising discretion is proven by regulating discretionary testing at the SAC, and there are practices and decisions. However, the critical issue is whether the SAC has the authority to test discretion. The SAC's authority is only given to examine the exercise of discretion and not whether the discretionary authority can answer concerns if the discretion issued is an abuse of power.

Comparing Administrative Discretion in Indonesia & Netherland Administrative Court

SAC is a judicial body whose function is to serve the community in seeking justice in disputes related to state administrative affairs. The matter in question is a state administration dispute that arises if there is a difference of opinion regarding state administration matters between individuals, civil legal entities, and agencies or officials at both the central and regional levels as a result of the issuance of a State Administration Decree. Lawsuits can be filed by individuals, civil legal entities, or state civil servants. In Indonesia, SAC is regulated in Law Number 5 of 1986 concerning State Administrative Courts ("Law 5/1986"); Law Number 9 of 2004 concerning The Amendment of Law Number 5 of 1986 concerning State Administrative Courts ("Law 9/2004"); Law Number 51 of 2009 concerning The Second Amendment of Law Number 5 of 1986 concerning State Administrative Courts ("Law 51/2009"); Constitutional Court Decision Number

Commission for Democracy through Law (Venice Commission) (15–16 October 2021)', *Journal of Foreign Legislation and Comparative Law*, 18.1 (2022), 1–1 <https://doi.org/10.12737/jflcl.2022.015>

³⁹ Eny Kusdarini and others, 'Roles of Justice Courts: Settlement of General Election Administrative Disputes in Indonesia', *Heliyon*, 8.12 (2022), e11932 <https://doi.org/10.1016/j.heliyon.2022.e11932>

17/PUU-IX/2011; Constitutional Court Decision Number 37/PUU-X/2012; and Constitutional Court Decision Number 43/PUU-XIII/2015.

The absolute competence of the SAC is the court's authority to adjudicate and resolve state administrative disputes in the field of state administrative law at the primary level. The conditions for an object to be the object of a dispute are limited to a written decision issued by a state administrative entity/official, constituting an act of state administrative law based on relevant legal regulations; concrete, individual, and final; and generating legal consequences for an individual or civil legal entity.⁴⁰ Meanwhile, in general, Dutch administrative courts are regulated in GALA. To be able to file a lawsuit at the Dutch SAC, three things need to be fulfilled, namely 1) administrative decision, 2) administrative authority, and 3) interested parties.⁴¹

Although the concept of authority and discretionary testing in SAC is still debated among experts in Indonesia, the promulgation of Law No. 30 of 2014 provides legitimacy to the public that a policy issued based on the discretion of state administrative officials can be tested at the SAC. If, in the previous period, the review of discretion was not regulated in statutory regulations, even though many discretions were considered deviant, then the birth of this law is considered to be able to provide legal certainty to citizens who are disadvantaged by the issuance of discretion.⁴²

Giving authority to the SAC to test the discretion of state administrative officials was also initially confusing. Because in procedural law Law no. 5 of 1986, the SAC's competence is limited to state administrative officials' decisions, so judicial review of discretion is empty. How could SAC carry out testing without procedural law? While Law No. 30 of 2014 does not regulate procedural law in full and in detail. This confusion was attempted to be resolved by the issuance of Supreme Court Regulations No. 4 and No. 5 of 2015, related to the procedural law for testing the discretion of state administrative officials.

The issuance of regulations does not necessarily address inherent conceptual issues. Problems in the context of discretionary testing at the SAC also arise due to the complexity of the discretionary formation procedures. Cancellation of discretion by the SAC is not based solely on the substance of the discretion. It is

⁴⁰ I Gusti Ngurah Wairocana and others, 'The Expansion of Administrative Decision Meaning Based on Government Administration Law: A Dispute Submission Process Approach', *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8.1 (2019), 13 <https://doi.org/10.24843/JMHU.2019.v08.i01.p02>

⁴¹ L. J. J. Rogler, 'Recent Developments In Administrative Law In The Netherlands and the European Union', *Indonesian Journal of International Law*, 2.2 (2005) <https://doi.org/10.17304/ijil.vol2.2.7>

⁴² Sholahuddin Al-Fatih and Asrul Ibrahim Nur, 'Does the Constitutional Court on Local Election Responsive Decisions?', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 569-96 <https://doi.org/10.53955/jhcls.v3i3.74>

necessary to understand not only the suitability of the terms and objectives of discretion but also based on the formal procedures for taking discretion. Discretions carried out without following the procedures specified in the statutory regulations will be the basis for cancellation by the SAC. The complicated issuance procedures in the law are feared to cause many discretions to be canceled. If discretion is appropriate and objective, circumstances require the issuance of the discretion. It would be a shame if the discretion had to be canceled because it does not fulfill the elements of formal procedure.

Meanwhile, in the Netherlands, administrative discretion is interpreted as a policy that arises because the legislative body, when formulating regulations, cannot always estimate/adopt the characteristics of each case. Therefore, leeway is given for the government to balance interests and make decisions that best suit the particular situation. However, as with Indonesia, judicial review has traditionally been hampered by the dichotomy between law and policy. Traditionally, courts should limit review to matters deemed to be judicial. This means that judicial review of arbitrary actions in areas formally defined as non-judicial is understood to fall outside the parameters of legitimate judicial action.⁴³

Dutch administrative courts are not permitted to review generally binding regulations. Article 8:3 of the GALA states that no appeal may be filed against a decision establishing generally binding regulations or policy rules. The dichotomy between law and discretion underlies Article 8:3 GALA's prohibition on courts. However, we must recognize that there are also exceptions to this if the litigant challenges the validity of an administrative order based on the invalidity of the provisions of the law on which the order is based.⁴⁴ The European Union courts have maintained a pragmatic approach in reviewing the administrative discretion of European Union bodies and institutions. While European Union institutions have broad discretion, judicial review is limited to checking whether or not procedural rules were complied with and whether an act contained "manifest errors or constituted an abuse of power, or whether the authority did not exceed the limits of its discretion." The formulation is relatively stable, but the stringency of judicial review has not varied significantly over time and across sectors.⁴⁵

Meanwhile, in Indonesia, there are differences of opinion among SAC judges. If discretion is essentially appropriate and its existence is necessary, then formal procedural errors do not necessarily invalidate discretion. It is not suitable for a judge to adhere to a rigid positivist view because justice must be the most crucial

⁴³ *Judicial Review of Administrative Discretion in the Administrative State*, ed. by Jurgen de Poorter, Ernst Hirsch Ballin, and Saskia Lavrijssen (The Hague: T.M.C. Asser Press, 2019) <https://doi.org/10.1007/978-94-6265-307-8>

⁴⁴ de Poorter, Hirsch Ballin, and Lavrijssen.

⁴⁵ Albertjan Tollenaar, 'Repressive Administrative Law', *European Journal of Social Security*, 20.1 (2018), 21–30 <https://doi.org/10.1177/1388262718761392>

consideration. Another opinion states that formal procedures are a marker for government agencies or officials in issuing discretion so that abuse of authority does not occur. Therefore, discretion that does not follow the provisions of the event becomes the basis for cancellation of the discretion by the judge. Furthermore, according to Law No. 30 of 2014 and Supreme Court Regulation No. 4 of 2015, testing the discretionary policy pushed is implementing the discretionary policy, not the discretionary policy.⁴⁶

If we refer to the regulations, the discretion exercised by authorized officials is aimed at several purposes, which are regulated rigidly, as stated in the previous discussion (Article 22). Apart from the objectives, the scope of discretion has also been determined (Article 23). For officials who want to use discretion, they must fulfill the conditions for its use. In Article 24, the term rigid is called cumulative. It also regulates how provisions regarding discretion disturb the public and burden the state's financial budget (Article 25). Articles 26-29 regulate procedures for the use of discretion in various circumstances. The series of articles above will influence how discretion can be tested at the SAC. Further discussing Articles 30-32, it regulates the legal consequences of the use of discretion by the government, with the following categories:

Table 1. Provisions for the Legal Effects of Discretion

| | Exceeding Authority | Confounding Authority | Arbitrary |
|------------------------|---|---|-----------------------------------|
| Provision | a. acting beyond the validity period of the Authority; b. acting beyond the limits of the area where the Authority applies; and/or; c. not following the provisions of Article 26, Article 27 and Article 28. | a. using discretion is not in accordance with the objectives of the authority granted; b. not following the provisions of Article 26, Article 27, and Article 28; and/or contrary to the AUPB. | issued by unauthorized officials. |
| The legal consequences | Invalid | Cancellable | Invalid |

Source: Law No. 30 of 2014

Reading Table 1, it can be seen that discretion can be exercised in the possible circumstances that occur due to the use of discretion. There are no problems, or one of the three types of legal consequences of discretion occurs. The above setting assumes that the judge can test the discretion being challenged with results that exceed authority, mix authority, or are arbitrary. Interestingly, to find out whether discretion exceeds authority or confuses authority, it can be tested by the conformity of discretion with the rules in Article 26, Article 27, and Article 28.

⁴⁶ Bibianus Hengky Widhi Antoro, 'Penguujian Penyalahgunaan Wewenang Di PTUN', *Jurnal Yudisial*, 13.2 (2021), 207 <https://doi.org/10.29123/jy.v13i2.350>

These three articles are very procedural—administrative, not substantive. Meanwhile, if you want to test it substantively, at least refer to the provisions that using discretion is not in accordance with the purpose of the authority given, and discretion is contrary to the AUPB. If these two conditions are proven accurate, the new discretion can be declared canceled. However, the conditions for canceling discretion are cumulative-alternative, so that if you do not fulfill one condition, you can take another condition or use two conditions at once without using another condition. It is not good if only one procedural requirement is taken. Meanwhile, the substance of the purpose of the use of discretion and whether it conflicts with the AUPB are not considered benchmarks. Despite its practice, the SAC tests discretion under the AUPB. The rules can be interpreted differently.

Article 175 Law no. 6 of 2023 states that discretion must meet the requirements under the AUPB. This means that apart from not conflicting with existing regulations, discretion also relies on implementing the AUPB. Policy regulations are not statutory, so they cannot be tested legally (*wetmatigheid*). Exercising of policy regulations is more directed at *doelmatigheid*; therefore, the touchstone is AUPB. Therefore, including requirements for issuing policy regulations based on the AUPB is a way to mediate suspicions of arbitrary actions by officials. Moreover, in the end, the SAC will establish its discretionary testing on the AUPB, so if, from the start, discretion is required to refer to the AUPB, it will make the assessment easier.

For example, referring to SAC Decision No. 213/PEN-DIS/2018/PTUN.JKT, where the plaintiff argued that in using discretion, KPK officials ignored analysis, opinions, and proposals from other bodies/parties as relevant stakeholders related to planning, implementation, and evaluation of personnel, including the staff rotation program. The plaintiff also argued that the defendant did not have a regulatory basis when appointing the plaintiffs. The defendant issued the new primary rules after the defendant took action by appointing and determining the Plaintiffs. In this petition, the plaintiff tried to convey that the defendant's decision was contrary to the "principle of accuracy"—AUPB as intended in Law No. 30 of 2014. However, this petition was rejected by the Tribunal on the basis that the Corruption Eradication Commission had issued the object of dispute following its authority and authority. procedure.

Another decision, Decision No. 60 PK/TUN/2020, regarding the discretion of one of the Vice Chancellors of Trisakti University, was issued by the Minister of Research, Technology, and Higher Education. Initially, the Jakarta SAC with Decision Number 269/G/2017/PTUN-JKT, then at the appeal level, the decision was upheld by the Jakarta State Administrative High Court with Decision Number 201/B/2018/PT.TUN.JKT was canceled by the Supreme Court with Decision Number 60 K/TUN/2019 at the cessation of the decision. At the Judicial Review, this application was rejected, with one consideration regarding discretion.

It was stated that the defendant's decision-making was discretionary to overcome the stagnation in the management of Trisakti University and for the sake of broader interests, namely the interests of the entire academic community; thus, in formal procedures, the discretion is justified by referring to Article 22, Article 23 and Article 24 of the Law. Law Number 30 of 2014 concerning Government Administration. Therefore, this discretion cannot be said to conflict with the AUPB. This argument does not refer to Article 26, Article 27, Article 29, Article 30, Article 31, or Article 32 concerning discretionary procedural regulations. However, it is based on the article concerning the terms and objectives of the discretion and the arguments of the AUPB.

In decisions regarding taxes, Decision No. 3625/B/PK/Pjk/2019 rejects the request for reconsideration. This is because the legal authority, which is the discretion of the respondent—the Directorate General of Taxes, can be justified according to law because according to the doctrine that freedom is given to State administrative apparatus by prioritizing the effectiveness of achieving a goal (*doelmatigheid*) rather than adhering strictly to legal provisions. This is motivated by overcoming concrete problems faced in government administration regarding laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation. Based on several examples of existing SAC decisions, the basis for the judge's considerations regarding the argument for the use of discretion is always based on the objectives, requirements, and conformity with the AUPB rather than being based on procedural errors as regulated in Article 26, Article 27, Article 29. This is a separate note in the regulation and concept of discretionary testing authority at SAC in Indonesia.

Another issue is regarding the form of discretionary action that can be reviewed by the SAC or is under the authority of the SAC, whether what is meant is a confirmed/factual action or an action that a warrant or other legal instrument has previously preceded. At SAC Medan, SAC Jakarta, and SAC Yogyakarta, there were differences in the judges' opinions regarding this matter. Some judges believe that the SAC can test factual or actual actions by government agencies or officials. However, some judges have another opinion that these concrete actions are not under the authority of the SAC; these actions are, as intended in Law No. 30 of 2014, an action preceded by a warrant or other instrument.

Administrative law in the Netherlands has similarities with Indonesia; they emphasize administrative procedures. This emphasis is reinforced by the tendency of Dutch administrative courts to defer to the exercise of discretionary powers by administrative authorities, allowing courts to carry out 'reasonableness tests' (i.e., judicial review limited to whether executive powers have been exercised reasonably). Courts cannot take responsibility for policy choices made by governments. Still, they can assess whether the decision-making processes used by governments are reasonable based on the principles of subsidiarity,

proportionality, transparency, prudence, and human rights.⁴⁷ The point is the same as Indonesia, which emphasizes the SAC's authority to conduct tests on implementing procedural discretion.

In other respects, there is integration between administrative processes and court processes in the Netherlands. If the SAC determines that an order is invalid, the court will cancel the order and order the administrative authority to issue a new order. The difference is that the test in the Netherlands sets a more manageable key, namely reasonableness. When courts exercise reasonableness testing, they tend to focus their review of the order on the procedural standards that the administrative authority must comply with.⁴⁸ Meanwhile, in Indonesia, the regulations have set special conditions for assessing whether discretion can be exercised. Also, the basis for testing is referred to AUPB.

Authorized government officials have the authority to use discretion, whether manifested in the form of decisions taken and/or actions taken by government officials.⁴⁹ Meanwhile, in the Netherlands, normatively, there is still the question of whether the difference between actions carried out based on law and those carried out based on policy is still appropriate in an administrative state. Claims of governmental authority have undergone radical changes that have impacted the form and content of administrative law. The 19th century transitioned to a more centralized and bureaucratic hierarchy, democracy becoming a new source of authority for government, reinforced by the doctrine of *ultra vires*. In each era, claims to government authority have been reflected in the framework of judicial oversight. We are rethinking where administrators derive their legitimate authority and the theoretical basis of judicial review.⁵⁰

Gelsthorpe and Padfield (2003) explain that wisdom is the freedom, power, authority, or leeway of an official, organization, or individual to decide, differentiate, or make judgments, choices, or decisions regarding alternative actions or inaction.⁵¹ Therefore, the limitations of the SAC's testing authority, which must be against various forms of discretion, should not be used as a reason for rejecting the use of discretion by the government without clear grounds. At the

⁴⁷ de Poorter, Hirsch Ballin, and Lavrijssen.

⁴⁸ Herwig C.H. Hofmann, 'The Duty of Care in EU Public Law – A Principle Between Discretion and Proportionality', *Review of European Administrative Law*, 13.2 (2020), 87–112 <https://doi.org/10.7590/187479820X15930701852265>

⁴⁹ Bambang Arwanto, 'Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah', *Yuridika*, 31.3 (2017), 358 <https://doi.org/10.20473/ydk.v31i3.4857>

⁵⁰ Janet McLean, 'The Authority of the Administration', in *The Foundations and Future of Public Law* (Oxford University Press, 2020), pp. 45–66 <https://doi.org/10.1093/oso/9780198845249.003.0003>

⁵¹ Joanne P. Van der Leun, Maartje A.H. Van der Woude, and Tim J.M. Dekkers, 'Exercising Discretion in Border Areas: On the Changing Social Surround and Decision Field of Internal Border Control in the Netherlands', *International Journal of Migration and Border Studies*, 2.4 (2016), 382 <https://doi.org/10.1504/IJMBS.2016.10000400>

extreme, Koch, Charles H. (2003) states that perhaps more importantly, the role of administrative judges is that administrative judges must apply policies in certain circumstances. Even clear policies leave some latitude, and most policies are ambiguous or are considered ambiguous because each case can provide considerable latitude.⁵² Discretion is the government's exclusive right due to the modern state principle of realizing social welfare as a complement to the principle of legality. Restrictions on discretionary testing authority by the SAC do require limitations; what is not true is regulations that are inconsistent in maintaining existing testing procedures and do not consider whether the test requirements are sufficient to decide a case.⁵³

Inseparable from the AUPB agreed upon in each adhering country, two principles are interesting to see from the system in the European Union. First, good faith, which is translated as honesty and caution. The principle of prudence is applied in limiting and controlling discretion from concerns of arbitrary attitudes. This principle can reform administrative decisions that protect citizens from detrimental government actions without preventing the government from functioning in the interests of its citizens.⁵⁴ Due care has been a critical principle in ensuring effective judicial review in the European Union system, which relies heavily on delegating discretionary powers.⁵⁵ Informal principles are also important to serve as a basis for reminding officials to use their discretion and judgment. How officials and courts review the resulting decisions is a separate issue. The European Union realizes that judicial review is not the only solution but adheres to informal principles with the intention that it can adequately work.⁵⁶

4. Conclusion

Based on the description above, this research concludes that authority is essential to resolve complex governance issues for countries that adhere to welfare, such as Indonesia and the Netherlands. The government has the freedom to act to take various policies necessary to realize social welfare. This paradigm has shifted one of the principles of the rule of law—positivism—that all government actions must be based on law. However, on the other hand, practice discretion is very vulnerable to abuse of authority that is detrimental to the people and various other corrupt practices. In Indonesia, concerns about the use of

⁵² Charles H. Koch, 'Policymaking by the Administrative Judiciary', *SSRN Electronic Journal*, 2003 <https://doi.org/10.2139/ssrn.460520>

⁵³ Widhi Antoro.

⁵⁴ College of William & Mary Law School William & Mary Law School Scholarship Repository Faculty Publications Faculty and Deans 1977 Administrative Law: Confining and Controlling Administrative Discretion Within the Seventh Circuit Charles H. Koch Jr. William & Mary Law School. Also see

⁵⁵ Hofmann.

⁵⁶ McCann.

discretion have been addressed by issuing Law Number 30 of 2014, which regulates the limits and scope of discretion as a reference for the government in giving discretion and also provides guidelines for testing discretion in the SAC. Even though it has been regulated in such a way, apart from the issue of trying authority, the use of discretion still experiences various problems, such as aspects of the meaning of discretion, which also include factual actions, aspects of the regulation of discretion which are carried out in detail in the law, procedural aspects in the use of discretion which require prior permission. In the past, there were aspects of the possibility of rejecting the discretion of superior officials. Meanwhile, in the Netherlands, GALA does not rigidly regulate discretion. However, the practice of use and testing is carried out. In Indonesia, discretionary testing is carried out on procedures for using discretion, not on discretionary authority. The test benchmarks include discretionary requirements and objectives and conformity with AUPB. Meanwhile, in the Netherlands, the SAC carries out a 'reasonableness test'—limited to whether administrative powers have been exercised relatively. Courts cannot take responsibility for policy choices made by governments. Still, they can assess whether the decision-making processes used by governments are reasonable based on the principles of subsidiarity, proportionality, transparency, prudence, and human rights.

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