

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: REFLECTION ON THE BANK CENTURY BAILOUT POLICY

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Abstract

Accountability is the key to good governance. In global administrative law, every policy made should be accountable. The given law should be accessible to the public. At the time of the global financial crisis, many countries did not have the necessary rules to solve the problems that arose. In Indonesia, the government's decision to bail out Bank Century has remained controversial up to the present time. The need for a comprehensive law dealing with economic, political and social factors should be considered. The Indonesian Law regarding Government Administration provides for the code of conduct for government action. An entire chapter in the law has been dedicated to set out provisions on discretion, reflecting a two-way approach, namely: restriction of government action on the one hand and the protection of public rights on the other. In practice, however, such rule is not implemented in line with the intended formulation. There is still a need for harmonization with the law regarding State Administration Courts in Indonesia.

Keywords: *accountability, administrative law, bailout policy, judicial review, discretion*

Abstrak

Akuntabilitas adalah kunci dari pemerintahan yang baik. Dalam hukum administrasi global, setiap kebijakan harus dapat dipertanggungjawabkan. Hukum yang ada harus bisa diakses oleh masyarakat. Ketika krisis keuangan global terjadi, banyak negara tidak memiliki hukum positif untuk mengatasinya. Di Indonesia, keputusan pemerintah dalam membailout Bank Century menjadi perdebatan sampai saat ini. Kebutuhan akan hukum yang komprehensif terkait ekonomi, politik dan sosial harus dipertimbangkan. UU Administrasi Pemerintahan Indonesia telah menyiapkan aturan dalam bertindak bagi pemerintah. Penempatan diskresi dalam satu bab tersendiri dapat dilihat dari dua sisi, batasan terhadap tindakan pemerintah sekaligus perlindungan bagi hak publik. Pada praktiknya, pelaksanaan dari aturan tersebut tidak semudah rumusan yang dimaksud. Harmonisasi dengan UU Peradilan Tata Usaha Negara masih dibutuhkan.

Kata kunci: *akuntabilitas, hukum administrasi, kebijakan bailout, judicial review, diskresi*

I. Introduction

Justice is an intangible concept. Some of the earliest thinking about justice is found in Aristotle's work. It was he who distinguished 'corrective justice' and 'distributive justice'. Nowadays, one cannot think about justice without mentioning Rawls' 'theory of justice'. The concept of justice according to Rawls is as follows:¹

1. The maximisation of liberty, subject only to such constraints which are essential for the protection of liberty itself;
2. Equality for all, both in the basic liberty of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of equality (the difference principle) and;
3. Fair equality of opportunity and the elimination of inequalities of opportunity based on birth and wealth.

The above mentioned principles may resemble the utilitarian concept, however they do differ in significant ways. Utilitarians can accept inequalities, social arrangements in which there is some benefit at the expense of others, provided the benefits (or pleasures) exceed the costs (or pains), so that the outcome is the maximisation of overall welfare level (the greatest happiness of the greatest number). This might be considered as unjust. Rawls, by contrast, defines benefits in terms of primary goods: liberty and opportunity, income and wealth and the bases of self-respect. Rawls doesn't stipulate how primary goods should be used by individuals: he implies that they may use them as they choose, provided in doing so they don't undermine 'just' institutions.²

Rawls uses a refurbished version of the social contract argument that

"free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the terms of their association".³

He sets out to show that certain moral principles are binding upon us because they would be accepted by people like us in 'the original position'. Rawls doesn't assume the principles of justice through the use of reason or in nature nor does he think they can be found empirically or in intuition or within religion. What Rawls hunts out are mutually acceptable ground rules.⁴

This paper will elaborate on the idea of justice through government perspectives. First, in the context of relationship between justice and the rule of law it will try to discern how validity and value play an important role. Second, the idea of judicial review of administrative action seems to become increasingly popular in implementing compliance by government agencies. Third, discretion as the core of administrative law will be discussed in terms of its accountability. Finally, discussion on the Bank

* I would like to thank Prof. Dr. Anna Erliyana, SH, MH-my supervisor-for her invaluable input in this article.

¹ M.D.A. Freeman, "Lloyd's Introduction to Jurisprudence", (London: Sweet & Maxwell, 2001). pp. 523-524.

² *Ibid.*

³ This argument only has superficial similarities with the tradition of Hobbes, Locke and Rousseau. The function of social contract in their theories is to justify the legitimacy of government and hence our obedience to it by claiming that we or our forebears, agreed to establish a particular political structure. To Rawls: there is no historical or quasi-historical pact nor does he use contractarianism to justify obedience to governments or laws.

⁴ Freeman, *op.cit.*, p. 525.

Century bailout policy case will try to shed light on administrative action in resolving public matters.

II. Justice and the Rule of Law

As justice is a relative concept, so is the rule of law. Friedmann said that to give the rule of law concept a universally acceptable ideological content is as difficult as to achieve the same meaning for natural law. Furthermore, other than in a purely formal sense, we cannot formulate any content for the rule of law which would be equally applicable to Democratic, Fascist, Communist, Socialist and Catholic States. In his argument, Friedmann concludes that a meaningful definition of the rule of law must be based on the realities of contemporary society.⁵

In other words, social justice makes rule of law acceptable in society. According to Weldon, this usage of 'the rule of law', or sometimes 'the supremacy of law' is turned into a kind of slogan or propaganda phrase. It then designates a special kind of legal system, namely one in which the type of evidence which can be produced in Court is precisely and narrowly defined and in which the accused has certain prescribed rights and privileges; or we can also say that not just a system of laws competently administered, but the sort of system which in the United States, Britain and elsewhere has come to be considered a satisfactory system.⁶

Implementation of justice in society is a different matter usually involving economic order like Karl Marx suggested. Ernest Baker stated that justice of this economic order is indeed a necessary part of social justice in the larger sense of that term; but social justice, in its broader sense, is a matter of something more than merely by economic duties and rewards. Due to the end of any national society is to foster and encourage, in and through partnership, the highest possible development of all the capacities of personality in all of its members; and this end is the justice or right ordering, of such society and may accordingly be called by the name of social justice.⁷

This article shares the opinion with Baker's statement that authority gives validity to law and justice gives it value. So to conclude, a law has validity, if it is declared, recognized and enforced as law by the authority of the legally organized community, acting in its capacity of a state. A law has value, if it has the inherent quality of justice. Ideally law ought to have both validity and value. Sometimes, there is a disparity between idea and reality in practice.

III. Judicial Review of Administrative Action

Freedom though is multifaceted, often asking the state not only to avoid intruding on the personal sphere, but also to actively help people realise freedom in a socio-economic sense. It is the violation of freedom that convinces us of the need to control the state. In achieving this aim, society as the vehicle for all human activity may not be collapsed in the state's needs and aspirations but must be dutifully governed in the cause of freedom. This entails striking a balance between the state and society, although according to John Stuart Mill, striking this balance is always difficult, not less

⁵ Sunarjati Hartono, *Apakah the Rule of Law itu?* [What is the Rule of Law], (Bandung: Penerbit Alumni, 1976), p. 29.

⁶ *Ibid.*, p.31.

⁷ *Ibid.*, p.35.

so in present times given the complex nature of modern society.⁸

The judicial review of legislation has become one of the prime hallmarks of constitutionalism today. The United States of America, with its tradition of review dating back more than two centuries, is no longer the exception to the rule in allowing judiciaries to test legislation in the light of higher norms of law, whether such norms are to be found in constitutions or treaties. This faith in judicial power to control legislative branch in its treatment of society forms part of the emergence of what may be term bipolar constitutionalism-legislation is no longer simply subject to a legislative pole, but increasingly to judicial pole as well.⁹

Judicial review as an instrument to pursue constitutionalism must be understood in relation to its particular constitutional system. As an often repeated mantra of British constitutionalism which states that the rule of law must be respected. One of the aims of this standard precept is to avoid the arbitrary exercise of state power by providing that individuals may only be limited in or deprived of their liberty through the law as applied by the courts. As for the Netherlands, the constitution can be described as that of a democratic *rechtsstaat*. Democracy, although the primary choice for national decision-making, is not left to its own devices but it is expected to operate within the recognised boundaries of the *rechtsstaat*.¹⁰

As an example in debating the future of the prohibition on review, some parliamentarians of the Netherlands proposed the idea of weak review in the run up to revising the Constitution in the 1980s, yet their plans met with no success in amending the constitutional prohibition. Nonetheless, the idea came to fruition when the Supreme Court observed in Harmonization Act judgement in 1989 that controversial legislation on higher education had violated the principle of legal certainty, a principle which was not only guaranteed in the Charter but also in unwritten law.¹¹ More would be discussed in the case study of bailout policy in Indonesia.

Asia has been called the home of illiberal democracy and represents perhaps the most difficult regional context for establishing the rule of law. Confucianism, in particular, would seem to present a difficult cultural environment for the development of judicial review. In contrast with western legal traditions organized around the notion of the autonomous rights-bearing individual, the Imperial Chinese legal tradition is usually depicted as emphasizing social order over individual autonomy and responsibilities over rights. Law exists not to empower and protect individuals from the state, but as an instrument for governmental control. Any rights that do exist are granted by the state and may be retracted.¹²

Furthermore, power is conceived as indivisible in the Confucian world-view, flowing solely from the emperor, who is the center of the cosmological and political order. No human force can check the emperor's power if he enjoys the mandate from heaven. The notion of intergovernmental check on the highest power is foreign to traditional Confucian thought. The emperor has "all-encompassing jurisdictional claims over the social political life of the people". This unified conception of power

⁸ Gerhard van der Schyff, "Judicial Review of Legislation A Comparative Study of United Kingdom, The Netherlands and South Africa" in *Ius Gentium Comparative Perspectives on Law and Justice*, Volume 5, (Springer, 2010). p. 1.

⁹ *Ibid.*, p.2.

¹⁰ *Ibid.*, p.22.

¹¹ *Ibid.*, p.25.

¹² Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, (Cambridge: Cambridge University Press, 2003), p.12.

is a very different one from that of modern constitutionalism with its distrust of concentrated authority.¹³

The question is how effective is judicial review in securing compliance with State Administration law? At first, we should address the meaning of administrative law. According to Harlow and Rawlings, there are two different senses in which the term 'administrative law' might be used. It might be used to refer to the common law principles which police the lawfulness of government behaviour. Alternatively, it might be used to refer to the law of administration-the substantive powers and duties of public agencies.¹⁴ I will address this issue with my case study: bailout policy in Indonesia.

Regulation is often used to refer to a technique of modern government whereby control is exercised over various aspects of social and economic life. However, perhaps there is a risk of confusion in analysing the influence of judicial review from a regulatory perspective. Many studies in regulation ultimately seek to assess the effectiveness of regulatory enforcement in achieving the goals of the regulatory scheme. Administrative law is one of those fields where the identification of regulatory goals is tricky business. Nevertheless, it should be noted at the outset that this study seeks to contribute to our understanding of judicial review litigation as a regulatory mechanism in pursuit of good administration within government.¹⁵

It seems that judicial review can be put into 'regulatory perspective' at two levels. First, one might consider the extent to which judicial review is effective in securing compliance with administrative law as developed by the court in relation to specific context. Secondly, one might consider the extent to which compliance with administrative law is effective in fulfilling the regulatory goal of 'good administration'.¹⁶ I will argue that both levels need to be addressed if we aim to achieve comprehensive knowledge about judicial review of administrative action especially in case of bailout policy in Indonesia. Although, I might use the term 'good administration' loosely as in 'good governance'.

IV. Judicial Review and Discretion

In Indonesia, judicial review of administrative action is possible. Supreme Court had done the interpretation of law when they review policy in the form of letter of memorandum from Mineral and Geothermal Directorate General No 03/31/DJB/2009.¹⁷ The concept of judicial review of administrative action has been practiced in Singapore. Based on the 'ultra vires' doctrine, judicial review "is not concerned with the decision but with the decision-making process". The reason of that statement came from Andrew Ang J Justice in the case of *ACC v CIT*.¹⁸

¹³ *Ibid.*

¹⁴ Simon Halliday, *Judicial Review and Compliance with Administrative Law*, (Oregon: Hart Publishing, Oxford and Portland, 2004), p.8.

¹⁵ *Ibid.*, p.12.

¹⁶ *Ibid.*, p.14.

¹⁷ Based on decision of Supreme Court of Indonesia case No. 23 P/HUM/2009, Supreme Court stated that the memorandum No. 03/31/DJB/2009 is against Law No 4 Year 2009 regarding Mineral and Geothermal and is considered invalid and not binding. That kind of Supreme Court decision has made interpretation of extending scope of regulation but has also made the limitation of policy rules to be an unclear concept.

¹⁸ "It is well established that in judicial review, the court is concerned not with the merits of a decision

Even if ‘*ultra vires*’ doctrine is well known in the Anglo Saxon tradition, up to this time the doctrine has been a major principle in administrative law that shows the importance of law in ordering limitation of power. *Ultra vires* refers to action which is outside-or in excess of-the powers of the decision making body. While judges continue to use the terms *ultra vires*, it is nowadays too limited for a term to encompass the whole ambit of judicial review. It may be preferable, therefore, to regard judicial review as the control of discretion and the regulation of the decision making process by the courts.¹⁹

Judicial review at first emerged in the United States practice even though it had never been explicitly set out in the Constitution. The decision of the Supreme Court in the case of ‘*Marbury v Madison*’ in 1803 is the reason judicial review has been acknowledged and is recognized in the United States legal system. At that time, Chief of Supreme Court, John Marshal stated that Article 13 of the Judiciary Act in 1789 was against the Constitution of the United States. Even though there were no clearly set rules about the authority of the Supreme Court to decide that case.²⁰

According to John Marshal, the rules of Article 13 of the Judiciary Act in 1789 granted extended authority to the Supreme Court. The application of such rules would give change to the constitution by ordinary law. That reason alone should make the rules invalid and against “the supreme law of the land”. The case itself was based on the appointment of judges at midnight that would become known as ‘the midnight judges’ by President John Adams before the elected President, Thomas Jefferson was inaugurated.

As a result of such situation, one of the judges, William Marbury, became irritated because the decree concerning his appointment was being held by Secretary of State, James Madison, by order from President Thomas Jefferson. The new government was considering to cancel the midnight judges so William Marbury sought approval from the Supreme Court to issue Writ of Mandamus so that Secretary of State James Madison would give his letter of appointment. Based on Judiciary Act 1789, Marbury’s case is part of the original jurisdiction of the Supreme Court so it is not necessary to to be processed at a lower court. The Supreme Court under Chief Justice John Marshall decided the case by conducting judicial review.²¹

Judicial review is regarded as a control for discretion whereas discretion is the nexus of law and the social sciences. Legal writers consider discretion as a ‘central and inevitable’ concept to understanding the translation of formal rules into action. Discretion, on the other hand, is produced and constrained by rules. By contrast, the interest of social sciences has been in analyzing discretion in terms of decision-making. They examine discretion in the sense that people have the freedom to make decisions. When an organization is involved, discretion refers to the freedom of the

but the process by which the decision has been made ... This is because judicial review is not an appeal from a decision and the court cannot substitute its discretion for that of the public body nor can it quash a decision on the basis that the court would not have arrived at that decision or that some other decision would have been a better one. Thio Li-ann, “The Theory and Practice of Judicial Review of Administrative Action in Singapore,” SAL Conference 2011 — Singapore Law Developments (2006–2010).

¹⁹ Hilaire Barnett, *Constitutional and Administrative Law*, (Routledge and Cavendish, 2006). p. 750.

²⁰ Laica Marzuki in *Judicial Review di Mahkamah Agung RI Tiga Dekade Pengujian Peraturan Perundang-undangan (Judicial Review in the Supreme Court of the Republic of Indonesia: Three Decades of Judicial Review)* by Zainal Arifin Hoesein (Jakarta: RajaGrafindo Persada, 2009), p. viii.

²¹ *Ibid.*

organization to make choices.²²

Legal theorists primarily focus on the general relation between law and discretion. H.L.A. Hart, a representative of positivists, believes that discretion arises where rules are delimited and extinguished. He proposes that law can be described as 'the union of primary and secondary rules'. These rules have central core meanings to some extent, but are also open textured. Judges exercise discretion when a case is not covered by established laws. In contrast to Hart, Ronald M. Dworkin suggests that discretion is a relative concept and occurs when rules exist. It makes sense to speak of discretion only when it is 'like the hole in a doughnut', surrounded by a belt of restriction.²³

This divergence is softened by D.J. Galligan who argues that Dworkin's doughnut metaphor is misleading in suggesting such a clear division between the surrounding rules and discretion. He perceptively points out that a clear division may be found in the strongest and clearest cases,

'but more typically the two are interwoven, with discretion occurring where there are gaps in the standards, or where the standards are vague, abstract, or in conflict.'

From Galligan's point of view it is neither clearly divided nor regularly placed. Thus, it doesn't make sense to say that one is surrounded by the other in an orderly way, such as a belt around a doughnut hole.²⁴

Unlike legal writers, social scientists view rules as a set of factors among a varied array of social forces to shape the decision-making process and the exercise of discretion. Discretion has been studied in organizational context. Organizational studies on discretion are heavily influenced by several theories in relation to decision: the Weberian description of bureaucracy²⁵, rational choice model²⁶, and naturalism²⁷. I will propose that the Century bailout in Indonesia is one form of discretion.

Understandably, discretion is part of the law. Due to the contemporary nature of law, the aim of legislation depends on officials and administration. This situation is unavoidable because interpreting the rules to action-process made abstract become reality-involves interpretation and choices. Before 1969, when Kenneth Culp Davis released his book called *Discretionary Justice*, discretion was often considered as a tool which would be chosen as preferred law, and also to soften the rigidity of law. After published, discretion became subject to critique due to its weak points and unfairness.²⁸

If decision involving justice between two parties made on one scale, with the rigidity of law on the left side and unbridled discretion on the right side, in the middle

²² Li Li, *Judicial Discretion within Adjudicative Committee Proceedings in China A Bounded Rationality Analysis*, (Berlin: Springer-Verlag, 2014). p.12.

²³ *Ibid.*, p. 13.

²⁴ *Ibid.*

²⁵ Weber views the fully developed bureaucracy as a machine which operates in standard way and produces a definite product with the input of organizational goals and information. Stability rather than discretion is emphasized in the sense of bureaucracy.

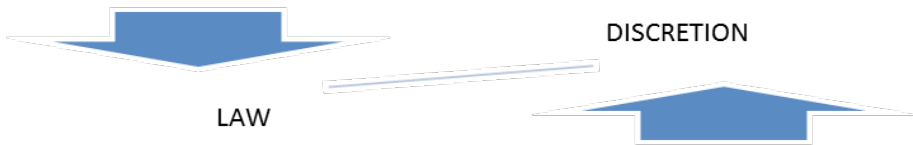
²⁶ In the rational model, action is efficiently designed to achieve a consciously selected goal or set of goals of the actor. It is presumed that the actor is able to foresee the likely outcome of the various courses of action under consideration and rationally choose the one that has closest vicinity to the settled goals.

²⁷ Which assumes that a system contains more factors than the human can process at one time and stresses the natural process of a particular decision. This approach may fail in pure description and is not useful for normative reflection.

²⁸ Keith Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in *Oxford Socio-Legal Studies 'The Uses of Discretion'*, ((Oxford: Oxford University Press, 1992), *op.cit.* p.14.

is justice concerning law, principle, standard, and general discretion then where on the scale is injustice? According to Davis, officials and judges would be on the left side because the formation of law in general does not involve emotion and decision makers are seldom faced with the rigidity of law. The middle would be balanced because principle and other rules would make discretion limited or controlled.²⁹

Chart 1: Scale of discretion and law



Unjustice according to Davis would often emerge on the right side because existing law and principle do not give direction and the interest of decision maker could influence the decision including factors such as politics or favoritism and human imperfection normally reflected in the choices they make. Davis also found that unfortunately jurisprudence has disregarded justice and prefers to choose legislators and judges rather than administrators, executives, the police and attorneys. Furthermore, jurisprudence also realizes that discretion is necessary but prefers the rigid law instead.³⁰

Administrative law is mostly dominated by discretion. The concept usually determines the function of an organ and describes the role of a court when conducting judicial review. For such reason it is important for the court to understand discretion in administration so that they are able to evaluate the works of an organ and the function of the court itself. Discretion has at least 5 different meanings in administrative law, namely as follows:³¹

- a. the authority to make decisions individually in implementing the general law is referred to as “individualizing discretion”;
- b. the freedom to fulfill the void in delegated authority in order to undertake administrative action is called “executing discretion”;
- c. the power to take action for general purposes is called “policymaking discretion”;
- d. if the review is conducted without approval, the organ conducting it would be considered to be exercising “unbridled discretion”;
- e. if it is only the principle which does not have approval, the organ conducting it is considered to be exercising “numinous discretion”.

The the court has a different function for each of the above mentioned types of discretion. The aim of state law is welfare state, so understandably, executive officials implementing the law must not be limited in taking action if there is no applicable law and if there is regulation to be interpreted. But still, discretion should be accountable and valid according to the law and moral. According to Administrative Law in the Anglo Saxon system, due to “judicial review”, there is no need for regulation about

²⁹ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, (University of Illinois Press, 1971), p. v.

³⁰ *Ibid.*

³¹ Charles H. Koch, Jr. *Judicial Review of Administrative Discretion*, (William & Mary Law School, 1986).

administrative court in general. The concept of “judicial review” according to Robert S. Lorch, is as follows:

“judicial review is the broad power of any court on judge not only constitutionality but all legal issues affecting not only acts of Congress but of any government official, agency or legislative body.”³²

V. Case Study: Bailout Policy in Indonesia

A. Discretion as an Object of Judicial Review

According to Indonesian Law regarding Government Administration (Law No. 30 Year 2014), discretion is a decision and/or action made and/or undertaken by a government official to resolve concrete problems in terms of regulations which choices are given, not regulated, not clear and/or governmental stagnant.³³ Furthermore, the scope of discretion is specifically explained in Article 23 which sets forth four conditional criteria to constitute discretion:

- a. The rules do provide choices;³⁴
- b. The rules that exist are not regulated;³⁵
- c. The rules that exist are not clear;³⁶
- d. There is stagnancy in governmental organization.

Chapter VI of Law No. 30 Year 2014 places discretion in one entire chapter, unfortunately dispute settlement regarding discretion is not clearly articulated. In Article 22, discretion is only said to be exercised by authorized officials. Furthermore, if the subjected official is found to possess excessive power³⁷, mix power³⁸ or abuse power³⁹, the rules become stagnant. In practice, there is no official appointed to declare such decision as being null or to cancel it out. If we take a look at Article 1 sub-article 18 which provides that the court in this regulation is the administrative court, it means that discretion should be subjected as an object of judicial review of the state administration court.

Chart 2: Discretion as an object of state administration court

³² In other words, every decision of the governmental organ or court can be review by higher institutions. Only in practice according to Lorch, in United States, that kind of thing doesn't have general consensus yet hence conflicts continue to emerge, “many policies governing judicial review are inconsistent within the fifty states and also between them”, see Robert Stuart Lorch, *Democratic Process & Administrative Law*, (Detroit: Wayne State University Press, 1969), p.158.

³³ Indonesia (1), *Undang-Undang tentang Administrasi Pemerintahan (Law regarding Government Administration)*, UU No. 30 Tahun 2014, LN No. 292 Tahun 2014 (Law No. 30 Year 2014, SG No. 292 Year 2014), art. 1 number 9.

³⁴ Elucidation of Article 23 point (a) is that the choices in decision and/or official action will be characterized with the word: can, may, or given authority, have the right to, should, is expected to, and other words in similar fashion in the regulation. In contrast, given choices and/or action is a response or official attitude in implementation, so it is not the governmental administration as stated in the regulation.

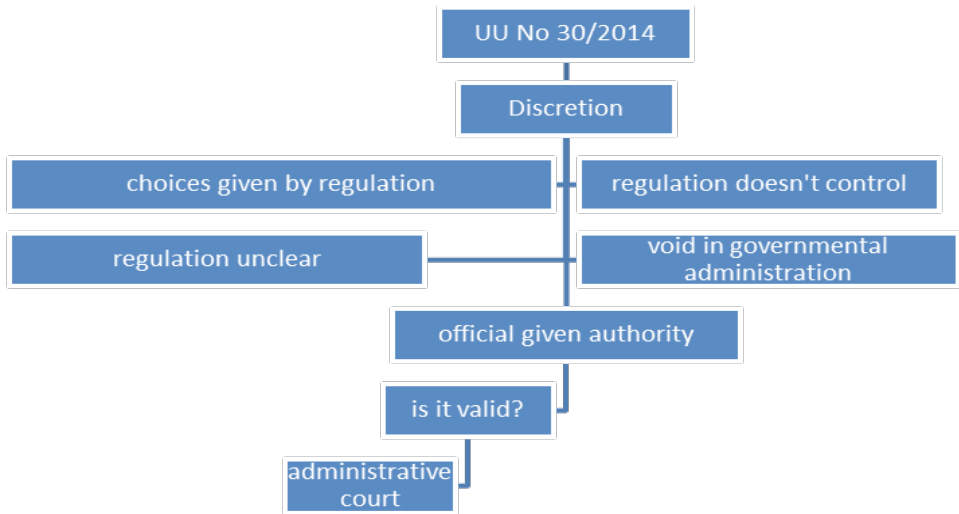
³⁵ Elucidation of Article 23 point (b) states that the terms ‘regulation doesn't regulate’ reflects the void of law which should be regulated by the governmental administration in certain conditions or beyond the usual.

³⁶ Elucidation of Article 23 point (c) states that the term ‘the regulation is not complete or is unclear’ is when the regulation requires further explanation, it not harmonized or not synchronized and the extended rules is yet to be made.

³⁷ Indonesia (1), *op.cit.*, Art. 30.

³⁸ *Ibid.*, Art. 31.

³⁹ *Ibid.*, Art. 32.



B. Judicial Review of State Administration Court

The regulation on state administration court has been changed on two occasions, however, the changes are not really significant in the matter of dispute settlement. In Article 1 sub-article 4 of the Law regarding State Administration Court (Law No. 5 Year 1986) it is stated that a dispute of administrative nature is a dispute which arises between people or private legal entities and government offices or official authorities at central state or local government as a result of decisions issued including disputes of governmental employees based on legislation in force.

In the first amendment with Law No. 9 Year 2004 and the second amendment with Law No. 51 Year 2009 respectively, provisions about dispute are not changed at all. Administrative decisions which are already an object at the state administration court are written decisions issued by government offices or authorized official which contain action of administrative law based on legislation in force, concrete, individual, and final, give rise to legal consequences to a person or private legal entity.⁴⁰ The law regarding the State Administration Court does not provide for discretion. However, the definition of decision in administrative action is changed by Article 87 which includes the following:

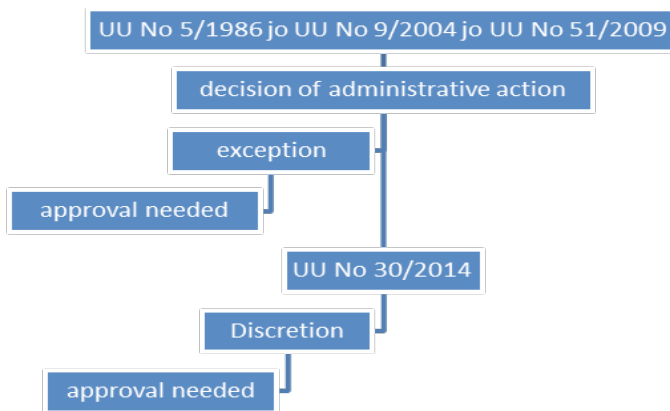
- written decisions which include factual action;
- decision of government offices and/or authorized officials in executive, legislative, judicial and other agencies;
- based on legislation in force and good administrative principles;
- final in the broad sense of the word;
- decision which has the potential to enforce law; and/or
- decision which is relevant in society.

In such context, discretion is not specifically mentioned. Besides, there is another significant problem if we look at Article 2 sub-article (c) or point number 3 in the Law

⁴⁰ See Article 1 sub-article 3 of Law No. 5 Year 1986 and Article 1 sub-article 9 of Law No. 51 Year 2009.

regarding State Administration Court stating that decisions of administrative action which still require approval are excluded from the definition of administrative action as an object of dispute. Unfortunately, under Law No 30 Year 2014 Article 25⁴¹ and 26⁴², discretion which is issued without approval is invalid.

Chart 3: Judicial review of state administration court



C. Harmonization of Legislation

The 1945 Constitution of the State of the Republic of Indonesia (the 1945 Constitution) explicitly governs only three forms of regulation which are as follows: (1) Legislation (*Undang-Undang* (UU) or Law)⁴³; (2) Government Regulation *in lieu* of law (*Peraturan Pemerintah Pengganti Undang-Undang* (Perpu)⁴⁴; and (3) Government Regulation (*Peraturan Pemerintah* (PP)). In practice, there used to be more forms of regulation which are not in accordance with the 1945 Constitution such as Government Stipulations (*Penetapan Pemerintah*) or Presidential Stipulation (*Penetapan Presiden*). Those regulation were eventually disciplined⁴⁵ with MPRS Stipulation (*Penetapan*

⁴¹ Paragraph 1 states that the use of discretion which has the potential to change the allocation of budget, approval is mandatory based on legislation in force. According to Article 2 the approval stated in Article 1 is required when the exercise of discretion based on Article 23 sub-articles (a), (b), and (c) also has the potential to change the national budget.

⁴² According to Paragraph 1 the official exercising discretion as stated in Article 25 paragraphs e 1 and 2 has obligation to give reasonable goal, aim, substance and impact on administration and finances. Paragraph 2 states that the official exercising discretion as indicated in Paragraph 1 has the obligation to have written approval from their authorized official.

⁴³ Article 5 paragraph 1: The President holds the power to make legislation with approval from DPR. Article 20 paragraph 1: every legislation should have approval from DPR and Article 21 paragraph 1: members of DPR have the right to issue legislation draft.

⁴⁴ Indonesia (2), *Undang-Undang Dasar Negara Kesatuan Republik Indonesia* [Constitution of the Republic of Indonesia], Art. 22.

⁴⁵ The reasons for disciplining were as follows: (1) there was chaos in the hierarchy of regulations; (2) substantive matters that were supposed to be provided for in legislation were unfortunately regulated by regulation *in lieu* of law; (3) as of substantive matters, there are many regulations which are not in accordance with the Constitution. See Soehino, *Hukum Tata Negara: Teknik Perundang-undangan* (Legislative Techniques) cited from summary of dissertation of Daniel Yusmic No. 39.

MPRS) No XIX/MPRS/1966 concerning Judicial Review Legislative Products beyond MPRS products which are not in accordance with the 1945 Constitution.⁴⁶

The result of review was subsequently legally recognized by Stipulation of MPRS No.XX/MPRS/1966 about Memorandum of DPR-GR concerning Sources of Law and the Hierarchy of Regulations in Indonesia. The development, evolution, type and hierarchy of regulations have been following constitutional dynamics. The latest regulation in this area was synchronized in Law regarding Establishment of Regulations No.12 Year 2011. The process of establishment of regulations in the reform era usually involving the government, the parliament and society, is basically an ideal form of process to control participatory regulation in achieving responsive regulation.⁴⁷

Unfortunately, the people's representative institution has not been able to accommodate the aspirations of the majority of people. In order to do that, the said institution should open up access to public participation in establishing regulations. The difficulty in formulating responsive regulation is a matter of the diversity in the society and also different background of political power in society.⁴⁸ Judicial review in Indonesia's constitutionalism began since 1970 through Law regarding the Principles of Judicial Authority (Law No 14 Year 1970) and following that in accordance with the third amendment of the 1945 Constitution⁴⁹, is a process to resolve normative conflict through law.

Judicial review as a normative control which authority is granted by judicial institution is aimed at maintaining consistency and vertical harmonization in order to uphold the rule of law and to see that the norms in every law can complement each other.⁵⁰ The object of judicial review is that every regulation has the nature to control (*regeling*) and be binding. In the hierarchy of regulations as stated in Law No 12 Year 2011, the objects of judicial review are regulations/or regulations *in lieu* of law (Law/*Perpu*), Government Regulation, Presidential Regulation (*Peraturan Presiden* (Perpres)) and Local Government Regulations (*Peraturan Daerah* (*Perda*)).

Due to the limitation of the objects of judicial review, the Supreme Court of Indonesia has limited authority to review regulations such as Government Regulations, Presidential Regulations and Local Government Regulations. The limitation is set because the 1945 Constitution (prior to amendment) did not control judicial review of constitutionalism as expected of the distributive power system leaning towards

⁴⁶ Daniel Yusmic P Foekh, "Peraturan Pemerintah Pengganti Undang-undang (PERPU) Suatu Kajian dari Perspektif Hukum Tata Negara Normal dan Hukum Tata Negara Darurat", (Government Regulation *In Lieu* of Law (*PERPU*) A Study from the Perspective of Ordinary and Emergency State Administration Law) (Summary of Dissertation, Faculty of Law, University of Indonesia, Jakarta, 2011), p. 8.

⁴⁷ Saifudin, "Proses Pembentukan Undang-undang Studi tentang Partisipasi Masyarakat dalam Proses Pembentukan UU di Era Reformasi". (The Law Making Process Related to Public Participation in the Law Establishment of Law in The Reform Era) (Dissertation, Faculty of Law, University of Indonesia, Jakarta, 2006) p. 530.

⁴⁸ *Ibid.*, p. 535.

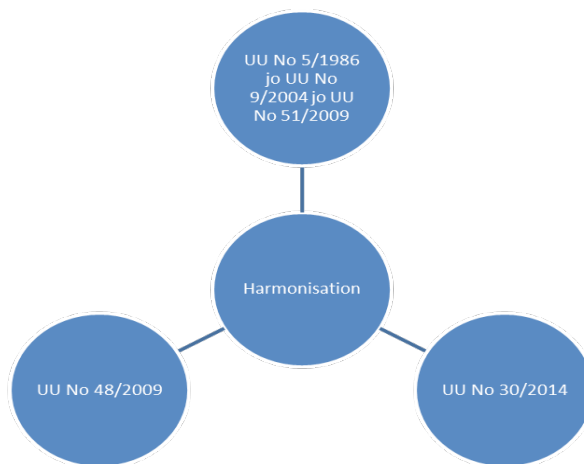
⁴⁹ *Ibid.*, p. 460. There are only two institutions which are granted the authority to perform judicial review: the Supreme Court (MA) and the Constitutional Court (MK) both with different objects to review. The Supreme Court deals with definitive objects for review, while the Constitutional Court has the authority to review regulations against the Constitution.

⁵⁰ Zainal Arifin Hoesein, "Pengujian Peraturan Perundang-undangan Menurut Konstitusi Indonesia, Studi tentang Perkembangan Pengaturan dan Pelaksanaannya oleh Mahkamah Agung RI dalam kurun waktu 1970-2003." (Review of Laws and Regulations Based on the Indonesian Constitution, A Study of the Development of Regulations and Their Implementation in the period 1970-2003) (Dissertation at the Faculty of Law University of Indonesia, Jakarta, 2006). p.455.

the 'supremacy of parliament'. For that reason, reviewing regulations which are products of the Parliament and the President is not possible since the Supreme Court has equal standing. In addition, the authority to review such regulations is held by People's Consultative Assembly (MPR) or at least the institution which established the regulation concerned. Unfortunately, if the regulation under the Constitution is a product made by governmental institution/official administration considered as an extension of the implementation of the Constitution itself, review by the Supreme Court is possible based on the supervisory principle or normative control principle.⁵¹

Article 2 sub-article (c) of Law No 5 Year 1986 or item (3) in Law No 9 Year 2004 provide that decisions on administrative action which still require approval from an authorized official are excluded from the definition of decisions in state administration court as an object of dispute. In contrast, Law No 48 Year 2009 regarding Judicial Power particularly Article 20 (2) item (b) provides that the Supreme Court has the authority to review regulations under the Constitution which are not in line with the Constitution. In other words, we can say that if discretion cannot be reviewed by the state administration court due to the factor of approval then discretion should be reviewed by the Supreme Court.

Chart 4: Harmonization of Regulation



D. Discretion in the Bail out of Bank Century

In the matter of law the bail out of Bank Century is a decision issued by a government official. In his inaugural speech, Girindo Pringgogidgo defines state as 'law construction' which has the rights, obligations, responsibilities and control by constitutional law. Furthermore, the state also has its own power, authority and sovereignty which are different from other legal entities. Therefore, he contends that the state is the main public legal entity.⁵² By observing the economic conditions at the

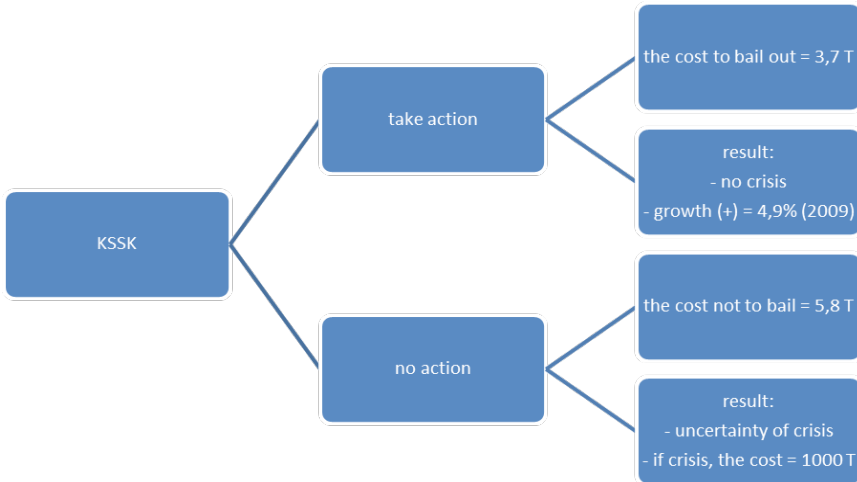
⁵¹ *Ibid.*

⁵² R.M. Girindro. "Kebijaksanaan, Hirarkhi Perundang-Undangan dan Kebijakan dalam konteks Pengembangan Hukum Administrasi Negara di Indonesia," (Policy, Hierarchy of Laws and Regulations and Policy in

time of the Bank Century bail out we can easily understand the need to act quickly under the critical conditions of the ongoing crisis. 'It is better to prevent than to cure'. Such wisdom is the perfect phrase to describe the mental situation of the Committee for the Stability of the Financial System (KSSK) meeting on November 20, 2008.⁵³

Racing against time, the KSSK decided to bail out Bank Century in order to avoid financial crisis and to rescue the national economy. The chart below describes the good intention of the Government at that time:⁵⁴

Chart 5: The KSSK's Considerations in making a decision on the Century bailout



The Government as an official institution which has the authority by Constitution to formulate regulation should have seen that the problem of formulating regulation was basically the same. The government in this matter is in the broad sense of the word which means that it includes all state institutions not only executive, legislative and judicial but also *auxiliary bodies*. Each of them can develop their own regulation and it is valid as long as it is not against higher regulations or is not produced based on authority itself as mentioned in Article 7 (1) and Article 8 (1) Law No. 12 Year 2011.⁵⁵

The establishment of regulation policy in practice is quite normal. According to Philipus M. Hadjon,

"day to day operational governance shows how agencies or officials often adopt pol-

the Context of Indonesia's State Administration Law Development) (Inauguration Speech Professor of Law at Faculty of Law University of Indonesia, Depok 16 November 1994).

⁵³ Assistance Team on the Socialization of the Policy on Preventing and Handling Financial System Crisis, *Buku putih Upaya Pemerintah dalam Pencegahan dan Penanganan Krisis (White Book: Efforts of the Government in Preventing and Handling the Financial System Crisis)*, (Jakarta: Department of Finance Republic of Indonesia, January 2010), p.2.

⁵⁴ *Ibid.*, p.49.

⁵⁵ Delfina Gusman, "Problematika dalam Pembentukan Peraturan Perundang-undangan," (Issues Related to the Establishment of Laws and Regulations) <http://fhuk.unand.ac.id/in/kerjasama-hukum/menu-artikeldosen-category/927--problematika-dalam-pembentukan-peraturan-perundang-undangan-article.html>, accessed 10 April 2013.

icy what we refer to now as beleidsregel, policy rule”.

Policy rule is a normal form of policy issued by official administration based on the discretion principle.⁸ Under normal circumstances, the system of law is enacted based on the Constitution and valid rules which are made to provide for every aspect of governmental organization. In practice, sometimes exceptional situations occur. In such situations, the exception of normal rules is needed in order for the state to operate effectively.⁹

There is a broad spectrum of such abnormal situations ranging from war which causes chaos in governmental organization, danger to public safety to situations which appear to be normal. In the larger context, the state of governmental situation which calls for the issuance of regulation *in lieu* of law (*Perpu*) is considered as abnormal situation. In such kind of situation, the rules of engagement sometimes need to address the specific case.¹⁰ According to Marbun and Ridwan HR, *freies ermessen* or discretion is a freedom attached in government or official administration. The use of discretion principle by official administration sometimes is done against the legality principle, but that doesn’t mean that official concerned cannot issue policy based on public interest.¹¹

One of the aims of the state goal is to uphold its law; however the main objective is the welfare of the state. In order to attain such goal, executive officials cannot be limited in action especially if stagnation of the law occurs (*wetvacuum*) and the extension of rules exists even if it requires interpretation (*interpret*). What needs to be reconsidered is that the discretion should be accountable and valid. Governmental function based on the legality principle means that it is conducted by written law, but in practice it is hard to operate like that due to the complexity of dynamics in society. It is one of the weaknesses of written law. According to Bagir Manan, written law has congenital and artificial defect in law.

“The slow growth of regulation which explains congenital defect is getting worse by artificial defect due to the infiltration of policy and action creating chaos in regulation as a system.”¹²

E. Judicial Review of the Bank Century Bailout

As stated earlier, the Century Bailout can be considered as discretion because it fits the definition of discretion in Law regarding Government Administration.

Table 1: Comparison of the Definition of Discretion and Century Bailout

Discretion as defined in Article 1 Number 9	Century Bailout
Decision and/or action	Decision to bail out Century
Established and/or done by official government	By committee of stabilization of the economic sector (KSSK)
To resolve concrete problems	To resolve the financial crisis
In terms of regulations in which choices are given, not regulated, are not clear and/or there is governmental stagnancy	Based on Government in lieu of law of safety net for economic system (PERPU JPSK)

By the same regulation (Law No 30 Year 2014), the dispute arising from

the bailout policy should be settled in the state administration court. Unfortunately, the regulation had not been in existence at the time the policy was issued. So, where should the injured party seek justice when the law does not provide for it? There is an *adagium* in court that the court cannot reject cases that come their way, therefore the Supreme Court should facilitate this kind of case.

Even if the regulation had existed at the time the case happened, the state administration court would not have been able to accept this kind of case due to the fact that discretion which compromises the national budget still requires official approval. The Law regarding State Administration Court (Law No 5 Year 1986) would exclude the decision which still requires official approval. Therefore, harmonization of the regulation concerning discretion would be significant in the future especially in cases arising in matters of crisis and for enabling the government to issue fast decisions as needed.

VI. Conclusion

In the context of the validity of law, administration officials who are unable to take action due to personal responsibilities would create a void in the implementation of law. This research is just a beginning in describing how financial crisis effectively changes the code of conduct for administrative offices. The need to make decisions in matters of crisis in a timely manner and in accordance with good administrative principles should be addressed in the future. Hopefully, this finding could be useful for further research, especially in the area of public policy facing sensitive difficulties. There should be a way to halt the cycle of crisis with policy capable of being explained, both morally as well as from the juridical point of view.

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