

DISCRETION BY THE INDONESIAN GOVERNMENT IN THE COVID-19 PANDEMIC ERA

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Abstract: *The pandemi Covid-19 has spread through the world with a staggering speed. It makes all the government in the world have to take an immediate action to overcome the effect. Not every country in the world are ready for it. Indonesia as one of the most counted victim also need a special act from the government to control the situation. Health management, economy management, security, and many other aspect. Discretion as a legal tool for a government to face any emergency situation has become very important nowadays. It is undebatable, when the government need to take an immediate act but stuck on a legal boundary, discretion will be a save passage to deviate from the law to save the people. This is a normative legal research with statutory approach, in order to determine whether the government discretion was taken according to the law, and has it fulfill the legal boundary on the use of discretion. After the Perppu No. 1 / 2020, and presidential decree 7/2020, Indonesian government had moved faster to overcome the pandemi, even though it has altered the state budget, all are within the legal boundary of a discretion.*

Keywords: *Pandemic, Government Discretion*

I. INTRODUCTION

Over the past six months or more, the Covid-19 pandemic had spread all over the world. The global pandemic has changed the way people live. Now, they stay home and try hard to stay healthy while working from home or going to school from home. But on the other hand, people need to keep working to make money for their lives. Some people have had a hard time.

This Covid-19 is having effects on more than just health. It also results in a significant loss of material. The pandemic is having a negative impact on every facet of social life and culture, as well as the economy. A great number of people have been laid off from their occupations, particularly those who relied on daily jobs or worked in informal settings. The fact that their line of work requires them to be outside all day, such as taxi drivers, food vendors, bus drivers, and many others, causes many people to lose their jobs all of a sudden. A significant number of people were likewise taken aback by the outbreak. Travel companies including airlines and hotels have been forced to lay off half of their workforce in order to prevent further erosion of their profit margins. Because there is now no treatment available and the virus is spreading at an alarming rate, the World Health Organization (WHO) has classified Covid-19 as a pandemic.¹ The rate of infectious disease spread in Indonesia is among the highest of any country in the world. The number of confirmed cases in Indonesia had risen to become the second highest in the world, and the country had the highest fatality rate in Asia.

According to an official page from the Johns Hopkins University School of Medicine, the number of verified positive cases of COVID-19 in Indonesia is 232.628 as of Thursday, September 17, 2020. That represented 0.77 percent of the global case total, which stood at 29.917.428 positive COVID-19 tests.² Because of everything that has happened, the government is forced to take a lot of

¹Mohamad, Mazliza, Ricco Survival Yubaidi, Safinaz Mohd Hussein, Rahmah Ismail, Suzanna Mohamed Isa, and Saidatul Nadia Abdul Aziz. "Measuring the Low-Income Earner on Housing Access in Urban Areas of Indonesia and Malaysia." *Hasanuddin Law Review* 7, no. 2 (2021): 61-74. DOI: <http://dx.doi.org/10.20956/halrev.v7i2.2876>

²<https://nasional.tempo.co/read/1387543/sebaran-covid-19-di-dunia-indonesia-menempati-urutan-ke-23/full&view=ok>

significant actions in order to combat the effects of the pandemic. As a result of Indonesia's strong commitment to upholding the Rule of Law, any and all of these countermeasures must be taken with extreme caution to avoid breaking the law. In order for the Indonesian government to respond effectively and expeditiously to this worldwide pandemic, the nation of Indonesia unquestionably requires a legislative tool. Legal Instrument in Indonesia has taken by the president by issuing Presidential Decree No. 7/2020 about Covid-19 Task Force and the Government Regulation No. 21/2020.

One of the main discussion point is the Perppu No. 1/2020 that, this Law contains 5 (five) main issues. *First*, budgeting. For the Covid-19 budget, 405,1 Trillions of Rupiah have been allocated. It is divided as follows: IDR 75 trillion for health care, IDR 110 trillion for the social security network, IDR 70,1 trillion for tax incentives and credit stimulus, and IDR 150 trillion for restoring national economic circumstances. Second, budgets for financing health care are prioritized for the protection of health care staff, such as physicians, nurses, and others, through the purchase of protective equipment, such as hazmat suits and others. In addition to the purchase of additional medical equipment such as ventilators and diagnostic kits, and the modernization of current hospitals or construction of new hospitals to care for covid-19 patients. Other expenses include incentives for medical personnel, death benefits, and other health care costs. Finally, social network security. Beginning in April, the government has allotted a budget of up to 10 million dollars for monthly credit payments over a four-month period. In addition, the sembako card (food card) has been increased to IDR 20 million with a bonus increase to IDR 200.000 per month for nine months. In addition, funding for proworker card holders increased to IDR 20 trillion to support about 5.6 million informal workers and micro and small enterprises. There is also a pos training incentive of around IDR 600,000 and a training fee of one million rupiah. In addition, there are funding for 24 million 450 VA electricity subscribers. In addition, there is funding for a 50% discount on power for 900 users in Virginia. Fourth, as a form of economic stimulus for micro and middle-class businesses, they have prioritized tax exemptions (Php21), tax-free imports, and a tax reduction of 25% for specific industries. Fifth, for the non-fiscal sector, the assurance of raw material availability for the industry. The government enacted a simplification of export-import procedures and a speeding up of the import-export process via the national logistic ecosystem.³

In addition to relying on statutory instruments, the government may also exercise discretion as an inherent authority in order to speed up its response to the Covid-19 pandemic. This is done in order to combat the pandemic as quickly as possible. The provisions regarding discretion contained in law No.30 of 2014 must be considered and used as the basis for issuing discretion in the context of using the covid-19 budget. Aside from that, the community must actively watch and be involved in the process of creating and implementing it as a preventative precaution. This must be done in order to ensure that it is effective. Many parties have criticized Law No. 2 of 2020, especially Article 27, because it is considered to provide legal immunity, but the makers of the Perppu have actually considered this because it has reflected from the past. The economic crisis that befell Indonesia between the years 1998 and 2008 resulted in the criminal prosecution of a large number of government officials who were responsible for resolving the crisis.

In reality, no nation is prepared to tackle the Covid-19 pandemic, including its legal system. As a solution, government employees must have the fortitude to exercise their discretion responsibly and not be afraid of criminal threats, because this is for the greater good of ensuring the protection of the public. This article seeks to examine whether the government's use of discretion has been warranted and supported by sufficient legal grounds. Will it be compatible with all other laws made in Indonesia, and what impact will the legal measures have on the government?

³Lizsaegeham, " *SederetAturanPenanganan Corona* <https://www.liputan6.com/news/read/4227914/sederet-aturan-yang-dikeluarkan-jokowi-melawan-pandemi-virus-coronadiakses> pada 28 Agustus 2020

II. METHOD

The author decided to use normative legal research methods to research and write as a legal research method. The use of normative research methods in the research effort and writing of this thesis is based on the background of the suitability of the theory with the required research methods by studying the problem in terms of legal rules regarding policy inconsistencies regarding the rules taken by the community with the law and the impact of the implementation of the discretion taken by the government amid the covid-19 outbreak. The approach method in this research is the statutory approach (Statue approach) and the comparative approach. By containing the descriptions under study based on a careful and in-depth literature review.

III. DISCUSSION

Government Discretion

According to article 1 paragraph 9 of Law number 30 of 2014 concerning Government Administration, it explains that: "Discretion is a decision and / or action determined and / or carried out by government officials to solve concrete problems faced in the administration of government in terms of laws and regulations.⁴ invitations that provide choices, do not regulate, are incomplete or unclear, and / or government stagnation.

Discretion is the freedom to be able to act on your own, especially when dealing with problems that need to be fixed right away but for which there are no rules yet because they haven't been made by the body in charge of making laws.

Government officials are in charge of giving services to the community and running the government. When it comes to putting laws into practice in people's lives, government officials do it through written, concrete, individual, and final government decisions. This means that they need to use their own judgment⁵. Urgent and important matters must contain the following elements at a minimum⁶:

- a) Emerging issues must be tied to the public interest, including the interests of the nation and the state, the broader community, the common people, and the interests of development.
- b) The abrupt appearance of these issues deviates from the predetermined plan.
- c) To overcome these problems, laws and regulations do not govern it or only regulate it in a generic sense, so the state administration is free to do so on its own accord.
- d) The procedure cannot be conducted in accordance with standard administrative procedures, or if it can be completed, it is less efficient and effective.

Government employees use discretion or Ermessen to carry out administrative policy (*beleid*), often known as discretionary power (*Discretionaire Bevoegdheden*).⁷ In actuality, the existence of policy regulations cannot be divorced from the government's free authority, known as *freies ermessen*. In other words, the authority of state administrative bodies and personnel to enact policy regulations derives from their guiding action principle (*beleidsvrijheid* or *beordelingsvrijheid*).

With the emergence of state administration goods based on *freies ermessen*, which became an absolute in the kind of welfare state, policy rules grew and began. *Freies ermessen* arose from the government's obligations in the welfare state, which highlighted that the primary responsibility of

⁴Johan, Suwinto, Amad Sudiro, and Ariawan Gunadi. "What Could ASEAN Learn about Bankruptcy Law from ASEAN Partner Countries, China and Japan?." *Hasanuddin Law Review* 8, no. 3 (2022): 194-210. DOI: <http://dx.doi.org/10.20956/halrev.v8i3.3692>

⁵ S. Prajudi Atmosudirdjo, *Hukum Administrasi Negara*, Seri Pustaka Ilmun Administrasi VII, Ghalia Indonesia, Jakarta, 1995, hlm. 78.

⁶Julista Mustamu, "Diskresi dan Tanggungjawab Administrasi Pemerintahan", *Jurnal Sasi*. Vol. 17 No. 2, April-Juni 2011

⁷ H.M. Laica Marzuki, "Menyoal Diskresi yang terpasung (Mengkritisi Undang-Undang Administrasi Pemerintahan)". *Amanna Gappa*. Vol. 25 No. 2, September 2017

government is to offer public services or to pursue the wellbeing of its citizens, in addition to providing protection for citizens in the performance of its functions.⁸

The principle that "the government should not refuse to provide services to the community on the grounds that there are no laws and regulations governing it" appears to be consistent with the concept of the welfare state, in which the primary responsibility of the government is to provide services to its citizens. Instead, he must find and provide a solution in conformity with the specified *freiesermessen* principle. Legislators created *Freiesermessen* because they were unable to govern it properly and accurately, so they gave state managers the authority to decide for themselves what should be done. If this is the case, then *freiesermessen* cannot be classified as statutory regulation, and policy regulations cannot be considered a part of and a type of legislation.⁹ *FreiesErmessen* is defined by SjachranBasah as the liberty to act on one's own initiative; nevertheless, in its application, state administrative acts must be in conformity with the law, as provided in a Pancasila-based constitutional state.¹⁰

In the modern legal state conception, discretion, Discretion (English), Discretionair (France), and *Freies Ermessen* (Germany) are required by the government and attached to its authority (inherent aan het bestuur), in accordance with the increasing demands for public services that the government must provide to the residents' increasingly complex socio-economic lives.

Freiseremssen is used primarily due to the following: first, an emergency condition that makes it impossible to apply written provisions; second, there is no or no regulation that regulates it; third, there are regulations, but the editorial includes freedom of administration (*interpretatievrijheid*), freedom to consider (*beoordelingsvrijheid*), and freedom to take policies. The basic requirements that must be met and enforced properly, and are contained in Article 24 of Law Number 30 of 2014 as follows¹¹:

- a. In accordance with the discretionary objectives as referred to in Article 22 paragraph 2;
- b. Does not conflict with statutory regulations;
- c. In accordance with AAUPB (Basic Principles of Good Governance);
- d. Based on objective reasons;
- e. Does not create conflicts and interests; and
- f. Done in good faith

When taking or deciding to take discretionary action, government authorities must consider both the rules and what the discretion is actually doing. A viable legal product requires the exercise of discretion that is not based on an arbitrary administrative process, as well as a solid legal foundation. In addition, Atmosudirdjo contends that the making of government choices by public officials is constrained by three (three) legal principles:

1. The principle of jurisdiction, meaning that government decisions must not violate the law;
2. Legality principle, meaning that the government's decision must be taken based on a statutory provision;
3. The principle of discretion, meaning that public officials may not refuse to make decisions on the grounds that there are no regulations, and therefore are given the freedom to make decisions according to their own opinion as long as they do not violate the juridical and legality principles mentioned above.

⁸Abdul Razak, "*HakikatPeraturanKebijakan*", Negara hukum. Di akses pada 20 Mei 2020, Pukul 16.31 WITA. (<http://www.negarahukum.com/hukum/hakikat-peraturan-kebijakan.html>).

⁹*Ibid.*

¹⁰SjachranBasah, *Eksistensi dan TolokUkurPeradilanAdministrasi Negara di Indonesia*, Bandung, Alumni, 1997, hlm. 3.

¹¹UU No. 30 Tahun 2004

Discretion Restrictions

According to J.H. Gray (1990), discretionary actions or activities must be based on principles; good faith, uninfluenced by extraneous reasons or motives, fairly, and within the legislative boundaries of the discretion. In fact, the requirements of the Government Administration Law have limited the use of government discretion in three (three) ways, with the first requiring the participation of authorized government employees. Second, it must be conducted in conformity with the aims and scope specified by legislation. Thirdly, technical administrative procedures or processes must be carried out in accordance with the provisions of the Government Administration Law.

Government discretion is classified as the use of authority when there is, first, the use of authority that is not in accordance with the purpose, second, the use of purposes that are not in accordance with the purpose of the authority being given, and third, the use of incorrect procedures or procedures. In the meantime, with regard to arbitration, good governance, if the act is good, if the action or action departs from the principle of proportionality, is considered to be in violation.¹²In addition, it specifies the minimal conditions that must be reached by the highest democratic government programs, which are as follows:

- a. Government policy does not destroy state order, as evidenced by the security guarantee for the person and property of citizens as governed and as sovereigns over the state (state actors).
- b. Policy does not factually diminish the welfare of the people directly and indirectly.
- c. Policy does not constitute a component (containing or permitting specific components to remain in the state) that destroys and alters the state's fundamental essence.

Discretion In Handling the Covid-19 Outbreak: Government Discretion Approach

The Covid-19 pandemic has caused a domino effect in numerous aspects of world existence. The transmission of the SARS-COV-2 virus is exponential and has simultaneous effects on multiple dimensions. Nobody knows with certainty when this virus outbreak will cease. Since the first case was reported by the president on March 2, 2020, there have been 19,189 confirmed instances of viral infection as of May 20, 2020. According to computer models used to anticipate the spread of this virus, it is predicted that the number of cases will continue to rise in the future. Similar to other nations, Indonesia has created a legal umbrella as a way of dealing to the increasingly alarming epidemic scenario in the third millennium. One of the main things that was also passed by the government of President Jokowi is Law No. 6/2018 on Health Quarantine.

In response to WHO's report on the status of the global pandemic and the situation with the spread of Covid-19, President Jokowi issued a policy on March 13, 2020, related to Presidential Decree No. 7 of 2020, to speed up the task of dealing with covid-19. It is interesting to note that this Presidential Decree has made parts of the police and armed forces part of the task force that will carry out the plan. The Head of the National Disaster Management Agency is in charge of this task force.

On March 13, Jokowi's government issued three policies related to the handling of the Covid-19 policy. The three government policies, namely:

- a. First, the Government Policy regarding the Presidential Decree on the Establishment of a Public Health Emergency No. 11 of 2020. The background of this government policy is due to the extraordinary spread of Covid-19 marked by the number of cases and / or the number of deaths that have increased and spread across regions and across countries which have an impact on political, economic, social, cultural aspects, defense, and security, as well as the welfare of the people in Indonesia.
- b. Second, Government Policies related to government regulations regarding large scale social restrictions (PSBB) No. 21 of 2020. The impact of the spread of covid-19 has resulted in certain circumstances so that it is necessary to make efforts to overcome one of them by taking the

¹²AminuddinIlmar, *Perbuatan Hukum Pemerintahan*, Makassar, Phinatama Media, 2020, hlm. 121

PSBB action. In this government regulation, what is meant by large-scale social restrictions (PSBB) are restrictions on certain activities of residents in an area suspected of being infected with Covid-19 in such a way as to prevent the possibility of Covid-19.

- c. Third, namely Policies related to Government Regulations in Lieu of Law (PERPPU) of state financial policies with financial system stability No. 1/2020. This policy was taken because the implications of the Covid-19 pandemic have also had an impact on the worsening of the financial system, as indicated by a decrease in various domestic economic activities so that it needs to be jointly mitigated by the government and the Financial System Stability Committee (KSSK) to take forward looking in order to maintain financial sector stability.¹³

Juridical Review Regarding the Use and Monitoring Of Discretion In Handling Covid-19

In the public interest and for the benefit of all, discretion is meant to make government run more smoothly, fill in legal gaps, and get things moving again when government is stuck. As for the scope of discretion, it includes making decisions and/or taking actions based on the provisions of laws and regulations, making decisions and/or taking actions because statutory regulations aren't clear or aren't complete, and making decisions and/or taking actions because the government isn't moving fast enough to protect broader interests. Also, discretion must meet certain requirements, such as being in line with the purpose of discretion, not going against laws and rules, following the AUPB, being based on objective reasons, not causing a conflict of interest, and being done in good faith. Lord Acton once remarked, "power tends to be corrupt, and absolute power is corrupt totally." In a state of emergency, government policies are susceptible to abuse. Indeed, discretionary authority need not cause concern for government personnel. Apart from being a principle in driving the running of government functions, discretion also has a strong juridical foundation based on Law No. 30 of 2014 concerning Government Administration. There will be problems when discretionary corruption is used. The misuse occurs because of the misinterpretation of discretion and / or malicious intent to obtain certain benefits by issuing discretion which results in corruption.¹⁴

As previously stated, discretion attempts to streamline administration, fill legislative voids, and overcome government stagnation in certain situations for the benefit and public interest.¹⁵ In order to avoid the abuse of discretion, clear mechanisms and accountability must be considered. As we know that the Parliament has passed Perppu No. 1 of 2020 becomes law. Future implementation laws should include supervisory processes and a clear framework for the use of oversight and accountability to prevent the misuse of money for covid-19 management.

Bagir Manan stated that the element of urgency that forces must show 2 (two) general characteristics, namely that there is a crisis and an urgency.¹⁶ According to him, it is a crisis situation when there is a disturbance that creates a sudden emergency. Urgency, in the event of unanticipated circumstances necessitating rapid action without waiting for the initial consultation, or if there are indications of a real start that, if not regulated promptly, will cause imminent disruptions to both the community and the government's operations. When viewed from the above parameters, in fact Perppu No.1 of 2020 has met the general requirements. Purpose of Ordering Perppu No. 1 of 2020 which has become Law No. 2 of 2020, namely the first, to provide a foundation and legal certainty for the government that determines certain policies and steps in the context of handling the health and economic crises caused by the Covid-19 pandemic. Second, as

¹³Peraturan Pemerintah Pengganti Undang-undang Republik Indonesia Nomor 1 Tahun 2020, tentang Kebijakan Keuangan Negara dan Stabilitas Sistem Keuangan Untuk Penanganan Pandemi Covid-19 dan/atau Dalam Rangka Menghadapi Ancaman yang Membahayakan Perekonomian Nasional dan/atau Stabilitas Sistem Keuangan

¹⁴Oce Madril, "Diskresi atau Korupsi" Kompas, (11 Agustus 2016), hlm. 6

¹⁵article 22 paragraph (2) of Law Number 30 of 2014 concerning Government Administration

¹⁶ Ibnu Sina Chandranegara, "Pengajuan Perppu terkait Sengketa Kewenangan Konstitusional antar-Lembaga Negara: Kajian atas Putusan Mk No.138/PUU-VII/2009". *Jurnal Yudisial*, Vol 5, No. 1 April 2012, hlm 15

an effort to prevent the threatened impact of Covid-19 and the dangers of the national economic system and / or financial stability.

The issuance of the perpu is not without debate, article 27 of the Perppu No. 1/2020 has been widely criticized for being considered a form of absolute power that protects officials. In fact, the government has considered that the impact of the Covid-19 pandemic is likely to cause a crisis. The provisions of article 27 of Perppu No.1 of 2020 are solely to provide a sense of "security" for government officials so that they are not caught in legal cases or criminalization after the Covid-19 pandemic which makes government officials afraid or hesitant to issue discretionary policies. Furthermore, the importance of article 27 of Perppu No.1 / 2020 will be explained as an effort to achieve the issuance of the Peppu. The formulation of Article 27 paragraph (1) of Perppu 1/2020 reads:

"The costs incurred by the government and / or the KSSK member institutions in the context of implementing the State revenue policy, including policies in the field of taxation, State expenditure policies including policies in the regional finance sector, financing policies, policies on financial system stability and national economic recovery programs, are part of the economical cost to save the state from the crisis and not be a loss to the State"

The government realizes that the policies taken to overcome a critical condition / event that endangers the national economy and / or financial system stability must be guaranteed by legal certainty. As one of the teachings put forward by Gustav Radbruch¹⁷, legal certainty is certainty about the law itself. Perppu No.1 of 2020 has fulfilled at least four things related to the meaning of legal certainty according to Gustav Radbruch¹⁸, *First*, that the law is positive, meaning that it is legislation. *Second*, that the law is based on facts, not a formulation of an assessment that will be carried out by the judge, such as "good faith", "decency". *Third*, bring that fact to be formulated. in a way that is clear so as to avoid confusion in meaning (multiple interpretations), besides being easy to run. *Fourth*, the positive law must not be changed frequently.

The President issued Presidential Instruction Number 4 of 2020 concerning Refocusing of Activities, Budget Reallocation, and Procurement of Goods and Services in order to accelerate the handling of Corona Virus Disease 2019 (Covid-19) on March 20, 2020. The President issued Perppu No.1 of 2020 concerning State Financial Policy and Financial System Stability for the handling of the 2019 Disease Corona Virus Pandemic (Covid-19) and / or in the Context of Facing Threats that Endanger the National Economy and / or Financial System Stability. Law Number 2 of 2020 concerning Stipulation of Perppu Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling Corona Virus Disease 2019 (Covid-19) and / or in order to face threats that endanger the national economy and / or financial system stability become law and attach it as an inseparable part of this law. This law comes into force on the date of promulgation, on May 18, 2020.

IV. CONCLUSION

This article's "good faith" language is also quite strong, and it does not mean that state officials who have been found to have committed wrongdoing in managing Covid-19 will be exempt from the law. The impact of the covid-19 epidemic on government discretion, particularly in the Perpu Discretion No. 1 of 2020, will continue to constrain the government's fiscal ability. Appropriate decision-making must undergird sufficient mitigation actions. Thus, the detrimental effect on the state's economic and financial sectors can be mitigated. The government has established a PEN program to combat the medical, social, and economic effects of Covid-19. Consequently, the government must be able to prioritize the distribution of stimulus monies. This is crucial for assessing the likelihood

¹⁷Mario Julyano, Aditya Yuli Sulistyawan, Pemahaman Terhadap Asas Kepastian hukum melalui konstruksi penalaran positivisme hukum. Jurnal Crepido, Vo. 01 Juli 2019 HL. 13-22

of economic outcomes. Through its budget function, the DPR RI must consider expenditure priority scales based on the level of urgency and require an adequate and efficient budget allocation. To ensure transparency and accountability about the impact of covid-19 funding, the Indonesian Parliament must also oversee the work of state financial audit and supervisory agencies and law enforcement.

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