

## THE POLITICS OF GOVERNMENT LAW ON DISCRETIONARY POLICIES IN HANDLING COVID-19 BASED ON LAW NO. 2 OF 2020

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### Abstract

*This study aims to analyze the politics of government law regarding discretionary policies in handling covid-19 based on Law No. 2 of 2020. The study focuses on the use and supervision of discretion in handling covid-19 and the protection of the use of discretion in handling covid-19 based on Law No. 2 of 2020. The results of the study show that the central government issued various legal instruments in the form of Ministerial Regulations, Presidential Decrees, and the making of laws in dealing with the Covid-19 pandemic. The government can use discretion as an inherent authority. The authority to use discretion already has a strong juridical basis based on Law No. 30 of 2014 concerning Government Administration. However, it becomes a problem when discretion is misused (discretionary corruption), including because of the wrong interpretation of discretion and / or malicious intent to gain profit by issuing discretion which results in corruption. Law No. 30 of 2014 and general principles of good governance.*

**Keywords:** Political Law, Government, Policy, Discretion, Covid

### A. INTRODUCTION

The Corona Virus Disease-19 (Covid-19) outbreak that has infected humans rapidly and spread globally has become a health issue that has given birth to worry and chaos. WHO on March 11, 2020 officially declared Covid-19 a pandemic. Indonesia is one of the countries exposed to Covid-19. The number of positive cases has continued to grow since it was confirmed by President Joko Widodo on March 2, 2020. Currently, it has reached 12,776 positive cases on May 7, 2020.<sup>1</sup>

In dealing with the Covid-19 pandemic, the central government issued various legal instruments in the form of Ministerial Regulations, Presidential Decrees, to the making of laws. It can be said that the government is doing the right thing because legal instruments are a firm and effective praxis solution in solving various problems including the Covid-19 problem. This needs to be further appreciated when the government makes mitigation, minimization, and prevention efforts at the right time.<sup>2</sup>

In response to the situation, various policies have been issued by the administration of President Joko Widodo to accelerate the handling of Covid-19. On March 13, 2020, Presidential Decree (Keppres) Number 7 of 2020 was issued concerning the Task Force for the Acceleration of Handling Covid-19 as amended by Presidential Decree Number 9 of 2020 concerning Amendments to Presidential Decree Number 7 of 2020. Through this Presidential Decree, synergy between ministries/agencies and local governments is regulated, where governors, regents, and mayors as Chairmen of the Task Force for the Acceleration of Covid-19 Handling in the regions, in setting policies in their respective regions must pay attention to the policies of the central government.<sup>3</sup>

Furthermore, on March 31, 2020, the President signed Government Regulation (PP) Number 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) in the Context of Accelerating Handling of Covid-19. According to the PP, local governments can carry out PSBB or restrictions on the movement of people and or goods for a particular province or regency/city with the approval of the Minister of Health (Menkes). On April 13, 2020, the president again issued Presidential Decree Number 12 of 2020 concerning the Determination of Non-Natural Disasters of the Spread of Covid-19 as National Disasters. With this Presidential Decree, governors, regents, and mayors in setting policies in their respective regions must pay attention to the policies of the central government.<sup>4</sup>

The COVID-19 pandemic has caused various aspects to be affected, both socio-cultural and world economies, which are weakening. This situation, of course, cannot be allowed because it will cause a prolonged crisis, in order to handle it as a legal state, of course, legal instruments in the form of laws and regulations are needed. The President has issued various laws and policies, including Presidential Decree Number 7 of 2020 concerning the Task Force for the Acceleration of Handling COVID-19, Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) in the Context of Accelerating Handling of COVID-19, Presidential Decree Number 11 of 2020 concerning Determination of Public Health Emergency Status, Perppu No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling COVID-19 Pandemic, Presidential Regulation Number 54 of 2020 concerning Changes in Posture and Details of the 2020 State Budget and finally Presidential Decree Number 12 of 2020 concerning the Determination of Non-natural Disasters the Spread of COVID-19 as a National Disaster.<sup>5</sup>

Government Regulation in Lieu of Law (Perpu) Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid19) Pandemic and/or In Order to Face Threats That Endanger the National Economy and/or Financial System Stability. Basically, the Perpu was issued as an effort by the Government to anticipate the potential for a monetary crisis due to the Covid-19 pandemic outbreak, but in a number of articles there are a number of provisions that have the potential to cause deviations. In Article 27 of the Perpu, it is stated that officials who take actions related to Perpu Number 1 of 2020 cannot be prosecuted either criminally/civilly as long as in carrying out their duties they have been based on good faith and applicable laws and regulations. In addition, in the same article it is said that all actions or decisions taken based on Perpu Number 1 of 2020 are not the object of disputes of the State Administrative Court. These two Articles are debated because there is a potential for legal irregularities to be born as an implication for the application of both articles.<sup>6</sup>

One of the interesting discussions is Perppu No. 1 of 2020 which has been determined by the DPR to be Law No. 2 of 2020, Broadly speaking, the content of the Perppu is divided into the fields of state financial policy, taxation and financial and business system stability policies. There are 5 (five) crucial points in this Perppu as follows:<sup>7</sup>

*First*, set a budget for handling COVID-19 of RP 405.1 trillion. The details, amounting to Rp 75 trillion for the health sector, Rp 110 trillion for the social safety net. Then IDR 70.1 trillion for tax incentives and stimulus for the People's Business Credit (KUR). And IDR 150 trillion was allocated to finance the national economic recovery program.

*Second*, the health sector budget will be prioritized for the protection of health workers, especially the purchase of PPE, the purchase of medical devices such as test kits, reagents, ventilators, and others, and also for upgrading referral hospitals including Wisma Atlet, as well as for incentives for doctors, nurses, and hospital personnel, as well as for death compensation for medical personnel, as well as handling other health problems.

*Third*, regarding the social safety net, the government allocated PKH 10 million KPM which was paid monthly starting from April. There is also a basic food card, the recipient of which is increased to 20 million with benefits of an increase of IDR 200 thousand for 9 months. In addition, the Pre-Employment Card fund was increased to IDR 20 trillion to be able to cover around 5.6 million informal workers, micro and small business actors. Beneficiaries get post-training incentives of IDR 600 thousand, with training costs of IDR 1 million. The budget is also allocated for a 3-month electricity cost waiver for 24 million 450VA electricity customers, and a 50 percent discount for 7 million subsidized 900VA customers. There are also additional housing incentives for MBR housing construction of up to 175 thousand and logistical support for basic necessities and basic needs of IDR 25 trillion.

*Fourth*, for economic stimulus for MSMEs and business actors, it will be prioritized to free PPh 21 for workers in the processing industry sector producing a maximum of IDR 200 million, for exemption of import VAT for taxpayers then import for export purposes. Especially for small and medium-sized industries in 19 specific sectors, and will also be used to reduce the income tax rate by 25 percent for taxpayers and then import export destinations, especially small and medium-sized industries in certain sectors.

*Fifth*, for the non-fiscal sector in ensuring the availability of goods currently needed, including industrial raw materials, the government has carried out several policies, namely simplification of export limited prohibitions (lartas), simplification of limited bans or import lartas, and acceleration of export-import process services through the national logistics ecosystem.

The government not only uses statutory instruments in accelerating the handling of the Covid-19 Pandemic, but the government can use discretion as an inherent authority. Discretion according to Law No. 30 of 2014 is, decisions and/or actions determined and/or carried out by government officials to overcome concrete problems faced in the administration of government, launch government administration, and provide legal certainty when the laws and regulations that provide choices do not provide rules, are incomplete, unclear, and/or due to government stagnation.<sup>8</sup>

Law No. 30 of 2014 concerning Government Administration provides a way out for Government Officials to continue to be able to issue decisions and/or actions in order to support the smooth implementation of Government programs as long as they provide general benefits and in accordance with the AUPB, namely issuing discretion. Discretionary authority is often issued when a government program does not run optimally and leads to stagnation as a result of incomplete or unclear regulations.<sup>9</sup>

Based on the description above, the author is interested in reviewing the discretion used by the Government in issuing Perppu No. 1 of 2020 which has been determined by the DPR to become Law No. 2 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or In Order to Face Threats that Endanger the National Economy and/or Financial System Stability.

## **B. DISCUSSION**

### **1. Use and Supervision of Discretion in Handling Covid-19**

Power in the state is actually a legal power, especially in the Basic Law as the supreme law that gives authority to the Government (executive) to act in accordance with the authority granted by law. In the administration of government functions, the actions of the Government must be based on the authority possessed and not on the power. Of course, the use of discretion must also be based on the

need for the implementation of Government programs and not on the personal will of Government Officials.<sup>10</sup>

Talking about government policy in the context of the state of law, it cannot be separated from the principle of legality which is a universal element of the concept of the state of law. In criminal law the principle of legality in its form "nullum delictum sine lege" today is still disputed the principle of applicability. In administrative law the principle of legality in its form "wetmatigheid van bestuur" has long been felt to be inadequate, although it is realized that the principle of wetmatigheid guarantees the implementation of the principle of equality before the law and the principle of legal certainty.<sup>11</sup>

Discretion as a governmental authority is a free authority possessed by a Government Official as opposed to a bound authority (*gebonden bevoegdheid*). The legal nature and character of this government action requires that the power of the government is not merely to implement the law (*the principle of wetmatigheid van bestuur*), but must prioritize "*doelstelling*" (goal setting) and regulation (policy). Government actions that promote "*doelstelling*" and "*regulation*" are active powers.<sup>12</sup>

According to S. Prajudi Atmosudirjo discretion,<sup>13</sup> *discretion* (English), *discretionair* (France), *freies ermessen* (Germany), as freedom of action or decision-making of officials of the state administration who are authorized and authorities in their own opinion. Furthermore, it is explained that discretion is needed as a complement to the principle of legality, namely the principle of state administrative law which states that any act or act of state administration must be based on the provisions of the law. It is impossible, however, for the law to regulate all sorts of cases of position in the practice of daily life. Therefore, it is necessary to have freedom or discretion from the state administration consisting of free discretion and bound discretion.

The definition of discretion can also be found in Article 1 number 9 of Law Number 30 of 2014 concerning Government Administration, which means that discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government, in the event that laws and regulations do not provide options, do not regulate, are incomplete or unclear, and/or the stagnation of government. Indeed, Law No. 30 of 2014 has regulated the objectives, scope and discretionary requirements.

Discretion aims to, streamline the administration of government, fill legal vacancies, provide legal certainty, and overcome the stagnation of government in certain circumstances for the benefit and public interest. The scope of discretion is decision making and/or actions based on the provisions of laws and regulations that provide a choice of decisions and/or actions, decision making and/or actions because laws and regulations do not regulate, decision making and/or actions because laws and regulations are incomplete or unclear; and decision-making and/or action due to government stagnation in the broader interest. In addition, discretion must be qualified, namely, in accordance with the purpose of discretion, not contrary to the provisions of laws and regulations, in accordance with the AUPB, based on objective reasons, not giving rise to a conflict of interest; and done in good faith.<sup>14 15 16</sup>

Referring to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), Indonesia is a country of law (*rechstaat*) or *a state governed by the rule of law*, in the sense that no matter how bad the law is when the regulation has been promulgated, the government and the people must be subject to the regulation. Therefore, every law must be ensured that as little as possible there is the potential to give birth to fraud. In addition to minimizing fraud, a regulation must not conflict with higher regulations or conflict with regulations that are of equal standing without providing legal certainty regarding the status of the regulation whether it is maintained or declared invalid. The existence of Perpu which is

equivalent to the Law refers to the hierarchy of laws and regulations as stated in Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations will certainly cause new problems in the law enforcement area when conflicting norms are found, especially in the transitional rules in Perpu Number 1 of 2020 are not mentioned in detail regarding the status of the related law whether it remains retained or declared invalid with the birth of Perpu.<sup>17</sup>

On the other hand, the policies of government officials implemented in the form of discretion should be protected by a legal umbrella, so that every government official who commits actions in the name of his office and is used in the public interest will get legal protection. State Administrative Law is an instrument of legal protection, as regulated in Law Number 30 of 2014 concerning Government Administration. The law provides assurance to government officials that the demand to reach a fair and flexible decision/action in the administration of modern government is a necessity, so discretion is seen as being able to make an important contribution to the public interest.<sup>18</sup>

The authority to use discretion does not need to be worried by government officials, because discretion also has a strong juridical foundation based on Law No. 30 of 2014 concerning Government Administration. However, it becomes a problem when discretion is misused (*discretionary corruption*), including due to a wrong interpretation of discretion and/or the existence of malicious intent to obtain profits by issuing discretion that leads to corruption.<sup>19</sup>

In the context of implementing Law No. 2 of 2020, corruption that occurs can be categorized as *administrative* corruption because of the potential for misappropriation that causes corruption to be carried out in the implementation stage of policies and decisions. The potential for disaster fund irregularities is more wide open and frequent, as governments and the public focus on handling, prevention, and post-disaster recovery. On the other hand, there is minimal supervision of the use of funds that ensure that the funds are appropriate and on target.<sup>20</sup>

Of course, this is very undesirable, so that public participation as an informal institution can carry out supervision for prevention. Participation is a concept that develops in the modern political system, which provides space for people to convey aspirations in the process of formulating policies, especially those directly related to people's lives. In this regard, Robert B. Gibson is of the view:

"The demand for public participation was once the exclusive preserve of radical challenging centralized and arbitrary power. Many radical critics continue to believe that the resolution of present problems requires the active participation of all individuals in making the decisions which affect their lives"<sup>21</sup>

Indeed, the participation and involvement of the community in the process of public policymaking plans, public policy programs, public decision-making processes and the reasons for public decision-making is one of the characteristics of the implementation of a democratic state. Community participation in the administration of the state is a fundamental right that is constitutionally guaranteed, this right is a manifestation of people's sovereignty in accordance with the mandate of Article 1 paragraph (2) of the 1945 NRI Constitution. Community participation efforts are a preventive way in the policy of handling Covid-19.<sup>22</sup>

## 2. Protection of the Use of Discretion in Handling Covid-19 Based on Law No. 2 of 2020

Discretion is essentially an exception to the necessity to act in accordance with the general rule of legislation. The exception contains a character that is closely related to freedom which is accompanied by a broad scope functionally proportional to the scope of the power/authority possessed by government agencies/officials. The view that government bodies/officials inherent (*inherently*) have residual freedom of action without even statutory authorization. This view recognizes that the position of government is the same as that of individuals who are presupposed to have equal freedom and may

do anything as long as it is not prohibited by law. As long as it is not done, it is considered that the government has freedom of action. This definition is conceived as "*the third source authority for government action*".<sup>23</sup>

The authority to issue Perppu has been constitutionally stipulated in Article 22 paragraph (1) that in the event of a coercive crunch, the President has the right to enact government regulations in lieu of laws. Constitutional Court Decision No. 138/PUU-VII/2009 interprets the condition of "coercive crunch" as:

- a) the urgent need to quickly resolve legal issues on the basis of legislation;
- b) the required legislation does not yet exist so there is a legal vacuum or there is a statute but it is inadequate; and
- c) The legal vacuum cannot be addressed by making laws in the usual procedure because it will take a considerable amount of time, while the urgent circumstances need certainty to be resolved.

According to Jimly Asshiddiqie, three important elements need to form the definition of a state of danger that can cause a compelling crunch, namely:<sup>24</sup>

- a) the presence of an element of *dangerous threat*;
- b) *necessity*); dan
- c) There is an element of *limited time* available.

On the basis of this element, Jimly stated that there are 3 (three) material requirements for the establishment of a government regulation in lieu of a law, namely:

- a) there is an urgent need to act or what is termed by him as "*reasonable necessity*";
- b) limited time or time crunch; and
- c) There are no other alternatives available or beyond *reasonable doubt* other alternatives are not expected to be able to overcome the situation, so the issuance of government regulations in lieu of laws is the only way to overcome the situation.<sup>25</sup>

Bagir Manan stated that the element of compelling crunch must show 2 (two) general characteristics, namely there is a <sup>26</sup>*crisis* and there is *an emergency*. According to him, a state of crisis if there is a disturbance that causes a *crunch and is sudden (a grave and sudden disturbunse)*. Emergency, if there are various circumstances that are not taken into account in advance and demand an immediate action without waiting for the consultative meeting to be resolved first, or there have been signs of a real beginning and according to reasonable reason, if not regulated immediately, it will cause disturbances both to the community and to the course of government.<sup>27</sup>

When viewed from the explanation of the parameters, Perppu No. 1 of 2020 has met the general requirements. The purpose of the establishment of Perppu No. 1 of 2020 which has been passed into Law No. 2 of 2020 is; *first*, to provide a foundation and legal certainty for the government in setting certain policies and measures in the context of handling the health and economic crisis caused by the Covid-19 pandemic. *Second*, as a preventive measure from the implications of Covid-19 that threaten and endanger the national economy and/or financial system stability.

Looking at the content of Perppu No. 1 of 2020 which has been passed into Law No. 2 of 2020, in fact the Government is not only using the attributive authority to issue Perppu based on the constitution, but also is using discretionary authority based on Law Number 30 of 2014 concerning Government

Administration. The issuance of the Perpu is not without debate, Article 27 of Perppu No. 1 of 2020 is widely criticized because it is considered a form of absolute power that protects officials. Indeed, 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 as not to be entangled in legal cases or criminalization after the Covid-19 pandemic which makes government officials afraid or hesitant to issue discretionary policies.

Perpu No. 1 of 2020 was formed by looking at the crisis events of 1998 to the bailout event of Bank Century. According to the government, the birth of the article cannot be separated from the experience during the 1998 and 2008 crises, where policymakers were vulnerable to being sued in court if state losses were found. One example is IBRA's policy in issuing certificates in the case of BLBI due to the 1998 monetary crisis and also the KSSK policy of providing Short-Term Funding Facilities (FPJP) aka bailouts to Bank Century to prevent a banking crisis in 2008. Repeatedly the policies/discretions taken by the Government to address the economic crisis at that time were disputed in the future, both by law enforcement officials and political opponents of the Government.

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Furthermore, it will be outlined the importance of Article 27 of Perppu No. 1 of 2020 as an effort to achieve the purpose of issuing a Perppu. The formulation of Article 27 paragraph (1) of Perppu 1/2020 reads:

"The costs incurred by the Government and/or KSSK member institutions in the context of implementing state revenue policies including policies in the field of taxation, state spending policies including policies in the field of regional finance, financing policies, financial system stability policies and national economic recovery programs, are part of the economic costs to save the economy from the crisis and are not state losses"

Through the formulation of this provision, the Government wants to understand that its actions are based on good faith intended to overcome the impact of the pandemic, which will inevitably result in a number of state expenditures that are unlikely to return and also the possibility of losing potential state revenues. The government actually sees this as an economic cost for recovery due to the pandemic and is not considered a loss to the country under normal conditions.<sup>29</sup>

It can explicitly be read that the emergency policy pursued by the Government through this Perppu is entirely carried out in good faith to overcome a condition/event that endangers the national economy and/or financial system stability in this case due to Covid-19. However, if in the implementation of the Perppu there are parties who have bad faith and deviate from the applicable laws and regulations, then these conditions are not included as protected under the provisions of article 27 paragraph (2). As previously explained, through this perppu, the Government is actually exercising its attributive authority based on the constitution and its discretionary authority as stipulated in Law No. 30 of 2014 concerning Government Administration.

In addition to having to fulfill its objectives, discretion or policy must also meet the requirements for discretionary retrieval, namely: 1) In accordance with the purpose of discretion, 2) Not contrary to the purpose of taking discretion 3) In accordance with the General Principles of Good Governance (AUPB) 4) Based on objective reasons 5) There is no conflict of interest 6) Conducted in good faith. According to these provisions, the discretion used by the Government in order to implement Perppu No. 1 of 2020 cannot actually be punished and what is regulated in Article 27 paragraph (2) of Perppu No. 1 of 2020 is appropriate as long as the requirements are met.<sup>30</sup>

Legal protection of discretionary policies has long been adopted in the criminal law system in Indonesia. The Criminal Code (KUHP) recognizes it by the term "reason for criminal removal" which

legal experts divide into 3 (three) parts, namely; justifying reasons, forgiving reasons and prosecution remover reasons. In the context of the implementation of Perppu No. 1 of 2020, the reason for the justification is quite relevant to be used, namely the reason that abolishes the unlawful nature of the act, so that what is done becomes an appropriate and correct act.

### **C. CONCLUSION**

In dealing with the Covid-19 pandemic, the central government issued various legal instruments in the form of Ministerial Regulations, Presidential Decrees, to lawmaking. It can be said that the government is doing the right thing because legal instruments are a firm and effective praxis solution in solving various problems including the Covid-19 problem. This needs to be further appreciated when the government makes mitigation, minimization, and prevention efforts at the right time.

The government not only uses statutory instruments in accelerating the handling of the Covid-19 Pandemic, but the government can use discretion as an inherent authority. Discretion according to Law No. 30 of 2014 is, decisions and/or actions determined and/or carried out by government officials to overcome concrete problems faced in the administration of government, launch government administration, and provide legal certainty when the laws and regulations that provide choices do not provide rules, are incomplete, unclear, and/or due to government stagnation.

Perppu No. 1 of 2020 which has been stipulated by the House of Representatives becomes Law No. 2 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid19) Pandemic and/or In Order to Face Threats That Endanger the National Economy and/or Financial System Stability. Basically, the Perpu was issued as an effort by the Government to anticipate the potential for a monetary crisis due to the Covid-19 pandemic outbreak.

The authority to use discretion already has a strong juridical foundation based on Law No. 30 of 2014 concerning Government Administration. However, it becomes a problem when discretion is misused (discretionary corruption), including due to a wrong interpretation of discretion and/or the existence of malicious intent to obtain profits by issuing discretion which leads to corruption

The exercise of discretion, especially in the midst of a crisis, certainly needs to be monitored so that there is no misuse. The way that can be done is internally, how to use discretion must be based on the conditions specified in Law No. 30 of 2014 and the general principles of good governance. External control is indispensable through public oversight efforts. This public participation became important which served as a counterweight and oversight of the course of state administration.

#### **Footnotes:**

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