

# THE USE OF DISCRETION IN HANDLING THE COVID-19 PANDEMIC IN INDONESIA

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## ABSTRACT

*This study analyzes the use of discretion in the response to Covid-19. This research is a normative study, with a statute approach and a conceptual approach. The results show that because there is no law that specifically regulates Covid-19, the Indonesian government uses discretion to realize benefits for all parties, especially in order to protect and save the rights of health and the right to life of citizens. Discretion as an authority is attached to a government function or position, and therefore brings consequences to the responsibility of the office. Government officials bear responsibility and accountability when using this discretion, they commit personal mistakes that cause harm to other parties.*

**Keywords:** Discretion, Covid-19 Pandemic, Statute Approach, Conceptual Approach, Indonesia

## INTRODUCTION

One of the obligations of the government in a modern rule of law is to provide services to citizens. Every citizen whose rights have been guaranteed by the constitution (constitutional rights) such as the right to education, work, health and other rights can be served effectively and efficiently on the basis of the principle of proportionality and the principle of benefit. Legal norms are arranged, among others, to achieve benefit in addition to justice and legal certainty.

In a constitutional state, every government action in providing services to that citizen must be based on law, which is known as the principle of legality so that its actions have juridical legitimacy and have legal validity and legal certainty.

Pneumonia Coronavirus Disease 2019 (Covid-19) demands fast, efficient, effective and accurate action from both central and local governments. At the time of writing, data from the Ministry of Health showed that 735,124 people were positive for Covid, 603,741 people recovered, and 21,994 people died. Conditions are very worrying and it is not known when it will end. This unpredictable condition allows the principle of in a state of law to be substantively interpreted and implemented, in the sense that the government can provide services to citizens quickly and precisely without having to base it on laws. The government takes actions to realize benefits for all parties, which is one of the objectives of the law, even though there is no formal legality or no. When Covid-19 broke out, there were no laws that specifically regulated this pandemic.

The government's action in providing services to citizens without being fully bound by the law is theoretically called discretion or namely actions that are carried out by prioritizing the achievement of goals rather than in accordance with applicable law (*rechtmatigheid*), in the sense that prioritizing benefits for citizens rather than legal certainty (Marcus, 1996; Mustafa, 1990).

In 22 paragraphs (2) of Law no. 30 of 2014 concerning Government Administration (UUAP), the use of discretion is aimed at: Smooth governance, fill in the legal void, and provide

legal certainty, Overcoming government stagnation in certain circumstances for the benefit and public interest.

Based on the UUAP annotation, the words "*and*" in this article indicate that the 4 (four) objectives are not optional or optional, but rather a single unit which must be fulfilled as a goal in every use of discretion. In other words, if one of the 4 (four) is not fulfilled, then the use of discretion does not meet the requirements of a clear objective (Yasin et al., 2017). Discretion, which is the freedom to make decisions or actions in a special situation, can hardly be implemented if the objectives of the use of discretion are cumulatively fulfilled (Thomann et al., 2018). In the use of discretion, the achievement of the goal should be alternative, in accordance with the meaning contained in this concept of discretion, namely freedom or freedom to make choices.

The legislators were apparently very concerned and intended to prevent the use of discretion for improper purposes, such as for the personal purposes of the officials concerned, for the purpose of perpetuating power, or other negative / unproductive purposes (Yasin et al., 2017). This concern is certainly reasonable, because as some experts have mentioned that discretion has a dark side that allows its users to go beyond authority, arousing the suspicion of legal experts, even Dicey (1952) said that where there is discretion there is arbitrariness, but setting boundaries that make that discretion unworkable is not the right thing to do (Krent, 1994; Hoexter et al., 2001). Discretion is a free authority in and inseparable from government functions in a modern constitutional state.

On the one hand, the terms of using cumulative discretion are not in accordance with the meaning of discretion, namely the freedom to make decisions or take action, especially in special or emergency conditions, and on the other hand it will hinder the achievement of public service goals effectively and efficiently. Determination of the cumulative conditions for the use of discretion will cause government officials to be unable to use discretion, even though discretion is necessary for effectiveness and efficiency in the administration of government affairs, considered *the "heart of agency power"*, the main source of creativity and innovation in government and law, it is even called the essence of administration (Galligan, 2012; Schwartz, 1991; Heffron & McFeeley, 1983).

When facing Covid-19, the Indonesian government has taken a number of policies contained in several regulations including Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 concerning State Financial Policy and State Financial System Stability for Handling the Covid-19 Pandemic and / or in the context of facing threats that endanger the national economy and / or financial system stability. Now this Government Regulation in Lieu of Law (Perppu) has become Law no. 2 of 2020, Government Regulation No. 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) in the Context of Accelerating the Handling of Covid-19, Presidential Decree No. 11 of 2020 concerning the Determination of Covid-19 Public Health Emergencies, Presidential Decree No. 12 of 2020 concerning the Determination of Non-Natural Disasters of the Spread of Covid 19 as a National Disaster, and Presidential Decree No. 7 of 2020 as amended by Presidential Decree No. 9 of 2020 concerning the Task Force for the Acceleration of Handling Covid-19. In addition, there is also the Minister of Health Regulation (Permenkes) No. 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in the Context of Accelerating the Management of Corona Virus Disease 2019 (Covid-19). A number of these regulations are followed up by the policies of other government officials, including local governments, in accordance with their respective scope of authority.

The use of discretion is the use of authority, that is, authority that is free (*vrije bevoegdheid*). As the use of authority, the principle applies "*geen bevoegdheid zonder verantwoordelijkheid*" (no authority without responsibility). The use of authority that deviates or is not in accordance with the law (*onrechtmatig*) will be subject to responsibility (*verantwoordelijk*) and even liability (*aansprakelijk*). But strangely, in Article 27 paragraph (3) of Perpu No. 1 of 2020 as has become Law no. 2 of 2020 there are provisions: "*All actions including decisions taken based on this Government Regulation in Lieu of Law (Perppu) are not the object of a lawsuit that can be submitted to the State Administrative Court*".

Covid-19 demands fast, efficient, effective and accurate action from both central and local governments, namely by using discretion, while Article 22 paragraph (2) UUAP determines the purpose of its use is cumulative. This certainly creates a dilemma for government officials. Taking action to provide services to citizens is a constitutional obligation, while using discretion as the most probable instrument in tackling Covid-19 but based on UUAP it must be a cumulative goal. Ignoring an obligation is considered an act against the law (*onrechtmatige overheidsdaad*), while using discretion whose purpose is not fulfilled will cumulatively qualify as violating UUAP. Are all actions and decisions of government officials in dealing with Covid-19 free from responsibility and accountability?

## Legal Matters

There are two legal issues that will be analyzed in this study, namely how is the use of discretion in the response to Covid-19? And can government officials be held accountable and accountable for the use of discretion and who is held accountable and accountable?

## DISCUSSION

### Discretion in the Response to Covid-19

One important aspect that becomes the foundation of a rule of law is the principle of legality (*legaliteitsbeginsel*), which means that every government legal action must be based on the prevailing laws and regulations or on the basis of the authority given by law; *allen bij krachtens de wet kunnen overheidsbevoegdheid in het leven worden geroepen* (Konijnenbelt, 1990). Sir William Wade and Forsyth (1994) said that legality means that every act of government power, that is, every action that affects the rights, obligations or freedoms of every person, must be shown a firm legal basis.

Although the principle of legality is the main foundation in a rule of law, its existence is not without problems. Laws as the basis of legality often have natural defects and artificial defects, Parliament does not have sufficient resources or personnel to concentrate on all issues in detail and simply formulate general policies, and therefore laws it is never complete (*de wet is onvolledig*), and there is often a gap between rapid changes in society and certain laws (Garner & Jones, 1989; Douglas, 2004). As a result, when the government is demanded to provide services to the community or there is an important or emergency event, while the law which is the basis for the government's action does not exist or does not exist (*leemten in het recht*) and is incomplete, or there are laws but contain norms *vage norm*, or contain open norms (open texture) (Prakoso, 2010; Susanti & Efendi, 2019). In addition, often the provisions in the law contain choice norms (Hoexter et al., 2001).

In these matters, the government is given a discretion or *freies Ermessen* to take policy (*beleidsvrijheid*) and freedom to exercise judgment (*beoordelingsvrijheid*), explain vague statutory norms (*uitleg van wettelijke voorschriften*), determine or establish facts (*vaststelling van feiten*), make interpretations (*interpretatievrijheid*), and make choices regarding various interests related to providing public services (Michiels, 2004; Ten Berge, 2001; van Wijk et al., 1995). In this context, the principle applies in modern rule of law states that the government must not refuse to provide services to citizens on the grounds that there is no law regulating it.

Theoretically, when this discretion is put in writing, it becomes a policy regulation (*beleidsregel*), which aims to "*naar buiten gebracht schricftelijk beleid*", which is to reveal a written policy, which, among other things, serves as a guide on how to solve the problem and its norms can be determined itself by the government (Hadjon, 1993; De-Meij et al., 2000).

Discretion is needed in administrative law in order to resolve problems which laws and regulations have not yet regulated or regulated in general, so that state administration has the freedom to resolve on its own initiative (Muhlizi, 2012). Discretion as a free authority (*vrije bevoegdheid*), inherent in government functions (*inherent aan het bestuur*), and therefore it is impossible to eliminate discretion from the government. Discretion becomes the completing power of de wet is *onvolledig*.

Through discretion, the government can take individual decisions or actions when effective restrictions on government power free it to make choices based on the possibility of compulsion to act or not act for the benefit of society (public good) without prescription of laws and regulations, and it is even possible to deviate from prevailing laws and regulations (Djaya, 2016). The government's freedom of action (discretion) is clearly incompatible with such a mindset (legality), because the mindset in discretion is a mindset that adjusts the reality of the process of life with the principles and broader legal politics, because law is for society not society for law (Fendri, 2015).

The Covid-19 pandemic that has hit the entire world is an extraordinary occurrence that cannot be predicted (unpredictable) on who its spread and when it will end, concerns the fate of human life, and affects all aspects of life. Regarding Covid-19, because there is no law that specifically regulates this pandemic, the President of the Republic of Indonesia issued a Government Regulation in lieu of Law No. 1 of 2020. This type of regulation is only issued in conditions of compelling emergency. On the basis of this regulation, various other regulations and policies have been issued as stated above. Facing this pandemic, the government is required to act quickly, efficiently, effectively, and without the need to wait for the basis of formal legality (law), namely by using discretion to realize benefits (*doelmatigheid*) for all parties, especially in order to protect and save the most basic human rights; citizens' right to life, in addition to the right to health.

### **Discretionary Usage Parameters**

Above, it has been raised concerns about the use of discretion, including the existence of *vage norms*, because it can give rise to flexibility for the bearers of authority to interpret these norms according to the tastes and interests of the interpreters (Suhartono, 2008). This concern is understandable, of course, because of the adjective "*vrije*" or "*freies*" in *bevoegdheid* or *Ermessen*. But actually, even though the discretion or *Ermessen* implies the meaning of freedom for the government to take action, this freedom does not mean at will or at will, even on the

grounds of overcoming Covid-19. Free authority in the context of law is not in the sense of independence (*onafhankelijkheid*) which is separated from the legal framework, but freedom and independence (*vrijheid en zelfstandigheid*) to take or not take an action and / or decision based on legal considerations that support it and in accordance with the demands of common sense (*redelijkheid*). Van Wijk et al., (1995) said that in using this free authority, government organs must comply with written and unwritten legal norms. Bagir Manan (2004) said that "the principles of" *doelmatigheid* "should not be used to set aside the principle of" *rechtmatigheid* ", unless it can really be shown that it is indispensable as something compelling (compelling interest) to achieve legitimate government objectives according to the principles of the based state over the law. The use of the principle of "*freies Ermessen*" or "discretionary power", must be limited to things that do not violate the principles of good state administration (*algemene beginselen van behoorlijk bestuur*) which still guarantees legal certainty, equality of treatment, is unbiased (due to conflict of interest), and others. In addition, discretion can only be used in the formal environment of the authority of government officials (*binnen formele kring van zijn bevoegdheid heeft gehandeld*) according to time (*bevoegdheid naar tijd*), place (*bevoegdheid naar plaats*), and their respective fields or materials (*bevoegdheid naar materie*).

Discretion in its various derivations such as freedom to take policies (*beleidsvrijheid*), use judgment (*beoordelingsvrijheid*), explain vague statutory norms (*uitleg van wettelijke voorschriften*), establish facts (*vaststelling van feiten*), interpret (*interpretatievrijheid*), and take the choice of various interests related to providing public services must be implemented on the basis of rationality, efficiency and effectiveness, and morality.

Rationality is related to the basic meaning of discretion or *Ermessen*, namely the freedom to use consideration, and that consideration must be relevant (relevant consideration) and in accordance with the demands of common sense (*redelijkheid or rationable*). Rationality is related to the basic meaning of discretion or *Ermessen*, namely the freedom to use consideration, and that consideration must be relevant (relevant consideration) and in accordance with the demands of common sense (*redelijkheid or rationable*).

Based on Article 24 UUAP it is determined that government officials who use discretion must meet the following requirements:

1. In accordance with the objective of discretion as referred to in Article 22 paragraph (2)
2. Does not conflict with the provisions of laws and regulations
3. In accordance with the General Principles of Good Governance (AUPB)
4. Based on objective reasons
5. Does not create a conflict of interest
6. Done in good faith

In the response to Covid-19, the government is given the freedom and freedom to make decisions or take actions directed at protecting and guaranteeing the health rights of all parties, preventing the spread of the virus, restoring those affected, and seeking various facilities and infrastructure the necessary support, including funds, in good faith.

## **Discretionary Liability and Liability**

It is mentioned again that the use of discretion is the use of authority and therefore the principle of no authority without responsibility applies "*geen bevoegdheid zonder verantwoordelijkheid*". A.D. Belinfante & Reede (1987) said that no one can exercise authority without assuming responsibility or without carrying out supervision. The government is responsible for implementing the protection and guarantee of the health rights of all parties, preventing the spread of the virus, restoring those affected, and providing facilities and infrastructure and funds so that the Covid-19 pandemic is contained.

In implementing this unpredictable disaster management, it is worth noting what Rajendran (2012), a researcher from Mumbai University said, that the potential for deviation from disaster funds is wider open and often occurs in Asian countries, especially in developing countries, because the government and the public only focus on handling, prevention and post-disaster recovery. On the other hand, there is minimal monitoring of the use of funds, especially since it is not certain that procedures are followed to ensure that the funds are efficient and right on target (Firdaus & Erliyana, 2020).

Based on the doctrine of administrative law, the government's responsibility is not only to formulate legal norms or formulate discretions, but also to enforce them. Ten Berge (2001) said that "*De overheid is primair verantwoordelijk voor de handhaving van publiekrecht*" (the government is the party most responsible for enforcing public law). Law enforcement includes supervision and enforcement of sanctions. Supervision is a preventive step to enforce citizens' compliance with legal norms, while the application of sanctions is a repressive step to be applied to norm violators. Based on this principle, when there is a deviation of disaster funds, as indicated by Rajendran (2012) above, it becomes the responsibility of the government, as part of the supervisory obligation.

Discretion as free authority, such as bound authority and facultative authority, is attached to a government function or position (Donner, 1987). The authority is exercised by functionaries or officials. In this case, the official acts for and on behalf of the position as the representative of the position, with consequences in the form of job responsibilities.

In carrying out their functions, public officials are bound by government norms written and unwritten legal rules that apply and apply to government positions, and apparatus behavior norms written and unwritten legal rules that must be considered and obeyed by the office holders. In connection with the existing and in the administration of public affairs, including in the use of discretion, the provisions of Article 27 paragraph (3) of Perpu No. 1 of 2020 as has become Law no. 2 Year 2020 is not really necessary. There are two reasons why this provision is not needed; first, it creates the impression or perception that the official, by reason of discretion, may take any action or decision. Whereas based on every action of a public official has norms that must be obeyed, including norms in the use of discretion; second, the provision contradicts UUAP and Supreme Court Regulation No. 2 of 2019 concerning Guidelines for Government Action Dispute Resolution and the Authority to Adjudicate Unlawful Acts by Government Agencies and / or Officials.

A functionary or official acting for and on behalf of office has personal immunity. This means that if the act he commits causes a loss to the other party, the loss burden is borne by the position, as understood from the provisions of Article 2 paragraph (1) and (2) PP No. 43 of 1991 concerning Compensation and Procedures for Its Implementation in PTUN states that "Compensation which is the responsibility of the Central State Administration, is borne by the State Budget (APBN)", and "*Compensation which is the responsibility of the Administrative*

*Body. Regional State, borne by the Regional Revenue and Expenditure Budget (APBD)". In Article 20 paragraph (5) UUAP it is stated that "The return of state losses as referred to in paragraph (4) shall be borne by the Government Agency, if the administrative error as referred to in paragraph (2) letter c occurs not due to an element of abuse of authority". Abuse of authority (*detournement de pouvoir*) qualifies as a personal error, which is, consciously diverting the goals that have been given out of personal interest, either for one's own interests or for others.*

With regard to the responsibilities of the position, F.R. Bothlingk (1954) links in his dissertation, which are classic but still relevant, are as follows: *"Both representatives and those who are represented are actors, but that does not mean that both have responsibilities. With regard to legal action, the answer is clear. Legal action is a statement of the will and responsibility specifically directed to the party whose will is expressed, namely the party represented. The representative does not declare his will of his own, therefore placing the responsibility on him inappropriately. The official does not bear the risk, because he is not involved in a legal relationship for himself, but for another party (position). Against outsiders it is not he (the official), but only his position, which acts as the responsible party"*.

However, an official can be burdened with personal responsibility, especially when exercising that authority there is personal error. Vegting (1958) stated that the responsibility is borne by the position if an illegal act committed by the official is objective, and the official concerned is not liable if there is no subjective error. On the other hand, the official or employee is held responsible when he commits a subjective error. F.R. Bothlingk (1954) said that: *"A representative is responsible for a third party when he or she acts in a manner that is morally despicable or, in other words, acts in bad faith or is negligent and careless. That is, for other illegal acts, only the representative is fully responsible; he has abused the situation, where he is acting as a representative, by committing his own immoral actions against the interests of a third party"*.

Based on Article 20 paragraph (6) UUAP it is determined that the return of state losses as referred to in paragraph (4) shall be borne by Government Officials, if the administrative error as referred to in paragraph (2) letter c occurs due to an element of abuse of authority, namely making personal mistakes. In various laws, there are provisions on the responsibility and accountability imposed on the person of an official who commits personal mistakes, such as Article 190 paragraph (1) of Law No. 36 of 2009 concerning Health, Article 34 paragraph (1) of Law no. 17 of 2003 concerning State Finance, Article 111 paragraph (1) of Law no. 32 of 2009 concerning Protection and Management of the Environment, Article 158 of Law no. 1 of 2011 concerning Housing and Settlement Areas, Article 132 of Law no. 6 of 2011 concerning Immigration, Article 92 paragraph (1) of Law no. 23 of 2006 concerning Population Administration, and others.

An official who performs public duties, including using discretion, commits personal mistakes and causes harm to other parties and the aggrieved party files a lawsuit, the official concerned bears the responsibility for the lawsuit personally. In principle, the official who made the mistake was burdened with the obligation to return to its original condition as it was before the act of breaking the law (*herstel in de vorige toestand*), as a form of responsibility. However, if the *herstel in de vorige toestand* cannot be implemented, the official concerned is liable to provide compensation, as a consequence of liability. This is based on the generally accepted legal principle "*schuldaansprakelijkheid*", namely liability based on fault. Anyone who makes a mistake, including in the use of discretion, is burdened with responsibility and liability.

## CONCLUSION

The use of discretion in the response to Covid-19 was carried out because there is no law that specifically regulates these inhabitants while the government is required to act quickly, efficiently, effectively, in order to realize benefits for all parties, especially in order to protect and save citizens' right to life.

Discretion is the use of free power by government officials. As an exercise of authority, the principle of "*geen bevoegdheid zonder verantwoordelijkheid*" applies. Discretion as an authority is inherent in a government function or position (*inherent aan het bestuur*), and therefore carries consequences for the responsibility of the position. However, government officials are burdened with responsibility and accountability when using this discretion, they make personal mistakes that cause harm to other parties.

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