

Legal Liability of Public Financial Administration in the Pandemic Era

(Study of Emergency Policy in Indonesia)

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Abstract—The conditions of the Covid-19 pandemic have prompted some major changes in various sectors, especially in this regard to the dimensions of financial governance. Basically, the state of emergency has several times causing massive factors to change the pattern and manner of government administration such as the threat of economic crises and other emergencies. Emergency conditions usually encourage changes that are not incremental but tend to be comprehensive, especially in the dimensions of government's financial administration. This change forces the government to immediately adapt to sudden conditions through the formations of various legal instruments and policies affecting how the government's finance is run compared to normal conditions. The problem is that the formation of emergency policies often brings a variety of criticisms and concerns about the accountability and legal liability of public finance administration as experienced in Indonesia. Act No. 2/2020 and Perpu No. 1/2020 is a legal basis for the government to manage the public finances during this crisis. Several articles in the policy deviate from the principles of rule of law and government accountability, because they seem to avoid legal accountability and give impunity for the management of public finances during a pandemic. Basically, from the perspectives of administrative and criminal law, the exclusion norms in the policy cannot be applied normatively, because it would contradict the principles of law and good governance. Therefore, the model of the norms of exemption and impunity as such, legally is not a barrier to holding the government accountable because of the violation against the use of public finance.

Keywords—legal, liability, public, finance, emergency

I. INTRODUCTION

The Covid-19 pandemic has changed many fields, especially the government sector and public services. This condition also has broad implications for the economic and business sectors, by June 2020, world economic growth was projected only be around -4.9% [1] and Indonesia was only around -3.1% [2]. Some of the areas experiencing major disasters are the health, economy, and public service sectors. A decrease in quality in one of the above areas will result in a

decrease in quality in other fields. Pragmatism in policy making and political choices cannot be avoided.

This also effects the implementation of various government affairs and public interests in Indonesia, where the development plan and use of the State Revenue and Expenditure Budget (APBN) which have been set for 2020 were revised radically and immediately. The Indonesian government is faced with a pragmatic policy choice between lockdown or restriction policies; prioritizing the health sector or pandemic response or economic and financial sector stability; as well as continuing policies for infrastructure development or pandemic response and other health issues. This dilemma has forced the government to make policy choices which raises high pros and cons in society.

Amidst of the dilemma and sensitive condition, Indonesian government still seems to give attention to the issues of economic stability so as not to be eroded too deeply while still considering overcoming pandemics and other health issues as the top priorities. This can be seen in the policy choice of not implementing a lockdown but large-scale and tight restrictions policy, nationally and locally, while keeping economic activity running even with restrictions. In addition, the administration of public finances is supported through the distribution of monetary and fiscal stimulus by sharing an enormous amount of money.

To anticipate all possibilities that may occur, the President issued an emergency policy through Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang/Perpu) Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability. This law was then approved by the House of Representative (DPR) and it is outlined in Law Number 2 of 2020. The enactment of the law has generated pros and cons for both the public and academics, which several articles are considered controversial because they contradict the

principles of the rule of law and the accountability of government authorities.

In the context of administrative law, it is basically possible for the government to exercise discretionary powers if an emergency occurs and requires quick handling. Because if there were no immediate actions had been taken, even greater losses could happen. In these conditions, the government has the prerogative to consider a number of things, which are regarded crucial and possible to be done immediately. Pandemic response and handling economic and financial stability are two very important and interdependent options.

Negatively, discretionary policies tend to open many infringements by the government or administrative bodies that have discretionary powers. In the context of the public finance administration, deviations are very likely to occur. In addition, in broad terms, various violations of the rights and interests of the community are also very likely to occur in the expense of active and broad intervention by the government to overcome various problems of pandemic and economic stability. In this condition, many government's actions which are legally taken in the normal conditions, it is very possible to be diverted for the sake of the public interest. Therefore, in principle, public financial management policies and actions taken by the government should be legally monitored and accountable.

A number of articles in Perpu no. 1/2020 is considered to violate the principles of the rule of law, because of a number of things, namely: (a) several norms regulate more policies for handling and controlling the monetary and fiscal sectors in addition to efforts to handle covid-19; (b) Relaxing the process of procuring government goods and services; (c) The government provides greater funding assistance for controlling the financial sector compared to handling covid-19; and (d) Any action and decision taken by the competent governmental body in an emergency situation cannot be challenged in an administrative court or prosecuted through criminal and civil law.

Focus of this article is on two research questions. The purpose of this study is to analyze whether the formation of Perpu No. 1/2020 and the norms therein violate the principles of rule of law. In addition, whether the norms of exclusion and avoidance of legal process in Perpu No. 1/2020 can be applied and are considered binding when it is viewed from the principles of the rule of law.

II. LITERATURE REVIEW

Indonesia is a country based on rule of the law which is stated in the Constitution of UUD 1945. The meaning of a rule of law, in principle, emphasizes the aspects of legal certainty, predictability, and settlement of community relations with the state [3]. Paul Craig builds the concept of the rule of law into formal conceptions and substantial conceptions [4]. The formal conception calls for the availability of formal and procedural legal rules where the law is general, non-contradictory, stable, clear, predictable and the availability of an independent judicial body. While the substantive conception views that formal and

procedural requirements are not sufficient but guarantees for justice and protection of the fundamental rights of citizens must be provided.

This concept is also supported by Randall Peerenboom [5] who used two approaches, namely: thin conceptions as a formal aspect and thick conceptions as an aspect of morality. Thin conceptions emphasize the formal and instrumental aspects of a rule of law which every rule of law (both democratic and non-democratic) must fulfill. The basic elements are stability and preventing anarchy, government in accordance with the law, predictability and legal certainty, the existence of a fair dispute resolution mechanism, and legitimacy for the government. Meanwhile, thick conceptions begin by applying thin conceptions and is supported with the political morality such as support for economic policies, protection of human rights, and appropriate forms of government.

The adoption of the rule of law concept does not automatically show the real practices of the rule of law, but it requires the realization of real legal certainty both juridically and empirically. A good rule of law shows a higher level of real legal certainty, which is reflected in three main factors, namely: legal regulations, agencies/institutions that form, enforce, and apply the legal rules; and the social environment such as economy, politics, socio-culture. Legal certainty is empirically interpreted by the presence of the basic elements of the rule of law above and is supported by the obedience to implement concrete judicial decisions [6].

In the context of the rule of law, every action and decision taken by a government body must be accountable. These government actions are very likely to cause harm to citizens, thereby reducing the quality of their rights and interests. Especially in the field of public law, such as administrative law, the government has a large and broad public authority to affect the lives and interests of all citizens. This special condition must be balanced with a supervisory mechanism and government accountability, so that respect for the rule of law can be realized.

The principle of government accountability is driven by the principle of government based on statute or law. The law means written and unwritten law, such as public administration ethics or government administration and moral and ethical values that apply and live in the society. If the government violates this, even without the presence of written legal norms that regulate the obligations and accountability of the government, then politically and ethically the government can be forced to be responsible legally, through the available monitoring means.

Another principle that applies in administrative law is that no authority can be exercised without an accountability mechanism. Without accountability, basically, authority can be arbitrary. The oversight and accountability mechanism are a pendulum that balances government authority with the rights and interests of the community.

In the concept of a government that is responsible for the law, the formation of norms cannot deviate from generally accepted principles of rule of law. Although legal norms are dynamic and their formation is open in nature, their formation and construction must go through certain and standard procedures or methods [7]. Formulation of statutory regulations must have clear legal reasoning and must not violate the principles of a rule of law, because it involves the lives of many people.

In the process of forming good legislation, the preparation of legal content to its stipulation and dissemination to the public must be carried out in accordance with the principles of forming good laws and regulations. The existence of these principles, although not all of them are contained in Law No. 12/2011 serves as a guide in the preparation of any legislation. These principles already contain the principles of democracy and the rule of law, so that if those are not applied, the legislation can be deemed to have legal flaws or other juridical deficiencies.

The formation of legal norms basically cannot be separated from legal theory and legal principles. Theories and legal principles become the soul and framework of the norm formation. The direction and purpose of norm formation can be read or understood by understanding the legal principles. Therefore, the principle of law can be called a thought or light that illuminates how legal norms should be read and understood. In other words, in principle, norms cannot deviate from universally applicable legal principles [8].

III. RESEARCH PROBLEMS

- What are the legal arrangements of the public financial administration in an emergency condition regulated in Perpu No. 1/2020?
- How government should be responsible in terms of using public finance in an emergency condition regulated in Perpu No. 1/2020?

IV. RESEARCH METHODS

The research method is a normative juridical method which is a mainstream one in the study of law. This research used a statute approach and a comparative approach. The primary legal material in this research is Law Number 2 of 2020 concerning the stipulation of the Perpu No. 1/2020 to be an act. This research is also supported by some secondary data related to this research topic.

V. FINDINGS AND DISCUSSION

Several provisions in Perpu No. 1/2020 were considered to violate the principle of a rule of law by providing articles to exclude legal examination of actions and policies taken by administrative bodies in managing public finances during emergencies due to Covid-19. These provisions appear to provide impunity for government officials. This is considered unusual in the formation of good legislation. In addition, these

provisions raise the suspicion that the government seems to avoid juridical responsibility if there is a violation of the management of public finances because it can be considered a criminal act of corruption. If the provisions in the Perpu are analyzed by comparing several norms and related laws and regulations, it will be found that some of the provisions are indeed unusual and clash with other related regulations.

Perpu No. 1/2020 is basically a legal basis for the Government and related institutions so that they can immediately take extraordinary policies and steps to save the national economy and financial system stability, caused by the Covid-19 pandemic in which all trade sectors and systems finances are shaken. These extraordinary instruments were carried out through various relaxation policies related to the implementation of the State Revenue and Expenditure Budget (APBN) in particular, by increasing spending on health, spending on social safety nets, and restoring the economy, and strengthening the powers of various institutions in the financial sector.

In principle, the Perpu forms the basis for issuing two important policy scopes during the emergency period, namely: the public financial policy and the financial system stability policy. Public financial policy includes policies related to the management of public revenues including taxation, public expenditure policies including regional finance, and financing policies. Meanwhile, the financial system stability policy includes policies to address financial institution problems that endanger the national economy and/or financial system stability.

In taking various policies and actions based on the regulated authorities, an emergency condition can be a reason to take various discretions. One of the provisions that provides room for discretion is by making some adjustments to the amount of mandatory spending as stipulated in the provisions of the relevant laws and regulations. In addition, authorized officials are given the discretion to take actions that result in expenditures on the State Budget (APBN), where the budget in financing these expenditures is not yet available or insufficient and determines the process and method of procuring goods and services.

These provisions provide freedom for authorized officials to consider a number of policies and actions which is deemed important and appropriate to take. The considerations constitute the prerogative and attributive authority of administrative officials carried out for the sake of the public interest in an emergency.

However, although the Perpu provides a very wide discretionary space for authorized officials such as in policy making and actions in the public financial management sector, this should not be done carelessly. Article 12 in the Perpu stipulates that the implementation of public financial policies and steps is carried out while still paying attention to good governance. In other words, the principles of good public financial management cannot be violated. In general, the

principles of good governance cannot be ignored on the grounds of an emergency public interest.

Besides of several provisions regarding the authority of discretion stipulated in the Perpu, there are several other articles which contain exclusion and impunity for legal accountability for authorized officials. Some of these articles are not commonly used in the formation of laws and regulations in Indonesia. However, the emergency situation may be a strong reason why the exclusion and impunity are regulated in the Perpu.

Article 27 paragraph (1) stipulates that costs that have been incurred by the Government and/or Financial Sector Stability Committee (KSSK) in the framework of implementation public revenue policies including policies on in the field of taxation, public expenditure policies including policies in regional finance, policies financing, financial system stability policies, and the national economic recovery program, is part of the economic cost of rescue the economy from the crisis and it is not public financial loss. Paragraph (2) also states that KSSK members and other authorized officials (such as: Ministry of Finance officers, Bank of Indonesia (BI), Financial Services Authority (OJK), as well as the Deposit Insurance Authority (LPS), and other officials relating to the implementation of the Perpu), in carrying out the tasks based on good faith and in accordance with the provisions of laws and regulations, cannot be prosecuted either by civil or criminal law. In the last paragraph, it was also stated that all actions including decisions made based on this emergency law are not the object of a lawsuit which can be submitted to the administrative court.

There are several opinions that can be expressed regarding the existence and effectiveness of these norms: (1) the norm is unnecessary and may even be redundant, because its existence and practice become ineffective if it is collided with the principle of the rule of law or due process of law; (2) such norms can be overridden by the judiciary, if indeed there has been a violation of the authority by the relevant officials. This is especially if the violation is related to law enforcement regarding corruption; (3) the judiciary is an impartial and independent institution which should not be able to be intervened by any power, so that the norms of exclusion and impunity can be overridden on the basis of justice and truth; (4) the enforceability of the norms of exclusion and impunity is relative and cannot be applied to all cases of violation of government authority, so that even in an emergency, the government must be checked and held accountable; (5) norms that violate the principles of rule of law and due process of law can be considered unconstitutional and legally flawed because it can violates human and citizen rights as well as the maintenance of arbitrary practices by the government; and (6) Basically, those norms can be reviewed by the court, so that it can be asked to be revoked or declared invalid if the judge's interpretation states that it violates the constitution or the principles of the rule of law.

In principle, the role and authority of judicial review cannot be overridden by the exclusion and impunity norms.

Obstructing the judiciary from reviewing the policies and actions of government agencies, especially in exercising discretionary powers, means blocking or diminishing citizens' rights and access to justice and to participate in overseeing government. In addition, norm examination by the court does not always have to follow the regulatory limits set out in the norms of the legislation because judges have the freedom to provide interpretations according to justice and legal truth. In other words, siding with the rule of law principles, due process of law, and justice are more important and are above regulatory norms.

In addition, to review the legality and position of the exclusion and impunity norms, we can compare or analyze them against other related norms which regulate similar issues. Perpu No. 1/2020 at least has linkages with several laws, namely: Law No. 17/2003 concerning public finance, Law No. 30/2014 concerning the governmental administration, Law No. 30/1999 concerning corruption, Law No. 48/2009 concerning Judicial Power, and Law No. 15/2004 concerning audit and accountability of public finances.

Law No. 17/2003 states that the President is the holder of the power to manage public finances as part of the governmental power of the President, where the implementation of this authority is further empowered to the Minister of Finance, ministers/leaders of institutions, and governors/regents/mayors in accordance with their authorities. If the officials are proven to have deviated from the policy stipulated in the law on APBN or Regional Regulation on APBD, they will be sentenced with imprisonment and a fine in accordance with the provisions of the law. Therefore, every public administrator is obliged to manage public finances in an orderly manner, comply with statutory regulations, be efficient, economical, effective, transparent, and accountable with due regard to the sense of justice and appropriateness. This management includes all activities, namely: planning, control, use, supervision, and accountability of the public finances.

It was mentioned above that the management of public finances is part of the exercise of governmental power which is empowered to each head of government agencies. Therefore, the management of this authority cannot be separated from the principles of government administration as stipulated in Law No. 30/2014. Governmental authority is the power of government agencies and officials or other public administrators to act in the realm of public law instead of private law. The implementation must not be carried out carelessly, in other words every decision and action of the officials who carry out governmental authority must be in accordance with statutory regulations and general principles of good governance (AAUPB).

In the context of managing public finances in covid-19 pandemic as regulated in Perpu No. 1/2020, there are several relevant government administration principles, such as: a. legality principle; b. principles of protection of human rights; and AUPB. The legality principle requires that the administration of government must be based on the law in

every decision and action of government agencies and public officials. The principle of protection of human rights demands that the public administrators must not violate the basic rights of citizens as guaranteed in the constitution. Meanwhile, the General Principles of Good Governance (AUPB) are the principles which must be considered by every public official in issuing decisions and actions in government administration. One of them is the principle for not abusing authority which obliges any public official not to use his/her authority for personal interests or other interests and is not in accordance with the purpose of the authority, does not exceed, does not abuse, and does not confuse their authority.

The improper use of power can lead to conflicts of interest, and such conflicts are very likely to occur in making decisions and actions in an emergency. Conflicts of interest of the public officials can affect the neutrality and quality of their decisions and actions. This also applies to discretionary decisions and actions taken by public officials to overcome concrete problems in the administration of government when the related laws and regulations do not cover, incomplete or unclear, or government stagnation occurs. As stipulated in the Law regarding government administration, the absence or ambiguity of laws and regulations, does not prevent public officials who are authorized to establish or carry out administrative decisions or actions as long as it can provide public benefits and is in accordance with the AUPB. However, if there is a deviation in the exercise of the discretionary authority, the courts can become a juridical mechanism to examine the validity of the exercise of the discretion.

The administration of public finances cannot be separated from the supervision and control system regulated in Law No. 15/2004 concerning audit and accountability of public finances. As regulated in Article 6, the administration of public finances is the overall activities including planning, implementation, supervision, and accountability. To ensure the proper use of public finances by public officials, the Financial Audit Board is authorized to carry out audits covering the managerial dimension and responsibility of public finances.

With a variety of juridical restrictions above, it is understandable that the provisions for the exception and avoidance of the legal liability as stipulated in Perpu No. 1/2020 is inappropriate and contrary to other legal norms. When various norms conflict with each other, legal certainty and justice will be neglected. Therefore, like it or not, under the rule of law principle, supervision and accountability of the government are very important things that cannot be rejected and avoided. The government must be able to be responsible with all the consequences of its authority. In other words, legal review and liability through the judiciary is absolutely important and cannot be excluded.

Law No. 48/2008 concerning judicial power stipulates that the judiciary applies and enforces law and justice based on Pancasila and the constitution through the principles of independence and impartiality. In exercising the authority, the court shall judge according to the law in a non-discriminatory

manner. During the examination and decision-making phase, judges are obliged to explore, follow, and understand the legal values and the sense of justice that live in the society. Even though in the reviewing process, the judge sees that the law does not exist or is unclear, the court is prohibited from refusing to examine, hear and decide on a case brought before him but he is obliged to examine and decide it.

To view more objectively about the regulation of public financial management policies and the accountability of public officials, we can conduct a comparative study with similar policies in international organizations and other countries. The World Health Organization (WHO) in the International Health Regulations on 2005 document regulates disaster management as a core function of public health law. National laws and emergency plans must take account of international obligations for the management of public health emergencies, including the International Health Regulations (IHR). In managing disaster management, WHO recommends the need for leniency in the management of public finances of countries affected by the pandemic. In the IHR document, it is stated that countries should prepare and regularly review a national emergency plan that sets out a clear command structure for decision-making and for activating and coordinating resources. Emergency plans should specify the officials and agencies that will have operational control during the emergency, and identify relevant advisory bodies, such as national emergency councils and standing committees advising in specialist areas.

Financial mechanisms should also include contingency funding for response and recovery. National budgetary systems need to be sufficiently flexible to provide financing expeditiously in the aftermath of an emergency. The legal authority and roles of key officials during an emergency should be defined in legislation. These powers may include the authority to take such actions as are reasonably required to deal with a serious risk to public health. In emergency policies, similar with Perpu No. 1/2020, it is possible to regulate immunity rights or protection from legal disputes. Units of government enjoy immunity, or protection from legal liability, for many of their activities. This immunity is not, however, unlimited. Emergency planning and response acquires its immunity from tort liability as a traditional or inherent governmental function. In addition, disaster response statutes and common law provide customary defenses and immunities for protection of emergency responders who are working in the capacity of a governmental employee.

If we look at this comparison, it is acceptable that immunity and exemption from lawsuits is very possible regulated in a legislation, but it should not be regulated in lower/inferior regulations or operational or executive policies because it would violate the rule of law principle. In addition, such regulations or restrictions are not broadly interpreted or are not unlimited, but it must be limited at least to the tasks and functions that are closely attached to the powers of the relevant public officials. In other words, protection and legal immunity for policies and emergency measures of public officials is only possible if those actions occur because of a negligence, not due

to deliberate breaches of applicable laws. In addition, emergency regulations cannot be used as an excuse for public officials to avoid legal responsibility. The discretionary powers should not be used arbitrarily.

VI. CONCLUSIONS

Although norms of exclusion and immunity for public officials in an emergency are possible in the legislation, however judicial process and legal liability cannot be neglected if the government officials and bodies took decisions or actions for breaking the laws and the principles of rule of the law. Judicial power is the *ultimum-remidium* to keep the administration of the government subject to the law and protect the rights of citizens. Besides, one of important legal principles in administrative law states that there is no power without responsibility. In an emergency, immunity for public officials is not unlimited and should be done in the scope of the emergency tasks and they do not make a profit from such acts. The idea of rule of the law should be kept applicable and not be restricted by any norms including emergency norms in Perpu No. 1/2020.

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