

Analysis of the Government's Discretionary Policy during the Covid-19 Pandemic in Relation to the Provisions of Article 27 of Government Regulation in Lieu of Law Number 1/2020

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ASBTRACT

Discretion as one of the Government's legal instruments with various functions and uses, of course, is not carried out arbitrarily, but there are a series of procedures that must be fulfilled. The problem faced in this thesis is how the Government should make discretion in the state of the Covid-19 pandemic which is linked to Article 27 of Government Regulation in Lieu of Law No.1 Year 2020 (Perppu No.1/2020) . And /or in the context of facing threats that endanger the national economy and/or financial system stability? The research method used is a normative juridical legal research method. The results showed that the emergency policy pursued by the Government Regulation in Lieu of Law No.1 Year 2020 was fully 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 Government Regulation in Lieu of Law No.1 Year 2020. There are parties with bad intentions and deviating from the prevailing laws and regulations, then this condition is not protected under the provisions of Article 27 paragraph (2), so it is necessary to make implementing regulations on Government Regulation in Lieu of Law No. 1 Year 2020 in the form of a Presidential Regulation which regulates accountability mechanisms in order to prevent corruption.

Keywords: Effectiveness, Government Discretion, Covid-19 Pandemic.

1. INTRODUCTION

Discretion according to Article 1 Number 9 of Law Number 30 of 2014 concerning Government Administration (hereinafter abbreviated as Law 30/2014) is a decision and/or action that is determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation. Using discretion in accordance with its objectives is one of the rights possessed by government officials in making decisions and/or actions.

Discretion as a form of freedom of taking decision in every situation faced by his own opinion.[1] Where discretion is not present as a tool to injure laws and regulations, but discretion is born as a complementary tool to laws and regulations that cannot always reach and regulate every aspect of people's lives. Use your freedom as a hallmark of the use of discretion, the Government in carrying out an activity of governance can act flexibly follow the current

conditions in the field without the slightest harm the principle of legality. Legal certainty and public justice are fully at stake when the government uses discretionary power to solve various kinds of complex problems related to the provision of a public service to the community.

The meaning of the nomenclature of freedom needs to be known in depth by government officials who are authorized to take a discretionary action. Freedom in the context of discretion is not freedom that is carried out immediately but rather freedom that is structured and based on statutory regulations. The freedom of discretion is the freedom of administration which includes the freedom of administration, the freedom to consider and the freedom to make policies. [2] The government as an important organ in solving all kinds of problems through the power of discretion, is obliged to know the limits of its freedom and to what extent it must act. Discretion describes factual matters attached to the position. Only government officials (authorized) can exercise discretion. The authority attached to the position is determined by the extent to which the scope of discretion is used.

Discretion as "one of the legal instruments of the Government with various functions and user her, certainly not done in a way that is arbitrary, but there are a series of procedures that must be met though not coordinated by a SOP (*Standard Operating Procedure*) related measures to use discretion. The procedure has been regulated directly by Law Number 30 of 2014 precisely in Chapter VI specifically discussing discretion. The procedure for the use of discretion is further regulated in this law in the fourth section. [3]

What needs to be understood is that discretion can be exercised in conditions where the laws and regulations provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation. In addition, discretion can be exercised if it does not conflict with the provisions of the legislation, in accordance with the general principles of good governance (AUPB), based on objective reasons, does not cause a conflict of interest, and is carried out in good faith.

Discretion can be exercised without having to obtain approval from the official's superior, if the discretion will cause public unrest, emergency, urgency, and/or natural disasters occur. In such conditions, government officials exercising discretion must notify the official's superior before the use of discretion, then report to the superior of the official after the use of the discretion. The terms of discretion mentioned above must of course be based on objective reasons. Objective reasons in this context mean that the reasons are based on facts and factual conditions, are impartial, rational, and based on principles, do not cause conflicts of interest and are carried out in good faith. Good faith in this context is a decision made or an action taken based on the motive of honesty and general principles of good governance.

The basis for discretion is based on the theory of government administration, where the government is given free authority or *freies Ermessen*, but in a legal state the use of *Ermessen freies* is *horny* within the limits allowed by applicable law. According to Muchsan, the restrictions on the use of *Ermessen Freies* are: (1) The use of *Ermessen Freies* must not conflict with the applicable legal system (positive legal rules); and (2) The use of *Freies Ermessen* is only intended for the public interest. [4]

Birth discretion is caused by several factors according to the previous discussion, including the condition of the legislation being unregulated, incomplete, or unclear and the stagnation of government conditions, thus requiring authorized government officials to take quick action in terms of overcoming regulatory deficiencies or conditions. stagnant government. With the authority to create policy rules based on the principle *Freies ermessen* are, in fact is the implication of state welfare (*welfare state*), because as state which aims to promote the general welfare, P government must play an active role to interfere in the field of life social economic society should be a people. [5] Although the granting discretion to the P he Government was a necessity, but the use of discretion is not without limits.

Signs in the use of discretion and policy making P he Government under the laws of the State administration are

general principles of good governance (Good Governance Principles). [6] Discretionary actions cannot be carried out with the personal will of government officials, but it is necessary to pay attention to a limitation in the form of the legality principle as contained in the AAUPB (General Principles of Good Governance) along with the procedures that must be carried out when using discretion.

Therefore, the discretionary use procedure must be observed by authorized government officials when using it. Also looking at some of the material requirements for compliance with laws and regulations and AAUPB, the need for approval from superiors, and the obligation to fulfill discretionary procedures (formal requirements) based on Law 30/2014 is a necessity for discretion in the practice of government administration. [7]

In this study, the author raises the case regarding the policies of President Joko Widodo, where on March 31, 2020, President Jokowi held a press conference, with the aim of announcing to the public the policies he chose to address Covid-19 as a global pandemic that is being faced by Indonesian society today.

In this regard, the President Joko Widodo issued a policy through regulation relating to the case of Covid-19, namely Perppu No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease Pandemic and/or in Facing Threats That Endanger the National Economy and/or Financial System Stability. However, whether the issuance of various legal instruments has been in accordance with the current needs of the nation to respond to the Covid-19 case .

In which according to the author, there are 3 (three) chapters in the Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 on State Finance Policy and Financial System Stability for handling Pandemic Covid-19, in order to face the threats that endanger the national economy or Stability The Financial System, which is related to Articles 2, 3, and Article 27. The reason is that this Perppu is considered to give the Government excessive authority (immunity) in managing state finances so that it cannot be corrected and is above the law.

The granting of authority to local governments (Pemda) to make changes through budget *refocusing* on local government spending and sub-spending must be monitored, both by the legislature and the community so that it is not misused. The implementation of budget *refocusing* must prioritize the principles of transparent, accountable, effective and efficient state financial management.

In the closing stipulation, it affirms that all organizers of this Perppu policy are immune from the law, which is related to Article 27.

The mandate of state management, including the management of state finances, cannot be based solely on good intentions. The implementation of the mandate must remain within the framework of a system that can be verified, assessed and even sanctioned if it is not in accordance with the basic principles of state financial management. Easing is possible, but he remains within the realm of legal and political accountability.

“ Article (3)

All actions including decisions taken based on this Government Regulation in Lieu of Law are not objects of a lawsuit that can be submitted to the state administrative court.”

Based on the foregoing, the author me interpret that all the actions taken by all the parties referred to in this provision although detrimental to the state, can't be charged under the law. This shows that the government or implementing officials are above the law. However, this should not rule out the possibility that if later evidence of a criminal act of corruption is found, the legal procedure must still be carried out. In regard to the other, a gar absence of deadlock and dysfunction in governance, the government has dared to do discretion. [8] Based on the description that has been presented on the background of writing the above, the author would raise the subject matter that is how can the Government should make a discretion in the circumstances of a pandemic Covid-19 associated Article 27 of Government Regulation in Lieu of Law No. 1 of 2020 regarding state financial policy and financial system stability for handling the Corona Virus Disease 2019 (Covid 19) pandemic and or in the context of dealing with threats that endanger the national economy and or financial system stability?

2. METHOD

This type of research used in scientific writing uses normative legal research methods, namely: examining laws that are conceptualized as norms or rules that apply in society, and become a reference for everyone's behavior. Research Scientific uses a study of the principles of law so that this can be the research *fact finding*, *problem identification* and *problem solution*.

The first type of data to be explored is secondary data, data obtained from library materials. Secondary data includes official documents, books, research results in the form of reports, diaries and so on. In this study, the first legal material collection tool examined was library material as a provision for the author in collecting primary data, in the form of interviews and observations. After the legal materials are collected, the legal materials are processed by going through several stages, namely editing, systematization and description.

In this study the authors used qualitative data analysis techniques. Data analysis technique is qualitative data analysis method by way of grouping and selecting the data obtained from field research by the quality and veracity, then arranged systematically, which is subsequently analyzed by the method of thinking deductively connected with the theories of literary research (secondary data) , then made useful conclusions to answer the formulation of the problem in this study

3. DISCUSSION

Perppu 1/2020 has been issued by the Government on March 31, 2020. Its presence has brought polemics in the community, especially the alleged impunity of state officials. There is even an institution that wants to sue this Perppu to the Constitutional Court because it is considered to provide legal protection that is not in accordance with the law. The presumption as if the impunity is related to Article 27 of Perppu 1/2020 Articles 1, 2 and 3. These articles state that the costs incurred by the government to save the economy from the crisis are not state losses, government officials related to the implementation of the Perppu cannot be prosecuted civilly or criminally if they carry out their duties in good faith, and all decisions based on the Perppu are not the object of a lawsuit to the State Administrative Court.

To see it in its entirety, can be seen in the following explanation:

1. The Perppu was issued because of the urgent situation and urgent need. Perppu 1/2020 was issued because the government considered that there was a compelling urgency due to the urgent need to resolve legal issues quickly. The pressing urgency is the emergence of a pandemic caused by the Corona Virus Disease – 2019 (Covid-19). Furthermore, the government considers that Covid-19 has had an impact, among others, on a slowdown in national economic growth, a decrease in state revenues, and an increase in state spending and financing. With these considerations, various Government efforts are needed to save health and the national economy, with a focus on spending on health, *social safety nets*, and economic recovery, including for the business world and affected communities.
2. The government spends money to save the country. The three main focuses in saving the country from the COVID-19 pandemic are the safety of life and public health, social safety nets and economic recovery for those affected. All focus was then realized in additional spending with a total of Rp 405.1 trillion, consisting of: a. IDR 75 trillion for Covid-19 prevention interventions in the form of additional health spending, providing incentives for health workers, and providing medical equipment including Personal Protective Equipment (PPE) for all 132 referral hospitals. b. IDR 110 Trillion to strengthen the social safety net.
3. The government does not protect those who carry out their duties in bad faith and do not comply with the provisions of the legislation. This Perppu is divided into two major groups, namely state financial policies that regulate budgeting and financing, regional finance and taxation and financial system stability policies that regulate expanding the authority of the Financial Sector Stability Committee, strengthening the authority of Bank Indonesia (BI), the Financial Services Authority (OJK) and the Deposit Insurance Corporation (LPS) as well as providing loans to

LPS. It can be seen that the Financial Sector Stability Committee (KSSK) consisting of the Ministry of Finance, BI, OJK and LPS is the party mentioned in this Perppu.

4. There are other laws that regulate legal protection. Efforts to protect the law to the competent authorities in making policy according to the law have been listed as well as have been included in other laws. There are three other laws in addition to the Criminal Code Law as previously mentioned. The first is Law Number 9 of 2016 concerning Prevention and Handling of Financial System Crisis (PPSK). In Article 48 paragraph 1 of the Law it is stated that unless there is an element of abuse of authority, KSSK members and officials or employees of the Ministry of Finance, BI, OJK and LPS cannot be prosecuted, either civilly or criminally for the implementation of functions, duties, and authorities based on the PPSK Law.
5. Perppu must have legal certainty In the Perppu there are various rules and regulations which will then be regulated in regulations at the level of the President or Minister. In other words, in implementing the Perppu, the Government will issue various decisions and take various actions. In practice, Perppu is a Government policy taken to overcome conditions that endanger the national economy and financial system stability. For this reason, the Perppu must have legal certainty.

In order to accelerate the handling of the Covid-19 pandemic, the government does not only use statutory instruments, "in addition, the government can use discretion as an inherent authority. Discretion according to Law no. 30 of 2014 are decisions and/or actions that are determined and/or carried out by government officials to overcome concrete problems faced in the administration of government, expedite the administration of government, and provide legal certainty when the laws and regulations that provide options do not provide rules, do not complete, unclear, and/or due to government stagnation."

Discretion at the implementation level must be in accordance with the laws and regulations. The measure of discretion is according to the general principles of good governance and is based on the provisions of the legislation, including: honesty, accuracy, purity in purpose, balance, legal certainty. Normatively the scope and terms of discretion have been regulated in Article 23 and Article 24 of Law no. 30 of 2014.^[9]

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 handling budget. In addition, as a preventive measure, the community must actively supervise and be involved in the process of preparation and implementation.

Many parties criticized Law no. 2 of 2020 especially Article 27 because it is considered to provide legal immunity, but the Perppu makers have actually considered this because they reflect on the past. The crises that hit Indonesia in 1998

and 2008 made many government officials responsible for dealing with these crises criminalized.

Article 27 of Law no. 2 of 2020 is a reflection of legal certainty in order to provide protection to government officials in the context of handling Covid-19, so that they are not burdened or think about being criminalized as in the past. In fact, no country is ready to face the Covid-19 pandemic, including the legal system of a country. As a breakthrough to solve it, government officials must dare to use their discretion responsibly, and not be afraid of criminal threats, "because this is for the wider benefit, namely the safety of citizens.

To avoid abuse of discretion, it is still necessary to have a clear mechanism of supervision and accountability. We know that the DPR has ratified Perppu 1/2020 into law, in the future the Government should make implementing regulations that contain supervisory procedures and mechanisms for using the authority of each government organ in Perppu 1/2020. Clear oversight and accountability mechanisms are solely to prevent misuse of funds for handling Covid-19.

In fact, Perppu 1/2020 has fulfilled the general requirements. The purpose of the establishment of Perppu 1/2020 which has been ratified as Law no. 2 of 2020, namely:

1. To provide a legal basis and certainty for the government in establishing certain policies and steps in the context of handling the health and economic crisis caused by the Covid-19 pandemic.
2. As a preventive measure from the implications of Covid-19 which threatens and endangers the national economy and/or financial system stability. Looking at the contents of Perppu 1/2020 which has been ratified into Law no. 2 of 2020, in fact the Government is not only using the attributive authority to issue Perpu based on the constitution, but is also exercising discretionary authority based on Law Number 30 of 2014 concerning Government Administration.

As explained above, that the issuance of the Perppu was not without debate, Article 27 of Perppu 1/2020 was widely criticized because it was considered a form of absolute power that protected officials. Indeed, the government has considered that the impact of Pandemic Covid-19 likely will lead to a crisis. The provisions of Article 27 Perppu 1/2020 merely to provide security for government officials to be not entangled case law or the post-pandemic criminalization Covid-19 that make government officials were afraid or hesitate to issue a policy of discretion. Perppu 1/2020 was formed by observing the 1998 crisis and the Century Bank *bailout*. According to the government, the issuance of this article cannot be separated from the experience during the 1998 and 2008 crises, where policy makers were vulnerable to being prosecuted in court if a state loss was found.

More lajut will be parsed importance of Article 27 of the regulation has 1/2020 as an effort to achieve the purpose of issuance of Perppu. The formulation of Article 27 paragraph (1) of Perppu 1/2020 which states that

"Costs have been issued by the Government and / or the member KSSK in the framework of the implementation of policies of state revenues, including policies on taxation, expenditure policy states including policies on regional finance, financing policy, the policy of stability system the financial and program recovery national economy is part of economic costs to save the economy from the crisis and not a state loss"

Through the formulation of this provision, it is clear that the Government's actions are based on good faith intended to overcome the impact of the pandemic, which will certainly result in a number of state expenditures that are unlikely to return and also the possibility of loss of potential state revenues. The government actually sees this as an economic cost for recovering from the pandemic and is not considered a state loss under normal conditions, because it has something to do with state finances that have the potential to be misused for personal gain, so there is a limitation that the provisions of this article only apply to member institutions. The KSSKs are the Ministry of Finance, Bank Indonesia, the Financial Services Authority (OJK) and the Deposit Insurance Corporation (LPS).

Furthermore, the formulation of Article 27 paragraph (2) of Perppu 1/2020 which states that:

KSSK members, KSSK Secretary, KSSK Secretariat members and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority and the Deposit Insurance Corporation and other officials, who are related to the implementation of this Government Regulation in Lieu of Law, cannot be prosecuted either civilly or legally. criminal if in carrying out the task is based on good faith and in accordance with the provisions of the legislation."

It can be read explicitly that the emergency policy adopted by the Government through Perppu 1/2020 was fully 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 intentions and deviate from the applicable laws and regulations, then these conditions are not protected under the provisions of P origin 27 paragraph (2). As explained earlier that through Perppu 1/2020, the Government is actually using its attributive authority based on the constitution and its discretionary authority as regulated in Law no. 30 of 2014 concerning Government Administration.

Based on the provisions in Article 27 of Perppu 1/2020 above, there are several points including:

1. Any costs incurred by the Government during the outbreak do not include state losses.
2. Officials cannot be prosecuted both civilly and criminally if in carrying out their duties they are based on good faith and in accordance with the provisions of the legislation.
3. Actions taken by officials based on the Perpu are not the object of the PTUN dispute.

Regarding these three things, as long as Perppu 1/2020 is enacted, Government Officials will obtain legal immunity (immunity). The three rights of immunity essentially violate a number of provisions, both contained in the 1945 Constitution and the Act. Although Law Number 30 of 2014 concerning Government Administration recognizes the concept of discretion, Article 24 letter b of the law provides conditions for the implementation of discretion, which is not contrary to the provisions of the legislation.

The granting of the right of immunity in conditions of a national disaster or monetary crisis is very contradictory to the explanation of Article 2 of the Law on the Eradication of Criminal Acts of Corruption, which in fact makes the sentence heavier, namely the death penalty, instead of being relaxed and given the right of immunity. The number of articles in Perppu 1/2020 that are contrary to the 1945 Constitution and the law will create problems in law enforcement, because apart from the potential to create legal uncertainty because the implementation of laws that are limited to the completion of the outbreak is very absurd or ridiculous and has the potential to present deviations, it also has the potential to giving birth to corrupt acts that are protected by laws and regulations.

Therefore, Perppu 1/2020 as the legal basis for the Government in carrying out its duties to overcome the Covid-19 pandemic outbreak should be reviewed either through an *executive review* mechanism, namely with a new Perpu to cancel the old Perpu, *legislative review* by using the legislative function of the DPR to make a new law or with a *judicial review* mechanism, namely by submitting a *judicial review* to the Constitutional Court.

Referring to Article 24 of Law no. 30 of 2014 concerning Government Administration, in addition to meeting its objectives, discretion or policies must also meet the requirements for making discretion, namely:

1. In accordance with the purpose of discretion,
2. Does not conflict with the purpose of making discretion
3. In accordance with the General Principles of Good Governance (AUPB)
4. Based on objective reasons
5. No conflict of interest
6. Done in good faith.

According to these provisions, the discretion used by the Government in implementing Perppu 1/2020 actually cannot be punished and what is stipulated in Article 27 paragraph (2) of Perppu 1/2020 is appropriate as long as the requirements are met.

Such protection has actually long been adopted in the criminal law system in Indonesia. The Criminal Code (KUHP) recognizes it as the reason for the abolition of crimes which legal experts divide into 3 (three) parts, namely; justification reasons, excuses and reasons for the abolition of prosecution. In the context of the implementation of Perppu 1/2020, the justification reason is quite relevant to use, namely the reason that abolishes the unlawful nature of the act, so that what is done becomes a proper and correct act. One of the legal umbrella reasons for

justification is regulated in Article 50 of the Criminal Code which states "no criminal penalty is imposed on a person who commits an act to implement a statutory law."

Finally, the formulation of Article 27 paragraph (3) of Perppu 1/2020 which states that:

"All actions including decisions taken based on this Government Regulation in Lieu of Law are not objects of a lawsuit that can be submitted to the state administrative court"

This provision illustrates that the government realizes that the policy taken to overcome a critical condition/event that endangers the national economy and/or financial system stability must be guaranteed by legal certainty. Legal certainty is certainty about the law itself. Perppu 1/2020 at least has met four matters relating to the meaning of the rule of law in Utrecht related to the rule that "a general nature makes people know what conduct should or should not do, and secondly, in the form of legal security for the individual from the tyranny of the government due to their general rules that individuals can know what the state may charge or do to individuals. First, that the law is positive, meaning that it is legislation. Second, that the law is based on fact, not a definition of the later assessment will be conducted by a judge, such as goodwill, decency. Third, that the facts must be formulated in a clear way so as to avoid mistakes in meaning (multi-interpretation), as well as being easy to implement. Fourth, the positive law should not be changed frequently.

Legal certainty and protection for state officials to implement policies due to this compelling urgency aims to avoid criminalizing policies that make officials afraid to act, as a result the Covid-19 pandemic crisis is not handled optimally. In fact, Article 27 paragraphs (1), (2) and (3) of Perppu 1/2020 are intended to provide legal certainty for decisions taken in urgent conditions, so that decisions taken during this pandemic are not questioned in the future.

The formulation of Article 27 paragraph (1), (2) and (3) regulation has 1/2020 which is considered to provide the immunity of state officials mentioned in Perppu is actually not entirely true, the formulation of the article only provides certainty and security that any economic recovery during and after the Covid-19 Pandemic according to the plan, but if it is proven that there is corruption in budget irregularities for groups or individuals, the person must still be legally responsible.

Based on the description above, it can be underlined that in fact the government will not issue this Perppu 1/2020 if there is no threat that endangers national economic growth and the global Covid-19 pandemic which has infected more than 200 countries, both today and in the future. The future must be understood and interpreted as a condition/event that endangers the national economy and/or financial system stability. The makers of the Perppu do not at all intend to create absolute power, because Article 27 of Perppu 1/2020 aims to provide legal certainty for government officials so that they do not hesitate to issue policies for wider benefits, namely overcoming Covid-19 for the safety of citizens. The exercise of discretion, especially in the midst of a crisis, of course needs to be monitored so that

there is no misuse. The way that can be done is internally, how the use of discretion must be based on the conditions specified in Law no. 30 of 2014 and the general principles of good governance. External control is needed through public scrutiny. This public participation becomes important which functions as a balancer and supervisor of the course of state administration.

4. CONCLUSION

Based on the descriptions of the previous chapters, it can be concluded that it is clear that the emergency policy adopted by the Government through this Perppu was fully 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 intentions and deviate from the applicable laws and regulations, then these conditions are not protected under the provisions of P origin 27 paragraph (2). As previously explained, through this perppu, the Government is actually using its attributive authority based on the constitution and its discretionary authority as regulated 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 making discretion, namely: 1) In accordance with the objectives of discretion, 2) Not contradicting the objectives of discretionary making 3) In accordance with the General Principles of Good Governance (AUPB) 4) Based on objective reasons 5) No conflict of interest 6) Done in good faith. According to these provisions, the discretion used by the Government in implementing Perppu No. 1 of 2020 actually cannot be punished and what is regulated in Article 27 paragraph (2) of Perppu 1/2020 "is appropriate as long as the requirements are met.

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