

# ASSESSING GOVERNMENT POLICY IN COMPARATIVE APPROACH: THE USE OF DISCRETION IN HANDLING COVID-19 CASE IN INDONESIA

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## Abstract

The use of discretionary authority by the Government and regional governments in tackling the Covid-19 pandemic as described above is vulnerable to deviations from authority by the government. The research is a normative law research, using normative case studies in the form of legal behavior products, by reviewing laws. The results show that discretion is an important instrument that enables the government to respond quickly and effectively to changing situations. Discretion is used in implementing public health policies, budget allocations, and affirmative policies related to pandemic response and national economic recovery. This ideal concept is formulated by considering comparative studies and the characteristics of Indonesian law. It is important to balance the need for local flexibility and adaptability with the need for coordination, transparency and accountability in the administration of governance systems.

**Keywords:** Discretion; Government; Legal Policy; Comparative Approach

## 1. INTRODUCTION

A country with the concept of a rule of law cannot be separated from the concept of populism, because the laws that regulate and limit the power of the state (government) and as established on the basis of power or people law. Related to a rule of law state, people's sovereignty is a material element of a rule of law, in addition to the issue of people's welfare. The government in maintaining the welfare of the community will establish a close legal relationship between the both, i.e between the government and its people. In other words, the government has an obligation to provide services to the community (*public service*).<sup>1</sup>

In addition, it is a fact that the involvement of law in issues related to social change raises problems that encourage the conscious use of law and as a means to participate in the development of a new order of life. This can be seen in terms of regulation by law, both from the legality and the effectiveness of its application.<sup>2</sup> Along with the changes that occur in society, certain situations arise that require the government to formulate policy regulations as well as make decisions quickly, urgent, so that the government cannot use its special powers, namely powers that must be taken when carrying out legal and ordinary actions. The policy regulation or action taken by the government is known as discretion.

The term discretion or *freies ermessen* or the principle of discretion in administrative law implies a broad understanding of obligations and powers, namely the actions to be taken and

the freedom to choose whether to take those actions or not. The use of discretion by government officials is based on principles, and the principle of using discretion must comply with all that is contained in the articles of the regulation. This of course will be a limitation or a signal for the government to exercise freedom of action, so that the government does not take action arbitrarily.

Currently, Indonesia and other countries in the world are facing the Corona Virus Disease 19 (Covid-19) pandemic which has a serious impact on the life of the nation and state. Certainly, the rapid spread of Covid-19 requires fast and appropriate action by the government to provide direction or reach the wider community. The government in its activities must be based on statutory regulations. However, the existing laws and regulations are incomplete and inadequate to deal with the problem. Therefore, the government issues policies based on discretion, because it is believed to be faster than establishing rules.

The use of discretionary authority by the Government and regional governments in tackling the Covid-19 pandemic as described above is vulnerable to deviations from authority by the government and sometimes even seems to be an action that carries legal risk. Legal issues as described above are very dangerous for the government implementing policies to deal with the spread of Covid-19, and problems like this can result in rejection, reluctance, and fear for the people of Indonesia, even the formation of these policy regulations has the potential to violate people's human rights. Therefore, for the use of discretion by government officials it is necessary to set tolerance limits, and this is necessary so that uncontrolled power does not appear to be arbitrary.

## **2. METHODOLOGY**

The research is a normative law research, using normative case studies in the form of legal behavior products, by reviewing laws.<sup>3</sup> Normative legal research that focuses on the use of discretion in tackling Covid-19 in Indonesia is to consider various relevant normative aspects. The author using statutory, conceptual and philosophical approaches.<sup>4</sup>

## **3. RESULTS AND DISCUSSION**

### **3.1. The Essence of Discretion in Tackling Covid-19: The Contradiction of Discretionary Values and Legal Legality**

As a concept in government, discretionary power often causes a dilemma in its actualization. The paradoxical of discretionary actions by the government is due to the inherent nature of these actions, namely freedom. There is nothing wrong with freedom at the level of abstraction, because it is a speculative idealization of ideas and/or concepts that have a philosophical meaning. The dilemma arises only when the nature of this discretionary action enters the realm of pragmatic or concrete action. Between legal-normative truth and absolute freedom of power, the essence of absolute power is the subjectivity of the officials concerned. Even though freedom of action is for the benefit of society, in this reform era, power in the sense of freedom of action (discretionary) is expected to be used for the benefit of society.

In Indonesia, discretion in the context of dealing with Covid-19 refers to the authority or policies given to authorities, such as the government or health officials, to make decisions based on their own judgment and consideration. In the context of this pandemic, discretion can mean decisions about limiting movement, closing public places, or arranging vaccinations. In general, the dilemma of the free value of power in discretionary action stems from a theoretical view of the legitimacy of governmental action and freedom as an abstraction of unrestricted action. Thus, there is an impression that the government's discretion is acting outside the principle of legality.

Therefore, there is no possibility of empowering government officials to take proactive actions to overcome problems that arise in the course of people's lives, because for government officials it only remains to make adjustments between problems that arise with existing regulations. As stated, the law is a panacea for diseases. Freedom of action (discretion) by the government is in accordance with this mentality (legality), because the mentality of wisdom is a state of mind that adapts process reality to legal principles and wider political life, because law serves society, not society serves law.<sup>5</sup>

Discretionary values themselves have a significant relationship with the legality system in various ways. Discretion refers to judgment or choice in interpreting and applying the law, and it is an integral part of any legal system. According to Hart's theory of law, law has "hard" and "soft" parts. The "hard" parts are laws that are clear and certain, while the "soft" parts are laws that require interpretation and judgment, and this is where discretion comes into play.<sup>6</sup> Hart argues that discretion is an essential and inevitable feature of any legal system, because it is impossible to formulate laws that cover all possible situations.

On the other hand, in the practice of *the welfare state*, government actions need not always be based on the principle of legality.<sup>7</sup> In certain cases, the government can act freely (discretion) on the basis of *the freies ermessen*, namely the legal authority to intervene in public affairs in order to carry out its duties to take care of the public interest. Wisdom exists if there is a breakthrough to achieve the common good for society without being hindered by deferment in legal action in pursuit of public dynamics. This reality creates a controversial reality in the exercise of discretion. The controversial facts culminate in the government's freedom to carry out government functions, and violate the responsibility in carrying out such initiatives to protect citizens' rights.<sup>8</sup> However, in practice it is usually more complex. In the context of a *welfare state*, sometimes the government must be able to act through discretion and not always based on the principle of legality in managing the public interest. Examples include actions taken to address crises or to meet rapidly changing societal needs.<sup>9</sup> Such acts, when done properly can promote the general welfare and achieve legal objectives.

Basically, there are 2 (two) types of government action, namely *feitelijkehandelingen* (ordinary actions) and *rechtshandelingen* (juridical actions). Government legal actions are actions carried out by state administrative bodies or officials in the context of administering public affairs. These elements of government action are carried out by government officials in their position as rulers, and are carried out in the context of carrying out public functions, and are intended as a means to cause legal consequences in the field of administrative law, and are carried out

in order to protect the interests of the state and the people.<sup>10</sup>

Thus, every government action, both juridical and ordinary contains legal intent based on the value of justice. Therefore, in viewing discretion, it must be seen in the context of justice and the purpose of the action. In this context, legal theories such as the aforementioned Rawls and Dworkin's theories of justice are relevant.<sup>11</sup> This means that in making discretionary decisions, government officials must consider the effect of those decisions on all members of society, not just those with power or special interests.

In exercising discretion, government officials must maintain fairness and equality, and may not make discriminatory or arbitrary decisions.<sup>12</sup> Therefore, it can be said that the essence of justice in the sense of discretion is important to remember that discretion must be used to promote justice and the public interest, and that this must be seen in the context of Pancasila ideology as the basic norm in the Indonesian constitution.

### **3.2. Ideal Model of Discretion in the Implementation of Public Health Policy**

The authority of public health agencies is formally determined by the discretion provided in the law. Agency discretion is defined as the freedom to make choices when carrying out the duties of a position.<sup>13</sup> This freedom allows practitioners to apply their expertise to the problem at hand. If an institution is granted discretion, the outcome may be very different from that desired by the elected legislature. From a legislative perspective, there is a trade-off between leveraging agency expertise and controlling policy outcomes. From an institutional perspective, discretion can be a double-edged sword and may offer freedom to use knowledge but also increase institutional accountability.

Related to this, discretion is important, in this case there are 5 (five) crucial points. The first, set a budget for tackling Covid-19 of Rp. 405.1 trillion. In detail, Rp. 75 trillion for health sector, Rp. 110 trillion for social safety nets. Then, Rp. 70.1 trillion for tax incentives and stimulus for People Business Credit and Rp. 150 trillion is allocated to finance the national economic recovery program.<sup>14</sup> The second, the health sector budget will be prioritized for the protection of health workers, especially the purchase of personal protective equipment (PPE), the purchase of medical devices such as test kits, reagents, ventilators, etc., as well as for upgrading referral hospitals, death benefits for medical workers<sup>15</sup> and handling of other health problems.

In the context of Covid-19 pandemic, discretion is an important instrument that allows the government to respond quickly and effectively in dealing with changing situations. Discretion is used in implementing public health policies, budget allocations, as well as economic and non-fiscal policies related to pandemic response and national economic recovery.

The implementation of discretion by Nunes must have an emphasis on the modality of power with different effects.<sup>16</sup> The first modality is creating behavior, not only by coercion or threats but also by trying to define what is appropriate or acceptable, and by closing alternatives or disagreements.<sup>17</sup> In the second modality, power appears as a productive force that creates and organizes capacity, competence and will. Power does not just prohibit, but forms subjects that

are in line with the vision of a “good” or “productive” society. Rather than viewing the individual as merely a target for power, this view sees power as essential to transforming the individual into a well-ordered subject of society.<sup>18</sup>

Both of these modalities need to be embedded in a structural context. Power relations occur in, and are themselves involved in the re-production, un unequal spheres in which certain groups are systematically placed in a position of subordination in relation to others.<sup>19</sup> Thus, a third modality of power can be identified when considering the structural conditions that allow certain behaviors and subjects to be promoted while others are prohibited or restricted, resulting in hierarchical and unequal outcomes.

Understanding discretionary functions in the context of public policy and its implementation, especially in tackling the Covid-19 pandemic is very important. Government involvement in managing and controlling resources for pandemic response includes a strategic role in interpreting and implementing rules and regulations. Discretion plays an important role in this process, providing space for bureaucrats to make adjustments based on existing circumstances.

In this context, analysis of power and discretion proposed by Nunes is very relevant. Nunes posits two modalities of power: the formation of behavior and the production of subject. The first modality focuses on how power shapes individual or group behavior, either through coercion or threats, or by defining what is deemed acceptable or appropriate. The second modality focuses on how power works to shape and regulate the capacity, competence, and will of individuals or groups, forming subjects that are in line with the vision of a “good” or “productive” society. To strengthen this argument, we can refer to Giddens’ structuration theory which emphasizes how social structure and individual behavior influence each other. Giddens argues that individuals are not only influenced by social structures, but also play a role in shaping and changing these structures through their actions.<sup>20</sup>

In the context of handling a pandemic, this means that government policies and actions not only influence the behavior of individuals and groups, but are also influenced by their actions and responses. For example, people’s responses to policies for tackling Covid-19, such as acceptance or rejection of social restrictions and vaccinations can influence how the government adjusts and implements these policies. Conversely, government policies and actions in handling pandemics can shape and change people’s behavior and attitudes towards pandemics. These two processes interact, and changes in one aspect can affect the other.

In the context of public health, discretion can help facilitate rapid policy adjustments that are responsive to changing conditions. For example, during the Covid-19 pandemic, public health policies must adapt rapidly to respond to new knowledge about the virus, changes in the spread of the virus, and various other factors. However, the use of discretion can also cause problems. One of the problems that may arise is the potential for abuse of power or injustice in implementing policies. For example, if discretion is used to provide differential treatment to certain groups without clear and transparent reasons, this can create injustice and undermine public trust in the public health system.

For example, during the early days of the Covid-19 pandemic in Indonesia, the government used their discretion in handling confirmed cases. In some cases, people deemed “low risk” were allowed to self-isolate at home, while others were treated in hospitals or specialized facilities. While this may be an appropriate response given health resource constraints, it also raises concerns about transparency and consistency in policy implementation. However, the law also stipulates that discretion may not be used for purposes that are inconsistent with law and justice, such as abuse of power or discrimination.

In tackling Covid-19 in Indonesia, the use of discretion by the government and health officials provide flexibility in responding to changing conditions. However, this also raises several issues that need to be addressed. Finally, discretion can lead to potential abuse of power. An example of this is the case of the distribution of the Covid-19 vaccine in Indonesia, where some officials and individuals get priority access to vaccines outside of the established stages. To prevent abuse of discretion, there needs to be an effective monitoring mechanism and punishment for those who abuse their authority.

In Indonesia, the use of discretion in tackling the Covid-19 pandemic needs to be managed properly so that it can function effectively and efficiently. This requires good coordination between central and local governments, transparency in decision-making and strict controls to prevent abuse of power. Based on this, it is important to see the description of the discretionary policy that has been previously explained which is presented in the following Table 1.

**Table 1: Comparison of discretionary policies in tackling Covid-19**

No	Country	Legal basis	Form of Discretion	Implications
1	United States of America	The Tenth Amendment to the US' Constitution	State and local governments have the authority to make their own pandemic policies.	This allows for adaptation based on local needs, but can create heterogeneity and uncertainty
2	European Union	EU's regulation 2020/1043	Member states have the authority to adapt and implement their own pandemic response policies	It creates uncertainty and heterogeneity in the handling of a pandemic, and can affect the effectiveness of response efforts and undermine public trust
3	India	The Epidemic Diseases Act, 1897; The Disaster Management Act, 2005	Central and state governments have the power to make their own pandemic policies	Discretion can create uncertainty and heterogeneity in the handling of a pandemic, and can also lead to violations of civil rights
4	Indonesia	Act No. 6 of 2018 concerning Health Quarantine	The central and local governments have the authority to regulate the handling of pandemic	Discretion can create policy inconsistencies, lack of transparency and potential for abuse.

Source: Primary data (2022) (processed).

Referring to the comparative study above, the ideal concept of discretion in tackling Covid-19 in Indonesia might involve revising regulations. There needs to be a more detailed explanation of how local and central governments can exercise their discretion in controlling communicable

diseases. This will ensure that there is better coordination and more consistent policies across countries.

As a comparison in the United States, that the handling of infectious disease is basically regulated by state and local governments, not by the federal government. The US's Constitution does not explicitly provide for combating infectious diseases, but the Tenth Amendment gives states the power to regulate matters not specifically regulated by the federal government. This includes the control of infectious diseases. Nonetheless, the federal government still has important roles to play, such as funding research and development, and providing aid and resources to the states.

Meanwhile, in the European Union, the control of infectious diseases is basically regulated by the governments of member countries. However, the European Union has a coordinating role and supports member countries in tackling infectious diseases, including in terms of tackling Covid-19. This includes coordinating response efforts, developing guidelines and recommendations, and facilitating the exchange of information and best practices between member countries.

In India, the control of infectious diseases is regulated by the central and state governments. The central government has the authority to regulate the response to infectious diseases under the Public Health Protection Act, while state governments also have the authority to regulate the response to infectious diseases in their areas under the laws of their respective states. However, there are several debates and disputes between the central and state governments about who should be responsible for handling infectious diseases, including tackling the Covid-19. Departing from this comparison, it can be seen that in every country there is an important role for local governments in tackling infectious diseases, including Covid-19.<sup>21</sup> However, it is also seen that it is important for the central government to have a role in coordinating and supporting communicable disease control efforts.

Local governments may judge that the rate of spread of Covid-19 in city or district is very high and local hospitals are near full capacity. In such situations, may decide to implement a high level of quarantine or movement restrictions to reduce the spread of the disease. Or vice versa, if the spread of the disease in their area is relatively low and hospital capacity is still sufficient, they may choose not to implement quarantine or only apply lighter restrictions. In other cases, the central government may see that the spread of infectious diseases in several provinces is very high and has the potential to spread to other provinces. In such situations, the central government may decide to implement quarantine or movement restrictions at the provincial or national level.

#### **4. IMPLICATIONS AND RECOMMENDATIONS**

Discretion is an important instrument that enables the government to respond quickly and effectively to changing situations. Discretion is used in implementing public health policies, budget allocations, and affirmative policies related to pandemic response and national economic recovery. This ideal concept is formulated by considering comparative studies and

the characteristics of Indonesian law. It is important to balance the need for local flexibility and adaptability with the need for coordination, transparency and accountability in the administration of governance systems. Both central and regional governments must work together in determining and implementing policies for tackling Covid-19. There should be strong oversight mechanisms in place to ensure that discretion is used in an appropriate and effective way. If there is an abuse of discretion, there must be accountability and appropriate punishment. Discretion should be used to ensure that these policies suit local needs and conditions, but there must be strong coordination to ensure that these policies are consistent and effective.

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### Declaration of Interest

Authors declare there are no competing interests in this research and publication.

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