

Discretion of Covid 19 Prevention in the Perspective of State Administrative Law

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Abstract

Strategic steps in handling the Covid 19 pandemic have been made by the Regional government to accelerate the handling of Covid-19. This study aims to look at the position of discretion as an instrument of administrative law in the formation of public policy, and analyze the extent to which discretion is used by regional heads as an effort to make effective policies in preventing covid 19 in their regions as part of the bureaucratic agility paradigm. This research uses an empirical juridical approach, with the data analysis method being carried out by collecting data through the study of library materials or secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials, both in the form of documents and applicable laws and regulations relating to normative juridical analysis of the synchronization of the Government Administration Law. The policy of handling covid 19 carried out by several regions has succeeded in reducing the mortality rate through discretion, with a more flexible and flexible policy character in carrying out the role of responsive bureaucratic agility. The approach of State Administration law provides more legal certainty and avoids clashes of constitutional issues in realizing public welfare and justice.

Keywords: Discretion, Covid 19 Prevention, State Administrative Law

Abstrak

Langkah strategis dalam penanganan pandemi Covid 19, telah dibuat oleh pemerintah Daerah untuk mempercepat penanganan Covid-19. Penelitian ini bertujuan untuk melihat kedudukan diskresi sebagai instrumen hukum administrasi dalam pembentukan kebijakan publik, serta menganalisis sejauhmana diskresi digunakan oleh kepala daerah sebagai upaya membuat kebijakan yang efektif dalam pencegahan covid 19 di daerahnya sebagai bagian dari paradigma agilitas birokrasi. Penelitian ini menggunakan pendekatan Yuridis empiris, dengan metode analisis data dilakukan dengan menghimpun data melalui penelaahan bahan kepustakaan atau data sekunder yang meliputi bahan hukum primer, bahan hukum sekunder dan bahan hukum tertier, baik berupa dokumen dokumen maupun peraturan perundang undangan yang berlaku yang berkaitan dengan analisis yuridis normatif terhadap sinkronisasi Undang-Undang Administrasi Pemerintahan. Kebijakan penanganan covid 19 yang dilakukan beberapa daerah berhasil menekan angka kematian melalui diskresi, dengan karakter kebijakan yang lebih lentur dan fleksibel dalam menjalankan peran agilitas birokrasi yang responsif. Pendekatan hukum Administrasi Negara lebih memberikan kepastian hukum dan menghindari benturan masalah ketatanegaraan dalam mewujudkan kesejahteraan dan keadilan masyarakat.

Kata kunci: Diskresi, Pencegahan Covid 19, Hukum Administrasi Negara

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Introduction

The pandemic in Indonesia through Corona Virus Disease-19 (Covid-19) has infected humanity worldwide, spread globally and has become a health issue that creates concern and chaos. Almost all countries in the world are experiencing the same conditions, with the same hopes, how to overcome this pandemic quickly and completely. Indonesia has taken strategic steps in handling the Covid 19

pandemic, various policies have been issued by President Joko Widodo's administration to accelerate the handling of Covid-19 (Amirudin, dkk, 2020).

A completely new situation and on the other hand the need for rapid handling, requires the role of the bureaucracy both at the central and regional levels, to be quick and responsive in responding to prevention. The bureaucracy is faced with a new paradigm that can be flexible and flexible in dealing with pandemic situations and conditions, which not only cause enormous material losses, worsening community welfare, but also the deaths of citizens that continue to increase from day to day. This flexible and pliable bureaucratic paradigm is called bureaucratic agility.

Bureaucratic agility requires regional leaders who are quick to respond to the situation quickly, making decisions on whether to carry out Imposition of Restrictions on Community Activities (PKKM) or Large-scale Social Restrictions (PPSB) in their regions, is very much determined by the character of regional leaders who have the character of agility. This is contrary to the old bureaucratic paradigm that prioritizes rules, procedures and standard rules, which are no longer valid to be applied in abnormal situations.

Handling bureaucracy, even though it is within the framework of solving problems, should not cause legal problems in the future. Learning from previous pandemic cases, which often led to new legal problems after normal conditions, should not be repeated. The formation of regulations with various types and hierarchies during a pandemic has the opportunity to undermine the spirit of regulatory simplification currently reflected in several state policies. The process of simplifying regulations is not only to avoid the emergence of over-regulation, but also to provide a sense of security and comfort to every legal subject in legal traffic (Rakia, 2020).

One of the efforts to agility the bureaucracy in order to overcome the pandemic problem and not cause legal problems in the future is to use the State Administrative Law approach. This State Administrative Law approach does not injure constitutional law, and can make policies that do not require a long time, so that they can overcome problems quickly. One form of State Administrative Law is the Discretion policy.

Based on Article 1 point 9 of Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration (hereinafter referred to as Law No. 30 of 2014), explains that: "*Discretion is a Decision and/or Action determined and/or carried out by a Government Official to overcome concrete problems encountered in the administration of government in the event that the laws and regulations that*

provide options, do not regulate, are incomplete or unclear, and/or there is government stagnation."

Furthermore, based on Article 22 paragraph (2) of Law No. 30 of 2014, it stipulates that every use of Discretion of Government Officials aims to: a. streamline government administration; b. fill legal gaps; c. provide legal certainty; and d. overcome government stagnation in certain circumstances for public benefit and interest.

Based on the preliminary description above, this study aims to determine the position of discretion as an instrument of administrative law in the formation of public policy, and analyze the extent to which discretion is used by regional heads as an effort to make effective policies in preventing covid 19 in their regions as part of the bureaucratic agility paradigm.

Research Problems

First, How is the Position of Discretion in State Administrative Law and *Second*, How is the Bureaucratic Agility and Effectiveness of Discretionary Policies in Handling Covid 19 in Indonesia.

Research Methods

Normative juridical research is a legal research method carried out by examining library materials or secondary materials only. This research is a Normative Juridical Research on issues concerning constitutional law in Indonesia, namely Law number 30 of 2014 concerning Government Administration. The data analysis method is carried out by collecting data through the review of library materials or secondary data which includes primary legal materials, secondary legal materials and tertiary legal materials, both in the form of documents and applicable laws and regulations relating to normative juridical analysis of synchronization of the Government Administration Law. To analyze the legal materials that have been collected, this research uses a qualitative data analysis method, namely normative juridical which is presented descriptively, namely by describing a policy related to improving the performance of the legal system in Indonesia and then assessing whether its application is in accordance with the normative provisions. Primary legal materials, namely research materials derived from laws and regulations related to the title and problems formulated.

Discussion

1. The Position of Discretion in State Administrative Law

The application of State Administrative Law in Indonesia has an important role in controlling the course of government instruments such as government-owned bodies and government officials who commit. The application of State Administrative Law in Indonesia has an important role in controlling the course of government instruments such as government-owned bodies and government officials who commit.

The application of State Administration Law (HAN) in Indonesia has an important role in controlling the course of government instruments such as government-owned entities and government officials who commit violations, be it theft or misuse of their authority, which will allude to protection for legal subjects who are harmed by the state or persons representing the state and legal protection in HAN.

The implementation of HAN itself is very strict and has its own law enforcement. This aims to create order in social life. Law in HAN According to P.Nicolai and friends, the means of administrative law enforcement contain:

1. Oversight that government organs are able to enforce compliance with or based on laws that are enacted in writing and oversight of decisions that impose obligations on individuals.
2. The application of government sanction authority and there are several criminal sanctions in HAN, namely: a. Government coercion; b. Withdrawal of favorable decisions; c. Imposition of forced money by the government; d. Imposition of administrative fines; e. State Administration from the perspective of State Administrative Law

A good government apparatus means an apparatus that : Being in its position as an ideal and functional apparatus. An ideal apparatus is an apparatus that works with high ideals, aspiring to create a better government than the previous government. And a functional apparatus is an apparatus that carries out its functions tenaciously, diligently and with a full sense of responsibility. If he works down to earth, then he is a functional apparatus. A good apparatus is a *Bestaandvoorwaarde*, meaning a condition that must exist for good government or good administration (Zakir, 2020).

Administration in a broad sense can be viewed from three angles, namely: a. Administration as a process in society. b. Administration as a type of human activity. c. Administration as a group of people who together are mobilizing the above activities. In other words, administration can be viewed from: a. The process angle (administration as a process) b. The function angle (administration in a

functional sense) c. The institutional angle, administration in institutionalization (Ridwan, 2002).

Furthermore, C.S.T. Kansil explained the formulation of administration as follows: From the point of view of the process, administration is a whole process, which starts with the thought process, the regulatory process, the process of achieving goals until the process of achieving those goals. To achieve a goal, people who have to think first then organize, and determine how to achieve that goal, then the achievement itself to the goal. The entirety of these activities is summarized into an understanding of administration. In terms of functions/tasks, administration means the overall action of activities that inevitably must be carried out consciously by a company (state) or group of people who are administrators or leaders of an effort (Marbun, 2001).

Law is the main basis for life to ensure the principle of order and discipline in order to maintain order, a sense of freedom, security, and order. Law becomes an umbrella between all types of human actions and behavior to achieve the principle of human protection. In line with these thoughts regarding sanctions, Philipus M. Hadjon, states that: The important role of sanctions in administrative law meets criminal law. The difference between administrative sanctions and criminal sanctions can be seen from the purpose of imposing the sanctions themselves (Hadjon, 1997). Administrative sanctions are aimed at the act of violation, while criminal sanctions are aimed at the violator by giving punishment in the form of pain. Administrative sanctions are intended to stop the offense. The nature of the sanction is "reparatoir" which means restoring to the original state. In addition, the difference between criminal sanctions and administrative sanctions is the law enforcement action. Administrative sanctions are applied by state administrative officials without having to go through judicial procedures, while criminal sanctions can only be imposed by criminal judges through a judicial process.

The government has several instruments to carry out its functions, including the following:

a. Legislation

The implementation of state policies within the framework of administrative law carried out based on laws and regulations is a manifestation of the concept of the rule of law which requires that every state administration must be carried out based on the law. In the scope of constitutional law, laws and regulations are legal instruments formed either by the legislature, executive, or formed by the legislature and executive for joint approval.

b. *State Administrative Decree*

State Administrative Decisions are unilateral statements from organs of government agencies that aim to create, change, or eliminate legal relationships.

c. *Policy regulation (Freis Ermeisen/Discretion)*

Policy regulations are usually referred to as pseudo wetgeving regulations that function when there is no regulation underlying government action, but are urgent to the problems faced by the government. The term Policy Regulation is not found in Law No. 30 of 2014, but has the same meaning as the term Discretion.

d. *Planning*

In the implementation of state governance, the government is obliged to launch government plans in a certain period, which are usually set out in the form of RPJM or RPJP Explanation of Article 14 paragraph (7) in the attachment to Law No. 30 of 2014, KTUN is closely related to government work plans.

e. *Licensing*

Based on Law No. 30 of 2014, there is a slight difference in the definition between permit, concession, and dispensation. Based on Article 1 point 19 of Law No. 30 of 2014, it explains that: "A permit is a decision of an authorized government official as a form of approval of an application from a citizen in accordance with the provisions of laws and regulations."

Based on Article 1 point 20 of Law No. 30 of 2014, it explains that: "Concession is a Decree of an authorized Government Official as a form of approval of an agreement between an Agency and/or Government Official and other than an Agency and/or Government Official in the management of public facilities and/or natural resources and other management in accordance with the provisions of laws and regulations."

f. *Civil Law*

In addition to acting using public law, the government can also act based on civil law instruments such as establishing cooperation with private parties or in civil law traffic such as buying and selling.

2. **Bureaucratic Agility and Discretionary Policy Effectiveness in Handling Covid 19 in Indonesia**

Problems arising from the bureaucratic side during the Covid-19 pandemic must be responded to immediately, because the success or failure of the implementation of the policy to accelerate the handling of Covid-19 is determined by the bureaucracy. The bureaucracy in handling Covid-19 is felt like a 'backbone',

which supports all efforts to handle Covid-19. However, the Indonesian bureaucracy still seems to exhibit Weberian bureaucratic behavior that is fixated on regulations and hierarchical procedures. As a result, the Indonesian bureaucracy seems slow and dexterous in dealing with the Covid-19 pandemic problem. In an emergency situation, the bureaucracy should practice the bureaucratic agility paradigm so that it is able to deal with new developments.

Bureaucratic flexibility requires discretion. This is because at this time the government is facing conditions that are full of uncertainty. Discretion is an important option for the bureaucracy to save and protect the public by holding that there is urgency and emergency in the field to anticipate events and undesirable consequences (Onno, 2014).

The formation of regulations with various types and hierarchies during the pandemic has the opportunity to undermine the spirit of regulatory simplification currently reflected in several state policies. The process of simplifying regulations is not only to avoid over-regulation, but also to provide a sense of security and comfort to every legal subject in legal traffic. Precisely with the current pandemic conditions, the most logical and consistent effort that must be made is to increase regulatory simplification, which aims to overcome the social saturation that has arisen during the Covid-19 pandemic.

Many Regional Heads have carried out Discretionary Policies in controlling and overcoming the pandemic that hit their regions. The Governor of DKI Jakarta, for example, implemented a Lockdown policy, by issuing a discretionary policy in the form of Governor Regulation Number 47 of 2020, by limiting the movement of its people not to leave the DKI area, as well as those outside Jakarta are not allowed to enter. Although it was widely opposed by members of the DKI DPRD, this discretionary program succeeded in reducing the death rate due to the Covid 19 Virus. The Mayor of Tegal, Dedy YonSupriyono issued a discretionary policy in the form of a mayoral circular letter Number: 443.1 / 002 dated March 27, 2020 concerning the isolation of the Tegal City area. In this policy, pros and cons accompanied the policy, because the Tegal city area was like a 'dead' city. All entrances were closed, public places such as Tegal square were closed, public street lights were extinguished at night, malls, schools and crowded places were closed. The policy succeeded in suppressing the rate of covid, so that, Tegal City was very successful in overcoming the pandemic compared to neighboring regencies such as Tegal Regency and Brebes Regency.

The example policy above is a regional policy that uses Discretionary policy. Through the application of Law No. 30 of 2014 in which there is an article on Discretionary Policy, where administrative law instruments are not only regelling

but also *beschikking*. Legal instruments that are *beschikkingen* have their own advantages, namely the material is only valid once-completed (*einmaligh*), and in contrast to legal instruments that are *regelling*, namely the material will apply continuously (*dauerhaftig*).

The process of law formation within the framework of administrative law with all its instruments is relatively faster than the conventional legislative process. Various administrative law instruments that are relatively fast can also minimize public psychology which has recently experienced saturation (Boylan., et al. 2021).

During a pandemic which is interpreted as an extraordinary situation, state government policies should be taken with extra and quick steps. With the "extra" provision in Article 27 paragraph (3), despite the controversy, this provision actually opens up opportunities for administrative law acceleration in policy formation, which does not have to be preceded by forming implementing regulations.

There are several factors that support the implementation of state policies in the Covid-19 pandemic era using administrative law instruments, including:

First, Administrative law is a system that is relevant to the unitary state structure with a presidential system of government. Although the development of state governance today shows the implementation of regional autonomy with the principle of decentralization, the nature of the unitary state structure with a presidential system of government requires the formation of a centralized state policy but not a centralized-autocratic one. This will affect decision-making by the government quickly without going through a prolonged bureaucratic process.

Second, Administrative law instruments are relatively more efficient. The formation of state policy is generally carried out by involving the branches of state power, including political influences. Administrative law is relatively more efficient because it contains technical instructions in dealing with concrete problems faced by the government. In addition, the formation of administrative law instruments tends to be faster, this is very much in line with the conditions of the spread of the Covid-19 pandemic which in fact has caused social saturation. With administrative law instruments, state administrators and the public can carry out legal actions without bureaucracy and convoluted regulations.

Third, the application of administrative law instruments is more flexible because they can be formed without being preceded by statutory attribution, if they do not conflict with statutory regulations. In fact, administrative law instruments can be formed and determined without being based on the attribution of higher regulations because the implementation of the rule of law is not only based on statutory regulations, but also based on the principle of "salus populi

suprema lex esto" and the principle of "vox populi vox dei". The existence of space for law formation through administrative law instruments that are relatively faster and less costly is also in line with the spirit of simplifying regulations that are in process, especially administrative law instruments in the form of decisions.

Fourth, providing faster legal protection. Basically, the effectiveness of providing legal protection lies in how citizens are satisfied with the resolution of legal problems. Legal protection through the judicial mechanism does not always provide legal protection in accordance with the inner will of justice seekers whose position is relatively weak.

Conclusion

Based on the discussion above, the following conclusions can be drawn: *First*, the application of State Administrative Law (HAN) in Indonesia has an important role in controlling the course of government instruments such as government-owned agencies and government officials who abuse their authority which will allude to protection for legal subjects who are harmed by the state.

Second, discretion becomes an important option for the bureaucracy to save and protect the public by holding that there is urgency and emergency in the field to anticipate the occurrence of events and undesirable consequences. *Third*, the process of law formation within the framework of administrative law with all its instruments is relatively faster than the conventional legislative process.

References

- A Sakri R S Rakia, Perkembangan dan Urgensi Intrumen Hukum Adminstrasi Pasca Penetpan UU No 2 Tahun 2020 Pada Masa Pandemi Covid 19. *SIGN Jurnal Hukum*. Volume 2 No 2 Maret 2021.
- Anindhita Kiky Amirudin, dkk, Birokrasi dan Kebijakan Percepatan Penanganan Covid 19, Pusat Penelitian Badan Keahlian DPR RI, Vol.XII no.9, Mei 2020.
- Faizal Kurniawan & Ayik Parameswary. Konstruksi Hukum Perlindungan Adhered Party dalam Kontrak Adhesi yang Digunakan dalam Transaksi Bisnis. *Perspektif: Kajian Masalah Hukum dan Pembangunan*, Universitas Wijaya Kusuma Surabaya, 19(3), 2014.
- Fauzan Zakir, Perkembangan Hukum Administrasi Negara di Indonesia, *Ensiklopedi Social Review*, Vol.2 No.1 Februari 2020, DOI: <https://doi.org/10.33559/esr.v2i1.449.2020>.
- H. Herman. Perlindungan Hukum Warga Negara terhadap Tindakan Pemerintah dalam Membuat Keputusan Administrasi Negara. *Jurnal Komunikasi Hukum*, Universitas Pendidikan Ganesha, 1(1), 2015.

- Hamzah, Sahlania Onno. "Perilaku Birokrasi Pemerintah dalam Pelayanan Puskesmas di Kota Makassar". *Jurnal Administrasi Publik*, Volume 4 No.1.2014.
- James Boylan., et al. (2021). Boredom in the COVID-19 Pandemic: Trait Boredom Proneness, the Desire to Act, and Rule-Breaking. *Personality and Individual Differences*, Elsevier, 171, 2021.
- Leslie Birnbaum, Due Process and administrative Hearings in the time of Coivd 19, *Journal of the National Association of administration law judiciary*, vol 41, issues 1, 2021.
- Philipus M Hadjon, ,dkk, Pengantar Hukum Adminstrasi Negara, 1997.
- Ridwan H. R., Hukum Administrasi Negara, Yogyakarta, 2002.
- S.F. Marbun, dkk., Dimensi-Dimensi Pemikiran Hukum Administrasi Negara, Yogyakarta, 2001.
- Tubagus Muhammad Nasarudin. Asas dan Norma Hukum Administrasi Negara dalam Pembuatan Instrumen Pemerintahan. *Jurnal Hukum Novelty*, Universitas Ahmad Dahlan, 7(2), Yodi Martono Wahyunadi. (2016).
- Victor Imanuel W. Nalle. (2016). Kedudukan Peraturan Kebijakan dalam Undang-Undang Administrasi Pemerintahan. *Refleksi Hukum: Jurnal Ilmu Hukum*, Universitas Kristen Satya Wacana, 10(1).2016
- Wendi Suprpto Padang & Heri Kusmanto. Perencanaan Partisipatif dalam Proses Penyusunan Rencana Pembangunan Jangka Menengah Daerah Kabupaten Dairi Tahun 2014-2019. *Jurnal Administrasi Publik (Public Administration Journal)*, Universitas Medan Area, 5(2), 2015.
- Yodi Martono Wahyunadi. Kompetensi Absolut Pengadilan Tata Usaha Negara dalam Konteks Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan. *Jurnal Hukum dan Peradilan*, Mahkamah Agung RI, 5(1), 2016.