Regional Quarantine Policy by the Head of Regions Reviewed from Administrative Legal Perspective

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Abstract. In early 2020, the Indonesian people were shocked by the announcement of two positive Covid-19 patients which marked the Corona Virus outbreak in Indonesia. A number of groups have urged the government to lock down or temporarily close the flow of national traffic. However, this was not done by the Central Government. On the other hand, there are a number of areas that have implemented a local lockdown or Regional Quarantine because of the very big concern about the spread of the outbreak in their area. The actions of several regional heads have drawn pros and cons because they are considered contrary to Law Number 6 of 2018 concerning Territorial Quarantine. Administrative law through the concept of *freies ermessen* provides space for freedom for State Administrative Officials to make a policy regulation when there is an emergency and there are no clear rules regulating it. This concept allows state Administrative Officials to take discretion as an alternative to the application of the legality principle which has weaknesses. Discretion was born to overcome the problems of legal vacuum that occur in society in the context of carrying out the state administration function and achieving welfare goals.

Keywords: Regional Quarantine, Decentralization, Policy Regulations.

1 Introduction

Indonesia is a unitary state, as stated in Article 1 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Abu Daud Busroh stated that unitary state is a single state which means that there is no state within the state, there is only one single government, namely the central government that has the highest power and authority in the country.[1]

There is no division of sovereignty in a unitary state as occurs in a union or federal state. The unitary state only recognizes the concept of division of authority which is known as decentralization. This decentralization calls for a division of authority between the center and the regions with the principle of autonomy, namely being able to take care of their own affairs. Indonesia is a unitary state that adheres to decentralization as explicitly regulated in Articles 18, 18A and 18B of the 1945 Constitution of the Republic of Indonesia (UUDNRI). Article 18 paragraph (1) stated that, "The Unitary State of the Republic of Indonesia is divided into provincials and provincial areas are divided into regencies and cities, each of which has a regional government, which is regulated by law ".

Furthermore, this area is regulated in Law Number 23 of 2014 concerning Regional Government. This Law has regulated the division of functions, supervision and finance between the central government and regional governments. It also regulates absolute affairs that can only be managed by the Central Government, while the regions can only run. This absolute affair is regulated in Article 10 of Law Number 23 Year 2014. These affairs include: foreign policy; defense; security; yustisi; national monetary and fiscal; and religion.

At the beginning of 2020, the world was shocked by a new virus called Corona or Covid-19 happened in Wuhan, Hubei, China. This virus is said to be a new virus that is still part of the Mers Virus and SARS class. This mysterious pneumonia characterized by fever, dry cough, and fatigue, and occasional gastrointestinal symptomps. This outbreak was reported in the Huanan Seafood Market in December 2019

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and then shut down on January 1, 2020, after the announcement of an epidemiologic alert by the local health authority. However, the next month, the disease has already spread to many cities in China such as Hubei, Zhejiang, Guangdong, Henan, Hunan, etc. In February 2019, a total of 28,276 confirmed cases with 565 deaths globally were documented by WHO, involving 25 countries.[2]

The virus, which was recorded to have infected 129 countries around the world, also infected Indonesia. Starting from Jakarta and spreading to various regions throughout Indonesia. The reaction from the Indonesian government when a positive victim of Covid-19 was detected was considered relatively slow, causing several regions to adopt policies to carry out Regional Quarantine independently. This policy reaps pros and cons among academics and legal practitioners, because it is considered that the regional head has exceeded his authority in determining the Regional Quarantine.

Based on the description that has been presented above, this research will discuss and analyze how administrative law views the issue of the Regional Quarantine policy stipulated by the regional head. This issue will be related to the theory of unitary state, especially the choice of Indonesia as a unitary state with decentralization, the *Freies Eermessen* theory which underlies the issuance of policy regulations by government administration which functions to fill any legal vacuum due to weaknesses in the principle of legality, as well as the provisions contained in the Law. Local Government, Government Administration and Health Quarantine.

2 Method

The type of this research uses normative legal research, a legal research that is conducted based on law and regulation and library material. Related with this type of research, the approach used in this paper are legal approach, conceptual approach, and historical approach. These approaches are applied by reviewing the law and regulations related to the problem that is being discussed in this research and this research also conduct a review on justice concepts.

3 Result and Discussion

3.1. Decentralization in the Concept of the Unitary State of Indonesia

The unitary state can be called a unitary state. If viewed from the structure, this country is single in the sense that it is not composed of several countries. The unitary state has only one government, namely the central government which has the highest power and authority in the field of state governance, determines government policies and implements state governance both at the center and in the regions.[3] This is also in line with the opinion of Abu Daud Busroh in his book, "Ilmu Negara".

Abu Daud Busroh stated that a unitary state is a single state which means that there is no state within the state, there is only one single government, namely the central government which has the highest power and authority in the country.[1] The unitary state takes two forms:

a) Unitary State with a centralized system
In a unitary state with a centralized system, all affairs in the state are directly regulated by the central government, while the regions will carry out instructions from the central government.

b) Unitary State with a decentralized system
In a unitary state with a decentralized system, regions are given the authority to manage their own affairs (regional autonomy) which are called autonomous regions.

In unitary state, the parts of the country are called regions, this term is a technical term to refer to a territorial part that has its own government within the country.[4] [1] This decentralization calls for a division of authority between the center and the regions with the principle of autonomy, namely being able to manage

[1] Ni'matul Huda, 2012, *Hukum Pemerintahan Daerah*, Nusamedia , pp. 31.

their own affairs. Indonesia is a unitary state that adheres to decentralization as explicitly regulated in Articles 18, 18A and 18B of the 1945 Constitution of the Republic of Indonesia (UUDNRI). Article 18 paragraph (1) stated, "The Unitary State of the Republic of Indonesia is divided into provincials and provincial areas are divided into regencies and cities, each of which has a regional government, which is regulated by law ". The term "divided over" (not "consists of") in the provisions of Article 18 paragraph (1) are not the terms used coincidentally. The term immediately explains that our country is a unitary state in which sovereignty the state is in central hands.[5]

Furthermore, this area is regulated in Law Number 23 of 2014 concerning Regional Government. This Law has regulated the division of functions, supervision and finance between the central government and regional governments. It also regulates absolute affairs which can only be managed by the Central Government, while the regions can only run. This absolute affair is regulated in Article 10 of Law Number 23 Year 2014. These affairs include: foreign policy; defense; security; yustisi; national monetary and fiscal; and religion.

Sri Soemantri in Ni'matul Huda said that the delegation of authority from the Central Government to the autonomous regions was not stipulated in the constitution, but was the essence of the unitary state itself. This is in line with the opinion of C.F. Strong stated that, "The essence of a unitary state is that the sovereignty is undivided, or, in other word, that the powers of the central government are unrestricted, for the constitution of a unitary state does not admit of any other law- making body than the central one ". (The essence of the unitary state is that the sovereignty is not divided, or in other words, the power of the central government is limited, the constitution of the unitary state does not recognize the existence of a legislative body other than in the center itself). Strong also stated that there are two absolute characteristics inherent in a unitary state, namely "the supremacy of the central parliament" and "the absence of subsidiary sovereign body" (the absence of other sovereign bodies).[5]

3.2. Freies Ermessen

The emergence of policy regulations cannot be separated from the free authority (*vrije bevoegdheid*) of the government known as Freis Ermessen. *Frei* means free, loose, unbound and independent. Whereas *ermessen* means to consider, assess, predict and estimate. *Freis ermessen* means a person who has the freedom to judge, suspect and consider something. [6] It can be said that *ermessen freies* is a space given to state administrative officials so they can take action without being bound by the law.

Ridwan HR said that this concept emerged as an alternative to fill the weaknesses of the legality principle. For a modern country that is a walfare state, the principle of legality alone is not sufficient to achieve public welfare. Laica Marzuki in Ridwan HR emphasized that *ermessen freies* are freedom given to state administrative officials in the context of administering governance, in line with the increasing demands for public services that must be provided for the complex socio-economic life society.[6]

There are several reasons the *ermessen freies* can be used by state administrative officials, namely:

a) There is no law that regulates concrete solutions to a particular problem, even though the problem demands an immediate settlement. For example, in the face of a natural disaster, or an epidemic of infectious diseases.
b) The laws and regulations which form the basis for government officials to act provide complete freedom. For example, in the case of granting a permit under Article 1 HO, each granting of a permit is free to interpret the meaning of "creating a dangerous situation" in accordance with the situation and conditions of each area.
c) The existence of a legislative delegation, namely the granting of the power to self-regulate to the government apparatus, which is actually the power of the apparatus of a higher level. For example, in exploring regional financial sources, local governments are given the freedom to manage financial sources on the condition that these sources are legitimate sources.[7]

Freies ermessen has consequences in the field of legislation, namely the transfer of legislative power to the government, where in certain circumstances and / or in certain portions and levels, the Government can issue laws and regulations without the approval of the parliament.

E. Utrecht also mentioned that there are several implications of *Freies Ermessen* in the field of legislation, namely: first, authority on one's own initiative, namely the authority to make statutory regulations at the level of laws. Second, the authority of the legislative delegation from the constitution, namely the authority to make statutory regulations of a lower degree than law.

In addition, the government also has a *droit function*, namely the power to interpret (either expand or narrow) itself regarding enviative provisions or that it does not preclude the possibility of regulating other, more detailed forms as needed. Although initiative, delegation and *droit* function in legislation are a form of logical consequence of the *freis ermessen* concept, the government is prohibited from carrying out actions that are *detournment de pouvoir* (arbitrary action) or *onrechtmatige overheidsdaad* (acts against government law). Any act of *detournment de pouvoir* or *onrechtmatige overheidsdaad* can be sued in court.[8]

3.3. Territorial quarantine in Law no. 6 of 2018 concerning Health Quarantine

Health quarantine is an effort to prevent the exit or entry of diseases and / or public health risk factors that have the potential to cause public health emergencies (Article 1 number 1 of Law No.6 of 2018). Meanwhile, what is meant by Regional Quarantine is the restriction of the population in an area including the area of entrance and its contents that are suspected of being infected with a disease and / or contaminated in such a way as to prevent the possibility of spreading disease or contamination (Article 1 number 10 of Law No.6 of 2018).

Regarding the implementation of health quarantine in regions, it is specifically regulated in Chapter VII concerning the Implementation of Health Quarantine in the Region. As for what is regulated in this chapter is the matter of home quarantine, regional quarantine, hospital quarantine and large-scale social restrictions. This discussion will specifically discuss Regional Quarantine and Large-Scale Social Restrictions which still cause confusion among the community.

Specific arrangements regarding Regional Quarantine have been regulated in Articles 53, 54 and 55. In these three articles are explained that Regional Quarantine is implemented as a response to a public health emergency after obtaining laboratory confirmation of the spread of disease among community members in the area. Regarding the implementation of Regional Quarantine, Health Quarantine Officials are required to provide an explanation to the community before quarantine occurs. Quarantine officials as mentioned in Article 1 point 29 are civil servants working in the health sector who are authorized by the minister who administers government affairs in the health sector to implement Health Quarantine.

This quarantined area is given a quarantine line and is continuously guarded by Quarantine Officials and the Indonesian National Police who are outside the quarantine area. In addition, the community is also prohibited from going out and about in the area and if someone is suffering from a health quarantine disease, they must be immediately isolated and referred to the hospital. During the Regional Quarantine period, the basic necessities of life for people and food for livestock in the quarantine area are the responsibility of the Central Government. The responsibility of the Central Government in implementing Regional Quarantine is carried out by involving the Regional Government and related parties.

Unlike the Regional Quarantine, Large-Scale Social Restrictions or abbreviated as PSBB aim to prevent the spread of health emergencies that are happening between people in a certain area. Large-Scale Social Restrictions are restrictions on certain activities of residents in an area suspected of being infected with a disease and / or contamination in such a way as to prevent the possibility of spreading disease or contamination (Article 1 Number 11 of Law No.6 of 2018).

The implementation of the PSBB includes at least several things such as: school and work vacations, restrictions on religious activities, restrictions on activities in public places or facilities. The implementation of this PSBB is in coordination and collaboration with various related parties in accordance with the provisions of laws and regulations (Article 59 of Law No.6 of 2018). So, it can be concluded that in this PSBB, the Government is not obliged to protect the basic necessities of life of people and livestock food, its nature is only to limit social activities to prevent a wider spread in a certain area. It is further explained in Article 60 which states that:

"Further provisions regarding the criteria and implementation of Home Quarantine, Regional Quarantine, Hospital Quarantine, and Large-Scale Social Restrictions are regulated by Government Regulation".

After knowing the differences between Territorial Quarantine and Large-Scale Social Restrictions (PSBB), the next thing to discuss is the authority to determine the Regional Quarantine status or PSBB. Based on the author's investigation, the Central Government, which has full authority in determining and removing emergencies, is responsible for organizing health quarantine, coordinating with international parties, determining regional quarantine and PSBB. Provisions regarding this matter can be seen in Article 5, 6, 10, Article 11 paragraph (1), Article 12, Article 13, Article 14 paragraph (1), Article 15, Article 15 paragraph (4) and Article 49 (3). However, in practice the Central Government can coordinate with the Regional Government.

Specifically regarding the determination of regional quarantine and PSBB, it is stipulated by the Minister. The provisions regarding this matter are regulated explicitly in Article 49 paragraph (3) which reads:

"Regional Quarantine and Large-Scale Social Restrictions as referred to in paragraph (1) shall be stipulated by the Minister."

Article 96 of this Law orders that the Government Regulation must have been enacted no later than 3 (three) years from the promulgation of this Law. However, until now there has been no Government Regulation that has been specifically formed regarding territorial quarantine. The government only made one special Government Regulation regarding Large-Scale Social Restrictions as a form of choice by the government when the Covid-19 virus began to enter Indonesia. That regulation is Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (COVID-19) which was set on March 31, 2020.

Following the issuance of this PP, the Minister of Health issued Decree Number Hk.01.07 / Menkes / 239/2020 concerning the Stipulation of Large-Scale Social Restrictions in the DKI Jakarta Province Area in the Context of Accelerating the Handling of Corona Virus Disease 2019 (Covid-19) which basically provides an umbrella act for the implementation of the PSBB in Jakarta, which at that time was the epicenter of the Covid-19 virus transmission.

This Government Regulation and the Decree of the Minister of Health underlie the issuance of the Governor Regulation in Jakarta with the issuance of Governor Regulation No. 33 of 2020 concerning the Implementation of Large-Scale Social Restrictions in Handling Corona Virus Disease 2019 (Covid-19) in the Province of the Special Capital Region of Jakarta. However, before this Government Regulation was enacted, it was recorded that 5 regions in Indonesia had implemented local lockdowns or limited quarantine for their territories as reported by kompas.com.[9] These areas Tegal City, Tasikmalaya City, Papua Province, Makassar City, and Ciamis Regency.

3.4. Territorial quarantine by Regional Heads in the Perspective of State Administrative Law

As discussed in the previous section, the authority to determine regional quarantine or PSBB is the full authority of the Central Government. The Regional Government in this case only helps after obtaining an appointment by the Central Government through the Minister. The phenomenon that occurred at the beginning of the pandemic period where several Regional Heads set Regional Quarantine or Local Lockdown for their respective regions was highlighted by the public. Some groups consider that the Regional Government has exceeded its authority. These areas include Tegal City, Tasikmalaya City, Papua Province, Makassar City, and Ciamis Regency.

The phenomenon at the beginning of the pandemic period where there was no Government Regulation from Law no. 6 of 2018 concerning quarantine and a firm stipulation from the Government whether by the President and the Minister of Health, which in this case are officials who have full power to do so based on the mandate of the Law, triggered a problem. Some people think this was because the government failed to tackle the virus, so it had been slow to respond. It triggered local government action in the form of a local lockdown policy, which is of course contrary to Law no. 6 of 2018 concerning Territorial Quarantine.

However, if we look at the aspect of administrative law, there is a term discretionary power which is a form of the *freies ermessen* concept. *Freies ermessen* is an alternative to fill the deficiencies and weaknesses of the legality principle. According to Ridwan HR., The *freies ermessen* are given to the government or state administration officials to carry out ordinary actions as well as legal actions. When it is embodied in a written juridical instrument, it becomes a policy rule.[6]

Indroharto in Ridwan HR explains that the discretionary authority of the state administration which later gave birth to these policy regulations contains two main aspects, namely: first, freedom to interpret the scope of authority formulated in the basic rules of authority or what is known as objective freedom of judgment. Second, the freedom to determine how and when the powers of the state administration are exercised or what is known as the subjective freedom of judgment[6]

If we look at the understanding and explanation of the *freies ermessen* concept above, the policies taken by the local government are part of a form of discretion because of weaknesses in the legality aspect. Where in this case, the Government or the Minister of Health had not issued a specific decision or regulation regarding the that condition. This *freies ermessen* concept provides flexibility for state administrative officials in determining a policy where there is a legal vacuum or obscure rules (obscuur).

Muchsan emphasized that there are reasons that the freies ermessen can be done, namely:

a. There is no law that regulates concrete solutions to a particular problem, even though the problem demands an immediate settlement. For example, in the face of a natural disaster, or an epidemic of infectious diseases.

b. The laws and regulations which form the basis for government officials to act provide complete freedom. For example, in the case of granting a permit under Article 1 HO, each granting of a permit is free to interpret the meaning of "creating a dangerous situation" in accordance with the situation and conditions of each area.

c. The existence of a legislative delegation, namely the granting of the power to self-regulate to the government apparatus, which is actually the power of the apparatus of a higher level. For example, in exploring regional financial sources, local governments are given the freedom to manage financial sources on the condition that these sources are legitimate sources.[7]

In this case, the problem of entry and the outbreak of Covid-19 is included in the first criteria. This case is an emergency case and there is no law that regulates in a concrete way the solution even though this problem needs to be resolved as soon as possible. Even though the Law on Territorial Quarantine already exists, the technical settlement and handling of the central government at that time was considered slow in responding to the situation, while the spread of the virus began to be alarming.

Another issue is whether the local lockdown policy is a form of regional government abuse or not. Although initiative, delegation and *droit* function in legislation are a form of logical consequence of the freies ermessen concept, the government is prohibited from carrying out actions that are *detournment de pouvoir* (arbitrary action) or *onrechtmatige overheidsdaad* (acts against government law). Any act of detournment de pouvoir or *onrechtmatige overheidsdaad* can be sued in court.[8]

In the author's opinion, the legal action of the local government that makes a policy on limited quarantine is not a form of arbitrary or illegal action. Precisely in this case, if the government ignores and negligent in fulfilling its obligations, then it can be deemed to have committed arbitrary acts or acts against the government's law. The discretion carried out by the local government is based on a quick response in an effort to prevent the outbreak of an outbreak in their respective areas.

4 Conclusion

Based on the description above, it can be concluded that the actions of local governments in implementing local lockdowns or limited quarantine in their areas are a form of initiative or discretion. Discretionary power is an alternative form that was born from the concept of *Freies Ermessen*. This concept was emerge from a lack of legality principles and provides space for state administrative officials to take action as long as it is not arbitrary or acts against government law.

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