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[JILS] Submission Acknowledgement
1 message

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To: Iza Rumesten RS <izarumesten@gmail.com> Sat, Jun 17, 2023 at 10:16 AM

Iza Rumesten RS:

Thank you for submitting the manuscript, "Strategy in Crisis: A Comparative Study of the Application of Discretion in Response to the Covid-19 Pandemic in Indonesia and the European Union" to Journal of Indonesian Legal Studies. With the online journal management system that we are using, you will be able to track its progress through the editorial process by logging in to the journal web site.

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If you have any questions, please contact me. Thank you for considering this journal as a venue for your work.

Ridwan Arifin, S.H., LL.M.

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2. Bukti Pre-Review



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Ridwan Arifin <ridwan.arifin@mail.unnes.ac.id>
Reply-to: Ridwan Arifin, S.H., LL.M. <jils@mail.unnes.ac.id>
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Wed, Jul 5, 2023 at 9:56 PM

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Ridwan Arifin, S.H., LL.M.

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3. Bukti konfirmasi review dan hasil review pertama



[JILS] Editor Decision

1 message

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Mon, Nov 6, 2023 at 12:00 AM

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Iza Rumesten RS, Firman Murtaqo, Saut Parulian Panjaitan, Anna Sergeevna Bugaeva, Mellisa Towadi:

We have reached a decision regarding your submission to Journal of Indonesian Legal Studies, "Strategy in Crisis: A Comparative Study of the Application of Discretion in Response to the Covid-19 Pandemic in Indonesia and the European Union".

Our decision is to: **Resubmit for Review**

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[JILS] Editor Decision

1 message

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Mon, Nov 13, 2023 at 9:10 AM

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Iza Rumesten RS, Firman Murtaqo, Saut Parulian Panjaitan, Anna Sergeevna Bugaeva, Mellisa Towadi:

We have reached a decision regarding your submission to Journal of Indonesian Legal Studies, "Strategy in Crisis: A Comparative Study of the Application of Discretion in Response to the Covid-19 Pandemic in Indonesia and the European Union".

Our decision is: **Revision Required**

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RESEARCH/REVIEW ARTICLE

STRATEGIES IN A CRISIS: A COMPARATIVE STUDY
OF THE APPLICATION OF DISCRETION IN
MANAGING THE COVID-19 PANDEMIC IN
INDONESIA AND INDIA

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ABSTRACT

This research aims to analyze and compare the discretionary policy patterns adopted by India and Indonesia during the COVID-19 pandemic. This research focuses on two main aspects: first, the structure and application of discretionary policies set by the central government in both countries; second, challenges and strategies in implementing these policies at the local level and responding to the dynamics of the pandemic. This research methodology involves analysis of relevant legal and policy documents, review of existing literature, and conceptual and philosophical interpretation of discretionary policies in pandemic management. The research results show that India and Indonesia have different approaches to implementing discretionary policies. India uses a more centralized system, while Indonesia takes a decentralized path. Both countries need help in coordination between levels of government, with India facing difficulties in aligning central and state policies and Indonesia struggling with divergence between central and local governments. In addition, both countries must revise or create more adaptive and dynamic legislation that combines legal force with flexibility to respond to rapidly changing pandemic conditions. Transparency and accountability in discretionary policy are crucial elements that must be strengthened in both countries to build public trust and ensure effective and fair policy implementation.

Keywords: Discretionary, COVID-19, Indonesia, India, Policy

INTRODUCTION

This year's coronavirus illness (COVID-19) is the sixth pandemic since the 1918 flu pandemic, and it has already infected almost every country on the planet. Since late December 2019, when the first case was reported, Wuhan, China, has been experiencing an epidemic of a novel strain of human pneumonia. Symptoms started appearing no earlier than December 1, 2019. Viral pneumonia was identified as the cause of this patient's symptoms of fever, lethargy, dry cough, and dyspnea.¹

The media first labelled the illness as "Wuhan pneumonia" due to the location and the fact that the symptoms resembled those of pneumonia. DNA

¹ Chaolin Huang dkk., "Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China," *The Lancet* 395, no. 10223 (15 Februari 2020): 497–506, [https://doi.org/10.1016/S0140-6736\(20\)30183-5](https://doi.org/10.1016/S0140-6736(20)30183-5).

sequencing of the whole genome identified the novel coronavirus as the culprit.² Thus, this virus is the eighth human-infecting member of the coronavirus family. On January 12, 2020, the World Health Organisation (WHO) gave the new virus the provisional name 2019 coronavirus (2019-nCoV), and on February 12, 2020, the WHO gave the infectious illness the official designation 2019 coronavirus disease (COVID-19).³ The Covid-19 epidemic is becoming a serious challenge for medical professionals and governments throughout. Governments in different nations must make swift and effective measures to safeguard their citizens in the face of a disaster of this size. In this case, the idea of discretion is crucial.

In Indonesia, discretion is defined as a decision and/or action determined and/or implemented by government officials in order to overcome certain problems faced by administrators in the event that the governing laws and regulations are incomplete or unclear, and/or there is stagnation. from the government. Article 22(2) of the Law states that discretion may be used for the following reasons:

1. simplify the workings of government;
2. remedy legal flaws;
3. ensure legal stability; and
4. Fourth, breaking through bureaucratic logjams when necessary in the sake of the public good.

In addition, article 24 of the Law stipulates the following standards for the exercise of discretion:

1. in line with the goals of the Authorization;
2. avoids breaking any rules set down by applicable legislation;
3. consistent with the guiding principles of sound administration;
4. for very good reasons;
5. does not include any potential for bias; and
6. acted upon with no malice intended.

With the aforementioned goals and requirements in mind, all of the articles of these laws must be followed by government authorities while exercising their discretion. Naturally, this will serve as a check on the government's ability to act arbitrarily and restrict its freedom of action. Corona Virus Disease 19

² DNA sequencing or DNA sequencing is a process or technique for determining the sequence of nucleotide bases in a DNA molecule. This sequence is known as the DNA sequence, which is the most basic information about a gene or genome because it contains the instructions needed for the formation of a living body. Look, Britannica Educational Publishing, *New Thinking About Genetics* (Britannica Educational Publishing, 2010).

³ Na Zhu dkk., "A Novel Coronavirus from Patients with Pneumonia in China, 2019," *New England Journal of Medicine* 382, no. 8 (20 Februari 2020): 201, <https://doi.org/10.1056/NEJMoa2001017>.

(Covid-19) is a global pandemic that has already had a devastating effect on the economies and societies of many nations, including Indonesia. It is clear that the government must take swift and appropriate steps to offer instruction or reach the larger population in response to the rapid proliferation of Covid-19. In truth, governmental actions must comply with established laws. However, the current set of rules and regulations is insufficient. For this reason, the government provides policies based on discretion, since it is regarded to be speedier than drafting rules.

The Indonesian government has issued three decrees in an effort to curb the spread of the coronavirus disease 2019 (COVID-19): (1) Decree of the President of the Republic of Indonesia Number 11 of 2020 Concerning the Determination of a Public Health Emergency for Coronavirus Disease 2019 (COVID-19); (2) Government Decree Number 21 of 2020 Concerning Large-Scale Social Restrictions in the Context of Accidents Related to the Coronavirus Disease 2019 (COVID-19); and However, this legal stance was highly criticised, and the laws were seen as coming too late; as a consequence, the federal and state administrations were unprepared to deal with the Covid-19 epidemic.⁴

Like Indonesia, India was on the cusp of worldwide panic in late January 2020 about the epidemic that would come to characterise the modern age. As the world learned of the severity of COVID-19, India reported its first case, marking a watershed moment that prompted introspection on the country's convoluted health care system and the weighing of human liberties against the need for immediate public health actions. On the same day, the World Health Organisation (WHO) declared a worldwide public health emergency, which served as an early warning for India and other nations to prepare a response.⁵

The Indian government took the extreme measure of instituting a nationwide lockdown as they spent the next almost two months trying to comprehend the scope and pace of the virus's spread. One of the world's largest initiatives to contain the virus has resulted in the shutdown of businesses, schools, and other public institutions.⁶ However, the economic damage quickly became apparent, and calls to reopen became louder as the urgency of economic and social recovery grew.

⁴ Ali Roziqin, Syasya Y.F. Mas'udi, dan Iradhad T. Sihidi, "An analysis of Indonesian government policies against COVID-19," *Public Administration and Policy* 24, no. 1 (1 Januari 2021): 92–107, <https://doi.org/10.1108/PAP-08-2020-0039>.

⁵ Gorkem Sariyer dkk., "Fiscal responses to COVID-19 outbreak for healthy economies: Modelling with big data analytics," *Structural Change and Economic Dynamics* 64 (1 Maret 2023): 191–98, <https://doi.org/10.1016/j.strueco.2022.12.011>.

⁶ Aritra Ghosh, Srijita Nundy, dan Tapas K. Mallick, "How India is dealing with COVID-19 pandemic," *Sensors International* 1 (1 Januari 2020): 100021, <https://doi.org/10.1016/j.sintl.2020.100021>.

With the arrival of better weather and renewed optimism in June, India slowly started to revive its economy. The action is a balancing act between preventing the spread of the virus and helping industries that are suffering because of the limitations. However, there is cause for optimism as the recovery rate continues to rise, despite the fact that new cases continue to arise, generating hotspots that need quick care.⁷

As Indians try to come to terms with this new reality, debates about the country's legal and constitutional structure have heated up. The Indian Constitution is now under scrutiny because it guarantees everyone the right to health care and a reasonable standard of living. Concerns have been raised concerning the appropriateness of limiting personal liberties in the name of public health.

The constitutional provisions regarding health care, such as the state's obligation to look out for the interests of its employees and give aid in times of need like sickness, took on new significance. India has a complicated federal system, with the states and union territories each having some say over health policy and execution.

The disparity in authority between the federal government and the states is especially apparent in the current climate of crisis. A successful response to the epidemic requires careful navigation of the distribution of authorities outlined in the Union List, States List, and Joint List of the Indian Constitution. Parliament has authority over Union List items, while state legislatures have control over State List items; nevertheless, in times of crisis, both levels of government must cooperate.

In many parts of the globe, such as Indonesia and India, the COVID-19 epidemic has presented unprecedented difficulties. Although each nation has distinct concerns, there are certain similar problems encountered by both areas.

Indonesia, being an archipelagic nation with a big and diversified population, is confronting obstacles in controlling the COVID-19 epidemic. Inadequate health facilities and uneven access to them have become serious obstacles in the fight against the epidemic. The widespread lack of access to health care and education in many parts of Indonesia further complicates efforts to raise awareness and prevent the spread of the virus.⁸

⁷ Justina Jose, Priyanka Mishra, dan Rahul Pathak, "Fiscal and monetary response to the COVID-19 pandemic in India," *Journal of Public Budgeting, Accounting & Financial Management* 33, no. 1 (1 Januari 2020): 56–68, <https://doi.org/10.1108/JPBAFM-07-2020-0119>.

⁸ Hendro Cahyo Saputro, "How Does the Law Solve the Covid-19 Problem?," *The Indonesian Journal of International Clinical Legal Education* 2, no. 3 (30 September 2020): 331–44, <https://doi.org/10.15294/ijicle.v2i3.38418>.

Governmental institutions, resources, and crisis management tactics in India and Indonesia differed greatly during the COVID-19 epidemic. Controlling the spread of the virus and reducing its social and economic effects is a tremendous undertaking for both nations, given their respective vast populations and health systems, which each confront their own unique obstacles.

As a first line of defence against the epidemic, India implemented a statewide lockdown with minimal advance notice. All of the individual states are obligated to comply with this federal ruling. Although beneficial in some ways, the emergency remedies authorised by the Epidemic Diseases Act of 1897 presented significant logistical and economic difficulties. The lockdown, critics argue, has created a humanitarian catastrophe, particularly for migrant workers who have been left far from home and their sources of income. However, the rigorous regulations provide time for health systems and other agencies to improve their capabilities.

Meanwhile, Indonesia opted for less central control. The federal government encourages states and municipalities to use their own judgement when implementing policies. While this allows for a more individualised strategy, it also creates difficulties in terms of international coordination and uniformity of reaction. There was a rise in instances in numerous regions due to initial delays in enforcing large-scale social restrictions (PSBB) and shutting borders.

The reaction of both nations was also influenced by the strength of their respective health care systems. India is able to increase production and distribution of PPE and vaccinations because to its robust pharmaceutical sector and manufacturing capability. In contrast, Indonesia's ability to monitor and control the spread of the virus is hampered by the country's health system and testing capabilities.

When it comes to exchanges of information, the two nations take quite different methods. In India, improvements to the EDA and active communication from the Ministry of Health and Family Welfare aided in spreading information and directives. Both the national and regional administrations in Indonesia make an effort to be transparent, yet there are still gaps in the information provided.

Pandemic management is difficult in both nations for a variety of reasons, including differences in government structure, economic conditions, and

current public health regulations. Their stories demonstrate the need for robust healthcare systems, inter-governmental cooperation, and fast action when addressing global health emergencies.

This study aims to address (1) What was the general pattern of discretionary policymaking in Indonesia and India during the Covid19 pandemic? based on the preceding description. And (2) How may Indonesia and India use their policymaking discretion to address some parts of the Covivirus 19 epidemic?

The theoretical basis of this study is grounded on normative legal theory.⁹ India and Indonesia, two nations with relatively large populations and fragmented health systems, have made major measures to address increasing public health concerns, as seen by their reaction to the COVID-19 epidemic. Long-standing laws, including as India's Epidemic Diseases Act of 1897, have been adapted to meet immediate demands in light of the epidemic. Legislative measures are being implemented to increase safeguards for health workers and sternly penalise violators in response to rising cases of violence against these professionals.

India has a constitutional duty to provide health services to its residents, despite the fact that the right to health is not directly recognised in the country's constitution but has nonetheless been included within the 'Right to Life' via a succession of judicial interpretations. However, due to the division of these roles between many tiers of government, coordination is essential but sometimes convoluted.

However, Indonesia has a lot of the same problems. The slow and inadequate reaction to the epidemic by the government has brought to light issues with policy execution and executive discretion. Finding a middle ground between containing the virus and keeping the economy afloat has been a challenge for Indonesia's Health Quarantine Law and pandemic management measures.

Both pandemics have shown the significance of openness and accountability in the application of discretionary policies, and the urgency with which public health problems must be addressed. Both nations have been put to the test by

⁹ Peter Marzuki Mahmud, *Pengantar Ilmu Hukum Edisi Revisi* (Jakarta: Kencana Prenada Media Group, 2016).

the COVID-19 pandemic, demonstrating the need for flexibility and improved collaboration in future public health management.

Studying government responses and the consequences of discretionary acts made during the epidemic through the lens of legal norms applied in this context, from both a statutory and a conceptual and philosophical perspective, might provide light on these issues. This study uses a prescriptive approach to not only describe the events that have taken place but also evaluate their appropriateness in light of the relevant legal standards, the ideas of justice and legal efficacy.¹⁰

I. DISCRETION UNDER NATIONAL AND INDIAN LAWS

1. Discretion According to Indonesian National Law

Rather than the "freies ermessen" notion employed in Indonesian law, we mean "Ermessen" in the sense of German discretion. The notion of *vrij bevoegdheid*, which is applied in the Netherlands as free authority, is most similar to the existence of *Ermessen*, which has been free by earlier legal experts. Despite the fact that *ermessen* and *wrej bevoegdheid* have fundamentally distinct meanings. If every state or public institution has the authority of "ermessen" (consideration), then every state or public institution must use "ermessen" in accordance with the use of that authority and the legal limits that apply to that discretion.

According to *ermessen* (consideration), state officials' acts are not discretionary but instead must be grounded on the applicable legal framework. It follows from the foregoing definition of *ermessen* that there is no *freies ermessen*; nonetheless, this must be explicitly verified in the legislative rules.

While the idea of a welfare state naturally leads to the development of a *freies ermessen* legal state, there must be constraints placed on its

¹⁰ Soerjono Soekanto dan Sri Mamudji, "Penelitian Hukum Normatif Suatu Tinjauan Umum," dalam *Rajawali Pers, Jakarta, 2007*.

application. Sjachran Basah argued for *freies ermessen* in the rule of law based on this premise:

1. Designed to carry out civic duties;
2. It's a proactive stance taken by the State government;
3. Third, the law permits this course of action;
4. This was a self-initiated move on his part;
5. This course of action is geared towards the resolution of pressing, unexpected issues;
6. There are legal and moral consequences for this mindset and approach.

Discretion or discretionary power granted to the government is a natural outgrowth of the welfare state idea, but it does not come without drawbacks. Because the existence of this free authority opens the door to abuse of power and willful disregard for the safety of the populace (French: *détournement de pouvoir* and Dutch: *willekeur*, respectively).

As was once thought, this discretion arose as a workaround for gaps and loopholes in the application of the principle of legality (*wetmatigheid van bestuur*). However, since the public interest is constantly evolving in tandem with scientific and technological advancements, the principle of legality alone is insufficient to play a maximum role in serving that interest.

The purpose of Article 22 Constitution State Administration, which establishes the limits on the use of discretionary power by government officials, is to:

1. Make government work more smoothly;
2. Simplifying the law;
3. Guaranteeing legal stability; And
4. Getting the government moving again when it has stalled, for the public's sake.

Proves that the aforementioned 4 (four) goals are not merely suggestions, but rather an integrated whole that should serve as the standard by which every discretion is judged. In other words, the article's regulations for the use of discretion fail if even one of the four requisite conditions is not met.

This discretion, according to Wayne La Farva, quoted by Soerjono Soekanto, entails making decisions that are not dictated solely by

legislation, but also factor in one's own values and preferences.¹¹ According to Wayne La Farva, government officials who like using their discretion must meet the following qualifications, which is consistent with article 24 of the State Administration Law:

1. In line with the discretionary goals laid out in Paragraph 2 of Article 22;
2. Complies with all applicable laws;
3. As per the Guiding Principles for Effective Government;
4. Reasonable assurances;
5. Doesn't include any potential conflicts of interest; And
6. Done in honest intent.

With description:

1. The term "objective reasons" refers to those that are grounded in the General Principles of Good Government and are founded on factual, unbiased, and rational considerations.
2. In this context, "good faith" refers to a choice or action that is made or taken in accordance with honesty and the AUPB.

Marcus Lukman, as cited by South P. Panjaitan, states that all truly pressing questions involve the following:

1. The issues that surface must be of significance to the public interest, which includes national and state interests, community interests, individual citizen interests, and development interests.
2. These issues appear out of the blue, disrupting our carefully laid plans.
3. This issue is left unregulated by statute or is only addressed in broad strokes, giving the executive branch and the public the leeway to work together to find a solution.
4. It is not possible to finish the task using standard administrative procedures, or doing so will result in a decrease in efficiency and effectiveness.
5. The public interest is at risk if this issue is not remedied as soon as possible.¹²

In Indonesia, discretion is implemented with reference to the foregoing idea of discretion as a legal source. Freedom of action has

¹¹ Soerjono Soekanto, *Faktor-faktor Yang Mempengaruhi Penegakan Hukum / Soerjono Soekanto* (Raja Grafindo, 2004), //senayan.iain-palangkaraya.ac.id/index.php?p=show_detail&id=1427&keywords=.

¹² S. F. Marbun dan Moh Mahfud MD, *Pokok-pokok hukum administrasi negara* (Yogyakarta: Liberty, 1987).

always been linked to government policy, with broad discretion given to policymakers. During both the old and new orders, discretionary decisions were often shielded by norms whose conditions and limitations were murky. Among these standards are public interests and public order. To protect the legitimacy of government acts that are not based on the interests of society, the government frequently hides behind abstract circumstances.

Wisdom as independent authority does not imply total autonomy. Independent power is not recognised by any institution in a state with a functioning legal system. Laws and regulations always place bounds on one's authority (both mandated and independent powers). A body's ability to exercise discretion is constrained without the authority provided by statute and regulation. The General Principles of Good Government, on the other hand, are norms of conduct for public servants who are tasked with governing the country.

Discretion is defined as "the power of a government agency or official that supports them in making choices and is not as free as freedom." in the State Administration Law, an attempt to codify the field of administrative law and also a normative source of government action. Decision-makers in government are subject to guidelines established by State Administration;

The purpose of discretion is actually the purpose of its own authority. Of course, lawmakers stray from their intended purposes when they endow the government with power. This is an exception to the general rule of lawfulness. The principle of legality states that all governmental bodies must operate in accordance with established rules of law. When referring to administrative law, the phrase "Dat het bestuur aan het wet is onderworpen" refers to this basis of legality.¹³ (that government is bound by law) or "Het legaliteitsbeginsel houdt in dat all (algemene) the burgers bindende bepalingen op de taal moeten beusten."¹⁴ (According to the principle of legality, all provisions that bind citizens must have a legal basis). The legitimacy of state action is based on the idea of legality, which also ensures the defence of human rights.

The Covid-19 epidemic shows how discretion can be used effectively in times of crisis. When a pandemic begins, the problem

¹³ WEJ TJEENK WILLINK ZWOLLE, "Rechtsfilosofie en Rechtstheorie," *Rechtsfilosofie en Rechtstheorie* 13 (1984): [i], <https://heinonline.org/HOL/Page?handle=hein.journals/njlp13&id=1&div=&collection=>

¹⁴ ZWOLLE.

requires swift and accurate handling, and often involves making judgements that are not precisely specified by current rules and regulations. Discretion is crucial in this situation.

Large-Scale Social Restrictions (PSBB) are one way in which the government has exercised its discretion in dealing with Covid-19. It's possible that the government wouldn't have the power to impose widespread bans on community events under normal circumstances. This discretion, however, becomes crucial in emergency situations like a pandemic to protect the public's health and safety. Discretion is also used in practise to determine additional regulations relating to managing Covid-19, such as restrictions on economic activities, restrictions on the mobility of persons, educational policies, and so on. Discretion gives the government the agility and precision it needs to implement each of these policies.

The State Administration Law stipulates that any discretion used must be consistent with existing laws and regulations, as well as founded on objective considerations and good faith. A process for monitoring and controlling the exercise of discretion is essential to ensuring that public interests are served and that power is not abused. The government must take into account many factors when adopting PSBB, including community requirements, the spread of the virus, the capacity of the health care system, and so on.

It's possible that this policy doesn't constitute an exemplary exercise of discretion if these considerations are ignored. As a result, whenever the government exercises such discretion, it owes it to the public to explain why it is doing so in a way that is both clear and transparent. This is crucial to preserving public confidence and facilitating widespread support for the policy's successful implementation. In conclusion, the Covid-19 epidemic does call for the government to use more discretion in formulating policies and making choices. This discretion, however, must be used in an ethical and transparent manner.

2. Discretion in Indian Law

Article 21 of the Indian Constitution (i.e., Right to Life, and the Government shall ensure that this right is not infringed upon) does not include the discretionary concept of the Right to Health; however, in the judgements *Consumer Education and Resource Centre v. Union of India* (1995), *State of Punjab and others v. Mohinder Singh Chawala* (1997), and

Paschim Banga Khet Mazdoor Samity v. State of West Bengal (1996), the Right to Health was included as.¹⁵ Therefore, the roles of the federal, state, and local governments (including panchayats and municipalities) cannot be overstated in ensuring that all individuals have access to quality medical care. Contrary to popular belief, "health emergencies" are not covered by the Indian Constitution's emergency clauses.

The Indian President has the authority to declare national, state, and financial emergencies under the Indian Constitution. Threats to national security from war, foreign aggression, or internal armed rebellion warrant the declaration of a national emergency. If there is a constitutional crisis, the state government declares a state of emergency. If a country's economy is in danger of collapsing, an emergency financial declaration will be made. Because restricting freedom of movement or adopting other extreme measures to stop the disease from spreading will have an effect on the population at large. During British colonial rule in India, the Epidemic Diseases Act, 1897 (EDA) was passed in response to an outbreak of bubonic plague in the then-named Bombay State (now Maharashtra State). Only four provisions of the 125-year-old statute remain in effect. John Woodburn, a member of the Council of the Governor General of India in Calcutta, described the law as "extraordinary" but "necessary" during its introduction in 1897 and emphasised that people should "trust to the wisdom of the executive in urgent and critical circumstances".¹⁶

Therefore, any action taken on the basis of the epidemic must consider every potentially catastrophic event. The "greater good" requires that the public not question such judgements. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2009), and Nipah virus (2018) were all contained in large part due to this rule. Only the EDA permits the use of lawful means to combat epidemics on a national or even regional scale.

On April 22, 2020, utilising powers under Article 123, the Modi Cabinet approved an ordinance to amend the EDA, as there had been incidences of attacks on health professionals. Section 3 of the EDA was revised due to ordinances. One may be sentenced to "imprisonment for a period of 3 months

¹⁵ Binod K. Patro, Jaya Prasad Tripathy, dan Rashmi Kashyap, "Epidemic Diseases Act 1897, India: Whether Sufficient to Address the Current Challenges?," *Journal of Mahatma Gandhi Institute of Medical Sciences* 18, no. 2 (September 2013): 109, <https://doi.org/10.4103/0971-9903.117796>.

¹⁶ M. Z. M. Nomani dan Rehana Parveen, "Covid-19 pandemic and application of disaster management act, 2005: Promises and pitfalls," *International Journal of Pharmaceutical Research* 12, no. 4 (2020): 3730–34, https://www.researchgate.net/profile/M-Nomani/publication/346720559_Covid-19_Pandemic_and_Application_of_Disaster_Management_Act_2005_Promises_and_Pitfalls/links/5feb479da6fdccdb8166e52/Covid-19-Pandemic-and-Application-of-Disaster-Management-Act-2005-Promises-and-Pitfalls.pdf.

to 5 years and a fine of Rs. 50,000/- to Rp.200,000/- " for "causing damage or loss to property."Health personnel who are the victims of aggression or physical assault face penalties including "incarceration for a period of 6 months to 7 years and a fine of Rs.100,000/- to Rp.500,000/." To add insult to injury, "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage."As the health department responsible for issuing guidelines and bulletins to other Central Government and state governments, the Ministry of Health and Family Welfare is heavily involved in guiding and advising states on COVID- '19.Since COVID- '19, the Secretary of the Ministry of Health and Family Welfare has held frequent press conferences to update the public. Regulations and notices were issued by state and UT governments under section 2 of the act concerning the steps to be taken to prevent the spread of COVID-19.¹⁷

However, the Seventh Schedule of the Constitution of India specifies that the central government and the state governments share responsibility for public health. Each level of government is responsible for enacting laws on a particular set of topics, as delineated by the List's Union List, State List, and Joint List.

The Indian government has shown considerable leeway in applying these regulations and statutes, however. The government has imposed a statewide lockdown in reaction to the pandemic, which might be seen as a violation of the individual liberties protected by Article 21 of the Constitution. It has also been shown that "executive discretion is in a precarious and critical state," a principle adopted by the British colonial authority in the original implementation of EDA.The relationship between executive discretion and applicable constitutional and legal standards must be taken into account when planning for and responding to the COVID-19 outbreak in India. In many respects, this discretion has been crucial in allowing governments to respond swiftly and effectively to the novel and unprecedented difficulties offered by the pandemic. However, the exercise of this discretion has also produced several problems and disputes about basic rights and good government.Some examples of executive discretion in urgent and severe situations are the employment of the EDA and the installation of a national lockdown. Some people, however, worry that these policies set a bad precedent for future government abuse of power and go

¹⁷ Richard Griffith, "Using public health law to contain the spread of COVID-19," *British Journal of Nursing* 29, no. 5 (12 Maret 2020): 326–27, <https://doi.org/10.12968/bjon.2020.29.5.326>.

against fundamental rights like the right to life and personal liberty that are guaranteed by the Constitution.¹⁸

The government's discretion has also created some real-world difficulties. For instance, the government revised the EDA to include stricter penalties for violators in reaction to attacks on health professionals. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.

It has been controversial and criticised that countries have a lot of leeway in how they respond to the pandemic. The government has been accused of abusing its power by violating the constitutional rights of its citizens.

The statewide lockdown instituted as a response to COVID-19 has been criticised as an infringement on fundamental freedoms protected by Article 21 of the Constitution. Even if the government claims that these actions were necessary to safeguard the public's health and safety, the lockdown's tough implementation and severe economic side effects have prompted widespread criticism and demonstrations. Some have also voiced concern that recent amendments to the Epidemic Diseases Act give the government and health professionals too much authority. However, there are worries that the new, harsher sanctions may be exploited, even though their stated purpose is to protect health workers from assault.

II. DISCRETION POLICY PATTERNS DURING THE COVID 19 PANDEMIC IN INDONESIA AND INDIA

The concept of legal discretion refers to a set of strategies and decisions adopted by the government to manage and guide people's behaviour in order to attain particular legal goals. Meanwhile, discretion (free policy) means that authorities can act or make choices based on their own interpretation of the law or the facts of a given case.¹⁹

¹⁸ Sangeeta Mahapatra, *Digital Surveillance and the Threat to Civil Liberties in India*, vol. 3, GIGA Focus Asien (Hamburg: German Institute for Global and Area Studies (GIGA) - Leibniz-Institut für Globale und Regionale Studien, Institut für Asien-Studien, 2021).

¹⁹ Maarten Pieter Schinkel, Lukáš Tóth, dan Jan Tuinstra, "Discretionary authority and prioritizing in government agencies," *Journal of Public Administration Research and Theory* 30, no. 2 (2020): 240–56, <https://academic.oup.com/jpart/article-pdf/doi/10.1093/jopart/muz018/33045851/muz018.pdf>.

There is a special relationship between these ideas during a pandemic. On the one hand, the rapid and unpredictable changes brought on by the pandemic call for legal rules that are both adaptable and responsive. However, discretion needs to be used cautiously to avoid infringing on citizens' fundamental rights.²⁰ There is a pressing need to find a middle ground between ensuring public safety and allowing people to maintain their personal liberties in the wake of the Covid-19 outbreak.²¹

"The legal response to the pandemic must be evidence-based, proportionate, and subject to scrutiny," says Stephen Thomson.²² There must be openness and responsibility in the use of discretion, and only extreme public health emergencies should warrant deviations from the norm.

Jack McNally, like many others, is of the opinion that extreme caution must be used during the epidemic. The document contends that "excessive use of discretion can create risks of abuse of power, injustice, and legal uncertainty, which can ultimately undermine public trust in the legal system and government".²³ Grogan also has another point of view: "the appropriate and prudent use of discretion in the face of a crisis such as the Covid-19 pandemic can serve as an important means to fill inevitable gaps in the law and to deal with extraordinary situations that cannot be anticipated by legislator."²⁴

This perspective recognises the critical role that discretion can play in stemming the pandemic, but stresses that it must be exercised fairly and proportionally. Thus, in the context of the Covid-19 epidemic, legal and discretionary policies are two sides of the same coin, both vital to delivering

²⁰ Joelle Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis," *Hague Journal on the Rule of Law* 14, no. 2–3 (Desember 2022): 349–69, <https://doi.org/10.1007/s40803-022-00168-8>.

²¹The pandemic presents unique challenges for democratic governance, with measures that often limit fundamental rights and can only be justified in certain circumstances. The urgency in dealing with the pandemic could conflict with the principles of separation of powers and the rule of law, bypassing ordinary processes and even potentially concentrating discretionary power in the executive. Look, Vageesh Jain, Jonathan Clarke, dan Thomas Beaney, "Association between Democratic Governance and Excess Mortality during the COVID-19 Pandemic: An Observational Study," *J Epidemiol Community Health* 76, no. 10 (1 Oktober 2022): 853–60, <https://doi.org/10.1136/jech-2022-218920>.

²² Stephen Thomson dan Eric C. Ip, "COVID-19 emergency measures and the impending authoritarian pandemic," *Journal of Law and the Biosciences* 7, no. 1 (2020): lsa064, <https://academic.oup.com/jlb/article-pdf/doi/10.1093/jlb/lsa064/37356468/lsa064.pdf>.

²³ Jack McNally, "Accountability, Discretion and the Rule of Law: Issues in Pandemic Policing," *Australian Public Law*, diakses 9 November 2023, <https://www.auspublaw.org/blog/2020/07/accountability-discretion-and-the-rule-of-law-issues-in-pandemic-policing>.

²⁴ Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis."

an effective and fair response to the challenges posed by the pandemic, provided they are handled with prudence and thoughtful consideration.

It is essential that discretion not be abused to do injury to individuals or groups, or to evade accountability in the court of law. Therefore, in the context of the epidemic, it is vital for governments and legal authorities to find the correct balance between the need to take rapid and effective action to protect public health, and the need to maintain legal principles and human rights. Not an easy assignment, but it's crucial to make sure the pandemic reaction is not just successful in stopping the virus' spread, but also just and considerate of people's rights.

In light of the foregoing, we now examine the prevailing legal and discretionary policy tendencies in Indonesia during the Covid-19 epidemic²⁵ and India,²⁶ It's crucial to remember that different specialists place emphasis on different aspects of discretionary issues and approach concepts. As a result, we should begin by analysing Indonesia's response to the Covid19 epidemic in terms of its discretionary policies.

Indonesia has a pluralistic legal system, which means that in addition to state law and religion law, there is also customary law. The Indonesian government has issued a number of restrictions and measures in response to the Covid-19 outbreak. The country of Indonesia as a whole The government's primary legal and regulatory basis for dealing with pandemics, including the Covid-19 Pandemic, is Law Number 6 of 2018 concerning Health Quarantine. However, the law does not yet control technical problems in handling the Covid-19 epidemic. The government's attempt to provide the public with some kind of legal clarity while also reducing the spread and fatalities caused by the Covid-19 outbreak. Among the many rules and regulations enacted by the government are:

²⁵According to Law Number 30 of 2014 concerning Government Administration, Article 1 number 9 states that discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of statutory regulations that provide choice, non-regulating, incomplete, or unclear, and/or government stagnation. Article 22 paragraph (2) states that discretion aims to streamline government administration, fill legal gaps, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest.

²⁶In the Indian legal system, legal discretion refers to the power or authority granted to government bodies or officials to make decisions in the performance of their official duties. This discretion is necessary because not all situations can be specifically regulated by law, so public officials need flexibility to adapt their actions to different conditions.

One of the important laws that gave discretion to officials in India was the Epidemic Diseases Act of 1897. This law is a classic example of how legal discretion is given to deal with public health emergencies, such as pandemics. During COVID-19, this law empowers the central and state governments to take actions deemed necessary to control the spread of infectious diseases.

1. Large-Scale Social Restriction Government Regulation No. 21 of 2020 in the Context of Rapidly Addressing Corona Virus Disease 2019 (Covid-19).
2. Public Health Emergency Due to the 2019 Corona Virus Epidemic (COVID-19): Decree No. 11 of the President of the Republic of Indonesia, 2020.
3. Health Minister's Order No. 9 of 2020: Social Restriction Guidelines in the Context of Rapid Response to Corona Virus Outbreaks.
4. Several directives from the Minister of Home Affairs restricting emergency community activities in the Java and Bali regions due to the 2019 Corona Virus Disease.

President Joko Widodo and his administration have repeatedly stated from the beginning of the epidemic in 2020 that regional quarantine will not be implemented. Jokowi ruled out a lockdown, saying it would have a negative impact on the economy.²⁷ Due to the far-reaching effects of quarantining entire regions. Therefore, the president and his team emphasised that only large-scale social limitations should be applied because the economy must continue to run. Government Regulation No. 11 of 2020, together with Minister of Health Regulation No. 9 of 2020 Regarding PSBB Guidelines, both reinforce the government's decision to solely enact Large-Scale Social Restrictions (PSBB). There were issues with the Government Regulation's substance because of PSBB. In this study, we'll go deeper into the three most pressing problems that surfaced when the government released its regulation on PSBB. The health emergency situation decided by President Joko Widodo by the issue of Presidential Decree Number 11 of 2020 addressing the determination of health emergency status is the basis for Government Regulation No. 11 of 2020 which regulates PSBB above. The two issues that resulted from this are elaborated upon in the following study.

PPKM, which stands for the Instruction of the Minister of Home Affairs on the Implementation of Emergency Community Activity Restrictions, is the most up-to-date rule regulating the management of the Covid-19 epidemic. Several Ministerial Instructions from the Ministry of Home Affairs were issued by the government with regards to PPKM. Beginning with Instruction of the Minister of Home Affairs No. 15 of 2021 about Emergency PPKM and ending

²⁷ Kompas Cyber Media, "Jokowi Akhirnya Blak-blakan soal Alasan Tak Mau Lockdown... Halaman all," KOMPAS.com, 1 April 2020, <https://nasional.kompas.com/read/2020/04/02/05405561/jokowi-akhirnya-blak-blakan-soal-alasan-tak-mau-lockdown>.

with Instruction of the Minister of Home Affairs No. 12 of 2022 regarding Micro PPKM.

By looking at the rules that were put in place following the CoVD19 epidemic, it is easy to see that we are under a time crunch that necessitates the elimination of red tape in order to have administrative policies implemented. According to Garry Goodpaster, who discussed the significance of Administrative Procedure Law for Indonesia, the most vital part is that all types of policy still adhere to sound administrative procedures:²⁸

“Administrative performance in Indonesia might be greatly enhanced by the passage of a law mandating openness and transparency in all administrative bodies, including those at the local level (an Administrative Procedure Law). Doing so would also set the stage for a robust system of regulatory scrutiny”.

Accordingly, the exercise of discretion is crucial in exceptional circumstances where statutory regulations either fail to provide clear direction or are insufficient to address the relevant issues at hand. The Indonesian government has used its discretion to adopt a number of legislation and regulations in response to the Covid-19 outbreak. This discretion helps to close the gap between the law and the ever-evolving reality on the ground, which is especially important in times of crisis like the recent Covid-19 outbreak.

However, exercising discretion still requires due diligence and deliberation. A number of stipulations are laid down in Law No. 30 of 2014²⁹ which must be met in using discretion: discretion can only be used if laws and regulations provide options but do not regulate, are incomplete or unclear, and/or there is governmental stagnation; the use of discretion must be based on public interest and justice; and the use of discretion must be carried out proportionally, professionally, objectively, fairly, and accountably.

However, the Infectious Diseases Act of 1897 and the Disaster Management Act of 2005 provide the Indian government extensive authority

²⁸ M. Ikbar Andi Endang, “Diskresi Dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan/Discretion and Responsibility of Government Officials Based on Law of State Administration,” *Jurnal Hukum Peratun* 1, no. 2 (2018): 223–44, <https://pdfs.semanticscholar.org/2c4c/1f71ec37a19de98e22022e5ceee8fe259bf8.pdf>.

²⁹For further information, see Chapter VI, Articles 22-32 (10 Articles), covering content material consisting of the general part of discretion (Article 22), scope of discretion (Article 23), discretionary requirements (Articles 24-25), procedures for using discretion (Article 24-25). Articles 26-29), the consequences of discretionary law (Articles 30-32).

over the management of public health crises in that country.³⁰ Both statutes offer a legislative framework that permits the federal and state governments to take special steps to respond to health emergencies such as pandemics. Having the freedom to craft their own policies gives states the leeway to tailor initiatives to meet specific regional requirements.

However, this exercise of legal discretion creates various obstacles. Uncertainty and disunity in response to the epidemic could be one of them. Since different states take different approaches, the public and relevant parties may be left wondering what rules actually apply. In addition, if the regulations enacted are seen as too restrictive or enforced in a discriminatory fashion, such discretion could lead to civil rights breaches.³¹

However, governments' swift and targeted responses to new threats are greatly facilitated by their discretionary powers. The ability to act quickly, without waiting for a protracted legislative procedure, is crucial in a rapidly developing crisis scenario, such as the spread of a disease. The potential for misuse of authority is increased, however.

Both countries, despite their distinct methods and legal systems, stress the need for discretion in dealing with the pandemic. One example of discretionary government action in Indonesia is the imposition of quarantine and social restrictions, while in India, it is the choice of various states to implement and adjust public health programmes.

The Indonesian government has responded to the pandemic in a number of ways, some of which have been more arbitrary than others. The government has discretion in choosing the nature and extent of quarantine measures necessitated, for instance, while carrying out Health Quarantine Law No. 6 of 2018.³² At the start of the pandemic, the government chose to implement what are known as "Large-Scale Social Restrictions" (PSBB), a form of social quarantine that is more flexible than a total lockdown.³³ Governments are given this leeway so that they can respond to changing circumstances and take into account a wide range of considerations, including the potential socioeconomic

³⁰ Ayushi Bajaj dan Gaurav Datt, "Financing of Fiscal Response to COVID-19: A Pragmatic Alternative," *Indian Economic Review* 55, no. 1 (1 November 2020): 149–60, <https://doi.org/10.1007/s41775-020-00090-6>.

³¹ Lekha Chakraborty dan S. Harikrishnan, "COVID-19 and Fiscal-Monetary Policy Coordination: Empirical Evidence from India," SSRN Scholarly Paper (Rochester, NY, 7 Februari 2022), <https://doi.org/10.2139/ssrn.4028927>.

³²See, Article 55, Law of the Republic of Indonesia Number 6 of 2018 concerning Health Quarantine

³³See, Government Regulation no. 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Corona Virus Disease 2019 (COVID-19)

effects of their decisions.³⁴ However, there are also several obstacles that must be overcome while using this discretion. The problem of ambiguity in the law is one of them. For instance, it is not entirely clear how the PSBB should be implemented or what kinds of exemptions are allowed. Some people are confused and sceptical as a result of this.

There are also worries about fundamental rights being violated and discretion being abused. Therefore, it is crucial for the government to make decisions with openness and accountability, and to base their decisions on sound science. Meanwhile, in the Indian context, the discretionary use of the Act. Infectious Diseases Act of 1897 (Epidemic Diseases Act, EDA) and the Disaster Management Act of 2005 (Disaster Management Act, DMA) in response to the COVID-19 pandemic has taken the form of their activation.³⁵ In light of a public health emergency on a scale not seen in India since independence, the central government has ordered the country's states to utilise the EDA as a legal foundation for implementing emergency measures to contain the virus. Central government has used the DMA to take strategic action and coordinate responses to the pandemic.

The EDA, enacted in the late 19th century, gave the government broad authority to respond swiftly and uniquely to epidemics of communicable diseases.³⁶ The necessity to amend and modernise this regulation, however, has become apparent in light of the difficulties inherent in predicting the complex modern nature of a pandemic like COVID-19. However, DMAs have been implemented to give a larger framework for emergency coordination and aid in more generic disaster scenarios.

Following this logic, we can summarise how Indonesia and India differ in their discretionary responses to the Covid 19 epidemic:

Aspect	India	Indonesia
Legal basis	- Regulation of Epidemics Act (1897) and the Disaster Management Act of 2005	- The Health Quarantine Act of 2018 (Law No. 6), the Disaster Management Act of 2007 (Law No. 24), and the Infectious Disease

³⁴ Reza Yustiyanto, "Diskresi Pemerintah Dalam Penanganan Pandemi Covid 19 Berdasarkan Undang-Undang Nomor 2 Tahun 2020," *Jurnal Restorasi Hukum*, 5, no. 1: 1–30, diakses 9 November 2023, <https://ejournal.uin-suka.ac.id/syariah/jrh/article/view/2382>.

³⁵ Kiran Kumar Gowd, Donthagani Veerababu, dan Veeraiahgari Revanth Reddy, "COVID-19 and the Legislative Response in India: The Need for a Comprehensive Health Care Law," *Journal of Public Affairs* 21, no. 4 (November 2021): e2669, <https://doi.org/10.1002/pa.2669>.

³⁶ Patro, Tripathy, dan Kashyap, "Epidemic Diseases Act 1897, India."

Aspect	India	Indonesia
		Outbreak Act of 1984 (Law No. 4)
Implementation of Discretion in Handling the Pandemic	- The power to formulate and enact laws rests with the federal and state governments.	- Both the federal and state governments have the power to make and carry out policy. Capacity to enact Policies of Mass Social Restriction (PSBB) and Related Measures.
Control and Accountability	- Managed by checks and balances in the legal system. Parliamentary and media discussion and criticism provide a forum for public accountability in politics.	- Legislative and auditing bodies provide the necessary oversight. Responsibility enforced by means of judicial and public review.
Impact of the Application of Discretion	- Introducing disorder and inconsistency into pandemic response. Can lead to human rights abuses, but also allows for targeted interventions. danger of power misuse.	- Disparities in regional policy implementation are possible. The adoption of PSBB and associated measures may pose a risk of civil rights abuses. Allows for quick adjustments and replies.

Source: Analysis Results

Both Indonesia and India have chosen to respond to the COVID-19 epidemic independently, with varying degrees of success. The usefulness and impact of using this discretion should be evaluated in light of the local context, which might vary greatly depending on the country or location.

In terms of legal basis, both India and Indonesia have regulatory instruments meant to manage health emergencies. India uses the Disaster

Management Act, which was passed in 2005, and the Epidemic Diseases Act, which dates back more than a century. When it comes to dealing with pandemics and natural calamities, however, Indonesia follows a different set of rules. It's possible that the emphasis placed on various policies, and the flexibility with which the law responds to new situations, account for these varying legal foundations.

When it comes to tackling the pandemic, both nations give power to local and state governments to make their own decisions. This reflects the understanding that local governments are best suited to address the unique challenges of their communities. However, difficulties in developing a unified and consistent response across nations arise from this decentralised strategy.

The requirement for speed in responding to the pandemic must be balanced with safeguards to prevent abuse of authority, and this is a challenge for both countries. Oversight and accountability in India mostly occur through the legal system and parliamentary discussion. Accountability for policies and practises is promoted in Indonesia through legislative regulation and audit.

Finally, the impact of the exercise of discretion in these two circumstances indicates that while discretion gives the flexibility essential for swift and locally appropriate responses, it also presents hazards that are no less important. Concerns concerning civil rights violations and possible misuse of power exist in both nations. However, in times of crisis like the current COVID-19 outbreak, speed of response is generally regarded as crucial.

Both countries have established legal frameworks and processes to cope with pandemic scenarios, as this analysis shows; yet, adjusting these laws to meet unexpected problems calls for a flexible but regulated approach. Important lessons for the future of legal reform in both nations can be gleaned from this experience.

III. INDONESIAN AND INDIAN DISCRETIONAL POLICY CHALLENGES AND STRATEGIES REGARDING ASPECTS OF THE COVID 19 PANDEMIC

India, like the rest of the world, is having trouble responding to the spread of COVID-19, especially in 2020 when so little is known about the virus. India, with its own distinct legal system, exercises similar legal discretion when dealing with COVID-19. The Indian government imposed a statewide

lockdown within the bounds of the law.³⁷ This leeway is also utilised to address social problems that have surfaced during the pandemic, such as the spread of misinformation and prejudice.³⁸

In Indonesia, legal discretion is also an important part of handling the COVID-19 epidemic. Decisions on movement restrictions, restricting economic sectors, and enforcing health protocols are made in Indonesia using legal discretion, as is the case in the United States and India. False information and discrimination against particular groups have become problems in Indonesia during the pandemic, much as they have in India. Through the Information and Electronic Transactions Law and other relevant rules, the Indonesian government exercises its legal discretion to crack down on violators and the dissemination of misleading information. Government and civil society organisations take measures including public education and law enforcement to combat discrimination, as required by applicable laws.

India and Indonesia, among others, are using legal discretion as a key instrument in their response to the pandemic. With this leeway, governments are better able to respond to shifting circumstances and tailor policy initiatives to each nations' need.

Regarding the COVID-19 pandemic, Indonesia's discretionary strategy has various possible flaws:

1. **Accountability and Openness to the Public:** Discretion in the enforcement of laws might create issues with openness and responsibility. Distributive economic stimulation initiatives in Indonesia carry the risk of misuse and corruption if they are not carefully controlled and administered.
2. **Ineffectiveness of Aid Distribution:** Discretion in the provision of financial aid might become problematic when there are no established, public standards for determining eligibility. As a result, aid distribution may become inequitable and inefficient.
3. **Challenges in Putting Policies Into Action:** Regulations for pandemic management may be implemented and enforced in a variety of ways due to the leeway afforded to local governments. This may hinder the efficiency and efficacy of national policymaking.
4. **Violations of human rights and discrimination:** When discretion is used to oppress certain groups or to impede freedom of speech and

³⁷ Deena Dimple Dsouza dkk., "Aggregated COVID-19 suicide incidences in India: Fear of COVID-19 infection is the prominent causative factor," *Psychiatry Research* 290 (1 Agustus 2020): 113145, <https://doi.org/10.1016/j.psychres.2020.113145>.

³⁸ Griffith, "Using public health law to contain the spread of COVID-19."

information, it can lead to discrimination and human rights breaches in the context of misleading information and law enforcement.

This suggests that in many countries, like India and Indonesia, the use of judicial discretion is crucial in responding to the COVID-19 pandemic. As a result, governments are better able to adapt to new circumstances as they arise by developing and enacting policies that are both effective and adaptable to local circumstances. There are concerns with the use of discretion in the law. The potential for discrimination and human rights breaches, as well as other implementation weaknesses such as a lack of transparency and accountability, ineffective aid distribution, and challenging policy implementation, must be foreseen and controlled effectively.

For Indonesia, this means prioritising human rights principles in all legal actions, increasing transparency and accountability in the use of judicial discretion, making it easier to determine who qualifies for financial aid, improving coordination between the national and regional levels of government, and so on.

Therefore, all important and crucial aspects must be considered in any action based on the outbreak. The "greater good" necessitates that the people not oppose such policies. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2014), and Nipah virus (2018) were all contained in large part due to this rule. In the event of a national or subnational epidemic, the EDA is the sole law that can be used to intervene legally. As there had been attacks on health professionals, on April 22, 2020, the Modi Cabinet used their Article 123 powers to draught an ordinance amending the EDA. Ebola Virus Disease Act (EVD) Section 3 of the Ordinance Was Amended. In the event of property destruction or loss, violators face "imprisonment for a period of 3 months to 5 years and a fine of Rs. 50,000/- to Rp.200,000/-." In cases of violence and physical attacks on health workers, they can be imprisoned "for a period of 6 months to 7 years and with a fine of Rs.100,000/- -to Rp.500,000/." And "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage." When it comes to COVID- '19, the Ministry of Health and Family Welfare takes the lead, leading and advising states. This is because it is the health agency responsible for issuing instructions and bulletins to other ministries of the Central Government and state governments. The Secretary of the Ministry of Health and Family Welfare (MoHFW) has been giving news conferences regularly since COVID- '19. Regulations and notices were issued

by state and UT governments under section 2 of the act concerning the steps to be taken to prevent the spread of COVID-19.³⁹

However, the Seventh Schedule of the Indian Constitution allocates public health duties between the federal government and individual states. The Union List, State List, and Joint List delineate the areas of jurisdiction for the federal government and individual states, respectively. In addition to being included in all three of these categories, public health lawmaking authority rests with both the federal and state levels of government. The Indian government, however, has shown a great deal of leeway in applying these regulations and statutes in practice. The government has imposed a statewide lockdown in reaction to the pandemic, which might be seen as a violation of the individual liberties protected by Article 21 of the Constitution. As the British colonial administration did first while enforcing the EDA, the government had shown "executive discretion in critical and critical situations".

The relationship between executive discretion and applicable constitutional and legal standards must be taken into account when planning for and responding to the COVID-19 outbreak in India. This leeway has been important in helping governments meet the novel and extraordinary difficulties faced by the pandemic with agility and efficiency. The use of this discretion, however, has resulted in a number of problems and debates about fundamental rights and effective government. For example, use of the Epidemic Disease Act (EDA) and the installation of a statewide lockdown might be considered as an example of the exercise of executive discretion in insecure and crucial circumstances. Others, however, worry that setting such a high bar for government overreach would be a violation of fundamental Constitutional rights like the right to life and the right to personal liberty.⁴⁰

The government's discretionary actions have also created real-world complications. Attacks on health professionals have prompted policy changes like those made to the Epidemic Disease Act (EDA) to increase sanctions for those responsible. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.⁴¹

³⁹Griffith, R. (2020). Using public health law to contain the spread of COVID-19. *British Journal of Nursing*, 29(5), 326–327

⁴⁰ Tanushka Sharma dan Arunima, "Management of Civil Liberties During Pandemic," *Indian Journal of Public Administration* 67, no. 3 (1 September 2021): 440–51, <https://doi.org/10.1177/00195561211035931>.

⁴¹ Shivangi dan Laxman S. Meena, "A Comprehensive Review of COVID-19 in India: A Frequent Catch of the Information," *Biotechnology and Applied Biochemistry* 68, no. 4 (Agustus 2021): 700–711, <https://doi.org/10.1002/bab.2101>.

While governments have a high degree of discretion in responding to the pandemic, it's no secret that the pandemic has been met with a fair share of scepticism and criticism. The government has been accused of abusing its power by taking measures that go against the rights of its citizens. Some have complained that the statewide lockdown implemented to combat COVID-19 infringes on people's rights protected by Article 21 of the Constitution. The government may claim that these actions were necessary to safeguard the health and safety of the population, yet widespread criticism and demonstrations have resulted from the lockdown's tough implementation and severe economic consequences. Changes to the Epidemic Diseases Act have also been criticised for allegedly giving the government and health professionals too much authority. The new regulations are supposed to keep medical professionals safe from harm, but some worry that the strict punishments may be misused.

India and Indonesia are taking a discretionary strategy to combating the COVID-19 epidemic by combining international cooperation with in-country adjustments. The two nations' approaches to discretion are very different, notably in terms of cross-border cooperation and openness.

In contrast, Indonesia takes a more decentralised strategy. While the federal government establishes broad guidelines, state and local governments are responsible for carrying them out. Large-scale social restriction (PSBB) policies reflect this reality; these policies vary from region to region based on the prevalence of COVID-19. Although this method is adaptable, it creates difficulties in coordinating between national and local governments and leads to inconsistencies and ambiguity in pandemic response.

Similar to India, Indonesia can allow a swift and targeted response to the COVID-19 pandemic by delegating authority to the central and regional governments to establish their own pandemic strategies. But there must be safeguards against arbitrary rule and human rights breaches.

1. **Transparency and Consistency in Policymaking:** There needs to be nationwide uniformity in how the government handles pandemics. All policy decisions and their rationales, as well as details on how they will be carried out, must be made public.
2. **Accountability and Supervision:** To make sure discretion is utilised correctly and efficiently, there must be a rigorous system of checks and balances. If there is an instance of discretionary abuse, there must be consequences.
3. **Evidence-based:** Decisions about policy should be based on evidence, not ideology. This is crucial for ensuring that the policies implemented

to combat the epidemic are not detrimental to society while also being effective.

Infectious illness prevention and treatment are governed at both the federal and state levels in India. The Public Health Protection Act gives the federal government the power to establish national standards for the prevention and treatment of communicable diseases, while individual states have the power to establish similar standards within their own borders. However, there are many disagreements and conflicts between federal and state governments regarding who is accountable for combating infectious diseases like COVID-19. This analysis demonstrates that, similar to COVID-19, local governments play a vital role in the fight against infectious illnesses worldwide. Central government appears to play a key role in infectious disease control through coordination and funding.

Evidence from around the world suggests that exercising restraint when responding to pandemics like COVID-19 is essential. Discretion gives flexibility for governments, both national and regional, to respond to varied situations in distinct regions. However, there is a danger that discretion could lead to misuse of authority.

Indonesia needs to think about a few things if it wants to use its discretion efficiently and responsibly. The first step is to establish each level of government's specific duties and responsibilities. Second, there must be openness and uniformity in how policies are carried out. Third, there should be robust systems for oversight and accountability in place to avoid and redress discretionary abuses. Finally, scientific evidence, not political considerations, must inform policy.

Important in realising perfect discretion in dealing with the pandemic is the revision of various articles in Law Number 6 of 2018 concerning Health Quarantine and other rules. Changes in policy and procedure, as well as enhanced national and local government capability, are essential to the successful implementation of legal reforms.

Taking India's experience with the COVID-19 epidemic into account, an optimal legal construction in Indonesia may contain the following changes to local laws and characteristics:

1. **Improved Harmonisation and Coordination:** Indonesia could learn from India's Disaster Management Act and create or improve procedures for central and regional governments to coordinate their responses to the pandemic. One possible mechanism for achieving this goal would be the establishment of dedicated boards or commissions whose job it would be

to coordinate a unified response while allowing for enough leeway at the regional level to adapt to unique circumstances.

2. **The Accountability Framework and Its Use of Discretion:** To account for the discretion given to local governments in Indonesia, similar to India's use of the Epidemic Diseases Act, clear criteria governing when and how this power can be used must be established. Better monitoring systems are needed to make sure that responses are appropriate and in line with human rights standards.
3. **Fortifying a Clear Legal Foundation:** To better deal with the pandemic crisis, Indonesia has to alter its legal base, possibly by revisiting the Law on Health Quarantine. The situation in India demonstrates the importance of passing new laws to deal with the unique difficulties of the current pandemic.
4. **A Well-Defined Procedure for Limiting Public Events:** In contrast to India's unexpected lockdowns, which have the potential to generate confusion and socioeconomic upheaval, Indonesia may need to set clear and precise instructions for applying Community Activity Restrictions.
5. **Honesty and clear communication:** Indonesia may learn to promote openness in decision making and ensure good communication between the government and the public by looking at the challenges India has had in these areas and adapting their own strategies.

The lessons that Indonesia could learn from India's legal system include the importance of creating a system that is both centralised and decentralised, has well-defined powers and responsibilities to prevent abuse of authority, and promotes civic engagement and trust through openness and clear communication.

CONCLUSION

The contrasts and difficulties in India and Indonesia's responses to the COVID-19 epidemic are highlighted by a comparison of their respective discretionary strategies. However, India's central government has a lot of say over how the country deals with a pandemic because to laws like the Epidemic Disease Act (EDA) and the Disaster Management Act (DMA). Indonesia, on the other hand, employs a decentralised strategy that allows local governments more leeway to tailor policies to local situations within the context of a national framework.

Similar difficulties in coordinating amongst different tiers of administration exist in both nations. In India, this issue occurs as a mismatch

between federal policies and their execution at state and local levels. Also, differences in approach between regional and central administrations in Indonesia can cause coordination issues. This may cause confusion and inconsistent application of policies. Similar to the difficulties Indonesia has had in understanding and implementing existing laws to pandemic crises, India has come under fire for relying on archaic colonial legislation (EDA) that is unprepared to cope with current pandemics. There is a need for regulations in both nations that may serve as clear guidelines while also accommodating unique regional circumstances.

In order to better respond to future pandemics, the legislation must be strengthened in both nations. A better legal framework for pandemic prevention and management measures may need new public health legislation in India, while current laws in Indonesia may need to be revised and strengthened. Both nations place a premium on openness and responsibility. Boosting openness and responsibility in India would boost public confidence, whereas in Indonesia it will boost regional policy implementation efficiency. In this respect, both nations have much to teach one another. While India might take notes from Indonesia's decentralised strategy to better equip local governments to adapt to unique local situations, Indonesia could learn from India's robust national framework for pandemics.

When it comes to the COVID-19 pandemic in both countries, the best construction of discretionary policy will involve balancing a centralised response for efficiency with local discretion for effectiveness, all while adhering to accountability, proportionality, transparency, respect for human rights, and the principles of justice.

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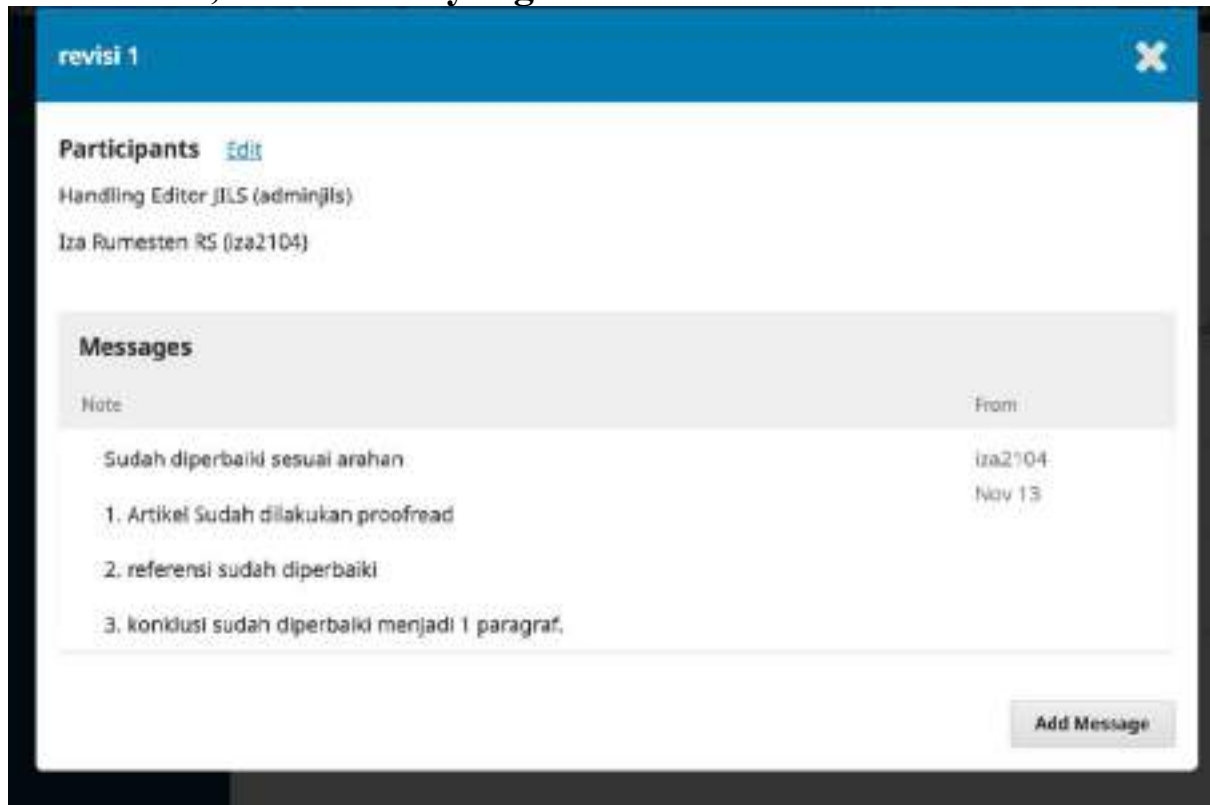
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4. Bukti konfirmasi submit revisi pertama, respon kepada reviewer, dan artikel yang diresubmit



RESEARCH/REVIEW ARTICLE

STRATEGIES IN A CRISIS: A COMPARATIVE STUDY OF THE APPLICATION OF DISCRETION IN MANAGING THE COVID-19 PANDEMIC IN INDONESIA AND INDIA

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ABSTRACT

This research aims to analyze and compare the discretionary policy patterns adopted by India and Indonesia during the COVID-19 pandemic. This research focuses on two main aspects: first, the structure and application of discretionary policies set by the central government in both countries; second, challenges and strategies in implementing these policies at the local level and responding to the dynamics of the pandemic. This research methodology involves analysis of relevant legal and policy documents, review existing literature, and conceptual and philosophical interpretation of discretionary policies in pandemic management. The research results show that India and Indonesia have different approaches to implementing discretionary policies. India uses a more centralized system, while Indonesia takes a decentralized path. Both countries need help in coordination between levels of government, with India facing difficulties in aligning central and state policies and

Indonesia needing help with divergence between central and local governments. In addition, both countries must revise or create more adaptive and dynamic legislation that combines legal force with flexibility to respond to rapidly changing pandemic conditions. Transparency and accountability in discretionary policy are crucial elements that must be strengthened in both countries to build public trust and ensure effective and fair policy implementation.

Keywords: Discretionary, COVID-19, Indonesia, India, Policy

INTRODUCTION

This year's coronavirus illness (COVID-19) is the sixth pandemic since the 1918 flu pandemic, and it has already infected almost every country on the planet. Since late December 2019, when the first case was reported, Wuhan, China, has been experiencing an epidemic of a novel strain of human pneumonia. Symptoms started appearing no earlier than December 1, 2019. Viral pneumonia was identified as the cause of this patient's symptoms of fever, lethargy, dry cough, and dyspnea.⁴²

The media first labeled the illness "Wuhan pneumonia" due to the location and the fact that the symptoms resembled pneumonia. DNA sequencing of the whole genome identified the novel coronavirus as the culprit.⁴³ Thus, this virus is the eighth human-infecting member of the coronavirus family. On January 12, 2020, the World Health Organisation (WHO) gave the new virus the provisional name 2019 coronavirus (2019-nCoV), and on February 12, 2020, the WHO issued the infectious illness the official designation 2019 coronavirus disease (COVID-19).⁴⁴ The Covid-19 epidemic is becoming a severe challenge for medical professionals and governments. Governments in different nations must make swift and effective measures to safeguard their citizens in the face of a disaster of this size. In this case, the idea of discretion is crucial.

In Indonesia, discretion is defined as a decision and action determined and implemented by government officials to overcome specific problems administrators face if the governing laws and regulations need to be completed

⁴² Chaolin Huang dkk., "Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China," *The Lancet* 395, no. 10223 (15 Februari 2020): 497–506, [https://doi.org/10.1016/S0140-6736\(20\)30183-5](https://doi.org/10.1016/S0140-6736(20)30183-5).

⁴³ DNA sequencing or DNA sequencing is a process or technique for determining the sequence of nucleotide bases in a DNA molecule. This sequence is known as the DNA sequence, which is the most basic information about a gene or genome because it contains the instructions needed for the formation of a living body. Look Kara Rogers, *New Thinking About Genetics* (Britannica Educational Publishing, 2010).

⁴⁴ Na Zhu dkk., "A Novel Coronavirus from Patients with Pneumonia in China, 2019," *New England Journal of Medicine* 382, no. 8 (20 Februari 2020): 201, <https://doi.org/10.1056/NEJMoa2001017>.

or clarified and there is stagnation. from the government. Article 22(2) of the Law states that discretion may be used for the following reasons:

5. simplify the workings of government;
6. remedy legal flaws;
7. ensure legal stability; and
8. Fourth, breaking through bureaucratic logjams when necessary in the sake of the public good.

In addition, article 24 of the Law stipulates the following standards for the exercise of discretion:

1. in line with the goals of the Authorization;
2. avoids breaking any rules set down by applicable legislation;
3. consistent with the guiding principles of sound administration;
4. for very good reasons;
5. does not include any potential for bias; and
6. acted upon with no malice intended.

With the goals above and requirements in mind, all of the articles of these laws must be followed by government authorities while exercising their discretion. Naturally, this will check the government's ability to act arbitrarily and restrict its freedom of action. Corona Virus Disease 19 (COVID-19) is a global pandemic that has already devastated the economies and societies of many nations, including Indonesia. The government must take swift and appropriate steps to offer instruction or reach the larger population in response to the rapid proliferation of COVID-19. In truth, governmental actions must comply with established laws. However, the current set of rules and regulations needs to be revised. For this reason, the government provides policies based on discretion since it is considered speedier than drafting rules.

The Indonesian government has issued three decrees to curb the spread of the coronavirus disease 2019 (COVID-19): (1) Decree of the President of the Republic of Indonesia Number 11 of 2020 Concerning the Determination of a Public Health Emergency for Coronavirus Disease 2019 (COVID-19); (2) Government Decree Number 21 of 2020 Concerning Large-Scale Social Restrictions in the Context of Accidents Related to the Coronavirus Disease 2019 (COVID-19); and However, this legal stance was highly criticized, and the laws were seen as coming too late; as a consequence, the federal and state administrations were unprepared to deal with the Covid-19 epidemic.⁴⁵

⁴⁵ Ali Roziqin, Syasya Y.F. Mas'udi, dan Iradhad T. Sihidi, "An analysis of Indonesian government policies against COVID-19," *Public Administration and Policy* 24, no. 1 (1 Januari 2021): 92-107, <https://doi.org/10.1108/PAP-08-2020-0039>.

Like Indonesia, India was on the cusp of worldwide panic in late January 2020 about the epidemic that would characterize the modern age. As the world learned of the severity of COVID-19, India reported its first case, marking a watershed moment that prompted introspection on the country's convoluted healthcare system and the weighing of human liberties against the need for immediate public health actions. On the same day, the World Health Organisation (WHO) declared a worldwide public health emergency, an early warning for India and other nations to prepare a response.⁴⁶

The Indian government took the extreme measure of instituting a nationwide lockdown as they spent almost two months trying to comprehend the scope and pace of the virus's spread. One of the world's most significant initiatives to contain the virus has shut down businesses, schools, and other public institutions.⁴⁷ However, the economic damage quickly became apparent and calls to reopen became louder as the urgency of economic and social recovery grew.

With the arrival of better weather and renewed optimism in June, India slowly started to revive its economy. The action is a balancing act between preventing the spread of the virus and helping industries suffering because of the limitations. However, there is cause for optimism as the recovery rate continues to rise despite new cases continuing to arise, generating hotspots that need quick care.⁴⁸

As Indians try to come to this new reality, debates about the country's legal and constitutional structure have heated up. The Indian Constitution is now under scrutiny because it guarantees everyone the right to health care and a reasonable standard of living. Concerns have been raised concerning the appropriateness of limiting personal liberties in the name of public health.

The constitutional provisions regarding health care, such as the state's obligation to look out for the interests of its employees and give aid in times of need, like sickness, took on new significance. India has a complicated federal system, with the states and union territories having some say over health policy and execution.

⁴⁶ Gorkem Sariyer dkk., "Fiscal responses to COVID-19 outbreak for healthy economies: Modelling with big data analytics," *Structural Change and Economic Dynamics* 64 (1 Maret 2023): 191–98, <https://doi.org/10.1016/j.strueco.2022.12.011>.

⁴⁷ Aritra Ghosh, Srijita Nundy, dan Tapas K. Mallick, "How India is dealing with COVID-19 pandemic," *Sensors International* 1 (1 Januari 2020): 100021, <https://doi.org/10.1016/j.sintl.2020.100021>.

⁴⁸ Justina Jose, Priyanka Mishra, dan Rahul Pathak, "Fiscal and monetary response to the COVID-19 pandemic in India," *Journal of Public Budgeting, Accounting & Financial Management* 33, no. 1 (1 Januari 2020): 56–68, <https://doi.org/10.1108/JPBAFM-07-2020-0119>.

The disparity in authority between the federal government and the states is especially apparent in the current climate of crisis. A successful response to the epidemic requires careful navigation of the distribution of authorities outlined in the Union List, States List, and Joint List of the Indian Constitution. Parliament has power over Union List items, while state legislatures have control over State List items; nevertheless, in times of crisis, both levels of government must cooperate.

In many parts of the globe, such as Indonesia and India, the COVID-19 epidemic has presented unprecedented difficulties. Although each nation has distinct concerns, some similar issues are encountered by both areas.

As an archipelagic nation with an extensive and diversified population, Indonesia faces obstacles in controlling the COVID-19 epidemic. Inadequate health facilities and uneven access to them have become serious obstacles in the fight against the epidemic. The widespread lack of access to health care and education in many parts of Indonesia further complicates efforts to raise awareness and prevent the spread of the virus.⁴⁹

Governmental institutions, resources, and crisis management tactics in India and Indonesia differed significantly during the COVID-19 epidemic. Controlling the spread of the virus and reducing its social and economic effects is a tremendous undertaking for both nations, given their vast populations and health systems, which each confront unique obstacles.

As a first line of defense against the epidemic, India implemented a statewide lockdown with minimal advance notice. All of the individual states are obligated to comply with this federal ruling. Although beneficial in some ways, the emergency remedies authorized by the Epidemic Diseases Act of 1897 presented significant logistical and economic difficulties. The lockdown, critics argue, has created a humanitarian catastrophe, particularly for migrant workers who have been left far from home and their sources of income. However, the rigorous regulations allow health systems and other agencies time to improve their capabilities.

Meanwhile, Indonesia opted for less central control. The federal government encourages states and municipalities to use their judgment when implementing policies. While this allows for a more individualized strategy, it also creates

⁴⁹ Hendro Cahyo Saputro, "How Does the Law Solve the Covid-19 Problem?," *The Indonesian Journal of International Clinical Legal Education* 2, no. 3 (30 September 2020): 331–44, <https://doi.org/10.15294/ijicle.v2i3.38418>.

difficulties in terms of international coordination and uniformity of reaction. There was a rise in instances in numerous regions due to initial delays in enforcing large-scale social restrictions (PSBB) and shutting borders.

The reaction of both nations was also influenced by the strength of their respective healthcare systems. India can increase the production and distribution of PPE and vaccinations because of its robust pharmaceutical sector and manufacturing capability. In contrast, Indonesia's ability to monitor and control the spread of the virus needs to be improved by the country's health system and testing capabilities.

When it comes to exchanges of information, the two nations take different methods. In India, improvements to the EDA and active communication from the Ministry of Health and Family Welfare aided in spreading information and directives. Indonesia's national and regional administrations try to be transparent, yet more information still needs to be provided.

Pandemic management is complex in both nations for various reasons, including differences in government structure, economic conditions, and current public health regulations. Their stories demonstrate the need for robust healthcare systems, inter-governmental cooperation, and fast action when addressing global health emergencies.

This study addresses (1) the general pattern of discretionary policymaking in Indonesia and India during the COVID-19 pandemic? Based on the preceding description. And (2) How may Indonesia and India use their policymaking discretion to address some parts of the COVID-19 epidemic?

The theoretical basis of this study is grounded in normative legal theory.⁵⁰ India and Indonesia, two nations with relatively large populations and fragmented health systems, have taken significant measures to address increasing public health concerns, as seen by their reaction to the COVID-19 epidemic. Long-standing laws, including India's Epidemic Diseases Act of 1897, have been adapted to meet immediate demands in light of the epidemic. Legislative measures are being implemented to increase safeguards for health workers and sternly penalize violators in response to rising cases of violence against these professionals.

⁵⁰ Peter Marzuki Mahmud, *Pengantar Ilmu Hukum Edisi Revisi* (Jakarta: Kencana Prenada Media Group, 2016).

India has a constitutional duty to provide health services to its residents, even though its constitution does not recognize the right to health. It has nonetheless been included within the 'Right to Life' via a succession of judicial interpretations. However, due to the division of these roles between many tiers of government, coordination is essential but sometimes needs to be clarified.

However, Indonesia has a lot of the same problems. The government's slow and inadequate reaction to the epidemic has brought to light issues with policy execution and executive discretion. Finding a middle ground between containing the virus and keeping the economy afloat has challenged Indonesia's Health Quarantine Law and pandemic management measures.

Both pandemics have shown the significance of openness and accountability in applying discretionary policies and the urgency with which public health problems must be addressed. Both nations have been tested by the COVID-19 pandemic, demonstrating the need for flexibility and improved collaboration in future public health management.

Studying government responses and the consequences of discretionary acts made during the epidemic through the lens of legal norms applied in this context, from both a statutory and a conceptual and philosophical perspective, might provide light on these issues. This study uses a prescriptive approach to describe the events that have taken place and evaluate their appropriateness in light of the relevant legal standards, the ideas of justice, and legal efficacy.⁵¹

IV. DISCRETION UNDER NATIONAL AND INDIAN LAWS

3. Discretion According to Indonesian National Law

Rather than the "*freeies ermessen*" notion employed in Indonesian law, we mean "*Ermessen*" in the sense of German discretion. The notion of *vrij bevoegdheid*, applied in the Netherlands as a free authority, is most similar to *Ermessen*, which has been accessible by earlier legal experts. Even though *ermessen* and *wrej bevoegdheid* have fundamentally distinct meanings. If every state or public institution has the authority of

⁵¹ Soerjono Soekanto dan Sri Mamudji, "Penelitian Hukum Normatif Suatu Tinjauan Umum," dalam *Rajawali Pers, Jakarta*, 2007.

"*ermessen*" (consideration), then every state or public institution must use "*ermessen*" by the use of that authority and the legal limits that apply to that discretion.

According to *ermessen* (consideration), state officials' acts are not discretionary but must be grounded on the applicable legal framework. It follows from the previous definition of *ermessen* that there is no *freies ermessen*; nonetheless, this must be explicitly verified in the legislative rules.

While the idea of a welfare state naturally leads to developing a *freies ermessen* legal state, constraints must be placed on its application. Sjachran Basah argued for *freies ermessen* in the rule of law based on this premise:

7. Designed to carry out civic duties;
8. It's a proactive stance taken by the State government;
9. Third, the law permits this course of action;
10. This was a self-initiated move on his part;
11. This course of action is geared towards the resolution of pressing, unexpected issues;
12. There are legal and moral consequences for this mindset and approach.

Discretion or discretionary power granted to the government is a natural outgrowth of the welfare state idea. Still, it does not come without drawbacks because this free authority opens the door to abuse of power and willful disregard for the populace's safety (French: *détournement de pouvoir* and Dutch: *willekeur*, respectively).

As was once thought, this discretion arose as a workaround for gaps and loopholes in applying the principle of legality (*wetmatigheid van bestuur*). However, since the public interest is constantly evolving with scientific and technological advancements, more than the principle of legality alone is required to play a maximum role in serving that interest.

5. The purpose of Article 22 Constitution State Administration, which establishes the limits on the use of discretionary power by government officials, is to:
 6. Make government work more smoothly;
 7. Simplifying the law;
 8. Guaranteeing legal stability; And
 9. Getting the government moving again when it has stalled, for the public's sake.

Proves that those above 4 (four) goals are not merely suggestions but an integrated whole that should serve as the standard by which every discretion is judged. In other words, the article's regulations for the use of discretion only succeed if even one of the four requisite conditions is met.

According to Wayne La Farva, quoted by Soerjono Soekanto, this discretion entails making decisions that are not dictated solely by legislation but also factor in one's values and preferences.⁵² According to Wayne La Farva, government officials who like using their discretion must meet the following qualifications, which is consistent with article 24 of the State Administration Law:

7. In line with the discretionary goals laid out in Paragraph 2 of Article 22;
8. Complies with all applicable laws;
9. As per the Guiding Principles for Effective Government;
10. Reasonable assurances;
11. Doesn't include any potential conflicts of interest; And
12. Done in honest intent.

With description:

1. The term "objective reasons" refers to those grounded in the General Principles of Good Government and founded on factual, unbiased, and rational considerations.
2. In this context, "good faith" refers to a choice or action made or taken by honesty and the AUPB.

Marcus Lukman, as cited by South P. Panjaitan, states that all truly pressing questions involve the following:

1. The surface issues must be of significance to the public interest, including national and state interests, community interests, individual citizen interests, and development interests.
2. These issues appear out of the blue, disrupting our carefully laid plans.
3. This issue is left unregulated by statute or is only addressed in broad strokes, giving the executive branch and the public the leeway to work together to find a solution.
4. It is impossible to finish the task using standard administrative procedures, or doing so will decrease efficiency and effectiveness.

⁵² Soerjono Soekanto, *Faktor-faktor Yang Mempengaruhi Penegakan Hukum / Soerjono Soekanto* (Raja Grafindo, 2004), //senayan.iain-palangkaraya.ac.id/index.php?p=show_detail&id=1427&keywords=.

5. The public interest is at risk if this issue is not remedied immediately.⁵³

In Indonesia, discretion is implemented concerning the preceding idea of discretion as a legal source. Freedom of action has always been linked to government policy, with broad discretion given to policymakers. During the old and new orders, discretionary decisions were often shielded by norms whose conditions and limitations were murky. Among these standards are public interests and public order. To protect the legitimacy of government acts that are not based on the interests of society, the government frequently hides behind abstract circumstances.

Wisdom as an independent authority does not imply total autonomy. Independent power is not recognized by any institution in a state with a functioning legal system. Laws and regulations limit one's authority (both mandated and independent powers). A body's ability to exercise discretion is constrained without the authority provided by statute and law. On the other hand, the General Principles of Good Government are norms of conduct for public servants tasked with governing the country.

Discretion is "the power of a government agency or official that supports them in making choices and is not as free as freedom." State Administration Law is an attempt to codify the field of administrative law and a normative source of government action. Decision-makers in government are subject to guidelines established by State Administration;

The purpose of discretion is the purpose of its authority. Of course, lawmakers need to pay more attention to their intended goals when they give the government power. This is an exception to the general rule of lawfulness. The principle of legality states that all governmental bodies must operate by established rules of law. When referring to administrative law, the phrase "*Dat het bestuur aan het wet is onderworpen*" refers to this basis of legality.⁵⁴ (that government is bound by law) or "Het legaliteitsbeginsel houdt in dat all (algemene) the burgers bindende bepalingen op de taal moeten beusten."⁵⁵ (According to the principle of

⁵³ S. F. Marbun dan Moh Mahfud MD, *Pokok-pokok hukum administrasi negara* (Yogyakarta: Liberty, 1987).

⁵⁴ WEJ TJEENK WILLINK ZWOLLE, "Rechtsfilosofie en Rechtstheorie," *Rechtsfilosofie en Rechtstheorie* 13 (1984): [i], <https://heinonline.org/HOL/Page?handle=hein.journals/njlp13&id=1&div=&collection=>

⁵⁵ ZWOLLE.

legality, all provisions that bind citizens must have a legal basis). The legitimacy of state action is based on the idea of legality, which also ensures the defense of human rights.

The Covid-19 epidemic shows how Discretion can be used effectively in times of crisis. When a pandemic begins, the problem requires swift and accurate handling and often involves making judgments not precisely specified by current rules and regulations. Discretion is crucial in this situation.

Large-Scale Social Restrictions (PSBB) are one way the government has exercised its Discretion in dealing with Covid-19. The government may not impose widespread bans on community events under normal circumstances. This Discretion, however, becomes crucial in emergencies like a pandemic to protect the public's health and safety. Discretion is also used in practice to determine additional regulations relating to managing COVID-19, such as restrictions on economic activities, restrictions on the mobility of persons, educational policies, and so on. Discretion gives the government the agility and precision to implement these policies.

The State Administration Law stipulates that any discretion used must be consistent with existing laws and regulations and founded on objective considerations and good faith. A process for monitoring and controlling the exercise of Discretion is essential to ensuring that public interests are served and that power is not abused. The government must consider many factors when adopting PSBB, including community requirements, the spread of the virus, the capacity of the healthcare system, and so on.

It's possible that this policy only constitutes an exemplary exercise of Discretion if these considerations are addressed. As a result, whenever the government exercises such Discretion, it owes it to the public to explain why it is doing so in a clear and transparent way. This is crucial to preserving public confidence and facilitating widespread support for the policy's successful implementation. In conclusion, the COVID-19 epidemic does call for the government to use more Discretion in formulating policies and making choices. This Discretion, however, must be used ethically and transparently.

4. Discretion in Indian Law

Article 21 of the Indian Constitution (i.e., Right to Life, and the Government shall ensure that this right is not infringed upon) does not include the discretionary concept of the Right to Health; however, in the

judgments *Consumer Education and Resource Centre v. Union of India* (1995), *State of Punjab and others v. Mohinder Singh Chawala* (1997), and *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996), the Right to Health was included as.⁵⁶ Therefore, the federal, state, and local governments (including panchayats and municipalities) must be balanced in ensuring that all individuals have access to quality medical care. Contrary to popular belief, "health emergencies" are not covered by the Indian Constitution's emergency clauses.

The Indian President has the authority to declare national, state, and financial emergencies under the Indian Constitution. Threats to national security from war, foreign aggression, or internal armed rebellion warrant the declaration of a national emergency. If there is a constitutional crisis, the state government declares an emergency. An emergency financial declaration will be made if a country's economy is in danger of collapsing. Because restricting freedom of movement or adopting other extreme measures to stop the disease from spreading will affect the population. During British colonial rule in India, the Epidemic Diseases Act of 1897 (EDA) was passed in response to an outbreak of bubonic plague in the then-named Bombay State (now Maharashtra State). Only four provisions of the 125-year-old statute remain in effect. John Woodburn, a member of the Council of the Governor General of India in Calcutta, described the law as "extraordinary" but "necessary" during its introduction in 1897 and emphasized that people should "trust to the wisdom of the executive in urgent and critical circumstances".⁵⁷

Therefore, any action based on the epidemic must consider every potentially catastrophic event. The "greater good" requires that the public not question such judgments. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2014), and Nipah virus (2018) were all contained in large part due to this rule. Only the EDA permits lawful means to combat epidemics on a national or regional scale.

On April 22, 2020, utilizing powers under Article 123, the Modi Cabinet approved an ordinance to amend the EDA, as there had been incidences of

⁵⁶ Binod K. Patro, Jaya Prasad Tripathy, dan Rashmi Kashyap, "Epidemic Diseases Act 1897, India: Whether Sufficient to Address the Current Challenges?," *Journal of Mahatma Gandhi Institute of Medical Sciences* 18, no. 2 (September 2013): 109, <https://doi.org/10.4103/0971-9903.117796>.

⁵⁷ M. Z. M. Nomani dan Rehana Parveen, "Covid-19 pandemic and application of disaster management act, 2005: Promises and pitfalls," *International Journal of Pharmaceutical Research* 12, no. 4 (2020): 3730–34, https://www.researchgate.net/profile/M-Nomani/publication/346720559_Covid-19_Pandemic_and_Application_of_Disaster_Management_Act_2005_Promises_and_Pitfalls/links/5feb479da6fdccdb8166e52/Covid-19-Pandemic-and-Application-of-Disaster-Management-Act-2005-Promises-and-Pitfalls.pdf.

attacks on health professionals. Section 3 of the EDA was revised due to regulations. One may be sentenced to "imprisonment for 3 months to 5 years and a fine of Rs. 50,000/- to Rp.200,000/- " for "causing damage or loss to property." Health personnel who are the victims of aggression or physical assault face penalties including "incarceration for a period of 6 months to 7 years and a fine of Rs.100,000/- to Rp.500,000/." To add insult to injury, "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage." As the health department responsible for issuing guidelines and bulletins to other Central Government and state governments, the Ministry of Health and Family Welfare is heavily involved in guiding and advising states on COVID-19. Since COVID-19, the Ministry of Health and Family Welfare Secretary has held frequent press conferences to update the public. Regulations and notices were issued by state and UT governments under section 2 of the act concerning the steps to be taken to prevent the spread of COVID-19.⁵⁸

However, the Seventh Schedule of the Constitution of India specifies that the central and state governments share responsibility for public health. Each level of government is responsible for enacting laws on a particular set of topics, as delineated by the List's Union List, State List, and Joint List.

The Indian government has shown considerable leeway in applying these regulations and statutes, however. The government has imposed a statewide lockdown in reaction to the pandemic, which might be seen as violating the individual liberties protected by Article 21 of the Constitution. It has also been shown that "executive discretion is in a precarious and critical state," a principle adopted by the British colonial authority in the original implementation of EDA. The relationship between executive discretion and applicable constitutional and legal standards must be considered when planning for and responding to the COVID-19 outbreak in India. In many respects, this discretion has been crucial in allowing governments to react swiftly and effectively to the novel and unprecedented difficulties the pandemic offers. However, exercising this discretion has also produced problems and disputes about fundamental rights and good government. Some examples of executive discretion in urgent and severe situations are the employment of the EDA and the installation of a national lockdown. Some people, however, worry that these policies set a bad precedent for future

⁵⁸ Richard Griffith, "Using public health law to contain the spread of COVID-19," *British Journal of Nursing* 29, no. 5 (12 Maret 2020): 326–27, <https://doi.org/10.12968/bjon.2020.29.5.326>.

government abuse of power and go against fundamental rights like the right to life and personal liberty that the Constitution guarantees.⁵⁹

The government's discretion has also created some real-world difficulties. For instance, the government revised the EDA to include stricter penalties for violators in reaction to attacks on health professionals. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.

It has been controversial and criticized that countries have a lot of leeway in responding to the pandemic. The government has been accused of abusing its power by violating the constitutional rights of its citizens.

The statewide lockdown instituted in response to COVID-19 has been criticized as an infringement on fundamental freedoms protected by Article 21 of the Constitution. Even if the government claims these actions were necessary to safeguard the public's health and safety, the lockdown's challenging implementation and severe economic side effects have prompted widespread criticism and demonstrations. Some have also voiced concern that recent amendments to the Epidemic Diseases Act give the government and health professionals too much authority. However, there are worries that the new, harsher sanctions may be exploited, even though their stated purpose is to protect health workers from assault.

V. DISCRETION POLICY PATTERNS DURING THE COVID 19 PANDEMIC IN INDONESIA AND INDIA

Legal discretion refers to a set of strategies and decisions the government adopts to manage and guide people's behavior to attain particular legal goals. Meanwhile, preference (free policy) means that authorities can act or make choices based on their interpretation of the law or the facts of a given case.⁶⁰

⁵⁹ Sangeeta Mahapatra, *Digital Surveillance and the Threat to Civil Liberties in India*, vol. 3, GIGA Focus Asien (Hamburg: German Institute for Global and Area Studies (GIGA) - Leibniz-Institut für Globale und Regionale Studien, Institut für Asien-Studien, 2021).

⁶⁰ Maarten Pieter Schinkel, Lukáš Tóth, dan Jan Tuinstra, "Discretionary authority and prioritizing in government agencies," *Journal of Public Administration Research and Theory* 30, no. 2 (2020): 240–56, <https://academic.oup.com/jpart/article-pdf/doi/10.1093/jpart/muz018/33045851/muz018.pdf>.

There is a special relationship between these ideas during a pandemic. On the one hand, the rapid and unpredictable changes brought on by the pandemic call for legal rules that are both adaptable and responsive. However, discretion must be used cautiously to avoid infringing on citizens' fundamental rights.⁶¹ There is a pressing need to find a middle ground between ensuring public safety and allowing people to maintain their liberties in the wake of the Covid-19 outbreak.⁶²

"The legal response to the pandemic must be evidence-based, proportionate, and subject to scrutiny," says Stephen Thomson.⁶³ There must be openness and responsibility in discretion, and only extreme public health emergencies should warrant deviations from the norm.

Like many others, Jack McNally thinks that extreme caution must be used during the epidemic. The document contends that "excessive use of discretion can create risks of abuse of power, injustice, and legal uncertainty, ultimately undermining public trust in the legal system and government".⁶⁴ Grogan also has another point of view: "The appropriate and prudent use of discretion in the face of a crisis such as the Covid-19 pandemic can serve as an essential means to fill inevitable gaps in the law and to deal with extraordinary situations that the legislator cannot anticipate."⁶⁵

This perspective recognizes the critical role that discretion can play in stemming the pandemic but stresses that it must be exercised reasonably and proportionally. Thus, in the context of the Covid-19 epidemic, legal and discretionary policies are two sides of the same coin, both vital to delivering

⁶¹ Joelle Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis," *Hague Journal on the Rule of Law* 14, no. 2–3 (Desember 2022): 349–69, <https://doi.org/10.1007/s40803-022-00168-8>.

⁶²The pandemic presents unique challenges for democratic governance, with measures that often limit fundamental rights and can only be justified in certain circumstances. The urgency in dealing with the pandemic could conflict with the principles of separation of powers and the rule of law, bypassing ordinary processes and even potentially concentrating discretionary power in the executive. Look, Vageesh Jain, Jonathan Clarke, dan Thomas Beaney, "Association between Democratic Governance and Excess Mortality during the COVID-19 Pandemic: An Observational Study," *J Epidemiol Community Health* 76, no. 10 (1 Oktober 2022): 853–60, <https://doi.org/10.1136/jech-2022-218920>.

⁶³ Stephen Thomson dan Eric C. Ip, "COVID-19 emergency measures and the impending authoritarian pandemic," *Journal of Law and the Biosciences* 7, no. 1 (2020): lsa064, <https://academic.oup.com/jlb/article-pdf/doi/10.1093/jlb/lsa064/37356468/lsa064.pdf>.

⁶⁴ Jack McNally, "Accountability, Discretion and the Rule of Law: Issues in Pandemic Policing," *Australian Public Law*, diakses 9 November 2023, <https://www.auspublaw.org/blog/2020/07/accountability-discretion-and-the-rule-of-law-issues-in-pandemic-policing>.

⁶⁵ Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis."

an effective and fair response to the challenges posed by the pandemic, provided they are handled with prudence and thoughtful consideration.

It is essential that discretion not be abused to cause injury to individuals or groups or to evade accountability in a court of law. Therefore, in the context of the epidemic, governments and legal authorities need to find the correct balance between the need to take rapid and effective action to protect public health and maintain legal principles and human rights. It's not an easy assignment, but it's crucial to ensure the pandemic reaction is not just successful in stopping the virus' spread but also just and considerate of people's rights.

In light of the foregoing, we now examine the prevailing legal and discretionary policy tendencies in Indonesia during the Covid-19 epidemic⁶⁶ and India,⁶⁷ It's crucial to remember that specialists emphasize different aspects of discretionary issues and approach concepts. As a result, we should analyze Indonesia's response to the COVID-19 epidemic in terms of its discretionary policies.

Indonesia has a pluralistic legal system, which means that there is also customary law in addition to state law and religious law. The Indonesian government has issued several restrictions and measures in response to the Covid-19 outbreak. The government of Indonesia as a whole's primary legal and regulatory basis for dealing with pandemics, including the COVID-19 pandemic, is Law Number 6 of 2018 concerning Health Quarantine. However, the law must still control technical problems in handling the Covid-19 epidemic. The government's attempt to provide the public with some legal clarity while also reducing the spread and fatalities caused by the COVID-19 outbreak. Among the many rules and regulations enacted by the government are:

⁶⁶According to Law Number 30 of 2014 concerning Government Administration, Article 1 number 9 states that discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of statutory regulations that provide choice, non-regulating, incomplete, or unclear, and/or government stagnation. Article 22 paragraph (2) states that discretion aims to streamline government administration, fill legal gaps, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest.

⁶⁷In the Indian legal system, legal discretion refers to the power or authority granted to government bodies or officials to make decisions in the performance of their official duties. This discretion is necessary because not all situations can be specifically regulated by law, so public officials need flexibility to adapt their actions to different conditions.

One of the important laws that gave discretion to officials in India was the Epidemic Diseases Act of 1897. This law is a classic example of how legal discretion is given to deal with public health emergencies, such as pandemics. During COVID-19, this law empowers the central and state governments to take actions deemed necessary to control the spread of infectious diseases.

1. Large-Scale Social Restriction Government Regulation No. 21 of 2020 in the Context of Rapidly Addressing Corona Virus Disease 2019 (Covid-19).
2. Public Health Emergency Due to the 2019 Corona Virus Epidemic (COVID-19): Decree No. 11 of the President of the Republic of Indonesia, 2020.
3. Health Minister's Order No. 9 of 2020: Social Restriction Guidelines in the Context of Rapid Response to Corona Virus Outbreaks.
4. Several directives from the Minister of Home Affairs restrict emergency community activities in the Java and Bali regions due to the 2019 Corona Virus Disease.

President Joko Widodo and his administration have repeatedly stated from the beginning of the epidemic in 2020 that regional quarantine will not be implemented. Jokowi ruled out a lockdown, saying it would hurt the economy.⁶⁸ Due to the far-reaching effects of quarantining entire regions. Therefore, the president and his team emphasized that only large-scale social limitations should be applied because the economy must continue to run. Government Regulation No. 11 of 2020 and Minister of Health Regulation No. 9 of 2020 Regarding PSBB Guidelines reinforce the government's decision to enact Large-Scale Social Restrictions (PSBB) solely. There were issues with the Government Regulation's substance because of PSBB. In this study, we'll go deeper into the three most pressing problems that surfaced when the government released its regulation on PSBB. The health emergency decided by President Joko Widodo by the issue of Presidential Decree Number 11 of 2020 addressing the determination of health emergency status is the basis for Government Regulation No. 11 of 2020, which regulates PSBB above. The two issues that resulted from this are elaborated upon in the following study.

PPKM, the Instruction of the Minister of Home Affairs on the Implementation of Emergency Community Activity Restrictions, is the most up-to-date rule regulating the management of the COVID-19 epidemic. The government issued several Ministerial Instructions from the Ministry of Home Affairs about PPKM. Beginning with Instruction of the Minister of Home Affairs No. 15 of 2021 about Emergency PPKM and ending with Instruction of the Minister of Home Affairs No. 12 of 2022 regarding Micro PPKM.

⁶⁸ Kompas Cyber Media, "Jokowi Akhirnya Blak-blakan soal Alasan Tak Mau Lockdown... Halaman all," KOMPAS.com, 1 April 2020, <https://nasional.kompas.com/read/2020/04/02/05405561/jokowi-akhirnya-blak-blakan-soal-alasan-tak-mau-lockdown>.

By looking at the rules that were put in place following the COVID-19 epidemic, it is easy to see that we are under a time crunch that necessitates the elimination of red tape to have administrative policies implemented. According to Garry Goodpaster, who discussed the significance of Administrative Procedure Law for Indonesia, the most vital part is that all types of policy still adhere to sound administrative procedures:⁶⁹

“Administrative performance in Indonesia might be significantly enhanced by passing a law mandating openness and transparency in all administrative bodies, including local ones (an Administrative Procedure Law). Doing so would also set the stage for a robust system of regulatory scrutiny”.

Accordingly, exercising discretion is crucial in exceptional circumstances where statutory regulations either fail to provide clear direction or are insufficient to address the relevant issues. The Indonesian government has used its discretion to adopt several legislation and regulations in response to the COVID-19 outbreak. This discretion helps to close the gap between the law and the ever-evolving reality on the ground, which is especially important in times of crisis like the recent COVID-19 outbreak.

However, exercising discretion still requires due diligence and deliberation. Several stipulations are laid down in Law No. 30 of 2014⁷⁰ Which must be met in using discretion: discretion can only be used if laws and regulations provide options but do not regulate, are incomplete or unclear, and there is governmental stagnation; the use of discretion must be based on public interest and justice; and the use of choice must be carried out proportionally, professionally, objectively, fairly, and accountably.

However, the Infectious Diseases Act of 1897 and the Disaster Management Act of 2005 provide the Indian government extensive authority over managing public health crises in that country.⁷¹ Both statutes offer a legislative framework that permits the federal and state governments to take

⁶⁹ M. Ikbar Andi Endang, “Diskresi Dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan/Discretion and Responsibility of Government Officials Based on Law of State Administration,” *Jurnal Hukum Peratun* 1, no. 2 (2018): 223–44, <https://pdfs.semanticscholar.org/2c4c/1f71ec37a19de98e22022e5ceee8fe259bf8.pdf>.

⁷⁰For further information, see Chapter VI, Articles 22-32 (10 Articles), covering content material consisting of the general part of discretion (Article 22), scope of discretion (Article 23), discretionary requirements (Articles 24-25), procedures for using discretion (Article 24-25). Articles 26-29), the consequences of discretionary law (Articles 30-32).

⁷¹ Ayushi Bajaj dan Gaurav Datt, “Financing of Fiscal Response to COVID-19: A Pragmatic Alternative,” *Indian Economic Review* 55, no. 1 (1 November 2020): 149–60, <https://doi.org/10.1007/s41775-020-00090-6>.

special steps to respond to health emergencies such as pandemics. The freedom to craft their policies gives states the leeway to tailor initiatives to meet specific regional requirements.

However, this exercise of legal discretion creates various obstacles. Uncertainty and disunity in response to the epidemic could be one of them. Since different states take different approaches, the public and relevant parties may wonder what rules apply. In addition, if the regulations enacted are seen as too restrictive or enforced in a discriminatory fashion, such discretion could lead to civil rights breaches.⁷²

However, their discretionary powers greatly facilitate governments' swift and targeted responses to new threats. The ability to act quickly, without waiting for a protracted legislative procedure, is crucial in a rapidly developing crisis scenario, such as the spread of a disease. The potential for misuse of authority is increased, however.

Despite their distinct methods and legal systems, both countries stress the need for discretion in dealing with the pandemic. One example of discretionary government action in Indonesia is the imposition of quarantine and social restrictions, while in India, it is the choice of various states to implement and adjust public health programs.

The Indonesian government has responded to the pandemic in several ways, some of which have been more arbitrary than others. The government has discretion in choosing the nature and extent of quarantine measures necessitated, for instance, while carrying out Health Quarantine Law No. 6 of 2018.⁷³ At the start of the pandemic, the government chose to implement what are known as "Large-Scale Social Restrictions" (PSBB), a form of social quarantine that is more flexible than a total lockdown.⁷⁴ Governments are given this leeway to respond to changing circumstances and consider a wide range of considerations, including the potential socioeconomic effects of their decisions.⁷⁵ However, several obstacles must be overcome while using this discretion. The problem of ambiguity in the law is one of them. For instance, it needs to be clarified how the PSBB should be implemented or what kinds of

⁷² Lekha Chakraborty dan S. Harikrishnan, "COVID-19 and Fiscal-Monetary Policy Coordination: Empirical Evidence from India," SSRN Scholarly Paper (Rochester, NY, 7 Februari 2022), <https://doi.org/10.2139/ssrn.4028927>.

⁷³ See, Article 55, Law of the Republic of Indonesia Number 6 of 2018 concerning Health Quarantine

⁷⁴ See, Government Regulation no. 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Corona Virus Disease 2019 (COVID-19)

⁷⁵ Reza Yustiyanto, "Diskresi Pemerintah Dalam Penanganan Pandemi Covid 19 Berdasarkan Undang-Undang Nomor 2 Tahun 2020," *Jurnal Restorasi Hukum*, 5, no. 1: 1–30, diakses 9 November 2023, <https://ejournal.uin-suka.ac.id/syariah/jrh/article/view/2382>.

exemptions are allowed. Some people need clarification and clarification as a result of this.

There are also worries about fundamental rights being violated and discretion being abused. Therefore, the government must make decisions with openness and accountability and base their decisions on sound science. Meanwhile, in the Indian context, the discretionary use of the Act. Infectious Diseases Act of 1897 (Epidemic Diseases Act, EDA) and the Disaster Management Act of 2005 (Disaster Management Act, DMA) in response to the COVID-19 pandemic have taken the form of their activation.⁷⁶ In light of a public health emergency on a scale not seen in India since independence, the central government has ordered the states to utilize the EDA as a legal foundation for implementing emergency measures to contain the virus. The central government has used the DMA to take strategic action and coordinate responses to the pandemic.

The EDA, enacted in the late 19th century, gave the government broad authority to respond swiftly and uniquely to epidemics of infectious diseases.⁷⁷ However, the necessity to amend and modernize this regulation has become apparent in light of the difficulties inherent in predicting the complex modern nature of a pandemic like COVID-19. However, DMAs have been implemented to give a larger framework for emergency coordination and aid in more generic disaster scenarios.

Following this logic, we can summarise how Indonesia and India differ in their discretionary responses to the COVID-19 epidemic:

Aspect	India	Indonesia
Legal basis	- Regulation of Epidemics Act (1897) and the Disaster Management Act of 2005	- The Health Quarantine Act of 2018 (Law No. 6), the Disaster Management Act of 2007 (Law No. 24), and the Infectious Disease Outbreak Act of 1984 (Law No. 4)

⁷⁶ Kiran Kumar Gowd, Donthagani Veerababu, dan Veeraiahgari Revanth Reddy, "COVID-19 and the Legislative Response in India: The Need for a Comprehensive Health Care Law," *Journal of Public Affairs* 21, no. 4 (November 2021): e2669, <https://doi.org/10.1002/pa.2669>.

⁷⁷ Patro, Tripathy, dan Kashyap, "Epidemic Diseases Act 1897, India."

Aspect	India	Indonesia
Implementation of Discretion in Handling the Pandemic	- Federal and state governments have the power to formulate and enact laws.	- Federal and state governments have the power to make and carry out policy – the capacity to enact Policies of Mass Social Restriction (PSBB) and Related Measures.
Control and Accountability	- Checks and balances in the legal system manage them. Parliamentary and media discussion and criticism provide a forum for public political accountability.	- Legislative and auditing bodies provide the necessary oversight – responsibility enforced using judicial and public review.
Impact of the Application of Discretion	- Introducing disorder and inconsistency into a pandemic response. It can lead to human rights abuses but also allows for targeted interventions – the danger of power misuse.	- Disparities in regional policy implementation are possible. Adopting PSBB and associated measures may pose a risk of civil rights abuses. Allows for quick adjustments and replies.

Source: Analysis Results

Both Indonesia and India have chosen to respond to the COVID-19 epidemic independently, with varying degrees of success. The usefulness and impact of using this discretion should be evaluated in light of the local context, which might vary greatly depending on the country or location.

In terms of legal basis, both India and Indonesia have regulatory instruments meant to manage health emergencies. India uses the Disaster Management Act, passed in 2005, and the Epidemic Diseases Act, which dates back more than a century. However, Indonesia follows a different set of rules when it comes to dealing with pandemics and natural calamities. The emphasis

on various policies and the flexibility with which the law responds to new situations account for these varying legal foundations.

When tackling the pandemic, both nations give local and state governments the power to make their own decisions. This reflects the understanding that local governments are best suited to address the unique challenges of their communities. However, difficulties in developing a unified and consistent response across nations arise from this decentralized strategy.

The requirement for speed in responding to the pandemic must be balanced with safeguards to prevent abuse of authority, and this is a challenge for both countries. Oversight and accountability in India mainly occur through the legal system and parliamentary discussion. Responsibility for policies and practices is promoted in Indonesia through legislative regulation and audit.

Finally, the impact of discretion in these two circumstances indicates that while intention gives the flexibility essential for swift and locally appropriate responses, it also presents no less critical hazards. Both nations have concerns concerning civil rights violations and possible misuse of power. However, in times of crisis like the current COVID-19 outbreak, speed of response is generally regarded as crucial.

This analysis shows that both countries have established legal frameworks and processes to cope with pandemic scenarios. However, adjusting these laws to meet unexpected problems requires a flexible but regulated approach. Important lessons for the future of legal reform in both nations can be gleaned from this experience.

VI. INDONESIAN AND INDIAN DISCRETIONAL POLICY CHALLENGES AND STRATEGIES REGARDING ASPECTS OF THE COVID 19 PANDEMIC

Like the rest of the world, India is having trouble responding to the spread of COVID-19, especially in 2020, when so little is known about the virus. With its distinct legal system, India exercises similar legal discretion when dealing with COVID-19. The Indian government imposed a statewide

lockdown within the bounds of the law.⁷⁸ This law is also utilized to address social problems that have surfaced during the pandemic, such as misinformation and prejudice.⁷⁹

Legal discretion is also essential to handling the COVID-19 epidemic in Indonesia. Decisions on movement restrictions, restricting economic sectors, and enforcing health protocols are made in Indonesia using legal discretion, as in the United States and India. False information and discrimination against particular groups have become problems in Indonesia during the pandemic, much as they have in India. Through the Information and Electronic Transactions Law and other relevant rules, the Indonesian government exercises its legal discretion to crack down on violators and the dissemination of misleading information. Government and civil society organizations take measures, including public education and law enforcement, to combat discrimination, as applicable laws require.

India and Indonesia, among others, use legal discretion as a critical instrument in responding to the pandemic. With this leeway, governments can better respond to shifting circumstances and tailor policy initiatives to each nation's needs. Regarding the COVID-19 pandemic, Indonesia's discretionary strategy has various possible flaws:

1. **Accountability and Openness to the Public:** Discretion in the enforcement of laws might create issues with openness and responsibility. Distributive economic stimulation initiatives in Indonesia risk misuse and corruption if they are not carefully controlled and administered.
2. **Ineffectiveness of Aid Distribution:** Discretion in the provision of financial aid might become problematic when there are no established public standards for determining eligibility. As a result, aid distribution may become inequitable and inefficient.
3. **Challenges in Putting Policies Into Action:** Regulations for pandemic management may be implemented and enforced in various ways due to the leeway afforded to local governments. This may hinder the efficiency and efficacy of national policymaking.
4. **Violations of human rights and discrimination:** When discretion is used to oppress certain groups or to impede freedom of speech and

⁷⁸ Deena Dimple Dsouza dkk., "Aggregated COVID-19 suicide incidences in India: Fear of COVID-19 infection is the prominent causative factor," *Psychiatry Research* 290 (1 Agustus 2020): 113145, <https://doi.org/10.1016/j.psychres.2020.113145>.

⁷⁹ Griffith, "Using public health law to contain the spread of COVID-19."

information, it can lead to discrimination and human rights breaches in the context of misleading information and law enforcement.

This suggests that judicial discretion is crucial in responding to the COVID-19 pandemic in many countries, like India and Indonesia. As a result, governments can better adapt to new circumstances by developing and enacting policies that are both effective and adaptable to local events. There are concerns with the use of discretion in the law. The potential for discrimination, human rights breaches, and other implementation weaknesses, such as a lack of transparency and accountability, ineffective aid distribution, and challenging policy implementation, must be foreseen and controlled effectively.

For Indonesia, this means prioritizing human rights principles in all legal actions, increasing transparency and accountability in judicial discretion, making it easier to determine who qualifies for financial aid, improving coordination between the national and regional levels of government, and so on.

Therefore, any action based on the outbreak must consider all crucial aspects. The "greater good" necessitates that the people not oppose such policies. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2009), and Nipah virus (2018) were all contained in large part due to this rule. In the event of a national or subnational epidemic, the EDA is the sole law that can be used to intervene legally. As there had been attacks on health professionals, on April 22, 2020, the Modi Cabinet used its Article 123 powers to draft an ordinance amending the EDA. Ebola Virus Disease Act (EVD) Section 3 of the Ordinance Was Amended. In the event of property destruction or loss, violators face "imprisonment for 3 months to 5 years and a fine of Rs. 50,000/- to Rp.200,000/-." "In cases of violence and physical attacks on health workers, they can be imprisoned" for a period of 6 months to 7 years and with a fine of Rs.100,000/- - to Rp.500,000/." "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage."

Regarding COVID-19, the Ministry of Health and Family Welfare takes the lead, leading and advising states. This is because it is the health agency responsible for issuing instructions and bulletins to other ministries of the Central Government and state governments. The Secretary of the Ministry of Health and Family Welfare (MoHFW) has been giving news conferences regularly since COVID-19. Regulations and notices were issued by state and UT governments under section 2 of the act concerning the steps to be taken to prevent the spread of COVID-19.⁸⁰

⁸⁰Griffith, R. (2020). Using public health law to contain the spread of COVID- -19. *British Journal of Nursing*, 29(5), 326–327

However, the Seventh Schedule of the Indian Constitution allocates public health duties between the federal government and individual states. The Union List, State List, and Joint List delineate the areas of jurisdiction for the federal government and individual states, respectively. In addition to being included in all three categories, public health lawmaking authority rests with both the federal and state levels of government. The Indian government, however, has shown a great deal of leeway in applying these regulations and statutes in practice. The government has imposed a statewide lockdown in reaction to the pandemic, violating the individual liberties protected by Article 21 of the Constitution. As the British colonial administration did first while enforcing the EDA, the government had shown "executive discretion in critical and critical situations."

The relationship between executive discretion and applicable constitutional and legal standards must be considered when planning for and responding to the COVID-19 outbreak in India. This leeway has been critical in helping governments meet the novel and extraordinary difficulties the pandemic faces with agility and efficiency. The use of this discretion, however, has resulted in several problems and debates about fundamental rights and effective government. For example, using the Epidemic Disease Act (EDA) and installing a statewide lockdown is an example of exercising executive discretion in insecure and crucial circumstances. Others, however, worry that setting such a high bar for government overreach would violate fundamental Constitutional rights like the right to life and personal liberty.⁸¹

The government's discretionary actions have also created real-world complications. Attacks on health professionals have prompted policy changes like those made to the Epidemic Disease Act (EDA) to increase sanctions for those responsible. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.⁸²

While governments have a high degree of discretion in responding to the, It's no secret that the pandemic has been met with skepticism and criticism. The government has been accused of abusing its power by taking measures that go against the rights of its citizens. Some have complained that the statewide lockdown implemented to combat COVID-19 infringes on people's rights

⁸¹ Tanushka Sharma dan Arunima, "Management of Civil Liberties During Pandemic," *Indian Journal of Public Administration* 67, no. 3 (1 September 2021): 440–51, <https://doi.org/10.1177/00195561211035931>.

⁸² Shivangi dan Laxman S. Meena, "A Comprehensive Review of COVID-19 in India: A Frequent Catch of the Information," *Biotechnology and Applied Biochemistry* 68, no. 4 (Agustus 2021): 700–711, <https://doi.org/10.1002/bab.2101>.

protected by Article 21 of the Constitution. The government may claim that these actions were necessary to safeguard the health and safety of the population. Yet, widespread criticism and demonstrations have resulted from the lockdown's challenging implementation and severe economic consequences. Changes to the Epidemic Diseases Act have also been criticized for allegedly giving the government and health professionals too much authority. The new regulations are supposed to keep medical professionals safe from harm, but some worry that the strict punishments may be misused.

India and Indonesia use a discretionary strategy to combat the COVID-19 epidemic by combining international cooperation with in-country adjustments. The two nations' approaches to discretion are very different, notably regarding cross-border collaboration and openness.

In contrast, Indonesia takes a more decentralized strategy. While the federal government establishes broad guidelines, state and local governments carry them out. Large-scale social restriction (PSBB) policies reflect this reality; these policies vary from region to region based on the prevalence of COVID-19. Although this method is adaptable, it creates difficulties in coordinating between national and local governments, leading to consistency and clarity in the pandemic response.

Like India, Indonesia can allow a swift and targeted response to the COVID-19 pandemic by delegating authority to the central and regional governments to establish their pandemic strategies. But there must be safeguards against arbitrary rules and human rights breaches.

1. **Transparency and Consistency in Policymaking:** There needs to be nationwide uniformity in how the government handles pandemics. All policy decisions and their rationales and details on how they will be carried out must be made public.
2. **Accountability and Supervision:** To ensure discretion is utilized correctly and efficiently, there must be a rigorous system of checks and balances. If there is an instance of discretionary abuse, there must be consequences.
3. **Evidence-based:** Policy decisions should be based on evidence, not ideology. This is crucial for ensuring that the policies implemented to combat the epidemic are not detrimental to society while also being practical.

Infectious illness prevention and treatment are governed at India's federal and state levels. The Public Health Protection Act gives the federal government the power to establish national standards for preventing and treating infectious diseases. At the same time, individual states can establish

similar standards within their borders. However, federal and state governments have many disagreements and conflicts regarding who is accountable for combating infectious diseases like COVID-19. This analysis demonstrates that, similar to COVID-19, local governments play a vital role in the fight against contagious illnesses worldwide. Central government plays a crucial role in infectious disease control through coordination and funding.

Evidence worldwide suggests that exercising restraint when responding to pandemics like COVID-19 is essential. Discretion allows national and regional governments to react to varied situations in distinct regions. However, there is a danger that discretion could lead to misuse of authority.

Indonesia needs to think about a few things if it wants to use its discretion efficiently and responsibly. The first step is establishing each government level's specific duties and responsibilities. Second, there must be openness and uniformity in how policies are carried out. Third, robust systems for oversight and accountability should be in place to avoid and redress discretionary abuses. Finally, scientific evidence, not political considerations, must inform policy.

Revising various articles in Law Number 6 of 2018 concerning Health Quarantine and other rules is essential in realizing perfect discretion in dealing with the pandemic. Policy and procedure changes and enhanced national and local government capability are critical to successfully implementing legal reforms.

Taking India's experience with the COVID-19 epidemic into account, an optimal legal construction in Indonesia may contain the following changes to local laws and characteristics:

1. **Improved Harmonisation and Coordination:** Indonesia could learn from India's Disaster Management Act and create or improve procedures for central and regional governments to coordinate their responses to the pandemic. One possible mechanism for achieving this goal would be establishing dedicated boards or commissions whose job would be to coordinate a unified response while allowing for enough leeway at the regional level to adapt to unique circumstances.
2. **The Accountability Framework and Its Use of Discretion:** To account for the discretion given to local governments in Indonesia, similar to India's use of the Epidemic Diseases Act, clear criteria must be established when and how this power can be used. Better monitoring systems are needed to ensure that responses are appropriate and aligned with human rights standards.
3. **Fortifying a Clear Legal Foundation:** To better deal with the pandemic crisis, Indonesia has to alter its legal base, possibly by revisiting the Law

on Health Quarantine. The situation in India demonstrates the importance of passing new laws to deal with the unique difficulties of the current pandemic.

4. **A Well-Defined Procedure for Limiting Public Events:** In contrast to India's unexpected lockdowns, which have the potential to generate confusion and socioeconomic upheaval, Indonesia may need to set clear and precise instructions for applying Community Activity Restrictions.
5. **Honesty and clear communication:** Indonesia may learn to promote openness in decision-making and ensure good communication between the government and the public by looking at India's challenges in these areas and adapting their strategies.

The lessons that Indonesia could learn from India's legal system include the importance of creating a centralized and decentralized system with well-defined powers and responsibilities to prevent abuse of authority and promote civic engagement and trust through openness and clear communication.

CONCLUSION

India and Indonesia exhibit contrasting approaches to the COVID-19 pandemic, primarily evident in their discretionary strategies. India's centralized governance, governed by laws like the Epidemic Disease Act (EDA) and the Disaster Management Act (DMA), grants the central government significant authority. Conversely, Indonesia adopts a decentralized strategy, providing local governments greater flexibility within a national framework. Both nations grapple with coordination challenges across different administrative tiers, with India facing a disconnect between federal policies and their execution at state and local levels and Indonesia encountering differences between regional and central administrations. Common difficulties include the inconsistent application of policies and reliance on outdated legislation. Both countries require strengthened legislation to enhance pandemic response, potentially necessitating new public health laws in India and revisions in Indonesia. Emphasizing openness and accountability is crucial in India for bolstering public confidence and improving regional policy implementation in Indonesia. The exchange of insights between the two nations is valuable, with India learning from Indonesia's decentralized strategy and Indonesia benefiting from India's robust national framework. Addressing future pandemics requires a balanced approach, integrating centralized efficiency with local discretion while upholding accountability, proportionality, transparency, human rights, and justice principles.

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Discretionary Policy Responses in India and Indonesia Amidst the COVID-19 Pandemic: Challenges, Strategies, and the Imperative for Legal Reform

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ABSTRACT

This study endeavors to conduct a meticulous analysis and comparison of the discretionary policy frameworks employed by India and Indonesia in response to the challenges posed by the COVID-19 pandemic. The research delineates its focus into two primary dimensions: firstly, an examination of the structure and application of discretionary policies formulated by the central governments of both nations; secondly, an in-depth exploration of the challenges and strategic considerations in the local-level implementation of these policies, aligned with the dynamic nature of the pandemic. Employing a rigorous research methodology, this study entails the systematic analysis of pertinent legal and policy



documents, a comprehensive review of existing literature, and a nuanced conceptual and philosophical interpretation of discretionary policies in the context of pandemic management. The findings of this research underscore the distinctive approaches undertaken by India and Indonesia in the implementation of discretionary policies. India adopts a more centralized model, whereas Indonesia pursues a decentralized trajectory. Both nations encounter challenges in inter-governmental coordination, with India grappling with the harmonization of central and state policies, and Indonesia contending with disparities between central and local governance. Furthermore, the research underscores the imperative for both countries to reassess and develop legislative frameworks that are adaptive and dynamic, harmonizing legal rigidity with the requisite flexibility to effectively respond to the rapidly evolving conditions of the pandemic. Crucially, the research emphasizes the necessity for enhanced transparency and accountability within the realm of discretionary policy. Both countries are urged to fortify these elements to cultivate public trust and ensure the efficacious and equitable implementation of policies during the ongoing public health crisis.

Keywords: Discretionary, COVID-19, Indonesia, India, Policy

INTRODUCTION

This year's coronavirus illness (COVID-19) is the sixth pandemic since the 1918 flu pandemic, and it has already infected almost every country on the planet. Since late December 2019, when the first case was reported, Wuhan, China, has been experiencing an epidemic of a

novel strain of human pneumonia. Symptoms started appearing no earlier than December 1, 2019. Viral pneumonia was identified as the cause of this patient's symptoms of fever, lethargy, dry cough, and dyspnea.¹

The media first labeled the illness "*Wuhan pneumonia*" due to the location and the fact that the symptoms resembled pneumonia. DNA sequencing of the whole genome identified the novel coronavirus as the culprit.² Thus, this virus is the eighth human-infecting member of the coronavirus family. On January 12, 2020, the World Health Organisation (WHO) gave the new virus the provisional name 2019 coronavirus (2019-nCoV), and on February 12, 2020, the WHO issued the infectious illness the official designation 2019 coronavirus disease (COVID-19).³ The Covid-19 epidemic is becoming a severe challenge for medical professionals and governments. Governments in different nations must make swift and effective measures to safeguard their citizens in the face of a disaster of this size. In this case, the idea of discretion is crucial.

In Indonesia, discretion is defined as a decision and action determined and implemented by government officials to overcome specific problems administrators face if the governing laws and regulations need to be completed or clarified and there is stagnation.

¹ Chaolin Huang et.al., "Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China," *The Lancet* 395, no. 10223 (020): 497–506, [https://doi.org/10.1016/S0140-6736\(20\)30183-5](https://doi.org/10.1016/S0140-6736(20)30183-5).

² DNA sequencing or DNA sequencing is a process or technique for determining the sequence of nucleotide bases in a DNA molecule. This sequence is known as the DNA sequence, which is the most basic information about a gene or genome because it contains the instructions needed for the formation of a living body. Look Kara Rogers, *New Thinking About Genetics* (Britannica Educational Publishing, 2010).

³ Na Zhu et.al., "A Novel Coronavirus from Patients with Pneumonia in China, 2019," *New England Journal of Medicine* 382, no. 8 (2020): 201, <https://doi.org/10.1056/NEJMoa2001017>.

from the government. Article 22(2) of the Law states that discretion may be used for the following reasons:

1. simplify the workings of government;
2. remedy legal flaws;
3. ensure legal stability; and
4. breaking through bureaucratic logjams when necessary in the sake of the public good.

In addition, article 24 of the Law stipulates the following standards for the exercise of discretion:

1. in line with the goals of the Authorization;
2. avoids breaking any rules set down by applicable legislation;
3. consistent with the guiding principles of sound administration;
4. for very good reasons;
5. does not include any potential for bias; and
6. acted upon with no malice intended.

With the goals above and requirements in mind, all of the articles of these laws must be followed by government authorities while exercising their discretion. Naturally, this will check the government's ability to act arbitrarily and restrict its freedom of action. Corona Virus Disease 19 (COVID-19) is a global pandemic that has already devastated the economies and societies of many nations, including Indonesia. The government must take swift and appropriate steps to offer instruction or reach the larger population in response to the rapid proliferation of COVID-19. In truth, governmental actions must comply with established laws. However, the current set of rules and regulations needs to be revised. For this reason, the government provides policies based on discretion since it is considered speedier than drafting rules.

The Indonesian government has issued three decrees to curb the spread of the coronavirus disease 2019 (COVID-19): (1) Decree of the President of the Republic of Indonesia Number 11 of 2020 Concerning

the Determination of a Public Health Emergency for Coronavirus Disease 2019 (COVID-19); (2) Government Decree Number 21 of 2020 Concerning Large-Scale Social Restrictions in the Context of Accidents Related to the Coronavirus Disease 2019 (COVID-19); and However, this legal stance was highly criticized, and the laws were seen as coming too late; as a consequence, the federal and state administrations were unprepared to deal with the Covid-19 epidemic.⁴

Like Indonesia, India was on the cusp of worldwide panic in late January 2020 about the epidemic that would characterize the modern age. As the world learned of the severity of COVID-19, India reported its first case, marking a watershed moment that prompted introspection on the country's convoluted healthcare system and the weighing of human liberties against the need for immediate public health actions. On the same day, the World Health Organisation (WHO) declared a worldwide public health emergency, an early warning for India and other nations to prepare a response.⁵

The Indian government took the extreme measure of instituting a nationwide lockdown as they spent almost two months trying to comprehend the scope and pace of the virus's spread. One of the world's most significant initiatives to contain the virus has shut down businesses, schools, and other public institutions.⁶ However, the

⁴ Ali Roziqin, Syasya Y.F. Mas'udi, and Iradhad T. Sihidi, "An analysis of Indonesian government policies against COVID-19," *Public Administration and Policy* 24, no. 1 (2021): 92–107, <https://doi.org/10.1108/PAP-08-2020-0039>.

⁵ Gorkem Sariyer, et.al., "Fiscal responses to COVID-19 outbreak for healthy economies: Modelling with big data analytics," *Structural Change and Economic Dynamics* 64 (2023): 191–98, <https://doi.org/10.1016/j.strueco.2022.12.011>.

⁶ Aritra Ghosh, Srijita Nundy, and Tapas K. Mallick, "How India is dealing with COVID-19 pandemic," *Sensors International* 1 (2020): 100021, <https://doi.org/10.1016/j.sintl.2020.100021>.

economic damage quickly became apparent and calls to reopen became louder as the urgency of economic and social recovery grew.

With the arrival of better weather and renewed optimism in June, India slowly started to revive its economy. The action is a balancing act between preventing the spread of the virus and helping industries suffering because of the limitations. However, there is cause for optimism as the recovery rate continues to rise despite new cases continuing to arise, generating hotspots that need quick care.⁷

As Indians try to come to this new reality, debates about the country's legal and constitutional structure have heated up. The Indian Constitution is now under scrutiny because it guarantees everyone the right to health care and a reasonable standard of living. Concerns have been raised concerning the appropriateness of limiting personal liberties in the name of public health.

The constitutional provisions regarding health care, such as the state's obligation to look out for the interests of its employees and give aid in times of need, like sickness, took on new significance. India has a complicated federal system, with the states and union territories having some say over health policy and execution.

The disparity in authority between the federal government and the states is especially apparent in the current climate of crisis. A successful response to the epidemic requires careful navigation of the distribution of authorities outlined in the Union List, States List, and Joint List of the Indian Constitution. Parliament has power over Union List items, while state legislatures have control over State List items; nevertheless, in times of crisis, both levels of government must cooperate.

⁷ Justina Jose, Priyanka Mishra, and Rahul Pathak, "Fiscal and monetary response to the COVID-19 pandemic in India," *Journal of Public Budgeting, Accounting & Financial Management* 33, no. 1 (2020): 56–68, <https://doi.org/10.1108/JPBAFM-07-2020-0119>.

In many parts of the globe, such as Indonesia and India, the COVID-19 epidemic has presented unprecedented difficulties. Although each nation has distinct concerns, some similar issues are encountered by both areas.

As an archipelagic nation with an extensive and diversified population, Indonesia faces obstacles in controlling the COVID-19 epidemic. Inadequate health facilities and uneven access to them have become serious obstacles in the fight against the epidemic. The widespread lack of access to health care and education in many parts of Indonesia further complicates efforts to raise awareness and prevent the spread of the virus.⁸

Governmental institutions, resources, and crisis management tactics in India and Indonesia differed significantly during the COVID-19 epidemic. Controlling the spread of the virus and reducing its social and economic effects is a tremendous undertaking for both nations, given their vast populations and health systems, which each confront unique obstacles.

As a first line of defense against the epidemic, India implemented a statewide lockdown with minimal advance notice. All of the individual states are obligated to comply with this federal ruling. Although beneficial in some ways, the emergency remedies authorized by the Epidemic Diseases Act of 1897 presented significant logistical and economic difficulties. The lockdown, critics argue, has created a humanitarian catastrophe, particularly for migrant workers who have been left far from home and their sources of income. However, the rigorous regulations allow health systems and other agencies time to improve their capabilities.

⁸ Hendro Cahyo Saputro, "How Does the Law Solve the Covid-19 Problem?," *The Indonesian Journal of International Clinical Legal Education* 2, no. 3 (2020): 331–44, <https://doi.org/10.15294/ijicle.v2i3.38418>.

Meanwhile, Indonesia opted for less central control. The federal government encourages states and municipalities to use their judgment when implementing policies. While this allows for a more individualized strategy, it also creates difficulties in terms of international coordination and uniformity of reaction. There was a rise in instances in numerous regions due to initial delays in enforcing large-scale social restrictions (PSBB) and shutting borders.

The reaction of both nations was also influenced by the strength of their respective healthcare systems. India can increase the production and distribution of PPE and vaccinations because of its robust pharmaceutical sector and manufacturing capability. In contrast, Indonesia's ability to monitor and control the spread of the virus needs to be improved by the country's health system and testing capabilities.

When it comes to exchanges of information, the two nations take different methods. In India, improvements to the EDA and active communication from the Ministry of Health and Family Welfare aided in spreading information and directives. Indonesia's national and regional administrations try to be transparent, yet more information still needs to be provided.

Pandemic management is complex in both nations for various reasons, including differences in government structure, economic conditions, and current public health regulations. Their stories demonstrate the need for robust healthcare systems, inter-governmental cooperation, and fast action when addressing global health emergencies.

This study addresses (1) the general pattern of discretionary policymaking in Indonesia and India during the COVID-19 pandemic? Based on the preceding description. And (2) How may Indonesia and India use their policymaking discretion to address some parts of the COVID-19 epidemic?

The theoretical basis of this study is grounded in normative legal theory.⁹ India and Indonesia, two nations with relatively large populations and fragmented health systems, have taken significant measures to address increasing public health concerns, as seen by their reaction to the COVID-19 epidemic. Long-standing laws, including India's Epidemic Diseases Act of 1897, have been adapted to meet immediate demands in light of the epidemic. Legislative measures are being implemented to increase safeguards for health workers and sternly penalize violators in response to rising cases of violence against these professionals.

India has a constitutional duty to provide health services to its residents, even though its constitution does not recognize the right to health. It has nonetheless been included within the 'Right to Life' via a succession of judicial interpretations. However, due to the division of these roles between many tiers of government, coordination is essential but sometimes needs to be clarified.

However, Indonesia has a lot of the same problems. The government's slow and inadequate reaction to the epidemic has brought to light issues with policy execution and executive discretion. Finding a middle ground between containing the virus and keeping the economy afloat has challenged Indonesia's Health Quarantine Law and pandemic management measures.

Both pandemics have shown the significance of openness and accountability in applying discretionary policies and the urgency with which public health problems must be addressed. Both nations have been tested by the COVID-19 pandemic, demonstrating the need for flexibility and improved collaboration in future public health management.

⁹ Peter Marzuki Mahmud, *Pengantar Ilmu Hukum* (Jakarta: Kencana Prenada Media Group, 2016).

Studying government responses and the consequences of discretionary acts made during the epidemic through the lens of legal norms applied in this context, from both a statutory and a conceptual and philosophical perspective, might provide light on these issues. This study uses a prescriptive approach to describe the events that have taken place and evaluate their appropriateness in light of the relevant legal standards, the ideas of justice, and legal efficacy.¹⁰

DISCRETION PRINCIPLE: THEORIES & PRACTICES UNDER INDONESIAN AND INDIAN LAW

I. Discretion under Indonesian National Law

Rather than the "*freeies ermessen*" notion employed in Indonesian law, we mean "*Ermessen*" in the sense of German discretion. The notion of *vrij bevoegdheid*, applied in the Netherlands as a free authority, is most similar to *Ermessen*, which has been accessible by earlier legal experts. Even though *ermessen* and *wrej bevoegdheid* have fundamentally distinct meanings. If every state or public institution has the authority of "*ermessen*" (consideration), then every state or public institution must use "*ermessen*" by the use of that authority and the legal limits that apply to that discretion.

According to *ermessen* (consideration), state officials' acts are not discretionary but must be grounded on the applicable legal framework. It follows from the previous definition of *ermessen* that

¹⁰ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Umum* (Jakarta: Rajawali Pers, 2007).

there is no *freies ermessen*; nonetheless, this must be explicitly verified in the legislative rules.

While the idea of a welfare state naturally leads to developing a *freies ermessen* legal state, constraints must be placed on its application. Sjachran Basah argued for *freies ermessen* in the rule of law based on this premise:

1. Designed to carry out civic duties;
2. It's a proactive stance taken by the State government;
3. Third, the law permits this course of action;
4. This was a self-initiated move on his part;
5. This course of action is geared towards the resolution of pressing, unexpected issues;
6. There are legal and moral consequences for this mindset and approach.

Discretion or discretionary power granted to the government is a natural outgrowth of the welfare state idea. Still, it does not come without drawbacks because this free authority opens the door to abuse of power and willful disregard for the populace's safety (French: *détournement de pouvoir* and Dutch: *willekeur*, respectively).

As was once thought, this discretion arose as a workaround for gaps and loopholes in applying the principle of legality (*wetmatigheid van bestuur*). However, since the public interest is constantly evolving with scientific and technological advancements, more than the principle of legality alone is required to play a maximum role in serving that interest. The purpose of Article 22 Constitution State Administration, which establishes the limits on the use of discretionary power by government officials, is to:

1. Make government work more smoothly;
2. Simplifying the law;
3. Guaranteeing legal stability; and

4. Getting the government moving again when it has stalled, for the public's sake.

Proves that those above 4 (four) goals are not merely suggestions but an integrated whole that should serve as the standard by which every discretion is judged. In other words, the article's regulations for the use of discretion only succeed if even one of the four requisite conditions is met.

According to Wayne La Farva, quoted by Soerjono Soekanto, this discretion entails making decisions that are not dictated solely by legislation but also factor in one's values and preferences.¹¹ According to Wayne La Farva, government officials who like using their discretion must meet the following qualifications, which is consistent with article 24 of the State Administration Law:

1. In line with the discretionary goals laid out in Paragraph 2 of Article 22;
2. Complies with all applicable laws;
3. As per the Guiding Principles for Effective Government;
4. Reasonable assurances;
5. Doesn't include any potential conflicts of interest; And
6. Done in honest intent.

With description:

1. The term "objective reasons" refers to those grounded in the General Principles of Good Government and founded on factual, unbiased, and rational considerations.
2. In this context, "good faith" refers to a choice or action made or taken by honesty and the AUPB.

Marcus Lukman, as cited by South P. Panjaitan, states that all truly pressing questions involve the following:

¹¹ Soerjono Soekanto, *Faktor-faktor Yang Mempengaruhi Penegakan Hukum* (Jakarta: Raja Grafindo, 2004),

1. The surface issues must be of significance to the public interest, including national and state interests, community interests, individual citizen interests, and development interests.
2. These issues appear out of the blue, disrupting our carefully laid plans.
3. This issue is left unregulated by statute or is only addressed in broad strokes, giving the executive branch and the public the leeway to work together to find a solution.
4. It is impossible to finish the task using standard administrative procedures, or doing so will decrease efficiency and effectiveness.
5. The public interest is at risk if this issue is not remedied immediately.¹²

In Indonesia, discretion is implemented concerning the preceding idea of discretion as a legal source. Freedom of action has always been linked to government policy, with broad discretion given to policymakers. During the old and new orders, discretionary decisions were often shielded by norms whose conditions and limitations were murky. Among these standards are public interests and public order. To protect the legitimacy of government acts that are not based on the interests of society, the government frequently hides behind abstract circumstances.

Wisdom as an independent authority does not imply total autonomy. Independent power is not recognized by any institution in a state with a functioning legal system. Laws and regulations limit one's authority (both mandated and independent powers). A body's ability to exercise discretion is constrained without the authority provided by statute and law. On the other hand, the General

¹² S. F. Marbun and Moh Mahfud MD, *Pokok-Pokok Hukum Administrasi Negara* (Yogyakarta: Liberty, 1987).

Principles of Good Government are norms of conduct for public servants tasked with governing the country.

Discretion is "the power of a government agency or official that supports them in making choices and is not as free as freedom." State Administration Law is an attempt to codify the field of administrative law and a normative source of government action. Decision-makers in government are subject to guidelines established by State Administration;

The purpose of discretion is the purpose of its authority. Of course, lawmakers need to pay more attention to their intended goals when they give the government power. This is an exception to the general rule of lawfulness. The principle of legality states that all governmental bodies must operate by established rules of law. When referring to administrative law, the phrase "*Dat het bestuur aan het wet is onderworpen*" refers to this basis of legality.¹³ (that government is bound by law) or "*Het legaliteitsbeginsel houdt in dat all (algemene) the burgers bindende bepalingen op de taal moeten beusten.*"¹⁴ (According to the principle of legality, all provisions that bind citizens must have a legal basis). The legitimacy of state action is based on the idea of legality, which also ensures the defense of human rights.

The Covid-19 epidemic shows how Discretion can be used effectively in times of crisis. When a pandemic begins, the problem requires swift and accurate handling and often involves making judgments not precisely specified by current rules and regulations. Discretion is crucial in this situation. Large-Scale Social Restrictions (PSBB) are one way the government has exercised its Discretion in dealing with Covid-19. The government may not impose

¹³ Wej Tjeenk Willink Zwolle, "Rechtsfilosofie en Rechtstheorie," *Rechtsfilosofie en Rechtstheorie* 13 (1984).

¹⁴ *Zwolle*.

widespread bans on community events under normal circumstances. This Discretion, however, becomes crucial in emergencies like a pandemic to protect the public's health and safety. Discretion is also used in practice to determine additional regulations relating to managing COVID-19, such as restrictions on economic activities, restrictions on the mobility of persons, educational policies, and so on. Discretion gives the government the agility and precision to implement these policies.¹⁵

The State Administration Law stipulates that any discretion used must be consistent with existing laws and regulations and founded on objective considerations and good faith. A process for monitoring and controlling the exercise of Discretion is essential to ensuring that public interests are served and that power is not abused. The government must consider many factors when adopting PSBB, including community requirements, the spread of the virus, the capacity of the healthcare system, and so on.¹⁶

¹⁵ See Rema Arya Mubarak, Chalisa Jasmine Azhima, and Muhammad Pramadiathalla. 2020. "Public Government Affairs As an Alternative Mechanism for Handling the COVID-19 Outbreak in Indonesia". *Lex Scientia Law Review* 4, no. 2 (2020): 25-38; Busrol Chabibi, and Irfan Jamallullail. "Are Government Appeals on Physical Distancing During the Covid-19 Pandemic Effective? An Analysis from Law and Public Policy". *Journal of Law and Legal Reform* 1, no. 4 (2020): 549-62; Rosalia Dika Agustanti, Yuliana Yuli Wahyuningsih, Satino Satino. "Guarantee Of Worker Rights During the Covid 19 Pandemic". *Jambura Law Review* 3, no. SI April (2021): 77-95.

¹⁶ Furthermore, it is emphasized that the Covid-19 pandemic has ushered in substantial changes across multiple domains. Firstly, alterations in legal enforcement and the judicial system have become apparent, signifying adaptations in how laws are enforced and legal processes are conducted. Secondly, various government policies have undergone transformation, encompassing decisions related to public health, safety regulations, economic stimuli, and social welfare initiatives. Thirdly, the economic sector has experienced shifts, with adjustments in fiscal policies, trade regulations, and financial support mechanisms aimed at mitigating pandemic-induced economic challenges. Lastly, the social sector has not been immune to change, as

This policy may be deemed a commendable exercise of discretion only if these considerations are diligently addressed. Consequently, whenever the government opts for such discretion, it bears the responsibility to elucidate the rationale behind its decisions in a lucid and transparent manner. This is paramount for upholding public confidence and garnering broad support essential for the effective implementation of the policy. In addition, the exigencies of the COVID-19 epidemic necessitate a heightened use of discretion by the government in policy formulation and decision-making. However, it is imperative that this discretion be wielded ethically and with transparency.

II. Discretion in Indian Law

Article 21 of the Indian Constitution (i.e., Right to Life, and the Government shall ensure that this right is not infringed upon) does

healthcare, education, and social assistance policies have been revisited to address the unique challenges posed by the ongoing global health crisis. In summary, the pervasive impact of the Covid-19 pandemic is evident across legal, economic, and social spheres, necessitating comprehensive adaptations in policies and systems to effectively respond to the unprecedented challenges at hand. *See also* Iqbal Kamalludin, Adissya Mega Christia, Achmad Jauhari Umar, Bunga Desyana Pratami, Rizqiyani Syifa Widiastuti, Delasari Krisda Putri. "A Human Rights Discourse on Death Penalty for Corruptors during the Outbreaks: Reflection on the Covid 19 Pandemic". *IJCLS (Indonesian Journal of Criminal Law Studies)* 8, no. 1 (2023): 1-36; Sandhy Handika, Muhammad Ibnu Fajar Rahim, & Rudi Pradisetia Sudirdja. "Virtual Court Policy For Criminal Justice on Corona Virus Disease Pandemic." *Substantive Justice International Journal of Law* 3, no. 1 (2020): 74-93; Ahmad Zaharuddin Sani Ahmad Sabri, Roziya Abu, Nicholas Khoo Kim Seng, and Rodiyah Rodiyah. "Movement Control Order on Legal and Social Aspects: Malaysian and Indonesian Government Initiatives During Covid-19". *Journal of Law and Legal Reform* 1, no. 4 (2020): 563-76; Nduka Lucas Oluka, "Covid-19, Global Crisis and the Challenges of Human Security Management in Nigeria". *Indonesian Journal of Advocacy and Legal Services* 4, no. 1 (2022): 161-94.

not include the discretionary concept of the Right to Health; however, in the judgments *Consumer Education and Resource Centre v. Union of India* (1995), *State of Punjab and others v. Mohinder Singh Chawala* (1997), and *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996), the Right to Health was included as.¹⁷ Therefore, the federal, state, and local governments (including panchayats and municipalities) must be balanced in ensuring that all individuals have access to quality medical care. Contrary to popular belief, "health emergencies" are not covered by the Indian Constitution's emergency clauses.

The Indian President has the authority to declare national, state, and financial emergencies under the Indian Constitution. Threats to national security from war, foreign aggression, or internal armed rebellion warrant the declaration of a national emergency. If there is a constitutional crisis, the state government declares an emergency. An emergency financial declaration will be made if a country's economy is in danger of collapsing. Because restricting freedom of movement or adopting other extreme measures to stop the disease from spreading will affect the population. During British colonial rule in India, the Epidemic Diseases Act of 1897 (EDA) was passed in response to an outbreak of bubonic plague in the then-named Bombay State (now Maharashtra State). Only four provisions of the 125-year-old statute remain in effect. John Woodburn, a member of the Council of the Governor General of India in Calcutta, described the law as "extraordinary" but "necessary" during its introduction in

¹⁷ Binod K. Patro, Jaya Prasad Tripathy, and Rashmi Kashyap, "Epidemic Diseases Act 1897, India: Whether Sufficient to Address the Current Challenges?," *Journal of Mahatma Gandhi Institute of Medical Sciences* 18, no. 2 (2013): 109, <https://doi.org/10.4103/0971-9903.117796>.

1897 and emphasized that people should "trust to the wisdom of the executive in urgent and critical circumstances".¹⁸

Therefore, any action based on the epidemic must consider every potentially catastrophic event. The "greater good" requires that the public not question such judgments. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2014), and Nipah virus (2018) were all contained in large part due to this rule. Only the EDA permits lawful means to combat epidemics on a national or regional scale.

On April 22, 2020, utilizing powers under Article 123, the Modi Cabinet approved an ordinance to amend the EDA, as there had been incidences of attacks on health professionals. Section 3 of the EDA was revised due to regulations. One may be sentenced to "imprisonment for 3 months to 5 years and a fine of Rs. 50,000/- to Rp.200,000/- " for "causing damage or loss to property." Health personnel who are the victims of aggression or physical assault face penalties including "incarceration for a period of 6 months to 7 years and a fine of Rs.100,000/- to Rp.500,000/." To add insult to injury, "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage." As the health department responsible for issuing guidelines and bulletins to other Central Government and state governments, the Ministry of Health and Family Welfare is heavily involved in guiding and advising states on COVID-19. Since COVID-19, the Ministry of Health and Family Welfare Secretary has held frequent press conferences to update the public. Regulations and notices were issued by state and UT governments under section 2 of

¹⁸ M. Z. M. Nomani and Rehana Parveen, "Covid-19 pandemic and application of disaster management act, 2005: Promises and pitfalls," *International Journal of Pharmaceutical Research* 12, no. 4 (2020): 3730–34.

the act concerning the steps to be taken to prevent the spread of COVID-19.¹⁹

However, the Seventh Schedule of the Constitution of India specifies that the central and state governments share responsibility for public health. Each level of government is responsible for enacting laws on a particular set of topics, as delineated by the List's Union List, State List, and Joint List.

The Indian government has shown considerable leeway in applying these regulations and statutes, however. The government has imposed a statewide lockdown in reaction to the pandemic, which might be seen as violating the individual liberties protected by Article 21 of the Constitution. It has also been shown that "executive discretion is in a precarious and critical state," a principle adopted by the British colonial authority in the original implementation of EDA. The relationship between executive discretion and applicable constitutional and legal standards must be considered when planning for and responding to the COVID-19 outbreak in India. In many respects, this discretion has been crucial in allowing governments to react swiftly and effectively to the novel and unprecedented difficulties the pandemic offers. However, exercising this discretion has also produced problems and disputes about fundamental rights and good government. Some examples of executive discretion in urgent and severe situations are the employment of the EDA and the installation of a national lockdown. Some people, however, worry that these policies set a bad precedent for future government abuse of

¹⁹ Richard Griffith, "Using public health law to contain the spread of COVID-19," *British Journal of Nursing* 29, no. 5 (2020): 326–27, <https://doi.org/10.12968/bjon.2020.29.5.326>.

power and go against fundamental rights like the right to life and personal liberty that the Constitution guarantees.²⁰

The government's discretion has also created some real-world difficulties. For instance, the government revised the EDA to include stricter penalties for violators in reaction to attacks on health professionals. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.

It has been controversial and criticized that countries have a lot of leeway in responding to the pandemic. The government has been accused of abusing its power by violating the constitutional rights of its citizens.

The statewide lockdown instituted in response to COVID-19 has been criticized as an infringement on fundamental freedoms protected by Article 21 of the Constitution. Even if the government claims these actions were necessary to safeguard the public's health and safety, the lockdown's challenging implementation and severe economic side effects have prompted widespread criticism and demonstrations. Some have also voiced concern that recent amendments to the Epidemic Diseases Act give the government and health professionals too much authority. However, there are worries that the new, harsher sanctions may be exploited, even though their stated purpose is to protect health workers from assault.

²⁰ Sangeeta Mahapatra, *Digital Surveillance and the Threat to Civil Liberties in India*, vol. 3, GIGA Focus Asien (Hamburg: German Institute for Global and Area Studies (GIGA) - Leibniz-Institut für Globale und Regionale Studien, Institut für Asien-Studien, 2021).

DISCRETION POLICY PATTERNS DURING THE COVID 19 PANDEMIC IN INDONESIA & INDIA

Legal discretion refers to a set of strategies and decisions the government adopts to manage and guide people's behavior to attain particular legal goals. Meanwhile, preference (free policy) means that authorities can act or make choices based on their interpretation of the law or the facts of a given case.²¹

There is a special relationship between these ideas during a pandemic. On the one hand, the rapid and unpredictable changes brought on by the pandemic call for legal rules that are both adaptable and responsive. However, discretion must be used cautiously to avoid infringing on citizens' fundamental rights.²² There is a pressing need to find a middle ground between ensuring public safety and allowing people to maintain their liberties in the wake of the Covid-19 outbreak.²³

²¹ Maarten Pieter Schinkel, Lukáš Tóth, and Jan Tuinstra, "Discretionary authority and prioritizing in government agencies," *Journal of Public Administration Research and Theory* 30, no. 2 (2020): 240–56, <https://academic.oup.com/jpart/article-pdf/doi/10.1093/jpart/muz018/33045851/muz018.pdf>.

²² Joelle Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis," *Hague Journal on the Rule of Law* 14, no. 2–3 (2022): 349–69, <https://doi.org/10.1007/s40803-022-00168-8>.

²³ The pandemic presents unique challenges for democratic governance, with measures that often limit fundamental rights and can only be justified in certain circumstances. The urgency in dealing with the pandemic could conflict with the principles of separation of powers and the rule of law, bypassing ordinary processes and even potentially concentrating discretionary power in the executive. *See also* Vageesh Jain, Jonathan Clarke, and Thomas Beaney, "Association between Democratic Governance and Excess Mortality during the

Stephen Thomson asserts that the legal response to the pandemic necessitates a foundation rooted in empirical evidence, a measured and proportional approach, and a framework subject to rigorous scrutiny.²⁴ There must be openness and responsibility in discretion, and only extreme public health emergencies should warrant deviations from the norm.

Like many others, Jack McNally thinks that extreme caution must be used during the epidemic. The document contends that "excessive use of discretion can create risks of abuse of power, injustice, and legal uncertainty, ultimately undermining public trust in the legal system and government".²⁵ Grogan also has another point of view: "The appropriate and prudent use of discretion in the face of a crisis such as the Covid-19 pandemic can serve as an essential means to fill inevitable gaps in the law and to deal with extraordinary situations that the legislator cannot anticipate."²⁶

This perspective recognizes the critical role that discretion can play in stemming the pandemic but stresses that it must be exercised reasonably and proportionally. Thus, in the context of the Covid-19 epidemic, legal and discretionary policies are two sides of the same coin, both vital to delivering an effective and fair response to the challenges posed by the pandemic, provided they are handled with prudence and thoughtful consideration.

COVID-19 Pandemic: An Observational Study," *J Epidemiol Community Health* 76, no. 10 (2022): 853–60, <https://doi.org/10.1136/jech-2022-218920>.

²⁴ Stephen Thomson and Eric C. Ip, "COVID-19 emergency measures and the impending authoritarian pandemic," *Journal of Law and the Biosciences* 7, no. 1 (2020).

²⁵ Jack McNally, "Accountability, Discretion and the Rule of Law: Issues in Pandemic Policing," *Australian Public Law*, retrieved from <https://www.auspublaw.org/blog/2020/07/accountability-discretion-and-the-rule-of-law-issues-in-pandemic-policing>.

²⁶ Grogan, "COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis."

It is essential that discretion not be abused to cause injury to individuals or groups or to evade accountability in a court of law. Therefore, in the context of the epidemic, governments and legal authorities need to find the correct balance between the need to take rapid and effective action to protect public health and maintain legal principles and human rights. It's not an easy assignment, but it's crucial to ensure the pandemic reaction is not just successful in stopping the virus' spread but also just and considerate of people's rights.

In light of the foregoing, we now examine the prevailing legal and discretionary policy tendencies in Indonesia during the Covid-19 epidemic²⁷ and India,²⁸ It's crucial to remember that specialists emphasize different aspects of discretionary issues and approach concepts. As a result, we should analyze Indonesia's response to the COVID-19 epidemic in terms of its discretionary policies.

²⁷ According to Law Number 30 of 2014 concerning Government Administration, Article 1 number 9 states that discretion is a decision and/or action determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of statutory regulations that provide choice, non-regulating, incomplete, or unclear, and/or government stagnation. Article 22 paragraph (2) states that discretion aims to streamline government administration, fill legal gaps, provide legal certainty, and overcome government stagnation in certain circumstances for the benefit and public interest.

²⁸ In the Indian legal system, legal discretion refers to the power or authority granted to government bodies or officials to make decisions in the performance of their official duties. This discretion is necessary because not all situations can be specifically regulated by law, so public officials need flexibility to adapt their actions to different conditions. One of the important laws that gave discretion to officials in India was the Epidemic Diseases Act of 1897. This law is a classic example of how legal discretion is given to deal with public health emergencies, such as pandemics. During COVID-19, this law empowers the central and state governments to take actions deemed necessary to control the spread of infectious diseases.

Indonesia has a pluralistic legal system, which means that there is also customary law in addition to state law and religious law. The Indonesian government has issued several restrictions and measures in response to the Covid-19 outbreak. The government of Indonesia as a whole's primary legal and regulatory basis for dealing with pandemics, including the COVID-19 pandemic, is Law Number 6 of 2018 concerning Health Quarantine. However, the law must still control technical problems in handling the Covid-19 epidemic. The government's attempt to provide the public with some legal clarity while also reducing the spread and fatalities caused by the COVID-19 outbreak. Among the many rules and regulations enacted by the government are:

1. Large-Scale Social Restriction Government Regulation No. 21 of 2020 in the Context of Rapidly Addressing Corona Virus Disease 2019 (Covid-19).
2. Public Health Emergency Due to the 2019 Corona Virus Epidemic (COVID-19): Decree No. 11 of the President of the Republic of Indonesia, 2020.
3. Health Minister's Order No. 9 of 2020: Social Restriction Guidelines in the Context of Rapid Response to Corona Virus Outbreaks.
4. Several directives from the Minister of Home Affairs restrict emergency community activities in the Java and Bali regions due to the 2019 Corona Virus Disease.

President Joko Widodo and his administration have repeatedly stated from the beginning of the epidemic in 2020 that regional quarantine will not be implemented. Jokowi ruled out a lockdown, saying it would hurt the economy.²⁹ Due to the far-reaching effects of

²⁹ Ihsanuddin Ihsanuddin and Kristian Erdianto, "Jokowi Akhirnya Blak-blakan soal Alasan Tak Mau Lockdown," *KOMPAS*, 2 April 2020,

quarantining entire regions. Therefore, the president and his team emphasized that only large-scale social limitations should be applied because the economy must continue to run. Government Regulation No. 11 of 2020 and Minister of Health Regulation No. 9 of 2020 Regarding PSBB Guidelines reinforce the government's decision to enact Large-Scale Social Restrictions (PSBB) solely. There were issues with the Government Regulation's substance because of PSBB. In this study, we'll go deeper into the three most pressing problems that surfaced when the government released its regulation on PSBB. The health emergency decided by President Joko Widodo by the issue of Presidential Decree Number 11 of 2020 addressing the determination of health emergency status is the basis for Government Regulation No. 11 of 2020, which regulates PSBB above. The two issues that resulted from this are elaborated upon in the following study.

PPKM, the Instruction of the Minister of Home Affairs on the Implementation of Emergency Community Activity Restrictions, is the most up-to-date rule regulating the management of the COVID-19 epidemic. The government issued several Ministerial Instructions from the Ministry of Home Affairs about PPKM. Beginning with Instruction of the Minister of Home Affairs No. 15 of 2021 about Emergency PPKM and ending with Instruction of the Minister of Home Affairs No. 12 of 2022 regarding Micro PPKM.

By looking at the rules that were put in place following the COVID-19 epidemic, it is easy to see that we are under a time crunch that necessitates the elimination of red tape to have administrative policies implemented. According to Garry Goodpaster, who discussed the significance of Administrative Procedure Law for

<https://nasional.kompas.com/read/2020/04/02/05405561/jokowi-akhirnya-blak-blakan-soal-alasan-tak-mau-lockdown>.

Indonesia, the most vital part is that all types of policy still adhere to sound administrative procedures:³⁰

Administrative performance in Indonesia might be significantly enhanced by passing a law mandating openness and transparency in all administrative bodies, including local ones (an Administrative Procedure Law). Doing so would also set the stage for a robust system of regulatory scrutiny.

Accordingly, exercising discretion is crucial in exceptional circumstances where statutory regulations either fail to provide clear direction or are insufficient to address the relevant issues. The Indonesian government has used its discretion to adopt several legislation and regulations in response to the COVID-19 outbreak. This discretion helps to close the gap between the law and the ever-evolving reality on the ground, which is especially important in times of crisis like the recent COVID-19 outbreak.

However, exercising discretion still requires due diligence and deliberation. Several stipulations are laid down in Law No. 30 of 2014³¹ Which must be met in using discretion: discretion can only be used if laws and regulations provide options but do not regulate, are incomplete or unclear, and there is governmental stagnation; the use of discretion must be based on public interest and justice; and the use

³⁰ M. Ikbar Andi Endang, "Diskresi dan Tanggung Jawab Pejabat Pemerintahan Menurut Undang-Undang Administrasi Pemerintahan/Discretion and Responsibility of Government Officials Based on Law of State Administration," *Jurnal Hukum Peratun* 1, no. 2 (2018): 223–44.

³¹ For further information, see Chapter VI, Articles 22-32 (10 Articles), covering content material consisting of the general part of discretion (Article 22), scope of discretion (Article 23), discretionary requirements (Articles 24-25), procedures for using discretion (Article 24-25). Articles 26-29), the consequences of discretionary law (Articles 30-32).

of choice must be carried out proportionally, professionally, objectively, fairly, and accountably.

However, the Infectious Diseases Act of 1897 and the Disaster Management Act of 2005 provide the Indian government extensive authority over managing public health crises in that country.³² Both statutes offer a legislative framework that permits the federal and state governments to take special steps to respond to health emergencies such as pandemics. The freedom to craft their policies gives states the leeway to tailor initiatives to meet specific regional requirements.

However, this exercise of legal discretion creates various obstacles. Uncertainty and disunity in response to the epidemic could be one of them. Since different states take different approaches, the public and relevant parties may wonder what rules apply. In addition, if the regulations enacted are seen as too restrictive or enforced in a discriminatory fashion, such discretion could lead to civil rights breaches.³³

However, their discretionary powers greatly facilitate governments' swift and targeted responses to new threats. The ability to act quickly, without waiting for a protracted legislative procedure, is crucial in a rapidly developing crisis scenario, such as the spread of a disease. The potential for misuse of authority is increased, however.

Despite their distinct methods and legal systems, both countries stress the need for discretion in dealing with the pandemic. One example of discretionary government action in Indonesia is the imposition of quarantine and social restrictions, while in India, it is

³² Ayushi Bajaj and Gaurav Datt, "Financing of Fiscal Response to COVID-19: A Pragmatic Alternative," *Indian Economic Review* 55, no. 1 (2020): 149–60, <https://doi.org/10.1007/s41775-020-00090-6>.

³³ Lekha Chakraborty and S. Harikrishnan, "COVID-19 and Fiscal-Monetary Policy Coordination: Empirical Evidence from India," *SSRN Scholarly Paper* (Rochester, NY, 7 February 2022), <https://doi.org/10.2139/ssrn.4028927>.

the choice of various states to implement and adjust public health programs.

The Indonesian government has responded to the pandemic in several ways, some of which have been more arbitrary than others. The government has discretion in choosing the nature and extent of quarantine measures necessitated, for instance, while carrying out Health Quarantine Law No. 6 of 2018.³⁴ At the start of the pandemic, the government chose to implement what are known as "Large-Scale Social Restrictions" (PSBB), a form of social quarantine that is more flexible than a total lockdown.³⁵ Governments are given this leeway to respond to changing circumstances and consider a wide range of considerations, including the potential socioeconomic effects of their decisions.³⁶ However, several obstacles must be overcome while using this discretion. The problem of ambiguity in the law is one of them. For instance, it needs to be clarified how the PSBB should be implemented or what kinds of exemptions are allowed. Some people need clarification and clarification as a result of this.

There are also worries about fundamental rights being violated and discretion being abused. Therefore, the government must make decisions with openness and accountability and base their decisions on sound science. Meanwhile, in the Indian context, the discretionary use of the Act. Infectious Diseases Act of 1897 (Epidemic Diseases Act, EDA) and the Disaster Management Act of 2005 (Disaster Management Act, DMA) in response to the COVID-19 pandemic have

³⁴ See Article 55, Law of the Republic of Indonesia Number 6 of 2018 concerning Health Quarantine

³⁵ See Government Regulation no. 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Corona Virus Disease 2019 (COVID-19)

³⁶ Reza Yustiyanto, "Diskresi Pemerintah dalam Penanganan Pandemi Covid 19 Berdasarkan Undang-Undang Nomor 2 Tahun 2020," *Jurnal Restorasi Hukum*, 5, no. 1 (2022): 1–30.

taken the form of their activation.³⁷ In light of a public health emergency on a scale not seen in India since independence, the central government has ordered the states to utilize the EDA as a legal foundation for implementing emergency measures to contain the virus. The central government has used the DMA to take strategic action and coordinate responses to the pandemic.

The EDA, enacted in the late 19th century, gave the government broad authority to respond swiftly and uniquely to epidemics of infectious diseases.³⁸ However, the necessity to amend and modernize this regulation has become apparent in light of the difficulties inherent in predicting the complex modern nature of a pandemic like COVID-19. However, DMAs have been implemented to give a larger framework for emergency coordination and aid in more generic disaster scenarios. Furthermore, how Indonesia and India differ in their discretionary responses to the COVID-19 epidemic, can be seen at Table 1.

TABLE 1. Comparison of discretionary responses during COVID-19 in Indonesia and India

Aspect	India	Indonesia
Legal basis	Regulation of Epidemics Act (1897) and the Disaster Management Act of 2005	The Health Quarantine Act of 2018 (Law No. 6), the Disaster Management Act of 2007 (Law No. 24), and the Infectious Disease Outbreak Act of 1984 (Law No. 4)

³⁷ Kiran Kumar Gowd, Donthagani Veerababu, and Veeraiahgari Revanth Reddy, "COVID-19 and the Legislative Response in India: The Need for a Comprehensive Health Care Law," *Journal of Public Affairs* 21, no. 4 (2021): e2669, <https://doi.org/10.1002/pa.2669>.

³⁸ Patro, Tripathy, and Kashyap, "Epidemic Diseases Act 1897, India."

Aspect	India	Indonesia
Implementation of Discretion in Handling the Pandemic	Federal and state governments have the power to formulate and enact laws.	Federal and state governments have the power to make and carry out policy—the capacity to enact Policies of Mass Social Restriction (PSBB) and Related Measures.
Control and Accountability	Checks and balances in the legal system manage them. Parliamentary and media discussion and criticism provide a forum for public political accountability.	Legislative and auditing bodies provide the necessary oversight—responsibility enforced using judicial and public review.
Impact of the Application of Discretion	Introducing disorder and inconsistency into a pandemic response. It can lead to human rights abuses but also allows for targeted interventions—the danger of power misuse.	Disparities in regional policy implementation are possible. Adopting PSBB and associated measures may pose a risk of civil rights abuses. Allows for quick adjustments and replies.

Source: Authors

Both Indonesia and India have chosen to respond to the COVID-19 epidemic independently, with varying degrees of success. The usefulness and impact of using this discretion should be evaluated in light of the local context, which might vary greatly depending on the country or location.

In terms of legal basis, both India and Indonesia have regulatory instruments meant to manage health emergencies. India uses the Disaster Management Act, passed in 2005, and the Epidemic Diseases Act, which dates back more than a century. However, Indonesia follows a different set of rules when it comes to dealing with pandemics and natural calamities. The emphasis on various policies and the flexibility with which the law responds to new situations account for these varying legal foundations.

When tackling the pandemic, both nations give local and state governments the power to make their own decisions. This reflects the understanding that local governments are best suited to address the unique challenges of their communities. However, difficulties in developing a unified and consistent response across nations arise from this decentralized strategy.

The requirement for speed in responding to the pandemic must be balanced with safeguards to prevent abuse of authority, and this is a challenge for both countries. Oversight and accountability in India mainly occur through the legal system and parliamentary discussion. Responsibility for policies and practices is promoted in Indonesia through legislative regulation and audit.

Finally, the impact of discretion in these two circumstances indicates that while intention gives the flexibility essential for swift and locally appropriate responses, it also presents no less critical hazards. Both nations have concerns concerning civil rights violations and possible misuse of power. However, in times of crisis like the current COVID-19 outbreak, speed of response is generally regarded as crucial.

This analysis shows that both countries have established legal frameworks and processes to cope with pandemic scenarios. However, adjusting these laws to meet unexpected problems requires a flexible but regulated approach. Important lessons for the future of legal reform in both nations can be gleaned from this experience.

INDONESIAN & INDIAN DISCRETIONARY POLICY: CHALLENGES & STRATEGIES REGARDING ASPECTS OF THE COVID 19 PANDEMIC

Like the rest of the world, India is having trouble responding to the spread of COVID-19, especially in 2020, when so little is known about the virus. With its distinct legal system, India exercises similar legal discretion when dealing with COVID-19. The Indian government imposed a statewide lockdown within the bounds of the law.³⁹ This law is also utilized to address social problems that have surfaced during the pandemic, such as misinformation and prejudice.⁴⁰

Legal discretion is also essential to handling the COVID-19 epidemic in Indonesia. Decisions on movement restrictions, restricting economic sectors, and enforcing health protocols are made in Indonesia using legal discretion, as in the United States and India. False information and discrimination against particular groups have become problems in Indonesia during the pandemic, much as they have in India. Through the Information and Electronic Transactions Law and other relevant rules, the Indonesian government exercises its legal discretion to crack down on violators and the dissemination of misleading information. Government and civil society organizations take measures, including public education and law enforcement, to combat discrimination, as applicable laws require.

India and Indonesia, among others, use legal discretion as a critical instrument in responding to the pandemic. With this leeway,

³⁹ Deena Dimple Dsouza dkk., "Aggregated COVID-19 suicide incidences in India: Fear of COVID-19 infection is the prominent causative factor," *Psychiatry Research* 290 (1 Agustus 2020): 113145.

⁴⁰ Griffith, "Using public health law to contain the spread of COVID-19."

governments can better respond to shifting circumstances and tailor policy initiatives to each nation's needs. Regarding the COVID-19 pandemic, Indonesia's discretionary strategy has various possible flaws:

1. Accountability and Openness to the Public

Discretion in the enforcement of laws might create issues with openness and responsibility. Distributive economic stimulation initiatives in Indonesia risk misuse and corruption if they are not carefully controlled and administered.

2. Ineffectiveness of Aid Distribution

Discretion in the provision of financial aid might become problematic when there are no established public standards for determining eligibility. As a result, aid distribution may become inequitable and inefficient.

3. Challenges in Putting Policies into Action

Regulations for pandemic management may be implemented and enforced in various ways due to the leeway afforded to local governments. This may hinder the efficiency and efficacy of national policymaking.

4. Violations of human rights and discrimination

When discretion is used to oppress certain groups or to impede freedom of speech and information, it can lead to discrimination and human rights breaches in the context of misleading information and law enforcement.

This suggests that judicial discretion is crucial in responding to the COVID-19 pandemic in many countries, like India and Indonesia. As a result, governments can better adapt to new circumstances by developing and enacting policies that are both effective and adaptable to local events. There are concerns with the use of discretion in the law. The potential for discrimination, human rights breaches, and other implementation weaknesses, such as a lack of transparency and

accountability, ineffective aid distribution, and challenging policy implementation, must be foreseen and controlled effectively.

For Indonesia, this means prioritizing human rights principles in all legal actions, increasing transparency and accountability in judicial discretion, making it easier to determine who qualifies for financial aid, improving coordination between the national and regional levels of government, and so on.

Therefore, any action based on the outbreak must consider all crucial aspects. The "greater good" necessitates that the people not oppose such policies. Cholera (1910), the Spanish flu (1918–19), smallpox (1974), swine flu (2014), and Nipah virus (2018) were all contained in large part due to this rule. In the event of a national or subnational epidemic, the EDA is the sole law that can be used to intervene legally. As there had been attacks on health professionals, on April 22, 2020, the Modi Cabinet used its Article 123 powers to draft an ordinance amending the EDA. Ebola Virus Disease Act (EVD) Section 3 of the Ordinance Was Amended. In the event of property destruction or loss, violators face "imprisonment for 3 months to 5 years and a fine of Rs. 50,000/- to Rp.200,000/-." "In cases of violence and physical attacks on health workers, they can be imprisoned" for a period of 6 months to 7 years and with a fine of Rs.100,000/- -to Rp.500,000/." "the perpetrator must also pay compensation to the victim and twice the fair market value for property damage."

Regarding COVID-19, the Ministry of Health and Family Welfare takes the lead, leading and advising states. This is because it is the health agency responsible for issuing instructions and bulletins to other ministries of the Central Government and state governments. The Secretary of the Ministry of Health and Family Welfare (MoHFW) has been giving news conferences regularly since COVID-19. Regulations and notices were issued by state and UT governments

under section 2 of the act concerning the steps to be taken to prevent the spread of COVID-19.⁴¹

However, the Seventh Schedule of the Indian Constitution allocates public health duties between the federal government and individual states. The Union List, State List, and Joint List delineate the areas of jurisdiction for the federal government and individual states, respectively. In addition to being included in all three categories, public health lawmaking authority rests with both the federal and state levels of government. The Indian government, however, has shown a great deal of leeway in applying these regulations and statutes in practice. The government has imposed a statewide lockdown in reaction to the pandemic, violating the individual liberties protected by Article 21 of the Constitution. As the British colonial administration did first while enforcing the EDA, the government had shown "executive discretion in critical and critical situations."

The relationship between executive discretion and applicable constitutional and legal standards must be considered when planning for and responding to the COVID-19 outbreak in India. This leeway has been critical in helping governments meet the novel and extraordinary difficulties the pandemic faces with agility and efficiency. The use of this discretion, however, has resulted in several problems and debates about fundamental rights and effective government. For example, using the Epidemic Disease Act (EDA) and installing a statewide lockdown is an example of exercising executive discretion in insecure and crucial circumstances. Others, however, worry that setting such a high bar for government overreach would

⁴¹ Richard Griffith, "Using public health law to contain the spread of COVID- 19". *British Journal of Nursing* 29, no. 5 (2020): 326–327

violate fundamental Constitutional rights like the right to life and personal liberty.⁴²

The government's discretionary actions have also created real-world complications. Attacks on health professionals have prompted policy changes like those made to the Epidemic Disease Act (EDA) to increase sanctions for those responsible. While these reforms are intended to protect healthcare workers, critics say they might be used to stifle civil liberties and crack down on legitimate protests.⁴³

While governments have a high degree of discretion in responding to the, It's no secret that the pandemic has been met with skepticism and criticism. The government has been accused of abusing its power by taking measures that go against the rights of its citizens. Some have complained that the statewide lockdown implemented to combat COVID-19 infringes on people's rights protected by Article 21 of the Constitution. The government may claim that these actions were necessary to safeguard the health and safety of the population. Yet, widespread criticism and demonstrations have resulted from the lockdown's challenging implementation and severe economic consequences. Changes to the Epidemic Diseases Act have also been criticized for allegedly giving the government and health professionals too much authority. The new regulations are supposed to keep medical professionals safe from harm, but some worry that the strict punishments may be misused.

India and Indonesia use a discretionary strategy to combat the COVID-19 epidemic by combining international cooperation with in-country adjustments. The two nations' approaches to discretion are

⁴² Tanushka Sharma and Arunima, "Management of Civil Liberties During Pandemic," *Indian Journal of Public Administration* 67, no. 3 (2021): 440–51, <https://doi.org/10.1177/001955612111035931>.

⁴³ Shivangi Shivangi and Laxman S. Meena, "A Comprehensive Review of COVID-19 in India: A Frequent Catch of the Information," *Biotechnology and Applied Biochemistry* 68, no. 4 (2021): 700–711, <https://doi.org/10.1002/bab.2101>.

very different, notably regarding cross-border collaboration and openness.

In contrast, Indonesia takes a more decentralized strategy. While the federal government establishes broad guidelines, state and local governments carry them out. Large-scale social restriction (PSBB) policies reflect this reality; these policies vary from region to region based on the prevalence of COVID-19. Although this method is adaptable, it creates difficulties in coordinating between national and local governments, leading to consistency and clarity in the pandemic response.

Like India, Indonesia can allow a swift and targeted response to the COVID-19 pandemic by delegating authority to the central and regional governments to establish their pandemic strategies. But there must be safeguards against arbitrary rules and human rights breaches.

1. Transparency and Consistency in Policymaking

There needs to be nationwide uniformity in how the government handles pandemics. All policy decisions and their rationales and details on how they will be carried out must be made public.

2. Accountability and Supervision

To ensure discretion is utilized correctly and efficiently, there must be a rigorous system of checks and balances. If there is an instance of discretionary abuse, there must be consequences.

3. Evidence-based

Policy decisions should be based on evidence, not ideology. This is crucial for ensuring that the policies implemented to combat the epidemic are not detrimental to society while also being practical.

Infectious illness prevention and treatment are governed at India's federal and state levels. The Public Health Protection Act gives the federal government the power to establish national standards for

preventing and treating infectious diseases. At the same time, individual states can establish similar standards within their borders. However, federal and state governments have many disagreements and conflicts regarding who is accountable for combating infectious diseases like COVID-19. This analysis demonstrates that, similar to COVID-19, local governments play a vital role in the fight against contagious illnesses worldwide. Central government plays a crucial role in infectious disease control through coordination and funding.

Evidence worldwide suggests that exercising restraint when responding to pandemics like COVID-19 is essential. Discretion allows national and regional governments to react to varied situations in distinct regions. However, there is a danger that discretion could lead to misuse of authority.

Indonesia needs to think about a few things if it wants to use its discretion efficiently and responsibly. The first step is establishing each government level's specific duties and responsibilities. Second, there must be openness and uniformity in how policies are carried out. Third, robust systems for oversight and accountability should be in place to avoid and redress discretionary abuses. Finally, scientific evidence, not political considerations, must inform policy.

Revising various articles in Law Number 6 of 2018 concerning Health Quarantine and other rules is essential in realizing perfect discretion in dealing with the pandemic. Policy and procedure changes and enhanced national and local government capability are critical to successfully implementing legal reforms.

Taking India's experience with the COVID-19 epidemic into account, an optimal legal construction in Indonesia may contain the following changes to local laws and characteristics:

1. Improved Harmonisation and Coordination

Indonesia could learn from India's Disaster Management Act and create or improve procedures for central and regional

governments to coordinate their responses to the pandemic. One possible mechanism for achieving this goal would be establishing dedicated boards or commissions whose job would be to coordinate a unified response while allowing for enough leeway at the regional level to adapt to unique circumstances.

2. The Accountability Framework and Its Use of Discretion

To account for the discretion given to local governments in Indonesia, similar to India's use of the Epidemic Diseases Act, clear criteria must be established when and how this power can be used. Better monitoring systems are needed to ensure that responses are appropriate and aligned with human rights standards.

3. Fortifying a Clear Legal Foundation

To better deal with the pandemic crisis, Indonesia has to alter its legal base, possibly by revisiting the Law on Health Quarantine. The situation in India demonstrates the importance of passing new laws to deal with the unique difficulties of the current pandemic.

4. A Well-Defined Procedure for Limiting Public Events

In contrast to India's unexpected lockdowns, which have the potential to generate confusion and socioeconomic upheaval, Indonesia may need to set clear and precise instructions for applying Community Activity Restrictions.

5. Honesty and clear communication

Indonesia may learn to promote openness in decision-making and ensure good communication between the government and the public by looking at India's challenges in these areas and adapting their strategies.

The lessons that Indonesia could learn from India's legal system include the importance of creating a centralized and decentralized system with well-defined powers and responsibilities to prevent

abuse of authority and promote civic engagement and trust through openness and clear communication.

CONCLUSION

This study concluded and highlighted that India and Indonesia exhibit contrasting approaches to the COVID-19 pandemic, primarily evident in their discretionary strategies. India's centralized governance, governed by laws like the Epidemic Disease Act (EDA) and the Disaster Management Act (DMA), grants the central government significant authority. Conversely, Indonesia adopts a decentralized strategy, providing local governments greater flexibility within a national framework. Both nations grapple with coordination challenges across different administrative tiers, with India facing a disconnect between federal policies and their execution at state and local levels and Indonesia encountering differences between regional and central administrations. Common difficulties include the inconsistent application of policies and reliance on outdated legislation. Both countries require strengthened legislation to enhance pandemic response, potentially necessitating new public health laws in India and revisions in Indonesia. Emphasizing openness and accountability is crucial in India for bolstering public confidence and improving regional policy implementation in Indonesia. The exchange of insights between the two nations is valuable, with India learning from Indonesia's decentralized strategy and Indonesia benefiting from India's robust national framework. Addressing future pandemics requires a balanced approach, integrating centralized efficiency with local discretion while upholding accountability, proportionality, transparency, human rights, and justice principles.

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