

# Evaluation of Discretionary Authority on Immigration Supervision

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## ABSTRACT

The purpose of this study is to find out the scope and executors who have discretionary authority in immigration control and find out what is the legal basis for consideration in using discretionary authority in enforcing immigration law? This writing uses a qualitative empirical normative approach through data collection and analysis techniques. The results of the discussion show that the limits of discretionary authority in immigration, including immigration officials (PPNS) as executors of discretion, the purpose and scope of discretion must be in accordance with applicable laws and regulations, and the exercise of discretion must be carried out in accordance with technical administrative procedures in the Administrative law Government. The implementation of discretionary powers is based on the guidelines of the principle of legality and general principles of good governance as well as the effectiveness and alternatives of immigration administration. It was concluded that immigration law enforcement officers (PPNS) exercise discretionary authority using the principle of legality as a benchmark for implementation and based on juridical and non-juridical considerations. It is recommended to be monitored and implemented strictly to avoid abuse of power.

## ABSTRAK

Tujuan penelitian ini adalah mengetahui ruang lingkup serta pelaksana yang memiliki kewenangan diskresi dalam pengawasan keimigrasian dan mengetahui apakah yang menjadi dasar hukum sebagai pertimbangan di dalam menggunakan kewenangan diskresi dalam melaksanakan penegakan hukum keimigrasian? Penulisan ini menggunakan metode pendekatan normatif empiris kualitatif melalui teknik pengumpulan dan analisis data. Hasil pembahasan menunjukkan bahwa batasan kewenangan diskresi dalam keimigrasian, diantaranya pejabat imigrasi (PPNS) sebagai pelaksana diskresi, tujuan dan ruang lingkup diskresi harus sesuai dengan peraturan perundang-undangan yang berlaku, dan pelaksanaan diskresi harus dilakukan sesuai dengan prosedur teknis administratif dalam undang-undang Administratif Pemerintahan. Pelaksanaan wewenang diskresi didasarkan pada pedoman asas legalitas dan asas umum penyelenggaraan pemerintahan yang baik serta keefektifan dan alternatif penyelenggaraan keimigrasian. Disimpulkan bahwa aparat penegak hukum (PPNS) keimigrasian melakukan wewenang diskresi menggunakan asas legalitas sebagai tolak ukur pengimplementasiannya serta didasarkan oleh dasar pertimbangan yuridis dan non yuridis. Disarankan untuk dilakukan pengawasan dan dilaksanakan dengan tegas untuk menghindari terjadinya penyalahgunaan kekuasaan.

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## I. INTRODUCTION

Indonesia is a constitutional state whose government is regulated in the 1945 Constitution of the Republic of Indonesia which has become a nation's benchmark for Indonesia's hopes and goals. The goals of the Indonesian state are contained in the 1945 Constitution in paragraph 4, one of the objectives reads, "To promote public welfare". In realizing this goal, the Indonesian government continues to improve National Development in a sustainable manner by managing Indonesia's natural resource wealth along with developing the quality of its human resources to be able to produce results that are in line with the goals of the Indonesian nation.

The country of Indonesia is known for its abundant wealth of natural resources starting from the mining, mining, mining, accidents, fisheries, mining, and energy sectors (Poedjiraharjoe, 2018). Even though Indonesia has abundant natural wealth, this is not enough to guarantee the welfare of the Indonesian people. Assistance from other countries that have advantages in other fields such as education and technology, in particular, are currently things that must be mastered to be able to compete in this globalization era because a country will not be able to live alone without social interaction with other countries. This then raises the limit of the realization of international cooperation relations with the development of free trade in this era of globalization which causes the national line to fade due to this freedom. Through these international relations, of course, it will provide benefits for Indonesia in terms of improving the country's economy and can become a forum for exchanging ideas regarding education in an effort to advance the welfare of the nation. However, on the other hand we need to look deeper that this situation can also have a negative impact because the free entry and exit of foreigners to Indonesia can create security threats and criminal acts in Indonesia.

The mobility of foreigners entering and leaving Indonesia has increased significantly which indirectly poses a threat to national security (Raspaty et al., 2018). The arrival of foreigners to Indonesian territory should be watched out for because there are still many crimes that arise as a result of the arrival of these foreigners. This is where the immigration authorities in particular have an important role in supervising the movement in and out of foreigners and the activities of foreigners while in Indonesian territory. Based on Law Number 6 of 2011 concerning Immigration, it contains the functions of immigration, one of which is law enforcement. In carrying out its function as a law enforcer, immigration determines law enforcement both administratively and immigration crimes aimed at Indonesian citizens and foreign nationals who are in Indonesian territory.

Immigration crime is a crime that is specifically committed by immigration investigators in carrying out the function of law enforcement in immigration. Even though it is included as a special crime, in practice law enforcement remains subject to the provisions of the Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Code. In enforcing immigration law, immigration officials have the right to exercise discretion, which is an action taken to resolve a problem in the form of a decision outside the provisions of written law. In practice, discretion in immigration is exercised in making decisions regarding the resolution of problems against an immigration violation either in the form of litigation (*pro justisial*), fines, or deportation (Suryanto, 2010). Immigration violations include abuse of residence permits, overstaying, committing acts of violence that threaten public security, and others. In the use of discretion it is also necessary to know the understanding of "authority" where the reader needs to know, authority is an attitude in determining a decision to achieve justice with the aim of smooth and successful implementation of tasks, this authority has also been interpreted by some experts, namely authority is " a power that has a legal entity, competence in carrying out legal actions, in which this action is carried out with the intention of causing legal consequences, and includes things that disappear and the emergence of certain legal consequences "(Endang, 2018).

Authority in a rule-of-law state is known for its pillars of legality above it, namely "authority is obtained from 3 sources, namely attribution, delegation and mandate" (Susanto, 2020). Law enforcement carried out by immigration officials should comply with and comply with the provisions

of the criminal justice system, but discretionary authority is often used in terms of settling a case and this is of course based on certain considerations in maintaining state sovereignty. Based on this background, the author wants to explore more deeply regarding discretionary authority in immigration control.

## II. RESEARCH METHOD

The type of approach used in this study is qualitative empirical normative legal research, which is a study in which the discussion describes, provides explanations and develops related legal issues (Tan, 2021). The discussion in this journal is based on data collected by the author by examining library materials such as writings, scientific papers and the results of previous studies that are relevant to the issues raised. The data analysis technique in this study uses qualitative data analysis techniques because it analyzes non-numeric data by analyzing and drawing conclusions from various previous studies.

## III. RESULT AND DISCUSSION

### 1. Scope and Executor of Discretionary Authority in Immigration Control

#### a. Scope

Discretion in state administrative law is called *Freies Ermessen*, which means it is a means for immigration officials of an agency to carry out an action that is not fully bound by law (Kaligis, 2022). According to Muchsan, in his writing, namely the discretionary authority of Immigration Civil Servant Investigators in the Settlement of Cases Outside the Court related to Misuse of Stay Permits, he explained that discretion is an authority that is free and is given to public officials by laws and regulations, meaning that public officials have the right to regulate the authority that charged according to his decision (Kusuma, 2018). Meanwhile, discretionary authority can be interpreted as the authority for state administration officials in making decisions on a government issue in accordance with their views (Susanto, 2020). Although decisions regarding the burden of authority received by public officials are taken in accordance with the decisions of the public officials themselves, in practice these public officials are still guided by and subject to the applicable law, namely the written law of the Republic of Indonesia Law Number 8 of 1981 concerning Criminal Procedure Code.

All state administrative actions must be in accordance with the provisions of the law, but in practice the law cannot regulate various types of cases because as we know the law is always general and not specific so that this discretionary authority or freedom becomes a complement to the principle legality. There are two types of discretionary authority, including:

- 1) Free discretion  
Free discretion is discretion that is limited by law in making decisions by public officials and these limits may not be exceeded or violated.
- 2) Discretion is bound  
Bound discretion is discretion that has been stipulated in the law accompanied by several alternative decisions so that later public officials have alternative choices in making decisions. Discretion for state immigration officials is limited in the Government Administration Act, these limits include:
  - a) Discretion must be exercised by authorized government officials, namely Immigration Civil Servants as officials in the field of immigration.
  - b) Discretion must be carried out in accordance with the objectives and scope that have been regulated by legal provisions in the applicable laws and regulations, both in the Immigration Law and the Government Administration Law.

Discretion must be carried out in accordance with administrative technical procedures as stipulated in the Law on Government Administration and bound by the principles of governance, including the principles of legality, protection of human rights, and AAUPB/AAUPL.

Discretionary powers that lead to criminal sanctions are then accounted for by the agency that issues discretionary policies in the form of decisions and/or legal actions from the use of said discretion. In imposing a person's sentence, it is not enough if it is only seen based on the element of unlawful nature, but an element of error is also needed in it. The element of error is in the form of an inner attitude or malicious intent in the perpetrator of the act and becomes a benchmark in criminal responsibility. In criminal law there is the principle of geen straf zonder schuld or the principle of no crime without error in determining that every person's actions become a crime must fulfill the existence of a mistake, namely an act committed with the ability to be accountable to the perpetrator, and intentionally and without excuses. Government officials have discretionary responsibility in taking a policy, the higher the position held, the higher the responsibility imposed.

a. Immigration Civil Servant Investigators (PPNS) as Executors

Law Number 6 of 2011 concerning Immigration explains that the crime of immigration is a special crime so that both the formal and material laws are different and specifically formed while the investigation process is still the same as other general crimes as stated in the Criminal Code. The specificity of this immigration crime can be seen from the officials who have the authority to carry out the investigation process. In carrying out the investigation process in immigration crimes, the authorized apparatus is Immigration Civil Servant Investigators (PPNS) who are special investigators and have received previous training. This is stated in Law Number 6 of 2011 concerning immigration to be precise in Article 1 Number 8 which reads,

Immigration Civil Servant Investigators, hereinafter referred to as Immigration PPNS, are Immigration Officers who are authorized by law to conduct investigations of Immigration crimes. Discretionary application of the authority of immigration officers:

a. Free discretion: According to law number 6 of 2011 concerning Immigration Article 75 which reads "Immigration officials have the authority to carry out Immigration Administrative Actions against foreigners who are in Indonesian Territory who carry out dangerous activities and should be suspected of endangering security and public order or not respecting or obeying regulations legislation".

What is meant in the article above is that Immigration Officers have the right to give Immigration Administration Actions to Foreigners who are suspected of endangering security or disobeying laws and regulations, Immigration Administrative Actions are given in accordance with the law and can be accounted for. So here the discretion of the Immigration Officer is to have the authority to sort out who is allowed to enter Indonesian territory by using "reasonably suspected"

b. Bound discretion: criminal sanctions applied to foreigners as perpetrators of immigration crimes are alternatively formulated, namely corporal punishment or fines.

In addition, Immigration Civil Servants also have several powers that can be exercised to expedite the handling of immigration crimes. This is also regulated in the Immigration Law to be precise in Article 106, which reads that, Immigration PPNS has the authority to:

- a. Receiving a report about an Immigration crime;
- b. Looking for information and evidence;
- c. Perform the first act on the scene;
- d. Prohibit any person from leaving or entering the scene of the case for the purposes of investigation;
- e. Calling, examining, searching, arresting, or detaining someone who is suspected of committing an immigration crime;
- f. Hold, check and confiscate Travel Documents;
- g. order the person suspected or suspected to stop and check the identity.
- h. Examine or confiscate letters, documents, or objects related to immigration crimes;

- i. Summon someone to be examined and hear their testimony as a suspect or witness;
- j. Bring in the necessary experts in connection with the examination of the case;
- k. Carry out inspections at certain places where letters, documents, or other objects are suspected of being related to immigration crimes;
  - l. Taking photos and fingerprints of suspects;
- m. Request information from the public or competent sources;
- n. Carrying out an investigation termination; and/or
- o. Take other actions according to law

## **2. Legal Basis as a Consideration in Using Discretionary Authority in Implementing Immigration Law Enforcement**

Discretionary authority is an authority that belongs to a state administrative agency/official whose regulations basically provide space for a state administrative agency/official to interpret and determine for themselves a decision to be issued (Yulikhsan, 2016). While referring to the Indonesian Law Number 30 of 2014 concerning Government administration in article 1 number 9, Discretion is decisions and/or actions determined and/or carried out by government officials to address concrete problems faced in administering government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or there is government stagnation (Mustamu, 2011).

Indonesia is a country based on law as contained in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which reads, that "Indonesia is a country based on law." Based on this, the position of government authority in administering government is closely related to the application of the principle of legality in a constitution of a rule of law state. The legality principle is the main principle that forms the basis of all government and state administration in every country that adheres to the rule of law concept. All decisions taken by state officials must have a legal basis so that every action or policy taken by the government is always based on the authority regulated in laws and regulations and it can be said that the principle of legality is the authority to carry out certain legal actions.

In the development of law, discretion is an important instrument in the law enforcement system. Discretion and law enforcement are related, namely law enforcement is a series of processes that involve various authorities, both from agencies or law enforcement and discretion is a form of authority delegated to law enforcers in their position as state administration officials, such as Civil Servant Investigators (PPNS). In law enforcement, discretion is inseparable from the criminal law enforcement system in the settlement of criminal cases. In practice, discretion has been applied in law enforcement on immigration crimes to assist immigration officials in making a policy of immigration violations and crimes. Immigration officials have discretionary authority in enforcing the law on immigration crimes through settlement of cases outside the court with immigration administrative measures. Based on Article 1 point 31 of the Immigration Law explains that immigration administrative action is an administrative sanction set by an Immigration Officer against Foreigners outside of the judicial process.

In its implementation, the law enforcement of immigration crimes is based on two (2) grounds, including:

### **a. Basic Juridical Considerations**

The implementation of immigration activities is based on one of them the basis of juridical considerations which is guided by two principles, namely the general principle of good governance (AAUPB) and the legal principle. AAUPB is a principle used to provide legal protection (rechtsbesherming) for the community from decisions and legal actions of state administration officials when carrying out government administration. Meanwhile, the principle of legality is the basis for all policies carried out by immigration officials so that if the policy implemented is contrary to this principle of legality, the policy can be canceled. These two principles become the legal basis for the implementation of immigration activities and discretionary policies in enforcing criminal law in the field of immigration.

b. Basis for Non Juridical Considerations

Determination of discretionary policies of immigration officials through non-judicial considerations is implemented as an effort, namely: 1) for alternatives in criminal law enforcement in overcoming deficiencies and weaknesses of written law, 2) for alternatives in criminal law enforcement policies, and 3) as effectiveness in public services in the field of immigration.

3. Effectiveness of Implementation of Discretionary Authority of Immigration Officers in Immigration Control



Figure 1. immigration administration action

Based on the annual supervision report of the Immigration Intelligence and Enforcement Section (Inteldakim) of the Class 1 Immigration Office of TPI Semarang, the Curvature of Immigration Administration Actions (TAK) and Criminal Acts of foreigners has decreased. The occurrence of TAK and Immigration Crime is based on many factors, especially in the economic and political fields which trigger violations in the field of immigration. Such as the circulation of narcotics networks by foreigners, abuse of residence permits, falsification of travel documents, pseudo-marriage carried out with the aim of obtaining a residence permit in Indonesian territory. So that it can endanger the sovereignty of the Indonesian state. The criminality data for foreigners listed has decreased only due to the pandemic which has limited movement/crossing between countries which can mean that the free and bound discretion of immigration officers has not been implemented properly so there are still many factors that must be improved both in terms of regulations, SOPs, inter-departmental coordination. government agencies, existing human resources so that immigration control can be carried out optimally.

IV. CONCLUSION

Based on the results of the discussion, it can be concluded that the scope of discretionary authority lies in making a policy regarding the authority delegated to immigration officials while still using the 1945 Constitution of the Republic of Indonesia and the principle of legality as a benchmark for making such a policy. All crimes that occur at immigration are classified as special crimes, the specificity of these immigration crimes can be seen from the apparatus that has the authority to carry out the investigation process (Suryana, 2018). In the process of investigating immigration crimes, the Immigration Civil Servant Investigator (PPNS) who is a special investigator and has received special training beforehand is able to provide the right policies in every implementation of immigration. Then, the implementation of immigration law enforcement is based on two considerations outside the court, including: juridical and non-juridical considerations. In implementing the discretionary authority entrusted to immigration officials to make a decision on any immigration crime that occurs, the

authors hope that each immigration official can use his discretionary authority appropriately so that there is no overlap in the law enforcement process that occurs in the immigration environment in particular. In addition, the legal basis for discretionary authority needs to be monitored and emphasized so that there is no abuse of power that violates the basic policy of statutory discretionary authority.

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