

## Conference Paper

# Legal Implications of Using Ministerial Instructions as a Legal Basis for the Implementation of Restriction on Community Activities During the Covid-19 Pandemic

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## Abstract.

This study examines the Legal Implications of using Ministerial Instruction Instruments as the Legal Basis for the Implementation of Restrictions on Community Activities During the Covid-19 Pandemic. As is known that during this pandemic, the Government made many instruments in the form of Ministerial Instructions to respond to the transmission of Covid-19 in the form of the Implementation of Restrictions on Community Activities. In fact, these instruments are not laws and regulations so they are not binding in general, let alone limit human rights through restrictions on the right to activity and threaten criminal sanctions. The Covid-19 Pandemic Emergency was also responded to excessively by several Ministries by issuing rules at the respective Ministry level, both in the form of a Joint Decree (SKB) and a Decree. In fact, among these instruments overlapping authorities, for example, related to the distribution of social assistance (bansos). In this case, there are legal problems related to the implications of the use of the Ministerial Instruction Instrument as the legal basis for the Implementation of Restrictions on Community Activities During the Covid-19 Pandemic. The problem arises due to the legality and binding force of the Ministerial Instruction and the impact of the implementation of the Ministerial Instruction on the protection of Human Rights. Through the normative juridical analysis research method, this research will reconstruct the legal basis in accordance with the principles of the state of the law in the event of a pandemic emergency so as not to reduce human rights. The results of this study indicate that the Instruction of the Minister of Home Affairs Number 6 of 2019 during the Covid-19 period in Indonesia has *validity*, binding power (*bonding*), and *efficacy*. On this basis, the implementation of the Minister of Home Affairs during the Covid-19 pandemic has binding legal implications and legal force.

**Keywords:** legal implications, ministerial instructions, Covid-19 pandemic

## 1. INTRODUCTION

Countries in the world at the end of 2019 were shocked by the news of the discovery of *Corona Virus Disease* or Covid-19 in Wuhan, China. [1] Several countries are preparing strategic steps, ranging from closing borders between countries, carrying out quarantines to a popular policy called *lockdown*. [2] However, the opposite step was taken by

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Indonesia. Covid-19 was initially responded by the Indonesian government by increasing visits to traveler. The government is willing to hire the services of influencers to promote tourist visits amid many countries that have begun to tighten border access to get in and out of Foreign Nationals (WNA). However, the Government took several strategic steps when positive Covid-19 was found in Indonesia. As the press conference held by President Jokowi on March 31, 2020. The press conference provided information to the public regarding policies chosen to address Covid-19 as a global pandemic. President Jokowi's policy in this condition is Large-Scale Social Restrictions (PSBB). PSBB is the policy chosen in dealing with health emergencies. Law Number 6 of 2018 concerning Health Quarantine (Health Quarantine Law) becomes the legal force for this anticipatory policy. [3]

PSBB is a restriction policy applied to an area of society affected or contaminated with disease.[4] The purpose of the PSBB is to prevent the spread of the virus to other people in an area. The implementation carried out by him reduces all activities outside the home, These activities are expected to break the chain of the spread of Covid-19, so the Government has taken a policy of closing schools, campuses implementing *online working*, and *staying at home*, restrictions on activities in public places to the point of limiting religious activities. [5]

The implementation of the PSBB in Indonesia began on April 10, 2020 in Jakarta, which was then followed by several other regions in Indonesia. There are several regulations made for the implementation of the PSBB. These regulations include: Government Regulation (PP) No. 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Corona Virus Disease 2019 (COVID-19), Minister of Health Regulation No. 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (COVID-19), as well as Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Pandemic Disease 2019 and/or In the Context of Facing Threats That Endanger the Stability of the Economy and/or the National Financial System. [3]

In addition to being stated in some of the regulations mentioned above, regulation related to PSBB is also widely stated in the form of instruments that are not laws and regulations, namely instructions and circulars.[6] Based on the Regulation of the Minister of State Apparatus Empowerment and Bureaucratic Reform Number 21 of 2021 concerning Service Manuscripts, Instructions and Circulars do not include laws and regulations. The definition of instructions and circulars is regulated in the Regulation of the Minister of Law and Human Rights Number 31 of 2020 concerning Service Manuscripts. Instructions

are Official Manuscripts that contain orders in the form of instructions / directions on the implementation of a policy regulated in laws and regulations. Some of the minister's instructions related to and regulating the Implementation of Restrictions on Community Activities include:

1. Instruction of the Minister of Home Affairs Number 6 of 2019 concerning Enforcement of Health Protocols for Control of Spreaders of Corona Virus Disease 2019 (Covid-19);
2. Instruction of the Minister of Home Affairs Number 4 of 2021 concerning the Extension of the Implementation of Restrictions on Micro-Based Community Activities and Optimizing the Post for Handling Corona Virus Disease 2019 at the Village and Village Levels to Control the Spread of Corona Virus Disease 2019;
3. Instruction of the Minister of Home Affairs Number 15 of 2021 concerning the Implementation of Restrictions on Emergency Community Activities of Corona Virus Disease 2019 in the Java and Bali Regions;
4. Instruction of the Minister of Home Affairs Number 06 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
5. Instruction of the Minister of Home Affairs Number 18 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
6. Instruction of the Minister of Home Affairs Number 20 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
7. Instruction of the Minister of Home Affairs Number 21 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 and Optimizing the Post for Handling Corona Virus disease 2019 at the Village and Village Levels to Control the Spread of Corona Virus Disease 2019 in the Regions of Sumatra, Nusa Tenggara, Kalimantan, Sulawesi, Maluku, and Papua;
8. Instruction of the Minister of Home Affairs Number 22 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;

Following up on the existence of the Ministerial Instruction as outlined above, the Regional Government then issued a Governor Regulation (Pergub), Regent Regulation

(Perbup) or Mayor Regulation (Perwali). From various Pergub, Perwali and Perbup to respond to the transmission of Covid-19, some have included rules regarding criminal sanctions. Such criminal sanctions can be in the form of fines of varying nominals that must be paid by the violator. In fact, in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, criminal sanctions should only be regulated in Laws and Regional Regulations. [7]

Pergub, Perwali or Perbup are not part of the Law or Regional Regulations, so normatively they cannot contain rules on criminal sanctions. Thus, if there is a Pergub, Perwali or Perbup that contains provisions regarding criminal sanctions and is applied by law enforcement such as the police or PP police, then the people affected by the regulation can carry out responsibilities to the relevant local governments. Through these liability efforts, criminal sanctions that have been received by violators, can be recovered.

Not only Pergub, Perwali or Perbup, the moment of the Covid-19 Pandemic was also responded excessively by several Ministries by issuing rules at the respective Ministry level, both in the form of Ministerial Regulations, Ministerial Decrees, Joint Decrees (SKB), Circulars and Decrees. In fact, among these regulations, there are often overlapping authorities, [8] for example related to the distribution of social assistance (bansos). [9] This is because several Ministries responded to the distribution of social aid programs by issuing Ministerial Regulations. Thus, this also increases the number of Ministerial Regulations as data from the Directorate General of PP of the Ministry of Law and Human Rights, there are as many as 17313 Ministerial Regulations until the beginning of 2022. [10] In fact, when viewed from the hierarchy of laws and regulations in Article 7 of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations, Ministerial Regulations are not included in it.

Law enforcement of the Java and Bali Emergency PPKM can be said to have not been carried out effectively, because according to the interim evaluation, there are still many violations of the Java and Bali Emergency PPKM. There are several factors that cause law enforcement to not run effectively, namely legal factors, especially the imposition of sanctions, factors of a society that has not complied and culture. These problems may arise due to the legality and binding force of the Ministerial Instruction and the impact of the implementation of the Ministerial Instruction on the principle of protection of Human Rights. Therefore, the Research Team chose the title "Legal Implications of using Ministerial Instruction Instruments and Circular Letters as the Legal Basis for the Implementation of Restrictions on Community Activities During the Covid-19 Pandemic in the Perspective of the State of Law".

## 2. METHODOLOGY/ MATERIALS

### 2.1. Types of Research

This research is a type of legal research, which is research carried out to produce new arguments, theories or concepts as a prescriptive in solving the problems faced[11] . The author conducts legal research to systematically review and provide explanations of the legal implications of using the Instrument of Ministerial Instruction and Circular Letter as the legal basis for the implementation of restrictions on community activities during the Covid-19 pandemic in the perspective of the legal state.

### 2.2. Research Approach

#### 2.2.1. Conceptual approach

According to Peter Mahmud Marzuki[13], the conceptual approach is a method of approach that is carried out by studying the views and doctrines in the legal science. By studying these views and doctrines, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issue at hand

#### 2.2.2. Case approach

The case approach is a type of approach that refers to *the ratio decidendi*, that is, the legal reasons used by the judge to arrive at his verdict.[14]

#### 2.2.3. The statutory approach (statue approach)

The statutory approach is a method of approach that is carried out by analyzing and reviewing all laws and regulations related to and related to the legal themes or issues discussed.[11]

### 2.3. Sources of Legal Materials

This research is sourced from primary legal materials and secondary legal materials. Primary legal material consists of legislation and judges' rulings. While secondary legal materials consist of textbooks, legal dictionaries and law journals (Marzuki, 2014).

## 2.4. Legal Materials Search

The technique of tracing legal materials in this study was carried out through a *library study (library research)*. This method is carried out by collecting, studying and reviewing legal materials that have relevance to the theme discussed.

## 2.5. Legal Material Analysis.

Legal material analysis techniques are an important stage in a study. The legal materials that have been successfully collected become material for classification and analysis using prescriptive analysis techniques that aim to produce new arguments, theories or concepts on the results of research on legal protection of the rights of indigenous peoples that have been carried out. The argument here is carried out to provide a description of whether or not it is true according to the law to the facts or legal events of the research results. As a science of a prescriptive nature, legal science studies the purpose of law, values, justice, the validity of the rule of law, legal concepts and legal norms. Thus, conclusions will be generated in the form of arguments, theories or new concepts related to the position of Ministerial Instructions and Circular Letters and their legal implications in Indonesia, especially during the Covid-19 pandemic in 2020-2022.

## 3. RESULTS AND DISCUSSIONS

The historical perspective explains that the ancient Greek era became a mass of development of the study of the legal state by philosophers, including Plato (Asshiddiqie, 2012) and Aristoteles[16]. Furthermore, in the 17th century, Paul Scholten explained that the *Glorius Revolution* of 1688 AD in England was behind the idea of a legal state. The idea of a legal state further appeared on the concept of *rechtsstaat* (which was pioneered by Immanuel Kant, Paul Laband, Julius Stahl, Fichtie) and the concept of *the Rule of Law* (pioneered by A.V. Dicey) [15]. Jimly Asshiddiqie formulated thirteen main principles / main pillars of the establishment of the modern state referred to as the state of law, namely as follows: *supremacy of law* (rule of law), *equality before the law* (equal position before the law), *due process of law* (principle of legality), restriction of power, independent executive organs, free and impartial justice, state administrative courts, constitutional courts (*constitutional court*), the protection of human rights, is democratic (*demokratische rechtsstaat*), serves as a means of realizing the goals of statehood (*welfare rechtsstaat*), transparency and social control, The One True God[15]

The term state of law in Indonesia is often translated *rechtsstaat* or *the rule of law*, which rests on the Continental European system. There are two sentences in the 1945 Constitution (UUD 1945) which reads, "Indonesia is a country based on law (*rechtsstaat*) and the Indonesian state based on law (*rechtsstaat*), not based on mere power (*machtsstaat*)". After the fourth amendment, the constitution reiterates its affirmation as a state of law as stated in the amendment to the 3rd 1945 Constitution in Article 1 paragraph (3).

The principle of the state of law is closely related to the principle of democracy because the two principles are like two sides of one currency that go hand in hand, and are hereinafter referred to as the democratic legal state [15]. Laws are built and enforced on democratic principles. Laws are prohibited from being made, enacted, interpreted, and enforced by mere power (*machtsstaat*), as well as democracies that require legal instruments to prevent the emergence of mobocracy (Sabine, n.d.).

The logical consequences of the state of law, making the life of the nation and state must be based on the law, including in carrying out the wheels of government. The wheels of government require a strong legal foundation, which in the context of Montesque teachings is known as the triassic politics [18] in which each element of the administration plays a role their respective roles. The executive runs the government, the legislature makes the basis or regulation of the running of the government and the judiciary enforces the rules that have been made by the legislature. In that perspective, the legislature certainly gets a larger portion to make legal products (Putuhena, 2013).

The role and function of legislation inherent in the legislative institution, in fact, is not always the default domain. This is because constitutional dynamics are often addressed flexibly, for example when facing the Covid-19 Pandemic. Since the first announcement of Covid-19 cases in Indonesia [1], the Government apparently prefers to respond to Covid-19 in the form of regulations other than laws. The following are shown some regulations in overcoming Covid-19 in Indonesia.

In addition to the aforementioned form as stated in the hierarchy of laws and regulations, there are also various rules that are issued sporadically by Ministries and Institutions. Here are some tabulations that the author managed to get regarding the regulations made by the Ministry during the response to the Covid-19 pandemic in Indonesia.

The author believes that, apart from the tabulations that have been made above, there are still quite a lot of regulatory models made, especially those outside the hierarchy of regulations of the negotiators as stated in Article & Law Number 12 of 2011 concerning Establishment of a regulation of the apexes. Among the various regulations outside

TABLE 1: Forms of Regulation in Indonesia in Responding to the Covid-19 Pandemic (Arsil & Ayuni, 2020)[21].

No.	Law	Non-Statutory
1.	Law Number 24 of 2007 concerning Disaster Management	Presidential Decree Number 12 of 2020 concerning the Determination of the Nonalam Disaster of the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster
2.	Law Number 7 of 2012 concerning Handling Social Conflicts	
3.	Law Number 6 of 2018 concerning Health Quarantine	Presidential Decree Number 11 of 2020 concerning the Determination of Corona Virus Disease 2019 (Covid-19) Public Health Emergency
4.		Perppu Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or In Order to Face Threats that Endanger the National Economy and/ or Financial System Stability
5.		Perppu Number 2 of 2020 concerning the Third Amendment to Law Number 1 of 2015 concerning the Establishment of Government Regulations in Lieu of Law Number 1 of 2014 concerning The Governorship Election, Regents, and Mayors Become Law
6.		Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Covid-19

Source: Processed by Author, 2022

the hierarchy, the Minister’s Instruction is one of the forms of regulation that will be discussed in this article. Theoretically, the Ministerial Instruction is not well known in the statutory system in Indonesia, both in Article 7 and article 8 of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. Thus, the Ministerial Instruction is closer to the definition as a Policy Regulation (*beleidsregel*) [24], whose binding force applies bindingly into the institution only.

Although theoretically it only has the binding power into institutions, during the Covid-19 pandemic in Indonesia (at least from 2020 to early 2022), various Ministerial Instructions, especially Instructions The Minister of Home Affairs (hereinafter referred to as the Minister of Home Affairs) has a very extraordinary position, marketability and usefulness for the community. Validity arises or exists if the legal norm is formed by a higher norm or by the institution authorized to form it (Indrati, 2016). Meanwhile, *bonding*



TABLE 2: Regulations Responding to Covid-19 Outside the Hierarchy of Laws and Regulations (Listiningrum et al., 2021)[21][23].

No.	Regulatory Identity
1.	Circular Letter of the Minister of Environment No. SE.2 / MENLHK / PSLB3 / PLB.3 / 3/2020 concerning the management of COVID-19 infectious waste so as not to damage the environment
2.	Circular Letter of the Minister of Environment No. SE.167 / MENLHK / PSLB3 / PLB.3 / 3/2020 concerning The Management of Medical LB3 in COVID-19 Emergency Health Facilities
3.	Regulation of the Minister of Health Number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions (PSBB regulation)
4.	Instruction of the Minister of Home Affairs Number 6 of 2019 concerning Enforcement of Health Protocols to Control the Spread of Corona Virus Disease 2019 (Covid-19);
5.	Instruction of the Minister of Home Affairs Number 4 of 2021 concerning the Extension of the Implementation of Restrictions on Micro-Based Community Activities and Optimizing the Post for Handling Corona Virus Disease 2019 at the Village and Village Levels to Control the Spread of Corona Virus Disease 2019;
6.	Instruction of the Minister of Home Affairs Number 15 of 2021 concerning the Implementation of Restrictions on Emergency Community Activities of Corona Virus Disease 2019 in the Java and Bali Regions;
7.	Instruction of the Minister of Home Affairs Number 06 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
8.	Instruction of the Minister of Home Affairs Number 18 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
9.	Instruction of the Minister of Home Affairs Number 20 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
10.	Instruction of the Minister of Home Affairs Number 21 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 and Optimizing the Post for Handling Corona Virus disease 2019 at the Village and Village Levels to Control the Spread of Corona Virus Disease 2019 in the Regions of Sumatra, Nusa Tenggara, Kalimantan, Sulawesi, Maluku, and Papua;
11.	Instruction of the Minister of Home Affairs Number 22 of 2022 concerning the Implementation of Restrictions on Community Activities Level 3, Level 2, and Level 1 Corona Virus Disease 2019 in the Java and Bali Regions;
12.	Regulation of the Minister of Finance of the Republic of Indonesia Number 23 / Pmk.03 / 2020 concerning Tax Incentives for Taxpayers Affected by the Corona Virus Outbreak
13.	Regulation of the Financial Services Authority of the Republic of Indonesia Number 11 / Pojk.03 / 2020 concerning National Economic Stimulus as a Countercyclical Policy impacting the Spread of Corona Virus Disease 2019
14.	Presidential Instruction of the Republic of Indonesia Number 4 of 2020 concerning Refocussing Activities, Budget Reallocation, and Procurement of Goods and Services in the Context of Accelerating the Handling of Corona Virus Disease 2019 (Covid-19)

Source: Processed by Author, 2022

is interpreted as the binding force of a legal norm. Meanwhile, *efficacy* is defined as the usefulness or benefit produced by a legal norm.

If examined practically and theoretically, the *validity* of the Minister of Home Affairs enters into the once-completed practice power (*einmahlig*), and does not apply continuously (*dauerhaftig*) [25]. This is understandable because looking at the nature of the pandemic which will be very likely to change its status to endemic or ordinary diseases. Thus, the regulation in the form of the the Minister of Home Affairs, although not listed textually in the hierarchy of laws and regulations, has *a validity*. Furthermore, the Minister of Home Affairs can also bind the affected communities and normatively mentioned in the Minister of Home Affairs content material, for example related to PPKM in Java and Bali. This means that people in the Java and Bali regions must submit and be bound to the Minister of Home Affairs, so that it can be called the Minister of Home Affairs in responding to Covid-19 has bonding.

In relation to *efficacy*, we can see from the data and research that mentions the success of PSBB and PPKM during the Covid-19 pandemic (Ristyawati, 2020). DKI Jakarta is said to be the most effective area to reduce daily cases of Covid-19 per 100,000 population during the PSBB and PPKM period (with various names and types) [26]. This proves that the implementation of the Inmendagri during the Covid-19 pandemic has binding legal implications, legal strength and brings benefits.

#### 4. CONCLUSION AND RECOMMENDATION

Based on the discussion mentioned above, it can be concluded that the Instruction of the Minister of Home Affairs issued by the Minister of Home Affairs during the Covid-19 period in Indonesia has the power to sell (*validity, bonding, and efficacy*). On this basis, the implementation of the Minister of Home Affairs during the Covid-19 pandemic has binding legal implications and legal force.

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