

## Legal Framework Derogation of Human Rights During the Covid-19 Pandemic

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#### Abstract

*The Covid-19 pandemic that has hit Indonesia since early March 2021 has impacted various sectors of life, especially the health sector and the economic sector. In response to Covid-19, the Indonesian government has issued various policies, including Large-Scale Social Restrictions (PPSB). Implementation of PPSB has had a significant impact on the fulfillment of the economic rights of the Indonesian people.*

*This conceptual paper will examine the legal framework derogation of human rights during the Covid-19 pandemic. The state's responsibility to protect human rights is divided into three aspects: the responsibility to guarantee, the responsibility to fulfill, and the responsibility to enforce. However, in an emergency, the responsibility for protecting human rights can be derogated. These restrictions are subject to two main conditions, only for derogable rights and determined by law.*

*Through a juridical normative approach and literature study, this paper analyzes the comparative legal basis issued by the government regarding the handling of Covid-19, which has implications for limiting the fulfillment of human rights. In positive Indonesian law, there are several provisions of laws and regulations relating to health emergencies and non-natural disasters on a national scale, including Law Number 36 of 2019 concerning Health, Law Number 24 of 2007 concerning Disaster Management, Law Number 6 of 2018 concerning Health Quarantine, Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Covid-19.*

**Keywords:** *derogable rights, human rights, Covid-19*



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## INTRODUCTION

The Covid-19 pandemic impacts almost the entire world community in various sectors, impacting the fulfillment of human rights. Because of this, the global pandemic has also affected the enforcement, guarantees, and fulfillment of human rights. Apart from undermining the right to health, Covid-19 has shattered other pillars of human rights. Covid-19 has limited civil rights, especially the freedom to move, travel, and move places; and the right to freedom to practice their respective religions and beliefs.

This condition has also affected the economy, especially the right to have and get a decent job. The Central Statistics Agency recorded that 29.12 million working-age people (14.28 percent of the total working-age population of 203.97 million) were affected in August 2020 (Wahid, 2020). Workers experienced a reduction in working hours to become unemployed, partly because they were exposed to layoffs. Covid-19 has also disrupted the guarantee of social rights, primarily to obtain optimal education services. For more than a year, students and college students have received educational services only online. This condition makes it difficult for some students to live in remote areas due to the lack of internet networks and inadequate technology and information facilities.

As a United Nations member, Indonesia is morally and legally bound to the Universal Declaration of Human Rights (UDHR). The UDHR was adopted by the United Nations General Assembly in 1948, making it a universally accepted international norm. Dignity, freedom, and equality are the three values that underlie human rights. As a follow-up to the UDHR, in 1966, two covenants were issued which were intended as legal documents to make them more binding, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). To date, the ICCPR has been ratified by 171 countries. Indonesia ratified it in 2005 through Law number 12 of 2005.

The consequence of the ratification of human rights instruments raises the state's responsibility to guarantee the recognition, respect, protection, fulfillment, and enforcement of human rights. This concept of state responsibility exists not only during normal conditions but also in extraordinary conditions, including during a pandemic. In exceptional circumstances, human rights may be derogated. However, these restrictions must be implemented under strict conditions (Komisi Nasional Hak Asasi Manusia, 2020): determined by law; has a time limit with strict monitoring mechanisms; necessary; clear, strict, and non-multi-interpreted arrangements; proportional and non-discriminatory.

Respect for and fulfilling human rights across the spectrum, including economic and social rights, and civil and political rights, will be fundamental to a successful public health response and pandemic recovery (United Nations Human Rights, 2020). To see how the legal framework derogation of human rights during the COVID-19 pandemic is going on, this paper will examine whether Indonesia's positive law related to COVID-19 response has complied with terms derogation of human rights.

## METHODOLOGY

This research uses normative legal research, using legal norms and rules, especially applicable laws and regulations. The data used is secondary data which in this study specializes in legislation to respond to the Covid-19 pandemic, which includes laws, government regulations, and other appropriate laws and regulations. Then this research uses the statute approach method, namely the statutory approach. Laws and regulations

related to the handling of Covid-19 are analyzed using the provisions on human rights restrictions set out in the Siracusa Principles.

## RESULTS AND DISCUSSION

### **Derogation of Human Rights**

State responsibility is a fundamental principle in international law that stems from sovereignty and equal rights between countries (Smith, 2010). State responsibility arises when there is a violation of international obligations to do something or not to do something, both those obligations under international treaties and customary international law (Brownlie, 2008). These include the obligation to provide an answer that calculates something that happened and the responsibility to provide recovery for the losses that may be caused (Istanto, 1998). Furthermore, based on Article 7 of the Human Rights Law, the government is obliged and responsible for respecting, protecting, upholding, and promoting human rights in the context of human rights.

In a public emergency, the state can apply derogation to deviate from legal responsibilities. Conditions as reasons for derogation are actual emergencies that threaten the survival of a country, strategic threats to national security, and national disintegration (Smith, 2010). The United Nations Commission on Human Rights requires two conditions in the context of limiting human rights. First, the situation must be in the form of an emergency that threatens the life of the nation and state. Second, the state party must officially declare a state of emergency. On the other hand, the European Court of Human Rights defined a public emergency as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed (Schreuer, 1982). The existence of a public emergency of significant magnitude may temporarily exonerate States from the duty to fully respect their human rights commitments, either through the operation of specific clauses that are included in the relevant treaties (so-called “derogation clauses”), or where no such provision is present by invoking certain justifications recognized in international law as valid excuses for the non-performance of legal obligations (Sommaro, 2012).

Article 4 of the ICCPR states that, in a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such actions are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. However, states usually have some discretion concerning the characterization of public emergency as they are best placed to assess the risks (Lebrecht, 2020).

Based on the Siracusa Principles that regulate the limitation and derogation Provisions in the ICCPR, restrictions on human rights in emergencies can only be carried out based on legality, necessity, proportionality, precise and non-discriminatory time restrictions. In the regulation of an emergency, some elements reduce or limit certain human rights. However, these reductions and limitations are only temporary until the crisis returns to normal. In addition, restrictions on human rights should not be carried out arbitrarily. The implementation of derogatory measures needs to meet specific substantive criteria: states cannot derogate to non-derogable rights, among the right to life, prohibition

of torture and ill-treatment, prohibition of slavery, and no punishment without law (Lebret, 2020).

### **Legal Framework Derogation Of Human Rights: Indonesia Perspective**

As Article 4 of the ICCPR, Law Number 39 concerning Human Rights allows the existence of free human rights. Based on the synthesis of Article 70 and Article 73, human rights are permitted under the following conditions:

1. Stipulated by law.
2. For the sake of recognition, respect for the rights and freedoms of others, and to fulfill fair requirements.
3. Based on considerations of morals, security, generality, decency, and the nation's interests (nation's integrity).

There is no doubt that Covid-19 fits these criteria, with an accurate and immediate threat to the right of all individuals to health and the right to life (Lebret, 2020).

Implementing a public emergency must be officially announced or declared and open to the public so that everyone knows it as a manifestation of policy transparency and accountability (Asshidiqie, 2007). The official declaration is conveyed to every citizen and the countries that are parties to the human rights treaty through the representatives of the countries concerned and to the special rapporteur of the United Nations.

Regarding any rights that can be limited, Law Number 39 of 1999 excludes non-derogable rights. Rights that cannot be reduced include the right to life, the right not to be tortured, the right to personal freedom, thoughts and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equal before the law, and the right not punished by non-retroactive law.

The Indonesian constitution has given the President the power to assess and declare a state of danger or emergency as guaranteed in Article 12 jo. Article 22 of the Constitution of the Republic of Indonesia. The President declared a state of emergency. The conditions that govern and the consequences of an emergency are regulated by law. To overcome the pressing urgency, the President has the right to stipulate government regulations in lieu of law (Perppu). Until this paper was written, the Government of Indonesia had not issued a Perppu declaring a public emergency due to the Covid-19 pandemic. The government issued a Perppu regarding financial and financial policies for handling Covid-19, namely Perppu Number 1 of 2020. Even though the government needs to declare an emergency as the basis for emergency policies, including those that determine human rights. Before the Covid-19 pandemic, the government had several legal products related to public emergencies.

**First**, the Government Regulation in Lieu of Law Number 23 of 1959 concerning Dangerous Conditions which regulates three categories, namely civil emergency, military emergency and war emergency (Widodo & Disantara, 2021). The Indonesian government had issued a discourse on the implementation of this rule, but it was rejected by civil society because it was not following the characteristics of the emergency that occurred and was prone to human rights violations.

**Second**, Law of Republic Indonesia Number 24 of 2007 concerning Disaster Management. The categories of disasters in this law are divided into natural and non-natural disasters, epidemics, and disease outbreaks, including natural disasters. The government must determine disaster emergency status for a certain period of time. Disaster management is based on human rights principles, including humanity, justice, equality before the law and government, and non-discrimination.

**Third,** Law of the Republic Indonesia Number 6 of 2018 concerning Health Quarantine. Public health emergency is an extraordinary public health incident, which is incorrectly marked by the spread of disease that poses a health hazard and is likely to spread across regions or countries. The central government (Ministry of Health) declares and revokes public health emergencies. Health policies in this law consist of home quarantine, hospital quarantine, regions quarantine, and Limitation of Large-Scale Social Interactions (PPSB). Health policy is based on the principles of human rights such as humanity, justice, and non-discrimination. The fundamental thing that needs to be underlined in a health emergency is that the government must ensure that everyone gets essential health services according to medical needs, food needs, and daily needs during quarantine.

On the other hand, after the pandemic hit, the Government made a legal product in the form of policies related to handling Covid, which had implications for limiting human rights. The description below will explain whether the policy is under the provisions on human rights restrictions based on the Siracusa principle.

- Government Regulation Of The Republic Of Indonesia Number 21 of 2020 regarding Large-Scale Social Restrictions in the Context of Accelerating the Handling of COVID 19

|                    |  |
|--------------------|--|
| Legality           | In the form of a Government Regulation, legally binding under the law and applies nationally   |
| Limitation period  | Legally binding from March 31, 2020, until an unspecified time.  |
| Necessary          | Crucial to protect public health.  |
| Unambiguous        | Minimum social restrictions include school and workplace holidays, restrictions on religious activities, and/or limitation of activities in public places or facilities. There is an unclear scope of activities related to public places or facilities. This ambiguity is prone to lead to multiple interpretations both in further regulation and implementation in the field. |
| Proportional       | Following the urgent needs in the field.   |
| non-discriminative | The choice of phrases and/or provisions for restrictions on activities in public places or facilities gives the impression that the government is more concerned with the fulfillment freedom of assembly and freedom of movement than the fulfillment of the right to education and the right to carry out religious activities.  |

- Head of the National Disaster Mitigation Agency Decree Number 9.A of 2020 regarding the Determination of the Status of Certain Disaster Emergency Situations due to Corona Virus Disease in Indonesia jo Decree of Head of BNPB No 13. A of 2020 regarding the Extension of the Emergency Status of the Corona Virus Disease Outbreak in Indonesia

|                   |   |
|-------------------|---|
| Legality          | fulfill legal aspects                               |
| Limitation period | Validity period, from 28 January 2020 – 29 Mei 2020 |

|                    |  |
|--------------------|--|
| Necessary          | Important but not strong   |
| Unambiguous        | Only regulates the determination of the state of emergency due to Covid-19 |
| Proportional       | Proportional, but inadequate   |
| non-discriminative | Non-discriminative   |

- Presidential Regulation Of The Republic Of Indonesia No 11 of 2020 on the Determination of the Corona Virus Disease 2019 Public Health Emergency

|                    |  |
|--------------------|--|
| Legality           | fulfill legal aspects  |
| Limitation period  | Effective from March 31, 2020, but there is no setting explaining the validity period of the emergency status in detail. |
| Necessary          | Important but not strong   |
| Unambiguous        | It was only declaring Covid-19 as a type of disease that causes a Public Health Emergency                                |
| Proportional       | Proportional, but inadequate   |
| non-discriminative | Non-discriminative   |

- Presidential Regulation Of The Republic Of Indonesia No 12 of 2020 on the Determination of the Status of Non-Natural Disasters Nationally

|                    |   |
|--------------------|---|
| Legality           | fulfill legal aspects   |
| Limitation period  | Valid from April 13, 2020, but there is no time limit on emergency status.                  |
| Necessary          | Important but not strong  |
| Unambiguous        | Only declared non-natural disasters caused by the spread of Covid-19 as national disasters. |
| Proportional       | Proportional, but not inadequate  |
| non-discriminative | Non-discriminative  |

## CONCLUSION

Responding to Covid-19 that threatens public health requires a strong legal basis. In a public emergency status, the president has the extraordinary authority to respond to emergency conditions with authority to make government regulations in lieu of law (Perppu) regarding the determination of an emergency. The declaration of a state of emergency is important as a condition for derogable rights restrictions based on international human rights instruments. The COVID-19 policy limits human rights with the policy of physical distancing, contact tracing, restrictions on social or crowd activities, quarantine, and sanctions.

Based on an analysis of the legal framework that limits human rights during the COVID-19 pandemic, it is concluded that:

1. These legal policies fulfill legal aspects. However, these legal policies do not have a strong legal basis. The president should have stipulated a Perppu on health emergencies. Declaration of health emergencies only through Government Regulations and Presidential decree is not appropriate because it does not have a binding force as Perppu.
2. These legal policies are not comprehensive and not immediately to respond to emergencies.

3. These legal policies are multi-interpreted and therefore vulnerable to discrimination in the limitation of human rights
4. Legal policies that limit human rights do not regulate the validity of the emergency status. That condition is not in accordance with the principle of derogation of human rights

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