



The Construction of Legal Basis Relevant to The State of Law in The Event of Pandemic Emergency: A Lesson from Indonesia

Aan Eko Widiarto^{1*}, Muhammad Dahlan², Ria Casmi Arrsa³

^{1,2,3} Faculty of Law, Universitas Brawijaya, Malang, East Java, 65145, Indonesia

* Corresponding author: widiarto@ub.ac.id

Article	Abstract
Keywords: Construction; Legal Basis; State of Law; Covid-19; Indonesia Article History Received: Oct 02, 2022; Reviewed: Oct 05, 2022; Accepted: Dec 17, 2022; Published: Dec 24, 2022;	<i>This paper aims to study the construction of an appropriate legal basis for a state of law in responding to the Covid-19 emergency. As a state of law, Indonesia has been making many regulations at both central and local government levels. The regulations vary, ranging from Government Regulations in Lieu of Law, Ministerial Regulations, Ministerial Decrees, and Joint Decrees of Ministerial Instructions, to the Regulations of Regional Heads, and these regulations have led to overlapping regulations. With normative-juridical methods, the prescriptive technique was used to further analyze the problem and find a new concept of the construction of an appropriate legal basis in responding to the Covid-19 emergency. The research results show that, juridically, the use of non-legal products such as Ministerial Instructions and Circular Letters issued by ministers during the Covid-19 emergency in Indonesia has fulfilled the procedural aspects of law-making but not the substantive ones regarding the curbs restricting people's social activities. This research recommends that the construction of a legal basis intended to respond to a state of emergency should simultaneously meet both procedural and substantive aspects</i>



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INTRODUCTION

News on both natural and non-natural disasters is globally inevitable. It has been common knowledge that at the end of 2019 (Forman et al., 2020; Wahidah et al., 2020), the world was shaken by Corona Virus Disease or Covid-19 spreading in Wuhan, China (Okada et al., 2020). One of the symptoms experienced by victims of Covid-19

is fever, cough, and shortness of breath (Al-Fatih et al., 2020). To break the chain of spreading this virus, several countries set their strategic measures, ranging from closing state borders, health quarantines, to lockdown policies, and so did Indonesia. On 31 March 2020, President Jokowi held a press conference in which the president publicly announced a policy picked to respond to Covid-19 as a global pandemic (Fadhila et al., 2022; Sutono et al., 2021). He further stated that the restrictions were enforced to respond to a state of emergency in health (Andriani, S.Si, Apt, M.Sc, Ph.D, 2020). Law Number 6 of 2018 concerning Health Quarantine was set as a legal basis for this new policy.

Social restrictions were put in place in areas with infected residents. This measure was simply intended to contain the virus (Campedelli et al., 2021). This policy restricted people from doing activities outdoors. To optimize this policy, the government stopped teaching activities at schools, and campuses, while online working and stay-at-home movements were more encouraged. Social and religious activities in public places were also restricted. This measure departed from the assumption that the virus would massively and easily spread all over areas and that this spread was caused by people gathering without their masks on and without following health guidelines.

Social activity restrictions in Indonesia were put in place for the first time on 10 April 2020 in Jakarta, followed by other regions in the country (RA et al., 2020). The decision was enforced by the government of the capital city of Jakarta after about five weeks of cases of Covid-19 being first confirmed in Indonesia (Olivia et al., 2020). Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions to Expedite the handling of Coronal virus disease 2019 (COVID-19), Regulation of Health Minister Number 9 of 2020 concerning Guidelines of Large-Scale Social Restrictions to Expedite the Handling of Corona Virus Disease 2019 (COVID-19), and Government Regulation in Lieu of Law Number 1 of 2020 concerning the Policy of State Finance and Financial System Stability in Handling Corona Virus Disease 2019 Pandemic and/or in Facing Problems Threatening National Economy and/or Financial System Stability.

In addition, regulations regarding social restrictions were also enacted as instruments not as legislation, such as Instructions and Circular Letters. The Regulation of the Minister of Administrative and Bureaucratic Reform of the Republic of Indonesia Number 21 of 2021 concerning Official Document Management defines an Instruction as an official document consisting of instructions regarding the enforcement of policies governed in the legislation, while a circular letter is defined as an official document consisting of notifications of certain matters that are deemed to be urgent and important.

As official documents, those forms of regulations are only binding to the institutions that issued them, and these official documents were picked as anticipative and tactical measures to deal with the spread of Covid-19 in Indonesia, considering

that laws and Presidential Regulations consume more time in the making and are costly. These official documents are still responded to with multi-interpretation and misunderstanding and some substances have been found irrelevant to the principles of legislation-making. This issue is studied in this paper and broken down into three main problems: how does the dimension of the legality of the ministerial Instructions and Circular Letters during the Covid-19 pandemic work and what are the legal implications, probabilities, and challenges at present and in the future? This research carries its strong novelty, considering there have not been any similar studies that specifically reveal the construction of the legal basis of a regulation intended to respond to a state of emergency of Covid-19 in Indonesia.

METHOD

Normative-juridical research methods were used along with the prescriptive analysis technique (Al-Fatih & Siboy, 2021). With this approach, a new concept of the construction of an appropriate legal basis is expected in order to respond to a state of emergency of Covid-19. Several legal products referred to during the pandemic in Indonesia served as the analysis materials to help find out whether the construction of the legal basis of all the regulations made to respond to a state of emergency of the pandemic is appropriate.

RESULTS AND DISCUSSION

The Dimension of the Legality of Ministerial Instructions and Circular Letters during Covid-19 Pandemic

The use of state power towards the citizens is not without conditions. Citizens cannot be unfairly treated as objects. Decisions and/or Measures addressed to the people must be relevant to the provisions set forth in the legislation and general principles of good governance. Supervision conducted over the decisions and/or measures is to test whether the treatment to the members of the public involved complies with the law and considers the principles of legal protection that can effectively be done by the state institutions.

Regarding the above condition, the progress of the regulations during the pandemic has experienced rise and fall amidst their implementation affecting the people and/or businesses run at both central and local levels. There have been some new emerging regulations since the outbreak, including several instructions and circular letters issued by the Home Affairs Minister, Transportation Minister, and other ministers of different sectors. From the perspective of the legislative theory, the enforcement of instructions and circular letters concerned certainly come with legal implications at both national and regional levels, considering that those instructions and/or circular letters outline social restrictions that curb people's activities following the enforcement of Large-Scale Social Restrictions, Social Activity Restrictions, or the delegation to Regional Heads to enact a Regional Head's Regulation at a local level.

In terms of the standing of the legislation that holds legal force, the legislation is positioned accordingly in the hierarchy, meaning that lower regulations must not contravene the higher laws (Laila, 2019). If the lower laws and regulations conflict with those above, then these regulations can be demanded to be canceled or null and void (van rechtswegenietig) (Huda, 2006). Thus, the aspect of legislation-making according to the provision of Article 7 of Law Number 12 of 2011 concerning Legislation-Making, as amended to Law Number 13 of 2022, has set the basis of justification, implying that the legal order of the legislation is recognized and legally binding if it is declared mandatory by higher laws or if it is set forth according to power.

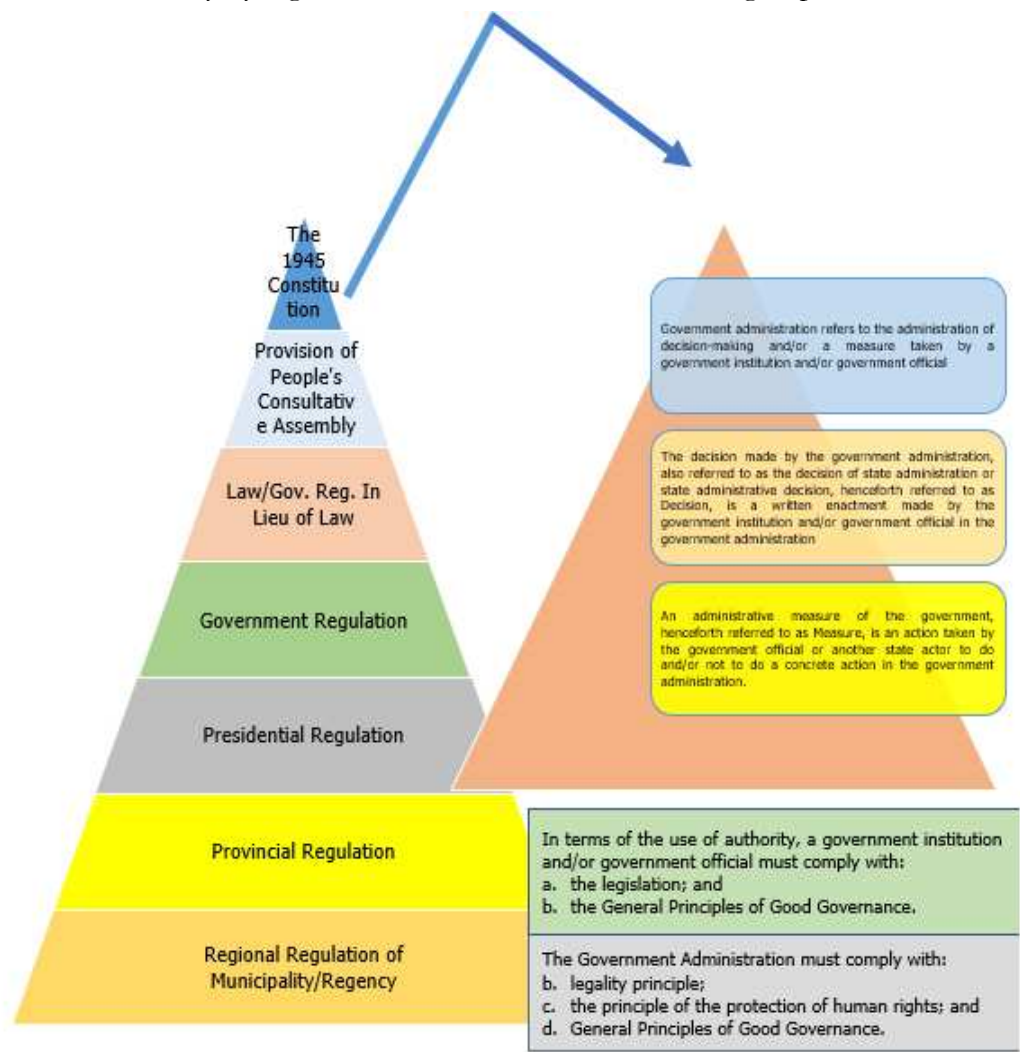


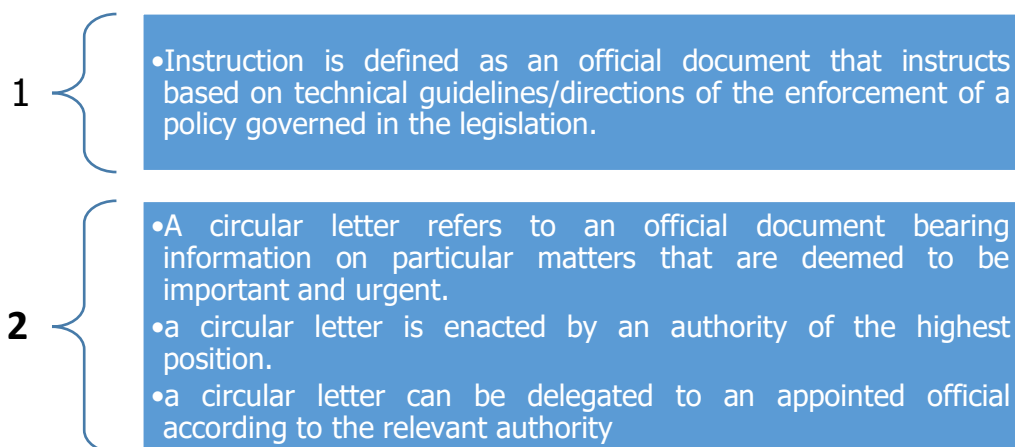
Figure 1. Hierarchical Order of Legislation and its Relation to the Order of Government Administration

The above structure indicates that in a hierarchical order of legislation and government administration, the dimension of legality and legislation is vital in assuring human rights protection (the rights of the citizens) in line with the General Principles

of Good Governance. Similarly, the enforcement of several instruments qualified as an administrative measure of the government enacted in the form of instructions and circular letters during the pandemic should also refer to the principles of legality and compliance with the legislation.

In the theoretical aspects, the standing of instructions and circular letters is qualified as official documents that bear written information representing an instrument of communication that is made and/or accepted by authorized officials within the scope of state institutions or regional governments to support the government and development. Every institution either at the national or regional level represents the authority to manage administrative orders of the government with the instruments of official documents. Official documents are identified as follows.

Chart 1. Types of Official Documents



The above structure indicates an administrative measure should be enacted as an official document that bears informative and instructive characteristics and/or advice to encourage the running of the government administration. Thus, in terms of the execution of the measures of the government administration, the existence of instructions and circular letters cannot be qualified as legislation that holds regulating (*regelling*) features or as the Decision of Officials of State Administration with individual and concrete (*beschikking*) characteristics. However, the measures taken by the government as set forth in official documents still must put forward the aspects of legality and compliance with the legislation.

The issuance of Circular Letters in the legislative hierarchy in Indonesia has been questioned over whether Circular Letters have regulating (*rebellling*) or enacting (*beschikking*) features. Regarding this matter, the standing of Circular Letters is elaborated in the following:

1. Circular Letters concerned are those made by Ministries, not as legislation because regulations made by Ministries do not bear norms that govern attitudes (prohibitions, instructions, permits, and releases), authorities, and enactment.
2. Circular Letters concerned refer to official documents bearing information, elucidations, and/or instructions of procedures that are deemed to be important and urgent.
3. Circular Letters concerned cannot serve as the legal basis to annul the regulations made by Ministries, Presidential Regulations, or Government Regulations. Instead, they are to elucidate the meaning of the regulations to promulgate.
4. Circular Letters concerned are positioned higher than ordinary letters, considering that Circular Letters bear instructions or elucidation regarding the matters that must be performed according to regulating provisions. Circular Letters are to inform and are not to regulate sanctions since they are not norms.
5. Circular Letters concerned are categorized as letters of instruction issued by certain officials addressed to the subordinates.
6. Circular Letters concerned do not hold any binding power for outer institutions, but rather they are binding only to the institutions by which the Circular Letters were issued.

The officials issuing the Circular Letters do not need any legal basis because the issuance of these letters is not bound to any regulations. However, it is important to understand that Circular Letters can only be issued due to emergency, there may be some unclear provisions in the letters that need to be further interpreted, the substances must not contravene the legislation, and they should be accountable morally according to the principles of good governance. Circular Letters bear instructions or elucidation that do not hold any binding power, meaning that they do not lead to sanctions for those failing to abide by the rules in the letters. In terms of juridical, philosophical, and sociological aspects, the issuance of Circular Letters can be concluded as follows:

First, in a juridical aspect, the making of Circular Letters does not refer to laws, and Circular Letters are made by the government to elucidate or render matters clearer and these matters must not contravene the legislation. *Second*, in terms of a philosophical aspect, the making of Circular Letters may be considered as a technical need aiming to elucidate the unclear norms positioned above them, and, thus, Circular Letter-making is intended to elucidate what is unclear.

Third, in a sociological aspect, Circular Letters are needed during a state of emergency and to fill legal loopholes. Therefore, Circular Letters, one way or another, must be considered lawful and valid if they are binding only to the officials of the institution that make them without overlooking juridical, philosophical, and sociological aspects. It is essential to bear in mind that the position of Circular Letters within the legal system in Indonesia is not equal to that of the legislation simply because

these letters do not meet the aspects of legal norms. Instead, Circular Letters represent policies (*beleidsregel*) or pseudo legislation (*pseudo wetgeving*). Thus, to see the aspect of legality of instructions and Circular Letters, several related instruments during the pandemic can be identified.

Table 1. The Instruments of Ministerial Instructions and Circular Letters during the Covid-19 Pandemic

No	Instrument	Procedural Aspect	Substantive Aspect	Analysis
1.	Instruction of Home Affairs Minister Number 6 of 2019 concerning Enforcement of Health Guidelines to Contain the Spread of Corona Virus Disease 2019 (Covid-19);	Fulfilled	As an instrument bearing information on the administrative measures of the government	Either in the procedural or substantive scope, the enactment of this instrument has followed the legality principle. However, several substantive aspects still enforce restrictions and impose sanctions. Thus, it is inappropriate to formulate this instruction in an official document in the form of an instruction and/or a Circular Letter.
2.	The Instruction of Home Affairs Minister Number 4 of 2021 concerning the Extension of the Restrictions of Micro-based Social Activities and Optimizing Coronavirus Disease 2019 Mitigation Centers at rural Levels and Districts to control the spread of	Fulfilled	As an informative instrument regarding the administrative measures taken by the government	Either in procedural or substantive scope, principally the enactment has followed the legality principle. However, some substantive measures still enforce restrictions and impose sanctions. Thus, it is inappropriate to formulate this instruction in an Official Document in the form of an Instruction and/or a Circular Letter.

	Corona Virus Disease 2019			
3.	The Instruction of Home Affairs Minister Number 15 of 2021 concerning the Enforcement of Social Activity Restrictions responding to the Emergency of Corona Virus Disease 2019 in Java and Bali.	Fulfilled	As an informative instrument regarding the administrative measures taken by the government	In terms of either procedural or substantive scope, the enactment has followed the legality principle. However, some substantive measures still enforce restrictions and impose sanctions. Thus, it is inappropriate to formulate this instruction in an Official Document in the form of an Instruction and/or a Circular Letter.
4	The Instruction of Home Affairs Minister Number 21 of 2022 concerning the Enforcement of Social Activity Restrictions level 3, Level 2, and Level 1 and Optimization of Corona Virus Disease 2019 Mitigation Centers at rural and district levels to help control the spread of Corona Virus Disease 2019 in Sumatera, Nusa Tenggara, Kalimantan, Sulawesi,	Fulfilled	As an informative instrument regarding the administrative measures taken by the government	In terms of either procedural or substantive scope, the enactment has followed the legality principle. However, some substantive measures still enforce restrictions and impose sanctions. Thus, it is inappropriate to formulate this instruction in an Official Document in the form of an Instruction and/or a Circular Letter.

Maluku, and
Papua;

The above analysis indicates that the existence of Instructions and/or Circular Letters are categorized into Official Documents whose regulatory quality and formation are theoretically legal according to the laws above them. Despite the fulfillment of both procedural and substantive aspects, Official Documents still bear limitations on human rights and sanction imposition. That is, it is advisable that Official Documents not be set as substances, considering that Official Documents represent administrative measures within the scope of government administration. Therefore, formulating Official Documents in the form of Instructions and/or Circular Letters should comply with legality and legislative provisions.

The Legal Implication of the Use of the Instrument of Instructions and Circular Letters issued by Ministries

The World Health Organization states that Covid-19 first spread on December 31 2019 (Rizka et al., 2022), and was confirmed as a global pandemic (Esfandiari, 2021). Health crises at a global level demanded quick, assertive, and efficient responses from every government to protect societies. The governments in all countries set an emergency legal framework as a response to the massive proliferation of the pandemic, ruling out the standards required to pick a proper legal instrument.

Within the context of the proliferation of Covid-19 in Indonesia, in March 2020, the first case was announced (Syahputra, 2020), and President Joko Widodo also took part in announcing this first case. Several legal instruments holding *regelling* quality were made, including Government Regulation in Lieu of Law Number 1 of 2020 concerning the Policy of State Finance and Financial System Stability in Handling Corona Virus Disease 2019 Pandemic and Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions to Expedite the handling of Coronal virus disease 2019 as a subordinate regulation for Law Number 6 of 2018 concerning Health Quarantine. The Indonesian Government also responded to this issue by immediately making some legal instruments including Presidential Decree Number 7 of 2020 concerning the Task Force of Expedition in Covid-19 Mitigation, responded by the Chief of the National Agency for Disaster Countermeasure with the enactment of the Decree of the Chief of National Agency for Disaster Countermeasure Number 13A of 2020 concerning Extension of Emergency Status of Epidemic as an extension of the Decree Number 9A of 2020 in January 2020.

The primary measures taken by the Indonesian Government as mentioned above have triggered legal implications which can be reasonably accepted by the common legal logic, where the making of regulations and decrees or enactment of legal products

will result in legal implications that apply to all the members of the public. The statutory approach is certainly based on the constitutional concept in a state of law, a concept that implies that the administration of a state complies with the law and does not rely on the desire of those with power (rule by law and not rule by man). In his dissertation, Herlambang Wiratraman argued that to resolve a problem in society, the state could intervene in a positive context by abiding by the principles of the rule of law. In such an intervention, the protection given by the state emerges in a liberal democratic model that should not lead to any repressive conditions. This is certainly contrary to negative intervention practices of the governance that do not follow the principles of the rule of law with the repressive intervention that tends to trigger violations of the constitutional rights of the citizens; this situation is known as liberal undemocratic as described in the following diagram (Wiratraman, 2014):

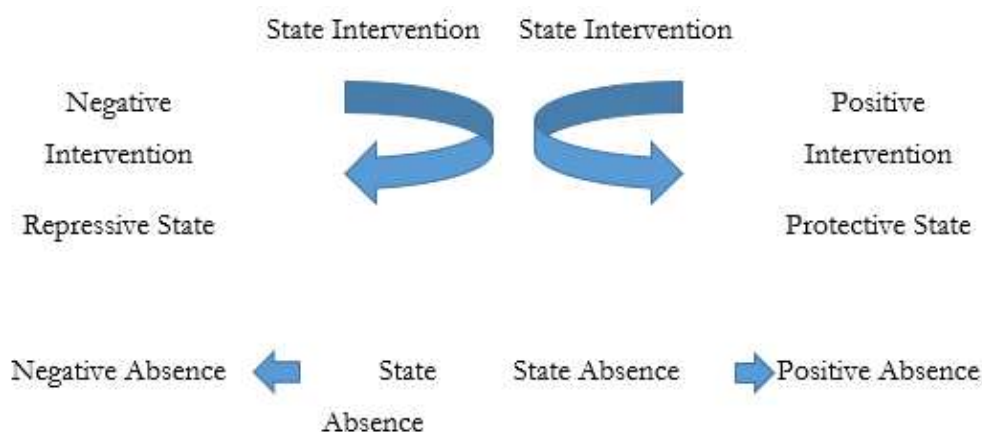


Figure 2. Diagram of the Supremacy of Law and Protection of Constitutional Rights

This is in line with the two criteria given in the following (Molloy, 2021):

1. Relying on legal provisions, which constitutionally allow for an emergency approach (Health Quarantine Law); and
2. Interpreting existing laws to provide the basis for emergency measures or delegated regulation-making;

In contrast, in fact, delegated regulation- and decree-making or enactment are deemed to be insufficient, along with it is an approach that is equivocal in a legal scope, arousing debates over the legality of the instrument used such as a government measure that does not hold (or does not seem to hold) a certain legal basis and the phenomenon of the use of an Official Document as a legal instrument (or as if it were a legal instrument) that is binding during the Covid-19 pandemic. The instruments include, inter alia, Ministerial Instructions as mentioned earlier. Several regional

governments have come up with regional products to provide the legal basis for emergency measures. Like what has been done by the Central Government, a legal product could spare extensive power for the executive and regional governments to allow them to plan regarding a state of emergency.

Theoretically and doctrinally, in the context of the Covid-19 pandemic, the following are five elements that should be met in declaring a state of emergency (Grogan, 2020):

1. the requirements of declaring a state of emergency by the Government;
2. the type of legal products that govern a state of emergency;
3. self-explanatory delegation of power that does not leave any likelihood of equivocation;
4. restrictions of the delegation; and
5. the provision implying that the supervision conducted by the Legislative or Judicative Body remains and must not be overlooked by the law.

Certainly, those five elements are related to compliance with Siracusa principles as the guidelines to fulfill the basic rights of the citizens as governed in ICCPR. As commonly understood, derogations in a public emergency can only be given pursuant to the following guidelines:

1. "Public Emergency Which Threatens the Life of the Nation"
2. Proclamation, Notification, and Termination of a Public Emergency.
3. "Strictly Required by the Exigencies of the Situation"
4. Non-Derogable Rights.
5. Some General Principles on the Introduction and Application of a Public Emergency and Consequent Derogation Measures.
6. Recommendations Concerning the Functions and Duties of the Human Rights Committee and United Nations Bodies.

The reference to these five principles implies that every citizen of the state, as governed in the 1945 Constitution of the Republic of Indonesia, is entitled to basic rights that cannot be constitutionally revoked and unfairly derogated because those rights are interconnected and inseparable. Compared to the use of Siracusa principles, the substance of the Instructions of Home Affairs Minister Number 1, Number 4, and Number 6 of 2020, in the context of the mitigation of Covid-19 used as a sample, arose from the Regulation of Home Affairs Minister Number 20 of 2020, and the substances do not indicate that there are violations of restrictions or guidelines enacted in Siracusa. That is, the Ministerial instructions concerned are deemed to be conceptually problematic in terms of their type, not the substances. That is, legal products should be appropriately picked and made to deal with a state of emergency of Covid-19.

The fundamental aspects serving as the basis for compliance with the guidelines of the five elements above that must be fulfilled in declaring a state of emergency include the consistency of the principles of the state of law; every social activity is

regulated by a legal product whose democracy must be assured. In terms of the legislative and judicative body, legal products should be available and appropriate for use. During a state of emergency, governments can set the fundamentals intended to deal with a state of emergency of Covid-19 in the form of a legal product but it should have binding power.

This binding and executorial power that a non-legal product holds and its application to the public are certainly ideas that the logic of law cannot simply accept. In the time to come, there must be legal instruments that could ensure that they respond to a state of emergency according to the law, and non-legal products can only ensure that the substances of the legal products concerned are elaborated into operational guidelines that are more applicative and reactive to the real conditions based on the substances of legal products. The consistency of making non-legal products such as a Ministerial Instruction intended to deal with a state of emergency of Covid-19 in Indonesia serves as a lesson regarding how necessary it is for a state institution to be strictly assigned and held responsible attributively to conduct evaluations of and adjustment to non-legal products used in the administration of the state government in providing public services and responding to the issues arising in society.

Ius Constituendum and Ius Constitutum: Probabilities and Challenges

The Director of the World Health Organization (WHO) stated that all countries should be able to maintain harmony in providing health protection, minimizing economic risks and social disturbance, and respecting the fundamental rights of every citizen. The ideas of respecting and protecting the constitutional rights of the citizens set a vital structure that reinforces the efficacy of global attempts to tackle all the pandemic-related problems, including Covid-19 declared as a global pandemic (WHO, 2020).

In the future, it is a necessity for the governments in Indonesia both at national and regional levels to fix the legal bases and adjust the legal framework to ensure that responses to a state of emergency comply with the rule of law. The process that takes place in the reform and the harmonization of law could help determine the scope of power during a state of emergency clearly and constitutionally. Covid-19 has shown how difficult it has been to tackle the pandemic at all governmental levels. Attempts could be more focused on the making of new laws that strictly and clearly govern jurisdiction-related issues and the distribution of power so that it is expected not to be overlapping. This matter should also embrace proper responsibility, maintain the inadequate mechanism and the institution responsible for the coordination between the governments and their capacity, and build the capacity of the entities of sub-states to face external turmoil.

World Health Organization has been playing a vital role in supporting the member states of the United Nations in order to face the challenges brought along by Covid-19 and has been doing massive campaigns to give access to each country to a comprehensive approach to handling the pandemic (Velásquez, 2022). The mitigation of the pandemic through policies wrapped in non-legal products should really pay attention to the aspects of human rights as an integral part and ethical reference, and this attempt should also refer to the rule of law and be transparent, indiscriminative, proportional, time-restricted, appropriately addressed, and compliant with the legislation and international law.

The Organization for Economic Co-operation and Development (OECD) is a non-profit international organization that has been consistently conducting scientific research in formulating public policies for a better life, stating in its evaluation report regarding the mitigation of the Covid-19 pandemic in several countries that their preparations to mitigate the pandemic have been insufficient, giving panic attack to the countries and encouraging them to give quick reactions not preceded by in-depth analyses about the effects of these immediate reactions (OECD, 2022).

This matter shows how massive the Covid-19 pandemic has been. OECD argues that it should render an important lesson for the time to come by having more established experience in handling the Covid-19 pandemic with more proper preparations and analyses in the formulation of policies intended to tackle the pandemic. Issues regarding the protection of human rights, liberty, and independence of individuals to claim their constitutional rights are becoming vital. Thus, these are the legislative products that should be able to govern the derogation of constitutional rights within the context of a state of emergency or uncommon situations. Legislative products should be the standard instruments for the legislative products in a country.

CONCLUSION

The research results indicate that although, in a procedural scope, the construction of the legal basis of Ministerial Instructions and Circular Letters has met the legality principles, the substantive aspects regarding the limitation or derogation of constitutional rights of the citizens remain problematic because this matter should be governed in a legal product other than Ministerial Instructions and Circular Letters, considering that both are not legislative products. Indonesia should take this as a lesson to learn from. Non-legal products made to mitigate the pandemic should consider both the procedural and substantive aspects in terms of consistency with the principles of the rule of law, more deeply with Siracusa principles, and compliance with the principle of transparency, indiscrimination, proportionality, time restriction, appropriate addressing, and compliance with the legislation and international law. All these forms of compliance will legitimate the implication of the non-legal products in society.

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