

The Legal Standing of PPKM in Banten Province (Constitutional Law Perspective)

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ABSTRACT

The establishment of the policy for the Implementation of Restrictions on Community Activities (PPKM) is one of the efforts to overcome the pandemic carried out by the Indonesian government. The legal basis for the PPKM policy is contained in the Instruction of the Minister of Home Affairs, which is a problem because of the pandemic situation which is a national disaster but the policies used are only regulated in the minister's instructions. Banten Province, which is included in the Java-Bali PPKM area imposed by the central government, has issued a policy containing the implementation of PPKM as stipulated in the Banten Governor's Instruction Number 1 of 2021. These problems then have an impact on the extent of the binding power of the PPKM when viewed from the legal basis, its formation is related to the hierarchical system of legislation in Indonesia. The research method used is a normative juridical research method with the aim of seeing how the normative arrangements regarding the legal position of PPKM in Banten Province are in the Indonesian constitutional system. Using secondary data such as literature and literature but also using primary data or field data as supporting data. The policy in the form of a ministry instruction in this case the Instruction of the Minister of Home Affairs regarding PPKM cannot be used to regulate matters that are comprehensive or external to the ministry itself. Therefore, the use of a Ministerial Instruction in handling Covid-19 is not appropriate because it is not a legal product in the form of a regulation that can bind all parties and have clear legal consequences.

Keyword: Covid-19, Enforcement of Restrictions on Community Activities, Ministerial Instructions.

ABSTRAK

Pembentukan kebijakan Pemberlakuan Pembatasan Kegiatan Masyarakat (PPKM) merupakan salah satu upaya penanggulangan pandemi yang dilakukan oleh pemerintah Indonesia. Dasar hukum kebijakan PPKM terdapat dalam Instruksi Menteri Dalam Negeri, yang mana menjadi persoalan karena situasi pandemi yang merupakan bencana nasional akan tetapi kebijakan yang digunakan hanya diatur dalam instruksi menteri. Provinsi Banten yang termasuk ke dalam wilayah PPKM Jawa-Bali yang diberlakukan oleh pemerintah pusat, telah mengeluarkan kebijakan yang memuat tentang penerapan PPKM yang diatur dalam Instruksi Gubernur Banten Nomor 1 Tahun 2021. Permasalahan tersebut kemudian berdampak pada sejauh mana kekuatan mengikat dari PPKM tersebut jika dilihat dari dasar hukum pembentukannya dihubungkan dengan sistem hirarki perundang-undangan di Indonesia. Metode penelitian yang digunakan adalah metode penelitian yuridis normatif dengan tujuan untuk melihat bagaimana pengaturan normatif mengenai kedudukan hukum PPKM di Provinsi Banten dalam sistem ketatanegaraan Indonesia. Menggunakan data sekunder seperti literatur dan kepustakaan tapi juga menggunakan data primer atau data lapangan sebagai data penunjang. Kebijakan berupa instruksi kementerian dalam hal ini Instruksi Menteri Dalam Negeri mengenai PPKM tidak dapat digunakan untuk mengatur hal yang sifatnya menyeluruh atau eksternal dari kementerian itu sendiri Maka dari itu penggunaan Instruksi Menteri dalam penanganan Covid-19 tidaklah tepat karena bukan merupakan produk hukum yang berbentuk peraturan yang dapat mengikat semua pihak dan memiliki akibat hukum yang jelas.

Kata Kunci: *Covid-19, Pemberlakuan Pembatasan Kegiatan Masyarakat, Instruksi Menteri.*

Introduction

Indonesia is a country based on law as stated in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia). The elaboration of the notion as a state of law has the meaning that every aspect of people's lives, both in the social and government fields, must be carried out in accordance with the legal rules that apply in the law of the country. According to Hans Kelsen's teachings, the state is essentially a *Zwangordnung*, a legal order or social order that has a coercive nature, which gives rise to the right to govern and the obligation to submit.

Because the rule of law is incarnated in the form of regulations that contain sanctions if violated, thus limiting the freedom of citizens which is a fundamental value in a country. In addition, Indonesia is a country that adheres to the teachings of a welfare state (*verzoging* state, welfare state) and can be categorized as a democratic legal state. Where in every administration of government affairs must be based on applicable law (*wetmatigheid van bestuur*).

The Covid-19 pandemic that has hit Indonesia since the beginning of 2020 is a national disaster which until now is still something that has not been fully resolved. Nevertheless, various efforts have been made by the Indonesian government with the aim of accelerating the handling of the Covid-19 pandemic. Efforts to handle the Covid-19 pandemic carried out by the Indonesian government continue to experience developments in terms of choosing the

policy model to be used, which of course will be adjusted to the level of urgency in the field.

At the beginning of the spread of Covid-19 in Indonesia in 2020, the Indonesian government chose to use the Large-Scale Social Restriction policy (hereinafter referred to as PSBB) as an effort to deal with the pandemic.¹ The selection of PSBB was the result of a central government decision based on current conditions and state law in dealing with a health emergency or disease outbreak as in the case of Covid-19, namely Law Number 6 of 2018 concerning Health Quarantine (hereinafter referred to as the Health Quarantine Law).²

Over time, the implementation of the PSBB policy which has been implemented since the beginning of 2020 has continued to change into Local-Scale Social Restrictions (PSBL) and Transitional PSBB before the government finally switched to using a new policy, namely the Enforcement of Community Activity Restrictions (PPKM).

PPKM came into force in Indonesia on January 11, 2021 with the legal basis being the Instruction of the Minister of Home Affairs Number 1 of 2021 concerning the Enforcement of Restrictions on Community Activities to Control the Spread of Covid-19. The *Inmendagri* which is the legal basis for PPKM has a time limit of validity, which is from January 11, 2021 to January 25, 2021. After the expiration of the *Inmendagri* validity period, a new *Inmendagri* is then issued regarding the extension of PPKM for a period of validity

¹Government of Indonesia, "Government Regulation Number 21 of 2020 Concerning Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (Covid-19)" (2020).

²Eki Furqon and Edi Mulyadi, "The Harmonization of the Central and Local

Governments Authority: Handling Public Health Emergencies on Coronavirus Disease 2019," *UNIFIKASI : Jurnal Ilmu Hukum* 7, no. 2 (December 26, 2020): 205-14, <https://doi.org/10.25134/UNIFIKASI.V7I2.3569>.

that is adjusted to the wishes of the government.

PPKM in its development has similarities, such as the previous policy, namely PSBB, experiencing changes in terms ranging from PPKM, Micro-Based PPKM and Emergency PPKM. In general, Micro-Based PPKM is the same as regular PPKM, the difference is Emergency PPKM. Emergency PPKM is an implication of the establishment of *Inmendagri* Number 15 of 2021 concerning the Implementation of Restrictions on Emergency Community Activities for Corona Virus Disease in 2019 in the Java and Bali Regions, in which the implementation of Emergency PPKM can lead to curfew rules, crowd control and other more repressive actions.

The basic difference between the implementation of PSBB and PPKM is in terms of the legal basis. PSBB is regulated in a government regulation, while PPKM is regulated in the Instruction of the Minister of Home Affairs. In addition, the PPKM policy is not found in the Health Quarantine Law, in contrast to the PSBB which is clearly written in it. It can be explained that, PPKM is a government policy that is only based on ministerial instructions, because there are no clear references in the relevant laws.

Indonesia's positive legal system in which there is a vertical classification of laws and regulations which in other terms is called the hierarchy of laws and regulations in Indonesia.³ Therefore, every existing statutory regulation must be in accordance with the principle of statutory regulations, namely *lex superiori derogat lex inferiori*, namely a lower statutory regulation must not conflict with higher regulations. In addition to determining the level of the hierarchy formally, the hierarchy of laws and regulations can also see the binding

strength and limitations of the validity of a regulation itself.

The Banten Provincial Government, whose territory is included in the area that must implement PPKM, has issued Banten Governor Instruction Number 15 of 2021 concerning Covid-19 Emergency PPKM in the Banten Province. In his consideration, it was explained that this governor's instruction was following up on the Instruction of the Minister of Home Affairs Number 15 of 2021 concerning PPKM.

The issue regarding PPKM can then be seen from its legal basis and the extent to which it applies, which in this case is a Ministerial Instruction and specifically assesses the Instruction of the Minister of Home Affairs regarding the handling of the Covid-19 pandemic. This is a consequence of every policy within the scope of the rule of law. PPKM cannot only be seen in terms of effectiveness and efficiency, but the policy must be based on applicable laws and regulations.

Based on Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislation which explains the hierarchy of existing laws and regulations in Indonesia, it is important to conduct a study on the legal position of PPKM in Banten Province in the Indonesian Constitutional System and its relation to its binding power and the extent of the impact that can be caused by ministerial instructions, especially the Minister of Home Affairs Instruction regarding the handling of the Covid-19 pandemic.

Based on the explanation of the background above, the researcher obtained the formulation of the problem, namely how the legal position of the Enforcement of Restrictions on Community Activities in Banten Province in the Indonesian constitutional system?

³ See Article 7 of "Law Number 12 of 2011 Concerning the Establishment of Legislations" (n.d.).

Methodology

The research method used in this study is a normative juridical legal research method. Normative legal research puts law as a building system of norms. The system of norms in question is about principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings).⁴

In this study, the author uses normative legal research, which is a scientific research procedure to find the truth based on the logic of legal scholarship from the normative side. Normative juridical research uses secondary data as primary data and primary data as supporting or supporting data.

Data collection techniques used in this research are field studies and literature studies. Types of data collection through field studies conducted by researchers include field observations, interviews and questionnaires.

Literature study, is a secondary data collection technique, namely the source of data is not directly from people but data or from primary legal materials such as laws and regulations, books, documents and library materials or other written materials related to an event. or certain activities related to the formulation of the problem in the research to be answered. The data analysis used is descriptive analytical, in which the researcher will analyze the data and then process the data into a qualitative explanation.

Discussion

As a form of government effort in dealing with the ongoing COVID-19 pandemic in Indonesia, many policies have been made and implemented since the outbreak began to enter the country. Various policies, especially in the form of restrictions on the movement of people

from one place to another, continue to be intensified. This is of course to reduce the transmission rate of the COVID-19 virus, which is very easy to mutate between humans. The policy of restricting movement or restrictions on community activities began with the enactment of Large-Scale Social Restrictions (PSBB) in 2020 which were implemented in big cities and some of their buffer cities.

The policy is then given relaxation until it enters a transition period, where all activities in various sectors can begin to be carried out in stages. Seeing the national economy which must be immediately restored for the welfare of the community, also with the development of the spread of COVID-19 at that time it was starting to be controlled.

People are getting used to living a new life or what is called "New Normal", where all activities are still carried out in conjunction with the implementation of health protocols that must be obeyed by the whole community.

The various efforts of the central government to cope with the pandemic condition have actually been able to refer to the provisions of the applicable laws, one of which can be seen in Law Number 6 of 2018 concerning Health Quarantine. The following is a table of methods for handling public health emergencies contained in Law Number 6 of 2018:

Table 1

No	Types of Health Quarantine in the Region	Authority to Determine	Person responsible
1.	Home Quarantine	Health Quarantine Officer	Central Government by involving local government and related parties
2.	Regional Quarantine	Minister of Health	Central Government by involving local

⁴ Mukti Fajar and Ahmad Yulianto, *Dualisme Penelitian Hukum Normatif Dan*

Empiris, 3rd ed. (Yogyakarta: Pustaka Pelajar, 2010).

			government and related parties
3.	Hospital Quarantine	Health Quarantine Officer	Central Government and/or Local Government
4.	Large-Scale Social Restrictions	Minister of Health	Local government

Based on the table above, it can be seen that in the laws and regulations governing the management of public health emergencies, there are various types and classifications, the selection of which can be adjusted according to their respective needs. This has also been done by the government by implementing PSBB in 2020.

After almost a year of the new normal, until efforts to prevent the spread of the COVID-19 virus through mass vaccinations for the people of Indonesia showed that the development of the spread of COVID-19 continued to improve day by day, it turned out that there was a second wave of the spread of this virus that could not be controlled in the middle of the year. In 2021, the number of new positive case confirmations of people infected with the COVID-19 virus penetrated the tens of thousands plus the entry of this new variant of COVID-19.

Quick steps taken by the government to deal with this phenomenon, the government decided to implement the Implementation of Emergency Community Activity Restrictions (PPKM). The implementation of the policy is carried out in a limited manner in several cities / districts, especially in the islands of Java and Bali where the number of cases is very high to

suppress the spread of the COVID-19 virus.

Indonesia as a legal state based on Article 1 paragraph (3) of the 1945 Constitution has an absolute consequence that every government action and policy must be realized in the form of or through clear legal products. In the Implementation of Restrictions on Community Activities (PPKM), this policy is based on the issuance of Minister of Home Affairs Number 1 of 2021 concerning the Enforcement of Activity Restrictions to Control the Spread of Covid-19.

According to I Gede Pantja Astawa, what can be said as state regulations (*staatsregelings*) or decisions in a broad sense (*besluiten*). Decisions in a broad sense (*besluiten*) can be divided into 3 (three) groups, namely:⁵

- 1) *Wettelijk regeling* (statutory regulations), such as the Constitution, laws, government regulations in lieu of government regulations, presidential regulations, ministerial regulations, regional regulations, and others;
- 2) *Beleidsregels* (policy regulations), such as instructions, circulars, announcements and others;
- 3) *Beschikking* (determination), such as decrees and others.

In its classification as policy regulations, instructions can be further broken down into two types. First, these instructions are made and apply to policy regulators themselves. And the second is the type of instruction or policy regulation that is made and applies to administrative bodies or officials who are subordinate to the policy maker. While the substance of each policy is basically

⁵ Ahmad Gelora Mahardika and Rizky Saputra, "Kedudukan Hukum Pemberlakuan Pembatasan Kegiatan Masyarakat Dalam Sistem Ketatanegaraan Indonesia," *Legacy*:

Jurnal Hukum Dan Perundang-Undangan 1, no. 1 (March 4, 2021): 1-23, <https://doi.org/10.21274/LEGACY.2021.1.1.1-23>.

the same. That is, it contains implementation guidelines to technical instructions in the form of other general rules.⁶

Based on the classification regarding the hierarchy of laws and regulations as stated in Article 7 Paragraph (1) as follows:

Table 2

No	Regulations
1	1945 Constitution of the Republic of Indonesia
2	Decree of the People's Consultative Assembly
3	Laws/Government Regulations in Lieu of Laws (<i>Perppu</i>)
4	Government regulations
5	Presidential decree
6	Provincial Regulations
7	Regency/City Regional Regulation

Looking at the table above, it is not a type of legislation that has binding legal force and can be accounted for. If seen from the table above, it is not found regarding the legal position of the Ministerial Instruction because it is not a regulation that is included in Article 7 paragraph (1).

Concretely stated in Article 8 paragraph (1) of Law no. 12/2011 states that what can be categorized as statutory regulations are only any regulations issued by various state institutions and one of them is the minister. Thus, it can be ascertained that the Ministerial Instruction does not have a position as a statutory regulation in the Indonesian constitutional system. Referring to the provisions contained in Article 8 of Law Number 12 of 2011, only a Ministerial Regulation has this position.

Meanwhile, the Ministerial Instruction only applies as a policy regulation. In its implementation, policy regulations such as Ministerial

Instructions cannot be directly legally binding but still contain legal relevance. This was agreed by Maria Farida, according to Maria Farida Instructions do not include laws and regulations, this is because an instruction is always individual and concrete and there must be an organizational relationship between superiors and subordinates, while the nature of the legal norms in the legislation is general, abstract, and persistent.⁷

Looking at the legal basis for dealing with the pandemic outbreak in Indonesia. So, it can refer to Law no. 6 of 2018 concerning Health Quarantine. This is the basis for the issuance of various derivative rules such as the application of PSBB, and so on. Meanwhile, formally, the formation of every statutory regulation which is one of the steps in preventing the spread of Covid-19 must be based on Law Number 12 of 2011 concerning the Establishment of Legislation. This is important, so that in the design process until the ratification of each regulation does not conflict or conflict with other laws and regulations.

Banten Province translates the derivative of the Ministry of Home Affairs by issuing Banten Governor Instruction Number 1 of 2021. Regarding central regulations, guidelines and instructions on PPKM are contained in *Inmendagri* Number 1 of 2021. This instruction is a step that was initiated directly by the Central Government and addressed to all Regional Heads in Java-Bali. The Instruction states that its implementation is based on the massive development of the Covid-19 pandemic on the islands of Java and Bali, and with the new variant of the Covid-19 virus, efforts to control the Covid-19 pandemic are needed.⁸

The implementation of Community Activity Restrictions (PPKM) is regulated in the Ministry of Home Affairs. Ministers

⁶ Mahardika and Saputra.

⁷ Mahardika and Saputra.

⁸ Mahardika and Saputra. pg.7.

can issue policy regulations if they have received orders from the president. The system of laws and regulations in Indonesia itself is admittedly still contains a number of problems, including not all types of legislation clearly located in the hierarchy of laws and regulations and too broad material content and similarities. content material between laws and regulations.⁹

1. Formal Aspect

In an effort to prevent COVID-19, which has not been implemented optimally with the implementation of PSBB, the president has made more progressive prevention efforts, namely by ordering his ministers to be more responsive in dealing with COVID-19, which was then followed up with the establishment of a PPKM policy based on the Instruction of the Minister of Home Affairs No. 1 of 2021 concerning the Enforcement of Restrictions on Community Activities.

The issuance of the President's decision as a form of a health emergency that occurred in the territory of Indonesia due to the COVID-19 pandemic, which has not been able to control its spread, requires quick, focused, precise and integrated steps between the central government and regional governments to be instructed.

2. Material Aspect

The material aspect of the formation of this ministerial instruction is seen as a form of controversial legal product because there is no firm legal basis to regulate it. As a result, the content of the implementing regulations is independently prepared by the makers as a form of free authority (*vrije bevoegheid*).¹⁰ In reality, it is not clear what material must be regulated by a ministerial decision, which is definitely an implementing regulation of a higher-level statutory regulation.

The establishment of regulations at the ministerial level is in order to exercise government power, so that ministry regulations are strong enough to operate. Concretely stated in Article 8 Paragraph (1) of Law no. 12 of 2011 states that what can be categorized as statutory regulations are only any regulations issued by various state institutions and one of them is the minister.

It is called '*beleids*', 'policy' or policies, because formally it cannot be called or it is not in the form of an official regulation but its contents are regulatory (*regeling*). Policy rules are considered something that cannot be avoided, because they are needed in practice. Such as "subordinate legislation" which is needed to implement laws, policy rules. Although the official regulations are not laws, it is also necessary to carry out official regulations.¹¹

⁹ Bayu Dwi Anggono, "Tertib Jenis, Hierarki, Dan Materi Muatan Peraturan Perundang-Undangan: Permasalahan Dan Solusinya," *Masalah-Masalah Hukum* 47, no. 1 (January 30, 2018): 1, <https://doi.org/10.14710/mmh.47.1.2018.1-9>.

¹⁰ Cholida Hanum, "Analisis Yuridis Kedudukan Surat Edaran Dalam Sistem Hukum Indonesia," *Humani (Hukum Dan Masyarakat Madani)* 10, no. 2 (November 26,

2020): 138-53, <https://journals.usm.ac.id/index.php/humani/article/view/2401>.

¹¹ Iqozul Hiam, Kafrawi Kafrawi, and AD Basniwati, "Aspek Hukum PSBB Dan PPKM Dalam Penerapan Undang-Undang Kekeparantinaan Kesehatan," *Jurnal Diskresi* 1, no. 1 (June 21, 2022): 77, <https://journal.unram.ac.id/index.php/diskresi/article/view/1314>.

According to the doctrine of policy is a standard that determines a goal to be achieved. Policy is also known as public policy or public policy. Rian Nugroho Dwidjowijoto's opinion by dividing the policy into 3 stages, namely:¹²

- 1) Policies that are macro in nature in the form of laws and regulations that are regulated in the laws and regulations.
- 2) An intermediate policy or explanation of this implementation in this sense may take the form of a Ministerial Regulation, Governor Regulation, Regent Regulation and Mayor Regulation. The policy can also be in the form of a Joint Letter between the Minister, governor and regent and mayor.
- 3) Public policies of a micro nature, namely policies that regulate the implementation of the policies above. The form of policy is regulations issued by public officials under the Minister, namely governors, regents and mayors.

From the description above, the policy concepts referred to in this study include laws, Ministerial Instructions, and Governor's Circulars containing standards for determining goals to be realized by the state through Emergency PPKM in Handling the Eradication of Covid 19.

To find out whether this policy is categorized as *Freies Ermessen* or Discretion in Article 23 of Law Number 30 of 2014 concerning Government Administration, it is stated that the limits of the scope of the use of discretion by Government Officials include:

- 1) Making decisions or actions based on the provisions of laws and regulations that provide a choice of decisions or actions;
- 2) Decision making or action because the laws and regulations do not regulate;
- 3) Making decisions or actions because the laws and regulations are incomplete or unclear; and
- 4) Decision-making or action due to government stagnation for the wider interest.

In Article 24 of the Government Administration Law, there are conditions that must be met and heeded in issuing a discretion, including:

- 1) In accordance with the discretionary objectives as referred to in Article 22 paragraph 2;
- 2) Does not conflict with statutory regulations;
- 3) In accordance with the General Principles of Good Governance (AAUPB);
- 4) Based on objective reasons;
- 5) Does not cause conflicts and interests; and
- 6) Done in good faith.

As a legal order, all applicable laws and regulations in Indonesia must be interrelated as a system that is built in a comprehensive, consistent and hierarchical manner based on the 1945 Constitution of the Republic of Indonesia as the basic law and final legitimacy of regulatory validation. legislation and the entire legal system. That there is no conflict between one norm and another, solely for the sake of guaranteeing legal certainty to the community.

¹² Kadek Julia Mahadewi, "Kebijakan Pelaksanaan PPKM Darurat Untuk Penanganan Covid-19 Dalam Tatanan Kehidupan Era Baru Di Provinsi Bali," *Kertha*

Semaya : Journal Ilmu Hukum 9, no. 10 (August 22, 2021): 1879-95, <https://doi.org/10.24843/KS.2021.V09.I10.P13>.

PPKM implemented by the central government and then determined by local governments through a derivative regulation from the Instruction of the Minister of Home Affairs which regulates PPKM during the Covid-19 pandemic presents something that needs to be studied in the constitutional aspect in Indonesia. The selection of the Ministry of Home Affairs as the legal basis for PPKM is something that the central government needs to improve in the future when facing a pandemic situation such as Covid-19. Administratively, the ministry's instruction is not a regulation that can be applied by mobilizing many parties in the maximum sense, like other statutory regulations that exist above it. This is because its internal nature is not even higher than the Ministerial Regulation itself, which in this case means that it is inappropriate for a rule to be used comprehensively and massively based on an internal legal basis.

Conclusions

The Instruction of the Minister of Home Affairs regarding PPKM made by the government during the Covid-19 pandemic is one of the government's efforts to reduce the impact of the Covid-19 pandemic, but in legal standing, policies in the form of ministry instructions cannot be used to regulate matters that are overall or external to the ministry itself. Therefore, the use of the Ministerial Instruction in handling Covid-19 is not appropriate because it is not a legal product in the form of a regulation that can bind all parties and has clear legal consequences.

Referring to the Indonesian state administration system, in an emergency the state administration system will turn into an emergency constitutional law by keeping an eye on adjusting to the conditions that occur. The formation of regulations whose level is below the Law, as well as the formation of Government Regulations as implementing regulations

of the Law, must clearly regulate the basis for the application of discretion, whether the discretion is free or the discretion is bound.

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