

The response to the Covid-19 pandemic in Indonesia from the constitutionalist perspective

I. Introduction

1. Covid-19 in Indonesia

- First Covid-19 cases identified in early March 2020, rapidly overwhelming the Indonesian hospitals. The death toll remains the highest in Southeast Asia.
- Indonesia's authorities initially underestimated³ the danger of Covid-19 and tended to cover the actual number of cases.
- In comparison to other parts of the world, the community transmission is relatively lower due to the warm and tropical climate and other archipelagic conditions (such as the high proportion of outdoor and semi-outdoor venues), and to the low mobility within the country.

2. The high vulnerability of the Indonesian population

- Due to the large informal economic sector and the lack of a comprehensive social security system.
- For many, "home office" is not an option. Thus, they are more vulnerable for both, the pandemic and its economic impact.
- The high number of citizens with pre-existing illness leads to more serious Covid-19 cases, even among children.

3. Indonesia as a unitarian state with a presidential governing system and regional autonomy

- Under the Constitution of 1945, the President holds the power of government (art. 4). He has a broad regulatory power but regulations restricting human (fundamental) rights need a legal basis in a law (cf. art. 28J(2)).
- Indonesia is a unitary state but the provinces enjoy a strong autonomy (art. 18 ff.) and their directly elected governors are also vested with regulatory power. Their measures can complement those of the central government.

II. The measures taken by President Joko Widodo (Jokowi)'s Administration

1. The basic tendencies of their Covid-19 response

- a) Focusing rather on the economic concerns than on public health
 - The government adopted the REGULATION IN LIEU OF LAW NO. 1 OF 2020 ON THE STATE FINANCIAL POLICY AND FINANCIAL SYSTEM STABILITY FOR HANDLING THE CORONA VIRUS DISEASE 2019 (COVID-19) PANDEMIC. The regulation aims, among other things, to disburse 405.1 trillion IDR (23.5 billion €) for COVID-19 measures, most of which would be allocated to support the economic recovery rather than health care.
 - The government generally tried to avoid or limit the closing of shops, malls, markets, restaurants and other businesses, imposing milder restrictions and mandatory health protocols. Most of the time, the Covid-19 restrictions were less severe than in Europe. For example, in 2021 going out for dinner was never a problem in Yogyakarta.
- b) Avoiding to reveal the full dimension of the pandemic through little testing and tracing
 - In 2020, Indonesia had one of the world's lowest testing rates and contact tracing remained weak. Besides, as the President admitted, the government withheld information about Covid-19 cases to not stir panic among the general public.
 - The real number of cases is also unknown because Indonesian Covid-19 test certificates are not reliable. In December, Taiwan banned incoming flights of Indonesian migrant workers because many had arrived with a negative test certificate but tested positive after arrival. In May 2021, undercover police investigators revealed that at the airport of Medan up to 9.000 passengers had been tested reusing already used nose swabs.

2. The declaration of a *health emergency status* under the Health Quarantine Law (Law No. 6 of 2018)

- The PRESIDENTIAL DECREE NO. 12 OF 2020 ON THE DECLARATION OF COVID-19 AS NATIONAL DISASTER established a specific health emergency status. It allows the government to perform large-scale social restrictions but is not a state of emergency under art. 12 of the Constitution.

3. "*Large-scale social restrictions*" instead of a real lockdown

- Avoiding a real lockdown, the GOVERNMENT REGULATION NO. 21 OF 2020 ON LARGE-SCALE SOCIAL RESTRICTIONS (PSBB) and the MINISTER OF HEALTH REGULATION NO. 9 OF 2020 ON PSBB GUIDELINES limit but still allow social activities, including traveling to other parts of Indonesia. These measures were motivated by the intention to minimise economic damage and to avoid government duties under the Health Quarantine Law to fulfil basic needs of the people during a lockdown.
- The restrictions include temporary work closures, school and university closures with change to "home schooling" and "online teaching" (until today), restrictions of religious activities in places of worship, restrictions of social and cultural activities, restrictions of public transportation and restrictions of activities related to defence and security.
- **Update 25.07.2021:** Despite a new Covid-19 surge since June 2021, which in July has led to a catastrophic situation in Java and Bali causing numerous deaths, the government ruled out to impose the PSBB again. Instead, the MINISTER OF HOME AFFAIRS issued, on the basis of the existing laws and regulations, the INSTRUCTION NO. 15/2021 ON THE IMPLEMENTATION OF EMERGENCY RESTRICTION OF PUBLIC ACTIVITIES (EMERGENCY PPKM) FOR COVID-19 IN JAVA AND BALI, which later

¹ Lecturer at the Faculty of Law of Universitas Gadjah Mada, Yogyakarta; e-mail: mriramohammad@gmail.com.

² DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; 2017 - 2018 professor at the Hochschule des Bundes für öffentliche Verwaltung, Brühl; www.thomas-schmitz-yogyakarta.id, www.jura.uni-goettingen.de/schmitz; e-mail: tschmit1@gwdg.de.

³ Underlined text passages indicate links to relevant internet resources. Just click on the link in the PDF file!

was extended to other parts of the country. It orders far-reaching restrictions for the period from 3 to 20 July, which, however, fall short of a PSBB or lockdown and unlike in some European countries during the surges in spring 2021 do not include a nightly curfew or restrictions to meet friends and family at home. Public facilities, such as parks and tourist attractions and places of worship are closed. Public transport is restricted and long-distance transport requires besides a Covid-19 test a vaccine card documenting at least one vaccine dose. Sports and social activities are banned but wedding receptions still allowed to a maximum of 30 persons. In professional life, the so-called "non-essential sector" needs to apply 100 % work from home but apparently these restrictions cannot be effectively enforced. Meanwhile, the "essential sector" (finances and payment, capital markets, IT, communication technologies, export-orientated industries) is still allowed to work 50 % from office and a widely defined "critical sector" (including even petrochemicals, cement and construction, national vital objects and strategic projects) may even work 100 % from office. Teaching and learning activities must be online, what they usually were before. Shopping malls are closed. Supermarkets and markets may open with 50 % capacity until 20:00. Restaurants, cafes and street food vendors are limited to offer delivery or takeaway until 20:00. All in all, these social restrictions are currently leading to a considerable but apparently not sufficient reduction of mobility. They have been extended until 26 July and later until 02 August (now labelled "PPKM level 4") and are further subjected to revision if the number of new Covid-19 cases drops.

4. The ban of the annual Mudik (mass migration to the hometown to celebrate the end of the Ramadan) in 2020 and 2021
 - In Indonesia it is common that people working in bigger cities travel back to their hometown at the end of Ramadan to celebrate Eid al-Fitri (the Islamic Sugar Feast) with their family. This annual mass migration in the largest Muslim country can involve 30 million people.
 - To prevent larger gatherings and crowds, which would facilitate the spreading of the coronavirus, the government banned the Mudik by the REGULATIONS OF THE MINISTRY OF TRANSPORT NO. PM 25 OF 2020 resp. NO. 13 OF 2021. They strictly restricted any kind of traveling from a few days before to a few days after Eid al-Fitri. Police roadblocks were set up on the arterial roads of major cities to enforce them. After the restrictions had been circumvented by millions of people in 2020, in 2021 accompanying measures were taken to hinder travelling in a longer period before and after the holidays. Despite these efforts, five weeks after Eid al-Fitri a new, massive surge is sweeping across Indonesia.
5. The authorisation of the governors of the provinces to take additional measures with central government approval
 - The Regulations on the large-scale social restrictions define minimum restrictions but authorise regional and local government authorities, in particular the governors of the provinces, to apply complementary restrictions. These, however, need to be approved by the Minister of Health. Thus, the government secured strict control but shifted the responsibility in the eyes of the public to the governors.
 - The proceedings to achieve the approval have been criticised as being too cumbersome and bureaucratic to cope with the quickly changing demands of fighting a pandemic.
6. **Updated 25.07.2021:** The vaccination campaign
 - Indonesia has started an ambitious vaccination campaign, using the slightly less effective vaccine from Sinovac, which, however, is available and produced in Indonesia. Until 24 July 2021, 6.4 % of the population have been fully vaccinated. Recently it turned out that Sinovac is not so strong in protecting against the new Delta variant. In June, in the province of Kudus, 350 health workers have been infected despite vaccination with Sinovac, dozens needed to be hospitalised. One of us, Thomas Schmitz, has been infected several days after our lecture. However, it turned out that Sinovac prevents in most cases a severe course of the disease. Aside from using Sinovac, the government has also used Astrazeneca. And recently it has secured million doses of Moderna and Pfizer vaccines. The last two vaccines, the Ministry of Health declares, will be used as booster for medical workers.
 - The unconventional initial approach to prioritise the young, not the elderly, has prompted criticism from constitutionalists. Our university has vaccinated its lecturers and staff in an own campaign in March and April, starting with the elderly.
 - Under PRESIDENTIAL REGULATION NO. 14 OF 2021 ON THE IMPLEMENTATION OF THE VACCINATION PROGRAM, *vaccination is mandatory* but it is doubtful whether this obligation will be enforced.
 - The vaccination programs have also failed to address the systemic discrimination faced by members of sexual and religious minorities, i.e., transgender people and people of traditional faith who commonly do not have an ID card, which is required to get vaccinated.
7. **Update 25.07.2021:** Measures to ensure oxygen supply
 - Learning from the experience of India in spring 2021, the government increased the stock of oxygen and took measures to ensure sufficient domestic oxygen production. At the end of June, when the oxygen demand increased rapidly during the new surge, several ministers assured that sufficient oxygen supply for all hospitals was ensured. However, on 3 July, 33 patients died within a few hours in a hospital in Yogyakarta when it ran out of oxygen, possibly because of logistic problems. Meanwhile, many hospitals are turning away patients with respiratory problems, telling their families that they must provide their own oxygen at home, while finding oxygen on the "market" has become a difficult challenge.
 - At the middle of July, the government welcomed relief supplies from Singapore and Australia. At the end of July, a number of private companies take the initiative and join forces to set up a 500-bed oxygen therapy facility in East Jakarta.
8. Accompanying measures in the wider context with side effects on democracy and human rights
 - While the Covid-19 restrictions themselves were mostly less severe than in Europe, a couple of accompanying measures in a wider context have raised concerns about democracy and human rights:
 - a) The suppression of criticism of the President's Covid-19 policies
 - The Chief of the National Police has issued administrative provisions allowing the police to prosecute acts defaming the President's or government officials' ability to handle the coronavirus - a flagrant violation of the freedom of expression under art. 28 of the Constitution and art. 19 ICCPR.

- In the Ravio Patra case, the Law No. 11 of 2008 on Electronic Information and Transactions was abused to prosecute an independent researcher and government critic for his substantial criticism of the Covid-19 policies as alleged hate speech.
 - In the Pandu Riono case, the Twitter account of a critical epidemiologist was hacked by intruders to post tweets and photos to damage his reputation.
 - A student group at our Faculty of Law who was organising a webinar on presidential impeachment received anonymous death threats. This attack caused a clear reaction of our Dean, defending the academic freedom.
 - When the government took advantage of the pandemic for the hasty adoption of several highly controversial laws, protest demonstrations were suppressed under the pretext to prevent the spread of the virus. Unlike in Germany, technical solutions, which would have allowed to exercise the freedom of assembly in a limited but safe way, were not considered.
- b) The indirect involvement of the military in the Covid-19 policies
- By placing high-ranking and retired military officers without specific qualification in key institutions.
- c) The ban of the Islamic Defenders Front (FPI)
- A hardliner Muslim organisation that was renowned for its intolerant nature and repetitive violence towards religious and sexual minorities organised mass gatherings during the pandemic in violation of the large-scale social restrictions. Finally, its leader was arrested and the organisation disbanded.

III. Additional measures taken by the governors of the provinces

1. Measures of the Governor of the Jakarta Special Capital Region
 - Governor Anies Baswedan, who took office after a hostile campaign that led to the unfounded blasphemy conviction of his predecessor Ahok, seems to have been in an ongoing clash with the Jokowi administration. He claimed to have monitored potential Covid-19 cases even a month before the first cases were officially identified. When Jakarta became the epicentre of the crisis, his requests to impose social restrictions were repeatedly rejected by the national government. Some inferred that the Jokowi administration did not want the public to see the requests as Baswedan's taking initiative to handle the pandemic properly. According to recent national survey, he is seen as a potential presidential candidate in 2024.
2. Measures of the governors of other provinces
 - The East Java province became the Indonesian epicentre of the pandemic after Eid al-Fitri 2020, as the governor of the province did not adopt strict measures to prevent the Mudik and even eased restrictions despite a growing number of infections shortly after the holidays. In late June 2020, the province surpassed the capital Jakarta with more than 12,000 active cases and had the highest number of deaths in the country.

IV. Comments on the measures from the perspective of German and European constitutionalism

1. Violation of human/fundamental rights by individual Covid-19 restrictions
 - The *pandemic is no excuse for watering down the rights of the human being*, as they are guaranteed in international human rights treaties (→ ICCPR, ICESCR) and the national constitution (→ Chapter XA): Modern human and fundamental rights doctrine allows a precise and accurate assessment of the legality of any measure to fight Covid-19!
 - These measures affect numerous freedoms, especially those related to professional life, of movement, of assembly and of religion. The encroachments are usually justified by the freedoms' limits, here: the demands to protect public health (life and health of all citizens) as an element of public security or order (see for Indonesia art. 28J(2) Constit. 1945). Dogmatically, the focus is on the requirement of *proportionality*, which is also known in Indonesia. From the perspective of the advanced German proportionality doctrine, any restriction must indeed pursue the legitimate *aim to fight Covid-19*, be *suitable* (conducive) and *necessary* for that aim (there must be no milder alternative) and also be *proportional in the strict sense* (it must not impose a burden out of proportion to the pursued aim).
 - Since the authorities enjoy a wide margin of appreciation and evaluation and the measures were less drastic and more limited in time than in Europe (no curfew, few long-time closures of businesses, more mandatory health protocols instead of closures and recommendations instead of prohibitions), these requirements were usually met. Notably, during the first months *social assistance programs* alleviated the severity of the large-scale social restrictions for the vulnerable citizens in the informal economic sector, thus avoiding a disproportionate burden.
 - However, some measures were not necessary, e.g.
 - the obligation of car drivers in Jakarta to wear a face-mask even when alone in the car;
 - *non-targeted restrictions* such as total bans of demonstrations and religious services (instead of limiting and submitting them to health protocols).
 - A problem as anywhere in the world: Is it not a burden out of proportion to keep dying patients in absolute isolation, separated in the last moment of their life from families and friends?
2. Failure to comply with the state's "duties of protection"/"positive obligations" deriving from the human/fundamental rights?
 - According to the doctrines of "duties of protection" ["grundrechtliche Schutzpflichten"] of the German Federal Constitutional Court [Bundesverfassungsgericht] and of "positive obligations" of the European Court of Human Rights, the state must *not only respect* the citizen's rights *but also protect* them by active intervention against threats. However, it enjoys a *wide margin of appreciation and discretion*, whose limits are still diffuse. While the European Court focuses on the individual case, the Bundesverfassungsgericht postulates a *prohibition of insufficient means* ["*Untermaßverbot*"] whose contours are unclear. In complex situations, where various measures of different actors complement each other and have a serious impact on economic, social and private life, these doctrines allow only to identify obvious and serious failures of protection.
 - The Jokowi Administration's choice of "large-scale social restrictions" instead of a real lockdown may be criticised politically but, considering the serious social problems a real lockdown would cause in a country with a large informal economic

sector, cannot be qualified as insufficient protection under these doctrines. **Update 25.07.2021:** The same applies to the decision in June 2021 to fight the new surge with emergency restrictions of public activities which fall short of the "large-scale social restrictions" and a real lockdown but still are strong measures which reduce mobility and already impose a severe burden on parts of the society. To find the right balance falls primarily under the *political* responsibility of the state's institutions. However, with the new surge the crisis has achieved another dimension and if the situation escalates further, the hospitals stay overwhelmed and the death toll continues to rise dramatically, the state's obligation to protect the life and health of the citizen may not only politically but also legally oblige the government to take more efficient measures to fight Covid-19.

- **Update 25.07.2021:** The ongoing vaccination campaign with Sinovac cannot be qualified as insufficient protection, even if it turns out less conducive than planned for, because the vaccination still provides a certain protection by reducing considerably the risk of becoming seriously ill or dying with Covid-19. Moreover, it has been so far the only vaccine available on a large scale for Indonesia, so there was no alternative. However, the state's duty to protect particularly endangered groups - here: the health workers, many of whom have already died - may oblige the government to take complementary measures to augment the effect of their vaccination, for example, as it is planned, a third shot with another vaccine that proves more effective.
- In contrast, the premature decision of the Governor of East Java to ease the local restrictions shortly after Eid al-Fitri 2020 despite a soaring number of infections, represents a clear example of a violation of the "duties of protection" or "positive obligations". It led to numerous fatalities that could have been avoided easily. However, under these criteria the same may apply to the premature easing of the general lockdown in Germany in March 2021 at a time when the Third Wave was already building up.

3. Violation of human/fundamental rights and constitutional standards in the wider context of combatting Covid-19

- The suppression of criticism of the President's Covid-19 policies is a clear example of *illegal exploiting a crisis situation for extraneous interests*, even if in some cases it is not clear who is responsible. The aim to fight the pandemic cannot justify restrictions of the democratic freedoms (here: the freedoms to assemble and to express opinions under art. 28 Constit. 1945), which would not be justified without the pandemic. Furthermore, the state must protect the critics effectively against threats and hackers.
- The practice to place high-ranking and retired military officers instead of qualified experts in influential positions in key institutions is not as such unconstitutional in a free democratic process but feeds the suspicion of clientelism and reflects a distorted understanding of democracy.

V. Comments on the measures from the perspective of Indonesian constitutionalism

1. Democratic deconsolidation as the result of the government's restrictive measures

- It is common to describe Indonesia as a low-quality democracy as religious intolerance is still rampant, there is a strong military influence in Indonesian politics, and ethnic and religious violence often occur in the country. However, the Jokowi administration seems to be unaware of Indonesia's past terrible experience with the military dictatorship. As mentioned above, he has placed many powerful military actors and former general police officers in key positions in his administration. As a result, it is no surprise that the ways in which the government has dealt with criticism have often been to curtail the freedom of dissenters as shown by many hacking incidents that befell intellectuals, researchers and rights activists.
- The Jokowi administration has also failed to control its key institutions to deliberately undermine democracy. As described earlier, the issuance of the administrative provisions allowing the police to prosecute acts defaming the President's or government officials' ability to handle the coronavirus is a clear violation of the right to freedom of speech guaranteed in the Constitution. In fact, it is a violation of the Constitutional Court's decision that held that criticising the President is not a violation of the constitutional right to freedom of speech.
- While the numbers of Covid cases and fatalities are comparably low in the world, they are one of highest in Asia. The Jokowi's administration doesn't deserve the credit of containing the spread of the disease given limited effective strategies have been taken so far such as testing and tracing. As mentioned earlier, the low number of cases is due to the warm and tropical climate and other archipelagic conditions (such as the high proportion of outdoor and semi-outdoor venues), and to the low mobility within the country.
- **Update 25.07.2021:** As we expected, the Covid cases have soared in Indonesia, with the country having more than 40,000 to 50,000 new cases recorded each day. It should be noted that the actual number of cases is much higher than the number declared by the government authority because Indonesia only conducts 150,000 to 200,000 tests perday. In fact, Indonesia has a number of deaths reaching more than 1,000 each day. Some public health experts have noted that the government should have anticipated the situation and could have prevented more deaths by speeding up the vaccination and enforcing health protocols.

2. Further restriction of fundamental human rights and violation of the constitutional principle of non-discrimination

- The Jokowi administration seems to have taken advantage of the less robust supervision of the law enforcement brought by the pandemic to further restrict the fundamental rights of its citizens. Cases like Rasio Patra show that there was a deliberate attempt to silence critics and cast them as anarchists. Likewise, the curtailment of academic freedom as in the cases of the cancellation of a discussion at Gadjah Mada University and the hacking incident that happened to Dr. Pandu Riono, demonstrate that the Jokowi government has failed to guarantee academic freedom and freedom of expression.
- In handling the Covid-19 pandemic, the Jokowi administration appears to have neglected the constitutional principle of non-discrimination laid down in art. 28I(2) of the Constitution by prioritising younger people, military and police officers and government servants instead of the elderly who are much more vulnerable of dying because of the disease. In addition, the government has failed to address the systemic discrimination faced by members of religious and sexual minorities, many of whom do not have ID card, which is required for vaccinations.

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Update 25.07.2021: See also the Minister of Home Affairs Instruction No. 15/2021 on the implementation of Emergency Restriction of Public Activities (Emergency PPKM) for COVID-19 in Java and Bali.

See for a detailed list of all taken measures the Fact Sheet COVID-19 developments in Indonesia of the German-Indonesian Chamber of Industry and Commerce (EKONID), <https://indonesien.ahk.de/infothek/news/news-details/covid-19-developments-in-indonesia>.