

Indonesia's Legal Policies Amid Covid-19: Balancing Religious Freedom and Public Health

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Abstract

The Covid-19 pandemic has forced States to promulgate various legal policies to restrain public activities, including limiting or prohibiting people to exercise their right to religious freedom or beliefs (FoRB) in the public sphere and imposing repressive sanctions. International Human Rights Law (IHRL) regulates the standard limitation of FoRB, but the Government of Indonesia struggled to balance respecting FoRB and protecting public health, especially in the emergency of Covid-19. While the Government is oriented to protect public health, new violations of FoRB add more backlog on unresolved cases. Through a Human Rights-Based Approach and case studies, three essential principles of FoRB, namely the principle of non-discrimination, the principle of proportional restriction, and the principle of non-coercion in religion, will be analyzed qualitatively to assess, first, the extent to which legal policies in Indonesia amid Covid-19 are compatible with IHRL. Second, the extent to which these legal policies impact the right to religious freedom of the people. Third, to ask the question: how should the legal policies in the Covid-19 era be formulated so that the State can balance the protection of public health and religious freedom?

Keywords: Covid-19, the right to freedom of religion or belief, the right to public health, derogation, limitation

I. INTRODUCTION

Since the World Health Organization (WHO) declared the worldwide outbreak of the highly contagious coronavirus disease in early 2020², every government around the world scrambled into action to protect their citizens from getting infected. Each country created emergency policies and safety measures as responses to the pandemic, which were found to sometimes be over-limiting and harmful to the

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2 See Guidance Covid-19 May 13th, 2020. Covid-19 Response. United Nation Human Rights Office of the High Commissioner. Para 2. Emergency Measures. Page 1. Available at https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf

human rights of their citizens. It is acceptable that in the time of national emergency, such as the Covid-19 pandemic, a government may create emergency measures for protecting public life and safety through limiting public movement or banning public gathering. However, giving the government an unlimited power to suppress the rights of its citizens is too dangerous for the endurance of the rule of law and democracy.

In practice, many governments, including in Indonesia, were struggling to create a balance between protecting public health and respecting the right to freedom of religion and belief (FoRB). For instance, in order to slow down the spread of Covid-19, the Government of Indonesia enacted various regulations and legal policies to limit the right to FoRB through locking down public activities, including closing houses of worship, banning religious congregations and public gathering.³ Tobroni (2020) argues that the Covid-19 regulations do not violate the right to FoRB under the IHRL since they have been produced under the correct legal hierarchy.⁴ Nevertheless, there are not enough lines to support the author's conclusion that these regulations do not conflict with International Human Rights Law, especially the FoRB. The gap in how regulations related to Covid-19 are made through the correct legal hierarchy does not guarantee zero violations of FoRB.

Moreover, in a Greek study conducted by G. Androutsopoulos, He argues that disproportionate government policies in enforcing public emergency regulations during a pandemic have violated peoples' rights to worship and assemble. Androutsopoulos believes that it is important for the Greek government to proportionally limit the right to freedom of religion, so that the Government is able to balance the goals of handling the Covid-19 pandemic without having to violate the basic right to freedom of religion.⁵ The restrictions on the right to FoRB should not be too strict. In this context, the proportionality principle should not be violated, and the duration of limitation is only temporary and in the short term. The limitation should be revised from time to time, taking into account updated epidemiological data to select the most appropriate measures, and such restrictions should end when normal conditions have been reached.⁶ Meanwhile, the Government of Indonesia is experiencing a problem on how to balance between protecting public health and respecting the right to FoRB. Violations to the right to FoRB, which previously had been brought to public attention, experienced an increasing trend during the Covid-19 emergency. The Setara Institute, an advocacy organization for democracy and political freedom, reported that in 2019 there were 200 cases related to the right to religious freedom, with 238 times of security measures from the authority. Then, in 2020 there were 180 cases reported, and 422 times security measures. The Setara Institute also revealed that actors who perpetrated violations consisted of mainly state

3 There are no studies that take a complete inventory of the number and types of regulations made by the Indonesian government in dealing with COVID-19 that relate to human rights. At least in this study only a partial inventory related to FoRB rights.

4 See Tobroni, *Restrictions on Religious Activities in Handling Covid-19*. Vol.6 (2), Augustus 2020. *Jurnal Komunikasi Hukum (JKH)*. Universitas Pendidikan Ganesha.

5 George Androutsopoulos, *The Right of Religious Freedom in Light of the Coronavirus Pandemic: The Greek Case*, 2021 10-1 *Laws / An Open Access Journal from MDPI*, 2021 CanLIIDocs 487, <<https://canlii.ca/t/t22k>>, retrieved on 2021-10-03

6 *Ibid.*

actors, such as government officials and the police. Meanwhile, non-state actors included community members and religious organizations. The most frequent targets of violence are ordinary citizens, adherents of traditional religions, and adherents of minority religions.⁷

Studies on the impact of Covid-19 policies towards the right to FoRB have been carried out by various scholars (Mietzer, 2020;⁸ Tobroni, 2021;⁹ Selanno, 2021).¹⁰ Conversely, drawing on Indonesia's experience, the extent to which legal policies in the midst of Covid-19 are compatible with IHRL which correctly distinguish between the concept of derogation of human rights in a public emergency and the concept of limiting rights in normal situations, needs to be studied further. Second, the extent to which the legal policies have had an impact on communities right to freedom of religion also need to be look at. Lastly, the question of how legal policies in the Covid-19 era should be formulated so that the State can balance the protection of public health and freedom of religion needs to be asked. The confusion in understanding and adopting the different conceptions between human rights derogation and human rights limitations can lead to excessive restrictions on such rights. Moreover, the position of FoRB as a fundamental right that should not be derogated under any circumstances, including in a public emergency such as the Covid-19 pandemic, has been ignored. Hence, legal policies must be carried out legitimately, considering necessary aims, delivered in proportional way and without any intention to discriminate against others based on their gender, race, religion or ethnicity.¹¹ Consequently, the failure of the state to balance between the state's interest to protecting public health and its efforts to protect the rights of religious freedom will be a big setback towards democratization and the rule of law, since both rights have an equally important position.

This study is using a Human Rights Based Approach (HRBA),¹² a conceptual framework that is normatively based on international human rights standards for optimizing the protection of human rights, particularly the rights to FoRB. The HRBA approach focuses on qualitative analyzing referring to the principles of legality, equality and non-discrimination, public participation, empowerment of marginalized groups, and state responsibility as the duty barrier in the protection of

7 The Setara Institute in its report details that of the 238 state actors, elements of the local government and the police contributed to each of 42 actions. Then non-state actors were mostly carried out by citizen groups (67 actions) and religious organizations (42). Meanwhile, the victims of the 2020 KBB consisted of residents (56 incidents), individuals (47), local religions/believers (23), students (19), Christians (16), Christians (6), ASN (4), Confucians, Catholics, Muslims and Hindus (3 each) and Buddhists and religious organizations (2 each).

8 Mietzner M. Populist Anti-Scientism, Religious Polarization, and Institutionalized Corruption: How Indonesia's Democratic Decline Shaped Its COVID-19 Response. *Journal of Current Southeast Asian Affairs*. 2020;39(2):227-249. doi:10.1177/1868103420935561

9 Tobroni, Ibid.

10 Selanno, S., Rorong, K., & Heydemans, N. (2021). One Earth, Many Homes: The Impact and Strategies of The Church Responding to Covid-19. *Magenang: Journal of Christian Theology and Education*, 1 (2), 1-12. Retrieved from <http://ejournal-iakn-manado.ac.id/index.php/magenang/article/view/447>

11 Guidance Covid-19 May 13th, 2020., Ibid.

12 See <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>

human rights.¹³ The data used in this study includes various international human rights instruments, relevant legal regulations, expert opinions, and various reports concerning Indonesia's public policies of Covid-19, from 2020 to 2021, which were obtained from library materials. This data is also enriched by case studies obtained from various reports and news. In addition to the statute analysis approach, the texts of various statutes and legislations in the field of Covid-19 related to the right to FoRB will be examined.

II. PROTECTING PUBLIC HEALTH AND RELIGIOUS FREEDOM: DEROGATION OR LIMITATION?

FoRB is a fundamental right.¹⁴ Thus, it cannot be ignored by the States party of the International Covenant on Civil and Political Rights (ICCPR) as the duty bearer for its protection.¹⁵ The right to FoRB is guaranteed and recognized by the 1945 Indonesian Constitution and International Human Rights Law (IHRL).¹⁶ Various literatures indicate that the religious dimension has become one of the issues debated throughout the history of Indonesia. Historically, the effort to make Indonesia an inclusive Muslim-majority country was marked by the formulation of the Jakarta Charter in 1949 in which the first precepts of Pancasila were changed from "Belief with the obligation to carry out Islamic law for its adherents" to "Belief in the One and Only God" and omitted the words "with the obligation to carry out Islamic law for its adherents."¹⁷ However, following the existing developments of FoRB in Indonesia, this omission is not enough to assume that the condition of the right to freedom of religion in Indonesia is fine. The Indonesian government has drawn criticism from experts when studying the development of the right to FoRB which is getting weaker day by day. Tim Lindsey and Helen Pausackers assessed that altering first principle of Pancasila had distorted its meaning and was interpreted narrowly as a monotheistic view to strengthen the application of Islamic law.¹⁸ This is indicated by the various discriminatory regulations that were issued several years later. The question is, do regulations related to Covid-19 add to a series of regulations that violate freedom of religion and belief? This study will seek to find an answer.

13 See the Panel Principles in applying Human Rights Based Approach. Available at <https://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html>

14 Durham, C., Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities. Organization for Security and Co-operation in Europe Review Conference, September 1999 ODIHR Background Paper 1999/4. p.8. Available at <https://www.refworld.org/pdfile/3e283bd01.pdf>

15 See United Nation Human Rights Office of the High Commissioner. *International standards on freedom of religion or belief*. Para 21. Available at <https://www.ohchr.org/en/issues/freedomreligion/pages/standards.aspx>

16 Indonesian Constitution 1945

17 Mujar Ibnu Syarif. The Spirit of The Jakarta Charter In The 1945 Constitution. *Jurnal Cita Hukum, Fakultas Syariah dan Hukum UIN Jakarta Vol.4 No.1(2016)*, pp.15-32, DOI:10.15408/jch.v4i1.3568.2016.4.1.15-32

18 Reproduced from *Chinese Indonesians: Remembering, Distorting, Forgetting*, edited by Tim Lindsey and Helen Pausacker (Singapore: Institute of Southeast Asian Studies, 2005).

As mentioned earlier, the right to FoRB is strongly guaranteed and recognized in the 1945 Constitution. Article 29 paragraph (1) of the 1945 Constitution reinforces the First Principle of Pancasila which states, "The State is based on the One God the Almighty." The right of citizens to FoRB is guaranteed in Article 28E Paragraph (1), Article 28I Paragraph (1), and Article 29 Paragraph (2) of the 1945 Constitution. This is in line with Article 18 paragraph (1) of the ICCPR which had been ratified by the Government of Indonesia through Law Number 12 of 2005. On the other hand, under Article 12 of the International Covenant on Economic and Cultural Rights and Article 28H (1) of the 1945 Constitution, Indonesia has an obligation to protect the right to public health. Especially if the public health and the citizens' lives are threatened by a deadly virus.¹⁹ These two rights have the same vital position (vide Article 6 of the ICCPR and Article 28A, 28B (1), 28I of the 1945 Constitution). Both rights are interrelated with one another and cannot be deprived of human dignity. Hence, the right to public health cannot be positioned as more important than the right to freedom of religion, or vice versa. Thus, it is necessary to be careful in balancing the relationship between the two, so that optimal protection can be achieved.

Speaking of the right to FoRB, Tore Lindholm emphasized that the right to FoRB has two dimensions, namely the forum internum and the forum externum.²⁰ Referring to Heiner, the forum internum includes the right to choose, embrace, change religion or belief, and worship according to their respective beliefs. Generally, those are the inalienable rights to FoRB.²¹ Meanwhile, forum externum are rights to carry out worship or religious rituals, to gather, to organize, including to express one's religion or belief.²² In the case of the first category, the State should not restrict those rights at all, even in the time of emergency. The State cannot prohibit or impose or punish its citizens for embracing a belief or religion or for changing or leaving those beliefs. The State also may not push a particular belief or religion on its citizens, including placing a stigma on a particular teaching or religion as a heretical religion or belief. Whether in normal or emergency situations, such actions violate the right to FoRB of the forum internum. As for those rights included in the forum externum, the State may impose restrictions, with the consideration that these restrictions are necessary, so that people are not disturbing each other when exercising their rights.²³ Moreover, the restrictions are allowed as long as they are carried out in accordance with valid law, emergency conditions are met, and the restrictions are carried out proportionally. At the same time, the State must also not allow its citizens to be in a dangerous situation, such as the Covid-19 pandemic, which has taken many lives. This regulation is confirmed in Article 4 of the ICCPR:

19 Cucinotta, D., & Vanelli, M. (2020). WHO Declares COVID-19 a Pandemic. *Acta bio-medica : Atenei Parmensis*, 91(1), 157-160. <https://doi.org/10.23750/abm.v91i1.9397>

20 Tore Lindholm, et.al., *Facilitating Freedom of Religion*, 231. 209.

21 Bielefeldt, H. (2020). *Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom, Religion & Human Rights*, 15(1-2), 3-19. doi: <https://doi.org/10.1163/18710328-BJA10001>

22 Bielefeldt, H. (2020). *Ibid.*

23 Heiner, *Ibid.* p. 6.

- (1) In times of **public emergency** which threaten 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 measures 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.
- (2) **No derogation** from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.²⁴

From the contents of paragraph (1) a public emergency is defined as an emergency that threatens the life of the nation and its existence. If the state of emergency becomes the reason for the State to derogate human rights, it must be officially declared.²⁵ Accordingly, the States parties to the present Covenant (the ICCPR) have the option to suspend their obligations. However, such derogation policy must not override the State's obligation to protect human rights as stated in the ICCPR. Furthermore, the derogation is not permitted at all for the purpose of discriminating against other groups, including for religious reasons. A state of emergency according to the European Court of Human Rights is a situation of extraordinary crisis or emergency that affects the entire population and is a threat to the life of an organized community (Nihal Jayawickrama, 2002: 205). Emergencies can occur due to various factors, such as external factors or internal factors and military/armed threats. However, Paragraph (1) also emphasizes that when a State is trying to deviate from the obligation to protect the human rights guaranteed in this covenant, it must pay attention to the following conditions, namely: (1) a state of emergency is declared openly to the public; (2) the other State parties of the ICCPR agree on the emergency condition; (3) the state of emergency is temporary or limited time. Since WHO has officially announced that the spread of Covid-19 is a health emergency, the State's obligation to declare emergency conditions as stated in Article 4 (3) of the ICCPR has become automatically void. However, the Government of Indonesia still has the obligation to announce when the state of emergency begins and when it will end.

In terms of the right to FoRB, in the context of the prevention and control of Covid-19 outbreak, the reference that should be used is Article 18 (3) of the ICCPR, which is further elaborated in General Comment No. 22 and the *Syracuse Principle*. There are at least 4 (four) conditions that must be met in limiting the right to FoRB, namely: (1) legitimate limitation, (2) for necessary aims, (3) carried out proportionally, and (4) not for discriminatory purposes.

First, restrictions are carried out legitimately, meaning that regulations to deal with Covid-19 must be formed with respect to the principle of the rule of law, made by an authorized law-making body, have clear norms or avoid vague norms to uphold legal certainty. The ignorance of the legality dimension can produce laws that

24 See International Covenant on Civil and Political Rights. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

25 See Alston, P., 2013. *International Human Rights: The successor to International Human Rights in Context*. Oxford University Press, USA; p.

potentially violate fundamental human rights and the rule of law. Secondly, the restriction on the rights to FoRB must at least fulfill one of the four objectives contained in Article 18 (3), namely protecting public order, public health, public morals, and the rights and freedoms of others. If the policy amidst Covid-19 is intended to protect public health, then the meaning of public health must be in line with what is stipulated in the Syracuse Principle i.e., things that seriously threaten the health of the population or individual members of the community. The policy must be intended for preventing illness or injury, or providing care for the sick or injured.

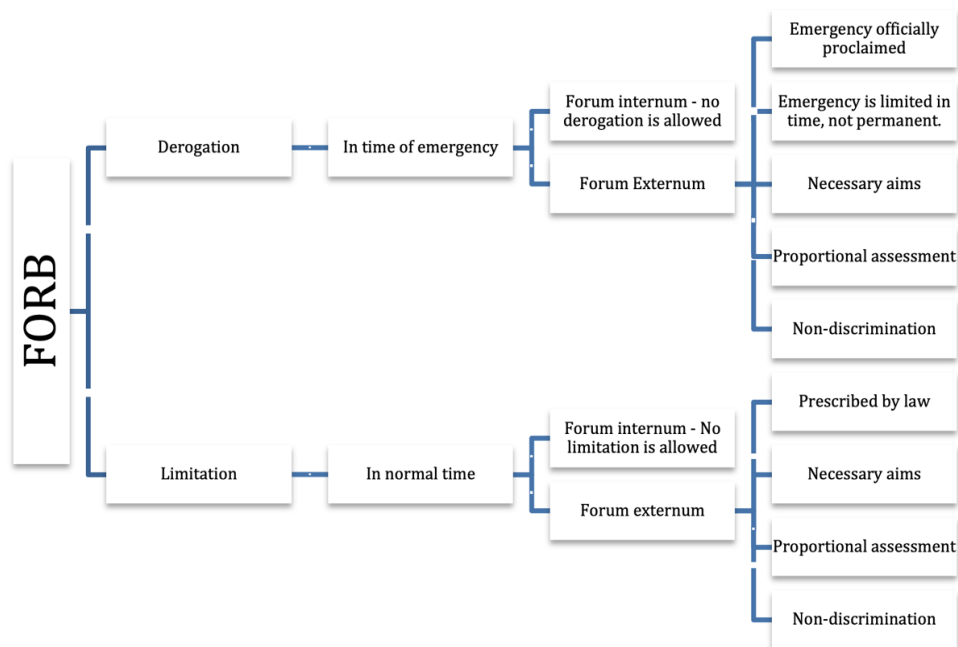


Diagram 1. Derogation and Limitation of FoRB

While the third aspect of proportionality means that the restriction should pay attention to the interests of others, the main goal is to protect the rights of others, not to attack the rights of others. A State is not allowed to take arbitrary actions against its citizens on the grounds of protecting the public interest. A State can be justified when violating human rights in an emergency situation, as long as the reasons that cause the violation are necessary and carried out in a proportional manner i.e., these steps do not conflict with other obligations under international law. In addition, restrictions imposed by the State may not intend to discriminate against other rights based on differences in race, color, sex, language, religion or social origin. These restrictions should then be ended once the emergency situation is declared over.

Meanwhile, in Indonesia, the limitation of exercising human rights is regulated under Article 28J of the 1945 Constitution. However, in contrast to the ICCPR, it does not distinguish between the concept of derogation of rights in a time of emergency and limitation of rights in normal conditions. Thus, the Government relying on the limitation clause under Article 28J could be problematic. If the Covid-19 situation is declared as a public emergency, then the Government should apply

the principle of derogation, instead of the principle of limitation. In the diagram above, to deviate from the fulfillment of the right to FoRB, a derogation can only be carried out by the State towards forum externum freedom. Derogation itself must be officially declared by a President or a head of State with a finite duration, when it starts and when it ends, since derogation cannot be permanent.

Hence, to examine whether the legal policies of the Government of Indonesia in derogating or limiting the rights to FoRB are appropriate, it is necessary to study further how the principles of derogation and limitation are applied consistently by the Government. The derogation norms described in Article 4 of the ICCPR, as well as the limitation norms regulated in Article 18 (3) of the ICCPR, General Comment No. 22 and the Syracuse Principle should serve as state guidelines. Bearing in mind that utilizing Article 28J of the 1945 Constitution only provides vague arrangements regarding to this matter. The Government must also be careful to apply those principles to maintain a balance between the State's efforts to fulfill the right to public health and the protection of the right to FoRB.²⁶ If the orientation of protecting public health is stronger but the state ignores the right to FoRB, then the right to FoRB can be violated. At the same time, the main goal of protecting public health itself cannot be achieved.

III. VARIOUS REGULATIONS AMID COVID-19 AND ITS PROBLEMS

Before discussing the main problems in this study, this section describes the results of the inventory of various legal policies in the handling of the Covid-19 outbreak that intersect with the right to FoRB. Table 1 provides the list of regulations that derogate the right to FoRB in the form of closing houses of worship during the time of emergency, the Covid-19 outbreak. While Table 2 provides the list of regulations that restricts the right to FoRB in a normal time. This inventory is compiled based on a hierarchical order of laws and regulations as applicable in Indonesia, and is grouped based on its contents, and sorted from those applicable at the national and regional levels.

Table 1. Derogation of FoRB in the form of Temporarily Closing Houses of Worships During the Time of Emergency, the Covid-19 Outbreak.

No.	Name of Regulations	Provisions	Level
1.	Decree of the President of the Republic of Indonesia Number 11 of 2020 concerning the Establishment of a Covid-19 Public Health Emergency.	Para. One. "Determining Coronavirus Disease 2019 Covid-19/ as a type of disease caused by a Public Health Emergency"	National

²⁶ Brett G. Schaffs, 2020. Coronavirus and Religious Freedom: A Preliminary View from The United States. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 54; p.16. Available at https://www.iclrs.org/app/uploads/2020/11/Scharffs_USA_coronavirus.pdf

2.	Minister of Health Regulation No. 9 of 2020 concerning PSBB Guidelines.	Article 13. "Implementation of Large-Scale Social Restrictions includes: [...] b. restrictions on religious activities; Article 13 Point (4) Restrictions on religious activities [...] are carried out in the form of religious activities carried out at home and attended by limited families, by keeping everyone at a distance."	National
3.	Presidential Instruction Number 6 of 2020 concerning Improvement of Discipline and Law Enforcement of Health Protocols in the Prevention and Control of Covid-19;	Para 2, Number 6, point 2) comply with health protocols in the prevention and control of Corona Virus Disease 2019 in public facilities, including places of worship.	National
4.	Instruction of the Minister of Home Affairs No. 15 Year 2021	Letter g: "places of worship, churches, temples, temples and pagodas as well as other public places that function as places of worship are temporarily closed;"	National
5.	CL Number P.002/ DJ. III/ Hk. 007/ 03/ 2020 concerning Protocol of Covid-19 Outbreak Handling in public area of Dirjen Bimbingan Masyarakat Islam para. E point (b).	Ordered citizens to pray at home.	National
6.	East Java Governor Regulation Number 18 of 2020 concerning Guidelines for Large-Scale Social Restrictions in Handling Coronavirus Disease 2019 (Covid-19) in East Java Province.	Part Four, Restrictions on Religious Activities in Houses of Worship Article 11 (1) "During the implementation of PSBB, religious activities are temporarily suspended in houses of worship and/or in certain places."	Regional

Sources: The Data taken from various sources, State Official Website, processed by the Author²⁷

From the various regulations above, it is clear that through Presidential Decree No. 11 Year 2020, the President officially announced that the spread of Coronavirus Disease 2019 (Covid-19) was an emergency, because the situation was extraordinary, marked by the number of cases and / or the number of deaths that had increased and spread across regions and across nations. Furthermore, it had an impact on the political, economic, social, cultural, defense and security aspects, as well as the welfare

²⁷ See <https://peraturan.bpk.go.id/Home/Details/>

of the people in Indonesia.²⁸ Yet, the nomenclature of “Large-Scale Social Restrictions” or PSBB makes the emergency aspect ambiguous, because the Government has not provided the peoples’ living allowance during the quarantine (vide Article 52 of Law No. 8 of 2018). Second, under the Presidential Decree No. 11 Year 2020 stated that the emergency measurement would take effect on March 31, 2020. However, it does not explicitly state when the emergency will end. Meanwhile, under the Ministerial Instruction No. 15 Year 2020, another term used is, namely “Enforcement of Restrictions on Emergency Community Activities,” or PPKM, without explaining the difference from the previous term. Nevertheless, the later regulation had determined its validity period from July 3, 2021 to July 20, 2021.

Moreover, the derogation aspect imposed by the Government related to the right to FoRB was the ordering to close houses of worship. The extent to which this policy violates the rights to FoRB will be discussed in more detail in the next section. Table 2 shows that the Indonesian government has issued several regulations and public policies in tackling the spread of Covid-19 that intersect with the right to FoRB. Unfortunately, these policies are sporadic and not well structured, o there is overlap between one another, containing vague norms.

Table 2. Restrictions of other Religious Activities During the Time of Covid-19.

No	Type of Restrictions	Name of Regulations	Provisions	Level
1.	Restrictions on religious activities.	Law Number 6 of 2018 concerning Health Quarantine. Article 59 paragraph (3) letter c of the Health Quarantine Law.	Article 59 (3) letter c: Large-Scale Social Restrictions [...] b. religious activity;	National
2.	Same	Government Regulation No. 21 of 2020 concerning PSBB to limit the activities of citizens in the context of Accelerating the Handling of Covid-19.	Article 4 (1) Large-Scale Social Restrictions [...] b. religious activity;	National
3.	Same	Presidential Instruction Number 6 of 2020 concerning Discipline Improvement and Law Enforcement of Health Protocols in the Prevention and Control of Covid-19;	Obligation to comply with Health protocols in places of worship (See Paragraph Two Number 6 points (2) and (3)).	National
4.	Working from Home for all staff of the Religion Ministry; meeting at the office is possible	Para 1 point (a) CL No. SE. 4 Year 2020 concerning the changing of the CL No. 3 Year 2020 concerning the Adaptation	Working from Home policy.	National

28 See Para 1. Consideration of the President Decree No. 11/ 2020.

	when considering the Covid-19 outbreak.	of Workers in anticipating the Covid-19 outbreak in the Minister of Religion.		
5.	Covid-19 protocol handling in houses of worship through maintaining a clean environment, no shaking hands or kissing cheeks; temperature check for all visitors, measuring washing hands with soap, and wearing masks.	Circulation letter (CL) No. SE.1 Year 2020 concerning Implementation of Covid-19 Handling at Houses of Worship.	See also Circulation Letter of Religion Minister No. 069/08/2020 concerning Implementation of Covid-19 Handling at the area of Religion minister.	National
6.	Restrictions on official travel, study activities, and lectures in all Islamic and Christian educational institutions. Teaching and learning are closed, semester Final Exams are carried out online, prohibitions from going out of the house and family visits, education about preventing the spread to all students.	CL No. 285.1 Year 2020 concerning Efforts on Preventing the Covid-19 Virus Outbreak. See also CL Number B.141/DJ. IV/ KP 08.2/03/2020.	See also CL Number 697/ 03/ 2020 concerning the changing of the learning system from partial learning at home to total learning at home.	National
7.	Postponing marriage events and religious events, limit the number of married applicants by KUA	Circular Letter of the Minister of Religion of the Republic of Indonesia No. P-002/Dj.III/Hk.00.7/03/2020 of 2020 concerning Appeals and Implementation of Covid-19 Handling Protocols in Public Areas.	Para E, Letter d. "Postponing mass gathering activities such as wedding receptions and religious events to avoid crowds." Letter © "Temporarily eliminate all types of services other than administrative services and marriage registration at the	National

		Office of Religious Affairs"
8.	Prayers for the deceased at the hospital for a maximum of 4 hours. Restrictions on burial of bodies, family members may be engaged after the bodies are buried.	See also Circulation Letter of the Minister of Religion of the Republic of Indonesia No. P.002/ DJ. III/ Hk. 007/ 03/ 2020 concerning Protocol of Covid-19 Outbreak Handling in public areas.
9.	Encourage them to carry out religious activities with caution.	Circular Letter of the Regional Office of the Ministry of Religion - Central Sulawesi no. 13/2020 Concerning Early Awareness, Preparedness, and Infection Prevention Measures.

Sources: the data taken from various sources, State Official Website, processed by the Author²⁹

First, although the public emergency of the Covid-19 outbreak has never been revoked by the Government of Indonesia, various regulations limiting the implementation of the right to FoRB as listed in Table 2 show that the Government has entered a normal phase. Nevertheless, the Government places the protection of public health as the main priority, compared to the protection of the right to FoRB, that received less attention from policy makers. For instance, according to Islamic Law, the corpse must be bathed by the biological family or the same sex and buried in the manner according to Islamic Law. Nonetheless, there is a case that happened at Pematang Siantar in North Sumatra, where health workers did not respect the religious values or beliefs of the bodies and its family.³⁰ Amid the Covid-19 Pandemic there has been no procedure for bathing or burying corpses according to the religion of the corpse or family. Responding the public protest, the policy regarding this matter, namely Circulation Letter of the Minister of Religion of the Republic of Indonesia No. P.002/ DJ. III/ Hk. 007/ 03/ 2020 concerning Protocol of Covid-19 Outbreak Handling in public areas, was formed. The Government considered the importance of respecting the religious rights of the bodies and their families after various upheavals arose in society. This shows that there is an imbalance in efforts to protect public health and protecting the right to FoRB.

²⁹ See <https://peraturan.bpk.go.id/Home/Details/>; Ibid,

³⁰ See Kompas., 2021. *Forensic officer named a suspect for bathing a woman's body*. Retrieved from <https://regional.kompas.com/read/2021/02/21/05000031/4-petugas-forensik-ditetapkan-tersangka-gara-gara-mandikan-jenazah-wanita?page=all>

Second, public participation does not appear to be optimally involved in strengthening regulations for the prevention of Covid-19. There are several Indonesian Ulama Councils (MUI) fatwas that do not agree with the policy on closing places of worship when the transmission rates rise.³¹ Various MUI regionals issued fatwas that the closure of places of worship was unnecessary and violated the adherents' right to freedom of religion, as this could be mitigated by implementing health protocols. In addition, the participation of other religious groups is not very prominent in the formation of Covid-19 legal policies.

Fourth, policy makers do not clearly distinguish whether Indonesia is carrying out derogation or just restricting the rights to FoRB. These two actions have different consequences and responsibilities. The public finds it difficult to distinguish whether since the issuance of Presidential Decree 11/2020 concerning Public Health Emergency, the current state situation is still in an emergency or in a normal situation. Given that Presidential Decree 11/2020 has never been revoked by the Government, the emergency situation can be assumed to still apply. However, referring to various policies that have put houses of worship and religious schools back into function, people can conclude that the emergency situation is over. This kind of ambiguity can lead to legal uncertainty and chaos in society. The Government's lack of uniformity in the policy of limiting religious activities became clear when the Government did not give an adequate explanation to the public about the diversity of the PSBB's implementation. This was then coupled with the attitude of public officials, who created a public uproar for the political benefits, when they should have been able to avoid it. Lastly, the government strictly limited the implementation of religious activities, but on the other hand tolerated shopping activities either through department stores or traditional markets. This shows an imbalance in the implementation of restrictions.

IV. VIOLATIONS OF FORB DURING THE COVID-19 PANDEMIC AND ITS FUTURE CHALLENGES

1. Closing of Houses of Worship

It is undeniable that the emergence of the Delta variant with a high acceleration of transmission³² requires the Government to anticipate and prevent transmission by restricting the rights of citizens, especially the right to FoRB. The Government was ordering the temporary closure of houses of worship through enacting Presidential

31 Moko Murdiyat, 2021. *Criticism of Revision of Mosque Opening, MUI: Bias in Meaning and Not Assertive*. Retrieved at <https://www.suaramerdeka.com/nasional/pr-04430407/kritik-revisi-pembukaan-masjid-mui-bias-makna-dan-tidak-tegas?page=all>. See also Kukuh S Wibowo, 2021. *MUI Asks Government to Clarify Rules for Opening Mosques During PPKM Emergency*. Retrieved from <https://nasional.tempo.co/read/1482617/mui-minta-pemerintah-memperjelas-aturan-pembukaan-masjid-selama-ppkm-darurat/full&view=ok>

32 See WHO, 2021. *Delta Variant*. Retrieved from <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-45--delta-variant>

Instruction 6/2020, concerning Discipline Improvement and Law Enforcement of Health Protocols, in the Prevention and Control of Covid-19. Then, this regulation, followed by the Ministry of Home Affairs, issued the Instruction of the Minister of Home Affairs No. 15 of 2021. In letter g it is stated that “Places of worship (mosques, prayer rooms, churches, temples, monasteries, and temples) as well as other public places that function as places of worship are temporarily closed.” Nevertheless, often this policy is carried out haphazardly and fails to balance the interests of protecting the right to FoRB and public health. It has discriminatory nuances and lacks public participation. This policy has caused public uproar and pros and cons debates among the public³³ because it is considered discriminatory and violates the right to freedom of religion for several reasons. First, the closure of mosques is an unnecessary form of restriction on the right of religious adherents. The government's concern about the transmission of Covid-19 can be anticipated by mitigating the risks and requiring for the use of places of worship according to the health protocols. Second, this policy contains discriminatory elements against religious adherents, because at the same time the Government allows malls, department stores, and markets to continue operating with the requirement to maintain health protocols. In letter E it states that “The implementation of eating/drinking activities in public places (restaurants, restaurants, cafes, street vendors, street stalls) [...] shopping centers/malls only accept delivery/take-away and do not accept dine-in.” From these provisions it can be concluded that business activities in shopping centers/malls are still allowed to operate, because what is banned is only eating or drinking activities in a general place. If houses of worship and malls both cause crowds, why does the Government not treat them the same? If malls and shopping places can be mitigated to reduce the risk of transmission by using masks, washing hands, and maintaining distance, the same requirements can certainly be applied to the use of places of worship. When the Government imposes excessive restrictions on places of worship, ironically at the same time the Government fails to anticipate the occurrence of mass crowds during vaccinations in various places, such as Tangerang, Jakarta, Bali, Banyuwangi, and so on.³⁴

Recognizing the potential violations of the right to FoRB related to the order to close houses of worship, the Government then issued the Minister of Home Affairs Number 19 of 2021, where letter g was amended into: “Places of worship for mosques, prayer rooms, churches, temples, temples, pagodas and other places that function as places of worship do not hold worship and religious activities in congregation during the implementation of Emergency of PPKM and optimize worship at home.” This policy still substantially prohibits religious communities from

33 Subadi, Tjipto. 2021. Pros and Cons of Mosque Closing. Online: <https://www.suaramerdeka.com/opini/pr-04429357/pro-kontra-penutupan-masjid?page=all>. See also <https://regional.kompas.com/read/2021/07/03/091330478/penutupan-tempat-ibadah-di-kota-serang-mui-demi-keselamatan-bangsa>; See also <https://www.cnnindonesia.com/tv/20210709212653-407-665736/video-pro-kontra-peniadaan-aktivitas-di-rumah-ibadah>

34 See the article of the CNN Indonesia "Vaccination Series in Regions Brings Crowds of Participants", online : <https://www.cnnindonesia.com/nasional/20210715075114-20-667895/deret-vaksinasi-di-daerah-berujung-kerumunan-peserta>.

carrying out worship in congregations, not emphasizing risk mitigation or implementing health protocols. Thus, since the issuance of the Presidential Instruction, houses of worship have returned to function. However, congregational worship activities are still prohibited. This continues to cause chaos when Muslims in Indonesia want to hold Eid al-Fitr and Eid al-Adha prayers in congregation, where the unclear arrangement of these restrictions under The Minister of Religion through Circular Letter No. 17 of 2021, creates multiple interpretations and legal uncertainty. This public policy again raises both pros and cons because the Government forbids Muslims to practice their religion and beliefs, without providing risk mitigation solutions that should be implemented like other sectors. It is not surprising that such ambiguous policies are interpreted in a non-uniform way. For instance, the Governor of West Sumatra insisted to hold the Eid al-Adha prayer in an open field.³⁵ This West Sumatra Governor's decision refers to the West Sumatra MUI No. 003/MUI-SB/VII/2021, which in principle states that “the omission of worship activities in places of worship cannot be approved and accepted because of the small potential for crowds to occur.”

Second, apart from the problem of closing temporary places of worship during the Covid-19 emergency, cases of closing, sealing, and destroying houses of worship are not new issues in relation to violations of the right to FoRB. Many cases were actually postponed during the Covid-19 Pandemic, thus adding to the series of violations of the right to FoRB. This is due to the fact that discriminatory regulations regarding places of worship, such as the Joint Regulations of the Minister of Religion and the Minister of Home Affairs No. 9 and No. 8 of 2006 concerning the Establishment of Houses of Worship and the Joint Decree of the Minister of Religion, Attorney General, and Minister of Home Affairs of the Republic of Indonesia No. 3 of 2008, No. KEP-033/A/JA/6/2008, No. 199 of 2008 which are known as the SKB of Ahmadiyya, are still in effect. Data reported by the Setara Institute in 2020, shows that there are at least 24 houses of worship, consisting of mosques (14), churches (7), Vihara (1), Hindu's temple (1), and Chinese temples (1) which were sealed by the Government. It seems that of the number of houses of worship that are closed,³⁶ Muslims experience the most disturbances since they constitute 50% of the total houses of worship closed. However, further investigation revealed that the most disturbed were places of worship for Muslims from minority groups, where the teachings are considered different from the mainstream faith.³⁷

2. The Omission of Violent Acts Toward Religious Minorities by Vigilante Groups.

The Covid-19 Pandemic did not reduce the historical violation of the rights of minority religious groups, which had previously been a central issue of FoRB for

35 *Republika*, 2021. The West Sumatra Provincial Government Allows the Implementation of the Eid al-Adha Prayer. <https://www.republika.co.id/berita/qw4gxq430/pemprov-sumbar-izinkan-pelaksanaan-sholat-idul-adha>

36 See the Setara Institute, *Pandemic, Fertile Land of Discrimination and Intolerance*; retrieved from <https://setara-institute.org/pandemi-lahan-subur-diskriminasi-dan-intoleransi/>

37 *Ibid.*

many decades. The unclear government policy regarding PSBB makes it very easy for vigilante groups to legitimize their acts of violence against religious minority groups. For instance,

At the end of April 2020, almost two months after COVID-19 was declared to have entered Indonesia, a worship service at the house of a Christian in Central Cikarang was raided by local residents on the grounds of violating the Large-Scale Social Restrictions (PSBB). Last September, there was a ban on the construction of the pastor's official house at the Pakpak Dairi Protestant Church (GKPPD) in Aceh Singkil. The Aceh Singkil Love and Peace Forum (Forcidas) said this project seemed to be hampered by the local government. Then, on September 13, 2020, a group of people disrupted the worship of the HKBP KSB congregation in Bekasi Regency. On September 20, a group of residents of Graha Prima Jonggol refused to worship the Pentecostal Church in Bogor. Then on September 21, Christians in Ngastemi Village, Mojokerto Regency, were forbidden to worship by a group of people. In October 2020, the Congregation of the GSJA Canaan Church House of Prayer in Nganjuk Regency, East Java.³⁸

Another case that occurred in September 2021 was the destruction of the Jamaat Ahmadiyya mosque in Sintang, West Kalimantan. The perpetrators of the vandalism are vigilante groups who act in the name of the Islamic Ummah Alliance.³⁹ The case was decided under the ambiguous and discriminatory Anti-Defamation Law.⁴⁰ As a result, the minority group continues to be considered enemies of hard-liner Islamic groups. Strongly condemning such acts of violence and punishing the perpetrators is not enough to prevent this from happening in the future.⁴¹ Moreover, discriminatory regulations must be immediately canceled or revised.⁴² Increasing public understanding to accept and respect differences must continue to be improved. The omission by the State apparatus on the act of violence toward minority groups because of religious hatred is a form of human rights violation.

If the Government declares that a public health emergency is being implemented, then the policy of closing houses of worship must be applied to all regions. If it is not applied uniformly, discriminatory acts are intentionally allowed by

38 See Cases of Intolerance Continue to Bloom During a Pandemic. Retrieved from <https://tirto.id/kasus-intoleransi-terus-bersemi-saat-pandemi-f5Jb>

39 See Sintang Ahmadiyya Mosque Destroyed, Mahfud MD Everyone Follows the Rules of Law. <https://tirto.id/masjid-ahmadiyah-sintang-dirusak-mahfud-semua-ikut-aturan-hukum-gjc5>; see: <https://nasional.tempo.co/read/1502185/mahfud-md-minta-polisi-segera-usut-kasus-perusakan-masjid-ahmadiyah-di-sintang>.

40 The ambiguity of the Anti-Defamation Law Number 1/PNPS/1965 was recognized by the Constitutional Court of the Republic of Indonesia in its various legal considerations which were stated in its various decisions, namely Decisions Number 140/PUU-VII/2009, 84/PUU-X/2012, and 76/PUU -XVI/2018. However, the Decision inconsistently states that the Anti-Defamation Law is constitutional. This will continue to be used as a legitimate tool to continue to carry out discriminatory and violent actions against minority religious groups, especially those deemed to deviate from religions recognized by the Government.

41 See <https://www.cnnindonesia.com/nasional/20210903203344-12-689559/komnas-ham-soal-ahmadiyah-aparat-pemkab-sintang-tak-tegas>

42 See UPR's recommendation on the Right to Religious Freedom for Indonesia, where since UPR Rounds I, II, and III have recommended Indonesia to revise or revoke the Anti-Defamation Law.

the Government. Such conditions will encourage hardline religious groups to take vigilante action that must be prohibited. During the Covid-19 Pandemic, instead of closing places of worship, the State should require the implementation of health protocols or limit the number of visitors. The public must be widely informed of the policy to ensure public understanding. The state should prevent its citizens from committing violence against religious adherents who are deemed to be deviant. Every violation or vigilant violence should be processed in accordance with the applicable provisions because the right to fair justice is a human right, as well as a constitutional right.

3. Continuing Criminalization of Religious Minorities

The Public Health Emergency Policy during the Covid-19 pandemic is justified when the derogation met the requirements above. In reality, this policy did not reduce the practice of criminalizing religious minority groups, which has been a serious problem in the protection of the right to FoRB. The enforcement of discriminatory laws, such as the Law Number 1/PNPS/1965, in conjunction with Article 156 of the Criminal Code, Articles 27 and 28 of the ITE Law, has increased the severity of violations against FoRB during Covid-19.

According to data reported by the Setara Institute:

“There are 32 cases of reporting blasphemy by non-state actors. A total of 27 of them are online-based which has the potential to be caused by the Covid-19 pandemic which has made people have more free time to use social media because they are at home. This online-based reporting is carried out on content that is considered misguided, insults religious figures, contains hate, and jokes that are harassing. In addition to being online-based, cases of reporting blasphemy also still occur among the community, mainly because they are considered deviant from the majority school and blasphemy. Of all these cases, 17 of them led to arrests, and 10 of them were subject to criminal sanctions in the form of fines and imprisonment.”⁴³

Restrictions on the right to freedom of expression are intertwined with the right to freedom of religion through various regulations. Law no. 1/PNP/1965 and the ITE Law have not fully led to the prevention of hate speech or Incitement of Hatred (vide Article 20 para. 2 of the ICCPR). Reporting, taking action, and punishing someone who criticizes religious teachings is a form of criminalization that does not meet the legality and the proportionality aspects of restrictions on the right to FoRB. This also violates the principle of non-discrimination if the prosecution and punishment is only targeted at religious minority groups.

43 <https://pgi.or.id/laporan-setara-institute-terkait-pelanggaran-kbb-di-tahun-2020/>

V. BALANCING BETWEEN THE RIGHT TO FORB AND PUBLIC HEALTH AMID COVID-19

The right to healthy living is supposed to receive the same level of protection as the right to freedom of religion guaranteed by the IHRL and national laws. Giving greater attention to the protection of the right to health during the Covid-19 pandemic, but ignoring the fulfillment of the rights to religious freedom, such as implementing excessive restrictions on the citizen's right to worship or congregation, does not provide a good measure for stopping the spread of disease.

Excessive restrictions on the right to FoRB also receive strong rejections from the public, which in the end will reduce public trust in the government. Restrictions on the right to freedom of religion regarding forum internum, such as the implementation of the blasphemy law number 1/PNPS/1965, which has long been criticized for its discriminatory and disproportionate nature, does not deserve to be continued and must be stopped immediately, especially in a health emergency.

On the other hand, the restrictions on the forum externum in public health, as long as it is necessary and proportionate, cannot be narrated as a form of prohibition or hatred of religion. Hence, firstly, government policies that are made must be able to place the right to FoRB and the right to health as interrelated and inseparable rights. Second, restrictions on the right to FoRB should not enter the territory of the internal forum, or only be carried out in the territory of the external forum. Moreover, the restrictions must be carried out carefully, legally, and proportionally, have a necessary aim and not be intended to discriminate against certain groups. Third, the emergency itself is based on relevant data and it must be officially declared by the Government. It has a clear time limit (when it starts and when it ends), as well as the responsibility of the government to bear the basic needs of the public. By understanding the different conceptions of human rights restrictions in times of emergency and in normal conditions, it is hoped that the birth of excessive, disproportionate, and discriminatory policies can be avoided.

Restrictions on the right to freedom of religion during the Covid-19 pandemic are not a blank check that can be cashed indefinitely without clear and proportional reasons. If there is a real threat to the health of the population, then restrictions are only permitted if the aim is to prevent disease and treat the sick with due observance of international health regulations from WHO (Syracuse Principles points 25 and 24). The Covid-19 pandemic emergency policy needs to be declared openly to the public, have a certain time limit, should not be carried out for the purpose of discriminating against certain groups based on religion, race, etc., and does not intend to limit the right to freedom of religion included in the forum internum.

Extreme policies such as closing houses of worship should be avoided as much as possible, if in fact the government does not take the same policy towards other activities that also have the potential to generate crowds. Providing strict regulation and supervision in implementing health protocols and limiting the number of visitors is considered more acceptable by the community if such policies are also applied to worship activities. Maintaining the anti-blasphemy law which in fact continues to be enforced during Covid-19 is a policy that has touched the right to religious freedom

in the internal forum area. These kinds of cases need to be stopped and reviewed immediately. Restrictions on the right to freedom of religion in the area of external forums, such as restrictions on the implementation of worship in places of worship, or restrictions on religious ritual activities, should not be carried out partially or sporadically, but government openness is needed to communicate the aims and objectives of the policy, so that it is not used by groups to legitimize acts of violence against community members who still carry out worship.

The synergy built by the Government in relation to religious organizations and religious leaders makes it easier for the government to carry out health programs in order to prevent greater transmission of Covid-19. For example, when there is a polemic idea against the use of vaccines by certain religious groups, the existence of a Fatwa which emphasizes that the use of the Covid-19 vaccine is safe and has been guaranteed by the Government and has been allowed and recommended for use during emergency conditions where the availability of halal vaccines is limited, getting community support to receive vaccines has significantly reduced the number of Covid-19 transmissions.

IV. CONCLUSION

Various legal policies in dealing with Covid-19 have the potential to violate the rights to FoRB for several reasons. First, Article 28J of the 1945 Constitution, which is the guideline for limiting the right to FoRB, does not distinguish between the concept of derogation and restrictions on the right to FoRB. The concept of derogation as regulated in Article 4 of the ICCPR, as well as the concept of limitation of the rights to FoRB as regulated in Article 18 (3), General Comment No. 22, and the Syracuse Principle, have not been used as a reference in formulating policies to limit the rights to FoRB during the pandemic. Thus, various forms of violations to the right to FoRB have actually increased during Covid-19, where under normal conditions before Covid-19, this had been an unsolved problem. Second, the Government did not give a clear indication whether after the PPKM (July 20th, 2021) was over, the Government had ended the public health emergency. The regulations do not provide legal certainty for how long the Covid-19 emergency condition is justified by the state in derogating the right to FoRB. Third, various legal policies are mutually contradictory and do not provide clear provisions for limiting the right to FoRB legitimately and proportionally. The Central and Regional Governments as the duty bearer of human rights have the responsibility to immediately stop all forms of violations of the right to FoRB, provide clear indications of whether the public emergency has ended, and revoke various regulations that have the potential to cause legal uncertainty, legal confusion, and discrimination against religious minority groups.

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