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1 **Principle of Impartiality: Air Transport Restriction Policy During the Covid-19 Pandemic in Indonesia**

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Abstract

The aim of this study is to analyze and identify policies issued by the government related to air passenger transportation restrictions during the Covid-19 pandemic. In addition, this study also examines the application of the principle of impartiality to passengers and airlines in the policy. This study uses a normative research method with secondary data in the form of a Circular issued by the Minister of Transportation and the Task Force for the Acceleration of Handling Covid-19 from 2020 to 2021. The results show that the policies issued by the Minister of Transportation during the Covid-19 Pandemic are by limiting the number of passengers ranging from 50% to 70% of the carrying capacity was made based on policies in order to minimize the transmission of Covid-19 passengers in the aircraft cabin by applying the principle of social distancing. The policy regulations issued are in the form of a Circular from the Ministry of Transportation and the Covid-19 Handling Acceleration Task Force related to passenger restrictions while still paying attention to the principle of impartiality. This restriction is an appropriate action, not discriminatory treatment for airlines where restrictions on passenger transportation can have an effect on reducing revenue. However, the restriction policy is implemented in the context of the state protecting the health of its citizens (passengers).

1. Introduction

After the Corona Virus spread in China at the end of 2019 then spread to various countries including Indonesia and the World Health Organization (WHO) on March 11, 2020 designated this event as a pandemic.¹ Since the Covid-19 pandemic hit Indonesia in early 2020, airplane passengers have experienced a significant decline

¹ Jinling Hua and Rajib Shaw, "Corona Virus (Covid-19) 'Infodemic' And Emerging Issues Through A Data Lens: The Case of China," *International Journal of Environmental Research and Public Health* 17, no. 7 (2020): 2309, <https://doi.org/https://doi.org/10.3390/ijerph17072309>.

compared to before the pandemic.² Air transport conditions during the January-June 2020 pandemic, the number of domestic flights was only 7% compared to May 2019.³ The decline in the number of passengers was due to restrictions from the government known as Large-Scale Social Restrictions (PSBB) (Permenkes No. 9 Tahun 2020) and the Enforcement of Restrictions on Community Activities (PPKM). These restrictions include restrictions on economic activities and even restrictions on transportation, including air transportation, which apply to pre-flight, in-flight, and post-flight activities.⁴

Transportation is one of the sectors that has the highest risk of spreading because of the intense human interaction that occurs in public transportation, which is easily spread through human interaction, especially in total closed model transportation such as airplanes. For this reason, restrictions in the form of social distancing are needed by controlling air transportation, including; reduction of airport capacity/number of flights (slot time) based on evaluation and limitation of the number of passengers up to 50% of the total seating capacity (Pasal 14B Permenhub. No. 18 Tahun 2020) by implementing physical distancing. This condition creates a risk of loss for the airline industry with reduced revenue due to restrictions on seating capacity (Surat Edaran Menhub No. 13 Tahun 2020).

The purpose of limiting aircraft passengers is to avoid clusters of transmission in the aircraft cabin, both for domestic and international flights.⁵ If there are no travel restrictions and passenger restrictions, there can be a potential for Covid-19 transmission in the aircraft cabin. Restrictions on passenger transportation and travel via air transportation are regulated in policy regulations issued by the Minister of Transportation and the Task Force for the Acceleration of Handling Covid-19.

According to Syougie, as a result of this restriction, flight turnover decreased from 30% to 50%.⁶ The number of travel restriction policies and health protocols issued by the government in the period 2020 to mid-2021, often changes in a relatively short time, thus making passengers confused in determining their attitude,⁷ especially related to the Health protocol rules issued by the Task Force for the Acceleration of Handling Covid-19.

² Sugiarti, "Analisis Dampak Covid-19 Terhadap Penerbangan Di Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 113-21.

³ Prila Kinantya, "Pergerakan Penumpang Dan Barang Angkutan Udara Dalam Masa Pandemi Covid-19 Di Indonesia," Badan Kebijakan Transportasi Kementerian Perhubungan, 2021, <https://baketrans.dephub.go.id/berita/pergerakan-penumpang-dan-barang-angkutan-udara-dalam-masa-pandemi-covid-19-di-indonesia>.

⁴ Dewi Dyah Widyastuti, "Pemeriksaan Penumpang Pesawat Udara Pada Masa Pandemi Covid-19 Di Bandar Udara Halim Perdanakusuma," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 53-60.

⁵ Mark A Gendreau Alexandra Mangili, "The Novel Coronavirus COVID19,," 2020.

⁶ Ibid. Rahayu, "Menhub: Pandemi Covid-19 Ancam Kebangkrutan Industri Penerbangan," *Anatara News*, 2020, <https://www.antaraneews.com/berita/1661774/menhub-pandemi-covid-19-ancam-kebangkrutan-industri-penerbangan>.

⁷ Ainaya Nadine and Zulfa Zahara Intiyaz, "Analisis Upaya Pemerintah Dalam Menangani Mudik Melalui Peraturan Menteri Perhubungan Nomor 25 Tahun 2020 Pada Masa Covid-19," *Media Iuris* 3, no. 3 (2020): 277-98, <https://doi.org/https://doi.org/10.20473/mi.v3i3.20674>.

To overcome the Covid-19 pandemic, the government has free authority to make policies called discretion.⁸ Discretion is one of the means that provides space for state administration officials or agencies to take action without being fully bound by the law. Discretion is a decision and/or action that is determined and/or carried out by a Government Official to address concrete problems faced in the administration of government in terms of the statutory regulations "not regulating, incomplete or unclear, and/or government stagnation" (Pasal 1 angka 9 UU No. 30 Tahun 2014).

The manifestation of discretion that is often used in the practice of administering government is in the form of policy regulations (*beleidsregels*), including in the form of a Circular as happened when the Covid-19 Pandemic hit Indonesia, a Circular Letter from the Minister of Transportation and the Task Force for the Acceleration of Handling Covid-19 was issued. For this reason, it is also necessary to examine whether the content of the Circular Letter has implemented the principle of impartiality, which is the principle of requiring government agencies and/or officials to determine and/or make decisions and/or actions by considering the interests of the parties as a whole and not discriminatory. This principle of impartiality is a citizen's right as mandated in Article 28I paragraph (2) of the 1945 Constitution which states that "everyone is free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment."

Although *freies ermesen* gives free authority to government officials in the administration of government, in the framework of a legal state, its use must still pay attention to the provisions of laws and regulations and general principles of good governance as stated in Article 10 of Law no. 30 of 2014 concerning General Principles of Good Governance, including the principle of impartiality as described above.

Many countries in the world are suffering from COVID-19 and striving to control it. Thus, some authorities voted for new policies and even decreased passenger air traffic. Those decisions, however, were not uniform.⁹ Indonesia with its *fries ermesen*, practices policy by Minister Circulation Letter form, while South Korea applies government's policy to stop the spread of the disease and help the industry to recover by establishing an airport quarantine system and providing support to the air transportation industry.¹⁰ Decision form varies from one to another country due to their differences legal system and legal hierarchy.

This study is urgent to be researched related to the research objective, namely to analyze and identify policy regulations in the form of Circulars issued by the government related to restrictions (restrictions) on passenger transportation in air transportation during the Covid-19 Pandemic. In addition, it examines how the policy of implementing the principle of impartiality between airlines as carriers and passengers as users in traveling is as outlined in the Circular Letter.

⁸ Marcus Lukman, *Eksistensi Peraturan Kebijaksanaan Dalam Bidang Perencanaan Dan Pelaksanaan Rencana Pembangunan Di Daerah Serta Dampaknya Terhadap Pembangunan Materi Hukum Tertulis Nasional* (Universitas Padjajaran, Bandung, 1996).

⁹ Yves Morel Sokadjo and Mintodé Nicodème Atchadé, "The Influence of Passenger Air Traffic on The Spread of Covid-19 in The World," *Transportation Research Interdisciplinary Perspectives* 8 (2020): 100213, <https://doi.org/10.1016/j.trip.2020.100213>.

¹⁰ Myeonghyeon Kim and Jeongwoong Sohn, "Passenger, Airline, and Policy Responses to The COVID-19 Crisis: The Case of South Korea," *Journal of Air Transport Management* 98 (2022): 102144, <https://doi.org/https://doi.org/10.1016/j.jairtraman.2021.102144>.

There are several articles related to the topic of this research, especially on passenger travel restrictions, but they have differences in terms of the object studied so that is no element of plagiarism in this study. Based on the search for secondary legal materials, several articles were found from several authors, namely Syougie et.al,¹¹ Ainaya Nadine, and Zulfa Zahara Imtiyaz¹², Victor Imanuel W. Nalle,¹³ Sadhu Bagas Suratno,¹⁴ Dewi Dyah Widyastuti¹⁵ and Yusti Fatmaningdyah and M. Fatchoelqorib.¹⁶

2. Research Method

Based on its nature, the research method in this study uses descriptive research with a focus on normative research studies, namely to test a prevailing norm by examining library materials or secondary data.¹⁷ To support this research, a legal, conceptual and interpretation approach is used in dissecting air transportation policy regulations in the form of a Circular issued by the government at the time the Covid-19 Pandemic hit Indonesia. The analysis was carried out on policy regulations in the form of Circulars issued by the Minister of Transportation and the Covid-19 Handling Task Force as actual data issued in the 2020-2021 period. The policies issued for analysis are related to passenger restrictions (restrictions) and the application of the principle of impartiality to passenger travel by air. Furthermore, the discussion and findings in this study are presented in the form of a qualitative description.

3. Result and Discussion

3.1 Policy on Restriction of Passenger Carriage During the Covid-19 Pandemic

The aviation industry in Indonesia has experienced a slump with the emergence of the Covid-19 pandemic, so a policy regulation was born in the form of a Circular (SE) issued by the Ministry of Transportation and the Task Force for the Acceleration of Handling Covid-19. Policy regulations in the form of Circulars related to restrictions on passenger transportation have a major impact on the aviation industry, such as a

¹¹ Syougie Syougie et al., "Potensi Penulanan COVID-19 Di Dalam Kabin Pesawat Komersil," *Jurnal Kedokteran* 6, no. 1 (2020): 77-85, <https://doi.org/http://dx.doi.org/10.36679/kedokteran.v6i1.266>.

¹² Nadine and Imtiyaz, "Analisis Upaya Pemerintah Dalam Menangani Mudik Melalui Peraturan Menteri Perhubungan Nomor 25 Tahun 2020 Pada Masa Covid-19."

¹³ Victor Imanuel W. Nalle, "Kedudukan Peraturan Kebijakan Dalam Undang-Undang Administrasi Pemerintah," *Refeksi Hukum* 10, no. 1 (2014): 1-16.

¹⁴ Sadhu Bagas Suratno, "Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan Yang Baik," *E-Journal Lentera Hukum* 4, no. 3 (n.d.): 164-74, <https://doi.org/10.19184/ejllh.v4i3.5499>.

¹⁵ Widyastuti, "Pemeriksaan Penumpang Pesawat Udara Pada Masa Pandemi Covid-19 Di Bandar Udara Halim Perdanakusuma."

¹⁶ Yusti Fatmaningdyah and Mochamad Fatchoelqorib, "Kebijakan Perjalanan Udara Di Masa Pandemi Corona Virus (Covid-19)," *Aviasi: Jurnal Ilmiah Kedirgantaraan* 17, no. 1 (2020): 21-34, <https://doi.org/https://doi.org/10.52186/aviasi.v17i1.56>.

¹⁷ Irwansyah Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel* (Yogyakarta: Mirra Buana Media, 2020). h. 42.

decrease in the number of passengers,¹⁸ which has the potential to reduce the income of the aviation industry which disrupts the economic circulation of airline companies.¹⁹

In general, policy regulations (*beleidsregel*) were formed as an embodiment of Fries Ermessen, namely authority with character in written form and binding on citizens.²⁰ The regulatory content contains separate general rules (*algemene regel*) that go beyond the scope of the rules (materialsphere) of laws and regulations whose regulations are made operationally. Institutions that make policy regulations (*beleidsregel*) do not have the authority to form legislation. However, it indirectly binds the citizens as is the case with the "*juridische regels*" rules. The form of policy regulations is not included in the legislation. Because the institution that forms the policy regulations does not have the authority to make laws and regulations (*wetgevende bevoegdheid*). The form of policy regulations such as Circulars is not directly legally binding.²¹ This initiative is in the form of positive concrete actions to solve government administration problems faced at certain times that require regulation,²² such as what happened when the Covid-19 pandemic hit Indonesia.

The substance of the policy regulations has binding power not different from the statutory regulations. However, most of the opinions of legal experts do not classify policy regulations as legislation.²³ One of the main characteristics of policy regulations is that there is no government authority to make these regulations. The meaning can be interpreted that there is no explicit authority if the laws and regulations give the government the authority to issue these policies related to passenger travel during the Covid-19 Pandemic. Therefore, in urgent conditions, policy regulations can be made by the government even though they still have legal relevance.²⁴ The non-binding of policy regulations is an implication of its position which is not a statutory regulation. In practice, the government uses policy regulations as a legal basis for implementing policies such as Circulars.

Circulars as a form of policy regulation cannot be categorized as one type of statutory regulation,²⁵ although there are those who argue that they have binding substance and power as well as statutory regulations.²⁶

The authority given to government agencies or officials is possible to take legal actions or factual actions within the scope of government to exercise discretion related to

¹⁸ Sugiarti, "Analisis Dampak Covid-19 Terhadap Penerbangan Di Indonesia."

¹⁹ Fatmaningdyah and Fatchoelqorib, "Kebijakan Perjalanan Udara Di Masa Pandemi Corona Virus (Covid-19)."

²⁰ P Sibuea Hotma, *Asas Negara Hukum Peraturan Kebijakan Dan Asas-Asas Umum Pemerintahan yang Baik* (Jakarta: Erlangga, 2010).

²¹ Ni Luh Gede Astariyani and Bagus Hermanto, "Paradigma Keilmuan Dalam Menyoal Eksistensi Peraturan Kebijakan Dan Peraturan Perundang-Undangan: Tafsir Putusan Mahkamah Agung," *Jurnal Legislasi Indonesia* 16, no. 4 (2019): 433-47, <https://doi.org/https://doi.org/10.54629/jli.v16i4.533>.

²² Ibid.

²³ Bagir Manan & Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia* (Bandung: Alumni, 1997).

²⁴ Ibid.

²⁵ Victor Imanuel W. Nalle, "Kedudukan Peraturan Kebijakan Dalam Undang-Undang Administrasi Pemerintah."

²⁶ Ibid.

policies.²⁷ This is also covered in the socio-economic life of the community, such as in the field of air transportation so that there is no legal vacuum²⁸ in regulating air transportation during the Covid-19 pandemic based on social distancing.

One of the government's guidelines for taking action is to apply the principle of discretion. Thus, the government can take action under any conditions with the possibility of discretion, such as the COVID-19 pandemic in Indonesia, where at the beginning of 2020 it was known as PPKM.²⁹ Based on the results of the policy inventory in the period 2020-August 2021, there are 25 policies consisting of 17 (seventeen) Circulars issued by the Minister of Transportation and 8 (eight) Circulars of the Task Force for the Acceleration of Handling Covid-19. Of the 17 (seventeen) policies in the form of Circular Letters, it was found that one Circular Letter issued by the Minister of Transportation, namely Circular Letter Number 13 of 2020 concerning Air Transportation Operations in the Period of Productive and Safe Community Activities from Corona Virus Disease 2019 (Covid-19) with restrictions the number of passengers 70% of the carrying capacity (load factor) of the total seating capacity with the implementation of physical distancing (Pasal 4.a.12 Surat Edaran Menhub No. 13 Tahun 2020). Furthermore, these restrictions are further strengthened by the Minister of Transportation Regulation Number 18 of 2021 concerning Transportation Control in the Context of Preventing the Spread of Corona Virus Disease 2019 (Covid-19), by limiting the number of passengers to 50% of the transport capacity (load factor) or from the total seating capacity with application of physical distancing (Pasal 14B Permenhub No.18 Tahun 2020). Limiting the number of passengers to 50% on the one hand reduces the revenue of the Aviation Industry in Indonesia. But on the other hand, the government has its own reasons for restricting passengers.

Passenger limitation up to 70% applied based on Indonesia Minister Circular Letter, caused real losses, but not bankruptcy to aviation since the loading factor in aviation is 50 %. Even, the aviation still suffers losses, and less profit (only 20 % passenger payment as profit). But, health care and existence aviation should be guaranteed, as the priority. And in Covid 19 condition time, both of interests could be combined. Passenger limitation is not to make aviation have zero losses, but just to drop or minimize profit. The writer thinks, this policy applies Principle of Impartiality.

Although the Circular is not included in the order of laws and regulations as in Law No. 12 of 2011 concerning the Establishment of Legislation, but referring to the explanation of the related article, it can be classified as a legal form of regulation, so it is subject to the provisions of the order in which lower regulations may not conflict with higher regulations.³⁰

For this reason, it is necessary to have discretion in responding to the Covid-19 pandemic situation related to restrictions (restrictions) on passenger transportation through air transportation. Because there is no arrangement for the transportation of

²⁷ Ibid.

²⁸ Krishna D Darumurti, *Kekuasaan Diskresi Pemerintah* (Bandung: PT. Citra Aditya Bakti, 2012).

²⁹ Rosy Dewi Arianti Saptoyo, "PPKM Diperpanjang Hingga 30 Agustus, Ini Syarat Perjalanan Terbaru," *Kompas.Com* : <https://www.kompas.com/tren/read/2021/08/24/100211265/Ppkm-Diperpanjang-Hingga30-Agustus-Ini-Syarat-Perjalanan-Terbaru?Page=all>. 25 Agustus 2021., 2021.

³⁰ Ni Luh Gede Astariyani, "Kewenangan Pemerintah Dalam Pembentukan Peraturan Kebijakan," *Jurnal Magister Hukum Udayana* 4, no. 4 (n.d.): 44198, <https://doi.org/10.24843/JMHU.2015.v04.i04.p08>.

passengers in air ¹ transportation during the Covid-19 pandemic, government administration officials are given the authority to make government decisions in the form of a Circular. In addition, discretion can provide positive benefits for the implementation of good government activities so that there is no legal vacuum. It's just that in creating the policy, it must not conflict with legal signs, norms that exist in society and the public interest.

3.2 Implementing the Principle of Impartiality in Policy Regulations

Concept of *beleidsregel* according to Jimly Asshiddiqie gave birth to the term "beleid" which is the equivalent of "policy" which explains that "formal policy regulations are not official regulations, so the terminology uses the word policy, *beleids*, or policy".³¹ For example, the Circular from the Minister of Transportation and the Task Force for the Acceleration of Handling Covid-19 is one example of policy regulation. Circulars are not stated in official regulations such as Ministerial Regulations, therefore they have a regulatory nature. Circulars do not exist in official regulations such as Ministerial Regulations, therefore they have a regulatory nature.

The absence of government authority in making policy regulations such as Circulars is one of the characteristics of policy regulations.³² Thus, the Circular Letter must be interpreted that the government's authority to issue such policies is not regulated by laws and regulations. However, in an urgent situation, policy regulations (such as Circulars) made by the government become relevant. Because the policy regulation is not a statutory regulation, the policy regulation has the implication of being non-binding.

In the conditions of the Covid-19 Pandemic that hit Indonesia, the Government needs to take action to make policies even though there is no legal basis to create legal certainty in the implementation of air transportation, both passengers and airlines. Discretion is the right legal product to be considered as an outcome of policy regulations as *beleidsregel* or policy rules. Limiting the number of passengers to a limit of 50%-70% is a form of consideration from the government to protect the health of the Indonesian people when traveling through air transportation. The percentage limitation does not mean taking sides with passengers and impartiality to airlines as carriers. However, this limitation is a policy because the health of passengers is prioritized to be given protection.

Thus the "principle of impartiality" has been applied in the air transportation policy as regulated in the Circular Letter of the Minister of Transportation (Surat Edaran Menhub No. 13 Tahun 2020). It is expressly stated in the Elucidation of Article 10 letter c of Law no. 30 of 2014 concerning General Principles of Good Governance, that the principle of impartiality is "a principle that requires Government Agencies and/or Officials to determine and/or carry out Decisions and/or Actions taking into account the interests of the parties as a whole and not discriminatory" (Pasal 10 UU No. 30 Tahun 2014). The application of this principle is analyzed by assessing the content in the Circular related to restrictions on passenger transportation through air transportation during the Covid-19 Pandemic Period. Although there are restrictions

³¹ Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Pers, 2010).

³² Bagir Manan & Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara Indonesia*.

on air transportation, it does not mean that it creates discrimination against airlines, but it is necessary to consider the health of passengers as members of the community.

The scope of discretion in the Government Administration Law is limited to decisions and/or actions determined and/or carried out by Government Officials as referred to in Article 1 point 9 of Law no. 30 of 2014 concerning Government Administration. Thus, at the conceptual and implementation level, according to the form of discretion, policy regulations are not only in the form of decisions/decrees but can also be in the form of circulars.

To accommodate the existence of the Circular as a form of policy regulation, it is necessary to reformulate Article 1 point 9 of Law no. 30 of 2014 concerning Government Administration, as follows:

"Discretion is "policy regulations, decisions and/or actions determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, government stagnation".³³

4. Conclusion

The policy for restricting the transportation of passengers during the Covid-19 pandemic in Indonesia was issued by the Minister of Transportation and the Task Force for the Acceleration of Handling Covid-19 in the form of a Circular. The policies made in the form of Circulars by the two government agencies are based on the principle of discretion. Although this Circular is not legally binding, it has legal relevance. Since Circular Letter is not a statutory regulation, as an implication, it is not binding. However, the policy of restricting passenger transportation during the COVID-19 pandemic must not conflict with higher regulations. Also, it is noted that, The Circular of the Minister of Transportation which provides restrictions (limitations) on passenger travel via air transportation up to 70% of the total seating capacity during the Covid-19 Pandemic, has had a tremendous impact on the aviation industry, namely a drastic decrease in the number of passengers which can cause flight company losses. However, the principle of impartiality based on social distancing is still applied in order to provide security to passengers and in the context of the state protecting the health of its people.

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³³ Suratno, "Pembentukan Peraturan Kebijakan Berdasarkan Asas-Asas Umum Pemerintahan Yang Baik."

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