

## **Face Mask and Jus Cogens in International Law**

**By**

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### **Abstract**

This research uses normative legal research which mostly uses international journal literature. This will make writing more comprehensive and up-to-date information. In the end, the use of masks is actually cogens juice because its use is obeyed by most of the world's people. When compliance occurs, in Indonesia it can be seen in Covid-19 Handling Task Force, namely the Circular Letter Number 22 of 2022 concerning Health Protocols for Overseas Travel during the Corona Virus Disease 2019 (Covid-19) Pandemic. This means that in designing laws and regulations, they must pay attention to the principles of the formation of laws and regulations. Often the lower the hierarchy of a statutory regulation that is produced, the level of its designation and what authority is regulated has a difference.

**Keywords:** Jus Cogens; Covid-19

### **Introduction**

In the development of legal science, it is known that legal facts are interesting things. Legal facts have always been a part of how legal norms can be applied and maintained properly. However, there is a legal issue that has become the legal norm until now, namely masks. Long ago, masks were face shields that were indeed used for public needs, meaning that the general need was to use masks to protect the face from exposure to the sun, protect the respiratory tract from dust, prevent infectious diseases and accessories for driving.

Masks which were previously not synonymous with law in the sense that their existence was not taken into account but are now an important part of humans. Masks are a proposal in legal instruments in creating order in society.

This article is based on Covid-19 in Indonesia. The Covid-19 case in Indonesia began with a dance party at the Paloma & Amigos Club, Jakarta. The participants of the event were not only Indonesian citizens, but also multinationals, including Japanese citizens living in Malaysia. The following is the chronology of the corona virus that emerged in Depok, West Java, Indonesia.

- 1) First case, NT (31)
  - a. February 14, 2020: NT joins a dance party with multinational participants, including Japan. When he returned to his domicile (Malaysia), the Japanese citizen tested positive for COVID-19.
  - b. February 16, 2020: Two days after that, NT experienced cough, shortness of breath, and fever for a period of 10 days.
  - c. February 26, 2020: To overcome his complaint, NT went to Mitra Depok Hospital. There the doctor diagnosed NT with bronchopneumonia, a type of pneumonia that causes

inflammation of the lungs. NT was named a suspect for the Wuhan corona virus, with a contact history of positive COVID-19 cases.

d. February 29, 2020: NT was referred to the Sulianti Saroso Infectious Disease Hospital (RSPI), although his condition has improved (no fever, still coughing).

e. March 1, 2020: Doctors take specimens in the form of nasopharynx, oropharynx, serum, and sputum. This sample is then sent to the Health Research and Development Agency (Litbangkes). Bronchoalveolar lavage (BAL) collection will be sent later. The case experienced by NT is included in the supervision category.

2) Second case, MD (64)

a. February 20, 2020: MD came into contact with his son NT who was suspected of having COVID-19.

b. February 22, 2020: Two days later, MD showed symptoms of corona virus infection. He also went to Mitra Depok Hospital with a diagnosis of typhoid and Acute Respiratory Infection (ARI). MD is suspected of having COVID-19.

c. February 29, 2020: Together with their child, NT, they were referred to RSPI Sulianti Saroso.

d. March 1, 2020: The procedure is the same as for NT, the doctor takes specimens in the form of nasopharynx, oropharynx, serum, and sputum. This sample is then sent to Litbangkes. The MD case is included in the supervision category. On Monday, March 2, 2020, President Jokowi Widodo said that both of them had tested positive for Covid-19. <https://katadata.co.id/timdatajournalism/analysisdata/5ecb63ef78264/asal-usul-virus-corona-enter-ke-indonesia> (Asal Usul Virus Corona Masuk ke Indonesia - Analisis Data Katadata.co.id n.d.)

Referring to the latest rules, namely the Covid-19 Handling Task Force, namely the Circular Letter Number 22 of 2022 concerning Health Protocols for Overseas Travel during the Corona Virus Disease 2019 (Covid-19) Pandemic. Referring to the letter F number 11 it is known that:

The health protocol meets the terms and conditions:

a. Use a 3-ply cloth mask or medical mask that covers the nose, mouth and chin while indoors or when in crowds;

b. Changing masks regularly every four hours, and disposing of waste masks in the places provided;

c. Washing hands regularly using water and soap or hand sanitizer, especially after touching objects touched by other people;

d. Maintain a minimum distance of 1.5 meters from other people and avoid crowds; and

e. It is advised not to speak one-way or two-way by telephone or in person throughout the journey using public transportation modes of land, rail, sea, river, lake, crossing, and air.

There are problems found, namely the obligation to use 3 layers of cloth masks is still a reference. This means that the use of masks at the beginning of Covid-19 cannot be sanctioned because it refers to the Law of the Republic of Indonesia Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Legislation. This is due to the nature of the Circular then in the perspective of legal justice, the use of masks is a habit.

From this explanation, it is known that Covid-19 in Indonesia has made legal norms to undergo a complete change. However, the focus of this paper is on the use of masks which were not previously regulated in Indonesian laws and regulations specifically.

## Research Method

This research uses normative legal research which mostly uses international journal literature. This will make writing more comprehensive and up-to-date information. (Michael 2020)

## Experiment And Result

Based on data obtained from IYKRA – March 25, 2020, it is known that:

**Table-1** List of Countries and Flights to China Country Date of First Case Time Range Fly to China

| Country      | Date Of First Case | Time Range | Fly To China (December) |
|--------------|--------------------|------------|-------------------------|
| Japan        | 1/22/20            | 21         | 303                     |
| Thailand     | 1/22/20            | 21         | 299                     |
| Cambodia     | 1/22/20            | 26         | 214                     |
| South Korea  | 1/22/20            | 21         | 151                     |
| India        | 1/22/20            | 29         | 75                      |
| Indonesia    | 1/22/20            | 61         | 71                      |
| Australia    | 1/22/20            | 24         | 52                      |
| Macau        | 1/22/20            | 21         | 57                      |
| United State | 1/22/20            | 21         | 54                      |

Table 1 shows that the on set of cases began in January 2020, meaning that not only Indonesia but most countries experienced it. In its development, the use of a mask is a must. When a necessity arises, the Indonesian state must be ready with its legal norms. The requirements referred to in the study of legal science, especially international law, are referred to as: *jus cogens*. *Jus cogens* is a Latin term meaning a mandatory or compelling law, and it refers to the peremptory norms of general international law from which derogation is forbidden. Despite the formal recognition of this legal concept, based on articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, regarding the nullity of the provisions of a treaty which come into conflict with a peremptory norm, *jus cogens* has a wider application in the international realm than the law of treaties. Therefore, *jus cogens* can appear in different forms, such as treaty law, customary law, general principles of law, etc., according to the content of the norms. (JUS COGENS (PEREMPTORY NORMS) - A KEY CONCEPT OF THE INTERNATIONAL LAW 2019)

In terms of the rule of law in Indonesia, the meaning of *jus cogens* is the same as customary law. Customary law, which starts from the customary law community, is in the form of a plurality with their own characteristics. This plurality is an asset and wealth of the nation that has strategic, important and of course valuable and economic value. All of this is clearly symbolized in various cultural expressions, languages, dances, songs and so on, as a manifestation of the identity of the Indonesian nation, which has been protected not only from aspects of basic norms and instrumental norms, but the presence of the state in the space of indigenous peoples is important. In the history written by some experts on customary law and anthropology, the presence of the old or pre-modern society was not based on a contractual basis, but based on the tribal traditions of pre-modern communities that enforced their legal

order based on the legal traditions of the tribes. The way they enforce the law is with an ascriptive status, namely determining each individual from the beginning of his birth according to the traditions of the community itself, outside the will of the individual concerned. This principle becomes a compound and flesh and blood within the members of the community as a guide for the behavior of members of the community. (Konradus 2018)

When customary law also applies in Indonesia, the existence of state law is not ruled out but complements each other. The question that arises is whether the use of masks which is a habit outside Indonesia (starting from a habit in many countries and then entering Indonesia) is equivalent to customary law?

Such a question cannot be answered with “yes” or “no” without a distinction between the law of *data* and *jus cogens*. So far, customary law has filled the void of norms in society, meaning that the resolution of legal problems depends on what the community wants. In cases of violence against women in three areas in East Nusa Tenggara, there are several settlement mechanisms. For cases of psychological violence or in the form of family neglect, women still choose to resolve them by customary law. This happens because marriage by local residents is still seen not only as binding on the husband and wife, but also the husband's extended family and the wife's extended family. The option to settle cases under customary law was taken to avoid breaking up relations between extended families and to reduce disgrace. In the case of violence against women with lower social status, the options for resolution are not many and very dependent on the wisdom of those with higher social status. In Waingapu, for example, the violence that occurred to female servants, the resolution depend on the Umbu or Rambu's sense of justice. In Kupang and Atambua, cases of violence that have fatal consequences, such as murder or rape, by families are mostly brought to the realm of state law. (Nafi et al. 2016)

Another example is customary law which is also not in accordance with the times, which violates human rights. For the Sumbanese, marriage has social and religious significance based on its purpose. Religiously, marriage is sacred because it aims to obtain descendants of the guardians of the Marapu house. This means that through marriage, humans get helpers to fulfill Marapu's demands, namely the descendants of the heirs of the Marapu clan, traditions, and heirlooms who continue to serve Marapu. (Kamuri, Grace, and Toumeluk 2021) This must be related to the religious level in Indonesia where religion plays an important role in the life of the state. Referring to Precepts 1 of Pancasila, namely Belief in the One and Only God, it can be interpreted that religion is the most important. The contradiction that occurs is that religion is not universal but rather leads to ancestral habits.

According to Schilbrack, religion has substantive characteristics related to belief in the existence and role of supernatural reality and practical characteristics that emphasize the role of ritual and worship of supernatural reality to answer concrete struggles. This definition emphasizes religion as belief in and dependence on supernatural realities, but does not pay attention to the role of religion as a provider of a value system that is believed to and shapes the lives of its adherents (religious normative characteristics). (Forrest 2015)

Different treatment for the use of masks can also be compared with the extent to which the international community accepts these masks? in order for there to be a sense of obligation towards *jus cogens* (most also interpret as peremptory norm), the peremptory norm must already exist as a discrete and self-standing rule. How does it exist without there being a sense of obligation? Similarly, before the peremptory norm exists as a custom-ary norm, consistent state practices must manifest a sense of obligation. Further, if a peremptory norm is

grounded in the sources thesis, the two requisites of such a norm – a sense of obligation by state officials and state practices – may change through time and thereby render the peremptoriness of a norm suspect. Although an individual right may initially exist outside the structure of peremptory norms, such a right may also emerge as a peremptory norm. (Conklin 2012) Peremptory norms, although often criticised and even more often approached with sceptical nihilism, nevertheless attract growing doctrinal and practical attention, and have increasing importance in determining the permissible limits on the action of State and non-State actors in different areas. In view of this overriding impact on what might otherwise be instances of the law-making process, peremptory norms concern a constitutional aspect of international law. Peremptory norms are non-derogable norms, and the concept of derogation is among the key concepts analysed here. Derogation from peremptory norms can be attempted in a wide variety of situations, but if peremptory norms are to operate as norms and not merely as aspirations, they must generate consequences that are also peremptory. This effects-oriented character of peremptory norms is examined in a variety of fields. The hierarchical superiority of peremptory norms is not limited to the sphere of primary legal relations, but becomes most crucially relevant after a specific peremptory norm is breached. A norm's peremptory character is relevant not only for its substance but also for its consequences; peremptoriness consists primarily in the capacity to impact through its effects upon conflicting acts, situations and agreements. (Orakhelashvili 2009) As a result, the authority of peremptory norms, it is argued, cannot be adequately explained by current positivist and voluntarist explanations of their authority. (Dubois 2009) Everywhere, the multiplication of fields now regulated by international law had led to the multiplication of international conventions. Several of the new conventions were endowed with their own 'follow-up machinery', which often too rapidly engendered the suggestion that such a feature transformed them into 'self-contained regimes', as if their relative autonomy made these conventional regimes totally independent of general international law, which is an illusion. (Dupuy 2020) Countries that use masks as a way to reduce Covid-19 have actually acknowledged that masks are part of the *jus cogens*. Good habits can actually be a source of reference in international law which is then applied to the law of the country.

## Conclusion

In the end, the use of masks is actually *jus cogens* because its use is obeyed by most of the world's people. When compliance occurs, in Indonesia it can be seen in Covid-19 Handling Task Force, namely the Circular Letter Number 22 of 2022 concerning Health Protocols for Overseas Travel during the Corona Virus Disease 2019 (Covid-19) Pandemic. This means that in designing laws and regulations, they must pay attention to the principles of the formation of laws and regulations. Often the lower the hierarchy of a statutory regulation that is produced, the level of its designation and what authority is regulated has a difference.

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