

REGULATIONS IN LIEU OF STATUTES IN STATES OF EMERGENCY IN INDONESIA

Lutfil Ansori¹

Citation Guide:

Lutfil Ansori,
'REGULATIONS IN LIEU OF STATUTES IN STATES OF EMERGENCY IN INDONESIA [2022] 4 (1) Prophetic Law Review 22.

Received:

7 March 2022

Accepted:

28 September 2022

Published:

14 October 2022

DOI:

10.20885/PLR.vol4.iss1.art2



Copyright: © 2021 by the author. Licensee Prophetic Law Review Journal, Indonesia. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution 4.0 International License (CC BY SA).

Abstract

The enactment of a Government Regulations in Lieu of Laws during states of emergency raises problems. This is evident so in the enactment of Government Regulation in Lieu of Law No. 1 of 2020 which was formed based on an emergency but used the framework of normal legal regime. Such has led to legal uncertainty and is hence vulnerable to abuse. This research was conducted to answer the problems regarding: the application of emergency laws in Indonesia and the government regulations in Lieu of Laws during states of emergency. This paper used normative legal research conducted by means of statutory, case study, and conceptual approaches. The study concludes that there have been some developments in the application of emergency law in Indonesia, since the status of the current public health emergency is categorized as an emergency that must be responded to by legal regime in a state of emergency. From the aspect of legal regulation, it is apparent that there are various forms of emergency laws in Indonesia, and each of these legal forms has a different impact on the regulation and its legal binding power. However, the diverse arrangements of emergency laws are not supported by the standard concepts of the state of emergency and these arrangements tend to overlap which has caused ambiguity in the arrangement of emergency law in Indonesia. government regulations in lieu of laws that are stipulated the states of emergency bear the status of emergency regulations. Therefore, the issuance of a government regulations in lieu of Las in the state of emergency must comply with the legal principles of the state of emergency. On this basis, the issuance of government regulations in lieu of laws in the state of emergency must firmly determine the period of its validity as a way to ensure that the existence of the government regulations in lieu of laws does not create legal uncertainty.

Keywords: government regulations in lieu of laws, state of emergency, emergency law.

¹ Lecturer, Universitas Islam Negeri (UIN) Sunan Ampel Surabaya. E-mail: fil.ansori@uinsby.ac.id

A. Introduction

There are times when a state may experience turmoil, known as a state of emergency. Such condition can be attributed to war, rebellion, social conflict, natural disaster, or non-natural disaster. In such states of emergency, the president is granted exceptional power to take extraordinary actions including promulgating emergency measures. The exceptional power granted to the president aims to overcome the state of emergency to ensure that the president can maintain the stability of the state and overcome all the dangers generated by the state of emergency. The President is the highest authority in charge of the security, safety and welfare of the people, and this responsibility applies in normal and exceptional circumstances.

In the Indonesian context, the 1945 Constitution authorizes the president to declare a state of emergency.² In such situations, the president is granted the right to stipulate a government regulation in lieu of law (herein after abbreviated as a “Government Regulation in Lieu of Law”). Article 22 of the 1945 Constitution states, “In the event of a compelling exigency, the President is entitled to stipulate government regulations in lieu of laws,” and one form of such compelling exigency is an emergency, be it resulting from war, rebellion, social conflict, natural disaster, or non-natural disasters. Apart from being an emergency, the conception of Article 22 of the 1945 Constitution also provides space for the president to stipulate a Government Regulation in Lieu of Law even though under normal circumstances it meets the requirements of a compelling urgency.³ As a matter of law, in Indonesia’s constitutional practice, the enactment of a Government Regulations in Lieu of Laws is more based on a so-called urgency that has nothing to do with a genuine emergency. This can be seen from the enactment of Government Regulations in Lieu of Laws over the last three decades which are mostly stipulated in normal state situations.⁴

² The 1945 Constitution article 12 states, “The President declared a state of danger. The conditions and consequences of the state of danger are established by law.”

³ The Constitutional Court provides guidance on the criteria for compelling urgency in Decision No. 138/PUU-VII/2009, by stating that, there are three criteria of compelling exigency as the basis for stipulating a government regulation in lieu of law, namely: (1) the existence of a situation, namely an urgent need to quickly resolve legal issues; (2) the required law does not yet exist hence there is a vacuum of law or there are laws but it is inadequate; and (3) the legal vacuum cannot be overcome by making law in the usual procedure because it will take a long time while the situation needs to be resolved.

⁴ Since the 1998 reform, there have been 35 Government Regulations in Lieu of Law enacted by Presidents B.J. Habibie, Abdurrahman Wahid, Megawati Soekarnoputri, Susilo Bambang Yudhoyono, and Joko Widodo, of which only 1 of the 35 Government Regulations in Lieu of Laws has Government in Lieu of Law which was stipulated in a state of emergency, namely Government Regulation in Lieu of Law No. 1 of 2020 declaring a public health emergency due to the Covid-19 pandemic.

The aforementioned illustration demonstrates two conditions for the enactment of Government Regulations in Lieu of Law in the Indonesian constitutional system, namely, Government Regulations in Lieu of Laws stipulated in an emergency and Government Regulations in Lieu of Laws stipulated under normal circumstances. By referring to constitutional dichotomy, it is clear that both types of mandates have different legal implication, because they are stipulated under different conditions.

Government Regulations in Lieu of Law which are promulgated under a state of emergency are classified as an emergency regulation (*noodregeling*). The main purpose of enacting this Government Regulation in Lieu of Law is to overcome the state of emergency faced by the state. Government Regulations in Lieu of Laws which are enacted under normal circumstances have the status of ordinary regulations that work as temporary laws, because there is not sufficient time to enact laws legislative procedure. There are two different types of Government Regulations in lieu of Laws in the Indonesian constitutional system, which may impact on the legal framework and the legal regime used to overcome the situation.

The state of emergency that occurred in Indonesia was classified as a non-natural disaster, particularly during the outbreak of Coronavirus Pandemic of 2019 (COVID-19). The non-natural disaster of COVID-19 has been designated by the president as a public health emergency.⁵ This state of emergency was triggered by the issuance of Government Regulation in Lieu of Law, namely Government Regulation in Lieu of Law no. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Coronavirus Disease of 2019 (COVID-19) Pandemic and/or In Facing Threats That Endanger the National Economy and/or Financial System Stability. This Government Regulation in Lieu of Law contains state financial policies to deal with the COVID-19 pandemic and the economic sector.

Government Regulation in Lieu of Law no. 1 of 2020 was issued on the ground that the COVID-19 pandemic had significantly affected economic activity and considerably led to massive impact to the national economy, including national economic growth, decreased state revenues, and increased state spending. This condition prompted the government to take various measures to save health and the national economy, with a focus on spending on health, social safety nets, and economic recovery. The COVID-19

⁵ The declaration of a public health emergency status was determined by the president through Presidential Decree No. 11 of 2020 concerning the Determination of the *Corona Virus Disease 2019 (Covid-19)* Public Health Emergency, dated March 31, 2020.

pandemic also has had an impact on concerns about the financial system, and thus the government needs to take anticipatory actions in order to maintain the security of the financial sector.⁶

The issuance of Government Regulation in Lieu of Law No. 1 of 2020 has attracted controversy and received widespread public attention, because some of the substance or material of the Government Regulation in Lieu of Law contradicted the Constitution and statutes. Four main issues remain in question, namely first, Government Regulation in Lieu of Law no. 1 of 2020 is considered to provide legal immunity for government officials, because government officials who implement this Government Regulation in Lieu of Law cannot be legally attacked, either through civil or criminal proceedings.⁷ Second, regarding the provisions on state financial losses, in which all the costs incurred by the government cannot be categorized as state losses, but are economic costs.⁸ The legal substance is deemed to open up space for abuse of state finances because it gives the government the freedom to use state money on the pretext of saving the nation's economy. Third, this Government Regulation in Lieu of Law is considered to interfere with the power of the judiciary because it eliminates the absolute authority of the State Administrative Court (PTUN), by stating that all actions, including decisions taken based on this Government Regulation in Lieu of Law, are not objects of a lawsuit that can be filed against the state administrative court.⁹ Fourth, Government Regulation in Lieu of Law no. 1 of 2020 eliminated the DPR's budget function, allowing the government to make changes to the budget posture without involving the DPR.¹⁰

The legal substance that deviates from ordinary law in Government Regulation in Lieu of Law No. 1 of 2020 clearly highlight that the Government Regulation in Lieu of

⁶ Government Regulation in Lieu of Law No. 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the *Corona Virus Disease 2019* (COVID-19) Pandemic and/or In Facing Threats That Endanger the National Economy and/or Financial System Stability considerant.

⁷ Government Regulation in Lieu of Law No. 1 of 2020 (n 6) article 27 paragraph (2) reads, "KSSK members, KSSK secretaries, members of the KSSK secretariat, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, as well as the Deposit Insurance Corporation, and other officials, relating to the implementation of this Government Regulation in Lieu of Law, cannot be legally prosecuted, either through civil or criminal law, if it is carried out in accordance with the provisions of the legislation."

⁸ Government Regulation in Lieu of Law No. 1 of 2020 article 27 paragraph (1) states, "The costs incurred by the Government and/or KSSK member institutions in local tax policies, regional finances, financing policies, financial system policies, and national economic recovery programs are part of the economic costs of saving the economy from the crisis and are not state losses."

⁹ Government Regulation in Lieu of Law No. 1 of 2020 article 27 paragraph (3) reads, "All actions including decisions taken based on this Government Regulation in Lieu of Law are not the object of a lawsuit that can be submitted to the state administrative court."

¹⁰ Government Regulation in Lieu of Law No. 1 of 2020 article 2 paragraph (1).

Law No. 1 of 2020 is intended to address emergencies. However, in view of the formation process formation, the Government Regulation in Lieu of Law was formed within the normal legal framework. In other words, the position of Government Regulation in Lieu of Law No. 1 of 2020 is ambiguous. This has raised legal problems because the Government Regulation in Lieu of Law was formed based on an emergency but uses the framework of a normal legal regime. Such practices may create legal uncertainty and are very vulnerable to the misuse of power for the benefit of a certain group in the name of the state of emergency. Therefore, this interesting issue is of great importance to study in a wider spectrum by way of analysing the application of the emergency law in Indonesia and the arrangement of a Government Regulation in Lieu of Law based on the state of emergency.

B. Problem formulation

Based on the aforementioned history of the issue, this research aims to answer the following problems: (1) how are emergency legal measure implemented in Indonesia? and (2) what is the legal framework for enactment of a Government Regulation in Lieu of Law in the state of emergency so as not to create legal uncertainty?

C. Methodology

This research is classified as normative legal research conducted using a statutory approach, the case approach, and the conceptual approach, with legal materials obtained from a literature review. The collected legal materials were analysed descriptively-qualitatively, by interpreting, describing, and compiling data in a logical-systematic manner according to the research objectives.

D. Discussion and Results

1. Conception of State of Emergency and Emergency Regulations

States of emergency are extraordinary conditions that occur outside the normal habit.¹¹ Conceptually, a state in the state of emergency is defined as a situation that applies or the state that endangers the safety of the people and the state which demands immediate action in unusual ways according to the rule of law in normal circumstances. Jimly Asshiddiqie expressed the same notion, saying that the state of emergency is a state of danger that suddenly threatens the law, which requires the state to act in

¹¹ Rizki Bagus Prasetio, 'Covid-19 Pandemic: Perspective of Emergency Constitutional Law', (2021) 15 (2) Scientific Journal of Legal Policy 327, 329.

unusual ways according to the rule of law that applies under normal circumstances.¹² Carl Schmitt called the state of emergency as an exceptional state, namely the ability or action taken by the sovereign to exceed or derogate the rules in the name of the public interest or the interests of the state.¹³

Kim Lane Scheppele described a state of emergency as a situation in which a nation is posed with a life-threatening situation that requires responsive action under normal circumstances that cannot be justified according to principles adopted by the nation concerned.¹⁴ Kim Lane Scheele's statement emphasized that in the state of emergency, emergency law (*noodstaatsrecht*) is needed.¹⁵ In line with the doctrine of constitutional dualism put forward by John Ferejohn and Pasquale Pasquino, that in a nation, two legal systems are needed, namely the law that applies under ordinary conditions and the law that applies in the state of emergency. John Ferejohn and Pasquale Pasquino put forward the following formulation, "The nation that there should be provisions for two legal systems, one that operates in normal circumstances to protect rights and liberties, and another that is suited to dealing with emergency circumstances."¹⁶

The concept of a state of emergency is based on the doctrine of 'necessity' which recognizes the right of every sovereign state to take the necessary steps to protect and defend the integrity of the state.¹⁷ In a state of emergency, the president as the chief executive has the power to take extraordinary actions, including issuing special regulations in order to deal with emergencies and carrying out certain government actions that can deviate or suspend applicable laws under ordinary circumstances.¹⁸

A state of emergency allows for prohibited actions. This is in line with Islamic law, particularly the Qur'an Surah al-Baqarah verse 173, which states the permissibility of carrying out prohibited actions in the state of emergency, such as during the state of

¹² Jimly Asshiddiqie, *Hukum Tata Negara Darurat* (PT RajaGrafindo Persada 2007) 7.

¹³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Translated by George Schwab, Foreword by Tracy Strong (University of Chicago Press 2005) 6.

¹⁴ Kim Lane Scheppele, 'Law in Emergencies: The Circumstances of Exception and the Temptation of 9/11' (2004) 6 (5) *Journal of Constitutional Law* 1001, 1004.

¹⁵ The law applied to emergency situations is known as emergency law or state emergency law or emergency constitutional law.

¹⁶ John Ferejohn & Pasquale Pasquino, 'The Law of Exceptions: Typology of Emergency Powers' (2004) 2 (2) *International Journal of Constitutional Law* 210, 234.

¹⁷ Binsar Gultom, *Human Rights Violations in Indonesian Emergencies Law Why are Indonesia's Ad Hoc Human Rights Courts Less Effective?* (PT Gramedia Pustaka Utama 2010) 12.

¹⁸ Jimly Asshiddiqie, 'Constitutional Dictator and Exceptional Law' (2020) Public Lecture Paper on the Development of Emergency Constitutional Law in Indonesia University of Indonesia, 2.

food scarcity.¹⁹ In addition to the ability to take otherwise prohibited actions, in the state of emergency, the president is given the power to issue emergency regulations in order to deal with the emergency to ensure that the state can immediately returns to normal.

Emergency regulations (*noodregeling*) are legal measures that were born from a state of emergency. Van Dullemen mentioned four main conditions to issue emergency regulations.²⁰ The first is the necessity to have the highest interest of the state;²¹ the second is the necessity for the emergency regulations (*noodreggeling*); the enactment of emergency regulations (*noodreggeling*) for a temporary situation, that is, only applicable during the state of emergency. When a situation returns to normal, the ordinary regulations will apply, while the emergency regulations will no longer apply; and the fourth is upon the determination of the state of emergency, parliament cannot convene.

The power to enact emergency regulations is a form of emergency power from the president. Conceptually, emergency power is executive power to deal with emergencies in order for the president, in accordance with his oath and promise of office, is able to maintain the existence of the nation and overcome all dangers caused by state of emergency.²² Emergency power aims to deal with sudden attack, that poses a threat against the nation.²³ According to Anna Khakee, emergency power is the prerogative of the president to act specifically to deal with emergencies. Anna Khakee states that, “[e]mergency powers are those special prerogatives that a government or a president can resort to in extraordinary situations such as war, insurgency, terrorist

¹⁹ “Verily, He has forbidden to you only carrion, and blood, and the flesh of swine, and that over which any name other than God’s has been invoked; but if one is driven by necessity - neither coveting it nor exceeding his immediate need -no sin shall be upon him: for, behold, God is much-forgiving, a dispenser of grace.” (Surat al-Baqarah: 173)

²⁰ AALF van Dullemen, *Staatsnoodrecht en Democratie*, quoted from Herman Sihombing, *Emergency Constitutional Law in Indonesia* (Djambatan 1996) 7-8.

²¹ The existence of the state depends on the implementation of these actions.

²² Brian McGiverin, ‘In the Face of Danger: A Comparative Analysis of the Use of Emergency Powers in the United States and The United Kingdom in the 20th Century’ (2008) 18 (1) *Indiana International and Comparative Law Review* 233, 234-235. Also read William Feldman, ‘Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege’ (2005) 38 (3) *Cornell International Law Journal* 1022, 1040-1041.

²³ Chris Edelson, *Emergency Presidency: From Drafting the Constitution to the War on Terror* (University of Wisconsin Press 2013) 8.

attacks, or other severe threats to the state, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives.”²⁴

The above notion provides a theoretical option that emergency power is in the hands of the president as the chief executive to act specifically to deal with the dangers that threaten the nation.²⁵ The justification for this theory is based on the view of Carl Schmitt,²⁶ which states that the emergency power must be in the hands of the authorities, namely the authorities who can make decisions on emergencies. Schmitt’s theory departs from the sovereignty approach, in which every sovereign state in an emergency is obliged to take the necessary steps to protect and maintain the integrity, existence, and ownership of the state. In this approach, the authority to take action to deal with emergencies cannot be taken from its obligation to protect citizens.²⁷

This conception indicates that the president has extensive authority as the holder of executive power. Therefore, to control power, the scope of emergency laws must be limited by the applicable legal principles in the state of emergency, such as the principle of declaration, provisionally, proportionality, and the principle of supervision. These various legal principles serve as guidelines or signs in the implementation of emergency law.

2. Regulation and Implementation of Emergency Laws in Indonesia

Indonesia has various forms of emergency legal arrangements. Some emergency arrangements occur under the Health Act, while others serve as emergency legal instruments based on the constitution, including those regulated in the Prevention²⁸ and the Quarantine Act.²⁹ The various legal arrangements have different characters and forms of the resulting power.³⁰

²⁴ Anna Khakee, ‘Securing Democracy? A Comparative Analysis of Emergency Forces in Europe (2009) Policy Paper (30) Geneva Center for the Democratic Control of the Armed Forces (DCAF) 5, 6.

²⁵ The same view was expressed by Appadorai, the responsibility to take action in the event of an emergency is the responsibility of the executive, because such action is considered in accordance with the function of executive power. A. Appadorai, *Political Substance* (Oxford University Press 2005) 557.

²⁶ Schmitt (n 13) 6-7.

²⁷ John Locke described the relationship between the people and the ruler in the theory of “community agreement,” where the people as the power holder are in the hands of the people appointing the ruler, namely the government to exercise that power. Rulers to protect the people’s basic rights, include the right to life, the right to freedom, and property rights. Likewise, Immanuel Kant emphasized that the state is to guarantee the law, which is a reflection of the people’s will, and guarantees the freedom of citizens.

²⁸ Law Number 24 of 2007 on Disaster Management

²⁹ Law Number 6 of 2018 on Health Quarantine

³⁰ Fitra Arsil and Qurrata Ayuni, ‘‘Model Pengaturan Kedaruratan dan Pilihan Kedaruratan Indonesia dalam Menghadapi Pandemi Covid-19’ (2020) 50 (2) Jurnal Hukum & Pembangunan 423, 441.

Based on the 1945 Constitution, there are two states of emergency, namely (i) a state of emergency (Article 12), and (ii) a compelling exigency (Article 22). The clause in the state of emergency in Article 12 of the 1945 Constitution is considered a form of constitutional assessment of the nation in the state of emergency.³¹ This article authorizes the president to declare the state of emergency, which results in a change in law enforcement from Ordinary Law to state emergency law.

The follow-up to the currently effective regulation of Article 12 of the 1945 Constitution is Law No. 23 of 1959 on the Determination of the State of Emergency. This law sets forth three states of emergency in Indonesia, namely Civil Emergency, Military Emergency, and Wartime Emergency.³² Three forms of emergency can be determined by the president under three conditions, including: the existence of a security or legal threat in part or all of the territory in Indonesia caused by riots, or as a result of natural disasters, which cannot be overcome by ordinary means; the outbreak of war or the occupation of Indonesian territory; and, the endangered life of the nation or other special circumstances that endanger the life of the nation.

Law No. 23 of 1959 gave the government the opportunity to deviate from existing law and human rights protection, which should not be carried out in ordinary conditions, except for human rights which are classified as non derogable rights.³³ Law No. 23 of 1959 also gives the government the freedom to make regulations that were deemed important to deal with emergencies.³⁴ In the practice of state administration, Law No. 23 of 1959 has been used as the basis to implement the state of emergency in several areas, such as in the Provinces of East Timor,³⁵ Maluku and North Maluku Provinces,³⁶ and the Provinces of Nanggroe Aceh Darussalam.³⁷

³¹ The 1945 Constitution article 12 states, “The President declares a state of emergency. The conditions and consequences of the state of emergency are established by law”.

³² Law (Prp) No. 23 of 1959 concerning the Determination of the State of Emergency art. 1 paragraph (1).

³³ *Non derogable rights* are human rights that cannot be reduced under any circumstances. Article 28I paragraph (1) of the 1945 Constitution states that it is prohibited to deviate from the fulfilment of the right to life, the right to not to be tortured, the right to individual freedom, to freedom of thought and conscience, religion, the right not to be enslaved, the right to be recognized as an individual and equal before the law, and the right not to be prosecuted retroactively under the law. See the 1945 Constitution art. 28I paragraph (1).

³⁴ Law (Prp) No. 23 of 1959 on the Determination of Hazardous Conditions art. 10.

³⁵ Presidential Decree No. 107 of 1999 on the State of Military Emergency in the Province of East Timor.

³⁶ Presidential Decree No. 88 of 2000 on the State of Civil Emergency in Maluku Province and North Maluku Province.

³⁷ Presidential Decree No. 28 of 2003 on the Declaration of a State of Emergency with Military Emergency Levels in the Province of Nanggroe Aceh Darussalam.

The second form of emergency according to the 1945 Constitution is a state of compelling exigency. Article 22 of the 1945 Constitution states, “In the event of a compelling exigency, the President has the right to promulgate government regulations in lieu of law.” This constitutional clause is the basis for the president’s authority to stipulate law-level regulations without involving the House of Representative (DPR). Based on the formulation of Article 22, it appears that the legitimacy of the president to stipulate a Government Regulation in Lieu of Law lies in the clause on matters of compelling exigency.

The concept of a compelling exigency is different from a state of emergency and is constructed to have a wider scope than a state of emergency. Jimly Asshiddiqie stated that everything that is dangerous always has the nature of causing a compelling exigency, but everything that compels it is not always emergent.³⁸ Therefore, matters of compelling exigency do not have to refer to a state of emergency, and thus the enactment of a Government Regulation in Lieu of Law by the president does not necessarily have to be carried out by a state of emergency. Ni’matul Huda emphasized that in the state of emergency, the president could at any time stipulate a Government Regulation in Lieu of Law as needed, but the president does not always have to be in the state of emergency to stipulate a Government Regulation in Lieu of Law.³⁹

Bagir Manan and Susi Dwi Harijanti articulated that the state of emergency in Article 22 of the 1945 Constitution in the form of a diametrically compelling exigency is different from the state of emergency in Article 12 of the 1945 Constitution.⁴⁰ A compelling exigency refers to a situation that requires an emergency legal measure or an urgent legal need, which should be regulated by the legal or constitutional. The urgent legal need arises due to a situation that requires a quick resolution by referring to the law, but the required law does not exist, or the existing law does not meet or is no longer able to meet the legal needs. This difference was also emphasized by the Constitutional Court in its Decision No. 003/PUU-III/2005, by stating that matters of

³⁸ Asshiddiqie (n 12) 206.

³⁹ Ni’matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi* (FH UII Press 2011) 118.

⁴⁰ Bagir Manan and Susi Dwi Harijanti, ‘Peraturan Pemerintah Pengganti Undang-Undang dalam Perspektif Ajaran Konstitusi dan Prinsip Negara Hukum’ (2017) 4 (2) *Padjajaran Jurnal Ilmu Hukum* 222, 230.

compelling exigency should not be equated with a state of emergency based on the level of civil emergency, military emergency, or a state of war.⁴¹

A compelling exigency clause is not the only reason to apply or activate emergency law/emergency constitutional law. The use of a Government Regulation in Lieu of Law does not automatically generate the state of emergency, except for a Government Regulation in Lieu of Law, which is issued due to a state of emergency, either in a state of emergency, or a state of war. However, government regulations in lieu of laws are equivalent to laws, so the regulations are regulated differently. The provisions in government regulations in lieu of laws can be statutory but may not be prohibited by law.⁴² Therefore, the formation of a Government Regulation in Lieu of Law in normal circumstances should not derogate the human rights of citizens contained in the constitution.

The next form of a state of emergency is as a matter of law. Law No. 24 of 2007 on Disaster Management regulates state of emergency due to disasters, which include natural disasters, non-natural disasters, and societal disasters. This law sets forth that the status of a disaster emergency refers to a condition determined by the government for a certain period based on the recommendation of the agency assigned with the task of dealing with disasters.⁴³ The implementation of this emergency situation compels a number of legal conditions to apply the law in a limited way, and authorizes the National Disaster Management Agency (BNPB) to gain ease of access for resources including the deployment of human resources, deployment of equipment, deployment of logistics, immigration, excise and quarantine, licensing, procurement of goods/services, rescue, and command to order sectors/institutions.

Law No. 6 of 2018 on Health Quarantine grants the president the authority to determine the status of a public health emergency. In the event of a public health emergency, this law authorizes the government to restrict the movement of people and goods, close regions and borders, as well as detain modes of travel that endanger public health.⁴⁴ These restrictions can be in the form of quarantine and Large-Scale Social Restrictions (PSBB). PSBB is a form of public health emergency response that allows

⁴¹ Constitutional Court Decision No. 003/PUU-III/2005, dated July 7, 2005.

⁴² Arsil and Ayuni (n 30) 432.

⁴³ Law No. 24 of 2007 on Disaster Management art. 1 par. 19.

⁴⁴ Law No. 6 of 2018 on Health Quarantine, art. 27.

the government to close schools and workplaces, restrict religious activities, and/or restrict activities in public places or facilities.

Although the above two laws use the term emergency, they do not specifically refer to Article 12 of the 1945 Constitution as the basis for determining certain states of emergency. This means that these laws are not included in the state of emergency legal regime, and therefore the enactment of the two laws does not result in the enactment of emergency law, and the system that applies is the normal legal system.

In the course of its history, Indonesia has experienced several states of emergency, either due to war, rebellion, social conflict, natural disasters, or non-natural disasters such as the COVID-19 pandemic, which emerged in early 2020. The various forms of emergency have been responded to by the government in various ways. Some are declared as civil emergency, military emergency, and state of war by applying the state of emergency law under the State of Emergency Act.⁴⁵ Some other governments also have not responded to such states of emergency with the emergency law. The following is an overview of the state of emergency and the application of emergency law in Indonesia.

Table 1. Implementation of State of Emergency in Indonesia

Year	The area	State of emergency	Type of the State of Emergency	Legal Regime/ Legal Use	Enactment of Government Regulation in Lieu of Law
1948	Java	Rebellion	Military Emergency	Emergency Law/ Law 6/1946 on The State of Emergency	-
1949	Yogyakarta	War	State of War	Emergency Law/ Law 6/1946 on The State of Emergency	Government Regulation in Lieu of Law 1/1949
1957	Java	War	State of War	Emergency Law/ Law 74/1957 on The State of Emergency	Emergency Act
1999	East Timor	Rebellion	Military Emergency (Presidential Decree 107/1999)	Emergency Law / Law 23/1959	-
2000	Maluku and North Maluku	conflict	Civil Emergency (Presidential Decree 88/2000)	Emergency Law / Law 23/1959	-

⁴⁵ Law (Prp) No. 23 of 1959 on the Determination of Danger Conditions.

2001	Sampit	conflict	-	Ordinary Law	-
2003	Aceh	Rebellion	Military Emergency (Presidential Decree 28/2003)	Emergency Law/ Law 23/1959	-
2004	Aceh	conflict	Civil Emergency (Perpres 2/2004)	Emergency Law/ Law 23/1959	-
2004	Aceh-Nias	natural disasters	-	Ordinary Law	Government Regulation in Lieu of Law 2/2005; Government Regulation in Lieu of Law 2/2007
2006	In Yogyakarta	natural disasters	-	Ordinary Law	-
2018	Lombok	natural disasters	-	Ordinary Law/Law 24/2007	-
2018	Hammer- Donggala	natural disasters	-	Ordinary Law/Law 24/2007	-
2019	Wamena	conflict	-	Ordinary Law/Law 7/2012	-
2020	Throughout Indonesia	Non- Natural Disasters (COVID- 19)	Health Emergency (Presidential Decree 11/2020)	Ordinary Law/UU 24/2007; 6/2018	Government Regulation in Lieu of Law 1/2020

Table 1 presents the factual data of several states of emergencies in Indonesia in the form of rebellions, wars, social conflicts, natural disasters, and non-natural disasters. However, the government has taken different measurements to respond to these various states of emergencies. Emergency law/state emergency law is used by the government when the nation is facing a state of emergency due to rebellion, war, and/or social conflict. This is seen from the 1948 rebellion in Java, which was declared a state of military emergency with the application of emergency law based on Law no. 6 of 1948 concerning States of Emergency. The state of war in Yogyakarta in 1949 and in Java in 1957 were also declared states of emergency, namely a state of war emergency. The uprising in East Timor in 1999 and the uprising in Aceh in 2003 were declared military emergencies. The social conflicts that occurred in Maluku and North Maluku in 2000 and the social conflicts in Aceh in 2004 were declared civil emergencies with

the implementation of emergency law based on Law No. 23 of 1959 on the Determination of the State of Emergency.

The government has never declared a state of emergency due to natural disasters and non-natural disasters with state administrative law. Natural disasters that occurred in Aceh and Nias in 2004, in Yogyakarta in 2006, and in Lombok, Palu and Donggala in 2018 were not designated as state of emergency. Likewise, the outbreak of non-natural disasters COVID-19 pandemic throughout the entire area of Indonesia and claimed many victims were not dealt with by emergency constitutional law.

The government's reluctance to designate a state of natural disaster or non-natural disaster as a state of emergency could possibly arise from the political enactment factor in determining the state of emergency. It is also due to the overlapping and out-of-synch legal arrangements of states of emergency in Indonesia.⁴⁶ Law No. 23 of 1959 stipulates four conditions as states of emergency, namely rebellion, riots (social conflict), natural disasters, and war. Meanwhile, Law No. 24 of 2007, separates natural disasters and riots (social conflicts)⁴⁷ from state of emergencies. This ambiguity has led to indecisive government responses in determining whether the natural disasters or non-natural disasters shall be designated as the state of emergency or not.

In the case of a non-natural disaster of the COVID-19 pandemic, it was clear that the government was handling the disaster using the ordinary legal process. The government prefers to use legal instruments in the form of the Disaster Management Law and the Health Quarantine Law, both of which are part of the normal legal regime. In addition, it is also obvious from the enactment of Government Regulation in Lieu of Law No. 1 of 2020 which was born from the normal legal framework, where the existence of a Government Regulation in Lieu of Law appears to be permanently effective, instead of serving as emergency regulations of a statutory nature. This fact is particularly seen from the absence of a sunset clause for the application of the Government Regulation in Lieu of Law (sunset clause).

The existence of a Government Regulation in Lieu of Law No. 1 of 2020 also exacerbates the ambiguity of handling state of emergencies in Indonesia. On one hand, Government Regulation in Lieu of Law No. 1 of 2020 is effective in a normal legal framework. However, on the other hand this Government Regulation in Lieu of Law

⁴⁶ Agus Adhari, 'Ambiguitas Pengaturan Keadaan Bahaya dalam Sistem Ketatanegaraan Indonesia' (2019) 11 (1) *Dialogia Iuridica: Jurnal Hukum Bisnis dan Investasi* 43, 56.

⁴⁷ Social unrest or conflict in Law No. 24 of 2007 is referred to as a social disaster.

contains material that deviates from the Ordinary Law. Such ambiguous conditions are likely to create legal uncertainty because Government Regulations in Lieu of Law annul legal norms applicable under normal circumstances and violate various constitutional provisions. If the Government Regulation in Lieu of Law deviates from the applicable law under ordinary circumstances, the Government Regulation in Lieu of Law must be regulated as an emergency regulation.

Subsequent to the implementation of the Health Quarantine Law, the president on March 31, 2020, declared the COVID-19 pandemic a public health emergency through Presidential Decree No. 11 of 2020 concerning the Determination of the Corona Virus Disease 2019 (Covid-19) Public Health Emergency. In terms of the public health emergency status, some noteworthy developments were readily apparent after the issuance of the Constitutional Court Decision No. 37/PUU-XVIII/2020⁴⁸ which can cause a legal shift in the implementation of a public health emergency status.

Constitutional Court Decision No. 37/PUU-XVIII/2020 clearly stipulates that the enactment of Law No. 2 of 2020, which is derived from Government Regulation in Lieu of Law No. 1 of 2020 must be restricted, because the Government Regulation in Lieu of Law aims to overcome the temporary condition of COVID-19 pandemic emergency. That is, the Constitutional Court deems the health emergency status of the COVID-19 pandemic as part of a state of emergency. Therefore, the Constitutional Court allows deviations from Ordinary Law as seen in Government Regulation in Lieu of Law No. 1 of 2020 which is only applicable during a state of emergency, particularly during the time when the government has not declared an end to the health emergency status of the COVID-19 pandemic. The Constitutional Court's decision can be interpreted as a roadmap to the issuance of Government Regulations in Lieu of Laws in the state of emergency, particularly in a public health emergency.

3. Enactment of Government Regulation in Lieu of Law on the Basis of a State of Emergency

In a state of emergency, the president as the holder of emergency power has the authority to promulgate emergency regulations (*noodregeling*), and the emergency regulations in Indonesia are in the form of a Government Regulations in Lieu of Law. The state of emergency can serve as the basis for stipulating a Government Regulation

⁴⁸ Constitutional Court Decision No. 37/PUU-XVIII/2020, October 28, 2021.

in Lieu of Law because every state of emergency inevitably creates a compelling exigency that urges the enactment of a Government Regulation in Lieu of Law.

According to Giorgio Agamben, the declaration of a state of emergency in the practice of global state administration today has expanded significantly, as in the handling of natural disasters, terrorist attacks, narcotics emergencies, disease outbreaks, and so on.⁴⁹ Hence, the scope of the state of emergency is very broad and there have been different ways in determining the state of emergency between one nation to another. The diverse states of emergency in the various countries reflects the problems in the practical implementation of the state of emergency in each nation.

The information presented in Table 1 demonstrates that Indonesia has had some experiences of several states of emergency, but not all of these situations have been juridically declared a state of emergency. In the context of the issuance of Government Regulations in Lieu of Law. The abovementioned Table 1 also highlights that state of emergency in the form of civil emergency, military emergency, and war emergency have never been responded to with the issuance of Government Regulations in Lieu of Law by the government, especially the post-reform government. The issuance of a Government Regulation in Lieu of Law during a state of emergency only occurred in the early days of independence when the Dutch military aggression took place in 1949.⁵⁰ The Dutch military aggression on December 19, 1948, was an attempt by the Dutch to cripple the Republic of Indonesia in Yogyakarta.⁵¹ This military aggression resulted in the establishment of the Emergency Government of the Republic of Indonesia in Bukit Tinggi, West Sumatra. The Government Regulation in Lieu of Law which was stipulated as a response to an emergency is Government Regulation in Lieu of Law No. 1 of 1949 on Military Administration in the Special Region of Yogyakarta, including the Kasunanan and Mangkunegara Enclaves.

⁴⁹ Giorgio Agamben, *Exceptional State*, Translated by Kevin Attell (The University of Chicago Press 2005) 2-3.

⁵⁰ Government Regulation in Lieu of Law No. 1 of 1949 concerning Military Administration in the Special Region of Yogyakarta, including the Kasunanan and Mangkunegara *Enclaves* when the nation was in a state of emergency, namely during the Dutch military aggression II in which the state capital of Yogyakarta was attacked by the Dutch army. Daniel Yusmic P. FoEkh, *Perppu dalam Teori dan Praktek* (Rajawali Pers 2021) 269.

⁵¹ Kuswandi, 'Pengaruh Perang Kemerdekaan II Terhadap Pengakuan Kedaulatan RI Tanggal 27 Desember 1949' (2015) 3 (2) Jurnal Artefak 207, 210. See Sri Margana, et.al, 'Naskah Akademik Serangan Umum 1 Maret 1949 sebagai Hari Nasional Penegakan Kedaulatan Negara' (2022) Dinas Kebudayaan Daerah Istimewa Yogyakarta, 4-5.

Since the 1998 reform, the Government Regulation in Lieu of Law, which was an emergency regulation, has never been applied to respond to a state of emergency. The rebellion in East Timor in 1999, the conflict in Maluku and North Maluku in 2000, the conflicts in Nanggroe Aceh Darussalam in 2003 and 2004, which were declared states of emergency were not supported by the enactment of a Government Regulation in Lieu of Law. The enactment of Government Regulations in Lieu of Laws after the Reformation is more in line with the compelling exigency that is not related to states of emergency.

Two possible hypotheses are proposed regarding this situation. First, the government views the available legal instruments as able to overcome a state of emergency and thus there is no need for new arrangements in the framework of a Government Regulation in Lieu of Law. Second, Government Regulation in Lieu of Law are more interpreted as a response to an urgent situation that requires regulation at the equal level of statutes, and Government Regulations in Lieu of Law are not seen by the government as an emergency regulation.

The pattern of issuing Government Regulations in Lieu of Law in the state of emergency has changed after the issuance of Constitutional Court Decision No. 37/PUU-XVIII/2020.⁵² This decision illustrates that during a state of emergency the president may stipulate a Government Regulation in Lieu of Law, and this Government Regulation in lieu of a Law which is stipulated in a state of emergency has the position of an emergency regulation and determines the principles of emergency law. This shows that the enactment of a Government Regulation in Lieu of Law in a state of emergency is different from the enactment of a Government Regulation in Lieu of Law in normal circumstances. Most importantly, there are two regulations arising from the enactment of Government Regulation in Lieu of Law in a state of emergency, namely (i) Government Regulation in Lieu of Law as an emergency regulation, and (ii) a time limit for the enactment of a Government Regulation in Lieu of Law.

a. Government Regulation in Lieu of Law Serving as an Emergency Regulation

Constitutional Court Decision No. 37/PUU-XVIII/2020 indirectly indicates the existence of Government Regulation in Lieu of Law no. 1 of 2020 as an emergency regulation (*noodregeling*), because it was issued when the country was in a state of

⁵² Constitutional Court Decision No. 37/PUU-XVIII/2020 (n 48).

emergency, namely a public health emergency. That is, the decision demonstrated that Indonesian constitutional practice contains several types of Government Regulations in Lieu of Laws which serve as emergency regulations, namely Government Regulations in Lieu of Laws issued in a state of emergency, which are promulgated with the intention of overcoming the state of emergency or the consequences of an emergency.

The position of Government Regulation in Lieu of Law as an emergency regulation has actually been mentioned in the Elucidation of the 1945 Constitution before the amendment.⁵³ The explanation of Article 22 of the 1945 Constitution states that:

This article concerns with the *noodverordeningsrecht* of the President. This rule needs to be enforced to ensure that the government protect the safety of the nation in coercive circumstances, which compels the government to act quickly and appropriately. Nevertheless, the Government will not be separated from the supervision of the House of Representatives. Therefore, the government regulations in this article have the same power as laws and must be ratified by the House of Representatives.

In Bagir Manan's view,⁵⁴ linguistically the word '*nood*' means danger or emergency, and '*ordenen*' shall be translated as 'to arrange,' so *noodverordeningsrecht* can be interpreted as a legal regulation to regulate a state of danger or emergency. The *noodverordeningsrecht* of the president implies the right of the president to make emergency regulations (*noodverordening*). The Elucidation of Article 22 of the 1945 Constitution as above also defines the purpose of the issuance of a Government Regulation in Lieu of Law namely, to ensure the safety and security of the state. This is in line with the main objective of emergency regulations to ensure the nation's safety in the face of critical situations or dangerous situations that may pose a threat on the integrity, existence, and ownership of the state,⁵⁵ while at the same time protecting the safety of citizens.

The explanation of the position of a Government Regulation in Lieu of Law as an emergency regulation can also be found in the 1949 RIS Constitution and the

⁵³ Although after the amendments, the Elucidation of the 1945 Constitution was abolished, as a historical document, the Elucidation of Article 22 of the 1945 Constitution can still serve as a guide to understand the nature of Government Regulations in Lieu of Laws in the constitution.

⁵⁴ Bagir Manan, *DPR, DPD dan MPR dalam UUD 1945 Baru* (FH UII Press 2003) 42-43.

⁵⁵ McGiverin (n 22) 234-235.

1950 Constitution, where the term Government Regulation in Lieu of Law in the 1945 Constitution was replaced with the designation “emergency law.” An emergency law is defined as *an Emergency Law (Emergency Legislation)*,⁵⁶ which clarifies the position of a Government Regulation in Lieu of Law as an emergency regulation. The use of the term emergency law in the RIS Constitution and the 1950 Constitution was principally an improvement from Soepomo’s provisions as the architect of the 1945 Constitution to improve the norms of Government Regulations in Lieu of Laws as regulated in the 1945 Constitution based on the then existing context.

In other words, since the earliest iteration of the 1945 Constitution, the Government Regulation in Lieu of Law in Article 22 of the 1945 Constitution was always related to a state of emergency. However, in Indonesian constitutional practice, the enactment of Government Regulations in lieu of Laws is not always related to the state of emergency, and this has been accepted as a customary or constitutional convention that is often utilized during successive government period. In this regard, it can be said that there are two types of Government Regulations in Lieu of Laws in the Indonesian constitution based on the 1945 Constitution, namely (i) Government Regulations in Lieu of Laws as a temporary law and to apply permanently as laws after obtaining approval from the DPR, and (ii) Government Regulations in Lieu of Law as emergency laws or emergency regulations, which are promulgated in state of emergency.⁵⁷

The position of a Government Regulation in Lieu of Law as an emergency regulation and the formation of Government Regulation in Lieu of Law must comply with the settled principles of emergency regulations. One of the important principles in the determination of the state of emergency is the principle of an interim or temporary nature. This necessitates that the enactment of a Government Regulation in Lieu of Law as an emergency regulation must be temporary, without the intention to enforce it as a permanent law. Van Dullemen emphasized the valid term of the emergency regulations by saying that emergency regulations (*noodregeling*) were

⁵⁶ Pantja Astawa and Suprin Na’a, *Dinamika Hukum dan Ilmu Perundang-undangan di Indonesia*, Edisi Pertama, 2008, Alumni 62.

⁵⁷ Jimly Asshiddiqie, ‘Tipe Perpu, Bentuk, dan Cabut’ < https://www.academia.edu/42854447/Type_PERPU_Bentuk_and_Cabut> retrieved on April, 10, 2022. Ni’matul Huda, Dodik Setiawan Nur Heriyanto and Allan Fatchan Gani Wardhana, “The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia” (2021) 7 Heliyon.

temporarily applicable, namely only during the state of emergency. After the situation returns to normal, the ordinary law is applicable while the emergency regulations no longer apply.⁵⁸

Jimly Asshiddiqie's view at least indicates four important principles regarding the implementation of emergency regulations, namely, the principle of declaration, the principle of temporariness, the principle of proportionality, and the principle of supervision.⁵⁹ These various principles function as guidelines or limitations on the application of emergency laws to prevent abuse by the holders of emergency power, as well as to provide legal protection for human rights in the state of emergency.

The declaratory principle stipulates that a state of emergency must be declared in accordance with applicable legal procedures as a basis for establishing emergency regulations. Based on the declaration principle, the president as the emergency authority gets the legitimacy and legality to take actions that are outside the legal corridors applicable under normal circumstances.

The provisional principle emphasizes that emergency regulations are temporary, and thus it is only applicable during the state of emergency. Therefore, emergency regulations cannot be enforced for an excessive duration. The provisional principle must be made applicable when the emergency regulation comes into effect.

The principle of proportionality emphasizes that the predetermined emergency regulations must be proportional or balanced according to the factual needs of the situation. This means that although the government has the freedom to act in the state of emergency, the actions taken must not exceed the circumstances required. The principle of proportionality is a legal principle that seeks to balance the application of emergency law.

The principle of supervision gives legitimacy to parliament and the judiciary to oversee the establishment of an emergency, therefore the suspension, reduction, or application of human rights in the state of emergency remains within the framework of the principles of democracy and the state. The role of the judiciary can be carried out through an emergency testing mechanism. In the context of supervision, the roles of two institutions, parliament and judiciary, are seen as important in assessing and controlling emergency governance in the modern era and are carried out by various

⁵⁸ Dullemen (n 20) 7-8.

⁵⁹ Asshiddiqie (n 12) 98-101.

countries. Even in South Africa, the court which assesses emergency decisions is seen an important instrument in exercising checks on a president's power to issue emergency regulations.⁶⁰

The status of a Government Regulation in Lieu of Law as an emergency regulation allows the content of Government Regulation in Lieu of Law to violate the law and suspend, reduce, or limit human rights guaranteed by the constitution and law for a certain period,⁶¹ which is not applicable when a Government Regulation in Lieu of Law is formed under normal circumstances. This means that a Government Regulation in Lieu of Law can regulate special policies in order to deal with states of emergency with policies that are different from normal situations.

b. Valid Term of Government Regulations in Lieu of Laws

The above description elucidates that one of the legal requirements for the enactment of a Government Regulation in Lieu of Law is to make it serve as an emergency regulation, and thus there must be for a limited period of validity of this Government Regulation in Lieu of Law. This requirement is in accordance with the provisional principle, which necessitates a certain limited period for a state of emergency. The provisional principle is important to avoid imposing a perpetual state of emergency that could damage freedom, human rights, the foundations of democracy, and the principle of constitutionalism. Based on this principle, emergency regulations must be temporary, or only applicable during a state of emergency, and thus, once a state of emergency declaration ends, the emergency regulations must likewise sunset.

The valid term of a Government Regulation in Lieu of Law refers the time limit for the validity of a Government Regulation in Lieu of Law when it comes into effect and when it must end, due to its status as an emergency legal measure. This means that a Government Regulation in Lieu of Law must have a time limit in terms

⁶⁰ The Constitution of the Republic of South Africa 1996 Section 37 Paragraph (3), "Any competent court may decide on the validity of – (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency".

⁶¹ Except for human rights which are classified as *non-derogable rights*, namely human rights that cannot be reduced under any circumstances. Article 28I paragraph (1) of the 1945 Constitution states that it is prohibited to deviate from the fulfilment of the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be enslaved and prosecuted on the basis of retroactive law.

of its application after being promulgated as a Government Regulation in Lieu of Law or after being enacted into law by the DPR.

The requirement for the enactment of a time limit for a Government Regulation in Lieu of Law which serves as an emergency regulation is also explicitly limited by the Constitutional Court in Decision No. 37/PUU-XVIII/2020 when examining Law No. 2 of 2020 which comes from Government Regulation in Lieu of Law No. 1 of 2020. In this case, Government Regulation in Lieu of Law no. 1 of 2020 did not provide a sunset clause regarding the valid term of a Government Regulation in Lieu of Law, even though the Government Regulation in Lieu of Law no. 1 of 2020 is stipulated in the state of emergency as a response to the public health emergency due to the COVID-19 pandemic.

The absence of a time limit on the valid term of a Government Regulation in Lieu of Law creates legal uncertainty. This is because the norms of articles in various repealed laws will still apply even though a public health emergency has ended.⁶² In this case, the Constitutional Court affirmed⁶³ that the main thing to emphasize in the state of emergency is a clear time limit on when the state of emergency of the Covid-19 pandemic ends. The Constitutional Court is of the conceptual view that a state of emergency and law in time of crisis must become an integrated element that cannot be separated from the effort to emphasize to the public that a state of emergency will end. This is expected to generate fair legal certainty as guaranteed in Article 28D paragraph (1) of the 1945 Constitution.⁶⁴ Therefore, the Constitutional Court considers it necessary to give a time limit for the enactment of Law no. 2 of 2020 firmly and definitively ensures legal certainty for all parties over all the provisions stipulated in the law.⁶⁵ The time limit is designated to cope with and anticipate the impact of the COVID-19 pandemic. Thus, Law no. 2 of 2020 must only be enacted due to the occurrence of a state of emergency due to the pandemic. In other words, this law is only valid if the status of the COVID-19 pandemic has not been declared over by the president.

To provide legal certainty, the Constitutional Court limits the validity of the Government Regulation in Lieu of Law by stating that the Government Regulation

⁶² Constitutional Court Decision No. 37/PUU-XVIII/2020 (n 48).

⁶³ Constitutional Court Decision No. 37/PUU-XVIII/2020 (n 48).

⁶⁴ Constitutional Court Decision No. 37/PUU-XVIII/2020 (n 48)..

⁶⁵ Constitutional Court Decision No. 37/PUU-XVIII/2020 (n 48)..

in Lieu of Law shall come into force on the date of its promulgation and must be declared no longer valid coincident with the president officially announcing that the status of the Covid-19 pandemic had been declared ends in Indonesia and the status must be declared no later than the end of the 2nd year. This means that the Constitutional Court gives a time limit for the enforcement of a Government Regulation in Lieu of Law for two years, including after it is enacted into law.

The limitation on the valid term of emergency regulations in various countries shows different arrangements with a span of 14 days to 12 months, according to the emergency rules in each country. Brazil's constitution, for example, stipulates the validity period of emergency regulations for 60 days from the time a regulation is enacted by the president, and can be extended only once for the same duration.⁶⁶

Limiting the validity of the Government Regulation in Lieu of Law which is stipulated on an emergency basis is important to prevent any legal misuse of the emergency regulation by the president as the holder of emergency power. The model may take the form of stipulating a clause in a Government Regulation in Lieu of Law stating that the Government Regulation in Lieu of Law is valid during the state of emergency. This means that the Government Regulation in Lieu of Law limits its valid term, namely only during the declaration of the state of emergency. When the state of emergency has ended or is revoked by the government, the valid term of the Government Regulation in Lieu of Law has expired and can no longer be used as a legal basis for making decisions or making policies. After being stipulated as a law, the valid term of the law remains only for the duration of the state of emergency. This pinpoints that the law on the enactment of a Government Regulation in Lieu of Law due to an emergency must have a sunset clause.

The description above demonstrates that Government Regulation in Lieu of Law has two types of status, namely Government Regulation in Lieu of Law in a normal legal regime and Government Regulation in Lieu of Law in an emergency regime. The two must be different because they have different guarantees and are

⁶⁶ Brazil Constitution Article 62 paragraph 3, "Except as provided for in paragraph 11 and 12, provisional measures shall lose their effectiveness as of the day of their issuance if they are not converted into law within a period of sixty days, which may be extended once, in the term of paragraph 7, for an equal period. It is the responsibility of the National Congress to regulate by legislative decree the legal relations stemming from such measures."

vulnerable to any misuse. On the other hand, mixing the two types of Government in Lieu of Law may lead to legal uncertainty and injustice.

Government Regulations in Lieu of Law in an emergency regime is a form of emergency legislation and relies on the principles of emergency regulations. This is certainly different from the enactment of a Government Regulation in Lieu of Law under a normal legal regime which does not serve as an emergency legislation. To emphasize this difference, formal arrangements are needed in the laws and regulations in Indonesia, especially in the Law for the Establishment of Legislation and the Law on the State of Emergency

E. Conclusion

As the analysis above demonstrates, it is conclusive that there have been some notable developments in the implementation of emergency laws in Indonesia. Initially, emergency law was only used to respond to state of emergencies attributed to rebellion, war, and social conflict, with various levels of states of emergency, including civil emergency, military emergency, and war emergency. However, currently, the status of a public health emergency is categorized as an emergency that must be responded to by a commensurate emergency legal regime. The emergency law scheme in Indonesia has various forms, since each form has its own character and differs from the arrangement and the resulting power. On the other hand, the diverse arrangements of state of emergency have resulted in an ambiguous emergency law in Indonesia, particularly as seen from the regulation of emergency settings due to natural disasters. This has implications for the position of Government Regulation in Lieu of Law which is used as a legal instrument to deal with the state of emergency. Government Regulation in Lieu of Law which is stipulated based on the state of emergency has had its own implications on the position of Government Regulation in Lieu of Law. In this sense, Government Regulation in Lieu of Law is positioned as an emergency regulation, and thus the issuance of Government Regulation in Lieu of Law must comply with the principles of emergency regulations. Government Regulations in Lieu of Laws issued in the state of its valid term in order to provide legal certainty over all provisions regulated in Government Regulations in Lieu of Laws. This can take the form of providing a certain clause in a Government Regulation in Lieu of Law by stating that this Government Regulation in Lieu of Law is only valid during a state of emergency.

References

Law

- 1945 Constitution.
1949 Constitution of the Indonesian Federation.
Provisional Constitution 1950.
1945 Constitution of the Republic of Indonesia.
Law No. 23 of 1959 on the Determination of the State of Emergency.
Law No. 24 of 2007 on Disaster Management.
Law No. 6 of 2018 on Health Quarantine.
Government Regulation in Lieu of Law No. 1 of 1949 concerning Military Administration in the Special Region of Yogyakarta, including the Kasunanan and Mangkunegara Enclaves.
Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or In Facing Threats That Endanger the National Economy and/or Financial System Stability.
Presidential Decree No. 107 of 1999 concerning the State of Military Emergency in the Province of East Timor.
Presidential Decree No. 88 of 2000 concerning the State of Civil Emergency in Maluku Province and North Maluku Province.
Presidential Decree No. 28 of 2003 concerning the Declaration of a State of Emergency with Military Emergency Levels in the Province of Nanggroe Aceh Darussalam.
Presidential Decree Number 11 of 2020 concerning the Determination of the Corona Virus Disease 2019 (Covid-19) Public Health Emergency.

Law of Other Countries

- 1988 Brazilian Constitution.
1996 Constitution of the Republic of South Africa.

Court Decisions

- Constitutional Court Decision No. 003/PUU-III/2005.
Constitutional Court Decision No. 138/PUU-VII/2009.
Constitutional Court Decision No. 37/PUU-XVIII/2020.

Books

- Agamben, Giorgio, *State of Exception*, Translated by Kevin Attell, The University of Chicago Press, 2005.
Appadorai, A., *The Substance of Politics*, Oxford University Press, 2005.
Asshiddiqie, Jimly, *Hukum Tata Negara Darurat*, PT RajaGrafindo Persada, 2007.
Astawa, Pantja, dan Na'a, Suprin, *Dinamika Hukum dan Ilmu Perundang-undangan di Indonesia*, Edisi Pertama, Alumni, 2008.
Dulleman, A.A.L.F. van, *Staatsnoodrecht en Democratie*, dikutip dari Herman Sihombing, *Hukum Tata Negara Darurat di Indonesia*, Djambatan, 1996.
Edelson, Chris, *Emergency Presidential Power: From the Drafting of Constitution to the War on Terror*, University of Wisconsin Press, 2013.
FoEkh, Daniel Yusmic P., *Perppu dalam Teori dan Praktik*, Rajawali Pers, 2021.
Gultom, Binsar, *Pelanggaran HAM dalam Hukum Keadaan Darurat di Indonesia Mengapa Pengadilan HAM Ad Hoc Indonesia Kurang Efektif?* PT Gramedia Pustaka Utama 2010.

- Huda, Ni'matul, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi* (FH UII Press 2011).
- Manan, Bagir, *DPR, DPD dan MPR dalam UUD 1945 Baru*. FH UII Press 2003. 42-43.
- Schmitt, Carl, *Political Theology: Four Chapters on the Concept of Sovereignty*, Translated by George Schwab, Foreword by Tracy Strong, University of Chicago Press, 2005.

Journals

- Adhari, Agus, 'Ambiguitas Pengaturan Keadaan Bahaya dalam Sistem Ketatanegaraan Indonesia' (2019) 11 (1) *Dialogia Iuridica: Jurnal Hukum Bisnis dan Investasi*.
- Arsil, Fitra, and Ayuni, Qurrata, 'Model Pengaturan Kedaruratan dan Pilihan Kedaruratan Indonesia dalam Menghadapi Pandemi Covid-19' (2020) 50 (2) *Jurnal Hukum & Pembangunan*.
- Feldman, William, 'Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege' (2005) 38 (3) *Cornell International Law Journal*.
- Ferejohn, John, & Pasquino, Pasquale, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 (2) *International Journal of Constitutional Law*.
- Huda N, Heriyanto DSN and Wardhana AFG, "The Urgency of the Constitutional Preview of Law on the Ratification of International Treaty by the Constitutional Court in Indonesia" (2021) 7 *Heliyon*.
- Khakee, Anna, 'Securing Democracy? A Comparative Analysis of Emergency Powers in Europe' (2009) Policy Paper (30) Geneva Centre for the Democratic Control of Armed Forces (DCAF).
- Kuswandi, 'Pengaruh Perang Kemerdekaan II Terhadap Pengakuan Kedaulatan RI Tanggal 27 Desember 1949' (2015) 3 (2) *Jurnal Artefak*.
- Manan, Bagir, and Harijanti, Susi Dwi, 'Peraturan Pemerintah Pengganti Undang-Undang dalam Perspektif Ajaran Konstitusi dan Prinsip Negara Hukum' (2017) 4 (2) *Padjajaran Jurnal Ilmu Hukum*.
- McGiverin, Brian, 'In the Face of Danger: A Comparative Analysis of the Use of Emergency Powers in The United States and The United Kingdom in the 20th Century' (2008) 18 (1) *Indiana International and Comparative Law Review*.
- Prasetyo, Rizki Bagus, 'Pandemi Covid-19: Perspektif Hukum Tata Negara Darurat', (2021) 15 (2) *Jurnal Ilmiah Kebijakan Hukum*.
- Scheppele, Kim Lane, 'Law in A Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 (5) *Journal of Constitutional Law*.

Papers

- Asshiddiqie, Jimly, 'Diktator Konstitusional dan Hukum Pengecualian' (2020) *Makalah Kuliah Umum Perkembangan Hukum Tata Negara Darurat di Indonesia Universitas Indonesia*.
- Margana, Sri, et.al., 'Naskah Akademik Serangan Umum 1 Maret 1949 sebagai Hari Nasional Penegakan Kedaulatan Negara' (2022) Dinas Kebudayaan Daerah Istimewa Yogyakarta.

Online Sources

- Asshiddiqie, Jimly, 'Dua Tipe Perpu, Pembentukan dan Pencabutannya' <https://www.academia.edu/42854447/Tipe_PERPU_Bentuk_and_Cabut> retrieved on April, 10, 2022.