

JURIDICAL ANALYSIS OF THE APPLICATION OF EMERGENCY CONSTITUTIONAL LAW DURING *THE COVID-19 PANDEMIC*

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Abstrak: *The emergency situation raises concerns about potential abuses of power or human rights violations during the implementation of emergency measures. It is important to consider that emergency measures must be proportionate, non-discriminatory, and always take into account and protect the rights of citizens and the time frame for their resolution. This research is a normative legal research (normative juridical by examining literature materials with a secondary database to review the Covid-19 problem from the perspective of emergency constitutional law using a statutory approach (statue approach) by examining laws related to the issues being studied, conceptual approach, and comparative approach. This research produced findings, namely that there has been no regulation related to the term and supervision in Law 6/2018 and there have been no regulations related to the supervision of legislative institutions outside the trial forum and the period that regulates the enactment of the Perppu. Then, some emergency laws in Indonesia have not referred to Article 12 of the 1945 Constitution of the Republic of Indonesia, thus causing inconsistencies in the scope of the Emergency HTN in Indonesia.*

Keywords : *Law No. 6 of 2018, concerning Health Quarantine, Covid-19, State Emergency.*

INTRODUCTION

The implementation of emergency constitutional law in Indonesia during the COVID-19 pandemic is a complex and sensitive topic. I will provide a general analysis based on the information available through January 2022, but keep in mind that situations and policies may change over time. At the constitutional level, Indonesia has a legal basis to deal with emergencies, including in Articles 22E to 22G and Article 28I Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia). These articles give the government the authority to take measures in emergency situations or extraordinary circumstances that require prompt and extraordinary action. During the COVID-19 pandemic, the Indonesian government has taken a variety of emergency measures including social restrictions, public health policies, and economic measures to respond to this health crisis. Some of these policies are carried out in order to protect public health and safety, in line with legal and constitutional

principles.

As in many emergency situations around the world, there are also concerns about potential abuses of power or human rights abuses during the implementation of emergency measures. It is important to consider that emergency measures must be proportionate, non-discriminatory, and always consider and protect the rights of citizens. It is also important to note that transparency and accountability in decision-making and policy implementation during an emergency are essential. Oversight by independent agencies and the participation of civil society in the decision-making process can help ensure that policies taken during emergencies meet legal and democratic standards.

Within the scope of Constitutional Law, it is known as the Emergency Constitutional Law (hereinafter referred to as Emergency HTN). According to Herman Sihombing, the Emergency HTN is an authority owned by a country that is special, extraordinary, and carried out in a short time, where the authority is aimed at eliminating something that endangers the life that has been going on.¹ Then, Jimly Asshidiqie defines Emergency HTN as a threatening situation, where the situation is present suddenly and unpredictably will occur. Such a situation forces the state to take extraordinary *and* unusual measures when viewed from a positive legal perspective under normal circumstances.²

Indonesia itself is a country with a tropical climate and has a position between three continents. This results in Indonesia being a country that is vulnerable to natural disasters. In addition, Indonesia is a country that has heterogeneous characteristics, where its people adhere to different values from each other. These differences are contrasting and ultimately make Indonesia vulnerable to social and political conflicts. When viewed historically, Indonesia has experienced several events that can be classified as dangerous circumstances.³

If reviewed normatively, the emergency HTN is regulated in the State Law of the Republic of Indonesia of 1945 (hereinafter referred to as the NRI1945 Constitution hereinafter referred to as the Constitution), namely in Article 12 and Article 22 paragraph (1). Article 12 of the 1945 Constitution of the Republic of Indonesia states:

"The President declared a dangerous situation. The conditions and consequences of dangerous

¹ Herman Sihombing, Emergency Constitutional Law in Indonesia, Djambatan, Jakarta, 1966, p. 1.

² Ibid., p. 1.

³ Agus Adhaari, Ambiguity of the Arrangement of the Bahaayaa State in the Indonesian Constitutional System, Dialogia Iuridica, Vo. 11 No. 1, 2019, p. 44.

conditions are stipulated by Law⁵".

Then, in Article 22 of the 1945 NRI Constitution it is stated:

"In the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of the Law⁶".

In addition to Article 12 and Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, dangerous circumstances are also regulated at the level of the Law, including:⁴

1. Law Number 24 of 2007 concerning Disaster Management (hereinafter referred to as Law 24/2007), which contains the phrase "disaster emergency";
2. Law Number 7 of 2012 concerning Social Conflict (hereinafter referred to as Law 7/2012), which contains the phrase "state of social conflict";
3. Law Number 9 of 2016 concerning the Prevention of Financial System Crises (hereinafter referred to as Law 9/2016), which contains the phrase "financial system crisis"; and
4. Law Number 6 of 2018 concerning Health Quarantine (hereinafter referred to as Law 6/2018), which contains the phrase "public health emergency"

If you look at the response in Indonesia, then only in a span of a month after the Covid-19 case in Indonesia was first reported to the public, the President then issued Presidential Decree Number 11 of 2020 concerning the Determination of the Public Health Emergency for Corona Virus Disease (hereinafter referred to as Presidential Decree 11/2020) and stipulated a 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 the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability (hereinafter referred to as Perppu 1/2020).⁵

In the end, in issuing Presidential Decree 11/2020, the President referred to Law 6/2018 and in establishing Perppu 1/2020, the President used Article 22 as the basis of his authority. However, the issuance of Presidential Decree 11/2020 and the stipulation of Perppu 1/2020 still raise constitutional law

⁴ Rizki Bagus Prasetyo, *Covid-19 Pandemic: Emergency Constitutional Law Perspective and Human Rights Protection*, Scientific Journal of Legal Policy Vol. 15 No. 2, 2021, p. 334.

⁵ Shofia Trianing Indarti, *Immigration Policy During Covid-19: Human Rights Perspective*, Journal of Human Rights Vol. 12, 2021, p. 2.

problems, which are still not regulated related to the period of the declaration of a "public health emergency" in Law 6/2018 and the limited role of the legislature in carrying out supervision related to the declaration of a "public health emergency", as contained in Law 6/2018 and its implementation and related to "urgent matters force", as contained in Article 22 of the 1945 Constitution of the Republic of Indonesia and its implementation.

METODOLOGI

This research is included in the normative legal research category, which focuses on literature review by utilizing secondary databases to examine the issue of Covid-19 through the perspective of constitutional law in emergency conditions. The approach used includes a statute approach by examining relevant regulations, a ⁶conceptual approach, and a comparative approach. The data collected was analyzed by descriptive-qualitative methods, while the analysis instrument used was the perspective of emergency constitutional law. Through this perspective, the researcher seeks to unravel the legal problems related to the regulation of Covid-19 in relation to the conditions for the occurrence of a compelling emergency. The analysis was used to examine the concept of emergency as well as to review the issuance of Presidential Decree Number 11 of 2020 concerning the Determination of a Corona Virus Disease Public Health Emergency.

The type of data used is secondary data, which consists of primary legal materials and secondary legal materials. The primary legal material is authoritative, covering all legal products related to the concept of compelling urgency, emergency, and the president's authority in determining presidential decisions in emergency situations in Indonesia. Legal materials that are binding include Pancasila as a fundamental norm and the 1945 Constitution of the Republic of Indonesia. Meanwhile, secondary legal materials function to provide explanations of primary legal materials, which are obtained through literature, study results, and recordings from various sources, such as books, legal dictionaries, journals, and academic comments on court decisions.⁷

RESULTS AND DISCUSSION

Analysis of the Application of Emergency Constitutional Law During the Pandemic Covid-19 in Indonesia

The Indonesian government has a constitutional basis that allows for emergency action to be taken in exceptional circumstances. Articles 22E to 22G and Article 28I Paragraph (2) of the 1945 Constitution of the Republic of Indonesia provide a legal basis for the government to take extraordinary actions such as in the COVID-19 pandemic. The government has taken a series of measures to prevent and control the spread of COVID-19. These include social restrictions, mask use, regional lockdowns, and mass vaccination programs. These measures are taken with the aim of protecting public health. One of the main challenges during the pandemic has been striking a balance between protecting public health and maintaining economic stability. Policies such as work from home, restrictions on business operations, and economic assistance are important aspects in dealing with this crisis.

There are concerns about potential human rights violations during the implementation of the Emergency Constitutional Law. For example, restrictions on freedom of movement may affect individual rights. Thus, it is important for the government to ensure that the actions taken are proportionate and always consider and protect the rights of citizens. During emergency situations, transparency and accountability in decision-making mechanisms and policy implementation are essential. The government should provide

⁶ Peter Mahmud Marzuki, *Legal Research*, (Jakarta: Kencana, 2010), p. 93.

⁷ Ibid., p. 141.

clear and up-to-date information to the public and involve independent institutions and civil society in oversight. Effective communication to the public about the actions taken, the reasons behind the policy, and ways to protect oneself is essential. Education and public awareness are key to success in dealing with the pandemic. And it is also important to continue to evaluate the policies that applied and learned from the experience of this pandemic to improve preparedness in the future.

Before examining the implementation of Emergency HTN during the Covid-19 pandemic in Indonesia, it is necessary to first describe the difference between Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia. When viewed from legal terms, it can be seen that Article 12 of the 1945 Constitution of the Republic of Indonesia uses the term "state of danger" and Article 22 of the 1945 Constitution of the Republic of Indonesia uses the term "compelling emergency". When referring to the opinion of Jimly Asshidiqie, then all "conditions of danger" can be classified as "compelling exigencies", while "compelling exigencies" cannot necessarily be classified as "conditions of danger".⁸

Regarding the method of legal interpretation, it cannot be separated from the existence of grammatical interpretation, where a norm is interpreted by referring to the language used in everyday life. The essence and purpose of the interpretation of law itself is to know the meaning of a norm.⁹ The state of danger or emergency that is the main norm in the discourse of emergency constitutional law must then be able to be defined appropriately. This is because through an emergency the ruler, namely the Central Government, has the authority to take all actions, including limiting the rights of its citizens.¹⁰

The difference between Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia is in the statement issued by the president. In Article 12 of the 1945 Constitution of the Republic of Indonesia, the president is required to declare a state of danger as required by law. Meanwhile, Article 22 of the 1945 Constitution of the Republic of Indonesia does not require the president to declare a compelling emergency first before enacting regulations.

Government in Lieu of Law (Perppu).¹¹ Regarding the statement of "state of danger", the only reference from Article 12 of the 1945 Constitution of the Republic of Indonesia that is valid until now is Law Number 23 PRP of 1959 concerning State of Danger (hereinafter referred to as Law 23/PRP/1959).¹² In Law 23/PRP/1959, it is explained that the president can declare a state of danger at three levels, including: (1) civil emergency, (2) military emergency, and (3) state of war.¹³

⁸ Hananto Widodo and Fradhana Putra Diantara, *The Problematic Legal Certainty of Public Health Emergencies During the COVID-19 Pandemic*, Journal of Legal Voices Vol. 3 No. 1, 2021, p. 205.

⁹ Isharyanto and Aryoko Abdurrachman, *Legal Interpretation of Constitutional Judges (Study on the Testing of Law No. 7 of 2004 concerning Water Resources)*, Moeka Publishing Page, Jakarta, 2016, p. 58.

¹⁰ Elfina Yuliati Putri, *Definition of Emergency Constitutional Law*, Legal Journal, Ekaksiti University, 2020, p. 2.

¹¹ Article 12 of the Constitution of the Republic of Indonesia in 1945. See also Article 22 of the 1945 Constitution of the Republic of Indonesia.

¹² Syahdi Firman, *Application of Emergency Constitutional Law Based on Law Number 23 PRP of 1959 concerning Dangerous Circumstances*, Dissertation (S3) Not Published, Faculty of Law, University of Riau, 2017, p. 288.

¹³ Binsar Gultom, *Human Rights Violations in Emergency Law in Indonesia*, Gramedia Pustaka Utama, 2013, p. 47.

In addition, Law 23/PRP/1959 describes the conditions for enactment, supervision, and termination of a state of danger, while in Article 22 of the 1945 Constitution of the Republic of Indonesia there is no reference in the form of a law, such as Article 12 of the 1945 Constitution of the Republic of Indonesia with Law 23/PRP/1959 so that Article 22 of the 1945 Constitution of the Republic of Indonesia gives full authority to the president to make a subjective assessment related to the matter of urgency that is compelling.¹⁴ Then related to the criteria for a situation can be said to be a matter of compelling urgency, then referring to the Constitutional Court Decision Number 138/PUU-VII/2009 there are three parameters of a situation that can be categorized as a compelling emergency:

- "1. There is a circumstance, namely an urgent need to resolve legal issues quickly based on the Law;*
- 2. The required law does not exist yet so that there is a legal vacuum, or there is a law but it is inadequate;*
- 3. The legal vacuum cannot be overcome by making a law in an ordinary procedure because it will take a long time while the urgent situation needs certainty to be resolved."*¹⁵

Then related to the validity period of the Perppu, the Perppu is valid for a maximum of 1 (one year). If a Perppu within a period of 1 (one) year of the trial period of the House of Representatives (DPR) does not get approval from the DPR, then the Perppu must be revoked. Based on this, it can be seen that the legislative institution in this case can only intervene during the trial while when the President establishes a Perppu, the legislative institution does not have the authority to carry out supervision or intervention. Intervention can only be carried out by the judiciary, through the Constitutional Court through the testing of the Perppu.¹⁶

If it is associated with Presidential Decree 11/2020 which refers to Law 6/2018, it is impossible to find the period of time from the determination of the public health emergency status carried out by the president and the determination of large-scale quarantine and social restrictions by the minister of health. In addition, it is not regulated related to supervision from the legislative institution after these determinations are issued by the president and the minister of health.

Then, related to Perppu 1/2020 which refers to Article 22 of the 1945 Constitution of the Republic of Indonesia, it is not regulated related to the period of validity of the Perppu and the supervision that can be carried out by the legislative institution outside the trial period. Then if we look at normatively several laws that have emergency characteristics, such as Law 24/2007, Law 7/2012, Law 9/2016, and Law 6/2018 do not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia, this then has

¹⁴ Didik Suhariyanto, *The Problem of Determining the State Condition of the State in Emergency in the Legal System in Indonesia*, USM Law Review Journal Vol. 4 No. 1, 2021, p. 203.

¹⁵ Constitutional Court Decision No. 138/PUNDANG-LAW-VII/2009, p. 19.

¹⁶ ASH, *Constitutional Court Authorized to Test Perppu*, <https://www.hukumonline.com/berita/a/mk-berwenang-uji-perppu-lt526a75edd6771/?page=3>, accessed June 11, 2023. See also Sandro Gatra, *The Constitutional Court's Authority in Perpu Testing*, <https://nasional.kompas.com/read/2023/01/17/06130151/kewenangan-mk-dalam-Perpu-Testing>, accessed June 11, 2023.

implications for the creation of inconsistencies in the framework of the Emergency HTN in Indonesia.

Analysis of the Ideal Arrangement in the Application of Emergency Constitutional Law in the Future

The application of emergency constitutional law is a serious and complex matter. This relates to the extraordinary situation in which the government is allowed to take extra measures in order to protect the security and stability of the country. The extraordinary powers granted to the government during times of emergency, it is important to ensure that there are clear arrangements and strong oversight mechanisms in place to prevent abuse of power. The announcement of the emergency period must be made transparently and accompanied by a clear explanation of the reasons and objectives. In addition, the emergency period must have a clear time limit to prevent abuse of power. Therefore, it is important to ensure that there is an independent oversight mechanism that can monitor government actions during emergencies. This could involve the ombudsman, the judiciary, or other independent bodies.

As previously explained, in the implementation of the Emergency HTN through Presidential Decree 11/2020 and Perppu 1/2020, the author still finds several shortcomings, such as the lack of legislative supervision in Law 6/2018 and the implementation of Article 22 of the NRI1945 Constitution and its lack of regulation regarding the period of determination of a public health emergency in Law 6/2018. In Presidential Decree 11/2020, it can be known that the determination of a public health emergency is carried out by referring to Law 6/2018. If you look at the provisions related to public health emergencies regulated in Article 10 – Article 15 of Law 6/2018, there is no period of time and supervision carried out by legislative institutions.¹⁷

If you refer to the Dissertation from Qurrata Ayuni entitled "The Concept of Emergency Constitutional Law According to the Constitution of the Unitary State of the Republic of Indonesia in 1945: A Study on the Regulation and Application of Emergency Constitutional Law in Indonesia in the Period 1945 – 2022, it can be known that the arrangements related to the period and supervision are only contained in Law 7/2012. Then, by referring to the Dissertation from Quratta Ayuni, the author found that there are differences between Law 7/2012 and Law 6/2018 reviewed through several variables, such as: time period, supervision, activation, and reference.

Table 1 Comparison of LAW 7/2012 and LAW 6/2018

Variable	LAW 7/2012	LAW 6/2018
Period	90 days can be extended by 30 days (Article 22 jo. Article 29 LAW 7/2012)	Unregulated
Supervision	DPRD I, DPRD II, and House of Representatives (Article 16 – Article 21 of LAW 7/2012)	Unregulated

¹⁷ Fikri Hadi, *The Failure of Regulations for Handling Covid-19 in Indonesia*, Constitutional Journal Vol. 19 No. 1, 2022, p. 35.

Activation	Referring to the scale of the conflict; the national conflict of the president as <i>the leading sector</i> , while the regional conflict of the governor/regent/mayor as the <i>leading sector</i>	Determination of a health emergency status by the president and the establishment of quarantine and large-scale social restrictions by the minister of foreign affairs health
Reference	Does not refer to Article 12 of the 1945 LAW	Does not refer to Article 12 of the 1945 LAW

Source: Qurrata Ayuni, *The Concept of Emergency Constitutional Law According to the Constitution of the Unitary State of the Republic of Indonesia in 1945: A Study of the Regulation and Application of Emergency Constitutional Law in Indonesia in the Period 1945 – 2022*, 2022.¹⁸

As is known in the application of Emergency HTN, it cannot be separated from theory and principle. In this study, the author wants to examine LAW 6/2018 as one of the laws that contains the conception of emergency reviewed from the theory of *checks and balances* and the principle of *limitation of time*. The theory of checks and balances was born from the concept of separation of powers initiated by Montesquieu, in which power is divided into executive, legislative, and judicial powers. This concept is still applied today and still exists in contemporary constitutionalism.¹⁹ The three branches of power, although separate, are essentially a barrier between one power and the other so that in ideal conditions there is no one branch of power that has a dominant position.

If it is associated with Law 6/2018 as a law that contains the conception of an emergency, there has not been an application of the theory of *checks and balances* as there is an article of Law 7/2012, so that the implementation of a public health emergency by the president in Law 6/2018 has the potential to facilitate the president as a representative of the executive institution to have a dominant position in the context of power in times of emergency.

In addition, the principle of *limitation of time* is a principle that cannot be separated from the implementation of emergency HTN. This principle was born so that an existing emergency is not used by the branch of power to abuse power. The characteristic of the accommodation of the principle of *limitation of time*, which is explicitly regulated is related to the period of time.²⁰

When associated with Law 6/2018 as a law that contains the conception of an emergency, the absence of regulations related to the period of time making Law 6/2018 can be said to be ideal as a law used in times of emergency. Therefore, provisions related to the term and supervision in Law 7/2012 should also be included in Law 6/2018.

¹⁸ Qurrata Ayuni, *The Concept of Emergency Constitutional Law According to the 1945 Constitution of the Unitary State of the Republic of Indonesia: A Study of the Regulation and Application of Emergency Constitutional Law in Indonesia in the Period 1945 – 2022*, Dissertation Summary, Faculty of Law, Postgraduate Program of Law, University of Indonesia, Depok, 2022, pp. 39 – 40.

¹⁹ Jimly Asshiddiqie, *Introduction to Constitutional Law* Cet.6, RajaGrafindo, Jakarta, 2014, p. 17.

²⁰ Joan M. Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, Philadelphia, 1994, p. 288.

In addition, if the theory of *checks and balances* and the principle of *limitation of time* are applied to Article 22 of the 1945 Constitution of the Republic of Indonesia, then the author formulates the following provisions:

1. That the House of Representatives has the authority to participate in supervising since a Perppu is determined by the President outside the trial forum.
2. That it is necessary to regulate the period of time the Perppu takes effect in the event that a Perppu is not discussed by the House of Representatives in the trial forum.

The existence of supervision carried out by the House of Representatives outside the trial forum makes supervision that was previously passive that must wait for the testing of the law by the applicant to the Constitutional Court to be active. In addition, regulations related to the validity period of a Perppu provide legal certainty and avoid disputes of authority between the Constitutional Court and the House of Representatives to conduct an assessment of a Perppu. In addition, in order for there to be consistency in terms of emergency regulation in Indonesia within the scope of the Indonesian Emergency HTN, all laws that contain emergency or danger clauses must refer to Article 12 of the 1945 Constitution of the Republic of Indonesia.

CONCLUSIONS

Implementation of Emergency HTN during a pandemic *Covid-19* was carried out by issuing Presidential Decree 11/2020 which refers to Law 6/2018 and Perppu 1/2020 which refers to Article 22 of the 1945 Constitution of the Republic of Indonesia. Then, it was found that there has been no regulation related to the term and supervision in Law 6/2018 and there have been no regulations related to the supervision of legislative institutions outside the trial forum and the period that regulates the enactment of the Perppu. Then, some emergency laws in Indonesia have not referred to Article 12 of the 1945 Constitution of the Republic of Indonesia, thus causing inconsistencies in the scope of the Emergency HTN in Indonesia.

Law 6/2018 and Article 22 of the 1945 Constitution of the Republic of Indonesia are not in accordance with the theory *check and balances* and the basics *limitation of time*. Therefore, the provisions related to the term and supervision in Law 7/2012 must be applied to Law 6/2018. Then, the author also formulated related to the application of theory *check and balances* and the basics *limitation of time* Article 22 of the 1945 Constitution of the Republic of Indonesia includes: That the House of Representatives has the authority to participate in conducting supervision since a Perppu is determined by the President outside the trial forum. That it is necessary to regulate the period of time the Perppu takes effect in the event that a Perppu is not discussed by the House of Representatives in the trial forum. In addition, the Emergency Law must refer to Article 12 of the 1945 Constitution of the Republic of Indonesia so that there are inconsistencies in the scope of the Emergency HTN in Indonesia.

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