

# Authority to Stipulate Government Regulations in lieu of Laws by the President in the Indonesian Constitutional Context

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## Abstract

In the Indonesian constitutional system, the President is given the authority to issue regulations in extraordinary circumstances called Government Regulations in Lieu of Laws (Perpu). However, the limits of this authority are quite abstract so that the phrase "a matter of compelling urgency" in the Indonesian constitution has become moot. This paper aims to analyze the basic meaning of the phrase "a matter of compelling urgency" in the Indonesian Constitution, and whether the Perpu is a regulation issued by the President as Head of State or Head of Government. The method used is normative-juridical research which is analyzed qualitatively. The results of this study indicate that the phrase "matters of compelling urgency" in the Constitutional Court Decision does not specifically explain the meaning of coercive circumstances. In addition, the establishment of a Perpu in the Indonesian constitutional system mixes the authority of the President as head of state and head of government.

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## I. Introduction

On March 31, 2020, the President of the Republic of Indonesia issued Presidential Decree Number 12 of 2020 concerning the Designation of Non-Natural Disasters with the Spread of Corona Virus Disease 2019 (COVID-19) as a National Disaster. After issuing this decision, the government then issued Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policies 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.

Government Regulation in Lieu of Law Number 1 of 2020 is considered a controversial regulation because, first, it concerns provisions for state losses. Second, the Financial System Stability Committee (KSSK) cannot be prosecuted criminally or civilly. Third, the decision is not the object of the State Administrative Court. First State Losses regarding "state losses", article 27 paragraph (1) states that the costs incurred by the Government and/or KSSK member institutions in the framework of implementing state revenue policies including policies in the field of taxation, state spending policies including policies in the area of regional finance, financing policies, financial system stability policies, and the national economic recovery program, are part of the economic costs to save the economy from the crisis and are not a loss to the state.<sup>[1]</sup>

Furthermore, the government also issued Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation, which was also considered controversial because it was considered contrary to the Ruling of the Constitutional Court of the Republic of Indonesia which ruled that the Job Creation Law was declared conditionally unconstitutional. This decision was because the process for establishing the Job Creation Law was not transparent and did not involve public participation, so it was deemed not according to a procedure or formally flawed. In terms of material content, there are several controversial matters, namely regarding labour holidays, minimum wages, labour outsourcing, as well as severance pay and Termination of Employment (PHK).<sup>[2]</sup>

Apart from these controversial matters, the Indonesian constitution gives the authority of the President to issue regulations in urgent situations. In Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, it is stated that "*In the event of a pressing emergency, the President has the right to issue government regulations in lieu of laws*" (hereinafter Government Regulation in Lieu of Law is called Perpu). The meaning

of the phrase "forced urgency" in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, explained in the Constitutional Court Decision Number: 138/PUU-VII/2009, includes:

1. There is a situation, namely an urgent need to resolve legal issues quickly based on the law;
  2. The required law does not yet exist so there is a legal vacuum, or there is a law but it is not sufficient;
- And
3. This legal vacuum cannot be overcome by making laws in the usual way because it will take quite a long time, while the urgent situation requires certainty to be resolved.

The decision of Constitutional Court Number: 138/PUU-VII/2009 is often used as a reference in the preparation of Perpu. In other words, the Court emphasized that the formation of a Perpu is the subjective authority of the President. This means that the phrase "forced urgency" as stated in Article 22 paragraph (1) and the Constitutional Court Decision Number 138/PUU-VII/2009, "critical situation" is purely based on the President's view without any involvement from the legislature. In other words, the Court in its interpretation emphasized that the Perpu is the absolute authority of the executive, in this case, the authority of the President.

Although the Constitutional Court Ruling has guided in forming a Perpu, the Constitutional Court ruling does not explicitly explain the meaning and scope of the phrase "compelling urgency" as contained in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. In addition, Indonesia's government system adheres to a presidential system of government which gives the position of the President as the head of state and head of government. This has an impact on the legal status of the Perpu, namely whether the Perpu is a regulation of the Head of State or a regulation of the Head of Government. If a Perpu is a Regulation of the Head of State, then the legislature is not strong enough or cannot veto a Perpu because the powers of the Head of State are relatively greater. Meanwhile, if the Perpu is a regulation from the Head of Government, then the formation of a Perpu should be objective and not a subjective power of the President.

This research intends to examine 2 main things, namely (i) What is the basic meaning of the phrase "a matter of compelling urgency" in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which gives subjective authority to the President in forming a Perpu?; and (ii) Is the Perpu a regulation issued by the President as Head of State or Head of Government?

## **II. Research Methods**

The research used in this study is normative-juridical legal research. This research is research that refers to the legal norms of all laws and regulations that are relevant to the research title. This research uses a qualitative nature, and the nature of the research used in this writing is descriptive-analytical. The approach used in this study is conceptual (*conceptual approach*), in which several loci approaches are used, namely the constitutional approach (*constitutional approach*), and statutory approach (*statute approach*).

## **III. Results And Discussion**

### **A. Concerning the Indonesian State Administration System**

When the MPR began discussing changes to the 1945 Constitution in 1999, one of the basic agreements about the direction of change was to reinforce the presidential system. Strengthening in this regard also includes improving the system of government administration so that it truly meets the basic principles of a presidential system.<sup>[3]</sup> In a presidential system, the holder of government power is the president who is separate from the parliamentary institution. This separation is strengthened by the same political legitimacy between the president and parliament, that is, both are elected by the people. Thus in the presidency, there is also an element as a representative of the people, especially to run the government. In running the government, the president is assisted by the vice president and ministers who are fully appointed, dismissed, and are responsible to the president because in principle all these positions are in one organization, namely the presidential institution. As a governing body that is separate from the parliamentary institution, all positions in the presidential institution cannot be concurrently held by members of parliament.

Therefore, in principle, the power to administer government is entirely in the hands of the president. The role of the DPR is in the area of forming laws, which is carried out by the president, as the basis and guidelines for administering the government as well as oversight aspects. All matters related to the administration of government, starting from determining development programs, budget allocations, and implementing government policies, to appointing officials within the government environment are the authority of the president.

However, between the parliament and the president or in a presidential system better known as the legislature and the executive, this does not mean that they have no relationship at all. On the contrary, the separation of powers between the two is made to create a mutual monitoring and balancing mechanism (*checks and balances*), without interfering with the position of the president whose term of office has been determined

(fixed term), except for certain legal reasons which qualify as grounds *impeachment* as stipulated in the constitution.

To reinforce governance based on a presidential system, various efforts are needed from both legal and political aspects, by the problems faced in government practices. Legal remedies are at the level of statutory regulations that regulate the position, authority and relationship between the executive and the legislature. By the principle of separation of powers and the principle of mutual supervision and balance, it is necessary to determine the limits of authority and the relationship between the two by the spirit of the constitution.

Things that are government territory are returned and confirmed as the government's authority under the president, both in terms of planning, budgeting, determining policies, and appointing positions within the government environment. Likewise, the supervisory function possessed by the DPR must still be able to guarantee the creation of checks and balances, without interfering with the authority possessed by the president, especially in running the government.

Entering this Reformation period, the Indonesian people were determined to create a democratic government system. For this reason, it is necessary to form a constitutional government or a government based on the constitution. The constitutional government is characterized by the fact that the country's constitution contains:

- a. There are restrictions on government or executive power,
- b. Guarantee of human rights and the rights of citizens.<sup>[4]</sup>

Based on this, the Reform that must be carried out is to make changes or amendments to the 1945 Constitution. By amending the 1945 Constitution to become a constitutional constitution, it is hoped that a better government system will be formed than before. Amendments to the 1945 Constitution have been made by the MPR four times, namely in 1999, 2000, 2001 and 2002. Based on the 1945 Constitution which has been amended it is the guideline for Indonesia's current government system.<sup>[5]</sup>

The main points of the Indonesian government system after the amendments to the 1945 Constitution of the Republic of Indonesia are as follows:

- a. The form of a unitary state with the principle of broad regional autonomy. The territory is divided into provinces.
- b. The form of government is a republic, while the system of government is presidential.
- c. The President is the head of state and a head of government. The president and vice president are directly elected by the people in one package.
- d. The cabinet or ministers are appointed by the president and are responsible to the president.
- e. It is. Parliament consists of two parts (bicameral), the People's Representative Council (DPR) and the Regional Representative Council (DPD). The members of the council are members of the MPR. The DPR has legislative power and the power to oversee the running of government.
- f. Judicial power is exercised by the Supreme Court and the judiciary under it.<sup>[6]</sup>

## **B. Government Regulation in Lieu of Law (Perpu)**

The legal basis for establishing a Government Regulation in Lieu of Law (hereinafter referred to as Perpu),<sup>[7]</sup> refers to Article 22 of the 1945 Constitution of the Republic of Indonesia. The provisions of Article 22 of the 1945 Constitution of the Republic of Indonesia are one of the provisions that have also not changed. In the Explanation of Article 22 of the 1945 Constitution before the amendment, it was stated that:

*"This article is about the President's noodverordeningsrecht. This type of regulation needs to be put in place so that national security can be guaranteed by the government in critical situations, which forces the government to act quickly and accurately. Despite this, the government will not escape the supervision of the House of Representatives. Therefore, the government regulation in this article, which has the same force as the law, must also be confirmed by the House of Representatives".*

Perpu is a regulation, although the type or form is government regulation, the content material is the law. Therefore, the Perpu is a regulation that is aligned with the law. If you pay attention to the description of the Explanation of Article 22 paragraph (1) of the 1945 Constitution before the amendment above, it is expressly stated that the Perpu is "emergency ordinance law" President, so it is very subjective. It should be understood that the phrase "forced urgency" must be distinguished from the phrase "a state of danger" as stated in Article 12 of the 1945 Constitution of the Republic of Indonesia. The phrase "compelling urgency" because of its position in emergency ordinance law", so it is very subjective. Temporary "dangerous situation" is an objective matter because the conditions for a state of danger must be determined by law.

The basic idea or conceptualization of the establishment of a Perpu is closely related to the policies of administering the state government, particularly the rule of law, in which several matters relating to the administration of the state are progressing too rapidly and the dynamics are developing so that they require arrangements as soon as possible. At the same time, rules that are born from the ordinary legislative process

generally take a relatively long time because the deliberations are carried out in stages, not to mention the problems of “*bargaining*” politics in parliament which tend to drag on. Therefore, a “fast” regulation is needed which has the same binding power as a law even though it is in the form of a government regulation.<sup>[8]</sup>

According to Bagir Manan, the difference between a Perpu and a law is determined based on the nature of the actions of the two regulations. The law is a product of state regulatory actions, while the Perpu is an act of regulatory products that are the only government in nature. However, according to Jimly Asshiddiqie, distinguishing between a Perpu and a law, although it makes it easier in terms of understanding, cannot be said to be completely precise. Furthermore, according to Jimly Asshiddiqie, the consideration is more precise and simple, namely the Perpu concerning government actions related to reasons “*internal state of emergency*” according to an urgent situation which (i) is urgent in terms of its substance; and (ii) critical in terms of time.<sup>[9]</sup>

As is well known, a Perpu is a type of statutory regulation that is at the same level as a law but was not formed with the joint approval of the DPR and the President. The debate regarding the Perpu by experts departs from the phrase “*compelling urgency*” in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Therefore, based on jurisprudence in the Constitutional Court Decision Number 138/PUU-VII/2009, it is determined that a Perpu is needed if:

1. There is a situation, namely an urgent need to resolve legal issues quickly based on the law;
  2. The required law does not yet exist so there is a legal vacuum, or there is a law but it is not sufficient;
- And

3. This legal vacuum cannot be overcome by making laws in the usual way because it will take quite a long time, while the urgent situation requires certainty to be resolved.

In Article 22 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia, it is stated that a Perpu must obtain the approval of the House of Representatives in the following session. If approval is not obtained, the government regulation must be revoked. The substance of the Perpu is based on Article 11 of Law Number 12 of 2011, which is the same as the substance of the law. The preparation of Perpu based on Article 52 of Law No. 12 of 2011, namely:

1. Government Regulations in Lieu of Laws must be submitted to the DPR in the following sessions.
2. Submission of Government Regulation in Lieu of Law as referred to in paragraph (1) is carried out in the form of filing a Draft Law concerning the stipulation of Government Regulation in lieu of law to become law.
3. The DPR only approves or does not approve Government Regulations in Lieu of Laws.
4. If a Government Regulation in Lieu of Law is approved by the DPR in a plenary session, the Government Regulation in Lieu of Law shall be stipulated to become an Act.
5. If a Government Regulation in Lieu of Law does not obtain the approval of the DPR in a plenary meeting, the Government Regulation in Lieu of Law must be revoked and declared no longer valid.
6. In the event that a Government Regulation in Lieu of Law must be revoked and declared no longer valid as referred to in paragraph (5), the DPR or the President shall submit a Draft Law concerning the Revocation of Government Regulation in lieu of Law.
7. The Draft Law on Revocation of Government Regulation in Lieu of Law as referred to in paragraph (6) regulates all legal consequences of the repeal of Government Regulation in lieu of a law.
8. The draft law on the revocation of government regulations in lieu of law as referred to in paragraph (7) is stipulated to become the law on the revocation of government regulations in lieu of law in the same plenary session as referred to in paragraph (5).

Based on the description above, although laws and Perpu are considered hierarchically equivalent, there are fundamental differences between laws and Perpu. There are at least 3 (three) main differences between the law and the Perpu, namely:

- a. Laws are formed in the ordinary legislation process, while Perpu is formed in “*extraordinary*” conditions.
- b. Laws are discussed and approved jointly by the DPR and the President, while Perpu is formed “*unilaterally*” based on the subjective and prerogative authority of the President.
- c. If the law is not mutually agreed upon, then the law may not be submitted at the session at that time. Meanwhile, if the Perpu is not approved by the DPR, then the Perpu must be revoked.
- d. Laws must be accompanied by academic texts, while Perpu is not.

Regarding Article 43 paragraph (3) of Law Number 12 of 2011 jo. Article 162 paragraph (2) letters b and c of Law Number 17 of 2014, it is necessary to elaborate so that they are not seen as ambiguous. It is stated that the Draft Law does not require an academic text, namely regarding:

- a. STATE BUDGET;
- b. The stipulation of government regulations in lieu of law becomes law; or
- c. Repeal of law or repeal of government regulation in lieu of a law.

### **C. President's Authority in Establishing Perpu**

Article 22 of the 1945 Constitution of the Republic of Indonesia explicitly provides attribution of authority to the President in forming a Government Regulation in lieu of a Law which is formed in urgent circumstances. Even though the formation of a Perpu is the authority of the President, it is not completely free from legislative control, in this case, the DPR. However, the control over the formation of this Perpu does not involve the DPD, which in theory and practice also serves as a representative institution.

In stipulating the Perpu, as explained previously that based on the Constitutional Court Decision Number: 138/PUU-VII/2009, the President's authority in matters of compelling urgency is an order of the 1945 Constitution of the Republic of Indonesia. Government" as referred to in Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia to implement the Law as it should, as well as "Government Regulations" in the form of a Perpu regulated in the Chapter on the DPR holding the power to form Laws. Thus, the material in the Perpu should be material according to the Constitution which is regulated by law, and not material that implements the law as referred to in Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

If traced, the Constitutional Court Decision has several elements as follows:

1. Granting authority to the President to make Perpu.
2. This authority can only be used in a state of urgency.
3. The Perpu that has been stipulated by the President must then obtain approval from the DPR at the next trial.
4. Government Regulations in the form of Perpu must be distinguished from Government Regulations in Article 5 paragraph (2) of the 1945 Constitution of the Republic of Indonesia.
5. There is a situation, namely an urgent need that must be resolved quickly by law.
6. The required law does not yet exist, so there is a legal vacuum, or there is a law but it is not sufficient.
7. This legal vacuum cannot be overcome by making laws using ordinary legislative procedures.

If you pay attention, *the reason for falling* in the Constitutional Court Decision is not substantially different from the Elucidation of Article 22 paragraph (1) in the 1945 Constitution before the amendment. In other words, the spirit of Article 22 paragraph (1) of the 1945 Constitution as stated in the Elucidation is reflected in the Court Decision. In the Constitutional Court's decision related to the legal position of the President in enacting a Perpu, the following is the mechanism of checks *and balances* reflected in the approval of the Perpu by the DPR, the Court also explained the meaning of the Perpu which is essentially identical to the Elucidation of the 1945 Constitution before the amendment.

There are 2 (two) arguments against this. *First*, the Court stated that the formation of a Perpu is the authority of the President even though it is under the control and supervision of the DPR. The control and supervision by the DPR on the formation of this Perpu may be because the type and hierarchy of the Perpu are the same as the law, so it requires control and supervision of the DPR. It would be different if Perpu were not aligned with laws, even though historically in the Indonesian constitution the formation of the Perpu was always controlled by the Parliament.

*Second*, in its decision, the Court emphasized that the provisions of the scope of "*matters of coercive urgency*" Absolutely absolutely determined by the President as a state power that is considered to hold the highest government authority. Thus, the "critical situation" is purely the President's view of problems present in the government cycle that must be responded to quickly, but based on regulations at the same level as laws. In this case, the President cannot solve the state's problem solely by relying on authority discretionary *power*.<sup>[10]</sup>

The determination of Perpu by the President as stated in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, apart from being a reflection of presidential legislation, this authority is also inseparable from the provisions of Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that "*The President of the Republic of Indonesia holds the power of government according to the Constitution.*" The phrase "governance" in this provision when viewed from the perspective of administrative law theory has meaning of the entire government of the country. Because the government system adopted by Indonesia is a presidential government system, Article 4 paragraph (1) of the 1945 Constitution of the Republic of Indonesia contains elements of the President as Head of State and Head of Government.

As the holder of state government power, in addition to the constitutional duties that have been granted by the 1945 Constitution of the Republic of Indonesia and the Law, the President is also given the authority to establish certain policies when the country is in extraordinary circumstances, so special and special actions are needed to resolve the issue. About that, the Constitution gives authority to the President to stipulate a state of danger and the types of regulations to be formed in dealing with this dangerous situation.

Even though the Perpu is the subjective right of the President, in enacting a Perpu the President's actions tend to show the President's actions in state administration. This was influenced by the Decision of the Constitutional Court whose substance was more directed towards the formal procedure for establishing a Perpu. In addition, in Article 22 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia,

the establishment of a Perpu is inseparable from the control function of the legislature, even though the existence of the legislature is relatively passive. This shows that if the Perpu is a regulation of the President as the head of state, then the approval of the legislative body by the Perpu stipulated by the President is not needed, because the authority as head of state essentially does not require approval from other state institutions due to the principle of prerogative rights.

#### **IV. Conclusion**

Based on the description above, it can be concluded that, First, the phrase "a matter of compelling urgency" in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia gives subjective authority to the President in establishing Perpu. Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia is supported by the Constitutional Court Decision Number: 138/PUU-VII/2009 which strengthens the President's position in determining a precarious situation. However, the Constitutional Court Decision does not specifically explain "critical conditions", which are considered urgent situations. Second, even though the President has 2 functions as head of state and head of government, the issuance of a Perpu tends to show that Perpu regulations are the actions of the President as head of government.

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