

Supervision Function Of Parliament Of The Republic Of Indonesia: A Legal Analysis Of Government Regulation In Lieu Of Law

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Abstract: The 1945 Constitution of the Republic of Indonesia as the highest law has been asserted that in urgency, the President shall be entitled to stipulate a government regulation in lieu of law. Then, the government regulation shall be approved by the House of People's Representative in the subsequent meeting. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. This research was conducted by using normative legal research, a theoretical studies on the legal aspects of a rule of law includes a process to make the rule of law, principles of law, as well as legal doctrines in order to answer the legal issue at hand. Data collecting techniques consisted of a literature study, observation, interview, and questionnaire. In this study, data collection techniques used was in-depth interviews against the informant and literature study. The results of the research indicated that to implement the people's sovereignty, Parliament is equipped with 3 (three) functions, namely: a) the function of budgeting; b) the function of supervision; and c) the function of legislation. As it turns out in practice, however, the system of legal norms that are intended for normal circumstances cannot expected to be effective to be used in order to achieve the goal of law that guarantees the aspect of fairness, certainty, and usefulness.

Index Terms: Government Regulation, Emergency Regulation, Rule of Law

1 INTRODUCTION

The unitary state of the Republic of Indonesia adheres to the idea of people sovereignty. According to Jimly Asshiddiqie, the concepts of people sovereignty are a basis of democracy. This means that the owner of the highest authority in the state is people or known the principle of power of the people, by the people and for the people. People-sovereign state implies that people have absolute power, supreme, infinite, independently and without exception. Based on this view, then a state are said people-sovereign if people participate directly or indirectly to determine the fate and future of the nation. The notion of people sovereignty or democracy can be distributed directly or indirectly. In a simple society, democracy organized directly as ever practiced in Greece with the concept of "city state". However, in the develop-ment of an increasingly complex society and with a large population and has a vast territory, then democracy or people sovereignty may not be implemented directly only. This indicates that it needed mechanism indirectly. On the basis of the construction, it develops people representative assembly or usually called as parliament. The question that arises is how people can exercise their sovereignty if the people no longer participate directly in governance.

According to Soimin and Sulardi, people can still play a role in governance through the representatives chosen to sit in parliament periodically through elections that have been determined. Through this parliament people can still hold their sovereignty. Parliament in the context of Indonesia embodied in state institutions, known as the House of Representatives (hereinafter abbreviated DPR) as a representation of all Indonesian people, which is one of its functions is to supervise what has been executed by the government. The task of government is accountable for all the respon-sibilities given to the people through Parliament. In that context, the purpose of accountability is not just about accountability of the state budget by the government, but also the President of legal product formed, one of which is the Government Regulation in Lieu of Law (hereinafter abbreviated to "Perppu"). In normal circumstances, the system of legal setting enacted under the provisions of the legislation in force. In fact, never thought about the possibility of another condition that is abnormal where existing legal setting are not able to accommodate the constitutional phenomenon that occurs. Circumstances which befall a country that is unusual or abnormal that requires separate settings so that the functions of state can continue to work effectively. In practice, such situation will include a category of unusual situation that require actions are also unusual. For example, such a situation may give authority to the President to establish a Government Regulation in Lieu of Law (Perppu), which is a regulation in terms of substance should be set in the form of legislation, but because urgency that forced that set out in the form of government regulation. This is stipulated in Article 22 paragraph (1) of the Constitution 1945 that "in critical circumstances in emergency force, the President has the right to set government regulations in lieu of law". When referring to this formulation, it is clear that the Perppu is a government regulation, but serves as an act. Thus, Perppu is one of the legal instruments that can be set by the President without requiring the involvement of the parliament (DPR). According to Bagir Manan, an element of urgency that forced shows two characteristics, i.e the existence of a crisis and urgent something. That is, a state of crisis defined as a disturbance that causes urgency and suddenly. While urgent something, can be defined as a state

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that is not calculated in advance and includes an action immediately without waiting for the consent. Or has been the first signs and real and reasonableness, if not set immediately would cause disruption to people or to the government. Meanwhile, urgency that forced according to Jimly Asshiddiqie precedence on the conditions needed urgent legal instrument or urgency due to the limitation of time. In addition, there are three material requirements to enact Perppu, namely: 1) There is an urgent need for action (*reasonable necessity*); 2) The time available is limited or there is urgency time (*limited time*); and 3) Not available alternatives based on logical reasoning or another alternative cannot to solve the situation, so that the determination of Perppu is the only way to deal the situation (*beyond reasonable doubt*). In the context of Government Regulation No. 4 of 2008, the parliament has made the approval of 2 (two) times, but in terms of regulation, there was no statutory provisions under the Constitution 1945 as the elaboration of the implementation of Article 22, in particular paragraph (2) and (3) so that rising multi-interpretation and even it is highly potential to causing norms conflict and/or inaction of legal norms as well as tend to the potential abuse of power by the President in constitutional law and has caused problems of legal system implementation. The reality today is that the government deliberately has filed a Draft of Act on the Financial System Safety Net (RUU JPSK) are in its academic manuscript really stated that the issuance of Government Regulation JPSK has provided the legal basis for the relevant authorities to take measures maintain SSK and addressing the problem. The measures comes through the decision to save the financial system were disrupted due to the troubled bank that can have a systemic impact. In a very difficult situation as experienced in 2008, Government Regulation of JPSK has given confidence to the authority to take decisions in a transparent, credible, accountable, and obey the principle.

2 METHOD OF RESEARCH

This research was conducted by using normative legal research, a theoretical studies on the legal aspects of a rule of law includes a process to make the rule of law, principles of law, as well as legal doctrines in order to answer the legal issue at hand. Data collecting techniques consisted of a literature study, observation, interview, and questionnaire. In this study, data collection techniques used was in-depth interviews against the informant and literature study.

3 ANALYSIS AND DISCUSSION

3.1 The Substance and Essence of Government Regulation

The existence of Government Regulation in Lieu of Law (Perppu) is often questioned. This is due to the legal basis of its existence were also multi-interpretations, as the particulars "state of emergency that forced (emergency)" as the basis of its formation. So it is not true to say that the legal basis only in case of emergency under the terms of danger that are associated with the imposition of *staatsnoodrecht* (law of country in a state of danger) or about *noodverordeningsrecht* of President. In addition to the danger that may occur for reasons of urgency. For example, to maintain state's safety of threats should not be allowed to continue. While the process of legislation by Parliament cannot be implemented, then the President on the basis of belief can only establish rules regarding the material that should be contained in the law as a

form of Government Regulation in Lieu of Law (Perppu). During this time, urgency that forced interpreted broadly, so that the Government Regulation may be established when the state in the normal or emergency states. If so, then the Government Regulation should be classified in a normal and emergency setting. In fact, Government Regulation is only classified into the normal regulation. Determination of Government Regulation in this normal regulation showed in Article 22 of Legislation 1945 stated that:

- (1) *In urgency, the President shall be entitled to stipulate a government regulation in lieu of law.*
- (2) *The government regulation shall be approved by the House of People's Representative in the subsequent meeting.*
- (3) *In case of disapproval, the government regulation shall be revoked.*

According to Maria Farida Indrati this article regarding *noodverordeningsrecht* of President. This rule should be held so that state's safety can be guaranteed by the state government in an emergency state, which forced the government to act quickly and appropriately. Nevertheless, the government will not be released from the supervision of the House of Representatives. Therefore, in this article, the government regulations whose power is equal to the law must be approved also by the House of Representatives. In essence "emergency regulations" has distinct character which different to the "normal regulation":

- a. Reviewed from legislation, the principal difference between the normal and emergency regulations. The normal regulation should be based on the principle of good formation of legislation, while the emergency regulations, the principle can be ignored, because the main of emergency regulation is "*Salus Popoli Supreme Lex*".
- b. The process of normal regulation formation using norm mechanisms, the presence of public debate, public participation, open, and conducted democratically, so it takes a long time, while the formation of an emergency regulation that close, without participation and undemocratic, and quicker.
- c. Under normal circumstances, the one with other regulations must be consistent and harmonious, should not overlapping, lower regulations must not conflict with higher regulations. Whereas if the country is in a state of emergency, various existing regulation can be violated and even violate the norm of constitution.
- d. Reviewed from the purpose of establishment, the normal regulation is more subjected to the order (*wetmatigheid*) and legal certainty (*rechtmatigheid*).
- e. The normal regulation such as legislation, it cannot be enforced without the mutual consent in advance of the people's representatives, while the emergency regulations enacted first before asking for approval to the people's representatives. As a consequence, if the emergency regulation was not approved by Parliament, the emergency regulation would lose the legitimacy or validity, and thus no legal action for emergency regulations repeal, except in the court of Parliament decides otherwise.

So far, no clear criteria to the meaning of "*urgency that forced*". Therefore, the presence of government regulation is

more on the subjective judgment of the President. In the reign of New Order, Soeharto seemed to really interpret the government regulation as “*emergency door*” that can only be used in emergency situations or force alone. Its reality, since the year 1966 - 1977 was published only 6 (six) government regulation. Meanwhile, after the New Order, government regulation seems to be used as a step to *bypass* the process of making laws normally, it is proved by the presence of 22 government regulation. In fact, when referring to the theoretical view, should not be allowed to happen “rain” government regulation. For example, van Dullemen there is four conditions of emergency constitutional law, namely: 1) The existence of state depends on emergency measures taken; 2) The action was necessary because it cannot be replaced by other measures; 3) The measure is temporary; and 4) When action is taken, the parliament cannot be real and earnest. For Dullemen, the fourth of conditions must apply cumulatively. At the conceptual level, government regulation is a rule established by the President in matters of urgency that forces, in the sense of its formation requires certain reasons, i.e the existence of emergency, forced or emergency can be defined as a state that is hard or difficult and suddenly that require immediate response. The criteria of what is meant by the matters of urgency that forced is a state that is difficult, important and sometimes crucial, which cannot be presumed, estimated or predicted in advance, and must be addressed immediately by the formation of legislation that equal with legislation. The state of emergency should not linger, because the main function of emergency state law (*staatsnoodrecht*) is to eliminate the danger immediately so back to normal. If occur, the danger violated the purpose of held emergency. Danger to the extraordinary efforts must be a balance, so that the authority was not excessive and prevent abuse of immense power. Danger, it is something abnormal, to address the danger the law was in normal circumstances must be seen as abnormal and extraordinary, perhaps in normal circumstances ruler’s action in the category of *onrechtmatig*, but due to the state of danger or abnormal, then the ruler’s action is legitimate and justifiable. It must be considered, how in the state of dangerous (*staatsnoodrecht*) the human rights still respected as appropriate. Likewise, the constitution and other laws which may not be eliminated completely, in a short time and temporary only and not for permanently. According to Maria Farida Indrati Soeprapto, since this government regulation that replaces the position of the law, the content of material is same with the legislation. However, the problem arises, and is often a matter of debate in a number of legal and political experts are the parameters of a condition that can be qualified as “urgency that forced”. Some government regulation ever issued by the President i.e Perppu No. 4 of 2009 on the amendment of Act No. 30 of 2002 on Corruption Eradication Commission and Perppu No. 4 of 2008 on Jaring Pengaman Sistem Keuangan (JPSK) are also polemical in society. In issuing government regulation as a authority of the President put “*power full*”, cannot be intervened by any institution until the time for hearing in the Parliament to determine whether the regulation has been approved or rejected. The president has full authority to judge and determine a condition to be stated in the “urgency that forced” or not, so it is necessary to issue the government regulation. As described above, the president both as head of state or as head of government has the constitutional authority to establish the government regulation to regulate things that are

necessary in order to save the nation and the state. Material or content contained in the government regulation depend on the actual legal necessity. Even, certain provisions concerning the protection of human rights guaranteed in the Constitution 1945 may be determined in the government regulation as long as it is intended to address the state of emergency in order to protect the interests of the nation. Certainly, the government regulation remain open and subject to the examination by the Court (*Judicial Review*) so that the constitutional either materially or formally still legally defensible. In addition to the elements above, a state of emergency should also bases itself on the principle of proportionality is known in the international law. This principle is considered as *the crush of the self-defense doctrine* or the core of *Self-Defense doctrine*. Inherently, principle of pro-portionality considered to provide standards reason-ableness, so that the criteria for determining the existence of *necessity* become more clear, the necessity which is formulated as a justification for action from the proportionate emergency, fair or equitable so that the actions referred to may not exceed fairness as a basis of justification for doing the act itself. In fact, in Indonesia alone, many establishment of government regulation conducted do not consider the emergency elements of state and the principles of proportionality above, but only based on a single element of any state of emergency, for example: a. establishment of Government Regulation No. 1 of 2002 on Terrorism Eradication, based solely on the dangerous threat. It can be seen from the general explanation asserted that the use this government regulation to regulate the eradication of terrorism is based on the consideration that the occurrence of terrorism in various places has caused losses for both material and immaterial and cause insecurity for the people, so the urge to be issued the government regulation has to be immediately created a conducive atmosphere for the maintenance of order and security without abandoning the principles of the legal state. Referring to the provisions above, the existence of government regulation depending on whether the approval of Parliament to the establishment of government regulation becomes law or not. In this case, the parliament approve the government regulation, the draft of legislation on the establishment of government regulation legalized into law, otherwise if Parliament rejects the government regulation, then the President submitted a draft of law on the revocation of government regulation that can manage well on all the legal consequences of refusal.

3.2 The Comparison of Constitution and the Arrangement of Government Regulation in Countries that Adopt Presidential System

South Africa

Article 203 Constitution of South Africa declares that South African President has the power to declare a state of danger. Statement of *dangerous situation* should submitted to the Parliament directly and in detail on (a) the reason for the statement; (b) the place where the defense force is deployed (c) the number of members involved (d) If at the time proclaimed a state of emergency, Parliament is not in session, the President should proclaim to the parliament to conduct the special session within 7 days after the proclamation; (3) if within 7 days the statement was not approved by the Parliament, then the dangerous statement is not applicable. Statement of emergency, as well as the regulations imposed

or other action taken as a result of the statement will apply where: a) the possibility of an emergency will occur; b) The period of emergency is no more than 21 days from the date of proclaimed of such emergencies, except when the *National Assembly* sets out to extend the imposition of emergency situation. The National Assembly may extend a state of emergency for a period of not more than three months. The first, the state of emergency must be through a resolution supported by a majority of the members of the National Assembly. The next must be through a resolution supported by at least 60 percent of members of the National Assembly. The decisions about the next extension are only allowed after a public debate conducted in the National Assembly. The constitution of South African is known that the South African President has the authority to issue any legislation in a state of emergency. Any regulations imposed as a result of the statement of a state of emergency, may suspend the implementation of the statement of citizen's rights. But, the drafting of regulations on this matter should be in line with the obligations of the Republic under applicable international law regarding the state of emergency. Regulations enforced in the emergency in addition to being reported to the National Assembly, also can be judged by the judge. If related to the government regulation, the authority of South Africa President issued a number of regulations (not just one type of regulation) in emergencies and not as a specific nomenclature. Regulations issued in an emergency can be categorized into the emergency regulations. Also, in terms of the substance, it is possible the regulations in force in the state of emergency in South Africa may suspend enforcement of citizen's rights. In Indonesia, the material of citizen's rights included in the material of the legislation.

Brazil

Brazilian's constitution organizes initiatives put legislation, not only given to a few members of committees of the Parliament, Senate or Congress, but also the President, the Supreme Court, Superior Court, the Attorney General and citizens. Special authority relating (1) to determine or modify the number of troops in the Armed Forces, and (2) laws that relate to it. In cases relating to the urgency, the President may issue a temporary rule that has a power as law and must be submitted to Congress. Brazilian's constitution limits the delegation of laws given to the President. Laws that are not delegated to the President with regard to (i) the organization of judicial branch or the Attorney General and the career and privileges of their members, (ii) nationality, citizenship and individual and political rights and elections, (iii) Draft budgets and multi-annual budget. Delegation to the president is given by congress resolution that establishes the content and its implementation time period. Thus, in urgency, Brazil's President was given the authority to issue temporary rules that have the force laws, but must be submitted immediately to Congress. When Congress was in recess, then within 5 days, the congress should hold a special session specifically to discuss the temporary rule. When modified into laws, the regulations will lose his validity in 30 days from publication. The authority of the President issued a rule is very limited, because it may not include laws that are delegated to the President as provided for in Article 68 of Brazilian's constitution, namely (i) the organization of the judicial branch or the Attorney General and the career and privileges of their members, (ii) nationality, citizenship and the individual and

political rights and elections, (iii) plans of budget draft and multi-annual budget. This differs from the Government Regulation to be able to regulate almost all aspects of life, as practices all this time.

South Korea

Article 76 of the Constitution of South Korea gave the authority to the President to take regulatory that have the power of laws, to two things; 1) if occur chaos in the country, the threat of great danger to the country comes from the outside or the economic financial crisis 2) if occur war affecting national security to maintain the integrity of the State. President can issue regulations that have the power of laws, while the National Assembly is difficult to session (not in session). Regulations that are taken by the President must be approved from the National Assembly. If not received approval from the National Assembly, the laws amended or deleted by the decision automatically applies back. The authority of South Korean's President to issue regulations that have the power of laws, has similarities with the government regulation. But with some differences, as follows:

- (1) The regulation was issued when the State of South Korea is in a state of emergency with a scope includes (a) if occur chaos in the country, the threat of great danger there is a state that comes from outside or the financial and economic crisis (b) if occur war that affects national security to maintain the integrity of the State. While the urgency that forced as the requirement to set up government regulation is not restricted, its size submitted to the President.
- (2) In Article 76 paragraph (4) the Constitution of South Korea explicitly stated that if regulations have the power of laws do not get approval from *the National Assembly*, the laws amended or removed through the regulation are automatically applies back. While the provisions stipulated in Article 22 paragraph (3) if it is not approved by the Parliament, then the government regulation should be revoked. In practice, though the government regulation was not approved by the Parliament, but still allowed to apply.
- (3) The authority granted to the President of South Korea is only for amended or eliminate laws that are applicable. While the government regulation does not only function to amended or eliminate laws but have other functions, for example to form an entirely new rule as the Government Regulation No. 1 of 2002 on Terrorism.

Moreover, as Article 77 the Constitution of South Korea, the President of South Korean has the authority to declare war to the two categories i.e extraordinary war situation and the situation of preventive war. The declaration of war must be approved by a majority of the National Assembly. If not then the declaration of war should be revoked.

4 CONCLUSION

Practice in Indonesia shows that to implement the people's sovereignty, Parliament is equipped with 3 (three) functions, namely: a) the function of budgeting; b) the function of supervision; and c) the function of legislation. In general, the function of Indonesian Parliament can be divided into three kinds, namely; a) as regulator; b) as supervision; and c) as a representative function. In normal circumstances, the system

of legal norms is applied under the provisions of legislation in force. But in reality, never thought about the possibility of another condition that is not normal in which the ordinary legal system cannot be expected to be effective to realize the goals of the law itself. In practice, in addition to the condition of country in a state of ordinary or normal, sometimes arise or occur abnormal circumstances. In such a situation, however, the system of legal norms that are intended for normal circumstances cannot expected to be effective to be used in order to achieve the goal of law that guarantees the aspect of fairness, certainty, and usefulness

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