Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.93, 2020 

# State of Emergency in Indonesia

Sonya Claudia Siwu[1]* Sudarsono[2] Isrok[3] Muchammad Ali Safaat[4]
1. Doctorate Candidate at Law Faculty, Brawijaya University, Malang
2. Professor of Law Faculty, Brawijaya University, Research Field Constitutional Law
3. Professor of Law Faculty, Brawijaya University, Research Field Constitutional Law
4. Doctorate of Law Faculty, Brawijaya University, Research Field Constitutional Law
* E-mail of the corresponding author: sclaudias2015@gmail.com

**Abstract**

The state may be in an emergency. In emergency situations the state will enact state emergency law. According to R. Kranenburg's theory the stte's emergency law should be balanced between the interests of the state and the interests of the people. In Indonesia the state emergency law is based on Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia. Article 12 of the 1945 Constitution of the Republic of Indonesia regulates the emergency of the Dangerous State and Article 22 of the 1945 Constitution of the Republic of Indonesia regulates the emergency of Crisis. Nevertheless, the implementation of Article 12 of the 1945 Constitution of the Republic of Indonesia in the form of Presidential Decree and the implementation of Article 22 of the 1945 Constitution of the Republic of Indonesia in the form of PERPPU reaps a lot of controversy. Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia as the basis of the constitution of the enactment of state emergency law are vague and ambiguous. So the provisions of the two chapters provide opportunities for abuse of power and human rights violations.

**Keywords:** State of emergency, Legal Concept, Emergency Regulation

**DOI**: 10.7176/JLPG/93-19
**Publication date:** January 31st 2020

## 1. Introduction

Emergency situations are most likely to be experienced by anyone and can happen anywhere within a country. Thomas Jefferson writes in his writings that when the state is in an emergency situation the highest obligation of the state is to apply the law of necessity, the law of self-defense, and the law to save the state (Thomas P. Crocker, 2011, 1552). The laws that apply in emergency situations are of course different from the laws that apply when the country is in a normal situation. Related to this is said by Krabbe: "*abnormal recht voor abnormal tijd*" (Jimly Asshiddiqie, 2011, 86). Similarly, R. Kranenburg, who argues that if the real situation is in an abnormal situation then the law applied must also deviate from the normal (Kabul Arifin, 1960, 54). According to Carl Schmitt, when the state is in an emergency situation the law in force under normal circumstances may be set aside or postponed, replaced by an emergency imposed by the President (Jimly Asshiddiqie, 2008, 228-229).

In Indonesia, throughout the history, has been repeatedly applying state emergency law. But the latest development post-reform, there has been a new phenomenon that the enactment of state emergency law in Indonesia reap a lot of counter-society attitude. State emergency law in question is the Presidential Decree (KEPPRES) no. 107 of 1999 on the Emergency Situation in East Timor, Presidential Decree no. 28 Year 2003 on Military Emergency I in Aceh, Presidential Decree No. 97 of 2004 on Military Emergency II in Aceh, and Presidential Decree No. 43 of 2004 on Statement of Extension of Hazard State with Level of Civil Emergency in Province of Nangroe Aceh Darussalam. This Presidential Decree is based on UUKB no. 23 of 1959 on which the constitutional basis derives from the provisions of Article 12 of the 1945 Constitution.

The attitude of the counter is also visible when the enactment of Government Regulation in Lieu of Law (PERPPU) by the President by reason of the crisis as constitutionally arranged in Article 22 of the 1945 Constitution. Recorded throughout the reform era, highly controversial PERPPU is PERPPU No. 4 Year 2008 regarding Financial Sector Security Net which is intended to provide bailout for Bank Century and PERPPU PILKADA stipulated by President Susilo Bambang Yudhoyono namely PERPPU No. 1 of 2014 on the election of Governors, Regents, and Mayors at the same time revoke the Law no. 22 of 2014 which regulates indirect election by DPRD and PERPPU no. 2 of 2014 on Regional Government and the Authority of the Regional People's Legislative Assembly to elect the Regional Head as stipulated in Law no. 23 of 2014 on Regional Government; and the latest controversy issue that has not been finished yet until now is PERPPU no. 2 Year 2017 on Amendment to Law no. 17 Year 2013 on Community Organizations established by President Jokowi. This PERPPU becomes the basis for the Government to be able to dissolve an ORMAS without going through

 

court. The reason for the rejection of the enforcement of the emergency law is that the public judges the state emergency law both KEPPRES and PERPPU only become legitimacy for the Government to be able to perform arbitrary acts even abuse of power on the grounds of the state in emergency situations. Based on the above description, the legal issues to be studied in this paper are: The legal concept of state emergency law in Indonesia which is intended by the founding father as set forth in Article 12 and Article 22 of the 1945 Constitution.

## 2. Terminology

Article 12 and Article 22 of The 1945 Constitution constitute the basis of state emergency law in Indonesia. Article 12 of the 1945 Constitution shall be subject to the following provisions: "The President declares a state of danger. The conditions and consequences of hazard conditions are established by law". Whereas in Article 22 of the 1945 Constitution is determined: "1) In the case of a compelling crunch, the President shall be entitled stipulate a Government Regulation in lieu of Law invite; 2) The Government Regulation shall be approved by the Council Representatives of the people in the next trial; 3) If it is not approved, then the Government Regulation must be revoked". There is no state emergency term was found in that constitution. The Dangerous State in Article 12 and the Crisis in Article 22 of the 1945 Constitution, became the legal terminology as well as the concept of emergency law in Indonesia. The founding father did not mention the reason why those two terms were used as emergency law terminology in Indonesia and not using the word emergency itself. The founder of the state also does not define the two terminologies.

Textually, the meaning of the State of Danger is a situation that can bring accidents (disaster, loss, misery, etc., while the crisis is understood as a critical situation. According to the dictionary, it is defined as a situation which is tense, dangerous (circumstances that may soon cause a catastrophic warfare and so on.) The word literally has the meaning of force to be done immediately (fulfilled, resolved because of emergencies, precarious and so on). Observing Article 12 and Article 22 of the 1945 Constitution, the founders of the state do intend that the terminology of the Dangerous State and the Crisis to be an abstract legal terminology is opened-textured. The authority to interpret it exists in two state high institutions namely the President as Head of State and Head of Government with the supervision of the House. The President and the Parliament shall give meaning to the terminology of the State of Danger in a law specifically regulating the terms and consequences of an emergency Dangerous Situation. Whereas the Compelling Interest Matters, for its interpretation, by the founders of the state are left only to the President as the basis for the issuance of PERPPU in an effort to address the emergency situation in question. Nevertheless, the authority of this Presidential interpretation is still overseen by the House of Representatives.

In the Explanation of the 1945 Constitution explained that the Constitution of the State of Indonesia is short and supportive, only contains the main rules which its implementation is submitted to the Government to be regulated further in the law. The 1945 Constitution is a binding legal basic law but it must also be open, adaptive in following and anticipating the development of the era. By law, the 1945 Constitution can be adaptable adjusted without repeated changes. In this regard, the Government must understand the provisions of the 1945 Constitution as the basic law (*droit* constitutional) of NKRI. Understanding the 1945 Constitution is not enough just to read the text in its chapters (*Loi Constitutionnelle*) but also to understand the practice and atmosphere (*gleistlichen hintergrund*). According to A.V. Dicey constitution can be defined by grouping it into 2 (two) types: "the flexible as one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body; and the rigid Constitution as a constitutional or fundamental law, may not be changed in the same manner as ordinary laws" (A.V. Dicey, 1952, 127).

The Terminology of Dangerous Conditions and Concerns of Crucial Interests that are not described in detail in the 1945 Constitution reaffirm that the 1945 Constitution is a constitution which has a short character (*miniteus*), in the sense that the articles in it are not formulated in detail but only the main provisions, in accordance with modern legislation techniques. As stated in the previous paragraph that the main provisions in the 1945 Constitution are also flexible or flexible (Kabul Arifin, 1960, 27).

The following articles of paragraphs of the 1945 Constitution are formulated abstractly with the intent of later to be elaborated with flexibility. Flexibility in the 1945 Constitution makes all the provisions in it can adapt according to the development of the existing era with the hope of the 1945 Constitution remains up to date or not obsolete. The founder of the state believes that state emergency exists in various forms.

In the past, state emergency may only be interpreted as a threat to the existence or sovereignty of the state in the form of war for the struggle for the territorial sovereignty between the country (external) and natural disaster or disease outbreak (internal), but over the course of the state emergency is not only caused by external dangers in

 

the form of attacks from other countries or warfare alone but can be caused by other things such as terrorism or technological progress. While internal dangers have shifted from natural disasters to more diverse forms arising from political conflicts, legal, economic, human rights and so on. According to S.E. Finer, Vernon Bogdanor, and Bernard Rudden, state of emergencies can be distinguished in three categories: 1) the state of defence; 2) the state of tention; 3) the internal state of emergency (S.E. Finer, 1995, 34). Nevertheless, the interpretation of abstract state emergency terminology to determine the state is in emergency or not, according to Patricia Mindus must consider various things (Patricia Mindus, 2010, 111): 1) emergency situations; 2) specify the features; 3) determine whether the situation at hand actually meet the criteria. Similarly, in interpreting the terminology of the Dangerous State and the Concerns of Crucial Wrongness. Surely it must be understood in terms of what the state can be said to be in a State of Danger or to be in the Compelling Matters of Force. It then assesses what kind of hazard events or incidents that can be justified to suspend the laws or rules applicable when the state is in a normal situation. The interpretation of the term Hazard State or the Things of Concern is to define both the terminology and determine its causes and then look at the facts that exist to determine whether the facts have met the criteria that exist to be able to state the state is in the State of Dangers or Things About Interest Compel.

### 3. The Legal Concept of Article 12 and Article 22 of The 1945 Constitution

Article 12 of the 1945 Constitution as follows: "The President declares a state of danger. The conditions and consequences of hazards shall be established by law. "This Article provides that the State of Danger is declared by the President as the highest state emergency authority on the basis of its authority; and, the following conditions are consequently governed by law. The state of Indonesia is a state based on law (*rechtstaat*), and not based on mere power (*machtstaat*). State law (*rechtstaat*) requires a system of government carried out according to the law is no exception for the enactment of state emergency law. Thus prevailing in Indonesia is no exception when the country is in emergency even. The special character of emergency law has the possibility of abuse of authority or arbitrary acts, therefore emergency Dangerous Conditions must be pre-arranged in laws whose contents are the terms and consequences. It is through this law that the People's Legislative Assembly exercises its role as the supervisor and balancer of the President's authority when the state is in an emergency situation. Then for the enforcement of the law there must be a statement of the State of Danger first by the President as the Head of State, on the grounds that the fact of the existence of the danger exists according to the hazard indicators set out in the law. The law in question is an objective state emergency law, which gives legitimacy to the President on the basis of existing conditions for performing extraordinary acts of a special and even repressive nature, outside the law applicable when the state is in a normal state, as a result.

In contrast to Article 12 of the 1945 Constitution of the Republic of Indonesia, the provisions concerning the concept of emergency law concerning the matter of the Crisis under Article 22 of the 1945 Constitution of the Republic of Indonesia are not required in this Article of the proclamation / declaration and the law on the terms and consequences. The President may enact an emergency law in the form of PERPPU only on the basis of his subjective belief in the existence of the emergency facts of the Compelling Interest. PERPPU is a state emergency law which is enacted by the President to address the emergency situation of Forced Enforcement. By not declaring the state of emergency before the issue of the President's Compelling Interest before issuing PERPPU, the state emergency referred to in Article 22 of the 1945 Constitution of 1945 is included in one of the categories of de facto state of emergency, namely the enactment of state emergency law without a statement officially by the President first. However, as in the concept of emergency law of the Dangerous State, in the concept of emergency law, the Crisis Issues also stipulates the involvement of the House of Representatives as a check and balances of the President's subjective authority on this one.

The widespread authority of the President is overseen and limited by the People's Legislative Assembly not by law but by limiting the period of PERPPU, until the next hearing between the President and the House. If this PERPPU is approved by DPR then PERPPU will be changed into Law. Whereas if the DPR does not approve this PERPPU in the following hearing, then this PERPPU must be revoked. It is not explained in this article what the founding fathers mean by the phrase 'until the next trial'. The elucidation of Article 22 of the 1945 Constitution only states that this article concerning the President's *noodverordeningsrecht*. This rule is indeed held with the intention of the state's safety can be guaranteed in a precarious state which forces the Government to act quickly and appropriately, because one characteristic of the emergency situation is unpredictable and the threat or danger can be caused by anything and in any form. Therefore, as a consequence of a legal state that guarantees legal protection of the people, the Government in this case the President as the emergency authority, when the country is in the worst situation though, it is inseparable from the supervision of the DPR. Therefore, the Government's regulation in this article is the same as the law, so it must be ratified by the DPR.

 

Regarding the right to *begrooting* the People's Legislative Assembly in relation to Article 22 of the 1945 Constitution, what is meant by the phrase 'up to the next trial' has been regulated in Article 19 of the 1945 Constitution (2) namely that the DPR convenes at least once a year. Herman Sihombing argues that the state emergency situation in the sense of crisis is a more urgent emergency that can be unpredictable how long it takes to overcome them. However, according to the theory of state emergency law, the enactment of state emergency law should not linger or deliberately applied for long periods of time. PERPPU validity period published by the President on the basis of the matter of Forced Interest that there is a period of validity and it is not for a long time let alone forever, but until the next session of the President together with the Parliament. In addition, when compared with the emergency of the State of Danger, according to Herman Sihombing of Emergency Concerns of Forced Issues because of its urgent nature to be dealt with immediately, the President as the Emergency Authority shall immediately take legal action in the form of PERPPU with the same content as the law to save the State, without having to wait for the terms and consequences to be determined in advance in a law. It is because of its urgent nature that it is not possible to discuss it first with the DPR.

The concept of state emergency law in Article 22 of the 1945 Constitution of 1945 is similar to the concept of state of exception. As popularized by Giorgio Agamben, the state of exception is a concept of state emergency law in which the Government in this case the President as the state's emergency lord, in a serious crisis situation threatens the existence of the state, he is given wider power (as a sovereign) as the only state institution that has the power to take legal action outside of normal law. This concept is motivated by the awareness that the state emergency is a situation that can happen suddenly and unexpectedly, can be anything that must be addressed immediately in order to save the State and the nation that face threats or are in danger. Article 22 of the 1945 Constitution of the Republic of Indonesia is a state of exception that has the greatest potential for arbitrary acts and abuse of authority because there is special authority of the President as an emergency ruler in it. However, such a state emergency law provision is inevitable because once again the emergency situation can occur at any time and the causes vary.

However, the authority of the President is not an infinite authority. Completing the President's subjective authority, further by the founding of the state is determined in Article 22 of the 1945 Constitution of the Republic of Indonesia that PERPPU issued by the President should be discussed or tested by the President with the Parliament in the next session. If the DPR does not approve it then the PERPPU must be revoked by the President and if otherwise the PERPPU can be ratified into law. The purpose of the issuance of the authority to the Parliament to examine the emergency law of PERPPU, besides intended to anticipate the act of abuse of authority and arbitrary, the founder of the state also realized that in urgent situation it is impossible to make the perfect and clear state law base, The concept of state emergency law according to Article 22 of the 1945 Constitution of the Republic of Indonesia shows that the founders of the state have done their best for this country and nation by seeking the maximum protection and defense of state security while ensuring legal protection for their people even when the country is in emergency situations.

## 4. The President

Furthermore, in the context of state emergency, according to Appadorai, the President is a single sovereign executive, namely: "The single Executive that has one clear advantage. It secures the unity, singleness of purpose, energy and promptness of decision so necessary for the purpose of an Executive. This consideration of particular importance at grave crises of national existence, when unity of control is absolutely essential. " (Arjun Appadurai, 2001, 558-559) As the supreme power holder, the President has the authority to exercise his power of independence and his inherent power. William B. Fisch argues that the President is the original power holder not only related to the normal state of the state but also when the country is in an emergency situation. In an emergency situation the authority of the President overcame the authority of parliament (William B. Fisch, 1990, 402). Similarly in Indonesia, when the country is in an emergency situation, if we look at Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia, the founding fathers of the President are granted free authority to assess the Dangerous State and the Concerns of Forced Interest and then take legal action on the basis of his judgment . While the role of the People's Legislative Assembly in such a situation is only given the role as a guardian of the power of such a great President.

Observing the provisions of Article 12 and Article 22 of the 1945 Constitution of the Republic of Indonesia, it is understood that the President's special powers as sovereign when the state in an emergency situation is the authority to interpret the terminology of the Dangerous State and the Concerns of Crucial Wrongness. The special authority of the President is no longer prerogative but is already a constitutional authority because it has been regulated in the 1945 Constitution of the Republic of Indonesia (Bagir Manan, 1998, 7). In addition, this

 

special authority under the terms of the two articles of the Constitution is also limited. When a State in a State of Danger of authority of the President declares the State in the State of Danger bounded by law on the terms and effect of the State of Danger, while the three countries face or are in the Subjects of Interest That Enforces the PERPPU period published by the President is limited until the next trial together with Parliament.

Article 12 of the 1945 Constitution uses the term Danger State initially adopted the understanding of the emergency law The State of Hazards of the Dutch East Indies government Reg. SOB No. 1939-582 in which the state emergency concept of state of emergency in the broad sense includes the state of war, social unrest, natural disaster, legal order, financial emergency, until the functions of constitutional power can not work properly. Dangerousness in the broad sense is limited and defined terms and consequences in the law as the basis of the President's authority to declare a de jure. Article 12 of the 1945 Constitution contains a provision that imposes restrictions on the provisions of the law on the authority of the President declaring Hazard State, considering the consequence of the statement that is the enactment of state emergency law as a result (state of emergency). While Article 22 of the 1945 Constitution contains the concept of state emergency Half Compelling Interest Matters that can be interpreted subjectively by the President. The concept of emergency in this article comes from the concept of state emergency in the sense of state of exception where in such an unexpected and urgent situation the President is given even greater authority by the constitution to subjectively (without a declaration and not involving DPR) established a state emergency law that is a law-level regulation with a content law called PERPPU to address existing emergency situations. Thus Article 22 of the 1945 Constitution provides legitimacy to extend the authority of the President (state of exception) on the grounds of the Emergency De facto Concerns.

Thus it is clear that Article 12 and Article 22 of the 1945 Constitution are both intended to be the basis of the constitution of the enactment of comprehensive state emergency law in Indonesia. The two chapters are complementary to one another. Both contain not just different concepts of emergency law (terminology, legal concepts, authority of the emergency authorities), but also contain elements of different contexts, so that both articles clearly have their own goals and intentions. Article 12 and Article 22 of the 1945 Constitution are indeed formulated by the founders of the state with the hope that the state emergency law can be applied effectively without abolishing the principles of the rule of law and remain adaptive in the face of all future threats and hazards. Through the discussion of the terminology, concept of law, and authority of state emergency authorities according to the provisions of Article 12 and Article 22 of the 1945 Constitution, it is clear that the founders of the state interpret the Dangerous State and the Concerns of Concerning Interest which can be interpreted as an emergency in the broad sense martial law, natural disasters, social unrest, legal or administrative order are disrupted, state finances, until the functions of legitimate constitutional powers are not able to work properly, except by violating certain laws temporarily being required to intercept the laws in question can not be fulfilled because there is not enough time available. As Herman Sihombing puts it, emergency has a very broad meaning including the notion of a state of emergency in the sense of 'staat van beleg' and a state of martial law in the sense of *'staat van oorlog'* (Herman Sihombing, 1996,5)..

## 5. Conclusion

The reason of the founders of the state to determine the basis of state emergency law as stipulated in Article 12 and Article 22 of the 1945 Constitution is Indonesia a democratic legal state with a presidential government system. The concept of the Law of Dangerousness and Compulsory Condition is determined in such a way as to prevent the act of abuse of power by the President as the Supreme Emergency Ruler. The 1945 Constitution is a living constitution which is so short & accommodating that by the founding member of the state terminology Dangerousness & Concerns of Forced Forcedness is deliberately defined as open textured nomenclature to be adaptive to face various forms of threats ahead.

## References

A. V. Dicey, (2001), “Introductionn to The Study of The Law of The Constitution”, London.

Bagir Manan, (1998), “Kekuasaan Prerogatif”, Paper Published inBandung

Herman Sihombing, (1996), “Hukum Tata Negara Darurat Di Indonesia”, Djambatan, Jakarta

Jimly Asshiddiqie, (2008), “Hukum Tata Negara Darurat”, Rajawali Press, P.T. Raja Grafindo

Kabul Arifin, (1960), “Peraturan Pemerintah Pengganti UU Tentang Keadaan Bahaya”, Jakarta

Patricia Mindus, “Sorting Out Modern Constitutional Provision on Emergency. A taxonomic Framework”, Uppsala University, Swedia

 

Thomas P. Crocker, (2011), "Presidential Power and Constitutional Responsibility", Boston College Review, Vol. 52

William B. Fisch, (1990), "Emergency in the Constitutional Law of The United States", Faculty Publication, University of Missouri School of Law

Undang-Undang Dasar NRI 1945