

JURNAL CITA HUKUM

Indonesian Law Journal



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Limitation and Reduction of Human Rights in Indonesia Through Substitute Governmental Regulations*

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Abstract

Substitute Governmental Regulations of law (*Perppu*) and Laws are two legislation products that are formed through different mechanisms with different formation reasons. Both also have a tendency to contain different material. However, the existence of Article 11 of Law Number 12 Year 2011 and the absence of restrictions on the material contained in the *Perppu* has resulted in issuing *Perppu* by the president which contains material that should be regulated in the Law. One of the *Perppu* contents is concerning the limitation and or reduction of human rights. The *Perppu* that has been issued has caused controversy among the community, namely the Government Regulation in substituting Law Number 1 of 2002 concerning Eradication of Terrorism Crimes, and then lastly is Substitute Governmental Regulations of Law Number 2 of 2017 concerning Amendment to Law Number 17 2013 about Community Organizations.

Keywords: Limitation and/or Reduction, Human Rights, *Perppu*

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Pembatasan dan Pengurangan Hak Asasi Manusia di Indonesia Melalui Peraturan Pemerintah Pengganti Undang-Undang

Abstrak

Peraturan Pemerintah Pengganti Undang-Undang (Perppu) dan Undang-Undang adalah dua produk peraturan perundang-undangan yang dibentuk melalui mekanisme yang berbeda dengan alasan pembentukannya yang berbeda. Keduanya juga memiliki kecenderungan yang memuat materi berbeda. Akan tetapi, keberadaan Pasal 11 Undang-Undang Nomor 12 Tahun 2011 serta tidak adanya pembatasan materi muatan dalam Perppu mengakibatkan Presiden sering kali menerbitkan Perppu yang berisi materi muatan yang seharusnya diatur dalam Undang-undang. Salah satu dari materi muatan Perppu yang seharusnya diatur di dalam Undang-Undang yakni mengenai pembatasan dan atau pengurangan hak-hak asasi manusia. Perppu yang pernah diterbitkan menimbulkan kontroversi di kalangan masyarakat di antaranya adalah Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2002 Tentang Pemberantasan Tindak Pidana Terorisme, dan yang terakhir adalah Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 Tentang Perubahan atas Undang-Undang Nomor 17 Tahun 2013 Tentang Organisasi Kemasyarakatan.

Kata Kunci: Pembatasan dan/atau Pengurangan, HAM, Perppu

Ограничения и снижения прав человека в Индонезии посредством Постановления правительства взамен законов

Аннотация

Постановления правительства взамен законов (Perppu) и акт – это два продукта законодательства, сформированные через разные механизмы с разными причинами их формирования. Оба также имеют тенденцию на содержание разных материалов. Однако наличие статьи 11 акта № 12 от 2011 года и отсутствие ограничения на содержание в Perppu привели к тому, что президент часто издавал Perppu, содержащий материалы, которые должны управляться законом. Одним из материалов, содержащихся в Perppu, которое должно управляться законом, является ограничение и/или снижение прав человека. Perppu вызвал споры среди людей, в том числе Постановления правительства взамен законов № 1 от 2002 года о борьбе с терроризмом и, совсем недавно, Постановления правительства взамен законов № 2 от 2017 года о поправках к акту № 17 от 2013 года об общественных организациях.

Ключевые слова: ограничение и/или снижение, права человека, Постановления правительства взамен законов (Perppu).

Introduction

The law and Substitute Governmental Regulations of law (*Perppu*) are two legislative products that are formed through different mechanisms and with a distinct reason. Consequently, according to this background both have a tendency to load different material. Although both occupy equal degrees in the hierarchy of Legislation Regulations as mentioned in Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation, it is impractical to say that both are identical and can be equated in matters of substance contained.

Establishment of *Perppu* is the attribution authority given by the constitution (before and after changes) to the President as stated in Article 22 of the 1945 Constitution of the Republic of Indonesia that "In the case regarding the urgency of the crisis, the President has the right to set a Government Regulation as a Substitute to the Law."

The Constitution does not regulate in detail what can be included by the President in determining a *Perppu*. In the explanation section, it only mentions the urgency of establishing the *Perppu* so that the government can act immediately and take appropriate steps in safeguarding the country. As stated below.

Article 22 is one of the articles that remained unchanged from the beginning until the fourth amendment. After giving the President's right to form and stipulate the *Perppu* in paragraph (1), (2) and (3), then it started a number of principles that must be obeyed in relation to the *Perppu*, including that the *Perppu* must obtain the House of Representatives (DPR) approval in the next court. In terms of a rejected *Perppu* by DPR, then it must be revoked. The formulation of the two verses is a juridical consequence of an equal level between the *Perppu* and the law, so that as there is supervision of the Law implementation, the DPR is also obliged to supervise the implementation of a *Perppu* by the Government through an approval mechanism by the DPR in the next session or order to revoke the *Perppu* if it does not get any endorsement by DPR.

In addition, reflecting the occasion that happens, it can be drawn the view that the pros and cons arising from the issuance of a *Perppu* are caused by the substance of the *Perppu* regulation, hence it is natural if several questions arise about what is the material limitation from a *Perppu*. Referring to the provisions of Law Number 12 of 2011, precisely Article 11 stated that "Material containing Substitute Governmental Regulations of law is the same as the

content of the Law". Meanwhile, as mandated by Article 10 of Law Number 12 of 2011 stipulates that the material covering the contents of an Act includes: 1). Further regulation regarding the provisions of the 1945 Constitution of the Republic of Indonesia; 2). Orders for an Act to be regulated by Law; 3). Ratification of certain international agreements; 4). Follow-up on the decision of the Constitutional Court; and/or 5). Fulfill the legal needs of the community.

Therefore, based on the provisions of Article 11 as mentioned previously, then all material points of the law contents are also material that can be loaded by the *Perppu*. As stated earlier, it is important to be careful in stating that what is contained in the law can also be contained by the *Perppu* made unilaterally by the President.

By contrast, the collapse of the very repressive New Order regime that controlled for 32 years has raised awareness of the importance of respecting human rights (Manan, 2001: 1). The 1945 Constitution of the Republic of Indonesia mandates the restriction and/or reduction of human rights in Indonesia only can be taken under law, as Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads: "In performing their rights and freedoms, everyone must comply with the restrictions stipulated by law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, religious values, security and public order in a democratic society."

However, something which got more attention in human rights after the amendment to the 1945 Constitution was constitutional practice related to the issuance of the *Perppu* relating to Human Rights, or even a few of the *Perppu* issued after the 1945 law were limiting or reducing human rights.

The registered *Perppu* is considered to be very intersecting with human rights, even limiting and/or reducing human rights, causing controversy among the public. Those *perppu* are Substitute Governmental Regulations of Law Number 1 of 2002 concerning Eradication of Terrorism Crime and the last is Substitute Governmental Regulations of Law Number 2 Year 2017 about Amendments to Law Number 17 Year 2013 on Community Organizations. In the *Perppu* Community Organization, the Government expanded the definition of prohibited teachings or belief which previously only included the teachings of atheism, communism/marxism-Leninism to be supplemented with other understandings aimed at changing Pancasila and the 1945 Constitution of the Republic of Indonesia. Moreover, the *perppu* was also facilitating the dissolution of mass organizations by shortening the process of applying administrative

sanctions on violations, implementing the *contrario actus* principle, and including threats of criminal witnesses that were previously absent (Kuwado & Erdianto, 2018).

The controversy is difficult to avoid since the issuance of the *Perppu* places the President in a proactive and effective position in determining rules and policies while based on the principle of separation of powers, legislative power is in the hands of the legislature. When issuing the *Perppu*, the President appears like a legislative power. The President is not only as of the main initiative maker in policy formation but also the legal product is immediately effective without going through other processes including discussions in the legislative body (Arsil, 2018: 2).

Hierarchy of Laws

Hans Kelsen argues in the theory of legal norms (*stufentheorie*) that legal norms are tiered and multilayered in a hierarchy (arrangement), means that a lower norm applies, originates, and is based on higher norms again, so on until it reaches a norm that cannot be traced further and is hypothetical and fictitious, namely the Basic Norm (*Grundnorm*). Hans Kelsen's theory which gets a lot of attention is the hierarchy of legal norms and chains of validity that make up the legal pyramid (*stufentheorie*). One of the figures who developed the theory was Hans Kelsen's student, Hans Nawiasky. Nawiasky's theory is called *theorie von stufenaufbau der rechtsordnung*. The arrangement of norms according to theories is called: 1). Fundamental norms of the country (*Staatsfundamentalnorm*); 2). Basic state rules (*Staatsgrundgesetz*); 3). Formal Law (*FormellGesetz*); and 4). Implementing regulations and Autonomous regulations (*VerordnungEnAutonomeSatzung*) (Atamimi, 1990: 287).

Hans Nawiasky considers that the content of *Staatsfundamentalnorm* is a norm which is the basis for the formation of a constitution or the Basic Law of a country (*Staatsverfassung*), including the norms of change. The legal nature of a *Staatsfundamentalnorm* is a condition for the enactment of a constitution or law. It existed before the constitution or law. According to Carl Schmitt, the constitution is a joint decision or consensus about the nature and form of a political unit (*eineGesammtentscheidung Uber Art und Form einerpolitischen Einheit*), which is agreed upon by a nation (Soeprapto, 2017: 46).

The State Basic Rules (*Staatsgrundgesetz*) are a group of legal norms under the State Fundamental Norms. These norms are rules that are still basic and

general and are still outline, so they are still a single legal norm (Soeprapto, 2017: 48).

The norms group under the State Basic Rules (*Staatsgrundgesetz*) is *formellGesetz* or translated as Law ('formal'). Unlike the different norms group above, namely State Basic Norms and State Basic Rules/State Principles, then the norms in a Law are legal norms that are more concrete and detailed and can be immediately applied in society. The legal norms in this Law are not only single legal norms but also in pairs so that there are secondary legal norms in addition to the primary legal norms, thus in a Law Invite already consisted sanctions that can be included, both criminal sanctions and forced sanctions. In addition, the law (*wet/Gesetz/act*) is different from other regulations, because it is a legal norm that always formed by a legislative body.

In Indonesia, the term of *formellGesetz* or *formelewetten* was commonly translated as the 'Law' only without following by the 'formal' word, since if the term of *formellGesetz* has translated into a 'Formal Law', it is incompatible with the types of legislation in Indonesia. At this time, many books and experts who translated the terms "*wet in formele zin*" and "*wet in materiele zin*" were literary as "Acts in the formal sense" and Laws in the material meaning without looking into the definitions contained, and the legislation which is applied in Indonesia.

In the Netherlands what is referred to as "*wet in formele zin*" is any decision formed by *Regering* and *Staten Generaal*, regardless of whether it contains a "determination" (*beschikking*) or "regulation" (*regeling*), therefore, in this case it can be seen from the shape, or who does forms, while what is called "*wet in zine material*" are any decisions formed by *Regering* and *Staten Generaal* or other decisions formed by other institutions other than *Regering* and *Staten Generaal* provided that the contents are binding regulations for the public (*algemeneverbidendevoorschriften*). In other words a "*wet in zin material*" is a decision seen from its contents regardless of who forms it, so that which includes "*wet in formele zin*" is "*wet*" (which is formed by *Regering* and *Staten Generaal*), while included in "*wet in zin material*" are "*wet*" and also "*Algemene Maatregel van Bestuur*," "*Ministerieleverordering*," "*Provincialeverordering*," "*Gemeenteverordering*," and other regulations containing binding rules for the public (*algemeneverbidendevoorschriften*) (Soeprapto, 2017: 51 -53).

The last group of legal norms is implementing regulations (*Verordnung*) and autonomous regulations (*AutonomeSatzung*). Both are located under the Act which has the purpose to implement the provisions of the law. The implementing regulations are sourced from the authority of the delegation

while the Autonomous Regulation comes from the authority of attribution (Soeprapto, 2017: 55).

Ideal Material of Substitute Governmental Regulations in Indonesia

One type of legislation known in the constitutional law is the Substitute Governmental Regulations, which is usually abbreviated as *Perppu*. The legal benchmark for this form of legislation is the provision of Article 22 paragraph (1) of the 1945 Constitution of Republic of Indonesia, which stated: "in the case of compulsive matters, the President has the right to stipulate *perppu*". This article shows that the power of the *Perppu* is "the same as the law". Thus, the position of *Perppu* is not the same as the "Government Regulation" issued to implement the law. Hierarchically, Government Regulation is positioned under the Law (Mahendra, 2000: 70).

The term of government regulation as a substitute for these Acts is fully created by the 1945 Constitution of Republic of Indonesia, which is determined in Article 22 paragraph (1) of the 1945 Constitution of Republic of Indonesia, which reads: "In matters of compulsive matters, the President has the right to stipulate government regulations as a substitution of laws". In Article 22 paragraph (2) it is stated: "The government regulation must be approved by the House of Representatives in the following courts", and paragraph (3) determines: "If there is no approval, then the government regulation must be revoked" (Asshiddiqie, 2006: 80).

Explanation of the 1945 Constitution of Republic of Indonesia, stated that the provisions of this *Perppu* are concerning the President's "*noodverordeningsrecht*", this is necessary in order to make State's safety can be guaranteed by the Government in a precarious state of urgency, so that the Government can act quickly and appropriately by issuing the *Perppu*, with the same force like the Law and can even abolish the Law (Hay, 1982: 227).

The term used by the RIS Constitution and 1945 Constitution of the Republic of Indonesia, is "Emergency Law" which better describes its meaning as "emergency law" (emergency legislation). After all, the term "*perppu*" is less practical or an extension. Therefore, there is a proposal to change the term into "Emergency Law" as in the 1945 Constitution of Republic of Indonesia and RIS Constitution. Consequently, it is clear that this form of regulation is only stipulated in emergencies based on the provisions of Article 12 (Asshiddiqie, 2002: 29).

The meaning of the compulsive crises in Article 22 of the 1945 Constitution of Republic of Indonesia, Jimly Asshiddiqie argues, that there are 3 (three) material requirements for the stipulation of the *Perppu*, namely: 1). There is an urgent need to act or "reasonable necessity"; 2). Limited time or there is a time constraint, and 3). There are no other alternatives or beyond reasonable doubt of other alternatives are unable to deal with the situation, so the determination of the *Perppu* is the only way to overcome the situation (Assiddiqie, 2007: 282).

In addition, the Constitutional Court has interpreted the "compulsion that forced" in the Decision of the Constitutional Court Number 138 / PUU-VII/2009. In the decision, the Constitutional Court argued that there were three conditions of compulsive crises referred to in Article 22 paragraph (1) of the 1945 Constitution of Republic of Indonesia, those are 1). There is an urgent situation which needs to resolve legal issues quickly based on the law; 2). the required law does not yet exist so that there is a legal vacuum, or there are inadequate laws, and 3). The legal vacuum cannot be overcome by making laws in the usual procedure because it will require a considerable amount of time while the urgent situation needs certainty to be resolved (Arinto, 2018).

Article 11 of Law Number 12 the Year 2011 concerning Establishment of Legislation is determining: "Content of Substitute Laws is the same as the content of laws."

Since the *Perppu* material is the same as the law material, then if we look at the provisions of Article 10 paragraph (1) Law number 12 of 2011, it can be concluded that the material must be regulated by the *Perppu* containing: 1). Further regulation regarding the provisions of the 1945 Constitution of the Republic of Indonesia; 2). The order of an Act to be regulated by law; 3). Confirmation of certain international agreements; 4). Follow-up on the Constitutional Court decision; and/or 5). Fulfillment of legal needs in the community.

According to arrangements regarding the items in the contents of the law number 12 of 2011, there was a very fundamental change compared to the items contained in the law as stated by A. Hamid S. Attamimi, as well as those stipulated in Law number 10 of 2004. The distinction is the existence of three additional new items which must be regulated by law, namely ratification of certain international agreements, follow-up on the decisions of the Constitutional Court, and fulfillment of legal needs in the community (Anggono, 2014: 104).

Specifically, for the content material that contains the Follow-up of the decision of the Constitutional Court, Article 10 paragraph (2) of Law No. 12 of 2011 stipulated that: "Follow-up on the Constitutional Court decision as referred to in paragraph (1) letter d is carried out by the DPR or the President". As explained in Article 10 paragraph (2) of Law number 12 of 2011, a follow-up to the decision of the Constitutional Court is intended to prevent a legal vacuum.

Regarding the definition of "international agreements that have broad and fundamental consequences for people's lives related to the state financial burden" (Explanation of Article 10 paragraph (1) letter c), as criteria for confirmation of certain international agreements as the material content of the law creates opportunities for disputes between the President and DPR. It is very possible, at one time the DPR was of the opinion that an international agreement was, in particular, an endorsement by law because it was considered to have broad and fundamental consequences for the lives of the people, which were related to the burden of state finances, while the President argued otherwise.

To provide legal certainty and harmonization with other laws, the criteria for accepting certain international agreements as one of the material contents of the law as stipulated in Article 10 paragraph (1) letter c of Law number 12 of 2011 must be linked and interpreted as referred to in Article 10 of Law number 24 of 2000 concerning International Agreements. Regarding the criteria for international agreements whether what must be valid by law is regulated in Article 10 of Law number 24 of 2000, namely the legitimation of international agreements carried out by law if they pertain to: a) political, peace, defense, and state security issues; b) changes or determination in territory of the Republic of Indonesia; c) sovereignty of the state; d) human rights and the environment; e) the formation of new legal rules; f) foreign loans and/or grants (Anggono, 2014: 105).

Arrangements in Article 10 paragraph (1) of Law No. 12 of 2011 becomes very broad and not limited to the items in letter e, namely fulfilling legal needs in the community. According to some groups such as PSHK and ELSAM, this provision is "the reason for the garbage can", considering that it can always be used without a clear measure.

In interpreting this provision, clear benchmarks should be used, namely legal requirements in accordance with the points in the provisions of the law as stipulated in letters a to d. The criteria for fulfilling legal needs in the community must also be understood in the context of the opinion of A. Hamid

S. Attamimi, namely the needs of the people of the law in order to regulate: human rights, rights and obligations of citizens, the division of state power, the principal organization of the institution highest/highest country. division of territory/region of the country, who are citizens and how to obtain/lose citizenship (Anggono, 2014: 105).

The term of "material content law" was first introduced by A. Hamid S. Attamimi, in the Law and Development Magazine number 3 years IX, May 1979, as a translation of "*het eigenaardig onderwerp der wet*".

The term of "*het eigenaardig onderwerp der wet*" is used by Thorbecke in the *Aantekening op de Grondwet*, which is translated as follows:

"*Grondwet* borrows the definition of *wet* only from the person / legal entity that forms it. *Grondwet* allows open questions about what in our country must be determined by *wet* and what may be stipulated by other means. As with other *Grondwets*, *Grondwet* (even this) is silent (to) formulate material content that is typical for *wet* (*het eigenaardig onderwerp der wet*)."

If Thorbecke's opinion is equated with the 1945 Constitution of Republic of Indonesia (before the change), that opinion is true. The 1945 Constitution of the Republic of Indonesia stipulated regarding who forms the Law in Article 5 paragraph (1), with the formula, "The President holds the power to form a law with the approval of the House of Representatives", but what is stated in the content of the law is not mentioned. The 1945 Constitution of Republic of Indonesia never mentioned why a problem must be regulated by law while the others are not, but rather it is regulated by other regulations.

Experts generally argue that the content of the law in the sense of "*formele wet*" or "*formellGesetz*" cannot be determined by the scope of the material, considering the law is the realization of king's sovereignty or people's sovereignty, while sovereignty is absolute, not dependent on anyone, and into highest above everything. Thus, according to the experts, all material can be subject to the law, unless the law "does not want" to regulate or determine it.

Unlike the opinion, A. Hamid S. Attamimi pointed that the material content of Indonesian law is an important thing for us to look for, because the formation of laws of a country depends on the country's purpose and the theory of state adopted, on the sovereignty and division of power in it, on the system of state administration that is held (Anggono, 2014: 234-235).

According to Jimly Asshiddiqie, in implementing a state and government policy in the legislation, there are also certain materials that are special in

nature, which absolutely can only be stated in the form of law. Some of the special things, for example, are:

1. Legislative delegation of rulemaking power;
2. Revocation of previous law;
3. Amendments to the provisions of the law;
4. Determination of substitute government law;
5. Ratification of an international agreement;
6. Taxation and Forced Levies;
7. The stipulation on imposing criminal sanctions; and
8. Determination of the authority of investigation, prosecution and conviction (Asshiddiqie, 2007: 213-235).

As for A. Hamid. S. Attamimi pointed, as quoted by Maria Farida Indrati S., that there are nine items of content from the Indonesian Law, namely things:

1. Which is strictly ordered by the Law and Legal Provisions of MPR (TAP MPR RI).
2. Which further regulates the provisions of the Law.
3. What governs human rights.
4. Which regulates the rights and obligations of citizens.
5. Which determines the division of state power.
6. Which stipulates the main organization of the highest state or institutions.
7. Which regulates the division of country regions.
8. Who regulates citizens and how to obtain/lose citizenship.
9. What is stated by a law to be regulated by law (Soeprapto: 242).

According to A. Hamid S. Attamimi, in broad outline, the law is a forum for a certain set of material, which includes:

1. Matters which by the basic law (body of the 1945 Constitution of Republic of Indonesia and TAP MPR) are explicitly requested or not to be stipulated by law;

2. Matters which, according to the principle adopted by the State of the Republic of Indonesia as a state based on law, are required to be regulated by law;
3. Matters which according to the principle adopted by the Government of Indonesia, namely constitutional systems are requested to be regulated by law (Atamimi, 1993: 10).

Based on Bagir Manan opinion, the contents of the law can be determined based on general benchmarks as follows:

1. Stipulated in the Basic Law;
2. Determined in the previous law;
3. Arranged in order to revoke, add to, or replace the old law;
4. Content material concerns basic rights or human rights;
5. Material which contains the interests or obligations of the people (Bagir Manan, 1992: 37).

Soehino imposed restrictions regarding the material of the Law in Indonesia, as follows:

1. Material which according to the provisions of the 1945 Constitution of Republic of Indonesia must be regulated by law;
2. The material according to the provisions of the TAP of the People's Consultative Assembly (MPR) must be regulated by law;
3. Material which according to the provisions of the law must be carried out further by law;
4. Other materials that are of general binding nature, such as; a) which imposes obligations on citizens, b) which reduces the freedom of citizens, c) which contains the obligation or prohibition (Soehino, 2006: 15).

Jimly Asshiddiqie argues, that there are three important things that must be regulated by the people's representatives through parliament, namely:

1. Arrangements that can reduce the rights and freedoms of citizens;
2. Arrangements that can burden citizens' assets; and
3. Regulations regarding expenditures by state administrators.

The arrangement of these three things can only be carried out with the consent of the citizens themselves, namely through the mediation of their

representatives in parliament as a representative body of the people (Asshiddiqie, 2007: 161). The given is a categorization of The law material according to the experts, as shown in table 1:

**Tabel 1 A Categorization of the law material according to the experts,
(Anggono: 68-69)**

| No | Material Content of Law in Indonesia | Experts Who Give Opinions |
|----|---|--|
| 1 | Firmly ordered by the Constitution/material which according to the provisions of the 1945 Constitution of the Republic of Indonesia must be regulated by law/stipulated in the Constitution. | A. Hamid S. Attamimi, Soehino, and Bagir Manan |
| 2 | Strictly ordered by the MPR Decree/material which according to the TAP MPR provisions must be regulated by law. | A. Hamid S. Attamimi and Soehino |
| 3 | It is stated by law to be regulated by law/material which according to the provisions of the law must be carried out further with the law / stipulated in the previous law. | A. Hamid S. Attamimi, Soehino, and Bagir Manan |
| 4 | Managing human rights/material concerning basic rights or human rights. | A. Hamid S. Attamimi and Bagir Manan |
| 5 | Regulating the rights and obligations of citizens / cargo material concerning the interests or obligations of many people / other material that is of general binding nature, such as; a) which imposes obligations on citizens, b) which reduces the freedom of citizens, c) which contains a requirement or prohibition / regulation that can reduce the rights and freedoms of citizens. | A. Hamid S. Attamimi/Bagir Manan, Soehino, and Jimly Asshiddiqie |
| 6 | Further, regulate the provisions of the Constitution | A. Hamid S. Attamimi |
| 7 | Regulate the distribution of State power | A. Hamid S. Attamimi |
| 8 | Regulates the main organization of the highest / highest state institutions | A. Hamid S. Attamimi |
| 9 | Regulate the distribution of regions/regions of the country | A. Hamid S. Attamimi |
| 10 | Who is the citizen and how to obtain/lose citizenship | A. Hamid S. Attamimi |
| 11 | Arrangements that can create a burden on the community budget / can burden the assets of the citizens | Bagir Manan and Jimly Asshiddiqie |
| 12 | Arrangement regarding expenses by state administrators (state finances) | Arifin P. Soeria Atmadja and Jimly Asshiddiqie |

Although in Article 7 paragraph (1) and Article 11 of Law number 12 of 2011 stipulates that the position of the *Perppu* is equal to the law and that the contents of the *Perppu* are the same as the contents of the law, so as not to be a

source of irregularities and deviations in the administration of the state. J. C. T. Simorangkir and MangReng Say and Bagir Manan's opinions can be considered.

According to J. C. T. Simorangkir and MangReng Say, the material in Article 22 of the 1945 Constitution of Republic of Indonesia, in the RIS Constitution is regulated in articles 139 and 140, while in the 1945 Constitution of the Republic of Indonesia in articles 96 and 97.

The main difference between the formulations of the other two Constitutions (Constitution of the RIS and the 1945 Constitution of Republic of Indonesia) with the formulation of Article 22 of the the 1945 Constitution of Republic of Indonesia, is, among others, the formulation of "stipulating emergency laws to regulate matters of government administration" contained in both law (RIS Constitution and the 1945 Constitution of Republic of Indonesia not in Article 22, it can be concluded that in the atmosphere of the RIS Constitution and the 1945 Constitution of Republic of Indonesia this provision may not be used to regulate matters that are not governmental, but it must be admitted that the administration of this matter is very broad and so it became difficult to determine its boundaries (Simorangkir & Reng Say, 1987: 73-74).

Therefore, according to Bagir Manan, the contents of the *Perppu* should be related to matters relating to the administration of government (state administration). So, it should not be issued a *Perppu* that is of a constitutional nature and matters relating to state institutions, judicial power, the implementation of popular sovereignty, and others beyond the scope of the administration of the state administration (Bagir Manan, 2004: 217).

Human Rights Restrictions and/or Reductions in Indonesia

Basically, every human right must be protected, fulfilled and enforced by the state. It's just that in its development, not all rights must be fulfilled absolutely, there are also rights that can be limited to fulfillment and rights that cannot be limited to fulfillment even in an emergency. The state is free to decide to what extent and with what means will restrict human rights provided that they fulfill the conditions contained in the relevant clauses (Nowak Manfred, 2006: 63).

Regarding the Restriction of Human Rights in Indonesia, there is one jurisprudence that can be used as a guideline, namely the Constitutional Court Decision Number 2-3/PUU-V/2007 related to the Testing of Law Number 22 the

Year 1997 about Narcotics on the 1945 Constitution of the Republic of Indonesia.

As the Decision of the Constitutional Court Number 2-3/PUU-V/2007, the Constitutional Court is based on all the statements of the former MPR BP II 1999-2004 represented by Patrialis Akbar and Lukman Hakim Saefuddin, viewed from the perspective of the original intent of the constitution of the 1945 Constitution of Republic of Indonesia, all human rights listed in Chapter XA of the 1945 Constitution of Republic of Indonesia can be restricted. The original intent of the 1945 Constitution which states that human rights can be limited is also strengthened by the placement of Article 28J as the closing article of all provisions governing human rights in Chapter XA of the 1945 Constitution.

Hence, in a systematic interpretation (*sistem cheinterpretatie*), human rights which are regulated in Article 28A up to Article 28I of the 1945 Constitution of Republic of Indonesia are subject to the restrictions stipulated in Article 28J of the 1945 Constitution of Republic of Indonesia. Systematic regulation of human rights in the 1945 Constitution of Republic of Indonesia is in line with the systematic regulation in the Universal Declaration of Human Rights which also places an article on limiting human rights as a closing article, namely Article 29 paragraph (2) which reads, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Besides that, judging from the history of the development of Indonesian constitutionalism, as reflected in the constitutions that once took effect, namely the pre-amendment of the 1945 Constitution of Republic of Indonesia, the 1949 RIS Constitution, the 1950 Constitution and the Amendment to the 1945 Constitution, there was also a tendency not to absolve human rights

In line with Article 28J of the 1945 Constitution of the Republic of Indonesia and the Decision of the Constitutional Court Number 2-3/PUU-V/2007, the provisions of Article 73 of Law Number 39 of 1999 concerning Human Rights also affirm that, "Rights and freedoms regulated in this law can only be limited by and based on the law, solely to guarantee the recognition and respect for human rights and freedom from others, morality, public order and the interests of the nation."

International conventions of civil and political rights give the state the authority to exercise restrictions on human rights when the state in an

emergency is essential and threatens the life of a nation. As stated in Article 4 of the Covenant on Civil and Political Rights as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision

Based on Article 4 the convention on civil and political rights above gives the government legality to limit human rights if the State is in an emergency. An emergency or in English referred to as a state of emergency according to the European Court for human rights is an extraordinary crisis situation or an emergency that affects the entire population and is a threat to organized community life (Nihal, 2002: 205).

Emergencies can occur due to various factors, such as causes that arise from external or internal the country. The threat can be in the form of a military/armed or can also be unarmed such as bomb terror and other emergencies, but can cause casualties, property among citizens which absolutely must be protected (Gultom, 2010: 4). In an abnormal state or an emergency, the applied legal system must use emergency powers and procedures through the law of the emergency which can override the law under normal conditions, without having to influence democratic government systems that are adopted according to the constitution.

In an emergency situation that threatens the life of the nation, the constitution gives power to the head of state or government to assess and determine the state in an emergency (Robertson & Merrills, 1994: 185).

Judge David said: "the government, within the constitution, has all the powers granted to it, which are necessary to preserve its existence." This is in line with Beni Prasad said as follows:

"when face to face with dire adversity, the government could do anything. The justification of it all is that abnormal times have ethics of their own, appaddharma as it is called. It must be clearly understood, that in days of distress, all the ordinary rules of morality and custom are suspended."

This means that in an emergency, all external actions taken by the government including limiting human rights can be justified in order to maintain state integrity and protect its citizens. United Nations Committee on Human Rights in General Comment number 29 on Article 4 of ICCPR. Require There are two basic conditions that must be fulfilled to limit human rights, namely: "The situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency."

According to Alexander N. Domrin, there are various reasons for declaring an emergency in the laws of the former countries such as those carried out by German law scholars, A Hamann and Hans-Ernst Folz dividing all emergencies into six or seven categories. A Hamann identified emergencies as follows (Alexander, 2006: 1): 1). Foreign Invention; 2). Public actions aimed at subversion of the constitutional regime; 3). Serious violations threaten public order and security; 4). Disaster; 5). Strikes and riots in important areas of the economy; 6). Important disturbances in public service; and 7). Difficulties in the economic and financial fields.

In Indonesia, related to the dangerous situation is regulated in Law Number 23/Prp/1959 concerning Revocation of Law number 74 of 1957 (State Gazette number 160 of 1957) and Determination of Hazardous Conditions. In Article 1 paragraph (1), the President/Supreme Commander of the Armed Forces declares that all or part of the territory of the Republic of Indonesia is in a state of danger with a level of civil emergency or a military emergency or state of war, if:

1. Security or legal order in all regions or in some parts of the Republic of Indonesia are threatened by rebellion, riots or due to natural disasters, so that it is feared that they cannot be overcome by ordinary equipment;
2. War arises or the danger of war or territory rape of the Republic of Indonesia in any way.
3. Country life is in danger or from special circumstances it turns out that there are symptoms that could endanger the life of the State;
4. Based on Article 1 paragraph (1) it can be said that the state of danger based on the impact and the consequences it causes has levels where the lowest level of danger is a civil emergency, and the most dangerous in the state of war.

Then according to Article 1 *jo.* article 2 of the Act Number 23/Prp/1959, that the state of danger must be decided and announced by the President/Supreme Commander of the Armed Forces. The formal form of decision is the Presidential Decree (*Keppres*).

The legal system in all countries determines specific measures to deal with abnormal conditions which are then referred to as emergencies. In these emergency arrangements, there are always elements which reduce, limit or freeze certain human rights. However, the reduction, limitation, or freezing of such human rights must be; 1). It is temporary; 2). Intended for the purpose of overcoming a crisis situation; and 3). With the intention of returning normal conditions as usual in order to maintain fundamental human rights.

The terms of the limitation and reduction of human rights set out above are translated in more detail in the Siracusa Principles. This principle states that restrictions on rights must not endanger the essence of rights. All clause restrictions must be interpreted expressly and aimed at supporting rights, this principle also emphasizes that limitation on rights should not be arbitrarily enforced. Human rights restrictions can only be done if they fulfill the following conditions (Kontras, 2018): 1). *Prescribed by Law*; 2). *Needed in a democratic society*; 3). *Public Order*; 4). *Public Health*; 5). *Public Morals*; 6). *National Security*; 7). *Public Safety*; 8). *Rights and freedoms of others or the rights or reputations of others*

Conclusion

A substitute governmental regulation (*Perppu*) is not "*wet in formele zin*", because the *Perppu* is not a decision formed by *Regering* (Government, *in casu* President) and *Staten Generaal* (Parliament, *in casu* DPR). Instead, the *Perppu* is "*wet in zine material*" as a binding regulation for the public (*algemeneverbidendevoorschriften*) which is only formed by the President. The binding power of a *Perppu* as mandated by the Explanation of Article 22 of the 1945 Constitution of Republic of Indonesia is the same as the binding force of the law, namely national. However, it does not mean that the same binding force as the Law can cause *Perppu* to have content material that is the same as the content of the law.

Related to the limitation and / or reduction of human rights in Indonesia, which Indonesia is one of the countries that do not make the absolute human rights, in the sense that the state can limit certain human rights but as Article 28J paragraph (2) of the 1945 Constitution of Republic of Indonesia, Article 73 of Law Number 39 of 1999, and Constitutional Court Decision Number 2-3/PUU-

V/2007 restrictions and/or reduction human rights can only be done by law, not by legislation other than the Act.

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