

EMERGENCY LAW-MAKING IN INDONESIA: BETWEEN POLITICAL AND CONSTITUTIONAL PROCESS

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ABSTRACT

The government regulations in lieu of law can be seen as a temporary law because the House's approval is requested as soon as possible. The research method used normative legal research with a qualitative approach. This research reviewing government regulations in lieu of laws relating to Covid-19 effect in Indonesia by analyzing legal principles, legal systems, legal synchronization in forming government regulations in lieu of laws following those regulated by the constitution and its various degradations. The results show that the House's political process is necessary to determine whether or not the House approves government regulations in lieu of a law. If government regulations in lieu of law don't receive approval from the house in the plenary session, government regulations in lieu of law will be repealed and declared invalid. The government regulations in lieu of law about covid-19, related to the meaning of "following house hearing session" when government regulations in lieu of law are adopted, then the following house hearing session after the break, not during the hearing when the government regulates the law, instead of this. During the interval of the House drafted government regulations in lieu of law, the President made it impossible to hold meetings.

Keywords: Law-Making, Emergency Law, Constitutional Process.

INTRODUCTION

Art 22 para (1) of the 1945 Constitution states that "*should exigencies compel, the President shall have the right to establish government regulations in lieu of laws.*" Government regulations in lieu of laws or emergency law is a regulation that in terms of its content should be set in the form of law, but because of the state of exception is set in the form of government regulation (Hsb, 2017). Further, in Art 22 para (2) of the 1945 Constitution states that the House must approve the government regulations in lieu of laws in the following house hearing session. If then, it does not get the approval of the House of Representatives, then government regulations in lieu of laws should be repealed (Hsb, 2020).

In Art 228 para (3) People's Consultative Assembly, the House of Representatives, the Regional House of Representatives, and the Regional House of Representatives Law stated that the House hearing period includes the House hearing period (Hsb, 2020) and the recess (Regulation, 2014). If the President sets the government regulations in lieu of law at the time of the recess, then the next parliamentary hearing after the recess. The next question is what if the President sets the government regulations in lieu of law and the House of Representatives is

still in session. Can the President immediately submit the government regulations in lieu of law to get approval from the House of Representatives?

In this article, we will see how the definition of “*The next parliamentary hearing*” as government regulations in lieu of laws validation process and how it has been practised so far.

RESEARCH METHODS

The research method used normative legal research with a qualitative approach. This research uses legal analysis by examining juridical structures such as legal principles, legal systematics, and levels of legal synchronization, legal history and comparative law. This method uses statutory as the primary unit. This kind of research is doctrinal research. Furthermore, Terry Hutchinson distinguishes legal research into doctrinal research, the category that regulates a particular legal category, analyzing relationship rules, describes, and predicts the possibility of future development, research that generally suggests assessing existing rules and recommending changes on inadequate rules. This research reviewed government regulations in lieu of laws relating to Covid-19 in Indonesia's effect by analyzing legal principles, legal systems, legal synchronization in forming government regulations in lieu of laws following those regulated by the constitution and its various degradations.

Government Regulations In Lieu of Laws as Emergency Law

Government regulations in lieu of law is recognizing in line to ordinary law that hierarchically based on Art 7 para (1) Legislation Procedures Law of 2011. It's because Government regulations in lieu have same scope material as ordinary law. The only difference is that the President sets government regulations in lieu of law in terms of the state of exception (Regulation, 2014). According to Manan, a government regulation in lieu of law is equated with ordinary law because it has the same material as the ordinary law (Indrati, 2007). Bagir Manan also suggests that the subject matter of government regulations in lieu of law is the subject matter of the law. Under normal circumstances, such material must be regulated by law (Manan, 1992). However, Bagir Manan further stated that the material in charge of government regulations in lieu of law should be on matters related to the implementation of state administration. Thus, the rule of government cannot replace the constitutional law of nature and issues relating to state institutions, judicial power, the exercise of the sovereignty of the people, etc. beyond the scope of state administrative maintenance (Manan, 2003).

The position of government regulations in lieu of law often gives rise to debates which are generally due to several factors, among others (Chandranegara, 2012):

1. The government regulations in lieu of law can be said to be a temporary regulation because as soon as possible the approval of the House of Representatives should be sought at the next session after the Government Regulation Substituting the Law was formed. Although temporary the impact of the enactment of the government regulations in lieu of law may last a long time, even if the Regulation of the Substitute Government has been repealed;
2. The political process in the House of Representatives which sometimes raises controversy so much that it is necessary for the determination of the House of Representatives whether to approve or disapprove of the government regulations in lieu of law. Sometimes the enactment of government regulations in lieu of law becomes a bargaining chip for the government and the House of Representatives so that the debate in terms of legal substance is not essential;

3. Submission of Government Substitution of Laws to the House of Representatives in the form of submitting a draft law on the stipulation of government regulations in lieu of law. In the event that the House of Representatives does not approve the government regulations in lieu of law then the draft law on the stipulation of the government regulations in lieu of law does not apply, and the President proposes a bill on the repeal of the government regulations in lieu of law which can regulate all as a result of such rejection. This process sometimes takes a long time as a result of the very uncertain dynamics in the House of Representatives.

Another debate related to the formation of government regulations in lieu of law is the meaning of "*compulsive conflict*" as the reason for the formation of government regulations in lieu of law. The definition of "*coercive tension*" based on doctrine can be found in the opinion of Jimly Asshiddiqie and Bagir Manan. Where according to Jimly Asshiddiqie, there are 3 (three) essential elements forming the meaning of a dangerous situation that can cause compelling stress, among others: (1) the presence of hazardous elements; (2) the presence of an aspect of necessity; and (3) the existence of a component of time constraints. Based on the element, Jimly Asshiddiqie stated that there are 3 (three) material conditions for the enactment of a Government Regulation Substitute for Law, namely (1) there is an urgent need to act; (2) the time available is limited, or there is a time constraint; and (3) no other alternative is available, or according to rational reasoning, other options will not be able to overcome the situation, so with the issuance of government regulations in lieu of law is the only way to overcome the crisis (Chandranegara, 2012).

Bagir Manan states that the element of compulsive disorder must show 2 (two) common characteristics, among other: (1) there is a crisis; and (2) there is urgency. According to him, it is a crisis when there is a disturbance that causes concern and is sudden. Urgency, if various circumstances are not taken into account in advance and demand an immediate action without waiting for prior consultation or there are signs of a real beginning and logical reason if not regulated disruption immediately to both the community and the way the government (Manan, 1999). However, since the existence of the Constitutional Court Decision Number 138/PUU-VII/2009, stipulated the conditions of "*coercion*" in the stipulation of government regulations in lieu of law, namely:

1. The existence of a situation that is an urgent need to resolve legal issues accurately;
2. The required law does not yet exist until there is a vacuum of law, or there is a law, but it is not enough to resolve; and
3. That vacuum cannot be overcome by making laws by the ordinary procedure as it will take quite a long time while such urgent situations need certainty to be resolved.

Government Regulations In Lieu of Laws Making Process

Related to the process of establishing government regulations in lieu of law is regulated in Art 22 of The 1945 Constitution as follows:

1. In the case of emergency, the President reserves the right to prescribe government regulations in lieu of law;
2. the House must approve the government regulations of representatives in the following house hearing session;
3. If it does not get approval, then the government regulations in lieu of law must be repealed.

From the provisions of Art 22 of The 1945 Constitution, above can be known several things, among others (Asshiddiqie, 2010):

1. These regulations are called government regulations in lieu of law, which means that their form is government regulations as referred to in Art 5 para (2) of the 1945 Constitution that: "The President sets the government regulations to carry out the law as it should." If usually, the form of government regulation is the regulation established to carry out the law as it should be, then in a state of crisis that compels the form of government regulation it can be used to impose the provisions which must have been enacted in the form of law and to replace the ordinary law;
2. In essence, government regulation in place of the law itself is not the official name given by the Constitution of the Republic of Indonesia in 1945. However, in practice so far, such government regulation is commonly referred to as Government Regulation Replacing the Law;
3. The Regulation of the Substitute Government in principle can only be applied by the President when the requirements of the coercive crisis are met as they should be. The state of "*compulsive urgency*" referred to here is different and should not be confused with the meaning of "*state of danger*" as determined by Article 12 of the Constitution of the Republic of Indonesia of 1945 which reads: The President states the state of danger. Conditions and consequences of hazardous conditions are prescribed by law ;
4. Because basically the rule of law replacing the law is equal or has the same power as the law, then the House of Representatives must actively monitor both the determination and implementation of the rule of law replacing the law in the field, not to be excessive and contrary to the initial purpose behind it. Thus, the rule of government replacing the law should be made a very strict object of supervision by the House of Representatives in accordance with its duties in the field of supervision;
5. Because the material load of government regulation replaces the law should be poured in the form of a law, the period of enactment of regulation of the law replacing the law is temporarily limited. Pursuant to the provisions of Article 22 paragraphs (2) and (3) of the Constitution of the Republic of Indonesia in 1945, The Government Regulation must be approved by the House of Representatives in the following session. If it does not get approval then the government regulations must be repealed.

This provision is further elaborated in Article 52 of Law Number 12 of 2011 on the Establishment of Legislative Regulations as follows:

1. Government Regulations Substituting for Law should be submitted to the House of Representatives in the following session.
2. Submission of Government Regulations Substituting for Law as referred to in paragraph (1) shall be made in the form of submitting a Draft Law on the Determination of Government Regulations Substituting Laws into Laws.
3. The House of Representatives only gives approval or disapproval of the Government Regulation Substituting the Law.
4. In the event that the Government Regulation Substituting the Law is approved by the House of Representatives in a plenary session, the Government Regulation Substituting the Law shall be stipulated as Law.
5. In the event that the Government Regulation Substituting the Law does not get the approval of the House of Representatives in the plenary session, the Government Regulation Substituting the Law shall be repealed and shall be declared invalid.
6. In the event that the Government Regulation Substituting the Law shall be repealed and shall be declared invalid as referred to in paragraph (5), the House of Representatives or the President shall submit a Draft Law on the Repeal of the Government Regulation Substituting the Law.
7. Draft Law on the Repeal of Government Regulation Substituting Laws as referred to in paragraph (6) regulates all legal consequences of the repeal of Government Regulations Substituting Laws.
8. Draft Law on Repeal of Government Regulation Substituting for Law as referred to in paragraph (7) shall be stipulated as a Law on Repeal of Government Regulation Substituting for Law in the same plenary meeting as referred to in paragraph (5).

The Meaning of Phrase Following House Hearing Session and Its Practice

Jimly Asshiddiqie in his book "*Comments on the Constitution of the Republic of Indonesia in 1945*" related to Article 22 paragraph (2) of the Constitution of the Republic of Indonesia in 1945 which contains the phrase "*next conference*" no explain the meaning of the phrase. Jimly Asshiddiqie only stated that the government's regulation of the replacement of the law had already been approved by the House of Representatives at the next session. That is, if the current trial period is three months, then it means that the age of the government regulation that replaces the law is at most only about 4-6 months, and after that it must be repealed or accepted into a new law (Asshiddiqie, 2013). In the explanation of Article 52 paragraph (1) of Law No. 12 of 2011 on the Establishment of Legislative Regulation it is stated that what is meant by "*next trial*" is the first session of the House of Representatives after the Government Regulation Substituting the Law is established. There is no further explanation of the provisions regarding what if then the government regulations replacing the law are set during the session of the House of Representatives. Whether the President can directly propose a government regulation to replace the law to be approved by the House of Representatives into law. This is a question, because in practice, its implementation is inconsistent.

Practical practice is related to the enactment of Government Regulation Substituting Law No. 1 of 2020 on the State Financial Policy and Stability of the Financial System for the Handling of *Corona Virus Disease 2019* (Covid-19) and/or in the Face of Threats Threatening the National Economy and/or Financial System Stability. Where the government regulation of the successor law is enacted and promulgated on March 31, 2020 which coincides with the session III of the Session 2019-2020. Then the government regulation of the successor law is set into law, namely Law Number 2 Year 2020 on the Establishment of Government Regulation Substituting Law No. 1 of 2020 on State Financial Policy and Financial System Stability for the Handling of *Corona Virus Disease 2019* (Covid-19) and/or in the Face of Threats to the National Economy and/or Financial System Stability into Law, which was enacted on 16 May 2020 and enacted on 18 May 2020 which was also during the III session of the 2019-2020 Session.

Related to the meaning of "*next conference*" when the rule of law replaces the law is set during the session of the House of Representatives, then the next session is the conference after the recess, not during the session when the rule of law replaces the law. For Government Regulation Substituting Law No. 1 of 2020 set during the third session of the House of Representatives, the President proposes a government regulation to replace the law in the next session, which is the session of session IV of the House of Representatives. This was one of them delivered by Heri Gunawan, one of Gerindra's politicians. Where, Heri Gunawan stated that Government Regulation Substituting Law No. 1 of 2020 was promulgated on March 31, 2020, while the Session III of the House of Representatives Session 2019-2020 began on March 30, 2020. That is, the President must submit government regulations to replace the law-law No. 1 of 2020 in the following session, namely the Session IV of the House of Representatives (Yulianto, 2020).

The same thing was also said by Muhammad Nur Solikhin who assessed the time limit of the next trial showed when the President made a government regulation to replace the law in the situation of the House of Representatives is not in the conditions of the trial period. That is, the President made a Government Regulation to Replace the Law during the recess of the House of Representatives which did not allow any sitting or meeting (Legal Policy, 2020).

CONCLUSION

Based on the above discussion, it can be concluded that there has been a deviation in interpreting "*following house hearing session*" in the formation of the government regulations in lieu of law. Based on the practice of government regulations in lieu of law set during the House of Representatives session, it is submitted and approved at the same session. Not at the following session. Therefore, to provide certainty and uniformity in the practice of establishing government regulations in place of legislation, to be given restrictions related to the "*following house hearing session*" in Law-Making Procedures Law of 2011.

Government Regulations In Lieu of Laws as Emergency Law, government regulations in lieu of law are treated as ordinary law because they have the same material as ordinary law. The material of government regulations in lieu of law must be regulated by law. The material responsible for government regulations in lieu of law should cover issues related to the State Administration's implementation. Therefore, the state of the government cannot substitute constitutional law and issues related to state institutions, the judiciary, the exercise of the sovereignty of the people, etc. Outside the state's administrative scope. Government Regulations In Lieu Of Laws Making Process, Regarding the process of adopting government regulations in lieu of law, it is governed by Art 22 of the 1945 Constitution, which states that, in case of emergency by the President, the House must approve it the following house hearing session; if it is not approved, government regulations in lieu of law should be repealed. This provision is further worked on, following article 52 of the law on the legislative process in 2011, which stated that a government regulation, instead of law for the chamber to be presented at the following house hearing session, there must be a form for submission of a draft law on the provision of government regulations in lieu of law. The chamber only approves or disapproves. If the Chamber approves government regulations in lieu of law of Deputies in a plenary session, government regulations in lieu of law will be determined as Law. The Meaning "*Following House Hearing Session*" according to the Art 22, para (2) of the 1945 Constitution, which contains the expression "*following house hearing session*", does not explain the meaning of the expression. Jimly Asshiddiqie merely stated that the second chamber had already passed government regulations in lieu of law at the next session. If the current House term is three months, it means that the government's regulations in lieu of law are about 4-6 months old and then must be repealed or accepted in a new law. Connection with the approval of state regulation, instead of Law No 1 of 2020, related to state financial issues, and the stability of the financial system for the treatment of feline Covid- 19, and/or in the face of threats to the country's economy and/or the stability of the financial system at risk (government regulations in lieu of law about covid-19). The government regulation of the successor law is issued and promulgated on March 31, 2020, and it coincides with the third session of the chamber of the 2019-2020 sessions. The government regulation of the successor law will then be established by law on May 16, 2020, and adopted on May 18, 2020, during the third session of the 2019-2020 sessions.

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