PalArch's Journal of Archaeology of Egypt / Egyptology

LEGAL PROBLEM DURING COVID-19 PANDEMIC IN INDONESIA: IS IT NECESSARY TO DECLARE IT TO BE AN EMERGENCY?

Wicipto Setiadi[1], Melta Setya Rahayu Pujianti[2]

[1] Faculty of Law, Universitas Pembangunan Nasional Veteran, Jakarta, Indonesia.

[2] Student of Master Program, Faculty of Law, Gadjah Mada University, Yogyakarta, Indonesia.

Wicipto Setiadi , Melta Setya Rahayu Pujianti , Legal Problem During Covid-19 Pandemic In Indonesia: Is It Necessary To Declare It To Be An Emergency? , Palarch's Journal Of Archaeology Of Egypt/Egyptology 18(7). ISSN 1567-214x.

Keywords: Emergency, Constitutional basis, Emergency law.

Abstract:

This research discusses the constitutional basis of emergency in Indonesia, evaluation of emergency law, and urgency of emergency lawformulation. Article 12 of the 1945 Constitution of the Republic of Indonesia is the only constitutional basis of emergency. This research employed a normative legal research method and statute and conceptual approaches. The research result shows that the onlyemergency law referring to Article 12 of the 1945 Constitution of the Republic of Indonesia is Government Regulation in Lieu of Law No. 23 of 1959 concerning State of Emergency. Article 12 of the 1945 Constitution of the Republic of Indonesia is not referred to in emergency law formulation since the article is the concept of constitutional dictatorship. There is a trauma of the past since the application of constitutional dictatorshiptends to be used by Presidentto perpetuate their power. However, after the 1945 Constitution of the Republic of Indonesia regime, the checks and balancesand power division principles have been applied, thus although Presidentserves as the holder ofemergency power, but President does not have absolute power. Formulation of emergency law in

Indonesiamay be returned to its constitutional path, which is to refer to Article 12 of the 1945 Constitution of the Republic of Indonesiaas the constitutional basis.

I. Introduction:

The spread of covid-19 in Indonesia keeps increasing until now. Various efforts have been made by the Government, but there is no sign of decline in the number of people positively exposed to covid-19. In legal sector, many regulations have been issued, but the number keeps increasing day by day. One of the causes of increasing spread of covid-19 is people's low discipline and legal awareness factors. Dealing with the covid-19 pandemic which increases from day to day needs a legal umbrella in the form of regulation, instead of merely circular letter, suggestion, or movement.

The law needed must be associated with the existing situation of increasing spread of covid-19, constituting normal and abnormal situations. Therefore, it is necessary to agree on whether the currently increasing spread of covid-19 is classified into normal or abnormal situation category. It is hard to determine it to be normal or abnormal situation and this requires a strong consideration and legal basis.

If it is agreed that the current spread of covid-19 is categorized into emergency, there is an urgent necessity to act quickly and appropriately to deal with the emergency. For the state's act to be pursuant to the emergency situation and condition, the law applied shall be emergency law. The application of a law regime depends on the state's condition. In normal condition, normal/ordinary law shall apply, while in emergency,emergency law shall apply (dualism of law) (John Ferejohn andPasquino, 2004).

There are some reasons regarding the application of normal law and abnormal law regimes application.First, applying ordinary lawto an emergency will cause injustice, and vice versa. "Normalerechtvoornormaletijd, enabnormalerechtsvoorabnormaletijd" (normal law for normal time and abnormal law for abnormal time) (JimlyAsshiddiqie, 2020). Second, ordinary lawis unpredictable.Ordinary law is formed for state administration in normalcondition, not in emergency, thus there is incapability of dealing withthe emergency. For example, the function of state agency in normal condition may differ from that in emergency. When its function in normal condition is applied in emergency,there will be malfunction, which may pervert emergency settlement. Third, the Government applies constitutional exception (state of exception) which is not justified in normal condition. For example, limitation of human rights in normal condition is not justified, but with emergency law application, such act of limitation may be justified.

Dualism of law has been applied in many countries. In general, it clearly and expressly separates two regimes of law in constitutional content material (Europe Commission For Democracy Through Law (Venice Commission), 1995), for example, the 1945 Constitution of the Republic of Indonesia. The ordinary law regime may be observed in many provisions of the 1945 Constitution of the Republic of Indonesia, while emergency law regime is explicitly set forth in Articles 12 and 22 of the 1945 Constitution of the Republic of Indonesia. These provisions are maintained until the 1945 Constitution of the Republic of Indonesia regime. Article 12 of the 1945 Constitution of the Republic of Indonesia states "The President declares the state of emergency. The conditions and consequences of a state of emergency shall be regulated by law" and Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states "In compelling crisis situations the President shall have the right to

issue government regulations in lieu of law". In emergency law regime of the 1945 Constitution of the Republic of Indonesia there are 2 legal terms, namelystate of emergency and compelling crisis. Difference in term has the implication in difference in emphasis. Difference in emphasis does not mean that the two are of different discussions. First, the two may be defined as extraordinary condition or condition which may threat the life of the nation. Second, the two are related to each other. State of emergencyis definitely a compelling crisis, while one cause of compelling crisis is state of emergency, thusthe product of emergency law may be in the form of Law (UU) or Government Regulation in Lieu of Law (Perpu).

Article 12 of the 1945 Constitution of the Republic of Indonesia is the only constitutional basis of emergency, makingordinary law application cannot be enforced. The delegated law of Article 12 of the 1945 Constitution of the Republic of Indonesia is emergency law. It is slightly different when what is applied is Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, since it maylead to 2 possible regimes of law. An ordinary law regime may be born if a Perpudoes not refer Article 12 of the 1945 Constitution of the Republic of Indonesia, for example,Perpu No. 1 of 2020 concerning State Finance and Financial Stability Policyto Deal with Corona Virus Disease 2019 (Covid-19) Pandemic in Facing ThreatsEndangering the National Economy and/or Financial System Stability (Perpu Covid-19). An emergency law regimemay be born if a Perpurefers to Article 12 of the 1945 Constitution of the Republic of Indonesia, for example,Perpu No. 23 of 1959 concerning Revocation of Law No. 74 of 1957 and Declaration of State of Emergency (Perpu KB). Normatively, the application of Article 12 of the 1945 Constitution of the Republic of Indonesia is not a problem. However, in practice, the application of Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis of an emergency Law or Perpuis minimallyimplemented, while Indonesia has faced emergency several times and may potentially face other emergency in the future.

Searching of emergency Law or Perpu, only Perpu KB refers to Article 12 of the 1945 Constitution of the Republic of Indonesia. None of the remaining Law or Perpubears the predicate "emergency" referring to Article 12 of the 1945 Constitution of the Republic of Indonesia, for example, Law No. 24 of 2007 concerning Disaster Relief (UU PB), Law No. 7 of 2012 concerning Dealing with Social Conflict (UU PKS), Law No. 6 of 2018 concerning Health Quarantine (UU KK) and Perpu Covid-19. In general, formulation ofemergency law only refers to Article 20 and 21 of the 1945 Constitution of the Republic of Indonesia, which are the bases of DPR's authority to form law. The same also applies to formulation of emergency Perpu, which only refers toArticle 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This means that, from the perspective of constitutional basis, the existing emergency law products are ordinary lawswhich are applied in emergency. Since they are ordinary laws, their whole working system is in normal condition. Itsimplementation cannot violate other laws and regulations and human rights. Law or Perpumay only be granted with constitutional exceptionwhen the condition which becomes the constitutional basis is Article 12 of the 1945 Constitution of the Republic of Indonesia.

Perpu KB is formed in the Old Order configuration, thus the situation needs to be renewed pursuant to current condition. Emergency keeps developing, not limited to military, war and civil emergencies as in Perpu KB. The development has long been caught by law draftersby producing many laws to solve emergency in Indonesia. Some of them have been mentioned above. However, the practice of emergency

lawsformulationthat has occurred may be declared "non-constitutional" since they do not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis. Therefore, it is necessary to return emergency law to constitutional path. This is very important considering that Article 12 of the 1945 Constitution of the Republic of Indonesia is the key to emergency enforcement. Without using the key, any products of emergency law cannot have constitutional exception.

II. Method:

This research employed a normative legal research method and focused its juridical study on the formulation of emergency law in Indonesia. The approaches employed in this research werestatue approachand conceptual approach. Legal materials were collected through library research, in which the materials were obtained from laws and regulations, books, journals and other relevant supporting literatures. Deductive abstraction was conducted after material inventorying, classification, and analysis, in which general preposition was drawn into specific preposition.

III. Result and Discussion:

A. Constitutional Basis of Emergencyin Indonesia:

Discussion on emergency law in Indonesia started from the session of the Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI) on 13 July 1945 with its agenda of discussion on Draft Constitution. The Draft Constitutionsubmitted by the Constitution Drafting Committeecontains the provisions of emergency law. The Draft Constitutionhas similarity to the currently prevailing provisions. Article 10 Draft Constitutionstates "The Presidentdeclares "Staat van beleg". The conditions and consequences of a "Staat van beleg" shall be regulated by law". The term "staat van beleg" may be defined as "State in emergency". Further, Article 23 paragraph (1) Draft Constitutionstates "In compelling crisis situations the President shall have the right to issue government regulations in lieu of law" (State Secretariat of the Republic of Indonesia, 1995). The super-fast drafting of the Constitution caused minimum discussion on emergency law,thus when it was legalized on 18 August 1945, the formulation of Constitution Drafting Committeewas legalized with an adaptation from the term "staat van beleg" to "state of emergency" (Article 12 of the 1945 Constitution of the Republic of Indonesia). Term changes reoccurredto the 1949 Federal Constitution of the United States of Indonesia (Article 139 of the 1949 Federal Constitution of the United States of Indonesia) with the terms "state of urgency" and "emergency law". The same term was later adopted by the Provisional Constitution of 1950 (Article 96 of the Provisional Constitution of 1950).

After the Presidential Decree on 5 July 1959, the 1945 Constitution of the Republic of Indonesia (UUD 1945) started to apply. The emergency law regime was explicitly set forth in Article 12 and Article 22 paragraph (1) UUD 1945. These two provisions were maintained until the 1945 Constitution of the Republic of Indonesia regime. Article 12 of the 1945 Constitution of the Republic of Indonesia states "The President declares the state of emergency. The conditions and consequences of a state of emergency shall be regulated by law". There are some elements: (1) declaration of a state of emergency. A regime of ordinary law may shift to an emergency law when the President first declares a state of emergency. There is no statement of what specific

legal product is issued by President, but referring to the phrase "declares the state of emergency" the characteristic of the legal product is a declaration (beschikking). President may issuea Presidential Decree (Keppres) to declare a state of emergency and when the state returns to normal, President may revoke theKeppresthrough Keppres; (2) President,as the holder of emergency power (the sole sovereign head of state),is authorized to take any actions and issue any policies needed to save the state from the state of emergency; and (3) the requirements and consequences of state of emergency shall be regulated by law, which may be defined that Article 12 of the 1945 Constitution of the Republic of Indonesia gives an open legal policyto law drafters to interpret the concerned emergency. The law will be the objective measure for the President to determine whether a situationand condition of the state constitutes a state of emergency.

Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia states "In compelling crisis situations the President shall have the right to issue government regulations in lieu of law". The Constitutional Court explainsthe elements of Article 22 of the 1945 Constitution of the Republic of Indonesia, including (Constitutional Court Decision of the Republic of Indonesia, No. 138/PUU-VII/2009): (1) to authorize the President to issue Perpu. This authority is in line withPresident's role as the sovereign head of state of emergency, thus inthe context of compelling crisis the President is authorized to issue Perpu; (2) the authority to issue Perpumay be used only in a compelling crisis. The definition of state of emergency in Article 12 of the 1945 Constitution of the Republic of Indonesia is an objective measure, but the definition of compelling crisis in Article 22 of the 1945 Constitution of the Republic of Indonesia is President's subjective measure. Therefore, limitation is needed for the definition of compelling crisis not to be too broad and cause abuse of power. The Constitutional Courtinterprets compelling crisis as (Constitutional Court Decision of the Republic of Indonesia, No. 138/PUU-VII/2009): (a) a condition compelling of necessity to solve legal problem quickly based on law; (b) the law needed has not existedyet, thus there is vacancy of law, or it exists but not accommodating; and (c) the vacancy of law cannot be solved bydrafting law through ordinary procedure since it will take a long time, while the state of urgency requires a certain settlement; (3) Perpumust be under approval of DPR in the next session. Perpushall apply only in a limited period, which is until the next DPR session, and the President must submit Perputo DPR for approval (Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia). If DPR approve it, the Perpuwill be legalized to be a Law, but when it is not approved, the Perpumust be revoked immediately (Article 22 paragraph (2) of the 1945 Constitution of the Republic of Indonesia).

From the provisions above, emergency, according to the 1945 Constitution of the Republic of Indonesia, may be categorized into 2, namely state of emergency and compelling crisis. They are practically defined as emergency, but the two have different emphases. State of emergency emphasizes on the structure (external factor), while compelling crisisemphasizes on the content (internal factor) (Muhammad Syarif Nuh, 2011). Article 12 of the 1945 Constitution of the Republic of Indonesia regulates President's authority as thehead of stateto declare a state of emergency in consideration of the requirements and consequences of state of emergency as set forth first in a law, while Article 22 of the 1945 Constitution of the Republic of Indonesia authorizes the President to exempt legislative function by issuing Perpuif the requirements for a crisis are met. State of emergency is ofcompelling crisis category, whilecompelling crisisis not always a state of emergency. State of emergency emphasizes on dangerous threat,

while compelling crisisemphasizes onurgent legal necessity. Lastly, Article 12 of the 1945 Constitution of the Republic of Indonesia implies objective measure to enforce, supervise and end a state of emergency with law, while Article 22 of the 1945 Constitution of the Republic of Indonesia does not specify it. The difference in emphasis cannot be interpreted as if the two are not correlated at all. A state of emergency certainly causes a compelling crisis, while compelling crisismay be caused, one of which and primarily, by state of emergency (JimlyAsshiddiqie, 2007).

Article 12 of the 1945 Constitution of the Republic of Indonesia is the only constitutional basis of emergency. Basically, Article 12 of the 1945 Constitution of the Republic of Indonesia may be explained to be the basis of formulation of 2 legal products. First,Keppres (Presidential Decree). Article 12 of the 1945 Constitution of the Republic of Indonesia does not specifically mention what legal productsare issued by the President but previously the author agrees that declaration of state of emergency is performed through Keppressince the substance of the legal product is declaration (beschikking). Second, Law.The phrase "... shall be regulated by law" in Article 12 of the 1945 Constitution of the Republic of Indonesia bears the same meaning with "shall be set forth by law" (JimlyAsshiddiqie, 2007). The 1945 Constitution of the Republic of Indonesia as thebasic lawformulates delegation to norms below it as an effort to explain and operate the norm. Therefore, the 1945 Constitution of the Republic of Indonesia identifies methods of delegation, one of which is "shall be regulated by law". The "shall be regulated by law" is defined that it must be regulated by issuing a separate law which regulates specifically the substance delegated (HukumOnlin.com, 2020). It may also refers to the substance delegated of which partialsubjects have been set forth in PUU which delegates it but is delegated further only in statute that delegates it and must not be delegated in lower statute (sub-delegation)(Appendix II of Law No. 12 of 2011).

The explanation above illustrates that Article 12 of the 1945 Constitution of the Republic of Indonesia is the constitutional basis in issuing an emergency law, with the requirements and consequences of state of emergency are regulated by law. This formulation results in emergency law in Indonesia. It is necessary to note that none of the prevailing emergency lawsin Indonesia refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis, other thanPerpu KB, whilethe constitutional basis is a conditio sine quanonin issuing a law. When a law contradicts or does not have a constitutional basis, we may state that the lawis not constitutional. Constitutional basis is divided into 2 types, namely: (1) formal basis, intended to give procedural legitimacy of formulation of laws and regulations listed in the legal framework "in view of" a statute. (2) Material basis, intended to give a sign that the laws and regulations listed are the explanation of articles of the 1945 Constitution of the Republic of Indonesia which are also listed in the legal framework "in view of" and outlined briefly in "in consideration of" and expressed in the Body and Explanatory Note to a Law (Machmud Aziz, 2009). Such practice is maintained for quite a long time in forming an emergency law. Not without a cause, the spreading opinion assumes that the application of Article 12 of the 1945 Constitution of the Republic of Indonesia in a law will legitimize power abuse, especially by President as the holder of emergency power. The concept of emergency powerholder cannot be separated from the influence of World Wars I and II which caused many constitutional, democratic nations to face emergency and face it using abnormal governance pattern. In this regard, Clinton L. Rossiter (1948) introduces Constitutional Dictatorship. Dictatorship in Rossiter's idea is to grant a legal exception to a trusted person (executive) to handle an emergency. After

the emergency ends, that person must submit the governance to normal condition. This way, Constitutional Dictatorshipapplies temporarily and may destruct itself. Constitutional Dictatorshipis needed as an unavoidable and determining factor in maintaining the existence of a constitutional, democratic nation. It is even said, "No form of government can survive that excludes dictatorship when the life of the nation is at stake." Ignoring the importance of dictatorship, there is no form of governmentthat can survive when the life of the nation is at a stake.

Rositter's opinion is opposed by Sanford Levinson and Jack M. BalkinthroughDistributed Dictatorship. This idea sees its relevance to modern government which is not concentrated on one executive power (monarchical), but distributed to many powers, including the presence of independent power (JimlyAsshiddiqie, 2020). In addition, there is weakness in Rositter's ideawhich leads to possible power abuse since the executive has sole authority in enforcing the emergency. The second reason is that many negative impacts have been found from Constitutional Dictatorshipnot only during emergency, but also after emergency has ended. For example, criminal or civil suit against officials implementing emergency power (JimlyAsshiddiqie, 2020). It is concluded that Article 12 of the 1945 Constitution of the Republic of Indonesia has applied Constitutional Dictatorship, as proven withthe grant of authority to President to declare a state of emergency. President is given with constitutional exception to take any action and issue any policy necessary to solve a state of emergency.

The application of Article 12 of the 1945 Constitution of the Republic of Indonesia does not result in a good outcome, since the emergency law which should solve the state of emergency creates a new state of emergency instead. An example of its dark recordswas during the Old Order in 1957, when President Soekarno declared a state of emergency through Perpu KB. The declaration strengthened President's role and political power, and military officials got more active in politics and took civil positions, and there was restriction on press and political party's activity (Fadrik Aziz Firdausi, 2020). Later, in the New Order, President Soehartoused Law No. 11/Pnps/1963 concerning Eradication of Subversive Actions (Subversion Law) as the weapon to eliminate his political rivals. Anyone who opposes any policies of the Government or its political conception, or desiring other social structure than what is outlined by Pancasila and its Political Manifesto is classified as subversive attempt. Because of its broad formulation, any attitude, behavior and act of a person is classified as subversive activity (Adnan BuyungNasution, 1978).

The dark record cannot serve as a legal reason to keep false practice of emergency law, moreover with the configuration of Article 12 of the 1945 Constitution of the Republic of Indonesia which is far different from its application in the 1945 Constitution regime. The configuration of the 1945 Constitution is still in the context of Indonesian independence. As a newly formed nation amidst the non-declining war, the President is given with big power and trust by the 1945 Constitution to operate the state, thus it is understandable if there is power abuse in this time, especially by President. This is contradictory to Article 12 of the 1945 Constitution of the Republic of Indonesia that has been supported with the checks and balancesand distribution of power principles. Constitutionally, the President remains the holder of emergency power, but in implementing the power, the checks and balances and distribution of power principles by other state agencies, even now, independent state agencies will also work.

Therefore, it is irrelevantwhen the formulation of emergency law in Indonesia maintains the false practice because of concern about reoccurring power abuse.

B. Evaluation ofLaw Related to Emergency in Indonesia:

a. Law No. 24 of 2007 concerningDisaster Relief:

Indonesian's vast territory has geographical, geological, hydrological and demographic conditions with potential disaster which may cause loss. Disasters in the country show an increasing graphic. From January to September 2020 there were 2,127 natural disasters which were dominated by landslide, tornado, and flood (Cindy MutiaAnnur, 2020). The data exclude non-natural disaster Covid-19 which stroke Indonesia from March 2020. Therefore, regulations which comprehensively regulate disaster prevention and relief are needed in order to deal with them. Current disaster prevention and relief law still refers to Law No. 24 of 2007 concerning Disaster Relief (UU PB). UU PB is issued because of the state's obligation to assume the responsibility to protect the whole people of Indonesia and the entire homeland of Indonesia by protecting the life and livelihood including protecting them from disaster in order to manifest prosperity (In consideration of point a Law No. 24 of 2007 concerning Disaster Relief).

Disaster is an event or a series of events threatening and disturbing the life and livelihood of the people, caused by natural, non-natural or human factor and even death, environmental damage, property loss, and psychological impact (Article 1 point 1 Law No. 24 of 2007 concerning Disaster Relief). There are 3 basic aspects, namely threatening or hazardous event or disturbance, the event or disturbance threatens life, livelihood, and function of the society and cause death, loss and exceeds the people's capability to solve it with their resources (Shanti Dwi Kartika, 2015). The definition covers the terminology of the United Nations Office for Disaster Risk Reduction (UNISDR)which divides disaster into 2, namely: (1) natural disaster, namely (a) hydro-meteorologicaldisaster in the form of flood, typhoon, flash flood, drought, and landslide; (b) geophysical disaster in the form of earthquake, tsunami, and volcanic activity; (c) biological disaster in the form of epidemic, plant and animal diseases; and (2) technological disaster, namely (a) industrial accident in the form ofchemical leak, industrial infrastructure damage, gas leak, poisoning, and radiation; (b) transportation accident in the form of air, rail, road, and water accidents; (c) miscellaneous accident in the form of domestic or non–industrial damage, explosion, and fire.

The broad definition opens wider potential emergency. Although it is understood that not all disasters cause national emergency, for example Tsunami disaster in Aceh caused local emergency. Viewing the legal framework "in view of" of UU PB which only refers to Article 20 and Article 21 of the 1945 Constitution of the Republic of Indonesia but does not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis, UU PB is an ordinary law but can be used to solve the emergency. The legal framework "in view of" should not only refer to the basis of authority of law formulation, but also the basis of PUU which directs law formulation(Appendix II of Law No. 12 of 2011 concerning Formulation of Legislation). Here, the formulators of UU PB differentiate between condition arising from natural disaster such as that in UU PB and emergency in Article 12 of the 1945 Constitution of the Republic of Indonesia and Perpu KB. The reason of this differentiation is that at the time of formulating UU PB, the spirit of state administration

is oriented to rejecting all forms of authoritarianism (JimlyAsshiddiqie, 2007). At that time, applying Article 12 of the 1945 Constitution of the Republic of Indonesia is equal to supporting the authoritarianism itself. The differentiation seems irrelevant when facing disaster which causes wide-scale emergency and impact on state pillars, such as Covid-19 which was declared to be a non-natural disaster with wide-scale impact (Presidential Decree No. 12 of 2020 concerning Declaration of Non-Natural Disaster of Corona Virus Disease 2019 (Covid-19) Spread as National Disaster).

Although Article 12 of the 1945 Constitution of the Republic of Indonesia does not serve as the constitutional basis of UU PB, but UU PB has the following of emergency characteristics: (1) there isemergency. Disaster emergency is indeed not regulated explicitly in UU PB but in Perpres. UU PB only regulates declaration of emergency status. In Perpres, disaster emergency is only a condition which threatens and disturbs the life and livelihood of a group of people/society that needs immediate and sufficient handling, covering emergency standby condition, emergency response, and emergency transition to recovery (Article 1 point 3 Presidential Regulation No. 17 of 2018 concerning Disaster Relief Implementation in Certain Condition); (2) the responsibility of disaster relief implementation is assigned to the Central Government and Local Government. The responsibility of disaster relief will be assigned in consideration of the disaster's scale. National scale disaster will be the Central Government's responsibility and local scale disaster will be Local Government's responsibility. This is identical to emergency since it grants the power to settle emergency to a state agency according to the disaster's scale; and (3) there is declaration of disaster emergency status. Declaration of the status of national disaster emergency is made by the government pursuant to the disaster's scale. A national scale disaster is declared by the President, a provincial scale disaster is declared by Governor, and regency/municipal scale disaster is declared by Regent/Mayor. Declaration of emergency status takes an important position since it legitimizes emergency law enforcement, including regarding the function of state agency in disaster relief process.

b. Law No. 6 of 2018 concerning Health Quarantine:

Similarly to its predecessors Law No. 1 of 1962 concerning Sea Quarantine and Law No. 2 of 1962 concerning Air Quarantine, Law No. 6 of 2018 concerning Health Quarantine (UU KK) has internationalcore law, namely the International Health Regulations 2005 (IHR 2005) as an update of IHR 1969. The update of IHR 1969 is needed to answer the limitation of IHR 1969 in identifying and dealing with extraordinary occurrence and control of new emerging, emerging, and re-emerging diseasewith internationaldimension, known as the Public Health Emergency of International Concern (PHEIC) (Drafting Team of DirectorateGeneral of Disease Control & Environmental Sanitation, 2008). The PHEIC is included in the consideration "in consideration of" item b of UU KK stating that:

> "that the advancement of transportation technology and the free trade era is at risk of causing health disorder and new disease or reemerging old disease with a more rapid spread which potentially cause**health emergency to the society**, requiring comprehensive and coordinated efforts to prevent and cope with the disease and health risk factor, which requires resources, people's participation and international cooperation"

Further, item c of UU KK states:

> "Indonesia is committed to performing efforts to prevent **health emergency to the society**troubling the world as mandated by the international regulation in health sector, and in implementing this mandate Indonesia must fully respect the dignity, human rights, bases of individual freedom, and universal application"

Although it is formulated from core PHEIC,but from the perspective of legal framework "in view of" it does not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia at all. The legal frameworks"in view of" referred to in UU KK are Article 5 paragraph (1), Article 20, Article 28H paragraph (1), Article 34 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Observing the legal framework "in view of", we may understand that UU KK is an ordinary law, instead of an emergency law. However, from the perspective of content material, UU KK contains the "typical" substance of emergency. There is an anomaly, that on one hand, the legal frameworkof "in view of" UU KK does not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia, but on the other handthe content material of UU KK contains emergency law.

The content materials of UU KK with emergency law characteristics are: (1) people's health emergency. Perpu KB only categorizes emergency into 3, namely military, war, and civil emergencies. In line with current development, potential emergency is not only caused by war, but also outbreak that leads to health emergency. Article 1 point 2 UU KK contains people's health emergency which is defined as people's extraordinary health occurrence; (2) declaration of people's health emergency. Emergency in Article 12 of the 1945 Constitution of the Republic of Indonesia must be declared first by the President as the holder of emergency power. This juridically results in a shift from ordinary law to emergency law regime. Article 10 paragraph (1) UU KK sets that the Central Governmentdeclares and cancels people's health emergency; (3) people's health emergency power holder. In the concept of emergency law there is state agency given with emergency power to solve the emergency. Article 10 paragraph (1) UU KK gives the right to declare the emergency to the Central Government, which means that Local Government serves as the holder of emergency power. However, Article 4 UU KK also gives the responsibility of health quarantine implementation to Local Government; and (4) restriction on human rights. Enforcement of emergency law regime legalizes restriction on human rights. Restriction on human rights may be observed, for example in Article 15 UU KK in the form of health quarantine, isolation, large scale social distancing (PSBB) which is classified into restriction on the right to movefreely (Article 13 Universal Declaration of Human Rights 1948).

B. Urgency of Covid-19 Pandemic Declared as an Emergency in Indonesia:

Law evaluation above shows thatemergency law formulation in Indonesia does not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis, thusthe law issued is an ordinary law, instead of an emergency law. As an ordinary law, its application cannot deviate from other legislation and cannot violate human rights, since there is no constitutional exception on which it is based. Consequently, dealing with the emergency will be obstructed since it is restricted by ordinary law. This reminds us of solus populi suprema lex esto, that people's safety is the highest law. In emergency, people'ssafety is the main thing to be enforced by the state. Legal enforcement should not hinder the state from manifesting people's safety. There are 4 types of urgency of emergency law formulation in Indonesia, namely:

a. Philosophical basis:

The philosophical basis of the importance of formulating emergency law in Indonesia cannot be separated from the fact that the state to be formed (at the time) by the founding parentsis a state of prosperity (Azhary, 1995). The basic idea of the premise starts from the mandate of struggle for Indonesian independence where thenation-state Indonesia attempts manifestation of physical and spiritual prosperity for all people without exception, freedom from oppression by other nation and from poverty because of the oppression (Budi Setiyono, 2018). This reflects that Indonesia aims at forming a state of prosperity as expressed in 4 goals of the nation in the Preamble of the 1945 Constitution of the Republic of Indonesia, namely (1) protect the whole people of Indonesia and the entire homeland of Indonesia, (2) to advance general prosperity, (3) to develop the nation's intellectual life, and (4) to contribute to the implementation of a world order based on freedom, lasting peace and social justice. The nation's goals are explained in the Body of the 1945 Constitution of the Republic of Indonesia and operated in many laws and regulations derived from it in order to ensure state administration of manifesting all people's prosperity. Likewise, it is absolute to implement the explanation of the state's responsibility to protect the whole people of Indonesia and the entire homeland of Indonesia in the Body of the 1945 Constitution of the Republic of Indonesia.

The goal of protecting the whole people of Indonesia and the entire homeland of Indonesia is extensively set forth in the 1945 Constitution of the Republic of Indonesia, including Article 28, 28A-J concerningrespect to and protection of human rights, Article 30 concerningdefense and security, and Article 12 and Article 22 concerning emergency. Emergency law formulation set forth in Article 12 of the 1945 Constitution of the Republic of Indonesia is one explanation of the state's goal, which is to protect the whole people of Indonesia and the entire homeland of Indonesia through emergency law formulation. The state is given with constitutional exception to take any action and issue policies needed to protect the people of Indonesia from any threat and disturbance of emergency. The state may even violate human rights as long as it is to settle an emergency. The powerful position of Article 12 of the 1945 Constitution of the Republic of Indonesia must be set into norm first with aseparate law, so that there will be no power abuse by the state. In case this occurs, the state of prosperity will not be manifested, and but a state which torments the people.

b. Sociological basis:

The correlation between law and society has long been developed by various scientific disciplines. Marcus Tullius Cicero's famous adage from Romestates "ubi societasibiius", that where there is society, there is law. This adage considers that correlation between law and society cannot be separated and they are interdependent on one another. The existence of law is understood and deemed to aim to regulate people's life justly, while the society desires law to maintain order among the society members in the interaction one with the other, for fulfillment of interested need (A.A. KT. Sudiana, 2012). In Indonesia, similar discussion is pioneered by SatjiptoRahardjothrough Progressive Law. According to Progressive Law, it is "law for human, instead of human for law". This means that law creation by human is for it to be human's servant, not the otherwise. A law is not born for itself, but for something more extensive, which is for human's self-esteem, happiness, prosperity and glory (Mukhidin, 2014).

On the basis of correlation between law and society, formulation of law should only to realize society's prosperity and happiness, instead of causing people's suffering. Therefore, law formulation must conform to people's needs. The umbrella of the concept is elaborated into emergency law formulation which is the urgent necessity of the Indonesian people who are surrounded by potentialemergencies, such as potential disaster, conflict, and outbreak. In line with the more rapid advancement of current development, emergency law formulation must be pursuant to the existing context of emergencysince each emergency has different characteristics and handling. For example, health emergency usually regulates restriction of people and goods movement. This is different from disaster emergency, which does not needregulation of restriction on people and goods movement.

c. Juridical basis:

Indonesia follows the legal norm hierarchy of Hans Kelsen and Hans Nawiasky's teaching. According to Kelsen, legal norms form a hierarchy, where lower norms are applicable to, derived from, and based on a higher norm, and so on until a norm which cannot be traced further and is hypothetical and fictive, which is the groundnorm (Maria Farida Indrati S., 2007). Nawiaskyadds thatlegal normsare in group and legal norms in a state are classifiedinto 4 big groups: staatsfundamentalnorm(state's fundamental norm), staatsgrundgesetz (state's basic rules), formellgesetz (formal law), verordnung and autonomesatzung(implementing rules and autonomous rules) (Maria Farida Indrati S., 2007). Legislation Formulation Law acknowledges hierarchy of legal norms, namely: staatsfundamentalnorm(Pancasila and Preamble of the 1945 Constitution of the Republic of Indonesia), staatsgrundgesetz(Body of the 1945 Constitution of the Republic of Indonesia), formellgesetz(Law/Government Regulation in Lieu of Law), verordnung and autonomesatzung (Government Regulation, Presidential Regulation, and Local Regulation).

In the context of emergency law formulation, protecting the whole people of Indonesia and the entire homeland of Indonesia is the aspiration that must be manifested bythe Indonesian Government. The mandate is outlined in Article 12 of the 1945 Constitution of the Republic of Indonesia as the only constitutional basis of emergency. For its operation, Article 12 of the 1945 Constitution of the Republic of Indonesia has mandated formulation of law containing requirements and consequences of state of emergency. The operation of Article 12 of the 1945 Constitution of the Republic of Indonesia is only expressed in Perpu KB and is irrelevant to the current development. Meanwhile, no existing law with predicate "emergency" refers to Article 12 of the 1945 Constitution of the Republic of Indonesia, thus the existing lawsmay be declared "non-constitutional" and are ordinary laws, instead of emergency laws.

d. Political basis:

According to Mahfud MD (2017), politics of law isthe legal policyor official line (policy) concerning law to be enforced, either with new law formulation or replacement of old law, in order to achieve the state's goals. King Faisal Sulaiman (2017) defines politics of lawas the basic policy of state administrator in the field of law that will apply, is currently applicable, and has applied, which is derived from the prevailing values in the society to reach the state's goals aspired. From the definition, politics of law aims at achieving state's goals from the Preamble of the 1945 Constitution of the

Republic of Indonesia. As a state which is based on law (rechtstaat) and not based on power (machstaat), the State Indonesia expresses the state's goals through law as its means. In other words, law is the means used to achieve state's goals aspired. It is here that law works as a law formulation process.

Law is actually a political product, thus it is full of political interest. Although there is a view dasssollen, that politics must comply withlegal provisions, but bydass sein, it is law that is actually determined by political configuration (King Faisal Sulaiman, 2017). Emergency law formulation cannot be separated from the influence of political willthat formulates the law. For what emergency law is formulated, its formulation objective, the content of emergency law, and where it is directed to depend on the political willthat formulates the law. Therefore, emergency law formulation process needs to prioritize formation of political willthat formulates the law in order to explore and accommodate society's needs from the emergency law that is able to settle the emergency quickly and appropriately. Such political willmay serve as the accelerator in realizing state's goal of protecting the whole people of Indonesia and the entire homeland of Indonesia.

IV. Conclusion:

Formulation of emergency lawsin Indonesia has maintained false practice for a long time since they do not refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis. Constitutional basis is theconditio sine quanonin formulating a law, thus when a law is contradictory to or does not have any constitutional basis, the law may be declarednon-constitutional. The minimum reference is caused by the concept of constitutional dictatorship brought by Article 12 of the 1945 Constitution of the Republic of Indonesia. There is trauma of the past caused by the application of constitutional dictatorshipwhich tends to be used by the President to perpetuate his power. From the description above, no emergency law refers to Article 12 of the 1945 Constitution of the Republic of Indonesia, other thanPerpu KB. However, fear of the history should not legalize the false practice. The reason is that after the 1945 Constitution of the Republic of Indonesia regime, the checks and balances and distribution of power principles have been applied, thus although the President as the holder of emergency power, the President does not have absolute power. There arechecks and balances and distribution of power from other branch of power that also in operation. Therefore, the current issue of power abuse caused by the application of Article 12 of the 1945 Constitution of the Republic of Indonesia can be resolved. Thus, emergency law formulation in Indonesia can return to the constitutional path, which is to refer to Article 12 of the 1945 Constitution of the Republic of Indonesia as the constitutional basis.

References:

Books:

Azhary, Negara Hukum Indonesia: Analisis Yuridis Normatiftentang Unsur-Unsurnya [Indonesia a Constitutional State: Juridical-Normative Analysis on its Elements], UI-Pres, Jakarta, 1995.

Budi Setiyono, Model dan Desain Negara Kesejahteraan (Welfare State) [Model and Design of Welfare State], Undip Press. Semarang, 2018.

JimlyAsshiddiqie, Hukum Tata Negara Darurat [Emergency Constitutional Law], PT RajaGrafindoPersada, Jakarta, 2007.

King Faisal Sulaiman, Politik Hukum Indonesia [Indonesia's Politics of law], Thafa Media, Yogyakarta, 2017.

Mahfud MD, Politik Hukum di Indonesia [Politics of Law in Indonesia], PT RajaGrafindoPersada, Jakarta, 2017.

Maria Farida Indrati S., IlmuPerundang-Undangan 1, Jenis, Fungsi, dan MateriMuatan [Legislation Science 1, Types, Functions, and Materials of Content], PT Kanisius, Sleman, 2007.

State Secretariat of the Republic of Indonesia, RisalahSidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 28 Mei – 22 Agustus 1945 [Summary of Session ofthe Investigating Committee for Preparatory Work for Indonesian Independence (BPUPKI), Preparatory Committee for Indonesian Independence (PPKI), 28 May – 22 August 1945], State Secretariat of the Republic of Indonesia, Jakarta, 1995.

Electronic Books:

Drafting Team of DirectorateGeneral of Disease Control &Environmental Sanitation, Pocket Book of Guidelines for Health Officers on International Health Regulations (IHR) 2005, DirectorateGeneral of Disease Control &Environmental Sanitation, Departmentof Health of the Republic of Indonesia, Jakarta, 2008.

Journals:

A.A. KT. Sudiana, Hubunganantara Hukum dan Masyarakat sebagai Pijakan Politik Hukum Nasional [Relationship between Law and Society as Political Footing of National Law], Journal of Legal Issues, 41th Edition, No. 3, Year 2012.

Adnan Buyung Nasution, Sekedar Tinjauan Mengenai Undang-Undang No. 11/Pnps/1963 tentangpemberantasan Kegiatan Subversi [Just a Review of Law No. 11/Pnps/1963 concerning Eradication of Subversive Activity], Journal of Law and Development, Vol. 8, No. 5790, October 1978.

Europe Commission For Democracy Through Law (Venice Commission), Science and Technique of Democracy No. 12, Strasbourgh, 1995, https://www.venice.coe.int/webforms/documents /default.aspx?pdffile=CDL-STD(1995)012-e.

John Ferejohn dan Pasquino, The Law of The Exception: A Typology of Emergency Powers, International Law Journal of Constitutional Law, 2004.

Lynford A. Lardner, Constitutional Dictatorship, by Clinton L. Rossiter 1 Princeton University Press, Louisiana Law Review, Vol. 9, No. 1, November 1948.

Machmud Aziz, Landasan Formil dan Materiil Konstitusional Peraturan Perundang-Undangan [Constitutional, Formal and Material Bases of Laws and Regulation], Journal of Legislation of Indonesia], Vol. 6, No. 3, September 2009.

Muhammad Syarif Nuh, HakekatKeadaanDarurat Negara (State of Emergency) sebagai Dasar Pembentukan Peraturan Pemerintah PenggantiUndang-Undang [The Essence of State of Emergency as the Basis of Formulation of Government Regulation in Lieu of Law], Journal of IusQuiaIustum Law, Vol. 18, No. 2, 2011.

Mukhidin, Hukum Progresifsebagai Solusi Hukum yang Mensejahterakan Rakyat [Progressive Law as a Solution to Law that Makes People to Prosper], Journal of Law Update, Vol. 1, No. 3, September – December 2014.

R. Julio Prasetyo, Pengadaan Barang/ Jasa Pemerintahdalam Penyelenggaraan Penanggulangan Bencana [Government's Goods/Services Procurement in Disaster Relief Implementation], Jurist-Diction, Vol. 2, No. 3, Mei 2019.

Shanti Dwi Kartika, Politik Hukum Penanggulangan Bencana [Politic of Law ofDisaster Relief], Study Vol. 20 No. 4, December 2015.

Non-Published Sources:

Public Lecture Online: Constitution and Covid-19 Pandemic, Faculty of Law of Surabaya University, 23 April 2020, JimlyAsshiddiqie, Constitutional Dictator.

Public Lecture Online: Constitution and Covid-19 Pandemic, Faculty of Law of Surabaya University, 15 April 2020, JimlyAsshiddiqie, Problematics ofGovernment Regulation in Lieu of Law of Covid-19.

Internet:

Cindy MutiaAnnur, 2.127 Bencana Terjadi di Indonesia Per September 2020 [Disasters Occurring in Indonesia Per September 2020], https://databoks.katadata.co.id/datapublish/2020/09/22/2127-bencana-terjadi-di-indonesia-per-september-2020, accessed on 25 October 2020.

Fadrik Aziz Firdausi, DaruratSipil Covid-19 & Sejarah Status Keadaan Bahaya di Indonesia [Civil Emergency of Covid-19 &History of Emergency Status in Indonesia], https://tirto.id/darurat-sipil-covid-19-sejarah-status-keadaan-bahaya-di-indonesia-eKUE, accessed on 24 October 2020.

HukumOnline.com, Bahasa Hukum [Legal Language], https://www.hukumonline.com/berita/baca /hol15982/menyimak-/, accessed on 23 October 2020.

Court Decisions:

Decision of Constitutional Court of the Republic of Indonesia, No. 138/PUU-VII/2009.

Laws and Regulations/International Treaty:

1945 Constitution of the Republic of Indonesia.

1945 Constitution.

1949 Federal Constitution of the United States of Indonesia.

Provisional Constitution of 1950.

Law of the Republic of Indonesia No. 6 of 2018 concerning Health Quarantine.

Law of the Republic of Indonesia No. 12 or 2011 concerning Formulation of Legislation.

Law of the Republic of Indonesia No. 24 of 2007 concerning Disaster Relief.

Presidential Regulation of the Republic of Indonesia No. 17 of 2018 concerning Disaster Relief Implementationin Certain Condition.

Presidential Decreeof the Republic of Indonesia No. 12 of 2020, Declaration of Non-Natural Disaster of Corona Virus Disease 2019 (Covid-19) Spread as a National Disaster.

Universal Declaration of Human Rights, Article 13, 10 December 1948.