

Questioning the Existence of an Urgent Situation in Issuing a Government Regulation in Lieu of the Law on Job Creation



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ABSTRACT: The President as the Head of State and Head of Government does not only have powers in the executive field, but more than that the President of the Republic of Indonesia has powers in the legislative field. In this case, the president has the authority to issue the government regulation in lieu of a law. This research aims to analyze and discuss the matters of urgency situation in government regulation in lieu of law, whether it has fulfilled the requirements of issuing the government regulation in lieu of law or not. The research method used in this research is normative legal research. The results of this study will explain government regulation in lieu of law concerning job creation and comply with the requirements in decision No. 138/PUU-VII/2009. The conclusion of this research shows that the issuance of a government regulation in lieu of a law does not meet the requirements of an "urgency situation" in accordance with decision no. 138/PUU-VII/2009 as well as the doctrine governing constitutional reasons for the issuance of PERPU in particular to interpret "forced critical matters".

KEYWORDS: Government Regulation in Lieu of Law, authority of president in legislative powers, urgency situation

I. INTRODUCTION

Based on the Indonesian government system, the President as the Head of State and Head of Government does not only have powers in the executive field, but more than that the President of the Republic of Indonesia has powers in the legislative field.¹

The derivative authority that originates from the president's legislative authority is the authority to form government regulation in lieu of a law (PERPU).² This is further regulated in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia³ which stipulates "in the event of a compelling crisis, the president has the right to issue government regulations in lieu of law". Based on the conditions in the formation of government regulations in lieu of law, the government regulations in lieu of law were formed in a state of "forced urgency/ urgency situation".⁴ However, the explanation regarding the meaning of "urgency situation" is not explained in the Constitution and other regulation, so the full interpretation will be based on the president.

In recent times, President Joko Widodo has always complained that the world is not doing well because of the threat of a recession.⁵ it means that the country is in an abnormal/emergency state. Circumstances that befall a state that is unusual or abnormal require special arrangements so that state functions can work effectively in abnormal circumstances. However, the system of legal norms reserved for abnormal situations can be expected to be effective in achieving legal objectives which guarantee justice, certainty, and benefit. Therefore, from the start, this abnormal situation should have been anticipated and the main points of regulation formulated in the Constitution. In fact, because of the importance of this matter, regulation is also needed in the form of a separate law.

The Constitutional Court through decision No. 003/PUU-III/2005 provides the conclusion that related "compelling urgency" does not have to be equated with the emergence of a state of emergency at the level of a civil emergency, military, or a state of war, but

¹ Mochtar, A., Z., & Afkar, K. (2022). President's Power, Transition, and Good Governance. *Bestuur*, 10(1): 68-84.

² Maruadi & Muhjad, H., M. (2021). The Legality Of The 2020 Regional Election On State Conditions In A Health Emergency. *Journal of Public Administration, Finance and Law*, 10(19), p. 225-237.

³ Wajdi, F., & Andryan. (2020). Prerogative Of The President In About The State Of Emergency (Comparison Of Indonesia With The United States). *International Journal Reglement & Society*, 1(2). P. 138-150

⁴ James, S., T., & Alihodzic, S. (2020). When Is It Democratic To Postpone An Election? Election During Natural Disasters Covid-19, And Emergency Situation. *Election Law Journal*, 19(3), p. 1-10.

⁵ Chanda. 2022. *Jokowi: Dunia Sedang Tidak Baik-baik saja, semua Takut!*. Diakses pada pukul 09:42 WIB pada tanggal 30 Maret 2023. Diakses melalui <https://www.cnbcindonesia.com/news/20220117120542-4-307912/jokowi-dunia-sedang-tidak-baik-baik-saja-semua-takut>

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"compelling urgency" is the subjective right of the President in determining, which will then become an objective if the DPR approves PERPU to be enacted into law.⁶

The stipulation of government regulations in lieu of law No. 2 of 2022 concerning Job Creation on December 30 of 2022 became controversial in various circles.⁷ This is related to the meaning of "forced emergency" which is the background for the establishment of government regulations in lieu of a law. The reason for forming the government regulations in lieu of law is an effort to prevent a global recession so that Indonesia can face the coming economic crisis. Pros and cons arise as to whether prevention efforts constitute an "urgency situation" that requires the President to issue government regulations in lieu of a law. Based on the background of the problem, the formula of the problem in this research is as follows; How is the Juridical analysis related to the "matters of urgency situation" in Government Regulation in Lieu of Law No. 2 of 2022 Concerning Job Creation?

II. RESEARCH METHOD

The type of research is normative research. This type of research is library research, in the sense that all data sources come from written materials in the form of books, documents, magazines, and manuscripts that are related to the topic of discussion through a review of various literature related to research which includes primary, and secondary data, and tertiary. The collected data is read, understood, and formulated in substance to then be compared with other writings (literature) so that a research synthesis is produced.

The author of this study uses qualitative data types, namely those related to the discussion of the problem. The data sources used consist of two kinds of data sources, namely Primary data and Secondary data. In order to obtain objective and accurate data to describe and answer the problems studied, data collection procedures are required. The technique of collecting data in this research was done through a literature study by accessing journals, reading conventions, books, legal documents, laws, regulations, and other sources related to this comparative study. Data were analyzed through a descriptive qualitative approach which focused on qualitative research on law about the "Matters of Urgency Situation" in Government Regulation in Lieu of Law No. 2 of 2020 Concerning Job Creation. In the descriptive qualitative method, the researcher will provide exposure to the subject and object of research. Then this research also conducted analysis and determined relevant data or legal materials for this research.

III. FINDING AND ANALYSIS

1. The Juridical Analysis Related to The Matters of Urgency Situation in Government Regulation in Lieu of Law No. 2 of 2020 Concerning Job Creation

The President as the head of state as well as the head of government in the presidential system adopted by Indonesia has the authority to form government regulation in lieu of law,⁸ this is further explained in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that "In the event of a compelling emergency, the President has the right to stipulate regulations Government in Lieu of Law". However, both in the elucidation of the article and the regulations under it, there is no single regulation that regulates matters related to "critical matters of coercion", so this matter is based on the subjectivity of the president.⁹

The efforts to limit the president's authority in forming and issuing Government Regulation In Lieu of Law were conveyed by Prof. Jimly Ashidique, who argued regarding the existence of substantial limitations as a material requirement for the formation of PERPU, namely:

- 1) There is an urgent need to act or (rationale necessity).
- 2) The time available is limited or there is a time crunch, and
- 3) There are no other alternatives beyond a reasonable doubt.

In addition, the Constitutional Court through decision Number 003/PUU-III/2005 provides the conclusion that related to "compelling urgency" does not have to be equated with the emergence of a state of emergency at the level of a civil emergency, military, or a state of war. Therefore, the "urgency situation" is the subjective right of the President in determining, which will become objectives if the DPR approves the government regulation in lieu of law to come into law. This means that determining

⁶ Putuhena, F., I., M. (2020). Constitutionality Of Mechanism Approval Government Regulation Replacement Act In Law Number 12 Of 2011 Concerning The Formation Of Laws And Regulation. *Nomoi Law Review*, 1(1), p. 78-88.

⁷ *Hukum Online*. 2023. *Banyak Pro Kontra, Pemerintah Jelaskan Urgensi dan Tujuan Perpu Cipta Kerja*. Diakses pada pukul 10:20 WIB pada tanggal 30 Maret 2023, Diakses melalui <https://www.hukumonline.com/berita/a/banyak-pro-kontra--pemerintah-jelaskan-urgensi-dan-tujuan-perppu-cipta-kerja-lt63c1162de18ac/>

⁸ Elwan, M., O., L. (2018). Reconstructs Legislation: The Effectiveness of Presidential Veto in Government System in Indonesia Based on the State of the Republic of Indonesia 1945 Constitution. *Halu Oleo Law Review*, 2(2), p. 429-447.

⁹ Taufik, A. & Subroto G. 2022. "Wabah Virus Corona (Covid-19) Indonesia Dalam Keadaan Darurat Hukum Ketatanegaraan". *Jurnal Yustitia*, Vol. 23(1). p. 1-10.

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whether a condition is a matter of urgency or coercion, is the absolute prerogative of the president, which will later become an objective with the stipulation of a PERPU into law. However, this cannot be separate from the purposes of the NRI that are explained in Paragraph 4 of the Preamble of the 1945 Constitution, "The purpose of the NRI is to protect the entire Indonesian nation and all of the Indonesian bloodsheds, to promote public welfare, educate the life of the nation, and participate in carrying out world order based on independence, lasting peace, and social justice". Therefore, the state must be responsible for overcoming dangerous situations that threaten the safety of citizens to prosper all Indonesian people.

In forming a government regulation in lieu of law, the president as one of his authorities needs to have clear and firm boundaries to provide space for the protection of constitutional rights. Therefore, the rights of citizens must not be violated for the sake of imposing these "critical circumstances." Therefore, it must be clear what is the matter the urgency of forcing the issuance of a PERPU by the president.

To see further regarding the reasons for issuing a PERPU, this can be seen in the "considering" section, where based on the preambles of letters (f) and (g) of PERPU No. 2 of 2022¹⁰ regulate that:

- f) that to implement the Constitutional Court Decision Number 9I/PUU-XVIII/2020, it is necessary to make improvements through the replacement of Law Number 11 of 2020 concerning Job Creation;
- g) that the global dynamics caused by rising energy and food prices, climate change, and supply chain disruptions have caused a decline in world economic growth and an increase in inflation, which will have a significant impact on the national economy which must be responded to with standard policy mixes to increase national competitiveness and attractiveness for investment through economic transformation contained in the Law on Job Creation.

Based on these considerations "urgency circumstances compel" the issuance of PERPU No. 2 of 2022 due to the threat of a global recession. Furthermore, to find out whether the "critical circumstances forcing" in the PERPU are appropriate, the Constitutional Court through Decision No. 138/PUU-VII/2009 regulates 3 conditions that must be met as criteria for "forced exigencies" in the issuance of PERPU¹¹, namely:

- 1) There is a situation as an urgent need to resolve legal issues quickly based on the law;
- 2) The required law does not yet exist, so there is a legal vacuum or there is a law but it is inadequate;
- 3) The legal vacuum cannot be overcome by making laws in the usual way because it will take quite a long time, while the urgent situation requires certainty to be resolved.

Based on these conditions it can be explained that:

- 1) There is a situation as an urgent need to resolve legal issues quickly based on the law

The urgent situation based on PERPU Job Creation considerations is the threat of a global recession. This is in line with the statement made by the Coordinating-Minister for the Economy, Dr. Ir. Airlangga Hartarto, "The government needs to accelerate anticipation of global conditions both related to the economy, where we are facing a global recession, increasing inflation and the threat of stagflation and in several countries related to the geopolitics of Russia and Ukraine, the war has not yet been completed, so several countries are facing food, energy, financial crises, and climate changes".

According to the National Economic Research Bureau (NBER), "The new economic slowdown can be called a recession when Gross Domestic Product (GDP) has decreased for 2 consecutive quarters".¹² Minister of Finance Sri Mulyani said that "When viewed from the situation in 2022, based on the extraordinary level and intensity of pressure, Indonesia's economy grew by 5.3%, Indonesia's exports were still good with a surplus of 3 times from 2021.¹³ Apart from that, Indonesia's state revenues grew 48% where the world says the world is dark and the world is in a bad situation. This is of course based on BPS data as follows:

¹⁰ Consideration of Government Regulation in Lieu of Law No. 2 of 2022 Concerning Job Creation.

¹¹ Marwan, H., A. (2021). JUDICIAL REVIEW OF GOVERNMENT REGULATIONS IN LIEU OF LAWS PROBLEMS. *Nomoi Law Review*, 2(1), p. 1-13.

¹² Firman Fikri, F. *et al.* 2023. "Resesi Ekonomi dan Implikasinya pada Masa Pandemi Covid-19". *Jurnal Pendidikan Seni, sains dan sosial Humanioral*, Vol. 1(1), p. 1-25.

¹³ CNBC. 2023." *Lengkap! Sri Mulyani Jawab CT Soal Situasi Ekonomi Terkini*". Access at 12:05 PM, On 1 April 2023. Access on <https://www.cnbcindonesia.com/news/20230301095500-4-417865/lengkap-sri-mulyani-jawab-ct-soal-situasi-ekonomi-terkini>

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Based on the data above, if it is related to the urgency that forced the issuance of PERPU No. 2 of 2022 concerning Job Creation, one of which is the global recession, this is not in line with Indonesia's economic growth that is at a stable level and even said to be impressive growth in the fourth quarter of 2022.

2) The required law does not yet exist, so there is a legal vacuum or there is a law but it is inadequate

Based on letter (f) preamble to Government Regulation in Lieu of Law No. 2 of 2022 concerning Job Creation, states that one of the reasons for issuing a PERPU is to carry out the Constitutional Court Decision No 91/PUU-XVIII/2020. If it is seen further that there are no significant differences related to the substance or material content in the Government regulation in Lieu of Law No. 2 of 2022 concerning Job Creation and Law No. 11 of 2022 concerning Job Creation with conditional unconstitutional status based on the Constitutional Court's decision.

The Constitutional Court Decision No. 91/PUU-XVII/2020 explained that it was declared conditionally unconstitutional by the decision in point 4¹⁴ which decided "*Declaring Law No. 11 of 2020 concerning Job Creation is still valid until repairs are made in accordance with the deadline as specified in this decision*". Furthermore, considering that there are no significant differences regarding the contents of the Job Creation Law and the Government Regulation in Lieu of Law concerning Job Creation, it means that there is already a law that regulates this Job Creation.

Dr. Zainal Mochtar, who is an expert on constitutional law aUGM, stated that "The issuance of a PERPU seems to "straddle" the Constitutional Court's decision or is like cheating the Constitutional Court's decision, being declared wrong at this point and then looking for other ways that seem to justify the illegal goods being legalized in a way that different from issuing PERPU. The made of Law no. 11 of 2020 concerning Job Creation in the Constitutional Court's decision to become conditionally unconstitutional is due to a lack of public participation, and it's extraordinary that the government has chosen a method that doesn't involve the public at all. So, refer to Dr. Zainal Arifin is an insult to the court's decision, because he took a different path that "straddled" the Constitutional Court's decision.

Based on the explanation above, it can be concluded that the second condition in the Constitutional Court Decision No. 138/PUU-VII/2009 has not been fulfilled regarding the basis of "critical matters forcing" in the issuance of PERPU No. 2 of 2022 concerning Job Creation as the President's prerogative.

3) This legal vacuum cannot be overcome by making laws in the usual manner because it will take quite a long time, while this urgent situation requires certainty to be resolved

Based on the previous explanation, there have been regulations that in fact didn't have significant differences from the PERPU issued by the President regarding Job Creation. This means that there is no legal vacuum because there is already a law that regulates Job Creation.

Point (5) The ruling of the Constitutional Court No. 91/PUU-XVII/2020, decided to "order the legislators of the Law to make improvements within a maximum period of 2 years from the time this decision was pronounced and if within this timeframe, no corrections can be made, then Law No. 11 of 2020 concerning Job Creation is permanently unconstitutional". So, if the government in this case has succeeded in carrying out the Constitutional Court's decision in correcting the formal defects in the conditional constitutional decision, then Law No. 11 of 2020 concerning Job Creation can be constitutional and have binding legal

¹⁴ Harjono, K., D., & Panjaitan, H., & Tobing, L., G. 2023. "PERPU NOMOR 2 TAHUN 2022 ANTARA KEGENTINGAN YANG MEMAKSA DAN PUTUSAN MAHKAMAH KONSTITUSI". *Synta Literate: Jurnal Ilmiah Indonesia*, Vol. 8(2). Hal. 1-11.

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force. However, in this case, the government didn't obey the decisions made by the constitutional judges. However, in this case, the government did not comply with the decision of the constitutional court. Even though the court has given 2 years for improvement. Based on its decision, the Constitutional Court decided unconstitutional conditional because:

- a) The omnibus law method is not regulated in the Law/regulations;
- b) Meaningful participation; and
- c) There is an error in the formal format of writing chapters, titles, and articles.

Furthermore, the first requirement has been implemented by including the omnibus law method in statutory regulations stipulated in Law No. 13 of 2022. This means that there should still be enough time if Law No. 11 of 2021 concerning Job Creation is corrected according to the decision of the Constitutional Court. Even though the decision required public participation, the issuance of PERPU No. 2 of 2022 seems to eliminate "meaningful participation".

IV. CONCLUSION

From a constitutional perspective, both in terms of the Constitutional Court's decision No. 138/PUU-VII/2009 as well as the doctrine governing constitutional reasons for the issuance of PERPU in particular to interpret "forced critical matters," associated with the Constitutional Court's decision No. 91/PUU-XVII/2020, the issuance of PERPU No. 2 of 2022 concerning Job Creation does not fulfill constitutional reasons and seems forced.

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