

NORMATIVE JURIDICAL ANALYSIS OF THE POSITION OF GOVERNMENT REGULATION IN LIEU OF LAW (PERPPU) IN THE HIERARCHY OF STATUTORY REGULATIONS

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Abstract

This study offers a normative and juridical analysis of the position of Government Regulations in Lieu of Law (Perppu) within the hierarchy of statutory regulations in Indonesia. It investigates the constitutional and legal framework surrounding Perppu, particularly in light of its "emergency" and "temporary" nature, the President's authority to issue them without prior legislative consultation, and the requirement for subsequent approval by the House of Representatives (DPR). The research critically examines the consistency of Perppu with fundamental legal principles, including the rule of law, constitutional supremacy, and the separation of powers. It addresses the theoretical and practical controversies surrounding the application of Perppu, especially concerning the interpretation of "compelling urgency" and the potential for abuse of executive authority, which has become increasingly relevant given the rising frequency of Perppu issuances. The study argues for the need to clarify the legal standing of Perppu within the existing legal structure, strengthen parliamentary and judicial oversight mechanisms, and establish objective and measurable criteria for determining "compelling urgency." By doing so, it aims to ensure that Perppu remains a constitutional instrument, operating within defined boundaries, and does not undermine the legislative functions of the DPR or the principles of a democratic state governed by law. This normative review also seeks to address the legal and constitutional challenges in the practice of forming Perppu in Indonesia.

Keywords: *Constitutional Law, Government Regulation in Lieu of Law (Perppu), Hierarchy of Laws, Indonesian Legal System, Rule of Law.*

INTRODUCTION

The Indonesian legal system adheres to the principle of legality, which requires that all state actions, including the creation of legislation, be based on applicable law. Within this framework, the hierarchy of legislation is a crucial element governing the normative relationship between various types of regulations. Article 7 of Law Number 12 of 2011, as most recently amended by Law Number 13 of 2022 concerning the Formation of Legislation, explicitly establishes a hierarchical structure of regulations, with Government Regulations in Lieu of Laws (Perppu) occupying an equal position with laws. However, both theoretically and practically, the position of Perppu within the Indonesian legal structure often generates controversy. This is due to the "emergency" and "temporary" nature of Perppu, which are issued directly by the President without prior legislative consultation with the House of Representatives (DPR). On the one hand, Perppu have the same legal force as laws from the moment of their enactment, but on the other hand, their validity still requires DPR approval in the next session. This condition creates ambiguity in the construction of constitutional law, especially regarding the binding power of the Perppu before obtaining DPR approval and its implications for the hierarchy of norms. The problem becomes more complex when a Perppu is used in a situation deemed not to truly fulfill the element of "compelling urgency" as required by Constitutional Court Decision No. 138/PUU-VII/2009. This raises critical questions regarding the abuse of the President's constitutional discretion, as well as the effectiveness of the checks and balances system in a democratic state governed by law. Therefore, a normative review of the Perppu's position within the hierarchy of laws and

regulations is crucial. This is not only to clarify its legal standing but also to ensure that the formation of a Perppu does not violate the principle of constitutional supremacy and does not diminish the legislative function of the House of Representatives (DPR). This research is relevant to addressing the legal and constitutional challenges in the practice of forming Perppu in Indonesia, which has recently become increasingly frequent. The rule of law is a fundamental principle in a state governed by the rule of law (*rechtstaat*), which requires that all forms of power be subject to the law, including the fundamental law of the state, the constitution. Within the Indonesian constitutional system, the existence of Government Regulations in Lieu of Laws (Perppu) holds a unique position because they are unilaterally created by the president in situations of "compelling urgency," yet have the same legal force as statutes.

Problems arise when the Perppu is used as a legal instrument that has the potential to replace the legislative function of the DPR, even though in theory and practice the constitution states that the formation of laws is the result of joint work between the president and the DPR. Furthermore, Law No. 12 of 2011 concerning the Formation of Legislation does not explicitly explain the position of the Perppu in the legal hierarchy, thus opening up room for interpretation and ambiguity of norms (vagueness of norms). This raises serious questions in the context of the rule of law and constitutional power, particularly regarding: Is the Perppu truly subject to the principle of the supremacy of law or is it a form of presidential override? This research is important for examining the normative position of the Perppu in the Indonesian legal system and testing its compatibility with the principles of the rule of law. The issues to be discussed in this research are: What is the position of the Perppu in the Indonesian legal system according to the 1945 Constitution and statutory regulations? Do the formation and use of Perppu reflect the principles of the rule of law and constitutional power? And how can normative solutions be formulated to ensure that Perppu does not become a form of abuse of executive authority?

LITERATURE REVIEW

A. Stufenbau Theory Hans Kelsen.

Modern legal theory cannot be separated from the thoughts of Hans Kelsen, an Austrian legal philosopher who is famous for his pure legal theory (*Reine Rechtslehre*) and the hierarchical structure of legal norms known as the Stufenbau Theory. This theory provides a systematic understanding that legal norms are arranged hierarchically, starting from the most abstract norms to the most concrete norms, and becomes the logical basis for the structure of a country's legal system. The term Stufenbau comes from German which means "hierarchical structure". According to Kelsen, a legal system is a system of norms arranged in hierarchical levels where lower norms derive their validity from higher norms, until finally reaching the basic norm (*Grundnorm*) as the final source of legal validity. Each norm in a legal system does not stand alone, but rather is part of a unified, vertically interconnected structure. In other words, a legal regulation is only valid and binding if it is derived from a higher norm that governs it. According to Kelsen, the structure of legal norms is hierarchical. This hierarchical structure can be explained systematically as follows:

1. **Grundnorm (Hypothetical Basic Norm):** The highest norm that serves as the source of legitimacy for the entire legal system. The Grundnorm is hypothetical because it cannot be empirically proven, but it is assumed to exist to provide the basis for the entire legal system.
2. **Constitution or Basic Law:** A written norm containing the basic rules for establishing other legal norms and the structure of state power. In the Indonesian context, this refers to the 1945 Constitution of the Republic of Indonesia.
3. **Laws and Regulations of the Same Level:** Legal norms established by legislative bodies based on the authority granted by the constitution. Laws contain more operational provisions than the constitution.
4. **Implementing Regulations:** Such as Government Regulations, Presidential Regulations, and ministerial regulations that explain the provisions in the law in more technical terms.
5. **Concrete and Individual Decisions:** Includes court decisions, decisions of state administrative officials, and other forms of individual norms that apply once to one case.

The legal system in Indonesia explicitly adopts a hierarchical approach in the formation of legislation, as regulated in Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Formation of Legislation. The hierarchical order of these norms is:

1. The 1945 Constitution of the Republic of Indonesia
2. Decree of the People's Consultative Assembly
3. Law/Government Regulation in Lieu of Law (Perppu)
4. Government regulations
5. Presidential decree

6. Provincial Regional Regulations
7. Regency/City Regional Regulations

The application of this legal structure shows how legal norms must be subject to the norms above them, according to the principles of the Stufenbau theory.

METHOD

This research is a normative (doctrinal) legal research, namely research that focuses on written legal norms as the main object of study. This research aims to examine the consistency of legal norms in the legal system, particularly regarding the position of Government Regulations in Lieu of Laws (Perppu) in the national legal hierarchy. Normative research bases its analysis on library research rather than empirical data, with a systematic and interpretative approach to relevant legal regulations and doctrines. The data sources used in this research are Secondary Data, namely in the form of primary legal materials: the 1945 Constitution of the Republic of Indonesia, Law Number 12 of 2011 concerning the Formation of Legislation, Constitutional Court Decisions relevant to the review of Perppu (for example, MK Decision No. 138/PUU-VII/2009). Secondary legal materials: academic literature such as constitutional law and constitutional law books, legal scientific journals, and scientific articles related to Perppu, the principles of the rule of law, and constitutionalism. Tertiary legal materials: Legal dictionaries, legal encyclopedias, and other supporting sources that explain the meaning of terms or basic concepts in this study.

RESULTS AND DISCUSSION

A. The position of Perppu in the Indonesian legal system

Constitutionally, Article 22 paragraph (1) of the 1945 Constitution states that "In the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of laws." Furthermore, paragraph (2) states that "The government regulations must receive approval from the House of Representatives in the following session." If not approved, then the Perppu must be revoked. From this formulation, it is clear that the Perppu is a temporary legal product and has the same status as a law, but only applies if approved by the DPR. However, in national legislative practice, there is an unclear normative position of the Perppu. Law Number 12 of 2011 concerning the Formation of Legislation, as last amended by Law Number 13 of 2022, does not explicitly mention the Perppu in the hierarchy of legislation, as stated in Article 7 paragraph (1) which lists the order of norms as follows:

"The types and hierarchy of statutory regulations consist of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Law/Government Regulation in Lieu of Law;
- c. Government regulations;
- d. Presidential decree;
- e. Provincial Regional Regulations; and
- f. Regency/City Regional Regulations."

While letter b mentions "Law/Perppu" simultaneously, the Perppu is not described as a stand-alone norm but rather as a combination with the law. This obscures the temporary, contingent, and conditional nature of the Perppu, which differs in legal character and process from ordinary laws. The absence of detailed regulations regarding legislative procedures for ratification, a definite time limit, or provisions for judicial review of Perppu (Government Regulation in Lieu of Law) in Law 12/2011 reinforces the assumption that there is a normative vacuum in the positive legal system. This ambiguity has given rise to several political and legal controversies, such as the Perppu on Mass Organizations (2017) and the Perppu on Job Creation (2022), which were questioned because they did not clearly meet the requirements of "compelling urgency" as interpreted by the Constitutional Court. A Perppu, essentially an emergency instrument of presidential power, should not be treated as functionally equivalent to a law in the long term without strict legislative oversight. Therefore, this ambiguity has the potential to open up room for abuse of executive authority, given that a Perppu can be enacted without the participation of the House of Representatives (DPR). In this case, the checks and balances mechanism on presidential power are weakened and contradict the principles of constitutionalism and the rule of law in a democratic state.

B. Formation and Use of Perppu so far

The supremacy of law is a fundamental principle in a state governed by the rule of law (*rechtstaat*), where all forms of power, whether executive, legislative, or judicial, must be subject to the law, particularly the constitution. In this context, the president's issuance of a Perppu (Government Regulation in Lieu of Law) must remain within the constitutional framework and not exceed the limits of his granted powers. However, constitutional practice shows that several Perppu (Government Regulations in Lieu of Law) have sparked serious controversy, as they are deemed to fail to meet the constitutional requirement of "compelling urgency." For example, Perppu No. 2 of 2017 concerning Mass Organizations (Perppu Ormas) is considered a form of weakening freedom of association, as it was issued without clear urgency and eliminated the court mechanism for disbanding mass organizations.

Government Regulation in Lieu of Law (Perppu) No. 2 of 2022 concerning Job Creation has also drawn criticism, as it was issued in a situation that does not necessarily reflect a compelling emergency, only a short time after the Job Creation Law was declared conditionally unconstitutional by the Constitutional Court (MK Decision No. 91/PUU-XVIII/2020). The two cases above demonstrate the weakness of judicial and legislative oversight of executive power. The House of Representatives (DPR) tends to approve Perppu (Government Regulations in Lieu of Law) without thorough substantive review, while the Constitutional Court limits itself to ex-post review after the Perppu is passed into law. This creates a constitutional oversight deficit, allowing emergency legal instruments to be used as political strategies or quick fixes, ignoring the principle of legal prudence. Thus, the current mechanism for forming a Perppu does not fully reflect the principles of the rule of law and shows an asymmetry of power that benefits the executive, contrary to the spirit of constitutionalism and a balanced division of power (checks and balances). One of the fundamental problems in the governance of the formation of Perppu in Indonesia is the absence of a rigid and measurable legal definition of the phrase "compelling urgency" as stated in Article 22 paragraph (1) of the 1945 Constitution. The Constitution only provides very general limitations without explaining the indicators or parameters of such urgency. This creates a constitutional loophole that can be exploited politically by the President to issue Perppu on the basis of the subjectivity of executive power.

The Constitutional Court (MK) has indeed tried to limit this subjective space through MK Decision No. 138/PUU-VII/2009, by establishing three constitutive conditions for the issuance of a Perppu, namely:

1. There is an urgent need to resolve legal issues quickly;
2. The required laws do not yet exist, resulting in a legal vacuum;
3. This legal vacuum cannot be overcome through the usual law-making procedures because it takes a long time.

However, in practice, the Constitutional Court has not always been consistent in applying these parameters. For example, in its judicial review of Government Regulation in Lieu of Law (Perppu) No. 2 of 2017 concerning Mass Organizations, the Constitutional Court considered the social and ideological conditions (threats to Pancasila) to constitute a compelling emergency, even though the substance of the Perppu actually eliminates the courts' role in disbanding mass organizations. Conversely, in its judicial review of Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 concerning the Handling of the COVID-19 Pandemic, the Constitutional Court rejected the judicial review petition, believing that the emergency had ended when the Perppu was passed into law. This incoherence reflects legal uncertainty and the Constitutional Court's weak position as guardian of the constitution, particularly in the context of controlling executive power. Furthermore, the House of Representatives' (DPR) weak evaluation system for Perppu (Government Regulations in Lieu of Law) also exacerbates the problem. In many cases, the House's approval of Perppu is more political than legalistic. There is no open and accountable substantive review forum, and many Perppu are approved without strong academic or constitutional arguments. The House tends to simply act as a "political rubber stamp" for executive legal products, without optimally exercising its oversight function.

This situation leads to a breakdown in the principle of checks and balances in Indonesia's presidential system. Therefore, constitutional reform and derivative legislation are needed to:

1. Objective and measurable indicators are established regarding the conditions of "compelling urgency" in the Perppu;
2. The DPR is required to conduct an open feasibility test before approving the Perppu;
3. The Constitutional Court was given stronger authority to test the formal requirements of urgency even though the Perppu had not been ratified as law (*ex ante* judicial review);
4. The position of the Perppu in the hierarchy of legal norms in the revision of Law No. 12 of 2011 is clarified.

Thus, systemic reformulation is very necessary to ensure that the Perppu remains within the framework of constitutional supremacy and does not become an unconstitutional political instrument.

C. Normative Solutions to the Weaknesses of Perppu Governance

Given the numerous constitutional issues surrounding the President's authority to issue Government Regulations in Lieu of Law (Perppu), concrete normative solutions are needed to strengthen the principles of constitutional supremacy and checks and balances in the Indonesian legal system. Several reform steps can be taken, including:

1. Revision of Law No. 12 of 2011 to Place Perppu Explicitly in the Legislative Hierarchy.

Even though Article 22 paragraph (1) of the 1945 Constitution states that a Perppu has the same legal standing as a law, Law No. 12 of 2011 concerning the Formation of Legislation does not include a Perppu in the hierarchical structure of legislation as contained in Article 7. The absence of a Perppu in this article creates legal ambiguity and opens up a gap for debate regarding its validity as a legal norm equivalent to a law before it is approved by the DPR.

Therefore, it is necessary to revise Law 12/2011 by explicitly adding a Perppu to the hierarchy, both as a temporary legal norm with binding power equal to that of a law, and as a contingency norm subject to legislative control for a certain period of time.

2. Affirmation of the Definition of "Compelling Emergency" in the Constitution or Organic Regulations

Currently, there is no official or operational explanation in the constitution regarding the meaning of "compelling urgency" as the basis for establishing a Perppu. Consequently, the interpretation of this phrase is subjective and dependent on immediate political interests. While the Constitutional Court has attempted to provide parameters in Constitutional Court Decision No. 138/PUU-VII/2009, this decision is not legally binding and has not been consistently followed by the President or the Constitutional Court in subsequent cases.

Therefore, organic regulations or constitutional addendums are needed that provide explicit definitions and objective indicators, for example based on the scale of threats to public order, national stability, or extraordinary disasters, so that the formation of a Perppu is accountable and legally controlled.

3. Strengthening Parliamentary and Judicial Control over Perppu

Under current constitutional practice, a Perppu takes effect immediately upon enactment, but the House of Representatives (DPR) can only approve or reject it during the next session. This mechanism is too weak because it lacks a clear time limit and lacks an open review forum to assess the urgency of the matter. Therefore, a reformulation of the oversight system is necessary, including:

- a. Implementing an ex ante constitutional review mechanism by the Constitutional Court, namely testing the constitutionality of the Perppu even before it is ratified by the DPR, to ensure that the Perppu is truly based on urgent circumstances;
- b. Establish a strict and constitutional deadline for DPR approval, for example, within 30 calendar days. If not approved, the Perppu is immediately void and must be revoked.
- c. Setting up a public hearing forum or legislative feasibility test as a prerequisite for the DPR to approve the Perppu.

These steps are necessary to ensure that the Perppu remains within the framework of the rule of law (rechtstaat), and does not become an instrument for abuse of executive power that is contrary to the spirit of checks and balances in Indonesia's presidential system.

CONCLUSION

From the research results described above, the following conclusions can be drawn:

1. While Law Number 12 of 2011 does mention the concurrent status of a law/Perppu, the Perppu is not described as a stand-alone norm but rather as a combination with the law. This obscures the temporary, contingent, and conditional nature of the Perppu, which differs in legal character and process from ordinary laws.
2. State practice shows that several Perppu have caused serious controversy, because they are considered not to fulfill the constitutional requirement of "compelling urgency".
3. Normative Solutions to the Weaknesses of Perppu Governance: 1. Revise Law No. 12 of 2011 to explicitly place Perppu within the legislative hierarchy. 2. Affirm the definition of "compelling urgency" in the Constitution or Organic Regulations. 3. Strengthen Parliamentary and judicial control over Perppu.

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