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## Concept and Implementation on the State of Emergency in Indonesia: Outlook to Strengthen Checks and Balances during Crisis

### *Conceito e Implementação sobre o Estado de Emergência na Indonésia: perspectivas para fortalecer freios e contrapesos durante a crise*

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## Abstract

This paper analyzes the problems caused by the state of emergency in Indonesia. It focuses on explaining the meaning of a state of emergency, based on Article 12 of the 1945 Indonesian Constitution. It addresses how Indonesia determines the emergency status and how checks and balances regarding the emergency status were implemented. This paper highlights three points. First, the existing law on the state of emergency is no longer in line with Indonesia's constitutional concept, following the amendment; second, there are findings indicating that several emergency statuses were not appropriately declared; third, the lack of the Parliamentary and court role in conducting checks and balances on the President in the state of emergency. This paper offers a recommendation concerning the importance of strengthening checks and balances to ensure there will be no abuse of power in implementing a state of emergency in the future..

**Keywords:** state of emergency; checks and balances; Indonesia; Parliament; courts.

## Resumo

*Este artigo analisa os problemas causados pelo estado de emergência na Indonésia. Concentra-se em explicar o significado de um estado de emergência, com base no artigo 12 da Constituição indonésia de 1945. Aborda como a Indonésia determina o estado de emergência e como foram implementados os freios e contrapesos em relação ao estado de emergência. Este artigo destaca três pontos. Em primeiro lugar, as normas existentes sobre o estado de emergência não está mais em consonância com o conceito constitucional da Indonésia, seguindo a emenda constitucional; em segundo lugar, há achados indicando que vários estados de emergência não foram devidamente declarados; terceiro, a falta de atuação parlamentar e judicial na condução de freios e contrapesos sobre o Presidente em estado de emergência. Este artigo oferece uma recomendação sobre a importância do fortalecimento de freios e contrapesos para garantir que não haverá abuso de poder na implementação de um estado de emergência no futuro.*

**Palavras-chave:** estado de emergência; freios e contrapesos; Indonésia; Parlamento; cortes.

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## 1. INTRODUCTION

The declaring a state of emergency as a crisis response frequently leads to controversy about its constitutionality.<sup>1</sup> This paper's discussion arises from a fundamental question regarding its legitimacy and constitutional necessity in instigating law enforcement in the state of emergency.<sup>2</sup> It is then followed by various questions regarding supervision, checks and balances on its implementation to avoid the potential abuse of power.<sup>3</sup>

<sup>1</sup> RAMRAJ, Victor V.; AHIRUVENGADAM, Arun K. **Emergency Powers in Asia**. Cambridge: Cambridge University Press, 2010. p. 1.

<sup>2</sup> DESIERTO, Diane A. **Necessity, And National Emergency Clauses: Sovereignty in Modern Treaty Interpretation**. Leiden: Martinus Nijhoff Publishers, 2012. p. 37.

<sup>3</sup> FREEMAN, Michael. **Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror**. Wesport: Praeger, 2003. p. 36-38.

The state of emergency in Indonesia, also known as *Hukum Tata Negara Darurat*, is a circumstance where the government declares an extraordinary response to threats.<sup>4</sup> When the state of emergency is activated, normal functioning is affected, allowing government authorities to suspend citizens' civil liberties, and even some human rights fulfillment.<sup>5</sup> The necessity to declare a country in a state of danger or emergency is common in extreme situations, such as war, economic crisis, mass strikes, pandemics, and natural disasters.<sup>6</sup>

In the Indonesian Constitution, the constitutional clause relating to the law on the state of emergency is in Article 12. This article is considered a form of constitutional exception in a state of emergency. Article 12 of the Indonesian Constitution states that *"The President declares a state of emergency, the conditions and consequences of the emergency condition shall be stipulated by law."* This clause gives the President the authority to determine a state of emergency as the head of state.<sup>7</sup> Thus, it awards the President the power to commit legal deviations in an emergency condition, constitutionally.<sup>8</sup>

Currently, there is only one law that uses Article 12 of the Indonesian Constitution as a reference: Law Number 23/prp/1959, concerning the State of Danger (the State of Danger Law). Its use created several problems. The law is used to determine civil emergencies, military emergencies, and war emergencies. It is also used repeatedly in different regimes, namely in Megawati and Susilo Bambang Yudhoyono Governments, to establish martial law and civil emergency in Aceh Province in Indonesia. This law are Presidential Decree of Indonesia Number 28 of 2003 concerning the Enforcement of Military Emergency Status in Nanggroe Aceh Darussalam Province and Presidential Decree of Indonesia Number 43 of 2004 concerning the Statement of Changing the Status of a Danger with the Level of Military Emergency to a Danger with the Level of Civil Emergency in the Province of Nanggroe Aceh Darussalam, and Abdurahman Wahid also uses it for cases of civil emergency in Maluku Province in Indonesia, such as Presidential Decree of Indonesia Number 88 of 2004 concerning Civil Emergency in Maluku Province and North Maluku Province. This situation is similar to a military or civil emergency that has also occurred in Papua Province in Indonesia, although it is not clear which formal declaration was used.

The study on the state of emergency is essential for Indonesia because it often experiences conflicts, disasters, and pandemics and ensures legal certainty and order

<sup>4</sup> ASHIDDIQIE, Jimly. **Hukum Tata Negara Darurat**. Jakarta: RajaGrafindo Persada, 2007.

<sup>5</sup> ORAA, Jaime. **Human Rights in States of Emergency in International Law**. Oxford: Clarendon Press, 1992. p. 247.

<sup>6</sup> ASHIDDIQIE, Jimly. **Hukum Tata Negara Darurat**. Jakarta: RajaGrafindo Persada, 2007.

<sup>7</sup> Indonesian Constitution in English available in: <https://www.mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf>.

<sup>8</sup> ARSIL, Fitra; AYUNI, Qurrata. Model Pengaturan Kedaruratan Dan Pilihan Kedaruratan Indonesia Dalam Menghadapi Pandemi Covid-19. **Jurnal Hukum dan Pembangunan**, Depok, v. 50, n. 2, pp. 423-446, 2020.

in an emergency.<sup>9</sup> The emergency policy potentially produces human rights violations, the neglect of citizens' constitutional rights, and uncontrolled loss of resources. Using the juridical-normative method, this paper finds that the regulations regarding the state of emergency in Indonesia are outdated and should be amended. It also has no precise checks and balances formula in emergency conditions. The historical review shows inconsistencies in the proclamation of the emergency; some emergencies are not even formally declared (*de jure*).

This paper contains five sections. The first is an introduction providing a background to the problem of emergencies in Indonesia. The second part discusses the conception of a state of emergency in the Indonesian Constitution. The third part discusses several inconsistencies in the implementation of the state of emergency in the past. The fourth section discusses the conditions of checks and balances in the state of emergency in Indonesia, involving both legislature and the judiciary. The last section is the conclusion that summarizes the findings of this paper.

## 2. THE CONCEPTION OF THE STATE OF EMERGENCY IN THE INDO-NESEAN CONSTITUTION

The constitutional clause related to the state of emergency in the Indonesian Constitution is contained in Article 12. This article is considered a form of constitutional exemption in a state of emergency. Article 12 of the Indonesian Constitution states, *"The President declares a state of danger, the conditions and consequences of the dangerous condition shall be stipulated by law."*<sup>10</sup> This clause gives the President, as the head of state, the authority to determine a state of emergency.<sup>11</sup> In addition, it provides power for the President to authorize legal deviations constitutionally in an emergency condition.

In 'Political Theology: Four Chapters on the Concept of Sovereignty', Carl Schmitt explains at least two main concepts: the meaning of the state of exception and the idea of sovereignty. In an emergency, the state of exception is the law of abnormality to create serenity, security, and discipline in an abnormal situation. According to Schmitt, *"All law is situational law"*; which implies that special laws are used in particular conditions.

<sup>9</sup> AYUNI, Qurrata; ARINANTO, Satya; ARSIL, Fitra; INDRATI, Maria Farida; FATMAWATI. "State of Emergency" Proclamation Authority in Indonesia Disaster Case. **Elementary Education Online**, Ankara, v. 19, n. 4, pp. 3522-3526, 2020.

<sup>10</sup> Indonesian Constitution in English available in: <https://www.mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf>

<sup>11</sup> BASKORO, Dewo; ARSIL, Fitra; AYUNI, Qurrata. The Authority of the Indonesian Power Holder Related to the State of Emergency in Terms of the Law on States of Emergency. In: SUSETYO, Heru; WAAGSTEIN, Patricia Rinwigati; CAHYONO, Akhmad Budi. **Advancing Rule of Law in a Global Context**. London: CRC Press, 2020. p.81-89.

<sup>12</sup>With regard to the concept concerning *the state of exception*, then linked with *the sovereign* idea; namely “*Sovereign, decides on the exceptional case*”.<sup>13</sup> According to Schmitt, the meaning of the *sovereign* is the one who decides the exception. In times of emergency, the sovereign power should make a state of exceptions to restore discipline and stability. According to Schmitt, “*In order for the legal system to work, a normal situation must exist, and it is the sovereign who must decide whether this normal situation exists*”.<sup>14</sup>

Schmitt states that efforts to defend sovereignty in state of exception can only be understood in the context of the entire legal order. This authority operates in accordance with provisions in the Constitution. Schmitt uses the Constitution’s requirements in a way that strengthens the *raison d’être* of the state, ensures citizen discipline and stability, allowing the constitutional order of the country to function normally.<sup>15</sup> Hence, it is necessary to regulate the concept of ‘exception’ and ‘the sovereign’ in a constitution.

The concept of the state of emergency then developed and improvements were made. Rossiter began to explore the need for certain limitations in implementing the state of emergency to avoid creating a dangerous constitutional dictatorship.<sup>16</sup> However, the implementation of state of emergency performance produced many dilemmas; on one hand, a state of emergency negates the enforceability of laws and statutory norms due to the need to guarantee protection and state sovereignty.<sup>17</sup> Conversely, state of emergency may permits violation on law and suspend human rights which regulated in the Constitution.<sup>18</sup>

Regulation of emergency law clauses and exceptions that can be made in crises are usually regulated through several approaches. Several provisions regarding emergency clause are held as part of the Constitution’s text such as in Norway and Canada.

<sup>12</sup> SCHMITT, Carl. **Political Theology: Four Chapters on The Concept of Sovereignty**, Translated by George Schwab. Chicago: University of Chicago Press, 2005. p. 13.

<sup>13</sup> SCHMITT, Carl. **Political Theology: Four Chapters on The Concept of Sovereignty**, Translated by George Schwab. Chicago: University of Chicago Press, 2005. p. 5.

<sup>14</sup> SCHMITT, Carl. **Political Theology: Four Chapters on The Concept of Sovereignty**, Translated by George Schwab. Chicago: University of Chicago Press, 2005. SCHMITT, Carl. **Political Theology: Four Chapters on The Concept of Sovereignty**, Translated by George Schwab. Chicago: University of Chicago Press, 2005. p. 44.

<sup>15</sup> SCHWAB, George. **The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936**. Wesport: Praeger, 1989. p. 37-43.

<sup>16</sup> ROSSITER, Clinton. **Constitutional Dictatorship: Crisis Government in the Modern Democracies**. Abingdon-on-Thames: Routledge, 2017. p. 3.

<sup>17</sup> AURIEL, Pierre; BEAUD, Olivier; WELLMAN, Carl. The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law. In: SELLERS, Mortimer; MAXEINER, James (Eds.). **Ius Gentium: Comparative Perspectives on Law and Justice**. Vol. 64. Berlin: Springer, 2018.

<sup>18</sup> ROSSITER, Clinton. **Constitutional Dictatorship: Crisis Government in the Modern Democracies**. Abingdon-on-Thames: Routledge, 2017. p. 3.

According to the US Constitution, while not explicitly referring as emergency clause, *habeas corpus* (individual detention) can be suspended in a security crisis.<sup>19</sup>

Unfortunately, the Indonesian Constitution does not explicitly regulate what can and cannot be done in a state of emergency, so that the regulatory norms regarding the limits and permissibility of deviations in an emergency are not clarified. Article 12 of the 1945 Constitution details regulations regarding the state of emergency through law. Details on what can and cannot be done during an emergency are only available in Law 23/prp/1959 concerning the State of Danger.<sup>20</sup>

In Indonesian literature, a state of emergency is referred to as the constitutional state of emergency (*Hukum Tata Negara Darurat*). Herman Sihombing defines constitutional emergency law as a series of extraordinary and exceptional when all state institutions and authorities working together in the shortest time to eliminate any threatening emergency or danger to ordinary life according to general and regular laws and regulations.<sup>21</sup> Meanwhile, a prominent scholar in Indonesia, Jimly Asshiddiqie, defines the constitutional state of emergency as a state of danger that suddenly threatens public order, which demands the state to act in unusual ways according to the rule that usually applies under normal circumstances.<sup>22</sup>

A constitutional state of emergency provides flexibility for the government in an emergency to take action outside the law but still within the constitutional corridor. The constitutional state of emergency has elements that reduce, limit, or even freeze certain human rights. However, the reduction must meet three conditions, namely: 1) it must be temporary, 2) it is intended for overcoming a crisis, and 3) there must be a return to normal circumstances to defend fundamental human rights.<sup>23</sup>

In facing an abnormal emergency, the President of Indonesia is given the authority to take actions that violate the regular law.<sup>24</sup> That authority is intended solely to protect citizens. The protection's norm for citizens in the Indonesian Constitution lies in the fourth paragraph of the preamble to the Indonesian Constitution, which states, "... form a government of the state of Indonesia which shall protect all the people of Indonesia

<sup>19</sup> FARRELL, Brian R. Habeas Corpus In Times of Emergency: A Historical and Comparative View. **Pace International Law Review Online Companion**, New York, vol. 1, n. 9, pp. 74-98, 2010. p. 80.

<sup>20</sup> ARSIL, Fitra; AYUNI, Qurrata. Model Pengaturan Kedaruratan Dan Pilihan Kedaruratan Indonesia Dalam Menghadapi Pandemi Covid-19. **Jurnal Hukum dan Pembangunan**, Depok, v. 50, n. 2, pp. 423-446, 2020.

<sup>21</sup> SIHOMBING, Herman. **Hukum Tata Negara Darurat di Indonesia**. Jakarta: Djambatan, 1996. p. 1.

<sup>22</sup> ASSHIDDIQIE, Jimly. **Hukum Tata Negara Darurat**. Jakarta: Raja Grafindo Persada, 2007. p. 7.

<sup>23</sup> ASSHIDDIQIE, Jimly. **Hukum Tata Negara Darurat**. Jakarta: Raja Grafindo Persada, 2007. p. 97.

<sup>24</sup> BASKORO, Dewo; ARSIL, Fitra; AYUNI, Qurrata. The Authority of the Indonesian Power Holder Related to the State of Emergency in Terms of the Law on States of Emergency. In: SUSETYO, Heru; WAAGSTEIN, Patricia Rinwigati; CAHYONO, Akhmad Budi. **Advancing Rule of Law in a Global Context**. London: CRC Press, 2020. p.81-89.

*and all the independence and the land that has been struggled for, ... to participate toward the establishment of a world order based on freedom, perpetual peace and social justice*<sup>25</sup>

This constitutional foundation is also supported by the provision in Article 28G paragraph (1) of the Indonesian Constitution, which states that 'Every person shall be entitled to the protection of his/her person, family, honor, dignity, and property under his/her control, as well as be entitled to feel secure and be entitled to protection against the threat of fear to do or omit to do something being his/her fundamental right.' However, in an emergency such as a disaster, pandemic, or rebellion, it becomes more difficult for the government to fulfill the purpose of safety, self-protection, and that of family members, using standard methods. Therefore, the constitutional law's concept recognizes the permissibility of deviating from the law in an emergency to guarantee sovereignty and fulfill citizens' rights.<sup>26</sup>

The only law that uses Article 12 of the Indonesian Constitution's constitutional basis for its formation is Law No. 23/prp/1959 concerning the State of Danger. The State of Danger Law was originally a government regulation in lieu of laws issued during the Soekarno leadership era to eradicate a rebellion.<sup>27</sup> Its content is closely related to the need to address conditions related to state security and defense intervention.<sup>28</sup> The State of Danger Law provides regulations regarding three conditions of emergency in Indonesia that is Civil Emergency, Military Emergency, and War Emergency (article 1, Indonesian Government Regulation Substitute of Law Number 74 of 1957 concerning Revocation Law and Determination of Danger Condition, Government Regulation Substitute of Law Number 23 of 1959). The President can determine these three conditions in three situations: a) there is a threat to security or legal order in some or all areas in Indonesia due to rebellion, riots, or natural disasters, the fear being that they cannot be limited by standard equipment; b) war, or the danger of war arises or there is threatened occupation of the territory of Indonesia; c) the life of the state, which is in a state of danger or other special conditions that endanger the existence of the state (article 1, Indonesian Law Number 23/prp/1959 concerning the State of Danger "Indonesian State of Danger Law").

The State of Danger Law provides a series of permissions for the government to derogate law, and human rights observed in normal conditions are not permitted. For example, in a civil emergency, the government is allowed to confiscate goods, using

<sup>25</sup> Indonesian Constitution in English available in: <https://www.mkri.id/public/content/infoumum/regulation/pdf/uud45%20eng.pdf>.

<sup>26</sup> ASSHIDDIQIE, Jimly. **The Constitutional Law of Indonesia: A Comprehensive Overview**. Malaysia: Sweet & Maxwell Asia, 2009.

<sup>27</sup> INDONESIA. **Penemuan Kembali Revolusi Kita (The Rediscovery of Our Revolution)**: Pidato Presiden Republik Indonesia Pada Tanggal 17 Agustus 1959. Djakarta: Kementerian Penerangan, 1959.

<sup>28</sup> SUSATON, Budi. **Identitas dan Postkolonialitas di Indonesia**. Jakarta: Kanisius, 2003. p. 158.



public items, conducts tapping and restrictions on telecommunications media, prohibits activities and meetings, and limits people from leaving their house (article 16-19 Indonesian State of Danger Law).

As for military emergency, the government is given the authority to prohibit the production and trade of firearms and explosives; control communication equipment; limit land, air, and sea traffic; restrict theatre or performances and printing, hold postal and telegraphic letters, militarize certain positions, and make arrests, for 21 days (article 24-26 Indonesian State of Danger Law).

Meanwhile, in a war emergency, the government is given the right to take ownership of goods for war, prohibit performances and close printing, force people to be conscripted/militarized, and make regulations that are contrary to laws for defense and security during the war (article 27-32 Indonesian State of Danger Law)

One of the discretion clauses provided by Indonesian State of Danger Law when declaring a state of emergency details the government's discretion to make regulations deemed essential to deal immediately with an emergency. Article 10 of Indonesian State of Danger Law states:

*"(1) The Regional Civil Emergency Authority has the right to issue regulations deemed necessary in the interests of public order or for the security of their respective regions, which according to central legislation, may be regulated by rules that are not central legislation. (2) The Central Civil Emergency Authority has the right to enforce all regulations deemed necessary in the interests of public order and for security purposes."*

In an emergency, it is necessary to enforce laws that give power to the emergency authorities attributively by making policies that may deviate from the Constitution, other laws, and regulations. Some legislation can be excluded, namely policies or actions that violate rights that cannot be reduced, as stipulated in the Constitution. In this way, the focus is on bestowing power to enforce emergency laws that are general and broad.

Another deviation from the principle of checks and balances is an exemption from judges and legislative supervision against the President's statements regarding emergencies. The court has the right to examine the President's decision regarding an emergency. There are regulations related to independence from judicial review by the state administrative court of policies issued during the emergency period, which are confirmed in Article 49 of Law no. 5 of 1986, concerning Indonesian State Administrative Court, which states that:

*"The court is not authorized to examine, decide and settle certain State Administrative disputes if the disputed decision is issued: a. in time of war, in a state of danger, a state of natural disaster, or an extraordinary situation that is endangering, based on the prevailing statutory regulations; b. in an urgent situation for the public interest based on the prevailing laws and regulations."*

Substantially, the existence of the State of Danger Law 1959 is no longer in accordance with the Constitutional system in Indonesia. Furthermore, after the last amendment to the 1945 Constitution was carried out, in 2001, the President of Indonesia was no longer answerable to the People's Consultative Assembly. Therefore, it is necessary to formulate a stricter supervisory mechanism for the President in carrying out emergency procedures.

Various terms and nomenclature used in Indonesian State of Danger Law year 1959 no longer exist in the Indonesian government system. The granting of authority to the First Minister, Central Military Emergency Authority, Regional Military Emergency Authority, and many other positions will be constrained. This condition is because the positions no longer exist in the current government.

The concept of government in the State of Danger Law has not yet addressed regional autonomy. This means that, in an emergency situation, the actions of the regional head do not have a firm legal basis. This condition has the potential to create opportunities for the abuse of power and the ineffective handling of emergencies.

The State of Danger Law has also barely responded to the need for checks and balances in an emergency. The question of how to stop the potential abuse of power in an emergency situation has not been regulated in the normative scheme of The State of Danger Law. Moreover, there are also various problems and public resistance regarding the use of The State of Danger Law because of its potential to create arbitrariness and incur allegations of human rights violations.

### 3. INCONSISTENCY IN THE IMPLEMENTATION OF CONSTITUTIONAL STATE OF EMERGENCY

#### 3.1. The Implementation of Law on the State of Danger

History records that one of the polemics against the use of the Constitutional Law of Emergency concerns several potential gross human rights violations.<sup>29</sup> It was found in the implementation of the status of the Military Operations Area (*Daerah Operasi Militer*/DOM) in Aceh, which was not explicitly stipulated by the New Order government.<sup>30</sup> According to Tempo magazine records, in 1990, the Aceh Head of Local Government reported to President Soeharto requesting additional Indonesian state army personnel.<sup>31</sup> Using Government Regulation Number 16 of 1960 concerning the

<sup>29</sup> SRIRAM, Chandra Lekha. **Confronting Past Human Rights Violations**. Abingdon-on-Thames: Routledge, 2004.

<sup>30</sup> ASPINALL, Edward; CROUCH, Harold. **The Aceh Peace Process: Why It Failed**. Washington, D.C.: East-West Center, 2003.

<sup>31</sup> TEMPO MAGAZINE. **Mengapa Aceh Berontak**, Jakarta, vol. 25, n. 32, Aug. 2003.

Request and Implementation of Military Assistance (Government Ordinance of Military Assistance), the government increased Aceh's military strength from 6,000 to 12,000.<sup>32</sup>

The President did not issue any state of emergency declaration regarding the situation in Aceh at that time. However, the implementation of the Military Operation Area in Aceh was effectively conducted through a repressive approach, using military force. Jimly Asshiddiqie later called this a *de facto* emergency, which means that an emergency or a state of danger is not legally declared, while in an actual situation, the emergency does occur.<sup>33</sup> This difference in conditions between *de facto* emergency and emergency *de jure* must be avoided in the rule of law.<sup>34</sup> According to Jimly Asshiddiqie's opinion, "by paying attention to the history of state administration practices in enforcement of emergency law, it can be distinguished between "emergency *de jure*" and "emergency *de facto*". If an emergency is officially proclaimed, the emergency is "*de jure*". However, if unofficially proclaimed emergency measures are practiced by violating normal rules, this condition is commonly called "*emergency de facto*," which should be avoided in every rule of law country.<sup>35</sup>

Although it was not officially declared, on August 7, 1998, the Government of Indonesia, through the Minister of Defense and Security/Commander of the Armed Forces, announced the revocation of military operations area status and immediately withdrew the armed forces operational units from the Aceh region. However, during the military operations area implementation period, many human-rights violations occurred, such as kidnappings, killings, and rape, which some writers believe were committed by the military.<sup>36</sup>

The government did not use the official State of Danger Law declaration to implement the military operations. This application was inappropriate within the guidelines on the State of Danger Law. Furthermore, the indecisiveness regarding the emergency laws used to implement Aceh's military operations area was also problematic, in practice. According to the records of the Aceh Human Rights Non-Government

<sup>32</sup> DJOHARI, Djohari. Penerapan Norma Hukum Tata Negara Darurat Serta Kaitannya Dengan Penanggulangan Gangguan Keamanan Dan Bencana Tsunami Di Provinsi Nanggroe Aceh Darussalam. *Jurnal Ilmu Hukum*, Jambi, v. 2, n. 3, pp. 64-85, 2011.

<sup>33</sup> ASSHIDDIQIE, Jimly. *The Constitutional Law of Indonesia: A Comprehensive Overview*. Malaysia: Sweet & Maxwell Asia, 2009. p. 30.

<sup>34</sup> BJØRNSKOV, Christian; VOIGT, Stefan; KHESALI, Mahdi. Unconstitutional States of Emergency. *Institute of Law and Economics Working Paper Series*, Hamburg, n. 51, pp. 1-35, 2021.

<sup>35</sup> ASSHIDDIQIE, Jimly. *The Constitutional Law of Indonesia: A Comprehensive Overview*. Malaysia: Sweet & Maxwell Asia, 2009. p. 31.

<sup>36</sup> USMAN, Abdul Rani. *Sejarah Peradaban Aceh: Suatu Analisis Interaksionis, Integrasi dan Konflik*. Jakarta: Yayasan Pustaka Obor Indonesia, 2003. p.30.

Organization Coalition, quoted by Daniel Hutagalung, there are four significant clusters of violations, as follows<sup>37</sup>:

**Table 1.** Cases of Human Rights Violations During the Enactment of Military Operation Areas (DOM) 1989 - 1998

Type of Cases	Number of Victims
Murder/arbitrary outside the legal process	1321 persons
Enforced Disappearance	1958 persons
Rape	128 persons
Incendiarism	597 houses

The imposition of martial law in Aceh was only officially affirmed during the Megawati administration through Presidential Decree No. 28 of 2003 concerning the Enforcement of Military Emergency Status in the Province of Nanggroe Aceh Darussalam. This policy was born after the Tokyo meeting's failure between the leaders of the Free Aceh Movement (Gerakan Aceh Merdeka/GAM) and the Government of Indonesia on December 9, 2002. Before the Presidential Decree issuance, the government had held a Consultation Meeting between the President and all Leaders of the Indonesian Parliament, factions, and two Commissions on May 15, 2003. The consultation meeting then received support from the leadership of the Indonesian House of Representatives, factions, and Commission I and Commission II of the Indonesian House of Representatives by observing the state of development and the attitude of the Free Aceh Movement (GAM). In the last days after the Consultation Meeting, there was no change in the direction of improvement; it was deemed necessary to determine a State of Danger with a State of Military Emergency for the entire territory of the Province of Nanggroe Aceh Darussalam.

The government further reduced Military Emergency to Civil Emergency on May 18, 2004, through Presidential Decree No. 43 of 2004 concerning the Statement of Changing the Status State of Danger with the Level of Military Emergency to a Danger Level of Civil Emergency in the Province of Nanggroe Aceh Darussalam (considering section, letter d, Presidential Decree Number 28 of 2003). The President published this change after a Consultation Meeting between the government and the House of Representatives on May 17, 2004 and received support from the House (Presidential Decree Number 43 of 2004 concerning the Statement of Changing the Status of a Danger

<sup>37</sup> HUTAGALUNG, Daniel. Memahami Aceh Dalam Konteks: Kajian Atas Situasi Darurat Militer Di Aceh 2003-2004. **Aceh Working Group Monograf**, [s.l.], n. 2, pp. 1-31, 2004.

with the Level of Military Emergency to a Danger with the Level of Civil Emergency in the Province of Nanggroe Aceh Darussalam). This cooperates with the previous Military Emergency program, namely the Integrated Operations, which included Humanitarian Operations, Economic Recovery Operations, Law Enforcement Operations, Governance Strengthening Operations, and Security Restoration Operations (considering section, letter a, Presidential Decree Number 43 of 2004).

The interesting thing about the implementation of the constitutional law of Emergency in Aceh is its removal method. Both the Military Emergency and the Civil Emergency in Nanggroe Aceh Darussalam Province use a Presidential Decree as the basis for their stipulation. However, in revoking the status of Civil Emergency in Aceh, the government used a presidential regulation, namely Presidential Regulation Number 38 of 2005 concerning the Elimination of Hazardous Conditions with a Level of Civil Emergency in Nanggroe Aceh Darussalam Province. This Presidential Regulation became effective on May 19, 2005, after the government previously held a Consultation Meeting with the Indonesian People's Representative Assembly on May 16, 2005. The meeting considered that the condition of security, tranquility and public order and governance, and the activities of the socio-economic life of the people of Nanggroe Aceh Darussalam Province have been progressing better and showing significant results. So it is deemed necessary to eliminate the Civil Emergency in the Province of Nanggroe Aceh Darussalam (consideration section Presidential Regulation Number 38 of 2005).

Inconsistencies in the use of legal products in determining the emergency status in Aceh have resulted in inconsistencies in the legal form of activating the state of emergency. Besides, having a Consultation Meeting with The House of Representatives before determining an emergency status is a practice that is not required by laws and regulations. As a result, the Consultation Meeting with The House of Representatives can be a form of checks and balances or supervision carried out by the legislature in the executive branch, which is not binding.

Similar cases also occurred in connection with military operations in Papua, Irian Jaya.<sup>38</sup> The existence of security disturbances, such as The Free Papua Movement, made the government launch several military operations involving the Indonesian Armed Forces deployment.<sup>39</sup> Papua has implemented several military operations, namely; Operation Sadar (1965-1967), Operation Bharatayudha (1967-1969), Operation Wibawa (1969), Military Operation in Jayawiyata Regency (1977), Operation Sapu Bersih I and II (1981), Operation Galang I and II (1982), Operation Tumpas (1983-1984) and Operation

<sup>38</sup> OSBORNE, Robin. **Kibaran Sampari**: Gerakan Pembebasan OPM dan Perang Rahasia di Papua Barat. Amiruddin al Rahab. (transl.). Jakarta: Lembaga Studi dan Advokasi Masyarakat, 2001.

<sup>39</sup> AL-RAHAB, Amiruddin. Operasi-Operasi Militer di Papua, Pagar Makan Tanaman? **Jurnal Penelitian Politik**, Depok, v. 3, n. 3, p. 3-23, 2006.

Sapu Bersih (1985).<sup>40</sup> However, the President did not issue the declaration of emergency status in advance to implement military operations. Enforcing military operations without an explicit statement of emergency powers' use provides an opportunity for human rights violations in these situations.<sup>41</sup>

The following are some emergency's declarations issued by the Indonesian Government in various regions:<sup>42</sup>

**Table 2.** Several emergency status declarations based on the State of Danger Law

No.	Area	Presidential Decree	Concerning
1.	Nanggroe Aceh Darussalam	Presidential Decree No. 28 Tahun 2003	Statement of Danger State with the Level of Military Emergency Situation in Nanggroe Aceh Darussalam Province
2.	Nanggroe Aceh Darussalam	Presidential Decree No. 97 of 2003	Statement of Extension of State of Danger with the Level of Military Emergency Situation in Nanggroe Aceh Darussalam Province
3.	Nanggroe Aceh Darussalam	Presidential Decree No. 43 of 2004	Statement of Changing Status of a State of Danger with a State of Military Emergency to a State of Danger with a Level of Civil Emergency in Nanggroe Aceh Darussalam Province
4.	Nanggroe Aceh Darussalam	Presidential Regulation Number 38 of 2005	Revocation of Danger Status with a Level of Civil Emergency in Nanggroe Aceh Darussalam Province
5.	Maluku and North Maluku Province	Presidential Decree No. 88 of 2000	Civil Emergency Situation in Maluku Province and North Maluku Province
6.	Maluku Province	Presidential Decree No. 71 of 2003	Elimination of Civil Emergency Status in Maluku Province
7.	North Maluku Province	Presidential Decree No. 27 of 2003	Elimination of Civil Emergency Status in North Maluku Province

<sup>40</sup> SYUFI, Thomas Ch. **Bunga Rampai Indonesia: Sebuah Proposal Ringkas Papua**. Yogyakarta: Deepublish, 2016. p. 60-61.

<sup>41</sup> OSBORNE, Robin. **Kibaran Sampari: Gerakan Pembebasan OPM dan Perang Rahasia di Papua Barat**. Amiruddin al Rahab. (transl.). Jakarta: Lembaga Studi dan Advokasi Masyarakat, 2001.

<sup>42</sup> Presidential Decree, National Agency for Disaster Management (Sept. 30, 2020), available in <https://bnpb.go.id/produk-hukum/keputusan-presiden?page=1>

### 3.2. The Application of Law on Disaster Management

Another phenomenon that is also valuable to study is some legislation products that have emergency characteristics but do not mention Article 12 of the 1945 Constitution as a consideration. Some of the laws with emergency characteristics are 1) Law Number 24 of 2007 concerning Disaster Management; 2) Law Number 7 of 2012 concerning Handling of Social Conflicts; and 3) Law Number 6 of 2018 concerning Quarantine Health and 4) Law Number 9 of 2016 concerning Financial Crisis Prevention and Management System. All of these laws have emergency characteristics that can deviate from normal laws under certain conditions.

The author provides an example of determining the emergency status of natural and non-natural disasters. The pros and cons of deciding the status of a national catastrophe in various regions in Indonesia raise exciting questions to study. Does the President have to be bound by specific indicators to determine a national disaster emergency status? Or, as the holder of the highest executive power, can the President declare the establishment of national and local disaster emergency status as his prerogative?

These pros and cons have emerged in almost all cases of disasters in Indonesia. For example in the earthquake in Lombok (2018), the earthquake and tsunami in Palu (2018), the volcanic eruption in Sinabung (2010-2017), the eruption of Mount Merapi in Yogyakarta (2006), and the earthquake in Padang (2009), many parties asked the President to determine National Disaster status, but the President did not grant it. Located in an area known as the Ring of Fire<sup>43</sup>, Indonesia is one of the countries that can experience the most natural disasters in the world. Data from the National Disaster Management Agency (BNPB) states that natural disasters are still the most significant contributor to Indonesia's disasters. Catastrophes often occur, such as floods, earthquakes, tsunamis, and volcanic eruptions, taking thousands to millions of lives.

In particular, Law Number 24 of 2007 concerning Disaster Management (Law on Disaster Management) has regulated disaster emergencies. This law is a product of legislation passed as valuable lessons from the tsunami disaster in Aceh Province on December 26, 2004, and the earthquake in the Nias Islands on March 28, 2005.<sup>44</sup> The Aceh Tsunami in 2004, with a death toll of more than 165,000 people, and The Nias earthquake with more than 1,000 victims, has made the Indonesian government aware of the importance of preparing legislative instruments to deal with disasters. The recent disasters have also caused casualties. Such as the earthquake in Lombok with 564

<sup>43</sup> National Agency for Disaster Management, Master Plan Pengurangan Resiko Bencana Tsunami 1, available in <https://bnpb.go.id/uploads/migration/pubs/578.pdf>.

<sup>44</sup> SUPARTOYO. Mengenang Gempa Nias 2005, *Geomagz* (Oct. 16, 2016), available in <http://geomagz.geologi.esdm.go.id/mengenang-gempa-nias-2005/>.

deaths and 1,584 injuries in August 2018.<sup>45</sup> That disaster was followed by the Palu earthquake in October 2018, with 2,113 fatalities and 4,612 injured.<sup>46</sup> This disaster phenomenon creates many legal problems, such as determining a disaster's status and what kind of emergency policies should be carried out by the government.

Article 51 of the Law on Disaster Management states that the government shall determine disaster emergency status according to the disaster scale. The President carries out the determination of national disaster emergency on a national scale. The governor carries out the decision of a local disaster emergency, and the regent/mayor scale carries out the determination of the district/city disaster emergency (article 51 Law on Disaster Management). However, this law still has weaknesses. The weakness lies in the delegation of authority to make a declaration. Regional Leaders, namely Governors, Regents, and Mayors are not regulated or obliged to submit requests for permission to the President to declare a disaster emergency status in their area. So that regional leaders can declare a disaster emergency condition according to their respective considerations. This condition can lead to a declaration to facilitate policy deviation and facilitate disproportionate lengthening of the emergency.

### 3.3. Application of Laws in Dealing with Covid-19

Another example that shows the phenomenon of uncertainty and inconsistency in the use of emergency law also occurs when the Government is facing the Covid-19 pandemic. Initially, the President took a health emergency approach using Law Number 6 of 2018 concerning Health Quarantine (Health Quarantine Law). Through the Health Quarantine Law, the government then issued Presidential Decree No. 11 of 2020 concerning the Determination of Public Health Emergencies, which refers to the Health Quarantine Law. This determination is the basis for implementing Large-Scale Social Restrictions (*Pembatasan Sosial Berskala Besar*/PSBB) in several regions in Indonesia.<sup>47</sup>

Activation of Public Health Emergencies allows the government to undertake school and work vacations, restrictions on religious activities, and restrictions on public places or facilities (article 59 Health Quarantine Law). The implementation of quarantine and PSBB must first require a stipulation from the Central Government. In addition to determining the status of a Public Health Emergency, the President also issued

<sup>45</sup> HALIM, Devina. *Hampir 2 Bulan Berlalu, Ini 'Update' Korban Gempa Lombok dari BNPB*, KOMPAS (Oct.16, 2018), available in <https://nasional.kompas.com/read/2018/10/01/21091241/hampir-2-bulan-berlalu-ini-update-korban-gempa-lombok-dari-bnpb?page=all>.

<sup>46</sup> HADI, Syafiu. *Jumlah Korban Tewas Terkini Gempa dan Tsunami Palu*, Tempo.Co (Oct. 23, 2018), available in <https://nasional.tempo.co/read/1138400/jumlah-korban-tewas-terkini-gempa-dan-tsunami-palu-2-113-orang>.

<sup>47</sup> PRANSAISKA, Lucky. *Presiden Jokowi: Indonesia Memilih PSBB*, Kompas (Mar. 31, 2020), available in <https://kompas.id/baca/video/2020/03/31/presiden-jokowi-indonesia-memilih-psbb/>.



Presidential Decree No. 12 of 2020 concerning the Designation of Non-Natural Disasters of the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster.<sup>48</sup> This Presidential Decree uses Law Number 24 of 2007 concerning Disaster Management as a legal foundation for activating non-natural disaster emergencies. Some technical terms in the Law on Disaster Management use emergency terms such as Disaster Emergency Response and Disaster Emergency Status (article 1 Disaster Management Law). The emergency characteristics in this law are also similar to the concept built in the emergency concept state.

The Disaster Management Law states that the status of disaster emergency is a condition determined by the government for a certain period. The establishment of the status of disaster based on the Agency's recommendation assigned the task of coping with disasters (article 19 Disaster Management Law). Disaster emergency status can be determined by the President for a national disaster scale and by the regional head for a regional disaster scale. So that in a disaster condition, the central government and local governments are given the authority to activate other legal regimes that cannot be used under normal conditions.

With the issuance of non-natural disaster status, the legal conditions are limited according to the Disaster Management Law provisions. Article 50 of the Disaster Management Law gives authority to the National Disaster Management Agency and Regional Disaster Management Agency in the form of easy access to disaster control. The conveniences include mobilization of human resources, deployment of equipment, deployment of logistics, immigration, excise, quarantine, licensing, procurement of goods/services, management and accountability of money or goods, rescue, and commands sectors/institutions.

The existence of two emergency statuses issued by the President regarding Covid-19 led to the birth of two leading sectors counterproductive in implementing fast and precise policies. Several policies are considered overlapping and bureaucratic. David & Brenda explained that a bureaucratic approach in implementing emergency management would result in an ineffective emergency response.<sup>49</sup> Institutional strengthening is carried out to control public policies in times of crisis that require high accuracy and high speed. To improve the policymaking process so that it does not drag on.

Determination of non-natural disaster emergency status and public health emergency status in Indonesia only provides a limited handling instrument. Meanwhile, the Covid-19 pandemic caused other side effects, namely the financial crisis.

<sup>48</sup> IHSANUDDIN. Presiden Jokowi Teken Keppres Tetapkan Wabah Covid-19 Bencana Nasional, Kompas (Apr. 13, 2020), available in <https://nasional.kompas.com/read/2020/04/13/18101841/presiden-jokowi-teken-keppres-tetapkan-wabah-covid-19-bencana-nasional>.

<sup>49</sup> NEAL, David M; Brenda D. Phillips. Effective Emergency Management: Reconsidering the Bureaucratic Approach. *Disaster*, Mattoon, vol. 19, n. 4, p. 327-337, 1995. DOI: <https://doi.org/10.1111/j.1467-7717.1995.tb00353.x>. p. 327.

However, neither the Disaster Management Law nor the Public Health Emergency Law did not provide a way out in the face of the Covid-19 economic turmoil. To overcome this condition, the President of Indonesia issued a Government Regulation in lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Pandemic Corona Virus Disease (Covid-19) or in the Context of Facing Threats Endanger the National Economy or Financial System Stability.

The power to form regulations in lieu of laws is typical in various countries, especially in countries with presidential systems. In multiple works of literature, this type of regulation is known by numerous names. These include the constitutional decree authority, or some writers call it the executive decree authority or presidential decree authority.<sup>50</sup> On the pretext of overcoming the Covid-19 pandemic in the financial sector, the government submitted government regulations in lieu of laws that cut the constitutional power of the House of Representatives' budgeting scope. It is stated in Article 12 paragraph (2) that changes in posture or details of the State Revenue and Expenditure Budget (Anggaran Pendapatan Belanja Negara/APBN) in the context of implementing state financial policies are only regulated by or based on government regulations. Whereas this contradicts Article 23 paragraph (2) of the Indonesian Constitution (1945), which requires House of Representatives interaction in ratifying the APBN budget, *"The President shall submit the bill on the state budget for joint debate with The People's Representative Council taking into account the recommendations from the Regional Representative Council."*

Although considered to have violated the authority of The House of Representatives constitutionally, this Government Regulation in lieu of law was ultimately passed into law by the House of Representatives at the plenary session of May 12, 2020. This regulation was later ratified as Law Number 2 of 2020 concerning Stipulation of regulations in lieu of laws Number 1 of 2020 concerning State Financial Policy and Financial Stability for Handling the Covid-19 Pandemic or in the context of Facing Threats that Endanger the National Economy and/or Financial System Stability into law. Many parties are concerned when the issuance of a law reducing the constitutional's role of The House of Representatives. However, the House of Representatives' political agreement process even approved the scheme under the argument of a crisis during the Covid-19 pandemic. The author also identifies the tendency of a congruent constellation in political parties that support the government as the majority party, making the President's policies easier to be approved but reducing the parliament's checks and balance function.

<sup>50</sup> ARSIL, Fitra. Menggagas Pembatasan Pembentukan dan Materi Muatan Perppu: Studi Perbandingan Pengaturan dan Penggunaan Perppu di Negara-Negara Presidensial. **Jurnal Hukum & Pembangunan**, Depok, v. 48, n. 1, pp. 1-21, 2018.

## 4. CHECKS AND BALANCES IN THE STATE OF EMERGENCY IN INDONESIA

Black's Law Dictionary, the 9th Edition, defines Checks and Balances as a theory about government power's power and function. Each branch of government can oppose the actions of other branches. Thus, no single branch can control the entire government. For example, the executive branch can inspect the legislature using veto power, but the legislature can override the veto by a sufficient majority.<sup>51</sup>

According to the Britannica dictionary, checks and balances are government principles under which separate branches are empowered to prevent actions by other branches and are induced to share power. Checks and balances are applied primarily in constitutional governments. They are of fundamental importance in tripartite governments, such as that of the United States, which separate powers among legislative, executive, and judicial branches.<sup>52</sup>

In a state of emergency, some administrative procedures do not function normally. However, there are standards and limits to provide corridors. The implementation of the state of emergency does not turn into what Clinton Rossiter is concerned about as a dangerous constitutional dictatorship.<sup>53</sup>

International law regulates the "state of emergency," as stated in Article 4 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR). The article reads:

*"In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."*

Within the ICCPR framework, the announcement of the status of emergency must be along with several things. Some of these include the reasons, the date the emergency is to start, the possible reductions, the emergency duration, and the date on which the emergency is expected to end.<sup>54</sup> In the United Nation Special Rappor-

<sup>51</sup> GARNER, Bryan Andrew. **Black's Law Dictionary**. Eagan: West Publishing Company, 2009. p. 270.

<sup>52</sup> See The Editors of Encyclopaedia Britannica. Checks and Balances, **Encyclopedia Britannica** (May. 28, 2020), <https://www.britannica.com/topic/checks-and-balances>.

<sup>53</sup> ROSSITER, Clinton. **Constitutional Dictatorship**: Crisis Government in the Modern Democracies. Abingdon-on-Thames: Routledge, 2017. p. 16.

<sup>54</sup> See UN General Assembly. International Covenant on Civil and Political Rights: 16 December 1966. United Nations Treaty Series, vol. 999, p. 171, art. 4(3), available at <https://www.refworld.org/docid/3ae6b3aa.html> [accessed 7 October 2020]

teurs, a recommendation is put forward that the international community must follow the principles in determining a state of emergency, namely: the principles of legality, proclamation, notification, time limit, extraordinary threats, proportionality, non-discrimination, compatibility, concordance and comply with various norms of international law.<sup>55</sup>

Implementing the state of emergency is indeed capable of creating many irregularities that endanger human rights and sovereignty. Therefore, their implementation must be carried out with careful supervision. Establishing an emergency status must also be based on a doctrine known as “proportional necessity.” In essence, this also becomes the President’s authority to determine the need’s degree to determine an emergency or danger. Nicholas Tsagourias stated that necessity is an urgent situation that justifies extraordinary to protect vital interests from more significant damage.<sup>56</sup> According to him, this exceptional action impacted the government’s ability to use military and non-military forces.

#### 4.1. Checks and Balances by Parliament

The Indonesian Constitution does not oblige the President to consult with parliament when he wishes to declare a state of emergency. The several practices of Consultation Meetings between the President and The House of Representatives before determining the emergency status conducted by President Megawati and President Susilo Bambang Yudhoyono<sup>57</sup> are not a binding obligation. However, the authors consider that such a procedure can be used as a constitutional convention used in the future.

The involvement of The House of Representatives in consultations on determining the status of emergency allows for the risk of unresponsiveness in facing crises. However, the possibility of this delay can be circumvented by limiting the time for giving responses from the House of Representatives so that the President can still declare an emergency status according to the principle of immediacy.

Several legal doctrines have several approaches in handling this emergency. One of them is the doctrine relating to the principles of proportionality and immediacy.<sup>58</sup> In the Indonesian context, the need for proportional and quick crisis management

<sup>55</sup> See UN Sub-Commission on the Promotion and Protection of Human Rights. The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, 23 June 1997, E/CN.4/Sub.2/1997/19, available at <https://www.refworld.org/docid/3b00f4d1.html> [accessed 7 October 2020]

<sup>56</sup> TSAGOURIAS, Nicholas. Necessity and the Use of Force: A Special Regime- Necessity Across International Law. *Netherlands Yearbook of International Law*, Den Haag, vol. 41, pp. 11-44, 2010. p. 11-13.

<sup>57</sup> See Presidential Decree No. 28 of 2003 concerning Statement of Danger State with the Level of Military Emergency Situation in Nanggroe Aceh Darussalam Province, available at <https://bnpb.go.id/produk-hukum/keputusan-presiden/keputusan-presiden-no-28-tahun-2003>.

<sup>58</sup> KRETZMER, David. The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum. *European Journal of International Law*, Oxford, vol. 24, n. 1, pp. 235-242, 2013.

is one of the principles that must exist in facing a crisis. Therefore, a sensitivity is needed for the central government and local governments to provide an emergency status statement in implementing this immediacy immediately. The longer the determination of the crisis in practice can result in a slower provision of protection and guarantees to citizens who become victims.

The International Law Association (ILA) adopts another definition of emergency, “public emergency.” The Paris Minimum Standards of Human Rights Norms in the State of Emergency stipulate the following:<sup>59</sup>

- a. The existence of a public emergency threatens the nation’s life, and which is officially declared, will justify the declaration of a state of emergency.
- b. The expression “public emergency” means an extraordinary situation of public crisis or danger, actual or imminent, which affects the entire population or the whole population in the area where the declaration is in effect and is a threat to an organized organization.

Oren Gross and Fionnuala Ní Aoláin stated that a declaration of a state of emergency must meet several methods. The first is to set a time limit on the state of emergency that has been declared. Second, establish strict procedures related to the expansion of the declared state of emergency. Some constitutions set limits on extending emergencies or certain limitations, usually one year to be re-evaluated later.<sup>60</sup>

For example, several countries use the parliamentary function as checks and balances on an emergency declaration. The deadline for obtaining post-declaration approval may be as short as 24 hours (Fiji), but is typically longer: 5 days in Romania, 14 days in the Bahamas and Kenya, 21 days in South Africa, and 30 days in Spain. Some countries have a longer period before legislative approval has to be granted (e.g., 120 days in Bangladesh). However, this can be dangerous for democracy, as it decreases power and oversight by the parliament, and increases the risk of being misused by emergency powers.<sup>61</sup>

The criticism of the absence of a parliamentary role in overseeing the implementation of emergency power in the State of Danger Law is one reason why there is resistance to its use. The elucidation of the State of Danger Law clearly states that it is prohibited for the parliament to carry out supervision during the state of emergency.<sup>62</sup> There is also no special oversight by The House of Representatives regarding a statement

<sup>59</sup> CHOWDHURY, Subrata Roy. **Rule of Law in a State of Emergency**. United Kingdom: Pinter Publishing, 1989. p. 11.

<sup>60</sup> GROSS, Oren; AOLÁIN, Fionnuala Ní. **Law in Times of Crisis Emergency Powers in Theory and Practice**. Cambridge: Cambridge University Press, 2006. p. 57.

<sup>61</sup> BULMER, Elliot. **Emergency Powers International IDEA Constitution-Building Primer 18**. Stockholm: International Institute for Democracy and Electoral Assistance, 2008. p. 15.

<sup>62</sup> See the elucidation section of Law Number 23 of 1959 concerning the State of Danger, available in <https://jdih.kemenkeu.go.id/fulltext/1959/23TAHUNPERPPUPenj.htm>.

of a state of danger by the President because it is not following the President's position according to the Constitution, which is only responsible for the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*).

Historically, the State of Danger Law of 1959 was born in conditions where there were many rebellions in Indonesia, such as the rebellion of the Republic of South Maluku, DI/TII, the Revolutionary Government of the Republic of Indonesia, the People's Struggle for the Universe and many more. Besides that, there was also a conflict between the Republic of Indonesia and the Dutch Kingdom. So that in this condition, President Soekarno considered the need for an enormous and almost unlimited executive power to save the country's sovereignty.

The parliamentary prohibition against carrying out supervision was because, at that time, Indonesia had not yet amended the Indonesian Constitution (1945). The President obtained the mandate from the People's Consultative Assembly. It was responsible for the highest state institution so that in this context, The House of Representatives is deemed not authorized to supervise the President.

Parliament can be a counterweight in controlling the excessive use of emergency powers. Jimly Asshiddiqie states that the role of parliament in limiting the enforcement of emergencies can be carried out as (1) a form of tight supervision in determining the existence of an emergency, (2) forming the power to overcome the crisis, (3) monitoring the implementation of executive government authority overcoming the situation abnormalities, (4) investigating various irregularities or abuse of power in the exercise of executive officer in that emergency, (5) if necessary declare the end of the emergency period or ask the President to declare a stop to it.<sup>63</sup>

The author notices a law related to an emergency that provides an opportunity for parliament to make checks and balances on executive power. The existence of parliamentary involvement in the Law on Social Conflict Management can be concluded as a form of unique checks and balances. The uniqueness is because checks and balances cannot be found in other laws related to emergencies. It gives the impression that policymakers partially use checks and balances on certain types of crises.

## 4.2. Checks and Balances by Courts

Concern over the use of the state of emergency as a condition that allows abuse of power to occur is a common concern. Joan Fitzpatrick gave signs of deviation from the 'state of emergency' declaration, namely:<sup>64</sup>

<sup>63</sup> ASSHIDDIQIE, Jimly. **The Constitutional Law of Indonesia: A Comprehensive Overview**. Malaysia: Sweet & Maxwell Asia, 2009. p. 79-80.

<sup>64</sup> FITZPATRICK, Joan. **Human Rights in Crisis: The International System for Protecting Rights During States of Emergency**. Philadelphia: University of Pennsylvania Press, 1994.

3. A crisis is not communicated to the related institutions;
4. De facto, human rights are still suspended even though the stipulation of the state of emergency has been revoked;
5. The state of emergency arises more and more due to the continual extension of the formal crisis;
6. The complexity of the emergency has resulted in overlapping legal regimes through the suspension of some constitutional norms with the issuance of many decrees that have a broad reach;
7. The state of emergency was instituted by the authoritarian government and extended the transitional emergency regime ostensibly intending to return to democracy and the Constitution, but this raises many questions and doubts.

In the theory of separation of powers, checks and balances are the constitutional controls whereby separate branches of government have limiting powers over each other so that no branch will become supreme.<sup>65</sup> This concept guarantees supervision and restrictions on other branches of power in a country. So that in normal or emergency conditions, one branch of power cannot act beyond its proportional needs.

Elliot Bulmer noted that the Constitution of several countries regulates the judiciary's right to conduct a review in connection with: (a) the declaration or extension of a state of emergency and/or (b) the exercise of emergency powers.<sup>66</sup> A number of these constitutions are Kenya, Slovakia, South African, and France. In Kenya, checks and balances by the court are regulated in article 58 of its constitution. The article regulates that the Supreme Court is authorized to judge the legality of declaring a state of emergency, additional emergencies, laws that have been enacted, or other measures taken due to emergency declaration. As for Slovakia, these provisions are regulated on its Constitution article 129. The difference is, this authority is given to the Constitutional Court. Then, in South Africa, the court's supervision in the form of a judicial review of the issuance of an emergency status and policies issued due to the emergency status is regulated in articles 37 (3a) and (3b). Last, Article 16 of the French Constitution allows the Constitutional Council to determine, at the request of about 10 percent of parliamentarians, whether or not the state of emergency should be extended.<sup>67</sup>

The Indonesian Constitution (1945) does not provide regulations and powers for the court to review the state of emergency status. However, in the Law on State of

<sup>65</sup> BERMAN, Harold Joseph. **Law and Revolution: The Formation of the Western Legal Tradition**. Cambridge, Massachusetts: Harvard University Press, 1983. p. 95.

<sup>66</sup> BERMAN, Harold Joseph. **Law and Revolution: The Formation of the Western Legal Tradition**. Cambridge, Massachusetts: Harvard University Press, 1983. p. 30.

<sup>67</sup> BERMAN, Harold Joseph. **Law and Revolution: The Formation of the Western Legal Tradition**. Cambridge, Massachusetts: Harvard University Press, 1983. p. 30.

Danger, there is a clause that explicitly prohibits the court from exercising oversight of the state of emergency.<sup>68</sup> The elucidation of paragraph (1) of the Law on State of Danger emphasizes the President's freedom in declaring a state of danger in full. It states: "The evaluation of the events mentioned in paragraph (1) as a reason that allows a state of danger to be declared, is left solely to the President; then the judge cannot review the state of danger status whether it is legal or not."

The prohibition for courts to review conditions and the declaration of the state of emergency is also clearly stated in Article 49 of Law No. 5 of 1986 concerning State Administrative Courts which states that: "The court is not authorized to examine, decide and resolve certain State Administrative disputes if the disputed decision is issued: a. in time of war, in a state of danger, a state of natural disaster, or an extraordinary situation that is endangering, based on the prevailing statutory regulations; b. in an urgent condition for the public interest based on the existing laws and regulations."

The absence of a court's role is an emergency, especially when the ruling political party in the parliament is a party that supports the President. This condition will justify the President's actions during an emergency to create a massive potential for abuse of power. The absence of a supervisory role during the state of emergency in Indonesia in the State of Danger Law is actually out of date. Changes in Indonesia's constitutional law and government system after the amendment to the Indonesian Constitution (1945) gave birth to stronger checks and balances. Based on the amendments of the Indonesian Constitution (1945), the People's Consultative Assembly no longer elect the President. They also no longer accept the responsibility of the President. Thus, there is significance to build strong supervision from other branches of power, such as the legislative and judiciary.

The court's reduced authority to carry out supervision can also be found in Law No. 2 of 2020 concerning Covid-19. Article 27 paragraph (3) of Law No. 2 of 2020 concerning Covid-19 states that all actions, including decisions taken, are not the object of a lawsuit that can be submitted to the state administrative court so that the role of the judiciary in providing checks and balances in the scope of handling Covid-19 economic stability is lost.

The absence of a court's role in determining the state of emergency and monitoring the state of emergency's operation is a weakness that needs to be corrected. A mechanism needs to be established to give courts the power to limit executive powers in an emergency. Thus, the ease with which regulations bend from them should not be the legitimacy of deviations detrimental to the Indonesian nation and state.

<sup>68</sup> Supervision by judges on statements of danger is not carried out because they are not in line with the composition of the Indonesian directors in general and are not in accordance with judges' position, especially in Indonesia. See the the elucidation section of Law No. 23 of 1959 concerning State of Danger, point 2, available at <https://jdih.kemenkeu.go.id/fulltext/1959/23TAHUNPERPPUPenJ.htm>.



## 5. CONCLUSION

The foundation of the constitutional state of emergency in Indonesia was born based on Article 12 of the Indonesian Constitution (1945). This article gives the President the power to determine and end a state of emergency without considering and consulting the House of Representatives. Article 12 of the Indonesian Constitution (1945) gave birth to the Law on State of Danger in 1959 long before the amendment. So that is running the state of emergency, the president does not need to be supervised by the House of Representatives and the court because the president will be accountable to the People's Consultative Assembly.

The only regulation that involves parliament in monitoring emergency conditions is the Law on Social Conflict Management to provide oversight of actions taken by the Regional Government and the Central Government by the House of Representatives and the Regional House of Representatives. The extension of the social conflict emergency status also requires parliament approval. Unfortunately, this clause is not found in other emergency statutes.

There were many irregularities in the use of the state of emergency before the reformation era. Implementing the military emergency area in Aceh before the reformation era did not even have an explicit declaration. Likewise, in the case of a military emergency in Papua/Irian Jaya, which was also not explicitly declared. This leads to abuse of power in the state of emergency.

Indonesia needs firmer arrangements regarding checks and balances in an emergency. The Law on State of Danger does not accommodate these checks and balances, so it needs to be evaluated, amended, or revoked. Besides, there is also a need for solid regulations and checks and balances in various other laws, such as in the law on disaster management, public health emergencies, and laws on handling Covid-19 to protect human rights and the rule of law Indonesia.

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