

THE EXISTENCE OF GOVERNMENT REGULATION IN LIEU OF LAW OR PERATURAN PEMERINTAH PENGGANTI UNDANG-UNDANG (PERPPU) IN LEGAL SYSTEMS OF THE REPUBLIC OF INDONESIA

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ABSTRACT -The Government Regulation in Lieu of Law (Perppu) for the legal system in the republic of Indonesia which reflects the executive power is used to overcome "the forcing crunch". It (Perppu) is one of legislations which is based on Pancasila and Indonesian Constitutions in 1954 (UUD 1945) as all sources of law and the basic law of the country in legislation, and should be able to be a source of law legislation which is lower. But in practice it is often found that there are still some problems related to existence and function of the Government Regulation in Lieu of Law (Perppu). Therefore, it has to arrange amendment to Act no. 10 of 2004 and Act no. 12 of 2011 on the Establishment Regulation Legislation clarifying in finding solutions, especially the definition of "the forcing crunch".

1. BACKGROUND

Legislation in Indonesia, from the highest to the lowest is set out in Article 7 (1) of Act no 12 in 2011 on the Establishment of Legislation. The article mentions that the type hierarchy of legislation consisting of (1) of the Constitution of the Republic of Indonesia, (2) Stipulation of the Assembly, (3) the Act / Regulation in lieu of law, (4) government regulation, (5) Presidential Regulation, (6) Provincial Regulation, (7) the District / Municipality regulation. From the seven regulations mentioned above, government regulations in lieu of law (Perppu) is the only rule that requires a matter of "the forcing crunch" in its formation. Constitution of the Republic of Indonesia in 1945 (UUD 1945), Article 22 paragraph (1) states that in matters of the forcing crunch, the president has the right to set the government regulation in lieu of law (perppu). When referring to this statement, it is clear that the government regulation in lieu of law (perppu) is an instrument that is determined by the President without the involvement of the House of Representatives (DPR). Act no.12, 2011 states that the substance of the government regulation in lieu of law (perppu) is the same as legislation. Based on the decision of Supreme Court, no.1-2/PUU-XII/2014 dated February 11, 2014 stating that the substance of government regulation in lieu of law was the substance of the legislation which has the power like legislation and binds since promulgated.¹

The role of Parliament regarding the new government regulation in lieu of law can be seen in Article 22 paragraph (2) and (3) of the 1945 Indonesian Constitution which stipulates that "government regulation should get approval of the House of Representatives in the next session" and "if it is not approved by then the government regulation in lieu of law (perppu) should be revoked". Unlike the law, regulation has a very short validity period that is up to Parliament conference which is close to the date of the

government regulation in lieu of law which is stipulated. After that, it needs the assertiveness of the House of Representatives on whether to approve or not the government regulation in lieu of law (Perppu). Filing it (Perppu) to the House of Representatives is conducted in the form of the law draft on the stipulation of government regulation in lieu of law (Perppu) to be law. In this case the House of Representatives legalized it (Perppu) to be law, whereas if the regulation has been rejected by the Parliament, the regulation has not occurred. Then, the President submits a law draft on law repeal of Perppu which manages the consequences of the refusal. In the legal system of the Republic of Indonesia, the prevailing legal norms are in a system that is layered and tiered, as well as in groups, in which a norm that is always valid, sourced and based on the higher norms, and norms a higher force, sourced, and based on the higher norms, and so on until one basic norms of state (state fundamental norm) of Republic of Indonesia that is Pancasila. Article 2 No. 12 of Act 2011 affirms that Pancasila is the source of all sources of state law that the basic meaning of this is a basic ideology as well as national philosophy in order that every substance of the legislation must not be in contradiction with Pancasila and Article 3, paragraph (1) no. 12 of law 2011 which affirms that the 1945 Constitution is the basic law of the Establishment Regulations Act. As one of Law And Regulation, Perppu must also be based on Pancasila and 1945 Indonesian Constitution as source of all sources of state law and the basic law and regulation which is based on a concept representing Perppu which has a regulation in terms of "the forcing crunch" which is stipulated in the form of Perppu which is the most parallel hierarchy law and regulation. Though its (Perppu) position is parallel with law and regulation, it owns a speciality – it is not formed through solution and approval from the House of Representatives and President but it (Perppu) is formed on the basis of President's absolute power.

Another speciality of Perppu (the government regulation in lieu of law) is that there is condition in matters of "the forcing crunch" in its establishment.

¹Monika Suhayati, *Kontroversi Perppu Pilkada dan Perppu Penda*, Jurnal Singkat Hukum Vol.VI No.20/II/P3DI/Oktober/2014, hlm.2

The forcing crunch is defined as an abnormal situation requiring unconventional efforts to overcome it at once. In history of Indonesian republic, it often occurs incidents and conditions which are abnormal in politics, law, economy, social, natural disaster, etc and sometimes there is no law which can be a solution. In an abnormal condition, it needs specific legal system either in its substance or in its establishment so in the condition, Perppu (the government regulation in lieu of law) is important to be an instrument to do prevailing regulations and it has legal force binding society.²

Therefore, in relation to the background, the research entitled "The Existence of Government Regulation in Lieu of Law (Perppu) in Legal Systems of the Republic of Indonesia"

2. DISCUSSION

This research uses normative research analyzing the existence of Perppu (the government regulation in lieu of law) in legal systems of the Republic of Indonesia. Some Approaches used in this research are *statute approach* and *historical approach*. The research refers to the primary, secondary and tertiary law references. Because it is also descriptive analysis, it has data collection, formulation of the problems, and related theories of law .

a. The Parameter of Forcing Crunch in Forming Perppu (the Government Regulation in Lieu of Law)

The issue which is always controversial is the parameter of "Forcing crunch" as political and sociological bases in forming Perppu (the government regulation in lieu of law). Indeed there is a public opinion that Perppu (the government regulation in lieu of law) stipulated is not because of the forcing crunch but a forcing interest. The forcing crunch can be described as an abnormal condition requiring unconventional efforts to overcome the condition. In the history of Indonesia, it often occurred the incidents and conditions which are abnormal in the basis of politics, law, economy, social, natural disaster and so on where the instrument of positive law that there is often not capable of acting as a solution. In this abnormal condition required for legal norms that are too specific in terms of both substance and process of establishment so that in those conditions Perppu (the government regulation in lieu of law) is indispensable as a legal instrument like prevailing legislation and has binding force to the society.

The forcing crunch as the basic thing in Perppu formation is not similar with "the dangerous situation" meant in article 22 of Indonesian Constitution in 1945 even though both the forcing crunch and dangerous situation are more concrete elaboration of emergency situation in a particular constitutional system. the clear

determination of conditions and effect of "dangerous situation" in article 22 of Indonesian Constitution in 1945 needs of House of Representatives involvement to stipulate with legislation while "the forcing crunch" in article 22 of Indonesian Constitution in 1945 is dependent on the president's subjectivity though later it needs objective approval of members of parliament³.

Dynamics of history of law and regulation in Indonesia show that background of stipulating of Perppu by President is different from each other. It is because the measurement of the forcing crunch has always been multi-interpretation and the level of president's subjectivity in interpretation the phrase "the forcing crunch" as the basis of Perppu establishment.

In theory related to constitutional law emergency mentioned that "the forcing crunch as in article 22 of Indonesian Constitution in 1945 more emphasizes at law requirement aspect which is urgent and bound the limited time.

At least there are 3 (three) elements which can generate a "forcing crunch" that is⁴:

1. dangerous threat;
2. reasonable necessity; and/or
3. limited time which is available

From the three elements, dangerous threat more orient to article 12 of Indonesian Constitution in 1945 especially concerning with a dangerous situation although in Perppu which is dilatory overshadowed by dangerous threat. For example, Perppu no. 1 of 2002 about eradication of terrorism where in the general clarification, the use of Perppu is to regulate the eradication of terrorism which is based on the consideration that it is occurred in many places emerging the loss of either material or immaterial as well as insecurity for society. Thus it is indispensable to release Perppu in order to create a conducive situation for conservancy of orderliness and security without leaving law principles. An example of Perppu which is based on reasonable necessity is Perppu no. 3 of 2009 about the change of no. 9 of 1992 regulation about immigration where the governmental policy of Arab Saudi states that in 1430 Hijriah pilgrims from all over the world (including Indonesia) must use ordinary passport which is valid internationally. It becomes the measurement of a "forcing crunch" so Indonesian government needs some efforts which can guarantee to the availability of passport in order that hajj can be implemented.

As for example [of] [of] Perppu in relation to the element of limited time which is available is Perppu no. 1 of 2006 is about Change of no. 12 of 2003 law regarding Election of parliament member, members of council in region, and members of legislative council arranging that members of General Election Commission (KPU) chosen based on Article no. 4 of 2000 about Change of article no. 3 of 1999 about General Election which have been adapted with

² Nur Rohim, *Kontroversi Pembentukan Perppu Nomor 1 Tahun 2013 tentang Mahkamah Konstitusi Dalam Rangka Kegentingan Yang Memaksa*, Jurnal Cita Hukum, Vol. I Nomor 1 Juni 2014, hlm. 128-129.

³ Jimly Asshiddiqie, *Hukum Tata Negara Darurat*, Edisi 1, Jakarta, PT. Raja Grafindo Persada, 2007, hlm. 12-13.

⁴ Jimly Asshiddiqie, *Op. Cit.*, hlm. 207-208.

law no.12 of 2003, remain to do their duty until the forming of general election implementation to replace the rule which is going into effect in law no. 12 of 2003. In relation to the consideration, President has a notion the matter condition [of] a “forcing crunch” which has been fulfilled to stipulate Perppu.

Regarding the above examples, it seems that it is difficult to give the exact parameter on the matter of the “forcing crunch” to stipulate Perppu because it is president’s subjectivity mandated in section 22 of 1945 constitution. Further, the condition of president to determine forcing matters must be on the basis of the decision of supreme court, no.138/PUU-VII/2009 date of 8 Februari 2010

In supreme court decision, there are 3 (three) conditions of the existence of the forcing crunch which is mentioned in section 22 sentence 1 of 1945 constitution that is⁵:

- 1) Existence of circumstance, that is urgent requirement to finish the problem regarding law at once pursuant to law
- 2) Law required is not yet there so that happened vacant regulation or relevant law which is not adequate; and
- 3) The Law emptiness cannot be overcome by legislating with the ordinary procedure because it will need the sufficient time, while the urgent circumstance of certainty requires to be finished.

Assessment concerning with a matter of the forcing crunch becomes objective after that matter is assessed and approved by House of Representatives (DPR) as arranged in Section 22 sentence (2) of 1945 Constitution⁶. In the section explained that Perppu hereinafter has to get the DPR’ approval in the following conference

b. Rule of Crime Matter May Not Be In Perppu

Section 11 law no.12 of 2011 affirms that contents of Regulation of law substitution are equal to main points in law. If submission consists of section rule so the contents of Perppu are similar with regulation arranged including crime matters.

The proposition can be tested its rationality with the argument that Perppu is arranged in abnormal constitution, while regulation is formed in an abnormal condition so the contents in Perppu are different from those in regulation. One of differences is that Perppu do not consists of crime stipulation because Perppu is formed to overcome the forcing crunch which is not for long term and it does not involve parliament in the process of its establishment⁷. Inclusion of crime stipulation is related with the principles of legality. In criminal law theory, one of important aspects regarding legalities are formulated

with the stipulation of criminal regulation through the process of democratic legitimacy in formal regulation⁸.

In legislation theory, law in formal meaning is the law norm which is stipulated by legislative council⁹. This case constitutes the existence of section 15 law no. 12 of 2011 “the contents concerning crime rule can only be issued in law, province regulation, and regency or town regulation”. Thus, it is clear that Perppu does not consist of crime stipulation because Perppu does not belong to the category of law norms stipulated by legislative council.

3. CONCLUSION

Perppu represents one of law and regulation types which must be in the system of law norms of Indonesian republic as one of logical consequence followed by presidential system in the government of Indonesian republic which is always maintained, in the parameter regarding “the forcing crunch” as the political and sociological base in forming Perppu. There are at least 3 (three) elements called as the “forcing crunch”¹⁰:

- a) *dangerous threat*;
- b) *reasonable necessity*; and /or
- c) *limited time which is available*

And it is reassured with the decision of supreme court with constitution no. 138/PUU-VII/2009. In the making of decision there are 3 (three) conditions in relation to the “forcing crunch” as meant in section 22, sentence (1), 1945 constitution.

Perppu does not consist of crime stipulation with the reason that Perppu is established to overcome the “forcing crunch” which is not for long term and it does not involve parliament as the element of people representatives in the process of its formation. Inclusion of crime stipulation related much to the principles of legalities. In criminal law theory, one of important aspects regarding legalities is formulated with criminal law through democratic legacy into legislation in formal meaning. In legislation theory, law in formal meaning is always formed by legislative council.

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⁸ Marjanne Termorshuizen-Arts, Makalah “Asas legalitas Hukum Pidana Indonesia dan Belanda” yang disampaikan pada ceramah Hukum Pidana “Same Root Different Development”, FHUI Depok pada tanggal 3-4 April 2006.

⁹ Maria Farida Indrati S., *Ilmu Perundang-Undangan Jenis, Fungsi, dan Materi Muatan*, Kanisius, Yogyakarta, 2007., hlm.52.

¹⁰ Jimly Asshiddiqie, *Op.Cit*, hlm.207-208.

⁵ Putusan MK Nomor 138/PUU-VII/2009 tanggal 8 Februari 2010

⁶ Jimly Asshiddiqie, *Ibid.*, hlm.13

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