E-ISSN: 2622-7045 I P-ISSN: 2654-3605
UNES LAW REVIEW
https://review-unes.com uneslawreview@gmail.com +62 856-5804-3983
DOI: https://doi.org/10.31933/unesrev.v6i1
Received: 21 Oktober 2023, **Revised:** 25 Oktober 2023, **Publish:** 27 OKtober 2023

Constitutional Review of Covid-19 Law at Indonesia Constitutional Court

Qurrata Ayuni[1]
[1] Faculty of Law, University of Indonesia, Indonesia
Email: qurrataayuni@ui.ac.id

Corresponding Author: qurrataayuni@ui.ac.id[1]

Abstract: *This paper analyzes the constitutionality of Law Number 2 of 2020 concerning COVID-19 which was originally passed as emergency legislation in the form of "government regulation in lieu of law". The COVID-19 Law reaps pros and cons because it is considered to have the potential to give birth to abuse of power in times of crisis. Grounded by final decision of The Constitutional Court, this paper raises three main issues; First, the vital role of judicial power in providing checks and balances in an emergency situation. Second, the prohibition of granting immunity to the practice of irregularities in state finances in times of crisis. Third, the need for a time limit for granting discretion caused by COVID-19 to ensure legal certainty. Through the method used, namely normative juridical, conclusions were obtained regarding the urgency of the role of the power of the Constitutional Court in Indonesia as the protector of the Constitution in the COVID-19 emergency.*

Keywords: *Constitutional Court, Covid-19, Constitutional, Review.*

Abstrak: Tulisan ini menganalisis konstitusionalitas Undang-Undang Nomor 2 Tahun 2020 tentang Covid-19 yang pada awalnya disahkan sebagai undang-undang darurat dalam bentuk "peraturan pemerintah pengganti undang-undang". UU Covid-19 menuai pro dan kontra karena dinilai berpotensi melahirkan penyalahgunaan kekuasaan di masa krisis. Berlandaskan pada putusan final Mahkamah Konstitusi, tulisan ini mengangkat tiga isu utama; Pertama, peran vital kekuasaan kehakiman dalam memberikan checks and balances dalam situasi darurat. Kedua, larangan pemberian imunitas terhadap praktik penyimpangan keuangan negara di masa krisis. Ketiga, perlunya batas waktu pemberian diskresi yang disebabkan oleh Covid-19 untuk menjamin kepastian hukum. Melalui metode yang digunakan yaitu yuridis normatif, diperoleh kesimpulan mengenai urgensi peran kekuasaan Mahkamah Konstitusi di Indonesia sebagai pengawal konstitusi di masa darurat Covid-19.

Kata Kunci: Mahkamah Konstitusi, Covid-19, Konstitusi, Pengujian.

INTRODUCTION

On March 31, 2020, the President of Indonesia, Mr. Joko Widodo, issued a Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease (Covid-19) Pandemic and/or in Facing Dangerous National Economy Threats and/or Financial System Stability. This emergency legislation is the only law-level regulation that specifically addresses Covid-19 (Ayuni & Arsil, 2021). The government regulation in lieu of this law was later stipulated as Law Number 2 of 2020 (in this paper will be referred to as Covid-19 Law) by the Dewan Perwakilan Rakyat/ Indonesia House of Representatives on May 16, 2020 (Arsil & Ayuni, 2020).

Since the birth of the Covid-19 Law, various pros and cons have emerged in public. Many groups have even submitted a test of review of the Covid-19 Law to the Constitutional Court because it is considered unconstitutional (Aulia, 2021). There are at least seven applications against the Covid-19 Law, namely Case Number 37, 42, 43, 45, 47, 49, and 75/PUU-XVIII/2020. Of the seven applications for testing the Covid-19 Law, only the Constitutional Court was partially granted, namely case Number 37/PUU-XVIII/2020.

Many constitutional issues were sued related to the potential abuse of power given in the COVID-19 Law. However, the testing carried out is also related to the substance or material of the law and the formal testing of the Covid-19 Law. The request for material testing is related to the right to immunity, the principle of legality, and the ambiguity of a clear limitation on period in the use of discretion of Covid-19 Law. Meanwhile, in the formal examination, the issue of public participation in the ratification of government regulations in lieu of law became the argument put forward.

Only on October 28, 2020, after conducting a trial of evidence during the pandemic, did the Constitutional Court partially grant the request in case Number 37/PUU-XVIII/2020. The other six cases are considered mutatis mutandis with respect to the principal petition, which the Constitutional Court has partially granted in the case that has been decided. Of the nine constitutional judges, there are three Constitutional Justices: Constitutional Justice Anwar Usman, Constitutional Justice Arief Hidayat, and Constitutional Justice Daniel Yusmic P Foekh who filed a Dissenting Opinion on this decision.

Specifically, in case Number 37/PUU-XVIII/2020, the Petitioner submitted a formal review and material testing of norms in 23 Articles, including titles and attachments in the COVID-19 Law. However, on the final decission The Court only granted the request related to Article 27 paragraph (1), Article 27 paragraph (3), and Article 29 of the Covid-19 Law. Therefore, the review of other articles is deemed not to be in opposition to the Constitution.

The final decision of the Court regarding the Covid-19 Law has become one of the landmark decisions as a phenomenal decision in a pandemic. The Constitutional Court final decision strengthens constitutionalism because it abolishes the right of immunity in the irregularities of state finances. In addition, this decision also provides certainty for the due process of law by allowing a lawsuit against acts of irregularities in state administration through the state administrative court. Eventually, the Constitutional Court's choice restricts the pertinence of the different discretions allowed in the Covid-19 Law, which is just two years for assessment.

METHODOLOGY

This paper uses a normative juridical legal method which aims to examine systematic, principles legal synchronization which added with the analysis of legal history and comparisons (Budianto, 2020). Normative research can use several approaches: legislation approach, concept approach, analytical, comparison/comparison, historical/historical, philosophy, and case approach (Christiani, 2016). The issues in this paper were analyzed descriptively-analytical with a qualitative approach to secondary data from the materials

studied. This paper examines explicitly Constitutional Court decision of 37/PUU-XVIII/2020 concerning of material and formal review of Law Number 2 of 2020 concerning "the Stipulation of Government Regulations in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling The Corona Virus Disease 2019 (Covid-19) and/or In the Context of Facing Threats That Endanger the National Economy and/or Financial System Stability Becomes Law" (Covid-19 Law).

RESULTS AND DISCUSSION

Conception of Emergency and State of Emergency

Thought Carl Schmitt (2006) in his book entitled Political Theology, Carl Schmitt (2006) explains at least two main concepts, namely the meaning of the "state of exception" and the concept of "the sovereign". "State of exception" is the legal regime of exception in an emergency to create peace, security and order in an abnormal situation.

The concept of the state of exception is then linked to the concept of the sovereign , namely " Sovereign is he who decides on the exceptional case ". According to Schmitt, the meaning of a Sovereign is that he decides the exceptions (Schmitt, 2006). In times of emergency the sovereign power must make a series of exceptions to restore order and stability. According to Schmitt (2006), "for the legal system to work, normal situations must exist, and it is the sovereign who must decide whether these normal situations really exist."

Schmitt (2006) expressed that sovereign measures must be perceived with regards to the by and large lawful request in which this authority works which starts and finishes with arrangements in the Constitution. Schmitt (2006) involved the arrangements of the Constitution such that reinforced the state's raison d'etre , guaranteed resident request and solidness, would permit the sacred request of the country to work regularly. So there needs to be a regulation regarding the concept of exception and the sovereign in a constitution.

A condition of "state of emergency" is a circumstance where the public authority is given the position to make a move or carry out arrangements that are not typically allowed under ordinary conditions (Bulmer, 2018). The activation of the State of Emergency suspends the normal functioning of a government, allows government authorities to suspend the civil liberties of citizens and even suspend the fulfillment of human rights (Oraá, 1992). The need to declare a country in a condition of 'state of emergency' is commonly recognized in conditions such as war, economic crisis, mass strikes, pandemic of disease and natural disasters (Oraá, 1992).

The State of Emergency provides flexibility for the government in an emergency to take actions outside the law but still within the constitutional corridor. So it can be said that the "State of Emergency" is a condition in which the government in a country performs an extraordinary response in responding to the threats faced by a country. Oliver Beaud said the state of emergency contained a number of dilemmas (Auriel, et al., 2018). On the one hand, the State of Emergency negates the enforcement of laws and statutory norms due to the need to guarantee the protection and sovereignty of the state. But on the other hand, the negation of the law is a form of violation of the law, human rights and even the agreements contained in the Constitution (Denysov & Falalieieva, 2020). Alan Greene defines a state of emergency as a highly sensitive situation recognized and marked by a nation of such greatness that it is considered to have passed the boundary of danger seriousness, requires quick, phenomenal and, consequently, transitory activity by the state isn't allowed when conditions are typical (Greene, 2018).

International law also recognizes the concept of "state of emergency" as expressed in Article 4 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR) that reads, "In a state of emergency that threatens the life of the nation and its existence, which has promulgated, the States Parties to the present Covenant may take measures which reduce their obligations under the present Covenant, to the extent necessary in the emergency

situation, provided that such measures do not conflict with their other obligations under international law and does not contain discrimination solely on the basis of race, color, sex, language, religion or social origin."

Within the framework of the ICCPR a state of emergency situation should be declare to express the justification for the crisis, the date the crisis is to begin, the conceivable decrease, with the length of the crisis and the date on which the crisis is relied upon to end. In the United Nation Special Rapporteurs , recommendations were made that the international community must follow the principles in establishing a state of emergency, namely: the principle of legality, proclamation, notification, time limit, extraordinary threats, proportionality, non-discrimination, compatibility, concordance and complying with various international legal norms (Fitzpatrick, 1994).

An emergency situation that causes legal exceptions to be activated must be implemented for a limited period of time. This is because the deviation will provide flexibility for the president to act arbitrarily. The implementation of emergency power for too long will lead to changing the " constitutional dictatorship " towards what Clinton Rossiter calls a dangerous " dictatorship " (Rossiter, 2011).

So that in a number of constitutions a clear clause is given that the President needs approval from the legislature to determine whether to continue the state of emergency policy . John Ferejohn and Pasquale Pasquinon note that history in the Roman Senate may direct consuls to appoint a dictator for a term of up to six months (Ferejohn & Pasquino, 2004). Then the government is given the authority to suspend legal rights and processes and for marshals of the military and other powers to deal with threats of invasion or rebellion for the purpose of resolving threats to the republic.

A circumstance of exceptional and impending risk or emergency that influences the overall population as unmistakable from specific gatherings and the Constitution is a danger to individuals' lives and influences the presence of the state. Oren Gross and Fionnuala Ní Aoláin expressed that the assertion of a state of emergency must meet a few methods; the first is to drawn a course of events on the declared state of emergency ; and second is to lay out severe methodology with respect to the development of the declared state of crisis (Gross and Aoláin, 2006). Some constitutions put down certain boundaries on the augmentation of a highly sensitive situation or a specific breaking point, generally one year for later re-assessment.

The International Law Association (ILA) offers an alternative definition of an "emergency" known as a "public emergency." This definition is outlined in their Paris Minimum Standards of Human Rights Norms in a State of Emergency, (Lillich, 1985). According to this framework, a "public emergency" is characterized by two key criteria: a) The presence of a public crisis that poses a significant threat to the existence of the country. This crisis should be officially declared, and such a declaration serves as the basis for the declaration of a state of emergency. b) The term "public crisis" denotes a situation of public emergency or peril, whether it is currently happening or anticipated. This situation impacts the entire population or the specific population residing in the area to which the declaration of emergency applies. The crisis must also pose a threat to the organized functioning of the state.

In essence, this definition emphasizes that a "public emergency" is a critical situation that endangers the very existence of a nation, which must be officially declared and justifies the declaration of a state of emergency (Ayuni, *et. all*, 2022). Furthermore, it underscores that such crises have a substantial impact on the entire population or a particular locality, posing a threat to the orderly operation of the state.

Joan Fitzpatrick gave signs of deviation from the 'state of emergency declaration, namely (Fitzpatrick, 1994);

a) Emergency situations are not communicated to the relevant institutions;

b) De facto , human rights are still suspended even though the state of emergency has been revoked;
c) Emergencies are increasingly arising due to the continued prolongation of formal emergencies;
d) The complexity of the state of emergency gave rise to overlapping legal regimes through the partial suspension of constitutional norms with the issuance of many wide-ranging decrees;
e) An authoritarian government instituted a state of emergency. It extended the transitional emergency regime ostensibly intending to return to democracy and the Constitution, but it raised many questions and doubts.

Jimly Asshiddiqie (2007) expressed that the function of parliament in restricting the execution of a crisis can be done as (1) a form of strict supervision in determining the existence of an emergency, (2) establishing the power to deal with the emergency, (3) monitoring the implementation of the executive government's authority to deal with the situation. that is not normal, (4) investigate various irregularities or abuses of power in the exercise of executive authority in an emergency, (5) if necessary declare the end of the emergency period or ask the President to declare an end to it.

Establishing a disaster emergency status must also be based on a doctrine known as " proportional necessity ". This, in essence, also becomes the authority for the President to determine the degree of need to establish a state of emergency or danger. Nicholas Tsagourias stated that necessity is a state of urgency which justifies extraordinary to protect essential interests from greater damage (Tsagourias, 2010). According to him, this extraordinary action had an impact on the government being given the authority to use military and non-military force.

The Constitutional Court Function in the "State of Emergency"

The judicial power role as a balancer of executive power becomes very important in a state of emergency (Bulmer, 2018). Judicial power is one of the safeguards in limiting the possibility of arbitrariness carried out by executive branch. In the condition where a state of emergency declare, the executive branch of power in this case in Indonesia is held by the President to be very strong. This is because the President is given the mandate to declare a "state of emergency" as mandated in Article 12 of the UUD 1945 (Arsil & Ayuni, 2020).

Executive power that is so strong and sometimes uncontrollable makes it an unbound executive (Posner & Vermeule, 2011). It was later realized that it also gave birth to a form of constitutional dictatorship in a state of emergency. Judicial power is considered capable of being a balancer in a situation where one branch of power is so powerful as the President in an emergency.

According to Eliot Bulmer (2018), the judiciary has the power to conduct a judicial review of regulations issued by emergency authorities at the point when they are considered to be in opposition to the Constitutions. The formation and enforcement of laws during an emergency tends to have the potential to violate the human rights of citizens that have been guaranteed in the Constitution (Tupper, 1994). This is what can then be protected by the judicial branch of power through testing emergency legislation formed by both the executive and the legislature.

One example of a country that emphasizes the existence of judicial review in emergency legislation is Article 29 of the Bahamas Constitution which provides a judicial review mechanism if there is emergency legislation that conflicts with the basic rights of citizens. Article 37 of the South African Constitution also states the function of judicial review to assess the validity of emergency declarations and extensions of emergencies established by the Government (Bulmer, 2018).

The Constitutional Court is one of the state organizations that play an autonomous judicial power to manage constitutionalism and justice. The Constitutional Court has five authorities as stipulated in the 1945 Constitution. First, review the law against the Constitution. Second, to settle on disagreements about the power of state organizations whose authority is conceded by the Constitution. Third, settle on the dissolution of political parties. Fourth, conclude questions about the final result of the general election. Fifth, the Constitutional Court is obliged to give a choice on the assessment of the House of Representatives with respect to supposed infringement by the President as well as Vice President as per the Constitution.

The Indonesian Constitution does exclude the power of the Indonesian Constitutional Court to survey declaration of state of emergency. Article 24C of the 1945 Constitution, one of the powers given to the Indonesian Constitutional Court is to settle the constitutionality of the law against the constitutions. In the construction of such a constitution, the Constitutional Court can examine the emergency legislation passed to address certain emergency conditions against the 1945 Constitution.

According to research by Ginsburg and Versteeg (2020), courts can limit and counterbalance emergency procedures. Ginsburg and Versteeg wrote several aspects of oversight by the judiciary as follows (Ginsburg & Versteeg, 2020); First, ensuring that constitutional procedures are followed, namely assessing the procedural validity of the emergency declaration. Second, reviewing substantive rights, namely by assessing the executive's actions in carrying out emergency restrictions that are contrary to the basic rights of citizens. Third, demanding action, namely forcing the executive to take active action in protecting the rights of citizens in an emergency.

There are five circumstances to satisfy the significance of constitutional losses, in particular; First, the presence of the constitutional rights of the Petitioner conceded by the 1945 Constitution. Second, the constitutional rights as well as constitutional power of the Petitioner are considered to have been impaired by the institution of the proposed regulation. Third, the potential of loss should be explicit (exceptional) and real or if nothing else expected which as indicated by sensible thinking can be learned to occur. Fourth, there is a circumstances and logical results connection between the potential constitutional loss to the law for which the audit is being requested. Fifth, there is plausible that with the allowing of the appeal, the established lost as contended will not or will never again happen (Bisariyadi, 2017).

As the protector of the Constitution, the guardian of the Constitution, the Constitutional Court has the right to provide interpretations of legal provisions so that they are in line with constitutional values. The Constitutional Court is the sole interpreter of the constitutionality of the articles in the law. Therefore, the Constitutional Court can request interpretation of articles that have ambiguous, unclear, and/or multiple interpretations (Isra, 2016).

As protector of the Constitution he Constitutional Court has the privilege to give interpretation of lawful provisions so that they are in accordance with protected values. The Constitutional Court is the sole translator of the constitutionality of the articles in the law. Therefore, the Constitutional Court would request interpretation of articles that be able to have vague, unclear, and/or various understandings (Isra, 2016).

The role of the Constitutional Court is limited to reviewing emergency regulations at the same level as law. Not only can it review laws, the Constitutional Court can also test the constitutionality of government regulations in lieu of laws against the 1945 Constitution. Government regulations in lieu of laws are also considered a form of emergency legislation in conditions of compelling urgency. Article 22 paragraph (1) of the 1945 Constitution which reads: “In the event of a compelling urgency, the President has the right to stipulate government regulations in lieu of law.”

Based on the Constitutional Court's Decision Number 138/PUU-VII/2009 the reason for the issuance of a government regulation in lieu of law is the "forced urgency" parameter, which is as follows:

> "(1) The existence of circumstances, namely the urgent need to resolve legal issues quickly based on the Act; (2) The required law does not yet exist so that there is a legal vacuum, or there is a law but it is not sufficient; (3) The legal vacuum cannot be overcome by making laws in the usual procedure because it will take quite a long time while the urgent situation requires certainty to be resolved."

Regarding the case of the COVID-19 Law's review, Constitutional Court considers the Petitioners for Case Number 37/PUU-XVIII/2020 have legal standing. According to the Constitutional Court, the Petitioners are citizens who are directly affected by state financial policies as regulated in the COVID-19 Law. The presumption of factual and potential losses in question will not occur again and will not occur again if the petition of the Petitioners is granted. Based on these considerations, the Constitutional Court is of the assessment that the Petitioners have the lawful remaining to act as Petitioners in the review of the COVID-19 Law at the Constitutional Court.

Review Procedure for Emergency Legislation COVID-19 Law

One of issues raised in the constitutional review of the Covid-19 Law is formal testing. In this case, the Petitioners argue that the process of establishing the Covid-19 Law as emergency legislation is inappropriate and does not comply with procedures (Arsil, et all, 2022) . According to the Petitioners, the exclusion of the Regional Representatives Council in the discussion of the ratification of the Covid-19 legislation has reduced the qualities of the standard of law as ensured in Article 1 paragraph (3) of the UUD NRI 1945. In fact, various arrangements for the Covid-19 Law are also related to regional government so that requires the involvement of the Regional Representative Council. In addition, according to the Petitioners, decision-making through virtual meetings has the potential to violate people's sovereignty, because the potential for non-concrete presence is unconstitutional and has reduced the essence of implementing the people's mandate entrusted to their representatives in the DPR and also reduces democratic values.

However, in the states of the Covid-19 pandemic, parliament has made adjustments to the procedure for making meeting decisions. The DPR stipulates DPR Regulation Number 1 of 2020 concerning Orders (DPR 2020 Regulations) which came into force on 2 April 2020 as part of attemp to anticipate the transmission of Covid-19. 19. Based on the 2020 DPR Standing Orders in the arrangement of Article 254 paragraph (4) it is stated that:

> "All types of DPR meetings are attended by Members, except in certain circumstances, namely dangerous situations, compelling urgency, extraordinary circumstances, conflict situations, natural disasters, and certain other circumstances that ensure national urgency, meetings can be held virtually by using technology information and communication."

The implementation of the virtual meeting has been clearly regulated in Article 279 paragraph (6) of the 2020 DPR Standing Orders which states that:

> "In the event that the signing of the attendance list of Members as referred to in paragraph (5) cannot be carried out and due to reasons as referred to in Article 254 paragraph (4), the attendance of Members in all types of DPR meetings is carried out based on virtual attendance."

Additionally, in the arrangement of Article 279 paragraph (7) of the 2020 DPR Standing Orders, it is stated that:

> "Proof of virtual attendance as referred to in paragraph (6) can be confirmed and verified through the Secretariat General of the DPR."

The Covid-19 Law was passed on May 12, 2020 which was carried out using a hybrid method, namely the method of combining virtual meetings with physical meetings that were

carried out simultaneously. The meeting was attended by 438 DPR members (355 people attended online and 83 people attended offline).

According to the guideline of openness, the Constitutional Court expressed that the arrangement of regulations during the pandemic should in any case focus on the rule of openness. What is implied by "rule of receptiveness" is that the formation of regulations and guidelines beginning from planning, drafting, talking about, endorsing or deciding, and ordering laws is straightforward and open. Thus, all levels of society have the largest chance to give input in the development of regulations and regulations(Munir, 2021).

According to the Constitutional Court, the essence of the principle of openness is public access to parliament. At the time of the COVID-19 situation, public participation cannot be imposed directly due to limitations caused by the pandemic conditions, so conventional public participation is irrelevant because it is still carried out using an online mechanism with technology and communication media. Thus, based on these deliberations, accordant to the Petitioners' disputes that basically states that a virtual meeting has the potential to violate people's sovereignty is not legally grounded.

Immunity Related to State Loss

One of the most crucial issues in testing the Covid-19 Law is the issue of immunity rights related to state losses. The petitioners stated that Article 27 paragraph (1), (2), and (3) of the Covid-19 Law contradicts the principles of the rule of law, the principle of managing state finances, equality before the law, and the principle of guarantees, protection, and legal certainty. fair. This is due to the Covid-19 Law because it provides immunity for state officials to be free from lawsuits in carrying out the implementation of saving state finances due to Covid-19.

Article 27 paragraph (1), (2), and (3) of the Covid-19 Law states:

> "(1) Costs incurred by the Government and/or member institutions of the Secretariat of the Financial System Stability Committee in the context of implementing state revenue policies including policies in the taxation sector, state expenditure policies including policies in regional finance, financing policies, financial system stability policies, and programs national economic recovery, is part of the economic costs to save the economy from the crisis and is not a state loss.
>
> (2) Members of the Secretariat of the Financial System Stability Committee, Secretariat of the Secretariat of the Financial System Stability Committee, members of the secretariat of the Secretariat of the Financial System Stability Committee, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, as well as the Deposit Insurance Corporation, and other related officials. With the implementation of this Government Regulation in Lieu of Law, it cannot be prosecuted either civilly or criminally if carrying out tasks is based on good faith and in accordance with the provisions of the legislation.
>
> (3) All actions including decisions taken based on this Government Regulation in Lieu of Law are not objects of a lawsuit that can be submitted to the state administrative court."

The three main issues in testing Article 27 of the Covid-19 Law are the existence of a clause (1) is not a loss to the state, (2) cannot be prosecuted both civilly and criminally if carrying out duties is based on good faith and in accordance with the provisions of laws and regulations, and (3) is not the object of a lawsuit that can be submitted to the state administrative court.

The Constitutional Court is of the assessment that the express "not a state loss"" in the arrangements of Article 27 of the Covid-19 Law has the possibility to give insusceptibility privileges to parties overseeing state finances. This has the potential to cause exemption in regulation enforcement. The Constitutional Court evaluated the construction of Article 27 passage (1) of the Covid-19 Law which explicitly specifies that all costs that have been

incurred by the Government and additionally part establishments of the Secretariat of the Financial System Stability Committee with regards to executing emergency the board strategies because of the Covid-19 pandemic are part of the monetary expenses to save the economy. This implies that the expense is "not a state loss", consequently bringing forth the right of resistance which is explicitly for strategy making authorities in terms of beating the monetary emergency because of the Covid-19 pandemic. The effect of this article is that authorities can't be prosecuted both commonly and criminally if completing the assignment is based on great confidence and as per the arrangements of the regulation.

The condition "not a state loss" in Article 27 paragraph (1) of the Covid-19 Law which isn't joined by great faith and as per the regulations and guidelines has in the end caused uncertainty in regulation enforcement. The Constitutional Court considers that the express "not a misfortune to the state" in Article 27 passage (1) Attachment to Law 2/2020 is unquestionably opposite to the standard of fair treatment of regulation for equivalent protection. Therefore, for lawful assurance, the standard of Article 27 paragraph (1) of the Covid-19 Law should be pronounced unlawful as long as the phrase "not a state loss" is not interpreted as "not a state loss" as long as it is carried out in good faith and in accordance with statutory regulations"

In relation to Article 27 paragraph (3) of the Covid-19 Law that states that the policy in the Covid-19 Law isn't an object of a claim that can be submitted to the administrative court, according to the Constitutional Court, such matter should still be controlled and can be made the object of a lawsuit to the State Administrative Court. The Constitutional Court underlined that the checks and balances mechanism was not given, so this can possibly cause maltreatment of force and lawful vulnerability. This is because the party who has the authority to judge decisions and/or actions that are contrary to or not against the law is the Court Judge. Subsequently, as long as choices and additionally activities are given concerning the Covid-19 pandemic and are done in sincerely and understanding with statutory guidelines, the appointed authority should express that the object of the choice of the State Administration or potentially government regulatory activity isn't the object of a claim. However, in the event that factually the opposite is true, then the decision of the state administrative body and/or government action if it is proven that there has been abuse of authority must be declared null and void and has no binding legal force.

COVID-19 Law Time Limitation

The principle of time limitation attached to an emergency is meant for when the last time the emergency is. That is, an emergency cannot be permanent (Ashiddiqie, 2007). This prevents the opportunity for excessive abuse of power. Article 27 of the American Convention on Human Rights explicitly expresses that the action taken is "for a period of time so urgently required by the urgency of the situation." (Grossman, 1986)

The temporary nature of an emergency is characterized by a time limit. This is to ensure the restoration of normal law which stops the reduction and limitation of the rights of citizens. The international branch of power and control must ensure that no state of emergency can last longer than necessary.

The adequate government should right away end the emergency situation on the off chance that the conditions supporting its announcement no longer exist. This has an impact on the limitations allowed by the Constitution and the law under normal circumstances enough to return to normal conditions (Ashiddiqie, 2007). To avoid from misuse and the continuation of the emergency situation, another model standard would recommend an occasional survey by the organization or observing body of the reasons justifying its maintenance or extension (Bulmer, 2018).

The testing of Article 29 of the Covid-19 Law is due to the absence of time restrictions on the validity of the discretion in the Covid-19 Law. This is contrary to the standard of law

and order and the rule of guarantees, protection, and fair lawful sureness, because it does not provide a period of validity of the law. According to the Petitioners , this will have the potential to cause arbitrariness by the Government, especially in the accountable management of state finances for social and humanitarian interests focused on the Covid-19 pandemic. The Constitutional Court is of the opinion that if there is no time limit to the implementation of the Covid-19 Law, a number of discretionary norms will be applied permanently, including when the Covid-19 pandemic has ended.

In the absence of a time limit, discretion still applies because it is still used for other purposes, specifically in the context of managing dangers that imperil the public economy and/or monetary framework solidness. This creates uncertainty about the time limit for the conditions of the forcing urgency. Moreover, the implementation of the Covid-19 Law is closely related to the use of state finances which greatly affects the country's economy according to Article 23 paragraph (2) of the UUD 1945.

The Constitutional Court emphasized that in terms of an emergency it is need a clear time limit on when the Covid-19 pandemic emergency situation will end. The Constitutional Court considers that this Covid-19 Law is only valid as long as the status of the Covid-19 emergency has not been announced as ending by the President and at the latest until the end of the second year since the Covid-19 Law was promulgated. However, if the pandemic is expected to last longer, before entering its 3rd year, with regard to budget allocation for conduct the Covid-19 emergency, the DPR must take consent from the House of Representatives (Dewan Perwakilan Rakyat/ DPR) and Regional Representaitve Council (Dewan Perwakilan Daerah/DPD) considerations.

Dissenting Opinion

In the decision of case Number 37/PUU-XVIII/2020, there are 3 (three) Constitutional Justices, namely Constitutional Justice Anwar Usman, Constitutional Justice Arief Hidayat, and Constitutional Justice Daniel Yusmic P. Foekh have different opinions or dissenting Opinions. According to these three judges, the Constitutional Court should have rejected the Petitioners' petition. The dissenting opinion does not change the binding power of the Court's decision.

The Petitioners argue that Article 27 paragraph (1) and (3) of the COVID-19 Law is contrary to the principle of rule of law, the principles in managing state finances, the authority of the Supreme Audit Agency (Badan Pemeriksa Keuangan /BPK), the authority of the judiciary, and the principle of equality before the law and the principles of guarantees, protection, and fair legal certainty . The definition of state losses is contained in several laws, including the following;

The Law Number 15 of 2006 concerning the Supreme Audit Agency (Article 1 Number 15):

" State/regional losses are shortages of money, securities, and goods, which are real and definite in amount as a result of unlawful acts , whether intentionally or negligently ."

The Law Number 1 of 2004 concerning State Treasury (Article 1 Number 22):

" State/regional losses are shortages of money, securities, and goods, which are real and definite in amount as a result of unlawful acts , whether intentionally or negligently ."

The dissenting opinions of three judges stated that a state loss must contain elements of an unlawful act. It adopts the principle of criminal law that there is no crime without fault (geen straf zonder schuld). In criminal law, there are two reasons why violators of the rule of law are not subject to sanctions, namely reasons for justification (rechtvaardigingsgrond) and reasons for releasing elements of error (schulduitsluitinggrond) called fait d'excuse or excuses for forgiveness (stasuitsluitingsgrond). Meanwhile, there are two deviations from the rules, namely deviations which are exceptions and which are deviations or violations.

It is also quoted in the dissenting opinion section that Article 50 of the Criminal Code stipulates that whoever implements the provisions of the law cannot be punished. This provision "justifies" actions based on the provisions of the law as long as they have good faith. Implementing the law is not only limited to carrying out acts ordered by law, but also includes actions taken with the authority granted by law.

According to three judges in the dissenting opinion it was stated that what has been required by law cannot be threatened by other laws, even though the act committed is a violation of the rule of law, but the perpetrator freed from error (Schuldopheffingsgrond). This action occurs because of a force majeure or overmacht condition , namely a condition or force beyond human capacity based on Article 48 of the Criminal Code. In this case, a state of emergency (noodtostand) is a form of force majeure, so that actions based on these provisions cannot be punished.

It was feared by three judges who expressed a dissenting opinion that if state expenditures during the Covid-19 pandemic were considered detrimental to the state, then no official would dare to take extraordinary policy steps even with the aim of saving the country, society and the economy. In the context of legal protection provided by law to officials making and implementing policies.

CONCLUSION

The constitutional review conducted at the Constitutional Court has strengthened the guarantee of constitutional rights and the protection of constitutionalism for all stakeholders in Indoensia. The Constitutional Court function in Indonesia during the Covid-19 pandemic is very important to prevent and to cease the potential of misuse of power from the executive and legislative branches during crisis. Therefore, the role of the Constitutional Court in efforts to checks and balances in a state of emergency, especially in reviewing emergency legislation, cannot be abolished. In particular, in case Number 37/PUU-XVIII/2020, the Constitutional Court has given birth to a landmark decision by eliminating the potential for impunity and the prohibition of immunity which is contrary to equality before the law. In addition, the Constitutional Court has also given a period of two years for the implementation of the Covid-19 Law to avoid excessive discretion. Through the judicial review of the Covid-19 Law, the Constitutional Court has attempted to become the guardian of the Constitution in times of emergency. The need to strengthen the position of the Constitutional Court in giving decisions related to emergencies needs to be emphasized in the constitution in Indonesia. Emergency conditions, in the context of Covid-19 as well as in other crises, are fragile conditions where there is a weakening of public supervision. The birth of immunity with the argument of saving the state is not a blank check that can be used to be free from legal audits. Therefore, supervision and checks and balances need to be strengthened in order to maintain constitutionalism in a crisis. One of them is by strengthening the constitutional review authority of the Constitutional Court in times of emergency.

REFERENCES

Ayuni, Qurrata, and Fitra Arsil. "Handling of Covid-19 as a Non-Natural Disaster in Indonesia." *BIS-HSS 2020: Proceedings of the 2nd Borobudur International Symposium on Humanities and Social Sciences, BIS-HSS 2020, 18 November 2020, Magelang, Central Java, Indonesia*. European Alliance for Innovation, 2021.

Ayuni, Q., Arinanto, S., Arsil, F., & Indrati, M. F. (2022). Concept and Implementation on the State of Emergency in Indonesia: Outlook to Strengthen Checks and Balances during Crisis. *Revista de Investigações Constitucionais*, *9*, 11-36.

Arsil, Fitra, Qurrata Ayuni, and Ariesy Tri Mauleny. "The disappearance of the 'legislative model': Indonesian parliament's experience in response to Covid-19." *The Journal of Legislative Studies* (2022): 1-23.

Arsil, Fitra, and Qurrata Ayuni. "Model Pengaturan Kedaruratan Dan Pilihan Kedaruratan Indonesia Dalam Menghadapi Pandemi Covid-19." *Jurnal Hukum & Pembangunan* 50.2 (2020): 423-446.

Bisariyadi, Bisariyadi. "Membedah Doktrin Kerugian Konstitusional." *Jurnal Konstitusi* 14.1 (2017): 22-44.

Budianto, A. (2020). Legal Research Methodology Reposition in Research on Social Science. International Journal of Criminology and Sociology, 9, 1339–1346.

Bulmer, E. (2018). Emergency powers. In International IDEA Strömsborg (Vol. 18, Issue 8695). International Institute for Democracy and Electoral Assistance International. https://doi.org/10.1177/0032258x4001300104

Christiani, T. A. (2016). Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object. Procedia-Social and Behavioral Sciences, 219, 201–207.

Denysov, V., & Falalieieva, L. (2020). Derogation In The Field Of Human Rights: International Legal Instruments And Practice Of Ukraine. International \& Comparative Law Review/Mezinárodn{\'\i} a Srovnávac{\'\i} Právn{\'\i} Revue, 20(2).

Ferejohn, J., & Pasquino, P. (2004). The law of the exception: A typology of emergency powers. International Journal of Constitutional Law, 2(2), 210–239.

Fitzpatrick, J. (1994). Protection against Abuse of the Concept of Emergency. Stud. Transnat'l Legal Pol'y, 26, 203.

Ginsburg, T., & Versteeg, M. (2020). Binding the Unbound Executive: Checks and Balances in Times of Pandemic. Available at SSRN.

Greene, A. (2018). Permanent states of emergency and the rule of law: constitutions in an age of crisis. Bloomsbury Publishing.

Gross, O., & Aoláin, F. N. (2006). Law in times of crisis: emergency powers in theory and practice (Vol. 46). Cambridge University Press.

Grossman, C. (1986). A Framework for the Examination of States of Emergency Under the American Convention on Human Rights. Am. UJ Int'l L. \& Pol'y, 1, 35.

Isra, S. (2016). Peran Mahkamah Konstitusi dalam penguatan hak asasi manusia di Indonesia. Jurnal Konstitusi, 11(3), 409–427.

Lillich, R. B. (1985). The Paris minimum standards of human rights norms in a state of emergency. American Journal of International Law, 79(4), 1072–1081.

Macdonald, R. S. J. (1998). Derogations under Article 15 of the European Convention on Human Rights. Colum. J. Transnat'l L., 36, 225.

Munir, S. (2021). Asas Keterbukaan dalam Pelaksanaan Fungsi Legislasi Dewan Perwakilan Rakyat (Perspektif Islam dan Hukum Positif di Indonesia). YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam, 12(2), 257–274.

Oraá, J. (1992). Human Rights in States of Emergency in International Law. Oxford.; Clarendon Press.

Posner, E. A., & Vermeule, A. (2011). The executive unbound: after the madisonian republic. Oxford University Press.

Rossiter, C. L. (2011). Constitutional Dictatorship - Crisis Government in the Modern Democracies. Read Books Limited. https://books.google.co.id/books?id=qSp8CgAAQBAJ

Schmitt, C. (2006). Political Theology: Four Chapters on the Concept of Sovereignty (G. Schwab (ed.)). University of Chicago Press.

Tsagourias, N. (2010). Necessity and the use of force: A special regime. Netherlands Yearbook of International Law, 41, 11–44.

Tupper, A. (1994). Human Rights in States of Emergency in International Law by Jaime Ora. In Alberta Law Review. Clarendon Press. https://doi.org/10.29173/alr1188