Position of Government Regulations for Replacement of Laws in Construction of Democracy Law State

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Abstract: The phrase ”compulsive urgency” has a multi-interpretive understanding and is the authority of the President to interpret the compulsive crises in forming government regulations instead of laws. In essence, in setting government regulations instead of laws, there must be an objective limitation on the compulsive crunch. Although the Decision of the Constitutional Court Number 138 / PUU-VII / 2009 has stated that compulsive crises must fulfill 3 (three) conditions, namely the existence of a situation that is an urgent need to resolve legal issues quickly based on the law, the required law does not yet exist so that there is a legal vacuum or there are laws but it is inadequate and the legal vacuum cannot be overcome by making law in the usual procedure because it will take a long time. However, this has not been able to provide a benchmark for the meaning of the crunch that forced it to be proven by the issuance of Perpu No.2 of 2017 concerning the dissolution of Community Organizations.

1 INTRODUCTION

Constitutionally based on Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia [1] it was stated that ”In the event of a compelling matter of urgency, the President has the right to set government regulations instead of the law.” The question that arises is what conditions are said as a matter of the force of the force. In terms of the president’s power in carrying out his duties as head of government, the president’s right to issue a Government Regulation instead of Law (PERPU) is considered subjective because of a unilateral presidential judgment on behalf of the government to determine the state in danger or matters of urgency . PERPPU is a regulation which in terms of its contents should be stipulated in the form of a law but because of the forced state of crisis stipulated in the form of a government regulation (Asshidiqie, 2008).

The assessment can only be objective if PERPU has been discussed to be agreed together with the House of Representatives (DPR) to be mutually agreed to become a law. As referred to in Article 22 paragraph (2) of the 1945 Constitution which reads ”The Government Regulation must obtain the approval of the House of Representatives in the trial”. Theoretically PERPU, based on the hierarchy of laws and regulations, is at the same level as the Law. So that it can be concluded that PERPU has a very dominant position in the construction of a democratic legal state because PERPU has a very broad impact on the rights held by Indonesian citizens.

The formation of the PERPPU can be considered to make the state tend to appear authoritarian due to the actions of the government that gave birth to the PERPPU with ”crunch matters” which have multiple interpretations so that they can injure democratic values in the construction of the Indonesian law. Although the Constitutional Court has interpreted the sentence was the matter of urgency to force in the decision of the Constitutional Court with case number No. 138 / PUU-VII / 2009 which stipulates three categories of compulsive crises, but has not provided a measure of the meaning of the force of force. The crucial issue of the existence of the PERPPU can also be seen from the birth of PERPPU No. 2 of 2017 [2] concerning the dissolution of many community organizations that have received an assessment that the government has carried out an authoritarian action because of its multiple interpretations of the urgency of

[1] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

[2] Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 Tentang Perubahan Undang-Undang Nomor 17 Tahun 2013 tentang Organisasi Kemasyarakatan.

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force in Article 22 paragraph (1) 1945 Constitution of NKRI.

2 DISCUSSION

2.1 Legal Aspects of Government Regulations Law Replacement

Hierarchically all types of legislation have certain functions. But in general, according to Bagir Manan the function of the legislation is divided into 2 (two) main groups (Halim and Putera, 2013), namely:

1. Internal function, namely the function of legislation as a legal sub-system of the rule of law system in general. Internally, legislation runs several functions including:
   a The function of the creation of law (rechtschepping) which gives birth to a generally accepted legal system of law or occurs in several ways, namely through judicial decisions, habits that arise in practice in public or state life, and legislation. In Indonesia, legislation is the main way of creating law.
   b Legal renewal function. Establishment of legislation can be planned, so that legal reform can also be planned. The function of renewal of legislation is, among others, in order to replace the Dutch legislation and national legislation that is no longer in line with new needs and developments.
   c The function of integration of legal system pluralism. The pluralism of the legal system that prevails today is one of the colonial legacies that must be reorganized. The renewal of the national legal system is in order to integrate the various legal systems so that they are arranged in a harmonious order with each other.
   d Legal certainty function. Legal certainty is an important principle in legal action and law and regulation can provide legal certainty that is higher than customary law and customary law or jurisprudence.
2. The external function is the linkage of legislation with the place of effect. External functions can also be called socio-legal functions (Siallagan and Yusdiansyah, 2008), and can be divided into:
   a Function of change. The function of change is law as a means of social engineering where laws and regulations are created or formed to encourage changes in society in the economic, social and cultural fields
   b Stability function. Laws and regulations in the field of criminal, order and security are rules which are primarily aimed at ensuring the stability of society
   c Convenience function. The convenience function can function as a means of regulating various regulations that contain incentives, such as tax breaks.

In essence, based on Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation Regulations [3] stating that: "The type and hierarchy of Legislation Regulations consists of:

a 1945 Constitution of the Republic of Indonesia
b Decree of the People's Consultative Assembly
c Substitute Government Laws / Regulations
d Government regulations
e Provincial Regulation; and'
f District Regulation

For the sound of the article, it can be concluded that PERPPU has a position parallel to the Law so that the functions of the legislation referred to above are also related as a function of a PERPPU. In addition, according to Maria Farida Indrati Soeprapto, because this perppu is a government regulation that supersedes the law, the content of the material is the same as the material contained in the law (Indrati et al., 2008). PERPPU is a government regulation that acts as an Act or in other words, PERPPU is a government regulation that is given the same authority as law. The formation of the PERPPU was purely the authority of the president because of its formation without first asking for approval from the House of Representatives (Manan, 1992), although in the end it had to be discussed together to get mutual approval from the president and the House of Representatives (Haryono, 2009).

2.2 Key Terms of Establishment of PERPU

Constitutionally the conditions for establishing PERPU will only be found in Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia [4], that only in the event of a compulsive crisis, the president can issue PERPPU. PERPPU which

[3] Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan

[4] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

was born later was signed by the president. PERPPU has a limited (temporary) period of time.

The main requirement for the formation of PERPPU can also be seen in Article 1 number 4 of Act No. 2 of 2011 which only states that the main requirement for the stipulation of the PERPPU is the issue of compulsive crises, but in the Law the explanation section does not explain the terms and passed to form a PERPPU. So that it can be concluded that the conditions for making PERPPU are merely the subjective judgment of the president or the government stating the state of the country in a state of urgency or in an emergency

2.3 The Crunch of the Forcing in the Issuance of PERPU (Based on the Decision of the Constitutional Court Number 138 / PUU-VII / 2009

During this time there was no clear boundary about ”compulsion”. As a result there is no single interpretation of the birth of the Perppu. In this context the decision of the Constitutional Court No. 138 / PUU-VII / 2009. Judicially, the Constitutional Court assessed whether actually PERPU was equal to the law so PERPU could be tested at the judicial institution of the Constitutional Court. Based on Article 7 paragraph (1) of Law Number 12 of 2011 it is stated that PERPU itself has an equal position with the law.

Article 22D paragraph (1) of the 1945 Constitution which essentially states that:

1. Granting authority to the president to form government regulations instead of the law
2. The authority can only be used if the situation is in a situation of compulsive crises.
3. PERPU must obtain the approval of the House of Representatives for further hearings which determine whether PERPU becomes a law or is revoked.

In the situation where there is a vacant position the existence of a law caused by various things so that the draft law has not been processed to be followed up as a law based on the applicable provisions, but in such conditions, there is a legal vacuum then arises which is said to be a state urgent (urgent) so that immediately requires a law to overcome this. Then the provisions of Article 22 of the 1945 Constitution provide a special institution by giving authority to the president as head of government to make PERPU a form of overcoming the occurrence of legal vacuum in the country (Mawuntu, 2011). If you follow the mechanism for drafting a law in a rule, the problem of legal vacuum will not be able to be answered because time in making legislation will take a long time, starting from the planning stage to the final stage, namely enactment in gazette.

Based on the consideration of the Constitutional Court's ruling, it can be concluded that the notion of ”matters of urgency that are compelling” according to the interpretation of the Constitutional Court is not only about the danger but also must be interpreted in conditions that must meet 3 (three) conditions, namely:

1. There is a situation that is an urgent need to solve a legal problem in a fast way
2. The law needed to resolve the problem does not yet exist so that there is a legal vacuum
3. The legal vacuum cannot be overcome by making laws with ordinary procedures because it will take a long time

Based on the formulation of Article 22 paragraph (1) of the 1945 Constitution, it is clear that the statement ”President has the right” is impressed that the issuance of PERPU is seen as subjective because it is a right and fully under the control of the president. However, the Constitutional Court ruling No. 138 / PUU-VII / 2009 [5] is what should provide an explanation and enlightenment regarding the benchmarks of what is said to be a compelling situation or a precarious situation in a country. And even though the Constitutional Court's decision has been issued, it has not been able to give the true meaning related to the intention of the compulsive crunch. So that after the issuance of the verdict of the constitutional court the presence of a PERPU today still has a shared view of where the meaning of urgency intended by the president as the subject given the authority to issue PERPU. As an example of the issuance of PERPU regarding the dissolution of community organizations which also invited public sentiment and became controversial in the level of public opinion.

2.4 Published Analysis PERPU No.2 of 2017 Concerning Community Organizations

PERPU No. 2 of 2017 concerning Community Organizations has spawned good debate among academics, practitioners and the public who stand on the pro and contra positions which have implications for interesting political dynamics in the Indonesian constitutional system. Through this PERPU, the government

[5] Putusan Mahkamah Konstitusi Nomor 138/PUU-VII/2009.

actually made PERPU as an instrument to control the existence of social organizations within the Unitary State of the Republic of Indonesia. The issuance of PERPU as if it seems that the policies issued by the government in issuing PERPU tend to be one-sided and subjective. The condition of the compulsive crunch has not yet fully become a proven condition in the midst of society. Through PERPU, the government also revoked the existence of Community Organizations, namely Hizb ut-Tahrir Indonesia, which was considered to be in conflict with Pancasila.

Government policies that issued PERPU have not been fully accepted due to the difficulty of measuring precarious conditions due to the existence of HTI organizations and the absence of concrete indicators and can measure the extent to which community organizations are in line with Pancasila values so that the boundaries become vague and seem to be being a one-sided subjective judgment in assessing the precarious situation. If reviewed further, the existence of HTI at the time before it was dissolved has not been said to be alarming, because there has not been an active movement carried out by HTI which could cause the matters of crisis as intended by the government.

The lack of government aspirations for the dissolution of HTI organizations has also become the public's main spotlight. The government only listens to the voices of one party claiming that the existence of HTI endangers the integrity of the unitary state of the Republic of Indonesia. The opinions of various groups are certainly needed to provide an assessment of the existence of HTI so that there is sufficient indicator that HTI organizations can create a danger for the integrity of the country of Indonesia. Regarding this, Dr. Jeje Zaenudin as deputy general chairman of PP Persatuan Islam writes:

> "The irregularities are also getting stronger when the government bases the dissolution of HTI because it often collides with other mass organizations in the community. In fact, only recently has HTI activities been prevented from being obstructed and disbanded by a particular mass organization that manipulates it. With other mass organizations, such as Muhammadiyah, Persis, Al Irsyad, PUI, etc., HTI remains harmonious, there must be differing views on several aspects of Islamic teachings, especially the concept of khilafah (Riadi et al., 2017)"

Besides that, PERPU No.2 Year 2017 also gives constitutional authority to the government to dissolve the existence of community organizations that are deemed inappropriate. Juridically, matters concerning the dissolution of mass organizations are in the hands of the court as the holder of the judicial authority based on the theory of power sharing initiated by Montesqui. Indirectly, the government automatically has taken over the authority rather than the judicial power which is under the authority of the Supreme Court, which prior to the issuance of PERPU the authority to dissolve the existence of social organizations was in the hands of the court. Based on these problems, the issuance of PERPU No. 2 of 2017 [6] gives the impression of the current dictator of the government, in addition to not measuring the indicators of the state of urgency that forced the issuance of PERPU, the government has deviated its power as the holder of executive power by overthrowing judicial power in the dissolution of community organizations. And in the author's opinion, this problem would tend to make new problems oriented to the division of ethnicity, race, religion, and culture that exist in Indonesia because of the existence of issues related to radicalism at the level of nation and state. So that it can be concluded that with the birth of PERPU No. 2 of 2017 there has been an injury to the value of democracy and the concept of separation of powers.

3 CONCLUSIONS

The phrase 'compulsive urgency' in the background of making Government Regulations Substituting the Law does not yet have a judicial objective measure. The authority in the issuance of PERPU is still oriented to the constitutional subjective rights of the president given by the 1945 Constitution of the Republic of Indonesia. The Constitutional Court Decision Number 138 / PUU-VII / 2009 [7] has not been able to answer the explanations of state benchmarks in matters of compulsion. So that with the birth of polemic against PERPU No. 2, 2017 is still an interesting concern from a political and legal standpoint. With regard to the urgency of the existence of mass organizations that are considered inconsistent with the ideological values of the nation, namely the Pancasila. So that PERPU's position is still considered as a frame for a government that leads to an authoritarian government. It is recommended that the Government and Parliament to emergency situation and to make use Presidential Advisor Board so that issuance of government regulation to subtitute act the meets

[6] Peraturan Pemerintah Pengganti Undang-Undang Nomor 2 Tahun 2017 Tentang Perubahan Undang-Undang Nomor 17 Tahun 2013 tentang Organisasi Kemasyarakatan.

[7] Putusan Mahkamah Konstitusi Nomor 138/PUU-VII/2009.

the principles of democracy rule of law and public accountability (Almanar et al., 2015).

REFERENCES

Almanar, H. A. J., Rasyid, N., et al. (2015). Kedudukan peraturan pemerintah pengganti undang-undang dalam sistem peraturan perundang-undangan di indonesia. *Jurnal Ilmu Hukum*, 3(2).

Asshidiqie, J. (2008). *Hukum Tata Negara Darurat*. Rajawali Press, Jakarta.

Halim, H. and Putera, K. R. S. (2013). Cara praktis menyusun & merancang peraturan daerah. *Jakarta: Prenada Media Group*.

Haryono, D. (2009). Ilmu perundang-undangan.

Indrati, M. F., Perundang-undangan, I., Jenis, F., and Muatan, M. (2008). Kanisius. *Yogyakarta, l998*.

Manan, B. (1992). *Dasar-dasar perundang-undangan Indonesia*. Ind-Hill-Company.

Mawuntu, J. R. (2011). Eksistensi peraturan pemerintah pengganti undang-undang dalam sistem norma hukum insonesia. *Jurnal Hukum Unsrat*, 19(5):118–127.

Riadi, B., Drajat, D., and Ulhaq, M. Z. (2017). Analisis kebijakan perppu ormas: Kritik terhadap perppu nomor 2 tahun 2017.

Siallagan, H. and Yusdiansyah, E. (2008). Ilmu perundang-undangan di indonesia.