

Presidential Power's Limitation to Emergency Provisions in Indonesia*

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Abstract.

After the demise of Suharto's regime, Indonesia's 1945 Constitution was successfully revised from 1999 to 2002. This period of constitutional revision added emphasis to avoid authoritarian administrations such as those experienced during the times of Sukarno and Suharto; consequently, the constitution was re-designed to limit the powers of the government. This article examines the trajectory of constitutional practices in the post-constitutional revision by taking into account emergency provisions exemplifying the new challenges of democratization in contemporary Indonesia. Currently, emergency provisions are amongst the unamended norms in the 1999-2002 agenda of constitutional revision. As a consequence, authoritarianism threatens the future of liberal democracy in Indonesia, especially the enjoyment of civil and political rights. Hence, this analysis elucidates the extent to which the deficit is inherent to Indonesia's revised constitution on emergency laws and how this deficit threatens the design of liberal constitutionalism. Selected cases were collected to illustrate how Indonesia's current constitution is reflected, articulated, debated, and negotiated toward the idea of legally limited powers. The deficits have resulted in two major adverse impacts; first, the ambiguous provisions on emergency laws prevail as they are mentioned in Articles 12 and 22 of the 1945 Constitution; second, the President's monopoly on the power to issue emergency laws is a result of the absence of limitations outlined in the constitution. While the monopoly of such a power is often utilized by the government under the backdrop of constitutional legitimacy, there is a possible effort to eschew potential authoritarianism to add the constitutional restraint to presidential powers in the agenda of constitutional revision.

Keywords: constitutionalism, emergency provisions, Indonesian constitution

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Batasan Kekuasaan Presiden untuk Ketentuan Darurat di Indonesia

Abstrak.

Pasca runtuhnya rezim Suharto, UUD 1945 berhasil direvisi dari 1999 hingga 2002. Revisi konstitusi periode ini menambahkan penekanan untuk menghindari pemerintahan otoriter seperti yang dialami pada masa Sukarno dan Suharto; akibatnya, konstitusi dirancang ulang untuk membatasi kekuasaan pemerintah. Artikel ini mengkaji lintasan praktik ketatanegaraan dalam revisi pasca konstitusi dengan memperhatikan ketentuan darurat yang menjadi contoh tantangan baru demokratisasi di Indonesia kontemporer. Saat ini, ketentuan darurat merupakan salah satu norma yang belum diamandemen dalam agenda revisi konstitusi 1999-2002. Akibatnya, otoritarianisme mengancam masa depan demokrasi liberal di Indonesia, khususnya penikmatan hak sipil dan politik. Oleh karena itu, analisis ini menjelaskan sejauh mana defisit melekat pada revisi konstitusi Indonesia tentang undang-undang darurat dan bagaimana defisit ini mengancam rancangan konstitusionalisme liberal. Kasus-kasus terpilih dikumpulkan untuk menggambarkan bagaimana konstitusi Indonesia saat ini direfleksikan, diartikulasikan, diperdebatkan, dan dinegosiasikan menuju gagasan kekuasaan terbatas secara hukum. Defisit tersebut mengakibatkan dua dampak merugikan yang besar; pertama, ketentuan hukum darurat yang ambigu sebagaimana diatur dalam Pasal 12 dan 22 UUD 1945; kedua, monopoli Presiden atas kewenangan mengeluarkan undang-undang darurat adalah akibat tidak adanya batasan yang diuraikan dalam konstitusi.

Kata kunci: konstitusionalisme, ketentuan darurat, konstitusi Indonesia

Аннотация.

После падения режима Сухарто Конституция 1945 года была успешно пересмотрена с 1999 по 2002 год. Пересмотр конституции на этот период добавил напряжение на недопущение авторитарного правления, которое имело место в периоды Сукарно и Сухарто; в результате конституция была изменена с целью ограничить полномочия правительства. В данной статье исследуется развитие конституционной практики в период постконституционного пересмотра с учетом чрезвычайных положений, которые стали примерами новых вызовов демократизации в современной Индонезии. В настоящее время чрезвычайные положения являются одной из неизменных норм в программе пересмотра конституции на 1999–2002 года. В результате авторитаризм угрожает будущему либеральной демократии в Индонезии, особенно осуществлению гражданских и политических прав. Таким образом, этот анализ объясняет, в какой степени недостатки связаны с пересмотром конституции Индонезии о чрезвычайном законе, и как эти недостатки угрожают проекту либерального конституционализма. Отобранные случаи собраны, чтобы проиллюстрировать, как текущая конституция Индонезии отражается, формулируется и обсуждается в отношении понятия юридически ограниченной власти. Этот дефицит привёл к двум основным пагубным эффектам: во-первых, неоднозначные положения чрезвычайного закона, предусмотренные статьями 12 и 22 Конституции 1945 года; во-вторых, монополия президента на право издавать чрезвычайные законы является результатом отсутствия каких-либо ограничений, предусмотренных конституцией.

Ключевые слова: конституционализм, чрезвычайные положения, конституция Индонезии.

A. INTRODUCTION

Nowadays, two decades after the 1998 Reformation, the revival of authoritarianism is a severe topic of debate in contemporary Indonesia. Despite the successful introduction of direct election and smooth political transition that brings Indonesia into a new era of democratization, including the latest anxiety in the 2019 election ended with a safe situation (The Diplomat, 2019), the spirit of the New Order has revived in Indonesia (Power, 2018) amidst political turbulent and segregation of the Pancasila and Islamism divide (Hadiz, 2017). These episodes resulted in a series of justifications in which Pancasila is used as an ideological weapon to combat the opposition. Indeed, Indonesia's Tiananmen protest in 1998, so-called *Reformasi* (Reformation), had been set to accomplish basic requirements to establish constitutionalism through a constitutional amendment from 1999 to 2002. Subsequently, Indonesia evaluated its constitutional framework as a result of an autocratic government started from the late period of Sukarno through the entire Suharto's regime, from the mid to the end of the 20th century. These adverse experiences are reflected in Indonesia's future constitutional design as constitutional democracy is its major primary feature. The current revised constitution provides a shifting framework of reorganized powers of constitutional organs and the dramatic protection of human rights (Nasution, 2011, p. 35), as it mirrors the basic prerequisite of the promotion of democracy and the rule of law. Such an amendment was an assertion which the 1945 Constitution could not accommodate democratic visions and limited powers of government. Besides, it reflects the nature of the 1945 Constitution, which was intended to be an interim constitution with imperfect features (Horowitz, 2013, p. 13).

While a revised constitution was accomplished, the critics regarding normative loopholes emerged. Their arguments center on how Indonesia provides a constitutional design to meet constitutionalism. Indonesian leading scholars, like Jimly Ashiddiqie, argue that the absence of adequate synchronization and harmonization was the underlying reason the revised 1945 Constitution leaves further considerable constitutional problems (Harijanti & Lindsey, 2006). Therefore, this paper focuses on the consideration of two main causes that led to constitutional ambiguity. They are emergency provisions that were skipped during the 1999-2002 constitutional revision and constitutional limits to aspire liberal democracy and constitutionalism. It will revisit the extent to which constitutional deficiencies on emergency laws enshrined in Articles 12 and 22 of the 1945 Constitution have prevailed as it is reflected in various constitutional practices of post-Suharto order. Under the backdrop of an extraordinary situation such powers, however, are often conflicted with

constitutionalism and seen as a dangerous threat not only to civil and political rights but also liberal democracy and the rule of law.

The introduction describes how this paper is organized. The first part of this paper will overview the practice of emergency powers from a historical perspective. The second part of this article will examine to the extent the rules of emergency laws have a political dimension in which Articles 12 and 22 of the 1945 Constitution provide the President absolute powers. This part includes an analysis of political interests under the backdrop of constitutional legitimacy. Lastly, this paper reveals the need to limit the President's monopoly of emergency laws.

B. METHODS

This paper uses normative approaches to legal study i.e. legal research carried out by reviewing library records or supplementary evidence, as a core activity. Normative legal review is a scientific research approach for finding an evidence-based legal scientific theory from a normative point of view (Soekanto, 2015: 13-14). Consequently, this analysis departs from the viewpoint of positive legal standards about the national statutory system (Marzuki, 2016: 59). The legal procedure and case-by-case methodology are the approaches used. Secondary evidence is generally used as key legal material from the rules and legislation on the eradication of corruption and decisions of the court. The data that was accumulated was qualitatively analyzed.

C. RESULTS AND DISCUSSION

1. A Historical Overview of Emergency Laws in Indonesia

Today, the discussion of emergency laws is strongly related to modern constitutional governments (Ferejohn & Pasquino, 2004). The term emergency is usually illustrated as an unforeseen and dangerous situation followed by the call for immediate action (Sagar, 2016). In extraordinary situations, when national interest is seriously threatened, a suggestion may include a declaration of a limited period of providing the extraordinary government powers aimed at restoring the situation. As a result, some constitutions authorize power to the President or certain executive authorities to issue decrees following the suspension of ordinary constitutional law.

Historically, since Indonesia proclaimed independence, emergency laws have been amongst contentious provisions due to the lack of constitutionalism imparted in the constitution. The absence of such sufficient legally limited government's power, then, affects the democratization process. In the Sukarno era, emergency powers dealt with a revolutionary period of restoring stability to tumultuous situations after the country gained independence. In other words, during the grave instability after Indonesia's independence, with its following political contentions, emergency powers played an essential role in Sukarno's administration. This role, however, did not comply with comprehensive procedures and limits of executive powers outlined in the constitution. Instead, the constitution arbitrarily authorizes the President to declare the state of emergency by following procedures and criteria to be set by *undang-undang* or statutory law (Article 12) and the government instead of law (*Peraturan Pemerintah Pengganti Undang-Undang-Perppu*) (Article 22).

For those that adhere to this view, the absence of legally limited powers granted to the President dealing with emergency powers subsequently suffered civil and political rights. To be sure, this severely impacted Indonesia's fledgling democracy and the rule of law. As the adoption of democracy was narrowly understood in an Indonesian way, so-called 'illiberal democracy,' it legitimated Sukarno to apply an authoritarian style of government as the country was considered to face chronic instability (Robertson-Snape, 1999). Under the backdrop of illiberal democracy, it approved the idea of providing dominant powers to the President in constitutional practices. Paradoxically, such an idea was reiterated around the time of Indonesia's first successful democratic election in 1955 when the parliament members sharply demanded to establish constitutional democracy.

It is undeniable to assess such a paradox without drawing upon the principal contention that had re-emerged after the 1955 election. The evidence shows that, as the result of the election, there was political and ideological fragmentation that transformed into a sharpened political rivalry between nationalist and Islamist blocks. These rivalries centered, especially on the competing idea regarding the proposed constitution. For example, the fight of Islamic parties for constitutionalizing Islam in the Assembly in which it was strongly influenced by the result of the 1955 Election with a fair vote of nationalist, Islamist, and communist groups (Mietzner, 2009, p. 77). The result indicated Sukarno's weak political leadership: Indonesian National Party (PNI), *Majelis Syuro Muslimin Indonesia* (Masyumi), *Nahdlatul Ulama'* (NU), and Indonesian Communist Party (PKI) respectively got 22.3%, 20.9%, 18.4%, and 15.4% of the electoral vote (Mietzner, 2009, p. 77). Thus, it encouraged Sukarno

to ally with armed forces, and then such forces interfere with Sukarno (Subekti, 2007, p. 124). Such intervention implied the legitimate support to wield emergency powers. The involvement of armed forces was not only because of a similar vision to support nationalism but military interests into the government's dominant power which ultimately aims to increase political expansion and embrace economic advantage.

Such an episode can be seen from the situation that finally prompted Sukarno to declare a state of emergency through *Staat van Orloogen Beleeg* (*Undang-Undang Keadaan Perang*) on the 14th March 1957 (Hosen, 2010). To this end, Sukarno referred to the legitimate constitutional power which was essentially inherited from Dutch colonial law on the state of emergency (Hosen, 2010). As a result of the declaration, when the national economy was collapsing, *Perppu* No. 23/Prp/1959 on the state of emergency was issued. This *Perppu*, however, provided dominant and legitimate powers to the army, including the acquisition process of all Dutch corporations in Indonesia (Hosen, 2010, p. 269). Consequently, the military inevitably gained economic benefits from nationalization, and these actions became the gateway for the military to enter business fields.

The declaration of the state of emergency was not a panacea for restoring stability. Instead, it was the initial step in driving Indonesian democracy to a crossroads. In this context, the period of authoritarianism began when Sukarno, self-identifying as the embodiment of the people's sovereignty, suspended the elected parliament (*Konstituante*) (Acharya, 2003). On this matter, Sukarno decided that *Konstituante* finally failed to draft the proposed constitution in line with Indonesia's dream to have a legitimate constitution by a democratic parliament. However, when the confirmation was made, *Konstituante* progressed with a 90% final draft (Nasution, 1995). Wilopo, the Chairman of *Konstituante*, revealed that the contention, and unending constitutional debate, within the Assembly particularly dealt with the appropriate choice to establish the foundation of the state as either *Pancasila* or Islamic ideals. But, Wilopo guaranteed that *Konstituante* would finish the task using an extension for the session, as it was formerly agreed on the deadline of 26th March 1960 (Nasution, 1995). On the contrary, Sukarno insisted on the proposal to revert to the 1945 Constitution, which was predominantly supported by armed forces (Nasution, 1995, p. 418).

It was not so long after these conflicting arguments that Sukarno issued a unilateral decree on the 5th of July, 1959. *Konstituante* was suspended, and the 1945 Constitution was reinstated. Through these measures, the constitutional

direction finally changed (Bourchier, 2014, p. 114), though it contradicted with Sukarno's previous statement the day after the proclamation of independence. He advised that the 1945 Constitution was only an interim constitution with imperfect features, so Indonesia should prepare a comprehensive one once the country held a democratic election (Horowitz, 2013, p. 17).

With the reinstatement of the 1945 Constitution, Sukarno introduced the Guided Democracy featuring Asian values, which sharply opposed liberal democracy (Ulum & Hamida, 2018). The Guided Democracy predominantly postulates a concept to avoid the debate between government and opposition (Ricklefs, 1981, p. 239) as it might be from his adverse experience of the political turmoil after the 1955 electoral results. In other words, this democracy advocates romanticized relations, as it wanted to establish a strong state with the spirit of *gotong royong* (mutual help) (Darmaputera, 1988, p. 181) which later was claimed to reflect Indonesia's character. Despite no adequate constitutionally limited President's power, this rhetoric finally placed the President as the ultimate constitutional organ. Following the introduction of the Guided Democracy, the government legitimated absolute powers granted to the President under the backdrop of character's reflection (Ricklefs, 1981, p. 242) and also in emergencies with competing arguments on the grounds of political and ideological fragmentation. This idea is reflected in Sukarno's speech titled, "Let Us Bury Parties" (*Mari Kita Kubur Partai-Partai*) on the 28th October 1956. This speech encouraged the idea to adopt the Guided Democracy (Anom, 2016, p. 23).

In the meantime, the emergency measure was also an influential instrument for compliance with the legitimation of the executive heavy during the chaotic political transition from Sukarno to Suharto. In the attempt to restore the order against the alleged Communist coup (PKI), Suharto acted on emergency powers with a letter outlining official authority (*Supersemar*) authorized by Sukarno on March 11th, 1966 which was later understood as the accidental transfer of power from Sukarno to Suharto (Hosen, 2010, p. 269). Although it was not subjected to Article 12 or 22 of the Constitution, this letter was subsequently interpreted as the source of legitimacy granted to Suharto with extraordinary measures to save the country against critical threats by which PKI was accused as the main actor. As a result, PKI disbanded, followed by a series of killings and detention of its members (Butt & Lindsey, 2012, p. 7). All the measures taken during this time were not prevalent and reflected the state of emergency, though it was never declared.

In the post-Suharto order, which demands the intense democratic fervor, application of the emergency laws in Article 12 of the 1945 Constitution are

avoided except in the Megawati period. Instead, those measures in Article 22 were favored not only by Suharto but also successive Presidents in addressing specific incidents. The evidence shows that these types of incidents are not frequently related to compelling exigency, but the government initiative construed and claimed it amidst the compelling exigency with *Perppu* (Siddiq, 2014). Therefore, since the Reformation, the number of *Perppu* has significantly increased because of its flexibility, and there are by no means definite criteria written in the constitution. Article 22 of the 1945 Constitution arbitrarily provides the President subjective appraisals to issue the *Perppu* to which it is primarily aimed to address unexpected incidents in the compelling exigency. Conversely, the recent trend shows the *Perppu* is also envisaged as a presidential legislative shortcut due to the long process of the enactment of new laws. In practice, the *Perppu* would be upgraded to a statutory law after reaching an agreement with the House in the next assembly. However, it is important to note that the constitution does not state any provision on whether or not the *Perppu* would be the legislative output after it had reached an agreement of the House. Rather, it only elaborates if *Perppu* is rejected, it should be void. By the absence of the further norms on the issuance of *Perppu*, it is often interpreted that the constitution essentially grants the President remaining powerful legislative function as it is claimed to overcome compelling exigency.

After the 1999 election, Indonesia's political practice was colored by the dispute of constitutional organs with the result of the impeachment of Abdurrahman Wahid. This impeachment was the consequential response of issuing a decree on the disbandment of the House of Representatives (*Dewan Perwakilan Rakyat*) (Lanti, 2002). In this respect, the issuance of the decree was accused as the President's arbitrary power of constitutional practice through a decree which was not formally recognized as part of legal instruments or as part of emergency laws. As a result, with the absence of constitutional provisions to provide impeachment processes, the Assembly, acting as the people's sovereignty, successfully ousted Abdurrahman Wahid.

Emergency laws, both *Perppu* and the state of emergency, also played an essential role during the Megawati era. The tragic situation of the Bali bomb blast, following the 9/11 attack in the United States, forced Megawati to use emergency power to issue *Perppu*. In this case, the *Perppu* was released not only to respond to immediate incidents but also to be a legislative shortcut to address the bomb attack (Sebastian, 2003, p. 257), as Indonesia did not have such a law to criminalize terrorism. With the absence of limitations and criteria set by the constitution, however, Megawati subsequently took the *Perppu* to amend the Forestry Law 41/1999 by allowing corporations to continue mining operations in

protected forests (Hosen, 2010, p. 473). This amendment was followed by the issuance of the *Perppu* by taking into account the absence of new investments that would threaten the nation (Hosen, 2010, p. 473). Besides, the state of emergency was declared in her period regarding territorial disintegration under the Free Aceh Movement, or *Gerakan Aceh Merdeka* (GAM), in the province of Aceh (Miller & Feener, 2010). This declaration extended up to six months (Miller & Feener, 2010). In contrast, such a state of emergency imposed in Aceh was suspended by Habibie due to the high demand for reformation (Asshiddiqie, 2007, p. 45).

As a result of such an episode, it is essential to note that the absence of any procedures and limitations concerning the state of emergency outlined in the constitution will potentially encourage the President to wield this power. As the exercise of emergency powers allow the President to suspend ordinary law, the constitution's vague norms on the state of emergency will potentially bring harm to future constitutional practice and national stability. In this context, at the issuance of *Perppu*, the President is arbitrarily granted the power to interpret which emergency power can be exercised.

In the Yudhoyono era, the regulations in lieu of law were frequently issued to address administrative tasks, such as the postponement of the validity of statutes, statutory revisions on regional administration, taxation, immigration, the Constitutional Court, and so forth. Such emergency powers, however, were issued closely with a conflict of interest due to himself as the chairman of the Democratic Party. For instance, in response to the enactment of Law 22/2014, which shifted the appointment of governors, regents, and majors through election to their appointment by the regional legislative body, Yudhoyono issued *Perppu* 1/2014 to annul such law and the *Perppu* 2/2014 to amend related provisions on the appointment in regional administration law. This is reflected during the enactment of Law 22/2014; the Democratic Party rejected such enactment and was followed by its walkout from the session (Kompas, 2014).

2. Socio-Political Aspects of Emergency Laws

The provisions of emergency laws are present in Articles 12 and 22 of the 1945 Constitution. With these two categories of emergency laws, Indonesia essentially introduces redundant provisions in dealing with emergency powers, as they are exclusively granted to the President without the dispersion of powers to other constitutional bodies as it is required to establish checks and balances. The former article grants the President the power to declare the state of emergency (literally: *keadaan bahaya*) and the latter provides the President the

right to issue a *Perppu* due to compelling exigency (literally: *kegentingan memaksa*). However, both provisions are not intertwined and interrelated as the consequential and continuum element. Due to the absence of further elaboration, confusion prevails and brings multifarious interpretations. It might be arduous tasks, not only for the government, practitioners, or constitutional judges but also for academicians, to make a clear interpretation of such provisions. Instead, constitutional revision is possible to end this ambiguity.

Constitutional ambiguity can be traced by scrutinizing such provisions. It must be clear that Article 12, which deals with the state of emergency, neither defines its functions, rules, procedures, nor limitations of the use of the legal instrument. Its translation is arbitrarily granted to the legislative body through an act. The constitutional design set the President's dominant power on the exercise of the legislative function, which was not only through the regular session to establish acts but also through the extraordinary situation to legitimate the issuance of *Perppu*. Accordingly, further translation was laid down with the Law on the State of Emergency through *Perppu* No. 23/Prp/1959. The *Perppu* classified the state of emergency into three degrees: civil emergency, martial law, and war situation. Through this *Perppu*, the state of emergency could be declared solely by the President where the security of Indonesia or any part of the territory is endangered with three indicators. First, if the nation is threatened by the rebellion, turmoil, or natural disaster. Second, if the nation will cause a danger of war or, there is a fear in dealing with the rape in the territory. The third indicator is if the state of danger or from particular circumstances which can potentially endanger the life of the state. As a result of the declaration, the law gives the authority to issue regulations to restrict performance, publishing, announcement, distribution, trade, and attachment of any form whatsoever to paintings and drawings. It also legitimates the authority in dealing with searching, surveillance, and detention.

Compared to the state of emergency, the *Perppu*, which deals with compelling exigency, is quite different. The ambiguity arises with the development of Indonesian constitutional practices. In *Saor Siagan vs the State*, the petition concerning interim members of the Eradication of Corruption Commission with the *Perppu* 4/2009, the Constitutional Court confirmed that the meaning of compelling exigency in Article 22 is not paralleled and limited to the definition in dealing with the state of emergency in Article 12. In other words, as the state of emergency is declared, postponement of the ordinary legislative process by granting the president exclusive powers in the law-making process is allowed. However, it should be extensively understood that the state of emergency itself is not the only ground of compelling crisis as outlined in Article

22. With the following approach taken by the Constitutional Court, such difficulties develop for two reasons. First, both articles are written in different articles and different chapters. Second, they are required to issue with varying kinds of law, including further implications in constitutional practices.

While *Perppu* could no longer be limited to Article 12, the Constitutional Court defines three criteria on the limitation to issue *Perppu* in dealing with the literal interpretation of compelling exigency. First, the definition includes a compelling situation to solve legal problems shortly under laws. Second, there is a legal void, or the current law is irrelevant or inadequate. Third, such a legal void could not be addressed with the ordinary legislative procedure since it needs a relatively long process to the extent that the compelling situation requires certainty. Accordingly, the compelling exigency as it has been interpreted by the Constitutional Court does not only deal with the situation subjected to Article 12. Rather, it includes the situation that provides the President an alternative to issuing a law as the result of the long process of law-making with the House of Representatives.

There are some critical notes regarding the definition provided by the Constitutional Court, leading to adverse impacts on constitutional practices. By the power given to the president to issue regulation as the substitution of legislative output (statute law), it asserts that in a compelling exigency as interpreted by the Constitutional Court, the president will potentially abuse power. This abuse could occur specifically when it deals with statute laws, for instance, on the dissolution of specific constitutional organs or human rights. By considering historical views, it can reflect Indonesia's experiences with the episodes of the demise of *Konstituante* in the Sukarno era and the dissolution of the House of Representative in Abdurrahman Wahid era. Those episodes are evidence that competing ideologies and the conflict of interest should be seriously addressed on a constitutional basis. In other words, as constitutionalism matters, a new approach should be made to restrict such definitions provided by the Constitutional Court.

In the case of *Perppu*, the unexpected failure of the constitutional machinery will possibly prevail. As the *Perppu* solely grants the exclusive power on legislative coverage, the President, for instance, can dissolve the Court and Parliament as the result of the conflicting powers between them or when it deals with the conflicting political ideologies as a means to strengthen the President's political position. To a lesser extent, the President can arbitrarily address some contextual issues, such as applying an interim government and suspend human

rights. Therefore, the provisions on emergency laws are those which need to be critically examined.

3. Limiting Presidential Power Over Emergency Laws

It is worth noting that Indonesia, after more than seven decades of independence, has ignored the importance of examining the president's monopoly to interpret and wield power to issue emergency laws. Indeed, emergency laws have been utilized as political weapons and resulted in severe political and ideological conflicts. Such attitudes affirm that legally limited powers granted to the president to issue emergency laws are essential, and those are the prerequisite to establish political stability within Indonesia. As political stability has been maintained, it will be followed by economic growth that impacts robust economic development, and it is a reflection of Indonesia's often depressed economy.

These episodes of practicing emergency laws as political weapons were also experienced by India which posed greater challenges with emergency laws and its complexity was put into a heated discussion in Asian politics. As it is commonly referred to and practiced in various countries, the state of emergency in India should be initially proclaimed by the president, but it should be preceded by the proposal of the prime minister. However, the proclamation should meet one of these types of extraordinary situations: national security emergency, failure of constitutional machinery, and financial emergencies. In this context, India proclaimed emergency laws under the ground of national security emergency in 1975 and the failure of constitutional machinery in 1994, but no financial emergency has ever been applied (Sagar, 2016).

Following the result of the proclamation, the Indian Constitution grants powers to the Union to direct and the Parliament to legislate to any state. The power includes allowing the power to the president in dealing with the suspension of the freedom of speech, assembly, association, and movement and the restriction of the ability of citizens to move courts for the enforcement of fundamental rights guaranteed in Part III of the Constitution, except Articles 20 and 21 (Sagar, 2016, p. 214).. However, such proclamations should end within one month or the period will be able to be extended up to six months if it is confirmed by Parliament (Articles 353 (5), 356 (3), 356 (4)).

Regarding the national security, emergency declared in 1975, the evidence shows that it was not solely raised due to internal disturbance. It refers to the episode where the evolution of constitutional practices manifested the conflicting

ideologies (symbolic politics) by manipulating the symbols (Rao, 1987). The political rivalry was inevitable by which it brought chaotic effects in political and economic situations (Morris-Jones, 1975). It suggests that emergency law was the legitimate instrument of the government against the opposition. For instance, in retaliation, the government to ban four major political and religious organizations and 11 groups affiliated to the opposition including *Rashtrya Swayamsevak Sangh* (RSS) and *Jamaat-e-Islami-e-Hind* (Park, 1975) which are suspected to oppose Indira Gandhi and her policies personally (Rao, 1987, p. 167). As the declaration is predominantly granted to the Prime Minister to proclaim by the President, it is not exaggerated to state that emergency law was more than to address the emergency, including conflicting political interests.

According to such an incident, therefore, India evaluated emergency provisions in the constitution to the extent it is laid in Article 352 (3) of the Indian Constitution. It strictly limits the exclusive power granted to the Prime Minister as it had been previously the monopoly of the Prime Minister to propose the declaration of emergency to the President. Rather, the declaration should meet a collective agreement with the Union of Cabinet before it can arrive before the President, as the contemplation on the subjective appraisal of the Prime Minister as it was applied in 1975. Therefore, such a new procedure is prominent following a constitutional approach. Without any elaboration as to which institution or mechanism, the declaration of emergency likely brings the country to be driven into a personalized rule of government that overrides constitutionalism. However, the following effects of the state of emergency proclaimed in 1975 was the continuing protest to save democracy by the Sikh-majority party the Akali Dal whose over 40.000 members were arrested as the evidence indicated that such group opposed Indira Gandhi (Telford, 1992) To this end, the contention continued, and Bluestar operation was ordered by Indira Gandhi in June 1984. This operation was the government's military mission to establish control over the Golden Temple in Amritsar as a means to dismiss Jarnail Singh Bhindranwale and any members of religious radical armed from the complex (Telford, 1992, p. 984). As a culturally and religiously sensitive country, this was subsequently followed by the assassination of Indira Gandhi by her two Sikh bodyguards in revenge for the operation (Kundu, 1994) and the disastrous communal retaliation of anti-Sikh in response to the assassination with 4.000-5.000 victims across Delhi (Singh, 2007).

Therefore, Indonesia needs to learn from Indian constitutional experiences because both are culturally and religiously sensitive countries and both have divided societies. As aforementioned in the previous part, the provisions in dealing with the state of emergency in Indonesia do not elucidate to the extent

the power granted to the president should be limited. Rather, the further rules and procedures should be legislated in the statute law, but there are not any sufficient dispersed powers to other constitutional organs as it is required or to constrain the president's arbitrary powers or avoid the abuse of power (Barnett, 2013, p. 6).

In contemporary Indonesia, these Indian experiences can be a lesson for Indonesia after Joko Widodo responded to the rising of radicalism (The Jakarta Post, 2017) through the issuance of *Perppu* No. 2/2017 on the disbandment of civil society organizations (CSOs). Although this *Perppu* is understood to be an arduous effort to address the radical religious group *Hizbut Tahrir Indonesia* (HTI), it lays a fragile basis for more easily silencing all CSOs that those opposed to *Pancasila*. Simultaneously they were silenced without any defense in the courts before the disbandment as it was previously provided in CSOs law. Thus, it essentially affirms the bridge for higher demand to the establishment of the authoritarian government.

Under the backdrop of *Pancasila*, to be sure, it will repeat what was practiced by the previous governments with severe episodes of authoritarianism; the government used *Pancasila* as the vehicle to contest the political fragmentation. In particular, the accusation that HTI opposed *Pancasila* brings greater political risks to which it implies the consequences of the conflicting political ideologies and identities between nationalist and certain conservative Islam blocks (Nasution, 1995, pp. 51-52).³ Since its commencement, HTI has advocated shifting *Pancasila*, Indonesia's political philosophy guiding principles to Islamic teaching (Osman, 2010). However, this fact can be linked to the experience when the fragmentation previously occurred in a series of constitutional drafting of the very early days when Indonesia was established. At the time, during the forum which resulted in the drafting of the 1945 Constitution, which is known as the Committee for the Efforts for the Preparation of the Independence of Indonesia (BPUPKI), there was a serious debate on the foundation of the state (Salim, 2008, p. 64). Islamic teaching was one of the most complex and contentious proposals, other than communism, integralism, and liberal democracy (Ulum & Hamida, 2018, p. 115). For instance, Wahid Hasjim proposed to include an article stating, "the religion of the state is Islam, with the guarantee of freedom for adherents of other religions to profess their religions..."

³ It is reflected from the ideological debate of drafting the failed constitution in 11 November - 7 December 1957. It fragmented into at least three blocks, i.e. (a) *Pancasila* Block supported by Indonesian National Party (PNI) and other parties with nationalist basis, including Indonesian Communist Party (PKI); (b) Islamic block supported by Masyumi, Nahdlatul Ulama, and other parties with Islamic basis; and (c) Social Economic block supported by Partai Murba.

(Salim, 2008, p. 52) Subsequent maneuvers were made to adopt a similar idea by the Islamic block during the constitutional arrangement from 1956 to 1959 which later hit Sukarno to reinstate the 1945 Constitution on 5 July 1959 (Butt & Lindsey, 2012, p. 38). Such conflicting political ideologies and identities, however, dissolved during the Suharto Order following the suspended proposal of the establishment of Islamic teaching as the results of the ideological oppression under the doctrine of Pancasila as the sole principal (Ismail, 1996). The doctrine firmly emphasizes the unity of the state (Butt & Lindsey, 2012, p. 43).

About the disbandment of HTI, it is important to refer to Sukarno's Guided Democracy as a result of the political fragmentation after the 1955 election, particularly during the long contention on the constitutional arrangement whether to adopt Islamic teaching. The reinstatement of the 1945 Constitution, *Majelis Syuro Muslimin Indonesia* (Masyumi) was disbanded in 1960. Though it was not directly related to Pancasila, the adoption of the Guided Democracy implies how the political philosophy was negotiated with Pancasila and integralism (Bourchier, 2014, p. 75). To this end, the disbandment was made on the ground of the accusation of the participation of Masyumi in the rebellion against the central government and followed by the imprisonment of influential leaders of Masyumi (Emmerson, 1999, p. 42).

The evidence shows that this rebellion was strongly motivated by the dissatisfaction with the authoritarian style of government practiced by Sukarno (Mietzner, 2009, p. 78). Instead of solving the political situation, it brought a more diametral opposition to the government as this was appraised as the competing ideologies between nationalism and Islam. On the one hand, this rebellion can be considered as the result of the unsuccessful struggle of Islamic block to provide a central position to Islam in the constitutional arrangement (Manderson, Smith, & Tomlinson, 2012, p. 90). On the other hand, as a result of rebellion, Sukarno established a closer relationship with the Indonesian Communist Party (PKI). Sukarno made this strategy as a means to overcome the political fragmentation of nationalist, religious, and communist blocks into a single unity known as *Nasionalis, Agama dan Komunis* or NASAKOM. This unity subsequently functioned as the state ideology under the claim of the Indonesian way that wants romanticized relations rather than the opposition of the political scenario (Boland, 1982, p. 102).

Over the decades, it shows that contemporary Indonesia needs a new framework of emergency laws. This new framework is to ensure that emergency laws are used not seemingly as a result of subjective attacks on the ground of the political fragmentation; these laws address certain national crises that endanger

the state with clear parameters, functions, rules, and limitations. As India's constitutional experience, these are important to refrain from the government imposing the state of emergency as it was personally interpreted. There is a need for the dispersion of powers on emergency laws to lessen the president's monopoly, as the presidential system of the Indonesian government put the president as the head of state and the head of government. The dispersion is paramount to provide checks and balances between constitutional organs by involving the House of Representatives and the courts.

D. CONCLUSION

Emergency laws play an essential role in current Indonesian politics. Their importance is reflected in Indonesia's adverse experiences on the use of emergency laws without any explicit constitutional provisions and limitations. As a consequence, These incidents demonstrated that emergency laws could be arbitrarily and personally interpreted by the President. By because emergency provisions were the result of the original 1945 Constitution, which is characterized as an authoritarian document that does not provide adequate checks and balances, there is a need to amend by setting clear parameters, functions, rules, and limitations on emergency laws. This is to aspire to liberal democracy that emphasizes the constraint of the government's power to ensure human rights from state-sponsored violations.

REFERENCES:

- Acharya, A. (2003). Democratisation and the Prospects for Participatory Regionalism in Southeast Asia. *Third World Q*, 375.
- Anom, E. (2016). *Pemerintah, Media dan Masyarakat di Indonesia*. Penerbit Andi.
- Asshiddiqie, J. (2007). *Hukum Tata Negara Darurat*. Rajawali Pers.
- Barnett, H. (2013). *Constitutional and Administrative Law* (10th ed.). Milton Park, Abingdon, Oxon, England: Routledge.
- Boland, B. J. (1982). *The Struggle of Islam in Modern Indonesia*. Dordrecht: Springer Netherlands.
- Bourchier, D. (2014). *Illiberal Democracy in Indonesia: The Ideology of the Family State*. Routledge.

- Butt, S; Lindsey, T. (2012). *The Constitution of Indonesia: A Contextual Analysis*. Bloomsbury Publishing.
- Darmaputera, E. (1988). *Pancasila and the Search for Identity and Modernity in Indonesian Society: A Cultural and Ethical Analysis*. BRILL.
- Emmerson, D. K. (1999). *Indonesia Beyond Suharto: Polity, Economy, Society, Transition*. M.E. Sharpe.
- Ferejohn, J; Pasquino, P. (2004). The law of the exception: A typology of emergency powers. *Int J Const Law*, 2(2), 210.
- Hadiz, V. R. (2017). Indonesia's Year of Democratic Setbacks: Towards a New Phase of Deepening Illiberalism? *Bull Indones Econ Stud* 261 at 269.
- Harijanti, u. D; Lindsey, T. (2006). Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court. *Int J Const Law*, 4(1), 138-139.
- Horowitz, D. L. (2013). *Constitutional Change and Democracy in Indonesia, Problems of international politics*. New York: Cambridge University Press.
- Hosen, N. (2010). Emergency Powers and the Rule of Law in Indonesia. *Emerg Powers Asia Explore Limits Leg*, 267-268.
- Ismail, F. (1996). Pancasila as the sole basis for all political parties and all mass organizations: an account of Muslims' responses. *Stud Islam*, 3(4), 2.
- Kompas, K. C. (2014). *Kompas*. Diambil kembali dari Batalkan Pilkada Tak Langsung, Presiden SBY Terbitkan 2 Perppu!: <https://nasional.kompas.com/read/2014/10/02/21435921/Batalkan.Pilkada.Tak.Langsung.Presiden.SBY.Terbitkan.2.Perppu>
- Kundu, A. (1994). The Indian Armed Forces' Sikh and Non-Sikh Officers' Opinions of Operation Blue Star. *Pac Aff*, 67(1), 46-66.
- Lanti, I. G. (2002). Indonesia: The Year of Continuing Turbulence. *Southeast Asian Aff*, 111-116.
- Manderson, L.S.W; Tomlinson, M. (2012). *Flows of Faith: Religious Reach and Community in Asia and the Pacific*. Dordrecht: Springer Netherlands.
- Mietzner, M. (2009). *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation*. Institute of Southeast Asian Studies.

- Miller, M. A., & Feener, R. M. (2010). Emergency and Islamic Law in Aceh. *Emerg Powers Asia Explore Limits Leg*, 213.
- Morris, J.W.H. (1975). Whose Emergency — India's or Indira's? *World Today*, 31(11), 451.
- Nasution, A.B. (1995). *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-legal atas Konstituante 1956-1959*.
- Nasution, A.B. (2011). *Towards Constitutional Democracy in Indonesia*. Asian Law Centre, Melbourne Law School: The University of Melbourne.
- Osman, M.N. (2010). Reviving the Caliphate in the Nusantara: Hizbut Tahrir Indonesia's Mobilization Strategy and Its Impact in Indonesia. *Terror Polit Violence*, 22(4), 601-616.
- Park, R.L. (1975). Political Crisis in India. *Asian Surv*, 15(11), 996-1007.
- Power, T.P. (2018). Jokowi's Authoritarian Turn and Indonesia's Democratic Decline. *Bull Indones Econ Stud* 307 at 309.
- Rao, R.V. (1987). Mrs. Indira Gandhi and India's Constitutional Structures: An Era of Erosion. *J Asian Afr Stud*, 22(3-4), 156.
- Ricklefs, M.C. (1981). *A History of Modern Indonesia Since C. 1300 to the Present*. London: Macmillan Education UK.
- Robertson, S.F. (1999). Corruption, Collusion, and Nepotism in Indonesia. *Third World Q*, 20(3), 289.
- Sagar, R. (2016). Emergency Powers. *Oxf Handb Indian Const*, 215.
- Salim, A. (2008). *Challenging the Secular State: The Islamization of Law in Modern Indonesia*. Honolulu: University of Hawaii Press.
- Sebastian, L.C. (2003). The Indonesian Dilemma: How to Participate in the War on Terror Without Becoming a National Security State. *Dalam Bali*. Co-Published by World Scientific Publishing Co. and Institute of Defence and Strategic Studies.
- Siddiq, M. (2014). Kegentingan Memaksa Atau Kepentingan Penguasa (Analisis Terhadap Pembentukan Peraturan Pemerintah Pengganti Undang-Undang (PERPPU)). 48(1), 264. Diambil kembali dari <<http://asy-syirah.uin-suka.com/index.php/AS/article/view/87>>

- Singh, P. (2007). "The Political Economy of the Cycles of Violence and Non-violence in the Sikh Struggle for Identity and Political Power: Implications for Indian Federalism. *Third World Q*, 555-562.
- Subekti, V.S. (2007). *Menyusun konstitusi transisi: pergulatan kepentingan dan pemikiran dalam proses perubahan UUD 1945*. Jakarta: Rajawali Pers, RajaGrafindo Persada.
- Telford, H. (1992). The Political Economy of Punjab: Creating Space for Sikh Militancy. *Asian Survey*, 32(11), 969-972.
- The Diplomat. (2019). *Indonesia's Surprisingly Quiet Election*. Taken from The Diplomat: <<https://thediplomat.com/2019/04/indonesias-surprisingly-quiet-election/>>.
- The Jakarta Post. (2017). *The Jakarta Post*. Diambil kembali dari Jokowi signs regulation banning Hizbut Tahrir: <http://www.thejakartapost.com/news/2017/07/11/jokowi-signs-regulation-banning-hizbut-tahrir.html>
- Ulum, M.B., & Hamida, N. A. (2018). Revisiting Liberal Democracy and Asian Values in Contemporary Indonesia. *Const Rev*, 4(1), 111-116.

