




# Urgency of Indonesia's Emergency Regulation According To Perspective Emergency Constitutional Law In Face Pandemic

Masriyani<sup>1\*</sup>, Nazifah<sup>2</sup>, Muhammad Badri<sup>3</sup>, Nella Oktaviany Siregar<sup>4</sup>

<sup>1,2,3,4</sup> Faculty of Law Batanghari Jambi University, Jambi, Indonesia.

 : [masriyani@unbari.ac.id](mailto:masriyani@unbari.ac.id)

Corresponding Author\*

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## Abstract

**Introduction:** Legislation in Indonesia has provided a place for regulation in emergency situations, both at the constitutional and statutory levels. There are inconsistencies, both conceptually and practically in the use of the emergency clause in emergency regulations. Through this paper, the author would like to emphasize need for projection of revamping the laws and regulations related to emergency situation in Indonesia.

**Purposes of the Research:** This study aims to analyze Indonesia's emergency regulation according to perspective of emergency constitutional law of in the face of a Pandemic. Emergency situations they are Emergency State Law regime Article 12 of the 1945 Constitution, the use of Article 22 of the 1945 Constitution of the Republic of Indonesia, and the meaning of other emergencies in accordance with law.

**Methods of the Research:** The research methodology used is normative juridical by approaching the laws and regulations (Statute Approach) and conceptual approach. From the approach to legislation, it aims to find out the rules related to emergency regulations. The legal materials were collected by means of a literature study, then the legal materials were analyzed in a qualitative juridical manner.

**Results of the Research:** Results of his research, emergency option based on constitution which is represented by the phrase state of emergency in Article 12 of the 1945 Constitution gives great powers to emergency authorities, can deviate from democratic procedures in constitution and violate human rights, except for non-derogable rights. Activation of state of danger also results in lack of political and legal oversight.

## 1. INTRODUCTION

National development aims to create a fair and prosperous society both spiritually and materially based on Pancasila and the Constitution of the Republic of Indonesia. As a form of practicing Pancasila, national development must be carried out in all aspects of the life of the nation and state which are organized by the community together with the government. In order for community and government activities to be carried out, of course, the community as the main development actor must be directed, guided and protected by the

government, so the national development goals can be realized with support from the community and government.<sup>1</sup>

Furthermore, Supriyono and Irawan “The Covid-19 pandemic has brought about changes in almost all aspects of life in society. These changes are very evident in several sectors, such as health, education, economy, social, culture and even politics and law”.<sup>2</sup> Starting from the policies are made by the Government to work, study and worship at home using online methods, cases of layoffs (Termination of Employment) for workers by several companies, closing of shopping centers and tourist attractions, including places of worship. The implementation of online learning greatly affects student learning patterns, it is especially students who live in remote areas and have not been supported by adequate telecommunication facilities. With the issuance of Government Regulation Number 21 of 2020 that is concerning Large-Scale Social Restrictions in the Context of Accelerating for Handling of Corona Virus Disease 2019 (COVID-19) which was implemented in various regions, it also had a direct impact on people’s lifestyles which had triggered new problems in the socio-economic life of the community.<sup>3</sup>

In his scientific journal, Jaelani (2021) “explained that with the rapid spread of the COVID-19 virus, the number of positive cases for COVID-19 in Indonesia was higher compared to other countries”.<sup>4</sup> Seeing these conditions, the corona virus disease, apart from causing health effects in every country, also has an impact on the economy, namely weakening the economy in a country, including in this case Indonesia. In addition, this Covid-19 also requires the Indonesian government to take various policies and regulations so that the number of Covid-19 cases does not increase in Indonesia. Chabibi Busrol., Jamallullail, & Irfan “To accelerate the recovery of the COVID-19 outbreak, the Government of Republic Indonesia has appealed to the public with various regulation and circulations. Being aware of government appeal is considered the best way to slow the spread of the virus”.<sup>5</sup>

The government should ensure that all stages must take the right policies in overcoming the crisis due to the Covid-19 disaster which has caused disproportionately large losses to many vulnerable people.<sup>6</sup> Preliminary research (State of the art) regarding Covid-19 from various aspects has been examined as follows: Yuan et al. mention “the association of both outbreaks with wildlife diet in China and proposed suggestions for regulating wildlife conservation and food safety to prevent human exposure to the novel

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<sup>1</sup> M Muslih, Masriyani Masriyani, and Ryanda Putra Pratama, “Pelaksanaan Program Badan Usaha Milik Desa (BUMDes) Di Kecamatan Jambi Luar Kota Kabupaten Muaro Jambi,” *Wajah Hukum* 4, no. 2 (2020): 500-505, <http://wajahhukum.unbari.ac.id/index.php/wjhkm/article/view/269>.

<sup>2</sup> Supriyono Supriyono and Anang Dony Irawan, “Semangat Kebangkitan Nasional Untuk Menghadapi Covid-19 Dalam Konteks Pancasila Dan Konstitusi,” *Jurnal Pendidikan Sosial Keberagaman* 7, no. 2 (2020): 141-148, doi:10.29303/juridiksiam.v7i2.137.

<sup>3</sup> Eskild Petersen et al., “COVID-19 Travel Restrictions and the International Health Regulations—Call for an Open Debate on Easing of Travel Restrictions,” *International Journal of Infectious Diseases* 94 (2020): 88-90, doi:10.1016/j.ijid.2020.04.029.

<sup>4</sup> Muhammad Jaelani, “Peran Gubernur Jambi Untuk Mengontrol Kebijakan Pemerintah Daerah Dalam Menanggulangi Covid 19,” *Wajah Hukum* 5, no. 2 (2021): 582-91, <http://wajahhukum.unbari.ac.id/index.php/wjhkm>.

<sup>5</sup> Busrol Chabibi and Irfan Jamallullail, “Are Government Appeals on Physical Distancing During the Covid-19 Pandemic Effective? An Analysis from Law and Public Policy,” *Journal of Law and Legal Reform* 1, no. 4 (2020): 549-62, doi:10.15294/jllr.v1i4.39890.

<sup>6</sup> Audrey Lebret, “COVID-19 Pandemic and Derogation to Human Rights,” *Journal of Law and the Biosciences* 7, no. 1 (2020): lsa015, doi:10.1093/jlb/lisa015.

virus, including increasing social awareness of hazards in eating wild animals, strengthening legislation on eating and trading of wild animals, improving the standards for food safety, and establishing market supervision mechanism. Regulatory intervention is not only critical for China but also for other countries where wildlife hunting is prevalent to prevent novel virus exposures".<sup>7</sup>

There is flexibility needed to be regulated in the face of abnormal conditions in the constitution. The state does not always run under normal conditions, where all state apparatus function properly according to the ideal state administrative design. There are certain situations where the country is faced with unusual conditions that require a special constitutional approach through emergency regulations.<sup>8</sup>

To understand what is meant by emergency regulations in this paper, the author will form a simple definition. That the emergency regulations here, they are products of legislation that are used to anticipate or respond to emergencies or other urgent needs. So, the legal products in this abnormal situation may activate certain legal statuses or even form a new law.<sup>9</sup>

There are two articles in the constitution those are often considered to be used to deal with abnormal or emergency situations. The first is Article 12 of the 1945 Constitution which reads The President declares a state of danger, the conditions and consequences of a danger state are stipulated by law. This article is known as the article that gave birth to the provisions of Emergency Constitutional Law or Emergency State Law. In addition, the Article 22 from the 1945 Constitution is also known about government regulations in lieu of law which reads In the case of a compelling urgency, the President has the right to stipulate government regulations in lieu of law. Both are often considered as articles that talk about the possibility of the president to issue government regulations in lieu of laws which are also often considered to be used to solve problems that have emergency problems.

Apart from the pros and cons regarding the effectiveness of government policies in dealing with Covid-19, this article will discuss the models of laws and regulations that apply in Indonesia. The author makes at least three classifications of models that have been used by Indonesia in emergency situations, they are; the first is the Emergency State Law regime Article 12 of the 1945 Constitution, the second is the use of Article 22 of the 1945 Constitution of the Republic of Indonesia, and the third is the meaning of other emergencies in accordance with the law.

The author also finds that, there is a paradigm problem in the concept of this emergency regulation. There are inconsistencies, both conceptually and practically in the use of the emergency clause in emergency regulations. Through this paper, the author would like to emphasize the need for the projection of revamping the laws and regulations related to the emergency situation in Indonesia. It is not only to correct misunderstandings in legal theory, but it is also to strengthen checks and balances so that they do not become

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<sup>7</sup> M Zhang et al., "Knowledge, Attitude, and Practice Regarding COVID-19 among Healthcare Workers in Henan, China," *Journal of Hospital Infection* 105, no. 2 (2020): 183–87, doi:10.1080/20964129.2020.1741325.

<sup>8</sup> Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (USA: Oxford University Press, 2006), 23.

<sup>9</sup> Yoav Mehozay, *Between the Rule of Law and States of Emergency: The Fluid Jurisprudence of the Israeli Regime* (USA: State University of New York Press, 2016), 45.

what Rossiter calls a dangerous constitutional dictatorship.<sup>10</sup> Therefore, this article explores the following research questions; How are Indonesia's emergency regulation according to perspective of emergency constitutional law of in the face of a Pandemic?

## 2. METHOD

The research methodology used is normative juridical by approaching the laws and regulations (Statute Approach) and conceptual approach. From the approach to legislation, it aims to find out the rules related to emergency regulations. The legal materials were collected by means of a literature study, then the legal materials were analyzed in a qualitative juridical manner. The problem approach in this study uses a conceptual approach, with an assessment of the supporting literature by legal experts as well as the opinions of experts and the Statute Approach itself which includes the provisions of laws and regulations relating to the themes discussed by reviewing and researching these legal norms.

## 3. RESULTS AND DISCUSSION

### 3.1 State of Emergency According to Article 12 of the 1945 Constitution

Emergency State Law or in other terminology referred to as a state of emergency, is a condition in which the government in a country makes an extraordinary response in addressing the threats faced by a country. The activation of the Emergency State Law 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.<sup>11</sup>

It is called Emergency Law, it is meant to apply in abnormal conditions. Therefore, the norms of emergency law regulation, law enforcement instruments and their formation are different from normal law or may even be contradictory. In an emergency the government can do anything. Carl Schmitt mentioned "in an emergency All is justified that appears to be necessary for a concretely gained success. The need to declare a country in a state of danger or emergency is commonly recognized in situations such as war, economic crisis, mass strikes, epidemics of disease and natural disasters".<sup>12</sup>

Emergency State Law concept from the concept introduced by Carl Smith through State of Exception (Ausnahmezustand). Carl Smith stated that a leader may become a dictator, when his country is in a state of threat, which creates an urgent need to save the sovereignty of a country. However, such behavior must be limited by certain corridors as stated by Herman Sihombing "that the emergency situation is only temporary until the emergency is deemed no longer dangerous".

The constitutional clause related to Emergency Emergency State Law, it is contained in Article 12 of the 1945 Constitution. This article is considered a form of constitutional exception in a state of emergency. Article 12 of the 1945 Constitution states The President declares a state of danger, the conditions and consequences of a danger state are determined by law. This clause gives the President authority to determine a state of emergency as the

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<sup>10</sup> Clinton L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York: Routledge, 2017), 56.

<sup>11</sup> Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992), 89.

<sup>12</sup> Detlev Vagts, "Carl Schmitt's Ultimate Emergency: The Night of the Long Knives," *The Germanic Review: Literature, Culture, Theory* 87, no. 2 (2012): 203-9, doi:10.1080/00168890.2012.675795.

head of state. It gives the President of Indonesia the power to deviate from the law in a constitutional emergency.

The conception of Article 12 from the 1945 Constitution can also be interpreted from the understanding of legislation that was born based on that article. Law Number 6 of 1946 is the first post-independence law that explicitly places Article 12 in the consideration given. This law, which was enacted in Yogyakarta on June 6, 1946, was clearly based on the desire to make regulations in order to ensure the safety of the country from the threat of danger in the form of attack, danger of attack, rebellion or rioting, so that it was feared that the civilian government would not be able to carry out its work, or natural disasters. In another aspect research by Roojin Habibi et al. (2020) meaning “with findings First, under Article 43.2, countries cannot implement additional health measures exclusively as a precaution but must rather ground their decision making in scientific principles, scientific evidence, and advice from WHO.<sup>13</sup> Second, under Article 43.1, any additional health measures implemented by countries shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives, Third. The most importantly, Article 3.1 strictly requires all additional health measures to be implemented with full respect for the dignity, human rights and fundamental freedoms of persons, which in turn must reflect the international law principles of necessity, legitimacy, and proportionality that govern limitations to and derogations from rights and freedoms”.

Emergency activation also has a number of limitations within the scope of human rights. Although, the activation of a emergency state allows for a number of deviations from the fulfillment of human rights, but these deviations are not unlimited. The Constitutional clause has stipulate that there is a cluster of human rights that cannot be reduced under any circumstances. The article 28I paragraph (1) of the 1945 Constitution states that, “there is a prohibition against deviating from the fulfillment of the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right to not be prosecuted on the basis of retroactive law as a human right that cannot be reduced under any circumstances. This prohibition also applies even if emergency activation has been declared”.<sup>14</sup>

The possibility of violations to human rights in an emergency is a common concern. The fundamental question that will arise is regarding to what extent the suspension of Human Rights is relevant to the real emergency threat faced? Therefore, the author considers the need for detailed regulation about the emergency law in the constitution as part of design in human rights protection that needs to be initiated.<sup>15</sup>

The main concept of power exertion in the Danger Situations Act is the attributive granting of power to emergency authorities to shape policy. The author considers that the formation of this policy also includes policies that can deviate from the Constitution and other laws and regulations. Exceptions are policies or actions that violate non-derogable

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<sup>13</sup> Roojin Habibi et al., “Do Not Violate the International Health Regulations during the COVID-19 Outbreak,” *The Lancet* 395, no. 10225 (2020): 664–66, doi:10.1016/S0140-6736(20)30373-1.

<sup>14</sup> Herlambang Perdana Wiratraman, “Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights?,” *Jseahr* 4, no. 1 (2020): 306–34, doi:10.19184/jseahr.v4i1.18244.

<sup>15</sup> Chang-fa Lo, “The Missing Operational Components of the IHR (2005) from the Experience of Handling the Outbreak of COVID-19: Precaution, Independence, Transparency and Universality,” *Asian Journal of Wto & International Health Law and Policy* 15, no. 1 (2020): 1–26, <http://journal.uad.ac.id/index.php/index/oai>.

rights, as determined by the Constitution. So, the focus is on granting general and broad powers of emergency law enforcement (*blanco mandaat*).

### 3.2 The urgency of forcing according to Article 22 of the 1945 Constitution

Article 22 of the 1945 Constitution states 1) In the event of a compelling emergency, the President has the right to stipulate a government regulation in lieu of a law, 2) The government regulation must obtain the approval of the House of Representatives in the next trial. This constitutional clause is the basis for granting the President the authority to issue regulations at the level of a law without involving the parliament. The power to form legislation in lieu of law is common in various countries, especially in countries with presidential systems. In various literatures, this type of regulation is known by various names, including the so-called constitutional decree authority or some writers call it executive decree authority or presidential decree authority.

In countries with presidential systems, this type of power is classified in the presidential power group in the legislative field (President's legislative power), they are the presidential power which is exercised in the legislature. In addition to the presidential decree or emergency decree, powers that can be grouped in this type include the presidential power to veto the legislative process in parliament, the power to propose initiatives in draft laws in certain fields, the power to determine priorities for discussing draft laws, holding a referendum. or plebiscite, and special powers in the formation of the state budget.<sup>16</sup>

The legitimacy for the president to issue this type of regulation is in the phrase matters of coercive urgency. Bagir Manan & S. Dwi Harijanti (2017) mention that emergency referred to in Article 22 of the 1945 Constitution with a urgency of coercion is very real and is even called diametrically different from a state of danger according to Article 12 of the 1945 Constitution. This opinion is based on a semantic study of the origin of phrase and traces the emergence of phrase in the 1945 Constitution, the 1949 RIS Constitution, the 1950 Constitution and Article 93 of the Indische Staatsregeling (constitutional regulations during the Dutch East Indies era).<sup>17</sup>

The urgency of forcing does not have to refer to a dangerous situation (dangerous threat). In simple terms, the phrase forced urgency means a condition interpreted by the President as the need to make arrangements on the one hand and on the other hand, it is the limited time to carry out the usual legislative process. In various countries, similar phrases are also found as the reason for the president to issue a government regulations in lieu of law or Constitutional decree authority (CDA). In France for instance, uses the term 'état de siège' to refer to a state of danger and the term 'emergency powers' or 'pouvoirs exceptionnels' to refer to emergency powers in a state of danger.<sup>18</sup> In Brazil there are phrases of relevance and urgency, and in Argentina there are phrases of exceptional circumstances

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<sup>16</sup> J Mark Payne, Daniel Zovatto, and Fernando Carrillo Flórez, *Democracies in Development: Politics and Reform in Latin America*, vol. 1 (Washington: InterAmerican Development Bank, 2002), 45.

<sup>17</sup> Bagir Manan and Susi Dwi Harijanti, "Artikel Kehormatan: Peraturan Pemerintah Pengganti Undang-Undang Dalam Perspektif Ajaran Konstitusi Dan Prinsip Negara Hukum," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4, no. 2 (2017): 222-43, doi:10.22304/pjih.v4n2.a1.

<sup>18</sup> Filip G Bozinovic, "Finding the Limits of France's State of Emergency," in *Claremont-UC Undergraduate Research Conference on the European Union*, vol. 1, 2017, 13-31, doi:10.5642/urceu.201701.04.

or necessity and urgency. Interestingly, this phrase can be equated with the phrase about the urgency of forcing in Indonesia. The word relevance in Brazil or necessity in Argentina can be interpreted as a need because of conditions that require regulation and urgency associated with the limited time for the ordinary legislative process in parliament.

In Indonesia, guidelines for the use of phrase compelling urgency for now, it has been given by the Constitutional Court. Based on the Court's considerations (*ratio decidendi*) in the Constitutional Court's Decision No. 138/PUU-VII/2009, there are three conditions as parameters for the existence of urgency that forces the President to stipulate a government regulations in lieu of law, they are: (i) the existence of circumstances, it is an urgent that need to resolve legal issues quickly based on the Act; (ii) the required law does not yet exist, resulting in a legal vacuum, or there is a law but it is not sufficient; (iii) 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.

With the concept mentioned above, it can be said that the crunch of coercion is not a reason to activate emergency law. The applicable legal system is the law under normal circumstances. The use of government regulations in lieu of law does not cause the state situation to be in an emergency or dangerous situation. However, because the position of government regulations in lieu of law is equal to the law, so long as it is regulated differently, the provisions in the government regulations in lieu of law may override the law. The constitution which has a higher position than the government regulations in lieu of law and the law may not be ruled out by the provisions contained in the government regulations in lieu of law.

Therefore, the guarantee of human rights and the rights of citizens contained in the Constitution must still be upheld, it should not be ruled out by the implementation of the norms regulated by government regulations in lieu of law. The guarantee of worship freedom should not be violated by basing it on government regulations in lieu of law. The guarantee of equal treatment before law, it is also a part that cannot be eliminated or delayed by the enactment of government regulations in lieu of law, including the immunity mechanism that frees the implementers of government regulations in lieu of law from the object of supervision from the General Court or State Administrative Court. The consequences of government regulations in lieu of law must be formed based on the constitution, it must not conflict and apply in a normal legal system, so a government regulations in lieu of law is an object of constitutional review. In the author's opinion, the Constitutional Court can examine government regulations in lieu of law against the basic law.

### **3.3 Other Emergencies based On Law**

In addition to the two models above, it was found, that there were other emergency concepts regulated by law in the prevailing laws and regulations in Indonesia. Interestingly, there are several laws that have the concept of emergency and also use the term emergency, but do not place Article 12 of the 1945 Constitution as a consideration in the law. Some of the laws that have emergency characteristics are: 1) Law Number 24 of 2007 that concerns Disaster Management, 2) Law Number 7 of 2012 concerning Handling of Social Conflicts, 3) Law Number 6 of 2018 concerning Health Quarantine , and 4) Law Number 9 of 2016 concerning Prevention and Handling of Financial System Crisis.

These four laws do not refer to Article 12 of the 1945 Constitution as the basis for determining status with certain emergency characteristics. Thus, the enforcement of four laws does not result in the enactment of emergency law, the prevailing legal system is a normal legal system. However, each of these laws recognizes the diction of an emergency status. For example, the Disaster Management Law recognizes the diction of the national disaster emergency status, the Health Quarantine Law recognizes the Public Health Emergency Status and the Social Conflict Management Law recognizes the National/Local Conflict Status.

The Covid-19 pandemic brings new challenges to people around the world, including in Indonesia. How countries prevent and prevent the spread of the virus is much broader. The Covid-19 pandemic in Indonesia is still an unsolved problem. As a result of the Covid-19 pandemic and threatening health and the economy, government policies are also exacerbated. The Covid-19 pandemic provides an impetus for a country to take inefficient policies to break the Covid-19 chain.<sup>19</sup>

Another law that also has specificities regarding emergencies is Law Number 6 of 2018 concerning Health Quarantine. This Law gives the authority to the President for determining the status of a Public Health Emergency. Although, it does not use Article 12 of the 1945 Constitution as a consideration, this Law still uses the emergency clause as the terminology for the use of this law.

It is stated in Article 1 point 2 of the Health Quarantine Law that “a Public Health Emergency is an extraordinary public health incident marked by the spread of infectious diseases and/or events caused by nuclear radiation, biological pollution, chemical contamination, bioterrorism, and food that causes health hazard and has the potential to spread across regions or across countries”.

The Health Quarantine Law provides an opportunity for a provisional law to be enforced in an emergency. With the argument of public interest in the form of public health, the government can restrict the activities of people, containers, transportation means, and goods deemed capable of transmitting disease or preventing other contamination. Such restrictions are known as the concept of quarantine.<sup>20</sup>

There are three types of quarantine known in this Law. The first is Home Quarantine, which means the restriction of occupants in a house and its contents suspected of being infected with a disease and/or contaminated in such a way as to prevent the possibility of spreading disease or contamination. Second, Hospital Quarantine is the restriction of a person in a hospital suspected of being infected with a disease and/or contaminated in such a way as to prevent the possibility of spreading the disease or contamination. While the third is Regional Quarantine, which is the limitation of population in an area including the entrance area and its contents suspected of being infected with a disease, and/or contaminated in such a way as to prevent the possibility of spreading disease or contamination.<sup>21</sup>

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<sup>19</sup> Lucas Bergkamp, “State Liability for Failure to Control the COVID-19 Epidemic: International and Dutch Law,” *European Journal of Risk Regulation* 11, no. 2 (2020): 343–49, doi:10.1017/err.2020.21.

<sup>20</sup> Fradhana Putra Disantara, “Tanggung Jawab Negara Dalam Masa Pandemi Covid-19,” *JCH (Jurnal Cendekia Hukum)* 6, no. 1 (2020): 48–60, doi:10.33760/jch.v6i1.262.

<sup>21</sup> Fradhana Putra Disantara, “The Large Scale Social Restrictions Policy for Handling the COVID-19 Pandemic,” *Jurnal Pembaruan Hukum* 7, no. 2 (2020): 128–41, doi:10.26532/jph.v7i2.9429.



The implementation of quarantine must first require a stipulation from the Central Government. In practice, the determination of the Public Health Emergency Status is carried out by the President in the form of a Presidential Decree. There is no time limit on how long the minimum or maximum duration of this Public Health Emergency Status will be.

After the President has determined the status of Public Health Emergency, the Minister of Health will stipulate regional quarantine and/or large-scale social restrictions. This stipulation by the Minister will provide legality to close certain areas in Indonesia that are considered to have the potential to endanger public health. The authority granted by the Health Quarantine Law is the authority to restrict the movement of people and goods, to close areas and borders or to detain ships or airplanes deemed to be dangerous to public health.

Due to increasing cases significantly happened in several regions, the central government chose to implement the policy of Large-Scale Social Restrictions or Pembatasan Sosial Berskala Besar (hereinafter: PSBB). This policy is literally a slightly different from other countries, where others use the term "Lockdown". Countries, like China, which enforced lockdowns were able to suppress COVID-19 spread transmitted inside the country dropped to zero about eight weeks after the major government quarantine of some 60 million people in the province of Hubei.<sup>22</sup> Currently, with the virus epicenter lockdown in Wuhan expected to be lifted on 8 April, 2020, countries around the world will be watching closely to see if infections are rising again. Other countries that implement this policy are, Italy, India, Britain and Spain.<sup>23</sup>

### 3.4 Government Emergency in Handling the Covid-19 Pandemic

WHO as a global public health body is central to the establishment of health norms a international level.<sup>24</sup> Established in the aftermath of World War II in 1948, WHO is guided by a deep, collective awareness of the worldwide need for improvement in health.<sup>25</sup> Article 1 of the WHO Constitution explicitly recognizes that the purpose of the organization shall be the attainment by all peoples of the highest possible level of health. Upon the organization establishment, Member States granted WHO an unparalleled lawmaking power to ensure the agency would fulfil its constitutional mandate. Specifically, WHO Constitution and the United Nations Charter establishes the organization as the specialized health agency within the United Nations system, tasked with coordinating and responding to international health activities.

The three emergency concepts in the current laws and regulations have their own unique characteristics. It gives rise to the range of emergency arrangements of each legislation which are also different in resolving different scopes of problems. Therefore, it is needed for the accuracy of policy makers to identify the type of emergency that occurs and

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<sup>22</sup> Hien Lau et al., "The Positive Impact of Lockdown in Wuhan on Containing the COVID-19 Outbreak in China," *Journal of Travel Medicine* 27, no. 3 (2020): 1-14, doi:10.1093/jtm/taaa037.

<sup>23</sup> Mardiansyah Mardiansyah, "World Health Organization Policy Facing the Spread of COVID-19 in Indonesia," *Jurnal Hukum Novelty* 12, no. 1 (2021): 1-13, <https://pesquisa.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-1645612>.

<sup>24</sup> Muh Hasrul, "Aspek Hukum Pemberlakuan Pembatasan Sosial Berskala Besar (Psbb) Dalam Rangka Penanganan Corona Virus Disease 2019 (Covid-19)," *Jurnal Legislatif* 3, no. 2 (2020): 385-98, doi:10.20956/jl.v3i2.10477.

<sup>25</sup> Tsung-Ling Lee, "Global Health in a Turbulence Time: A Commentary," *Asian Journal of Wto & International Health Law and Policy* 15, no. 1 (2020): 27-60, <https://ssrn.com/abstract=3563393>.

what policy space is needed to deal with the emergency situation. This conformity will make emergency handling policies focus on the problems faced in the hope that the emergency will end soon. One of the important principles in an emergency is the provisional principle which contains a message that an emergency must be carried out within a certain time limit, if possible the emergency must end immediately, it does not need to take a long time.

The longer duration of an emergency generally raises basic concerns. It is not only worrying about the birth of excess access, they are the emergence of casualties, restrictions on rights and abuse of power.<sup>26</sup> But also extends to the reduction of democratic procedures and the fulfillment of human rights. World experts and activists have sounded an early warning, lest the enactment of laws in the current state of emergency of the Covid-19 outbreak, for example, lead to a long-term decline of civil liberties and constitutional democracy. In particular, they worry that many leaders in various countries may not easily give up the power they have just gained in this crisis, and will continue to use it so that restrictions on civil liberties will become the new normal.

Tom Ginsburg and Mila Versteeg in their writings in the Harvard Law Review Blog do classification the legal scheme models that become the choice of countries in the world in implementing emergencies in the face of Covid-19 outbreak. Ginsburg and Versteeg make 3 models of emergency choices for countries in the world. First, the declaration of a state of emergency under the constitution, they are the countries that choose to carry out emergency activation based on the constitution. Second, the use of existing legislation dealing with public health or national disasters (legislative model), they are the countries that choose to use legal instruments at the statutory level, it is especially those related to public health and national disasters. Third, the passing of new emergency legislation, they are the countries that choose to form new laws specifically for handling the Covid-19 pandemic.

In the analysis was presented by Ginsburg and Versteeg, if each of these emergency options has implications for democracy and freedom in each country. The emergency option based on the constitution (the first option) is similar to the provisions of Danger Condition in Article 12 of the 1945 Constitution. Giving great powers to the emergency authorities, can carry out various kinds of legal and human rights deviations with limited supervision. The same problem as in Indonesia is also found in various countries, it is the concept of an emergency, it is more emphasized on emergency due to security disturbances. There are very few countries whose constitution explicitly mentions disasters, especially those caused by the spread of disease, as a reason for imposing a state of emergency. As a result, the use of this type of emergency is less focused and tends to potentially hamper freedom and democracy.

The classification of emergency law schemes according to law (the second option) was actually borrowed by Ginsburg and Versteeg from the ideas presented by Ferejohn and Pasquino regarding the legislative model. Ferejohn and Pasquino argue that in developed democracy countries in an emergency, it is not necessary to always activate an emergency based on the constitution. In fact, the emergency approach based on law is preferred. Ferejohn and Pasquino's approach which emphasizes the large role of the legislature in an emergency is considered interesting because so far the concern that has always been a

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<sup>26</sup> Scott P Sheeran, "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law (Legal Doctrine, and Politics)* 34, no. 3 (2012): 491-99, <https://repository.law.umich.edu/mjil/vol34/iss3/1>.

concern is the magnitude of the executive power in an emergency that performs the role of constitutional dictatorship as mentioned by Clinton Rossiter.<sup>27</sup>

While the third option, that is implementing new legislation, it is considered an emergency option when the existing laws are deemed insufficient to address the problem of the Covid 19 outbreak. The choice of new legislation may be appropriate to define the type of emergency faced, but this type of legislation has several weaknesses. New legislation in the event has been an emergency situation, it is usually minimal participation because it is discussed and decided during the pandemic, so the activities such as public debate and absorption of aspirations are relatively very limited due to pandemic barriers. In addition, another important weakness is the regulation that was formed in the midst of an emergency, it usually gives great powers to the emergency authorities by giving them the freedom to take extraordinary steps that may deviate from democratic procedures and the fulfillment of human rights.

Fulfillment of human rights. If you look at the choices of policy makers in Indonesia to face the Covid-19 pandemic, the dominant choice is the legislative model, those are carrying out emergency activation based on the law. This choice was marked by the issuance of Presidential Decree Number 11 of 2020 that is concerning the Determination of Corona Virus Disease 2019 (Covid-19) Public Health Emergency which was an activation of Law Number 6 of 2018 concerning Health Quarantine which was then followed by the issuance of Presidential Decree Number 12 of 2020 that is concerning Determination of Non-Natural Disasters for the Spread of Corona Virus Disease 2019 (Covid-19) as National Disasters which is the activation of Law Number 24 of 2007 that is concerning Disaster Management.

The activation of these two laws specifically wants to deal with emergencies in the perspective of public health and non-natural disasters in line with what Ginsburg and Versteeg call the use of existing legislation dealing with public health or national disasters or what Ferejohn and Pasquino call the legislative model. The choice of this legal scheme does not cause the emergency authority to become very large and fast in executing policies, but the law-based emergency approach makes the emergency policy perspective more specific to public health and disasters because the law on public health and disaster is used. Therefore, the powers of the emergency authorities are focused and very limited, and all provisions in the constitution can still work to protect the rights of citizens.<sup>28</sup>

With this policy choice, it should not be found that the basic rights of citizens will be restricted. Even if there are residents who feel that their rights have been violated, they can still apply for their fulfillment either through legal or political channels. In its various provisions, there are indeed restrictions on the expression of citizens in carrying out their activities, but they are not directly related to the material freedom of expression.<sup>29</sup> The restrictions imposed are more on technical meetings and the movement of citizens to prevent transmission. Limiting the mechanism of community meetings in direct meeting forums does not mean that there is a ban on discussion materials, nor does the restriction of

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<sup>27</sup> John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (2004): 210–39, doi:10.1093/icon/2.2.210.

<sup>28</sup> Johannes Thome et al., "The Impact of the COVID-19 Outbreak on the Medico-Legal and Human Rights of Psychiatric Patients," *European Psychiatry* 63, no. 1 (2020): 1–2, doi:10.1192/j.eurpsy.2020.58.

<sup>29</sup> Ruqaiyah Yearby and Seema Mohapatra, "Law, Structural Racism, and the COVID-19 Pandemic," *Journal of Law and the Biosciences* 7, no. 1 (2020): 1–20, doi:10.25041/fiatjustitia.v15no1.2101.

carrying out activities in places of worship mean that there are restrictions on online studies and restrictions on study materials.<sup>30</sup>

The policy for handling Covid-19 in Indonesia does not choose to do the activation an emergency situation based on Article 12 of the 1945 Constitution, which means the implementation of an emergency legal system with various powers and minimal supervision as mentioned above. The discourse on the activation of Article 12 of the 1945 Constitution had previously surfaced through the emergence of debates about the imposition of Civil Emergency which was the lightest level in Law 23/prp/1959. However, as described above, the Civil Emergency material is not suitable for a pandemic situation which is a non-security emergency.<sup>31</sup>

The choice to avoid emergency declarations based on the Constitution in various countries has similar reasons to Indonesia. The powers of emergency rulers will be enormous, more freedom of citizens can be deviated with limited political and legal control. Therefore, the potential for deviation by the emergency authorities is wide open. Constitutional emergency declarations in democratic countries tend to be reserved as safety valves, if the activation of statutory emergencies alone is not sufficient to deal with crises.<sup>32</sup> In the classification carried out by Ginsburg and Versteeg, the choice of emergency policy in Indonesia in dealing with Covid-19 is also the passing of new emergency legislation. The issuance of government regulations in lieu of law Number 1 of 2020 that is concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in Facing Threats That Endanger the National Economy and/or Financial System Stability and government regulations in lieu of law Number 2 of 2020 that is concerning The third amendment to Law Number 1 of 2015 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2014 concerning the Election of Governors, Regents, and Mayors to become Laws can be analyzed in this framework. These two statutory-level regulations were indeed issued during a pandemic and related to the pandemic and it can also be seen that the great powers given to them by their makers according to Ginsburg and Versteeg's analysis. The formation of government regulations in lieu of law Number 1 of 2020 in an emergency period within the framework of Ginsburg and Versteeg's analysis will give great power to the executive power and indeed this government regulations in lieu of law gives the government the power to form large state finances with limited control, much different from that found in normal times.

#### 4. CONCLUSION

Laws and regulations in Indonesia have provided a place for regulation in emergency situations, both at the constitutional and legal levels. Each of these emergency law schemes has its own character. The emergency option based on the constitution which is represented by the phrase state of emergency in Article 12 of the 1945 Constitution gives great powers to the emergency authorities, can deviate from democratic procedures in the constitution and violate human rights, except for non-derogable rights. In addition to the phrase state of emergency, the constitution also has other instruments in an emergency, which is

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<sup>30</sup> Ibid.

<sup>31</sup> M. KENZA Radhya E.A. and Ersya Dwi Nurifanti, "Umbrella Act as a Solution to Overcome Conflicting Regulations During the Covid-19 Pandemic," *Yuridika* 36, no. 3 (2021): 709–20, doi:10.20473/ydk.v36i3.30382.

<sup>32</sup> Anna Jonsson Cornell and Janne Salminen, "Emergency Laws in Comparative Constitutional Law—the Case of Sweden and Finland," *German Law Journal* 19, no. 2 (2018): 219–50, doi:10.1017/S2071832200022677.

represented by the phrase urgency of coercion in Article 22 of the 1945 Constitution. This phrase implies that the president has the power to form regulations at the level of law. In a situation where the president considers it necessary to regulate in an urgent situation and it is not possible to do so with the usual legislative process, the means of interpreting the urgency of coercion can be used. The powers of the emergency authorities have become more focused on the type of emergency and not many democratic procedures and the fulfillment of human rights have been violated. In the face of Covid 19, it appears that this emergency option has become the choice of the Government of the Republic of Indonesia so that there should be no unnecessary repression of freedom of expression in handling Covid-19 in Indonesia.

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