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The Ratio Legis of Government Regulation in Lieu of Law as Emergency Legislation

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ABSTRACT

This study aims to examine the hierarchy, the meaning of urgent necessity, and the substance of Government Regulations in Lieu of Law (Perppu) from the perspective of emergency constitutional law. This study contributes to efforts to emphasise the importance of regulatory reform regarding the formulation of legislation, which is necessary to: First, clarify the hierarchy of Perppu within the legal system, as it is inappropriate to equate Perppu-as emergency legislation-with Law, which is legislation under normal conditions. Therefore, Perppu need not be included in the legislative hierarchy. Secondly, to clarify the meaning of urgent necessity as a prerequisite for the President to issue a Perppu. Thirdly, to clarify the substantive content of Perppu. This research is a normative legal study employing a juridical, historical, and conceptual approach. The findings indicate that the current regulation of Perppu does not fully reflect the concept of emergency legislation, particularly regarding hierarchy and substantive content. Legal reform is required to strengthen the position of the Perppu as an emergency legislation within Indonesia's constitutional system, so that its use can be strictly and clearly limited and issued only when the state is in a state of emergency. The recommendations of this study are to reconstruct the hierarchy, clarify the meaning of 'urgent need', and define the content of the Perppu so that it meets the requirements of emergency legislation.

Introduction

Government Regulation in Lieu of Law (Perppu), a type of legislation that is always controversial, is an interesting object of research in the context of Indonesian legislation.[1] One crucial issue related to Perppu is the strong tradition of understanding that states "the content of the Perppu is the same as the content of the Law" so that what may be regulated by Law is considered to be regulated by

[1] Rohadhatul Aisy, Ngboawaji Daniel Nte, and Windiahsari, "The Relationship Between Law and Politics in the Government Regulation in Lieu of Law (Perppu) on Social Organizations," *Indonesian Journal of Advocacy and Legal Services* 6, no. 2 (September 2, 2024): 269–92, https://doi.org/10.15294/ijals.v6i2.30576.

Perppu,[2] even though in the 'genus' of legislation, Perppu and Law are two different 'species' that have their own functions and characteristics as a derivation of the doctrine of constitutional dualism which necessitates that in a country's constitution there are always regulatory norms that apply in normal constitutional conditions and regulatory norms that (only) apply in emergency or abnormal constitutional conditions.[3] Another crucial issue is the starting point and benchmark for "compelling urgency" as a condition for determining and implementing Perppu.[4] In this simple study, the author attempts to reconstruct the understanding of hierarchy, the meaning of compelling urgency, and the content of Perppu, considering that after the amendment to the 1945 Constitution of the Republic of Indonesia (UUD 1945), there was a significant increase in the number of Perppu, especially when compared to the New Order era.[5] According to Jeremy Waldron, the importance of discussing Legislation is an effort to increase the dignity of the Government and respect for legal sources.[6]

The Perppu issued by the President during the Old Order (Orde Lama) regime to the reform era demonstrates that every state or government administration faces the possibility of a constitutional crisis. Resolving such crises requires extraordinary measures, whether through legislation or specific legal actions. Constitutional law experts refer to these as "extraordinary rules" or "extraordinary measures." They are considered extraordinary because they deviate from the prevailing general order, even though under normal circumstances, such actions and regulations are prohibited.[7]

Given that crises can occur at any time, require extraordinary measures, and have the potential to lead to arbitrary action, various state systems regulate matters related to such emergencies. In a country with a written constitution, various important instruments are provided for this, including provisions regarding state

[2] Hasannudin Hidayat, Sunny Ummul Firdaus, and Isharyanto, "Democratic Backsliding through the Abuse of Emergency Powers: An Analysis of Government Regulation in Lieu of Law on Mass Organizations and Job Creation during Joko Widodo's Presidency," in *Proceedings of the International Conference on Democracy and National Resilience 2025 (ICDNR 2025)* (Paris, France: Atlantis Press, 2025), 53–66, https://doi.org/10.2991/978-2-38476-529-4_6.

[3] John Ferejohn and Pasquale Pasquino, "The Law of Exception: A Typology of Emergency Powers," *International Law Journal of Constitutional Law* 2, no. 2 (2004): 210–39, https://doi.org/10.1093/icon/2.2.210.

[4] William Feldman, "Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege," *Cornell International Law Journal* 38, no. 3 (2025): 1021–48.

[5] Muwaffiq Jufri et al., "Standardisation of the Legislation as a Follow-Up to the Constitutional Court's Decision on Judicial Review of Omnibus Law," *Jurnal Konstitusi* 21, no. 3 (September 1, 2024): 366–91, https://doi.org/10.31078/jk2132.

[6] Jeremy Waldron, "The Rule of Law and the Role of Courts," *Global Constitutionalism* 10, no. 1 (March 15, 2021): 91–105, https://doi.org/10.1017/S2045381720000283.

[7] András Jakab, "German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse," *German Law Journal* 7, no. 5 (2006): 453–77, https://doi.org/10.1017/S207183220000479X.

officials or institutions authorized to address abnormal conditions and restore normalcy.[8]

The object the Author discusses in this research is Perppu; more specifically, it examines their hierarchy, the meaning of 'urgent needs,' and their contents. Considering that this research highlights Perppu as emergency legislation, but regarding the hierarchy, the meaning of 'urgent need,' and the content of Perppu, they do not meet the requirements for emergency legislation.

The first problem is the hierarchy of legislation, because under Article 7, Paragraph (1), Letter c, of Law Number 12 of 2011 concerning the Formation of Legislation, Perppu are equal to Laws. According to Widodo Ekatjahjana and Totok Sudaryanto, the regulation equating Perppu to Laws is wrong for two reasons. First, seen from the name, and the institution that created it was made unilaterally by the government, and is not a legal product of the legislature, so it cannot be equated or equalized with Laws. Second, Perppu have special public law characteristics, including public accountability, so they must be approved by the House of Representatives.[9]

Second, the Revocation of Article 52, Paragraph (5), of the Law on the Establishment of Legislation (UU P3): if it does not receive DPR approval, the Perppu must be revoked, as in Article 22 of the 1945 Constitution. According to J.C.T. Simorangkir, there are three reasons why the DPR does not approve Perppu: (a) because of differing opinions regarding the existence of the factor "in the case of compelling emergencies"; (b). because they cannot agree on the contents of the articles; (c) because of a combination of (a) and (b).[10] The word "must be revoked" in the Law on the Establishment of Legislation contains problems. Who or what body will carry out the revocation; what form the revocation will take; and what about Perppu that does not receive DPR approval but is still allowed to apply. The Perppu No. 1 of 1999 concerning the Human Rights Court was once rejected by the DPR, but the President did not revoke it. According to Yusril Ihza Mahendra, the government's decision to allow Perppu Number 1 of 1999 to stand was based on the consideration of preventing a legal vacuum before the enactment of Law Number 26 of 2000 concerning the Human Rights Court, as the draft Human Rights Court Law was being discussed by the government and the DPR at that time.[11]

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[8] Novendri M Nggilu et.al, "Constitutional Crisis: Intensifying Disobedience to the Decisions of the Indonesian Constitutional Court," *Revista Chilena de Derecho* 50, no. 2 (2023): 115–32, https://doi.org/10.7764/R.502.5.

[9] Widodo Ekatjahjana dan Totok Sudaryanto, *Sumber Hukum Tata Negara Formal Di Indonesia: Kilas Balik Ketetapan MPR RI No.III/MPR/2000, Perubahan UUD 1945, Kekuasaan Kepala Negara Dan Pemerintahan, Maklumat Presiden 28 Mei 2001 Dan Ide Dekrit Presiden Abdurrahman Wahid* (Bandung: PT. Citra Aditya Bakti, 2001).

[10] J. C. T Simorangkir, *Hukum Dan Konstitusi Indonesia 2* (Jakarta: Gunung Agung, 1986), 109-113.

[11] Yusril Ihza Mahendra, "Problematika Sekitar PERPPU," in *70 Tahun Prof. Dr. Harun Alrasid, Integritas, Konsistensi Seorang Sarjana Hukum*, ed. Andi M. Asrun dan Hendra Nurtjahjo (Jakarta: PSHTN FH UI, n.d.). 70.

https://doi.org/10.71239/jicl.v3i1.230

Daniel Yusmic P. Foekh criticized the revocation of Perppu, which are similar to the revocation of ordinary laws. He argued that Laws and Perppu cannot be equated. Laws are created by mutual agreement, are discussed together, then enacted and ratified by the President. Perppu, on the other hand, are unilaterally enacted, immediately enacted, and come into effect. Therefore, in Legislation, there must be a theory for classifying regulations into two types: those created under normal circumstances and those created under emergency circumstances. Laws are born when the State is in a normal state, and Perppu are born when the State is in a state of emergency. Laws and Perppu cannot be equated.[12]

The revocation of Perppu, which is the same as the revocation of ordinary laws, is further strengthened by Constitutional Court Decision Number 138/PUU-VII/2009, in which the Constitutional Court stated that it has the authority to review Perppu against the 1945 Constitution. The author disagrees with this Decision because Article 22 of the 1945 Constitution states that Perppu are the President's subjective authority, and oversight lies with the DPR, which has the authority to approve or disapprove Perppu. Furthermore, the author believes that in this Decision, the Constitutional Court seeks to expand its authority, even though Article 24C, Paragraph (1), of the Constitution already limits the Constitutional Court to only four authorities and one obligation.

Similarly, regarding the contents of the Perppu, President Joko Widodo (Jokowi) once issued Perppu Number 1 of 2016 concerning Child Protection. This Perppu has been approved by the DPR and stipulated as Law Number 17 of 2016 concerning Child Protection. The substance of this Perppu regulates chemical castration as a sanction for perpetrators of child sexual abuse.[13] The author does not object to this sanction; however, if the country wishes to impose it, it should be stipulated in a law, not a Perppu.

This study aims to fill a gap in the research, which has not been widely discussed by previous researchers, who have addressed only the President's authority to issue Perppu and the limitations on Perppu's validity period, as demonstrated by the research conducted by: First, Siti Marwiyah, whose findings indicate that the President, as head of state, is constitutionally authorized to declare a state of emergency by issuing a Perppu.[14] Second, an article by Reza Fikri Febriansyah. This study states that Perppu is a type of legislation that must exist within the legal system of the Republic of Indonesia, a logical consequence of the adoption of a presidential system of government in Indonesia, a system that has been consistently maintained

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[12] Daniel Yusmic P. Foekh, *Perpu Dalam Teori Dan Praktik* (Depok: Rajawali Pers, 2021), 37, https://www.rajagrafindo.co.id/produk/perpu-dalam-teori-dan-praktik-dr-daniel-yusmic-p-foekh/.

[13] Muhammad Rinaldy Bima, "Hal Ikhwal Kegentingan Yang Memaksa Sebagai Landasan Pembentukan Peraturan Pemerintah Pengganti Undang-Undang," *Jurnal Ius: Kajian Hukum Dan Keadilan* 7, no. 1 (2019): 97–106, https://doi.org/10.29303/ius.v7i1.595.

[14] Siti Marwiyah, "Kewenangan Konstitusional Presiden Terhadap "Hal Ihwal Kegentingan Yang Memaksa"," *Masalah-Masalah Hukum* 44, no. 3 (2015): 296–304, https://doi.org/10.14710/mmh.44.3.2015.296-304.

https://doi.org/10.71239/jicl.v3i1.230

throughout the history of the Indonesian constitution.[15] Third, an article by Lutfil Ansori. This study finds that Perppu issued during a state of emergency must explicitly define their validity period to ensure that their existence does not create legal uncertainty.[16]

Fourth, an article by Qurrata Ayuni, Satya Arinanto, Fitra Arsil, and Maria Farida Indrati. This paper analyzes the problems caused by states of emergency in Indonesia. The focus is on explaining the meaning of a state of emergency under Article 12 of the 1945 Constitution. This paper discusses how Indonesia determines a state of emergency and how the checks and balances related to it are implemented.[17] Fifth, an article by Cipto Prayitno. This research focuses on the limitations of Perppu, which aims to protect the constitutional rights of the people as stipulated in the 1945 Constitution.[18]

This research's novelty addresses the hierarchy, meaning of compelling urgency, and the content of Perppu, which are not addressed in the five studies mentioned above. Based on this, this research can be scientifically justified by adhering to the rules and academic ethics required of researchers. The aim of this research is to strengthen the position of the Perppu as an emergency legislation.

Methods

This research is a normative legal study that uses doctrinal methods to analyze the principles and norms of legislation governing the Ratio Legis of Perppu as emergency legislation, from the perspective of emergency constitutional law. There are four approaches used in this research, namely: the statutory regulatory approach, the historical approach, and the conceptual approach.[19]

This legislative approach will examine legislation related to the central theme of this research (Perppu). A historical approach will help the author understand the background of the changes themselves, which can be comprehensively explored and traced through history, specifically the history of Perppu.[20] The conceptual approach

[15] Reza Fikri Febriansyah, "Eksistensi Dan Prospek Pengaturan Perppu Dalam Sistem Norma Hukum Negara Republik Indonesia," *Jurnal Legislasi Indonesia* 6, no. 4 (2009): 667–82, https://doi.org/10.54629/jli.v6i4.338.

[16] Lutfil Ansori, "Regulations In Liew Of Statutes In States Of Emergency In Indonesia," *Prophetic Law Review* 4, no. 1 (2022): 22–47, https://doi.org/10.20885/PLR.vol4.iss1.art2.

[17] Qurrata Ayuni et.al, "Concept and Implementation on the State of Emergency in Indonesia: Outlook to Strengthen Checks and Balances during Crisis," *Revista de Investigações Constitucionais* 9, no. 1 (2022): 11–36, https://doi.org/10.5380/rinc.v9i1.83557.

[18] Cipto Prayitno, "Analisis Konstitusionalitas Batasan Kewenangan Presiden Dalam Penetapan Peraturan Pemerintah Pengganti Undang-Undang," *Jurnal Konstitusi* 17, no. 2 (2020): 461–77, https://doi.org/10.31078/jk17210.

[19] Hari Sutra Disemadi, "Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies," *Journal of Judicial Review* 24, no. 2 (November 2022): 289, https://doi.org/10.37253/jjr.v24i2.7280.

[20] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2024), 126, https://prenadamedia.com/produk/penelitian-hukum-edisi-revisi/.

was chosen because the author will outline ideas on the relevant issues currently being faced.[21]

The primary legal materials in this research are: (1) The 1945 Constitution; (2) Law on the Formation of Legislation (Law Number 12 of 2011, Law Number 15 of 2019, and Law Number 13 of 2022) (P3 Law). The secondary legal materials in this research include papers, legal journals, books, and other scientific works.[22] The data collection method in this research is a literature review, an activity required in research aimed at developing theoretical and practical aspects.[23]

Discussion

Original Intent of Article 22 of the 1945 Constitution, which Regulates the Perppu

According to Adam Dyrda, ratio legis is: the subjective and objective goals of a rule or decision; the construction of legal arguments that predict the intent and purpose of the lawmaker; the specific purpose of a law; and the overall purpose of a law.[24] Mikolaj Hermann illustrates the ratio legis as the lawmaker's goal in creating a specific regulation. Mikolaj Hermann exemplifies how legal provisions are interpreted as a configuration of social relations, achieved through the implementation of a passed regulation.[25]

In examining the Original Intent of Article 22 of the 1945 Constitution, which regulates the Perppu, the author feels it necessary to examine and examine the political configuration in the minutes of the meetings that formed the 1945 Constitution before the amendment, the 1945 Constitution after the amendment, and the Law on the Formation of Legislation. This is because constitutional provisions and other laws and regulations were born of political agreement, as K.C. Wheare defines it: the result of various forces (political, economic, and social) operating at the time of their formation. According to Moh. Mahfud MD, the political configuration approach is used to understand the considerations of political power elites and mass participation in the creation and enforcement of various legal regulations. The political configuration will assist the author in viewing law as "law

[21] Tunggul Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (February 2, 2023): 1–9, https://doi.org/10.22219/aclj.v4i1.24855.

[22] Muwaffiq Jufri et.al, "State Power Limitations on Religion for The Fulfillment of The Constitutional Rights of Indigenous Religion Believers in Indonesia," *Journal of Indonesian Constitutional Law* 1, no. 3 (2024): 195–213, https://doi.org/10.71239/jicl.v1i3.23.

[23] Rhuks Ako and Damiola S. Olawuyi, "Methodology, Theoretical Framework and Scholarly Significance: An Overview of International Best Practices in Legal Research," *Journal of Sustainable Development Law and Policy (The)* 8, no. 2 (January 1, 1970): 225–41, https://doi.org/10.4314/jsdlp.v8i2.11.

[24] Al Araf et.al, "The Legal Politics Of The Dissolution Of Mass Organizations: An Analysis Of Government Regulation In Lieu Of Law No. 2 Of 2017 (Perpu Ormas)," *Journal of Public Administration, Finance and Law*, no. 17 (2020): 353–71.

[25] Putra Perdana Ahmad Saifulloh et.al, "Legal Standing to the Corruption Eradication Commission As a Applicant for the Dissolution of a Political Party at the Constitutional Court," *Jurnal Konstitusi* 20, no. 2 (2023): 318–39, https://doi.org/10.31078/jk2028.

in action," a complement to "law on the books." Without political configuration, it would be difficult for the author to understand the intent of a norm and the background of the political struggle that ultimately gave birth to that norm as a political agreement. Political configuration can strengthen the findings of the background of debate obtained from the historical approach, thus illustrating the original intent of the lawmakers and their legal politics.[26]

Constitutional law experts have attempted to trace the background to the inclusion of this Perppu provision.[27] They believe the framers of the 1945 Constitution may have been influenced by the provisions of the R*egeringsreglement* and *Indische Staatsregeling*, which grant the Governor-General authority to issue regulations to address emergencies, both during and after war. Perppu is systematically regulated in the Chapter on the DPR. This placement is interesting, given that the issuance of a Perppu falls under the President's authority and should therefore be more appropriate in Chapter III, which concerns the Powers of the State Government. It appears that the framers of the 1945 Constitution placed the provisions of Article 22 in the Chapter on the House of Representatives, emphasizing the link between Perppu and the formation of laws.[28]

In "The Initial Plan of the Indonesian Constitution," as published in the book by R.M. A.B. Kusuma, the provisions of the Perppu are contained in Chapter I, Article 5, which concerns the "Head of State." The full text reads:[29]

> "*If there is an urgent need to maintain public safety or prevent public disorder and if the House of Representatives is not in session, the Head of State shall issue government regulations in lieu of laws. Such government regulations must be submitted before the next session of the House of Representatives. If this body does not approve the regulations, the Government must state that these regulations will not be valid for the future."*

The Perppu was discussed on July 13, 1945, when the Sub-Committee for Drafting the Basic Law presented the Draft Basic Law at a meeting of the Investigating Committee for Preparatory Work for Independence (Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan or BPUPK).[30] In the first draft of the Basic Law, the Perppu's content was regulated in Article 23, with the full text as follows:[31] 1) In the event of a compelling emergency, the President has the right to issue a

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[26] Amancik et.al, "Choices of Law for Democratic Regional Head Election Dispute Resolution Institutions in Indonesia," *Jambura Law Review* 6, no. 2 (2024): 309–10.
[27] Saru Arifin, "The Quality of Indonesia's COVID-19 Legislation," *The Theory and Practice of Legislation* 12, no. 3 (September 11, 2024): 317–43, https://doi.org/10.1080/20508840.2024.2365034.
[28] Chaidir Ali and Fatmawati, "Formal Constitutional Review Paradox: The Law on Legislation Making between Legal Procedure and Constitutional Norms," *As-Siyasi: Journal of Constitutional Law* 5, no. 1 (June 15, 2025): 195–214, https://doi.org/10.24042/as-siyasi.v51.27578.
[29] R.M. Ananda B. Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2004).
[30] Nana Setialaksana, "Peranan Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (Bpupki) 1945 Dalam Proses Menuju Kemerdekaan Indonesia," *Jurnal Artefak* 4, no. 2 (September 5, 2017): 109, https://doi.org/10.25157/ja.v4i2.904.
[31] R.M. Ananda B. Kusuma, *Lahirnya Undang-Undang Dasar 1945*.

Perppu; 2) Such Government Regulation must be approved by the House of Representatives in the following session; 3) If approval is not obtained, the Government Regulation must be revoked. In the second Draft Basic Law on July 14, 1945, Article 23 was changed to Article 22 because Article 14, which reads: "The President determines the creation of currency," was removed. This resulted in the subsequent articles being numbered differently.[32]

According to the available documents, none of the meeting participants questioned Article 22 of the Draft Basic Law, and it remained unchanged. Of the three paragraphs in Article 22, only the third was refined by the Language Refinement Committee. Article 22 Paragraph (3) of the Draft Basic Law, which originally read: "If there is no approval, then the Government Regulation must be revoked," was amended to read: "If there is no approval, then the Government Regulation must be revoked." This change is evident in Article 22 of the Draft Basic Law, which reads:[33] 1) In cases of compelling emergency, the President has the right to issue a Perppu; 2) The Government Regulation must be approved by the DPR in the next session; 3) If approval is not obtained, then the Government Regulation must be revoked.

During the discussions at the BPUPK Session, whether on July 14, 1945, or July 16, 1945, not one of the BPUPK members specifically raised the issue of the Perppu, except for input from the Language Refinement Committee. The Draft Basic Law was then accepted at the final BPUPK meeting on July 16, 1945. From this description, it can be assumed that Soepomo's role as the Sub-Committee for the Draft Basic Law was very dominant in formulating Article 22 of the 1945 Constitution.[34]

The first Draft Basic Law, drafted by Soepomo together with Soebardjo and A.A. Maramis on April 4, 1942, inspired Soepomo to draft Article 22 of the 1945 Constitution because it contained an article substantially similar to a Perppu regulation in Article 5.[35] Article 5 of the first Draft Basic Law reads as follows:[36] 1) If there is an urgent need to maintain public safety or prevent public disorder, and if the House of Representatives is not in session, the Head of State shall issue a Perppu; 2) Such Government Regulations must be submitted to the next session of the House of Representatives. If this body does not approve the regulations, the Government must state that the regulations will no longer be in effect.

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[32] R.M. Ananda B. Kusuma.
[33] Ni Putu Niti Suari Giri et al., "The Dynamics of Government Fiscal Policy Post COVID-19 Pandemic in Indonesia (Legal Analysis of Government Regulation Instead of Law Number 1 Year 2020)," *Law Reform* 20, no. 1 (June 21, 2024): 135–52, https://doi.org/10.14710/lr.v20i1.63339.
[34] Zainal Arifin Mochtar, "A Notion of Regulatory Reform," *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 1 (June 7, 2022): 65–82, https://doi.org/10.25041/fiatjustisia.v16no1.2431.
[35] Yudi Latif, "The Religiosity, Nationality, and Sociality of Pancasila: Toward Pancasila through Soekarno's Way," *Studia Islamika* 25, no. 2 (August 31, 2018): 207–45, https://doi.org/10.15408/sdi.v25i2.7502.
[36] R.M. Ananda B. Kusuma, *Lahirnya Undang-Undang Dasar 1945*.

Article 5 of the first Draft Basic Law, Paragraph (1), states that the Head of State has the authority to issue Regulations similar to a Perppu,[37] provided that public safety or the prevention of public disorder is maintained, and if the House of Representatives is not in session. Article 5, Paragraph (2) Such Government Regulations must be submitted to the next session of the DPR. If this body does not approve the regulations, the Government must state that they are no longer applicable. The requirement to maintain public safety or prevent public disorder in the first Draft Basic Law bears a resemblance to the phrase "in cases of compelling emergency" in Article 22, Paragraph (1), of the 1945 Constitution.[38]

After the Proclamation of Indonesian Independence on August 17, 1945, which, according to Jazim Hamidi, reflected a political act that created law,[39] on August 18, 1945, the Draft Basic Law, the result of the work of the BPUPK, was enacted by the Preparatory Committee for Indonesian Independence (Panitia Persiapan Kemerdekaan Indonesia or PPKI), becoming the Constitution of the Republic of Indonesia.[40] These changes included replacing the term "Basic Law" with "Undang-Undang Dasar (UUD)," replacing the Preamble with "Preamble," and removing seven words from the Jakarta Charter.[41] In the PPKI meeting on August 18, 1945, Otto Iskandar Dinata raised the issue of the Perppu after Soepomo explained the articles of the Draft Basic Law, stating:[42]

> "*So..." Government regulations must be approved by the House of Representatives during its session. In practice, the President will be appointed. The President must then issue regulations that must be ratified by the House of Representatives, which we will form. What about this? Soepomo immediately responded, "That's included in the Transitional Regulations."*

Considering Otto Iskandar Dinata's issue, he appears to disagree with the Perppu's requirement for DPR approval. Otto Iskandar apparently knew that the President would be appointed, and that the DPR, whose approval was requested, had not been formed within a relatively short time, making it impossible to apply

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[37] Taufikkurrahman Upik, Slamet Suhartono, and Syofyan Hadi, "Technical Problems in the Reviewing of Government Regulation in Lieu of Law (Perppu) At the Constitutional Court from the Perspective of Legal Certainty," *IBLAM Law Review* 4, no. 3 (September 10, 2024): 1–10, https://doi.org/10.52249/ilr.v4i3.414.
[38] Zulwisman Zulwisman and Muhammad Haikal Diegio, "Analysis of the Issuance of Government Regulation in Lieu of Law (PERPPU) Number 2 Year 2022 in the Perspective of Law Formation Politics," *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 3, no. 2 (July 31, 2023): 151–65, https://doi.org/10.15294/ipmhi.v3i2.67018.
[39] Dikdik Baehaqi Arif et.al, "Thought and Exemplary Islamic Nationalism of the Early Days of Independence Indonesia: Learning from Ki Bagus Hadikusumo," *Jurnal Civics: Media Kajian Kewarganegaraan* 22, no. 1 (2025): 11–19, https://doi.org/10.21831/jc.v22i1.1333.
[40] Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Jurnal Ilmiah Hukum LEGALITY* 25, no. 2 (July 14, 2018): 247, https://doi.org/10.22219/jihl.v25i2.6005.
[41] Ridho Al-Hamdi, "The Jakarta Charter In Post-Soeharto Indonesia: Political Thoughts Of The Elites In Muhammadiyah," *Masyarakat Indonesia* 41, no. 1 (2015): 43–56, https://doi.org/10.14203/jmi.v41i1.560.
[42] R.M. Ananda B. Kusuma, *Lahirnya Undang-Undang Dasar 1945*.

Article 22 of the 1945 Constitution.[43] Soepomo immediately responded, "That's already included in the transitional regulations."[44] The transitional regulations Soepomo was referring to in his response to Otto were the DPR's oversight function,[45] which, before its formation, would be replaced by the National Committee, as stated in Article IV of the Transitional Regulations: "Before the People's Consultative Assembly, the People's Representative Council, and the Supreme Advisory Council are formed in accordance with this Constitution, all their powers shall be exercised by the President through a National Committee."[46] The lack of response was due to the situation not allowing all meeting participants to freely express their opinions.[47]

Original Intent of the Regulation of Article 7 Paragraph (1) Letter C of Law Number 12 of 2011, which regulates the Hierarchy of Perppu

Article 1, Paragraph (3) of the 1945 Constitution states: "Indonesia is a country based on the rule of law".[48] The State is a rule of law. It is a state of order. The State is an orderly system. Therefore, this state order is the same as a legal order.[49] A legal system is a hierarchical system of legal rules in which the validity of lower-level rules depends on or is determined by higher-level rules.[50]

Several experts have put forward the concept of hierarchy. Some define hierarchy as a sequence of levels.[51] Others define legislation as structured in a tiered, pyramid-like structure, which is the pillar of the national legal system.[52] Legally, the Elucidation of Article 7 Paragraph (2) of Law Number 12 of 2011 stipulates that,[53] in this provision, hierarchy refers to the hierarchy of each type of legislation based

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[43] Herlambang Perdana Wiratraman, "Legal System for Endorsing Press Independency in Indonesia," *Journal of Southeast Asian Human Rights* 1, no. 1 (November 24, 2017): 80, https://doi.org/10.19184/jseahr.v1i1.5304.

[44] Andy Omara, "Why Not Indonesia an Islamic State? Constitutional Debate Concerning Religion-State Relation in A Muslim Majority Country," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 1 (April 27, 2024): 421, https://doi.org/10.22373/sjhk.v8i1.15889.

[45] Wicipto Setiadi, "Institutional Restructuring to Sustain Regulatory Reform in Indonesia," *Hasanuddin Law Review* 5, no. 1 (May 14, 2019): 120, https://doi.org/10.20956/halrev.v5i1.1699.

[46] Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity* (Leiden, The Netherlands: Brill | Nijhoff, 2024), 55–94, https://doi.org/10.1163/9789004691698_004.

[47] R.M. Ananda B. Kusuma, *Lahirnya Undang-Undang Dasar 1945*.

[48] Amancik et.al, "Breaking the Cycle of Injustice: Revolutionizing Human Rights Violations Resolution Through the 1945 Constitution," *Lex Scientia Law Review* 8, no. 2 (2024): 777–816, https://doi.org/10.15294/lslr.v8i2.7460.

[49] Henry Cohen, "Kelsen's Pure Theory of Law," *The Catholic Lawyer* 26, no. 2 (1981): 147–57.

[50] Joseph Raz, "Kelsen's Theory of the Basic Norm," *The American Journal of Jurisprudence* 19, no. 1 (1974): 94–111, https://doi.org/10.1093/ajj/19.1.94.

[51] Martti Koskenniemi, "Hierarchy in International Law: A Sketch," *European Journal of International Law* 8 (1997): 566–82, https://doi.org/10.1093/oxfordjournals.ejil.a015607.

[52] Ian Stewart, "The Critical Legal Science of Hans Kelsen," *Journal of Law and Society* 17, no. 3 (1990): 273–308, https://doi.org/10.2307/1410155.

[53] Muwaffiq Jufri, "Urgensi Amandemen Kelima Pada Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Terkait Hak Dan Kebebasan Beragama," *Jurnal HAM* 12, no. 1 (April 22, 2021): 123, https://doi.org/10.30641/ham.2021.12.123-140.

on the principle that lower-level legislation must not conflict with higher-level legislation.[54] Therefore, hierarchy is the order of legislation types, based on the principle that lower-level legislation must not conflict with higher-level legislation.[55] Based on Article 7, Paragraph (1) of Law Number 12 of 2011, the hierarchy of legislation in Indonesia is as follows:[56]

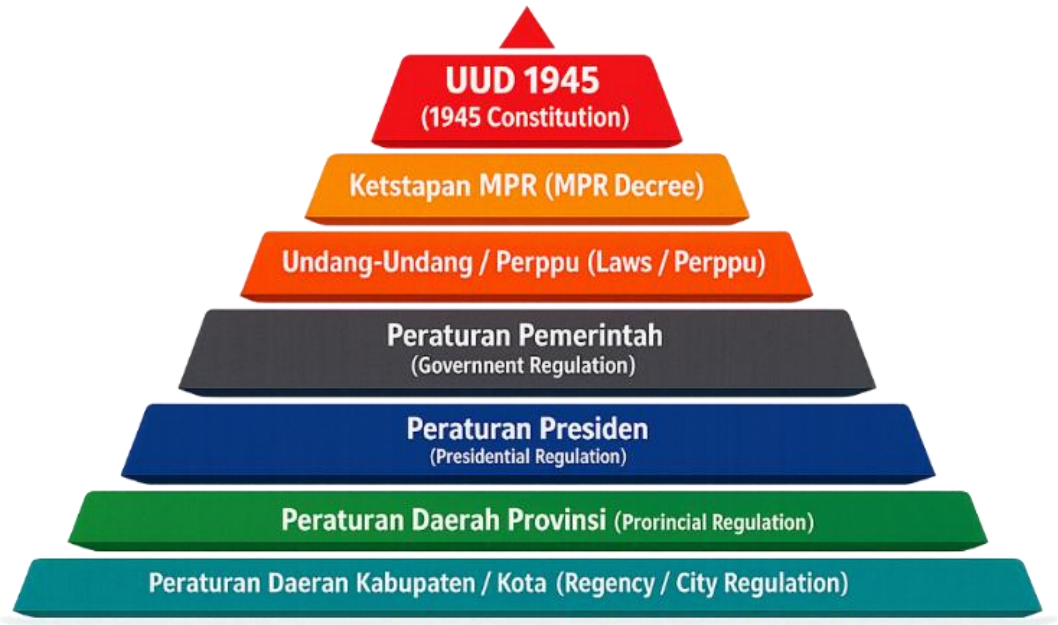

Figure 1. Hierarchy of Legislation in Indonesia
Source. Law No. 12 of 2011 on the Formation of Legislation

In this sub-chapter, the author is interested in examining why, in Article 7 Paragraph (1) Letter c of Law Number 12 of 2011, the hierarchy of PERPPU is equal to UU. To answer this question, the author feels the need to examine the meeting's treatises to formulate Law Number 12 of 2011. Law Number 12 of 2011 is a proposal initiated by the DPR and prepared by the DPR's Legislative Body (Badan Legislasi or Baleg). Discussion on the hierarchy of Perppu was among the few discussed. The most frequent discussion regarding Perppu was about the purpose of the emergency situation as a requirement for issuing a Perppu, the establishment of a Perppu, and the revocation of a Perppu.

The discussion on the hierarchy of Perppu was addressed by two constitutional law experts presented by the DPR, and both supported the need for Perppu to be on par with laws. Satya Arinanto, Professor of Constitutional Law at the Faculty of Law, University of Indonesia, stated: "*Laws and Perppu are on the same level. Laws and Perppu are on the same level. Please don't be like TAP III of 2000*." "*Tap III of 2000 is a*

[54] Sholahuddin Al-Fatih et.al, "The Hierarchical Model of Delegated Legislation in Indonesia," *Lex Scientia Law Review* 7, no. 2 (2023): 629–58, https://doi.org/10.15294/lesrev.v7i2.74651.
[55] Julius Cohen, "The Political Element in Legal Theory: A Look at Kelsen's Pure Theory," *The Yale Law Journal* 88, no. 1 (1978): 1–38, https://doi.org/10.2307/795677.
[56] Charles Simabura et.al, "Ministerial Authority in Formulating Regulations Related to Presidential Lawmaking Doctrine," *Constitutional Review* 9, no. 2 (2023): 297–326, https://doi.org/10.31078/consrev924, 297-326.

https://doi.org/10.71239/jicl.v3i1.230

Perppu under the law."[57] Another constitutional law expert whose opinion was heard by the DPR, M. Fajrul Fallakh, a lecturer in Constitutional Law at the Faculty of Law, Gadjah Mada University, stated:[58]

> *"There are two types of government regulations: government regulations to implement laws properly and government regulations to replace laws. So, in essence, a Perpu is a government regulation, but it is given legitimacy because of circumstances beyond the urgent need to replace laws. Even before being approved by the House of Representatives, it already has binding force. This raises the question of whether a Perppu should be equated with law. If not, the question naturally arises whether a Perppu should be tested in the Supreme Court, since it is below the law. The question is: if a Perppu is to be tested, it should be tested in parliament through legislative review, given the urgent need. So the question is not whether the Supreme Court (Mahkamah Agung or MA) or the Constitutional Court (MK) should come first; this must come first, and naturally, it should wait until parliament has approved it. Only the judiciary has the competence to test it, because its status as a legal product is definitive".*

After studying the original intent of the minutes of the meeting that formed Law No. 12 of 2011, the author concluded that there was no detailed discussion of why the Perppu hierarchy should be on the same level as the Law. The DPR, apart from simply copying and pasting the provisions of Article 7 Paragraph (1) letter b of Law No. 10 of 2004 concerning the Formation of the Old Legislation, was also influenced by the opinions of Constitutional Law Experts presented by the DPR, namely: Satya Arinanto and M. Fajrul Fallakh.

The Meaning of "Compelling Urgency" as a Prerequisite for the President to Issue a Perppu

A Perppu is a type of legislation subjectively established by the President in a state of "compelling urgency" as a variant of a constitutional emergency.[59] The President's authority to issue a Perppu is one of the emergency powers constitutionally vested in him.[60] Emergency powers conceptually represent executive authority to address a constitutional emergency, enabling the President, in accordance with his oath and the promise of office, to maintain the nation's existence and address any dangers arising from the emergency.[61] The concept of emergency powers is derived from the principle of constitutional dictatorship, which can be

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[57] DPR RI, *Risalah Rapat Panita Khusus Rancangan Undang-Undang Tentang Pembentukan Peraturan Perundang-Undangan, Rapat Dengar Pendapat Umum II, Tanggal 26 Januari 2011* (Jakarta: Sekretariat Jendral DPR-RI, 2011).

[58] DPR RI, *Risalah Rapat Panita Khusus Rancangan Undang-Undang Tentang Pembentukan Peraturan Perundang-Undangan, Rapat Dengar Pendapat Umum I, Tanggal 26 Januari 2011* (Jakarta: Sekretariat Jendral DPR-RI, 2011).

[59] Wand Mei Herry Susilowati, "Application of Fast-Track Legislation Method in Presidential System of Government in Indonesia," *Cepalo* 8, no. 1 (June 13, 2024): 49–68, https://doi.org/10.25041/cepalo.v8no1.3346.

[60] Qurrata Ayuni, "Pros and Cons of the Government Regulation in Lieu of Law No. 2 Year 2017 Concerning Mass Organizations," in *Advancing Rule of Law in a Global Context* (Boca Raton: CRC Press, 2020), 270–76, https://doi.org/10.1201/9780429449031-32.

[61] J Malcolm Smith and Cornelius P Cotter, *Powers of The President During Crises* (Washington DC: Public Affairs Press, 1960).

https://doi.org/10.71239/jicl.v3i1.230

traced back to the Roman Republic and continued to develop until it reached its peak after the 9/11 terrorist attacks.[62] Bruce Ackerman aptly analogized the relationship between the concept of emergency powers and the principles of a democratic state to that of morphine and the human body. Therefore, the use of emergency powers should ideally be exercised only by those with the capacity to do so, in a proportional manner, and not routinely.[63]

To examine the nature of the Perppu more deeply, it is necessary to recall Article 22 of the 1945 Constitution and its Explanation, which emphasize the Perppu's essence: the right to establish regulations in a state of emergency.[64] The President must act swiftly and expeditiously, yet with measured measures, to ensure the safety of the nation in the event of a "compelling emergency" so that the situation can quickly return to normal constitutional order. It is clear, theoretically, historically, and normatively, that the Perppu is not, and indeed should not be, interpreted as a "shortcut (*jalan pintas*)" or "quick fix (*solusi cepat*)" for the President to effect a fait accompli with the DPR in the law-making process.[65]

It is not easy to define or define "emergency." This is due, in part, to the diverse types or typologies of emergencies. Oren Gross and Fionnuala Ní Aoláin, for example, distinguish between "violent" emergencies, such as terrorism, war, and armed conflict, and emergencies arising from economic and natural disasters.[66] Clinton Rossiter explains that a crisis in a democratic country can arise for several reasons, such as war, rebellion, or natural disasters.[67]

In the Indonesian context, as explained above, the 1945 Constitution recognizes two types of emergencies, as set out in Articles 12 and 22. The term "emergency" in Article 22 is intended to mean "a compelling emergency." In an effort to define "compelling emergency," the Constitutional Court, in Decision Number 138/PUUVIII/2009 dated February 8, 2010, defined three conditions as "compelling emergency":[68] a. the existence of a situation, namely an urgent need to resolve a legal problem quickly based on law; b. the required law does not yet exist, resulting in a legal vacuum, or a law exists but is inadequate; c. This legal vacuum

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[62] Andrew Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University PressOxford, 1999), https://doi.org/10.1093/oso/9780198150688.001.0001.

[63] Bruce Ackerman, "The Emergency Constitution," *The Yale Law Journal* 113 (2004): 1029–91, https://doi.org/10.2307/4135710.

[64] Jimly Asshiddiqie, *Hukum Tata Negara Darurat* (Jakarta: PT Rajagrafindo Persada, 2007), https://www.rajagrafindo.co.id/produk/hukum-tata-negara-darurat-prof-dr-jimly-asshiddiqie-s-h/.

[65] Sanford Levinson and Jack M Balkin, "Constitutional Dictatorship: Its Dangers and Its Design," *Minnesotta Law Review* 94 (2010): 1789–1866.

[66] Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Power in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

[67] Wilfred U Codrington III, "Purcell In Pandemic," *New York University Law Review* 96 (2021): 942–83.

[68] Fitra Arsil et.al, "The Disappearance Of The 'Legislative Model": Indonesian Parliament's Experience In Response To Covid-19,"' *The Journal of Legislative Studies* 30, no. 3 (2024): 265–87, https://doi.org/10.1080/13572334.2022.2067948.

cannot be overcome by passing a law through normal procedures, as that would take a long time, while this urgent situation requires certainty.

Currently, there is a Constitutional Court Decision Number 138/PUU-VII/2009, which serves as a guideline regarding the normative benchmark of "compelling urgency". Following the Constitutional Court Decision, there has been a paradigm shift regarding the benchmark of "compelling urgency" from what was initially the absolute subjectivity of the President to a limitative subjectivity as long as the three conditions in the Constitutional Court Decision are met, although the assessment of the objectivity of the Perppu remains the authority of the DPR to later give or withhold approval for the Perppu to become a Law. Thus, following Constitutional Court Decision Number 138/PUU VII/2009, if the President wishes to stipulate a Perppu, the three conditions in the Constitutional Court Decision must be described more explicitly both in the "Considering" and "General Explanation" considerations of the Perppu. Another note regarding Constitutional Court Decision Number 138/PUU-VII/2009 is that the Constitutional Court implicitly recognizes the functional distinction between a Perppu and a Law. A Perppu functions as a type of legislation that the President can use to address urgent or incidental needs in the form of "compelling emergencies" based on the President's subjective assessment. A law, on the other hand, serves as an instrument to meet a planned national need on a regular basis and is formulated in the National Legislation Program through a process of deliberation and joint approval between the President and the DPR.[69] The following is a list of Perppu use by eight presidents from the Orde Lama, Orde Baru, and Reform eras.

Table 1. Number of Perppu Used by Presidents from 1945-2025

President	Period	Perppu Issued
Soekarno	1945-1966	144
Soeharto	1967-1998	8
B. J. Habibie	1998-1999	2
Abdurrahman Wahid (Gus Dur)	1999-2001	4
Megawati Soekarno Putri	2001-2004	4
Susilo Bambang Yudhoyono (SBY)	2009-2019	19
Joko Widodo (Jokowi)	2014-2024	8
Prabowo Subianto	2024-2029	0

***Source**: Sigid Kurniawan, Siapa Presiden Indonesia yang Paling Banyak Mengeluarkan Perpu?, https://www.tempo.co/hukum/siapa-presiden-indonesia-yang-paling-banyak-mengeluarkan-perpu--229593,*

The existence of this norm is influenced by the A paradigm. Hamid Attamimi and Maria Farida Indrati, who stated, "...*because this Perppu is a Government Regulation*

[69] Manunggal K Wardaya, "Perubahan Konstitusi Melalui Putusan MK: Telaah Atas Putusan Nomor 138/PUU-VII/2009," *Jurnal Konstitusi* 7, no. 2 (2010): 19–46, https://doi.org/doi.org/10.31078/jk722.

https://doi.org/10.71239/jicl.v3i1.230

that replaces a Law, its substance is the same as the substance of a Law." Solly Lubis also argues that a Perppu is essentially an emergency regulation that may be used only in cases of compelling emergency, in accordance with the President's constitutional rights.[70]

Thus, it is clear that Perppu and Law are two types of legislation that have different functions, formation processes, and constitutional bases, even though both are normatively regulated as equals in the hierarchy of legislation, so that it is reasonable that the material content of Perppu and the material content of Law should be able to be distinguished.[71]

The Content of a Perppu as an Emergency Legislation

Bagir Manan stated that the content of a Perppu should not be exactly the same as the content of a law. This is crucial to maintain consistency with the paradigm of "the content of a law in a material sense" according to the 1945 Constitution, which views the content of a law as inherently unique and subject to a unique and specific formulation procedure, thus ensuring that laws are inherently limited and have a specific scope. If another type of legislation (in this case, a Perppu) contains the same content as a law, then the "unique" nature of the law itself is essentially lost.[72]

Article 22 of the 1945 Constitution does not regulate the content of a Perppu. Normative provisions regarding the content of a Perppu are regulated within the law, specifically in Article 11 of Law No. 12 of 2002, which states that "the content of a Perppu is the same as a law." This differs from the Constitution of the Republic of Indonesia (KRIS) and the 1950 Provisional Constitution (UUDS) which regulate the content of Emergency Laws in the constitutional realm, namely in Article 139 paragraph (1) KRIS Article 96 paragraph (1) UUDS 1950.[73]

By citing the understanding of A. Hamid S. Attamimi states that the determination of the content of state legislation is highly dependent on the system of formation of state legislation, along with its historical background and system of division of powers.[74] then in the context of the content of the Perppu and Emergency Law, the Author is of the opinion that constitutionally, the drafters of the 1945 Constitution adhered to the paradigm of "Content of the Perppu in a formal understanding" because the content of the Perppu is not

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[70] Maria Farida Indrati (Ed), *Kumpulan Tulisan A. Hamid S. Attamimi: Gesetzgebungswissenschaft Sebagai Salah Satu Upaya Menanggulangi Hutan Belantara Peraturan Perundang-Undangan* (Depok: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2021).

[71] Bayu Dwi Anggono, "Tertib Jenis, Hierarki, Dan Materi Muatan Peraturan Perundang-Undangan: Permasalahan Dan Solusinya," *Jurnal Masalah-Masalah Hukum* 47, no. 1 (2018): 1–9, https://doi.org/10.14710/mmh.47.1.2018.1-9.

[72] Bagir Manan, *Perkembangan UUD 1945* (Yogyakarta: FH UII Press, 2004).

[73] Adnan Buyung Nasution, *Aspiration for Constitutional Government in Indonesia a Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992).

[74] A Hamid S Attamimi, "Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisa Mengenai Keputusan Presiden Yang Berfungsi Pengaturan Dalam Kurun Waktu Pelita I-Pelita IV" (Universitas Indonesia, 1990).

https://doi.org/10.71239/jicl.v3i1.230

specifically/specifically determined in the constitution, while the drafters of the KRIS and UUDS 1950 adhered to the paradigm of "Content of the Emergency Law in a material understanding" because the content of the Emergency Law is specifically/specifically determined in the constitution, namely to regulate matters of government administration (federal).[75]

Constitutionally, the distinction between the contents of a Perppu and the contents of a Law is perfectly reasonable and can even be considered inevitable. The State Budget (Anggaran Pendapatan dan Belanja Negara or APBN) is one example of an issue that clearly cannot be regulated by a Perppu under the 1945 Constitution. Article 23 paragraph (3) of the 1945 Constitution stipulates that if it does not approve the Draft State Budget (RAPBN) proposed by the President, the only constitutional solution for the President is to implement the previous year's APBN.[76] Therefore, the President is not permitted to issue a Perppu solely because the RAPBN he submitted did not receive DPR approval. In this context, Yusril Ihza Mahendra argues:[77]

> *"...the Constitution does not provide the President with the opportunity to unilaterally determine the APBN by issuing a Perppu. Although the 1945 Constitution upholds the principle of equality between the DPR and the President, regarding the determination of the APBN, the Explanation to the 1945 Constitution states that the DPR's position is stronger than the President's."*

Similarly, in the realm of Constitutional Court Decisions, although Constitutional Court Decision Number 138/PUU-VII/2009 stated that the material of the Perppu is the same and at the same level as the material of the Law and therefore the Constitutional Court also has the authority to test the constitutionality of the Perppu, but it is also necessary to consider that one of the legal considerations of the Constitutional Court Decision Number 132/PUU-XIII/2015 affirms that *"...Declaring an act that was originally not a criminal act to be a criminal act must be agreed upon by all the people in the State of Indonesia represented by the DPR together with the President..."* so that according to the Constitutional Court, the criminalization policy can only be carried out through a specific type of legislation, namely the Law.[78]

Thus, within the bounds of reasonable reasoning, the Constitution and Constitutional Court Decision No. 132/PUU-XIII/2015 have affirmed that the contents of a Perppu are not identical to those of a law. The State Budget and the criminalization policy *("...Declaring an act that was previously not a criminal act to be a*

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[75] Aninda Novedia Esafrin and Qurrota Ayuni, "Controversy of Presidential Decrees in a State of Emergency in Indonesia: Case Study of The Decrees of President Soekarno And President Abdurrahman Wahid," *Jurnal Penelitian Hukum De Jure* 2, no. 2 (2022): 175–190, https://doi.org/10.30641/dejure.2022.V22.175-190.

[76] Mei Susanto, "Hak Budget DPR Dalam Pengelolaan Keuangan Negara," *Jurnal RechtsVinding* 5, no. 2 (2016): 183–96, https://doi.org/10.33331/rechtsvinding.v5i2.139.

[77] Yusril Ihza Mahendra, *Dinamika Tata Negara Indonesia* (Jakarta: Gema Insani Press, 1996).

[78] Brice Dickson, "Criminal Justice and Emergency Laws," in *Facets of the Conflict in Northern Ireland*, ed. Seamus Dunn (London: Macmillan, 1995), 61–79.

criminal act...") have been affirmed as not subject to regulation by a Perppu under the 1945 Constitution and Constitutional Court Decision No. 132/PUU-XIII/2015.

Hamdan Zoelva also implicitly believes that the contents of a Perppu are not identical to those of a law. A Perppu issued by the President concerning the powers of other state institutions is susceptible to misuse. Hamdan Zoelva expressed his disapproval of a Perppu concerning the authority of other state institutions.[79] Similarly, Susi Dwi Harjanti's view in this context states:[80]

> *"...the substance of a Perppu should not be the same as the substance of a law. This is primarily based on the nature of regulations issued in "urgent circumstances," where the assessment of "urgent circumstances" is subjectively determined by the President...". "...as a regulation issued in "urgent circumstances," a Perppu cannot regulate matters of a constitutional nature, namely as regulations governing the organizational structure of the state, the division of power, and the rights of citizens...". "...equating the substance of a Perppu with a law means opening up the opportunity for the Perppu to intervene in other branches of government and opening up opportunities for the government (the President) to expand its powers. This clearly contradicts the principle of constitutionalism, which requires the limitation of power."*

The Ideal Concept of Hierarchy, the Meaning of Urgent Measures, and the Content of the Perppu from the Perspective of Emergency Constitutional Law

Based on the ratio legis above, the Hierarchy, the Meaning of Urgent Measures, and the Content of the Perppu need to be revised to align with the concept of Emergency Constitutional Law. This, according to the author, is the ideal concept (*ius constituendum*)[81] of the Hierarchy, the Meaning of Urgent Measures, and the Content of the Perppu from the Perspective of Emergency Constitutional Law. According to Muwaffiq Jufri, the process of successfully revising regulations requires formal legitimacy, understood as the improvement of positive law.[82] Formal Legitimacy by the DPR and the President is expected to utilize their constitutional authority in the formation of laws to revise the Law[83] on the Formation of Legislation (Law Number 12 of 2011, Law Number 15 of 2019, and Law Number 13 of 2022) to reform the Perppu, particularly to clarify the hierarchy of Perppu

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[79] Rita Triana Budiarti, *Pergulatan Konstitusi Hamdan Zoelva* (Jakarta: Konstitusi Press, 2015), 55, https://simpus.mkri.id/opac/detail-opac?id=9291.

[80] Susi Dwi Harijanti, "Menakar Kegentingan Memaksa Perppu," *Makalah Diskusi Publik "Membedah Makna 'Kegentingan Memaksa' Dalam Perppu", Kerjasama Fakultas Hukum Universitas Atmajaya Dengan APHTN-HAN Jakarta Raya*, 2017.

[81] Amancik et.al, "Reforming the Indonesian Bureaucracy through State Civil Apparatus Reform, Could It Be Optimized with Technology?," *Journal of Law and Legal Reform* 5, no. 3 (2024): 943–72, https://doi.org/10.15294/jllr.v5i3.13753.

[82] Jufri, "Urgensi Amandemen Kelima Pada Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Terkait Hak Dan Kebebasan Beragama."

[83] Putra Perdana Ahmad Saifulloh, "The Obligation of the Constitutional Court of Indonesia to Give Consideration in the Process of Dissolution of Societal Organizations," *Constitutional Review* 4, no. 1 (May 2018): 131, https://doi.org/10.31078/consrev416.

within legislation: clarifying the meaning of compelling urgency as a requirement for the President to issue a Perppu; and clarifying the content of legislation. This is to strengthen the position of the Perppu as an emergency legislation from the perspective of emergency constitutional law. This is what the author calls formal legitimacy, which requires time (long-term).

First, the hierarchy of Perppu, from the perspective of emergency legislation, need not be included in the hierarchy of legislation. According to Daniel Yusmic P. Foekh in his book on Legislation, there must be a theory for classifying regulations into two forms: those issued under normal circumstances and those issued under emergency circumstances.[84] The author considers the placement of the PERPPU within normal regulations and its hierarchical position problematic. According to Van Dullemen, the Perppu is an emergency legislation because it meets four requirements. Therefore, it is inappropriate to equate the Perppu with laws, let alone hierarchize it within the normal regulatory family. The Perppu, as a presidential political decision disguised as a regulation, was formed not based on sound principles of legislative formation, but rather on the principle of salus populi, suprema lex. It is inappropriate to equate it with laws.[85]

Until now, the Perppu has been equated with laws, which are a joint product of the DPR and the President, and categorized as normal regulations. However, the Perppu is a unilateral decision by the President, overriding the DPR, in cases of compelling urgency, which constitutes emergency powers with the force of law. Therefore, it is inappropriate to equate the Perppu, as emergency legislation, with laws that are part of the normal regulatory family. Previously, when a Perppu issue arose, the resolution was forced to rely on ordinary legislative principles. This principle applies only to normal regulations, not to Perppu, which are part of the emergency legislation.[86] Article 5 of the Law Number 12 of 2011 outlines seven principles that must be adhered to in the formation of formal legislation.[87] However, these formal principles are not binding on the Perppu formation process, such as the principle of openness. Because transparency is essential, the DPR, which has the authority to enact laws, is not involved, and there is no public participation.[88] Essentially, emergency legislation differs from normal regulations in several respects. This is shown in the following table.

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[84] Daniel Yusmic P. Foekh, *Perpu Dalam Teori Dan Praktik*, 27–28.

[85] The four conditions are: (1). The highest interest of the State, namely the existence of the State itself; 2) Emergency legislations are absolutely necessary; 3) Noodregeling is temporary, provocative, only as long as the emergency situation remains, and after that, normal, ordinary regulations are needed, and emergency legislations are no longer applicable; and 4) When emergency legislations are made, the DPR cannot hold sessions or is truly and truly inactive. See Herman Sihombing, *Hukum Tata Negara Darurat Di Indonesia* (Jakarta: Djambatan, 1996).

[86] Daniel Yusmic P. Foekh, *Perpu Dalam Teori Dan Praktik*.

[87] Yuliandri, *Asas-Asas Pembentukan Perundang-Undangan Yang Baik: Gagasan Pembentukan Undang-Undang Berkelanjutan* (Jakarta: PT Rajagrafindo Persada, 2009).

[88] Fahmi Ramadhan Firdaus, "Public Participation After The Law-Making Procedure Law Of 2022," *Jurnal Ilmiah Kebijakan Hukum* 16, no. 3 (2022): 495–514, https://doi.org/10.30641/kebijakan.2022.V16.495-514.

Table 2. Differences between Laws and Perppu

Differences	Laws	Perppu
Principles Salus Populi, Suprema Lex	Principles for the Formation of Good Legislation	*Salus Populi, Suprema Lex*
The Formation Process	Requires a normal mechanism, public debate, public participation, an open, democratic process, and therefore requires a long time.	The formation mechanism is closed, non-participatory, non-democratic, and requires rapid development.
Harmonious with the Constitution and Other Laws	Must be consistent and harmonious, must not overlap, and lower-level regulations must not conflict with higher-level regulations.	If the country is in a state of emergency, a Perppu can deviate from or violate existing regulations. It is even possible for a Perppu to violate the Constitution.
The Purpose of Establishment	More Aimed at Legal Order.	More at Legal Benefit.
Ratification	Cannot take effect without prior joint approval from the House of Representatives.	It must be enacted first, and then the House of Representatives must seek approval. Consequently, if a Perppu does not receive DPR approval, it will become invalid. Therefore, no legal action to revoke the Perppu is necessary, unless a DPR session determines otherwise.
Hierarchy	Must be included in the legal hierarchy.	Does not need to be included in the legal hierarchy.

***Source**: Daniel Yusmic P. FoEkh, Perpu Dalam Teori Dan Praktik, (Depok: PT Rajagrafindo Persada, 2021).*

The 80 years of experience governing the nation under four constitutions should be aligned with the democratic system, the rule of law, and the constitutional system enshrined in the 1945 Constitution. One issue that needs adjustment to reflect the state's dynamics is the clear separation between normal and emergency legislation. Therefore, according to the author, the Perppu, as an emergency legislation, need not be included in the hierarchy of statutory regulations.[89]

Second, regarding the meaning of "compelling urgency," to minimize the "dictatorial" nature of the Perppu, and in relation to the principles of the rule of law and constitutionalism, several limitations are deemed necessary. Bagir Manan stated that a situation is considered a "compelling urgency" if "a disturbance has clearly occurred, creating a sudden emergency that must be addressed immediately without waiting for prior deliberation. This definition also includes the criteria of having clear initial signs and, according to common sense, immediately causing disruption, both to society and to the functioning of the government." Thus, the element of "compelling emergency" exhibits two general characteristics: crisis and urgency. A

[89] Asrinaldi, Mohammad Agus Yusoff, and dan Zamzami Abdul Karim, "Oligarchy in the Jokowi Government and Its Influence on the Implementation of Legislative Function in Indonesia," *Asian Journal of Comparative Politics* 7, no. 2 (June 23, 2022): 189–203, https://doi.org/10.1177/2057891121995564.

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crisis is a sudden disruption that creates a sense of urgency, while urgency is an unforeseen situation that must be addressed immediately. Borrowing a phrase from Article 16 of the 1958 French Constitution, it also refers to an immediate and serious threat. Furthermore, "compelling emergency" must be based on actual circumstances, not mere estimates or conjecture.[90]

Third, regarding the content. Under a regulation issued in a state of "compelling emergency," a Perppu cannot regulate constitutional matters, namely, the state's organizational structure, the distribution of powers, and citizens' rights. The 1950 Provisional Constitution stipulates that Emergency Laws may only regulate matters of state administration. If we borrow from this provision, the content of a Perppu should be limited to matters governing the functioning of government (executive or state administration). Equating the contents of a Perppu with a law opens the door to interference in other branches of government and allows the government (the President) to expand its powers.[91] This clearly contradicts the principle of constitutionalism, which requires the limitation of power.[92] Fourth, regarding timing. A Perppu is issued when the House of Representatives (DPR) is in recess or not in session. Furthermore, a Perppu is temporary. The provisions of the 1945 Constitution require that a Perppu be submitted to the DPR immediately upon the next session.[93]

Conclusion

This study concludes that in the discussion of the BPUPK Session, both on July 14, 1945, and July 16, 1945, none of the BPUPK members specifically raised the issue of Perppu, except for input from the Language Refinement Committee. The Draft Basic Law was then accepted in the final BPUPK meeting on July 16, 1945. From this description, it can be inferred that Soepomo's role on the Small Committee for the Draft Basic Law was dominant in formulating Article 22 of the 1945 Constitution. This study also did not find a detailed discussion of why the hierarchy of Government Regulations as a substitute for laws must be equivalent to laws. The DPR, apart from only copying and pasting the provisions of Article 7 Paragraph (1) letter b of Law Number 10 of 2004 concerning the Formation of the old Legislation, was also influenced by the opinions of Constitutional Law Experts presented by the DPR.

The Ideal Concept of Hierarchy, and the Revocation of Perppu from the perspective of emergency legislation, namely: 1) It is not appropriate if the Government Regulation in Lieu of Law as an emergency regulation is aligned with the Law which is a group of normal regulations, and the Perppu as an emergency legislation does not need to be included in the hierarchy of statutory regulations; 2)

[90] Susi Dwi Harijanti, "Menakar Kegentingan Memaksa Perppu."
[91] Susi Dwi Harijanti.
[92] Edoardo Celeste, "Digital Constitutionalism: A New Systematic Theorisation," *International Review of Law, Computers & Technology* 33, no. 1 (2019): 76–99, https://doi.org/10.1080/13600869.2019.1562604.
[93] Susi Dwi Harijanti, "Menakar Kegentingan Memaksa Perppu."

The study assesses that the model for revoking the Perppu in accordance with the state administrative law of the emergency state is regulated in the Constitution of the Republic of Indonesia 1949, and the Provisional Constitution of 1950, namely that after being revoked by Parliament, the Perppu issued by the President mutatis mutandis does not apply; and 3) The content of the Perppu should not be the same as the content of the law. This is mainly based on the nature of the regulation issued in a "compelling emergency" where the assessment of "emergency" is determined subjectively by the President.

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