

URGENCY OF EMERGENCY CONSTITUTIONAL LEGAL PERSPECTIVE IN LEGAL SYSTEM PRACTICE IN INDONESIA

Arief Fahmi Lubis

Military Law School – PTHM/AHM

Jalan Matraman Raya No. 126, Jakarta Pusat

E-mail: arieffahmilubis0@gmail.com

ABSTRACT

Danger or nood can occur anytime and anywhere, in this case, it can only occur in a certain area or it can even occur as a whole in the territory of a country. The purpose of this research is to give an idea that emergency constitutional law provides reasons or the basis for granting the state a right to take action in overcoming or dealing with dangerous situations. This qualitative research used a descriptive approach to collect data systematically, factually, and quickly according to the description when the research was conducted. The results of this study indicate that it is necessary to stipulate an emergency law that regulates matters of governance that due to urgent circumstances need to be regulated immediately.

Keywords: *Emergency Constitutional Law, Administrative, staatsnoodrect, Emergency Law.*

INTRODUCTION.

Imperiimajestasesest tutelae salus, The greatness of a country is its security (If a country is not safe or unable to guarantee its security then in fact that country never existed)

The national stability and security of a country are not static, but always dynamic along with the development of the strategic environment both regionally and globally. If the political stability and security of the country are disturbed, it can be ascertained that the country is in an unsafe condition and this situation can be caused by natural things such as natural disasters, crop failure, famine, widespread disease outbreaks, or other circumstances such as political crises, economic crises, food embargo, internal conflicts in a region and others. If this situation and condition persist for a sufficiently long period of time, therefore to prevent a humanitarian disaster or other widespread impacts, the government must declare or stipulate that the country is in a state of emergency. This is an inevitability because the laws and regulations that apply under normal circumstances are powerless and no longer effective. Meanwhile, on the other hand, if left unchecked, such security situations and conditions are very urgent and endanger the life of the nation and state.

RESEARCH METHODOLOGY

This research was conducted using a normative juridical research method by conducting a comprehensive study based on legislation and empirical juridical research, namely conducting an assessment based on observations of the handling of respect and protection of human dignity in emergencies, especially during armed conflicts.

This research was legal research that uses several approaches to answer the problems studied, namely: 1) the statutory approach, 2) the conceptual approach, 3) the comparative approach, and 4) historical and philosophical approaches.

Data processing was done qualitatively. The written legal materials that had been collected were then systematized according to the problems studied. Furthermore, the legal material was studied and described in accordance with the problem using the relevant theoretical basis. To answer the problem, the legal material that had been systematized was then assessed so that it can correctly answer the meaning, position, as well as legal implications of establishing an emergency law that regulates matters of governance that due to urgent circumstances need to be regulated immediately.

RESULTS AND DISCUSSION.

Facing the emergency conditions above, the response of state or government organs can lead to two issues as follows:

First: *dysfunction syndrome* in which state or government organs do not function properly (paralyzed) so that the government cannot control the situation (chaos)

Second: *dictator by accident* in which state organs or the government turns into a tyrant or dictator who takes advantage of the nation's state of emergency for the benefit of his power.

In such circumstances, the state must be present to control the government and enforce the law and protect the entire nation and the whole homeland of Indonesia with a legal mechanism known as "Emergency Constitutional Law". This term is not very popular in Indonesia, because in practice so far, in dealing with emergency conditions, the government only announces that the state is in an emergency but still applies the applicable laws and regulations which are used under ordinary conditions or normal conditions. This is because until now Indonesia does not have special rules applied to the emergency state situation and conditions.

In general, a state of emergency can be interpreted "as a statement by the authorities to postpone a normal function of several powers held by the executive, legislature, and judiciary, including changing the normal lives of citizens and government institutions, in the context of emergency response". This understanding is referred to by the German expert, Carl Schmitt, in what he calls the state of exception, namely the ability or action taken by the sovereign to exceed/exclude the rule of law in the name of the public interest. Schmitt asserts that the sovereign is "he who decides on the exception".

Understanding Emergency Constitutional Law.

In general, the Emergency Constitutional Law (HTND) includes two definitions, namely the Subjective and the Objective HTND.

First: Subjective HTND (*staatsnoodrecht*) is the right of the state to act in a state of danger or emergency by deviating from the provisions of the law, and even if necessary, deviating from the basic law. In many works of literature, the term *staatsnoodrecht* in this subjective sense is usually called *staatsnoodrecht* only, without subjective additions. Therefore, if we find the term *staatsnoodrecht* in various works of literature, we can understand it in the context of that subjective understanding. This habit continues to be maintained by scholars considering that the source of *staatsnoodrecht* in a subjective sense is human rights, which were originally unwritten laws that relied on human law as objective law. However, due to the influence of the positivism flow development and the teachings of a formal legal state, only after that did the term *staatsnoodrecht* develop in an objective sense.

Second: Objective HTND (*staatsnoodrecht objective*) is the law that applies when the country is in a state of emergency. Now the legal provisions that are still in force and regulate this state of danger or emergency are the provisions of Article 12 of the 1945 Constitution of the Republic of Indonesia and Government Regulation in Lieu of Law Law No. 23 of 1959 Concerning the State of Danger.

From the Aspect of Terminology, the Term Staatsnoodrecht in An Objective Sense.

It is an antonym or opposite of *staatsnoodrecht* (in a subjective sense) which is widely used in constitutional law. The term *objective staatsnoodrecht* is what M.I. Prins proposed to change with the term *noodstaatsrecht* because what is prioritized in *objective staatsnoodrecht* is the state of emergency or *staat in nood*.

Therefore, according to him, the term *nood staatsrecht* is more appropriate to describe the meaning contained in the words *staats noodrecht* in that objective sense. Danger or *nood* conditions can occur anytime and anywhere, in this case, it can occur in a certain area or it can even occur as a whole in the territory of a country. If the state of danger arises, only in certain areas, then it is sufficient to become the basis or reason for the state to use its subjective right to impose a state of emergency or *staatsnoodrecht* in a subjective sense in a certain area or throughout the territory of the country. In other words, the term *noodstaatsrecht* or *staatsnoodrecht* in an objective sense is a constitutional law that applies or only applies when the country is in a state of emergency or danger. Furthermore, in the term *noodstaatsrecht*, the subject is *staatsrecht* or Constitutional Law, while in the term *staatsnoodrecht* (subjective) the subject is *staatsnood* or State Emergency or Dangerous Conditions, which then becomes the reason or basis for granting the right to the state to take action in overcoming or dealing with these dangerous situations.

According to Prof. Dr. Jimly Asshiddiqie, S.H, State Emergency Law can be in the form of Constitutional Law, State Administrative Law, Criminal Law, or the field of Civil Law. Meanwhile, the terms of *noodstaatsrecht* are only discussed in constitutional law, which applies when the country is in a state of emergency or referred to as emergency constitutional law. Furthermore, according to Kabul Arifin et al., the term "staatsnoodrecht" in an unwritten subjective sense (the right of the state to act) should be translated into Indonesian as "state emergency rights" or "subjective emergency constitutional law". In other words, the much more precise terms "staatsnoodrecht" and "noodstaatsrecht" should not be separated because they substantively contain the same meaning so that they can be translated as "Emergency State Constitution". In the legal system of Indonesia, the emergency constitutional law (HTND) is a new thing and should begin to be studied and adopted into the Indonesian national legal system". In several countries such as in the United States and England the term "the State of emergency" is known, in France: "etat de siege" and in the Netherlands "staatsnood".

The legality of Emergency Situations.

Emergency Constitutional Law (HTND) is indeed "not familiar" to our ears, especially in the legal system in Indonesia. So far we only know the term "State in an Emergency" but legally, the Indonesian government does not yet have "legal standing" related to the mechanism and procedures, status, authority, and rights and obligations of the government when the country is in a state of emergency.

1. The 1945 Constitutions.

In the historical records and practice of the Indonesian legal system, during the promulgation of the 1949 UUD-RIS, the term used was "urgent circumstances" furthermore Article 139 (1) of the Emergency Law, states: "The government has the right, with its own power and responsibility, to stipulate an Emergency Law to regulate the administration of the federal government, which was also adopted in the 1950 Constitution in article 96 paragraph (1) which states that, "the government has the right to power and own responsibility to stipulate an emergency law that immediately regulates government administration due to urgent circumstances". Thus, in the 1945 Constitution, the terms "state of danger" and "forced urgency" are used, as mentioned in:

Article 12: The President declares a state of danger. The conditions and consequences of the state of danger are determined by law.

Article 22: In the case of a compelling emergency, the president has the right to stipulate government regulations in lieu of a law.

2. Law on the State of Danger.

Since the 1945 Constitution was enacted and ratified on August 18, 1945, further regulation regarding the state of danger as intended in Article 12 has been implemented in several laws, namely: Law No. 6 of 1946 on Dangerous Conditions, later revoked by Law no. 74 of 1957 and finally repealed by Government Regulation in Lieu of Law No. 23 of 1959 concerning the State of Danger and is still applicable today. Previously, a state of danger was distinguished between a state of emergency (staat van beleg) and a state of war (staat van oorlog). Furthermore, in Government Regulation in Lieu of Law No. 23 of 1959 concerning the State of Danger, it is distinguished according to its level, namely: a state of war emergency, a military emergency, and a civil emergency (the word "emergency" is considered identical or a synonym for the word "danger").

3. Law on Disaster Management.

Law no. 24 of 2007 concerning Disaster Management has limitedly regulated the state's responsibility in a disaster emergency. Disaster emergencies regulated in this law include natural disasters, non-natural disasters, and social disasters. A disaster is an event or series of events that threaten and disrupt people's lives and livelihoods which is caused both by natural factors and/or non-natural factors as well as human factors, resulting in human casualties, environmental damage, property losses, and psychological impacts.

Natural disasters are disasters events or a series of disaster events caused by nature, including earthquakes, tsunamis, volcanic eruptions, floods, droughts, hurricanes, and landslides, meanwhile, non-natural disasters are disasters events or series of disaster events caused by non-nature, including technological failures, modernization failures, epidemics, and disease outbreaks. In addition, social disasters are disaster events or a series of disaster events caused by humans which include social conflicts between groups or between communities, and terror.

The implementation of disaster management during emergency response as referred to in Article 33 letter b includes:

- a. rapid and precise assessment of the location, damage, and resources.
- b. determination of a disaster emergency status.
- c. rescue and evacuation of disaster-affected communities.

Furthermore, the status of a disaster emergency is described in Article 1 Number 19 of the Disaster Management Law, as follows: "The status of a disaster emergency is a condition determined by the Government for a certain period of time based on the recommendation of the Agency assigned to deal with disasters" when the country is in a state of emergency.

4. Mobilization and Demobilization.

The state of danger (state of emergency) is also regulated in Law Number 27 of 1997 concerning Mobilization and Demobilization. This law is related to the understanding and provisions regarding the state of danger as it can be seen clearly in the preamble considering Law no. 27 of 1997 also mandated by Article 42 of Law no. 20 of 1982 concerning the Basic Provisions for the Defense and Security of the Republic of Indonesia which stipulates the mobilization and demobilization. Moreover, Law No. 14 of 1962 concerning the stipulation of Government Regulation in Lieu of Law No. 1 of 1962 concerning Demobilization and Mobilization of all citizens in the context of General Mobilization for the Interests of National Security and Defense into law is very outdated.

Article 1 Number 1 formulates the Dangerous Conditions as a situation that can cause a threat to the unity and integrity of the nation and the survival of the nation and the Republic of Indonesia in accordance with the Danger Situation Law.

Meanwhile, Article 1 Number 2 defines Mobilization as the act of mobilizing and simultaneously using national resources as well as national facilities and infrastructure that have been fostered and prepared as components of the state defense and security forces to be used in an appropriate, integrated, and directed manner for overcoming any threats, both from abroad and from within the country.

Furthermore, Article 1 Number 5 defines Demobilization as the act of stopping the deployment and cessation of national resources, facilities, and infrastructure utilization to all regions of the country which is carried out in stages to restore the functions and duties of each element as before the force of mobilization.

According to Article 4, Mobilization and demobilization have different objectives, as follows:

(1) Mobilization aims to overcome every threat that endangers the unity, integrity, and life of the nation and the Unitary State of the Republic of Indonesia.

(2) Demobilization aims to restore the general functions and duties of government, and social life, while maintaining the ability and strength of state defense and security.

From the description above, it can be seen that legally "state of emergency", *staatsnoodrecht* or "*noodsrethstaats*" or state emergency is translated differently in several terms, namely: state of danger, state of emergency, state of civil emergency, state of war emergency, state of military emergency, state of disaster emergency, and any circumstances that can pose a threat and a compelling urgency.

This kind of ambiguous regulation makes us difficult to analyze and comprehend "the limits or the ways an event can be categorized as an emergency". In facing the situation and condition in a state of emergency, the country, in this case, the government or the authorities, must immediately take the possible action to minimize the risk or the possibility of greater danger. According to Vinkat Iyer, the country's emergency actions in such conditions must be firm but still pay attention to the protection and respect for Human Rights, including:

1. power of arrest
2. power of detention
3. power imposing restriction of fundamental freedom
4. power concerning modification of trial procedures and punishment
5. power imposing restrictions on access to the judiciary
6. power concerning immunities enjoyed by the police and member of security forces and so on.

Principles of Emergency Enforcement

1. Principle of the Emergency Declaration must be announced or proclaimed to the whole community. If a state of emergency is not declared, the actions taken by the government will not be valid.
2. The principle of legality. It is related to actions taken by the state in an emergency. Actions taken must be carried out within the corridor of law, both national and international law.
3. Principles of Communication. A state experiencing an emergency must communicate the situation to all citizens. In addition to its citizens, the government must also inform other countries officially. Information is made through representatives of the country concerned and to the UN special rapporteur on the state of emergency.
4. Provisional Principle in determining the state of emergency. It must be made under legal certainty, namely the period of implementation of the emergency because the country in a state of emergency can injure the basic rights of citizens. So that the implementation of a state of emergency must be clear about the beginning and end of its implementation.
5. Privileged Principle of Crisis Threat that causes an emergency must occur or at least contain potential dangers that can threaten the state. The threat must be significant in that it poses a threat to life, physical, property, sovereignty, safety, and the existence of the country, or the common life in a country.
6. The principle of proportionality. The purpose of imposing a state of emergency is to support the state to return it to its original state in a short time. Therefore, the actions taken must be appropriate to the symptoms that occurred. It is carried out to avoid inappropriate and excessive actions of a country.
7. The principle of Intangibility. This principle is related to human rights. In an emergency, the government may not dissolve its companion organs, namely the legislature and the judiciary.
8. Supervision Principle of An Emergency Situation Implementation must also be controlled and comply with the principles of the rule of law and democracy. Parliament should supervise the conduct of the state of emergency as a form of a “checks and balances” mechanism. The state of emergency does not reduce the authority to supervise the policies taken by the government.

Thus, in the future, the Emergency Constitutional Law will become an important part of constitutional practice in Indonesia because it is substantively related to 1) the rights and obligations of the state to protect the whole nation and homeland of Indonesia, 2) the implementation of the state's obligations to use its power in protecting and maintaining the integrity of the country and 3) prevention to any danger or threat to the survival of the state and the safety of the nation. The state of emergency allows what should not be done in normal state situations and conditions, or what is known as "onrecht word rech" (things that were not legal became law or what were originally prohibited became permissible).

REFERENCES

The 1945 Constitution.

Government Regulation in Lieu of Law No. 23 of 1959 concerning the State of Danger.

Law No. 27 of 1997 concerning Mobilization and Demobilization.

Law No. 24 of 2007 concerning Disaster Management.

Government Regulation No. 21 of 2008 concerning the Implementation of Disaster Management.

Presidential Regulation No. 17 of 2018 concerning the Implementation of Disaster Management in Certain Circumstances.