WEIGHING COMPETING URGENCY CONDITIONS IN THE ESTABLISHMENT OF GOVERNMENT REGULATION IN LIEU OF LAW (PERPPU) NUMBER 2 OF 2022 ON JOB CREATION

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Abstract
The establishment of Government Regulation in lieu of Law (Perppu) Number 2 of 2022 on Job Creation has stirred public debate. Even though it is the President’s right based on the 1945 Constitution, establishing a Perppu must fulfill the condition of compelling urgency. This article examines whether there is a compelling urgency in determining the Perppu. The compelling urgency must fulfill three conditions specified in a Decision of the Constitutional Court. Based on these three conditions, there is no urgent need for the Perppu to be established, as there is no strong correlation between the pressures on the global economy, the impact on the domestic economy, and the need for Perppu on Job Creation. The law already covers matters regulated in the Perppu, so there is no legal vacuum. Additionally, there is still time for the government and the House of Representatives (DPR RI) to implement the Decision of the Constitutional Court Number 91/PUU-XVIII of 2020 to revise the Law on Job Creation in accordance with prevailing laws and regulations. Therefore, the DPR RI should not approve the Perppu, as it needs to meet the compelling urgency condition.

Introduction
The establishment of Government Regulation in Lieu of Law (Perppu) Number 2 of 2022 on Job Creation by President Joko “Jokowi” Widodo on December 30, 2022, gave rise to public debate. The President underscored that establishing the Perppu was intended to provide legal certainty for domestic and foreign investors, considering that Indonesia’s economy in 2023 highly depends on investment and exports (Kompas, December 31, 2022).

The establishment of the Perppu is the government’s response to the Decision of the Constitutional Court on Case Number 91/PUU-XVIII of 2020 in the case of the For-
mal Review of Law Number 11 of 2020 on Job Creation. Law Number 11 of 2020 on Job Creation was formally declared flawed and conditionally unconstitutional according to the Decision. In response, the government must improve the materials stipulated in the Law on Job Creation within two years after the Decision of the Constitutional Court was announced (Kompas.id, November 25, 2021).

The establishment of the Perppu was met with a negative response from some. Jimly Asshiddiqie, Chief Justice of the Constitutional Court for the 2003–2008 period and Professor of Constitutional Law at the Faculty of Law of the University of Indonesia, said that the establishment of the Perppu violated the principle of the rule of law state (Media Indonesia, January 5, 2023). Krisna Gupta, an Associate Researcher at the Center for Indonesian Policy Studies (CIPS), argued that instead of providing legal certainty for investors, establishing the Perppu raised many questions and uncertainties (Media Indonesia, January 4, 2023).

Labor and employers were also concerned about changes in the employment cluster. The Association of Indonesian Employers (Apindo) also highlighted the difference in the formula for calculating the minimum wage and outsourced work, which was considered to have the potential to disrupt the investment climate (Kompas, January 4, 2023). Workers also voiced concerns about articles on wages. Meanwhile, the President of the Confederation of Indonesian Trade Unions (KSPI), Said Iqbal, argued that, in the context of international labor law, there is no known “certain index” in determining the minimum wage, but rather economic growth and inflation. Said disagreed that outsourcing is still allowed in the Law on Job Creation and the Perppu (Kompas, January 4, 2023).

The establishment of a Perppu by the President must fulfill the condition of compelling urgency and get approval from DPR RI. If DPR RI does not approve, the Perppu must be revoked. This article examines the issue of the compelling urgency that forced the establishment of the Perppu. This study is expected to provide inputs for DPR RI to approve or disapprove the Perppu.

### The President’s Rights in Establishing a Perppu

Provisions of Article 22 paragraph (1) of the 1945 Constitution states that “in the event of a compelling urgency, the President has the right to issue a government regulation in lieu of a law.” Furthermore, DPR RI has the authority to approve or not the Perppu the President proposed for enactment as law. (Article 71 letter b Law Number 17 of 2014 on People’s Consultative Assembly (MPR), House of Representatives (DPR), Regional Representatives Council (DPD), and Regional Legislative Council (DPRD).

Granting the right to the President to establish a Perppu is stated in the concept of Staatnoodrecht or Emergency Constitutional Law in the Netherlands, which states that where the state’s rights deviate from the provisions of laws and regulations statutory provisions
A Perppu can only be established by the President if there is a compelling urgency. Concerning the meaning of urgency, one must refer to the Decision of Constitutional Court Number 003/PUU-III of 2005 and the Decision of Constitutional Court Decision Number 138/PUU-VII/2009.

The Decision of the Constitutional Court Number 003/PUU-III of 2005, which deals with the case of the Application for the Right to Material and Formal Review of Law Number 19 of 2004 on Forestry, concludes that “matters of compelling urgency” as referred to in Article 22 paragraph (1) of the 1945 Constitution should not be equated with the presence of a dangerous situation as referred to in Article 12 of the 1945 Constitution. Rather, compelling urgency is a situation that compels the President to act. In contrast, the objectivity of the situation is assessed by DPR RI, which has the power to approve or reject the establishment of a Perppu as a law.

Through the Decision of the Constitutional Court Number 138/PUU-VII of 2009 on the case of the Appeal for Review of Government Regulation in Lieu of Law Number 4 of 2009 on the Corruption Eradication Commission, the Constitutional Court provided an interpretation of Article 22, paragraph (1) of the 1945 Constitution, which provides guidelines for the establishment of a Perppu. In that decision, the Constitutional Court stated that although the authority to establish a Perppu rests with the President, the President’s subjective assessment must be based on objective conditions. The Constitutional Court formulated the objective situation in terms of the presence of compelling urgency, which includes:

1) There is an urgent need to resolve legal issues expeditiously based on the law;
2) The required law is not yet available, creating a legal vacuum, or there is a law already, but it is not sufficient;
3) Formulating laws, as usual, cannot address the legal vacuum, as it would take a long time.

Based on these three conditions, whether the stipulation of the Perppu meets the criteria of compelling urgency is explained in the following section.

**Conditions for the Presence of a Compelling Urgency in Establishing Perppu on Job Creation**

1) There is an urgent need to resolve legal issues according to laws and regulations expeditiously.

As previously stated, establishing the Perppu is intended to provide legal certainty for investors, as Indonesia’s economy in 2023 is highly dependent on investment and exports. Through the Perppu, the government aims to meet the investment target of Rp1,400 trillion in 2023 to maintain domestic economic growth at around 5 percent and the State Budget deficit below 3 percent. However, the establishment of the Perppu is considered not to meet the required condition. Mohammad Faisal, Executive Director of the Center of Reform on Economics Indonesia,
argued that there is no strong correlation between the pressures on the global economy, the impact on the domestic economy, and the need for the Perppu (Kompas, January 3, 2023). Indonesia’s economic resilience is still relatively strong. The obstacle to investment in 2023 is the “seasonal” uncertainty ahead of the general election, not the Law on Job Creation status. The Constitutional Court declared the Law conditionally unconstitutional in 2022. However, even though the revision of the Law was still pending, investment realization was proven to be high in the same year (Kompas, January 3, 2023).

2) The required law still needs to exist, so a legal vacuum or law needs to be revised.

Matters regulated in the Perppu are already in the law and amended by the Perppu, so no legal vacuum must be filled immediately because of the existing law. The legal requirements needed are still adequate. Legislators were asked to amend the Law in accordance with the mechanism stipulated in the Law on Formulating Legislation within a period of two years from the time the Decision of the Constitutional Court was announced on November 25, 2021.

3) The legal vacuum cannot be overcome by making laws as usual.

There are still eleven months left for the government to implement the Decision of the Constitutional Court Number 91/PUU-XVIII of 2020 so that the Law on Job Creation can be amended. Even though it seems quite difficult, it is possible to do this if the legislators use the fast-track legislation (FTL) mechanism. FTL is a mechanism for formulating laws quickly, in which one of the criteria is the urgency of the bill that wants to be formulated. Even though there are both criteria of compelling urgency through establishing the Perppu in formulating laws through the FTL, there is the same role for both DPR RI and the President (Dian Kus Pratiwi, December 17, 2020). The legal basis used is Law Number 5 of 2019 on Amendments to Law Number 12 of 2011 on Formulation of Legislation, which states that in certain circumstances, DPR RI or the President can submit a bill outside the National Legislation Program, including to address extraordinary circumstances, state of conflict, or natural disaster (Article 23 letter a).

From the explanation above, it is clear that the Perppu does not have a compelling urgency basis. Although the compelling urgency that became the basis for issuing the Perppu is the subjective right of the President, this subjectivity must be accounted for and measurable. Feri Amsari, an expert in constitutional law from Padang’s Andalas University, stated that while the 1945 Constitution does provide legitimacy for the President’s actions to establish a Perppu in cases of compelling urgency, it is considered that the establishment of the Perppu does not meet the condition of a compelling
urgency such as a legal vacuum (Media Indonesia, January 2, 2023).

The establishment of the Perppu, which canceled the conditional unconstitutional status of the Law on Job Creation based on the Decision of the Constitutional Court Number 91/PUU-XVIII of 2020, has set a bad precedent for legislation and checks and balances as a feature of democratic legal state. Legislators should consistently implement the Decision by amending the Law on Job Creation in accordance with the requirements ordered by the Constitutional Court. The Decision is final, as stated in Article 24C paragraph (1) of the 1945 Constitution.

The President has left it to the DPR RI to deliberate over the Perppu. If the DPR RI approves, the Perppu will be passed as a law. Conversely, if the DPR RI approves, the Perppu will prevail. The analysis results show that the Perppu does not meet the condition of compelling urgency, so the DPR RI should not approve the Perppu.

Conclusion

Based on the 1945 Constitution, establishing a Perppu must comply with the condition of compelling urgency. The Constitutional Court has determined the conditions for compelling urgency, but the President’s establishment of the Perppu does not fulfill the conditions for an urgent need. A legal vacuum cannot be overcome by formulating laws in the usual way.

Establishing the Perppu has set a bad precedent for legislation and checks and balances as a feature of a democratic legal state. Legislators should consistently implement the decision of the Constitutional Court by amending the Law on Job Creation in accordance with the conditions set by the Constitutional Court, as the court’s decision is final. The establishment of the Perppu has shut down public participation and annulled transparency in forming legal products. Therefore, the DPR RI should not approve the Perppu, so it does not prevail.

Reference

“Buruh Pilih Perppu karena tidak percaya dengan DPR”, Media Indonesia, January 2, 2022, p. 5.
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