



The Oversight Role of Legislative Institutions in Emergency Situations (Comparison of Indonesia with The United States)

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Abstract

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An emergency situation disrupts the normal functioning of a country, rendering standard laws and procedures ineffective. In such cases, extraordinary measures are required, and the President, as the executive authority, is granted significant powers to address the emergency. The House of Representatives (DPR), as the legislative body, is responsible for overseeing the executive branch. However, the oversight function of the DPR appears to be suspended during emergencies under Government Regulation in Lieu of Law Number 23 of 1959 (Perppu Keadaan Darurat). Furthermore, there are no clear guidelines defining the DPR's role during states of emergency in Indonesia. The DPR's oversight function is crucial and cannot be eliminated, as it represents the people's interests and voices. This article employs a normative juridical method, incorporating conceptual, comparative, and legislative approaches with a descriptive analysis. It aims to explore the role of legislative oversight in emergency situations in both Indonesia and the United States, comparing the effectiveness of their oversight systems in preventing power abuse and protecting human rights. The United States has established regulations to ensure legislative oversight during emergencies, thereby preventing arbitrary actions



by the executive. Indonesia could benefit from adopting similar mechanisms to enhance its legislative oversight during emergencies and better protect human rights.

A. Introduction

A state of emergency or crisis can arise in various countries, including Indonesia, disrupting the normal functioning of the state and rendering standard laws inapplicable. In such cases, extraordinary or exceptional measures become necessary.¹ The president, as the executive authority, is then granted extensive powers to address the emergency conditions.

The 1945 Constitution of the Republic of Indonesia (*UD 1945*) includes two articles that address abnormal conditions: Article 12 and Article 22. Article 12 states, "The President declares a state of danger, with the conditions and consequences of such a state determined by law," using the term "state of danger." On the other hand, Article 22 asserts, "In compelling exigencies, the President has the right to issue government regulations in lieu of law," referring to "compelling exigencies."

In their work titled "Government Regulations in Lieu of Laws from the Perspective of Constitutional Doctrine and the Principle of the Rule of Law," Prof. Bagir Manan and Prof. Susi Dwi Harijanti clarify that Article 12 of the *UD 1945* is specifically used to declare a state of danger threatening the State of Indonesia. In contrast, Article 22 may be invoked in urgent situations not necessarily threatening the state but where existing regulations fail to address pressing legal needs within a short timeframe.²

These two articles highlight the president's significant role in both emergency and urgent situations. Government Regulation in Lieu of Law Number 23 of 1959 (*Perppu Keadaan Darurat*), which governs states of emergency, grants the president extensive powers during emergencies, including civil emergencies, military emergencies, or states of war. Under this regulation, the president can implement emergency policies without the lengthy and complex legislative process, increasing the risk of abuse of power and human rights violations.

Conversely, the House of Representatives (*DPR RI*), as the legislative body, is responsible for overseeing the executive branch. This oversight encompasses monitoring policy decisions, budgeting and state expenditure, and the appointment of public officials.³ However, *Perppu Keadaan Darurat* appears to suspend this oversight function during states of emergency. Additionally, there are no clear regulations regarding the role of the *DPR RI* when Indonesia is in a state of emergency.

Christian Bjørnskov and Stefan Voigt, as discussed by Muhammad Yoppy Adhihernawan, outline the essential elements that must be present in a state of emergency:

1. What conditions cause a state of emergency for the country?
2. Who has the authority to declare a state of emergency?
3. Who has the authority to declare the end of a state of emergency?
4. Who has the authority to legally oversee policies used during a state of emergency?
5. Who enforces the state of emergency? and
6. What powers are granted to the emergency government during a state of danger?⁴ where there is a question about who carries out oversight during an emergency.

¹ Jimly Asshiddiqie, *Emergency Constitutional Law*, Jakarta: PT Rajagrafindo Persada, (2007), p. 58.

² Manan, Bagir & Harijanti, Susi Dwi. "Government Regulations in Lieu of Laws in the Perspective of Constitutional Teachings and Principles of the Rule of Law." *Padjadjaran Journal of Legal Studies* 4, No. (2), (2017): 222-243. <https://doi.org/10.22304/pjih.v4n2.a1>.

³ Jimly Asshiddiqie, *Principles of Post-Reformation Indonesian Constitutional Law*, Jakarta: PT Bhuana Popular Science, (2007), p. 163.

⁴ Adhihernawan, MY "Restrictions on the President's Power in Declaring Dangerous Conditions Based on Article 12 of the 1945 Constitution of the Republic of Indonesia." Thesis, Padjadjaran University.

The oversight function held by the *DPR RI* is crucial and cannot be disregarded. The parliament, as a representative body, serves as the voice of the people, advocating their aspirations, interests, and opinions. It is tasked with ensuring that policies are shaped and implemented in a manner that reflects and benefits the people it represents. This function remains essential even during states of emergency.

Indonesia, as a republic, handles emergency situations differently from federal countries like the United States. In the U.S., Congress plays a significant role in overseeing policies issued by the president during emergencies. State constitutions often outline legislative oversight during such times.⁵ This research aims to explore and compare the role of legislative oversight during emergencies in both Indonesia and the United States, evaluating the effectiveness of these systems in minimizing abuses of power and human rights violations.

Previous research has explored various aspects of states of emergency, including Muhammad Yoppy Adhiernawan's "Limitation of the Presidential Power in Declaring a State of Danger Based on Article 12 of the *UUD 1945*," Jimly Asshiddiqie's "Constitutional Law of Emergency," and Bagir Manan and Susi Dwi Harijanti's "Government Regulations in Lieu of Laws from the Perspective of Constitutional Doctrine and the Principles of the Rule of Law." However, these studies have not specifically addressed the role of the legislative body during emergencies or compared Indonesia's situation with that of the United States. This research will focus on the following issues:

1. What is the role of legislative oversight during emergencies in Indonesia and the United States?
2. How does the effectiveness of existing oversight systems compare in minimizing human rights violations?

The research method employed in this article is the normative juridical method. This approach involves analyzing primary and secondary legal materials.⁶ The primary legal materials examined include the 1945 Constitution of the Republic of Indonesia (*UUD 1945*), Government Regulation in Lieu of Law Number 23 of 1959 concerning the Revocation of Law No. 74 of 1957 and the Stipulation of a State of Danger (*Perppu Keadaan Darurat*), and the National Emergencies Act (1976). Secondary legal materials consist of books and journal articles.

These legal materials are analyzed using several approaches: the conceptual approach, the comparative approach, and the statute approach, all within a descriptive framework. The conceptual approach explores doctrines within legal science and involves analyzing the concept of emergency situations. The comparative approach involves comparing emergency laws between countries, specifically between Indonesia and the United States. The statute approach examines relevant legislation and regulations related to legislative oversight during emergencies.⁷ The research will compare the legislative oversight conducted during emergency situations in the United States and Indonesia. It will use human rights variables as a benchmark to evaluate which country's legislative oversight better ensures the protection of human rights during emergencies.

B. Discussion

1. Supervisory Function by the Legislative Institution (theoretical level)

The social conditions of the proponents of the separation of powers illustrate the necessity of such a division. In 18th-century France, despite not being as dire as earlier periods when access to knowledge was highly restricted and the church held significant dominance, the state

⁵ National Conference of State Legislatures. "Legislative Oversight of Emergency Executive Powers." June, 15, 2023. Available online <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> ,

⁶ Soerjono Soekanto & Sri Mahmudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta: Rajawali, (2003), p. 13.

⁷ Nugroho, Sigit Sapto, dkk. (2020). *Metodologi Riset Hukum*, Solo: Oase Pustaka. p. 98.

system was still a monarchy with immense power and wealth concentrated in the hands of the king. One of the early methods used by writers to critique the ruler's lifestyle was satire aimed at officials, as exemplified by Montesquieu in his work "Candide," which led to his imprisonment. Montesquieu's primary critique focused on the pervasive corruption of rulers and the arbitrary nature of government.⁸

Montesquieu categorized forms of government into three types: Republic, Monarchy, and Despotic. A republic is characterized by supreme power resting with the people, and is marked by an egalitarian government that upholds virtue. A monarchy, according to Montesquieu, operates under fixed laws and honor, with fear being a foundational element of administration. A despotic government, on the other hand, is described as one where a single ruler or an oligarchy holds absolute political power.⁹

Following his observations in England, where he witnessed the excesses of absolute monarchy, Montesquieu argued in his book "The Spirit of the Laws" for the division of government into three branches: executive, legislative, and judicial. He emphasized that this separation is crucial for ensuring liberty. Montesquieu stated, "When the legislative and executive powers are united in the same person or the same body of rulers, there can be no liberty... Nor is there liberty if the power of judging is not separate from legislative and executive powers. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control... Were it joined with the executive, the judge might behave and act with violence and oppression..."¹⁰

The concept of separation of powers¹¹ has inspired numerous countries to structure their governments into executive, legislative, and judicial branches, each with the aim of limiting arbitrariness. Despite the variations in how these branches are organized, the underlying goal remains consistent: to prevent the concentration of power and ensure a system of checks and balances.

In Indonesia and the United States, there are notable differences in the legislative structure within this separation of powers framework. In Indonesia, legislative power is divided into three chambers: the *DPR RI* (People's Representative Council), the *DPD* (Regional Representative Council), and the *MPR* (People's Consultative Assembly), which includes both the *DPR RI* and the *DPD*. In contrast, the United States has a bicameral legislature consisting of the House of Representatives and the Senate.¹²

The principle of checks and balances is a cornerstone of the separation of powers. It ensures that the executive, legislative, and judicial branches are distinct yet interdependent, with each branch able to check and balance the others to prevent abuses of power. This principle is reflected in the authorities and interactions among these branches.

In the United States, for example, the president can veto bills passed by Congress, but Congress can override this veto with a two-thirds majority in both Houses.¹³ The Supreme Court reviews regulations and laws through judicial review, and justices, who are appointed for life

⁸ Crash Course, "The Enlightenment: Crash Course European History #18", 2020. Available online https://www.youtube.com/watch?v=NnoFj2cMRLY&list=PL8dPuuaLjXtMsMTfmRomkVQG8AqrAmJFX&index=19&ab_channel=CrashCourse.

⁹ Syafaah, Aah. "Social Class in the *Landelijk Stelsel* of the Raffles Period (1811 - 1816)." *Tamaddun Journal* 6, No. 1 (2019): 133 - 146. 10.24235/tamaddun.v6i1.3252.

¹⁰ InMind Institute. "A Summary of Montesquieu's Political Thought." June, 17, 2023. Available online <https://inmind.id/rangkuman-pemikiran-montesquieu-1689-1755/>.

¹¹ Historically, the idea of dividing power actually existed long before Montesquieu proposed the idea of dividing power, namely in the time of Aristotle and was already practiced in the English kingdom. Montesquieu's ideas then often emerged because Montesquieu's ideas were considered the most relevant and were the inspiration for many countries in Europe and America in forming state power.

¹² Excellent, Jake. "Comparison of the Authority of Legislative Bodies in Indonesia and the United States." *Journal of State and Justice* 8 No. 1 (2019): 1-12. <https://doi.org/10.33474/Hukum.v8i1.4482>.

¹³ Jimly Asshiddiqie, *Op.cit*, p. 70.

by the executive, can be impeached by Congress if they commit crimes.¹⁴ Similarly, the President can be impeached by Congress. These mechanisms illustrate how the three branches of government mutually exert checks and balances to maintain the integrity and balance of power.

The principle of checks and balances can be operationalized in the following ways:

- a. granting more than one body of authority to take action,¹⁵ such as giving the authority to make laws to both the executive and legislative branches.
- b. granting the power to appoint certain officials to more than one institution, such as the executive and legislative branches;
- c. providing impeachment mechanism for one branch to act against another;
- d. granting one institution the authority to directly oversee another state institutions; and
- e. granting the judiciary the authority to resolve disputes between the executive and legislative branches.

In the operation of checks and balances, one key aspect is the authority granted to one institution to oversee another, which is a common practice in both Indonesia and the United States. Specifically, the legislative branch's oversight of the executive branch is crucial for ensuring that the executive does not act arbitrarily and remains within its designated authority.

The Congressional Research Service, in its article "Congressional Oversight and Investigation," outlines three primary objectives of legislative oversight:¹⁶

- a. programmatic purposes (program objectives);

This includes:

- ensuring that agencies and programs operate in a cost-effective and efficient manner and fulfill their statutory missions;
- ensuring executive compliance with legislative intent;
- evaluating program performance;
- investigating waste, fraud, and abuse;
- reviewing the agency's rulemaking process; and
- obtaining useful information for future policies making.

- b. political purposes (political goals); And

These include:

- generating favorable publicity for lawmakers;
- winning electoral support from constituents and external groups;
- countering criticism of favorite programs or institutions.

Oversight occurs within a political context where congressional relations with administrative entities can range from cooperation to conflict. Additionally, there is also inherent constitutional and political tensions between Congress and the President, even during periods of unified government.

- c. institutional purposes.

This includes:

- examining the powers of the executive branch;
- investigating how laws are administered; and
- informing Congress and the public.

These purposes are particularly significant as they serve to protect congressional prerogatives and strengthen the public's ability to evaluate executive activities and actions.

¹⁴ Sunarto, "The Principle of Checks and Balances in the Indonesian Constitutional System." *Journal Issues - Legal Issues* 45, No. 2 (2016): 157-163. 10.14710/mmh.45.2.2016.157-163 .

¹⁵ Munir Fuady, *Theory of the Modern Legal State*, Bandung: Refika Aditama, (2020), p. 124.

¹⁶ Congressional Research Service, "Congressional Oversight and Investigations," June, 19, 2023. Available online <https://crsreports.congress.gov/product/pdf/IF/IF10015#:~:text=United%20States%3A%20The%20%E2%80%9Cpower%20of,proposed%20or%20possibly%20needed%20statutes.%E2%80%9D> .

In Indonesia, the legislative institution (in this case the *DPR RI*) has an oversight function depicted in 3 rights:

1. Right of Interpellation;
The *DPR RI*'s right to request information from the Government regarding important and strategic policies that have a broad impact on the life of society, nation, and state.
2. Right of Inquiry
The *DPR RI*'s right to conduct investigations into the implementation of a law or government policy relating to important, strategic matters, and having a broad impact on the life of the community, nation, and state which is alleged to be in violation of the law.
3. Right to Express an Opinion
The *DPR RI* has the right to express opinions on:
 - a. government policies or extraordinary events occurring domestically or internationally;
 - b. follow-up to the implementation of the right of interpellation and the right of inquiry; or
 - c. allegations that the President and/or Vice President have committed violations of the law in the form of treason against the state, corruption, bribery, other serious criminal, or disgraceful acts, and/or the President and/or Vice President no longer fulfill the requirements as President and/or Vice President.

In the United States, the oversight function is known as Legislative Oversight, which can take the form of:¹⁷

- a. hearings and investigations into reports;
- b. consulting with or receiving reports directly from the president;
- c. providing advice and approval on agreements;
- d. impeachment of the president initiated by the House and tried in the senate, etc.

2. State of Emergency

The term "state of emergency" refers to a situation of a sudden danger that threatens public order, requiring the state to act in an unusual manner in accordance with the legal rules that usually apply under normal circumstances. When viewed at a linguistic level, there are many synonyms to describe a state of emergency:¹⁸

1. state of emergency;
2. state of civil emergency;
3. state of national necessity;
4. emergencies;
5. dangerous situation (article 12 of the *UUD 1945*);
6. extraordinary circumstances; etc.

Indonesia and the United States, like many other countries, face various threats to their integrity and sovereignty, which can originate from both internal and external sources and manifest as either military or non-military threats.¹⁹ To address such threats, legal mechanisms have been established, such as Martial Law in the United States and *Hukum Tata Negara Darurat* (Emergency Constitutional Law) in Indonesia.

Carl Schmitt, in his work "Political Theology: Four Chapters on the Concept of Sovereignty," notes that "Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation. This requirement for internal peace compels it in critical

¹⁷ Thoughtco.com. "Congressional Oversight and the US Government", June, 21, 2023. Available online <https://www.thoughtco.com/congressional-oversight-4177013>.

¹⁸Farid, Wajdi & Andryan. "Prerogative of the President in Concerning the State of Emergency (Comparison of Indonesia with the United States)." *IJRS: International Journal Regulation & Society* 1, No. 2 (2020): 138-150. <https://doi.org/10.55357/ijrs.v1i2.170>.

¹⁹Emil Faisal, et al. *National Integration Textbook*, Palembang: Bening Media Publishing, (2022), p. 19.

situations to decide also upon the domestic enemy.”²⁰ This highlights that in abnormal situations, the usual laws may be inadequate, and the state must take decisive action to address these exceptional circumstances.

Jimly Asshiddiqie expands on the concept of an abnormal situation, describing it as encompassing various dimensions, from warfare that causes widespread chaos and threatens lives, to situations that may appear normal but still pose a threat to national integrity.²¹ Kim Lane Scheppele defines an abnormal state or state of exception as "a condition where the state faces a threat of life and death and overcoming this threat requires responsive action that, under normal circumstances, cannot be justified by the legal principles of that state."²²

These emergency measures, often referred to as emergency actions, are implemented to address states of emergency, which can lead to the suspension or modification of normal legal provisions. Venkat Iyer, cited by Mahfud MD, identifies several forms of emergency action, including:²³

1. the transfer of all or part of the power held by the legislative branch to the executive branch;
2. the expansion of executive powers in conducting arrests and detention in criminal acts that are the source of emergency, as well as administrative detention of those deemed to be against the state.
3. the use and establishment of special courts for criminal perpetrators who are the source of emergency;
4. restrictions on civil liberties for citizens and suspension of constitutional rights held by citizens;
5. the reduction of judicial authority in examining actions taken by the government.

Among the emergency measures discussed, this study particularly highlights the "transfer of all or part of the power held by the legislative branch to the executive branch." This raises the question: What happens to the supervisory system maintained by the legislature?

3. The Principle of Proportional Necessity as a Benchmark for the Use of Oversight Rights by the DPR

When examining the emergency power measures discussed earlier, state of emergency often results in "restrictions on civil liberties for citizens and suspension of constitutional rights." However, it is crucial to recognize that within human rights, there are Non-Derogable Rights—rights that cannot be violated even during emergencies. As stipulated in Article 28I (1) of the 1945 Constitution, these Non-Derogable Rights include: "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to recognition as a person before the law, and the right not to be prosecuted on the basis of retroactive law." These rights cannot be diminished under any circumstances.²⁴

While the DPR's right to exercise oversight is not classified as a Non-Derogable Right and can be restricted, it cannot be entirely abolished. The DPR plays a crucial role in maintaining balance, and its elimination would allow the government to act arbitrarily during

²⁰Hukumonline. "Emergencies and the Constitution." June, 23, 2023. Available online <https://www.hukumonline.com/berita/a/kedaruratan-dan-konstitusi-lt6062df35267d3?page=1>.

²¹Jimly Asshiddiqie, *Emergency Constitutional Law*, Op.cit, p. 3.

²²Scheppele, Kim Lane. "Law in a Time of Emergency: States of Exception and the Temptations of 9/11." *Journal of Constitutional Law* 6, no. 5 (2004): 1001 - 1083. <https://scholarship.law.upenn.edu/jcl/vol6/iss5/4>.

²³Jimly Asshiddiqie, *Emergency Constitutional Law*, Op.cit, p. 74.

²⁴Qurrata Ayuni,, "Kedaruratan dan Konstitusi", Juni, 23, 2023. Available online, [hukumonline.com/berita/a/kedaruratan-dan-konstitusi-lt6062df35267d3?page=1](https://www.hukumonline.com/berita/a/kedaruratan-dan-konstitusi-lt6062df35267d3?page=1).

an emergency without legislative oversight. To prevent arbitrary actions by the state, the Principle of Proportional Necessity is essential.

The Principle of Necessity is a fundamental concept underlying the declaration of a state of emergency. Originating from Roman law, where it is known as "*necessitas non habet legem*" or "necessity knows no law," this principle asserts that the dangers threatening a state often do not align with existing laws. Instead, the law must adapt to the emergency conditions, necessitating extraordinary measures. This principle illustrates that the state may need to violate existing laws to effectively address emergent threats.

Thomas Jefferson, as cited by Jimly Asshiddiqie, underscores that "The principle of necessity to protect the state from threats holds a very high position. The loss of a state merely because of the obligation to comply with rigid written laws leads to the loss of the law itself, along with life, liberty, property, and those who enjoy them. Or it can be said that we sacrifice the common goal only because we prioritize procedure or method."²⁵ However, the Principle of Necessity must be complemented by the Principle of Proportionality.

The Principle of Proportionality dictates that any emergency actions must be reasonable and proportional to the threat they address, ensuring that these actions do not exceed what is necessary. This principle provides a framework to reasonably limit emergency measures. Thus, while the state has the right to override existing laws to confront immediate threats, such actions must be reasonable, proportional, and commensurate with the threat.²⁶

In the context of DPR oversight, this principle can be illustrated with a hypothetical scenario: during a state of emergency, such as wartime, the government may need to reallocate funds urgently. If the DPR's approval process is slow, it may be necessary to temporarily bypass this process to expedite financial reallocation. This should only occur if the oversight is genuinely aimed at addressing the emergency and not for unrelated purposes.

To ensure the effective implementation of the principle of proportionality and proper management of emergencies, Christian Bjørnskov and Stefan Voigt, as outlined by Muhammad Yoppy Adhihernawan, identify essential elements that must be addressed during a state of emergency. These elements include: 1) defining the specific conditions or threats that constitute a state of emergency, 2) identifying who has the authority to officially declare a state of emergency, 3) determining who can declare the end of the state of emergency, 4) establishing who is responsible for legally overseeing the policies and measures implemented during the emergency, 5) clarifying who will implement the necessary actions and measures, and 6) specifying the powers granted to the government or authorities during the emergency. Addressing these six elements is crucial for preventing arbitrary state actions and ensuring that emergency measures are both necessary and properly supervised.²⁷

4. Emergency Rules in Indonesia

In the *UUD 1945*, the regulation of abnormal conditions uses two terms:

1. state of danger (article 12); And
2. compelling emergency (Article 22).

Article 12 of the *UUD 1945* states that "The President declares a state of danger; the conditions and consequences of the state of danger are determined by law," while Article 22

²⁵ Jimly Asshiddiqie, op.cit, p. 84.

²⁶ *Ibid.* p. 93-94.

²⁷ Muhammad Yoppy Adhihernawan, op.cit, p. 18

provides that "In the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of law." Bagir Manan and Susi Dwi Harijanti clarify that the distinction between Articles 22 and 12 lies in their application: Article 22 is invoked in urgent situations where existing laws or regulations cannot address legal issues promptly, while Article 12 is employed when declaring a state of danger to address emergencies threatening the state's integrity.

The state of emergency referred to in Article 12 is further elaborated in the *Perppu Keadaan Darurat*, which categorizes emergencies into three forms:

1. Civil Emergency;
2. Military Emergency; and
3. War Emergency.

In Article 1 paragraph (1) of the *Perppu Keadaan Darurat* in the general explanation, it is explained that there are circumstances which can be the reason for the president to declare a state of emergency, whether civil, military or war, namely:

1. when security and public order in the entire part of the territory of the Republic of Indonesia are threatened by rebellion, riots, or the impact of natural disasters that are difficult to handle using ordinary equipment;
2. when there is or a threat of war that threatens the territory of the Republic of Indonesia in any forms;
3. when the life of the state is in danger or there are special circumstances indicating or are concerned about the existence of symptoms that could endanger the life of the state; And
4. when the conditions of the state of danger have been fulfilled, the power (in this case usually carried out by the executive) will take the necessary actions outside of existing legal norms to overcome this.

These measures are collectively referred to as emergency powers acts. Throughout Indonesia's 78-year history of independence, a series of events has necessitated the application of emergency law to address various crises. These events include the post-independence war, the political crises of 1958 and 1965-1966, the separatist conflicts in Aceh and Papua, the Aceh tsunami disaster, the Lapindo mudflow case, the East Timor conflict, the Second Military Aggression leading to the formation of the Emergency Government of the Republic of Indonesia (PDRI) in West Sumatra, and the recent Covid-19 pandemic in 2020.²⁸

Currently, Indonesia has several regulations with emergency provisions, aside from the Emergency Regulations. Examples include Law Number 24 of 2007 on Disaster Management, Law Number 7 of 2012 on Social Conflict, Law Number 6 of 2018 on Health Quarantine, and Law Number 2 of 2020 on the Establishment of Government Regulations in Lieu of Laws related to State Financial Policy and Financial System Stability to address the Covid-19 pandemic and potential threats to the national economy and financial system stability. These regulations aim to complement the Regulations on Emergency Situations by addressing specific areas such as health, finance, and disaster management.

5. *Martial Law in United States of America*

In countries that follow the continental European legal system, rules regarding states of emergency are typically enshrined in the constitution. For instance, France regulates its state of emergency, or *état de siège*, within the Constitution of the Fifth Republic and further details it in related regulations. In contrast, Anglo-Saxon countries, including the United States, do not have explicit constitutional provisions for emergency law. Instead, they rely on practices such as "martial law," which is not directly addressed in the constitution. In the U.S., there is no legal text that explicitly grants the President the authority to declare a state of emergency. Instead,

²⁸JDIH Sukoharjo Regency. "Basics of Emergency Constitutional Law", June, 25, 2023. Available online <https://jdih.sukoharjokab.go.id/berita/detail/darurat-Hukum-tata-negara-darurat> .

the concept of martial law has evolved through judicial interpretations and the principle of judge-made law.²⁹

In the U.S., the term "martial law" is often associated with states of emergency and is somewhat analogous to the extraordinary measures applied in continental systems, such as the *état de siège*.³⁰ Historically, martial law referred to military law during wartime. However, in contemporary contexts, it generally denotes laws applied during a state of emergency, similar to the exceptional circumstances found in continental legal systems.

Although the U.S. Constitution does not explicitly address emergency constitutional law, William B. Fisch, in his article "Emergency in The Constitutional Law of the United States," asserts that "there is no doubt that the Framers considered the question of how to deal with emergencies, or 'exigencies', and believed that they had fashioned a document which would permit the government to do it effectively." This intention is reflected through various mechanisms and judicial interpretations that allow the government to respond to emergencies effectively.³¹

1. the allocation of certain powers to specific functions closely related to extraordinary or emergency situations; and
2. the provision of certain exceptions to general rules linked to extraordinary or emergency situations.

Martial law is practiced even though it is not explicitly regulated in the constitutional text. This doctrine has evolved separately through judicial interpretations, rooted in the principle of judge-made law. Typically, the term "martial law" refers to the legal measures that apply or are enforced during a state of emergency. The implementation of emergency or military laws is considered a common practice in such situations. In the application of martial law, four key aspects are particularly relevant:³²

1. the authority of the President to declare martial law due to an emergency;
2. judicial review of decisions and regulations made under martial law;
3. the use of military courts in areas under martial law; and
4. restrictions on individual freedoms after martial law is declared.

The use of emergency law is evident from historical events such as the American Civil War. During this period, President Abraham Lincoln mobilized American citizens into militias to combat the rebels, paying them minimal wages despite the risks they faced. He also granted military leaders the authority to arrest individuals deemed suspicious or dangerous. These measures were considered necessary to preserve the United States.³³

To formalize and regulate such states of emergency, the United States enacted the National Emergencies Act of 1976. This legislation granted the president the authority to declare a state of emergency, aiming to streamline the various emergency statutes in place for over 40 years and to provide a clear procedural framework for future declarations. In his signing speech, President Gerald Ford emphasized the bill's purpose to "reform the existing maze of statutes" and to enable future presidents to declare emergencies with congressional oversight.³⁴

This authority has become well-established in American governance, with the president declaring 64 states of emergency in the past 40 years alone.³⁵ Emergency actions have varied widely, including blocking property related to significant cyber threats (April 1, 2015),

²⁹Jimly Asshiddiqie. *Emergency Constitutional Law*, *Op. cit* , p. 111.

³⁰*Ibid*, 112.

³¹Fisch, WB "Emergency in the Constitutional Law of the United States." *The American Journal of Comparative Law* 38 , (1990): 389–420. <https://doi.org/10.2307/840550>.

³²Wajdi, Farid & Andryan. *Op. cit*.

³³Adhihernawan, MY *Op.cit*, p. 42.

³⁴The American Presidency Project. "Statement on Signing the National Emergencies Act", June, 27, 2023. Available online <https://www.presidency.ucsb.edu/documents/statement-signing-the-national-emergencies-act> .

³⁵CNN. " *Trump's Wall Would Be The 32nd Active National Emergency* ", June, 29, 2023, Available online <https://edition.cnn.com/2019/01/07/politics/trump-wall-active-national-emergency/> .

imposing sanctions on individuals linked to the Venezuelan crisis (March 9, 2015), and addressing issues in Nicaragua (November 27, 2018).³⁶ Additionally, as a federal system, individual states have their own constitutional provisions and regulations for handling emergencies, and governors possess the authority to declare states of emergency within their jurisdictions.

6. Comparison of Oversight Systems in Emergency Situations

Christian Bjørnskov and Stefan argue that six conditions must be met to determine whether a state has adequately regulated a state of emergency. One critical question is: "Who has the power to legally oversee the policies used during a state of emergency?"

In times of war, disease, or other extraordinary circumstances, governors are typically authorized to declare a state of emergency. Once declared, executive powers are expanded beyond their usual scope until the emergency ends. These expanded powers often include those normally reserved for legislative bodies, such as the suspension of existing laws or the creation of temporary new laws necessary to address the emergency. While the executive branch needs the flexibility to respond swiftly to emergencies, it is essential that the legislature plays a crucial role in overseeing and limiting these powers to prevent abuse and maintain the separation of powers fundamental to democratic governance.³⁷

One of the key aspects of legislative oversight involves protecting human rights. During emergencies, governments may take actions that restrict constitutional rights, such as freedom of expression, freedom of assembly, and the right to privacy, in the name of national security or other public interests. Ensuring that these rights are not unduly infringed upon is a vital test of legislative oversight and the balance between effective emergency response and the preservation of democratic principles.³⁸

The use of emergency law can indeed create a dilemma between safeguarding constitutional rights and addressing national security or public interests. Excessive restrictions on citizens' rights may lead to human rights violations and potentially exacerbate the emergency situation. Conversely, insufficient restrictions might compromise national security or public welfare. As Mahfud MD notes in his book "Constitutional Law," cited by Atmadja, "Human rights are often violated for the reason that the most important thing is the rights of the community as a unit under the jargon of 'public interest,' while the measurements of the public interest are not clear so that the public interest is identical to the government's interest." This suggests that during emergencies, governments may blur the lines between public interest and governmental interest, making legislative oversight even more critical.

Legislative oversight remains essential, even during states of emergency. If the legislature can continue to hold sessions, it should persist in monitoring and evaluating the emergency measures in place. The extent of legislative involvement depends on the severity of the emergency: in a state of war, for example, the executive may have broader powers compared to situations involving limited natural disasters or social unrest.³⁹ Consequently, a lighter level of danger would warrant a more significant role for the legislature in assessing and addressing the emergency.⁴⁰

In Indonesia, the regulation concerning legislative oversight during emergencies is not well-defined. The primary regulation is found in Article 22 of the 1945 Constitution, which states that "In the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of law." Paragraphs (2) and (3) specify that such regulations

³⁶*Ibid.*

³⁷National Conference of State Legislatures, *Op. cit.*

³⁸Jimly Asshiddiqie. *Emergency Constitutional Law, Op.cit* , p. 58.

³⁹Adhihernawan, MY *Op.cit.* p. 186.

⁴⁰Jimly Asshiddiqie. *Emergency Constitutional Law, Op.Cit*, p. 260.

must be approved by the House of Representatives (*DPR RI*) in the subsequent session, and if approval is not granted, the regulation must be revoked. This framework emphasizes the DPR's role in reviewing emergency regulations, but lacks detailed mechanisms for ongoing oversight.

These regulations are considered insufficient to provide the supervisory role needed in emergencies for several reasons:

1. If we take the opinion of Bagir Manan and Susi Dwi Harijanti that article 22 is only used in urgent situations where existing laws or regulations cannot resolve the required legal problems in a short time. This does not cover the state of danger contained in article 12 of the *UUD 1945*.
2. The object of oversight held by the *DPR RI* is only legal products in the form of government regulations in lieu of laws. Meanwhile, in an emergency, emergency actions are not limited to just the formation of legal products, but can take the form of other actions.
3. This article is not included in the oversight functions of the *DPR RI*, namely: the right to inquiry, the right to interpellation, and the right to express an opinion.

Although not explicitly regulated by Indonesian law, the oversight function of the *DPR RI* does not cease to exist. Historical instances of emergencies in Indonesia illustrate this continuity.

A notable example is the government's comprehensive oversight during the Covid-19 emergency. To monitor and manage the pandemic response, the *DPR RI* established a Supervisory Working Committee dedicated to overseeing Covid-19 handling. Additionally, a Supervisory Team was formed to oversee pandemic management from regulatory, institutional, and disaster mitigation perspectives.⁴¹ *DPR* also created a Covid-19 Handling Task Force (*Satgas Covid-19*) to facilitate government efforts by connecting local entrepreneurs and donors with health facilities in need.

However, it is important to note that the Covid-19 emergency, while significant, does not reach the level of other emergencies such as military crises or wartime situations. Therefore, it cannot be the sole benchmark for assessing the DPR's effectiveness in oversight during emergencies.

For instance, during the political crisis of 1965-1966, a significant state of emergency was declared in Sumatra on October 4, which later extended to most of Indonesia. According to Jess Melvin's book, *Army and Genocide in Indonesia: Procedures for Mass Murder*, and quoted by the BBC, this emergency declaration allowed the government to direct its troops based on the warrant issued due to the state of emergency.⁴² During this period, there was a widespread massacre of millions of individuals deemed sympathizers of the Indonesian Communist Party (PKI), who were killed without trial.⁴³

In this context, the DPR, known then as the DPR Gotong Royong, did not take action against the human rights violations perpetrated by the government. This historical example underscores the necessity of an effective oversight mechanism within the *DPR RI* during emergencies. On the contrary, in the United States, most states have established legislative oversight mechanisms for emergencies. Out of 50 states, only eight—Delaware, Illinois, Massachusetts, Mississippi, New Jersey, South Dakota, Tennessee, and Wyoming⁴⁴—do not have such regulations. The author will provide several examples of regulations regarding supervision of emergency measures in various states in the United States:⁴⁵

⁴¹Indonesian Parliamentary Center. "2020 *DPR RI* Monitoring Function Monitoring Notes *The Power of Parliamentary Oversight during the Covid-19 Pandemic*", July, 1, 2023. Available online <https://ipc.or.id/dataan-pengawasan-function-pengawasan-dpr-ri-2020-powered-pengawasan-parlemen-di-masa-pandemi-covid-19/>.

⁴²BBC.Com. "Soeharto 'coordinated' Massacre Operations 1965-1966, Document Says", July, 3, 2023, Available online <https://www.bbc.com/indonesia/indonesia-44962160>.

⁴³Tumbo, Asher. "The Concept of *Transitional Justice* in Handling Serious Human Rights Violations in Indonesia." *Paulus Law Journal* 1, No. 2 (2020): 72-87. 10.51342/plj.v1i2.100

⁴⁴National Conference of State Legislatures, *op.cit.*

⁴⁵*Ibid.*

1. Alaska;
Emergency proclamations may not remain in effect longer than 30 days unless extended by the legislature with a concurrent resolution. The governor can spend state funds to address disasters under the following circumstances:
 - a. if the legislature is in session, the legislature approves the financing plan; or
 - b. if the legislature is not present, the governor convenes a special session of the legislative body within five days after declaring a state of disaster emergency or within five days after providing a financing plan and the legislative body convenes in a special session which then approves the financing plan.
2. Colorado;
The general assembly, by joint resolution, can end the state of disaster emergency at any time.
3. Connecticut;
Any governor's declaration of a state of emergency can be rejected by a majority vote of a legislative committee.
4. Alabama;
The Legislature can declare a state of emergency and if the governor declares it, he must report it to the legislature.
5. Kansas;
No state of disaster emergency may continue for more than 15 days unless authorized by a legislative decision hearing a report from the governor.
6. New Hampshire
The governor has the power to declare a state of emergency. As soon as practicable, the governor shall notify the speaker of the house of representatives and the speaker of the senate of the impending issuance of an emergency order under this section and provide an explanation of the order and the legislature may rescind the state of emergency.

One common pattern observed in emergency regulations across various states in the United States is that legislative bodies are granted the right to receive reports from the executive branch concerning the implementation of emergency measures. Additionally, depending on state provisions, the legislature has the authority to terminate the emergency situation declared by the executive. This mechanism ensures that the executive branch remains accountable for its emergency actions, providing a form of legislative oversight that includes safeguarding human rights. Furthermore, state authority in emergencies is generally limited to those related to natural disasters.

On a national level, the United States has the National Emergencies Act (NEA), which outlines the powers of the president and Congress during emergencies. Under the NEA, Congressional authority is divided into two main aspects:

1. Title II regarding Declarations of Future National Emergencies states that the president can declare a national emergency and notify Congress. A national emergency can be terminated with a congressional resolution or presidential proclamation. Within a period of 6 months, Congress will vote to consider whether the national emergency is still relevant. When congress or the president agrees to end a national emergency, then a decision from the senate is needed to end the national emergency. The agreement must be accepted by the senate within 15 days.
2. Title IV regarding Accountability and Reporting Requirements of the President states that the president and all executive agencies send all documents issued during a national emergency to Congress.

From this, it is evident that Congress, as the representative body of each state, retains its authority even during emergencies, allowing it to oversee the president's actions. In 2019, President Donald Trump declared a national emergency to secure funding for constructing a

wall along the U.S.-Mexico border. This declaration was prompted by the perceived security threat posed by the high volume of immigrants crossing the border. However, Congress passed a resolution against the emergency declaration, which was subsequently overturned by the Senate.⁴⁶

7. Creating an Emergency Law as a monitoring solution

As previously discussed, the regulations outlined in the *Perppu Keadaan Darurat* are outdated and require modernization through new legislation. These regulations, which have been in place for nearly 65 years without formal ratification into law, underscore the need for a revised emergency law that better addresses the legislative body's oversight role during emergencies. Although there is no specific regulation indicating that the *DPR RI*'s oversight authority is suspended during emergencies, the extensive powers granted to the executive in such situations seemingly restrict the *DPR RI*'s ability to perform its oversight duties.

The potential for the executive's extensive powers to be used arbitrarily during emergencies is a significant concern, especially given the close connection between emergencies and human rights. As the people's representative, the DPR cannot simply have its oversight authority removed. Implementing a robust oversight system in state administration is crucial to regulating, limiting, and controlling state power effectively, preventing abuse by state officials, and ensuring actions remain within legal and ethical boundaries. Thus, it is imperative to regulate the *DPR RI*'s authority during emergencies.

Historically, Law Number 74 of 1957, prior to being repealed by the current *Perppu Keadaan Darurat*, established the DPR's role in overseeing emergencies. For instance, Article 4, paragraph (3) stipulated that the declaration and termination of a state of danger should be promptly communicated to the House of Representatives for approval or rejection. Additionally, Article 5, paragraph (1) required the President to submit a bill to the House of Representatives within three days of declaring a state of danger (except in the case of a sudden enemy attack) to determine the continuation of the emergency or state of war by law. This demonstrates that the *DPR* was once granted oversight authority during emergencies, an authority unfortunately omitted from the *Perppu Keadaan Darurat*, resulting in a legislative void regarding oversight functions during emergencies in Indonesia.

For oversight authority during emergencies, if we look at existing regulations in the United States, Indonesia can regulate it in several aspects:

1. Authority to declare a state of emergency: as in several states in the United States, the legislative body's supervisory authority can take the form of the authority to reject or give approval to the declaration of a state of emergency made by the executive agency.
2. Authority to evaluate and revoke the state of emergency: the authority that can be given to the *DPR RI* is the authority to cancel the state of emergency as given to Congress in the United States.

This type of regulation actually already exists in the context of the deployment of the Indonesian National Army (*TNI*), where in Law (*UU*) no. 34 of 2004 concerning the Indonesian National Army, precisely in article 18 it is regulated that:

- (1) In compelling circumstances to face military threats and/or armed threats, the President can directly mobilize *TNI* forces.
- (2) In the case of direct deployment of *TNI* forces as referred to in paragraph (1), **within 2x24 hours from the issuance of the decision to deploy forces, the President must report to the House of Representatives.**

⁴⁶CNBC. "US Senate Issues Resolution to Cancel National Emergency", July, 5, 2023, Available online <https://www.cnbcindonesia.com/news/20190315092111-8-60822/senat-as-keelukan-re-Resolution-batalkan-darurat-nasional> .

- (3) In this case **the House of Representatives does not approve the deployment as intended in paragraph (1) and paragraph (2), the President must stop the deployment of TNI forces.**

Examining these provisions highlights the crucial need for an emergency law in Indonesia, particularly to regulate the legislative body's oversight of emergency situations. Such a law would ensure that the powers granted to the executive are not misused and that human rights are upheld during emergencies.

One key aspect of this oversight could include granting the DPR authority to obtain reports on emergency policies. This would enable the DPR to monitor the implementation of these policies effectively and respond accordingly. By reviewing these reports, the DPR would be able to conduct supervision and provide feedback or recommendations on the policies enacted during emergencies, thereby enhancing accountability and transparency.

C. Conclusion

The social conditions faced by the pioneers of the separation of powers underscore the importance of dividing power to prevent abuse, ensuring freedom, and fostering effective governance through a system of checks and balances. Legislative oversight is a vital component of this system, crucial in both Indonesia and the United States. During states of emergency, legislative powers are often transferred to the executive to address critical threats. This raises concerns about how legislative oversight can be maintained and how checks and balances are preserved in such extraordinary circumstances. While restrictions on constitutional rights may be necessary during emergencies, it is essential to uphold non-derogable human rights and ensure that state actions are proportional and adhere to the principle of necessity to prevent arbitrariness.

In countries with civil law systems, emergency rules are usually embedded in the constitution. Conversely, in the United States, emergency law is not explicitly stated in the constitution but has evolved through practices such as martial law and statutes like the National Emergencies Act. This Act grants the president authority to declare emergencies, subject to congressional oversight. Effective legislative oversight of executive actions during emergencies is crucial to prevent abuse of power and human rights violations. However, the mechanisms and effectiveness of this oversight can vary across countries and even within states, as evidenced by differences between the United States and Indonesia. In Indonesia, the oversight authority of the House of Representatives (*DPR RI*) during emergencies needs to be clearly defined to prevent executive overreach and safeguard human rights. Drawing from legislative oversight practices in the United States and historical examples in Indonesia, it is essential to involve the DPR in approving, evaluating, and receiving reports on emergency situations to ensure a balanced and accountable response to crises.

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