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CONTROVERSY OF PRESIDENTIAL DECREES IN A STATE OF EMERGENCY IN INDONESIA: CASE STUDY OF THE DECREES OF PRESIDENT SOEKARNO AND PRESIDENT ABDURRAHMANWAHID

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ABSTRACT

The debate of the decrees of President Soekarno and President Abdurrahman Wahid regarding the constitutional and unconstitutional presidential decree in emergency constitutional law continues to be a controversy that does not end until now because it is still being discussed related to the situation. This paper discusses 2 (two) phenomenal decrees related to constitutional or unconstitutional in terms of emergency constitutional law. By using normative juridical research methods. The approaches used are the statutory approach, the conceptual approach, and the historical approach. This paper discusses 3 (three) main findings, among others: First, the Presidential Decree is de facto and de jure motivated by no recognition of political action or legal action; Second, the decree is formally regulated in Article 12 and Article 22 of the Constitution of the Republic of Indonesia because in the 1945 Constitution it is regulated that if the country is in a state of danger, the president can make decisions in accordance with the authority regulated by laws and regulations; and Third, The decree can be said to be unconstitutional because it is not in accordance with the Indonesian constitution. The decree is not regulated by Indonesian legislation so that formation is considered unconstitutional because it cannot be based on law. However, in the emergency constitutional law, this situation becomes normal because the emergency constitutional law does not use legislation as usual when the country is in normal condition.

Keywords: decree; unconstitutional; state of emergency; controversy

INTRODUCTION

The Presidential Decree caused controversy when the circumstances had to be carried out. The first controversy, when in mid-1959 to be precise on 5 July 1959 President Soekarno issued a Presidential Decree related to the dissolution of the Constituent Assembly[1] , and the second controversy was when President Abdurrahman Wahid or commonly known as Gus Dur issued a Presidential Decree regarding the freezing of the People's Representative Council and People's Consultative Assembly of the Republic of Indonesia. The decree was issued on 23 July 2001[2]. Both Presidential Decrees were issued based on Presidential Decree No. 150 of 1959. The act of issuing a presidential decree was to prevent Indonesia from being in an emergency that caused instability both in politics and economics. However, the decree has consequences in the form of attitudes, thoughts, behavior, and supporters because the policy must be in accordance with the legal provision or authority. An attitude based on legal authority can prevent abuse of power from the president. The president's action in issuing a decree based solely on the Presidential Decree, causes many to think that the presidential decree is not unconstitutional because it is not in accordance with the applicable regulations and is only based on the presidential decree. Moreover, this attitude is not in accordance with staatsnoodrecht or a state of emergency. Meanwhile, the presidential

[1] Hamdan Zoelva, "Relasi Islam, Negara, Dan Pancasila Dalam Perspektif Tata Hukum Indonesia," (The Relationship between Islam, the State, and Pancasila in the Perspective of the Indonesian Legal System), *Journal de Jure* 4, no. 2 (December 30, 2012): 99–112.

[2] Kukuh Bergas, "Dewan Perwakilan Rakyat dan Majelis Permusyawaratan Rakyat dalam Proses Impeachment Presiden Aburrahman Wahid," (The House of Representatives and the People's Consultative Assembly in the Impeachment Process of President Aburrahman Wahid), *Jurnal Hukum & Pembangunan* 49, no. 4 (March 27, 2020): 847–859.

decision is subjective and can be influenced by political interests.

Emergency State is a state of danger that can affect the stability of the country both from economic, political, and socio-cultural aspects.[3] Moreover, in an emergency state, the legislature cannot negotiate to determine the regulations to be used, so a legal system or laws that are different from the normal situation is needed, which requires an extraordinary legal system that can be applied in an emergency state or coercive circumstances. The legal basis of Indonesia, namely the 1945 State Constitution of the Republic of Indonesia regulates emergencies as contained in Article 12 of the State Constitution of the Republic of Indonesia stating that "The president declared a state of danger, the conditions and consequences of a state of danger as stipulated by law" and in Article 22 states that in the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of law".[4] Mr. Iwa Kusuma Sumantri in his work mentions that the law of the emergency state is a law that is deliberately enforced because of a dangerous, urgent and coercive situation. He also added that if the president wants to issue an emergency policy, then it must meet 5 (five) criteria, including: urgency; security that can threaten the Unitary State of the Republic of Indonesia; to address problems that threaten the country; unable to hold meeting with members of the legislature; and regulations made are only temporary.[5]

The controversy over the presidential decrees of Sukarno and Gus Dur did not stop at the unconstitutionality of the legal system, but also became a debate on de facto and de jure recognition. De facto recognition is an acknowledgment from other countries that they recognize the existence of a group of people in a certain area organized by a sovereign government or in other words de facto is an acknowledgment based on reality and facts.[6] Meanwhile, de jure recognition is an acknowledgment based on law[7]. Therefore, in the first presidential decree made by President Soekarno. Recognition de facto and de jure has received recognition even though in the country itself there are still many internal problems in the executive and legislative bodies.[8] Meanwhile, the second presidential decree issued by Gus Dur did not receive de facto or de jure recognition from the legislature and the public. During the second decree, the people were divided into two camps, namely the camp that opposed Gus Dur if he was forcibly removed from his position and the other side that chose to have him demoted because the government he was running was not in accordance with the wishes of the people.

In addition, many questions arise behind the issuance of the presidential decree. The question is related to the existence of political interests or whether the president feels that Indonesia is truly in a state of emergency which disrupts

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[3] Osgar S. Matompo, "Pembatasan Terhadap Hak Asasi Manusia dalam Perspektif Keadaan Darurat," (Restrictions on Human Rights in the Perspective of Emergencies), *Jurnal Media Hukum,* Juni 2014, Vol. No.1, 59.

[4] Hukumonline, *1945 Constitution - Pusat Data Hukumonline*, n.d., accessed January 16, 2022, https://hukumonline.com/pusatdata/detail/lt4ca2eb6dd2834/nprt/lt49c8ba3665987/uud-undang-undang-dasar-1945.

[5] Muhammad Yasin, "3 Aturan Ini Jadi Rujukan Utama dalam Hukum Tata Negara Darurat," (These 3 Rules Are The Main References in Emergency Constitutional Law), *hukumonline.com*, accessed January 26, 2022, https://hukumonline.com/berita/a/3-aturan-ini-jadi-rujukan-utama-dalam-hukum-tata-negara-darurat-lt5cb7dd8f09254.

[6] Agil Burhan Satia, Cicik Nike Rimayani, and Hesti Nuraini, "Sejarah Ketatanegaraan Pasca Proklamasi Kemerdekaan 17 Agustus 1945 Sampai 5 Juli 1959 Di Indonesia," (State Administration History After the Proclamation of Independence August 17, 1945 to July 5 1959 in Indonesia), *Mimbar Yustitia* 3, no. 1 (2019): 89–104.

* De facto recognition can be divided into 2 (two) properties, namely permanent and temporary. De facto recognition is permanent, which is marked by the existence of relations within a country such as bilateral, multilateral or unilateral relations. While the recognition is temporary, that is, a country recognizes another country with no guarantee that the recognized country will last a long time. De Jure recognition is also divided into 2 (two) types, namely full and permanent de jure recognition. Recognition is full, i.e. when another country recognizes a country based on the law that applies to that country, while acknowledgment is permanent, i.e. when another country gives permanent legal recognition to a country that is considered to have stable sovereignty..

[7] Ibid.

[8] Theresia Ngutra, "Hukum dan Sumber-Sumber Hukum," (Law and Legal Resources), *Jurnal Supremasi*, Oktober 2016, Vol. 11, No. 2, 194.

the economic and socio-cultural stability of the Indonesian people. Because the decree is a subjective policy of a president when the country is in a state of emergency. The president can issue the necessary regulations if the country is really in a state of danger. This is also the basis for the presidential decree.[9] Because the president has executive power. Executive power has come into force in Indonesia since the amendments to the 1945 Constitution were made. According to some well-known figures such as John Locke and Montequieu, executive power is the power to carry out a policy or law. However, when President Soekarno issued a decree declaration, Indonesia had not yet amended the 1945 Constitution, which meant that Indonesia had recognized executive power but the system could not be implemented perfectly as after the amendment to the 1945 Constitution.[10] The power of the president or executive power in Indonesia is regulated in the 1945 Constitution but it is not explicitly stated that this situation is executive power. In addition to having power rights regulated by the 1945 Constitution, such as administrative, legislative, judicial, military, and diplomatic powers.[11] The president also has rights beyond the regulated rights, namely the president's prerogative rights.

The president's prerogative right is the constitutional right of the president to fill in things that are not detailed in the constitution. Prerogative rights do not need to be written or stated in the constitution because these rights are the privilege of a president because the country is in a state of compelling emergency. According to John Locke, the prerogative is:

> *"Power to act according to direction, for the public good, without the prescription of the law, and sometimes even against it and prerogative is supposed to be used only in extraordinary circumstancess and only until the legislature can remedy whatever defect in the law requires resort to extra-legal measures, but the nation that any individual is ever allowed to exercise such enormous discretionary power is difficult to square with a commitment to limited government and the rule of law"*[12]

As stated by John Locke that the limitation of prerogative rights is when the state is in a state of danger or emergency which requires a president to take quick decisions and until the legislature can formulate a presidential decision or policy that is made quickly and suddenly into a law.[13] However, with the development of time, the president's prerogative rights do not automatically become the privilege of a president but also other institutions because the prerogative rights have now been regulated in the 1945 Constitution of the Republic of Indonesia and other laws and regulations so that prerogative rights are more accurately called constitutional power or statutory power.[14] Therefore, in the focus of the discussion, we will analyze how is the review of the Presidential Decree from the perspective of emergency constitutional law in Indonesia?

RESEARCH METHODS

The type of research in this paper is normative juridical law research, namely library law research.[15] Legal research is a form of process in obtaining legal rules, legal principles, and

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[9] "Dekrit Adalah Wewenang Subyektif Presiden," (Decrees Are the Subjective Authority of the President), *Tempo*, last modified December 10, 2003, accessed January 29, 2022, https://nasional.tempo.co/read/34073/dekrit-adalah-wewenang-subyektif-presiden.

[10] Ahmad Yani, "Sistem Pemerintahan Indonesia: Pendekatan Teori dan Praktek Konstitusi Undang-Undang Dasar 1945," (The Indonesian Government System: The Theory and Practice Approach to the Constitution The 1945 Constitution), *Jurnal Ilmiah Kebijakan Hukum* 12, no. 2 (July 31, 2018): 119–135.

[11] Mohammad Zamroni, "Kekuasaan Presiden Dalam Mengeluarkan Perppu (President's Authority to Issue Perppu)," *Jurnal Legislasi Indonesia* 12, no. 3 (2018): 1–38.

[12] Hendra Wahanu Prabandani, "Batas Konstitusional Kekuasaan Eksekutif Presiden (Conxtituitional Limits of the Presidential Executive Power)," *Jurnal Legislasi Indonesia* 12, no. 3 (November 30, 2018), accessed January 29, 2022, https://e-jurnal.peraturan.go.id/index.php/jli/article/view/409.

[13] Ibid.

[14] Mei Susanto, "Perkembangan Pemaknaan Hak Preogratif Presiden," (The Development of the Meaning of the Prerogative of the President), *Jurnal Yudisial* 9, no. 3 (December 9, 2016): 237–258.

[15] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (Normative Legal Research), 19th ed. (Depok: Rajawali Pers, 2019), 23.

doctrines to be able to answer legal problems that are currently happening. Legal research can also be used as a theoretical argument or a new concept for solving problems. This research is a descriptive analysis using a conceptual approach, a statute approach, and a historical approach.[16] The sources of legal research used in this research paper are primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials consist of statutory regulations, treaties, and jurisprudence. Secondary legal materials are materials that can provide further explanation regarding primary legal materials such as draft laws, books, and legal scientific journals. Tertiary legal materials consist of legal materials that can share an explanation of primary and tertiary legal materials, such as dictionaries, encyclopedias, and cumulative indexes.[17]

DISCUSSION

A. History of Soekarno Presidential Decree in 1959

President Soekarno's decree on 5 July 1959 began during the 1955 general election. The general election was conducted to elect the People's Representative Council of the Republic of Indonesia and the Constituent Assembly. The Constituent Assembly was formed to formulate a new constitution for Indonesia. The Constituent Assembly is regulated in Article 134 of the 1950 Law of the Republic of Indonesia concerning the Amendments to the Provisional Constitution of the Republic of Indonesia. The article states that "the Constituent Assembly (the constitution-making assembly) together with the government shall immediately stipulate the Constitution of the Republic of Indonesia which will replace the Provisional Constitution.[18] In addition, matters relating to the duties and obligations of the constituents are also regulated in the law. The Constituent Assembly began convening to formulate a new constitution on 10 November, marked by President Soekarno's speech entitled "Without Provisions Regarding Restrictions on Terms of Office". However, in the middle of the assembly of the new constituent assembly, President Soekarno again made a speech in front of the constituent assembly. The President proposed that in the name of the government, it would be better if the new constitution returned to the 1945 constitution which had previously been in force because the 145 Constitution was in accordance with the guided democracy system which would later be enacted by the government. However, the government's proposal was not immediately approved by the constituent assembly because other proposals also came from among adherents of Islam that the new constitution should add the diction "with the obligation to carry out Islamic law for its adherents" at the opening of the 1945 Constitution with the contents of the Jakarta Charter, but if this is approved by the constituent assembly then the next problem is changing the sound in article 29 which in that article regulates the beliefs of the Indonesian people. Regarding the addition of diction and sound changes proposed by the adherents of Islam, it was not approved by the constituent assembly because the Indonesian people have various beliefs and religions, not only fixating on or favoring one religion. The refusal was conveyed by the constituent assembly at its session on 29 May 1959.

The previous government's proposal related to the return to use of the 1945 Constitution without any changes or additions by the constituent assembly on 30 May 1959 only made a decision. The decision-making did not produce a satisfactory decision because of the 474 people present, less than 2/3 (two-thirds) voted against the government's proposal, in other words, the votes produced did not reach the quorum vote as mandated by Law No. 7 of 1950. Because the decision-making was not in accordance with the Constitutional Rules of Procedure, the decision-making was held 2 (two) more times on 1 and 2 June 1959. On the 1st the votes obtained in the decision-making were 264 against 204 out of 469 members and on the 2nd obtained 263 votes against 203 out of 468 members. All the votes obtained during the trial, none of them had a quorum vote or 2/3 of the total members present, so the trial

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[16] Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Legal Research: Revised Edition), (Prenada Media, 2017), 27.

[17] Soekanto and Mamudji, *Penelitian Hukum Normatif* (Normative Legal Research), 12.

[18] Law no. 7 of 1950 concerning the Amendment of the Provisional Constitution of the United States of Indonesia to the Provisional Constitution of the Republic of Indonesia, n.d., accessed February 12, 2022, https://peraturan.bpk.go.id/Home/Details/38102/uu-no-7-tahun-1950.

of the government proposal was rescheduled or dismissed until a time limit that could not be determined by the constituent assembly.

The suspension of the trial for the formulation of the new constitution and the government's proposal to return to the 1945 Constitution caused a bit of turmoil among the political elite. To prevent the turmoil from getting bigger and hotter, the Army Chief of Staff, Lieutenant General A.H. Nasution on behalf of the Central War Authority ratified Regulation Prt/Perpepu/040/1959 concerning the Prohibition of Holding Political Activities. The regulation was enforced on 2 July 1959.[19] Then on 16 June 1959, Suwiryo (General Chairman of Partai Nasional Indonesia) sent a message to President Soekarno for Sukarno to decree the re-enactment of the 1945 Constitution and dissolve the Constituent Assembly. The contents of Suwiryo's message were "Given the situation in the country and the trust of all the people has been spilled over to P.J.M, we on behalf of the Marhaenis Front urge the First, that the President decree the re-enactment of the 1945 Constitution and dissolve the Constituent Assembly; Second, so that by the time the decree is pronounced, the 45 presidential cabinet has already been formed".

Before the constituent assembly went into recess due to failure to make decisions, this situation had been predicted by one of the domestic political critics and commentators, the initials D.R. whose prediction reads that "In the future Constituent Assembly no one party will succeed in fighting for the foundations of belief in formulating a new constitution. Even though the national group was assisted by the communists, this situation was not able to achieve absolute victory, including with the other groups."

The events that gave rise to several conflicts due to the failure of the constituent assembly heated up both among the political elite and the public so President Soekarno issued his subjective rights as president to stop these conflicts. The rights issued by President Soekarno are the prerogative rights of the president who can make decisions when the country is faced with an emergency or danger. The failure of the Constituent Assembly is considered an emergency that endangers the unity and safety of the Unitary Republic of Indonesia. Then on 5 July 1959, President Soekarno officially announced the Decree. The decree contains 3 (three) things, among others: First, the dissolution of the constituent assembly; Second, the invalidity of the 1950 Provisional Constitution and the re-enactment of the 1945 Constitution; Third, the establishment of a Provisional People's Consultative Assembly consisting of members of the People's Representative Council plus regional and group delegations and the Provisional Supreme Advisory Council.

B. History of Abdurrahman Wahid (Gus Dur) Presidential Decree on 23 July 2001

The decree of President Abdurrahman Wahid or Gus Dur was initiated very early due to the incompatibility between the legislature and the executive. This discrepancy is indicated by differences of opinion in decision-making between the two-state institutions.[20] Then the situation was exacerbated by the Buloggate case that befell Gus Dur so the legislature wanted to impose sanctions on Gus Dur based on the applicable law, namely Article 2 paragraph 1 of Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption[21]. Due to this incident, the People's Representative Council of the Republic of Indonesia gave Gus Dur the first warning because the People's Representative Council of the Republic of Indonesia has the view that a president who takes advantage to enrich himself by harming the state and society, then his position as a President must be relinquished. On 1 February 2001, the People's Representative Council of the Republic of Indonesia issued its first directive and on the same day, thousands of students from various universities took to the streets and demonstrated at the MPR/DPR

[19] Musta'in Ramli, "Dekrit Presiden (Studi Perbandingan Dekrit 5 Juli 1959 dengan Dekrit Presiden 23 Juli 2001)" (Presidential Decree (Comparative Study of the Decree of July 5, 1959 with the Decree of the President of July 23, 2001), *Jurnal Swarnadwipa,* 2017, Vol. 1, No.3, 170.

[20] Angela Ervina, Rachamt Kriyanto, Mauina Pia Wulandari, "Kontroversi Gaya Kominikasi Politik Presiden K.H. Abdurrahman Wahid," (President K.H.'s Political Communication Style Controversy Abdurrahman Wahid), *Jurnal Ilmu Komunikasi Mediakom,* 2019, Vol. 02, No. 02, 98.

[21] UU No. 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi," (Law no. 31 of 1999 concerning the Eradication of Corruption Crimes), accessed February 19, 2022, https://peraturan.bpk.go.id/Home/Details/45350/uu-no-31-tahun-1999.

Building demanding that Gus Dur resigns from his position as President of the Republic of Indonesia. On 30 April 2001, the People's Representative Council of the Republic of Indonesia issued a second directive and requested that a Special Session of the People's Consultative Assembly of the Republic of Indonesia be held on 1 August 2001. After the second directive and the request for a Special Session of the People's Consultative Assembly of the Republic of Indonesia, President Gus Dur took political steps by issuing a Presidential Decree.[22]

Before President Gus Dur issued a Presidential Decree on 22 July 2001. On 21 July 2001, exactly the day before President Gus Dur's decree was issued, there was a commotion and a war of statements until late at night. The situation was triggered by bomb explosions at the HKBP Jatiwaringin Church and at the Santa Anna Church which caused several people to suffer serious injuries and several people to suffer injuries. This was followed by a meeting of several representatives of political parties at Megawati's house. This is related to the appointment of Megawati as the next President of Indonesia through the Special Session of the People's Consultative Assembly of the Republic of Indonesia which will be held as soon as possible. However, President Gus Dur and Rachmawati chose to visit the victims of the bombings in several hospitals that had become previous referrals, such as St. Carolus. While President Gus Dur was visiting the victims of the bombing, several political parties supporting Megawati held a press conference explaining that they supported Megawati Soekarnoputri as the next President so that the government she would lead would be stable, effective and gain public trust because as long as President Gus Dur served as President, the level of public confidence in the government is very low and there is a possibility that there will be a power vacuum in the position of vice president until the Annual Session of the People's Consultative Assembly of the Republic of Indonesia which will be held in October 2001. However, several political parties reject the existence of a power vacuum until the Annual Session of the People's Consultative Assembly of the Republic of Indonesia is held. Responding to a press conference held by Megawati supporters, President Gus Dur stated that he would not step down as President and he also emphasized that political parties that came from the TNI/Polri to withdraw their support for the Special Session to be held by the People's Consultative Assembly of the Republic of Indonesia and appealed to the security forces not to use violence and sharp weapons in the face of heated polemics. The TNI/Polri then withdrew their support for the Special Session of the People's Consultative Assembly of the Republic of Indonesia and immediately held an assembly at the State Palace to secure the commotion, chaos, and riots that occurred.[23]

After all the chaos that had occurred and if the chaos was not immediately prevented, it would immediately destroy the Unitary State of the Republic of Indonesia, therefore the Presidential Decree Gus Dur was issued on 23 July 2001 which contained, among other things: First, Freezing the People's Consultative Assembly of the Republic of Indonesia and the People's Representative Council of the Republic of Indonesia; Second, to return sovereignty to the people, prepare the body in charge of carrying out elections within 1 (one) year; Third, Freezing the Golkar Party while awaiting the decision of the Supreme Court. Therefore, I urge the TNI/Polri to carry out security for the Unitary State of the Republic of Indonesia and urge the public to remain calm so that things can run normally. The decree was made on 22 July 2001 in Jakarta on behalf of the President of the Republic of Indonesia or the Supreme Commander of the Armed Forces K.H. Abdurrahman Wahid.[24]

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[22] Sumiyatun Sumiyatun, "Dekrit Presiden (Studi Perbandingan Dekrit 5 Juli 1959 dengan Dekrit Presiden 23 Juli 2001)," (Presidential Decree (Comparative Study of the Decree of July 5, 1959 with the Decree of the President of July 23, 2001)) *SWARNADWIPA* 1, no. 3 (2017): 169–178.

[23] Achmad, *Jatuhnya Gus Dur: Dekrit Senjata Makan Tuan* (The Fall of Gus Dur: The Decree of the Lord's Weapons), 1st ed. (Jakarta: PT. Gria Media Prima, 2001), 60.

[24] Liputan6.com, "23 July 2001: Dekret Presiden, Perlawanan Parlemen, dan Celana Pendek Gus Dur," (Presidential Decree, Parliamentary Resistance, and Gus Dur Shorts), *liputan6.com*, last modified July 23, 2019, accessed January 13, 2022, https://www.liputan6.com/news/read/4019189/23-juli-2001-dekret-presiden-perlawanan-parlemen-dan-celana-pendek-gus-dur.

C. Decrees in Emergency Constitutional Law

Indonesia as a state of the law is a certainty because this has been explained and confirmed in the 1945 Constitution of the Republic of Indonesia. However, in the implementation of state administration, Indonesia cannot continue to use the normal legal system as regulated by law, because in running the country, abnormal conditions or commonly referred to as emergencies must occur in every country including Indonesia. Therefore, when faced with an emergency state, the state requires abnormal laws that can be used to overcome an emergency state in the interest of the state and society so that government functions can run as usual and do not hinder the fulfillment of people's rights. [25]

The state of emergency can be viewed from 2 (two) sides, namely the side of the state of danger and the side of the urgency of forcing. Both sides have the same impact when the state is in a state of emergency, but both have differences, namely that the state of danger focuses more on structure, while the situation of urgency that forces focus on the content.[26] Then a state of emergency must also be based on the principles agreed upon by the international community if the country is in an emergency, namely the principle of proportionality. The principle of proportionality is considered a self-defense doctrine that provides a standard of reasonableness to obtain criteria for determining a clear need for justification for taking emergency and proportional actions. The point is that in carrying out emergency actions there must be a reasonable limit in it so that decision-making when the country is in an emergency does not exceed the reasonable limits that have been determined.[27]

According to the Indonesian Dictionary (KBBI), a decree is a decision or stipulation issued by the head of state, courts, and so on.[28] The word "decree" comes from the Latin "decretum", in French "dêcret", in German "decree", in English "decree", and in Dutch "decreet". The Roman word "decretum" has the meaning of a decision taken out of the ordinary or as an extraordinary decision from a king or government official. Decretum also has a meaning, namely a decision from the authorities regarding a matter that is currently a problem and must get an unusual solution due to an urgent situation. It can be interpreted in general that the Decree is a government decision that has contents related to decisions and announcements to citizens and residents around the world. Then the notion of an emergency comes from the Netherlands, namely staatsnoodrecht or noodstaatsrecht. The word "nood" which comes from staatsnoodrecht has the meaning of a state of danger while the word "nood" from noodstaatsrecht has an emergency legal meaning. Therefore, staatsnoodrecht means that the state is in a state of danger so the regulations used are also regulations that are urgent but are different from noodstaatsrecht which has the understanding that the law of a state administration is in a state of emergency so that it is not related to the state but is related to the constitutional law.[29]

The definition of a state in an emergency state from several experts such as Jimmly Ashidiqie and Herman Sihombing is also slightly different. Herman Sihombing argues that the state is in a state of emergency, which is a series of extraordinary and special state institutions and authorities that in the shortest time can eliminate emergencies or dangers that threaten ordinary life according to general and ordinary laws and regulations.[30]

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[25] Muhammad Syarif Nuh Syarif Nuh, "Hakekat Keadaan Darurat Negara (State Of Emergency) Sebagai Dasar Pembentukan Peraturan Pemerintah Pengganti Undang-Undang," (The Nature of a State of Emergency as a Basis for Formation of Government Regulations in Lieu of Law), *Jurnal Hukum IUS QUIA IUSTUM* 18, no. 2 (2011): 229–246.

[26] Basri Effendi, "Tafsir Konstitusi Negara Dalam Keadaan Darurat (State Of Emergency) Dalam Menghadapi Darurat Kesehatan Masyarakat," (Interpretation of the State Constitution in a State of Emergency in Facing a Public Health Emergency), *Jurnal Transformasi Administrasi* 10, no. 1 (July 30, 2020): 67–79.

[27] Nuh, "Hakekat Keadaan Darurat Negara (State Of Emergency) Sebagai Dasar Pembentukan Peraturan Pemerintah Pengganti Undang-Undang." (The Nature of a State of Emergency as a Basis for Formation of Government Regulations in Lieu of Law)

[28] KBBI, "Dekret" (Decree), https://kbbi.web.id/dekret-atau-dekrit.

[29] Mirza Sahputra, "Negara Dalam Keadaan Darurat Menurut UUD 1945," (The State is in a State of Emergency according to the 1945 Constitution), *Jurnal Transformasi Administrasi* 10, no. 1 (July 29, 2020): 80–98.

[30] Rizki Bagus Prasetio, "Pandemi Covid-19: Perspektif Hukum Tata Negara Darurat dan Perlindungan HAM," (Covid-19 Pandemic: Perspective of Emergency

Therefore, in an emergency constitutional law, elements are needed as a sign of a state in an emergency, including: First, when the country is in a state of danger, extraordinary handling is needed; Second, there is an extraordinary effort by an institution that is legal and common so that it is not sufficient to be used to respond to and overcome the existing dangers; Third, the extraordinary powers granted by law to the state government to immediately end the emergency except in normal circumstances; and Fourth, Granting extraordinary powers of constitutional law for a while until the country does not experience an emergency and danger.[31] In addition to the elements that must be considered, the requirements related to state emergency regulations must also be considered. These conditions include: The highest interest of the state with the existence of the state itself; Emergency regulations must be absolute; An emergency is temporary as long as the situation is still considered an emergency and after it can be considered fine, ordinary or normal rules can be applied so that no more emergency rules apply; and When the emergency regulation is applied, the People's Representative Council of the Republic of Indonesia cannot hold a real and genuine session or meeting.[32] In his book, Herman Sihombing also distinguishes an emergency state according to its style, form, and source, including objective emergency constitutional law; subjective emergency constitutional law; written constitutional law; unwritten emergency constitutional law. Subjective in emergency constitutional law is the right of the state to act in a state of danger or emergency by deviating from the provisions of the law, while from an objective perspective of emergency constitutional law, namely the law that applies if the country is in a state of emergency, danger or a very compelling emergency.[33]

Jimly Asshiddiqie mentions in his book "Emergency Constitutional Law" that Saatsnoodrecht or emergency state law refers to a situation that is in an emergency or danger. The decree has an unwritten legal basis which can be said that the legal basis of the decree is an emergency. A state of emergency or it can also be interpreted as an urgency that compels is regulated in the 1945 Constitution of the Republic of Indonesia. The decision on a state of emergency is entirely left to the government.[34] If the government feels that the country is in a state of emergency, the government can decide to announce or declare an emergency for the sake of the nation and state objectively. Muh Yamin believes that the decree is a "Constitutional Emergency Law" which was carried out by force to save the nation and state.[35] In addition, Jimly Asshiddiqie explained that the decree could only be carried out if it met 3 conditions. These conditions include: First, the country is in a state of war so that everything becomes an emergency and a danger, so it is allowed to make regulations that violate normal laws; Second, the state is in a state of chaos so that a decree is issued to overcome the chaos in the state; and Third, the circumstances under which a decree can be issued are when the functions of the state system are in a state of emergency so that in this situation regulations can be issued in the form of a Government Regulation in Lieu of Law.

Yusril Iza Mahendra also added that the decree has no position in the Indonesian constitution, both from a political and sociological perspective. Therefore, in the constitution, it is the President who has the authority to issue decrees. So that the decree is a special legal product and is one of the reasons for the fundamental violation of the president's

Constitutional Law and Protection of Human Rights), *Jurnal Ilmiah Kebijakan Hukum* 15, no. 2 (July 26, 2021): 327–346.

[31] Herman Sihombing, *Hukum tata negara darurat di Indonesia* (Emergency constitutional law in Indonesia) (Djambatan, 1996), 56.

[32] Sihombing, *Hukum tata negara darurat di Indonesia*.

[33] Yoyon Mulyana Darusman, "Kedudukan Peraturan Pemerintah Pengganti Undang-Undang (Perppu) di dalam Sistem Ketatanegaraan Indonesia dihubungkan dengan diterbitkannya Peraturan Pemerintah Pengganti Undang-Undang (Perppu) No. 1 Tahun 2014 Tentang Pemilihan Gubernur, Bupati Dan Walikota," (The position of Government Regulation in Lieu of Law (Perppu) in the Indonesian Constitutional System is related to the issuance of Government Regulation in Lieu of Law (Perppu) No. 1 of 2014 concerning the Election of Governors, Regents and Mayors), *Jurnal Surya Kencana Dua(Dinamika Masalah Hukum & Keadilan)* 2, no. 2 (December 5, 2015): 7, accessed February 20, 2022, http://eprints.unpam.ac.id/1377/.

[34] *Ibid,* page 205-225.

[35] Dr Asmaeny Azis, *Constitutional Complaint dan Constitutional Question Dalam Negara Hukum* (Constitutional Complaints and Constitutional Questions in the Rule of Law), (Kencana, 2018), 31.

function to implement laws and regulations into the president's function as legislator or legislature and underlying such deviation is an emergency or extraordinary situation which must be dealt with as quickly as possible with emergency or unusual laws as well. The Perppu or commonly referred to as Government Regulation in Lieu of Law Number 23 of 1959 concerning the Dangerous Conditions lists 3 (three) criteria for a state in a state of emergency, namely civil emergency, war emergency and military emergency.[36] Then Article 1 of the Government Regulation in Lieu of Law Number 23 of 1959 stipulates a state of emergency, among others:[37] Security or law and order in the entire territory or part of the territory of the Republic of Indonesia is threatened by rebellion, riots or as a result of natural disasters, so it is feared that it cannot be overcome by means of ordinary equipment;[38] The emergence of war or the danger of war or fear of raping the territory of the Republic of Indonesia in any way; and the life of the State is in a state of danger or from special circumstances it turns out that there are or is feared that there are symptoms that can endanger the life of the State. In the General Elucidation, it explains that a regulation or law in a state of danger is a regulation that regulates the limits of power under certain circumstances to the authorities to be responsible for carrying out their duties to protect citizens and residents and outside the law in a state of danger there are no restrictions on human rights carried out alone apart from the power of the law and as a guide for the government when the country is in danger.

Jimly Asshiddiqie also explained other criteria for a state of danger, including The threat of war from outside; TNI that fights abroad; Rebellion; Social unrest; Natural disasters; Danger situation due to disturbing legal and administrative order; The state of danger due to the state's financial condition; and other circumstances in which the constitutional function cannot work. A state of emergency or danger can reduce the freedom of human rights but cannot limit the basic rights of human rights because an emergency state can easily violate the basic rights of citizens. An emergency is a condition that allows a situation that was not initially allowed because of an urgent situation so that it is permissible to violate normal rules. What is certain is that in the birth of the decree, it must have the main requirements which are divided into 2 (two) parts, namely: First, the decree is issued because it is the only way out to save the country, and the Second, there must be a balance between the state of danger that comes with the contents of the decree issued.

The issuance of a Presidential Decree does not immediately solve the problems of the constituent assembly or the state's problems in saving the state of the country, but also the issuance of the decree is considered an action by the government to restore the government's position as head of state and head of the government that was lost as a result of the parliamentary system. The issuance of a presidential decree is a sign that the Indonesian government system has changed to a guided democratic government system. Guided Democracy is a system emphasizing the importance of government-centered leadership. The Guided Democracy System was first introduced on 10 November 1956 by President Soekarno at the opening session of the constituent assembly. However, the guided democracy system was officially used after the issuance of a presidential decree.[39] And the democratic system is regulated in Article 1 of the MRRS Decree No. VII/MPRS/1965.[40] In addition, guided democracy is also a democratic concept that focuses on the contribution of a leader in every political method or system that has occurred in society.[41]

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[36] *Government Regulation in Lieu of Law Number 23 of 1959 concerning Revocation of Law Number 74 of 1957 (State Gazette Number 160 of 1957) and Determination of Hazard Conditions*, n.d., accessed March 12, 2022, https://peraturan.bpk.go.id/Home/Details/53973/perpu-no-23-tahun-1959.

[37] *Ibid,* Pasal 1

[38] Danang Risdiarto, "Kebijakan Dan Strategi Pembangunan Hukum Dalam Memperkuat Ketahanan Nasional," (Legal Development Policies and Strategies in Strengthening National Resilience) *Jurnal Penelitian Hukum De Jure* 17, no. 2 (June 15, 2017): 177–193.

[39] Gili Argenti, "Pemikiran Politik Soekarno Tentang Demokrasi Terpimpin," (Soekarno's Political Thoughts About Guided Democracy) *Jurnal Politikom Indonesiana* 2, no. 2 (2017): 36.

[40] *MPRS Decree No. VII/MPRS/1965 of 1965 concerning the Principles of Deliberation for Consensus in Guided Democracy as a Guide for Deliberative/Representative Institutions*.

[41] Gili rgenti and Dini Sri Istiningdias, "Pemikiran Politik Soekarno Tentang Demokrasi Terpimpin,"

D. De Facto and De Jure Presidential Decree

The Presidential Decree cannot be separated from the existence of recognition, both de facto and de jure.[42] Recognition itself in terminology means a process, way, or act to admit. Acknowledging has the meaning of entitled. This means the process of acknowledging the rights to something or certain circumstances. According to international law, de facto recognition is a temporary recognition because it focuses on the reality of the government's position on the effectiveness of government policies for its people and de facto recognition tends to change to de jure recognition over time. De jure recognition is a permanent recognition accompanied by legal action so de jure recognition is legal recognition.[43] Hans Kelsen in his book Theory of Law and State argues that recognition is:

"Two actions in a confession are political actions and legal actions. The political act of recognizing a state means that the state acknowledges its will to establish political relations and other relations with the people it recognizes. Meanwhile, legal action is a procedure established by international law to establish state facts in a concrete case."

Therefore, the presidential decree is considered not to fulfill de facto and de jure recognition because the decree is only based on an unwritten law, so there is a lot of debate regarding this situation. The decree of 5 July 1959 issued by President Soekarno according to Urep Ranuwidjaya was unconstitutional or invalid due to 3 (three) circumstances, among others: First, the decree was not in accordance with the Constituent Order of Rules, namely as an institution forming a new constitution or the Constitution which is mandated by the 1950 Provisional Constitution, it has never approved the government's proposal to return to the 1945 Constitution; Second, the results of the plenary session of the People's Representative Council of the Republic of Indonesia on 22 July 1959 did not explicitly approve the existence of the Decree of 5 July 1959. The People's Representative Council of the Republic of Indonesia only stated that it was ready to cooperate in assisting in the preparation of the Constitution; and Third, Article 1 paragraph 2 of the 1950 Provisional Constitution cannot be used as a legal basis for amendments to the Constitution because only the constituents have the right to make changes. Therefore, according to the 1950 Provisional Constitution, the president does not have the authority to enact or not enact a constitution as in the Presidential Decree of 5 July 1959. Simorangkir in his dissertation also said that the decree is a stipulation of the Constitution not based on the Constitution.[44] However, according to several constitutional law experts, it is stated that the decree is essentially an unwritten law so that the president can use rescue actions based on unwritten laws such as decrees based on the state in an emergency and threatened in terms of unity. This was confirmed by Budisetyo that the decree was legally valid because the decree referred to the Decision of the Council of Ministers related to the implementation of guided democracy which returned to the 1945 Constitution. The decision was issued 4 (four) months before the decree was issued so that the decree was considered valid. But that is only when the country is truly in a state of emergency and requires a quick response from the president.

Gus Dur's Presidential Decree dated 23 July 2001 was the only one that was rejected by all groups, from the legislature to the people, because they considered the decree issued by President Gus Dur not based on the applicable laws. They considered that President Gus Dur issued a decree based only on political interests as a shield for him not to be demoted from the position of President of Indonesia. However, President Gus Dur denied this because the President considered that the decree was the president's prerogative right that

(Soekarno's Political Thoughts About Guided Democracy), *Jurnal Politikom Indonesiana* 2, no. 2 (2017): 14–27.

[42] Sabrina Nadilla, "Pelokalan Hak Asasi Manusia Melalui Partisipasi Publik dalam Kebijakan Berbasis Hak Asasi Manusia," (Localization of Human Rights Through Public Participation in Human Rights-Based Policies), *Jurnal HAM* 10, no. 1 (July 19, 2019): 85–98.

[43] Hayatul Ismi, "Pengakuan Dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional," (Legal Recognition and Protection of Indigenous Peoples' Rights to Communal Lands in Efforts to Renew National Laws), *Jurnal Ilmu Hukum* 3, no. 1 (March 8, 2013), accessed February 21, 2022, https://jih.ejournal.unri.ac.id/index.php/JIH/article/view/1024.

[44] Ibid.

could be used in an emergency. The prerogative right itself has experienced a lot of controversy in various countries regarding its use. In Indonesia, Bagir Manan and Mahfud MD agreed to say that the president can use prerogative rights in the formation of government institutions and the appointment of state officials and must get the approval of the People's Representative Council of the Republic of Indonesia so that prerogative rights are not used to garner political support or get rid of political opponents and even build collusion partners. In addition, to control the president's prerogative rights in the field of legislation. In addition, when President Gus Dur issued a presidential decree, he used Law No.23/Prp/1959 and held the view that it was true in an emergency and was the authority of a president without requiring the approval of the People's Representative Council of the Republic of Indonesia. With this decision, Gus Dur's Presidential Decree was rejected by the People's Consultative Assembly of the Republic of Indonesia members, of the 601 members present at the time, 599 of them said they refused and two members abstained. The Decision of the People's Consultative Assembly of the Republic of Indonesia was later stipulated in Decree of the People's Consultative Assembly of the Republic of Indonesia No.1/MPR/2001 and stated that the Presidential Decree 23 July 2001 was invalid because it was against the law and had no legal force.[45]

CONCLUSION

Presidential decrees that have occurred in Indonesia 2 (two) times on 5 July 1959 and 23 July 2001 often become controversial because they do not have a fixed legal basis. A decree can occur if the state is truly in a state of danger or emergency (a compelling emergency) and the President with his prerogative rights takes such action. However, the decision-making must be based on the law in the 1945 State Constitution of the Republic of Indonesia, which is one of the main legal bases used in making decisions. However, this is not considered strong enough to be the basis for the decision to issue a presidential decree. Therefore, some argue that the presidential decree should be based on a state of emergency. The state of emergency itself has several elements and conditions that must be met to be considered a state in a state of emergency, namely: The highest interest of the state with the existence of the state itself; Emergency regulations must be absolute; An emergency state is temporary as long as the situation is still considered an emergency and after it can be considered fine, then normal rules can be applied so that no more emergency rules apply; and When emergency regulations are made, the People's Representative Council of the Republic of Indonesia cannot hold a real and genuine session or meeting. These conditions were stated by Herman Sihombing. Recognition de facto and de jure of the decrees of President Soekarno and President Gus Dur are different. Soekarno's Presidential Decree was contradicted because it was deemed inconsistent with the constituent rules of the 1950 Constitution. Meanwhile, Gus Dur's Presidential Decree dated 23 July 2001 cannot be considered a presidential decree because the decree did not have a strong legal basis. Moreover, at that time the country was not in a state of emergency, it was just that there was upheaval between the legislature and the executive as a result of the buloggate case involving President Gus Dur and the legislature wanted President Gus Dur to step down from office while the President wanted to keep his position in accordance with the law.

SUGGESTIONS

Therefore, the legal basis related to the emergency state such as presidential decrees should be regulated in more detail in the law because until now Indonesian law does not recognize a presidential decree. Indonesia only recognizes the Government Regulation in Lieu of Law as a presidential policy when the country is in a state of emergency, and preferably, regulations related to the emergency state in Indonesia must be updated immediately because they are not in accordance with the current emergency state.

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[45] Ni'matul Huda, "Hak Prerogatif Presiden Dalam Perspektif Hukum Tata Negara Indonesia," (Prerogative of the President in the Perspective of Indonesian Constitutional Law), *Jurnal Hukum IUS QUIA IUSTUM* 8, no. 18 (2001): 1–18.

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