

FAST-TRACK LEGISLATION MECHANISM AS AN ALTERNATIVE TO THE FORMATION OF LEGISLATION IN INDONESIA

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Abstract

The formation of laws and regulations that take a short time to be formulated may have procedural defects in the process of their formation, such as procedural violations, non-implementation of one or several procedures for their formation and insufficient quality of implementation of the procedures for their formation. Consequently, the legislative process in Indonesia leads to poor conditions, causing problems in the formation of laws and regulations. The practice of making laws and regulations in a short period carried out by the legislature seems to apply the mechanism of fast-track legislation. However, this fast process is not in accordance with the positive law that regulates it. Therefore, the mechanism of fast-track legislation is seen as an alternative to the formation of laws and regulations to prevent the practice of forming bad laws and regulations from being repeated continuously. This research is normative juridical research, with a statutory approach and a comparative law approach. This research journal aims to examine the effectiveness of the fast-track legislation mechanism when used as an alternative to the formation of legislation in Indonesia.

Keywords: alternative; effectiveness; fast-track legislation

INTRODUCTION

Background

Indonesia is a state of law as stated in the 1945 Constitution of the Republic of Indonesia Article 1 paragraph 3. Therefore, the legislature is formed as a state institution whose functions are to produce legislative products in the form of laws and regulations that regulate the lives of the people and the government of Indonesia so that the Indonesian state can be realized as a state of law. The establishment of legislative institutions is a concrete manifestation of the Indonesian state becoming a state of law.

The legislative body in carrying out its duties to carry out the process of making laws and regulations must be in accordance with the positive laws governing it, including Law number 13 of 2022 concerning the Formation of Legislation. The formation of good laws and regulations in accordance with the provisions will produce good legislative products, which can have a good impact on the people and the government in the life of the state. The most important requirement to be considered a good law is the principle of certainty, which means that it is known to everyone, consistent in its formation, clear in its implementation,

simple and strictly enforced¹.

Based on the facts that have occurred, the process of forming laws and regulations that have been carried out by the legislative body is considered not meeting the regulation in positive law, including Law number 13 of 2022 concerning the Formation of Legislation. The recent examples of this practice are the formation of a revision of Law number 30 of 2002 concerning the Corruption Eradication Commission, the formation of Law number 11 of 2020 concerning Job Creation and the formation of Law number 3 of 2022 concerning the National Capital City. The process to formulate those laws is considered very fast and rushed. The practice of forming legislation that seems hasty will endanger judicial power.² This happens because there is a majority interest from the legislators to maintain the law, causing the delegation of public discourse discussions that should be in the DPR (the House of Representatives) to be transferred to the Court.

After a law is passed, it was submitted to the Constitutional Court for review, both formally and materially. The submissions come from various groups. Based on this phenomenon, the existence of positive laws governing the formation of laws and regulations does not guarantee an adequate deliberation process and consider public aspirations properly in the formation process, thus leading to constitutionality testing in the Constitutional Court.³

The positive law that currently regulates the formation of laws and regulations only emphasizes the implementation of the stages

of the formation of laws and regulations but does not have an emphasis on the obligation to carry out a sufficient deliberation process.⁴ An ideal positive law must contain provisions on the measure of implementation of its content.

The formation of laws and regulations that are very fast can indicate procedural defects in the process, such as violations of procedures, lack of procedural stages or insufficient quality of the implementation of the formation procedures. The phenomenon of the formation of laws that are rushed with no clear reason to accelerate their formation is considered to worsen the legislative process in Indonesia.⁵

The nature of the legislative product refers to the process of making laws. The process of making laws or regulations contains an understanding that must be passed by the interacting legislators, which is not separated from the study of politics and sociology, although guided by the law.⁶

Therefore, it is deemed necessary to have an alternative mechanism for the formation of laws and regulations that can be implemented effectively by the legislature in a short time without violating the formation process. Thus, good legislative products can be produced and do not cause problems in the formation of laws and regulations in Indonesia.

1 Bayu Dwi Anggono, *Perkembangan Pembentukan Undang-Undang Di Indonesia* (Jakarta: Konstitusi Press, 2014), 1.
2 Berdasarkan Pemaparan Dari Nara Sumber Dr. Ibnu Sina Chandranegara Pada Diskusi Terbuka Mengenai *Fast-track Legislation* Ibnu Sina Chandranegara, "Perihal Rapid Legislation" (Universitas Padjajaran, 2020), 1.
3 Jimly Asshiddiqie, *Pengujian Formil Undang-Undang Di Negara Hukum*, 2020, 76.

4 Sd Harijati, *Keterangan Ahli Dalam Perkara Nomor 60/Puu-Xviii/2020 Tentang Pengujian Formil Uu. No.3 Tahun 2020 Terhadap UUD. 1945*, 2020.
5 Kompas.Com, "Revisi Uu. Mk. Diajukan Ketua Baleg. Dpr. Sebagai Pengusul Tunggal," 2022, <https://Nasional.Kompas.Com/Read/2020/04/13/15433351/Revisi-Uu-Mk-Diajukan-Ketua-Baleg-Dpr-Sebagai-Pengusul-Tunggal>. diakses pada tanggal 25 April 2022, pukul 10:23 WIB.
6 Eka NAM Sihombing and Muhammad Yusrizal Adi Syaputra, "Implementasi Penggunaan Kecerdasan Buatan Dalam Pembentukan Peraturan Daerah," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 425.

In several other countries such as the United States and the United Kingdom, there is a mechanism for the formation of legislation that is carried out quickly, known as fast-track legislation. The legislature in Indonesia has not used this kind of mechanism. However, in reality, the legislature often seems to practice the fast-track legislation procedure. Therefore, to use this mechanism in Indonesia, a study is needed that examines the effectiveness of the fast-track legislation mechanism as an alternative to the formation of laws and regulations in Indonesia.

Research Question

Based on the problem above, the research questions that can be formulated are:

1. Why can a mechanism of fast-track legislation be applied in Indonesia?
2. How is the effectiveness of the fast-track legislation mechanism as an alternative to the formation of laws and regulations in Indonesia?

Aims

The purpose of this research is to examine 2 conditions, namely:

1. Fast-track legislation mechanism can be applied in Indonesia, and
2. The effectiveness of the fast-track legislation mechanism as an alternative to the formation of laws and regulations in Indonesia.

Research Methods

This research is a qualitative study using a juridical-normative approach and a comparative approach. The normative juridical approach is an approach that seeks to synchronize the legal provisions that apply in legal protection against norms or other legal regulations with their relation to the application of these legal regulations in the field.⁷ The comparative approach is

to conduct a study that analyzes objective and systematic solutions offered by various systems for a particular legal problem.⁸ The objects of comparison in this research are the regulation, process and requirements of the fast-track legislation mechanism used in several countries such as the United States and the United Kingdom

This research used secondary data consisting of primary legal materials and secondary legal materials, especially those related to the formation of laws and regulations. The data analysis method was carried out by systematizing data to determine the effectiveness of the fast-track legislation mechanism when it is applied in Indonesia.

DISCUSSION

Fast-Track Legislation Can Be Applied in Indonesia

In simple terms, fast-track legislation is a term given to a bill that is accelerated through each of the legislative stages required to make a law in a much shorter time than usual.⁹ The mechanism is to fulfill the response of the community's need for law that is considered an immediate need so that a quick law or solution is needed.¹⁰

In the academic world of legal science, various terms such as expedited, majoritarian exception, or fast-track legislative procedures have developed in the United States.¹¹ In the United Kingdom, there are several terms such as rapid legislation, accelerated procedure, instant legislation, or expedited legislation, but

Rineka Cipta, 2001), 15.

8 Walther Hug, *The History of Comparative Law* (Harvard Law Review, 1931), 1027.

9 House of Lords, *Fast-Track Legislation: Constitutional Implications and Safeguards*, vol. 1, 2009, 7.

10 Ibid., 194.

11 Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track Legislation Dalam Pengusulan Rancangan Undang-Undang Oleh Presiden," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021): 129

7 Burhan Asofa, *Metode Penelitian Hukum* (Jakarta:

the common term is fast-track legislation.¹²

In the UK, the use of fast-track legislation is based on criteria relating to the substance of the legislation. The use of fast-track legislation mechanisms in the UK continues to be regulated with limited criteria, such as¹³:

1. To correct errors in the Law
2. To respond to the court decisions that are suspected of creating new arrangements
3. To ensure that an Act applies to a specific event or condition
4. To ensure that the UK continues to comply with its international commitments
5. To implement the changes contained in the budget
6. To overcome the economic crisis
7. To implement counter-terrorism measures
8. To maintain peace with Scotland, Wales and Northern Ireland, and
9. To respond to public outcry.

In the United States, the mechanism of expedited or fast-track legislation is carried out all considerations with all considerations of its use entirely in the realm of the legislature.¹⁴ In the United States, the use of fast-track legislation mechanism is based on criteria that is oriented towards achieving the objectives of the draft law, which is generally time-limited.¹⁵ Thus, the consideration of urgency here is not fully intended as a threatening emergency, but rather a situation that wants to achieve a certain momentum.¹⁶ The use

of the fast-track legislation mechanism in the United States is carried out by providing qualification provisions and procedural stages for a draft law. Generally these procedural stages include:¹⁷

1. setting a time limit for the jurisdictional committee to report their work;
2. granting the committee automatic dismissal from consideration of further action, or for a preferential motion to dismiss the committee, without debate or limited debate, if the committee fails to report within its time limit;
3. making the act (fast-track legislation) a privilege for basic consideration, either immediately or after a short layover period, whether the act is reported from the jurisdictional committee or the committee is dismissed;
4. prohibiting basic amendments, including committee amendments, and imposing strict time limit on debate during the basic consideration of the act and all questions relating to it;
5. providing prompt basic consideration, with little or no debate, on identical counterpart law or resolutions of other tribunals.

In France, Ecuador, and Colombia which regulate fast-track legislation in their constitutions, they give the executive power to request that the discussion of a draft law be carried out in a flash, through a time limit for discussion or specific stages that are different from the regular stages of discussing the draft law. The three countries have one common condition in implementing fast-track legislation. They use fast-track legislation in the draft law that is only related and have an urgent economic impact.

12 House of Lords Select Committee on The Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (London: The Stationery Office, 2009), 7.

13 *Ibid*, 10.

14 HH Koh, "The Fast-track and United States Trade Policy," *Brooklyn Journal of International Law* (1992): 143–180.

15 NR Minter, "Fast-track Procedures: Do They Infringe Upon Congressional Constitutional Rights," *Syracuse Journal of Legislation & Policy* Y (1995): 107.

16 AAP Bruhl, "Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and

The Rules of Proceedings Clause," *Journal of Law & Politics* (2003): 345–445.

17 CM Davis, "Expedited Procedures in The House: Variations Enacted into Law" (Library of Congress, 2003), 2–12.

Based on the data above, there are similarities between countries that use the mechanism of fast-track legislation. First, it is done based on a causal relationship, due to urgent conditions in the country, resulting in the use of fast-track legislation mechanism to overcome these conditions. Second, fast-track legislation is regulated in the constitution and technical regulations governing the formation of law.

There are two methods in using fast-track legislation, firstly, by cutting certain discussion stages in the discussion stages of draft law, or secondly, limiting the time for discussing qualified bills using fast-track legislation.¹⁸

The aforementioned countries are considered to successfully carry out the fast-track legislation mechanism, so it becomes important to do a legal comparison with these countries in order to implement the fast-track legislation mechanism in Indonesia.

Based on the data of the countries previously mentioned, there are many similarities with Indonesia. Therefore, it can be concluded that the mechanism of fast-track legislation can be applied in Indonesia. The first similarity is that the Indonesian state adheres to the continental European legal system (civil law system) originating from European countries such as England and France. The second similarity is that Indonesia uses a presidential system of government which is also used in the United States, France, Ecuador and Colombia. The third similarity is that Indonesia also uses the theory of separation of state powers by Montesquieu which is also used by these countries. The fourth similarity is that the Indonesian state also has a legislative body that functions to produce laws like the

countries mentioned above. So far, Indonesia has technical regulations that regulate the formation of laws and regulations to overcome urgent conditions in the country and to overcome certain other conditions that ensure the existence of national urgency for a Draft Law as stated in Article 23 (2) of the Law. Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislation.

So far, Indonesia has had a mechanism for the formation of legislation that is quite fast through Government Regulations in Lieu of Law which can be used as one of the legal aspects in the application of fast-track legislation mechanism in Indonesia.

The mechanism of fast-track legislation can be applied in Indonesia by implementing the following criteria:¹⁹

1. fast track legislation would be better regulated through the Constitution with the consequence of the abolition of the president's power to issue Perppu (the Government Regulation in Lieu of Law). This is intended as a substitute for the power to issue a Perppu which has the potential to lead to a constitutional dictatorship.²⁰
2. if fast-track legislation turns out to be regulated at the level of the law, it would be better if, apart from only being able to be submitted by the President, it must use the method of time limitation to discuss the draft law and not the method of reducing the stages of discussing the draft law.
3. regulation of fast-track legislation must manage and limit which of the material content of the law that is pursued

¹⁹ *Ibid.*

²⁰ Ibnu Sina Chandranegara, "Komparasi Kebijakan Hukum Dalam Penanggulangan Pandemi Covid-19 Di Berbagai Negara: Penggunaan Keadaan Dan Hukum Darurat Atau Optimalisasi Instrumen Hukum Yang Ada?," *Segi Hukum Terhadap Implikasi Covid-19 di Indonesia* (2020): 22–34.

¹⁸ Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track Legislation Dalam Pengusulan Rancangan Undang-Undang Oleh Presiden," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021): 134.

through fast-track legislation, what the procedure is, the length of time required, and the fulfillment of public access in the deliberation process that is sufficient

4. the inclusion of sunset clause, the inclusion of sunset clause or the time period clause for the enactment of the legislation at the end, becomes crucial if this fast-track legislation is adopted
5. as another option, if it does not encompass the inclusion of a sunset clause, it may include an obligation to review legislation after the draft law has been passed through the mechanism of fast-track legislation (post-legislative review). This obligation arrangement can be given within one or two years from the date of enactment. This obligation can also be cumulative with provisions that have consequences, namely, if the post legislative review is not completed within one year, then the law adopted through the fast-track legislation mechanism is not binding by itself, and
6. sixth, if fast-track legislation is adopted in the future, it will be better if the draft law that uses the omnibus method is prohibited from being pursued by the mechanism of fast-track legislation. This is intended to prevent legal hostages (regulatory capture) or even state capture.

Fast-Track Legislation Mechanism as an Alternative to the Formation of Legislation in Indonesia

Fast-track legislation mechanism as an alternative of legislation formulation in Indonesia is hoped to have expected effects. In general, the effectiveness of the fast-track legislation mechanism can be interpreted as the effectiveness of the law. The factors that are able to affect the effectiveness of the law can be detailed as follows:²¹

1. the legal factor itself
2. the law enforcement factor, namely the parties that form or implement the law
3. the factor of facilities that support law enforcement
4. community factor, namely the environment in which the law applies or is applied
5. cultural factors, namely as a result of work, creativity, and sense based on intention in social life.

The five factors are correlated. Therefore, in analyzing the effectiveness of the law, it is necessary to pay attention to the relation between the forementioned factors.²²

Legal factor in Indonesia has supported the implementation of fast-track legislation mechanism because the law in Indonesia and in countries that have already implemented it have many resemblances. The law enforcement factor in Indonesia is adequate enough so that it is deemed sufficient to support the implementation of fast-track legislation mechanism. Community factor in Indonesia has supported the implementation of the fast-track legislation mechanism, as observed from the many submissions for judicial review of legislation products that are produced in a short period but are not in accordance with the positive law of this phenomenon, it can be understood that Indonesian does not support the practice of making legislation that is fast yet not in accordance with positive law and seen from the many papers written by legal academics and legal practitioners in Indonesia who write about the application of mechanism of fast-track legislation in this country. Cultural factors in Indonesia tend to show that Indonesian prefer a fast process in taking care of all matters. It includes the formulation of laws and regulations so far. A lot of legislation formulations are carried out

21 Winarno Yudho and Heri Tjandrasari, "Efektivitas Hukum Dalam Masyarakat," *Jurnal Hukum & Pembangunan* 17, no. 1

(2017): 60.
22 *Ibid.*

in a short period even though they are not in accordance with the provisions. From this phenomenon, it can be understood that the Indonesian people like a process that is fast and easy, which then naturally becomes the culture of the people in Indonesia.

Based on the analysis of the aforementioned factors, it can be concluded that the mechanism of fast-track legislation can bring positive effects and produce many functionalities that the Indonesian want from the mechanism for formulating laws and regulations that are quick legally.

Quoting from an open discussion webinar, the idea of a fast-track method of House of legs legislation in the United Kingdom makes an analogy that a fast-track bill can be categorized as express, not going through existing procedures but only shortening the duration of each procedure in drafting a bill, the formation process in drafting a bill as a democratic form of the state, then they use 5 (five) principles when to use fast-track legislation, namely:

1. It must be ensured that the inspection or structuring by the legislative body can be carried out effectively and can be observed at every stage.
2. Technically it must be ensured that the quality of the draft law can be guaranteed
3. There must be an opportunity for related parties or those that will be affected by the fast-tracked design, in order to have an influence on the discussion process
4. It must be guaranteed that the laws that are formulated are proportional in nature, can be justified for their formation and are the right response to the problems that occur
5. There must be ensured that basic constitutional rights are not threatened.

According to Dian Kus Pratiwi at the webinar, Optimizing Fast-track Legislation can be a challenge in the formation of laws if they are regulated in the re-arrangements

in the Constitution and the Law Formation of Laws. Then there is the determination of the criteria for the Act with Fast-track Legislation, Transparency and Public Participation in the formation process.

According to Bagas Wahyu, the presence of fast-track legislation in Indonesia is not only creating an orderly arrangement of legislative functions in responding to emergency or urgent events but also providing limits on a legislative process that can be carried out quickly. However, the idea of this method has bad implications. For example, if it is implemented later, it will open up the possibility of a vulnerable discussion of the bill that is not in depth because of the limited time and even there are procedures that are skipped. Consequently, there can be inconsistencies from legislators to not make the basis of urgency as the main reference, so that the method is wide open. This will be used politically to perpetuate authoritative power in terms of certain interests to produce a bill quickly.²³

Regarding Fast-Track Legislation (FTL), there are not any special regulations in positive law if there is an emergency case that needs law formulation. The process to respond to emergency cases is still normal, there are no special procedures. Related to the Legal Basis for Planning The formation of law in normal cases, based on Article 16 of Law No. 12 of 2011 amendments to the Act. No. 15 of 2019, says that planning for the preparation of laws is carried out in the National Legislation Program (Prolegnas).²⁴

23 Bagas Wahyu Nursanto, "Diskursus Wacana Fast-track Legislation Di Indonesia," *Media Justitia*, Last Modified 2021, Accessed September 16, 2022, <https://www.mediajustitia.com/publikasi/opini/diskursus-wacana-fast-track-legislation-di-indonesia/>.

24 Intan Khairunisa, "Fast-track Legislation Sebagai Bentuk Peningkatan Supremasi Hukum Indonesia," diakses pada tanggal

Procedurally, regulations in Indonesia do not officially accommodate the acceleration of bill deliberation through the mechanism of fast-track legislation. However, at least there are several reasons that make the DPR (The House of Representatives) able to “accelerate” or skip stages in the formulation of the bill. The main reason is that most of the existing provisions only determine the maximum time limit taken in certain stages or activities. For example, the provisions regarding the socialization of the National Legislation Program after the determination to provide information and/or to obtain inputs from the community and stakeholders only stipulates that the activity must be carried out no more than 30 (thirty) days after the Prolegnas is promulgated. Meanwhile, the mechanism for accelerating the discussion of the bill is made possible through the provisions of Article 290 of the DPR’s Code of Ethics.²⁵

This Fast-Track Legislation mechanism can also be applied in practice if there is an urgent need for the enactment of a law so that it is required to go through the legislative process quickly. As stipulated in the provisions of Article 23 paragraph 2 of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Establishment of Legislation which states that under certain circumstances, the DPR or the President may submit a draft law outside The National Legislation Program. These circumstances include dealing with extraordinary situations, conflict situations, or natural disasters as well as certain other conditions that ensure national urgency for a draft law that can be jointly approved by

the DPR apparatus that specifically handles the field of legislation and the minister who carries out government affairs in the field of law. In addition, in the scope of the establishment of PERPPU as regulated in the provisions of Article 22 paragraph (1) of the 1945 Constitution, it states that in the event of a compelling emergency, the President has the right to stipulate government regulations in lieu of law. Based on the provisions of the above regulation, basically the practice of legislation in Indonesia may implement the Fast-track Legislation mechanism.²⁶

CLOSING

Countries that have implemented fast-track legislation mechanisms regulate and provide clear guidelines in their implementation so that they are carried out properly and the goal of accelerating the formation of laws can be achieved.

There are several important points about the implementation of fast-track legislation mechanism in Indonesia as an alternative to the formation of laws and regulations. First, it is to realize the principle of legal certainty in state administration, especially in the formation of legislation in Indonesia, so that it cannot be influenced by subjective circumstances or interests. The realization of legal certainty in the formation of legislation in Indonesia is expected to produce legislation products that are beneficial to the people, government and state. Second, to fulfill the urgent needs of the people and the state which must be addressed immediately so as to prevent national disasters and country losses.

16 September 2022 pkl. 22:12, last modified 2020, <https://ketik.unpad.ac.id/posts/1317/fast-track-legislation-sebagai-bentuk-peningkatan-supremasi-hukum-indonesia>.

25 Yassar Aulia, Ali Abdurahman, and Mei Susanto, “Fundamental Principles of the Legislation Process,” *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 6, no. 1 (2021): 53.

26 Sudarto, “Fast-track Legislation: Persoalan Praktik Legislasi Di Indonesia,” *Advokat Konstitusi*, diakses pada tanggal 16 September 2022 pkl. 22:26, last modified 2021, <https://advokatkonstitusi.com/fast-track-legislation-persoalan-praktik-legislasi-di-indonesia/>.

The use of the mechanism for the accelerated formation of laws and regulations that are legal in accordance with positive law is a real effort in realizing the formation of good laws and creating good legal conditions in Indonesia.

Conclusion

The mechanism of fast-track legislation in the preparation of laws and regulations in Indonesia can be applied, because it has many similarities such as in the United States, England, and France. Indonesia and those countries in fact adhere to the continental European legal system, using a presidential system of government as well as using the concept of separation of state powers as well as parliament as the main institution forming laws and regulations.

The effectiveness of fast-track legislation as an alternative to the formation of laws and regulations in Indonesia has the potential to be considered as effective, by legally applying the principles and achieving the goals of the community as well as the proportional formulation that can be justified for its formation.

Suggestion

In the application of the fast-track legislation mechanism, it is better if the regulations that become the legal basis for its application are designed and compiled by academics and legal practitioners who are truly experts and masters of the law and fast-track legislation mechanisms. These experts should be well-known as legal academics and legal practitioners who are acceptable and morally decent, in order to avoid unjust interests that are infiltrated by unruly people who chase mere profit for their own group.

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