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The Reformulation of Government Regulations in Lieu of Law: Constitutional Court's Decision Perspective

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ABSTRACT: The President's issuance of Regulations in Lieu of Law No 1 of 2022 regarding the Job Creation represents a deliberate endeavor to operationalize and further refine the previously ratified Job Creation Law. The objective of this research is to provide a lucid comprehension of the formulation of the Regulations in Lieu of Law that adheres to the Constitutional Court's directives. This paper employs normative legal research methodologies, incorporating conceptual, historical, statutory, and jurisprudential analyses to scrutinize extant legal quandaries concerning the urgency and constitutionality of Regulations in Lieu of Law No 1 of 2022 regarding the Job Creation. Furthermore, the research yields the proposition that the promulgation of Government Regulation in Lieu of Law No. 1 of 2022 on Job Creation, *vis-à-vis* Constitutional Court Decision No. 91/PUU-XVIII/2020, may be regarded as a departure from the constitutional imperatives articulated in Constitutional Court Decision No. 91/PUU-XVIII/2020. Furthermore, concerning the reformulation of provisions governing the issuance of a Regulation in Lieu of Law by the President within the national legislative framework, a predicated state of emergency is a requisite antecedent. The President is obligated to communicate this state of emergency to the Indonesian People's Consultative Assembly and the public before promulgating the Regulation in Lieu of Law.

KEYWORDS: Constitutional Court Decisions, Government Regulations in lieu of Laws, Reformulation.

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I. INTRODUCTION

History records that several countries in the world have experienced emergencies. In 1933 in Germany, Adolf Hitler used a state of emergency to consolidate his power after the events of *reichstag* controversially, at that time Adolf Hitler convinced President Hindenburg to issue an Emergency Decree which eliminated civil rights, arrested and detained political opposition, and controlled the media.[1] Furthermore, in Asian countries, a state emergency in 1975 occurred in India where Prime Minister Indira Gandhi declared a state of emergency. In this period civil liberties were restricted, individual rights were ignored, and political opposition was suppressed. The emergency ended in 1977 after general elections that resulted in the defeat of the Congress Party.[2] Examining the history of the Indonesian nation, a state emergency occurred which was implemented by President Soeharto in 1965 after the G30S/PKI coup attempt.[3]

During this state of emergency, political opposition was suppressed, freedom of expression was restricted, and human rights were violated. Martial law lasted for more than two decades before ending in 1998.[4] Basically, every state emergency has a different context and impact on constitutional constellations. Basically, a state emergency is understood as an extraordinary situation in which a country faces a serious threat to the security, stability or sustainability of that country. In a state of emergency, the government or competent authorities in the country may take extra steps that are unusual or beyond the limits that usually apply under normal circumstances. Basically, a state emergency arises when there is a very large and urgent threat that threatens the continuity of the state, including threats to people's lives, national security or political stability. According to

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1 Keith E Whittington, *Handbook Hukum dan Politik* (Bandung: Nusa media, 2021) at 12.

2 Sapto Hermawan & Muhammad Rizal, "Pengaruh Dekrit Presiden Terhadap Demokratisasi Di Indonesia" (2022) 8:2 Veritas et Justitia 287–314.

3 Yandry Kurniawan & Yandry Kurniawan, "A Historical Overview on the State of Emergency and Martial Law in Indonesia" (2018) The Politics of Securitization in Democratic Indonesia 45–68.

4 Adriyanto Adriyanto, "Kontroversi Keterlibatan Soeharto Dalam Penumpasan G30S/Pki 1965," *Kalpataru: Jurnal Sejarah dan Pembelajaran Sejarah* 2, no. 2 (2016): 1–12.

Hans Kelsen, a state emergency is a situation where exceptions to constitutional legal norms can be accepted in the event of a serious threat to the state.[5] However, Kelsen also emphasized the need for strong limits and supervision of government power in state emergencies.[6] Furthermore, Carl Schmitt in his book entitled *Theology II: The Myth of the Closure of any Political Theology* in the section on the concept of sovereignty and political theology, explains that state emergencies occur when political authorities gain extra power in the face of serious threats to the state.[7] Schmitt considered a state emergency as a condition in which constitutional law can be suspended and decisions obtained through strong executive power. Emergency constitutional law is the legal framework that regulates actions and circumstances that occur in state emergencies. In a state emergency, the government is given special authority to take actions outside normal procedures to maintain state security and stability. Emergency constitutional law provides the legal basis that allows the government to take these steps.Looking closely at the Indonesian constitutional constellation, the emergency constitutional legal instrument that the Government often uses is Government Regulation in Lieu of Law ("**Perppu**"). Based on Article 22 paragraph (1) of the 1945 Constitution, it is determined that:

> *"In the event of a compelling emergency, the President has the right to enact government regulations in lieu of law".*[8]

Referring to the provisions of the article above, it can be understood that the existence of "compelling urgent matters" is the legal basis for the enactment of the Perppu. The meaning of compelling urgency and a state emergency is that it has a close relationship where in a state emergency the reason *"compelling urgency*" is used as a reason to take action or policy

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5 Mark Klamberg, "Reconstructing the Notion of State of Emergency" (2020) 52 he George Washington International Law Review 53.

6 Muazidan Takalamingan, "Implikasi Perppu No. 1 Tahun 2020 terhadap Pertanggungjawaban Pemerintah dalam Penyelenggaraan Pemerintahan" (2021) 9:3 Lex Administratum.

7 Carl Schmitt, *Political Theology II: The Myth of The Closure of Any Political Theology* (John Wiley & Sons, 2014).

8 Lutfil Ansori, "Regulations in Liew of Statutes in States of Emergency in Indonesia" (2022) 4:1 Prophetic Law Review 22–47.

quickly without using the usual formalistic methods. Jimly Asshiddiqie said that the use of Perppu should be limited to emergencies that require quick decisions and cannot be handled through a long legislative process. The use of Perppu must be followed by appropriate monitoring and resolution mechanisms.[9]

In line with this, Romli Atmasasmita stated that the use of Perppu must be within clear limits following emergencies that require immediate decisions. Perppu must not be used as a tool to ignore the principles of democracy, separation of powers, and effective supervision. Since the independence era, several Perppu have been issued, aseries of significant Perppus have been enacted in Indonesia's legislative history.[10] Perppu no. 1 of 1966, which amended Law no. 1 of 1965 concerning the Establishment of the Supreme Court, was issued to facilitate the transition from a Parliamentary Democracy to a Guided Democracy. In a similar vein, Perppu no. 2 of 1966, known as "Securing the National Revolution," was introduced to establish a legal basis for safeguarding the National Revolution process. Perppu no. 1 of 1999, addressing the Replacement of Law no. 22 of 1999 on Regional Government, aimed at the implementation of regional autonomy in Indonesia.[11]

Perppu no. 3 of 2001, focused on General Elections, was released to ensure direct, general, free, secret, honest, and fair general elections. Additionally, Perppu no. 1 of 2002 pertained to Amendments to Law no. 25 of 1999 concerning Financial Balance between the Central and Regional Governments, aiming to make adjustments to the financial balance system.[12] Lastly, Perppu no. 1 of 2020, which dealt with State Financial

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[9] Ni'matul Huda, "Problematika Substantif Perppu Nomor 1 Tahun 2013 tentang Mahkamah Konstitusi" (2013) 10:4 Jurnal Konstitusi 557–578.

[10] Topo Santoso, "Anti-Terrorism Legal Framework in Indonesia: Its Development and Challenges" (2013) 25:1 Jurnal Mimbar Hukum Fakultas Hukum Universitas Gadjah Mada 87–101.

[11] Alan Bayu Aji, "Politik Hukum Pengaturan Pertanggungjawaban Kepala Daerah Kepada Dewan Perwakilan Rakyat Daerah (Studi Perbandingan Antara Undang-Undang Nomor 22 Tahun 1999 Dan Undang-Undang Nomor 23 Tahun 2014)" (2018).

[12] Akhmad Safik, "Law-making Process in Indonesia An Analysis On the National Legislation Program (Prolegnas)" (2021) 1:1 Jurnal Magister Ilmu Hukum 20–33.

Policy and Financial System Stability in response to the COVID-19 pandemic, was issued to address the emergency caused by the pandemic.[13] The President has issued Perppu no. 1 of 2022 concerning Job Creation ("**Perppu 1/2022**") as an effort to implement and further regulate the Job Creation Law which was previously passed. However, on the other hand, many parties assume that the stipulation of Perppu 1/2022 is a form of resistance to Constitutional Court Decision No. 91/PUU-XVIII/2020.[14] From the perspective of unilateralism, a president's action in issuing a Perppu is undertaken with the objective of shaping policy while circumventing the parliamentary discussion process (by passing it). This course of action is typically adopted by the president when they have garnered only minority support in parliament, essentially making them a 'minority president,' or when they decline to collaborate with the legislature. This scenario often unfolds in the context of divided government.[15]

Apart from that, after the enactment of Perppu 1/2022, various views emerged that questioned and debated the basis for consideration of its stipulation, especially concerning whether or not there was a "*compelling urgency*" regarding the state emergency which was one of the legal bases for its formation.[16] By using a juridical-normative approach, the author examines the ideal concept of the formation of a Perppu by the President through a reformulation effort based on the approach of Constitutional Court Decision No. 91/PUU-XVII/2020 and the Court's decision related

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[13] Soesi Idayanti, "Issue to the Legal Protection of the Use of the State Budget to Handling Covid-19" (2021) 4:1 Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences 1168–1177.

[14] HASBULLAH ADNAN HAMID, "Criticizing The Meaning of Government Regulation in Lieu of Law Number 2 Of 2022 Concerning Job Creation (Perppu No. 2/2022) for Workers And Entrepreneurs: Perspectives on Labor Law in Indonesia" (2023) 11:4 Russian Law Journal.

[15] Bagus Hermanto & Nyoman Mas Aryani, "Omnibus Legislation as a Tool of Legislative Reform by Developing Countries: Indonesia, Turkey and Serbia practice" (2021) 9:3 The Theory and Practice of Legislation 425–450.

[16] BF Sihombing & Adnan Hamid, "Impact of The Omnibus Law/Job Creation Act in Indonesia" (2020) 8:10 International Journal of Scientific Research and Management (IJSRM) 266–281.

to the issue as well as the theory and practice of constitutional law.[17] In the context of the legal issue under consideration, several antecedent studies have addressed the same subject matter, focusing on the genesis of Perppu and the construal of the term "compelling urgency". Firstly, Muhammad Siddiq, in his treatise entitled " *Compelling urgency or the ruler's interest: an Analysis of the Formation of Perppu delves into the interpretation of Compelling Urgency within the Perppu formation process*", which frequently lends itself to subjective interpretation as the President's prerogative, thereby deviating from its intended purpose and objectives. Notably, this study has a lacuna in its omission of reference to several Constitutional Court decisions that have provided elucidations on "Compelling Urgency".[18]

Secondly, Fitra Arsil, in his scholarly exposition entitled *"Proposing Limitations on the Formation and Content of Perppu: A Comparative Study of the Regulation and Usage of Perppu in Presidential Countries" (Pioneering Constraints on the Formation and Substantive Content of Perppu: A Comparative Study of the Regulation and Application of Perppu in Presidential Countries)*, conducts a nuanced analysis of Perppu formation in diverse nations, including Brazil and Argentina.[19] An area warranting further scrutiny pertains to a more exhaustive exploration of the mandates within Constitutional Court verdicts and the potential for reformulations to ensure that the raison d'être of Perppu remains intrinsically tethered to the concept of "compelling urgency" The incorporation of such research endeavors is poised to yield valuable insights into instances where Perppu contravenes the dictates of Constitutional Court pronouncements, alongside pragmatic measures that can be instituted to guarantee that each Perppu conforms to the imperatives associated with the ontology of Perppu.

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[17] Fithriatus Shalihah, "Industrial Relations with Specific Time Work Agreements after the Decision of the Constitutional Court of the Republic of Indonesia Number 91/PUU-XVIII/2020 in The Perspective of Legal Justice." (2022) 13:1 Jurnal Hukum Novelty (1412-6834).

[18] Muhammad Siddiq, "Kegentingan Memaksa Atau Kepentingan Penguasa (Analisis Terhadap Pembentukan Peraturan Pemerintah Pengganti Undang-Undang (PERPPU))" (2014) 48:1 Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum.

[19] Fitra Arsil, "Menggagas Pembatasan Pembentukan Dan Materi Muatan Perppu: Studi Perbandingan Pengaturan Dan Penggunaan Perppu Di Negara-Negara Presidensial" (2018) 48:1 Jurnal Hukum & Pembangunan 1–21.

II. METHOD

The study uses normative legal research methods with conceptual, historical, statutory and jurisprudential approaches. In particular, a conceptual approach is used to dissect the concept of a state emergency and the form of a Perppu as a product of emergency constitutional law. Furthermore, the historical approach will provide a holistic understanding to understand the legal hermeunitics of situations that are referred to as "*state emergencies*" through a series of legal events in the issuance of Perpu throughout Indonesia's constitutional history. Then the statutory approach reviews the regulatory framework for the formation of Perppu based on Indonesian positive law to see *the legal loopholes* in the process of Perppu stipulated. Finally, the jurisprudential approach especially towards the Constitutional Court's decision regarding Perppu, will help in interpreting the constitutional mandate regarding the issuance of an ideal Perppu.

III. LOGICAL-JURIDICAL CONSEQUENCES OF GOVERNMENT REGULATION IN LIEU OF LAW NUMBER 1 OF 2022 CONCERNING JOB CREATION OF CONSTITUTIONAL COURT DECISION NO. 91/PUU-XVIII/2020

The power of the president to issue emergency decrees is available in various countries worldwide. In various literature, this type of regulation is known by different names, including constitutional decree authority. Some authors refer to it as executive decree authority or presidential decree authority. Notably, Brazil refers to this legal instrument as 'medidas provisorias' (provisional measure), which can be translated as "temporary measure".[20] In Argentina, it is recognized as the "*decreto de necesidad y urgencia*" (decree of necessity and urgency).[21] For the sake of simplicity in this document, we employ the term found in Indonesia, namely "Perppu". In countries with a presidential system, this type of power is often referred

[20] Medida Provisoria, "The 2013 Regulatory Changes in The Brazilian Port Sector" (2013) 8:2 CONSTRUCTION LAW INTERNATIONAL 3.

[21] Juan Santiago Ylarri, "Permanent Economic Emergency in Argentina and its Constitutional Implications" (2021) 13:2 Mexican law review 87–114.

to as presidential power in the legislative sector or President's legislative power.[22]This denotes the authority exercised by the president within the legislative institution. In addition to presidential decrees or emergency decrees, powers falling into this category encompass the president's ability to veto legislative processes in parliament, the authority to propose initiatives within specific legislative fields, the power to set priorities for the discussion of draft laws, the capability to conduct referendums or plebiscites, and special authority in shaping the state budget.[23]

The presence of the Constitutional Court (MK) in the Indonesian constitutional structure is to realize a system of separation of powers (*separation of power*) with principles of *checks and balances*.[24] The Constitutional Court's constitutional authority implements principles of *checks and balances* placing all state institutions in an equal position so that there is balance in state administration and can mutually correct performance between state institutions.[25] One of the MK's authorities is to implement principles of *checks and balances* is through constitutional review of the law against the constitution. Constitutional review of laws gives rise to an understanding that the law formation process has not been carried out effectively and efficiently even ignoring the provisions of the constitution and applicable laws and regulations.[26] Constitutional review carried out by the Constitutional Court is carried out with two types of testing, namely constitutional review relating to the principles of forming statutory regulations and material constitutional review relating to the content of statutory regulations. The Constitutional Court's decision on judicial

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[22] Eduardo Alemán and Patricio Navia, "Presidential Power, Legislative Rules, and Lawmaking in Chile," *Legislative institutions and lawmaking in Latin America* (2016): 92–121.

[23] J Mark Payne, *Democracies in Development: Politics and Reform in Latin America* (Idb, 2002).

[24] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Depok: Rajawali Pers, 2020).

[25] Topane Gayus Lumbuun, "Tindak Lanjut Putusan Mahkamah Konstitusi oleh DPR RI" (2018) 6:3 Jurnal Legislasi Indonesia 77–94.

[26] R Daniel Kelemen & PECH Laurent, "The Uses and Abuses of Constitutional Pluralism: Undermining The Rule of Law In The Name of Constitutional Identity in Hungary and Poland" (2019) 21 Cambridge Yearbook of European Legal Studies 59–74.

review is the concrete embodiment of the principle of *checks and balances.*[27] One of the issues regarding the Constitutional Court's decision is regarding the clarity of implementation of the decision so that it can take place effectively in equal functional horizontal coordination based on doctrine *checks and balances* in the *separation of powers*.[28] This is an important point in analyzing the considerations in the Job Creation Perppu, one of which is based on arguments as a follow-up to Constitutional Court Decision No. 91/PUU-XVIII/2020.

In the consideration of the Perppu Job Creation it is very emphatically written that *"In order to implement the Constitutional Court Decision Number 9I/PUU-XVIII/ 2O2O, improvements need to be made by replacing Law Number 11 of 2O2O concerning Job Creation"*.[29] Therefore, the coherence of the Constitutional Court Decision Number 9I/PUU-XVIII/ 2O2O regarding the implementation of the Job Creation PERPPU is important to analyze as a form of compliance with the Constitutional Court Decision. This correlation is important because failure to implement the Constitutional Court's decision as it should can more or less lead to a process of delegitimization of the 1945 Constitution, which in essence can shake the stability of the administration of national and state.[30] The final and binding nature of the Constitutional Court's decision is the basis for binding the decision *to all*. The Constitutional Court's final decision is attached to the position of the Constitution as the highest law so that no other law has a higher position than it and in an effort to maintain and protect the authority of the constitutional judiciary.[31] Apart from that, the binding meaning of the Constitutional Court Decision is that its provisions are binding on all citizens. However, on the other hand, the meaning of

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[27] Jimly Asshiddiqie, Ernst Benda, and Dieter C Umbach, *Tugas Dan Tantangan Mahkamah Konstitusi Di Negara-Negara Transformasi Dengan Contoh Indonesia*, (2005).

[28] Maruarar Siahaan, "Peran Mahkamah Konstitusi dalam Penegakan Hukum Konstitusi" (2009) 16:3 Jurnal Hukum Ius Quia Iustum 357–378.

[29] See the point considering letter f of Government Regulation in Lieu of Law of the Republic of Indonesia Number 2 of 2022 concerning Job Creation.

[30] Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi" (2009) At 372.

[31] Fajar Laksono Soeroso, "Aspek Keadilan dalam Sifat Final Putusan Mahkamah Konstitusi" (2014) 11:1 Jurnal Konstitusi 64–84.

binding is also closely related to the follow-up to a Constitutional Court Decision which should be carried out by the legislator as*addresat* decision.[32] Therefore, it is very important to know how the address of the Constitutional Court's decision should be understood and appreciated *"...the Constitutional Court's decision is the first and final level decision which is final..."*.

The constitutional review at least affects the formation of laws in two models. **First,** judicial review balances the formation of laws, by using the constitution as a limitation in the formation of laws. **Second,** the Constitutional Court's decision becomes *sensitizing concept* positioning itself as an initiator and guide in the formation of laws. [33]Apart from these two models, the Constitutional Court's decision basically has an important constitutional messages to be implemented in relation to law makers. Fajar Laksono Surosa explained that a constitutional mandate is an order from the constitutional court in order to carry out its functions *the sole interpreter of the constitution* which is addressed to legislators as a way or strategy to uphold the constitution in line with the implementation of the decision.[34] Constitutional mandates can be divided into several variants consisting of (i) suggestions, recommendations, suggestions or encouragement to make changes, improvements and formation of laws, (ii) providing alternative norms in forming laws, (iii) prohibitions on making certain norms, (iv) the obligation to contain specific norms in the formation of laws, (v) the obligation to make changes, improvements or formation of laws by providing a time limit for completion and (vi) the obligation to make changes, improvements or formation of laws by

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[32] Mohammad Agus Maulidi, "Problematika Hukum Implementasi Putusan Final dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum" (2017) 24:4 Jurnal Hukum Ius Quia Iustum 535–557.

[33] Stuart Hargreaves, "Of Rights & Review: The American, Kelsen, & New Commonwealth Models" *The Chinese University of Hong Kong*, (2016) : 50 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435786.

[34] Laksono, *Relasi Antara Mahkamah Konstitusi Dengan Dewan Perwakilan Rakyat Dan Presiden Selaku Pembentuk Undang-Undang (Studi terhadap Dinamika Pelaksanaan Putusan Mahkamah Konstitusi melalui Legislasi Tahun 2004-2015)* (Doctor, Universitas Brawijaya, 2017) [unpublished].

providing a time limit resolution and consequences if not implemented.[35] This basis will be the analytical tool in assessing the suitability of the constitutional mandate of the Constitutional Court's decision regarding the Job Creation Perppu.[36]

Constitutional Court Decision No. 91/PUU-XVIII/2020 in paragraph 3.20.3 stated that:

> *"That with the legal considerations mentioned above, the Court hereby orders that a standard legal basis be immediately established to serve as a guide in the formation of laws using the omnibus law method which has this specific nature. Therefore, based on the legal basis that has been established, Law 11/2020 a quo has been revised to fulfill definite, standard and standard methods or methods, as well as compliance with the principles of law formation, as mandated by Law 12/2011, especially regarding with the principle of openness, it must include maximum and more meaningful public participation, which is the embodiment of the constitutional order in Article 22A of the 1945 Constitution. Thus, to fulfill this need, the Court considers it necessary to set a time limit for the legislators to improve the procedures for forming Law 11/2020 for 2 (two) years since this decision was pronounced. "If within 2 (two) years, Law 11/2020 is not revised, then the Court will declare that Law 11/2020 will result in the law becoming permanently unconstitutional."*

Constitutional Court Decision No. 91/PUU-XVIII/2020 in paragraph 3.20.4 stated that:

> *"That if within the 2 (two) year time frame the legislators are unable to complete the revision of Law 11/2020 then for the sake of legal certainty, especially to avoid a legal vacuum regarding the law or articles or material content of the Law that has been revoked or amended, it must be declared come back into effect"*

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[35] Fajar Laksono Soeroso, "Aspek Keadilan dalam Sifat Final Putusan Mahkamah Konstitusi" (2014) 11:1 Jurnal Konstitusi 64–84.

[36] Aulia Kartika Putri, Hinza Praitma Adli & Akhmad Habibullah, "Analysis of Government Regulations in Lieu of Law No. 1 of 2020: As a Response to the Urgency of the COVID-19 Pandemic" (2023) 4:1 Jurnal Studi Ilmu Pemerintahan 179–188.

Constitutional Court Decision No. 91/PUU-XVIII/2020 in paragraph 3.20.5 stated that:

> *"That in order to avoid a greater impact on the implementation of Law 11/2020 during the 2 (two) year grace period, the Court also stated that the implementation of Law 11/2020 relating to matters of a strategic nature and broad impact must be suspended first, including that it is not justified "forming new implementing regulations and it is not permissible for state administrators to make strategic policies that can have a broad impact based on the norms of Law 11/2020 which has been formally declared conditionally unconstitutional."*

Constitutional Court Decision No. 91/PUU-XVIII/2020 actually implies firmly regarding the 5 (five) constitutional mandates contained in its decision, especially in influencing the formation of laws to (i) regulate the standard basis for methods*to all*n the formation of laws and regulations in Indonesia, (ii) implementation of the principle of openness with maximum and more meaningful public participation (*meaningful participation*), (iii) the duration of the repair is 2 (two) years and if within this period it is not corrected it will become permanently unconstitutional, (iv) the re-enactment of laws or articles or content of laws that have been revoked or changed if not repaired within 2 (two) years and (v) it is not justified to form new implementing regulations and it is also not justified for state administrators to make strategic policy decisions that can have a broad impact.[37] In relation to the mandate relationship in relation to the basis for the formation of Perppu, there are 3 related mandates, namely the constitutional mandate in points (i), (iii) and (iii). The results of the analysis of the suitability of the constitutional mandate of the Constitutional Court's decision will be described as follows:

Table 1. Conformity of Constitutional Mandate to Constitutional Court Decision No. 91/PUU-XVIII/2020 Regarding the Formulation of the Job Creation Perppu and the Ideal Formulation of the Job Creation Law

[37] Marojahan Panjaitan, "Applicability of Law Number 11 of 2020 Concerning Job Creation After The Constitutional Court Decision Number 91/PUU-XVIII/2020" (2022) 17:2 Pandecta Research Law Journal 216–228.

Constitutional Mandate Constitutional Court Decision No. 91/PUU-XVIII/2020	**Formulation of Constitutional Mandate Constitutional Court Decision No. 91/PUU-XVIII/2020 on Perppu Job Creation**	**Ideal Formulation of Constitutional Mandate Constitutional Court Decision No. 91/PUU-XVIII/2020 on the Job Creation Law**
Method Default Settings *to all* In the Formation of Legislative Regulations in Indonesia	After Law Number 13 of 2022 concerning the Second Amendment to Law 11 of 2011 concerning the Formation of Legislative Regulations, the Job Creation Perppu in the substance of its formation has accommodated the method*to all*.	Constitutional Court Perspective on Decisions *a quo* has been accommodated in Law Number 13 of 2022 concerning the Second Amendment to Law 11 of 2011 concerning the Establishment of Legislative Regulations. This provision should be the basis for harmonizing hierarchical and similar laws and regulations in the Job Creation Law.
Principle of Openness with Maximum and More Meaningful Community Participation	Perppu does not accommodate the principles of forming statutory regulations, especially regarding the principle of openness with maximum and more meaningful public participation due to the nature of Perppu as a legal action in the	The principle of openness with maximum and more meaningful public participation has actually been reformulated in the revision of the Law on the Establishment of Legislative Regulations. The process of establishing the Job

	context of emergency constitutional law.	Creation Law should take maximum and meaningful attention to the provisions of Article 96 of the Law *a quo*.
Repair Duration is 2 (two) Years	The Job Creation Law was not amended in the form of a law, instead through the Perppu instrument.	*Post-Verdicta quo* Law makers should make formal and material improvements to the Job Creation Law.

Source: Processed by the Author from the results of the analysis of Constitutional Court Decision No. 91/PUU-XV/2020

While Constitutional Court decisions provide guidelines, the interpretation and application of these norms in parliamentary debates can lead to significant differences of opinion.[38] Potential points of contention, firstly, the urgency in resolving legal issues. The President must effectively articulate that the circumstances necessitated the issuance of a Perppu due to pressing and immediate legislative requirements. When a Perppu alters or supersedes a law recently approved jointly by the President and the DPR, such as the Perppu on Mass Organizations, the President must clarify the differences between the situation when the Perppu is issued and the circumstances during the enactment of the law.[39] Secondly, it is crucial to conduct a comprehensive assessment of what constitutes a legal vacuum. What defines the absence of a law governing an issue or the inadequacy of existing legislation? When a Perppu is employed to amend or replace an existing law, it can be challenging to argue for a legal vacuum, especially if the existing law is relatively recent. The question of what qualifies as an inadequate law also arises. For example, if a law has never been used to

[38] Ahmad Wijaya & Nasran Nasran, "Comparison Of Judicial Review: A Critical Approach To The Model In Several Countries" (2021) 14:2 Jurnal Legalitas 85–106.

[39] Tulus Asa Perdana & Wendra Yunaldi, "Paradoks Legislasi Perppu Cipta Kerja: Kepentingan atau Kegentingan yang Memaksa? Universitas Muhammadiyah Sumatera Barat" (2023) 10:3 YUSTISI 232–244.

address the legal issues that the Perppu aims to tackle, as in the case of UU no. 12 of 2013 concerning Mass Organizations, it requires examination.[40]

Thirdly, the possibility of the normal legislative process being impractical due to time constraints raises questions that demand clear explanations from the President. For instance, in the Perppu on Mass Organizations, only a few articles were added, primarily regarding the revocation of mass organizations' legal entity status. If both the President and the DPR concur on the urgency, it can lead to expedited discussions in the DPR. In fact, there have been instances where a revised bill was discussed for as little as 5 hours. However, when the President aims to take the lead in policy formation in parliament and demonstrate control over the legislative agenda, a Perppu remains a viable option.[41]

IV. REFORMULATION OF PROVISIONS FOR THE FORMATION OF GOVERNMENT REGULATIONS IN LIEU OF LAWS BY THE PRESIDENT IN THE NATIONAL LEGISLATION SYSTEM

Dissecting the Indonesia Constitution regarding emergency state and matters of compelling urgency, is *ratio d'etre* of being for the government to stipulate a Perppu in order to save the interests of the nation and state. Often the issuance of Perppu stems from critical situations, where it has become a necessity that the safety of the people is the highest law, even higher than the Constitution *(Salus Populi Supreme Law)*. Reflecting on the 1945 NRI Constitution as the state constitution, one can find the legal basis on which the genealogy of the Perppu is regulated. If we look further, in Article 12 and Article 22 of the 1945 NRI Constitution, article 12 explicitly states that *"The President declares the state of danger, the conditions, and consequences of the state of danger are set by law".* Meanwhile, article 22 of the 1945 Constitution of the Republic of Indonesia also states explicitly

[40] Victor Imanuel Nalle, "Asas Contarius Actus pada Perpu Ormas: Kritik dalam Perspektif Hukum Administrasi Negara dan Hak Asasi Manusia" (2017) 4:2 PADJADJARAN Jurnal Ilmu Hukum (Journal of Law) 244–262.

[41] Badrun Ubedilah, *Sistem Politik Indonesia : Kritik dan Solusi Sitem Politik Efektif* (Jakarta: Bumi Aksara,2019).

that "*in the event of a crisis that forces the President to enact government regulations in lieu of law*".[42]

Based on the provisions above, it can be seen that there are 2 (two) categories of unusual (extraordinary) circumstances in the country or state emergencies (*state of emergency*) first, dangerous conditions, and second, matters of compelling urgency. Both categories have the same meaning as a state emergency (*state of emergency*), but both have differences in their accentuation, namely that the term danger situation places more emphasis on its structure (external factors) whereas in the case of a compelling emergency, it places more emphasis on its content (internal factors). Therefore, it is necessary to know the historical aspects of the existence of a

Perppu as a prerogative of the President as head of state which was born out of critical circumstances.[43] Basically, the authority to form a Perppu according to the 1945 Constitution of the Republic of Indonesia is only given to the President, including the authority to determine the existence or occurrence of a state emergency. This authority is attributive in nature (*attribution of law to give power*) which also gives rise to responsibilities to the President. Therefore, this authority is subjective, meaning that the right to enact a Perppu is based on the President's own subjective assessment regarding the existence of a state emergency (*state of emergency*) which creates a compelling urgency. On the other hand Muh. Yamin in his viewpoint states that whether there is an urgent situation or not is his assessment (evaluation) according to government policy.[44] This means that an urgent situation may arise at any time if the government assesses that a situation is in an urgent and compelling situation.

Therefore, the author interprets the Perppu as a subjective right of the President which departs from an objective situation regarding the existence of a compelling emergency or critical situation. Although according to the

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[42] Debby Ekowati, "Emergency Law in The Indonesian Legal System" (2022) 10:2 Jurnal Hukum Progresif 112–126.

[43] Asrinaldi & Mohammad Agus Yusoff, "Power Consolidation and its Impact on The Decline of Democracy in Indonesia Under President Jokowi" (2023) 9:1 Cogent Social Sciences 2232579.

[44] Wirjono Prodjodikoro, *Azas-Azas Hukum Tata Negara di Indonesia* (Jakarta: Dian Rakyat, 1974).

1945 Constitution of the Republic of Indonesia, the authority to form a Perppu is the subjective authority of the President for the sake of saving the nation and state, if viewed from the philosophical aspect of its formulation, ideally the formation of a Perppu must fulfill the elements of a state emergency (*state of emergency*) cumulatively and the principle of proportionality which contains certainty, expediency and legal justice.[45] This is carried out so that the Perppu is born out of compelling urgent urgency, not as a Presidential policy that tends to be formally flawed. The authority to form this Perppu was also born from the paradigm presidential government system that not only places the President as the center of executive power but also state power. This means that the President is not only the head of government *(chief of executive),* but also as head of state *(Head of state).* As Rett R. Ludwikowsk said, "*The President, as the sole executive, is elected as head of state and head of the government*".[46] The position of the President in the Presidential government system based on the 1945 Constitution of the Republic of Indonesia is not separated as head of state and head of government, in the sense that the position as head of state and head of government is attached to one hand of a President. This is in accordance with the provisions of Article 4 paragraph (1) which states *"The President of the Republic of Indonesia holds governmental powers according to the Constitution*".[47] The purpose of government power according to these provisions is executive power. Thus, the President holds two powers at once, namely the power of the head of state and the power of the head of government. As the perspective of constitutionalism develop, the power of the head of state experiences limitations to avoid authoritarian actions.

Despite experiencing restrictions, the President's position as head of state remains strong and carries powers that other state institutions do not have.

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[45] Muhammad Yoppy Adhihernawan, Hernadi Affandi & Departemen Hukum Tata Negara, "Limitation Of The President's Power To Declare A State Of Emergency: A Comparison Of France, India, And Indonesia" (2022) 22:2 Jurnal Penelitian Hukum De Jure 145–162.

[46] Rett Ludwikoski, "Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot" (2003) The Boston University International Law Journal 29.

[47] Mohammad Wahyu Adji Setio Budi, "Indonesian State System Based on Pancasila and the 1945 Constitution: A Contemporary Developments" (2022) 1:1 Indonesian Journal of Pancasila and Global Constitutionalism 1–16.

The powers that the President has as head of state in the government system are based on the 1945 Constitution of the Republic of Indonesia. One factor is the strong position of the President in the Presidential government system because the President is the head of state.The president as head of state holds powers that other state institutions do not have, even though this institution also has a direct mandate from the people, such as Parliament. The head of state has philosophical consequences, namely that he is the head of the state who holds all state power. Before the birth of the republic, initially, only one system was known throughout the world, namely a monarchy headed by a king. In the hands of a king, all state power resides, so that the king is known as the head of state, namely the person who heads all state power. In a republic, the head of state is in the hands of a President, therefore the President has the right to hold all the reins of state power. This is what is called the original power of the head of state *(inherent power of the head of state)*.

However, in a constitutional state, as time goes by, whether, in a constitutional monarchy or republican system, the original powers of the head of state are ultimately limited by the limits contained in the constitution to avoid abuse of state power, this is what is called the principle of constitutionalism.[48] Therefore, the original power of the head of state can reappear and can be used again by the President when the country is in a state of emergency. Under normal circumstances, the implementation of constitutional law is based on normal constitutional provisions as stated in the Constitution and in the unwritten constitution. Emergencies are exceptions, command and use of coercive force *(public force)* to deal with emergencies is a power that by its nature is included in the original powers of the head of state. All deviations during the exception period are permitted to be carried out simply to return the situation to normal.

[48] Jacob Levy, "The Separation of Powers and the Challenge to Constitutional Democracy" (2020) 25 Review of Constitutional Studies 1.

This authority possessed by the President is one of the factors that strengthen the President's position in the presidential government system.[49] In fact, with the legitimacy of a state of emergency a President could potentially fall into arbitrariness.This can be seen in the case where President Sukarno, on the grounds that the country was in danger, dissolved the democratically elected constituent body, decreed a return to the 1945 Constitution of the Republic of Indonesia, and appointed himself President for life, this was stated in the Presidential Decree of 5 July 1959.[50] Likewise, when riots and chaos occurred in 1998 during the Suharto era when many human rights violations occurred, such as the Trisakti and Semanggi tragedies, it was very difficult to bring the parties responsible, including the President, to justice, because at that time an emergency situation was in effect whose elements were not yet clear. sociological and normative.[51] The application of the provisions of Article 22 paragraph (1) only emphasizes the compelling aspect of urgency, namely the element of necessity that requires it, and the element of time limitations that are required, without emphasizing the dangerous nature of the threat. The President can judge for himself whether the country's condition is in a critical and compelling situation or whether there is an urgency that forces a Perppu to be implemented.[52]

Thus, the declaration of a state of danger in accordance with Article 12 requires an objective assessment based on law, while the application of Article 22 paragraph (1) is not based on an objective assessment based on law but rather subjectively the President can personally assess it. This provision is clearly a source of extraordinary authority for the President so this authority is also a factor that strengthens the President's position in the

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[49] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Mahkamah Konstitusi Republik Indonesia dan Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2005).

[50] Henry Aspan, "The Role of Legal History in the Creation of Aspirational Legislation in Indonesia" (2020) 7:6 International Journal of Research and Review.

[51] John Peter Tehusijarana, "Indonesia's Student and Non-student Protesters in May 1998: Break and Reunifcation" (2023) Trajectories of Memory Excavating the Past in Indonesia 223–246.

[52] Fadil Cakra Perdana & Yogi Syahputra Alidrus, "Analysis of the Legitimacy of the State of Emergency in Forming Perppu Number 2 of 2022 Concerning Job Creation" (2023) 1:09 Asian Journal of Social and Humanities 440–448.

presidential government system based on the 1945 Constitution of the Republic of Indonesia. Even Ismail Sunny gave his assessment regarding this provision:

> *"In the event of a compelling emergency, the President has the right to issue a government regulation in lieu of law, but the government regulation must be approved by the House of Representatives at the following session. If approval is not obtained, the regulation must be revoked. "It is clear that this article can be a source of enormous power, especially considering that the next session of the House of Representatives may last for 1 year."*[53]

Thus, it can be concluded that essentially state power is in the hands of the head of state. As the teachings of modern constitutionalism develop, the main function of the Constitution is to limit the enormous power of the head of state. However, if there is no provision that expressly prohibits it, the remaining powers must inherently be considered or interpreted as falling within the scope of the President's powers as head of state. This is what is understood as the original power of the head of state*"inherent power of the President"*.[54] In the 1945 Constitution of the Republic of Indonesia, the original powers of the head of state are contained in the regulations regarding emergencies, namely Article 12 and Article 22 paragraph (1).

These two articles give the President a strong position in the Presidential government system based on the 1945 Constitution of the Republic of Indonesia.In Indonesia, the history of the formation of Perppu in Indonesia to date has included hundreds of Perppu starting from the administration of President Soekarno to President Joko Widodo. The president who was most productive in forming Perppu was President Soekarno. This is of course very natural because at that time the condition of the country had just become independent from colonialists and the conditions of the new country were structured to be able to survive through the transition period of power.

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[53] Ismail Sunny, *Pergeseran Kekuasaan Eksekutif Suatu Penyelidikan Dalam Hukum Tatanegara* (Jakarta: Aksara Baru, 1983).

[54] Jane Manners & Lev Menand, "The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence" (2021) 121 Colum Leg Rev 1.

The 1945 Constitution of the Republic of Indonesia (UUD 1945) was amended four times, the provisions regarding Perppu were not touched at all, that in the event of a compelling emergency, the President has the right to enact a Perppu which must be approved by the DPR in the next session and if it is not approved then The Perppu must be revoked. During the reign of President Habibie and President Soesilo Bambang Yudhoyono, there was a Perppu that was rejected by the DPR Of the many Perppu that were issued, only very few were rejected by the DPR[55]. It is as if compelling urgency is the basis that is often chosen to cover up errors in the formation of legislation. Apart from explaining the intensity of the crisis experienced, it also questions the quality of the Perppu which was produced in a short, urgent, and problematic drafting time. In the hierarchy of statutory regulations based on Article 7 paragraph (1) of Law No. 12 of 2011, Perpu is placed as a statutory regulation that is parallel to the Law. Article 11 Law no. 12 of 2011 states that the content of the Perppu is the same as the content of the law. Constitutional Court Decision No. 1-2/PUU-XII/2014 dated 11 February 2014 states that the content of the Perppu is the content of the law, has the same effect as law, and is binding on the public from the moment it is promulgated.[56]

Further, a Perppu is actually a government regulation that acts as a law, or in other words, a Perppu is a government regulation that is given the same authority as a law.[57] The hierarchy is at the same level as the law, so the function and content of the Perpu are the same as the function and content

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[55] Asrinaldi & Mohammad Agus Yusoff, "Power consolidation and its impact on the decline of democracy in Indonesia under President Jokowi" (2023) 9:1 Cogent Social Sciences 2232579.

[56] Monika Suhayati, "Kontroversi Peraturan Pemerintah Pengganti Undang-undang Pilkada dan Peraturan Pemerintah Pengganti Undang-undang Pemda" (2014) VI Info Singkat Hukum.

[57] The Constitutional Court in its decision concluded that the President's subjectivity in enacting the Peraturan Pemerintah Pengganti Undang-Undang was due to the urgent need to be defined carefully and not only prioritizing the President's subjective interests, which in the end would give rise to legal uncertainty and could disrupt development in Indonesia. This proves that the government cannot prove that there is a compelling urgency without the requirements as outlined in the Legislative Regulations Read in the Constitutional Court Decision Number 128/PUU-XII/2014 concerning Review of Perppu Number 1 of 2014 concerning the Election of Governors, Regent and Mayor.

of the law.[58] A Perppu that has been promulgated and has entered into force and is binding on the public, must be submitted to the DPR at the next DPR session in the form of submitting a draft Law on the Determination of the Perppu into Law. The DPR gives approval or does not give approval to the Perppu. If the Perppu is approved, it will be stated in the form of an Act establishing a Perppu.[59] In the event that the Perppu does not receive approval from the DPR in a plenary session, the Perppu must be revoked and must be declared invalid by means of the President submitting a draft Law on the Revocation of the Perppu. The Law on the revocation of this Perppu will contain all the legal consequences of the revocation of the rejected Perpu.[60]

The drafting of the Draft Law on the Establishment of a Perppu into Law is carried out by the Initiator after the Perppu is stipulated by the President. Apart from drafting a Draft Law regarding the Determination of a Perppu into Law, the Initiator also drafted a Draft Law regarding the Revocation of a Perppu.[61] In preparing the Draft Law concerning the Determination of the Peprpu as Law and the Draft Law concerning the Revocation of the Perppu, the Initiator formed an inter-ministerial and/or inter-non-ministerial committee. The results of the preparation of the Draft Law are submitted to the minister who handles legal affairs to carry out harmonization, rounding out, and strengthening the conception. After that, the initiator again conveys the results to the President. This kind of concept should be a guide for the Government in formulating Perppu in a more selective mechanism as outlined in Law Number 12 of 2011 concerning the Formation of Legislation.

The basis or reasons for the formation of the Perppu must be stated clearly, including the reasons for the urgency of forcing that are the basis for the formation of the Perppu. In accordance with Law Number 12 of 2011,

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[58] Maria Farida Indrati, *Ilmu Perundang-Undangan: (Proses dan Teknik Penyusunan) Jilid 2* (Malang: Kanisius, 2007).

[59] Yudi Widagdo Harimurti, Aprilina Pawestri & Farell Heydar Hilmy Fattuberty, "Some Provisions In The 1945 Constitution Of The Republic Of Indonesia Are Further Regulated By The Law" (2023) 50 Technium Social Sciences Journal 9–13.

[60] *Ibid*.

[61] Presidential Regulation Number 87 of 2014 concerning Implementing Regulations of Law Number 12 of 2011 concerning the Formation of Legislative Regulations.

apart from the juridical basis, philosophical basis, and sociological reasons that must be included in the considerations, the Perppu must also include reasons for the urgency of forcing it so that the basis for the formation of the Perppu is in accordance with applicable legal rules. This is in accordance with what is stated in Attachment I to Law Number 12 of 2011 concerning the Formation of Legislative Regulations, that the preamble must contain a brief description of the main ideas that are being considered and the reasons for the formation of Legislative Regulations.

The main ideas in the preamble contain philosophical, sociological, and juridical elements which are the considerations and reasons for its formation, the writing of which is placed sequentially from philosophical, sociological, and juridical. Thus, the consideration of the Perppu must contain the president's considerations or reasons for issuing the Perppu, including the brief inclusion of all the main ideas and facts, so that the president's basis for enacting the Perppu is in accordance with legal rules and the needs of the government and society. Starting from the description of the main ideas above, we can interpret that the formation of Perppu is the absolute authority of the President, thus the subjective interests of the President become primary, but the further formation of Perppu does not only refer to Article 22 of the Constitution and Article 1 point 4 of the Law Number 12 of 2011, namely that there are matters of compelling urgency, but must also include legal considerations as decided by the Constitutional Court in Case Number 138/PUU-VII/2009, namely:

1. There is a situation that is an urgent need to resolve legal problems quickly based on the law
2. The required laws do not yet exist, resulting in a legal vacuum, or there are laws but they are inadequate
3. This legal vacuum cannot be overcome by making laws using normal procedures because it takes a long time while in urgent situations there is a need for legal certainty. *(legal certainty).*

This means that every Perppu formulation must also be based on criteria as determined by the Constitutional Court as the interpreter of the Constitution *(the sole interpretation of the constitution),* This is the basic

parameter in issuing a Perppu so that tendencies do not arise from abuse of power. These criteria must also be positivized in Law 12 of 2011 concerning the Formation of Legislative Regulations with the following revision law. Starting from the description of the main ideas above, in fact, Perppu in the regulatory context must contain legal certainty which is rigid. A compelling precarious situation is not only seen as a complete emergency in the context of an emergency but is also inherently related to Article 12 of the 1945 Constitution of the Republic of Indonesia concerning the state of danger declared by the President. After the dangerous situation is determined by the President, this can be one of the factors in issuing the Perppu in terms of overcoming all the problems that occur amidst this dangerous situation. There is a connection between the spirit contained in Article 12 of the 1945 NRI Constitution and Article 22 C of the 1945 NRI Constitution, namely the relationship between a state of danger and the issuance of a Perppu. Therefore, to facilitate understanding of the reformulation of the formation of the Perppu, this will be explained in the following figure:

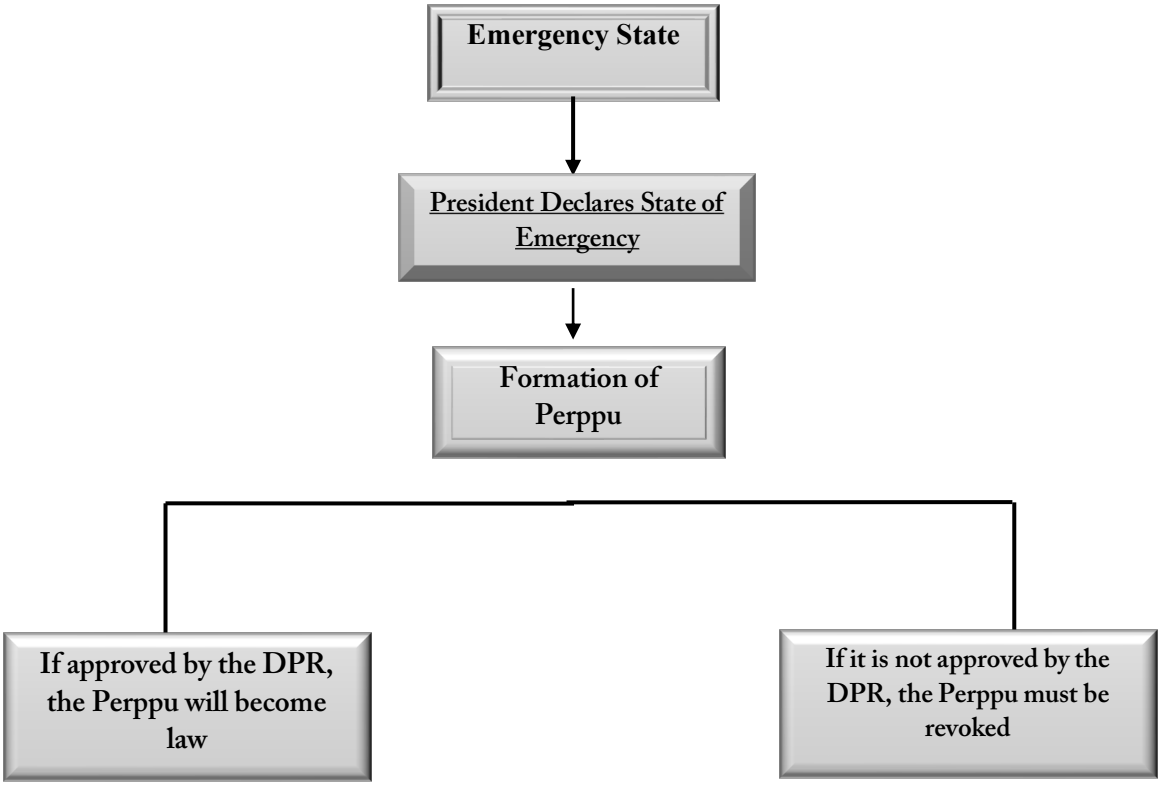

Figure 1. Flow of Formation of Perppu

V. CONCLUSION

The stipulation of Government Regulation in Lieu of Law Number 1 of 2022 concerning Job Creation in light of Constitutional Court Decision No. 91/PUU-XVIII/2020 may be perceived as a deviation from the constitutional mandate articulated in the aforementioned decision. This is primarily due to the fact that, per Decision a quo, legislators are expected to effectuate formal and substantive amendments to the Job Creation Law within the prescribed timeframe. Moreover, with regard to the restructuring of the procedural requirements governing the President's issuance of a Perppu within the national legislative framework, a preliminary declaration of a state of emergency by the President is an indispensable precondition. This declaration is subsequently conveyed to the DPR RI directly in forum and the public through the television or official Social media before the Perppu is enacted.

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