LIMITING EXECUTIVE DECREE AUTHORITY IN INDONESIA: LESSONS FROM COLOMBIA AND ITALY

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Introduction

Since Indonesia's independence in 1945, the Indonesian President has enacted 176 Government Regulations in Lieu of Statute.[1] Government regulations in lieu of statute (hereinafter " Perppu"[2]) is a regulation with the force of law issued by Indonesian President in compelling exigencies situation without prior approval by the House of Representatives.[3] In Shugart and Carey's perspective, this type of power is part of a broader concept called executive decree authority, referring to the power of the Executive to issue law in lieu of action by the assembly.[4]

Even though the use of this power has significantly decreased, many Indonesian scholars still consider it problematic. Fajrul Falaakh argued that the President's ability to issue Perppu contains a high legal uncertainty and tends to be abused.[5] While Bagir Manan referred to this power as "the necessary evil" as something that should be shunned but had to be taken only as a last resort (*abnormal rechtsvorming*).[6] One of the problems was in defining what constitutes a compelling exigency situation.

From time to time, the President has a high degree of subjectivity to determine a compelling exigency situation. For example, in 1984 and 1992, the President issued a Perppu to delay the entry into force of Statute No. 8/1983 on Value Added Tax and Statute No. 14/1992 on Traffic

[1] kumparanNEWS, "Sukarno, Presiden RI Yang Paling Banyak Mengeluarkan Perppu" (*kumparan*October 13, 2019) <https://kumparan.com/kumparannews/sukarno-presiden-ri-yang-paling-banyak-mengeluarkan-perppu-1s2qkyjRfmI> accessed January 7, 2020

[2] The word Perppu is an abbreviation of Peraturan Pemerintah Pengganti Undang-Undang (Government Regulations in Lieu of Statute). This abbreviation is widely used in Indonesian official legal documents, including the constitutional court decision.

[3] Indonesia Constitution, Article 22.

[4] Executive decree does not refer to executive actions that govern the administration of law that has been set by the assembly. Carey JM and Shugart MS, *Executive Decree Authority* (Cambridge University Press 1998) 11.

[5] Falaakh F, "Involusi Perppu (Bank Century)," *Centurygate: Mengurai Konspirasi Penguasa-Pengusaha* (Buku Kompas 2010) 115-116.

[6] Manan B and Harijanti SD, "Artikel Kehormatan: Peraturan Pemerintah Pengganti Undang-Undang Dalam Perspektif Ajaran Konstitusi Dan Prinsip Negara Hukum" (2017) 4 PADJADJARAN Jurnal Ilmu Hukum (Journal of Law) 238.

Law[7] because the government was not ready to implement both statutes. In other words, the President considers unpreparedness to enforce a statute as a compelling exigency circumstance.[8] In this case, the urgency was not defined as a danger, threat, or various other emergencies that directly affect the people.

Another issue was related to the substantial limits of Perppu, whether this type of regulation can be used to limit fundamental rights? This question was raised, for instance, when President Joko Widodo enacted Perppu No. 2/2017 on Mass Organization.[9] With the pretext of fighting a radical and intolerant right-wing Islamic organization, this regulation gives the Ministry of Law and Human Rights the power to dissolve mass organizations without any judicial oversight. In practice, this regulation then used to ban Hisbut Tahrir Indonesia, a right-wing Muslim organization, to spread an ideology that contradicts to the state ideology, Pancasila.[10]

The attempt to limit the exercise of this power began when the Indonesian Constitutional Court (hereinafter "ICC") decided that a Perppu can be reviewed through the constitutional review process. However, the involvement of ICC has deemed failed to put any constraints on the use of this power. For example, in decision No. 003/PUU-III/2005, the ICC refused to define what

[7] Based on Article 21 of Statute No. 8 Year 1983 on Value Added Tax, the law will come into force on 1st July 1984. Approaching the deadline, the government was not yet ready to implement the law. The same occurs with the Law No. 14 year 1992 on Traffic Law, which should have come into force on September 17th 1994. Manan B, *Lembaga Kepresidenan* (FH UII Press 2006) 152.

[8] Ibid 152.

[9] Almanar A, "Gov't Issues Perppu to Expedite Disbanding of Anti-Pancasila Organizations, Including HTI" *Jakarta Globe* (July 12, 2017) <https://jakartaglobe.id/news/govt-issues-perppu-expedite-disbanding-anti-pancasila-organizations-including-hti/> accessed February 10, 2020

[10] Pancasila is five principles that were announced by Sukarno in his speech on 1 June 1945 to the Investigating Committee for Indonesian independence. These principles then used as a state ideology and contained in the Preamble of the 1945 Constitution. The five principles include 1. Belief in the One Supreme God; 2. Just and civilized Humanity; 3. Unity of Indonesia; 4. 'Deliberative' Democracy; and 5. Social justice. Indonesia Constitution, Preamble. https://www.constituteproject.org/constitution/Indonesia_2002.pdf?lang=en

constitutes a compelling exigency and decided it as a political question.[11] In another decision, the ICC refused to review Perppu because it already ratified by the House of Representatives.[12]

This research aims to examine how to make judicial institutions better functioning in controlling government abuse in exercising executive decree authority. The method used is comparative desk research with a focus on comparing court decisions. The study will first look at Colombia, a country with a presidential system of government. The Colombian President has the authority to promulgate a decree during social, economic, and ecological emergency. History noted that this power had been used by the President to become the de facto legislator.[13] The second is a country with a parliamentary system of government: Italy. Article 77 of the Italian Constitution equipped the government the power to issue decree-law (*decreti legge*). Since the 1980s, the use of this power has expanded abnormally.[14] Both countries will be suitable as comparators since the decrees in both countries are essentially similar to the Perppu. Besides, there exist judicial decisions which (tried to) limit the exercise of such power.

The capstone thesis has five parts. The first part will explore the conceptual framework on the importance of judicial control on the use of executive decree authority. The next part will describe the use and abuse of Perppu in Indonesia and the judicial attempt to limit this power. The third part will explain the comparative analysis on how constitutional courts in Colombia and Italy limited the use of executive decree authority. The fourth part will analyze how the ICC could better function to constraint and hold the President accountable when s(he) exercise executive decree authority. And the last part is the conclusion.

[11] Arsil F, "Menggagas Pembatasan Pembentukan Dan Materi Muatan Perppu: Studi Perbandingan Pengaturan Dan Penggunaan Perppu Di Negara-Negara Presidensial" (2018) 48 Jurnal Hukum & Pembangunan 1 12.
[12] 38-39-41-48-49-52-58/PUU-XV/2017 [2017] Indonesia Constitutional Court (Indonesia Constitutional Court). See also Butt S (n62).
[13] Uprimny R, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia" (2003) 10 Democratization 46 7.
[14] Barsotti V and others, *Italian Constitutional Justice in Global Context* (Oxford University Press 2017) 164.

1 Judicial Control on Executive Decree Authority: A Conceptual Framework

The question surrounding the Executive remains the same from time to time; how much power does this branch of power should have? This question becomes increasingly relevant since, in modern democracies, the Executive power has become omnipresent and overpowering.[15] While it does happen differently, power centralization is present in all forms of democratic government. One of the phenomena is a growing trend of endowing the executive branch with the decree authority.[16]

Law making is widely considered as the domain of the legislature based on the separation of powers and democratic principles. In this regard, Parliament is entrusted with the mandate to express the people's will, and they should exercise exclusive authority over the legislative process.[17] Meanwhile, the Executive is endowed with the power appoints and directs cabinet, conducts international relations, declares war, and makes a regulation for the implementation of the law.[18] However, to prevent deadlock and impede the passage of necessary legislation, the practice of providing the Executive with some legislative power is accepted in many countries.[19] If the Executive leaves without the ability to influence lawmaking, this allegedly leads to stagnation, general discontent, and public disillusionment with the democratic system.

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[15] SAJO ANDRASUITZRENATA, *CONSTITUTION OF FREEDOM: an Introduction to Legal Constitutionalism* (OXFORD UNIV PRESS 2019) 158.

[16] Negretto G, "Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America" (2009) 39 British Journal of Political Science 117 5.

[17] Andras Sajo & Renata Uitz. (n15) 287.

[18] Bulmer E, "International IDEA Constitution-Building Primer" <https://www.idea.int/sites/default/files/publications/presidential-legislative-powers-primer.pdf> accessed February 10, 2020 6.

[19] This practice happened in both Presidential or parliamentary systems. The extreme example is the French Fifth Republic. Charles de Gaulle and Michel Debre, when designing the French Constitution of 1958, give executive decree authority to both President and the Prime Minister in Article 16 and Article 38. It was influenced by the history of the inability of the government to act decisively during the fourth republic. See John D. Huber, Executive Decree Authority in France. In Carey JM and Shugart MS, (n4) 233-253.

In the extreme situations, the President may take power in an extraconstitutional and undemocratic way.[20]

Carey and Shugart consider executive decree authority as a proactive power of the Executive to control legislation. Such power can vary across a wide variety of components, such as whether it applied immediately as policy, whether it requires prior or post-approval by the parliament, or whether the authority is delegated by an assembly or is claimed as constitutional power. It produces many titles and variances of decree authority, for instance, constitutional decree authority[21], para constitutional decree authority,[22] and delegated decree authority.[23] In terms of their immediacy, Carey and Shugart also divide the decree authority into two parts: an emergency decree and traditional constitutional decree authority.[24]

Apart from the various titles and models, this capstone thesis will focus only on a constitutional decree authority, which has three characteristics; first, the power to issue a decree is explicit in the constitution or based on a judicial power decision. Second, the regulation is issued under an urgent condition, which was impossible to go through a normal legislative process. And third, the regulation is effective immediately when it is published without going through discussion in the legislature.[25]

The decree power is more powerful than a normal agenda-setting power. When the agenda-setting power allows the Executive to influence and direct a legislature to consider a particular policy, the decree power equipped an executive to directly create and enact laws without prior

[20] Linz, J., 'The Perils of Presidentialism', In Bulmer E (n18) 6.
[21] Constitutional decree authority refers to an authority to initiate policy by decree apart from any delegation of authority by statute. Constitutional decree authority can be divided into two types, emergency powers and standard decree authority. Carey JM and Shugart MS (n4) 13.
[22] Para constitutional decree authority is a decree issued by the Executive but that are not clearly defined by the Constitution. Ibid 14.
[23] Delegated decree authority refers to an action by the assembly to pass legislation that gives the executive power to make new laws by decree, which allow them to change policy explicitly set by the existing statutes. Ibid 13.
[24] Ibid 14.
[25] Negretto G (n16) 535.

approval of the Parliament.[26] An (emergency) decree power is also considered an essential power for the executive to face a crisis based on a constitutional dictatorship viewpoint. There are two dangers if the executive does not have this power; either the regime could collapse, or there is an increased possibility for the executive to act illegally and breakdown the rule of law.[27] Both theories justify the adoption of executive decree authority as an integral component of government, especially in developing democracies.[28]

Nevertheless, the inherited nature of executive decree as dictatorial decision-making also poses dilemma, especially to the rule of law. Despite its benefits and uses as previously mentioned, numerous commentators have observed that this power has been abused by the Executive to their prerogatives, for instance, to bypass the legislative process to avoid deliberation altogether.[29] The Presidents in Latin American countries have become famous for stepping in through their regulatory powers (*decretismo*) and use an emergency as an excuse for systematic human rights abuses.[30] In responding to this dilemma, the international human rights law has adopted a middle position, highlighting that this type of power is unavoidable; however, it must be regulated and controlled to prevent abuse.[31] One way to exercise this control is by establishing a judicial review to the executive decree authority.

The role of the judiciary to control this type of power has become widely accepted. One of the justifications to support this argument was proposed by Robert Burt, who introduces the concept of judge as a special interest advocate. Burt stated that the alternative to understand the judicial role in this issue is not to consider judge as the final authority to balance the demand

[26] Arberry LL, "The Evolving Executive: Provisional Decrees and Their Impact on Brazil's Executive-Legislative Relationship" (*Digital Scholarship@UNLV*) <https://digitalscholarship.unlv.edu/honors_theses/9> accessed February 15, 2020 10.
[27] Uprimny R (n13) 2.
[28] Palanza, *Checking Presidential Power: Executive Decrees and the Legislative Process in New Democracies* (Cambridge University Press 2019) 5.
[29] Lance L. Arberry (n26) 11.
[30] See SAJO ANDRASUITZRENATA (n15) 288. See also Uprimny R (n13) 3.
[31] Uprimny R (n13) 3.

of expanding the executive power, preferably by seeing the judge as a special interest advocate to protect the rule of law.[32] As part of the third wave of democracy, which proceeded around the world, the expansion in the power of judges has been acceptable both in established and new ones.[33]

[32] Burt, Robert. Judicial Supremacy, Judicial Impotence and the rule of law in times of crisis. VI-39 in Uprimny R (n13) 3.
[33] Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 6.

2 The Development and Judicial Control on Executive Decree Authority in Indonesia

The executive decree authority in Indonesia is manifested in the power of the President to issue a Perppu. This type of regulation can only be used to respond to a compelling exigency situation and subject to the House of Representative approval in its next session. Historically, this power has been granted since Indonesia adopted a Constitution for the first time in 1945. Bagir Manan stated that Article 22 of the Indonesian Constitution is a copy of Article 93 of *Indische Staatsregelin*, the Dutch colonial rule. This Article gives the power the colonial government the power to make a law when an urgent legal need occurs.[34] This type of power was common in colonial regime since the threat was more unpredictable.

Besides its use to respond to an extraordinary situation, Indonesia also experienced the abuse of the President's misuse of the executive decree authority. The first part of the following section will explain the use and abuse of this power throughout the Indonesia's history. The second part will focus on the development of the Constitutional Court jurisprudence to restrict this power and its limitation.

2.1 The Use and Abuse of Executive Decree Authority in Indonesia

Since Indonesia's Independence in 1945, the Perppu has been issued by all serving Presidents. The first part of this chapter contains a general overview of the usage of Perppu by all the Presidents, while the second part will more focusing on the form of President's abuse in issuing a Perppu in Indonesian history.

[34] Indische Staatsregeling (IS) is a dutch colonial rule equal to a constitution. Yuliandri, *Asas-Asas Pembentukan Peraturan Perundang-Undangan Yang Baik: Gagasan Pembentukan Undang-Undang Berkelanjutan* (Rajawali Press 2011) 50-51.

2.1.1 The Use of Perppu in Indonesia

In total, there were 178 Perppu has been issued by all serving Presidents in Indonesian history.[35] However, in terms of numbers, the first President, Sukarno, issued most of these Perppu. Sukarno enacted the first Perppu in 1946, only ten months after the independence.[36] During his 22 years in office, Sukarno had issued 136 Peppu, equal to 76% of the total. Bivitri Susanti suggested there are three reasons that influenced Sukarno's regime reliance on the use of Perppu. First, it was influenced by the fact that Indonesia has just gained independence, where state institutions and legal orders were not fully established and functioning.[37] Second, political instability, which influenced by many factors, including a separatist movement in many regions. Also, the third, the swift from parliamentary democracy (1950-1959) to guided democracy in 1959-1966. Guided democracy is a Sukarno-centric era where power was dominated by sukarno's personality, ideas, and jargon.[38] During this period, Sukarno exercised the Presidential powers to the fullest, with little resistance by the parliament, appointed by him.[39] During this period, Perppu was widely issued to pursue the guided economy idea, with an increased emphasis on economic nationalism and state-led economy. During the first two years of guided democracy, in 1959 and 1960, Sukarno enacted 85 Perppu, mostly regulated economic affairs, such as taxation, finance, and trade.[40]

Table 1: The number of Perppu enacted by President[41]

[35] The data was based on the Indonesia Ministry of Law and Human Rights, curated by Kumparan.com. kumparanNEWS, "Sukarno, Presiden RI Yang Paling Banyak Mengeluarkan Perppu" (*kumparan*October 13, 2019) <https://kumparan.com/kumparannews/sukarno-presiden-ri-yang-paling-banyak-mengeluarkan-perppu-1s2qkyjRfmI/full> accessed March 3, 2020

[36] The Composition of Regional Defense Councils and Special Regions Peppu 1946

[37] KumparanNEWS (n36)

[38] Ricklefs MC and Hardjowidjono D, *Sejarah Indonesia Modern* (Gadjah Mada Universiti Press 1994) in Prasetyo T and Yoesoev MM, "The Role of Pandji Masjarakat During the Guided Democracy Period" [2018] Proceedings of the International Conference on Culture and Language in Southeast Asia (ICCLAS 2017) 227

[39] Redfern WA, *Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in 1960s*. (University of Michigan) 40.

[40] In 1959, Soekarno enacted 29 Perppu and, in 1960, passed 56 Perppu. Most of the Perppu was related to economic affairs, for instance, Perppu No. 2 of 1959 on Deduction of Currency Value.

[41] KumparanNEWS (n36)

President	Year in Power	Number
Soekarno	1945 – 1967 / 22 Years	136
Soeharto	1967-1998 / 32 Years	7
Habibie	1998-1999 / 2 Years	3
Abdurrahman Wahid	1999-2001 / 2 Years	3
Megawati	2001-2004 / 3 Years	4
Susilo Bambang Yudhoyono	2004-2014 / 10 Years	19
Joko Widodo	2014-now	5

While during the Suharto regime, the President's power to issue a Perppu was rarely used. During his 32 years in power, Suharto only enacted 7 Perppu. By militaristic approach and his influence over the People's Consultative Assembly, Soeharto could freely govern the country with Presidential Decree. In His Dissertation, Hamid Attamimi pointed out that during the first four of the country's five-year development plan (known as Pelita I-IV, from 1969 to 1989), Suharto enacted 1295 Presidential Decree (Keputusan Presiden). It means, on average, Suharto passed 56 Presidential Decree in one year. [42] In terms of substance, most of this Presidential Decree, 925 of 1295, was regulatory in nature and supposed to be regulated by a statute. It illustrates the great latitude of freedom that Suharto has in running the government and the ineffectiveness of the House of Representative in performing a legislative function.

During and after the transition to a more democratic constitutional framework, the President's power to issue a Perppu was maintained in the Constitution, and its use is continuously low. The successor of Suharto, President BJ Habibie, known as a champion in democracy and human rights, issued three Perppu in his two-years presidency. The same number of Perppu also issued by President Abdurrahman Wahid, which also served for two years. The first female

[42]A. Hamid S. Attamimi, Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggraan Pemerintahan Negara (Dissertation, Universitas Indonesia 1990) 280.

President, Megawati Sukarnoputri, enacted four Perppu in her four years term in office. An increase in the number of Perppu issued occured during President Susilo Bambang Yudhoyono (SBY) 10 Years in the office with 19 Perppu. Lastly, the current President Joko Widodo has enacted 4 Perppu in his first period in office, and recently, during his second term, he passed two Perppu to respond to the Covid-19 Pandemic.

Meanwhile, in terms of substance, most of the Perppu issued were related to economic affairs, including taxation, finance, trading, and banking. The pattern of using Perppu to regulate economic issues happened in all presidency, except in the Megawati Sukarnoputri regime. As mentioned earlier, during the guided democracy period, President Sukarno enacted dozens of Perppu on finance, tax, banking, and trading. The same practice also happened during the Suharto regime, for instance, by enacting Perppu No. 1 of 1969 on models of State Enterprise. Other Presidents, including BJ Habibie, Abdurrahman Wahid, SBY, and Joko Widodo, used Perppu to overcome an ostensible emergency in the form of global economic crisis. BJ Habibie and Abdurrahman Wahid enacted several Perpu to respond to the 1997 Asian financial crisis. [43] SBY passed 4 Perppu to meet the 2008 financial crisis.[44] Meanwhile, President Jokowi presently adopted one Perppu to respond to the economic effect of the Covid-19 Pandemic.[45]

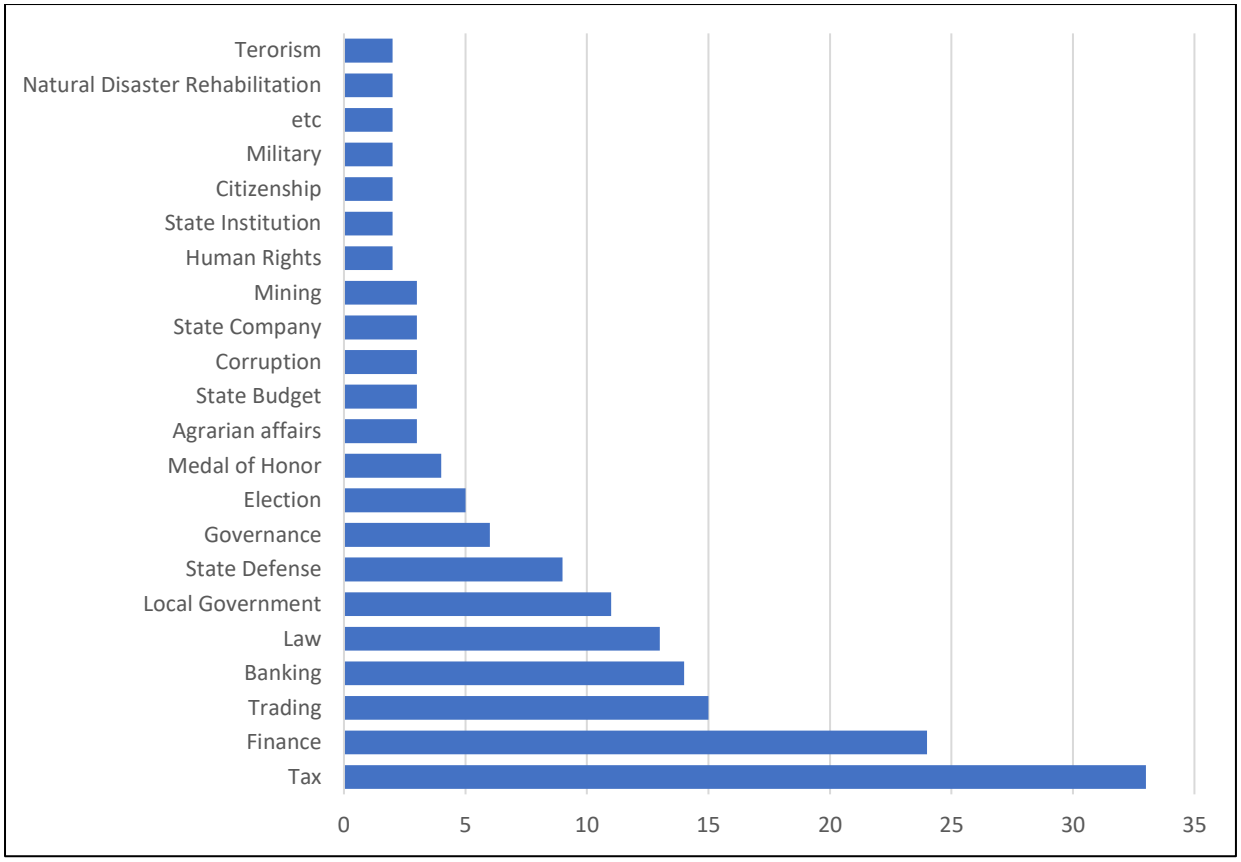
Table 2: a Perppu based on Topic[46]

[43] President B.J. Habibie enacted Perppu No. 1 of 1998 on the amendment of law on Bankruptcy. While all three Perppu that enacted by President Abdurrahman Wahid was related to economic affairs, such as government regulation in lieu of law on Free Trading Area and Free Port, on free trading area and free port in Sabang, and amendment of Employment Law.

[44] Perppu No. 2 of 2008 on Amendment of Law on Central Bank, Perppu No. 3 of 2008 on Amendment of Law on Indonesia Deposit Insurance Corporation, Perppu No. 4 of 2008 on Financial Safety Net, and Perppu No. 5 of 2008 on General Provision and Procedure of Taxation.

[45] The other Perppu is Perppu No. 2 Year 2020 on the Postponement of Local Election.

[46] The data was based on Indonesia Ministry of Law and Human Rights, curated by Kumparan.com. KumparanNEWS (n36)



Besides used to regulate economic issues and crises, Perppu was also used to other types of ostensible emergencies, for instance, to respond to terrorist attacks and natural disasters. In 2001, President Megawati Sukarnoputri enacted Perppu on Eradication of Terrorism, only six days after the bombing. Meanwhile, to respond to the tsunami which hit Aceh and Nias Province in December 2004, Presiden SBY issued Perppu No. 2 of 2005 on the Management of Legal Issues and Implementation of Rehabilitation and Reconstruction of the Regions and Communities of the Nanggroe Aceh Darussalam (NAD) Province and Nias.

The Perppu ability to be used immediately to respond a crisis was one of the justifications for maintaining this power in the Constitution during the 1999-2002 Constitutional amendment.[47] However, it must be noted, as mentioned earlier, despite its use to deal with a real crisis; there

[47] For instance, it stressed by Gregorius Seto Harianto, from FDKB Fraction and Hendy Tjaswandi from the National Military and Police fraction. Both stated that the President power to issue a Perppu must be regarded as an escape clause for the future need. respond the future need. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002* (Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, Republik Indonesia 2010) 946.

were also practice where Perppu were enacted in a highly subjective manner, contained authoritarian rule and violate its procedural requirement. This practice will further explain the following section.

2.1.2 The Abuse of Perppu in Indonesia

2.1.2.1 Fake Exigencies

As mentioned in the previous section, based on Article 22 of the Indonesian Constitution, the Perppu is an instrument that can be issued only under a compelling exigency situation. However, no further explanation of what constitutes a compelling exigency. This part will highlight some examples where Perppu was published, not in a compelling exigency situation.

The first example is when the President uses the situation of unpreparedness to implement a statute as a ground to enact a Perppu. It happened in 1984 when President Suharto passed Perppu No. 1 of 1984 on the suspension of coming into force of Statute No. 8 of 1983 on Value Added Tax.[48] Based on Article 21 of the Statute, it will come into force on 1 July 1984. However, approaching the deadline, the President found that the taxation apparatus and the equipment required by the Law was not ready.[49] The same situation also happened when the President delayed the coming into force of Law No. 14 of 1992 on Traffic Law.[50] In this case, the urgency was not interpreted as a danger, threat, or various other emergencies that directly affect the people.

Another example of fake exigency can be traced to the issuance of Perppu No. 1 of 2004 on the amendment of Forestry Law. The Perppu was issued to allow thirteen companies to extend

[48] Based on Article 21 of law No. 8 of 1983 on Value Added Tax, the law will come into force on 1 July 1984. Approaching to the deadline, the government was not yet ready to implement the law. The same occur with the Law No. 14 of 1992 on Traffic Law, which should have come into force on September 17th 1994. Manan B (n7) 152.

[49] Ida Zuraida, *Batasan Kegentingan yang Memaksa Dalam pembentukan Peraturan Pemerintah Pengganti Undang-Undang (PEPPU) di Bidang Perpajakan*, (Simposium Nasional Keuangan negara 2018) 306. <https:/osf.oi/pmv59/download> accessed March 5 2020.

[50] Manan B (n7)

their permits and continue their mining operation in the protected forest area.[51] In the consideration section of the Perppu, the President stated that the Perppu was issued to create legal certainty in the mining industry and encourage the investor interest and trust in Indonesia. The fear of the absence of new investment for a long period regarded as a threat to the nation.

2.1.2.2 Overturning a Newly Passed Statute

As mentioned previously, according to the Constitution, the lawmaking power is shared equally between the President and the House of Representatives. Both the President and the House of Representatives can propose, discuss, and together approve a bill to become a statute. However, in several instances, the President used the power to issue a Perppu to cancel the newly passed statute. For example, this practice happened during SBY presidency, which passed two statutes that would the direct local election.[52] However, due to widespread rejection by the public, the President then issued Perppu No. 1 of 2014 on Local Election and Perppu No. 2 of 2014 on Local Government to bring back direct local election. Even though on the one hand, both Perppu regulated a good substance for Indonesian democracy, on the other hand, the practice is dangerous to the deliberation process in Parliament. The power to issue a Perppu may potentially used to overturn a statute which recently agreed by the President and the House of Representatives.

2.1.2.3 Limiting Constitutional Rights

Another form of abuse of Perppu is when it used to suppress constitutional rights. The first example was when the President issued 2 Perppu to respond to a shocking terrorist attack in

[51] Nadirsyah Hosen, 'Emergency Powers and the Rule of Law in Indonesia', *Emergency. Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010) 273.

[52] Parlina I, "SBY Bids Save Direct Electoin" *The Jakarta Post* (October 1, 2014) <https://www.thejakartapost.com/news/2014/10/01/sby-bids-save-direct-elections.html> accessed March 10, 2020

Bali in 2002.[53] The President issued Perppu No. 1 of 2002 on the Eradication of Terrorism and Perppu No. 2 of 2002 which made Perppu No. 1 of 2002 retroactively appliable to the Bali Bombing. The enactment of this Perppu was then considered contrary to the basic principle of criminal law, a non-retroactive principle, which also regulated in the chapter on human rights, Article 28I, of the Indonesian Constitution.

Another example was when President Joko Widodo enacted Perppu No. 2 of 2017 on Mass Organization.[54] With the pretext of fighting a radical and intolerant right-wing Muslim organization, this regulation authorized the Ministry of Law and Human Rights to dissolve mass organizations without any judicial oversight. The issuance of this regulation received widespread criticism. Marcus Meitzner argued by enacting this Perppu, Joko Widodo had violated one of the ground rules used on the militant democracy approach, that the banning should be based on a judicial decision.[55]

2.1.2.4 Breach of Time Limitation

The last form of abuse on the use of Perppu was when it violated the procedural requirement, especially with the time limit and method of approval by the House of Representatives. As mentioned earlier, Article 22 Par (2) and (3) of the Constitution stated that a Perppu must obtain the House of Representative's approval during its next session. If there be no such approval, it shall be revoked. However, the wording of each article was considered vague and open the room of abuse.

The first problem arises on the definition of term "the next session," as a time limit for the House of Representatives to approve a Perppu to become a statute. In practice, this term was

[53] Topo Santoso. 'Anti-Terrorism Legal Framework in Indonesia: Its Development And Challenges' (2013) 25 Mimbar Hukum 88. <https://media.neliti.com/media/publications/40594-anti-terrorism-legal-framework-in-indone-607b1886.pdf> accessed 10 March 2020

[54] Almanar A (n9)

[55] Mietzner M, "Fighting Illiberalism with Illiberalism: Islamist Populism and Democratic Deconsolidation in Indonesia" (2018) 91 Pacific Affairs 261 277.

interpreted loosely by also allowing the House of Representatives to approve not in the first next session after the Perppu was enacted. It happened on the House of Representative approval to Perppu No. 4 of 2009 on the Amendment of Law on Corruption Eradication Commission. The Perppu was enacted on 22 September 2009, while the first next session of the House of Representatives was on 1 October to 2 December 2009. However, this Perppu was not discussed during this first next session, but on 2 March 2010, the second session after its enactment.[56] This practice is abusive that it opens the possibility for the House of Representative, either intentionally or unintentionally, to delay or even make a Perppu valid for an unlimited time.

Another type of procedural abuse was related to the form of regulation that should be used to revoke a Perppu. Due to the unclearness of the Constitution, the practice can be divided into two models.[57] The first, the most common method, the House of Representatives will issue a statute containing a declaration of approval or disapproval to the Perppu enacted by the President. The second, the President passed a new Perppu to revoke the previous Perppu. This practice happened, for instance, when President BJ Habibie enacted Perppu No. 3 of 1998 to withdraw Perppu No. 2 of 1998 on the Freedom of Expression.

Bagir Manan stated that the practice of issuing a revocation Perppu is wrong and not applicable.[58] The reasoning is, in principle, a Perppu can only be issued to respond to a compelling exigency situation. No exigency arises when a revocation perppu issued by the President. Another reason is, the Constitution stated that each Perppu must be submitted to the House of Representatives for approval. Therefore, by following this logic, a revocation Perppu

[56] Hukumonline, "DPR Tolak Perppu Pelaksana Tugas KPK" *Hukum Online* (March 2, 2010) <https://www.hukumonline.com/berita/baca/lt4b8d2c6c6f7a3/dpr-tolak-perppu-pelaksana-tugas-kpk/> accessed March 10, 2020.
[57] This was happened due to the unclearness of Article 22 Paragraph (3) of the Constitution, which stated that "if there be no such approval, it (Perppu) shall be revoked". The Constitution did not specify on how and what type of regulation should be used to revoke a Perppu.
[58] Manan B and Harijanti SD (n6).

will also subject to the House of Representatives approval. Therefore, this practice is considered as not practical.

2.2 The ICC Involvement and Its Limitations

The Constitution did not explicitly grant the ICC power to review the constitutionality of a Perppu.[59] This power was gained and developed, from time to time, by the ICC interpretation. In its first attempt to review a Perppu, in case No. 3/PUU-III/2005[60], the Court seems to already presumed that it had the jurisdiction to review a Perppu.[61] However, the reasoning behind this jurisdiction expansion was not clearly explained in the Court decision. This decision to a debate by Indonesian Scholar on the constitutionality of the ICC power to review a Perppu. Some scholars argued that Constitution had assigned the power to review a Perppu to the House of Representative. Meanwhile, others who support this idea based their opinion on substantial similarity and status between a Perppu and a Statute.

The awaited reasoning was then given in the ICC's next decision in Case No. 138/PUU-VII/2009. This case was related to the review of Perppu No. 4 of 2009 on the Amendment of Corruption Eradication Commission Law This Perppu authorized the President to select a temporary commissioner in case the total number of the commissioner less than three-person.[62] In its reasoning, the ICC highlighted that a Perppu could contain a new legal norm, which creates a new legal status, relationship, and consequences. This new legal norm comes into force since the issuance of the Perppu until it ratified or revoked by the House of

[59] The Indonesian Constitution regulated that the ICC shall have the final power of decision in reviewing laws against the Constitution. Indonesia Constitution, Article 24, Par (3)

[60] The case was related to the review of Law No. 19 Year 2004 which ratified Perppu No. 1 Year 2004 on the Amendment of Forestry Law. The Perppu was enacted by President Megawati Soekarnoputri to allowed thirteen mining companies to continue their operation in a protected forest area. Ziegenhain P, *The Indonesian Parliament and Democratization* (Institute of Southeast Asian Studies 2008) 154.

[61] Butt S, *The Constitutional Court and Democracy in Indonesia* (Brill 2015) 141.

[62] This was issued after a great scandal of criminalization of Chandra Hamzah and Bibit Samad Rianto, two of the five commissioners of the Corruption Eradication Commission. The applicant in this case, a group of advocates-activist, stated that the issuance of the Perppu not under a compelling exigencies situation and interfere the independence of the Corruption Eradication Commission.

Representatives. Therefore, during this time, the new legal norm which contained in a Perppu has the same force and operates is if it were a statute. Thus, the Court has the authority to review a Perppu.[63] This decision was then cited in the Court's subsequent decision to justify its power.

However, even though the ICC has declared its juridiction to review a Perppu, the Court jurisprudence has been minimalist on this issue. The following part will explore the ICC development of interpretation and its limitation to the aim of limiting executive decree authority.

2.2.1 Evaluating Compelling Exigencies

As mentioned in the previous section, the President has also issued a Perppu, which not made under a real urgent situation. However, in its early judgment, the Court was seen as avoiding imposing limits on this power. It can be seen in the ICC decision in Case No. 3/PUU-III/2005. The case was related to the review of Statute No. 19 of 2004, which ratified Perppu No. 1 of 2004 on the Amendment of Forestry Law. With the pretext of providing legal certainty to foreign investment, the President allowed thirteen mining companies to continue their operation in a protected forest area. The Applicant argued that the Perppu was not issued under a compelling exigency situation as regulated in Article 22 of the Constitution. The Applicant stated that the term "compelling exigencies," must be defined according to Article 12 on President's power to declare a state of emergency and its Organic Statute. In Statute No. 23 of 1959 on the State of Danger, an emergency is limited in several forms, including rebellion, riots, natural disasters, or wars.[64]

[63] 138/PUU-VII/2009 [2009] 15 Indonesia Constitutional Court (Indonesia Constitutional Court). See also Butt S (n62).
[64] State of Danger Act 1959, (1).

In its reasoning, The Court ruled that the President is free to determine whether a compelling exigency situation exists. Meanwhile, the check to this power will be performed by the House of Representatives, to give an objective consideration on the existence of the exigency.[65] To support this view, the ICC upheld a longstanding practice, considered as constitutional convention[66], where a Perppu was defined as the existence of an urgent legal needs, which must be regulated by a regulation with the force of a statute.[67] In short, the only limit to the President discretion is the Parliament approval.

In its subsequent decision, in Case No. 138/PUU-VII/2009, the ICC moved from its earlier decision and tried to narrow down the definition of "compelling exigencies." The Court held that even though the President has the right to issue a Perppu, this power is not absolute. The Court believed that it was reasonable to limit this power because, unlike in the making of a statute, the President acts unilaterally in issuing a perppu. The ICC then introduced three objective components to be fulfilled in the issuance of a Perppu:

1. There is an urgent need to resolve a legal problem by issuing a statute immediately.
2. The statute needed does not exist, leaving a legal vacuum, or if the statute exists, it is insufficient.
3. The legal vacuum cannot be filled by enacting a statute following normal procedures because it will take a long time, whereas the pressing situation must be resolved with certainty.

However, it was still not clear in this decision on who has the authority to assess these three objectives components. Whether it was made to guide the Parliament before converting a Perppu into a Statute or will be used by the Constitutional Court in its subsequent decision.

The last interpretation of the term "compelling exigency" introduced in Case No. 1-2/PUU-XII/2014. This case was related to the review of a statute that ratified Perppu No. 1 of 2013 on

[65] Butt S (n62) 141.
[66] The ICC then mentioned a list of Perppu, for instance, Perppu No. 1 Year 1984 on The Delay Of Coming Into Force Of Statute On Value Added Tax, Perppu No. 1 Year 1999 on Human Rights Court, and Perppu No. 1 Year 2002 on Eradication of Terrorism, as an example that the issuance of Perppu does not require declaration of state of emergency.
[67] 3/PUU-III/2005 [2015] 15 Indonesia Constitutional Court (Indonesia Constitutional Court).

the Amendment of Constitutional Court Law.[68] This case was the first time for the ICC to invalidate a whole Perppu. However, instead of using these three-objective components, relied on other factors to justify its decision. First, the Preamble of the Perppu did not specify the exigency that the Perppu addressed. The second, the Court concluded that the Perppu had not in fact been pressing because it was not promptly and immediately implemented to resolve a legal problem.[69]

From all decisions above, it was clear that since the beginning, the ICC has failed to put constraint or give a higher standard for the President before issuing a Perppu. The three objective components introduced in the second decision is also too vague. For example, the Court didn't specify the meaning of a legal vacuum. In general legal sense, legal vacuum means a situation where no regulation exists to regulate an issue. However, subsequent to the CCC decision, the President still issued a Perppu which was made to replace or amend an already existing statute. Towards this practice, the ICC and the House of representative have never invalidated it.

Meanwhile, on the ICC last decision in Case No. 1-2/PUU-XII/2014, many critics consider it to be a form of inconsistency and conflict of interest. Simon Butt stated that a review of a compelling exigencies situation must be carried out based on the conditions the President faced when the Perppu was issued, not on its application. It also cannot be denied that the ICC was benefited from this decision for avoiding them from external oversight.[70]

[68] The Perppu was issued to respond to the arrest of the then-Chief Justice of Constitutional Court, Akil Mochtar, for accepting a bribe in a local election dispute case. In substance, it required all Constitutional Court nominees to engage in a fit and proper test conduct by an expert panel before being assigned to the Court, banned politician from becoming Constitutional Court judge and it formed an ethics committee, called Constitutional Court Judge Honor Council, to investigate possible infringements of the Code of Judicial Ethics.
[69] After enacted for almost three months, the substance of the Peppu, for instance, in establishing the Expert Panel and Constitutional Court Judge Honor Council, had not yet been implemented. Butt S (n62) 144.
[70] Ibid 144.

2.2.2 Perppu Is Unreviewable Once Converted into A Statute

Another settled practice was the ICC will stop the review of a Perppu once it already converted into a Statute by the House of Representatives. The example of this practice is on the review of Perppu No. 2 Year 2017 on the Amendment of Mass Organization Law. This Perppu was enacted by President Joko Widodo to respond the rise of right-wing Islamic organization, which perceived to have political agenda contrary to the state ideology and the Constitution. The main feature of the enactment of principle of *contrarius actus*, which authorize the Ministry of Law and Human Rights to dissolve mass organization without prior examination in the Court. This remove the opportunities of mass organization to defend themselves before being dissolve by the government.[71]

The first case arises from this Perppu was brought by Ismail Yusanto, in Case No. 39/PUU-XV/2017. The applicant was the founder of Hisbut Tahrir Indonesia, a mass organization which banned by the government. The applicant argued that the Perppu didn't fulfil the first and the second objective component, introduced in the ICC earlier decision in the case No. 138/PUU-VII/2009. The applicant argued that before the President issued the Perppu, there exist a Statute No. 17 year 2013 on Mass Organization which already regulated a more right based approach to ban a Mass Organization. However, the same with the previous decision in Case No. 91/PUU-XI/2013, the ICC rejected this case because the Perppu has been ratified by the House of Representative in the middle of the review process. After the Perppu converted into a Statute, this case was resubmitted by another applicants in case No.94/PUU-XV/2017 and 2/PUU-XVI/2018. In this decision, the question whether the Perppu was issued not under a compelling exigencies situation was no longer discussed. This practice is problematic at least in two senses.

[71] Ayuni Q, "Pros and Cons of the Government Regulation in Lieu of Law No. 2 Year 2017 Concerning Mass Organizations" [2020] Advancing Rule of Law in a Global Context 276.

First, it stops the possibility of the Court to review the urgency nature of the Perppu. Second, it limited the Applicant rights to be heard in a constitutional review process.

3 Judicial Control on Executive Decree Authority in Colombia and Italy

3.1 Limiting Executive Decree Authority by the Colombian Constitutional Court (CCC)

Colombia has long experienced a remarkably powerful executive. By combining the power to declare a state of emergency and issue an executive decree, the President could easily bypass the Parliament and become the primary legislator. This situation raised concern on the quality of deliberative democracy, the abuse of constitutional rights, and the basic legitimacy and effectiveness of the country.[72]

The rise of this practice is linked to the "state of siege" power, which regulated in the 1886 Constitution. This constitution granted the Colombian President, signed by all his/her ministers, the ability to declare a state of siege in case of grave perturbations of internal public order or external war.[73] After announcing the state of siege, the President obtained the power to issue a decree with the force of statute (*decretos legislativos*).[74] No time limit existed for the exercise of this power.[75] However, even though it granted only to face crises, the President has used this power as an ordinary instrument of government.[76] This led to a regularize use of emergency power throughout Colombian history.

[72] Cepeda EMJ and David L, "Part Three The Separation of Powers, 9 The President: Problems of Executive Overreach" [2017] Colombian Constitutional Law 273.
[73] Ibid 287.
[74] Uprimny R (n13) 7.
[75] Cepeda EMJ and David L (n73) 287.
[76] Rodrigo Uprimny observed this power as an ordinary instrument that happened at least three ways; first, the country has been operating under the emergency regime much of the time. Between 1949 to 1991, Colombia had been under state of siege for more than 30 years. Second, major legal reforms implemented by issuing state of siege decrees, which were then ratified by the Parliament. The last, the almost permanent emergency, posed profound restrictions in constitutional freedom. Uprimny R (n13) 7.

During this early period, the Supreme Court, which was the institution that conducted the substantive judicial review under the 1886 Constitution, subjected the declaration of state of siege and the decree enacted by it to judicial review. However, the review has been rather lenient.[77] In the review of the state of siege's declaration, the Court ruled that it lacked the authority to review because the issue was a political question, entirely within the competence of the President. Therefore, in reviewing the declaration, the Court only conducted a formal control of this power, for instance, verifying whether the President and the member of the Cabinet has signed the decree.[78] The same happened when the Court reviewed the decree enacted under the state of siege. Most of the decrees were upheld by the Court, even when it had no correlation with the emergency and severely limited a fundamental right.[79]

When Colombia adopted a new Constitution in 1991, the President's emergency powers were tried to be limited. The Constituent Assembly decided to abolish the state of siege power and replace it with a state of exception (*estados de excepcion*), which consists of three types of emergencies. First, the state of foreign war to repel aggression and defend the sovereignty of the nation. [80] This power is regulated in Article 212 of the Constitution. During this time, the Government can issue a decree with the force of statute, which will no longer be in effect as soon as normal conditions are declared. To check this power, the Parliament at any time may amend or repeal the decrees through a favorable vote of two-thirds of the members of each chamber.[81]

[77] Uprimny R (n13) 10.
[78] In practice, this led to the misused of emergency powers, for instance to respond a minor crisis, and also the practice of excessive extension of emergency beyond the real situation. For example, in May 1965, a declaration of state of siege which issued in response to the student protest in Medellin lasted for three and a half years. Ibid 10.
[79] Ibid 10.
[80] Colombian Constitution, Article 212, Par 4.
[81] This type of emergency has never been used until today. Cepeda EMJ and David L (n73) 287.

Second, the state of internal commotion, to respond to a severe disruption of public order or the peaceful coexistence. This power is laid down in Article 213 of the Constitution. The state of internal commotion can be declared for maximum 90 days, extendable for two similar periods.[82] During this emergency, the President can also issue a decree with the force of statute. However, it will no longer be in effect as soon as the situation restored and may only extend up to ninety more days.[83] A decree enacted both in the state of exterior war and internal commotion can be categorized as an emergency decree, due to its limited ground and validity period.

To prevent the potential abuse, Article 214 of the Constitution regulated some restrictions to the use of state both emergencies. For example, the emergency decrees must be signed by the President and all his/her ministers, it may only refer to matters directly connected with the emergency being faced, and the duty not to fundamental freedoms and the rule of international humanitarian law.

The last type of emergency is a state of economic, social, and ecological emergency to respond to a grave calamity of an economic, social, and environmental nature.[84] This emergency may only be declared for thirty days in each case and may not exceed ninety days in a calendar year. During this period, the President, with the signature of all the ministers, may issue a decree with the force of law which exclusively respond to the crisis.[85] In contrast to the decrees imposed during the period of state of foreign war and state of internal commotion, decrees issued during a state of economic, social, and ecological emergency are permanent in nature—they become permanent laws of the Republic and do not expire when the declaration of state

[82] The second extension requires prior and favorable two-thirds of the Senate. Colombian Constitution, Article 213, Par 1.
[83] Colombian Constitution, Article 213, Par 1.
[84] Colombian Constitution, Article 215.
[85] Colombian Constitution, Article 215.

of emergency ends.[86] Reflecting from the Carey and Shugart distinction, the decree enacted under this emergency can be categorized as a constitutional decree authority.

Besides providing restrictions on the declaration, time limits, and measures available during emergencies, the 1991 Constitution also explicitly gives the Constitutional Court the power to automatically reviews a decree enacted during these three types of emergencies.[87] However, considering the comparability with the two other countries, the section will only focus on the CCC effort to limit the use of social, economic, and ecological emergency decree in Colombia.

The first form of limitation is related to the review of the declaration of emergency. Contrary to the Supreme Court decision under the 1996 Constitution, the newly established Court was quick to establish that it had the jurisdiction to review the declaration of emergency. The initial decision on this merit was in Case No. C-004/1992. The case was related to the declaration of a state of social emergency in order to increase police salaries.[88] Even though, the Court upheld the declaration, it tried to introduce restrictions on the President discretion to declare emergency and the measure allowed to be taken during the period.[89]

The Court stated that the President had to show the evidence on which he relied, and (ii) that he had too little ability to determine whether such evidence presented a situation that was significant enough to warrant the use of emergency powers. The Court also claimed that, (iii) based on the subsidiarity principle, the President needed to show that ordinary instruments of government were inadequate to deal with the crisis. The Court concluded that if (i) either the

[86] The one exception to this permanence is new taxes, which may only be declared provisionally and expire at the end of the next fiscal year unless adopted by Congress. Cepeda EMJ and David L (n73) 301.
[87] Based on Article 214 Par 6 and Article 215, the government shall immediately send the decree to the Constitutional Court. Nolte D and Schilling-Vacaflor A, *New Constitutionalism in Latin America: Promises and Practices* (Ashgate 2013) 322.
[88] The declaration was made under Decree No. 333 Year 1992 as a response to a widespread civil unrest and a threat of strike by some police officers due to low wages. Ulloa FC and Morales V, *Strengths of Colombia* (Editorial Planeta Colombiana SA 2006) 203.
[89] Rios-Figueroa J, *Constitutional Courts as Mediator: Armed Conflict, Civil-Military Relation and the Rule of Law in Latin America* (Cambridge University Press 2016) 73.

facts were not proven, (ii) or the presidential assessment about the severity of the crisis was wrong, (iii) or the government had legal instruments to deal with the crisis, then the declaration of the state of emergency would be invalid.[90]

The second form of limitation is to carry out a substantial review of the decree issued during the emergency. As a general rule, if the Court rejects the declaration of state of exception, then, generally speaking, all emergency decrees issued during that a state of exception are also void. However, even though the proclamation of emergency has been confirmed, the Court will continue to examine each decree to determine whether it is proportional to the emergency and whether it conflicts with rights found in the Constitution, international human rights treaties, or international humanitarian law.[91]

The third form of limitation is related to the CCC case law, which has long held that the government might not use emergency power to respond to problems that are "chronic" or "structural" in nature.[92] The recent example of this doctrine is in Case No. C-252 of 2010, on the review of the declaration of social, economic, and ecological emergency by President Alvaro Uribe administration to reform the national healthcare system.[93] In its decision, the Court revoked the entire emergency as the circumstances that inspired it was persistent and systemic rather than a genuinely new and unforeseen. The Court held that it should be dealt with by Congress rather than using extraordinary lawmaking.

Meanwhile, the last Constitutional Court effort to limit the use of this power is by limiting the undue extension of the emergency. This was happened, for instance during President Juan Manuel Santos administration. To respond the problems affected by the La Nina weather

[90] Uprimny R (n13) 12.
[91] Cepeda EMJ and David L (n73) 297.
[92] Ibid 301.
[93] For a lucid analysis of why the human rights approach to health not only challenges power relations but also constitutes a paradigm change, see Alicia Ely Yamin, Power, Suffering, and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter (2016). See Ibid 177.

phenomenon, the President issued Decree No. 4580 Year 2010 on the declaration of state of social, economic, and ecological emergency due to serious natural disaster. The declaration was issued to mainly free up funds for relief and reconstruction in affected areas, and also created new taxes to fund the emergency. However, when the President tried to declare a new emergency[94] to deal with the same crisis, the Court unanimously struck down the effort in Decision C-216 Year 2011. The Court reasoned that the government had not used substantive and clear grounds to prove that the facts listed at the time could not be addressed by the use of the emergency powers previously imposed. The Court reiterated that, considering the distinct nature of the 1991 Constitution, every declaration of state of emergency must be stringent and independently justified.[95]

All of the abovementioned limits introduced by the CCC is a form of progressive orientation of the Court to reduce the uncertainty nature of emergency power and the use of executive decree authority.[96] Rodrigo Uprimny highlighted that the success of the CCC was influenced by several factors. First, through its longstanding history of judicial control over constitutionality, the review of executive decree was no longer considered strange. Before the Constitutional Court established in the 1991 Constitution, this type of power has long been performed by the Supreme Court. Second, the procedural design which influenced the court to perform active intervention. For example, the introduction of an automatic review of decree issued during emergency and the tutela, which open the possibility to any person to directly request the court to protect his or her fundamental rights. Third, the procedural design which confers enormous legal power on the court to annul, for constitutional reason, other judges'

[94] The declaration was enacted through Decree No. 020 of 2011. "Corte Constitucional De Colombia" (*contador de visitas gratis*) <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9211> accessed April 5, 2020.
[95] Ibid.
[96] Rios-Figueroa J (n 90) 73.

decision. In comparative sociology, the Court tends to be more judicial activism in countries where most of the authority is concentrated in a single supreme court.

Besides, the political factor must also take into account. First, Colombia has experienced a disenchantment with politics, where the political representation was not performing well to debate and resolve public issues. In this context, the Court was not considered as take on other power, but to fill the legal vacuum, at least there is one power exist to acts progressively. Second, Colombia has also weak social movement. On the ground, it was not only weak, but include the use of violence, where many leader and activists has been murdered.

The impact of this progressiveness appears to be considerable in reducing constitutional abnormality in Colombia. The time Colombian live under an emergency regime fell from 80 % in 1980 to less than 20% in the 1990.[97]

3.2 Limiting Executive Decree Authority by the Italian Constitutional Court (ItCC)

The Italian Constitution granted the executive with two exceptional powers. First, the power to issue a statute under delegation by the parliament, known as legislative decree (*decreti legislativi*). This power can be exercised only after a delegation of law (legge delega) has been formally passed by the Parliament.[98] Second, the power to issue a decree-laws (*decreti legge*).[99] This type of decree can only be issued in a case of necessity and urgency. Historically, this power became a form of compromised between the idea of preventing a return of fascist dictatorship and completely disarming government by not giving them access to any form of emergency power.[100] The decree-laws shall enter into force immediately but will expire within

[97] Uprimny R (n13) 21.
[98] Italian Constitution, Article 76.
[99] Parliament may regulate the legal relations arisen from the rejected measure. Italian Constitution, Article 76.
[100] Sala VD and Kreppel A, 'Dancing Without a Lead: Legislative Decrees in Italy', in Carey JM and Shugart MS (n4).

60 days unless they have been converted into law by the Parliament or otherwise nullified from the very start.[101]

Reflecting on the distinction of form of executive decree authority created by Carey and Shugart, a legislative decree can be categorized as delegated decree authority. Unlike other types of decree, a delegated decree authority is bound and controlled by the Parliament. Thus, the discretion of the executive is more limited in this type of executive decree authority. Meanwhile, the decree-law may be categorized as a constitutional decree authority, which may be issued only in a situation of urgency and necessity, and which shall enter into force immediately after its publication. Considering the comparability with two other countries, this section will only focus on the limits imposed by the Italian Constitutional Court on the use of the decree-laws.

In practice, the decree-law has been one of the most constitutionally problematic sources of law in the Italian history. While Article 77 of the Constitution specifies that this power should only be granted to respond a genuinely exceptional circumstances, the government has used this power far from the expected purpose.[102] One of the reasons was, due to the extremely slow and complicated parliamentary procedures. Since the 1980s, this authority has grown abnormally and violate the provision of the Constitution. The conversion of the decree-laws has become a common lawmaking practice, while the constitutionally prescribed legislative process has been reduced to a residual parliamentary power.[103] This practice has altered the respective roles and positions of Parliament and the Executive Branch in the Italian constitutional system.

[101] Barsotti V and others (n14).
[102] Besides, the wording of Article 77 also left many questions unanswered, for instance, could the government rule indefinitely by decree, issuing the same (or almost the same) decree every sixty days even if the Parliament rejected or simply let it expire without voting on it. Sala VD and Kreppel A (n101) 177.
[103] Ibid 176.

The first form of limit imposed by the Italian Constitutional Court was related to the practice of renewal of decree-laws by the Government. This doctrine was first decided in the ItCC Decision No. 360/1996 in response to the decree-law drama of the 1990s. During this time, more than one decree per day (the monthly average in 1995 was approximately 34 decree-laws) was promulgated by the Executive. This situation triggered a vicious cycle;on the one hand, the more decree-laws the executive introduced, the less time Parliament had to examine and approve them, and the more difficult it became for Parliament to take any decision within the maximum period of 60 days. In order to avoid the automatic nullification of the decree-laws, the government would renew to avoid their expiration date, re-adopt another identical decree-laws to gain an additional 60 days validity.[104] In an extreme case, some decree-laws were renewed more than ten times.[105] On the other hand, the Parliament which governed by the same parliamentary majority as the government, consented to this practice.[106]

By fall of 1996, a large number of lower courts challenged this practice by an incidental method of access to the Constitutional Court. In its consideration, the ItCC held that the practice of reiteration of decree-laws affects the institutional equilibriums and infringes the certainty of law. Hence, this practice was considered to be unconstitutional. Pursuant to the decision of the ItCC, the Government ended the practice of renewing the decree-laws, but it did not avoid from issuing a new one. This decision only resulted in forcing Parliament to convert the decree-law on time.[107]

The second limitation concerned the review of the urgency of the decree. This was related to the popular practice in which the decree-laws were issued not under a factual necessity and urgency situation as required by the Constitution. In fact, this practice was not new, since

[104] Barsotti V and others (n14) 166.
[105] Sala VD and Kreppel A (n101) 189.
[106] Barsotti V and others (n14) 166.
[107] Ibid 167.

1980s, the lower court had asked the Constitutional Court to review the constitutionality of such decrees. However, in its early decisions the Constitutional Court considered the assessment of necessity and urgency to be a political question, best left to the Parliament.[108]

A new approach to this question came with Decision No. 29/1995. Two key principles were introduced by this decision. First, the absence of necessity and urgency situation must be evident in order for the ItCC to invalidate a decree-laws. Second, it reversed the previously held opinion that the procedural unconstitutionality cannot be cured by the ratification of a decree-laws by the Parliament. However, this doctrine was never applied to invalidate a conversion of decree-laws until 2007, in decision No. 171/2007.[109] The case was related to the review of a decree-law, which repeals the requirement in the Local Government Statute, which regulated a Mayor should be removed if he or she convicted with a criminal offense of improper use of state assets. The decree was issued right before the Court of Cassation decision on the case of the Mayor of Messina who was removed from office by the same offense. In its decision, the ItCC introduced a doctrinal decision that not only discusses the decree-law being reviewed, but also connects it with the Italian form of government. The Court concerned with the nature of a decree-laws, which immediately effective after its issuance, would make it capable of creating an irreversible change to society and to legal order.[110]

[108] Ibid 167.
[109] Ibid 167.
[110] Ibid 170.

4 The Future of Judicial Control on Executive Decree Authority in Indonesia

As explained in the previous chapters, Indonesia, Colombia, and Italy experienced the abuse of executive decree authority. In Italy, the Executive depended on the executive decree authority as a tool to govern the country. This power has become a routine practice in the lawmaking process. It was influenced by a fragmented and incoherent governing coalition and a prolonged and complicated parliamentary process.[111] The same problem has also occurred in Colombia but with different reasons. The political and public order instability influenced the use of this power.[112] Between 1970 and 1991, Colombia has lived under a state of exception for 82 percent of the time.[113]

Meanwhile, for Indonesia, the abuse of executive decree has also occurred. Even though the number of executive decrees enacted is way smaller than Italy and Colombia, the tendency to misuse this power can easily be spotted.[114] Throughout history, the President mostly used executive decree authority to regulate financial affairs, including tax, trading, and banking. This practice shows the likelihood of the President to bypass the Parliament on the deliberation of economic issues. Besides, this power has also used to limit Constitutional rights.

Based on the experience of the three countries, the abuse of executive decree power can be categorized into three issues, First, the executive issued this power to respond to a fake or a minor crisis. Second, the substance of executive decree is not proportional to the crisis and violates constitutional rights. And lastly, the undue extension of executive decree authority. Compared with the Colombian and Italian Constitutional Court, the Indonesian one is the

[111] Sala VD and Kreppel A (n101) 176.
[112] Cepeda EMJ and David L (n73) 4.
[113] See Uprimny R (n13).
[114] In contrast to Italy and Colombia, the executive branch in Indonesia does not need to rely on executive decree authority. The President has the power to involve in every stage, including to propose, discuss, and approve a bill together with the House of Representatives.

weakest in dealing with such abuse. The ICC needs to learn from the limitation imposed by the two other Courts, especially the CCC, which can easily be considered as the most progressive among the three.

In responding to the first abuse, the CCC and ItCC have longstanding jurisprudence that the necessity and urgency are requisite to the constitutionality of executive decree authority. Therefore, the Court will not only review the constitutionality of decree's substance but also assess whether it was issued under a real extraordinary situation. Meanwhile, The ICC jurisprudence in this issue has been unclear and inconsistent. Even though they already introduced the three objective components to define the term "compelling exigency," the Court did not firm to determine who would evaluate the existence of the three components. Even if the ICC considers it as their authority, the three objective components have never been used to review an executive decree.

In the second form of abuse, the CCC has introduced at least three limitations. First, an executive decree authority must directly connect with the emergency being faced. Second, there is a duty to not to limit fundamental rights and respect to the rule of international humanitarian law. Lastly, an executive decree authority might not be used to respond to a chronic or structural in nature. The Court held that this type of issue is better to be discussed with the Parliament. Thus far, the ICC has not applied any of these limitations when reviewing an executive decree. In reviewing a Perppu which allowed the government to ban a mass organization without due process of law, the Constitutional Court upheld the Perppu on the ground that the affected mass organization can still fill a lawsuit to the administrative court. The ICC did not realize that the basic issue with the Perppu was it deprived the opportunity of the mass organization to defend themselves before they were dissolved. Moreover, even the militant democracy doctrine still required the involvement of the judiciary to hear the case on the dissolution of a political party.

The last form of abuse is an undue renewal of an executive decree, both the ItCC and the CCC has vehemently opposed to this practice. In the Italian experience, this had been triggered by a vicious cycle where the Parliament finds it challenging to take any decision within the maximum period of decree validity. The decree has no longer been made to respond to an urgent situation, but rather to avoid the deliberation in the Parliament. An almost similar situation happened in Indonesia, although in a different form. As explained in Chapter II, there is a practice in which an executive decree ratified beyond the time limit. Although the ICC has never decided in this type of case, the firm position taken by the ItCC and the CCC is exemplary. After invalidating this practice, the number of undue renewals of the executive decree has decreased significantly in Italy and Colombia.

However, besides these judicially-made limitations, the Colombian experience also highlighted the importance of the constitutional design of the executive decree authority and the institutional design of the CCC to make the judiciary's involvement better functioning to curb the executive. The 1991 Colombian Constitution has strictly regulated the circumstances, measures, and time limit of executive decree authority. It also introduced an automatic review mechanism, which makes every executive decree subject to review by the Constitutional Court. Regarding the Institutional design of the Court, Tutela's introduction of Tutela has widely opened the access of ordinary citizens to the Constitutional Court.

5 Conclusion

To summarize, some preliminary findings on this topic shall be mentioned. First, in terms of number, the executive decree produce in Indonesia is way smaller compare to Colombia and Italy. One of the possible explanations is the ability of the President to directly involve in every stage of law making. Therefore, the President does not need to rely on executive decree authority to rule the country. However, it also important to note that this does not means the executive will not misuse the power.

Second, even though each country has its own origin and uniqueness, there is an almost similar model of abuse to executive decree authority. The abuse can be divided into three forms; First, the executive issued executive decree to respond to a fake or a minor crisis. Second, the substance of executive decree is not proportional to the crisis and violate constitutional rights. And lastly, the undue extension of executive decree authority.

In responding to the abuse to executive decree authority, the Indonesia Constitutional Court has been minimalist to put constraint on the executive decree authority. The ICC has mainly deal three with issues, first in confirming its authority to review an executive decree. Second, to define the term “compelling exigency”. And lastly, to stop a review of executive decree authority once it ratified by the House of Representatives. However, these three jurisprudences are the weakest compare to other country. In the future, the ICC can adopt the jurisprudence by the other country, especially Colombia, which considered successful in limiting executive decree authority.

However, even though this research is aim to compare a judicial institution effort to limit this type of power, two other factors is also found to be important, which are the constitutional design of the executive decree authority and the institutional design of the Court.

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