Jurnal Penelitian Hukum De Jure
Volume 22 Number 2, June 2022
P-ISSN: 1410-5632, E-ISSN: 2579-8561
Accredited No: 10/E/KPT/2019
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LIMITATION OF THE PRESIDENT'S POWER TO DECLARE A STATE OF EMERGENCY: A COMPARISON OF FRANCE, INDIA, AND INDONESIA

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Paper received on: 25-03-2022; Revised on: 10-06-2022; Approved to be published on: 20-06-2021
DOI: http://dx.doi.org/10.30641/dejure.2022.V22.145-162

ABSTRACT

The state must declare a state of emergency under certain conditions that endanger the safety of the state and society. Limiting the power to the declaration of a state of emergency is essential because this great authority cannot be used according to the President's will, so it is necessary to have restrictive mechanisms so that the President does not misuse the authority to carry out the emergency. However, the Indonesian constitution does not stipulate any restrictions on the powers of the President in declaring a state of emergency. This study aims to determine the dangers of not limiting the President's powers in declaring a state of emergency in the Indonesian constitution by using the arrangements and practices of emergency law in France and India. The approach used in this study is a comparative level that compares the contents of the constitution's text and compares the implementation and history of the constitution. The result of this study is limiting the power of the President in declaring a state of emergency is necessary based on a comparison of arrangements and experiences in France and India. Therefore, Indonesia must restrict the President's power in declaring a state of emergency to its constitution.

Keywords: constitution; emergency; misuse; president; restriction

INTRODUCTION

The condition of a country is not always in a state of peace. Under certain conditions, sometimes a country experiences an emergency and is forced to declare a state of emergency. That is the background for a country to have a regulatory mechanism related to handling emergencies so that its condition can return to its state of peace.

This arrangement serves to carry out an act of power that is extraordinary or an exceptional measure. The state of emergency also serves as a legal distinction between the emergency and ordinary constitutional law. It serves as a safeguard to prevent abuse of power from arising in such extraordinary circumstances.[1]

A state of emergency is crucial to implement when a country is threatened by a condition that can damage the existence of that country, damage democracy, or threaten human rights and the life of citizens. According to Clinton L. Rossiter, the concept of emergency law exists to save democracy even though it has to go through enormous sacrifices, as in World War II.[2]

David Dyzenhaus said that the declaration and response to an emergency in a country that adheres to the rule of law principle should be regulated by the law. So, it becomes crucial to protect individuals from arbitrary actions by the state even though the state is in a state of emergency.[3]

Regulations related to the state of emergency in the Indonesian constitution can be found in Article 12, which reads, "The President declares a state of emergency. The conditions governing and the consequences of a state of emergency shall be stipulated by-laws". According to Bagir Manan and Susi Dwi Harijanti, Article 12 of the Indonesian constitution aims to declare the country in a state of emergency (*in staat van gevoar verklaren or gevaar omstandigheden*) if there is a threat to the state, such as a threat to the safety of the people or the territorial integrity of the country.[4]

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[1] Jimly Asshiddiqie, *Hukum Tata Negara Darurat* (Jakarta: PT Rajagrafindo Persada, 2007), 58.

[2] Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948), 314.

[3] David Dyzenhaus, *Legality in a Time of Emergency* (New York: Cambridge University Press, 2006), 2.

[4] Bagir Manan and Susi Dwi Harijanti, "Government

The author assumes that Article 12 of the Indonesian Constitution and its implementing regulations, Government Regulations in Lieu of Laws (Perppu) No. 23/1959 about Emergency Situation, are so open-ended that they can become the basis for justifying excessive use of power and abuse of power.

This assumption is based on Christian Bjørnskov and Stefan Voigt's opinion, making six questions that must be answered in the constitution's emergency provisions. These questions are:[5]

1. What are the necessary conditions for a state of emergency?
2. Who has the power to declare a state of emergency?
3. Who has the power to declare the end of an emergency?
4. Who has the power to monitor the legality of the means used during a state of emergency?
5. Who exercises emergency powers?
6. What competencies does a state of emergency confer on the emergency government?

If contextualized to the regulation of emergencies in Indonesia, the question answered in Article 12 of the Indonesian Constitution is who has the power to declare a state of emergency. The answers to other questions are contained in Perppu Number 23 of 1959. First, the answer for the necessary conditions for a state of emergency is stated in Article 1 Paragraph (1) Perppu Number 23 of 1959 is divided into three classifications, namely Civil Emergency, Military Emergency, and War Emergency. Second, the answer for who has the power to declare the end of an emergency is stated in Article 1 Paragraph (2) of Perppu Number 23 of 1959. Finally, the following answer for who exercises emergency powers and what competencies are given to the government during an emergency is spread from article 3 to article 46 of Perppu Number 23 of 1959, depending on the emergency classification.

However, Indonesia's emergency law is missing the answer to who can monitor the legality of the means used during a state of emergency. In Article 12 Indonesia Constitution and Perppu Number 23 of 1959, no institution or party can monitor the means used during a state of emergency.

The institution which has the authority to oversee the state of emergency declaration and the means used during a state of emergency must be an institution in a branch of power other than the Executive. In addition, in a democratic country, when the President wants to declare a state of emergency because of a danger that threatens the country, it is crucial to get the people's approval. This agreement is essential because the state of emergency will severely limit the rights of the people. Therefore, the legislative body should be the ideal institution to limit the state of emergency declaration and implement the handling of an emergency.

As a comparison, if looking at other countries' regulations, the President's authority is still limited even though he is in a state of emergency. For example, the French constitution requires the President to consult with the Prime Minister, Parliament, and the Constitutional Council in dealing with emergencies that may threaten the nation's independence, the territorial integrity of the country, fulfillment of commitments to international agreements, and the public interest.[6]

In addition to arrangements regarding the separation of powers and checks and balances in determining a state of emergency status, the French constitution also regulates the time limit for how long a state must implement a state of emergency. Article 16 paragraph 6 stipulates that after 30 (thirty) days of the state of emergency is enforced, the implementation of the emergency law must be evaluated by the national assembly and the Senate, in which to continue the state of emergency a vote of approval from 60 members of the national assembly or 60 members of the Senate is required. This kind of evaluation will continue when the state of emergency reaches day 60, and if it is resumed, it will be re-evaluated on day 90

Regulations in Lieu of Laws in the Perspective of Constitutional Teachings and Principles of the Rule of Law," ("*Peraturan Pemerintah Pengganti Undang-Undang Dalam Perspektif Ajaran Konstitusi Dan Prinsip Negara Hukum,*") *Padjadjaran Jurnal Ilmu Hukum* 4, no. 2 (2017).

[5] Christian Bjørnskov and Stefan Voigt, "The Architecture of Emergency Constitutions," *International Journal of Constitutional Law* 16, no. 1 (2018): 101–127.

[6] Article 16 Paragraph 1 Constitution of Fifth Republic of France

and continue for another 30 days.[7]

Likewise, in India, article 352 authorizes the President to declare a state of emergency if a severe emergency threatens India's security by war, external aggression, or armed rebellion.[8] In proclaiming a state of emergency, the President must obtain the approval of both Parliaments of India except for the proclamation, which revokes the previous state of emergency.

The proclamation of a state of emergency in India also has a period of validity. The explanation of article 352 number 4 paragraph 2 stipulates that the declaration of emergency issued by the President of India will expire automatically within 30 days unless it has received approval from parliament before the end of the 30 days.[9]

The absence of regulations regarding how to limit the power and also checks and balances related to the President's authority in the provisions of an emergency in Indonesia, especially Article 12 of the Indonesian Constitution, makes the formulation of the rules is too exposed, causing too vast opportunities for abuse of authority to occur.

This paper will discuss the dangers of being too exposed to emergency law in the Indonesian constitution by using the arrangements and practices of emergency law in France and India as a comparison.

The author chose France because they already had emergency provisions earlier and were much more stable than Indonesia. In addition, France experienced seven dangerous situations from 1955 to 2020. Still, without any special attention to the abuse of authority due to effective power restrictions. Many academics also consider the French concept of *stat de siège* as the closest concept to the original concept of the Roman dictatorship in the Roman Republic.[10] In essence, the author chose France to be a role model in reforming the emergency law in Indonesia.

However, before having a stable state of emergency, France was in turmoil due to the weakness of its constitutional constitution, especially during the First and Second French Republic,[11] so it is hoped that Indonesia's emergency constitutional law will be as stable as France's.

While the reason the author chose India is that India has the same level of legal development as Indonesia in emergency law. India's history has come out of a prolonged state of emergency due to abuse of authority in the emergency. India experienced it when a state of emergency in 1975 due to Internal Disturbance. This state of emergency in 1975 is commonly referred to as the most controversial use of emergency powers in the history of independent India.[12]

Several previous studies have examined the emergency law in Indonesia, but the authors did not find any that proposed limiting the President's power in declaring a state of emergency. For example, the research conducted by Jayus and Muhammad Bahrul Ulum entitled "Presidential Power's Limitation to Emergency Provisions in Indonesia". The study that uses the historical perspective concludes that the emergency provision is one of the norms that has not been amended in the 1999-2002 constitutional revision agenda. As a result, authoritarianism threatens the future of liberal democracy in Indonesia, particularly the enjoyment of civil and political rights due to the ambiguous provisions of the emergency law as regulated in Articles 12 and 22 of the 1945 Constitution.[13]

In addition, Atma Suganda and Musa Anthony Siregar, in their research entitled "The Meaning and Development of State Emergency Laws Based on Constitution in The Indonesian Legal System", have concluded that emergency law in Indonesia is very open and endangers human rights. Therefore, it is essential to limit the powers of the President in an emergency.[14]

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7 Article 16 Paraghraph 6 Constitution of Fifth Republic of France

8 Article 352 Paragraph 1 Constitution of India

9 Explanation Number 4 Paragraph 2 of Article 352 Constitution of India.

10 Oren Gross and Fionnuala ní Aoláin, *Law in Time of Crisis* (New York: Cambridge University Press, 2006), hlm 26.

11 Ibid.

12 Subin Paul, "'When India Was Indira,'" *Journalism History* 42, no. 4 (2017): 201–211.

13 Jayus and Muhammad Bahrul Ulum, "Presidential Power's Limitation to Emergency Provisions in Indonesia," *Cita Hukum* 8, no. 2 (2020): 343–362.

14 Atma Suganda and Musa Anthony Siregar, "The Meaning and Development of State Emergency Laws Based on Constitution in The Indonesian Legal

Indeed, previous studies as described above have concluded that there are problems in Article 12 of the 1945 Constitution of the Republic of Indonesia. There need to be restrictions on the President's power in declaring a state of emergency. However, they did not offer recommendations for improving Article 12 of the 1945 Constitution of the Republic of Indonesia, which is based on a theoretical basis and comparisons with other countries. Therefore, we conducted a study that resulted in comparative research to improve Article 12 of the 1945 Constitution of the Republic of Indonesia through the perspective of experiences from other countries.

For this reason, the author is interested in studying the regulation and practice of emergency law in France and India, which later will be used as the basis by the author to recommend improvements to Article 12 of the Indonesian constitution.

RESEARCH METHOD

This research used doctrinal normative legal analysis, including research on legal products, principles, and legal doctrines. The approach used in this research is the comparative law approach method. According to Rudolf B. Schlesinger, comparative law is a method of investigation to obtain more profound knowledge of specific legal materials.[15]

The author uses the comparative law method to reform Indonesia's emergency constitutional law. In line with what, according to Peter de Cruz, one of the functions of the comparative law method is as an aid to legislation and law reform, namely comparative law can use as a tool in helping the idea of legal reform in a country.[16]

Francois Venter divides the four levels of depth of comparative constitutional law. First is the comparison of the law of the constitution, which is a comparison that compares the only text of the constitution. Second is the comparison of constitutional law, which is a comparison that studies the text and practice of the constitution. Third, Constitutional history and constitutional comparison examine the history or background of forming a country's constitutional system to find similarities in concepts from different constitutional systems. Fourth is the Constitutional principles and doctrine, which is most profound in reviewing the constitutional system because it examines the philosophy, principles, and doctrines underlying a country's constitution.[17]

Based on that, the authors choose a comparison in the third level to see the background of the construction of a country's constitutional system. So, it has a consequence that the author compares the text of the constitution and the history of the construction of the constitution's text.[18]

DISCUSSION AND ANALYSIS

A. The Need for a State of Emergency Declaration for a Country

1. Necessity Principle

The basis of the need for emergency law for a country on one Roman principle, namely *necessitas non-habet legem*, or necessity does not know the law. This means that under certain conditions, the applicable law can be violated because of a compelling need or, in other words, an emergency condition.[19]

This principle is that a state of emergency that may threaten a country will not conform to the existing ordinary law, but a law that must adapt to the condition of the state of emergency so that an extraordinary law is needed.[20]

An example of this principle is during the United States Civil War. The President of the United States at the time, Abraham Lincoln, mobilized Americans to become a militia and fight

System," *Advances in Social Science, Education and Humanities Research* 499 (2020): 544–553.

[15] Rudolf B. Schlesinger, *Comparative Law: Cases Text Materials*, 2nd ed. (Brooklyn: Foundation Press, 1959), hlm 1.

[16] Peter De. Cruz, *Comparative Law in a Changing World*, ed. Cavendish (London, 1999), hlm 18.

[17] Francois Venter, *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional State*, ed. Juta & CO Ltd (Cape Town, 2000), hlm 41-44.

[18] Ibid.

[19] Moch Marsa Taufiqurrohman et al., "The Use of Necessitas Non Habet Legem and Wederspanningheid in Law Enforcement for Covid-19 Vaccination in Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 4 (2021): 473–488.

[20] Gross and Aoláin, *Law in Time of Crisis, 47*.

against the rebels. Lincoln also paid them very cheap wages even though they had risked their lives on the battlefield. Lincoln also authorized military leaders to arrest anyone suspicious and deemed a danger to the country.[21]

However, there is no single charge against Lincoln that he acted arbitrarily or authoritarian. Instead, Lincoln's reasons for doing this are well known as follows:[22]

> "It became necessary for me to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age, and posterity".

Based on Lincoln's reasoning, he had no other choice but to do the things I have described above. The principle of necessity became a justification for Lincoln to violate the human rights of citizens of the United States. Still, it was necessary to prevent the United States of America's fall.

The relevance of the civil war in the United States to the principles of necessity is that in some instances where the existence and sovereignty of a country are threatened, the rulers can take extraordinary steps. This step can also be done by taking human rights from citizens if necessary to defend the country.

Jimly Asshidiqie explained that the principle of necessity could not be separated from proportionality. Jimly explained these two things are the crux of the self-defense doctrine or the core of the self-defense doctrine, namely the doctrine in which the state defends itself from threats that endanger itself and its citizens. The principle of proportionality will provide reasonableness in the doctrine of self-defense; therefore, the criteria for determining the existence of necessity become clear.[23]

Herman Sihombing argues that in handling dangerous situations, a balance between emergency and need effort so that the authority is not excessive to prevent the abuse of this great power.[24]

Herman Sihombing's opinion is based on Kranenburg's opinion in his writing entitled *'De Grondslagen der Rechtswetenschap'*. The opinion says that the states related to the theory of balance in an emergency state that the state of emergency is something abnormal. Hence, the law is also in an emergency to overcome that emergency. Therefore, ordinary things must be considered abnormal and extraordinary. Therefore, maybe under normal circumstances, the ruler's actions fall against the law. Still, because of the dangerous or abnormal circumstances, the steps of the ruler are legitimate and can be justified.[25]

Based on the opinion of Kranenburg, Herman Sihombing stated that there must be a balance between the emergency that threatens the effort or institution and the great authority given to the ruler of the state of emergency. The basis is acceptable, but measuring the extent and extent of the extraordinary power given to compensate and even eliminate the emergency is complex. Because the power needed to deal with an emergency must be greater than the law that regulates the attention to the threat that arises so that handling a dangerous situation can be effective.[26]

Besides the proportionality principle, necessity must also be complemented by the principle of immediacy or the urgency of time. This principle is based on the understanding that there should be no gap between the arrival of an armed attack and applying the principle of necessity to enforce the emergency law for self-defense.[27]

2. Self-Preservation Principle

Furthermore, in theory, it is also said that the state must consider using reserve power if the condition is an emergency to carry out its need for self-defence.[28] This right is referred to as the state's natural right, which cannot be hindered by positive law that applies under normal

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[21] Mark E. Neely Jr, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 29.

[22] Ibid.

[23] Jimly Asshiddiqie, *Hukum Tata Negara Darurat, 93*.

[24] Herman Sihombing, *Hukum Tata Negara Darurat di Indonesia* (Jakarta: Penerbit Djambatan, 1996), 4.

[25] Ibid, 5.

[26] Ibid.

[27] Jimly Asshiddiqie, Emergency Constitutional Law (*Hukum Tata Negara Darurat), 94*.

[28] Ibid, 89.

circumstances when a country faces an attack or other dangerous situation, then whatever the state will do to maintain the country's existence.[29] However, Hugo Grotius emphasized that the natural right of the state does not mean that the state can use it arbitrarily or whenever needed for the sake of the state.[30]

According to Oren Gross and Fionnuala ní Aoláin, self-preservation is legalizing state actions to defend the state outside the applicable law. When a country considers specific measures necessary to protect itself and the survival of its citizens, then the country is considered to be able to do whatever it takes to minimize the damage caused by a state of emergency.[31]

Furthermore, Oren Gross and Fionnuala ní Aoláin stated that the principle of self-preservation originated from the doctrine held by Germany regarding the military need to meet their war needs.[32] Germany began to use this principle during World War I. Germany thought its military could do anything without being based on law, including international law, which caused a lot of harm to both German citizens and citizens of the world.[33] That is what made Germany have a massive concept of conscription during the World War, where all its citizens who are considered able to go to the battlefield will be obliged to fight to defend their country.

Karl Loewenstein argues that the theory of self-preservation is necessary to maintain a country. Loewenstein's full opinion is as follows:[34]

> "Where fundamental rights are institutionalized, their temporary suspension is justified. When the ordinary channels of legislation are blocked by obstruction and sabotage, the democratic state uses the emergency powers of enabling legislation that implicitly, if not explicitly, are involved in the very notion of government. Government is intended for governing . . . If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism . . . every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles".

Loewenstein expressed this opinion to justify democratic countries preparing to face World War II by bringing together the allied bloc with the ideology of democracy and the axis bloc with fascism. Therefore, Loewenstein argues, "if you feel that democracy is better than fascism, then whatever means must be done to save democracy".[35]

For Loewenstein, democracy should as much as possible fight against fascism by covering up weaknesses in the democratic system related to respect for human rights. Indeed, this will change the face of democracy, which is known to respect human rights. Still, it is necessary so that what is protected by democracy, namely human dignity and freedom, can last even longer.[36]

Thomas Jefferson also has more or less the same opinion as Loewenstein regarding self-preservation. Jefferson argued that the highest obligation of a democratic state is not to obey the written law. Still, the highest responsibility of a state is to save the country when it is in danger because losing the state is equivalent to losing the life of every citizen, freedom, and property rights. That makes the sacrifices of citizens to defend the country a reasonable one.[37]

B. The Importance of Limiting Power in Emergencies

There was one exciting event in the United States when Supreme Court Judge Robert Jackson tried the actions of United States President Harry S. Truman when the country was in emergency. In the trial process, Truman argued that the Executive should have unlimited authority when the country was in an emergency so that the court could not try his actions. Truman's argument was immediately

[29] Oscar. Schachter, "Self Defence and the Rule of Law," *American Journal of International Law*, no. 83 (1989): 253.

[30] H Lauterpacht, "The Realist Challenge and the 'Grotian Tradition' in 20th-Century International Relations," *European Journal of International Relations* 12, no. 2 (2006): 30–38.

[31] Gross and Aoláin, *Law in Time of Crisis, 331-332*.

[32] Ibid.

[33] Thomas Erskine Holland, *The Laws of War on Land* (Oxford: Clarendon Press, 1908), 2.

[34] Karl. Loewenstein, "Militant Democracy and Fundamental Rights," *American Political Science Review* 31 (1937): 432.

[35] Ibid.

[36] Ibid.

[37] Paul Leicester Ford, *The Writings of Thomas Jefferson* (New York: G.P. Putnam's Sons, 1986), 1231.

refuted by Supreme Court Judge Jackson with his famous argument as follows:[38]

> "Emergency powers are consistent with the free government only when their control is lodged elsewhere than the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula . . . Such power either has no beginning, or it has no end. If it exists, it needs to submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction".

Based on the views of Supreme Court Judge Jackson, we can see that the great power possessed by the President is a step that can potentially lead the country to a dictatorship if left unattended, without a beginning and an end. Therefore, we can see that power limitation is still needed in this case, even though the state is facing an emergency.

The relevance of this case is that an emergency must be limited because the President has almost unlimited powers in that situation. Then a state of emergency cannot be left without a beginning and an end. Therefore, emergencies must be rigidly defined as how to start and end. If there are no restrictions, the author strongly agrees with Supreme Court Justice Jackson that the country will lead to a dictatorship.

In the beginning, state leaders may have good qualities. Still, over time, a pattern of excessive concentration on power arises, which ultimately destroys the personal influence of the power holder, both mentally and spiritually, so that he eventually loses the capacity to govern well, even when they want to do justice. Moreover, when a person or group of people is in power too long and too absolute, it will rob others of perpetuating the power that he is exercising.[39]

That is what makes even in an emergency; the law must still limit the President's power so that arbitrariness does not occur. Therefore, the formation of emergency law needs to be carried out with extra care because it will determine the destiny of a country, whether it will be destroyed due to a state of emergency or destroyed in the hands of a dictator who is given great authority handle a dangerous situation. Therefore, emergency law must be able to prevent both possibilities.

Limitation of powers to the declaration of a state of emergency by the President can use a concept known as checks and balances. This concept is closely related to the separation of powers which supervises each other between one branch of power and another. Therefore, the doctrine of checks and balances is that the legislature must watch and influence the Executive, including one, when declaring a state of emergency.[40]

C. Necessity and Self-Preservation Principle in Indonesia

The principle of Necessity and Self-Preservation in Indonesia is implemented through Perppu Number 23 of 1959. However, Perppu Number 23 of 1959 itself does not regulate the limitation of power when the President wants to declare a state of emergency. As a result, the President has the sole power to declare a state of emergency without being questioned by anyone.

The substance regulated in the Perppu is related to the authorities possessed by the authorities in a state of emergency. To make it easier, the author will present this in the form of a table as follows:

Table 1. Government Authority in an Emergency based on Perppu Number 23 of 1959

Civil Emergency	Military Emergency	War Emergency
Knowing telephone conversations and restricting newspapers (Article 17)	Prohibition of production and possession of firearms (Article 25)	Taking any goods for defense purposes (Article 37)
Prohibit public meetings or gatherings and have the right to enter private homes or buildings (Article 18)	Seize the entire post or money order along with all the information contained in the post (Article 27)	Require citizens to participate in national defence (Article 41)

[38] Alan F Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet and Tube Co. v. Sawyer; The Steel Seizure Decision* (New York: Macmillan, 1958), 59-65.

[39] T.R.S Allan, "Dworkin and Dicey: The Rule of Law as Integrity," *Oxford Journal of Legal Studies* 8, no. 2 (1988): 2.

[40] Mei Susanto, Rahayu Prasetianingsih, and Lailani Sungkar, "The Power of the DPR in Filling State Positions in the Indonesian Constitutional System," ("*Kekuasaan DPR Dalam Pengisian Jabatan Negara Dalam Sistem Ketatanegaraan Indonesia*,") *Jurnal Penelitian Hukum De Jure* 18, no. 1 (2018): 23–41.

Civil Emergency	Military Emergency	War Emergency
Restricting people from being outside the home (Article 19)	Prohibits people from living in an area or part of an area (Article 28)	
Checking the body of each person's clothes (Article 20)	Militarization of a group or company (Article 31)	
	Catch people and hold them for 20 days (Article 32)	

The powers that the author has mentioned above mean that the civil emergency authority can only exercise powers that may be exercised during a civil emergency. The war emergency authority can only exercise powers that may be exercised during civil and military emergencies. The emergency war authority can use all of its powers, whether regulated for civil, military, or war emergencies. Based on these powers, it can be seen that a lot of authority has been given to the President to become a dictator to save the integrity of the country and the safety of the people in an emergency.

These powers reflect the implementation of the principles of necessity and self-preservation because the government has a need to limit the human rights of citizens, and this is legally justified. Likewise, the government uses the people as a reserve force to defend the country as an implementation of the principle of self-preservation.

These powers will undoubtedly be dangerous if they are not limited and left without a beginning or end. The absence of restrictions in Article 12 of the Indonesian Constitution and Perppu Number 23 of 1959 makes the potential for misuse of power extensive. Therefore, Indonesia needs to impose limits on the powers of the President in declaring a state of emergency

D. Limitation of powers to declare a state of emergency in France

1. History of Emergency Law in France

Emergency law arrangements in France have existed since the early days of the French Republic, since the revolution that overthrew the absolute monarchy. Emergency law at that time was contained in the decree of the French Constituent Assembly in 1789, which had a provision that emergency law gave all functions originally attached from civilian authorities to military leaders to maintain state security.[41]

After the second French Revolution in 1848 and the experience of tyranny under Napoleon Bonaparte, the Constitution of the French Republic included a new article regarding the circumstances. The forms and effects of the *etat de siège* would be elaborated in legislation so that the ruler did not easily abuse the law in a state of emergency.[42]

The inclusion of these new post-revolutionary articles was carried out after realizing that *etat de siege* could not only be a tool for the authorities to face military threats or the threat of invasion from foreign countries (*état de siege reel*). But could also be used to deal with political threats or threats using emergency law. However, these emergencies are considered fictional or unreal (*état de siege fictif*). The use of military force to deal with political threats is not proportional and must be avoided.[43]

The articles that regulate the tat de siege in the Second French Constitution of 1848 are contained in article 106, which reads "Article 106. - A law will determine the cases in which a state of siege can be declared, and will regulate the form and effect of the action. this". Based on article 106 of the Constitution of the French Republic of 1848, it can see that the provisions, form, and impact of a state of emergency will be regulated by law. The sound and framework of this article are very similar to Article 12 of the current Indonesian Constitution, where there is no power at all to declare a state of emergency.

The lack of regulatory content in the emergency law turned out to have a fatal impact on the French Second Republic. France's state of emergency continued to be imposed by the

[41] Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human Right Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law*, no. 491 (2013): 496.

[42] Ibid.

[43] Clinton Rossiter explained that after the French Revolution there was an awareness that there were two possible uses of emergency law, namely emergency law in an emergency situation and emergency law in things that were not real or in a fictional state. The law in an emergency must take care that the law is only used when the situation is truly an emergency. See Rossiter, *Constitutional Dictatorship, 79-129*.

authorities for a long time and on a wide scale. Moreover, the state of emergency imposed continuously led to several coup attempts, which caused the Second Republic to collapse at the hands of Louis Napoleon, the President of the Second French Republic who eventually declared himself emperor of France.[44]

Learning from this, finally, in 1875, after the French Empire under Louis Napoleon fell, the French Third Republic attempted to reform the laws of war and its state of emergency so that the French Republic would not fall for the third time. Therefore, Article 9 of the Constitution of the French Third Republic of 1875 stipulates that "The President of the Republic cannot declare war without the prior consent of both chambers".

The arrangement contains that the French President cannot declare war without the approval of the two chambers of parliament in France, namely the National Assembly and the Senate. Based on this arrangement, it can see that the French Third Republic has begun to establish a system of checks and balances so that the key to a declaration of war and a state of emergency is not only in the hands of the President.

Furthermore, on April 4, 1878, the French Third Republic also began to reform its state of emergency at the statutory level. In the new law, there is a statement that "a state of siege could only be declared by law and only in imminent danger resulting from a foreign war or an armed insurrection".[45]

France's new state of emergency law is designed so that a state of emergency is declared in a situation that endangers the state's existence *(état de siege reel)*. The new regulation in the law is that a state of emergency is declared, terminated, and extended by the parliament to be further implemented by the President to create checks and balances in a declaration of an emergency. This law also stipulates that the declared state of emergency must contain the period of validity of the emergency. In addition, the declaration of a state of emergency must also state in detail the areas where the emergency law must be applied.[46]

When a state of emergency is declared correctly, all matters relating to the safety of the Republic are left to the military authorities. Military courts also take charge of any breaches of emergency law by both military and civilians. The military is also authorized by law to conduct house searches of civilians, deport or remove people from areas with an emergency status, and prohibit the publication or dissemination of information that is considered detrimental or harmful to the condition of the state.[47]

During World War I, in 1914, the President declared a state of emergency in all of France, which was not in accordance with the state of emergency law of 1878. In addition, the declaration of the emergency state that the period of emergency was until "the war ended". However, there is no clarity at all on when the war will end. It happened again in World War II when martial law was declared by the President, not by the legislature.[48]

2. Emergency Law in Modern French

After World War II, the French Republic again reworked its constitution, including provisions relating to the law in a state of emergency. The regulations regarding the declaration of a state of emergency can be found in the first paragraph of Article 16 in the 1958 Constitution of the Fifth Republic of France (the current constitution):

> "Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council."

The article stipulates that the President can take necessary actions if there is a situation where the existence of a republic, national independence, territorial integrity, or fulfillment of international commitments is in serious threat, in which the function of state institutions is disrupted. However, before taking that action, the President needs to consult with the Prime Minister, Parliament, and the French Constitutional Council.

[44] Gross and Aoláin, *Law in Time of Crisis, 27*.
[45] Ibid, 28.
[46] Ibid.
[47] Ibid, 29.
[48] Ibid, 30.

Furthermore, in the next paragraph, of the same article, it is said that: "He shall address the Nation and inform it of such measures".[49] It means that the President must notify all countries that there is an emergency and overcome it is necessary to take specific actions.

Furthermore, in the third paragraph, it is said that "The measures shall be designed to provide the public constitutional authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted about such measures".[50] The paragraph stipulates that the necessary steps in dealing with emergencies must be designed as quickly as possible, especially regarding the division of tasks among state institutions. These measures and the division of tasks must be consulted with the French Constitutional Council.

Finally, Paragraph 6 regulates the time limit for the implementation of an emergency, which reads:

> "After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly, or sixty Senators, to decide if the conditions laid down in paragraph one still applies. The Council shall make its decision publicly as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter".

The paragraph contains a regulation that stipulates that after 30 (thirty) days of the state of emergency being enforced, the application of the state of emergency must be evaluated by the National Assembly and the Senate. To continue the state of emergency required a vote of approval from 60 members of the National Assembly or 60 members of the Senate. This kind of evaluation will continue when the emergency reaches day 60, and if it is resumed, it will be re-evaluated on day 90 and continue for another 30 days.

[49] Article 16 Paragraph 2 Constitution of the Fifth Republic of France

[50] Article 16 Paragraph 3 Constitution of the Fifth Republic of France

Based on the regulatory framework in Article 16 of the French Constitution, it can be seen that there are very comprehensive arrangements related to emergencies. Moreover, these arrangements are very accommodating related to the limitation of power and checks and balances related to the President's authority in dealing with emergencies.

The new arrangement has proven to be effective in dealing with emergencies and preventing arbitrariness of the authorities in an emergency. Since the founding of the French Fifth Republic in 1958, France has experienced several states of emergency. However, as I mentioned earlier, France handled these emergencies without any special note of arbitrariness.

Among them was the attempted coup of Charles de Gaulle in 1961, at which time Charles de Gaulle, the President of France at that time, began to think and make plans to carry out a referendum to determine the fate of Algeria whether to remain with France or become an independent country.[51]

The plan of Charles de Gaulle turned out to be much opposed by the French generals who fought against the Algerian independence forces. The generals then occupied the city of Algiers, the capital of Algeria, and called the actions of Charles de Gaulle a betrayal of the French people in Algeria. Therefore, they also had a plan to launch a coup against Charles de Gaulle.[52]

The generals then mobilized troops to control vital points in Algeria and kidnapped several French Ministers and officials in Algeria. Charles de Gaulle responded to this by coordinating directly with the Constitutional Council on his plans to declare a state of emergency in accordance with Article 16 of the Constitution of the French Fifth Republic. After that, Charles de Gaulle coordinated with the Senate and the National Assembly, and soon de Gaulle declared France an emergency due to a coup.[53]

In implementing the state of emergency, Charles de Gaulle undertook a policy limiting civil rights and strict censorship of the press and freedom of expression in public. However, thanks

[51] Martin. Windrow, *The Algerian War 1954-62* (London: Bloomsbury Publishing, 1997), 37.

[52] Ibid.

[53] Adam Roberts, "Civil Resistance to Military Coups," *Journal of Peace Research* 12, no. 1 (1975): 19–36.

to these restrictions, they were finally able to awaken French civilians to resist the coup carried out by the military generals. The state of emergency lasted for five months, with an evaluation by the French parliament each month.[54]

In addition, a state of emergency was also imposed on several other events, namely the New Caledonian War of Independence in 1984, which lasted for four years,[55] the French riots in 2005 that lasted three months,[56] and last is the terrorist attacks in Paris in 2015, which lasted for two years.[57]

However, the French parliament failed to balance the Executive in declaring a state of emergency in its development. This phenomenon is evident in the declaration of a state of emergency in 2015, where there was no deliberation process from the French parliament against the declaration of a state of emergency, so the state of emergency was extended up to five times.[58]

Many parties, especially Non-Government Organizations working on human rights issues, regret the attitude of the French parliament because the state of emergency imposed by France threatened the human rights of French citizens a lot. For example, based on media reports from Human Rights Watch and Amnesty International, French Muslims were subjected to government arbitrariness during a state of emergency. Many people are also detained without any evidence, but only subjective suspicions that the person is a suspected terrorist.[59]

The incident was caused by the French emergency law enforced at that time, giving the government so much authority. For example, the French government detained someone believed to be a terrorist without adequate evidence. In addition, the government can also search every house and building without a court order.[60]

These restrictions should be of great concern to the French parliament because they are related to restrictions on people's rights. The incident in France shows that giving the parliament the authority to limit the President's power in declaring a state of emergency is not enough. Still, a political will is needed from the parliament to restrict the President's power.

E. Limitation of Powers to Declare a State of emergency in India

1. History of Emergency Law in India

India's emergency law has existed since India was still part of British colonialism. The emergency constitutional law arrangement is regulated in the India Council Act of 1861. In this act, the governor-general can declare and disseminate a state of emergency to maintain order and government running in India.[61]

During World War I, the Governor-General of India declared a state of emergency intending to mobilize the Indian population to fight for Britain. After the war, the Governor-General did not end the state of emergency and used it against Indian nationalist activists. In a state of emergency, the Governor-General made the Anarchical and Revolutionary Act 1919 to criminalize everyone who moved to create an independent India.[62]

After India's independence in 1947, they passed a new Indian constitution in 1949. Article 352 of the Indian Constitution, which regulates the declaration of a state of emergency in the Indian Constitution before the amendment, reads as follows:

> "(1) If the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether, by war or external

[54] Ibid.

[55] Jimly Asshiddiqie, *Hukum Tata Negara Darurat, 136*.

[56] Gross and Aoláin, *Law in Time of Crisis, 200*.

[57] Christian Hartmann, "Two Years after the Paris Attacks France Ends State of Emergency," *Reuters.com*.

[58] Y Hermann, "French National Assembly Votes to Extend State of Emergency for Fifth Time," *Dw.com*, last modified 2016, accessed May 20, 2022, https://www.dw.com/en/french-national-assembly-votes-to-extend-state-of-emergency-for-fifth-time/a-36758337.

[59] Human Right Watch, "France: Abuses Under State of Emergency," *HRW.org*, last modified 2016, accessed May 20, 2022, https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency.

[60] Human Right Watch, "France: New Emergency Powers Threaten Rights," *HRW.org*, last modified 2015, accessed May 20, 2022, https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights.

[61] Venkat Iyer, *States of Emergency: The Indian Experience* (New Delhi: Butterworths India, 2000), 67.

[62] Ibid, 68.

aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect".

"(2) A Proclamation issued under clause (1) -- (a) may be revoked by a subsequent Proclamation; (b) shall be laid before each House of Parliament; (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament."

"(3) A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by internal disturbance m be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof".

By the time the article was in effect for approximately 20 years, India had successfully passed two states of emergency under Article 352 of the Indian Constitution, namely the state of emergency resulting from aggression from other countries in 1962 and 1971. In 1962, the President of India, Jawaharlal Nehru, declared a state of emergency based on the war between India and China.[63]

In 1975, the Indira Gandhi case finally exposed the weakness of Article 352 of the Indian Constitution. In 1975 when Indira Gandhi served as Prime Minister of India, she wrote to Fakhruddin Ali Ahmed, the President of India, to declare a state of emergency.[64]

The declared state of emergency is based on the phrase internal disturbance. The reason for the state of emergency declared on Indira Gandhi's proposal was not as natural as the two previous states of emergency, where the state of emergency occurred because of military aggression from other countries.

Many believed that the declaration of a state of emergency was imposed on Gandhi's proposal against a backdrop of rivalry between political groups. The state of emergency was declared to silence and even criminalized her political opponents.[65]

The state of emergency that was imposed resulted in legal chaos, including making amendments to the constitution to justify the government's actions which violated the human rights of citizens. During the state of emergency, the government detained and arrested thousands of civilians, implemented strict censorship policies, banned the press, and did other things against human rights and democracy.[66]

2. Emergency Law in Modern India

The declaration of a state of emergency from 1975 to 1977, which brought disastrous results, made a valuable lesson for India to reconstruct the arrangements regarding the declaration of a state of emergency in the constitution. Therefore, after the events in 1975 described above, India immediately implemented the 44th constitutional amendment in 1978. The main target of the amendment was Article 352, which regulates the procedure for declaring a state of emergency.[67]

The substance of the changes of the 44th amendment is related to the conditions which can be the basis for declaring a state of emergency in India. In the article before the amendment, it can be seen that the conditions for declaring a state of emergency are "war or external aggression or internal disturbance". In the 44th amendment, these conditions were changed to "war or external aggression or armed rebellion". These conditions are considered more specific than the conditions for internal disturbances that can be used as an emergency in 1975 to face political opponents from the authorities.[68]

Furthermore, there is also an additional requirement, namely "the President will not issue a Proclamation of Emergency unless the decision of the Union Cabinet that such a Proclamation may be issued has been communicated to him in writing". The arrangement stipulates that the President of India can only declare a state of emergency if there is a written proposal from the Cabinet. It will limit the President's subjectivity in

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63 Ibid, 132-133.

64 Granville Austin, *Working a Democratic Constitution - A History of the Indian Experience* (New Delhi: Oxford University Press, 1999), 320.

65 Iyer, *States of Emergency: The Indian Experience,* 157.

66 Ibid.

67 R.C Bhardwaj, *Constitution Amendment in India* (New Delhi: Northern Book Centre, 1995), 1102-1103.

68 Ibid, 194.

declaring a state of emergency.[69]

The substance of the amendment is to replace the concept of the relationship between the President and parliament in declaring a state of emergency. Initially, as previously mentioned, one of the conditions for declaring a state of emergency was "shall be laid before each House of Parliament". That condition was changed to "shall be laid before each House of Parliament for approval" to prevent an incident like the Indira Gandhi case. The addition of this phrase makes the declaration of a state of emergency unenforceable if the two parliaments do not agree to the declaration. It will undoubtedly strengthen the limitation of the President's power in declaring a state of emergency, hoping that the emergency incident in 1975 will not happen again.[70]

Furthermore, the pre-amendment arrangement states that "shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament". There are several changes to the phrase. The first change is the two-month requirement was replaced with one month.[71]

The next change is the addition of the approval by the parliament in terms of the extension of the state of emergency, namely "that such resolution will have to be passed by a majority of the total membership of each House and by a majority of not less than two-thirds of the members present and voting in each house". With the condition of an absolute majority, the President will find it more challenging to extend the state of emergency declared.[72]

After implementing the amendment, the practice of handling India's emergencies has also improved. Until this article was written, the Indian government had never again used article 352 of the Indian constitution to declare a national emergency.

F. Lessons Learn from a Comparison of Power Limitations in Emergencies in France, India, and Indonesia

Based on my previous explanation regarding the limitation of power in declaring a state of emergency in France and India, there are two similarities in the history of establishing the emergency law article in their constitutions. The first similarity is that the two countries have experienced arbitrariness due to the absence of restrictions on the President's authority in declaring a state of emergency. Nevertheless, the two countries eventually learned from historical experience and finally made amendments to add restrictions on powers in declaring a state of emergency. After adding the power limitation, it was proven that the two countries could prevent arbitrary acts during an emergency.

It can be used as a lesson for Indonesia to fix its emergency law, especially in declaring a state of emergency. The author's claim in the introduction is that Article 12 of the Indonesian Constitution creates too many opportunities for abuse of authority to occur.

The absence of limiting powers in declaring and implementing a state of emergency can endanger the country. Instead, it is hoped that the authorities in a state of emergency will use their great authority to monitor the state of emergency in their country. However, what happens can be the opposite, namely using their power for personal interests so that they can endanger the integrity of the state and the safety of the people. Therefore, according to the author's analysis, there are several lessons that Indonesia can adopt based on comparisons with France and India.

1. Limiting the President's Power in Declaring a State of Emergency.

First, the lesson is that Article 12 of the Indonesian constitution needs to be amended by adding two forms of limiting the President's power in declaring a state of emergency.

The first form of limitation is the need for legislative approval in declaring a state of emergency. The importance of checks and balances in declaring an emergency, as the author described earlier, is to limit the subjectivity of the President in declaring an emergency. Checks and balances, which are essentially formed as a system to prevent abuse of authority by balancing

69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.

and controlling each other between branches of power, can be used in emergency law and can be used to limit the President's power in declaring an emergency.

France and India also have a similar arrangement, as the author has explained in the previous section. The two countries fixed their emergency constitutional law after the dictator who took advantage of the emergency, Napoleon in France and Indira Gandhi in India. After the fall of Napoleon III in 1875, France immediately included the provision "The President of the Republic cannot declare war without the prior consent of both chambers" into its constitution. Likewise, after experiencing a dictatorship under dangerous circumstances by Indira Gandhi, India immediately included the provision "shall be laid before each House of Parliament for approval".

That is what makes declaring a state of emergency. Therefore, the Indonesian National Assembly (*Dewan Perwakilan Rakyat* – DPR) must have an important role in limiting the consideration of the President's subjectivity in declaring a state of emergency. Consequently, it is necessary to have an arrangement contained in the constitution that stipulates that a state of emergency declared by the President must obtain the approval of the DPR. If the DPR does not approve the statement of a state of emergency, the declaration of the state of emergency is invalid.

Furthermore, according to the author, the requirements for the DPR to approve the dangerous situation declared by the President must also be regulated because the approval given by the DPR does not reflect the majority's decision. For example, in the French Constitution, providing consent to a declaration of a state of emergency requires a vote of approval from the 60 members of the national assembly or 60 members of the Senate. Meanwhile, the Indian Constitution requires two-thirds of the members to present and vote in each parliament. Therefore, the Indonesian constitution must explicitly require this so that the condition for agreeing to a state of emergency is not easy.

For the declaration of a state of emergency to be approved by an absolute majority of parliament, it is necessary to have provisions in Article 12 of the Indonesian Constitution regarding the minimum number of members of parliament who approve the state of emergency declaration. Furthermore, several articles in the Indonesian Constitution use the number 2/3 as a condition for final provisions, such as those regulated in Article 7B, which regulates impeachment, and Article 37, which regulates amendment to the constitution. Therefore, Article 12 needs to add a paragraph that reads, "The State of Emergency declared by the president is approved by at least 2/3 of the members of parliament". In this way, it is hoped that an emergency will be easy, and it is expected to prevent misuse of power.

2. The Time Limit

The time limit is the second limitation that needs to be added in article 12 of the Indonesian constitution. In addition to the restrictions imposed by the DPR on the President in declaring a state of emergency, a time limit also needs to be given so that the state of emergency does not become prolonged and cause long-suffering to the people.

Comparing the existing arrangements in India and France, there are some restrictions on the timing of applying the hazard situation, as explained in the previous chapter. For example, in France, an emergency is declared after 30 (thirty) days of the enforced state of emergency. The National Assembly must evaluate the application of the state of emergency. If the Senate wanted to continue the state of emergency, it requires a vote of approval from 60 members of the National Assembly or 60 members of the Senate. This kind of evaluation will continue when the emergency reaches day 60, and if it is resumed, it will be re-evaluated on day 90 and continue for another 30 days.

Likewise, in India, there is an arrangement that the state of emergency declared will end automatically within 30 days unless the state of emergency is extended and both Indian parliaments approve the extension. However, even this time limit must be included in the regulation regarding declaring an emergency in Indonesia. The state of emergency is indeed enforced during an emergency, and no use of authority in a state of emergency is found under normal conditions.

The following table compares the limitations of the President's power in declaring a state of emergency between France, India, and Indonesia. Indonesia does not have any restrictions, either institutionally for monitoring or the time limit for the declared state of emergency.

Table 2. Comparison of Power Restrictions in France, India, and Indonesia

State	Institutions involved	Time Restriction
France	House of Parliament and Constitutional Council	30 Days
India	Both chambers of Parliament	30 Days
Indonesia	-	-

Therefore, Article 12 of the Indonesian Constitution must be added with a paragraph related to the limitation of the validity period of the declared emergency. The time limit can take the example of France and India, which is 30 days. Therefore, the addition of a paragraph in Article 12 of the Indonesian Constitution can read, "a state of emergency automatically ends after 30 days and can be extended for another 30 days after obtaining approval from parliament". That way, the emergency will not be too protracted.

CONCLUSION

Limiting the power of the President in declaring a state of emergency is necessary both from the perspective of emergency law theory and the comparison of arrangements and practices in other countries, especially France and India, which are the objects of comparison in this study. Both in theory and comparative practice, the absence of adequate power restrictions on the President's authority in declaring a state of emergency has proven to make a country fall into the abyss of authoritarianism.

However, in fact, at this time, the regulations related to the emergency law currently in force in Indonesia, namely Article 12 of the Indonesian Constitution and Perppu Number 23 of 1959, do not contain any regulations regarding the limitation of the President's power in declaring a state of emergency. Therefore, it can endanger Indonesia's democracy in the future.

France and India have already tasted the bitterness of the absence of power restrictions in declaring a state of emergency. However, the bitter experience experienced by the two countries was immediately used as a lesson, and the two countries immediately made amendments by including the substance of limiting power in declaring a state of emergency. As a result, the arbitrariness caused by the state of emergency has never happened again in these two countries until now.

Based on the comparison between France and India, it is essential for Indonesia to also add to the regulation of limiting the power of the President in declaring a state of emergency before the absence of such restrictions will bring disaster to Indonesia in the future.

SUGGESTION

Based on the comparison with France and India, it is necessary to amend the Indonesian constitution and Perppu No. 23/1959 by adding a regulation regarding restrictions on the President's power in declaring a state of emergency.

The mechanism for limiting the President's power in declaring a state of emergency needs to be regulated in the constitution. The limitation is in the form of the role of the legislative branch of power or the DPR in the procedure for declaring a state of emergency to limit the President's subjectivity in declaring a state of emergency.

Then the Indonesian Constitution needs to restrict the time for enacting a state of emergency. If the time expires, the President must extend the state of emergency with the same procedure as declaring a new state of emergency.

ACKNOWLEDGMENT

The author would like to thank all parties involved and support the author in completing this research. Thanks to the journal De Jure for being willing to publish this research, to Susi Dwi Harijanti, head of the Department of Constitutional Law, Faculty of Law, Padjadjaran University, and all fellow researchers at the Center for State Policy Studies, Faculty of Law, Padjadjaran University.

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