# CONSTITUTIONALITY OF STATE FINANCIAL POLICY

## for Handling COVID-19

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for handling COVID-19

Konstitusi dan Demokrasi (KoDe) Inisiatif
in collaboration with YAPPIKA-ActionAid



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*YAPPIKA-ActionAid in collaboration with KoDe Inisiatif*

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**Arranged by:**

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YAPPIKA-ActionAid in collaboration with KoDe Inisiatif

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# Prologue

## Politics of Fiscal Consolidation After the Decision of the Constitutional Court

The COVID-19 pandemic provides an essential lesson on how resilient the choices of the currently adopted fiscal policy direction are to face the crisis. The choice may reflect the power relations between political actors and government branches, illustrating how elected officials mobilize budgetary resources to address citizens' concerns in emergencies and the outcomes of policy contestations. The practice of budgeting during an emergency opens Pandora's box, exposing the vulnerability of fiscal resilience in facing various problems. The various fiscal policy options that the government has chosen in dealing with COVID-19 have exposed the veil of vulnerabilities both from the political aspect of the budget and its governance.

In such an uncertain crisis, citizens' dependence on the State is increasing. The market or the private sector also relies on the central role of the government.

The presence of the State at the forefront when an emergency occurs is non-negotiable. Fiscal instruments are the key to overcoming the crisis, which is far from over. We see how countries have poured trillions of dollars into the fight against Covid-19, and or, to borrow Philip Stephens' term in the Financial Times (26 March 2020), an era that marked the collapse of the fundamental fiscal regime.

Similarly, in Indonesia, hundreds of trillions of rupiah are at stake through the COVID- 19 Handling and National Economic Recovery (PC-PEN) program to save citizens' lives. Various plans are underway. Regulatory and bureaucratic obstacles have been gradually alleviated, flexible and fast budget formulation and implementation have been initiated. The Government Regulation in Lieu of Law (Perppu) has been issued, the deficit limit has been raised, the bureaucratic tender has been relaxed, and various other relaxations have been carried out.

Table. 1 Development of Emergency Fiscal Policy Package in Mitigating Covid-19

| **Emergency Fiscal Policy Package** | **Purposes and Types of Stimuli** |
|---|---|
| Presidential Decree No. 09/2020 about Budget Refocusing and Reallocation as a source of financing for handling COVID-19 (February 2020) | |
| Stimulus 1 | Through spendings which aim to strengthen the domestic economy, through accelerated spending on labor-intensive policies and spending stimulus (expansion of the grocery subsidy cards, Kartu Sembako, and labor-intensive and tourism incentives) |
| Stimulus 2 | Focus on maintaining the purchasing power and the ease of export and import; IDR 70 trillion for the income tax of the industrial sectors (PPh 21), the exemption of income tax. |
| The Government Regulation in Lieu of Law (Perppu) No.1 of 2020 and The Presidential Regulation (Perpres) No. 54 of 2020 (April 2020) | |
| Stimulus 3 | Additional spending and financing through changes to the APBN; IDR 405 trillion for Health provisions, Social Protection and Economic Recovery. |
| Presidential Decree Number 72 of 2020 (June 2020) | |
| Stimulus 4 | Additional spending and financing through changes in state budget (APBN) to IDR 695 trillion for Health provisions, Social Protection and Economic Recovery. |

*Source: Minister of Finance Press Conference materials April 1, 2020 and various sources*

The table above illustrates the emergency fiscal policy package adopted by the government prior to the issuance of the Perppu in the form of stimulus 1 and 2. Stimulus policy packages 1 and 2 taken are still limited to government authority. The Government utilizes budgetary discretion through other expenditures in the budget section 99, which can be used in emergencies or disasters.

The third stimulus policy package is a sign that the Government needs wider space to deal with the uncontrolled spread of the COVID-19 virus. In the context of fiscal governance, there are at least three types of leeway in financing, expenditures, and revenues owned by the Government through this Perppu.

**First,** the Government has the authority to exceed the budget deficit limit above 3% of GDP (Gross Domestic Product) and is required to return in stages until 2023. The problem that arises is that there is no limit to the deficit. The concern that may occur is that the fiscal burden will be heavier with debt payments in the future. The Government's debt-to-GDP ratio increased sharply from 29% of GDP in 2019 to 41% in 2021. This debt does not include the debts of SOEs, and non-financial institutions, which are contingent liabilities. Although the government debt limit of 60% of GDP is still in effect, without an upper limit on the deficit, it will result in fiscal sustainability in the future.

**Second,** in terms of spending, the Government has the authority to make adjustments to mandatory spending, shifting the budget between organizations, functions and programs, using unavailable budgets and using other budget sources. There are two fundamental issues in the governance aspect of this issue. The government's authority on the spending side does not have a time limit, while the deficit limit expressly has a time limit of authority.

Another problem is that there is no regulation regarding the function of the House of Representatives (DPR)'s budget in this emergency budgeting process.

In fact, the Government issued a Presidential Regulation on the changes to the 2020 APBN without going through the process of changing the law, without any proposals for financial notes and discussion with the DPR, violating its principle of transparency and accountability.

It should also be noted that in times of crisis, power tends to be top-down and centralized, where "budget improvisation" (which is administered by the executives) can limit the legislative authority to supervise rather than to cooperate (OECD, 2020). This, of course, opens a discretionary space for the executive's budgets to be misused.

Indeed, the options were narrower for the legislature in its budgetary functions when various restrictions occurred in emergencies. However, it is wrong for the members to ignore their roles as people's representatives and to ensure accountability. The following table shows various breakthrough practices in the legislative role within different countries. It illustrates how the legislature can still take part in improving the accountability of emergency budgeting by setting a routine schedule for reporting and monitoring, as well as involving the role of the financial examiner from the beginning.

Table 2. Functions of the Legislative Budget during a Pandemic in Other Countries

| Country | Legislative Involvement Practice |
|---|---|
| Netherlands, Australia, Switzerland | Using emergency funds upfront and late approval from the legislature |
| New Zealand, Norway, Israel, Spain | Forming a special committee for COVID-19 or giving full powers to the relevant committee |
| Australia | Setting an upper limit on the use of emergency funds |
| Canada, UK, Sweden and Ireland | The legislature provides a time limit or renewal of the emergency |

*Source: Legislative budget oversight of emergency responses: Experiences during the coronavirus (Covid-19) pandemic (OECD, 2020)*

**Third**, various relaxations during the crisis run the risk for the Government to include an agenda unrelated to a crisis, such as unpopular policy initiatives or purely political interests (House of Lords, 2009). One example, the Government has used its authority from the revenue side to reduce tax rates, for example, the corporate income tax rate to 22% in 2020, 20% in 2022, and 17% for domestic taxpayers listed on the stock exchange. Several articles in the Perppu related to taxation also have similar editorials as the Tax Omnibus Law Bill that the previous Government proposed. This gives the impression that there is an attempt to take advantage of the crisis to accelerate the tax reduction rate.

This tax rate adjustment also does not have an explicit expiration time frame. Considering that this tariff setting is in an emergency, it is a consequence that this tariff adjustment must end when the emergency is over.

The Constitutional Court's decision on Law No. 2 of 2020 at least provides certainty about the time limit for various relaxations that the government has in managing the budget during an emergency. Not only the deficit limit must return to 3% in the 2023 APBN, but also the various restitutions of budget reallocation, use of budget resources, and provision of tax incentives.

The fiscal consolidation agenda will determine the direction of the state's alignment. A series of crucial questions must be answered in carrying out this fiscal consolidation. How big and fast should adjustments be made? What are the consequences of a delay in imposing a deficit cap? Should there be a spending cut, should there be an increase of income, or should there be both? Which components of income and expenditure should be adjusted? Then, what is the political cost of fiscal adjustment policy?

Fiscal consolidation is not an easy challenge to tackle. 2022 shall be the final year for the government to exceed the budget deficit limit of 3% of GDP at will. The fight over budget resources will be even more challenging in the face of fiscal pressure from three fiscal directions at once, both in terms of income, expenditure, and financing.

The COVID-19 pandemic has changed various countries' fundamental order of life. Not only predicting the implementation of health protocols as a new way of living to carry out everyday activities normally, but scholars also predict the birth of a new normal order in various aspects of life, including redefining the state's role with its fiscal instruments. Citing the idea of Ian Davis, Managing Director of McKinsey & Company (2020), the new normal is formed from the confluence of great powers that had emerged from the financial crisis and had been in operation long before the crisis began.

It should be acknowledged that the current crisis is different from the crisis of the last few decades. We do not have a regular business cycle. Instead, we have a restructuring of the economic order. This pandemic should be a valuable momentum to rearrange the direction of fiscal politics agreed upon so far. Now is the right time to make a fundamental change towards a new normal for a better fiscal policy. Fiscal and political reforms can no longer be done in a patchwork manner to overcome the impact of the pandemic.

In the context of public finance, finance scholars have been studying the fiscal policy that came from the thought to place more emphasis on fiscal discipline and economic growth rather than the fulfillment of public services and aspects of justice (De Renzio and Lakin, 2019). The media, international financial institutions, and financial markets are often questioning the extent to which the state budget deficit and its contribution could boost investment and growth. Currently, the public finance framework or interpretation model used is very focused on a combination of: macroeconomic stability and fiscal discipline, with a neutral position on other important issues related to how the costs and benefits of public financial decisions are distributed, and how they impact people's lives.

We need to rethink the fiscal policy, which has been managed with strict fiscal discipline, focusing on low deficits, tightening spending (fiscal austerity), and low tax rates to stimulate economic growth. With such a limited fiscal space, we deprioritize income redistribution and quality improvement to public services. At least the current crisis has forced the government to bravely carry out fiscal expansion by loosening the 3% deficit cap, which has been a scourge.

The reorientation of fiscal instruments to reduce income inequality and boost welfare must be a top priority above the economic growth target. Several alternative approaches to public finance need to be adopted, for example, concepts of justice, human rights (HAM), and democracy (De Renzio and Lakin, 2019).

In the concept of justice, aspects of public finance that need to be adopted are fair financial and tax reform. Tax is the most important instrument of justice, where taxes collected from the people based on the differences in income and wealth are redistributed in the context of reducing inequality. The second is the allocation of resources and expenditures that prioritize the needs of marginalized groups and inequality between regions. Various instruments have been developed, including gender budgeting, budgeting for children, and various initiatives developed in other countries. The third is public service performance, which includes access, quality, and impact. Essential public services that are inclusive and of good quality will have a development impact if supported with the allocated budgetary resources. Fourth, the deficit, debt, and financing aspects of justice must consider the acceptable level of deficit criteria, which are used for additional financing and repayment capabilities. The deficit financing also needs to consider the burden on future generations and the sustainability of fiscal policy.

In the context of human rights, public budgets must at the very least adhere to the principles of progressive realization, maximum use of available resources, non-discrimination, and equality. In terms of progressive realization, the state must increase the fulfillment of citizens' human rights through targeted and concrete policies. The state must also mobilize as many resources as possible to fulfil its obligations. It is related to taxation and resource allocation, as well as how available resources are utilized to the greatest extent possible, or to budget credibility. The final principle of non-discrimination must serve as the state's benchmark in fulfilling citizens' basic rights by taking a proactive approach to citizens who face discrimination.

Changing the perspective of public finance with the two concepts mentioned above is difficult due to the complexities of the issues and the interests of the powers involved. As a result, the latter concept of democratizing the budget in order to reorient fiscal policy toward justice and human rights must be adopted as the game's rule. Budget democratization must include the strengthening of representative institutions like parliament as well as accountability institutions like the Supreme Audit Agency (BPK). In addition, adequate conditions for budget deliberation, such as transparency and explanation of budget decisions, must be established. It must also include the creation of a new "outside parliament" and participatory space for engagement and deliberation that is inclusive and allows the public to more frequently influence policy and budgets.

Several countries are implementing novel approaches to reorient public finance. Consider New Zealand as a country known for pioneering public finance reforms in the 80s and 90s, in 2019 budgeting, they introduced a well-being budget approach (McCulloough, De Renzio, and Huang, 2020). This country has formulated a Living Standards Framework (LSF), which consists of 61 (sixty-one) indicators to measure welfare as the primary foundation in preparing its budget, which was adopted from the better life index from the OECD. When Prime Minister Jessica Arden came to power in late 2017, she decided to put LSF at the heart of her budgeting process and have it fully implemented in the 2019 fiscal year. Each ministry was asked to show how its proposed budget contributes to the priority welfare agenda and to identify the 1 percent of its routine spending that could be diverted towards achieving the priority framework in the LSF.

Without adopting new budgeting models from other countries, our constitution clearly states that "the state budget (APBN) is managed openly and responsibly for the greatest prosperity of the people". The Central Bureau of Statistics (BPS) has also formulated a happiness index which is in line with the life index formulated by the OECD, as one of the indicators for APBN formulated for the prosperity of the people.

**Yuna Farhan, Ph.D.**
Country Manager for Indonesia on International
Budget Partnership

# Greetings

## The director of YAPPIKA-ActionAid

YAPPIKA-ActionAid is a non-profit organization that works for policy advocacy, improvement of public services and humanitarian action and resilience in Indonesia. During the Covid-19 pandemic, YAPPIKA-ActionAid contributed to providing inclusive vaccination services, especially for vulnerable and marginalized groups. This can start with preparing a Covid-19 pandemic risk mitigation and mitigation plan during the second wave. This Covid- 19 pandemic risk prevention and mitigation plan are followed up by providing inclusive Covid- 19 vaccination services, which are carried out by prioritizing groups with limited access to vaccinations. Covid-19 includes the elderly, disabled, women workers in the informal sector, and other marginal groups.

In response to the Covid-19 pandemic, YAPPIKA-ActionAid routinely collects and analyzes the most recent information on the pandemic situation, policies, and government responses. The National Economic Recovery (PEN) budget, which has been set aside to expedite the handling of Covid-19, can be used inclusively, proportionately, and on time, as well as managed transparently and accountable. As a result, YAA actively supervises the management of the Covid-19 handling budget via judicial review of Law Number 2 of 2020. YAPPIKA-ActionAid works with the KoDe Inisiatif to oversee budget management, from judicial review to examining the outcomes of the Constitutional Court (MK)'s decisions to writing books. This book on the State Finance Constitutionality for Handling Covid-19 aims to document the process, dynamics, and substance of the judicial review of Law No. 2 of 2020, as well as to provide several critical thoughts on Constitutional Court decisions and policy choices during the Covid-19 pandemic.

This book summarizes the successful recording of the State Financial Law review process for handling COVID-19. This book is intended for readers, policymakers, activists who are concerned with issues of state finance, social and disaster management, as well as all Indonesian people. We hope this book will serve as an appreciation and inspiration for the development of state policies so that they can transform into better, transparent, and accountable ones in the future.

Greetings,
**Fransisca Fitri Kurnia Sari**
Executive Director of YAPPIKA-ActionAid

# Preface

The COVID-19 pandemic has exposed modern constitutional countries, including Indonesia, to critical conditions that have significantly impacted the health, economic, social and other fields. There is no single state government that has a good understanding of how to handle this pandemic. To save lives and also save the people, every country must accelerate the adaptation process, formulate policies based on rational considerations, and adhere to constitutional democracy principles.

The Indonesian government responded to this situation by forming a task force, declaring a public health emergency, declaring a non-natural disaster of COVID-19 and ratifying Perppu No. 1 of 2020 into Law No.2 of 2020 regarding the Law on State Financial Policy for Handling Covid-19, which was then debated in the Constitutional Court's adjudication room. Application Number 37/PUU-XVIII/2020, submitted by YAPPIKA-ActionAid, Desiana Samosir, Muhammad Maulana, and Syamsuddin Alimsyah, became the landmark decision. This review is an effort by civil society groups to ensure that budget management for COVID-19 is transparent, accountable, and targeted.

In this book, we documented the review process of the Law on State Financial Policy for Handling COVID-19. Readers will gain an understanding of the Petitioners' perspective in submitting this judicial review. This book also summarizes the dynamics of the review process of the law on State Financial Policy for Handling Covid-19, beginning with brainstorming ideas for arguments, registering cases, debating during case review, and the Constitutional Court's decisions. Not only that, but this book analyzes the Constitutional Court's considerations and decisions and outlines a study of the Covid-19 handling policy as a response to the government in general and as a follow-up to this Constitutional Court Decision.

This book consists of 4 (four) parts. In the first part, "Why Should You Be Sued?" the author traced back the background of the review of the Law on State Financial Policy for Handling Covid-19. Furthermore, the second part notes "The Dynamics of Review of the Law on State Financial Policy for Handling Covid-19". Here the author tries to show some of the challenges and debates that occurred throughout the adjudication process of the Constitutional Court trial.

The following section, "Constitutional Conditions based on the Decisions of the Constitutional Court," contains the authors' perspectives on the Constitutional Court's decision in reviewing this Law, which both praise and criticize. The final section, "Remaining Agenda," describes various agendas or issues related to COVID-19 that can be researched further.

It was not easy to write this book. The process is lengthy and influenced by various internal and external challenges that the writers face. Nonetheless, the writer recognizes that a good book is a completed book. This book is far from perfect, and there are still flaws that need to be addressed in order to improve the material. Nevertheless, it is hoped that this book can be used as a learning tool and a reference for future policy implementation in emergencies.

We'd like to thank everyone who helped us write this book. Support and prayers are being offered to assist and strengthen the author in completing this manuscript. Finally, I hope that this book will be useful to a wide range of audiences, including the general public, academics, and policymakers.

Regards,
**Writer team**

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# Part One

## Why Should It Be Sued?

# The Government's Response to the COVID-19 Pandemic

At the beginning of 2020, the world was shocked by the coronavirus (Covid-19) outbreak which acutely infects the respiratory system. The first case was confirmed in Wuhan City, Hubei Province, China which then quickly spread to all other parts of the country. In response to this, the World Health Organization (WHO) since January 2020 has declared that the Covid-19 outbreak is a pandemic and a Public Health Emergency of International Concern.[1]

The Covid-19 pandemic is no exception in Indonesia. The Government announced the first and second cases of COVID-19 on March 2, 2020, while the third and fourth cases were announced on March 6, 2020. Nevertheless, despite the WHO's warning about the status of the COVID-19 pandemic or the factual confirmation of COVID-19 cases, Indonesia is confronted with a number of complex issues in dealing with the COVID-19 pandemic. These issues are intertwined with the issue of responsiveness and seriousness of the Government in handling the COVID-19 pandemic, the debate over the emergency response regime to the COVID-19 pandemic, and the Government's focus on economic and business issues during the COVID-19 pandemic, as well as establishing checks and balances between the Government and the DPR during a COVID-19 pandemic emergency.

The Government was not prepared and responsive enough to deal with the pandemic from the start. There were issues with leadership, problem-solving priorities, problem understanding, and public communication during the handling of COVID-19. At the start of the COVID-19 wave, the government is not taking the virus's spread and transmission seriously enough. It is reflected in the statements and policies issued by several state administrators, which present public debate because they ignore rationality and scientific aspects in policy formation, override constitutional values, and are counterproductive to accelerating the COVID-19 pandemic response. [2]

Table 1.1 Controversial Statements of several State Administrators related to COVID-19

| | |
|---|---|
| | **11 February 2020**<br><br>"If there are no (corona virus discoveries), we shouldbe grateful, and shouldnot question it; that's what I don't understand; we should be grateful, the Almighty God still blesses us, " |
| | **17 February 2020**<br><br>Former Health Minister Terawan Agus Putranto issued another counterproductive statement opposing dealing with the COVID-19 pandemic. Prayer, specifically, was the reason the coronavirus did not spread to Indonesia. According to him, the government always works hard, prays, and trusts in God Almighty to keep the COVID-19 virus out. |

*[1] World Health Organization, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019- nCoV), accessed through <https://web.archive.org/web/20200131005904/https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)- emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)>, on [03/25/2022], 2020.*

*[2] Kompas.com, Kilas Balik 6 Bulan COVID-19: Pernyataan Kontroversial Pejabat soal Virus Corona..., accessed through <https://nasional.kompas.com/read/2020/09/02/09285111/kilas- balik-6-bulan-COVID-19-pernyataan-kontroversial-pejabat-soal-virus?page=all>, pada [25/03/2022], 2020; AntaraNews, Budi Karya: Virus COVID-18 Tidak Masuk Indonesia Karena "Nasi Kucing", accessed through <https://www.antaranews.com/berita/1302390/budi-karya-virus-COVID-19-tidak-masuk-indonesia-karena-nasi-kucing>, pada [25/03/2022], 2020; Tempo.co, Setahun Pandemi COVID-19, Ini Kelakar Pejabat Indonesia Soal Corona, <https://nasional.tempo.co/read/1437577/setahun-pandemi-COVID-19-ini-kelakar-pejabat- indonesia-soal-corona>, on [03/25/2022], 2021.*

| | |
|---|---|
| | **15 February 2020**<br><br>Coordinating Minister for Political, Legal and Security Affairs Mahfud MD conveyed a joke by Coordinating Minister for Economic Affairs Airlangga Hartanto about the coronavirus that had not yet entered Indonesia. As uploaded on Mahfud MD's Twitter account, he said, "Alhamdulillah, 243 Indonesian citizens who returned from Wuhan and were observed for 14 (fourteen) days in Natuna were declared clean of corona. In a joke, Coordinating Minister for the Economy Airlangga said, 'Because the licensing process in Indonesia is complicated, the corona virus cannot enter. But the omnibus law on employment licensing continues." |
| | **17 February 2020**<br><br>Minister of Transportation Budi Karya Sumadi joked that COVID-19 did not enter Indonesia because the people eat nasi kucing (traditional Javanese rice dish) every day, so the people are immune from the virus. |
| | **February 25, 2020**<br><br>The government's initial focus was not on the health sector. Through the Coordinating Minister for Economic Affairs, Airlangga Hartanto, the government announced Rp. 72 billion in incentives to finance influencers and media promotions to increase Indonesian tourism affected by COVID-19. The budget includes IDR 98.5 billion for airlines and travel agents, IDR 103 billion for tourism promotion, IDR 25 billion for tourism activities, and IDR 72 billion for media relations and influencers. |
| | **March 2, 2020**<br><br>Following the confirmation of two cases of COVID-19 in Depok, former Health Minister Terawan Agus Putranto urged the public not to be alarmed because the common cold has a higher mortality rate than the corona virus.<br><br>"Even though we have the flu, the cough and cold have higher mortality rate than the corona, so why should we react dramatically?" |
| | **March 12, 2020**<br><br>COVID-19, according to former Health Minister Terawan Agus Putranto, is a self- limiting disease that will heal on its own. This contrasts with cases in the field that necessitate intensive care, particularly in patients with other diseases or comorbidities, and the COVID-19 virus, which continues to mutate into more dangerous and faster-transmitting variants. |

| | |
|---|---|
| | **April 22, 2020**<br><br>President Joko Widodo made a muddled statement about the difference between mudik and pulang kampung ahead of the 2020 Eid al-Fitr celebration. To prevent the spread of COVID-19 to other regions, the government has prohibited Eid "mudik." However, "pulang kampung" is permitted. They both mean the same thing, though. |
| | **May 7, 2020**<br><br>President Joko Widodo urged the public to "make peace" with COVID-19 until an effective vaccine could be developed. The public has reacted negatively because the government is perceived to be desperate and ineffective in dealing with the COVID-19 pandemic. |
| | **May 26, 2020**<br><br>Mahfud MD, the coordinating minister for Political, Legal, and Security Affairs, shared a meme about the Corona virus that he received from Luhut Binsar Pandjaitan, the Coordinating Minister for Maritime Affairs and Investment. He compared dealing with the COVID-19 pandemic to his domestic life with his wife. "Corona is similar to your wife." Corona is like your wife; when you want to marry, you believe you can conquer her, but after becoming your wife, you realize you can't. ...You eventually learn to live with it." |

There has also been debate about the emergency regime that will be implemented in response to the COVID-19 pandemic, particularly the discourse on implementing a civil emergency to limit people's mobility in order to control the virus's rate of spread. The 1945 Constitution recognizes two types of emergencies: (1) a state of danger, as defined in Article 12 of the 1945 Constitution, and (2) a state of urgency, as defined in Article 22 of the 1945 Constitution.

Clause 12 of the 1945 Constitution enables the President to declare a state of emergency. In maintaining the original intent of this article, the concept of a state of danger here includes a situation known as Martial Law 3 or a situation in which the state is under a dangerous threat. According to Ananda B. Kusuma, this concept dates back to the Middle Ages and depicts a country being besieged by enemies or in a state of danger, so that civil power temporarily gives way to military power[4]

The government refers to the derivative of Article 12 of the 1945 Constitution, namely Law (Prp) No. 23 of 1959 concerning the state of emergency ("Perppu on Conditions considered as the State of Emergency").

There are three types of state of emergency in the Perppu: civil emergency, military emergency, and war emergency. The President may declare the condition if and only if:

a. There is a threat to security or law and order in part or all of Indonesia's territory as a result of rebellion, riots, or natural disasters, such that ordinary measures are
feared ineffective;
b. A war, threat of war, or occupation of Indonesian
territory occurs;
c. The nation gets a threat or is subject to other special
circumstances that end anger lives within the nation.

However, the emergency context mentioned in the Perppu above does not correspond to the actual conditions of the COVID-19 pandemic. Because these conditions lead to the temporary transfer of power to the military. As a result, potential violations of human rights may occur, and basic needs cannot be guaranteed.

*[3] Muhammad Yamin, Naskah Persiapan Undang-Undang Dasar 1945: Disiarkan dengan Dibubuhi Tjatatan, Vol. 1, Jakarta: Jajasan Prapantja, 1959, p. 51.*

*[4] Fitri Arsil dan Qurrata Ayuni, "Model Pengaturan Kedaruratan dan Pilihan Kedaruratan Indonesia dalam Menghadapi Pandemi COVID-19", Jurnal Hukum & Pembangunan 50, No. 1, Depok: Fakultas Hukum Universitas Indonesia, 2020, p. 426.*

Aside from the types of emergencies described in the Perppu on Danger, Indonesian law recognizes additional types of emergencies, as outlined in the following laws:

(1) Law No. 24 of 2007 concerning Disaster Management ("Law on Disaster Management");
(2) Law No. 7 of 2012 concerning Social Conflict Resolution ("Law on Social Conflict Resolution");
(3) Law No. 6 of 2018 concerning Health Quarantine ("Law on Health Quarantine"); and
(4) Law No. 9 of 2016 concerning Financial System Crisis Prevention and Handling ("Law on Financial System Crisis Prevention and Handling").

According to a number of decisions made by the President, normatively, the emergency regime has chosen to deal with COVID-19 by utilizing the Disaster Management Law and the Health Quarantine Law. Secondly, both laws will serve as the basis for future policy-making for handling COVID-19.

The response to the COVID-19 pandemic began on March 13, 2020, with the ratification of Presidential Decree No. 7 of 2020 concerning the Task Force for the Acceleration of COVID- 19 Handling ("The Presidential Decree on the Formation of the COVID-19 Task Force"), when the number of positive COVID-19 patients in Indonesia was 69.5 These Presidential Decrees served as the foundation for the formation of the Task Force for the Acceleration of COVID- 19 Handling, which was led by the Director of the National Disaster Management Agency (BNPB). Furthermore, the President declares a state of public health emergency based on Presidential Decree No. 11 of 2020, dated March 31, 2020, declaring COVID-19 a Public Health Emergency ("Presidential Decree on the Status of COVID-19 Public Health Emergency").

Furthermore, on April 13, 2020, the President issued Presidential Decree No. 12 of 2020 declaring the COVID-19 Non-Natural Disaster a National Disaster ("Presidential Decree on the Status of Non-Natural Disasters of COVID-19"). The two Presidential Decrees established the COVID-19 pandemic's status as a public health emergency and a non-natural disaster.

Table 1.2 Basis for Determining the Status of the COVID-19 Pandemic

| COVID-19 Emergency Status | |
|---|---|
| | **Public Health Emergency Due to COVID-19**<br><br>(Presidential Decree No. 11 of 2020 concerning the Establishment of COVID-19 as A Public Health Emergency, dated March 31, 2020) |
| | **Public Health Emergency Due to COVID-19**<br><br>(Presidential Decree No. 11 of 2020 concerning the Establishment of COVID-19 as A Public Health Emergency, dated March 31, 2020) |

[5] *Katadata, Jokowi Bentuk Gugus Tugas Percepatan Penanganan COVID-19, accessed through <https://katadata.co.id/berita/2020/03/13/jokowi-bentuk-gugus-tugas-percepatan- penanganan-COVID-19>, on [03/14/2022], 2020.*

| Legal Regime | Law on Disaster Management<br><br>Law No. 24 of 2007 concerning Disaster Management |
|---|---|
| | Law on Health Quarantine<br><br>Law No. 6 of 2018 concerning Health Quarantine |
| | Law on State Financial Policy to Handle COVID-19<br><br>Law No. 2 of 2020 Concerning Government Regulation in Lieu of Law (Perppu) No. 1 of 2020 Concerning State Financial Policy and the Stability of the State Financial System in Handling the COVID-19 Pandemic and/or Facing Threats to the National Economy and/or Financial System Stability Becomes Law |

This status determination was accompanied by the enactment of emergency law6 as extraordinary measures, namely the Perppu, which was later ratified as Law No. 2 of 2020 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2020 concerning State Financial Policy and System Stability. The Law on State Financial Policy for Handling the COVID-19 Pandemic and/or Threats Endangering the National Economy and/or Financial System Stability becomes law on May 18, 2020 ("Law on State Financial Policy for Handling COVID-19"). The issuance of the law above demonstrates that the government's initial priority was to address the impact of the COVID-19 pandemic on slowing national economic growth, decreasing state revenues, increasing state spending and financing, and disrupting financial system stability. As a result, the policy focus of this law is on spending on health, spending on social safety nets, and economic recovery, as well as strengthening the authority of various financial institutions.

Sri Mulyani Indrawati, Minister of Finance, explained that the Government will implement 4 (four) types of measures during a Working Meeting with the DPR's Budget Board on May 4, 2020, with the agenda of Confirming the Draft Law (RUU) concerning the Stipulation of Perppu No. 1 of 2020. The first measure is about COVID-19 handling. Then there's social assistance. The third is economic incentives for MSMEs and cooperatives, and the last is the anticipation for financial system stability.

*[6] According to Prof. Jimly Asshiddiqie, the Law on State Financial Policy for Handling COVID- 19 was not issued in response to an emergency, but rather as a regular law (in normal situation). Because the basis for considering the Perppu only refers to Article 22 of the 1945 Constitution, Article 12 of the 1945 Constitution is not used. Vide Aida Mardatillah, Pandangan Jimly Terkait Perppu Penanganan COVID-19, accessed through < https://www.hukumonline.com/berita/a/pandangan-jimly-terkait-perppu-penanganan- COVID-19-lt5eaf518c0f3c3 >, on [03/25/2022], 2020.*

The financial policy response in the State Financial Policy Law for Handling COVID-19 is to increase the deficit limit to above 3% for 2020, 2021, and 2022. With the funding source deficit widening, it is necessary to explore alternative funding sources and make adjustments to mandatory spending so that the State Revenue and Expenditure Budget (APBN) and Regional Revenue and Expenditure Budget (APBD) can be more flexible in dealing with such an immediate and extraordinary threat. This law also governs the national economic recovery program by bolstering the implications for the real sector and job creation sector, as well as preventing threats in the financial sector.

The Financial System Stability Committee (KSSK) was also reinforced, with the addition of the authority of Bank Indonesia (BI) to participate in the purchase of state debt securities in APBN funding. Similarly, the Financial Services Authority (OJK) and the Deposit Insurance Corporation (LPS) were added to the authority to prevent risks to financial system stability, particularly in the banking sector, and to protect banking customers.

The Government has made additional expenditures and financing of IDR 405.1 trillion based on this Law, which were not previously included in the State Budget for Fiscal Year 2020. The additional spending includes IDR 75 trillion for the health sector, IDR 110 trillion for Social Safety Net (JPS), IDR 70.1 trillion for industrial sector protection, and for handling guarantee financing, as well as industrial restructuring to support the IDR 150 trillion National Economic Recovery Program. Furthermore, the IDR 75 trillion in the health sector includes additional BPJS subsidies for hospital bills, as well as incentives for central and regional medical personnel at 132 referral hospitals. The President conveyed a value of IDR 25 trillion, which included monthly incentives of Rp. 15 million for specialist doctors, IDR 10 million for general practitioners, IDR 7.5 million for nurses, IDR 5 million for other health workers and hospital administration staff, and death compensation of IDR 300 million per person. The IDR 65.8 trillion of reserves are used to provide medical equipment such as Personal Protective Equipment (PPE), Rapid tests, reagents, ventilators, and health infrastructure, including increasing hospital capacity to finance the COVID-19 escalation, such as the construction of the Galang Island Hospital and the Athlete House for the COVID-19 quarantine.

Meanwhile, the Social Safety Net (JPS) was disbursed IDR 110 trillion to the Family Hope Program (PKH) as a way to increase its benefit, from 9.2 million to 10 million recipients, with payments made monthly until the end of the year beginning in April. Then, beginning in April, the Government increases the funding for the Grocery Subsidy Card (Kartu Sembako) from 15.2 million to 20 million, with amounts ranging from Rp. 150 thousand to IDR 200 thousand per person. Furthermore, the Government also increase the funding for the JPS for Pre-Employment Cards (Kartu Pra Kerja), which was originally IDR 10 trillion to IDR 20 trillion, primarily for workers in the informal sector such as online motorcycle taxi drivers and micro businesses.

The beneficiaries will receive an IDR 1 million worth of grants for trainings, plus a Rp. 650 thousand allowance for four months. The government then provides free electricity usage for 3 (three) months for houses with 450 kVA limit and a 50% discount for houses with 900 kVA limit. The government also increased housing subsidies for low-income people (MBR) by 175 thousand housing units, or IDR 1.5 trillion in additional reserves. In the JPS, IDR 25 trillion is also set aside for basic needs and market operations, ensuring that there is no shortage of goods in quarantined areas.

Furthermore, the education budget has been adjusted to meet the constitutional mandate of 20% of the APBN. A total of IDR 70.1 trillion in industry stimulus will be extended to more than 19 sectors, with taxes deferred and import duty exemptions expanded. Then there is a plan to give financial institutions a 6-month delay in paying KUR principal and interest, which will cost IDR 6.1 trillion. Meanwhile, IDR 255.1 trillion has been allotted for additional spending on healthcare, JPS, and industry. A further IDR 150 trillion is provided for the national economic restructuring and recovery program to ensure that the financial sector is capable and willing to restructure, so that bad loans do not halt credit flows, further deteriorating the economy.

The issuance and ratification of the aforementioned Perppu became a topic of discussion. The Partai Keadilan Sejahtera faction (F-PKS), for example, rejected the idea and considered that this Perppu did not focus on resolving COVID-19 and its socio-economic impact. It is reflected in the budget allocation for government spending. The total budget for health and social protection spending is less than that of the national economic recovery program.

Furthermore, the ratification of this Law does not raise fundamental concerns about the management of state finances, which is also the basis for a judicial review to the Constitutional Court. In this case, the debate was focused on the Constitutional Court's landmark decision on Decision No.37/PUU-XVIII/2020, which was submitted by the Constitutional State Finance Advocacy Alliance (Aliansi Akar Konstitusi). First, the scope of this Law extends not only to resolving the COVID-19 pandemic crisis, but also to other economic crises unrelated to the COVID-19 pandemic. Second, this Law does not adhere to the constitutional legal framework for managing state finances. Third, a number of provisions in this Law negate the function and authority of supervising the people's representative institutions (DPR and DPD), the Supreme Audit Agency (BPK), the Supreme Court and the judiciary below it, and the general public, as well as legalizing corrupt practices in the granary of disaster management funds due to a clause on impunity for state financial managers. Fourth, it has the potential to lead to the misuse of funds and ineffective use of funds raised to combat the COVID-19 pandemic.

# Public Perspective on the State Financial Policy Package for Handling COVID-19

The public reacted quickly and critically to the COVID-19 handling policy package. In particular, when the Law on State Financial Policy for Handling COVID-19 was still in the form of a Perppu (Government Regulation in Lieu of Law) in 2020, two petitioners filed a judicial review to the Constitutional Court. Meanwhile, following the ratification of the Perppu as a law, there were 9 (nine) reviews, for a total of 11 (eleven) reviews related to the Perppu and the State Financial Policy Law for Handling COVID-19.

This occurrence confirms the deterioration of legislation discovered by the KoDe Inisiatif during the COVID-19 pandemic. The number of recently passed laws that have been directly examined at the Constitutional Court has increased significantly since 2019, up to 5 (five) times.7 This condition is also a byproduct of a non-participatory legislative process, aspirations that are not considered meaningfully, are not transparent, are hasty, and are not deliberative.8

Table 1.3 Number of Review related to Perppu and the State Financial Policy Law for Handling COVID-19 to the Constitutional Court

| Types | Number | Number of Review |
|---|---|---|
| The Perpu | No. 1 of 2020 | 2 cases |
| The Law | No. 2 of 2020 | 9 cases |

*Source: The Constitutional Court's decision is processed by the KoDe Inisiatif*

According to the data above, the public is very interested in the issuance of regulations regarding the State Financial Policy for Handling COVID-19. This demonstrates that the related regulations have a significant impact and are considered in violation of the 1945 Constitution.

## Judicial Review of Perppu

The Perppu on State Financial Policy for Handling COVID-19 has a relatively short time limit, which causes the constitutionality review to be insufficiently long, resulting in only two applications against it. Furthermore, because the Perppu had already been passed into law, the Constitutional Court determined that the review had lost its purpose in a short period of time. Nonetheless, there are a large number of Petitioners requesting to review the Perppu.

[7] *KoDe Inisiatif, Constitutional Court and "PR" for Judicial Review of Laws, Jakarta: KoDe Inisiatif, 2021, p. 1.*

[8] *Ibid., p. 2.*

Table 1.4 Identity of the Petitioners and Substance of the Review of Perppu COVID-19 to the Constitutional Court

| Decision Number | Applicant Identity | Review Substance |
|---|---|---|
| 23/PUU-XVIII/2020 | Prof. Dr. M. Sirajuddin Syamsuddin, Prof. Dr. Sri Edi Swasono, Prof. Dr. HM Amien Rais, MA, Dr. Marwan Batubara, M. Hatta Taliwang, and 19 other individual petitioners<br><br>(24 petitioners) | The issue of the government's legal immunity in managing state finances |
| 24/PUU-XVIII/2020 | Perkumpulan Masyarakat Anti Korpsi Indonesia (MAKI), Yayasan Mega Bintang Solo Indonesia 1997, Lembaga Kerukunan Masyarakat Indonesia ( KEMAKI ) Lembaga Pengawasan, Pengawalan, and Penegakkan Hukum Indonesia (LP3HI), Perkumpulan Bantuan Hukum Peduli Keadilan (PEKA) | Provisions for state losses and immunity from law |

*Source: The Constitutional Court's decision is processed by KoDe Inisiatif*

If you look at the two cases above, the Petitioners who filed for judicial review of Perppu 1/2020 are pretty diverse. The Constitutional Court Decision No. 23/PUU- XVIII/2020 was submitted by 24 (twenty-four) persons or individuals who became the Petitioners. Meanwhile, the Constitutional Court's Decision No. 24/PUU-XVIII/2020 was submitted by 5 (five) private institutions or legal entities that advanced to become Petitioners.

All requests for judicial review of the Perppu have argued that they are related to the issue of legal immunity. This can also be seen from the articles examined by the petitioner relating to legal immunity in the two decisions referred to. The Constitutional Court Decision No. 23/PUU-XVIII/2020 reviewed Article 2 paragraph (1) letter 'a' no. 1, 2, and 3, Article 27, and Article 28, while the Constitutional Court Decision No. 24/PUU-XVIII/2020 reviewed Article 27 paragraph (2). Nevertheless, the Constitutional Court ruled that the petition submitted by the petitioner lost the object. Although unacceptable, the Constitutional Court stated that the petitioners had the legal standing to file a quo case.

## Judicial Review of the Law

The review of the Law on State Financial Policy for the Handling of COVID-19 is significant compared to the review of the Perppu. It is because the Perppu has been ratified into Law, and the time limit for submitting the petition was much longer than the review of the Perppu.

It is demonstrated by an increase in the number of reviews of the Law on State Financial Policy for Handling COVID-19 in comparison to the Perppu. The Court has examined and decided 9 (nine) petitions, namely:

Table 1.5 Results of several Review of the Law on State Financial Policy for Handling COVID-19 to the Constitutional Court

| Decision Number | Verdict |
|---|---|
| 37/PUU-XVIII/2020 | 1. Rejected for formal review<br>2. Partially approved for judicial review |
| 38/PUU-XVIII/2020 | Accepted for formal review |
| 42/PUU-XVIII/2020 | Rejected |
| 43/PUU-XVIII/2020 | 1. rejected for formal review<br>2. Rejected as long as Article 27 paragraph (1) & (3)<br>3. Rejected for judicial review of other and the following cases |
| 45/PUU-XVIII/2020 | 1. Rejected as long as Article 27 (1) & (3)<br>2. Rejected for review of other and the following cases |
| 47/PUU-XVIII/2020 | Rejected |
| 49/PUU-XVIII/2020 | 1. Unacceptable as long as Article 27 (1) & (3)<br>2. Rejected for review of other and the following cases |
| 51/PUU-XVIII/2020 | Stipulation |
| 75/PUU-XVIII/2020 | 1. Rejected for formal review<br>2. Rejected as long as Article 27 (1) &(3)<br>3. Rejected for judicial review of other and the following cases |

*Source: The Constitutional Court's decision is processed by KoDe Inisiatif*

If you look at the table above, there are at least 4 (four) cases submitted for formal review, and the rest are judicial review. There are also several provisions because the Petitioner withdrew the petition to the Constitutional Court.

Table 1.6 Identity of Petitioners for the Judicial Review of the Law on State Financial Policy for Handling COVID-19 to the Constitutional Court

| Decision Number | The Petitioners' Identities |
|---|---|
| 37/PUU-XVIII/2020 | Yayasan Penguatan Partisipasi, Inisiatif, dan Kementerian Masyarakat Indonesia (YAPPIKA-ActionAid) (in this case represented by Fransisca Fitri Kurnia Sri as Executive Director), Desiana Samosir, Muhammad Maulana, and Syamsuddin Alimsyah<br>(1 Institution and 3 Persons) |
| 38/PUU-XVIII/2020 | Perkumpulan Masyarakat Anti Korupsi Indonesia (MAKI), Yayasa Mega Bintang Solo Indonesia 1997, Lembaga Kerukunan Masyarakat Abadi Keadilan Indonesia (KEMAKI), Lembaga Pengawasan, Pengawalan, dan Penegakkan Hukum Indonesia(LP3HI), and Perkumpulan Bantuan Hukum Peduli Keadilan (PEKA)<br>(5 Institutions) |
| 42/PUU-XVIII/2020 | Ir. Iwan Sumule, Muhammad Mujib, Setya Darma S Pelawi, Standarkia Latief, Asrianty Purwantini, and 45 other individual petitioners.<br>(50 People) |
| 43/PUU-XVIII/2020 | H. Ahmad Sabri Lubis, H. Munarman, SH, Khotibul Umam, S.Ag., Ir. Ismail Yusanto, Hasanudin, SH, MM, M.SI., and 5 other individual petitioners.<br>(10 people) |
| 45/PUU-XVIII/2020 | Sururudin, SH, LL.M. |
| 47/PUU-XVIII/2020 | Triono, Suyanto, Mura'I Ahmad, SE, SH, Achmad Sarif Eny Kurniawan, Pranoto Utomo, and 17 other individual petitioners.<br>(22 people) |
| 49/PUU-XVIII/2020 | H. Damai Hari Lubis, S.H., M.H. |
| 51/PUU-XVIII/2020 | Pimpinan Pusat Persatuan Islam (PP PERSIS), Wanita Al-Irsyad, Pengurus Besar Pemuda Al- Irsyad, Dewan Pimpinan Nasional Amanat Kejujuran Untuk Rakyat (AKURAT INDONESIA), Yayasan LBH Catur Bhakti, Kesatuan Aksi Mahasiswa Muslim Indonesia (KAMMI), Wanita Islam, and Prof. Dr. M. Sirajuddin Syamsuddin, Prof. Dr. Sri Edi Swasono, Prof. Dr. HM Amien Rais, MA, Dr. Marwan Batubara, M. Hatta Taliwang, and 52 other individual petitioners. (6 Institutions and 57 People) |

| | |
|---|---|
| 75/PUU-XVIII/2020 | Pengurus Besar Pemuda Al-Irsyad, Yayasan LBH Catur Bhakti, Kesatuan Aksi Mahasiswa Muslim Indonesia (KAMMI), Wanita Islam, and Prof. Dr. M. Sirajuddin Syamsuddin, Prof. Dr. Sri Edi Swasono, Prof. Dr. HM. Amien Rais, MA, Dr. Marwan Batubara, M. Hatta Taliwang, and 38 other individual petitioners. (4 Institutions and 43 People) |

*Source: The Constitutional Court's decision is processed by the KoDe Inisiatif*

Of the 9 (nine) decisions above, a variety of petitioners submitted a judicial and formal review of the Law on State Financial Policy for Handling COVID-19. Petitioners are not only from individuals but also organizations or institutions. This shows great attention to managing the COVID-19 budget, which involves meeting the basic needs of the community at large.

Of the 9 (nine) petitions that were reviewed, the author participated in mapping the issues for filing a review petitioned by each petitioner. Namely:

Table 1.7 Issues Petitioned to Review the Law on State Financial Policy for Handling COVID-19 to the Constitutional Court

| Decision Number | Issues petitioned |
|---|---|
| 37/PUU- XVIII/2020 | **Formal Review**: (1) DPD is not involved in discussing Perppu; (2) decision-making through virtual meetings can violate people's sovereignty because of the potential for non- concrete attendance or absenteeism. **Judicial review**: (1) Title and Scope not only for dealing with the COVID-19 pandemic, but also for the economic crisis and financial system outside those related to the COVID- 19 pandemic; (2) determination of the budget deficit unilaterally by the government without involving the DPR and DPD; (3) the uncertainty of the use of the education endowment fund; (4) the absence of DPR approval in the issuance of SUN and SBSN, BI may purchase SUN and SBSN in the primary market; (5) the flexibility of the government to determine the sources of financing without involving the DPR and DPD; (6) refocusing the central government's budget has the potential to reduce the implementation of regional autonomy; (7) PMSE is not related to the handling of the COVID-19 pandemic; (8) tax incentives are not accompanied by a prohibition on layoffs; (9) the exemption from import duty is aimed at a broad scope and is not limited to handling COVID-19 only; (10) the absence of a particular COVID-19 budget account; (11) the mandate of great authority to OJK for restructuring financial service institutions; (11) the impunity of state financial administrators cannot be prosecuted for criminal, civil, or TUN; (12) the COVID-19 budget is immediately deemed not to be a loss to the state, even though there is a potential for fraud; (13) restrictions on the validity of the Law only during a health emergency due to COVID-19. |
| 38/PUU-XVIII/2020 | Not identified |

| | |
|---|---|
| 42/PUU-XVIII/2020 | Legal accountability in the use of the APBN (state budget) during the COVID-19 pandemic. |
| 43/PUU- XVIII/2020 | Determination of the budget deficit limit; Legal accountability in the use of the APBN during the COVID-19 pandemic (granting immunity rights for the government); a formal defect in the decision-making regarding the approval of Perppu into Law (one of which concerns the virtual presence of most council members). |
| 45/PUU- XVIII/2020 | Legal accountability in the use of the APBN during the COVID-19 pandemic; the validity period of the Law on State Financial Policy for Handling COVID-19; expansion of the President's authority during the COVID-19 Pandemic |
| 47/PUU- XVIII/2020 | Adjustment of village fund allocation during the COVID-19 Pandemic |
| 49/PUU- XVIII/2020 | Legal accountability in the use of the APBN during the COVID-19 pandemic (impunity for the government for state losses) |
| 51/PUU- XVIII/2020 | Determination of APBN through Perppu; vulnerability of the APBN in crisis conditions due to setting a deficit limit of more than 3% of GDP without a maximum limit. |
| 75/PUU- XVIII/2020 | Legal accountability in the use of the APBN during the COVID-19 pandemic; determination of the budget deficit limit in the APBN; establishment of tax regulations; granting immunity rights; imposing time limit for the validity of the Law on State Financial Policy for Handling COVID-19; a formal defect in the decision-making regarding the approval of the Perppu into Law; Expansion of the President's authority through emergency conditions. |

Looking at the proposed petitions above, there are at least several significant issues argued by the petitioner in the review of this Law, namely:
a. The discussion process until the ratification of the Law on State Financial Policy for Handling COVID-19 as a follow-up to the Perppu; and
b. The material substance of the Law on State Financial Policy for Handling COVID-19 can be seen in the table above.

In this context, it is interesting to see further how the legal position of the Petitioner for Decision No. 37/PUU-XVIII/2020, which the Constitutional Court declared was partially granted and as a landmark decision for the review of this Law. At least in the a-quo petition, four parties submit themselves as petitioners, namely:

1. Yayasan Penguatan Partisipasi, Inisiatif, dan Kementerian Masyarakat Indonesia (YAPPIKA-ActionAid) or Petitioner I as a private legal entity petitioner; as well as
2. Individual Petitioners of Indonesian Citizens (WNI), namely Desiana Samosir (Petitioner II), Muhammad Maulana (Petitioner III), and Syamsuddin Alimsyah (Petitioner IV)

These four petitioners are members of the Aliansi Advokasi untuk Keuangan Negara Konstitusional (Aliansi Akar Konstitusi). Fundamentally, the review of this Law departs from the concerns of the Petitioners regarding the management of the APBN for handling COVID-19 and the hidden agenda behind it based on The Law on State Financial Policy for Handling COVID-19 and its attachments.

This Petitioner's concern is based on several reasons: [9]
a. The scope of the a-quo Law extends to resolving the crisis due to the COVID-19
pandemic and other economic crises that have nothing to do with the COVID-19
pandemic.
b. b. The a-quo law does not reflect the constitutional legal basis for managing state
finances;
c. c. To negate the function and authority of supervising the people's representative
institutions, the Supreme Audit Agency, the Supreme Court and the judiciary below it, and the public at large, as well as legalizing the corrupt practices of the granary of disaster management funds; and
d. d. It can potentially cause misuse and inappropriate use of funds disbursed for handling the COVID-19 pandemic.

In addition to the reasons above, the petitioner also feels that the process of forming the a-quo Law violates the Constitution because it negates the role of the DPD in the discussion process to ratify or not ratify Perppu No. 1 of 2020 and the virtual presence and decision- making quorum in the plenary meeting of ratification of the Perppu potentially indicated inconcrete attendance. If left unchecked, this practice can set a bad precedent in future law formulation, which is counterproductive to the principles of democracy, the rule of Law, and people's sovereignty. [10]

In detail, each of the Petitioners in this petition also explains the reasons and the causal relationship between the enactment of the provisions in the Law on State Financial Policy for Handling COVID-19 that cause constitutional harm to the Petitioners. Like the first petitioner who linked the causal relationship of the enactment of this Law to his constitutional rights.

Table 1.8 Construction of Reasons and Cause-and-Effect Relationships of Provisions that Harm the Constitutional Rights of the Petitioner I

| **Provisions that are detrimental to the Constitutional Rights of the Petitioner I** | **Reason and Cause-Effect Relationship** |
|---|---|
| The discussion process does not involve DPD and virtual meetings that have the potential of unconcreted attendance. | This condition violates the petitioner's constitutional rights because it has denied the petitioner's efforts to advocate and influence the implementation of good governance, in this case, adherence to the constitutional procedures for the preparation of the Law on the determination of the Perppu. |
| Title and Article 1 paragraph (3) letter b | The broad scope of the a-quo Law has the potential to provide flexibility for the government to carry out extraordinary actions against threats to state finances and financial system stability that are not related to the handling of the COVID-19 pandemic and its implications so that the allocation of state finances to improve health services during COVID-19 and social safety nets for the poor and marginalized, as one of the concerns of implementing the objectives of the petitioner organization, have the potential to be neglected. |
| 1 Article 2 paragraph (1) letter a No. 1, No. 2, and No. 3;<br>2 Article 2 paragraph (1) letter f jo. Article 16 paragraph (1) letter c and Article 19;<br>3 Article 2 paragraph (1) letter g | 1. Eliminate the control of the DPR and DPD by giving the government extraordinary power to determine the limits of the budget deficit unilaterally without requiring the approval of the DPR and the consideration of the DPD.<br>2. Eliminate the oversight and budgetary functions of the DPR in terms of issuing SUN and SBSN and threaten the independence of Bank Indonesia because it is encouraged to buy bonds through the primary market. |

*[9] Decision of the Constitutional Court No. 37/PUU-XVIII/2020 section on the Legal Position of the Petitioner No. 15. Thing. 8.*
*[10] Decision of the Constitutional Court No. 37/PUU-XVIII/2020 section on the Legal Position of the Petitioner No. 16. Thing. 9.*

| | |
|---|---|
| | 3. Eliminate the oversight and budgetary functions of the DPR because the government is given unilateral discretion to determine the sources of budget financing.<br><br>Reducing the legislature's oversight can lead to arbitrary and corrupt actions by the government. Threats to BI's independence, on the other hand, have the potential to deviate from the goal of managing constitutional monetary policy for state finances. As a result, these articles violate the petitioner's constitutional right to advocate for and obtain accountable, transparent, and targeted management of state finances for the greatest prosperity of the people during the COVID-19 pandemic. |
| 1 Article 4 paragraph (1) letter a jo. Article 5 letter a and letter b;<br>2 Article 4 paragraph (1) letter b, Article 4 paragraph (2), Article 6, and Article 7;<br>3 Article 9 and Article 10 paragraph (1) and paragraph (2) | 1 Providing tax relief without being accompanied by a ban on layoffs due to COVID-19 and tax relief should not be flat for all agencies but set on a maximum scale of 22%.<br>2 Taxes for Trading Through Electronic Systems do not meet the element of urgency that compels the handling of COVID-19 and should be regulated in a separate law to be more comprehensive and provide legal certainty.<br>3 The desire to change the substance of the customs law with a Ministerial regulation. This article violates the petitioner's constitutional rights because it hinders and complicates the petitioner's efforts to advocate for improving the living standards of the poor and marginalized due to layoffs. In addition, this regulation has the potential to lead to tax management and tax duties that do not provide fair legal certainty and are not in line with the principles of APBD management for public services, as the petitioner continues to strive for through the petitioner's activities. |
| Article 12 paragraph (1) | This article needs to be accompanied by establishing a special account for handling COVID-19 so that the government could be more optimal, targeted, transparent, and accountable in managing the COVID-19 budget. Without a special account, this rule violates the petitioner's constitutional right to obtain accountable and transparent management of state finances. |
| Article 23 paragraph (1) letter a | It has the potential to be misused by forcing healthy banks to merge, take over, and integrate with troubled banks due to mismanagement from the start, not due to the COVID-19 pandemic. Thus, the use of the APBN can be misused for such actions, and the petitioner does not receive financial management that is accountable, transparent, and on target in the health, social and humanitarian fields. |

| | |
|---|---|
| Article 27 paragraph (1), paragraph (2), and (3) | The legitimization of the misappropriation of state financial management and freeing state administrators from the entanglement of articles of criminal acts of corruption, as well as closing access to justice for petitioners carrying out supervision, advocacy, and legal efforts, as well as to get justice when there is a potential misuse of the APBN that is not intended for social, health, and humanitarian needs during COVID-19. |
| Article 29 | Without a time limit for the validity of the Perppu, the government has the potential to be arbitrary, and the petitioner does not get fair legal certainty and accountable management of state finances for social and humanitarian interests that are focusing on COVID-19. |

Observing the description above, Petitioner I submitted a judicial review to the Constitutional Court due to the potential to hinder the Petitioner's efforts to realize the goals of the Petitioner's organization in the social and humanitarian fields, particularly concerning the current context of handling the COVID-19 pandemic.

In this petition, apart from Petitioner I as a private legal entity that submitted a judicial review, several other petitioners participated as petitioners in the judicial review, namely individual Petitioners as Indonesian Citizens (WNI):

a.Petitioner II, Petitioner III, and Petitioner IV are activists who fight for good governance, both at the central and regional levels, from the aspect of transparent, accountable, and targeted state financial management, aspects of public information disclosure, aspects of good public services, to aspects of anti-corruption governance.

b. Conducting a review of the Law on State Financial Policy for Handling COVID-19 and its attachments is an attempt by the Petitioners to fight for constitutional state financial management and restore the constitutional rights of the petitioners who have been violated as a result of the enactment of this Law.

Table 1.9 Descriptions of the Legal Position of Petitioners II, III, and IV

| Petitioner | Description of the Petitioner's Legal Position |
|---|---|
| Petitioner II | Petitioner II is an activist in advocating public information disclosure alongside the Coalition for Freedom of Information Network Indonesia (FOINI), which oversees the implementation of the UU KIP and the Open Government Partnership in Indonesia. The Petitioner's attention on the efforts to encourage public information disclosure and Open Government Partnership in Indonesia is also addressed by the seriousness of the Petitioner in reviewing various matters related to information disclosure and Open Government Partnership in Indonesia. It is shown by the petitioner's publication on Open Government Partnership in Indonesia (Book title: "Pembaruan Komisi Informasi: Menuju Komisi Informasi yang Mandiri dan Profesional", "Laporan Hasil Independen Monitoring Implementasi Open Government Partnership di Indonesia 2012-2013", "Melawan Korupsi, dari Advokasi hingga Pemantauan Masyarakat"). In addition to conducting studies, the Petitioners actively monitor access to public information during the COVID-19 disaster response period from the a-quo Law. |

| | |
|---|---|
| Petitioner III | Petitioner III, who works as a researcher, is also an activist in public budget advocacy to realize good state financial governance through good governance. Petitioner III's attention on the efforts to encourage a more reasonable state budgeting in Indonesia is also addressed by the seriousness of Petitioner III in conducting studies related to issues of public budget governance. It is shown by the Petitioner III's publications regarding the governance of state finances in Indonesia (Book titles: "Integration of Budget Planning, "Integrasi Perencanaan Penganggaran", Artikel "Mengawal Anggaran COVID-19", "Mengulik Anggaran Penanganan Wabah Corona"). In addition to conducting studies, Petitioner III is currently also actively monitoring public budget governance during the COVID-19 disaster response period based on the a-quo Law. |
| Petitioner IV | Petitioner IV is an individual Indonesian citizen who is active in community organizations that are concerned with public policies and services, as well as concerns about anti-corruption issues. From 2001-2006, Petitioner IV was the Coordinator of Koalisi Kebijakan Partisipatif (KKP) Simpul Sulawesi Selatan, in addition in 2008- 2013 as the Coordinator of the Koalisi Masyarakat Peduli Pelayanan Publik (MP3) Simpul Sulawesi Selatan, and also in 2002 - Now active as the Initiator of the Establishment and the Presidium of the Koalisi Masyarakat Anti Korupsi (KMAK) of South Sulawesi. Petitioner IV's attention on the efforts to encourage anti- corruption public policies and services is shown by books published by the Petitioner IV, entitled "Realizing Projects Without Corruption," "Planned Supervision of Education Funds, Technical Guidelines for DPRD," and "APBD Traffic Light: Best Practices." & Lesson Learned Budget Advocacy in Sulawesi |

Petitioner II, Petitioner III, and Petitioner IV are Indonesian citizens who have constitutional rights as stipulated in Article 23 Paragraph (1), Article 28C Paragraph (2), and Article 28D Paragraph (1) of the 1945 Constitution. Some rules in the Appendix applied to the Law on State Financial Policy for Handling COVID-19. Petitioner II, Petitioner III, and Petitioner IV argue that applying the above rules has eliminated the petitioners' constitutional rights and hampered the activism efforts of Petitioner II to IV to advance society and nation and state in encouraging and influencing policies and implementation of sound governance principles, especially on the aspects of transparency, accountability, and accuracy of APBN management, in this case, for handling the COVID-19 outbreak. This obstacle is also factually demonstrated by the petition of some rules in this Law, which do not provide fair legal guarantees and certainty for Petitioners II to IV in guarding and ensuring the management of state finances for COVID-19 has constitutional value.

In the context of strengthening the petitioner's legal position, the petitioner also explains that Petitioner II to IV are tax payers, as evidenced by a photocopy of the Taxpayer Identification No. (NPWP). As taxpayers, Petitioners II to IV is very interested in reviewing this Law, considering that the substance being reviewed is directly related to the management of the State Revenue and Expenditure Budget (APBN) for handling COVID-19, one of which comes from taxes paid by the Petitioners as taxpayers. In this case, the Petitioners demanded a constitutional rule of Law so that the budget, one of which comes from the petitioners' taxes, is managed in an accountable, transparent, and targeted manner to accelerate the handling of the COVID-19 pandemic and its implications.

The Constitutional Court's decision No. 37/PUU-XVIII/2020 also confirms the legal position of the petitioner, which reveals:[11]

[11] *Legal Considerations of the Constitutional Court regarding the Legal Position of the Petitioners in Decision No. 37/PUU-XVIII/2020.*

“That based on the entire description of the arguments for the legal standing of the Petitioners above, regardless of whether it is proven or not, according to the Court, the Petitioners consisting of Non-Governmental Organizations (Petitioner I) and activists who fight for governance have proven the evidence of the Petitioner’s argument regarding the process of forming the Law on State Financial Policy for Handling COVID- 19 and the conflicting norms in the articles petitioned for review of the 1945 Constitution. Good governance (Petitioners II to Petitioners IV) has been able to describe the direct linkage relationship with the Law being applied for and specifically describe the existence of a causal relationship between the validity of the norms reviewed by the Petitioners and the perceived constitutional loss of the Petitioners as regulated in the Articles of the Constitution. 1945. Moreover, the Petitioners are citizens directly affected by state financial policies as stipulated in the Law on State Financial Policy for Handling COVID- 19. The presumption of substantial and potential losses in question will no longer occur and will not occur again if the petition of the a-quo Petitioners is granted. Based on these considerations, the Court believes that the Petitioners have legal standing to act as the Petitioners in the a-quo petition.”

# Part Two

## Dynamics of The Law on State Financial Policy Review for Handling COVID-19

# The Challenges of Judicial Review of the Law on State Financial Policy for Handling COVID-19

In this section, the dynamics and challenges of the Judicial Review of the Law on State Financial Policy for Handling COVID-19 refer to Petition No. 37/PUU-XVIII/2020, which is the landmark decision of the Constitutional Court in the review of this Law and is a petition that the Constitutional Court partially granted. Petition No. 37/PUU-XVIII/2020 takes a more holistic picture of the problems in this Law, both from a legal and judicial perspective.

## Trial Model According to the COVID-19 Handling Protocol

Due to the COVID-19 pandemic, the trial process was adjusted to the health protocol for handling the COVID-19 pandemic. At the Preliminary Review and Review of the Petition for Correction, the trial was still carried out face-to-face in the Court's Meeting Room, provided that it complied with the health protocol, namely the limitation of the number of parties present in each case, a maximum of three people.

Then, the parties present must wear masks and gloves. However, for the subsequent trial, starting from the Hearing of the Government's Statement to the pronouncement of the verdict, the trial process has been carried out online through the Zoom Meeting platform. The parties are not allowed to attend directly to the Constitutional Court Building to control the spread of the COVID-19 pandemic and maintain the parties' health.

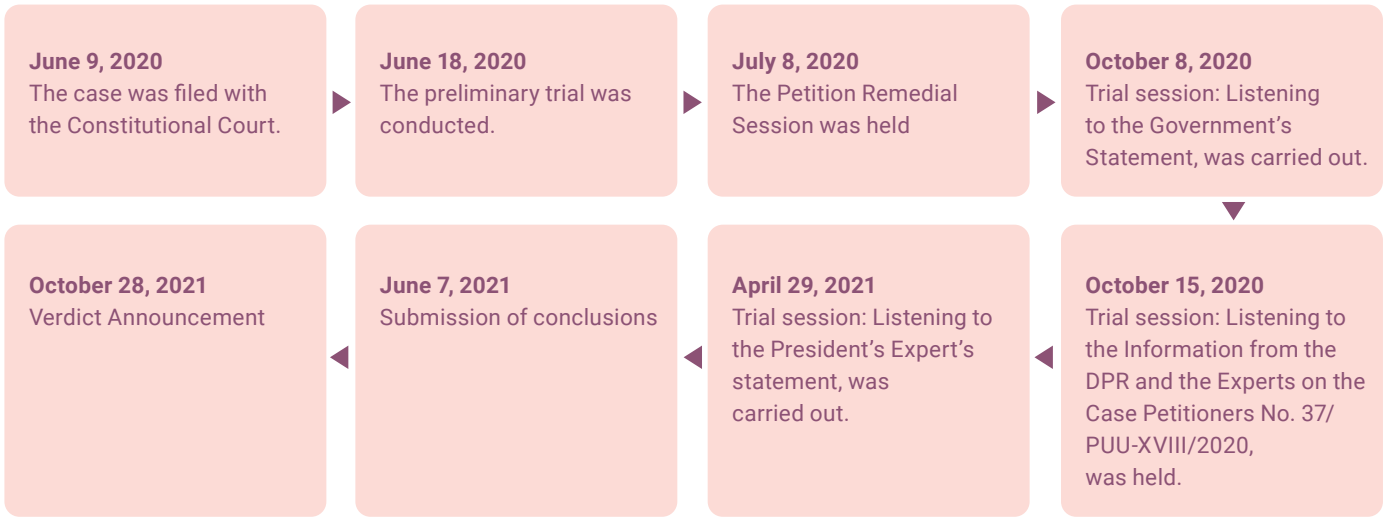
Although the trial was conducted online, the filing process was still carried out by submitting a hardcopy to the Admissions Section of the Constitutional Court. The number of files submitted is 12 (twelve) copies with details of one original copy and 11 (eleven) copies.

Before being submitted to the Constitutional Court's File Reception, all files are sterilized using a particular machine to kill viruses that can stick to the files. Currently, there is no new policy on digitizing files and reducing the number of files the Court must receive. The policy was adopted after the process of reviewing this Law was completed.

## The Length of the Trial Process

The trial process for Case No. 37/PUU-XVIII/2020 took a relatively long time. The first petition was registered with the Constitutional Court on June 9, 2020, while the pronouncement of the verdict was carried out on October 28, 2021. The process followed in this case in detail can be seen in the flow below.

**Chart 2.1 Process Flow of Case No. 37/PUU-XVII/2020**




The trial process has been running for 16 (sixteen) months. This time exceeds the average time for the decision announcement on judicial review in the State Finance category.

Based on the data collected by the KoDe Inisiatif (2003–2019), the average length of the review and decision process for the State Finance category from the time the case is registered with the Constitutional Court is as follows: [12]

[12] *Veri Junaidi et al., Reading 16 Years of the Constitutional Court Data for Judicial Review of the 1945 Constitution (2003-2019), Jakarta: Yayasan KoDe Inisiatif, p. 245.*

Table 2.1 Length of Time for Decisions on Judicial Review of State Finance Category (2003 – 2019)

| Decision Type | Average Length of issuance |
|---|---|
| Completely accepted | 9.3 months |
| Partially accepted | 8 months |
| Rejected | 11.4 months |
| Not acceptable | 8.6 months |
| Failed | 2 months |
| Determination (withdrawal) | 2 months |

Suppose you compare it with the data above. In that case, the time for decisions on examining the Law on State Financial Policy for Handling COVID-19 is too long, up to twice the average length of decisions in the State Finance category whose decisions are partially granted. The length of the trial was the result of the trial postponement. The judicial review of this Law experienced 3 (three) trial delays, namely because of (1) the initial adjustment of the Constitutional Court to the COVID-19 health protocol; (2) implementation of Large-Scale Social Restrictions rules that limit community mobilization and effectiveness of meetings in government offices and other public spaces; and (3) The government is not yet ready to present Experts.

The trial postponement due to COVID-19 pandemic is understandable. However, in this review, Constitutional Court does not capture the emergency aspect of the need to decide this case immediately. The review of this Law is considered an ordinary law review under normal circumstances, not a law to respond to an emergency. In fact, in the petition, a request has been presented to speed up the trial process for the judicial review of this Law because the Law on State Financial Policy for Handling COVID-19 is the fundamental basis for managing the COVID-19 budget. This Law is intended to respond to the management of the APBN in 2020, 2021, and 2022 Fiscal Years to be adjusted to the state of the COVID-19 pandemic. Due to the limited period and specific referrals, the Court should have been able to respond to the review more quickly.

This Law was formed through an emergency legal basis (Perppu) to respond to the pressing urgency caused by COVID-19. It is like the heart in handling COVID-19 if unconstitutionality, both in terms of procedures and in substantive terms, will hinder the acceleration of handling COVID-19.

This was also proven by the Constitutional Court's decision which partially granted the Petitioner's request and stated that there was a clause that was conditionally contradictory to the 1945 Constitution. The Constitutional Court should be able to read the conditions of urgency and emergency as reflected in the factual conditions of handling the COVID-19 pandemic and the substance of the Law being reviewed.

- **Proposition Demanding the Presence of the DPD and the Ombudsman of the Republic of Indonesia in the Session**

During the review of the Law on State Financial Policy for Handling COVID-19, the Petitioner for Case No. 37/PUU-XVIII/2020 had asked the Court of Justice to present the Regional Representatives Council (DPD) and the Indonesian Ombudsman as parties whose statements needed to be heard. It is necessary to note that both have links to judicial review and the implementation of the Law on State Financial Policy for Handling COVID-19.

The DPD's statement is needed to examine and strengthen the arguments related to the formal review of the DPD's involvement in the discussion process and consideration of the approval of the Perppu on the State Financial Policy for Handling COVID-19 into Law. The DPD's statement is intended to show the facts of DPD's involvement in the discussion of the Perppu because the Perppu contains material on regional finance and taxation. In addition, it is essential to dig up DPD information regarding the its involvement in the discussion of Perppu on the issue of administration practice, as shown in the discussion of Perppu No. 3 of 2005 concerning Amendments to Law No. 32 of 2004 concerning Regional Government and Perppu No. 1 of 2005. 2014 concerning the Election of Governors, Regents, and Mayors.

Meanwhile, the information from the Indonesian Ombudsman is needed to demonstrate the effectiveness of law enforcement through the implementation of the corrective function of the Indonesian Ombudsman in dealing with allegations of maladministration and fraud in the management of state finances for COVID-19, which substitutes for law enforcement in Court (civil, criminal, and state administration) closed through the enactment of Article 27 paragraph (1), paragraph (2), and paragraph (3) Attachment to Law No. 2 of 2020. The Ombudsman's statement is also intended to show the potential for maladministration and fraud in managing state finances for COVID-19 to enrich the consideration of the Constitutional Court's decision in the future.

However, the Constitutional Court rejected the request to present the DPD and the Ombudsman of the Republic of Indonesia to the court. The reason is that the existence of these two institutions is irrelevant to the substance of the judicial review. The Constitutional Court wants to focus more on examining the Law against the 1945 Constitution in a normative manner, not related to the implementation or practical aspects of this Law.

The Constitutional Court's refusal was quite disappointing. Because the presence of the DPD is closely related to the formal review proposed by the Petitioners, in this case, the Constitutional Court already has its stand on the substance of the review. However, the case review process has not yet been completed. On the other hand, the Constitutional Court's establishment to focus on normative review is counterproductive to the development of the Constitutional Court's constitutional adjudication so far, which often takes into account aspects of the implementation of the Act. The Indonesian Ombudsman holds the key to showing the potential for maladministration and violations, considering that during the COVID-19 pandemic, the Indonesian Ombudsman was flooded with reports of violations in the management of COVID-19 social assistance and the handling of COVID-19.

### Government Experts Not Known by the Petitioners

At the trial, the government proposed three experts who presented statements orally before the Constitutional Court: Dr. Maruarar Siahaan, SH, Dr. Chatib Basri, and Dr. W. Riawan Tjandra, SH, M. Hum. However, apart from the three experts, the Petitioners are unaware of any Government Expert who submitted affidavits or written statements, namely Expert Chandra M. Hamzah, SH, Expert Prof. Denny Indrayana, SH, LL.M., Ph.D., and Dr. Yunus Husein, SH, LL.M.

The Petitioners only learned about the addition of the three experts later after the Constitutional Court's decision was read. The Constitutional Court's Decision explains that the government presents additional experts who submit written statements.

When confirming with several attorneys for other petitions, the response was also the same: no one knows additional experts were involved.

It would be a shame if the committee of the Constitutional Court did not notify all petitioners for the Review of the Law on State Financial Policy for Handling COVID-19 of the presence of experts who only submitted written statements. The Petitioners were not allowed to clarify or declare bias the information presented by these three Experts.

## Debates on the Review of the Law on State Financial Policy for Handling COVID-19

### Reasons for Formal Review

In the formal review, the Petitioners rely on the basic concept of the importance of observing the due process of law-making. This benchmark assesses how obedient the legislators reflect the morality of the Law by carrying out constitutional procedures to maintain the continuity of the democratic process. Questioning the procedure for the formation of this Law is a logical consequence of Indonesia's construction as a state based on people's sovereignty (Article 1 Paragraph [2] of the 1945 Constitution) and as a state of Law (Article 1 Paragraph [3] of the 1945 Constitution). That said, the process of forming laws must follow the preceding applicable laws and carry out the people's will. In addition, these efforts were also functioned a form of correction from the Constitutional Court against the process of forming criminal laws to produce constitutional and quality legal products as a framework for state regulation. The issue of legal violations also includes the consequences of the violation, namely the legitimacy of the validity of the legal product. If it is proven that the Law is formally flawed in a formal review, it will impact the cancellation of the Law in its entirety.

In case No. 37/PUU-XVIII/2020, procedural issues that arose in the process of determining the Perppu to become the Law on State Financial Policy for Handling COVID-19 were: (1) the DPD was not involved in the discussion process to determine whether the Law was approved or not; and (2) a virtual meeting to take the approval of Perppu into a law which has the potential not to be attended concretely by members of the DPR.

In the formal review, some basics that become references are the interpretation of the articles of the 1945 Constitution, Law No. 12 of 2012 concerning the Establishment of Legislations, as amended by Law No. 15 of 2019 ("The Law on the Establishment of Legislations and Regulations Invitation"), and Law No. 17 of 2014 concerning the MPR, DPR, DPD, and DPRD and their amendments. At the time this Law was reviewed, the only decision of the Constitutional Court that became a reference for the formal review was the Constitutional Court Decision No. 27/PUU-VII/2009, dated June 16, 2010, concerning the Formal Review of Law No. 3 of 2009 concerning Amendments to the Act. Law No. 5 of 2004 concerning Amendments to Law No. 14 of 1985 concerning the Supreme Court.

Therefore, the jurisprudential sources used in the review of this Law are limited because, at the same time, the Constitutional Court is examining the Formal Review of laws that have drawn much public criticism, such as Law No. 19 of 2019 concerning the Second Amendment. On Law No. 30 of 2002 concerning the Corruption Eradication Commission ("Revision of the KPK Law") and Law No. 3 of 2020 concerning Amendments to Law No. 4 of 2009 concerning Mineral and Coal Mining ("Revision of the Minerba Law" ). In addition, the first formal review, partially granted by the Constitutional Court, namely the Formal Review of Law No. 11 of 2020 concerning Job Creation ("UU Cipta Kerja"), was decided later after this review. Therefore, the precedent of the Constitutional Court's decision on the formal review mentioned above has not become a reference.

- **DPD Involvement in Perppu Discussion**

The discussion of the Perppu on State Financial Policy for Handling COVID-19 does not involve the DPD as a regional representative. However, the substance is also related to several topics of the scope of work of the DPD and local governments. The absence of DPD's involvement is argued as on contrary to the values of people's sovereignty, the rule of Law, and the authority of the DPD in forming legislation in Indonesia.

The problem rests on the elaboration that the 1945 Constitution, particularly Article 22, does not explicitly regulate the role of the DPD in the discussion of the Perppu. However, in the Perppu on State Financial Policy for Handling COVID-19, it is clear that there is material content that is part of the authority for the discussion and given consideration by the DPD as set out in Article 22D Paragraph (2) and Article 23 Paragraph (2) of the 1945 Constitution. In addition, it departs from Article 71, paragraph (1) of the Law on the Formation of Legislation, which stipulates that the mechanism for discussing the bill on the determination of the Perppu is carried out through the exact mechanism as the discussion of the draft law.

In conclusion, the involvement of the DPD in discussing and providing considerations regarding the substance of the Perppu is crucial. It must be understood that the role of the DPD is as an institution that participates in discussing and providing considerations, not participating in approving as is the constitutional authority of the DPR and the President. Alternatively, in other words, the DPD is a regional representative institution whose views must be heard. It is inseparable from the existence of 6 (six) Perppu materials that are included in the scope of the DPD's discussion and consideration authority, which are as follows:

Table 2.2 Regulatory Materials and Potential Constitutional Roles of DPD

| Article & Theme Settings | Setting Material | Potential Constitutional Role of DPD |
|---|---|---|
| Article 2 paragraph (1) letter a No. 1, No. 2, and No. 3 **(Material of the Law on APBN)** | Great power for the government to determine the limits of the budget deficit unilaterally without requiring the approval of the DPR and the consideration of the DPD | To consider the bill (Article 23 Paragraph [2] of the 1945 Constitution) |
| Article 2 paragraph (1) letter e No. 2 **(Education)** | Education endowment can be allocated for handling COVID- 19 | To consider the bill (Article 22D Paragraph [2] of the 1945 Constitution) |
| Article 3 paragraph (2) **(Regional autonomy, central and regional relations, as well as central and regional financial balance)** | Policies in regional finance | Participation in discussing the Bill (Article 22D Paragraph [2] of the 1945 Constitution) |
| Article 4 paragraph (1) letter a jo. Article 5 letter a and letter b **(Tax)** | Adjustment of income tax rates for domestic corporate taxpayers and permanent establishments | To consider the bill (Article 22D Paragraph [2] of the 1945 Constitution) |
| Article 4 paragraph (1) letter b, Article 4 paragraph (2), Article 6, and Article 7 **(Taxes)** | Taxes for Trading Through Electronic Systems | To consider the bill (Article 22D Paragraph [2] of the 1945 Constitution) |

The involvement of the DPD in discussing the determination of the Perppu must be interpreted extensively and systematically by drawing a silver lining between Article 22 and Article 22D of the 1945 Constitution so that the DPD should be able to play a role in the discussion of the Perppu which has been ratified as the Law on State Financial Policy for Handling COVID-19. Moreover, in the Perppu, the regulated aspects include DPD coordination, which the 1945 Constitution explicitly regulates. Thus, the involvement of the DPD in carrying out checks and balances on executive power in issuing Perppu during an emergency cannot be eliminated.

The precedent of the Constitutional Court's decision has repeatedly strengthened the bargaining position of the DPD in carrying out the checks and balances function in the form of implementing the legislative function through the Constitutional Court Decision No. 92/PUU-X/2012, dated March 27, 2013, and the Constitutional Court Decision No. 79/PUU- XII/2014 dated September 22, 2015. In particular, in the Constitutional Court's Decision No. 92/PUU-X/2012, dated March 27, 2013, the Court has opened space for the DPD to participate in the discussion of Perppu, particularly about revoking certain Perppu. In the decisions, the Constitutional Court interpreted that in brief, when a bill on the revocation of the Perppu was related to regional autonomy; central and regional relations; the formation and expansion and merging of regions; management of natural resources and other economic resources; as well as the balance of central and regional finances, the DPD must be involved during the discussion.

The exclusion of the DPD in the discussion of the Perppu, whose substance is related to local government administration, reduces the value proposition of the rule of Law (Article 1 Paragraph [3] of the 1945 Constitution). One aspect of the crystallization on the value of the rule of Law is due to the limitation of power. In this case, the practice of limiting the power through the function of checks and balances, the power of the DPD is reduced due to the absence of the role of the DPD to participate in discussing and considering issues that are not applied optimally.

In addition, the DPD also carries the mandate of the regional representation of the people as a form of people's sovereignty in Article 1 Paragraph (2) of the 1945 Constitution. The public health emergency due to COVID-19 in Indonesia has had social, health, economic and other aspects up to the regional level. Not a single province in Indonesia has been spared the spread of COVID-19. Therefore, the role of the DPD here is crucial in translating the aspirations and needs of local government administration in dealing with COVID-19.

Suppose you look back on Indonesia's state administration practices in the formation of Perppu so far. In that case, it can be illustrated that, on the ground, the DPD has participated in the discussion of Perppu.

For example, in the discussion of Perppu No. 3 of 2005 concerning Amendments to Law No. 32 of 2004 concerning Regional Government (vide Constitutional Court Decision No. 92/PUU-X/2012) and Perppu No. 1 of 2014 concerning the Election of Governors, Regents, and Mayors. Even when the request for a formal review was being submitted, Committee I of DPD aggressively responded to Perppu No. 2 of 2020, which regulates the postponement of regent elections during the COVID-19 pandemic as stated in DPD RI Letter No. PU.04/1097/DPDRI/VI/2020 regarding the Statement of Rejection to the Implementation of the Simultaneous Regent Elections in 2020. This state administration practice proves that no reason can negate the role of the DPD in the discussion of Perppu, especially Perppu No. 1 of 2020, stipulated by Law No. 2 of 2020.

However, the Constitutional Court considered the role of the DPD in discussing the Perppu irrelevant. It is also regrettable when it is related to the Constitutional Court Decision No. 92/PUU-X/2012 and the practices presented in the trial; the Constitutional Court once again localized the role of the DPD only limited to forming laws alone, not laws originating from the Perppu.

The Constitutional Court also localized the involvement of the DPD as far as the perppu revocation aspect was concerned. The context of the revocation of the perppu also goes through the discussion stage first to state whether you agree or disagree if the perppu is passed into Law. [13]

### Concrete Attendance at DPR Virtual Meeting

The COVID-19 pandemic has changed many aspects of people's lives, one of which is avoiding crowds to minimize the spread of COVID-19. Therefore, the meetings are used by utilizing technology and are conducted online. Not to mention the implementation of a plenary meeting by the DPR to ratify the Law on State Financial Policy for Handling COVID-19, which is also carried out online or virtual.

The use of technology through online meetings to support the performance of the DPR and public accessibility to the performance of the DPR is a development that must be supported. However, there are concerns about the substantial presence of the DPR in the online forum. Even though the plenary session is held online, DPR members must be physically present in front of the virtual platform and focus on the approval process for the Perppu determination. Through online meetings, it is possible that the "absenteeism" rate of irresponsible legislators will be much greater. Therefore, through this review, it is hoped that the Constitutional Court can provide guidance regarding the constitutionality of virtual meetings in law formation, especially concerning how to ensure and require the substantial presence of legislative members at virtual meetings.

[13] *Article 52 paragraph (5) and paragraph (6) of the Law on the Establishment of Legislation.*

This concern is justified because it departs from the case of taking approval for revising the KPK Law in 2019. At the plenary session, the DPR meeting room was not complete and empty of DPR members. During the reading of the DPR's statement in the judicial review of the revision of the KPK Law, the DPR clearly and unhesitatingly stated that the practice of "attendance in absentia" in DPR sessions was common. After signing the attendance sheet, DPR members can leave the room to attend to other agendas. The practice counts as attendance, even if the person is not physically present in the room.

At the Plenary Meeting of the Determination of the Perppu on State Financial Policy for Handling COVID-19 into Law, the participants met a-quorum; namely, there were 296 members with 255 virtual attendance and 41 physically attending. However, it cannot be determined whether the person concerned was present at the meeting; they could just log in for the attendance, then log out to do other activities. Another probability is that the account used may remain on standby, but the person concerned does not follow the meeting. Alternatively, more fatally, it could be that the person concerned only watched the meeting via live streaming on the Parliament TV channel or YouTube. It was counted as a presence. Such conditions will propagate and have fatal consequences for subsequent trial agendas, such as in the case of decision-making. Members who do not attend concretely will miss delivering their views and voices on specific issues. Alternatively, in other words, the person concerned is not responsible for conveying the constituents' aspirations through the DPR session forums.

The probability of non-concrete presence and merely "attendance in absentia" is unconstitutional because it has reduced the essence of the implementation of the people's mandate entrusted to the representatives in the DPR and also reduced democratic values, as crystallized in Article 1 Paragraph [2] of the 1945 Constitution. A concrete attendance becomes a compass to direct the constitutionality of a legislative discussion.

The concrete attendance of legislative members in DPR meetings is vital as a manifestation of accountability and conveying constituents' aspirations. As stated by Saldi Isra, who has the capacity as an expert in the Constitutional Court Decision No. 27/PUU-VII/2009, dated June 16, 2010, there are three primary reasons why concrete attendance is important:

1. As a concrete form of implementing the concept of people's representation. If members of the people's representatives are not present in the decision-making process, the people are absent in essential and strategic decision-making;
2. To provide an opportunity for members of the legislature who, from the beginning, did not participate in discussing vital draft decisions (e.g., the draft law) because the internal mechanisms of the legislative body leave it to the section in charge of specific fields; and
3. To anticipate the possibility of determining/making a final decision through a voting mechanism. If voting decisions are unavoidable, at least according to the minimum requirements, as noted in Black's Law Dictionary and Robert L. Madex, members of the legislature must be present, especially to pass certain types of legislation.

Questioning attendance in virtual meetings is not an act of resistance to the use of technology and information. In fact, through this review, the petitioners support digitalization to facilitate the performance of state administrators and public services for the community. However, the game's rules for the use of technology must not be played with; they must be firmly established and provide no space for deviations that reduce the essence of popular sovereignty and the implementation of constitutional democracy.

### Reasons for Judicial Review

In case No. 37/PUU-XVIII/2020, the judicial review of the Law on State Financial Policy for Handling COVID-19 wiped out almost all the main points of the content of the Act. There are 13 (thirteen) materials in question, which are as follows:

Table 2.3 Content in question in Case No. 37/PUU-XVII/2020

| Reviewed Part | Violated 1945 Constitution Norms |
|---|---|
| Title and Article 1 paragraph (3) letter b concerning the scope of the Law and its attachments | **Article 1, paragraph (3)**<br>Indonesia is a state of Law.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law. |

| | |
|---|---|
| | **Article 22 of the 1945 Constitution**<br>(1) In the case of compelling urgency, the President has the right to stipulate government regulations in lieu of Law.<br>(2) The government regulation must be approved by the House of Representatives in the next session.<br>(3) If no approval is obtained, the government regulation must be revoked. |
| Article 2 paragraph (1) letter a No. 1, No. 2, and No. 3 concerning widening the deficit limit to above 3% (three percent) | **Article 1 Paragraph (2)**<br>Sovereignty is in the hands of the people and is implemented according to the Constitution.<br><br>**Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 20A Paragraph (1)**<br>The House of Representatives has a legislative function, a budgetary function, and a supervisory function.<br><br>**Article 23 Paragraph (2)**<br>The draft law on the state revenue and expenditure budget is submitted by the President to be discussed with the DPR by taking into account the considerations of the DPD. |
| Article 2 paragraph (1) letter e No. 2 concerning the education endowment fund allocated for handling COVID-19 | **Article 31 Paragraph (1)**<br>Every citizen has the right to education.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, a guarantee, a protection, q fair legal certainty, and an equal treatment before the Law. |
| Article 2 paragraph (1) letter f jo. Article 16 paragraph (1) letter c and Article 19 regarding the issuance of SUN/SBSN by the government unilaterally and the purchase of SUN/SBSN by Bank Indonesia in the primary market | **Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 20A Paragraph (1)**<br>The House of Representatives has a legislative function, a budgetary function, and a supervisory function.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, a guarantee, a protection, q fair legal certainty, and an equal treatment before the Law.<br><br>**Article 23D**<br>The state has a central bank whose structure, position, authority, responsibility, and independence are regulated by Law. |

| | |
|---|---|
| Article 2 paragraph (1) letter g concerning the determination of sources of financing by the government unilaterally. | **Article 1 Paragraph (2)**<br>Sovereignty is in the hands of the people and is implemented according to the Constitution.<br><br>**Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 20A Paragraph (1)**<br>The House of Representatives has a legislative function, a budget function, and a supervisory function.<br><br>**Article 23 Paragraph (2)**<br>The draft law on the state revenue and expenditure budget is submitted by the President to be discussed with the DPR by taking into account the considerations of the DPD. |
| Article 3 Paragraph (2) concerning the regulation of regional government budget refocusing through the Regulation of the Minister of Home Affairs | **Article 18 Paragraph (2) and Paragraph (5)**<br>(2) The provincial, district, and city governments shall regulate and manage their government affairs according to the principle of autonomy and co-administration.<br>(5) The regional government shall exercise the broadest possible autonomy, except for government affairs determined by Law to be the affairs of the Central Government. |
| Article 4 paragraph (1) letter a jo. Article 5 letter a and letter b about tax incentives | **Article 28D Paragraph (1)**<br>Everyone has the right to recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law.<br><br>**Article 28D Paragraph (2)**<br>Everyone has the right to work and receive fair and proper remuneration and treatment in an employment relationship. |
| Article 4 paragraph<br>(1) letter b, Article 4 paragraph<br>(2), Article 6, and Article 7 regarding taxes for Trading Through Electronic Systems (PMSE) | **Article 22 Paragraph (1)**<br>In the event of compelling urgency, the President has the right to stipulate government regulations in lieu of Law.<br><br>**Article 23A**<br>Law regulates taxes and other coercive levies for the state. |
| Article 9 and Article 10 paragraph (1) and paragraph (2) regarding the exemption of import duty | **Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law. |
| Article 12 paragraph (1)<br>about COVID-19 budget governance | **Article 23 Paragraph (1)**<br>The state revenue and expenditure budget as a manifestation of state financial management is determined annually by Law and is carried out openly and responsibly for the greatest prosperity of the people. |

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| | **Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law. |
| Article 23 paragraph (1) letter concerning the authority of OJK to issue restructuring orders | **Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law. |
| Article 27 paragraph (1), paragraph (2), and (3) regarding funding based on the a-quo Law is not a loss to the state, immunity of state administrators, and closure of TUN legal remedies. | **Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 23 Paragraph (1)**<br>The state revenue and expenditure budget as a manifestation of state financial management is determined annually by Law and is carried out openly and responsibly for the greatest prosperity of the people.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law.<br><br>**Article 23E paragraph (1)**<br>An independent Supreme Audit Agency is established to examine state finances' management and responsibilities.<br><br>**Article 24 Paragraph (1) and Paragraph (2)**<br>(1) Judicial power is an independent power to administer justice to enforce Law and justice. (2) Judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a Constitutional Court.<br><br>**Article 27 Paragraph (1)**<br>All citizens have the same position in Law and government and are obliged to uphold the Law and government without exception. |
| Article 29 on closing | **Article 1, paragraph 3)**<br>Indonesia is a state of Law.<br><br>**Article 28D Paragraph (1)**<br>Everyone has the right to get recognition, guarantee, protection, fair legal certainty, and equal treatment before the Law. |

In general, the review is based on concerns:

1. That the scope of the a-quo Law extends not only to resolve the crisis due to the COVID-19 pandemic but also to other economic crises that have nothing to do with the COVID-19 pandemic.
2. That the a-quo law does not reflect the constitutional legal basis for managing state finances.
3. Negating the function and authority of supervising the people's representative institutions, the Supreme Audit Agency, the Supreme Court and the judiciary below it, and the public at large, as well as legalizing the corrupt practice of the granary of disaster management funds; and
4. The probability for inappropriate use of funds raised for handling the COVID- 19 pandemic.

Given its substance, this Law is the basic game rule for managing the APBN for Fiscal Year 2020, Fiscal Year 2021, and Fiscal Year 2022. Because this Law is also aimed at responding to health emergencies due to the COVID-19 pandemic, this Law also gave broad flexibility for the government to manage the budget. However, there is no balance and broad supervisory role from the legislature (DPR and DPD), as if the COVID-19 pandemic and public health emergencies could immediately override the roles of the two institutions.

In addition, there is no time limit for the validity of this Law. Even when conditions have returned to normal, in the sense that the COVID-19 pandemic has become endemic, this Law is still in effect. If this Law is maintained, there is the potential for an extensive misuse of the APBN, triggered by the lack of control of the legislative body and the absence of a time limit for its validity.

The review of the Law on State Financial Policy for Handling COVID-19 also challenges how far the content material that can be regulated in an emergency law responds to a state of emergency, such as the addition of the authority of BI, OJK, and LPS which are also applicable in normal conditions, or the provisions of the Trade Through Electronic System (PMSE) tax that have nothing to do with the handling of COVID-19, but was more of the material from the Tax Omnibus Law If the Constitutional Court is not strict regarding the substance of the emergency law, then almost any materials can be included in the Perppu to respond to the emergency, whether they are related or not.

Not only compared to the 1945 Constitution, the law on financial policy for COVID-19 also has some limitations against the standard rules of the constitution, which then require it to adhere, theoretically, to the assessment results conducted to review the elements that form an emergency law.

Such formation needs to comply with the following factors:[14] (1) there should be a situation considered as a dangerous threat; (2) there should a reasonable necessity requiring immediate solution and is proportional (reasonable necessity and proportionality); (3) there must be a time limit (limited time); (4) there should be strict supervision from the legislative and judicial powers.

The term *dangerous* threat in the above exposition means assessing whether there is indeed a compelling urgency or an emergency to be resolved immediately, not just because of a *legal vacuum*. Then, the term *reasonable necessity and proportionality* means assessing whether the objectives to be achieved from the issuance of the perppu and whether the rules are legitimate and important? Is there a rational relationship between the goals to be achieved and the means chosen to achieve them through the emergency law policy? Is it important for countries to achieve these goals? And has there been a proportionality between the public interest and the impact on individual constitutional interests or rights? Next, the term *limited time* means assessing the need for a time limit to resolve an emergency with an emergency law. In other words, emergency law must no longer be valid when the emergency has been resolved and the state administration has returned to normal.

Finally, the checks and balances function ensures that the extraordinary conducts proposed in the emergency law are under the strict supervision of the legislative and judicial institutions. These factors can assist in the assessment so that the Law on State Financial Policy for Handling COVID-19 can avert what Stefanus Hendrianto said as *"... abusive constitutionalism in Indonesia, with the government's management of the pandemic as a pretext"*, which means arbitrary constitutionalism with the handing of the pandemic as the cause. [15]

### Title and Scope of the Law

The title of the Law being reviewed is the State Financial Policy and Financial System Stability for Handling the COVID Pandemic and/or In Facing Threats That Endanger the National Economy and/or Financial System Stability. The use of the word "and/or" in the title expands the scope and material of this Law, not only for handling the COVID-19 pandemic and its impacts but also for "Threats That Endanger the National Economy" and "Financial System Stability," beyond the impact of the COVID-19 pandemic. The budget allocated under this Law can also expand, not only for accelerating the handling of COVID-19 and its impacts but for everything the Government considers and interprets as a national economic crisis and financial system stability. The breadth of this scope makes the title and the Law are treated as against the principles of the Nation of Laws, the principle of protection, assurance and the presence of a just law, and the conditions stated as "reasonable necessity requiring immediate solution" behind the issuance of the Perppu.

*[14] Jimly Asshiddiqie, Hukum Tata Negara Darurat, Jakarta: PT Rajawali Grafindo Persadar, 2007, hlm. 207; Tom Ginsburg dan Mila Versteeg, Statef of Emergency: Part II, <https://blog.harvardlawreview.org/states-of-emergencies-part-ii/>, diakses pada [27/06/2020].*

*[15] Stefanus Hendrianto, Early Warning Signs of Abusive Constitutionalism in Indonesia: Pandemic as Pretext, Int'l J. Const. L. Blogs , Jun. 20, 2020, at: http://www.iconnectblog.com/2020/06/early-warning-signs-of-abusive-constitutionalism-in- indonesia-pandemic-as-pretext/*

Article No. 22 of the 1945 Constitution stipulates that the formation of a perppu must be based on "matters of compelling urgency." The Constitutional Court gave a definition to the term "compelling urgency" in the Constitutional Court's Decision No. 138/PUU-VII/2009, dated February 8, 2010, which must be in the following circumstances:

a. The existence of circumstances, namely an urgent need to resolve legal issues quickly based on the law;
b. The required law does not yet exist, resulting in a legal vacuum, or there is a law but it is not sufficient;
c. The legal vacuum cannot be overcome by making laws in the usual procedure because it will take quite a long time, while the urgent situation requires certainty to be resolved;

In other decisions, namely the Constitutional Court Decision No. 1-2/PUU-XII/2014 and the Constitutional Court Decision No. 118-119-125-126-127-129-130-135/PUU-XII/2014, the Perppu that has been issued must resolve the problem that arise immediately. The scope of this law should be limited to handling and resolving the implications of the COVID-19 pandemic, because this clause fulfills the aspect of "forced urgency", considering that imminent danger is in sight and has met the prerequisites of the Perppu which must take effect immediately, as determined by the Constitutional Court in its decision precedent. Crisis and other threats that are not related to the acceleration of handling COVID-19 do not meet the aspects of necessity and proportionality in the formation of emergency law.

Limiting the scope is also important to fulfill the principle of the rule of law, especially to limit the power. The expansion of the material will provide flexibility for the government to carry out extraordinary actions against the national economic crisis and financial system crisis that have nothing to do with the COVID-19 pandemic and this has the potential to open the door to arbitrary administration of government. Therefore, in order to provide guarantees, protection, and fair legal certainty, considering the handling of this crisis is also related to the management of the State Budget, it is necessary to limit the scope, which is only for handling and resolving the implications of the COVID-19 pandemic.

### Deficit Widening Rules Without DPR Approval and DPD Considerations

Article 2 paragraph (1) letter a no.1, 2, and 3 Attached to the Law on State Financial Policy for Handling COVID-19 is also questioned and considered to be contrary to the principles of the rule of law, the principle of people's sovereignty, the oversight and budgetary functions of the DPR, as well as the principle of state financial management. This article served as the foundation for regulating the flexibility of determining the budget deficit, which then allowed a deficit limit of greater than 3% (three percent) [16] in order to deal with the COVID-19 pandemic.

There are at least four problems with the Article:

1. The government has the authority to set its own budget deficit limits without requiring the approval of the DPR and the consideration of the DPD;
2. This article does not explicitly regulate the percentage of the widening of the budget deficit, this rule only stipulates the amount of the deficit due to the handling of COVID- 19 above 3% (three percent);
3. The deficit limit above 3% is set until the end of the 2022 Fiscal Year without a mechanism to evaluate the size of the deficit in each fiscal year. This article only regulates adjustments in determining the deficit during a crisis that is carried out in stages;
4. The widening of the budget deficit is not only aimed at dealing with the crisis due to the COVID-19 pandemic, but also to deal with all forms of threats that endanger the national economy and financial system stability beyond the impact of the COVID-19 outbreak.

In the petition No. 37/PUU-XVIII/2020, the Petitioner did not question the deficit limit figure, because the petitioner did not have the capacity to calculate a reasonable number during a public health emergency. The widening of the budget deficit is a consequence of higher state expenditures than revenues due to increased state spending and financing for handling the COVID-19 pandemic. The higher the percentage of the budget deficit, the bigger the impact will be on the source of financing, the government has the potential to issue debt securities to cover the deficit.

However, this Article does not specify the upper limit of budget deficits, moreover this widening is not only intended to deal with the crisis due to COVID-19, but also to deal with threats and crises of other conditions besides COVID-19. Therefore, to provide fair legal certainty and limit the movement of state officials to make problems worse, for example by using the article as the basis to smuggle counterproductive legal actions for the national economy and state financial stability. Therefore, the widening deficit balance must be limited to dealing with COVID-19 and the crisis arising from COVID-19 alone.

Another crucial point of this article is that the government gets more authority to play a role in setting budget deficit limits unilaterally in the face of the COVID-19 pandemic, without any approval and evaluation from the DPR. Although the executive has central authority in handling emergencies, the principle of checks and balances cannot be negated. As a state of law, the application of the principle of limitation of power in the administration of the state plays a very important role. Executive power must be kept in check against potential arbitrariness.

[16] *Elucidation of Article 12 paragraph (3) of Law Number 17 of 2003 concerning State Finance (hereinafter referred to as "State Financial Law").*

During a public health emergency, the control of the legislature (DPR) over the executive (President) should be strengthened to avoid abuse of emergency powers. Parliamentary mechanisms (special measures of legislative oversight) must be put in place to counterbalance the President's powers in times of emergency. Article 20A Paragraph (1) of the 1945 Constitution stipulates that the DPR has three functions, namely the legislative function, the supervisory function, and the budgetary function. In times of emergency, Parliament should focus more on carrying out its oversight and budgetary functions.

The preparation and management of state finances in the APBN must be in line with the principle of popular sovereignty. All state assets and finances belong to the sovereign people, with the government acting only as steward and manager.[17] This means that the preparation, amendment and management of the State Budget must be based on the approval of the people, represented by the DPR through the implementation of the supervisory and budgetary functions.

Determining the widening of the deficit should not be done by the government unilaterally, but involves the approval of the DPR and DPD consideration. Through their constitutional functions, DPR and DPD serve as a counterweight that will control, assess the rationality and give approval to the establishment of deficit limits. It is reflected in the supervisory and budgetary functions (vide Article 20A Paragraph [1] of the 1945 Constitution) and the consideration function of DPD (vide Article 23 Paragraph [2] of the 1945 Constitution). In addition, the DPR should also play a role in evaluating the size of the deficit and the state's financial capacity in each fiscal year, so that adjustments to the size of the deficit are determined based on the control function performed by the DPR.

It is considered important, because in times of emergency, the President as the holder of state administration power has the authority to ratify extraordinary measures. However, in order not to deviate from the Constitution, the President's powers in times of emergency must still be balanced by the powers of the legislature, which has the right to carry out extraordinary measures of legislative oversight.

Therefore, to put this Article back on track, at least the Constitutional Court can provide additional definitions as follows,

1. The determination of the budget deficit limit by the President is done after being discussed together and approved by DPR by taking into account the consideration of DPD;

2. The establishment of a budget deficit limit exceeding 3% of GDP during the handling period of (COVID-19) for a maximum of until the end of the 2022 Fiscal Year, preceded by an evaluation in each Fiscal Year.

- **Use of Education Endowment Fund for COVID-19 Handling**

Article 2 paragraph (1) letter e no. 2 of the Annex to the Financial Policy Law for Handling the COVID-19 Pandemic authorizes the government to be able to use the education endowment fund for handling the COVID-19 pandemic.

It is considered contrary to the essence of the education endowment fund, which is to ensure the continuity of education programs for the next generation as a form of intergenerational accountability, as stipulated in Article 2 of Presidential Regulation No. 12/2019 on Education Endowment Fund (hereinafter referred to as the "Presidential Regulation on Education Endowment Fund"). The education endowment fund is intended to implement service programs, operations, and/or to increase the education endowment fund. Service programs include degree and non-degree scholarships and research funding. Meanwhile, the service program and other service programs are determined by the Board of Trustees (vide Article 10 paragraph (1), paragraph (2), and paragraph (3) of the Presidential Regulation on Education Endowment Fund).

Article 31 Paragraph (1) of the 1945 Constitution guarantees that every citizen has the right to education. This means that the state is responsible for fulfilling the educational rights of every citizen, one of which is by managing an education endowment fund so that the continuity of national education implementation is guaranteed.

The use of education endowment funds to implement state financial policy in the context of handling COVID-19 creates legal uncertainty, because it has deviated from the nature of education endowment funds. The government also has the potential to override its responsibility to fulfill the right to education of citizens in a sustainable and cross-generational manner.

- **Issuance of Notes without Parliamentary Approval and Purchase by Bank Indonesia in the Primary Market**

Article 2 paragraph (1) letter f jo. Article 16 paragraph (1) letter c and Article 19 of the Annex to the Law on State Financial Policy for Handling COVID-19 are considered to be contrary to the principle of the rule of law, the principle of popular sovereignty, the supervisory and budgetary functions of the DPR, the independence of Bank Indonesia, and the principle of fair legal certainty. The argument comes from the crucial issues that have arisen, namely: (1) the issuance of State debt securities (SUN) and/or State Sharia Securities (SBSN) can be carried out unilaterally by the government without involving the approval of the DPR in advance. (2) Bank Indonesia (BI) can purchase SUN and/or SBSN issued by the government in the primary market; and (3) one of the purposes of BI's use of funds to purchase SUN and/or SBSN is to maintain the sustainability of state financial management.

[17] *Jimly Asshiddiqie, The Budget Function of the House of Representatives, delivered at a Public Hearing of the Budget Committee of the House of Representatives, 2011, pp. 5.*

The issuance of SUN and SBSN is one of the potential sources of financing in the state budget. The purpose of the issuance of SUN according to Article 4 of Law Number 24 of 2002 concerning Government Securities ("SUN Law"), namely:

a. Finance the state budget deficit;
b. To cover short-term cash shortages due to mismatches between cash flows of receipts and disbursements from the State Cash Account in one fiscal year;
c. Managing the sovereign debt portfolio.

Meanwhile, the purpose of SBSN issuance according to Article 4 of Law No. 19/2008 on State Sharia Securities ("SBSN Law") is to finance the state budget including financing project development. In the Explanation of this Article, what is meant by "financing project development" refers to projects for which funds have been allocated in the State Budget, including infrastructure projects in the energy, telecommunications, transportation, agriculture, manufacturing industry, and public housing sectors.

Referring to the SUN Law and SBSN Law, as part of the APBN financing sources in certain circumstances, the issuance of SUN and SBSN must first obtain approval from the DPR. In this case, the DPR has an important role in the issuance of debt securities, which is to approve or reject. The issuance of sovereign debt can have far-reaching implications for the country's financial management across generations. Here, the DPR plays a role in providing control for the government to ensure that the debt issuance is well-targeted. based on prudential principles, and still in a rational amount, interest rate, and maturity period so as not to burden the government in the next period.

In the context of a public health emergency, the House of Representatives' oversight of the President cannot be negated on the grounds of urgency, instead it should be strengthened to avoid abuse of power. The oversight function is closely attached to the DPR, as referred to in Article 20A Paragraph (1) of the 1945 Constitution, so it cannot be reduced in times of emergency like this. Therefore, the House of Representatives must implement a special oversight and control mechanism for emergencies in order to balance the President's power in times of emergency.

On this basis, Article 2 paragraph (1) letter f of the Annex to the Law on State Financial Policy for Handling COVID-19 is contrary to Article 1 paragraph (2), Article 1 paragraph (3), and Article 20A paragraph (1) of the 1945 Constitution if it is not interpreted as "...issuing Government Securities and / or State Sharia Securities with a specific purpose, especially in the context of the Corona Virus Disease 2019 (COVID-19) pandemic, by first obtaining DPR approval...".

The next issue is the ability of BI to buy SUN and/or SBSN issued by the government in the primary market or quantitative easing. Article 2 paragraph (1) letter f along the phrase "Bank Indonesia" as well as Article 16 paragraph (1) letter c and Article 19 of the Annex to the Law on State Financial Policy for Handling COVID-19 which regulates that BI can purchase SUN and / or SBSN in the primary market is contrary to the 1945 Constitution, especially Articles 23D and 28D Paragraph (1) of the 1945 Constitution.

The existence of this clause has the potential to tarnish BI's independence as the central bank mandated in Article 23D of the 1945 Constitution. BI's independence is reaffirmed in Article 4 paragraph (2) of Law No. 23 Year 1999 concerning Bank Indonesia, as amended several times in Law No.3 Year 2004 and Law No. 6 Year 2009 ("Bank Indonesia Law"), namely Bank Indonesia is an independent state institution in carrying out its duties and authorities, free from interference from the Government and/or other parties, except for matters expressly regulated in this Law.

The practice of quantitative easing needs to be avoided on several considerations:

a. Potentially violates the principle of BI independence guaranteed by the constitution, because when BI can buy debt securities through the primary market, it is indirectly placed as a subordinate of the government. The reason is because BI is encouraged to continue printing money to fulfill the purchase of debt securities;
b. Potentially poses a risk of obstruction of prudent principle because this practice mixes fiscal and monetary regimes. BI as the central bank is an institution authorized to set monetary policy to maintain currency stability and control inflation. Meanwhile, the authority to set fiscal policy to manage and orient the economy is the responsibility of the government, in this case the Ministry of Finance. Purchasing debt securities in the primary market is a form of fiscal policy to cover budget deficits. This action could be a loophole for government intervention against BI;
c. May pose an unlimited purchase risk. BI is placed as the last resort in the purchase of sovereign debt securities. However, this practice may lead to the loss of BI's capacity to determine when to buy debt securities and when to stop. One of the concerns is that the remaining global bonds that do not sell in the market will be charged to BI entirely;
d. May pose emission risks in the primary market. The printing of new emissions will be more vulnerable, so it may not be more flexible to sell due to the very high price;
e. When BI is placed as the last resort to buy government bonds in the primary market, there is a potential maximum deficit risk on fiscal policy that encourages the government to implement spending with a maximum deficit limit.

### Determination of Financing Sources by the Government without Parliamentary Approval

Article 2 paragraph (1) letter g of the Annex to the Law on State Financial Policy for Handling COVID-19 provides discretion for the government to determine the sources of budget financing for handling COVID-19 and its impacts unilaterally without involving the DPR. This regulation needs to be accompanied by Article 2 paragraph (1) letter a of the Annex to the Law on State Financial Policy for Handling COVID-19 which authorizes the government to widen the deficit limit to above 3% (three percent). In other words, the determination of these sources of financing is specifically aimed at covering the possibility of a deficit above 3% (three percent).

Pursuant to Article 11(2) of Law No. 17/2003 on State Finance ("State Financial Law"), the State Budget consists of revenue, expenditure, and financing. When the budget is estimated to be in deficit, Article 12 paragraph (3) of the State Financial Law authorizes the state to determine sources of financing to cover the deficit. This shows that the sources of financing and their use are part of the management of the State Budget.

According to Article 23 Paragraph (2) of the Constitution, it is proposed by the President to be discussed with DPR by taking into account the DPD's consideration. The involvement of the legislature is needed to control the government so that it is not arbitrary and precise in determining the source of financing, as happened in Article 2 paragraph (1) letter e number 2 of the Annex to the Law on State Financial Policy for Handling COVID-19 which uses a budget derived from endowment funds and accumulated education endowment funds.

The DPR's lack of involvement in determining financing sources in the Law on State Financial Policy for Handling COVID-19 has overridden the DPR's supervisory and budgetary functions, as stipulated in Article 20A paragraph (1) of the 1945 Constitution. Furthermore, the action also reflects an attempt to negate the existence of the DPR as the people's representation in ensuring the management of state finances for the prosperity of the people. On this basis, Article 2 paragraph (1) letter g of the Annex to the Law on State Financial Policy for Handling COVID-19 is contrary to Article 1 paragraph (2), Article 1 paragraph (3), Article 20A paragraph (1), and Article 23 paragraph (2) of the 1945 Constitution insofar as it is not interpreted as "determining the sources of Budget financing originating from domestic and / or foreign after being discussed together and approved by the DPR with due regard to the considerations of the DPD".

### Regional Autonomy in Budget Management for Handling COVID-19

Article 3 paragraph (2) of the Annex to the Law on State Financial Policy for Handling COVID-19 is considered contrary to the principle of regional autonomy because it has the potential to dictate to local governments in managing the COVID-19 budget. Article 3 of the Annex to the Law on State Financial Policy for Handling COVID-19 regulates the following matters: Provisions regarding the prioritization of the use of budget allocations for certain activities (refocusing), changes in allocations, and the use of Regional Budget Revenue and Expenditure as referred to in paragraph (1), regulated by Regulation of the Minister of Home Affairs. This regulation is considered to reduce the implementation of regional autonomy, as stipulated in Article 18 Paragraph (2) and Paragraph (5) of the 1945 Constitution.

In this case, local governments are not given the independence to determine their own adjustments and use of the Regional Budget (APBD), even though it is one of the important aspects of implementing regional autonomy. On the other hand, each region has challenges with different complexities, needs and capabilities in handling COVID-19, so local governments should have full authority to adjust the budget in dealing with COVID-19.

For example, if you examine the events in Bogor Regency. In early 2020, along with the outbreak of the COVID-19 pandemic, Bogor Regency was also hit by flash floods followed by landslides, fallen trees and fires.18 The Bogor District Government, on the other hand, had to respond to this challenge more responsively, as these disasters also caused casualties and other material losses. The government prioritized and budgeted Rp92.9 billion for post- disaster management, such as victim recovery and revitalization of public facilities and housing.[19] This does not mean an act of putting aside the handling of the COVID-19 pandemic, but rather an act to distribute priorities to other problems that also need to be resolved.

*[18] Kompas.com, Floods and Landslides on January 1, 2020 in Bogor Regency claimed 8 lives, accessed via <https://regional.kompas.com/read/2020/01/01/23312441/banjir-dan-longsor- 1-januari-2020-di-kabupaten-bogor-memakan-8-korban-jiwa>, [22/04/2022], 2020.*

*[19] Republika.co.id, Post-Sliding Budget in Bogor Regency IDR 92.9 Billion, accessed via <https://www.republika.co.id/berita/q924ll484/network>, [22/04/2022], 2020.*

### Tax Incentives Not Coupled with Layoff Prohibition

Article 4 paragraph (1) letter a jo. Article 5 paragraph (1) letter a and letter b of the Annex to the Law on State Financial Policy for Handling COVID-19 provides tax relief to business actors. However, this incentive is not accompanied by a ban on layoffs, so it does not provide guarantees for workers affected by the COVID-19 pandemic. This contradicts the principle of fair and equitable treatment in labor relations as well as fair guarantees, protection, and legal certainty.
The COVID-19 pandemic has had a cross-cutting impact, not only on health, but also on the economy and business. Due to the COVID-19 pandemic, the productivity of economic administration has declined. Providing incentives in the form of tax relief for affected corporate taxpayers can play an important role in maintaining the stability of economic growth, people's purchasing power, and business sector productivity. However, the provision of this incentive must be accompanied by a policy prohibiting layoffs by companies. Layoffs lower people's welfare. Based on data from the Ministry of Manpower released on April 20, 2020, more than two million Indonesians lost their jobs as a result of the COVID-19 pandemic. Therefore, companies that will be given incentives in the form of tax deductions need to be prohibited from conducting permanent layoffs. It is aimed at ensuring that the crisis does not continue and workers get guarantees and certainty to get their jobs back after the COVID-19 pandemic, as well as to realize fair and decent treatment in employment relations.
In the petition, it is requested that Article 4 paragraph (1) letter a of the Annex to the Law on State Financial Policy for Handling COVID-19 is contrary to Article 28D Paragraph (1) and Paragraph (2) of the 1945 Constitution if it is not interpreted as *"adjustment of income tax rates for domestic corporate taxpayers and permanent establishments and prohibition of termination of employment (PHK)".*

In addition, the tax reduction incentives required by this Law have various standards. This means that each company has a different percentage of cuts, according to the core- business being carried out. For companies engaged in research and development for handling COVID-19, they receive greater tax incentives for the efforts made to accelerate the handling of the COVID-19 pandemic.

Therefore, Article 5 paragraph (1) letter a and letter b of the attachment to the Law on State Financial Policy for Handling COVID-19 is conditionally contradictory to Article 28D Paragraph (1) of the 1945 Constitution. Article is considered unconstitutional as long as it is not interpreted " a. a maximum of 22% (twenty two percent) and 22% (twenty two percent) specifically for domestic agencies engaged in research and development for the handling of COVID-19 which applies in Fiscal Year 2020 and Fiscal Year 2021; and b. a maximum of 20% (twenty percent) and 20% (twenty percent) specifically for domestic agencies engaged in research and development for handling COVID -19) which will take effect in the 2022 Fiscal Year."

### Trade Tax through Electronic Systems: Tax Omnibus Law Material Deposit

The Law on State Financial Policy for Handling COVID-19 is placed as the legal basis for taxes for Trading Through the Electronic System (PMSE), although this provision is not directly related to the handling of COVID-19. This material is basically the formulation of Article 14 – Article 17 of the Omnibus Law of the Taxation Bill which is deposited in such a way in this Perppu. At the time this Law was reviewed in the Constitutional Court, the regulation was still in the form of a draft in the Priority Prolegnas. Therefore, this rule is contrary to the Tax Regulations, Fair Legal Certainty, and the Prerequisites of "Compelling Urgency" in the issuance of Perppu.

Therefore, this regulation actually does not fulfill the element of compelling urgency as a fundamental prerequisite for the formation of Perppu, as referred to in Article 22 paragraph (1) of the 1945 Constitution jo. Constitutional Court Decision Number 138/PUU- VII/2009 and Constitutional Court Decision Number 1-2/PUU-XII/2014. Moreover, the regulation on PMSE taxation is not directly related to the handling of the COVID-19 pandemic. Reviewing this rule does not necessarily indicate the applicants' disapproval of the PMSE tax regulation, but rather their disapproval of the Government's method of regulation, which is through "entrustment" into the Perppu. It is feared that such practices are used as success stories to smuggle in certain content material that may be opposed by the community.

If it is still necessary to regulate PMSE tax, the Government and DPR should use their legislative function to form a law regulating this matter. In the absence of the element of urgency and the absence of regulation in a separate type of law, the provisions regarding taxes on PMSE do not provide fair guarantees, protection and legal certainty (Article 28D paragraph [1] of the 1945 Constitution). Because formally, the type of legislation chosen has an unconstitutional value.

### Legal Basis for Import Duty Exemption Rules

In addition to taxes, the Law on State Financial Policy for Handling COVID-19 also incentivizes import duties. However, this regulation has the potential to contradict the Principles of the Rule of Law, the Principles of Fair Protection, Guarantees, and Legal Certainty, as well as the principle of "Compelling Urgency" in the Issuance of Perppu. The provisions regarding the exemption or relief of import duties, as referred to in Article 9 letter b of the Annex to the Law on State Financial Policy for Handling COVID-19, are aimed at a very broad scope, not limited to handling the COVID-19 pandemic, but also to deal with economic crises and/or financial system stability for other reasons.

This provision should be limited and focused only on handling COVID-19, whose problems are already in sight, so that there is no smuggling of unconstitutional actions and/or policies wrapped in the legality of the rule of law.

Then, Article 10 of the Annex to the Law on State Financial Policy for Handling COVID- 19 has opened the opportunity to change the provisions of import duty exemptions on imported goods based on their intended use,20 through a Minister of Finance Regulation. This provision contradicts the hierarchy of laws and regulations, as changes to one aspect of the law can only be made by another aspect of the law with a higher or equal position. Ministerial regulations are hierarchically lower than laws, so it is not appropriate if changes to the content of the law are regulated in the Minister of Finance Regulation.

To implement the provisions of this Law, the Minister of Finance issued Minister of Finance Regulation Number 34/ PMK.04/2020 concerning the Granting of Customs and/or Excise and Taxation Facilities for the Import of Goods for the Purpose of Handling the COVID- 19 Pandemic ("PMK Number 34/PMK.04/2020"). In this PMK, the Minister of Finance has granted duty exemptions for imported goods intended for the purposes of handling the COVID-19 pandemic which are divided into the following types:

a. Hand sanitizer and products containing disinfectant;
b. Test kits and laboratory reagents;
c. Virus media transfer;
d. Medicine and vitamins;
e. Medical equipment; and
f. Personal protective equipment (PPE);

In principle, the items regulated in PMK 34/PMK.04/2020 are equipment that will greatly support the acceleration of handling the COVID-19 pandemic in the health sector. However, on the other hand, the arrangements in Article 10 paragraph (1) and paragraph (2) of the Annex to the Law on State Financial Policy for Handling COVID-19 violate an important principle in the formation of laws and regulations. If this method is maintained, it has the potential to cause adverse consequences and abuse in the future. Therefore, in order for the regulation on duty exemption for tools to support the acceleration of handling COVID-19 to remain constitutional, it is necessary to change the wording of the article, namely the regulation through the PMK is not intended to change the clause in the Customs Law, but as a delegation of the regulation of Article 9 letter a of the Attachment to the Law on State Financial Policy for Handling COVID-19.

Based on the above reasons, Article 9 of the Annex to the Law on State Financial Policy for Handling COVID-19 along the phrase "...and / or; b. facing threats that endanger the national economy and / or financial system stability" is concluded to be contrary to Article 22 Paragraph (1) of the 1945 Constitution jo. Constitutional Court Decision Number 138/PUU- VII/2009 and Constitutional Court Decision Number 1-2/PUU-XII/2014. Then, Article 10 paragraph (1) of the Annex to the Law on State Financial Policy for Handling COVID-19 along the phrase "... regulated by Regulation of the Minister of Finance" is contrary to Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution conditionally if it is not interpreted as "regulated by this law to be further stipulated by Regulation of the Minister of Finance". Furthermore, Article 10 paragraph (2) of the Annex to the Law on State Financial Policy for Handling COVID-19 is contrary to Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution.

### COVID-19 Budget Special Account

The Law on State Financial Policy for COVID-19 Handling is aimed at managing the COVID-19 budget. However, this law is not complemented by the obligation to establish a special account to accommodate the budget for handling COVID-19. Therefore, Article 12 paragraph (1) of the Annex to the Law on State Financial Policy for Handling COVID-19 is considered contrary to the principles of transparent and accountable state financial management for the prosperity of the people and the principles of fair guarantees, protection and legal certainty.

Article 12 paragraph (1) of the Annex to the Law on State Financial Policy for Handling COVID-19 is a standard so that the management of state financial policies for handling COVID- 19 is carried out with due regard to good governance. The management of these state finances must be used in a targeted manner and fully aimed at handling COVID-19 and the resulting crisis.

Therefore, the Government needs to establish a special account that holds the allocation of funds for handling COVID-19 and the crisis due to COVID-19 to ensure that any state money allocated under this Law is right on target. In addition, the existence of this special account will provide legal certainty and convenience for the accountability of state financial management. On the other hand, special accounts also make it easier for the public to oversee the use of the budget for handling COVID-19 and handling the crisis caused by COVID-19.

In comparison, France is one of the countries that also used special accounts during the COVID-19 pandemic. France created a budget program that allowed them to group additional spending during the COVID-19 pandemic into a budgetary envelope specifically for COVID-19 response called the "Emergency plan for health crisis. "[21]

*[20] Vide Article 25 paragraph (1) and Article 26 paragraph (1) of the Customs Law.*
*[21] Helene Barroy, Ding Wang, Claudia Pescetto, and Joseph Kutzin, How to Budget for COVID- 19 Response? A Rapid Scan of Budgetary Mechanisms in Highly Affected Countries, World Health Organization,*

The existence of a special account for the COVID-19 budget is crucial, because the potential for deviations from the COVID-19 budget is very large. Especially if you reflect on cases of corruption in the management of disaster management funds, as shown in the following table.

Table 2.2 Regulatory Materials and Potential Constitutional Roles of DPD

| Corruption Cases | Corruption Case Defendants & Values | Verdict |
|---|---|---|
| Corruption of tsunami disaster relief funds in Nias Regency (2011) | Ex. Regent of Nias and members of DPRD Kab. Nias,<br><br>**IDR 3.7 billion** from IDR 9.4 billion | 5 years in prison, fined IDR 200 million in lieu of 4 months imprisonment |
| Earthquake disaster fund corruption for school building rehabilitation in Mataram City (2018) | Chairman of Commission IV of the Mataram City DPRD,<br><br>**4.2 billion** | 2 years in prison, 50 million fine in lieu of 2 months in prison |
| Bribery for the construction of a drinking water supply system (SPAM) project in Donggala, Palu, Central Sulawesi (2018) | 8 Ministry of PUPR officials,<br><br>**The value of the bribes was IDR 5.3 billion, USD 5,000 and SGD 22,100.**<br><br>Total project value IDR 429 billion | Anggiat was sentenced to 8 years in prison, fined IDR 400 million in lieu of 4 months imprisonment. Meanwhile, Meina was charged with 5.5 years in prison, a fine of IDR 300 million in lieu of 3 months imprisonment. Nazar charged with 8 years in prison, fine IDR 500 million in lieu of 4 months in detention, while Donny was charged with 5.5 years in prison, fined IDR 300 million in lieu of 3 months in detention. |
| Mosque rehabilitation assistance affected by the West Nusa Tenggara tsunami earthquake (2019) | ASN from the Regional Office (Kanwil) of the Ministry of Religious Affairs (Kemenag) NTB,<br><br>**6 billion** | 4 years in prison and a fine of IDR 100 million in lieu of two months' imprisonment |

*<https://www.who.int/docs/default-source/health-financing/how-to-budget-for-COVID-19- english.pdf?sfvrsn=356a8077_1>, 2020, p. 3*

To create a special account for handling the COVID-19 pandemic, Article 12 paragraph (1) of the Annex to the Law on State Financial Policy for Handling COVID-19 needs to be interpreted extensively. Thus, this Article is considered contrary to Article 23 Paragraph (1) and Article 28D Paragraph (1) of the 1945 Constitution insofar as it is not interpreted as "The implementation of state financial policies and measures as referred to in Article 2 through Article 11 is carried out with due regard to good governance through the use of a special account for the management of the budget for handling COVID-19 and handling the crisis due to the COVID- 19 pandemic by paying attention to the principles of transparency and accountability."

At the hearing to read out the President's testimony at the Constitutional Court, Finance Minister Sri Mulyani claimed that her office had a special account for the COVID-19 handling budget. However, detailed accountability for budget utilization is not accessible. The accountability submitted is not detailed, but only based on broad categories.

### Additional for the Financial Services Authority

Article 23 paragraph (1) Attachment to the Law on State Financial Policy for Handling COVID-19 gives the Financial Services Authority (OJK) the authority to support the implementation of the KSSK's authority in dealing with financial system stability problems. The article provides great authority for OJK to restructure financial service institutions that may face difficulties, thereby endangering their business continuity in the midst of the COVID-19 pandemic. In other words, OJK can force troubled banks to restructure and force healthy banks to join, take over, or integrate with troubled banks.

Previously, under normal conditions, OJK could only issue a restructuring advisory by first implementing an intensive supervision mechanism and special supervision to the financial service institution concerned. This clause has the potential to be misused and creates a moral hazard that is counterproductive to banking health and financial stability in general. Banks that had previously been "ill" due to mismanagement could be saved in the name of the COVID- 19 pandemic.

An example of this practice is currently happening, namely the merger between PT Bank Pembangunan Daerah Banten Tbk. (Bank Banten) with PT Bank Pembangunan Daerah Jawa Barat and Banten Tbk. (Bank BJB) to anticipate greater business pressure for Bank Banten due to COVID-19. Bank Banten had been in trouble before the COVID-19 pandemic occurred. Since 2017, Bank Banten 's shares have been stagnant at the level of IDR 50 per share and the price has not changed throughout the year. Based on the 2018 financial report, Bank Banten recorded a net loss of IDR 131.07 billion. Meanwhile, in 2019, the loss increased to IDR 180.70 billion. In 2019, Bank Banten 's core capital was eroded, from IDR 334.07 billion to IDR 154.13 billion. The capital adequacy ratio of Bank Banten also recorded a decline to the level of 9.01%.[22]

Although the capital is problematic and continues to lose money, since 2017, Bank Banten is no longer under the special supervision status of the OJK but is under normal supervision status. 23 Moreover, BPK found problems in OJK's supervision of Bank Banten. This finding is the result of the BPK audit of the implementation of supervision on commercial banks held by OJK in 2017-2019 and is contained in the Summary of Review Results for Semester II 2019. Based on BPK's findings, OJK did not provide recommendations to Bank Banten in making corrections to non-performing loans (NPL), allowance for impairment losses (CKPN), and/or minimum capital adequacy requirements according to the results of the 2018 audit. This resulted in Bank Banten's supervisory status as of December 2018 which did not reflect and could not anticipate current conditions.[24]

Based on the facts above, OJK has not carried out its supervisory and regulatory functions optimally under normal circumstances. If in the midst of the COVID-19 pandemic, the OJK is given greater authority to force the restructuring of financial service institutions, then it is dangerous. This addition of authority is not in line with the principle of limiting power in Article 1 Paragraph (3) of the 1945 Constitution which declares that the Indonesia is a state of law.

In times of emergency like this, adding the authority of certain institutions using an emergency legal basis (Perppu) is a practice that must be avoided, because it has the potential to expand power which can lead to abuse of power. Thus, Article 23 paragraph (1) letter a Attachment of the Law on State Financial Policy for Handling COVID-19 is concluded to be contrary to Article 1 Paragraph (3) of the 1945 Constitution and 28D Paragraph (1) of the 1945 Constitution.

*[22] Bisnis.com, Merger of Bank Banten and Bank BJB. Who will benefit? <https://finansial.bisnis.com/read/20200423/90/1232013/merger-bank-banten-dan-bank- bjb.-who-yang-yang-diuntungkan>, [14/05/2020 ], 2020.*

*[23] Media Indonesia, Bank Banten Releases from Special Supervision, <https://mediaindonesia.com/read/detail/96648-bank-banten-lepas-dari-pengawasan-special>, [14/05/2020], 2020*

*[24] Katadata, BPK Finds FSA Negligence in Supervising Seven Banks, Here are the Details, <https://katadata.co.id/berita/2020/05/12/bpk-tekan-kelalaian-ojk-dalam-mengawasi- Tujuh-bank- here-details>, [05/14/2020], 2020.*

### The COVID-19 Budget is Not a State Loss and Immunity for the Government and KSSK Members

Article 27 paragraph (1), paragraph (2), and paragraph (3) Attachment of the Law on State Financial Policy for Handling COVID-19 is one of the articles that is highlighted by the public. This article contradicts the principle of the rule of law, the principle of managing state finances, the authority of the Supreme Audit Agency (BPK), the authority of the judiciary, the principle of equality before the law, and the principles of guarantees, protection, and fair legal certainty.

It is due to Article 27 paragraph (1), paragraph (2), and paragraph (3) Attachment to the Law on State Financial Policy for Handling COVID-19 which provides immunity for state officials to be free from lawsuits in implementing the provisions of this Law. On the other hand, the article also provides immunity to efforts to manage state finances from being ensnared by articles of corruption. The reason is that all funds spent to implement this regulation cannot be considered as state losses. In addition, this article also closes the door for citizens to challenge the policies and implementation of this law in the state administrative court. In detail, these articles argue as follows:

1. Costs that have been incurred by the Government and/or KSSK member institutions in the context of implementing state revenue policies including policies in taxation, state expenditure policies including policies in regional finance, financing policies, financial system stability policies, and national economic recovery programs, is part of the economic costs to save the economy from the crisis and is not a loss to the state.
2. Members, the Secretary, the KSSK secretariat, and officials or employees of the Ministry of Finance, Bank Indonesia, the Financial Services Authority, as well as the Deposit Insurance Corporation, and other officials, related to the implementation of this Government Regulation in Lieu of Law (Perppu), cannot be prosecuted, both civilly and criminally, if they carry out their duties with good intention and in accordance with the provisions of laws and regulations.
2. All actions, including decisions taken based on this Perppu, are not objects of a lawsuit that can be submitted to the state administrative court.

By reading Article 27 paragraph (1), paragraph (2), and paragraph (3) of the Annex to the Law on State Financial Policy for Handling COVID-19 systematically, this provision is counterproductive to the principle of the rule of law, the spirit of anti-corruption in the administration of a clean and free government. In practice, this article has the potential to override the general principles of good governance (AUPB) in managing state finances during the COVID-19 pandemic. The existence of this article indicates the possibility for state officials to use it as a justification for taking unconstitutional actions under the pretext of handling the COVID-19 pandemic.

Article 27 paragraph (1) Attachment to the Law on State Financial Policy for Handling COVID-19 immediately assumes that all funds budgeted under this Law are not state losses. This article stamps the use of the budget, whether carried out in good or bad intention, not as a loss to the state. When there is budget abuse or corruption, the perpetrators can take cover behind this article, because the entire budget that is issued and managed is not considered a state loss.

In addition, Article 27 paragraph (2) and paragraph (3) of the Attachment to the Law on State Financial Policy for Handling COVID-19 has clearly violated the principle of the rule of law, as stipulated in the provisions of Article 1 Paragraph (3) of the 1945 Constitution and is contrary to the principle of equal treatment before the law in Article 27 Paragraph (1) of the 1945 Constitution. This article had closed the access to justice for the public as the result of the immunity given to implementing this law.

The immunity that has been described provides immunity to the implementing organs of the Law so that they cannot be prosecuted civilly or criminally. Other immunities, such as excluding decisions and administrative actions of the implementing organs of this Law as objects that can be sued administratively through the State Administrative Court, have clearly ruled out the meaning and concept of the rule of law as regulated in Article 1 Paragraph (3) of the 1945 Constitution.

The norm of Article 27 paragraph (2) Attachment to the Law on State Financial Policy for Handling COVID-19 reads "...cannot be prosecuted criminally and civilly if carrying out duties is based on good intention". Good intention in this norm is a realm that must be proven and can be measured through a series of evidence in court. How is it possible for an event that still needs to be proven, whether there is an element of good intention or not, but has been eliminated and the chance to prove it has been closed from the start?

A state based on law certainly has a logical consequence, namely the existence of an independent and impartial law enforcement system. This principle is attached to the judicial power. Constitutionally, it is the authority of the Supreme Court which oversees the judicial environment in general, in particular the special courts for corruption and civil and state administrative courts, and the Constitutional Court, as regulated in Article 24 Paragraph (1) and Paragraph (2) of the 1945 Constitution.

Therefore, the application of Article 27 paragraph (2) and paragraph (3) of the Attachment to the Law on State Financial Policy for Handling COVID-19 clearly violates the principle of the rule of law and the principle of equal treatment before the law. This article has also reduced and taken away the authority of an independent judicial power organ to decide whether there is good intention in matters. This article also closes public access to seek justice due to the closure of administrative accountability in the State Administrative Court.

- **Deadline for the Enforcement of the Law on State Financial Policy for Handling COVID-19**

The last point that was reviewed in the Constitutional Court was Article 29 of the Appendix to the Law on State Financial Policy for Handling COVID-19 which stipulates: “This Government Regulation in Lieu of Law shall come into force on the date of its promulgation”. In closing, this article is not equipped with a sunset clause regarding the validity period of this Law, even though it was issued to resolve problems in public health emergencies. The nature of emergency law is intended to resolve the crisis that has occurred before our eyes, so that we can return to normal conditions. It is unlikely that the country will continue to use this Law after the COVID-19 pandemic and continue to maintain a public health emergency status.

Thus, Article 29 of the Attachment to the Law on State Financial Policy for Handling COVID-19 contradicts Article 1 Paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution as long as it does not mean “This Government Regulation in Lieu of Law shall come into force on the date of its promulgation and until The President of the Republic of Indonesia revoked the status of ‘Corona Virus Disease 2019 (COVID-19) Public Health Emergency.”

# Part Three

## Conditional Decision of the Constitutional Court

# Novelty in the Constitutional Court Decision

A review by YAPPIKA-ActionAid, Desiana Samosir, Muhammad Maulana, and Syamsuddin Alimsyah yielded good results. As a result, on October 28, 2021, the Constitutional Court made the petition a landmark decision among other petitionss and issued a verdict to grant Petitioner's petition partly. Thus, the Constitutional Court's Decision Number 37/PUU- XVIII/2020 becomes the primary reference in reading the constitutionality of the Law on State Financial Policy for Handling COVID-19.

The Court only granted the petition for a judicial review in the decision. Of all the judicial reviews, the Constitutional Court only granted the issue of the immunity of state officials, the object of the lawsuit in the Administrative Court, and the time limit for the validity of the Law on State Financial Policy for Handling COVID-19. On the one hand, the Constitutional Court's decision is sufficient to provide a breakthrough for the formation and substance of the Law in an emergency period. On the other hand, the Constitutional Court is also not optimal in functioning its constitutional authority because it does not examine in depth the points relating to fiscal and monetary policy, which are immediately ruled out for emergency reasons. The Constitutional Court also does not provide sufficient material limits on what content should be regulated in the emergency law so that the legal product has constitutional value and fulfills the values of constitutionalism.

### Formal Provisions for the Formation of Laws in Emergency

In the Constitutional Court Decision Number 37/PUU-XVIII/2020, there are two main issues in examining the formal aspects of the formation of the Law on State Financial Policy for Handling COVID-19, which was initially a Government Regulation in Lieu of Law (Perppu) Number 1 of 2020. The two main issues are (1) the exclusion of the Regional Representatives Council (DPD) in the process of discussing the Perppu into Law; and (2) a virtual meeting enables the probability of non-concrete presence and "attendance in absentia."

### Involvement of the Regional Representative Council in the Discussion of Perppu

In the decision-making, Constitutional Court believes that the DPD does not need to be involved in discussing the Bill (RUU) originating from the issuance of the Perppu, such as the Law on State Financial Policy for Handling COVID-19. The Constitutional Court's considerations relate to three aspects, namely (1) the Law on State Financial Policy for Handling COVID-19 as a bill originating from the Perppu; (2) The DPD is only given the legislative authority to propose a bill limited to the regulation of Article 22D of the 1945 Constitution; and (3) The DPD is only given the legislative authority to discuss the Bill, which is limited to the regulation of Article 22D of the 1945 Constitution.

The Constitutional Court separates and draws a line of difference between the regimes of Article 22 of the 1945 Constitution, which becomes the basis for the formation of the Perppu to respond to the pressing urgency, with Article 22D of the 1945 Constitution, which outlines the authority and scope of issues that become the affairs of the DPD. Thus, according to the Constitutional Court, the role of the DPD is only in the discussion of the Bill, which does not start with the issuance of a perppu, but rather discusses the Bill related to regional autonomy, central and regional relations, formation, and expansion and merging of regions, management of natural resources and other economic resources, as well as those relating to the balance of central and regional finances as well as considering the DPR on the Bill on the State Budget and the Bill on Taxes, Education, and Religion.

The Constitutional Court also reiterated the Constitutional Court Decision Number 92/PUU-X/2012, dated March 27, 2013, regarding the position of the DPD in the discussion of the Perppu. Accordingly, the DPD only plays a role when considering the revocation of the perppu. From the Constitutional Court's standpoint, although some of the substance of the Law on State Financial Policy for Handling COVID-19 contains material directly related to state budget/financial policies, it does not allow the DPD to play a role in discussing or providing considerations. It is because the formation of the Law on the State Financial Policy for Handling COVID-19 is constitutionally subject to the norms of Article 22 of the 1945 Constitution.

### Decision Making through Virtual Meetings

The COVID-19 pandemic has changed the interaction pattern between people as they have to maintain physical and social distancing. It is no exception for legislators who utilize information and communication technology to discuss and ratify the Perppu on State Finance for COVID-19 into Law. For example, on May 12, 2020, the Level II Plenary Meeting was held using a combination of physical and virtual meetings, with 355 (three hundred and fifty-five) people and 83 (eighty-three) people attending the virtual meeting attending in-person.

The Constitutional Court supports using online technology to facilitate the performance of DPR legislation. However, although the Constitutional Court considers this mechanism constitutional, the Constitutional Court still emphasizes that the legislators still guarantee the principle of openness that gives the public access to parliament. Therefore, information and communication technology must support public participation that cannot be done directly (face to face).

## Considerations on the Fiscal and Monetary Policies in Response to COVID-19 Emergency

Fiscal and monetary policies in the Law on State Financial Policy for Handling COVID- 19 that have come in question in the case Number are as follows:

a. The Law's title and broad scope are not only intended to deal with the COVID-19 pandemic but also with the economic crisis and financial system and beyond those related to the COVID-19 pandemic;
b. Determination of the budget deficit unilaterally without involving the DPR and DPD considerations (Article 2 paragraph (1) letter a number 1, number 2, and number 3);
c. The use of the education endowment fund (Article 2 paragraph (1) letter e number 2);
d. The absence of DPR approval in the issuance of the government bonds (SUN) and the State Sharia Securities (SBSN) and BI may purchase SUN and/or SBSN issued by the Government in the primary market (Article 2 paragraph (1) letter f jo. Article 16 paragraph (1) letter c and Article 19);
e. Government's discretion to determine sources of financing without the approval of the DPR (Article 2 paragraph (1) letter g);
f. The authority to refocus the budget which has the potential to reduce the implementation of regional autonomy (Article 3 paragraph (2));
g. The provision of tax incentives that is not followed by a prohibition on layoffs has implications for the decline in the level of public welfare (Article 4 paragraph (1) letter a jo. Article 5 paragraph (1) letter a and letter b);
h. The taxation rules on Trade Through Electronic Systems (PMSE) are material for the omnibus law of taxation (Article 4 paragraph (1) letter b, Article 4 paragraph (2), Article 6, and Article 7);
i. Import duty exemption with an extensive scope and not limited to handling the COVID-19 pandemic (Article 9 and Article 10 paragraph (1) and paragraph (2));
j. There is no particular bank account for the COVID-19 budget (Article 12 paragraph (1));
k. The Financial Services Authority (OJK) is granted great authority to restructure financial service institutions.

According to the Constitutional Court, the above policy options were issued because of the situation's urgency or emergency conditions. Therefore, the Constitutional Court considers that policy options are very limited in handling the COVID-19 pandemic and cannot be predicted as a budget burden under normal conditions. Therefore, the Constitutional Court understands the concerns of the Petitioners. Still, in a dilemma due to the COVID-19 pandemic, the Constitutional Court emphasizes that there are no constitutional issues regarding the abovementioned issues.

## Elimination of Immunity from Civil and Criminal Liability and State Administration

Article 27 paragraph (1), paragraph (2), and paragraph (3) of the Law on State Financial Policy for Handling COVID-19 is one of the crucial articles that is widely opposed by the public because it is considered a deviation from the anti-corruption spirit in managing the budget for the COVID-19 handling. This article stipulates that (1) the budget issued under this Law is not categorized as a state loss; 3) the decision regarding COVID19 is not the object of a lawsuit that can be submitted to the State Administrative Courts.

Regarding the issue of state financial loss, the Constitutional Court reads it in a contrario or vice versa; even though the budget for the COVID-19 handling is not used under the laws and regulations, the perpetrators cannot be prosecuted because it is "not categorized as a state loss". Therefore, Article 27 paragraph (2) of the Law on State Financial Policy for Handling COVID-19 cannot apply to anyone doing the work. The construction of this article has the potential to provide immunity rights for state financial administrators.

The phrase "not categorized as a state loss" in Article 27 paragraph (1) of the Appendix to the Law on State Financial Policy for Handling COVID-19 is contrary to the principle of due process of Law to obtain equal protection. It denies everyone's rights because of a law that excludes some people's rights but grants such rights to others without exception; such a situation can be considered a violation of equal protection. Therefore, for the sake of legal certainty, the norm of Article 27 paragraph (1) of this Law must be declared unconstitutional as long as the phrase "not categorized as state losses" is not interpreted as "not categorized as state losses if they are carried out in good faith and are not in accordance with the laws and regulations." Through the above interpretation of Article 27 paragraph (1), according to the Constitutional Court, Article 27 paragraph (2) no longer has a constitutionality issue.

Concerning the object of the lawsuit in Administrative Court, the Constitutional Court agreed to link with Article 49 of Law Number 5 of 1986 concerning the State Administration, which stipulates that the Administrative Court is not authorized to examine, decide, and resolve lawsuit in administrative Court when decisions are issued in times of emergency. However, considering that the Law on State Financial Policy for Handling COVID-19 is not only intended for the COVID-19 pandemic but also for various threats that endanger the national economy and/or the stability of the state financial system, it should be controlled and can be the object of the lawsuit in Administrative Court.

The Constitutional Court's interpretation of Article 27 paragraph (3) of the Law on the State Financial Policy for Handling COVID-19 is:

As long as the phrase *"all actions including decisions taken based on government regulations in place of this law are not objects of a lawsuit that can be submitted to the State Administrative Court" is contrary to the 1945 Constitution, as long as it is not interpreted as "it is not the object of a lawsuit that can be submitted to the state administrative court as long as it is carried out based on the handling of the COVID-19 pandemic and is carried out in good faith and in accordance with statutory regulations."*

- **Time Limitation of the Enforcement of Law on the Financial Policy for Handling COVID-19**

The interpretation of the time limit for implementing the Law on the State Financial Policy for Handling COVID-19 is a promising breakthrough by the Constitutional Court. Similar to the perspective of the Petitioners in Decision Number 37/PUU-XVIII/2020, the Constitutional Court agreed that the Law on State Financial Policy for Handling COVID-19 did not have a precise time limit in resolving public health emergencies due to the COVID-19 pandemic. The anticipatory measures by the Government are closely related to the use of state finances. Therefore, this issue needs to be tightly controlled through, among other things, time limitations. The Constitutional Court advised the contents of the Law that were formed in a crisis must not only meet the principles of justice but also comply with the principle of certainty, including certainty in its implementation.

The time limit in the Law on the State Financial Policy for Handling COVID-19 is vital because the characteristics of the Law derived from the perppu are intended to address emergencies due to the COVID-19 pandemic. In addition, Article 28 of the Law on State Financial Policy for Handling COVID-19 annulled several norms from various laws. Therefore, if the Law on State Financial Policy for Handling COVID-19 has no time limit, these norms will lose their legal validity permanently even after the COVID-19 pandemic.

The Constitutional Court also considered a clear timeline for when the COVID-19 pandemic emergency would end. In this regard, The Constitutional Court outlines that conceptually, the state of emergency and Law in times of crisis must go hand in hand to emphasize to the public that the emergency will end. Thus, enacting the Law on State Financial Policy for Handling COVID-19 is only to cope with and anticipate the impact of the COVID-19 pandemic, so its enforcement must be related to the emergency status that occurs due to the COVID-19 pandemic.

Hence, the Constitutional Court decided that the Law on State Financial Policy for Handling COVID-19 only applies as long as the President has not announced the status of the COVID-19 pandemic and, at the latest, until the end of the 2nd year since this Law was promulgated. However, if the pandemic is expected to last longer, before entering its 3rd year, it is related to the budget allocation for handling the COVID-19 pandemic; it must obtain the approval of the DPR and the consideration of the DPD. Such limitation needs to be carried out because this Law has limited the budget deficit scheme until 2022. Therefore, the two-year limitation no later than the President officially announces the end of the pandemic is under the estimated timeframe for the budget deficit.

The reading of the consideration of the Constitutional Court's verdict is as follows:

Article 29 of the Appendix to the Law on State Financial Policy for Handling COVID-19 is not in line with the 1945 Constitution. It has no binding legal force as long as it is not interpreted as "This government regulation in lieu of Law comes into force on the date of promulgation. It must be declared invalid by the president officially announcing that the status of the COVID-19 pandemic has ended in Indonesia. The status must be declared no later than the end of the second year. The fact is that the COVID-19 pandemic has not ended; before entering the third year, the quo law can still be enforced, but the allocation of the budget and the determination of the budget deficit limit for handling the COVID-19 pandemic must obtain the approval of the DPR and the consideration of the DPD".

# The Significance of the Constitutional Court Decision

There are 3 (three) of the 12 (twelve) judicial review materials that the Constitutional Court has granted; (1) the budget for COVID-19 handling is not a state loss. Thus, it eliminates the immunity of state administration in managing the budget for COVID-19 handling (Article 27 paragraphs (1) and (3)); and (2) limiting the validity of the Law on State Financial Policy for Handling COVID-19 as long as the COVID-19 Public Health Emergency status is still ongoing. The constitutional court verdict can be seen as follow:

Table 3.1 Constitutional Court Verdict in Decision Number 37/PUU-XVII/2020

| | |
|---|---|
| Interpretation of the phrase "not a loss to the state" | The phrase "not state losses" Article 27 paragraph (1) The Appendix to the Law on State Financial Policy for Handling COVID-19 is contrary to the 1945 Constitution. Therefore, it does not have conditionally binding legal force as long as it is not interpreted as "not state loses as long as they are carried out in good faith and in accordance with the laws and regulations."<br><br>Article 27 paragraph (1) of the Appendix to the Law on State Financial Policy for Handling COVID-19 stipulates that "costs incurred by the Government and/or KSSK member institutions in implementing state revenue policies including regional financial policies, financing policies, financial system stability policies, and national economic recovery programs are part of the economic costs to save the economy from the crisis and do not constitute a loss to the state, as long as they are carried out in good faith, and based on the laws and regulations." |
| State administrative lawsuit | The phrase "is not an object of a lawsuit that can be submitted to the state administrative court" in Article 27 paragraph (3) of the Appendix to the Law on State Financial Policy for Handling COVID-19 is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it is not interpreted as "not the object of a lawsuit that can be submitted to the state administrative court as long as it is carried out for the COVID-19 handling and is carried out in good faith and in accordance with statutory regulations."<br><br>Article 27 paragraph (3) of the Appendix of the Law on State Financial Policy for Handling COVID-19 stipulates, "All actions, including decisions taken based on government regulations in place of this law, are not objects of a lawsuit that can be submitted to the State Administrative Court as long as they are carried out related to the handling of the Covid-19 pandemic and are carried out in good faith and based on the laws and regulations." |

| | |
|---|---|
| The time limit on the validity of the law | Article 29 Appendix to the Law on State Financial Policy for Handling COVID-19 is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it is not interpreted as "This government regulation in lieu of Law comes into force on the date of promulgation. It must be declared invalid by the president officially announcing that the status of the COVID-19 pandemic has ended in Indonesia. That status must be declared no later than the end of the second year. The fact is that the COVID-19 pandemic has not ended; before entering the third year, the quo law can still be enforced, but the allocation of the budget and the determination of the budget deficit limit for handling the COVID-19 pandemic must obtain the approval of the DPR and the consideration of the DPD." |

Even though the Constitutional Court has partially given its verdict to grant the petition, critical points are still not confirmed through its considerations and verdicts. First, the consideration of the Constitutional Court's decision is not equipped with risk mitigation, the impact of policy options, and the potential for abuse of power in managing the budget for the COVID-19 handling. The Constitutional Court does not describe the potential problems faced during a crisis and an anticipatory risk management scheme in its decision. The problems in question, for example, are inflation due to the health crisis, high debt due to an increase in the minimum deficit limit, the potential for corruption in disaster funds, the potential for abuse of government power during a crisis, etc.

Second, the Constitutional Court does not strengthen the system of checks and balances to control the dominant government power in handling the COVID-19 public health emergency, especially those carried out by the legislative powers (DPR and DPD), as frequently alluded to by the Petitioners in the review of Law on State Financial Policy for Handling COVID- 19.

In addition, Alamsyah Saragih said that checks and balances in managing state finances at the policy level would involve 4 (four) other main entities; the President through the Ministry of Finance and Bank Indonesia, as the policymakers and policy implementers that need to be monitored, parliament (DPR and DPD) as legislators and supervisors, and the Audit Board of Indonesia (BPK) as the auditor.25 However, the special roles of these four entities in the public health emergency are not elaborated in the legal considerations of the Constitutional Court.

Third, the Constitutional Court seems to rely on a time limit for implementing the Law on State Financial Policy for COVID-19 not to examine state financial policies in times of public health emergencies in greater depth. Limiting the validity of the Law is an effort by the Constitutional Court to get out of the fiscal and monetary policy problems in an emergency without questioning its constitutionality because it is considered there are limited policy options.

### Affirmation of Control of DPR and DPD in Emergency Conditions

The absence of special measures of legislative oversights is one of the significant loopholes behind the review of the Law on State Financial Policy for the Handling of COVID- 19. This Law has a crucial function as the legal basis for managing state finances during the COVID-19 public health emergency. However, it is not enough to provide a portion of tightening the supervision of the legislative body in its management.

There are 4 (four) issues of the supervisory role of the legislative body that are highlighted in Petition Number 37/ PUU-XVII/2020, namely:

1. The role of the DPD in terms of taking part in considering the ratification of the Perppu on State Financial Policy for Handling COVID-19 into Law, as a form of extensive interpretation of Article 22 and Article 22D of the 1945 Constitution and the Constitutional Court Decision Number 92/PUU-X/2012;

2. In Article 2 paragraph (1) letter a number 1, number 2, and number 3 of the Law on State Financial Policy for Handling COVID19, the DPR is not involved in discussing and giving approval to the determination of the deficit limit above 3% (three per cent), as well as DPD is not involved in giving considerations, as mandated in Article 23 Paragraph (2) and Paragraph (3) of the 1945 Constitution;
3. In Article 1 paragraph (1) letter f of the Law on State Financial Policy for Handling COVID-19, the DPR is not involved in giving approval or not giving approval;
4. In Article 2 paragraph (1) letter g of the Law on State Financial Policy for Handling COVID-19, The DPR is not involved in discussing and giving approval on sources of financing, nor is the DPD involved in providing considerations.

The Constitutional Court is aware of the magnitude of the executive power and the absence of the role of the legislative body to balance the President's power in managing state finances in a public health emergency. It is reflected in the considerations and verdict of the Constitutional Court when limiting the time of the implementation of the Law on State Financial Policy for Handling COVID-19. The Constitutional Court revealed that implementing the Law on State Financial Policy for Handling COVID-19 is closely related to state finances, which greatly affected the country's economy based on Article 23 Paragraph (2) of the 1945 Constitution. Thus, it should obtain the approval of the DPR and the consideration of the DPD.

On this basis, when limiting the time this Law takes effect until the COVID-19 pandemic status is announced to end by the President, the Constitutional Court added that the clause must include the involvement of the DPR and DPD when the COVID-19 pandemic still lasted until the end of the 2nd year since this Law was enacted. In detail, the Constitutional Court formulated as follows:

> *"However, if the pandemic is expected to last longer before entering its 3rd year, it is related to the budget allocation for handling the COVID-19 pandemic; regarding the budget allocation for Covid-19 mitigation, it must obtain the approval of the DPR and the consideration of the DPD.* [26] *Such limitation needs to be carried out because this Law has limited the budget deficit scheme until 2022."*

The legal considerations have not touched on the fundamental issues in this Law, namely the extraordinary supervision of the DPR and DPD in managing state finances during the public health emergency. The Constitutional Court does not elaborate on and interprets the constitutional functions of the DPR and DPD in an emergency, such as the legislative, budget, and supervisory functions in Article 20A Paragraph (1) of the 1945 Constitution. Furthermore, the Constitutional Court does not explain how the role of these two institutions should be in balancing executive power, which has the potential to be excessive and has the potential to cause arbitrariness, especially in terms of budget management for COVID-19 mitigation. Moreover, considering the tendency of top-down and centralized power in executive power.

Tom Ginsburg and Mila Versteeg argue that three fundamental principles must be implemented to minimize the risk of abuse of power in an emergency: (1) provide legislative and judicial oversight of the executive power; (2) limit extraordinary actions to actions that are necessary;

(3) ensure that the power lasts only for the duration of the pandemic. 27 In this context, legislative oversight needs to anticipate the Government's need to obtain acceleration and flexibility in managing the state budget, as reflected in the Law on State Financial Policy for Handling COVID-19. However, the Constitutional Court did not give a message about how the legislative body needs to proactively encourage transparency and accountability in budget management on the one hand and still ensure the acceleration of budget management for handling COVID-19.

By reflecting on the practice of other countries, some applicable special measures of legislative oversight, including: [28]

1. Establish a special committee for COVID-19 or give new powers to an existing special committee;
2. Setting limits on the expenditure of emergency funds;
3. Establish sunset clauses and update contingent accountability mechanisms;
4. Establish additional monitoring and reporting requirements;
5. Involve national auditors in assessing the pandemic response.

The special measures of legislative oversight to support checks and balances in times of emergency are implemented in several modern democracies as listed in the following table: [29]

[26] *Underlined by the writers*

[27] *Tom Ginsburg dan Mila Versteeg, State of Emergency: Part II, <https://blog.harvardlawreview.org/states-of-emergencies-part-ii/>, accessed on [06/27/2020], 2020.*

[28] *OECD, Legislative Budget Oversight of Emergency Responses: Experiences During the Coronavirus (COVID-19) Pandemic, accessed from <https://www.oecd.org/coronavirus/en/>, on [03/14/2022], 2020, p. 11 – 14.*

[29] *Yuna Farhan, "Politik Konsolidasi Fiskal Pasca Putusan MK", presented at the Review of State Financial Policy Decisions for COVID-19 (Constitutional Court Decision Number 37/PUU- XVIII/2020), organized by the KoDe Inisiatif in collaboration with YAPPIKA-ActionAid on February 25, 2022, p. 4.*

Table 3.2 Legislative Involvement Practices in Several Countries

| Countries | Legislative Involvement Practices |
|---|---|
| Netherlands, Australia, Switzerland | Use advance emergency funds, and approval is given later by the legislature |
| New Zealand, Norway, Israel, Spain | Establish a special committee for COVID-19 and give full powers to the relevant committee |
| Australia | Set an upper limit on the use of emergency funds |
| Canada, UK, Sweden and Ireland | Provide a time limit or emergency time |

The above points can be adopted and elaborated by the Constitutional Court to provide guidelines for legislative oversight in current and future crises. Thus, the role of the Constitutional Court is not only to validate or strengthen the norms in the constitutional review but also to provide mitigation efforts to avoid potential constitutional violations in the future.

### Affirmation of the Scope of the Law

The Constitutional Court realizes that the scope of the Law is too broad and is not only intended for handling COVID-19 alone. It is one of the basic considerations for the Constitutional Court when it imposes a time limit on the validity of Law on the State Financial Policy for Handling COVID-19. According to the Constitutional Court, the time limit for implementing the Law on State Financial Policy for Handling COVID-19 is essential because the norms in various laws, as stipulated in Article 28 of the Law on State Financial Policy for Handling COVID-19, will permanently lose their validity. The norm that is void is invalid because it is used for the benefit of dealing with threats that endanger the national economy and/or the stability of the state financial system. The Constitutional Court states:

> *"If there is no time limit for the enactment of Law 2/2020, then some norms in the various laws that are void will permanently lose their validity. Even when the Covid19 pandemic is over, in the absence of a time limit, the norms annulled by Article 28 of the Attachment of Law 2/2020 still do not apply because they are still used for other purposes; to face threats that endanger the national economy and/or financial system stability.* [30] *Therefore, it creates uncertainty about the time limit for the compelling emergency. Moreover, the enactment of the quo law is closely related to the use of state finances, which significantly affects the country's economy based on Article 23 paragraph (2) of the 1945 Constitution should obtain the approval of the DPR and the consideration of the DPD."*

However, the Constitutional Court does not provide comments and limits on how substances can be regulated in the emergency law to respond to emergency conditions. Moreover, the formulation of the Law's title, which is also intended to deal with threats that endanger the national economy and/or financial system stability, is too broad and can be used for purposes other than handling COVID-19. Therefore, the limitation and localization of issues from the Constitutional Court are vital to direct the Government to remain focused on accelerating the handling of the COVID-19 pandemic and to avoid abuse of authority and budget under the pretext of endangering the economy and financial system stability.

[26] ***Underlined by the writers***

The nature of the Constitutional Court's decision which has the value of erga omnes and adheres to the binding precedent, makes the interpretation of the Constitutional Court related to the limitations of the substance of emergency law necessary to be used in other conditions that are not only intended for cases of the COVID-19 pandemic. Therefore, the interpretation of the Constitutional Court's decision should be placed as a precedent and more visionary as a constitutional basis in making future policies if similar conditions are encountered.

### Consideration of the State Financial Policies

One other thing that the Constitutional Court does not do enough is to elaborate considerations on fiscal, monetary, and taxation policies in handling the COVID-19 pandemic. The state financial policies that become the substance of the review in Case Number 37/PUU- XVIII/2020 are:

a. It is a concern that the title and broad scope of the Law are not only intended to deal with the COVID-19 pandemic but also with the economic crisis and financial system beyond those related to the COVID-19 pandemic;
b. Determination of the budget deficit unilaterally without involving the DPR and DPD considerations (Article 2 paragraph (1) letter a number 1, number 2, and number 3);
c. The use of the education endowment fund (Article 2 paragraph (1) letter e number 2);
d. The absence of DPR approval in the issuance of the government bonds (SUN) and the State Sharia Securities (SBSN) and BI may purchase SUN and/or SBSN issued by the Government in the primary market (Article 2 paragraph (1) letter f jo. Article 16 paragraph (1) letter c and Article 19);
e. Government's discretion to determine sources of financing without the approval of the DPR (Article 2 paragraph (1) letter g);
f. The authority to refocus the budget which has the potential to reduce the implementation of regional autonomy (Article 3 paragraph (2));
g. The provision of tax incentives that is not followed by a prohibition on layoffs has implications for the decline in the level of public welfare (Article 4 paragraph (1) letter and in conjunction with Article 5 paragraph (1) letter a and letter b);
h. The taxation rules on Trade Through Electronic Systems (PMSE) are material for the omnibus law of taxation (Article 4 paragraph (1) letter b, Article 4 paragraph (2), Article 6, and Article 7);
i. Import duty exemption with an extensive scope and not limited to handling the COVID-19 pandemic (Article 9 and Article 10 paragraph (1) and paragraph (2));
j. There is no particular bank account for the COVID-19 budget (Article 12 paragraph (1));
k. The Financial Services Authority (OJK) is granted great authority to restructure financial service institutions.

Against the above review, the Constitutional Court negates its position as the guardian of the constitution. But on the other hand, it could be that the Constitutional Court intends to respect the policy options of the legislators. However, the Constitutional Court has shown a dysfunction as a guardian of the constitution that should explore and ensure that the rules for managing state finances are in line with the 1945 Constitution, even in times of emergency. Because the Constitutional Court adheres to the idea that the policy options issued by the Government are adopted due to the limited options in times of urgency or emergency conditions. Due to its dilemma, the Constitutional Court emphasized that there was no constitutionality issue. The Constitutional Court chose the way to "take all" the provision of considerations rather than exploring and deliberation one by one the crucial issues presented in the petition. According to Alamsyah Saragih, the limitations of the policies argued by the Constitutional Court can be patched by enriching the perspective of the Constitutional Court through the statements of experts who have expertise in the field of state financial policy in times of emergency.[31]

Even if the Constitutional Court views that there is no other option that the Government can take, the Court should be able to strengthen efforts to balance and supervise the Government and the DPR through mitigative interpretations. This thought is supported by Bivitri Susanti, who also questioned the extent to which the actual crisis conditions allowed or did not allow decisions that were not taken carefully because the Constitutional Court explained the limited choices and rapid policy making due to the crisis conditions.[32] However, the Constitutional Court does not elaborate on the constitutional parameters in this case.

These are the main points expected to emerge from the consideration of the Constitutional Court's decision, that is, signs to mitigate the potential risks that occur due to the choice of rules adopted in the Law on State Financial Policy for Handling COVID-19. Therefore, regardless of whether the Constitutional Court will grant the request or not, this risk mitigation point is important as a constitutional guideline for policymakers and relevant agencies to:

a. Map potential problems arising from policy options;
b. Understand the measures and standards of values that should be adopted in policy options in times of emergency;
c. Take action and policy actions to anticipate the impact of policy options.

*[31] Alamsyah Saragih, Pengujian UU Keuangan Negara untuk Covid-19, 2022. Presented at the Interview of the Writing Team with Alamsyah Saragih in Jakarta, 17 March 2022.*

*[32] Bivitri Susanti in Eksaminasi Putusan Kebijakan Keuangan Negara untuk COVID-19 (Constitutional Court Decision Number 37/PUU-XVIII/2020), organized by KoDe Inisiatif in collaboration with YAPPIKA-ActionAid on February 25, 2022.*

In addition to providing risk mitigation, the Court's in-depth review of the issues being sued is also expected to map and prevent potential loopholes for abuse of power in COVID- 19 budget management. It relates to how the Constitutional Court plays an active role in encouraging transparency and accountability of the Government in managing disaster funds.

As compensation, the Constitutional Court set a time limit for the validity of the Law on State Financial Policy for Handling COVID-19, valid until the status of public health emergencies and non-COVID natural disasters is revoked and no longer valid. Other mitigative considerations that the Constitutional Court conveyed were related to the "revival" of the authority to grant approval by the DPR and considerations by the DPD regarding budgeting and setting a deficit limit. However, overall, the Constitutional Court's considerations show the image of the Constitutional Court that has withdrawn from being a constitutional court because it is passive and non-interventionist, a predicate that strays from the essence of constitutional justice in a system of checks and balances. The Constitutional Court only exercises its constitutional authority procedurally but not substantively.

- **Elaboration of Measurement for the Term of "Good Faith and in Accordance with Legislation."**

The Constitutional Court gave interprets the phrase "not a state loss" in Article 27 paragraph (1) of the Attachment to the Law on State Financial Policy for Handling COVID-19 as: "it is not a state loss as long as it is carried out in good faith and in accordance with the laws and regulations." This article previously provided potential immunity rights for state administrators who were given the authority to manage state finances based on this Law. Article 27 paragraph (1) Attachment to the Law on State Financial Policy for Handling COVID- 19 is a package of articles of Article 27 paragraph (2) and Article 27 paragraph (3).

The construction of Article 27 paragraph (2) states that state officials cannot be prosecuted, either civil or criminal, as long as the state budget management according to this Law is carried out in good faith and accordance with the laws and regulations. Meanwhile, Article 27 paragraph (3) also closes access to justice related to all actions, including decisions based on this Law, which are not objects of lawsuits that can be submitted to the state administrative court.

The Constitutional Court does not emphasize the essence of the phrase "good faith and in accordance with the laws and regulations" in this provision. Because, to find out whether the formation of policies or management of state finances is based on good faith or bad faith, as well as compliance with the Law, one must undergo a law enforcement process. The process begins with investigations by the Police, indictments/ prosecutions by the Prosecutor's Office, and adjudication and reading of decisions by the judiciary.

The power of Supreme Court judicial and the courts below it is authorized to state the extent to which good faith and compliance with the Law have been fulfilled. Therefore, this phrase is not needed.

Another thing to deep dive into is the reasons and directions that the Government and DPR expect by adding this phrase. As if they automatically take advantage of a crisis to provide immunity for certain state administrators. The government and the DPR argue that this provision can be justified because, in several laws related to crisis management, legal protection is provided for the authorities in charge of taking and implementing policies; the laws are:

1. **Law Number 9 of 2016 on Prevention and Resolution of Financial System Crisis**
   Article 48 paragraph (1) states that, unless there is an abuse of authority, neither members of the KSSK, secretariat members of the KSSK, nor employees of the Finance Ministry, BI, the OJK, or the LPS, can be prosecuted, either civil or criminal, in implementing their functions, duties, and authorities.
2. **Law Number 11 of 2016 on Tax Amnesty**
   Article 22 states that the Minister, Deputy Minister, employees of the Ministry of Finance, and other parties related to the implementation of Tax Amnesty, cannot be reported, sued, investigated, or prosecuted for civil and criminal actions if carrying out their duties is based on good faith and in accordance with the provisions of the legislation. As for good faith, it is explained if in carrying out their duties, and they are not seeking profit for themselves, their families, groups, and/or other actions indicate corruption, collusion, and/or nepotism.
3. **Bank Indonesia Regulations**
   Article 45 stipulates that the Governor, Deputy Governor, and/or Bank Indonesia officials cannot be punished because they have taken decisions or policies that are in line with their duties and authorities as referred to in this Law as long as they are carried out in good faith.
4. **Law Number 37 of 2008 on Ombudsman**
   Article 10 of the Law states, "In the course of the performance of its duties and authorities, the Ombudsman cannot be arrested, detained, interrogated, prosecuted or sued in court."
5. **Law Number 18 of 2003 concerning Advocates**
   Article 16 states that Advocates cannot be prosecuted, either civil or criminal, in carrying out their professional duties in good faith to benefit the client's defense in court proceedings.
6. **MPR, DPR, DPD, and DPRD Law**
   Article 224 paragraph (1) stipulates that members of the DPR cannot be prosecuted in front of a court because of the statements, questions, and/or opinions expressed either orally or in writing in DPR meetings or outside DPR meetings relating to the functions and authorities and duties of the DPR.

The writers' stance that questions the function of the phrase "good faith and in accordance with the laws and regulations" is in line with Bivitri Susanti's perspective. Bivitri Susanti revealed that if "good faith" or "not good faith" is something that must be proven in a trial in Court, why does this article need to be included—both by legislators and by the Constitutional Court through its decision?[33] It is unnecessary when state management adheres to the general principles of good governance (AUPB). AUPB functioned as a fence to assess whether the practice of discretionary decision-making in disaster/emergency conditions is under AUPB. Second, is there room for policymakers to leave the AUPB? In this second context, Bivitri considered that the discussion on AUPB became more relevant to be questioned and elaborated on by the Constitutional Court. [34]

Furthermore, Bivitri emphasized that there should not be a "veil" deliberately made to protect decision-making so that there would be no consequences from the decision. In a state of Law, no one should be allowed to open up space for careless policy-making that leads to criminal acts. The reasons for handling the crisis or other things cannot be used as justification. In the context of the rule of Law, there should be no immunity that can lead to impunity. [35]

### State Administrative Lawsuit for COVID-19 Handling Policies that are Still Disclosed

In this case, the Constitutional Court's decision opens some objects to be sued in the state administrative court (TUN), as regulated in Article 27 paragraph (3) of the Appendix to the Law on State Financial Policy for Handling COVID-19. However, the TUN's decision body related to the COVID-19 pandemic is still excluded as the object of the lawsuit in administrative court. The Constitutional Court shows inconsistencies. On the one hand, the Court believes that issues related to "threats that endanger the national economy and/or stability of the state financial system" should be controlled and can be made a lawsuit to the State Administrative Court to prevent abuse of power and legal uncertainty.

But on the other hand, issues related to handling the COVID-19 pandemic cannot be the object of a lawsuit in the State Administrative Court.
In this case, it is not easy to understand the Constitutional Court's way of thinking. Unfortunately, the Constitutional Court does not respond to pressures to prevent obstacles in the justice system and ensure the judicial system's functioning.

In fact, according to Bivitri Susanti, the rule of Law is monitored with suspicion against state officials because there is always a potential for abuse of power.[36] But when the means to thwart abuse of power are closed, how can the public trust the state administration and judicial systems?

During the public health emergency due to the COVID-19 pandemic, the administrative power of the state is centralized in the hands of the Government because it requires quick and adaptive efforts to respond to the COVID-19 pandemic. However, it cannot negate aspects of supervision and access to judicial institutions to question and challenge the resulting decisions relating to the handling of COVID-19.

The dynamics of handling COVID-19 show that the public is very critical of the Government's efforts to deal with COVID-19. Some policies have become public discourse and controversy, such as the Pre-Employment Card Program, inconsistent social restrictions, COVID-19 prevention, mitigation, COVID-19 test policies, etc. The is room in the state administrative court for (1) correcting policies that are ineffective and not in accordance with AUPB principles to optimize further the Government's efforts in handling COVID-19; (2) restoring the rights of citizens who have been harmed as a result of a decision by state administrators; (3) giving an administrative punishment to the state administrators and preventing similar incidents from repeating.

*[33] Bivitri Susanti in Eksaminasi Putusan Kebijakan Keuangan Negara untuk COVID-19 (Constitutional Court Decision Number 37/PUU-XVIII/2020), Ibid.*

*[34] Bivitri Susanti in Eksaminasi Putusan Kebijakan Keuangan Negara untuk COVID-19 (Constitutional Court Decision Number 37/PUU-XVIII/2020), Ibid.*

*[35] Bivitri Susanti in Eksaminasi Putusan Kebijakan Keuangan Negara untuk COVID-19 (Constitutional Court Decision Number 37/PUU-XVIII/2020), Ibid.*

*[36] Bivitri Susanti in Eksaminasi Putusan Kebijakan Keuangan Negara untuk COVID-19 (Constitutional Court Decision Number 37/PUU-XVIII/2020), Ibid.*

# Follow Up on Constitutional Court Decision

President Joko Widodo has issued Presidential Decree Number 24 of 2021 on Determination of the Factual Status of the COVID-19 Pandemic in Indonesia, stipulated in Jakarta on December 31 2021. The presidential decree emphasizes that the status of the COVID-19 pandemic is still valid in 2022. Consequently, the legal basis for managing state finances still refers to the Law on State Financial Policy for Handling COVID-19, in line with the Constitutional Court's order.

This effort should be appreciated because it is the government's good faith in following up on legal considerations and the Constitutional Court Decision Number 37/PUU-XVIII/2020. This decision mandates the importance of regular updates regarding the status of public health emergencies and non-COVID natural disasters to provide legal certainty for state administration, particularly the handling of COVID-19, and the crucial role of checks and balances of DPR and DPD in an emergency to balance the government's power.

Regarding the State Budget deficit, the Minister of Finance, Sri Mulyani, has targeted the 2022 FY APBN deficit at 4 - 4.8% (four to four point eight percent). However, based on the Law on State Financial Policy for Handling COVID-19 and the Constitutional Court's decision, 2022 is the last year in which the deficit limit is no longer limited to a maximum of 3% (three percent) to adjust financial conditions during COVID-19. Therefore, it is necessary to highlight what adjustments should be taken by state administrators to push the APBN deficit below 3% (three percent).

The Minister of Finance has also budgeted a total National Economic Recovery (PEN) budget of IDR 455.62 trillion with details, IDR 122.5 trillion for health, IDR 154.8 trillion for social protection, and IDR 178.3 trillion for economic strengthening. However, the Minister of Finance has opened the opportunity to use the PEN budget for the relocation of New Capital City. A budget allocation of Rp. Five hundred ten billion was allocated to seven ministries based on Presidential Regulation Number 58 of 2021 concerning the Government's 2022 Action Plan.

This Government policy needs to be assisted, and several things need to be anticipated to remain in line with the 1945 Constitution, the Constitutional Court Decision Number 37/PUU-XVIII/2020, other laws and regulations, and the development of the COVID-19 pandemic. The future actions include three aspects: aspect of state financial policy, checks and balances of DPR and DPD, and aspect of fulfilling the constitutional right to public health and administering the government bureaucracy.

Regarding the aspect of **State Financial Policy**, the Government should begin to adapt to changes in the budget deficit limit scheme, considering that a deficit of above 3% (three percent) is valid until the end of the 2022 Fiscal Year. Since the 2023 Fiscal Year, the deficit limit returns to a maximum of 3% (three percent). Furthermore, there are also adaptations to the new fiscal and monetary policy possibilities since the Law on State Financial Policy for Handling COVID-19 is enforced until the status of public health emergencies and non-COVID natural disasters is revoked. Also, the government needs to evaluate and pay attention to COVID-19 budget allocations at the center and regions by accelerating the absorption of budgets adapted to public health emergencies and non-COVID natural disasters by considering accountability, transparency, and prudence, as well as ensuring that the budget allocation is right on target to accelerate the handling of the COVID-19 pandemic.

On the aspect of the **DPR and DPD's Checks and Balances**, they must strengthen supervision of the formulation of the State Budget and the determination of the limit of the State Budget deficit and accountability for the use of the COVID-19 budget with an adaptive and responsive monitoring model and optimize the use of information technology. Furthermore, the DPR and DPD also proactively supervise and review public health policies to accelerate the handling of the COVID-19 pandemic.

In addition, the DPR and DPD also periodically review the status of the COVID-19 pandemic (three or six months following the quarterly evaluation of the performance of the implementation of the State Budget) to provide legal certainty that has implications for state administration, especially in the management of state finances and public health services. The DPR and DPD must take the initiative to carry out this evaluation even though it is not explicitly regulated in legislation or the Constitutional Court's decision.

Regarding **Fulfilling the Constitutional Right to Public Health and the Implementation of the Government Bureaucracy**, the handling of COVID-19 does not only include the COVID-19 budget policy. Given the fact that the COVID-19 pandemic is still spreading and the mutation of new variants of the virus, the Government needs to evaluate the design and planning related to accelerating the handling of the COVID-19 pandemic and meeting public health needs, such as increasing national vaccination achievements, seeking accessible booster vaccination and fulfilling health facilities that are adequate and providing easy access to vulnerable groups. Furthermore, it is important to enforce an anti-corruption, transparent and accountable bureaucracy for administering state finances, in line with the elimination of immunity from criminal, civil, and state administrative responsibility for state financial administrators in the Constitutional Court Decision Number 37/PUU-XVIII/2020.

# Part Four

## Remaining Agenda

This section outlines several unfinished agendas to be followed up in response to handling the COVID-19 pandemic. In addition, the agendas can be used as objects for a more in-depth analysis. There are 5 (five) highlighted issues; they are: (1) the constitutional design of the perppu material; (2) the time limit for discussing the State Budget for Fiscal Year 2023 and the Status of the COVID-19 Pandemic; (3) the distribution of authority at the level of laws, ministerial regulations, and regional Government; (4) governance of state institutions and budgets during the COVID-19 pandemic; sectors that should be of particular concern in times of public health emergencies; and (6) participation and transparency in the policy-making process.

## Constitutional Design of Perppu Material

The Constitutional Court's Decision Number 37/PUU-XVIII/2020 is insufficient to provide a message regarding the extent of the substance that can be regulated in the Perppu. It is because the Constitutional Court, in its consideration of state financial policy, takes a "one size fits all approach, meaning that it does not explore issues one by one. The constitutional design of the perppu material is important so that the perppu is not used as a forum for making controversial policies through the fast track. Instead, Perppu should be specifically intended to accommodate arrangements and resolve critical issues and issues that have no legal basis for their settlement.

## Time Limitation for Discussion of the State Budget for Fiscal Year 2023 and the Status of the COVID-19 Pandemic

In the Constitutional Court's Decision Number 37/PUU-XVIII/2020, the Constitutional Court has confirmed the time limit for the validity of the Law on State Financial Policy for Handling COVID-19. Therefore, 2022 is the last year where the deficit limit is no longer limited to a maximum of 3% (three per cent), whether the Government will extend the status of the COVID- 19 pandemic as a public health emergency and non-natural disaster.

So, while the status of the COVID-19 pandemic is still valid, the deficit limit above 3% (three per cent) will still apply, provided that the process of discussing and ratifying the State Budget for Fiscal Year 2023 must go through a constitutional process, namely, the ratification of the State Budget Law which is balanced by checks and balances from the DPR and DPD.

For that adjustment, the Government must be prepared to carry out fiscal consolidation in line with the mandate of the Constitutional Court's decision. Accordingly, fiscal consolidation is the Government's fiscal policy to reduce the deficit and accumulation of debt during the COVID-19 pandemic. Fiscal consolidation covers the following issues: (1) the amount and speed of adjustments; (2) the potential consequences of postponing the limitation of the deficit; (3) consideration of whether spending should be extended, income should be increased, or even both; (4) selection of income and expenditure components that must be adjusted; (5) the political cost of fiscal adjustment.[37]

According to Yuna Farhan, the challenge of fiscal consolidation for the Fiscal Year 2023 will be more challenging because, in addition to 2022 being the last year the Government has the flexibility to exceed the deficit limit of 3% (three per cent), the struggle for budget resources is also getting tighter. It is due to fiscal pressure by the revenue, expenditure and financing. According to him, from an income standpoint, the economic contraction during the COVID-19 pandemic in 2020 resulted in a decrease in tax revenue by 16.88%. Also, declined economic growth was indicated by a reduction in demand and prices of various commodities and a drop in tax revenue caused by government incentives. As a result, the debt interest ratio to revenue (interest payment ratio) was 13.58% (thirteen point fifty-eight per cent), and the ratio of interest and debt instalments to revenue (debt service ratio) was 36.74% (thirty-six point seventy-four per cent).[38]

The fiscal consolidation will also be influenced by how the Government responds to public health emergencies and non-natural disasters of COVID-19, considering that the COVID-19 pandemic is unpredictable and the variant of COVID-19 continues mutating. Therefore, the DPR and DPD need to be proactive in overseeing the determination of the status because it is closely related to the legal basis for the main rules of the game in managing the state budget.

The fiscal consolidation will also be influenced by how the Government responds to public health emergencies and non-natural disasters of COVID-19, considering that the COVID-19 pandemic is unpredictable and the variant of COVID-19 continues mutating. Therefore, the DPR and DPD need to be proactive in overseeing the determination of the status because it is closely related to the legal basis for the main rules of the game in managing the state budget.

[37] *Yuna Farhan, "Politik Konsolidasi Fiskal Pasca Putusan MK"..., Ibid., p. 7.*

[38] *Yuna Farhan, "Politik Konsolidasi Fiskal Pasca Putusan MK"..., Ibid., p. 7.*

# Distribution of Authority at the Legislative, Ministerial Regulations, and Regional Government Level

The Law on State Financial Policy for Handling COVID-19 provides a lot of delegation of arrangements to the level of implementing regulations, even on fundamental matters that should be regulated at the level of law.

But, on the other hand, 17 (seventeen) articles deregulate the implementation. The chart below shows the types of regulation implementation and the number of delegations to them in the Law on State Financial Policy for Handling COVID-19.

**Chart 4.1 Number and Types of Implementing Regulations in Law on State Financial Policy for Handling Covid-19**


From the above data, the adjustment portion is given to the Minister of Finance with 6 (six) regulatory delegates. This number is equivalent to the portion of Government Regulations, which also receive 6 (six) adjustment delegations. Other technical matters are further regulated in the Minister of Home Affairs Regulation, Presidential Regulation, Bank Indonesia Regulation, Joint Regulation of the Minister of Finance and Governor of Bank Indonesia, and the OJK Regulation. Although those institutions have only one portion of adjustment at each, the things regulated are crucial.

For example, further arrangements in the Presidential Regulation contain changes in posture and/or details of the State Budget in the context of implementing state financial policies and steps for implementing state financial policies during the COVID19 pandemic. As a result, this regulation has become centralized, even though the Government intends to change the State Budget without changing the law. Thus, eliminating the role of the DPR and DPD as representatives of the people.

Details regarding the substance of the adjustment in the regulation implementation are as follows:

Table. 4.1 Implementing Regulations for Delegates in the Law on State Financial Policy for Handling COVID-19

| Implementing Regulations | Regulations |
|---|---|
| **Minister of Finance Regulations** | 1. Article 2 paragraph (2) concerning further provisions regarding state financial policies.<br>2. Article 6 paragraph (13) concerning: (a) procedures for the appointment, collection, and deposit, as well as the reporting of Value Added Tax; (b) significant economic presence, payment procedures, and income tax reporting electronic transaction tax; (c) procedures for appointing representatives. |

| | |
|---|---|
| | 3. Article 7 paragraph (7) concerning procedures for (a) giving a warning; and (b) requesting for termination of access.<br>4. Article 10 paragraph (1) regarding changes to imported goods that are granted exemption on import duty based on the purpose of their use as referred to in Article 25 paragraph (1) of Law Number 10 of 1995 concerning Customs as amended by Law Number 17 of 2006 concerning Amendments on Law Number 10 of 1995.<br>5. Article 10 paragraph (2) regarding changes to imported goods that may be granted exemption or relief from import duty based on the purpose of their use as referred to in Article 26 paragraph (1) of Law Number 10 of 1995 concerning Customs as amended by Law Number 17 of 2006 concerning Amendments to Law Number 10 of 1995.<br>6. Article 24 paragraph (2) concerning the requirements and procedures for granting loans by the Government to the Deposit Insurance Corporation. |
| **Minister of Home Affairs Regulations** | Article 3 paragraph (2) concerning the provisions regarding the use of budget allocations for specific activities (refocusing), changes in allocations, and the use of the Regional Revenue and Expenditure Budget (APBD). |
| **Government Regulations** | 1. Article 5 paragraph (3) concerning further provisions regarding specific requirements for adjustment of income tax rates for domestic taxpayers.<br>2. Article 6 paragraph (12) concerning the amount of the tariff, the basis for imposition, and the procedure for calculating Income Tax and electronic transaction tax.<br>3. Article 11 paragraph (7) concerning the implementation of the national recovery program.<br>4. Article 15 paragraph (3) concerning further provisions regarding the scheme of providing support by the Government for handling problems with financial service institutions and financial system stability that endangers the national economy.<br>5. Article 20 paragraph (1) letter d concerning the policy of deposit guarantee for groups of customers by considering the source of funds and/or designation of deposits and the amount of guaranteed value for the group of customers.<br>6. Article 20 paragraph (2) regarding further provisions regarding the implementation of the authority of the Deposit Insurance Corporation in the context of implementing measures to deal with problems of financial system stability. |
| **Presidential Decree** | Article 12 paragraph (2) concerning Changes in posture and/or details of the APBN in the context of implementing state financial policies and the steps as referred to in Article 12 paragraph (2) Article 2 to Article 11 |
| **Regulation of Bank Indonesia** | Article 16 paragraph (2) concerning the obligation to receive and use foreign exchange |

| | |
|---|---|
| **Joint Regulation of the Minister of Finance and Governor of Bank Indonesia** | Article 18 paragraph (4) concerning schemes and mechanisms for Special Liquidity Loans (PLK) Grant. |
| **OJK Regulation** | Article 23 paragraph (2) regarding further provisions regarding the implementation of the authority of the Financial Services Authority in the context of implementing the financial system stability policy. |

On the one hand, the preparation of implementing regulations is needed to regulate detailed implementation mechanisms that are not explicitly stated in the law. But on the other hand, the delegation of implementing regulations also provides exclusivity for institutions that are given the authority to formulate rules. Moreover, in contrast to the formation of restrictions at the level of laws, government regulations, ministerial regulations, and other institutional regulations do not go through a process of discussion and mutual approval with the DPR and the provision of considerations by the DPD.

The control mechanism in the process must be carried out more strictly. In addition, the legislature must be proactive in formulating possible ways to reach the process and substance of the regulations as a form of government policy supervision.

# State Institutions and Budget Governance during the COVID-19 Pandemic

The governance of the state institution bureaucracy and budget use/allocation during the COVID-19 pandemic is one of the red reports in mitigating the COVID-19 pandemic. Crucial points that become the discourse are intertwined with the issue of transparency and accountability in state management as well as the potential for corruption and maladministration, such as the issue of accelerating the absorption of the COVID-19 budget, the Pre-Employment Card program, overlapping basic food assistance.

The economic recovery program for the impacted communities has become ineffective due to political and budget fragmentation. [39] Assistance programs to the community in the form of basic necessities, cash assistance, expansion of social protection programs, labor intensive, and pre-employment cards are budgeted by ministries/agencies such as the central, provincial, district/city governments, and village governments. The distribution of aid by many agencies often overlaps because it is managed separately by each central and regional institution with different databases and political interests, thus, making it redundant. The report on the results of the review of the Audit Board (BPK) (2021) on the Financial Report of Central Government (LKPP) confirmed that it was IDR 2.4 trillion social assistances distributed by Ministries/Agencies were mistargeted, unaccountable, duplicated, and substandard. [40]

Regarding the distribution of social assistance, based on the monitoring report of the Indonesia Budget Center and Indonesia Corruption Watch, the following are misappropriation of budget and distribution of social assistance. [41]

*[39] Yuna Farhan, "Politik Konsolidasi Fiskal Pasca Putusan MK"..., Ibid., p. 5; Ervyn Kaffah, Fokus Perhatian Terkait Penanganan COVID-19, FITRA, 2020, p. 8.*

*[40] Yuna Farhan, "Politik Konsolidasi Fiskal Pasca Putusan MK"..., Ibid., p. 5.*

*[41] Hatma Nova Kartikasara, Anggaran COVID-19 dalam Ruang Tertutup, Indonesia Budget Center, 2020, pp. 11 – 15.*

Table 4.2 Potential COVID-19 Misappropriation of Budget

| Region | Case |
|---|---|
| DKI Jakarta | 1. There is an allegation of reducing the volume of social assistance for necessities by the RT head.<br>2. The data in the RT and the website for the list of recipients of social assistance from the DKI Jakarta Provincial Government are out of sync;<br>3. There are overlaps between the social assistance recipients from the President and the Provincial Government of DKI Jakarta;<br>4. A person is registered as a recipient of social assistance but does not receive social assistance; and<br>5. The number of social assistance packages dropped in the RT at each stage often changes. |
| Tanah Data District, West Sumatra Province | 1. The Task Force of Tanah Datar Team is suspected of corruption in the COVID-19 budget<br>2. There is an indication of mark-ups of the 160 sets of Personal Protective Equipment (PPE), five beds, fictitious activities to create a COVID-19 information website, and procurement of hand rubs that directly involve PPK. |
| West Kalimantan Province | 1. There is an indication of misappropriation of budget; the budget for the social assistance from the Ministry of Social Affairs is cut by 90% of the aid value (IDR 177 million) in the Rasau Jaya District, Kubu Raya Regency, West Kalimantan Province.<br>2. There is an indication of cutting the social assistance budget by IDR 500 thousand - IDR 700 thousand per person for the elderly category—over 45 years, worth IDR 2.7 million. |
| Serang, Banten Province | There is an indication of a mark-up of the social assistance budget of IDR 1.9 billion by PT Bantani Damir Primarta. Therefore, this case has been returned to the regional treasury, and DPRD proposes to reuse it for spending on social assistance. |
| Bojonegoro Regency, East Java | Allegedly Rp800 million in social assistance from Ministry of Social Affairs is not distributed. |

Another aspect that is being discussed is the Pre-Employment Card Program which is full of conflicts of interest and is not transparent and accountable. Based on the record of Indonesia Corruption Watch, this program is hardly intended as an effort to overcome the COVID-19 economic impact. [42]

Furthermore, other issues include project and procurement of institutions that serve as training platforms, capability, potential conflicts of interest, unclear price standards, and platform commissions. [43]

*[42] Egi Primayoga, et al., Polemik Mitra dan Lembaga Pelatihan Program Kartu Prakerja – Catatan Kritis Lembaga Pelatihan Program Kartu Prakerja, Jakarta: Indonesia Corruption Watch, 2020, p. 4.*

*[43] Egi Primayoga, et al., Polemik Mitra dan Lembaga Pelatihan Program Kartu Prakerja – Catatan Kritis Lembaga Pelatihan Program Kartu Prakerja..., pp. 9 – 13.*

# Sectors that Should be of Particular Attention during a Public Health Emergency

The Law on State Financial Policy for COVID-19 focuses more on managing the budget for handling COVID-19. Meanwhile, other aspects should be of concern during a public health emergency. The first sector relates to disaster management mitigation. Unfortunately, the Disaster Management Bill discussion to support this issue is stalled. Two important issues can be explored further; (1) determining whether the institution will continue to be managed by The National Agency for Disaster Countermeasure (BNPB) or placed in each ministry. The budget aspect that the ministry can utilize opens up opportunities for this change; (2) the discussion on the percentage of funds for humanitarian purposes and disaster management stagnates in the DPR and the Government. The Government stated that 3% (three percent) of the state budget was too large and burdensome to state finances. [44]

The second sector is social security for the community, especially those laid off due to the crisis due to COVID-19. Finally, the third sector relates to the allocation of the budget for COVID-19 so that it is right on target. For instance, The PEN budget for the State-owned Enterprises (BUMN). The total PEN budget allocated for BUMN is IDR 44.57 trillion, increasing to IDR 53.57 trillion and IDR 62.2 trillion. The budget is allocated for 11 (eleven) BUMN, namely PT PLN, PT Hutama Karya, PT Garuda Indonesia, PT Kereta Api Indonesia, PT Perkebunan Nusantara, PT BPUI, PT Permodalan Nasional Madani, PT Krakatau Steel, PERUMNAS, PT Pertamina, and PT Pengembangan Pariwisata Indonesia. Of all SOEs that received the PEN budget, they consistently experienced increased debt and losses during 2015–2019. Or in other words, the BUMN is not performing well.[45] According to the Secretary General of FITRA, only PT Pertamina, one of four BUMN, is classified as making a significant contribution to state revenue.

# Public Participation and Transparency in Policy Making

Public participation and transparency in policy-making during the COVID-19 pandemic are also crucial during the handling of the COVID-19 pandemic. Unfortunately, policies, i.e. Laws during the COVID-19 pandemic, have been very disappointing regarding public participation, disclosure of related documents, and the haste in passing laws. For example, it can be seen from the process of formulating laws passed during the COVID-19 pandemic, such as the Revision of the Minerba Law, the Revision of the Constitutional Court Law, and the Job Creation Law.

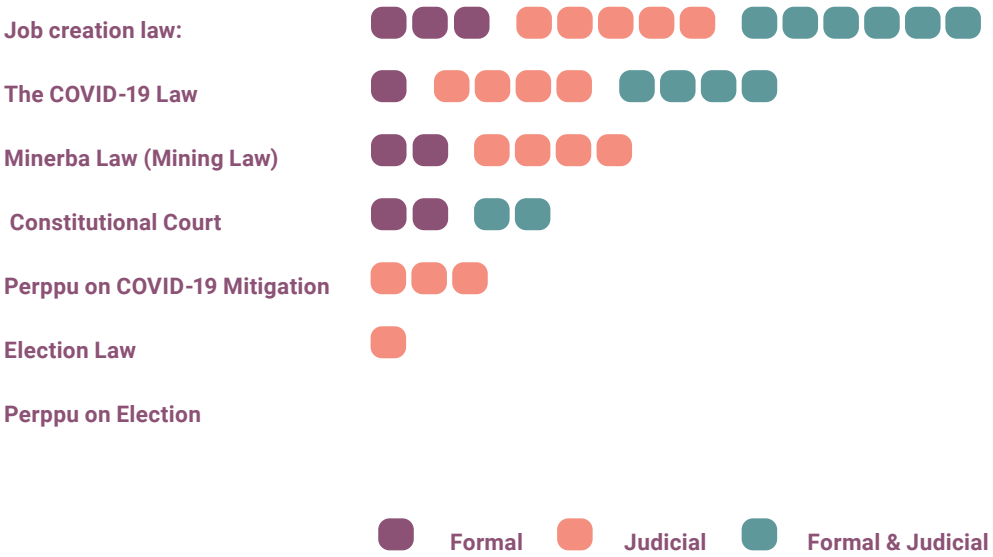
Public dissatisfaction with the process of law formulation is confirmed by the data processed by the KoDe Inisiatif, which shows that this problem is a reduction by the non- participatory and non-transparent process of formation, resulting in the Court's adjudication shortly after the law was passed. The following bar chart shows the number of petitions for judicial review and the types of review: [46]

*[44] Indira Hapsari's presentation at the Expert Meeting Review of Constitutionality of State Financial Policy for Handling COVID-19, organized by the KoDe Inisiatif in collaboration with YAPPIKA-ActionAid on March 22, 2022.*

*[45] Indonesia Corruption Watch, Policy Brief: Menakar Akuntabilitas Kebijakan Pemulihan Ekonomi Nasional untuk BUMN, Jakarta: Indonesia Corruption Watch, p. 4.*

*[46] KoDe Inisiatif, Mahkamah Konstitusi dan "PR" Pengujian Undang-Undang, Jakarta: KoDe Inisiatif, 2021, p. 1.*

**Chart 4.2 Judicial Review of Laws During the COVID-19 Pandemic (2020-2021)**




The policy formation should not use the COVID-19 pandemic as an excuse to formulate policies in a non-transparent and hasty manner. It is important to remember the concept of meaningful participation conveyed by Prof. Susi Dwi Harijanti, which was later adopted in the Constitutional Court Decision Number 91/PUU-XVIII/2020 concerning the Review of the Job Creation Law. Meaningful participation aims to create genuine public participation and involvement. The conditions for meaningful participation that must be adopted in the policy formation process are (1) the right to be heard, (2) the right to be considered, and (3) the right to be explained.

Public participation is intended for community groups directly impacted or concerned about the bill or other policies being discussed. The meaning of meaningful participation also emphasizes the principle of openness/transparency, legal form, clarity of purpose, clarity of formulation and method of formation (access to documents for the formation of bills or other policies) to improve the quality of laws and increase public trust and legitimacy of legislators or other policies.

# Epilogue

## Expectations of the Petitioners for Judicial Review of the Law on State Financial Policy in Handling COVID-19

The COVID-19 pandemic has pushed many countries to be adaptive, especially in terms of governance in emergencies. However, to ensure that public health is prioritized, no principles are violated, and accountability can be carried out, as the petitioners, we view that the scope of the Law on State Financial Policy for Handling COVID-19 is too broad, as it does not only aim to mitigate COVID-19 and its implications, but also intends to deal with threats that endanger the national economy and financial system stability beyond the impact of Covid-19. As a result, it causes unconstitutional actions to misuse state finances for other things than COVID-19 mitigation. In particular, the existence of norms on immunity in implementing organs of the Law makes it difficult to prove that financial management is carried out openly and responsibly.

Also, the interpretation of the Constitutional Court of the Republic of Indonesia states that the phrase “not a state loss” is not in line with the 1945 Constitution of the Republic of Indonesia and has no legal force to bind conditionally as long as it is not interpreted as “not a state loss as long as it is carried out in good faith and in accordance with laws and regulation.” As well as the interpretation of the phrase “All actions including decisions taken based on this Government Regulation in Lieu of Law are not objects of a lawsuit that can be submitted to the state administrative court as long as they are carried out concerning the handling of the COVID-19 pandemic and are carried out in good faith and accordance with laws and regulations “ has strengthened the constitutional guidelines, that in carrying out good governance in times of emergency, there is no impunity. In addition, with the certainty of the status of the emergency period, it is necessary to continue to evaluate the status to ensure that there are checks and balances between the government, DPR RI and DPD RI in managing state finances during an emergency.

We hope that this interpretation of the constitution can be used as a reference in managing state finances in times of emergency, which might repeat in the future.

Best regards,
**Petitioners on Judicial Review**
Case Number 37/PUU-XVII/2020

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After he graduated, he became an intern at KoDe Inisiatif—to assist in monitoring the decisions of the Constitutional Court and a contract-based researcher at the Institute for Lembaga Studi dan Advokasi Masyarakat (ELSAM) to assist in two research projects on business relations and human rights. Currently, he works for Indonesia Corruption Watch (ICW) in the Political Corruption Division.

Some of his writings focus on the issue of democratic backsliding and constitutional disobedience. His writing entitled "A Constitutional Crisis Brewing? Indonesian National Police and its Constant Disregard towards Constitutionalism" was presented at The Global Summit— an international conference on constitutional law organized by The University of Texas at Austin on January 12-16, 2021. His publications can be accessed at https://scholar.google.com/citations?user=IfmIr70AAAAJ&hl=en.