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Measuring the Impact of COVID-19 Law Response and the Role of Supreme Audit Institutions

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Abstract

The objective of this paper is to measure the impacts of constitutional arrangement of a state of emergency, especially Covid-19 pandemic, and to suggest the role of Supreme Audit Institutions to reduce those impacts. This paper uses a descriptive analysis to study constitutional arrangement of emergency in several countries and focuses on the Covid-19 law response in Indonesia. This paper also highlights pandemic-related audits which were conducted by Badan Pemeriksa Keuangan (BPK), the Supreme Audit Institution of Indonesia. This paper concludes that emergency response by the government (such as in the Covid-19 pandemic) should not contradict the intention of legal system to achieve justice in society. Moreover, audit by SAIs is crucial to adjust the emergency response. Thus, this paper suggests that SAIs should take the opportunity and perform audit on the pandemic law response to make a difference to the lives of citizens.

Keywords: *Justice; Legal System; Emergency Response; Supreme Audit Institutions.*

INTRODUCTION

Covid-19 pandemic has become the most threatening challenge faced by all States in the past two years. Globally, as of 20 January 2022, there have been 336,790,193 confirmed cases of Covid-19, including 5,560,718 deaths, reported to WHO. All regions in the world are affected by this virus. Americas suffers the most from this pandemic with more than 123 million confirmed cases and nearly 2.5 million people died (WHO, 2022). This highly contagious disease forces all countries to restrict people's mobility and economic activities. Several countries even lockdown major parts of their economy. Consequently, this pandemic not only affects people's health but also global poverty. The World Bank estimates that extreme poverty significantly increases in 2020, when the pandemic started to spread. It exceeds the number of extreme poverty in 2016 (Mahler, Yonzan, Lakner, Aguilar, & Wu, 2021; Ennab et al., 2022; Chen, 2022; Yamin, 2022). All countries introduce various policies to respond to the global pandemic. These policies rely on the enactment of emergency regulations. These policies are typically activated after the declaration of a state of emergency. Response to emergency situation requires extraordinary measures which deviate from the normal ones (Rahim et al., 2020; Dodaro, 2020; Tampubolon, 2022).

The enactment of emergency regulations poses threat to several aspects of people's lives. As the rule-of-law deviates from business-as-usual arrangements, several risks occur. These risks might be disregarded because the primary concern of the government is terminating the emergency situation (Gorrissen, 2020; Dobrowolski, 2020; Popescu & Plesa, 2022).

This paper aims to highlight some challenges arose from the constitutional arrangement of a state of emergency, for example the Covid-19 global pandemic. It begins with describing the role of law in society. Then it illustrates how several countries legally respond to a state of emergency (Okonofua, 2022; Gotama, 2022; Hu, 2022). Afterwards, it points out the impact of this response to the risk of abuse of power, human rights, and corruption. It primarily uses the Covid-19 handling in Indonesia as the study case (Culea & Constantin, 2021). Finally, it provides several suggestions for the Supreme Audit Institutions to play a role in minimizing these risks so that they can fulfil their mission.

METHOD

This paper uses a descriptive analysis method to determine impacts of Covid-19 regulatory response and to emphasize several suggestions for the SAIs to play a role in reducing those impacts. This paper uses various data including statistical data from WHO, estimated number from the World Bank, literature books and journal, information from the Indonesia's Constitutional Court, and audit report of BPK. The conceptual framework of this research is illustrated in the Figure 1 below:

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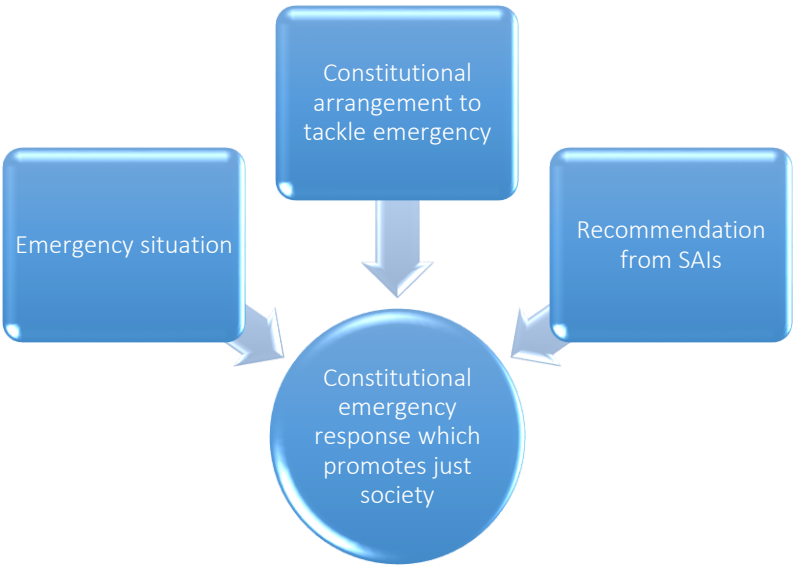

Figure 1. Conceptual Framework of the Research

RESULT AND DISCUSSION

Importance of Law in Society

Law acts as a guidance which provides behavioral norms for society. In his book titled The Behavior of Law, Donald Black defines law as a social control from the government. Law controls social norms and processes to promote good behaviors and prevent the bad ones. Social control imposes consequences for a particular act. However, not all social control considered as law. Parents use norms to shape their children's character. This control is not categorized as law because it does not come from the government (Friedman, 1998).

According to Friedman (1998), there are four functions of legal system. They include social control, dispute settlement, social engineering, and social maintenance. As a social control, legal system tells the society what to do and what not to do. People who break the rule are chased, arrested, and punished. As a dispute settlement, legal system tries to find resolution for conflicted parties. As a social engineering, legal system promotes changes in society. For example, government introduces tax to redistribute welfare from the rich to the poor. Therefore, this function is also known as redistributive function (Mulyatno, 2020). When acting as social maintenance, legal system sustains the status quo. Society needs the legal system to guarantee fairness, even in a free market economy where the invisible hand aims at achieving the best interest of society.

These functions of legal system inferred that law is intended to achieve justice in society. As mentioned in his book titled Justice as Fairness: A Restatement, Rawls (2001) argues that to achieve fair equality of opportunity, a free market system requires political and legal institutions to distribute income more evenly and prevent monopoly of economic activities by a party who has political influences. Moreover, Rawls (2001) acknowledges the role of constitutional guarantee (in the form of bills and declarations of rights) to obtain specific rights and liberties throughout the history of democracy.

Legal system consists of four elements. They are structure, substance, culture, and impact (Friedman, 1998). Legal structure represents a continuing part of the system. It does not change as fast as the other elements. It involves various arrangements including: the number and size of the court, its jurisdiction, legislative arrangement, what the president can and can't do, standard operational procedures of police department. Legal substance is the rules, norms, and behavioral pattern of people in the system. Legal culture represents confidence, values, and expectations of society to the system. Legal culture determines how law is used. Legal impact is consequences of a court decision.

Constitutional Arrangement in a State of Emergency

Emergency situation is extraordinary and impermanent. According to Cornell and Salminen (2018), this situation forces a State to disregard basic principles (such as separation of power and mechanism of checks and balances) and swift to expand the power of the executive. Thus, responding to an emergency situation requires constitutional rearrangement. Asshiddiqie (2008) highlights that the primary intention of emergency law is for the State to not perish. There are two doctrines in responding to a state of emergency, which are self-preservation and self-defense. In the self-preservation doctrine, the state has a preserved power to do whatever necessary to handle an emergency situation. Therefore, unlawful acts by the government, supposing that they are related to emergency response, are allowed by this doctrine. On the

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contrary, self-defense doctrine forbids those illegitimate responses. Thus, Asshiddiqie (2008) argues that self-defense doctrine is more appropriate as it won't consider extra-legal responses to an emergency situation.

The state of emergency has typically been governed in constitution. According to Ferejohn and Pasquino (2004), constitutional arrangement in a state of emergency changes over time. In the era of Roma Empire, emergency power lead to temporary dictatorship. Roman executive office consisted of two consuls. The Roman Senate acted as legislative and executive. It could enact decrees and govern Rome in the absence of consuls. In an emergency situation, Roman Senate could order consuls to appoint a dictator for up to six months. In the Post-Roman era, emergency powers are derived from a democratic process, not an appointment from group of people with special power like in the Roman Empire. State constitution explicitly gives emergency powers to the president to respond to emergency situations. In some cases, advanced democracies do not regulate emergency powers. They respond to emergency situations with ordinary law, for example Defense Against Terrorism act in Britain and PATRIOT Act in the US. Another model of emergency powers does not delegate the powers to the president, but to parliament. In this so-called "legislative model", parliament enacts common laws which give special and temporary powers to the executive. Legislatures controls the use of these powers. They can terminate the powers or prolong them if necessary. The legislative model is slightly different with Roman model in terms of existing powers in a state of emergency. In Roman model, the Senate suspended its operations. All constitutional duties required to respond the emergency situations are delivered to the dictator. Meanwhile, in legislative model, emergency and legislative function run side by side.

Cornell and Salminen (2018) provides examples of emergency constitutional arrangement in Sweden and Finland. Swedish constitution does not provide legal definition of a state of emergency. Cornell and Salminen refer this as a constitutional silence. Handling an emergency situation in Sweden is rather a political consensus between Swedish Government and Legislative (i.e the Committee on the Constitution) than a legal practice. Although this kind of arrangement succeed in the past, Cornell and Salminen argue that this model requires parliamentary stability and political consensus to work. Constitutional silence suffers from lack of accountability and inefficiency which could lead to abuse of power.

On the other hand, Finland has guidance in times of emergency in the form of Emergency Powers Act. Finnish constitution regulates internal emergency and may restrict fundamental rights when responding to a state of emergency. However, it does not define the state of emergency in detail, specifically which bodies of Government have the power to declare emergency. When an emergency occurs, Government submit a decree to Parliament for approval. Unless the emergency situation endures, this decree works for only three months.

From the explanations above, there are several principles of emergency rule. In his book titled The Emergency Constitutional Law, Asshiddiqie (2008) underlines three principles of it including necessity, proportionality, and immediacy. Principle of necessity associates with the rationale for declaring a state of emergency. This principle is arisen from the state's right to defense itself on account of its people. Principle of proportionality provides a standard of reasonableness in the emergency rule. By applying this principle, government must set space and time limitations of emergency responses. The third principle, immediacy, means that an emergency situation occurs so instantaneously that there is no time to examine the policy that will be taken. Emergency state possesses the risk of abuse of power. Even in a detailed emergency rule regime like in Central and Eastern Europe (CEE) region, this applies. Drinóczi (2020) points out a flaw in the Hungarian emergency constitutional arrangement. The Hungarian Fundamental Law develops an emergency legal response based on the constitutions of the CEE. It regulates boundaries of definition, time frame, and authorities in a state of emergency. However, the Hungarian Government still be able to abuse the power by developing a new definition of emergency in 2015 known as "crisis situation caused by mass migration" which does not fit in the Fundamental Law (Drinóczi, 2020). Moreover, on March 11, 2020, the Hungarian Government activated a "state of danger" concerning Covid-19 pandemic. This decision was latter followed by the enactment of Coronavirus Act 2020 at the end of the month. Drinóczi (2020) argues that this Act is unconstitutional because of three reasons. First, it does not follow the observation rule in the Fundamental Law. Second, it does not have a constitutional ground because the Fundamental Law does not explicitly recognize this kind of emergency. Third, it permits additional decree in the future in the absence of parliamentary supervision.

Regulation in an emergency situation may possess threat to human rights. Drinóczi (2020) highlights limitation of journalists' access to information and Parliamentary sessions due to Coronavirus Act 2020. Statistical data regarding the pandemic was not provided by the Hungarian Government since the beginning on the grounds that they contain private information. By analyzing a global data set of countries during 1976 – 1996, Linda and Poe (2004) argues that increasing threat faced by the government correlates to worse human rights abuse. However, transferring the responsibility to declare a state of emergency from executive to legislative results in lowering personal integrity abuse during civil war. Asshiddiqie (2008) emphasizes that limitation of basic rights during emergency must be temporary, intended to handle the emergency situation, and returned to normal arrangement once the state of emergency ends.

In the management of state finance, emergency events may lead to corruption. Luz (2021) emphasizes examples of corruption in the emergency situation. Indian Ocean Tsunami in 2004 gave rise to fraudulent housing distribution and

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importing vehicles in Sri Lanka. Ebola outbreak in 2014 caused mismanagement of emergency funds and procurement in Sierra Leone and Liberia. Likewise, Covid19 pandemic in 2020 resulted in corruption. Bolivia's Health Minister and Indonesia's Social Affairs Minister were dismissed from their post owing to overpriced purchase of ventilators and bribery in the procurement of food parcels, respectively.

There are several prerequisites to prevent emergency response lead to abuse of power. As mentioned in Cornell and Salminen (2018), emergency constitution must regulate the following parameters to prevent abuse of emergency power: clear definition of a state of emergency, competence to exercise the power provided by constitution, and unambiguous boundaries when implementing that power. Ackerman (2004) adds up that these rules will only perform in a political system where distinct separation of power is existed. He suggests that a key parameter in regulating an emergency response is the limitation of time. The executive should be granted the emergency powers as short as possible. It should only be long enough for the preparation of parliamentary assessment. Brief period of power prevents normalization of the state of emergency (Ackerman, 2004).

Emergency Law Response to COVID-19

The Indonesian constitution recognizes the state of emergency. In an emergency situation, the 1945 Constitution allows the President to issue an emergency law named Perpu (*Peraturan Pemerintah Pengganti Undang-Undang*/Government Regulation in lieu of Law). However, Hosen (2010) argues that the Constitution does not clearly state the types of emergency which could be a constitutional ground for issuing a Perpu. This decree issuance led to a validity request by Constitutional Court from NGOs after President Megawati issued Perpu No. 1 of 2004 which amends the Forestry Law. The request was made on the grounds that the government did not describe the emergency situation when issuing the Perpu. Therefore, Hosen (2010) points out that the role of Perpu as a legal instrument to respond to emergency situations is problematic.

Likewise, Rajagukguk & Najib (2021) argues that Perpu is conservative/orthodox/elitist because it only represents government's notion to tackle the emergency situation. According to the established law, Perpu does not require academic studies. Since the regulation must be enacted as soon as possible, it does not have to capture aspiration from the community and oversight from the parliament.

In the presence of Covid-19 pandemic, the Indonesian Government once again exercise its emergency power. Before WHO announced Covid-19 as a global pandemic on March 11, 2020, the Indonesian Government has already declared a state of emergency by releasing Decision of Indonesian Head of National Disaster Management Agency on February 28, 2020. On March 31, 2020, the Indonesian Government enacted Perpu No. 1 of 2020 which regulates policy on state finance and financial system stability to respond to the pandemic. Moreover, on April 13, 2020, President Jokowi declared a national disaster for Covid-19 pandemic by issuing Presidential Decree No. 12 of 2020 (Djalante et al., 2020).

Law No. 1 of 2020 has been enacted as Law No. 2 of 2020 by the House of Representatives on May 18, 2020. The emergency regulation highlights several policies taken by the Indonesian Government to respond to the pandemic. These policies include (Cabinet Secretariat of the Republic of Indonesia, 2020):

1. Prevention of Covid-19 which consists of incentives for doctors and nurses, death benefit, and purchase of medical devices;
2. Social assistance in the form of cash, groceries, exemptions and discounts on electricity bill, and pre-employment card;
3. Tax relaxation incentive, and assistance for Micro, Small, and Medium Enterprises (MSMEs) in the form of postponement of installments, interest subsidies and additional working capital.

Controversy arises with the implementation of covid-19 emergency response act. Several NGOs, researchers, and advocacy activists challenged Law No. 2 of 2020 in the Constitutional Court. The challenge was made on the grounds that (The Constitutional Court of the Republic of Indonesia, 2020):

1. Articles being petitioned gave the government the authority to use an endowment fund for education as a budget source for handling Covid-19 pandemic. This hindered the Petitioners to perform humanitarian activities to improve people's education.
2. The implementation of the law has a very broad scope, which is broader than the initial intention of the Government to deal with Covid-19 pandemic. Not only regulates the mitigation and resolution effort of the Covid-19 pandemic, but this Law also includes the economic crises and financial stability.
3. Article being petitioned violates the rule of law regarding state budgeting. It overrules legislative power to evaluate the magnitude of fiscal deficit and the ability of the state finances every year.
4. Law No. 2 of 2020 is against the principle of regional autonomy as legalized in the 1945 Constitution. It hampers the exercise of autonomy power of regional governments to manage their regional budget.
5. The impunity provided by this Law for the Financial System Stability Committee (KSSK), the Financial Services Authority (OJK), Bank Indonesia, and the Ministry of Finance does not reflect justice for all Indonesians. According to the Law,

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they cannot be prosecuted in civil, criminal, or state administrative courts when carrying out their duties on the pretext of good faith, where any costs incurred do constitute a state loss.

Legal Impact of COVID-19 and Role of Supreme Audit Institutions

Supreme Audit Institutions (SAIs) play an important role in ensuring transparency and accountability of state financial management. They aim at keeping an eye on state's revenue and spending and the credibility of government's financial reporting. Although type and authority of SAIs vary among countries, they have similarity in performing audit. There are three basic audits they perform, which are financial, performance, and compliance audit. By conducting financial audit, an SAI assess the accuracy and fairness of government's financial statement. Performance audit enables SAI to measure whether a public program satisfies principle of economy, efficiency, and/or effectiveness. In compliance audit, an SAI evaluates whether government revenue and spending comply with regulations (Stapenhurst & Titsworth, 2001). Moreover, OECD (2016) outlines that SAIs play an important role in the whole cycle of public policy including policy formulation, implementation, evaluation, and oversight. Specifically, SAIs evolve from just providing oversight to also delivering insight and foresight for the government across policy cycle (OECD, 2016). As also stated in the International Organization of Supreme Audit Institutions Principles 1 (INTOSAI P-1), which is known as the Lima Declaration, audit performed by SAIs covers legality, regularity, economy, efficiency, and effectiveness of state financial management (INTOSAI, 2019a).

SAIs focus their audit to deliver benefit to society. According to INTOSAI P-12 (The Value and Benefits of SAIs), SAIs can make a difference to the lives of citizens by promoting these efforts (INTOSAI, 2019b):

1. Strengthening the accountability, transparency and integrity of government and public sector entities;
2. Demonstrating ongoing relevance to citizens, Parliament and other stakeholders;
3. Being a model organization through leading by example.

In an emergency situation, SAIs should allocate resources to measure risk of abuse of power. As specifically mentioned in INTOSAI P-12, based on their mandate, SAIs should respond to the risks of fraudulent activities and corruption (INTOSAI, 2019b). Emergency situations should not move state financial management away from legality, regularity, economy, efficiency, and effectiveness. Moreover, constitutional arrangement in the state of emergency should be in favor of society as a whole, not just a particular part of it. Thus, SAIs should focus on several critical areas which correspond to the exercise of emergency power by the government such as the following:

1. Parameters used by the government when declaring a state of emergency;
2. Boundaries of time frame and authorities;
3. Checks and balances mechanism;
4. Coherence of emergency regulations with the state constitution;
5. Compliance on public procurement;
6. Compliance and effectiveness of the distribution of social assistance.

SAIs can identify fraudulent activities in the emergency situation by performing all types of audit. SAIs might conduct financial audit to assess the accuracy of social spending which correlates to the emergency situation. Moreover, SAIs could provide insight and foresight concerning deficit on the government financial statement. By conducting performance audit, SAIs could evaluate coherence in constitutional arrangement and appropriateness of checks and balances mechanism during emergency. Furthermore, SAIs could measure the economy, efficiency, and effectiveness of emergency-related public spending (including social assistance) by delivering performance audit. Compliance audit could be focused on public procurement and the distribution of social assistance.

SAIs might need to perform the evaluation through a coordinated audit. Covid-19 handling is a national program which involves various entities of government. It is also a collaborated program by national and sub-national government. Consequently, the evaluation of this program must involve SAIs in national and sub-national level. This kind of audit is similar to the audit of Sustainable Development Goals (SDGs) as offered in Rajaguguk (2017). In a coordinated audit, audit teams on national and sub-national level share similar or partly identical objectives, scope, and methodology (Rajagukguk, Yatnaputra, & Paulus, 2017).

As a member of INTOSAI, SAI of Indonesia (Badan Pemeriksa Keuangan/BPK) initiates effort to strengthen accountability and transparency of covid-19 response by the government. In the 2nd Semester of 2020, BPK audited the Covid-19 Handling and Economic Recovery Program by the Indonesian Government. This audit involved 27 entities in central government, 204 local governments, and 10 state-owned enterprises and other entities. BPK conducted performance and compliance audit for this Program. There are several significant findings resulted from the audit as the following (BPK, 2020):

1. Inaccurate data of public spending related to Covid-19 pandemic. BPK concludes that the government underestimate spending on Covid-19 Handling and Economic Recovery as several activities which associate with the pandemic are not included in the Program yet.

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2. Unsynchronized regulations from the Ministry of Finance and Ministry of Internal Affairs concerning monitoring and evaluation of the disbursement of Covid-19 handling fund.
3. Unreliable data of social assistance recipients which resulted in mistargeted distribution of social assistance, for example: micro businesses received grant more than once and thousands of micro business are not eligible but received the grant.
4. Noncompliance in Covid-19 related procurement which cause inefficiency and indication of state loss.

BPK has also released its foresight concerning the handling of Covid-19 pandemic by the Indonesian Government. BPK uses scenario planning to develop possible future outcomes of the pandemic. BPK recommends the better responses from the government in tackling future threats and challenges, which include: reform in health sector, tax reform to increase fiscal capacity of the government, improvement of leadership of the government, transition to digital government, and increase in quality of human resources (BPK, 2021).

CONCLUSION

Emergency response by the government (such as in the Covid-19 pandemic) should not contradict the intention of legal system to achieve justice in society. Thus, the government must obey the principle of proportionality in handling the emergency situation. Boundaries of authorities, space, and time must be clarified in the regulations. This arrangement is crucial to prevent abuse of emergency power by the executive.

SAIs can contribute to adjust the exercise of emergency power by the government through their audit. They may conduct financial, performance, or compliance audit depends on the audit objectives. In evaluating the Covid-19 handling program, SAIs might need to conduct a coordinated audit as it involves various entities and levels of government. They may also exercise their foresight capacity to provide valuable options for the government. In addition, SAIs should adjust their audit methodology to comply to the pandemic-related regulations, for example physical distancing.

SAIs should focus on the risk of fraudulent activities in public procurement when conducting a compliance audit related to Covid-19 handling. Some countries suffer from mismanagement of emergency fund and procurement. Moreover, SAIs should also measure the effect of those misconducts to the government financial statement while performing financial audit.

In conducting performance audit, the writers suggest that SAIs should at least focus on two objectives. First, to evaluate the coherence of emergency regulations with established law, for example appropriateness of Covid-19 law making process. Second, SAIs should also assess the proportionality of the emergency rule. SAIs should focus on the impact of non-proportional constitutional arrangement in an emergency situation to the distribution of welfare among society. By doing so, they can improve government readiness to tackle emergency situation in the future without having to introduce any extra-legal efforts. Thus, SAIs can fulfil their mission to make a difference to the lives of citizens.

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