

## A LAW ATTEMPT TO RESOLVE THE VACUUM OF NORM BY FORMULATION PERPPU AS A NEW LEGAL FORMATION RELATED TO THE IMPLEMENTATION OF INTERIM REPLACEMENTS IN SPECIAL SITUATIONS

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### ABSTRACT

*The existence of mass or collective corruption cases committed by DPRD legislators in the current legal reality has caused a vacuum in the legislature and stagnation in the administration of local government. DPRD legislators who have been identified as defendants must resign through the mechanism of inter temporal replacement (PAW). Principally, the problem is that the rights of these defendants are still protected by law because there has been an *unincracht* decision. This is the case of the legal studies issues raised in this paper. The research used in this writing is normative legal research because there are problems with the condition of vacuum norms so that new laws and regulations are needed to regulate the stagnation of local government administration due to mass corruption. Furthermore, it is necessary to establish a new law, namely Government Regulation in Lieu of Law (Perppu) as a new legal norm that regulates special situations. In terms of overcoming if similar legal problems will occur again at a later time, then the provisions in the Perppu will apply and otherwise the MPR, DPR, DPRD, and DPD Law (MD3 Law) is not applicable in the special situation problem, as the use of the principle of *lex posteriori derogat legi priori* applies.*

**Keywords:** *vacuum of norm, inter temporal replacement, special situations*

### INTRODUCTION

This research stems from the problem of mass corruption cases committed by DPRD members, resulting in vacant seats in the legislature and stagnation in the administration of local government. Further, DPRD members who have been named as suspects must resign through an interim replacement mechanism (PAW). However, in principle, the rights of these suspects are still protected by law because there has been no *incracht* decision.

In the placement of legislative members both at the regional and central levels, the people who will be placed must be people nominated by political parties to be elected by the community. This shows the idea that (prospective) legislative members have a very strong attachment to the political party that nominated them to become legislative members. But the opposite is that (prospective) legislative members do not have an attachment to the voting community when they become legislative members. This thinking has the consequence that after a legislative candidate becomes a valid member of the legislature, the community does not have any right to dismiss and/or replace the legislative member, but the legislative member

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can only be dismissed and/or replaced during his/her term of service. This shows that if someone becomes a member of the legislature, in this case a member of the DPR and DPRD, then the relevant political party is authorized to take actions ranging from giving warnings, dismissal of party membership to PAW. This is because the interests of political parties must be adhered to and implemented as members of the DPR and DPRD. This is because the attachment of legislative members to their parties is very close, even reaching into the working mechanism of the legislative body so that all policy lines set by the party must be obeyed and implemented in carrying out the functions and duties of the DPR and DPRD.

One example of mass corruption cases committed by members of the Malang City DPRD in 2018 has resulted in the malfunctioning of the legislative body and the stagnation of regional government administration. Therefore, it is necessary to carry out a PAW mechanism without having to wait for a decision that is legally binding (*inkracht*) as in accordance with the arrangements in Law of the Republic of Indonesia Number 13 of 2019 concerning the Third Amendment to Law of the Republic of Indonesia Number 17 of 2014 concerning the People's Consultative Assembly, House of Representatives, Regional Representative Council, and Regional People's Representative Council. (hereinafter referred to as MD3 Law). For these problems, it is necessary to establish a new law, namely Perppu as a new legal norm that regulates special situations. This is because in referring to the above problems, the arrangements in the MD3 Law do not have adequate regulatory provisions to deal with special situation issues in the PAW mechanism. Thus, to overcome if similar legal problems occur again in the future, the provisions in the Perppu will apply otherwise the MD3 Law does not apply in the case of such special situation problems, as the use of the principle of *lex posteriori derogat legi priori* applies.

## RESEARCH METHODS

The type of research used in this writing is normative legal research. Normative legal research is legal research that places the law as a legal system building regarding principles, norms, rules from laws and regulations, court decisions, agreements and doctrines (teachings) (Mukti Fajar and Yulianto Achmad, 2010). Soerjono Soekanto and Sri Mamudji provide an opinion that normative legal research is legal research conducted by examining library materials which include research on legal principles, legal systematics, research on the level of vertical and horizontal synchronization, comparative law, and legal history (Soerjono Soekanto and Sri Mamudji, 2010). Normative research in this writing is based on the existence of problems with the condition of empty norms (*vacuum norm*). This occurs because there is no norm at all or there has been a vacuum of norms or "*lacuna*" or "*leemten van normen*", so that new legislation is needed to regulate the concept of the topic of the problem concerned.

This research uses three types of approaches, namely a *statute* approach and a *conceptual* approach, and a *case* approach (Peter Mahmud Marzuki, 2005). *The statutory approach* is a research that prioritizes legal materials in the form of laws and regulations as a basic reference material in conducting research. This approach is carried out by examining all laws and regulations that are related to the problem (legal issue) at hand. The *statute approach* is used to examine legal regulations relating to the provisions of the Interim Replacement (PAW) mechanism.

The legal *concept analysis approach* (*conceptual approach*) is an approach that departs from

the views and doctrines that develop in legal science. By studying the views and doctrines in law, ideas will be found that give birth to legal concepts and legal principles that are relevant to the issue at hand (Peter Mahmud Marzuki, 2005). In this paper, the *analytical and conceptual approach* is used to understand the concepts applied in solving the problem of the *vacuum* norm.

*The case approach* is one type of approach in normative legal research in which researchers try to build legal arguments in the perspective of concrete cases that occur in the field, of course the case is closely related to cases or legal events that occur in the field. For this reason, usually this type of approach aims to find the value of truth and the best solution to legal events that occur in accordance with the principles of justice. This approach is carried out by examining cases related to the legal issues at hand. The case approach in writing this thesis refers to the case of congregational corruption committed by many elements of the regional representative council in one particular region who committed congregational corruption. The case of congregational corruption caused an impact on the paralysis of the performance and function of the local DPRD until the interim replacement process (PAW) was carried out.

## DISCUSSION

Legal vacuum is an absence or empty state of legal regulations that regulate order in society. Legal vacuum in positive law is more accurately said to be a vacuum of legislation. In the preparation of laws and regulations, both by the legislature and / or the executive, in fact, it takes a long time and process so that when the laws and regulations are declared in force, the things that the regulations want to regulate have changed. In addition, a legal vacuum can occur because the circumstances that occur have not been regulated in a legislation or even those that have been regulated but are unclear or incomplete. This is actually in line with the assumption that the formation of legislation in the future will always lag behind or regress in relation to developments that occur rapidly in society.

If there is a vacuum of norms, then in a writing a problem solving can be planned to think of a new norm formation in filling the vacuum of norms. The new norm is *ius constituendum* or *lege ferenda*, namely the law that will be aspired to and apply in the future (I Made Pasek Diantha, 2017). The norm vacuum is in a certain field of law, so we can criticize the weaknesses of existing norms that are unable to reach the material needed for regulation. The relevant criticism can be done by basing it on the theory of good legislation formation from L. Fuller. L. Fuller's view suggests that a good law must avoid the occurrence of 8 (eight) fatal things, namely: (I Made Pasek Diantha, 2017)

1. *(failure to establish rules at all, leading to absolute uncertainty).*
2. *Failure to make rules public to those required to observe them.*
3. *Improper use of retroactive law making.*
4. *Incomplete (failure to make comprehensible rules).*
5. *Making rules which contradict each other.*
6. *Impose requirements with which compliance is impossible (making rules which impose requirements with which compliance is impossible).*
7. *Too frequent changes (changing rules so frequently).*
8. *There is no consistency between content and practice (discontinuity between content and practice).*

The legal vacuum is an absence or empty state of legal regulations that regulate order in society. Thus a legal vacuum in positive law is more accurately said to be a vacuum of legislation. In addition, a legal vacuum can occur because the circumstances that occur have not been regulated in a statutory regulation or even those that have been regulated but are unclear or incomplete. This is actually in line with the assumption that the formation of legislation in the future will always lag behind or regress in relation to developments that occur rapidly in society (I Gusti Ayu Putri Kartika, et al., 2016). For this reason, confusion arises in society regarding what law should be used or applied, so that in the development of society there is no legal certainty applied in regulating certain circumstances or events that occur.

Legal discovery is a response to problem situations raised by people in legal terminology with regard to legal questions, legal problems or conflicts, and legal disputes. Legal discovery leads to the provision of answers to questions about the law and the search for solutions to concrete problems. Based on this, a number of questions are raised which include the explanation and application of legal rules, as well as questions about the meaning of the facts relating to which the law should be applied.

Perppu is a regulation that in terms of its content should be stipulated in the form of a law, but due to a matter, namely a state of compelling urgency, the regulation is stipulated in the form of a Perppu instead of a law (Jimly Asshiddiqie, 2008). Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) stipulates that "in the event of a compelling urgency, the President has the right to stipulate government regulations in lieu of laws."

Based on the hierarchy of laws and regulations, laws and Perppu have the same position. Therefore, the functions of the Law and Perppu are the same Organizing further regulation of the provisions in the 1945 Constitution of the Republic of Indonesia Regulations in the field of constitutional material such as: organization, duties, and composition of state institutions and 2) The relationship between the state and citizens and between citizens on a reciprocal basis (Maria Farida Indrati, 2008). The content material of the Perppu is regulated in the provisions of Article 11 of Law Number 13 of 2022 Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation (hereinafter referred to as UUP3), namely, "The content material of government regulations in lieu of laws is the same as the content material of laws". This is because the position of Perppu and Law is the same hierarchically, the only difference is that the Perppu is issued by the President in a matter of compelling urgency.

Maria Farida Indrati stated that Perppu has the same content material as the content material of the law so that Perppu is a government regulation that replaces the law (Maria Farida Indrati, 2008). Then this is also supported by Bagir Manan who states that the content material of the Perppu is the content material of the Law, where the content material of the Perppu should be on matters relating to the administration of government so that it is not allowed to issue Perppu that are constitutional in nature and matters relating to state institutions, judicial power, implementation of popular sovereignty, and others outside the scope of state administration (Bagir Manan, 2000).

If there is a vacancy in the law or a legal vacuum due to various reasons so that the

material of the law has not been processed to become a law in accordance with the procedures or provisions applicable in making laws, but there are situations and conditions that are urgent and should be necessary to form legal rules *in the case of* laws that are immediately used to overcome these urgent situations and conditions. So that Article 22 of the 1945 Constitution of the Republic of Indonesia is understood as a provision that provides special institutions by authorizing the President to make Government Regulations in lieu of laws. The making of a law to fill a legal vacuum by making a law like the process in general by starting with the stage of submitting a draft law (RUU) by the DPR or by the President which will take a long time so that the urgent legal needs cannot be overcome. Thus, in our opinion, it can be concluded that Perppu is needed if:

1. There is an urgent need to resolve legal issues quickly based on the law.
2. The required law has not yet been regulated, resulting in a legal vacuum or there is a law that is needed but does not have adequate provisions to regulate the urgent need.
3. The legal vacuum cannot be resolved by making laws in the usual procedure because it will take a long time, while the urgent situation requires legal certainty to be resolved.

As Article 22 paragraph (1) of the 1945 Constitution of the Republic of Indonesia has previously stated, the Government Regulation referred to in the provision is a substitute for a law, which means that the material should be regulated in the form of a law. However, due to compelling urgency, the 1945 Constitution gives the President the right to enact Perppu and does not give the DPR the right to make regulations in lieu of laws. If the making of regulations is left to the DPR, the process will take a long time because the DPR is a representative institution where decision-making is in the hands of members. This means that to be able to decide on a matter must go through the DPR meeting agenda so that if you have to wait for the DPR's decision, to fulfill legal needs in addressing these urgent needs cannot be fulfilled quickly.

Perppu as a new legal norm will give rise to new legal status, new legal relations, and new legal consequences. Since the Perppu is passed, it will create a new legal norm and furthermore, the norm will depend on the approval of the DPR to accept or reject it. However, prior to the DPR's opinion to accept or reject the Perppu, the new legal norm in the Perppu is valid and applies like a law.

Based on this paper, Perppu as the formation of new legal norms is supported by the use of the *lex posteriori derogate legi priori* principle. The principle of *lex posteriori derogate legi priori* means that new laws change or negate old laws that regulate the same material. The principle of *lex posteriori derogate legi priori* applies to 2 (two) rules governing the same issue in the same hierarchy. Thus, if a problem regulated in a law is then regulated again in a new law, even though the new law does not revoke or negate the validity of the old law, and automatically the old law governing the same thing does not apply (Hartono Hadisoeparto, 2001).

The understanding of the principle of *lex posteriori derogate legi priori* which means that a new law or in front of it then overrides the old law or the law behind it, of course, depends on the law enforcer who runs it. The application of a law by law enforcers must be adjusted to

legal needs because it cannot be denied that it causes conflicts between applicable laws. But in addition, it should also be understood that the justice aspect of the new legal needs of society must also be considered and assessed as a whole when it is felt that there is a discrepancy between the applicable law and the existing reality. Regarding the application of the principle of *lex posteriori derogate legi priori*, this principle emphasizes the issue of the time of enactment of a law, according to the author, the understanding of the principle of *lex posteriori derogat legi priori* should precisely have the meaning of understanding that the new law perfects the old law where a new law cannot be fully said to override the old law, but falls in the context of the new law perfecting the old law because it must be considered from the context of the enactment of the time of the law (*tempus delicti*) in applying the law.

The MD3 Law is a "*priori*" while the new legal formation, namely the Perppu, is a "*posteriori*". Thus, if guided by the principle of *lex posteriori derogate legi priori*, the new legal formation, namely the Perppu, overrides the MD3 Law. But on the other hand, a thought can be drawn if the principles in the new law must still be applied without allowing the principles in the old law to be overridden. This may raise the question, does the legal principle of *lex posteriori derogate legi priori* allow for certain exceptions?

As according to Gert-Fredrik Malt in his book *Methods for the Solution of Conflict Between Rules in A System of Positive Law* (as quoted by Kusnu Goesniadhie) that the principle of *lex posteriori derogate legi priori* is classified into general legal principles so that it is general in nature which means that it applies to all areas of law and not to certain issues only. As for being general, the legal principle opens up the possibility of exceptions or deviations. The possibility of an exception or deviation will make the legal system flexible or not rigid so that the legal principle can fulfill the value of legal needs along with existing developments. Conversely, if no exceptions or deviations are possible, the system will be static and rigid (Kusnu Goesniadhie, 2010).

The strength of the principle of *lex posteriori derogate legi priori* is used as the equivalent of the principle that supports the proposal for the need to make a Perppu as a new law formation on the issue of norm vacuum in the MD3 Law regulation which is inadequate regarding how to overcome the malfunctioning of the legislature due to mass corruption committed by DPRD members. So, as the author has explained earlier, in this case the Perppu is a *posteriori* so that it becomes the law that is aspired to in the future (*ius constituendum*). Perppu as *ius constituendum* serves to regulate the interim replacement and filling of legislative membership in special situations such as the occurrence of government stagnation that results in the wheels of government paralyzed. Thus, the conceptual idea of making Perppu as a new legal formation can be interpreted to complement and complement each other for the development of legal needs in society.

## Conclusion

The case of mass or congregational corruption, for example, carried out by members of the Malang City DPRD in 2018, has resulted in the dysfunction of the legislative body and the stagnation of regional government administration. So it is necessary to carry out a PAW mechanism without having to wait for a decision that is legally binding (*inkracht*) as in accordance with the arrangements in the MD3 Law. For these problems, it is necessary to

establish a new law, namely Perppu as a new legal norm that regulates special situations. This is because in reference to the discussion above, the regulation in the MD3 Law does not have adequate regulatory provisions to deal with the issue of special situations in the PAW mechanism. Thus, to overcome if similar legal problems will occur again at a later time, the provisions in the Perppu will apply and otherwise the MD3 Law does not apply in the special situation problem, as the use of the principle of *lex posteriori derogat legi priori applies*.

### **Suggestion**

The need for adequate laws is necessary to resolve any legal problems that occur in the administration of government. The President's authority to enact Perppu in special situations is a mandate for the President to enact Perppu as an effort to resolve problems in governance. This should be the basis of consideration for the legislators in the formation of laws and regulations that are under their authority and included in the consideration as the basis for the formation of Perppu.

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