Powers and Limits of State during COVID-19 Pandemic:  
a Critical Appraisal

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Abstract  
The research aims to analyze the power and limit of the state and whether Indonesia has properly adopted the concept of powers and limits during state emergency of COVID-19 pandemic. The method of the research was normative legal research which used statute and case approach were employed for data analysis. The result shows that a state may apply some types of power in an emergency condition. However, in using its powers, the government must consider principle of limits in a state of emergency. In fact, Indonesia does not properly adopt the balance of power and limit in the state of emergency during COVID-19 pandemic. It is true that the government may take actions to respond to the COVID-19 pandemic. However, the State cannot exceed the limitations of using powers in accordance with state emergency principle. There was a tendency to exceed the limits by the State during the pandemic. The State has violated some state of emergency principles during COVID-19 pandemic such as temporary, the rule of law, necessity, proportionally, intangibility, constitutionalism, harmony, and supervision. The research recommends that the Government and the House of Representatives (the DPR) in the future should obey the state of emergency principles, particularly in terms of state power limits to respect constitutional principles and rule of law. In addition, individuals, groups of people, or organizations may submit judicial review of laws or regulations that violate the state of emergency principles in handling pandemic in the light of protecting the fundamental rights of citizens.  
Keywords: COVID-19; Indonesia; Limits; Powers; State of Emergency.

Introduction  
Unexplained respiratory disease cases have emerged from Wuhan, Hubei province, China, in late December 2019. The disease has been connected to Huanan Seafood Wholesale Market in Wuhan.¹ A novel coronavirus causes the
inductive agent of this mysterious respiratory disease. Therefore, the World Health Organization named the relevant infected disease as Coronavirus Disease 2019 (COVID-19). On January 30, 2020, the WHO has announced COVID-19 as a Public Health Emergency of International concern that creates a high risk for countries with vulnerable health systems. The Emergency Committee said that coronavirus transmission could be interrupted through isolation, early detection, implementing a robust device to trace contacts, and quick recovery.

The outbreak has been spreading in China and other countries all over the world. Based on the data from worldometers, there are 113,950,840 people infected by the Coronavirus Disease 2019 (COVID-19). Most of the sufferers of COVID-19 inflammation have developed moderate symptoms consisting of dry cough, sore throat, and fever. Specifically, patients who need in-depth care guides are those who are older and have some comorbidities. When COVID-19 has spread worldwide, various countries around the world declared states of emergency to slow down or stop its spread. Nevertheless, as the United Nations (UN) reminded on March 16, 2020: “States are not to abuse emergency measures to suppress human rights”. The utilization of emergency powers must be declared publicly. Useful public health purposes must influence restrictions taken to respond to the pandemic.

In Indonesia, there are 1,334,634 people infected by the novel coronavirus (COVID-19). Moreover, on March 31, 2020, President Joko Widodo “Jokowi” declared a public health emergency, one month after the first two cases in Indonesia were confirmed on March 2, 2020. The President has issued Government Regulation

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2 Deng Yu and Li Weina He Feng, ‘Coronavirus Disease 2019: What We Know?’ (2020) 97 Journal of Medical Virology.[1].
7 Bernheim Adam et al., ‘Chest CT Findings in Coronavirus Disease-19 (COVID-19): Relationship to Duration of Infection’ (2020) 295 Radiology.[7].
8 worldometers (n 5).
Number 21 of 2020 on Large-Scale Social Restrictions to limit the people and goods’ movement within a control zone and close the borders. On March 31, 2020, the government issued Government Regulations in Lieu of Laws Number 1 of 2020 on State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease Pandemic or in the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability. Therefore, on May 16, 2020, this Government Regulations in Lieu of Laws Number 1 of 2020 has enacted as the Law by issuing Law Number 2 of 2020. However, this law has violated some articles in the 1945 Constitution. For example, Article 27 paragraph (1), paragraph (2), and paragraph (3) of Law Number 2 of 2020 violates its constitutional right to obtain information on the use of state finances in handling COVID-19 and closes legal surveillance efforts for state courts. Moreover, many people have criticized Law Number 2 of 2020. The law gives immunity rights to the government. Not a single country gives the government the right to immunity in cases of emergencies. Due to the government’s policy, many people lost their job, made the wrong decisions, etc. Based on the statement above, so it is necessary to know the concept of powers and limits of the state in a state of emergency and to analyze whether Indonesia adopts the concept of powers and limits of state properly in a state of emergency during COVID-19 Pandemic in Indonesia.

This research is a normative research method, particularly related to the issue of powers and limits of the state in a state of emergency, with a special reference to the COVID-19 case in Indonesia. Moreover, the research uses a statutory approach and case approach in connection with normative legal research. This research uses secondary data that consist of primary legal material, secondary legal material, and tertiary legal materials. The primary legal material in this research such as the 1945 Constitution of the Republic Indonesia, Law Number 2 of 2020 on the Establishment of Government Regulation in Lieu of Law Number 1 of 2020

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Concerning State Financial Policies and Financial System Stability for Handling Pandemic Corona Virus Disease 2019 (Covid-19) and/or in Order to Deal with Threats that Harm the National Economy and/or Financial System Stability become the Law, Law Number 6 of 2018 on Health Quarantine, Law Number 14 of 2008 concerning Freedom of Information, Law Number 24 of 2007 concerning Disaster Management, Law Number 17 of 2003 concerning State Finances, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption, Government Regulation in Lieu of Law Number 23 of 1959 on Determination of State Emergency, Government Regulation Number 21 of 2020 on Large-Scale Social Restriction, Presidential Regulation Number 54 of 2020 on Posture Changes and Details of the State Budget for the 2020 Fiscal Year, Presidential Decree Number 12 of 2020 on Determination of Non-Natural Disaster for the Spread of COVID-19 as a National Disaster, Presidential Decree Number 11 of 2020 on Determination of COVID-19 as Public Health Emergency, Minister of Home Affairs Regulation Number 20 of 2020 on Acceleration of Handling of Corona Virus Disease 2019 in Local Government Environments, and Constitutional Court Decision Number 8/PUU-XII/2014 on Challenge to Law Number 7 of 2012 on Handling Social Conflict. Secondary legal material such as journals, books, trusted Internet sites; and other non-legal documents related to this research. The method of collecting data in this research carried out through library research by reading, analyzing, and deriving conclusion from related documents. And the data were analyzed systematically through a qualitative juridical approach.

The Spread of COVID-19 in Indonesia

Indonesia’s government has been criticized at home and abroad for failing to respond to the pandemic quickly. Throughout February, when the spread of the virus in neighboring countries, Singapore and Malaysia, increased rapidly, Indonesia claimed to have no cases of COVID-19. The development of the spread of COVID-19 took place very rapidly. The spread of the COVID-19 in Indonesia from March 2020 until February 2021 has separated into 4 Quarters.
A. Quarter 1 (March, April, and May)

The Central Government announced the first and second cases of COVID-19 on March 2, 2020, and the third and fourth cases were reported on March 6, 2020. Meanwhile, Presidential Decree (Keputusan Presiden/KEPPRES) Number 7 of 2020 concerning the formation of a Rapid-Response Team led by the Head of the National Disaster Management Agency (BNPB) was only issued on March 13, 2020,\(^\text{10}\) when the number of positive COVID-19 patients in Indonesia was recorded at 69 people.\(^\text{11}\) The Head of BNPB (Badan Nasional Penanggulangan Bencana) subsequently announced COVID-19 as a non-natural emergency,\(^\text{12}\) on the same day that the Minister of Transportation Budi Karya was reported to have been infected with COVID-19 on March 14, 2020, when the number of positive COVID-19 patients in Indonesia was

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recorded as 96 people.\textsuperscript{13} The following day, the President and all cabinet members underwent a test, on a day when the number of COVID-19 positive patients in Indonesia had increased to 117 people.\textsuperscript{14} The first and second cases in Indonesia were participants in a dance club event in Jakarta. Both are suspected of contracting COVID-19 from a foreign national participating in the club event, which was positive for COVID-19 abroad after participating in the event. Later it was discovered that the fifth case was still related to the Jakarta cluster/dance club.\textsuperscript{15}

After the fifth case, imported cases began to be found, such as in the sixth case, which was an Indonesian crew member from the Diamond Princess cruise ship who was previously quarantined for 14 days in Japan due to positive COVID-19 passengers. At that time, another imported case began to be discovered from Indonesian citizens who had returned from traveling abroad.\textsuperscript{16} Based on data from the Ministry of Health regarding the development of the COVID-19 case from March 1 to April 1, 2020.\textsuperscript{17} The development of the COVID-19 case in Indonesia has two periods. The First Period is the period before the government announces the emergency status of COVID-19. The second period is when the government declares an emergency status between March 14 and April 1.

Until the cases reached 1000 cases in Indonesia, more than 50 percent of


\textsuperscript{15} Fajar B Hirawan, \textit{Indonesia Dan COVID-19: Pandangan Multi Aspek Dan Sektoral} (Center for Strategic and International Studies - CSIS Indonesia 2020).


positive cases were in Jakarta.\textsuperscript{18} Therefore, other large clusters were identified, where the process of this virus infection was thought to have occurred even before the first case was announced. These clusters came from meeting forums that involved many people who came from various regions in Indonesia. At least four large clusters were identified, formed in the province of West Java. These four clusters developed into super spreaders, becoming carriers to other regions. The first of the four clusters were the Sharia Business Seminar in Bogor City on February 25-28, 2020. There are 200 participants attended. Four seminar participants from Solo, Central Java, were identified as positive, and two died on March 10, 2020. The second cluster is the Indonesian Bethel Church (GBI) in Lembang, West Bandung, March 3-5, 2020. Pastor (The leader of the GBI) tested positive for corona and died. From the test results of 637 GBI congregations, 226 of them tested positive for COVID-19. The third cluster was the GPIB Annual Synod Session in Bogor City, which took place on February 26-29, 2020, attended by approximately 600 participants.\textsuperscript{19} The fourth cluster was the West Java Indonesian Young Entrepreneurs Association (HIPMI) Conference event in Karawang, which took place on March 9-10, 2020. Four hundred participants attended this event. At least seven participants in this meeting recently tested positive for COVID-19. These include the Regent of Karawang, Cellica Nurrachdiana, Deputy Mayor of Bandung, Yana Mulyana, and also Mayor of Bogor Bima Arya. Approximately six initial clusters of the spread of COVID-19 have been identified, four of which can be categorized as super spreaders to more people and regions in Indonesia.

When the President declared a public health emergency on March 31, 2020, the number of positive COVID-19 was 1.528 cases, the death toll


reached 136, with the number recovered by 81 people. Until April 2020 ends, Indonesia has recorded 10,118 positive cases of COVID-19 and has tested 72,351 times. There are 7,804 patients still in care, while 1,522 people have been declared cured. Meanwhile, the death toll reached 792, with the death ratio at 7.8 percent. On May 31, 2020, 700 new positive cases of COVID-19, 293 people are cured, and 1,613 people are died due to COVID-19.

B. Quarter 2 (June, July, and August)

Since mid-June 2020, the number of new confirmed positive COVID-19 cases in Indonesia is in the range of 1,000 cases a day. Until the end of July 2020, the transmission of COVID-19 cases in Indonesia still shows an increase. As of July 30, 2020, Indonesia has reported 106,336 cases of infection. Throughout August, new cases of COVID-19 emerged, with many clusters of families and offices to factories. The government has also allowed people to work in offices and open the tourism place even with strict health protocol restrictions.

C. Quarter 3 (September, October, and November)

New clusters have also emerged during the transition period towards this new adaptation, namely Pilkada Serentak (the Simultaneous Local Government Election) in 2020. On September 2-4, 2020, the General Election Commission (KPU) held registrations for local government election candidates. In October 2020, there were an additional 123,079 new cases of COVID-19. On average, during October 2020, there was an increase in cases of 3,970 patients every 20 Jawahir Gustav Rizal, ‘Kasus COVID-19 Di Indonesia Selama April Dan Prediksi Bulan Mei’ (Kompas.com, 2020) <https://www.kompas.com/tren/read/2020/05/01/190604465/kasus-covid-19-di-indonesia-selama-april-dan-prediksi-bulan-mei?page=all> accessed 7 December 2020.
On December 28, 2020, there were 719,219 positive COVID-19 cases confirmed in Indonesia, with 21,452 deaths and 589,978 recoveries. There were 12,001 new cases of COVID-19 in the period of 30-31 January 2021. The total confirmed cases of COVID-19 became 1,078,314 people. Until the end of February 2021, there are 1,334,634 positive cases of COVID-19. The government began its COVID-19 Vaccination Program on January 13, 2021. It is split into four phases with healthcare workers receiving the first batch of vaccines, followed by public servants and then other members of the public. As of February 2021, as many as 4,959,063 people have been vaccinated for COVID-19.

The Powers and Limits of State in the State of Emergency

A. Powers of State in the State of Emergency

According to Jimly Asshiddiqie, three important elements form the definition of a state of emergency that creates an emergency, as follows:

1. The element of a dangerous threat;
2. Elements of a necessity that is required; and
3. The element of the limited time available.

There are two intuitive reasons for declaring a state of emergency. First, the government identifies the dangers and exceptions that occur in the country. Furthermore, second, the government may also declare a state of emergency because

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they want to use the additional power for its benefit, for example, to weaken its political opposition. To weaken the opposition, many governments declared a state of emergency, such as Honduras and Ethiopia. Emergency powers are extra rights that a government or a president can obtain in unusual circumstances such as war, insurrection, terrorist acts, other significant risks to the state, natural hazards, major industrial incidents, pandemics, or related life-threatening situations.

Nevertheless, it is necessary to remember that emergency steps are enforced in various forms, such as limiting the freedom of press content or restricting public meetings, any fines, and specific regulations to discipline anyone who does not comply with the emergency regulation. Moreover, the main obstacles during emergencies are avoiding human rights abuses and restricting the government’s absolute power. They will represent protection against enabling the usage of extraordinary emergency powers to become “the new normal”.

According to Vinkat Iyer, there are six categories of actions on the state of emergency, as follow:

a. the authority to arrest;
b. the power to detention;
c. the authority to impose restrictions on fundamental freedoms;
d. the authority to changes in judicial and criminal procedural procedures;
e. the power to impose restrictions on access to the judiciary; and
f. powers to the immunity enjoyed by the police and other members of the security forces.

B. Limits of State in the State of Emergency

During the state of emergency, there are several limitations for the government, as follows:

1. Human rights limitation must be predicted by law (to ensure legitimacy).

During an emergency, many countries have provisions in their constitutional

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28 ibid.
29 Venkat Iyer, States of Emergency: The Indian Experience (Butterworths India 2000).
laws that specify when and how human rights can be limited;
2. The limitation should be defined as precisely as possible; they must overcome
the danger and be proportionate to the goal (proportionally);
3. The state of emergency must be timed and possibly geographically covered;
4. The rule of law must be upheld, including the right to an effective remedy,
such as the right to go to court. The state must ensure that important court
cases are handled, especially emergency action challenges, urgent criminal
cases, or civil and administrative cases, where the courts must step in to stop
dangerous behavior;
5. Democratic procedures and guarantees of the rule of law are only impeded as
necessary in response to emergencies. Freedom of speech must be maintained,
parliaments, political parties, and courts must be effective as much as possible.

There are two significant international conventions: the European Convention on
Human Rights (ECHR) and the International Covenant on Civil and Political Rights
(ICCPR), which clarify that states have to obey such emergencies.\footnote{Sarah Joseph and Melissa Castan, \textit{The International Covenant on Civil and Political
Rights: Cases, Materials, and Commentary} (Oxford University Press 2013).}[34]. For example,
the declaration of a state of emergency has to provide a well-considered reason for
the emergency’s actual or inevitable existence. This declaration must be officially
declared, which could minimize the likelihood of a de facto emergency and meet
the limitations imposed by the applicable binding instruments of international
and national law.\footnote{Filip G Bozinovic, ‘Finding the Limits of France’s State of Emergency’ [2017] Claremont-
UC Undergraduate Research Conference on the European Union.}[4].
The Declaration of emergency requires the government to
completely restrict or revoke all civil liberties and human rights and warn people
to alter their usual behavioral pattern.\footnote{Christian Bjørnskov and Stefan Voigt, ‘When Does Terror Induce a State of Emergency?
And What Are the Effects?’ (2020) 64 Journal of conflict resolution.}[579]. Under the International Treaty on Civil and
Political Rights (ICCPR), certain rights during a state of emergency that endangers
the nation’s life can be limited by the state.\footnote{Alex Conte and Richard Burchill, \textit{Defining Civil and Political Rights: The Jurisprudence
of the United Nations Human Rights Committee} (Routledge 2016).}[29].

Therefore, the Siracusa Principles on the Limitation and Derogation
Provisions in the International Covenant on Civil and Political Rights (the Siracusa
principles) defines the limitation of rights that a state may have an emergency. The
Siracusa principles describe the state of emergency that threatens the country’s life
as an extraordinary condition, and real or approaching chance, which threatens the country’s life, is an experience.\textsuperscript{34} In the Siracusa principles, restrictions are only justified if they support legitimate and regulated purposes by law, limited duration, proportionate, necessary, and subject to review against violation of applications. State actions must also be based on evidence and not arbitrarily or discriminatory.\textsuperscript{35} Implementing the emergency suspension steps is justified because civil liberties and citizens’ constitutional rights must not create any government barriers to take quick action and extraordinary steps needed to solve the emergency, preserving the state’s legitimacy.\textsuperscript{36}

Some principles must be respected by states during a state of emergency,\textsuperscript{37} as follows:

a. The principles of the declaration

The purpose of this proclamation is that the state of emergency in question must be announced or proclaimed openly to be aware of it.\textsuperscript{38} An open declaration, not only to make transparent and accountable, but it also serves as a legal momentum that determines the status of the existing legal situation.\textsuperscript{39}

b. The principles of temporary

The temporary principle refers to the special nature of the emergency declaration, which needs to be limited in time to prevent the abuse of power that threatens freedom and constitutional guarantees of human rights. The principle of temporary or ‘limitation of time’ requires certainty about when an emergency starts and when it ends or will end so that all legal actions in that emergency can be measured and controlled as well as possible.

c. The principle of necessity

The principles of necessity are a concept used to define the grounds on which the executive power’s exceptional acts, intended to preserve justice or maintain basic constitutional values, are held to be lawful even though such conduct


\textsuperscript{35} Nina Sun, ‘Applying Siracusa: A Call for a General Comment on Public Health Emergencies’ (2020) 22 Health and Human Rights.[387].


\textsuperscript{37} Jimly Asshiddiqie, \textit{Hukum Tata Negara Darurat} (Raja Grafindo Persada 2007).[98–103].


may usually be deemed to contravention existing norms or conventions. The exceptional acts include a private person’s ability to infringe a law without penalty where there was a need for breach of law to prevent harm. 40 Because an activity has become ‘required’ to avoid more harm, it may be used to escape all criminal prosecution and neglect civil suits. 41 When necessity exists, it can be a protection against criminal prosecution. It can also be a defense against a claim for damages resulting from the same behavior. 42

d. The principles of self-preservation
The principles of Self-preservation apply to unilateral intervention by the State in reaction to a legitimate necessity to protect the State in one way or another. Self-preservation has, in many cases, been used as legal justification for an action that would otherwise have been unlawful. 43

e. The principle of proportionality
This principle refers to the need to take immediate action because of compelling needs. It requires the necessary actions to deal with or overcome them proportionately. Implementing an emergency aims to overcome all threats and their impacts and return the state to its original state. 44 If the goal has been achieved, the action’s proportionality is considered fulfilled, so there is no need to continue. If it is continued, that subsequent action cannot be called a proportional action anymore. 45 Likewise, actions that are not needed to overcome the situation in question are not included in the proportional definition referred to by this principle. 46

f. The principles of intangibility
This principle concerns a special nature’s human rights, which cannot be reduced under any circumstances. It is especially important that the representative institutions of the people, as the guardians of human rights, must not be the first victims of a declaration of a state of emergency.

g. The principles rule of law
The rule of law is a legal principle, which contains the idea that justice can be

served by making a system of regulations and procedures that are objective, impartial, impersonal, and autonomous.47

h. The principles of constitutionalism
Constitutionalism is a concept or idea that argues that government power needs to be limited so that the state’s administration is not arbitrary or authoritarian.48 Constitutionalism considers that a constitution or constitution guarantees to protect the people from arbitrary behavior by the government.49

i. The principles of harmony
Harmony indicates balance, equilibrium, fair proportion, a state of agreeing or concord. Other synonyms are union, peacefulness, cooperation, consonance. Harmony aspires to overcome discordant and irregular movements; here the harmonization is something that is done, an object of the harmonization process as an imposition of an order pattern. From a comparative point of view, in a constitution the noun harmony, or the adjective harmonious, expresses the aspirations or representations of society; likewise, there is an obligation to live together in harmony or to promote it. It is also related to human or societal development.50

j. The principles of supervision
The enforcement of the state of emergency must still be subject to control. The parliamentary institution’s function as an instrument of supervision over the implementation of the authorities’ duties during emergency is considered very important in the framework of the principle of checks and balances. Therefore, the parliament must be actively involved whenever the executive power holders want to proclaim a state of emergency or even ratify a state of emergency imposed by the executive.51

Assessment on Application of Powers and Limits of State Emergency Principles during COVID-19 Pandemic in Indonesia

A. The Application of the Principles of Declaration during COVID-19 Pandemic

Basically, when the state in emergencies or in danger a state must declare a state of emergency to the public openly. Therefore, openly declaration of emergency not

49 Nicholas William Barber, The Principles of Constitutionalism (Oxford University Press 2018).[47].
only to make transparent and accountable but also serves as a legal momentum that determines the status of the existing legal situation.\(^{52}\) So, the state then can determine what kind of step or action that they can do in solving the emergencies. President of Republic Indonesia, Joko Widodo, has declared that COVID-19 Pandemic is categorized as a public health emergency by issuing Presidential Decree Number 11 of 2020. The government’s action to issue Presidential Decree Number 11 of 2020 in declaring public health emergency has in line with the declaration principle. Therefore, the reference to the law used when establishing the Presidential Decree Number 11 of 2020 is the Health Quarantine Act. Article 1 states that public health emergencies are public health events of an extraordinary nature characterized by the spread of infectious diseases or events caused by nuclear radiation, biological pollution, chemical contamination, bioterrorism, and food that cause health hazards and have the potential to spread across regions or cross country. It is further explained in Article 15 paragraph (1) that health quarantine responds to public health emergencies. In this emergency concept, the government is responsible for protecting public health from public health risk factors and disease that is the current pandemic (Article 4).

But, apart from the establishment of Presidential Decree Number 11 of 2020 there is also Presidential Decree Number 12 of 2020. These 2 Presidential Decree have the potential to cause confusion in policy making, especially in relation to the use of the budget. According to Constitutional Law Expert, Refly Harun, this Presidential Decree Number 12 of 2020 overlaps with Presidential Decree Number 11 of 2020. Presidential Decree Number 12 of 2020 itself refers to Law Number 24 of 2007 concerning Disaster Management, of which the leading sector is the National Disaster Management Agency. Meanwhile, Presidential Decree Number 11 of 2020 refers to Law Number 6 of 2018 concerning Health Quarantine, the leading sector is the Minister of Health. Presidential Decree Number 12 of 2020 exists but is not preceded by the revocation of the previous Presidential Decree

(Presidential Decree Number 11 of 2020). The problem is these two presidential
decrees have the potential for overlapping budget allocation and coordination. And also, the confusion of the community.\(^{53}\)

B. The Application of the Temporary Principles during COVID-19 Pandemic

When the state is declared a state of emergency, it needs limited time based on the temporary principles. The President has declared a public health emergency by issuing Presidential Decree Number 11 of 2020. Nevertheless, Presidential Decree Number 11 of 2020 does not contain when the emergency ends. The Presidential Decree refers to Article 10 paragraph (1) of the Health Quarantine Act. However, Article 10 paragraph (4) of the Health Quarantine Act states that a Government Regulation shall regulate further provisions regarding procedures for determining and withdrawing public health emergencies. In fact, until today, no Government Regulation regulates this matter. The regulation that without time limitation will be potentially misused. Even according to Prof. Jimly Asshiddiqie, state rulers can turn into tyrants or “dictators by accident” who take advantage of emergencies for their interests or strengthen their power emergency is not restricted.

C. The Application of the Principles of Necessity, Self-preservation, and Proportionality during COVID-19 Pandemic

During a state of emergency, a state must maintain the principles of necessity, self-preservation, and proportionality of action; a state cannot go beyond the limit. President Joko Widodo has prepared a budget of IDR 405.1 trillion to fight COVID-19. Therefore, an increase of the State Budget for 2020 in handling COVID-19 pandemic amounting to IDR 695 Trillion. This budget allocates the health sector of IDR 87.55 trillion and the national economic recovery of IDR 589.65 trillion.\(^ {54}\) From this data, the economic sector budget is higher than the


budget for the health sector. It means that the government maximized its power in the economic sector instead of the health sector.

Therefore, Law Number 2 of 2020 on the Establishment of Government Regulations in Lieu of Law Number 1 of 2020 concerning State Financial Policies and Financial System Stability for Handling COVID-19 Pandemic become the Law regulates the issue of impunity and immunity. In some of the Articles, several provisions have the potential to cause irregularities. Article 27 of the Law Number 2 of 2020 states that all actions, including decisions made based on the Law Number 2 of 2020, cannot be the object of a lawsuit by the State Administrative Court. Even though there is a necessity to establish the Law in combatting COVID-19 and the government’s action to establish Law Number 2 of 2020 also as self-preservation in which a legitimate necessity to protect the state, but when establishing the Law, it needs to look at the principles of proportionality. Proportionality that can provide a standard of reasonableness in taking steps during an emergency. The principle of proportionality requires that the need for mitigation measures must be reviewed periodically by an independent institution. Proportionality in this principle is the taking of actions and / or policies by the authorities, not to exceed reasonableness, or in accordance with the circumstances that require. Everyone should be the same under the Law, and there are no immunity rights for the government to conduct their activities. In an emergency, the actions taken must be clear in terms of limits and measures, this needs to be done so as not to open up opportunities for abuse of power that results in wider losses. Formulation of Article 27 Law Number 2 of 2020 which is oriented towards providing legal immunity for the implementer, is very inappropriate. Thus, implementing legal immunity on Law Number 2 of 2020 to overcome COVID-19 is a policy that is too forced and irrelevant.

D. The Application of the Principles of Intangibility during COVID-19 Pandemic

Principles of intangibility requires that every step of the Government’s policy in handling an emergency must not reduce the basic human rights which are

55 Constitutional Court Decision Number 8/PUU-XII/2014 (Constitutional Challenge to Law Number 7 of 2012 on Social Conflict).
specific and must be protected under any circumstances. In handling COVID-19, there is a tendency to clash between the need to fulfill the right to health and the interests of economic recovery, which is accompanied by marginalization of human rights. According to the Institute for Community Studies and Advocacy (ELSAM), the aspects that can be seen from a number of problems in Indonesia including: a decrease in the quality of civil liberties; increasing problems related to protecting the right to privacy; weak encouragement in respecting human rights involving non-state actors, particularly corporations; stagnation in the accountability process to resolve allegations of past gross human rights violations; the strengthening of the tendency for policy formation to be contrary to human rights; and the continuing conflict and violence that occurred in Papua.

In the aspect of civil liberties, the downward trend can be seen mainly in the enjoyment of freedom of religion, expression and assembly. In general, the assessment provided by Freedom House (2020) shows the quality of Indonesian civil liberties in a “partly free” condition. In protecting religious freedom, for example, Freedom House only gives a score of 1 on a scale of 4 for Indonesia, which indicates the lack of protection for this freedom. During this period, a number of cases of intimidation and persecution against religious minority groups, as well as acts of prohibiting and closing a number of places of worship, took place in various regions. Even so in the enjoyment of freedom of expression, the situation is no better than other civil liberties. The use of the Law on Information and Electronic Transactions (ITE) is still a scourge in the implementation of this freedom, especially in the (digital) network space. Criticism of the handling of COVID-19 has often been responded to with threats of criminalization, through the use of defamation articles and the spread of hate speech. In the name of overcoming disinformation surrounding the COVID-19 pandemic, the criminal articles in the ITE Law are often used as an instrument of chilling effect, with the threat of imprisonment. Meanwhile, in the aspect of freedom of assembly, the implementation of Large-Scale Social Restrictions (PSBB) in a number of areas, as an effort to limit the spread of the COVID-19 outbreak, its implementation also seems selective, and
tends to negate the enjoyment of other human rights. This situation was especially recorded in the handling of a number of demonstrations against the ratification of the Job Creation Bill in several cities, which security forces repressed on the grounds of implementing the PSBB. In fact, intimidation was also carried out against students and students who joined the action to reject the bill. Not only involving security forces, but intimidation also involves the Ministry of Education and Culture and university institutions.

Throughout 2020, there were a series of incidents of personal data leakage involving government institutions, such as data on handling COVID-19 and data on permanent voters, as well as data leaks managed by a number of e-commerce platforms. Unfortunately, from these various incidents, an adequate investigation and handling process was not carried out, which was informed to the public in an accountable manner, to ensure that similar incidents did not happen again.

E. The Application of the Principles of Rule of Law during COVID-19 Pandemic

There are three characteristics of the rule of law as stated by AV Dicey, namely supremacy of law, equality before the law, and the constitution based on individual rights. From March 5 until April 21, 2020, 93 incidents of prosecution were related to threats to civil liberties during the large-scale social restrictions period. As regulated in Article 28J paragraph 2 of the 1945 Constitution, constitutionally, the state’s restrictions can be imposed in the context of morality, religious values, security, and public order in a democratic society. It is a consequence of submission to the people’s sovereign rulers and adherence to all kinds of legal instruments made by the ruler as part of a rule of law’s basic principles. The government’s action has violated the guarantees of legal protection and the rule of law principles. 56

F. The Application of the Principles of Constitutionalism during COVID-19 Pandemic

The principles of constitutionalism stated that there is limitation for the state power and all action that conducted by the state must based on the law. One of the

checks and balances mechanisms is a legal responsibility for the government, which not abuses its authority. Unfortunately, it turns out that this has been implicitly injured in several regulations intended to address COVID-19, such as in Article 10 paragraph (1) of Law Number 6 of 2018 concerning Health Quarantine and Article 27 of the Law Number 2 of 2020 on the Establishment of Government Regulations in Lieu of Law Number 1 of 2020 concerning State Financial Policies and Financial System Stability for Handling COVID-19 Pandemic become the Law. Therefore, Article 27 said that not all actions or decisions taken based on Law Number 2 of 2020 are objects of the dispute over the State Administrative Court. These articles are debated because of the potential for legal irregularities as an implication of applying the two articles. Article 1 paragraph (3) of the 1945 Constitution states that Indonesia is a constitutional state, in the sense that all state actions must be based on the rule of law, one of which is the limitation of power, equality before the law and a special court in the field of administration. This is contradictory when looking at several norms listed in Law Number 2 of 2020, eliminating criminal or civil sanctions for officials who commit an action that harms the state both in enriching themselves and corporations. Furthermore, Law Number 2 of 2020 also creates complexity in enforcing the law on corruption, as stated in Articles 2 and 3 of the Law on Corruption’s Eradication. The definition of everyone in the Law refers to the basic theory of statutory science; the word “everyone” means that the article’s criminal provisions apply to anyone without exception. Everyone should be the same under the Law, and there are no immunity rights for the government to conduct their activities. This is contradictory when looking at several norms listed in Law Number 2 of 2020, eliminating criminal or civil sanctions for officials who commit an action that harms the state both in enriching themselves and corporations.

57 Article 27 of Law Number 2 of 2020 on the Establishment of Government Regulations in Lieu of Law Number 1 of 2020 Concerning State Financial Policies and Financial System Stability for Handling Pandemi Corona Virus Disease 2019 (COVID-19) and/or to Deal with Threats that Harm the National Economy and/or Financial System Stability become the Law.

58 Ahmad Gelora Mahardika, ‘Potensi Penyiimpangan Hukum Dalam Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2020’ (2020) 27 urnal Hukum IUS QUIA IUSTUM. [281].
Formulation of Article 27 Law Number 2 of 2020 which is oriented towards providing legal immunity for the implementer, is very inappropriate, because with this immunity there will be an overlap of power between the Executive and the Judiciary, or even the executive will tend to interfere in judicial affairs.

G. The Application of the Principles of Harmony during COVID-19 Pandemic

The action of the government is against the principles of harmony Many activists and scientists have asked for a lockdown to stop the transmission of the COVID-19, but President Joko Widodo said that the government is not moving towards a lockdown policy. Rather, Jokowi urged all Indonesians to conduct social distancing, a study from home, worship from home, and work from home.\(^{59}\) The declaration is a claim that ignores the wishes and demands of a variety of regions articulated by their leaders, such as a demand from the Governor of Jakarta to implement a lock-down policy in Jakarta.\(^{60}\) Furthermore, local governments and the central government are responsible for the availability of the necessary resources. Local governments must also supervise activities related to COVID-19. It is appropriate with the provisions of Article 6, which states, “The Central Government and Regional Governments are responsible for the availability of resources needed in the implementation of Health Quarantine”.\(^{61}\) Since COVID-19 is characterized as a pandemic, the government must conduct a health quarantine, or a lockdown based on Article 4 of Law Number 6 of 2018 on Health Quarantine. Nevertheless, the government only conducts a large-scale social restriction. Lockdown does not eliminate viral infections in people with the disease, but it does limit the disease’s spread. Lockdown can have a positive effect on the spread of COVID-19.\(^{62}\) In


\(^{61}\) Siti Chadijah, ‘Harmonisasi Kewenangan Penanganan Pandemi Covid-19 Antara Pemerintah Pusat Dan Daerah’ (2020) 8 Kertha Semaya: Journal Ilmu Hukum.[864].

\(^{62}\) Siti Setiati and Muhammad Khifzhon Azwar, ‘COVID-19 and Indonesia’ (2020) 52 Acta Medica Indonesiana.[86].
addition, there were 1.9 million Indonesian citizens reported to have lost their job during the pandemic because of the weak management crisis.63

H. The Application of the Principles of Supervision during COVID-19 Pandemic

Freedom of Information Network Indonesia (FoINI), a civil society network that advocates for information disclosure, asked stakeholders to use budgets to be transparent. Information on the use of the COVID-19 budget should be accessible to the public, as referred to Article 9 paragraph (2) letter c of Law Number 14 of 2008 concerning Freedom of Information FoINI is also concerned that the closed use of the budget opens opportunities for irregularities, including corruption. Besides, government supervision of the distribution of social assistance funds during the COVID-19 pandemic is still minimum.64 Based on the check and balances mechanism, the government, during social assistance distribution, needs to be controlled and secured by the Corruption Eradication Commission (KPK) to avoid abuse of power. In addition, it also needs the supervision of the DPR, the DPR has supervisory function65 that needed in this condition. One of the supervisory functions that the DPR can carry out is examining the quality of the policies that have been issued and whether the policies issued to deal with COVID-19 have been implemented in the field and protect the people. However, instead of focusing on forming legislative products related to COVID-19 and supervising the government, the DPR has discussed various Draft Laws irrelevant to the current public interest.66 These bills include the Job Creation Bill or what is more commonly referred to as the “Omnibus Law,” the Criminal Code Bill which

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has created controversy in the community. When there is a state of emergency, the parliament can provide great supervision to the government to handle a pandemic to target and minimize arbitrariness.

**Conclusion**

Based on the analysis that has been mentioned previously, it can be concluded that *firstly*, the State has powers in a state of emergency in the light of principle of necessity and self-preservation. Therefore, the State has authority to arrest, the power to detention, the authority to impose restrictions on fundamental freedoms, the authority to changes in judicial and criminal procedural procedures, the power to impose restrictions on access to judiciary, and powers to the immunity enjoyed by the police and other members of the security forces. However, the State must also obey some limitations of using power during state of emergency. This is because the State must respect human rights protections and rule of law even though in emergency situation. Limitation must be predicted by law and democratic procedures and guarantees of the rule of law only be impeded as much as it is necessary for response to emergencies.

*Secondly*, Indonesia does not properly adopt the concept of powers and limits of the state during state of emergency of COVID-19 pandemic. The government may take action to respond to the pandemic. However, some issues show that the government does not keep the balance the use of powers. There is a tendency to exceed the State of Emergency’s limits and the government’s action is not in accordance with the state of emergency principles such as temporary, the rule of law, necessity, proportionally, intangibility, constitutionalism, harmony, and supervision.

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