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CONSTITUTIONAL CONTROL OF EMERGENCY POWERS IN INDONESIA'S PRESIDENTIAL SYSTEM

KONTROL KONSTITUSIONAL ATAS WEWENANG DARURAT DALAM SISTEM PRESIDEN INDONESIA

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ABSTRACT
The constitutional regulation of emergency powers presents a significant challenge for contemporary constitutional democracies, particularly within presidential systems where executive authority often expands during crises. In Indonesia, this issue is encapsulated in Article 12 of the 1945 Constitution, which grants the President the authority to declare a state of emergency without clearly delineating substantive thresholds, temporal limits, or institutional mechanisms of control. The ongoing reliance on Law No. 23 Prp of 1959 further entrenches a security-oriented framework that increasingly diverges from Indonesia's post-amendment constitutional commitment to the rule of law and human rights protection. This article explores constitutional controls over emergency powers in Indonesia through a doctrinal and comparative constitutional analysis. It assesses the normative coherence and institutional adequacy of Indonesia's emergency powers framework by situating it in a comparative perspective with South Korea and Brazil, two presidential systems that have developed more structured constitutional mechanisms for regulating emergencies. The comparison emphasizes differentiated emergency regimes, legislative involvement, temporal limitations, and judicial oversight as key tools for constraining executive discretion during crises. The article concludes that Indonesia's emergency powers framework remains normatively under-specified and institutionally fragile, resulting in fragmented emergency governance and weak constitutional accountability. Drawing on comparative insights, the article

identifies reform implications aimed at strengthening constitutional controls, particularly through clearer emergency standards, enhanced legislative and judicial oversight, and the reconceptualization of emergency powers as a constitutionally regulated exception rather than an open-ended executive prerogative.

Keywords : State of Emergency, Emergency Powers, Constitutional Control, Presidential System, Rule of Law.

ABSTRAK

Regulasi konstitusional terhadap kewenangan darurat tetap menjadi tantangan utama bagi demokrasi konstitusional kontemporer, khususnya dalam sistem presidensial di mana kewenangan eksekutif cenderung meluas selama masa krisis. Di Indonesia, tantangan ini tercermin dalam Pasal 12 Undang-Undang Dasar 1945, yang memberikan kewenangan kepada Presiden untuk menyatakan keadaan darurat tanpa secara jelas menentukan batasan substantif, batasan waktu, atau mekanisme institusional untuk pengawasan. Ketergantungan yang berkelanjutan pada Perppu No. 23 Tahun 1959 semakin memperkuat kerangka kerja yang berorientasi pada keamanan, yang semakin tidak selaras dengan komitmen konstitusional Indonesia pasca-amandemen terhadap prinsip negara hukum dan perlindungan hak asasi manusia. Artikel ini mengkaji kontrol konstitusional terhadap kewenangan darurat di Indonesia melalui analisis konstitusional doktrinal dan komparatif. Artikel ini menilai koherensi normatif dan kecukupan institusional dari kerangka kewenangan darurat Indonesia dengan menempatkannya dalam perspektif komparatif dengan Korea Selatan dan Brasil sebagai dua sistem presidensial yang telah mengembangkan mekanisme konstitusional yang lebih terstruktur untuk mengatur keadaan darurat. Perbandingan difokuskan pada rezim darurat yang berbeda, keterlibatan legislatif, batasan waktu, dan pengawasan yudisial sebagai alat utama untuk membatasi diskresi eksekutif selama krisis. Artikel ini menemukan bahwa kerangka kewenangan darurat Indonesia masih normatif kurang terinci dan secara institusional rapuh, mengakibatkan tata kelola darurat yang terfragmentasi dan akuntabilitas konstitusional yang lemah. Dengan mengambil wawasan komparatif, artikel ini mengidentifikasi implikasi reformasi yang bertujuan memperkuat kontrol konstitusional, khususnya melalui standarisasi keadaan darurat yang lebih jelas, peningkatan pengawasan legislatif dan yudisial, serta rekonseptualisasi kewenangan darurat sebagai pengecualian yang diatur secara konstitusional, bukan sebagai hak prerogatif eksekutif yang tidak terbatas.

Kata Kunci : Keadaan Darurat, Kewenangan Darurat, Pengawasan Konstitutional, Sistem Presidensial, Supremasi Hukum.

I. INTRODUCTION

In recent years, constitutional democracies have encountered increasingly intricate crises, including armed conflict, political instability, pandemics, and climate-related disasters.[1] These developments have intensified scholarly debates regarding the constitutional design of emergency powers, which must enable swift state action while preventing executive overreach.[2] Comparative constitutional scholarship has demonstrated that inadequately regulated emergency regimes may erode checks and balances and weaken democratic institutions. Experiences in several jurisdictions illustrate how emergency powers can be transformed from temporary safeguards into instruments of political consolidation.

Within the broader discourse, the regulation of emergency powers in presidential systems poses distinct challenges.[3] Given that executive authority is institutionally concentrated in the presidency, emergency provisions may substantially augment discretionary power if not accompanied by explicit substantive thresholds, temporal constraints, and robust legislative and judicial oversight.[4] Contemporary scholarship underscores the necessity of "constitutionalizing" emergency powers rather than treating them as extra-legal exceptions. As articulated by scholars such as Bruce Ackerman and David Dyzenhaus, extraordinary powers must remain anchored within constitutional legality to avert the normalization of exceptional governance.[5]

Indonesia provides a particularly important case study in this regard. Article 12 of the 1945 Constitution grants the President the power to proclaim a "state of danger," but it lacks detailed criteria, procedural protections, time constraints, and mechanisms for institutional oversight.[6] The continued

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[1] Michael Lawrence et al., "Global Polycrisis.: The Causal Mechanisms of Crisis Entanglement," *Global Sustainability* 7 (2024): e6, https://doi.org/10.1017/sus.2024.1.

[2] Zoltán Szente, "How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework," *Hague Journal on the Rule of Law* 17, no. 1 (2025): 117–38, https://doi.org/10.1007/s40803-024-00244-1.

[3] David Dyzenhaus, "States of Emergency," in *A Companion to Contemporary Political Philosophy*, 1st ed., ed. Robert E. Goodin et al. (Wiley, 2017), https://doi.org/10.1002/9781405177245.ch50.

[4] Francesco Bromo et al., "Governments and Parliaments in a State of Emergency: What Can We Learn from the COVID-19 Pandemic?" *The Journal of Legislative Studies.* 31, no. 4 (2025): 918–46, https://doi.org/10.1080/13572334.2024.2313310.

[5] Gábor Mészáros, "How Misuse of Emergency Powers Dismantled the Rule of Law in Hungary.," *Israel Law Review* 57, no. 2 (2024): 288–307, https://doi.org/10.1017/S0021223724000025.

[6] BNPB, *Indeks Risiko Bencana Indonesia (IRBI)* (Badan Nasional Penanggulangan Bencana, 2024), https://inarisk.bnpb.go.id/irbi.

reliance on Law No. 23 Prp of 1959—enacted in a pre-democratic political context—further complicates the constitutional landscape.[7]

Existing Indonesian scholarship has examined aspects of emergency governance, including the constitutional limits of Government Regulations in Lieu of Law (Perppu) and the practical challenges of emergency implementation.[8] However, these studies have not systematically evaluated Indonesia's emergency regime through a structured comparative constitutional framework, nor have they fully assessed its normative coherence within the post-amendment constitutional architecture. Consequently, a gap remains in understanding whether Indonesia's emergency powers design meets contemporary constitutional standards in presidential democracies.

Conceptually, a state of emergency is a legal construct activated by a formal declaration from an authorized official in response to an extraordinary situation requiring immediate action.[9] Such a declaration is both performative and illocutionary, as it creates a temporary legal regime that deviates from normal provisions and becomes effective immediately after its declaration.[10] The broader the discretionary space for declaring a state of emergency, the greater the potential for the uncontrolled expansion of executive authority. Therefore, the design of emergency powers requires the formulation of strict substantive and procedural parameters to ensure that extraordinary actions remain within the constitutional framework.[11]

To date, several academic studies have been conducted on Indonesia's state of emergency. One of them is Prayitno's research, which comprehensively elaborates the criteria for "compelling urgency" in the issuance of Perppu based on Article 22 of the 1945 Constitution,[12] although it does not touch upon the state of emergency as stipulated in Article 12. Ayuni's study provides an in-depth analysis of the design and practice of the state of emergency and identifies the problem of constitutional ambiguity that

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[7] M. Fuady et al., "Disaster Mitigation in Indonesia: Between Plans and Reality," *IOP Conference Series: Materials Science and Engineering* 1087, no. 1 (2021): 012011, https://doi.org/10.1088/1757-899X/1087/1/012011.

[8] Ayuni Qurrata et al., "Challenges of Checks and Balances in Disaster Management in Indonesia," *Disaster Advances* 15, no. 5 (2022): 1–7, https://doi.org/10.25303/1505da01007.

[9] Jimly Asshiddiqi.e, *Hukum Tata Negara Darurat* (PT Rajagrafindo Persada, 2007).

[10] J. Ferejoh.n and P. Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (2004): 210–39, https://doi.org/10.1093/icon/2.2.210.

[11] Felix Dube, "The Rule of Law in a State of Disaster: Evaluating Standards for the Promulgation, Administration and Enforcement of Emergency Regulations in South Africa," *Hague Journal on the Rule of Law* 15, no. 1 (2023): 143–59, https://doi.org/10.1007/s40803-022-00179-5.

[12] Cipto Prayitno, "Analisis Konstitusionalitas Batasan Kewenangan Presiden Dalam Penetapan Peraturan Pemerintah Pengganti Undang-Undang," *Jurnal Konstitusi* 17, no. 3 (2020): 513, https://doi.org/10.31078/jk1733.

creates opportunities for deviation in implementation.[13] Building on these two studies, this study seeks to addresses that gap by employing a doctrinal and comparative constitutional approach. It compares Indonesia's emergency framework with those of South Korea and Brazil, two presidential systems that have developed more structured constitutional mechanisms for regulating states of emergency.

Accordingly, this study seeks to answer the following research questions: *first*, To what extent does Indonesia's emergency regime align with contemporary constitutional standards regarding legislative participation, judicial oversight, and temporal limitation? *Second*, What institutional reforms are necessary to transform Indonesia's emergency powers framework into a constitutionally coherent and democratically accountable system?

By addressing these questions, this article contributes to the broader debate on constitutionalized emergency governance in presidential systems. It argues that Indonesia's current emergency powers framework remains normatively under-specified and institutionally fragile, and that meaningful reform is required to reconcile executive flexibility with constitutional accountability.

II. METHOD

This study adopts a doctrinal approach by examining the body of constitutional provisions and statutory regulations that regulate emergency powers in Indonesia, with particular attention to Article 12 of the 1945 Constitution. This approach is relevant because the issues studied are normative,[14] concerning the coherence, sufficiency, and consistency of the legal design of emergency situations within the constitutional framework after the amendments. Through textual and systematic analysis of positive legal provisions,[15] this research assesses whether the existing framework is capable of ensuring limitations on power, maintaining checks and balances, and protecting the constitutional rights of citizens in extraordinary situations.

In addition, this research applies a constitutional comparative approach as part of the doctrinal framework to examine how other countries formulate substantive and procedural limits on the use of emergency powers.[16] This comparative approach is used to identify general standards in constitutional

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[13] Qurrata Ayuni et al., "Concept and Implementation on the State of Emergency in Indonesia: Outlook to Strengthen Checks and Balances during Crisis," *Revista de Investigações Constitucionais* 9, no. 1 (2022): 11, https://doi.org/10.5380/rinc.v9i1.83557.

[14] Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group, 2005).

[15] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (2012): 83, https://doi.org/10.21153/dlr2012vol17no1art70.

[16] Vicki C. Jackson, "Comparative Constitutional Law: Methodologies," in *The Oxford Handbook of Comparative Constitutional Law*, by Vicki C. Jackson, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), https://doi.org/10.1093/oxfordhb/9780199578610.013.0004.

emergency governance and to assess the extent to which Indonesia's design aligns with contemporary constitutional practices. Thus, the methods used allow for the formulation of a more comprehensive prescriptive analysis regarding the need to reconstruct the legal framework for emergencies in Indonesia.

III. ANALYSIS AND DISCUSSION

a. Normative Gaps and Their Implications

Within Indonesian constitutional law, emergency powers function as a legal mechanism to safeguard the state when ordinary legal frameworks are insufficient to address grave dangers. Jimly Asshiddiqie conceptualizes such a condition as a form of constitutional necessity, meaning an urgent circumstance that justifies a restricted deviation from standard legal norms in order to secure the broader public interest.[17] This framework aligns with Bruce Ackerman's theory, which emphasizes that emergency regimes must be designed with strict boundaries to prevent them from becoming instruments for concentrating power.[18] Other literature reinforces this theoretical foundation, like David Dyzenhaus' focus on the rule of law during emergencies, which asserts that every emergency action must still have a legal basis that can be tested.[19] Taken together, these views indicate that a state's flexibility in facing crises must be balanced by strict constitutional limits.

According to Indonesia's Constitution, the legal foundation for managing a state of emergency is outlined in Article 12 of the 1945 Constitution, which empowers the President to proclaim a state of danger. However, systematically, this provision must be read alongside other constitutional norms that restrict the use of extraordinary powers. The Preamble to the 1945 Constitution provides normative legitimacy through the obligation to protect all the nation's people, but Article 1, paragraph (3) affirms that emergency actions must remain within the corridor of a rule-of-law state. Likewise, Articles 28A–28J provide a framework for human rights protection that cannot be ignored, while Articles 7A and 7B create mechanisms of accountability for the president. Thus, Indonesia's constitutional design contains two interrelated dimensions: the state is given room to act quickly in extraordinary situations but is still bound by the principles of the rule of law, respect for human rights, and institutional checks on its power.

The Constitution expresses a dedication to upholding the rule of law and ensuring institutional accountability, Article 12 fails to translate those commitments into enforceable constitutional constraints. It neither defines objective thresholds for declaring a state of danger nor prescribes procedural

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[17] Asshiddiqie, *Hukum Tata Negara Darurat*.

[18] Bruce A. Ackerman, *Before the next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2006).

[19] Dyzenhaus, "States of Emergency."

safeguards, temporal limitations, or mandatory oversight mechanisms.[20] This silence is not merely a legislative omission but a structural constitutional weakness: by leaving the determination of emergency conditions entirely to executive discretion, the provision risks functioning as an open-ended delegation of exceptional authority. The continued reliance on Law No. 23 Prp 1959 further deepens this structural defect.[21] Enacted within a centralistic and militarized political order, the law reflects a security-oriented logic rather than a rights-based constitutional framework. Its persistence within Indonesia's post-amendment democratic architecture produces a normative dissonance, while the Constitution as amended emphasizes limited government and human rights protection, the operational emergency regime remains anchored in executive supremacy. Consequently, the emergency framework does not merely suffer from regulatory incompleteness; it reveals an incomplete constitutionalization of emergency governance, where extraordinary power exists without correspondingly robust constitutional safeguards.

This normative gap is evident in Indonesia's historical experience of implementing states of emergency. During the New Order era, the status of Military Operation Areas (DOM) in Aceh was enacted without a formal declaration of a state of emergency, as required by Article 12 of the 1945 Constitution or Law No. 23 Prp 1959.[22] During President Megawati's tenure, a military state of emergency was declared through Presidential Decree No. 28 of 2003, which was subsequently altered to a civil emergency by Presidential Decree No. 43 of 2004. Nevertheless, Presidential Regulation No. 38 of 2005 was used to abolish the status, leading to discrepancies among the legal frameworks for declaring, altering, and revoking the state of emergency.[23] A similar pattern occurred in Papua, where intensive military operations occurred without an official declaration of a state of emergency. These practices reveal the absence of procedural standards and unclear legal instrument hierarchies within Indonesia's emergency regime.

The ambiguity in the legal framework for emergencies became more evident during the management of the Covid-19 crisis. Instead of utilizing the constitutional emergency provisions outlined in Article 12 of the 1945 Constitution, the government chose to address the situation through a health emergency strategy as per Law No. 6 of 2018 on Health Quarantine. Under

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[20] Ainuddin Ainuddin, "Covid-19 Pandemic Reviewed in Constitutional Law Perspective," *Jurnal IUS Kajian Hukum Dan Keadilan* 9, no. 3 (2021), https://doi.org/10.29303/ius.v9i3.980.

[21] Ayuni et al., "Concept and Implementation on the State of Emergency in Indonesia."

[22] D. Djohari, "Penerapan Norma Hukum Tata Negara Darurat Serta Kaitannya Dengan Penanggulangan Gangguan Keamanan Dan Bencana Tsunami Di Provinsi Nanggroe Aceh Darussalam," *Jurnal Ilmu Hukum Jambi* 2, no. 3 (2011).

[23] Abdul Rani Usman, *Sejarah Peradaban Aceh Suatu Analisis Interaksionis, Integrasi Dan Konflik* (Yayasan Pustaka Obor Indonesia, 2003).

this law, the President enacted Presidential Decree No. 11 of 2020, declaring a Public Health Emergency to justify the implementation of Large-Scale Social Restrictions (PSBB).[24] Nevertheless, the execution of these measures did not fully align with the Health Quarantine Law's standards, particularly concerning the state's responsibility to ensure the population's basic needs during the restrictions on movement.[25] This practice again highlights a longstanding issue: emergency regimes are applied only partially, unsystematically, and without fully adhering to available legal mechanisms.

Overall, this analysis shows that Indonesia faces structural problems in the design and implementation of its emergency regime.[26] A persistent gap exists between constitutional principles that emphasize the limitation of power and the protection of human rights, and operational legal instruments that are outdated and applied inconsistently. During emergencies, the executive tends to assume greater control at the expense of judicial and legislative oversight, resulting in weakened checks and balances and unsystematic governance.[27] Consequently, the administration of emergency powers risks operating without legal certainty, effective oversight, and adequate safeguards against human rights violations

b. Comparative Constitutional Approaches to Emergency Powers

Indonesia's constitutional design concerning states of emergency is not merely minimalistic; it reflects a broader under-theorization of emergency governance within its post-amendment constitutional order. The absence of clearly articulated substantive thresholds, temporal limits, and mandatory institutional controls does not simply create regulatory gaps—it structurally privileges executive discretion at precisely the moment when constitutional safeguards should be most robust.[28] Such design fragility renders emergency governance susceptible to discretionary expansion and legal fragmentation, as various statutory instruments are deployed without a coherent constitutional framework. In this context, comparative constitutional analysis is not undertaken as a descriptive exercise but as a critical evaluative tool. By situating Indonesia alongside other presidential systems that have

[24] Ali Roziqin et al., "An Analysis of Indonesian Government Policies against COVID-19," *Public Administration and Policy* 24, no. 1 (2021): 92–107, https://doi.org/10.1108/PAP-08-2020-0039.

[25] Saru Arifin, "The Quality of Indonesia's COVID-19 Legislation," *The Theory and Practice of Legislation* 12, no. 3 (2024): 317–43, https://doi.org/10.1080/20508840.2024.2365034.

[26] M. Yakub Aiyub Kadir et al., "Discrepancy of the Law on Disaster Emergency in Indonesia: In Search of an Integrated Law," *Jàmbá Journal of Disaster Risk Studies* 16, no. 1 (2024), https://doi.org/10.4102/jamba.v16i1.1437.

[27] Tom Ginsburg and Mila Versteeg, "The Bound Executive: Emergency Powers during the Pandemic," *International Journal of Constitutional Law* 19, no. 5 (2021): 1498–535, https://doi.org/10.1093/icon/moab059.

[28] Ansori, "Regulations In Liew Of Statutes In States Of Emergency In Indonesia."

constitutionalized emergency constraints, this study seeks to assess whether Indonesia's framework represents a legitimate model of executive flexibility or an incomplete institutionalization of democratic emergency control.[29]

This study selects South Korea, and Brazil as examples of presidential countries with relatively comprehensive emergency regulatory frameworks. The selection of these two is based on the theoretical consideration that they place the President as the central actor in crisis management, yet implement very different configurations of checks and balances, and oversight mechanisms. The descriptive and conceptual variations among these two countries offer a suitable comparative framework for assessing the normative weaknesses of Indonesia's emergency regulations while identifying more accountable design models that align with the principles of a constitutional rule-of-law state.

1) South Korea

Furthermore, South Korea's constitutional framework provides comprehensive and explicit provisions for emergencies. The Constitution clearly regulates two emergency regimes: state of emergency and martial law, each designed as a legal instrument to respond to extraordinary situations but still confined within strict constitutional boundaries. This arrangement reflects South Korea's commitment to ensuring that the state's extraordinary actions remain subject to the principles of legality, proportionality, and democratic accountability.

The legal framework governing states of emergency is primarily outlined in Articles 76 and 77 of the Constitution. According to Article 76(1), the President is empowered to declare a state of emergency in response to a national disaster, a threat to national security, or other external situations that demand immediate action.[30] Under these conditions, the President can issue emergency executive orders and ordinances as quasi-legislative measures without needing prior consent from the National Assembly. Nevertheless, all such actions must be promptly presented to the National Assembly for approval; if they are not approved, the emergency measures lose their legal effect. This system of retrospective legislative oversight is essential in curbing the potential overreach of executive power.

Article 77 regulates martial law, a more intensive form of a state of emergency. Martial law may be imposed in cases of armed unrest, rebellion, or military threats that endanger a state's survival. Two categories of martial law are recognized: the Martial Law of Alert, which is preventive and limited

[29] Tomás De Rementería, "Desentrañando la excepción: análisis doctrinario y comparativo sobre los estados de excepción constitucional," *Justicia &Derecho*, December 28, 2020, 1–21, https://doi.org/10.32457/rjyd.v3i2.491.

[30] Seokmin Lee, "South Korea's Combating COVID-19 Under the Rule of Law," *Verfassungsblog: On Matters Constitutional*, ahead of print, April 8, 2021, https://doi.org/10.17176/20210408-172700-0.

in scope, and the Martial Law of Combat, which allows for the restriction of fundamental rights, such as freedom of the press, freedom of assembly, and civil court jurisdiction. Historically, the imposition of martial law in South Korea during the Park Chung-hee and Chun Doo-hwan eras became a source of political and social trauma, as it was often used as an instrument of power consolidation. These experiences prompted the 1987 constitutional reforms, which aimed to strengthen legislative and judicial oversight mechanisms over emergency actions.

Judicial oversight plays a fundamental role in South Korea's constitutional structure. The Constitutional Court has the authority to conduct constitutional reviews of emergency decrees; however, in practice, this body tends to be relatively cautious (deferential) toward executive actions during crises. Nevertheless, several key decisions have demonstrated the judiciary's readiness to uphold constitutional boundaries when executive actions deviate from the rule of law.

The most recent case affirming the limits of emergency authority occurred in December 2024, when President Yoon Suk Yeol issued a short-term declaration of martial law (lasting about six hours) to restrict parliamentary access during the budget approval process, citing the presence of "anti-state forces."[31] This action was swiftly rejected by the National Assembly, followed by impeachment proceedings on December 14, 2024, and was ruled unconstitutional by the Constitutional Court on April 4, 2025. The decision stated that using emergency powers for political reasons, like weakening the legislative branch, is a serious breach of the separation of powers and the rule of law.[32] Normatively, this precedent establishes that emergency actions are only legitimate when based on objective threats and not as tools to interfere with political processes.

South Korea's experience illustrates the importance of constitutional design that balances executive flexibility and institutional constraint mechanisms. With ex post legislative approval, active judicial oversight, and a collective memory of past abuses of emergency powers during authoritarian periods, South Korea has succeeded in developing an emergency regime that is responsive yet remains democratic in nature.

2) Brazil

The regulation of the state of emergency in the 1988 Brazilian Constitution is comprehensively set out in Articles 136–141. The Brazilian Constitution clearly distinguishes between two emergency regimes: Estado de

[31] Seungwoo Han, "Martial Law, Democratic Erosion, and Democratic Resilience in South Korea," *Asian Journal of Comparative Politics*, August 25, 2025, 20578911251369983, https://doi.org/10.1177/20578911251369983.

[32] Jae-seung Lee and Dae-joong Lee, "2024 South Korean Martial Law Crisis: Lessons for the Democratic Resilience," *Australian Journal of International Affairs* 79, no. 2 (2025): 313–20, https://doi.org/10.1080/10357718.2025.2458697.

Defesa (state of defense) and Estado de Sítio (state of siege). This differentiation reflects a constitutional approach that seeks to balance the need for a swift state response to crises with the principles of limiting state power and protecting human rights.[33]

Estado de Defesa is designed as a low-intensity emergency regime that can be enacted in situations of serious institutional instability or large-scale natural disasters. The authority to declare it lies with the President but is limited by the obligation to consult with the Council of the Republic and the National Defense Council, as well as by strict time constraints.[34] Meanwhile, Estado de Sítio is an emergency regime with broader restrictions that can only be applied in more extreme conditions, such as the failure of Estado de Defesa or in cases of war and foreign aggression.[35] Its implementation requires approval from the National Congress, thus constitutionally placing the legislature as a key actor in controlling the escalation of executive powers.

In Brazil, the way emergencies are handled is different from Carl Schmitt's idea, which gives all power to the government during crises. Instead, Brazil's Constitution treats emergencies as special situations that still follow the law. These situations must respect rules about legality, time limits, and responsibility. Human rights can only be limited if necessary and must follow international human rights laws.[36]

Empirically, Brazil has rarely, if ever, formally activated the mechanisms of the Estado de Defesa or Estado de Sítio. Instead of utilizing constitutional emergency regimes, the government often responds to crises through ordinary laws, public security policies, or internal military operations.[37] This phenomenon creates a constitutional paradox in which the state experiences a de facto emergency without activating constitutional emergency mechanisms specifically designed to ensure oversight, time limitations, and accountability.

In the context of judicial oversight, the Federal Supreme Court (Supremo Tribunal Federal, STF) plays a significant role in ex post constitutional supervision. The STF's oversight occurs through judicial review of presidential decrees and executive policies that impact the restriction of citizens'

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[33] Jose Levi Mello Do Amaral Junior, "Estado de Defesa e Estado de Sítio," *Revista de Estudos Constitucionais, Hermenêutica e Teoria Do Direito* 12, no. 3 (2021): 428–38, https://doi.org/10.4013/rechtd.2020.123.07.

[34] Ricardo Marcondes Martins, "Poder Judiciário e Estado de Exceção: Direito de Resistência Ao Ativismo Judicial," *Revista de Investigações Constitucionais* 8, no. 2 (2021): 457, https://doi.org/10.5380/rinc.v8i2.71729.

[35] Amaral Junior, "Estado de Defesa e Estado de Sítio."

[36] Juan Santiago Ylarri, "Los Estados de Excepción y Las Situaciones Que Habilitan Su Declaración Un Estudio Desde El Derecho Comparado," *Revista Jurídica Austral* 01, no. 01 (2020): 219–73, https://doi.org/10.26422/RJA.2020.0101.yla.

[37] Sávio Antiógenes Borges Lessa and Fabio Rychecki Heckttheuer, "Segurança Pública Como Direito Fundamental: O Atual Cenário de Crise," *Revista Justiça Do Direito* 33, no. 3 (2019): 165–88, https://doi.org/10.5335/rjd.v33i3.10644.

constitutional rights.[38] This role becomes increasingly prominent when an emergency situation is not formally declared, but the executive operates with emergency logic in day-to-day governance.[39]

c. Constitutional Protections and the Constraints on Executive Authority During Emergency Situations in Indonesia

The amended 1945 Constitution supports the rule of law, separation of powers, and human rights. However, it does not have strong rules to control emergency powers in Indonesia. Article 12 of the Constitution lets the President declare emergencies, but it does not provide clear guidelines or limits.[40] There is no requirement for prior legislative approval, no objective standard for assessing a state of danger, and no clear regulation regarding temporal limits. Consequently, executive power in emergencies tends to operate as a broad discretionary power that is difficult to control.

The House of Representatives (DPR) has a weak role in emergencies. They mostly get involved after the fact by approving Government Regulations in Lieu of Laws (Perppu), as stated in Article 22 of the 1945 Constitution. This is different from the rules in Article 12. The DPR does not have a special process to approve or review the declaration of a state of danger. This means the President alone decides when an emergency starts, how long it lasts, and what it covers.[41] Such institutional arrangements mirror a broader global risk where emergency powers are exploited to consolidate political authority; a prime contemporary example is President Nayib Bukele of El Salvador, who instrumentalized the state of exception to bypass democratic constraints and expand executive hegemony.[42]

These weaknesses in the checks and balances mechanism become even more problematic because Indonesia's constitutional system does not provide any specific institutional instruments for the DPR to exercise substantive control over the validity and implementation of a state of emergency declaration.[43] Unlike other countries that require parliamentary ratification, periodic evaluation, or strict temporal limitations, Indonesia's DPR does not have the explicit authority to assess the factual basis of a state of danger declaration, extend or revoke emergency status, or systematically oversee the President's use of extraordinary powers.

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[38] Martins, "Poder Judiciário e Estado de Exceção."

[39] Dyzenhaus, "States of Emergency."

[40] Ayuni et al., "Concept and Implementation on the State of Emergency in Indonesia."

[41] Ansori, "Regulations In Liew Of Statutes In States Of Emergency In Indonesia."

[42] Melissa Martinez, "Democratic Backsliding: El Salvador's State of Emergency and Use of Violence," *Georgetown Journal of International Affairs* 25, no. 1 (2024): 168–74, https://doi.org/10.1353/gia.2024.a934900.

[43] Qurrata et al., "Challenges of Checks and Balances in Disaster Management in Indonesia."

Consequently, legislative oversight tends to be reduced to informal political supervision, which heavily depends on the political configuration within the parliament. In situations where the parliamentary majority is part of the ruling coalition, this control function risks becoming merely symbolic and losing its corrective power.[44] This indicates that the absence of a constitutionally institutionalized system of checks and balances not only weakens executive accountability but also leads to excessive dependence on short-term political dynamics.

The limits on legislative oversight affect how the judiciary can control emergency powers. The Constitutional Court can review laws related to emergencies, but it does not have clear rules to judge if declaring a state of danger is legal.[45] Without guidelines on necessity, proportionality, and time limits, the Court often agrees with the President's claim of an emergency. As a result, judicial review has not been an effective way to check the misuse of executive power during a crisis.[46]

The weaknesses of these constitutional safeguards become more apparent when linked to historical and contemporary practices. The use of military force in domestic security contexts—both during the New Order and after the Reform Era —has often occurred without a formal declaration of a state of emergency.[47] This phenomenon shows that emergency power in Indonesia is frequently exercised de facto without activating the constitutional mechanisms designed to ensure accountability and limit power. Thus, the absence of clear safeguards not only creates a risk of abuse but also promotes the normalization of extraordinary practices that are beyond the law and ethical boundaries.[48]

Overall, Indonesia's constitutional limitations on executive power in emergencies remain normatively abstract and have not yet been effectively institutionalized. Without strengthening safeguards through clear substantive and procedural regulations, emergency powers will continue to exist in a constitutional grey area that is vulnerable to exploitation for political, security, or administrative purposes that exceed the justification for extraordinary situations.

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[44] Wicaksana Dramanda et al., "Sistem Presidensil dan Kebangkitan Neo-Otoritarianisme: Kegagalan Reformasi Konstitusi di Indonesia?," *Jurnal Konstitusi* 21, no. 3 (2024): 345–65, https://doi.org/10.31078/jk2131.

[45] Ni'matul Huda, "Pengujian Perppu Oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 7, no. 5 (2016): 073, https://doi.org/10.31078/jk754.

[46] Fitra Arsil, "Menggagas Pembatasan Pembentukan Dan Materi Muatan Perppu: Studi Perbandingan Pengaturan Dan Penggunaan Perppu Di Negara-Negara Presidensial," *Jurnal Hukum & Pembangunan* 48, no. 1 (2018): 1–21.

[47] Norman Joshua, "Counterinsurgency, Emergency, and Civil-Military Relations in Indonesia," *Journal of Advanced Military Studies* 13, no. 1 (2022): 57–78, https://doi.org/10.21140/mcuj.20221301003.

[48] Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA L. Rev.* 65 (2018): 78.

d. Toward a More Coherent Constitutional Framework for Emergency Powers in Indonesia

The preceding analysis demonstrates that the challenge facing Indonesia is not merely regulatory reform, but constitutional recalibration. The current emergency framework reflects a structural imbalance in which executive necessity is recognized, yet constitutional limitation remains underdeveloped.[49] This imbalance cannot be resolved through incremental statutory adjustment alone if the underlying constitutional ambiguity of Article 12 remains unaddressed. While comprehensive constitutional amendment may not be immediately feasible, any reform initiative must explicitly confront the tension between executive flexibility and democratic accountability that has long characterized Indonesia's emergency governance.

The replacement of Law No. 23 Prp 1959 is therefore not simply a matter of modernization, but of normative realignment. A new organic law must consciously embed the paradigm of constitutionalized emergency governance, in which emergency powers are understood as legally structured exceptions subject to predefined criteria, temporal limits, and institutional control. Without such recalibration, Indonesia risks perpetuating a system in which emergency authority operates within formal legality but outside meaningful constitutional constraint.

The classification of emergency categories should not be understood as a mere administrative refinement, but as a constitutional technique for calibrating power in times of crisis. Differentiating between military, civil, public health, and other forms of emergency is essential because not all crises justify the same intensity of state coercion. A constitutional democracy must recognize that the scope of permissible restriction correlates with the nature and gravity of the threat.[50] Without such differentiation, emergency governance risks collapsing diverse crises into a single undifferentiated category, thereby normalizing maximal executive authority regardless of contextual necessity.

From a constitutional theory perspective, categorization functions as a mechanism of proportionality at the structural level. By linking each type of emergency to predefined thresholds, specific powers, and clearly limited rights restrictions, the Constitution transforms emergency authority from a discretionary reaction into a rule bound institutional response.[51] Comparative

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[49] Qurrata et al., "Challenges of Checks and Balances in Disaster Management in Indonesia."

[50] Oren Gross and Fionnu.ala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, vol. 46 (Cambridge University Press, 2006).

[51] Matthias Jestaedt, "The German Reticence Vis-à-Vis the State of Emergency," in *The Rule of Crisis*, vol. 64, ed. Pierre Auriel et al., Ius Gentium: Comparative Perspect.ives on Law and Justice (Springer International Publishing, 2018), https://doi.org/10.1007/978-3-319-74473-5_12.

practice in South Korea and Brazil demonstrates that differentiated regimes prevent the automatic escalation of emergency powers and reinforce the principle that exceptional authority must remain context sensitive and temporally constrained. For Indonesia, adopting such a framework would represent a shift from a generalized emergency clause toward a graduated and constitutionally structured system of crisis governance

The urgency to reformulate Article 12 of the 1945 Constitution becomes increasingly apparent when associated with the principles of constitutional clarity and legal certainty as essential elements of a democratic rule-of-law state.[52] Constitutional norms that leave room for executive discretion without measurable substantive criteria have the potential to create what Dyzenhaus refers to as the "grey zone of legality", an ambiguous area where state actions are difficult to legally challenge but have a direct impact on citizens' rights.[53] In the Indonesian context, the ambiguity of Article 12 is not merely technical but also structural because it leaves the determination of a state of danger entirely to the subjective assessment of the President. Without a reformulation that incorporates elements such as a threshold of emergency, time limits, and objective standards of threat, the norm is at risk of continuing to function as an open-ended emergency clause, inconsistent with the spirit of constitutionalism post-amendment.

Furthermore, strengthening legislative control must be a central element in the new design. The declaration of a state of emergency should be subject to the approval or ratification of the DPR (*House of Representatives*) within a specific timeframe, along with strict limitations on its duration. This model of legislative control is essential to ensure that the assessment of an emergency is not monopolized by the President but becomes a collective constitutional decision that can be democratically accounted for.[54]

Moreover, strengthening the checks and balances mechanism within the emergency regime cannot rely solely on the assumption of executive self-restraint but must instead be institutionally embedded.[55] The experience of mature presidential systems shows that the effectiveness of oversight lies in the requirement for shared responsibility between the executive and legislative branches from the declaration stage, not just during the policy evaluation stage. Without the legislature's constitutive involvement the emergency regime tends to operate under the logic of executive dominance.[56] In Indonesia, institutionalizing the DPR's role in emergencies is not intended to impede the state's rapid response but to ensure that such swiftness

[52] Asshiddiqie, *Hukum Tata Negara Darurat*.
[53] Dyzenhaus, "States of Emergency."
[54] Bromo et al., "Governments and Parliaments in a State of Emergency."
[55] Szente, "How to Assess Rule-of-Law Violations in a State of Emergency?"
[56] Camila Almeida Porfiro, *Executive Dominance in Times of Crisis: Governing by D.ecree and the Pandemic*, 1st ed. (Routledge, 2025), https://doi.org/10.4324/9781003610816.

remains within the corridors of constitutional accountability and does not become a precedent for concentrating power.

Judicial oversight of emergency powers must move beyond formal legality toward structured constitutional review grounded in principled standards. The incorporation of necessity and proportionality is not merely a procedural refinement but a doctrinal shift that redefines how emergency authority is evaluated within a constitutional democracy.[57] The necessity test obliges the executive to demonstrate that ordinary legal mechanisms are genuinely insufficient, while proportionality requires that emergency measures be suitable, strictly required, and balanced against the severity of rights restrictions imposed. By embedding these standards, the burden shifts from judicial deference to constitutional justification, compelling the executive to substantiate claims of urgency with verifiable reasoning.[58] In the absence of such standards, emergency governance risks fostering executive centered constitutionalism, where courts retreat at the very moment heightened scrutiny is required. Comparative constitutional practice shows that structured review does not obstruct crisis management but instead reinforces democratic legitimacy by ensuring that extraordinary powers remain normatively bounded. For Indonesia, articulating clear judicial standards would therefore constitute a crucial step in completing the constitutionalization of emergency governance.[59]

Nonetheless, enhancing the legal framework for emergencies also requires bolstering the Constitutional Court's role as the protector of the constitution during crises.[60] In the absence of specific standards for evaluating emergency measures, such as rigorous necessity tests, proportionality, and time constraints, judicial review risks becoming merely a formal check on normative adherence. Indonesia's experience during the Covid-19 pandemic illustrates that the Court often adopts a deferential stance when confronted with executive assertions of emergency. Consequently, reforms to the constitutional framework should clearly empower the Court to evaluate not only the legality of emergency legal measures but also the constitutional justification for their declaration and execution. This approach would ensure that emergency law remains subject to constitutional supremacy rather than existing as an exception.

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[57] Jan Petrov, "The COVID-19 Emergency in the Age of Executive Aggrandi.zement: What Role for Legislative and Judicial Checks?," *The Theory and Practice of Legislation* 8, nos. 1–2 (2020): 71–92, https://doi.org/10.1080/20508840.2020.1788232.

[58] Petrov, "The COVID-19 Emergency in the Age of Executive Aggrandizement."

[59] Lee and Lee, "2024 South Korean Martial Law Crisis."

[60] Keith E. Whittington, "Judicial Checks on the President," in *The Oxford Handbook of the American Presid.ency*, 1st ed., ed. George C. Edwards and William G. Howell (Oxford University Press, 2010), https://doi.org/10.1093/oxfordhb/9780199238859.003.0028.

IV. CONCLUSION

This article contends that Indonesia's constitutional framework on emergency powers remains normatively inconsistent and institutionally vulnerable. Although Article 12 of the 1945 Constitution formally authorizes the declaration of a state of emergency, its broad and indeterminate formulation, together with the continued reliance on Law No. 23 Prp of 1959, does not establish clear standards concerning the grounds, duration, supervision, and termination of emergency measures. Consequently, emergency governance in Indonesia has frequently relied on ad hoc legal mechanisms and expansive executive discretion, creating legal uncertainty and undermining constitutional accountability. These shortcomings are increasingly difficult to reconcile with Indonesia's post amendment constitutional order, which strongly emphasizes the rule of law, the protection of human rights, and the principle of limited government.

The comparative analysis demonstrates that presidential systems are not inherently prone to emergency-driven executive dominance; rather, the decisive factor lies in whether emergency authority is constitutionally structured or left normatively indeterminate. Both South Korea and Brazil illustrate that robust emergency powers can coexist with democratic accountability when accompanied by differentiated regimes, explicit constitutional thresholds, mandatory legislative ratification, temporal limits, and meaningful judicial review. In these systems, emergency authority is embedded within a framework of shared institutional responsibility, thereby preventing the executive from monopolizing the definition, scope, and duration of exceptional measures.

In contrast, Indonesia's minimalist emergency clause and reliance on outdated statutory regulation reveal not an excess of executive power per se, but an absence of constitutionally institutionalized constraint. The core deficiency of Indonesia's framework lies in its failure to translate emergency necessity into structured constitutional accountability. As a result, emergency governance risks operating in a constitutional grey zone that is formally authorized yet insufficiently regulated, where discretion expands without commensurate oversight. The comparative experience thus underscores a central normative lesson for Indonesia: emergency powers require not greater authority, but clearer constitutional boundaries. Building on these insights, this article advances a policy oriented proposal for reforming Indonesia's emergency powers framework. Such reform should include the constitutional clarification of emergency categories, the replacement of Law No. 23 Prp of 1959 with a modern organic emergency law aligned with human rights standards, and the institutionalization of robust legislative and judicial controls throughout the emergency cycle. Reconceiving emergency powers as a constitutionally regulated exception rather than an open ended executive prerogative would enhance Indonesia's capacity to

manage crises while safeguarding democratic principles and preventing authoritarian regression. In the context of recurrent political, security, and public health emergencies, such constitutional reform is no longer optional but essential to sustaining constitutional democracy.

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